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### The missing stone in the Cathedral

*Of unfair terms in employment contracts and coexisting rationalities in European contract law*

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## Part I

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# The “policy”<sup>71</sup> discussion in European contract law and its limitations

### Introduction

This part aims to unveil tensions between regulatory and non-regulatory or “private law” rationalities in a specific context: the EU (private law) developments concerning the Unfair Contract Terms directive. By the end of the two chapters, it should have become clear to the reader that, even though “EU” unfair terms control undoubtedly has – and especially *has acquired* – a stark regulatory component, regulatory reasoning cannot easily stand alone. A private law dimension tends to resurface in the face of attempts to full-blown instrumentalisation.

In Chapter 1, the “regulatory turn” in the debate surrounding unfair terms control at in European private law is illustrated by juxtaposing the original explanations for the adoption of Directive 93/13 and the more recent academic debate. In Chapter 2, the tensions between regulatory and private law rationales are laid out by looking at salient aspects of the CJEU’s interpretation of the Directive.

In order to identify regulatory and private law elements in unfair terms discussions and adjudication, it must be made clear what the analytical framework for the inquiry will be. In the analysis, I take Schmid’s definition of corrective justice as a blueprint: thus, for the purposes of the present work, arguments that (mainly) justify an outcome with reference to the concerned contractual parties are taken to reflect a private law rationality, whereas arguments that mainly “make sense” with a view to concerns *beyond* the parties to a specific relation and what justice requires between them are regulatory.<sup>72</sup>

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<sup>71</sup> The 2008 Consumer law compendium realised on behalf of the commission devotes a section to “policy reasons” for introducing unfair terms control. None of the other chapters, covering all the main consumer law instruments in the *acquis communautaire* of the time, include a comparable meta-positivistic section.

<sup>72</sup> Schmidt defines commutative justice as meaning “that private law relationships are to be governed only by criteria originating in the relationship between the parties themselves” (see Schmid, “The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell,” 2011.. Obviously the blueprint above is less normatively pure and more pragmatic.

As discussed above, the distinction between regulatory and private law rationalities is one of questions asked, not of answers given. To the extent that they pursue external goals – market efficiency or consumer welfare – through the regulation of contractual relations, rules of contract law are seen here as regulatory irrespective of their specific content. This approach follows an established strand in regulation theory, that sees regulation as “the use of numerous institutions, tools and techniques to ensure the achievement of desired social goals”.<sup>73</sup> The notion thus adopted is, notably, different from that embraced by approaches seeing regulation more or less exclusively as a means of addressing market failures.<sup>74</sup> Such broad definition appears best suited to help drawing a workable distinction between “regulatory” and “private law” rationalities, by avoiding the creation of in-between categories;<sup>75</sup> it also seems to be in line with the ideas implied by the existing literature referred to in the introduction.<sup>76</sup> In a similar fashion, such a broad understanding of regulation seems to be embraced in the leading works expressly discussing the “regulatory function” of EU private law,<sup>77</sup> and, crucially, in a conspicuously prolific project on “European Regulatory Private Law”,<sup>78</sup> which, as we will see, has significantly contributed to making the “visible hand” of regulatory private law actually visible in the private law debate.

Chapter 2 will show how the arguments which dominate this discussion fall short of accounting for some significant features of the way the Unfair Terms Directive has been interpreted by the Court of Justice of the European Union. While most of the Court’s case-law has taken the Directive in a decidedly regulatory direction – in line with one or the other of the policy goals discussed in Chapter 1 – the

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<sup>73</sup> F. Snyder, *Better Regulation in EU law: variations on a theme*, Peking University School of Transnational Law Research Paper No. 17-5, (2017) p 5 with further references.

<sup>74</sup> See for a reconstruction of different strands: Baldwin, Scott and Hood, Introduction, in Baldwin, R., Scott, C., & Hood, C. (Eds.), *A Reader on Regulation*, Oxford University Press 1998, and specifically p 9 for a short account of the birth of regulation in the US as a means to counter market failures.

<sup>75</sup> Which would be necessary, it appears, if policy goals other than addressing market failures would be taken out of the realm of regulation.

<sup>76</sup> See *supra* 1.3., in particular 1.3.1.

<sup>77</sup> See Collins in his prognosis on EU private law governance: H. Collins, *Governance implications of the changing character of private law*, in Cafaggi, Muir Watt 2010.

<sup>78</sup> The theme is not discussed extensively in the setup of the project and it is left to pre-comprehension in most of the contributions which have been emerged from the project, but Micklitz defines regulatory law as “the law which is adopted in order to pursue particular political purposes” in a clarification note - see Micklitz, *The Visible Hand of European Regulatory Private Law*, *Yearbook of European Law*, (2009): 28.

complex set of rules and principles in which unfair terms control is embedded seems to resist overreaching instrumentalisation.