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A Modern Standard Contract Terms Law from Reasonable Assent to Enhanced Fairness Control

– A View on Digital Environments and Post-Transaction Assent –

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Abstract: This paper gives a birds' eye view on the ALI Restatement on Consumer Contracts (proposal) and European, and partly also Member State, law of standard contract terms with respect to the environment where these standard contracts and assent to them appears to be particularly fleeting, namely in digital contexts. It does so, however, with a broader scope: It tries to explain why assent rules are not meaningless even in a world where most consumers and customers do not read standard contract terms, and it tries to explain how lessons could be deduced also for a meaningful and more differentiated fairness control. It argues that favouring intervention of control (ie information) intermediaries – such as consumer associations – is key and that the preservation of possibilities for negotiation should be maintained and valued. In these respects, the paper is inspired in good part by company law and capital market law dealing with parallel problems.

Résumé: Cet article présente une vue panoramique du projet de Restatement de l'ALI sur les contrats à la consommation ainsi que sur le droit de l'Union et celui des Etats membres sur les clauses standardisées dans des contextes où le contenu de ces clauses et le consentement qui leur est donné paraissent particulièrement insaisissables, à savoir dans le monde numérique. Mais il a aussi un object plus large. Il vise à expliquer pourquoi le régime du consentement conserve un sens même dans un monde où consommateurs et clients ne lisent pas, pour la plupart, les clauses contractuelles, et tente d'expliquer comment en tirer des enseignements en vue d'un contrôle significatif et plus différencié de l'équité contractuelle. L'argument avancé est qu'en favorisant l'intervention d'un contrôle (c'est-à-dire, de l'information), les intermédiaires – telles les associations de consommateurs – sont des acteurs clé, et que des possibilités même résiduelles de

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négociation devraient être sauvegardées. A tous ces égards, cet article s'inspire en grande partie de la pratique des marchés des capitaux confrontés à des problèmes similaires.

Zusammenfassung: In diesem Beitrag werden das ALI Restatement on Consumer Contracts (Entwurf) und Europäisches, teils mitgliedstaatliches, AGB-Recht aus der Vogelperspektive betrachtet und zwar primär für solche Konstellationen, in denen die Einbeziehungsakte eher flüchtig erscheinen, namentlich in digitalen Kontexten. Abgezielt wird hierbei freilich auf einen breiteren Befund: Der Beitrag will erklären, warum eine klare Einbeziehungskontrolle keineswegs nutzlos wird, wenn tatsächlich die meisten Verbraucher und Kunden AGBs nicht lesen. Zudem werden mit dem Beitrag aus den zur Einbeziehung angestellten Überlegungen auch Schlussfolgerungen für eine differenzierte Missbrauchs-/Fairnesskontrolle gezogen. Das Kernargument geht dahin, dass AGB-Recht ein Einschreiten von Kontroll-/Informationsintermediären – etwa Verbraucherschutzverbänden – erleichtern sollte, dass aber auch Restbereiche einer 'Verhandlungslösung' nicht ausgeblendet werden sollten. Hier bieten sich Anleihen in zentralen Diskussionsfeldern im Gesellschafts- und Kapitalmarktrecht an.

I Context

The Restatement on consumer law targets only one part of consumer law, namely the use of standard contract terms in relationship to consumers. In this, it is similar to the EU Consumer Rights Directive 2011[1] that is not on *all* consumer rights

1 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [Consumer Rights Directive], *OJ EU* 2011 L 304/64; proposal see next footnote; opinions *OJ EC* 2009 C 317/54 (Economic and Social Council) and *OJ EC* 2009 C 200/76 (Committee of Regions); Standpoint of the European Parliament of 23 June 2011 (EP-PE_TC1-COD(2008)0196) and Decision by the Council of 10 October 2011 (PE-CONS 26/11); on this directive, see, in particular, S. Grundmann, 'The EU Consumer Rights Directive – Optimizing, Creating Alternatives, or Dead End?' (2013) *Uniform Law Review* 98; E. Hall, G. Howells and J. Watson, 'The Consumer Rights Directive – An Assessment of its Contribution to the Development of European Consumer Contract Law' (2012) *European Review of Contract Law* 139; O. Unger, 'Die Richtlinie über die Rechte der Verbraucher – Eine systematische Einführung' (2012) *Zeitschrift für Europäisches Privatrecht* 270; also – from the chairman of the committee in charge within the European Parliament – A. Schwab, 'Die neue EU-Verbraucherrechte-Richtlinie' (2012) *notar* 172–173; A. Schwab and A. Giesemann, 'Die Verbraucherrechte-Richtlinie – ein wichtiger Schritt zur Voll-

either (after a proposal that had been considerably broader),[2] but the restatement is different as well in focusing indeed on the area that is by far the most important also for the practice of EU Law – standard contract terms.[3]

In targeting only standard contract terms law, the Restatement is, however, also considerably broader than its (rather old and never amended) European counter-piece, the EC Unfair Contract Terms Directive of 1993.[4] Contrary to what is the case in this piece of legislation, the Restatement devotes much effort to questions about the integration of standard contract terms into the contract and of the legal preconditions and boundaries of such incorporation. Moreover, the

harmonisierung im Binnenmarkt' (2012) *Europäische Zeitschrift für Wirtschaftsrecht* 253; also J. Heinig, 'Verbraucherschutz – Schwerpunkte der EU-Verbraucherrechte-Richtlinie' (2012) *Monatsschrift für Deutsches Recht* 323. In some cases, somehow mechanistically, it has only been counted whether the directive reached or went beyond the consumer protection level established so far and then – without any further substantive evaluation – the verdict has been spoken on the directive or not; in this sense, for instance: K. Tonner and K. Fangerow, 'Directive 2011/83/EU on Consumer Rights: A New Approach to European Consumer Law?' (2012) *Europäische Zeitschrift für Unternehmen- und Verbraucherrecht* 67; see also, quite extensively with respect to the full harmonisation approach A. Mittwoch, *Vollharmonisierung und Europäisches Privatrecht* (Berlin and New York: de Gruyter, 2013) 78 *et seq*., 266 *et seq*.

2 The initial project was to include the eight most important EC directives then existing, see the list in (EU Commission) Green Paper on the Review of the Consumer Acquis, *COM*(2006) 744 final, annex II; and already, although more dispersed in the document: Consumer Policy Strategy 2002–2006, *COM*(2002) 208 final; then Proposal by the EU Commission for a Directive of the European Parliament and of the Council on consumer rights of 8 October 2008, *COM*(2008) 614 final. The most important inclusion that has been abandoned later on is that of consumer sales and of the use of standard/unfair contract terms in relation to consumers. See on this history and on the broader scope of the proposal: A.D. Chirita, 'The Impact of Directive 2011/83/EU on Consumer Rights', in A.L.M. Keirse, and M.B.M. Loos (eds), *Alternative Ways to Ius Commune* (Antwerp: Intersentia, 2012) 65–82; and more generally the literature quoted in the last footnote.

3 On the predominance of the EC Unfair Contract Terms Directive in the case law of the CJEU on European Contract Law – where it serves as the basis for approx. 35 % of all cases (based on the CJEU systematic classification scheme) –, see, in particular (counting up to 60 %), H.-W. Micklitz and B. Kas, 'Overview of Cases before the CJEU on European Consumer Contract Law (2008–2013) – Part I' (2014a) 10 *European Review of Contract Law* 1; H.-W. Micklitz and B. Kas, 'Overview of Cases before the CJEU on European Consumer Contract Law (2008–2013) – Part II' (2014b) 10 *European Review of Contract Law* 189.

4 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ EC* 1993 L 95/29; on this directive, see, in particular, P. Nebbia, *Unfair Contract Terms in European Law* (Oxford: Hart Publishing, 2007) 3–22; H.-W. Micklitz and N. Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) *Common Market Law Review* 771; P. Ulmer and M. Habersack, 'Introduction', in P. Ulmer, H. Brandner and H.-D. Hensen (eds), *AGB-Recht* (12th ed, Cologne: Verlag Dr Otto Schmidt, 2016) para 104; J. Basedow, '§ 305 BGB', in *Münchener Kommentar zum BGB* (8th ed, Munich: C H Beck, 2019) para 22 *et seq*.

context of digital environments can always be sensed, and in some illustrations it is explicit, while the Directive is still pre-dating the age of digitalisation. Articles 1–3 are indeed dedicated to integration of standard contract terms and the legal preconditions and boundaries of such integration and namely so in the modern contexts of rather fleeting forms of consent. In this important aspect, the restatement rather resembles Member States' law. Examples would be the German Law with its elaborate regime on integration of standard contract terms into consumer contracts (§ 305 of the German Civil Code ['BGB'], taken up below) or the famous Italian specific regime of integration of particularly harsh clauses ('clausole vessatorie' that need to be signed individually under articles 1341, 1342 Italian Codice Civile, already enacted as early as 1942).[5] Indeed, this is not a minor issue for the restatement. While the reporters might even have preferred no integration control at all (see below section 3), they still emphasize very much one particular conceptual and possibly also doctrinal differentiation. They differentiate between assent to the transaction and formation of contract – thus leaving open the legal nature of the consumer's behaviour that manifests assent to the transaction in the light of being given a chance to take note of standard contract terms. The reporters see this segregation of assent to the transaction from a consent to the contract terms as a major step of clarification – assent to transactions looking more like a factual phenomenon that only triggers, if certain conditions are met, the legal consequence of integrating the standard contract terms.[6] Under traditional doctrine – rather universal at least in continental Europe –, while also accepting that this type of consent is by no means 'thick' and particularly meaningful, namely not particularly well informed and free,[7] the concept would still seem to integrate these steps into the idea of formation of contracts. In other

5 On the Italian regime, see for instance V. Roppo, 'Il Contratto', in G. Iudica and P. Zatti (eds), Trattato di Diritto Privato (Milano: Giuffrè, 2001) 912; C.M. Bianca, *Diritto Civile, III, Il Contratto* (2nd ed, Milano: Giuffrè 2000) 375; and H. Beale, B. Fauvarque-Cosson and J. Rutgers, *Cases, Texts and Materials on Contract Law* (Oxford: Hart Publishing, 2010) 215 *et seq*; but also the contribution in this issue by C. Rinaldo.

6 On the view of the reporters whether this is merely a factual act or whether there needs to be a (implied) will to be legally bound, see O. Bar-Gil, O. Ben-Shahar and F. Marotta-Wurgler, Restatement of the Law, Consumer Contracts (draft, on file with the author), 5. The reporters subscribe Karl Llewellyn's concept of 'blanket assent' to 'any not unreasonable or indecent terms'; see K.N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (New York: Little Brown, 1960) 370. This approach is reflected in particular in Section 2, 'Adoption of Standard Contract Terms'.

7 From the discussion whether integration of standard contract terms is a consent based, hence contractual act at all, and what are the differences to traditional contract law and namely contract formation settings, see, in particular, M.J. Radin, *Boilerplate. The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2012).

words, integration of standard contract terms would still be seen as being based on declaration of legally binding will. In such a concept, the conditions described in the Restatement are seen as being such that they can be construed as implied consent to adding standard contract to a contract that is formed – hence an extension in content of the concept of formation of contracts.[8]

A last word on (personal) ambit of application and on approach. While it is meaningful to discuss these issues as well for B2B contracts and while, for instance, German Law subjects B2B contracts also fairness control,[9] this contribution does not deal with the issue of how far B2B contracts should be subject to the same regime. Therefore, whenever 'consumers' are addressed, this could imply as well 'clients' more generally. Moreover, while this contribution discusses and is inspired by the scheme on standard contract terms proposed in the Restatement, it deviates in its point of departure. It does not – and need not – subscribe to the constraints to which the reporters of the restatement were subjected. Contrary to what the reporters had to do, this contribution is not restating US-American law (albeit with an innovative trend) or purporting to do so. It rather assesses the policy solutions that are or could be imagined. This is particularly important in the area of assent where the comments and illustrations in the restatement seem to point into one direction. It would seem logical – given the policy bases explained – that the reporters would have liked to abolish more of the requirements for valid inclusion of the terms into the contract ('assent') or even do away with them completely. Conversely, the position in this article is that there are good policy reasons for having these requirements and that the restatement is even too lax in some respects. Thus, paradoxically, the reporters integrate rules on assent – it would seem – rather reluctantly because the exercise of 'restating' forces them to do so, while I would plead for them – and rather more stringent ones – on policy grounds.

The starting point and prime object of consideration for this contribution are the regimes on assent – pre-transaction assent, post transaction assent and also assent in case of ongoing relationships (see below sections 2–4). This contribution does, however, take into consideration in its final part as well the repercus-

8 For such construction as the largely prevailing view, see, Beale, Fauvarque-Cosson and Rutgers, n 5 above, 798.

9 On standard/unfair contract terms law with respect to professional clients, see, for instance M.W. Hesselink, 'Unfair Terms in Contracts Between Businesses', in J. Stuyck and R. Schulze, *Towards a European Contract Law* (Munich: Sellier, 2011); also C. Rinaldo, 'xxx' (2019) 15(2) *European Review of Contract Law* xxx-xxx (in this issue). For German law, it should be specified that the core rules on 'assent', ie the core requirements for the integration of standard contract terms into the contract, apply only in the B2C context (namely § 305 BGB discussed below) and that therefore the core of application of unfair contract terms law to B2B contracts lies in the fairness control of clauses.

sions that regimes on assent may have on fairness review and how 'contractual' elements more generally can have the most bearing possible in the area of standard/unfair contract terms law (see below section 5). Overall, this contribution shares the view of the reporters that fairness control is the target point and the most important part of the regulation of standard contract terms.

II Rule Basis: Restatement, European and Member State Law

1 Restatement

The Restatement distinguishes three situations and gives them divergent solutions. The distinction as such is meritorious, as the balance of interests in all three situations shows significant differences. Whether the solutions are adapted to these different interests and the latter are convincingly balanced will constitute the core of the discussion. The three situations are pre-transaction assent to the standard terms (§ 2 lit a), post-transaction assent to the transaction (§ 2 lit b) – these two in the setting of discrete contracts – and change of standard contract terms in an ongoing relationship (§ 3).

In the first situation, a *discrete contract* is at stake, and contract terms are displayed to the client/consumer before/while the contract is formed (the restatement calls it pre-transaction assent, see above section 1). *The rule – contained in § 2 lit a)* – follows lines accepted in principle also in Europe and reads as follows: '*§ 2. Adoption of Standard Contract Terms.* (a) A standard contract term is adopted as part of a consumer contract if the consumer manifests assent to the transaction after receiving: (1) a reasonable notice of the standard contract term and of the intent to include the term as part of the consumer contract, and (2) a reasonable opportunity to review the standard contract term.' This follows accepted standards insofar as three things are required in principle: (i) 'assent' to the transaction/contract by the client, after (ii) having been given 'reasonable notice' of both the terms and the intention to include them and (iii) having had 'reasonable opportunity to review' them. While it is true that differentiating between contract formation and transaction is novel in a European perspective,[10] this distinction

10 For some traces of differentiating between de facto assent to the bargain / receiving the benefits on the one hand and legally binding will and contract formation as such on the other, see, however, already in: H. Kötz, *European Contract Law* (2nd ed, Oxford: OUP, 2017) 49, 53; and now R. Schulze and F. Zoll, *European Contract Law, European Contract Law* (Baden-Baden: Nomos, 2018) 131.

does not really entail any deviation from traditional doctrine in outcome. The general term of 'reasonableness' – of notice, of the terms and of opportunity to read – is open enough to potentially encompass virtually all of the prerequisites spelled out in European and Member State law with respect to integration of standard contract terms law.[11] This is true namely for such requirements as the intelligibility and transparency of the terms, and the balance between the rights and obligations of the parties.[12]

In the second situation, a *discrete contract* is still at stake, but the contract terms, while being announced before, are displayed to the client/consumer *only after the contract is formed* (the restatement calls it post-transaction assent). *The rule – contained in § 2 lit b)* – deviates from what is typically accepted in Europe, thus breaking new ground (on the basis of US experience[13] and namely in the digital world of contracting). It reads as follows: '*§ 2 continued.* (b) When a standard contract term is available for review only after the consumer manifests assent to the transaction, the standard contract term is adopted as part of the consumer contract if: (1) before manifesting assent to the transaction, the consumer receives a reasonable notice regarding the existence of the standard contract term intended to be part of the consumer contract, informing the consumer about the opportunity to review and terminate the contract, and explaining that the failure to terminate would result in the adoption of the standard contract term; and (2) after manifesting assent to the transaction, the consumer receives a reasonable opportunity to review the standard contract term; and (3) after the standard contract term is made available for review, the consumer has a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden, and does not exercise that power.' In this way, the rule allows post-

11 For an integration of the standard contract terms under the circumstances described (reasonable chance to know terms and willingness to integrate them, to review them plus pre-transaction acceptance via agreement to the transaction), see, in particular, H.-W. Micklitz, J. Stuyck, E. Terryn, *Cases, Materials and Texts on Consumer Law* (Oxford: Hart Publishing, 2010) 282; Beale, Fauvarque-Cosson and Rutgers, n 5 above, 812.

12 See, in particular, Study Group on a European Civil Code, Research Group on EC Private Law (*Acquis* Group), *Principles*, *Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (Munich: Sellier, 2009) Principles II-I:109, II-I:110.

13 Noteworthy in this context the new empirical finding by the reporters of the restatement that the lead case of *ProCD, Inc* v *Zeidenberg* (decided by judge F. Easterbrook) and similar ones – that literature had so far seen as one of two poles in an evenly divided picture of case law – seems to have gained much higher and perhaps even universal acceptance than cases pointing into the opposite direction: Restatement Draft, 41 and 47–50 (with abundant reference to the case law). The restatement adopts the solution of this case, allowing a characterization of post-transaction silence (no reaction) as assent in principle.

transaction adoption of contract terms at the instance of the business (i) when a client/consumer has shown 'assent' to the transaction and at this moment (ii) already has reasonably been informed about the existence of standard contract terms and the business' intention to integrate them into the contract, but (iii) has had 'reasonable opportunity to review' only after assent to the transaction. While these prerequisites are formulated in parallel to those for the first situation named above (pre-transaction assent), the final part of the equation differs. Indeed instead of (iv) acceptance – albeit rather formal and perhaps not really meaningful – prior to the transaction, there is in post-transaction assent cases only the chance for the consumer to terminate – combined with the mandatory condition that such termination may not lead to an 'unreasonable cost, loss of value, or personal burden' for the consumer/client. This was a highly disputed rule in the course of restatement already in the US (see last footnote). In Europe, though one would have to consult the variety of national laws, the prevalent view would probably invalidate such concept.[14] The policy implications will be discussed later (see below section 4.).

A third situation regulated is about *long-term contracts ('ongoing relationship')* where contract terms are changed in the later course of the relationship. The rule – contained in *§ 3* – falls into two options. The first one (in lit a) gives the consumer/client the real choice – to accept or to reject and continue under the old regime – and reads as follows: '*§ 3. Modification of Standard Contract Terms* (a) Standard contract terms in a consumer contract governing an ongoing relationship are modified if: (1) the consumer receives a reasonable notice of the proposed modified terms and a reasonable opportunity to review them; (2) the consumer receives a reasonable opportunity to reject the proposed modified terms and continue the contractual relationship under the existing terms, and a reasonable notice of this opportunity; (3) the consumer either manifests assent to the modified terms or continues the contractual relationship after the expiration of the rejection period [a reasonable rejection period] provided in the proposal.' This regime solves the problem that ongoing relationships may require posterior adaptation only in one respect. It leaves all requirements that would have existed in a pre-transaction assent intact, but qualifies not only actual acceptance as acceptance of the consumer/client, but as well silence (under certain conditions) as acceptance. Hence for coping with the need of posterior adaptations and allowing

14 See, in particular, BGH, Judgment of 11 November 2009, VIII ZR 12/08, *Neue Juristische Wochenschrift* 2010, 864 *et seq* (para 38 *et seq*) (for German law); S. Pagliantini, 'La Modificazione Unilaterale del Contratto Asimmetrico Secondo la Cassazione (Aspettando la Corte di Giustizia)' (2012*) I Contratti* 165 (for Italian law); and broader Beale, Fauvarque-Cosson and Rutgers, n 5 above.

for them at all, the only (additional) burden it puts on the consumer is (i) to assess now a second time the contract terms and (ii) to 'protest' under 'reasonable' conditions if discontent with the changes. If these conditions of protest are indeed 'reasonable', the possibility given to him/her to stick to the old regime would seem to give all guarantees needed to the consumer/client (especially, if lit c, applicable here as well, is still taken into account, see next paragraph).

This third scenario (*'ongoing relationship'*) can, however, be subjected by the business also to a second regime. This regime (in lit b) gives the consumer/client only the choice between accepting the change of terms or terminating the relationship altogether, not to keep it unchanged, and it reads as follows: '*§ 3. Continued.* (b) A consumer contract governing an ongoing relationship may provide for a reasonable procedure … [that] may … [only] replace the reasonable opportunity to reject the modified terms with a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden.' Under both rules – whenever the amended version is accepted –, there is a limit to changes by law. They are only accepted insofar as the 'spirit' of the initial agreement (on set of terms) is not altered. The rule reads as follows (and relates both to lit. a and lit. b): '*§ 3. Continued.* (c) A modification of standard contract terms in a consumer contract is enforceable only if it is proposed in good faith and if it does not have the effect of undermining an affirmation or promise made by the business that was made part of the basis of the original bargain between the business and the consumer.' In the case described in lit. b), despite any application of lit c) and the limits formulated in it, the consumer not only has to read and react a second time – keeping, however, the right to stick to the initial bargain –, but can be forced to give up the initial bargain. He cannot be forced into the new deal, but, when not accepting it (termination), at least into a burden provided that the latter remains less significant, ie that it does not amount 'unreasonable cost, loss of value, or personal burden'.

2 Unfair Contract Terms Law in the EU: Limited to a Transparency Regime

The *EC Unfair Contract Terms Directive* of 1993 (above note 4) remains mostly silent on questions of assent as regulated in §§ 1–3 of the Restatement. There is, however, an important exception that relates to *transparency requirements*. Transparency requirements may have a bearing also on questions of fairness and may even be regulated primarily as part of the fairness control by the EC/national legislature. If their main scope is, however, to enhance understanding by the consumer/client, they very clearly have a strong link to rules on assent and integration

of standard contract terms that typically fix a requirement for such integration that presupposes a reasonable possibility to take note of the content of the terms.[15]

A *transparency requirement* can be found at two instances of the regime of the directive, in Article 4 in relation to so-called core terms and in Article 5 as a more general rule that could be seen as stating an overarching principle. The provision on core terms reads as follows: '*Article 4 [Unfairness Test]*. [Regime on ancillary terms] 1. … [Regime on core terms] 2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.' The provision containing the overarching principle states: '*Article 5 [General transparency requirement]*. In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.' While the main thrust of the provision contained in article 4 is to exempt the core of the bargain for conceptually convincing policy reasons,[16] the transparency requirement still

15 More in detail on the relationship between, on the one hand, transparency requirements and, on the other hand, notice and opportunity to read requirements in the integration regimes for standard contract terms, see, for instance:
M.B.M. Loos, 'Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law' (2015) *European Review of Private Law* 179; C. Leone, 'Transparency Revisited – On the Role of Information in the Recent Case-law of the CJEU' (2014) 10 (2) *European Review of Contract Law* 312; E. Gottschalk, 'Das Transparenzgebot und allgemeine Geschäftsbedingungen' (2006) 206 *Archiv für die civilistische Praxis* 559, 581; Basedow, '§ 305 BGB', in *Münchener Kommentar zum BGB*, n 4 above, para 80; J. Basedow, '§ 307 BGB', in *Münchener Kommentar zum BGB*, n 4 above, para 57; S. Roloff, '§ 307 BGB'. in *Erman Kommentar zum BGB* (Cologne: Verlag Dr Otto Schmidt, 2017) para 18 *et seq*; T. Pfeiffer, '§ 307 BGB', in M. Wolf, W. Lindacher and T. Pfeiffer (eds), *AGB-Recht* (6th ed, Munich: C H Beck, 2013) para 238, para 238; and broader Beale, Fauvarque-Cosson and Rutgers, n 5 above.

16 This is the part on which the attention of the parties is focused, where therefore the rationale of fairness control does not really apply and where the free flow of markets should essentially govern. On this exemption of core terms (definitions of main object of the contract) and of questions of adequacy between them and on the rationale of this exemption, see, in particular, M. Dellacasa, 'Judicial Review of "Core Terms" in Consumer Contracts: Defining the Limits' 2015 11(2) *European Review of Contract Law* 152, 158–163; S. Weatherill, *EU Consumer Law and Policy* (2nd ed, Cheltenham: Edward Elgar, 2013) 153–156; M. Schillig, 'Directive 93/13 and the "Price Term Exemption": A Comparative Analysis in the light of the "Market for Lemons" Rationale' (2011) 60 *International and Comparative Law Quarterly* 933; H.E. Brandner and P. Ulmer, 'The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission' (1991) 28 *Common Market Law Review* 647; and in this issue: F. Gomez, 'Core versus Non-Core Terms and Legal Controls over Consumer Contract Terms: (Bad) Lessons from Europe?' (2019) 15(2)

needs to be seen as a complementary core element. While freedom of individual decision taking in these matters and unhindered play of market forces are (seen as being) paramount, this can apparently not excuse a suboptimal drafting of those definitions that would render understanding less likely. This added element in Article 4 is, however, not only seen as being paramount for those definitions on which the attention of the parties is focused. Rather, it is extended to all terms formulated as standard contract terms. Indeed, the provision in article 5 can be seen as stating an overarching principle. Contrary to Article 4 – and *e contrario* – it applies to all terms, also ancillary ones. Moreover, while it is particularly important for standard contract terms in writing (because of their sheer size) and while they therefore are addressed directly, standard contract terms in oral form should certainly not be exempted and allowed to be formulated in anything else than plain, intelligible language.[17] Thus, in all contract terms – core or ancillary, in writing or oral – 'plain and intelligible language' is required and more generally every effort to render them as transparent and clear as possible.[18]

3 UCTD Regime Supplemented by Member States' Laws (eg Germany)

While the transparency principle will be of core importance in the argument to follow, a *genuine regime on assent* and integration of standard contract terms into the contract is not formulated in the directive, but *left to the Member States*. The directive thus seems to run into the direction that the ALI reporters might even have preferred – doing away with assent and integration requirements altogether (see below section 3). The EU regime can, however, also be conceived as not downplaying this issue, but characterising it as a question better to be regulated

European Review of Contract Law 177–194; A.-L. Sibony, 'European Unfairness and American Unconscionability: A Letter From a European Lawyer to American Friends' (2019) 15(2) *European Review of Contract Law* 195–226.

17 On art 5 seen as an overarching principle, see, in particular, N. Reich, H.-W. Micklitz, P. Rott and K. Tonner *European Consumer Law* (2th ed, Cambridge: Intersentia, 2014) 142 *et seq*. There is some dispute on whether a transparency principle can even be observed as governing the whole of European contract law. See on the one hand: B. Heiderhoff, *Europäisches Privatrecht* (4th ed, Heidelberg: C F Müller, 2016) 118; I. Klauer, *Europäisierung des Privatrechts: EuGH als Zivilrichter* (Baden-Baden: Nomos, 1998) 95 and on the other: K. Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (Berlin *et al*: de Gruyter, 2003) 301 *et seq*.

18 For such a duty to draft and render standard contract terms as 'ready to hand' for the consumer as possible, G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (London and New York: Routledge, 2018) 152–153.

'locally', at Member State level (for subsidiarity concerns). The German regime is representative and particularly explicit. In its core, it applies only to consumer contracts – like the directive and the restatement more generally (while other parts of German standard contract terms law apply also to B2B relationships).

The general rule on integration of standard contract terms into the contract in *Germany* reads as follows: '*Section 305 BGB [Civil Code] Incorporation of standard business terms into the contract* (1) Standard business terms are all contract terms pre-formulated for more than two contracts which … … (2) … only become a part of a contract if the user, when entering into the contract, 1. refers the other party to the contract to them explicitly or, where explicit reference, due to the way in which the contract is entered into, is possible only with disproportionate difficulty, by posting a clearly visible notice at the place where the contract is entered into, and 2. gives the other party to the contract, in an acceptable manner, which also takes into reasonable account any physical handicap …, the opportunity to take notice of their contents, and if [3.] the other party to the contract agrees to their applying.' This regime strongly resembles – also in the details – the three-partite prerequisite contained in § 2 lit a of the Restatement (see above section a), namely (i) 'assent' to the transaction/contract by the client, after (ii) having been given 'reasonable notice' of both the terms and the intention to include them and (iii) having had 'reasonable opportunity to review' them. What is missing, however, is a parallel rule to § 2 lit b of the Restatement, ie a possibility of post-transaction assent. It should, however, be highlighted that the idea that necessity may require modification of the prerequisites is not completely alien to the German regime. In such a case (of 'disproportionate difficulty'), exceptions are possible, but in current reading, this refers still to pre-transaction assent only.[19]

For the question of assent and integration of later changes of standard contract terms into the contract – and amended version of the contract – this general rule is *supplemented by two more rules* of particular relevance, *both ranging among those on fairness control*. While the first is placed among the rules on fairness control – among the list of specific terms – and not like § 3 of the Restatement among those on assent, it still deals with the same issue as the latter does, namely changes/modifications of standard contract terms (needed) in ongoing relationships. This rule reads as follows: *Section 308 BGB Test of reasonableness of content ['list of grey clauses']*. In standard business terms the following are in particular ineffective … 5. [Fictitious declarations] a provision by which a de-

19 For such reading of the norm, see BGH, Judgment of 11 November 2009, VIII ZR 12/08, *Neue Juristische Wochenschrift* 2010, 864 *et seq* (para 38 *et seq*); Basedow, n 15 above (2019a), para 83 *et seq*; P. Ulmer and M. Habersack, '§ 305', in Ulmer, Brandner and Hensen, n 4 above, 147a, 155 *et seq*.

claration by the other party to the contract with the user, made when undertaking or omitting a specific act, is deemed to have been made or not made by the user unless a) the other party to the contract is granted a reasonable period of time to make an express declaration, and b) the user agrees to especially draw the attention of the other party to the contract to the intended significance of his behaviour at the beginning of the period of time; …'. Finally, the *general rule on the fairness text applied to standard contract terms* under German law – in the parts that will also be important in the following and that at least have some bearing on assent – reads as follows: 'Section 307 BGB Test of reasonableness of content: (1) Provisions in standard business terms are ineffective … [if] they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible. … (2) [omitted] … (3) Subsections (1) and (2) above, and sections 308 and 309 apply only to provisions in standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed. Other provisions may be ineffective under subsection (1) sentence 2 above, in conjunction with subsection (1) sentence 1 above.' The rule named first (§ 308 n 5 *BGB*), parallel to § 3 lit a of the Restatement, allows silence to be characterised as post-transaction assent when, in an ongoing relationship, a need for adapting contract terms is felt later on. It differs from § 3 lit a and b of the Restatement, however, in that it reverses the burden of terminating when the consumer/client wants to stick to the old regime (the business has to terminate and respect the general conditions and consequences of such termination). Moreover, the German rule does not state – at least not explicitly – a limit as § 3 lit c of the Restatement does (no change of the essence of the bargain).[20] The rule named second (§ 307 *BGB*) contains the German regime/transposition on exemptions for core terms and for the general transparency requirement.

4 EU Contract Law beyond Unfair Contract Terms Law

While the regime in the Unfair Contract Terms Directive predates the digital age, there is one directive and rule in EU law that not only deals with contracting in

20 In favour of such a prerequisite to maintain at least the essence of the bargain when proposing a chance of standard contract terms, also for German law, see H. Schmidt, '§ 308', in Ulmer, Brandner and Hensen, n 4 above, para 7; W. Wurmnest, '§ 308 Nr 5 BGB', in *Münchener Kommentar zum BGB* (8th ed, Munich: C H Beck, 2019) para 11; BGH, Judgment of 11 October 2007, III ZR 63/07, *Neue Juristische Wochenschrift – Rechtsprechungs-Report* 2008, 134 *et seq* (para 30 *et seq*) by applying § 307 BGB to cases in which fictitious declarations do not infringe § 308 n 5 BGB (for German law).

digital environments, but can even be seen as a specific application of the transparency requirement to these situations. The rule is contained in the EC E-Commerce Directive of 2000[21] and reads as follows: '*Article 10 E-Commerce Directive – Information to be provided*: 1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service: (a) the different technical steps to follow to conclude the contract; …' This rule, by acknowledging that the digital world may be so complex that one single rule on formation of contracts may be difficult to find (namely as early as 2000), just puts the burden on the provider to explain the steps that lead to formation as clearly as possible ('clearly, comprehensibly and unambiguously'). This implies that it has to be made 'unambiguously' clear – prior to the transaction – when and with whom a contract is formed. Thus, any blurring of border-lines, any suboptimal arrangement is banned. As the business is master of the shaping of the process, a kind of strict fiduciary duty is put on it. The guideline for business conduct is the interest of the consumer/client: plain understanding has to be brought to him or her.[22]

III Models and Considerations

1 Assumptions Underlying the Restatement Regime and Critique

The restatement states itself at p 34 its three core assumptions on which the regime on assent to the transaction is based. All three assumptions require, however, either refinement – like the first one and in some way as well the third one – or they would seem objectionable – like the second one.

21 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *OJ EC* 2000 L 178/1; on this directive, see, in particular, A.R. Lodder, 'Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market', in A.R. Lodder and A.D. Murray, *EU Regulation of E-Commerce* (Cheltenham: Edward Elgar, 2017); J. Marly, 'Sekundärrecht A 4', in E. Grabitz, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäischen Union: EUV/AEUV* (40th ed, Munich: C H Beck, 2009); C. Sommer and G. Bender, 'E-Commerce-Richtlinie: Auswirkungen auf den elektronischen Geschäftsverkehr in Deutschland' (2000) *Recht der Internationalen Wirtschaft* 260.

22 See more in detail on this rule Lodder, n 21 above, 41–43.

Firstly, the restatement starts from the view that 'credible empirical evidence, as well as common sense and experience, suggests that *consumers rarely read standard contract terms* no matter how those terms are disclosed.'[23] While this is an observation that has long been made and while the strong asymmetry in information costs would even suggest that indeed consumers should (mostly) not read standard contract terms in the individual case to which they apply,[24] this assumption needs one refinement nevertheless. At least some do read fine print, because they observe markets and engage in policing markets, thus fighting at least the collective damage that G. Akerlof highlighted as one of two core adverse effects of information asymmetries and indeed as the most important one in his view.[25] As this policing function is so important for the market structure – to rebut 'lemons' as strongly as possible – any rule on assent should as well take into account that

23 The restatement itself quotes two of the three reporters, namely Y. Bakos, F. Marotta-Wurgler and D. Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts' (2014) 43 *Journal of Legal Studies* 1; O. Ben-Shahar and C. Schneider, *More than you Wanted to Know: The Failure of Mandated Disclosure* (Princeton: Princeton University Press, 2014) ch 2; earlier already O. Ben-Shahar, 'The Myth of the Opportunity to Read in Contract Law' (2009) 5 *European Review of Contract Law* 1, 7–21.

24 More in detail for structurally inevitable information asymmetries as the main rationale for standard contract terms regulation, namely for mandatory in depth fairness control, M. Adams, 'Ökonomische Begründung des AGB-Gesetzes – Verträge bei asymmetrischer Information' *Betriebsberater* 1989, 781, 787; E.G. Furubotn and R. Richter, *Institutions and Economic Theory – The Contribution of the New Institutional Economics* (2nd ed, Ann Arbor: University of Michigan Press, 2005) 241–246; H.-B. Schäfer and C. Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, (5th ed, Heidelberg: Springer, 2012) 552–555.

25 See G. Akerlof, '"The Market for Lemons": Quality uncertainty and the Market Mechanism' 84 *Quarterly Journal of Economics* 488 (1970); on this idea and its development since Akerlof, see S. Grundmann, in S. Grundmann, H.-W. Micklitz and M. Renner, *Privatrechtstheorie* (Tübingen: Mohr-Siebeck, 2015) ch 12 (forthcoming in English with CUP, ch 12); more recent empirical studies in Europe would seem to indicate that this is mostly the case, but not necessarily in all markets (which raises the question of best regulatory approach to such markets). These studies should not be read as questioning Akerlof's general findings across markets: see E. Bond, 'A Direct Test of the "Lemons" Model: The Market for Used Pickup Trucks' 72 *American Economic Review* 836 (1982); M. Pratt and G. Hoffer, 'Test of the Lemons Model: Comment' 74 *American Economic Review* 798 (1984); J. Lacko, *Product Quality and Information in the Used Car Market* (Washington: Bureau of Economics Staff Report to the Federal Trade Commission, 1986); D. Genesove, 'Adverse Selection in the Wholesale Used Car Market'101 *Journal of Political Economy* 644 (1993); R. Porter and P. Sattler, *Patterns of Trade in the Market for Used Durables: Theory and Evidence* (Cambridge/MA: National Bureau of Economic Research, 1999); W. Emons and G. Sheldon, *The Market for Used Cars. A New Test of the Lemons Model* (London: Centre for Economic Policy Research, 2002); C. Adams, L. Hosken and P. Newberry, 'Vettes and Lemons on eBay' 9 *Quantitative Marketing and Economics* 109 (2011).

its design should not obstruct, but rather further this function and those carrying it out.

Secondly, the restatement holds that 'the use of standardization in the production of contract terms is, like the *standardization* in the production of goods and services, a source of potential *benefits to consumers and businesses alike*.'[26] This assumption falls actually into two parts. While it may be questionable already for production whether standardisation really is 'equally' beneficial to consumers and businesses (might standardisation not also be a source of potential 'cheating' even in the realm of production, hiding important negative qualities of the product/service?), the more interesting proposition may still be the second one. The question is about the comparison made and has several facets. Firstly, one must ask from the outset why business, when drafting fine-print ('standardization'), should take customers' interests 'equally' into account (benefiting both parties 'alike'), especially when consumers do not read such fine-print and therefore the potential of hiding is high. In fact, it would even be counterintuitive and contradict the basic theoretical framework condition of selfish maximizing rational actors. Why should businesses – behaving as such actors – when proposing standard contract terms do so not in their own interest, but take the interest of the other party just as much into account?[27] If indeed consumers do not read standard contract terms and information asymmetries allow for massive hiding of selfish behaviour equilibrated standard contract terms – beneficial to both parties 'alike' – are even a rather unrealistic assumption. Secondly, it seems rather plausible that there are still better chances to assess the quality of goods/services than quality of contract terms. This is so because there is traditionally more screening for the former in markets, for instance via quality testing agencies,[28] there are

26 Restatement, proposal, 34; no quote is given for this assumption.

27 The traditional economic justification has been that even with a few consumers reading the fine prints, it is also in the interest of profit-maximizing businesses to offer the best possible (efficient) terms and exercise bargaining power by raising prices. For a review of the literature on the point, emphasising the many caveats of the claim also before the impact of behavioural studies, see F. Esposito, 'A Dismal Reality: Behavioural Analysis and Consumer Policy' (2017) 40(2) *Journal of Consumer Policy* 193. On the underlying theory of maximizing, selfish behaviour – to the extent possible – see, for instance A. Sen, 'Rational Behaviour', in S.N. Durlauf and L.E. Blume (eds), *The New Palgrave Dictionary of Economics* (3rd ed, Basingstoke and New York: Palgrave Macmillian, 2018), online edition.

28 On screening as a device to overcome information problems, seem path-breaking, J.E. Stiglitz, 'The Theory of Screening: Education and the Distribution of Income' (1975) 65 *The American Economic Review* 283; moreover J. Hörner, 'Signalling and Screening', in Durlauf and Blume, n 27 above. For its use in product/service market with respect to quality, H.E. Leland, 'Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards' (1979) 87 *Journal of Political Economy* 1328.

better possibilities for signalling, for instance via an offering of warranties,[29] and product/service quality may still be more of an observation good type than terms.[30] Thus, the caveats relating to the possibility of an efficient market in standard contract terms and the findings on screening and signalling would seem to suggest one conclusion. While there is ample ground for finding the assumption plausible that screening and signalling do indeed substantially help in situations of information asymmetry in product and service markets, a similar finding seems to be largely missing for markets of standard contract terms. Thirdly and finally, the need for standardisation would seem inevitable in the production of goods and services, as there is no alternative available. State production of goods and services or production by associations replacing businesses is no desirable alternative to production by businesses. Conversely, for standardisation of rules and equitable terms, there is indeed a natural provider in the form of states, but as well associations that represent all stakeholders and therefore alternatives are much more readily at hand – including alternatives of negotiated terms (see below section V). Therefore, in the area of standard contract terms law it is possible to narrow all standardisation as much as possible to mere adaptations of the rules enacted by legislatures, while in the area of production, this is not a thinkable option.

Thirdly, the restatement starts from the assumption that 'courts routinely enforce standard terms, even in the absence of informed assent to these terms.' The quote continues – rather clearly implying substantial criticism in this respect: 'Still, courts insist on basic requirements before they conclude that standard terms have been incorporated into a consumer contract.'[31] This proposal is the most difficult to interpret, namely which policy statement is made with it. Does it

29 On signalling as a device to overcome information problems, see equally path-breaking, M. Spence, 'Job Market Signalling' (1973) 83 *Quarterly Journal of Economics* 355; M. Spence, 'Consumer Misperceptions, Product Failure and Producer Liability' (1977) 44 *The Review of Economic Studies* 561; moreover M. Spence, 'Signalling in Retrospect and the Informational Structure of Markets' (2002) 92 *The American Economic Review* 434. For its use in product/service markets with respect to quality P. Milgrom and J. Roberts, 'Price and Advertising Signals of Product Quality' (1986) 94 *Journal of Political Economy* 796; P.J. Hughes, 'Signalling by Direct Disclosure Under Asymmetric Information' (1986) 8 *Journal of Accounting and Economics* 119.

30 On observation goods, experience goods and credence goods as three categories with different potential for the other market side to acquire the relevant information, see, for instance, P. Nelson, 'Information and Consumer Behavior' (1970) 78 *Journal of Political Economy* 311; M.R. Darby and E. Karni, 'Free Competition and the Optimal Amount of Fraud' (1973) 16 *The Journal of Law & Economics* 68. Conversely, standard contract terms would rather appear to be an item the quality of which is particularly difficult to observe (because of the small numbers in which the issue is really tested by a customer and because of their legal/uncertainty nature).

mean that courts do not admit the defense that consent is not informed if the requirements of reasonable notice and reasonable chance to read are satisfied? In this case, the argument developed below still holds that the requirements for integration may still have the function (i) to give the chance at least to the few who want to read and (ii), more importantly, to steer the control/information intermediaries to the clauses they want to have scrutinized (in court etc.), thus giving fairness control real bite. Alternatively, does this proposal imply that courts 'routinely enforce standard terms' once the requirements of assent are satisfied irrespective of the unfairness of their content? If this were the case, ie if giving notice and an opportunity to read dispensed from fairness requirements in the content of standard contract terms, this consequence would indeed be objectionable.[32] Anyhow, from a European perspective, it is not permitted to dispense with the control over fairness just because the integration of standard contract terms has been properly arranged (anyhow, the latter would mostly be under national law). Moreover, the theory of information asymmetries and adverse selection would run counter to assuming such a consequence. Therefore, this third assumption made by the reporters might rather boil down to a hidden policy statement in the sense that it would be preferable to totally abolish all requirements of integration of standard contract terms. The strongest argument in this direction could potentially be found in inquiries that suggest that consumers having given their consent/assent to standard contract terms feel more strongly bound to them even if they are unfair than consumers not having been asked for consent/assent.[33] This might imply that they are less inclined to question such terms just because they have given a (weak and uninformed) confirmation. The discussion of such a policy recommendation is at the heart of what follows.

31 Bar-Gil, Ben-Shahar and Marotta-Wurgler, n 6 above, 34; again, no quote is given for this assumption and therefore some doubts remain about the exact proposal made in this respect (see text).

32 This harsh consequence is indeed seen as the one given in many US jurisdictions in: Ben-Shahar, n 23 above, 15–18. The restatement, however, quotes a good number of cases where a fairness control was delivered in addition to the requirements of integration of/assent to standard contract terms. See, in particular, Section 5 'Unconscionability' (73–96).

33 See, in this sense, namely studies by Tess Wilkinson-Ryan, such as T. Wilkinson-Ryan, 'The Perverse Consequences of Disclosing Standard Terms' (2017) 103 *Cornell Law Review* 117; similar, I. Ayres and A. Schwartz, 'The No-Reading Problem in Consumer Contract Law' (2014) 66 *Stanford Law Review* 545, 595–605; Bakos, Marotta-Wurgler and Trossen, n 23 above, 19.

2 Alternative Approach in a Nutshell

The first two assumptions made in the restatement are either focusing on too narrow a range of addressees or are objectionable outright. The third 'assumption' would seem to contain rather a policy recommendation than an assumption – a policy recommendation to be discussed now. An alternative approach must strongly take into account that there are actors policing markets and thus reducing and combatting the collective adverse effects on markets that information asymmetries can create. Therefore, facilitating the work of those 'watch-dogs' would seem to form an important task of rules on assent to standard contract terms and on integration of these terms into contracts. Moreover, an alternative approach would not start from a presumption of beneficial effects of standard contract terms that go beyond the strict minimum of adaptation of the legislative model to specific sectors of the economy. To the contrary, while there is – or at least may be – a presumption that legislatures take the interests of all affected parties (properly) into account, assuming that this is also the case for businesses proposing standard contract terms does not seem in line with accepted economic (and behavioural) theory. It fundamentally deviates from such theory. If therefore the main thrust of an alternative approach would be to enhance all tools that empower those who do read and control standard contract terms (perhaps and in part even not only ex-post, but as part of a market reaction disciplining providers of standard contract terms ex ante), the other side is important as well. The benefits of standardisation for businesses are, of course, to be taken into account and furthered as well to the extent that this does not diminish the potential of control. They should only not be assumed to be automatically also in the interest of consumers. The alternative proposal made here is to work more on the definition of justified 'safe havens' – which constitute one important technique used in capital market law. Therefore, some consideration has to be given to the shape of fairness control (even in an article mainly focusing on the regime of integration of standard contract terms; see below section 5).

IV Rules on Assent in a World of Customers' Apathy

Rules on assent or integration of standard contracts terms seem to face primarily one problem that might be termed as customers' apathy – just as the term of shareholders' apathy has been coined for a situation in which shareholders are not interested in getting informed about the agenda of shareholder meetings and

the items on it. As there is in both cases the same double source of apathy – informing oneself is typically more costly than the expected losses from not informing oneself and the prospect of minimal potential influence proportionally adds to this negative calculus – it might be worthwhile to draw lessons from one scenario for the other. Looking at the integration of standard contract terms into contracts, the argument in the following is on two levels. Firstly, not much would seem to be gained if one mixes this problem with the one of reliance on public statements (often rather vague) and liability for them (see below section a). Secondly, it is argued that customers' apathy with regard to the question of integration of standard contract terms can be treated quite substantially in parallel to shareholders' apathy for which a good amount of novel instruments have evolved over the last two decades (see below section b).

1 Keeping Public Statements and Assent to Standard Contract Terms Separate

The way in which to arrange the prerequisites for an integration of standard contract terms and the question under which conditions third parties – other than sellers or other immediate contract partners of the consumer/client – should be liable for public statements are certainly both questions of protection of consumers/clients on markets. In Germany, because of *Dieselgate*, such liability for public statements is currently much debated.[34] The answer, however, to one of the two questions does not contain substantial lessons for the answer to the other. This is different, of course, where the public statements are formulated in / accompanied by standard contract terms (like in the case of warranties made by third parties, namely producers, via the seller). Outside such direct promises made to consumers by producers, the core question in relationships where a producer can clearly be discerned behind the seller (who is direct contract partner of the consumer) is to ask whether the consumer should have only one claim or rather two. Should there be only one claim against the seller for defects (and recourse by the latter against the producer, as in Article 4 of the EC Sales Directive EC/1999/44)[35] or should there be in addition also a direct claim against the produ-

34 See, for instance, J. Oechsler, 'Rückabwicklung des Kaufvertrags gegenüber Fahrzeugherstellern im Abgasskandal' (2017) *Neue Juristische Wochenschrift* 2865–2869.

35 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ EC* 1999 L 171/12; Monographs on the directive by: G. de Cristofaro, *Difetto di conformità al contratto e diritti del consumatore – l'ordinamento italiano e la direttiva 99/44/CE sulla vendita e le garanzie dei beni di consumo* (Pado-

cer? There are arguments for both solutions. If, however, one sees arrangements within the distribution chain as a valuable instrument that deals efficiently with the distribution of responsibilities and of the ways to provide cure, the better arguments would seem to speak against a second (direct) claim that would disturb such arrangements.[36] The strongest argument, however, is to be found beyond contract law. The issue of liability for public statements – like the ones contained in publicity or also the ones implicitly made in cases of manipulating software and thus pretending higher performance – is so complex that disregarding the discussion in capital market law carries the risk of losing out on important substantive issues. This is clear for the following items of discussion in capital market law. One first core issue is about knowing whether third party liability should not be limited to statements for which boards have consciously taken responsibility – as is guaranteed by law for prospectuses and ad-hoc disclosure.[37] A second issue is about the standard of care that should apply: whether gross negligence or simple negligence is an adequate standard in the situation of rather vague public statements.[38] A third issue is that of rules on causation that should apply in situations where the consumer/client would have had different ways to react.[39] All

va: CEDAM, 2000); M. Bianca and S. Grundmann (eds), *EU Sales Directive – Commentary* (Cologne: Schmidt, 2002); A. Orti Vallejo, *Los defectos de la cosa en la compraventa civil y mercantil. El nuevo régimen jurídico de las faltas de comformidad según la Directiva 1999/44/CE* (Granada: Comares, 2002); S. Pellet, *La garantie légale des biens de consommation – étude comparée des droits français, anglais et communautaire*, (Montpellier: Diss, 2000); T. Repgen, *Kein Abschied von der Privatautonomie – die Funktion zwingenden Rechts in der Verbrauchsgüterkaufrichtlinie*, (Tübingen: Mohr-Siebeck, 2001); see also B. Grunewald, '§ 433 BGB', in *Erman Kommentar zum BGB* (5th ed, Cologne: Schmidt, 2017) para 37 *et seq*; F. Faust, '§ 433 BGB', in G. Bamberger and H. Roth (eds), *Kommentar zum BGB* (3rd ed, Munich: C H Beck, 2013) para 4 *et seq*.

36 See, in this sense, S. Grundmann, 'Contractual networks in German private law', in F. Cafaggi (ed), *Contractual Networks, Inter-Firm Cooperation and Economic Growth* (Cheltenham *et al*: Edgar Elgar, 2011) 111–162, 129–131 (= 'Die Dogmatik des Vertragsnetzes', *Archiv für die civilistische Praxis* 207 [2007] 718–767, 735–737).

37 On the idea that liability has thus to be channelled exclusively to statements that are attributed/attributable to boards, see, for instance, M. Casper, 'The Significance of the Law of Tort with the example of the Civil Liability for Erroneous ad hoc Disclosure', in R. Schulze (ed), *Compensation of Private Losses: The Evolution of Torts in European Business Law* (Munich: Sellier, 2011) 91.

38 For the discussion of the adequate standard of care and liability in case of public statements, see, in a broad comparative law perspective for Europe: K. Uhink, *Internationale Prospekthaftung nach der Rom-II-VO – eine neue Chance zur Vereinheitlichung des Kollisionsrechts? Zugleich eine rechtsvergleichende Untersuchung der deutschen, englischen und französischen Haftungstatbestände* (Hamburg: Kovac, 2016) esp 30 (Germany), 73 (England), 88 (France); see also references next footnote.

39 On the host of literature on theories of causation in this area see, for instance, B.J. de Jong, 'Liability for Misrepresentation – European Lessons on Causation from the Netherlands' (2011) 8

three issues are paramount, but typically disregarded when coining the questions only in a perspective of implied contract terms. In many capital market laws, the minimum solution goes into the direction that only outright fraud – in Germany, under § 826 BGB – gives direct claims in case of public statements unless there are more concrete legal rules (carefully considered and delimited in democratic legislation processes).[40] All this seems far too remote from problems of integration of standard contract terms to combine both sets of problems and draw lessons from one such set for the other.

2 Combatting Consumers' Apathy Faced with Standard Contract Terms (also Compared with Shareholders' Apathy)

Conversely, it would seem promising to have a look at instruments *combatting shareholders' apathy* before discussing policy with respect to customers' apathy in the context of integration of standard contract terms into contracts. Starting out from the analysis of the two main problems named (information costs highly exceed potential gains and chances of success are minimal), the Shareholders Rights Directive of 2007 nevertheless broke with a defeatist stance.[41] Its strategy can be summarized as rendering individual shareholder voice as strong in general

European Company and Financial Law Review 352; and good broader survey by H.-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in H.-W. Micklitz, N. Reich and P. Rott, *Understanding EU Consumer Law* (Antwerp: Intersentia, 2009) 61–120.

40 For a comparative law survey on this issue, see M. Geller, 'The protection of Minority Investors and the Compensation of their Losses', in M. Schauer and B. Verschraegen (eds), *General Reports of the XIXth of the International Academy of Comparative Law* (Dordrecht: Springer, 2017) 351.

41 Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, *OJ EC* 2007 L 184/17; Proposal by the EU Commission *COM*(2005) 685 final; opinions and resolutions *OJ EC* 2006 C 338/42 (Economic and Social Committee) and *OJ EC* 2007 C 287 E/486 (European Parliament); on this directive, see, in particular, S. Grundmann, 'The Renaissance of Organized Shareholder Representation in Europe', in M. Tison, H. de Wulf, C. van der Elst and R. Steennot (eds), *Perspectives in Company Law and Financial Regulation: Essays in Honour of Eddy Wymeersch* (Cambridge: Cambridge University Press, 2009) 183; A. Hainsworth, 'The Shareholder Rights Directive and the challenge of re-enfranchising beneficial shareholders' *Law and Financial Markets Review* 2007, 11; A. Pinto, 'The European Union's Shareholder Voting Rights Directive from an American Perspective: Some Comparisons and Observations' 32 *Fordham International Law Journal*, 587 (2009); on the recent updates, for instance, W. Bayer and J. Schmidt, 'BB-Gesetzgebungs- und Rechtsprechungsreport zum Europäischen Unternehmensrecht 2017/18' (2018) *Betriebsberater* 2562; M. Habersack, 'Vorstands- und Aufsichtsratsvergütung – Grundsatz- und Anwendungsfragen im Lichte der Aktionärsrechterichtlinie' (2018) *Neue Zeitschrift für Gesellschaftsrecht* 127.

meetings as possible – despite its weakness! – and as giving moreover a permit in principle to all forms of organized representation. Many single measures were taken to further this (twofold) end. Meaningful information on agendas and voting were rendered possible even in situations of long deposit chains, national bans on distance voting (via letters or electronically) were excluded, individual representation was immunized against limits and excessive conditions, all forms of organized representation were explicitly allowed, and restrictions by law largely forbidden (no national law barriers other than those tackling conflicts of interests). The theoretical background was that even some exercise of voice by the affected parties was better than none or minimal one, and that it was in addition of paramount importance to increase the intervention of information and control intermediaries – the latter measure probably being still more important (including shareholders' associations, depositary voting, also targeted proxies to management).[42]

If *integration of standard contract terms* mainly raises the question of how to deal with consumers'/clients' apathy, any approach has to be tested against this double background as well – individual consumers' interests *and* the structural facilitation of information/control intermediaries' intervention. The latter is so important that at least in some Member States – for instance in Germany with its abundance of standard contract terms cases –, the number of law suits undertaken by consumer associations and other control intermediaries substantially exceeds that of law suits undertaken by individual consumers.[43]

42 For this twofold goal, see, for instance: J. Velasco, 'Taking Shareholder Rights Seriously' (2007) *Scholarly Works*, Paper 310, 605. Ultimately, the thrust is to further 'voice' despite the alternative of 'exit', as a combination of both seems more promising than either one of the two alone. See on this approach, path-breaking, A. Hirschman and A. Hirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organizations, and States* (Cambridge Mass and London: Harvard University Press, 1970) esp 1–5 and 76–83; and later in corporate governance literature almost universally accepted, see J.E. Parkinson, *Corporate Power and Responsibility* (Oxford: Clarendon, 1995) 178–199; W.F. Ebke, 'Unternehmenskontrolle durch Gesellschafter und Markt', in O. Sandrock and W. Jaeger (eds), *Internationale Unternehmenskontrolle und Unternehmenskultur* (Tübingen: Mohr Siebeck, 1994) 7–35, 27; a more recent study on the interplay: A. Hellgardt, 'Europäisches Kapitalmarktrecht und Corporate Governance – Unternehmensüberwachung als Ziel der Europäischen Kapitalmarktregulierung', *Festschrift für Hopt* (Berlin: de Gruyter, 2010) 397–422. Today, it is in this line of ideas that specific laws on the internal organisation of listed companies is developed (stock exchange company law, *'Börsengesellschaftsrecht'*): see a short survey in S. Grundmann, *European Company Law: Organization, Finance and Capital Markets*, (2nd ed, Antwerp and Oxford: Intersentia, 2012) para 617.

43 The German consumer association reports approximately 1500 cases per year, 20-25 % of which are brought before a court; https://www.verbraucherzentrale.de/wissen/vertraege-reklamation/kundenrechte/verbraucherrechte-letzter-ausweg-klage-10833, last access: 20 January 2019.

In the following, only *integration of standard contract terms into B2C relationships* will be considered – as most Member States, the UCTD and the Restatement subject such terms to control only for B2C relationships. In this scenario, the prevalent rule is to require (explicit) manifestation of will to integrate a set of terms, reasonable opportunity to take note of them and their content for the consumer and consent by the latter (albeit only implied via assent to the transaction).[44] The core advantage of these requirements is not necessarily that consumers tend to take substantive note in a considerable number of cases, but that the *set of terms is thus ear-marked in a completely transparent way*. Consumer associations do not risk the possibility that a target of attack will be with drawn once they open a law suit. Businesses cannot invent procedures via which on the one hand they hold consumers to certain standard contract terms, but on the other hand they can avoid being target of such control intermediaries.

Thus, clear rules on integration facilitate fairness control – at least for those actors who are the source of the densest scrutiny, in numbers and potentially also in substance. However, in the interest of individual consumers as well, the question arises whether there should not be a *duty to choose the simplest way of integration*, or, to put it differently, whether indeed the law should facilitate techniques by which businesses obscure for the consumer to which standard contract terms he is bound. One such technique is to permit standard contract terms to be provided only later on – even if, as in most cases, they had well been known to the business already at the moment of entering into the transaction. At least, when a conflict then arises, such techniques further disadvantage consumers in a potential attempt to defend herself via obscuring the legal situation as to whether the contract terms at stake have been integrated or not. The rationale of Article 10 n 5 of the EC E-Commerce would seem to require from the business that shapes the process of formation of the obligation that it does not obscure the process and that it makes at least the decisive moment for formation as simple and as clear as possible. Moreover, if de facto a withdrawal from the contract becomes more difficult – for instance via putting the burden of termination and at least some costs on the consumer (see § 2 lit b Restatement) –, even the potential to choose differently because of standard contract terms is de facto foreclosed. Facilitating techniques that still reduce potential choice and that obscure the process of assent is not convincing as a policy approach, at least not when businesses could well have chosen as well a clearer way.

Applied to § 2 lit b and to § 3 of the Restatement (the cases of post-transaction integration/change of standard contract terms), the explanations made so far

44 See references above footnote 11.

would speak in favour of putting at least all the burden of rejection by the consumer on the business (all costs, and no duty of the consumer to arrange for return). If at all, the possibility of post-transaction assent is needed only and should be given only when businesses can show that another way of arranging was de facto impossible ('disproportionately difficult' as German law puts it for a different scenario). While the need to change standard contract terms is typically more plausible in ongoing relationships where future developments are at stake and cannot be foreseen (context of § 3 of the Restatement) than in discrete contracts (with post-transaction assent according to § 2 lit b Restatement), the solution advocated may even be preferable in ongoing relationships. It avoids difficult questions of proof and triggers a mechanism by which changes by the business that disfavour consumers – as compared to the regime in place before – are increasingly burdensome. Businesses will lose more consumers when not making the necessity of change and the relatively small deviation rather plausible. At the very least, all costs should be put on the business when it chooses such an obscuring (post-transaction assent) arrangement. This would need to include a duty to inform the consumer that he can terminate and the business will arrange itself for taking back completely free of charge and costs. In any case, § 3 lit c of the proposal – requiring that an ex-post change may not run counter the 'spirit' of what had been agreed on – should not be limited to the situation where a need to change periodically is more plausible, ie in the ongoing relationship. It should apply to § 2 lit b of the proposal *a fortiori*.

These considerations do not only speak against the concrete shape of § 2 lit b Restatement, but in favour of still more stringent solutions. The fact that the power of shaping the process of integration is with the business should have further consequences. The corollary to such power should rather be that the business has to shape it as simple and as transparent as possible – for instance to make it as clear as possible in composite contracts (cell phone as item, license, monthly telecommunication contract) with which business which contract and standard contract terms are made and integrated. A legislature, taking into consideration the problem of adverse selection in cases of information problems (including uncertainties about legally binding effect), should mandate those with the power to shape the process to use the simplest method possible, unless they can prove that the application of such simple method has striking and considerable drawbacks. The duty to provide transparency, contained in Articles 4 and 5 UCTD and forming an overarching principle, can be read in this sense.

V Rules on Fairness and Enhancing Negotiation Processes

1 (*Premia* for) Facilitating Fairness Scrutiny

If fairness control constitutes indeed the core of control of standard contract terms – as the prevalence of this control in the UCTD would suggest and as the Restatement rather clearly states –,[45] facilitating such control – either by individual consumers or by consumer associations – would seem to constitute a logical first step. The opposite of facilitating such control, albeit in the form of (weak) voice by individual consumers, is obstructing (or abolishing) voice or voice systems. If the Restatement – for questions of competence – is barred from considering procedural issues (such as arbitration clauses or clauses barring class actions, namely systematic and far-spread use of arbitration clauses that exclude state courts in some [?] cases),[46] this technique would probably qualify as such a de facto abolition or obstruction. In Europe, the first case on the UCTD invalidated a clause obstructing de facto access to justice, in that case a forum clause.[47]

One step towards facilitating fairness scrutiny – in the form of weak voice by individual consumers, but as well in the form of stronger voice exercised by associations – was already named. This step consisted in putting the burden of decreased transparency (clarity) on the business. Businesses should carry the full costs of choosing the instrument of post-transaction assent (if admitting it at all); lack of transparency in the use of divided terms should even lead to their nullity

45 See Bar-Gil, Ben-Shahar and Marotta-Wurgler, n 6 above, 5 and 74 (stating that 'the ultimate goal of the unconscionability doctrine is to deny enforcement to contract terms that are fundamentally unfair') *et seq*; in this sense, see as well H. Eidenmüller, 'Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR' (2009) *European Review of Contract Law* 128; H. Beale, 'Legislative Control over Fairness: The Directive on Unfair Terms in Consumer Contracts', in J. Beatson and D. Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) ch 9.

46 In this sense, Bar-Gil, Ben-Shahar and Marotta-Wurgler, n 6 above, 4 – where the following development is described, but then explicitly all further discussion is excluded a limine: 'One such statute is the Federal Arbitration Act (FAA), which was held by the US Supreme Court to preempt, in some cases, the application of the common-law doctrine of unconscionability to arbitration clauses.'

47 CJEU of 27 June 2000 – case C-240/98, *Océano Grupo*, [2000] ECR 2000 I-04941; on this case and its rationale, see J. Stuik, 'Joined Cases C-240/98 to C-244/98, Oceano Grupo Editorial SA v Rocio Murciano Quintero and Salvat Editore SA v Jose M. Sanchez Alcon Prades et al, Judgment of the Full Court of 27 June 2000' (2001) 38 *Common Market Law Review* 719; on further developments with respect to such procedural clauses, see also Micklitz and Reich, n 4 above, 780 *et seq*.

(non-integration). These are obstacles to an exercise of control/voice that can be avoided; incentives for using the potential of more clarity are hence desirable. Doctrinally, the concept of 'reasonable possibility to review' (Restatement, proposal, Article 2 lit a n 2 and p 7 *et passim*) could be used to this end. This is important even for the cases of individual consumers, even though only a (relatively small) minority will use the possibility to review, and even though even the informed minority concept has to admit that the impact of such a potential of review may be weak.[48] The most important benefit of any rule that requires and clarifies well observable steps of integration of standard contract terms into the contract is, however, that of market wide transparency – namely for control and information intermediaries. They profit considerably from clear integration rules for the performance of their important role as watch-dogs.

2 (*Premia* for) Facilitating Negotiation Processes

Enhancing fairness control may imply as well directing businesses into forms of arrangements where the suggestion that standard contract terms '*benefit … consumers and businesses alike*' (Restatement, proposal, 34, see above section 3 a) is more likely to hold true. More precisely, this is where there are well observable structures that would suggest that the outcome is considerably more equilibrated than in the typical use of standard contract terms. For the normal use of standard contract terms by businesses, there is neither input legitimacy usually, nor is there output legitimacy[49] (for the latter, see explanations above in section 3 a). In other words, the body that formulates the standard terms is neither particularly legitimized (as neither true consent nor representation of all affected parties in the formulation process is given), nor is there the likelihood of an equilibrated set of contract terms. Directing businesses into forms of arrangements that systematically are more likely to '*benefit … consumers and businesses alike*' would therefore structurally enhance overall fairness. This could be achieved by privileging those standard contract terms that are formulated by all affected parties, ie those that are negotiated between the most relevant groups, certainly including at least the businesses *and* consumer associations. Such privileges could take the following

48 On the informed minority concept, stronger in the context of capital markets, see E.M. Miller, 'Risk, Uncertainty, and Divergence of Opinion' (1977) 32 *The Journal of Finance* 1159; and broader and more recently Esposito, n 27 above.

49 For the concepts of input legitimacy and of output legitimacy, see S. Mena and G. Palazzo, 'Input and Output Legitimacy of Multi-Stakeholder Initiatives' (2012) 22 *Business Ethics Quarterly* 527.

forms. There could (at least) be a presumption of fairness for such standards – a further step would be an exemption.[50] In addition, the argument – often barred – that some beneficial clauses may as well offset some invasive clauses ('overall balance')[51] could be admitted in these contexts. Finally, there could as well be an obligation to use such sets of standard contract terms in the industry/segment where they exist[52] – the solution named last having, however, strong and perhaps even decisive downsides as well, namely with respect to entrepreneurial freedom and (potentially even more important) because of cartelizing effects such mandatory terms for whole segments may have.

A second aspect of handing fairness control over to additional actors – and thus enhancing systematic control – would seem to be more delicate. This would be endeavours to enable consumers themselves – and also individually – to exercise such control. In corporate prospectus law, the approach adopted to empower small private investors consists in mandating a summary of no more than one (well legible) DIN A4 page (Article 7(3) of Prospectus Regulation (EU) 2017/1129). In capital market law, this provision does, however, not exclude the duty to issue a full prospectus and the summary has binding effect (the consequence of liability) only to a limited extent (see Article 11(2) of the Regulation). In standard contract terms law, a parallel rule could be that standard contract terms limited to a certain (really low) number of words – potentially numbers of words could also graded by values of the contact at stake – trigger certain privileges, especially if accompanied by an explicit invitation to 'negotiate' or an option of wavering the clause for a price supplement. Again, a presumption of fairness might ensue. This rule would go considerably into a direction advocated in the literature on beha-

50 In Germany, this had initially been the stance taken by case law of the private law supreme court (*Bundesgerichtshof*) when standard contract terms had been negotiated by associations with such broad reach, see BGH, Judgement of 16 December 1982, VII ZR 92/82, BGHZ 86, 135 *et seq* (para 28); BGH, Judgement of 3 November 1994, I ZR 100/92, BGHZ 127, 275 *et seq* (para 21). This stance has had later been given up, see BGH, Judgement of 24 July 2008, VII ZR 55/07, BGHZ 178, 1 *et seq* (para 24). Nowadays, § 310 para 1 phrase 3 Civil Code now mostly exempts from fairness control at least one such set of standard contract terms, namely those in the construction industry if the set negotiated there has been integrated in full.

51 This kind of overall balance is typically excluded as justification in the case law, see, for Germany, BGH, Judgement of 29 November 2002, V ZR 105/02, BGHZ 153, 93 *et seq* (para 20); and more broadly the comparative law survey in Beale, Fauvarque-Cosson and Rutgers, n 5 above, 757.

52 This would seem to be the case in the Netherlands, see J. Rutgers, 'Choice of Law in b2b Contracts: the Law of the Jungle. Exploratory Interviews with Dutch Lawyers' (2018) 14 *European Review of Contract Law* 241, 259. For a critique of such mandatory use of negotiated standard contract terms, see O. Bar-Gil and O. Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' (2013) 50 *Common Market Law Review* 109.

vioural regulation, framing and nudging.[53] This would allow businesses not to 'drown' their customers in terms, but nevertheless to make the one or two adaptations that they see as being paramount for their business and still give some plausibility to a concrete option of reading for consumers – thus making these short terms much more plausibly and frequently a potential object of debate. Dogmatically, such a solution could be justified via the rule that negotiated terms are totally exempted from fairness control. It could be argued – a bit less far reaching – that fairness and transparency are seen as communicating vessels – as the Restatement suggests (see p. 98–102) – and lower the threshold of the one if the other prerequisite is satisfied to a particularly high degree.

VI Conclusions

Altogether, this article pleads for a much more holistic view of both the rules on integration of standard contract terms and of their fairness control. For the former area, the propositions might sound 'traditional' at first sight, because they stick to a rather strict pre-transaction consent criterion. At the same time, the core understanding is one that deviates totally from the traditional one as not only the individual consumer is taken as (prime) addressee of these rules, but (even much more importantly) also organized control intermediaries such as consumer associations. Moreover, some argument is made in favour of a duty to render standard contract terms as transparent as possible. This 'duty' potentially gets most of its bite via privileging particularly transparent or even collectively negotiated terms. In these cases, the main source and problem of why standard contract terms are so different from normal contract contents – the highly increased information and apathy problems – is considerably mitigated. This speaks in favour of seeing rules on integration of standard contract terms and rules on their fairness control in communication with each other – perhaps even as a system of communicating vessels.

53 On the concept of 'simple' and 'well framed' in (behavioural) regulation, see R. Baldwin, 'From Regulation to Behaviour Change: Giving Nudge the Third Degree' (2014) 44 *The Modern Law Review* 835; R. Thaler and C. Sunstein, *Nudge* (New Haven: Yale University Press, 2008, revised as Penguin, 2009). See also R. Thaler and C. Sunstein, 'Libertarian Paternalism' (2003) 93 *American Economic Review* 175 and 'Libertarian Paternalism is Not an Oxymoron' (2003) 70 *University of Chicago Law Review* 1159; A. Tversky and D. Kahneman, 'The Framing of Decisions and the Psychology of Choice' (1981) 211 *Science* 453. For a comprehensive review of behavioural research on consumer law with a particular emphasis on the European perspective, see H.-W. Micklitz, A.-L. Sibony and F. Esposito (eds), *Research Methods in Consumer Law* (Chelthenam: Edward Elgar, 2018).