

UNIVERSITA' COMMERCIALE "LUIGI BOCCONI"

PhD SCHOOL

PhD program in *Legal Studies*

Cycle: 38°

Disciplinary Field (code): IUS/01

**The Consequences of the Unfairness of Contract
Terms in Business-to-Consumer Contracts: A
Study of Directive 93/13/EEC in the Context of
Foreign Currency Loans**

Advisor: Prof. Pietro SIRENA

Co-Advisor: Prof. Chantal MAK

PhD Thesis by

Maddalena GINESTRI

ID number: 3029269

Year 2026

ABSTRACT

In the context of European private law, particular attention must be given to Council Directive 93/13/EEC of 5 April 1993 (Unfair Contract Terms Directive), relating to the approximation of the laws and administrative provisions of Member States concerning unfair terms in consumer contracts. Its relevance is such that it calls for a dedicated, in depth study, that moves beyond a neutral description of its content or a simple survey of how its rules have been implemented within the various national legal systems.

Commentators who have addressed this topic have already noted that ‘the originally limited impact of the Directive on Member State contract law and procedure has been substantially extended – as a metaphor, one may even say that a “Sleeping Beauty has been kissed awake” by the Court [of Justice of the European Union]!’.

The implications that can be drawn from the case law of the Court of Justice, which is particularly extensive with regard to foreign currency linked loans, prompt us to undertake a renewed reflection on this long-standing Directive. Arguably, there are three core issues that make the Unfair Contract Terms Directive a topic of definite current interest.

First, the Unfair Contract Terms Directive compels a reconsideration, both in structural and functional terms, of the role of consumer protection within European legislation and, more specifically, within the emerging configuration of European private law.

Second, the Unfair Contract Terms Directive is the only existing consumer-related directive still based on a minimum-harmonization approach. Tentatively, this feature mirrors downstream what has been described upstream as the ‘pointillist’ and ‘fragmentary’ nature of European private law legislation.

Third, the Unfair Contract Terms Directive offers a particularly illuminating lens through which to revisit contemporary debates on legal pluralism. In one of its early pathbreaking conceptualizations, legal pluralism was associated with the idea that the law of a nation state coexists not only with the laws of other nation states but also with normative orders of a different nature, namely the ‘private order’ generated by parties through the exercise of their autonomy, and the ‘international order’ arising from customs governing transnational relations, whether among private actors or between public authorities. In this regard, the Directive invites a critical reconsideration of this tripartite relationship. While autonomy, hence the ‘private order’, remains a foundational element of European private law, mechanisms of consumer protection seek to ensure that consumers and traders enjoy genuinely equivalent opportunities, requiring imposing constraints on traders so that consumers can participate fully and freely in the market. At the same time European private law continues to expand its legislative

reach to the point that some scholars have suggested that there is little room left for further substantive growth in EU consumer law, as most areas are already regulated. Moreover, owing partly to the Court of Justice's continuous intervention, the procedural autonomy of Member States has undergone profound transformation. The Court has progressively treated it less as a structural guarantee of national sovereignty and more as a contingent value that may be curtailed whenever necessary to ensure the full effectiveness of EU law. In particular, the principles of equivalence and effectiveness have become the primary vehicles through which the Court has extended its supervisory authority over domestic legal systems.

In conclusion, the first question that we are called upon to address when dealing with the Unfair Contract Terms Directive concerns whether or not the contract terms at issue fall under the scope of the fairness test and the judicial control enshrined in Article 3(1) of the Unfair Contract Terms Directive. The purpose of the present analysis, however, is not to determine whether contract terms fall within the realm of judicial control under the Directive per se, but rather to examine the consequences of a judicial finding of unfairness. Indeed, when a contract term is found to be unfair, a first fundamental issue arises concerning its substitution. Furthermore, if the removal of the unfair term then prevents the contract from continuing in force and leads to its complete annulment, further questions arise regarding the restitutory effects. In particular, this concerns the restitution of amounts that were unduly paid as a result of the unfair clause imposing them, raising complex issues about the scope and limits of restitutionary claims under both domestic and European law.

INTRODUCTION

1. Reasons Behind The Present Analysis.....	1
2. Consequences Of The Unfairness Of Contract Terms: Underlying Issues And Methodological Approaches	5

CHAPTER 1

‘REGULATING CONTRACTUAL UNFAIRNESS’

PART I

FUNCTIONAL ANALYSIS: THE ANALYSIS OF RATIONALES

1. Consumer Contract Law, Economic Integration And Consumer Policy	7
1.1. Consumer Protection And Subsidiarity	19
1.2. The Economic Rationale For Unfair Terms Control	21
1.2.1. ‘Unsafe’ Terms In Foreign Currency Linked Loans, A Case Study.....	24
1.3. The Unfair Contract Terms Directive Is Not Limited To Consumer Protection: The <i>Extrinsic</i> And <i>Intrinsic</i> Perspectives	28
2. Consumer Contract Law And Social Justice.....	39
2.1. Commutative vs Distributive Justice.....	42
2.2. Rationalizing vs Rectifying The Market	47
3. The Constitutionalization Of The Law Of Contracts.....	55
3.1. Towards A Constitutional Scrutiny Of The <i>Consequences</i> Of Unfair Contract Terms	61
3.2. Equality, <i>Equivalence</i> And Solidarity.....	64

PART II

STRUCTURAL ANALYSIS: THE ANALYSIS OF REGULATIONS

4. Rules On Incorporation And Rules On Fairness: The Intricacies Between <i>Ius Communitatis</i> And <i>Ius Commune Modernum</i>	67
5. Lack Of Knowledge Or Abuse Of Bargaining Power?.....	72
5.1. The Issue Of Substantive (Un)fairness: A Misunderstanding	76
6. A Comparative Overview	78
6.1. Germany	79
6.2. France	82
6.3. UK	84
7. The Blurred Boundaries Between Unfairness, Excessive Benefit, Unfair Exploitation And Gross Disparity.....	85
8. Preliminary Conclusions	90

CHAPTER 2

‘UNFAIR CONTRACT TERMS: BETWEEN LEGAL REMEDIES AND LEGAL EFFECTS’

PART I

LEGAL REMEDIES AND LEGAL EFFECTS

1. Methodological Remarks	91
2. ‘Legal Remedies’ And Substantive Rights	94
2.1. Contract Nullity Between <i>Satisfactory</i> And <i>Non-Satisfactory</i> ‘Legal Remedies’	101

3. 'Legal Remedies' In European Contract Law	105
4. Between 'Legal Remedies' And 'Legal Effects'	109
5. A Functionalist Approach Towards Remedies, A Critical Analysis.....	112
6. Proportionality	117

PART II

NON-BINDING CHARACTER OF UNFAIR TERMS AND CONTRACT INVALIDITY

7. The 'Non-Binding Character' Of Unfair Contract Terms	120
8. ... And The Binding Character Of The Contract If It Is Capable Of Continuing In Existence Without The Unfair Terms: <i>Utile Per Inutile Non Vitiatur</i> And Partial Invalidity	126
8.1. 'Core' Terms And 'Ancillary' Terms	130
8.2. 'Blue Pencil Test' And 'Blue Pencil Rule'	134
9. Reconciling Unilateral 'Ineffectiveness' Of Article 6(1) With Domestic Regulation: The Italian Approach.....	136
10. The German Approach: The Unreasonable Consequences Over Sellers And Suppliers And § 306 BGB As A Limitation On Consumer Overprotection.....	139
11. Contract Invalidity And Consumer Protection: From The 'Nullity' Of Contract To The 'Nullities' Of Contract And Returning	141

PART III

STATUTORY AND JUDICIAL SUPPLEMENTATION OF CONTRACTS

12. The Relevant Case Law On Unfair Contract Terms Directive And Related Issues	147
12.1. Mere Expulsion Of Unfair Terms And The Deterrent Effect Exerted On Sellers And Suppliers	153
13. Statutory Supplementation And Judicial Supplementation Of Contracts.....	156
13.1. Contract Supplementation By Means Of Supplementary Provisions Of National Law .	158
13.2. The Distinction Between 'Supplementary Provisions Of National Law' And 'National Provisions Of A General Nature'	164
13.3. Contract Supplementation By Means Of Equity And Judicial Adaptation	171
14. The Principle Of Good Faith Between The <i>Pars Destruens</i> And The <i>Pars Costruens</i> Of Contract Supplementation.....	176
15. The Emergence Of A Dangerous Double Standard For 'Core' And 'Ancillary' Terms; A Paradox.....	177
16. Contract Supplementation By Means Of Supplementary Provisions Of National Law Left To The <i>Unilateral</i> Assessment of The Consumer.....	178
17. Preliminary Conclusions	181

CHAPTER 3

'UNFAIR CONTRACT TERMS: RESTITUTIONARY CLAIMS AND PRESCRIPTION'

PART I

RESTITUTIONARY CLAIMS AND CONTRACTS

1. The Law Of Restitutions And Contracts.....	183
1.1. Contractual Restitutions In The Realm Of The Unfair Contract Terms Directive, Between <i>Principles</i> And <i>Rationales</i>	190

2. From ‘Nullity Serving A Protective Function’ To ‘Restitutions Serving A Protective Function’	197
2.1. Partial Or Total Denial Of Restitutions, A Critical Analysis	201
3. Defences Against Restitutions	206
a) <i>In favor of consumers</i>	
3.1. Illegality	206
3.2. Consumers As Unassisted Minors Or Incapacitated Adults	213
b) <i>In favor of sellers and suppliers</i>	
3.3. Change Of Position	216
3.3.1. The Applicability Of <i>Saldotheorie</i> In The Realm Of Unfair Contracts	220
4. Restitutionary Claims Resulting From Damages: An Alternative Path	222
5. Quantifying Restitutionary Claims	226
5.1. Restitutionary Claims And The Principle Of ‘No Credit Without Interest’	226
5.2. Restitutionary Claims And Disgorgement Of Profits	230

PART II

PREScription REGIME AND CONSUMER PROTECTION

6. The Challenges Associated With Prescription Within The Context Of Unfair Contract Terms Directive	235
6.1. The ‘Traditional Approach’ To Prescription	239
6.2. Between The Rules Governing <i>Indebitum Solutum</i> And Restitutionary Claims After The Dissolution Of The Contract	241
6.3. Between Equivalence And Effectiveness And The Other Forgotten Principles	243
7. Commencement Of Prescription Period (<i>Dies a quo</i>): The ‘Modern Approach’	246
7.1. Reasonable Discoverability Between Objective And Subjective Criteria	251
7.2. The Assessment Of Reasonable Discoverability	257
8. The Length Of Prescription Periods	258
9. Preliminary Conclusions	259

CONCLUSION

1. The Unfair Contract Terms Directive: Between Rationales And Structure	262
2. The Consequences Of The Unfairness Of Contract Terms In Business-To-Consumer Contracts	262
2.1. Partial Invalidity And Contract Supplementation	262
2.2. Total Invalidity And Contractual Restitutions	263
3. <i>De Iure Condendo</i> : A Future Perspective	264

LIST OF CASES	267

BIBLIOGRAPHY	271

INTRODUCTION

TABLE OF CONTENTS: 1. Reasons Behind The Present Analysis – 2. Consequences Of The Unfairness Of Contract Terms: Underlying Issues And Methodological Approaches

1. Reasons Behind The Present Analysis

European legislation soon recognized the need to address private law matters within the broader project of harmonizing national legal systems, particularly as a means of removing obstacles to the free movement of persons, goods, services and capital¹. From the mid-1980s onwards, this awareness resulted in a series of directives that significantly expanded the scope of European intervention. Early milestones included Directive 85/374/EEC on liability for defective products, Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises and Directive 86/653/EEC relating to self-employed commercial agents. By the end of the century, legislation had followed on consumer credit, package travel, cross-border credit transfers, distance selling, late payment in commercial transactions and, more broadly, on unfair contract terms and the sale of consumer goods. As the substance of these directives makes clear, two priorities emerged early and decisively, alongside fostering the Internal Market, namely the promotion of small and medium-sized enterprises and, above all, consumer protection².

Against this background, particular attention must be given to Council Directive 93/13/EEC of 5 April 1993 (Unfair Contract Terms Directive), relating to the approximation of the laws and administrative provisions of Member States concerning unfair terms in consumer contracts. Its relevance is such that it calls for a dedicated, in depth study, that moves beyond a neutral description of its content or a simple survey of how its rules have been implemented within the various national legal systems.

¹ W. HALLSTEIN, 'Angleichung des Privat- und Prozessrechts in der Europäischen Wirtschaftsgemein', in *RabelsZ*, 1964, 28, p. 212: 'Mit der Schaffung neuen Gemeinschaftsrechts und Maßnahmen zur Rechtsangleichung allein auf den im römischen Vertrag ausdrücklich erwähnten Gebieten ist es jedoch nicht getan. Es war vorauszusehen, daß die fortschreitende Integration der Märkte durch Abbau der Zoll- und Kontingentsschranken, durch Verwirklichung der Freizügigkeit und des freien Waren-, Dienstleistungs- und Kapitalverkehrs auch die Beseitigung der Schwierigkeiten notwendig machen würde, die unterschiedliche Regelungen auf andern Rechtsgebieten verursachen'.

² A. JANSSEN, M. LEHMANN and R. SCHULZE, 'The Future of European Private Law – An Introduction' in A. JANSSEN, M. LEHMANN and R. SCHULZE (eds.), *The Future of European Private Law*, Baden-Baden, 2023, pp. 12-13.

Commentators who have addressed this topic have already noted that ‘the originally limited impact of the Directive on Member State contract law and procedure has been substantially extended – as a metaphor, one may even say that a “Sleeping Beauty has been kissed awake” by the Court [of Justice of the European Union]!’³.

The implications that can be drawn from the case law of the Court of Justice, which is particularly extensive with regard to foreign currency linked loans⁴, prompt us to undertake a renewed reflection on this long-standing Directive⁵. Arguably, there are three core issues that make the Unfair Contract Terms Directive a topic of definite current interest.

First, the Unfair Contract Terms Directive compels a reconsideration, both in *structural* and *functional* terms, of the role of *consumer protection* within European legislation and, more specifically, within the emerging configuration of European private law. If we consider the recent case law of the Court of Justice on the Unfair Contract Terms Directive, two guiding pillars appears to have consistently informed its reasoning: the need to safeguard consumer protection and the need to ensure a deterrent effect on sellers and suppliers⁶. The Court relied on these pillars on the premise of the need to ensure effective judicial protection⁷ – that now shape the Directive’s interpretative framework. Yet a systematic examination reveals a gradual and at times troubling evolution: the mentioned pillars have occasionally extended beyond their

³ H.-W. MICKLITZ and N. REICH, ‘The Court and the Sleeping Beauty: the revival of the Unfair Contract Terms Directive (UCTD)’, in *CMLR*, 2014, 51(3), p. 771.

⁴ S. GRUNDMANN and P. SIRENA, ‘Introduction’ in S. GRUNDMANN and P. SIRENA (eds.), *European Contract Law and Future Challenges*, Louvain-la-Neuve, 2025, p. 1: ‘European contract law (...) has solidified as a highly impactful reality on the legal systems of the Member States, profoundly transforming them. Some of its provisions, starting with the 1993 Directive on Unfair Contract Terms, can undoubtedly be considered the frontier of the most significant change in private law since World War II. Over this time, it has served as an extraordinary instrument for the renewal of contract law and the progressive Europeanization of national legal systems, also due to the strongly interventionist role played by the European Court of Justice’.

⁵ A. JANSSEN, M. LEHMANN and R. SCHULZE, ‘The Future of European Private Law – An Introduction’ in A. JANSSEN, M. LEHMANN and R. SCHULZE (eds.), nt. 2, p. 20.

⁶ See, *inter alia*, Case C-520/21, *Bank M.*, ECLI:EU:C:2023:478, paras 66, 68, 71, 76, 78; Case C-472/20, *Lombard Pénzügyi és Lizing Zrt. v PN*, ECLI:EU:C:2022:242, para 56; Case C-269/19, *Banca B. SA*, ECLI:EU:C:2020:954, para 41; Case C-260/18, *Dziubak*, ECLI:EU:C:2019:819, paras 50-51; Joined Cases C-154/15, C-307/15 and C-308/15, *Gutierrez Naranjo*, ECLI:EU:C:2016:980, para 60; Cases C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco y Caixabank*, ECLI:EU:C:2015:21, para 31 and Case C-26/13, *Kásler and Káslerné Rábai*, ECLI:EU:C:2014:282, para 79.

⁷ See, *inter alia*, Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188, para 5; Case C-432/05, *Unibet*, ECLI:EU:C:2007:163, paras 37-38; Joined Cases C-402/05 and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461, para 335; Case C-12/08, *Mono Car Styling*, ECLI:EU:C:2009:466, para 47; Case C-409/06, *Winner Wetten*, ECLI:EU:C:2010:503, para 58; Joined Cases C-317/08 to C-320/08, *Alassini*, ECLI:EU:C:2010:146, para 61.

original scope, resulting, on the one hand, in forms of *overcompensation* for the consumer and, on the other, in an increasingly *punitive* stance towards sellers and suppliers⁸.

Second, the Unfair Contract Terms Directive is the only existing consumer-related directive still based on a minimum-harmonization approach. Tentatively, this feature mirrors downstream what has been described upstream as the ‘pointillist’ and ‘fragmentary’ nature of European private law legislation: regulatory intervention intensified in selected areas without a parallel effort to develop an overarching, coherent system of private law at the European level⁹. As a result, the Directive presents significant gaps concerning the consequences of the unfairness of contract terms, ranging from the substitution of the unfair clause to the potential invalidity of the contract when core terms are affected, to the restitutionary claims arising from the dissolution of the contract¹⁰. As anticipated, to compensate for these structural limitations,

⁸ See, *inter alia*, Case C-520/21, *Bank M.*, nt. 6 and Case C-421/14, *Banco Primus*, ECLI:EU:C:2017:60, para 71; Case C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:349, para 65; Case C-488/11, *Asbeek Brusse and de Man Garabito*, ECLI:EU:C:2013:341, para 57; Joined Cases 482/13, 484/13, 485/13 and 487/13, *Unicaja Banco y Caixabank*, nt. 6, para 28.

⁹ H. KÖTZ, ‘Gemeineuropäisches Zivilrecht’ in H. GERNSTEIN, U. DROBNIG and H. KÖTZ (eds.), *Festschrift für Konrad Zweigert zum 70. Geburtstag*, Tübingen, 1981, pp. 481-483; ID., ‘Rechtsvergleichung – Nutzen, Kosten, Methoden, Ziele’, in *RabelsZ*, 1986, 50, p. 5 (‘Freilich sind es nicht nur die schiere Vielfalt der einheitsrechtlichen Texte und ihr pointillistischer Charakter, die der Praxis die Auffindung und richtige Anwendung des Einheitsrechts erschweren’); ID., *European Contract Law*, 2nd ed., Oxford, 2017, p. 9 (translated by Gill Mertens and Tony Weir) (‘It is clear that these directives only address certain selected problems and thus have a ‘fragmentary’ or ‘pointillist’ character’); F. RITTNER, ‘Das Projekt eines Europäischen Privatgesetzbuches und die wirtschaftliche Praxis’, in *DB*, 1996, pp. 25-27; H. HONSELL, ‘Die Erosion des Privatrechts durch das Europarecht’, in *ZIP*, 2008, 14, p. 630 (‘Allerdings böte ein Europäisches Zivilgesetzbuch im Hinblick auf die gemeinsamen Wurzeln im europäischen *ius commune* die Chance für die Erhaltung des dogmatischen Niveaus der europäischen Zivilrechtsordnungen, welches die pointillistischen und fragmentarischen EU-Richtlinien zum Privatrecht leider völlig vermissen lassen’); R. SCHULZE, ‘European Private Law and Existing EC Law’, in *ERPL*, 2005, 13(1), p. 4 (‘Until now, in contrast to this the European Community has regulated numerous questions of contract law in directives and in some cases also in regulations. These provisions however appear as “islands in a broad sea of Member State law”’); C. TWIGG-FLESNER, ‘Introduction’ in C. TWIGG-FLESNER (eds.), *The Cambridge Companion to European Union Private Law*, Cambridge, 2010, p. 8; R. SCHULZE and F. ZOLL, *European Contract Law*, 3rd ed., Baden-Baden, 2021, p. 14; P. SIRENA, ‘National Laws and European Private Law: The Value of Legal Pluralism in Europe’ in A. JANSSEN, M. LEHMANN and R. SCHULZE (eds.), nt. 2, pp. 357-358.

¹⁰ Moreover, the distinctiveness of the Unfair Contract Terms Directive also lies in the fact that it started giving rise to significant interpretive difficulties long before the so-called ‘new challenges’ of European private law emerged, such as digitalization/digitization and sustainability. See, G. HOWELLS, ‘The Contribution of Consumer Law to the (Re)shaping of European Private Law’ in A. JANSSEN, M. LEHMANN and R. SCHULZE (eds.), nt. 2, pp. 267-268: ‘We have already seen the principles of the Consumer Sales Directive extended to cover digital content and services and reform of the Product Liability Directive to meet the needs of technology is promised alongside initiatives to regulate artificial intelligence (AI) and provide for AI liability principles. As is clear from the Commission’s New Consumer Agenda, the Commission will of course continue to keep consumer law under review as it did with the REFIT programme that led to the New Deal for Consumers and the Modernisation Directive and Representative Actions Directive’.

the Court of Justice has taken on an increasingly prominent role, often with highly debated and controversial results.

Third, the Unfair Contract Terms Directive offers a particularly illuminating lens through which to revisit contemporary debates on *legal pluralism*¹¹. In one of its early pathbreaking conceptualizations, legal pluralism was associated with the idea that the law of a nation state coexists not only with the laws of other nation states but also with normative orders of a different nature, namely the ‘private order’ generated by parties through the exercise of their autonomy, and the ‘international order’ arising from customs governing transnational relations, whether among private actors or between public authorities¹². In this regard, the Directive invites a critical reconsideration of this tripartite relationship. While autonomy, hence the ‘private order’, remains a foundational element of European private law, mechanisms of consumer protection seek to ensure that consumers and traders enjoy genuinely equivalent opportunities, requiring imposing constraints on traders so that consumers can participate fully and freely in the market¹³. At the same time European private law continues to expand its legislative reach to the point that some scholars have suggested that there is little room left for further substantive growth in EU consumer law, as most areas are already regulated¹⁴. Moreover, owing partly to the Court of Justice’s continuous intervention, the procedural autonomy of Member States has undergone profound transformation. The Court has progressively treated it less as a structural guarantee of national sovereignty and more as a contingent value that may be curtailed whenever necessary to ensure the full effectiveness of EU law. In particular, the principles of equivalence and effectiveness have become the primary vehicles through which the Court has extended its supervisory authority over domestic legal systems. Here again, Honsell’s remark on the ‘Erosion des Privatrechts durch das Europarecht’ acquires renewed resonance¹⁵.

¹¹ Cf P. SIRENA, ‘National Laws and European Private Law: The Value of Legal Pluralism in Europe’ in A. JANSSEN, M. LEHMANN and R. SCHULZE (eds.), nt. 2, pp. 349 et seq.

¹² S. ROMANO, *L’ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto*, Pisa, 1918. For an in-depth account of the work and its various editions, see P. SIRENA, ‘National Laws and European Private Law: The Value of Legal Pluralism in Europe’ in A. JANSSEN, M. LEHMANN and R. SCHULZE (eds.), nt. 2, pp. 349-350 and nt. 4.

¹³ G. HOWELLS, ‘The Contribution of Consumer Law to the (Re)shaping of European Private Law’ in A. JANSSEN, M. LEHMANN and R. SCHULZE (eds.), nt. 2, p. 268: ‘Autonomy remains central to the EU private law, but consumer protection mechanisms seek to ensure both consumer and trader have equivalent chances of exercising their autonomy even if that means imposing conditions on the trader to ensure the consumer can fully and freely participate in the market’.

¹⁴ G. HOWELLS, ‘The Contribution of Consumer Law to the (Re)shaping of European Private Law’ in A. JANSSEN, M. LEHMANN and R. SCHULZE (eds.), nt. 2, p. 267: ‘My prediction would be that there will be no significant broadening of the scope of legal rules covered by EU consumer law – most areas are already covered’.

¹⁵ H. HONSELL, nt. 9, pp. 621 et seq.

2. *Consequences Of The Unfairness Of Contract Terms: Underlying Issues And Methodological Approaches*

The first question that we are called upon to address when dealing with the Unfair Contract Terms Directive concerns whether or not the contract terms at issue fall under the scope of the fairness test and the judicial control enshrined in Article 3(1) of the Unfair Contract Terms Directive¹⁶. In this regard, Article 4(2) of the Directive significantly narrows its objective scope of application, providing that ‘[a]ssessment 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 supplied in exchange, on the other, in so far as these terms are in plain intelligible language’¹⁷.

The purpose of the present analysis, however, is not to determine whether contract terms fall within the realm of judicial control under the Directive *per se*, but rather to examine the consequences of a judicial finding of unfairness. Indeed, when a contract term is found to be unfair, a first fundamental issue arises concerning its substitution. On this point, indeed, Article 6(1) of the Unfair Contract Terms Directive, simply provides that ‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall (...) not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms’¹⁸. If the removal of the unfair term then prevents the contract from continuing in force and leads to its complete annulment, further questions arise regarding the restitutory effects. In particular, this concerns the restitution of amounts that were unduly paid as a result of the unfair clause imposing them, raising complex issues about the scope and limits of restitutionary claims under both domestic and European law.

All that being said, the first chapter of the present work is entirely devoted to a *functional* and *structural* analysis of the Unfair Contract Terms Directive. The functional analysis seeks, first, to critically reassess the role of consumer policy within the broader framework of

¹⁶ More precisely, Article 3(1) stipulates that: ‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’.

¹⁷ Moreover, Article 5 states that: ‘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. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2)’.

¹⁸ See, in this regard, Case C-421/14, *Banco Primus*, ECLI:EU:C:2017:60, para 71 and the case-law mentioned.

European private law and, second, to determine whether the Directive's scope of application is limited to consumer protection. This inquiry necessarily involves establishing whether the Directive serves as a tool of commutative or, instead, of distributive justice, and whether it was designed to correct market failures or, instead, to rationalize market functioning. The structural analysis is conducted through a sequence of comparative and historical examinations. It first highlights the distinctions between the Directive, as an expression of the *ius Communitatis*, and the *ius commune modernum*, crystallized in the PECL; it then adopts a historical perspective to trace the evolution of the legal regime governing contractual unfairness; and finally, it compares the Directive with key non-legislative codifications (beyond the PECL), thereby clarifying the blurred boundaries between unfairness, excessive benefit, undue exploitation, and gross imbalance.

The second chapter is structured into three main parts. The first section addresses the reconceptualization of *legal remedies* and their distinction from *legal effects*, establishing the conceptual framework for the second part of the chapter, which analyzes the non-binding nature of unfair terms and, consequently, the implications for contract invalidity. The third part of the chapter examines, instead, the first consequence of a contractual term being declared unfair: the possibility of supplementing the contract to fill the gap left by the unfair clause. This section considers the various techniques of contractual supplementation, distinguishing between statutory and judicial supplementation, and maintains a continuous engagement with the case law of the Court of Justice, which has consistently adopted a restrictive approach.

The third chapter focuses entirely on the restitutionary effects arising from the annulment of a contract in its entirety due to unfairness. Moreover, particular attention is paid to the applicable prescription regimes for restitutionary claims brought by the parties. Once again, the analysis is closely intertwined with the jurisprudence of the Court of Justice, which has demonstrated an approach that may be described as *overcompensative* in favor of the weak part.

CHAPTER 1

‘REGULATING CONTRACTUAL UNFAIRNESS’

PART I

FUNCTIONAL ANALYSIS: THE ANALYSIS OF RATIONALES

TABLE OF CONTENTS: 1. Consumer Contract Law, Economic Integration And Consumer Policy – 1.1. Consumer Protection And Subsidiarity – 1.2. The Economic Rationale For Unfair Terms Control – 1.2.1. ‘Unsafe’ Terms In Foreign Currency Linked Loans, A Case Study – 1.3. The Unfair Contract Terms Directive Is Not Limited To Consumer Protection: The *Extrinsic* And *Intrinsic* Perspectives – 2. Consumer Contract Law And Social Justice – 2.1. Commutative vs Distributive Justice – 2.2. Rationalizing vs Rectifying The Market – 3. The Constitutionalization Of The Law Of Contracts – 3.1. Towards A Constitutional Scrutiny Of The *Consequences* Of Unfair Contract Terms – 3.2. Equality, *Equivalence* And Solidarity

1. Consumer Contract Law, Economic Integration And Consumer Policy

Traditional private law, though diverse in its national expressions, owes much of its conceptual architecture to the Roman-Canonical tradition, further rigorously and analytically developed by the 19th century Pandectistic School¹. National legal systems have long approached contracts as largely self-contained agreements between private individuals, failing to consider the unintended externalities they might engender, whether affecting the internal relationship between the contracting parties or producing ripple effects that compromise the wider public interest². In this vein, contracts have traditionally been portrayed as a straightforward exercise of private parties’ autonomy, which are binding between the parties: what has been agreed is binding because in making the contract the parties have agreed that it

¹ P. SIRENA, ‘La parte generale della disciplina contrattuale dopo l’europeizzazione del diritto privato’ in M. MAUGERI and G. GRASSO (eds.), *Contratto, contratti e mercati*, Roma, 2022, p. 109; R. ZIMMERMANN, ‘Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law’, in *ERCL*, 2012, 8(4), pp. 377, 392; R. SACCO, ‘Codificare: modo superato di legificare?’, in *Riv. dir. civ.*, 1983, I, pp. 133 et seq; U. PETRONIO, *La lotta per la codificazione*, Torino, 2002, pp. 62 et seq; S. PATTI, ‘Ricodificazione’, in *Riv. dir. civ.*, 2018, pp. 447 et seq.

² P. SIRENA, nt. 1, p. 109.

should determine their rights and duties³. In contrast, with respect to third parties, contracts will, by definition, be considered a *res inter alios acta*⁴.

In this context, the emergence of consumer law in the mid-20th century marked a profound rupture in the classical architecture of contract law⁵. Consumer law casted a revealing light upon the inadequacies of a purely dyadic conception of contractual relations. Thus, what must be established first is a reconstruction of the key stages through which European consumer law emerged and evolved.

Even in its foundational moment, the European integration project did not remain entirely silent on the figure of consumers. The Treaty of Rome, agreed in 1957 and entered into force the following year, already included a series of provisions - such as those on the free movement of goods and services and on competition law - that, although primarily market-oriented, carried implications for the consumer's position within the emerging economic order⁶. These

³ Ibid. With reference to the German BGB, W. FLUME stated: 'The idea behind contract is that what has been agreed is binding because in making the contract the parties have agreed that it should determine their rights and liabilities' (*Allgemeiner Teil des Bürgerlichen Rechts*, II, *Das Rechtsgeschäft*, 4th ed., Berlin/Eidelberg/New York, 1992, p. 7 - 'Die Idee des Vertrages ist, daß das vertraglich Vereinbarte deshalb gilt, weil die Vertragschließenden, ein jeder in Selbstbestimmung, vereinbart haben, daß es so Rechtens sein soll' - in the translation of T. WEIR in K. ZWIEGERT and H. KÖTZ, *An Introduction to Comparative Law*, 3rd ed., Oxford, 1998, p. 325).

⁴ P. SIRENA, 'Autonomia privata e regolazione del mercato nella disciplina dei contratti d'impresa', in *BBTC*, 2023, pp. 509 et seq and ID., nt. 1, pp. 109-110: 'È indubbio che la legge ponga alcuni limiti generali di liceità dell'accordo concluso tra le parti contraenti, così com'è indubbio che gli effetti giuridici che esso produce siano variamente integrati da fonti eteronome che possono spingersi fino all'equità (art 1374 c.c.); ma così com'è disciplinato dal codice civile, il contratto è e resta concepito come un accordo privato che ha forza di legge tra le parti contraenti (art. 1372, 1° comma, c.c.), da un lato, e che dall'altro, non può danneggiare i terzi, rispetto ai quali esso costituirà per definizione una *res inter alios acta* (art 1372, 2° comma, c.c.)'.

⁵ P. SIRENA, 'L'europeizzazione degli ordinamenti giuridici e la nuova struttura del diritto privato', in *ODCC*, 2014, p. 3 and ID., 'L'integrazione del diritto dei consumatori della disciplina generale del contratto', in *Riv. dir. civ.*, 2004, I, pp. 787 et seq. See also P. NEBBIA, *Unfair contract terms in European law: a study in comparative and EC law*, Oxford, 2007, p. 23: 'Since World War II, the changing nature of consumption and the emergence of the welfare state has provided the background to dramatic regulatory changes in Europe. Technological developments, changes in the methods of sale and distribution and the increased use of mass methods of manufacture and of standard form contracts have radically changed the economic and social landscape of the last century. Buyers no longer have sufficient knowledge and skill to assess the quality of goods they want to purchase; the retailers' function has been reduced to handling what buyers have already been persuaded to buy by nationally advertised producers; the established balance between buyer and seller (if ever there was any) has been seriously disturbed by the use of standard contracts necessary to deal with customers on mass scale'.

⁶ Article 39 contained a list of five objectives of the common agricultural policy, the fifth of which was 'to ensure that supplies reach consumers at reasonable prices'. Article 40 required that the common organization of agricultural markets would exclude 'any discrimination between producers or consumers within the Community'. Additionally, Article 85(3) excluded from the prohibitions outlined in Article 85(1) those agreements that allowed consumers 'a fair share of the resulting benefit'. Article 86 provided an illustrative list of abusive conduct perpetrated by dominant firms, including 'limiting production, markets or technical development to the prejudice of consumers'. In this context, see P. NEBBIA, nt. 5, pp. 5 et seq: 'The provisions of the Treaty that explicitly refer to the consumer illustrate what could be

provisions have been largely preserved in their original form within the current text of the Treaty on the Functioning of the European Union (TFEU)⁷. And yet, at the beginning, those early textual references to the protection of the weaker party remained devoid of normative ambition with reference to the creation of a coherent set of protected interests and rights in favor of consumers⁸.

Well before consumer protection was elevated to the status of an autonomous legislative competence at the European level - an achievement formally consecrated only with the entry into force of the Maastricht Treaty in 1993 - the conceptual terrain had already begun to shift⁹. Throughout the preceding decades, the foundations of a European consumer law were laid not through binding legislative acts, but through a constellation of soft law instruments¹⁰. Indeed, a key milestone in this early phase was the Council Resolution of 14 April 1975¹¹, which

called a “productivist” perception of his interests in the common market: the attention to consumption has its “raison d’être” in the fact that it is directly related to production and distribution. In other words, the Treaty proceeds on the basis that the consumer is the ultimate beneficiary of the economic objectives of the Community: at the European level, consumer law revolves around the application of the substantive provisions of the Treaty which act as an instrument for the achievement of the economically efficient integrated market. (...) In this context, competition is regarded as the “consumer’s best friend” and its intensification should serve the consumer by increasing the available choice of goods and services’.

⁷ The provisions mentioned in nt. 6 were renumbered, first by the Amsterdam Treaty, which entered into force in 1999, as Articles 33, 34, 81, 82 and 87 EC and then again by the Lisbon Treaty with effect from December 2009. They are today Articles 39, 40, 101, 102 and 107 TFEU.

⁸ S. WEATHERILL, *European consumer law and policy*, 2nd ed., Cheltenham/Northampton, 2013, p. 4: ‘In fact the assumption of the original Treaty [of Rome] pattern is that the consumer will benefit from the process of integration through the enjoyment of a more efficient market, which will yield more competition allowing wider choice, lower prices and higher-quality products and services’.

⁹ Ibid. H. RÖSLER, ‘Consumers and Consumer Protection Law’ in J. BASEDOW, K.J. HOPT and R. ZIMMERMANN (eds.), *The Max Plank Encyclopedia of European Private Law*, Oxford, 2012, pp. 369-373; ID., ‘Consumer Contracts (PIL)’, *ibid*, pp. 361–365.

¹⁰ In this regard see S. WEATHERILL, nt. 8, pp. 7 et seq. The author explains that a distinct form of consumer policy emerged at the EU level not only through the application of core internal market provision on free movement and competition, but also via additional pathways. The first involved ‘soft law’ initiatives in the field of consumer protection; the second, the harmonization of national laws in this area, which gave rise to a form of ‘indirect’ consumer policy at the EU level. The gradual expansion of EU activity beyond narrowly defined limits has been a defining feature of the system’s evolution since its inception’. In this regard see also P. NEBBIA, nt. 5, pp. 6 et seq: ‘(...) despite the exclusion of consumer protection from the explicit constitutional structure of the Treaty of Rome, the status of the consumer as a partner of the developing structure of Community law and practice started earning recognition, at first largely at an informal level by “soft law” initiatives. Since the Paris Summit of October 1972 various political declarations insisted on the social dimension of the European Community. The objective of Community policy-making was said not to be confined to the establishment of the internal market, but to promoting an active and comprehensive social policy throughout the Community’.

¹¹ Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [OJ C 92].

marked the first coordinated effort by the Member States to acknowledge the consumer's role in the functioning of the Internal Market¹².

In particular, the text recognized the consumer not merely as a buyer or user of goods and services, but as a person embedded within the broader social fabric and thus exposed - directly or indirectly - to a wide array of structural forces¹³. On this basis, five fundamental rights were articulated: the right to the protection of health and safety, the right to the protection of economic interests, the right to redress, the right to information and education, and the right to representation¹⁴. And yet, the scope of this ambition was immediately tempered: point 4 of the same Council Resolution served as a cautionary counterpoint, reaffirming that consumer policy could not exist in isolation from other broader policies¹⁵. Instead, the effectiveness of consumer protection would depend upon its integration within the wider fabric of European policymaking - economic, agricultural, social, environmental, transport, energy - as well as through the approximation of national laws¹⁶.

The evolution of European consumer policy throughout the 1980s continued through the adoption of further soft law instruments such as a second Council Resolution of 19 May 1981¹⁷

¹² For a general overview of the consumer's role in the functioning of the Internal Market, see C.U. SCHMID, *Die Instrumentalisierung des Privatrechts durch die Europäische Union. Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung*, Baden-Baden, 2010; S. GRUNDMANN, *Europäisches Schuldvertragsrecht. Das Europäische Recht der Unternehmensgeschäfte (nebst Texten und Materialien zur Rechtsangleichung)*, Berlin, 1999; ID., 'The Structure of European Contract Law', in *ERPL*, 2001, 9(4), pp. 511 et seq; P. SIRENA, 'L'integrazione del diritto dei consumatori della disciplina generale del contratto', nt. 5, pp. 792 et seq. In this regard, see also L. KRÄMER, *EEC Consumer Law*, Bruxelles, 1986, p. 2.

¹³ In this regard see N. REICH, 'The consumer as citizen - The citizen as consumer' in *Liber amicorum Jean Calais-Auloy, Études de droit de la consommation*, Paris, 2003, pp. 943-962; G. HOWELLS and T. WILHELMSSON, *EC Consumer Law*, Abingdon/New York, 1997; H.-W. MICKLITZ, 'Concept of Competitive Contract Law', in *Penn St. Int'l L. Rev.*, 2005, 23, pp. 550 et seq; J. STUYCK, 'European Consumer Law After the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market?', in *CMLR*, 2000, 37(2), pp. 368 et seq; S. WEATHERILL, nt. 8, pp. 6 et seq.

¹⁴ Council Resolution of 14 April 1975, nt. 11. Point 3 outlines that '(...) Consumer interests may be summed up by a statement of five basic rights:

- (a) the right to protection of health and safety,
- (b) the right to protection of economic interests,
- (c) the right of redress,
- (d) the right to information and education,
- (e) the right of representation (the right to be heard)'.

¹⁵ Ibid.

¹⁶ Ibid. Point 4 outlines that: 'All these rights should be given greater substance by action under specific Community policies such as the economic, common agricultural, social, environment, transport and energy policies as well as by the approximation of laws, all of which affect the consumer's position. Such action falls within the context of a policy for improving the conditions of life in the Community'.

¹⁷ Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy [OJ C 133].

and a third Council Resolution of 23 June 1986¹⁸. In December 1986, the Council adopted another Resolution on the integration of consumer policy in the other common policies¹⁹ which was followed by the Council Resolution adopted in November 1989²⁰.

Nevertheless, the formal crystallization of a distinct EU consumer policy occurred, as previously noted, only in 1993 with the entry into force of the Maastricht Treaty. For the first time, the Treaty introduced a dedicated Title on ‘Consumer Protection’, thereby conferring an express legislative competence upon the European Community in this domain²¹. The foundational legal basis was set out in Article 129a²², and now in Article 169 TFEU²³. In parallel, today, Article 12 TFEU provides that ‘[c]onsumer protection requirements shall be taken into account in defining and implementing other Union policies and activities’.

Article 169 TFEU holds particular significance, as it recognizes consumer protection not merely as a supplementary objective but as a distinct area of EU competence - closely interwoven with internal market objectives and the European Union’s harmonization strategies (Article 169(2)(a))²⁴.

From the perspective of legal harmonization, it became increasingly evident within the Member States that some level of protection for structurally *weaker* parties was not only desirable but necessary²⁵. Initially, such protection emerged in a piecemeal fashion, first in

¹⁸ Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests [OJ C 167].

¹⁹ Council Resolution of 15 December 1986 on the integration of consumer policy in the other common policies [OJ C 3].

²⁰ Council Regulation of 9 November 1989 on future priorities for relaunching consumer protection policy [OJ C 294].

²¹ F. LAURSEN, ‘The Treaty of Maastricht’ in E. JONES, A. MENON and S. WEATHERILL (eds.), *The Oxford Handbook of the European Union*, Oxford, 2013, p. 126.

²² Article 129a(1) established that: ‘The Community shall contribute to the attainment of a high level of consumer protection through:

(a) measures adopted pursuant to Article 100a in the context of the completion of the internal market;
(b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers’.

²³ Article 169(1) establishes now that: ‘In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests’.

²⁴ Article 169(2)(a) states that: ‘The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through (...) measures adopted pursuant to Article 114 in the context of the completion of the internal market’. In this context see also, S. WEATHERILL, nt. 8, p. 18: ‘The Maastricht Treaty’s elevation of consumer protection to an explicit competence with effect from 1993 has not altered the central role of harmonisation pursuant to what are now Articles 114 and 115 TFEU is giving shape to EU consumer policy’.

²⁵ Within various legal systems, it became increasingly clear that the liberal ideas of the 19th century, which had established rights aimed at eliminating formal distinctions between individuals, had ultimately produced little more than *Tropfen sozialen Öls* (literally, ‘drops of social oil’). In this regard

favor of employees, tenants, and subsequently in relation to consumers²⁶. Several jurisdictions also extended protective measures to other non-professional subjects, including small and medium-sized enterprises. However, these developments were largely uncoordinated across legal systems and gave rise to a fragmented regulatory landscape²⁷. This divergence in national approaches soon began to hinder the establishment of a truly integrated Single Market²⁸. As such it is hardly surprising that the development of European private law has focused on the removal of such differences in national laws²⁹.

The arguments outlined thus far apply broadly to the emergence of a European consumer policy as a general regulatory domain. However, when narrowing the focus to the more specific context of a European consumer *contract* law, a more defined trajectory begins to take shape.

see T. WILHELMSSON, 'Le diverse forme di welfarismo nel diritto europeo dei contratti' in A. SOMMA (eds.), *Giustizia sociale e mercato nel diritto europeo dei contratti*, Torino, 2007, pp. 267 et seq. With specific reference to the German BGB, see R. ZIMMERMANN, *The New German Law of Obligations: Historical and Comparative Perspectives*, Oxford, 2005, pp. 163 et seq; O. GIERKE, 'Die soziale Aufgabe des Privatrechts' in *Die soziale Aufgabe des Privatrechts*, Berlin/Heidelberg, 1889, p. 10; B. MARKESINIS, H. UNBERATH and A. JOHNSTON, *The German Law of Contract*, 2nd ed., London, 2006, pp. 45 et seq. See also G. HOWELLS, 'The Contribution of Consumer Law to the (Re)shaping of European Private Law' in A. JANSSEN, M. LEHMANN and R. SCHULZE (eds.), *The Future of European Private Law*, Baden-Baden, 2023, p. 569.

²⁶ H. COLLINS, *The Law of Contract*, 4th ed., London, 2003, pp. 9 et seq; P. NEBBIA, nt. 5, p. 5: 'Similarly, employment legislation was passed to confer rights on employees which they could not secure for themselves by contract; landlord and tenant legislation was enacted to give minimum rights to tenants; the increasing awareness of consumers' rights and the development of consumers' representative groups in the late fifties in many European states also involved revising to different extents the classical principles of freedom of contract, *caveat emptor* and fault liability, seen as mechanisms discriminating against consumers and other weaker parties or groups in the society'.

²⁷ This issue was also approached by the European Commission in its *Communication from the Commission to the Council and the European Parliament* [COM (2001) 398 final] and has been a recurring theme in later communications, in particular in the *Green Paper on the Review of the Consumer Acquis* [COM (2006) 744 final]. More precisely, the Green Paper explains that current EU consumer protection rules are fragmented in two main ways. First, the existing directives allow Member States to adopt stricter rules in their national legislation (minimum harmonization), and many Member States have made use of this option to ensure a higher level of consumer protection. Second, many issues are regulated inconsistently across directives or have been left open. In this context, see also A. CYGAN, 'A step too far? Constitutional objections to harmonization of EU consumer and contract law' in C. TWIGG-FLESNER (eds.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham/Northampton, 2016, p. 13; K. RIESENHUBER and K. TAKAYAMA, 'Rechtsangleichung: Grundlagen, Methoden und Inhalte' in K. RIESENHUBER and K. TAKAYAMA (eds.), *Rechtsangleichung: Grundlagen, Methoden und Inhalte*, Berlin/Boston, 2006, pp. 1-2; V. KENDALL, *EC Consumer Law*, London, 1994, p. 7.

²⁸ See, for instance, *Green Paper on the Review of the Consumer Acquis*, nt. 27, with references to further studies; *Green Paper from The Commission on policy options for progress towards a European Contract Law for consumers and businesses* [COM(2010) 348 final].

²⁹ As is made clear in, for example, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Consumer Policy Strategy 2002-2006* [COM(2002) 208 final]; *Communication from the Commission to the European Parliament and the Council - A More Coherent European Contract Law An Action Plan* [COM(2003) 68 final]; *Communication from the Commission to the European Parliament and the Council - European Contract Law and the revision of the acquis: the way forward* [COM(2004) 651 final].

This trajectory took on institutional clarity with the first of the Commission's three-year action plans for consumer policy, spanning 1990-1992³⁰. At the heart of this plan lay the recognition that bolstering consumer confidence was not merely desirable but imperative for the effective completion of the Internal Market. To this end, four core policy areas were identified as priorities: consumer representation, consumer information, consumer safety, and *consumer transactions*³¹. From a systemic perspective, the emergence of consumer *contract* law represents a turning point in the evolution of private law in Europe. It has facilitated a gradual departure from the traditional model of nationally contained legal systems - rooted in the codification projects of the 19th century - and has instead promoted a supranational dimension, fundamentally reshaping the sources and structure of contract law across Member States³².

Looking back over more than three decades since the first institutional engagement with consumer contract law at the European level, one can now discern a transformed legal landscape. What has gradually taken shape is a body of European contract laws which, in its general provisions, appears to be increasingly centered on consumer transactions - so much so that, in practice, the general framework of EU contract law is often indistinguishable from its consumer-specific dimension³³. This symbiosis has led to the fact that the doctrine of *pacta sunt servanda* is no longer absolute, and the idea of the contract as a *res inter alios acta* has been

³⁰ Three Year Action Plan of Consumer Policy in the EEC (1990 – 1992) [COM/90/98 final]. Part A of the document presented a concise overview of the consolidation of progress made, while Part B outlined a detailed Three-Year Action Plan.

³¹ More precisely, the Three Year Action Plan (nt. 30) identifies four main initiatives aimed at reducing disparities in the conditions of sale in contracts across Member States. These include the identification of elements within national contract laws that may discourage consumer purchasing, and the improvement of access to justice. The four initiatives are (i) a proposal for a directive on unfair contract terms; (ii) an examination of possible initiatives to simplify cross frontier consumer contracts, guarantees and after sales services; (iii) consideration of means of improving consumer access to justice and redress; and (iv) a proposal for a directive on distance selling.

³² P. SIRENA, 'L'europeizzazione degli ordinamenti giuridici e la nuova struttura del diritto privato', nt. 5, pp. 4 et seq. The author explains that as a result, a 'new' law of contracts has emerged. Its novelty lies not merely in the periodic revision of legislative content — a routine function of legislative authority — but in a kind of legal 'new beginning', signaling a departure from pre-existing norms. The 'contract of the 21st century' thus represents the outcome of a shift in some of the fundamental paradigms of legal culture and technique. See also F. DI MARZIO (eds.), *Il nuovo diritto dei contratti. Problemi e prospettive*, Milano, 2004; R. SCHULZE, 'The Acquis Communautaire and the Development of European Contract Law' in R. SCHULZE, M. EBERS and C. GRIGOLEIT (eds.), *Informationspflichten und Vertragsschluss im Acquis communautaire*, Tübingen, 2003, pp. 15 et seq; R. SCHULZE, 'European Private Law and the Existing EC Law', in *ERPL*, 2005, 13(1), pp. 3 et seq.

³³ P. SIRENA, 'L'integrazione di diritto privato e diritto pubblico nella tutela del cliente bancario', in *ODCC*, 2021, p. 24; G. DE CRISTOFARO, 'Il contratto del 2020 nel diritto derivato dell'Unione europea' in ID. (eds.), *Diritto italiano ed europeo dei consumatori*, Padova, 2024, pp. 1 et seq; ID., '40 anni di diritto europeo dei contratti dei consumatori: linee evolutive e prospettive future', in *I Contratti*, 2019, pp. 177 et seq.

eroded³⁴. The contract is no longer perceived solely as a private act between equal parties, but as a legal mechanism with broader social implications, capable of producing effects that extend beyond the immediate contractual relationship. In this sense, the contract becomes a site where public and private interests intersect³⁵.

It is precisely within this context that the first steps of the present analysis are taken. Indeed, from a functional perspective, it is of utmost importance to examine the rationales underpinning consumer contract law³⁶. In other words, it is therefore crucial to examine how consumer policy interacts with the broader framework of EU policies, particularly with regard to the market integration policy³⁷.

At the heart of this inquiry lies the question of whether consumer protection can exist as an autonomous policy and should be protected *per se* or whether it remains structurally dependent on, or subordinate to, the objectives of market integration. As a matter of fact, consumer law in general and consumer *contract* law in particular are closely tied to one of the most critical issues of European economic integration, as it strongly highlights the dialectic between open borders, protectionism, and bona fide intervention of Member States to protect legitimate social values and objectives, even at the cost of interrupting the free flow of goods on which the idea of a common market is based³⁸.

³⁴ P. SIRENA, 'L'europeizzazione degli ordinamenti giuridici e la nuova struttura del diritto privato', nt. 5, pp. 4, 10 et seq.

³⁵ P. SIRENA, 'L'europeizzazione degli ordinamenti giuridici e la nuova struttura del diritto privato', nt. 5, p. 4.

³⁶ S. WEATHERILL, nt. 8, p. 1: 'Why should there be a consumer policy at EU level? Is not the quest to create a more efficient, competitive, border-free economy for Europe itself amply beneficial to the interests of consumers? (...) Perhaps this is so – but where does this leave to the scope for states to select patterns of market regulation that suit their own consumers' particular preferences? And can there truly be an EU internal market without a comprehensive framework of common rule making established at European level?'. See also L. MILLER, *The Emergence of EU Contract Law: Exploring Europeanization*, Oxford, 2011, pp. 153–156.

³⁷ See, in this regard, H.-W. MICKLITZ, nt. 13, pp. 549-585; K. RIESENHUBER, 'A "competitive contract law"' in K. PURNHAGEN and P. ROTT (eds.), *Varieties of European Economic Law and Regulation, Liber Amicorum Hans Micklitz*, Cham, 2014, pp. 105-120; G. COMPARATO, H.-W. MICKLITZ and Y. SVETIEV, 'The regulatory character of European private law' in C. TWIGG-FLESNER (eds.), nt. 27, pp. 58-59, who describe European contract law with the expression 'competitive contract law': '(...) the EU has, among other things, employed private law in b2b and b2c relations so as to enhance competition in completing the internal market. Since regulation is used to insert rules into private relations that allow for the promotion of competition it follows that, within the overall purpose of the completion of the internal market, private law and competition law are tightly interlinked through regulation. This development can be summarised in the expression "competitive contract law"'.

³⁸ See S. WEATHERILL, nt. 8, p. 2: 'It is not overstating the case to claim that striking this balance is the most controversial economic issue facing the European Union today. How much market (re-)regulation at EU level is required or even permitted in order to achieve the objectives of the EU Treaty? In this vein, shaping the landscape of European regulation of financial markets asks how much should be done at European level. Similar questions of regulatory design attend the matter of labour market regulation

A similar line of inquiry appears to have been pursued by the Court of Justice of the European Union (Court of Justice), which on occasion has seized the opportunity to articulate some general observations concerning the relationship between legislative harmonization and consumer protection. More specifically, the Court of Justice has affirmed that ‘[i]n that regard it suffices to point out that, although consumer protection is one of the objectives of the Community, it is clearly not the sole objective. (...) [N]o provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State. The reduction in the level of protection which may thereby result in certain cases through the application of the second subparagraph of Article 4(1) of the Directive does not call into question the general result which the Directive seeks to achieve, namely a considerable improvement in the protection of depositors within the Community’³⁹.

All in all, a useful starting point in addressing the mentioned question lies in the observation that the very rationale underpinning consumer protection is rooted in its functional necessity in order to prevent market failures capable of undermining the very functioning of the Single Market towards which the broader European project is directed. Indeed, the market cannot operate efficiently where competitive dynamics are distorted - be it due to a scarcity of market players, asymmetries in consumer information, manipulative practices, or the presence of unaccounted-for externalities⁴⁰.

In this vein, the development of EU law is clearly aligned with the principles of German *ordo-liberalism* (*Ordoliberalismus*) and German *ordo-liberalism* clearly promoted a social order grounded in private law (*Privatrechtsgesellschaft*)⁴¹, in which the constitutional

and of social policy more generally and of environmental protection. But consumer policy too is a richly illustrative area of inquiry’.

³⁹ Case C-233/94, *Federal Republic of Germany v European Parliament and Council of the European Union*, ECLI:EU:C:1997:231, para 48. Cf, with regard to the notions of European polity and nationalism and their relationship, C. MAK, ‘Europe-building through private law: Lessons from constitutional theory’, in *ERCL*, 2012, 8(3), pp. 330 et seq.

⁴⁰ D. LOWERY, ‘Consumer Sovereignty and Quasi-Market Failure’, in *Journal of Public Administration Research and Theory*, 1998, 8(2), pp. 137 et seq; H. GINTIS, ‘Consumer Sovereignty and Human Interests (Book Review)’, in *Journal of Economic Literature*, 1988, 26(1), pp. 98-99. Cf also the analysis of H. SCHULTE-NÖLKE, ‘The Objectives of Directive 93/13/EEC on Unfair Contract Terms: An Overview after 30 Years of Case Law’, in *ERPL*, 2024, 32(3), p. 318.

⁴¹ See P. SIRENA, *Introduction to Private Law*, 3rd ed., Bologna, 2019, pp. 239-240; S. GRUNDMANN, ‘The Concept of the Private Law Society: After 50 Years of European and European Business Law’, in *ERPL*, 2008, 16(4), pp. 553 et seq and K. MAYER and J. SCHEINPFLUG, *Privatrechtsgesellschaft und die Europäische Union*, Tübingen, 1996, pp. 11 et seq, 75 et seq.

commitment to safeguarding individual freedoms was embedded within a robust framework of economic regulation⁴².

Against this backdrop, the foundational structure of the European Union may be understood as a form of *Wirtschaftsverfassung* - an economic constitution which encompasses *economic* freedoms, particularly the right to undertake private initiatives⁴³. However, those very freedoms, left unchecked, risk generating distortions that ultimately erode the market's ability to self-regulate, leading to systemic failures⁴⁴. A paradigmatic example is the formation of anti-competitive cartels, where dominant parties collude to fix prices, restrict market access, or exclude rivals⁴⁵. Thus few subjects acquire the private power to act to the detriment of other companies and, possibly, consumers as well⁴⁶.

Ordo-liberalism demands the exercise of public authority to prohibit such conduct, in line with a *Systementscheidung*, in favor of a social market economy model⁴⁷. This commitment is now explicitly reflected in Article 3(3)(1) TEU which clearly stipulates that '[t]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment'⁴⁸.

⁴² P. SIRENA, nt. 41, pp. 239-240. Cf also I. RAMSAY, 'Ordoliberalism and Opportunism? The Making of Consumer Law in the UK' in H.-W. MICKLITZ (eds.), *The Making of Consumer Law and Policy in Europe*, London, 2021, pp. 235 et seq.

⁴³ E.-J. MESTMÄCKER, 'European Economic Constitution' in J. BASEDOW, K.J. HOPT and R. ZIMMERMANN (eds.), nt. 9, pp. 588 et seq; D.J. GERBER, 'Constitutionalizing the economy: German neo-liberism, competition law and the "new Europe"', in *American Journal of Comparative Law*, 1994, 42, pp. 25 et seq.

⁴⁴ P. SIRENA, nt. 41, pp. 239-240.

⁴⁵ Ibid. See also D. HASELBACH, *Autoritärer Liberalismus und Soziale Marktwirtschaft: Gesellschaft und Politik im Ordoliberalismus*, Baden-Baden, 1991, pp. 77 et seq; A. SOMMA, *Diritto comunitario vs. diritto comune europeo*, Torino, 2003, pp. 21 et seq, ID., 'Tutte le strade portano a Fiume. L'involuzione liberista del diritto comunitario', in *Riv. crit. dir. priv.*, 2002, pp. 263 et seq; ID., 'Il diritto privato liberista. A proposito di un recente contributo in tema di autonomia contrattuale', in *Riv. trim. dir. proc. civ.*, 2001, pp. 263 et seq.

⁴⁶ P. SIRENA, nt. 41, pp. 239-240.

⁴⁷ Ibid. The author clarifies that '(...) EU law was first articulated in a *pars destruens*, properly designed to carry out a liberalistic function. It was created by removing from national legal systems those legislative and administrative provisions that constituted potential obstacles to the exercise of economic freedoms guaranteed by the founding Treaties (negative integration). On the other hand, the *pars costruens* of EU law acts as a re-regulation of the market and society, creating a legislative framework that unifies the legal systems of the Member States (positive integration)'.

⁴⁸ Article 3(3)(1) TEU establishes that: 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance'.

Another significant element to be taken into account is the explicit classification of consumer protection under Article 4(2)(f) TFEU as an area of shared competence between the Union and the Member States⁴⁹. This formal recognition appears to elevate the status of consumer protection within the European Union's overall policy architecture and competence framework. Nonetheless, given that the Union does not hold exclusive legislative authority in this field, any exercise of competence must respect the guiding principles of subsidiarity and proportionality, now enshrined in Article 5 TEU (formerly Article 3b of Maastricht Treaty)⁵⁰.

The broader picture thus gradually begins to come into focus: all in all, it may be argued that the intricate relationship between market integration and consumer protection resists simplistic characterizations. Indeed, it is no longer adequate to claim, on the one hand, that consumer law (in general) and consumer contract law (in particular) merely operate as technocratic instruments of market regulation, seamlessly absorbed into the general framework of contract law, devoid of any protectionist undertones⁵¹. Similarly, nor is it sufficient, on the other hand, to reduce their significance to a form of social policy, according to the idea, grounded in the liberal premise, that distinctions between individuals ought to be dismantled⁵².

⁴⁹ Article 4(2)(f) TFEU establishes that: 'Shared competence between the Union and the Member States applies in the following principal areas: consumer protection'.

⁵⁰ More precisely, Article 5(3) TEU outlines that: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.

⁵¹ P. SIRENA, 'L'europeizzazione degli ordinamenti giuridici e la nuova struttura del diritto privato', nt. 5, pp. 11 et seq. Cf C.M. BIANCA, *Le autorità private*, Napoli, 1977, now in ID., *Realtà sociale ed effettività della norma. Scritti giuridici, I, Teoria generale e fonti - persone e famiglia - garanzie e diritti reali*, vol. 1, Milano, 2002, pp. 47 et seq; S. WEATHERILL, 'Consumer Policy' in P. CRAIG and G. DE BÚRCA (eds.), *The Evolution of the EU Law*, 3rd ed., Oxford, 2021, pp. 875 et seq and P. NEBBIA, nt. 5, p. 5, which explains that since the Paris Summit of October 1972 various political declarations insisted on the social dimension of the European Community. The objective of Community policy-making was said not to be confined to the establishment of the internal market, but to promoting an active and comprehensive social policy throughout the Community.

⁵² For a critical analysis see M. BARCELLONA, 'Sulla giustizia sociale nel diritto europeo dei contratti' in A. SOMMA (eds.), nt. 25, p. 71 and C. AMATO, 'La politica comunitaria tra diritti dei consumatori ed esigenze del mercato', *ibid.*, p. 57: 'La politica consumeristica dell'UE ha colto i limiti e le mistificazioni proprie delle codificazioni ottocentesche, tramandate in quelle attuali: il passaggio dallo status al contratto ha comportato ed imposto una maggiore responsabilizzazione dell'uomo, proiettato nel mercato e invogliato a partecipare al gioco secondo regole che assumevano come presupposto di fondo l'uguaglianza (formale) degli individui, tutti soggetti di diritto e perciò tutti sottoposti in egual modo ai principi dell'autonomia negoziale. Della sacralità del vincolo contrattuale, dell'autodeterminazione dei contraenti. L'UE, appunto, sembra cogliere l'inesattezza del presupposto di fondo, e in nome dell'uguaglianza (questa volta sostanziale) si preoccupa del soggetto meno forte e meno scaltro, lo riconosce come "debole" e lo sottrae all'aggressione del giocatore esperto che, per qualità professionale, sa utilizzare senza scrupoli le regole del gioco'. With regard to the concept of 'vertical solidarity' see A. SOMMA, *Temi e problemi di diritto comparato, II, Tecniche e valori nella ricerca comparatistica*, Torino, 2005, pp. 179 et seq.

Instead, it should be recognized that market integration and consumer protection are not inherently conflicting policies. In other words, as someone has argued, if a market is well-functioning, consumers are sovereign⁵³. Conversely, when market failures arise, this undermines consumer sovereignty and justifies the need for intervention to correct these failures⁵⁴.

Thus, one could argue that the relationship between consumer policy and market integration policy is not one of vertical hierarchy, which would necessitate a determination of which should take precedence at any given time⁵⁵. Rather, the two policies are interconnected through a horizontal *causal* relationship (i.e., as previously outlined, if a market is well-functioning, consumers are sovereign). The Commission itself in its Communication of 7 May 2002 ‘Consumer Policy Strategy 2000-2006’ has reaffirmed that the development of consumer policy at EU level has been the ‘essential corollary of the progressive establishment of the internal market’⁵⁶. This does not preclude – hypothetically - the possibility of regulations that prioritize

⁵³ F. ESPOSITO, *The Consumer Welfare Hypothesis in Law And Economics*, Cheltenham/ Northampton, 2022, p. 33. See also G. HOWELLS and S. WEATHERILL, *Consumer Protection Law*, 2nd ed., London, 2005, p. 1: ‘A society based on (...) “perfect competition” in the market should secure the best of all possible worlds for the consumer. The consumer, indeed, is dominant. He or she exercises the power of commercial life or death over suppliers in the shape of his or her purchasing decisions. The consumer will be supplied according to his or her preference and, for society generally, there will be no waste of resources’. Cf V. SCALISI, ‘Invalidità e inefficacia nella prospettiva europea dei rimedi’ in ID. (eds.), *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, Milano, 2011, p. 273: ‘Ma attenzione: come è stato anche di recente autorevolmente ribadito, tra obiettivi di regolazione del mercato e finalità di tutela del c.d. contraente debole non vi è contrasto né incompatibilità; lo stesso mercato non è fatto solo di economicità ed anzi in tipologie contrattuali caratterizzate da strutturale predominio di una delle parti o, come altri ha efficacemente scritto, da asimmetria di potere contrattuale, il perseguimento di istanze perequative e di giustizia contrattuale è una necessità vitale per lo stesso mercato, ponendosi come il miglior antidoto all’instaurarsi di meccanismi distorsivi di alterazione del suo corretto e regolare funzionamento’. See also N.W. AVERIT and R.H. LANDE, ‘Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law’, in *Antitrust Law Journal*, 1997, 65, pp. 713 et seq. These authors – though addressing the different kinds of market failures that are to be solved by those disciplines – have attempted to propose a unitary theory under the rubric of ‘Consumer Sovereignty’.

⁵⁴ F. ESPOSITO, nt. 53, p. 33.

⁵⁵ Cf W.H. HUTT, ‘The Concept of Consumers’ Sovereignty’, in *The Economic Journal*, 1940, 50, pp. 66 et seq; G.H. HILDEBRAND, ‘Consumer Sovereignty in Modern Times’, in *American Economic Review*, 1951, 41(2), pp. 19 et seq. See also L. MILLER, nt. 36, p. 155: ‘From the purely legal perspective, an important characteristic of multilevel legal systems is that the legal orders within the system do not work independently from each other. Problems are functionally interwoven, which means that one problem is rarely governed at one level (for example, the national or the European) but will call for the continuous negotiation amongst many different levels’.

⁵⁶ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Consumer Policy Strategy 2002-2006 [COM (2002) 208 final]: ‘The development of consumer policy at EU level has been the essential corollary of the progressive establishment of the internal market. The free circulation of good and services has required the adoption of common, or at least convergent, rules to ensure at one and the same time sufficient protection of consumer interests and the elimination of regulatory obstacles and competitive distortions. Measures have frequently sought to give consumers the means to protect their own interests

market integration to the detriment of consumer protection, nor does it negate the plausibility - supported by recent judgments from the Court of Justice - of regulations that enhance consumer protection at the expense of market integration⁵⁷. In this regard, addressing market failures, which is at the foundation of the European economic constitution, should serve exactly to identify a common denominator, creating an area of intersection between the two policies within which EU law should ideally operate⁵⁸.

In fact, by reversing the generally accepted perspective, consumer protection emerges as a necessary foundation for establishing and operating the Single Market, which is precisely why the European Union holds regulatory authority in this area. These regulations are not ‘goal-oriented’ frameworks that impose a particular economic arrangement on market participants; rather, they are ‘conditional’ regulations that establish the essential ‘rules of the game’, enabling each party to pursue their individual interests within the market framework⁵⁹.

1.1. Consumer Protection And Subsidiarity

by making autonomous, informed choices. This typically ensures that consumers will have sufficient, correct information before engaging in transactions and certain legal rights in case the transaction does not deliver the required outcome. These measures seek to redress structural imbalances between individual consumers and business flowing from limits on the formers’ access to information and legal expertise as well as on their economic resources’.

⁵⁷ Cf F. ESPOSITO, ‘Dziubak Is a Fundamentally Wrong Decision: Superficial Reasoning, Disrespectful of National Courts, Lowers the Level of Consumer Protection’, in *ERCL*, 2020, 16(4), pp. 538 et seq.

⁵⁸ Cf L. KRÄMER, nt. 12, pp. 7-25; M. EGAN, *Constructing a European Market*, Oxford, 2001; M. POLLACK, ‘Creeping Competence: The Expanding Agenda of the European Community’, in *Journal of Public Policy*, 1994, 4, p. 95; S. WEATHERILL, ‘Competence Creep and Competence Control’, in *Yearbook of European Law*, vol. 23, issue 1, 1 January 2004, p. 1; H.-W. MICKLITZ, *The Politics of Judicial Co-operation in the EU*, Cambridge, 2005, pp. 7-10. In this sense, the interpretation provided by P. NEBBIA, nt. 5, pp. 9 et seq of the judgment in Case C-120/78, *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1976:188, can be understood as suggesting that the *Cassis de Dijon* mandatory requirements aim to ensure that market integration does not pose a threat to certain valuable non-market interests.

⁵⁹ P. SIRENA, ‘L’integrazione del diritto dei consumatori della disciplina generale del contratto’, nt. 5, p. 794: ‘La tutela del consumatore, secondo il modello di politica del diritto adottato dal legislatore comunitario, non è quindi complementare, ma conforme al mercato, e anzi, rovesciando la prospettiva generalmente adottata, costituisce un presupposto necessario per l’instaurazione e il funzionamento del mercato unico (ed è proprio per questo che la Comunità Europea ha una competenza normativa in materia)’. For a critical analysis on the capacity of the public authority to accumulate enough knowledge about the market to effectively *order it through legal regulation and its administrative and judicial enforcement*, see M. GROCHOWSKI, ‘The Knowledge Gap in Contract Law’ in P.B. MILLER, J. OBERDIEK (eds.), *Oxford Studies in Private Law Theory*, vol. 3, Oxford, 2025, pp. 86 et seq. See also M.W. DOWDLE, ‘On the Doubly Constitutionalising Character of European Contract Law’ in C. MAK and B. KAS (eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe*, Oxford, 2023, pp. 43 et seq, on the idea that the ‘judicial activism’ granted to the Court of Justice ‘stems from the pronouncedly (but not uniquely) economic character of the “constitution” of political Europe’.

According to Article 5(3) TEU ‘(...) in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’⁶⁰. In this respect, the principle of subsidiarity is generally considered applicable to consumer policy, as this field does not fall under the EU’s exclusive competence⁶¹. Sir Leon Brittan famously described subsidiarity as the pursuit of the ‘best level’ of regulatory intervention within the EU framework⁶².

Nevertheless, the principle has been often criticized for its vagueness and lack of legal certainty. Much depend, indeed, on the criteria used to assess whether objectives are better attained at the Union level. In this sense, transforming subsidiarity from a rhetorical device into a dependable guide for interpreting EU competences proves exceptionally challenging⁶³.

Against this background, certain Member States appear to have invoked the principle of subsidiarity as a means to obstruct legislative action⁶⁴. A notable example is the German government’s early 1990s proposal to drastically curtail EU interventions in the field of consumer protection⁶⁵.

Overall, despite concerns that subsidiarity might be wielded to restrict the scope of EU legislation, it has, in practice, done little to disturb the European process that is often perceived as predisposed toward centralization⁶⁶.

Moreover, one might argue that the scope for joint action in the field of consumer protection is already clearly delineated in the precise wording of Article 169(1) TFEU⁶⁷. This is further reinforced by Article 169(4) TFEU, which enshrines the principle of a minimum level of

⁶⁰ See, in this regard, S. WEATHERILL, ‘The Constitutional Context of (Ever-wider) Policy-Making’ in E. JONES, A. MENON and S. WEATHERILL (eds.), nt. 21, pp. 578 et seq.

⁶¹ N. REICH, H.-W. MICKLITZ, P. ROTT, K. TONNER, *European Consumer Law*, 2nd ed., Cambridge/Antwerp/Portland, 2014, pp. 20-21 and S. WEATHERILL, nt. 8, pp. 21 et seq.

⁶² Sir Leon Brittan, ‘Institutional Development of the EC’ [1992] PL 567.

⁶³ S. WEATHERILL, nt. 8, p. 20.

⁶⁴ Ibid.

⁶⁵ Ibid. In the codified systems, a process of ‘decodification’ has been identified. In this regard, see F. ZOLL, ‘The problems associated with the implementation of directives into national legal systems – a few examples from the codified legal traditions’ in C. TWIGG-FLESNER (eds.), nt. 27, pp. 68 et seq; I. SCHMIDT, ‘Codification’ in J. BASEDOW, K.J. HOPT and R. ZIMMERMANN (eds.), nt. 9, p. 222; G. ALPA, ‘Harmonization and codification in European contract law’ in S. VOGENAUER and S. WEATHERILL (eds.), *The Harmonisation of European Contract Law: Implications for European Private Laws Business and Legal Practice*, Oxford, 2006, pp. 158 et seq.

⁶⁶ N. REICH, H.-W. MICKLITZ, P. ROTT, nt. 61, pp. 20-21.

⁶⁷ See above nt. 23.

protection, thereby limiting the practical restraining effect that subsidiarity might otherwise impose⁶⁸.

In this context, however, it becomes increasingly significant the Court of Justice's approach. As a matter of fact, the Court appears to have interpreted subsidiarity – alongside the principle of effectiveness of protection – as a justification to foster a seamless legal integration across Member States, viewing such coherence as a hallmark through which the effectiveness of rights and freedoms under EU law can be realized. More precisely, this effectiveness has been interpreted as operating within two dimensions: (i) a negative dimension (aimed at overcoming obstacles that, at the national level, hinder the full realization of freedoms and rights recognized by the Union); and (ii) a proactive dimension (aimed at identifying measures and remedies suitable for the full expansion of the protection of those freedoms and rights)⁶⁹.

1.2. The Economic Rationale For Unfair Terms Control

For the reasons set out above and when viewed through the interpretative lens that understand EU law as a normative response to market failures, the rationale underlying the Union's regulatory intervention across a wide range of fields, including the substantive control of consumer contract terms, becomes more readily apparent. Against this background, it is worth examining whether the regulation of unfair terms may likewise be justified on law and economics grounds⁷⁰.

Tentatively, contract terms may be regarded as intrinsic components of the products or services acquired by consumers - or, put differently, one may reasonably contend that consumer contracts themselves constitute a *product* that consumer *acquire*⁷¹.

⁶⁸ More precisely, Article 169(4) establishes that: 'Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them'.

⁶⁹ Cf P. SIRENA, M. GINESTRI, E. VALLETTA, 'National Procedural Rules and the New Boundaries of ECJ's Control in the Light of Directive 93/13', in *ERPL*, 2024, 32(3), p. 574; F. DE ELIZALDE, 'Remedies for Unfair Terms in Light of the General Principles of EU Law', *ibid.*, pp. 461 et seq.

⁷⁰ See above § 1. For a critical perspective on the techniques developed by European contract law in the field of consumer protection (in general) and in field of unfair contract terms (in particular), see O. BARGILL and O. BEN-SHAHAR, 'Regulatory Techniques In Consumer Protection: A Critique Of European Consumer Contract Law', in *CMLR*, 2013, 50, pp. 109 et seq.

⁷¹ In this regard see A.W. KATZ, 'Standard Form Contracts' in P. NEWMAN (eds.), *The New Palgrave Dictionary of Economics and the Law*. Palgrave Macmillan, London, 2002, pp. 502 et seq; the author explains that standard form contracts have long been received with distrust, and the rules governing their interpretation have engendered considerable controversy. While economic analysis has little to say regarding the libertarian objection to standard form contracts or their relationship to personal autonomy, it can help evaluate their effects on efficiency and the distribution of the gains from trade. From such a perspective, standard forms should be analyzed like any other productive input, comparable to design, marketing, and technical support.

This perspective makes it possible to extend to consumer contracts the same economic reasoning that has long justified regulatory intervention in relation to, for instance, defective products. In other words, beyond considerations of fairness and solidarity, the regulation of unfair contract terms may also be justified on efficiency grounds.

In this vein, EU has long deemed it essential to regulate consumer goods to prevent consumers from purchasing ‘unsafe’ products (evidenced by stringent rules governing food safety and pharmaceutical authorization)⁷². EU has also acted to mitigate negative externalities arising from products, such as environmental degradation or public health risks⁷³. Likewise, the EU has intervened to curb the diffusion of low-quality goods: indeed, economic analysis has shown that markets flooded with products which present hidden (bad) features tend to crowd out higher-quality alternatives, generating significant distortions in market functioning⁷⁴. In parallel, EU consumer policy has sought to address the informational asymmetries which structurally characterize business-to-consumer relationship: consumers typically possess less knowledge, experience, and awareness of product-related risks compared to professional sellers and suppliers⁷⁵. Added to this is the behavioral insight that consumers frequently act irrationally, particularly when facing complex purchasing decisions⁷⁶.

⁷² O. BEN-SHAHAR, ‘Fixing Unfair Contracts’, in *Stan. L. Rev.*, 2011, 63, p. 898 and G. HOWELLS and S. WEATHERILL, nt. 53, p. 1: ‘From the consumer standpoint, we might characterise a “perfect” market as one where there is no such thing as an unsafe product or even a poor quality product. There are simply products of different types from which the consumer can choose’.

⁷³ See, for example, Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC [OJ L, 2024/1781].

⁷⁴ G.A. AKERLOF, ‘The Market for “Lemons”: Quality Uncertainty and the Market Mechanism’, in *Quarterly Journal of Economics*, 1970, 84(3), p. 488. In his analysis of information asymmetries, the author explains how the market for ‘lemons’ (‘used cars’) breaks down when there is no credible mechanism to signal vehicle quality.

⁷⁵ I. AYRES and A. SCHWARTZ, ‘The No-Reading Problem in Consumer Contract Law’, in *Stanford Law Review*, 2014, 66, pp. 545-609; O. BEN-SHAHAR and C.E. SCHNEIDER, ‘The Failure of Mandated Disclosure’, in *University of Pennsylvania Law Review*, 2011, 159, pp. 647-749; Y. BAKOS, F. MAROTTA-WURGLER and D. TROSSEN, ‘Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts’, in *Journal of Legal Studies*, 2014, 43, pp. 1-35; O. BEN-SHAHAR and C.E. SCHNEIDER, *More Than You Wanted To Know: The Failure Of Mandated Disclosure*, Princeton, 2014. For a different opinion, see S. GRUNDMANN, W. KERBER and S. WEATHERILL, ‘Party Autonomy and the Role of Information in the Internal Market - an Overview’ in S. GRUNDMANN, W. KERBER and S. WEATHERILL (eds.), *Party Autonomy and the Role of Information in the Internal Market*, Berlin/New York, 2001, pp. 3 et seq.

⁷⁶ In the context of psychological biases which may affect consumers, see, for example, X. GABAIX and D. LAIBSON, ‘Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets’, in *Quarterly Journal of Economics*, 2006, 121(2), pp. 505 et seq; S. DELLAVIGNA and U. MALMENDIER, ‘Contract Design and Self-Control: Theory and Evidence’, in *Quarterly Journal of Economics*, 2004, 119(2), pp. 353 - 402; S. MULLAINATHAN and A. SHLEIFER, ‘The Market for News’, in *American Economic Review*, 2005, 95(4), pp. 1031–1053; S.M. OSTER and F.M. SCOTT MORTON, ‘Behavioral Biases Meet the Market: The Case of Magazine Subscription Prices’, in *Advances in*

It is within this same logic that a further justification emerges for subjecting consumer contracts, particularly their terms, which constitute their defining features, to regulatory oversight. Consumer contracts may contain what can be tentatively defined as ‘unsafe terms’, such as provisions governing personal data and privacy, terms that entirely exclude any form of liabilities in favor of sellers or suppliers, or penalties that disproportionately burden the weaker party and restrict their ability to exit the contract⁷⁷.

Furthermore, contracts may give rise to negative externalities⁷⁸. A contract term that excludes all liability on the part of the seller or supplier may not only prejudice the individual consumer, but also compromise the rights of third parties, effectively leaving injured parties without meaningful legal recourse.

Hidden features are equally problematic: firms may make sweeping promises in their advertising, only to negate them in the fine print⁷⁹. Consumers often lack the time, expertise, or incentives to scrutinize complex terms, especially when contracts require advanced literacy, numeracy, and legal understanding⁸⁰.

Lastly, consumer contracts are almost invariably characterized by a structural imbalance between the professional and the non-professional party, both in terms of information and contractual powers⁸¹.

In conclusion, this perceptive account of the economic rationale underlying unfair contract terms control also recalls a point that has long been recognized. Measures designed to protect consumers, such as mandatory disclosure obligations and the conferral of a right of withdrawal

Economic Analysis and Policy, 2005, 5(1), pp. 1 et seq; J. HANSON and D. KYSAR, ‘Taking Behavioralism Seriously’, in *Harvard Law Rev.*, 1999, 112, pp. 1422 et seq; C. SUNSTEIN (eds.), *Behavioral Law and Economics*, Cambridge, 2000. Cf, also, R. CATERINA, ‘Psicologia della decisione e tutela dei consumatori’ in A. D’ADDA, V. BACHELET and L. REGAZZONI (eds.), *Il diritto privato dei consumatori. Nuovi assetti e prospettive*, Pisa, 2026, pp. 11 et seq.

⁷⁷ O. BEN-SHAHAR, nt. 72, p. 898: ‘Making unreasonably unsafe products (and using the contract to limit the manufacturer’s liability for physical injury represents (...) [a] social cost’.

⁷⁸ In the specific context of contracting over personal data, see O. BEN-SHAHAR, ‘Data Pollution’, in *Journal of Legal Analysis*, 2019, 11, pp. 104-149, ID., ‘Privacy Protection, at What Cost? Exploring the Regulatory Resistance to Data Technology in Auto Insurance’, in *Journal of Legal Analysis*, 2024, 15, pp. 129-157.

⁷⁹ With specific reference to *hidden prices*, see X. GABAIX and D. LAIBSON, nt. 76, pp. 505 et seq.

⁸⁰ See, for example, G. CORDERO-MOSS, ‘Standard contract terms as an alternative to legislation’ in C. TWIGG-FLESNER (eds.), nt. 27, pp. 487 et seq and D. ECHENBERG, ‘Negotiating International Contracts: Does the Process Invite a Review of Standard Contracts from the Point of View of National Legal Requirements?’ in G. CORDERO-MOSS (eds.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, Cambridge, 2011, pp. 11 et seq. See, more recently, G. CORDERO-MOSS, *International Commercial Contracts: Contract Terms, Applicable Law and Arbitration*, 2nd ed., Cambridge, 2024, pp. 8-38, specifically 11.

⁸¹ G. HOWELLS and S. WEATHERILL, nt. 53, p. 2; G.J. STIGLER, ‘The Economics of Information’, in *Journal of Political Economy*, 1961, 69, p. 213; J. STIGLITZ, ‘The Contributions of the Economics of Information to Twentieth Century Economics’, in *Quarterly Journal of Economics*, 2000, 115, p. 1441.

on the weaker party, undoubtedly serve an important function, but they are not costless. The transaction costs associated with these protective mechanisms are, at least in part, likely to be passed on by businesses to consumers.

1.2.1. ‘Unsafe’ Terms In Foreign Currency Linked Loans, A Case Study

An interesting case study, which will accompany us throughout the analysis, is that of foreign currency linked loans⁸². These types of contracts offer significant insights into what is meant by ‘unsafe’ terms and negative externalities in the context of consumer contracts.

Since the beginning of the 21st century, foreign currency linked loans have begun to spread within several EU Member States. In particular, since December 2004, they have gained wide fame especially in Central and Eastern Europe⁸³. By way of example, as of April 2011, these

⁸² For an in-depth discussion of the notion of foreign currency linked loans in the Italian context see F. AZZARRI, ‘I “prestiti in valuta estera” nella direttiva 2014/17/UE sui “contratti di credito ai consumatori relativi a beni immobili residenziali”’, in *ODCC*, 2015, pp. 189 et seq; D. MAFFEIS, ‘Direttiva 2014/17/UE: rischio di cambio e di tasso e valore nella componente aleatoria nei crediti immobiliari ai consumatori’, in *BBTC*, 2016, II, pp. 191-192; L. BUONANNO and F. MEZZANOTTE, ‘Some Problematic Issues Concerning the Implementation of the MCD in Italy’ in M. ANDERSON and E. ARROYO AMAYUELAS (eds.), *The Review Of The Mortgage Credit Directive: Toward A Digital, Sustainable And Inclusive European Market*, Paris, 2025, pp. 276 et seq; V. ROPPO, ‘Iscrivibilità di ipoteca per somma denominata in moneta estera’, in *Riv. dir. priv.*, 1996, pp. 55 et seq. See also P. SIRENA, ‘Tutela dei clienti e regolazione del mercato trent’anni dopo l’emanazione del Testo unico bancario’, in *Quaderni di Ricerca Giuridica della Consulenza Legale - Banca d’Italia*, Roma, 2024, pp. 123-140. Regarding international literature on foreign currency linked loans see A. WIEWIÓROWSKA-DOMAGALSKA, ‘Unfair Contract Terms in CHF Mortgage Loans. Case C-206/18 Dziubak – where do we go from here?’, in *EuCML*, 2020, 9(5), pp. 207, 211-212; EAD., ‘Potential and Hurdles for the CJEU’s Jurisprudence in Domestic Legal Orders: A Polish Case Study’ in S. GRUNDMANN and M. GROCHOWSKI (eds.), *European Contract Law and the Creation of Norms*, Cambridge, 2021, pp. 280, 282-287; R. VASSILEVA, ‘Monetary Appreciation and Foreign Currency Mortgages: Lessons from the 2015 Swiss Franc Surge’, in *ERPL*, 2020, 28(1), pp. 181–195 and E. MIŠČENIĆ, P. TERESZKIEWICZ and M. INFANTINO, ‘The Interplay Between the CJEU and National Courts in the Case Law on Unfair Contract Terms in Foreign Currency Loans: A Comparative Overview’, in *ERCL*, 2023, 19(4), pp. 355 et seq; C. BRESCI, ‘Transparency Claims, Intellectual Services and Consumer Contracts: A Case of Consumer Over-Protection and Under-Protection?’, *ibid.*, pp. 394 et seq; A.D. TASSIKAS, ‘The Court and the Sleeping Beauty 2.0: Filling the Contractual Gap, or Making Valid Consumer Contracts to the Detriment of the Non-consumer?’, *ibid.*, pp. 422 et seq; M. JÓZON, ‘Judicial Governance by Unfair Contract Terms Law in the EU: Proposal for a New Research Agenda for Policy and Doctrine’, in *ERPL*, 2020, 28(4), pp. 909 et seq. For a comprehensive analysis of the importance of the role of judicial adjudication of cases concerning mortgage loan contracts and their impact for domestic legal reforms see C. MAK, ‘Giving Voice: A Public Sphere Theory of European Private Law Adjudication’, in *European Law Open*, 2023, 2(4), pp. 700 et seq; A. WIEWIÓROWSKA-DOMAGALSKA and M. GROCHOWSKI, ‘Consumer Law in Poland: Or There and Back Again’ in H.-W. MICKLITZ (eds.), *The Making of Consumer Law and Policy in Europe*, London, 2021, pp. 227 et seq; M. GROCHOWSKI and M. TABOROWSKI, ‘Effectiveness and EU Consumer Law: The Blurriness in Judicial Dialogue’ in F. CASAROSA and M. MORARU (eds.), *The Practice of Judicial Interaction in the Field of Fundamental Rights: The Added Value of the Charter of Fundamental Rights of the EU*, Cheltenham/ Northampton, 2022, pp. 235–256. See also D. BUSCH and M. LEHMANN (eds.), *Unfair Terms in Banking and Financial Contracts*, Oxford, 2023.

⁸³ See R. MANKO, *Unfair Terms In Swiss Franc Loans. Overview Of European Court Of Justice Case Law*, European Parliamentary Research Service, March 2021,

contracts amounted to the 40% of Polish commercial banks' loan portfolios and more than a half of these loans were indexed to the Swiss franc (CHF)⁸⁴.

In this context, it is worth noting that there are three main kinds of foreign currency linked loans which can be identified⁸⁵.

The simplest is that one which allows the bank to provide the loan in foreign currency and instalments are made in the foreign currency⁸⁶.

Secondly, banks may offer loans denominated in a foreign currency, where the value of the loan is expressed in foreign currency, but the disbursement and repayments of the principal are in domestic currency. Therefore, instalments are calculated on the basis of the exchange rate between the domestic and the foreign currency⁸⁷.

Differently, loans pegged to a foreign currency entail that the principal and the instalments are expressed and repaid in the domestic currency; nonetheless, the borrower's overall debt is linked to the amount of domestic currency required to purchase the equivalent principal in the foreign currency. In other words, the parties agree that a loan denominated in the domestic currency shall be repaid in the same currency, but for the amount needed to purchase the sum due in the foreign currency. In essence the indexation clause modifies the amount owed according to fluctuations in the exchange rate between the two currencies⁸⁸.

By way of illustration, it can be considered a loan agreement pegged to CHF for ten thousand euros, where the exchange rate CHF/euro is 2. The loan specifies that the amount to be repaid is not ten thousand euros, but rather the sum required to purchase twenty thousand CHF based on the initial exchange rate. If euro appreciates against the CHF, fewer euros will be needed to

[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2021\)689361](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)689361). See also D. ROGOZIŃSKI, 'Orzecznictwo Sądu Najwyższego w sprawie kredytów waloryzowanych kursem waluty obcej a prawidłowa implementacja jurysdykcyjna dyrektywy 93/13/EWG', in *Journal of Insurance, Financial Markets and Consumer Protection*, 2018, 4, p. 4.

⁸⁴ See M. BROWN and R. DE HAAS, 'Foreign Currency Lending In Emerging Europe: Bank-Level Evidence', in *European Banking Center Discussion Paper*, 2010, pp. 1-2 and D. ROGOZIŃSKI, nt. 83, p. 4.

⁸⁵ R. MANKO, nt. 83, p. 2; E. MISĆENIĆ, 'Currency Clauses In CHF Credit Agreements: A "Small Wheel" In The Swiss Loans' Mechanism', in *EuCML*, 2020, 6, pp. 226 et seq.

⁸⁶ See T. ASCARELLI, 'Obbligazioni pecuniarie. Art. 1277-1284' in A. SCIALOJA, G. BRANCA (eds.), *Commentario del codice civile*, Bologna/Roma, 1959, pp. 366 et seq; ID., 'I debiti di moneta estera', in *Riv. dir. comm.*, 1923, I, pp. 444 et seq and F. PISTELLI, *L'indicizzazione del regolamento contrattuale*, Napoli, 2023, pp. 35-36.

⁸⁷ P. DE GIOIA CARABELLESE and C. CHESSA, 'La direttiva 2014/17/UE in merito ai contratti di credito ai consumatori relativi a beni immobili residenziali', in *Resp. civ. prev.*, 2016, pp. 1434 et seq, F. PISTELLI, nt. 86, pp. 35-36; ID., 'Ritorno al futuro. La tutela del consumatore nei foreign currency loans', in *Actualidad Jurídica Iberoamericana*, 2022, pp. 738 et seq; F. AZZARRI, nt. 82, pp. 189 et seq and D. MAFFEIS, nt. 82, pp. 191-192.

⁸⁸ F. PISTELLI, nt. 86, pp. 35-36, ID., nt. 87, pp. 738 et seq.

determine the repayment amount for each instalment. Conversely, if euro depreciates, a greater amount will be required to cover the equivalent amount in CHF⁸⁹.

Given such a background, it is easy to understand that the supply of foreign currency loans is first and foremost influenced by countries' monetary conditions⁹⁰. Thus, in countries where exchange rates are tightly pegged or where further domestic currency appreciation is expected, banks are likely to be more inclined to offer foreign currency linked loans⁹¹. This means that the aggregate amount of foreign currency linked loans is positively correlated with domestic currency volatility and is negatively correlated with exchange rate volatility.

A further advantage of indexation lies in its potential to offer the borrower more favorable interest rates. In practical terms, this mechanism involves the application of a lower interest rate in exchange for the borrower's acceptance of the risk associated with exchange rate fluctuations between the domestic currency and the foreign currency⁹².

All in all, the most common manifestation of this type of mechanism has been the so called 'exchange risk clause' or 'double indexation' clause⁹³. Unlike straightforward indexation mechanism, these variants introduce an additional layer of complexity by distinguishing the historical exchange rate and the current rate used to calculate individual instalments or early repayment amounts⁹⁴. As a result, neither the total value of the debt nor the precise amount of each instalment is fixed in advance. Instead, both are subject to the exchange rate prevailing at the time of payment – whether it be the due date of a regular instalment or the date of early repayment⁹⁵.

Despite the robust justification underpinning such contracts, following the proverbial aphorism 'not all that glitters is gold', this system actually concealed a quid pro quo, consisting

⁸⁹ This example is provided by F. PISTELLI, nt. 86, p. 36.

⁹⁰ See M. BROWN and R. DE HAAS, nt. 84, pp. 1 et seq.

⁹¹ European Central Bank - Financial Stability Review, June 2010, <https://www.ecb.europa.eu/pub/pdf/fsr/financialstabilityreview201006en.pdf>, p. 162.

⁹² More precisely, loans indexed to or denominated in CHF typically offered more favorable interest rates, as they were linked to the LIBOR (London Interbank Offered Rate), unlike loans in domestic currencies, which applied local benchmark rates such as the WIBOR (Warsaw Interbank Offered Rate). LIBOR was generally lower than WIBOR, due to the greater depth and liquidity of the interbank lending market for a currency like CHF, compared to those of smaller national markets.

⁹³ See F. PISTELLI, 'Finanziamenti in valuta estera e rimedi: oltre la conversione', in *ODCC*, 2022, pp. 241 et seq. In Italy, this wording is predominantly used by the Banking and Financial Ombudsman.

⁹⁴ F. PISTELLI, nt. 86, pp. 84 et seq.

⁹⁵ R. DORNBUSH, 'Expectations and exchange rate dynamics', in *Journal of Political Economy*, 1976, 84, pp. 1161 et seq and R. DORNBUSH and J.A. FRANKEL, 'The flexible exchange rate system: experience and alternatives', in *NBER Working Paper Series*, 1988.

of the accumulation of a financial risk related to the fluctuations between the domestic and foreign currencies⁹⁶.

The particular riskiness of foreign currency loans originated in a dense intertwining of default risk and exchange rate risk and the exposure to these risks can lead to systemic problems, both in the event of currency appreciation and in the case of currency depreciation⁹⁷.

All in all, the most emblematic case has been represented by the CHF/euro exchange rate. With the spreading of the global financial crisis, the strong interest nurtured for loans denominated or indexed to CHF (considered a safe haven, sheltered from the consequences of the crisis on dollar and on euro) has led to a progressive appreciation of this currency and its consequent overvaluation compared to the other currencies. In August 2011, the *Schweizerische Nationalbank* (SNB) therefore embarked on a series of monetary policies aimed at an extraordinary reduction in interest rates and an expansion of liquidity in the market. These measures culminated on 6 September 2011, with the SNB's decision to set a minimum value (floor) of 1.20 CHF per euro to the exchange rate between the two currencies⁹⁸. The floor was maintained until 15 January 2015, when the SNB decided that it would no longer hold CHF at a fixed exchange rate with euro⁹⁹. Therefore, exchange rate between CHF and the other national

⁹⁶ P. YEŞİN, 'Foreign Currency Loans and Systemic Risk in Europe', in *Federal Reserve Bank of St. Louis Rev.*, 2013, pp. 219 et seq; J. FIDRMUC, H. MARIYA and H. STIX, 'Households' Foreign Currency Borrowing in Central and Eastern Europe', in *Journal of Banking & Finance*, 2013, pp. 1880 et seq; M. BROWN and R. DE HAAS, nt. 84, pp. 57 et seq; J. PANN, R. SELIGER, J. ÜBELEIS, 'Foreign Currency Lending in Central, Eastern and Southeastern Europe: The Case of Austrian Banks', in *Financial Stability Report*, 2010, 20, pp. 56 et seq; F. ROY, 'Mortgage Markets In Central And Eastern Europe – A Review Of Past Experiences And Future Perspectives', in *European Journal of Housing Policy*, 2008, 8(2), pp. 133-160 and A. CSIZMADY, J. HEGEDUŞ, D. VONNAK, 'A Housing Regime Unchanged: The Rise And Fall Of Foreign-Currency Loans In Hungary', in *Corvinus Journal of Sociology and social policy*, 2019, pp. 3 et seq.

⁹⁷ In fact, an appreciation of the domestic currency will - at first - have a favorable effect on the foreign currency wealth of households and firms, leading to an increase in the attractiveness of such foreign currency loans, especially if there is a persistently wide interest rate differential on domestic currency loans over foreign currency loans. Ultimately, this scenario will ease aggregate demand and increase the risk of overheating in the economy, which could manifest itself in excessive credit growth during booms and, subsequently, in greater credit compression during bust periods, thus exacerbating boom-bust cycles. Similarly, a depreciation of the domestic currency is apt to increase the foreign currency debts to be repaid by households and firms, causing a worsening in their debt-servicing capacity, especially in cases where they do not use adequate hedging instruments against exchange rate risk or they do not have foreign currency inflows. Such negative externalities are likely to affect the private sector widely, and, therefore, such an event could potentially pose a systemic risk to the financial stability of the country. This is particularly true when foreign currency appreciation is accompanied by an increase in interest rates on foreign currency loans, which would clearly aggravate the borrower's default risk.

⁹⁸ According to the SNB, this measure 'has been taken by the Swiss National Bank under its responsibility'.

⁹⁹ See SNB Press Release, *Swiss National Bank Discontinues Minimum Exchange Rate And Lowers Interest Rate To -0.75%*, Zurich, 15 January 2015: 'The minimum exchange rate was introduced during a period of exceptional overvaluation of the Swiss franc and an extremely high level of uncertainty on the financial markets. This exceptional and temporary measure protected the Swiss economy from

currencies (złoty, forint, kuna, etc) and the foreign currency interest rates within the contracts soared unexpectedly¹⁰⁰.

Consequently, borrowers and banks found themselves trapped. More specifically, borrowers found themselves in the situation of having to repay up to twice the value of the original loan, unable to escape these negative consequences by selling the purchased property, as its value would only cover a small percentage of the debt¹⁰¹.

This explains why, in recent years, numerous consumers brought claims before national courts, seeking a declaration that the contractual terms governing the denomination or indexation mechanism of those contracts were unfair. More precisely, consumers complained not so much about the assumption of an exchange rate risk because of the indexation mechanism, but instead they complained the way in which exchange rates were determined.

In fact, most of these foreign currency linked loans provided that the calculation of the monthly repayments had to take place on the basis of the *selling* rate of the foreign currency applied by the bank, while the amount of the loan disbursed was fixed on the basis of the *buying* rate applied by the bank for the same currency. Therefore, from the consumers' point of view, the way in which exchange rates were determined concealed inherently the possibility for the bank to profit unilaterally from market fluctuations, charging any fluctuations due to the appreciation of the foreign currency against the domestic currency to the borrower.

1.3. The Unfair Contract Terms Directive Is Not Limited To Consumer Protection: The Extrinsic And Intrinsic Perspectives

It is exactly within this broader framework that the adoption of Council Directive 93/13/EEC of 5 April 1993 (Unfair Contract Terms Directive), relating to the approximation of the laws and administrative provisions of Member States concerning unfair terms in consumer contracts, finds its justification¹⁰².

serious harm. Recently, divergences between the monetary policies of the major currency areas have increased significantly – a trend that is likely to become even more pronounced. The euro has depreciated considerably against the US dollar and this, in turn, has caused the Swiss franc to weaken against the US dollar. In these circumstances, the SNB concluded that enforcing and maintaining the minimum exchange rate for the Swiss franc against the euro is no longer justified’.

¹⁰⁰ See R. MANKO, nt. 83, p. 3. For instance, the exchange rate between CHF and the Polish złoty soared from PLN 1.96 per Swiss franc in August 2008, to PLN 3.21 in February 2009, and PLN 4.29 in January 2015.

¹⁰¹ See M. BROWN and R. DE HAAS, nt. 84, pp. 1-2. These data are consistent with what was stated in Bankier.pl website as far as the CHF/PLN exchange rate is concerned.

¹⁰² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [OJ L 95]. In this respect, it should be recalled Recital 6 which establishes that ‘[w]hereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his

Unfair Contract Terms Directive represents a pivotal development in the trajectory of European contract law, marking one of the first substantive intrusions into the traditionally sovereign domain of national private law¹⁰³. For national scholars within Member States, the Directive constituted a profound departure from the long-standing perception of EU law as largely confined to the domain of public law and economic governance¹⁰⁴. Simultaneously, for EU legal scholars, the Directive charted a course into previously uncharted terrain long seen as the preserve of domestic legal autonomy¹⁰⁵.

At the outset, a matter of definitional significance must be addressed - namely, the identification of the category of contracts subjected to regulatory oversight under the Unfair Contract Terms Directive. Indeed, Article 1 establishes that its provisions apply to contracts concluded between a 'seller or supplier' and a 'consumer'¹⁰⁶. In this vein, Article 2 clarifies

own, it is essential to remove unfair terms from those contracts'. As pointed out by P. ROTT, 'Unfair contract terms' in C. TWIGG-FLESNER (eds.), nt. 27, p. 288, the Court of Justice emphasizes the objectives of the Directive by referring to the structurally weaker position of consumers vis-à-vis sellers or suppliers. See, in this regard, Joined Cases C-240/98 and C-244/98, *Océano Grupo Editorial SA v Rocío Murciano Quintero* and *Salvat Editores SA v José M. Sánchez Alcón Prades ea*, ECLI:EU:C:2000:346, para 25: 'As to the question of whether a court seised of a dispute concerning a contract between a seller or supplier and a consumer may determine of its own motion whether a term of the contract is unfair, it should be noted that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms'. In this context see also P. NEBBIA, nt. 5, p. 3: 'Like most community measures in the area of consumer protection 93/13 (...) has a Janus-faced nature: formally based on article 100a (now article 95) of the Treaty of Rome and therefore aimed at reinforcing the internal market, it also pursues the objective of ensuring protection of consumers against unfair terms throughout Europe'. In conclusion, the Unfair Contract Terms Directive has not been amended since, save only for a minor adjustment made by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [OJ L 304], concerning (but not changing) its minimum character in terms of harmonization policy.

¹⁰³ For a preliminary overview see R. SCHULZE and F. ZOLL, *European Contract Law*, 3rd ed., Baden-Baden, 2021, pp. 173 et seq; the authors describe unfair terms law as a 'core area' of contract law. See also H. SCHULTE-NÖLKE, C. TWIGG-FLESNER, M. EBERS, *EC Consumer Law Compendium*, Berlin/New York, 2008, pp. 197, 204; F. RANIERI, *Europäisches Obligationenrecht*, 3rd ed., Wien, 2009, p. 404; F. ZOLL, 'Unfair Terms in the Acquis Principles and Draft Common Frame of Reference: A Study of the Differences between the Two Closest Members of One Family', in *Juridica International*, pp. 69-71; H.-W. MICKLITZ, J. STUYCK and E. TERRY (eds.), *Consumer Law*, Oxford/Portland, 2010, pp. 279 et seq, P. ROTT, 'Unfair contract terms' in C. TWIGG-FLESNER (eds.), nt. 27, pp. 287 et seq, N. REICH, H.-W. MICKLITZ, P. ROTT, K. TONNER, nt. 61, pp. 127 et seq.

¹⁰⁴ R. SCHULZE and F. ZOLL, nt. 103, pp. 173 et seq.

¹⁰⁵ P. SIRENA, 'La disciplina delle clausole contrattuali abusive nell'interpretazione della giurisprudenza e dell'Arbitro Bancario Finanziario (ABF)' in A. BELLELLI, L. MEZZASOMA and F. RIZZO (eds.), *Le clausole vessatorie a vent'anni dalla Direttiva CEE 93/13*, Napoli, 2014, p. 59; R. SCHULZE, 'Contours of European Private Law' in R. SCHULZE and H. SCHULTE-NÖLKE (eds.), *European Private Law – Current Status and Perspectives*, Munich, 2011, p. 4.

¹⁰⁶ Article 1 establishes that: 'The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer'. Moreover, Recital 10 provides additional clarification regarding

that the notion of ‘seller or supplier’ encompasses any natural or legal person acting for purposes relating to their trade, business, or profession, regardless of whether that activity is conducted in the private or public sector¹⁰⁷. By contrast, ‘consumer’ refers to any natural person acting for purposes which lie outside the scope of their trade, business, or profession¹⁰⁸.

The genesis of Unfair Contract Terms Directive is to be discerned in the early development of European consumer law¹⁰⁹. As the post-industrial marketplace grew ever more intricate - populated by an overwhelming array of goods and services and characterized by increasingly asymmetrical relationships between sellers or suppliers and consumers - the foundational assumptions of classical contract theory began to fracture¹¹⁰.

This recognition led to a growing awareness, at the supranational level, of the structural inefficiencies inherent in mass-market transactions. Consequently, the imperative emerged for a coherent Community strategy capable of addressing the specific vulnerabilities of consumers, not only in terms of health and safety, but also with regard to their economic position within the contractual relationship¹¹¹. Among the concerns identified as requiring urgent intervention

the scope of application by expressly excluding certain types of contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements: ‘Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; whereas those rules should apply to all contracts concluded between sellers or suppliers and consumers; whereas as a result *inter alia* contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements must be excluded from this Directive’. For a broader analysis see T. JOSIPOVIĆ, ‘Scope of Application of the Unfair Contract Terms Directive: Is It Time for a New Compromise?’, in *ERPL*, 2024, 32(3), pp. 339-360 and Case C-593/22, *First Bank SA*, ECLI:EU:C:2023:555. Moreover, it is worth mentioning Case C-488/11, *Asbeek Brusse*, ECLI:EU:C:2013:341, paras 23-34, which clearly explains that the Directive is not meant to exclusively apply to sales contracts.

¹⁰⁷ Article 2(c) provides that: ‘For the purposes of [Unfair Contract Terms Directive] (...) “seller or supplier” means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned’.

¹⁰⁸ Article 2(b) clarifies that: ‘For the purposes of [Unfair Contract Terms Directive] (...) “consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession’.

¹⁰⁹ P. NEBBIA, nt. 5, p. 6; V. RIZZO, *Le “clausole abusive” nell’esperienza tedesca, francese, italiana e nella prospettiva comunitaria*, Napoli, 1994, p. 559: ‘La Direttiva CEE n. 13/93, concernente le clausole abusive nei contratti stipulati con i consumatori, ha avuto un *iter* lungo e travagliato. Essa va inquadrata, nel suo sorgere, nei programmi generali di protezione del consumatore degli organi comunitari, che storicamente vedono la luce agli inizi degli anni ‘70’.

¹¹⁰ Council Resolution of 14 April 1975 [OJ C 92], nt. 11: ‘While consumer protection has long been an established fact in the Member States of the Community, the concept of a consumer policy is relatively recent. It has developed in response to the abuses and frustrations arising at times from the increased abundance and complexity of goods and services afforded the consumer by an ever-widening market. Although such a market offers certain advantages, the consumer, in availing himself of the market, is no longer able properly to fulfil the role of a balancing factor’.

¹¹¹ More precisely, the Parliamentary Assembly of the Council of Europe adopted Resolution n. 543 in 1973, approving a ‘Consumer Protection Charter’. This document not only lists a series of consumer

were the widespread use of pre-formulated standard terms, the exclusion of fundamental contractual rights, the imposition of excessive obligations under credit agreements, and aggressive or coercive sales practices¹¹².

In this vein, following the adoption of a ‘preliminary programme’ on 14 April 1975, the Commission advanced, in August 1976, an *avant-projet* regarding standard terms in consumer contracts¹¹³. This draft proposal included a general rule stipulating that standard terms conferring an undue advantage to the drafting party are void¹¹⁴. The proposal was accompanied by a detailed annex listing numerous clauses deemed inherently unfair and, as such, considered null and void. However, following 1977, the Commission’s legislative efforts on this front appeared to stagnate¹¹⁵.

A Second Programme, approved only on 19 May 1981, for a consumer protection and information policy, referring to the question of unfair contract terms, reported that the Commission had considered that their first step should be to draft ‘a discussion paper in which it will set out all the problems which this subject involves and the various options open with a view to harmonizing those aspects which may be affected by discrepancies in this area’¹¹⁶.

rights but also outlines more specific intervention guidelines. Among these, in order to safeguard consumers’ economic interests, it emphasizes the need to monitor standard contract terms and protect against unfair terms. As stated in the Resolution: ‘The individual consumer shall be protected against the abuse of the power of the supplier of goods and services, in particular against one-sided standard contracts, the exclusion of essential legal rights in contracts, demand for payment of unsolicited goods and high-pressure selling methods which do not allow consumers to make reasonable assessments of the terms of sale’. See, in this context, G. ALPA and M. BESSONE, ‘La “Carta Europea dei Consumatori”’, in *Riv. soc.*, 1974, pp. 827 et seq; V. RIZZO, nt. 109, pp. 559-560; G. ALPA, *Diritto privato dei consumi*, Bologna, 1986, p. 59; ID., ‘Programmi e progetti del consiglio d’Europa e della C.e.e. sulla disciplina dei contratti “standard”’, in *Foro it.*, 1977, V, pp. 73 et seq; E. VON HIPPEL, *Verbraucherschutz in Europa*, in *RabelsZ*, 1981, 45, pp. 365 et seq.

¹¹² Council Resolution of 14 April 1975 [OJ C 92], nt. 11.

¹¹³ V. RIZZO, nt. 109, pp. 560-561: ‘(...) la Commissione ha presentato nell’agosto 1976 un *avant-projet* di direttiva sulle «clausole *standard* nei contratti con i consumatori» ove, accanto ad una regola generale secondo cui «le clausole *standard* che procurano al soggetto che le propone un vantaggio indebito sono nulle» (art. 3), si pone una estesa lista di clausole da considerare «indebite» e quindi nulle’.

¹¹⁴ G. ALPA, nt. 111, pp. 80 et seq.

¹¹⁵ V. RIZZO, nt. 109, pp. 560-561: ‘Nel 1977 il «Comitato consultivo dei consumatori» esprime il proprio parere sulla questione delle «clausole abusive» dopo di che non si hanno ulteriori progressi nei lavori della Commissione. Da un lato i pareri raccolti e le leggi nel frattempo emanate in alcuni Stati membri lasciano apparire presto l’*avant-projet* almeno come parzialmente superato’.

¹¹⁶ Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy [OJ C 133], para 30: ‘Continuation of action provided for under the preliminary programme. The commission will pursue the action already begun under the 1975 programme which it has not been able to bring to a conclusion, particularly as regards certain unfair commercial practices. The commission has already started work on unfair terms in contracts, with the help of government experts, as a basis for a community measure. Meanwhile, legislation has been adopted in several member states, and the commission will submit, as a first step, a discussion paper in which it will set out all the problems which this subject involves and the various options open with a view to harmonizing those aspects of competition which may be affected by disparities in this area. After

A resolution adopted by the Council on 9 November 1989, concerning the future priorities for revitalizing consumer protection policy included - within its annex - a clear call to advance ongoing initiatives spearheaded by the Commission¹¹⁷. Among these was the groundwork for a proposed directive on unfair terms in consumer contracts. However, this proposal would not see the light of day in its first official form until 24 July 1990¹¹⁸. A revised draft followed on 5 March 1992¹¹⁹, before the long-awaited final adoption was eventually secured on 5 April 1993.

Given that background, the central argument advanced herein is that the Unfair Contract Terms Directive - contrary to its ostensible consumer-centric framing - is not *limited* to consumer protection, both from an *extrinsic* and *intrinsic* perspective.

The analysis shall now turn to the *extrinsic* dimension of this proposition.

The placement of consumer protection objectives in the 8, 9, 10, and 11 Recitals, after other objectives, such as establishing the Internal Market (1 Recital), coping with the disparities in the laws of the Member States between the seller or supplier, on the one hand, and consumers, on the other hand (2 Recital), preventing the ‘distortions of competition’ (*ibid*), and dealing with the lack of awareness which may deter consumers from direct transactions for the purchase of goods or services in another Member State (5 Recital), unveils the assumption that market regulation by the European legislator, included the unfair terms regulation, can be justified in so far as it contributes primarily to removing obstacles to trade and eliminating market failures¹²⁰.

In other words, echoing the thesis set forth in the opening paragraph, the regulation of unfairness is justified insofar as European legal intervention remains within that grey area where market integration policy and consumer protection policy intersect¹²¹. In this regard, the

wide-ranging consultations on this discussion paper, the commission will put forward suitable proposals, where necessary’. See also, V. RIZZO, nt. 109, p. 562.

¹¹⁷ Council Resolution of 9 November 1989 on future priorities for relaunching consumer protection policy [OJ C 294]. The annex to the Resolution outlines the priorities for relaunching the policy for the protection and promotion of consumer interests, identifying key areas of action to strengthen consumer rights and integration within European policies. Among these priorities the annex mentions ‘[b]ringing to a conclusion [the Directive on unfair terms in consumer contracts], in consultation with national experts and in accordance with the criteria set by the Council resolution of 23 June 1986’.

¹¹⁸ Proposal for a Council Directive on unfair terms in consumer contracts [90/C 243/02], pp. 2 et seq.

¹¹⁹ Amended proposal for a Council Directive on unfair terms in consumer contracts [92/C 73/05], pp. 7 et seq.

¹²⁰ N. JANSEN, ‘Introduction before Art 6:201’ in N. JANSEN and R. ZIMMERMANN (eds.), *Commentaries on European Contract Laws*, Oxford, 2018, p. 924: ‘Politically, the Directive was nevertheless conceived as an instrument of general market regulation. The Commission aimed its instrument at unifying the rules on unfair contract terms all Europe, establishing a sufficiently high level of protection for consumers, easing access to the Common Market for businesses, and thus enhancing the European economy’.

¹²¹ See above § 1. On the various theories regarding the objectives of the Unfair Contract Terms Directive, cf T. WILHELMSSON, ‘Various Approaches to Unfair Terms and Their Background

suppression of unfair terms in contracts emerges as a fundamental precondition for the realization of a fully integrated Internal Market. Similarly, the very project of market integration operates as a compelling normative rationale for the law's incursion into the realm of private autonomy, authorizing a departure from the classical tenet of *pacta sunt servanda*.

Furthermore, the contribution of the Unfair Contract Terms Directive to the advancement of the Internal Market - as acknowledged in Recital 6¹²² - unfolds along two complementary axes: that of the *consumer* and that of the *seller or supplier*¹²³.

From consumers' perspective, the Directive serves a strategic function in dismantling legal, linguistic, and psychological impediments to cross-border trade, as well explained under the doctrine of the so-called 'confident consumer':

'it cannot be assumed that consumers who cross frontiers to buy goods or services, or to invest or acquire property in other Member States, have understood and agreed the terms of a contract they have made, if they do not speak the local law, especially if it is complex ... Unless there is some assurance that they will not be seriously disadvantaged by unfair contracts, consumers will lack the confidence to use the new possibilities opened up by the completion of the internal market, for example the opportunity to buy goods and services at more favourable prices in other Member States than their country of residence'¹²⁴.

Philosophies', in *Juridica International*, 2008, XIV, p. 51; E. HONDIUS, *Unfair Terms in Consumer Contracts*, Utrecht, 1987; ID., 'The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States', in *ERPL*, 1995, 3(2), p. 241; H. SCHULTE-NÖLKE, 'Incorporation of Standard Contract Terms on Websites', in *ERPL*, 2019, 15(2), p. 14. On the notion of unfairness see C.M. BIANCA, 'Le tecniche di controllo delle clausole vessatorie' in C.M. BIANCA and G. ALPA (eds.), *Le clausole abusive nei contratti stipulati con i consumatori*, Padova, 1996, pp. 357 et seq, now in C.M. BIANCA, *Realtà sociale ed effettività della norma. Scritti giuridici*, II, *Obbligazioni e contratti. Responsabilità*, vol. 2, Milano, 2002, pp. 631 et seq, specifically 633 and D. ACHILLE and S. CHERTI, 'Le clausole vessatorie nei contratti tra professionista e consumatore' in G. RECINTO, L. MEZZASOMA and S. CHERTI (eds.), *Diritti e tutele dei consumatori*, Napoli, 2014, pp. 85 et seq.

¹²² See above nt. 102.

¹²³ In this regard see S. WEATHERILL 'The role of the informed consumer in EC law and policy', in *Consumer Law Journal*, 1994, pp. 49-69; D. OUGHTON and C. WILLETT, 'Quality Regulation in European Private Law', in *Journal of Consumer Policy*, 2002, 25, pp. 302-303. The authors explain that '[m]arket integration via the eradication of competitive distortion provides what might be called the "supply side" rationale for the adoption of common minimum obligations and remedies in contracts of sale. The goal, as we have seen, is a level playing field for sellers. However there is also a "demand side" rationale for the adoption of common standards in the pursuit of market integration. The key here is the idea of consumer confidence. The Unfair Terms Directive was the first to express the idea that consumer protection rules can lead to market integration by giving consumers the confidence to purchase goods and services in Member States other than their own'.

¹²⁴ Explanatory Memorandum to the 1990 Proposal. For an in-depth analysis see P. NEBBIA, nt. 5, p. 11 and M. DEAN, 'Unfair Contract Terms: The European Approach', in *Modern Law Review*, 1993, 56(4), p. 582. In this regard see also Recital 5 which establishes that: 'Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale

On the other hand, from sellers or suppliers' perspective, the Directive seeks to facilitate the removal of legal and economic barriers to cross-border trades by mitigating, for example, transaction costs and ambiguity associated with determining the validity of certain contractual clauses when subject to the laws of a different legal system¹²⁵. In this vein, Recital 2 highlights the role of the Unfair Contract Terms Directive in correcting distortions of competition, which may result in unequal conditions of competition, particularly when traders operate across borders¹²⁶.

If this is what happens extrinsically, the analysis shall now turn to the *intrinsic* perspective.

It would be most unwise to permit the prevailing conflation of European contract law with European *consumer* contract law to unduly constrict our analytical horizon¹²⁷. As has been perceptively remarked, the regulation of consumer contracts often serves as a reflection, if not a direct echo, of the regulatory choices exercised by public authorities over the businesses they oversee¹²⁸. Viewed from the opposite, a compelling normative framework emerges, namely that one where private law governs the external relations of businesses¹²⁹, distinguishing the rules governing unilaterally commercial contracts (business-to-consumer) and those governing bilaterally commercial contracts (business-to-business)¹³⁰.

of goods or services; whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State'.

¹²⁵ In this context see Recital 7 which states that: 'Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own, it is essential to remove unfair terms from those contracts'.

¹²⁶ P. NEBBIA, nt. 5, p. 11. According to Recital 2, 'national markets for the sale of goods and services to consumers differ from each other and (...) distortions of competition may arise amongst the seller and suppliers, notably when they sell and supply in other Member States'. See also D. OUGHTON and C. WILLETT, nt. 123, p. 303.

¹²⁷ P. SIRENA, nt. 33, p. 24.

¹²⁸ P. SIRENA, nt. 33, pp. 26-27: 'È pertanto coerente con la funzione che il diritto privato europeo è chiamato generalmente a svolgere che la disciplina dei contratti stipulati dai consumatori tenda a replicare o a imitare le decisioni regolatorie e gli *standards* di vigilanza che sono utilizzati dalle autorità competenti nei confronti delle imprese vigilate. Così, la disciplina delle clausole abusive nei contratti dei consumatori «imita» le *grey* e le *black lists* di pratiche commerciali che sono esentate dai divieti antitrust per categoria (c.d. *block exemptions*); il recesso legale di pentimento del consumatore (*ius se poenitendi*) «imita» il *cooling-off period* che può escludere l'anticoncorrenzialità di un'intesa da parte dell'autorità competente; la valutazione di merito creditizio che l'intermediario è obbligato a condurre nella fase precontrattuale «imita» lo standard di *responsible lending* in sede di vigilanza bancaria di tutela del cliente, ecc'.

¹²⁹ See N. IRTI, *Codice civile e società politica*, 3rd ed., Roma-Bari, 1999, p. 66: '(...) l'impresa non appartiene più all'esclusivo mondo del commercio e degli affari, ma penetra e dilaga nella quotidianità della convivenza civile. Quando la concreta "parte" del negozio cede all'anonima massa dei consumatori, che ha dinanzi a sé la potenza nazionale o planetaria delle imprese produttrici, allora le regole dell'attività economica segnano, insieme, la misura dell'autonomia privata'.

¹³⁰ P. SIRENA, nt. 33, p. 24.

What these two categories of contracts share - at least from the standpoint of EU law - is that their regulation serves a functional role in the broader governance of the market. This functional orientation also helps explain why different types of contracts may call for different regulatory approaches: varying forms of market failure may require distinct remedies. That said, where the same type of market failure is present, it cannot be ruled out - at least in principle - that rules originally designed to protect consumers might be applied, by analogy, to economically weaker businesses, where such an extension is appropriate¹³¹. There are, therefore, compelling reasons to argue for an extension of the Unfair Contract Terms Directive beyond the consumer sphere, and specifically into business-to-business relationships – and even more pertinently, into relationships between businesses and online platforms. In this regard, it bears recalling that the number of online platforms where both suppliers and customers are businesses continues to grow. Within the business-to-business landscape, the (im)balance of power between a platform and its commercial users has now become a central concern¹³².

It is precisely such concerns that prompted the European Union to adopt, for instance, Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services¹³³. The Regulation recognizes that the

¹³¹ See below nt. 140. See, notably, F.P. PATTI, ‘Unfair Terms Control in Business-to-Business Contracts’, in *Italian Law Journal*, 2019, 5(2), pp. 600-613. The author notes that the absence of a dedicated protection mechanism for small and medium-sized enterprises may, at first glance, appear difficult to reconcile with Article 3 of the Italian Constitution, given that legal subjects—whether natural persons or legal entities—may find themselves exposed to the same take-it-or-leave-it situations typically associated with consumer contracting. The Italian *Corte Costituzionale*, however, firmly rejected this line of reasoning, emphasizing that the political objectives pursued by the European Union in the consumer domain cannot be transposed to business-to-business relationships. Within the Italian legal context, some degree of (indirect) judicial scrutiny is nevertheless available through open-ended clauses and specific statutory provisions. Courts have, for instance, invoked the doctrine of *abuso del diritto*, grounded in the principle of good faith, to review pre-formulated terms that allow a business to withdraw *ad nutum* from a contract. Other decisions have endorsed a substantive review by relying on the general clause of contractual ‘worthiness’ (*meritevolezza*) under Article 1322 of the Italian *Codice civile* and on the concept of *causa contractus*. Furthermore, attention must be given to special provisions located outside the Italian *Codice civile*. The notion of ‘abuse of economic dependence’ can, to some extent, encompass the phenomenon of unfair terms in business-to-business contracts. Finally, Article 1229 of the Italian *Codice civile* imposes limits on contractual freedom by restricting clauses that exclude or limit liability.

¹³² G. ALPA, ‘On Contractual Power of Digital Platforms’, in *EBLR*, 2023, 34(3), p. 378; C. TWIGG-FLESNER, ‘The EU’s Proposals for Regulating B2B Relationships on online platforms – Transparency, Fairness and Beyond’, in *EuCML*, 2018, 7(6), pp. 222 et seq.

¹³³ The digital legislative framework is quite complex. In this regard, it should also be recalled Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act) [OJ L 265] and Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services (Digital Services Act) [OJ L 277]. For an in-depth analysis see F. MÖSLEIN, ‘Digitized Terms: The Regulation of Standard Contract Terms in the Digital Age’, in *ERCL*, 2023, 19(4), pp. 304 et seq. Moreover, it should be noted that on 19 November 2025, the European Commission published the final version of the proposed Regulation of the European Parliament and of the Council amending

increasing intermediation of transactions through such services has generated a significant dependence – particularly among micro, small and medium-sized enterprises – on platform providers as gateways to consumers. As a result of this heightened dependence, platform operators frequently enjoy superior bargaining power, enabling them to act unilaterally in ways that may be unfair and detrimental to the legitimate interests of the business users, and, indirectly, to consumers within the Union. By way of example, they may unilaterally impose practices that grossly depart from good commercial conduct or that run counter to principles of good faith and fair dealing¹³⁴. In light of these dynamics, it is arguable that, where platform-determined contract terms become particularly one-sided, the law governing the contract between the platform and its business users may indeed allow for a measure of substantial control over such terms¹³⁵.

In this vein, it is interesting to note that despite the fact that Unfair Contract Terms Directive establishes review only as an instrument of consumer law, the European Commission has originally envisaged regulating unfair contract terms as a general issue of contract law¹³⁶. The

Regulations (EU) 2016/679, (EU) 2018/1724, (EU) 2018/1725, (EU) 2023/2854 and Directives 2002/58/EC, (EU) 2022/2555 and (EU) 2022/2557 as regards the simplification of the digital legislative framework, and repealing Regulations (EU) 2018/1807, (EU) 2019/1150, (EU) 2022/868, and Directive (EU) 2019/1024 (Digital Omnibus).

¹³⁴ See Recital 2 of Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [OJ L 186]. See, also, F. MÖSLEIN, ‘Digitized Terms: The Regulation of Standard Contract Terms in the Digital Age’, nt. 133, pp. 305-306 (‘Platforms typically operate as marketplaces with triangular structure where users must first conclude a user contract with the platform to be subsequently able to conclude contracts between themselves. As part of this user contract, they agree to the platform’s terms and conditions. Their regulatory content, however, typically extends beyond the bilateral relationship between the user and the platform and has a profound impact on the individual transactions between the users’); V. MAK, ‘Private Law Perspectives on Platform Services’, in *EuCML*, 2016, 5(1), pp. 19 et seq; S. GRUNDMANN and P. HACKER, ‘Digital Technology as a Challenge to European Contract Law’, in *ERCL*, 2017, 13(3), pp. 256 et seq.

¹³⁵ See on this topic C. TWIGG-FLESNER, nt. 132, pp. 222 et seq and G. HOWELLS, ‘The Contribution of Consumer Law to the (Re)shaping of European Private Law’ in A. JANSSEN, M. LEHMANN and R. SCHULZE (eds.), *The Future of European Private Law*, Baden-Baden, 2023, p. 267. Quite interestingly, the parallels between the Unfair Contract Terms Directive and Regulation (EU) 2019/1150 are manifold. First, Recital 14 of the Regulation, mirroring Article 3 of the Directive, provides that the ‘[r]egulation should apply where the terms and conditions of a contractual relationship, regardless of their name or form, are unilaterally determined by the provider of online intermediation services’. Second, Article 3(1)(a) of the Regulation, in a manner akin to Article 5 of the Unfair Contract Terms Directive, stipulates that ‘[p]roviders of online intermediation services shall ensure that their terms and conditions (...) are drafted in plain and intelligible language’. Moreover, Article 3(3) of the Regulation, even more unequivocally than Article 6 of the Directive, provides that ‘[t]erms and conditions, or specific provisions thereof, which do not comply with the requirements of paragraph 1, as well as changes to terms and conditions implemented by a provider of online intermediation services contrary to the provisions of paragraph 2 shall be null and void’. In this regard, G. ALPA, nt. 132, p. 389 significantly states ‘[r]egulation [2019/1150] treats professionals adhering to the conditions in the same way as consumers’.

¹³⁶ See N. JANSEN, ‘Introduction before Art 6:201’ in N. JANSEN and R. ZIMMERMANN (eds.), nt. 120, p. 922, specifically nt. 19. . For a comprehensive picture of the state of law in the 1970s, see the reports

choice to limit the scope to consumer contracts was not rooted in legal principle but rather dictated by the constraints of the Union's legislative competence and the political challenge of securing consensus for broader reform¹³⁷. The Commission subsequently maintained this approach until 2008, strongly influenced by the traditional approach of the CISG and the PICC, which do not provide for a general fairness test for commercial contracts (PICC 7.1.6 rather grants very limited protection against grossly unfair exception clauses)¹³⁸.

Precisely because of its narrowly defined subjective scope of application, the initial draft of the Unfair Contract Terms Directive, issued on 24 July 1990, provoked particularly strong criticism from German legal quarters¹³⁹. The main concerns focused on what was seen as a departure from key principles of the market economy, contractual freedom, and private autonomy and the *Basisinstitution aller europäischen Rechtsordnungen*¹⁴⁰.

In particular, the decision to limit the Directive's scope to 'consumer contracts' was criticized for potentially introducing an undesirable divide within the previously coherent body of contract law in the Member States. Such a division was seen as echoing the legal architecture

in E. VON HIPPEL, 'Der Schutz des Verbrauchers vor unlauteren allgemeinen Geschäftsbedingungen in den EG-Staaten', in *RabelsZ*, 1977, 41, pp. 238-241, 253-280; for an overview on the rules, including non-European legal systems, see T. PFEIFFER in M. WOLF, W.F. LINDACHER and T. PFEIFFER (eds.), *AGB-Recht, Kommentar*, 6th ed., Einleitung, 2013, pp. 48-97. Nevertheless, it may be noted that the limitation to consumer contracts was less problematic for systems that themselves had developed general unfair terms control. In the Netherlands, for instance, the 1992 revision of the Civil Code introduced a general part on unfair terms control, in which the objectives of the Unfair Contract Terms Directive could be integrated.

¹³⁷ P. NEBBIA, nt. 5, p. 21: 'Some early proposals envisaged a wider control on unfair terms and the possibility of controlling terms included in all standard form contracts was considered. The difficulties involved in gathering consensus for a set of rules that would be applicable to all standard contracts, the formal inclusion of the Directive in the EC consumer policy programme, the fact that the Directive is a compromise between different schools of thought and, last but not least, a strong lobbying from large enterprises played a remarkable role in bringing the scope of the Directive down to the lowest possible level'. See also N. JANSEN, 'Introduction before Art 6:201' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 120, p. 924 ('(...) extreme difficulties which would be involved in obtaining acceptance of common rules'); O. REMIEN, 'AGB-Gesetz und Richtlinie über mißbräuchliche Verbrauchervertragsklauseln in ihrem europäischen Umfeld', in *ZEuP*, 1994, 2, pp. 38, 43. In general, on the influence exerted by comparative law in shaping European legislation, see L. BUONANNO, 'European Private Law and its Multi-Level Comparative Method' in A. JANSSEN, M. LEHMANN and R. SCHULZE (eds.), *The Future of European Private Law*, Baden-Baden, 2023, pp. 379 et seq.

¹³⁸ Article 7.1.6 PICC (Exemption clauses) establishes that: 'A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract'.

¹³⁹ In this regard, see H.E. BRANDNER and P. ULMER, 'The Community Directive on Unfair Terms in consumer contracts: some critical remarks on the proposal submitted by EC Commission', in *CMLR*, 1991, 28, pp. 647 et seq; H.J. BUNTE, 'Gedanken zur Rechtsharmonisierung in der EG auf dem Gebiet der mißbräuchlichen Klauseln in Verbraucherverträgen', in *Festschr. für H. Locher zum 65. Geburtstag*, Düsseldorf, 1990, pp. 325 et seq; K. WAGNER-WIEDUWILT, 'EG-Vorschlag für eine AGB-Richtlinie', in *DB*, 1990.

¹⁴⁰ For a general overview, see V. RIZZO, nt. 109, pp. 569-570.

of socialist systems, where consumer and commercial law are strictly separated, with significant constraints on private autonomy applying only in the former. This was viewed as an unusual and unwelcome departure from established principles of contract law, all the more so given that, at the time, Eastern European socialist countries were beginning to transition towards market-based economies inspired by the contractual models of Central and Western Europe¹⁴¹.

Evidence of all this can be seen in the fact that in more recent times, specifically through the CESL, the European Commission tried to broaden the scope of its provisions on unfair contract terms by extending a fairness test to business transactions, thereby re-establishing the rules on unfair terms as a component of general contract law¹⁴². In doing so, the Commission adhered to the modern approach of the PECL, which was subsequently adopted by the ACQP and the DCFR¹⁴³.

In sum, this reconstruction clarifies that the Unfair Contract Terms Directive's apparent confinement to consumer contracts reflects historical happenstance rather than any inherent feature of its normative design. The impetus to shield the non-drafting party from unfair terms rests, as observed, on the recognition that such terms represent a market failure warranting corrective intervention. It follows that the aim of weak party protection cannot, and must not, be inflated beyond its proper bounds, nor deployed as a justification for pursuing outcomes

¹⁴¹ V. RIZZO, nt. 109, pp. 570 et seq: 'Permarrebbe, in questo modo, irrisolto il particolare problema che emerge da un'analisi dei rapporti all'interno dell'intera catena di distribuzione, che va dal produttore al consumatore finale, ove gli intermediari (piccole e medie imprese, dettaglianti) sarebbero tenuti a garantire al consumatore la protezione prevista dalla Direttiva, senza poter invocare essi stessi la medesima protezione nei confronti del produttore o del fornitore'. See also R. DAMM, 'Europäisches Verbrauchervertragsrecht und AGB-Recht. Zur Umsetzung der EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen', in *JZ*, 1994, pp. 167 et seq.

¹⁴² Article 86 CESL (Meaning of 'unfair' in contracts between traders) establishes that: 'In a contract between traders, a contract term is unfair for the purposes of this Section only if: (a) it forms part of not individually negotiated terms within the meaning of Article 7; and (b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing'.

¹⁴³ Article 4:110 PECL (Unfair Terms not Individually Negotiated) states that: 'A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded'; Article 6:301 ACQP (Unfairness of terms) establishes that: 'A contract term which has not been individually negotiated is considered unfair if it disadvantages the other party, contrary to the requirement of good faith, by creating a significant imbalance in the rights and obligations of the parties under the contract. Without prejudice to provisions on collective proceedings, when assessing the unfairness of a contractual term, regard is to be given to the nature of the goods or services to be provided under the contract, to all circumstances prevailing during the conclusion of the contract, to all other terms of the contract, and to all terms of any other contract on which the contract depends'; Article II. – 9:405 DCFR (Meaning of "unfair" in contracts between businesses): 'A term in a contract between businesses is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing'.

more punitive to the professional party than the straightforward removal of a clause that gives rise to a significant imbalance in the parties' rights and obligations.

2. *Consumer Contract Law And Social Justice*

Traditionally, freedom of contract has been upheld as a cornerstone of wealth maximization and, accordingly, as a principle deserving of legal protection¹⁴⁴. Within this framework, parties contemplating entry into a contract were expected to exercise due diligence and safeguard their own interests¹⁴⁵. They were to ensure that the terms of the agreement served their advantage, as, once the contract had been concluded, it would be futile to seek judicial relief from obligations they had come to regret or misunderstood in scope¹⁴⁶. The maxim *caveat emptor* – let the buyer beware – encapsulated this ethos of individual responsibility¹⁴⁷.

Freedom of contract was restricted only in specific situations where a party's autonomy was compromised, such as through threats or coercion or in cases of mistake, fraud, or conflicts with public policy. The contract's content itself was not scrutinized; as famously observed, '[f]or them, free dealing was fair dealing'¹⁴⁸, or in French, '[q]ui dit contractuel dit juste'¹⁴⁹.

However, when transposed into the realm of consumer contracts, this traditional conception of freedom of contract becomes increasingly problematic¹⁵⁰. Whatever freedom may exist in such contexts is significantly diminished by the realities of a mass production economy, the use of standardized terms, informational asymmetries and imbalances in bargaining power¹⁵¹.

¹⁴⁴ G. HOWELLS and S. WEATHERILL, nt. 53, p. 15.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ A famous high-water mark in the notion of judicial *laissez-faire* was the observation of Sir George Jessel MR in 1875 that: '[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice' (see *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq. 462, 465).

¹⁴⁸ See P. ATIYAH, *The Rise and Fall of Freedom of Contract*, Oxford, 1979, p. 403, who quoted P. DEVLIN, *The Enforcement of Morals*, Oxford, 1965, p. 47.

¹⁴⁹ A. FOUILLÉE, *La science sociale contemporaine*, 2nd ed., Paris, 1885, p. 410: 'Nous sommes frères parce que nous acceptons volontairement un même idéal en entrant dans la société et que nous nous obligeons à former une même famille; nous sommes frères aussi parce que nous sommes naturellement membres d'un même organisme, parce que nous ne pouvons vivre ou nous développer les uns sans les autres, parce que notre moralité même est liée à l'état social et à la moralité de l'ensemble. En définitive, l'idée d'un organisme contractuel est identique à celle d'une fraternité réglée par la justice, car qui dit organisme dit fraternité, et qui dit contractuel dit juste'.

¹⁵⁰ J.M. SMITS, *Contract Law. A Comparative Introduction*, 2nd ed., Cheltenham/ Northampton, 2017, p. 10. See also C. MAK, 'The One and the Many: Translating Insights from Constitutional Pluralism to European Contract Law Theory', in *ERPL*, 2013, 21(5/6), pp. 1190 et seq. Cf also, on this topic, M. GROCHOWSKI, 'Freedom of Contract on Crossroads: The Struggle over the Concept of Contract Liberty in 20th Century Poland', in *Osteuropa Recht*, 2020, 66, pp. 34-53.

¹⁵¹ Cf J. HANSON and D. KYSAR, nt. 76, , pp. 1422 et seq; R. KOROBKIN, 'Behavioral Economics, Contract Formation, and Contract Law' in C. SUNSTEIN (eds.), *Behavioural Law and Economics*,

This paradigmatic shift invites a re-evaluation of the nature and function of contract law in consumer transactions. Indeed, it suggests a move away from a purely formalist approach, which prioritizes the enforcement of legally valid agreements, towards a more substantive model of regulation¹⁵².

This reconceptualization of contract law is further reinforced by the broader evolution of society throughout the 20th century. National contract laws of the 19th century, shaped by markedly different social and economic conditions, increasingly proved inadequate in addressing the complexities of modern contractual relations¹⁵³. A defining transformation during this period was the emergence of the welfare state, described by the Danish sociologist Gøsta Esping-Andersen as the institutional recognition of the state's responsibility to ensure a basic standard of welfare for its citizens¹⁵⁴. Against this backdrop, a growing body of scholarship began to approach contract law through the lens of social justice, arguing that social justice does not merely inform contract law, but rather constitutes its central purpose¹⁵⁵.

This concern found significant expression in 2004 with the publication of a study group work: 'Social Justice in European Contract Law: a Manifesto'¹⁵⁶. In that document, the

Cambridge, 2000, pp. 116 et seq. See also P. ATIYAH, *Essays on Contract*, Oxford, 1988, specifically 329 et seq and H. KÖTZ, *European Contract Law*, 2nd ed., Oxford, 2017, p. 132: 'Standard terms are a product of the industrial revolution of the nineteenth century: as the production of goods and services was standardised, so were the terms of business on which such goods and services were supplied. Standard terms contribute to the rationalisation and development of mass transactions, for they save companies and their customers the cost and trouble of negotiating the terms of each contract individually, or of going to court to have the contract construed and amplified. Standard terms therefore make it easier to forecast the cost of doing business, simplify its procedures, and thus contribute to keeping costs and prices low'.

¹⁵² G. HOWELLS and S. WEATHERILL, nt. 53, p. 21.

¹⁵³ F. WIEACKER, *A History of Private Law in Europe*, Oxford, 1995, p. 427.

¹⁵⁴ G. ESPING-ANDERSEN, *The Three Worlds of Welfare Capitalism*, Cambridge, 1990, p. 19.

¹⁵⁵ J.W. RUTGERS, 'European Contract Law and Social Justice' in C. TWIGG-FLESNER (eds.), nt. 27, pp. 539-540: 'To sum up, in the literature pertaining to national general contract law, authors acknowledge that contract law plays a role in the welfare state or in other words, prescribes outcomes which the market itself would not have provided. In those instances, contract law has distributive or redistribute effects and is not neutral. In contrast to this claim, there are also authors who argue that there is no role for social justice in contract law. Most arguments are based on law and economics. First, they claim that there are better ways to redistribute wealth in society, for instance by taxation and social benefits. Second, restriction of freedom of contract is a bad thing, since freedom of contract is the best instrument to run the market. Third, by imposing mandatory rules and standards on the supplier, the seller, landlord or employer, those parties will incur extra costs, which they will charge the weaker party, the buyer, tenant'. Cf, on this topic, F. ESPOSITO and L. DE ALMEIDA, 'In Search of a Grand Theory of European Private Law: Social Justice, Access Justice, Societal Justice and Energy Markets' in L. DE ALMEIDA, M. CANTERO GAMITO, M. DUROVIC, K.P. PURNHAGEN (eds.), *The Transformation of Economic Law: Essays in Honour of Hans-W. Micklitz*, Oxford, 2019, pp. 153-172.

¹⁵⁶ Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' (2004) 10 ELJ. The Manifesto identifies four topics, which concern the relation between social justice and contract law. The first concerns social justice or fairness, which implies that a fair market order must be chosen which does not exploit or abuse any European citizen. Second, contract

Commission's vision for the future development of European contract law - particularly as set out in the Communication on European Contract Law¹⁵⁷ and in its Action Plan¹⁵⁸ - was subjected to sharp criticism. The Commission had presented the development of European contract law as a largely technical and value-neutral exercise, aimed at removing barriers to cross-border trade within the Internal Market¹⁵⁹. The authors of the Manifesto took issue with this characterization, arguing that freedom of contract and private autonomy no longer occupy the paramount position they once held in national private law systems¹⁶⁰. Instead, they contended, modern contract law is increasingly animated by the imperative to strike a balance between private autonomy and substantive fairness, an imperative that lies at the very core of contemporary debates about appropriate contractual principles¹⁶¹.

Moreover, the Manifesto advanced a crucial normative claim: proposals for the construction of a European contract law should not be understood merely, or even primarily, as technical instruments for market integration. Rather, they ought to be recognized as part of a broader political project - namely, the construction of an EU grounded in shared fundamental values, particularly those governing the social and economic relations among its citizens¹⁶².

Among the prominent voices advocating for a conception of contract law that integrates considerations of social justice is Anthony Kronman¹⁶³. He maintains that contract law can, and under certain circumstances should, serve objectives traditionally associated with distributive justice, particularly when alternative mechanisms, such as taxation or social benefits, may prove

law must correspond and fit with fundamental rights. Third, European contract law must obtain legitimacy through a democratic process and dialogue and finally, principles of social justice must find a way to reconcile the different peoples of Europe and at the same time respect their diversity.

¹⁵⁷ Communication from the Commission to the Council and the European Parliament on European Contract Law [COM(2001) 398 final].

¹⁵⁸ Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law, An Action Plan [COM(2003) 68 final].

¹⁵⁹ 'Social Justice in European Contract Law: a Manifesto', nt. 156. See, in this context, J.W. RUTGERS, 'European Contract Law and Social Justice' in C. TWIGG-FLESNER (eds.), nt. 27, pp. 535 et seq.: '(...) in 2004, the Manifesto on Social Justice was published. In the Manifesto, the European Commission's plans for the future of European contract law were criticized. The European Commission presented the development of contract law as a technical, value-free exercise in the Communication on European contract law and the Action Plan. The authors of the Manifesto counter-argued that private law and contract law, in particular, reflect a market and social order, which calls for choices which are not value-free. In its Action Plan the European Commission proposed, *inter alia*, a Common Frame of Reference (CFR) and a non-sector-specific instrument as regulatory tools in the area of contract law. The Manifesto's point of departure is that contract law reflects the market order in which it operates and consequently, contract law reflects the extent to which social justice plays a role in that market order'.

¹⁶⁰ 'Social Justice in European Contract Law: a Manifesto', nt. 156.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ A. KRONMAN, 'Contract Law and Distributive Justice', in *Yale L.J.*, 1980, 89, pp. 472-474.

either too burdensome or politically infeasible¹⁶⁴. From this perspective, various legal rules within the domain of contract law are intentionally designed to produce redistributive outcomes¹⁶⁵. Examples of such rules include usury laws that cap loan interest rates, non-waivable warranties of quality or habitability, and minimum wage laws¹⁶⁶. Each of these measures aims to transfer resources from relatively advantaged actors - such as lenders, vendors, landlords, or employers - to less advantaged counterparts, namely borrowers, consumers, tenants, or employees, by redefining the legally acceptable terms of contractual exchange¹⁶⁷.

This insight is broadly echoed in the academic literature concerning general national contract law, where scholars increasingly acknowledge the role of contract law in supporting social justice¹⁶⁸. In such instances, rules are employed to produce outcomes that diverge from those that a purely market-driven system would yield. As a result, contract law is revealed to have a distributive or redistributive function, rather than being a neutral mechanism¹⁶⁹.

Given such a background, the purpose of the following paragraphs is less to question, as Anthony Kronman does, whether ‘(...) legal rules of this sort (rules with a distributive aim) [can] be defended’¹⁷⁰, and more to explore whether the Unfair Contract Terms Directive truly embodies a redistributive intent.

2.1. *Commutative vs Distributive Justice*

In order to analyze various forms of social justice within contract law, it is logical to start with a foundational overview of key concepts of justice, particularly Aristotle’s distinction between commutative (or corrective) justice and distributive justice. Commutative justice is

¹⁶⁴ Ibid. Cf. also, H. EIDENMULLER, ‘What can be wrong with an option? An optional common European sales law as a regulatory tool’, in *CMLR*, 2013, 50, pp. 71 et seq.

¹⁶⁵ T. WILHELMSSON, nt. 25, p. 273.

¹⁶⁶ A. KRONMAN, nt. 163, p. 473.

¹⁶⁷ Ibid. In this context, see also Du. KENNEDY, ‘Distributive and Paternalist Motives in Contract and Tort Law’, in *Maryland Law Rev.*, 1982, 41, p. 563 and H. COLLINS, *Social Market and the Law of Contract*, Stuttgart, 1992, pp. 85-87.

¹⁶⁸ I. DOMURATH, *Consumer Vulnerability and Welfare in Mortgage Contracts*, Portland, 2017, pp. 16 et seq.

¹⁶⁹ For a different view, see H. EIDENMULLER, nt. 164, p. 71; H. EIDENMULLER, N. JANSEN, E.-M. KIENINGER, G. WAGNER, R. ZIMMERMANN, ‘The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law’, in *Edinburgh L. Rev.*, 2012, 16, pp. 303 et seq; S.A. SMITH, *Contract Theory*, Oxford, 2004; J.J. GANUZA and F. GOMEZ, ‘Optional Law for Firms and Consumers: an Economic Analysis of Opting into the Common European Sales Law’, in *CMLR*, 2013, 50, p. 35.

¹⁷⁰ A. KRONMAN, nt. 163, p. 473: ‘Can legal rules of this sort be defended? More generally, is it ever appropriate to use the law of contracts-understood in the broad sense in which I have been using the term-as an instrument of redistribution, or should the legal rules that govern the process of private exchange be fashioned without regard to their impact on the distribution of wealth in society?’.

classically defined as the ‘constans et perpetua voluntas ius suum cuique tribuendi’, representing the continuous intention to give each individual their due. In legal terms, this concept often revolves around correcting situations resulting from unacceptable behavior. Distributive justice, by contrast, addresses the allocation of benefits and burdens within society, focusing on the distribution and re-distribution of resources from a social welfare perspective.

Distributive justice and social justice are concepts that often intersect¹⁷¹. From a first perspective, social justice can be seen as inherently tied to just distribution. According to that idea, social justice involves assessing how institutions distribute rights, duties, and benefits among individuals¹⁷². Other scholars, instead, argue that social justice entails fairness in the distribution of wealth, power and other goods if compared to what would emerge from market mechanisms left to operate without constraints¹⁷³. Others emphasize the systemic dimension of justice, focusing on how entitlements are allocated throughout the social structure¹⁷⁴. In this regard, it becomes crystal clear that social justice differs from commutative justice: commutative justice is concerned with a just sanction for a specific wrong in an individual case, whereas social justice is concerned with the distribution of entitlements within a social system¹⁷⁵.

Given such a background, narrowing down our perspective, it may be argued that, when examining the Unfair Contract Terms Directive, it lacks an intrinsic redistributive purpose and this is somehow demonstrated by both its subjective and objective scope of application¹⁷⁶.

¹⁷¹ I. DOMURATH, nt. 168, p. 17.

¹⁷² J. RAWLS, *A Theory of Justice*, Cambridge, 1971, p. 6. Cf, in this regard, C. MAK, nt. 82, pp. 709-711. The author explains that: ‘In the field of European Private Law, the debate does currently not so much concern the question whether private law has distributive consequences, but rather how to understand and address these’. Moreover, the author explains that: ‘Europe’s justice deficit in the field of private law, however, cannot only be explained in the light of social justice understood as distributive justice. It also concerns questions of inclusion and representation’.

¹⁷³ H. COLLINS, ‘The Constitutionalisation of European Private Law as a Path to Social Justice?’ in H.-W. MICKLITZ (eds.), *The Many Concepts of Social Justice in European Private Law*, Cheltenham, 2011, p. 133.

¹⁷⁴ T. WILHELMSSON, *Twelve Essays on Consumer Law and Policy*, Helsinki, 1996, p. 193.

¹⁷⁵ See G. D’AMICO, ‘Giustizia contrattuale e contratti asimmetrici’, in *Eur. dir. priv.*, 2019, pp. 1 et seq. For a comprehensive overview of these concepts see I. DOMURATH, nt. 168, pp. 16 et seq. Contract law traditionally aligns with commutative justice, drawing from its principles. Many mandatory rules, which aim to correct the effects of unfair conduct and ensure that each party receives what is rightfully theirs, are rooted in the concepts of commutative justice.

¹⁷⁶ By contrast, see H. COLLINS, ‘La giustizia contrattuale in Europa’ in A. SOMMA (eds.), nt. 25, p. 85 and J.W. RUTGERS, ‘European Contract Law and Social Justice’ in C. TWIGG-FLESNER (eds.), nt. 27, p. 547: ‘To sum up, the Directive on unfair terms not only deals with the way parties entered into the contract – did they obtain all the information before the conclusion of the contract – but also polices the terms substantively. The CJEU has an active role in this respect. First, it provided the national courts with a powerful instrument: they must apply of their own motion the rules laid down in the Directive. In addition, the CJEU elaborated the fairness test in the Directive to assess whether there is a significant imbalance to the detriment of the consumer contrary to good faith. Moreover, if a contract includes

Such a stance should not surprise us since the function of the European Community, as traditionally understood, is to promote a free market, not to ensure that this market is corrected in the light of distributive aims. Accordingly, the European Community lacks a clear general mandate to pursue a scheme of distributive justice in its regulation of trade¹⁷⁷.

According to Article 3 of the Unfair Contract Terms Directive, its objective scope of application is limited to ‘term[s] which ha[ve] not been individually negotiated’, which expressly include those terms that have been drafted in advance¹⁷⁸. Furthermore, under Article 7 the Directive addresses specifically those terms drawn up for general use in contracts concluded with consumers¹⁷⁹.

At first glance, this approach stands in marked contrast to a distributive model of justice, which would take a broader and more nuanced view of contractual fairness by recognizing the structural imbalances that often characterize consumer transactions - regardless of whether specific terms have been subject to negotiation¹⁸⁰. In practice, indeed, even where the formal

unfair terms, which prevent a consumer from being entitled to an essential, for instance housing, the Directive is even more important. This all lead to the conclusion, at least with respect to the Directive on unfair terms, that European contract law does involve elements of social justice and is not merely restricted to repair market failures’. For an overview of the role of the Court of Justice, see H.-W. MICKLITZ and N. REICH, ‘The Court and the Sleeping Beauty: the revival of the Unfair Contract Terms Directive (UCTD)’, in *CMLR.*, 2014, 51, p. 771.

¹⁷⁷ H. COLLINS, ‘La giustizia contrattuale in Europa’ in A. SOMMA (eds.), nt. 25, p. 86.

¹⁷⁸ More precisely, Article 3 establishes that: ‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’. In this context, see N. REICH, H.-W. MICKLITZ, P. ROTT, K. TONNER, nt. 61, pp. 133-135.

¹⁷⁹ Article 7(1) and (2) establishes that: ‘1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. 2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms’.

¹⁸⁰ It is interesting to note that in the first proposal of the Directive, which refers to unfair terms in consumer contracts, a contractual term is considered unfair ‘(...) if, of itself or in combination with another term or terms of the same contract, or of another contract upon which, to the knowledge of the person or persons who conclude the first mentioned contract with the consumer, it is dependent: — it causes to the detriment of the consumer a significant imbalance in the parties’ rights and obligations arising under the contract, or — it causes the performance of the contract to be unduly detrimental to the consumer, or — it causes the performance of the contract to be significantly different from what the consumer could legitimately expect, or — it is incompatible with the requirements of good faiths’ (Article 2(1)). It is then specified that ‘[t]he fairness or unfairness of a contractual term is to be determined by reference to the time at which the contract is concluded, to the surrounding circumstances at that time and to all the other terms of the contract’ (Article 2(5)). However, in the amended proposal, pursuant to Article 3, was the objective scope of application significantly restricted to ‘contractual term[s] which ha[ve] not been individually negotiated’. Article 3 stated, in fact, that ‘[a] contractual term which has not been individually negotiated shall be regarded as unfair if, of itself or in combination with another term or terms of the same contract, or of another contract upon which it is dependent, contrary

possibility of negotiation exists, consumers are rarely in a position to influence the terms meaningfully, particularly in markets characterized by standardization and a lack of viable alternatives¹⁸¹.

As far as the subjective scope of application is concerned, Article 1 of the Unfair Contract Terms Directive stipulates that its provisions merely apply to contracts concluded between sellers or suppliers and consumers¹⁸². This again reflects a limited vision of fairness, as a genuinely redistributive approach would arguably require an extension of protection to other vulnerable contractual parties beyond the consumer category¹⁸³. It is widely recognized that legal subjects outside the consumer definition may also lack bargaining power and be similarly exposed to unfair terms without the capacity to negotiate them.

Further narrowing the scope of intervention, Article 4(2) of the Directive explicitly excludes from judicial scrutiny both the definition of the main subject matter of the contract and the adequacy of the price and remuneration¹⁸⁴. This exclusion is grounded in the presumption that

to the requirements of good faith: — it causes to the detriment of the consumer a significant imbalance in the parties' rights and obligations arising under the contract, or — it causes the performance of the contract to be significantly different from what the consumer could legitimately expect'. Therefore, the most significant differences between the various texts concern the objective scope of application, which does not contain any limits or precise conditions in the first version of 1990 (which refers to both standard and individually negotiated clauses), passes through the compromise represented by the amended proposal of 1992, with differentiated rules for non-individually negotiated clauses and individually negotiated clauses (Articles 3 and 4), until, in its final wording, its scope is restricted to clauses that have not been individually negotiated. In this context, see V. RIZZO, nt. 109, pp. 567-569: 'Dal quadro d'assieme sinteticamente tracciato appaiono evidenti le variazioni, nel corso del tempo, tra le diverse versioni influenzate, in primo luogo, dall'esigenza di approntare tecniche giuridiche il più possibile idonee a perseguire le finalità indicate nei numerosi "considerando" (risentendo le une e le altre del "momento" e del "clima" in cui vedono la luce) ed influenzate anche, in maniera non secondaria, ora dall'agire di gruppi di pressione con evidenti operazioni di *lobbying*, ora dall'incalzare delle rappresentanze dei singoli paesi, stimulate e motivate nella loro azione da un dibattito giuridico interno attento e da una dottrina vigile, ora dagli interventi cadenzati degli organi consultivi in cui tutte queste istanze si riflettono. (...) Va altresì segnalato che, pur prospettandosi la Direttiva essenzialmente come forma di protezione del consumatore, emerge in maniera forte la venatura in essa presente di strumento funzionale anche alle esigenze del mercato e della concorrenza (...)'

¹⁸¹ N. REICH, H.-W. MICKLITZ, P. ROTT, K. TONNER, nt. 61, pp. 133-135.

¹⁸² More precisely, Article 1 establishes that: 'The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer'.

¹⁸³ See the overview concerning the German legal system and the French legal system, §§ 6.1. and 6.2. below. It should be noted that the argument advanced in the main text appears to remain valid even in light of proposals to extend the subjective scope of application of the Unfair Contract Terms Directive in favor of non-consumer actors. In its original structure, the Directive, indeed, limits its scope of application to consumers and this remains a key element for understanding its functional rationale.

¹⁸⁴ This approach notably differs from the Nordic legal framework, where a collective standard of contractual fairness applies to all contract terms, including prices and individually negotiated clauses, regardless of whether the parties are businesses or consumers. Cf, in this context, also the Quebec Civil Code and the Argentinian Civil Code. For an in-depth analysis, in this last regard, see F. DELFINI, 'Unnegotiated Contracts of Adhesion in American Common and Civil Law Jurisdictions: The Canadian and Argentinian Cases', in *Milan Law Review*, 2021, 2(1), pp. 19 et seq.

the equilibrium between price and performance should be determined by market forces, and not subject to external review.

The Directive does proceed from the assumption that contractual freedom may exhibit an inherent or structural deficit of solidarity or proportionality where a weaker party is confronted with a stronger one. However, its intervention is only triggered by a circumscribed concern, namely the *unfair* exploitation by the stronger party of its superior bargaining position. From a commutative justice approach, this amounts exactly to the type of ‘legally unacceptable behavior’ that warrants a corrective remedy in favor of the weak party (‘constans et perpetua voluntas ius suum cuique tribuendi’). In this sense, the Unfair Contract Terms Directive does not proscribe disadvantageous bargains as such; it targets only those contractual terms that are *unfairly* disadvantageous. In other words, the Directive does not prohibit significantly unbalanced terms, refraining from engaging with redistributive concerns or interfering with the core economic structure of the contractual relationship, but intervenes only if these unbalanced terms are imposed unfairly¹⁸⁵.

In conclusion, it is true, as some influential scholars explain, that the Unfair Contract Terms Directive is concerned not only with the circumstances under which the parties entered into the contract – most notably, whether adequate information was provided prior to its conclusion – but also with the substantive policing of contractual terms. However, such substantive control appears to operate only insofar as information has not been duly provided or the relevant terms are not drafted in a transparent manner. It is the dimension of ‘consensualism’, rather than that of social justice, which emerges as predominant from the structure of the Unfair Contract Terms Directive.

In contrast, EU competition law allows for some redistributive effects within inter-business relations. Indeed, unlike consumer law, which refrains from intervening into the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, rules concerning abuse of dominant position actively engage with these aspects¹⁸⁶.

¹⁸⁵ Cf above nt. 176. See also P. SIRENA, ‘Il giudizio di abusività delle clausole c.d. economiche’ in G. ALPA and V. LEVI (eds.), *I diritti dei consumatori e degli utenti. Un commento alle leggi 30.7.1998 n. 281 e 24.11.2000 n. 340 e al decreto legislativo 23.4.2001 n. 224*, Milano, 2001, pp. 337-338 and M.R. MARELLA, ‘The Old and the New Limits to Freedom of Contract in Europe’, in *ERCL*, 2006, 2, pp. 266 et seq.

¹⁸⁶ See, for instance, M.P. SCHINKEL, ‘On Distributive Justice by Antitrust: The Robin Hood Cartel’, in *Journal of Competition Law & Economics*, 2022, 18(3), pp. 588 et seq and A. PILETTA MASSARO, ‘Competition as an Institution for Regulating Societal Transformations in the Digital Era: The Role of Social Values in Competition Law’, in *Digital Society*, 2025, 33(4), pp. 7-8: ‘[i]n fact, as the analysis conducted on the development of the two main competition law models showed, the interest towards provisions aimed at preventing the formation of big and powerful economic conglomerates was not directed at promoting economic efficiency only, but, instead, at favouring the concerned markets’

Against this backdrop, it should be noted that the analysis carried out above regarding the presence - or lack - of distributive justice elements in the Unfair Contract Terms Directive is not, as mentioned at the outset, aimed at determining whether such objectives can be justified. Rather, its purpose is to understand how the Directive was *originally* conceived, as opposed to how one *might* wish it to function.

This distinction is important in order to take a critical view of the more recent case law of the Court of Justice, which will be examined in greater detail in Chapters 2 and 3. As a matter of fact, what clearly emerges is that the Court of Justice appears to be increasingly attempting to reshape the Directive through the lens of distributive justice, ultimately stretching its original purpose and turning it into a tool of punitive justice, rather than maintaining its initial focus on protection of the weak party and market efficiency¹⁸⁷.

2.2. Rationalizing vs Rectifying The Market

The alleged distorted use of the Unfair Contract Terms Directive by the Court of Justice can also be observed from another perspective.

Indeed, the distinction between commutative and distributive justice is not the only conceptual tool used to discuss welfarism in contract law. Another approach involves classifying various types of interventions based on their roles and intended purposes within the

contestability, thus improving the general wellness of society through the protection of competition as an institution. Therefore, it results evident that competition law was part of a broader context, deeply rooted in the main values shaping the considered legal systems' structure, as a sort of meeting point between democracy and economic freedom. It is not a case that the same U.S. Supreme Court labelled the Sherman Act as *the Magna Carta of free enterprise, which is as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms*'.

¹⁸⁷ See, for instance, Case C-488/11, *Asbeek Brusse*, nt. 106, para 59, it was determined that Article 6(1) of Unfair Contract Terms Directive does not permit the national court to interpret it in a way that would allow the reduction of the penalty imposed on the consumer in a contract between a seller or supplier and a consumer if the court deems a penalty clause to be unfair. Instead, the Court should exclude the application of that clause completely: '... Article 6(1) of the directive cannot be interpreted as allowing the national court, in the case where it establishes that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair, to reduce the amount of the penalty imposed on the consumer instead of excluding the application of that clause in its entirety...'. The Court has emphasized that considering the nature and significance of the public interest underlying consumer protection, the Unfair Contract Terms Directive obliges Member States, as stated in Article 7(1), to establish effective and adequate measures 'to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers'. If the national court had the authority to modify unfair terms in such contracts, it would potentially undermine the ultimate goal of Article 7 of Unfair Contract Terms Directive. This is because it would diminish the deterrent effect on sellers or suppliers by not applying those unfair terms directly to the consumer (C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:349, paras 66–69).

market economy. In this regard, someone claims that truly welfarist contract law requires measures on different levels¹⁸⁸. Therefore, a socially just contract law requires:

- (i) Measures designed to enhance party autonomy and improve the functioning of market mechanisms (market-rational welfarism), together with corrective measures aimed at rectifying market outcomes¹⁸⁹;
- (ii) Mechanisms of internal redistribution that favor the weaker parties within a contractual relationship, along with externally redistributive measures that allocate benefits to disadvantaged members within a group of contracting parties (equality)¹⁹⁰;
- (iii) Needs-based regulation that considers the requirements of parties with particular vulnerabilities (for example, *social force majeure* rules), as well as regulation aimed at advancing interests and values that are independent of the contracting parties¹⁹¹.

Thus, considering the first level of analysis outlined above - also in relation to consumer law - it is possible to distinguish between two types of regulatory intervention: those that aim to *rationalize* the market and those that seek to *rectify* it.

Upon closer examination, one may argue that *rationalizing* measures are primarily ‘preventive’ in nature, intended to reduce the risk of market failures by enhancing the efficiency and transparency of contractual processes. By contrast, *rectifying* measures are ‘remedial’ in character: they address the adverse consequences market inefficiencies produce, particularly where they disproportionately disadvantage one of the contracting parties¹⁹².

¹⁸⁸ T. WILHELMSSON, nt. 25, pp. 275 et seq and ID., nt. 174, p. 193.

¹⁸⁹ T. WILHELMSSON, nt. 25, pp. 275-276 and ID., nt. 174, p. 193.

¹⁹⁰ T. WILHELMSSON, nt. 25, pp. 277-279 and ID., nt. 174, p. 193.

¹⁹¹ T. WILHELMSSON, nt. 25, pp. 279-281 and ID., nt. 174, p. 193.

¹⁹² T. WILHELMSSON, nt. 25, p. 275: ‘Con riguardo al diritto dei consumatori, ad esempio, può essere fatta una distinzione tra interventi di razionalizzazione e interventi di rettificazione del mercato, laddove i primi, in linea con la visione tradizionale del contratto, hanno a che fare con il miglioramento del meccanismo di mercato, e i secondi concernono la correzione degli esiti che un simile meccanismo produce, sotto il profilo degli svantaggi che si determinano’. See also M. ASTONE, ‘Rimedi e contratti del consumatore nella prospettiva del diritto privato europeo’, in *Eur. dir. priv.*, 2014, p. 18, which uses the distinction between ‘remedial-preventive’ and ‘remedial-subsequent’. More precisely, the author explains that a thorough examination of EU legislation reveals the adoption of a two-pronged corrective strategy: one of a preventive nature, aimed at avoiding situations of legal and, consequently, economic unfairness (*iniquità*) (prior disclosure requirements, collective injunctions of a preventive or preventive-subsequent nature); and one that operates *ex post*, when the protected interest has remained unsatisfied. At the pre-contractual stage, consumer protection is entrusted to the fulfilment of specific information duties imposed on the trader, to prohibitions of unfair commercial practices, and to forms of transparent advertising, as well as to the full observance of the general duty of good faith as a standard for assessing the conduct of the stronger contracting party. In essence, these are *ex ante* strategies, supported—where breached—by preventive or preventive-subsequent injunctive mechanisms aimed at facilitating the formation of fair contractual terms. At the post-contractual stage, by contrast, the normative ‘ought’ of the agreement—whether violated or improperly formed as a result of incorrect, omitted, or inaccurate information—is incapable of satisfying the consumer interests at stake. Hence the need for remedies and alternative instruments of consumer protection capable of restoring the infringed interests. For this

The choice between these two types of intervention ultimately depends on one's conception of human nature¹⁹³. The more one believes in individuals' capacity and willingness to behave rationally in the market, the more one will lean toward *rationalizing* measures instead of *rectifying* measures.

Such differentiation is evident also from a historical point of view. As a matter of fact, chronologically, the mid-1980s saw the adoption of two key directives: namely Council Directive of 10 September 1984 relating to the approximation of the laws concerning misleading advertising¹⁹⁴ and Council Directive of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises¹⁹⁵. The latter was particularly significant - not merely because it marked the first directive to impact consumer contracts, but also because it introduced two foundational pillars of EU consumer law: the consumer's right to withdraw from the contract and the seller's duty to provide specific information (albeit, in this instance, limited to informing the consumer of the right of withdrawal)¹⁹⁶.

eventuality, the legal order provides a plurality of remedies, alternative or concurrent, individual or collective, through which, by intervening in the unfair contractual programme, it seeks to ensure the highest possible level of market efficiency.

¹⁹³ T. WILHELMSSON, nt. 25, p. 276.

¹⁹⁴ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [OJ L 250].

¹⁹⁵ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [OJ L 372].

¹⁹⁶ Despite recent significant changes in community consumer policy, which features substantial interventions, the obligation to provide information remains central. See, in this regard, A. OGUS, *Regulation: Legal Form and Economic Theory*, Oxford, 1994; G. HADFIELD, R. HOWSE and M. TREBILCOCK, 'Information-Based Principles for Rethinking Consumer Protection Policy', in *Journal of Consumer Policy*, 1998, 21, p. 131; M. TREBILCOCK, 'Rethinking consumer protection policy' in C. RICKETT and T. TELFER (eds.), *International Perspectives on Consumers' Access to Justice*, Cambridge, 2003, pp. 69 et seq; G. HOWELLS and S. WEATHERILL, nt. 53, pp. 63 et seq; 'A further technique lies in intervention designed to improve consumer information. The 1999 White Paper *Modern Markets: Confident Consumers* places great weight on the virtue of generating a body of active consumers aware of what is available from suppliers and therefore able to use their power of informed choice to provoke efficiently functioning markets. Consumers should therefore have access to accurate, comprehensive and comprehensible information, in shops and through advertising media. Moreover, it should be remembered that the private law has been molded to serve the interest of the consumer in greater transparency. However, the law can operate more positively. By *requiring* particular types of information to be made available to consumers, the law serves to bridge the information gap, permitting the consumer to choose between different types of products in an informed manner. The technique avoids the objection to the setting of minimum standards that the State is thereby taking away from the market the decision about what will and will not be available. Information disclosure addresses the market failings of informational imbalance, but then leaves the market to set its own quality levels. The techniques of information disclosure have become popular in recent years and is especially at the European Union level. The notion that the consumer duly informed and thereby protected, is able to participate fairly and effectively in the market has assumed the status of a guiding principle of policy. The market is corrected by information disclosure in the sense that it becomes more efficient and competitive. Consumers are enabled to transmit messages to suppliers which reflect "real" preferences, undistorted by the lack of transparency'.

Building on the conceptual distinctions outlined above if, on one hand, duties to inform fall under measures aimed at rationalizing the market, which seek to ‘prevent’ market failures caused by information asymmetries; on the other hand, cooling-off periods provide a form of fallback protection, allowing consumers to withdraw even after the conclusion of the contract, where information alone proves inadequate¹⁹⁷.

In order to determine whether the Unfair Contract Terms Directive is more appropriately conceptualized as an instrument of *rationalization* or, rather, of *rectification* of the market, it is necessary, once again, to begin with the Directive’s overall structure.

At first sight, Article 1(1), which defines the very purpose of the Directive, appears to support a *rationalizing* reading. Indeed, Article 1(1) refers to the ‘approximation of the laws, regulations and administrative provisions of the Member States relating to unfair terms *in contracts concluded between a seller or supplier and a consumer*’¹⁹⁸. Moreover, Article 3(1), in defining unfair terms, provides that a contractual term shall be regarded as unfair where three cumulative conditions are satisfied: the term has not been individually negotiated; it is contrary to the requirement of good faith; and it causes a significant imbalance in the parties’ rights and obligations *arising under the contract*, to the detriment of the consumer¹⁹⁹.

This orientation becomes even clearer in Article 4(1), which provides that the unfairness of a contractual term must be assessed by reference to the nature of the goods or services concerned and, crucially, ‘at the time of the conclusion of the contract’, taking into account all the circumstances attending the conclusion of the contract, together with all the other terms of the contract or of another contract on which it is dependent²⁰⁰. Read together with Recital 19 – which clarifies that, while the assessment of unfairness does not extend to terms defining the main subject matter of the contract or the adequacy of the price/remuneration, the price/quality ratio may nevertheless be considered in assessing the fairness of other contractual terms²⁰¹.

¹⁹⁷ See e.g. M. TREBILCOCK, *The limits of Freedom of Contract*, Cambridge, 1993; H. COLLINS, *Regulating Contracts*, Oxford, 1999; C. WILLETT, *Fairness in Consumer Contracts*, Aldershot, 2007; M. KENNY, J. DEVENNEY and L. FOX O’MAHONY (eds.), *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable*, Cambridge, 2010.

¹⁹⁸ See nt. 182.

¹⁹⁹ See nt. 16.

²⁰⁰ More precisely, Article 4(1) establishes that: ‘Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent’.

²⁰¹ More precisely, Recital 19 states that: ‘Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, *inter alia*, that in insurance contracts, the terms which clearly define or

The logic underpinning the Unfair Contract Terms Directive emerges most clearly in Article 6, pursuant to which unfair terms ‘shall not be binding’ on the consumer. Therefore Article 6 seeks to neutralize the detrimental consequences of unfair terms within contracts that have already been concluded and, in many instances, at least partially performed.

Taken together, these provisions strongly suggest that the Directive adopts a predominantly *ex post* perspective and is therefore primarily concerned with the *rectification* of the market rather than with its *ex ante* rationalization.

Such a reading may, however, be challenged in light of Article 7, which expressly provides that ‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to *prevent* the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers’. Even more significantly, the earlier version of this provision – Article 8 of the Proposal of 5 March 1992 – expressly referred to contractual terms drawn up for general use irrespective of their actual inclusion in individual contracts²⁰². Read in this light, Article 7(1) appears to require Member States to adopt mechanisms aimed at preventing unfairness before it materializes in individual contracts rather than merely remedying its consequences retrospectively²⁰³.

The crucial question, therefore, concerns the role that Article 7 plays within the overall architecture of the Directive and, more specifically, how its preventive rationale relates to the system established by the Recitals and by Articles 1 to 6.

Some scholars argued that Article 7 establishes a parallel regime applicable specifically to contractual terms drawn up for general use in contracts concluded with consumers²⁰⁴.

circumscribe the insured risk and the insurer’s liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer’.

²⁰² Cf V. RIZZO, nt. 109, pp. 620 et seq. More precisely, Article 8(3) of the Proposal of 5 March 1992 established that: ‘The measures referred to in the foregoing paragraph may be directed jointly against a number of persons using, preparing to use or recommending the use of the same general contractual terms or identical terms; the decision reached by the competent authorities shall be binding on all the persons concerned’.

²⁰³ Article 7(1) of the Unfair Contract Terms Directive provides that: ‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers’. In this vein, Article 7(1) refers back to Recital 24 which states that: ‘(...) the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts’. Accordingly, Article 7(2) stipulates that: ‘The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms’. For a broad interpretation of Article 7, in order to guarantee a high level of protection in favour of consumers, see also Case C-472/10, *Invitel*, ECLI:EU:C:2012:242 and Case C-119/15, *Biuro podróży*, ECLI:EU:C:2016:987.

²⁰⁴ V. RIZZO, nt. 109, pp. 620 et seq.

According to this interpretation, such a regime exists alongside the framework governing unilaterally drafted terms intended for individual use – although also applicable to contractual terms drawn up for general use – set out in Articles 3 to 6 of the Directive.

On this view, the Unfair Contract Terms Directive envisages two distinct forms of control over unfair terms. The first consists of an *individual* and *subsequent* review mechanism grounded in Article 6, operating through the declaration of non-bindingness of unfair clauses within a specific contractual relationship²⁰⁵. The second consists of a *public/collective* – and potentially *preventive* – form of review under Article 7, directed exclusively at contractual terms drafted for general use, irrespective of their actual incorporation into a particular contract.

Yet, what immediately emerges from the structure of the Directive is that this possible dichotomy between individual-ex post control under Article 6 and public/collective-ex ante control under Article 7 is not regulated in the same degree of normative sophistication.

Indeed, significant difficulties arise attempting to identify the appropriate framework for assessing the unfairness of contractual terms drafted for general use independently of any concrete contractual application²⁰⁶. Article 4, for instance, expressly requires the assessment of unfairness to be conducted ‘at the time of conclusion of the contract’, taking into account ‘all the circumstances attending the conclusion of the contract’ and ‘all the other terms of the contract’. Such language sits uneasily with any abstract review detached from a specific contract.

²⁰⁵ More specifically, Article 6 establishes that: ‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms’. For a partially different opinion see, in this context, A. WIEWIÓROWSKA-DOMAGALSKA, ‘Lost in Information - The Transparency Dogma of the Unfair Contract Terms Directive’, in *ERPL*, 2024, 32(3), p. 427: ‘(...) broad interpretation of the existing provisions (Article 4 paragraph 2 and Article 5) and including transparency as a part of the unfairness test, which does not follow from a literal reading of Article 3 paragraph 1. Therefore, the balance is shifting from protecting through content control under the UCTD towards protecting through information’. By contrast, see T. WILHELMSSON, nt. 25, p. 275: ‘Le misure che concernono il contenuto del contratto, così come le regole imperative di correttezza contrattuale, restano comunque tipiche dell’intervento di rettificazione’.

²⁰⁶ These difficulties become even more apparent when one considers that, by contrast, Article 8(4) of the Proposal of 5 March 1992 established that: ‘As part of the measures referred to in the foregoing paragraphs, the competent authorities shall assess the unfairness of the terms in question in the light of the list of standard terms given in the Annex and, secondarily, by applying the criteria laid down in Article 3(1)’. In this regard, Article 3(1) of the Proposal of 5 March 1992 explained that: ‘A contractual term which has not been individually negotiated shall be regarded as unfair if, of itself or in combination with another term or terms of the same contract, or of another contract upon which it is dependent, contrary to the requirements of good faith:

- it causes to the detriment of the consumer a significant imbalance in the parties' rights and obligations arising under the contract, or
- it causes the performance of the contract to be significantly different from what the consumer could legitimately expect’.

As has been persuasively observed, where standard terms are subject to preventive review, the very feasibility of an assessment encompassing the circumstances of the individual case is necessarily lost. The abstract nature of the inquiry confines the court to an examination of the content of the clause and of the object, purpose and type of contract in which it is intended to operate²⁰⁷. This entails, first, that factors ordinarily regarded as crucial to a proper appraisal of contractual fairness are excluded for reasons of procedural design wholly extraneous to the substantive issue under examination. Secondly, because the applicable evaluative parameter changes according to the procedural mean selected – whether an individual adjudication or a *Kontrollverfahren* – the anomalous possibility arises that the same term may be subjected to divergent assessments²⁰⁸. A contractual term which, when considered in the concrete circumstances of a particular relationship, might be condemned as unexpectedly onerous and therefore unfair could escape censure under a purely abstract content review. Conversely, concerns formulated in the abstract may ultimately prove unfounded once tested against the factual matrix of a specific contractual relationship²⁰⁹.

Other scholars, by contrast, have interpreted Article 7(1) as merely reflecting the general principle of effectiveness, as developed by the Court of Justice, which requires Member States to ensure the availability of adequate means – including, hypothetically, *ex ante* control over contractual terms drawn up for general use – to bring to an end the continued use of unfair terms in contracts concluded with consumers²¹⁰. The Directive, however, does not specify a particular form of this procedure at national level but rather only outlines the minimum requirements for such a procedure (Article 7(2)).

The Italian implementation of the Directive appears consistent with this interpretation and, more broadly, confirms the structural predominance of an *ex post* control within the system²¹¹. Indeed, under the Italian framework, jurisdiction to determine the unfairness of contractual terms was entrusted exclusively to ordinary courts, called upon to undertake such assessments primarily within individual proceedings, through a necessarily subsequent form of protection²¹². Alongside this mechanism, the system also introduced collective injunctive

²⁰⁷ R. PARDOLESI, 'Clausole abusive (nei contratti dei consumatori): una direttiva abusata?', in *Foro it.*, 1994, V, pp. 148-149.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Cf P. ROTT, 'Unfair contract terms' in C. TWIGG-FLESNER (eds.), nt. 27, p. 304.

²¹¹ Cf T. WILHELMSSON, nt. 25, p. 275: 'Le misure che concernono il contenuto del contratto, così come le regole imperative di correttezza contrattuale, restano comunque tipiche dell'intervento di rettificazione'.

²¹² Cf G. DE CRISTOFARO and A. ZACCARIA, *sub* Art. 37, in *Comm. dir. cons.*, 2nd ed., Padova, 2013, pp. 419 et seq.

proceedings. Former Article 1469-*sexies* of the Italian *Codice civile*, in its original version, implemented Article 7 of the Unfair Contract Terms Directive by conferring standing upon representative consumer associations, professional associations and the Chambers of Commerce to seek injunctive relief against a seller or supplier or an association of sellers or suppliers²¹³. However, that remedy was initially available only in respect of terms drawn up for general use that had *already* been used by the seller or supplier or by the relevant association of sellers and suppliers and whose unfair character had been judicially established²¹⁴.

This limitation was subsequently removed by Article 6 of Law No. 14 of 2003, which inserted the words ‘or recommend the use of general conditions of contract’, thereby disentangling the grant of injunctive relief from the requirement that the contested standard term had already been incorporated into a specific contract²¹⁵. Article 1469-*sexies* of the Italian *Codice civile* was later repealed by Article 142 of D.lgs. No. 206/2005 (the Italian *Codice del consumo*). The injunctive action is now governed by Article 37 of the Italian *Codice del consumo*, which, subject to certain amendments, substantially reproduces the earlier provision²¹⁶.

Even following the introduction of the reference to those who ‘recommend the use of general conditions of contract’, it remains possible to conclude that this form of public protection acquires a genuinely preventive character only incidentally. Its anticipatory dimension remains contingent upon the prior drafting, recommendation, or use of the contested standard terms. The mechanism therefore does not establish an autonomous system of abstract

²¹³ In its original version, Article 1469-*sexies* of the Italian *Codice civile* established that: ‘Le associazioni rappresentative dei consumatori e dei professionisti e le camere di commercio, industria, artigianato e agricoltura, possono convenire in giudizio il professionista o l’associazione di professionisti che utilizzano condizioni generali di contratto e richiedere al giudice competente che inibisca l’uso delle condizioni di cui sia accertata l’abusività ai sensi del presente capo. L’inibitoria può essere concessa, quando ricorrono giusti motivi di urgenza, ai sensi degli articoli 669-bis e seguenti del codice di procedura civile. Il giudice può ordinare che il provvedimento sia pubblicato in uno o più giornali, di cui uno almeno a diffusione nazionale’.

²¹⁴ Cf G. DE CRISTOFARO and A. ZACCARIA, *sub* Art. 37, nt. 212, p. 419.

²¹⁵ In its last version, Article 1469-*sexies* of the Italian *Codice civile* established that: ‘Le associazioni rappresentative dei consumatori e dei professionisti e le camere di commercio, industria, artigianato e agricoltura, possono convenire in giudizio il professionista o l’associazione di professionisti che utilizzano o che raccomandano l’utilizzo di condizioni generali di contratto e richiedere al giudice competente che inibisca l’uso delle condizioni di cui sia accertata l’abusività ai sensi del presente capo. L’inibitoria può essere concessa, quando ricorrono giusti motivi di urgenza, ai sensi degli articoli 669-bis e seguenti del codice di procedura civile. Il giudice può ordinare che il provvedimento sia pubblicato in uno o più giornali, di cui uno almeno a diffusione nazionale’.

²¹⁶ Article 37(1) of the Italian *Codice del consumo* establishes that: ‘Le associazioni rappresentative dei consumatori, di cui all’articolo 137, le associazioni rappresentative dei professionisti possono convenire in giudizio il professionista o l’associazione di professionisti che utilizzano, o che raccomandano l’utilizzo di condizioni generali di contratto e richiedere al giudice competente che inibisca l’uso delle condizioni di cui sia accertata l’abusività ai sensi del presente titolo’.

regulatory supervision but rather constitutes an ancillary remedy operating within a legal framework whose center of gravity remains firmly anchored in the *ex post* judicial control of unfair contractual terms.

Nor does the overall picture appear to have been fundamentally altered by the introduction, within the Italian *Codice del consumo*, of Article 37-*bis* by Law No. 27 of 2012. In its original formulation - prior to the amendments enacted in 2022 and 2023 - Article 37-*bis* established the possibility of an ‘administrative’ review of unfair terms entrusted to the *Autorità Garante della Concorrenza e del Mercato* (‘AGCM’)²¹⁷. However, the provision did not confer upon the Authority the power to issue injunctive orders or restorative measures, nor, most significantly, did it empower the AGCM to impose administrative pecuniary sanctions.

The current framework has evolved following the insertion of paragraph 2-*bis* into Article 37-*bis*. As a result of that amendment, the use of unfair terms now constitutes an infringement under public law and may give rise to the imposition of an administrative pecuniary sanction²¹⁸. On the prevailing interpretation of the provision, nevertheless, it appears that the AGCM’s sanctioning powers may be exercised only where the seller or supplier has already made *actual use* of the standard terms in question by entering into a series of contractual relationships with a plurality of consumers²¹⁹. No administrative pecuniary sanction may therefore be imposed upon a trader who has merely drafted a set of standard terms but has not yet concluded any contracts on the basis thereof²²⁰.

3. The Constitutionalization Of The Law Of Contracts

²¹⁷ Article 37-*bis*(1) of the Italian *Codice del consumo* establishes that: ‘L’Autorità garante della concorrenza e del mercato è designata, ai sensi dell’articolo 5, paragrafo 1, del regolamento (UE) 2017/2394, quale autorità competente responsabile dell’applicazione della direttiva 93/13/CEE del Consiglio, del 5 aprile 1993, concernente le clausole abusive nei contratti stipulati con i consumatori. In materia di accertamento e di sanzione delle violazioni della citata direttiva 93/13/CEE, si applica l’articolo 27 del presente codice (...)’.

²¹⁸ Article 37-*bis*(2-*bis*) of the Italian *Codice del consumo* establishes that: ‘Qualora l’Autorità accerti, in alcuno dei contratti di cui al comma 1, l’utilizzo di clausole vessatorie come definite all’articolo 33, comma 1, applica una sanzione amministrativa pecuniaria (...)’.

²¹⁹ Cf G. DE CRISTOFARO, ‘Vessatorietà e trasparenza delle clausole dei contratti b-to-c e procedimenti amministrativi di competenza dell’AGCM. Il novellato art. 37-*bis* c. cons.’, in *Nuove leggi civ. comm.*, 2023, p. 527: ‘Sembra poi doversi riconoscere che anche in queste ipotesi i poteri sanzionatori di cui è munita AGCM possano essere esercitati soltanto se ed in quanto il professionista abbia *effettivamente già instaurato* con una pluralità di consumatori una serie di rapporti contrattuali validamente assoggettati alle suddette condizioni generali, non potendo essere irrogata alcuna sanzione amministrativa pecuniaria nei confronti di un professionista che non abbia ancora stipulato concretamente alcun contratto utilizzando lo standard negoziale da lui stesso predisposto’.

²²⁰ Ibid.

The increasing influence of constitutional rights within the domain of private law²²¹ - most notably in the domain of contract law - has given rise to what is now commonly referred to as the 'Constitutionalization of private law'. This conceptual shift reflects a deeper transformation: private law is no longer viewed as an autonomous and self-contained body of norms governing interpersonal relations, but rather as being progressively permeated by, and somehow subordinate to, the normative framework of constitutional 'values'²²². Such a trajectory inevitably challenges the long-standing doctrinal divide between public and private law²²³.

²²¹ Numerous authors have commented on recent developments in this field and have offered insights into its potential future direction. See, in this regard, C. MAK, nt. 82, pp. 706 et seq; EAD., 'Unchart(er)ed territory: EU fundamental rights and national private law' in A.S. HARTKAMP, C.H. SIEBURGH, L.A.D. KEUS, J.S. KORTMANN and M.H. WISSINK (eds.), *The influence of EU law on national private law*, Deventer, 2014, pp. 323 et seq; H. COLLINS, 'On the (In)compatibility of Human Rights Discourse and Private Law' in H.-W. MICKLITZ (eds.), *Constitutionalization of European Private Law*, Oxford, 2014, pp. 26 et seq; D. LECZYKIEWICZ and S. WEATHERILL, 'Private Law Relationships and EU Law' in D. LECZYKIEWICZ and S. WEATHERILL (eds.), *The Involvement of EU Law in Private Law Relationships*, London, 2013, pp. 6-7; D. LECZYKIEWICZ, 'The Constitutional Dimension of Private Law Liability Rules in the EU', *ibid.*, pp. 199 et seq; C. STARCK, 'Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court'; A. HELDRICH and G.M. REHM, 'Importing Constitutional Values through Blanket Clauses'; H. BEALE and N. PITAM, 'The Impact of the Human Rights Act 1998 on English Tort and Contract Law' and R. ELLGER, 'The European Convention of Human Rights and Fundamental Freedoms and German Private Law' in D. FRIEDMANN and D. BARAK-EREZ (eds.), *Human Rights in Private Law*, Oxford/Portland, 2001 - respectively - pp. 97, 113, 131 and 161.

²²² With regard to the concept of constitutional 'values' see M. FABRE-MAGNAN, 'Constitutional Values and Freedom of Contract', in *ERCL*, 2024, 20(3), pp. 208 et seq and specifically nt. 2: 'The words of the subject are very broad (...). The notion of "constitutional values" is not really a legal concept. The term "values" itself does not often appear in legal texts, except in preambles or general statements. The concept is used in both singular and plural forms'. The author also specifies that the preamble to the TEU draws "[i]nspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law' and it recalls in its Article 2 that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail', then in its Article 3 that '[t]he Union's aim is to promote peace, its values and the well-being of its peoples'. On a different note, for a comprehensive analysis of the role of the Court of Justice in the Constitutionalization of freedom of contract see C. MAK, 'Free movement and contract law' in C. TWIGG-FLESNER (eds.), nt. 27, pp. 188 et seq. In this regard, see also G. DAVIES, 'Freedom of movement, horizontal effect, and freedom of contract', in *ERPL*, 2012, 20, pp. 805, 827.

²²³ O.O. CHEREDNYCHENKO, 'The Constitutionalization of Contract Law: Something New under the Sun?', in *Electronic Journal of Comparative Law*, 2004, 8.1., p. 5. According to the author, the Dutch and English cases illustrate a shift within private law itself towards a more society-oriented approach. This trend is particularly evident in the increasing protection of the weaker party, especially in the context of contract law. The underlying idea is that, at various stages of a contract's life cycle, one party should not be guided solely by its own interests, but should also take into account the legitimate interests of the other party. In this context, some commentators even speak of a so-called 'consumerization' of private law, as opposed to its traditional commercialization.

To some extent, this discourse – with specific reference to the inherent tension between contractual freedom and the normative constraints imposed by overarching constitutional ‘values’ – is not a recent innovation. Indeed, the function of fundamental rights is frequently cast as external limitations tempering the scope of individual freedom in contract formation and performance²²⁴. In this vein, both PECL and DCFR affirm that a contract is devoid of legal effect – or rendered void – where its terms conflict with principles recognized as fundamental within the constitutional traditions of the EU Member States²²⁵.

A particularly lucid formulation of this position is offered by those scholars who have argued that it has long been observed that unrestricted contractual freedom not only creates an arena in which pre-existing inequalities are reflected, but that in doing so it tends to exacerbate rather than mitigate those inequalities: the market it facilitates can be predatory in nature, so that strong predators are likely to thrive and become even stronger, while those who enter it in a position of weakness risk becoming even weaker²²⁶.

This historical and conceptual backdrop helps illuminate the French *Conseil Constitutionnel*’s initial reluctance to elevate freedom of contract to the level of constitutional value²²⁷. Such caution was not without reason: granting constitutional status to contractual freedom risked limiting the legislature’s ability to rebalance contractual relationships in pursuit of substantive fairness, particularly where economic disparities place one party at a systemic disadvantage²²⁸. Nonetheless, as the political and legal climate shifted towards a more liberal conception of personal freedom, the *Conseil Constitutionnel* gradually embraced a more expansive understanding of freedom of contract. This doctrinal realignment, observed notably from the late 1990s onwards, has had the effect of constraining the legislature’s power to protect vulnerable contracting parties²²⁹.

²²⁴ M. FABRE-MAGNAN, nt. 222, p. 210: ‘In other words, certain limits on freedom of contract serve not only to protect constitutional values; they also serve to protect freedom of contract itself. To forget this would risk leading to the disappearance or reversal of this freedom’.

²²⁵ On the one hand, Article 15:101 PECL (Contracts Contrary to Fundamental Principles) establishes that: ‘A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union’; on the other hand, Article II–7:301 DCFR (Contracts infringing fundamental principles) states that: ‘A contract is void to the extent that: (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle’.

²²⁶ D. KIMEL, ‘Personal Freedom and the Protection of the Weak through the Lens of Contract: Jurisprudential Overview’ in S. VOGENAUER and S. WEATHERILL (eds.), *General Principles of Law: European and Comparative Perspectives*, Bloomsbury, 2017, p. 298.

²²⁷ For a comprehensive overview see M. FABRE-MAGNAN, nt. 222, p. 211, specifically nt. 8.

²²⁸ M. FABRE-MAGNAN, nt. 222, pp. 211–212.

²²⁹ M. FABRE-MAGNAN, *L’institution de la liberté*, 2nd ed., Paris, 2023.

The implications of this shift are eloquently captured in Lacordaire's celebrated maxim: '(...) qu'entre le fort et le faible, entre le riche et le pauvre, entre le maître et le serviteur, c'est la liberté qui opprime, et la loi qui affranchit'²³⁰. At the supranational level, similar currents are evident. The Court of Justice has articulated freedom of contract as a fundamental aspect of EU law, grounding it in the broader freedom to conduct a business²³¹.

In this context, a central issue concerns the identification of the boundaries within which legal intervention in private law, in general, and in contract law, in particular, may be considered legitimate. This necessarily involves determining not only the extent of such interventions, but also identifying the institutions entitled to carry them out, the normative standards by which they are guided, and the 'values' that justify interference with contractual freedom²³². In particular, attention must be paid to those fundamental rights and 'values' that have been described by some scholars as constituting an 'intangible minimum', whose safeguarding may legitimately prompt legislative or judicial paternalism²³³.

Against this background, it becomes especially meaningful to explore how national courts have addressed these tensions, and to consider the argumentative structures applied by judges²³⁴.

A significant point of departure for this line of inquiry is found in the seminal judgment of the *Bundesverfassungsgericht* delivered on 19 October 1993²³⁵. Commonly referred to as the

²³⁰ Cf Conférences, *Œuvres du R. P. Henri-Dominique Lacordaire*, Poussielgue frères, Paris, 1872, vol. 9, III, Years 1846-1848, p. 494. Arguably more important is the sentence that comes right after: 'Le droit est l'épée des grands, le devoir est le bouclier des petits'.

²³¹ Case C-426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*, ECLI:EU:C:2013:521, para 32: 'That fundamental right [freedom to conduct a business] covers, inter alia, freedom of contract, as is apparent from the explanations provided as guidance to the interpretation of the Charter (OJEC 2007 C 303, 17) and which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into account for the interpretation of the Charter (Case C-283/11 *Sky Österreich* [2013] ECR, paragraph 42)'.

²³² A. KARAMPATZOS, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model*, New York, 2020, pp. 37 et seq. Cf, with regard to role of judge-made private law in the emerging European polity, C. MAK and B. KAS, 'Civil Courts and the European Polity. An Introduction' in C. MAK and B. KAS (eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe*, Oxford, 2023, pp. 1-2.

²³³ M. FABRE-MAGNAN, nt. 222, p. 222: 'The limit must therefore be an objective limit. Certain constitutional values should be an intangible minimum of which the persons cannot be deprived, nor may they deprive themselves by contract. These are mainly values linked to the person and his/her body'.

²³⁴ For a comprehensive overview of the German, English and Dutch legal systems, see O.O. CHEREDNYCHENKO, nt. 223, pp. 6, 13.

²³⁵ Cf C. MAK, *Fundamental rights in European contract law: a comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn, 2008, pp. 75 et seq. The *Bürgschaft* case involves a real estate agent who attempted to secure additional credit for his business from the local state bank (*Stadtsparkasse*). The bank agreed to increase his credit limit but only on the condition that the agent's daughter would sign the contract as a guarantor for her father's entire debt. At that time, she was 21 years old and was employed as an

Bürgschaft case, this decision serves as a paradigmatic example of how fundamental rights may exert influence not only on suretyship agreements - such as the one at issue - but also on a broader category of risky financial and banking contracts²³⁶.

In this context, it is fitting to begin by outlining the three principal implications that German legal scholarship has consistently drawn from the *Bürgschaft* case²³⁷:

- (i) Firstly, according to the *Bundesverfassungsgericht*, the Basic Law requires private parties to be protected against themselves²³⁸.
- (ii) Secondly, it accords with the normative framework of constitutional rights, as well as with the underlying tenets of the *Sozialstaatsprinzip*, that private law - and contract law in particular - should not be confined to the mere regulation of relations between private

unskilled worker at a fish factory, earning a salary of DM 1,150 (575 euros) per month. Moreover, in 1984, her father left his real estate business to become a shipowner. He obtained a loan of DM 1.3 million (650/665,000 euros) from the bank to finance the purchase of a ship, but shortly afterward, the father's business encountered financial difficulties. As a result, the bank terminated its credit agreements with him and demanded DM 100,000 (50/51,000 euros) plus interest, amounting to a total of DM 160,000 (80,000 euros), from the daughter, who was a single mother relying on social security. After being held liable by the Federal Supreme Court to pay the entire sum, the daughter lodged a constitutional complaint against this decision of the Supreme Court invoking the violation of her constitutional rights as guaranteed by Article 1(1) of the Basic Law (the principle of human dignity) and Article 2(1) of the Basic Law (the right to the free development of one's personality) in conjunction with Article 20(1) and Article 28(1) (the principle of social state). All in all, constitutional rights were used to demonstrate that the contract was null and void and that it would have entailed disastrous consequences for the weaker party to be obliged to pay the promised sum.

²³⁶ O.O. CHEREDNYCHENKO, *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, München, 2007, p. 235. The author explains that in most cases the protection of a fundamental right of one party necessarily entails interference with a fundamental right of the other party: '(...) in the context of risky financial transactions, the protection of a surety or an investor on the basis of the constitutional right to private autonomy in conjunction with the principle of the social state, human dignity or the general right to personality constitutes an intrusion upon the financial institution's constitutional right to private autonomy'.

²³⁷ For a comprehensive overview see, O.O. CHEREDNYCHENKO, nt. 236, pp. 211 et seq; H. WIEDEMANN, 'Zur verfassungsrechtlichen Inhaltskontrolle von Verträgen', in *JZ*, 1994, pp. 411-413; W. ZÖLLNER, 'Regelungsspielräume im Schuldvertragsrecht', in *AcP*, 1996, p. 5 ('Ich fasse die wichtigsten Folgerungen, die er in voller Zustimmung zu der Entscheidung zieht, zusammen: (1) Die Verfassungsordnung verlangt einen durch Gesetz und Richterspruch konkretisierten Schutz der Privatrechtssubjekte vor sich selbst. (2) Es entspricht der in den Grundrechten und in der Sozialstaatsklausel niedergelegten Wertordnung und durchaus auch der europäischen Rechtstradition, daß die Privatautonomie allgemein und das Vertragsrecht im besonderen nicht nur Ordnungs-, sondern auch Schutzaufgaben erfüllen muß. (3) Jedes Rechtsgeschäft (sie!) ist auf seine inhaltliche und verfahrensmäßige Schieflage zu überprüfen; daran schließt sich die Sachkontrolle durch das jeweilige Fachgericht an. Alle Vertragsarten und Gesellschafterbeschlüsse sind mithin angreifbar').

²³⁸ See in particular R. SINGER, 'Vertragsfreiheit, Grundrechte und der Schutz des Menschen vor sich selbst', in *JZ*, 1995, p. 1141: 'den Grundrechten [kommt] nicht nur freiheitsgewährleistende, sondern in gewissem Umfang auch freiheitsbegrenzende Funktion zu'.

parties. Rather, it ought also to safeguard individuals from structural imbalances and ensuring that substantive justice is not eclipsed by formal freedom of contract²³⁹.

(iii) Third, it falls upon the judiciary to subject contract terms to careful scrutiny²⁴⁰.

According to *Bundesverfassungsgericht*, this obligation derives from the constitutional mandate to safeguard individual private autonomy (Article 2 (1) of the Basic Law) in conjunction with the *Sozialstaatsprinzip* (Articles 20 (1) and 28 (1) of the Basic Law)²⁴¹.

In so doing, the *Bundesverfassungsgericht* embraced the emerging doctrine of *grundrechtlicher Schutzpflicht*²⁴². Whereas fundamental rights were traditionally conceived as defensive entitlements - barriers erected to shield the individual from undue State interference - they are now increasingly understood as imposing 'positive obligations' upon the State to safeguard those very rights²⁴³. Crucially, this duty of protection extends to all organs of the State, including the ordinary civil courts. As a result, German private law now recognizes that the State bears a responsibility to protect individuals' constitutional rights not only against public authority, but also against infringement by other private actors - thereby aligning its protective function in private law with that traditionally associated with public or even criminal law domains²⁴⁴.

²³⁹ Cf C. HILLGRUBER, 'Abschied von der Privatautonomie?', in *ZRP*, 1995, p. 6: 'Mit den grundlegenden Entscheidungen des BVerfG (...) die den Grundrechten als objektiven Normen eine Ausstrahlungswirkung in das Privatrecht zuschrieben (...) Eine neuere, von Canaris begründete Lehre (...) bringt die Grundrechte im Privatrecht in der Weise zur Geltung (...) als Eingriffsverbote und Schutzgebote'.

²⁴⁰ See R. SINGER, nt. 238, pp. 1136 et seq.

²⁴¹ See the analysis of C. MAK, nt. 235, pp. 77 et seq. Cf also BVerfG 19 October 1993 (*Bürgschaft*). The BVerfG held: 'Handelt es sich (...) um eine typisierbare Fallgestaltung, die eine strukturelle Unterlegenheit des einen Vertragsteils erkennen läßt, und sind die Folgen des Vertrages für den unterlegenen Vertragsteil ungewöhnlich belastend, so muß die Zivilrechtsordnung darauf reagieren und Korrekturen ermöglichen. Das folgt aus der grundrechtlichen Gewährleistung der Privatautonomie (art. 2 Abs. 1 GG) und dem Sozialstaatsprinzip (art. 20 Abs. 1, Art. 28 Abs. 1 GG) (...) Heute besteht weitgehend Einigkeit darüber, daß die Vertragsfreiheit nur im Falle eines annähernd ausgewogen Kräfteverhältnisses der Partner als Mittel eines angemessenen Interessenausgleichs taugt und daß der Ausgleich gestörter Vertragsparität zu den Hauptaufgaben des Zivilrechts gehört. (...) Für die Zivilgerichte folgt daraus die Pflicht, bei der Auslegung und Anwendung der Generalklauseln darauf zu achten, daß Verträge nicht als Mittel der Fremdbestimmung dienen. Haben die Vertragspartner eine an sich zulässige Regelung vereinbart, so wird sich regelmäßig eine weitergehende Inhaltskontrolle erübrigen. Ist aber der Inhalt des Vertrages für eine Seite ungewöhnlich belastend und als Interessenausgleich offensichtlich unangemessen, so dürfen sich die Gerichte nicht mit der Feststellung begnügen: "Vertrag ist Vertrag". Sie müssen vielmehr klären, ob die Regelung eine Folge strukturell ungleicher Verhandlungsstärke ist, und gegebenenfalls im Rahmen der Generalklauseln des geltende Zivilrechts korrigierend eingreifen'.

²⁴² On the concept of State's constitutional duty of protection see C.-W. CANARIS, *Grundrechte und Privatrecht*, Berlin/New York, 1999.

²⁴³ See, in this regard, O.O. CHEREDNYCHENKO, 'The EU Charter of Fundamental Rights and Consumer Credit: Towards Responsible Lending?' in H. COLLINS (eds.), *European Contract Law and the Charter of Fundamental Rights*, Cambridge, 2017, pp. 154 et seq.

²⁴⁴ Cf BVerfG 7 February 1990 (*Handelsvertreter*). Cf, in this regard, C. MAK, nt. 235, pp. 70-75.

3.1. *Towards A Constitutional Scrutiny Of The Consequences Of Unfair Contract Terms*

In the *Bürgschaft* case, as previously noted, the *Bundesverfassungsgericht* firmly established that a contract seen especially in the light of the constitutional protection of private autonomy (Article 2 (1) of the Basic Law), cannot escape invalidity - primarily on the ground that it is contrary to good morals - if it imposes an unusually heavy burden on one of the parties and, in so doing, is the result of a structural bargaining imbalance between the parties, in particular a structural inferiority of one of them in relation to the other²⁴⁵.

Therefore, while both contracting parties are formally entitled to invoke party autonomy as a constitutional right, its application is not symmetrical²⁴⁶. For the stronger party, private autonomy operates as a straightforward entitlement. By contrast, for the weaker party, the same right – when interpreted in conjunction with the principle of the social state – entails a degree of constitutional protection against contract terms that are excessively onerous against the weaker party²⁴⁷.

Traditionally, this approach entails invoking fundamental rights and ‘values’ in order to exercise constitutional control over the formation and enforcement of contracts. However, against this backdrop, it becomes particularly relevant to explore whether these rights might also serve to assess not merely the formation and execution of a contract, but also the *consequences* of its invalidity. For the purposes of this analysis, the case of foreign currency linked loans, previously examined, offers a pertinent example²⁴⁸. In fact, if the unfairness resulting from the lack of transparency affects the price of the contract or the way in which it is calculated, as is usually the case in loan agreements and indexation clauses, the exclusion of

²⁴⁵ See above nt. 241.

²⁴⁶ O.O. CHEREDNYCHENKO, nt. 236, p. 235: ‘Fundamental rights are therefore a double-edged sword in the hands of both powerful creditors and weak debtors, and an expression of fundamental contradictions with regard to values which exist in a society. Since the interests of both the stronger and the weaker parties can be protected by the national constitutions and international human rights instruments, fundamental rights may come into conflict with each other’.

²⁴⁷ See A. COLOMBI CIACCHI, ‘The Constitutionalization of European Contract Law’, in *ERCL*, 2006, 2(2), pp. 167-180, who relates this development to ideas of social justice.

²⁴⁸ The Unfair Contract Terms Directive not only accounts for around half of the Court of Justice’s case law on contract law in the 2010s, but has also led to a completely new paradigm of European contract law, subject to fundamental rights and in particular the right to a ‘due process’, and even to a completely new field of law, European restitution law. In this regard, see also C. MAK, ‘Rights and Remedies - Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters’ in H.-W. MICKLITZ (eds.), nt. 221, pp. 236 et seq; G. GENTILE, ‘Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU. *Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States*’ in C. MAK and B. KAS (eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe*, Oxford, 2023, pp. 141 et seq.

the contested clause renders the entire contract null and void, which may trigger the rules on contractual restitutions²⁴⁹.

In this context, it can reasonably be argued - at least hypothetically – that the weak party can invoke both the right to the free development of one’s personality²⁵⁰ and the broader constitutional value of human dignity to oppose the devastating and burdensome consequences of such invalidity²⁵¹. In the specific case of foreign currency linked loans, such consequences might include an obligation for the borrower to immediately repay the outstanding balance, which would likely exceed the consumer’s financial capacity. Human dignity, as constitutionally protected, guarantees that everybody can live at least on a subsistence level (*Existenzgrundlage*)²⁵².

In this context, it is worth noting the structure of the Charter of Fundamental Rights of the European Union. The Preamble explicitly states that ‘the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity’. The Charter contains separate titles devoted to each of these ‘values’. Thus, Article 1 contains an explicit guarantee of human dignity which must be respected and protected²⁵³. Chapter II ‘Freedoms’, instead, starts with the right to liberty and the security of the person (Article 6)²⁵⁴.

In this light, it is at least worthy of investigation whether a rigid application of civil codes, and in particular of the rules on *condictio indebiti*, can contribute to perpetuating injustice and exploitation. As will be broadly explained in the next chapters, in the specific case of foreign currency linked loans, despite appearances, the answer tends to be negative.

More precisely, two main interrelated questions arise in this context. The first concerns whether, after the ‘annulment’ of the loan contract in its entirety due to unfairness, the professional may recover amounts exceeding the principal originally advanced — in particular, whether the restitution of interests is permissible. The second concerns whether the consumer,

²⁴⁹ See, for instance, Case C-453/10, *Perenicová*, ECLI:EU:C:2012:144, para 35 and Joined Cases C-80/21, C-81/21, C-82/21, *D.B.P. (Crédit hypothécaire libellé en devises étrangères)*, ECLI:EU:C:2022:646, para 84: ‘It follows from all the foregoing considerations that Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as meaning that they preclude national case-law according to which the national court may, after finding that an unfair term contained in a contract concluded between a consumer and a seller or supplier is invalid and that the contract as a whole is void, replace the annulled term either with an interpretation of the wishes of the parties in order to avoid the annulment of the contract, or with a supplementary provision of national law, even though the consumer has been informed of the consequences of the annulment of that contract and has accepted them’.

²⁵⁰ See above nt. 237.

²⁵¹ Cf D. FRIEDMANN and D. BARAK-EREZ (eds.), nt. 221, p. 2: ‘Today, however, freedom of contract can be considered a feature of the human right to dignity’.

²⁵² O.O. CHEREDNYCHENKO, nt. 236, p. 224.

²⁵³ More precisely, Article 1 states that: ‘Human dignity is inviolable. It must be respected and protected’.

²⁵⁴ Article 6 establishes that: ‘Everyone has the right to liberty and security of person’.

beyond obtaining repayment of the instalments already made, might also claim further restitution or compensation extending simple reimbursement.

With regard to the first question, the Court of Justice has taken a restrictive stance towards professionals. It has ruled that Articles 6(1) and 7(1) of the Unfair Contract Terms Directive preclude a national interpretation allowing the credit institution to seek compensation from the consumer exceeding the return of the principal disbursed under the contract. On the other hand, with regard to the second question, there remains considerable uncertainty as to whether a credit institution may be required, for instance, to disgorge the profits obtained during the contract's execution.

As will be argued, ultimately, the manner in which the national rules on *condictio indebiti* are to be applied also to cases of 'annulment' of the contract on grounds of unfairness will depend on a rigorous interpretation of the *principles* and *policies* underlying the Unfair Contract Terms Directive, some of which have already been highlighted: the policies of 'commutative, not redistributive' justice and of 'market-rectifying, not rationalizing'.

Moreover, in this context, it is worth recalling that even in cases involving the Public Administration and undue payments received by individuals, who may have legitimately relied on the finality of the performance received, legal systems have not generally denied the *solvens* the possibility of recovering what was performed. Rather, they have converged on exercising control over the *manner* in which such restitution must be carried out, in light of the principle of proportionality²⁵⁵. In this respect, key considerations include the financial, social, or health vulnerabilities of the party obliged to perform restitution²⁵⁶.

This notion of proportionality aligns with the interpretation given by the European Court of Human Rights (ECtHR) of Article 1 of the 1st Protocol to the European Convention of Human Rights which stipulates that '[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of

²⁵⁵ ECHR Court, 11 february 2021, *Casarin v. Italia*, n. 4893/13, para 60: 'En outre, la Cour estime, au regard du degré de confiance que la requérante pouvait avoir en l'exactitude de la décision de l'INPS, que la nature de l'employeur revêt une certaine importance dans l'examen global de la proportionnalité de l'ingérence (Čakarević, précité, § 80). En effet, la confiance légitime d'un salarié peut raisonnablement trouver un appui différent selon les caractéristiques de l'employeur et donc de l'autorité avec laquelle ce dernier interprète et fait application de normes plus ou moins complexes'.

²⁵⁶ ECHR Court, 11 february 2021, *Casarin v. Italia*, n. 4893/13, para 58: 'La Cour observe que la mise en place de procédures de mobilité et la prévision de mesures de garantie salariale telles que l'allocation compensatrice font entrer en jeu des considérations liées aux politiques économiques et sociales qui relèvent en principe de l'ample marge d'appréciation accordée aux États dans ce domaine (...). Toutefois, cette marge peut être plus étroite lorsque, dans des cas tels que celui de l'espèce où des sommes sont versées par erreur à la partie intéressée, l'erreur est imputable uniquement aux autorités étatiques'.

international law'²⁵⁷. The ECtHR has interpreted this provision expansively²⁵⁸. Specifically, the concept of 'possession'²⁵⁹ is understood not only to cover an immediate and current right to enjoy the possession itself, but also legitimate expectations to derive an economic benefit in the future. In light of this interpretation, the ECtHR has developed the notion of 'legitimate expectation' - or more precisely, the *espérance légitime d'obtenir la jouissance effective d'un droit de propriété*, i.e. the legitimate expectation of effectively enjoying a property right²⁶⁰.

3.2. Equality, Equivalence And Solidarity

Additional insights into the justification for a body of rules governing unfair contract terms may be drawn from philosophy of law, which posits that law is, at its core, the application of an ideal of justice to concrete social interactions. Within this framework, Kojève identifies at least two distinct forms of justice, each grounded in a separate principle: the principle of equality and the principle of equivalence²⁶¹. These two principles are described as conceptually independent, yet they remain compatible²⁶². Indeed, the law frequently provides rules that, while formally adhering to the principle of equality, fail to address the disparities they produce

²⁵⁷ See, in this context, E. BUFANO and A. DINISI, 'Ripetizione dell'indebito e affidamento dell'accipiens. CEDU e diritto interno a confronto', in *Pactum*, 2022, p. 71.

²⁵⁸ F. SUDRE, 'Le recours aux 'notions autonomes' in F. SUDRE (eds.), *L'interprétation de la Convention européenne des droits de l'homme*, Bruxelles, 1998, pp. 93 et seq; S. PUGLIATTI, *La proprietà nel nuovo diritto*, Milano, 1964, p. 309. According to this author 'possiamo dichiarare che la parola "proprietà" non ha oggi, se mai ha avuto, un significato univoco. Anzi troppe cose essa designa, perché possa essere adoperata con la pretesa di essere facilmente intesi. In ogni caso l'uso di essa, con le dovute cautele e chiarimenti necessari, anche se si protrarrà ancora nel prossimo futuro, non può ormai mantenere l'illusione che alla unicità del termine corrisponda la reale unità di un saldo e compatto istituto'. See also A. GAMBARO, 'Consonanze e dissonanze nelle fonti dell'istituzione proprietaria', in *Juscivile*, 2016, p. 291: '(...) la Corte EDU non è riuscita a fornire al testo da cui muove una interpretazione consonante con gli altri testi costituzionali europei e ciò l'ha condotta da un lato a dilatare enormemente il proprio sindacato sulle leggi e sugli atti amministrativi degli Stati membri e dall'altro lato a sviluppare una protezione dei diritti di proprietà che ricorda da vicino l'esperienza vissuta dalla Corte suprema federale americana durante la cosiddetta Lochner Era'.

²⁵⁹ See A. MOSCARINI, *Proprietà privata e tradizioni costituzionali comuni*, Milano, 2006, pp. 228 et seq; E. BUFANO and A. DINISI, nt. 257, p. 72; C.S.A. ANGIOLINI, 'L'interpretazione estensiva dell'art. 1, prot. 1, Cedu: fra tutele proprietarie e beni comuni', in *Nuova giur. civ. comm.*, 2016, II, pp. 328 et seq.

²⁶⁰ Cf A. GIGLI, *Nuove prospettive di tutela del legittimo affidamento nei confronti del potere amministrativo*, Napoli, 2016, p. 69; B. DELAUNAY, 'Le contentieux des espérances légitimes en droit fiscal' in T. LAMBERT (eds.), *Le contentieux fiscal en débats*, Paris, 2014, p. 297.

²⁶¹ A. KOJÈVE, *Lineamenti di una fenomenologia del diritto*, M. FILONI and L. GAROFALO (translation), Venezia, 2024, pp. 333 et seq.

²⁶² A. KOJÈVE, nt. 261, p. 339 states that: '[c]osì, anche ai nostri giorni, noi chiamiamo "giusta" una divisione in parti *eguali*, che non tiene affatto conto di ciò che le parti distribuite significano (o "valgono") per coloro che le ricevono. Ma chiamiamo anche "giusta" l'imposta *progressiva*, senza preoccuparci dell'ineguaglianza e senza lasciarci impressionare dall'eguaglianza dell'imposta strettamente proporzionale'.

in practice. Similarly, it may embody the principle of equivalence without adequately confronting the structural inequalities that pre-exist or persist thereafter²⁶³.

Equality, in its general sense, entails that all individuals recognized as legal subjects are equal before the law – that is, they are treated as interchangeable regardless of their individual attributes. This legal equality constitutes a *conditio sine qua non* of any legal order: the same legal norm must be applied uniformly to all legal subjects²⁶⁴.

Yet, it is crystal clear that equality must reckon with the fact that individuals are not situated in conditions of equivalence. Dworkin - whose theory is generally placed within the tradition of ‘luck egalitarianism’ - attempts, in his account of justice, to reconcile equality with individual responsibility: each person must be allocated equal resources though all are then free to use them as they see fit, bearing the consequences of their choices. In this perspective, achieving substantive equality may require to an affirmative action, that is, preferential treatment of members of socially disadvantaged groups aimed exclusively at eliminating unfavourable conditions²⁶⁵. Kojève, on his part, argues that the conflict between equality and equivalence will naturally lead to a synthesis based on equitable justice, which combines the principle of equality with that of equivalence²⁶⁶.

Even in Hart, despite his celebrated distinction between ‘law as it is’ and ‘law as morally it ought to be’, and his denial of any necessary connection between law and morality²⁶⁷, recent scholarship perceives a movement toward the inclusion of justice-based consideration within the concept of law. This does reveal that Hart’s conception of *lex* is not entirely devoid of evaluative contents²⁶⁸.

²⁶³ Ibid.

²⁶⁴ A. KOJÈVE, nt. 261, p. 334 explains that: ‘L’eguaglianza giuridica nel senso generale del termine significa solo che tutti gli esseri umani *riconosciuti* dal Diritto come persone giuridiche aventi gli stessi diritti sono eguali davanti alla Legge, sono cioè intercambiabili, indipendentemente dalla loro natura personale. Ed è *questa* «eguaglianza giuridica» a essere la *conditio sine qua non* del Diritto’. Some scholars observe that solidarity may also be imposed top down, through the drafting of legal rules. See, for instance, DU. KENNEDY, ‘The Political Stakes in “Merely Technical” Issues of Contract Law’, in *ERPL*, 2002, 10(1), pp. 7-28.

²⁶⁵ Cf R. DWORKIN, *Taking Rights Seriously*, 1st ed., Cambridge, 1977. Moreover, someone has recalled the concept of *solidarity*, which can be defined as a concerted action from the bottom up in response to a situation of non-equivalence or oppression or, to put it positively, as an action that constitutes equity. Cf S.J. SCHOLZ, *Political Solidarity*, University Park, 2008, p. 34. Cf A. KOLERS, *A Moral Theory of Solidarity*, Oxford, 2016, p. 8.

²⁶⁶ A. KOJÈVE, nt. 261, p. 340: ‘Questo conflitto dei Diritti, questa dialettica giuridica condurrà necessariamente a una sintesi, al Diritto sintetico del Cittadino, fondato sulla Giustizia dell’equità che unisce il principio d’eguaglianza con quello di equivalenza’. Cf also C. MAK, nt. 235, pp. 201-206.

²⁶⁷ With regard to the distinction between *justice* and *morality*, see P. SIRENA, *De iure*, Torino, 2025, p. 84. See also H.L.A. HART, ‘Positivism and the Separation of Law and Morals’, in *Harvard Law Rev.*, 1958, 71, pp. 593 et seq.

²⁶⁸ Cf H.L.A. HART, *The Concept of Law*, 3rd ed., Oxford, 2012, pp. 157 et seq.

Transposed to the field of unfair contract terms, this analytical framework yields a clear structure. The principle of equality would require the exact fulfillment of obligations by the seller or supplier and the consumer. This is because the principle of equality is not concerned at all with what the services performed are worth, *rectius* burden, for those who receive them, *rectius* who perform them. At this point, however, the principle of equivalence will ask whether the equal parties are really equivalent. If it is found that performance is more burdensome for one party than for the other, it will be seen that the contractual exchange lacks real equivalence. In such a case, justice demands a reallocation of burdens, so that each party's performance is proportionate to their respective conditions²⁶⁹.

Once this principle has been applied, the matter will not end there. The principle of equality may still be unsettled by the unequal nature of performances and may seek redress the underlying reasons for such inequality. One will wonder why the performances are more burdensome for some than for others. And it is found, in the context of consumer law, that this difference is due to disparities in terms of wealth, bargaining power or access to information²⁷⁰.

In this sense, the regulation on unfair contract terms can be explained as an *ex post* re-proportioning of performance, so that – to borrow Kojève's formulation – the principle of equivalence pushes the principle of equality to be realized more perfectly²⁷¹. In fact, if legal subjects are truly equal, their equality no longer differs from their equivalence, and their equivalence is not something other than their equality²⁷².

²⁶⁹ Cf A. KOJÈVE, nt. 261, p. 391.

²⁷⁰ Ibid.

²⁷¹ Ibid. See also J. HABERMAS, *L'inclusione dell'altro*, Milano, 2014, p. 34.

²⁷² A. KOJÈVE, nt. 261, p. 391.

PART II

STRUCTURAL ANALYSIS: THE ANALYSIS OF REGULATIONS

TABLE OF CONTENTS: 4. Rules On Incorporation And Rules On Fairness: The Intricacies Between *Ius Communitatis* And *Ius Commune Modernum* – 5. Lack Of Knowledge Or Abuse Of Bargaining Power? – 5.1. The Issue Of Substantive (Un)fairness: A Misunderstanding – 6. A Comparative Overview – 6.1. Germany – 6.2. France – 6.3. UK – 7. The Blurred Boundaries Between Unfairness, Excessive Benefit, Unfair Exploitation And Gross Disparity – 8. Preliminary Conclusions

4. Rules On Incorporation And Rules On Fairness: The Intricacies Between *Ius Communitatis* And *Ius Commune Modernum*

Private law in Europe did not originate as a deliberate creation of the modern nation state²⁷³. Rather, it is the result of a gradual and layered accretion of a transnational legal tradition - namely the *ius commune*, complemented by *lex mercatoria* - whose foundations long predate the advent of national codifications²⁷⁴.

For centuries, jurists across the continent operated within this shared legal framework, which drew primarily upon Roman law as reinterpreted and refined by medieval and early modern scholarship²⁷⁵. Far from being displaced by the rise of codified national laws in the 19th century, this tradition was largely assimilated into the emerging legal systems, providing both their intellectual architecture and structural coherence²⁷⁶.

Although less visible today, this common legal heritage - the *ius commune europaeum* - continues to serve as a conceptual cornerstone of European private law²⁷⁷. It not only predates but, in certain respects, shapes the development of *ius Communitatis*, or EU law²⁷⁸. Indeed, EU

²⁷³ In this context, see J. GORDLEY, ‘Comparative Law and Legal History’ in M. REIMANN and R. ZIMMERMANN (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed., Oxford, 2019, pp. 754 et seq.

²⁷⁴ R. ZIMMERMANN, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford, 1990; A. VON MEHREN, ‘Some Reflections on Codification and Case Law in the Twenty-First Century’, in *U.C. Davis Law Rev.*, 1998, 31, pp. 659 et seq; R. ZIMMERMANN, ‘Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law’, in *ERCL*, 2012, 8(4), p. 367. For a comprehensive overview, see also P. SIRENA, ‘Pluralismo giuridico e diritto privato europeo’, in *BBTC*, 2025, pp. 155-156.

²⁷⁵ P. SIRENA, nt. 274, p. 156.

²⁷⁶ H. COING, ‘European Common Law: Historical Foundations’ in M. CAPPELLETTI (eds.), *New Perspectives for a Law of Europe*, Leyden/London, 1978, p. 31.

²⁷⁷ P. SIRENA, nt. 274, p. 156.

²⁷⁸ M.W. HESSELINK, ‘The Structure of the New European Private Law’ in ID. (eds.), *The New European Private Law. Essays on the Future of Private Law in Europe*, The Hague, 1995, pp. 227 et seq; ID., ‘How many systems of Private law are there in Europe? On plural legal sources, multiple identities and the unity of law’ in L. NIGLIA (eds.), *Pluralism and European Private Law*, Oxford, 2013, pp. 199 et seq.

law must be understood as part of a multi-level legal order²⁷⁹. Within this architecture, EU norms are not self-contained; rather, they are required to interact with national legal systems and, more fundamentally, with the deeper civil law tradition from which those systems historically emerged²⁸⁰.

A modern articulation of this shared foundation is found in the PECL, prepared by the Commission on European Contract Law under the direction of Professor Ole Lando. Just as the medieval *ius commune* developed from the *Corpus Iuris Civilis*, the PECL may be seen as a partial restatement of Europe's common legal tradition, what may aptly be termed *ius commune modernum*²⁸¹.

The aim of this paragraph, therefore, is to undertake a parallel analysis of the Unfair Contract Terms Directive - as the normative expression of *ius Communitatis* - and the PECL - as a contemporary reflection of the *ius commune*²⁸². Through this juxtaposition, it will be possible to offer a more nuanced and critical appraisal of the Directive's legal and conceptual underpinnings.

In this vein, the first significant difference between PECL and the Unfair Contract Terms Directive concerns the placement of provisions on non-negotiated (standard-form) contracts, which - pursuant to Article 3(1) of the Directive - are the specific object of the fairness assessment²⁸³.

Determining the appropriate place for provisions on standard contract terms within a contract law system is far from straightforward. Indeed, such terms present unique challenges regarding, simultaneously, their incorporation into contracts, their interpretation, and their fairness²⁸⁴.

²⁷⁹ E. VAN SCHAGEN, *The Development of European Private Law in a Multilevel Legal Order*, Antwerp, 2016.

²⁸⁰ S. GRUNDMANN, 'General Standards and Principles, Clauses Generales and Generalklauseln in European Contract Law - A Survey, in General Clauses and Standards' in S. GRUNDMANN e D. MAZEAUD (eds.), *European Contract Law: Comparative Law, EC Law and Contract Law Codification*, The Hague, 2006, pp. 4 et seq.

²⁸¹ P. SIRENA, 'La buona fede nel diritto europeo dei contratti' in P. FERRER VANRELL and A. MARTÍNEZ CANELLAS (eds.), *Principios de derecho contractual europeo y principios de unidroit sobre contratos comerciales internacionales*, Madrid, 2009, p. 250 and ID., 'La scelta dei Principles of European Contract Law (PECL) come legge applicabile al contratto', in *Riv. dir. civ.*, 2019, pp. 608 et seq.

²⁸² P. SIRENA, 'La buona fede nel diritto europeo dei contratti', nt. 281, p. 250: 'E come il *ius commune* del passato si è storicamente sviluppato sulla base del *Corpus Iuris Civilis*, così quello *modernum* è stato in qualche modo codificato o almeno fissato in una grande compilazione: i *Principles of European Contract Law*, redatti dalla Commissione presieduta dal Prof. Ole Lando'.

²⁸³ See above nt. 178.

²⁸⁴ See N. JANSEN, 'Introduction before Art 6:201' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 120, p. 930.

In response to these challenges, the drafters of PECL adopted a nuanced method that reflects the systematic rigor typical of doctrinal legal analysis²⁸⁵. Specifically, PECL situates the rules governing the inclusion of standard terms within Chapter 2, addressing contract formation. Article 2:104 acknowledges the increasing use of standardized terms, allowing their use, given their economic reasonableness, while also reinforcing obligations on the stronger party to effectively inform the counterparty of their inclusion. Notably it stipulates that ‘[c]ontract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party’s attention before or when the contract was concluded’. Such provision is then supplemented by Article 2:209 on conflicting general conditions²⁸⁶.

Meanwhile, the fairness assessment is treated separately in Chapter 4 on validity. Accordingly, Article 4:110 establishes that ‘[a] party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded’.

Furthermore, the *contra proferentem* rule and the provision on preference for negotiated terms are covered in Chapter 5²⁸⁷.

This structured arrangement has subsequently influenced, with some changes, the DCFR and the CESL²⁸⁸.

²⁸⁵ R. ZIMMERMANN, nt. 25, pp. 188, 199.

²⁸⁶ Article 2:209 PECL (Conflicting General Conditions): ‘If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance’.

²⁸⁷ Article 5:103 PECL (Contra Proferentem Rule): ‘Where there is doubt about the meaning of a contract term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred’.

²⁸⁸ In the DCFR, definitions are found in Book II, Chapter I (Art II.-1:109 f); the rules on incorporation and on the terms’ interpretation are placed in the Chapters on ‘Formation’ (Art II.-4:209: Conflicting standard terms), on ‘Interpretation’ (Art II.-8:103 f: contra-proferentem rule and preference for individually negotiated terms), and on ‘Content and effects of contracts’ (Art II.-9:103: Terms not individually negotiated). The fairness test is regulated comprehensively as one Section of this chapter on content and effects: from II.-9:401 to II.-9:411. On the other hand, the CESL’s central Chapter 8 thus only concerns the unfairness test. Standard terms are defined in Article 7 (Chapter 1); rules concerning the inclusion of standard terms into a contract are part of Chapter 3 on the conclusion of the contract (Article 39: Conflicting standard terms) and, surprisingly, Chapter 7 on contents and effects (Article 70: Duty to raise awareness of not individually negotiated contract terms), while rules on the interpretation of standard terms are placed in Chapter 6 on interpretation (Article 62: Preference for individually negotiated contract terms; Article 65: Interpretation against supplier of a contract term).

Against this backdrop, it should be noted that the approach adopted by PECL is consistent with the tradition of *ius commune*. Indeed, the standardization of contract terms is by no means a recent phenomenon. Roman jurists were already concerned with the inclusion of standardized clauses within contracts. As such, it has long been accepted practice to subject these terms to established principles of contract *formation* and *interpretation*²⁸⁹. This includes specific safeguards, such as rules designed to prevent the insertion of unexpected or ‘surprising’ terms, alongside the *contra proferentem* rule, which resolves ambiguities against the party who drafted the terms²⁹⁰. These measures aim to ensure a fair balance between the parties, preventing standard terms from placing one side at an undue disadvantage.

In contrast, the Unfair Contract Terms Directive consolidates the rules on non-negotiated (standard-form) contracts within a single chapter, thereby departing from traditional approaches based on the incorporation and interpretation of terms²⁹¹. As a matter of fact, the Directive revolves around the fairness assessment of terms and the principle of transparency. In this regard, under Article 3, a term is considered unfair if it creates a ‘significant imbalance in the parties’ rights and obligations’²⁹². Complementing this, Article 5 stipulates that ‘[i]n 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’.

Given such a background, it is important to focus on the distinction drawn by the PECL between ‘non-negotiated standard terms’ that were not properly disclosed to the contracting party - thereby failing to become part of the contract - and those which, although duly disclosed, are nonetheless subject to a fairness review. As a matter of fact, this two-step approach may lead to significant differences both in terms of consequences for cases of ‘non-disclosure’ on the one hand and ‘unfairness’, *stricto sensu*, on the other, as well as in terms of burden of proof.

With regard to the first issue, it may be argued that, where an essential term of the contract was not properly disclosed to the other party, this could prevent the contract from being

²⁸⁹ See P. HELLWEGE, ‘Standard Contract Terms’ in J. BASEDOW, K.J. HOPT and R. ZIMMERMANN (eds.), nt. 9.

²⁹⁰ N. JANSEN, ‘Introduction before Art 6:201’ in N. JANSEN and R. ZIMMERMANN (eds.), nt. 120, pp. 920 et seq.

²⁹¹ See in this regard, N. JANSEN, ‘Introduction before Art 6:201’ in N. JANSEN and R. ZIMMERMANN (eds.), nt. 120, p. 931: ‘(...) the rules on unfair contract terms may be easier to find and apply if they are packaged in one single chapter. This one-chapter approach was the ACQP’s counter-model; it can also be found in many national codifications, such as the BGB (§§ 305-310). This model is based on the European tradition of regulating unfair terms not as a general aspect of contract law, but rather as a specific issue to be treated in a single Directive. This approach is not too dissimilar to the original system of PECL: the PECL likewise addressed all questions relating to the unfairness test in a single provision placing it, perhaps surprisingly, amongst the many different provision on validity (Article 4:110)’.

²⁹² See above nt. 178.

considered even formed. In other words, the lack of agreement on a fundamental provision would undermine the formation of the contract itself. Conversely, if that essential term was adequately brought to the attention of the counterparty but is subsequently deemed unfair under Article 4:110, the term may be avoided²⁹³. In this latter case, there would be no doubt that a contract was indeed formed. As a result, the gap left by the removal of the unfair term may, depending on the applicable legal system, be filled by default rules or general principles of contract law²⁹⁴.

As previously noted, the approach adopted by the PECL may also lead to significant differences in terms of the allocation of the burden of proof. Even if PECL remains silent on that issue, it may be argued that, on the one hand, it is for the party seeking to rely on a non-negotiated (standard) term to demonstrate that the term was duly brought to the attention of the other party. On the other hand, it is for the party invoking the unfair nature of the contract term to prove both that the term was not individually negotiated and that it creates a significant imbalance between the parties' rights and obligations²⁹⁵.

As previously noted, the Unfair Contract Terms Directive does not adopt this two-step process. Instead, it uniformly applies a fairness assessment to all non-negotiated terms, irrespective of whether they were disclosed to the consumer, postponing the protection of the weaker party. In this vein, Annex (1)(i) of the Unfair Contract Terms Directive designates as unfair any terms that the other party had no real opportunity to review before the contract was concluded. Clearly, this provision does not truly fit within the framework of 'unfairness', *stricto*

²⁹³ More precisely, Article 4:110 PECL (Unfair Terms not Individually Negotiated) establishes that: '(1) A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded. (2) This Article does not apply to: (a) a term which defines the main subject matter of the contract, provided the term is in plain and intelligible language; or to (b) the adequacy in value of one party's obligations compared to the value of the obligations of the other party'.

²⁹⁴ N. JANSEN, *sub* Art 6:204: Effects of Unfair Contract Terms in N. JANSEN and R. ZIMMERMANN (eds.), nt. 120, p. 974.

²⁹⁵ This approach seems to be consistent with the *Normentheorie*, according to which the burden of proof falls on the party relying on a legal rule in their favor. In other words, each party is required to provide proof of the facts on which the legal rules they invoke are based on (either 'fatti costitutivi' or 'fatti estintivi e impeditivi'). In the absence of such evidence *das Prozessbegehren keinen Erfolg haben kann*. See, in this regard, R. POLI, 'Gli standard di prova in Italia', in *Giur. It.*, 2018, p. 2546. We owe the formulation of *Normentheorie* primarily to Leo Rosenberg. According to Rosenberg, each rule that determines the legal effect coming from the occurrence of certain facts is counteracted by so-called counter-rules, which either prevent, suspend, or extinguish such legal effects. In Rosenberg's view, at the time of decision, the court must apply only one of these rules: either the first rule or its counter-rule (also known as the 'burden of proof' in the objective sense). Consequently, each party is burdened with proving the occurrence of the facts which are established under each rule, the effects of which are favorable to them (referred to as the 'burden of proof' in the subjective sense).

sensu, as typically understood. This, incidentally, could explain why Article 6, instead of using expressions such as ‘[the] party may avoid a term’ as in the PECL, refers to terms that ‘shall (...) not be binding on the consumer’. It seems intended, *inter alia*, to enable the Directive to address all non-negotiated standard terms in a unified way, treating them collectively regardless of whether the issue concerns incorporation or invalidity.

This approach may also shed light on the Court of Justice’s contested interpretation of Article 6 of the Unfair Contract Terms Directive, which led it to assert that ‘... it follows from the wording of Article 6(1) of Directive 93/13 that national courts are merely required to exclude the application of an unfair contractual term so that it may not produce binding effects with regard to the consumer, without being empowered to revise the content of that term. That contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, insofar as, in accordance with the rules of domestic law, such continuity of the contract is legally possible’²⁹⁶. This interpretation effectively conflates the concept of non-bindingness with the pure deletion of the term, generating a degree of confusion that makes Article 6 appear more akin to a rule on incorporation rather than a provision concerning contract validity.

5. Lack Of Knowledge Or Abuse Of Bargaining Power?

In the context of standard form contracts or general terms and conditions, the inclusion of terms that benefit the business and disadvantage the consumer is, by its very nature, a structural feature²⁹⁷. Permitting the use of standard form contracts and general terms and conditions, typically means legitimizing agreements that reflect the autonomy of only one party, while the other is merely invited to adhere²⁹⁸.

²⁹⁶ Cf Chapter 2, Part II and Part III. See also Case C-421/14, *Banco Primus*, ECLI:EU:C:2017:60, para 71 and the case-law mentioned. In this context, however, the interpretation offered by M.B.M. LOOS, ‘Crystal Clear? The Transparency Requirement un Unfair Terms Legislation’, in *ERCL*, 2023, 19(4), pp. 290-291 and 296 et seq, is of particular interest. By introducing a distinction between ‘formal transparency’ and ‘substantive transparency’, the author argues that, in the event of a breach of formal transparency, the contract term cannot even be regarded forming part of the contract (a problem of incorporation), with the consequence that the default rules provided for by the national legal system apply. In this context, see also C. GARDINER, *Unfair contract terms in the digital age. The challenge of protecting European consumers in the online marketplace*, Cheltenham/Northampton, 2022.

²⁹⁷ N. IRTI, nt. 129, pp. 65 et seq. The author explains that negotiation today is limited to the choice of goods and the selective relationship between the anonymous buyer and the items on offer. Private autonomy—now stripped of any dialogic force (dealing with the other party) and therefore incapable of influencing the content of the transaction—is reduced entirely to the choice of goods, to the decision to prefer one object over another.

²⁹⁸ G. D’AMICO, ‘L’abuso di autonomia negoziale nei contratti dei consumatori’ in G. D’AMICO and S. PAGLIANTINI (eds.), *Nullità per abuso ed integrazione del contratto*, pp. 27 et seq.

Indeed, the very notion of ‘standard terms’ implies that the provisions have been drafted in advance to be incorporated into a potentially unlimited number of contracts with consumers²⁹⁹. In this framework, the business typically acts as the ‘form-giver’, while the consumer becomes a ‘form-taker’³⁰⁰.

As a result, derogations from default rules do not arise from mutual bargaining, but rather from the unilateral exercise of contractual freedom (*Inhaltsfreiheit*) by the drafting party. Unsurprisingly, this party is incentivized to exploit its position to its own advantage³⁰¹.

Therefore, although it is not, by definition, justified to prevent the parties from jointly derogating from default rules; if such derogation is the result of a unilateral exercise of contractual freedom, such a power cannot be without limits³⁰². Such limits are not external to the power itself but are intrinsic to it: every legal power must be exercised within the bound of its intended purpose and must not be abused³⁰³.

In such a context, one might wonder why contracting parties should resort to standard form contracts and general terms and conditions. The answer lies in commercial pragmatism³⁰⁴. The objectives of standard form contracts have indeed been described as saving time in the formation of transactions³⁰⁵. From an economic perspective, the standardization of contract

²⁹⁹ W. FREIHERR VON MARSCHALL, ‘Substance and scope of standard terms and criteria for their evaluation’ in *Standard Terms in Contracts*, Proceedings of the Eighth Colloquy on European Law, University of Neuchâtel, 6-8 June 1978, p. 35: ‘The words “standard terms” are understood to mean all terms that have been formulated in advance to be incorporated into a usually unknown number of contracts to be entered into in the future’.

³⁰⁰ P. BENSON, *Justice in Transactions. A Theory of Contract Law*, Cambridge/Massachusetts/London, 2019, p. 217; G. HOWELLS and S. WEATHERILL, nt. 53, pp. 19 et seq; F. KESSLER, ‘Contracts of Adhesion – Some Thoughts About Freedom of Contract’, in *Col. L. Rev.*, 1943, 43, p. 640 (‘[S]tandard contracts in particular could (...) become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast horde of vassals’); W.D. SLAWSON, ‘Standard Form Contracts and Democratic Control of Lawmaking Power’, in *Harvard Law Rev.*, 1970-71, 84(3), p. 529; A. LEFF, ‘Contract as Thing’, in *American Univ. Law Rev.*, 1970, 19, p. 131.

³⁰¹ G. D’AMICO, nt. 298, pp. 30-31.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ P. BENSON, nt. 300, p. 217: ‘To begin, I should identify, even provisionally, some basic features that characterize standard form contracts as a distinct type of transaction. In doing so, we must keep in mind that, as already mentioned, modern legal systems do not view these contracts as per se unenforceable, unconscionable, or against public policy. To the contrary, they recognize that these contracts can and generally do perform important positive legal, economic, and organizational functions. The selected features should be compatible with this positive assessment and not necessarily indicate pathology’. See also T. RAKOFF, ‘Contracts of Adhesion: An Essay in Reconstruction’, in *Harvard Law Rev.*, 1983, 96(6), pp. 1176–1180.

³⁰⁵ W. FREIHERR VON MARSCHALL, nt. 299, p. 36: ‘It is generally agreed that modern business conditions require frequently the use of standard contract terms and that many branches of business, for example those of insurers, carriers, bankers, or travel contracts have been described as saving time in the formation of transactions, as allocating contractual risks in order to determine who should bear the cost of insuring against them, but also as a (less acceptable) way of distributing risks in a one-sided way to

terms, much like that of goods and services, is generally seen as welfare-enhancing in mass-market environments³⁰⁶. Moreover, standard contract terms fill gaps in statutory or case law where no adequate provisions exist or where existing rules must be tailored to the specific needs of the parties³⁰⁷.

All in all, it can be argued that the unilateral power granted to *form-givers* to derogate from default rules through standard clauses is justified, provided that it serves the legitimate objective of facilitating and rationalizing commercial activity. However, when that power is exercised solely to secure an undue advantage for the drafter, in particular to the detriment of the weaker party and potentially to the detriment of the market itself, it amounts to abuse³⁰⁸.

This picture leads to the first issue that has traditionally characterized standard terms and conditions: lack of knowledge that affects the weaker party, who often finds themselves entering into contracts without having read or fully understood all the clauses contained therein³⁰⁹.

the detriment of the party who is economically weaker'. A representative statement is *Restatement (Second) of Contracts, Section 211*: '1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing. (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing. (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement'.

³⁰⁶ P. BENSON, nt. 300, p. 216: 'According to this approach, if there is to be legal scrutiny, the focus should not be on the bilateral relation between the parties. Rather, it should be, if at all, on systemic variables such as the operation of actual, often imperfect, markets; the many different economic roles—both visible and hidden—of standard terms; the economic impact of enforcing or striking out standard terms; and so forth'. This is emphasized particularly by writers who adopt an economic approach. See A. SCHWARTZ, 'Seller Unequal Bargaining Power and the Judicial Process', in *Indiana Law Journal*, 1974, 49(3), p. 367; L. KORNHAUSER, 'Unconscionability in Standard Forms', in *California Law Review*, 1976, 64(5), pp. 1179–1182; M.J. TREBILCOCK, 'An Economic Approach to the Doctrine of Unconscionability' in B. REITER and J. SWAN (eds.), *Studies in Contract Law*, Toronto, 1980, pp. 412–419.

³⁰⁷ W. FREIHERR VON MARSCHALL, nt. 299, p. 36.

³⁰⁸ G. D'AMICO, 'L'abuso di autonomia negoziale nei contratti dei consumatori' in G. D'AMICO and S. PAGLIANTINI (eds.), nt. 298, pp. 27 et seq. and H. KÖTZ, nt. 151, p. 133.

³⁰⁹ P. BENSON, nt. 300, p. 221; R. BARNETT, *The Oxford Introductions to U.S. Law: Contracts*, Oxford, 2010, pp. 112–114. See the English ticket case, *Parker v. South Eastern Railway Co.* where Lord Justice Bramwell concurrently implied a qualifying proviso in the following way: 'The truth is, people are content to take these things on trust. They know that there is a form which is always used—they are satisfied it is not unreasonable, because people do not usually put unreasonable terms into their contracts. If they did, then dealing would soon be stopped. (...) The very fact of not looking at the paper shews that this confidence exists. It is asked: What if there was some unreasonable condition, as for instance to forfeit 1000 l. if the goods were not removed in forty-eight hours? Would the depositor be bound? I might content myself by asking: Would he be, if he were told "our conditions are on this ticket" and he did not read them. In my judgment, he would not be bound in either case. I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read—no condition not relevant to the matter in hand'.

Given this context, the Italian *Codice civile* introduced Articles 1341 and 1342. The Italian legal system distinguishes between the general issue of incorporating standard terms (Article 1341(1)) and the more specific issue concerning the incorporation and the validity of ‘one-sided clauses’ or ‘onerous clauses’ (Articles 1341(2) and 1342(2)). While Article 1341(1) stipulates that standard terms are effective vis-à-vis the other party if the latter was aware of them or should have been aware of them by exercising ordinary diligence (*onere di conoscenza o di conoscibilità*). More importantly, Article 1341(2) states that some specific ‘onerous clauses’ are valid only if there is explicit approval in writing. These include, for instance, terms limiting liability, granting unilateral withdrawal rights, or imposing time constraints and forfeitures³¹⁰.

In essence, Article 1341(1) relies on the possibility of the adherent party of becoming aware of a certain term. If this is the case, this will be sufficient to make such a term binding (*efficace*). Article 1341(2), by contrast, introduces a formal safeguard for the most burdensome clauses, ensuring that the adhering party’s attention is explicitly drawn to them³¹¹.

By comparison, the Unfair Contract Terms Directive introduces a fairness test which is grounded on two pillars: a formal requirement of transparency in combination with a rule of interpretation³¹² (which in some ways resembles the old-fashioned mechanism of control implemented by Articles 1341 and 1342, under which the aim is to ensure that the *form-taker* is informed of the content of the standard terms), and a so called substantive test. It is precisely this substantive test that introduces a fundamental change in the ordinary regulation of standard

³¹⁰ P. NEBBIA, nt. 5, p. 32.

³¹¹ P. NEBBIA, nt. 5, p. 33; F. LAPERTOSA, ‘La giurisprudenza tra passato e futuro dopo l’avvento della nuova disciplina sulle clausole vessatorie’, in *Foro It.*, 1997, V, p. 357. See also W. FREIHERR VON MARSCHALL, nt. 299, p. 37: ‘Every judicial system has thus been confronted through the decades with the problem whether the general provisions of its law against unfair standard terms are sufficient to protect one party to a contract against unfair standard terms, or whether special criteria for the admittance and the control of standard contract terms have to be developed. The question to be answered is only one aspect of the general problem to find a balance between the basic concept of “freedom of contract” and the other basic principle that public policy requires a minimum of commutative justice (*ausgleichende Vertragsgerechtigkeit*) in every contract’.

³¹² Article 4(2) establishes that: ‘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 supplied in exchange, on the other, in so far as these terms are in plain intelligible language’. Moreover, Article 5 states that: ‘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. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2)’. See, in this regard, F. ESPOSITO and M. GROCHOWSKI, ‘The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration’, in *ERCL*, 2022, 18(1), pp. 1-31. The authors invite for a reconsideration of the *communis opinio* that there is a necessary connection between the average consumer and transparency, arguing that in some instances it is necessary to make reference to the ‘vulnerable consumer’. See, also, more recently Case C-139/22, *mBank S.A.*, ECLI:EU:C:2023:692.

contract terms (at least in certain jurisdictions) or, more generally, of terms that have not been individually negotiated: from a question of *lack of knowledge* to a question of *abuse of power* by the drafting party.

According to Article 3(1) of Unfair Contract Terms Directive only contractual terms which have not been individually negotiated are subject to the fairness test³¹³. Therefore, a term is deemed unfair not simply because it causes a significant imbalance, but because that imbalance is unilaterally imposed without the consumer having had any real opportunity to negotiate.

Thus, when a contract term has been negotiated, even if it leads to an imbalance, the legal system refrains from intervening. This shows that the focus is not on the abstract content of the clause, but on the fact that the imbalance is imposed unilaterally³¹⁴.

In this case, the principle of good faith plays a central role. The fundamental question is whether the disadvantage imposed on the consumer is justified by a legitimate interest of the drafter. If the clause serves no purpose other than to benefit the *form-giver* – taking advantage of its superior economic or informational position – it is unfair and, therefore ‘non binding’³¹⁵.

5.1. The Issue Of Substantive (Un)fairness: A Misunderstanding

The Unfair Contract Terms Directive is often considered, especially when compared to other regulations, such as Articles 1341 and 1342 of the Italian *Codice civile*, an example of legislation that, going beyond mere procedural (formal) supervision, finally establishes rules capable of ensuring substantive fairness.

At first glance, this interpretation might indeed seem accurate. The Directive not only imposes transparency requirements but also defines the characteristics that a term must possess to avoid being deemed unfair: it must not create a significant imbalance in the rights and obligations of the parties and must be a term that, in good faith, the professional could reasonably expect the consumer to accept³¹⁶.

³¹³ See above nt. 178.

³¹⁴ G. D’AMICO, ‘L’abuso di autonomia negoziale nei contratti dei consumatori’ in G. D’AMICO and S. PAGLIANTINI (eds.), nt. 298, pp. 27 et seq; H. KÖTZ, nt. 151, p. 133 (‘But the fact that the customer agrees to the conditions does not make it incompatible with the principle of freedom of contract for the law to control such terms, since it is only when both parties had a fair chance of influencing the content of contracts that the principle requires them to be respected. In the situations under consideration, the customer has no such opportunity—not because of the superiority of the company in economic or other respects, but because of the prohibitively high transaction costs of utilising any such opportunity’); M. TREBILCOCK and D. DEWEES, ‘Judicial Control of Standard Form Contracts’ in A. BURROWS and C. VELJANOVSKI (eds.), *The Economic Approach to Law*, Oxford, 1981, p. 93.

³¹⁵ G. D’AMICO, ‘L’abuso di autonomia negoziale nei contratti dei consumatori’ in G. D’AMICO and S. PAGLIANTINI (eds.), nt. 298, pp. 27 et seq; H. KÖTZ, nt. 151, p. 133.

³¹⁶ Cf Article 3.

A procedural approach to unfairness would rather be limited to regulating the incorporation of the term within the contract. Where the consumer knew about the imbalance of the rights and obligations arising under the contract, it would be difficult to argue towards unfairness. In contrast, a substantive approach examines the terms of the contract.

In spite of the English flavor, the continental origin of the fairness test under the Directive appears rather evident when examining German and French legislation: it will be noted that the French *loi Scrivener* used to base the concept of unfairness upon the idea of ‘avantage excessif’ deriving from a term imposed on the consumer through an ‘abus de puissance économique’³¹⁷ and in the *travaux préparatoires* explained this as meaning ‘an evident imbalance in parties’ rights and obligations’³¹⁸.

All in all, the open wording of Article 3, referring to ‘good faith’ and to a ‘significant imbalance in the parties’ rights and obligations arising under the contract’ has given rise to intense academic debate, in stark contrast to the fact that it took several years before a national court asked the Court of Justice to clarify these concepts.

The Court of Justice finally took the chance to interpret Article 3(1) in the *Mohamed Aziz* case³¹⁹. It stated that ‘in order to ascertain whether a term causes a “significant imbalance” in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favorable than that provided for by the national law in force’³²⁰.

The Court then discussed under what circumstances such a ‘significant imbalance’ is ‘contrary to the requirements of good faith’ and established that ‘the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer,

³¹⁷ French law appeared to include a procedural fairness requirement inherent in the exercise of stronger contractual power. However, courts and legal doctrine have consistently held that the two criteria tend to overlap, since the notion of conferring an excessive advantage is considered to be imposed through the abuse of contractual power by one of the parties. See J. GHESTIN and I. MARCHESSAUX, ‘L’élimination des clauses abusives en droit français, à l’épreuve du droit communautaire’, in *REDC*, 1993, p. 80.

³¹⁸ For a comprehensive overview, see P. NEBBIA, nt. 5, p. 136.

³¹⁹ Case C-415/11, *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164.

³²⁰ Case C-415/11, *Mohamed Aziz*, nt. 319, para 68.

could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations'³²¹.

On closer examination, it becomes clear that classifying the Unfair Contract Terms Directive as legislation governing substantive unfairness is partly inaccurate. As a matter of fact, it may be argued that there is a difference between imposing a *substantive* test on contract terms and guaranteeing, as a result, *substantive fairness*. In this regard, in order for the content of a contract to be assessed, several requirements must be satisfied:

- (i) the terms in question must not have been individually negotiated. This means that if the consumer had the opportunity to influence and modify the content of the contract, its terms cannot be subject to scrutiny in this context³²²;
- (ii) the unfairness test, as noted, does not apply to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration - essentially, the so-called 'core terms'³²³.

This indicates that the Directive is not primarily, or solely, concerned with eradicating imbalanced clauses from contracts for reasons of substantive justice. Instead, it aims to counteract the abuse of a business' bargaining power. The Directive therefore aims to restore contractual freedom by preventing businesses from imposing excessively unfavorable terms, while recognizing that consumers cannot impose their own terms.

This position is reiterated in Recital 16 which states that 'in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties'³²⁴.

6. *A Comparative Overview*

A comparative analysis reveals that the various legal systems that have addressed the issue of contractual unfairness over time have approached the problem from different perspectives:

³²¹ Case C-415/11, *Mohamed Aziz*, nt. 319, para 69. However, it should be noted that the question concerning the definition of 'good faith' already arose in Case C-237/02, *Freiburger Kommunalbauten*, ECLI:EU:C:2004:209, para 25. The Court in that case, however, indicated that national courts should assess what 'good faith' entailed in the particular national context.

³²² See Article 3(1).

³²³ See Article 4(2).

³²⁴ More precisely, Recital 16 establishes that: 'Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account'.

some have regulated the issue of contractual unfairness as a matter of ‘contract formation’; others have resorted to contract interpretation rules; still others have found it necessary to intervene in the content of the contract to ensure a proper rebalancing.

6.1. Germany

In German law, the regulation of unfair contract terms was first introduced with the 1976 *AGB-Gesetz* (Standard Terms of Business Act)³²⁵. However, this legislation did not significantly change the existing legal framework, nor was it strictly intended as consumer protection legislation³²⁶. Indeed, contrary to the initial proposals, the *AGB-Gesetz* was not limited to consumer contracts; it was designed to also apply to business-to-business contracts³²⁷. Subsequently, the *AGB-Gesetz* has been repealed by the 2002 reform of the BGB (*Schuldrechtsreform*) and its provisions are now reproduced, with minor variations, into the BGB. What used to be §§ 1-11 *AGB-Gesetz* now corresponds to §§ 305-310 BGB³²⁸.

These provisions address various issues. More specifically, they concern the incorporation of standard terms, rules on interpretation and the consequences of non-incorporation and invalidity (and, in the process, these provisions deviate from the general rule on partial invalidity in § 139 BGB). Moreover, they set standards for the policing of unfair standard contract terms³²⁹.

These issues are systematically connected to other BGB provisions, such as §§ 145 et seq (formation of contract), §§ 133, 157 BGB (interpretation), § 139 (partial invalidity), and either § 138 (contracts *contra bonos mores*), or § 242 (good faith), or possibly even §§ 315 et seq

³²⁵ *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz)*.

³²⁶ As a matter of fact, the Government originally decided not to amend the BGB, but tackled the problem of unfair standard terms of business by way of special legislation. See, in this, context, R. ZIMMERMANN, nt. 25, p. 173.

³²⁷ R. ZIMMERMANN, nt. 25, pp. 173-174.

³²⁸ R. ZIMMERMANN, nt. 25, p. 199: ‘The provision were thus shoved, lock, stock, and barrel, into one place, and the place chosen for this purpose was the one immediately following the rules on *mora creditoris* (and immediately preceding a section (...) entitled “contractual obligations”: as if standard terms of business were part of non-contractual obligations). There is no good reason at all to deal with standard terms of business at this specific place; and the only reason that can possibly be advanced is that a convenient space could relatively easily be created by dropping, removing, or compressing the rules previously located here. As a result, the new §§ 305-310 seem like a piece of pop music tossed into the second movement of a classical symphony: a *corpus alienum* without intellectual connection to its surroundings’.

³²⁹ *Ibid.* More precisely, § 305 deals with the issue of incorporation of standard business terms into the contract; § 305c regulates surprising and ambiguous clauses; § 306 regulates the legal consequences of non-incorporation and ineffectiveness; § 308 provides a list of prohibited clauses with the possibility of valuation; § 309, instead, a list of prohibited clauses without the possibility of valuation.

BGB (unilateral determination of performance). The German legislator chose to retain the structure of the *AGB-Gesetz* even if it was repealed³³⁰.

In this context, § 305(2) establishes that standard business terms become part of a contract only if the ‘user’ (*Verwender*) expressly draw attention to any standard terms and conditions applying to the contract and if the other contractual party agrees to their applying (*Allgemeine Geschäftsbedingungen werden nur dann Bestandteil eines Vertrags, wenn der Verwender bei Vertragsschluss (...) die andere Vertragspartei ausdrücklich oder, (...) durch deutlich sichtbaren Aushang am Orte des Vertragsschlusses auf sie hinweist und (...) und wenn die andere Vertragspartei mit ihrer Geltung einverstanden ist*). If it is not possible to inform clients expressly, a prominent notice must at least be displayed (*wenn ein ausdrücklicher Hinweis wegen der Art des Vertragsschlusses nur unter unverhältnismäßigen Schwierigkeiten möglich ist*)³³¹. All in all, as someone has argued, upon closer examination, the obligation to draw terms and conditions clearly to the attention of the other party is only practically relevant when the terms are physically not part of the contract³³².

The BGB then proceeds to analyze the so called ‘surprising’ or ‘ambiguous’ terms, which are not considered part of the contract. More specifically, terms are considered ‘surprising’ if they contain obligations which are so unusual that consumers would not normally expect to encounter them in a contract (§ 305c BGB)³³³.

The BGB includes both a ‘grey’ and a ‘black’ list of unfair terms³³⁴. More importantly, these lists are complemented by a general clause in § 307, which introduces a broad fairness test

³³⁰ For a sharp criticism see R. ZIMMERMANN, nt. 25, p. 199: ‘The incorporation of the Standard Terms of Business Act into the BGB, in other words, has been a purely formal exercise; it has not led to anything that could be called an integration into the fabric of the BGB’.

³³¹ More specifically, § 305(2) establishes that: ‘Standard business terms become part of a contract only if the user, when concluding the contract, 1. refers the other contractual party to them explicitly or if, due to the manner in which the contract is concluded, making such explicit reference would be possible only with disproportionate difficulty, if the user posts a clearly visible notice at the place at which the contract is concluded, and 2. gives the other contractual party the opportunity to take notice of their contents in a manner that reasonably can be expected of the other party to accept and that also adequately takes account of any physical handicap of the other contractual party that is discernible to the user, and if the other contractual party agrees to their applying’.

³³² Cf P. NEBBIA, nt. 5, p. 24.

³³³ More specifically, § 305c BGB states that: ‘(1) Provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the party contracting with the user need not expect to encounter them, do not form part of the contract. (2) Any doubts in the interpretation of standard business terms are resolved to the detriment of the user’.

³³⁴ The grey list under § 308 contains terms which present a substantial risk that the client will be disadvantaged. However, whether an unfair disadvantage exists depends on the specific circumstances and accordingly the validity of such terms is subject to judicial appraisal (these terms are called *Klauselverbote ohne Wertungsmöglichkeit*): for this purpose, the German legislator uses terms such as ‘reasonable’, ‘particular importance’, ‘unreasonably high’, ‘inadequately specified’, which are explicitly meant to provide judges with sufficient flexibility for a case-by-case analysis. On the other hand, § 309

(*Inhaltskontrolle*) for those terms which do not fall within §§ 308–309³³⁵. According to this section, standard business terms are deemed invalid if, contrary to the requirement of good faith (*Treu und Glauben*), they place the other contracting party at an unreasonable disadvantage (*unangemessene Benachteiligung*). The latter is the key requirement to the fairness test. When applying this test, courts must weigh the interests of both parties in light of the overall nature and purpose of the contract³³⁶.

In conclusion, it is worth noting that the implementation of the Unfair Contract Terms Directive by the German legislation took place in 1996 by adding two new provisions: § 12 on international applicability and § 24a on consumer contracts. § 24a served to align the German Standard Terms of Business Act with the Directive by ensuring comparable levels of protection³³⁷.

Accordingly, § 24a introduced the presumption that standard terms are proposed by the business party. It established that pre-established terms fall within the scope of control even if they are intended to be used only once³³⁸. Moreover, it required that, in determining unreasonable prejudice within the meaning of § 9, account be taken of the circumstances existing at the time of conclusion of the contract. The principle of transparency was not

lists terms whose invalidity is not subject to any appraisal (*Klauselverbote mit Wertungsmöglichkeit*). These include, for example, terms in which the seller excludes all liability for defective goods, or restricts his liability to repairing the defective good.

³³⁵ More specifically, § 307(1) establishes that: ‘Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the party contracting with the user. An unreasonable disadvantage also may arise from the provision not being clear and comprehensible’. In this regard, see notably F.P. PATTI, nt. 131, p. 588 who recalls that, at least in principle, in business-to-business contracts, only the general rule set out in § 307(1) BGB applies. Indeed, pursuant to § 310 BGB – which establish the so-called *Differenzierungsgebot* – the lists of prohibited clauses contained in §§ 308 and 309 BGB do not apply to business-to-business contracts. Nevertheless, the German Federal Court still refers to the clause lists in §§ 308 and 309 BGB when evaluating the unfairness of standard terms in business-to-business relationships.

³³⁶ § 307(2) of the German Civil Code (BGB) stipulates that, in case of doubt, a contractual clause is presumed to cause an unreasonable disadvantage if it conflicts with the fundamental principles of the statutory provision it replaces. This concept is based on previous court decisions interpreting § 242 BGB, according to which a clause that deviates from the basic structure or model (*Leitbild*) of default rules violates the principle of good faith. However, both legal scholars and courts often distinguish between default rules that serve justice (*Bestimmungen mit Gerechtigkeitsgehalt*), which are intended to protect the weaker party, and those aimed at practical efficiency (*Bestimmungen mit Zweckmässigkeitsfunktion*). Only the former are generally considered unfair when they are not complied with. Furthermore, clauses are considered unfair if they restrict the essential rights or obligations arising from the nature of the contract to such an extent that the achievement of the purpose of the contract is jeopardized (§ 307(2)(2)). Cf P. NEBBIA, nt. 5, p. 26.

³³⁷ Cf P. NEBBIA, nt. 5, p. 26.

³³⁸ Ibid.

mentioned until the 2002 reform, but this gap has been filled, as already indicated, by § 307(1)³³⁹.

6.2. France

The first legislative controls on the terms of consumer contracts combined ideas of abuse of trader's right to contract (*abus de la puissance économique*) and of the need to correct the *avantage excessif* that may result³⁴⁰.

Today, the legislative control on unfair terms in business-to-consumer contracts revolves around on the one hand, Articles 1110, 1170 and 1171 *Code civil* and, on the other, Articles L 212.1 – 212.2 *Code de la consommation* (formerly Articles L 132.1 et seq)³⁴¹.

More precisely, Article L 212.1(1) establishes that 'sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat'³⁴².

On the other hand, Article 1171, as enacted in 2016, restricts the fairness test to the terms of *contrats d'adhésion* defined by Article 1110 as ones which comprise a collection of non-negotiable terms which are determined in advance by one of the parties³⁴³. The underpinning idea is that - though seldom reflected in parliamentary discussions or legal scholarship - the use of standard form contracts results in a partial market failure³⁴⁴. For the party presented with pre-drafted contract terms, attempting to renegotiate them is often a pointless expenditure of time and resources. This reflects, as some scholars argued, a broader reluctance within French

³³⁹ Ibid.

³⁴⁰ *Loi no. 78-23 of 10 janvier 1978 sur la protection et l'information des consommateurs de produits et de services*, art 35(1) (authorizing the administration to prohibit unfair terms in consumer contracts).

³⁴¹ For a comprehensive overview, see S. WHITTAKER, 'Unfair Terms in Commercial Contracts and the Two Laws in Competition: French Law and English Law Contrasted', in *Oxford Journal of Legal Studies*, 2019, 39(2), pp. 404 et seq and P. STOFFEL-MUNCK, 'The Revolution in Unfair Terms' in J. CARTWRIGHT and S. WHITTAKER (eds.), *Code Napoléon Rewritten: French Contract Law after the 2016 Reforms*, Oxford, 2020, pp. 145 et seq.

³⁴² More precisely, Article L 212.1 *Code de la consommation* establishes that: 'Les dispositions de l'article L. 212-1 sont également applicables aux contrats conclus entre des professionnels et des non-professionnels'.

³⁴³ More precisely, Article 1171(1) *Code civil* states that: 'Dans un contrat d'adhésion, toute clause non négociable, déterminée à l'avance par l'une des parties, qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat est réputée non écrite'. In the course of ratification of the 2016 *Ordonnance*, while the *Assemblée nationale* and the *Sénat* agreed that the new control should apply only to the terms of *contrats d'adhésion*, they disagreed as to how those contracts should be defined. The *Sénat* thought that the notion of 'general conditions' used by Article 1110 was unclear and that the definition should rest on lack of negotiability rather than of negotiation of the terms, a view which was finally accepted by the *Assemblée nationale*. As a result, Article 1110(2) as ratified defines a *contrat d'adhésion* as 'celui qui comporte un ensemble de clauses non négociables, déterminées à l'avance par l'une des parties'.

³⁴⁴ R. ZIMMERMANN, nt. 25, pp. 175-176.

legal culture to embrace ‘law and economics’ reasonings, which are often viewed as fundamentally at odds with France’s protective contractual framework, which is rooted in moral considerations rather than in economic efficiency and seen as uncomfortably aligned with the utilitarian ethos of Anglo-American common law³⁴⁵.

Moreover, Article 1171(2) provides that the assessment of significant imbalance must not concern either the main subject-matter of the contract nor the adequacy of the price in relation to the act of performance³⁴⁶. The underpinning rationale is clear: the provision is not intended to grant judges authority to assess the fairness of contract’s core terms, but rather to enable control over the so called ancillary terms³⁴⁷. Unlike in consumer protection law, this exclusion is not contingent upon the clarity or intelligibility of the term in question³⁴⁸. This appears to imply that clauses relating, for example, to the price or the main subject matter of the contract remain beyond the reach of Article 1171, irrespective of how clearly or plainly they are expressed from the perspective of the adhering party.

On a different note, Article 1170 provides a ‘second hurdle’ for contract terms which, while possibly escaping the ambit of Article 1171, nonetheless undermine contract’s fairness. Indeed, Article 1170 stipulates that ‘[t]oute clause qui prive de sa substance l’obligation essentielle du débiteur est réputée non écrite’. Article 1170 is rooted in the *Chronopost* case of 1996³⁴⁹ and *Faurecia* case of 2010³⁵⁰, which were decided in the particular field of limitation of liability

³⁴⁵ S. WHITTAKER, nt. 341, p. 421.

³⁴⁶ Indeed, Article 1171(2) *Code civil* establishes that: ‘L’appréciation du déséquilibre significatif ne porte ni sur l’objet principal du contrat ni sur l’adéquation du prix à la prestation’.

³⁴⁷ S. WHITTAKER, nt. 341, p. 421.

³⁴⁸ Compare Article 1171 *Code civil* with Article 212.1 *Code de la consommation*. The latter explains that: ‘L’appréciation du caractère abusif des clauses au sens du premier alinéa ne porte ni sur la définition de l’objet principal du contrat ni sur l’adéquation du prix ou de la rémunération au bien vendu ou au service offert pour autant que les clauses soient rédigées de façon claire et compréhensible’.

³⁴⁹ Com 22 octobre 1996, *affaire Chronoposte*, D 1997.121 note Sériaux: ‘Attendu que, pour débouter la société Banchereau de sa demande, l’arrêt retient que, si la société Chronopost n’a pas respecté son obligation de livrer les plis le lendemain du jour de l’expédition avant midi, elle n’a cependant pas commis une faute lourde exclusive de la limitation de responsabilité du contrat; Attendu qu’en statuant ainsi alors que, spécialiste du transport rapide garantissant la fiabilité et la célérité de son service, la société Chronopost s’était engagée à livrer les plis de la société Banchereau dans un délai déterminé, et qu’en raison du manquement à cette obligation essentielle la clause limitative de responsabilité du contrat, qui contredisait la portée de l’engagement pris, devait être réputée non écrite, la cour d’appel a violé le texte susvisé’.

³⁵⁰ Com 29 juin 2010, *Société Faurecia*, JCP G 2010.787: ‘Attendu que la société Faurecia fait encore le même grief à l’arrêt, alors, selon le moyen, qu’après avoir constaté que la société Oracle n’avait pas livré la version V 12, en considération de laquelle la société Faurecia avait signé les contrats de licences, de support technique, de formation et de mise en œuvre du programme Oracle applications, qu’elle avait ainsi manqué à une obligation essentielle et ne démontrait aucune faute imputable à la société Faurecia qui l’aurait empêchée d’accomplir ses obligations, ni aucun cas de force majeure, la cour d’appel a jugé que n’était pas rapportée la preuve d’une faute d’une gravité telle qu’elle tiendrait en échec la clause

clauses. In summary, these rulings held that when a contractual cap on liability is so low that it removes all serious remedy for the breach by a party of what, legitimately, was essentially expected of it, the clause undermines the very essence of the obligation undertaken, or in other words it ‘empties of its substance’ the essential obligation undertaken by the debtor and ‘contradicts the scope’ of his undertaking³⁵¹.

6.3. UK

Examining various legal categories or areas of contract law, such as consideration, the incorporation of terms, undue influence, the interpretation of contracts and mistake, it is clear that the judiciary, while claiming to adopt a non-interventionist stance, often intervenes to prevent exploitation of the others by means of a contract³⁵². The presence of concerns about fairness is undeniable, but it is far from clear whether these are grounded in a coherent and comprehensive doctrine³⁵³.

In terms of consumer protection, reference should be made to the Consumer Rights Act 2015³⁵⁴. In introducing the Consumer Rights Act 2015, the UK government expressly acknowledged the difficulties that had arisen in implementing the Consumer Sales Directive 99/44/EC and the Unfair Contract Terms Directive alongside pre-existing UK legislation³⁵⁵. The Consumer Rights Act 2015, thus, replaced earlier legislation that had implemented these EU Directives.

It should be noted – in comparison to other legal systems - that the Unfair Contract Terms Act 1977 already employed a *neutral* language to describe the relevant contract terms. Rather than adopting terminology such as, the French *contrat d’adhésion*, the law made reference to standard terms³⁵⁶. In other words, they cautioned against defining these contracts solely on the

limitative de réparation; qu’en statuant ainsi, la cour d’appel n’a pas tiré les conséquences légales de ses constatations, violant les articles 1134, 1147 et 1150 du code civil’.

³⁵¹ For a comprehensive overview, see S. WHITTAKER, nt. 341, p. 421.

³⁵² Cf P. NEBBIA, nt. 5, pp. 45 et seq.

³⁵³ Cf P. GILIKER, ‘The Consumer Rights Act 2015 – a bastion of European consumer rights?’, in *Legal Studies*, 2017, 31(1), p. 79.

³⁵⁴ The Consumer Rights Act 2015 came into force on 1 October 2015 and it applies to the UK given that consumer rights are a reserved matter and not devolved to Scotland, Wales or Northern Ireland. In general, see A. SAMUELS, ‘The Consumer Rights Act 2015’, in *J. Bus L.*, 2016, 3, pp. 159 et seq.

³⁵⁵ See C. TWIGG-FLESNER and R. BRADGATE, ‘The EC Directive on certain aspects of the sale of consumer goods and associated guarantees – all talk and no do?’, in *Web Journal of Current Legal Issues*, 2000, 2; L. MILLER, ‘After the Unfair Contract Terms Directive: recent European Directives and English law’, in *ERCL*, 2007, 88(1), p. 91. The author describes the transposition of these directives as bringing into UK law ‘a tortuous web of legal provisions, impenetrable to those unversed in the particular area of sales law’.

³⁵⁶ S. WHITTAKER, nt. 341, p. 424: ‘(...) an expression [standard terms] which (before the 1977 Act) had no technical meaning but which was understood as referring to the situation where one of the parties

basis of bargaining power³⁵⁷. They recognized that some aspects, such as prices, could still be discussed, even if the fundamental terms (in particular those excluding liability) were presented as non-negotiable³⁵⁸.

The Consumer Rights Act 2015 is closely aligned with the Unfair Contract Terms Directive, although it differs from it in that it applies the fairness test to all terms, regardless of whether they have been negotiated, as previously required by the Unfair Terms in Consumer Contracts Regulation 1994 and 1999³⁵⁹. Indeed, Section 61(1) simply states that '[t]his part applies to a contract between a trader and a consumer' and Section 62(4) establishes that '[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'. It also maintains specific prohibition on terms seeking to exclude liability for personal injury or death caused by negligence, a feature inherited from the Unfair Contract Terms Act 1977, which no longer govern consumer contracts³⁶⁰.

7. The Blurred Boundaries Between Unfairness, Excessive Benefit, Unfair Exploitation And Gross Disparity

In national legal systems, it is widely accepted that neither the weaknesses of a party alone nor the imbalance between performance and counter-performance are sufficient to render a contract void, as, in principle, each party is responsible for protecting its own interests³⁶¹. The concept of *laesio enormis* as such, however, has only rarely been codified. As a matter of fact, the idea of setting aside a contract for mere imbalance of performance and counter-performance

habitually makes contracts of the same type in a particular form (that is, set of terms), with little if any variation allowed from that form'.

³⁵⁷ This thinking seems to have changed slightly when, in 2005, the Law Commission considered reforming the law on unfair terms (consumers and non-consumers) and recommended extending the general regime governing contracts concluded with consumers to contracts concluded with small businesses, as the latter are unlikely to understand standard terms and, even if they do, the power imbalances between them and their commercial partners can create market distortions. See, in this regard, Law Commission, Scottish Law Commission, Unfair Terms in Contracts, Law COM N. 292, Scot Law COM N. 199 (2005).

³⁵⁸ S. WHITTAKER, nt. 341, p. 424.

³⁵⁹ P. GILIKER, nt. 353, p. 93.

³⁶⁰ S. WHITTAKER, nt. 341, p. 423. The other change to the scope of the general controls in Section 62 of the Consumer Rights Act 2015 from the Unfair Contract Terms Directive is found in relation to the 'core exclusion' in Section 64 implementing and apparently extending the consumer's protection as compared with Article 4(2).

³⁶¹ S. LOHSSE, *sub* Art 4:109: Excessive Benefit or Unfair Advantage in N. JANSEN and R. ZIMMERMANN (eds.), nt. 120, p. 702.

had increasingly been thought to contradict the principle of freedom of contract and to ignore that the parties are therefore held to their agreements³⁶².

Imbalance between performance and counter-performance, however, continued to be a matter of concern, and the deficiencies of an approach merely referring to such imbalance was made up by supplementing additional such as the exploitation of the aggrieved party's weakness³⁶³. German law, for instance, pursuant to § 138(2) BGB, consider a contract invalid if the performance and counter-performance are grossly disproportionate and if the other party has exploited the aggrieved party's predicament, inexperience, lack of sound judgment, or considerable weakness of will³⁶⁴. Similar provisions can be found, *inter alia*, in Greek law (Article 179 of *Astikos Kodikas*)³⁶⁵, Italian law (Article 1448 of *Codice Civile*, which notably still preserves the concept of *laesio enormis* by referring to a fixed 50% criterion for disparity)³⁶⁶, Portuguese law (Article 282 of the Portuguese *Código Civil*)³⁶⁷, and Swiss law (Article 21 of the OR)³⁶⁸.

With specific reference to the aforementioned cases, it appears evident that the rules governing *unfair exploitation* or *excessive benefit*, in providing for the invalidity of a contract,

³⁶² S. LOHSSE, *sub* Art 4:109: Excessive Benefit or Unfair Advantage in N. JANSEN and R. ZIMMERMANN (eds.), nt. 120, p. 703. See also, R. ZIMMERMANN, nt. 25, pp. 145-152.

³⁶³ S. LOHSSE, *sub* Art 4:109: Excessive Benefit or Unfair Advantage in N. JANSEN and R. ZIMMERMANN (eds.), nt. 120, p. 703.

³⁶⁴ More precisely, § 138(2) BGB states that: 'Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen'.

³⁶⁵ Article 179 of the *Astikos Kodikas* establishes that: 'Άκυρη ως αντίθετη προς τα χρηστά ήθη είναι ιδίως η δικαιοπραξία με την οποία δεσμεύεται υπερβολικά η ελευθερία του προσώπου ή η δικαιοπραξία με την οποία εκμεταλλεύεται κάποιος την ανάγκη, την κουφότητα ή την απειρία του άλλου και πετυχαίνει έτσι να συνομολογήσει ή να πάρει για τον εαυτό του ή τρίτο, για κάποια παροχή, περιουσιακά οφέληματα, που, κατά τις περιστάσεις, βρίσκονται σε φανερή δυσαναλογία προς την παροχή'.

³⁶⁶ Article 1448(1) and 1448(2) of the *Codice civile* states that: '1. Se vi è sproporzione tra la prestazione di una parte e quella dell'altra, e la sproporzione è dipesa dallo stato di bisogno di una parte(1), del quale l'altra ha approfittato per trarne vantaggio, la parte danneggiata può domandare la rescissione del contratto. 2. L'azione non è ammissibile se la lesione non eccede la metà del valore che la prestazione eseguita o promessa dalla parte danneggiata aveva al tempo del contratto'.

³⁶⁷ Article 282 of the Portuguese *Código Civil*: 'É anulável, por usura, o negócio jurídico, quando alguém, explorando a situação de necessidade, inexperiência, ligeireza, dependência, estado mental ou fraqueza de carácter de outrem, obtiver deste, para si ou para terceiro, a promessa ou a concessão de benefícios excessivos ou injustificados'.

³⁶⁸ Article 21 of the OR 1 states that: 'Wird ein offenes Missverhältnis zwischen der Leistung und der Gegenleistung durch einen Vertrag begründet, dessen Abschluss von dem einen Teil durch Ausbeutung der Notlage, der Unerfahrenheit oder des Leichtsinns des andern herbeigeführt worden ist, so kann der Verletzte innerhalb Jahresfrist erklären, dass er den Vertrag nicht halte, und das schon Geleistete zurückverlangen'.

focus on the disparity between the parties and its unfair exploitation, rather than framing the issue as one of defective consent³⁶⁹.

Therefore, continental legal systems, generally, focus on disparity as the starting point and provide for voidness or ineffectiveness of the contract as the legal consequence. Remarkably, this approach is even applied where there cannot be any contractual disparity. Thus, in suretyship contracts the focus lies on the imbalance between the obligation undertaken and the surety's financial capacity; again, reference to subjective elements such as the surety's susceptibility to reverence³⁷⁰, or the surety being a consumer³⁷¹, functions as a corrective supplement.

This approach focusing on the fairness of the bargain has also become the starting point for the model rules³⁷²; in particular, it explains why the rules' titles refer to *gross disparity*, *excessive benefit*, *unfair advantage*, or *unfair exploitation*³⁷³. Nevertheless, these model rules may be defined as a compromise solution³⁷⁴.

For instance, Article 4:109 PECL, titled 'Excessive Benefit or Unfair Advantage', establishes that a party may avoid a contract if, at the time of the conclusion of the contract, it was improvident, ignorant, inexperienced or lacking in bargaining skill, and the other party knew or ought to have known of this and, given the circumstances and purpose of the contract,

³⁶⁹ S. LOHSSE, *sub* Art 4:109: Excessive Benefit or Unfair Advantage in N. JANSEN and R. ZIMMERMANN (eds.), nt. 120, p. 703. Only few civilian legal systems deal with the problem in the context of defects of consent. See, in this regard, Dutch law, Article 3:44 (4) BW establishes that: 'Misbruik van omstandigheden is aanwezig, wanneer iemand die weet of moet begrijpen dat een ander door bijzondere omstandigheden, zoals noodtoestand, afhankelijkheid, lichtzinnigheid, abnormale geestestoestand of onervarenheid, bewogen wordt tot het verrichten van een rechtshandeling, het tot stand komen van die rechtshandeling bevordert, ofschoon hetgeen hij weet of moet begrijpen hem daarvan zou behoren te weerhouden'.

³⁷⁰ See N. JANSEN, 'Seriositätskontrollen existentiell belastender Versprechen' in R. ZIMMERMANN (eds.), *Störungen der Willensbildung bei Vertragsschluss*, Tübingen, 2007, pp. 138–149 and H. KÖTZ, nt. 151, pp. 134 et seq.

³⁷¹ For a comprehensive overview, see R. PARRY, 'The Position of Family Sureties within the Framework of Protection for Consumer Debtors in European Union Member States', in *ERPL*, 2005, 13(1), pp. 357–381.

³⁷² See Article 4:109 PECL and Article II.-7:207 DCFR.

³⁷³ In this regard, it is quite interesting to analyze how H. KÖTZ, (nt. 147, p. 131) introduces the concept of unfairness: 'This must be distinguished from circumstances where the overall validity of the contract is not in doubt, but one party wishes to overturn one clause, because it does not form part of the contract; because is "inappropriate", "unreasonable", or "improper"; because it contravenes "good faith" or in some other way "grossly disadvantages" the party'. See also C.M. BIANCA, nt. 121, pp. 631 et seq, specifically p. 633 ('[I]e clausole vessatorie, precisamente, sono un fenomeno dannoso connesso alla situazione di disparità socio-economica in cui si trovano gli aderenti, assoggettati agli abusi di chi detiene il potere di fatto di predisporre a suo arbitrio la disciplina del contratto') and D. ACHILLE and S. CHERTI, 'Le clausole vessatorie nei contratti tra professionista e consumatore' in G. RECINTO, L. MEZZASOMA and S. CHERTI (eds.), nt. 121, pp. 85 et seq.

³⁷⁴ S.A.E. MARTENS, 'Undue Influence' in J. BASEDOW, K.J. HOPT and R. ZIMMERMANN (eds.), nt. 9, p. 1710.

took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit³⁷⁵.

Similarly, Article 3.2.7 PICC, titled 'Gross disparity', states that a party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. More precisely, regard is to be had, among other factors, to the fact that the other party has taken unfair advantage of the first party's improvidence, ignorance, inexperience or lack of bargaining skill³⁷⁶.

In conclusion, according to Article II.-7:207 DCFR, titled 'Unfair exploitation', a party may avoid a contract if, at the time of the conclusion of the contract the party was lacking in bargaining skill and the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or grossly unfair advantage³⁷⁷.

All that being said, it becomes evident, to some extent, that there is a degree of proximity between the rules on *unfair exploitation* or *excessive benefit* (or *gross disparity*, to use the term employed by the PICC) and those on *unfair contract terms* discussed in the preceding sections. Even at first glance, this connection is apparent within the PECL, where these provisions are placed side by side: Article 4:109 on *Excessive Benefit or Unfair Advantage* and Article 4:110 on *Unfair Terms Not Individually Negotiated*.

The proximity lies precisely in the fact, as highlighted above, that the model rules, in regulating the weaknesses of a party, focus on the disparity between the parties and its unfair exploitation, rather than framing the issue as one of defective consent. In both cases, the rules condemn the abusive behavior of the stronger party in the contract—whether due to superior

³⁷⁵ More specifically, Article 4:109(1) PECL (Excessive Benefit or Unfair Advantage) establishes that: 'A party may avoid a contract if, at the time of the conclusion of the contract: (a) it was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and (b) the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit'.

³⁷⁶ Article 3.2.7(1) PICC (Gross Disparity) states that: 'A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and (b) the nature and purpose of the contract'.

³⁷⁷ Article II.-7:207(1) DCFR (Unfair Exploitation): 'A party may avoid a contract if, at the time of the conclusion of the contract: (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill; and (b) the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or grossly unfair advantage'.

knowledge (as in the first case) or greater bargaining power through the use of standard contract terms (as in the second case)—which exploits the weaker party in violation of the principles of good faith and fair dealing, to impose disadvantageous contractual terms that cause a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the weaker party³⁷⁸.

All in all, it seems appropriate to focus on the remedies outlined by the rules on *unfair exploitation* or *excessive benefit* (or *gross disparity*). As a matter of fact, Article 3.2.7(2)(3) of the PICC states that, upon the request of the party entitled to avoidance, a court may adapt the contract or term to bring it into conformity with reasonable commercial standards of fair dealing³⁷⁹. Moreover, a court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. Similarly, Article 4:109(2)(3) and Article II.-7:207(2)(3) DCFR establish that upon the request of the party entitled to avoidance, a court may, if it is appropriate, adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed³⁸⁰. Moreover, a court may similarly adapt the contract upon the request of a party receiving notice of avoidance for excessive benefit or unfair

³⁷⁸ As has been pointed out in the Dutch context, Article 3:44 of the Dutch Civil Code also embodies a condemnation of such conduct. A key difference, however, concerns the legal technique through which this condemnation is operationalized. Whereas the PECL pursue invalidity of terms tainted by abusive conduct, Dutch law generally adopts a model based on voidability, thereby empowering the weaker party to decide whether to uphold the contract. In line with this structure, the general regime of unfair terms control in Dutch law likewise provides that unfair terms are voidable rather than void, thus leaving the decision whether to maintain the term with the party to whom it is imposed. An exception exists in business-to-consumer contracts, which fall within the scope of the Unfair Contract Terms Directive.

³⁷⁹ Article 3.2.7(2)(3) PICC: ‘Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing’ and ‘[a] court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.2.10(2) apply accordingly’.

³⁸⁰ Article 4:109(2)(3) PECL: ‘Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed’ and ‘[a] court may similarly adapt the contract upon the request of a party receiving notice of avoidance for excessive benefit or unfair advantage, provided that this party informs the party who gave the notice promptly after receiving it and before that party has acted in reliance on it’. On the other hand, Article II.-7:207(2)(3) DCFR states that: ‘Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been observed’ and ‘[a] court may similarly adapt the contract upon the request of a party receiving notice of avoidance for unfair exploitation, provided that this party informs the party who gave the notice without undue delay after receiving it and before that party has acted in reliance on it’.

advantage, provided that this party informs the party which gave the notice promptly after receiving it and before that party has acted in reliance on it.

In conclusion, there is reason to believe that, given the proximity between the aforementioned rules on *unfair exploitation* or *excessive benefit* and *unfair terms*, a similar proximity can be maintained in terms of the remedies applied.

8. Preliminary Conclusions

The analysis carried out proves that European contract law is currently confronted with several fundamental challenges – consumer protection, market regulation, the safeguarding of constitutional rights and values, and the ongoing tensions between *ius Communitatis* and *ius commune europaeum*. In this regard, European contract law should not merely be understood as a multi-level legal system; rather, it constitutes a living, *multidimensional* body.

As happens in physics, a line - initially one-dimensional - when projected through time in a particular direction, becomes an area with two dimensions. In a similar way, European contract law, beginning in the 1970s, was shaped by the rise of mass transactions and the notion of modern consumer. This shift compelled the law to evolve beyond its original dimension, acquiring a new axis, that of consumer protection. This new dimension, however, does not replace but coexist with the pre-existing dimension of market regulation. In this dual-dimension legal space, the prevention of market failures, which is a central concern of the European economic constitution, serves as a common denominator, striking the correct balance and thus defining the normative space in which EU law is ideally expected to operate.

Furthermore, by drawing the area once again through time, we obtain a cube with three dimensions. This third dimension represents the incorporation of social values and constitutional principles into European contract law. In this expanded legal reality, composed of length, width and height, the multiple dimensions interact dynamically. The problem will therefore be to find the right balance to allow dimensions to maintain their consistency and compatibility with the others. In this vein, it may be argued that the guiding concepts that will allow for equilibrium are the principle of equality, equivalence and *proportionality*.

Finally, if we imagine this cube being projected once more through time, we move into a four-dimensional framework, where time becomes a visible component, just like height, width and depth. It is within this expanded framework that we can meaningfully compare *ius Communitatis* with *ius commune europaeum*, and trace the gradual, stratified development of a transnational legal tradition.

CHAPTER 2

‘UNFAIR CONTRACT TERMS: BETWEEN LEGAL REMEDIES AND LEGAL EFFECTS’

PART I

LEGAL REMEDIES AND LEGAL EFFECTS

TABLE OF CONTENTS: 1. Methodological Remarks – 2. ‘Legal Remedies’ And Substantive Rights – 2.1. Contract Nullity Between *Satisfactory* And *Non-Satisfactory* ‘Legal Remedies’ – 3. ‘Legal Remedies’ In European Contract Law – 4. Between ‘Legal Remedies’ And ‘Legal Effects’ – 5. A Functionalist Approach Towards Remedies, A Critical Analysis – 6. Proportionality

1. Methodological Remarks

Any discussion that seeks to investigate the consequences of unfair terms in business-to-consumer contracts must necessarily begin with a critical analysis of the distinction between ‘legal remedies’, on the one hand, and ‘legal effects’, on the other¹. Such expressions are not only recurrent in legal discourse but arise from the legal reasoning itself, often preceding a precise inquiry into their formal meaning².

It is within this framework that Article 6(1) of the Unfair Contract Terms Directive warrants close examination. This provision has attracted growing attention from the Court of Justice, particularly in light of the numerous preliminary rulings delivered with reference to the

¹ For a comprehensive analysis of these concepts see, F. HOFMANN and F. KURZ, *Law of Remedies. A European Perspective*, Cambridge/Antwerp/Chicago, 2019; A. BURROWS, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed., Oxford, 2019; S. MAZZAMUTO and A. PLAIA, *I rimedi nel diritto privato europeo*, Torino, 2012, pp. 1 et seq; J. BERRYMAN, ‘The Law of Remedies: A Prospectus for Teaching and Scholarship’, in *Oxford University Commonwealth Legal Journal*, 2010, 9(2), pp. 123 et seq; R. ZAKRZEWSKI, *Remedies Reclassified*, Oxford/New York, 2005; P. BIRKS, ‘Rights, Wrongs and Remedies’, in *Oxford Journal of Legal Studies*, 2000, 20(1); ID., ‘Personal Property: Proprietary Rights and Remedies’, in *King’s Law Journal*, 11(1), 2000; C. KILPATRICK, T. NOVITZ and P. SKIDMORE (eds.), *The Future of Remedies in Europe*, London, 2000. In the common law context, see S.A. SMITH, *Rights, Wrongs, and Injustices: The Structure of Remedial Law*, Oxford, 2019; A. BURROWS, ‘Judicial Remedies’ in *English Private Law*, 3rd ed., Oxford, 2013; F.H. LAWSON, *Remedies of English Law*, 2nd ed., London, 1980; D. LAYCOCK, *Modern American Remedies – Cases & Materials*, 6th ed., University of Michigan, 2025; M.J. TILBURY, *Civil Remedies*, Sydney, 1990. In the Italian context, see A. FALZEA, ‘Efficacia giuridica’, in *Enc. dir.*, XIV, Milano, 1965, pp. 432 et seq; P. SIRENA, ‘La teoria dell’efficacia giuridica nel pensiero di Angelo Falzea’, in *Riv. dir. civ.*, 2017, pp. 999 et seq; U. MATTEI, ‘I rimedi’ in G. ALPA, M. GRAZIADEI, A. GUARNERI, U. MATTEI, P.G. MONATERI and R. SACCO, *La parte generale del diritto*, II, *Il diritto soggettivo* in R. SACCO (eds.), *Trattato di diritto civile*, Torino, 2001, pp. 107 et seq; I. PAGNI, *Tutela specifica e per equivalente*, Milano, 2004; A. DI MAJO, ‘Il linguaggio dei rimedi’, in *Eur. dir. priv.*, 2005, pp. 341 et seq; ID., ‘Rimedi e dintorni’, in *Eur. dir. priv.*, 2015, pp. 703 et seq; ID., *Diritti e Rimedi*, Torino, 2023, pp. 1 et seq; ID., *La tutela civile dei diritti*, 4th ed., Milan, 2003, pp. 13 et seq; D. MESSINETTI, ‘Processi di formazione della norma e tecniche «rimediali» della tutela giuridica’, in *Scienza e insegnamento del diritto civile in Italia*, Milano, 2004, pp. 209 et seq.

² A. FALZEA, nt. 1, p. 433.

interpretation of the Unfair Contract Terms Directive³. As previously noted, this is especially true in the context of foreign currency linked loans⁴.

Article 6(1) provides that ‘(...) unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer, and (...) the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms’⁵. In its interpretation of this provision, the Court of Justice has adopted a rigid and arguably problematic stance concerning

³ For an overview of the case law, see E. MIŠĆENIĆ, P. TERESZKIEWICZ, M. INFANTINO, ‘The Interplay Between the CJEU and National Courts in the Case Law on Unfair Contract Terms in Foreign Currency Loans: A Comparative Overview’, in *ERCL*, 2023, 19(4), pp. 355 et seq; H. SCHULTE-NÖLKE, ‘The Objectives of Directive 93/13/EEC on Unfair Contract Terms: An Overview after 30 Years of Case Law’, in *ERPL*, 2024, 32(3), pp. 315 et seq; R. SERAFIN, ‘The Court of Justice on Unfair Terms and Supplementation of the Contract: How Far is Too Far?’, in *EuCML*, 2023, 12(4), pp. 150 et seq; M. LAMICELA, ‘Valutazione di abusività ed effetti della nullità di protezione nei contratti del consumatore: la strategia della deterrenza e l’effettività delle tutele’, in *Juscivile*, 2020, 6, pp. 1532 et seq; P. IAMICELI, ‘The “Punitive Nullity” of Unfair Terms in Consumer Contracts and the Role of National Courts: A Principle-Based Analysis’, in *EuCML*, 2023, 12(4), pp. 142 et seq; M. D’ONOFRIO, ‘Nullità di clausole abusive, interpretazione e (limitato) ruolo del giudice in sede di integrazione contrattuale nella giurisprudenza della Corte di Lussemburgo’ and F. PISTELLI, ‘Scelta del rimedio e sua convenienza: il caso dei finanziamenti in valuta straniera ai consumatori. Corte di Giustizia UE, Sez. VI, sentenza 2 settembre 2021, C-932/19’, in *Juscivile*, 2020, 6, pp. 941 et seq and pp. 1060 et seq. For a comprehensive overview of the role of judicial adjudication with regard to non-discrimination, housing and climate change see C. MAK, ‘Giving Voice: A Public Sphere Theory of European Private Law Adjudication’, in *European Law Open*, 2023, 2(4), pp. 704 et seq.

⁴ See Chapter 1, Part I, § 1.2.1.. With regard to the international literature on foreign currency linked loans see A. WIEWIÓROWSKA-DOMAGALSKA, ‘Unfair Contract Terms in CHF Mortgage Loans. Case C-206/18 Dziubak – where do we go from here?’, in *EuCML*, 2020, 9(5), pp. 207, 211-212; EAD., ‘Potential and Hurdles for the CJEU’s Jurisprudence in Domestic Legal Orders: A Polish Case Study’ in S. GRUNDMANN and M. GROCHOWSKI, *European Contract Law and the Creation of Norms*, Cambridge, 2021, pp. 280, 282-287; R. VASSILEVA, ‘Monetary Appreciation and Foreign Currency Mortgages: Lessons from the 2015 Swiss Franc Surge’, in *ERPL*, 2020, 28(1), pp. 181–195. On the other hand, for an in-depth discussion of the notion of foreign currency linked loans in the Italian context see F. AZZARRI, ‘I “prestiti in valuta estera” nella direttiva 2014/17/UE sui “contratti di credito ai consumatori relativi a beni immobili residenziali”’, in *ODCC*, 2015, pp. 189 et seq, D. MAFFEIS, ‘Direttiva 2014/17/UE: rischio di cambio e di tasso e valore nella componente aleatoria nei crediti immobiliari ai consumatori’, in *BBTC*, 2016, II, pp. 191-192; L. BUONANNO and F. MEZZANOTTE, ‘Some Problematic Issues Concerning the Implementation of the MCD in Italy’ in M. ANDERSON and E. ARROYO AMAYUELAS (eds.), *The Review Of The Mortgage Credit Directive: Toward A Digital, Sustainable And Inclusive European Market*, Paris, 2025, pp. 276 et seq and V. ROPPO, ‘Iscrivibilità di ipoteca per somma denominata in moneta estera’, in *Riv. dir. priv.*, 1996, pp. 55 et seq; C. BRESCI, ‘Transparency Claims, Intellectual Services and Consumer Contracts: A Case of Consumer Over-Protection and Under-Protection?’, *ibid.*, pp. 394 et seq; A.D. TASSIKAS, ‘The Court and the Sleeping Beauty 2.0: Filling the Contractual Gap, or Making Valid Consumer Contracts to the Detriment of the Non-consumer?’, *ibid.*, pp. 422 et seq. See also P. SIRENA, ‘Tutela dei clienti e regolazione del mercato trent’anni dopo l’emanazione del Testo unico bancario’, in *Quaderni di Ricerca Giuridica della Consulenza Legale - Banca d’Italia*, Roma, 2024, pp. 123-140.

⁵ See Chapter 1, Part I, § 2.2. for an analysis of the rationale underpinning Article 6 of the Unfair Contract Terms Directive.

the ‘non-binding character’ of unfair terms in business-to-consumer contracts. As will be explained, its approach extends significantly beyond the literal wording of Article 6(1).

According to the Court, the provision requires national courts to exclude the application of an unfair term so that it produces no binding effect upon the consumer, while prohibiting them from modifying or revising the content of that term⁶. The contract must ‘continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible’⁷. This means, for instance, with regard to unfair penalty clauses, that national courts may not reduce the amount payable under the contract term to an acceptable level but simply have to discard the term in its entirety⁸.

Indeed, the Court of Justice has consistently held that to revise or reduce such terms would be tantamount to allowing them to retain partial binding force, which would ultimately favor the seller or supplier and dilute the deterrent function of the Directive⁹. In other words, such an outcome would undermine the effectiveness of Article 6(1) and weaken its dissuasive impact. After all, the Directive treats unfair terms as non-binding and, in Article 7(1), obliges Member

⁶ See, for instance, Case C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:349, para 65; Case C-488/11, *Asbeek Brusse*, ECLI:EU:C:2013:341, para 57; Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco y Caixabank*, ECLI:EU:C:2015:21, para 28; Case C-421/14, *Banco Primus*, ECLI:EU:C:2017:60, para 71; Joined Cases C-96/16 and C-94/17, *Banco Santander Escobedo Cortes*, EU:C:2018:643, para 73; Joined Cases C-154/15, C-307/15 and C-308/15, *Gutierrez Naranjo*, ECLI:EU:C:2016:980, para 57–61.

⁷ More precisely, Case C-618/10, *Banco Español de Crédito*, nt. 6, para 65 establishes that ‘[i]t thus follows from the wording of Article 6(1) that the national courts are required only to exclude the application of an unfair contractual term in order that it does not produce binding effects with regard to the consumer, without being authorised to revise its content. That contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible’. Cf. also, Case C-365/23, *Banco Santander, SA*, ECLI:EU:C:2023:578.

⁸ Case C-488/11, *Asbeek Brusse*, nt. 6, para 59: ‘(...) Article 6(1) of the directive cannot be interpreted as allowing the national court, in the case where it establishes that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair, to reduce the amount of the penalty imposed on the consumer instead of excluding the application of that clause in its entirety (...)’.

⁹ Cf Chapter 1, Part II, § 4. See, for instance, Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco y Caixabank*, nt. 6, para 31: ‘[i]n fact, if it were open to the national court to revise the content of unfair terms, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect for sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be adjusted, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers’. In the same vein, see Joined Cases C-154/15, C-307/15 and C-308/15, *Gutierrez Naranjo*, nt. 6, para 60 and Case C-26/13, *Kásler and Káslerné Rábai*, EU:C:2014:282, para 79.

States to adopt adequate and effective measures to prevent their continued use in business-to-consumer contracts¹⁰.

According to the Court of Justice, this interpretation would be reinforced by the final provision of Article 6(1), which stipulates that the remainder of the contract shall only bind the parties if it is capable of continuing into existence without the unfair terms¹¹.

In light of this context, the following sections will argue that the restrictive approach recently adopted by the Court of Justice is ultimately untenable. More specifically, the Court appears to overlap two distinct notions: ‘legal remedies’ and their ‘legal effects’¹². Furthermore, the Court appears to be ‘functionalizing’ the provisions provided for in the Unfair Contract Terms Directive to produce punitive consequences for sellers and suppliers, apparently in order to discourage the use of unfair terms¹³. However, it may be argued that such final results should not be developed by judicial interpretation, but rather defined and limited by the legal framework itself.

2. ‘Legal Remedies’ And Substantive Rights

¹⁰ In this regard, see, *inter alia*, Case C-488/11, *Asbeek Brusse*, nt. 6, para 58. The Court of Justice observed that this interpretation is consistent with both the purpose and the overall structure of the Unfair Contract Terms Directive. It stressed that, given the nature and importance of the public interest underlying consumer protection, the Directive requires Member States, under Article 7(1), to adopt effective and appropriate measures to prevent sellers or suppliers from continuing to use unfair terms in business-to-consumer contracts.

¹¹ While this determination relies on a legal assessment under the applicable national law on a case-by-case basis, some insights can still be derived from the Court of Justice’s rulings. See, for instance, Case C-118/17, *Dunai*, ECLI:EU:C:2019:207, para 52 (‘(...) the term relating to the exchange rate risk defines the main subject-matter of the contract. Therefore, in such a case, the continuation of the contract does not appear to be legally possible, which is however to be determined by the referring court’). Accordingly, see Case C-186/16, *Andriciuc*, ECLI:EU:C:2017:703, paras 35 and 37 (‘[a]s far as concerns the category of contractual terms falling within the concept of “main subject matter of the contract”, within the meaning of Article 4(2) of Directive 93/13, those terms must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it. (...) By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within the concept of “main subject matter of the contract”, within the meaning of that provision’).

¹² In this regard, see A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 30 and E. PESCE, *I rimedi dell’autonomia privata*, Pisa, 2022, pp. 69 et seq.

¹³ For a critical analysis, see below Part I, § 5. In this context, see also F. HOFMANN and F. KURZ, ‘Introduction to the Law of Remedies’ in *Law of Remedies. A European Perspective*, nt. 1, pp. 17 et seq and S.A. SMITH, ‘Rights-Threats, Wrongs and Injustices: The Common Law’s Causes of Action’, in *New Zealand Univ. Law Rev.*, 2017, 27, pp. 1033-1034. Cf, by contrast, for a different opinion on ‘judicial activism’ C. MAK, ‘First or second best? Judicial law-making in European private law’ in J. MENDES and I. VENZKE (eds.), *Allocating Authority: Who Should Do What in European and International Law?*, London, 2018, pp. 217 et seq; M.W. DOWDLE, ‘On the Doubly Constitutionalising Character of European Contract Law’ in C. MAK and B. KAS (eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe*, Oxford, 2023, pp. 43 et seq.

As has been perceptively observed, one of the defining features of future European private law is likely to be the integration of traditional civil law categories with a remedies-based approach¹⁴. This development reflects a pressing need for dialogue between the *Pandektenlehre*, rooted in the Roman-canon legal tradition, and the more remedial orientation characteristic of the Anglo-American common law¹⁵.

The notion of ‘legal remedy’ has been interpreted broadly¹⁶. For example, Birks identified five distinct senses in which the terms ‘legal remedies’ may be used: (i) as an action or cause of action (such as ‘conversion is your remedy’); (ii) as a right born of a wrong (such as a right to damages following the negligent infliction of personal injury); (iii) as a right born of a grievance or injustice (such as a right to restitution of a mistaken payment); (iv) as a right born of the order or judgment of a court (the remedy being the judgment which defined the claimant’s enforceable entitlement); and (v) as a right born of a court’s order issued on a discretionary basis (such as might flow from a ‘remedial constructive trust’)¹⁷.

Subsequent scholarship has attempted to stabilize this concept¹⁸. For instance, someone argues that the term ‘legal remedy’ should be limited to those rights arising directly from court

¹⁴ Cf A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 11; S. MAZZAMUTO, *Esecuzione forzata e pubblica amministrazione*, Torino, 2024, p. 19; P. SIRENA and Y. ADAR, ‘La prospettiva dei rimedi nel diritto privato europeo’, in *Riv. dir. civ.*, 2012, 3, pp. 360 et seq; M. ASTONE, ‘Rimedi e contratti del consumatore nella prospettiva del diritto privato europeo’, in *Eur. dir. priv.*, 2014, pp. 11 et seq.

¹⁵ See, in this regard, P. SIRENA and Y. ADAR, nt. 14, p. 360 and R. DAVID, ‘A Law of Remedies and a Law of Rights’ in ID. (eds.), *English Law and French Law: A Comparison in Substance*, London, 1980, pp. 1 et seq.

¹⁶ See, for instance, P.S. DAVIES, ‘Remedies In English Private Law – A “Stand-Alone” Research Area?’ and F. HOFMANN and F. KURZ, ‘Introduction to the Law of Remedies’ in *Law of Remedies. A European Perspective*, nt. 1 – respectively - pp. 3 et seq and 31 et seq; A. BURROWS, ‘Judicial Remedies’, nt. 1, p. 1253 ([t]he concept of a remedy has rarely been subjected to rigorous analysis. Views may differ as to precisely what one is talking about). In the German context, see P. SCHLECHTRIEM, *Schuldrecht, Allgemeiner Teil*, 5th ed., Tübingen, 2003, §§ 149 et seq, who advocates the use of the concept of *Rechtsbehelf*; by contrast, see H. STOLL, ‘Notizen zur Neuordnung des Rechts der Leistungsstörungen’, in *JZ*, 2001, pp. 589 et seq.

¹⁷ P. BIRKS, ‘Rights, Wrongs and Remedies’, nt. 1, pp. 6 et seq. More broadly Birks argues that ‘(...) responses to wrongs should be called rights, not remedies [and] for part of the case for using the language of rights is that the language of wrongs and remedies cannot properly be applied to every case the claimants bring into court’. For a critical analysis of what has been defined ‘absolutist view of rights’ see H.C. GUTTERIDGE, ‘Abuse of Rights’, in *Cambridge L. J.*, 1933, 5, pp. 22 et seq.

¹⁸ R. ZAKRZEWSKI, nt. 1, p. 43: ‘(...) [t]hese boundaries are demarcated in the first section by making a commitment to use the term ‘remedy’ only in the sense of the rights arising from certain court orders or pronouncements. The only relaxation which will be permitted is that the court order itself may be referred to as the remedy so long as this is understood as nothing more than a convenient shorthand for the rights born of such a judicial command or statement’.

orders or decisions¹⁹. In this view, rights that exist independently, i.e. prior to litigation and prior to judicial intervention, should not be classified as remedies²⁰.

By contrast, what may be regarded as the standard theory of legal remedies in continental legal thought defines remedies as technical mechanism for the secondary *realization* of substantive rights, with the primary aim of restoring the position of an aggrieved right-holder²¹. Therefore, substantive rights are traditionally seen as the primary instruments for protecting and enforcing individual interests²². However, these rights are susceptible, due to the differing practical conduct of individuals, to malfunctioning or failure to operate adequately as a result of harm suffered or non-fulfilment of corresponding obligations²³. In such cases, the legal system activates additional forms of protection, namely ‘legal remedies’, which serve to uphold or restore those rights²⁴.

Given such a background, one may wonder whether the ‘remedial’ dimension of legal systems is not merely complementary to, but potentially even substitute of, the dimension of substantive rights and corresponding obligations²⁵. For instance, it may be argued that the substantive claim to specific performance of an obligation has come to be definitively expressed in terms of the remedy for breach²⁶. Similarly, with reference to contracts of sale, replacement and repair may be seen as functionally substituting the implicit right to purchase goods fit for their intended use²⁷. In such instances, the remedy appears to displace the unexpressed right of the purchaser and the corresponding obligation of the seller.

¹⁹ R. ZAKRZEWSKI, nt. 1, pp. 45 et seq and 61: ‘(...) [i]f remedies are defined as rights arising from certain judicial commands or statements, the law of remedies becomes narrower than the law of all responses to infringements of rights’. For a different line of reasoning, see D. HARRIS, D. CAMPBELL, R. HALSON, *Remedies in Contract and Tort*, 2nd ed., London, 2002.

²⁰ R. ZAKRZEWSKI, nt. 1, p. 52.

²¹ See V. SCALISI, ‘Lineamenti di una teoria assiologica dei rimedi giuridici’, in *Riv. dir. civ.*, 2018, 4, pp. 1045-1046 and A. FALZEA, *L’offerta reale e la liberazione coattiva del debitore*, Milano, 1947 reprinted Milano, 2011, pp. 25 et seq. The author argues that: ‘l’essenza di ogni rimedio giuridico [va] riposta nella reintegrazione di un interesse rimasto senza tutela’, which in turn ‘è sinonimo di realizzazione supplementare del diritto soggettivo’.

²² See V. SCALISI, nt. 21, p. 1046: ‘Nel linguaggio dei moderni di area continentale, il termine “rimedi” (*remedies*) intende appunto alludere a siffatti strumenti di tutela succedanei, preordinati alla realizzazione supplementare di un diritto soggettivo leso o, che è la stessa cosa, di un obbligo rimasto inadempito. Di qui lo stretto nesso di necessaria complementarità che legherebbe i rimedi giuridici ai diritti in funzione fondamentalmente satisfattiva di questi ultimi, ma in certo senso anche sanzionatoria per il responsabile della mancata realizzazione primaria dell’interesse, siccome sembrerebbero suggerire anche i due noti brocardi: *ubi ius, ibi remedium* e *ubi remedium, ibi ius*’.

²³ See V. SCALISI, nt. 21, pp. 1045-1046.

²⁴ See V. SCALISI, nt. 21, p. 1046.

²⁵ A. DI MAJO, *Diritti e Rimedi*, nt. 1, pp. 4-5; S. MAZZAMUTO and A. PLAIA, nt. 1, p. 1.

²⁶ *Ibid.*

²⁷ *Ibid.*

‘Legal remedies’, however, as will be discussed, are better understood as conceptually distinct from rights, operating alongside and in addition to them²⁸. Indeed, ‘legal remedies’ often compensate for the inherent shortcomings of the *Tatbestand*²⁹. This legal construct cannot capture the full range of specific and concrete interests that arise when rights are harmed or unmet³⁰. These interests, by their nature, elude full expression within abstract categories and require responsive tools of protection³¹.

Hence, in the language of contemporary continental jurisprudence, a necessary and intrinsic relationship exists between legal remedies and substantive rights, most evidently in the responsive function that remedies serve, reflected in the enduring maxim *ubi ius, ibi remedium*³². Yet the inverse proposition - *ubi remedium, ibi ius* – cannot be excluded: legal protection may also originate with the remedy itself³³. In such instances, it is the remedial mechanism that gives rise to legal recognition of rights. This phenomenon is most apparent in common law systems, where remedies often derive directly from judicial rulings and may appear to precede the articulation of any corresponding right³⁴. Nor is this phenomenon entirely foreign to civil law systems: even within codified jurisdictions, emergency or provisional rulings are frequently granted in situations where the underlying right has not yet been formally established but merely presumed (*fumus boni iuris*)³⁵.

More broadly, both rights and remedies may be seen as legal instruments that give normative relevance to various types of interests manifest in social reality.

²⁸ Cf D. HARRIS and D. TALLON, *Contract Law Today — Anglo French Comparisons*, Oxford, 1989, p. 283; A. DI MAJO, *Diritti e Rimedi*, nt. 1, pp. 9-10: ‘(...) il linguaggio dei “diritti” non è il più pertinente per descrivere situazioni in cui la c.d. “innocent party” già lamenta la mancata soddisfazione di un proprio diritto, che è sempre fondamentalmente il diritto-pretesa all’adempimento dell’obbligo. Che il creditore di somme possa agire per ottenere il pagamento allorquando l’altro non paghi (v. art. 7.2.1.) è vicenda che non appartiene più al piano dei diritti *ma a quello dei rimedi contro diritti (rimasti) insoddisfatti*. Lo stesso si può dire quando si chiede che una prestazione inesatta venga riparata o sostituita “or other cure of defective performance” (art. 7.2.3.). Del resto, la stessa enunciazione (della possibilità) di un “change of remedy” (art. 7.2.5.), se comprensibile ove si rimanga sul piano dei rimedi, lo sarebbe assai meno se ci si muova sul piano dei diritti’.

²⁹ See, in this regard, V. SCALISI, nt. 21, p. 1043 (‘L’idea, di per sé corretta e condivisibile, secondo cui l’effetto-rimedio si sottrae allo schermo della fattispecie, perchè sta oltre e al di là dello schema (fattispecie-effetti), nulla però dice ancora circa natura ed essenza del rimedio’). See also N. IRTI, ‘La crisi della fattispecie’, in *Riv. dir. proc.*, 2014, pp. 38 et seq; ID., ‘Calcolabilità Weberiana e crisi della fattispecie’, in *Riv. dir. civ.*, 2014, pp. 987 et seq.

³⁰ G. SMORTO, ‘Sul significato di “rimedi”’, in *Eur. dir. priv.*, 2014, pp. 175 et seq; A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 6; L. NIVARRA, ‘I rimedi specifici’, in *Eur. dir. priv.*, 2011, p. 162.

³¹ A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 6.

³² V. SCALISI, nt. 21, pp. 1045-1046.

³³ P.S. DAVIES, ‘Remedies In English Private Law – A “Stand-Alone” Research Area?’ in *Law of Remedies. A European Perspective*, nt. 1, pp. 35 et seq; A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 3.

³⁴ P.S. DAVIES, ‘Remedies In English Private Law – A “Stand-Alone” Research Area?’ in *Law of Remedies. A European Perspective*, nt. 1, pp. 35 et seq.

³⁵ A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 3.

That said, given the inextricable relationship between substantive rights and remedies, it remains essential to understand the role (if any) played by substantive rights in shaping the content of remedies³⁶. In this regard, it has been proposed the distinction between ‘replicative remedies’, which replicate the claimant’s underlying substantive rights, and ‘transformative remedies’, which confer new rights distinct from those originally held³⁷. One consequence of this view is the assertion that damages should not be regarded as remedies: they belong, along with substantive rights, to the realm of substantive law, not remedial law³⁸.

According to this scholarship, an example of ‘replicative remedies’ would be an order of specific performance, which enforces the very obligation originally agreed in the contract³⁹. However, this view is not universally accepted. Indeed, some scholars contend that specific performance should not be classified as a remedy at all, but rather as the backbone of the obligation itself⁴⁰.

Conversely, ‘transformative remedies’ depart significantly from the claimant’s original rights. They are often authorized by statutes which grant broad judicial discretion to formulate responses that are not derived from pre-existing entitlements⁴¹. A paradigmatic non-statutory transformative remedy is, instead, the remedial constructive trust, which grants a proprietary

³⁶ Cf *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.* [1980] 2 W.L.R., 202 et seq, specifically 204 where Golding J argues that: ‘Within the municipal confines of a single legal system, right and remedy are indissolubly connected and correlated, each contributing in historical dialogue to the development of the other, and, save in very special circumstances, it is as idle to ask whether the court vindicates the suitor’s substantive right or gives the suitor a procedural remedy as to ask whether thought is a mental or a cerebral process. In fact the court does both things by one and the same act’.

³⁷ R. ZAKRZEWSKI, nt. 1, pp. 63 et seq: ‘The fundamental proposition should be that remedies either replicate antecedent (substantive) rights or transform them’.

³⁸ R. ZAKRZEWSKI, nt. 1, p. 66. More broadly, the author explains that ‘[o]ne must be vigilant to keep the taxonomy of remedies free of foreign matter such as substantive rights, both when constructing the taxonomy and when applying it. Some categories included in the received classification may also function as categories for concepts which are not remedies, for example, substantive rights. Substantive rights are clearly capable of being sorted into the first three categories of compensation, restitution, and punishment. Some primary rights belong in these categories. For example, a contractual right to the payment of liquidated damages, a right to the payment of a sum as restitution for unjust enrichment or a contractual right to the payment of a penalty respectively. Secondary rights can be easily divided into these goal-based categories. A right to the payment of compensatory damages for a wrong, a right to a payment of a sum as restitution for a wrong or a right to the payment of exemplary damages belong in each of the respective categories’. By contrast, see P.S. DAVIES, ‘Remedies In English Private Law – A “Stand-Alone” Research Area?’ in *Law of Remedies. A European Perspective*, nt. 1, p. 31, who considers ‘a narrow approach to remedies (...) unhelpful’, moreover he adds that ‘[i]t is somewhat odd to consider the law of remedies to include the law on injunctions and specific performance, for example, but not the law on damages’.

³⁹ R. ZAKRZEWSKI, nt. 1, p. 79.

⁴⁰ Cf E. RABEL, *Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung*, vol. 1, Berlin/Leipzig, 1936, p. 375 and F. HOFMANN and F. KURZ, ‘Introduction to the Law of Remedies’ in *Law of Remedies. A European Perspective*, nt. 1, p. 5.

⁴¹ R. ZAKRZEWSKI, nt. 1, p. 80.

interest to a claimant who held no such interest prior to the court's intervention⁴². In such cases, the main concern becomes not the existence of a prior right, but rather the jurisdictional and normative basis of the remedy itself⁴³.

Over time, particularly due to the influence of EU law and its commitment to the principle of effective judicial protection, the concept of 'legal remedies' has expanded to encompass virtually all areas of private law, including the very hierarchy of legal sources⁴⁴. Indeed, it has been convincingly argued that the disapplication of national law conflicting with EU law, the legal duty of conforming interpretation of national legislation as well as the principle that Member States are liable to individuals for damages suffered as a consequence of the State's non implementation of EU law should all fall within the broader framework of legal remedies⁴⁵.

In light of these arguments, the following analysis will focus on *contractual remedies*⁴⁶. For the purposes of this study, a contractual remedy will be understood as any *technical instrument*

⁴² Ibid. Cf House of Lords case of *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC, 669, specifically 714-715 where Lord Browne-Wilkinson stated: 'A remedial constructive trust, as I understand it, is (...) a judicial remedy giving rise to an enforceable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court'. See also, *Re Polly Peck (No 2)* [1998] 3 All ER, 812, specifically 830 where Nourse LJ stated: 'In referring to a remedial constructive trust, I mean an order of the court granting by way of remedy, a proprietary right to someone who, beforehand, had no proprietary right'.

⁴³ R. ZAKRZEWSKI, nt. 1, p. 80.

⁴⁴ V. SCALISI, nt. 21, p. 1050 and A. DI MAJO, 'Rimedi e dintorni', nt. 1, pp. 733 et seq.

⁴⁵ Cf D.B. DOBBS, *Law of remedies. Damages-Equity-Restitution*, 2nd ed., St. Paul, 1993, p. 20: 'In a broad sense, almost any solution to any kind of problem can be regarded as a remedy. One could say "education is a remedy for discrimination"'); M. ASTONE, nt. 14, pp. 9-10; P. PERLINGIERI, 'Rimedi e modello sociale europeo' in G. VETTORI (eds.), *Remedies in contract. The Common Rules for a European Law*, Padova, 2008, p. 205 and, for a critical view, A. NICOLUSSI, 'Diritto soggettivo e rapporto giuridico. Cenni di teoria generale tra diritto privato e diritto pubblico', in *Eur. dir. priv.*, 2014, p. 1211; D. MESSINETTI, 'Sapere complesso e tecniche giuridiche rimediali', in *Eur. dir. priv.*, 2005, p. 608; V. SCALISI, nt. 21, pp. 1050-1051: the author explains that when every situation is framed as a matter of remedy, as though it were a universal cure for all deficiencies in the pursuit of legal interests, the danger is that the very notion of remedy loses its meaning.

⁴⁶ In this context, see C. TWIGG-FLESNER, 'Remedies in European Contract Law. Themes and Controversies' in *Law of Remedies. A European Perspective*, nt. 1, pp. 251 et seq; G. HOWELLS, 'Reflections on Remedies for Lack of Conformity in Light of the Proposals of the EU Commission on Supply of Digital Content and Online and Other Distances Sales of Goods' in A. DE FRANCESCHI (eds.), *European Contract Law and the Digital Single Market*, Cambridge, 2016, pp. 145 et seq; M. BEHAR-TOUCHAIS, 'Remedies in the Proposed Digital Content Directive: An Overview' in R. SCHULZE, D. STAUDENMEYER and S. LOHSE (eds.), *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps*, Baden-Baden, 2017, pp. 127 et seq; L. OLSEN, 'The choice of the aggrieved party - An analysis of the remedies in the Principles of the European Contract Law', in *ERPL*, 1999, 7(1), pp. 21 et seq; D. LECZYKIEWICZ, "'Where Angels Fear to Tread": The EU Law of Remedies and Codification of European Private Law', in *ERCL*, 2012, pp. 47 et seq; Y. ADAR and M. GELBARD, 'The Role of Remedies in The Relational Theory of Contract - A Preliminary Inquiry', in *ERCL*, 2011, pp. 399 et seq. In the Italian context, see G. VETTORI, 'Giustizia e rimedi nel diritto europeo dei contratti', in *Eur. dir. priv.*, 2006, pp. 53 et seq; ID., 'Contratto giusto e rimedi effettivi', in *Pers. e merc.*, pp. 9 et seq; ID., *Il contratto europeo tra regole e principi*, Torino, 2015, pp. 149 et seq; V. SCALISI, 'Giustizia contrattuale e rimedi: fondamento e limiti di un controverso principio' in *Il contratto in trasformazione*.

rooted in and activated by the violation of a substantive right, a statutory provision or general principle⁴⁷.

As to the classification of such remedies, while the replicative-transformative distinction remains valuable, it will be argued that in the field of contract law, remedies may be more effectively distinguished as *satisfactory*, *non-satisfactory* and *neutral*, with the latter arguably constituting a subcategory of the second⁴⁸.

The relevant criterion lies in whether the remedy restores the original substantive right (*satisfactory*), fails to do so while satisfying an alternative interest that is incompatible with the interest underlying the original substantive right that has been violated (*non-satisfactory*), or simply dissolves the relationship between the parties (*neutral*)⁴⁹.

For instance, Directive (EU) 2019/771 on the sale of consumer goods grants consumers four primary remedies: repair, replacement, price reduction and termination⁵⁰. These derive, as already noted, from the consumer's substantive right to receive goods free from defects. As a matter of fact, Recital 10 stipulates that Directive (EU) 2019/771 covers rules on requirements for conformity and remedies available to consumers for a lack of conformity of the goods with the contract⁵¹. In this context, repair and replacement qualify as satisfactory remedies, since

Invalidità e inefficacia nella transizione al diritto europeo, Milano, 2011, pp. 337 et seq; F. PIRAINO, 'Il diritto europeo e la «giustizia contrattuale»', in *Eur. dir. priv.*, 2015, pp. 233 et seq.

⁴⁷ Such a broad definition of remedies appears, in fact, consistent with that conception which situated remedies within an elusive dogmatic or systematic framework. Cf A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 24; V. SCALISI, nt. 21, p. 1058 (according to this author remedies are fundamentally fluid and essentially shifting in nature); L. NIVARRA, 'Rimedi: un nuovo ordine del discorso civilistico', in *Eur. dir. priv.*, 2015, pp. 583 et seq; S. MAZZAMUTO, 'La nozione di rimedio nel diritto continentale', in *Eur. dir. priv.*, 2007, p. 588.

⁴⁸ Cf M. ASTONE, nt. 14, pp. 12 et seq; V. SCALISI, 'Giustizia contrattuale e rimedi: fondamento e limiti di un controverso principio' in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, nt. 46, pp. 369-370; ID., nt. 21, pp. 1057 et seq: '(...) i rimedi sarebbero (...) reali e personali, inibitori e coercitivi, restitutori e risarcitori (risarcitori di primo livello e risarcitori di secondo livello), satisfattivi e punitivi'. In this final regard, see also A. DI MAJO, *La tutela civile dei diritti*, nt. 1, pp. 49 et seq; U. MATTEI, nt. 1, pp. 130 et seq and S. MAZZAMUTO and A. PLAIA, nt. 1, pp. 50 et seq.

⁴⁹ In modern common law legal systems, a distinction has been drawn between *damages remedies*, *restitutionary remedies*, *coercive remedies*, *declaratory remedies*, *provisional and permanent remedies*. See, in this regard, D.B. DOBBS, nt. 45, *passim*.

⁵⁰ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, [OJ L 136]. More precisely, Article 13(2) states that '(...) the consumer may choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances'. Moreover, Article 13(4) provides that '[t]he consumer shall be entitled to either a proportionate reduction of the price in accordance with Article 15 or the termination of the sales contract in accordance with Article 16'.

⁵¹ More precisely, Recital 10 of the Directive (EU) 2019/771 reads as follow: 'This Directive should cover rules applicable to the sales of goods, including goods with digital elements, only in relation to key contract elements needed to overcome contract-law related barriers in the internal market. For this purpose, rules on requirements for conformity, remedies available to consumers for a lack of conformity

they restore the consumer's original entitlement. By contrast, price reduction is a non-satisfactory remedy, compensating for breach but failing to restore the right to purchase goods free from defects. Termination is better characterized as a neutral remedy: it returns the parties to their pre-contractual positions but does not fulfil the consumer's original right to receive a conforming product.

What ultimately supports the view that repair and replacement, as well as claims for specific performance, should indeed be classified as 'remedies' is the fact that they are by no means necessary or automatically available within legal systems. By way of example, Article 9:102 of PECL and Article 7.2.2. of PICC authorize courts to order specific performance, yet they also grant judges the discretion to refuse such orders in circumstances in which civil law courts would likewise deny them. Moreover, unlike in civil law systems, specific performance may also be refused where the aggrieved party can turn to the market, procure substitute goods or services, and then claim damages for non-performance. Although this may appear a sacrifice from a civil law perspective, from the standpoint of economic analysis of law it is one that, for practical reasons, should not be overstated.

2.1. *Contract Nullity Between Satisfactory And Non-Satisfactory 'Legal Remedies'*

It should be noted that many scholars reject the idea that certain legal categories, such as withdrawal, information duties and contract invalidity (for instance, nullity for unfair contract terms), can be considered true 'legal remedies'⁵². As a matter of fact, they contend that remedies

of the goods with the contract and on the main modalities for their exercise should be fully harmonised, and the level of consumer protection, as compared to Directive 1999/44/EC, should be increased'.

⁵² In the Italian context, see P. SIRENA and Y. ADAR, nt. 14, p. 365 ('La nullità delle clausole abusive non è invece rimessa alla libera iniziativa della parte tutelata (ossia, del consumatore), ma è automaticamente comminata dalla norma giuridica che la prevede ed è rilevabile dal giudice anche d'ufficio. Essa costituisce dunque una sanzione, laddove rileveranno piuttosto come rimedi l'azione individuale di accertamento ovvero quella collettiva di inibitoria'); N. IRTI, 'La nullità come sanzione civile', in *Contr. e impr.*, 1987, pp. 543 et seq ('(...) nullità, che è *sanzione*, di per sé, *infallibile ed effettiva*'); V. SCALISI, nt. 21, pp. 1051 et seq ('non possa parlarsi di vero e proprio rimedio (...) [n]ei casi in cui il dispositivo normativo, anziché puntare alla riconformazione strutturale della fattispecie, mira piuttosto invece alla rimodulazione del profilo funzionale della fattispecie medesima, ossia al rimodellamento degli effetti primari riconducibili alla stessa (come, ad esempio, nelle ipotesi delle c.d. nullità di protezione, che appunto per ciò non hanno natura di rimedi veri e propri, tant'è che a volte sono state segnalate per l'eccedenza rispetto allo schema, in quanto a immediato ridosso dello stesso interesse primario)'). By contrast, see S. MAZZAMUTO, nt. 47, p. 597 ('Il diritto di fonte comunitaria inaugura, infatti, una nuova tecnica normativa che si può ancora una volta definire rimediale, ma in un'accezione assai più ampia, che riporta il rimedio a ridosso non più esclusivamente del bisogno di tutela ma addirittura dell'interesse primario, anche se le tecniche utilizzate molto spesso si presentano con il volto del rimedio in senso proprio (come ad es. le c.d. nullità di protezione)'); S. MAZZAMUTO and A. PLAIA, nt. 1, pp. 23, 121 et seq; A. DI MAJO, *Diritti e Rimedi*, nt. 1, pp. 56-57 ('Ecco dunque affacciarsi, sullo scenario del diritto comunitario, la c.d. nullità "di protezione" ossia forma di nullità che ha come elemento caratterizzante la tutela di un determinato interesse (...). La nullità è "rimedio"

acquire autonomous legal significance only when their activation depends on the voluntary initiative of the protected party, that is when they are activated through a legal claim⁵³. Nullity for unfair contract terms, by contrast, arises automatically, and it is subject to an *ex officio* control by the judge⁵⁴.

Yet, this interpretation may lead to a paradox: if one were to accept that only legal categories requiring the party's initiative can qualify as 'legal remedies', one would be forced to consider avoidance a 'legal remedy', given that it generally requires a constitutive judicial ruling, while simultaneously denying such status to nullity, which often serves a parallel function⁵⁵.

Furthermore, according to this approach, *ex officio* control by the judge arguably undermines the very interest it seeks to protect, transferring the evaluation of that interest to a third-party adjudicator⁵⁶. Moreover, the automatic and complete dissolution of the invalid contract does little to preserve those contractual provisions which may still serve the interest of the protected party⁵⁷. In this view, contract nullity functions more as a 'legal sanction' than a remedy, whereas individual enforcement or public enforcement are true remedies⁵⁸.

nelle mani dell'interessato, il quale è libero di farlo valere o meno (...) anche con esito di recupero parziale del contratto'); L. NIVARRA, nt. 47, pp. 597 et seq.

⁵³ P. SIRENA and Y. ADAR, nt. 14, p. 365.

⁵⁴ Before the enactment of the Ordonnance n°2016-301, the former Article L 141-4 of the *Code de la consommation* already provided that the judge 'peut soulever d'office toutes les dispositions du présent code dans les litiges nés de son application'. Cf, also, A. BEKA, *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts' Own Motion*, Cambridge, 2018, pp. 9 et seq; B. FEKETE and A.M. MANCALEONI, 'Application of primary and secondary EU law on the national courts' own motion' in A. HARTKAMP, C. SIEBURGH and W. DEVROE (eds.), *Cases, Materials and Text on European Law and Private Law*, Oxford/Portland, 2017, pp. 421 et seq; A. HARTKAMP, 'Ex Officio Application in Case of Unenforceable Contracts or Contract Clauses. EU law and National laws Confronted' in *Essays in Honour of Hugh Beale*, Oxford, 2014, p. 482; C. PAVILLON, 'Ignorance is Bliss - How Ex Officio Control Became the Raison d'Être of the UCTD', in *ERPL*, 2024, 32(3), pp. 519 et seq; A. ALBANESE, 'Gli ultimi interventi della Corte europea di Giustizia e della Cassazione sulla rilevanza d'ufficio della nullità delle clausole vessatorie. Riflessioni critiche' in A. D'ADDA, V. BACHELET and L. REGAZZONI (eds.), *Il diritto privato dei consumatori. Nuovi assetti e prospettive*, Pisa, 2026, pp. 49 et seq. See, also, more recently Case C-173/23, *Eventmedia Soluciones SL v Air Europa Líneas Aéreas SAU*, ECLI:EU:C:2024:295.

⁵⁵ Cf A. GENTILI, 'La «nullità di protezione»', in *Eur. dir. priv.*, 2011, pp. 94-95 and V. SCALISI, 'Contratto e regolamento nel piano d'azione delle nullità di protezione' in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, nt. 46, p. 200.

⁵⁶ A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 56.

⁵⁷ Ibid.

⁵⁸ Cf P. SIRENA and Y. ADAR, nt. 14, p. 365; V. SCALISI, nt. 21, pp. 1051 et seq; S. MONTICELLI, *Contratto nullo e fattispecie giuridica*, Padova, 1995, p. 2; F. GALGANO, 'Alla ricerca delle sanzioni civili indirette', in *Contr. e impr.*, 1997, p. 533; A. DI MAJO, 'La nullità' in A. DI MAJO, G.B. FERRI, M. FRANZONI (eds.), *Il contratto in generale*, vol. XIII, in M. BESSONE (eds.), *Trattato di diritto privato*, Torino, 2002, pp. 43-45; P.M. PUTTI, *La nullità parziale. Diritto interno e comunitario*, Napoli, 2002, pp. 375 et seq ('All'idea della nullità-sanzione sembra facciano eco teorie secondo cui l'invalidità del contratto è la conseguenza della violazione di norme imperative, pur nelle diverse varianti della contrapposizione nullità-annullabilità').

An alternative line of thought maintains that contract nullity may be understood in remedial terms, but only when interpretative strategies or mechanisms of partial recovery are available⁵⁹. In this light, a distinction is drawn between traditional forms of contract nullity and what has been defined ‘nullity with a protective function’ or ‘nullity to protect’⁶⁰. The latter, particularly within the context of EU consumer law, is seen as a distinct form of nullity whose core purpose is the protection of a special interest, namely that of the consumer⁶¹.

In this framework, nullity operates as a ‘legal remedy’ in the hands of the interested party, who may choose whether or not to invoke it⁶². Importantly, it also permits the partial survival of the contract, allowing for the preservation of those provisions that continue to serve the protected interest⁶³. Such nullity – as a ‘legal remedy’ – thus stands in contrast to traditional nullity as a ‘legal sanction’, imposed and executed by the legislator without room for discretionary enforcement⁶⁴. By contrast, nullity as a ‘legal remedy’ is marked by flexibility, rejecting, as someone observed, the binary logic of *all-or-nothing* outcomes⁶⁵.

On the basis of these interpretations, several conclusions may be drawn. The difficulty in conceptualizing contract nullity, and other forms of contractual invalidity, as ‘legal remedies’ lies in the *structural* distinction typically made in legal scholarship between ‘legal remedies’, which are designed to address non-performance in a validly concluded contract, and nullity,

⁵⁹ A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 56.

⁶⁰ The expression ‘nullity to protect’, used as a translation of ‘nullità di protezione’, is employed by A. GENTILI, nt. 55, p. 119. For a more comprehensive discussion of this topic, without claiming to be exhaustive, see also M. GIROLAMI, *Le nullità di protezione nel sistema delle invalidità negoziali. Per una teoria della moderna nullità relativa*, Padova, 2008; G. D’AMICO, ‘Nullità virtuale-Nullità di protezione – (Variazioni sulla nullità)’, in *I Contratti*, 2009, pp. 737 et seq; A. FEDERICO, ‘Nuove nullità ed integrazione del contratto’ in A. BELLAVISTA and A. PLAIA (eds.), *Le invalidità nel diritto privato*, Milano, 2011, pp. 329 et seq; A. ALBANESE, ‘Non tutto ciò che è “virtuale” è “razionale”: riflessioni sulla nullità del contratto’, in *Eur. dir. priv.*, 2012, pp. 503 et seq; S. PAGLIANTINI, ‘Nullità virtuali di protezione?’, in *I Contratti*, 2009, pp. 1040 et seq; ID., ‘La nullità di protezione tra rilevabilità d’ufficio e convalida: lettere da Parigi e dalla Corte di Giustizia’ in ID. (eds.), *Le forme della nullità*, Torino, 2009, pp. 27 et seq; G. DE CRISTOFARO, ‘Le invalidità negoziali «di protezione» nel diritto comunitario dei contratti’, *ibid.*, pp. 179 et seq; S. POLIDORI, ‘Nullità di protezione e interesse pubblico’, in *Rass. dir. civ.*, 2009, pp. 1019 et seq; ID., *Discipline della nullità e interessi protetti*, Napoli, 2001; F. DI MARZIO, ‘Nullità di protezione, codice del consumo e contratti del consumatore’, in *Riv. dir. priv.*, 2005, pp. 837 et seq; A. D’ADDA, *Nullità parziale e tecniche di adattamento del contratto*, Milano, 2008.

⁶¹ See, *inter alia*, A. FEDERICO, ‘Nuove nullità ed integrazione del contratto’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 60, p. 330: “Nullità”, come anche si dice, “di protezione” in quanto disposte in via diretta e immediata nell’interesse di una categoria di contraenti (il consumatore, l’investitore, il cliente, il c.d. imprenditore debole) cui solitamente è riservata la legittimazione ad agire’.

⁶² A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 57.

⁶³ *Ibid.*

⁶⁴ *Ibid.* and ID., nt. 58, pp. 127 et seq.

⁶⁵ A. DI MAJO, *Diritti e Rimedi*, nt. 1, pp. 57 et seq. See also ID., nt. 58, pp. 127-128.

which concerns cases where the contract was never properly formed in the first place⁶⁶. However, if one adopts a *functional* approach, focusing on the contract as an instrument designed to fulfil the interests of the parties, this rigid distinction becomes less compelling.

As argued above, the contract can be considered as a *product* purchased by the consumer⁶⁷. From this point of view, the frustration of the purpose of the contract, i.e. the satisfaction of the party's interest, occurs regardless of whether it results from non-performance or initial invalidity. The final result is the same: the party's legitimate expectations are not met.

Another source of conceptual confusion stems from the tendency to limit the notion of 'legal remedy' to those of a strictly *satisfactory* nature⁶⁸. This has led to the perception of the need to distinguish between traditional nullity and those *new* nullities with protective function, with only the latter qualifying as a 'legal remedy'⁶⁹. The key argument in this case is that nullity with protective function, unlike traditional one, does not entail the total dissolution of the contract, but rather allows for its partial maintenance, thus preserving the substantial interest of the protected party⁷⁰.

However, this argument may be challenged on two grounds. First, even traditional forms of nullity may possess a protective function, as will be discussed in greater details⁷¹. Secondly, not all remedies are *satisfactory* in strict sense⁷². As already mentioned, remedies such as price reduction in the case of defective goods, or termination of the contract, do not satisfy the original contractual interest (e.g., the purchase of goods conforming to the contract). Rather, these are *non-satisfactory* or *neutral* remedies: they address alternative interests or aim to dissolve the contractual relationship altogether⁷³.

⁶⁶ In the Italian context, see V. SCALISI, 'Invalidità e inefficacia nella transizione al diritto europeo: quadro di sintesi' in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, nt. 46, pp. 439 et seq.

⁶⁷ See Chapter 1, Part I, § 1.2..

⁶⁸ Indeed, specific performance and compensation for damages in the area of civil liability are generally classified as legal remedies. These instruments ensure that the protected party receives what is rightfully theirs, thereby preventing others from infringing on their personal or property rights. However, there is some leeway in this regard; see, for example, P. SIRENA and Y. ADAR, nt. 14, pp. 377 et seq and A. DI MAJO, *Diritti e Rimedi*, nt. 1, pp. 57 et seq.

⁶⁹ Cf A. DI MAJO, *Diritti e Rimedi*, nt. 1, pp. 56-57; S. MAZZAMUTO, nt. 47, p. 597; S. MAZZAMUTO and A. PLAIA, nt. 1, pp. 23, 121 et seq; A. DI MAJO, *Diritti e Rimedi*, nt. 1, pp. 56-57; L. NIVARRA, nt. 47, pp. 597 et seq.

⁷⁰ A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 57.

⁷¹ See below Part II, § 11.

⁷² As already noted, the relevant criterion lies in whether the remedy restores the original substantive right (*satisfactory*), fails to do so while satisfying an alternative interest that is incompatible with the interest underlying the original substantive right that has been violated (*non-satisfactory*), or simply dissolves the relationship between the parties (*neutral*).

⁷³ See above § 2.

3. 'Legal Remedies' In European Contract Law

While the concept of 'legal remedies' in private law remains theoretically elusive and lacks a precise definitional consensus, recent developments reveal a growing recognition of their importance within the structure of European legal sources, model rules and uniform laws⁷⁴.

As has been perceptively observed, in the landscape of European contract law, the terms 'legal remedies' made their first notable appearance in Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees⁷⁵. Nevertheless, while the Directive clearly recognizes consumers' rights to repair or replacement where goods fail to conform with the contract (Article 3), it refrains from explicitly categorizing these entitlements as 'legal remedies'⁷⁶.

A more sophisticated approach to remedies is evident in the adoption of Directive (EU) 2019/770 of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and digital services⁷⁷, as well as the revised Directive (EU) 2019/771 of the European Parliament and of the Council on certain aspects concerning contracts

⁷⁴ See, in this regard, the analysis of R. ZIMMERMANN, *The New German Law of Obligations: Historical and Comparative Perspectives*, Oxford, 2005, pp. 39 et seq.

⁷⁵ Directive 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 L171/12]. In this regard, see Recitals 9, 11, 12. As a matter of fact, Recital 9 establishes that '[w]hereas the seller should be directly liable to the consumer for the conformity of the goods with the contract; whereas this is the traditional solution enshrined in the legal orders of the Member States; whereas nevertheless the seller should be free, as provided for by national law, to pursue remedies against the producer, a previous seller in the same chain of contracts or any other intermediary, unless he has renounced that entitlement; whereas this Directive does not affect the principle of freedom of contract between the seller, the producer, a previous seller or any other intermediary; whereas the rules governing against whom and how the seller may pursue such remedies are to be determined by national law'; Recital 11 provides that '[w]hereas the consumer in the first place may require the seller to repair the goods or to replace them unless those remedies are impossible or disproportionate; whereas whether a remedy is disproportionate should be determined objectively; whereas a remedy would be disproportionate if it imposed, in comparison with the other remedy, unreasonable costs; whereas, in order to determine whether the costs are unreasonable, the costs of one remedy should be significantly higher than the costs of the other remedy'; in conclusion, Recital 12 states that '[w]hereas in cases of a lack of conformity, the seller may always offer the consumer, by way of settlement, any available remedy; whereas it is for the consumer to decide whether to accept or reject this proposal'. Cf. also C. TWIGG-FLESNER, 'Remedies in European Contract Law. Themes and Controversies' in *Law of Remedies. A European Perspective*, nt. 1, p. 251.

⁷⁶ As a matter of fact, Article 3 is tellingly entitled 'Rights of the consumer'. Nevertheless, Article 3(3)(2), in referring to repair or replacement, provides that: 'A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account: - the value the goods would have if there were no lack of conformity, - the significance of the lack of conformity, and - whether the alternative remedy could be completed without significant inconvenience to the consumer'.

⁷⁷ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, [OJ L 171].

for the sale of goods, repealing Directive 1999/44/EC⁷⁸. For instance, Article 13 of Directive (EU) 2019/770 is explicitly entitled ‘Remedy for the failure to supply’ and it provides that traders are required to supply digital content or services in conformity with the contract⁷⁹. A failure to do so without undue delay, or within an additional period of time, as expressly agreed to by the parties, entitles consumers to terminate the contract. Moreover, Article 14, entitled ‘Remedy for lack of conformity’, establishes that in the case of a lack of conformity, the consumer shall be entitled to have the digital content or digital service brought into conformity, to receive a proportionate reduction in the price, or to terminate the contract⁸⁰. Similarly, Article 13 of Directive (EU) 2019/771 explicitly categorizes, among ‘Remedies for lack of conformity’, the right to have the goods brought into conformity or to receive a proportionate reduction in the price, or to terminate the contract⁸¹.

More broadly, the very nature of EU directives, which impose to Member States a result to be achieved (Article 249 TEU), inherently shifts the focus towards the ‘form’ and ‘methods’ of compliance, thus inviting a remedial interpretation of legal obligations⁸².

This remedial structure becomes even more explicit in the CESL: the obligations of the seller (Chapter 10) are immediately followed by the buyer’s remedies (Chapter 11) and subsequently by the seller’s remedies (Chapter 13)⁸³.

A similar approach is evident also in the DCFR, which reinforces the prominence of remedies by addressing them across a wide range of private law domains, including not only

⁷⁸ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019, nt. 50. Cf C. TWIGG-FLESNER, ‘Remedies in European Contract Law. Themes and Controversies’ in *Law of Remedies. A European Perspective*, nt. 1, p. 253: ‘In this realm, it is worth noting that the European Commission’s attempt to introduce a complete set of remedies via its proposal for a Common European Sales Law (CESL), which was the legislative proposal resulting from a decade of work on the idea of a European contract law, did not gain sufficient support and was ultimately withdrawn’.

⁷⁹ It is worth noting that Article 1 of Directive (EU) 2019/770 explicitly provides that: ‘The purpose of this Directive is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection, by laying down common rules on certain requirements concerning contracts between traders and consumers for the supply of digital content or digital services, in particular, rules on (...) remedies in the event of a lack of such conformity or a failure to supply, and the modalities for the exercise of those remedies’.

⁸⁰ More precisely, Article 14(1) of Directive (EU) 2019/770 establishes that: ‘In the case of a lack of conformity, the consumer shall be entitled to have the digital content or digital service brought into conformity, to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in this Article’.

⁸¹ Indeed, Article 13 of Directive (EU) 2019/771 provides that: ‘In the event of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity or to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in this Article’.

⁸² More precisely, Article 249(3) states that: ‘A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’.

⁸³ Cf C. TWIGG-FLESNER, *The Europeanisation of Contract Law*, 2nd ed., Abingdon, 2013.

contractual liability but also tortious liability and unjustified enrichment⁸⁴. The repeated and explicit reference to remedies reflects an emerging awareness that remedies constitute an autonomous and cohesive segment of legal analysis, one that increasingly demands formal treatment independent from traditional substantive areas of private law⁸⁵.

The CISG also adopts the terminology of remedies in a direct manner: Section III, indeed, is entitled ‘Remedies for breach of contract by the seller’. Buyers are afforded specific remedies against the seller, including specific performance (Articles 46 et seq), termination of the contract (Article 49) and compensation for damages (Article 74), which may be claimed independently or cumulatively with other remedies (Article 75 and Article 81). Contractual restitution also features in the remedial structure (Article 81(2) and Article 82), thereby illustrating the CISG’s comprehensive remedial framework⁸⁶.

In contrast, the PICC appear more cautious in their use of the term ‘legal remedy’, likely in an effort to bridge the terminological and conceptual differences between common law and civil law traditions. While the enforcement of specific performance is framed as a ‘right to performance’ (Article 7.2.1.), the term ‘remedy’ nonetheless appears elsewhere in the text, such as in Article 7.2.5., which permits that the aggrieved party who has required performance of a non-monetary obligation and who has not received performance within a fixed period or otherwise within a reasonable period of time may invoke any other remedy. Similarly, termination is introduced as the ‘right to terminate the contract’ (Article 7.3.1.) and, consistent with its autonomous framework, the PICC provides that termination need not be judicially declared but may be immediately effective when the aggrieved party exerts its right, provided the breach is fundamental (Article 7.3.1. and Article 7.3.2.)⁸⁷.

⁸⁴ The notion of remedies is formally embraced in the PECL. Indeed, a specific section is devoted to ‘Remedies in general’, which sets out the order of the available remedies (Article 8:101) and provides for their possible cumulation, insofar as they are not mutually incompatible (Article 8:102).

⁸⁵ Cf *The Future of the Judicial System of the European Union (Proposals and Reflections)* (‘*The Courts’ Paper*’) in A. DASHWOOD and A. JOHNSTON (eds.), *The Future of the Judicial System of the European Union*, Oxford, 2009, p. 134 where it is argued that ‘(...) the veritable cornerstone of the operation of the internal market, since it plays a fundamental role in ensuring that the law established by the Treaties retains its Community character with a view to guaranteeing that that law has the same effect in all circumstances in all the Member States of the European Union’. In this regard, C. HARLOW, ‘A Common European Law of Remedies?’ in C. KILPATRICK, T. NOVITZ and P. SKIDMORE (eds.), nt. 1, pp. 69-70 argues that: ‘Here the market objective as well as the contribution of the Community courts towards securing the single market is flagged up, as are two further points. First, the introduction of the phrase “the same effect” suggests that real uniformity, at least of interpretation, is the aim; second, the Court places its faith in the procedural device of reference under Article 234 EC (*ex* Article 177) to secure that uniformity’.

⁸⁶ Cf the analysis of A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 8 and the analysis of R. ZIMMERMANN, nt. 74, pp. 39 et seq.

⁸⁷ Cf the analysis of A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 8. The author highlights the ambiguity of the solution set forth in Article 28, whereby the court is not required to order specific performance where

Despite these developments, European contract law continues to exhibit significant gaps with respect to the provision of remedies⁸⁸. As a matter of fact, many directives still confer rights without specifying the respective remedies or confer remedies without specifying the consequences of their enforcement⁸⁹. This is probably because despite the autonomy that characterizes the hallmark of the European Union, EU law is not completely self-sustaining or independent⁹⁰. Instead, it grapples with a regulatory shortfall since it heavily relies on the substantive and procedural rules of its Member States⁹¹.

For instance, while Directive (EU) 2011/83 of the European Parliament and of the Council on consumer rights imposes extensive information obligations on traders, it does not clarify the legal consequences should a trader breach those duties⁹². Similarly, the Unfair Contract Terms Directive lacks precision regarding the consequences deriving from the unfairness of contract terms⁹³. As already noted, Article 6(1) provides that ‘(...) unfair terms used in a contract concluded with a consumer by a seller or supplier shall (...) not be binding on the consumer, and (...) the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms’. This formulation leaves open the question of whether the term’s legal status approximates nullity, unenforceability, or some other concepts, resulting in divergent implementations across Member States⁹⁴.

such remedy is not permitted under its national law. More precisely, Article 28 provides that: ‘If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention’. See, also, S. MAZZAMUTO and A. PLAIA, nt. 1, p. 3.

⁸⁸ C. TWIGG-FLESNER, ‘Remedies in European Contract Law. Themes and Controversies’ in *Law of Remedies. A European Perspective*, nt. 1, p. 252.

⁸⁹ Ibid. The author explains that ‘(...) despite the increasingly detailed approach to remedies in the aforementioned directives, it is striking that many aspects of EU consumer contract law are characterised by an incomplete approach. Many rights granted to consumers are provided without specifying a corresponding remedy. Key examples here are the widespread use of information duties (most recently under the Consumer Rights Directive (2011/83/EU)), and the fact that the consequences of a consumer having suffered loss because a trader relied on a contract term which has subsequently been found to be unfair under the Unfair Contract Terms Directive (93/13/EEC) are not addressed at the European level’.

⁹⁰ See, in this regard, F. EPISCOPO, ‘The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before National Courts’ in P. CRAIG and G. de BÚRCA (eds.), *The Evolution of EU Law*, Oxford, pp. 276-277.

⁹¹ C. HARLOW, ‘A Common European Law of Remedies?’ in C. KILPATRICK, T. NOVITZ and P. SKIDMORE (eds.), nt. 1, pp. 70 et seq; P. PIVA, *Il principio di effettività della tutela giurisdizionale nel diritto dell’Unione Europea*, Napoli, 2012, pp. 30-31.

⁹² Directive (EU) 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights, [OJ L304]. Cf the analysis of C. TWIGG-FLESNER, ‘Remedies in European Contract Law. Themes and Controversies’ in *Law of Remedies. A European Perspective*, nt. 1, p. 252.

⁹³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, [OJ L95]. Cf M. ASTONE, nt. 14, p. 18.

⁹⁴ Cf G. DE CRISTOFARO, ‘Le invalidità negoziali «di protezione» nel diritto comunitario dei contratti’ in S. PAGLIANTINI (eds.), nt. 60, p. 189: ‘Si ritiene pacificamente, nella dottrina europea, che la generica,

Ultimately, the absence of clearly defined remedies, along with their legal effects, across numerous sectors of European contract law can be partly attributed to the need to respect the principle of subsidiarity and procedural autonomy of Member States, especially in areas of shared competence⁹⁵. This cautious legislative stance aimed at preserving the diversity of national legal systems while fostering the Internal Market, has led, especially in the past, to directives that frequently set out only minimum harmonization requirements, thus offering little more than a basic framework upon which Member States must build⁹⁶.

4. *Between ‘Legal Remedies’ and ‘Legal Effects’*

Some scholars have attempted to interpret the concept of ‘legal remedies’ through the conceptual framework of ‘legal effects’⁹⁷. According to this view, ‘legal remedies’, as technical instruments aimed at ensuring the practical *realization* of a legal interest, falls within the scope of legal effectiveness and therefore qualifies as ‘legal effects’⁹⁸. Moreover, due to the fact that all effects are ultimately rooted in two fundamental categories (the power to act and the duty to act), it follows that a remedy consists of a right or an obligation: there are therefore remedies-as-rights and remedies-as-obligations⁹⁹.

In order to further clarify such point of view, it is argued that ‘legal remedies’, being instrumental to the secondary protection of an interest already recognized by the legal system, constitute what can be defined as a ‘secondary effect’¹⁰⁰. In this sense, ‘legal remedies’ operate as a conclusive effect, putting an end to that sequence initiated by the primary effect (i.e. the substantive right or interest) which did not materialize¹⁰¹. Beyond this point lie judicial claims and adjudication, since the ‘secondary effect’ (i.e. ‘legal remedies’) may remain unsatisfied if the party against whom it operates does not comply¹⁰². In such cases, judicial enforcement

atecnica e neutra locuzione «non vincolano» sia stata impiegata dagli organi comunitari in queste (...) disposizioni allo scopo precipuo di evitare una opzione netta e precisa per un modello di invalidità e consentire ai legislatori nazionali di compiere in proposito – in sede di recepimento – le scelte più e meglio rispondenti alle specifiche caratteristiche e peculiarità dei rispettivi ordinamenti interni’.

⁹⁵ See Chapter 1, Part I § 1.1..

⁹⁶ C. TWIGG-FLESNER, ‘Remedies in European Contract Law. Themes and Controversies’ in *Law of Remedies. A European Perspective*, nt. 1, p. 252. See also G. HOWELLS, C. TWIGG-FLESNER and T. WILHELMSSON, *Rethinking EU Consumer Law*, Abingdon, 2017, pp. 19-20.

⁹⁷ See, in this regard, V. SCALISI, nt. 21, p. 1051.

⁹⁸ Cf A. FALZEA, nt. 1, pp. 432 et seq.

⁹⁹ Ibid.

¹⁰⁰ See, in this regard, V. SCALISI, nt. 21, pp. 1051-1052; A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 5; S. MAZZAMUTO, nt. 14, p. 19; M. ASTONE, nt. 14, p. 9.

¹⁰¹ See, in this regard, V. SCALISI, nt. 21, pp. 1051-1052; A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 25; S. MAZZAMUTO, ‘Ricordo di Vincenzo Scalisi’, in *Eur. dir. priv.*, 2019, p. 116; D. MESSINETTI, nt. 45, pp. 605 et seq.

¹⁰² V. SCALISI, nt. 21, pp. 1051-1052.

becomes necessary. However, this marks, according to this view, the transition to a distinct area: that of ‘judicial remedies’¹⁰³.

Based on these premises, some authors have argued that ‘legal remedies’, while constituting an autonomous legal category, are thus characterized as a means to ‘reinforce’ the effectiveness of the initial protected interest¹⁰⁴.

This reconstruction is conceptually appealing, but not without difficulties. Firstly, if the existence of a remedy presupposes a primary legal effect (such as, for instance, a duty to perform), then the ‘legal remedy’, as has been perceptively observed, simply occupies that area left by the failure of the initial obligation¹⁰⁵. However, the very idea of such vacant area calls into question the adequacy of describing ‘legal remedies’ as ‘legal effects’. If ‘legal remedies’ exist because the primary effect failed, then their classification as a derivative (or secondary) effect seems strained¹⁰⁶.

Certainly, this model is not without influence. In French legal doctrine, it is common to consider the ‘effects’ of a legal relationship as comprising not only its creation and performance, but also its breach. This approach was definitely formalized in the 2016 reform of the *Code civil*, which introduces a chapter dedicated to *Les effets du contrat* (Articles 1193-1231-7)¹⁰⁷. Before the reform, the *Code civil* spoke more generally about the effects of obligations, with specific reference to contracts only in relation to third parties, reflecting the fact that, historically, the *stipulation pour autrui* was not fully recognized¹⁰⁸.

However, as has been observed, the main difficulty in interpreting the ‘legal remedy’ as a ‘legal effect’ lies in the ambiguity of its link with the initial protected interest. If the ‘legal remedy’ is framed as a ‘legal effect’, it risks becoming a mere component of such interest rather than a distinct normative response to its failure¹⁰⁹.

¹⁰³ See, in this regard, A. DI MAJO, ‘Forme e tecniche di tutela’ in S. MAZZAMUTO (eds.), *Processo e tecniche di attuazione dei diritti*, vol. I, Napoli, 1989, pp. et seq; U. MATTEI, nt. 1, pp. 108 et seq and V. SCALISI, nt. 21, pp. 1051-1052.

¹⁰⁴ A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 25; S. MAZZAMUTO, nt. 101, p. 116; D. MESSINETTI, nt. 45, pp. 605 et seq.

¹⁰⁵ A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 6.

¹⁰⁶ Cf S.A. SMITH, nt. 1, pp. 40-41. It may be argued that, had the primary effect occurred, there would have been no need for any remedy. In this sense, remedies do appear to be secondary or derivative in nature. Nevertheless, understood in this way, remedies risk being reduced to a mere extension of that interest, rather than constituting an autonomous normative response to its non-performance, due to the fact that they operate in the space left by the failure to satisfy the primary interest.

¹⁰⁷ More precisely, Articles 1193–1195 address the effects of the contract in terms of ‘Force obligatoire’, while Articles 1196–1198 govern the ‘Effet translatif’ of the contract.

¹⁰⁸ Cf A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 25.

¹⁰⁹ V. SCALISI, nt. 21, pp. 1051-1052; A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 30; S. MAZZAMUTO, nt. 14, p. 19; M. ASTONE, nt. 14, p. 9.

A further complication arises from the characterization of remedies as *reinforcing* in nature, with the specific function of *satisfying* the initial protected interest¹¹⁰. This definition, although inspiring, is overly restrictive. It excludes remedies that are not satisfactory in a technical sense. For example, price reduction in the case of defective goods or termination of the contract do not satisfy the original interest (e.g., the right to purchase compliant goods). As already observed, these are *non-satisfactory* or *neutral* remedies, which instead address alternative interests incompatible with the original substantive right or aim to dissolve the contractual relationship altogether¹¹¹.

Paradoxically, the very theoretical framework that locates ‘legal remedies’ as ‘secondary effects’ implicitly recognizes that they can fail, making judicial action necessary. In this vein, judicial enforcement of the initial protected interest is best understood as a further stage within the separate remedial sequence, designed to ensure the actual protection of the aggrieved party.

Historically, legal theory concerning legal effects has focused on two fundamental issues: the question of causation and the ontological nature of ‘legal effects’¹¹². From the perspective of causation, some have argued that legal rules function similarly to physical laws, linking a conditioning event to a conditioned result¹¹³. Others reject this analogy, arguing that legal facts serve as a psychological or normative motive for the legislator to prescribe a legal consequence¹¹⁴. A third school of thought rejects both models, insisting that neither physical causation nor psychological motivation adequately explains the relationship between legal facts and their effects¹¹⁵.

¹¹⁰ A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 25; S. MAZZAMUTO, nt. 101, p. 116; D. MESSINETTI, nt. 45, pp. 605 et seq.

¹¹¹ See above § 2.

¹¹² Cf A. FALZEA, nt. 1, pp. 432 et seq.

¹¹³ P. LOTMAR, *Über causa im römischen Recht – Beitrag zur Lehre von den Rechtsgeschäften*, München, 1875; E. ZITELMANN, *Irtum und Rechtsgeschäft*, Leipzig, 1879; J.E. KUNTZE, *Cursus des römischen Rechts*, Leipzig, 1879; A. AFFOLTER, *Naturgesetze und Rechtsgesetze*, München, 1904; A. VON TUHR, *Der Allgemeine Teil des deutschen Bürgerlichen Rechts*, Leipzig, 1914; F. CARNELUTTI, *Teoria generale del diritto*, 3rd ed., Roma, 1951; A.E. CAMMARATA, ‘Il significato e la funzione del fatto nell’esperienza giuridica’ in *Formalismo e sapere giuridico*, Milano, 1963.

¹¹⁴ S. SCHLOSSMANN, *Der Vertrag*, Leipzig, 1876; E.R. BIERLING, *Zur Kritik der juristischen Grundbegriffe*, vol. II, Gotha, 1883; T. KIPP, ‘Über Doppelwirkungen im Rechteinsbesondere über Konkurrenz von Nichtigkeit und Anfechtbarkeit’ in *Festschrift für F. Martitz*, Berlin, 1911; W. FUCHS, *Fatto e conseguenza giuridica*, in *Rifd*, 1928; D. RUBINO, *La fattispecie e gli effetti giuridici preliminari*, Milano, 1939.

¹¹⁵ F. KLINGMÜLLER, ‘Der Begriff des Rechtsgrundes’ in *Studien zur Erläuterung des bürgerlichen Rechts*, vol. VI, Breslau, 1901; I. BINDER, *Philosophie des Rechts*, Berlin, 1925; F. VON HIPPEL, *Zur Gesetzmäßigkeit juristischer Systembildung*, Berlin, 1930; K. PETER, ‘Die Möglichkeit mehrerer Gründe derselben Rechtsfolge und mehrerer gleicher Rechtsfolge’, in *Arch. civ. Pr.*, 1930; K. LARENZ, *Methodenlehre der Rechtswissenschaft*, 3rd ed., Berlin/Heidelberg/New York, 1995.

If one adopts a restrictive conception of ‘legal effects’, such that the effect is conceived as an inherent element of the substantive right protected and therefore the effect merely reflects the *mode of existence* of the underlying substantive right, then ‘legal remedies’ can no longer be plausibly characterized as ‘legal effects’, not even a secondary one¹¹⁶. Differently, the relationship between legal facts and effects can be explained in terms of equivalence (or correspondence).

It is possible to consider the example of contract formation. Where the law provides that a contract creates binding obligations, it means that the conclusion of a contract with certain requirements (A) gives rise to corresponding duties to perform (B). Conversely, a contract which does not fulfill those requirements ($\neg A$) gives rise to no such obligations ($\neg B$). In other words, $A = B$ and $\neg A = \neg B$.

By contrast, the ‘legal remedies’ applied to that contract which does not fulfil the requirements needed (C), such as avoidance, nullity, unenforceability, restitution etc., do not fit within this scheme of equivalence. Rather, they must be seen as an independent category. They are not, strictly speaking, ‘legal effects’ of non-compliance ($\neg A$), but legal responses generated by the legal system to manage the protection of the substantive rights involved. As such, they operate as *sources* of further ‘legal effects’, not as ‘legal effects’ themselves.

Returning to the Unfair Contract Terms Directive, it becomes necessary to clarify the distinction between ‘legal remedies’ and ‘legal effects’ in order to properly construe Article 6. That provision, indeed, as already noted, establishes that unfair terms are not binding on the consumer and that the contract may remain binding upon the parties only if it is capable of continue into existence without those terms. As will be explored in the following sections, the Directive remains silent as to the ‘legal remedy’ to be applied in cases of unfairness, confining itself to harmonizing a single aspect of its *modes of existence*, namely the non-binding character of the unfair term. The ‘legal remedy’ adopted within a given legal system may nonetheless entail additional ‘legal effects’ which, insofar as they do not impinge upon the non-binding nature of the unfair terms, must be regarded as compatible with the Directive.

5. A Functionalist Approach Towards Remedies, A Critical Analysis

It has often been observed that ‘legal remedies’ serve distinct functions¹¹⁷. According to a traditional classification, the main functions of ‘legal remedies’ are commonly identified as

¹¹⁶ Cf V. SCALISI, nt. 21, pp. 1051-1052.

¹¹⁷ A. BURROWS, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, nt. 1, pp. 9 et seq; S.A. SMITH, nt. 13, pp. 1033 et seq; F. HOFMANN and F. KURZ, ‘Introduction to the Law of Remedies’ in *Law*

compensation, restitution, punishment, compelling performance, the prevention of wrongful conduct, and the declaration of rights¹¹⁸.

This taxonomy, however, is not without its limitations. It arguably conflates, at least in part, the *content* of a remedy with its underlying *function*, thereby blurring the analytical distinction between the two.

A more rigorous analysis of the function of a remedy must focus on the final result it aims to achieve. Adopting this approach allows for meaningful comparison between remedies that may diverge significantly in form but converge in function¹¹⁹.

In the context of contractual remedies and based on the dichotomy between ‘satisfactory’ and ‘non-satisfactory’ remedies, it is clear that all ‘satisfactory’ remedies share a common *compensatory* function in a broad sense. This means that they place the non-performing party in the position it would have been in if the non-performance had not occurred, thereby fully satisfying the substantive right that has been breached (e.g., repair or replacement in the case of defective products).

Among the ‘non-satisfactory’ remedies, there are some that nevertheless perform a *compensatory* function. Consider, for example, compensation for damages. In this case, the objective is to provide monetary compensation that, to the extent that money can do so, places

of Remedies. A European Perspective, nt. 1, p. 17 (‘Besides the generalised approach of a “Law of Remedies”, different remedies have different functions’). Cf also J. MOSS, ‘The Intersection Between Economic Justifications for IP Rights and Cost of Enforcement in the English Courts’ in *Law of Remedies. A European Perspective*, nt. 1, pp. 275 et seq.

¹¹⁸ A. BURROWS, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, nt. 1, pp. 9 et seq (‘The primary functions of the judicial remedies for torts and breach of contract can be expressed as follows: compensation, restitution (sometimes referred to as disgorgement), punishment, compelling performance of positive obligations, preventing a wrong, compelling the undoing of a wrong, declaring rights’); F. HOFMANN and F. KURZ, ‘Introduction to the Law of Remedies’ in *Law of Remedies. A European Perspective*, nt. 1, p. 17 (‘The main ones are compensation, restitution, punishment, compelling performance, preventing a wrong and declaring rights’); R. CHAMBERS, ‘Liability’ in P.B.H. BIRKS and A. PRETTO (eds.), *Breach of Trust*, Oxford, 2002, p. 2 (‘At a lower level of generality, liabilities for breach of duty can be organised according to the goals they are supposed to achieve: direct enforcement of the duty, compensation for loss, restitution of gain, punishment, or other goals’); R. ZAKRZEWSKI, nt. 1, p. 64; M. TILBURY, M. NOONE and B. KERCHER, *Remedies Commentary and Materials*, 7th ed., North Ryde New South Wales, 2020, p. 9 (the remedial objectives or goals mentioned are compensation, restitution, punishment, coercion, interim and urgent relief, and declaratory relief). As Zakrzewski observed, in M. TILBURY, M. NOONE and B. KERCHER, *Remedies Commentary and Materials*, above, the categories of interim and urgent relief and declaratory relief are omitted from the series; D. WRIGHT, *The Remedial Constructive Trust*, Sydney, 1998, p. 283; D.B. DOBBS, nt. 45, pp. 2 et seq, the author distinguishes between damages remedies which include compensatory and punitive damages, restitutionary remedies which include orders for payment of restitution and restitution in specie (recovery of property), rescission and reformation (rectification), coercive remedies which include injunctions and specific performance, and declaratory remedies; D. HARRIS, D. CAMPBELL, R. HALSON, n. 19, pp. vii–xi.

¹¹⁹ Cf R. ZAKRZEWSKI, nt. 1, p. 65.

the non-breaching party in the position it would have been if the non-performance had not occurred. The function is *compensatory*, but the remedy is ‘non-satisfactory’ in the sense that the non-defaulting party does not receive satisfaction of the specific object which its original subjective right referred.

Within the category of ‘non-satisfactory’ remedies, there are also those that pursue a different purpose, namely a *liberating* function. In this context, one example is contract termination or contract nullity itself.

In more exceptional circumstances, the legal system may instead pursue a *punitive* function¹²⁰. The most notable instance of this is the award of punitive damages, whose applicability in the context of breach of contract remains contentious¹²¹. As with exemplary damages, such remedies must be treated with caution. As the House of Lords in *Rookes v Barnard* stipulates, ‘[t]he power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty (...) can also be used against liberty’¹²².

Similar concerns arise in the realm of unjustified enrichment, where distributive disgorgement remedies are employed to achieve an equitable sharing of revenue acquired between infringer and right-holder¹²³. These remedies produce two key effects: first, they ensure that the right-holder receives the portion of the gain attributable to the infringement; second, they avoid penalizing the infringer, who may have made a legitimate contribution to the generation of that gain¹²⁴. In contrast, remedies with an overt *punitive* function operate on a different rationale altogether, depriving of all illicit gains, irrespective of their contribution¹²⁵.

¹²⁰ Cf, *inter alia*, A. BURROWS, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, nt. 1, pp. 360 et seq.

¹²¹ Cf *Addis v Gramophone Co Ltd* [1909] AC, 488 et seq; *Perera v Vandiyar*, [1953] 1 WLR, 672 et seq; *Kenny v Preen*, [1963] 1 QB, 499 et seq where Pearson LJ clearly stated that: ‘As the claim was only in contract and not tort, punitive or exemplary damages could not be properly awarded’. By contrast, in *McMillan v Singh*, [1985] 17 HLR, 120 et seq, where again a landlord evicted a tenant, punitive damages were awarded. More recently, see *Attorney-General v Blake*, [2001] 1 AC, 268; *Kuddus v Chief Constable of Leicestershire Constabulary*, [2001] UKHL 29, [2002] 2 AC, 122 et seq; *Whiten v Pilot Insurance Co.*, [2003] SCC, 18 et seq. In general terms, it is worth recalling that many systems do not allow for the award of punitive damages, but only of compensatory damages.

¹²² *Rookes v Barnard*, [1964] 1 All ER (HL, Lord Devlin), 367 et seq.

¹²³ B. RAUE, ‘Disgorgement of Profits. Distributive And Deterrent Logics’ in *Law of Remedies. A European Perspective*, nt. 1, p. 156.

¹²⁴ *Ibid*. The author explains that: ‘Distributive disgorgement remedies aim to ensure the fair distribution of revenue between the infringer and the right holder. There are two basic consequences: First, the right holders should be assigned that part of the revenues that can be attributed to the infringement of their rights; second, infringers are not to be punished by the remedy and should be compensated for their contributions to the revenues’.

¹²⁵ B. RAUE, ‘Disgorgement of Profits. Distributive And Deterrent Logics’ in *Law of Remedies. A European Perspective*, nt. 1, p. 163: ‘In contrast, a remedy that is aimed to punish an infringer or deter future infringements follows a different logic. The remedy does not aim to distribute gains fairly to the contributing parties, but to deter a potentially infringing party. The punitive or deterrent nature of the

In this context, it has been argued that this ‘goal-based’ classification of remedies is ultimately inadequate¹²⁶. This is because such an approach would require an in-depth analysis of the goals underlying categories such as compelling performance or prevention of wrongdoing, a task that would inevitably lead to a wide diversity of purposes to support a coherent classification.

Instead, it is suggested that the true analytical value of identifying the function of a remedy lies in a twofold insight. First, it allows for an assessment of whether a given remedy is consistent with the substantive rights, statutory rules or general principles violated. Second, it allows for a critical assessment of judicial activity, particularly in cases where courts risk distorting the intrinsic function of a remedy in order to pursue unintended political objectives, a phenomenon that can be described as the *functionalization* of remedies or, more generally, as an example of ‘discretionary remedialism’¹²⁷.

It is in this latter sense that the Court of Justice can be seen as having recently acted, particularly in its case law on unfair terms in consumer contracts¹²⁸.

Against such a background, there is a growing perception that the Court of Justice is attempting to impose remedies with *punitive* function, distorting the fact that the Directive remains silent as to the ‘legal remedy’ to be applied in cases of unfairness, confining itself to harmonizing a single aspect of its *modes of existence*, namely the non-binding character of the unfair term¹²⁹. Moreover, *punitive* functions are neither inherent in nor expressly conferred on it by the EU legislator¹³⁰.

remedy should be construed in a way to maximise the deterrent effect. Therefore, the infringer should be deprived of the infringing benefits as comprehensively as possible’.

¹²⁶ Cf R. ZAKRZEWSKI, nt. 1, p. 65.

¹²⁷ Cf R. ZAKRZEWSKI, nt. 1, pp. 85 et seq.; F. HOFMANN and F. KURZ, ‘Introduction to the Law of Remedies’ in *Law of Remedies. A European Perspective*, nt. 1, p. 9. The authors, by making reference to *Coventry v Lawrence*, [2014] UKSC, 13 et seq, provides that: ‘In that case the court had to decide whether to grant an injunction or damages in lieu of an injunction in a nuisance case. On the question how far the court’s discretion to award damages in lieu is bound by relevant principles, Lord Neuberger said: “Indeed, it is appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible. Definitely, equitable remedies will not be granted automatically; those remedies will be denied if they cause injustice to the defendant”’.

¹²⁸ See, in this regard, M. FARINA, ‘Unfair Terms and Supplementation of the Contract’, in *ERPL*, p. 446: ‘With regard to the Unfair Contract Terms Directive, some scholars have spotted two different goals: a particular, or short-term objective and a more general, or long-term one. Indeed, according to this view, the remedy against unfair terms has, first, to intervene on the specific contract at stake, adjusting it; second, the repeated (and homogeneous) application of the remedy has to be such that discourages abusive conducts’.

¹²⁹ See, for instance, A. D’ADDA, ‘Giurisprudenza comunitaria e “massimo effetto utile per il consumatore”: nullità (parziale) necessaria della clausola abusiva e integrazione del contratto’, in *I Contratti*, 2013, p. 28.

¹³⁰ See below Part III, § 12.1.

In other words, the Court of Justice seems to argue that Article 7(1) of the Unfair Contract Terms Directive, which refers to the purpose of preventing the use of unfair terms in consumer contracts, legitimizes *punitive* techniques¹³¹. Yet this interpretative stance is unconvincing. As a matter of fact, it remains unclear whether the aim of avoiding the use of unfair terms in consumer contracts can justify the use of means that clearly unbalance the protection of one of the contracting parties and involve radical interference with their contractual autonomy. Such a reading cannot be derived from Article 7, which remains silent on these aspects¹³².

Moreover, punitive remedies should arguably be adopted only where explicitly mandated by the legislator. For instance, Article 1815(2) of the Italian *Codice civile* provides a *punitive* remedy if usurious interest rates are agreed upon¹³³.

Furthermore, as already noted, the placement of consumer protection objectives in the 8, 9, 10, and 11 Recitals of the Unfair Contract Terms Directive, after other objectives, such as establishing the Internal Market and preventing the ‘distortions of competition’¹³⁴, unveils the assumption that market regulation by the EU legislator can be justified in so far as it contributes primarily to removing obstacles to trade and eliminating market failures such as limitations on competition¹³⁵.

¹³¹ Cf P. ROTT, ‘Unfair Contract Terms’ in C. TWIGG-FLESNER (eds.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham/Northampton, 2016, pp. 302 et seq: ‘Considering the principle of effectiveness as enshrined in Article 7(1), the solution to that issue should have been obvious: if the only sanction for the unfairness of a clause was its reduction to what is just fair, there would be no incentive whatsoever not to use unfair terms in consumer contracts. Rather, it would even encourage traders to use unfair terms. In most cases, consumers would not notice or litigate anyway, and in the few other cases, the traders would not be sanctioned. The Court made this very clear: the power of the national court to revise the content of unfair terms would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms...in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers’. See also Case C-618/10, *Banco Español de Crédito*, nt. 6, para 69.

¹³² A. D’ADDA, nt. 129, p. 28.

¹³³ In fact, Article 1815(2) of the Italian *Codice civile* provides that: ‘Se sono convenuti interessi usurari la clausola è nulla e non sono dovuti interessi’.

¹³⁴ More precisely, the Recital 1 states that: ‘[w]hereas it is necessary to adopt measures with the aim of progressively establishing the internal market before 31 December 1992; whereas the internal market comprises an area without internal frontiers in which goods, persons, services and capital move freely’; Recital 2 reads as follow: ‘[w]hereas the laws of Member States relating to the terms of contract between the seller of goods or supplier of services, on the one hand, and the consumer of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply in other Member States’; and Recital 5 states that ‘[w]hereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services; whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State’.

¹³⁵ See G. ALPA and M. BESSONE, *I contratti standard nel diritto interno e comunitario*, Torino, 1991, pp. 202 et seq and A. GENTILI, ‘L’inefficacia delle clausole vessatorie’, in *Riv. dir. civ.*, 1997, p. 409, nt.

All that being said, as will be argued, given the asymmetrical nature of the protection provided by Article 6 of the Unfair Contract Terms Directive, the excluded adjustments should only be those with rewarding effects for the seller or supplier, but nothing beyond that¹³⁶.

This view is consistent with the broader public interest in ensuring that all individuals can exercise the freedoms granted by law¹³⁷. The US Supreme Court addressed this concern in the copyright case *Fogerty v Fantasy*, stating: ‘Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement’¹³⁸.

If parties are systematically threatened with *punitive* ‘legal remedies’, this risk creating ‘phantom rights’¹³⁹. Such rights do not exist because law assigns them but because third parties respect them due to the harsh consequences that might be imposed if the trial is lost. Those ‘phantom rights’ inhibit innovation and restrict legitimate freedom of action¹⁴⁰. Therefore, ‘legal remedies’ with *punitive* function should be limited to cases expressly provided by the legal system¹⁴¹.

6. Proportionality

14. Cf, in this regard, See also N. JANSEN, ‘Introduction before Art 6:201’ in N. JANSEN and R. ZIMMERMANN (eds.), *Commentaries on European Contract Laws*, Oxford, 2018, p. 924: ‘Politically, the Directive was nevertheless conceived as an instrument of general market regulation. The Commission aimed its instrument at unifying the rules on unfair contract terms all Europe, establishing a sufficiently high level of protection for consumers, easing access to the Common Market for businesses, and thus enhancing the European economy’.

¹³⁶ A. GENTILI, nt. 135, p. 433.

¹³⁷ Cf, in this regard, B. RAUE, ‘Disgorgement of Profits. Distributive And Deterrant Logics’ in *Law of Remedies. A European Perspective*, nt. 1, p. 163.

¹³⁸ *Fogerty v Fantasy*, [1994] 510 US, 517, 527.

¹³⁹ F. HOFMANN, ‘Kontrolle oder nachlaufender Rechtsschutz – wohin bewegt sich das Urheberrecht?: Rechtsdurchsetzung in der EU zwischen Kompensation und Bestrafung’, in *Gewerblicher Rechtsschutz und Urheberrecht*, 2018, 1 pp. 21 et seq; ID., ‘Disziplinarität, Interdisziplinarität und Interdisziplinarität am Beispiel der Grundsätze “mittelbarer Verantwortlichkeit”’, in *JZ*, 2018, 15/16, pp. 746, 751; B. RAUE, ‘Die doppelte Lizenzgebühr ist kein Strafschadensersatz – Anmerkung zu EuGH ZUM, 349 – Stowarzyszenie “Olawska Telewizja Kablowa”’, in *Zeitschrift für Urheber- und Medienrecht*, 2017, 4, pp. 353 et seq.

¹⁴⁰ B. RAUE, ‘Disgorgement of Profits. Distributive And Deterrant Logics’ in *Law of Remedies. A European Perspective*, nt. 1, pp. 164-165.

¹⁴¹ Ibid.

Despite their differing functions, ‘legal remedies’ must generally adhere to the principle of proportionality, a fundamental tenet in the European law of remedies¹⁴². It is precisely for this reason that it is important to identify contractual nullity as a legal remedy, in order to assess its effects in light of the principle of proportionality, both to avoid situations of *underprotection* and *overprotection* of the weaker party. Proportionality, however, should not be mistaken for judicial discretion; rather, it implies a form of *structured flexibility*¹⁴³.

In private law, which often involves the reconciliation of competing and sometimes conflicting interests, ‘legal remedies’ can serve as essential tools for achieving a fair and equitable balance. An illustrative example is found in Article 7 of Directive (EU) 2016/943 of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure¹⁴⁴. This provision explicitly requires that ‘measures, procedures and remedies provided for in this Directive shall be applied in a manner that (...) is proportionate’¹⁴⁵. Similarly, in the context of trade mark law, Article 130 of Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark provides that, where an EU trade mark has been infringed, courts shall issue an injunction to prevent further infringement ‘unless there are special reasons for not doing so’¹⁴⁶.

More broadly, the Court of Justice has repeatedly affirmed that Member States must establish appropriate systems of remedies, while ensuring that such remedies comply, in particular, with the principle of proportionality. Equitable and proportionate application of injunctive relief is thus essential. For instance, where damages are calculated as double the amount of a hypothetical royalty and this results in compensation that significantly exceeds the actual harm suffered, such a claim may constitute an abuse of rights. This is expressly precluded

¹⁴² F. HOFMANN and F. KURZ, ‘Introduction to the Law of Remedies’ in *Law of Remedies. A European Perspective*, nt. 1, pp. 18 et seq.

¹⁴³ Cf F. HOFMANN, “‘Equity’ im deutschen Lauterkeitsrecht? Der “Unterlassungsanspruch” nach der Geschäftsgeheimnis-RL’, in *Wettbewerb in Recht und Praxis*, 2018, 1, pp. 6-7 .

¹⁴⁴ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, [OJ L157].

¹⁴⁵ More precisely, Article 7 provides that: ‘The measures, procedures and remedies provided for in this Directive shall be applied in a manner that: (a) is proportionate; (b) avoids the creation of barriers to legitimate trade in the internal market; and (c) provides for safeguards against their abuse’.

¹⁴⁶ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification), [OJ L154]. More precisely, Article 130 states that: ‘Where an EU trade mark court finds that the defendant has infringed or threatened to infringe an EU trade mark, it shall, unless there are special reasons for not doing so, issue an order prohibiting the defendant from proceeding with the acts which infringed or would infringe the EU trade mark. It shall also take such measures in accordance with its national law as are aimed at ensuring that this prohibition is complied with’.

by Article 3(2) of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights¹⁴⁷.

In this context, someone has argued that the proportionality test represents a ‘new mega standard’ in the law of remedies¹⁴⁸. Indeed, it has been advocated for its incorporation within remedial framework as a guiding principle. Remedies cannot be regarded as merely automatic legal instruments following a finding of infringement.

A comparable approach emerges in the context of CISG. Article 28 provides that a court is not required to order specific performance if such a remedy is not available under its domestic law¹⁴⁹. This provision implicitly introduces considerations of proportionality or excessive burden into the structure of remedies provided for by the CISG, as made clear also in Article 46, concerning the choice between repair and replacement. The formulation of proportionality in this context would be much more difficult to sustain if addressed exclusively through the rigid framework of subjective rights¹⁵⁰.

The principle of proportionality is also reflected in the field of restitution following termination of the contract. Article 7.3.6. of the PICC allows restitution to take the form of a reasonable monetary equivalent of the performance received¹⁵¹. In this case, proportionality operates alongside the concept of reasonableness, both of which are key parameters that reflect the flexibility underlying the system of remedies¹⁵².

¹⁴⁷ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, [OJ L157]. More precisely, Article 3(2) establishes that: ‘Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse’.

¹⁴⁸ Cf O. FISCHMAN AFORI, ‘A Manifesto on Proportionality and Copyright Law. “Taking Remedies Seriously”’ in *Law of Remedies. A European Perspective*, nt. 1, pp. 223 et seq and F. HOFMANN and F. KURZ, ‘Introduction to the Law of Remedies’, *ibid*, nt. 1, p. 11.

¹⁴⁹ More precisely, Article 28 CISG stipulates that: ‘If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention’.

¹⁵⁰ Cf A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 11: ‘Tende dunque ad affermarsi un circuito proprio dei “rimedi”, che è dotato di principi o criteri, non esportabili facilmente nel vicino campo dei diritti (come quello di *proporzionalità* e/o di *ragionevolezza*)’.

¹⁵¹ Article 7.3.6(2) provides that: ‘If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable’.

¹⁵² A. DI MAJO, *Diritti e Rimedi*, nt. 1, p. 59.

PART II

NON-BINDING CHARACTER OF UNFAIR TERMS AND CONTRACT INVALIDITY

TABLE OF CONTENTS: 7. The ‘Non-Binding Character’ Of Unfair Contract Terms - 8. ... And The Binding Character Of The Contract If It Is Capable Of Continuing In Existence Without The Unfair Terms: *Utile Per Inutile Non Vitiatur* And Partial Invalidity – 8.1. ‘Core’ Terms And ‘Ancillary’ Terms – 8.2. ‘Blue Pencil Test’ And ‘Blue Pencil Rule’ – 9. Reconciling Unilateral ‘Ineffectiveness’ Of Article 6(1) With Domestic Regulation: The Italian Approach – 10. The German Approach: The Unreasonable Consequences Over Sellers And Suppliers And § 306 BGB As A Limitation On Consumer Overprotection – 11. Contract Invalidity And Consumer Protection: From The ‘Nullity’ Of Contract To The ‘Nullities’ Of Contract And Returning

7. The ‘Non-Binding Character’ Of Unfair Contract Terms

A proper understanding of Article 6(1) of the Unfair Contract Terms Directive, which provides that ‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall (...) not be binding on the consumer’, requires clarifying the meaning of the ‘non-binding character’ of such terms¹⁵³.

Indeed, it is necessary to assess whether the ‘non-binding character’ constitutes a ‘legal remedy’ explicitly prescribed by EU law against unfair terms, thereby limiting the discretion of Member States, or whether it instead represents a mere ‘legal effect’ that Member States are

¹⁵³ See, *inter alia*, N. JANSEN, *sub* Art 6:204: Effects of Unfair Contract Terms in N. JANSEN and R. ZIMMERMANN (eds.), n. 135, pp. 971 et seq; P. ROTT, ‘Unfair Contract Terms’ in C. TWIGG-FLESNER (eds.), nt. 131, p. 302; F. DE ELIZALDE, ‘Remedies for Unfair Terms in Light of the General Principles of EU Law’, in *ERPL*, 2024, 32(3), pp. 464 et seq; M.R. MAUGERI, ‘The Rules Applicable When Standard Contract Terms Are Avoided and Contracts with Inequality of Bargaining Power: Construction of a Unitary Model of Invalidity ora Plurality of Models?’ in H. COLLINS (eds.), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law*, Alphen aan den Rijn, 2008, p. 181; P. HELLWEGE and L. MILLER, ‘Control of Standard Contract Terms’ in G. DANNEMANN and S. VOGENAUER (eds.), *The common European sales law in context: interactions with English and German law*, Oxford, 2013, pp. 466-467. In the domestic context, see G. DE CRISTOFARO, ‘Le invalidità negoziali «di protezione» nel diritto comunitario dei contratti’ in S. PAGLIANTINI (eds.), nt. 60, pp. 188 et seq; A. GENTILI, nt. 135, pp. 407-408, where the author, with reference to Article 6 of the Unfair Contract Terms Directive, describes the rule that ‘unfair terms (...) shall not be binding upon the consumer’ as both ‘molto netto e molto flessibile’. More broadly, the consequences of contractual unfairness are addressed also in Article II.-9:408 DCFR, which stipulates that an unfair term is not binding upon the party who has not supplied it. Nevertheless, the remaining provisions of the contract continue to be valid, except where their preservation would prove unreasonable. A comparable formulation is found in Article 79 CESL, though it refrains from incorporating the requirement of reasonableness for the survival of the remainder of the contract, thereby adhering more closely to Article 6(1) of the Unfair Contract Terms Directive. The commentary on Article II.-9:408 DCFR explicitly indicates that the DCFR embraces the notion of partial invalidity rather than absolute invalidity, and it appears that the drafters of the CESL envisaged the same approach. Despite this, the provisions of Article II.-9:408 DCFR and Article 79 CESL are not entirely reconcilable with those contained in Article II.-9:405 DCFR and Article 86 CESL.

obliged to secure, leaving them free to determine the most suitable ‘form and methods’ through which that effect is to be achieved¹⁵⁴.

At first glance, such an analysis might appear redundant, since for a long time it was almost unquestioned that the reference to the ‘non-binding character’ of unfair terms in the Unfair Contract Terms Directive was intended merely to leave Member States at liberty to determine the most appropriate mechanisms for addressing their use¹⁵⁵. More recent developments in the case law of the Court of Justice, however, suggest a different reading: the ‘non-binding character’ of unfair terms is increasingly construed as linked to a specific regulatory model, thereby narrowing the margin of procedural and remedial discretion of Member States¹⁵⁶.

In other words, the issue is whether the concept of the ‘non-binding character’ of unfair terms should be interpreted as reflecting a narrow notion of ‘ineffectiveness’, that is as a specific ‘legal remedy’, or as reflecting a broad notion of ‘ineffectiveness’, understood as a ‘legal effect’ entailing ‘unenforceability’ of such terms against the consumer¹⁵⁷.

This issue was of particular relevance to certain national legal systems, including Italy. As a matter of fact, prior to the enactment of Article 36 of the Italian *Codice del consumo*, which provides that ‘[t]erms considered unfair (...) are null and void’, the matter had been governed differently by the former Article 1469-*quinquies* of the Italian *Codice civile*. Indeed, that provision established that ‘[t]erms considered unfair (...) are ineffective’¹⁵⁸. In this context,

¹⁵⁴ On this issue, G. DE CRISTOFARO, ‘Le invalidità negoziali «di protezione» nel diritto comunitario dei contratti’ in S. PAGLIANTINI (eds.), nt. 60, p. 188 takes a particularly unequivocal position. However, this line of reasoning does not seem straightforward in light of the words of A. GENTILI, nt. 135, p. 412: ‘[s]e l’inefficacia si intende in senso ampio, come esito della rilevazione del vizio (...) “inefficace” equivale a “non vincolante”, e dunque nulla vi aggiunge. Sicché la risposta effettiva dipende dal poter intendere l’inefficacia come un istituto giuridico particolare con una sua specifica disciplina. Si badi: il compito del legislatore nazionale di chiarire a quali condizioni stabilite dal diritto statale la clausola abusiva non è vincolante, non richiedeva un mero *nomen iuris*, ma appunto una disciplina. Cosicché anche se “inefficacia” si intende in senso stretto come *nomen* di una categoria distinta da nullità e annullabilità, il compito del recepimento sarà stato eluso se al *nomen* non corrisponda poi una disciplina specifica e costante. E una disciplina diversa, almeno per qualche punto qualificante, dalla disciplina della nullità, tanto ostinatamente ribadita nei successive progetti, quanto consapevolmente abbandonata nel testo definitivo’.

¹⁵⁵ Cf, *inter alia*, M. FARINA, nt. 128, p. 445; G. DE CRISTOFARO, ‘Le invalidità negoziali «di protezione» nel diritto comunitario dei contratti’ in S. PAGLIANTINI (eds.), nt. 60, p. 188; M. DELLACASA, ‘«Clausola abusiva...e poi?» Integrazione e nullità del contratto nella giurisprudenza della Corte di Giustizia’, in *Accademia*, 2023, p. 26.

¹⁵⁶ Cf below Part III.

¹⁵⁷ Cf A. GENTILI, nt. 135, pp. 412 et seq. With regard to the distinction between invalidity or ineffectiveness of the contract, see G. D’AMICO, ‘L’abuso di autonomia negoziale nei contratti dei consumatori’ in G. D’AMICO and S. PAGLIANTINI (eds.), *Nullità per abuso ed integrazione del contratto*, pp. 4 et seq.

¹⁵⁸ Cf in this regard P.M. PUTTI, nt. 58, pp. 44 et seq; L. MENGONI, ‘Problemi di integrazione della disciplina dei “contratti del consumatore” nel sistema del codice civile’ in *Studi in onore di P. Rescigno*, vol. III, Milano, 1998, p. 541 and now in ID., *Metodo e teoria giuridica. Scritti*, I, C. CASTRONOVO, A.

part of the legal scholarship took the view that unfair terms ought to be regarded as ineffective (in the narrow sense), rather than strictly void, on the assumption that the term itself could not be considered part of the contract¹⁵⁹. In other words, these scholars interpreted ‘ineffectiveness’ as an autonomous legal category, differing from contract nullity¹⁶⁰.

Given such a background, coming back to Article 6 of the Unfair Contract Terms Directive, if, on the one end, ‘ineffectiveness’ is interpreted in a broad sense, the term ‘ineffective’ becomes essentially synonymous with ‘non-binding’. In this sense, the ‘non-binding character’ of an unfair term is merely a ‘legal effect’ arising from its unfairness¹⁶¹.

On the other hand, if ‘ineffectiveness’ is understood in a narrow sense, as an autonomous legal category and a specific ‘legal remedy’ mandated by EU law, the focus shifts to identifying the legal regime that governs its application¹⁶².

All in all, the position that will be advocated herein is that the ‘non-binding character’ of unfair terms under Article 6(1) should not be regarded as a ‘legal remedy’. Rather, it represents a ‘legal effect’ that national legal systems are required to guarantee through their own remedial mechanisms.

ALBANESE, A. NICOLUSSI (eds.), Milano, 2011, pp. 352 et seq. According to the author — in the framework of consumer-contract regulation, and albeit with reference to the fate of the contract in the presence of an unfair term — equity expands the powers of the judge not only for the purpose of supplementing the contract by filling its gaps, but also for the purpose of correcting its content through the ‘annulment’ of terms deemed unfair.

¹⁵⁹ Cf G.B. FERRI, ‘Nullità parziale e clausole vessatorie’, in *Riv. dir. comm.*, 1977, I, pp. 11, 16; C.M. BIANCA, *Diritto civile*, III, *Il contratto*, 3rd ed., Milano, 2019, p. 354; L. FRANCIOSI, ‘Clausole vessatorie’ in *Enc. giur.*, vol. VI, Roma, 1988, pp. 8 et seq; M. NUZZO, ‘Predispensione di clausole e procedimento di formazione del contratto’ in *Studi in onore di F. Santoro-Passarelli*, vol. III, Napoli, 1972, p. 564.

¹⁶⁰ More precisely, some scholars suggested that while the concept of contract invalidity reflects a negative evaluation by the legal system of the contract, resulting in the denial of the validity of the contract itself; the notion of ineffectiveness in a narrow sense ought to be interpreted as a legal situation concerning the *functioning* of the contract. See in this regard, G. D’AMICO, ‘L’abuso di autonomia negoziale nei contratti dei consumatori’ in G. D’AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 10-11; V. SCALISI, ‘Inefficacia (dir. priv.)’ in *Enc. dir.*, vol. XXI, Milano, 1971, pp. 343 et seq.

¹⁶¹ As noted above (see Part I, § 4), where the law provides that a contract gives rise to binding obligations, it means that the conclusion of a contract with certain requirements (A) entails duties to perform (B). Conversely, a contract which does not fulfill those requirements ($\neg A$) gives rise to no such obligations ($\neg B$). In this context, unfairness ($\neg A$) leads directly to ineffectiveness ($\neg B$) in a broad sense.

¹⁶² Cf A. GENTILI, nt. 135, p. 412. This distinction is far from merely formal. Should the ‘non-binding character’ of unfair terms be seen as a ‘legal remedy’ directly laid down by EU law, it would follow that this remedy must be uniformly applied across all Member States and its substantive content would derive from EU legislation itself. Alternatively, if the ‘non-binding character’ described in Article 6(1) is interpreted as the result to be achieved, within the meaning of Article 288 TFEU, the emphasis lies on the ‘legal effect’ rather than the means. In this view, the various national categories, such as total or partial nullity, avoidance, or even non-existence, are not imposed by the Directive but rather constitute the ‘form and methods’ through which Member States fulfil the obligation to exclude unfair terms from consumer contracts.

In other words, the Unfair Contract Terms Directive partially harmonizes the legal effects that must follow the application of a domestic contractual remedy, by requiring that, regardless of the remedy selected by the Member State, it must lead to the ineffectiveness (in a broad sense) of the unfair term, but nothing beyond this¹⁶³.

A closer examination demonstrates that several arguments support this thesis.

First of all, the nature of directives under EU law inherently respects the principle of conferral in favor of Member States¹⁶⁴. It is precisely in this framework that a directive should be understood as to lead to harmonization of the national laws. Such a stance seems to be reiterated by Article 7 of the Unfair Contract Terms Directive which clearly states that ‘Member States shall ensure that (...) adequate and effective *means* exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers’¹⁶⁵.

Secondly, this position is also confirmed by a historical analysis of the Unfair Contract Terms Directive. In fact, the provision in Article 6 has undergone a significant transformation over time¹⁶⁶.

In its original wording, the provision expressly used the term ‘nullity’¹⁶⁷. At a later stage, a shift occurred towards a different wording that invoked the concept of ‘unenforceability against the consumer’¹⁶⁸. Ultimately, the current wording was adopted, which is more neutral and

¹⁶³ Cf M.R. MAUGERI, nt. 153, p. 180.

¹⁶⁴ C. KILPATRICK, ‘The Future of Remedies in Europe’ in C. KILPATRICK, T. NOVITZ and P. SKIDMORE (eds.), nt. 1, pp. 3 et seq. The author observes that reference is generally made to the concept of ‘national procedural autonomy’ rather than to that of ‘remedial autonomy’ and explains that ‘[c]ommentators have followed this and have placed under the shorthand of “remedies” or, indeed, “procedure” all of these aspects concerning the judicial enforcement of EC law rights. Remedies and procedure have not been clearly distinguished inter se as being distinctive parts of a legal claim. Rather, they are identified through contradistinction to issues of substance concerning the content of EC law rights’. See also C. HARLOW, ‘A Common European Law of Remedies?’, *ibid*, p. 73.

¹⁶⁵ As already mentioned, Article 7(1) of the Unfair Contract Terms Directive provides that: ‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers’. In this vein, Article 7(1) refers back to Recital 24 which states that: ‘(...) the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts’. Accordingly, Article 7(2) stipulates that: ‘The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms’.

¹⁶⁶ See below nt. 167 and 168.

¹⁶⁷ See Article 3 of the Proposal for a Council Directive on unfair terms in consumer contracts [90/C 243/02] and Article 7 of the Amended proposal for a Council Directive on unfair terms in consumer contracts [92/C 73/05], pp. 7 et seq. Both Article 3 and Article 7 stipulated that ‘[m]ember States (...) shall provide that if (...) unfair terms are used in such a contract they shall be void’.

¹⁶⁸ More precisely, on 29 June 1992, the Council adopted an agreement in principle on a common position: it was during this period that the amended proposal of the Commission was transformed into

nuanced, deliberately chosen to leave it to the legal systems of the Member States, in accordance with Article 288 TFEU, the task of defining the forms and methods by which unfair terms are not used in contracts concluded with consumers by a seller or supplier and, if such terms are nevertheless used, are not binding on the consumer¹⁶⁹.

In this regard, Recital 21 of the Unfair Contract Terms Directive entrusts Member States with the responsibility of adopting measures to prevent the inclusion of unfair terms in consumer contracts¹⁷⁰. This Recital has been effectively transposed into Article 6(1), which replicates this provision almost verbatim, while also explicitly referring to the rules ‘provided for under (...) national law’, as an unequivocal acknowledgement of national procedural autonomy¹⁷¹.

Moreover, if one proceeds to a general analysis, it becomes apparent that ‘ineffectiveness’ of unfair contract terms – understood in a broad sense – is firmly embedded in European private law in the area of consumer protection¹⁷². As a consequence, this also entails that ‘ineffectiveness’ generally operates *unilaterally*¹⁷³. Therefore, where for instance the term might be advantageous to the consumer, the seller or supplier remains bound by it. This rule is established, for example, in Article 6:306(1) of the *Acquis Principles*, which states: ‘Unfair terms are not binding on a party who did not supply them’.

Comparable provisions exist in other European legal instruments governing standard terms, particularly where such terms are excluded due to their surprising nature or inadequate disclosure¹⁷⁴. Indeed, Article 2:104 of PECL and Article 70 of CELS both establish that contract terms which have not been individually negotiated may only be invoked against a party if

the text finally approved on 5 April 1993. See, in this context, V. RIZZO, *Le “clausole abusive” nell’esperienza tedesca, francese, italiana e nella prospettiva comunitaria*, Napoli, 1994, p. 580.

¹⁶⁹ Cf V. RIZZO, nt. 168, p. 580.

¹⁷⁰ More precisely, Recital 21 establishes that: ‘Whereas Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions’.

¹⁷¹ As already observed, in Italy, for example, Article 36 of the Italian *Codice del consumo* provides that unfair terms are void, whereas the contract continues to bind parties; in Spain, Article 83 of the *Ley General Para la Defensa de los Consumidores y Usuarios* establishes that unfair terms as void; in France, Article L 241.1 of the *Code de la consommation* states that unfair terms shall be considered as *non écrites*; in Germany, § 307(1) of the BGB establishes that standard terms that, contrary to good faith, cause a disproportionate disadvantage to the adhering party are ineffective. On this topic, see G. DE CRISTOFARO, ‘Invalidity of Contracts and Contract Terms in the Feasibility Study on a Future Instrument for European Contract Law’ in R. SCHULZE and J. STUYCK (eds.), *Towards a European Contract Law*, Munich, 2011, p. 105.

¹⁷² N. JANSEN, ‘Art 6:204: Effects of Unfair Contract Terms’ in N. JANSEN and R. ZIMMERMANN (eds.), n. 135, pp. 971-972.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

reasonable steps were taken to bring them to that party's attention before or at the time of contract formation¹⁷⁵.

Nevertheless, certain legal instruments appear to envisage a broader, potentially *bilateral* form of 'ineffectiveness'¹⁷⁶. As a matter of fact, Article 2.1.20. of PICC stipulates that: 'No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party'.

Ultimately, Unfair Contract Terms Directive appears to reaffirm the European rule of *unilateral* 'ineffectiveness', as enshrined in Article 6(1).

Having thus clarified the meaning of the 'non-binding character' of unfair terms, the question of the appropriate contractual remedy to be attached to those terms has given rise to a particularly vibrant and ongoing debate on the national level¹⁷⁷.

For instance, § 307(1) BGB establishes that: 'Bestimmungen in Allgemeinen Geschäftsbedingungen sind unwirksam, wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen'¹⁷⁸. In the same vein, under the French legal system, Article L 241.1 of the *Code de la consommation* states that unfair terms shall be considered as *non écrites*¹⁷⁹. This solution - whereby the unfair term is deemed never to have formed part of the contract and is thereby retroactively removed - is often seen as both simpler and more radical¹⁸⁰. The use of this legal fiction enables the preservation of the remainder of the contract, even where the unfair term might have been of essential importance to the seller or supplier. Moreover, it allows for the substitution of the unfair

¹⁷⁵ More precisely, Article 2:104 PECL establishes that: 'Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded'. On the other hand, Article 70 of CESL stipulates that: 'Contract terms supplied by one party and not individually negotiated within the meaning of Article 7 may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded'.

¹⁷⁶ Cf N. JANSEN, 'Art 6:204: Effects of Unfair Contract Terms' in N. JANSEN and R. ZIMMERMANN (eds.), n. 135, p. 971.

¹⁷⁷ V. RIZZO, nt. 168, p. 622. For a critical analysis within the German context, see P. ULMER, 'Zur Anpassung des AGB-Gesetzes an die EG-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen' in *EuZW*, 1993, p. 338; K. FREY, 'Wie ändert sich das AGB-Gesetz?', in *ZIP*, 1993, p. 579; H.W. ECKERT, 'Die EG-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen und ihre Auswirkungen auf das deutsche Recht', in *Wertpapiermitteilungen*, 1993, p. 1077; H. HEINRICHS, 'Die EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen', in *NJW*, 1993, p. 1821. According to Ulmer, the contract should remain binding only if it can continue into existence without the unfair terms; he therefore proposed the elimination of what was at that time *Abs. 3 of § 6 AGB-Gesetz*. Heinrichs, on the other hand, took the opposite view.

¹⁷⁸ See above nt. 171.

¹⁷⁹ See above nt. 171.

¹⁸⁰ P. ROTT, 'Unfair Contract Terms' in C. TWIGG-FLESNER (eds.), nt. 131, p. 302.

provision with the relevant mandatory rules that have been violated, or with appropriate default rules provided by law¹⁸¹.

Other legal systems, while aligning with this general framework, go beyond the mere declaration of the non-binding nature of unfair terms. Instead, such terms are classified as invalid, and in some jurisdictions, as null and void or merely avoidable. For example, Article 6:233 BW stipulates that: ‘Een beding in algemene voorwaarden is vernietigbaar’¹⁸². By contrast, Article 36 of the Italian *Codice del consumo* explicitly provides that: ‘Le clausole considerate vessatorie (...) sono nulle’¹⁸³.

8. ... And The Binding Nature Of The Contract If It Is Capable Of Continuing In Existence Without The Unfair Terms: Utile Per Inutile Non Vitiatur And Partial Invalidity

The rule that unfair terms are not binding upon the consumer while the contract shall continue to bind the parties upon the same terms if it is capable of continuing in existence may be analyzed within the broader framework of partial invalidity of contracts¹⁸⁴.

This notion was systematically developed by medieval canon and Roman jurists, who expanded upon a concept deeply rooted in the *ius commune*, according to which one valid stipulation should not be vitiated by another one¹⁸⁵.

From this, the maxim *utile per inutile non vitiatur* emerged as a general rule governing contract law¹⁸⁶.

¹⁸¹ Cf V. RIZZO, nt. 168, p. 623; J. GESTIN and I. MARCHESSAUX, ‘L’élimination des clauses abusives end rout français, à l’épreuve du droit Communautaire’, in *REDC*, 1993, p. 86; E. HONDIUS, ‘Clauses abusives dans les contrats de consommation: vers une directive européenne’, in *REDC*, 1993, pp. 203 et seq. The authors observe that any harmonization at the European level of the rules on unfair terms necessarily requires a prior harmonization of the general rules governing contracts.

¹⁸² Cf P. ROTT, ‘Unfair Contract Terms’ in C. TWIGG-FLESNER (eds.), nt. 131, p. 302. This formulation originates from the 1992 revision of the Civil Code and therefore predates the Unfair Contract Terms Directive. Academic debate has arisen as to whether the wording should be amended in response to the Directive. However, since the provision applies to all contracts involving standard terms, and not exclusively to business-to-consumer agreements, the general wording has been retained. As clarified in case law, Dutch courts are now required, in business-to-consumer contexts, to interpret ‘vernietigbaar’ as implying an *ex officio* obligation to disapply unfair terms, as established by the Dutch Supreme Court (Hoge Raad) in *Heesakkers/Voets*, which clarified the implications of the Court of Justice’s case law on unfair terms for Dutch law.

¹⁸³ See above nt. 171.

¹⁸⁴ N. JANSEN, *sub* Art 6:204: Effects of Unfair Contract Terms in N. JANSEN and R. ZIMMERMANN (eds.), n. 135, p. 972.

¹⁸⁵ *Ibid.*

¹⁸⁶ G. TOMÁS, ‘Utile per inutile non vitiatur: can favor contractus be considered a European regula iuris?’, in *ERCL*, 2016, 12(3), pp. 265-270. See also N. JANSEN, *sub* Art 6:204: Effects of Unfair Contract Terms in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, p. 972, for a comprehensive analysis of the Roman legal sources.

In this context, it might appear that the modern European approach to safeguarding the contract despite the presence of unfair terms resonates with the established position of English law, whereby an ineffective term will be *severed* from the contract provided that its removal does not require a judicial supplementation of the agreement¹⁸⁷. The underlying rationale is to prevent the invalidity of one term from depriving the consumer of the contract's overall utility and intended performance¹⁸⁸.

Nevertheless, as a general tenet of contract law, the preservation of the contract notwithstanding the ineffectiveness (in a broad sense) or invalidity of certain terms may, in specific instances, give rise to problematic outcomes, particularly where the clause in question is of fundamental significance to one party's interest in the contract¹⁸⁹.

Therefore, over the course of the 19th century, the principle *utile per inutile non vitiatur* underwent a process of requalification: what was one treated as a general rule was increasingly downgraded to a rebuttable presumption, or, in some legal systems, dismissed or tied to the hypothetical will of the parties¹⁹⁰. In practice, the application of the rules on partial invalidity across most European legal systems tends to hinge on a subjective inquiry, namely, whether the parties would have entered into the agreement in the absence of the invalid provision¹⁹¹.

As an example, this approach is clearly embodied in the Italian legal system, which under Article 1419 of the *Codice civile* provides that partial nullity entails the nullity of the entire

¹⁸⁷ E. MCKENDRICK, 'Contract: In General' in A. BURROWS (eds.), *English Private Law*, Oxford, 2013, p. 519 ('(...) if a single term were severable, the party in breach might be prevented (...) from relying on one part of it while another might satisfy the requirement of reasonableness or be unaffected by the (...) provisions. But the court will not modify the term actually included so as to allow the party in breach to rely, eg, on a reasonable limitation, where the term provided for an unreasonable exclusion, of liability').

¹⁸⁸ See, in this regard, R. SCHULZE and F. ZOLL, *European Contract Law*, 3rd ed., Baden-Baden, 2021, p. 190 and Case C-260/18, *Dziubak*, ECLI:EU:C:2019:819: 'Article 6(1) of Directive 93/13 must be interpreted as precluding unfair terms contained in a contract from being upheld where their removal would entail that contract being annulled and the court takes the view that that annulment would give rise to unfavourable effects for the consumer, if the latter has not consented to them being upheld'.

¹⁸⁹ N. JANSEN, *sub* Art 6:204: Effects of Unfair Contract Terms in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, p. 972. See, in this regard, the opinion of Advocate General Tizzano (ECLI:EU:C:2005:576, paras 79-80), in Case C-302/04, *Ynos kft v János Varga*, ECLI:EU:C:2006:9: '(...) the aim of the Directive is to rebalance the contractual position of the consumer by preventing him "from being bound by an unfair term" rather than to safeguard the contractual freedom of the parties, and particularly that of the seller or supplier, who might indeed have every interest in escaping the obligations of a contract which, when the balance has been adjusted, would be less advantageous to him'.

¹⁹⁰ Cf S. LOHSSE, *sub* Art 4:116: Partial Avoidance in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, pp. 726-728.

¹⁹¹ Cf S. LOHSSE, 'Art 4:116: Partial Avoidance' in N. JANSEN and R. ZIMMERMANN (eds.), n. 135, pp. 726-728.

contract where it is established that the parties would not have concluded the agreement without that provision that has been deemed null and void¹⁹².

By contrast, certain legal systems adopt a more neutral and *objective* stance. Dutch law, for example, refrains from engaging with the parties' hypothetical intentions and instead assesses whether the provision can be severed in light of the contract's overall functional coherence¹⁹³.

That said, the practical significance of the distinction between the two main approaches to partial nullity (subjective and objective) should not be overestimated.

In fact, even when an apparently subjective criterion is adopted, its application often converges with a more objective reasoning¹⁹⁴. This is clearly demonstrated by Article 3.2.13. of PICC¹⁹⁵. The official comment clarifies that the assessment of unreasonableness depends on whether a party would have entered into the contract if it had foreseen the invalidity of the provision in question¹⁹⁶. However, the determination of such hypothetical intent is often based on an objective analysis, i.e., whether it is reasonable to conclude that the contract would still have been entered into in the absence of the invalid clause¹⁹⁷.

Overall, in the context of unfair contract terms, the application of the aforementioned rules on partial invalidity does not seem entirely appropriate. It is easy to argue, in fact, that the seller or supplier would never have entered into the contract without the clause that turned out to be unfair, thereby rendering inoperative the rule according to which 'the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms'¹⁹⁸.

¹⁹² More precisely, Article 1419 of the Italian *Codice civile* stipulates that: 'La nullità parziale di un contratto o la nullità di singole clausole importa la nullità dell'intero contratto, se risulta che i contraenti non lo avrebbero concluso senza quella parte del suo contenuto che è colpita dalla nullità'.

¹⁹³ Cf Article 3:41 BW: 'Betreft een grond van nietigheid slechts een deel van een rechtshandeling, dan blijft deze voor het overige in stand, voor zover dit, gelet op inhoud en strekking van de handeling, niet in onverbreekelijk verband met het nietige deel staat'. In this context, see also S. LOHSSE, *sub* Art 4:116: Partial Avoidance in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, p. 728.

¹⁹⁴ Cf W. FLUME, *Allgemeiner Teil des Bürgerlichen Rechts*, II, *Das Rechtsgeschäft*, 4th ed., 1992, Berlin/Heidelberg/New York, p. 579 and S. LOHSSE, *sub* Art 4:116: Partial Avoidance in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, p. 728.

¹⁹⁵ More precisely, Article 3.2.13 of PICC establishes that: 'Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract'.

¹⁹⁶ Indeed, the official comment explains that: 'This Article deals with situations where the grounds of avoidance affect only individual terms of the contract. In such cases the effects of avoidance will be limited to the terms affected unless it would in the circumstances be unreasonable to uphold the remaining contract. This will generally depend upon whether or not a party would have entered into the contract had it envisaged that the terms in question would have been affected by grounds of avoidance'.

¹⁹⁷ Cf S. LOHSSE, *sub* Art 4:116: Partial Avoidance in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, p. 728.

¹⁹⁸ S. LOHSSE, *sub* Art 4:116: Partial Avoidance in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, p. 729.

In the German legal tradition, for example, the idea that contract invalidity as such could constitute a general rule in the field of unfair terms has never been seriously considered¹⁹⁹. Nor have the hypothetical will of the parties, or the broader principle of party autonomy, typically been considered decisive²⁰⁰.

In this context, it has indeed been observed that a party that inserts unfair terms into a contract is abusing the principle of freedom of contract, hence, the seller or supplier's preferences cannot be taken into account to prevent the partial invalidity of the contract merely on the ground that they would not have entered into it in the absence of the clause subsequently found to be unfair²⁰¹.

In Article 4:116 of PECL, this principle has become part of a general rule on partial avoidance; here the effect of avoidance of particular terms of a contract only is limited 'to those terms unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold the remaining contract'²⁰². In the same vein, Article II.-9:408 of DCFR stipulates that: 'A term which is unfair (...) is not binding on the party who did not supply it. If the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties'. Similarly, Article 54 of CESL on partial avoidance states that: 'Where a ground of avoidance affects only certain contract terms, the effect of avoidance is limited to those terms unless it is unreasonable to uphold the remainder of the contract'.

Secondly, it is widely recognized that the burden of risk associated with the removal of an unfair term should fall on the seller or supplier, who should bear the consequences of being bound by a contract that proves to be less advantageous than initially anticipated²⁰³. This allocation of risk operates not only as a matter of fairness, but also as a preventive mechanism, discouraging the inclusion of unfair terms from the outset²⁰⁴.

In line with this reasoning, the prevailing legal approach is to presume that the remaining contract shall continue to bind the parties despite the removal of the unfair term. Exceptions to this presumption should remain exceptional and are generally justified only when the party

¹⁹⁹ N. JANSEN, *sub* Art 6:204: Effects of Unfair Contract Terms' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, p. 972.

²⁰⁰ F. ESPOSITO, 'Dziubak Is a Fundamentally Wrong Decision: Superficial Reasoning, Disrespectful of National Courts, Lowers the Level of Consumer Protection', in *ERCL*, 2020, 16(4), pp. 540 et seq.

²⁰¹ See, *inter alia*, A. D'ADDA, 'La correzione del «contratto abusivo»: regole dispositive in funzione «conformativa» ovvero una nuova stagione per l'equità giudiziale?' in A. BELLAVISTA and A. PLAIA (eds.), *Le invalidità nel diritto privato*, Milano, 2011, p. 371.

²⁰² Cf the comprehensive analysis of S. LOHSSE, *sub* Art 4:116: Partial Avoidance' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, pp. 726 et seq.

²⁰³ P. ROTT, 'Unfair Contract Terms' in C. TWIGG-FLESNER (eds.), nt. 131, p. 303.

²⁰⁴ *Ibid.*

invoking the clause, typically the seller or supplier, can demonstrate that maintaining the contract would amount to an unacceptable hardship on his side²⁰⁵.

However, against this background, it will be argued that a systematic interpretation of Article 6(1) of the Unfair Contract Terms Directive should not prevent the application of national rules on contract supplementation.

8.1. 'Core' Terms And 'Ancillary' Terms

On a preliminary analysis, the rule laid down in the Unfair Contract Terms Directive, relating to the 'survival' of the contract, devoid of its unfair terms, resonates with the traditional doctrine of partial invalidity outlined above, although reformulated as partial 'ineffectiveness' in the broad sense.

However, a more detailed analysis of Article 6(1) reveals that its logic differs both from the traditional *subjective* approach, based on reconstructing the hypothetical intentions of the parties, and from the *objective* approach, based on criteria of reasonableness. Instead, it adopts a predominantly *structural* approach: a contract can only continue to exist if the unfair terms are 'ancillary' to the agreement and not 'core' terms²⁰⁶. This approach also seems to be adopted by § 184(1) of Restatement of Law, (Second) Contracts which states that: 'If less than all of an agreement is unenforceable under the rule stated in § 178, a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed

²⁰⁵ See, for instance, Article 306(3) BGB which stipulates that: 'Der Vertrag ist unwirksam, wenn das Festhalten an ihm auch unter Berücksichtigung der nach Absatz 2 vorgesehenen Änderung eine unzumutbare Härte für eine Vertragspartei darstellen würde'.

²⁰⁶ See, in this regard, A. D'ADDA, 'La correzione del «contratto abusivo»: regole dispositive in funzione «conformativa» ovvero una nuova stagione per l'equità giudiziale?' in A. BELLAVISTA and A. PLAIA (eds.), nt. 201, pp. 376-377 and nt. 40: 'Nel passato, si noti, era proprio sulla base di considerazioni di tipo strutturale che, alla radice, si tendeva a risolvere il giudizio di nullità parziale: il contratto parzialmente viziato si sarebbe salvato o meno a seconda della natura della clausola caducata: essenziale od accidentale, primaria o secondaria'. Moreover, the author explains that so-called 'ancillary terms' may in practice turn out to be 'core terms' for the parties' interests. Cf also M. DELLACASA, 'Judicial review of "core terms" in consumer contracts: defining the limits', in *ERCL*, 2015, 11(2), pp. 152 et seq; F. GÓMEZ POMAR, 'Core versus Non-Core Terms and Legal Controls over Consumer Contract Terms: (Bad) Lessons from Europe?', in *ERCL*, 2019, 15(2), pp. 177 et seq; M.J. HESSELINK, 'Unfair Terms in Contracts between Businesses' in R. SCHULZE and J. STUYCK, nt. 171, pp. 131 et seq; H.W. MICKLITZ, 'Reforming European Unfair Terms Legislation in Consumer Contracts', in *ERCL*, 2010, 6(4), pp. 347 et seq; M. SCHILLIG, 'Directive 93/13 and the Price Term Exemption: A Comparative Analysis in the Light of the Market for Lemons Rationale', in *International and Comparative Law Quarterly*, 2011, 60(4), pp. 933 et seq; P. SIRENA, 'La disciplina delle clausole contrattuali abusive nell'interpretazione della giurisprudenza e dell'Arbitro Bancario Finanziario (ABF)' in A. BELLELLI, L. MEZZASOMA and F. RIZZO (eds.), *Le clausole vessatorie a vent'anni dalla Direttiva CEE 93/13*, Napoli, 2014, p. 67; M. FRAGALI, 'Clausole, frammenti di clausole, rapporti fra clausole e negozio', in *Giust. civ.*, 1959, I, pp. 312 et seq.

exchange'. In other words, if the performance as to which the agreement is unenforceable is an essential part of the agreed exchange, the inequality will be so great as to make the entire agreement unenforceable. Under § 184(1), however, if that performance is not an essential part of the agreed exchange, a court may enforce all but the part that contravenes public policy²⁰⁷.

In the context of unfair terms, as has been observed, the annulment of the contract in its entirety may potentially expose the consumer to 'particularly unfavourable consequences' and loan agreements offer a significant example in this regard: the annulment of the contract in its entirety may result in the consumer being immediately required to repay the loan balance in full²⁰⁸.

The problem that arises, therefore, is to understand what the Directive means by 'ancillary' terms and 'core' terms. In this regard, from a systematic interpretation of Article 4(2) and Article 6(1), it emerges that 'core' terms should be interpreted as referring to those provisions defining the main subject matter of the contract and those concerning the adequacy of price and remuneration²⁰⁹.

Given such a background, it should be noted that the *structural* approach to partial invalidity has, however, been the subject of vigorous criticism, particularly from the supporters of the *subjective* view. According to this perspective, the essential or ancillary nature of a term should

²⁰⁷ More precisely, the official comment to § 184 of Restatement of Law, (Second) Contracts explains that: 'Under the rule stated in the preceding Section, an agreement may be unenforceable as to corresponding equivalents on each side but enforceable as to the rest. If it is not possible to apportion the parties' performances in this way so that corresponding concessions are made on both sides, a refusal to enforce only part of the agreement will necessarily result in some inequality. If the performance as to which the agreement is unenforceable is an essential part of the agreed exchange, the inequality will be so great as to make the entire agreement unenforceable. Under Subsection (1), however, if that performance is not an essential part of the agreed exchange, a court may enforce all but the part that contravenes public policy. For example, a promise not to compete that is unreasonably in restraint of trade will often not invalidate the entire agreement of which it is a part. Whether the performance is an essential part of the agreed exchange depends on its relative importance in the light of the entire agreement between the parties. A party who has engaged in such serious misconduct that the entire agreement is unenforceable cannot take advantage of the rule stated in Subsection (1)'.

²⁰⁸ See, *inter alia*, Case C-26/13, *Kásler and Káslerné Rábai*, nt. 9, paras 83-84: 'However, if, in a situation such as that at issue in the main proceedings, it was not permissible to replace an unfair term with a supplementary provision, requiring the court to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, so that the dissuasive effect resulting from the annulment of the contract could well be jeopardised. In general, the consequence of an annulment is that the outstanding balance of the loan becomes due forthwith, which is likely to be in excess of the consumer's financial capacities and, as a result, tends to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts'. See, in this context, G. DE NOVA, 'Il contratto contrario a norme imperative', in *Rass. crit. dir. priv.*, 1985, 3-4, p. 451 ('Se la norma imperativa è posta a protezione di uno dei contraenti, nella presunzione che il testo contrattuale gli sia imposto dall'altro contraente, la nullità integrale del contratto potrebbe piuttosto nuocere che giovare al contraente che il legislatore intende proteggere').

²⁰⁹ Cf N. JANSEN, *sub* Art 6:205: Exclusions from Unfairness Test' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, p. 981.

not, in itself, be decisive for the fate of the contract. Indeed, even ‘ancillary’ terms may, in light of the specific allocation of interests agreed upon by the parties, assume a ‘primary’ role²¹⁰.

It is also true, however, that the *structural* approach suggests something important, namely that where the invalid clause governs an essential element of the contract, it is not possible, at least in principle, to preserve the rest, regardless of the policy considerations of the legislator or its willingness to intervene in a corrective manner in the parties’ agreement.

All in all, it is perhaps also for this reason that Article 4(2) expressly excludes from the unfairness assessment both the definition of the main subject matter of the contract and the adequacy of the price and remuneration, unless these provisions are not drafted in a clear and transparent manner, in which case they are not shielded from scrutiny²¹¹.

Traditionally, this exemption has been explained by making reference to two interlocking foundations: the general principle of freedom of contract and a classical liberal commitment to the view that prices ought to be determined by market dynamics rather than by legislative or judicial intervention²¹².

In addition, it should be emphasized that, the policy decision to shield ‘core’ terms from judicial review, provided that they were sufficiently transparent, was far from uncontested²¹³.

²¹⁰ Cf A. D’ADDA, *Nullità parziale e tecniche di adattamento del contratto*, nt. 60, pp. 44 et seq. The author explains that, within the German context, the survival of the contract is linked to the concept of *Teilbarkeit*, in the sense that ‘ein Rest zurückbleibt der als selbständiges Rechtsgeschäft für sich bestehen kann’. See also W. HEFERMEHL in H.T. SOERGEL (eds.), *Bürgerliches Gesetzbuch*, 13th ed., Stoccarda, 1987, sub § 139, Rn. 23.

²¹¹ More precisely, Article 4(2) of the Unfair Contract Terms Directive stipulates that: ‘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 supplied in exchange, on the other, in so far as these terms are in plain intelligible language’.

²¹² Cf Article 6:303(2) of the *Acquis Principles*: ‘For contract terms which are drafted in plain and intelligible language, the unfairness test extends neither to the definition of the main subject matter of the contract, nor to the adequacy of the price to be paid’; Article 4:110(2) of the PECL: ‘This Article does not apply to: (a) a term which defines the main subject matter of the contract, provided the term is in plain and intelligible language; or to (b) the adequacy in value of one party’s obligations compared to the value of the obligations of the other party’; Article II.-9:406(2) DCFR: ‘For contract terms which are drafted in plain and intelligible language, the unfairness test extends neither to the definition of the main subject matter of the contract, nor to the adequacy of the price to be paid’; Article 80 of the CESL: ‘(1) Sections 2 and 3 do not apply to contract terms which reflect rules of the Common European Sales Law which would apply if the terms did not regulate the matter. (2) Section 2 does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the trader has complied with the duty of transparency set out in Article 82. (3) Section 3 does not apply to the definition of the main subject matter of the contract or to the appropriateness of the price to be paid’.

²¹³ Cf H.W. MICKLITZ, nt. 206, p. 363: ‘The exclusion of the so-called core terms gave rise to much debate, not only over the question whether core terms should be excluded at all, but also what exactly ‘core terms’ means and how they can be distinguished from the other contract terms which are submitted to judicial control’. Moreover the author explains that in its Green Paper on the Revision of the Consumer Acquis [COM(2006) 744 final], the Commission had raised the question whether the revised

Indeed, the European Commission originally proposed subjecting such provisions to the fairness test, but this initiative encountered resolute opposition, most prominently from Germany, and was ultimately abandoned²¹⁴. Thus, the Unfair Contract Terms Directive's more permissive stance has since remained largely undisturbed, enjoying broad, though not unqualified, acceptance across the Member States²¹⁵.

All that being said, the main difficulty lies, of course, in the persistent challenge of drawing a bright distinction between 'core' terms and 'ancillary' terms²¹⁶. This ambiguity is particularly acute in financial and banking services but is likewise discernible in heavily regulated sectors such as energy, transport and telecommunications²¹⁷.

In this context, the case law on foreign currency linked loans is instructive. In such cases, the Court of Justice has held, for example, that the differential between a bank's buying and selling exchange rates does not amount to remuneration for a service actually rendered to the consumer, who receives and repays the loan exclusively in domestic currency²¹⁸. Therefore, these provisions do not fall under the definition of 'core' terms. Indeed, where one party 'does not provide any actual service which could constitute consideration for that charge', the charge cannot relate to the quality/price ratio; thus a distinct service needs to be identified in exchange for the price or remuneration²¹⁹. Nevertheless, the Court of Justice also acknowledged that for

EU Directive should cover the core terms. Nevertheless, the replies to the Green Paper did not paint a clear picture.

²¹⁴ 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', in *CMLR*, 1991, 28(3), pp. 655-657; P. HOMMELHOFF and K.-U. WIEDEMANN, 'Allgemeine Geschäftsbedingungen gegenüber Kaufleuten und unausgehandelte Klauseln in Verbraucherverträgen: Grundsätzliches zur Transformation der EG-Klauselrichtlinie ins deutsche Recht', in *ZIP*, 1993, pp. 563 et seq.

²¹⁵ N. JANSEN, *sub* Art 6:205: Exclusions from Unfairness Test in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, pp. 981-982.

²¹⁶ Cf H.W. MICKLITZ, nt. 206, p. 363.

²¹⁷ Cf N. JANSEN, *sub* Art 6:205: Exclusions from Unfairness Test' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, p. 982.

²¹⁸ See Case C-26/13, *Kásler and Káslerné Rábai*, nt. 9, paras 57-58: 'In the circumstances, it must be stated, in addition, that the exclusion of the assessment of the unfairness of a term being limited to the adequacy of the price and the remuneration on one hand as against the services or goods supplied on the other, it cannot apply where there is a challenge to the variation between the selling rate of exchange of a foreign currency, which must be used in accordance with that term in order to calculate the repayment instalments, and the buying rate of exchange of that currency, which must be used in accordance with other terms of the loan agreement in order to calculate the amount of the loan advanced. Moreover, that exclusion cannot apply to terms that, like Clause III/2, merely determine the conversion rate of the foreign currency in which the loan agreement is denominated, in order to calculate the repayment instalments, without however any foreign exchange service being supplied by the lender in making that calculation and do not, therefore, constitute "remuneration", the adequacy of which as consideration for a service supplied by the lender could be assessed to determine its unfairness pursuant to Article 4(2) of Directive 93/13'.

²¹⁹ See Case C-143/13, *Bogdan Matei and Ioana Ofelia Matei vs SC Volksbank România SA*, ECLI:EU:C:2015:127, paras 70-71: 'Whilst the matter is once again subject to verification by the

consumers the exchange rate spread is indistinguishable from a concealed surcharge embedded within the interest rate and thus fails the transparency requirement. On this view, the justification for subjecting such terms to fairness control was not really their ancillary character, but their opacity, which precluded their shelter under Article 4(2)'s exemption²²⁰.

In conclusion, this dichotomy between 'core' and 'ancillary' terms carries further legal consequences, as will be examined in Part III.

As a matter of fact, the Court of Justice has used it as a springboard for endorsing a differentiated approach to the supplementation or revision of contract terms. As a matter of fact, where unfairness involves a 'core' term, thereby jeopardizing the contract's capacity to continue into existence, the Court has accepted the legitimacy of certain forms of contract supplementation. Conversely, where the unfairness concerns an 'ancillary' term, the Court's position has been that the contract should simply continue to bind the parties without any amendment, eschewing any form of supplementation, a stance that cleaves closely to the literal meaning of Article 6(1)²²¹.

This bifurcated approach is, however, open to serious objection. This different treatment of 'core' terms and 'ancillary' terms is not only analytically unconvincing but also capable of producing paradoxical and inconsistent outcomes. Even if one were to concede that such distinction is conceptually necessary, the substantive solutions advanced by the Court, in particular, the strict refusal to supplement contracts in the case of 'ancillary' terms, remain controversial²²².

8.2. 'Blue Pencil Test' And 'Blue Pencil Rule'

referring court, some of that information suggests that the subject-matter of the dispute in the main proceedings does not concern the adequacy of amount of that commission as compared with a service provided by the lender (of whatever kind) since it is submitted that the lender does not provide any actual service which could constitute consideration for that charge, so that the question of the adequacy of that charge does not arise. However, the information in the documents submitted to the Court appear to indicate that the dispute in the main proceedings essentially covers the grounds justifying the terms in question, and in particular, whether, in so far as they require the consumer to pay commission of a substantial amount which aims to ensure the repayment of the loan, even though it is argued that that risk is already guaranteed by a mortgage and that, in exchange for that charge, the bank does not provide a real service to the consumer solely in the consumer's interests, those terms must be regarded as unfair, within the meaning of Article 3 of Directive 93/13'. In this context, see also T. JOSIPOVIĆ, 'Scope of Application of the Unfair Contract Terms Directive: Is It Time for a New Compromise?', in *ERPL*, 2024, 32(3), p. 376.

²²⁰ Cf N. JANSEN, *sub* Art 6:205: Exclusions from Unfairness Test' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, p. 984.

²²¹ See below Part III, § 15.

²²² *Ibid.*

When assessing the non-binding character of unfair contract terms, a central issue concerns the identification of the relevant term, the delimitation of the scope of its ‘non-binding character’ and the determination of the status of the remaining parts of the contract that continues to bind the parties if it is capable of continuing in existence without the unfair terms.

In Austrian and German case law, it is generally accepted that formal criteria alone are not decisive when assessing whether a contract term is ‘severable’²²³. According to such a view, ‘ineffectiveness’ should be limited to that part of the contract term considered unfair, provided that those provisions that appear formally linked can be separated conceptually and remain understandable and meaningful when considered in isolation²²⁴.

In this context, Austrian and German scholarship (as well as German case law) today use the terms ‘blue pencil test’ and ‘blue pencil rule’, sometimes also described as ‘geltungserhaltender Klauselabgrenzung’²²⁵. Accordingly, German scholarship generally identifies three conditions for the correct application of the ‘blue pencil test’: (i) the invalid part must be capable of being deleted outright, that is, linguistically severable without any correction of the wording; (ii) the valid part must constitute a comprehensible and meaningful provision on its own; and (iii) the valid part must not result in a regulatory scheme that deviates entirely from the original agreement²²⁶. The third condition, in particular, is highly indeterminate and has been the subject of extensive debate²²⁷.

²²³ Cf A. GEROLDINGER, ‘Klauselbegriff und „blue pencil test“ in der AGB-Rechtsprechung’, in *Austrian Law Journal*, 2015, 2, p. 199.

²²⁴ See A. GEROLDINGER, nt. 223, p. 200. The author makes reference to the Austrian *Oberste Gerichtshof* (OGH 2 Ob 215/10x wobl 2012, 404 (Riss)) which elaborated such principle: ‘Für die Qualifikation einer Klausel als ‚eigenständig‘ ist (...) nicht die Gliederung des Klauselwerks maßgebend. Es können vielmehr auch zwei unabhängige Regelungen in einem Punkt oder sogar in einem Satz der Allgemeinen Geschäftsbedingungen (...) enthalten sein. Es kommt darauf an, ob ein materiell eigenständiger Regelungsbereich vorliegt. Das ist dann der Fall, wenn die Bestimmungen (...) isoliert voneinander wahrgenommen werden können’. Similarly, the German *Bundesgerichtshof* (BGH VIII ZR 155/99 NJW 2001, 292) has stated that: ‘Lässt sich eine AGB-Klausel nach ihrem Wortlaut „aus sich heraus verständlich und sinnvoll“ in einen inhaltlich zulässigen und in einen unzulässigen Regelungsteil trennen, so sei die Aufrechterhaltung des zulässigen Teils rechtlich unbedenklich’.

²²⁵ Interestingly, the term ‘blue pencil’ refers to the historical practice of deleting unauthorized provisions with a blue pencil, as publishers and censors did in England and the US. In its original form, the method allowed the judge to remove only the invalid part of a contract term without rewriting the remaining part, thus preserving the contractual autonomy of the parties. The deletion did not create a new agreement but simply removed the problematic element with minimal intervention.

²²⁶ Cf the German *Bundesgerichtshof* (BGH III ZR 325/12 NJW 2014, 141): ‘Die inhaltliche Trennbarkeit einer Klausel und damit ihre Zerlegung in einen inhaltlich zulässigen und einen inhaltlich unzulässigen Teil ist immer dann gegeben, wenn der unwirksame Teil der Klausel gestrichen werden kann, ohne dass der Sinn des anderen Teils darunter leidet (sog. blue-pencil-test); ob beide Bestimmungen den gleichen Regelungsgegenstand betreffen ist dabei unerheblich’.

²²⁷ Cf A. GEROLDINGER, nt. 223, p. 201.

Historically, the ‘blue pencil test’ can be traced back to the English case *Mallan v May* (1843)²²⁸, which concerned the validity of a non-competition agreement prohibiting the practice of dentistry in London and other cities. Rather than applying an ‘all or nothing’ approach, the court upheld the restriction for London but invalidated it elsewhere. This decision referred to an earlier case, *Chesman v Nainby* (1727)²²⁹, in which a non-competition clause prohibiting the sale of textiles within half a mile of the beneficiary’s residence was partially upheld: the applicable part was retained, while the excessively broad part was annulled.

Over time, the traditional and strict ‘blue pencil rule’ has been criticized²³⁰. As a matter of fact, the strict blue pencil doctrine permitted only the removal of unreasonable contractual provisions, while denying courts to revise or add language to the agreement²³¹.

As a result, more flexible approaches have emerged. For example, § 184 of the Restatement of Law, (Second) Contracts (1979) replaced the original ‘blue pencil rule’ contained in § 518 of the Restatement of Law, (First) Contracts (1932) with a broader ‘rule of reasonableness’, which allows for limited judicial redrafting²³². Today, case law, particularly in the US, remains diverse: the ‘blue pencil test’ continues to operate in various forms, including strict and liberal doctrines, demonstrating its enduring relevance in contract law²³³.

9. Reconciling Unilateral ‘Ineffectiveness’ Of Article 6(1) With Domestic Regulation: The Italian Approach

²²⁸ *Mallan v May* (1843) 11 M. & W. 653.

²²⁹ *Chesman v Nainby* (1727) 2 Str. 793.

²³⁰ See, *inter alia*, G. TORONJO PIVATEAU, ‘Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements’, in *Nebraska Law Review*, 2007, 86(3), p. 683.

²³¹ *Ibid.*

²³² More precisely, Article §184 of the Restatement of Law, (Second) Contracts (1979) establishes that ‘(1) If less than all of an agreement is unenforceable under the rule stated in § 178, a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange. (2) A court may treat only part of a term as unenforceable under the rule stated in Subsection (1) if the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing’. The official comment explains that: ‘It differs from former § 518 in two respects. First, the present rule is stated so as to apply to terms generally, whereas the former version was limited to promises in restraint of trade. Second, and more important, this Section rejects the so-called “blue-pencil rule” of former § 518, under which a promise in restraint of trade was unenforceable in its entirety if the restraint imposed exceeded what was reasonable and the terms of the agreement indicated no line of division. This rule is rejected because it is now contrary to the weight of authority and has been strongly criticized by scholarly writers’.

²³³ G. TORONJO PIVATEAU, nt. 230, p. 687: ‘In Minnesota, a liberal blue pencil state, courts face few limits on their equitable powers. (...) Illinois also follows the liberal blue pencil rule, allowing courts “to modify . . . unreasonable terms of an agreement in order to make it reasonable”. New Jersey is another example of a jurisdiction that applies the blue pencil rule liberally. There, when restrictive covenants are found to violate the reasonableness test, rather than deem the covenants void *ab initio*, courts will enforce them to the extent that is reasonable under the circumstances’.

Within the Italian legal system, the debate over the most appropriate contractual remedy to be applied to unfair terms is deeply influenced by longstanding discussions surrounding Article 1341 of the Italian *Codice civile* and, prior to the enactment of the Italian *Codice del consumo*, Articles 1469-*bis* et seq²³⁴.

Indeed, the transposition of the Unfair Contract Terms Directive into the Italian legal system is preceded by a complex legislative history. The first draft, presented in 1993, positioned its provisions immediately after Article 1341 of the *Codice civile* and addressed unfair terms through an express declaration of nullity, invocable solely by the consumer and never extending to the nullity of the contract in its entirety²³⁵. Following a change in the legislature, a second draft was introduced, placing the provisions after Article 2062 of the *Codice civile* and once again affirming the nullity of the unfair term²³⁶. However, mirroring the Directive's own evolution from draft to final text, during which the explicit reference to nullity was removed, the final Italian transposition likewise abandoned that formula (former Article 1469-*quinquies*)²³⁷.

Nevertheless, it is now generally accepted that certain interpretative elements within the Unfair Contract Terms Directive may be read as indicating the intention that, once transposed into the Italian legal system, the contractual remedy for unfair terms should correspond to contract nullity²³⁸. Accordingly, after the enactment of the Italian *Codice del consumo*, the Directive's statement that unfair terms 'shall not be binding on the consumer' has been transposed as a case of *unilateral* nullity, whereby only the party adversely affected – namely, the consumer – has standing to raise the issue (Article 36 of the Italian *Codice del consumo*)²³⁹.

The recourse to the legal category of nullity, however, is often approached with caution, principally because of the potential application of Article 1419(1) of the *Codice civile*²⁴⁰. As already mentioned, that provision stipulates that the nullity of an individual term may render the entire contract null and void, provided that the parties would not have concluded the agreement without such term²⁴¹.

²³⁴ A. GENTILI, nt. 135, p. 410.

²³⁵ Cf A. GENTILI, nt. 135, p. 410.

²³⁶ Ibid.

²³⁷ See above Part II, § 7.

²³⁸ By contrast, see A. D'ADDA, nt. 206, p. 368.

²³⁹ See above Part II, § 7.

²⁴⁰ See above nt. 192.

²⁴¹ Ibid.

The strict application of Article 1419(1) to consumer contract and to unfair terms risks depriving the entire regime of much of its effectiveness²⁴².

In order to avoid this result, some scholars have argued that Article 1419 should be interpreted as favoring the preservation of the contract whenever this appears ‘just’ in light of the reasons that led the legislator to disapprove the term in question²⁴³. According to this reading, the provision legitimizes a form of *Ergänzende Vertragsauslegung*, grounded in the principle of good faith, which would require limiting the effects of nullity whenever such limitation is consistent with the values pursued by the legal system²⁴⁴.

A further line of reasoning maintains that the Italian legal system should treat unfair terms not as null *stricto sensu*, but as ineffective. This interpretation draws on traditional reasoning, according to which ‘ineffectiveness’ in a narrow sense arises where the legal order disapproves of a term as a means of protecting one part, rather than imposing a general prohibition through an overriding mandatory rule²⁴⁵. On this basis, since the remedy provided for unfair terms is ‘ineffectiveness’ rather than nullity, the regime of partial nullity would not apply.

It remains uncertain, however, whether the recourse to ‘ineffectiveness’ in a narrow sense, as a remedy not expressly governed by the legal systems, can truly circumvent the application of Article 1419. Indeed, it may be argued that contractual ineffectiveness must, by analogy, be subject to the rules governing partial invalidity²⁴⁶.

According to yet another view, Article 36 lays down a special regime of partial nullity, derogating from Article 1419 of the *Codice civile*. If the purpose of nullity is not served by the dissolution of the entire contract but rather by correcting it through the nullity of the unfair term while preserving the remainder of the contract, the very rationale of nullity would require *teleological reduction* of its effects, limiting its scope solely to the unfair term. This suggests

²⁴² Cf A. GENTILI, nt. 135, p. 367: ‘In questa linea non mancano – ed anzi negli anni recenti si sono fatti più intensi – tentativi degli interpreti volti ad assicurare la “sterilizzazione” della disciplina di cui al primo comma dell’art. 1419 c.c., al fine di renderla inoffensiva per i nuovi scopi perseguiti dal diritto dei contratti’. See also V. ROPPO, ‘Contratto di diritto comune, contratto del consumatore, contratto con asimmetria di potere contrattuale: genesi e sviluppo di un nuovo paradigma’ in ID., *Il contratto del duemila*, 4th ed., 2020, pp. 69 et seq. See also F.P. PATTI, ‘Dai «contratti standard» al «contratto asimmetrico». Considerazioni su metodo e obiettivi delle ricerche di Vincenzo Roppo’, in *Juscivile*, 2018, 2, pp. 226 et seq.

²⁴³ A. D’ADDA, nt. 206, p. 365.

²⁴⁴ V. ROPPO, ‘Nullità parziale del contratto e giudizio di buona fede’, in *Riv. dir. civ.*, 1971, I, pp. 707 et seq.

²⁴⁵ Cf F. GALGANO, ‘Invalidità e inefficacia del contratto’ in A. SCIALOJA, G. BRANCA, F. GALGANO (eds.), *Commentario al codice civile, Simulazione. Nullità del contratto. Annullabilità del contratto*, Milano/Bologna, 1998, pp. 1 et seq.

²⁴⁶ Cf A. D’ADDA, nt. 206, pp. 369 et seq.

an alternative mechanism of partial invalidity, distinct from that provided by Article 1419 of the Italian *Codice civile*, and more directly tailored to consumer protection²⁴⁷.

Finally, it has been suggested that a more appropriate conceptual framework could be found in the development of the legal concept of *irrelevance*²⁴⁸. This view is supported by the observation that unfair terms are inherently incompatible with the principle of good faith. Consequently, their non-binding nature should not be framed in terms of nullity *stricto sensu*, but rather as legal irrelevance deriving *ex fide bona*. Abandoning the classical notion that nullity derives from a defect in the act that totally prevents it from producing legal effects, it seems reasonable to suggest that, where a clause is the result of an abusive exercise of private autonomy, the legal system may limit the effects of nullity to the unfair parts of the contract²⁴⁹.

The conclusion that can be drawn from this is that, as explained in more details below, nullity is neither functionally nor structurally uniform, which is why the *disapplication* of Article 1419 in the specific context of unfair terms in business-to-consumer contracts appears to be consistent with the underlying rationale of this regime, or, in other words, aligns with the feature of *unilateral* nullity²⁵⁰. In this vein, in the Austrian context, it has already been noted that ‘einem gesunden allgemeinen Grundsatz des österreichischen Vertragsrechtes entspricht, einen unerlaubten Vertrag nur soweit als nichtig zu behandeln, als dies nach Inhalt und Zweck des Verbotsgesetzes erforderlich ist’²⁵¹.

10. The German Approach: The Unreasonable Consequences Over Sellers And Suppliers And § 306 BGB As A Limitation On Consumer Overprotection

²⁴⁷ Cf A. D’ADDA, nt. 206, pp. 373 et seq; K. LARENZ, *Methodenlehre der Rechtswissenschaft*, 3rd ed., Berlin/Heidelberg/New York, 1995, p. 377 (‘Weil hiermit die im Gesetz enthaltene, nach ihrem Wortsinn zu weit gefaßte Regel auf den ihr nach dem Regelungszweck oder dem Sinnzusammenhang des Gesetzes zukommenden Anwendungsbereich zurückgeführt, reduziert wird, sprechen wir von einer „teleologischen Reduktion“. Gebräuchlich ist auch der Ausdruck „Restriktion“. Die teleologische Reduktion verhält sich zu einer einschränkenden Auslegung ähnlich wie die Einzelanalogie zu einer erweiternden Auslegung’); L. MENGONI, *Ermeneutica e dogmatica giuridica*, Milano, 1996, pp. 92 et seq; A. ALBANESE, ‘Abuso di dipendenza economica: nullità del contratto e riequilibrio del rapporto’, in *Eur. dir. priv.*, 1999, p. 1191.

²⁴⁸ Cf V. SCALISI, ‘Invalidità e inefficacia. Modalità assiologiche della negozialità’ in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, nt. 46, pp. 130 et seq; V. RIZZO, nt. 168, p. 624; L. BIGLIAZZI GERI, ‘Condizioni generali di contratto e buona fede’ in E. CESARÒ (eds.), *Clausole abusive e direttiva comunitaria. Atti del Convegno di Napoli del 28 maggio 1993*, Padova, 1994, p. 35.

²⁴⁹ Cf with regard to consumer protection C.M. BIANCA, nt. 159, pp. 362 et seq.

²⁵⁰ A. GENTILI, nt. 55, p. 77 et seq. See below § 11.

²⁵¹ F. BYDLINSKI, ‘Allgemeine Versorgungsbedingungen und Energielieferungsverträge’ in *Festschrift für Karl H. Neumayer zum 65. Geburtstag*, Baden-Baden, 1985, p. 127.

Within the German legal system, § 306 of BGB provides that if standard business terms, as a whole or in part, have not become part of the contract or are ineffective (*Unwirksam*), then the remainder of the contract will remain binding between the parties²⁵². In such cases, the content of the contract is supplemented by the relevant provisions of statutory law (*Abs. 2*), unless ‘upholding it, (...) would constitute an unreasonable hardship for one party’ (*Abs. 3*)²⁵³.

According to one school of thought, this last provision (*Abs. 3*) can be explained on the basis of the principle that, although consumers deserve protection from unfair terms, they should not derive undue benefit beyond what is necessary from a contract which, with the mere expulsion of certain terms, may become unbalanced in their favor, nor should the deterrent effects exerted on sellers and suppliers be overemphasized, as other legal categories are more appropriately suited to such purposes²⁵⁴.

More precisely, § 306 of BGB (and before § 6 *AGB-Gesetz*) codifies a rule originally developed through case law and legal scholarship, which diverges from the general rule enshrined in § 139 of BGB²⁵⁵. As has been observed, the enforceability of the remainder of the contract - despite the exclusion or ineffectiveness of the term deemed unfair—now follows directly from statutory law and no longer requires judicial justification as a limitation on the scope of unfairness. This clarifies a situation that had given rise to numerous interpretations. Indeed, in the presence of an *Inhaltskontrolle*, there were various discussions about the ‘Unbeachtlichkeit’ of the general conditions. As someone already summarized, it was alternatively stated that (i) they were to be considered ‘keiner Vertragsbestandteil’ or that (ii) the seller or supplier could not invoke them (‘nicht berufen’) or that (iii) by doing so he would

²⁵² More precisely, § 306(1) stipulates that: ‘Sind Allgemeine Geschäftsbedingungen ganz oder teilweise nicht Vertragsbestandteil geworden oder unwirksam, so bleibt der Vertrag im Übrigen wirksam’.

²⁵³ More precisely, § 306(2) and (3) stipulates that: ‘(2) Soweit die Bestimmungen nicht Vertragsbestandteil geworden oder unwirksam sind, richtet sich der Inhalt des Vertrags nach den gesetzlichen Vorschriften. (3) Der Vertrag ist unwirksam, wenn das Festhalten an ihm auch unter Berücksichtigung der nach Absatz 2 vorgesehenen Änderung eine unzumutbare Härte für eine Vertragspartei darstellen würde’.

²⁵⁴ Cf A. GENTILI, nt. 135, p. 433; P. SIRENA, ‘La disciplina delle clausole contrattuali abusive nell’interpretazione della giurisprudenza e dell’Arbitro Bancario Finanziario (ABF)’ in A. BELLELLI, L. MEZZASOMA and F. RIZZO, nt. 206, p. 69; S. PAGLIANTINI, ‘Profili sull’integrazione del contratto abusivo parzialmente nullo’ in G. D’AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 116 et seq; G. D’AMICO, ‘L’integrazione (cogente) del contratto mediante il diritto dispositivo’, *ibid.*, pp. 213 et seq; V. SCALISI, ‘Invalidità e inefficacia nella transizione al diritto europeo: quadro di sintesi’ in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, nt. 46, pp. 435 et seq.

²⁵⁵ Cf J. BASEDOW, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2007, sub § 306, Rn. 21-25, Rn. 30 et seq.

have committed an ‘unzulässige Rechtsausübung’ or that (iv) his conduct ‘gegen Treue und Glauben verstoße’²⁵⁶.

This gives rise to the question of how § 306 of BGB relates to the more general rule set out in § 139 of BGB, which provides that partial nullity results in the nullity of the entire contract, unless it can be assumed that the parties would have concluded the contract even without the invalid provision²⁵⁷. In seeking to reconcile these two provisions, legal scholarship typically regards § 306 of BGB as a *lex specialis* (*Sonderregelung*), expressly favoring the preservation of the remaining contract (*Restgeschäft*)²⁵⁸.

At the same time, legal scholars have noted that § 306 of BGB cannot be adequately explained by reference to the hypothetical intent of seller or supplier, who remains bound by the contract up to the threshold of what is deemed unreasonable (*Unzumutbarkeit*). Rather, its rationale lies in the need to protect the counterparty - typically the consumer or weaker party. From this perspective, the dissolution of the entire contract would, as the German saying goes, offer to the consumer ‘more stones than bread’ (*mehr Steine als Brot*)²⁵⁹.

11. Contract Invalidity And Consumer Protection: From The ‘Nullity’ Of Contract To The ‘Nullities’ Of Contract And Returning

First introduced under the French *Code civil* and later under the German BGB, a fully articulated framework for invalidity took shape between the 19th and 20th century²⁶⁰. This framework recognized two distinct categories: in France, *nullité absolue* and *nullité relative* and in Germany, *Nichtigkeit* and *Anfechtbarkeit*²⁶¹.

²⁵⁶ Cf V. RIZZO, nt. 168, pp. 287-289 (the author refers to certain German rulings that are relevant to the aforementioned debate and, namely, BGH, 29 October, 1956, in *NJW*, 1957, p. 17; BGH, 1 March 1974, *ibid*, 1974, p. 1246). In German context, see W. LÖWE in W. LÖWE, F. GRAF VON WESTPHALEN, R. TRINKNER, *Kommentar zum AGB-Gesetz: Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, Heidelberg, 1983, p. 135.

²⁵⁷ Cf V. RIZZO, nt. 168, p. 289.

²⁵⁸ With reference to the former § 6 *AGB-Gesetz*, see H. SCHMIDT in P. ULMER, H.E. BRANDNER, H.D. HESSEN, *AGB-Gesetz Kommentar zum Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, Köln, 1978, p. 324.

²⁵⁹ Cf W.F. LINDACHER in M. WOLF, N. HORN, W.F. LINDACHER, *AGB-Gesetz: Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, München, 1984, pp. 234 et seq; V. RIZZO, nt. 168, p. 290.

²⁶⁰ See the comprehensive analysis of A. GENTILI, nt. 55, pp. 91 et seq.

²⁶¹ A. GENTILI, nt. 55, p. 92: ‘Ad esse sembrava corrispondere pienamente la sistemazione del Codice del 1865: nullità e annullabilità. Del tutto diverso, però, quantomeno nell’approccio è stato sul punto il discorso dei legislatori e il discorso degli interpreti’.

Beneath these legal categories lay an intellectual heritage traceable to Enlightenment, according to which private transactions are ‘valid’ only if they were the product of reasoned will, chosen autonomously, with adequate knowledge²⁶².

In scholarly discourse, the prevailing model of invalidity was *structural* in character²⁶³. Under this view, the effectiveness of a contract depended upon the presence of all those elements regarded as essential; the absence or defect of any of such element meant that the agreement was incapable of producing binding effect²⁶⁴.

From this perspective, nullity and avoidance were regarded as uniform legal categories, governed by a uniform corpus of rules.

In this regard, nullity, whether *nullité absolue* or *Nichtigkeit*, have typically the consequence that the contract is wholly or partially ineffective from the outset (*ab initio*, or *ex tunc*), regardless of whether or not any of the parties disaffirmed it. Nullity might be invoked by either the contracting party, by third parties or by the court of its own motion. Moreover, nullity is not subject to statutes of repose or limitation periods and cannot be validated unless differently provided for by the law²⁶⁵.

By contrast, in the event of avoidance, a legal act is effective until its avoidance occurs at the election of the aggrieved party, who thus holds the power-right to disaffirm such act. This power-right is time-barred, being subject to statutes of repose or to statutes of limitation²⁶⁶.

In earlier legal doctrine, a contract was rendered null and void when it contravened overarching general interests or public policy. However, in more recent years, nullity has increasingly been deployed in situations where the infringement at issue is not exclusively public in character but directed against the specific and individual interests of one of the

²⁶² F.C. VON SAVIGNY, *Sistema del diritto romano attuale*, vol. III, § 106, Torino, 1900, pp. 22 et seq.

²⁶³ Cf R. JAPIOT, *Des nullités en matière d’actes juridiques, essai d’une théorie nouvelle*, Paris, 1909, pp. 14 et seq (‘On reconnaîtra donc la nullité à ce signe distinctif qu’elle aura pour cause un fait existant dès le moment de la formation de l’acte: on exprime cette idée en disant que la nullité a pour cause un *vice originaire* de l’acte, que la nullité est un *inefficacité originaire*’); P. SIMLER, *La nullité partielle des actes juridiques*, Paris, 1969, p. 28; G. D’AMICO, ‘L’abuso di autonomia negoziale nei contratti dei consumatori’ in G. D’AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 10-11; A. GENTILI, nt. 55, pp. 97 et seq (‘Se ci si interroga sul perché dell’approccio strutturale della teoria, esso è presto trovato nella concezione dell’atto di autonomia privata come “atto di volontà produttivo degli effetti voluti”. Dato fondamentale è che il contratto è “fatto”. Fatto che produce l’effetto, ad esso legato da un rapporto di causalità stabilito dalla legge’).

²⁶⁴ A. GENTILI, nt. 55, p. 97; V. SCALISI, ‘Nullità e inefficacia nel sistema europeo dei contratti’ in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, nt. 46, pp. 176 et seq: ‘(...) la nullità europea [invece] si atteggia fundamentalmente come nullità *funzione*, come nullità cioè che è e sta in diretto e immediato rapporto di congruenza e di corrispondenza con un determinato assetto di interessi, della specifica posizione delle parti, dei beni e servizi negoziati’.

²⁶⁵ See P. SIRENA, *Introduction to Private Law*, 3rd ed., Bologna, 2019, p. 303.

²⁶⁶ Ibid.

contracting parties, particularly where that party occupies a position of structural or circumstantial weakness with regard to the other party²⁶⁷. These scenarios often involve economic or contractual asymmetries, where traditional remedies such as avoidance were considered inadequate to afford sufficient protection.

From this shift has emerged a category widely acknowledged by legal scholars as ‘nullity serving a protective function’ or ‘nullity to protect’, a development particularly prominent in the context of business-to-consumer contracts²⁶⁸. In this regard, Italian law offers a clear illustration: Article 36 of the Italian *Codice del consumo* is expressly entitled ‘nullità di protezione’.

Within the majoritarian opinion, these ‘new’ forms of nullity with a protective function are to be considered ‘special’ nullities. Their distinctiveness is said to lie both in their legal effects and in their structural features. The power-right to rely upon such nullity is generally reserved to the party for whose benefit the provision was enacted, ordinarily the party in the weaker contractual position and is denied to the counterparty. It also frequently takes the form of partial nullities. This is regarded as a logical and proportionate means of advancing the aim of safeguarding the protected party’s interests²⁶⁹.

The special character also stems from the origin of the cause of the invalidity itself, which may be attributable to circumstances lying wholly outside contract, i.e. extrinsic to the agreement²⁷⁰.

²⁶⁷ Cf S. POLIDORI, ‘Nullità di protezione e interesse pubblico’, nt. 60, pp. 1019 et seq; G. PASSAGNOLI, *Nullità speciali*, Milano, 1995, pp. 191 et seq; V. SCALISI, ‘Nullità e inefficacia nel sistema europeo dei contratti’ in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, nt. 46, pp. 176 et seq; ID., ‘Contratto e regolamento nel piano d’azione delle nullità di protezione’, *ibid*, pp. 197 et seq; ID., ‘Giustizia contrattuale e rimedi: fondamento e limiti di un controverso principio’, *ibid*, pp. 337 et seq; A. FEDERICO, ‘Nuove nullità ed integrazione del contratto’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 60, pp. 329 et seq.

²⁶⁸ The expression ‘nullity to protect’, used as a translation of ‘nullità di protezione’, is employed by A. GENTILI, nt. 55, p. 119. Cf also M. GIROLAMI, nt. 60; G. D’AMICO, nt. 60, pp. 737 et seq; A. FEDERICO, ‘Nuove nullità ed integrazione del contratto’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 60, pp. 329 et seq; A. ALBANESE, nt. 60, pp. 503 et seq; S. PAGLIANTINI, nt. 60, pp. 27 et seq.; G. DE CRISTOFARO, ‘Le invalidità negoziali «di protezione» nel diritto comunitario dei contratti’ in S. PAGLIANTINI (eds.), nt. 60, pp. 179 et seq; S. POLIDORI, ‘Nullità di protezione e interesse pubblico’, nt. 60, pp. 1019 et seq; ID., *Discipline della nullità e interessi protetti*, nt. 60; F. DI MARZIO, nt. 60, pp. 837 et seq; A. D’ADDA, nt. 60.

²⁶⁹ Cf A. NATUCCI, ‘Invalidità di protezione e nullità delle clausole vessatorie alla luce dei principi costituzionali (italiani e europei)’ in G. IUDICA and G. ALPA (eds.), *Costituzione europea e interpretazione della Costituzione italiana*, Napoli, 2006, pp. 227 et seq and A. GENTILI, ‘Codice del consumo ed esprit de geometrie’, in *I Contratti*, 2006, pp. 167-168, 171.

²⁷⁰ Cf A. DI MAJO, nt. 58, p. 128 (‘Le «cause» e/o i fattori, se così qui possono definirsi, di nullità qui attengono a circostanze o elementi che sono, tutti, «esterni» al contratto e che pure sono destinati a reagire sul trattamento di esso’).

Therefore, the category of ‘nullity serving a protective function’ has prompted scholars to reflect on a deeper shift within private law: the gradual dissolution of the once-clear boundary between the domains of public and private realms in the law of contracts²⁷¹. Far from fitting neatly to either sphere, this category fulfils a dual mandate. It shields specific parties, most often those in a weak position, while also serving a broader market-regulation purposes. The aim is to promote both contractual efficiency and fairness²⁷². In other words, the normative foundation for distinguishing between nullity and avoidance is undermined²⁷³.

Having explored the meaning of the term ‘nullity serving a protective function’ and its treatment in legal scholarship, it should be noted, as someone already observed, that such a nullity appears less as a legislative novelty, but rather the most modern expression of the protective function historically embedded in the legal category of nullity itself²⁷⁴.

As a matter of fact, it is possible to consider, for instance, an agreement by which a purchaser acquire a good he already owns: the agreement lacks a lawful *causa contractus* as to him, who incurs a price for no corresponding benefit, while the seller plainly benefits from the transaction. Likewise, a purported donation completed without the formal requirements prescribed by law may reveal insufficient deliberation on the one part, even though the recipient remains unaffected²⁷⁵.

In these and similar cases the effect of invalidity has been to operate asymmetrically, shielding the party exposed to detriment²⁷⁶.

The same reasoning applies to avoidance. Mistake, duress and fraud are circumstances that can undermine the authenticity of a person’s consent and affect both their freedom and their consciousness and thus the rationality of their contractual decision²⁷⁷. Avoidance, in such instances, is nothing other than a form of invalidity with a protective function²⁷⁸.

Seen in this light, the ‘new’ protective strand invoked by some scholars is better understood as the refinement and modern expression of an enduring protective rational within the category of contract nullity, and more generally of contract invalidity²⁷⁹.

²⁷¹ Cf S. POLIDORI, ‘Nullità di protezione e interesse pubblico’, nt. 60, p. 1027.

²⁷² Cf, *inter alia*, A. GENTILI, nt. 55, pp. 107-108.

²⁷³ M. GIROLAMI, nt. 60, pp. 322 et seq.

²⁷⁴ Cf A. GENTILI, nt. 55, pp. 94-95 and R. NICOLÒ, ‘Diritto civile’, in *Enc. dir.*, vol. XII, Milan, 1964, pp. 913 et seq.

²⁷⁵ A. GENTILI, nt. 55, p. 95.

²⁷⁶ *Ibid* and ID., ‘I contratti usurari: tipologie e rimedi’, in *Riv. dir. civ.*, 2001, I, pp. 355 et seq.

²⁷⁷ Cf A. GENTILI, nt. 55, pp. 95-96.

²⁷⁸ *Ibid*.

²⁷⁹ Cf A. GENTILI, nt. 55, p. 96.

Another line of argument raises the question of whether nullity serving a protective function can really be classified as a ‘special’ form of nullity, both in terms of its legal effects and its internal structure.

In terms of legal effects, it is theoretically correct that any interested party can invoke traditional nullity, since the legislature cannot predict whether a defect will disadvantage one or both parties. However, if the defect is blatantly one-sided, the utility of such a rule becomes doubtful. The party who benefits from the transaction is rarely interested to seek contract nullity, so the possibility of unilaterally invoking the ground for nullity does not in principle contradict the traditional logic of such legal category²⁸⁰. Moreover, in the case of avoidance, the power-right to invoke contract invalidity rests exclusively with the aggrieved party, reflecting the same principle: the legal mechanism must be activated by those who have a genuine interest in doing so. This would argue in favor of denying a clear distinction between traditional nullity and nullity ‘serving protective function’²⁸¹.

Moreover, its rationale is not limited to safeguarding individual autonomy. As already noted, nullities ‘serving protective function’ also operate as a regulatory tool designed to align private conduct with broader economic policy objectives²⁸². Indeed, a party who enters into a bargain without genuine intention, without securing the intended benefit, without adequate information, or under conditions of coercion, deception, or abuse - whether such pressures come from a creditor, seller or supplier, business partner, or even public authority - has not exercised a free and rational choice. Yet, beyond this personal harm, there is a systemic risk: the erosion of the proper functioning of the market²⁸³. Thus, one could discern a general path underlying such a protective public order: a synthesis which, on the one hand, calls for the effective safeguarding of the interests at stake, and, on the other, does not allow the unconditional protection of any one of them.

As already been noted, during its formative decades, the European Community focused its efforts on dismantling the internal barriers that persisted under the protectionist and interventionist economic policies characteristic of postwar continental Europe²⁸⁴. In their place,

²⁸⁰ Cf A. GENTILI, nt. 55, pp. 104-105; by contrast see, *inter alia*, A. DI MAJO, nt. 58, pp. 128 et seq.

²⁸¹ Cf A. GENTILI, nt. 55, p. 108; A.A. DOLMETTA, ‘All’essenza della nullità di protezione: l’operatività «a vantaggio». Per una critica costruttiva di Cass. SS.UU., n. 28314/2019’, in *Riv. dir. banc.*, 2020, pp. 90 et seq; G. PASSAGNOLI, ‘Analisi di un falso principio: nullità speciali e restituzione unilaterale’, in *Pers. e merc.*, 2021, 2, p. 264; G. BENEDETTI, ‘Negozio giuridico e iniziativa economica privata’ in *Il diritto comune dei contratti e degli atti unilaterali tra vivi a contenuto patrimoniale – Studi*, Napoli, 1991, pp. 573 et seq.

²⁸² Cf A. GENTILI, nt. 55, p. 116.

²⁸³ Ibid. See also G. PASSAGNOLI, nt. 281, p. 266 and nt. 15.

²⁸⁴ P. SIRENA, nt. 265, pp. 239-240.

it pursued a liberalized model of integration based on maintaining competition as the organizing principle of the Internal Market²⁸⁵.

Among the instruments used for this purpose was the declaration of the nullity of contracts, particularly with regard to agreements establishing cartels or implementing concentrations with distorting effects on competition²⁸⁶. These measures derived directly from EU law and were imposed not because of formal shortcomings in the agreements themselves, as in national systems, but because of their substantive economic impact²⁸⁷. While easily understood as expressions of public economic policy, they also served a protective function, protecting market participants - both consumers and firms - from abuses by dominant parties²⁸⁸.

Moreover, in the last two decades of the 20th century, EU law introduced numerous instances of contracts or terms deemed 'non-binding'. At the same time, businesses became subject to a growing number of behavioral obligations, chiefly information duties, and a range of commercial practices were banned, especially misleading or aggressive conduct²⁸⁹.

The argument, then, is that nullity as a legal category is neither functionally nor structurally uniform. This leads us to conclude that it not possible to overemphasize the *protective* nature of these *new* nullities, which have developed primarily within the field of consumer law, with the aim of pursuing additional outcomes such as the punitive treatment of sellers and suppliers.

²⁸⁵ Ibid.

²⁸⁶ Ibid. See also D. HASELBACH, *Autoritärer Liberalismus und Soziale Marktwirtschaft: Gesellschaft und Politik im Ordoliberalismus*, Baden-Baden, 1991, pp. 77 et seq.

²⁸⁷ See Chapter 1, Part I, § 1.

²⁸⁸ Cf A. GENTILI, nt. 55, pp. 114 et seq.

²⁸⁹ See Chapter 1, Part I, § 1.

PART III

STATUTORY AND JUDICIAL SUPPLEMENTATION OF CONTRACTS

TABLE OF CONTENTS: 12. The Relevant Case Law On Unfair Contract Terms Directive And Related Issues – 12.1. Mere Expulsion Of Unfair Terms And The Deterrent Effect Exerted On Sellers And Suppliers – 13. Statutory Supplementation And Judicial Supplementation Of Contracts – 13.1. Contract Supplementation By Means Of Supplementary Provisions Of National Law – 13.2. The Distinction Between ‘Supplementary Provisions Of National Law’ And ‘National Provisions Of A General Nature’ – 13.3. Contract Supplementation By Means Of Equity And Judicial Adaptation – 14. The Principle of Good Faith Between The *Pars Destruens* And The *Pars Construens* Of Contract Supplementation – 15. The Emergence Of A Dangerous Double Standard For ‘Core’ And ‘Ancillary’ Terms; A Paradox - 16. Contract Supplementation By Means Of Supplementary Provisions Of National Law Left To The *Unilateral* Assessment Of The Consumer - 17. Preliminary Conclusions

12. The Relevant Case Law On Unfair Contract Terms Directive And Related Issues

The Unfair Contract Terms Directive offers little clarity as to the *consequences* of identifying an unfair term in a business-to-consumer contract. In particular, it is virtually silent on how to address the contractual gaps that arise once such a term has been deleted. The only guidance is contained, as already observed, in Article 6(1), which states that ‘the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms’. However, this rule leaves critical questions unanswered.

One of the earliest rulings of the Court of Justice to address this issue was *Banco Español De Credito*²⁹⁰. The dispute concerned a loan agreement whose late payment interest clause was found to be unfair, as the rate exceeded the nominal interest rate by more than twenty percentage points, far surpassing benchmarks such as the Euribor and the European Central Bank rate. In this context, the *Juzgado de Primera Instancia No 2 de Sabadell* declared the clause automatically void on grounds of unfairness. On appeal, the *Audiencia Provincial de Barcelona* referred a preliminary question to the Court of Justice, asking, in light of Article 6(1) of the Unfair Contract Terms Directive and Article 2 of Directive 2009/22/EC (no longer in force), what was the precise scope of the rule that unfair terms ‘shall not be binding on the consumer’.

²⁹⁰ Case C-618/10, *Banco Español de Credito*, nt. 6. In this context, see M. FARINA, nt. 128, pp. 448 et seq; M. DELLACASA, nt. 155, p. 49. This author interprets such ruling in a restrictive sense. However, this restrictive interpretation appears to be contradicted by the subsequent clarifications made by the Court of Justice in Case C-26/13, *Kásler and Káslerné Rábai*, nt. 9 and Case C-260/18, *Dziubak*, nt. 188.

The Court of Justice held that national courts must draw all the *consequences* provided by domestic law to ensure that unfair terms do not bind the consumer²⁹¹. More importantly, it also clarified that national courts are only required to exclude the application of an unfair term, without revising its content. Indeed, the contract must, in principle, continue in existence without any amendment other than the deletion of the unfair term, provided this is legally possible under national law²⁹².

As Advocate General Trstenjak noted, granting national courts the power to revise unfair terms could undermine the deterrent effect intended by Article 7 of the Unfair Contract Terms Directive, as sellers and suppliers might be encouraged to include such terms, in the hope that most of them will be overlooked by the national court²⁹³. In other words, sellers and suppliers may ultimately feel provoked by such a legal situation, especially since they would have nothing to lose by attempting to impose their terms on consumers²⁹⁴.

This strict approach was reaffirmed in *Asbeek Brusse*, which concerned a residential property rent agreement containing an excessive penalty clause²⁹⁵. The Dutch court had attempted to reduce the penalty to a reasonable level, but the Court of Justice ruled that the clause should have been excluded in its entirety rather than revised. This approach was further strengthened

²⁹¹ Case C-618/10, *Banco Español de Crédito*, nt. 6, para 63: ‘In that context, the Court has already had the opportunity to interpret that provision as meaning that it is a matter for national courts, when they find that contract terms are unfair, to draw all the consequences that follow under national law, in order that the consumer will not be bound by those terms’.

²⁹² See also Joined Cases C-96/16 and C-94/17, *Banco Santander Escobedo Cortes*, nt. 6, para 73: ‘(...) in accordance with Article 6(1) of Directive 93/13, national courts are merely required to refrain from applying an unfair contractual term in order that it may not produce binding effects with regard to the consumer, without being empowered to revise the content of that term. That contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible’.

²⁹³ Opinion of Advocate General Trstenjak, 14 February 2014, ECLI: ECLI:EU:C:2012:74, para 88.

²⁹⁴ See also Joined Cases C-154/15, C-307/15 and C-308/15, *Gutierrez Naranjo*, nt. 6, paras 60-62: ‘On the other hand, the national court may not revise the content of unfair terms, lest it contribute to eliminating the dissuasive effect for sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms. It follows from the foregoing considerations that Article 6(1) of Directive 93/13 must be interpreted as meaning that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. Therefore, the determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he would have been in if that term had not existed. It follows that the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts. The absence of such restitutory effect would be liable to call into question the dissuasive effect that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) of that directive, is designed to attach to a finding of unfairness in respect of terms in contracts concluded between consumers and sellers or suppliers’. Cf also C. MAK, ‘Gutierrez Naranjo: on limits in law and limits of law’, in *European Law Review*, 2018, 43(3), pp. 447 et seq.

²⁹⁵ See also Case C-488/11, *Asbeek Brusse*, nt. 6, paras 57 et seq.

in *Abanca Corporación Bancaria*, where the Court of Justice rejected the partial deletion of an unfair acceleration clause in a mortgage loan²⁹⁶.

Nevertheless, a departure from this rigid stance was suggested by Advocate General Kokott in *Banca Transilvania*²⁹⁷. The contract at issue met the criteria of the *Kásler* exception, as will be explained below, for contract supplementation, yet no suitable default rules existed under Romanian law. To avoid disadvantaging consumers, she argued that national courts should be able to replace an unfair term with a new one restoring an effective balance between the parties, but only where (i) the contract could not survive the removal of the unfair term without substitution; (ii) annulment would have ‘particularly unfavourable consequences’ for the consumer; and (iii) no supplementary provisions of national law or agreed alternative existed²⁹⁸.

As already observed, the *Kásler* case marked a significant step in interpreting Article 6(1)²⁹⁹. The case, concerning a mortgage loan denominated in foreign currency, established that Article 6(1) and paragraph 73 of the judgment of the Court of Justice in *Banco Español de Crédito* should be interpreted as precluding a rule of national law which allows a national court to adjust the contract by revising the content of an unfair term.

²⁹⁶ C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, ECLI:EU:C:2019:250.

²⁹⁷ See Case C-81/19, *NG, OH v SC Banca Transilvania SA*, ECLI:EU:C:2020:532 and Opinion of Advocate General Kokott, 19 March 2020, ECLI:EU:C:2020:217.

²⁹⁸ Opinion of Advocate General Kokott, nt. 297, para 87: ‘In light of all the foregoing, I conclude that Article 6(1) of Directive 93/13 does not prevent a national court from removing an unfair term and substituting it with a supplementary rule that replaces the formal balance between the rights and obligations of the parties with an effective balance which re-establishes equality between them, if - the contract concerned cannot be maintained if the unfair term is removed without substitution; - annulment of the contract would have particularly unfavourable consequences for the consumer; and - there is no supplementary provision under national law and no provision that the parties to the contract concerned have opted for which could act as a substitute for the term removed’.

²⁹⁹ Case C-26/13, *Kásler and Káslerné Rábai*, nt. 9. In the same vein, see C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, nt. 296, para 64: ‘In the light of the foregoing considerations, the answer to the questions referred in Cases C-70/17 and C-179/17 is that Articles 6 and 7 of Directive 93/13 must be interpreted, first, as precluding an accelerated repayment clause of a mortgage loan contract that has been found to be unfair from being maintained in part, with the elements which make it unfair removed, where the removal of those elements would be tantamount to revising the content of that clause by altering its substance, and, second, as not precluding the national court from compensating for the invalidity of such an unfair term by replacing that term with the new wording of the legislative provision on which it was based, which is applicable where the parties to the contract so agree, provided that the mortgage loan contract in question cannot continue in existence if that unfair term is removed, and that the annulment of the contract in its entirety would expose the consumer to particularly unfavourable consequences’. For a comprehensive analysis of these rulings see also M. FARINA, nt. 128, pp. 453 et seq and, for a different opinion, M. DELLACASA, nt. 155, p. 67: ‘Se dunque allo stato attuale la giurisprudenza della Corte non impedisce l’applicazione di norme legali in sostituzione delle clausole abusive, ancorché esse non siano essenziali per la sopravvivenza del contratto, non si può escludere che in futuro si affermi un orientamento più restrittivo. È ciò che potrebbe accadere qualora l’affermazione in base alla quale la sostituzione di una clausola abusiva con una norma legale è ammissibile solo allo scopo di scongiurare una nullità integrale del contratto pregiudizievole per il consumatore venisse isolata dal contesto in cui è stata espressa’.

However, given the nature and significance of the public interest constituted by the protection of consumers, Article 6(1) should also entail that, in a situation in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, it does not preclude a rule of national law enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law³⁰⁰.

This exception seems strictly linked to the risk of ‘particularly unfavourable consequences’ arising from the annulment of the contract in its entirety³⁰¹. Indeed, more recently, in *Luminor Bank AS*³⁰², the Court of Justice stressed that Article 6(1) must be interpreted as precluding a national court, where it has found that a contract cannot remain valid following the removal of an unfair term and the consumer concerned expresses the intention to preserve that contract by amending that term, from ruling on the measures to be taken to restore the effective balance between the rights and obligations of the parties to that contract without first examining the consequences of annulling that contract in its entirety, even where that court has the possibility of replacing that term with a supplementary provision of national law or with a provision applicable where the parties so agree³⁰³.

The restrictive reading of Article 6(1) continued in *Dziubak*, involving a mortgage loan, denominated in Polish złoty (PLN), but indexed to a foreign currency, namely the Swiss franc (CHF)³⁰⁴. Once unfair terms were removed, the contract could not continue into existence and the Court held that Article 6(1) must be interpreted as precluding gaps from being filled solely on the basis of national provisions of a general nature which entail that the effects expressed in

³⁰⁰ Case C-26/13, *Kásler and Káslerné Rábai*, nt. 9, paras 82 et seq.

³⁰¹ On the notion of ‘particularly unfavourable consequences’ see also Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco y Caixabank*, nt. 6, para 33; Joined Cases C-96/16 and C-94/17, *Banco Santander Escobedo Cortes*, nt. 6, para 74; Joined C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, nt. 296, paras 56-63. Moreover, see also Case C-118/17, *Dunai*, nt. 10, para 54; Case C-51/17, *OTP Bank and OTP Faktoring*, ECLI:EU:C:2018:750, para 61. See also F. ESPOSITO, ‘Has the Unfair Contract Terms Directive Entered Its Dark Ages? On the Recent Case-Law Concerning the Consequences for the Contractual Relationship of Unfair Indexing Mechanisms to a Foreign Currency’ in P. SIRENA (eds.), *Unfair Contract Terms and Unjustified Enrichment. The European case of foreign currency loans*, Cambridge, forthcoming.

³⁰² Case C-645/22, *Luminor Bank AS*, ECLI:EU:C:2023:774.

³⁰³ Case C-645/22, *Luminor Bank AS*, nt. 302, para 42: ‘Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding a national court, where it has found that a contract cannot remain valid following the removal of an unfair term and the consumer concerned expresses the intention to preserve that contract by amending that term, from ruling on the measures to be taken to restore the effective balance between the rights and obligations of the parties to that contract without first examining the consequences of annulling that contract in its entirety, even where that court has the possibility of replacing that term with a supplementary provision of national law or with a provision applicable where those parties so agree’.

³⁰⁴ Case C-260/18, *Dziubak*, nt. 188.

a legal transaction are to be supplemented, *inter alia*, by the effects arising from the principle of equity or from established customs, which are neither supplementary provisions nor provisions applicable where the parties to the contract so agree. In other words, the facts of the case led to the exclusion of supplementation through equity and usages, but the ban can be easily extended to similar general principles, such as good faith or reasonableness³⁰⁵.

Nonetheless, as someone has argued, the *Lombard* case³⁰⁶, echoing the earlier judgment in *Banca B.*³⁰⁷, seems to introduce a more flexible nuance. Indeed, where no statutory default rules exist and the annulment of the contract in its entirety would produce ‘particularly unfavourable consequences’ for the consumer, national courts must take ‘all the measures necessary’ under domestic law to protect the consumer³⁰⁸. In this regard, *Banca B.* explicitly includes inviting the parties to negotiate a new mechanism, within a judicially defined framework, that restore an effective contractual balance³⁰⁹.

³⁰⁵ Case C-260/18, *Dziubak*, nt. 188, para 69: ‘Article 6(1) of Directive 93/13 must be interpreted as precluding gaps in a contract caused by the removal of the unfair terms contained in that contract from being filled solely on the basis of national provisions of a general nature which provide that the effects expressed in a legal transaction are to be supplemented, *inter alia*, by the effects arising from the principle of equity or from established customs, which are neither supplementary provisions nor provisions applicable where the parties to the contract so agree’. For a critical analysis see F. ESPOSITO, ‘Has the Unfair Contract Terms Directive Entered Its Dark Ages? On the Recent Case-Law Concerning the Consequences for the Contractual Relationship of Unfair Indexing Mechanisms to a Foreign Currency’ in P. SIRENA (eds.), nt. 301. See also A. WIEWIÓROWSKA-DOMAGALSKA, ‘Unfair Contract Terms in CHF Mortgage Loans. Case C-206/18 *Dziubak* – where do we go from here?’, nt. 4, pp. 206 et seq.

³⁰⁶ Case C-472/20, *Lombard Pénzügyi és Lizing Zrt. v PN*, ECLI:EU:C:2022:242.

³⁰⁷ Case C-269/19, *Banca B. SA*, ECLI:EU:C:2020:954.

³⁰⁸ Case C-404/16, *Lombard Ingatlan Lizing Zrt.*, nt. 306, para 56: ‘Thus, where the national court takes the view that the loan agreement at issue in the case before it cannot, in accordance with contract law, legally continue to exist after the unfair terms in question have been removed, and where there are no supplementary provisions of national law or provisions applicable where the parties to the contract at issue so agree which may replace those terms, it must be held that, in so far as the consumer has not expressed his or her wish to retain the unfair clauses, and/or annulling the contract would expose the consumer to particularly unfavourable consequences, the high level of consumer protection which must be ensured under Directive 93/13 demands that, in order to restore the effective balance between the reciprocal rights and obligations of the parties, the national court must, while taking into account all of its national law, take all the measures necessary to protect the consumer from the particularly unfavourable consequences which could result from the annulment of the loan agreement in question, notably the fact that the seller or supplier could immediately claim the debt from the consumer’. On this issue see the overview of F. ESPOSITO and L. DE ALMEIDA, ‘European Union Litigation’, in *ERCL*, 2022, 18(3), p. 268.

³⁰⁹ Case C-269/19, *Banca B. SA*, nt. 307, para 43: ‘In circumstances such as those in question in the main proceedings, nothing precludes the national court from, *inter alia*, inviting the parties to negotiate with the aim of establishing the method for calculating the interest rate, provided that that court sets out the framework for those negotiations and that those negotiations seek to establish an effective balance between the rights and obligations of the parties taking into account in particular the objective of consumer protection underlying Directive 93/13’.

In conclusion, an apparent outlier remains the ruling in *Caixabank*³¹⁰, where a clause in a mortgage loan imposed all the costs associated with the creation and cancellation of the mortgage on the consumer. The decision reached by the Court of Justice seems to be inconsistent with the settled case law. Indeed, in a brief line of reasoning, it endorsed the application of statutory default rules to determine the allocation of the relevant fees between the parties³¹¹. This approach appears difficult to reconcile with the reasoning in *Kásler*. As such, the *Caixabank* case remains in an isolated instance in which the Court expressly accepted the use of supplementary provisions to fill contractual gaps arising from the removal of ‘ancillary’ clauses³¹².

All in all, from this body of case law, it emerges that the issue of supplementation of contracts following the removal of unfair terms is undergoing renewed scrutiny³¹³. While the

³¹⁰ Joined Cases C-224/19 and C-259/19, *CY and Others v Caixabank SA and Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2020:578.

³¹¹ Joined Cases C-224/19 and C-259/19, *CY and Others v Caixabank SA and Banco Bilbao Vizcaya Argentaria SA*, nt. 310, para 54: ‘Further to the foregoing, it should also be noted that the fact that a contractual term which has been held to be unfair is deemed never to have existed is such as to justify the application of any provisions of national law that govern the allocation of costs connected with the creation and cancellation a mortgage in the absence of any agreement between the parties in this regard. If those provisions impose all or part of those costs on the borrower, neither Article 6(1) nor Article 7(1) of Directive 93/13 make it impossible for the consumer to be denied a refund of that part of those costs which he or she must himself or herself bear’. On the lack of coordination between the decisions of the Court of Justice, see F. ESPOSITO, ‘Has the Unfair Contract Terms Directive Entered Its Dark Ages? On the Recent Case-Law Concerning the Consequences for the Contractual Relationship of Unfair Indexing Mechanisms to a Foreign Currency’ in P. SIRENA (eds.), nt. 301.

³¹² See, in this regard, R. SERAFIN, nt. 3, pp. 154 et seq.

³¹³ See, *inter alia*, J. FAZEKAS, ‘The consumer credit crisis and unfair contract terms regulation – Before and after *Kásler*’, in *EuCML*, 2017, 6(3), pp. 99 et seq; F. DE ELIZALDE, ‘Partial Invalidity for Unfair Terms? CJEU in *Abanca – C-70 & 179/17*’, in *EuCML*, 2019, 8(4), pp. 147 et seq; F. ESPOSITO, nt. 200, pp. 538 et seq; ID., ‘Loans and the Unfair Contract Terms Directive after C-472/20 *Lombard – Where Are We Now?*’, in *EuCML*, 2022, 11(6), pp. 223 et seq; R. SERAFIN, nt. 3, pp. 150 et seq; P. IAMICELI, nt. 3, pp. 142 et seq.; M. FARINA, nt. 128, pp. 441 et seq; M. HULMÁK, ‘The Consequences of Unfair Terms in Consumer Contracts’, in *The Lawyer Quarterly*, 2022, 12(1), pp. 53 et seq; S. WHITTAKER, ‘Distinctive features of the new consumer contract law’, *ibid*, 2017, 133, pp. 47 et seq; E. STORME, ‘On the Usefulness of Default Rules and Disproportionate Sanctions in Consumer Law’, in *ERPL*, 2021, 29(3), pp. 399 et seq; G. TOMÁS, nt. 186, pp. 259 et seq. In the Italian context see, S. PAGLIANTINI, ‘L’integrazione del contratto tra Corte di Giustizia e nuova disciplina sui ritardi di pagamento: il segmentarsi dei rimedi’, in *Pers. e merc.*, 2013, 1, pp. 11 et seq; ID., ‘Profili sull’integrazione del contratto abusivo parzialmente nullo’ in G. D’AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 67 et seq; G. D’AMICO, ‘L’integrazione (cogente) del contratto mediante il diritto dispositivo’, *ibid*, pp. 213 et seq; P. SIRENA, ‘La disciplina delle clausole contrattuali abusive nell’interpretazione della giurisprudenza e dell’Arbitro Bancario Finanziario (ABF)’ in A. BELLELLI, L. MEZZASOMA and F. RIZZO (eds.), nt. 206, pp. 59 et seq; A. FEDERICO, ‘Nuove nullità ed integrazione del contratto’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 60, pp. 329 et seq; A. D’ADDA, ‘La correzione del «contratto abusivo»: regole dispositive in funzione «conformativa» ovvero una nuova stagione per l’equità giudiziale?’, *ibid*, pp. 361 et seq; ID., ‘Nullità parziale ed integrazione del contratto con regole dispositive’ in S. PAGLIANTINI (eds.), nt. 60, pp. 115 et seq; G. DE CRISTOFARO, ‘Le invalidità negoziali «di protezione» nel diritto comunitario dei contratti’, *ibid*, pp. 179 et seq; F.P. PATTI, ‘Clausola vessatoria sugli interessi moratori e integrazione del contratto’, in *I Contratti*, 2014, pp. 737 et seq; F.

EU legislator has consistently sought to intervene against contract terms deemed unfair and generating ‘a significant imbalance in the parties’ rights and obligations’, its preferred approach has been to exclude such terms from the agreement while preserving the remainder of the contract whenever possible.

In such a context, the most acute difficulties arise where the unfair term is essential to the contract, such that, once removed, little or nothing remains to be preserved. In such cases, the central challenge is to determine what legal mechanism, if any, may be deployed to fill the resulting gaps and safeguard the continued existence of the contract³¹⁴.

12.1. Mere Expulsion Of Unfair Terms And The Deterrent Effect Exerted On Sellers And Suppliers

In its rulings, the Court of Justice consistently holds that national courts are required to ‘exclude the application’ of an unfair term so that ‘it does not produce binding effects with regard to the consumer’, while not being authorized ‘to revise its content’³¹⁵. Consequently, the contract must, in principle, continue to exist ‘without any amendment other than that resulting from the deletion of the unfair terms’, thereby restoring the consumer to the legal and factual position they would have occupied had the unfair term never existed³¹⁶.

AZZARRI, ‘Nullità della clausola abusiva e integrazione del contratto’, in *ODCC*, 2017, pp. 37 et seq; M. DELLACASA, nt. 155, pp. 25 et seq; S. GATTI, ‘Limiti europei all’integrazione (e all’interpretazione) del contratto contenente clausole vessatorie: marginalizzazione o mutata centralità del giudice?’, in *Pactum*, 2022, pp. 297 et seq; ID., ‘Oltre la nullità (parziale) di protezione del contratto B2C: Integrazione e restituzioni nella prospettiva di una tutela utile per il contraente debole’, in *Pers. e merc.*, 2022, pp. 608 et seq; M. LAMICELA, nt. 3, pp. 1532 et seq; M. D’ONOFRIO, nt. 3, pp. 941 et seq and F. PISTELLI, nt. 3, pp. 1060 et seq; A. PALMIERI and S. PAGLIANTINI, ‘Il post-vessatorietà come una “Baustelle im Dunkeln”?’’, in *Foro it.*, IV, 2021, pp. 294 et seq; S. PAGLIANTINI, ‘Post-vessatorietà ed integrazione del contratto nel decalogo della CGUE’, in *Nuova giur. civ. comm.*, 2019, 3, pp. 361 et seq; P. GALLO, ‘La nullità, l’integrazione e le restituzioni secondo la Corte di Giustizia’, in *Arch. di dir. civ.*, 2024; F. DI MARZIO, ‘Deroga abusiva al diritto dispositivo, nullità e sostituzione di clausole nei contratti del consumatore’, in *Contr. e impr.*, 2006, pp. 673 et seq; V. BACHELET and A. D’ADDA (eds.), *Lineamenti di diritto europeo dei contratti*, Torino, 2020; M. GROCHOWSKI, ‘The majoritarian concept of default rules: towards a shift in paradigms?’ in *Studia Prawa Prywatnego*, 2020, 1, pp. 63-74. For a detailed analysis of the case law, see also E. MIŠČENIĆ, P. TERESZKIEWICZ, M. INFANTINO, nt. 3, pp. 355 et seq; H. SCHULTE-NÖLKE, nt. 3, pp. 315 et seq. In conclusion, see also S. TROIANO, ‘Le clausole vessatorie a trentadue anni dalla Direttiva 93/13/CEE’ and A. D’ADDA, ‘Clausole abusive, assiologia consumeristica e strutture del diritto contrattuale (sui limiti delle scelte anti integrative della Corte di Giustizia)’ in A. D’ADDA, V. BACHELET and L. REGAZZONI (eds.), nt. 54 – respectively – pp. 27 et seq and pp. 65 et seq.

³¹⁴ Cf, for instance, A. D’ADDA, ‘La correzione del «contratto abusivo»: regole dispositive in funzione «conformativa» ovvero una nuova stagione per l’equità giudiziale?’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 60, pp. 375 et seq.

³¹⁵ See, for example, Joined Cases C-96/16 and C-94/17, *Banco Santander Escobedo Cortes*, nt. 6, para 73.

³¹⁶ See, for example, Joined Cases C-154/15, C-307/15 and C-308/15, *Gutierrez Naranjo*, nt. 6, paras 60-62. Cf also C. MAK, nt. 294, pp. 447 et seq.

Accordingly, the finding of unfairness entails the ‘deletion of the unfair terms’, that is the complete removal of their effects from the contractual framework.

This consequence explains the persistent reluctance of the Court of Justice to intervene by modifying a contract following the deletion of an unfair term: in its view, the mere expulsion of that term follows naturally and inevitably from its non-binding nature under the Unfair Contract Terms Directive. From this point of view, ‘mere deletion’ has a significant penalizing effect on sellers and suppliers, thus acting as a deterrent against the inclusion of unfair terms in business-to-consumer contracts³¹⁷.

On the contrary, allowing national courts to review the content of an unfair term, reducing its scope or modifying it to bring it within the limits of fairness, would risk undermining the objectives of the Unfair Contract Terms Directive³¹⁸. As already observed, the same restrictive stance seems to extend also to contract supplementation through supplementary provisions of national law and, even more markedly, to the application of national provisions of a general nature³¹⁹.

In this regard, it must, however, be observed that replacing an unfair term with its statutory counterpart does not, at least in principle, amount to anything more than subjecting the consumer to the same legal consequences that would apply to any contracting party under the general law³²⁰. Nevertheless, for the Court of Justice, this is not sufficient, revealing a shift in

³¹⁷ With regard to partial nullity as a deterrent remedy, see for example, S. PAGLIANTINI, ‘Nullità di protezione, integrazione dispositiva e massimo effetto utile per il consumatore: variazioni sul tema dell’asimmetria contrattuale’, in *Pers. e merc.*, 2012, pp. 106 et seq.

³¹⁸ Cf Opinion of Advocate General Trstenjak, 14 February 2014, nt. 293.

³¹⁹ Although with different nuances and often relying on non-identical judgements, the prevailing view is that the Court of Justice’s case law tends to rule out the possibility of supplementing the contract after the deletion of the unfair term with statutory rules. See in this regard, A. D’ADDA, ‘Integrazione del contratto’, in *Enc. dir., I tematici*, I, Milano, 2021, p. 629; ID., nt. 129, pp. 24 et seq; P. IAMICELI, nt. 3, p. 144; S. PAGLIANTINI, ‘Trent’anni di direttiva 93/13, postvessatorietà restitutoria ed il vuoto di un’interpretazione conforme a tutto tondo’, in *Accademia*, 2023, pp. 11 et seq. For a different view, see M. DELLACASA, nt. 155, p. 67 and G. D’AMICO, nt. 313, pp. 241 et seq.

³²⁰ See G. DE NOVA, ‘Nullità relativa, nullità parziale e clausole vessatorie non specificamente approvate per iscritto’, in *Riv. dir. civ.*, 1976, I, pp. 487-488: ‘Il legislatore può sancire la nullità della clausola, e usare come materiale di sostituzione un precetto legale in sé derogabile; e può esservi sostituzione della clausola nulla anche se il legislatore non l’ha espressamente prevista. Non mancano infatti ipotesi in cui la «regola legale» che sostituisce la clausola nulla è in sé derogabile. Vi sono casi in cui le parti possono liberamente derogare al regime legale, purché rispettino determinati requisiti di forma (un esempio è quello degli interessi convenzionali: art. 1284, comma 3°, c.c.), e casi in cui le parti possono derogare al regime legale, ma non oltre certi limiti (un esempio è quello degli interessi usurari nel mutuo: art. 1815, comma 2°, c.c.). Se le parti non osservano i requisiti formali o non rispettano i limiti, le clausole sono nulle e quel profilo del contratto è regolato, per espressa disposizione, dal regime legale’; ID., nt. 208, p. 452: ‘Crediamo che l’interprete possa concludere per la sostituzione, anche se la norma imperativa prevede la nullità, ma non prevede espressamente la sostituzione; crediamo, ancora, che la sostituzione possa avvenire anche utilizzando, come materiale di sostituzione, una regola in sé derogabile’. See, on the *essence* of default rules, M. GROCHOWSKI, nt. 313, pp. 63-74 and ID., ‘Default

purpose: from re-establishing authentic contractual balance in favor of the consumer towards making it wholly disadvantageous for sellers and suppliers to insert unfair terms³²¹.

Therefore, mere deletion ensures that all costs arising from the removal of the unfair term are borne entirely by the seller and supplier, eliminating even the slightest loss of utility for the consumer, whereas replacement with statutory rules may still entail a residual burden for the consumer³²².

The approach based on mere deletion is supported by the argument that supplementation may leave the consumer only partially protected, which would not fully comply with the requirement of the Unfair Contract Terms Directive that unfair terms ‘shall not be binding’ on the consumers³²³.

This argument can, however, be countered by observing that supplementation through statutory law does not entail partial enforcement of the unfair term. Once the unfair term has been removed, the consumer is simply subject to the obligations that would apply to any party in a comparable legal situation. This does not constitute partial enforcement of the unfair term, but rather the application of a ‘legal effect’ established within the legal system³²⁴.

Furthermore, Article 6(1) of the Unfair Contract Terms Directive, while stipulating that ‘the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms’, can be read as allowing for the substitution of an unfair term when necessary to preserve the contract in existence³²⁵. As a matter of fact, the Court of Justice itself, by requiring that the contract remains binding between the parties despite the gap created following the deletion of the unfair term, implicitly accepts supplementation. Indeed, this implicit supplementation involves the application of rules that provide, for example, that

Rules Beyond the State’ in S. GRUNDMANN and M. GROCHOWSKI (eds.), *European Contract Law and the Creation of Norms*, Cambridge, 2021, pp. 231 et seq.

³²¹ Cf S. PAGLIANTINI, ‘Profili sull’integrazione del contratto abusivo parzialmente nullo’ in G. D’AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 122 et seq.

³²² Ibid.

³²³ Cf A. D’ADDA, nt. 129, p. 26 and G. D’AMICO, ‘L’integrazione (cogente) del contratto mediante il diritto dispositivo’ in G. D’AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 232 et seq.

³²⁴ G. D’AMICO, ‘L’integrazione (cogente) del contratto mediante il diritto dispositivo’ in G. D’AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 227 et seq: ‘A questo argomento potrebbe tuttavia replicarsi che, applicando la seconda alternativa (integrazione del contratto attraverso la regola legale “dispositiva”) (...) non tanto si darebbe efficacia (parziale) alla clausola vessatoria, quanto piuttosto si darebbe attuazione ad un *effetto legale*’.

³²⁵ See A. GENTILI, nt. 135, pp. 432 et seq; A. D’ADDA, nt. 129, pp. 26-27; M.C. VENUTI, *Nullità della clausola e tecniche di correzione del contratto*, Padova, 2004, pp. 56 et seq, 117 et seq.; G. D’AMICO, ‘L’abuso di autonomia negoziale nei contratti dei consumatori’ in G. D’AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 228 et seq; A. D’ADDA, ‘La correzione del «contratto abusivo»: regole dispositive in funzione «conformativa» ovvero una nuova stagione per l’equità giudiziale?’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 60, pp. 380 et seq.

‘no interest is due’ to the bank in cases where the indexation mechanism of foreign currency linked loans is found to be unfair³²⁶. In this regard, it has long been noted that the supplementation of a contract can also take place by ‘subtraction’³²⁷.

Finally, it remains doubtful whether Article 7(1) of the Unfair Contract Terms Directive, which underlines the aim of preventing the use of unfair terms in business-to-consumer contracts, legitimizes *punitive* techniques, which clearly unbalance the protection of one of the contracting parties and involve radical interference in their choices³²⁸, in this sense the legal remedy would not appear proportionate. This interpretation cannot be easily inferred from Article 7, which does not address these issues explicitly and which can be solved with *punitive* means only when the legal system has made such an intention explicit (as is the case, for example, under Article 1815(2) of the Italian *Codice Civile*)³²⁹.

13. Statutory Supplementation And Judicial Supplementation Of Contracts

As already observed, the debate on contract supplementation has gained renewed momentum in recent years with the emergence of regulatory framework governing business-to-consumer contracts³³⁰. In this context, the main question is what follows from the deletion of an unfair term and the resulting emergence of a gap within the contract. More precisely, this raises the issue of whether such a supervening gap requires to be supplemented and, if so, whether it is preferable to rely upon supplementary provisions of national law or instead to allow the courts to fashion supplementary rules case by case, tailored to the specific circumstances at hand³³¹.

It should be noted, however, that courts have not always been ready to fill gaps arising from invalidated terms. Historically, when a contract contained an unconscionable element or was tainted by coercion, the prevailing approach was often to render the entire contract

³²⁶ See A. D’ADDA, nt. 129, p. 26 and ID., *Nullità parziale e tecniche di adattamento del contratto*, nt. 60, p. 274.

³²⁷ See V. ROPPO, nt. 244, p. 707; A. D’ADDA, *Nullità parziale e tecniche di adattamento del contratto*, nt. 60, p. 65; A. D’ADDA, nt. 129, p. 27; S. RODOTÀ, *Le fonti di integrazione del contratto*, Milano, 2004, p. 202; M. DELLACASA, nt. 155, p. 52 (‘L’affermazione in base alla quale l’integrazione del regolamento contrattuale può avvenire anche “per sottrazione” mantiene la sua validità in una prospettiva rovesciata: quando non travolge l’intero accordo, la sottrazione di una o più clausole al regolamento contrattuale ne comporta necessariamente l’integrazione’).

³²⁸ On this issue see A. D’ADDA, nt. 129, p. 28.

³²⁹ Ibid. More precisely, Article 1815(2) of the Italian *Codice civile* provides a penalty if usurious interest is agreed upon: ‘Se sono convenuti interessi usurari la clausola è nulla e non sono dovuti interessi’.

³³⁰ See above nt. 313. See also S. PAGLIANTINI, ‘Contratti del consumatore – Diritto europeo’, in *Enc. dir., I tematici*, I, Milan, 2021, pp. 67 et seq.

³³¹ For a critical analysis see F.P. PATTI, nt. 313, p. 748. See also O. BEN-SHAHAR, ‘Fixing Unfair Contracts’, in *Stan. L. Rev.*, 2011, 63, pp. 289 et seq; the author tries to explore the problem of how to fix unfair terms and illustrate its solutions under legal systems.

unenforceable, rather than to preserve it through judicial intervention³³². This reluctance was grounded in the idea that it was not the role of courts to rewrite the parties' agreement in a more reasonable form. Even today, where unconscionability is linked to defective consent – such as duress or fraud – courts may still refuse to reform the contract and instead set it aside in its entirety³³³.

Modern developments, however, point in a different direction. This shift is also reflected at the legislative level. With regard, for instance, to those legal systems in which the doctrine of unconscionability has been developed, Section 2-302 of the UCC expressly allows courts to 'limit the application of any unconscionable term as to avoid any unconscionable result'³³⁴, while the PECL goes even further, permitting courts to adapt the contract so as to align it with what the parties might have agreed had good faith and fair dealing been respected³³⁵. Nonetheless, some uncertainty persists as to the permissible scope of judicial intervention – namely, whether courts may actively replace the offending term with a newly crafted provision, or whether they are confined to excising the invalid term and relying on default rules to fill the resulting gap.

In such contexts, courts have developed a range of techniques to deal with gaps once an unfair term is struck. A common solution is to remove the offending clause and enforce the remainder of the contract, thereby implicitly replacing the invalid term with the applicable default rule³³⁶. Yet, courts may also adopt more nuanced solutions. Rather than eliminating the term entirely, they may 'trim' it, preserving its core while removing only the unconscionable excess³³⁷. This idea suggests that a term – such as an excessively high interest rate – may be enforced up to the point at which unconscionability becomes operative.

To note, there is, of course, a clear difference between legitimizing partial invalidity of a contract, calibrating the legal effects descending from contract invalidity in accordance with

³³² Cf O. BEN-SHAHAR, nt. 331, p. 875 and the case law mentioned (i.e. *Earl of Chesterfield v. Janssen*, (1750) 28 Eng. Rep. 82 (Ch.)).

³³³ Ibid.

³³⁴ More precisely, Section 2-302 of the UCC states that: 'If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result'.

³³⁵ Cf Article 4:109(2) PECL.

³³⁶ Cf O. BEN-SHAHAR, nt. 331, p. 890 and the case law mentioned (i.e. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 445-46 (D.C. Cir. 1965)) where the elimination of an unfair cross-collateral clause resulted in the application of the default rule, leaving the seller without special security over prior purchases.

³³⁷ Ibid. The author mentions the following illustrative cases: *Toker v. Westerman*, 274 A.2d 78 (N.J. 1970); *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264 (Sup. Ct. 1969); or *Bank of Indiana National Ass'n v. Holyfield*, 476 F. Supp. 104 (S.D. Miss. 1979).

the reasons for which a term is condemned, and admitting corrective supplementation of the contractual framework. The latter possibility is the more ambitious one, for it entails judicially reconstructing the parties' bargain in situations where the legal system has provided no supplementary provisions capable of stepping in to replace the unfair term.

13.1. Contract Supplementation By Means Of Supplementary Provisions Of National Law

It has long been acknowledged that the consumers' interest in preserving the contract, once purged of its unfair terms, may be seriously undermined where the invalidity or ineffectiveness of such terms generates a gap so significant as to jeopardize the contract's continued existence between the parties³³⁸. In response to this concern, several scholars – albeit on different grounds – have suggested that the removal of an unfair term should allow for its replacement either with the supplementary provisions of national law that been derogated from or, more generally, through mechanisms of contractual supplementation aimed at filling the resulting gap³³⁹.

However, the substitution of unfair terms with supplementary provisions, particularly those of a 'default rules' nature, raises two main issues. First, the gap produced by the removal of the unfair term is, by definition, supervening rather than original. It does not stem from the parties' conscious decision to leave a matter unregulated – thus inviting the application of default rules – but rather from a judicial finding of unfairness. Nonetheless, it has been argued that even in such cases substitution may operate as a *pars costruens* accompanying the invalidity or ineffectiveness of the term, thereby enabling the consumer to continue benefiting from the contract³⁴⁰. Secondly, substitution does not occur through mandatory provisions, but rather through supplementary rules, which, at least in principle, remain subject to party autonomy³⁴¹.

³³⁸ Cf A. D'ADDA, nt. 319, p. 609.

³³⁹ On the Italian debate concerning the distinction between 'integrazione cogente' (Article 1339 of the Italian *Codice civile*) and 'integrazione suppletiva' (Article 1374 of the Italian *Codice civile*), see for instance 'L'integrazione (cogente) del contratto mediante il diritto dispositivo' in G. D'AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 246 et seq; G. DE NOVA, nt. 320, pp. 487-488. With regard to the international context, see H. SCHULTE-NÖLKE, nt. 3, pp. 331-332.

³⁴⁰ A. FEDERICO, 'Nuove nullità ed integrazione del contratto' in A. BELLAVISTA and A. PLAIA (eds.), nt. 60, p. 353. See also N. KORNET, *Contract interpretation and gap filling: comparative and theoretical perspective*, Antwerpen, 2006, p. 135, where the author explains that '[u]nder German law, it is regarded as irrelevant whether the gap exists at the time of contract formation, or whether it develops subsequently. For example, in the case of an *Erbbauvertrag*, which provides a long term, hereditary right to build on another's land, constructive interpretation (*ergänzende Vertragsauslegung*) could lead to the ground rent (*Erbbauszins*) being adapted as a result of the increase in property prices'.

³⁴¹ M. DELLACASA, nt. 155, pp. 26-27; S. PAGLIANTINI, 'L'equilibrio soggettivo dello scambio (e l'integrazione) tra Corte di giustizia, Corte costituzionale ed ABF: il "mondo di ieri" o un trompe l'oeil concettuale?', in *I Contratti*, 2014, p. 861; ID., 'Il diritto derivato nazionale e la finzione di un dialogo

While some scholars justify this mechanism by invoking the protective rationale underlying consumer law³⁴², others object that such an approach risk overlooking another equally important objective: the prevention of market distortions arising from the systematic use of unfair terms³⁴³.

An alternative justification for the substitution of unfair terms by means of default rules may be found in the inherent indeterminacy of judicial review in this field. Since unfairness is not exhaustively defined but left to case-by-case judicial assessment, the precise nature of the contractual gap cannot be anticipated in advance. This uncertainty makes it reasonable to rely on a mechanism that is both flexible and predictable – namely, supplementation through default rules – which allows for a balanced reconstruction of the contract³⁴⁴.

Within domestic legal systems, this reasoning has led to calls for ‘evolutionary’ interpretation of the traditional mechanism by which invalid terms are replaced only in case of a breach of mandatory rules, extending its operation to default rules as well. Given the functional overlap between contract preservation and contract supplementation, such an extension appears justified: where the contract survives despite the invalidity of a term, the default rule may be said to ‘re-expand’ into the contractual gap that has been created³⁴⁵.

tra le corti’, in *ODCC*, 2018, pp. 336; A. D’ADDA, *Nullità parziale e tecniche di adattamento del contratto*, nt. 60, pp. 251 et seq and F. AZZARRI, nt. 313, p. 73.

³⁴² F. DI MARZIO, nt. 313, pp. 704-708; G. DE NOVA, nt. 320, p. 489; M. FARINA, nt. 128, pp. 446-447: ‘The provision [Article 7] carries a very powerful message, stressing out the ultimate goal the Directive aims at. First, it clearly states what has to be done: adequate and effective remedies shall be set down, which means – as it has already been said – that the protection granted to weaker contractual parties shall be substantial, so as to restore a just agreement. (...) Article 7, paragraph 1, as long as it shows the *rationale* behind the Directive, enlightens the interpretation of Article 6, paragraph 1. On this ground, the obliteration of the unfair term realizes a remedial function compliant with the overall objective of the Directive, only if it manages to grant the consumer an effective protection, thus contributing to create a more efficient and solidaristic market’. With regard to the concept of substantial protection granted to the weaker party, see also C. MAK, ‘Rights and Remedies: Art. 47 EUCFR and Effective Judicial Protection in European Private Law Matters’ in H.-W. MICKLITZ (eds.), *Constitutionalization of European Private Law*, Oxford, 2014, p. 253; V. TRESNJACK and E. BEYSEN, ‘European Consumer Protection Law: Curia Semper Dabit Remedium?’, in *CMLR*, 2011, 48, p. 105; F. BARTOLINI, ‘The Consumer-Debtor Dimension: Some Further Steps for the Principle of Effectiveness within Consumer Credit Contracts’, in *ERCL*, 2016, 12(3), pp. 292 et seq.

³⁴³ Cf M. ASTONE, nt. 14, p. 13 (‘È proprio nel rapporto tra mercato e tutela del consumatore che si inserisce il problema del controllo sugli atti di autonomia privata e della correlata questione dei rimedi’) and S. PATTI, ‘Autonomia privata e diritto privato europeo’, in *Contr. e impr.*, 2013, pp. 633 et seq; A. FEDERICO, ‘Nuove nullità ed integrazione del contratto’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 60, pp. 352 et seq; E. GABRIELLI and A. ORESTANO, ‘Contratti del consumatore’, in *Dig. disc. priv. (sez. civile)*, *Aggiornamento*, Torino, 2000, p. 259, specifically nt 96.

³⁴⁴ A. FEDERICO, ‘Nuove nullità ed integrazione del contratto’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 60, pp. 353 et seq.

³⁴⁵ A. D’ADDA, ‘La correzione del «contratto abusivo»: regole dispositive in funzione «conformativa» ovvero una nuova stagione per l’equità giudiziale?’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 201, pp. 386 et seq (‘Si potrebbe infatti ritenere che, una volta legittimata la conservazione del contratto “per il resto” (...) anche il problema della sostituzione trovi una soluzione. In fondo il meccanismo della

Similarly, it has been argued that a provision which is ordinarily a default rule may, in business-to-consumer contracts, acquire a mandatory character. The rationale is that the presence of a statutory provision invalidates any unfair derogation from the default regime. Once such a derogation is declared unfair, the previously excluded rule is restored to effect, thereby re-entering the contract³⁴⁶. This line of reasoning appears to echo a doctrinal reconstruction, largely developed in German legal scholarship, according to which default rules, although formally subsidiary to party autonomy, should not be regarded as merely optional. Rather, they are conceived as ‘law’ in the proper sense, embodying a ‘fair and natural balancing of interests’ and expressing the ‘natural’ regulatory standard governing the contractual relationship in question (‘normale’ *Ordnung des betreffenden Lebensverhältnisses*³⁴⁷)³⁴⁸. Strictly speaking, however, this is not a case of supplementation. Rather, the invalidity or ineffectiveness of the unfair term simply reinstates the legal rule which the seller or supplier had attempted to exclude or modify in breach of the principle of good faith³⁴⁹.

More generally, legal systems display a tendency to incorporate statutory content into contracts whenever invalidity arises from a conflict between contractual terms and legal rules that not only prohibit certain arrangements but also provide an alternative regulatory

conservazione per il resto e quello dell’integrazione dispositiva sembrano sovrapporsi: come osservato, se alla nullità della clausola di limitazione della responsabilità, ovvero della clausola penale, si accompagna la conservazione del contratto per il resto, allora sarà proprio la disciplina dispositiva a riespandersi naturalmente. Ristabilendo le normali regole di responsabilità, ovvero gli ordinari criteri per la quantificazione del danno da risarcire’); M. DELLACASA, nt. 155, p. 54; P. SIRENA, ‘La disciplina delle clausole contrattuali abusive nell’interpretazione della giurisprudenza e dell’Arbitro Bancario Finanziario (ABF)’ in A. BELLELLI, L. MEZZASOMA and F. RIZZO (eds.), nt. 206, p. 68; V. BACHELET, ‘La nullità di protezione contro le clausole abusive’ in V. BACHELET and A. D’ADDA (eds.), nt. 313, pp. 52-53 (‘[u]na disciplina normalmente dispositiva – stando alle regole del codice civile – diventa pertanto inderogabile in ambito *business-to-consumer*, essendovi una norma imperativa che determina la nullità della clausola abusiva derogante alla disciplina dispositiva. Se la deroga è abusiva, si riespande allora elasticamente la disciplina derogata’).

³⁴⁶ Cf. V. BACHELET, ‘La nullità di protezione contro le clausole abusive’ in V. BACHELET and A. D’ADDA (eds.), nt. 313, pp. 52-53.

³⁴⁷ Cf. L. RAISER, *Das Recht der allgemeinen Geschäftsbedingungen*, Hamburg, 1935, reprinted 1961, p. 293.

³⁴⁸ Cf. V. RIZZO, nt. 168, p. 139 and N. KORNET, nt. 340, p. 46: ‘Legislative default provisions therefore can be seen to function as a set of “back-up” rules, leaving individual parties free to contract out of the provisions laid down by the legislature. They are seen to be based on experience and a sense of what is fair and just. By creating these rules, the legislature has undertaken the task of weighing the typical interests of contracting parties with a view to creating a fair and reasonable rule that would be acceptable in most cases, without actually waiting to impose them upon individual contracting parties, thus leaving the freedom of contract intact’.

³⁴⁹ Cf. P. SIRENA, ‘La disciplina delle clausole contrattuali abusive nell’interpretazione della giurisprudenza e dell’Arbitro Bancario Finanziario (ABF)’ in A. BELLELLI, L. MEZZASOMA and F. RIZZO (eds.), nt. 206, p. 68 and G.B. FERRI, nt. 159, pp. 16 et seq.

framework³⁵⁰. For this perspective, supplementation through default rules operates as a corrective device aimed at addressing the unfairness resulting from the unilateral exercise of the power to derogate from them. The abuse lies not in derogation *per se* – since default rules are, by definition, derogable – but in the misuse of that power, particularly where it leads to a significantly unbalanced contractual arrangement³⁵¹. The purpose of supplementation is thus to reconstruct the contractual equilibrium by approximating the terms that reasonable parties, negotiating under fair market conditions and in good faith, would have accepted³⁵².

This corrective function is closely linked to the broader role of default rules within contract law. Traditionally, their content and function have been situated within a fundamental theoretical tension between two competing paradigms. On the one hand, default rules have been conceived as instruments for reconstructing the hypothetical will of the parties. In this vein, Windscheid famously argued that such rules give effect, if not to the parties' actual will, then at least to their 'eigentlichen Willen'³⁵³, articulating only what the parties themselves 'would have expressed' had they contemplated the specific case³⁵⁴. On the other hand, an opposing view emphasizes their heteronomous nature, independent of private will and oriented toward broader normative objectives, reflecting social and ethical considerations and aligning with ideals of commutative or, even, distributive justice³⁵⁵.

³⁵⁰ A. D'ADDA, 'La correzione del «contratto abusivo»: regole dispositive in funzione «conformativa» ovvero una nuova stagione per l'equità giudiziale?' in A. BELLAVISTA and A. PLAIA (eds.), nt. 201, pp. 387 et seq.

³⁵¹ G. D'AMICO, 'L'abuso di autonomia negoziale nei contratti dei consumatori' in G. D'AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 248 et seq.

³⁵² G. D'AMICO, 'L'abuso di autonomia negoziale nei contratti dei consumatori' in G. D'AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 228 et seq. ('il regolamento che avrebbe razionalmente accettato un contraente *che avesse potuto "negoziare" il contratto secondo standards di mercato* e con una controparte che si fosse comportata in maniera "corretta").

³⁵³ B. WINDSCHEID, *Lehrbuch des Pandektenrechts*, vol. 6, 1887, S. 263 et seq.

³⁵⁴ Cf F. MÖSLEIN, '„Governance by Default“ Innovation und Koordination durch dispositives Recht' in S. GRUNDMANN, B. HAAR, H. MERKT, P.O. MÜLBERT, M. WELLENHOFER, H. BAUM, J. von HEIN, T. von HIPPEL, K. PISTOR, M. ROTH and H. SCHWEITZER (eds.), *Festschrift für Klaus J. Hopt zum 70. Geburtstag am 24. August 2010: Unternehmen, Markt und Verantwortung*, Berlin/New York, 2011, p. 2862.

³⁵⁵ Ibid. Cf, also, V. RIZZO, nt. 168, p. 143: 'Se le norme di diritto dispositivo contengono contemporaneamente una *ordnungspolitische Aussagebedeutung*, questa è tuttavia presente in diversa misura: da un lato, ci sono norme a contenuto prevalentemente politico-giuridico (es. § 459 et seq BGB), da altro lato, ci sono norme a prevalente contenuto di utilità (sono richiamate al riguardo, in particolare, le norme sulla prescrizione, sulla compensazione, sul foro competente). Ne consegue che tanto più alto è l'*ordnungspolitische Aussagewert* di una norma, tanto più forte è la posizione del cliente e difficile la possibilità di deroga; tanto più debole è la posizione del cliente e più agevole la possibilità di deroga. Nei confronti di siffatto indirizzo sono stati avanzati, comunque, rilievi volti a mettere in dubbio la possibilità di tenere ferma l'indicata distinzione, formandosi così un orientamento, oggi ampiamente dominante, che tende a prescindere da essa'.

This dualism is also reflected in their functional operation. From an *ex ante* perspective, default rules influence contractual behavior by providing a normative reference point. While a fully rational and informed *homo oeconomicus* is assumed to contract around such rules, the *homo sociologicus* remains more responsive to the normative frameworks embedded within them³⁵⁶. From an *ex post* perspective, default rules serve as tools for reconstructing the contractual balance once it has been disrupted³⁵⁷.

In this latter capacity, default rules often function as a benchmark in assessing the unfairness of contractual terms, thereby giving expression to the so-called ‘*Ordnungs- (or ‘Richtlinien’) und Leitbildfunktion*’ of default rules³⁵⁸. They operate as *Referenzmaßstab* against which private agreements are measured, shaping expectations even where parties remain formally free to deviate³⁵⁹. This approach is reflected, for instance, in § 307(2) BGB, where statutory default rules serve as a benchmark for assessing substantive fairness³⁶⁰. Deviations from such rules, especially when systematically embedded in standard terms, may signal structural imbalances extending beyond individual instances of private autonomy. Rather than imposing binding commands, default rules cast a normative ‘shadow’ (*Schatten*) over contracts, operating as instruments of indirect regulation (*Feinsteuerung*) characteristic of private law³⁶¹.

Against this background, it would be paradoxical to rely on national law as to the primary benchmark for assessing unfairness – despite the absence of a uniform notion of ‘significant imbalance’ – only to disregard the same rules once unfairness has been established. On the contrary, the replacement of unfair terms with supplementary provisions of national law may help offset, at least in part, the fragmentation resulting from divergent national standards³⁶².

³⁵⁶ F. MÖSLEIN, nt. 354, p. 2863.

³⁵⁷ Ibid.

³⁵⁸ Cf L. RAISER, nt. 347, pp. 291 et seq. This is the so called *Leitbildfunktion* theory, according to which default rules provide the parameters of substantive fairness against which the potential unfairness of a contract term is to be assessed. The theory rests on the observation that the derogation introduced by standard terms from default rules constitutes a particularly significant manifestation of contractual autonomy, since the deviation from statutory rules acquires a general character that an individual exercise of private autonomy would not normally possess. The *Leitbildfunktion* theory has been expressly acknowledged in the BGB itself, in § 307(2). Cf also F.P. PATTI, nt. 313, pp. 744-745, specifically nt. 18.

³⁵⁹ F. MÖSLEIN, nt. 354, p. 2864: ‘Der entscheidende Akteur kann schlicht nicht eindeutig identifiziert werden, weil immer auch das Verhalten des jeweils anderen Spielers zu bedenken ist: Gesetzgeberische Vorgaben können durch privatautonome Abbedingung verpuffen, umgekehrt erfolgen private Vereinbarungen im Schatten der dispositiven Regeln, die als wichtiger Referenzmaßstab dienen’.

³⁶⁰ See above nt. 171.

³⁶¹ F. MÖSLEIN, nt. 354, pp. 2864 and 2875.

³⁶² For a different opinion see, F.P. PATTI, nt. 313, p. 748.

The reasoning of the Court of Justice in *Mohamed Aziz* is particularly illuminating in this respect³⁶³. The Court of Justice clarified that Article 3(1) of the Unfair Contract Terms Directive must be interpreted as meaning that the concept of ‘significant imbalance’ to the detriment of the consumer must be assessed in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties. The test is therefore whether, and to what extent, the contested term places the consumer in a less favorable legal position than that provided under national law. To that end, an assessment must also be made of the consumer’s legal position with regard to the means available under national law to prevent the continued use of unfair terms³⁶⁴.

All in all, the mere deletion of unfair terms from business-to-consumer contracts appears inconsistent with the fundamental choice made by the EU legal system. Under Article 6(1) of the Unfair Contract Terms Directive, the ordinary consequence of unfairness entails that the parties remain bound by the contract, now purged of the unfair term. Yet such an objective is unlikely to be realized in practice unless the unfair term is replaced by an alternative rule capable of restoring the conditions necessary for the contract to operate effectively³⁶⁵.

This approach finds further support in the wording of § 306 of the BGB. As already observed, under the significant title ‘Legal consequences of non-incorporation and ineffectiveness’, it is established that to the extent that certain terms have not become part of the contract or are ineffective, the contents of the contract are determined by statutory provisions (*nach den gesetzlichen Vorschriften*), thus according to the corresponding regime governing the type of contract concerned (or by analogy) and, where necessary, to *ergänzende Vertragsauslegung*, aiming at preserving the contractual objective originally pursued by the parties³⁶⁶. Then, at

³⁶³ Case C-415/11, *Mohamed Aziz*, ECLI:EU:C:2013:164. Cf the analysis of C. MAK, ‘Reimagining Europe Through Private Law Adjudication’ in C. MAK and B. KAS (eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe*, Oxford, 2023, pp. 72-74.

³⁶⁴ Case C-415/11, *Mohamed Aziz*, nt. 363, para 11: ‘Article 3(1) of Directive 93/13 must be interpreted as meaning that (...) the concept of ‘significant imbalance’ to the detriment of the consumer must be assessed in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force. To that end, an assessment of the legal situation of that consumer having regard to the means at his disposal, under national law, to prevent continued use of unfair terms, should also be carried out’. Cf, more recently, Joined Cases C-6/24 and C-231/24, *Abanca Corporación Bancaria SA*, ECLI:EU:C:2025:333.

³⁶⁵ Cf M. DELLACASA, nt. 155, p. 53.

³⁶⁶ Cf F.P. PATTI, nt. 313, p. 740; F. AZZARRI, nt. 313, p. 58 et seq; M. DELLACASA, nt. 155, p. 26. With regard to the reasons why default rules should prevail over *ergänzende Vertragsauslegung*, see N. KORNET, nt. 340, p. 109. At p.136, the author explains that, where supervening circumstances give rise to a gap in the contract, constructive interpretation (*ergänzende Vertragsauslegung*) converges with the doctrine of *Wegfall der Geschäftsgrundlage*. The latter addresses situations in which unforeseen events undermine the very basis of the transactions, such that the contract can no longer be regarded as identical to the one originally concluded. As a result of this change in circumstances, one party is subjected to a

paragraph 3, as already analyzed, it is clarified that the contract is ineffective if upholding it, even taking into account the alteration provided, would constitute an unreasonable hardship for one party (*unzumutbare Härte*)³⁶⁷.

Yet, a different question is whether the replacement of unfair terms by supplementary provisions of national law, such as those found in the European civil codes, can truly be regarded as a satisfactory solution. Indeed, it has been observed that consumers tend to invoke the unfairness of contract terms only in a rather limited percentage of cases. If this is correct, the practical deterrent effect on sellers and suppliers is unlikely to derive from default rules, such as those contained in civil codes, which merely restore equilibrium within the individual contract. As a matter of fact, they are hardly capable of reshaping the standard contractual practices routinely employed by sellers and suppliers in offering goods and services to consumers³⁶⁸.

In this final regard, however, it is important to distinguish between the evaluation of a mechanism's practical effectiveness from the coherent reconstruction of the legal effects that flow from the application of a given discipline. To exclude default rules from operating once an unfair term has been deleted would amount to *functionalizing* and reshaping the consequences of the remedy of nullity or of ineffectiveness in the narrow sense, by diverting them from their proper legal effects. Moreover, admitting the possibility of supplementing contracts by means of default rules would be *proportionate* and *reasonable* in light of the fact that contract nullity must be understood as a 'legal remedy'.

All that being said, the real difficulty emerges when a contract term is declared unfair on the ground of a lack of transparency. In such circumstances, the straightforward reinstatement of the applicable default rules may prove insufficient, as no applicable provision may exist. To avoid inconsistency both in the treatment of contractual terms and in the rationale for their invalidation, it is therefore necessary to admit alternative forms of contract supplementation³⁶⁹.

13.2. The Distinction Between 'Supplementary Provisions Of National Law' And 'National Provisions Of A General Nature'

As mentioned above the Court of Justice has shown reluctance towards supplementing contracts after removing unfair terms. However, there have been some exceptions to this stance.

manifestly disproportionate burden, and it would lead to a gross injustice to allow the contract to be enforced as written.

³⁶⁷ See above Part II, § 10.

³⁶⁸ Cf M. DELLACASA, nt. 155, p. 55.

³⁶⁹ Cf G. D'AMICO, 'L'integrazione (cogente) del contratto mediante il diritto dispositivo' in G. D'AMICO and S. PAGLIANTINI (eds.), nt. 157, p. 224. See also above § 12.

Indeed, in *Kásler*, the Court of Justice recognized that if it was not permissible to replace an unfair term with a supplementary provision of national law, leading to the annulment of the contract in its entirety, it could result in particularly unfavorable consequences for the consumer³⁷⁰. More precisely, in *Kásler*, the particularly unfavorable consequences referred to the immediate repayment of the outstanding loan balance, which would exceed the financial capacity of the consumer³⁷¹. Consequently, this would penalize the consumer instead of the lender, who may continue to insert such terms in their contracts without being dissuaded.

Accordingly, in response to a preliminary reference in *Dziubak*, the Court of Justice stated that if removing an unfair term would require the national court to annul the contract in its entirety, thereby subjecting the consumer to particularly unfavorable consequences, the national courts were not prohibited from substituting the unfair term with a supplementary provision of national law or one which is applicable where the parties to the contract at issue so agree³⁷². However, the Court of Justice, in that situation, added that ‘Article 6(1) of Directive 93/13 must be interpreted as precluding gaps in a contract caused by the removal of the unfair terms contained in that contract from being filled solely on the basis of national provisions of a general nature which provide that the effects expressed in a legal transaction are to be supplemented, inter alia, by the effects arising from the principle of equity or from established customs, which are neither supplementary provisions nor provisions applicable where the parties to the contract so agree’³⁷³.

In essence, according to the Court of Justice’s reasoning, the possibility of substitution, deviating from the general rule that the contract at issue can remain binding on the parties only

³⁷⁰ See Case C-26/13, *Kásler and Káslerné Rábai*, nt. 9, paras 80-83: ‘However, it does not follow, in a situation such as that in the main proceedings, that Article 6(1) of Directive 93/13 precludes the national court, in accordance with the principles of the law of contract, from deleting an unfair term and substituting for it a supplementary provision of national law. On the contrary, replacing an unfair term with such a provision which, as is clear from the thirteenth recital in the preamble to Directive 93/13, is presumed not to contain unfair terms, in that it leads to the result that the contract may continue in existence in spite of the fact that Clause III/2 has been deleted and continues to be binding for the parties, is fully justified in the light of the purpose of Directive 93/13. (...) However, if, in a situation such as that at issue in the main proceedings, it was not permissible to replace an unfair term with a supplementary provision, requiring the court to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, so that the dissuasive effect resulting from the annulment of the contract could well be jeopardised’.

³⁷¹ See Case C-26/13, *Kásler and Káslerné Rábai*, nt. 9, para 84: ‘In general, the consequence of an annulment is that the outstanding balance of the loan becomes due forthwith, which is likely to be in excess of the consumer’s financial capacities and, as a result, tends to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts’. See, in this context, I. DOMURATH and C. MAK, ‘Private Law and Housing Justice in Europe’, in *The Modern Law Review*, 2020, 83(6), pp. 1189 et seq.

³⁷² See Case C-260/18, *Dziubak*, nt. 188, para 59.

³⁷³ See Case C-260/18, *Dziubak*, nt. 188, para 62.

if it can continue in existence without the unfair terms, is limited to supplementary provisions of national law or those which are applicable where the parties so agree and it is precluded to national provisions of general nature. This assumption is based, in particular on the ground that such supplementary provisions of national law, unlike national provisions of general nature, are presumed not to contain unfair terms³⁷⁴. In other words, both the unwritten rules generated by the practice of economic relations and equity derived from the norms of ‘social coexistence’ cannot guarantee that in the heteronomous redetermination of the contractual arrangement, an unfair allocation of rights and obligations between the parties is not reproduced, albeit to a lesser extent³⁷⁵. Such sources of supplementation of the contract could, therefore, hinder the achievement of the objective of the Unfair Contract Terms Directive, which aims to replace, following the declaration of unfairness of a contract term, the formal balance resulting from the unilateral drafting of the contract with a real balance between the parties³⁷⁶.

Despite acknowledging the Court of Justice’s willingness to consider contract supplementation, it is important to note that the decisions, particularly the one in *Dziubak*, have received criticism³⁷⁷.

As a matter of fact, in *Dziubak*, the Court of Justice, on the one hand, seems to operate under the contested assumption that Article 1(2) of the Unfair Contract Terms Directive³⁷⁸ draws a distinction between rules introduced by the legislator, deemed fair as they undergo evaluation, and provisions that grant national courts discretion to derive the governing rule, which cannot be presumed fair³⁷⁹ and, on the other hand, seems to take a formalistic approach towards the concept of ‘freedom of contract’, as influenced by Advocate General Pitruzzella’s opinion³⁸⁰. Indeed, that opinion suggests that using general provisions for gap-filling purposes would constitute a ‘creative’ intervention that, ultimately, would alter the balance of interests sought by the parties and would infringe excessively on contractual autonomy³⁸¹.

³⁷⁴ See Case C-260/18, *Dziubak*, nt. 188, para 61.

³⁷⁵ Cf M. LAMICELA, nt. 3, p. 1548; F. AZZARRI, nt. 313, p. 81; E. NAVARRETTA, ‘Il contratto “democratico” e la giustizia contrattuale’, in *Riv. dir. civ.*, 2016, p. 1280.

³⁷⁶ Cf M. LAMICELA, nt. 3, p. 1548.

³⁷⁷ See notably F. ESPOSITO, nt. 200, pp. 538 et seq.

³⁷⁸ More precisely, Article 1(2) of the Unfair Contract Terms Directive stipulates that: ‘The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive’.

³⁷⁹ See F. ESPOSITO, nt. 200, p. 543.

³⁸⁰ See F. ESPOSITO, nt. 200, pp. 540 et seq.

³⁸¹ Opinion of Advocate General Pitruzzella, 14 May 2019, ECLI:EU:C:2019:405, para 74: ‘(...) the use of a contractual term which reflects such general provisions would constitute ‘creative’ intervention capable of altering the balance of interests sought by the parties and excessively encroaching on contractual autonomy’.

At first glance, judicial supplementation may effectively appear problematic. Allowing a third party, namely national courts, to intervene in the contract effectively amounts to permitting its rewriting³⁸². This implies that the parties become subject not only to obligations different from those originally agreed upon, but also to obligations that could not have been anticipated or clearly defined in advance³⁸³. From a traditional perspective, such an intervention seems disruptive: it intrudes upon the principle of contractual autonomy and threatens legal certainty³⁸⁴. The contract no longer remains the exclusive realm of private will; instead, the parties are required to accept that another authority may determine, with binding force, the content of their agreement and the allocation of their respective interests³⁸⁵.

From a broader perspective, endowing individual judges with substantial authority to recast contract terms naturally raises concerns regarding legal certainty and the foreseeability of judicial decisions. Excessive discretion risks leaving market participants without reliable guidance, potentially undermining confidence and hindering the ordinary functioning of commercial relations³⁸⁶.

However, it is important to consider the position of those who argue that this formal conception of freedom of contract and contractual autonomy is at odds with the normative foundations of the Unfair Contract Terms Directive³⁸⁷. Indeed, the Directive rests on the assumption that the consumer is the weaker party in the contract. With this in mind, the Directive aims to prevent consumer contracts from including unfair terms and protect

³⁸² See, in general terms, S. WHITTAKER, 'Judicial Interventionism and Consumer Contracts', in *Law Quarterly Review*, 2001, 117, p. 215; ID., 'Theory and Practice of the "General Clause" in English Law: General Norms and the Structuring of Judicial Discretion' in S. GRUNDMANN and D. MAZEAUD (eds.), *General Clauses and Standards in European Contract Law*, The Hague, 2006, p. 57. With regard, in general, to the relationship between contract supplementation and contractual autonomy, see A. D'ADDA, nt. 319, pp. 609-610.

³⁸³ M. FARINA, nt. 128, pp. 457 et seq.

³⁸⁴ Ibid. See also A. D'ADDA, 'La correzione del «contratto abusivo»: regole dispositive in funzione «conformativa» ovvero una nuova stagione per l'equità giudiziale?' in A. BELLAVISTA and A. PLAIA (eds.), nt. 201, pp. 396 et seq.

³⁸⁵ For a different opinion, see M. FARINA, nt. 128, pp. 460 et seq: 'First of all, it might be subject to some criticism the starting point of this objection: that is that the judicial correction is something that completely floors the professional, as if the judge could take her decision absolutely discretionally. On the contrary, the judge has – especially in the context under analysis – several parameters she has to stick to when deciding'. On this topic, see also A. D'ADDA, nt. 319, p. 619 ('Se i contenuti dell'integrazione equitativa prendono le mosse dal «caso concreto», ed anzi da una analitica disamina delle pattuizioni delle parti per individuare ulteriori profili regolamentari in grado di «sciogliere» conflitti di interessi insorti tra le medesime – e non regolati dal contratto, dalla legge ovvero dagli usi – allora è evidente come il modello equitativo si disponga quasi per definizione lungo una linea di sviluppo armonioso dell'atto di autonomia privata, proporzionata alla direttiva economica ad esso sottesa'); S. RODOTÀ, nt. 327, pp. 238 et seq.

³⁸⁶ M. FARINA, nt. 128, pp. 457 et seq; G. D'AMICO, 'L'integrazione (cogente) del contratto mediante il diritto dispositivo' in G. D'AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 232 et seq.

³⁸⁷ See F. ESPOSITO, nt. 200, pp. 543 et seq.

consumers' economic interests. Accordingly, consent, party autonomy, and contractual autonomy must be treated differently in business-to-consumer contracts than in contracts negotiated between equal parties³⁸⁸.

In reality, a formalistic adherence to party autonomy in consumer contracts merely conceals the persistence of imbalances and exploitation³⁸⁹. As a result, it seems unjustified to restrict the possibility of contract supplementation solely to supplementary provisions of national law.

Further criticism of the distinction between supplementary provisions of national law and national provisions of a general nature can be drawn from Recital 13, which affirms that 'the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms'³⁹⁰. Accordingly, it may be argued that the indirect determination through statutory or regulatory provisions could encompass determinations made by national courts resulting from their interpretative activity. In such cases, a presumption of fairness should likewise apply³⁹¹. Recital 13 further states that 'the wording "mandatory statutory or regulatory provisions" in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established'³⁹². This suggests that the Unfair Contract Terms Directive leaves Member States considerable discretion in deciding how contractual gaps should be filled³⁹³.

Ultimately, preventing national courts from relying on general provisions to develop supplementary rules necessary to apply the *Kásler* exception raises significant concerns regarding compatibility with the founding Treaties of the European Union³⁹⁴.

³⁸⁸ Ibid.

³⁸⁹ See F. ESPOSITO, nt. 200, p. 546.

³⁹⁰ See F. ESPOSITO, nt. 200, pp. 543 et seq. In this context, see also T. JOSIPOVIĆ, nt. 219, pp. 367 et seq.

³⁹¹ Cf Article 1(2) of the Unfair Contract Terms Directive.

³⁹² More precisely, Recital 13 of the Unfair Contract Terms Directive stipulates that: 'Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording 'mandatory statutory or regulatory provisions' in Article 1 (2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established'.

³⁹³ See F. ESPOSITO, nt. 200, pp. 543-544.

³⁹⁴ See F. ESPOSITO, nt. 200, p. 548: 'More fundamentally, there are serious issues of division of powers between the Union and the Member States that derive from the prohibition of entrusting to national courts the use of general provisions to develop the supplementary rules needed to apply the *Kásler* exception'.

As a matter of fact, the TEU emphasizes the principle of sincere cooperation between the European Union and the Member States, requiring mutual respect and assistance in fulfilling Treaty-based obligations³⁹⁵ and requiring Member States to ensure effective judicial protection in areas governed by EU law³⁹⁶. Moreover, as already observed, Article 288 TFEU provides that a directive is binding upon each Member State as to the results to be achieved, while leaving national authorities free to choose the form and methods of implementation³⁹⁷.

Therefore, the authority to devise gap-filling provisions, whether exercised by the legislature or by the judiciary, primarily belongs to the Member States. Consequently, the distinction drawn by the Court of Justice between supplementary provisions of national law and national provisions of a general nature seems difficult to reconcile with these principles.

A further complication arises from the Court of Justice's restrictive approach to supplementing contracts through national provisions of general nature, which appears to sit uneasily with the principle of *favor contractus*. This principle requires that contracts, whenever possible, be preserved even if affected by partial invalidity. It finds explicit expression in Article 6(1) of the Unfair Contract Terms Directive, which states that a contract remains binding upon the parties if it can continue into existence without the unfair terms³⁹⁸.

This tension resurfaced more recently in a case before the Court of Appeal in Cluj, Romania, which offered the Court of Justice an opportunity to clarify the role of national courts in situations where the removal of an unfair term would prevent the contract from continuing into existence, while the annulment of the contract in its entirety would generate particularly unfavorable consequences for the consumer.

All in all, in *Banca B.*, the Court of Justice's reasoning began with a recognition of the structural imbalance that characterizes business-to-consumer contracts³⁹⁹. Interpreting Article 6(1) of the Unfair Contract Terms Directive, the Court established that judicial adaptation of unfair terms risks undermining the deterrent effect of the prohibition enshrined in Article 7⁴⁰⁰.

³⁹⁵ Indeed, Article 4(3) TEU establishes that: '[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.

³⁹⁶ Article 19(1) TEU establishes that: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

³⁹⁷ See above, Part II, § 13.2..

³⁹⁸ Cf. G. TOMÁS, nt. 186, pp. 259 et seq and F. ESPOSITO, nt. 200, p. 544. The author explains that: 'Arguably, Article 6(1) expresses this principle when it states that "the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms". But even if this were not the case, the road to declaring *favor contractus* a general principle of EU law is wide open. First, the Kásler exception can be seen as a manifestation of *favor contractus*'.

³⁹⁹ See Case C-269/19, *Banca B. SA*, nt. 307.

⁴⁰⁰ See Case C-269/19, *Banca B. SA*, nt. 307, paras 30-31.

Accordingly, domestic courts may not substitute or modify the content of an unfair term, except in circumstances where annulment of the contract in its entirety would prove more detrimental to the consumer than to the seller or supplier⁴⁰¹. In such exceptional cases, the Court of Justice stressed that national courts must, in accordance with domestic law, adopt all measures necessary to shield the consumer from the adverse consequences⁴⁰².

On this basis, the Court concluded that ‘negotiation’ between the parties represents the only legitimate means of avoiding the disproportionate consequences of annulment of the contract in its entirety. Nevertheless, national courts retain a supervisory role, ensuring that negotiation is conducted within a framework that restores contractual balance without exceeding what is strictly necessary⁴⁰³.

The Court of Justice thus warned against judicial interventions that would go beyond these corrective functions, since such an approach would jeopardize both the principle of equality between the parties and the broader objective of eliminating unfair terms from business-to-consumer contracts⁴⁰⁴.

Lastly, as already observed, in *Lombard*, the Court of Justice appeared to go further. Whereas *Banca B.* had emphasized the limits on judicial intervention, *Lombard* relaxed this stance by

⁴⁰¹ See Case C-269/19, *Banca B. SA*, nt. 307, para 32.

⁴⁰² Cf above nt. 308.

⁴⁰³ See Case C-269/19, *Banca B. SA*, nt. 307, para 42. A skeptical position with regard to negotiation is taken, in the domestic context, by V. SCALISI, ‘Giustizia contrattuale e rimedi: fondamento e limiti di un controverso principio’ in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, nt. 46, p. 372: “Neppure il criterio della *rinegoziazione*, con l’attribuzione di un corrispondente diritto da parte della vittima dell’ingiustizia, sembra praticabile. Sia *Pecl* (art. 6:111) che *Upicc* (art. 6.2.3.) (ma anche l’*Avant-projet* pavese: artt. 97 e 157) fanno capire che la *rinegoziazione* può funzionare solo in ipotesi di squilibrio originario di raffronto da salvaguardare”. In this vein, see also G. MARASCO, *La rinegoziazione del contratto. Strumenti legali e convenzionali a tutela dell’equilibrio negoziale*, Padova, 2006; F. MACARIO, *Adeguamento e rinegoziazione nei contratti a lungo termine*, Napoli, 1996. For a different opinion, see E. NAVARRETTA, ‘I contratti d’impresa e il principio di buona fede’ in P. SIRENA (eds.), *Il diritto europeo dei contratti d’impresa*, Milano, 2006, pp. 528 et seq.

⁴⁰⁴ See Case C-269/19, *Banca B. SA*, nt. 307, para 45: ‘In the light of all the foregoing considerations, the answer to the questions referred is that Article 6(1) of Directive 93/13 must be interpreted as meaning that, after terms establishing the mechanism for determining the variable interest rate in a loan agreement such as that at issue in the main proceedings have been found to be unfair, and when that contract cannot continue to exist following the removal of the unfair terms in question, annulment of the contract would have particularly unfavourable consequences for the consumer and there are no supplementary provisions under national law, the national court must, while taking into account all of its national law, take all the measures necessary to protect the consumer from the particularly unfavourable consequences which could result from annulment of the loan agreement in question. In circumstances such as those in question in the main proceedings, nothing precludes the national court from, inter alia, inviting the parties to negotiate with the aim of establishing the method for calculating the interest rate, provided that that court sets out the framework for those negotiations and that those negotiations seek to establish an effective balance between the rights and obligations of the parties taking into account in particular the objective of consumer protection underlying Directive 93/13’.

accepting the possibility of creating supplementary rules. In essence, the Sixth Chamber acknowledged that it falls to national legal systems to decide how to generate such rules, within the scope of the *Kásler* exception. Notably, the Court of Justice did not strictly suggest that national judges are barred from relying on general principles or established customs in order to develop supplementary provisions, provided that their domestic legal system allows for such recourse where no supplementary provisions of national law exist.

This reasoning, however, stands in stark contrast to the logic underpinning *Dziubak*, where the Court of Justice had insisted on a much stricter prohibition against judicial supplementation.

13.3. Contract Supplementation By Means Of Equity And Judicial Adaptation

While the Court of Justice appears willing, within certain limits, to legitimize the supplementation of a contract by means of supplementary provisions of national law following the deletion of the unfair term, it adopts a far more cautious stance with regard to judicial supplementation⁴⁰⁵.

As has been observed, the case law of the Court of Justice reveals a marked distinction between statutory supplementation and judicial supplementation. Indeed, when contractual gaps are filled through statutory provisions, the consequence on the contractual framework is largely predictable, since the applicable provisions are fixed in advance within the legal system. Judicial supplementation, on the other hand, introduces a greater degree of uncertainty, as the adjustment of the contract depends on the case-specific evaluation of the judge⁴⁰⁶.

In other words, judicial supplementation deals with less uniform form of intervention. For instance, supplementation by means of equity requires the court to step in and reconstruct the rule best suited to govern the unresolved conflict of interests between the parties.

In this regard, despite the inherent opacity of supplementation by means of equity, domestic courts have long gone beyond the mere wording of the parties' declarations when defining the binding content of contractual relations. Alongside the parties' expressed intentions, national courts routinely consider default rules, established commercial usages, and overarching standards including good faith or 'équité'⁴⁰⁷. These external sources may either shape the interpretation of the parties' statements or operate directly as substantive mechanisms that

⁴⁰⁵ For a critical analysis see, in the Italian context, M. MATTIONI, 'Sul ruolo dell'equità come fonte del diritto dei contratti', in *Riv. dir. civ.*, 2014, pp. 567 et seq.

⁴⁰⁶ A. D'ADDA, 'La correzione del «contratto abusivo»: regole dispositive in funzione «conformativa» ovvero una nuova stagione per l'equità giudiziale?' in A. BELLAVISTA and A. PLAIA (eds.), nt. 201, pp. 390 et seq; M. DELLACASA, nt. 155, p. 54.

⁴⁰⁷ H. DEDEK, *sub* Art 6:102: Implied Terms in N. JANSEN and R. ZIMMERMANN (eds.), nt. 135, pp. 805 et seq.

complement and complete the contractual framework⁴⁰⁸. In this regard, as early as 1663, William Sheppard perceptively observed that ‘[e]very Contract is ruled much by Equity, and the Law doth much heed what is according to equity therein’, thereby highlighting the long-standing role of equity in shaping contractual contents⁴⁰⁹.

The decisive question, however, is which standards may properly guide the judge in reconstructing such a supplementary rule. Unlike good faith, which functions as a general clause channeling the values that the legal system, though expressed in open-textured provisions, seeks to promote, equity points instead to case-specific adjustments. It calls for attention to the peculiarities of the individual context, treating it as distinct from other analogous situations. In other words, equity thrives on the singular consideration of the incomplete contract, enabling the application of a rule which, in that instance, appears adequate, just and necessary for the effective operation of the agreement⁴¹⁰.

All in all, it may be argued that when courts are able to adjust contracts, consumers can secure effective redress without losing access to the goods or services originally agreed upon, while simultaneously being protected from unfair contract terms⁴¹¹.

As already mentioned, the role of the judiciary becomes even more critical in situations where default rules are absent or insufficient to fill the gap created by the deletion of an unfair term. In these cases, without some corrective mechanism, the contract could become unworkable, frustrating both the parties’ expectations and the protective objectives that underpin consumer law⁴¹².

Moreover, concerns about the potential uncertainty of judicial supplementation can be mitigated. Historically, courts have always exercised powers to moderate excessively onerous

⁴⁰⁸ Cf J. DOMAT, *Les loix civiles dans leur ordre naturel*, vol. I, tit. I, sec. III, Paris, 1777. In this regard, Domat famously elaborated on the content of contractual obligation: ‘Les conventions obligent non-seulement à ce qui y est exprimé, mais encore à tout ce que demande la nature de la convention, & à toutes les suites que l’équité, les loix & l’usage donnent à l’obligation où l’on est entré; de sorte qu’on peut distinguer trois sortes d’engagement dans les conventions; ceux qui sont exprimés, ceux qui sont des suites naturelles des conventions, & ceux qui sont réglés par quelque loi et quelque coutume’.

⁴⁰⁹ W. SHEPPARD, *Actions upon the Case for Deeds, viz. Contracts, Assumpsits, Deceits, Nuisances, Trover and Conversion, Delivery of Goods, and for other Male-feasance and Mis-feasance*, London, 1663, p. 108.

⁴¹⁰ Cf A. D’ADDA, nt. 319, p. 619; L. MENGONI, *Scritti I. Metodo e teoria giuridica*, Milano, 2011, pp. 171 et seq.

⁴¹¹ In this vein, see V. SCALISI, ‘Giustizia contrattuale e rimedi: fondamento e limiti di un controverso principio’ in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, nt. 46, p. 372: ‘Ma sia *Pecl* (art. 4:109, nn. 2 e 3) che *Upicc* (3.10) evidenziano nel contempo che probabilmente il rimedio più appropriato, in mancanza di pur sempre auspicabili e risolutivi accordi pattizi eliminativi dello squilibrio, resta quello dell’*adattamento* per mano aliena di norma, quella del giudice) del regolamento contrattuale sulla base del principio di buona fede’.

⁴¹² Cf M. FARINA, nt. 128, pp. 457 et seq.

contract terms, reflecting a longstanding tradition of equitable adaptation. Analogous techniques exist in domestic legal systems, for instance in Article 1384 of the Italian *Codice civile*⁴¹³ and Article 6:94(1) of the Dutch *Burgerlijk Wetboek*⁴¹⁴, which empower courts to adapt contract terms where their strict enforcement would produce excessive onerous results⁴¹⁵.

Moreover, uncertainty is not unique to judicial supplementation: the Court of Justice itself relies on flexible criteria, such as evaluating whether the deletion of an unfair term may cause ‘particularly unfavourable consequences’, when determining whether intervention is appropriate to preserve a contract.

From this perspective, some scholars maintain that if the legal systems entrust judges with the task of scrutinizing the fair balance of contractual arrangements, there seems to be little reason to deny them the power to reshape provisions once their inequitable character has been established⁴¹⁶. In this line of reasoning, a legal system that condemns abuses of contractual autonomy cannot merely invalidate the offending contract term; implicit in such condemnation is a mandate to reconstruct the agreement on equitable terms⁴¹⁷.

Comparable ideas are echoed in non-legislative codifications⁴¹⁸. Indeed, Article 3.2.7(2)(3) PICC permits national courts to adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing⁴¹⁹. Similarly, Article 4:109(2)(3) PECL authorizes national courts to adapt the contract in order to bring it into accordance with what

⁴¹³ More precisely, Article 1384 of the Italian *Codice civile* establishes that: ‘La penale può essere diminuita equamente dal giudice(1), se l’obbligazione principale è stata eseguita in parte ovvero se l’ammontare della penale è manifestamente eccessivo, avuto sempre riguardo all’interesse che il creditore aveva all’adempimento’.

⁴¹⁴ More precisely, Article 6:94(1) of the Dutch *Burgerlijk Wetboek* stipulates that: ‘Op verlangen van de schuldenaar kan de rechter, indien de billijkheid dit klaarblijkelijk eist, de bedongen boete matigen, met dien verstande dat hij de schuldeiser ter zake van de tekortkoming niet minder kan toekennen dan de schadevergoeding op grond van de wet’.

⁴¹⁵ Cf M. DELLACASA, nt. 155, p. 51.

⁴¹⁶ Cf A. D’ADDA, ‘La correzione del «contratto abusivo»: regole dispositive in funzione «conformativa» ovvero una nuova stagione per l’equità giudiziale?’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 201, pp. 390 et seq.

⁴¹⁷ Ibid. The author, however, explains that: ‘L’argomento non sembra però decisivo: non si può fare discendere dalla attribuzione al giudice della facoltà di giudicare patti iniqui altresì un potere di correzione del contratto: un conto sono le scelte dell’ordinamento quanto alla disapprovazione di un patto, altro conto quelle scelte che – imponendo regole e non limitandosi a caducare contratti – sono ben più “intrusive” rispetto all’autonomia privata’.

⁴¹⁸ See, Chapter 1, Part II, § 7.

⁴¹⁹ More precisely, Article 3.2.7(2)(3) PICC: ‘Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing’ and ‘[a] court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.2.10(2) apply accordingly’.

might have been agreed had the requirements of good faith and fair dealing been followed⁴²⁰. In this vein, Article II.-7:207(2)(3) DCFR establishes that upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been observed⁴²¹.

It is also worth recalling that the Court of Justice has expressly held, in a number of decisions, that national courts must ensure that the consumer is restored ‘to the position in which he would have been if the unfair term had never existed’⁴²². To that end, national courts are expected to deploy all necessary measures to protect the consumer from the particularly detrimental consequences that the annulment of the contract in its entirety might otherwise entail⁴²³.

This does not, of course, suggest that such powers are without limits. Reflecting national legal traditions, one might argue that the scope of judicial supplementation by means of equity and, thus, also in the form of judicial adaptation should be confined to situations that cannot be adequately addressed by supplementary provisions of national law⁴²⁴. In such cases alone is the judge authorized to fashion an equitable rule of the case, guided by principles of proportionality, reasonableness, and the fair reconciliation of the parties’ interests, as they can be inferred from the underlying economic transaction⁴²⁵.

That said, a broader approach has also been advocated. Some scholars contend that judicial supplementation should not be restricted to instances where no supplementary provisions of national law are available to preserve the contract. On the contrary, judicial intervention may

⁴²⁰ More precisely, Article 4:109(2)(3) PECL: ‘Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed’ and ‘[a] court may similarly adapt the contract upon the request of a party receiving notice of avoidance for excessive benefit or unfair advantage, provided that this party informs the party who gave the notice promptly after receiving it and before that party has acted in reliance on it’.

⁴²¹ More precisely, Article II.-7:207(2)(3) DCFR states that: ‘Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been observed’ and ‘[a] court may similarly adapt the contract upon the request of a party receiving notice of avoidance for unfair exploitation, provided that this party informs the party who gave the notice without undue delay after receiving it and before that party has acted in reliance on it’.

⁴²² See, for instance, Case C-932/19, *JZ v OTP Jelzálogbank Zrt et alii*, ECLI:EU:C:2021:673, para 50.

⁴²³ See the opinion of M. DELLACASA, nt. 155, p. 65 and nt. 130.

⁴²⁴ A. FEDERICO, ‘Nuove nullità ed integrazione del contratto’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 60, pp. 343 et seq.

⁴²⁵ Ibid.

in itself represent the most effective means of advancing the objective of curbing the use of unfair terms in business-to-consumer contracts⁴²⁶.

On this basis, it might be argued that, at least in principle, judicial supplementation by means of equity, also in the form of judicial adaptation, is consistent with the objectives pursued by the Unfair Contract Terms Directive. It not only affords the weaker party substantial protection but also imposes a particularly stringent reaction on the stronger party by substituting a new contract term. From this perspective, this mechanism exerts a powerful deterrent effect: it compels the seller or supplier to accept contract terms she had not envisaged, thereby encouraging the adoption of clearer and fairer provisions in future dealings⁴²⁷.

It must also be added that, from a comparative perspective, there is a clear tendency to recognize a certain degree of judicial power whenever this is necessary to preserve the validity of the contract. In this regard, Article 1167 of the French *Code civil* confers upon the judge the authority to adjust the contract by replacing the invalid reference with ‘l’indice qui s’en rapproche le plus’. A similar approach is adopted in Article 6:107 of PECL, Article 5.1.7 of PICC and Article II.-9:107 of DCFR, which, albeit with partially differing formulations, provide that where the price is to be determined by reference to factors that do not exist, or have ceased to exist or to be accessible, the nearest equivalent factor shall be used as a substitute. In this context, the European Union has recently adopted two implementing regulations designating a statutory replacement for certain benchmark such as CHF LIBOR (Regulation (EU) 2021/1847 of 14 October 2021 on the designation of a statutory replacement for certain

⁴²⁶ Cf T.A. AULETTA, ‘Le clausole vessatorie nella giurisprudenza’ in C.M. BIANCA (eds.), *Le condizioni generali di contratto*, vol. I, Milano, 1979, pp. 44 et seq. See also A. D’ADDA, ‘La correzione del «contratto abusivo»: regole dispositive in funzione «conformativa» ovvero una nuova stagione per l’equità giudiziale?’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 201, pp. 391 et seq: ‘Sarebbe allora davvero questo il momento per accreditare un più largo intervento del giudice sul regolamento negoziale “abusivo”. Talora perché questa sola è la strada per assicurare una correzione del contratto; in ogni caso perché la correzione giudiziale si presta meglio di ogni altra a dare effettività alle scelte perseguite dall’ordinamento e volte ad obliterare il patto abusive’; ID., nt. 319, p. 618; G. D’AMICO, ‘L’integrazione (cogente) del contratto mediante il diritto dispositivo’ in G. D’AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 227 et seq: ‘Stando così le cose, il rimedio (più appropriato) all’abuso – e alla *ratio* della sua repressione (che non è certo – si ripete – quella di “imporre” l’applicazione del diritto dispositivo, ciò che trasformerebbe quest’ultimo in diritto “cogente”) – potrebbe allora ravvisarsi appunto non tanto nella cancellazione *sic et simpliciter* della clausola che produce lo squilibrio (anzi, per essere precisi: uno squilibrio *notevole*), quanto piuttosto nella eliminazione da essa di quell’eccesso che ne determina la “vessatorietà”, cercando di ipotizzare quale sarebbe stato (non tanto – si badi – il regolamento cui sarebbero pervenute le parti se avessero contrattato *in condizioni di parità*, quanto piuttosto) il regolamento che avrebbe razionalmente accettato un contraente che avesse potuto “negoziare” il contratto secondo standards di mercato e con una controparte che si fosse comportata in maniera “corretta”’.

⁴²⁷ Cf G. D’AMICO, ‘L’integrazione (cogente) del contratto mediante il diritto dispositivo’ in G. D’AMICO and S. PAGLIANTINI (eds.), nt. 157, pp. 227 et seq.

settings of CHF LIBOR) and for EONIA (Regulation (EU) 2021/1848 of 21 October 2021 on the designation of a replacement for the benchmark Euro overnight index average).

Moreover, according to a certain school of thought, the same result might be achieved even under the German legal system through the *Generalklauseln*, such as the duty of cooperation laid down in § 242 BGB (duty to perform the contract in good faith).

14. The Principle of Good Faith Between The Pars Destruens And The Pars Costruens Of Contract Supplementation

Despite continuing reservations in both legal scholarship and case law, the role of good faith as a supplementary mean in the field of contract law is gaining increasing recognition even in domestic legal systems⁴²⁸. Against this background, it should be noted that the supplementary role of the principle of good faith is generally recognized by transnational legal instruments, as demonstrated by Article 5.1.2 PICC⁴²⁹, Article II.-9:101 DCFR⁴³⁰ and Article 6:102 PECL⁴³¹.

Moreover, in the specific context of unfair contract terms, it may be argued that good faith assumes both the role of *pars destruens* and *pars costruens* within the process of contract supplementation.

As a matter of fact, on the one hand, Article 3(1) of the Unfair Contract Terms Directive establishes that ‘[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’. In this context, the Court of Justice in *Mohamed Aziz* established that in order to assess whether the imbalance arises ‘contrary to the requirement of good faith’, it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations⁴³². All in all, it follows that the principle of good faith operates first of all

⁴²⁸ With regard to the notion of good faith in the contract law field, see R. ZIMMERMANN and S. WHITTAKER (eds.), *Good Faith in European Contract Law*, Cambridge, 2000.

⁴²⁹ More precisely, Article 5.1.2(c) PICC (Implied obligations) stipulates that: ‘Implied obligations stem from (...) good faith and fair dealing’.

⁴³⁰ More precisely, Article II.-9:101(2)(c) DCFR (Terms of a contract) establishes that: ‘Where it is necessary to provide for a matter which the parties have not foreseen or provided for, a court may imply an additional term, having regard in particular to (...) the requirements of good faith and fair dealing’.

⁴³¹ More precisely, Art 6:102(c) (Implied Terms) stipulates that: ‘In addition to the express terms, a contract may contain implied terms which stem from (...) good faith and fair dealing’.

⁴³² Case C-415/11, *Mohamed Aziz*, nt. 363, para 77: ‘Article 3(1) of Directive 93/13 must be interpreted as meaning that (...) in order to assess whether the imbalance arises “contrary to the requirement of good faith”, it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations’.

as a *pars destruens* within the process of contract supplementation: unfair terms are deleted from the contract if they cause a significant imbalance in the parties' rights and obligations and the seller or supplier could not reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations.

On the other hand, the principle of good faith may also operate as a *pars costruens* within the process of contract supplementation⁴³³. According to one school of thought, indeed, good faith serves as a vehicle for values inherent in contracts, such as fairness and compliance with the principle of *pacta sunt servanda*, or as a reflection of socially typical and expected patterns of behavior⁴³⁴. A second school of thought, on the other hand, emphasizes the 'external' dimension and highlights the ability of good faith to embody overarching principles, especially constitutional ones, such as solidarity among members of society⁴³⁵. In conclusion, in addition to these perspectives, another approach argues that the contract supplementation by means of good faith does not necessarily presuppose the existence of contractual gaps, but rather serves as a criterion for the physiological completion of the contractual framework, with particular regard to contract performance⁴³⁶.

15. The Emergence Of A Dangerous Double Standard For 'Core' And 'Ancillary' Terms; A Paradox

The Court of Justice's case law suggests that national courts may substitute an unfair term with a supplementary provision of national law only where the annulment of the contract in its entirety would otherwise be required, and such annulment would expose consumers to particularly unfavorable consequences⁴³⁷.

The Court of Justice appears to employ the criterion of 'particularly unfavourable consequences' as a gateway to contract supplementation, modification or rectification within the limits of fairness.

⁴³³ V. SCALISI, 'Giustizia contrattuale e rimedi: fondamento e limiti di un controverso principio' in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, nt. 46, pp. 372-373. See also, in the Italian context, C. CASTRONOVO, 'Un contratto per l'Europa' in ID. (eds. it.), *Principi di diritto europeo dei contratti*, vol. I and II, Milano, 2001, pp. XXXVIII et seq; M. BARCELLONA, *Clausole generali e giustizia contrattuale*, Torino, 2006, pp. 257 et seq; S. MAZZAMUTO, 'Equivoci e concettualismi nel diritto europeo dei contratti: il dibattito sulla vendita dei beni di consumo', in *Eur. dir. priv.*, 2004, pp. 1035 et seq; E. NAVARRETTA, 'I contratti d'impresa e il principio di buona fede' in P. SIRENA (eds.), nt. 403, pp. 537 et seq; B. BARRY, *Theories of Justice*, Oakland, 1991, pp. 391 et seq.

⁴³⁴ Cf A. FEDERICO, 'Nuove nullità ed integrazione del contratto' in A. BELLAVISTA and A. PLAIA (eds.), nt. 201, p. 345.

⁴³⁵ Ibid.

⁴³⁶ Cf A. D'ADDA, nt. 319, pp. 620 et seq.

⁴³⁷ See above § 12.

This functions, in effect, as an exception to the principle of sanctity of contract, applicable solely in circumstances where the contract would otherwise face annulment in its entirety, that is where the unfair term concerns a core element of the agreement.

However, the breadth and indeterminacy of this standard (‘particularly unfavourable consequences’) leaves considerable discretion to national courts, which must interpret and apply it on a case-by-case basis. This inevitably risks generating inconsistent outcomes both within individual legal systems and across Member States, thereby undermining the effectiveness of the Unfair Contract Terms Directive.

Moreover, this approach establishes a differentiated regime depending on whether the unfairness concerns a ‘core’ or ‘ancillary’ term – a distinction that lacks convincing justification⁴³⁸. Paradoxically, the Court of Justice’s reasoning incentivizes sellers and suppliers to introduce unfair terms in relation to essential contractual elements. In such cases, recognition of unfairness would endanger the very existence of the contract, thereby engaging the *Kásler* exception, which, though controversial, permits contractual supplementation and facilitates the rebalancing of the parties’ rights and obligations.

By contrast, where an ancillary term is declared unfair, the contract is likely to continue into existence after the deletion of the unfair term, thus triggering the strict *Banco Español* approach, which demands the deletion of the unfair term without any form of contract supplementation or adaptation. This, counterintuitively, may impose harsher consequences on sellers and suppliers.

16. Contract Supplementation By Means Of Supplementary Provisions Of National Law Left To The Unilateral Assessment Of The Consumer

The rulings in *Dunai*⁴³⁹ and *JZ v OTP Jelzálogbank Zrt et alii*⁴⁴⁰ provide further clarification on the delicate question of how best to guarantee effective consumer protection against unfair terms in business-to-consumer contracts.

In *Dunai*, the Court of Justice was called upon to determine whether certain Hungarian default rules were consistent with EU law and could therefore be applied to fill the contractual gap created by the deletion of unfair terms. By contrast, in *JZ v OTP Jelzálogbank Zrt et alii*, the Court of Justice was invited to consider whether the protection afforded under the Unfair Contract Terms Directive extends so far as to entitle consumers to

⁴³⁸ Cf M. GINESTRI, ‘Equality or superiority of the weak party? Consumer protection and the issues at stake’, in *ERCL*, 2023, 19(4), pp. 388 et seq.

⁴³⁹ Case C-118/17, *Dunai*, nt. 10.

⁴⁴⁰ Case C-932/19, *JZ v OTP Jelzálogbank Zrt et alii*, nt. 422.

avoid the application of default rules capable of filling the gap, thereby opting instead for the more radical remedy of annulling the contract in its entirety.

In both cases, the national provisions at issue mandated the deletion of contract terms permitting banks to apply their own exchange rates in foreign currency linked loans and their retroactive substitution with the official rate set by the national central bank. The effect of these provisions was to neutralize the discrepancy between the buying and selling rates employed by different banks in their business-to-consumer contracts.

As made clear in *Dunai*, the Court of Justice relied on the capacity of supplementary provisions of national law to restore the factual and legal situation in which the consumer would have found herself in the absence of the unfair term⁴⁴¹. This criterion was used to determine whether such rules could appropriately supplement or revise the contract, in particular by giving rise to a right to restitution of advantages wrongly obtained, to consumer's detriment, by the seller or supplier on the basis of the unfair term⁴⁴². Thus, the Court of Justice concluded that Article 6(1) of the Unfair Contract Terms Directive does not preclude national legal systems which prevents the court seized of the case from granting an application for the cancellation of a loan contract on the basis of the unfair nature of a term relating to the exchange difference, provided that a finding that terms in such an agreement were unfair would restore the legal and factual situation that the consumer would have been in had that unfair term not existed⁴⁴³.

It is at this juncture that the most problematic aspects of the Court of Justice's reasoning arise. First, in admitting the possibility of contract supplementation through default rules, the Court appears to introduce an additional requirement not present in its earlier case law – namely, that such provision must demonstrate their ability to restore the consumer's factual and legal situation as it would have been in the absence of the unfair terms, in particular by giving rise to a right to restitution of advantages wrongly obtained, to consumer's detriment, by the seller or

⁴⁴¹ Case C-118/17, *Dunai*, nt. 10, para 65: 'Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that (...) it does not preclude national legislation which prevents the court seized of the case from granting an application for the cancellation of a loan contract on the basis of the unfair nature of a term relating to the exchange difference, such as that at issue in the main proceedings, provided that a finding that terms in such an agreement were unfair would restore the legal and factual situation that the consumer would have been in had that unfair term not existed'.

⁴⁴² Case C-118/17, *Dunai*, nt. 10, para 44: 'In this case, in so far as the action brought by Mrs Dunai is based on the term relating to exchange difference which was included initially in the loan contract concluded with the bank, it is for the referring court to ascertain whether the national legislation, which declared terms of that nature to be unfair, allowed the legal and factual situation in which Mrs Dunai would have been in the absence of such an unfair term to be restored, in particular by giving rise to a right to restitution of advantages wrongly obtained, to her detriment, by the seller or supplier on the basis of that unfair term'.

⁴⁴³ Ibid. Cf, also, Case C-630/23, *ZH and KN v AxFina Hungary Zrt*, ECLI:EU:C:2025:302.

supplier on the basis of the unfair term. This approach casts doubt on the presumption that supplementary provisions of national law are inherently free from unfairness and are therefore always capable of rebalancing the contractual relationship effectively⁴⁴⁴.

Secondly, although supplementary provisions of national law existed that could eliminate the exchange rate discrepancy, the Court of Justice nevertheless denied their applicability emphasizing instead the consumer's interest in being entirely insulated from the exchange rate risk inherent in foreign currency linked loans⁴⁴⁵.

A comparable, albeit not identical, reasoning is discernible in *JZ v OTP Jelzálogbank Zrt et alii*. In that context, the consumer asked the referring court not to apply certain supplementary provisions of national law, arguing that annulment of the contracts in their entirety would better serve his interests⁴⁴⁶. Each of those contracts contained an exchange rate spread clause applied both at the time of disbursement and repayment of the instalments. The Court stressed that the consumer's right to effective protection also encompasses the freedom to waive the safeguards conferred by the Unfair Contract Terms Directive.

On that basis, the Court held that as it falls to the domestic court to take into account, where appropriate, the consumer's will when she, aware of the non-binding nature of an unfair term, nevertheless consents to its applicability, thereby giving free and informed consent to the term, the consumer must *a fortiori* be entitled to oppose being afforded protection against the adverse consequences of the annulment of the contract in its entirety by means of the application of supplementary provisions of national law⁴⁴⁷.

⁴⁴⁴ Cf Article 1(2) of the Unfair Contract Terms Directive and Recital 13.

⁴⁴⁵ Case C-118/17, *Dunai*, nt. 10, paras 34 and 55. By contrast, see Opinion of Advocate General Wahl, 15 November 2018, ECLI:EU:C:2018:921, para 81: 'In the light of all the foregoing considerations, the answer to the first question referred for a preliminary ruling should be that Directive 93/13 must be interpreted as meaning that it does not preclude a provision of national law which, in the event of the partial invalidity of a contract concluded with a consumer as a result of one of its terms being unfair, seeks, in principle, to maintain the validity of the contract without the unfair term. The court hearing the case cannot therefore remedy the fact that a term of a contract concluded between a seller or supplier and a consumer is invalid solely on the ground that the continuation of the contract would allegedly be contrary to the economic interests of the consumer'. See also S. PAGLIANTINI, 'I mutui indicizzati e il mito di un consumatore "costituzionalizzato": la dottrina della Corte di Giustizia da Árpád Kásler a Dziubak', in *Nuove leggi civ. comm.*, 2019, pp. 1258 et seq.

⁴⁴⁶ Cf Case C-932/19, *JZ v OTP Jelzálogbank Zrt et alii*, nt. 422, para 35.

⁴⁴⁷ Cf Case C-932/19, *JZ v OTP Jelzálogbank Zrt et alii*, nt. 422, para 48: 'In addition, the Court has held that, similarly, since that system of protection against unfair terms does not apply if the consumer objects to it, he or she must *a fortiori* be entitled to object to being protected, under that same system, against the unfavourable consequences caused by the agreement being annulled in its entirety where he or she does not wish to rely on that protection, in the circumstances referred to in the judgment of 30 April 2014, *Kásler and Káslerné Rábai*, namely in the situation in which the removal of the unfair term would require the court to annul that agreement in its entirety, thereby exposing the consumer to particularly unfavourable consequences, with the result that the consumer would thus be penalised'.

Yet this reasoning conflates two distinct scenarios, or more precisely, two qualitatively different types of choice. Indeed, on the one hand, the consumer waives the protection afforded by the law by acquiescing in an unfair term, thereby placing herself in a position objectively less favorable than that secured by the legal system. On the other hand, the consumer is required to decide between annulment of the contract and its supplementation by default rules – that is, between alternative mechanisms against unfair terms.

While this approach strengthens the role of consumer autonomy in determining the content of contracts, it also raises serious concerns⁴⁴⁸. Within this framework, consumers not only retain the exclusive right to initiate proceedings against unfair terms, but also have the unilateral power to decide whether the contract should be supplemented⁴⁴⁹. Such discretion can, in principle, work to the consumer's advantage, but without any guarantee of effectiveness, especially in markets where there are no genuine competitive alternatives⁴⁵⁰.

Furthermore, the Court of Justice's continuing skepticism regarding the ability of national legal systems to ensure effective consumer protection risks further undermining confidence in national legal frameworks as reliable instruments of consumer protection⁴⁵¹.

17. Preliminary Conclusions

In light of all the above considerations, it is possible to draw some conclusions. First of all, the non-binding nature of unfair terms, as governed by Article 6(1) of the Unfair Contract Terms Directive, must be interpreted as a legal effect and not as a legal remedy. In other words, the Unfair Contract Terms Directive partially harmonizes the legal effects that must result from the application of a national contractual remedy, requiring that, regardless of

⁴⁴⁸ Cf F. DENOZZA, 'Fallimenti del mercato: i limiti della giustizia mercantile e la vuota nozione di "parte debole"', in *Orizzonti del diritto commerciale*, 2013, pp. 16-17.

⁴⁴⁹ Cf M. LAMICELA, nt. 3, pp. 1553-1554: 'Come nel gioco dell'oca, si intravede un vistoso passo indietro rispetto alla fissazione dei margini entro i quali le limitazioni "positive" dell'autonomia contrattuale da parte del legislatore possano reputarsi ammissibili; ma anche un altrettanto vistoso passo in avanti (o forse nel buio) nell'individuazione dei soggetti cui affidare le sorti della vicenda contrattuale. Il vistoso passo indietro si intravede poiché, ad un controllo giudiziale delle clausole contrattuali che, come si è già visto, potrebbe assumere anche contorni piuttosto invasivi circa la congruità dell'operazione di scambio divisa dalle parti, sembra contrapporsi a un intervento legale di integrazione conformativa dei contenuti contrattuali condizionato alla sua sostanziale coerenza con l'interesse soggettivo del consumatore. Si abdicerebbe quindi all'ipotesi di una rimodulazione del regolamento contrattuale che, seppure rispettosa del profilo causale del contratto, ne imponga l'esecuzione non più secondo l'equilibrio di diritti e obblighi reciproci ispirato dagli interessi soggettivi del predisponente, ma secondo il diverso assetto suggerito dalla prassi economica e oggettiva formalizzata dal legislatore alla stregua dei criteri di lealtà e correttezza'.

⁴⁵⁰ U. SALANITRO, 'Squilibrio contrattuale e tecniche rimediali' in L. PELLEGRINI (eds.), *Studi in memoria di G. Gabrielli*, vol. II, Napoli, 2018, p. 1719. See also G. DE NOVA, nt. 320, p. 484.

⁴⁵¹ Cf M. LAMICELA, nt. 3, p. 1559.

the remedy chosen by the Member State, it must lead to the ineffectiveness (in the broad sense) of the unfair term, but nothing more than that.

This conclusion is particularly important in the critical analysis of the most recent case law of the Court of Justice. As a matter of fact, the Court of Justice seems to suggest a different interpretation: the non-binding nature of unfair terms is increasingly interpreted as being linked to a specific regulatory model, thus restricting the procedural and remedial discretion of Member States.

Secondly, once the unfair term has been identified in the contract, it is necessary to verify what happens following its deletion and the supervening gap created within the contract. This consideration, which may seem to be of primarily domestic relevance, is also significant beyond national borders, as its resolution must take into account the principles of sincere cooperation between the European Union and the Member States, freedom of contract, contract autonomy, consumer protection, and fostering the Internal Market.

This leads to the conclusion that national courts should be granted broad powers of supplementation of the contract, as there is no justification for a distinction between supplementary provisions of national law and national provisions of a general nature. In such a context, the most acute difficulties arise where the unfair term is essential to the contract, such that, once removed, little or nothing remains to be preserved. In such cases, the central challenge is to determine what legal mechanism may be deployed to fill the resulting gaps and safeguard the continued existence of the contract.

CHAPTER 3

‘UNFAIR CONTRACT TERMS: RESTITUTIONARY CLAIMS AND PRESCRIPTION’

PART I

RESTITUTIONARY CLAIMS AND CONTRACTS

TABLE OF CONTENTS: 1. The Law Of Restitutions And Contracts – 1.1. Contractual Restitutions In The Realm Of The Unfair Contract Terms Directive, Between *Principles* And *Rationales* – 2. From ‘Nullity Serving A Protective Function’ To ‘Restitutions Serving A Protective Function’ – 2.1. Partial Or Total Denial Of Restitutions, A Critical Analysis – 3. Defences Against Restitutions – *a) In favor of consumers* - 3.1. Illegality – 3.2. Consumers As Unassisted Minors Or Incapacitated Adults - *b) In favor of sellers and suppliers* - 3.3. Change Of Position – 3.3.1. The Applicability Of *Saldotheorie* In The Realm Of Unfair Contracts – 4. Restitutionary Claims Resulting From Damages: An Alternative Path – 5. Quantifying Restitutionary Claims – 5.1. Restitutionary Claims And The Principle Of ‘No Credit Without Interest’ – 5.2. Restitutionary Claims And Disgorgement of Profits

1. The Law of Restitutions And Contracts

In European legal systems, it is a well-established principle that anyone who receives a payment that was not actually due is required to return it, notably where the underlying contract has been invalidated¹. Despite these common foundations, the law of restitutions arising from the dissolution of the contract still stands at a crossroads, suspended between competing

¹ See, in this regard, R. ZIMMERMANN, ‘Unjustified Enrichment: The Modern Civilian Approach’, in *Oxford Journal of Legal Studies*, 1995, 15(3), p. 403. The author traces the foundations of the principle of enrichment to the precept ‘[n]eminem cum alterius detrimento fieri locupletiores’, which prohibits a person from becoming enriched at another’s expense. See also W. WILBURG, *Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht*, Graz, 1934, pp. 5 et seq, 97 et seq; C. WOLLSCHLÄGER, ‘Das stoische Bereicherungsverbot in der römischen Rechtswissenschaft’ in O. BEHREND, M. DIESELHORST and W. ECKART VOSS (eds.), *Römisches Recht in der europäischen Tradition. Symposium aus Anlaß des 75. Geburtstages von Franz Wieacker*, Ebelsbach, 1985, pp. 41 et seq; P. GALLO, *L’arricchimento senza causa*, Padova, 1990, pp. 15 et seq and 99 et seq; P. SIRENA, ‘L’azione generale di arricchimento senza causa’ in *Obbligazioni, I, Il rapporto obbligatorio*, in N. LIPARI and P. RESCIGNO (eds.), *Diritto Civile*, vol. III, Milano, 2009, p. 554 and ID., ‘Arricchimento ingiustificato e restituzioni: una prospettiva di diritto europeo’, in *Rass. dir. civ.*, 2018, pp. 658 et seq. More recently, see the same author’s analysis of restitutionary claims arising from the annulment of contracts due to unfairness in P. SIRENA, ‘Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation’ in ID. (eds.), *Unfair Contract Terms and Unjustified Enrichment. The European case of foreign currency loans*, Cambridge, forthcoming. The author recalls that already under Roman law the *indebiti solutio* (undue payment) was recognized as the source of a restitutionary obligation, albeit grounded in the payer’s mistake. Modern civil codes have progressively abandoned the requirement that the payer act under a mistake; instead, the corresponding restitutionary obligation is understood as an instance of the broader principle of unjustified enrichment.

theoretical constructions and divergent national traditions². As a matter of fact, *contractual restitutions* continue to oscillate between a unitary and a dualistic conception, reflecting broader differences in the understanding of how the dissolution of the contract triggers restitution of parties' benefits received by performance³.

Within this comparative landscape, the French legal system, prior to the recent reform, applied to *contractual restitutions* a regime modelled on the 'répétition de l'indu'⁴. Accordingly, the Italian legal system, drawing direct inspiration from the French model, tends to unify the restitutionary consequences resulting from a case of 'pagamento non dovuto' (Article 2033 of the Italian *Codice civile*⁵) and restitutions arising from the dissolution of a contract, furthermore, rejecting any distinction between restitutions based on original defects of the contract or supervening reasons for ineffectiveness⁶.

² Cf, in the Italian context, C.M. BIANCA, *Diritto civile*, V, *La responsabilità*, 3rd ed., Milano, 2021, pp. 761 et seq; P. SIRENA, 'Arricchimento ingiustificato e restituzioni: una prospettiva di diritto europeo', nt. 1, pp. 658 et seq; P. GALLO, 'I modelli' in P. GALLO and G. MAGRI (eds.), *Le restituzioni contrattuali*, Torino, 2024, pp. 24 et seq.

³ See P. GALLO, 'I modelli' in P. GALLO and G. MAGRI (eds.), *Le restituzioni contrattuali*, nt. 2, pp. 24 et seq. In this regard, it should be noted that restitutionary obligations have traditionally been considered *contractual* in nature when they arise from the contract itself or from the intentional fulfilment of a contractual obligation that is not actually due.

⁴ Several scholars, however, have criticized the traditional approach, which subjected the restitution of benefits obtained through the performance of a void contract to the rules governing the 'répétition de l'indu'. See in this regard, J. CARBONNIER, *Droit civil*, IV, *Obligations*, Paris, 1988, p. 199; M. MALAURIE, *Le restitutions en droit civil*, Paris, 1991, pp. 35 and 66; C. GUELFUCCI-THIBIERGE, *Nullité, restitutions et responsabilité*, Paris, 1992, pp. 372 et seq; F. TERRÉ, P. SIMLER and Y. LEQUETTE, *Droit civil. Les obligations*, 11th ed., Paris, 2013. As for the case law, see Cass. civ. 1^{re}, 24 sept. 2002, n° 00-21.278, in *Bull. civ.*, I, n° 218, in *Dall.*, 2003, n° 6, 369, which, following the academic criticisms of the traditional approach, held that: 'attendu que les restitutions consécutives à une annulation ne relèvent pas de la répétition de l'indu mais seulement des règles de la nullité'. For a comprehensive overview, see the recent analysis of G. TERLIZZI, 'Le restituzioni nel diritto francese' in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 166 et seq.

⁵ More precisely, Article 2033 of the Italian *Codice civile* held that: 'Chi ha eseguito un pagamento non dovuto ha diritto di ripetere ciò che ha pagato. Ha inoltre diritto ai frutti e agli interessi dal giorno del pagamento, se chi lo ha ricevuto era in mala fede, oppure, se questi era in buona fede, dal giorno della domanda'.

⁶ This view rests not so much on the wording of Article 2033 of the Italian *Codice civile*, whose broadly framed and abstract language offers little guidance as to the circumstances in which the undue payment was rendered. Rather, textual support may be found in two provisions of the general law of contract, namely Article 1422 (dealing with contract nullity) and Article 1463 (concerning contract termination for supervening impossibility), both of which make express reference to the rules governing 'ripetizione dell'indebito'. Recently, on this subject, C.M. BIANCA, *Diritto civile*, V, *La responsabilità*, nt. 2, pp. 761 et seq; P. GALLO, 'I modelli' in P. GALLO and G. MAGRI (eds.), *Le restituzioni contrattuali*, nt. 2, pp. 17 et seq. The author observed that, in reality, the matter within the Italian legal system is far more complex and nuanced than it might appear at first glance. Numerous exceptions exist to the retrospective conception of contractual restitutions, both in cases of original defects and in cases of supervening causes of contract ineffectiveness, and this is particularly true with respect to long-term contractual relationships. See, in this regard, M. DELLACASA, 'La restituzione delle prestazioni di fare nella patologia del contratto', in *Riv. dir. priv.*, 2015, p. 523 and E. BARGELLI, '«Sinallagma rovesciato» e ripetizione dell'indebito. L'impossibilità della *restitutio in integrum* nella prassi giurisprudenziale', in

In France, the 2016 reform marked a decisive turning point. By introducing a unified law of restitution and eliminating the historical reference to the ‘*répétition de l’indu*’, the reformed *Code civil* fully embraced the retrospective conception of the *condictio*, without distinguishing between original and supervening causes of contractual ineffectiveness⁷. Article 1302 (1) of the French *Code civil* now affirms that ‘[t]out paiement suppose une dette; ce qui a été reçu sans être dû est sujet à restitution’⁸.

The French and Italian models may therefore be described as backward-looking systems, applicable to all cases of contract dissolution⁹. Following this approach, the CESL abandoned the distinction between original and supervening defects of contracts¹⁰ and imposing a single

Riv. dir. civ., 2008, p. 92. The author observes that: ‘[t]uttavia la linearità del sistema italiano fin qui prospettata è solo apparente. Poiché, infatti, le regole sulla ripetizione dell’indebito dettate dal codice civile sono modellate sull’ipotesi di una «isolata» prestazione non dovuta, si pongono immediatamente due ordini di questioni. Occorre innanzitutto chiedersi se l’esecuzione di un contratto — in particolare con prestazioni corrispettive — che sia fin dall’origine inefficace o che lo sia divenuto successivamente presenti problemi specifici, destinati a non coincidere perfettamente con quelli derivanti dall’isolato pagamento di un indebito e risolti dagli artt. 2033 ss. c.c.; e, una volta data risposta positiva a questa prima questione, se queste disposizioni si prestino comunque ad offrire soluzioni adeguate’.

⁷ For a comprehensive analysis see C. HERVAS-HERMIDA, ‘Le régime des restitutions dans la réforme des obligations’, in *Jur. class. pér. not.*, 2016, 3, pp. 1116 et seq; F. CHENEDE, *Le nouveau droit des contrats et des obligations*, 2nd ed., Paris, 2018; P. GALLO, *Introduzione al diritto comparato*, II, *Istituti giuridici*, 3rd ed., Torino, 2018, p. 393. In a broader sense, the conceptual rationale connecting restitution with the retrospective effect of contractual nullity finds expression in the wording of Article 1178 (2) and (3) of the French *Code civil*: ‘Le contrat annulé est censé n’avoir jamais existé. Les prestations exécutées donnent lieu à restitution dans les conditions prévues aux articles 1352 à 1352-9’. In this final regard, see also G. TERLIZZI, ‘Le restituzioni nel diritto francese’ in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 167 et seq.

⁸ Cf F. CHENEDE, nt. 7.

⁹ See, *ex multis*, A. DI MAJO, ‘Il regime delle restituzioni contrattuali nel diritto comparato ed europeo’, in *Eur. dir. priv.*, 2001, pp. 530 et seq; E. MOSCATI, ‘Caducazione degli effetti del contratto e pretese di restituzione’, in *Riv. dir. civ.*, 2007, pp. 435 et seq; G. MAGRI, ‘Le restituzioni nel diritto comune europeo’, in P. GALLO and G. MAGRI (eds.), nt. 2, p. 356.

¹⁰ Cf P. SIRENA, ‘The Rules about Restitution in the Proposal on a Common European Sales Law’, in *ERPL*, 2011, 19(6), pp. 979 et seq; ID., ‘Arricchimento ingiustificato e restituzioni: una prospettiva di diritto europeo’, nt. 1, pp. 668 et seq. The author argues that there is no need to treat restitution in the case of a void contract as subject to a separate set of rules. The rationale for distinguishing between different forms of contractual restitutions lies not in the distinction between nullity and avoidance, or between invalidity and termination, but rather in the nature of the benefits to be returned. From this standpoint, whether a contract is void, avoidable, or terminated makes little difference in practice or theory, supporting the case for a unified approach to contractual restitutions. Similarly, contrary to the approach taken in Article 44 CESL, there is no compelling reason to treat withdrawal differently, since it can, for most practical purposes, be assimilated to termination, with any differences remaining marginal.

regime of restitutions *ex tunc* (Article 172 (1) CESL)¹¹, extending to natural and legal fruits (Article 172 (2) CESL) without regard to good or bad faith¹².

By contrast, the German model, while entirely codified in §§ 812 et seq BGB, retains a resolutely dualistic structure¹³. It distinguishes between cases in which the contract is invalid from the outset and those in which it becomes ineffective at a later stage. In the first scenario, contractual restitutions are governed by the general law of *Bereicherung* (§§ 812 et seq BGB)¹⁴; in the second, the duty to return those benefits deriving from the performance of the contract arises reciprocally, as a direct consequence of contract termination¹⁵. The termination (*der Rücktritt*), even though it renders the contract retrospectively ineffective, it does not erase it; rather, it produces new, symmetrical obligations mirroring the original ones¹⁶. The parties become reciprocally bound to return the benefits received by performance¹⁷.

Following this approach, the DCFR emphasizes the distinction between ‘Restitution’ and ‘Unjustified Enrichment’¹⁸. As has been observed, in the DCFR, the term ‘Restitution’ is not

¹¹ More precisely, Article 172 (1) CESL established that: ‘Where a contract is avoided or terminated by either party, each party is obliged to return what that party (“the recipient”) has received from the other party’.

¹² More precisely, Article 172 (1) CESL established that: ‘The obligation to return what was received includes any natural and legal fruits derived from what was received’.

¹³ It was Friedrich Carl von Savigny who first connected the *condictiones* of the *ius commune* – remedies ensuring restitution of transfers *sine causa* – to the principle prohibiting *unjustified enrichment*. For a general overview of the German approach to contractual restitutions, see, *ex multis*, A.S. ZIMMERMANN, *Der gesetzliche Rückforderungsanspruch*, Tübingen, 2021; R. ZIMMERMANN and J. DU PLESSIS, ‘Basic Features of the German Law of Unjustified Enrichment’, in *Restitution Law Review*, 1994, 2, pp. 40 et seq; W. FLUME, ‘Der Bereicherungsausgleich in Mehrpersonenverhältnissen’, in *Arch. f. d. civ. Praxis (AcP)*, 1999, 199, pp. 3 et seq; F.L. SCHÄFER, ‘§812-822. Ungerechtfertigte Bereicherung’ in M. SCHMOECKEL, J. RÜCKERT, R. ZIMMERMANN, *Historisch-kritischer Kommentar zum BGB*, Bd. III, *Schuldrecht: Besonderer Teil*. §§ 433-853, 2. Teilbd., Tübingen, 2013, Rn. 40 et seq and 47 et seq. With regard to the Italian context, see G. MACARIO BAN, ‘Le restituzioni contrattuali nel diritto tedesco’ in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 202 et seq; E. BARGELLI, ‘«Sinallagma rovesciato» e ripetizione dell’indebito. L’impossibilità della *restitutio in integrum* nella prassi giurisprudenziale’, nt. 6, pp. 87 et seq; ID., *Il sinallagma rovesciato*, Milano, 2010.

¹⁴ P. GALLO, ‘I modelli’ in P. GALLO and G. MAGRI (eds.), nt. 2, p. 14.

¹⁵ See, in this vein, G. MACARIO BAN, ‘Le restituzioni contrattuali nel diritto tedesco’ in P. GALLO and G. MAGRI (eds.), nt. 2, p. 204.

¹⁶ Cf P. SIRENA, ‘The DCFR – Restitution, Unjust Enrichment and Related Issues’, in *ERCL*, 2008, 4(3), pp. 446 et seq.

¹⁷ Ibid. See, also, M. MALAURIE, nt. 4, p. 64; E. MOSCATI, nt. 9, pp. 435 et seq. In this context, it is very evocative the notion, borrowed from French scholarship and later adopted in the Italian context, of the ‘contrat synallagmatique renversé’ or ‘contrat à l’enverse’.

¹⁸ G. MAGRI, ‘Le restituzioni nel diritto comune europeo’ in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 362 et seq. Critically, see P. SIRENA, nt. 16, p. 447. The author also notes that the German *Rücktritt* model has proved to be anything but attractive, as leading German scholars have long made clear. This is demonstrated, among other things, by the strong criticism levelled at §§ 346 et seq BGB (old version) by E. VON CAEMMERER, ‘*Mortuus redhibetur*. Bemerkungen zu den Urteilen BGHZ 53,144 und 57,137’ in *Festschrift für Karl Larenz zum 70. Geburtstag*, München, 1973, pp. 621 et seq. Nor can it be said that the *Modernisierung* has resolved the issue, as this criticism has been widely reiterated, with the legislator once again accused of inconsistency and lack of coherence. See, in this final regard, R. ZIMMERMANN,

used in its broad, traditional sense, but is specifically tied to the termination of the contract¹⁹. Upon termination for fundamental non-performance, each party must return the benefits which has received by performance of the other one²⁰. On the other hand, when the contract is deemed void, avoided or ineffective *ex tunc*, the *Unjustified enrichment* rules apply, requiring each party to return what has been received, as the original transfer becomes *sine causa*, as specified under Articles VII.-5:101 to VII.-6:103 DCFR²¹. This solution echoing both German doctrine and the Italian rules on ‘ripetizione dell’indebito’, maintains a conceptual separation between the two spheres and rejects any *synallagmatic* interdependence between restitutionary obligations²².

The situation also proves to be rather complex in common law countries. More precisely, within these legal systems, the historical form of action known as (*indebitatus*) *assumpsit* enabled a person who had made a mistaken payment to recover it through an action for *money had and received*²³. It has become prevailing view in common law that this remedy, together with others of a similar kind, should fall within a unified law of restitution grounded in the principle of *unjustified enrichment*²⁴. Indeed, in the UK, contractual restitutions now find their

‘Restitution after Termination for Breach of Contract: German Law after the Reform of 2002’ in A. BURROWS and A. RODGER (eds.), *Mapping the Law, Essays in Memory of Peter Birks*, Oxford, 2006, pp. 323, 341; ID., ‘The Unwinding of Failed Contracts in the Unidroit Principles 2010’, in *Rev. dr. unif.*, 2011, pp. 563-587. Similar remarks, although without explicit reference to the DCFR, can also be found in R. ZIMMERMANN, ‘Restitutio in integrum. Die Rückabwicklung fehlgeschlagener Verträge nach den Principles of European Contract Law, den UNIDROIT Principles und dem Avant – Project eines Code Européen des Contrats’ in H. HONSELL, R. ZÄCH, F. HASENBÖHLER, F. HARRER, R. RHINOW (eds.), *Privatrecht und Methode, Festschrift für Ernst A. Kramer*, Basel-Genf-München, 2004, pp. 735 et seq.

¹⁹ P. SIRENA, nt. 16, p. 446.

²⁰ Ibid. See also G. MAGRI, ‘Le restituzioni nel diritto comune europeo’ in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 364 et seq and S. TANDOI, ‘Le restituzioni nei progetti di codificazione dottrinale del diritto contrattuale’ in G. DE NOVA (eds.), *Le restituzioni contrattuali*, Padova, 2012, p. 25.

²¹ See the analysis of G. MAGRI, ‘Le restituzioni nel diritto comune europeo’ in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 366 et seq and S. TANDOI, *Le restituzioni nei progetti di codificazione dottrinale del diritto contrattuale* in G. DE NOVA (eds.), nt. 20, pp. 28 et seq.

²² P. SIRENA, nt. 16, p. 448. The author notes that ‘[i]f the particularity of contractual restitutions were to be found in the reverse synallagmatic effects which are considered to be produced by the contract that has been terminated, they could not be involved when the contract has been avoided. In the latter case, there is no possibility of any further synallagmatic effects of the contract, since the contract itself is avoided from the very beginning. If the contract as basis of the performances already carried out fails, the following restitutionary obligations should be fairly governed by the rules of unjustified enrichment, as explicitly settled by the DCFR in art. 7:303 of Book VII, equalising under this profile the nullity of the contract at its avoidance’.

²³ See, *ex multis*, R. ZIMMERMANN, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford, 1990, pp. 892 et seq; B. DICKSON, ‘The Law of Restitution in the Federal Republic of Germany: A comparison with English Law’, in *International and Comparative Law Quarterly*, 1987, 6, pp. 753 et seq; A.W.B. SIMPSON, *A History of the Common Law of Contract*, Oxford, 1975, pp. 199 et seq, 489 et seq; Sir R. GOFF and J. GARETH, *The Law of Restitution*, 2nd ed., London/Toronto, 1978, pp. 5 et seq; P. BIRKS, *An Introduction to the Law of Restitution*, Oxford, 1985, pp. 22, 29 et seq (rvsd ed., Oxford 1989).

²⁴ Cf P. BIRKS, nt. 23, p. 26; A. BURROWS, *The Law of Restitution*, 3rd ed., Oxford, 2011, pp. 5, 9 et seq; G. VIRGO, *The Principles of the Law of Restitution*, 4th ed., Oxford, 2024, pp. 53 et seq and spec 55. This

place within this general principle²⁵, whose function is to correct imbalances and restore the parties to their original position²⁶. More precisely, English law of restitutions differs markedly from the continental legal tradition, as it regards the absence of a valid legal ground for the transfer neither as sufficient nor as necessary. In order to determine whether the transfer is *unjust*, the English case law identified a series of *unjust factors*, that may justify the claimant's restitutionary claim. One of the most common *unjust factors* in cases of contractual restitutions

author makes reference to the traditional criticism revolving around the unitary idea of unjustified enrichment ('(...) unjust enrichment is not sufficiently recognized by the courts and (...) the principle is artificial in bringing together disparate areas of the law which are not sufficiently similar, so that it is not possible to identify a coherent independent body of law founded on the reversal of the defendant's unjust enrichment'). In this regard, see also P.S. ATIYAH, 'The Rise and Fall of Freedom of Contract', Oxford, 1979, p. 768 and S. HEDLEY, 'Restitution: Its Division and Ordering', London, 2001; ID., 'Unjust Enrichment. Looking for a Role' in W. SWAIN and S. PEARI (eds.), *Rethinking Unjust Enrichment: History, Sociology, Doctrine, and Theory*, Oxford, 2023, p. 275. For a critical view on the notion of a unified law of restitution (or unjust enrichment) see also R. STEVENS, *The Laws of Restitution*, Oxford, 2023, pp. 21 et seq ('The law of restitution (as opposed to the law of unjust enrichment) also claims to be a subject united by the form of rights that are created. It is said to concern obligations to give up (which for some includes giving back) to another gains made. In this it purports to sit alongside other categories united by the form of the subject matter of any claim. Claims to gains made by the defendant may be contrasted with claims to make good losses incurred by the claimant. As we shall see, the material traditionally treated as making up the 'law of restitution' has no such formal commonality').

²⁵ For the English context, see the recent analysis of R. SERAFIN, 'Le restituzioni contrattuali nel diritto inglese' in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 296 et seq. As regards the American context, it should be recalled that the *Restatement (First) of Restitution* of 1937, prepared by Seavy and Scott, was the first to unify the law of restitution previously characterized as a fragmented field of *causes of actions* and *remedies*. As has often been observed, while the *Restatement (First) of Restitution* succeeded in grounding the entire subject in the fundamental principle of *unjustified enrichment*; its bipartite structure - dividing *quasi-contractual remedies* and *equitable remedies* - preserved the conceptual separation between these two domains. The *Restatement (Third) of Restitution and Unjust Enrichment* of 2011, under Kull, further systematized the subject by organizing it around four parts: the first part is dedicated to general principles; the second part concerns the substantive grounds of restitution; the third part, which is in turn divided into two *Topics*, identifies two groups of remedies, the first aimed at specific restitution and the recognition of rights to identifiable properties or sums of money; and the fourth part concerns the available defenses. In this context, see the recent analysis of F. RANA, 'Restitution e Contract negli Stati Uniti' in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 327 et seq. See also D. LAYCOCK, 'The Scope & Significance of Restitution', in *Tex. L. Rev.*, 1989, 67, pp. 1277 et seq, who aptly remarked, with regard to the *Restatement (First) of Restitution* of 1937, that 'this was a major accomplishment; it created the field'. See also P.H. WINFIELD, 'The American Restatement of the Law of Restitution', in *Law Quarterly Review*, 1938, 54, pp. 529 et seq; N. PALMER, *Law of Restitution*, vol. I, Boston-Toronto, pp. 3 et seq; W. FARNSWORTH, *Restitution*, Chicago/London, 2014, pp. 11 et seq.

²⁶ In this context, see notably P. SIRENA, 'The Rules about Restitution in the Proposal on a Common European Sales Law', nt. 10, p. 987 ('(...) the remedies that are based on the principle of unjust enrichment are not aimed to a better distribution of wealth among citizens, on the assumption that the recipient has less need or merit to enrich himself than the giver (distributive justice). Their purpose is instead to cancel a patrimonial transfer that occurred without a legal basis, so that the benefit that has flown from the giver's patrimony into that of the recipient can return from the latter to the former (corrective or commutative justice'). Cf also A. BURROWS, nt. 24, pp. 68-69; K. BARKER, 'Unjust Enrichment: Containing the Beast', in *OJLS*, 1995, 15, pp. 457 et seq; L. SMITH, 'Restitution: The Heart of Corrective Justice', in *Tex L. Rev.*, 2001, 79, pp. 2115 et seq.

is *failure of consideration*. Other unjust factors include *mistake of fact*, *exploitation of weakness*, *incapacity*, *ignorance*, *legal compulsion*, *necessity* and *illegality*.

The principle of *unjustified enrichment* has also been acknowledged in the case law of the Court of Justice²⁷. Indeed, the Court stated that ‘where contracts under which services are provided prove to be invalid and cease to exist, the enrichment of the beneficiary of those services must, in accordance with the principles developed in the legal systems of the Member States, give rise, in certain circumstances, to restitution’²⁸. This judgment also confirms that *unjustified enrichment* operates as a general principle of EU law, capable of filling normative gaps and providing coherence to the EU’s law of restitutions²⁹.

The judicial acknowledgment is mirrored in several legislative provisions at EU level, where the principle of *unjustified enrichment* emerges either explicitly or implicitly³⁰. In this regard, the former Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer

²⁷ Case C-47/07, *P Masdar (UK) Ltd v Commission of the European Communities*, ECLI:EU:C:2008:726, para 50: ‘However, despite those characteristics, the possibility of bringing an action for unjust enrichment against the Community cannot be denied to a person solely on the ground that the EC Treaty does not make express provision for a means of pursuing that type of action. If Article 235 EC and the second paragraph of Article 288 EC were to be construed as excluding that possibility, the result would be contrary to the principle of effective judicial protection, laid down in the case-law of the Court and confirmed in Article 47 of the Charter of fundamental rights of the European Union, proclaimed at Nice on 7 December 2000’.

²⁸ Case C-47/07, *P Masdar (UK) Ltd v Commission of the European Communities*, nt. 27, para 55. See also Case C-432/05, *Unibet*, ECLI:EU:C:2007:163, para 37, and Joined Cases C-402/05 and C-415/05 *P Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461, para 335.

²⁹ Cf N. BADENHOOP, ‘Restitution Claims – EU Consumer Law Principles and the Mortgage Credit Directive as an Overarching Value Model’ in P. SIRENA (eds.), nt. 1.

³⁰ Ibid. The author notes that some legislative acts address the principle of *unjustified enrichment* within the *vertical* dimension, governing relations between individuals and the State, while others concern *horizontal* relationships between private parties. Within the former category, the Community Customs Code Regulation establishes in Article 236 a specific restitutionary right concerning import duties, providing that ‘[i]mport duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed’ and further clarifying that ‘[n]o repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned’. Likewise, Article 62 of the Commission Regulation (EC) No 43/2003 of 23 December 2002 laying down detailed rules for applying Council Regulations (EC) No 1452/2001, (EC) No 1453/2001 and (EC) No 1454/2001 as regards aid for the local production of crop products in the outermost regions of the European Union – now repealed by Commission Delegated Regulation (EU) No 179/2014 of 6 November 2013 supplementing Regulation (EU) No 228/2013 of the European Parliament and of the Council with regard to the register of operators, the amount of aid for the marketing of products outside the region, the logo, the exemption from import duties for certain bovine animals and the financing of certain measures relating to specific measures for agriculture in the outermost regions of the Union – introduced a restitutionary claim in respect of agricultural aid, stipulating that ‘[i]f undue payment is made, the grower shall repay the amount in question plus interest’, with the rate of interest to be determined according to national law but ‘not lower than the interest rate applicable for the recovery of amounts under the national provisions’.

credit expressly incorporated the principle of *unjustified enrichment* within its Article 7³¹. This provision required Member States to ensure that ‘where the creditor recovers possession of the goods, the account between the parties shall be made up so as to ensure that the repossession does not entail any unjustified enrichment’³². Although this provision was later omitted from the subsequent Directive 2008/48/EC³³ and Directive 2014/17/EU³⁴, this legislative silence has not been interpreted as a rejection of the principle of *unjustified enrichment*³⁵. Scholars suggest that the omission was merely stylistic and not substantive, reflecting the understanding of the content of the former Article 7 was already encompassed by the overarching general principle of *unjustified enrichment* recognized under EU law³⁶.

1.1. Contractual Restitution In The Realm Of Unfair Contract Terms Directive, Between Principles And Rationales

The debate surrounding the Unfair Contract Terms Directive (in general) and foreign currency linked loans (in particular) occupies a particularly delicate position within European contract law, as it raises fundamental questions concerning contractual restitutions – whereas the contract is annulled in its entirety due to unfairness - which, according to certain scholars, remain ‘virtually unknown in European contract law’³⁷.

³¹ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [OJ L 42], repealed by Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers [OJ L 133].

³² More precisely, Article 7 of Directive 87/102/EEC established that: ‘In the case of credit granted for the acquisition of goods, Member States shall lay down the conditions under which goods may be repossessed, in particular if the consumer has not given his consent. They shall further ensure that where the creditor recovers possession of the goods the account between the parties shall be made up so as to ensure that the repossession does not entail any unjustified enrichment’.

³³ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers, now repealed by Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers [OJ L, 2023/2225].

³⁴ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 Text with EEA relevance [OJ L 60].

³⁵ Cf N. BADENHOOP, ‘Restitution Claims – EU Consumer Law Principles and the Mortgage Credit Directive as an Overarching Value Model’ in P. SIRENA (eds.), nt. 1.

³⁶ A. HARTKAMP, *European Law and National Private Law*, Cambridge, 2016, pp. 219-220: ‘The old directive had an Article 7 which read: ‘In the case of credit granted for the acquisition of goods, Member States shall lay down the conditions under which goods may be repossessed, in particular if the consumer has not given his consent. They shall further ensure that where the creditor recovers possession of the goods the account between the parties shall be made up so as to ensure that the repossession does not entail any unjustified enrichment.’ This provision has not been included in the new directive. In my opinion this does not result in any substantive changes, because the subject matter is covered by EU law and this law recognises a principle rejecting unjust enrichment’.

³⁷ See in this regard S. GRUNDMANN and N. BADENHOOP, ‘Foreign Currency Loans and the Foundations of European Contract Law – A Case for Financial and Contractual Crisis?’, in *ERCL*, 2023, 19(1), p. 6.

Indeed, the Unfair Contract Terms Directive provides only a partial regulatory framework on the consequences of the unfairness of contract terms in business-to-consumer contracts. While Article 6(1) merely stipulates that ‘unfair terms (...) shall (...) not be binding on the consumer’ and Article 7(1) requires ‘Member States to ensure adequate and effective means (...) to prevent the continued use of unfair terms’, the Directive does not expressly regulate the restitutionary consequences following the annulment of a contract, which are left to domestic legal systems³⁸.

Therefore, any inquiry into the remedies available against unfair contract terms, including the restitutionary consequences arising from the annulment of a contract, must navigate a complex normative terrain. This examination entails consideration of three interrelated dimensions: the policies informing the specific regulatory framework governing unfair contract terms (I); the general principles underpinning EU law (II) and those emerging from domestic legal systems (III)³⁹. The real problem is that such principles and policies may not be aligned, leading to jarring or inconsistent outcomes.

From a policy perspective (I), two rationales appear particularly relevant: the first one which may be defined as ‘commutative, not redistributive’⁴⁰ and the second one which may be termed ‘market-rectifying, not rationalizing’⁴¹.

³⁸ See S. GRUNDMANN and N. BADENHOOP, nt. 37, p. 17. In the Italian context, see E. BARGELLI, ‘Invalidità del contratto e restituzioni nelle intersezioni fra le fonti del diritto’, in *Riv. dir. civ.*, 2024, pp. 569 et seq. The author recalls that, even before addressing the consequences of a finding of unfairness, the Court of Justice had already dealt with issues concerning the restitutionary effects of the right of withdrawal in distance and off-premises contracts, as in Case C-481/99, *Heininger*, ECLI:EU:C:2001:684; Case C-350/03, *Schulte v. Deutsche Bausparkasse Badenia AG*, ECLI:EU:C:2005:637; Case C-229/04, *Crailsheimer*, ECLI:EU:C:2005:640; Case C-489/07, *Messner v. Krüger*, ECLI:EU:C:2009:502; and Case C-97/22, *DC v. HJ*, ECLI:EU:C:2023:413. The author further notes that, more recently, the question of restitution has arisen in cases concerning the early termination of consumer credit agreements, most notably in Case C-383/18, *Lexitor*, ECLI:EU:C:2019:702 and Case C-555/21, *UniCredit Bank Austria AG*, ECLI:EU:C:2023:78. Outside the sphere of consumer law, reference should also be made to Case C-453/99, *Courage v. Crehan*, ECLI:EU:C:2001:465, where the Court addressed the applicability of the *in pari causa turpitudinis* defence in actions for nullity of agreements prohibited under Article 101(2) TFEU.

³⁹ Cf. E. BARGELLI, nt. 38, p. 595. The author observes that, when national courts are called upon to apply domestic remedies, whether general or sector-specific, within a purely regulatory framework, they must accordingly refine and adapt their interpretative ‘toolkit’. This requires taking into account, where relevant, the principles and rules on European private law already incorporated into the national legal system, including, notably, the protective function underlying the notion of invalidity. It also entails employing a reasoning grounded in the principle of consistent interpretation and its corresponding limits, chief among them the prohibition of *contra legem* construction. In this way, any disconnect between domestic private-law remedies and the European regulatory framework should be resolved by favoring interpretations that best align with the objectives pursued by the latter.

⁴⁰ See Chapter 1, Part I, § 2.1.

⁴¹ See Chapter 1, Part I, § 2.2.

As regards the former, it has been argued that the Unfair Contract Terms Directive does not pursue an intrinsically redistributive objective⁴². At this juncture, however, certain qualifications are in order. The reference to a ‘commutative, not redistributive’ rationale is not intended to characterize European contract law as a whole, nor to deny that social justice may play a role in a hypothetical regime governing unfair contract terms or to deny that influential strands of the literature maintain that European contract law embodies elements of social justice. Rather, it seeks to capture the specific normative architecture of the Unfair Contract Terms Directive⁴³.

This tension emerges with particular clarity when one considers the definitions of the social models of justice advanced by various authors in order to account for the limits to freedom of contract. By way of illustration, some of these influential accounts argue that, first, ‘freedom of contract is not only limited by reference to specific social relations but also in consideration of particular social conditions that can affect the parties’ bargaining power in *any* contractual

⁴² See, again, Chapter 1, Part I, § 2.1. By contrast, see H. COLLINS, ‘La giustizia contrattuale in Europa’ in A. SOMMA (eds.), *Giustizia sociale e mercato nel diritto europeo dei contratti*, Torino, 2007, p. 85 and J.W. RUTGERS, ‘European Contract Law and Social Justice’ in C. TWIGG-FLESNER (eds.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham/Northampton, 2016, p. 547: ‘To sum up, the Directive on unfair terms not only deals with the way parties entered into the contract – did they obtain all the information before the conclusion of the contract – but also polices the terms substantively. The CJEU has an active role in this respect. First, it provided the national courts with a powerful instrument: they must apply of their own motion the rules laid down in the Directive. In addition, the CJEU elaborated the fairness test in the Directive to assess whether there is a significant imbalance to the detriment of the consumer contrary to good faith. Moreover, if a contract includes unfair terms, which prevent a consumer from being entitled to an essential, for instance housing, the Directive is even more important. This all lead to the conclusion, at least with respect to the Directive on unfair terms, that European contract law does involve elements of social justice and is not merely restricted to repair market failures’. For an overview of the role of the Court of Justice, see H.-W. MICKLITZ and N. REICH, ‘The Court and the Sleeping Beauty: the revival of the Unfair Contract Terms Directive (UCTD)’, in *CMLR.*, 2014, 51, p. 771.

⁴³ Cf H. COLLINS, ‘La giustizia contrattuale in Europa’ in A. SOMMA (eds.), nt. 42, pp. 83 et seq. The author, while acknowledging that many legal systems are characterized by specific rules addressing instances of substantive unfairness in contracts – such as minimum wage legislation, limits on excessive or usurious interest rates in consumer credit agreements, and mechanisms for the control of unfair terms in consumer contracts – and while advocating the European legal system should move beyond its traditional market-promoting function so as to recognize the role it may play in securing social justice through the regulation of markets, nevertheless concedes that the EU lacks a fully-fledged conception of distributive justice. Indeed, the author further observes that, notwithstanding the founding Treaties’ commitment to ensuring a high level of protection, the primary justification of any legal regulation of the market within the EU must ultimately be found in the need to remove obstacles to trade or to correct market failures. See, also, M.R. MARELLA, ‘The Old and the New Limits to Freedom of Contract in Europe’, in *ERCL*, 2006, 2, pp. 257 et seq and J.W. RUTGERS, ‘European Contract Law and Social Justice’ in C. TWIGG-FLESNER (eds.), nt. 42, pp. 545 et seq. The author acknowledges that a further difficulty lies in the very meaning of social justice, which remains inherently contested: some scholars emphasize the protection of weaker parties in the market, while others focus on the role of contract law within the welfare state or on its redistributive effects.

transaction'⁴⁴; secondly, 'the general limit to freedom of contract has the specific function of correcting and/or compensating a sort of *original* lack of solidarity and proportionality that inheres in freedom of contract'⁴⁵; and thirdly, 'contract becomes the vehicle through which the state enacts solidarity within the community'⁴⁶. Yet, however compelling at a high level of abstraction, these premises do not appear fully consonant with the internal logic of the Unfair Contract Terms Directive. As already noted, the Directive is premised on the idea that freedom of contract may entail an inherent or structural lack of solidarity or proportionality when the weaker party is faced with a stronger one. Its intervention, however, is limited to a specific concern, namely the *unfair* use by the stronger party of its superior bargaining power. In this respect, the Unfair Contract Terms Directive does not prohibit disadvantageous bargains as such, but focuses only on those contractual terms that are unfairly detrimental. From a commutative justice approach, this amounts exactly to the type of 'legally unacceptable behavior' that warrants a corrective remedy in favor of the weak party ('constans et perpetua voluntas ius suum cuique tribuendi'). This conclusion is further borne out by the well-known limits of the Unfair Contract Terms Directive's objective scope of application, which excludes review of both the definition of the main subject matter of the contract and the adequacy of the price or remuneration, precisely those domains in which a genuinely redistributive or solidarity-based logic might otherwise be expected to find its most direct expression⁴⁷. In other words, the Directive does not prohibit significantly unbalanced terms, refraining from engaging with redistributive concerns or interfering with the core economic structure of the contractual relationship, but intervenes only if these unbalanced terms are imposed unfairly⁴⁸.

⁴⁴ See M.R. MARELLA, nt. 43, p. 266.

⁴⁵ Ibid.

⁴⁶ See M.R. MARELLA, nt. 43, p. 267.

⁴⁷ Furthermore, according to Article 3 of the Unfair Contract Terms Directive, the objective scope of application is limited to 'term[s] which ha[ve] not been individually negotiated', which expressly include those terms that have been drafted in advance. In this context, see N. REICH, H.-W. MICKLITZ, P. ROTT, K. TONNER, *European Consumer Law*, 2nd ed., Cambridge/Antwerp/Portland, 2014, pp. 133-135, V. RIZZO, *Le "clausole abusive" nell'esperienza tedesca, francese, italiana e nella prospettiva comunitaria*, Napoli, 1994, pp. 567-569 and T. JOSIPOVIĆ, 'Scope of Application of the Unfair Contract Terms Directive: Is It Time for a New Compromise?', in *ERPL*, 2024, 32(3), pp. 337-338. This approach notably differs from the Nordic legal framework, where a collective standard of contractual fairness applies to all contract terms, including prices and individually negotiated clauses, regardless of whether the parties are businesses or consumers. Cf, in this context, also the Quebec Civil Code and the Argentinian Civil Code. For an in-depth analysis, in this last regard, see F. DELFINI, 'Unnegotiated Contracts of Adhesion in American Common and Civil Law Jurisdictions: The Canadian and Argentinian Cases', in *Milan Law Review*, 2021, 2(1), pp. 19 et seq.

⁴⁸ See P. SIRENA, 'Il giudizio di abusività delle clausole c.d. economiche' in G. ALPA and V. LEVI (eds.), *I diritti dei consumatori e degli utenti. Un commento alle leggi 30.7.1998 n. 281 e 24.11.2000 n. 340 e al decreto legislativo 23.4.2001 n. 224*, Milano, 2001, pp. 337-338.

On a different note, as regards the ‘market-rectifying, not rationalizing’ policy, it has been already observed that Article 6 of Unfair Contract Terms Directive, by declaring that unfair terms ‘shall not be binding’ on the consumer, adopts an *ex post* perspective, seeking to redress the ‘significant imbalance’ created by such contractual provisions⁴⁹. In light of this policy, it will be essential to consider carefully how the ‘deterrent’ objective may be incorporated within such legal framework.

From the standpoint of principles derived from EU law (II), remedies for unfairness in business-to-consumer contracts must satisfy dual requirements of *effectiveness* and *adequacy* (Article 7 of the Unfair Contract Terms Directive)⁵⁰. These principles apply equally to restitutionary remedies. Effectiveness, on the one hand, aims to prevent situations where national rules would render the exercise of rights based on EU law impossible or excessively difficult⁵¹, while adequacy encompasses two dimensions: it must protect the consumer’s individual interest in avoiding the consequences of unfair contract terms, and it must also uphold the broader public interest – namely, the proper function of the market – which underpins the regulation on unfair contract terms⁵².

Scholars have further noted that these principles imply a requirement that remedies be *deterrent*. In practice, this means that the application of a remedy, included restitutionary

⁴⁹ See, again, Chapter 1, Part I, § 2.2. Cf also T. WILHELMSSON, ‘Le diverse forme di welfarismo nel diritto europeo dei contratti’ in A. SOMMA (eds.), nt. 42, p. 275: ‘Le misure che concernono il contenuto del contratto, così come le regole imperative di correttezza contrattuale, restano comunque tipiche dell’intervento di rettificazione’.

⁵⁰ Article 7(1) and (2) establishes that: ‘1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. 2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms’.

⁵¹ E. BARGELLI, nt. 38, p. 573: ‘Anche il test dell’autonomia procedurale, infatti, conduce – a seconda dei casi – a scartare, a modellare o a reinterpretare il diritto interno, principalmente attraverso il potente veicolo del principio di effettività (declinato come impossibilità o eccessiva difficoltà pratica di esercizio del rimedio conferito dall’Unione oppure come diritto a una tutela giudiziale effettiva)’. See, in this regard, F. EPISCOPO, *Varieties of effectiveness and their impact on private law adjudication*, in *ZEuP*, 2023, pp. 350 et seq and D. HALBERSTAM, ‘Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach’, in *Cambridge Yearbook of European Legal Studies*, 2021, 23, pp. 128 et seq. In the Italian context, see also G. VETTORI, ‘Effettività delle tutele (diritto civile)’, in *Annali*, X, 2017, pp. 387 et seq; ID., ‘Contratto giusto e rimedi effettivi’, in *Pers. e merc.*, 2015, pp. 5 et seq. See also M. GROCHOWSKI, C. PATERA and F. PISTELLI, ‘Effective consumer protection between administrative and judicial enforcement (Chapter 3)’ in P. IAMICELI, F. CAFAGGI, M. ARTIGOT I GOLOBARDES (eds.), *FRICoRe Casebook – Effective Consumer Protection and Fundamental Rights*, Roma, 2022, pp. 145 et seq.

⁵² Cf G. D’AMICO, ‘La tutela del consumatore alla prova dell’effettività’, in *Foro it.*, 2023, IV, pp. 392-393.

remedies, should eliminate any incentive for a professional to rely on an unfair contract term, whether by assuming the consumer will not contest it or by anticipating that any sanction would, at most, restore the professional to the position they would have occupied had they acted correctly from the outset⁵³. Importantly, the objective of countering opportunistic behavior should apply to consumers as well⁵⁴. Indeed, as will be analyzed, an asymmetrical restitutionary regime could bias consumer conduct, encouraging the pursuit of the annulment rather than the preservation of the contract⁵⁵.

All in all, it is worth recalling that efficient deterrence should seek to minimize the costs resulting from nonenforcement of contracts. Indeed, when an illegal contract is not enforced, parties lose the economic resources that they allocated to an activity calculated to maximize their respective self-interests. It also is costly to society because resources spent to enter or even perform a contract that is of no effect could have been productively utilized elsewhere in the economy⁵⁶.

⁵³ Cf G. D'AMICO, 'La tutela del consumatore alla prova dell'effettività', nt. 52, p. 393. This issue is linked to the debate surrounding the possibility for national courts to *revise* or *reduce* contract terms deemed unfair. See, for instance, Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco y Caixabank*, ECLI:EU:C:2015:21, para 31: '[i]n fact, if it were open to the national court to revise the content of unfair terms, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect for sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be adjusted, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers'. In the same vein, see Joined Cases C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo*, ECLI:EU:C:2016:980, para 60 and Case C-26/13, *Kásler and Káslerné Rábai*, EU:C:2014:282, para 79. In this context see, C. MAK, 'Gutiérrez Naranjo: On Limits in Law and Limits of Law', in *European Law Review*, 2018, 43, p. 447.

⁵⁴ In fact, an approach that goes beyond simple consumer protection and becomes overprotective — or that shifts from being a deterrent to becoming punitive towards the seller or supplier — risks encouraging opportunistic behavior on the part of consumers. Such behavior would ultimately have repercussions not so much on the sellers or suppliers themselves, but on the market as a whole.

⁵⁵ See above nt. 54.

⁵⁶ See, in this regard, J.P. KOSTRITSKY, 'Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory', in *Iowa Law Review*, 1988, 74, pp. 120 et seq. The economic analysis of illegal contracts suggests that, where parties are aware of the risks and costs of non-enforcement, they may allocate those costs contractually in advance. In the absence of such explicit allocation, the courts must determine the appropriate distribution of loss, ideally assigning it to the 'cheapest cost avoider' or 'superior risk bearer'. The various exceptions developed in case law to the traditional *no-effect* rule can be understood through this lens of efficient deterrence and loss reallocation. These exceptions — sometimes expressly recognized, sometimes operating implicitly — allow recovery in cases depending on factors such as (i) the relative status and bargaining power of the parties; (ii) their respective knowledge and voluntariness; (iii) their degree of participation in the illegal act; and (iv) the relative benefit derived from it. On this view, the so-called 'status disparity', denoting differences in professional, education, or financial standing between the parties, justifies judicial preference for the weaker party, insofar as such disparity typically entails unequal knowledge, expertise, or negotiating strength.

Going further, it has been persuasively argued that *deterrence* in the context of unfair contract terms should not be conflated with *penalization*. According to such position, the Unfair Contract Terms Directive does not seek to penalize either party⁵⁷. More broadly, punitive measures are largely alien to the EU legal system, as reflected, for example, in the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, which explicitly precludes overcompensation through punitive or multiple damages (Recital 13 and Article 3(3))⁵⁸.

In conclusion, as regards the principles underpinning domestic legal systems (III), it has been observed how national legal systems often incorporate a ‘protective’ function into the rules on contract invalidity, but also into the rules on contractual restitution⁵⁹. Yet, more recent views developed on the issue, encourage a proper balance between such protective approach and the principle of ‘consumer equality, not superiority’⁶⁰. As has been explained by those authors who crystallized such principle, the Directive does not intend to grant consumers unearned advantages. In practice and with regard to foreign currency linked loans, this principle requires that consumers are properly informed *ex ante* of the financial consequences of foreign currency loans, including the differences between buying and selling rates and their impact on total repayment obligations⁶¹. *Ex post*, equality is realized not by annulling all contracts containing

⁵⁷ See S. GRUNDMANN and N. BADENHOOP, nt. 37, pp. 19, 32-33, 34: ‘Article 6 para 1 UCTD does not intend to penalise either contractual side. The consumer ought not to be penalised by any solution found, as the CJEU stressed in Dziubak that the nullity of entire contracts could not result in ‘unfavourable consequences’ for consumers and hence, did not ‘penalise’ consumers. Neither is the business counterpart to be penalised’. The authors argue that punitive measures are largely alien to the EU legal system, also referring to the rule of *nulla poena sine lege*.

⁵⁸ More precisely, Recital 13 and Article 3(3) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [OJ L 349] respectively establish that ‘[t]he right to compensation is recognised for any natural or legal person — consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by a competition authority. This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU. Without prejudice to compensation for loss of opportunity, full compensation under this Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages’ and ‘[f]ull compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages’.

⁵⁹ See Chapter 2, Part II, § 11 and below § 2.

⁶⁰ See S. GRUNDMANN and N. BADENHOOP, nt. 37, pp. 18-19.

⁶¹ Cf S. GRUNDMANN and N. BADENHOOP, nt. 37, p. 18. See, in this regard, also Case C-240/98, *Océano Grupo* ECLI:EU:C:2000:346; Case C-168/05, *Mostaza Claro*, ECLI:EU:C:2006:675, para 36 (‘The importance of consumer protection has in particular led the Community legislature to lay down, in Article 6(1) of the Directive, that unfair terms used in a contract concluded with a consumer by a seller or supplier ‘shall ... not be binding on the consumer’. This is a mandatory provision which, taking into

unfair terms, but by restoring a genuine balance between the parties' rights and obligations⁶². Restitutionary remedies, likewise, where the contract can no longer bind the parties and is set aside in its entirety, should be oriented towards re-establishing the equilibrium between the parties, rather than conferring a disproportionate advantage upon one of them.

In conclusion, a key challenge in applying the principle of equality lies, of course, in the inherent asymmetry between consumers and professionals⁶³. At a closer examination, however, this potential conflict is resolved by the very notion of unfairness: it functions to restore balance within the contractual relationship, ensuring that consumers are protected against unfair terms without converting the remedy into a punitive measure.

2. From 'Nullity Serving A Protective Function' To 'Restitutions Serving A Protective Function'

As emphasized by contemporary legal scholarship, the traditional category of 'contract invalidity' has progressively undergone a significant functional reconfiguration⁶⁴. Increasingly,

account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them'); Case C-26/13, *Kásler and Káslerné Rábai*, nt. 53, paras 72-75 ('(...) Having regard to all the foregoing, the answer to the second question is that Article 4(2) of Directive 93/13 must be interpreted as meaning that, as regards a contractual term such as that at issue in the main proceedings, the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it'). Cf, in this context, A. WIEWIÓROWSKA-DOMAGALSKA, 'Lost in Information - The Transparency Dogma of the Unfair Contract Terms Directive', in *ERPL*, 2024, 32(3), pp. 423 et seq.

⁶² See S. GRUNDMANN and N. BADENHOOP, nt. 37, p. 18. See, in this regard, also Case C-118/17, *Dunai*, ECLI:EU:C:2019:207, paras 40 and 51; Joined Cases C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, ECLI:EU:C:2019:250, para 57 and Case C-260/18, *Dziubak*, ECLI:EU:C:2019:819, para 39: '(...) According to settled case-law, the purpose of that provision, and in particular of its second part, is not to cancel all contracts containing unfair terms but to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance re-establishing equality between them, it being specified that the contract at issue must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms. Provided that the latter condition is satisfied, the contract at issue may, pursuant to Article 6(1) of Directive 93/13, be continued as long as, in accordance with the rules of domestic law, such continuity of the contract is legally possible without the unfair terms, which is to be determined objectively'.

⁶³ See Chapter 1, Part I, § 3.2.

⁶⁴ In the Italian context, see A. DALMARTELLO, 'Conseguenze del giudizio di vessatorietà: dalla post-vessatorietà alla *condictio* indebiti di protezione', in *Riv. dir. banc.*, 2023, II, pp. 80 et seq. As already noted in Chapter 2, many scholars have identified a general departure of nullity serving a protective function from the codified archetype across different jurisdictions. This deviation appears to have been acknowledge by the case law itself.

contract invalidity, and in particular contract nullity, have been invoked not only in response to infringements of public policy or mandatory rules, but also in cases where the infringement concerns the specific and individual interests of one of the contracting parties⁶⁵. These are typically situations in which the affected party occupies a structurally or circumstantially weaker position vis-à-vis the other, revealing pronounced economic or informational asymmetries.

Out of this evolution has emerged a category widely recognized by legal scholarship as ‘nullity serving a protective function’ or ‘nullity to protect’⁶⁶. Within the majoritarian opinion, these ‘new’ forms of nullity are to be considered ‘special’ in character⁶⁷.

This classification, however, has already been criticized. Indeed, from the standpoint of *novelty*, it has been argued that ‘nullity serving a protective function’ should not be viewed as a true legislative innovation, but rather as the most modern expression of the protective rationale historically embedded within the very notion of contract nullity⁶⁸. From the standpoint of

⁶⁵ Cf S. POLIDORI, ‘Nullità di protezione e interesse pubblico’, in *Rass. dir. civ.*, 2009, pp. 1019 et seq; G. PASSAGNOLI, *Nullità speciali*, Milano, 1995, pp. 191 et seq; ID., ‘Analisi di un falso principio: nullità speciali e restituzione unilaterale’, in *Pers. e merc.*, 2021, 2, p. 266 (‘In quanto speciali, simili nullità non si esauriscono, come pur un tempo si reputava, in un sovrastante e unitario pubblico interesse: il quale, nel concreto atteggiarsi delle tecniche di tutela, ben può divenire “*ratione publicae utilitatis secundario*”. Ma in quanto nullità, in esse non può difettare un processo di sintesi tra l’interesse pubblico e gli interessi particolari volta a volta protetti, i quali rilevano non solo in sé, ma in funzione di una appartenenza categoriale. Sicché si apprezza, immancabilmente, un interesse generale al fondamento di un simile ordine pubblico di protezione: sintesi che, se da un lato, reclama *effettività* per gli interessi in giuoco, dall’altro, non consente la tutela incondizionata di uno solo tra di essi’); V. SCALISI, ‘Nullità e inefficacia nel sistema europeo dei contratti’ in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, Milano, 2011, pp. 176 et seq; ID., ‘Contratto e regolamento nel piano d’azione delle nullità di protezione’, *ibid.*, pp. 197 et seq; ID., ‘Giustizia contrattuale e rimedi: fondamento e limiti di un controverso principio’, *ibid.*, pp. 337 et seq; A. FEDERICO, ‘Nuove nullità ed integrazione del contratto’ in A. BELLAVISTA and A. PLAIA (eds.), *Le invalidità nel diritto privato*, Milan, 2011, pp. 329 et seq.

⁶⁶ Cf A.A. DOLMETTA, ‘All’essenza della nullità di protezione: l’operatività «a vantaggio». Per una critica costruttiva di Cass. SS.UU., n. 28314/2019’, in *Riv. dir. banc.*, 2020, pp. 90 et seq; A. GENTILI, ‘La «nullità di protezione»’, in *Eur. dir. priv.*, 2011, p. 119. Cf also M. GIROLAMI, *Le nullità di protezione nel sistema delle invalidità negoziali. Per una teoria della moderna nullità relativa*, Padova, 2008; G. D’AMICO, ‘Nullità virtuale-Nullità di protezione – (Variazioni sulla nullità)’, in *I Contratti*, 2009, pp. 737 et seq; A. FEDERICO, ‘Nuove nullità ed integrazione del contratto’ in A. BELLAVISTA and A. PLAIA (eds.), nt. 65, pp. 329 et seq; A. ALBANESE, ‘Non tutto ciò che è “virtuale” è “razionale”: riflessioni sulla nullità del contratto’, in *Eur. dir. priv.*, 2012, pp. 503 et seq; S. PAGLIANTINI, ‘La nullità di protezione tra rilevanza d’ufficio e convalida: lettere da Parigi e dalla Corte di Giustizia’ in ID. (eds.), *Le forme della nullità*, Torino, 2011, pp. 27 et seq.; G. DE CRISTOFARO, ‘Le invalidità negoziali «di protezione» nel diritto comunitario dei contratti’ in *ibid.*, pp. 179 et seq; S. POLIDORI, nt. 65, pp. 1019 et seq; ID., *Discipline della nullità e interessi protetti*, Napoli, 2001; F. DI MARZIO, ‘Nullità di protezione, codice del consumo e contratti del consumatore’, in *Riv. dir. priv.*, 2005, pp. 837 et seq; A. D’ADDA, *Nullità parziale e tecniche di adattamento del contratto*, Milano, 2008.

⁶⁷ Cf D. IMBRUGLIA, ‘Appunti su nullità e restituzioni’, in *Giur. it.*, 2020, pp. 1534-1535.

⁶⁸ See Chapter 2, Part II, § 11.

specialty, moreover, it has been observed that contract nullity, as a legal category, is neither structurally nor functionally uniform⁶⁹.

In any event, ‘nullity serving a protective function’ is typically characterized by the fact that the power-right to rely upon such nullity is reserved to the party for whose benefit the provision was enacted, ordinarily the party in the weaker contractual position and is denied to the counterparty. It also frequently takes the form of partial nullities. This is regarded as a logical and proportionate means of advancing the aim of safeguarding the protected party’s interests⁷⁰.

Following the same rationale, even in the absence of an explicit statutory provision recognizing ‘nullity serving a protective function’, courts across jurisdictions have shown an increasing willingness to vary their treatment of parties to illegal or invalid contracts, sometimes recognizing a one-sided voidability right, or alternatively a one-sided right of enforcement⁷¹. In other instances, where partial performance had already occurred, courts granted a unilateral right of rescission with restitution or denied enforcement altogether while still allowing rescission⁷².

Building upon these foundations, it has been observed that the protective rationale of contract nullity has increasingly extended beyond its traditional boundaries, permeating the adjacent field of contractual restitutions⁷³. In this respect, a number of statutory provisions providing for partial or total denial of restitutions against only one of the contracting parties might be interpreted as a legislative applications of the logic underlying the ‘nullity serving a protective function’.

⁶⁹ Ibid.

⁷⁰ Cf A. NATUCCI, ‘Invalidità di protezione e nullità delle clausole vessatorie alla luce dei principi costituzionali (italiani e europei)’ in G. IUDICA and G. ALPA (eds.), *Costituzione europea e interpretazione della Costituzione italiana*, Napoli, 2006, pp. 227 et seq and A. GENTILI, ‘Codice del consumo ed *esprit de geometrie*’, in *I Contratti*, 2006, p. 171: ‘(...) diviene più evidente che l’invalidità «di protezione» è pur sempre nullità perché è comunque connessa ad un interesse generale, e quindi è rilevabile d’ufficio e imprescrittibile. Ma essendo di protezione opera solo a vantaggio della parte protetta, come precisa il legislatore; e quindi il suo tratto centrale è che è necessariamente parziale, a prescindere dalla volontà anche ipotetica della controparte, e sempreché ciò non renda privo di funzionalità il residuo’.

⁷¹ See *Corbin on Contracts*, vol. IV, § 1373 (‘[s]o it is with illegal bargains; their legal effect varies with the character of the factor that cause them to be called illegal’; furthermore ‘[t]he certainty suggested by the expression of the [no-effect rule] in many respects is illusory’). See also J.W. WADE, ‘Restitution of Benefits Acquired Through Illegal Transactions’, in *U. Penn. L. Rev.*, 1947, 95(3), pp. 261 et seq; W. GELLHORN, ‘Contracts and Public Policy’, in *Colum. L. Rev.*, 1935, 35, p. 683; G.A. STRONG, ‘The Enforceability of Illegal Contracts’, in *Hastings L.J.*, 1961, 12, pp. 347 et seq.

⁷² See J.P. KOSTRITSKY, nt. 56, pp. 120 et seq. The author notes that it is common in the area of securities law for courts or legislatures to grant voidability rights to parties that justifiably lack knowledge of the wrongdoing. See also *Farnsworth on Contracts*, § 5.9.

⁷³ Cf A. DALMARTELLO, nt. 64, pp. 79-80; G. PASSAGNOLI, ‘Analisi di un falso principio: nullità speciali e restituzione unilaterale’, nt. 65, pp. 266 et seq.

Illustrative examples of this phenomenon can be found in several provisions within domestic legal systems⁷⁴. For instance, Article 67-septiesdecies (5) of the Italian *Codice del consumo* provides that, in insurance contracts, the insurer must refund premiums paid and perform obligation for the period during which the contract was in force; however, indemnities and sums already paid to insured parties or beneficiaries are non-recoverable, without prejudice to the consumer's right to damages⁷⁵.

These provisions reveal a systemic asymmetry in the allocation of restitutionary effects: the restitutionary burden lies solely upon the professional party, thereby confirming that the functional logic of protection governing contract nullity extends to the restitutionary consequences of invalidity⁷⁶.

A comparable tension emerges in the field of abuse of economic dependence. It has been argued that, where a contract is declared void on this ground, and in the absence of an express statutory provision preserving the performances already rendered, the matter should fall within the scope of the general rules governing undue payments⁷⁷. These rules have traditionally been regarded as having the sole function of correcting transfers *sine causa*, in a manner that is in itself *neutral*, or rather *impartial*, being foreign to any protective purpose directed at the contracting party in a weaker position⁷⁸. That said, it should be acknowledged that, even within

⁷⁴ Cf also, in the Italian context, Article 125-bis (9) of *Testo Unico Bancario* (TUB), in cases of nullity, the consumer cannot be required to return more than the sums actually used and may repay what is due in instalments, according to the original agreement or, failing that, in thirty-six monthly payments. Moreover, restitution of accrued interests is expressly excluded. A comparable structure is found in Article 167 (2) of D.lgs. 7 September 2005, n. 209 (*Codice delle Assicurazioni*), which permits only the policyholder or insured to invoke nullity; while the insurer must refund premiums, it cannot claim indemnities already paid or owed. This exclusion is functionally motivated: were the business or the stronger party entitled to claim restitution, the weaker party might be dissuaded from invoking nullity, thereby frustrating the very protective purpose of the law.

⁷⁵ More precisely, Article 67-septiesdecies (5) establishes that: 'La nullità può essere fatta valere solo dal consumatore e obbliga le parti alla restituzione di quanto ricevuto. Nei contratti di assicurazione l'impresa è tenuta alla restituzione dei premi pagati e deve adempiere alle obbligazioni concernenti il periodo in cui il contratto ha avuto esecuzione. Non sono ripetibili gli indennizzi e le somme eventualmente corrisposte dall'impresa agli assicurati e agli altri aventi diritto a prestazioni assicurative. È fatto salvo il diritto del Consumatore ad agire per il risarcimento dei danni'.

⁷⁶ G. PASSAGNOLI, 'Analisi di un falso principio: nullità speciali e restituzione unilaterale', nt. 65, pp. 269 et seq. In the Italian context, other scholars have likewise identified a protective function in the regulation of various types of restitution. In some cases, this results in an increase of the amount due (Article 2126), in others in its reduction (Article 1443), and in yet others in its exclusion altogether (Articles 2035 and 2231).

⁷⁷ Cf L. ZAPPATA, 'Le restituzioni nei contratti nulli' in G. DE NOVA (eds.), nt. 20, pp. 142 et seq. and A. ALBANESE, 'Abuso di dipendenza economica: nullità del contratto e riequilibrio del rapporto', in *Eur. dir. priv.*, 1999, p. 1206.

⁷⁸ Cf L. ZAPPATA, 'Le restituzioni nei contratti nulli' in G. DE NOVA (eds.), nt. 20, p. 144; A. ALBANESE, nt. 77, p. 1206; G. PASSAGNOLI, 'Analisi di un falso principio: nullità speciali e restituzione unilaterale', nt. 65, pp. 269 et seq. According to settled Italian case law on restitution, the protection afforded is in fact always the same, even though the genetic or functional defects affecting the contract — and thus

this ostensibly neutral framework, such rules are not entirely insensitive to considerations of fairness, as evidenced by instances in which the position of the *accipiens* is assessed in light of good or bad faith, as, for example, under Article 2033 of the Italian *Codice civile*.

Along these lines, it has further been observed that a neutral approach risks depriving the party who has suffered the abuse of economic dependence of effective protection. Indeed, as a result of restitution, such a party would find itself once again in the same situation that led it to accept a contract that was excessively burdensome or discriminatory. It thus becomes necessary to ascertain whether the law of restitutions does not, in fact, undermine the policy rationale underlying the prohibition of certain contracts or contract terms⁷⁹.

The emergence of (a law of) ‘restitutions serving a protective function’ thus represents both the culmination and the critical testing ground of the broader process by which the functional logic of protection has progressively permeated consumer contract law⁸⁰.

2.1. Partial Or Total Denial Of Restitutions, A Critical Analysis

In recent years, the EU law has once again brought the question of contractual restitutions to the forefront of legal debate, spurred by an increasingly rich body of case law from the Court of Justice addressing the consequences of declaring the unfairness of contract terms in business-to-consumer contracts. As has been already observed, the most emblematic of these decisions are those concerning foreign currency linked loans⁸¹.

Against this background, the Court of Justice’s decision in *Bank M.* assumes a special significance⁸². It has indeed been read by some as establishing a rule of partial denial of

giving rise to the need for its activation — may differ. In general terms, therefore, the specific ground underlying each claim for restitution is extraneous to the *causa petendi*: it constitutes an irrelevant *prius* for the identification of the action, which is based solely on the absence of a valid *causa adquirendi*, however it may have arisen. The protection thereby afforded is strictly objective in nature, representing the legal system’s reaction to an unjustified transfer of wealth, regardless of its underlying reason — which, in any event, does not contribute to defining the *causa petendi*. See, for instance, Cass. civ. n. 10498/2001, in *Riv. not.*, 2002, II, pp. 184 et seq; Cass. civ. n. 27334/2005, in *Giust. Civ. Mass.*, 2006, 2; Cass. civ. n. 5624/2009, *Giust. Civ. Mass.*, 2009, 3, pp. 409 et seq; Cass. civ. n. 9052/2010, in *Rep. Civ.*, 2010, 7, pp. 552 et seq; Cass. civ. n. 2956/2011, in *Giust. Civ. Mass.*, 2011, 2, pp. 188 et seq; Cass. civ. SU nn. 26242-26243/2014.

⁷⁹ Cf L. ZAPPATA, ‘Le restituzioni nei contratti nulli’ in G. DE NOVA (eds.), nt. 20, p. 144 and A. ALBANESE, nt. 77, p. 1206.

⁸⁰ Cf L. ZAPPATA, ‘Le restituzioni nei contratti nulli’ in G. DE NOVA (eds.), nt. 20, p. 148. However, in this regard, see also P. TRIMARCHI, *L’arricchimento senza causa*, Milano, 1962, pp. 34-35 (‘molto spesso si parla di arricchimento senza causa quando un evento abbia comunque causato uno squilibrio che appaia iniquo, fra due situazioni patrimoniali, e l’ordinamento non offra rimedi per l’iniquità (...) [ma] inteso in tal modo, l’arricchimento diventerebbe il modo per creare il diritto, e per modificare qualsiasi altra norma di legge’).

⁸¹ Cf E. BARGELLI, nt. 38, p. 569.

⁸² Case C-520/21, *Bank M.*, ECLI:EU:C:2023:478.

restitutions against the credit institutions after the complete ‘annulment’ of the contract due to unfairness⁸³.

More precisely, according to the Court of Justice’s interpretation, while Article 6(1) and Article 7(1) of the Unfair Contract Terms Directive do not preclude a judicial interpretation of national law according to which the consumer has the right to seek compensation from the credit institution going beyond reimbursement of the monthly instalments paid and the expenses paid in respect of the performance of that agreement; on the other hand, they preclude a judicial interpretation of national law according to which the credit institution is entitled to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement⁸⁴. According to such approach, the fact that this determination results in the loan being, in substance, free of charge for the time it was in effect is of no real significance, since in accordance with the principle ‘*nemo auditur propriam turpitudinem allegans*’ (no one may rely on his or her own wrongdoing), a party cannot be

⁸³ Cf, *ex multis*, F. CORLETTI, ‘Towards a Protective *Condictio*? The Bank M Case in the Prism of Restitutory Remedies: A Reconstructive Proposal’, in *ERCL*, 2024, 20(2), pp. 155 et seq; G. D’AMICO, ‘La tutela del consumatore alla prova dell’effettività’, nt. 52, pp. 390 et seq; E. SCODITTI, ‘Il contratto come comportamento: la responsabilità per i danni da clausola abusiva e la Corte di giustizia’, in *Foro it.*, 2023, IV, pp. 395 et seq; A.A. DOLMETTA, ‘La clausola di «doppia conversione al cambio convenzionale» tra interesse pubblico (Corte di giustizia) e interessi privati (sezioni unite della Corte di cassazione)’, *ibid.*, pp. 400 et seq; F. MACARIO, ‘L’evoluzione delle categorie (e della dogmatica) del diritto contrattuale e la giurisprudenza della Corte di giustizia’, *ibid.*, pp. 383 et seq; S. PAGLIANTINI, ‘*Culpa in contrahendo* da contratto nullo e retroversione del profitto al consumatore: uso alternativo del diritto o una storia semplice?’, *ibid.*, pp. 377 et seq; A. PALMIERI-R. PARDOLESI, ‘Invalidità post-vessatoria dei contratti dei consumatori, restituzioni risarcitorie e altre calamità’, *ibid.*, pp. 369 et seq; M. MAUGERI, ‘Post-caducazione da vessatorietà e post-vessatorietà: il caso Bank M.’, *ibid.*, pp. 407 et seq. See also F. DI MARZIO, *La nullità del contratto*, Padova, 2008, p. 653, who already noted that case law, sometimes, tended to favor substantially equitable solutions, even going so far as to ignore or circumvent statutory provisions.

⁸⁴ Case C-520/21, *Bank M.*, nt. 82, para 85: ‘In the light of all the foregoing considerations, the answer to the question referred is that, in the context of the annulment in its entirety of a mortgage loan agreement on the ground that it cannot continue in existence after the removal of the unfair terms, Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as:

- not precluding a judicial interpretation of national law according to which the consumer has the right to seek compensation from the credit institution going beyond reimbursement of the monthly instalments paid and the expenses paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served, provided that the objectives of Directive 93/13 and the principle of proportionality are observed and,
- precluding a judicial interpretation of national law according to which the credit institution is entitled to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served’. Cf also, more recently, Case C-140/22, *mBank S.A.*, ECLI:EU:C:2023:965.

allowed to derive economic advantages from his, her or its unlawful conduct or to be compensated for the disadvantages caused by such conduct'⁸⁵.

All in all, the decision in *Bank M.* is noteworthy in a twofold respect. First, it prevents the credit institution from claiming compensation from the consumer that exceeds the mere reimbursement of the capital original disbursed (I); secondly, it does not exclude the possibility that domestic legal systems may allow consumers to recover the profits obtained by the credit institution through reliance on the unfair term during the period in which the loan agreement was performed (II)⁸⁶. According to the Court of Justice, in fact, it is not enough that the credit institution should be denied any entitlement to interest for the period during which the loan agreement was in force (an approach which may entail a clear-cut loss). The intention is to strike deeper, making the credit institution potentially liable for any *disgorgement* of profit, reversing it in favor of the consumer⁸⁷.

In light of the foregoing, the decision of the Court of Justice warrants careful scrutiny, in particular as regards their compatibility with the fundamental principles of EU law and the manner in which contractual restitutions are governed under national legal systems⁸⁸.

Focusing, for the moment, on the first aspect – namely the Court of Justice's statement that Articles 6(1) and 7(1) of the Unfair Contract Terms Directive preclude any interpretation of national law allowing the credit institution to claim compensation from the consumer beyond the mere repayment of the capital – it becomes evident that the Court of Justice has shaped this restitutionary regime in accordance with the 'deterrent' or 'dissuasive' rationale embodied in

⁸⁵ Case C-520/21, *Bank M.*, nt. 82, para 81 ('(...) in accordance with the principle *nemo auditur propriam turpitudinem allegans* (no one may rely on his or her own wrongdoing), a party cannot be allowed to derive economic advantages from his, her or its unlawful conduct or to be compensated for the disadvantages caused by such conduct'). For a critical analysis, see also M. GUTOWSKI, 'Is the remuneration for use of capital a part of a restitution claim in case of annulment of the bank loan contract? Remarks after the ECJ judgment of 15 June 2023' and C. GÓMEZ LIGÜERRE, 'Unfair Terms and the Restitution of Performances Rendered by the Parties' in P. SIRENA (eds.), nt. 1.

⁸⁶ See above nt. 84.

⁸⁷ Cf M.E. STORME, 'On the usefulness of default rules and disproportionate sanctions in consumer law', in *ERPL*, 2021, 3, pp. 399-340 and A. PALMIERI-R. PARDOLESI, nt. 83, p. 375

⁸⁸ Cf E. BARGELLI, nt. 38, pp. 580-581. The author explains that, while it is unsurprising that the professionals precluded from bringing an action for restitution exceeding the reimbursement of the capital paid, what is more striking is the Court's statement of compatibility with the Unfair Contract Terms Directive of a national law allowing the recovery of profits obtained by the professional through the use of an unfair term during the period in which the loan agreement was performed. According to the Court of Justice, such a restitutionary claim not only serves the purpose of restoring the consumer to the *status quo ante*, but also contributes to achieving the deterrent effect pursued by the Directive. However, this latter consideration does not go so far as to require national law to provide for an action aimed at recovering the professional's profits, which therefore remains optional and contingent.

Article 7(1) of the Unfair Contract Terms Directive⁸⁹. Read in conjunction with Recital 24⁹⁰, this provision allocates the consequences of unfairness in business-to-consumer contracts exclusively to the professional party who unilaterally introduced the unfair term⁹¹. The professional party, having sought to benefit from an imbalance in contractual rights and obligation, cannot legitimately claim compensation for the loss of profits that it had expected to obtain under such contract⁹².

Against this background, one might, nevertheless, object that such strict approach risks engendering an unowned benefit of the consumer, apparently at odds with the general principle of EU law proscribing *unjustified enrichment*⁹³. Indeed, as has been recently noted, the enjoyment by the weaker party of rights granted under EU law does not preclude that party from being liable from any *unjust enrichment* obtained at the expense of the contractual counterparty, who is consequently entitled to recover it⁹⁴. This interpretative stance is by no means unfamiliar to the Court of Justice, which on multiple occasions has adopted approaches to consumer protection that remain fully consistent with the general principles of EU law⁹⁵. A

⁸⁹ Cf P. SIRENA, 'Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation' in ID. (eds.), nt. 1; A. DALMARTELLO, nt. 64, pp. 83-84; E. BARGELLI, nt. 38, pp. 580-581; A. PALMIERI and R. PARDOLESI, nt. 83, pp. 373 et seq. See also Case C-520/21, *Bank M.*, nt. 82, para 68: '[i]t follows that the compatibility with EU law of national rules governing the practical consequences of the invalidity of a mortgage loan agreement on account of the presence of unfair terms depends on whether those rules, first, make it possible to restore, in law and in fact, the situation which the consumer would have been in had that contract not existed and, second, do not undermine the deterrent effect sought by Directive 93/13'.

⁹⁰ More precisely, Recital 24 provides that '(...) the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts'.

⁹¹ Case C-520/21, *Bank M.*, nt. 82, para 82 ('(...) any annulment of the mortgage loan agreement is a consequence of Bank M.'s use of unfair terms. Accordingly, it cannot be compensated for the loss of a profit similar to that which it hoped to derive from that contract'). See also, Opinion of Advocate General Collins, 16 February 2023, ECLI:EU:C:2023:120, para 58 ('I first observe that any annulment of the mortgage loan agreement would arise as a consequence of Bank M. having introduced unfair terms into that agreement. As the Commission rightly submits in its written observations, having regard to the generally accepted legal principle *nemo auditur propriam turpitudinem allegans*, a party cannot derive any economic advantage from a situation it has created by its own unlawful conduct. In particular, should a bank suffer any disadvantage following the annulment of a mortgage loan agreement containing unfair terms, it should not be compensated for that disadvantage since it arose as the exclusive result of its own unlawful conduct').

⁹² Cf P. SIRENA, 'Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation' in ID. (eds.), nt. 1.

⁹³ Cf S. GRUNDMANN and N. BADENHOOP, nt. 37, pp. 15 et seq and E. BARGELLI, nt. 38, p. 575.

⁹⁴ P. SIRENA, 'Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation' in ID. (eds.), nt. 1.

⁹⁵ *Ibid.* The author makes reference to two illustrative examples. First, with specific reference to (former) Directive 97/7/EC, the Court of Justice held that '[...] the prohibition laid down in the second sentence of Article 6(1) and Article 6(2) thereof do not preclude, in principle, a legal provision of a Member State which requires a consumer to pay fair compensation in the case where he has made use of the goods acquired under a distance contract in a manner incompatible with the principles of civil law, such as

comparable reference is found in *Friz*, regarding the implications of withdrawing from a closed-end property fund, which does not fully release the consumer from his obligations as set out in the wording of Directive 85/577/EEC: ‘[T]here is nothing in the Directive to preclude the consumer, in certain specific cases, from having obligations to the trader and, depending on the circumstances, from having to bear certain consequences resulting from the exercise of his right of cancellation’⁹⁶.

Further support for this perspective may be drawn from the rules governing the effects of withdrawal within the realm of distance and off-premises contracts regulated by Directive 2011/83/EU⁹⁷. That framework embodies a fundamentally commutative logic in relation to the delivery of goods or the performance of services, requiring the professional to secure the consumer’s prior consent before executing the contractual performance during the withdrawal period. This ensures that the consumer is fully aware of the obligation to remunerate the professional for any service rendered or goods delivered in the interim, should the right of withdrawal be exercised, thereby balancing the effective consumer protection with the equitable treatment of the professional⁹⁸.

In conclusion, however, it seems appropriate to recall that the approach adopted by the Court of Justice in *Bank M.* appears to be consistent with certain domestic rules on undue payments. Indeed, as already emphasized, Article 2033 of the Italian *Codice civile* provides that a person who has made a payment not due is entitled to recover what has been paid. That person is also entitled to fruits and interest from the date of payment where the recipient acted in bad faith, or, if the recipient was in good faith, from the date of the claim. Quite apart from this, moreover, taking once again the Italian legal system as an illustrative example, recent case law has recognized the possibility of configuring ‘restitutions serving a protective function’ in the field of financial investments involving consumers. This approach implies not merely a

those of good faith or unjust enrichment’. Secondly, as regards liability from infringement of the prohibition of anti-competitive agreements, the Court of Justice acknowledged the availability of the *passing-on* defence to a party to a contract liable for restricting or distorting competition sued for damages by another, weaker, party to the same contract. The Court emphasized that national courts are not prevented ‘from taking steps to ensure that the protection of the rights guaranteed by [EU] law does not entail the unjustified enrichment of those who enjoy them’.

⁹⁶ Case C-215/08, *Friz*, ECLI:EU:C:2010:186, para 45. See also Case C-350/03, *Schulte*, ECLI:EU:C:2005:637, para 93: ‘Accordingly, the Directive does not preclude national legislation which provides for an obligation on the consumer, in the event of cancellation of a secured credit agreement, not only to repay the amounts received under the contract but also to pay to the lender interest at the market rate’.

⁹⁷ 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 [OJ L 304].

⁹⁸ For a different opinion, see E. BARGELLI, nt. 38, p. 576.

differentiated regulation of the restitutionary claim available to the consumer in comparison with the professional, but, more radically, the denial of any corresponding right of restitution on the part of the professional⁹⁹.

Nevertheless, within the broader framework of European private law, there appears to be little room for *overcompensatory* or *remedy-enhancing* measures in the absence of specific normative justifications for recognizing such remedial opportunism on the part of the protected party¹⁰⁰. In this respect, reference may be made to the already mentioned Article 3(3) of Directive 2014/104/EU which explicitly held that '[f]ull compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages'¹⁰¹ and Article 11a of Directive 2005/29/EC, as amended by the Directive (EU) 2019/2161, which establishes that '[c]onsumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies'¹⁰².

3. Defences Against Restitutions

a) In favor of consumers

3.1. Illegality

Across both civil law and common law systems, albeit in distinct national forms, there exists a traditional doctrine under which 'illegality' precludes claims based on *unjustified enrichment*¹⁰³. The English approach, for instance, offers a broader scope of application than the Italian legal system, which prohibits the recovery of what has been rendered *contra bonos*

⁹⁹ L. BUONANNO and F. MEZZANOTTE, 'Some Problematic Issues Concerning the Implementation of the MCD in Italy' in M. ANDERSON and E. ARROYO AMAYUELAS (eds.), *The Review Of The Mortgage Credit Directive: Toward A Digital, Sustainable And Inclusive European Market*, Paris, 2025, pp. 276 et seq; G. PASSAGNOLI, 'Analisi di un falso principio: nullità speciali e restituzione unilaterale', nt. 65, pp. 266 et seq; A. DALMARTELLO, nt. 64, pp. 86 et seq.

¹⁰⁰ Cf S. GRUNDMANN and N. BADENHOOP, nt. 37, p. 18.

¹⁰¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [OJ L 349].

¹⁰² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [OJ L 149].

¹⁰³ S. MEIER, *sub* Art 15:104: Restitution in N. JANSEN and R. ZIMMERMANN (eds.), *Commentaries on European Contract Law*, Oxford, 2018, pp. 1922 et seq.

mores (Article 2035 of the Italian *Codice civile*¹⁰⁴)¹⁰⁵. Whereas the Italian rule bars restitution in cases involving transactions *contra bonos mores*, the English legal system extends to any performance that contravenes mandatory provisions of the legal system or public policy.

As someone observed, it is to this very doctrine that the Court of Justice appears to refer when stating that ‘*nemo auditur propriam turpitudinem allegans* (no one may rely on his or her own wrongdoing), a party cannot be allowed to derive economic advantages from his, her or its unlawful conduct or to be compensated for the disadvantages caused by such conduct’¹⁰⁶. Similarly, in another passage, the Court of Justice observes that ‘to grant a credit institution the right to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement and, as the case may be, the payment of default interest, would be liable to call into question the deterrent effect sought by Directive 93/13’¹⁰⁷. In the same vein, Advocate General Collins observed that ‘if, in a situation such as that which arises in the main proceedings, a bank were allowed to assert against a consumer claims that go beyond reimbursement of the loan principal, plus default interest at the statutory rate, in particular remuneration for the use of the loan capital without a contractual basis, that would deprive Directive 93/13 of its effectiveness and lead to an outcome inconsistent with the objectives it pursues’¹⁰⁸. To the objection that this would effectively allow the borrower to obtain a loan ‘free of charge’ the Court responded that the contract in question has been annulled due to the use of unfair terms by the credit institution, which therefore ‘cannot be compensated for the loss of a profit similar to what it hoped to derive from that contract’¹⁰⁹.

¹⁰⁴ More precisely, Article 2035 of the Italian *Codice civile* provides that: ‘Chi ha eseguito una prestazione per uno scopo che, anche da parte sua, costituisca offesa al buon costume non può ripetere quanto ha pagato’.

¹⁰⁵ For an evolutionary interpretation see G. MAGRI, *Dallo scambio immorale allo scambio illecito*, Torino, 2022; F.P. PATTI, ‘Buon costume e scopo della norma violata: sull’ambito di applicazione dell’art. 2035 c.c.’, in *Riv. dir. civ.*, 2021, pp. 517 et seq; ID., ‘«*In pari causa turpitudinis*», cinquant’anni dopo’ in *Liber amicorum Pietro Rescigno*, vol. II, Napoli, 2018, pp. 1537 et seq.

¹⁰⁶ Case C-520/21, *Bank M.*, nt. 82, para 81. See, in this regard, A. PALMIERI and R. PARDOLESI, nt. 83, p. 375.

¹⁰⁷ Case C-520/21, *Bank M.*, nt. 82, para 76: ‘To grant a credit institution the right to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement and, as the case may be, the payment of default interest, would be liable to call into question the deterrent effect sought by Directive 93/13, as the Advocate General observed in point 60 of his Opinion’.

¹⁰⁸ See Opinion of Advocate General Collins, nt. 91, para 59: ‘I would next observe that if, in a situation such as that which arises in the main proceedings, a bank were allowed to assert against a consumer claims that go beyond reimbursement of the loan principal, plus default interest at the statutory rate, in particular remuneration for the use of the loan capital without a contractual basis, that would deprive Directive 93/13 of its effectiveness and lead to an outcome inconsistent with the objectives it pursues’.

¹⁰⁹ Case C-520/21, *Bank M.*, nt. 82, para 82. See also P. SIRENA, ‘Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation’ in ID. (eds.), nt. 1.

It is, however, necessary to examine carefully the circumstances in which the doctrine of ‘illegality’ results in the irrecoverability of what has been performed. Indeed, English case law has recently undergone a significant evolution in this respect, moving from a rigid to a more flexible and context-sensitive approach¹¹⁰.

In *Patel v Mirza*, the UK Supreme Court formulated a three-stage test to determine whether a claim tainted by illegality may nonetheless allow restitution in favor of the claimant¹¹¹. First, the court must consider the underlying purpose of the prohibition that has been infringed and whether denying the claim would enhance the fulfilment of that purpose¹¹². Secondly, the court must assess whether refusing the restitutionary claim would have any additional impact on public policy¹¹³. Finally, the court must determine whether denial of the claim would be a proportionate response to the illegality in question¹¹⁴. Only where the court is satisfied that allowing the defendant to retain the benefit constitutes a proportionate, non-detrimental and normatively consistent response will the defense of illegality be upheld¹¹⁵.

With the regard to the criterion of proportionality, it has been persuasively argued that the conclusions reached by the Court of Justice in *Bank M.* are not entirely convincing and cannot fully sustain its assertion that if the bank were able to pursue claims beyond the repayment of loan principal, this would mean that it could profit from the fact that it included unfair contractual terms in the agreement, and thus its conduct, which was contrary to the requirements

¹¹⁰ Cf the recent analysis of R. SERAFIN, ‘Le restituzioni contrattuali nel diritto inglese’ in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 315-316.

¹¹¹ *Patel v Mirza* [2016] UKSC 42 (Lord Toulson).

¹¹² *Patel v Mirza* [2016] UKSC 42 (Lord Toulson) [120]: ‘The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate’.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ *Patel v Mirza* [2016] UKSC 42 (Lord Toulson) [121]. Cf also F.P. PATTI, ‘Buon costume e scopo della norma violata’, nt. 105, p. 525; G. VIRGO, nt. 24, pp. 786 et seq; ID., ‘The Defence of Illegality in Unjust Enrichment’ in A. DYSON, J. GOUDKAMP and F. WILMOT-SMITH (eds.), *Defences in Unjust Enrichment*, Oxford, 2016, pp. 176 et seq; ID., ‘A taxonomy of Defences in Restitution’ in E. BANT, K. BARKER, S. DEGELING (eds.), *Research Handbook on Restitution and Unjust Enrichment*, Cheltenham/Northampton, 2020, pp. 398 et seq.

of good faith and good practice, would bring it benefits¹¹⁶. Indeed, this reasoning appears sound only insofar as it concerns the profit margin the credit institution have earned from the conclusion of the loan agreement itself and provided in its favour¹¹⁷. By contrast, it seems less persuasive when applied to the average price determined by the historical average interest rate on housing loans in the domestic market¹¹⁸.

A further issue concerns the scope of the proportionality assessment itself: it remains to be determined, in fact, whether proportionality should be evaluated solely in light of the detrimental consequences borne by the parties to the dispute, or whether the analysis may also extend to the wider adverse effects produced within the market as a whole.

In this regard, it is noteworthy that a growing body of scholars recognizes an increasingly close interrelation between the regulation of public good and the principles of private law¹¹⁹. This convergence has been particularly evident with the advent of private enforcement mechanisms in the field of competition law, an area that epitomises the intersection of public interest regulation and individual legal remedies¹²⁰.

Equally relevant is the establishment of the European Banking Union and the stability framework governing the financial sector¹²¹. Within this regime, an overarching principle has emerged as paramount: the preservation of systemic stability. Its central objective is to prevent banking crises - and the consequent socialisation of losses onto taxpayers, through all available measures¹²². This rationale underlies the introduction of private burden-sharing mechanisms, most notably the bail-in, which replaces traditional tax-funded bail-outs by ensuring that the

¹¹⁶ Case C-520/21, *Bank M.*, nt. 82, para 24.

¹¹⁷ Cf P. SIRENA, 'Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation' in ID. (eds.), nt. 1. By contrast see E. BARGELLI, nt. 38, pp. 590 et seq.

¹¹⁸ Cf P. SIRENA, 'Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation' in ID. (eds.), nt. 1. See also G. VIRGO, 'The Defence of Illegality in Unjust Enrichment' in A. DYSON, J. GOUDKAMP and F. WILMOT-SMITH (eds.), nt. 115, pp. 176 et seq; ID., 'A taxonomy of Defences in Restitution' in E. BANT, K. BARKER, S. DEGELING (eds.), nt. 115, pp. 398 et seq.

¹¹⁹ Cf S. GRUNDMANN and N. BADENHOOP, nt. 37, p. 13. See also on this topic, F. ESPOSITO and G. TUZET, 'Economic Consequences as Legal Values: An Inferentialist Approach' in P. CSERNE and M. MALECKA (eds.), *Law and Economics as Interdisciplinary Exchange. Philosophical, Methodological and Historical Perspectives*, Abingdon, 2020, pp. 135-157.

¹²⁰ J. BASEDOW, 'Entwicklungslinien des europäischen Rechts der Wettbewerbsbeschränkungen– von der Dezentralisierung über die Ökonomisierung zur privaten Durchsetzung' in S. AUGENHOFER (eds.), *Europäisierung des Kartell- und Lauterkeitsrechts*, Tübingen, 2009, pp. 1–14; P. KIRST, *The Impact of the Damages Directive on the Enforcement of EU Competition Law – A Law and Economics Analysis*, Cheltenham, 2021.

¹²¹ Cf S. GRUNDMANN and N. BADENHOOP, nt. 37, p. 13.

¹²² Ibid.

costs of financial distress are borne, as far as possible, by the institution's own stakeholders rather than by the public purse¹²³.

From a broader perspective, it should nonetheless be observed that the traditional doctrine according to which illegality bars claims for unjustified enrichment has, in more recent developments, been incorporated within the modern non-legislative codifications. Indeed, Article 15:104 of PECL, dealing with contracts infringing mandatory rules or fundamental principles, allows for a derogation from the general obligation to return whatever the other party has supplied under the contract where restitution would defeat the purpose of the rule which has been infringed, or produce an inequitable outcome in light of factors such as the seriousness of the infringement or intentionality of the infringement, or the category of persons for whose protection the rule exists (Article 15:102(3))¹²⁴ and Article 15:104(2) PECL¹²⁵)¹²⁶. An award of restitution may also be refused to a party who knew or ought to have known of the reason for the ineffectiveness (Article 15:104(3) PECL)¹²⁷.

Accordingly, Article 15:104 PECL does not establish a rigid or standardized regime of restitution. Rather, it provides a general framework that empowers the decision-maker to determine, in view of the particular circumstances of the case, whether restitution is appropriate and consistent with the demands of justice¹²⁸.

¹²³ S. GRUNDMANN and N. BADENHOOP, nt. 37, pp. 13-14; J.-H. BINDER and C. GORTSOS, *The European Banking Union – A Compendium*, Baden-Baden, 2016; J.-H. BINDER, C. GORTSOS, K. LACKHOFF, C. OHLER (eds.), *European Banking Union – Brussels Commentary*, Munich, 2022; N. BADENHOOP, 'Banking Communication Non-binding and Burden-sharing Approved: Kotnik', in *ERCL*, 2017, 13(3), pp. 299-309.

¹²⁴ More precisely, Article 15:102(3) PECL provides that: 'A decision reached under paragraph (2) must be an appropriate and proportional response to the infringement, having regard to all relevant circumstances, including:

- (a) the purpose of the rule which has been infringed;
- (b) the category of persons for whose protection the rule exists;
- (c) any sanction that may be imposed under the rule infringed;
- (d) the seriousness of the infringement;
- (e) whether the infringement was intentional; and
- (f) the closeness of the relationship between the infringement and the contract'.

¹²⁵ See below nt. 126.

¹²⁶ More precisely, Article 15:104 PECL establishes that: '(1) When a contract is rendered ineffective under Articles 15:101 or 15:102, either party may claim restitution of whatever that party has supplied under the contract, provided that, where appropriate, concurrent restitution is made of whatever has been received. (2) When considering whether to grant restitution under paragraph (1), and what concurrent restitution, if any, would be appropriate, regard must be had to the factors referred to in Article 15:102(3). (3) An award of restitution may be refused to a party who knew or ought to have known of the reason for the ineffectiveness. (4) If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received'.

¹²⁷ See above nt. 126.

¹²⁸ G. MAGRI, 'Le restituzioni nel diritto comune europeo' in P. GALLO and G. MAGRI (eds.), nt. 2, p. 358. This approach represents a significant departure from the traditional rule precluding recovery of performances rendered *contra bonos mores*, which is no longer applied indiscriminately to all illegal

A comparable solution is found in the PICC. Indeed, Article 3.3.2. establishes that where there has been performance under a contract infringing a mandatory rule, restitution may be granted where this would be reasonable in the circumstances¹²⁹. Thus, in cases involving contracts contrary to mandatory rules, restitution is made subject to an assessment of reasonableness, requiring an evaluation of whether restitution would conflict with the purpose of the rule that has been violated¹³⁰.

Like the PECL, the PICC do not impose a single, uniform rule governing restitution in cases of illegality. Instead, they entrust the interpreter with identifying those situations in which restitution would undermine the objectives of the infringed provision, in which a rule of *soluti retentio* will apply. The PICC also calibrate the effects of restitution in light of the parties' reasonable expectations, the actual benefits received, and the efforts required to restore performances¹³¹. The *synallagmatic* relationship embodied in the contract thus serve as the guiding framework through which the scope and outcomes of restitutionary obligations must be determined¹³².

contracts, as such an absolute rule could itself give rise to inequitable results. See, in this context, E. BARGELLI, *Il sinallagma rovesciato*, nt. 13, pp. 231-232: 'Si percepisce, quindi, il doppio volto del diritto alla ripetizione. Da una parte, esso serve a rafforzare la *ratio* della causa di inefficacia, in quanto contribuisce a rendere incerte e aleatorie le conseguenze della conclusione di contratti affetti dall'invalidità e, in tal modo, concorre a scoraggiare le parti dall'intraprendere questa attività. Dall'altra, la pretesa restitutoria, sorgendo dalle ceneri del contratto nullo o annullato, conferisce al *solvens* uno strumento di tutela nei confronti della controparte, la cui compatibilità con il fondamento della causa di invalidità non può essere data per scontata'.

¹²⁹ More precisely, Article 3.3.2. PICC provides that: '(1) Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances. (2) In determining what is reasonable, regard is to be had, with the appropriate adaptations, to the criteria referred to in Article 3.3.1(3). (3) If restitution is granted, the rules set out in Article 3.2.15 apply with appropriate adaptations'. See the analysis of G. MAGRI, 'Le restituzioni nel diritto comune europeo' in P. GALLO and G. MAGRI (eds.), nt. 2, p. 360 and S. TANDOI, 'Le restituzioni nei progetti di codificazione dottrinale del diritto contrattuale' in G. DE NOVA (eds.), nt. 20, p. 19 and nt. 35. It should be noted that among the factors to be considered in determining whether restitution is appropriate, the PICC also refer to 'the parties' reasonable expectations' (Article 3.3.1.(2)(g)), a circumstance not contemplated, however, in the PECL.

¹³⁰ Cf G. MAGRI, 'Le restituzioni nel diritto comune europeo' in P. GALLO and G. MAGRI (eds.), nt. 2, p. 360 and S. TANDOI, 'Le restituzioni nei progetti di codificazione dottrinale del diritto contrattuale' in G. DE NOVA (eds.), nt. 20, p. 19. See also Article 3.3.1.(3)(a) which requires that '[i]n determining what is reasonable regard is to be had in particular to (...) the purpose of the rule which has been infringed'.

¹³¹ Cf the Official Comment no. 2 to Article 3.2.15. PICC which provides that: 'The purpose of specifying that an allowance has to be made in money "whenever reasonable" is to make it clear that an allowance only has to be made if, and to the extent that, the performance received constitutes a benefit for the recipient'. See also G. MAGRI, 'Le restituzioni nel diritto comune europeo' in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 360-361; R. ZIMMERMANN, 'The Unwinding of Failed Contracts in the Unidroit Principles 2010', nt. 18, p. 572.

¹³² D. IMBRUGLIA, nt. 67, p. 1537: 'Orbene, mettere in luce l'esistenza di un nesso tra la "marcata graduazione degli effetti" e la disciplina delle prestazioni già svolte consente di immaginare tante regole restitutorie quanti i trattamenti della nullità. Inoltre, il medesimo nesso vuole dire anche che la *ratio* invalidante non esaurisce la sua *vis* normativa sul piano della legittimazione attiva o sul piano delle

Similarly, the DCFR follows a comparable logic. Pursuant to Article VII.-6:103, where a contract is void or avoided because of an infringement of a fundamental principle (within the meaning of Article II.-7:301 (Contracts infringing fundamental principles)¹³³) or mandatory rules of law, the enriched person is not liable to reverse the enrichment to the extent that the reversal would contravene the policy underlying the principle or rule¹³⁴.

In summary, nearly all modern non-legislative codifications instrument in European private law have moved away from the traditional distinction between contracts that are invalid due to being contrary to public policy, mandatory provisions, or *bonos mores*. Instead, they subordinate the availability of restitutionary remedies to the *purpose* of the violated norm. Restitution is therefore excluded only when it would undermine the objective pursued by the rule that has been breached; conversely, when restitution aligns with that purpose, there is no justification for denying recovery¹³⁵.

In conclusion, it is worth recalling the approach taken by the *Restatement (Third) of Restitution and Unjust Enrichment*, as it articulates the principle in an even more explicit and structured manner¹³⁶. According to Section 32, a person who renders performance under an agreement that is illegal or otherwise unenforceable for reasons of public policy may obtain restitution from the recipient only in certain circumstances: (i) when restitution is required by the policy underlying the prohibition, whether or not this is necessary to prevent unjust enrichment and (ii) when restitution is necessary to prevent unjust enrichment, provided that granting it would not defeat or frustrate the policy of the underlying prohibition¹³⁷.

conseguenze future della nullità: come appunto dimostra proprio il rapporto tra indebito e nullità come radicale inefficacia, essa si riverbera anche sul piano restitutorio’.

¹³³ More precisely, Article II.-7:301 establishes that: ‘A contract is void to the extent that: (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle’.

¹³⁴ Quite interestingly, the Official Comment clarifies that ‘[t]he formulation of the first Article is similarly intended to avoid the varying national concepts of immorality, illegality at common law, public policy, *ordre public* and *bonos mores*, by invoking a necessarily broad idea of fundamental principles found across the European Union, including EU law. Guidance as to these fundamental principles may be obtained from such documents as the EC Treaty (...) [and] the European Convention on Human Rights (e.g. (...) a high level of consumer protection (art. 38))’.

¹³⁵ Cf D. IMBRUGLIA, nt. 67, p. 1537.

¹³⁶ See in this regard J.M. PERILLO, ‘Restitution in a Contractual Context and the Restatement (Third) of Restitution & Unjust Enrichment’, in *Wash. & Lee L. Rev.*, 68, 2011, pp. 1020-1021.

¹³⁷ More precisely, § 32 of the *Restatement (Third) of Restitution and Unjust Enrichment* specifies that: ‘A person who renders performance under an agreement that is illegal or otherwise unenforceable for reasons of public policy may obtain restitution from the recipient in accordance with the following rules: (1) Restitution will be allowed, whether or not necessary to prevent unjust enrichment, if restitution is required by the policy of the underlying prohibition. (2) Restitution will also be allowed, as necessary to prevent unjust enrichment, if the allowance of restitution will not defeat or frustrate the policy of the underlying prohibition. There is no unjust enrichment if the claimant receives the counter performance specified by the parties' unenforceable agreement.(3) Restitution will be denied, notwithstanding the

In light of the foregoing, it may be submitted that the Court of Justice's decision in *Bank M.* finds one of its most solid foundations in the doctrine of illegality as a defence against restitutionary claims. It should, however, be emphasized that, strictly speaking, what the Unfair Contract Terms Directive prohibits is the *unfair* imposition of a significant imbalance between the rights and obligations of the parties. Accordingly, the invocation of illegality as a bar to restitution ought to be carefully circumscribed: it may be argued that it should operate only in respect of that profit margin obtained by the credit institution in bad faith, insofar as it corresponds to the unfair component of the contractual term. In this sense, the invocation of illegality as a bar to restitution appears less persuasive when extended to the average price determined by the historical interest rates prevailing in the domestic housing loan market¹³⁸.

3.2. *Consumers As Unassisted Minors Or Incapacitated Adults*

In European legal systems, it is recognized that, under certain circumstances, the *accipiens* of an undue payment is bound to make restitutions of the benefit received only to the extent that it has remained in her hands¹³⁹. This rule finds expression, for example, in Articles 1443 and 2039 of the Italian *Codice civile*¹⁴⁰, as well as in Article 1352-4 of the French *Code civil*, as amended by L. n. 2018-287 del 20 apr. 2018, art. 13¹⁴¹. Pursuant to this provision, restitution

enrichment of the defendant at the claimant's expense, if a claim under subsection (2) is foreclosed by the claimant's inequitable conduct'. Cf, in this context, F. RANA, 'Restitution e Contract negli Stati Uniti' in P. GALLO and G. MAGRI (eds.), nt. 2, p. 340. According to the author's reconstruction, the general rule is that restitution is barred in case of illegality, subject, however to two exceptions: (i) where denying would frustrate the rationale of the rule from which the illegality arises; and (ii) where, having regard to the circumstances of the case, the court considers that restitution would not conflict with the purpose of the rule or policy infringed. See, in this final regard, the case law mentioned by the author *Greenberg v. Evening Post Ass'n*, 91 Conn. 371, 99 A. 1037 (1917); *National Recovery Systems v. Ornstein*, 541 F.Su1131 (E.D. Pa. 1982); *Evans v. Luster*, 84 Wash.A447, 928 P.2d 455 (1996); *Charlebois v. J.M. Weller Associates, Inc.*, 72 N.Y.2d 587, 535 N.Y.S.2d 356, 531 N.E.2d 1288 (1988); *Farrell v. Whiteman*, 146 Idaho 604, 200 P.3d 1153 (2009); *White v. McBride*, 937 S.W.2d 796 (Tenn. 1996).

¹³⁸ See Chapter 1, Part I and above § 1.1. See also E. BARGELLI, *Il sinallagma rovesciato*, nt. 13, pp. 248 et seq.

¹³⁹ For a comparative analysis, see B. HÄCKER, 'Minority and Unjust Enrichment Defences' in A. DYSON, J. GOUDKAMP and F. WILMOT-SMITH (eds.), nt. 115, pp. 195 et seq; R. PÖSSINGER, *Die bereicherungsrechtliche Haftung Minderjähriger*, Hamburg, 1973, pp. 36 et seq; A. FORMFEREK, *Der Schutz des Vermögens Minderjähriger*, Frankfurt am Main, 2002, pp. 11 et seq. For a general overview, see also P. SIRENA, *Introduction to Private Law*, 3rd ed., Bologna, 2019, pp. 353-354 and E. BARGELLI, *Il sinallagma rovesciato*, nt. 13, pp. 233 et seq.

¹⁴⁰ More precisely, Article 1443 provides that '[s]e il contratto è annullato per incapacità di uno dei contraenti, questi non è tenuto a restituire all'altro la prestazione ricevuta se non nei limiti in cui è stata rivolta a suo vantaggio'. Instead, Article 2039 establishes that '[l]'incapace che ha ricevuto l'indebito, anche in mala fede, non è tenuto che nei limiti in cui ciò che ha ricevuto è stato rivolto a suo vantaggio'.

¹⁴¹ Article 1352-4 of the French *Code civil* stipulates that 'Les restitutions dues par un mineur non émancipé ou par un majeur protégé sont réduites à hauteur du profit qu'il a retiré de l'acte annulé'.

owed by a *mineur non émancipé* or a *majeur protégé* is limited to the actual benefit derived from the annulled act. As has been observed, the scope of the rule has been extended in comparison with earlier formulation, since the current text refers to the ‘majeur protégé’ rather than to ‘majeurs en tutelle’¹⁴².

These provisions find their origins in Roman law, which already addressed the question of the liability of a *pupillus infantia maior* who concluded a contract *sine auctoritate tutoris*.

Under Roman law, such minor could not incur contractual obligation; yet there was equally no justification for permitting them to retain any enrichment resulting from the transaction. Accordingly, Emperor Antoninus Pius established that an action could be brought against a minor ‘in quantum locupletior fact[us] est’¹⁴³ – that is, to the extent that he had been enriched. Consequently, a creditor could pursue an action upon providing a *versio in rem*: ‘Contractus (...) cum pupillo initus tam diu erit nullus, usque dum creditor versionem in rem, sive hunc exinde factum esse locupetiolem, probaverit’¹⁴⁴. The *actio de in rem verso* could therefore lie even ‘adversus eum quoque (...), qui ex negotio se ipsum obligare nequit’¹⁴⁵, extending not only to a *pupillus infantia maior* but also *aliae personae* who, while incapable of incurring contractual liability, had nonetheless been unjustly enriched¹⁴⁶.

In this context, prevailing scholarship has long cultivated the image of the consumers as a vulnerable or ‘incapacitated’ party¹⁴⁷. This analogy was already attempted in the framework of the former directive on distance contracts (Directive 97/7/EC)¹⁴⁸. In this regard, some commentators argued that granting consumers a right of withdrawal from a distance contract without requiring any justification prompts the question ‘[c]an we still call this European

¹⁴² Cf, *inter alia*, O. DESHAYES, T. GENICON e Y.-M. LAITHIER, *Réforme du droit des contrats, du régime général et de la preuve des obligations*, Paris, 2016, pp. 231 et seq; S. TETARD, ‘Les restitutions dans le nouvel article 1352-4 du code civil (ou les risques de la simplification)’, in *Dall.*, 2017, pp. 777 et seq; T. GENICON, ‘La grammaire dans la réforme du droit des contrats’, in *Rev. contr.*, 2016, pp. 751 et seq; S. PELLET, ‘Proposition de modifications des articles 1352 et suivants du code civil: les restitutions’, in *Rev. contr.*, 2017, p. 211.

¹⁴³ Ulp. D. 26, 8, 1 pr.; Ulp. D. 26, 8, 5. Cf R. ZIMMERMANN, nt. 23, p. 882.

¹⁴⁴ S. STRYK, *Usus modernus pandectarum*, Lib. XII, Tit. I, § 17. Cf R. ZIMMERMANN, nt. 23, p. 882.

¹⁴⁵ Io. A. HELLFELD, *Iurisprudentia forensis secundum pandectarum ordinem*, 4rd ed., Jenae, § 918. Cf R. ZIMMERMANN, nt. 23, p. 882.

¹⁴⁶ R. ZIMMERMANN, nt. 23, p. 882.

¹⁴⁷ With regard to the Italian context, see for instance S. PAGLIANTINI, ‘La nullità selettiva quale epifania di una deroga all’integralità delle restituzioni: l’investitore è come il contraente incapace?’, in *Pers. e merc.*, 2019, 4, pp. 123 et seq. By contrast, see G. PASSAGNOLI, ‘Analisi di un falso principio: nullità speciali e restituzione unilaterale’, nt. 65, pp. 260 et seq.

¹⁴⁸ G.J. BLICHARZ, ‘Consumers as Unassisted Minors: Asymmetrical Sanction for Unfair Contract Terms’, in *Laws*, 2022, 11(6), pp. 87 et seq.

consumer distance contract a contract?’¹⁴⁹. Following this line of reasoning, it has more recently been contended that, if it is objectionable to impose upon an incapacitated person an obligation, even if limited to the restitution of the benefit received, it would be equally appropriate to curb the conduct of unscrupulous contracting parties who impose unfair contract terms¹⁵⁰.

Nonetheless, the comparison between consumers, on the one hand, and unassisted minors or incapacitated adults, on the other, is not entirely persuasive¹⁵¹. Unlike the case of unassisted minors or incapacitated persons, the Unfair Contract Terms Directive does not prohibit the conclusion of contracts with consumers *per se*, even under unfair conditions; rather, it prevents sellers and suppliers from *abusing* their bargaining power by including contract terms that produce a significant imbalance in the parties’ rights and obligations¹⁵².

It would be therefore more appropriate to liken the unfairness regulated by the Unfair Contract Terms Directive to the case of ‘*rescissione per lesione*’ (Article 1448 of the Italian *Codice civile*)¹⁵³, who protects a party found to be in a state of need or state of peril or, in the French legal system, to the case of ‘*rescision pour cause de lésion*’ as governed by Article 1674 of the French *Code civil*¹⁵⁴.

Within the German legal context, instead, § 138(2) BGB provides that ‘*Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen*’. In this regard, it is noteworthy that both §§ 138(1) and (2) are designed to keep commercial life and legal relations ‘clean’¹⁵⁵. Indeed, the legal system cannot tolerate transactions which offend the sense

¹⁴⁹ J. NIEUWENHUIS, ‘Caveat emptor in digital times’ in H. SNIJDERS and S. WEATHERILL (eds.), *E-Commerce Law, National and Transnational Topics and Perspectives*, vol. 3, The Hague/London/New York, 2003, p. 91.

¹⁵⁰ S. PAGLIANTINI, nt. 147, p. 129. Cf, in this context, P. BARCELLONA, ‘Note critiche in tema di rapporti fra negozio e giusta causa dell’attribuzione’, in *Riv. trim. dir. proc. civ.*, 1965, I, p. 41.

¹⁵¹ For a different opinion, see G.J. BLICHARZ, nt. 148, pp. 87 et seq.

¹⁵² See Chapter 1, Part II, § 5.

¹⁵³ More precisely, Article 1448 (1) of the Italian *Codice civile* establishes that: ‘Se vi è sproporzione tra la prestazione di una parte e quella dell’altra, e la sproporzione è dipesa dallo stato di bisogno di una parte, del quale l’altra ha approfittato per trarne vantaggio, la parte danneggiata può domandare la rescissione del contratto’.

¹⁵⁴ More precisely, Article 1674 of the French *Code civil* provides that: ‘Si le vendeur a été lésé de plus de sept douzièmes dans le prix d’un immeuble, il a le droit de demander la rescision de la vente, quand même il aurait expressément renoncé dans le contrat à la faculté de demander cette rescision, et qu’il aurait déclaré donner la plus-value’.

¹⁵⁵ It is worth recalling that Article 138 (1) BGB provides that: ‘Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig’.

of decency of a fair and reasonable person¹⁵⁶. Broadly speaking, these provisions aim to protect parties regarded as structurally disadvantaged in a contractual relationship. Significantly, this may include a consumer charged an excessive interest rate by an instalment credit institution for a loan repayable by instalments¹⁵⁷. Indeed, instalment credit contracts have provided German courts with the opportunity effectively to establish a form of judicial price control¹⁵⁸.

In light of this understanding, it should be emphasized that, as a general rule, no one disputes that following a ‘*rescissione per lesione*’ or ‘*rescision pour cause de lésion*’, the parties are required to return whatever has been performed by the other party¹⁵⁹. This comparison, therefore, undermines any argument in favor of asymmetric restitutions between professionals and consumers.

b) In favor of sellers and suppliers

3.3. Change Of Position

Reversing the analytical perspective, one may now wonder whether, in the case of a seller or supplier who has entered into a contract subsequently annulled due to unfairness, such a party may raise any defence against the restitution of the benefits received.

According to the traditional approach to *unjustified enrichment*, the obligation to make restitution is contingent upon the *enrichment* persisting within the patrimony of the *accipiens* at the time the claim is brought (*non est verum, si non durat verum*)¹⁶⁰.

Indeed, in English common law, the traditional defence of *change of position* allows a bona fide defendant to show that they have suffered a subsequent impoverishment, thereby limiting or excluding the claimant’s right to restitution¹⁶¹. To invoke the *change of position* defence,

¹⁵⁶ Cf R. ZIMMERMANN, *The New German Law of Obligations: Historical and Comparative Perspectives*, Oxford, 2005, pp. 170-171; Cf, T. MAYER-MALY and C. ARMBRÜSTER, *sub* § 138 in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. I, 4th ed., 2001, nn. 14 et seq.

¹⁵⁷ Cf R. ZIMMERMANN, nt. 156, pp. 170-171. See also V. EMMERICH, ‘Rechtsfragen des Ratenkredits’, in *Juristische Schulung*, 1998, pp. 925 et seq; T. MAYER-MALY and C. ARMBRÜSTER, nt. 156, nn. 117 et seq.

¹⁵⁸ R. ZIMMERMANN, nt. 156, p. 171.

¹⁵⁹ Cf G. PASSAGNOLI, ‘Analisi di un falso principio: nullità speciali e restituzione unilaterale’, nt. 65, p. 268: ‘(...) se davvero dovesse operare la disattivazione della disciplina dell’indebito in presenza di una legittimazione relativa e di una operatività “a vantaggio” della nullità, la ripetizione unilaterale dovrebbe semmai, ed *a fortiori*, trovare applicazione nella rescissione e massimamente nell’annullamento, ove appunto è massima la disponibilità dell’interesse protetto’.

¹⁶⁰ Cf. P. D’ONOFRIO, ‘Arricchimento senza causa’ in A. SCIALOJA and G. BRANCA, *Commentario del Codice civile*, Bologna/Roma, 1981, pp. 589-590; A. TRABUCCHI, ‘Arricchimento’ in *Enc. Dir.*, vol. III, Milano, 1958, pp. 72-73.

¹⁶¹ See E. BANT, *The Change of Position Defence*, Oxford/Portland, 2009.

two cumulative requirements must be satisfied: first, the *accipiens* must have lost, in whole or in part, the enrichment previously obtained; and second, the loss must have occurred in good faith. In addition, a sufficient causal nexus must exist between the defendant's impoverishment and the benefit originally received¹⁶².

By way of illustration, under Italian law the rules governing *indebitum solutum* require the *accipiens* to return the benefit received, or, where restitution in kind is impossible, to reimburse its market value¹⁶³. The *accipiens* acting in good faith may, however, invoke the loss of its enrichment pursuant to Article 2037(3) of the Italian *Codice civile*, where the enrichment has subsequently ceased to exist¹⁶⁴.

In the past, the German legal scholarship articulated this principle with particular clarity¹⁶⁵. Since the general action for *unjustified enrichment* is grounded in equity – which prohibits enrichment at another's expense – the same principle of equity dictates that the restitutionary obligation should cease where the enrichment itself has disappeared (*Wegfall der Bereicherung*)¹⁶⁶. In accordance with this doctrine, German case law has held that the obligation to make restitution does not arise, for instance, where the benefit has been wrongfully taken from the *accipiens*, where it has been lost as a result of an unsuccessful investment, or where it has been expended on luxury goods or travel that would not otherwise have been purchased¹⁶⁷.

¹⁶² See the analysis of R. SERAFIN, 'Le restituzioni contrattuali nel diritto inglese' in P. GALLO and G. MAGRI (eds.), nt. 2, p. 312. Cf also the case law mentioned *Derby v Scottish Equitable Plc* [2001] EWCA Civ 369 (Robert Walker LJ) [31] ('In this court Mr Stephen Moriarty QC (appearing with Mr Richard Handyside for Scottish Equitable) did not argue against the correctness of the wide view, provided that the need for a sufficient causal link is clearly recognised. The fact that the recipient may have suffered some misfortune (such as a breakdown in his health, or the loss of his job) is not a defence unless the misfortune is causally linked (at least on a 'but for' test) with the mistaken receipt. In my view Mr Moriarty was right to make that concession. Taking a wide view of the scope of the defence facilitates 'a more generous approach ... to the recognition of the right to restitution') and *Lipkin Gorman v Karpnale Ltd* [1988] UKHL 12.

¹⁶³ Cf Articles 2037 and 2038 of the Italian *Codice civile*.

¹⁶⁴ More precisely, Article 2037 (3) of the Italian *Codice civile* stipulates that: 'Chi ha ricevuto la cosa in buona fede non risponde del perimento o del deterioramento di essa, ancorché dipenda da fatto proprio, se non nei limiti del suo arricchimento'. See also the analysis of P. SIRENA, *La gestione di affari altrui. Ingerenze altruistiche, ingerenze egoistiche e restituzione del profitto*, Torino, 1999, pp. 25 et seq.

¹⁶⁵ See the analysis of P. GALLO, 'Arricchimento senza causa e quasi contratti (i rimedi restitutori)' in R. SACCO (directed by), *Trattato di diritto civile*, Torino, 2008, pp. 78 et seq.

¹⁶⁶ Cf B. WINDSCHEID, *Lehrbuch des Pandektenrechts*, Frankfurt, 5th ed., vol. II, §424, pp. 546 et seq.

¹⁶⁷ For case law references see P. GALLO, nt. 165, pp. 79-80. With specific regard to the Italian context, see P. TRIMARCHI, nt. 80 and P. SIRENA, 'La ripetizione dell'indebito' in N. LIPARI and P. RESCIGNO (directed by), *Diritto civile*, vol. III, *Obbligazioni*, I, *Il rapporto obbligatorio*, Milano, 2009, p. 540. The author argues that: '[s]econdo una nota regola romanistica, invece, l'*accipiens* di una somma di denaro ne diventa senz'altro il proprietario (salvo che si tratti di una specie di moneta avente valore intrinseco): nonostante una risalente opinione dottrinale, si deve quindi escludere che, per quanto in buona fede, egli sia esonerato dalla responsabilità restitutoria in caso di furto o di smarrimento del denaro stesso'.

This rule, however, is inapplicable where the recipient has acted in bad faith, or from the moment they become aware of the undue nature of the benefit received. Such a defence is often regarded as an essential and defining feature of the principle of *unjustified enrichment*¹⁶⁸.

The question that arises, therefore, is whether the defence based on *change of position* can also be invoked in the context of *contractual restitution*. In legal systems that adopt a unified approach to the law of restitution, such an application would not seem conceptually problematic¹⁶⁹. The position of English law, however, was recently examined in detail by Judge Foxton in the case of *Banca Intesa Sanpaolo S.p.A. v. Comune di Venezia*¹⁷⁰.

In that case, brought before the High Court, an Italian local authority – the Comune di Venezia – sought to have certain interest rate swap agreements entered into with various financial institutions declared void. The agreements were governed by English law. The Court held that Comune di Venezia did not have the capacity to contract and therefore declared the swap contracts void, with the parties' obligations to return the sums to be determined in accordance with English law.

The banks argued that, based on the contracts, they had entered into related hedging transactions in good faith in order to mitigate the financial risks assumed under the swaps and that the costs thus incurred should be deducted from the amounts repayable to the Comune di Venezia. This argument was put forward on the basis of the doctrine of *change of position*, which allows a defendant to reduce or extinguish a restitutionary liability if, acting in good faith, it has changed its position based on the validity of the transaction subsequently deemed null and void¹⁷¹.

However, according to the English courts, this does not imply that the defence based on *change of position* is invariably available to a contracting party. Firstly, the defence cannot be invoked by the *accipiens* who has obtained a benefit knowing that, at a later stage, he would certainly have to return it¹⁷². Secondly, if the *accipiens* receives a benefit subject to a condition

¹⁶⁸ A. BURROWS, 'In Defence of Unjust Enrichment', in *Cambridge Law Journal*, 2019, 78(3), p. 535.

¹⁶⁹ See above, § 1.

¹⁷⁰ *Banca Intesa Sanpaolo S.p.A. v. Comune di Venezia* [2022] EWHC 2586 (Comm). See also F. DELFINI and J.D. MC CAMUS, 'Ineffective contracts, restitution and the change of position defence', in *Milan Law Review*, 2023, 4(1), pp. 19 et seq; F. DELFINI, 'Nullità contrattuale, restituzioni e *change of position* defence', in *Nuove leggi civ. comm.*, 2023, II, pp. 494 et seq; A.M. GAROFALO, 'La High Court e i derivati del Comune di Venezia (ovvero: il problema degli *swap* degli enti locali e la mentalità del giurista di *common law*)', in *Riv. dir. banc.*, 2023, pp. 311 et seq.

¹⁷¹ See the description of the case law made by R. SERAFIN, 'Le restituzioni contrattuali nel diritto inglese' in P. GALLO and G. MAGRI (eds.), nt. 2, p. 313.

¹⁷² Cf *Banca Intesa Sanpaolo S.p.A. v. Comune di Venezia*, nt. 170, [399ii]: '(...) where the benefit is acquired on a basis whereby it is to be repaid (e.g., money paid to the "borrower" under a void loan), it will be no answer to a claim for restitution that the recipient has spent the money. This was the position in *Haugesund*, in which the local authority had engaged in ultra vires swaps transactions, used the

that they know has not yet been satisfied, any subsequent change of position will also be ignored¹⁷³.

Turning to the specific case of foreign currency linked loans, however, allowing credit institutions to rely on the defence of *change of position* prove problematic. Firstly, it would conflict with the principle that a party may not act *contra factum proprium*, that is, inconsistently with its own prior conduct¹⁷⁴.

Secondly, it would be difficult to envisage a situation in which the *accipiens* – here, the credit institution – could demonstrate, in good faith, that it had incurred expenses it would not otherwise have borne as a consequence of the undue amounts received. This is because the annulment of the contract would be attributable to the credit institution itself, owing to the presence of the unfair contract terms that rendered the agreement invalid in the first place¹⁷⁵.

This reasoning appears to find indirect support in certain German theories, notably Flume's *vermögensmäßige Entscheidung* and Canaris's *Gegenleistungskondiktion*, both developed to explain restitution in cases of *Vorleistungsfälle* (situations involving performance in advance of consideration)¹⁷⁶. Although they differ in emphasis, these theories converge on the idea that where the decision to perform constitutes an act of self-imposed sacrifice or investment aimed at obtaining the counter-performance, the *accipiens* – having voluntarily undertaken such an initiative – cannot later act *contra factum proprium* by shifting to the other party the risk of loss or deterioration of the counter-performance received¹⁷⁷. Rather, the *accipiens* must accept that,

upfront receipt to make investments which had failed, and then sought to rely on those failed investments as giving rise to a change of position defence to the counterparty's claim for restitution. As, on its own understanding of the transaction it thought it had entered into, the local authority was always going to have pay the amount received back with interest, whether the investments succeeded or failed (such that the payments were economically "conditional", even on the transaction as it was believed to be), there was no good reason to afford the local authority a change of position defence: paras 124–126'.

¹⁷³ Cf *Banca Intesa Sanpaolo S.p.A. v. Comune di Venezia*, nt. 170, [399iii]: '(...) When money is paid to a recipient subject to a condition which the recipient knows has yet to be satisfied, and the recipient spends the money for their own purposes, the defence of change of position will not be available: e.g. the example in Goff and Jones, para 27-58 of the builder who receives an upfront payment for building works who knows the payment is conditional on the work being done, spends the money on a holiday, and it then proves impossible for the work to be done (without the fault of either party). To similar effect see Professor Robert Stevens, "The Unjust Enrichment Disaster" (2018) 134 LQR 574, 587'.

¹⁷⁴ Cf G. MACARIO BAN, 'Le restituzioni contrattuali nel diritto tedesco' in P. GALLO and G. MAGRI (eds.), nt. 2, p. 259.

¹⁷⁵ Case C-520/21, *Bank M.*, nt. 82, para 81.

¹⁷⁶ C.-W. CANARIS, 'Die Gegenleistungskondiktion' in B. PFISTER and M.R. WILL (eds.), *Festschrift für Werner Lorenz zum siebzigsten Geburtstag*, Tübingen, 1991, pp. 19 et seq; W. FLUME, 'Die Rückabwicklung nichtiger Kaufverträge nach Bereicherungsrecht. Zur Saldotheorie und ihren "Ausnahmen"', in *JZ*, 2002, 7, pp. 321 et seq; S. LORENZ, *sub* § 818 in *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. (§§ 812-822 BGB) (Ungerechtfertigte Bereicherung)*, J. von Staudingers, BGB, 14th ed., 2007, Rn. 43.

¹⁷⁷ S. LORENZ, nt. 176, § 818, Rn. 43.

from the performance already rendered and subject to restitution, a value corresponding to the counter-performance lost or deteriorated should be deducted – at least up to the threshold (*vertrauensrechtliche Opfergrenz*) representing the extent of the sacrifice the *accipiens* was prepared to make from the outset in reliance upon the transaction¹⁷⁸.

3.3.1. The Applicability Of Saldotheorie In The Realm Of Unfair Contracts

As a general rule, when benefits have been provided under a contract that is subsequently declared void, the benefits conferred through performance should be restored in kind. In such cases, restitution is typically pursued through independent and unilateral claims, in accordance with what German legal doctrine defines as *Zweikondiktionentheorie*¹⁷⁹.

Alternatively, one could invoke the contrasting *Saldotheorie*, which takes a more holistic perspective by treating the parties' mutual claims for restitution as interconnected elements of a single accounting process¹⁸⁰. Under this *Prinzip der Gesamtabrechnung*, the opposing rights of restitution are not asserted separately, but are instead offset against each other, leaving only the net balance as the subject of a single *condictio*¹⁸¹. In effect, this approach replaces the two separate claims for restitution that would otherwise arise under a *synallagmatic* contract with a single unified action against the party whose assets were ultimately increased as a result of the void transaction¹⁸². The practical value of *Saldotheorie* becomes particularly evident in cases involving fully performed *synallagmatic* contracts, where one of the benefits received has been

¹⁷⁸ C.-W. CANARIS, nt. 176, pp. 24 et seq.

¹⁷⁹ See the recent analysis of G. MACARIO BAN, 'Le restituzioni contrattuali nel diritto tedesco' in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 248 et seq.

¹⁸⁰ See analysis of E. BARGELLI, *Il sinallagma rovesciato*, nt. 13, pp. 271 et seq. The author nonetheless recalls the existence of both a procedural and a substantive *Saldotheorie*. In the former sense, the *Saldotheorie* allows for two alternative outcomes: if the performances are homogeneous, it operates to reduce the claimant's demand to any excess between the performance rendered and the counter-performance received; if, on the other hand, the performances are heterogeneous, the *Saldotheorie* enables the defendant in restitution to assert a simultaneous right to recover the reciprocal performance already rendered. However, there also exists a *Saldotheorie* in the *substantive* sense, according to which the debtor of a benefit that has perished or deteriorated, when claiming restitution of the price, must deduct from the amount claimed the value of what cannot be returned. Accordingly, the debtor's claim is limited to any excess between what was given and what was received. In this regard, see W. FLUME, *Zur Anwendung der Saldotheorie im Fall der Nichtigkeit eines Grundstücks-Kaufvertrags nach § 138 I BGB wegen verwerflicher Gesinnung des Käufers*, in ZIP, 2001, pp. 1622 et seq. See also G. MACARIO BAN, 'Le restituzioni contrattuali nel diritto tedesco' in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 252 et seq.

¹⁸¹ Cf P. SIRENA, 'Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation' in ID. (eds.), nt. 1.

¹⁸² Ibid.

lost or deteriorated. In such circumstances, the calculation of the net balance prevents the restitution mechanism from producing unfair or economically irrational results¹⁸³.

The Court of Justice appears to be explicitly considering whether *Saldotheorie* can be applied to a case of unfairness in a business-to-consumer contract in the *Noble Bank* case¹⁸⁴, where one of the questions submitted to the Court is, indeed, whether Article 6(1) and Article 7(1) of the Unfair Contract Terms Directive must be interpreted as precluding a judicial interpretation of national law according to which, where a mortgage loan agreement concluded with a consumer by a seller or supplier is no longer capable of continuing in existence after the unfair terms in that agreement have been removed, that seller or supplier may rely on a right of retention which allows him or her to make the restitution of the payments which it has received from that consumer conditional on that consumer making an offer to repay the sums which he or she has himself or herself received from that seller or supplier or to provide a security for the repayment of those sums¹⁸⁵.

In fact, the *Saldotheorie*, understood in its procedural sense, confers upon the defendant in an action for restitution a defence where he has performed his own obligation under the contract. The effect is that the claimant's restitutionary claim becomes conditional upon his offering, in turn, to return what he has received (*Zug um Zug*), or that the claim is reduced to the extent of any net balance in his favor. In practical terms, in cases involving the bilateral performance of an invalid contract, this approach prevents one party from obtaining an unjustified unilateral enrichment¹⁸⁶.

In this vein, the Court of Justice held that Article 6(1) and Article 7(1), read in the light of the principle of effectiveness, must be interpreted as precluding the seller or supplier from relying on a right of retention, where the exercise by that seller or supplier of that right entails the loss, for the consumer, of the right to obtain default interest as from the expiry of the time limit set for performance by the seller or supplier concerned, following receipt by that seller or supplier of a request to repay the sums he or she had been paid in performance of that agreement¹⁸⁷.

¹⁸³ Cf G. WEINTRAUD, *Die Saldotheorie. Ein Beitrag zur Lehre vom Gegenstand des Bereicherungsanspruchs*, Breslau, 1931, pp. 7 et seq. See also, in the Italian context, P. TRIMARCHI, nt. 80, pp. 149 et seq.

¹⁸⁴ Case C-28/22, *TL and WE v Liquidator of Getin Noble Bank S.A.*, ECLI: ECLI:EU:C:2023:992. See, in this regard, E. BARGELLI, 'Prescrizione, asimmetria delle restituzioni nei mutui indicizzati e principio di effettività nel diritto privato europeo', in *Pactum*, 2024, pp. 447 et seq.

¹⁸⁵ Case C-28/22, *TL and WE v Liquidator of Getin Noble Bank S.A.*, nt. 184, para 83.

¹⁸⁶ Cf E. BARGELLI, *Il sinallagma rovesciato*, nt. 13, pp. 273-274.

¹⁸⁷ Case C-28/22, *TL and WE v Liquidator of Getin Noble Bank S.A.*, nt. 184, para 87. With regard to the principle of effectiveness and Article 6 see also Case C-35/22, *CAJASUR Banco SA*, ECLI:EU:C:2023:569 and Case C-321/22, *Provident Polska S.A.*, ECLI:EU:C:2023:911.

All in all, it has been noted that the *Saldotheorie* remains the object of considerable controversy within European private law¹⁸⁸. The criticisms levelled against this doctrine, however, mainly concern those situations in which the parties to a void *synallagmatic* contract have agreed that their respective performances are to be rendered at different points in time (*Vorleistungsfälle*)¹⁸⁹. This is because the corresponding performance, not yet executed by the *accipiens*, cannot logically be returned and therefore cannot fall within the scope of the *Saldierung* mechanism¹⁹⁰. Secondly, the *Saldotheorie* would not even be capable of accounting for the exceptions that case law itself has developed in relation to certain grounds of contractual invalidity, which are instead inspired by the *Schutzzweck* (the protective purpose) of the rule declaring the contract invalid¹⁹¹.

4. Restitutionary Claims Resulting From Damages: An Alternative Path

In situations where due to unfairness the contract is annulled in its entirety, the issue of restoring equilibrium moves to the domain of restitutionary remedies for unjust enrichment or, in certain circumstances, resulting from damages¹⁹². This occurs particularly where the mere annulment of the contract proves insufficient to redress all the detrimental effects arising from unfairness.

In this respect, the Court of Justice in *Bank M.* clarified that Article 6(1) and Article 7(1) of the Unfair Contract Terms Directive do not preclude a judicial interpretation of national law according to which the consumer has the right to seek compensation from the credit institution *going beyond* reimbursement of the monthly instalments paid and the expenses paid in respect of the performance of the agreement¹⁹³. On this point, the Advocate General Collins had already observed that the concept of ‘undue performance’ and, a fortiori, that of ‘unjust enrichment’ are relatively broad concepts which cover a wide range of matters, including, potentially, claims in relation to the use of money without a contractual basis¹⁹⁴.

¹⁸⁸ Cf P. SIRENA, ‘Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation’ in ID. (eds.), nt. 1. See also M. SCHWAB, § 818, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2020, Rn. 261; S. LORENZ, nt. 176, § 818, Rn. 43.

¹⁸⁹ Cf S. LORENZ, nt. 176, § 818, Rn 42.

¹⁹⁰ Cf S. LORENZ, nt. 176, § 818, Rn 42. See also the analysis of E. BARGELLI, *Il sinallagma rovesciato*, nt. 13, pp. 271 et seq and G. MACARIO BAN, ‘Le restituzioni contrattuali nel diritto tedesco’ in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 257 et seq.

¹⁹¹ Cf W. FLUME, *Studien zur Lehre der ungerechtfertigten Bereicherung*, Tübingen, 2003, p. 80.

¹⁹² S. GRUNDMANN and N. BADENHOOP, nt. 37, p. 2. Cf also P. SIRENA, ‘La restituzione dell’arricchimento e il risarcimento del danno’, in *Riv. dir. civ.*, 2009, pp. 65 et seq, 82 et seq.

¹⁹³ Case C-520/21, *Bank M.*, nt. 82, para 85.

¹⁹⁴ See Opinion of Advocate General Collins, nt. 91, para 20. Cf also S. PAGLIANTINI, ‘*Culpa in contrahendo* da contratto nullo e retroversione del profitto al consumatore: uso alternativo del diritto o una storia semplice?’, nt. 83, pp. 378 et seq.

If one seeks to establish that contractual restitutions might tentatively be regarded as a form of compensation for the loss suffered by the party who made payments under the annulled contract, it is first necessary to identify the ground for liability (I), and subsequently to determine the nature of the loss allegedly sustained (II).

As to the ground for liability (I), the case law of the Court of Justice indicates that a tort may be found in the conduct of a professional who drafts standard terms later declared unfair. Such conduct is deemed unlawful, and arguably morally reprehensible, as it contravenes Article 3 of the Unfair Contract Terms Directive¹⁹⁵.

Slightly differently, certain scholars have identified in the professional's conduct a *culpa in contrahendo*, arising from the fact that the professional knew or ought to have known of the contractual unfairness, yet failed to disclose it to the other party. Consequently, the professional would be liable for the damage suffered by the counterparty, who relied in good faith on the validity of the contract¹⁹⁶. Alternatively, the ground for liability could be found in the duty to act in good faith, binding the parties even before the formal conclusion of the agreement¹⁹⁷.

While the foregoing analysis may be accepted, it has been clearly and persuasively noted that the mere unlawful possession of funds by the professional does not, in itself, amount to a tortious act¹⁹⁸. Rather, it constitutes an instance of *unjustified enrichment* at the expense of the payer, who is therefore entitled to restitution. In substance, such a claim is not concerned with compensating a loss suffered by the claimant, but with restoring a benefit obtained by the defendant without a legal basis¹⁹⁹.

On this view, it has been argued that the law of contractual restitution operates outside the scope of civil liability. For instance, unlike in actions for damages, the borrower is not entitled to default interest on instalments unduly paid prior to formal notice, nor to compensation for loss of purchasing power or for benefits forgone, such as lost profits²⁰⁰. Accordingly, reconciling the law of restitutions with a compensatory function proves problematic²⁰¹.

¹⁹⁵ Cf P. SIRENA, 'Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation' in ID. (eds.), nt. 1.

¹⁹⁶ S. PAGLIANTINI, '*Culpa in contrahendo* da contratto nullo e retroversione del profitto al consumatore: uso alternativo del diritto o una storia semplice?', nt. 83, pp. 378 et seq.

¹⁹⁷ S. PAGLIANTINI, '*Culpa in contrahendo* da contratto nullo e retroversione del profitto al consumatore: uso alternativo del diritto o una storia semplice?', nt. 83, pp. 378 et seq; G. D'AMICO, 'La tutela del consumatore alla prova dell'effettività', nt. 52, p. 394. This discussion is connected to the obligation incumbent upon the seller and supplier to draft contractual terms in plain, intelligible language, according to Article 5 of the Unfair Contract Terms Directive.

¹⁹⁸ Cf P. SIRENA, 'Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation' in ID. (eds.), nt. 1.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

From this perspective, it might have been preferable for the Court of Justice in *Bank M.*, rather than subsuming under the law of contractual restitutions *all* claims *going beyond* the mere restitutions of sums paid *sine causa*, to have expressly acknowledged the possibility of combining an action for annulment based on unfairness with a separate action for damages²⁰².

It seems that, in its reasoning, the Court of Justice has been influenced by that strand of doctrine, as developed within common law systems, according to which the restitutionary obligation arising from the dissolution of a contract finds its source in the (albeit ineffective or defective) agreement itself²⁰³. Only this assumption can explain why, notwithstanding the Court's ostensible adherence to the principle of *unjustified enrichment*, it tends to quantify such obligations not by reference to the *enrichment* of the *accipiens*, but rather with a view to restoring the pre-contractual position, thereby protecting the *status quo ante* or *reliance interest* of the *solvens*²⁰⁴.

According to a different, yet equally influential, line of thought the issue is rather one of clarifying what is meant by 'unjust enrichment'²⁰⁵. From this perspective, the term 'unjust enrichment' designates a variety of remedies performing different functions. At times, they aim in substance to compensate for the enrichment of one party at another's expense; at other times, they serve to restore the value of performances rendered *sine causa*, irrespective of any corresponding increase in the *accipiens* net assets²⁰⁶. The loss suffered by one party and the corresponding benefit derived by another may take the most diverse forms, and the traditional formulation of the principle of *unjustified enrichment* is therefore to be understood in its historical rather than substantive sense²⁰⁷.

All in all, having thus identified what may constitute a valid legal ground for liability on the part of the professional, namely the imposition of contract terms subsequently declared unfair, or the knowledge (actual or constructive) of a cause of invalidity deliberately withheld from the

²⁰² Cf E. SCODITTI, 'Il contratto come comportamento: la responsabilità per i danni da clausola abusiva e la Corte di giustizia', nt. 83, pp. 395 et seq; ID., 'Clausole abusive nel contratto di assicurazione: il consumatore ha diritto al risarcimento del danno?', in *Danno e resp.*, 2005, pp. 941 et seq; F. DI MARZIO, 'Teoria dell'abuso e contratti del consumatore', in *Riv. dir. civ.*, 2007, pp. 681 et seq.

²⁰³ See W. FARNSWORTH, *Restitution*, Chicago/London, 2014, pp. 75 et seq.

²⁰⁴ See J. PERILLO, 'Restitution in a Contractual Context', in *Col. L. R.*, 1973, 73, pp. 1213 et seq; A. KULL, 'Restitution as a Remedy for Breach of Contract', in *South. Cal. L. R.*, 67, pp. 1465 et seq. Cf also R. SERAFIN, 'Le restituzioni contrattuali nel diritto inglese' in P. GALLO and G. MAGRI (eds.), nt. 2, p. 334 and the case law mentioned *Coleman Eng'g Co., Inc. v. North Am. Aviation, Inc.*, 420 P.2d 713, 729 (Cal. 1966) (Traynor, C.J., dissenting); *Earhart v. William Low Co.*, 600 P.2d 1344, 1351-52 (Cal. 1979); *Heyl & Patterson Intern., Inc. v. F. D. Rich Hous. of Virgin Islands, Inc.*, 663 F.2d 419 (3d Cir. 1981).

²⁰⁵ Cf J.P. DAWSON, 'Restitution Without Enrichment', in *Bo. U. L. R.*, 61, 1981, p. 620.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

other party, it remains to determine the nature of the harm that the consumer may, as a result, be deemed to have suffered (II).

Some scholars have suggested that the damage sustained by the consumer consists in the inability to benefit from more advantageous contractual conditions²⁰⁸. This form of prejudice, however, does not differ substantially from the loss of opportunity or profit that arises where a party is prevented from entering into more favorable transactions. In the specific context of *Bank M.* and foreign currency linked loans, it may indeed be observed that any alternative transaction the consumer might reasonably have concluded would, in all likelihood, have been another loan, albeit one governed by fair and transparent terms. The only loss that can thus be identified lies in the margin profit unduly paid to the credit institution - sums which, had they not been wrongfully exacted, could have been employed in other economic ventures or yield-bearing activities.

A different line of reasoning has instead focused on the particular consequences of declaring a loan agreement annulled in its entirety due to unfairness²⁰⁹. According to this view, the main detrimental consequences suffered by the consumer arises from the obligation to immediately return to the credit institution the loan capital, subject to deduction of the instalments already repaid and of ancillary costs or commissions borne in the performance of the contract²¹⁰. It is reasonable to assume that the consumer will, in the ordinary course of affairs, have already made use of the borrowed capital, and that, in order to satisfy the restitutionary obligations, he or she will be compelled to obtain substitute financing²¹¹. Such refinancing may involve higher borrowing costs, including an interest rate exceeding that which would have been negotiated under a fair contract²¹².

From this perspective, the additional cost associated with obtaining a new loan in order to discharge the restitution owed to the initial lender should properly be regarded as a compensable

²⁰⁸ Cf. S. PAGLIANTINI, '*Culpa in contrahendo* da contratto nullo e retroversione del profitto al consumatore: uso alternativo del diritto o una storia semplice?', nt. 83, pp. 378 et seq.

²⁰⁹ See G. D'AMICO, 'La tutela del consumatore alla prova dell'effettività', nt. 52, p. 394; E. SCODITTI, 'Il contratto come comportamento: la responsabilità per i danni da clausola abusiva e la Corte di giustizia', nt. 83, pp. 395 et seq; S. PAGLIANTINI, '*Culpa in contrahendo* da contratto nullo e retroversione del profitto al consumatore: uso alternativo del diritto o una storia semplice?', nt. 83, pp. 378 et seq.

²¹⁰ See Chapter 1, Part I, § 3.1. See also G. D'AMICO, 'La tutela del consumatore alla prova dell'effettività', nt. 52, p. 394.

²¹¹ M. MAUGERI, 'Post-caducazione da vessatorietà e post-vessatorietà: il caso Bank M.', nt. 83, p. 410; G. D'AMICO, 'La tutela del consumatore alla prova dell'effettività', nt. 52, p. 394.

²¹² G. D'AMICO, 'La tutela del consumatore alla prova dell'effettività', nt. 52, p. 394.

head of loss, for which the consumer may claim damages against the credit institution whose conduct gave rise to the contract's invalidity²¹³.

Moreover, someone has maintained that, in cases involving unfair contract terms, liability for damages may arise independently of any direct *causal* connection between the harm and the declaration of unfairness or the consumer's reliance on the contract's validity²¹⁴. Under this approach, compensation would extend to all losses suffered by the consumer in performing the unfair contract under its onerous conditions, even where such losses cannot be strictly traced to the consumer's mistaken reliance on the contract's enforceability²¹⁵.

Yet another strand of opinion contends that such a compensatory framework remains incapable of fully protecting the consumer's substantive interest in concluding a contract free from unfair terms. On this view, monetary compensation alone cannot achieve the equilibrium that is restored only where the contract remains into existence between the parties, purged of its unfair content and, where appropriate, supplemented by the relevant default rules of national law²¹⁶.

5. Quantifying Restitutionary Claims

Once the existence of a restitutionary obligation has been established, the question arises as to the manner of its performance and the determination of its *quantum*.

5.1. Restitutionary Claims And The Principle Of 'No Credit Without Interest'

It is once again necessary to refer to the Court of Justice's ruling in *Bank M.*²¹⁷. For the purposes relevant here, the Court of Justice in *Bank M.* reaffirmed that '*nemo auditur propriam turpitudinem allegans* (no one may rely on his or her own wrongdoing), a party cannot be allowed to derive economic advantages from his, her or its unlawful conduct or to be compensated for the disadvantages caused by such conduct'²¹⁸. Similarly, in another passage,

²¹³ Ibid: 'Riteniamo che questo maggior costo del (nuovo) mutuo, a cui il consumatore deve (eventualmente) far ricorso per adempiere l'obbligo restitutorio nei confronti del primo mutuante, costituisca una posta di danno della quale il consumatore stesso potrà chiedere il risarcimento alla banca che ha dato causa alla nullità del contratto'.

²¹⁴ Cf the opinions of G. D'AMICO, 'La tutela del consumatore alla prova dell'effettività', nt. 52, pp. 390 et seq; E. SCODITTI, nt. 83, pp. 395 et seq; A.A. DOLMETTA, nt. 83, pp. 400 et seq; F. MACARIO, nt. 83, pp. 383 et seq; S. PAGLIANTINI, nt. 83, pp. 377 et seq; A. PALMIERI and R. PARDOLESI, nt. 83, pp. 369 et seq; M. MAUGERI, nt. 83, pp. 407 et seq.

²¹⁵ Cf A. PALMIERI and R. PARDOLESI, nt. 83, pp. 369 et seq.

²¹⁶ Cf A. DALMARTELLO, nt. 64, pp. 83 et seq.

²¹⁷ Case C-520/21, *Bank M.*, nt. 82.

²¹⁸ Case C-520/21, *Bank M.*, nt. 82, para 81. See, in this regard, A. PALMIERI and R. PARDOLESI, nt. 83, p. 375.

the Court of Justice observed that ‘to grant a credit institution the right to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement and, as the case may be, the payment of default interest, would be liable to call into question the deterrent effect sought by Directive 93/13’²¹⁹. Such an interpretation would, in practice, transform the original loan into a loan ‘free of charge’²²⁰. To the critics advanced, the Court responded that the contract in question has been annulled due to the use of unfair terms by the credit institution, which therefore ‘cannot be compensated for the loss of a profit similar to what it hoped to derive from that contract’²²¹.

By contrast, the consumer has the right to seek compensation from the consumer going beyond reimbursement of the instalments paid; obtaining, therefore, an accounting of their usage and to reimburse for any incurred expenses²²².

In this regard, the Court of Justice appears to overlook the proper characterization of the performance rendered by the professional to the consumer, the restitution of which is now at issue²²³. Moreover, the Court seems to conflate two distinct notions: first, the argument according to which under market conditions credit is granted with interest (I)²²⁴; and second, the principle of the natural fruitfulness of money, as regulated within the broader framework of the law of restitution, which, in some legal systems, differentiates between an *accipiens* acting in good or bad faith (II)²²⁵.

Under Italian law, for instance, Article 2033 of the Italian *Codice civile* provides that a person who has made an undue payment is also entitled to recover both the natural and legal fruits. Such natural and legal fruits accrue from the day of payment if the *accipiens* acted in bad faith, or from the day of the restitutionary claim if the *accipiens* acted in good faith²²⁶.

²¹⁹ Case C-520/21, *Bank M.*, nt. 82, para 76.

²²⁰ Cf P. SIRENA, ‘Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation’ in ID. (eds.), nt. 1.

²²¹ Case C-520/21, *Bank M.*, nt. 82, para 82. See also P. SIRENA, ‘Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation’ in ID. (eds.), nt. 1.

²²² E. BARGELLI, nt. 38, p. 577.

²²³ Cf P. SIRENA, ‘Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation’ in ID. (eds.), nt. 1.

²²⁴ Cf N. BADENHOOP, ‘Restitution Claims – EU Consumer Law Principles and the Mortgage Credit Directive as an Overarching Value Model’ in P. SIRENA (eds.), nt. 1. Nor does the fact that a loan agreement – for example, under the Italian legal system – may be free of charge appear to be a decisive factor in ruling out the repayment of interest. Some contracts may be gratuitous or for consideration; this does not mean that, in the event of nullity, an allowance for the service must automatically be dismissed.

²²⁵ See, in the Italian context, P. GALLO, ‘Allocazione del rischio e determinazione del *quantum*’ in P. GALLO and G. MAGRI (eds.), *Le restituzioni contrattuali*, nt. 2, pp. 51 et seq.

²²⁶ See above nt. 5.

The question, however, remains whether such a regime can be applied consistently in the context of contractual restitution. This requires determining under what circumstances the parties who have performed an invalid contract may be deemed to have acted in good or bad faith. From this perspective, one could argue that good faith exists when a party is unaware of the defect affecting the contract, whereas bad faith should be attributed to the party who knowingly relies on an invalid agreement²²⁷.

Comparable provisions can be found, for instance, in Article 1352-3 of the *Code civil* as amended in 2016, which provides that restitution encompasses both the fruits and the value derived from the use of the good received²²⁸. Similarly, pursuant to § 818 (1) BGB, the obligation to return extends to the fruits received²²⁹, while Article 84 (1) of the CISG establishes that if the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid²³⁰.

Starting from this premise, as persuasively noted by some commentators, the benefit unduly received by the borrower should be understood as a *service*, which also consists in allowing the consumer to *dispose* of and *enjoy* a certain sum of money for a given period of time, rather than a *mere transfer of money*²³¹. Despite appearances, such a benefit cannot be returned in kind; it

²²⁷ See, in the Italian context, P. GALLO, ‘Allocazione del rischio e determinazione del *quantum*’ in P. GALLO and G. MAGRI (eds.), *Le restituzioni contrattuali*, nt. 2, p. 30.

²²⁸ More precisely, Article 1352-3 (1) of the French *Code civil* establishes that: ‘La restitution inclut les fruits et la valeur de la jouissance que la chose a procurée’.

²²⁹ More precisely, § 818 (1) BGB establishes that: ‘Die Verpflichtung zur Herausgabe erstreckt sich auf die gezogenen Nutzungen sowie auf dasjenige, was der Empfänger auf Grund eines erlangten Rechts oder als Ersatz für die Zerstörung, Beschädigung oder Entziehung des erlangten Gegenstands erwirbt’.

²³⁰ More precisely, Article 84 (1) CISG establishes that: ‘If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid’.

²³¹ Cf P. SIRENA, ‘Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation’ in ID. (eds.), nt. 1. By contrast, see E. BARGELLI, nt. 38, p. 578: ‘Per le prestazioni di denaro non possono essere spesi tutti gli argomenti che, nel caso dell’esecuzione di un servizio da parte del professionista, militano a favore dell’unilateralità del diritto alla ripetizione in capo al consumatore. Le restituzioni – avendo a oggetto il *tantundem* che ciascuna parte ha ricevuto in esecuzione del contratto (al netto della disapplicazione del tasso di cambio) – restano, qui, bilaterali: il consumatore, infatti, deve versare il capitale preso a mutuo (oltre agli interessi legali di mora)’. All in all, it is acknowledged that this line of reasoning departs from the approach traditionally adopted by domestic courts, particularly in Italy. *Ex multis*, reference may be made to a recent decision of a lower court, namely Trib. Spoleto, 13.01.2022, n. 10, according to which: ‘in conseguenza della declaratoria di nullità, il finanziamento diverrebbe improduttivo d’interessi corrispettivi, di tal ch  la banca potrebbe chiedere la restituzione del solo capitale erogato a titolo di indebito oggettivo ex art. 2033 cc’. A further objection that could be raised against the reasoning developed in the main text is that, pursuant to Article 1814 of the Italian *Codice civile*, a loan agreement (*mutuo*) constitutes a contract producing proprietary effects (*contratto ad effetti reali*), thereby entailing the transfer of ownership over the assets forming the subject matter of the agreement, which consequently enter into the borrower’s full legal availability. From this perspective, therefore, the bank would not be regarded as rendering a service, but rather as effecting a mere transfer of money. It should nevertheless be emphasized, albeit briefly, that the classification of the *mutuo* as a contract producing proprietary effects is closely connected to the nature of the assets that may constitute its subject matter — namely, ‘danaro o [...] altre cose fungibili’ — which, by their very

must instead be restituted in value²³². Under the principle of *unjustified enrichment*, the value of an undue benefit must be objectively determined — that is, by reference to the prevailing market price of the good or service in question, where such a benchmark exists. In the absence of such a reference, the value should be established on the basis of the average historical price for similar transactions²³³.

These preliminary observations reveal the first conceptual misunderstanding underlying the *Bank M.* judgment of the Court of Justice. Allowing the credit institution to recover the capital and an allowance for its use merely restores what was originally performed under the unfair contract and nothing beyond that. This interpretation aligns with one of the guiding principles of the law of restitution — *good faith and fairness* — which requires that both parties be restored, as far as possible, to the legal and factual position they would have occupied had the unfair contract never been concluded²³⁴.

In this connection, it is particularly significant that some of the largest EU Member States — notably Germany and France — have adopted restitutionary frameworks which, even when applied in distinct contexts, permit credit institutions to recover at least statutory interest from borrowers. This holds true even in situations where the lender's own conduct was flawed, for instance in failing to properly assess the borrower's creditworthiness. Such an approach reflects

nature, become commingled with the borrower's patrimony and are capable of restitution through the return of the *tantundem eiusdem generis*. However, this does not preclude—at least in theory—the classification of interests as consideration, not for the mere transfer of money, but for the benefit derived therefrom, which may take different forms depending on the circumstances, such as the time allowed for repayment. Furthermore, the consideration for the granting of the loan need not necessarily consist in the payment of interest but may also take the form of an obligation to do or to give something. Lastly, it should be recalled that there exist several contractual arrangements which, exceptionally, precisely by reason of the nature of their subject matter — namely, money — are characterized as *contratti ad effetti reali*, without thereby altering the underlying *causa contractus*. In this regard, reference may be made, for example, to the distinction between 'pegno ordinario' and 'pegno irregolare'.

²³² Cf P. SIRENA, 'Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation' in ID. (eds.), nt. 1.

²³³ Cf P. SIRENA, 'Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation' in ID. (eds.), nt. 1. Therefore, according to this author, where a mortgage loan indexed to or denominated in a foreign currency (such as the Swiss franc) is annulled, two alternative criteria may be applied to determine the ordinary interest corresponding to the market value of the financial service unduly provided to the borrower: (a) the historical reference rate applicable to mortgage loans denominated in the foreign currency (e.g., the CHF LIBOR); or (b) the historical reference rate applicable to mortgage loans denominated in the domestic currency (e.g., the WIBOR in Poland). Whichever criterion is adopted, it should be supplemented by the historical loan margin prevailing in the relevant money market, since that margin constitutes part of the price which, pursuant to Article 5:103(1)(1) DCFR, 'a provider and a recipient with a real intention of reaching an agreement would lawfully have agreed upon'.

²³⁴ S. GRUNDMANN and N. BADENHOOP, nt. 37, pp. 18 et seq.

a broader economic and legal understanding: in a functioning market, the granting of credit is inherently linked to remuneration for the time value and risk associated with the loan²³⁵.

This leads to what can be identified as the second conceptual error in the reasoning of the Court of Justice. The Court appears to adjust the recoverability of interest – sometimes even excluding it to the detriment of the credit institution – as if it were applying the general rule, common to various legal systems, according to which the party that has made an undue payment is entitled to recover the natural and legal fruits, depending, however, on whether that party acted in good or bad faith²³⁶.

In the Court's view, the credit institution is presumed to have acted in bad faith, having imposed an unfair term that led to the annulment of the contract as a whole. On that basis, the institution would be denied the right to claim the legal fruits arising from its performance. Yet this reasoning rests on a conceptual confusion. The benefit conferred by the bank is mistakenly treated as a simple payment of money, rather than as the provision of a service — namely, the temporary transfer of capital against remuneration²³⁷. It is precisely this mischaracterization that generates the overlap and the interpretative error: by qualifying the lender's performance as a mere monetary transfer, the Court inadvertently excludes the functional dimension of credit as a remunerated service, thereby distorting the logic that ordinarily governs restitution.

5.2. *Restitutionary Claims And Disgorgement of Profits*

²³⁵ Cf N. BADENHOOP, 'Restitution Claims – EU Consumer Law Principles and the Mortgage Credit Directive as an Overarching Value Model' in P. SIRENA (eds.), nt. 1 and S. GRUNDMANN and N. BADENHOOP, nt. 37, p. 27. The authors recalls that even under Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property '[e]rrors in the creditworthiness assessment may not lead to the loan's cancellation or alteration apart from cases of fraudulent consumer behaviour (Article 18 para 4 MCD)'. Moreover, they make reference to the French and German legal systems, highlighting that '[t]he EU's two biggest jurisdictions Germany and France show that the loan is upheld with a mere reduction in interest rates. In France, the interest rate can be reduced by up to 30% if the lender fails to properly inform the consumer about the financial risks or if it does not properly assess the creditworthiness. Only if no creditworthiness assessment takes place at all can the interest rate be reduced to zero. In Germany, interest rates are reduced to a market minimum. Fixed interest rates are reduced to the prevailing market rate on capital markets for mortgage bonds and public bonds whose duration corresponds to that of the fixed interest rate. Variable interest rates are reduced to EURIBOR 3M. Both national transpositions show that, even where lenders infringe their duty to assess the borrower's creditworthiness, in principle, there is no credit without interest, but rather interest rates are reduced in proportion (France) or to a market minimum (Germany). This rationale can be transposed to the case of foreign currency loans being partially or totally annulled'.

²³⁶ See, in the Italian context, P. GALLO, 'Allocazione del rischio e determinazione del *quantum*' in P. GALLO and G. MAGRI (eds.), *Le restituzioni contrattuali*, nt. 2, p. 30.

²³⁷ Cf P. SIRENA, 'Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation' in ID. (eds.), nt. 1.

As has been already observed, according to the Court of Justice, it is not enough that the credit institution should be denied any entitlement to interest for the period during which the loan agreement was in force (an approach which entails a clear-cut loss). The Court's intention appears to go further, making the professional liable in favor of the consumer for any *disgorgement* of profits obtained²³⁸.

Indeed, a disgorgement of profits technique seems to have been employed by the Court of Justice even before the *Bank M.* judgment. In *Dunai*, the Court held that Article 6(1) of the Unfair Contract Terms Directive permits national courts to annul a loan agreement on the ground of an unfair exchange rate clause, 'provided that the finding that such a term is unfair allows the legal and factual situation that the consumer would have been in in the absence of that unfair term to be restored'²³⁹. Accordingly, the referring court had to ascertain whether national legislation restored the legal and factual situation in which the claimant would have been in the absence of the unfair term, 'in particular by giving rise to a right to restitution of advantages wrongly obtained, to her detriment, by the seller or supplier on the basis of that unfair term'²⁴⁰.

This raises the question of how to characterize an action aimed at reversing the profit obtained by a professional who has inserted an unfair indexation clause – a profit which might, for instance, derive from the profitable investment of the sums received or from the proceeds of an assignment of the credit²⁴¹.

In English law, the notion that 'tort must not pay', as famously put by Lord Devlin, encapsulates a long-standing readiness to compel wrongdoers to disgorge gains wrongfully

²³⁸ Cf M.E. STORME, nt. 87, pp. 399-340 and A. PALMIERI-R. PARDOLESI, nt. 83, p. 375. See also P. SIRENA, nt. 16, p. 450: '(...) [there is a distinction] which is instead indelible and which has remained latent in the experience of civil law and which, on the contrary, came into light in that wide and jagged phenomenology of the common law which can be recalled through the concept of "restitution for wrongs". When a wrong does not causa an effective loss to the person who suffered it, this person cannot really complain of the wrong in order to obtain compensation. The English judges, however, have then traditionally admitted, though within certain limits, that the law can require the wrongdoer to disgorge the enrichment obtained, so that he shall not remain, so to say, unpunished – *tort must not pay*, sounds the warning by Lord Devlin in a famous English case'.

²³⁹ Case C-118/17, *Dunai*, ECLI:EU:C:2019:207, para 45. See also Joined Cases C-154/15, C-307/15 and C-308/15, *Gutierrez Naranjo*, ECLI:EU:C:2016:980.

²⁴⁰ Case C-118/17, *Dunai*, nt. 239, para 44; Cases C-154/15, C-307/15 and C-308/15, *Gutierrez Naranjo*, nt. 239; Case C-483/16, *Sziber*, ECLI:EU:C:2018:367, para 53.

²⁴¹ Cf E. BARGELLI, nt. 38, p. 581: 'È stata perlustrata, nei primi commenti alla decisione *Millenium*, la strada della responsabilità precontrattuale. È incontestabile, in effetti, che rientri nella fattispecie dell'art. 1338 c.c. la richiesta di risarcimento del danno subito dal mutuatario in conseguenza della nullità (totale) del contratto imputabile al professionista. Nel caso che ha dato origine alla sentenza *Millenium*, però, la domanda non si limita all'interesse negativo, ma punta alla reversione del profitto percepito dal professionista, per ottenere il quale ben scarso appiglio offrono gli artt. 1337 e 1338 c.c. Questa direzione di indagine, pertanto, non appare del tutto appagante, dovendo almeno essere integrata dalla ricerca dell'eventuale fondamento dell'azione di reversione del lucro'.

acquired²⁴². Equity, in particular, grants an account of profits where a fiduciary or a person bound by a duty of confidence derives a benefit through breach of those obligations. This equitable device traditionally belongs to the broader law of restitution, yet it is not based on unjust enrichment as a cause of action²⁴³.

By contrast, civil law systems have traditionally struggled to accommodate this idea within the conceptual structure inherited from Roman law²⁴⁴. As has been already remarkably argued, the medieval notion of *commodum ex negotiatione* – the surplus value obtained by the wrongdoer – cannot be treated as unjust enrichment, since the enrichment requirement *at the plaintiff's expense* limits restitution to what corresponds to the objective market value of the benefit that the wrongdoer has unlawfully subtracted to another²⁴⁵. Profit, by contrast, often arises from the wrongdoer's own skill, organization, and enterprise, irrespective of the lawfulness of the conduct²⁴⁶.

Nonetheless, scholarship has explored other constructs, particularly to the doctrine concerning the restitution of profits gained by a person who has interfered with another's legal sphere, a theory built upon cases involving the exploitation of another's absolute right²⁴⁷. Therefore, the disgorgement of profits in such cases requires a distinct restitutionary claim, separate from unjust enrichment. This alternative route may be found in the rules of *negotiorum gestio*²⁴⁸.

Under this doctrine, a person who consciously interferes with another's affairs is deemed to act as the other's agent, thereby incurring duties similar to those of a fiduciary²⁴⁹. The analogy with the English account of profits is evident: both frameworks impose an obligation to surrender gains obtained through wrongful interference²⁵⁰. Comparative analysis, moreover, confirms that, in principle, the disgorgement duty arises only where the actor intervenes in bad faith - that is, knowingly and intentionally in another's affairs²⁵¹.

German law reflects this convergence through several mechanisms. Besides the 'unechte Geschäftsführung' or 'false' *negotiorum gestio*, regulated by § 687 (2), reference may also be

²⁴² *Rookes v Barnard*, [1964] 1 All ER.

²⁴³ P. SIRENA, nt. 16, p. 451.

²⁴⁴ Cf F. SCHULZ, 'System der Rechte auf den Eingriffserwerb', in *AcP*, 1909, pp. 1 et seq. See also the historical analysis of P. SIRENA, nt. 16, p. 450.

²⁴⁵ Cf R. SACCO, *L'arricchimento ottenuto mediante fatto ingiusto*, Torino, 1959.

²⁴⁶ *Ibid.*

²⁴⁷ Cf E. BARGELLI, nt. 38, pp. 581 et seq.

²⁴⁸ For a comprehensive analysis of the institution of *negotiorum gestio* see of P. SIRENA, nt. 164, *passim*.

²⁴⁹ P. SIRENA, nt. 16, p. 451.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

made in particular to §§ 987 et seq BGB – the so called ‘owner-possessor model’ – under which an owner may, *inter alia*, claim the benefits that a possessor has derived from the use of the owner’s property²⁵². One must also consider the *Eingriffskondiktion*, inferred from §812(1) BGB (‘enrichment in other ways’), which allows recovery of benefits improperly gained and not captured by other remedies²⁵³.

With respect to the owner-possessor model and its potential suitability as a foundation for reclaiming the profits obtained by a bank from payments later found to have been undue following the annulment of a contract, it has persuasively been argued that such provisions are ill-suited to the restitutionary obligations at issue²⁵⁴. The unlawful possessor’s duty to account for benefits derived from another’s property is ancillary to a proprietary remedy, which finds no application in this context. The concepts of ownership and possession, moreover, are difficult to transpose into a situation in which money is not conceived as a *res* but as fungible medium of exchange²⁵⁵.

Turning to the *Eingriffskondiktion*, this has traditionally been applied where a defendant has made profitable, unauthorized use of the claimant’s image or patented invention – conduct that may, but need not, amount to a tort²⁵⁶. Relief is granted whenever one person infringes another’s right and the gains in question can be traced exclusively to that right (*die Lehre vom Zuweisungsgehalt*)²⁵⁷.

Nevertheless, it remains doubtful whether this doctrine can, *a fortiori*, be extended to the contractual domain so as to encompass the conduct of a contracting party who, by abusing his superior bargaining power, has imposed unfair terms upon the other party. Indeed, it is difficult to argue that such reasoning fits a scenario in which the performances have been duly rendered and received, albeit under a contract later found to be unfair. Even the professional’s bad faith does not suffice to justify disgorgement, since the parties, acting in reliance on the contract’s validity, sought to perform their own (putative) obligations, not to manage another’s affairs (within the meaning of *negotiorum gestio* (§ 687(1) BGB)) not to exert another party’s right (within the meaning of *Eingriffskondiktion*). Therefore, the subjective element characteristic of the management of another’s affairs (*animus aliena negotia gerendi*) would be lacking, since

²⁵² Cf the analysis of D. VISSER, ‘Unjustified Enrichment in Comparative Perspective’ in M. REIMANN and R. ZIMMERMANN (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed., Oxford, 2019, p. 971.

²⁵³ Ibid.

²⁵⁴ Cf P. SIRENA, ‘Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation’ in ID. (eds.), nt. 1.

²⁵⁵ Ibid.

²⁵⁶ Cf D. VISSER, nt. 252, pp. 970-971.

²⁵⁷ Cf P. SIRENA, nt. 164, pp. 204-205.

the agent would have believed that he was managing his own affairs (so-called *vermeintliche Geschäftsführung*, § 687(1) BGB)²⁵⁸. Moreover, the gains hypothetically obtained by the professional do not derive, rigorously speaking, from the exploitation of any right belonging to the consumer, but rather from the deployment of the professional's own organizational and economic resources – namely, the investment of funds received and assimilated into his assets under contract subsequently deemed unfair²⁵⁹.

In this final regard, it is noteworthy that neither Directive (EU) 2014/104 (Article 3)²⁶⁰, dealing with actions for antitrust damages, not, though less explicitly, Directive (EU) 2019/2161 on unfair commercial practices, envisages the disgorgement of profits²⁶¹. Both instruments adopt a strictly compensatory conception of damages, thereby excluding any punitive element.

²⁵⁸ Ibid.

²⁵⁹ Cf A. ALBANESE, *Ingiustizia del profitto e arricchimento senza causa*, Padova, 2005, pp. 356 et seq; ID., 'Fatto illecito, fatto ingiusto e restituzioni dell'arricchimento in assenza di danno', in *Resp. civ. prev.*, 2004, pp. 538 et seq. Within the context of *Eingriffskondiktion*, see A. NICOLUSSI, 'Proprietà intellettuale e arricchimento ingiustificato: la restituzione degli utili nell'art. 45 TRIPS', in *Eur. dir. priv.*, 2002, pp. 1003 et seq.

²⁶⁰ More precisely, Article 3(3) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union establishes that: 'Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages'.

²⁶¹ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [OJ L 328].

PART II

PRESCRIPTION REGIME AND CONSUMER PROTECTION

TABLE OF CONTENTS: 6. The Challenges Associated With Prescription Within The Context Of Unfair Contract Terms Directive – 6.1. The ‘Traditional Approach’ To Prescription – 6.2. Between The Rules Governing *Indebitum Solutum* And Restitutionary Claims After The Dissolution Of The Contract – 6.3. Between Equivalence And Effectiveness And The Other Forgotten Principles – 7. Commencement Of Prescription Period (*Dies a quo*): The ‘Modern Approach’ – 7.1. Reasonable Discoverability Between Objective And Subjective Criteria – 7.2. The Assessment Of Reasonable Discoverability – 8. The Length Of Prescription Periods – 9. Preliminary Conclusions

6. *The Challenges Associated With Prescription Within The Context Of Unfair Contract Terms Directive*

The Unfair Contract Terms Directive does not establish a comprehensive legal framework governing rules on prescription²⁶², leaving this aspect to the discretion of domestic legal systems²⁶³. Nonetheless, from its earliest rulings concerning the Unfair Contract Terms Directive, the Court of Justice has sought to remedy this lacuna by progressively shaping a strict interpretative framework.

A key finding that has emerged is that the non-binding nature of unfair terms cannot, in itself, be constrained by any statutory limitation period. In other words, consumers must always be able to invoke the protection afforded by the Directive when faced with claims from sellers or suppliers based on unfair terms. The unfair nature of a contract term may therefore be identified either by the consumer or by the court of its own motion, without the risk that such scrutiny is time-barred²⁶⁴.

²⁶² G. MAGRI, *La prescrizione. Ricodificazione degli ordinamenti giuridici europei e prospettive di modernizzazione del diritto italiano*, Napoli, 2019, p. 60. In this context, it is worth recalling that in European private law, the terminology *prescription* is employed in the PECL, the DCFR, and the CESL alike. In common law, however, *prescription* denotes acquisitive prescription (i.e., the acquisition of rights through lapse of time), not extinctive prescription. In the UK, the latter is instead referred to as *limitation*. The reason why the term *limitation* could not be adopted to translate the continental notion of extinctive prescription lies in the conceptual difference between the two traditions: in common law, *limitation of actions* emphasizes the procedural nature of the bar to bringing a claim, whereas in civil law systems *prescription* is treated as an institution of substantive law. For this reason, the use of the more neutral and substantively oriented term *prescription* has been preferred in the European instruments.

²⁶³ Cf M. GUTOWSKI, ‘Statute of Limitations for Restitution Claims after a Term is Declared Unfair. Some Remarks on the CJEU Judgement of 8th of September 2022 (Joined Cases C-80/21 to C-82/21)’, in *ERCL*, 2023, 19(3), pp. 241 et seq.

²⁶⁴ Case C-473/00, *Cofidis*, ECLI:EU:C:2002:705, para 36: ‘A procedural rule which prohibits the national court, on expiry of a limitation period, from finding of its own motion or following a plea raised by a consumer that a term sought to be enforced by a seller or supplier is unfair is therefore liable, in

The position was clearly affirmed in the *Cofidis* case, where the Court of Justice held that in proceedings brought by sellers or suppliers to enforce contractual terms against consumers, a limitation period restricting the court's power to annul unfair terms, whether of its own motion or following a consumer's plea, would undermine the effectiveness of the protection envisaged by Articles 6 and 7 of the Unfair Contract Terms Directive²⁶⁵. Allowing such a time constraint would effectively enable sellers and suppliers to sidestep consumer protection rules simply by waiting for the limitation period to expire before seeking enforcement of unfair terms they would continue to employ in contracts²⁶⁶. The same rationale should extend to requests to declare contract terms unfair in individual proceedings or injunctions as outlined in Article 7(2) of the Unfair Contract Terms Directive²⁶⁷.

By contrast, the Court of Justice has clarified that the Unfair Contract Terms Directive does not generally preclude national laws from imposing limitation periods on claims seeking restitution following the annulment of the contract due to unfairness²⁶⁸. However, this is contingent on the limitation period being no less favorable than those governing comparable domestic actions and not rendering practically impossible or excessively difficult the exercise of rights conferred by the EU legal framework²⁶⁹.

From this perspective, prescription constitutes a crucial component of the legal architecture surrounding restitutionary remedies, with a direct bearing on the extent to which the Unfair Contract Terms Directive's protective purpose is realized. In situations where a contract has been at least partially performed, restitution is indispensable to re-establishing the legal and factual position the consumer would have occupied absent the unfair term²⁷⁰. This restitutionary

proceedings in which consumers are defendants, to render application of the protection intended to be conferred on them by the Directive excessively difficult'.

²⁶⁵ Case C-473/00, *Cofidis*, nt. 264, para 35: 'It is therefore apparent that, in proceedings aimed at the enforcement of unfair terms brought by sellers or suppliers against consumers, the fixing of a time-limit on the court's power to set aside such terms, of its own motion or following a plea raised by the consumer, is liable to affect the effectiveness of the protection intended by Articles 6 and 7 of the Directive. To deprive consumers of the benefit of that protection, sellers or suppliers would merely have to wait until the expiry of the time-limit fixed by the national legislature before seeking enforcement of the unfair terms they would continue to use in contracts'.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ See, *inter alia*, Joined Cases C-698/18 and C-699/18, *SC Raiffeisen Bank SA and BRD Groupe Soci  t   G  n  rale SA v JB and KC*, ECLI: ECLI:EU:C:2020:537.

²⁶⁹ See below 6.2.

²⁷⁰ See above Part I.

effect not only fulfils the Directive's core objective, but also serves as an instrument of private enforcement aimed at deterring professionals from persisting the use of such contract terms²⁷¹.

A fundamental aspect of any prescription regime lies not only in its length but also in the moment when the period begins to run (*dies a quo*)²⁷². The consumer must be given an effective and fair opportunity to pursue their claim. Both the length and the rules governing its commencement therefore play a decisive role in determining whether the system of prescription upholds or frustrates the Unfair Contract Terms Directive's intended level of consumer protection²⁷³.

The Court of Justice's early case law on prescription gradually consolidated the principle that such prescription periods are compatible with the principle of effectiveness only where the consumer has had a real opportunity to become aware of their rights before the prescription period begins to run or expires²⁷⁴.

²⁷¹ E. BARGELLI, nt. 184, pp. 450 et seq; A. RUIZ ARRANZ, 'The Commencement of Prescription (and what the Consumer's Awareness of the Unfairness is) within the Unfair Contract Terms Directive', in *ERCL*, 2023, 19(3), pp. 184-185.

²⁷² M.E. STORME, 'Constitutional review of Disproportionately Different Periods of Limitation of Action (Prescription)', in *ERPL*, 1997, 5(1), pp. 79-100; R. ZIMMERMANN, *Comparative foundations of a European Law of Set-Off and Prescription*, Cambridge, 2002, pp. 78-79, 105; M.J. BONELL, 'Limitation Periods' in A. HARTKAMP, M. HESSELINK, E. HONDIUS, C. JOUSTRA, E. PERRON and M. VELDMAN (eds.), *Towards a European Civil Code*, 4th ed., Nijmegen, 2020, pp. 517-522.

²⁷³ Cf N.H. ANDREWS, 'Reform of Limitation of Actions: The Quest for Sound Policy', in *Cambridge Law Journal*, 1998, 57, pp. 589-590.

²⁷⁴ Cf Case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, ECLI:EU:C:2009:615, para 45; Cases C-698/18 and C-699/18, *SC Raiffeisen Bank SA and BRD Groupe Société Générale SA v JB and KC*, nt. 268, para 75 ('It follows from the foregoing that the principle of effectiveness precludes an action for reimbursement from being subject to a limitation period of three years, which starts to run from the date on which the contract in question ends, irrespective of the question whether the consumer was, or could reasonably have been, aware on that date of the unfairness of a term of that contract relied on in support of his or her action for reimbursement, since such limitation rules are likely to render excessively difficult the exercise of that consumer's rights conferred by Directive 93/13'); Joined Cases C-224/19 and C-259/19, *CY and Others v Caixabank SA and Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2020:578, paras 90-91 ('In that regard, it is important to bear in mind that consumers may be unaware that a term in a mortgage loan agreement is unfair or do not appreciate the extent of their rights under Directive 93/13. Indeed, the application of a five-year limitation period that begins to run from the conclusion of the contract, in so far as it means that the consumer may seek the refund of payments made pursuant to a contractual term held to be unfair only during the first five years following the signing of the contract, irrespective of whether he or she was or could reasonably have been aware of the unfairness of that term, may make it excessively difficult for that consumer to exercise his or her rights under Directive 93/13, and, consequently, run counter to the principle of effectiveness read in conjunction with the principle of legal certainty'); Joined Cases C-776/19 to C-782/19, *VB and Others v BNP Paribas Personal Finance SA and AV and Others v BNP Paribas Personal Finance SA and Procureur de la République*, ECLI:EU:C:2021:470, para 46 ('A limitation period may be compatible with the principle of effectiveness only if the consumer has had the opportunity to become aware of his or her rights before that period begins to run or expires'); Case C-485/19, *LH v Profi Credit Slovakia s.r.o.*, ECLI:EU:C:2021:313, paras 61-62 ('It is clear from the information given by the national court, in particular in the context of its first question, that the three-year period provided for in Article 107(2) of the Civil Code begins to run from the date on which the

More recently, however, the Court has adopted a more assertive stance, holding that national legislation allowing the *dies a quo* to commence prior to the judicial declaration of a contract's nullity is incompatible with the Unfair Contract Terms Directive, even where the consumer has already become aware of the rights conferred upon them. More precisely, the Court of Justice held that 'a situation in which the limitation period for a consumer's claims stemming from the nullity of a mortgage loan agreement begins to run before the date on which the definitive unenforceability of that agreement is established by a court, even though that period does not expire before the consumer became aware, or could reasonably have become aware, of his or her rights, whereas the limitation period laid down for the corresponding claims of the seller or supplier begins to run on the date on which that definitive unenforceability is established by a court, involves an asymmetry capable of undermining the protection of that consumer guaranteed by Directive 93/13'²⁷⁵.

This interpretative development acquires particular significance when viewed in light of the Court's case law on *res iudicata*. In *Banco Primus*, for instance, the Court ruled that where a national court has reviewed only certain key terms of a contract, the rules on *res iudicata* does not preclude subsequent scrutiny of additional terms, either at the consumer's request or of the court's own motion²⁷⁶. As reaffirmed in *Ibercaja*²⁷⁷, an effective review of the possible unfairness of contractual terms, as required by the Unfair Contract Terms Directive, could not be guaranteed if the force of *res iudicata* extended also to judicial decisions which do not indicate such a review²⁷⁸.

unjust enrichment occurred and that the limitation period applies even if the consumer is not in a position to assess for himself or herself that a contractual term is unfair or has not been made aware of the unfairness of the contractual term in question. In that connection, it is necessary to take account of the weaker position of consumers vis-à-vis sellers or suppliers, as regards both their bargaining power and their level of knowledge, and the fact that it is possible that the consumers are not aware of the unfair nature of a term in the agreement concluded with a seller or supplier or do not appreciate the extent of their rights deriving from Directive 93/13 or Directive 2008/48').

²⁷⁵ Case C-28/22, *TL and WE v Liquidator of Getin Noble Bank S.A.*, nt. 184, para 66.

²⁷⁶ Case C-421/14, *Banco Primus*, ECLI:EU:C:2017:60, paras 50-52 ('(...) in the case where, in a previous examination of a contract in dispute which led to the adoption of a decision which has become *res iudicata*, the national court limited itself to examining of its own motion, with regard to Directive 93/13, one or certain terms of that contract, that directive requires a national court, such as the one in the main proceedings, before which a consumer has properly lodged an objection to enforcement proceedings, to assess, at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose, the potential unfairness of other terms of that contract. In the absence of such a review, consumer protection would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13'). See also C-415/11, *Aziz*, EU:C:2013:164, para 60.

²⁷⁷ Case C-600/19, *Ibercaja*, ECLI:EU:C:2022:394, para 50.

²⁷⁸ According to the Italian Court of Cassation (Cass. Civ. SU 6 April 2023, No. 9479), the Court of Justice's decisions on *res iudicata* would find their roots in principles (for instance, the right to defence) that, together with the impartiality and neutrality of the judge, form the pillars of a 'fair trial' as set out

Finally, the issue of compatibility between the *dies a quo* governing restitutionary claims and Articles 6(1) and 7(1) of the Unfair Contract Terms Directive has been expressly addressed in recent case law²⁷⁹. Indeed, the Court of Justice confirmed that Article 6(1) and Article 7(1) of the Unfair Contract Terms Directive must be interpreted as precluding the limitation period for an action for restitution of costs that were paid by the consumer, pursuant to a term of a contract concluded with a seller or supplier that has been found to be unfair by a final judicial decision given subsequent to the payment of those costs, from beginning to run on an earlier date, on which the national supreme court delivered, in separate cases, judgments declaring standard terms corresponding to the term in question of that contract unfair²⁸⁰.

6.1. The ‘Traditional Approach’ To Prescription

In all modern legal systems, the lapse of a given period of time may ultimately prevent an individual from exercising a right they believe to hold²⁸¹. As has been illustrated, where that

in Articles 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention on Human Rights, and that, similarly, constitute the essential core of the fundamental guarantees provided by Articles 24 and 111 of the Italian Constitution. Nevertheless, the consequences that – at least the decisions of 17 May 2022 as implemented by the Italian Court of Cassation (Cass. Civ. SU 6 April 2023, No. 9479) - will have on the Italian legal system are significant. Firstly, they impose an unknown obligation on the judge handling the order for payment claim to validate its decision with information regarding the presence or absence of unfair clauses within the contract from which the seller or supplier’s order for payment claim arises. Furthermore, because of the Court of Justice’s decision as implemented by the Italian Court of Cassation, it will be required that the warning provided to the debtor (under Article 641(1) of the Italian *Codice di procedura civile*), that within forty days an objection to the judge’s order for payment can be filed, and that in the absence of such an objection, enforcement proceedings will proceed, must also inform the consumer that, in the absence of such an objection, he/she will lose the opportunity to seek a declaration concerning the unfair nature of the contract clauses at hand. But even more significantly, the retroactive effect of the Court of judgments requires finding a solution for (i) the previous judge’s orders for payment, which do not align with the aforementioned requirements concerning motivation and warning contents, and did already become final, as well as (ii) ongoing enforcement proceedings. It is palpable that the Court of Justice’s decisions have led to a monumental resurgence of the principle of substantive justice at the expense of the dictate of procedural economy. But above all, it is evident that the Court has done what the legislator could have done, going far beyond mere interpretation of existing law, and creating new law, albeit justified by the necessity to protect consumers. See, in this regard, A.M. GAROFALO, ‘Le sezioni unite su Banco di Desio: una giurisprudenza sempre più legislativa’, in *Nuova giur. civ. comm.*, 2023, p. 965. Cf, also, more recently Case C-531/22, *Getin Noble Bank S.A.*, ECLI:EU:C:2024:58.

²⁷⁹ Cf Case C-561/21, *Banco Santander*, ECLI:EU:C:2024:362.

²⁸⁰ Case C-561/21, *Banco Santander*, nt. 279, para 54.

²⁸¹ A comprehensive study of the law of prescription in the German language was last undertaken by K.A.D. UNTERHOLZNER, *Ausführliche Entwicklung der gesamten Verjährungslehre aus den gemeinen in Deutschland geltenden Rechten*, 1828, followed by a second edition edited by Theodor Schirmer in 1858. In France, G. BAUDRY-LACANTINIERE and A. TISSIER, *Traité théorique et pratique de droit civil: De la prescription*, 4th ed., 1924. For Italy, G. PUGLIESE, *La prescrizione nel diritto civile*, vol. I, 4th ed., 1921 and vol. II, 1924, (first published in 1889 (vol I) and 1892 (vol II)). Today, standard reference works remain K. SPIRO, *Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalefristen*, I, *Die Verjährung der Forderungen*, and II, *Andere Befristungen und Rechte*, Bern,

right concerns the enforcement of an obligation, the term ‘prescription’ has become the accepted technical expression used to describe this form of temporal limitation²⁸².

The adoption of this terminology is also evident in the modern non-legislative codifications, such as the PECL (Article 14:101: A right to performance of an obligation (‘claim’) is subject to prescription by the expiry of a period of time in accordance with these Principles), the DCFR (Article III.-7:101: A right to performance of an obligation is subject to prescription by the expiry of a period of time in accordance with the rules in this Chapter), as well as the CESL (Article 178: A right to enforce performance of an obligation, and any right ancillary to such a right, is subject to prescription by the expiry of a period of time in accordance with this Chapter)²⁸³.

The origins of the modern concept of prescription can be traced back to late antiquity, when the notion of *longi temporis praescriptio* emerged²⁸⁴. This mechanism allowed a defendant to resist a claim solely on the basis of the passage of time. The standard period was typically set at thirty years, though shorter prescription periods, where already established, remained unaffected²⁸⁵. Crucially, the commencement of the long period was assessed according to objective criteria, independently of any knowledge or awareness the creditor might have had or reasonably been expected to have²⁸⁶.

1975. In this context, see also R. ZIMMERMANN, nt. 156, pp. 122 et seq; ID., ‘Introduction before Art 14:101’ in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, pp. 1823 et seq; ID., *Limitation of Actions under the Draft Civil Code for Israel in Comparative Perspective*, Tübingen, 2008, pp. 221 et seq; R. ZIMMERMANN and J. KLEINSCHMIDT, ‘Prescription: General Framework and Special Problems Concerning Damages Claims’ in H. KOZIOL, B.C. STEININGER (eds.), *European Tort Law 2007. Tort and Insurance Law Yearbook*, Wien, 2008, pp. 26 et seq; O. REMIEN (eds.), *Verjährungsrecht in Europa – zwischen Bewährung und Reform*, Tübingen, 2011; C.M. BIANCA, *Diritto civile*, VII, *Le garanzie reali-la prescrizione*, Milan, 2012, pp. 507 et seq; A. GUARNERI, ‘L’exordium prescriptionis’, in *Riv. dir. civ.*, 2013, pp. 1129 et seq; A. LEPORE, *Prescrizione e decadenza. Contributo alla teoria del «giusto rimedio»*, Napoli, 2012, pp. 22 et seq; S. PAGLIANTINI, ‘Exordium praescriptionis e rapporti di consumo: variazioni sulla prescrizione’, in *Nuove leggi civ. comm.*, 2021, pp. 762 et seq.

²⁸² R. ZIMMERMANN, ‘Introduction before Art 14:101’ in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, p. 1824.

²⁸³ R. ZIMMERMANN, ‘Art 14:101: Claims Subject to Prescription’ in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, pp. 1832 et seq. Cf also G. MAGRI, nt. 262, p. 60.

²⁸⁴ R. ZIMMERMANN, ‘Introduction before Art 14:101’ in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, p. 1824. The author recalls that the period of time envisaged in an enactment by Emperor Theodosius II in 414 AD was (normally) thirty years.

²⁸⁵ See L. BUONANNO, ‘Europeizzazione degli ordinamenti giuridici ed effetti della cosa giudicata sostanziale sulle prescrizioni brevi: verso una riforma dell’art. 2953 c.c.?’ in *Rass. dir. civ.*, 2021, p. 452 and nt. 6. The author recalls that, in modern codifications, thirty years was the ordinary prescription period provided for by § 1478 ABGB, Article 2262 of the French *Code civil*, and § 195 BGB. The operation of this prescription period, however, was often mitigated through the application of the doctrine of *Verwirkung*.

²⁸⁶ C.M. BIANCA, *Diritto civile*, VII, *Le garanzie reali-la prescrizione*, nt. 281, pp. 555 et seq; R. ZIMMERMANN, ‘Introduction before Art 14:101’ in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, pp. 1826-1827.

By the late nineteenth century, it became increasingly apparent that the inherited framework governing prescription was deeply unsatisfactory²⁸⁷. What has long been regarded a dry and marginal area of private law was suddenly recognized as conceptually rich and in urgent need of reform²⁸⁸. The traditional thirty-year period, derived from Theodosius' legislation and transmitted through the *ius commune* into numerous modern codifications, was now seen as an anachronism²⁸⁹. In a rapidly evolving social and economic context, such an extensive period effectively insulated many claims from ever becoming time-barred, thereby undermining the very function of prescription²⁹⁰.

In response, a variety of shorter limitation periods were introduced - some with ancient roots of their own - intended to restore balance between legal certainty and the protection of creditors²⁹¹. Yet this proliferation of time limits brought new inconsistencies. In numerous instances, the period allowed for enforcement was so brief that it deprived creditors of any realistic opportunity to pursue their claims²⁹². Moreover, closely related rights were often subjected to markedly different prescriptive regimes without any coherent justification. The resulting lack of systematic coherence underscored the need for a more principled and harmonized approach to the law of prescription, one capable of reconciling fairness to creditors with the broader demands of legal certainty and finality²⁹³.

6.2. *Between The Rules Governing Indebitum Solutum And Restitutionary Claims After The Dissolution Of The Contract*

From a strictly analytical perspective, the classification and regulation of the prescription period applicable to restitutionary claims following the annulment of a contract on grounds of

²⁸⁷ R. ZIMMERMANN, 'Introduction before Art 14:101' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, pp. 1827; F. PETERS and R. ZIMMERMANN, 'Verjährungsfristen', in *Bundesminister der Justiz* (eds.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. I, 1981, pp. 189-192. See also, more recently, the analysis of C.M. BIANCA, *Diritto civile*, VII, *Le garanzie reali-la prescrizione*, nt. 281, pp. 567 et seq.

²⁸⁸ For the traditional view, see F. BYDLINSKI, *System und Prinzipien des Privatrechts*, Wien, 1996 (reprint 2013), p. 168.

²⁸⁹ Cf M. STORME, 'Verjährung und Verfassung—Belgische Erfahrungen' in O. REMIEN (eds.), *Verjährungsrecht in Europa – zwischen Bewährung und Reform*, Tübingen, 2011, pp. 143–175.

²⁹⁰ F. PETERS and R. ZIMMERMANN, nt. 287, pp. 189-192.

²⁹¹ R. ZIMMERMANN, 'Introduction before Art 14:101' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, p. 1827.

²⁹² F. PETERS and R. ZIMMERMANN, nt. 287, pp. 196-214.

²⁹³ Cf M. STORME, 'Verjährung und Verfassung—Belgische Erfahrungen' in O. REMIEN (eds.), nt. 289, pp. 143-175.

unfairness necessarily depend on how each legal system conceptualizes and governs contractual restitutions as such²⁹⁴.

Indeed, in legal systems where contractual restitutions are subsumed under the broader rules on *indebitum solutum*, the prescription period typically begins to run from the moment each individual performance is made²⁹⁵. Yet, this approach can prove particularly onerous for the parties when annulment occurs long after the contractual obligations have been performed. In such cases, the prescription period may expire well before the consumer becomes aware of the unfair nature of the clause, effectively depriving them of any meaningful remedy²⁹⁶.

With specific regard to the French legal context, other issues arise. In fact, where the parties seek restitution as part of an action for nullity or ‘rescission’, the prescription period governing the restitutionary claim is absorbed into that which applies to the action seeking to set aside the contract²⁹⁷. In this sense, the right to recover what has been unduly paid cannot be exercised beyond the special prescription period for the underlying action. In this regard, French jurisprudence has clarified that the restitutionary claim is merely a consequence of the nullity or ‘rescission’. Consequently, once the right to bring the principal claim is time-barred, the corresponding right to restitution necessarily lapses as well²⁹⁸.

However, such an interpretation appears to sit uneasily with the position taken by the Court of Justice. In its judgment of 8 September 2022²⁹⁹, the Court examined whether the Unfair Contract Terms Directive, interpreted in light of the principle of effectiveness, precludes national case-law under which a ten-year limitation period for a consumer’s action to recover sums unduly paid under an unfair term begins to run from the date of each individual payment³⁰⁰. This was so even though, at that point in time, the consumer was not yet in a position to recognize the unfair nature of the term - particularly in the context of a loan agreement with a thirty-year repayment period, far exceeding the statutory prescription period³⁰¹.

²⁹⁴ P. GALLO, ‘Allocazione del rischio e determinazione del *quantum*’ in P. GALLO and G. MAGRI (eds.), *Le restituzioni contrattuali*, nt. 2, pp. 82-83.

²⁹⁵ P. GALLO, ‘Allocazione del rischio e determinazione del *quantum*’ in P. GALLO and G. MAGRI (eds.), *Le restituzioni contrattuali*, nt. 2, p. 82.

²⁹⁶ Ibid.

²⁹⁷ Cf G. TERLIZZI, ‘Le restituzioni nel diritto francese’ in P. GALLO and G. MAGRI (eds.), nt. 2, pp. 193-194.

²⁹⁸ Ibid.

²⁹⁹ Joined Cases C-80/21 to C-82/21, *D.B.P. (Crédit hypothécaire libellé en devises étrangères)*, ECLI:EU:C:2022:646. Cf also M. GUTOWSKI, nt. 263, pp. 239 et seq.

³⁰⁰ Joined Cases C-80/21 to C-82/21, *D.B.P. (Crédit hypothécaire libellé en devises étrangères)*, nt. 299, para 49.

³⁰¹ Joined Cases C-80/21 to C-82/21, *D.B.P. (Crédit hypothécaire libellé en devises étrangères)*, nt. 299, para 99.

The Court held that the Unfair Contract Terms Directive does not permit a ten-year limitation period to commence from the moment each payment is made if, at that time, the consumer could not reasonably assess the unfairness of the clause³⁰². The Directive's overarching purpose, to shield consumers from unfair contract terms imposed by economically stronger parties, would otherwise be undermined. National rules on prescription must therefore be interpreted and applied in a manner that ensures the effective realization of this protection³⁰³.

6.3. Between Equivalence And Effectiveness And The Other Forgotten Principles

Despite the autonomy that characterizes the hallmark of the European Union, EU law is not completely self-sustaining or independent³⁰⁴. Instead, it grapples with a regulatory shortfall since it heavily relies on the substantive and procedural rules of its Member States³⁰⁵. This structural reliance reflects an inherent regulatory gap: where EU legislation does not lay down specific procedural rules, it is for the national legal systems to provide the mechanisms through which rights derived from EU law are to be exercised and protected. This arrangement is founded on the principle of national procedural autonomy, according to which the practical enforcement of EU rights falls within the responsibility of each Member State³⁰⁶.

The contours of this principle were first delineated by the Court of Justice in the landmark decision in *Rewe*³⁰⁷. There, the Court affirmed that, in the absence of relevant Union provisions, the enforcement of EU law at the national level must take place within the institutional and procedural structures of each Member State. However, the reliance on Member States' procedural rules comes with the condition that effectiveness and equivalence of EU law must

³⁰² Joined Cases C-80/21 to C-82/21, *D.B.P. (Crédit hypothécaire libellé en devises étrangères)*, nt. 299, para 100.

³⁰³ *Ibid.*

³⁰⁴ F. EPISCOPO, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before National Courts' in P. CRAIG and G. DE BÚRCA (eds.), *The Evolution of EU Law*, Oxford, 2021, pp. 276-277

³⁰⁵ C. HARLOW, 'A Common European Law of Remedies?' in C. KILPATRICK, T. NOVITZ, and P. SKIDMORE (eds.), *The Future of Remedies in Europe*, Oxford, 2000, pp. 76-77; P. PIVA, *Il principio di effettività della tutela giurisdizionale nel diritto dell'Unione Europea*, Napoli, 2012, pp. 30-31.

³⁰⁶ The Court of Justice has stated on several occasions that national procedural rules are applicable 'in the absence of Community rules on this subject'. See, *inter alia*, Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188, para 5; Case C-45/76, *Comet BV*, ECLI:EU:C:1976:191, para 13; Case C-6/90, *Francovich*, ECLI:EU:C:1991:428, para 42. In this regard, see also C.N. KAKOURIS, 'Do The Member States Possess Judicial Procedural "Autonomy"?', in *CMLR*, 1997, p. 1389. The author highlights that: 'The impression is thus given that national procedural law falls to be applied as a matter of basic principle, that that law derives from one of the residual competences reserved to the Member States and that it accordingly constitutes a manifestation of their sovereignty'.

³⁰⁷ Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, nt. 306.

be guaranteed³⁰⁸. Effectiveness, on one hand, aims to prevent situations where national procedural rules would render the exercise of rights based on EU law impossible or excessively difficult. Equivalence, on the other hand, requires that a Member State treats claims arising from EU law no differently than those arising under its national legislation.

Within the Court of Justice's jurisprudence, the notion of effectiveness has evolved into two complementary dimensions that have profoundly shaped the institutional fabric of the European Union³⁰⁹. The first concerns the effectiveness of EU law and norms, which underlies the doctrines of direct effect. The second pertains to the effectiveness of judicial protection, which safeguards the individual's ability to secure effective remedies before national courts when invoking EU rights. Taken together, these dimensions reveal the dynamic and interdependent relationship between EU law and the procedural autonomy of Member States. The EU legal order relies on national systems not merely as instruments of implementation, but as partners in a shared enterprise of ensuring that the rights and obligations arising under EU law are not only formally recognized but also practically realized³¹⁰.

As per the effectiveness of judicial protection, the Court of Justice has consistently anchored it in the foundational principles of the EU's legal order. This encompasses respect for the rights of defence, the principle of legal certainty and the proper administration of justice, all of which must be interpreted in light of the right to an effective remedy as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union³¹¹.

³⁰⁸ For a deep analysis of the right to effective judicial protection in EU law and the relationship of EU fundamental rights to European private law see C. MAK, 'Rights and remedies: article 47 EUCFR and effective judicial protection in European private law matters' in H.-W. MICKLITZ (eds.), *Constitutionalization of European private law*, Oxford, 2014, pp. 236 et seq; V. TRSTENJAK and E. BEYSEN, 'European Consumer Protection Law: Curia Semper Dabit Remedium?', in *CMLR*, 2011, p. 105. See also, *inter alia*, Case C-78/98, *Preston and Others*, ECLI:EU:C:2000:247, para 31; Joined cases C-392/04 and C-422/04, *Germany and Arcor*, ECLI:EU:C:2006:586, para 57. See also M. GROCHOWSKI and M. TABOROWSKI, 'The impact of Article 47 of the Charter of Fundamental Rights in the Polish legal order' in M. BONELLI, M. ELIANTONIO, G. GENTILE (eds.), *Article 47 of the EU Charter and Effective Judicial Protection*, vol. 2, Oxford, 2023, pp. 181-200. With regard to the principle of equivalence, see also Case C-230/24, *MF v Banco Santander SA*, ECLI:EU:C:2025:177.

³⁰⁹ Cf N. REICH, *General Principles of EU Civil Law*, Cambridge, 2013, pp. 89 et seq; T. TRIDIMAS, *The General Principles of EU Law*, 2nd ed., Oxford, 2006, p. 418; D. LECZYKIEWICZ, 'Effectiveness of EU Law Before National Courts: Direct Effect, Effective Judicial Protection, and State Liability' in A. ARNULL and D. CHALMERS (eds.), *Oxford Handbook of European Union Law*, Oxford, 2015, pp. 212 et seq.

³¹⁰ Cf N. REICH, nt. 309, pp. 89 et seq.

³¹¹ See F. EPISCOPO, 'Varieties of effectiveness and their impact on private law adjudication', in *ZEuP*, 2023, pp. 375 et seq; G. VETTORI, 'Effettività delle tutele (diritto civile)' in *Annali*, nt. 51, pp. 387 et seq; ID., 'Contratto giusto e rimedi effettivi', nt. 51, pp. 787 et seq. See also in this regard M. GROCHOWSKI, C. PATERA and F. PISTELLI, 'Effective consumer protection between administrative and judicial enforcement (Chapter 3)' in P. IAMICELI, F. CAFAGGI, M. ARTIGOT I GOLOBARDES (eds.), *FRICoRe Casebook – Effective Consumer Protection and Fundamental Rights*, Roma, 2022, pp. 145 et seq. More recently, see also Case C-598/21, *Všeobecná úverová banka a.s.*, ECLI:EU:C:2023:845.

Turning to the specific context of the Unfair Contract Terms Directive, as has been already observed, the Court of Justice has clarified that, as a matter of principle, the mere imposition of a limitation period on consumer restitution claims is not, in itself, inconsistent with the principle of effectiveness³¹². Consequently, national limitation periods of three to five years, and even those extending up to ten years, have been regarded as compatible with EU law, provided they do not render the exercise of the rights conferred by the Unfair Contract Terms Directive practically impossible or excessively difficult³¹³. In other words, these prescription periods are, in principle, sufficient to enable a consumer to identify, prepare and pursue an action for restitution grounded on the unfairness of a contract term³¹⁴.

Nonetheless, the Court of Justice has also acknowledged that the practical application of such prescription periods must be sensitive to the nature of the contractual relationship at issue. In the context of long-term loan agreements, for instance, the Court has ruled that the limitation period may not start to run before the contract in question comes to an end, because such a limitation period regime deprive consumers of the possibility of claiming the return of payments made under terms contrary to that directive and of the opportunity to become aware of their rights before that period began to run or expired³¹⁵.

All that being said, it must equally be recognized that the principles of effectiveness and equivalence should not be the sole compass guiding the Court of Justice's reasoning in this field. The case law reveals a persistent concern to avoid transforming the legitimate aim of

³¹² See also Joined Cases C-776/19 to C-782/19, *BNP Paribas Personal Finance*, ECLI:EU:C:2021:470, para 38.

³¹³ Joined Cases C-80/21 to C-82/21, *D.B.P. (Crédit hypothécaire libellé en devises étrangères)*, nt. 299, paras 90-92: 'As regards the length of the limitation period to which a claim by a consumer for repayment of sums unduly paid on the basis of unfair terms within the meaning of Directive 93/13, it should be noted that the Court has already had occasion to rule on the compatibility with the principle of effectiveness of limitation periods shorter than that at issue in the main proceedings, of three and five years, which were imposed on actions seeking to assert the restitutionary effects of a finding that a contractual term was unfair. Provided that they are established and known in advance, those periods are, in principle, sufficient to allow the consumer concerned to prepare and bring an effective action. Thus, limitation periods of three to five years are not, in themselves, incompatible with the principle of effectiveness'. See also Joined Cases C-776/19 to C-782/19, *BNP Paribas Personal Finance*, nt. 312, para 41. See, more recently, Joined Cases C-811/21, C-812/21, C-813/21, *Caixabank (Prescription de remboursement des frais hypothécaires)*, ECLI:EU:C:2024:81.

³¹⁴ Cf the analysis of M. GUTOWSKI, nt. 263, p. 242.

³¹⁵ Joined Cases C-80/21 to C-82/21, *D.B.P. (Crédit hypothécaire libellé en devises étrangères)*, nt. 299, para 95: 'In that context, the Court held that loan agreements, such as that at issue in the main proceedings, are generally performed over long periods of time and, therefore, if the event which triggers the 10-year limitation period is any payment made by the borrower, which it is for the national court to ascertain, it cannot be ruled out that, at least in respect of some of the payments made, the limitation period will run even before the contract in question comes to an end, so that such a limitation period regime is liable systematically to deprive consumers of the possibility of claiming the return of payments made under terms contrary to that directive'.

consumer protection into a form of over-protection, which could unduly upset the balance between the interests of consumers and those of sellers and suppliers³¹⁶. In other words, effective protection of weaker parties must remain compatible with the other general principles of European private law, such as the principle of proportionality and the balancing principle³¹⁷.

A telling illustration of this balancing approach can be found in the jurisprudence interpreting Directive 97/7/EC on distance contracts³¹⁸. In that contest, indeed, the Court of Justice observed that ‘(...) although Directive 97/7 is designed to protect the consumer in the particular situation of a distance contract, it is not intended to grant him rights going beyond what is necessary to allow him effectively to exercise his right of withdrawal. Consequently, the purpose of Directive 97/7 and, in particular, the prohibition laid down in the second sentence of Article 6(1) and Article 6(2) thereof do not preclude, in principle, a legal provision of a Member State which requires a consumer to pay fair compensation in the case where he has made use of the goods acquired under a distance contract in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment’³¹⁹.

7. Commencement Of Prescription Period (Dies a quo): The ‘Modern Approach’

At the heart of any coherent set of rules on prescription periods lies a fundamental question concerning the criterion that determines when prescription begins to run.

In this regard, by the latter half of the twentieth century, many legal systems had grown increasingly uneasy with traditional approaches to prescription. The existing rules were often seen as rigid, unfair, or ill-suited to the realities of modern commerce and litigation³²⁰.

Indeed, reform movements across different jurisdictions gradually converged on a common direction: the ideal model should establish a general prescription period of roughly two or five years, which would not begin to run until the creditor knew, or could reasonably have known, the facts giving rise to the claim³²¹. This system would also be complemented by a maximum ‘long-stop’ period, calculated from an objective event such as the due date or the accrual of the claim³²².

³¹⁶ Cf N. REICH, nt. 309, pp. 141 et seq.

³¹⁷ Ibid.

³¹⁸ Case C-489/07, *Messner v Firma Stefan Krüger*, ECLI:EU:C:2009:502.

³¹⁹ Case C-489/07, *Messner v Firma Stefan Krüger*, nt. 318, paras 25-26.

³²⁰ See above § 6.1. See also C.M. BIANCA, *Diritto civile*, VII, *Le garanzie reali-la prescrizione*, nt. 281, pp. 567 et seq.

³²¹ R. ZIMMERMANN, ‘Introduction before Art 14:101’ in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, pp. 1826-1827.

³²² J.-S. BORGHETTI, ‘Prescription’, in *ZEuP*, 2016, 24, pp. 167–182; W. ERNST, ‘Das Verjährungsrecht des (D)CFR’ in O. REMIEN (eds.), nt. 289, pp. 67-91; R. ZIMMERMANN, ‘Introduction before Art 14:101’ in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, pp. 1828; ID., ‘Prescription’ in J. BASEDOW, K.J.

Modern non-legislative codifications have largely embraced this dual-period framework; a shorter, knowledge-dependent term and a longer, objective one³²³. The expiry of the short period of prescription usually depends on the creditor's awareness (or reasonable potential awareness) of both the debtor's identity and the facts underlying the claim. In fact, this standard is commonly referred to as the 'criterion of reasonable discoverability'. In contrast, the expiration of the long period of prescription is generally assessed independently of what the creditor knew or could have known, relying solely on objective factors³²⁴.

In this context, it is worth recalling that the short period of prescription and the concept of prescription itself primarily serve to protect the debtor by ensuring legal certainty, the introduction of the discoverability standard offers a crucial counterbalance that safeguards the creditor's legitimate interests. In other words, the emergence of the discoverability criterion has gone hand in hand with the broader movement toward shorter prescription periods³²⁵. More specifically, this development reflects a dual trend: expanding the range of cases in which a creditor's ignorance can be considered, while at the same time limiting excessive delays by replacing lack of knowledge with a test of reasonable discoverability.

Going further, as has been noted, there are two main ways to structure the dual system of prescription described above³²⁶. The first, adopted by the PECL and the DCFR, treats only the short period as a true prescription period. This is therefore referred to as the 'general' prescription period³²⁷.

Under Article 14:203 (1) of PECL, similarly to Article III.-7:203 (1) of DCFR, '[t]he general period of prescription begins to run from the time when the debtor has to effect performance or, in the case of a right to damages, from the time of the act which gives rise to the claim'. However, both set of rules suspend the running of this period while the creditor could not reasonably discover the relevant facts. As a matter of fact, Article 14:301 of the PECL held that '[t]he running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably know of: (a) the identity of the debtor; or (b) the facts giving rise

HOPT and R. ZIMMERMANN (eds), *The Max Plank Encyclopedia of European Private Law*, Oxford, 2012, p. 1308

³²³ J.-S. BORGHETTI, nt. 322, pp. 167–182; W. ERNST, 'Das Verjährungsrecht des (D)CFR' in O. REMIEN (eds.), nt. 289, pp. 67-91; R. ZIMMERMANN, 'Introduction before Art 14:101' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, pp. 1828.

³²⁴ R. ZIMMERMANN, 'Introduction before Art 14:101' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, pp. 1828.

³²⁵ Ibid.

³²⁶ Cf M.J. BONELL, 'Limitation Periods' in A. HARTKAMP, M. HESSELINK, E. HONDIUS, C. JOUSTRA, E. PERRON and M. VELDMAN, nt. 272, pp. 517-523.

³²⁷ See the analysis of R. ZIMMERMANN, *sub* Art 14:203: Commencement in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, p. 1843.

to the claim including, in the case of a right to damages, the type of damage'. Article III.-7:301 of DCFR follows the same logic, using slightly different wording. A similar approach has also been adopted by the Danish *forældelsesloven*³²⁸.

Suspension of the prescription period on the ground of reasonable discoverability, rather than opting to postpone its commencement on the same grounds, presents some practical advantages³²⁹.

First, even if discoverability were to determine commencement of the period of prescription, it would also have to be required that the obligation has come into existence and that performance is due³³⁰. Second, the idea that the period of prescription should not run against a creditor who could not reasonably be aware of the claim reflects a broader principle: a right must not prescribe if it is impossible for the creditor to pursue it (*contra non valentem agere non currit praescriptio*)³³¹.

A further aspect concerns the burden of proof. As noted by the English Law Commission, '[t]he date of discoverability is concerned with the knowledge of the [claimant] rather than the defendant ... In consequence it will commonly be more difficult and expensive for the defendant to provide evidence of the knowledge of the [claimant] at a particular date, than for the [claimant] to provide such evidence'³³².

A further distinction within the two-tier system concerns how legal instruments conceptualize the maximum limit beyond which prescription cannot be extended. Under Articles 14:307 of PECL and Article III:307 of DCFR, this maximum does not constitute a

³²⁸ A. FÖTSCHL, 'Das neue dänische Verjährungsrecht', in *Recht der internationalen Wirtschaft*, 2011, pp. 696–702, cf also F. PETERS and R. ZIMMERMANN, nt. 287, p. 306.

³²⁹ Cf the analysis of A. RUIZ ARRANZ, nt. 271, p. 188.

³³⁰ Ibid.

³³¹ Cf O. LANDO, E. CLIVE, R. ZIMMERMANN, *The Principles of European Contract Law*, Part III, Oxford, 2003, pp. 175-177; C. VON BAR and E. CLIVE, 'III.-7:301' DCFR, (full ed.) 2009, p. 1164; S. PATTI, 'Certezza e giustizia nel diritto della prescrizione in Europa', in *Riv. trim. dir. proc. civ.*, 2010, 64(1), pp. 21 et seq and C.M. BIANCA, *Diritto civile*, VII, *Le garanzie reali-la prescrizione*, nt. 281, pp. 569 who observes that '(...) [s]i è infatti affermato che il termine di prescrizione del diritto al risarcimento del danno da responsabilità professionale inizia a decorrere non già dal momento in cui la condotta del professionista determina l'evento dannoso, bensì da quello in cui la produzione del danno è oggettivamente percepibile e conoscibile da parte del danneggiato. Analogo riconoscimento si è avuto con riguardo al danno subito dal consumatore a causa di intesa concorrenziale, e, ancora, con riguardo al danno causato da protesto illegittimo o da omessa vigilanza da parte della Consob'.

³³² The Law Commission, Consultation Paper No 151: *Limitation of Actions*, 1998, p. 398. See also R. ZIMMERMANN, *sub* Art 14:301: Suspension in Case of Ignorance in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, pp. 1850 and N.H. ANDREWS, 'Reform of Limitation of Actions: The Quest for Sound Policy', in *Cambridge Law Journal*, 1998, 57(3), pp. 589-610.

separate prescription period. Instead, it sets an absolute ceiling, calculated from the same moment when the general prescription period begins to run³³³.

Other non-legislative codifications, such as the PICC and the CESL, adopt a different structure. They treat the long-stop limit as a second, autonomous prescription period, distinguishing between a ‘short’ and a ‘long’ (CESL) or a ‘general’ and a ‘maximum’ (PICC) period³³⁴. More precisely, Article 10.2 (1) of PICC establishes that “[t]he general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee’s right can be exercised’, while Article 10.2 (2) specifies that ‘[i]n any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised’.

In similar terms, Article § 199 (1) BGB establishes that ‘Die regelmäßige Verjährungsfrist beginnt, soweit nicht ein anderer Verjährungsbeginn bestimmt ist, mit dem Schluss des Jahres, in dem 1. der Anspruch entstanden ist und 2. der Gläubiger von den den Anspruch begründenden Umständen und der Person des Schuldners Kenntnis erlangt oder ohne grobe Fahrlässigkeit erlangen müsste’. Of course, the *Ultimo-Verjährung* (also referred to as *Jahresend-Verjährung* or *Silvester-Verjährung*) is a notable particularity of the German legal system³³⁵. According to the first paragraph of § 199 BGB, indeed, the standard prescription period does not begin at the exact moment when the legal conditions are fulfilled but rather at the end of the calendar year in which those conditions occur. This specifically German solution, which has no counterpart in other European or international systems, is intended to facilitate the practical determination of when prescription begins, since it may otherwise be difficult to identify the precise moment when the creditor acquired or should have acquired the requisite knowledge³³⁶. It also provides greater protection for the right-holder, who is spared the need for continuous monitoring throughout the year to avoid missing a deadline³³⁷. Nonetheless, a

³³³ R. ZIMMERMANN, *sub* Art 14:203: Commencement, in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, p. 1843.

³³⁴ Cf R. ZIMMERMANN, *sub* Art 14:203: Commencement in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, p. 1843 and E. ARROYO I AMAYUELAS and A. VAQUER, ‘Prescription in the Proposal for a Common European Sales Law’, in *ERCL*, 2013, 9(1), pp. 38–60.

³³⁵ Cf R. ZIMMERMANN, *sub* Art 14:203: Commencement in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, p. 1846; M. TESCARO, ‘L’auspicabile ammodernamento del diritto della prescrizione italiano alla luce del confronto con altre esperienze e specialmente con quella tedesca a venti anni dalla *Schuldrechtsmodernisierung*’ in C. GRANELLI, S. PATTI and P. SIRENA (eds.), Torino, 2023, pp. 181 et seq.

³³⁶ M. TESCARO, ‘L’auspicabile ammodernamento del diritto della prescrizione italiano alla luce del confronto con altre esperienze e specialmente con quella tedesca a venti anni dalla *Schuldrechtsmodernisierung*’ in C. GRANELLI, S. PATTI and P. SIRENA (eds.), nt. 335, p. 207 and O. REMIEN, ‘Schlusswort: Übereinstimmungen und Unterschiede in den Kernfragen der Verjährung in der europäischen Privatrechtsentwicklung’ in O. REMIEN (eds.), nt. 289, p. 393.

³³⁷ Cf J. NEUNER, *Allgemeiner Teil des Bürgerlichen Rechts*, 12th ed., München, 2020, p. 287.

part of German legal scholarship criticizes this approach for introducing an inequitable deviation from the ordinary principles governing the commencement of prescription periods³³⁸.

Against this background, a contrasting model is found in the UNCITRAL Convention on the Limitation Period in the International Sale of Goods³³⁹. The Convention applies only to contractual claims between parties to international sales contracts and establishes a uniform four-year prescription period³⁴⁰. This prescription period begins when the claim accrues and is not suspended on account of the creditor's lack of knowledge. The UNCITRAL system thus adheres to an entirely objective approach³⁴¹.

As previously observed, the Court of Justice has progressively aligned with the modern approach. Indeed, it has consistently held that prescription periods comply with the principle of effectiveness only when consumers have had a genuine opportunity to become aware of their rights before the period begins or expires³⁴². Accordingly, the Court has ruled that national provisions establishing the following are incompatible with the Unfair Contract Terms Directive: a three-year period beginning on the date of full performance of the contract³⁴³; a five-year period starting from the signing of the contract³⁴⁴; a five-year period running from acceptance of the loan offer³⁴⁵; a three-year period starting from the date of payment in cases of unjust enrichment³⁴⁶; a ten-year period beginning from each performance, even if the consumer could not at that time assess the unfairness of the term³⁴⁷.

³³⁸ Cf D. LOOSCHELDERS, 'Verjährungsbeginn und – frist im subjektiv-objektiven System sowie die Wirkung von Treu und Glauben' in O. REMIEN (eds.), nt. 289, pp. 189 et seq.

³³⁹ Cf R. ZIMMERMANN, 'Introduction before Art 14:101' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 203, pp. 1830 et seq; K. SPIRO, 'Befristung und Verjährung der Ansprüche nach dem Wiener Kaufrechtsübereinkommen' in H. HOYER and W. POSCH (eds.), *Das einheitliche Wiener Kaufrecht*, 1992, Wien, pp. 195–206; U. MAGNUS, 'Limitation in the International Arena—The United Nations Limitation Convention for International Sales' in O. REMIEN (eds.), nt. 289, pp. 94–106; M. MÜLLER-CHEN, 'Commentary on the United Nations Convention on the Limitation Period in the International Sale of Goods' in I. SCHWENZER and U.G. SCHROETER (eds.), Schlechtriem & Schwenger. *Commentary on the Convention on the International Sale of Goods (CISG)*, 5th ed., Oxford, pp. 1288–1337.

³⁴⁰ More precisely, Article 8 establishes that: 'The limitation period shall be four years'.

³⁴¹ R. ZIMMERMANN, 'Introduction before Art 14:101' in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, pp. 1830 et seq. More precisely, Article 9 establishes that: 'Subject to the provisions of articles 10, 11 and 12 the limitation period shall commence on the date [on] which the claim accrues'.

³⁴² Cf Case C-473/00, *Cofidis*, nt. 264, para 36.

³⁴³ Cases C-698/18 and C-699/18, *SC Raiffeisen Bank SA and BRD Groupe Société Générale SA v JB and KC*, nt. 268, para 18.

³⁴⁴ Joined Cases C-224/19 and C-259/19, *CY and Others v Caixabank SA and Banco Bilbao Vizcaya Argentaria SA*, nt. 274, paras 88–91.

³⁴⁵ Joined Cases C-776/19 to C-782/19, *BNP Paribas Personal Finance*, nt. 312, para 47.

³⁴⁶ Case C-485/19, *LH v Profi Credit Slovakia s.r.o.*, nt. 274, paras 64–66.

³⁴⁷ Joined Cases C-80/21 to C-82/21, *D.B.P. (Crédit hypothécaire libellé en devises étrangères)*, nt. 291, paras 97–100.

However, the precise *dies a quo* remains unresolved. Several alternatives can be identified within the context of the Unfair Contract Terms Directive. The prescription period could start: from the moment the consumer submits a claim based on the unfairness of a term; from the declaration by the consumer acknowledging awareness of the effects of nullity; from the judicial determination of the consumer's degree of knowledge concerning those effects; or from the date of the final judgement³⁴⁸.

More recently, the question has arisen whether asymmetrical prescription periods could be justified, specifically whether the consumer's period of prescription should begin earlier than the seller or supplier³⁴⁹. However, this possibility has been rejected by the Court of Justice, as already stigmatized by Advocate General Kokott, in her Opinions in *Cofidis* and *OPR-Finance*³⁵⁰, observing that it would be inconsistent for a seller or supplier to enjoy a longer period to enforce payment than the consumer has to challenge the validity of the contract³⁵¹.

7.1. Reasonable Discoverability Between Objective And Subjective Criteria

As previously noted, the notion of reasonable discoverability has increasingly become the prevailing criterion for determining the effective commencement of a prescription period. In this respect, it is worth recalling that even within domestic legal systems we can identify provisions that move in a similar direction.

³⁴⁸ Cf E. BARGELLI, nt. 184, p. 449.

³⁴⁹ Case C-28/22, *TL and WE v Liquidator of Getin Noble Bank S.A.*, nt 184. See, in this regard, E. BARGELLI, nt. 184, pp. 447 et seq.

³⁵⁰ Opinion Advocate General Kokott, 14 November 2019, ECLI:EU:C:2019:975.

³⁵¹ Opinion Advocate General Kokott, nt. 350, paras 63-67: 'However, the conclusion must be different if national time bars or limitation periods lead to an asymmetry of the possibilities for bringing an action, that is to say if a creditor can assert his payment claims for longer than the consumer can assert the invalidity of the contract. (...) In the present cases, the mere fact that the national provisions provide for time bars of 3 years and limitation periods of 5 years does not in itself constitute an infringement of the principle of effectiveness. Three or 5 years may in principle constitute a sufficiently long period of time for consumers to assert claims by filing an action before a national civil court in the event that the contractual relationship is disrupted. However, this cannot be the case if, due to the imbalance described (...) above, the consumer does not or cannot assert that the creditor has failed to comply with its obligations, even if merely as a means of defence in an action for payment brought against him. (...) [T]he creditor will generally be able to assert payment claims after such periods have expired, as such claims do not arise until the instalment to be paid by the borrower falls due and the limitation period for them therefore does not begin to run until that point in time. The consumer is therefore at risk of being ordered to pay the contractually agreed sums without it being possible to verify compliance with the creditor's obligations and, if necessary, to impose penalties. This asymmetry — which is comparable to that in the situation in a previous *Cofidis* judgment — is capable of impairing the effectiveness of the protection afforded by the Consumer Credit Directive. This risk is demonstrated by the facts of the present *Cofidis* case: the creditor brought an action against the consumer a few days after the five-year limitation period expired. In the light of such an imbalance, civil penalties limited by time bars or limitation periods would also not be effective, dissuasive and proportionate within the meaning of Article 23 of the Consumer Credit Directive'.

For instance, Article 1442 of the Italian *Codice civile* provides that the prescription period for an action seeking the annulment of a contract begins to run from the day on which duress ceases, or from the day on which fraud or mistake is discovered, or, where duress has been exercised against a third party (Article 1436 of the Italian *Codice civile*³⁵²), from the day on which the contracting party becomes aware that such duress has ceased. In these cases, the commencement of the prescription period is linked to the subjective knowledge of the party concerned³⁵³. This choice is justified by the need to ensure the effective protection of the contracting party in respect of the defect in consent and to guarantee that the party acts with full knowledge of it³⁵⁴.

Similarly, under Article 2224 of the French *Code civil* ‘Les actions personnelles ou mobilières se prescrivent par cinq ans à compter du jour où le titulaire d'un droit a connu ou aurait dû connaître les faits lui permettant de l'exercer’³⁵⁵. This provision thus introduces a subjective element into the running of the prescription period and has been hailed by part of the legal scholarship as one of the most significant innovations of the reform legislation³⁵⁶. Another part of the doctrine, however, considers that such a rule renders the prescription period somewhat ‘glissant’ and ‘flottant’ and therefore only partially effective in addressing the problems that existed under the previous text³⁵⁷.

Although the formulation may appear problematic, it undoubtedly carries considerable significance, as it ultimately embraces the principle expressed in the maxim *contra non valentem agere non currit praescriptio*, which is reaffirmed, in a more elaborate form, in Article 2234: ‘La prescription ne court pas ou est suspendue contre celui qui est dans l'impossibilité d'agir par suite d'un empêchement résultant de la loi, de la convention ou de la force majeure’³⁵⁸.

³⁵² More precisely, Article 1436 of the Italian *Codice civile* stipulates that: ‘La violenza è causa di annullamento del contratto anche quando il male minacciato riguarda la persona o i beni del coniuge del contraente o di un discendente o ascendente di lui’.

³⁵³ More precisely, Article 1442 of the Italian *Codice civile* establishes that: ‘Quando l'annullabilità dipende da vizio del consenso o da incapacità legale, il termine decorre dal giorno in cui è cessata la violenza, è stato scoperto l'errore o il dolo, è cessato lo stato d'interdizione o d'inabilitazione, ovvero il minore ha raggiunto la maggiore età’.

³⁵⁴ Cf the analysis of G. MAGRI, nt. 262, p. 193. See also L. CASTELLI, *Prescrizione e impedimenti di fatto*, Milan, 2018.

³⁵⁵ See the analysis of G. MAGRI, nt. 262, p. 215.

³⁵⁶ Cf L.X. LICARI, *Le nouveau droit français de la prescription extinctive à la lumière d'expériences étrangères récentes ou en gestation (Louisiane, Allemagne, Israël)*, in RIDC, 2009, p. 744.

³⁵⁷ Cf A. HONTEBEYRIE, ‘Prescription extinctive’, in *Encyclopédie Dalloz.*, p. 34.

³⁵⁸ See the analysis of G. MAGRI, nt. 262, p. 215. Cf also P. CASSON, *Le nouveau régime de la prescription* in P. CASSON and P. PIERRE (eds.), *La réforme de la prescription en matière civile*, Paris, 2010, p. 32.

The modern focus lies, in other words, on whether a creditor could, with reasonable diligence, have become aware of the circumstances giving rise to the claim. Quite interestingly, in this context, the CESL adopted the term ‘awareness’ instead of ‘knowledge’³⁵⁹. As a matter of fact, Article 180 (1) of CESL establishes that ‘[t]he short period of prescription begins to run from the time when the creditor has become, or could be expected to have become, *aware* of the facts as a result of which the right can be exercised’³⁶⁰. In this regard, someone has argued that the linguistic shift of CESL appears to draw inspiration from Article 10 of Directive 85/374/EEC concerning liability for defective products³⁶¹.

As has been observed, reasonable discoverability can work in two different ways. The first option is to consider reasonable discoverability as a prerequisite for the commencement of prescription³⁶². According to certain scholars, this approach enables a more objective assessment of the moment of discoverability, taking into account external circumstances beyond the creditor’s mere inaction³⁶³. This approach proves particularly suitable in cases where the claim depends on a legal assessment rather than a purely factual event, as in restitutionary claims following the declaration of an unfair contract term in business-to-consumer contracts³⁶⁴. In these situations, the limitation period does not begin until the creditor becomes aware, or can reasonably be expected to be aware, of the unfair character of the contract term that justifies restitution³⁶⁵. Yet, as noted above, it nevertheless remains uncertain

³⁵⁹ Cf R. ZIMMERMANN, *sub* Art 14:301: Suspension in Case of Ignorance in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, p. 1848.

³⁶⁰ Cf R. ZIMMERMANN, *sub* Art 14:301: Suspension in Case of Ignorance in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, p. 1844.

³⁶¹ Cf R. ZIMMERMANN, *sub* Art 14:301: Suspension in Case of Ignorance in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, p. 1848. More precisely, Article 10 of 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 stipulates that: ‘1. Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer. 2. The laws of Member States regulating suspension or interruption of the limitation period shall not be affected by this Directive. Article 11. Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer’.

³⁶² See Article 10.2 (1) PICC. By contrast, see Article 14:203 (1) of PECL and Article III.-7:203 (1) of DCFR.

³⁶³ Cf the analysis of A. RUIZ ARRANZ, nt. 271, p. 188.

³⁶⁴ Cf the analysis of A. RUIZ ARRANZ, nt. 271, pp. 188 et seq.

³⁶⁵ *Ibid.* See, in this regard, more recently Case C-484/21, *Caixabank SA*, ECLI:EU:C:2024:360.

how the reasonable discoverability criterion operates under the Unfair Contract Terms Directive³⁶⁶.

Conversely, other authors contend that structuring ignorance as a ground for suspension of the limitation period is preferable. This solution results in a structurally simpler system, governed by a single period subject to a maximum duration rather than by two separate prescription periods³⁶⁷. It also accommodated practical scenarios in which lack of knowledge arises *after* the running of prescription has already started – for instance, where the creditor or debtor dies and knowledge of relevant facts is temporarily lost³⁶⁸. In such cases, suspension offers a more flexible tool for preserving the creditor's position without disrupting the overall coherence of the law of prescription³⁶⁹.

In this context, it is worth remembering that attributing decisive weight to the creditor's knowledge nevertheless poses obvious difficulties³⁷⁰. Excessive reliance on a subjective element risk indefinitely postponing the beginning of the limitation period, undermining both legal certainty and the debtor's legitimate expectation of finality. The Court of Justice has already recognized this issue in several cases concerning the liability of EU institutions³⁷¹.

In *Holcim*, the Court of Justice made clear that, for the purpose of determining when the limitation period begins to run, it is in fact irrelevant that the Community's unlawful conduct was only later established by a ruling of that Court³⁷². Likewise, in *Kampffmeyer*, the Court of Justice held that Article 215 of the Treaty of Rome did not preclude an action for damages in respect of foreseeable harm, even if such harm cannot yet be precisely quantified³⁷³. Advocate General Mengozzi further emphasized that 'to argue otherwise would ultimately put a claimant

³⁶⁶ Cf E. BARGELLI, nt. 184, p. 449.

³⁶⁷ Cf M.J. BONELL, 'Limitation Periods' in A. HARTKAMP, M. HESSELINK, E. HONDIUS, C. JOUSTRA, E. PERRON and M. VELDMAN (eds), nt. 272, p. 723. Cf also the analysis of A. RUIZ ARRANZ, nt. 271, pp. 188 et seq.

³⁶⁸ M. TESCARO, 'L'auspicabile ammodernamento del diritto della prescrizione italiano alla luce del confronto con altre esperienze e specialmente con quella tedesca a venti anni dalla *Schuldrechtsmodernisierung*' in C. GRANELLI, S. PATTI and P. SIRENA (eds.), nt. 335, pp. 206 et seq.

³⁶⁹ Cf the analysis of A. RUIZ ARRANZ, nt. 271, pp. 188 et seq.

³⁷⁰ See M. MAURO, 'Prescrizione ed effettività, nel dialogo tra Cassazione e Corti europee', in *Pers. e merc.*, 2014, pp. 146 and 148 et seq.

³⁷¹ See, *inter alia*, Case C-282/05 P, *Holcim (Deutschland) AG v. Commissione*, ECLI:EU:C:2007:226.

³⁷² Case C-282/05 P, *Holcim (Deutschland) AG v. Commissione*, nt. 371, para 31: 'In the present case, however, the damaging effects of the Cement decision arose vis-à-vis the applicants predecessors as soon as they were ordered to pay a fine. Those orders were coupled with the option, made available in order to avoid having to pay the fines immediately, of providing bank guarantees. Contrary to what is submitted by the applicant, the damaging effects of the Cement decision therefore did not arise when the Court of First Instance annulled that decision. It is in fact irrelevant, as regards the starting point of the period of limitation, that the Community's unlawful conduct was established by a ruling of that Court'.

³⁷³ Joined Cases C-56/74 e 60/74, *Kampffmeyer*, ECLI:EU:C:1976:78, para 6.

itself in the position of being able to cause time to run or not run for the purposes of the limitation period. Indeed, that period would not run until the claimant had brought an action (for annulment or to establish liability, or both) and secured a finding that the institutions conduct was unlawful)³⁷⁴.

All in all, it can be argued that although a judicial finding of a wrongful act is indeed a necessary precondition for establishing liability, it does not in itself affect the *existence* of that liability or the commencement of the prescription period³⁷⁵. By analogy, a judicial declaration confirming the unfairness of a contract term cannot, in principle, influence, when the limitation period for a restitutionary claim begins. A later judgement of the Court of Justice reaffirmed this reasoning, clarifying that a purely subjective approach – one that ties the commencement of prescription to the individual perception of damage – would be inconsistent with the principle of legal certainty. Accordingly, the limitation period for actions seeking compensation for losses arising from an unlawful regulation begins to run when that regulation starts producing its harmful effects³⁷⁶.

Domestic case law, however, reveals persistent divergences regarding the relationship between contractual invalidity and the corresponding restitutionary actions. The prevailing view in Italian jurisprudence holds that the prescription period begins to run on the date of payment, not on the date when the judgment declaring the underlying contract null and void becomes final³⁷⁷. A minority view, on the contrary, argues that as long as the contract has not been definitively invalidated, the right of restitution cannot yet be exercised, and the prescription period should therefore only start running from the moment the judgement becomes final³⁷⁸.

Yet this latter interpretation is difficult to reconcile with the case law of the Court of Justice. The Court has expressly recognized that prescription periods are compatible with restitutionary claims arising from the annulment of contracts on grounds of unfairness. If this is so, the running of the prescription period cannot depend on the exercise of the action that seeks to establish such unfairness, which is not subject to prescription periods. Otherwise, the

³⁷⁴ Opinion of Advocate General Mengozzi, 11 January 2007, para 30.

³⁷⁵ See M. MAURO, nt. 370, pp. 148 et seq.

³⁷⁶ Cf Case C-51/05 P., *Commission of the European Communities v Cantina sociale di Dolianova Soc. coop. arl and Others*, ECLI: ECLI:EU:C:2008:409.

³⁷⁷ See M. MAURO, nt. 370, pp. 149-150 and the case law mentioned.

³⁷⁸ Ibid.

restitutionary claim would effectively become imprescriptible, thereby upsetting the balance between the protection of the creditor's rights and the legitimate interests of the debtor³⁷⁹.

All that being said, an exceptional situation arises where the legal context is so complex and uncertain that it would be unreasonable to expect the creditor to initiate proceedings. German law captures this under the concept of *Unzumutbarkeit der Klageerhebung*, literally the 'unreasonableness of bringing and action'³⁸⁰. In such circumstances, prescription does not begin to run until the legal situation becomes sufficiently clear to justify taking action. The underlying rationale is that the creditor should not be required to act when even a well-informed third party would have refrained from filing a claim³⁸¹.

This exception departs from the general rule that focuses on factual knowledge, allowing a temporary adjustment based on legal uncertainty³⁸². However, because it constitutes an extraordinary deviation from the ordinary mechanism of prescription, courts interpret it restrictively. The central issue then becomes whether and how this notion might apply to restitutionary actions arising from the unfairness of contractual terms – a question that is primarily legal rather than factual in nature.

Traditionally, the doctrines of awareness and reasonable discoverability have been confined to factual elements – that is, to the creditor's knowledge of the facts giving rise to the claim³⁸³. Under this view, prescription runs even where the creditor is mistaken about the legal implications of those facts, since a mistake of law does not interrupt or suspend prescription periods³⁸⁴. On this reading, a consumer's awareness of the unfairness of a contractual term need not be confirmed by a judicial decision. What matters is the point at which the consumer, exercising reasonable diligence, could recognize that a claim for restitution existed. From that perspective, awareness could, in theory, arise at the very moment of payment made under the unfair contract term.

³⁷⁹ See M. MAURO, nt. 370, p. 150: 'Un punto di equilibrio sembra essere stato suggerito dalla Cassazione in una sentenza del 2011 resa sul rapporto tra azione revocatoria e domanda di risarcimento del danno. Secondo i giudici, "affinché si dispieghi l'effetto interruttivo/sospensivo della prescrizione del diritto al risarcimento del danno è sufficiente l'instaurazione di un diverso giudizio, purché *inscindibilmente connesso* a quello volto alla tutela di tale diritto"'.
³⁸⁰ Cf R. ZIMMERMANN, *sub* Art 14:303: Suspension in Case of Impediment Beyond Creditor's Control in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, pp. 1857 et seq.

³⁸¹ *Ibid.*

³⁸² Cf R. ZIMMERMANN, *sub* Art 14:303: Suspension in Case of Impediment Beyond Creditor's Control in N. JANSEN and R. ZIMMERMANN (eds.), nt. 103, pp. 1843 et seq.

³⁸³ *Ibid.*

³⁸⁴ Cf R. WINTGEN, 'Article 10.2' in S. VOGENAUER (eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed., Oxford, 2015.

7.2. *The Assessment Of Reasonable Discoverability*

With regard to the criteria for assessing reasonable discoverability, it is important to emphasize that, as a rule, actual knowledge is equated with the possibility of knowledge, which rests on two principal parameters³⁸⁵.

The first is objective in nature and corresponds to the generally accepted scientific and professional standards of the time. The second is subjective and is grounded in the right-holder's duty to inform themselves, the diligent fulfilment of which must be assessed by reference to the standard of the *homo eiusdem professionis et condicionis*³⁸⁶.

Evidently, the determination of such criteria would entail a significant procedural burden, with all the detrimental consequences that could arise both for the legal system as a whole and for the parties themselves. To avert this risk, the judiciary may complement the statutory framework and, in certain context where litigation is particularly frequent, introduce rebuttable presumptions of lack of knowledge operating in favor of both the creditor and the debtor³⁸⁷.

On this issue, French legal scholarship has identified a problematic aspect linked to the application of Article 2224 of the French *Code civil*, which arises where the party is only partially aware of the facts forming the basis of their right³⁸⁸. In such circumstances, it would appear that, so long as the knowledge remains too incomplete to allow the right to be effectively exercised, it cannot be regarded as sufficient to trigger the running of the limitation period³⁸⁹. However, the party must take steps to fill any informational gaps, since culpable ignorance (*ignorance blâmable*) must be treated as equivalent to actual knowledge³⁹⁰.

In this context, culpable ignorance occurs where a person who is unaware of the relevant fact ought to have known it by exercising ordinary diligence, that is the degree of care expected of a *bonus pater familias* in similar circumstances³⁹¹.

In conclusion, the assessment of whether the fact was capable of being known should be made, at least in principle, in abstract rather than in concrete terms. Nevertheless, particularly in more sensitive cases requiring enhanced protection of the right-holder (such as that one involving business-to-consumer contracts), it would be preferable to assess culpable ignorance in concrete terms.

³⁸⁵ See M. MAURO, nt. 370, p. 152.

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ See above § 7.1. Cf also the analysis of G. MAGRI, nt. 262, p. 215.

³⁸⁹ See G. MAGRI, nt. 262, p. 216.

³⁹⁰ Ibid.

³⁹¹ See G. MAGRI, nt. 262, p. 216; A. HONTEBEYRIE, nt. 357, p. 37.

8. *The Length Of Prescription Periods*

As previously noted, both the PECL and the DCFR recognize a single general limitation period of three years (Article 14:201 of PECL; Article III.-7:203 of DCFR), which may be suspended in accordance with the criterion of reasonable discoverability (Article 14:301 of PECL; Article III.-7:301 of DCFR). However, in no case may the limitation period be extended beyond ten years³⁹².

By contrast, the CESL and the PICC adopt a dual-period regime, providing for two limitation periods running concurrently for each claim: a short period, the commencement of which depends upon the criterion of reasonable discoverability, and a long period, which begins to run essentially from the same objective point in time as the general limitation period under the PECL and DCFR (Article 179 of CESL; Article 10.2 of PICC)³⁹³.

Naturally, the determination of a limitation period falls within the discretion of each domestic legal system. Nevertheless, a period that is either excessively lengthy or unduly restrictive may adversely affect the effective protection of the rights at stake. With regard to the former, reference may be made to *Oleksandr Volkov v Ukraine*, in which the absence of a limitation period was held to constitute a breach of the principle of legal certainty enshrined in Article 6 of the ECHR³⁹⁴.

In this regard, the Court of Justice has traditionally assessed the reasonableness of temporal constraints on a case-by-case basis, taking into account a range of contextual factors. As a result, there is no universally applicable benchmark for determining whether a specific time limit or prescription period is reasonable. For example, a two-month period for challenging an arbitral award following its notification was held by the Court to be reasonable, as it afforded consumers sufficient time to consider the grounds for challenge and to prepare an application for annulment³⁹⁵. The Court also emphasized that the national rule - providing that the time limit began to run from the date of notification - ensured that consumers were not caught unaware, with the limitation period expiring without their knowledge of the consequences of an unfair arbitration clause³⁹⁶.

³⁹² See above § 7.

³⁹³ See above § 7.

³⁹⁴ ECHR, 9 January 2013, no 21722/11, *Oleksandr Volkov v. Ukraine*.

³⁹⁵ Case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira*, nt. 274, paras 44-46.

³⁹⁶ Case C-327/00, *Santex*, ECLI:EU:C:2003:109, para 55. Most recently, the same line of reasoning is followed by Cases C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco y Caixabank*, nt. 53, where it has been established that Article 6(1) ‘must be interpreted as precluding the limitation period for an action for restitution of costs that were paid by the consumer, at the time of conclusion of a contract with a seller or supplier, pursuant to a contractual term that has been found to be unfair by a final judicial decision given subsequent to the payment of those costs, from beginning to run on the date

Conversely, in *Banco Español*, a twenty-day time limit for opposing a payment order was regarded as ‘particularly short’³⁹⁷. The Court observed that the requirement of legal representation and the associated costs could dissuade consumers from exercising their rights within such a restricted period³⁹⁸.

Similarly, in the *BBVA* case, which concerned a transitional provision introducing a new right to contest mortgage enforcement proceedings based on unfair contract terms, the Court held that a four-week period for filing an objection in pending cases was, in principle, reasonable and proportionate³⁹⁹. However, it nonetheless found that consumer protection was undermined, as individuals were informed of this right solely through publication in the Official Journal, without any personal notification. Consequently, the time limit began to run from the day following publication of the new law, creating a serious risk that consumers might lose their right to act before becoming aware of it⁴⁰⁰. The Court therefore concluded that such a rule compromised the principle of effectiveness and, by extension, the Unfair Contract Terms Directive - a position later reaffirmed in the *Andriciuc* judgment⁴⁰¹.

In conclusion, according to the prevailing view, the assessment of a prescription period’s effectiveness must not be undertaken in abstract terms. Rather, it must be determined concretely whether the prescribed time limit has, in practice, impaired the exercise of the right to the extent of nullifying it. In this context, the crucial question is whether there exists a reasonable relationship of proportionality between, on the one hand, the individual whose guaranteed right has been curtailed, and, on the other, the legitimate objective of ensuring legal certainty.

9. Preliminary Conclusions

The debate surrounding the Unfair Contract Terms Directive, and more specifically its application to foreign currency linked loans, occupies a particularly sensitive position within European contract law. It brings to the fore the complex issue of contractual restitutions where a contract is annulled in its entirety on grounds of unfairness — an area that, as some scholars have observed, remains ‘virtually unknown in European contract law’. The central question,

of that payment, irrespective of whether that consumer was or could reasonably have been aware of the unfairness of that term at the time of that payment, or before that term was found to be void by that decision’.

³⁹⁷ C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:349, para 36.

³⁹⁸ *Ibid.*

³⁹⁹ Case C-8/14, *BBVA SA v Pedro Peñalva López e a.*, ECLI:EU:C:2015:731.

⁴⁰⁰ Case C-8/14, *BBVA SA v Pedro Peñalva López e a.*, nt. 399, paras 30-31, 33-41.

⁴⁰¹ Case C-186/16, *Andriciuc*, ECLI:EU:C:2017:703.

therefore, concerns the legal framework governing restitutionary claims arising from such annulments.

Two main interrelated questions arise in this context. The first concerns whether the professional may recover amounts exceeding the principal originally advanced — in particular, whether the restitution of default interests is permissible. The second concerns whether the consumer, beyond obtaining repayment of the instalments already made, might also claim further restitution or compensation extending simple reimbursement.

With regard to the first question, the Court of Justice has taken a restrictive stance towards professionals. It has ruled that Articles 6(1) and 7(1) of the Directive preclude a national interpretation allowing the credit institution to seek compensation from the consumer exceeding the return of the principal disbursed under the contract.

This position, however, appears to blur two distinct legal concepts: on the one hand, the economic premise that credit is never granted gratuitously in market conditions; on the other, the principle of natural fruitfulness of money, applicable within the law of restitution and often tied to the *accipiens*' good or bad faith. The Court's reasoning thus seems to treat the recoverability of default interests as though governed by the general restitutionary rule according to which the *solvens* may reclaim the natural or legal fruits of performance only where good faith so permits.

The foundation of Court of Justice approach arguably lies also in the traditional defence of illegality. Across both civil law and common law systems - albeit in different forms - it is a well-established principle that *illegality* precludes claims for unjustified enrichment. Nevertheless, most legal systems confer discretion on the court to assess, in light of the specific circumstances, whether restitution would frustrate the normative purpose of the infringed provision. Only where that is the case, the rule of *soluti retentio* applies.

Ultimately, therefore, the analysis must turn to the underlying policy of the Unfair Contract Terms Directive itself. Thus, from this policy perspective, two complementary rationales can be discerned. The first may be characterized as 'commutative, not redistributive'. The second may be described as 'market-rectifying, not rationalizing', reflecting the Directive's *ex post* corrective function, at least as far individual mechanisms of control are concerned: it aims to neutralize the 'significant imbalance' created by unfair terms, not to impose punitive consequences beyond that aim.

Turning to the second issue - whether the consumer may recover beyond the instalments already paid - the question is more nuanced. There remains considerable uncertainty as to whether a credit institution may be required to disgorge the profits obtained during the

contract's execution. Such a claim would struggle to fit within the conceptual boundaries of unjust enrichment, as the bank cannot easily be framed as a party who has consciously interfered with another's affairs. Conversely, there is stronger ground for recognizing a consumer's right to damages, where actual loss can be shown.

The final aspect concerns prescription, which forms an integral part of the legal architecture of restitutionary remedies. Limitation periods determine, in practice, the extent to which the Directive's protective purpose is realized.

Where a contract has been at least partially performed, restitution serves to restore the legal and factual position the consumer would have occupied had the unfair term never existed. This issue is particularly pressing in long-term credit relationships, such as foreign currency loans. In this regard, the Court has clarified that the limitation period may not begin to run before the contract has come to an end, since an earlier starting point would deprive consumers of the opportunity to claim repayment of sums paid under terms contrary to the Directive, or even of the chance to become aware of their rights before the period expired.

It may be argued that, in this context, a balanced approach is preferable and it requires avoiding automatic solutions. On the one hand, the *modern approach* to prescription - anchored in subjective evaluation - suggests that prescription periods should be dependent upon the moment when the consumer actually knew, or ought reasonably to have known, of their right, thereby giving effect to the principle *contra non valentem agere non currit praescriptio*. On the other hand, awareness might, in principle, arise before a final judicial decision on unfairness is reached or even at the time of payment. Indeed, to hold that prescription could automatically begin to run only once the consumer has initiated proceedings or obtained a final judgment would, however, risk rendering restitutionary claims effectively imprescriptible - an outcome inconsistent with the former case law of the Court of Justice with regard to the Unfair Contract Terms Directive.

CONCLUSION

TABLE OF CONTENTS: 1. The Unfair Contract Terms Directive: Between Rationales And Structure – 2. The Consequences Of The Unfairness Of Contract Terms In Business-To-Consumer Contracts – 2.1. Partial Invalidity And Contract Supplementation – 2.2. Total Invalidity And Contractual Restitutions – 3. *De Iure Condendo*: A Future Perspective

1. The Unfair Contract Terms Directive: Between Rationales And Structure

A rigorous analysis of the structure and functions of the Unfair Contract Terms Directive usefully refocuses attention on the role that consumer protection and the deterrent effect exerted on sellers and suppliers against the use of unfair terms are meant to play within its framework. It follows that solutions which maximize consumer protection – ultimately amounting to overprotection, insofar as they extend beyond shielding consumers from unfair terms – cannot be justified in the context of the Unfair Contract Terms Directive where they undermine the very functioning of the market¹. Such an approach would also run counter to the understanding that the Directive, as an instrument of commutative justice, was not designed to generate redistributive effects between professionals and consumers².

With regard to the deterrence exerted on sellers and suppliers, it must be borne in mind that the Directive was strongly conceived as an instrument of *ex post* market correction rather than *ex ante* market rationalization. Consequently, the need for deterrence, at least as far as individual *ex post* mechanism of control is concerned (Article 6), cannot be transformed into a demand for prevention³.

In conclusion, overburdening the Directive with purposes it was not intended to pursue – by continually intensifying the consequences for sellers and suppliers who insert unfair terms into contracts – does not in fact ensure the absence of such terms in business-to-consumer contracts. Rather, it clashes with the Directive's very structure and sits uneasily with national legal traditions.

2. The Consequences Of The Unfairness Of Contract Terms In Business-To-Consumer Contracts

2.1. Partial Invalidity And Contract Supplementation

¹ See Chapter 1, Part I, § 1.3..

² See Chapter 1, Part I, § 2.1..

³ See Chapter 1, Part I, § 2.2..

A restrictive reading of the Unfair Contract Terms Directive by the Court of Justice with regard to the possibility of supplementing the contract following its partial invalidity is once again grounded in the perceived need to deter professionals. Yet there exist compelling systematic reasons to conclude that the supplementation of contracts is not only justified but cannot be confined to the supplementary provisions of national law without generating unjustified disparities⁴. This direction is likewise supported by non-legislative codifications and by national legal systems when viewed through a comparative lens⁵.

The invalidity which generally affect unfair contract terms has been characterized as serving a *protective* function. Therefore, it is generally qualified as necessarily *partial* invalidity, which implicitly reflects the notion that the consumer's primary interest lies in preserving the contract – particularly given the *unfavorable consequences* that may arise from the invalidity of the agreement in its entirety. This interest would be systematically frustrated whenever the unfair term concerns an essential contract term⁶. Second, the statutory benchmark for assessing the unfairness of a contractual term is the very default rule that the professional has derogated from; it is therefore difficult to justify attributing such central role to default rules at the stage of determining unfairness, only to deny them relevance when addressing the consequences of such unfairness⁷. Third, denying the possibility to supplement the contract after a clause has found to be unfair, a paradoxical incentive structure would emerge; professionals would be better off inserting unfair terms relating to essential aspects of the contract rather than unfair terms concerning ancillary aspects⁸.

2.2. Total Invalidity And Contractual Restitutions

It is precisely in situations where the contract cannot continue into existence that it becomes all the more important to characterize nullity as a legal remedy, and therefore subject to the principles of proportionality and reasonableness⁹. It is worth recalling that even in cases involving the Public Administration and undue payments received by individuals – who may legitimately have relied on the finality of the performance provided – legal systems have not, as a rule, denied the *solvens* the possibility of recovering what was performed. Rather, they

⁴ See Chapter 2, Part III, § 13.1.; 13.2.; 13.3..

⁵ See Chapter 2, Part III, § 13.3..

⁶ See Chapter 2, Part III, § 13.1..

⁷ See Chapter 2, Part III, § 13.1..

⁸ See Chapter 2, Part III, § 15.

⁹ See Chapter 2, Part I, § 2.1..

have converged on exercising control over the modalities of restitution in light of the principle of proportionality¹⁰.

In this respect, the rigid approach adopted by the Court of Justice – particularly in the context of foreign currency linked loans – according to which Articles 6(1) and 7(1) of the Unfair Contract Terms Directive preclude a national interpretation that permits the credit institution to seek compensation from the consumer exceeding the return of the principal disbursed under the contract, cannot be fully endorsed¹¹.

3. De Iure Condendo: *A Future Perspective*

In conclusion, one might legitimately question whether the Unfair Contract Terms Directive, is, in its current form, capable of putting an end to the persistent practice of replacing default rules with unilaterally drafted terms more favorable to the professional than those provided by domestic legal systems. A significant body of scholarship tends to answer in the negative, a view corroborated by the empirical observation that only a minimal fraction of contracts is ever brought before a court, compared to the vast number of contracts performed without dispute. It is therefore hardly surprising that, notwithstanding the Unfair Contract Terms Directive, the widespread insertion of terms skewed in favor of the drafter has by no means disappeared from consumer contracts.

This enduring gap between regulatory ambition and practical outcomes is not merely accidental but largely reflects structural and functional features of the Directive itself. As such, its effectiveness inevitably depends on the deterrent effect generated by judicial review (*Inhaltskontrolle*), which continues to represent the central and predominant form of control. Yet precisely because this mechanism is *subsequent* in nature, its capacity to influence market behavior remains inherently limited. The temptation, therefore, has been to compensate for these limitations by stretching the Directive's provisions beyond their original design, or by intensifying the adverse consequences imposed on professionals, as evidenced in certain strands of the Court of Justice's case law. However, such an approach risks initiating a regressive dynamic, in which the system increasingly relies on punitive effects, potentially producing disproportionate consequences not so much for the individual seller or supplier as for the functioning of the market as a whole.

From a *de iure condendo* perspective, this suggests that a more convincing path lies in rebalancing the system by complementing *ex post* judicial control with genuinely preventive

¹⁰ See Chapter 1, Part I, § 3.1..

¹¹ See Chapter 3, Part I, § 5.1..

forms of intervention. In this respect, it would be misleading to regard preventive control as a novel or untested idea: on the contrary, legal systems have long developed a variety of mechanisms aimed at addressing unfairness upstream.

These include, on the one hand, institutional forms of oversight, such as the activity of independent expert bodies exemplified by the French *Commission des clauses abusives*, or systems of prior authorization in regulated sectors like insurance and credit, and, on the other, more flexible and cooperative models, such as the German practices of *Konditionenempfehlungen* and *Konditionenkartelle* and sectoral standardization agreements (e.g. *Verdingungsordnung für Bauleistungen* and *Allgemeine Deutsche Spediteurbedingungen*), as well as the influential role played in Nordic countries by the *Consumer Ombudsman*¹². The latter, endowed with powers of supervision, negotiation and, in some cases, injunction, operates in a manner not entirely dissimilar – albeit within a different institutional framework – to the former Director General of Fair Trading in the United Kingdom, whose primary function has been to encourage the elimination of problematic clauses through the promotion of industry codes of practice¹³.

Particularly illuminating, in this broader landscape, are the Israeli and Swedish experiences, which demonstrate in concrete terms both the potential and the limits of preventive control. The Israeli *Standard Contracts Law* of 1964 introduced a pioneering system of non-judicial scrutiny, allowing suppliers to submit certain categories of ‘restrictive terms’ to an administrative board for prior approval. Such approval produces a significant legal effect, in that a term once authorized cannot subsequently be declared void by a court, whereas refusal entails nullity extending even to contracts already concluded. By contrast, the Swedish model, developed since the early 1970s, relied less on formal authorization and more on the proactive and continuous intervention of the *Consumer Ombudsman*, who systematically reviewed standard terms, engaged in negotiations with traders and trade associations, and frequently contributed to the drafting of revised contractual models¹⁴. While widely regarded as effective, this system also revealed certain shortcomings, particularly insofar as it presupposed a high degree of institutional efficiency and cooperative compliance¹⁵.

At the same time, these comparative experiences bring into sharp relief a number of structural constraints that any preventive system must confront. First, their effectiveness

¹² Cf V. RIZZO, *Le “clausole abusive” nell’esperienza tedesca, francese, italiana e nella prospettiva comunitaria*, Napoli, 1994, pp. 248 et seq.

¹³ Cf J. HELLNER, ‘Non Judicial Control of Standard Terms’ in *Standard Terms in Contracts*, Proceedings of the Eighth Colloquy on European Law, University of Neuchâtel, 6-8 June 1978, pp. 46-47.

¹⁴ Cf J. HELLNER, ‘Non Judicial Control of Standard Terms’, nt. 13, p. 48 et seq.

¹⁵ *Ibid.*

depends on the existence of strong and representative consumer organizations capable of engaging on an equal footing with professional associations; in their absence, negotiated or cooperative mechanisms risk losing much of their practical value. Secondly, such systems must be designed in a manner that preserves, rather than undermines, the economies of scale inherent in mass contracting. Finally, and perhaps more critically, they raise complex issues of coordination with judicial review (*Inhaltskontrolle*). In this regard, the Italian experience is particularly instructive: case law has repeatedly emphasized that administrative findings, including those of the AGCM, have no binding effect on the civil judge in assessing the validity of contractual terms¹⁶. Judicial *Inhaltskontrolle* thus retains its centrality, even in the presence of preventive mechanisms.

This, in turn, reflects a broader and well-established principle, already recognized, for instance, in the German experience under the *AGB-Gesetz*, namely that forms of administrative authorization or cooperative standard-setting do not – and should not – exclude subsequently judicial review. The coexistence of preventive and *ex post* control therefore requires not only institutional coordination, but also a degree of substantive alignment, particularly as regards the criteria employed in assessing unfairness¹⁷.

Against this background, a *de iure condendo* reappraisal of the Unfair Contract Terms Directive should not aim at overturning its foundational structure, nor at transforming it into a predominantly punitive instrument in pursuit of deterrence. Instead, it should seek to integrate more systematically those preventive mechanisms which, though historically well-known, remain to be adequately adjusted within the current framework. Only through such an integrated model – capable of addressing unfair terms both upstream and downstream – can the persistent gap between the Directive's objectives and its practical effectiveness be meaningfully reduces.

¹⁶ See, for instance, Cass. civ., 22 gennaio 2025, n. 1580.

¹⁷ V. RIZZO, nt. 12, p. 249.

LIST OF CASES

European Union

European Court of Justice

Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188
Case C-45/76, *Comet BV*, ECLI:EU:C:1976:191
Joined Cases C-56/74 e 60/74, *Kampffmeyer*, ECLI:EU:C:1976:78
Case C-6/90, *Francovich*, ECLI:EU:C:1991:42
Joined Cases C-240/98 and C-244/98, *Océano Grupo Editorial SA v Rocio Murciano Quintero and Salvat Editores SA v José M. Sánchez Alcón Prades ea*, ECLI:EU:C:2000:346
Case C-233/94, *Federal Republic of Germany v European Parliament and Council of the European Union*, ECLI:EU:C:1997:231
Case C-453/99, *Courage v. Crehan*, ECLI:EU:C:2001:465
Case C-481/99, *Heininge*, ECLI:EU:C:2001:684
Case C-327/00, *Santex*, ECLI:EU:C:2003:109
Case C-473/00, *Cofidis*, ECLI:EU:C:2002:705
Case C-237/02, *Freiburger Kommunalbauten*, ECLI:EU:C:2004:209
Case C-350/03, *Schulte v. Deutsche Bausparkasse Badenia AG*, ECLI:EU:C:2005:637
Case C-229/04, *Crailsheimer*, ECLI:EU:C:2005:640
Case C-302/04, *Ynos kft/János Varga*, ECLI:EU:C:2006:9
Joined Cases C-402/05 and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461
Case C-168/05, *Mostaza Claro*, ECLI:EU:C:2006:675
Case C-282/05 P, *Holcim (Deutschland) AG v. Commissione*, ECLI:EU:C:2007:226
Case C-432/05, *Unibet*, ECLI:EU:C:2007:163
Case C-409/06, *Winner Wetten*, ECLI:EU:C:2010:503
Case C-47/07, *P Masdar (UK) Ltd v Commission of the European Communities*, ECLI:EU:C:2008:726
Case C-489/07, *Messner v. Krüger*, ECLI:EU:C:2009:502
Case C-12/08, *Mono Car Styling*, ECLI:EU:C:2009:466
Case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, ECLI:EU:C:2009:615
C-215/08, *Friz*, ECLI:EU:C:2010:186
Joined Cases C-317/08 to C-320/08, *Alassini*, ECLI:EU:C:2010:146
Case C-453/10, *Perenicová*, ECLI:EU:C:2012:144
Case C-472/10, *Invitel*, ECLI:EU:C:2012:242
Case C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:349
Case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI: EU:C:2013:164
Case C-426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*, ECLI:EU:C:2013:521
Case C-488/11, *Asbeek Brusse and de Man Garabito*, ECLI:EU:C:2013:341
Case C-26/13, *Kásler and Káslerné Rábai*, ECLI:EU:C:2014:282
Case C-143/13, *Bogdan Matei and Ioana Ofelia Matei vs SC Volksbank România SA*, ECLI:EU:C:2015:127
Cases C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco y Caixabank*, ECLI:EU:C:2015:21
Case C-8/14, *BBVA SA v Pedro Peñalva López e a.*, ECLI:EU:C:2015:731
Case C-421/14, *Banco Primus*, ECLI:EU:C:2017:60
Case C-119/15, *Biuro podróży*, ECLI:EU:C:2016:987
Joined Cases C-154/15, C-307/15 and C-308/15, *Gutierrez Naranjo*, ECLI:EU:C:2016:980
Joined Cases C-96/16 and C-94/17, *Banco Santander Escobedo Cortes*, ECLI:EU:C:2018:643
Case C-186/16, *Andriucic*, ECLI:EU:C:2017:703
Case C-483/16, *Sziber*, ECLI:EU:C:2018:367
Case C-51/17, *OTP Bank and OTP Faktoring*, ECLI:EU:C:2018:750,
C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, ECLI:EU:C:2019:250
Case C-118/17, *Dunai*, ECLI:EU:C:2019:207

Case C-260/18, *Dziubak*, ECLI:EU:C:2019:819
Case C-383/18, *Lexitor*, ECLI:EU:C:2019:702
Joined Cases C-698/18 and C-699/18, *SC Raiffeisen Bank SA and BRD Groupe Societ  Generale SA v JB and KC*, ECLI: ECLI:EU:C:2020:537
Case C-81/19, *NG, OH v SC Banca Transilvania SA*, ECLI:EU:C:2020:532
Joined Cases C-224/19 and C-259/19, *CY and Others v Caixabank SA and Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2020:578
Case C-269/19, *Banca B. SA*, ECLI:EU:C:2020:954
Case C-485/19, *LH v Profi Credit Slovakia s.r.o.*, ECLI: ECLI:EU:C:2021:313
Case C-600/19, *Ibercaja*, ECLI:EU:C:2022:394
Joined Cases C-776/19 to C-782/19, *VB and Others v BNP Paribas Personal Finance SA and AV and Others v BNP Paribas Personal Finance SA and Procureur de la R publique*, ECLI:EU:C:2021:470
Case C-932/19, *JZ v OTP Jelz logbank Zrt et alii*, ECLI:EU:C:2021:673
Case C-472/20, *Lombard P nz gyi  s L zing Zrt. v PN*, ECLI:EU:C:2022:242
Joined Cases C-80/21, C-81/21, C-82/21, *D.B.P. (Cr dit hypoth caire libell  en devises  trang res)*, ECLI:EU:C:2022:646
Case C-484/21, *Caixabank SA*, ECLI:EU:C:2024:360
Case C-520/21, *Bank M.*, ECLI:EU:C:2023:478
Case C-555/21, *UniCredit Bank Austria AG*, ECLI:EU:C:2023:78
Case C-561/21, *Banco Santander*, ECLI:EU:C:2024:362
Case C-598/21, *V seobecn   verov  banka a.s.*, ECLI:EU:C:2023:845
Joined Cases C-811/21, C-812/21, C-813/21, *Caixabank (Prescription de remboursement des frais hypoth caires)*, ECLI:EU:C:2024:81
Case C-28/22, *TL and WE v Liquidator of Getin Noble Bank S.A.*, ECLI: ECLI:EU:C:2023:992
Case C-35/22, *CAJASUR Banco SA*, ECLI:EU:C:2023:569
Case C-140/22, *mBank S.A.*, ECLI:EU:C:2023:965
Case C-321/22, *Provident Polska S.A.*, ECLI:EU:C:2023:911
Case C-531/22, *Getin Noble Bank S.A.*, ECLI:EU:C:2024:58
Case C-593/22, *First Bank SA*, ECLI:EU:C:2023:555
Case C-97/22, *DC v. HJ*, ECLI:EU:C:2023:413
Case C-139/22, *mBank S.A.*, ECLI:EU:C:2023:692
Case C-645/22, *Luminor Bank AS*, ECLI:EU:C:2023:774
Case C-173/23, *Eventmedia Soluciones SL v Air Europa L neas A reas SAU*, ECLI:EU:C:2024:295
Case C- 630/23, *ZH and KN v AxFin Hungary Zrt*, ECLI:EU:C:2025:302
Case C-365/23, *Banco Santander, SA*, ECLI:EU:C:2023:578
Joined Cases C-6/24 and C-231/24, *Abanca Corporaci n Bancaria SA*, ECLI:EU:C:2025:333
Case C-230/24, *MF v Banco Santander SA*, ECLI:EU:C:2025:177

European Court of Human Rights

ECHR, 11 February 2021, *Casarin v. Italia*, n. 4893/13
ECHR, 9 January 2013, *Oleksandr Volkov v. Ukraine*, n. 21722/11

USA and UK

Printing and Numerical Registering Co v Sampson (1875) LR 19 Eq. 462, 465
Parker v. South Eastern Railway Co.
Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd. [1980] 2 W.L.R.
Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC
Re Polly Peck (No 2) [1998] 3 All ER
Addis v Gramophone Co Ltd [1909] AC
Perera v Vandiyar, [1953] 1 WLR
Kenny v Preen, [1963] 1 QB
McMillan v Singh, [1985] 17 HLR
Attorney-General v Blake, [2001] 1 AC

Kuddus v Chief Constable of Leicestershire Constabulary, [2001] UKHL 29, [2002] 2 AC
Whiten v Pilot Insurance Co., [2003] SCC
Rookes v Barnard, [1964] 1 All ER (HL, Lord Devlin)
Coventry v Lawrence, [2014] UKSC
Fogerty v Fantasy, [1994] 510 US
Mallan v May (1843) 11 M. & W. 653
Chesman v Nainby (1727) 2 Str. 793
Patel v Mirza [2016] UKSC 42 (Lord Toulson)
Greenberg v. Evening Post Ass'n, 91 Conn. 371, 99 A. 1037 (1917)
National Recovery Systems v. Ornstein, 541 F.Su1131 (E.D. Pa. 1982)
Evans v. Luster, 84 Wash.A447, 928 P.2d 455 (1996)
Charlebois v. J.M. Weller Associates, Inc., 72 N.Y.2d 587, 535 N.Y.S.2d 356, 531 N.E.2d 1288 (1988)
Farrell v. Whiteman, 146 Idaho 604, 200 P.3d 1153 (2009)
White v. McBride, 937 S.W.2d 796 (Tenn. 1996)
Derby v Scottish Equitable Plc [2001] EWCA Civ 369 (Robert Walker LJ)
Lipkin Gorman v Karpnale Ltd [1988] UKHL 12
Banca Intesa Sanpaolo S.p.A. v. Comune di Venezia [2022] EWHC 2586 (Comm)
Coleman Eng'g Co., Inc. v. North Am. Aviation, Inc., 420 P.2d 713, 729 (Cal. 1966) (Traynor, C.J., dissenting)
Earhart v. William Low Co., 600 P.2d 1344, 1351-52 (Cal. 1979)
Heyl & Patterson Intern., Inc. v. F. D. Rich Hous. of Virgin Islands, Inc., 663 F.2d 419 (3d Cir. 1981)
Earl of Chesterfield v. Janssen, (1750) 28 Eng. Rep. 82 (Ch.)
Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 445-46 (D.C. Cir. 1965)
Toker v. Westerman, 274 A.2d 78 (N.J. 1970)
Jones v. Star Credit Corp., 298 N.Y.S.2d 264 (Sup. Ct. 1969)
Bank of Indiana National Ass'n v. Holyfield, 476 F. Supp. 104 (S.D. Miss. 1979)

Germany

Bundesverfassungsgericht

BVerfG 7 February 1990 (*Handelsvertreter*)

BVerfG 19 October 1993 (*Bürgerschaft*)

Bundesgerichtshof

BGH VIII ZR 155/99 NJW 2001, 292

BGH III ZR 325/12 NJW 2014, 141

BGH, 29 October, 1956 NJW 1957

BGH, 1 March 1974, in NJW 1974

Oberste Gerichtshof (OGH 2 Ob 215/10x wobl 2012, 404 (Riss))

France

Com 22 octobre 1996, *affaire Chronoposte*, D 1997.121

Com 29 juin 2010, *Société Faurecia*, JCP G 2010.787

Cass. civ. 1^{re}, 24 sept. 2002, n° 00-21.278, in *Bull civ.*, I, n° 218, in *Dall.*, 2003, n° 6, 369

Italy

Cass. civ. n. 10498/2001, in *Riv. not.*, 2002, II, pp. 184 et seq

Cass. civ. n. 27334/2005, in *Giust. Civ. Mass.*, 2006, 2

Cass. civ. n. 5624/2009, *Giust. Civ. Mass.*, 2009, 3, pp. 409 et seq

Cass. civ. n. 9052/2010, in *Rep. Civ.*, 2010, 7, pp. 552 et seq

Cass. civ. n. 2956/2011, in *Giust. Civ. Mass.*, 2011, 2, pp. 188 et seq

Cass. civ. SU nn. 26242-26243/2014

Cass. civ. n. 12942/1992, in *Corriere giur.*, 1993, p. 322

Cass. civ. SU n. 9479/2023
Cass. civ., 22 gennaio 2025, n. 1580
Trib. Spoleto, 13.01.2022, n. 10

BIBLIOGRAPHY

- ACHILLE D. and CHERTI S., 'Le clausole vessatorie nei contratti tra professionista e consumatore' in RECINTO G., MEZZASOMA L., CHERTI S. (eds.), *Diritti e tutele dei consumatori*, Napoli, 2014, pp. 85 et seq
- ADAR Y. and GELBARD M., 'The Role of Remedies in The Relational Theory of Contract – A Preliminary Inquiry', in *ERCL*, 2011, 3, pp. 399 et seq
- ADOMEIT K., 'Die gestörte Vertragsparität – ein Trugbild', in *NJW*, 1994, pp. 2467 et seq
- AFFOLTER A., *Naturgesetze und Rechtsgesetze*, München, 1904
- AKERLOF G.A., 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism', in *Quarterly Journal of Economics*, 1970, 84(3), pp. 488 et seq
- ALBANESE A., 'Abuso di dipendenza economica: nullità del contratto e riequilibrio del rapporto', in *Eur. dir. priv.*, 1999, pp. 1179 et seq
- ALBANESE A., 'Fatto illecito, fatto ingiusto e restituzioni dell'arricchimento in assenza di danno', in *Resp. civ.*, 2004, pp. 538 et seq
- ALBANESE A., 'Gli ultimi interventi della Corte europea di Giustizia e della Cassazione sulla rilevanza d'ufficio della nullità delle clausole vessatorie. Riflessioni critiche' in D'ADDA A., BACHELET V. and REGAZZONI L. (eds.), *Il diritto privato dei consumatori. Nuovi assetti e prospettive*, Pisa, 2026, pp. 49 et seq
- ALBANESE A., 'Non tutto ciò che è "virtuale" è "razionale": riflessioni sulla nullità del contratto', in *Eur. dir. priv.*, 2012, pp. 503 et seq
- ALBANESE A., *Ingiustizia del profitto e arricchimento senza causa*, Padova, 2005
- ALPA G. and BESSONE M., 'La "Carta Europea dei Consumatori"', in *Riv. soc.*, 1974, pp. 827 et seq
- ALPA G. and BESSONE M., *I contratti standard nel diritto interno e comunitario*, Torino, 1991
- ALPA G., 'Harmonization and codification in European contract law' in VOGENAUER S. and WEATHERILL S. (eds.), *The Harmonisation of European Contract Law: Implications for European Private Laws Business and Legal Practice*, Oxford, 2006, pp. 149 et seq
- ALPA G., 'On Contractual Power of Digital Platforms', in *EBLR*, 2023, 34(3), p. 377 et seq
- ALPA G., 'Programmi e progetti del consiglio d'Europa e della C.e.e. sulla disciplina dei contratti "standard"', in *Foro it.*, 1977, V, pp. 73 et seq
- ALPA G., *Diritto privato dei consumi*, Bologna, 1986
- AMATO C., 'La politica comunitaria tra diritti dei consumatori ed esigenze del mercato', in SOMMA A. (eds.), *Giustizia sociale e mercato nel diritto europeo dei contratti*, Torino, 2007, pp. 55 et seq
- ANDREWS N.H., 'Reform of Limitation of Actions: The Quest for Sound Policy', in *Cambridge Law Journal*, 1998, 57, pp. 589 et seq
- ANDREWS N.H., 'Reform of Limitation of Actions: The Quest for Sound Policy', in *Cambridge Law Journal*, 1998, 57(3), pp. 589 et seq

ANGIOLINI C.S.A., 'L'interpretazione estensiva dell'art. 1, prot. 1, Cedu: fra tutele proprietarie e beni comuni', in *Nuova giur. civ. comm.*, 2016, II, pp. 328 et seq

ARROYO I AMAYUELAS E. and VAQUER A., 'Prescription in the Proposal for a Common European Sales Law', in *ERCL*, 2013, 9(1), pp. 38 et seq

ASCARELLI T., 'I debiti di moneta estera', in *Riv. dir. comm.*, 1923, I, pp. 444 et seq

ASCARELLI T., 'Obbligazioni pecuniarie. Art. 1277-1284' in SCIALOJA A. and BRANCA G. (eds.), *Commentario del codice civile*, Bologna/Roma, 1959

ASTONE M., 'Rimedi e contratti del consumatore nella prospettiva del diritto privato europeo', in *Eur. dir. priv.*, 2014, pp. 1 et seq

ATYIAH P., *Essays on Contract*, Oxford, 1988

ATYIAH P., *The Rise and Fall of Freedom of Contract*, Oxford, 1979

AULETTA T.A., 'Le clausole vessatorie nella giurisprudenza' in BIANCA C.M. (eds.), *Le condizioni generali di contratto*, vol. I, Milan, 1979

AVERIT N.W. and LANDE R.H., 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law', in *Antitrust Law Journal*, 1997, 65, pp. 713 et seq

AYRES I. and SCHWARTZ A., 'The No-Reading Problem in Consumer Contract Law', in *Stanford Law Review*, 2014, 66, pp. 545 et seq

AZZARRI F., 'I "prestiti in valuta estera" nella direttiva 2014/17/UE sui "contratti di credito ai consumatori relativi a beni immobili residenziali"', in *ODCC*, 2015, pp. 187 et seq

AZZARRI F., 'Nullità della clausola abusiva e integrazione del contratto', in *ODCC*, 2017, pp. 37 et seq

BACHELET V., 'La nullità di protezione contro le clausole abusive' in BACHELET V. and D'ADDA A. (eds.), *Lineamenti di diritto europeo dei contratti*, Torino, 2020, pp. 37 et seq

BADENHOOP N., 'Banking Communication Non-binding and Burden-sharing Approved: Kotnik', in *ERCL*, 2017, 13(3), pp. 299 et seq

BADENHOOP N., 'Restitution Claims – EU Consumer Law Principles and the Mortgage Credit Directive as an Overarching Value Model' in SIRENA P. (eds.), *Unfair Contract Terms and Unjustified Enrichment. The European case of foreign currency loans*, Cambridge, forthcoming

BAKOS Y., MAROTTA-WURGLER F. and TROSSEN D., 'Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts', in *Journal of Legal Studies*, 2014, 43, pp. 1 et seq

BANT E., *The Change of Position Defence*, Oxford/Portland, 2009

BAR-GILL O. and BEN-SHAHAR O., 'Regulatory Techniques In Consumer Protection: A Critique Of European Consumer Contract Law', in *CMLR*, 2013, 50, pp. 109 et seq

BARCELLONA M., 'Sulla giustizia sociale nel diritto europeo dei contratti' in SOMMA A. (eds.), *Giustizia sociale e mercato nel diritto europeo dei contratti*, Torino, 2007, pp. 67 et seq

BARCELLONA M., *Clausole generali e giustizia contrattuale*, Torino, 2006

BARCELLONA P., 'Note critiche in tema di rapporti fra negozio e giusta causa dell'attribuzione', in *Riv. trim. dir. proc. civ.*, 1965, I, pp. 11 et seq

BARGELLI E., '«Sinallagma rovesciato» e ripetizione dell'indebito. L'impossibilità della *restitutio in integrum* nella prassi giurisprudenziale', in *Riv. dir. civ.*, 2008, pp. 87 et seq

BARGELLI E., 'Invalidità del contratto e restituzioni nelle intersezioni fra le fonti del diritto', in *Riv. dir. civ.*, 2024, pp. 568 et seq

BARGELLI E., 'Prescrizione, asimmetria delle restituzioni nei mutui indicizzati e principio di effettività nel diritto privato europeo', in *Pactum*, 2024, pp. 447 et seq

BARGELLI E., *Il sinallagma rovesciato*, Milano, 2010

BARKER K., 'Unjust Enrichment: Containing the Beast', in *OJLS*, 1995, 15, pp. 457 et seq

BARNETT R., *The Oxford Introductions to U.S. Law: Contracts*, Oxford, 2010

BARRY B., *Theories of Justice*, Oakland, 1991

BARTOLINI F., 'The Consumer-Debtor Dimension: Some Further Steps for the Principle of Effectiveness within Consumer Credit Contracts', in *ERCL*, 2016, 12(3), pp. 292 et seq

BASEDOW J. in REBMANN K., JÜRGEN S. and RIXECKER R. (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2001

BASEDOW J., 'Entwicklungslinien des europäischen Rechts der Wettbewerbsbeschränkungen– von der Dezentralisierung über die Ökonomisierung zur privaten Durchsetzung' in AUGENHOFER S. (eds.), *Europäisierung des Kartell- und Lauterkeitsrechts*, Tübingen, 2009, pp. 1 et seq

BASEDOW J., *sub § 305 - § 306a BGB* in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2007

BAUDRY-LACANTINERIE G. and TISSIER A., *Traité théorique et pratique de droit civil: De la prescription*, 4th ed., 1924

BEALE H. and PITTAM N., 'The Impact of the Human Rights Act 1998 on English Tort and Contract Law' in FRIEDMANN D. and BARAK-EREZ D. (eds.), *Human Rights in Private Law*, Oxford/Portland, 2001, pp. 131 et seq

BEHAR-TOUCHAIS M., 'Remedies in the Proposed Digital Content Directive: An Overview' in SCHULZE R., STAUDENMEYER D. and LOHSE S. (eds.), *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps*, Baden-Baden, 2017, pp. 127 et seq

BEKA A., *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts' Own Motion*, Cambridge, 2018

BEN-SHAHAR O. and SCHNEIDER C.E., 'The Failure of Mandated Disclosure', in *University of Pennsylvania Law Review*, 2011, 159, pp. 647 et seq

BEN-SHAHAR O. and SCHNEIDER C.E., *More Than You Wanted To Know: The Failure Of Mandated Disclosure*, Princeton, 2014

BEN-SHAHAR O., 'Data Pollution', in *Journal of Legal Analysis*, 2019, 11, pp. 104 et seq

- BEN-SHAHAR O., 'Fixing Unfair Contracts', in *Stan. L. Rev.*, 2011, 63, pp. 869 et seq
- BEN-SHAHAR O., 'Privacy Protection, at What Cost? Exploring the Regulatory Resistance to Data Technology in Auto Insurance', in *Journal of Legal Analysis*, 2024, 15, pp. 129 et seq
- BENEDETTI G., 'Negozio giuridico e iniziativa economica privata' in *Il diritto comune dei contratti e degli atti unilaterali tra vivi a contenuto patrimoniale – Studi*, Napoli, 1991
- BENSON P., *Justice in Transactions. A Theory of Contract Law*, Cambridge/Massachusetts/London, 2019
- BERRYMAN J., 'The Law of Remedies: A Prospectus for Teaching and Scholarship', in *Oxford University Commonwealth Legal Journal*, 2010, 9(2), pp. 123 et seq
- BIANCA C.M., 'Le tecniche di controllo delle clausole vessatorie' in BIANCA C.M. and ALPA G. (eds.), *Le clausole abusive nei contratti stipulati con i consumatori*, Padova, 1996, pp. 357 et seq, now in BIANCA C.M., *Realtà sociale ed effettività della norma. Scritti giuridici*, II, *Obbligazioni e contratti. Responsabilità*, vol. 2, Milano, 2002, pp. 631 et seq
- BIANCA C.M., *Diritto civile*, III, *Il contratto*, 3rd ed., Milan, 2019
- BIANCA C.M., *Diritto civile*, V, *La responsabilità*, 3rd ed., Milano, 2021
- BIANCA C.M., *Diritto civile*, VII, *Le garanzie reali-la prescrizione*, Milano, 2012
- BIANCA C.M., *Le autorità private*, Napoli, 1977, now in ID., *Realtà sociale ed effettività della norma. Scritti giuridici*, I, *Teoria generale e fonti - persone e famiglia - garanzie e diritti reali*, vol. 1, Milano, 2002, pp. 47 et seq
- BIERLING E.R., *Zur Kritik der juristischen Grundbegriffe*, vol. II, Gotha, 1883
- BIGLIAZZI GERI L., 'Condizioni generali di contratto e buona fede' in CESARÒ E. (eds.), *Clausole abusive e direttiva comunitaria. Atti del Convegno di Napoli del 28 maggio 1993*, Padova, 1994, pp. 31 et seq
- BINDER I., *Philosophie des Rechts*, Berlin, 1925
- BINDER J.-H. and GORTSOS C., *The European Banking Union – A Compendium*, Baden-Baden, 2016
- BINDER J.-H., GORTSOS C., LACKHOFF K., OHLER C. (eds.), *European Banking Union – Brussels Commentary*, Munich, 2022
- BIRKS P., 'Personal Property: Proprietary Rights and Remedies', in *King's Law Journal*, 2000, 11(1), pp. 1 et seq
- BIRKS P., 'Rights, Wrongs and Remedies', in *Oxford Journal of Legal Studies*, 2000, 20(1), pp. 1 et seq
- BIRKS P., *An Introduction to the Law of Restitution*, Oxford, 1985 (rvsd ed., Oxford 1989)
- BLICHARZ G.J., 'Consumers as Unassisted Minors: Asymmetrical Sanction for Unfair Contract Terms', in *Laws*, 2022, 11(6), pp. 87 et seq
- BONELL M.J., 'Limitation Periods' in HARTKAMP A., HESSELINK M., HONDIUS E., JOUSTRA C., PERRON E. and VELDMAN M. (eds.), *Towards a European Civil Code*, 4rd ed., Nijmegen, 2020, pp. 515 et seq

- BRANDNER H.E. and ULMER P., 'The Community Directive on Unfair Terms in consumer contracts: some critical remarks on the proposal submitted by EC Commission', in *CMLR*, 1991, 28, pp. 647 et seq
- BRESCI C., 'Transparency Claims, Intellectual Services and Consumer Contracts: A Case of Consumer Over-Protection and Under-Protection?', in *ERCL*, 2023, 19(4), pp. 394 et seq
- BROWN M. and DE HAAS R., 'Foreign Currency Lending In Emerging Europe: Bank-Level Evidence', in *European Banking Center Discussion Paper*, 2010, pp. 1 et seq
- BUFANO E. and DINISI A., 'Ripetizione dell'indebito e affidamento dell'accipiens. CEDU e diritto interno a confronto', in *Pactum*, 2022, pp. 71 et seq
- BUNTE H.J., 'Gedanken zur Rechtsharmonisierung in der EG auf dem Gebiet der mißbräuchlichen Klauseln in Verbraucherverträgen', in *Festschr. für H. Locher zum 65. Geburtstag*, Düsseldorf, 1990, pp. 325 et seq
- BUONANNO L. and MEZZANOTTE F., 'Some Problematic Issues Concerning the Implementation of the MCD in Italy' in ANDERSON M. and ARROYO AMAYUELAS E. (eds.), *The Review Of The Mortgage Credit Directive: Toward A Digital, Sustainable And Inclusive European Market*, Paris, 2025, pp. 247 et seq
- BUONANNO L., 'Europeizzazione degli ordinamenti giuridici ed effetti della cosa giudicata sostanziale sulle prescrizioni brevi: verso una riforma dell'art. 2953 c.c.?', in *Rass. dir. civ.*, 2021, pp. 450 et seq
- BUONANNO L., 'European Private Law and its Multi-Level Comparative Method' in JANSSEN A., LEHMANN M. and R. SCHULZE (eds.), *The Future of European Private Law*, Baden-Baden, 2023, pp. 379 et seq
- BURROWS A., 'In Defence of Unjust Enrichment', in *Cambridge Law Journal*, 2019, 78(3), pp. 521 et seq
- BURROWS A., 'Judicial Remedies' in ID. (eds.), *English Private Law*, 3rd ed., Oxford, 2013, pp. 1253 et seq
- BURROWS A., *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed., Oxford, 2019
- BURROWS A., *The Law of Restitution*, 3rd ed., Oxford, 2011
- BUSCH D. and LEHMANN M. (eds.), *Unfair Terms in Banking and Financial Contracts*, Oxford, 2023
- BYDLINSKI F., 'Allgemeine Versorgungsbedingungen und Energielieferungsverträge' in *Festschrift für Karl H. Neumayer zum 65. Geburtstag*, Baden-Baden, 1985, pp. 115 et seq
- BYDLINSKI F., *System und Prinzipien des Privatrechts*, Wien, 1996 (reprint 2013)
- CAMMARATA A.E., 'Il significato e la funzione del fatto nell'esperienza giuridica' in *Formalismo e sapere giuridico*, Milan, 1963
- CANARIS C.-W., 'Die Gegenleistungskondiktion' in PFISTER B. and WILL M.R. (eds.), *Festschrift für Werner Lorenz zum siebzigsten Geburtstag*, Tübingen, 1991, pp. 19 et seq
- CANARIS C.-W., 'Die Gegenleistungskondiktion' in PFISTER B. and WILL M.R. (eds.), *Festschrift für Werner Lorenz zum siebzigsten Geburtstag*, Tübingen, 1991, pp. 19 et seq
- CANARIS C.-W., *Grundrechte und Privatrecht*, Berlin/New York, 1999

- CARBONNIER J., *Droit civil, IV, Obligations*, Paris, 1988
- CARNELUTTI F., *Teoria generale del diritto*, 3rd ed., Roma, 1951
- CASSON P., *Le nouveau régime de la prescription* in P. CASSON and P. PIERRE (eds.), *La réforme de la prescription en matière civile*, Paris, 2010, pp. 25 et seq
- CASTELLI L., *Prescrizione e impedimenti di fatto*, Milano, 2018
- CASTRONOVO C., 'Un contratto per l'Europa' in ID. (eds. it.), *Principi di diritto europeo dei contratti*, vol. I and II, Milan, 2001
- CATERINA R., 'Psicologia della decisione e tutela dei consumatori' in D'ADDA A., BACHELET V. and REGAZZONI L. (eds.), *Il diritto privato dei consumatori. Nuovi assetti e prospettive*, Pisa, 2026, pp. 11 et seq
- CHAMBERS R., 'Liability' in BIRKS P.B.H. and PRETTO A. (eds.), *Breach of Trust*, Oxford, 2002, pp. 1 et seq
- CHENEDE F., *Le nouveau droit des contrats et des obligations*, 2nd ed., Paris, 2018
- CHEREDNYCHENKO O.O., 'The Constitutionalization of Contract Law: Something New under the Sun?', in *Electronic Journal of Comparative Law*, 2004, 8.1., pp. 1 et seq
- CHEREDNYCHENKO O.O., 'The EU Charter of Fundamental Rights and Consumer Credit: Towards Responsible Lending?' in COLLINS H. (eds.), *European Contract Law and the Charter of Fundamental Rights*, Cambridge, 2017, pp. 154 et seq
- CHEREDNYCHENKO O.O., *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, München, 2007
- COING H., 'European Common Law: Historical Foundations' in CAPPELLETTI M. (eds.), *New Perspectives for a Law of Europe*, Leyden/London, 1978, pp. 31 et seq
- COLLINS H., 'La giustizia contrattuale in Europa' in SOMMA A. (eds.), *Giustizia sociale e mercato nel diritto europeo dei contratti*, Torino, 2007, pp. 83 et seq
- COLLINS H., 'On the (In)compatibility of Human Rights Discourse and Private Law' in MICKLITZ H.-W. (eds.), *Constitutionalization of European Private Law*, Oxford, 2014, pp. 26 et seq
- COLLINS H., 'The Constitutionalisation of European Private Law as a Path to Social Justice?' in MICKLITZ H.-W. (eds.), *The Many Concepts of Social Justice in European Private Law*, Cheltenham, 2011, pp. 133 et seq
- COLLINS H., *Regulating Contracts*, Oxford, 1999
- COLLINS H., *Social Market and the Law of Contract*, Stuttgart, 1992
- COLLINS H., *The Law of Contract*, 4th ed., London, 2003
- COLOMBI CIACCHI A., 'The Constitutionalization of European Contract Law', in *ERCL*, 2006, 2(2), pp. 167 et seq

COMPARATO G., MICKLITZ H.-W. and SVETIEV Y., 'The regulatory character of European private law' in TWIGG-FLESNER C. (eds.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham/Northampton, 2016, pp. 35 et seq

CORBIN A.L., *Corbin on contracts: a comprehensive treatise on the rules of contract law*, West Publishing Company, 1950

CORDERO-MOSS G., *International Commercial Contracts: Contract Terms, Applicable Law and Arbitration*, 2nd ed., Cambridge, 2024

CORDERO-MOSS G., 'Standard contract terms as an alternative to legislation' in TWIGG-FLESNER C. (eds.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham/Northampton, 2016, pp. 487 et seq

CORLETTI F., 'Towards a Protective *Condictio*? The Bank M Case in the Prism of Restitutory Remedies: A Reconstructive Proposal', in *ERCL*, 2024, 20(2), pp. 155 et seq

CSIZMADY A., HEGEDUS J., VONNAK D., 'A Housing Regime Unchanged: The Rise And Fall Of Foreign-Currency Loans In Hungary', in *Corvinus Journal of Sociology and social policy*, 2019, pp. 3 et seq

CYGAN A., 'A step too far? Constitutional objections to harmonization of EU consumer and contract law' in TWIGG-FLESNER C. (eds.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham/Northampton, 2016, pp. 13 et seq

D'ADDA A., 'Clausole abusive, assiologia consumeristica e strutture del diritto contrattuale (sui limiti delle scelte anti integrative della Corte di Giustizia)' in D'ADDA A., BACHELET V. and REGAZZONI L. (eds.), *Il diritto privato dei consumatori. Nuovi assetti e prospettive*, Pisa, 2026, pp. 65 et seq

D'ADDA A., 'Giurisprudenza comunitaria e "massimo effetto utile per il consumatore": nullità (parziale) necessaria della clausola abusiva e integrazione del contratto', in *I Contratti*, 2013, pp. 16 et seq

D'ADDA A., 'Integrazione del contratto', in *Enc. dir., I tematici*, I, Milano, 2021

D'ADDA A., 'La correzione del «contratto abusivo»: regole dispositive in funzione «conformativa» ovvero una nuova stagione per l'equità giudiziale?' in BELLAVISTA A. and PLAIA A. (eds.), *Le invalidità nel diritto privato*, Milano, 2011, pp. 361 et seq

D'ADDA A., 'Nullità parziale ed integrazione del contratto con regole dispositive' in PAGLIANTINI S. (eds.), *Le forme della nullità*, Torino, 2009, pp. 115 et seq

D'ADDA A., *Nullità parziale e tecniche di adattamento del contratto*, Milano, 2008

D'AMICO G., 'Giustizia contrattuale e contratti asimmetrici', in *Eur. dir. priv.*, 2019, pp. 1 et seq

D'AMICO G., 'L'abuso di autonomia negoziale nei contratti dei consumatori' in D'AMICO G. and PAGLIANTINI S. (eds.), *Nullità per abuso ed integrazione del contratto*, Torino, 2013, pp. 1 et seq

D'AMICO G., 'L'integrazione (cogente) del contratto mediante il diritto dispositivo' in D'AMICO G. and PAGLIANTINI S. (eds.), *Nullità per abuso ed integrazione del contratto*, Torino, 2013, pp. 213 et seq

D'AMICO G., 'La tutela del consumatore alla prova dell'effettività', in *Foro it.*, 2023, IV, pp. 390 et seq

D'AMICO G., 'Nullità virtuale-Nullità di protezione – (Variazioni sulla nullità)', in *I contratti*, 2009, pp. 732 et seq

D'ONOFRIO M., 'Nullità di clausole abusive, interpretazione e (limitato) ruolo del giudice in sede di integrazione contrattuale nella giurisprudenza della Corte di Lussemburgo', in *Juscivile*, 2020, 6, pp. 941 et seq

D'ONOFRIO P., 'Arricchimento senza causa' in SCIALOJA A. and BRANCA G., *Commentario del Codice civile*, Bologna/Rome, 1981

DALMARTELLO A., 'Conseguenze del giudizio di vessatorietà: dalla post-vessatorietà alla *condictio indebiti* di protezione', in *Riv. dir. banc.*, 2023, pp. 79 et seq

DAMM R., 'Europäisches Verbrauchervertragsrecht und AGB-Recht. Zur Umsetzung der EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen', in *Juristenzeitung*, 1994, pp. 161 et seq

DASHWOOD A. and JOHNSTON A. (eds.), *The Future of the Judicial System of the European Union*, Oxford, 2009

DAVID R., 'A Law of Remedies and a Law of Rights' in ID. (eds.), *English Law and French Law: A Comparison in Substance*, London, 1980

DAVIES G., 'Freedom of movement, horizontal effect, and freedom of contract', in *ERPL*, 2012, 20(3), pp. 805 et seq

DAVIES P.S., 'Remedies In English Private Law – A “Stand-Alone” Research Area?' in HOFMANN F. and KURZ F. (eds.), *Law of Remedies. A European Perspective*, Cambridge/Antwerp/Chicago, 2019, pp. 27 et seq

DAWSON J.P., 'Restitution Without Enrichment', in *Bo. U. L. R.*, 61, 1981, pp. 563 et seq

DE CRISTOFARO G. and ZACCARIA A., *sub* Art. 37, in *Comm. dir. cons.*, 2nd ed., Padova, 2013, pp. 418 et seq

DE CRISTOFARO G., 'Le invalidità negoziali «di protezione» nel diritto comunitario dei contratti' in S. PAGLIANTINI (eds.), *Le forme della nullità*, Turin, 2009, pp. 179 et seq

DE CRISTOFARO G., '40 anni di diritto europeo dei contratti dei consumatori: linee evolutive e prospettive future', in *Contratti*, 2019, pp. 177 et seq

DE CRISTOFARO G., 'Il contratto del 2020 nel diritto derivato dell'Unione europea' in ID. (eds.), *Diritto italiano ed europeo dei consumatori*, Padova, 2024, pp. 1 et seq

DE CRISTOFARO G., 'Invalidity of Contracts and Contract Terms in the Feasibility Study on a Future Instrument for European Contract Law' in SCHULZE R. and STUYCK J. (eds.), *Towards a European Contract Law*, Munich, 2011, pp. 97 et seq

DE CRISTOFARO G., 'Vessatorietà e trasparenza delle clausole dei contratti b-to-c e procedimenti amministrativi di competenza dell'AGCM. Il novellato art. 37-bis c. cons.', in *Nuove leggi civ. comm.*, 2023, pp. 517 et seq

DE ELIZALDE F., 'Partial Invalidity for Unfair Terms? CJEU in Abanca – C-70 & 179/17', in *EuCML*, 2019, 8(4), pp. 147 et seq

DE ELIZALDE F., 'Remedies for Unfair Terms in Light of the General Principles of EU Law', in *ERPL*, 2024, 32(3), pp. 461 et seq

DE GIOIA CARABELLESE P. and CHESSA C., 'La direttiva 2014/17/UE in merito ai contratti di credito ai consumatori relativi a beni immobili residenziali', in *Resp. civ. prev.*, 2016, pp. 1422 et seq

DE NOVA G., 'Il contratto contrario a norme imperative', in *Rass. crit. dir. priv.*, 1985, 3-4, pp. 435 et seq

DE NOVA G., 'Nullità relativa, nullità parziale e clausole vessatorie non specificamente approvate per iscritto', in *Riv. dir. civ.*, 1976, I, pp. 480 et seq

DEAN M., 'Unfair Contract Terms: The European Approach', in *The Modern Law Review*, 1993, 56(4), pp. 581 et seq

DEDEK H., *sub* Art 6:102: Implied Terms in JANSEN N. and ZIMMERMANN R. (eds.), *Commentaries on European Contract Law*, Oxford, 2018, pp. 801 et seq

DELAUNAY B., 'Le contentieux des espérances légitimes en droit fiscal' in T. LAMBERT (eds.), *Le contentieux fiscal en débats*, Paris, 2014, pp. 297 et seq

DELFINI F. and MC CAMUS J.D., 'Ineffective contracts, restitution and the change of position defence', in *Milan Law Review*, 2023, 4(1), pp. 19 et seq

DELFINI F., 'Nullità contrattuale, restituzioni e *change of position defence*', in *Nuove leggi civ. comm.*, 2023, II, pp. 494 et seq

DELFINI F., 'Unnegotiated Contracts of Adhesion in American Common and Civil Law Jurisdictions: The Canadian and Argentinian Cases', in *Milan Law Review*, 2021, 2(1), pp. 19 et seq

DELLACASA M., '«Clausola abusiva...e poi?» Integrazione e nullità del contratto nella giurisprudenza della Corte di Giustizia', in *Accademia*, 2023, pp. 25 et seq

DELLACASA M., 'Judicial review of "core terms" in consumer contracts: defining the limits', in *ERCL*, 2015, 11(2), pp. 152 et seq

DELLACASA M., 'La restituzione delle prestazioni di fare nella patologia del contratto', in *Riv. dir. priv.*, 2015, pp. 517 et seq

DELLAVIGNA S. and MALMENDIER U., 'Contract Design and Self-Control: Theory and Evidence', in *Quarterly Journal of Economics*, 2004, 119(2), pp. 353 et seq

DENOZZA F., 'Fallimenti del mercato: i limiti della giustizia mercantile e la vuota nozione di "parte debole"', in *Orizzonti del diritto commerciale*, 2013, pp. 1 et seq

DESHAYES O., GENICON T. e LAITHIER Y.-M., *Réforme du droit des contrats, du régime général et de la preuve des obligations*, Paris, 2016

DEVLIN P., *The Enforcement of Morals*, Oxford, 1965

DI MAJO A., 'Forme e tecniche di tutela' in S. MAZZAMUTO (eds.), *Processo e tecniche di attuazione dei diritti*, vol. I, Napoli, 1989

DI MAJO A., 'Il linguaggio dei rimedi', in *Eur. dir. priv.*, 2005, pp. 341 et seq

DI MAJO A., 'Il regime delle restituzioni contrattuali nel diritto comparato ed europeo', in *Eur. dir. priv.*, 2001, pp. 530 et seq

DI MAJO A., 'La nullità' in DI MAJO A., FERRI G.B., FRANZONI M. (eds.), *Il contratto in generale*, vol. XIII, in M. BESSONE (eds.), *Trattato di diritto privato*, Torino, 2002

- DI MAJO A., 'Restituzioni e responsabilità nelle obbligazioni e nei contratti', in *Riv. crit. dir. privato*, 1994, pp. 291 et seq
- DI MAJO A., 'Rimedi e dintorni', in *Eur. dir. priv.*, 2015, pp. 703 et seq
- DI MAJO A., 'Risoluzione del contratto ed effetti restitutori: debito di valore o di valuta?', in *Corriere giur.*, 1993, pp. 322 et seq
- DI MAJO A., *Diritti e Rimedi*, Torino, 2023
- DI MAJO A., *La tutela civile dei diritti*, 4th ed., Milan, 2003
- DI MARZIO F. (eds.), *Il nuovo diritto dei contratti. Problemi e prospettive*, Milano, 2004
- DI MARZIO F., 'Deroga abusiva al diritto dispositivo, nullità e sostituzione di clausole nei contratti del consumatore', in *Contr. e impr.*, 2006, pp. 673 et seq
- DI MARZIO F., 'Nullità di protezione, codice del consume e contratti del consumatore', in *Riv. dir. priv.*, 2005, pp. 837 et seq
- DI MARZIO F., 'Teoria dell'abuso e contratti del consumatore', in *Riv. dir. civ.*, 2007, pp. 681 et seq
- DI MARZIO F., *La nullità del contratto*, Padova, 2008
- DICKSON B., 'The Law of Restitution in the Federal Republic of Germany: A comparison with English Law', in *International and Comparative Law Quarterly*, 1987, 6, pp. 751 et seq
- DOBBS D.B., *Law of remedies. Damages-Equity-Restitution*, 2nd ed., St. Paul, 1993
- DOLMETTA A.A., 'All'essenza della nullità di protezione: l'operatività «a vantaggio» . Per una critica costruttiva di Cass. SS.UU., n. 28314/2019', in *Riv. dir. banc.*, 2020, pp. 89 et seq
- DOLMETTA A.A., 'La clausola di «doppia conversione al cambio convenzionale» tra interesse pubblico (Corte di giustizia) e interessi privati (sezioni unite della Corte di cassazione)', in *Foro it.*, 2023, IV, pp. 400 et seq
- DOMAT J., *Les lois civiles dans leur ordre naturel, nouvelle édition, tome premier*, vol. I, tit. I, sec. III, Paris, 1777
- DOMURATH I. and MAK C., 'Private Law and Housing Justice in Europe', in *The Modern Law Review*, 2020, 83(6), pp. 1188 et seq
- DOMURATH I., *Consumer Vulnerability and Welfare in Mortgage Contracts*, Portland, 2017
- DORNBUSH R. and FRANKEL J.A., 'The flexible exchange rate system: experience and alternatives', in *NBER Working Paper Series*, 1988
- DORNBUSH R., 'Expectations and exchange rate dynamics', in *Journal of Political Economy*, 1976, 84, pp. 1161 et seq
- DOWDLE M.W., 'On the Doubly Constitutionalising Character of European Contract Law' in MAK C. and KAS B. (eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe*, Oxford, 2023, pp. 43 et seq
- DWORKIN R., *Taking Rights Seriously*, 1st ed., Cambridge, 1977

ECHENBERG D., 'Negotiating International Contracts: Does the Process Invite a Review of Standard Contracts from the Point of View of National Legal Requirements?' in G. CORDERO-MOSS (eds.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, Cambridge, 2011, pp. 11 et seq

ECKERT H.W., 'Die EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen und ihre Auswirkungen auf das deutsche Recht', in *Wertpapiermitteilungen*, 1993

EGAN M., *Constructing a European Market*, Oxford, 2001

EIDENMÜLLER H., 'What can be wrong with an option? An optional common European sales law as a regulatory tool', in *CMLR*, 2013, 50, pp. 69 et seq

EIDENMÜLLER H., JANSEN N., KIENINGER E.-M., WAGNER G., ZIMMERMANN R., 'The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law', in *Edinburgh L. Rev.*, 2012, 16, pp. 303 et seq

ELLGER R., 'The European Convention of Human Rights and Fundamental Freedoms and German Private Law' in FRIEDMANN D. and BARAK-EREZ D. (eds.), *Human Rights in Private Law*, Oxford/Portland, 2001, pp. 161 et seq

EMMERICH V., 'Rechtsfragen des Ratenkredits', in *Juristische Schulung*, 1998

EPISCOPO F., 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before National Courts' in CRAIG P. and DE BÚRCA G. (eds.), *The Evolution of the EU Law*, 3rd ed., Oxford, 2021, pp. 275 et seq

EPISCOPO F., *Varieties of effectiveness and their impact on private law adjudication*, in *ZeUP*, 2023, pp. 350 et seq

ESPING-ANDERSEN G., *The Three Worlds of Welfare Capitalism*, Cambridge, 1990

ESPOSITO F. and DE ALMEIDA L., 'European Union Litigation', in *ERCL*, 2022, 18(3), pp. 265 et seq

ESPOSITO F. and DE ALMEIDA L., 'In Search of a Grand Theory of European Private Law: Social Justice, Access Justice, Societal Justice and Energy Markets' in DE ALMEIDA L., CANTERO GAMITO M., DUROVIC M., PURNHAGEN K.P. (eds.), *The Transformation of Economic Law: Essays in Honour of Hans-W. Micklitz*, Oxford, 2019, pp. 153 et seq

ESPOSITO F. and GROCHOWSKI M., 'The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration', in *ERCL*, 2022, 18(1), pp. 1 et seq

ESPOSITO F. and TUZET G., 'Economic Consequences as Legal Values: An Inferentialist Approach', in CSERNE P. and MALECKA M. (eds.), *Law and Economics as Interdisciplinary Exchange. Philosophical, Methodological and Historical Perspectives*, Abingdon, 2020, pp. 135 et seq

ESPOSITO F., 'Dziubak Is a Fundamentally Wrong Decision: Superficial Reasoning, Disrespectful of National Courts, Lowers the Level of Consumer Protection', in *ERCL*, 2020, 16(4), pp. 538 et seq

ESPOSITO F., 'Has the Unfair Contract Terms Directive Entered Its Dark Ages? On the Recent Case-Law Concerning the Consequences for the Contractual Relationship of Unfair Indexing Mechanisms to a Foreign Currency' in SIRENA P. (eds.), *Unfair Contract Terms and Unjustified Enrichment. The European case of foreign currency loans*, Cambridge, forthcoming

ESPOSITO F., 'Loans and the Unfair Contract Terms Directive after C-472/20 Lombard – Where Are We Now?', in *EuCML*, 2022, 11(6), pp. 223 et seq

ESPOSITO F., *The Consumer Welfare Hypothesis in Law And Economics*, Cheltenham/ Northampton, 2022

FABRE-MAGNAN M., 'Constitutional Values and Freedom of Contract', in *ERCL*, 2024, 20(3), pp. 207 et seq

FABRE-MAGNAN M., *L'institution de la liberté*, 2nd ed., Paris, 2023

FALZEA A., 'Efficacia giuridica', in *Enc. dir.*, XIV, Milano, 1965

FALZEA A., *L'offerta reale e la liberazione coattiva del debitore*, Milan, 1947 (reprinted Milano, 2011)

FARINA M., 'Unfair Terms and Supplementation of the Contract', in *ERPL*, 3, pp. 441 et seq

FARNSWORTH E.A., *Farnsworth on Contracts*, 4th ed., New York, 2023

FARNSWORTH W., *Restitution*, Chicago/London, 2014

FAZEKAS J., 'The consumer credit crisis and unfair contract terms regulation – Before and after *Kásler*', in *EuCML*, 2017, 6(3), pp. 99 et seq

FEDERICO A., 'Nuove nullità ed integrazione del contratto' in BELLAVISTA A. and PLAIA A. (eds.), *Le invalidità nel diritto privato*, Milano, 2011, pp. 329 et seq

FEKETE B. and MANCALEONI A.M., 'Application of primary and secondary EU law on the national courts' own motion' in HARTKAMP A., SIEBURGH C. and DEVROE W. (eds.), *Cases, Materials and Text on European Law and Private Law*, Oxford/Portland, 2017

FERRI G.B., 'Nullità parziale e clausole vessatorie', in *Riv. dir. comm.*, 1977, I, pp. 11 et seq

FIDRMUC J., MARIYA H. and STIX H., 'Households' Foreign Currency Borrowing in Central and Eastern Europe', in *Journal of Banking & Finance*, 2013, pp. 1880 et seq

FISCHMAN AFORI O., 'A Manifesto on Proportionality and Copyright Law. "Taking Remedies Seriously"' in HOFMANN F. and KURZ F. (eds.), *Law of Remedies. A European Perspective*, Cambridge/Antwerp/Chicago, 2019, pp. 223 et seq

FLUME W., 'Der Bereicherungsausgleich in Mehrpersonenverhältnissen', in *Arch. f. d. civ. Praxis (AcP)*, 1999, 199, pp. 1 et seq

FLUME W., 'Die 'Rückabwicklung nichtiger Kaufverträge nach Bereicherungsrecht. Zur Saldotheorie und ihren "Ausnahmen"', in *Juristenzeitung (JZ)*, 2002, 7, pp. 321 et seq

FLUME W., *Allgemeiner Teil des Bürgerlichen Rechts, II, Das Rechtsgeschäft*, 4th ed., Berlin/Eidelberg/New York, 1992

FLUME W., *Studien zur Lehre der ungerechtfertigten Bereicherung*, Tübingen, 2003

FORMFEREK A., *Der Schutz des Vermögens Minderjähriger*, Frankfurt am Main, 2002

FÖTSCHL A., 'Das neue dänische Verjährungsrecht', in *Recht der internationalen Wirtschaft*, 2011, pp. 696 et seq

FOUILLÉE A., *La science sociale contemporaine*, 2nd ed., Paris, 1885

- FRAGALI M., 'Clausole, frammenti di clausole, rapporti fra clausole e negozio', in *Giust. civ.*, 1959, I, pp. 312 et seq
- FRANCARIO L., 'Clausole vessatorie' in *Enc. giur.*, vol. VI, Rome, 1988
- FREIHERR VON MARSCHALL W., 'Substance and scope of standard terms and criteria for their evaluation' in *Standard Terms in Contracts*, Proceedings of the Eighth Colloquy on European Law, University of Neuchâtel, 6-8 June 1978
- FREY K., 'Wie ändert sich das AGB-Gesetz?', in *Zeitschr. Wirtschaftrecht*, 1993
- FUCHS W., *Fatto e conseguenza giuridica*, in *Rifd*, 1928
- GABAIX X. and LAIBSON D., 'Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets', in *Quarterly Journal of Economics*, 2006, 121(2), pp. 505 et seq
- GABRIELLI E. and ORESTANO A., 'Contratti del consumatore', in *Dig. disc. priv. (sez. civile), Aggiornamento*, Torino, 2000
- GALGANO F., 'Alla ricerca delle sanzioni civili indirette', in *Contr. e impr.*, 1997, pp. 531 et seq
- GALGANO F., 'Invalidità e inefficacia del contratto' in SCIALOJA A., BRANCA G., GALGANO F. (eds.), *Commentario al codice civile, Simulazione. Nullità del contratto. Annullabilità del contratto*, Milano/Bologna, 1998
- GALLO P., 'Allocazione del rischio e determinazione del *quantum*' in GALLO P. and MAGRI G. (eds.), *Le restituzioni contrattuali*, Torino, 2024, pp. 27 et seq
- GALLO P., 'Arricchimento senza causa e quasi contratti (i rimedi restitutori)' in SACCO R. (directed by), *Trattato di diritto civile*, Torino, 2008
- GALLO P., 'I modelli' in GALLO P. and MAGRI G. (eds.), *Le restituzioni contrattuali*, Torino, 2024, pp. 5 et seq
- GALLO P., 'La nullità, l'integrazione e le restituzioni secondo la Corte di Giustizia', in *Arch. di Diritto civile*, 2024, pp. 345 et seq
- GALLO P., *Introduzione al diritto comparato*, II, *Istituti giuridici*, 3rd ed., Torino, 2018
- GALLO P., *L'arricchimento senza causa*, Padova, 1990
- GAMBARO A., 'Consonanze e dissonanze nelle fonti dell'istituzione proprietaria', in *Juscivile*, 2016, p. 281 et seq
- GANUZA J.J. and GOMEZ F., 'Optional Law for Firms and Consumers: an Economic Analysis of Opting into the Common European Sales Law', in *CMLR*, 2013, 50, pp. 29 et seq
- GARDINER C., *Unfair contract terms in the digital age. The challenge of protecting European consumers in the online marketplace*, Cheltenham/Northampton, 2022
- GAROFALO A.M., 'La High Court e i derivati del Comune di Venezia (ovvero: il problema degli swap degli enti locali e la mentalità del giurista di *common law*)', in *Riv. dir. banc.*, 2023, pp. 311 et seq
- GAROFALO A.M., 'Le sezioni unite su Banco di Desio: una giurisprudenza sempre più legislativa', in *Nuova giur. civ. comm.*, IV, 2023, pp. 956 et seq

- GATTI S., 'Limiti europei all'integrazione (e all'interpretazione) del contratto contenente clausole vessatorie: marginalizzazione o mutata centralità del giudice?', in *Pactum*, 2022, pp. 297 et seq
- GATTI S., 'Oltre la nullità (parziale) di protezione del contratto B2C: Integrazione e restituzioni nella prospettiva di una tutela utile per il contraente debole', in *Pers. e merc.*, 2022, pp. 608 et seq
- GELLHORN W., 'Contracts and Public Policy', in *Colum. L. Rev.*, 1935, 35, pp. 679 et seq
- GENICON T., 'La grammaire dans la réforme du droit des contrats', in *Rev. contr.*, 2016, pp. 751 et seq
- GENTILE G., 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU. *Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States*' in MAK C. and KAS B. (eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe*, Oxford, 2023, pp. 141 et seq
- GENTILI A., 'Codice del consumo ed *esprit de geometrie*', in *I Contratti*, 2006, pp. 159 et seq
- GENTILI A., 'I contratti usurari: tipologie e rimedi', in *Riv. dir. civ.*, 2001, I, pp. 353 et seq
- GENTILI A., 'La «nullità di protezione»', in *Eur. dir. priv.*, 2011, pp. 77 et seq
- GERBER D.J., 'Constitutionalizing the economy: German neo-liberism, competition law and the "new Europe"', in *American Journal of Comparative Law*, 1994, 42, pp. 25 et seq
- GEROLDINGER A., 'Klauselbegriff und „blue pencil test“ in der AGB-Rechtsprechung', in *Austrian Law Journal*, 2015, 2, pp. 196 et seq
- GHESTIN J. and MARCHESSAUX I., 'L'élimination des clauses abusives en droit français, à l'épreuve du droit communautaire', in *Revue Européenne de Droit de la Consommation*, 1993, pp. 65 et seq
- GIERKE O., 'Die soziale Aufgabe des Privatrechts' in *Die soziale Aufgabe des Privatrechts*, Berlin/Heidelberg, 1889, pp. 1 et seq
- GIGLI A., *Nuove prospettive di tutela del legittimo affidamento nei confronti del potere amministrativo*, Napoli, 2016
- GILIKER P., 'The Consumer Rights Act 2015 – a bastion of European consumer rights?', in *Legal Studies*, 2017, 31(1), pp. 78 et seq
- GINESTRI M., 'Equality or superiority of the weak party? Consumer protection and the issues at stake', in *ERCL*, 2023, 19(4), pp. 375 et seq
- GINTIS H., 'Consumer Sovereignty and Human Interests (Book Review)', in *Journal of Economic Literature*, 1988, 26(1), pp. 98 et seq
- GIROLAMI M., *Le nullità di protezione nel sistema delle invalidità negoziali. Per una teoria della moderna nullità relativa*, Padova, 2008
- GOFF Sir R. and GARETH J., *The Law of Restitution*, 2nd ed., London/Toronto, 1978
- GÓMEZ LIGÜERRE C., 'Unfair Terms and the Restitution of Performances Rendered by the Parties' in SIRENA P. (eds.), *Unfair Contract Terms and Unjustified Enrichment. The European case of foreign currency loans*, Cambridge, forthcoming
- GÓMEZ POMAR F., 'Core versus Non-Core Terms and Legal Controls over Consumer Contract Terms: (Bad) Lessons from Europe?', in *ERCL*, 2019, 15(2), pp. 177 et seq

GORDLEY J., 'Comparative Law and Legal History' in REIMANN M. and ZIMMERMANN R. (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed., Oxford, 2019, pp. 754 et seq

GROCHOWSKI M. and TABOROWSKI M., 'Effectiveness and EU Consumer Law: The Blurriness in Judicial Dialogue' in CASAROSA F. and MORARU M. (eds.), *The Practice of Judicial Interaction in the Field of Fundamental Rights: The Added Value of the Charter of Fundamental Rights of the EU*, Cheltenham/ Northampton, 2022, pp. 235 et seq

GROCHOWSKI M. and TABOROWSKI M., 'The impact of Article 47 of the Charter of Fundamental Rights in the Polish legal order' in BONELLI M., ELIANTONIO M., GENTILE G. (eds.), *Article 47 of the EU Charter and Effective Judicial Protection*, vol. 2, Oxford, 2023, pp. 181 et seq

GROCHOWSKI M., PATERA C. and PISTELLI F., 'Effective consumer protection between administrative and judicial enforcement (Chapter 3)' in IAMICELI P., CAFAGGI F., ARTIGOT I GOLOBARDES M. (eds.), *FRICoRe Casebook – Effective Consumer Protection and Fundamental Rights*, Roma, 2022, pp. 145 et seq

GROCHOWSKI M., 'Default Rules Beyond the State' in S. GRUNDMANN and M. GROCHOWSKI (eds.), *European Contract Law and the Creation of Norms*, Cambridge, 2021, pp. 227 et seq

GROCHOWSKI M., 'Freedom of Contract on Crossroads: The Struggle over the Concept of Contract Liberty in 20th Century Poland', in *Osteuropa Recht*, 2020, 66, pp. 34 et seq

GROCHOWSKI M., 'The majoritarian concept of default rules: towards a shift in paradigms?' in *Studia Prawa Prywatnego*, 2020, 1, pp. 63 et seq

GROCHOWSKI M., 'The Knowledge Gap in Contract Law' in P.B. MILLER, J. OBERDIEK (eds.), *Oxford Studies in Private Law Theory*, vol. 3, Oxford, 2025, pp. 85 et seq

GRUNDMANN S. and BADENHOOP N., 'Foreign Currency Loans and the Foundations of European Contract Law – A Case for Financial and Contractual Crisis?', in *ERCL*, 2023, 19(1), pp. 1 et seq

GRUNDMANN S. and HACKER P., 'Digital Technology as a Challenge to European Contract Law', in *ERCL*, 2017, 13(3), pp. 255 et seq

GRUNDMANN S. and SIRENA P., 'Introduction' in GRUNDMANN S. and SIRENA P. (eds.), *European Contract Law and Future Challenges*, Louvain-la-Neuve, 2025, pp. 1 et seq

GRUNDMANN S., 'General Standards and Principles, Clauses Generales and Generalklauseln in European Contract Law – A Survey, in General Clauses and Standards' in GRUNDMANN S. e MAZEAUD D. (eds.), *European Contract Law: Comparative Law, EC Law and Contract Law Codification*, The Hague, 2006, pp. 1 et seq

GRUNDMANN S., 'The Concept of the Private Law Society: After 50 Years of European and European Business Law', in *ERPL*, 2008, 16(4), pp. 553 et seq

GRUNDMANN S., 'The Structure of European Contract Law', in *ERPL*, 2001, 9(4), pp. 505 et seq

GRUNDMANN S., *Europäisches Schuldvertragsrecht. Das Europäische Recht der Unternehmensgeschäfte (nebst Texten und Materialien zur Rechtsangleichung)*, Berlin, 1999

GRUNDMANN S., KERBER W. and WEATHERILL S., 'Party Autonomy and the Role of Information in the Internal Market - an Overview' in GRUNDMANN S., KERBER W. and WEATHERILL S. (eds.), *Party Autonomy and the Role of Information in the Internal Market*, Berlin/New York, 2001, pp. 3 et seq

GUARNERI A., 'L'exordium prescriptionis', in *Riv. dir. civ.*, 2013, pp. 1129 et seq

GUELFUCCI-THIBIERGE C., *Nullité, restitutions et responsabilité*, Paris, 1992

GUTOWSKI M., 'Is the remuneration for use of capital a part of a restitution claim in case of annulment of the bank loan contract? Remarks after the ECJ judgment of 15 June 2023' in SIRENA P. (eds.), *Unfair Contract Terms and Unjustified Enrichment. The European case of foreign currency loans*, Cambridge, forthcoming

GUTOWSKI M., 'Statute of Limitations for Restitution Claims after a Term is Declared Unfair. Some Remarks on the CJEU Judgement of 8th of September 2022 (Joined Cases C-80/21 to C-82/21)', in *ERCL*, 2023, 19(3), pp. 239 et seq

GUTTERIDGE H.C., 'Abuse of Rights', in *Cambridge L. J.*, 1933, 5, pp. 22 et seq

HABERMAS J., *L'inclusione dell'altro*, Milano, 2014

HÄCKER B., 'Minority and Unjust Enrichment Defences' in DYSON A., GOUDKAMP J. and WILMOT-SMITH F. (eds.), *Defences in Unjust Enrichment*, Oxford, 2016, pp. 195 et seq

HADFIELD G., HOWSE R. and TREBILCOCK M., 'Information-Based Principles for Rethinking Consumer Protection Policy', in *JCP*, 1998, 21, pp. 131 et seq

HALBERSTAM D., 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach', in *Cambridge Yearbook of European Legal Studies*, 2021, 23, pp. 128 et seq

HALLSTEIN W., 'Angleichung des Privat- und Prozessrechts in der Europäischen Wirtschaftsgemein', in *RabelsZ*, 1964, 28, pp. 211 et seq

HANSON J. and KYSAR D., 'Taking Behavioralism Seriously', in *Harvard Law Rev.*, 1999, 112, pp. 1422 et seq

HARLOW C., 'A Common European Law of Remedies?' in KILPATRICK C., NOVITZ T. and SKIDMORE P. (eds.), *The Future of Remedies in Europe*, London, 2000, pp. 69 et seq

HARRIS D. and TALLON D., *Contract Law Today — Anglo French Comparisons*, Oxford, 1989

HART H.L.A., *The Concept of Law*, 3rd ed., Oxford, 2012

HART H.L.A., 'Positivism and the Separation of Law and Morals', in *Harvard Law Rev.*, 1958, 71, pp. 593 et seq

HARTKAMP A., 'Ex Officio Application in Case of Unenforceable Contracts or Contract Clauses. EU law and National laws Confronted' in *Essays in Honour of Hugh Beale*, Oxford, 2014, pp. 467 et seq

HARTKAMP A., *European Law and National Private Law*, Cambridge, 2016

HASELBACH D., *Autoritärer Liberalismus und Soziale Marktwirtschaft: Gesellschaft und Politik im Ordoliberalismus*, Baden-Baden, 1991

HEDLEY S., 'Restitution: Its Division and Ordering', London, 2001

HEDLEY S., 'Unjust Enrichment. Looking for a Role' in SWAIN W. and PEARI S. (eds.), *Rethinking Unjust Enrichment: History, Sociology, Doctrine, and Theory*, Oxford, 2023, pp. 275 et seq

- HEFERMEHL W. in SOERGEL H.T. (eds.), *Bürgerliches Gesetzbuch*, 13th ed., Stoccarda, 1987
- HEINRICHS H., ‘Die EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen’, in *Neue jur. Wochenschr.*, 1993, pp. 1817 et seq
- HELDRIICH A. and REHM G.M., ‘Importing Constitutional Values through Blanket Clauses’ in FRIEDMANN D. and BARAK-EREZ D. (eds.), *Human Rights in Private Law*, Oxford/Portland, 2001, pp. 113 et seq
- HELLFELD Io. A., *Iurisprudentia forensis secundum pandectarum ordinem*, 4rd ed., Jenae
- HELLWEGE P. and MILLER L., ‘Control of Standard Contract Terms’ in DANNEMANN G. and VOGENAUER S. (eds.), *The common European sales law in context: interactions with English and German law*, Oxford, 2013, pp. 423 et seq
- HELLWEGE P., ‘Standard Contract Terms’ in BASEDOW J., HOPT K.J. and ZIMMERMANN R. (eds.), *The Max Plank Encyclopedia of European Private Law*, Oxford, 2012
- HERVAS-HERMIDA C., ‘Le régime des restitutions dans la réforme des obligations’, in *Jur. class. pér. not.*, 2016, 3, pp. 1116 et seq
- HESELINK M.W., ‘Unfair Terms in Contracts between Businesses’ in SCHULZE R. and STUYCK J., *Towards a European Contract Law*, Munich, 2011, pp. 131 et seq
- HESELINK M.W., ‘How many systems of Private law are there in Europe? On plural legal sources, multiple identities and the unity of law’ in NIGLIA L. (eds.), *Pluralism and European Private Law*, Oxford, 2013, pp. 199 et seq
- HESELINK M.W., ‘The Structure of the New European Private Law’ in ID. (eds.), *The New European Private Law. Essays on the Future of Private Law in Europe*, The Hague, 1995, pp. 227 et seq
- HILDEBRAND G.H., ‘Consumer Sovereignty in Modern Times’, in *The American Economic Review*, 1951, 41(2), pp. 19 et seq
- HILLGRUBER C., ‘Abschied von der Privatautonomie?’, in *ZRP*, 1995, pp. 6 et seq
- HOFMANN F. and KURZ F., ‘Introduction to the Law of Remedies’ in *Law of Remedies. A European Perspective*, Cambridge/Antwerp/Chicago, 2019, pp. 3 et seq
- HOFMANN F., “‘Equity’ im deutschen Lauterkeitsrecht? Der “Unterlassungsanspruch” nach der Geschäftsgeheimnis-RL’, in *Wettbewerb in Recht und Praxis*, 2018, 1, pp. 1 et seq
- HOFMANN F., ‘Disziplinarität, Intradisziplinarität und Interdisziplinarität am Beispiel der Grundsätze “mittelbarer Verantwortlichkeit”’, in *JuristenZeitung*, 2018, 15/16, pp. 746 et seq
- HOFMANN F., ‘Kontrolle oder nachlaufender Rechtsschutz – wohin bewegt sich das Urheberrecht?: Rechtsdurchsetzung in der EU zwischen Kompensation und Bestrafung’, in *Gewerblicher Rechtsschutz und Urheberrecht*, 2018, 1, pp. 21 et seq
- HOMMELHOFF P. and WIEDEMANN K.-U., ‘Allgemeine Geschäftsbedingungen gegenüber Kaufleuten und unausgehandelte Klauseln in Verbraucherverträgen: Grundsätzliches zur Transformation der EG-Klauselrichtlinie ins deutsche Recht’, in *Zeitschrift für Wirtschaftsrecht (ZIP)*, 1993, pp. 562 et seq
- HONDIUS E., ‘Clauses abusives dans les contrats de consommation: vers une directive européenne’, in *REDC*, 1993

HONDIUS E., 'The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States', in *ERPL*, 1995, 3(2), pp. 241 et seq

HONDIUS E., *Unfair Terms in Consumer Contracts*, Utrecht, 1987

HONSELL H., 'Die Erosion des Privatrechts durch das Europarecht', in *ZIP*, 2008, 14, pp. 621 et seq

HONTEBEYRIE A., 'Prescription extinctive', in *Encyclopédie Dalloz*

HOWELLS G. and WEATHERILL S., *Consumer Protection Law*, 2nd ed., London, 2005

HOWELLS G. and WILHELMSSON T., *EC Consumer Law*, Abingdon/New York, 1997

HOWELLS G., 'Reflections on Remedies for Lack of Conformity in Light of the Proposals of the EU Commission on Supply of Digital Content and Online and Other Distances Sales of Goods ' in DE FRANCESCHI A. (eds.), *European Contract Law and the Digital Single Market*, Cambridge, 2016, pp. 145 et seq

HOWELLS G., 'The Contribution of Consumer Law to the (Re)shaping of European Private Law' in JANSSEN A., LEHMANN M. and R. SCHULZE R. (eds.), *The Future of European Private Law*, Baden-Baden, 2023, pp. 267 et seq

HOWELLS G., TWIGG-FLESNER C. and WILHELMSSON T., *Rethinking EU Consumer Law*, Abingdon, 2017

HULMÁK M., 'The Consequences of Unfair Terms in Consumer Contracts', in *The Lawyer Quarterly*, 2022, 12(1), pp. 53 et seq

HUTT W.H., 'The Concept of Consumers' Sovereignty', in *The Economic Journal*, 1940, 50, pp. 66 et seq

IAMICELI P., 'The "Punitive Nullity" of Unfair Terms in Consumer Contracts and the Role of National Courts: A Principle-Based Analysis', in *ECML*, 2023, 12(4), pp. 142 et seq

IMBRUGLIA D., 'Appunti su nullità e restituzioni', in *Giur. it.*, 2020, pp. 1533 et seq

IRTI N., 'Calcolabilità Weberiana e crisi della fattispecie', in *Riv. dir. civ.*, 2014, pp. 987 et seq

IRTI N., 'La crisi della fattispecie', in *Riv. dir. proc.*, 2014, pp. 36 et seq

IRTI N., 'La nullità come sanzione civile', in *Contr. e impr.*, 1987, pp. 541 et seq

IRTI N., *Codice civile e società politica*, 3rd ed., Roma-Bari, 1999

JANSEN N., 'Introduction before Art 6:201' in JANSEN N. and ZIMMERMANN R. (eds.), *Commentaries on European Contract Laws*, Oxford, 2018, pp. 920 et seq

JANSEN N., 'Seriositätskontrollen existentiell belastender Versprechen' in ZIMMERMANN R. (eds.), *Störungen der Willensbildung bei Vertragsschluss*, Tübingen, 2007, pp. 125 et seq

JANSEN N., *sub* Art 6:204: Effects of Unfair Contract Terms in JANSEN N. and ZIMMERMANN R. (eds.), *Commentaries on European Contract Laws*, Oxford, 2018, pp. 971 et seq

JANSSEN A., LEHMANN M. and SCHULZE R., 'The Future of European Private Law – An Introduction' in JANSSEN A., LEHMANN M. and R. SCHULZE R. (eds.), *The Future of European Private Law*, Baden-Baden, 2023, pp. 11 et seq

JAPIOT R., *Des nullités en matière d'actes juridiques, essai d'une théorie nouvelle*, Paris, 1909

JOSIPOVIĆ T., 'Scope of Application of the Unfair Contract Terms Directive: Is It Time for a New Compromise?', in *ERPL*, 2024, 32(3), pp. 335 et seq

JÓZON M., 'Judicial Governance by Unfair Contract Terms Law in the EU: Proposal for a New Research Agenda for Policy and Doctrine', in *ERPL*, 2020, 28(4), pp. 909 et seq

KARAMPATZOS A., *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model*, New York, 2020

KATZ A.W., 'Standard Form Contracts' in P. NEWMAN (eds.), *The New Palgrave Dictionary of Economics and the Law*. Palgrave Macmillan, London, 2002, pp. 502 et seq

KENDALL V., *EC Consumer Law*, London, 1994

KENNEDY Du., 'Distributive and Paternalist Motives in Contract and Tort Law', in *Maryland Law Rev.*, 1982, 41, pp. 563 et seq

KENNY M., DEVENNEY J. and FOX O'MAHONY L. (eds.), *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable*, Cambridge, 2010

KESSLER F., 'Contracts of Adhesion – Some Thoughts About Freedom of Contract', in *Col. L. Rev.*, 1943, 43, pp. 629 et seq

KILPATRICK C., 'The Future of Remedies in Europe' in KILPATRICK C., NOVITZ T. and SKIDMORE P. (eds.), *The Future of Remedies in Europe*, London, 2000, pp. 1 et seq

KIMEL D., 'Personal Freedom and the Protection of the Weak through the Lens of Contract: Jurisprudential Overview' in VOGENAUER S. and WEATHERILL S. (eds.), *General Principles of Law: European and Comparative Perspectives*, Bloomsbury, 2017, pp. 297 et seq

KIPP T., 'Über Doppelwirkungen im Rechtsinsbesondere über Konkurrenz von Nichtigkeit und Anfechtbarkeit' in *Festschrift für F. Martitz*, Berlin, 1911

KIRST P., *The Impact of the Damages Directive on the Enforcement of EU Competition Law – A Law and Economics Analysis*, Cheltenham, 2021

KLINGMÜLLER F., 'Der Begriff des Rechtsgrundes' in *Studien zur Erläuterung des bürgerlichen Rechts*, vol. VI, Breslau, 1901

KOJÈVE A., *Lineamenti di una fenomenologia del diritto*, M. FILONI and L. GAROFALO (translation), Venezia, 2024

KOLERS A., *A Moral Theory of Solidarity*, Oxford, 2016

KORNET N., *Contract interpretation and gap filling: comparative and theoretical perspective*, Antwerpen, 2006

KORNHAUSER L., 'Unconscionability in Standard Forms', in *California Law Review*, 1976, 64(5), pp. 1151 et seq

KOROBKIN R., 'Behavioral Economics, Contract Formation, and Contract Law' in SUNSTEIN C. (eds.), *Behavioural Law and Economics*, Cambridge, 2000, pp. 116 et seq

KOSTRITSKY J.P., 'Illegal Contacts and Efficient Deterrence: A Study in Modern Contract Theory', in *Iowa Law Review*, 1988, 74, pp. 115 et seq

KÖTZ H., 'Gemeineuropäisches Zivilrecht' in GERNSTEIN H., DROBNIG U. and KÖTZ H. (eds.), *Festschrift für Konrad Zweigert zum 70. Geburtstag*, Tübingen, 1981, pp. 481 et seq

KÖTZ H., 'Rechtsvergleichung – Nutzen, Kosten, Methoden, Ziele', in *RabelsZ*, 1986, 50, pp. 1 et seq

KÖTZ H., *European Contract Law*, 2nd ed., Oxford, 2017

KRÄMER L., *EEC Consumer Law*, Bruxelles, 1986

KRONMAN A., 'Contract Law and Distributive Justice', in *Yale L.J.*, 1980, 89, pp. 472 et seq

KULL A., 'Restitution as a Remedy for Breach of Contract', in *South. Cal. L. R.*, 67, pp. 1465 et seq

KUNTZE J.E., *Cursus des römischen Rechts*, Leipzig, 1879

LAMICELA M., 'Valutazione di abusività ed effetti della nullità di protezione nei contratti del consumatore: la strategia della deterrenza e l'effettività delle tutele', in *Juscivile*, 2020, 6, pp. 1532 et seq

LANDO O., CLIVE E., ZIMMERMANN R., *The Principles of European Contract Law*, Part III, Oxford, 2003

LAPERTOSA F., 'La giurisprudenza tra passato e futuro dopo l'avvento della nuova disciplina sulle clausole vessatorie', in *Foro It.*, 1997, V, pp. 357 et seq

LARENZ K., *Methodenlehre der Rechtswissenschaft*, 3rd ed., Berlin/Heidelberg/New York, 1995

LAURSEN F., 'The Treaty of Maastricht' in JONES E., MENON A. and WEATHERILL S. (eds.), *The Oxford Handbook of the European Union*, Oxford, 2013, pp. 121 et seq

LAWSON F.H., *Remedies of English Law*, 2nd ed., London, 1980

LAYCOCK D., 'The Scope & Significance of Restitution', in *Tex. L. Rev.*, 1989, 67, pp. 1277 et seq

LAYCOCK D., *Modern American Remedies – Cases & Materials*, 6th ed., University of Michigan, 2025

LECZYKIEWICZ D. and WEATHERILL S., 'Private Law Relationships and EU Law' in LECZYKIEWICZ D. and WEATHERILL S. (eds.), *The Involvement of EU Law in Private Law Relationships*, London, 2013, pp. 1 et seq

LECZYKIEWICZ D., 'Effectiveness of EU Law Before National Courts: Direct Effect, Effective Judicial Protection, and State Liability' in ARNULL A. and CHALMERS D. (eds.), *Oxford Handbook of European Union Law*, Oxford, 2015, pp. 212 et seq

LECZYKIEWICZ D., 'The Constitutional Dimension of Private Law Liability Rules in the EU' in LECZYKIEWICZ D. and WEATHERILL S. (eds.), *The Involvement of EU Law in Private Law Relationships*, London, 2013, pp. 199 et seq

LECZYKIEWICZ D., "'Where Angels Fear to Tread": The EU Law of Remedies and Codification of European Private Law', in *ERCL*, 2012, 1, pp. 47 et seq

LEFF A., 'Contract as Thing', in *American Univ. LR*, 1970, 19, pp. 131 et seq

- LEPORE A., *Prescrizione e decadenza. Contributo alla teoria del «giusto rimedio»*, Napoli, 2012
- LICARI L.X., *Le nouveau droit français de la prescription extinctive à la lumière d'expériences étrangères récentes ou en gestation (Louisiane, Allemagne, Israël)*, in *RID comp.*, 2009, pp. 739 et seq
- LINDACHER W.F. in WOLF W.F., HORN N., LINDACHER W.F., *AGB-Gesetz: Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, München, 1984
- LOHSSE S., *sub Art 4:109: Excessive Benefit or Unfair Advantage* in JANSEN N. and ZIMMERMANN R. (eds.), *Commentaries on European Contract Laws*, Oxford, 2018, pp. 701 et seq
- LOHSSE S., *sub Art 4:116: Partial Avoidance* in JANSEN N. and ZIMMERMANN R. (eds.), *Commentaries on European Contract Laws*, Oxford, 2018, pp. 724 et seq
- LOOS M.B.M., 'Crystal Clear? The Transparency Requirement un Unfair Terms Legislation', in *ERCL*, 2023, 19(4), pp. 281 et seq
- LOOSCHELDERS D., 'Verjährungsbeginn und – frist im subjektiv-objektiven System sowie due Wirkung von Treu und Glauben' in REMIEN O. (eds.), *Verjährungsrecht in Europa – zwischen Bewährung und Reform*, Tübingen, 2011, pp. 189 et seq
- LORENZ S., *sub § 818 in Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. (§§ 812-822 BGB) (Ungerechtfertigte Bereicherung)*, J. von Staudingers, BGB, 14th ed., 2007, Rn. 43
- LOTMAR P., *Über causa im römischen Recht – Beitrag zur Lehre von den Rechtsgeschäften*, München, 1875
- LÖWE W. in LÖWE W., GRAF VON WESTPHALEN F., TRINKNER R., *Kommentar zum AGB-Gesetz: Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, Heidelberg, 1983
- LOWERY D., 'Consumer Sovereignty and Quasi-Market Failure', in *Journal of Public Administration Research and Theory*, 1998, 8(2), pp. 137 et seq
- MACARIO BAN G., 'Le restituzioni contrattuali nel diritto tedesco' in P. GALLO and G. MAGRI (eds.), *Le restituzioni contrattuali*, Torino, 2024, pp. 201 et seq
- MACARIO F., 'L'evoluzione delle categorie (e della dogmatica) del diritto contrattuale e la giurisprudenza della Corte di giustizia', in *Foro it.*, 2023, IV, pp. 383 et seq
- MACARIO F., *Adeguamento e rinegoziazione nei contratti a lungo termine*, Napoli, 1996
- MAFFEIS D., 'Direttiva 2014/17/UE: rischio di cambio e di tasso e valore nella componente aleatoria nei crediti immobiliari ai consumatori', in *BBTC*, 2016, pp. 190 et seq
- MAFFEIS D., *Contratti illeciti o immorali e restituzioni*, Milano, 1999
- MAGNUS U. , 'Limitation in the International Arena—The United Nations Limitation Convention for International Sales' in REMIEN O. (eds.), *Verjährungsrecht in Europa – zwischen Bewährung und Reform*, Tübingen, 2011, pp. 94 et seq
- MAGRI G., 'Le restituzioni nel diritto comune europeo' in GALLO P. and MAGRI G. (eds.), *Le restituzioni contrattuali*, Torino, 2024, pp. 355 et seq
- MAGRI G., *Dallo scambio immorale allo scambio illecito*, Torino, 2022

MAGRI G., *La prescrizione. Ricodificazione degli ordinamenti giuridici europei e prospettive di modernizzazione del diritto italiano*, Napoli, 2019

MAK C. and KAS B., 'Civil Courts and the European Polity. An Introduction' in MAK C. and KAS B. (eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe*, Oxford, 2023, pp. 1 et seq

MAK C., 'Europe-building through private law: Lessons from constitutional theory', in *ERCL*, 2012, 8(3), pp. 326 et seq

MAK C., 'First or second best? Judicial law-making in European private law' in MENDES J. and VENZKE I. (eds.), *Allocating Authority: Who Should Do What in European and International Law?*, London, 2018, pp. 217 et seq

MAK C., 'Free movement and contract law' in TWIGG-FLESNER C. (eds.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham/Northampton, 2016, pp. 182 et seq

MAK C., 'Giving Voice: A Public Sphere Theory of European Private Law Adjudication', in *European Law Open*, 2023, 2(4), pp. 697 et seq

MAK C., 'Gutierrez Naranjo: on limits in law and limits of law', in *European Law Review*, 2018, 43(3), pp. 447 et seq

MAK C., 'Reimagining Europe Through Private Law Adjudication' in MAK C. and KAS B. (eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe*, Oxford, 2023, pp. 63 et seq

MAK C., 'Rights and Remedies - Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' in MICKLITZ H.-W. (eds.), *Constitutionalization of European Private Law*, Oxford, 2014, pp. 236 et seq

MAK C., 'The One and the Many: Translating Insights from Constitutional Pluralism to European Contract Law Theory', in *ERPL*, 2013, 21(5/6), pp. 1189 et seq

MAK C., 'Unchart(er)ed territory: EU fundamental rights and national private law' in HARTKAMP A.S., SIEBURGH C.H., KEUS L.A.D., KORTMANN J.S. and WISSINK M.H. (eds.), *The influence of EU law on national private law*, Deventer, 2014, pp. 323 et seq

MAK C., *Fundamental rights in European contract law: a comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn, 2008

MAK V., 'Private Law Perspectives on Platform Services', in *EuCML*, 2016, 5(1), pp. 19 et seq

MALAURIE M., *Les restitutions en droit civil*, Paris, 1991

MANKO R., *Unfair Terms In Swiss Franc Loans. Overview Of European Court Of Justice Case Law*, European Parliamentary Research Service, March 2021, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2021\)689361](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)689361).

MARASCO G., *La rinegoziazione del contratto. Strumenti legali e convenzionali a tutela dell'equilibrio negoziale*, Padova, 2006

MARELLA M.R., 'The Old and the New Limits to Freedom of Contract in Europe', in *ERCL*, 2006, 2, pp. 257 et seq

- MARKESINIS B., UNBERATH H. and JOHNSTON A., *The German Law of Contract*, 2nd ed., London, 2006
- MARTENS S.A.E., ‘Undue Influence’ in BASEDOW J., HOPT K.J. and ZIMMERMANN R. (eds.), *The Max Plank Encyclopedia of European Private Law*, Oxford, 2012, pp. 1710 et seq
- MATTEI U., ‘I rimedi’ in G. ALPA, M. GRAZIADEI, A. GUARNERI, U. MATTEI, P.G. MONATERI and R. SACCO, *La parte generale del diritto*, II, *Il diritto soggettivo* in R. SACCO (eds.), *Trattato di diritto civile*, Torino, 2001
- MATTIONI M., ‘Sul ruolo dell’equità come fonte del diritto dei contratti’, in *Riv. dir. civ.*, 2014, pp. 567 et seq
- MAUGERI M., ‘Post-caducazione da vessatorietà e post-vessatorietà: il caso Bank M.’, in *Foro it.*, 2023, IV, pp. 407 et seq
- MAUGERI M., ‘The Rules Applicable When Standard Contract Terms Are Avoided and Contracts with Inequality of Bargaining Power: Construction of a Unitary Model of Invalidity ora Plurality of Models?’ in COLLINS H. (eds.), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law*, Alphen aan den Rijn, 2008, pp. 177 et seq
- MAURO M., ‘Prescrizione ed effettività, nel dialogo tra Cassazione e Corti europee’, in *Pers. e merc.*, 2014, pp. 139 et seq
- MAYER K. and SCHEINPFLUG J., *Privatrechtsgesellschaft und die Europäische Union*, Tübingen, 1996
- MAYER-MALY T. and ARMBRÜSTER C., *sub § 138 in Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. I, 4th ed., 2001
- MAZZAMUTO S. and PLAIA A., *I rimedi nel diritto privato europeo*, Torino, 2012
- MAZZAMUTO S., ‘Equivoci e concettualismi nel diritto europeo dei contratti: il dibattito sulla vendita dei beni di consumo’, in *Eur. dir. priv.*, 2004, pp. 1029 et seq
- MAZZAMUTO S., ‘La nozione di rimedio nel diritto continentale’, in *Eur. dir. priv.*, 2007, pp. 585 et seq
- MAZZAMUTO S., *Esecuzione forzata e pubblica amministrazione*, Torino, 2024
- MCKENDRICK E., ‘Contract: In General’ in A. BURROWS (eds.), *English Private Law*, Oxford, 2013, pp. 481 et seq
- MEIER S., *sub Art 15:104: Restitution* in JANSEN N. and ZIMMERMANN R. (eds.), *Commentaries on European Contract Law*, Oxford, 2018, pp. 1921 et seq
- MENGONI L., ‘Problemi di integrazione della disciplina dei “contratti del consumatore” nel sistema del codice civile’ in *Studi in onore di P. Rescigno*, vol. III, Milan, 1998 and now in ID., *Metodo e teoria giuridica. Scritti*, I, CASTRONOVO C., ALBANESE A., NICOLUSSI A. (eds.), Milano, 2011, pp. 352 et seq
- MENGONI L., *Ermeneutica e dogmatica giuridica*, Milan, 1996
- MESSINETTI D., ‘Processi di formazione della norma e tecniche «rimediali» della tutela giuridica’ in SCALISI V. (eds.), *Scienza e insegnamento del diritto civile in Italia*, Milano, 2004, pp. 199 et seq
- MESSINETTI D., ‘Sapere complesso e tecniche giuridiche rimediali’, in *Eur. dir. priv.*, 2005, pp. 605 et seq

MESTMÄCKER E.-J., 'European Economic Constitution' in BASEDOW J., HOPT K.J. and ZIMMERMANN R. (eds.), *The Max Plank Encyclopedia of European Private Law*, Oxford, 2012, pp. 588 et seq

MICKLITZ H.-W. and REICH N., 'The Court and the Sleeping Beauty: the revival of the Unfair Contract Terms Directive (UCTD)', in *CMLR*, 2014, 51(3), pp. 771 et seq

MICKLITZ H.-W., 'Concept of Competitive Contract Law', in *Penn St. Int'l L. Rev.*, 2005, 23, pp. 549 et seq

MICKLITZ H.-W., STUYCK J. and TERRY E. (eds.), *Consumer Law*, Oxford/Portland, 2010

MICKLITZ H.-W., *The Politics of Judicial Co-operation in the EU*, Cambridge, 2005

MICKLITZ H.W., 'Reforming European Unfair Terms Legislation in Consumer Contracts', in *ERCL*, 2010, 6(4), pp. 347 et seq

MILLER L., 'After the Unfair Contract Terms Directive: recent European Directives and English law', in *ERCL*, 2007, 88(1), pp. 88 et seq

MILLER L., *The Emergence of EU Contract Law: Exploring Europeanization*, Oxford, 2011

MISĆENIĆ E., 'Currency Clauses In CHF Credit Agreements: A "Small Wheel" In The Swiss Loans" Mechanism', in *ECML*, 2020, 6, pp. 226 et seq

MISĆENIĆ E., TERESZKIEWICZ P. and INFANTINO M., 'The Interplay Between the CJEU and National Courts in the Case Law on Unfair Contract Terms in Foreign Currency Loans: A Comparative Overview', in *ERCL*, 2023, 19(4), pp. 346 et seq

MONTICELLI S., *Contratto nullo e fattispecie giuridica*, Padova, 1995

MOSCARINI A., *Proprietà privata e tradizioni costituzionali comuni*, Milano, 2006

MOSCATI E., 'Caducazione degli effetti del contratto e pretese di restituzione', in *Riv. dir. civ.*, 2007, pp. 435 et seq

MÖSLEIN F., 'Digitized Terms: The Regulation of Standard Contract Terms in the Digital Age', in *ERCL*, 2023, 19(4), pp. 300 et seq

MÖSLEIN F., '„Governance by Default“ Innovation und Koordination durch dispositives Recht' in GRUNDMANN S., HAAR B., MERKT H., MÜLBERT P.O., WELLENHOFER M., BAUM H., von HEIN J., von HIPPEL T., PISTOR K., ROTH M. and SCHWEITZER H. (eds.), *Festschrift für Klaus J. Hopt zum 70. Geburtstag am 24. August 2010: Unternehmen, Markt und Verantwortung*, Berlin/New York, 2011, pp. 2861 et seq

MOSS J., 'The Intersection Between Economic Justifications for IP Rights and Cost of Enforcement in the English Courts' in HOFMANN F. and KURZ F. (eds.), *Law of Remedies. A European Perspective*, Cambridge/Antwerp/Chicago, 2019, pp. 275 et seq

MULLAINATHAN S. and SHLEIFER A., 'The Market for News', in *American Economic Review*, 2005, 95(4), pp. 1031 et seq

MÜLLER-CHEN M., 'Commentary on the United Nations Convention on the Limitation Period in the International Sale of Goods' in SCHWENZER I. and SCHROETER U.G. (eds.), *Schlechtriem & Schwenzler. Commentary on the Convention on the International Sale of Goods (CISG)*, 5th ed., Oxford, pp. 1288 et seq

- NATUCCI A., 'Invalidità di protezione e nullità delle clausole vessatorie alla luce dei principi costituzionali (italiani e europei)' in IUDICA G. and ALPA G. (eds.), *Costituzione europea e interpretazione della Costituzione italiana*, Napoli, 2006
- NAVARRETTA E., 'I contratti d'impresa e il principio di buona fede' in SIRENA P. (eds.), *Il diritto europeo dei contratti d'impresa*, Milano, 2006, pp. 528 et seq
- NAVARRETTA E., 'Il contratto "democratico" e la giustizia contrattuale', in *Riv. dir. civ.*, 2016, pp. 1262 et seq
- NEBBIA P., *Unfair contract terms in European law: a study in comparative and EC law*, Oxford, 2007
- NEUNER J., *Allgemeiner Teil des Bürgerlichen Rechts*, 12th ed., München, 2020
- NICOLÒ R., 'Diritto civile', in *Enc. dir.*, vol. XII, Milan, 1964
- NICOLUSSI A., 'Diritto soggettivo e rapporto giuridico. Cenni di teoria generale tra diritto privato e diritto pubblico', in *Eur. dir. priv.*, 2014, pp. 1191 et seq
- NICOLUSSI A., 'Proprietà intellettuale e arricchimento ingiustificato: la restituzione degli utili nell'art. 45 TRIPS', in *Eur. dir. priv.*, 2002, pp. 1003 et seq
- NIEUWENHUIS J., 'Caveat emptor in digital times' in SNIJDERS H. and WEATHERILL S. (eds.), *E-Commerce Law, National and Transnational Topics and Perspectives*, vol. 3, The Hague/London/New York, 2003, pp. 89 et seq
- NIVARRA L., 'I rimedi specifici', in *Eur. dir. priv.*, 2011, pp. 157 et seq
- NIVARRA L., 'Rimedi: un nuovo ordine del discorso civilistico', in *Eur. dir. priv.*, 2015, pp. 583 et seq
- NUZZO M., 'Predisposizione di clausole e procedimento di formazione del contratto' in *Studi in onore di F. Santoro-Passarelli*, vol. III, Naples, 1972, pp. 563 et seq
- OGUS A., *Regulation: Legal Form and Economic Theory*, Oxford, 1994
- OLSEN L., 'The choice of the aggrieved party - An analysis of the remedies in the Principles of the European Contract Law', in *ERPL*, 1999, 7(1), pp. 21 et seq
- OSTER S.M. and SCOTT MORTON F.M., 'Behavioral Biases Meet the Market: The Case of Magazine Subscription Prices', in *Advances in Economic Analysis and Policy*, 2005, 5(1), pp. 1 et seq
- OUGHTON D. and WILLETT C., 'Quality Regulation in European Private Law', in *Journal of Consumer Policy*, 2002, 25, pp. 299 et seq
- PAGLIANTINI S., 'Contratti del consumatore – Diritto europeo', in *Enc. dir.*, *I tematici*, I, Milano, 2021
- PAGLIANTINI S., 'Culpa in contrahendo da contratto nullo e retroversione del profitto al consumatore: uso alternativo del diritto o una storia semplice?', in *Foro it.*, 2023, IV, pp. 377 et seq
- PAGLIANTINI S., 'Exordium praescriptionis e rapporti di consumo: variazioni sulla prescrizione', in *Nuove leggi civ. comm.*, 2021, pp. 762 et seq
- PAGLIANTINI S., 'I mutui indicizzati e il mito di un consumatore "costituzionalizzato": la dottrina della Corte di Giustizia da Árpád Kásler a Dziubak', in *Nuove leggi civ. comm.*, 2019, pp. 1258 et seq.

PAGLIANTINI S., 'Il diritto derivato nazionale e la finzione di un dialogo tra le corti', in *ODCC*, 2018, pp. 317 et seq

PAGLIANTINI S., 'L'equilibrio soggettivo dello scambio (e l'integrazione) tra Corte di giustizia, Corte costituzionale ed ABF: il "mondo di ieri" o un trompe l'oeil concettuale?', in *I Contratti*, 2014, pp. 853 et seq

PAGLIANTINI S., 'L'integrazione del contratto tra Corte di Giustizia e nuova disciplina sui ritardi di pagamento: il segmentarsi dei rimedi', in *Pers. e merc.*, 2013, 1, pp. 11 et seq

PAGLIANTINI S., 'La nullità di protezione tra rilevabilità d'ufficio e convalida: lettere da Parigi e dalla Corte di Giustizia' in ID. (eds.), *Le forme della nullità*, Torino, 2009, pp. 27 et seq.

PAGLIANTINI S., 'La nullità selettiva quale epifania di una deroga all'integralità delle restituzioni: l'investitore è come il contraente incapace?', in *Pers. e merc.*, 2019, 4, pp. 123 et seq

PAGLIANTINI S., 'Nullità di protezione, integrazione dispositiva e massimo effetto utile per il consumatore: variazioni sul tema dell'asimmetria contrattuale', in *Pers. e merc.*, 2012, pp. 96 et seq

PAGLIANTINI S., 'Nullità virtuali di protezione?', in *I Contratti*, 2009, pp. 1040 et seq

PAGLIANTINI S., 'Post-vessatorietà ed integrazione del contratto nel decalogo della CGUE', in *Nuova giur. civ. com.*, 2019, III, pp. 361 et seq

PAGLIANTINI S., 'Profili sull'integrazione del contratto abusivo parzialmente nullo' in D'AMICO G. and PAGLIANTINI S. (eds.), *Nullità per abuso ed integrazione del contratto*, Torino, 2013, pp. 67 et seq

PAGLIANTINI S., 'Trent'anni di direttiva 93/13, postvessatorietà restitutoria ed il vuoto di un'interpretazione conforme a tutto tondo', in *Accademia*, pp. 11 et seq

PAGNI I., *Tutela specifica e per equivalente*, Milano, 2004

PALMER N., *Law of Restitution*, vol. I, Boston-Toronto

PALMIERI A. and PAGLIANTINI S., 'Il post-vessatorietà come una "Baustelle im Dunkeln"?', in *Foro it.*, IV, 2021, pp. 294 et seq

PALMIERI A. and PARDOLESI R., 'Invalidità post-vessatoria dei contratti dei consumatori, restituzioni risarcitorie e altre calamità', in *Foro it.*, 2023, IV, pp. 369 et seq

PANN J., SELIGER R., ÜBELEIS J., 'Foreign Currency Lending in Central, Eastern and Southeastern Europe: The Case of Austrian Banks', in *Financial Stability Report*, 2010, 20, pp. 56 et seq

PARDOLESI R., 'Clausole abusive (nei contratti dei consumatori): una direttiva abusata?', in *Foro it.*, 1994, V, pp. 137 et seq

PARRY R., 'The Position of Family Sureties within the Framework of Protection for Consumer Debtors in European Union Member States', in *ERPL*, 2005, 13(1), pp. 357 et seq

PASSAGNOLI G., 'Analisi di un falso principio: nullità speciali e restituzione unilaterale', in *Pers. e merc.*, 2021, 2, pp. 260 et seq

PASSAGNOLI G., *Nullità speciali*, Milan, 1995

PATTI F.P., '«In pari causa turpitudinis», cinquant'anni dopo' in *Liber amicorum Pietro Rescigno*, vol. II, Napoli, 2018, pp. 1537 et seq

PATTI F.P., 'Buon costume e scopo della norma violata: sull'ambito di applicazione dell'art. 2035 c.c.', in *Riv. dir. civ.*, 2021, pp. 517 et seq

PATTI F.P., 'Clausola vessatoria sugli interessi moratori e integrazione del contratto', in *I Contratti*, 2014, pp. 737 et seq

PATTI F.P., 'Dai «contratti standard» al «contratto asimmetrico». Considerazioni su metodo e obiettivi delle ricerche di Vincenzo Roppo', in *Juscivile*, 2018, 2, pp. 226 et seq

PATTI F.P., 'Unfair Terms Control in Business-to-Business Contracts', in *Italian Law Journal*, 2019, 5(2), pp. 583 et seq

PATTI S., 'Autonomia private e diritto privato europeo', in *Contr. e impr.*, 2013, pp. 633 et seq

PATTI S., 'Certeza e giustizia nel diritto della prescrizione in Europa', in *Riv. trim. dir. proc. civ.*, 2010, 64(1), pp. 21 et seq

PATTI S., 'Ricodificazione', in *Riv. dir. civ.*, 2018, pp. 435 et seq

PAVILLON C., 'Ignorance is Bliss - How *Ex Officio* Control Became the *Raison d'Être* of the UCTD', in *ERPL*, 2024, 32(3), pp. 519 et seq

PELLET S., 'Proposition de modifications des articles 1352 et suivants du code civil: les restitutions', in *Rev. contr.*, 2017, pp. 211 et seq

PERILLO J.M., 'Restitution in a Contractual Context', in *Col. L. R.*, 1973, 73, pp. 1208 et seq

PERILLO J.M., 'Restitution in a Contractual Context and the Restatement (Third) of Restitution & Unjust Enrichment', in *Wash. & Lee L. Rev.*, 68, 2011, pp. 1007 et seq

PERLINGIERI P., 'Rimedi e modello sociale europeo' in G. VETTORI (eds.), *Remedies in contract. The Common Rules for a European Law*, Padova, 2008, pp. 203 et seq

PESCE E., *I rimedi dell'autonomia privata*, Pisa, 2022

PETER K., 'Die Möglichkeit mehrerer Gründe derselben Rechtsfolge und mehrerer gleicher Rechtsfolge', in *Arch. civ. Pr.*, 1930, pp. 1 et seq

PETERS F. and ZIMMERMANN R., 'Verjährungsfristen', in Bundesminister der Justiz (eds.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. I, 1981

PETRONIO U., *La lotta per la codificazione*, Torino, 2002

PFEIFFER T. in WOLF M., LINDACHER W.F. and PFEIFFER T. (eds.), *AGB-Recht, Kommentar*, 6th ed., Einleitung, 2013

PILETTA MASSARO A., 'Competition as an Institution for Regulating Societal Transformations in the Digital Era: The Role of Social Values in Competition Law', in *Digital Society*, 2025, 33(4), pp. 1 et seq

PIRAINO F., 'Il diritto europeo e la «giustizia contrattuale»', in *Eur. dir. priv.*, 2015, pp. 233 et seq

PISTELLI F., 'Finanziamenti in valuta estera e rimedi: oltre la conversione', in *ODCC*, 2022, pp. 241 et seq.

PISTELLI F., 'Ritorno al futuro. La tutela del consumatore nei foreign currency loans', in *Actualidad Jurídica Iberoamericana*, 2022, pp. 734 et seq

PISTELLI F., 'Scelta del rimedio e sua convenienza: il caso dei finanziamenti in valuta straniera ai consumatori. Corte di Giustizia UE, Sez. VI, sentenza 2 settembre 2021, C-932/19', in *Juscivile*, 2020, 6, pp. 1060 et seq.

PISTELLI F., *L'indicizzazione del regolamento contrattuale*, Napoli, 2023

PIVA P., *Il principio di effettività della tutela giurisdizionale nel diritto dell'Unione Europea*, Napoli, 2012

POLI R., 'Gli standard di prova in Italia', in *Giur. It.*, 2018, pp. 2517 et seq

POLIDORI S., 'Analisi di un falso principio: nullità speciali e restituzione unilaterale', in *Pers. e merc.*, 2021, 2, pp. 260 et seq

POLIDORI S., 'Nullità di protezione e interesse pubblico', in *Rass. dir. civ.*, 2009, pp. 1019 et seq

POLIDORI S., *Discipline della nullità e interessi protetti*, Napoli, 2001

POLLACK M., 'Creeping Competence: The Expanding Agenda of the European Community', in *Journal of Public Policy*, 1994, 14(2), pp. 95 et seq

PÖSSINGER R., *Die bereicherungsrechtliche Haftung Minderjähriger*, Hamburg, 1973

PUGLIATTI S., *La proprietà nel nuovo diritto*, Milano, 1964

PUGLIESE G., *La prescrizione nel diritto civile*, vol. I, 4th ed., 1921 and vol. II, 1924, (first published in 1889 (vol I) and 1892 (vol II))

PUTTI P.M., *La nullità parziale. Diritto interno e comunitario*, Napoli, 2002

RABEL E., *Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung*, vol. 1, Berlin/Leipzig, 1936

RAISER L., *Das Recht der allgemeinen Geschäftsbedingungen*, Hamburg, 1935, reprinted 1961

RAKOFF T., 'Contracts of Adhesion: An Essay in Reconstruction', in *Harvard Law Review*, 1983, 96(6), pp. 1173 et seq

RAMSAY I., 'Ordoliberalism and Opportunism? The Making of Consumer Law in the UK' in MICKLITZ H.-W. (eds.), *The Making of Consumer Law and Policy in Europe*, London, 2021, pp. 235 et seq

RANA F., 'Restitution e Contract negli Stati Uniti' in GALLO P. and MAGRI G. (eds.), *Le restituzioni contrattuali*, Torino, 2024, pp. 325 et seq

RANIERI F., *Europäisches Obligationenrecht*, 3rd ed., Wien, 2009

RAUE B., 'Die doppelte Lizenzgebühr ist kein Strafschadensersatz – Anmerkung zu EuGH ZUM, 349 – Stowarzyszenie "Olawska Telewizja Kablowa"', in *Zeitschrift für Urheber- und Medienrecht*, 2017, 4, pp. 353 et seq

RAUE B., 'Disgorgement of Profits. Distributive And Deterrant Logics' in HOFMANN F. and KURZ F. (eds.), *Law of Remedies. A European Perspective*, Cambridge/Antwerp/Chicago, 2019, pp. 153 et seq

RAWLS J., *A Theory of Justice*, Cambridge, 1971

REICH N., 'The consumer as citizen – The citizen as consumer' in *Liber amicorum Jean Calais-Auloy, Études de droit de la consommation*, Paris, 2003, pp. 943 et seq

REICH N., *General Principles of EU Civil Law*, Cambridge, 2013

REICH N., MICKLITZ H.-W., ROTT P., TONNER K., *European Consumer Law*, 2nd ed., Cambridge/Antwerp/Portland, 2014

REMIEN O., 'AGB-Gesetz und Richtlinie über mißbräuchliche Verbrauchervertragsklauseln in ihrem europäischen Umfeld', in *ZEuP*, 1994, 2, pp. 35 et seq

REMIEN O., 'Schlusswort: Übereinstimmungen und Unterschiede in den Kernfragen der Verjährung in der europäischen Privatrechtsentwicklung' in ID. (eds.), *Verjährungsrecht in Europa – zwischen Bewährung und Reform*, Tübingen, 2011, pp. 393 et seq

RIESENHUBER K. and TAKAYAMA K., 'Rechtsangleichung: Grundlagen, Methoden und Inhalte' in RIESENHUBER K. and TAKAYAMA K. (eds.), *Rechtsangleichung: Grundlagen, Methoden und Inhalte*, Berlin/Boston, 2006, pp. 1 et seq

RIESENHUBER K., 'A "competitive contract law"' in PURNHAGEN K. and ROTT P. (eds.), *Varieties of European Economic Law and Regulation, Liber Amicorum Hans Micklitz*, Cham, 2014, pp. 105 et seq

RITTNER F., 'Das Projekt eines Europäischen Privatgesetzbuches und die wirtschaftliche Praxis', in *DB*, 1996

RIZZO V., *Le "clausole abusive" nell'esperienza tedesca, francese, italiana e nella prospettiva comunitaria*, Napoli, 1994

RODOTÀ S., *Le fonti di integrazione del contratto*, Milano, 2004

ROGOZIŃSKI D., 'Orzecznictwo Sądu Najwyższego w sprawie kredytów waloryzowanych kursem waluty obcej a prawidłowa implementacja jurysdykcyjna dyrektywy 93/13/EWG', in *Journal of Insurance, Financial Markets and Consumer Protection*, 2018, 4, pp. 3 et seq

ROMANO S., *L'ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto*, Pisa, 1918

ROPPO V., 'Contratto di diritto comune, contratto del consumatore, contratto con asimmetria di potere contrattuale: genesi e sviluppo di un nuovo paradigma', in *Riv. dir. civ.*, 2001 now in ID., *Il contratto del duemila*, 4th ed., 2020

ROPPO V., 'Iscrivibilità di ipoteca per somma denominata in moneta estera', in *Riv. dir. priv.*, 1996, pp. 55 et seq

ROPPO V., 'Nullità parziale del contratto e giudizio di buona fede', in *Riv. dir. civ.*, 1971, I, pp. 686 et seq

RÖSLER H., 'Consumer Contracts (PIL)' in BASEDOW J., HOPT K.J. and ZIMMERMANN R. (eds.), *The Max Plank Encyclopedia of European Private Law*, Oxford, 2012, pp. 361 et seq

RÖSLER H., 'Consumers and Consumer Protection Law' in BASEDOW J., HOPT K.J. and ZIMMERMANN R. (eds.), *The Max Plank Encyclopedia of European Private Law*, Oxford, 2012, pp. 369 et seq

ROTT P., 'Unfair contract terms' in TWIGG-FLESNER C. (eds.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham/Northampton, 2016, pp. 287 et seq

ROY F., 'Mortgage Markets In Central And Eastern Europe – A Review Of Past Experiences And Future Perspectives', in *European Journal of Housing Policy*, 2008, 8(2), pp. 133 et seq

RUBINO D., *La fattispecie e gli effetti giuridici preliminari*, Milano, 1939

RUIZ ARRANZ A., 'The Commencement of Prescription (and what the Consumer's Awareness of the Unfairness is) within the Unfair Contract Terms Directive', in *ERCL*, 2023, 19(3), pp. 181 et seq

RUTGERS J.W., 'European Contract Law and Social Justice' in TWIGG-FLESNER C. (eds.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham/Northampton, 2016, pp. 535 et seq

SACCO R., 'Codificare: modo superato di legificare?', in *Riv. dir. civ.*, 1983, I, pp. 117 et seq

SACCO R., *L'arricchimento ottenuto mediante fatto ingiusto*, Torino, 1959

SALANITRO U., 'Squilibrio contrattuale e tecniche rimediali' in L. PELLEGRINI (eds.), *Studi in memoria di G. Gabrielli*, vol. II, Napoli, 2018, pp. 1711 et seq

SAMUELS A., 'The Consumer Rights Act 2015', in *J. Bus L.*, 2016, 3, pp. 159 et seq

SCALISI V., 'Contratto e regolamento nel piano d'azione delle nullità di protezione' in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, Milano, 2011, pp. 195 et seq

SCALISI V., 'Giustizia contrattuale e rimedi: fondamento e limiti di un controverso principio' in *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, Milan, 2011, pp. 337 et seq

SCALISI V., 'Invalidità e inefficacia nella prospettiva europea dei rimedi' in ID. (eds.), *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, Milan, 2011, pp. 265 et seq

SCALISI V., 'Invalidità e inefficacia. Modalità assiologiche della negoziabilità' in ID. (eds.), *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, Milano, 2011, pp. 125 et seq

SCALISI V., 'Lineamenti di una teoria assiologica dei rimedi giuridici', in *Riv. dir. civ.*, 2018, 4, pp. 1045 et seq

SCALISI V., 'Nullità e inefficacia nel sistema europeo dei contratti' in ID. (eds.), *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, Milano, 2011, pp. 167 et seq

SCALISI V., 'Invalidità e inefficacia nella transizione al diritto europeo: quadro di sintesi' in ID. (eds.), *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo*, Milano, 2011, pp. 421 et seq

SCHÄFER F.L., '§812-822. Ungerechtfertigte Bereicherung' in SCHMOECKEL M., RÜCKERT J., ZIMMERMANN R., *Historisch-kritischer Kommentar zum BGB*, Bd. III, *Schuldrecht: Besonderer Teil*. §§ 433-853, 2. Teilbd., Tübingen, 2013

SCHILLIG M., 'Directive 93/13 and the Price Term Exemption: A Comparative Analysis in the Light of the Market for Lemons Rationale', in *International and Comparative Law Quarterly*, 2011, 60(4), pp. 933 et seq

SCHINKEL M.P., 'On Distributive Justice by Antitrust: The Robin Hood Cartel', in *Journal of Competition Law & Economics*, 2022, 18(3), pp. 584 et seq

SCHLECHTRIEM P., *Schuldrecht, Allgemeiner Teil*, 5th ed., Tübingen, 2003

SCHLOSSMANN S., *Der Vertrag*, Leipzig, 1876

SCHMID U., *Die Instrumentalisierung des Privatrechts durch die Europäische Union. Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung*, Baden-Baden, 2010

SCHMIDT H. in ULMER P., BRANDNER H.E., HESSEN H.D., *AGB-Gesetz Kommentar zum Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, Köln, 1978

SCHMIDT I., 'Codification' in BASEDOW J., HOPT K.J. and ZIMMERMANN R. (eds.), *The Max Plank Encyclopedia of European Private Law*, Oxford, 2012, pp. 221 et seq

SCHOLZ S.J., *Political Solidarity*, University Park, 2008

SCHULTE-NÖLKE H., 'Incorporation of Standard Contract Terms on Websites', in *ERPL*, 2019, 15(2), pp. 103 et seq

SCHULTE-NÖLKE H., 'The Objectives of Directive 93/13/EEC on Unfair Contract Terms: An Overview after 30 Years of Case Law', in *ERPL*, 2024, 32(3), pp. 315 et seq

SCHULTE-NÖLKE H., TWIGG-FLESNER C. and EBERS M. (eds.), *EC Consumer Law Compendium*, Berlin/New York, 2008

SCHULZ F., 'System der Rechte auf den Eingriffserwerb', in *AcP*, 1909, pp. 1 et seq

SCHULZE R. and ZOLL F., *European Contract Law*, 3rd ed., Baden-Baden, 2021

SCHULZE R., 'Contours of European Private Law' in SCHULZE R. and SCHULTE-NÖLKE H. (eds.), *European Private Law – Current Status and Perspectives*, Munich, 2011, pp. 3 et seq

SCHULZE R., 'European Private Law and the Existing EC Law', in *ERPL*, 2005, 13(1), pp. 3 et seq

SCHULZE R., 'The Acquis Communautaire and the Development of European Contract Law' in SCHULZE R., EBERS M. and GRIGOLEIT C. (eds.), *Informationspflichten und Vertragsschluss im Acquis communautaire*, Tübingen, 2003

SCHWARTZ A., 'Seller Unequal Bargaining Power and the Judicial Process', in *Indiana Law Journal*, 1974, 49(3), pp. 367 et seq

SCODITTI E., 'Clausole abusive nel contratto di assicurazione: il consumatore ha diritto al risarcimento del danno?', in *Danno e resp.*, 2005, pp. 941 et seq

SCODITTI E., 'Il contratto come comportamento: la responsabilità per i danni da clausola abusiva e la Corte di giustizia', in *Foro it.*, 2023, IV, pp. 395 et seq

SERAFIN R., 'Le restituzioni contrattuali nel diritto inglese' in GALLO P. and MAGRI G. (eds.), *Le restituzioni contrattuali*, Torino, 2024, pp. 295 et seq

SERAFIN R., 'The Court of Justice on Unfair Terms and Supplementation of the Contract: How Far is Too Far?', in *ECML*, 2023, 12(4), pp. 150 et seq

SHEPPARD W., *Actions upon the Case for Deeds, viz. Contracts, Assumpsits, Deceits, Nuisances, Trover and Conversion, Delivery of Goods, and for other Male-feasance and Mis-feasance*, London, 1663

- SIMLER P., *La nullité partielle des actes juridiques*, Paris, 1969
- SIMPSON A.W.B., *A History of the Common Law of Contract*, Oxford, 1975
- SINGER R., ‘Vertragsfreiheit, Grundrechte und der Schutz des Menschen vor sich selbst’, in *JZ*, 1995, pp. 1133 et seq
- SIRENA P. and ADAR Y., ‘La prospettiva dei rimedi nel diritto privato europeo’, in *Riv. dir. civ.*, 2012, pp. 359 et seq
- SIRENA P., ‘Arricchimento ingiustificato e restituzioni: una prospettiva di diritto europeo’, in *Rass. dir. civ.*, 2018
- SIRENA P., ‘Autonomia privata e regolazione del mercato nella disciplina dei contratti d’impresa’, in *BBTC*, 2023, pp. 509 et seq
- SIRENA P., PATTI F.P., SCHULZE R., ZIMMERMANN R., *Diritto privato europeo. Testi di riferimento*, 3rd ed., Torino, 2020
- SIRENA P., ‘Il giudizio di abusività delle clausole c.d. economiche’ in G. ALPA and V. LEVI (eds.), *I diritti dei consumatori e degli utenti. Un commento alle leggi 30.7.1998 n. 281 e 24.11.2000 n. 340 e al decreto legislativo 23.4.2001 n. 224*, Milan, 2001, pp. 337 et seq
- SIRENA P., ‘L’azione generale di arricchimento senza causa’ in *Obbligazioni*, I, *Il rapporto obbligatorio*, in LIPARI N. and RESCIGNO P. (eds.), *Diritto Civile*, vol. III, Milan, 2009
- SIRENA P., ‘L’europeizzazione degli ordinamenti giuridici e la nuova struttura del diritto privato’, in *ODCC*, 2014, pp. 3 et seq
- SIRENA P., ‘L’integrazione del diritto dei consumatori della disciplina generale del contratto’, in *Riv. dir. civ.*, 2004, I, pp. 787 et seq
- SIRENA P., ‘L’integrazione di diritto privato e diritto pubblico nella tutela del cliente bancario’, in *ODCC*, 2021, pp. 23 et seq
- SIRENA P., ‘La buona fede nel diritto europeo dei contratti’ in FERRER VANRELL P. and MARTÍNEZ CANELLAS A. (eds.), *Principios de derecho contractual europeo y principios de unidroit sobre contratos comerciales internacionales*, Madrid, 2009, pp. 250 et seq
- SIRENA P., ‘La disciplina delle clausole contrattuali abusive nell’interpretazione della giurisprudenza e dell’Arbitro Bancario Finanziario (ABF)’ in BELLELLI A., MEZZASOMA L. and RIZZO F. (eds.), *Le clausole vessatorie a vent’anni dalla Direttiva CEE 93/13*, Napoli, 2014, pp. 59 et seq
- SIRENA P., ‘La parte generale della disciplina contrattuale dopo l’europeizzazione del diritto privato’ in M. MAUGERI and G. GRASSO (eds.), *Contratto, contratti e mercati*, Roma, 2022, pp. 109 et seq
- SIRENA P., ‘La ripetizione dell’indebito’ in N. LIPARI and P. RESCIGNO (directed by), *Diritto civile*, vol. III, *Obbligazioni*, I, *Il rapporto obbligatorio*, Milan, 2009
- SIRENA P., ‘La scelta dei Principles of European Contract Law (PECL) come legge applicabile al contratto’, in *Riv. dir. civ.*, 2019, pp. 608 et seq
- SIRENA P., ‘La teoria dell’efficacia giuridica nel pensiero di Angelo Falzea’, in *Riv. dir. civ.*, 2017, pp. 999 et seq

SIRENA P., 'National Laws and European Private Law: The Value of Legal Pluralism in Europe' in JANSSEN A., LEHMANN M. and SCHULZE R. (eds.), *The Future of European Private Law*, Baden-Baden, 2023, pp. 349 et seq

SIRENA P., 'Pluralismo giuridico e diritto privato europeo', in *BBTC*, 2025, pp. 150 et seq

SIRENA P., 'The DCFR – Restitution, Unjust Enrichment and Related Issues', in *ERCL*, 2008, 4(3), pp. 445 et seq

SIRENA P., 'The Rules about Restitution in the Proposal on a Common European Sales Law', in *ERPL*, 2011, 19(6), pp. 97 et seq

SIRENA P., 'Tutela dei clienti e regolazione del mercato trent'anni dopo l'emanazione del Testo unico bancario', in *Quaderni di Ricerca Giuridica della Consulenza Legale - Banca d'Italia*, Roma, 2024, pp. 123 et seq

SIRENA P., 'Unfair Indexation Clauses and Quasi-Contractual Restitution in European Consumer Loan Litigation' in ID. (eds.), *Unfair Contract Terms and Unjustified Enrichment. The European case of foreign currency loans*, Cambridge, forthcoming

SIRENA P., *De iure*, Torino, 2025

SIRENA P., GINESTRI M., VALLETTA E., 'National Procedural Rules and the New Boundaries of ECJ's Control in the Light of Directive 93/13', in *ERPL*, 2024, 32(3), pp. 549 et seq

SIRENA P., *Introduction to Private Law*, 3rd ed., Bologna, 2019

SIRENA P., *La gestione di affari altrui. Ingerenze altruistiche, ingerenze egoistiche e restituzione del profitto*, Torino, 1999

SLAWSON W.D., 'Standard Form Contracts and Democratic Control of Lawmaking Power', in *Harvard L. Rev.*, 1970-71, 84(3), pp. 529 et seq

SMITH L., 'Restitution: The Heart of Corrective Justice', in *Tex L. Rev.*, 2001, 79, pp. 2115 et seq

SMITH S.A., 'Rights-Threats, Wrongs and Injustices: The Common Law's Causes of Action', in *New Zealand Universities Law Review*, 2017, 27, pp. 1033 et seq

SMITH S.A., *Contract Theory*, Oxford, 2004

SMITH S.A., *Rights, Wrongs, and Injustices: The Structure of Remedial Law*, Oxford, 2019

SMITS J.M., *Contract Law. A Comparative Introduction*, 2nd ed., Cheltenham/ Northampton, 2017

SMORTO G., 'Sul significato di "rimedi"', in *Eur. dir. priv.*, 2014, pp. 159 et seq

SOMMA A., 'Il diritto privato liberista. A proposito di un recente contributo in tema di autonomia contrattuale', in *Riv. trim. dir. proc. civ.*, 2001, pp. 263 et seq

SOMMA A., 'Tutte le strade portano a Fiume. L'involuzione liberista del diritto comunitario', in *Riv. crit. dir. priv.*, 2002, pp. 263 et seq

SOMMA A., *Diritto comunitario vs. diritto comune europeo*, Torino, 2003

SOMMA A., *Temi e problemi di diritto comparato*, II, *Tecniche e valori nella ricerca comparatistica*, Torino, 2005

SUNSTEIN C. (eds.), *Behavioral Law and Economics*, Cambridge, 2000

SPIRO K., ‘Befristung und Verjährung der Ansprüche nach dem Wiener Kaufrechtsübereinkommen’ in HOYER H. and POSCH W. (eds.), *Das einheitliche Wiener Kaufrecht*, 1992, Wien, pp. 195 et seq

SPIRO K., *Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalefristen*, I, *Die Verjährung der Forderungen*, and II, *Andere Befristungen und Rechte*, Bern, 1975

STARCK C., ‘Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court’ in FRIEDMANN D. and BARAK-EREZ D. (eds.), *Human Rights in Private Law*, Oxford/Portland, 2001, pp. 97 et seq

STEVENS R., *The Laws of Restitution*, Oxford, 2023

STIGLER G.J., ‘The Economics of Information’, in *Journal of Political Economy*, 1961, 69, pp. 213 et seq

STIGLITZ J., ‘The Contributions of the Economics of Information to Twentieth Century Economics’, in *Quarterly Journal of Economics*, 2000, 115, pp. 1441 et seq

STOFFEL-MUNCK P., ‘The Revolution in Unfair Terms’ in CARTWRIGHT J. and WHITTAKER S. (eds.), *Code Napoléon Rewritten: French Contract Law after the 2016 Reforms*, Oxford, 2020, pp. 145 et seq

STOLL H., ‘Notizen zur Neuordnung des Rechts der Leistungsstörungen’, in *JZ*, 2001, pp. 589 et seq

STORME E., ‘On the Usefulness of Default Rules and Disproportionate Sanctions in Consumer Law’, in *ERPL*, 2021, 29(3), pp. 399 et seq

STORME M., ‘Verjährung und Verfassung—Belgische Erfahrungen’ in O. REMIEN (eds.), *Verjährungsrecht in Europa – zwischen Bewährung und Reform*, Tübingen, 2011, pp. 143 et seq

STORME M.E., ‘Constitutional review of Disproportionately Different Periods of Limitation of Action (Prescription)’, in *ERPL*, 1997, 5(1), pp. 79 et seq

STRONG G.A., ‘The Enforceability of Illegal Contracts’, in *Hastings L.J.*, 1961, 12, pp. 347 et seq

STRYK S., *Usus modernus pandectarum*, Lib. XII, Tit. I

STUYCK J., ‘European Consumer Law After the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market?’, in *CMLR*, 2000, 37(2), pp. 367 et seq

SUDRE F., ‘Le recours aux ‘notions autonomes’ in SUDRE F. (eds.), *L’interprétation de la Convention européenne des droits de l’homme*, Bruxelles, 1998

TANDOI S., ‘Le restituzioni nei progetti di codificazione dottrinale del diritto contrattuale’ in DE NOVA G. (eds.), *Le restituzioni contrattuali*, Padova, 2012, pp. 9 et seq

TASSIKAS A.D., ‘The Court and the Sleeping Beauty 2.0: Filling the Contractual Gap, or Making Valid Consumer Contracts to the Detriment of the Non-consumer?’, in *ERCL*, 2023, 19(4), pp. 422 et seq

TERLIZZI G., ‘Le restituzioni nel diritto francese’ in P. GALLO and G. MAGRI (eds.), *Le restituzioni contrattuali*, Torino, 2024, pp. 165 et seq

TERRÉ F., SIMLER P. and LEQUETTE Y., *Droit civil. Les obligations*, 11th ed., Paris, 2013

TESCARO M., 'L'auspicabile ammodernamento del diritto della prescrizione italiano alla luce del confronto con altre esperienze e specialmente con quella tedesca a venti anni dalla *Schuldrechtsmodernisierung*' in GRANELLI C., PATTI S. and SIRENA P. (eds.), Torino, 2023, pp. 181 et seq

TETARD S., 'Les restitutions dans le nouvel article 1352-4 du code civil (ou les risques de la simplification)', in *Dall.*, 2017, pp. 777 et seq

TILBURY M., NOONE M. and KERCHER B., *Remedies Commentary and Materials*, 7th ed., North Ryde New South Wales, 2020

TILBURY M.J., *Civil Remedies*, Sydney, 1990

TOMÁS G., 'Útile per inutile non vitiatur: can favor contractus be considered a European regula iuris?', in *ERCL*, 2016, 12(3), pp. 259 et seq

TORONJO PIVATEAU G., 'Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements', in *Nebraska Law Review*, 2007, 86(3), pp. 672 et seq

TRABUCCHI A., 'Arricchimento' in *Enc. Dir.*, vol. III, Milan, 1958

TREBILCOCK M. and DEWEES D., 'Judicial Control of Standard Form Contracts' in BURROWS A. and VELJANOVSKI C. (eds.), *The Economic Approach to Law*, Oxford, 1981

TREBILCOCK M., 'Rethinking consumer protection policy' in RICKETT C. and TELFER T. (eds.), *International Perspectives on Consumers' Access to Justice*, Cambridge, 2003, pp. 68 et seq

TREBILCOCK M., *The limits of Freedom of Contract*, Cambridge, 1993

TREBILCOCK M.J., 'An Economic Approach to the Doctrine of Unconscionability' in REITER B. and SWAN J. (eds.), *Studies in Contract Law*, Toronto, 1980, pp. 379 et seq

TRESNJACK V. and BEYSEN E., 'European Consumer Protection Law: Curia Semper Dabit Remedium?', in *CMLR*, 2011, 48, pp. 95 et seq

TRIDIMAS T., *The General Principles of EU Law*, 2 ed., Oxford, 2006

TROIANO S., 'Le clausole vessatorie a trentadue anni dalla Direttiva 93/13/CEE' in D'ADDA A., BACHELET V. and REGAZZONI L. (eds.), *Il diritto privato dei consumatori. Nuovi assetti e prospettive*, Pisa, 2026, pp. 27 et seq

TWIGG-FLESNER C. and BRADGATE R., 'The EC Directive on certain aspects of the sale of consumer goods and associated guarantees – all talk and no do?', in *Web Journal of Current Legal Issues*, 2000, 2

TWIGG-FLESNER C., 'The EU's Proposals for Regulating B2B Relationships on online platforms – Transparency, Fairness and Beyond', in *EuCML*, 2018, 7(6), pp. 222 et seq

TWIGG-FLESNER C., 'Introduction' in TWIGG-FLESNER C. (eds.), *The Cambridge Companion to European Union Private Law*, Cambridge, 2010, pp. 1 et seq

TWIGG-FLESNER C., 'Remedies in European Contract Law. Themes and Controversies' in HOFMANN F. and KURZ F. (eds.), *Law of Remedies. A European Perspective*, Cambridge/Antwerp/Chicago, 2019, pp. 251 et seq

TWIGG-FLESNER C., *The Europeanisation of Contract Law*, 2nd ed., Abingdon, 2013

ULMER P., 'Zur Anpassung des AGB-Gesetzes an die EG-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen' in *Europäische Zeitschrift für Wirtschaftsrecht*, 1993, pp. 337 et seq

UNTERHOLZNER K.A.D., *Ausführliche Entwicklung der gesamten Verjährungslehre aus den gemeinen in Deutschland geltenden Rechten*, 1828, followed by a second edition edited by Theodor Schirmer in 1858

VAN SCHAGEN E., *The Development of European Private Law in a Multilevel Legal Order*, Antwerp, 2016

VASSILEVA R., 'Monetary Appreciation and Foreign Currency Mortgages: Lessons from the 2015 Swiss Franc Surge', in *ERPL*, 2020, 28(1), pp. 173 et seq

VENUTI M.C., *Nullità della clausola e tecniche di correzione del contratto*, Padova, 2004

VETTORI G., 'Contratto giusto e rimedi effettivi', in *Pers. e merc.*, 2015, pp. 5 et seq

VETTORI G., 'Effettività delle tutele (diritto civile)', in *Annali*, X, 2017

VETTORI G., 'Giustizia e rimedi nel diritto europeo dei contratti', in *Eur. dir. priv.*, 2006, pp. 53 et seq

VETTORI G., *Il contratto europeo tra regole e principi*, Torino, 2015

VIRGO G., 'A taxonomy of Defences in Restitution' in E. BANT, K. BARKER, S. DEGELING (eds.), *Research Handbook on Restitution and Unjust Enrichment*, Cheltenham/Northampton, 2020, pp. 398 et seq

VIRGO G., 'The Defence of Illegality in Unjust Enrichment' in DYSON A., GOUDKAMP J. and WILMOT-SMITH F. (eds.), *Defences in Unjust Enrichment*, Oxford, 2016, pp. 165 et seq

VIRGO G., *The Principles of the Law of Restitution*, 4th ed., Oxford, 2024

VISSER D., 'Unjustified Enrichment in Comparative Perspective' in M. REIMANN and R. ZIMMERMANN (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed., Oxford, 2019, pp. 961 et seq

VON CAEMMERER E., '*Mortuus redhibetur*. Bemerkungen zu den Urteilen BGHZ 53,144 und 57,137' in *Festschrift für Karl Larenz zum 70. Geburtstag*, München, 1973, pp. 621 et seq

VON HIPPEL E., 'Der Schutz des Verbrauchers vor unlauteren allgemeinen Geschäftsbedingungen in den EG-Staaten', in *RabelsZ*, 1977, 41, pp. 237 et seq

VON HIPPEL E., *Verbraucherschutz in Europa*, in *RabelsZ*, 1981, 45, pp. 353 et seq

VON HIPPEL F., *Zur Gesetzmäßigkeit juristischer Systembildung*, Berlin, 1930

VON MEHREN A., 'Some Reflections on Codification and Case Law in the Twenty-First Century', in *U.C. Davis Law Review*, 1998, 31, pp. 659 et seq

VON SAVIGNY F.C., *Sistema del diritto romano attuale*, vol. III, Torino, 1900

VON TUHR A., *Der Allgemeine Teil des deutschen Bürgerlichen Rechts*, Leipzig, 1914

WADE J.W., 'Restitution of Benefits Acquired Through Illegal Transactions', in *U. Penn. L. Rev.*, 1947, 95(3), pp. 261 et seq

- WAGNER-WIEDUWILT K., 'EG-Vorschlag für eine AGB-Richtlinie', in *Die Bank*, 1990, pp. 710 et seq
- WEATHERILL S., 'Competence Creep and Competence Control', in *Yearbook of European Law*, vol. 23, issue 1, 1 January 2004, pp. 1 et seq
- WEATHERILL S., 'Consumer Policy' in CRAIG P. and DE BÚRCA G. (eds.), *The Evolution of the EU Law*, 3rd ed., Oxford, 2021, pp. 874 et seq
- WEATHERILL S., 'The Constitutional Context of (Ever-wider) Policy-Making' in JONES E., MENON A. and WEATHERILL S. (eds.), *The Oxford Handbook of the European Union*, Oxford, 2013, pp. 570 et seq
- WEATHERILL S., 'The role of the informed consumer in EC law and policy', in *Consumer Law Journal*, 1994, pp. 49 et seq
- WEATHERILL S., *European consumer law and policy*, 2nd ed., Cheltenham/Northampton, 2013
- WEINTRAUD G., *Die Saldotheorie. Ein Beitrag zur Lehre vom Gegenstand des Bereicherungsanspruchs*, Breslau, 1931
- WHITTAKER S., 'Distinctive features of the new consumer contract law', in *The Lawyer Quarterly*, 2017, 133, pp. 47 et seq
- WHITTAKER S., 'Judicial Interventionism and Consumer Contracts', in *Law Quarterly Review*, 2001, 117, pp. 215 et seq
- WHITTAKER S., 'Theory and Practice of the "General Clause" in English Law: General Norms and the Structuring of Judicial Discretion' in GRUNDMANN S. and MAZEAUD D. (eds.), *General Clauses and Standards in European Contract Law*, The Hague, 2006, pp. 57 et seq
- WHITTAKER S., 'Unfair Terms in Commercial Contracts and the Two Laws in Competition: French Law and English Law Contrasted', in *Oxford Journal of Legal Studies*, 2019, 39(2), pp. 404 et seq
- WIEACKER F., *A History of Private Law in Europe*, Oxford, 1995
- WIEDEMANN H., 'Zur verfassungsrechtlichen Inhaltskontrolle von Verträgen', in *JZ*, 1994, pp. 408 et seq
- WIEWIÓROWSKA-DOMAGALSKA A. and GROCHOWSKI M., 'Consumer Law in Poland: Or There and Back Again' in MICKLITZ H.-W. (eds.), *The Making of Consumer Law and Policy in Europe*, London, 2021, pp. 193 et seq
- WIEWIÓROWSKA-DOMAGALSKA A., 'Lost in Information - The Transparency Dogma of the Unfair Contract Terms Directive', in *ERPL*, 2024, 32(3), pp. 423 et seq
- WIEWIÓROWSKA-DOMAGALSKA A., 'Potential and Hurdles for the CJEU's Jurisprudence in Domestic Legal Orders: A Polish Case Study' in GRUNDMANN S. and GROCHOWSKI M. (eds.), *European Contract Law and the Creation of Norms*, Cambridge, 2021, pp. 269 et seq
- WIEWIÓROWSKA-DOMAGALSKA A., 'Unfair Contract Terms in CHF Mortgage Loans. Case C-206/18 Dziubak – where do we go from here?', in *EuCML*, 2020, 9(5), pp. 206 et seq
- WILBURG W., *Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht*, Graz, 1934
- WILHELMSSON T., 'Le diverse forme di welfarismo nel diritto europeo dei contratti' in SOMMA A. (eds.), *Giustizia sociale e mercato nel diritto europeo dei contratti*, Torino, 2007, pp. 267 et seq

WILHELMSSON T., *Twelve Essays on Consumer Law and Policy*, Helsinki, 1996

WILHELMSSON T., 'Various Approaches to Unfair Terms and Their Background Philosophies', in *Juridica International*, 2008, XIV, pp. 51 et seq

WILLETT C., *Fairness in Consumer Contracts*, Aldershot, 2007

WINDSCHEID B., *Lehrbuch des Pandektenrechts*, Frankfurt, 5th ed., vol. II and vol. VI, §424

WINFIELD P.H., 'The American Restatement of the Law of Restitution', in *Law Quarterly Review*, 1938, 54, pp. 529 et seq

WINTGEN R., 'Article 10.2' in VOGENAUER S. (eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed., Oxford, 2015

WOLLSCHLÄGER C., 'Das stoische Bereicherungsverbot in der römischen Rechtswissenschaft' in BEHREND S., DIESSELHORST M. and ECKART VOSS W. (eds.), *Römisches Recht in der europäischen Tradition. Symposium aus Anlaß des 75. Geburtstages von Franz Wieacker*, Ebelsbach, 1985, pp. 41 et seq

WRIGHT D., *The Remedial Constructive Trust*, Sydney, 1998

YEŞİN P., 'Foreign Currency Loans and Systemic Risk in Europe', in *Federal Reserve Bank of St. Louis Review*, 2013, pp. 219 et seq

ZAKRZEWSKI R., *Remedies Reclassified*, Oxford/New York, 2005

ZAPPATA L., 'Le restituzioni nei contratti nulli' in DE NOVA G. (eds.), *Le restituzioni contrattuali*, Padova, 2012, pp. 135 et seq

ZIMMERMANN A.S., *Der gesetzliche Rückforderungsanspruch*, Tübingen, 2021

ZIMMERMANN R. and DU PLESSIS J., 'Basic Features of the German Law of Unjustified Enrichment', in *Restitution Law Review*, 1994, 2, pp. 14 et seq

ZIMMERMANN R. and KLEINSCHMIDT J., 'Prescription: General Framework and Special Problems Concerning Damages Claims' in KOZIOL H., STEININGER B.C. (eds.), *European Tort Law 2007. Tort and Insurance Law Yearbook*, Wien, 2008, pp. 26 et seq

ZIMMERMANN R. and WHITTAKER S. (eds.), *Good Faith in European Contract Law*, Cambridge, 2000

ZIMMERMANN R., 'Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law', in *ERCL*, 2012, 8(4), pp. 367 et seq

ZIMMERMANN R., 'Restitutio in integrum. Die Rückabwicklung fehlgeschlagener Verträge nach den Principles of European Contract Law, den UNIDROIT Principles und dem Avant – Project eines Code Européen des Contrats' in HONSELL H., ZÄCH R., HASENBÖHLER F., HARRER F., RHINOW R. (eds.), *Privatrecht und Methode, Festschrift für Ernst A. Kramer*, Basel-Genf-München, 2004, pp. 735 et seq

ZIMMERMANN R., 'Restitution after Termination for Breach of Contract: German Law after the Reform of 2002' in BURROWS A. and RODGER A. (eds.), *Mapping the Law, Essays in Honour of Peter Birks*, Oxford, 2006, pp. 323 et seq

ZIMMERMANN R., 'Unjustified Enrichment: The Modern Civilian Approach', in *Oxford Journal of Legal Studies*, 1995, 15(3), pp. 403 et seq

ZIMMERMANN R., *Comparative foundations of a European Law of Set-Off and Prescription*, Cambridge, 2002

ZIMMERMANN R., Introduction before Art 14:101 in JANSEN N. and ZIMMERMANN R. (eds.), *Commentaries on European Contract Law*, Oxford, 2018, pp. 1823 et seq

ZIMMERMANN R., *Limitation of Actions under the Draft Civil Code for Israel in Comparative Perspective*, Tübingen, 2008

ZIMMERMANN R., *sub* Art 14:203: Commencement in JANSEN N. and ZIMMERMANN R. (eds.), *Commentaries on European Contract Law*, Oxford, 2018, pp. 1843 et seq

ZIMMERMANN R., *sub* Art 14:301: Suspension in Case of Ignorance in JANSEN N. and ZIMMERMANN R. (eds.), *Commentaries on European Contract Law*, Oxford, 2018, pp. 1848 et seq

ZIMMERMANN R., *sub* Art 14:303: Suspension in Case of Impediment Beyond Creditor's Control in JANSEN N. and ZIMMERMANN R. (eds.), *Commentaries on European Contract Law*, Oxford, 2018, pp. 1857 et seq

ZIMMERMANN R., *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford, 1990

ZIMMERMANN R., *The New German Law of Obligations: Historical and Comparative Perspectives*, Oxford, 2005

ZIMMERMANN R., 'The Unwinding of Failed Contracts in the Unidroit Principles 2010', in *Rev. dr. unif.*, 2011, pp. 563 et seq

ZITELMANN E., *Irtum und Rechtsgeschäft*, Leipzig, 1879

ZOLL F., 'The problems associated with the implementation of directives into national legal systems – a few examples from the codified legal traditions' in TWIGG-FLESNER C. (eds.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham/Northampton, 2016, pp. 68 et seq

ZOLL F., 'Unfair Terms in the Acquis Principles and Draft Common Frame of Reference: A Study of the Differences between the Two Closest Members of One Family', in *Juridica International*, pp. 69 et seq

ZÖLLNER W., 'Regelungsspielraum im Schuldvertragsrecht', in *AcP*, 1996, pp. 1 et seq

ZWEIGERT K. and KÖTZ H., *An Introduction to Comparative Law*, 3rd ed., Oxford, 1998 (translated by WEIR T.)