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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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Chapter 2 Directive 93/13, justification and aims

2.1. Justification and aims of the Unfair Terms Directive

Until very recently, the Unfair Terms Directive was a “sleeping beauty”⁷⁹- if one that everyone was talking about.⁸⁰ With very little litigation having reached the Court of Justice, it was close to impossible to have a comprehensive idea of its real harmonisation capacity and concrete effects on national legal practices. Even in this period, however, the Directive was a fascinating object of study for private lawyers- especially, but not only, those involved in the European Private Law debate. Next to its more straightforward symbolic value as the first “horizontal” instrument of EU contract law, the scholars’ fascination with the Directive has been plausibly explained by Thomas Wilhelmsson,⁸¹ who pointed out how one’s answers to the core questions concerning the proper approach to unfair terms are influenced by deeply entrenched and overlapping-but-distinguished background ideas. Thus, according to Wilhelmsson, how we view this question has to do as much with one’s disciplinary background as with their conception of the role of justice in contract law and, quite possibly, one’s general understanding of the functioning of humans and society. Frequently, these convictions will align: for instance, it seems plausible that people holding some strong assumptions as to human rationality will also believe in a restricted role for justice in contract law and will not easily see any problems with one-sided contract terms. Sometimes, they will not – somebody may believe that humans are, or ought to be, relatively rational, and still be in favour of unfair terms regulation on grounds of efficiency (see Section 1.1.2.2. below). The various layers which are at stake in the discussion, however, make it fertile ground for academic inquiry. In particular, marking or undermining the boundaries between the Directive and national “general” contract laws and their respective attitudes to freedom of contract has provided impulse for national commentators to delve into the question of the Directive’s justification and aims – to an extent that is unimaginable for more “sectoral” instruments.

⁷⁹ Hans-W. Micklitz and Norbert Reich, “The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD),” *Common Market Law Review* 51, no. 3 (2014): 771–808.

⁸⁰ On Google Scholar, the search “Directive 93/13” retrieves over two thousand entries for the period 1993-2013.

⁸¹ Thomas Wilhelmsson, “Various Approaches to Unfair Terms and Their Background Philosophies,” *Juridica Int’l* 14 (2008): 51.

The national commentaries however are not the focus of the coming sections, which, after presenting an “internal” perspective on the reasons for adopting the Directive in 1993, will concentrate on theoretical arguments concerning unfair terms control (with an emphasis on consumer contracts) and connect such arguments to the basic features of the UTD as passed in 1993. The starting point for the discussion are the main arguments that have been presented *in the (English language) debate on the Unfair terms directive* itself or on other possible rules expressly addressing unfair terms control within harmonised European contract law (even though such arguments are further contextualised).⁸² The chapter furthermore only considers contributions which have expressly addressed the justification/aims question – the much vaster literature taking such justifications for granted and discussing individual rules or court decisions is not considered here but rather, where appropriate, in Chapter 3.

2.1.1. The Directive’s Aims in the view of the EU legislator

Directive 93/13 harmonised judicial control of “unfair” terms in non-negotiated consumer contracts. The recitals present it as being justified by a series of arguments mainly relating to the promotion of the internal market⁸³ and consumer protection “across borders”:

“In order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of member states other than his own, it is essential to remove unfair terms from those contracts.”⁸⁴

From the first perspective (internal market), harmonisation was required since laws of Member States relating to unfair terms in consumer contracts “show marked divergences”. This could lead to unfair competition between sellers and suppliers subject to unfair terms control and their non-regulated competitors. By reducing such divergences, the Directive was expected to help stimulate fairer competition. The second aim, consumer protection when acquiring goods or services across borders, in practice catered to the sub-section of consumers who would not be able to rely on the application of their home-base mandatory

⁸² Thus, for instance, the very important discussion of the quasi-legislative nature of standard terms as hypothesised by Raiser, or the “double collectivisation” issue as Micklitz has labelled it later on (both hinted to in Chapter 1 supra), is not discussed in Chapter 2 since it has not had significant resonance in the European debate.

⁸³ Which – under then article 100 A EEC Treaty – was also the legal basis for the adoption of the Directive.

⁸⁴ Directive 93/13 EEC, recitals.

consumer protection under the Rome Convention 1980⁸⁵– namely, those contracting with a provider who did not in any way direct their activities towards the consumer’s country of residence. While both reasons were mentioned also by the Explanatory Memorandum accompanying the first proposal put forward by the Commission in 1990, they seem to have appeared only at that stage – i.e. when a legal basis had to be established – and are absent from previous documents.⁸⁶ In particular, the argument that the Directive should eliminate distortions of competition and foster consumer confidence was necessary to establish the EU’s competence to enact legislation under the internal market clause, but was not subject to– and would probably not pass – strict scrutiny.⁸⁷

The recitals further recall that successive consumer programmes had suggested that ‘acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts’, and that this protection “ought to be provided by laws and regulations which are either harmonized at Community level or adopted directly at that level”. The recitals, thus, do not directly delve into the substantive reasons for regulating unfair terms in consumer contracts, but rather concentrate on justifying the need for *harmonised* rules. To use Joerges’ words, harmonisation reasoning “remains indeterminate as to the substantive content of harmonisation measures”.⁸⁸

For more substantive justifications, readers of the recitals are directed to the Community’s own programmes on consumer protection and consumer information of 1975 and 1981.⁸⁹ Indeed the programme of 1975 mentioned unfair

⁸⁵ 1980 Rome Convention on the law applicable to contractual obligations (consolidated version) OJ C 27, 26.1.1998, later replaced by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

⁸⁶ See the Commission communication presented to the Council on 14 February 1984 (based on COM (84) SS final), Bulletin of the European Communities Supplement 1 /84.

⁸⁷ See Norbert Reich, “European Consumer Law and Its Relationship to Private Law,” *European Review of Private Law* 3, no. 2 (1995): 285–305. Similarly, T. Wilhelmsson, “The Abuse of the ‘Confident Consumer’ as a Justification for EC Consumer Law,” *Journal of Consumer Policy* 27, no. 3 (2004): 317. Whereas similar arguments have been advanced, in more sophisticated form, also with reference to more recent contract law harmonization proposals, they have been object of criticism from several perspectives.

⁸⁸ Joerges, “The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines—an Analysis of the Directive on Unfair Terms in Consumer Contracts,” 176.

⁸⁹ Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ No C 92, 25. 4.

terms, under the heading “protection of the economic interests of consumers”, as the first of a number of “principles” which would guide the Commission’s actions:

“Purchasers of goods or services should be protected against the abuse of power by the seller, in particular against one-sided standard contracts, the unfair exclusion of essential rights in contracts, harsh conditions of credit, demands for payment for unsolicited goods and against high-pressure selling methods.”⁹⁰

Already within the short text included in the consumer programme, different possible rationales seem to transpire: insofar as the “economic interests of consumers” are concerned, it was already clear at that time that such interest may not be immediately or univocally threatened every time “one-sided” standard terms are used, since such terms may allow the trader to demand a lower price in return for its services.⁹¹ Lamenting the imposition of one-sided standard terms by means of “abuse of power” by the trader seems to imply a different concern – namely, that the consumer’s ability to self-determine, or contractual autonomy, has been harmed.⁹²

1975, p. 1 and Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ No C 133, 3. 6. 1981, p. 1.

⁹⁰ Council resolution 1975, para 19 (i).

⁹¹ As Beale had already pointed out, the rationale matters to determining whether in this case terms should be invalidated: *“Is the aim to prevent exploitation, so that a transaction under which the consumer gets ‘value for money’ is not improper even if it is harsh, or will other forms of harshness justify intervention? If the term reduces the protection that the consumer would have received under the facultative rules, but there is evidence that the term has led to the consumer being charged less, is the ‘balance’ restored?”* Hugh Beale, “Inequality of Bargaining Power,” *Oxford Journal of Legal Studies* 6, no. 1 (March 1, 1986): 123–36, <https://doi.org/10.1093/ojls/6.1.123>. The price argument is however contentious see Leone Niglia, “The Rules Dilemma-The Court of Justice and the Regulation of Standard Form Consumer Contracts in Europe,” *Colum. J. Eur. L.* 13 (2006): 125.

⁹² Ebers, in the Consumer law compendium, writes that abuse implies that “in view of the economic, social, psychological and intellectual superiority of the business the customer has no choice other than to submit to the clauses in question.” See Hans Schulte-Nölke, Christian Twigg-Flesner, and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and Its Transposition in the Member States* (Walter de Gruyter, 2009), 338.

When reconstructing “the problem” with unfair terms in contracts concluded with consumers, the Commission’s communication of 1984⁹³ concluded with a quite principled observation:

“The widespread use of standard contract terms can thus be seen as calling into question the consensual basis of contract law. It was long believed that the provisions of the general law ensured an equitable balance between the parties to a contract, while parliament and the courts saw to it that this balance was maintained. Since the parties to a contract may in so many cases derogate from the law’s provisions, however, the equitable balance which such laws might have guaranteed is almost never achieved, because suppliers use standard terms designed primarily to protect their own interests.”⁹⁴

The text does not necessarily express concern with the weak position of consumers *vis á vis* traders, even though it suggests that drafting terms in advance grants the latter a stronger bargaining position.⁹⁵ The concern is mainly with the lack of negotiation *per se*,⁹⁶ coupled with fact that the standard terms used by traders routinely upset the balance stricken by the law by means of default rules.⁹⁷

Next to harmonising the control of standard terms in consumer contracts in the (many) member states which had already introduced relevant legislation, the Directive led to the introduction of unfair terms in consumer contracts rules in three countries – Italy, Greece and Belgium – where no specific rules had been adopted before. Filling a gap in these three countries may have been an additional reason for the Commission to push forward the harmonisation proposal. A climate generally favourable to the expansion of European intervention in “social” fields may also have played a role.⁹⁸ The Directive marked the first European inroad into

⁹³ Unfair terms in contracts concluded with consumers, Commission communication presented to the Council on 14 February 1984 (based on COM (84) SS final), Bulletin of the European Communities, Supplement 1/84.

⁹⁴ Commission Communication, p. 6.

⁹⁵ Point 14: “Since the terms were designed, drawn up and applied unilaterally by the supplier, they improve their bargaining position.”

⁹⁶ Point 12: “The standard terms are drawn up without the consumer’s participation, so he is unable to assert his interest and ensure that they are reflected in the terms.”

⁹⁷ Again Point 14: “Whereas the law generally ensures a certain equilibrium between the various interests involved, it is not the purpose or effect of standard term to establish a fair balance.”

⁹⁸ Consider, for instance, the adoption of the Community Charter of the Fundamental Social Rights of Workers in 1989, and, in the field of consumer protection, the Doorstep Sales Directive of 1987. Weatherhill presents it as an example of directives adopted “pursuant to the Treaty-conferred competence to harmonise with no serious explanation or expectation

the general contract laws of the Member States, playing a fundamental role in stimulating private lawyers' interest in European law and policy and even attracting the attention of prominent non-specialists⁹⁹ to issues of contract law.

2.1.2. The academic debate

For the first few years after the Directive's adoption, commentators were mainly busy analysing its specific contents and trying to predict its impact on the private laws of the different Member States, also with a look to the various implementation strategies put in place by national legislators. Around the turn of the Century, the European private law debate received unprecedented impulse thanks to the Commission's announced intention to investigate possibilities for further, and much more comprehensive, harmonisation or even unification. The prospect of extensive law-making exercises to come opened up the question of what rules would have to be adopted, and with that the quest for justifications supporting the one or the other rule.¹⁰⁰ Unfair terms rules, and in particular questions concerning their scope, have been intensely discussed in the past two decades in the main European private law fora.

The next two sections will reconstruct the main arguments put forward in the debate concerning unfair terms control on EU-level platforms, setting aside national developments. This limitation indirectly also bears on the time-frame considered – I will not discuss here the discussions which, in the second half of the twentieth century, surrounded the adoption of unfair or "standard terms" legislation in various member states. As already done in the introduction, I defer on this point to the many existing studies on the issue.

2.1.2.1. The weaker party argument

Weaker party protection is a familiar formula in contemporary private law. It can cover certain trends in general civil law¹⁰¹ as well as rules of "special" contract

that they would advance the process of market integration". See Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing, 2013), 73.

⁹⁹ Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies," *The Modern Law Review* 61, no. 1 (1998): 11–32.

¹⁰⁰ "The CFR can restore the full picture of social justice issues in private law question of which the Community legislator has lost sight as a result of the limits posed by the functional competences attributed to the Union." Martijn W. Hesselink, *CFR & Social Justice* (Walter de Gruyter, 2009), 16.

¹⁰¹ In this sense eg Maria Rosaria Marella, "The Old and the New Limits to Freedom of Contract in Europe," *European Review of Contract Law* 2, no. 2 (2006): 257–274, <https://doi.org/10.1515/ERCL.2006.019>; Marisa Meli, "Social Justice, Constitutional

law¹⁰² involving consumers or tenants. The notion has been known to private lawyers and private international lawyers¹⁰³ for a comparatively long time. Depending on the preferred nuance, it can refer to a concern with possible discrepancies between one party's formal expression of private autonomy and the requirements of a *substantial* exercise of such autonomy. In a stronger version, weaker party protection can be expressly paternalistic, i.e. exclude certain options from those available to (certain) parties in pursuit of the party's "real" best interest – based on the assumption that they are not in a position to judge for themselves what preserving such interest requires.¹⁰⁴

Categorical protection such as that afforded to consumers, is not necessarily the same as the protection of individual parties – it will be at times over-comprehensive and at times under-comprehensive, generating possible disparities of treatment between similar cases. This categorical protection possibly – but not necessarily – engages with (and raises) questions of *distribution*. "Consumers" or "workers" could be seen as a proxy for individuals actually needing protection. They may also, however, be seen as *groups* whose interests are advanced or protected vis à vis the interests of a different group – typically, providers or employers. When consumer protection emerged, it emerged in a

Principles and Protection of the Weaker Contractual Party," *European Review of Contract Law* 2, no. 2 (2006): 159–166.

¹⁰² See various contributions to The Protection of the Weak Party in a Harmonised European Contract Law, a special issue of the *Journal of Consumer Policy* edited by Stephen Weatherill in 2004 – e.g. Hans-W. Micklitz, "The Principles of European Contract Law and the Protection of the Weaker Party," *Journal of Consumer Policy* 27, no. 3 (2004): 339–356; Ewoud Hondius, "The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis," *Journal of Consumer Policy* 27, no. 3 (2004): 245–251.

¹⁰³ Interestingly, in the field of private international law the concept covers both consumer and employment contracts – see the various contributions in the French-speaking literature: Fausto Pocar, *La Protection de La Partie Faible En Droit International Privé* (Martinus Nijhoff, 1984); Frédéric Leclerc, "La Protection de La Partie Faible Dans Les Contrats Internationaux: Étude de Conflits de Lois" (PhD Thesis, Strasbourg 3, 1990); Marcel Fontaine and Jacques Ghestin, *La Protection de La Partie Faible Dans Les Rapports Contractuels. Comparaisons Franco-Belges*, 1996; Anne Sinay-Cytermann, "La Protection de La Partie Faible En Droit International Privé," *Mélangés En l'honneur de Paul Lagarde. Le Droit International Privé: Esprit et Méthodes*, 2005, 737.

¹⁰⁴ The latter version is quite close to an approach based on public morals rather than the protection of "weak" individuals as such. Consider classical examples such as the sale of parts of the human body, surrogacy or the case for and against "dwarf tossing": is it easy to see that paternalistic and other perfectionist arguments can lead to partially overlapping results, as discussed by Marella, "The Old and the New Limits to Freedom of Contract in Europe."

number of national legal systems as part of the welfare state, most prominently in the central part of the past century. The debate on weaker party protection in contract law was partially separated, partially influenced by this development – it was not necessary to be at all time clear on whether one meant weaker party as a proxy or as a matter of distribution. Starting in the nineteen eighties, however, the EU has taken up a large part of the rule-setting activities.¹⁰⁵

The protective intent of EU consumer law was acknowledged in early commentaries:

“[The European legislator] has become increasingly inclined to differentiate between types of contracting parties, such as employees, consumers, tenants, and companies. It has also revealed a willingness to recognise norms of solidarity, such as requirements of trustworthy conduct, carefulness in dealings and performance of obligations, and protection against inequality of bargaining power. These strands all appear in the Directive on Unfair Contract Terms, which mirrors the developments in private law in many legal systems. The rejection of abstraction and universalism, and a disposition to respond to the expectations of participants in the market, brings private law closer to the cultural roots of the communities which it regulates.”¹⁰⁶

In the context of non-negotiated (consumer) contracts, inequality between the parties exists already because the trader’s standard terms are usually offered on a take-it-or-leave-it basis. The consumer does not have the chance to negotiate such terms, which are typically drafted in advance to be applied to a countless number of transactions. Noticeably, when a reference is sought for the weaker party argument in the context of European unfair terms rules, the choice often falls on an old North-American piece, namely “Contract of adhesion: some thoughts on freedom of contract” by Friedrich Kessler.¹⁰⁷ The article, dating from 1943, does indeed argue that

¹⁰⁵ Rösler has aptly pointed out, in this respect, that – within private law – a division of labour seemed to exist after the EU’s intervention in consumer law: “standardised inferiority” was to be taken care by European legislation, while individual inferiority was left to decide upon at Member State level. See Hannes Rösler, “Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-Level Private Law,” *European Review of Private Law* 18, no. 4 (2010): 729–756.

¹⁰⁶ Hugh Collins, “European Private Law and the Cultural Identity of States’(1995),” *European Review of Private Law* 3 (n.d.): 364.

¹⁰⁷ The piece has become such a classic in the discipline that it by now makes part of the “law commons” series made available by Yale Law School, see http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3728&context=fss_papers.

"[s]tandard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses."

The "weakness" considered in this analysis was not necessarily of a socio-economical nature; all it all, it seems plausible that even a very rich customer would most likely just have to accept the standard terms drafted by e.g. their laundry service providers. The weakness was *relational* – i.e. the consumer was in this sense "weak" vis à vis the provider, but not necessarily in absolute terms. Even though, indeed, one need not be destitute in order to be faced with a "take-it-or-leave-it" contractual offer, this way of contracting is quite far from the exercise of contractual autonomy on which continental private law codifications were based. A very limited understanding of contractual autonomy needs to be brought forward in order to "normalise" this image – namely that the non-drafter could always decide to refuse the offer and "shop around" for better terms¹⁰⁸. Not for nothing had earlier scholars like Saleilles rejected the qualification of standard terms as contracts: most contract lawyers¹⁰⁹ would probably agree that the thin consent exercised by a party accepting standard terms does not provide the same legitimating force of an actual negotiation.¹¹⁰

The idea that when consumers are faced with a "take it or leave it" offer, even on otherwise competitive markets, they will usually have to accept has intuitive appeal¹¹¹ and has been often used by lawyers in the course of the 20th century.¹¹²

¹⁰⁸ This narrow understanding of autonomy has been recently criticised by Hans-W. Micklitz, "The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic," *Journal of Consumer Policy* 35, no. 3 (2012): 283–296.

¹⁰⁹ See e.g. Patrick Selim Atiyah, *Essays on Contract*, 2nd revised (Oxford University Press, 2012). In his essay "Freedom of contract and the new right" Atiyah struggles to explain how, as a supporter of the so-called new right, he can still not do away with the feeling that freedom of contract should not be left unrestricted. If the hypothesis in the book is correct, Atiyah had (in his scholarship already) more or less all the elements that he needed in order to answer this question.

¹¹⁰ See Rösler, "Protection of the Weaker Party in European Contract Law," 742. See also footnote 65- quoting Reiser.

¹¹¹ The Commission's proposal called the application of normal rules on consent to consumer contracts "something of a fiction". COM(90) 322 final I 2- SYN 285 p.2.

¹¹² Again, the Commission's 1984 Communication (fn. 14 above) reasons at point 9: "(...) very few consumers will be sufficiently well informed to do so; and those who try, for example,

The Directive's recitals¹¹³ and, more recently, the language used by the Court of Justice to describe the Directive's aims, both emphasise how unfair terms control aims to redress consumers' weakness. Starting with *Oceano* [para 26], the Court has reproduced the same language in a large number of decisions concerning the Directive:

"the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms."

The consumer is thus seen as being unable to influence the contract's content (lack of bargaining power) and lacking important information on the content of the contract or of, possibly, the negotiation itself (level of knowledge).¹¹⁴ The last weakness may be addressed by procedural measures: this involves, we will see, the timely provision of pre- and contractual information and by a way of drafting that does not make the contract's conditions untransparent.¹¹⁵ However, substantive balance also matters. If this balance is lacking, the Directive's remedial provision

*"is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them."*¹¹⁶

by striking out clauses to which they object, and stipulating that the general provisions of the law shall apply, may well find that the supplier refuses to do business except on his own standard conditions:"

¹¹³ As mentioned above, one of the recitals says that *"acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts."*

¹¹⁴ It stands out that in this context the parties' different level of knowledge is seen as a form of weakness rather than as a market problem - or as a market problem originating from a weakness, as phrased by Josse G. Klijnsma, "Oneerlijke Bedingen Onder Het Voorstel Voor Een Gemeenschappelijk Europees Kooprecht: De Positie van KMO's," *Tijdschrift Voor Consumentenrecht & Handelspraktijken (TvC)*, no. 3 (2013): 109..

¹¹⁵ See *C-92/11, RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, ECLI:EU:C:2013:180. In this way, information is not so much something the consumer really bases their decision on (though this point is also put forward in *RWE*) as a tool to manage the contract afterwards, especially when something goes contrary to the party's expectations.

¹¹⁶ *"As regards that weaker position, Article 6(1) of Directive 93/13 provides that unfair terms are not binding on the consumer. As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the*

In the more recent academic debate, however, not many¹¹⁷ seem willing to defend weaker protection as a proper goal of Directive 93/13.¹¹⁸ When weaker party protection is discussed, the Unfair Terms Directive is usually mentioned with some caveats,¹¹⁹ although its inclusion may be mainly due to its symbolic relevance within European private law.¹²⁰ The intuitively appealing reasons offered in previous discussions seem to have lost ground; when a particular decision on the Directive is discussed more in depth, its specific relevance is related to external factors – e.g. “hidden constitutionalisation”.¹²¹ Only occasionally the Directive’s protective mission is taken sufficiently seriously to mount more articulated critique of its failures.¹²²

This development can be explained, I think, by the following three reasons: first, the contents of the directive; second, the difficult position of weaker party position in post-national debates (expressly non-positivistic) debates; third, the specific context in which discussions on the Directive have been taking place. As concerns the contents of the Directive, several authors¹²³ have noticed that some of the fundamental features of unfair terms control under the Directive, such as the exclusion of core terms and the focus on non-negotiated contracts, are not consistent with a weaker party protection approach. If the consumer is in a weak

parties with an effective balance which re-establishes equality between them (see Mostaza Claro, paragraph 36; Asturcom Telecomunicaciones, paragraph 30; Case C-137/08 VB Pénzügyi Lizing [2010] ECR I-10847, paragraph 47; and C-453/10 Pereničová and Perenič [2012] ECR, paragraph 28).”

¹¹⁷ Except for Hondius, “The Protection of the Weak Party in a Harmonised European Contract Law.”

¹¹⁸ Except for Hondius.

¹¹⁹ Rösler, “Protection of the Weaker Party in European Contract Law.”

¹²⁰ Geraint Howells, Thomas Wilhelmsson, and Roger Brownsword, *Welfarism in Contract Law* (Dartmouth, 1994).

¹²¹ Hans-W. Micklitz, “Mohamed Aziz-Sympathetic and Activist, but Did the Court Get It Wrong?,” in *ECLN Conference Florence, 2013.*, Mak, “On Beauty and Being Fair—The Interaction of National and Supranational Judiciaries in the Development of a European Law on Remedies”; Chantal Mak, “First or Second Best? Judicial Law-Making in European Private Law,” *Judicial Law-Making in European Private Law (September 22, 2016)*. Centre for the Study of European Contract Law Working Paper Series, no. 2016–12 (2016).

¹²² Mónica Józón, “Unfair Contract Terms Law in Europe in Times of Crisis: Substantive Justice Lost in the Paradise of Proceduralisation of Contract Fairness,” *Journal of European Consumer and Market Law* 6, no. 4 (August 1, 2017): 157–66.

¹²³ Martijn W. Hesselink, “Unfair Terms in Contracts between Businesses,” in *Towards a European Contract Law*, ed. Schulz, Reiner and Stuyck, Jules (Sellier European Law Publishers, 2011), 131–148; Weatherill, *EU Consumer Law and Policy*.

position vis á vis the supplier, the criticism goes, they will not be better positioned to secure a fair price than to discuss liability terms, and when trying to negotiate they may land in an ever worse position than other consumers subject to the supplier's standard terms.¹²⁴ The Directive's approach, concentrating harmonisation efforts on unfair terms control as a private law mechanism brought about primarily by way of individual litigation,¹²⁵ can also be criticised as a device tailored more to sophisticated actors (those who are likely to bring their case in court) than to really "weak" ones. Next to saying very little on collective and administrative enforcement, the Directive is silent on alternative institutional arrangements, such as the negotiation of "fair" standard terms between professional and consumer organizations, which are arguably more effective in securing the interests of the weakest consumers.¹²⁶

Weaker party protection through contract law is in turn a fairly fraught terrain – in general and certainly with reference to unfair terms control. As said above, weaker party protection is seen as part of "welfarist" contract law – i.e. contract law based in the ethos of the welfare state. "Welfarist" here is thus not meant as "welfare-maximising": not all welfarist contract law, or the reasons behind it, are regulatory in the sense intended in this book. Under this broad notion, Wilhelmsson¹²⁷ placed very different measures and agendas – ranging from mandated disclosures to the Nordic law idea of *social force majeure* and (accordingly) from market enhancement to "public values "welfarism". He also, however, usefully highlighted how those several different perspectives intertwine when discussing weaker party protection. Not all these perspectives apply to unfair terms control, which Wilhelmsson finds to have no redistributive ambition but to be based in a version of corrective justice and aim to "rectify outcomes of the market mechanism in order to promote acceptable contractual behaviour".

¹²⁴ Hesselink, "Unfair Terms in Contracts between Businesses."

¹²⁵ The directive, as such, draws the contours of the substantive mechanism but leaves all procedural matters to the member states, subject to the requirement – at article 7 – that "adequate and effective means exist to prevent the continued use of unfair terms". This requirement includes, according to art 7(2), allowing private or public organisations to bring actions, but establishes no further rules concerning the concrete set-up of such collective or public enforcement mechanisms.

¹²⁶ E.g. Hans-W. Micklitz, "Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse," *Yearbook of European Law* 32, no. 1 (2013): 266–367; H. Collins, "The Directive on Unfair Contract Terms: Implementation, Effectiveness and Harmonization," *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* 15 (2008).

¹²⁷ Wilhelmsson, "Varieties of Welfarism in European Contract Law."

Wilhelmsson, however, provides no elaboration on how the measure of acceptable contractual behaviour should be identified.

A decade later, Hesselink¹²⁸ observed that some of the most plausible justifications for imposing limits to contractual autonomy – market ethics or some versions of paternalism – are rather illiberal. Within individual legal systems, manifestations of such motives may be taken for granted, i.e. as having been enshrined (to different degrees) in the system. In the openly normative academic discussions sparked by the Commission’s start-of-the-century law-making agenda, such perfectionist – but also contingent – motives have gained less traction.¹²⁹ The European intervention created a starker division between individual and collective protection: the relatively porous boundaries between the two at MS level became harder and individual protection fell out of fashion. What remains, due especially to the abundance of German scholars in the debate on unfair terms legislation, is rather some acknowledgement of the impossibility to rely on the “legitimising effect” of consent in the case of contracts accepted without knowing their terms, which in general justifies a restriction of formal private autonomy in view of fostering the substantive exercise of that same autonomy.¹³⁰

When the discussion falls onto distributive ambitions as a justification in the field of unfair terms control – as with all consumer protection – the challenge of backfiring or adverse redistribution cannot be averted: *if* unfair terms control is effective in clearing consumer markets of bad terms, will this not likely mean that consumers on average will have to pay more for the same products, because providers will transfer to them the costs associated with the better terms? Is unfair terms control, thus, going to generate upward redistribution – from less to more privileged consumers?¹³¹ The question raised is of empirical nature and sometimes its purchase and bona fide nature have been questioned,¹³² but it is particularly

¹²⁸ Hesselink, “Unfair Terms in Contracts between Businesses.”

¹²⁹ Rösler, “Protection of the Weaker Party in European Contract Law,” 742. Rösler has aptly pointed out, in this respect, that – within private law – a division of labour seemed to exist after the EU’s intervention in consumer law: “standardised inferiority” was to be taken care by European legislation, while individual inferiority was left to decide upon at Member State level.

¹³⁰ See Rösler, 742. See also footnote 65- quoting Raiser.

¹³¹ In an almost irresistible version: Omri Ben-Shahar, “The Paradox of Access Justice, and Its Application to Mandatory Arbitration,” *The University of Chicago Law Review*, 2016, 1755–1817.

¹³² Robert A. Hillman, “The Rhetoric of Legal Backfire,” *BCL Rev.* 43 (2001): 819.

troublesome for anyone who is in favour of pursuing some form of social justice via private law.

With reference to the Directive, the different purchase of established arguments, however, is also owed, as Micklitz has claimed,¹³³ to the specific characteristics of the directive vis à vis national legislative instruments and the different contexts in which these were respectively adopted. The effectiveness of unfair terms control as an instrument for improving consumer welfare has been questioned.¹³⁴ This seemed particularly problematic in the context of harmonisation efforts after the year 2000, when the EU law framework that was quite shattered by the Tobacco judgment.¹³⁵ Besides the more general questions concerning the relationship between minimum harmonisation and internal market,¹³⁶ the case set in motion important changes in the ways in which successive harmonisation instruments were presented and framed, prompting the Commission to place much more emphasis on the internal market arguments justifying legislative intervention.¹³⁷ This further contributed to framing discussions on consumer protection in regulatory terms – if not to pursue some overall measurable goal, why was the EU involved in the first place? An efficiency analysis seemed, at this point, to provide for more consistent answers – at least on a theoretical level.

2.1.2.2. Market failure argument

An alternative argument ‘justifying’ unfair terms legislation, indeed, is based on an economic analysis of law. From that perspective, the mere facts that a party’s autonomy may not be respected or that specific terms may not be fair are not of

¹³³ See for instance Micklitz, “The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law,” 2012.

¹³⁴ Hanneke Luth, “Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited,” 2010; Michael G. Faure and Hanneke A. Luth, “Behavioural Economics in Unfair Contract Terms,” *Journal of Consumer Policy* 34, no. 3 (September 1, 2011): 337–58, <https://doi.org/10.1007/s10603-011-9162-9>.

¹³⁵ Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union*, ECLI:EU:C:2000:544.

¹³⁶ The relationship was a complex one from inception – for a critical analysis completed just before the Tobacco judgment, see Michael Dougan, “Minimum Harmonization and the Internal Market,” *Common Market Law Review* 37, no. 4 (2000): 853–885. Given such tensions, the judgment could be seen as providing impulse for the Commission to move on to a maximum harmonization agenda – see Marija Bartl, “Legitimacy and European Private Law (EUI Thesis),” Available at SSRN 2142798, 2012, 137.

¹³⁷ See Stephen Weatherill, “The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law Has Become a ‘Drafting Guide,’” *German Law Journal* 12, no. 3 (2011): 827–864.

particular relevance. Instead, the focus is on the fact that consumer contracts are typically mass contracts, and the question that needs to be asked is whether mass contracts generate market failures. Do non-negotiated mass contracts generate inefficient results? A finding in this direction would, in turn, constitute an economic justification for targeted interference with market mechanisms. The economic analysis of standard contracts is undoubtedly a well-developed, though also ever-evolving, field.

Several lines of reasoning based on market failures have been identified in the field of non-negotiated terms. They will be recalled here with the aim of correctly identifying the most salient issues relevant to a market approach to unfair terms control. This, in turn, will be useful to identify the characteristics of Directive 93/13 which seem to square with such an approach and those which do not.

Does lack of negotiation, then, lead to market failures? It is a relatively intuitive idea, fitting well with contract law thinking,¹³⁸ that when terms are not negotiated, this likely leads to sub-optimal contractual content. Negotiation is, indeed, supposed to be the mechanism through which each party asserts their interests, leading to an efficient exchange which effectively reflects the parties' preferences. However, negotiation is expensive too, thus there are good reasons- from an individual and societal point of view- to adopt standardised contracts. Standardisation lowers transaction costs.¹³⁹

In the context of mass contracting, however, whereby one party only makes use of standard terms, the parties have very different information and incentives when approaching the contract. The drafter knows the contract's content much better, and has an interest in using it as a means of optimising their business over several transactions. They have, thus, good reasons to invest in careful drafting, and to use that drafting to tilt the contract's content to their advantage. The other party, if they are not a repeat player and the stakes are not particularly high, have few incentives to acquire information concerning the contract's content. As a consequence, they are not aware of the potentially disadvantageous terms and therefore may enter a contract on conditions they wouldn't consciously accept. This is typically, but not exclusively, the case with consumers.

This approach can be roughly labelled a "transaction cost" approach. It leads to the conclusion that non-negotiated terms must be regulated and has (as such)

¹³⁸ And in particular with the idea of procedural justice.

¹³⁹ Hans-Bernd Schäfer and Patrick C. Leyens, "Judicial Control of Standard Terms and European Private Law," *Economic Analysis of the DCFR: The Work of the Economic Impact Group within CoPECL*, 2010, 99; Atiyah, *Essays on Contract*.

prominently been introduced to the European debate by the much-read 2008 “Consumer Law Compendium”.¹⁴⁰ In that context, the “transaction cost” argument is presented as describing the historical reasons for regulation adopted by individual member states, and Germany in particular.¹⁴¹ This is rather bold considering that the very notion of “transaction cost” became popular¹⁴² only after the German rules on standard terms were adopted, which in turn happened at the end of an extremely lengthy legislative process. However, the argument does not capture relevant developments in the legal-economic debate concerning the regulation of mass contracts: as will be discussed below, not many of those engaging in economic analysis of standard form contracts would subscribe to the idea that the consumer’s non-reading attitude is a problem in itself.¹⁴³

The economic case for regulation, is not satisfied by pointing at non-negotiation, transaction costs or information asymmetries: the question is whether these phenomena lead to (net) efficiency losses, that is if they lead to different terms than the ones we would observe under a regime of perfect competition. While negotiation and “informed” consent are central to classical contract law, their role can be reduced to none in economic terms – to the extent that efficiency is secured by other elements in the market mechanism. This forms the background for a second strand of “economic” arguments, more sceptical about the need to allow (judicial or otherwise) control of non-negotiated contracts. When a party fails to negotiate/read the contract, the reasoning goes, their attitude is to be read as *rational apathy*:¹⁴⁴ for that party, it is most beneficial (and thus, rational) to save the time and effort that it would take to engage in reading/negotiations.

Market competition, according to an important strand of US-based scholars, will make sure that the contract’s drafter does not take undue advantage of the circumstances. Assuming that consumers dislike one-sided terms, too many such terms would lead customers who do read the contract (the so-called “informed

¹⁴⁰ Schulte-Nölke, Twigg-Flesner, and Ebers, *EC Consumer Law Compendium*, 2009.

¹⁴¹ Schulte-Nölke, Twigg-Flesner, and Ebers, 337 ff.

¹⁴² Mostly through the publication of Oliver E. Williamson, “Transaction Cost-Economics: The Governance of Contractual Relations,” *The Journal of Law & Economics*, 1979, 233–61.

¹⁴³ See e.g. Ian Ayres and Alan Schwartz, “Remedies for the No Read Problem in Consumer Contracting,” in *Stanford Law Rev*, 2013. According to Ayres and Schwartz, consumers often predict how bad the terms are. Only “unpredictably bad” terms should be subject to restriction in their view.

¹⁴⁴ Michael G. Faure and Hanneke A. Luth, “Behavioural Economics in Unfair Contract Terms,” *Journal of Consumer Policy* 34, no. 3 (September 1, 2011): 337–58, <https://doi.org/10.1007/s10603-011-9162-9>.

minority")¹⁴⁵ to abandon the greedy provider, damaging their business. In principle, thus, an intervention will be required only when there are specific reasons to believe that in a certain market these corrective mechanisms are not taking place.¹⁴⁶ This analysis, which still holds considerable ground across the Atlantic, is not equally successful in Europe. As we will see, the reconstruction is challenged by other approaches. A further challenge comes from empirical studies that question the existence of a sufficiently numerous group of reading consumers.¹⁴⁷

Other strands of North-American legal-economic analysis, which focus on behavioural and decision-making processes, concentrate their suspicions not on the parties' access to relevant information, but rather on their (our) failure to process that information. Recent contributions insist on the fact that humans tend to a) take their decisions on the basis of a limited set of possibly ill-chosen parameters and b) systematically err in appreciating how those factors will actually work out as the contract is executed- especially when a time dimension is added.

First, psychological research shows that humans presented with complex choices tend to focus their decision-making on only a few issues which are "salient" to them and to factor other elements out. In the context of contractual decision-making, this means in the first place that we tend to concentrate on the basic features of the good that we seek to achieve and most notably on its price, while

¹⁴⁵ Theorised by Alan Schwartz and Louis Wilde, "Intervening In Markets on the Basis of Imperfect Information: A Legal and Economic Analysis," *University of Pennsylvania Law Review* 127, no. 3 (January 1, 1979): 630.

¹⁴⁶ One interesting feature of the unfair terms control system set by the Directive, or more in general of a system relying on open norms applied ex post, is that it can be modelled differently according to the guiding ideas, so for instance A. Hatzis has suggested that the Directive poses no problem as long as it is only applied to cases where certain market problems are ascertained, instead of where terms are "unfair" in light of the moral or normative assessment by the concerned judges. See Aristides N. Hatzis, "An Offer You Cannot Negotiate: Some Thoughts on the Economics of Standard Form Consumer Contracts," in *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law*, ed. H. Collins, vol. 15, 2008, 43–56.

¹⁴⁷ Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, "Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts," *The Journal of Legal Studies* 43, no. 1 (2014): 1–35.

other elements, most prominently those concerning the contract itself, tend to play a (much) lesser role.¹⁴⁸

In the second place, even within the few parameters that are taken into account, several biases affect decision-making negatively.¹⁴⁹ Often mentioned in consumer law studies are the “optimism bias” and so-called “hyperbolic discounting”. According to the first, we tend to overestimate ourselves in comparison to our peers and thus our ability to keep our promises, also in the face of others’ failure to deliver on the same terms. The second bias suggests that we overly “discount” the value of events which seem temporally remote, irrationally sacrificing our actual long-term preferences to present satisfaction.

This “behavioural” approach has recently attracted much interest in Europe and in certain member states. We will use a decision from the United Kingdom to illustrate with an example how behavioural insights have been and can be incorporated in the discussion over unfair terms control.¹⁵⁰ The decision concerns a gym chain’s standard contracts, which were offered in a number of variations all requiring the consumer to commit to the gym for a certain amount of time. The court ruled the minimum duration terms invalid, validating the Office of Fair Trade’s submission that complaints it had received

“demonstrate that consumers tend to overestimate the use they will make of their gym club memberships, that unforeseen circumstances often make it impractical for members to use the gym facilities, and that often a monthly payment that may have been affordable at the beginning of the agreement ceases to be affordable before the end of the minimum membership period. Mr. Jason Freeman has exhibited to his witness statements many such complaints. They also reveal that consumers often do not appreciate that they have entered into an agreement which requires them to remain a member for a minimum period until they seek to bring it to an end. Indeed statements have sometimes been made to them which have positively misled them into believing that they have a right to terminate under their agreements when in truth they do not.”¹⁵¹

¹⁴⁸ Russell Korobkin, “Bounded Rationality, Standard Form Contracts, and Unconscionability,” *U. Chi. L. Rev.* 70 (2003): 1203.

¹⁴⁹ See for general references, Dan Ariely, *Predictably Irrational* (Harper Audio New York, NY, 2008); Daniel Kahneman, *Thinking, Fast and Slow* (Macmillan, 2011). More directly focussing on consumer behaviour Omri Ben-Shahar and Carl E. Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press, 2014).

¹⁵⁰ OFT v Ashbourne Management Services Limited and others [2011] EWHC 1237.

¹⁵¹ OFT v Ashbourne, para 133.

In a similar vein, it has been argued that the reasoning on (unfair) contract terms should incorporate insights that suggest that in long terms contracts consumers are often “seduced” by short-term advantages and tend to ignore higher costs which will only arise at a later stage.¹⁵² This means that even some “main” (or “core”, or salient) contractual issues might escape the (effective) operation of market forces.

While these perspectives all offer valuable insight, the most established approach to Directive 93/13 and market failures builds on the notion of “market for lemons”.¹⁵³ The theory is based on information economics. The premise of this argument is similar to the ones we have just examined: the market for contract terms does not work as it should. Consumers, due to transaction costs or biases, do “not reward high quality contract terms”,¹⁵⁴ i.e. they do not pay more for better terms.¹⁵⁵ As a consequence, producers offering better terms- which are costly for them- are put at a disadvantage against competitors using worse terms. Market forces tend to draw the quality of terms down. Eventually, the argument goes, downward competition might lead consumers to leave a market which no longer offers terms of acceptable quality. Some regulation can just be justified in order to prevent such perverse operation of the market.

The market for lemons justification claims¹⁵⁶ to give a good account of several relevant aspects of the directive, including the exclusions of “core” terms from control and the Court of Justice’s refusal to give a too concrete specification of what “unfairness” entails as a standard. From this perspective, the language used by the Court of Justice to invoke the need for consumer protection appears spurious. The fact that such language has not only been repeated, but also appears to have been reinforced since the time that the theory has been exposed may be seen to undermine the theory’s explanatory value, but the next chapter will

¹⁵² Oren Bar-Gill, *Seduction by Contract: Law Economics, and Psychology in Consumer Markets*, 2012.

¹⁵³ Korobkin, “Bounded Rationality, Standard Form Contracts, and Unconscionability.”

¹⁵⁴ Schillig, “Inequality of Bargaining Power versus Market for Lemons,” 341.

¹⁵⁵ In more nuanced terms, the contention is that consumers do not base their choice of a certain product or service on the provider’s standard terms, or only on a small part of these. Given similar products, they will choose cheaper products over more expensive products coming with “better” terms. This assumption is of course reinforced by the insights on consumer behaviour discussed above, but does not rely on them.

¹⁵⁶ Schillig, “Inequality of Bargaining Power versus Market for Lemons,” 336; Michael Schillig, “Directive 93/13 and the ‘Price Term’ Exemption: A Comparative Analysis in the Light of the ‘Market for Lemon’s’ Rationale,” *International & Comparative Law Quarterly* 60, no. 4 (2011): 933–963.

attempt at providing a somewhat more sophisticated argument in a similar direction.

2.2. European private law and the rise of “aims” discussions

A broader look suggests that the regulatory turn in the unfair terms debate should not come as a surprise. European Private Law has emerged in radically different ways than its national counterparts.¹⁵⁷ The EU’s institutional mission of creating and upholding the so-called internal market has deeply characterized its efforts in the domain of private- here, contract- law from the beginning on. As has been argued by several authors,¹⁵⁸ this stems as much from the Union’s limited competences in the field of private law and institutional designs as, especially since the first Barroso commission, from the interaction between the factors just mentioned and a specific pro-market ideology.

Harmonisation of certain fields of private law has sometimes been presented as a market-creating mechanism, securing the establishment of a “level playing field” among actors in different Member States¹⁵⁹ and, more recently, removing obstacles to cross-border trade.¹⁶⁰ In the last part of the 20th century, this connection has

¹⁵⁷ Although national private law systems are arguably also subject to transformation in a similar direction. See Guido Comparato, “Public Policy through Private Law: Introduction to a Debate on European Regulatory Private Law,” *Eur. LJ* 22 (2016): 5.

¹⁵⁸ For powerful accounts that have emerged over the past few years: G. T. Davies, “Democracy and Legitimacy in the Shadow of Purposive Competence,” *European Law Journal* 21, no. 1 (2015): 2–22; Marija Bartl, “Internal Market Rationality: In the Way of Re-Imagining the Future,” *European Law Journal* 24, no. 1 (February 11, 2018): 99–115.

¹⁵⁹ Or under the “consumer confidence” banner firstly raised by the famous Sutherland report. See Hans-W. Micklitz, “The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation,” *Yearbook of European Law* 28, no. 1 (2009): 10.

¹⁶⁰ Note the difference between the Unfair Terms Directive, which, at its second recital, only mentions “distortions of competition” arising from the existence of different national rules, and the 2011 Consumer Rights Directive, which, while emphasising the need to strike a balance between consumer protection and business competitiveness (at recital 4), expressly refers to legislative differences as “internal market barriers affecting traders and consumers”. Existing disparities, according to recital 6, “increase compliance costs to traders wishing to engage in the cross-border sale of goods or provision of services. Disproportionate fragmentation also undermines consumer confidence in the internal market.” The 1985 Product Liability Directive mentions distortions of competition in a way similar to the UTD and adds disparities in consumer protection level as a problem in itself (first recital, which also mentions that differences may affect the free movement of goods, but does not say how this would happen). Within the Doorstep sales Directive, the language was even more unsophisticated,

allowed the Commission and the Member States to formally establish the Union's competence to enact harmonising measures, under the banner of then article 100 TEC (now, with modifications, art 114 TFEU). While the choice of legal basis might have been a mere matter of expediency at the time,¹⁶¹ it has markedly influenced the following developments of EU legislation in the field of consumer protection.¹⁶² In this respect, it may suffice to recall that article 169, the TFEU provision establishing a specific competence for consumer protection, details two "routes to consumer policymaking"¹⁶³: the most prominent, still, refers to the internal market (article 114 TFEU); the second, which enables the Parliament and Council to enact legislative measures "which support, supplement and monitor the policy pursued by the Member States" has seldom been used.¹⁶⁴

On other occasions, harmonisation has been the *consequence* of market creation; such is the case of the liberalisation of formerly public services, which has engendered the need for some special regulation of, inter alia, energy supply contracts. The EU, indeed, "has taken over the competence of most of those specific areas of the economic system that are considered as in a particular need of regulation"¹⁶⁵- which is an additional explanation of the distinctively regulatory¹⁶⁶ outlook of its interventions in private law.

The tight connection between private law and market making within the Union has been emphasised-or decried- by many authors. The only divergence, indeed, seems to concern the authors' normative stance vis à vis such connection. What they all seem to agree on is that it is impossible to look at European private law

merely stating that rules on contracts concluded away from business premises had to be harmonized because "*any disparity between such legislation may directly affect the functioning of the common market*" (second recital). This is in striking contrast to, e.g., the elaborate justifications of the need of new consumer sales rules to be found at recitals 3-5 of the recent proposal of 31 October 2017, COM(2017) 637 final.

¹⁶¹ See, with reference to the UTD, Weatherill, *EU Consumer Law and Policy*, 147.

¹⁶² For a compelling critique, see Bartl, "Internal Market Rationality."

¹⁶³ Weatherill, *EU Consumer Law and Policy*, 17. More recently, Stephanie Law, "The CJEU's Interpretation of the Consumer: What Significance of Judicial Cooperation?," in *Judicial Cooperation in European Private Law* (Edward Elgar Publishing, 2017), 167-68. Law still observes that art 169 (*rectius*, its pre-predecessor art 129.a(2) of the Maastricht treaty) has been used as legal basis only once since the possibility was established in 1993, for Directive 98/6 on consumer protection in the indication of the prices of products offered to consumers. According to article 169(4) TFEU, the legal basis as provided by article 169.2(b) and 169(3) can only be used for minimum harmonization measures.

¹⁶⁴ see, again, Weatherill, *EU Consumer Law and Policy*, 18.

¹⁶⁵ Comparato, "Public Policy through Private Law," 2016, 7.

¹⁶⁶ See Chapter 1, 1.3. and Chapter 2.

and see the seemingly technical, non-instrumental body of rules that national private laws have long been considered to represent.¹⁶⁷ The “instrumentalisation” of private law, of course, is no invention of the European Commission(s): along the twentieth century, private law rules have been used to various ends.¹⁶⁸ Within the context of European private law, however, this trend is particularly strong and is tilted towards one particular end- again, the internal market.

In this respect, consumer (protection) law is a terrain for ideological contention. While there is a certain consensus that the market- whether its creation, opening, expansion- is a central concern to European consumer legislation, very different ideas are represented concerning the degree to which non-market aims are and should be pursued as well. In recent years, the notion of EU-originated private law as “regulatory” private law has gained ground as a descriptive-explanatory tool thanks to the work of the research team led by Hans Micklitz at the European University Institute.

The notion of European Regulatory Private Law postulates that private law rules stemming from the EU are essentially concerned with the regulation (sometimes self-regulation) of different, partially segregated markets, which while pursuing loosely coherent *objectives* cannot be seen to be establishing or to follow any general principles such as the ones characterising national (private) legal orders.¹⁶⁹ Not all the tenets and implications of the ERPL theory are necessarily equally shared among scholars in the field,¹⁷⁰ but at its core the project helps to make sense of an emerging “system” of private law which differs in very remarkable ways from the private laws which have been adopted and developed in the Member States. The traditional defining function of private law, with some simplification, is non-regulatory.¹⁷¹ The law of contracts, torts and property has for centuries secured existing rights, helped create new ones and, crucially, reacted when protected rights were violated. In stark contrast to the *steering* attitude of

¹⁶⁷ Of course one should not here suggest that this account had not been challenged by several attempts at deconstruction in earlier times – from the critical legal studies movement to American and Scandinavian realists. In particular, in the European private law debate it is common to refer to Duncan Kennedy, “The Political Stakes in” Merely Technical” Issues of Contract Law,” *European Review of Private Law* 10, no. 1 (2002): 7.

¹⁶⁸ Schmid, “The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell,” 2011, 18.

¹⁶⁹ Guido Comparato, “Public Policy through Private Law: Introduction to a Debate on European Regulatory Private Law,” *Eur. LJ* 22 (2016): 621.

¹⁷⁰ See Martijn W. Hesselink, “Private Law, Regulation, and Justice,” *European Law Journal* 22, no. 5 (2016): 681–695.

¹⁷¹ Hesselink.

regulation,¹⁷² private law was first of all an ex-post mechanism. The European Regulatory Private Law paradigm does not come without a concern for justice – it comes with an “original” concept of justice, that is *access justice*. Other than the classical private law notion of corrective justice, access justice is not mainly concerned with the relationship between the two parties to the contract but focuses mainly on providing the (here) consumer with meaningful opportunities on the internal market, crucial to functioning fully in the European market society. In contrast to *social justice*, which has followed *national* patterns of solidarity, self-help and redistribution, access justice is a loose notion (it can take different shapes in different markets) but, at its core, it is homogeneous throughout the EU and is less dependent on the typical institutional structures of the Westphalian state.

The unfair terms directive does not, within the ERPL account, belong to the generation of EU interventions properly characterised by access justice; much rather, it belongs to a previous phase in EU private law making in which national patterns of social justice were mimicked – and left essentially in place, inter alia by the use of minimum harmonisation. However, the account is not exclusively descriptive but also normative; it contains an important critique on the feasibility of social justice through private law, tied not only in the classical arguments by law & economics – and, to an extent, social science – scholars, but also in a broader reflection on the changing role of the State. We have seen above that it is not easy to decide to what extent unfair terms control was ever meant to pursue social justice in a strong sense. ERPL forefronts the struggle in defending why we would then want to keep it in place.

2.3. Conclusion: unfair terms control for whom?

The idea of private law as regulation is a powerful explanatory instrument because it does not postulate any specific goals¹⁷³ but only a certain – goal-oriented, rather than principle-based; more “macro” than “micro” – rationality. With reference to the Unfair Terms Directive, we have seen how two main “goals” have been identified: on the one hand, the protection of consumers *as a class*, i.e. the “regulatory” version of the principle of weaker party protection, and the eradication of unfair terms to be found in consumer markets. The effective pursuit

¹⁷² In a relatively classical definition, regulation can be identified as the intentional use of authority to affect behaviour of a different party according to set standards, involving instruments of information-gathering and behaviour modification- see Julia Black, “Critical Reflections on Regulation,” *Austl. J. Leg. Phil.* 27 (2002): 1.

¹⁷³ Although it affords certain goals a strong advantage over certain other goals – see Hugh Collins, *Regulating Contracts* (Oxford University Press, 2002).

of these goals, then, would be the primary function of adjudication under the Directive. Saying that these goals are regulatory in nature entails that they do not primarily concern the relation between two specific parties.

The original intentions were not as clear. We have seen that contemporaneous documents did not extensively elaborate on the reasons for intervening against unfair terms, rather starting from the need to harmonise existing provisions enacted at MS level.

Over the years, the protection of individual consumers as “weak” parties has been losing ground in the discussion. The protection of consumers *as a group* by means of unfair terms control can be made to fit within a regulatory rationale but is a questionable enterprise for reasons that have also been mentioned above – from the dangers of backfiring to questions of effectiveness. Thanks to the emerging consensus on some form of information-related market failure (combined with the growing popularity of behavioural economics), the Directive’s orientation has increasingly come to be associated with a market-cleansing rationale. The more “welfarist” arguments, as predictable, tend to lose ground. So, a regulatory rationale tends to be mostly about market-enhancing interventions. But how regulatory is the directive in practice? Is it really the case that the regulatory rationale has displaced the – admittedly, murky – more plural origins of unfair terms control? These questions will be investigated in Chapter 3.