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Unfair Terms and Supplementation of the Contract

Marco Farina*

Abstract: Article 6, paragraph 1 of Directive 1993/13/EEC provides that unfair terms shall not be binding, whereas the contract shall continue to bind the parties with regards to the terms that can still be effective. Such a rule pursues the particular interest of the consumer, along with the more general interest towards an efficient and competitive market only when the abusive clause is not essential. In fact, when the unfair term constitutes one of the main obligations of the debtor, the contract is not able to continue to exist once deprived from the unfair term. In such situations, in order to provide the consumer with an adequate and effective remedy, a supplementation of the contract is needed.

Résumé: L'article 6, paragraphe 1 de la Directive 1993/13/CEE dispose que les clauses abusives ne lient pas les consommateurs et que le contrat restera contraignant pour les parties selon les termes qui peuvent rester effectifs. Une telle règle poursuit l'intérêt particulier du consommateur ainsi que l'intérêt plus général vis-à-vis d'un marché performant et compétitif uniquement lorsque la clause abusive n'est pas essentielle. En fait, lorsque la clause abusive constitue l'une des principales obligations du débiteur, le contrat ne peut plus continuer d'exister une fois privé de la clause abusive. Dans de telles situations, et afin de fournir au consommateur une solution adéquate et effective, un complément du contrat s'avère nécessaire.

Zusammenfassung: Artikel 6 Absatz 1 der Richtlinie 1993/13/EWG sieht vor, dass missbräuchliche Klauseln unverbindlich sind, während der Vertrag die Parteien hinsichtlich der Klauseln, die noch wirksam sein können, weiterhin binden soll. Eine solche Regelung verfolgt das besondere Interesse des Verbrauchers sowie das allgemeine Interesse an einem effizienten und wettbewerbsfähigen Markt nur dann, wenn die missbräuchliche Klausel nicht wesentlich ist. Wenn nämlich die missbräuchliche Klausel eine der Hauptpflichten des Schuldners darstellt, kann der Vertrag nicht mehr fortbestehen, sobald die missbräuchliche Klausel wegfällt. In solchen Situationen ist eine Ergänzung des Vertrags erforderlich, um dem Verbraucher eine angemessene und wirksame Abhilfe zu verschaffen.

Keyword: Directive 1993/13/EEC, Consumer Protection, Unfair Terms, Supplementation of the Contract Directive 1993/13/EEC, Protection des consommateurs, Clauses abusives, Intégration du contract Richtlinie 1993/13/EWG, Verbraucherschutz, Missbrauchliche Klauseln, Integration des Vertrages

* Università degli Studi di Milano. The final version of this contribution was submitted on 14 February 2021. Email: marco.farina@unimi.it.

1. Introduction

Directive 1993/13/EEC[1] represents the pillar of European consumer legislation and can be properly considered as the first incursion of EU law into the heart-land of national contract law thinking.[2] Indeed, it concerns weaker parties' protection, aiming at preventing an abusive exploitation of the private autonomy detrimental for consumers.[3]

The great importance of the said Directive relies on this: it designs a regulation that is no longer directed to achieve a 'mere' procedural fairness, but it addresses – and strongly tends to achieve – a substantive fairness.[4] This clearly emerges from Article 3, paragraph 1: such a provision sanctions a contractual term as unfair, if it (1) has not been individually negotiated and (2) contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[5] Indeed, it does not simply matter how negotiations are carried out, as a crucial relevance is attributed to the outcome of the negotiations themselves, that is the contract and, specifically, the juridical effects it produces.

In fact, the EU legislator seems to be well aware that, in business-to-consumer (B2C) relationships, the contract may become a means by which the stronger party might impose unfair conditions to the weaker one. If such a situation arises, the consequence is set out in Article 6, paragraph 1: the unfair term is ineffective and it has to be expelled from the contractual set of provisions which remains binding for the parties. The reaction is very strict and it inevitably provokes a contractual gap in the set of terms originally arranged for by the parties.

A strong emphasis is, in fact, put by the EU legislator on the remedy triggered by the abusive contractual conduct: the amendment of the unfair contract

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1 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, data.europa.eu/eli/dir/1993/13/oj.

2 See S. Weatherill, *EU Consumer Law and Policy* (Cheltenham: Edward Elgar 2005), p 115; H. Collins (ed.), *Standard Contract Terms in Europe: A Basis and a Challenge to European Contract Law* (The Hague: Kluwer Law International 2008). See also, for the Italian literature, F. Addis, 'Il "codice" del consumo, il codice civile e la parte generale del contratto', *Obbligazioni e contratti* 2007, p 878.

3 See H.-W. Micklitz, *Unfair Terms in Consumer Contracts*, in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law* (2d ed., Cambridge: Intersentia 2014), p 125.

4 See L. Niglia, *The Transformation of Contract in Europe* (The Hague: Kluwer Law International 2003); S. Whittaker, 'Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract', 116. *L. Q. Rev. (Law Quarterly Review)* 2000, p 95.

5 The Annex to the Dir. 1993/13, according to Art. 3, para. 3, sets out an 'indicative and non-exhaustive list of the terms which may be regarded as unfair'. Such a list – including 17 terms – is of great significance both in the implementation of the Directive and in the practical application of the unfair terms regulation by national courts. In this respect, see C. Willett, 'Directive on Unfair Terms in Consumer Contracts', *Consumer L. J. (Consumer Law Journal)* 1994, p 114.

is achieved through the deletion of the unlawful term, so as to re-establish a balanced combination of parties' rights and obligations. It seems that different attention is paid, though, to the consequences that the contract faces, once emended from the unfair term – and this is precisely the problem I would like to focus on in this paper. How to govern the contractual gaps resulting from the unfairness test? Should the contract stand as it is, simply without the unfair term? Or should a supplementation process take place, in order to substitute the unfair term with one that aligns the deal to the one envisioned by the parties? And finally: what if the unfairness test addresses an essential element of the deal? Should the answers to the first two questions vary accordingly to the relevance of the unfair term? Which role should the *rationale* underlying the Directive play in driving such technical solutions?

These questions have usually received no explicit answers by the legislator (both European and national), thus leaving the judge responsible to find case-by-case solutions that can better achieve an effective realization of the interests at stake.

The analysis I will carry out will, therefore, start from a functional interpretation of the Directive 1993/13/EEC; the examination of recent case-law from the European Court of Justice (ECJ) will follow, in order to show how problematic the interplay between the unfairness test and the supplementation process can be; finally, I will stress out some problematic issues that have not been fully brought to the ECJ's attention yet, focusing on new remedial tools that – even if not provided for by the EU legislator – can achieve the goals set by the EU legislator itself in the most effective way.

2. The Unfair Terms Regulation Under Directive 1993/13/EEC

Directive 1993/13/EEC (Section B) traditionally addresses standard term or mass-produced contracts, that run between a consumer and a professional, who could be either a seller or a supplier.

According to Article 3, a certain term falls within the scope of application of the Directive when it 'has not been individually negotiated'. It is so, when the term at stake has been 'drafted in advance' by the professional, and the consumer has therefore 'not been able to influence the substance of the term', finding herself in a take-or-leave situation.[6]

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6 The situation is aggravated by the rise and rise of electronic commerce. See M. Chen-Wishart, 'Regulating Unfair Terms', in L. Gullifer & S. Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Oxford: Hart Publishing 2014), pp 107-108, stressing out that consumer contract law imposes a shift from a 'negotiated contract paradigm' to a 'non-negotiated contract paradigm'. More generally, on the nature of negotiation in standard term contracts, see V. Bolgar, 'The Contract of Adhesion', 20. *Am. J. Comp. L. (American Journal of Comparative Law)* 1972, p 53; L. Coppo, *Contract As a Tool for*

The limitation to such contracts is more than simply a practical method of drawing the outer limit of potential legal intervention into the parties' bargain. Indeed, it represents an index of the underlying purpose of the Directive. As long as the consumer has actually engaged in negotiation with the professional, it seems that the process of negotiation itself acts as an adequate protection from the risk of the imposition of unfair terms: the lack of justification for legal intervention follows. Only when negotiation is absent, an intervention in the substance of the deal becomes bearable.[7]

It is so, because of the genetic and structural imbalance that characterises B2C relationships: in fact, the consumer is in a weaker position vis-à-vis the seller or the supplier, in so far as she generally suffers from substantial asymmetry of information or expertise, and, because of this, she has a limited bargaining power.[8]

The phenomenon can be observed from two different standing points: on a mere economic ground, there is a clear inequality among parties, that may have an impact on the purely juridical ground, thus resulting in an imbalance in the rights and obligations that derive from the contract.[9] Were this to happen and were the stronger party to exploit her superior position to abusively obtain an unjust agreement, then European consumer private law performs its remedial function.[10]

Directive 1993/13/EEC aims at re-establishing the fairness of the contract by discarding the formal allocation of rights and obligations the parties agreed upon. To this extent, the European legislator requires Member States to provide for

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Getting-To-Yes: A Civil Law Perspective (Napoli: Edizioni scientifiche italiane 2018), p 40; F. Delfini, 'The Control of Contract Power and Standard Terms in Italy and Canada: a Comparative Overview', *Rivista di diritto privato* 2020, p 9.

7 See S. Weatherill, *EU Consumer Law and Policy*, p 118; P. Rott, 'Unfair contract terms', in C. Twigg-Flessner (ed.), *Research Handbook on EU Consumer and Contract Law* (Cheltenham: Edward Elgar 2016), p 292.

8 According to a well-established case-law, the system of protection introduced by Dir. 1993/13 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, which 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'. See Case C-147/16 *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen*, para. 54. At the end of that para, the Court refers to Case C-488/11 *Asbeek Brusse e de Man Garabito*, para. 31, and Case C-110/14 *Costea*, para. 18 and the case-law cited there. Similar statements can be found in many other rulings: e.g., in Case C-169/14 *Sánchez Morcillo e Abril García*, para. 22.

9 For an economic and legal analysis of the issue, see, above all, L. Bebchuk & R. Posner, 'One-Sided Contracts in Competitive Consumer Markets', 104. *Mich. L. Rev. (Michigan Law Review)* 2006, p 827.

10 Together with Dir. 1993/13, Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (data.europa.eu/eli/dir/2005/29/oj) completes the consumer protection. On the coordination between the provisions of the two directives, see S. Orlando, 'The Use of Unfair Contractual Terms as an Unfair Commercial Practice', *Eur. Rev. Contract L. (European Review of Contract Law)* 2011, p 25.

a mechanism ensuring that every contractual term (not individually negotiated) may be reviewed in order to determine whether it is unfair.[11] In this regard, the most important provisions are, of course, Articles 6 and 7.

Article 6, paragraph 1 of the Directive provides that 'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms'. Article 7, paragraph 1 of the Directive provides that 'Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers'.

Those provisions have to be read jointly and cannot be analysed stand-alone.[12]

As already said in the introduction, Article 6, paragraph 1 provides for a specific solution to the problem at stake. Were the seller or the supplier to impose an unfair term to the consumer without individually negotiating it, such a term shall be considered 'not binding', and the contract shall continue to bind the parties with regards to the terms that can still be effective.[13] The Directive deliberately chooses a broad and neutral expression – 'not binding' –, which transcends the different legal traditions of the Member States, with the intention to leave Member States enough room for implementing the sanction to unfair contractual terms.[14]

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11 The Directive adopts the model of 'minimum harmonisation'. On this topic, see, above all, M. Dougan, 'Minimum Harmonisation and the Internal Market', 37. *Common Mkt. L. Rev. (Common Market Law Review)* 2000, p 853. For a comparative overview of the transposition of the Directive in Member States, see H. Beale et al. (eds), *Cases, Materials and Text on Contract Law, Ius Commune Casebooks for the Common Law of Europe* (Oxford: Hart Publishing 2010); P. Nebbia, *Unfair Contract Terms in European Law* (Oxford: Hart Publishing 2007); M. Tenreiro, 'The Community Directive on Unfair Terms and National Legal Systems', 3. *Eur. Rev. Private L. (European Review of Private Law)* 1995, p 273; E.H. Hondius, 'The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States', 3. *Eur. Rev. Private L. (European Review of Private Law)* 1995, p 242. For a global overview, see H.-W. Micklitz & G. Saumier (eds), *Enforcement and Effectiveness of Consumer Law* (Cham: Springer 2018).

12 With regard to the interpretative issues the Directive arouses, see Commission Notice 2019/C 323/04, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (Text with EEA relevance)', *OJ 27 September 2019*, eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52019XC0927(01).

13 The provision clearly expresses the principle of *favor contractus*. On this topic, see G. Tomás, 'Utile per inutile non vitiatur: can favor contractus be considered a European regula iuris?', *Eur. Rev. Contract. L. (European Review of Contract Law)* 2016, p 259.

14 In Italy, for example, Art. 36 of the Italian Consumer Code provides that unfair terms are void, whereas the contract continues to bind parties; in Spain, Art. 83 of the *Ley General paragraph la Defensa de los Consumidores y Usuarios* sanctions unfair terms as void; in France, Art. L.241-1 of

At this point, Article 7, paragraph 1 gets into the scene. It has a much wider meaning than the previous provision and, even if it doesn't set down any specific rule, it is of the utmost importance not only in the implementation of the Directive, but also in the interpretation and, therefore, in the application of all the national pieces of legislation which deal with unfair terms discipline. This is to say that Article 7, paragraph 1 addresses not only national legislators, but also judges (both national and European) and interpreters, as it fixes the legal parameters all of them have to stick to, when drafting, or applying, or interpreting unfair terms discipline.

The provision carries a very powerful message, stressing out the ultimate goal the Directive aims at. First, it clearly states what has to be done: adequate and effective remedies shall be set down, which means – as it has already been said – that the protection granted to weaker contractual parties shall be substantial, so as to restore a just agreement.[15] Second, it specifies which functions such remedies shall be capable to satisfy. With this regard, it is possible to spot two different goals: a particular, or short-term objective and a more general, or long-term one. Indeed, the remedy has, first, to intervene on the specific contract at stake, adjusting it; second, the repeated (and homogeneous) application of the remedy has to be such that discourages abusive conducts.[16] The judge has to bear in mind that every time

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the French Consumer Code states that unfair terms shall be considered as non-written (*non écrites*); in Germany, § 307, para. 1 of the German Civil Code opts for the absolute nullity. On this topic, see G. De Cristofaro, 'Invalidity of Contracts and Contract Terms in the Feasibility Study on a Future Instrument for European Contract Law', in R. Schulze & J. Stuyck (eds), *Towards a European Contract Law* (Munich: Sellier 2011), p 105.

15 This is how Art. 7 of Dir. 1993/13 enucleates the principle of effectiveness on consumer protection (see *infra*). Such an interpretation is perfectly in line with the new Art. 8 *ter* of the Directive – as recently introduced by Art. 1 of Directive (UE) 2019/2161 of 27 November 2019 (data.europa.eu/eli/dir/2019/2161/oj) – which significantly states that, in case an infringement of the national provisions pursuant to the Directive occurs, the penalties provided for by Member States 'shall be effective, proportionate and dissuasive'. As such, the provision appears also in line with Art. 19 of the Treaty on European Union, stating that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law', and with Art. 47 of the EU Charter of Fundamental Rights, granting to 'everyone whose rights and freedoms guaranteed by the law of the Union are violated' the 'right to an effective remedy before a tribunal'. In this regard, see C. Mak, 'Rights and Remedies: Art. 47 EUCFR and Effective Judicial Protection in European Private Law Matters', in H.-W. Micklitz (ed.), *Constitutionalization of European Private Law* (Oxford: Oxford University Press 2014), p 253; V. Tresnjack & E. Beysen, 'European Consumer Protection Law: Curia Semper Dabit Remedium?', 48. *Common Mkt. L. Rev. (Common Market Law Review)* 2011, p 105. For a comment on an interesting case-law by the ECJ, see F. Bartolini, 'The Consumer-Debtor Dimension: Some Further Steps for the Principle of Effectiveness within Consumer Credit Contracts', *Eur. Rev. Contract. L. (European Review of Contract Law)* 2016, p 292.

16 See also the twenty-fourth recital in the preamble to the Directive, which states that 'the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts'.

she makes a decision on a specific contractual relationship, she also produces an impact on the market as a whole: in doing so, the judge – with her settlement – has to foster the idea of a competitive and common market, and has to dissuade stronger parties to abuse of their privileged position.[17]

Article 7, paragraph 1, as long as it shows the *rationale* behind the Directive, enlightens the interpretation of Article 6, paragraph 1. On this ground, the obliteration of the unfair term realises a remedial function compliant with the overall objective of the Directive, only if it manages to grant the consumer an effective protection, thus contributing to create a more efficient and solidaristic market.

At a first glance, the specific remedy provided for by Article 6, paragraph 1 pretends to exactly reach a perfect equilibrium between the above-mentioned goals. Indeed, the unfairness test intervenes in a very simple and sharp way on the contract. The latter undergoes a thorough scrutiny, aimed at amending it of all those clauses that manifest an unlawful abuse of power, detrimental for the consumer, thus keeping in place the set of lawful clauses to bind the parties. As a result, the consumer remains in the contractual relationship, thus getting the good or service she had interest in; on the other side, the professional loses the extra-profit she abusively tried to appropriate and she is forced to stay in a modified contract, even if it turns out that the professional herself – knowing such a modification – would not have entered the contractual relationship at stake. It is a severe sanction, which works as a deterrent towards a serial abusive conduct and tends, on the long-term, to the creation of a fairer and more competitive market.

In conclusion, it seems that, under Article 6, paragraph 1, the particular consumer interest and the general market interest are fairly often aligned.

A question can be raised, though, whether such a conclusion always applies. The question sounds legitimate, if one only takes a more accurate look at the circumstances under which the elected remedy works. Indeed, Article 6, paragraph 1 views the partial obliteration of the contract (in its abusive content) as a necessity. But such a rule efficiently reaches the abovementioned goals only on one assumption: the assessment of unfairness shall regard an ancillary – and not essential – clause. In fact, when the unfairness test meets an essential clause, it becomes evident that the contract cannot simply stand and continue to produce any effect: making the unfair term to disappear simply means to deem the contract to fall as a whole.

In such a case, a strict application of Article 6, paragraph 1 may result in a consequence which is not compliant with the objectives set out by Article 7,

17 In Case C-618/10 *Banco Español de Crédito*, para. 69, the ECJ states that Art. 7 of Dir. 1993/13 aims at pursuing a 'long-term objective', as its application shall produce a 'dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms'. See also Case C-470/12 *Pohotovost'*, para. 41 and the case-law cited.

paragraph 1.[18] Indeed, the consumer who, having suffered an abusive conduct from the professional, has entered a contract which is unfair in one of its essential element, basically faces two options: she may choose to apply for a judgment, getting the contract annulled and thus losing the service or good she was looking for; or she may choose not to apply for a judgment, thus preferring to remain bound to an unjust contract, that still provides her with the good or service she needs, although at unfair conditions.

This is to say that, once again, the consumer finds herself in a take-or-leave situation. And, when looking at the long-term objective, the situation is even worse. In fact, such an application of the remedy can very hardly perform an efficient deterrent function: the stronger party keeps an interest in imposing unfair conditions, betting on the lack of consumers willing to litigate over the contract.

The result – almost a paradox – is the farthest possible from the ideal outcomes the application of Directive 1993/13/EEC wants to achieve.

3. Unfair Terms and Supplementation of the Contract with Statutory Provisions in the ECJ Case-law

Should the unfair term be an essential one, it is necessary to deal with the consequences of its deletion. And, as it has been shown, it is the national legal systems that have to determine the criteria to govern the possibility of a contract continuing its existence without the unfair term in a manner consistent with EU law.

Case-law offers very interesting material, useful to deepen our analysis. Indeed, especially in the last years, the ECJ has tackled the problem at stake numerous times, establishing a very rich dialogue with national courts that tried to fill in the contractual gaps resulting from the obliteration of the unfair term.[19]

The first decision regarding the problem under analysis is the *Banco Español de Crédito* case, delivered by the ECJ on 4 June 2012.[20] The dispute had

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18 See M. Maugeri, 'The Rules Applicable When Standard Contract Terms Are Avoided and Contracts with Inequality of Bargaining Power: Construction of a Unitary Model of Invalidity or a Plurality of Models?', in H. Collins (ed.), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Alphen and Rijn: Kluwer Law International 2008), p 182.

19 See H.-W. Micklitz & N. Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', 51. *Common Mkt. L. Rev. (Common Market Law Review)* 2014, p 771, underlying how the originally limited impact of the Directive on Member States' contract law has been substantially extended thanks to the innovative case-law delivered by the ECJ. See also N. Gavrilovic, 'The Unfair Contract Terms Directive through the Practice of the Court of Justice of the European Union: Interpretation or Something More?', *Eur. Rev. Contract. L. (European Review of Contract Law)* 2013, p 163.

20 Case C-618/10 *Banco Español de Crédito*, with note by P. Rott, 'Case note on Banco Español de Credito v. Joaquín Calderón Camino', *Eur. Rev. Contract. L. (European Review of Contract Law)* 2012, p 475.

arisen between Banco Español de Crédito SA and its customer, Mr Camino, who failed to pay the monthly repayments under a consumer credit agreement. The bank initiated proceedings before the Spanish courts in order to claim the repayment of the loaned amount plus interest and costs. Under the consumer credit agreement, the rate of interest on late payments was set at 29%. The Spanish court, after having declared this standard term unfair, wanted to reduce the unfair interest rate for delayed payment from 29% to 19%, as laid down in the national piece of legislation. Therefore, the Spanish court referred to the ECJ for a preliminary ruling, asking whether a national judge can adjust the content of an unfair contract term instead of just declaring it not-binding.

According to the ECJ, the Spanish court is not authorised to revise the contract's content.[21] But the importance of the decision relies especially on the reasoning that underlies the given solution. Indeed, in the specific case brought to the Court's attention, resorting to supplementary provision is considered unlawful not only because it is against the wording of Article 6, paragraph 1, but also – and especially – because it does not allow to fully accomplish the objective and overall scheme of Directive 1993/13/EEC.[22]

European judges could have just sticked to the literal meaning of Article 6, paragraph 1, which precludes legislation of a Member state to fill in the gaps resulting from the deletion of the unfair term. But they go beyond the literal argument, carrying out a functional interpretation of the remedy provided for by the Directive.

In the case at stake, the unfairness test clearly addresses an ancillary term: no one can doubt, in fact, that the provision for interests on late payments is not a key element of the loan. In such a situation, declaring the unfair term as non-binding – leaving the contract to live without any provisions regarding interests on

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21 The Court (para. 40) stresses that Art. 6, para. 1 is 'a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them'. In this regard, see also Case C-453/10 *Pereničová and Perenič*, para. 28. In protecting the consumer, the provision assesses a 'public interest' and, to this extent, it shall also be interpreted as attributing to the national court 'the obligation to examine the unfairness issue of its own motion' (para. 43). Such a statement is in line with a well-established case-law: see Case C-243/08 *Pannon GSM*, para. 32; Case C-168/05 *Mostaza Claro*, para. 38; Case C-40/08 *Asturcom Telecomunicaciones*, para. 32; Case C-397/11 Jőrös, para. 28. On this topic, see R. Alessi, 'Clausole vessatorie, nullità di protezione e poteri del giudice: alcuni punti fermi dopo le sentenze Jőrös e Asbeek Brusse', *Jus civile* 2013, p 7.

22 The Court, throughout its entire decision, focuses very often on the consequences a certain application of the Directive might lead to. In para. 70, the Court affirms that a power to revise the contract, if granted to the national court, 'would not be such as to ensure, by itself, such efficient protection of the consumer as that resulting from non-application of the unfair terms'. Later on (para. 72), the Court clarifies that the national court has to ensure that Art. 6 of the Directive is 'fully effective', thus 'achieving an outcome consistent with the objective pursued by it'. See also Case C-282/10 *Dominguez*, para. 27 and the case-law cited.

late payments – is the solution which perfectly fits both within the literal wording of Article 6, paragraph 1 and the *rationale* behind it, as it emerges from Article 7, paragraph 1: indeed, it re-establishes a fair balance of the contract (so protecting the consumer in an effective way), while discouraging the professional from imposing unfair contract terms. On the contrary, letting the national court to fill in the gap with a statutory provision would result in a less effective remedy for the consumer and, above all, in a paradox for the market, because such a result represents an incentive for sellers or suppliers to exercise in an abusive way their power, since they – in the worst-case scenario – obtain a reasonable threshold (the legal one), whereas in the best-case scenario they would succeed in unlawfully maximising their payoff with detriments to consumers.[23]

The ECJ seems, then, to adopt a goal-oriented approach, declaring as non-compliant with the Directive every legislative solution which does not achieve the highest level of consumer protection.

Such an approach gets confirmed and reinforced in successive decisions. So it happens in the *Asbeek Brusse* case, delivered on 30 May 2013,[24] dealing with an excessive penalty clause; and in the *Unicaja Banco* case, delivered on 21 January 2015,[25] dealing with unfair default interest rate in a mortgage contract. In both cases, the unfairness test addresses a not essential clause, that could then be removed from the contract, without impeding the contract itself to continue in existence.

Again, the Court sanctions as illegitimate the national pieces of legislation that allow national judges to mitigate the non-binding effect. Such decisions descend – once again – not just from the literal application of Article 6, paragraph 1, but especially from a functional interpretation of the Directive. In the Court's reasoning, every national solution to unfair negotiations in B2C contracts is not consistent with European law as long as it weakens 'the dissuasive effect on sellers or suppliers of the straightforward non-application of those unfair terms with regard to the consumer', thus compromising 'the attainment of the long-term objective of Article 7 of the Directive'.[26]

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23 In fact, according to the Court (para. 69), those sellers or suppliers would remain tempted to use unfair 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'.

24 Case C-488/11 *Asbeek Brusse e de Man Garabito*, with note by I. Picciano, 'Il potere del giudice nazionale di integrare il contenuto di una clausola penale abusiva', *Contratti* 2013, p 857.

25 Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco e Caixabank*, with note by S. Pagliantini, 'Il restatement della Corte di Giustizia sull'integrazione del contratto del consumatore nel prisma armonizzato delle fonti', *Nuova giurisprudenza civile commentata* 2015, p 423.

26 Such a statement was first made in Case C-618/10 *Banco Español de Crédito*, para. 69 (see *supra*). It was then again made in Case C-488/11 *Asbeek Brusse e de Man Garabito*, para. 58, and in joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco e Caixabank*, para. 31.

In order to state whether or not the implementation of the Directive fully respects its overall meaning, it is important to identify, on a case-by-case basis, what the best interest of the consumer is and to establish how the chosen remedy pursues it. When dealing with unfair secondary terms, the solution that fits perfectly within both the literal meaning of Article 6, paragraph 1, and the *rationale* behind it is the deletion of the abusive clause, without allowing any judicial revision of the (rest of the) contract. In such cases, the mere obliteration of the unfair term represents a remedy that is both sufficient and effective, and so perfectly in line with the Directive's spirit.[27]

But as already mentioned, a perfect alignment between the literal argument and the functional one shows some shortfalls when the unfairness test addresses an essential clause of the B2C contract.

The *Kasler* case, delivered on 30 April 2014[28] well demonstrates this idea. The facts can be summarized as follows. In May 2008, several Hungarian borrowers concluded a mortgage loan contract denominated in foreign currency (Swiss franc). The dispute had arisen because of a standard term which allowed the bank to calculate the amount of the due loan on the basis of the 'buying rate' of Swiss Francs at the day when the contract was concluded, whereas the monthly repayment instalments were based on the currency's 'selling rate', which is usually higher.

As the ECJ affirms, the term at stake defines the 'main subject-matter of the contract', within the meaning of Article 4, paragraph 2 of the Directive, since it enucleates the core obligation of the debtor. Furthermore, it results to be drafted not in a clear and 'plain intelligible language',[29] as it does not allow the consumer to get easily and transparently[30] the reason for and the particularities of the

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27 The Court, especially in the *Asbeek Brusse* case (para. 58), ascertains that the proposed interpretation of Art. 6, para. 1 is 'borne out by the objective and overall scheme of the Directive'. Moreover, in the *Unicaja Banco* case (para. 38), the Court affirms that national provisions dealing with unfair terms regulation shall be interpreted 'in the light of the wording and purpose of the Directive in order to achieve an outcome consistent with the objective pursued by the Directive'.

28 Case 26/13 *Kásler e Káslerné Rábai* with note by M. Dellacasa, 'Judicial Review of Core Terms in Consumer Contracts: Defining the Limits', *Eur. Rev. Contract. L (European Review of Contract Law)* 2015, p 152.

29 Case 26/13 *Kásler e Káslerné Rábai* (paras 29–75).

30 Transparency plays a prominent role in unfair contract terms law. See, in general terms, S. Weatherill, 'The Role of the Informed Consumer in EC Law and Policy', 2. *Consumer L. J. (Consumer Law Journal)* 1994, p 49; S. Grundmann, W. Kerber & S. Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Berlin: De Gruyter 2001). More specifically, see M.B.M. Loos, 'Transparency of Standard Terms Under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law', 2 *Eur. Rev. Private L. (European Review of Private Law)* 2015, p 179; E. Ferrante, 'Transparency of Standard Terms as a Fundamental Right of European Law', in B. Heiderhoff, S. Lohsse & R. Schulze (eds), *EU-Grundrechte und Privatrecht* (Baden-Baden: Nomos 2016), p 115.

mechanism for converting the foreign currency, thus making extremely difficult to assess the total cost of the sum borrowed and the overall juridical meaning of the deal.

The term is consequently sanctioned as unfair[31] and the ECJ has finally to face the potential normative conflict between Article 6, paragraph 1 and Article 7, paragraph 1 of the Directive. For the first time, in fact, the European judges deal with an essential (unfair) term, the deletion of which inevitably provokes the ineffectiveness of the entire contract, unless a corrective intervention is authorized.

Apparently going against its previous case-law, which excluded any kind of revision of the unjust contract, but substantially promoting the same functional approach, driven by the research for the best interest of the consumer, the ECJ opens to the substitution of the unfair term with a supplementary provision of national law.[32]

The decision correctly moves from the peculiarities of the case at stake and, above all, from the consideration of the 'particularly unfavourable consequences' the consumer would suffer, if the contract were to be entirely annulled. It follows that, in such a situation, correcting the contract 'is fully justified in the light of the purpose of Directive 1993/13/EEC'[33] Only by supplementing the contract with a statutory provision it is possible to re-establish a fair balance of rights and obligations among parties and, moreover, to dissuade the professional from adopting non transparent contractual contents.

European judges are well aware that a strict and formal interpretation of Article 6, paragraph 1 might weaken the consumer protection and the deterrent

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31 With regard to the link between non-transparency and unfairness, see Case C-154/15 *Gutiérrez Naranjo*, dealing with an essential term; Case C-143/13 *Matei*, and Case C-348/14 *Bucura*, dealing with a non-essential term. For a comment, see C. Leskinen and F. de Elizalde, 'The Control of Terms That Define the Essential Obligations of the Parties Under the Unfair Contract Terms Directive: *Gutiérrez Naranjo*', 55. *Common Mkt. L. Rev. (Common Market Law Review)* 2018, p 1595.

32 On the relation between incomplete-contract theory and default rules, see I. Ayres & R. Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules', *Yale L. J. (Yale Law Journal)* 1989, p 87. On the relevant role statutory provisions play in pursuing contractual justice within European contract law, see M. Hesselink, 'Non-Mandatory Rules in European Contract Law', *Eur. Rev. Contract L. (European Review of Contract Law)* 2005, p 43. With regard to Italian literature, see A. Plaia, 'Profili evolutivi della tutela contrattuale', *Europa e diritto privato* 2018, p 69, who underlies that, in B2C contractual relationships, the remedy of 'voidness' does not pursue its traditional restitutionary purpose, but it rather shows a satisfactory nature (as it is typical of specific performance remedies).

33 Case 26/13 *Kásler e Káslerné Rábai* (paras 81–83). The Court manifestly adopts a consequences-oriented reasoning, seeking for the best concrete possible solution for the consumer. The Court, in fact, realises (para. 84) that 'the consequence of an annulment is that the outstanding balance of the loan becomes due forthwith, which is likely to be in excess of the consumer's financial capacities and, as a result, tends to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts'.

effect of the Directive. They, therefore, openly address the problem: Article 6, paragraph 1 requires national courts to merely exclude the application of an unfair term – without being empowered to revise the content of that term – only when the contract, deprived from the unjust part, is capable to continue to bind parties. Should this not be the case, Article 7, paragraph 1 of the Directive avoids any annulment of the entire contract, thus giving room for supplementing it. Such a supplementation process is not literally covered by any provision, but is still fully rooted on the Directive and on its protective goals, since it enacts an effective remedy.

The *Kasler* case does not represent a *unicum* in the ECJ case-law. In fact, later on the Court has had the chance to confirm its settlement in the *Bankia SA* case, delivered by the Grand Chamber on 26 march 2019.[34] The Court remarks that it is up to the national judge to verify: (1) whether the removal of the unfair term would mean that the continued existence of the B2C contract is no longer possible, and, if so, (2) whether the annulment of the entire contract would expose the consumer concerned to harsher consequences.[35] If such prerequisites are met, Article 6, paragraph 1 could not be interpreted as deeming the contract to fall and a supplementation process shall take place in order to substitute the unfair term with the default rule offered by the legislative provision.[36]

Once again, the Court's reasoning is driven by the consequences that a certain interpretation provokes. There is no room for standard legal solutions: what matters most is the maximisation of the outcomes envisaged by the Directive, as they emerge from the *rationale* behind the Directive's provisions.[37]

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34 Joined Cases C-70/17 and C-179/17 *Bankia SA* with note by A. Iuliani, 'L'abusività delle clausole di risoluzione anticipata nel quadro dell'armonizzazione giudiziale del diritto europeo', *Nuova giurisprudenza civile commentata* 2019, p 424, and C. Sartoris, 'Clausola abusiva di risoluzione anticipata e poteri del giudice nella sentenza Bankia S.A. della Corte di Giustizia', *Persona e mercato* 2019, p 9. More recently, the same approach has been adopted by the decision held on 3 March 2020 by the Grand Chamber, Case C-125/18 *Marc Gómez del Moral Guasch.*

35 Such an evaluation shall be conducted following an 'objective approach', since the individual understanding of the consumer 'cannot be regarded as the decisive criterion determining the fate of the contract'. See Case C-453/10 *Pereničová and Perenič*, para. 32 and the case-note by C. Leone, 'Transparency Revisited – on the Role of Information in the Recent Case-Law of the CJEU', *Eur. Rev. Contract. L (European Review of Contract Law)* 2014, p 312.

36 By resorting to these criteria, the Court diversifies the remedial solutions accordingly to the peculiarities of the situation at stake. It then affirms (para. 59) that, in the concrete case brought to its attention, Art. 6, para. 1 of the Dir. 1993/13 'cannot be interpreted as precluding a national court from replacing that term, with a view to preventing that contract from becoming invalid'. In the same line of arguments, see also Cases C-92/16 *Bankia* (order of the Court) and C-167/16 *Banco Bilbao Vizcaya Argentaria SA* (order of the Court), that admit the substitution of an unfair term, 'the wording of which is based on a legislative provision', with 'the new wording of that legislative provision' as introduced or amended after the B2C contract was concluded.

37 See S. Pagliantini, 'Nullità di protezione, integrazione dispositiva e massimo effetto utile per il consumatore: variazioni sul tema dell'asimmetria contrattuale', *Persona e mercato* 2012, p 104; L.

The *Kasler* case, as confirmed by the *Bankia SA* case, does not only offer, then, a technical remedial solution to a specific and complex problem; it also teaches a precise methodological approach to the subject at stake: when assessing the unfairness test, under Directive 1993/13/EEC, every concrete juridical solution shall be tested on the ground of the values and interests that the European legislator wanted to ensure across Member states. Those are the protection of the consumer and, through it, the protection of a common, efficient and solidaristic market.

4. Unfair Terms and Supplementation of the Contract in Absence of Statutory Provisions: The Duty to Renegotiate

The ECJ case-law that has been so far rendered draws a clear trajectory of what European private law should look like – that is, a legal system centered on consumer's protection.

Article 6, paragraph 1 of the Directive basically precludes any kind of amendment of the contract and the mere deletion of the unfair term generally grants the attainment both of the short-term and long-term objectives of the European legislator. When the contract, once emended of the unfair term, could not stand as it is, and this provokes unfavorable consequences for the consumer, resorting to statutory national provisions becomes a necessary solution in order to supplement the deal. European judges are, to this extent, willing to bend the literal interpretation of Article 6, paragraph 1 of the Directive, in order not to frustrate the *rationale* behind it.

At this stage of the analysis, it's possible to make a step forward, trying to explore some new territories that have not been fully explored by the case-law, yet. In particular, it may be asked: what if the unfairness test addresses an essential clause – as it happened in the *Kasler* case – and the national legislation does not provide for – as it did not happen in the *Kasler* case – any default rule that may fill in the gap derived from the obliteration of the unfair term?

The question evidently involves the possibility to resort to other sources of supplementation, different from statutory law. Moreover, it invokes the traditional problem of the relationship between the private autonomy principle and a third-party intervention on the contract.

A very conservative approach would suggest that in a situation such as the one hypothesized, the parties have a duty to re-negotiate the contract, in order to 'correct' the imbalance in rights and obligations, as it results from the unfair term.

The solution may find its regulatory ground especially in Article 3, paragraph 1 of the Directive, that explicitly cites the good faith principle as a pillar of

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Valle, 'La vessatorietà delle clausole, oltre la nullità parziale', *Contratto e impresa/Europa* 2014, p 100.

B2C relationships and, specifically, as an instrument to evaluate the abusive conduct of the professional.[38] It can be easily shown, then, that the good faith principle obliges parties – and particularly the seller or supplier – to re-negotiate the contract in all those (essential) provisions that were sanctioned as unlawful.

Indeed, in such a situation, the good faith principle does not immediately act as a source of specific rights and obligations that supplement the contractual provisions. It rather represents, as a general clause, the guidance criterion that obliges parties to re-discuss their affair. To this extent, the solution appears to be very respectful of the parties' contractual freedom, which of course represents the cornerstone of every modern legal system. In fact, once the unfair term is declared as non-binding, and the contract cannot continue its existence without the erased essential term, the parties themselves could intervene on the contract, adjusting it in a way that is compliant with the parameters set out by the unfair terms regulation and also aligned to the original deal envisioned by the parties themselves.

It appears clear, though, that such a solution, so reasonable in principle, is likely to fail in concrete.

A re-negotiation process might effectively take place within a relationship between parties with equal bargaining power, where both parties substantially contribute towards the creation of the complex set of provisions, and are, therefore, able to re-arrange such set in a fair and balanced way, should any supervening circumstance occur.[39] This is exactly what does not happen in standard term B2C relationships, where the contractual self-determination of the consumer always risks of being squeezed. In this case, it's the seller or supplier who monopolizes the contract and abuses of the private autonomy principle in order to impose unfair

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38 According to R. Schulze & F. Zoll, *European Contract Law* (Baden-Baden: Nomos 2016), p 72, such a provision 'plays a specific role in European legislation because it expresses the substantive requirement for the limitations of party autonomy'. On the great relevance of the good faith principle within European contract law and on its application, see H. Collins, 'Good Faith in European Contract Law', 14. *Oxford J. Legal Stud. (Oxford Journal of Legal Studies)* 1994, p 229; R. Zimmermann and S. Whittaker, *Good Faith in European Contract Law* (Cambridge: Cambridge University Press 2000). With regard to Italian literature, see G. Vettori, 'Buona fede e diritto europeo dei contratti', *Europa e diritto privato* 2002, p 930; F. Piraino, *La buona fede in senso oggettivo* (Torino: Giappichelli 2015), p 540.

39 The existence of a duty to re-negotiate (in good faith) has been very much debated with regard to long-term contracts, especially with regard to situations in which supervening and unforeseen circumstances occur to alter the original equilibrium of the contract. On this topic, see E. Schanze, 'Failure of Long-Term Contracts and the Duty to Re-negotiate', in F. Rose (ed.), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (Oxford: Hart Publishing 1997), p 155; A. Schwartz, 'Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies', XXI. *J. Legal Stud. (Journal of Legal Studies)* 1992, p 271; for a comparative approach, see E. Tuccari, 'Supervening Unconscionability Between Judicial Review and Legal Certainty: Examples of Italy, Brazil and Argentina', 11. *J. Comp. L. (Journal of Comparative Law)* 2016, p 1.

conditions to the weaker party. Indeed, the same pathological situation that characterizes the initial negotiation between the consumer and the professional reappears at the time the contract is litigated and the unfair essential term is declared as non-binding.

It follows that obliging the seller or supplier to re-negotiate the unfair term does not re-establish at all a substantive balance between the parties, while it re-exposes the consumer to the same ontological risks she was exposed to when she entered a negotiation with a professional party. In fact, it will always be the professional – the very professional who has drafted an unjust contract – to have the upper hand in the negotiation.

Moreover, even ignoring the said inconveniences, a re-negotiation process normally takes a significative amount of time in order to be successfully developed, thus impeding the consumer to get a quick remedy against the abuse she has suffered. In fact, also regardless of the outcome of the re-negotiation, waiting for too long in order to get a modified fair contract could be an undesirable effect itself for the consumer.

In conclusion, it's hardly arguable that such a solution does constitute an adequate and effective remedy, under Article 7, paragraph 1 of the Directive. On the contrary, a duty to re-negotiate (in good faith) the unfair term seems rather to be a non-remedy.

There is still another option, though. Should the unfair term constitute an essential element of the deal, and should no statutory national provision be available, the supplementation of the contract might be realized through a judicial intervention. This means that it's the judge who, declaring the unfair term as non-binding, immediately replaces it with a new provision, tailored on the basis of the specific deal at stake and able to re-establish a fair balance of rights and obligations among parties.

Such a solution is highly controversial, as it presents very relevant pros and cons, that shall be now analyzed.

5. Judicial Correction of the Contract: A Difficult Equilibrium Between the Effectiveness of the Remedy, Parties' Contractual Freedom and Legal Certainty

Admitting the judicial correction of the contract basically means to allow a third subject to step into the contract, so over-writing it.[40] As a consequence, parties will

40 See, in general terms, S. Whittaker, 'Judicial Interventionism and Consumer Contracts', 117. *L. Q. Rev. (Law Quarterly Review)* 2001, p 215; Id., 'Theory and Practice of the 'General Clause' in English Law: General Norms and the Structuring of Judicial Discretion', in S. Grundmann & D. Mazeaud (eds), *General Clauses and Standards in European Contract Law* (The Hague: Kluwer Law International 2006), p 57.

find themselves bound to new obligations that are not only different with respect to those originally drafted in the contract, but that are also very difficult to be predicted or defined *a priori*. The outcome may immediately sound disruptive to a traditional jurist, as it clearly impacts on the parties' contractual freedom, and, moreover, on the legal certainty principle. In fact, the contract ceases to be the realm of private will and parties have to bear that someone else chooses – with binding effects – how to shape their deal and juridically arrange their interests. Furthermore, as for the systematic effects, granting to every single judge such a powerful tool risks to substantially harm the predictability of the decisions, leaving the market players without any guidance and – at the end of the day – impeding commercial transactions to flourish.

If those are the cons one might find against the judicial correction of the unjust contract, there are also many relevant pros that stand in favour of such a penetrating instrument.

Indeed, it's difficult to neglect that a judicial correction of the contract might result in a very effective remedy against the abusive conduct of the professional in B2C relationships.[41] In fact, the consumer who applied for a court injunction against an (essential) unfair term gets a quick and adequate answer to her complaints: she does not lose the good or service she looked for when entered the negotiation; she is exposed to unjust conditions no more.

Especially if compared with the above-mentioned sources of supplementation of the contract, the judicial correction manifests appreciable elements. Differently from the re-negotiation, a judicial amendment can intervene in much a quicker way, reaching out very rapidly the weaker party's needs and basically setting to zero the risk that the professional could keep on adopting abusive conducts detrimental for the counterparty. Differently from the supplementation through statutory provisions, the judicial correction might offer a more ductile response, as it ontologically aims at tailoring the remedy on the specific interests at stake in the case *sub judice*.

On this basis, it might be argued that – at least in principle – the judicial correction of the unfair term is in line with the objectives the Directive 1993/13/EEC aims at achieving. Indeed, it provides the weaker party with a substantial protection, while severely sanctioning the stronger party with the imposition of a new contractual provision. From this point of view, the remedy displays an even stronger dissuasive effect – and, to this extent, it fosters the idea of an efficient and solidaristic common market –, as it forces the professional into a contract she did

41 Among Italian scholars, the topic is highly controversial. See S. Pagliantini, 'Profili sull'integrazione del contratto abusivo parzialmente nullo', in G. D'Amico & S. Pagliantini (eds), *Nullità per abuso e integrazione del contratto* (Torino: Giappichelli 2013), p 67; L. Valle, *L'inefficacia delle clausole vessatorie* (Padova: Cedam 2004), p 261; F. Azzarri, 'Nullità della clausola abusiva e integrazione del contratto', *Osservatorio del diritto civile e commerciale* 2017, p 68.

not expect and, in so doing, pushes her to adopt more transparent and fairer contractual conditions for the future.

The principle of effectiveness[42] – a cornerstone of EU consumer private law – seems then to legitimate to resort also to the judicial correction. Such a remedy represents of course an *extrema ratio*, essential – under certain circumstances – to impede the annulment of the entire contract (whose essential term is unfair), thus putting the consumer protection at the centre of the system.[43]

But the cons against such a remedy are still there and have to be taken very seriously, as they involve general principles of every European national legal system, that, at the bottom line, constitute the spine of European private law. This is to say that the principle of effectiveness has to co-exist with other important principles. Only if it turns out that the traditional objections can nowadays be overcome, then the judicial correction of the unfair contract might receive a full legitimation under Directive 1993/13/EEC.

The first objection substantially consists in the incompatibility between the freedom of contract and a judge stepping into parties' evaluations.[44] In fact, as stressed out also in the *Dziubak* case, when no statutory provisions are available, national courts can not simply go for a 'mere act of substitution'[45]

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42 On this topic, see N. Reich, 'The Principle of Effectiveness and EU Contract Law', in J.W. Rutgers & P. Sirena (eds), *Rules and Principles in European Contract Law* (Cambridge: Intersentia 2015), p 46; Id., *General Principles of EU Civil Law* (Cambridge: Intersentia 2013), p 89; F. Cafaggi & P. Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions', 3. *Eur. Rev. Private. L. (European Review of Private Law)* 2017, p 575. With regard to Italian literature, see S. Pagliantini, 'Effettività della tutela giurisdizionale, consumer welfare e diritto europeo dei contratti nel canone interpretativo della Corte di giustizia: traccia per uno sguardo d'insieme', *Nuove leggi civili commentate* 2014, p 804; G. Vettori, 'Contratto giusto e rimedi effettivi', *Rivista trimestrale di diritto e procedura civile* 2017, p 787.

43 The ECJ refers to Art. 7, para. 1 of the Directive and the principle of effectiveness almost interchangeably as a legal source for guarantees related to the effectiveness of the procedural protection against unfair terms in B2C contracts. In this regard, see, very recently, joined Cases C-224/19 and C-259/19 *CY/Caixabank*, focusing on the consequences to be drawn from the non-binding character of an unlawful term, under Art. 6, para. 1 of the Directive.

44 See, in general terms, M. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, MA: Harvard University Press 1993), and, more recently, H.-W. Micklitz, 'On the Intellectual History of Freedom of Contract and Regulation', 4. *Penn St. J. L & Int'l Aff. (Penn State Journal of Law & International Affairs)* 2015, p 1; S. Patti, 'Contractual autonomy and European Private Law', in J. W. Rutgers & P. Sirena (eds), *Rules and Principles in European Contract Law*, p 123. With regard to the Italian literature, see G. Benedetti, 'Tutela del consumatore e autonomia contrattuale', *Rivista trimestrale di diritto e procedura civile* 1998, p 17; G. D'Amico, 'L'integrazione (cogente) del contratto a mezzo del diritto dispositivo', in G. D'Amico and S. Pagliantini (eds), *Nullita per abuso e integrazione del contratto*, p 230.

45 Case C-260/18 *Dziubak*, with note by F. Esposito, 'Dziubak Is a Fundamentally Wrong Decision: Superficial Reasoning, Disrespectful of National Courts, Lowers the Level of Consumer protection', *Eur. Rev. Rev. Contract. L. (European Review of Contract Law)* 2020, p 538. The Court

It might be argued, though, that putting such a strong emphasis on the private autonomy principle would mean to treat it as an absolute value. But this is not the case, especially in EU private law and especially when it comes to B2C contractual relationships. This is easily arguable just having a look at the Directive under analysis. Indeed, the starting point of such a piece of legislation is that private autonomy, when monopolised by one party, does not express itself in a genuine and reasonable way, but becomes a means for abusive conducts. It, then, needs to be limited and re-oriented in light of a principle of substantial justice.[46]

An important index might be taken from Article 6, paragraph 1 itself. This provision – when applied to not essential unfair term – mandates the mere obliteration of the unfair term, without leaving any room for the professional to prove that she would have preferred not to sign that contract, should have she known of the unlawfulness of the term at stake. This means that her hypothetical will has to step back in front of the consumer protection. As a result, the professional finds herself bound to a contract which is different from the one she drafted and, to this extent, also in this case she endures a correction (through a partial deletion) of the deal. It follows, in principle, that every time Article 6, paragraph 1 is applied – no matter the consequences descending from the obliteration of the unfair term – a revision of the contract takes place.

It seems, indeed, that, under Directive 1993/13/EEC, the parties' freedom of contract principle could undergo some limitations, if such is needed to attain the goals envisaged by the European legislator.[47]

The second objection looks stronger than the first one, as it stresses out how dangerous the spread of unpredictable decisions could be for the market (as a whole).[48]

(para. 59) reckons that statutory provisions of national law can supplement the contract 'on the ground that such provisions are presumed not to contain unfair terms'. However, it doubts that resorting to more general provisions, like 'the principle of equity' or 'established customs', could establish a fair and lawful balance between rights and obligations in a B2C contract. Such a statement is undemonstrated and it seems to reveal a preconceived scepticism against a judicial correction of the contract.

46 See J. Basedow, 'Freedom of Contract in the European Union', 6. *ERPL (European Review of Private Law)* 2008, p 921, affirming that 'the principle of contractual freedom can be construed in connection with the protection of competition'. See also C. Castronovo, 'Autonomia privata e Costituzione europea', *Europa e diritto privato* 2005, p 46; M. Farneti, *La vessatorietà delle clausole «principali» nei contratti del consumatore* (Padova: Cedam 2009), p 318.

47 See J. Basedow, 6 *ERPL* 2008, p 903, emphasising that 'social justice in the modern welfare state calls for a restriction of freedom of contract where the economic superiority of one of the parties might well lead to an agreement unfairly prejudicial to the legitimate interests of the other'. See also S. Delle Monache, 'Unfair Contracts in European Contract Law', *Osservatorio del diritto civile e commerciale* 2019, p 153.

48 Such unpredictability might also result, from a transnational perspective, in a lack of harmonisation among Member States. On the topic, see, above all, A. Schwartz, 'Justice and the Laws of

First of all, it might be subject to some criticism the starting point of this objection: that is that the judicial correction is something that completely floors the professional, as if the judge could take her decision absolutely discretionally. On the contrary, the judge has – especially in the context under analysis – several parameters she has to stick to when deciding.

In fact, it's important to bear in mind that the Directive applies to standard term contracts. This represents an important factual element, since it implies that the judge always deals with very common contractual models, that are easily reachable and diffusely used by all the different market players who share the economic stage. It follows that, when emending the unfair term, the judge shall try to get the economic objective sense of the deal,[49] as it emerges from a holistic interpretation of all the provisions embedded in the contract; but she shall also resort to the analysis of all the good practises spread in the same market area and used for transactions similar to the one at stake. Under these circumstances, the judicial correction will likely produce a balanced outcome, both coherent with the original parties' will and with other similar contractual models, commonly offered on the market.

This might easily happen, for example, in an abusive loan contract (as it was exactly the case in the *Kasler* and *Bankia SA* settlements): the judge who is asked to emend the contract could make more transparent – thus lawful – the unfair term, having as a guidance the overall objective meaning of the contract at stake, but finding also useful hints in the contractual schemes (of loans) arranged and offered by other banks to similar clients. To this extent, allowing a judicial supplementation does not produce subjectivism and arbitrariness in the decisions, but leads to reasonable and not surprising settlements.

Finally, it is worth to ask what the real meaning of the legal certainty principle shall be, when it comes to contractual relationships characterized by a structural imbalance among parties' bargaining powers.

A formalistic approach would reckon that, in order to enhance certainty – and, as a consequence, justice –, it is necessary to grant every time an identical and repeated solution.[50] Such an idea inevitably goes against a judicial correction of the

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Contract: A Case for the Traditional Approach', 9. *Harv. J. L. & Pub. Pol'y (Harvard Journal Law and Public Policy)* 1986, p 107. With regard to Italian literature, see E. Minervini, *Dei contratti del consumatore in generale* (Torino: Giappichelli 2010), p 89; A. D'Adda, 'La correzione del 'contratto abusivo': regole dispositive in funzione 'conformativa' ovvero una nuova stagione per l'equità giudiziale?', in A. Bellavista & A. Plaia (eds), *Le invalidità nel diritto privato* (Milano: Giuffrè 2011), p 393.

49 See, again, Case C-453/10 *Pereničová and Perenič*, para. 32, stressing out the importance of an 'objective approach' in the interpretation of the contract at stake. Similarly, see also Case C-118/17 *Dunai*, paras 40 and 51.

50 Such an approach is adopted, in the *Dziubak* case, by the Advocate General A.G. Pitruzzella, who, in his Opinion (para. 74), states that allowing a supplementation process through general clauses

contract, since the latter ontologically has some rate of variability. Such an idea, however, entails the risk that different situations are not always treated in different ways, as they would need to. This is exactly what would happen in B2C contracts, under Directive 1993/13/EEC. In fact, not admitting a judicial supplementation, the consumer who enters a contract which is unfair in one of its essential elements gets exposed to different treatments: she may get an effective remedy, if there is a default rule eligible for its contract; she may not get an effective remedy at all, if there is not a default rule eligible for its contract (and, of course, similar discriminations may also occur accordingly to the Member state where the dispute is litigated).

Such inconveniences would be reduced, however, just embracing a more substantial idea of legal certainty. With this regard, the remedy that the system provides for – and the judge applies – shall be considered "certain" as far as it perfectly fits within the normative values underpinning the legal system itself.[51] It follows that, especially in imbalanced contractual relationships, weaker parties have always to get their (different) protection needs fully satisfied in the same effective way, as this is the only outcome a legal system may aim at, in light of a substantive justice principle.[52]

'would constitute "creative" intervention capable of altering the balance of interests sought by the parties and excessively encroaching on contractual autonomy'. Similarly, for the Italian literature, see A. D'Adda, *Nullità parziale e tecniche di adattamento del contratto* (Padova: Cedam 2008), p 237, who strongly contests the idea of a judicial correction of the contract and does so both on a *de jure condito* and on a *de jure condendo* perspective, and P. Schlesinger, 'L'autonomia privata e i suoi limiti', *Giurisprudenza italiana* 1999, p 229.

51 Considering the legal system as a whole, it is interesting to notice that the European soft legislation significantly embraces the idea of a judicial correction as a mean to enact substantive justice within imbalanced contractual relationships. In fact, Art. 4:109 of the *Principles of European Contract Law* (PECL), dealing with 'Excessive Benefit or Unfair Advantage', provides that: 'upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed'. See also, very similarly, Art. 3.2.7 of the *Unidroit Principles*, dealing with 'Gross Disparity', providing that: 'upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing'; and Art. II. – 7:207 of the *Draft Common Frame of Reference* (DCFR), dealing with 'Unfair Exploitation', and providing that: 'Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been observed'. Such provisions might, at least, suggest that a judicial amendment of the contract shall not be considered completely alien to the European private law system.

52 In this regard, see P. Perlingieri, 'Legal Principles and Values', 3. *Italian L. J. (The Italian Law Journal)* 2017, p 125, challenging the 'sacrosanctity of legal certainty' in favour of seeking for remedial solutions that satisfy the concrete interests at stake in the best way possible. See also G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni scientifiche italiane 2015), p 53.

Directive 1993/13/EEC, as already said, promotes exactly this idea of justice, trying to limit the abusive exploitation of the private autonomy and focusing on an 'adequate and effective' protection of the consumer. Such a result shall, therefore, not be missed by a national legal system, that pretends to comply with the European Directive.

6. Conclusion

In conclusion, the principle of effectiveness of the consumer protection justifies a goal-oriented approach in the research of the remedy that could satisfy in the most adequate way the weaker party's needs. Such a principle, as particularly stated in Article 7, paragraph 1 of the Directive 1993/13/EEC, enlightens the interpretation of the whole legislative text and correctly represents the guidance criterion for the ECJ case-law.

In every different circumstance and on a case-by-case basis, it is necessary to assess the unfairness test in a functional way, thus tailoring the remedial response on the specific interests at stake. To this extent, the mere obliteration of the unfair term turns out to be a necessary and sufficient remedy against an unfair term which does not constitute an essential element of the contract. On the contrary, should the unfair term represent a core obligation, its mere deletion would inevitably provoke the annulment of the entire contract, thus exposing the weaker party to unfavourable consequences.

In such a case, in order to achieve both the short-term and the long-term objectives of the Directive, a supplementation process is needed. The contractual gap resulting from the non-binding declaration of the unfair term could, then, be filled, resorting to national statutory provisions or, if the latter are not available, to the judicial correction of the contract.