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*Unfair Terms in Consumer Contracts*

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Since 1913, an Act of Congress has protected hogs, sheep and cattle against the marketing of worthless drugs. It is time, we gave men, women and children the same protection.<sup>1</sup>

JOHN F KENNEDY spoke these words on 15 March 1962 when he addressed the US Congress to announce his plans for consumer protection. Consumer policy, which is now laid down in Treaty on the Functioning of the EU (TFEU) Article 169, has not always been included in the Treaties governing the European Union. The Treaty establishing the Economic European Community of 1957 did not mention consumer policy.<sup>2</sup> Ten years after Kennedy's speech to the US Congress, consumer policy was discussed at the Paris Summit in 1972.<sup>3</sup> Nearly seven years later, the European Court of Justice (CJEU) mentioned consumer protection as one of the overriding mandatory requirements when the CJEU introduced the rule of reasons in *Cassis de Dijon*, which could justify an infringement of the free movement of goods.<sup>4</sup> In the Maastricht Treaty (1992), consumer policy was mentioned for the first time. However, already within the context of the internal market, the first consumer, product liability and doorstep selling Directives were adopted in 1985.<sup>5</sup>

Within this context, Directive 93/13/EC on unfair terms in consumer contracts<sup>6</sup> ('Unfair Terms Directive') was adopted on 5 April 1993. It had to be implemented into the national legal systems of the Member States of the then European Economic Community by 21 December 1994.

<sup>1</sup> See [jfklibrary.org/Asset-Viewer/Archives/JFKPOF-037-028.aspx](http://jfklibrary.org/Asset-Viewer/Archives/JFKPOF-037-028.aspx).

<sup>2</sup> See about the development of consumer policy in the European Union, S Weatherill, 'Consumer Policy' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2011) 837.

<sup>3</sup> [1975] OJ C92/1.

<sup>4</sup> 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

<sup>5</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29; Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31.

<sup>6</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29. For a comparative overview of the transposition of the Directive in French, German and English law, see H Beale *et al* (eds), *Cases, Materials and Text on Contract Law*, Ius Commune Casebooks for the Common Law of Europe, 2nd edn (Oxford, Hart Publishing, 2010) 780.

It has been suggested<sup>7</sup> that this Directive does not only concern unfair terms, but ‘goes to the heart of contract law’.<sup>8</sup> In *Océano*, the CJEU handed down the first decision regarding this Directive, in 2000.<sup>9</sup> This decision resulted in an essential change as to how the courts should deal with general conditions and the notion of avoidance in many Member States. This is just one example of the effect of the Unfair Terms Directive on contract law. The question which I will address in this chapter is whether this Directive has gone to the heart of contract law. To do so, I will discuss the case-law of the CJEU and try to place the cases in a broader perspective.

As is well known, the Unfair Terms Directive aims at the protection of the consumer. This is stated in the recitals to the Directive and the CJEU referred to this repeatedly:

the system of protection implemented by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge.<sup>10</sup>

The Directive only applies to business to consumer (‘B2C’) contracts. The consumer is a natural person who acts outside his business, trade or profession, whereas the seller or supplier is either a natural or a legal person who acts within his business, trade or profession (Unfair Terms Directive, article 2(b), (c)). Moreover, the Directive concerns minimum harmonisation. This implies that Member States are allowed to have more stringent rules to protect the consumer (article 8).<sup>11</sup> According to the general scheme of the Directive, an unfair term in a B2C contract which is not individually negotiated, is not binding. However, contract terms that constitute the core of the contract do not have to pass the fairness test, provided they are in plain and intelligible language. The Directive gives general indications when a term is considered to be unfair. In addition, a term must be in plain and intelligible language (article 5). Hereafter, I will discuss in particular the recent case-law of the CJEU as to whether the Unfair Terms Directive goes to the heart of contract law.

## UNFAIR TERMS

### Preliminary Remarks

To assess whether a contract term is unfair, it must first be established whether the challenged contract term falls within the scope of the Unfair Terms Directive, which concerns a non-individually negotiated term in a B2C contract (Unfair Terms

<sup>7</sup> E Hondius, ‘The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States’ (1995) *ERPL* 242.

<sup>8</sup> See also titles of books concerning this Directive: 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 in this respect H Collins, ‘Good Faith in European Contract Law’ (1994) 14 *OJLS* 253.

<sup>9</sup> C-240/98–C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero; Salvat Editores SA v José M. Sánchez Alcón Prades, José Luis Copano Badillo, Mohammed Berroane, Emilio Viñas Feliú* [2000] ECR I-4941.

<sup>10</sup> C-472/11 *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, 21 February 2013 (CJEU, nyr).

<sup>11</sup> See, eg also C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I-4785.

Directive, art 3(1)).<sup>12</sup> Moreover, the unfairness of a term that belongs to the core terms of the contract, provided that they are in plain and intelligible language, cannot be challenged (article 4(2)). The CJEU has held that this exemption does not apply in the case of mechanisms that amend/change the price of either the services or the goods.<sup>13</sup>

Within English case-law and literature there is a discussion as to which terms belong to the core of the contract and how this must be established.<sup>14</sup> I will not discuss English law, but I would like to address one element of that discussion. In this respect references are made to the average or typical consumer. It has been argued that, as to whether a term relating to the price of the service or the good is a core term of the contract, the term at stake must be considered through the eyes of the typical or average consumer.<sup>15</sup> This was dismissed by Lord Mance in *Office of Fair Trading v Abbey National*, who held that this would not fit within the scheme of the Directive, since it introduced too complicated a test.<sup>16</sup>

The notion of the average consumer is taken from European law. In this respect, Directive 2005/29/EC on unfair commercial practices<sup>17</sup> and the CJEU ruling in *Gut Springenheide*<sup>18</sup> are mentioned. Whittaker argues that for the sake of uniformity in European law, the notion of the average consumer should be used.<sup>19</sup> He refers to a number of CJEU decisions, but does not distinguish as to the subject matter of the case. Does it concern free movement or, for instance, is it a case concerning harmonisation of the labelling or marketing of eggs, which was the situation in *Gut Springenheide*.<sup>20</sup> This notion, however, has also been criticised.<sup>21</sup> Thus, opinions differ as to whether the consumer to be protected under the Unfair Terms Directive is the average consumer. Unberath and Johnston have pointed out that, in the case of consumer protection, the CJEU case-law has a double face.<sup>22</sup> In their view, a distinction must be made between the case-law relating to the free movement of

<sup>12</sup> Cf Weatherill, 'Consumer Policy', n 2 above, 858; S Whittaker in H Beale (general ed), *Chitty on the Law of Contracts*, vol I, *General Principles* 31st edn (London, Sweet & Maxwell, 2012) para 15–053.

<sup>13</sup> C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, 26 April 2012 (CJEU, nyr) para 23.

<sup>14</sup> *Office of Fair Trading v Abbey National plc* [2009] UKSC 6; *Chitty on the Law of Contracts*, n 12 above, para 15-033; S Whittaker, 'Unfair Contract Terms, Unfair Prices and Bank Charges' (2011) 74 *MLR* 114. Cf M Kenny, 'The Law Commissions' 2012 Issues Paper on Unfair Terms: Subverting the System of Europeanized Private Law' (2013) *ERPL* 871.

<sup>15</sup> *Chitty on the Law of Contracts*, n 12 above, para 15-033; Whittaker, 'Unfair Contract Terms, Unfair Prices and Bank Charges', n 14 above. See further in respect of the average consumer T Wilhelmsson, 'Cooperation and Competition regarding Standard Contract Terms in Consumer Contracts' (2006) *EBLR* 52.

<sup>16</sup> *Office of Fair Trading v Abbey National plc* [2009] UKSC 6, para 102. Cf Beale *et al*, *Cases, Materials and Text on Contract Law*, n 6 above, 809.

<sup>17</sup> Directive 2005/29/EC on unfair commercial practices [2005] OJ L149/22.

<sup>18</sup> C-210/96 *Gut Springenheide GmbH and R Trusky v Oberkreisdirektor des Kreises Steinfurt and Amt für Lebensmittelüberwachung* [1998] ECR I-4657.

<sup>19</sup> Whittaker, 'Unfair Contract Terms, Unfair Prices and Bank Charges', n 14 above.

<sup>20</sup> *Chitty on the Law of Contracts*, n 12 above, para 15-033; C-210/96 *Gut Springenheide GmbH*, n 18 above.

<sup>21</sup> Collins, 'Good Faith in European Contract Law', n 8 above; E Macdonald, 'Bank Charges and the Core Exemption: *Office of Fair Trading v. Abbey National Plc*' (2008) 71 *MLR* 990.

<sup>22</sup> H Unberath and A Johnston, 'The Double-headed Approach of the ECJ concerning Consumer Protection' (2007) 44 *CML Rev* 1237. Cf H-W Micklitz *et al* (eds.), *Cases, Materials and Text on Consumer Law* (Oxford, Hart Publishing, 2010) 38.

goods and consumer protection, on the one hand, and the case-law relating to Directives harmonising consumer law, on the other.<sup>23</sup> As to the free movement cases, a national rule can be challenged if it is contrary to the free movement of goods. Nevertheless, if an impediment to the free movement of goods is established, a national rule can be justified, *inter alia*, because of consumer protection, provided the other requirements of the rule of reason are also met.<sup>24</sup> In these instances, only national rules which protect the confident, circumspect and well-informed consumer may justify an infringement; more protection for the consumer is dismissed by the CJEU. Many of these free movement cases concern national rules on advertising or marketing.

In the case of positive integration, harmonisation of rules relating to consumer transactions, another type of consumer is protected, Unberath and Johnston have argued.<sup>25</sup> Among those Directives, the Directive on unfair commercial practices<sup>26</sup> is the odd one out, because it provides explicitly that the consumer to be protected under that Directive is the average consumer. This notion has been taken from the case-law on free movement as regards advertising law.<sup>27</sup> Taking into account the distinction between the two types of cases, as Unberath and Johnston have pointed out, it does not seem obvious that the notion of the average consumer should be used to determine the core terms of the contract.

Thus, if a term is not individually negotiated and does not belong to the core of the contract, a court can establish whether a term is unfair.

## Unfair

A term is ‘unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer’ (Unfair Terms Directive, article 3(1)). Assessing this significant imbalance contrary to good faith, ‘all the circumstances attending the conclusion of the contract and ... all the other terms of the contract or of another contract on which it is dependent’ must be considered, as well as ‘the nature of the goods or services for which the contract was concluded’ (article 4(1)). From the CJEU case-law it can be inferred which circumstances must be considered. In *Freiburger Kommunalbauten*, the CJEU held that ‘the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to national law’.<sup>28</sup> The case concerned Mr and Mrs Hofstetter, who had bought a parking space in a car park which had still to be built. According to the contract, they had to pay the price before the building was finished and the builder had to provide them with a bank guarantee. They refused to pay the price,

<sup>23</sup> Unberath and Johnston, ‘The Double-headed Approach of the ECJ’, n 22 above.

<sup>24</sup> *ibid.* Cf Weatherill, ‘Consumer Policy’, n 2 above, 842.

<sup>25</sup> Unberath and Johnston, ‘The Double-headed Approach of the ECJ’, n 22 above.

<sup>26</sup> See n 17 above.

<sup>27</sup> Micklitz *et al*, *Cases, Materials and Text on Consumer Law*, n 22 above, 38.

<sup>28</sup> C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v L Hofstetter and U Hofstetter* [2004] ECR I-3403, para 21. Note by MW Hesselink, (2006) 2 *ERCL* 366; C-76/10 *Photovost’ SRO v Iveta Korčková* [2010] ECR I-11557.

whereas the builder had done what he had to do. The builder started proceedings against the couple and claimed payment of the price. Mr and Mrs Hofstetter argued that the clause according to which they had to pay the full price before the building was finished was unfair. Under German law, the clause was fair, because the builder had to provide a bank guarantee and had done that.

In addition, the other circumstances to be considered are all the other terms of the contract<sup>29</sup> and information included in a term which can be considered an unfair commercial practice.<sup>30</sup> There is a list of clauses which could be considered unfair (article 3(3)). Thus, the test to be applied as to whether a clause is unfair is whether there is a significant imbalance to the detriment of the consumer contrary to good faith, considering all the circumstances during the conclusion of the contract and the other terms of the contract.<sup>31</sup>

### Significant Imbalance Contrary to Good Faith

In *Aziz*, the CJEU discussed what pertains to a significant imbalance in the rights and obligations to the detriment of the consumer.<sup>32</sup> In that case, Mohammed Aziz had borrowed EUR138,000 from a Catalan bank, CatalunyaCaixa, to pay off another loan, which he had used to buy his family home in Spain. The loan was secured by a mortgage which was vested in the family home. At the moment he borrowed the money, 19 July 2007, Aziz had a monthly income of EUR1,341. Until 30 January 2008, he had to pay a fixed amount of interest of EUR701.04. After that date, the interest was variable. From May 2008, Aziz failed to pay the monthly instalments. The general conditions of the loan agreement stipulated that if a debtor failed to pay, he had to pay an interest rate of 18.75 per cent. Aziz had accrued a debt of EUR139,764.76 when the bank started enforcement proceedings against Aziz to sell the house. In the end, the family home was sold for 50 per cent of its value and Aziz was forced to leave the house on 21 January 2011. In the meantime, Aziz had also started proceedings in which he asked for a declaratory judgment that clauses in his loan contract were unfair. Under Spanish procedural law, the enforcement proceedings could not be deferred until a decision on whether the stipulations concerning the interest rate were unfair was given.

To assess whether there is a significant imbalance to the detriment of the consumer, the CJEU held that a court must make a comparison between the situation where the contract was concluded and the situation where there is no contract.<sup>33</sup> The latter refers to the situation where a court will apply the national rules as if there is no

<sup>29</sup> C-472/11 *Banif Plus Bank Zrt v C Csipai and V Csipai*, n 10 above, para 41. *Chitty on the Law of Contracts*, n 12 above, para 15-86.

<sup>30</sup> C-453/10 *J Pereničová and V Perenič v SOS financ spol SRO*, 15 March 2012 (CJEU, nyr), Note by B Keirsblick, 'The Interaction between Consumer Protection Rules on Unfair Contract Terms, and Unfair Commercial Practices: Pereničová and Perenič' (2013) 50 *CML Rev* 247; *Chitty on the Law of Contracts*, n 12 above, para 15-077.

<sup>31</sup> See C-137/08 *VB Pénzügy Lízing v F Schneider* [2010] ECR I-10847.

<sup>32</sup> Case C-415/11 *M Aziz v Caixa d'Estalvis de Catalunya, Tarragona I Manresa (Catalunyacaixa)*, 14 March 2013 (CJEU, nyr).

<sup>33</sup> Consideration 68.

contract. A court can then assess whether and to what extent the consumer will be in a worse position. If so, there is a significant imbalance. In a subsequent judgment, *Menéndez Álvarez*, the CJEU observed that the assessment of a significant imbalance is not restricted to a quantitative economic evaluation.<sup>34</sup> In that case, Menéndez Álvarez had bought a house. According to the sale contract, he was responsible for payment of an urban tax, which he paid, whereas it was the legislator's intention that this tax should be borne by the seller. The question arose whether this clause was unfair, because the buyer had to pay a tax for which he was not liable. The CJEU considered that an impairment of the legal situation sufficed. The CJEU referred to three types of impairment: a restriction of rights; a constraint on the exercise of such rights; an imposition on the consumer of additional obligations.

Apart from the significant imbalance, the contract term must also be contrary to good faith to qualify as unfair. In *Aziz*, the CJEU elaborated on this.<sup>35</sup> The test to be applied is whether 'the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations'.<sup>36</sup>

### Annex to Unfair Terms Directive

Another important element to assess as to whether a clause is unfair is the list provided in the Annex to the Unfair Terms Directive. According to article 3(3) of the Directive, these clauses may be considered unfair. The CJEU was asked repeatedly what the meaning of these terms are and in which situations they apply.<sup>37</sup> In general, the CJEU held that inclusion of a term on the list is an essential element to assess whether a clause is unfair.<sup>38</sup> In other words, inclusion is a strong indication that a term is unfair. Further, where necessary, the terms listed in the Annex must be interpreted in the light of articles 3 and 4 of the Directive.<sup>39</sup> This line of reasoning of the CJEU seems to deviate from its ruling in *Océano*, where it held that a forum choice for the seller's place of business was an unfair term, because these terms were included in paragraph 1(q) of the Annex.<sup>40</sup>

Apart from the general meaning of the Annex, the CJEU also discussed specific terms of the Annex. As already stated, in *Océano*, the CJEU held that a forum choice for the place of business of the seller fell within the scope of paragraph

<sup>34</sup> C-226/12 *Constructora Principado SA v José Ignacio Menéndez Álvarez*, 16 January 2014 (CJEU, nyr) para 24.

<sup>35</sup> C-415/11 *M Aziz v Caixa d'Estalvis de Catalunya*, n 32 above, para 68.

<sup>36</sup> *ibid* para 69. A different test seems to be proposed in *Chitty on the Law of Contracts*, n 12 above, para 15-074, where good faith is 'to ensure that the test of "significant imbalance" ... is not applied in any sense mechanically'.

<sup>37</sup> C-415/11 *M Aziz v Caixa d'Estalvis de Catalunya*, n 32 above, para 74.

<sup>38</sup> C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, n 13 above; C-488/11 *DF Asbeek Brusse and K de Man Garabito v Jahani BV*, 30 May 2013 (CJEU, nyr) para 55. In an earlier decision, C-243/08 *Pannon GSM Zrt v E Sustikné Györfi* [2009] ECR I-4713, para 43, the CJEU applied a more lenient test.

<sup>39</sup> C-243/08 *Pannon GSM Zrt v E Sustikné Györfi*, n 38 above.

<sup>40</sup> C-240/98–C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero*, n 9 above.

1(q) of the Annex and the CJEU itself held that it was an unfair term.<sup>41</sup> This was nuanced in later decisions.<sup>42</sup> In *Pannon*, also a forum choice for the place of the seller's business was included.<sup>43</sup> The forum was 275 km from the place where the buyer, who received an invalidity benefit, lived. Moreover, there was no direct train or bus connection, as a result it was very difficult for the consumer to reach the court chosen. The CJEU did not consider itself whether the clause was unfair, but held that it was for the national court to do so taking into account all the circumstances described above.<sup>44</sup>

Another term listed in the Annex is the term according to which a consumer must pay a disproportionately high sum in compensation (paragraph 1(e)). In a number of cases, where especially Spanish courts had referred cases for a preliminary ruling, the CJEU considered paragraph 1(e) in connection with paragraph 1(g) and paragraph 2(a).<sup>45</sup> One element of the tests which the CJEU explicitly referred to in connection with articles 3 and 4 is that the national court must compare the statutory interest with the interest laid down in the contract. The CJEU applied the rule which it expressed as to the meaning of significant imbalance.

Another issue which the CJEU confirmed was that in long-term contracts, the supplier or seller has a legitimate interest to change the price unilaterally. If he does so, he must meet the requirements of transparency, balance and good faith. This all follows from paragraph 2(b) second sentence and (d) of the Annex.<sup>46</sup> Crucial is whether 'the reason for and the mode of a change of costs are specified in a transparent way in the contract', so that the consumer may expect the cost increases. Moreover, in the case of a price increase, the consumer must have the possibility of ending the contract.

To sum up, from the case-law it follows that to assess whether a term is unfair, all the circumstances at the moment of conclusion of the contract are relevant, as well as the other terms of the contract. Moreover, to assess whether there is a significant imbalance to the detriment of the consumer, it does not suffice to assess whether the economic situation of the consumer is worse. Reference must also be made to the legal situation. To assess whether this is the case, a comparison must be made between the situation as if no contract had been concluded and the situation under the contract. In addition, under the case-law of the CJEU, the notion of good faith refers to the situation where a seller or supplier could reasonably expect a consumer to enter into a contract with those terms if the consumer had negotiated about the contract terms individually. The Annex (referred to in Unfair Terms Directive,

<sup>41</sup> *ibid*; *Chitty on the Law of Contracts*, n 12 above, para 15–106.

<sup>42</sup> See, eg C-243/08 *Pannon GSM Zrt v E Sustikné Györfi*, n 38 above; C-137/08 *VB Pénzügy Lízing v F Schneider*, n 31 above.

<sup>43</sup> C-243/08 *Pannon GSM Zrt v E Sustikné Györfi*, n 38 above.

<sup>44</sup> It must be noted that arguably it follows from the holding in C-413/12 *Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España*, 5 December 2013 (CJEU, nyr), that in the case of consumer organisations, a forum choice for the habitual residence of the seller is permitted.

<sup>45</sup> C-415/11 *M Aziz v Caixa d'Estalvis de Catalunya*, n 32 above, para 74; C-537/12 and C-116/13 *Banco Popular Español SA v Maria Teodolinda Rivas Quichimbo and Wilmar Edgar Cum Pérez; Banco de Valencia SA v J Valldeperas Tortosa and MÁ Miret Jaume*, 14 November 2013 (CJEU, nyr).

<sup>46</sup> C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, 21 March 2013 (CJEU, nyr).

article 3(3)) is an essential element, together with those mentioned in articles 3 and 4, to establish whether a clause is unfair.

#### ADDITIONAL REQUIREMENTS

The Unfair Terms Directive provides that unfair contract terms are non-binding. In addition, article 5 of the Directive also provides that a term must be in plain and intelligible language. The Directive does not provide a remedy where a contract includes an incomprehensible term.<sup>47</sup> It only provides the *contra proferentem* rule, which implies that in case of doubt the most favourable interpretation for the consumer must be taken.

Together with recital 20 of the Directive, the CJEU has also inferred from this provision that the information on contract terms must be available before the conclusion of the contract.<sup>48</sup> This is ‘of fundamental importance to the consumer’.<sup>49</sup> In practice, this results in an obligations for the seller or supplier to provide the consumer with the contract terms before the conclusion of the contract, otherwise the consumer is not able to read the contract terms before entering into it. Thus, the CJEU presumes that the consumer reads the terms of the contract if they are provided to them before entering into the contract. The underlying idea is that the consumer understands the contract terms if he reads them before the conclusion of the contract and consequently he can take a well-informed decision about entering into the contract.<sup>50</sup> However, this idea is questioned, because in daily life a consumer does not read general terms.<sup>51</sup> A consumer does not read the general conditions before he buys a train ticket, because ‘[r]eading is boring, incomprehensible, alienating, time-consuming, but most of all pointless. We want the product, not the contract’,<sup>52</sup> as Ben-Sahar writes.

In this respect, the question is raised whether the duty to provide the information before the conclusion of the contract should not be abandoned, because it does not reflect empirical evidence and should be replaced by other means, for instance ranking of companies.<sup>53</sup>

Where the supplier or seller fails to provide the general conditions before the conclusion of the contract, the case-law does not indicate what the remedy should be, albeit, it is provided that it does not suffice to provide the information during the contract.

<sup>47</sup> Collins, ‘Good Faith in European Contract Law’, n 8 above.

<sup>48</sup> C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, n 13 above, para 27; C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, n 46 above; C-226/12 *Constructora Principado SA v JI Menéndez Álvarez*, 16 January 2014 (CJEU, nyr) para 24.

<sup>49</sup> C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, n 13 above, para 27; C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, n 46 above; C-226/12 *Constructora Principado SA v JI Menéndez Álvarez*, n 48 above, para 24.

<sup>50</sup> Cf O Ben-Sahar, ‘The Myth of the Opportunity to Read in Contract Law’ (2009) *ERCL* 1.

<sup>51</sup> *ibid*; O Ben-Sahar and CE Schneider, ‘The Failure of Mandated Disclosure’ (2011) 159 *University of Pennsylvania Law Review* 647.

<sup>52</sup> Ben-Sahar, ‘The Myth of the Opportunity to Read in Contract Law’, n 50 above.

<sup>53</sup> O Bar-Gill and O Ben-Shahar, ‘Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law’ (2013) 50 *CML Rev* 119.



## UNFAIR CLAUSES: NON-BINDING

An unfair clause is non-binding (Unfair Terms Directive, article 6). This is a mandatory provision which aims ‘to replace the formal balance which the contract establishes between the rights and the obligations of the parties with an effective balance which re-establishes equality between them’.<sup>54</sup> Non-binding is not a technical legal term. In some legal systems of the Member States, a distinction is made between nullity and avoidance. Non-binding means nullity rather than avoidance within the meaning of the Directive.<sup>55</sup> Also, other questions rise in this respect, for instance, whether a court may declare the whole contract non-binding if the consumer is better off that way. The CJEU held that this is not the legal consequence which the Directive attaches to an unfair clause, but since the Directive concerns minimum harmonisation, national legal systems can include that remedy in their legislation.<sup>56</sup>

Another question is whether the non-bindingness of a clause in one particular case also has consequences for other cases. In *Invitel*, the CJEU said ‘no’.<sup>57</sup> However, in a recent decision, *Banco Popular Español*, the CJEU explicitly referred to its previous decision in *Aziz* and its conclusion in that decision. In that sense, there is an informal way of dealing with precedents.<sup>58</sup> The situation occurs most frequently when there are frequently used general conditions in a particular field. In practice, it is very likely that a court will follow an earlier decision, but it will result in costs for the litigating parties.

The notion of non-bindingness is not only important with respect to the remedy, but also concerns rules of civil procedural law. Now, I will deal with the latter consequences.

In *Océano*, the CJEU held, in answer to a preliminary question of a Spanish court, that a court has to apply the national rules transposing the rules laid down in the Unfair Terms Directive, by its own motion.<sup>59</sup> The reasoning is that the Directive aims at the protection of the consumer vis-à-vis the supplier or the seller, because the consumer is in a weaker position than the creditor. To make sure that the consumer will have the protection he is entitled to under the Directive, a court must apply the rules of its own motion. A considerable number of preliminary questions, in which national courts sought guidance, followed *Océano*.<sup>60</sup> The CJEU ruled in a similar vein. However, a few qualifications were made. To apply a rule of its own motion, a court must have sufficient factual and legal information.<sup>61</sup> Moreover, a court cannot

<sup>54</sup> See, eg C-76/10 *Photovost’ SRO v Iveta Korčková*, n 28 above, para 38.

<sup>55</sup> V Trstenjak, ‘Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU’ (2013) *ERPL* 459.

<sup>56</sup> C-453/10 *J Pereničová and V Perenič v SOS financ spol SRO*, n 30 above.

<sup>57</sup> C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, n 13 above.

<sup>58</sup> C-537/12 and C-116/13 *Banco Popular Español SA v MT Rivas Quichimbo*, n 45 above.

<sup>59</sup> Cf *Chitty on the Law of Contracts*, n 12 above, para 15–130; V Trstenjak and E Beysen, ‘European Consumer Protection Law: *Curia Semper Dabit Remedium?*’ (2011) 48 *CML Rev* 119; Trstenjak, ‘Procedural Aspects of European Consumer Protection Law’, n 55 above; Weatherill, ‘Consumer Policy’, n 2 above, 859.

<sup>60</sup> See, eg C-137/08 *VB Pénzügy Lízing v F Schneider*, n 31 above; C-76/10 *Photovost’ SRO v Iveta Korčková*, n 28 above.

<sup>61</sup> *Chitty on the Law of Contracts*, n 12 above, para 15–131.

declare a term unfair if a consumer opposes this.<sup>62</sup> In addition, a court must inform the parties that it will apply of its own motion the rules concerning unfair terms, and invite the parties to express their view on it.<sup>63</sup> The CJEU referred in this respect to the right to a fair trial as laid down in Article 47 of the Charter of Fundamental Rights, which includes, amongst other things, the principle of *audi alterem partem*.

This is an effective way of preventing consumers being bound by unfair terms and the use of unfair terms by traders in contracts with consumers, the CJEU held.<sup>64</sup> It also elaborated why the consumer does not raise the unfairness of the term. It could, for instance, be that the consumer is not aware of his rights or he does not appear in the proceedings because of the costs which those proceedings would involve.<sup>65</sup>

Whether a court must apply a rule of its own motion is generally considered to belong to the ambit of civil procedural law. This is not the only example of the way the Unfair Terms Directive affects national civil procedural law. If national rules of civil procedural law render the enforcement of consumer rights which stem from European law practically impossible, such national rules cannot be applied.<sup>66</sup> To come to this conclusion, the CJEU has used the doctrine of effective judicial protection. It applies in situations where the matter at stake has not been harmonised (in the words of the CJEU: it is a matter for the Member States), but these national rules prevent or render the enforcement of rights to which a person is entitled under European law more difficult or even impossible. If that is the case, the national rule cannot be applied in that situation.<sup>67</sup> To test whether the national rules render the enforcement of rights derived from European law more difficult, the CJEU uses the principles of effectiveness and equivalence.<sup>68</sup> The latter refers to the situation where there is a similar rule under national law. In those instances, the European situation must be treated in the same way as the national one. If not, the national rules cannot be applied. This was at stake in *Asbeek Brusse*.<sup>69</sup> Under Dutch civil procedural law, a court must apply rules of public policy even on appeal and even if the parties have not mentioned the issue in their complaints. However, on appeal a court is not allowed to raise issues which fall outside the complaints concerning the decision at first instance. The CJEU held that the rules laid down in the Unfair Terms Directive are comparable to rules which have a public policy character within the national legal system. As a consequence, since a court must apply national rules of a public policy character of its own motion on appeal, it

<sup>62</sup> C-243/08 *Pannon GSM Zrt v E Sustikné Györfi*, n 38 above.

<sup>63</sup> C-472/11 *Banif Plus Bank Zrt v C Csipai and V Csipai*, n 10 above.

<sup>64</sup> C-76/10 *Photovost' SRO v Iveta Korčkovská*, n 28 above, para 41.

<sup>65</sup> *ibid* para 43.

<sup>66</sup> *Chitty on the Law of Contracts*, n 12 above, para 15–131; M Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures or Enforcing Union Law before the National Courts' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd edn (Oxford University Press, 2011) ch 14, 411. See, eg C-76/10 *Photovost' SRO v Iveta Korčkovská*, n 28 above; C-413/12 *Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España*, n 44 above.

<sup>67</sup> Cf Trstenjak and Beysen, 'European Consumer Protection Law', n 9 above, 96.

<sup>68</sup> See, eg C-473/00 *Cofidis* [2002] ECR I-10875; C-488/11 *DF Asbeek Brusse and K de man Garabito v Jahani BV*, n 38 above; C-537/12 *Banco Popular Español SA v Maria Teodolinda Rivas Quichimbo*, n 45 above; and C-116/13 *Banco de Valencia SA v Joaquín Valldeperas Tortosa*, n 45 above. Cf Trstenjak, 'Procedural Aspects of European Consumer Protection Law', n 55 above.

<sup>69</sup> C-488/11 *DF Asbeek Brusse and K de Man Grabito v Jahani BV*, n 38 above.

should also apply rules of a European origin that have a public policy character, of its own motion.

The principle of effectiveness applies when the national rule ‘makes the application of European Union law impossible or excessively difficult’.<sup>70</sup> In *Aziz*, Spanish rules of civil procedure resulted in the impossibility of applying the rules included in the Directive, since it was not permitted to defer the enforcement proceedings relating to the mortgage until another judge had decided whether it concerned an unfair clause.

Thus, the notion of non-bindingness does not only concern the remedy for an unfair term, but also affects national civil procedural law, as follows from the CJEU case-law. National rules which make it practically impossible to render an unfair clause not binding, cannot be applied under CJEU case-law.

## CONCLUSION

The CJEU case-law on the Unfair Terms Directive deals with daily life situations: loan contracts which people enter into because they want to buy a car, a house; subscriptions to gyms; sale contracts to buy a parking lot or an encyclopaedia; rent contracts. By obliging the national court to apply of its own motion the rules in the Directive in so far as there are sufficient legal and factual grounds and, moreover, setting aside national rules according to which this is impossible, the CJEU has shown an activist side, which not only goes to the heart of contract law but also of other areas, for instance civil procedural law. In addition, in answer to preliminary questions, the CJEU has referred to the specific consequences in a particular case; for instance, in *Aziz*, *Aziz* was expelled from his home regardless of whether the terms were considered. Moreover, the CJEU has given guidance on how to interpret the notions of a significant imbalance and good faith. This all leads to the conclusion that, because of the activist approach of the CJEU with respect to the Directive, the Unfair Terms Directive’s reach is beyond mere contract law.

Hugh, I first met within the framework of the Study Group on a European Civil Code. Hugh was one of the members of the drafting committee and I worked within the Amsterdam Team that drafted rules on commercial agency, franchising and distribution. Hugh came to the meetings we had with our advisers as a member of the drafting committee. Subsequently, Hugh invited me to work on the second edition of the *Casebook on European Contract Law*, together with Denis Tallon, Benedicte Fauvarque Cosson and Stefan Vogenauer. I have really fond memories of working together on the *Casebook* in Leamington and the other times we met. We not only discussed law but also, with Jane and Mark, the novels we had read and films we had seen. I hope that we will continue to do so.

<sup>70</sup> C-415/11 *M Aziz v Caixa d’Estalvis de Catalunya*, n 32 above; joined cases C-537/12 and C-116/13 *Banco Popular Español SA v Maria Teodolinda Rivas Quichimbo*, n 45 above; and *Banco de Valencia SA v Joaquín Valldeperas Tortosa*, n 45 above.

