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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 3 The Directive “in action”, a three-pronged analysis

This Chapter will propose an analysis of salient aspects in the CJEU’s interpretation of the Unfair Terms Directive.<sup>174</sup> The aim of the analysis is to identify the reach and limitations of regulatory reasoning in this area. As said above, the leading criterion to identify “regulatory” features is whether the rule emerging from a decision is best justified with reference to the parties concerned or having in mind goals going beyond the rights and interests of those specific parties. In particular, rules which are adopted with a view to providing a certain type of incentives – i.e. steering party behaviour in a desired direction – even though the application of a different rule to the contract under consideration would entail a more balanced or “fairer” outcome and would suggest a regulatory rationale.

Although most readers will be familiar with the structure and content of the Directive, it seems appropriate to very briefly introduce them here. Within its scope, which is limited to non-negotiated terms in consumer contracts, the Directive contains, at article 3 one main substantive provision declaring that a term has to be regarded as unfair if “*contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.*”<sup>175</sup> The control does not “relate to” the determination of the main subject matter of the contract, nor to the relationship between the goods or services provided and the price paid by the consumer- as long as the terms containing these determinations are drafted in plain intelligible language.<sup>176</sup> A requirement of “plain and intelligible” drafting further applies to all (non-negotiated) contract terms contained in written contracts.<sup>177</sup> In case of doubt, the interpretation most favourable to the consumer shall prevail.<sup>178</sup> Member States must make sure that terms which are found unfair are *not binding* on the affected consumers.<sup>179</sup>

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<sup>174</sup> The chapter is to a large extent an elaboration and update of a paper I presented in Leiden at the end of 2016. Even though the argument has changed considerably in the meantime, I am still grateful to the organizers of the conference “Private law and market regulation” of 2 December 2016 for the chance they gave me to reconsider my topic. The conference paper is available online: Candida Leone, “Of Private Law, Market Regulation and Telling Them Apart in the EU,” *Amsterdam Law School Research Paper*, no. 2017–28 (2017): 017–04.

<sup>175</sup> Art 3(1) Directive 93/13/EEC

<sup>176</sup> Art 4(2) Directive 93/13/EEC.

<sup>177</sup> Art 5(2).

<sup>178</sup> Except in collective actions, see art 5(2).

<sup>179</sup> Art 6(1).

The analysis will concentrate on three salient aspects of the CJEU's adjudication concerning Directive 93/13: substantive standards, consequences of unfairness and the main procedural issues come to prominence in the Court's case-law. These three aspects have been selected for different reasons. The unfairness test includes several open-ended concepts, some of which appear to be somewhat morally laden; a regulatory approach may be expected to find difficulties in making sense of such open-ended and "charged" notions as those used in the Directive's substantive provisions. Evidence of a "regulatory" focus in these areas would testify to the pervasiveness of instrumental rationalities in unfair terms adjudication before the CJEU. The consequences of unfairness are one point on which the Directive has expressly deferred to national law: unfair terms shall not be binding on the consumers "as provided by national law". This makes the area a likely place for collisions between national private laws and EU harmonization, and quite possibly for clashes of rationalities. Civil procedure, finally, with its reliance on private action, is typically stressed as one of the main shortcomings of private law in terms of regulatory effectiveness; thus, the treatment of sanctions and remedies under the Directive has much to say about the reach and limitations of regulatory strategies in the matter.

In the context of unfair terms control, regulatory rationales may mean different things. In line with what has been said above, "regulatory" in this context does not mean exclusively market-oriented. As recalled above and submitted by prominent scholars,<sup>180</sup> *what* goals regulation pursues is not intrinsic in the notion. Therefore, going back to the two main arguments identified in Chapter 2, both weaker party protection *as a matter of policy* and addressing market failures are regulatory goals. In other words, consumer protection that is granted in the same way irrespective of whether individual consumers "deserve" or need it follows a regulatory rationality. However, one should not neglect two important side observations: first, that the boundaries between weaker party protection as a matter of policy and weaker party protection as a matter of "principle" are often blurred: in other words, a certain intervention may to an extent align with both ideas; second, that (again, with a number of scholars) adopting a regulatory rationality indirectly tends to reinforce economic, market-related (or market enhancing) goals<sup>181</sup> over

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<sup>180</sup> Ralf Michaels, "Of Islands and the Ocean: The Two Rationalities of European Private Law," in *The Foundations of European Private Law*, ed. Roger Brownsword et al. (Hart Publishing, 2011); Hugh C. Collins et al., eds., *Legal Regulation of the Employment Relation* (London: Kluwer Law International, 2000).

<sup>181</sup> Bronwen Morgan, "The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality," *Social & Legal Studies* 12, no. 4 (December 1, 2003): 489–523,

goals that rather aim to *correct* market results. As a result of both these factors, it is to be expected that the clearest examples of “regulatory” features in CJEU adjudication will be in line with a market failure approach.

Starting with the “market for lemons” approach, such a rationale would require trying to secure that all terms for which no plausible market will arise are scrutinised.<sup>182</sup> The specific standard according to which scrutiny would take place is a less straightforward issue – one could argue that courts should strike out inefficient terms, but it is far from clear that they would be well-placed to (efficiently!) perform the necessary assessment. Control of “non-salient” terms could be then performed on the basis of some proxy or general rule that courts can apply without too much need to non-legal input. A weaker party protection – qua advancement of collective interests – rationale would require, for instance, that unfair terms control turns into a way of imposing demanding standards of behaviour on the professional, irrespective of specific contractual interactions; that as many consumers as possible can rely on a declaration of unfairness – which is in general an aim better served by collective than by individual proceedings – and that terms intervening in sensitive areas of economic and contracting activity be scrutinised with particular attention. Both rationales would place emphasis on deterrence when it comes to the consequences of unfairness.

By contrast, a more “private law” rationale would focus on the rights, responsibilities and behaviours of the parties directly involved in the dispute. It would require some – formal or substantive – criteria to identify which terms should be controlled *in a certain case*, likely on the basis of the quality of consent. If concerned with weaker party protection, it would require standards as much as possible capable of tailoring to the specific needs of the concerned consumer and the context in which a certain contract was concluded. It would aim at making sure that the individual consumer concerned does not have to bear the effects of particularly imbalanced contractual conditions. Setting incentives for the professional to behave better in the future, or “punishing” them, is not central to a protective private law rationale: the individual consumer has no stakes in this discussion. Protective concerns taken aside, a private law rationale would actually require giving adequate consideration to the interests of the trader, likely

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<https://doi.org/10.1177/0964663903012004004>; Collins et al., *Legal Regulation of the Employment Relation*.

<sup>182</sup> Schillig, “Directive 93/3 and the ‘Price Term’ Exemption”; Korobkin, “Bounded Rationality, Standard Form Contracts, and Unconscionability.”

moderating the negative effects of a declaration of unfairness when the trader has not been particularly reckless.

All in all, the chapter shows that a regulatory rationale does much to justify the developments in unfair terms control which have taken place in the hands of the CJEU since the start of the century. This seems, among other things, an unsurprising product of the institutional positioning of the CJEU, whose jurisdiction is limited to the interpretation of rules – to make things worse, rules originally addressed at legislators rather than at private parties. However, “private law” elements resurface all the time. The private law that emerges is sometimes of a technical nature; sometimes, though, what surfaces is the genuine concern with not entirely losing sight of the individual parties’ interests and rights in the pursuit of effective, behaviour-steering regulation.<sup>183</sup> In other words, the private law that emerges as a counterbalancing force to sheer regulation is one that already incorporates weaker party protection among its concerns – a private law which is no longer the 19<sup>th</sup> century model whose departure was already underway as it was being celebrated.

As recalled above, the Directive has generated notoriously little case-law for over a decade, until the adverse economic cycles triggered by the 2007-2008 financial crisis have finally “kissed it awake”.<sup>184</sup> It is therefore thanks to the many cases which have been decided over a relatively short period of time that the Court has had the chance to quite momentarily develop a number of doctrines well beyond- or besides- what one would have been able to expect only a few years ago. We will now look into a number of particularly salient aspects among those which have featured prominently in the case law of the last two decades.

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<sup>183</sup> This is only to speak of the EU level – a different discussion altogether concerns the worries and motives of national courts bringing preliminary reference applications. In particular, judges concerned with the impossibility of giving justice within the legal framework established by their national legislation have been the object of much writing – see, with very different styles, Fernando Gómez Pomar and Karolina Lyczkowska, “Spanish Courts, the Court of Justice of the European Union, and Consumer Law,” *InDret*, no. 4 (2014); Fernanda Nicola and Evelyne Tichadou, “Océano Grupo: Missed Opportunities and a Second Life for EU Consumer Law,” in *EU Law Stories*, ed. Fernanda Nicola and Bill Davies (Cambridge University Press, 2017), 369. Also in this case, justice in individual cases and broader concerns seem tightly intertwined.

<sup>184</sup> Micklitz and Reich, “The Court and Sleeping Beauty,” 51. Józón, “Unfair Contract Terms Law in Europe in Times of Crisis,” 157.

### 3.1. The unfairness test: substantive unfairness and transparency

#### 3.1.1. Unfairness: significant imbalance, good faith and the possible role of proportionality

When the Directive was adopted, the general clause of article 3 attracted much attention (and criticism), especially due to its reference to good faith.<sup>185</sup> However, enthusiasm and fears alike went considerably down after the Court's decision in *Freiburger Kommunalbauten*,<sup>186</sup> which seemed to announce a future of judicial restraint. In this case, the Court declared that it did not fall within its remit to assess whether a given term was unfair:

*“as to the question whether a particular term in a contract is, or is not, unfair, Article 4 of the Directive provides that the answer should be reached taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract. It should be pointed out in that respect that the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law.”<sup>187</sup>*

As a consequence of the Directive's formulation and of the Court's institutional mandate – interpreting EU law –, the decision affirms, it is for national courts to determine whether individual terms are to be considered unfair under the Directive. As pointed out by Hesselink,<sup>188</sup> the Court's laid-back approach in this context was not difficult to understand; however, to the extent that the justification relied on the need to consider “national legislation” in order to assess a term's fairness, the ECJ was creating a requirement that had been nowhere in the Directive itself. By distinguishing its previous decision in *Océano*, which had declared a jurisdiction clause unfair, the ECJ appeared to take a step back and avoid encouraging national courts to seek far-reaching guidance on applying the Directive. For a couple of years, they did not do so. It was only after 2009 that

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<sup>185</sup> Famously, Teubner, “Legal Irritants.”

<sup>186</sup> Case C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG and Ludger Hofstetter, Ulrike Hofstetter*, ECLI:EU:C:2004:209.

<sup>187</sup> *Freiburger Kommunalbauten*, para 21.

<sup>188</sup> Martijn W. Hesselink, “ECJ–Freiburger Kommunalbauten v Hofstetter,” *European Review of Contract Law* 2, no. 3 (2006): 373–74.

preliminary reference requests started gaining more traction, with the Court having decided several cases on unfair terms rules every year at least since 2014.<sup>189</sup>

While the stream of cases which has reached Luxembourg in the last few years has not really revived the excitement that had surrounded the “unfairness” clause in the early days of the Directive, it has shown that the Court is ready to adopt a more decisive role. In particular, with its landmark *Aziz*<sup>190</sup> decision, the Court has actually taken up the task of providing further indications on the meaning of the Directive’s article 3. In this context, the ECJ seems to have separated two prongs within the unfairness test – “significant imbalance” on the one hand, and “contrary to good faith” on the other.<sup>191</sup>

As to the significant imbalance, the Court has held in *Aziz* that

*“it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.”*<sup>192</sup>

Compared to *Freiburger*, this passage in *Aziz* takes two steps at the same time: it makes the role of national rules more explicit *and* it ties such role directly into the notion of significant imbalance. Default rules of national contract law become, in this construction, the point of reference for assessing whether the consumer’s legal

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<sup>189</sup> Considering judgments and orders quoting the Directive in their operative part, 68 cases on Directive 93/13 appear to have been settled by the Court between 1 January 2014 and October 2019.

<sup>190</sup> Case C-415/11 *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164.

<sup>191</sup> This may seem obvious now but it was not at the time when the Directive was adopted and immediately afterwards. To the contrary, a former Commission officer who was privy to the negotiations leading to the Directive’s adoption wrote in 1995: “Let us be clear: there is no way that a contractual term which causes ‘a significant imbalance in parties’ rights and duties arising under the contract to the detriment of the consumer’ can conform with the requirement of ‘good faith’ Indeed, the opposite is true: a term is always regarded as contrary to the requirement of ‘good faith’ when it causes such an imbalance. What the principle of good faith adds is something that the criterion of significant imbalance alone could not provide us with: namely, decades of national case-law and doctrine.” See Mario Tenreiro, “The Community Directive on Unfair Terms and National Legal Systems: The Principle of Good Faith and Remedies for Unfair Terms” (1995),” *European Review of Private Law* 3 (n.d.): 273, 279.

<sup>192</sup> *Aziz*, para 68.

position has been significantly impaired by the contentious term: the more a term deviates from the otherwise applicable rules, to the consumer's disadvantage, the more likely it is that that term should be considered unfair. This stance has been repeated and reinforced in the later *Constructora Principado*<sup>193</sup> decision, where the Court specified that

*“the question whether that significant imbalance exists cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract and the costs charged to the consumer under that clause.*

*On the contrary, a significant imbalance can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules.”<sup>194</sup>*

At the same time, the Court pointed that this analysis should not entirely exhaust the significant imbalance test:

*“in assessing whether there is a significant imbalance, it is for the referring court to take into account the nature of the goods or services for which the contract was concluded by referring to all the circumstances attending the conclusion of that contract, as well as all the other terms of contract.”<sup>195</sup>*

In *Aziz*, after the general argument concerning the significant imbalance test, the CJEU has then proceeded with very specific guidance to the national court, instructing them to examine three suspicious terms. In these instructions, the guiding criteria enumerated above- in particular, the comparison with the otherwise applicable default national legal rules and the remedies available to the consumer in case a term is unduly triggered- are implemented consistently. In the case of one of the terms, establishing custom default interest rates, the court additionally included a *proportionality* test which seems particularly interesting – the national court should check whether the interest rate established in the contract “*compared with the statutory interest rate [...] is appropriate for securing the*

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<sup>193</sup> Case C-226/12 *Constructora Principado SA v José Ignacio Menéndez Álvarez*, ECLI:EU:C:2014:10.

<sup>194</sup> *Constructora Principado* para 22-23.

<sup>195</sup> *Constructora Principado* para 30. The language mirrors article 4(1) of the Directive as well as its recitals. See *infra* section 3.1.3.

*attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them”*.<sup>196</sup>

With reference to the requirement that the significant imbalance has arisen “contrary to good faith”, the Court in *Aziz* instructed national courts to ascertain whether

*“the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations”*.<sup>197</sup>

Deriving guidance from such instructions does not seem too easy. To the extent that the focus would be on what the seller or supplier could expect when “dealing fairly and equitably”,<sup>198</sup> the Court’s specification did not seem to add much clarity to the “good faith” requirement as such. The result of *not* focussing on fair and equitable dealing on the side of the trader, on the other hand, appears likely conducive to a rather consumer-unfriendly standard: since, in most cases, the consumer’s volition concentrates on the contract itself rather than on its terms,<sup>199</sup> the abstract possibility of negotiating individual contract terms would be unlikely to improve the consumer’s substantive position. In other words, consumers who have agreed to unfair terms such as the very harsh acceleration clauses contained in the contract considered in *Aziz* would likely have agreed to them even if they were not pre-printed but “agreed” between the individual consumer and the bank’s agent, if they were presented as necessary conditions for accessing the credit. This test seems to differ from the most common understanding of “objective” good faith, entailing the consideration of the other party’s interests,<sup>200</sup> and has been seen as wavering towards a more subjective view – mediated by a notion of the consumer’s will which, as said above, seems potentially

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<sup>196</sup> This mirrors the reasoning promoted in Micklitz, “Some Reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts,” 2008.

<sup>197</sup> Case C-415/11 *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164, para 69.

<sup>198</sup> Could *reasonably* expect: but there is no way of projecting whether the Court meant this as an additional factor or just used the language to be inclusive towards common lawyers not appeased by the notion of “dealing fairly and equitably”.

<sup>199</sup> Something which we choose to acquiesce to when understanding consent to standard terms – see Andrea Azzaro, *I Contratti Non Negoziati* (Esi, 2000).

<sup>200</sup> M. W. Hesselink, “The Concept of Good Faith,” in *Towards a European Civil Code*, ed. A. S. Hartkamp et al., 4th ed. (Kluwer Law International, 2011). In particular see p.621 for a discussion of the main understandings of objective good faith.

problematic.<sup>201</sup> If the court, thus, sees any normative content in the concept of good faith, that content is not easy to distil from existing case-law.<sup>202</sup>

More recently, the good faith standard outlined in *Aziz* came back to the fore in a rather indirect manner. In its 2018 *Banco de Sabadell*<sup>203</sup> decision, the ECJ validated a blanket prohibition, by the Spanish Supreme Court, of default interest rates<sup>204</sup> going above a certain threshold (set by the Court itself), on the reason that:

*“It is apparent [that] the Tribunal Supremo (Supreme Court) examined the national rules applicable in various branches of law and sought to determine the default rate of interest which could reasonably be agreed to, at the end of an individual negotiation, by a consumer who has been treated fairly and equitably, whilst ensuring in particular that the function of that interest is maintained, which is specifically to deter delays in payment and compensate the creditor in a proportionate manner in the event of such delay.”<sup>205</sup>*

In doing so, according to the ECJ, the Tribunal Supremo “*complied with the requirements set out in Aziz*”. In validating the Spanish court’s irrefutable presumption of unfairness, however, the ECJ seems to have discarded part of those requirements. After articulating (at para 68-70) the implications of significant imbalance and good faith as discussed above, the decision in *Aziz*, that the court refers to in *Banco de Sabadell* – much like that *Constructora Principado* – added a reference to the specific circumstances at the time of the contract’s conclusion:

*“Furthermore, pursuant to Article 4(1) of the directive, the unfairness of a contractual term is to be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of it.”<sup>206</sup>*

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<sup>201</sup> See, with more references, Sara Iglesias Sánchez, “Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: *Aziz v. CatalunyaCaixa*,” *Common Market Law Review* 51, no. 3 (2014): 955–974.

<sup>202</sup> See also Immaculada Barral-Viñals, “*Aziz* Case and Unfair Contract Terms in Mortgage Loan Agreements: Lessons to Be Learned in Spain,” *Penn St. J.L. & Int’l Aff.* 4 (2015): 69.

<sup>203</sup> Joined Cases C-96/16 and C-94/17, *Banco Santander SA v Mahamadou Demba, Mercedes Godoy Bonet* (C-96/16), and *Rafael Ramón Escobedo Cortés v Banco de Sabadell SA* (C-94/17), ECLI:EU:C:2018:643.

<sup>204</sup> That is, interests payable in case the consumer fails to timely meet their obligations under the contract.

<sup>205</sup> *Banco de Sabadell*, para 63.

<sup>206</sup> *Aziz* para 71.

Such emphasis on the specific circumstances surrounding the conclusion of the contract could have been problematic in *Banco de Sabadell*, as an irrebuttable presumption such as that established by the CJEU in this case by definition does not allow taking the specific circumstances into account if this would lead to “exonerating” the term.<sup>207</sup> The “expulsion” of the circumstances assessment from the good faith standard seems to counter the subjective turn that could be read in *Aziz* – a generalized assessment such as that at stake in *Banco de Sabadell* clearly had nothing to do with the state of mind of the individual traders involved.

Allowing forms of covert judicial-black listing of terms is a move with an obvious enhancing effect on the regulatory potential of unfair terms control: it gives a strong signal. Similarly, the reference to background default rules and the remedies available under national rules, as well as the embryonic proportionality test suggested in *Aziz*, make the outcome in a specific case highly dependent on the national legal environment, and therefore (national) market-specific, but rather easy to generalise within the relevant market/legal system. Thus, national judicial decisions dealing with a certain term within a specific group of contracts should be relatively apt for being considered by drafters in the same legal system and market sector concluding contracts of comparable content- which, even absent direct ultra partes effectiveness of the judgments, should contribute to their regulatory impact.

The court’s discomfort in (not) dealing with the non-regulatory aspects built in the text seems to emerge with reference to the general approach to the good faith test and the wavering attention paid to circumstances. As to the former, the hint to “subjective” good faith seems straight out of line with the broad spirit of the directive, whether in terms of (individual or collective) weaker party protection or in terms of market failures. As to the latter, one must not forget that their relevance is in principle first and foremost guaranteed by the division of labour between CJEU and national courts. However, the Court has – so far – not volunteered any elaboration on how the reference should be interpreted or in which way the national judges should go about it. This is particularly alarming in light of the fact that circumstances do seem to play a large role in the case-law on transparency.

### 3.1.2. Transparency

Depending on how one regards these outcomes as to the “substantive” unfairness standard, they may be more or less surprised by the parallel developments concerning the other main control mechanism foreseen by the Directive:

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<sup>207</sup> We will go back to this in section 2.1.3, dealing with the relevance of the circumstances surrounding the conclusion of the contract.

transparency. In first instance, the last statement may sound in itself controversial – one may doubt whether transparency, expressed in the directive mainly through the requirement of “plain and intelligible” drafting articulated by art. 5, was ever supposed to be treated as a control mechanism on more or less equal footing with the clause of art. 3. Even relatively recent commentaries<sup>208</sup> remind us that this was at least not the way in which the obligation of clear and comprehensible drafting was expected to work when the Directive was adopted. However, a combination of factors has contributed to making transparent drafting one of the key elements in the CJEU’s adjudication concerning Directive 1993/13. In particular, the transparency clause has become central in the adjudication of price-related terms, for which the Court was sometimes not able to tell *ex ante* whether they would be open for scrutiny under the unfairness clause (since they may be exempted under the “core terms” exception). The transparency obligation has been developed in a string of cases all concerning long-term contracts, and by now we know that the CJEU considers similar requirements to apply when it is used as a material standard of evaluation<sup>209</sup> and when it works as a gateway for the possibility to control “core” terms.<sup>210</sup> Even more recently, the Court has clarified that in certain cases a lack of transparency can be in itself conducive to unfairness when it misleads the consumer as to the extent of the rights they enjoy.<sup>211</sup>

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<sup>208</sup> See Johanna Waelkens, “Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts,” 2015, 47. See also, much more recently, AG Hogan’s discomfort with the developments undergone by transparency under CJEU case-law: AG opinion, case C-34/18 *Ottília Lovasné Tóth v ERSTE Bank Hungary Zrt*, ECLI:EU:C:2019:245.

<sup>209</sup> Such is the case, in a strong way – possibly entailing unfairness – for certain terms under the non-binding, but increasingly relevant, Annex, and under certain national legal systems. In a less dramatic way, transparency scrutiny applies to all terms under article 5, possibly requiring courts to undertake pro-consumer interpretation of terms which are found to be unclear.

<sup>210</sup> See CJEU case C-26/13, *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282 para 69 and case C-143/13, *Bogdan Matei, Ioana Ofelia Matei v SC Volksbank România SA*, ECLI:EU:C:2015:127 where the Court of Justice is explicit that the scope of art 4(2) and 5 has to be considered as overlapping.

<sup>211</sup> C- 191/15, *Verein für Konsumenteninformation (VKI) v Amazon*, ECLI:EU:C:2016:612. In a similar vein, the Spanish Tribunal Supremo (TS) has understood certain core terms to be unfair because in the given circumstances the consumers were left in the dark as to their significance and consequences. While the case – of so-called *floor clauses* – has eventually come before the CJEU, the latter did not engage substantively with the question of whether the TS’ application of the test was in line with the Directive.

The ECJ is clear that the requirement of transparency “cannot be reduced to [the terms] being formally and grammatically intelligible”<sup>212</sup>; the “system of protection” put in place by the Directive is such that “the requirement of transparency must be understood in a broad sense”.<sup>213</sup> In particular, whether establishing price modifications, interest rates variation or conversion in a foreign currency, the terms must set out “transparently the reasons for and the particularities of the mechanism [emphasis added]”<sup>214</sup> which may not be of immediate evidence for the consumer, in a way that allows them to “foresee, on the basis of clear, intelligible criteria, the economic consequences” which the term has in the context of the contract they are concluding. The Court holds that the acquisition of information “before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer”;<sup>215</sup> who can on that basis decide whether they want at all to be bound by the contract; additionally, with specific emphasis on long-term contracts, it seems that contract terms can play a further role in providing the consumer a point of reference to later check the legitimacy of the other party’s behaviour during the time of contractual performance.<sup>216</sup>

Up to here, the Court’s understanding of transparency, which is in all likelihood also more substantive and more constraining than an obligation of drafting in layman language,<sup>217</sup> aligns in two important ways with a regulatory agenda: on the one hand, it tries to secure that the consumer has an operational (as opposed to literal) understanding of the workings of a contract, before and after concluding

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<sup>212</sup> This is confirmed in *Amazon*, which, however, does not elaborate on the standard to be tested. It seems that the provider would be required to include a mention of the provisions which provide the relevant context for a sufficient comprehension of the term’s meaning.

<sup>213</sup> *Kásler*, 71 and 72.

<sup>214</sup> *Matei, Kásler*, but also case C-92/11, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, ECLI:EU:C:2013:180.

<sup>215</sup> This language has become a staple in consumer decisions – see recently in C-43/17 *Walbusch Walter Busch*, ECLI:EU:C:2019:47, para 36, referring to *Wind Tre* and *Vodafone Italia*, C-54/17 and C-55/17, EU:C:2018:710, paragraph 46.

<sup>216</sup> See *Candida Leone*, “Transparency Revisited—on the Role of Information in the Recent Case-Law of the CJEU,” *European Review of Contract Law* 10, no. 2 (2014): 312–325. The connections between transparency requirements, pre-contractual information obligations and the obligation to provide information on a durable medium foreseen by some consumer protection Directives is a further question that is beyond the scope of the present research.

<sup>217</sup> See also *Joasia Luzak and Mia Junuzović*, “Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts,” *Journal of European Consumer and Market Law* 8, no. 3 (2019): 97–107.

it, so that they can operate as agents of competition;<sup>218</sup> on the other hand, again it gives drafters quite clear directions as to how complex terms should be formulated, while seeking to undermine the attractiveness of trading strategies which in part *rely* on a combination of unclear drafting<sup>219</sup> and discretionary powers or savvy use of market mechanisms. The adoption of the “average consumer”<sup>220</sup> notion as the imaginary consumer against whose understanding the term’s transparency should be assessed, in this light, would again appear to be consistent with an approach that concentrates on the (market) regulatory impact of unfair terms control rather than with the specific relationship at stage. Such average consumer, whom we would imagine to be normatively informed,<sup>221</sup> attentive and circumspect,<sup>222</sup> is in turn expected to discipline other market actors by their proactive market behaviour.

### 3.1.3. Circumstances: between ex ante and ex post

As discussed with reference to the substantive fairness test, the Directive expressly mentions that non-negotiated terms have to be assessed by referring to all circumstances attending the conclusion of the contract.<sup>223</sup> This is one of the reasons why the Court, since *Freiburger*, has claimed that it is not in a position to assess whether specific terms are unfair. There have been no express occasions, however, for the CJEU to clarify which circumstances should be considered and how they should matter. However, the transparency assessment seems to be turning into an access point through which circumstances play a concrete role.

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<sup>218</sup> Reflecting what Micklitz has termed “competitive” and “contractual” transparency – see Hans-W. Micklitz, “The Concept of Competitive Contract Law,” *Penn St. Int’l L. Rev.* 23 (2004): 549.

<sup>219</sup> Or unclear explanation of the contract’s operation- see above and below.

<sup>220</sup> In this respect, the issue just highlighted at fn. 18 is crucial; the Court in *Kásler* (para 74) suggested that the transparency of the terms under review should be examined, inter alia, in light of whether the average consumer, having available the information that was (likely) available in the case considered, would have understood. The “average consumer” notion was again used in case C-96/14, *Jean-Claude Van Hove v CNP Assurances SA*, ECLI:EU:C:2015:262.

<sup>221</sup> But see *infra* 3.1.4.

<sup>222</sup> For detailed analysis and critique of the standard, see Bram B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive*, vol. 5 (Springer, 2015).

<sup>223</sup> Directive 93/13, article 4(1).

The relevance of the “circumstances” assessment, as said above (2.1.1), is difficult to establish. In *Banco de Sabadell*,<sup>224</sup> the CJEU considered that an irrebuttable presumption of unfairness, established by means of supreme court case-law, for terms setting default interests at a rate more than two percent higher than the statutory interest rule, is not incompatible with the Directive. A Spanish court had raised doubts in this respect, considered that “the criterion applies objectively and automatically, without allowing the national court hearing the matter to take into account all of the circumstances of the case”.<sup>225</sup> In a previous case, *Unicaja*,<sup>226</sup> the CJEU had otherwise maintained that a national provision requiring a competent court to reduce default interest rates more than three times the statutory rate to an amount not exceeding that threshold could not take away the possibility, for that national court, to separately assess whether a default interest term – either above or below that threshold – must be considered unfair.<sup>227</sup> The main reason for this was found in the requirement that unfairness be assessed by referring to all the circumstances attending the conclusion of the contract.<sup>228</sup>

In *Banco de Sabadell*, however, the Court maintains that

*“the development of a criterion derived from case-law, such as that identified in the present case by the Tribunal Supremo (Supreme Court), is wholly consistent with the objective of consumer protection pursued by that directive. It follows from Article 3(1) of Directive 93/13 and from the general scheme of the directive that the*

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<sup>224</sup> Joined Cases C-96/16 and C-94/17, *Banco Santander SA v Mahamadou Demba, Mercedes Godoy Bonet* (C-96/16), and *Rafael Ramón Escobedo Cortés v Banco de Sabadell SA* (C-94/17), ECLI:EU:C:2018:643.

<sup>225</sup> *Banco Sabadell*, para 52.

<sup>226</sup> *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21.

<sup>227</sup> *Unicaja*, also recalled in *Banco de Sabadell* at para 67: “The Court in essence inferred from those provisions as well as from Article 6(1) and Article 7(1) of Directive 93/13 that the latter precludes national legislation defining a criterion in the light of which the unfairness of a contractual term must be assessed, when such legislation prevents the national court dealing with a term that does not meet that criterion from examining whether that term is unfair and, if it is, declaring it unfair and setting it aside (see, to that effect, judgment of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraphs 28 to 42).”

<sup>228</sup> As well as the consequences of the term in a specific contract, having in mind its effect under the applicable national rules. See *Unicaja* para 37: “the unfairness of a contractual term must be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, on the date of conclusion of the contract, to all the circumstances attending its conclusion. It therefore follows that the consequences of the term under the law applicable to the contract must also be taken into account. This requires consideration to be given to national law (see order in *Sebestyén*, C-342/13, EU:C:2014:1857, paragraph 29 and the case-law cited).”

*latter does not so much aim to guarantee an overall contractual balance between the rights and obligations of the parties to the agreement as to prevent an imbalance between those rights and obligations from arising to the detriment of consumers.*<sup>229</sup>

It seems, here, that the attainable level of consumer protection is the defining factor in this case: while a blanket prohibition of default interests above a certain rate (at stake in *Banco de Sabadell*) does not prevent national courts from finding that a certain term is unfair and deriving all necessary consequences from such finding, the impossibility to form an independent assessment in *Unicaja* would have possibly undermined the effectiveness of article 6. In affirming this, however, the Court makes a rather far-reaching statement when it considers that the directive “does not aim to guarantee an overall contractual balance”, but only to prevent imbalances from arising *to the detriment of the consumer*. The danger ventilated by Niglia in reaction to *Freiburger* – namely, that circumstances would be turned by the CJEU into an inlet for watering down consumer protection – seems not to have come true so far.<sup>230</sup> To the extent that circumstances do play a role, they have not led to any deformalisation or deregulation – in other words, when the Court has brought up the circumstances prong, it was if anything instructing national courts to adopt a more stringent approach rather than a more permissive one. The consideration of circumstances as an exonerating factor does not seem to play as much weight as their possible relevance *to the consumer’s advantage*. In practice, a similar – if more nuanced – conclusion emerges from an analysis of the connection between transparency and the circumstances prong.

Already in *RWE*,<sup>231</sup> the Court had linked transparency to the broad issue of pre-contractual information, observing that information, prior to concluding the contract, on the terms of the agreement and their significance was of crucial importance to the consumer.<sup>232</sup> Transparency, then, may include the information provided to the consumer at the moment of concluding the contract, with a view to allowing them to understand possibly complex terms.<sup>233</sup> How salient this would be in practice depended, at that point, on what national courts would do with this indication when applying the test.

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<sup>229</sup> *Banco de Sabadell*, para 69.

<sup>230</sup> See Niglia, “The Rules Dilemma-The Court of Justice and the Regulation of Standard Form Consumer Contracts in Europe.”

<sup>231</sup> C-92/11, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, ECLI:EU:C:2013:180.

<sup>232</sup> *RWE* para 44.

<sup>233</sup> *Ibidem*, para 50.

In *Kásler*,<sup>234</sup> shortly afterwards, the CJEU observed that whether the average consumer would be able to assess what impact the terms would have on their rights and obligation must be assessed “*having regard to all the relevant information, including the promotional material and information provided by the lender in the negotiation of the loan agreement.*”<sup>235</sup> This seemed to confirm the expansion of the scope of the transparency assessment, but was not per se expanded upon in the decision.

More recently, though, the relevance of pre-contractual information (and its understanding by the consumer) to the transparency assessment has come prominently to the fore thanks to the *Andriuc*<sup>236</sup> decision. In this case, again concerning foreign-currency loans, the question centered rather straightforwardly on the extent of the lender’s information obligation as implied by the duty of transparent drafting.<sup>237</sup> The Court of Justice answered the question by declaring that

*“the requirement that a contractual term must be drafted in plain intelligible language requires that, in the case of loan agreements, financial institutions must provide borrowers with sufficient information to enable them to take prudent and well-informed decisions. In that connection, that requirement means that a term under which the loan must be repaid in the same foreign currency as that in which*

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<sup>234</sup> Case C-26/13, *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282.

<sup>235</sup> For the contested terms to meet the transparency requirement, the average consumer should, as a result of the information and drafting, “not only be aware of the existence of the difference, generally observed on the securities market, between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to assess the potentially significant economic consequences for him resulting from the application of the selling rate of exchange for the calculation of the repayments for which he would ultimately be liable and, therefore, the total cost of the sum borrowed.” See *Kásler* para 74.

<sup>236</sup> Case C-186/16, *Ruxandra Paula Andriuc and Others v Banca Românească SA*, ECLI:EU:C:2017:703

<sup>237</sup> The referring’s court question was formulated as follows: “Must the plainness and intelligibility of a contractual term, within the meaning of Article 4(2) of Directive 93/13, be understood to mean that that term must provide not only for the grounds of its incorporation in the contract and the term’s method of operation, or must it also provide for all the possible consequences of the term as a result of which the price paid by the consumer may vary, for example, foreign exchange risk, and in the light of Directive 93/13 may it be considered that the bank’s obligation to inform the customer at the time of granting the credit relates solely to the conditions of credit, namely, the interest, commissions, and guarantees required of the borrower, since such an obligation may not include the possible overvaluation or undervaluation of a foreign currency?”

*it was contracted must be understood by the consumer both at the formal and grammatical level, and also in terms of its actual effects, so that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would be aware both of the possibility of a rise or fall in the value of the foreign currency in which the loan was taken out, and would also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations.”*

In the reasoning, the national court’s task to consider “all the circumstances surrounding the conclusion of the contract” functions as a bridge towards the relevance of pre-contractual information.<sup>238</sup> This express connection of the “circumstances” prong with transparency and information duties seems to have some potential to inject life into an otherwise somewhat neglected clause of the Directive. But *Andriuc* goes one step further in giving prominence to the “circumstances” prong by expressly linking the drafter’s specific knowledge and attitude to the significant imbalance test:

*“[...] the assessment of the unfairness of a contractual term must be made with reference to the time of conclusion of the contract at issue, taking [into] account all of the circumstances which could have been known to the seller or supplier at that time, and which were such as to affect the future performance of the contract.”<sup>239</sup>*

In particular, in the case of terms resting all risks of currency depreciation on the consumer

*“It is for the referring court to assess, having regard to all of the circumstances of the case in the main proceedings, and taking account, in particular of the expertise and knowledge of the seller or supplier, in the present case the bank, with regards to the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, of the existence of a possible imbalance within the meaning of [the Directive’s article 3(1)].”<sup>240</sup>*

By implication, the formulation requires ignoring imbalances that have emerged *after* the conclusion of the contract unless they could be anticipated (in particular: by the seller or supplier) already at that stage. Corrective interventions in exceptional cases characterised by supervening circumstances are thus left to the

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<sup>238</sup> See para 46.

<sup>239</sup> *Ibidem* para 54.

<sup>240</sup> *Andriuc*, para 58.

Member States, which often – but not always – will mean falling back on rules of general contract law.<sup>241</sup>

A final and connected consideration on the ways in which judicial control under the Directive is taking shape concerns the observation that, in general, there seems to be no place for an appreciation of whether the consequences triggered by a certain clause, or in other words the effects of the clause, would or would not be justified in the case at stake. The only element that matters is whether, *ex ante*, the clause was to be seen as acceptable in the context of the contract's overall balance. This is an element almost implicit in the option for unfair terms control- if it is the term and not its "actioning" which is subject to control, it follows almost logically that the question whether in the case under review the consequences determined by the term were actually justified is not relevant. For instance, in *Aziz* the question whether the acceleration clause included in the contract should be voided did not depend on whether, in the case at stake, a demand for repayment would be justified by the importance of the debtor's non-performance, but exclusively on the term's formulation.<sup>242</sup> This apparently small sub-rule may be seen as indicative of an intrinsically "regulatory" inclination of unfair terms control: in the individual case, it may well be that a too broadly drafted term has only been invoked in a situation where its consequences would be fully justified – or it could be that invoking a fair term in a certain situation would disproportionately affect the individual consumer – but these considerations do not matter<sup>243</sup> if the point is, for one reason or another, to get rid of unfair terms used in mass contracts.

To sum up, we can see that the Court has a conflicted relationship with the circumstances prong: on the one hand, it seems to play down its relevance or to deliberately use it in a selective manner. The passage in *Banco de Sabadell* that discards contractual balance as a possible goal of the directive is particularly

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<sup>241</sup> Some remedy for *imprévision* being available in many national systems, see Hugh Beale et al., *Cases, Materials and Text on Contract Law* (Bloomsbury Publishing, 2019). The possibility to invoke such remedies will usually be subject to very strict requirements. In some legal systems, however, more consumer-friendly devices may exist- see e.g. Thomas Wilhelmsson, "Social Force Majeure – A New Concept in Nordic Consumer Law," *Journal of Consumer Policy* 13, no. 1 (1990): 1–14.

<sup>242</sup> See also a discussion of the Spanish follow-up decisions in Sánchez, "Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis," 966–67. Also, in the order rendered in case C-602/13, *Banco Bilbao Vizcaya Argentaria SA v Fernando Quintano Ujeta, María-Isabel Sánchez García*, ECLI:EU:C:2015:397, the Court confirmed that this approach should be considered as established interpretation of the Directive.

<sup>243</sup> Except for certain constellations in which the potential effects were clearly foreseeable at the time of concluding the contract, see the discussion above (*Andriiciuc*).

striking in this respect. Consumer protection is here, for once, presented as quite absolute from the need of balancing with other concerns. On the other hand, the reference to circumstances in order to expand the scope of transparency requirements well beyond the textual formulation of terms inserts an element of uncertainty that really seems to open up to a discussion on the merits of a specific interaction. While referring to a regulatory standard, the test articulated in *Andriuc*<sup>244</sup> for national courts to ascertain whether the seller should have informed the consumer about risks connected to monetary depreciation is reminiscent of national doctrines on duties to disclose in general contract law.

### 3.1.4. The average consumer

In the years since *Kásler*, the CJEU has repeatedly referred to the “average consumer” as the ideal recipient of contract terms and pre-contractual information. As we have just recalled, in *Andriuc* the Court even repeated that such consumer is postulated to be “reasonably well informed and reasonably observant and circumspect”. However, this consumer is also quite needy when they have to understand a contract: they need to be informed about certain legal provisions,<sup>245</sup> and should not be too quickly assumed to understand legal jargon<sup>246</sup> or be able to translate legalese into a concrete scheme of hypotheses and consequences.<sup>247</sup> Such consequences may, on occasion, have to be clearly spelled

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<sup>244</sup> See supra excerpt referred to in fn. 205.

<sup>245</sup> With limits – see *C-34/18, Ottília Lovasné Tóth v ERSTE Bank Hungary Zrt*, ECLI:EU:C:2019:764, according to which article 5 of Directive 93/13 “does not require the seller or supplier to provide additional information relating to a term which is drafted clearly, but the legal effects of which may be determined only by interpreting provisions of national law in respect of which there is no consistent case-law.” While the Court relies on quite formalistic arguments – essentially just saying that the facts of the case are not the same as in *Amazon* – I think the case should not be read as turning *Amazon* into an exception but rather as seeking to avoid the imposition of unreasonable burden onto the sellers. The Court expressly voices this concern at para 69 of the decision: imposing an obligation on the seller or supplier to inform the consumer of the existence of general procedural provisions and of the relevant case-law would go beyond what could reasonably be expected of the seller or supplier in the context of the requirement for transparency.

<sup>246</sup> See *van Hove* para 47: it is for the referring court to determine whether, [...] an average consumer, [...] would not only be aware of the existence of the difference between the concept of ‘total incapacity for work’, within the meaning of the contract at issue in the main proceedings, and that of ‘partial permanent incapacity’, within the meaning of the national social security law, but would also be able to assess the potentially significant economic consequences, for him, resulting from the limitation of the cover included in the insurance policy in accordance with the requirements of the case-law referred to in paragraph 41 above.

<sup>247</sup> *Ibidem*, second part of the sentence.

out for them in the contract<sup>248</sup> or explained<sup>249</sup> at the moment of concluding it. Furthermore, a consumer concluding several related contracts cannot be expected to be as alert, with regard to terms in each contract, as they could be if they were concluding one simple transaction.<sup>250</sup> The signals that the CJEU issues to national referring courts in its guidance on unfair terms seem, thus, to depart from the more exacting average consumer image that the same Court has painted elsewhere.<sup>251</sup>

The average consumer as a normative idea that expressly rejects more realistic paradigms is a quite apt regulatory notion:<sup>252</sup> an informed, circumspect consumer is a consumer who shops around, identifies the better available options and is able to follow up on their research in their shopping behaviour, promoting healthy competition. A weaker consumer may reveal a more protective agenda and as such could still be compatible with a regulatory rationale: it sets very demanding standards of behaviour on professionals, who know that they are otherwise exposed to unfavourable consequences, and hence hopefully enhances the position of consumers as a class. This still requires, however, that the standard is set in a relatively homogeneous manner – only in that way will it work to stir behaviours on a significant scale.

The “possibly weak” average consumer that emerges from the Court’s case-law – an average consumer whose actual strengths are left for national courts to assess on a seemingly very case-by-case basis – tends to defy both possible regulatory aims. It keeps in place a relatively underdefined standard which will make the transparency assessment heavily contingent on individual circumstances. Quite

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<sup>248</sup> See *RWE*, where this necessity is supported by the contents of the Energy directives.

<sup>249</sup> See *Andriciu*.

<sup>250</sup> *Again Van Hove*, section 48.

<sup>251</sup> For a similar recent development in the field of labelling see Hanna Schebesta and Kai P. Purnhagen, “The Behaviour of the Average Consumer: A Little Less Normativity and a Little More Reality in the Court’s Case Law? Reflections on Teekanne” (2016), *European Law Review* 41 (n.d.): 589. Discussing both developments, a more general analysis is made in Geraint Howells and Gert Straetmans, “The Interpretive Function of the CJEU and the Interrelationship of EU and National Levels of Consumer Protection,” *Perspectives on Federalism* 9, no. 2 (2017): E–180.

<sup>252</sup> 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; Dorota Leczykiewicz and Stephen Weatherill, *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Bloomsbury Publishing, 2016); Katalin J. Csere, “The Regulatory Consumer in EU and National Law? Case Study of the Normative Concept of the Consumer in Hungary and Poland,” *Yearbook of Antitrust and Regulatory Studies (YARS)* 9, no. 13 (2016): 9–41.

surprisingly, thus, the adoption of the average consumer standard seems not only not to have made the unfairness test harsher to consumers, but also it appears to have if anything decreased the Directive's regulatory outlook in favour of a more private law rationality.

## 3.2. Consequences of unfairness

### 3.2.1. "Not binding is not binding"

The remedy for unfairness is provided by article 6(1). Though in principle leaving room for technical variations, the Directive requires MS to make sure that unfair terms are not "binding" on consumers. The choice to formulate the provision in a way which did not espouse any existing national terminology provided for diverging interpretations in the first years following the directive's adoption. In the last decade, however, the CJEU has clarified that, in order to achieve the directive's aims, when materially able to do so, courts should be ready to scrutinise terms *ex officio*<sup>253</sup> and that terms found to be unfair have to be entirely removed from the contract,<sup>254</sup> with no chance of adaptation. Once the term is removed from the contract, the concerned court has to evaluate whether the agreement is "capable of continuing in existence" without the unfair term.<sup>255</sup>

The total eradication of terms found unfair, rather than their "reduction" or adaptation by the concerned courts, is justified in plainly regulatory terms:

*"[I]f it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms (see, to that effect,*

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<sup>253</sup> Case C 168/05, *Mostaza Claro*, ECLI:EU:C:2006:675, paragraph 38; case C 40/08, *Asturcom Telecomunicaciones*, ECLI:EU:C:2009:615, paragraph 31; Case C 137/08 *VB Pénzügyi Lízing*, ECLI:EU:C:2010:659, paragraph 48; see *infra*, 3.3.

<sup>254</sup> Case C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*, ECLI:EU:C:2012:349.

<sup>255</sup> Also on this point the CJEU has been able to make clear that the evaluation has to be made objectively, and should be unaffected by the consideration that voiding the contract altogether might be more convenient for the consumer than upholding it without the invalid term: see Case C-453/10, *Jana Pereničová, Vladislav Perenič v SOS financ spol. s r. o.*, para 32-33. However (paragraph 35), since the Directive only carried out "partial and minimum harmonization", MS are free to enact "in compliance with European Union law, national legislation under which a contract concluded between a trader and a consumer which contains one or more unfair terms may be declared void as a whole where that will ensure better protection of the consumer."

*the order in Pohotovost', paragraph 41 and the case-law cited), in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.*"<sup>256</sup>

The contrast between these considerations and national rules and practices in general contract law, which (think of penalty clauses) frequently give judges the task to reshape unacceptable terms into acceptable ones, is quite remarkable. The task in that case is either to maintain an agreement as close as possible to the original deal, or to reach a solution that secures a reasonable balance between the interests of the parties to the contract. Neither of these concerns are particularly relevant to the establishment of the appropriate consequences of unfairness before the CJEU. In particular, this was recently reinforced in a decision<sup>257</sup> concerning the compatibility with the Directive of judge-made criteria for unfairness assessment in Spain:

*"the development of a criterion derived from case-law, such as that identified in the present case by the Tribunal Supremo (Supreme Court), is wholly consistent with the objective of consumer protection pursued by that directive. It follows from Article 3(1) of Directive 93/13 and from the general scheme of the directive that the latter does not so much aim to guarantee an overall contractual balance between the rights and obligations of the parties to the agreement as to prevent an imbalance between those rights and obligations from arising to the detriment of consumers"*.<sup>258</sup>

Thus, the fact that case-law of the Spanish supreme court blacklisted default interest clauses that exceeded the regular interest rate by more than 2 percentile points, even though liable to disallow possibly not unreasonable terms, did not go against the Directive.<sup>259</sup>

### **3.2.2. Unless the consumer opines otherwise**

The fact that the imbalance should not emerge *to the detriment of the consumer* is established in general – but how does that reflect in individual cases? In other words, who assesses what is detrimental to the consumer? In Pannon, the court affirmed that the directive does not require national courts to set aside an unfair term

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<sup>256</sup> See *Banco Español de Crédito SA v Joaquín Calderón Camino*, C-618/10, para 69.

<sup>257</sup> Joined Cases C-96/16 and C-94/17.

<sup>258</sup> Joined Cases C-96/16 and C-94/17, para 69.

<sup>259</sup> Joint cases C-96/16 and C-94/17, para 69.

*“if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status”.*<sup>260</sup>

The court does not elaborate on this outcome. The solution is, indeed, easily in line with the text of the Directive: *non-binding on the consumer* does not seem to suggest that the term must be invalidated even if the consumer has no interest in it being set aside. From a regulatory perspective, the result is less straightforward: the possibility that a term assessed as unfair may be legitimised in specific proceedings by the consumer’s assent takes away from the guidance potential of the assessment. Furthermore, consumers as a group do not gain much from the court’s finding if that finding can in fact be countered by a consumer’s possible last-minute preference in favour of the term’s application. From the perspective of the individual procedure, however, as well as in terms of protecting the individual consumer concerned, the rule makes perfect sense and represents a counterbalance to the Court’s determination to enhance the effectiveness of a declaration of unfairness, which is rather difficult to carry out consistently in the practice of national adjudication.

### **3.2.3. “As provided for under national law” (I): What about supplementary rules?**

Establishing that an unfair term cannot be “fixed” by a court does not exhaust the discussion on unfairness from the perspective of contract law. In *Kásler*, the Court has affirmed that the terms found unfair can be replaced by national default (“supplementary”) rules if this is necessary for the contract to “continue in existence after an unfair term has been deleted”.<sup>261</sup> This approach has been developed having in mind the review of core terms, which by definition should be such that the contract should be unable to survive their removal. The justification for this exception to the rule is the concern that *“the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to disadvantageous consequences”*.<sup>262</sup>

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<sup>260</sup> *Pannon*, para 33. Again in *Banif*, Case C-472/11, para 27.

<sup>261</sup> *Kásler*, para 85, relying on precedents (Case C-453/10 *Pereničová and Perenič* EU:C:2012:144, paragraph 31, and *Banco Español de Crédito* EU:C:2012:349, paragraph 40 and case-law cited). It is not clear to what extent the same reasoning could be applicable to the replacement of supplementary rule for unfair terms whose invalidation would not have consequences for the contract’s existence.

<sup>262</sup> Joined cases C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco, SA v José Hidalgo Rueda and others & Caixabank v Manuel María Rueda Ledesma and others*, henceforth *Unicaja*, para 33.

On the basis of this reasoning, in *Unicaja* the Court has clearly excluded that the decision it gave in *Kásler* could be relied upon to allow national courts to moderate unfair default interest clauses:

*“subject to the checks to be made in this regard by the referring court, the annulment of the contractual clauses at issue could not have adverse consequences for the consumer, inasmuch as the amounts for which the mortgage enforcement proceedings have been brought will necessarily be lower in the absence of an increase by applying default interest laid down by those clauses.”*<sup>263</sup>

This state of things gave interpreters considerable headaches.<sup>264</sup> In the cases referred to above, the Court had neither made a clear distinction between giving a judge moderating powers and replacing the term with a default rule which is applicable under national law, nor really decided on the second scenario: the case at stake concerned the admissibility of judicial moderation of default interest rates rather than their replacement by a default statutory interest.<sup>265</sup> This made it tempting to think that replacement of the unfair terms by means of national default rules may be generally allowed.<sup>266</sup>

From a national perspective, establishing then when a term falls the otherwise applicable rule of contract law takes its place is tantamount to establishing that the term has never become part of the contract. Especially if one espouses the idea that supplementary provisions express what the legal system concerned considers as a “fair” solution, without involving the possibly contentious evaluations of one specific court, replacing unfair terms by the content of default rules is an option which undoubtedly carries great appeal. This also seems in line with the Court’s own contention that unfair terms control should restore the consumer in the

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<sup>263</sup> *Unicaja*, para 34.

<sup>264</sup> Especially vivid in Dutch law: see for extensive discussion and further references Marco B.M. Loos, *Algemene Voorwaarden* (Den Haag: Boom Juridisch Uitgever, 2018), 360.

<sup>265</sup> See AG opinion in ECLI:EU:C:2014:2299, Joined cases C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco, SA v José Hidalgo Rueda and others & Caixabank v Manuel María Rueda Ledesma and others*. AG Wahl has expressly stated that “the fact that moderating powers might be conferred by a provision of national law rather than being an expression of judicial discretion is irrelevant”. According to the AG, “Member States may only adopt or retain rules providing for *greater* consumer protection than that already granted under the directive”.

<sup>266</sup> This proved not to be the case, even though the nature of national default rules turned out to be relevant to the application of the *Kásler* rule: see *infra* in this section.

position they would have been in had the unfair term never been included in the contract.<sup>267</sup>

In a string of 2019 decisions, the CJEU has considerably advanced its case-law on the subject. With its Grand Chamber decision in *Abanca*,<sup>268</sup> it has quite definitely clarified<sup>269</sup> that also replacement by means of national default rules is subject to the Kásler test. This means that replacement is only possible when the contract would otherwise have to be invalidated *and* invalidation would be to the consumer's detriment. In a crucial following case, *Dziubak*,<sup>270</sup> the Court has further decided that it is for the consumer to assess whether invalidity would be against their interest.<sup>271</sup> In the same case, the Court has had the chance to explain that the Kásler exception must be interpreted strictly as applying only to national default rules; a standard or open norm such as "the principle of equity or [...] established customs" does not qualify for application under Kásler. The reasons for this are explained by the Court by reference to the fact that only "supplementary provisions of national law or those which are applicable where the parties so agree" are "presumed not to contain unfair terms":<sup>272</sup>

*"Those provisions are meant to reflect the balance that the legislature intended to establish between all the rights and obligations of the parties to certain contracts in cases where the parties have not departed from a standard rule provided for by the*

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<sup>267</sup> Pavillon comments on the tension between this idea and the Court's insistence on not allowing any form of replacement of terms declared unfair. See Pavillon, "Private Enforcement as a Deterrence Tool."

<sup>268</sup> See the discussion in CJEU C-70/17 and C-179/17, *Abanca Corporación Bancaria SA v Alberto García Salamanca Santos and Bankia SA v Alfonso Antonio Lau Mendoza and Verónica Yuliana Rodríguez Ramírez*, ECLI:EU:C:2019:250, as well as the order in C-486/16, *Bankia SA v Alfredo Sánchez Martínez, Sandra Sánchez Triviño*, ECLI:EU:C:2019:572.

<sup>269</sup> Some have observed that the joint cases arose from a particularly complicated fact-pattern and hence the answers given by the court do not lend themselves easily to generalisation. See Francisco de Elizalde, "Partial Invalidity for Unfair Terms? CJEU in *Abanca* - C-70 & 179/17," *Journal of European Consumer and Market Law* 8, no. 4 (September 1, 2019): 147–49. I tend to disagree: the reasons should emerge from the text.

<sup>270</sup> Case C-260/18, *Kamil Dziubak, Justyna Dziubak v Raiffeisen Bank International AG*, ECLI:EU:C:2016:612.

<sup>271</sup> *Dziubak* para 55, based on the precedents discussed supra under section 2.2.2.: "since the system of protection against unfair terms does not apply if the consumer objects to it, that consumer must a fortiori be entitled to object to being protected, under that same system, against the unfavourable consequences caused by the contract being annulled in its entirety where he does not wish to rely on that protection."

<sup>272</sup> *Dziubak*, para 59.

*national legislature in relation to the contracts concerned, or indeed have expressly opted for a rule introduced by the national legislature to that end to be applicable.*

*However, in the present case, even assuming that provisions such as those to which the national court refers, given their general nature and the need to make them effective, can in practice replace the unfair terms concerned by the mere act of substitution by the national court, they do not appear, in any event, to have been subject to a specific assessment by the legislature with a view to establishing that balance, such that those provisions are not covered by the presumption set out in paragraph 59 of this judgment that they are not unfair.”<sup>273</sup>*

The Court, thus, seems to fall back to the Directive’s *favor* for national rules<sup>274</sup> and to the exemplary function of national default rules as expression of a “just” apportionment of rights and interests also relevant to the unfairness test.<sup>275</sup> The CJEU’s recent case-law further shows deference to national law on a crucial point: it is national law that determines when a contract is to be considered as not viable, and thus invalid, without the unfair term.<sup>276</sup> Article 6, according to the Court, provides no criteria to decide on this issue<sup>277</sup> – besides what has been several times repeated by the Court itself, namely, that the assessment must be objective, i.e. not related to the interests of the parties (in particular: the professional).<sup>278</sup> This criterion is to be seen as binding if the national criteria are to be defined “*in a manner consistent with EU law*”.<sup>279 280</sup>

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<sup>273</sup> *Dziubak*, para 60-61.

<sup>274</sup> Both the Directive’s 13<sup>th</sup> recital and article 1(2), excluding terms reflecting mandatory statutory or regulatory provisions from control are reproduced in the “Legal context” section of the decision. However, the juxtaposition of the two is actually in contrast with the Court’s own interpretation of article 1(2), which has strictly limited the exemption to *mandatory* rules – and thus not to “supplementary rules”.

<sup>275</sup> See *supra*, 3.1.1.

<sup>276</sup> Both *Abanca & Bankia* and *Dziubak*.

<sup>277</sup> *Dziubak* para 40.

<sup>278</sup> *Dziubak* para 39.

<sup>279</sup> *Dziubak* para 40.

<sup>280</sup> Effective compliance with this parameter was arguably in doubt in both *Dziubak*, where the referring court thought “freedom of contract” may stand in the way of upholding the contract, and in *Abanca-Bankia*, where the Spanish government claimed that the essence of the contract type would be violated, but the infringement would really only alter the creditor’s advantages arising from the contract type. See more extensively my analysis in Candida Leone, “Case Note *Abanca Corporación Bancaria, S.A. v Alberto García Salamanca Santos* (Grand Chamber),” *Revue Européenne de Droit de La Consommation*, no. forthcoming (2020).

In cases where the contract can continue without the unfair term, the question remains to what extent the Directive precludes replacement of the terms by means of supplementary legal provisions. In 2018, the Court has approved of Spanish case law instructing lower courts confronted with unfair default interest rates to find that no default interest was due by the debtor,

*“without being able to substitute supplementary national provisions for that contractual term or revise the term in question, whilst maintaining the validity of the other terms in the agreement, and in particular the term concerning ordinary interest”.*<sup>281</sup>

While in this case the answer may seem pretty straightforward, from the perspective of national law the question is where the line must be drawn: for instance, should a national court invalidate an unfair conventional limitation period, it would be entirely counterintuitive to conclude that no statutory limitation applies to any claims that would have been covered by the unfair term. More dubious would be the possibility to apply general rules on damages for non-performance when a penalty clause is declared unfair. The Court has clarified in *Kanyeba*<sup>282</sup> that the Directive does not preclude allowing the trader to present claims based on extra-contractual liability as it does not, in fact, in any way seek to harmonise tort law. Whether one could extend the same reasoning to a claim in contract-based liability is not obvious.

A possible reading would be that only rules whose scope or function overlaps with the unfair term would need to be left out. Nothing in the Court’s jurisprudence so far, however, provides a solid anchoring for this argument.<sup>283</sup> In line with *Kásler*, one could argue that also beyond cases of possibly invalidity, the consumer’s interest may be the appropriate parameter to decide whether supplementary

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<sup>281</sup> Cases C-96/16 and C-94/17, para 78.

<sup>282</sup> Joined cases 349-351/18, *Kanyeba*, ECLI:EU:C:2019:936.

<sup>283</sup> The Court did operate a similar distinction in order to justify that the invalidation of (the part of) a term establishing default interests did not require setting aside the “regular” contractual interest even as the former was calculated on the basis of the latter. The specific formulation, the Court argued, did not take away the different functions performed by the terms – ordinary interests being intended to remunerate the creditor for making a certain sum available, while default interests can perform deterrent, punitive and damage compensation functions – see para 76. However, transplanting this reasoning to the area of the consequences of unfairness is no obvious operation.

provisions should or should not apply. This solution would only apply to a limited palette of terms and possibly conflict with other considerations.<sup>284</sup>

The Court's uncompromising attitude on the issue of total eradication shows its paradoxical implications in *Dziubak*: when no default statutory provision can replace an invalid term, consumers are confronted with a rather unattractive choice – between the contract's invalidity and upholding a term that has been declared unfair. The solution is, with all evidence, far from concerned with ensuring contractual balance. At the same time, the solution seems both at odds with the protective rationale of the *Käsler* exception to the eradication rule and even, in the long run, likely to upend the very effectiveness that the eradication doctrine seeks to guarantee. The prospect of going through court proceedings and ultimately ending up with the original unfair term may represent a further element discouraging consumers from invoking unfairness and thus act as enforcers. Overreaching regulatory zeal does not sit well within a complex legal panorama.

#### **3.2.4. “As provided for under national law” (II): but with all the effects that must derive from it**

Once a term is declared invalid, any effects that it may have produced lack a legal basis and must be redressed. In particular, this means that consumers who have undergone extra costs as a result of the unfair provision may have a compensatory claim against their contractual counterpart. Such was, for instance, the case as a result of the German litigation surrounding price increases in contracts for the supply of energy, which gave rise to the Court's RWE decision<sup>285</sup>. In that case, the CJEU had considered whether it should limit in time the effects of its own findings concerning the transparency and fairness of relevant price variation clauses on the basis of the possible impact that its decision may have on the finances of the companies concerned. The Court had concluded that the circumstances of the case did not warrant such a limitation.

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<sup>284</sup> For instance, it may only partially overlap with Pavillon's suggestion that replacement should be possible every time the unfair term was one that restricted the rights of the affected consumer – think of a short term: for the consumer no term is better than the default rule, hence replacement is not in their interest. See Charlotte MDS Pavillon, “Case Note: ECLI:EU:C:2019:250 (Abanca Corporación Bancaria),” *Nederlandse Jurisprudentie*, 2020, 101.

<sup>285</sup> See *supra* note 233.

In *Gutierrez Naranjo*,<sup>286</sup> the CJEU had to decide on the compatibility with EU law of a Spanish Supreme Court orientation which limited the recoverability of excess payments due under terms that were at some point declared unfair. The Court concluded that such a limitation was incompatible with the Directive.

In several cases concerning the unfair terms directive, the Court of Justice had indeed declared that legal certainty and other relevant interests can justify limitations to consumer protection under the Directive - thus declaring rules of civil procedure concerning *res iudicata* and limitation periods compatible with EU law.<sup>287</sup> However, these cases cannot be used as a justification for national courts limiting the effects of a declaration of unfairness. As the Court explains elsewhere, “the application of a limitation period does not altogether deprive a person, [...], of the right”<sup>288</sup> that EU law entitles them to. Conversely, the temporal limitation of the legal effects stemming from a declaration of nullity in application of Directive 93/13

*“is tantamount to depriving, in general, any consumer having concluded, before [the relevant] date, a mortgage loan contract containing such a clause of the right to obtain repayment in full of the amounts overpaid”.*<sup>289</sup>

Hence, it is not open to national law to adversely affect the substance of the rights conferred by EU law to individual consumers – in this case, the right not to be bound by a term which has been declared unfair.<sup>290</sup> In the RWE, the German government had asked the CJEU to limit the effects of its decision because of the impact it may have on German energy providers. The Court rejected the request

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<sup>286</sup> See joined cases C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo v. Cajasur Banco, Palacios Martínez v. BBVA and Banco Popular Español v. Irlés López*, ECLI:EU:C:2016:980. After having found frequently used “floor clauses” unfair under the Spanish rules implementing the unfair terms directive, the Spanish Supreme Court had decided that consumers would only be entitled to restitution for having paid too high interest rates as of the date of the Supreme Court’s own finding. In his opinion, AG Mengozzi argued in favour of a similar limitation, but the CJEU found it incompatible with the Directive. See for an early commentary <http://recent-ecl.blogspot.nl/2016/12/spanish-floor-clauses-clausulas-suelo.html>.

I am indebted to the author, my colleague Joanna ML van Duin, for pretty much all the insight I have on unfair terms before Spanish courts.

<sup>287</sup> See *Gutiérrez Naranjo* para 69-69 with reference to C-40/08, *Asturcom Telecomunicaciones*, EU:C:2009:615

<sup>288</sup> See Case C-542/08 *Friedrich G. Barth v Bundesministerium für Wissenschaft und Forschung*, para 35, as referred to in *Gutierrez Naranjo* para 70.

<sup>289</sup> *Gutierrez Naranjo* Para 72.

<sup>290</sup> *Gutierrez Naranjo* Para 71.

on relatively formalistic ground (the possible financial impact would not be exclusively a result of the CJEU's interpretation); however, more interesting is that on that occasion the CJEU repeated that such a limitation of individuals' ability to rely on the correct interpretation of EU law can only be put in place in "altogether exceptional cases".<sup>291</sup>

It stands out how non-regulatory reasoning plays a powerful role in the justification of the outcome in *Gutierrez Naranjo*: the reason why the Spanish court cannot limit the effects of a declaration of unfairness is simply in the fact that a limitation would deprive affected consumers of the rights they hold under the Directive (article 6.1). The fact that such a restriction, next to providing "incomplete and insufficient" protection, would also not constitute "*an adequate or effective means of preventing the continued use of that type of term*" in line with the Directive's article 7 is mentioned in passing<sup>292</sup> but does not appear necessary in order to justify the decision – and is not repeated in the final lines.

### **3.3. Ex officio control and the relationship between individual and collective proceedings**

#### **3.3.1. Development and expansion of ex officio control**

As widely known, Member States retain a large degree of autonomy as concerns the implementation of directives within their legal systems, and in particular as to the procedural arrangements surrounding the actioning of the substantive rules put in place by virtue of EU rules. In the case of the Unfair Terms Directive, this means that the Directive does not directly establish any procedural rules concerning the way in which unfair terms should be challenged or resisted in court.<sup>293</sup> Over the last few years, however, the Court of Justice has been busy establishing an articulated and demanding set of requirements that national procedural laws have to respect in order to comply with the principles of equivalence of effectiveness.

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<sup>291</sup> RWE, para 59.

<sup>292</sup> At para 73.

<sup>293</sup> Except establishing that, as concerns the non-negotiated nature of the relevant terms, the burden of proof is on the professional who wants to claim a certain term has been negotiated (art 3).

First of all, it is by now clear that national courts should be ready to scrutinise non-negotiated terms *ex officio*.<sup>294</sup> It is instructive to take a closer look at the way in which the Court justifies the power of revision in *Mostaza Claro*:

*“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 those terms [...]*

*Such an imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract.*

*It is on the basis of those principles that the Court has ruled that the national court’s power to determine of its own motion whether a term is unfair constitutes a means both of achieving the result sought by Article 6 of the Directive, namely preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers [...]*<sup>295</sup>

This power, however, is turned into a duty by the end of the decision:

*“The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.”*

In this case, a local court had been asked by a consumer to annul an arbitration award, on the grounds that the arbitration agreement under which the award had been pronounced had to be considered void. The consumer had not raised the issue in the arbitration proceedings. The other party, but also the German government, had argued that allowing - or requiring - courts to invalidate an arbitral award in cases like the one at stake would “seriously undermine the effectiveness” of arbitration awards.<sup>296</sup> The Court explains that, as with other elements of public policy deriving from EU law, setting aside arbitration awards is required every time it would be possible for courts to pronounce their nullity

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<sup>294</sup> Case C 168/05, *Mostaza Claro*, ECLI:EU:C:2006:675, paragraph 38; case C 40/08, *Asturcom Telecomunicaciones*, ECLI:EU:C:2009:615, paragraph 31; Case C 137/08 VB *Pénzügyi Lízing*, ECLI:EU:C:2010:659, paragraph 48.

<sup>295</sup> *Mostaza Claro* paras 25-27.

<sup>296</sup> *Mostaza Claro* para 33.

for violation of national public policy rules. A violation of this obligation, the Court has recently confirmed,<sup>297</sup> can (under relatively strict conditions) qualify as a violation of EU law giving rise to a claim in damages against the non-compliant MS for the aggrieved consumers.

The Court's reasoning in this case is intriguingly ambiguous. It refers to the "deterrent" effect of ex officio control to explain why powers in this direction are to be seen as invested in national courts and then turns to public policy and the Union's task to raise the standard of living and the quality of life in its territory<sup>298</sup> in order to convert these powers into obligations which cannot be compressed for the sake of arbitration. When explaining the mandatory nature of article 6, the court explains that the aim of the provision is

*"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."*<sup>299</sup>

While effectiveness (here: effectiveness of the protection offered by article 6) is in itself an ambiguous notion,<sup>300</sup> the Court's concern for the protection offered to the individual consumer involved in the dispute seems here relatively genuine. The ex officio obligations are not limited to arbitration procedures that, from the Directive's perspective, are after all likely illegal.<sup>301302</sup> Within the outer limits posed by the principle of *res iudicata*,<sup>303</sup> and with the help of an unusually high number

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<sup>297</sup> Case C-168/15, *Milena Tomášová v Slovenská republika – Ministerstvo spravodlivosti SR, Pohotovosť s.r.o.*, ECLI:EU:C:2016:602.

<sup>298</sup> *Mostaza Claro* para 37: as the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory".

<sup>299</sup> See Case C-488/11 *Asbeek Brusse and the Man Garabito v Jahani BV*, ECLI:EU:C:2013:341 para 38, with further references.

<sup>300</sup> Where EU law offers no comparable "protection", the court seems less concerned with the consumer's (fundamental) rights: see Case C-109/17, *Bankia SA*.

<sup>301</sup> See now article 18 Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>302</sup> For a different take, emphasising the specifically problematic nature of arbitration clauses and seeking to thus distinguish, in particular, VKI, AG opinion, case C-34/18 *Ottília Lovasné Tóth v ERSTE Bank Hungary Zrt*, ECLI:EU:C:2019:245.

<sup>303</sup> see to that effect case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, ECLI:EU:C:2009:615 – also in these cases, the national rules will have to comply with the principle of effectiveness.

or preliminary reference requests,<sup>304</sup> the Court of Justice has been “upgrading”- i.e. the rules of civil procedure (concerning in particular but not exclusively mortgage enforcement) in the Kingdom of Spain throughout the last decade.<sup>305</sup>

### 3.3.2. Collective actions and individual rights

The Directive shows its market-cleansing orientation in a more traditional fashion at article 7, which imposes that MS go beyond the establishment of private law rules, allowing “persons or organizations” (art 7(2)) with a legitimate interest to act in protecting consumers, which includes obtaining injunctions to prevent the (continued) use of terms which are found unfair. Consumer organisations as well as business associations are considered as potential carriers of the required legitimate interest. Indeed, it is easy to see that while unfair terms control in individual proceedings can give relief to certain specific consumers, it is hardly an instrument capable of eliminating unfair terms from entire markets, or- as the Directive undertook to do- from the internal market as a whole. To this end, collective enforcement presents advantages at least under two points of view: first, overcoming individuals’ possible lack of appropriate incentives to act; second, delivering a result which is not only relevant in one dispute, but capable of impeding the use of certain terms at large. The legality of such effect of injunctions brought by consumer associations has been, again, established by the CJEU at the beginning of this decade.<sup>306</sup> In addition to these points, allowing collective enforcement, in the hands of consumer associations or possibly of public agencies in charge of consumer protection, can help the establishment of practices whereby the standard terms in use in a market can become the object of negotiations “in the shadow of the law”, enhancing the bargaining power of consumer advocates.

In contrast, the Court’s decisions concerning the delimitations between collective and individual proceedings under the Directive testify to a concern with private

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<sup>304</sup> See Pomar and Lyczkowska, “Spanish Courts, the Court of Justice of the European Union, and Consumer Law.”

<sup>305</sup> See Barral-Viñals, “Aziz Case and Unfair Contract Terms in Mortgage Loan Agreements.”

<sup>306</sup> Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, ECLI:EU:C:2012:242: the Directive “does not preclude the declaration of invalidity of an unfair term included in the standard terms of consumer contracts in an action for an injunction, provided for in Article 7 of that directive, brought against a seller or supplier in the public interest, and on behalf of consumers, by a body appointed by national legislation from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same general business conditions apply, including with regard to those consumers who were not party to the injunction proceedings.”

law as a mechanism for securing rights rather than an instrument of public policy enforcement. Collective proceedings differ from individual disputes, since in the former context a term's evaluation takes place in abstracto and not with reference to a specific transaction.<sup>307</sup> Consistent with this difference, the Court of Justice has affirmed<sup>308</sup> that national civil procedure rules cannot let collective actions automatically pre-empt individual ones. Making consumers dependent on a procedure from which they cannot dissociate themselves and depriving them of the possibility to ex post accept the application of an invalid term would be contrary to the requirement of effective protection. From a market regulation perspective, this decision is arguably quite problematic as it undermines the predictive –and thus, guidance - value of decisions taken in collective proceedings.

In a similar vein, the CJEU has<sup>309</sup> decided that national civil procedure rules requiring consumer associations to bring actions for injunctions before the courts of the place where the defendant is established, instead of allowing them to sue where the association is established, do not jeopardise the achievement of the purposes of directive 93/13 and do not violate EU law. According to the Court, “it is clear that, as regards the procedural remedies available to consumer protection associations in order to prevent the continued use of unfair terms, they are not in an inferior position vis-à-vis the seller or supplier.” Therefore, consumer associations cannot be equated to consumers for the purpose of establishing jurisdiction in the case of injunctions against the use of allegedly unfair terms. In this case, the idea that increasing the effectiveness of actions by consumer associations by making sure that they could easily bring an injunction against the continued use of unfair terms was not enough for the CJEU to equate them to individual consumers, whose protection can justify the Court's interference with national civil procedures. While the reasons for *not* expanding to associations the procedural protection granted to consumers are mainly in the sphere of the relationship between EU and national law, the decision reinforces the idea that the procedural protection of consumers is not merely an instrument for effective

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<sup>307</sup> As we have seen, this means that certain rules -i.e. the consideration of circumstances attending the contract's conclusion and the interpretation most favourable to the consumer- are only applicable in individual proceedings.

<sup>308</sup> C-381/14, C-385/14, *Jorge Sales Sinués v Caixabank SA, and Youssouf Drame Ba v Catalunya Caixa SA (Catalunya Banc SA)*, ECLI:EU:C:2016:909.

<sup>309</sup> Case C-413/12, *Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL*, ECLI:EU:C:2013:800.

enforcement, but is just as importantly meant to secure the protection of individual consumers.<sup>310</sup>

### 3.4. Conclusions

A close look into the CJEU's extensive case-law concerning selected aspects of the Unfair Terms directive shows – as expected – a strong regulatory undertone; more interesting is the question of where non-regulatory motives arise. The overview reveals that the “nuisance” of justice-related motives emerges more or less at every turn.

Such was the case for the unfairness test discussed in section 2.1.: within the substantive unfairness test, the significant imbalance element has gained preponderance and seems to be designed in order for traders to manage their legal risks within each national legal systems effectively; meanwhile, the Court has been showing its discomfort with the “good faith” element in the test – essentially leaving it up to national courts to fill it in with their favourite standards. However, the circumstances surrounding the conclusion of the contract – seemingly downgraded in a number of decisions to a mere style trait – seem to make their way back via the transparency clause, destabilising the attempts to crystallise its meaning in objective, regulatory-friendly ways. The transparency test, indeed, seems to concern more and more a comprehensive assessment of the informational basis on which the (individual) consumer has concluded a contract. In stark contrast to a “simple” obligation to draft the terms in a transparent manner, such comprehensive assessment will evidently depend on the circumstances of the cases. This is troublesome for the Court itself, which by definition interprets the law rather than applying it to specific sets of circumstances. The development diminishes the regulatory potential of the test, as does – quite surprisingly – the “possibly weak average consumer” that the Court seems to have adopted in UCTD cases. This relatively realistic consumer image, towards which the CJEU seems to steer national judges, is possibly the most significant concession to consumer-protection-qua-interpersonal justice in the overview.

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<sup>310</sup> The topic is, in one way or another, at the centre of a vast array of contributions and at least three PhD dissertations in English, two of which have been published as books: Allison Östlund, *Effectiveness versus Procedural Protection* (Nomos Verlagsgesellschaft mbH & Co. KG, 2019); Anthi Beka, *The Active Role of Courts in Consumer Litigation* (Intersentia, 2018). The third one is currently being completed: preliminary results have been published in Anna van Duin, “Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC,” *Journal of European Consumer and Market Law* 6, no. 5 (2017): 190–198.

If the relationship between different rationales seemed ambiguous in respect of the unfairness test, it appeared as more openly problematic in the section devoted to the consequences of unfairness. The Court in this area pursues an openly regulatory agenda by concentrating on the preventive function of the term's invalidity. To make sure that this preventive function is not undermined, it excludes all adaptation of the term – irrespective of whether adaptation would possibly be in the consumer's interest or whether the invalidity could generate problems under national law. Only a market-cleansing objective justifies this approach. The limits to this overarching dissuasive function are to be found in some minimal consideration for the consumer who – at least! – must be given the final word on whether a term should be held invalid or applied and as to whether they prefer invalidity or (sic!) the application of the unfair term. It is quite obvious that the parties to the individual contract, and the individual dispute, are not the main focus. The parties' interests, then, can be perhaps conceptualised as the external limits on the regulatory focus – determining when exceptions to the main rule need to be accepted. In this sense, however, the focus seems to be on *the individual consumer as a weaker party*. Additionally, one must consider how *practical* problems seem to arise in fitting the court's incentive-based approach in the national private law systems, where for instance layers of remedies may be available – see e.g. the problem of different procedures for claims arising from the same contract, or the concurrence of contractual and tortious damages. The court's decision in Gutierrez points to a non-instrumental consumer protection very much grounded in corrective justice: the consumer must be returned what they unjustly paid. The court in this case did (for once) not rely on incentives in order to assert the protection of consumers who had suffered a prejudice against the asserted systemic effect of removing the unfair terms.

As concerns the last section on ex officio and the relationship between collective and individual actions, market-cleansing, collective consumer protection and the protection of individual consumers may seem to go hand in hand most of the time: ex officio application of the Directive seems one example of such harmony. Disentangling different rationales is, hence, difficult. The Court has made significant inroads into the Member States' procedural autonomy under the banner of effective protection. These inroads have not been justified with language similar to the one found in the section on the *Consequences of unfairness*,<sup>311</sup> but out

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<sup>311</sup> The “deterrent nature” and “dissuasive purpose” of measures adopted in order to establish collective enforcement measures under article 7 of the Directive is mentioned in *Inwitel*, not considered in this review, but in order to justify something that Member states

of an apparently genuine concern for the protection of the individual consumer-claimant – or more often consumer-defendant. It has not been willing to cross boundaries in the same way when, as in *Asociacion de Consumidores de Castilla y Leon*, collective procedures were at stake. It has further made clear that access to justice for individual consumer must, as a rule, trump the stabilising effects of a decision taken in a collective procedure. In this context, the court seems to think that consumer protection as a matter of individual protection justifies further interference with national law than the Directive’s market-cleansing or collective protection aims.

One further red thread emerges – that is, the difficult position of the Court of Justice in typically private law cases, when its function is intrinsically regulatory: it interprets part of the legal framework relevant to a dispute but does not apply the rules. Seen how a growing number of cases remind us how doing “justice” between the parties will ultimately be a task for the national courts, the emergence of justice remainders within the CJEU’s adjudication should be seen as all the more remarkable.

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*could* do, not something that they are actually required to so – even though some passages in the text may suggest otherwise. See C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, ECLI:EU:C:2012:242.