

Control of Standard Terms in Consumer Contracts in Vietnamese Law:
Lessons Learnt from European Experiences

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Control of Standard Terms in Consumer Contracts
in Vietnamese Law:
Lessons Learnt from European Experiences

Toezicht op algemene voorwaarden in consumentencontracten naar
Vietnamees recht: lessen uit Europa

(met een samenvatting in het Nederlands)

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¹ Applying a functional comparative approach, it is not difficult to find an equivalent Latin idiom ‘*A bove majori discit arare minor*’ (‘From the older ox, the younger learns to plough’) in the Western society.

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LIST OF ABBREVIATIONS

ACQP	Acquis Principles
B2B	Business-to-Business
B2C	Business-to-Consumer
C2C	Consumer-to-Consumer
CESL	Proposal for a regulation on an optional Common European Sale Law
CJEU	Court of Justice of European Union
CMA	Competition and Market Authority (the United Kingdom)
CPL	Consumer Protection Law promulgated by Vietnamese National Parliament in 2010
CPO	Ordinance on Protection of Consumers' Rights and Interest issued by Standing Committee of Vietnamese National Parliament in 1999
DCFR	Draft Common Frame of Reference
EU	European Union
GTC	General trading conditions
OFT	Office of Fair Trading (the United Kingdom)
PECL	Principles of European Contract Law
SMEs	Small and medium-sized enterprises
UCTD	Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts
UKlaG	Act on Injunctive Relief for consumer rights and other violations – <i>Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Germany)</i>
VCA	Vietnamese Competition Authority

Chapter 1

INTRODUCTION

1. IMPETUS FOR THE RESEARCH

Corresponding to the profound social, political and economic changes in Vietnamese society, Vietnamese contract law has experienced fundamental changes during the 20th century.¹ One of the milestones in the development of Vietnamese contract law is the adoption of the Vietnamese Civil Code, which explicitly recognized the principle of freedom of contract as a core pillar of Vietnamese contract law.² With the aim of laying down a new contractual framework for economic exchange during the transformation from a planned economy to a market economy in Vietnam, Vietnamese legislators have been deeply inspired by Western classical contract law³ which arose in the 19th century – the heyday of the philosophy of *laissez-faire*.⁴

In the *laissez-faire* marketplace, economic agents – who were expected to act in their self-interest – freely interacted and contracted to maximize their own profits, thereby promoting efficiency in the markets.⁵ Underlying the paradigm of freedom

1 For an overview of the historical development of Vietnamese contract law in the 20th century see Pham Huu Nghi, *Che Do Hop Dong Trong Nen Kinh Te Thi Truong o Viet Nam Giai Doan Hien Nay* [Institution of Contracts in the Market Economy of Vietnam in The Current Period] (1996) PhD dissertation; Dinh Thi Mai Phuong, *Thong Nhat Luat Hop Dong o Viet Nam* [Unifying Contract Law in Vietnam], Judicial Publisher, 2005.

2 Hoang The Lien, Nguyen Duc Giao, *Binh Luan Khoa Hoc Bo Luat Dan Su Viet Nam* [Scientific Commentary on the Civil Code of Vietnam], vol. 1, (Hanoi: National Political Press, 2001).

3 John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam*. (Ashgate Publishing, Ltd., 2006).

4 F. Kessler recalls that 'freedom of contract does not commend itself for moral reasons only; it is also an eminently practical principle. It is the inevitable counterpart of a free enterprise system. As a result, our legal lore of contracts reflects a proud spirit of individualism and of laissez faire.' Friedrich Kessler, 'Contracts of Adhesion--Some Thoughts About Freedom of Contract' (1943) 43 *Colum. L. Rev.* 630. For further views on the role of freedom of contract and the free market society, see Max Weber, *Economy and Society*, trans G. Roth & C. Wittich (Berkeley: University of California Press, 1978).

5 Apparently, the 19th century was also the heyday of theories of natural law, which explains the requirements of respecting individual rights of free choice. Nowadays, the rationales for freedom of contract can be found not only in the utilitarian theory but also in the autonomy theory. Clinging on to the value of party autonomy, the autonomy theory contends that society must respect the free will of individuals to makes choices and refrain from any arbitrary interference with private decisions. Contract law can thus be seen as a means that allows an individual to exercise his/her right of self-determination concerning his/her person, labour, and property. On the other hand, the most renowned aspect of the utilitarian theory, law and economics, supports the freedom of contract because it creates an incentive for efficient cooperation. According to the rational choice theory, individuals can make a deal that maximizes their self-interest and it thereby enhances

of contract there were two basic assumptions reflecting contracting practices at that time. First, two contracting parties were presumed to have equal bargaining power. Apparently, although several exceptions to this general view can be readily noticed such as cases of incapacity, contract law is in principle built upon the ideal notion of formal equality between individuals in society. Second, the contracting practice was a negotiating process according to which parties genuinely engaged in a bargaining process to negotiate individual contractual terms before finalizing their agreements.⁶ Accordingly, under the basic assumptions of classical contract law, contractual freedom leads to contractual justice.⁷ Once contracting parties who have an equal bargaining position negotiate each individual kind of contractual term before finalizing their agreements in a contract, the contractual content can be assumed to produce a just outcome for both parties. Since the parties are the best judges of their own interests, the maxim ‘*qui dit contractuel, dit juste*’⁸ reveals that a fair contract is what the parties freely bargain and agree.⁹ The ultimate function of classical contract law is nothing more than to ensure that an enforceable contract genuinely reflects the free will of the contractual parties; as long as contracting parties freely and voluntarily agree to enter into a contract, the contractual terms are fair *per se*, therefore the law should merely examine the way in which the agreement has been formed, not its content.¹⁰

Nevertheless, industrialization and globalization in the late 20th and early 21st century have significantly transformed the contracting models on which Vietnamese contract law has been based. Nowadays, standard form contracts are so ubiquitous in Vietnamese society that a person virtually cannot participate in ordinary life without them. In almost every kind of daily activity, such as those related to mobile telephones, insurance, banking services, gym membership or social activities, goods and services are offered in the form of pre-formulated terms on a ‘take it or leave it’ basis.¹¹ Consequently, if consumers wish to obtain those goods and services, they must adhere to such terms, with little or no possibility of negotiating different terms

the welfare of society. See P.S. Atiyah, *An Introduction to the Law of Contract*, 5th edn (Clarendon Press, Oxford, 1995) Chapter 1 ‘The Development of the Modern Contract Law’; K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 324-5.

- 6 M. Chen-Wishart, ‘Regulating Unfair Terms’ in L. Gullifer and S. Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law Essays in Honour of Hugh Beale* (Hart Publishing Oxford 2014) 107.
- 7 P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, (Clarendon Press, Oxford 1979), 765.
- 8 ‘If it is contractual, it is fair.’ This proverb is attributed to Fouillée, *La science sociale contemporaine* (1880), 410 by Abegg, Andreas, and Annemarie Thatcher, ‘Review Essay—Freedom of Contract in the 19th Century: Mythology and the Silence of the Sources—Sibylle Hofer’s Freiheit ohne Grenzen? Privatrechtstheoretische Diskussionen im 19. Jahrhundert’ (2004) 5.1 *German Law Journal* 5.
- 9 Study Group on Social Justice in European Contract Law, ‘Social Justice in European Contract Law: Manifesto’ in Martijn W. Hesselink (ed.), *The Politics of a European Civil Code* (Kluwer Law International, 2006) 172.
- 10 See P.S. Atiyah, *An Introduction to the Law of Contract*, 5th edn (Clarendon Press, Oxford, 1995) Chapter 16 ‘Unfair Terms’, 282.
- 11 VCA, *Bao Cao Cac Quy Dinh Ve Hop Dong Mau Va Dieu Kien Thuong Mai Chung: Phap Luat Viet Nam Va Kinh Nghiem Quoc Te* [Report on the Regulation of Standard Form Contracts and General Trading Conditions: The Vietnamese Law and International Experience] (Hanoi, 2009); Tang Van Nghia, ‘Ban Ve Dieu Kien Giao Dich Chung Cua Doanh Nghiep’ [On the General Transaction Condition of Business], (2009) No.3 *Journal of Democracy and Law* 21-8; Phan Thao Nguyen, ‘Ve Hop Dong Mau Trong Cung Ung Thuong

and conditions, and accordingly, of themselves determining the rights and obligations binding on them. The omnipresence of standard form contracts, as a result, poses a significant challenge to the fundamental assumptions underlying classical contract law. Firstly, the classical contract model assumes that contracting parties will negotiate all the important terms before materializing their agreement into contracts, but standard form contracts are unilaterally pre-drafted by traders, the adhering parties cannot meaningfully influence their content. Secondly, the classical contract model assumes that both contracting parties are put on an equal footing, but bargaining power between consumers and businesses is unlikely to be equal. The stronger party, often the supplier of goods and services may abuse his/her power to exploit the weaker party through contracts. Consequently, it is very doubtful whether standard form contracts are truly the fruit of adhering parties' consent, whether the famous maxim '*Qui dit contractuel, dit juste*' remains true, and whether the standard form contracts are not inefficient. As a matter of fact, there are an increasing number of standard form contracts that contain terms which are unnecessarily one-sided to the detriment of consumers.

Many efforts have been witnessed in Vietnam to deal with the phenomenon of the standardization of contracts in recent years. Of significant importance is the first attempt by the Vietnamese legislators in 2010 to prescribe a specific regulation on standard terms in consumer contracts and to delegate regulatory powers to the Vietnamese Competition Authority (VCA) in order to pre-approve several kinds of standard form contracts.¹² Since then, there have been two emerging trends in legal literature concerning the legal treatment of standard terms in consumer contracts. The first trend is to advocate an extension of the current approval mechanism according to which standard forms must be reviewed by the competent agency before being used in the market.¹³ The second trend is to argue that the public approval of standard form contracts is a regrettable retreat from a newly established paradigm of freedom of contract.¹⁴ Although acknowledging the problems of standard form contracts, the second trend concludes that parties are capable of protecting themselves from onerous terms as long as they are provided with sufficient information. In the view of those following this second trend, the pre-approval mechanism for standard form contracts is merely helpful in protecting consumers in a monopolized market where there are very few suppliers, especially when they are normally state-owned enterprises. However, in the competitive market the freedom of contract principle implies that parties are entitled to freely decide on contractual content and that the state shall not interfere except for

Mai Dich Vu' [On Standard Contracts in Supplying Commercial Goods and Services', (2005) No. 4 *Journal of State and Law*, 54-6.

- 12 Articles 14-19 of the 2010 Consumer Protection Law and Decree 99/2011/ND-CP dated 27 October 2011 of the Government Making Detailed Provisions and Providing Guidelines for the Implementation of a Number of Articles of the Law on the Protection of Consumers' Rights.
- 13 The trend in expanding the scope of the approval mechanism was initiated by Decision No.35/2015/QĐ-TTg on 20 August 2015 issued by the Prime Minister to amend Decision No. 02/2012/QĐ-TTg and subjecting three more kinds of standard form contracts to a review by the state agency before being circulated in the market.
- 14 Duong Hong Phuong, 'Trien Khai Thuc Hien Hop Dong Theo Mau, Dieu Kien Giao Dich Chung Trong Cung Ung Dich Vu Ngan Hang' [Implementing Provisions on Standard Form Contracts and General Trading Conditions Pertaining to Supplying Banking Services], (2016) 19 *Journal of Banking* 13.

the purpose of guaranteeing a fair bargaining process. To this end, the problems of standard form contracts are sufficiently addressed merely by strengthening the function of the market through transparency requirements.¹⁵

These two trends in the legal literature somewhat reflect the wider debates regarding (i) the proper role of the state in regulating private negotiation and (ii) the real image of consumers who are assumed to be weaker parties in comparison to businesses. Indeed, given the historical development of Vietnamese contract law, it is not difficult to explain mainstream scholars' mistrust of any positive state interference in standard form contracts. The ghosts of excessive paternalism during the planned economy are too obsessive for them to tolerate any substantive rules rather than information-based solutions in dealing with the problems of standard terms in consumer contracts.¹⁶ However, the insights from behavioural sciences seem to suggest that the formal version of the freedom of contract paradigm, based on a model of highly competent and rational parties, does not accurately reflect the decision-making process by consumers. Indeed, the effectiveness of information-based solutions – the least intrusive means of interfering in contractual relationships – is challenged since consumers, regardless of being provided with adequate information and due to their cognitive biases, are unable to sufficiently understand standard contract terms and thus cannot make rational decisions.¹⁷

Simultaneously, from an international perspective, it is worth noting that a classic model of contract law in Western society in the 19th century from which Vietnamese law borrowed has experienced a movement which is the so-called materialization of contract law to better correspond to the modern economy. Arguably, this modern version of contract law can provide a more promising start to not only preserve the utility of standard form contracts but also to constrain the overreaching by drafting parties within a normative framework of contract law. In this new contract law there are substantive arguments for two regulatory concepts in contract law: the market-rational concept and social concept.¹⁸ It is the market-rational version of the regulatory approach to contract law that justifies rules which are necessary to address market failure as to standard terms.¹⁹ On the other hand, the social concept enables contract law to include rules for the purpose of preventing the exploitation of the weaker party by the stronger.²⁰ To be sure, like any modernization project, this sort of regulatory contract law also has problems from political and doctrinal perspectives, and thus entails that the materialization of contract law should be approached cautiously.

15 As will be discussed later, this tendency is entirely in line with the opinion of the drafting committee of the 2015 Civil Code.

16 For further discussion on the development of Vietnamese contract law during the 20th century, especially in the planned economy before the adoption of the 1995 Civil Code, see Section 1, Chapter 3.

17 See further the discussion in Section 4.1, Chapter 2.

18 See Brigitta Lurger, 'The Future of European Contract Law between Freedom of Contract, Social Justice and Market Rationality' (2005) 4 *European Review of Contract Law* 442. These concepts will be further discussed in Section 2.3, Chapter 2.

19 See further the discussion in Section 3, Chapter 2.

20 See further the discussion in Section 4, Chapter 2.

2. RESEARCH QUESTIONS

Against the above backdrop, this research aims to evaluate the current framework and, from a comparative law perspective, propose feasible solutions to reform Vietnamese legislative controls of standard terms in consumer contracts. To this end, this dissertation seeks to answer the following questions: (i) What are the rationales justifying the control of standard terms in consumer contracts? (ii) How do Vietnamese law and European law control standard terms in consumer contracts? and (iii) What lessons from European experiences can be learnt in order to reform the current framework of Vietnamese law?

Underlying these questions is an assumption that an effective control mechanism for standard terms requires a holistic approach: well-designed substantive provisions need to be combined with feasible procedural provisions on which parties can rely in order to perform their legal duties and rights. Accordingly, this dissertation considers the legislative schemes for controlling standard terms in consumer contracts in a broad sense, which includes the elements of both substantive law and procedural law.

As far as substantive rules are concerned, the dissertation will follow a different outlook from the classical approach. Indeed, it is well known that in so far as standard contract terms are applicable, it raises three distinct issues concerning classical contract law: first, how a set of standard terms unilaterally offered by one party can become a part of an individual contract (the incorporation issue). Second, how vague or ambiguous clauses should be interpreted if the other party does not have any influence on the drafting process (the interpretation issue). Third and most importantly, how should the fairness of the contract be guaranteed given the potential one-sidedness of conditions imposed by the user of standard terms (the issue of control over unfair terms).²¹ Throughout the course of the 20th century, various legal systems in Europe promulgated legislation or developed case law to respond to the three issues mentioned above.²² One drawback of this outlook in the context of Vietnamese law is that it does not explicitly reflect different levels of state interference in contract law. Given the historical development of the paradigm of freedom of contract in Vietnamese contract law, it is not self-evident for mainstream scholars why a general (substantive) unfairness control of standard terms is needed. As mentioned earlier, one major trend in the legal treatment of standard terms alleged that regulatory rules which have the effect of guaranteeing the transparency of standard terms are adequate for protecting consumers. That was the reason why the concept of unfair standard terms was deliberately avoided, even though the 2010 Consumer Protection Law prohibits several kinds of standard terms in consumer contracts.²³ Accordingly, this dissertation classifies the substantive

21 Thomas Wilhelmsson, 'Standard Form Conditions' in Arthur S. Hartkamp, *Towards a European Civil Code*, (Kluwer Law, 2011) 571-86.

22 For the legal treatment of standard form contracts in the different legal systems in Europe, see more in K.H. Neumayer, 'Contracting Subject to Standard Terms and Condition' in *International Encyclopedia of Comparative Law: Contracts in General* (1975).

23 Unfortunately, the lack of a general concept of unfair (standard) terms resulted in a grave misunderstanding by international readers that there is no consumer protection against unfair terms in Vietnam. For example, a Malaysian scholar recently remarked, 'Most of Malaysia's neighbours have enacted laws dealing with

rules into information-based solutions and content-based solutions to ascertain whether information-based solutions are sufficient to deal with the problems of standard terms, and if not, to what extent are content-based solutions justified. Nevertheless, from a functional perspective, the approach of this dissertation is comparable to a traditional approach: information-based solutions include the legal techniques that are equivalent to the first two concepts of the classical approach, namely the incorporation issues and interpretation issues, while the content-based solutions primarily aim at controlling substantive unfair terms.

One of the key characteristics of private law is that enforcement depends on proceedings being initiated by private parties. However, in the case of standard terms in consumer transactions, there are two major problems with such a classic approach. Firstly, individual consumers who have limited knowledge and financial capacity lack the incentive to bring a case before the courts because the potential gains are typically outweighed by the cost of litigation in conjunction with the low probability of success. Secondly, judicial review cannot effectively address the extremely diverse nature of standard terms because judicial decisions do not have binding effect on other consumers or other suppliers providing similar terms. Accordingly, the issues are whether an individual proceeding is an efficient means to challenge problems of standard terms and, if not, to what extent could collective proceedings be more effective in enforcing consumers' rights. By doing so, this dissertation goes beyond the assumptions of the classic private law enforcement mechanism to consider the institutional choices for the purpose of effectively controlling standard terms in consumer contracts.

3. DELIMITATION

In a broad sense, a holistic approach to the effective control of standard terms always includes a careful analysis of substantive regulations in specific sectors which may have the direct or indirect effect of controlling such terms. Only a thorough analysis of a specific market sector may produce adequate evidence for legislators to prohibit a particular term from being used in such an individual market. Otherwise, the general legislative control of standard terms, especially the outright prohibition of several terms in the case of the CPL, will become over-inclusive legislation since a particular term which is unnecessarily onerous in one market sector may be justified in other sectors. Although adhering to such an approach and even taking it into consideration to evaluate the feasibility of the blacklisted terms in the CPL, this dissertation does not explicitly address the problems of standard terms in any particular market sector, but it does study the legislative control of standard terms as a safety-net instrument to police all standard terms in all market sectors. The general legislative control of standard terms itself, however, may function as a useful starting point for legislators to specifically regulate standard terms which are used in a particular market in the future.

unfair contracts, including Australia, Brunei, China, Hong Kong, New Zealand, the Philippines, and Singapore. There is, however, no unfair contracts law in Vietnam.' Adnan Trakic, 'Statutory protection of Malaysian consumers against unfair contract terms. Has enough been done?' (2015) 44.3 *Common Law World Review* 203, 209.

Additionally, while it is vital to understand the problems of standard terms in business transactions under which both parties enjoy equal bargaining power, this dissertation deliberately limits the research to consumer transactions. As a result, several interesting topics relating to business contracts such as the battle of forms or unfair terms in business contracts will not be addressed.²⁴

4. RESEARCH METHODOLOGY

The ultimate aim of this research is to assess the Vietnamese legislative control of standard terms in consumer contracts and to find feasible solutions to reform the current framework. Therefore, given the fact that the problems surrounding standard form contracts have been dealt with in many jurisdictions for such a long time, it is logical for this dissertation to make a choice to follow a comparative law perspective.

Due to its benefits of providing insights in order to engage in legal reform, comparative law has been utilized since the time of Hammurabi.²⁵ Similarly, in order to modernize and enhance legal development it is generally acknowledged in Vietnam that rather than waiting for decades to distil a modern legal framework from internal practices, it would be better for Vietnam to borrow foreign legal ideas and legal institutions.²⁶ Apparently, a good legal framework in one jurisdiction may not work for another, as each country has its own economic, social and cultural context. However, in some cases it is much more cost-effective²⁷ to learn from developed countries and simultaneously to make the necessary adaptations rather than to come up with brand new ideas.²⁸

24 The ‘battle of forms’ issue in Vietnamese contract law was discussed by the author in a different place, see Do Giang Nam, Review on the Provisions on Standard Form Contracts in the Draft Civil Code (2015), (2015) No. 05 *The Journal of Legislative Studies* (Vietnamese).

25 Alan Watson, Legal Transplants and European Private Law, vol. 4.4 *Electronic Journal of Comparative Law*, (December 2000), <<http://www.ejcl.org/ejcl/44/44-2.html>> [accessed 15 May 2017].

26 In Vietnam, the use of comparative law for legislative purposes has become a custom. The documents which the Government must submit to the National Assembly typically include a comparative report to inform legislators how similar problems have been dealt with in several other jurisdictions. For example, in the drafting process of the CPL in 2010 and 2015 CC, the drafting committees prepared an 84-page and 200-page comparative law report respectively. For an comprehensive analysis of the role of comparative law in drafting the CPL in 2010, see Nguyen Van Cuong, *The Drafting of Vietnam’s Consumer Protection Law: An Analysis from Legal Transplantation Theories*, PhD thesis, (2011), 109 (Faculty of Law, University of Victoria) <https://dspace.library.uvic.ca/bitstream/handle/1828/3404/Nguyen_Cuong_PhD_2011.pdf?sequence=1&isAllowed=y> [accessed 15 May 2017].

27 In the 1970s, Alan Watson famously coined the term ‘legal transplants’ to indicate the transferring of a certain legal rule from one country to another. In a work which was later regarded as a ‘seminal’ text in comparative law, he argued that legal transplantation ‘is socially easy’ and the ‘historical roots and social context of the creation of law are less important’, see Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn, (Athens: University of Georgia Press, 1993) 95. Nevertheless, Pierre Legrand posited that a legal transplantation is impossible: legal rules are not autonomous entities which are free from a historical and cultural background, see Pierre Legrand, ‘The Impossibility of Legal Transplants’, (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

28 This is in line with the opinion of the majority of discussants at the international conference ‘*The Challenges and Practices of Legal Transplant in Vietnam: Sharing European Experiences*’ organized by the Office of the National Assembly of Vietnam in cooperation with the European Union Delegation to Vietnam in Hanoi, on 5 February 2015. With more than a dozen individual reports from the most prominent legal scholars in Vietnam, the conference comprehensively synthesized the orthodox views of the Vietnamese

By following the comparative law approach, the dissertation attempts to seek inspiration and to identify better solutions in dealing with standard form contracts in consumer transactions.²⁹ The former aim is self-explanatory as by engaging in a legal comparison, Vietnam may always gain inspiration in order to reform its law. Even if comparative law cannot fully provide the necessary solutions, it can still produce more evidence to evaluate the Vietnamese law than an enquiry, which limits itself to only the internal perspective. The latter aim, however, begs the following question: how does one determine what is in fact ‘better’ law.³⁰ This question highlights the necessity for a yardstick to indicate according to which criteria one legal solution can be considered to be better than another.³¹

Having described the general functions of the comparative law approach, the following sections will explain in detail the choice regarding the selection of jurisdictions and their legal sources for a comparison and the selection of the criteria to be used as a benchmark to evaluate the legal solutions. Also, the last section will describe the methods that have been used to collect the relevant information for this dissertation.

4.1. Selection of Jurisdictions

Given that the ultimate goal of this comparative research is to reform Vietnamese law, the jurisdictions selected in order to be compared with Vietnamese law must be able to function as a fruitful source for possible solutions to the problems of standard terms.³² To that end, European law, notably Directive 93/13/EEC, seems to be a feasible choice thanks to its reputation of addressing the problems of standard terms in

legal community on theories and practices of legal transplants. The proceedings of the conference were later published by the Office of the National Assembly of Vietnam, see Office of the National Assembly of Vietnam, *The Challenges and Practices of Legal Transplant in Vietnam: Sharing European Experiences*, (Hong Duc Publisher, 2016).

- 29 In a paper entitled ‘Aims of Comparative Law’, Patrick Glenn has generally provided at least four functions of comparative law. Accordingly, comparative law can be utilized as an instrument (a) of learning and knowledge (b) of evolutionary and taxonomic science, (c) to contribute to understanding and improving one’s own legal system, and (d) for the harmonization of law, H. Patrick Glenn, ‘The Aims of Comparative Law’, in: J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, (Cheltenham: Edward Elgar 2006), 57-65. Also see the ‘purposes of comparative law research’ as listed by Esin Öricü, E. Öricü, ‘Developing Comparative Law’, in E. Öricü and D. Nelken (eds), *Comparative Law: A Handbook*, (Oxford: Hart Publishing 2007) 53-56.
- 30 Regarding the concept of ‘better law’, see Ralf Michaels, ‘The Functional Method of Comparative Law,’ in Mathias Reimann and Reinhard Zimmermann, (eds), *The Oxford Handbook of Comparative Law*, (Oxford University Press, 2006) 340, 373; Mathias Siems, ‘Bringing in Foreign Ideas: The Quest For “Better Law” In Implicit Comparative Law’ (2014) 9 *The Journal of Comparative Law* 119.
- 31 Konrad Zweigert and Hein Kötz argued ‘that the comparatist is in the best position to follow his comparative researches with a critical evaluation’ K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 47.
- 32 Marieke Oderkerk, ‘The Need for a Methodological Framework for Comparative Legal Research-Sense and Nonsense of Methodological Pluralism in Comparative Law’ (2015) 79.3 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 589. ‘If the ultimate objective of a comparative legal research project is evaluative or regulatory (or both), one should include in the selection the system which will be evaluated (and, if necessary that for which the new regulation is meant), together with at least one system that can function as a source of other, possible, solutions, (guideline 2)’ page 605.

consumer contracts.³³ Indeed, the Directive is well known for its unique combination of substantive rules on controlling the transparency and fairness of standard terms and procedural rules on eliminating unfair terms from the market.³⁴ As a matter of fact, it has launched a new wave of legislation on unfair (standard) terms in Europe by setting out standards for controlling unfair standard terms in every kind of consumer contract in different legal systems of the Member States.^{35, 36} On the one hand, for the Member States which had even adopted their own legislation before the adoption of Directive 93/13/EEC, the implementation of Directive 93/13/EEC has provided them with an opportunity to reconsider their own legislation.³⁷ On the other hand, Directive 93/13/EEC has been of particular importance for the new Member States of the European Union when these states were required to implement Directive 93/13/EEC, which has led, as a result, to consumer law reform.³⁸ The constant flow of references concerning this Directive by national courts to the Court of Justice of the European Union (CJEU) is obvious evidence of its crucial practical significance today.

Certainly, in contrast to an EU Regulation,³⁹ the Directive only takes effect once it has been transposed into national laws and it is up to each individual country to develop its own laws to determine how to apply these rules. Additionally, Directive 93/13/EEC

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- 33 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21/04/1993. Recital 9 states: 'Whereas in accordance with the principle laid down under the heading 'Protection of the economic interests of the consumers', as stated in those programmes: 'acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.'
- 34 Hans-W Micklitz, 'Reforming European Unfair Terms Legislation in Consumer Contracts' (2010) 6.4 *European Review of Contract Law* 347, 348. For a praise of European law when it is compared to American law on unfair standard terms, see Jean Braucher, 'Unfair Terms in Comparative Perspective: Software Contracts' in Larry DiMatteo, Keith A. Rowley, Severine Saintier, and Qi Zhou (eds), *Commercial Contract Law: A Transatlantic Perspective* (Cambridge University Press, 2013), available at SSRN: <<https://ssrn.com/abstract=2033237>>; Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton, NJ, Princeton University Press, 2012).
- 35 See the impact of the directive on unfair terms on the laws of the Member States in Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts COM (2000) 248 final; Hugh Collins (ed), *Standard Contract Terms In Europe: A Basis For And A Challenge To European Contract Law*, Vol. 15 (Kluwer Law International, 2008).
- 36 For an evaluation of the process of the Europeanization of national contract law, see Anne L.M. Keirse, 'European Impact on Contract Law; A Perspective on the Interlinked Contributions of Legal Scholars, Legislators and Courts to the Europeanization of Contract Law' (2011) 7 *Utrecht Law Review* 34; Lucinda Miller, *The emergence of EU contract law: exploring Europeanization* (OUP Oxford, 2011); Christian Twigg-Flesner, *The Europeanisation of contract law: current controversies in law*, 2nd edn, (Routledge, 2013).
- 37 By means of example, when Meryll Dean considered the impact of the Directive on the UK law of contract, he argued that the implementation of the Directive could provide an opportunity to address the 'inadequacies of the inaccurately named Unfair Contract Terms Act 1977,' see Meryll Dean, 'Unfair Contract Terms: The European Approach' (1993) 56.4 *The Modern Law Review*, 581.
- 38 By way of illustration, see more about consumer law reform in Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia in Nada Dollani, Christa Jessel-Holst, Tatjana Josipović (eds), *Civil Law Forum for South East Europe, Collection of Studies and Analyses, Second Regional conference*, (Nacionalna i univerzitetska biblioteka Sv. Kliment Ohridski, Skopje 2012), 157-258; Marija Karanikic, Hans-Wolfgang Micklitz, and Norbert Reich, *Modernising Consumer Law: The Experience of the Western Balkans* (Nomos, 2012.)
- 39 Regulations are legal acts defined by Article 288 of the Treaty on the Functioning of the European Union (TFEU). They have general application, are binding in their entirety and are directly applicable in all European Union countries.

is ‘minimum harmonisation’ and, by virtue of Article 8, Member States are allowed to adopt or retain more stringent provisions to ensure a maximum degree of protection for consumers.⁴⁰ As a result, one can raise the reasonable question of whether it is feasible to select Directive 93/13/EEC as the main subject to be compared, or whether it is necessary to confine the research to comparing Vietnamese law with national legal systems such as Dutch or German law. It can be stated that although this research takes Directive 93/13/EEC as an initial starting point, when it is necessary to clarify its provisions a considerable amount of work will be devoted to selectively taking into account the laws of Member States.⁴¹ Furthermore, the main virtue of Directive 93/13/EEC is that it is a flexible instrument which allows EU countries to achieve a certain goal but leaves them free to determine how to do so. Arguably, due to its nature, Directive 93/13/EEC can function as a toolbox for Vietnamese law to regulate standard terms as long as the Vietnamese legislators attempt to reach an equivalent aim.

Additionally, soft law in the form of the *acquis commun*,⁴² which has been intensely developed through a number of initiatives by European comparative law scholars, has a role to play in assisting in the improvement of the existing *acquis communautaire*, as it can be applicable in various ways as a toolbox for legislators or by providing guidelines for judges.⁴³ Of particular relevance are the Principles of European Contract Law (PECL)⁴⁴ and the Draft Common Frame of Reference (DCFR),⁴⁵ both of which contain rules on controlling standard terms corresponding to those prescribed under the Directive. While the respective rules on unfair terms in the Acquis Principles (ACQP)⁴⁶ reflect the current state of EU Private Law, those in the PECL may reflect the common features of national jurisdictions in the EU, and those in the DCFR, to some extent, offer

40 For an overview of the transposition of the Directive in the Member States, see Section 1.3, Chapter 4.

41 Much attention will be paid to German, English and Dutch law. The selection of German law is warranted by the fact that the Standard Contract Terms Act (1976 AGB-Gesetz) has a significant influence on the structure and legal techniques used in the UCTD. German law, therefore, may function as a reference to understand the development of unfair terms in Europe. By way of an example, it seems that the CJEU took the German rules, such as Article 307 BGB, as a point of departure to interpret the concept of a significant imbalance in the *Aziz* case. English law has been chosen thanks to the recent adoption of the Consumer Rights Act 2015 and the effectiveness of the OFT (now replaced by the CMA) in performing their functions to control unfair terms. Lastly, Dutch law is considered particularly due to the attractiveness of the drafted bipartisan general trading conditions due to the collective bargain between business associations and consumers’ organizations.

42 For the notion of the *acquis commun* see Nils Jansen, ‘Legal Pluralism in Europe-National Laws, European Legislation, and Non-Legislative Codifications’ in Leone Niglia, *Pluralism and European Private Law*, *Pluralism and European Private Law*, (Hart Publishing, 2013) 109.

43 In contrast to the idea that the development of European law shall solely depend on national institutions, Anne L.M. Keirse convincingly argues that ‘combined action by legal scholars, legislators and the courts on both the European and national level can eventually lead to the development of so-called “better law”’. Anne L.M. Keirse, ‘European Impact on Contract Law; A Perspective on the Interlinked Contributions of Legal Scholars, Legislators and Courts to the Europeanization of Contract Law’ (2011) 7 *Utrecht Law Review* 34, 51.

44 Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II Combined and Revised*, The Hague etc. 2000 and Ole Lando, Eric Clive, André Prüm & Reinhard Zimmermann (eds), *Principles of European Contract Law, Part III*, (The Hague 2003).

45 Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009).

46 Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles), Contract I. Pre-contractual Obligations, Conclusion of Contract, Unfair Terms* (Sellier 2007).

the best solution chosen from these sources. Additionally, although the proposal for a regulation on an optional Common European Sales Law (CESL)⁴⁷ was withdrawn,⁴⁸ it remains a truly valuable source to depict how EU contract law has been developed. Indeed, insofar as the topic of this dissertation is concerned, the CESL reflects a new stage in the development of European contract law with regard to the legislative control of unfair terms, and thus it should at least be treated as equally as the PECL, ACQP and DCFR.

Furthermore, it is worth mentioning that the potential of these models is not limited to having an influence on the improvement of Community law. The legal borrowing from these instruments may occur horizontally as well as vertically and this may occur within or beyond Europe. Indeed, the drafters of the DCFR envisioned that their instrument providing for a possible source of inspiration for suitable solutions to private law questions would have ‘repercussions for reform projects within the European Union, at both national and Community law levels, and beyond the EU’.⁴⁹ In a similar vein, the PECL are also expected to offer a model for legislators that have to draft a national code or an international convention as well as a tool for (arbitral) courts that have to interpret them.⁵⁰ Thus, it is conceivable that other legal systems, even outside Europe such as Vietnam, may also use these instruments as models for their law reform.

4.2. Evaluative Criteria

As mentioned above, the ultimate aim of this research to reform the current Vietnamese law explains why a general choice of comparative law methodology has been selected. In particular, its normative aim entails that the research should not be limited to the comparative or explanatory stages, but should be logically extended to the stage of evaluation to assess the legal solutions deployed by Vietnamese law and European law to deal with the problems of standard form contracts.⁵¹ In this connection, the ‘better’ law solutions will be chosen through not only the traditionally technical but more importantly the normative lens.⁵² Firstly, an evaluation in the technical sense will

47 Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635 final.

48 The European Commission introduced the proposal for new digital single market contract law Directives, see Proposal for a directive on certain aspects concerning contracts for the supply of digital content, Brussels, 9.12.2015, COM (2015) 634 final; Proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods Brussels, 9.12.2015, COM (2015) 635 final.

49 Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009) para 8.

50 Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II Combined and Revised* (The Hague etc. 2000) xxii, xxiv, Comment D to art. 1:101 (at 96-97); Ole Lando, Eric Clive, André Prüm & Reinhard Zimmermann (eds), *Principles of European Contract Law, Part III*, (The Hague etc. 2003) xv.

51 Marieke Oderkerk, ‘The Need for a Methodological Framework for Comparative Legal Research-Sense and Nonsense of Methodological Pluralism in Comparative Law’ (2015) 79.3 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 589. ‘In the case of comparative legal research with a regulatory aim, evaluation forms a necessary part of the research.’ page 621.

52 Mathias Siems, ‘Bringing in Foreign Ideas: The Quest for “Better Law” in Implicit Comparative Law’ (2014) 9 *The Journal of Comparative Law* 119, 120. It should be mentioned that a comparison by itself is at best

be conducted to assess which legal systems provide greater legal certainty by offering clearer rules to govern standard form contracts, or provide legal flexibility which allows the law to be reflective concerning future developments. For example, the outright prohibition of several kinds of onerous standard terms may contribute to legal certainty because it informs the stakeholders at the outset which terms are legal or illegal. On the other hand, the existence of a general clause on the unfairness test may make the law future-proof since the law is able to catch up with all potentially unfair terms which traders attempt to create in order to manipulate the blacklist of terms.

More significantly, however, the evaluation will be steered towards ascertaining which law satisfies specific aims more successfully. Undoubtedly, the overall aim is to effectively control problems of standard terms in consumer contracts. For this purpose, as the normative framework in Chapter 2 will discuss in further detail, the legislative control of standard terms in Vietnam and Europe will be assessed to ascertain to what extent they are capable of (i) rectifying market failure as to standard terms, (ii) stimulating contractual justice by bolstering the position of the weaker party in the contractual relationship.

4.3. Methods of Collecting Data

The following two methods have been used to gather data for this research: desk study and field research. A desk study involves conducting research by examining the relevant legislation, cases and the literature. In this connection, it should be noted that there exists a considerable asymmetry of available information about European law and Vietnamese law. While the vast amount of relevant information on case law and legal literature pertaining to European law can be easily collected, it is extremely challenging to find equivalent data in Vietnam.⁵³ Indeed, one of the central reasons for this is that the discussions on standard form contracts, consumer contracts or even the principle of freedom of contract have a relatively short history in comparison with their counterparts in Europe. Moreover, practical issues such as limited access to merely cases of the Supreme People's Court⁵⁴ and the lack of a commercial legal database on judicial decisions also contribute to the difficulties in gathering primary sources of Vietnamese law.⁵⁵⁶

'weakly normative', thus 'comparative studies may uncover interesting ideas for domestic law reform, but in the end the case for adoption of a foreign model cannot rest on the fact that many other countries have the rule of legal institution.' John C Reitz, 'How to do comparative law' (1998) 46 *American Journal of Comparative Law* 617, 624.

53 However, all legislation and regulations in Vietnam are published online and are easily accessed in the Vietnamese language at <<http://vanban.chinhphu.vn/>>. Several important pieces of legislation and regulations have been translated into English and can be accessed at <<http://vietnamlawmagazine.vn/gazette.html#vnlpositionyl>>.

54 <<http://toaan.gov.vn/portal/page/portal/tandtc>> [accessed 15 May 2017].

55 Anh Luu, *Update by Le Thi Hanh, Vietnam Legal Research*, <<http://www.nyulawglobal.org/globalex/Vietnam1.htm#researchresources>> [accessed 15 May 2017].

56 However, on 26 March 2017 an important reform was implemented by the Judicial Council of the Supreme People's Court, according to which virtually all cases decided by the courts after 1 July 2017 must be published online within 30 days after the courts have issued their judgments. This reform should be praised

In order to partly overcome these obstacles, field research was conducted in January 2014 and December 2015 in order to gather unpublished opinions involving several general subjects of contract law and particular matters of consumer contract disputes heard by the Courts at the provincial level. Moreover, during the two field trips, further information was collected through interviews with numerous academics who were members of the drafting committee of the CPL and the 2015 Civil Code, public officials in the VCA who are in charge of the mandatory approval of standard form contracts, as well as several judges and lawyers in Vietnam. The primary aim of such interviews was to actually understand the legislative intention underlying the legal text of the CPL and the Civil Code in order to grasp the practice of administrative control conducted by the VCA and to somewhat identify the development tendency concerning the legal treatment of standard form contracts in the Vietnamese context.

5. OUTLINE

This dissertation contains six main chapters. This introductory section will be followed by Chapter 2, which will discuss the theoretical framework according to which the legislative schemes that control standard form contracts in Vietnamese law and European law will be analysed and evaluated. It starts by identifying the phenomenon of standard form contracts and argues that the actual contracting practices of the consumer society significantly depart from two underlying assumptions upon which 19th century classical contract law was built: (i) the negotiated contracting paradigm; (ii) formal equality between contracting parties. Against this background, the main parts of this chapter will be devoted to respectively considering market failure arguments and the inequality of bargaining power to justify legislative control over standard terms. In particular, the new insights from behavioural sciences as regards the capacity of consumers to make rational decisions will be utilized to thoroughly understand why and to what extent state interference is justified to sufficiently address the problems of standard terms in consumer contracts. By doing so, this chapter seeks to provide an answer to the first question of this research.

Chapters 3 and 4 will respectively discuss the Vietnamese and European legislative schemes for controlling standard terms in consumer contracts. Each chapter on the specific system will be broken down into the following sections: the scope of control – including the subjective and objective scope, the information-based techniques,⁵⁷ the content-based techniques⁵⁸ and the enforcement mechanisms. Although the simultaneous comparison method to present the research outcome is more exciting for the readers, the successive comparison method is used to not only avoid confusion in comparing the

as one of the key reforming steps in making the Vietnamese judicial system more accessible. See Resolution No. 03/2017/NQ-HDTP of the Judicial Council of the Supreme People's Court on the publication of judicial judgments and decisions on the Courts' digital portals.

57 However, in respecting the widely accepted concepts of each system the dissertation will use these different concepts in each chapter: formal control (in the case of Vietnamese law) and the transparency principle (in the case of European law).

58 Similar to the previous footnote, the dissertation will use the two different concepts in each chapter: substance control (in the case of Vietnamese law) and the principle of fairness (in the case of European law).

somewhat different jurisdictions, but also to provide a clear overall picture of European law for Vietnamese readers and *vice versa*.⁵⁹ Additionally, before analysing the current Vietnamese legislative scheme for controlling standard form contracts, Chapter 3 will provide an overview of the development of Vietnamese contract law and consumer protection law. This section is particularly warranted so as to provide background information for the purpose of understanding the shape of the current framework which controls standard terms as well as considering how the solutions suggested in Chapter 5 might be integrated into the system.

On the basis of the findings of the previous chapters, Vietnamese law and European law will be compared in Chapter 5. Specifically, the similarities and differences between the two systems will be determined and partly explained. After that, the current framework of Vietnamese and European law will be assessed to determine to what extent they are capable of enhancing the quality of consent, efficiency, or contractual justice. The last section aims to directly answer the research question by presenting a number of recommendations to reform the legislative scheme for controlling standard terms in Vietnam.

59 Regarding the classification of the successive method, according to which 'an individual report covering all legal aspects of each legal system is provided', and the simultaneous method, according to which 'a report per legal question containing the answers of the legal systems is provided', see Katharina Boele-Woelki, 'What Comparative Family Law Should Entail' (2008) 4(2) *Utrecht L. Rev.* 1, 8.

Chapter 2

JUSTIFICATIONS FOR THE LEGISLATIVE CONTROL OF STANDARD TERMS IN CONSUMER CONTRACTS

This chapter aims to argue in favour of the desirability and justifiability of state control of standard terms in consumer contracts. The arguments can be divided into five sections. The first section will depict the advent and growth of standard form contracts as the main contracting paradigm in consumer transactions and their fundamental challenges to classical contract law. In response to these challenges, the second section will evaluate several attempts in the search for an appropriate legal treatment of standard form contracts. Accordingly, Sections 3 and 4 will respectively consider market failure arguments and inequality of bargaining power arguments to justify the legislative control of standard terms in consumer contracts. Corresponding to these two lines of justification, Section 5 will consider the basic structure of the state control regime including (i) the scope of control, (ii) the possible legal techniques ranging from information-based solutions to content-based solutions, and (iii) the feasible enforcement mechanisms.

1. CHARACTERISTICS OF STANDARD FORM CONTRACTS

1.1. Advent and Growth of Standard Form Contracts

The ubiquity of standard form contracts as a means of contracting can be traced back to the 19th century when industrialization created an advent of mass production.¹ It stimulated businesses to apply identical terms for all their customers who entered into a particular transaction involving the same goods or services. Having first become popular in the transport, insurance and banking markets, nowadays standard form contracts have virtually superseded agreements in which terms are individually negotiated to govern transactions in all other fields of business.

The development of the Internet has increased the significant role of standard form contracts.² An online contracting environment has provided more opportunities for traders to present their terms and conditions in several different ways than in the

1 Phillip Hellwege, 'Standard Contract Terms' in Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann, *The Max Planck Encyclopedia of European Private Law*, Vol 2. (Oxford University Press, 2012) 1588.

2 Christine Riefa and Julia Hörnle, 'The changing face of electronic consumer contracts in the twenty-first century: fit for purpose?' in Lilian Edwards and Charlotte Wealde (eds), *Law and the Internet* (3rd edn, Hart 2009).

paper world.³ In a so-called click-wrap agreement, traders may present their terms in a scrollable textbox that requires users to click on an acceptance text such as the icon ‘I agree’ to express their consent.⁴ Meanwhile, in a so-called browse-wrap agreement, terms and conditions are indicated with a hyperlink normally located at the bottom of the screen, and users may give their consent by merely browsing the website.⁵ Regardless of their differences, they share a common core with standard form contracts in the paper world in that both sets of terms are unilaterally drafted by the businesses in question and are presented to their customers on a ‘take it or leave it’ basis.

The increasing utility of standard form contracts in modern society can be explained by several economic rationales.⁶ Economists often argue for the uses of standard form contracts for the reason that the standardization of contracts may reduce transaction costs.⁷ The application of standard terms for several transactions may lead to a reduction in contracting costs including not only the costs of negotiation, but also the costs of drafting the contract.⁸ Furthermore, standard form contracts have been a necessary means for traders to control their agencies in mass-market transactions.⁹ In the modern economy, consumers are more likely to engage in transactions not with traders but with their agencies, and thus triggering so-called agency costs where principals must monitor agents to ensure that their conduct does not disturb the pricing models under the original contract.¹⁰ Thus, standard form contracts are applied to reduce such agency costs by not allowing the agents to agree to any modification to the original contractual terms. The reduction in these costs benefits not only the drafters but also the counterparty since in theory it may enable the drafters to offer lower prices.¹¹

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- 3 James R. Maxeiner, ‘Standard-Terms Contracting in the Global Electronic Age: European Alternatives’ (2003) 28(1) *Yale Journal of International Law* 109; Nancy S. Kim, *Wrap Contracts: Foundations and Ramifications* (Oxford University Press, 2013). In this important book about standard form contracts in the digital world, Nancy Kim coins the term ‘wrap contract’ to indicate click-wrap, browse-wrap and also shrink-wrap agreements.
 - 4 Graham Smith (ed.), *Internet Law and Regulation* (4th edn, Sweet & Maxwell 2007) 821; Nathan J. Davis, ‘Presumed Assent: The Judicial Acceptance of Clickwrap’ (2007) 22(1) *Berkeley Technology Law Journal* 577.
 - 5 Graham Smith (ed.), *Internet Law and Regulation* (4th edn, Sweet & Maxwell 2007) 821; Christina L. Kunz et al, ‘Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements’ 2003 59(1) *The Business Lawyer* 279.
 - 6 Omri Ben-Shahar (ed.), *Boilerplate: The Foundation of Market Contracts*. (Cambridge University Press, 2007).
 - 7 Clayton P. Gillette, Standard Form Contracts (April 8, 2009) NYU Law and Economics Research Paper No. 09-18; Avery W. Katz, ‘Standard Form Contracts’ in Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law* vol. 3 (Palgrave Macmillan 1998) 502-05.
 - 8 Aristides N. Hatzis, ‘An Offer You Cannot Negotiate: Some Thoughts on the Economics of Standard Form Consumer Contracts’ in Hugh Collins (ed.), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Wolters Kluwer Law 2008) 43.
 - 9 Todd D. Rakoff, ‘Contracts of adhesion: An essay in reconstruction’ (1983) 96(6) *Harvard Law Review* 1173, 1223.
 - 10 For agency costs and how to reduce them, see general Michael C. Jensen and William H. Meckling, ‘Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure’ (1976) 3(4) *Journal of Financial Economics* 305, 308.
 - 11 Kessler argued that once a reduction of costs leads to reduced prices, society as a whole ultimately benefits from the use of standard contracts, see Friedrich Kessler, ‘Contracts of Adhesion – Some Thoughts About Freedom of Contract’ (1943) 43 *Colum. L. Rev.* 629, 632. In the same vein, other scholars have argued that although standard form contracts are non-negotiable, businesses and consumers are assumed to share the benefits gained from such contracts, see Michael I. Meyerson, ‘The Efficient Consumer Form Contract: Law and Economics Meets the Real World’ (1990) 24(3) *Georgia Law Review* 583, 594. However, still other

Furthermore, standard form contracts are a legal means for traders to alter the default rule provided by law, thereby specifying traders' risk management strategy.¹² Obviously, contrary to an ideal vision, even the most comprehensive contract law cannot satisfy all specific needs associated with innumerable kinds of transactions. In addition, at the very core of contract law is the idea that most contract rules are *ius dispositivum* and one party may modify them to meet her/his own preference.¹³ Therefore, standard form contracts have emerged not only to fill the gaps of *ius dispositivum* but also to deviate from it. Accordingly, through the application of standard form contracts traders attempt to reduce legal uncertainty and to specify their own business plans.

1.2. Deficiencies of Standard Form Contracts

Although standard form contracts have become an indispensable part of the modern economy, their advent and growth do not come without a price. The major disadvantages of standard form contracts are that (i) they lack meaningful consent, and (ii) they are one-sided to the detriment of the adhering parties.

1.2.1. Lack of Meaningful Consent

A key problem arising from standard form contracts is the low degree of certainty concerning adhering parties' consent; in other words, their consent is questionable because it is of low quality.¹⁴ Here the concerns are twofold. Firstly, adhering parties may be unaware of the existence of standard form contracts. Secondly and more significantly, due to the signing-without-reading phenomenon – a common practice that adhering parties may sign contracts without spending time and energy in understanding their content, there exists a lack of meaningful consent by the adhering parties concerning terms that are buried in the fine print, but that considerably affect their rights and obligations.

The first concern that parties may be totally ignorant of entering into standard form contracts can be relevant both in traditional and modern markets. Traditionally,

scholars doubt that there is enough evidence to empirically prove that cost savings from using standard form contracts are actually passed on to consumers, see Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press 2013) 290-91.

- 12 This point of the legal advantage of standard form contracts has been particularly emphasised by German authors. Phillip Hellwege, 'It is Necessary to Strictly Distinguish Two Forms of Fairness Control! (2015)' 4(4) *Journal of European Consumer and Market Law* 129, 130; James R. Maxeiner, 'Standard-Terms Contracting in the Global Electronic Age: European Alternatives' (2003) 28(1) *Yale Journal of International Law* 109, 110. For economists, the standardization of contracts may have similar economic benefits of conferring learning effects among parties and reducing uncertainty as to the meaning of certain terms, see Surajeet Chakravarty and W. Bentley MacLeod, 'On the Efficiency of Standard Form Contracts: The Case of Construction' (August 2004) USC CLEO Research Paper No. C04-17.
- 13 Martijn W. Hesselink, 'Non-Mandatory Rules in European Contract Law' (2005) 1(1) *European Review of Contract Law* 44, 46.
- 14 Friedrich Kessler, 'Contracts of Adhesion – Some Thoughts About Freedom of Contract' (1943) 43 *Colum. L. Rev.* 629; W David Slawson, 'Standard Form Contracts and Democratic Control of Law making Power' (1971) 84 *Harvard Law Review* 529; Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2012).

in several markets such as transportation services, apart from price clauses that are included in the tickets, customers' rights and obligations are actually governed by a separate document, which is commonly known as the General Trading Conditions, and is posted at train or bus stations.¹⁵ Needless to say, not only are customers not able to influence these general terms and conditions, but also most of them are actually unaware of the fact that they may be bound by such terms by virtue of the doctrine of constructive notice.¹⁶ In modern times, the increase in e-commerce over the Internet has resulted in the prevalent use of 'pay now, terms later' standard form contracts, according to which customers are not able to read the standard terms at the time of the formation of the contract, but only after the purchase, when standard terms arrive together with the products. A telling example is a licensing agreement that is always shrink-wrapped inside a software package.¹⁷ It assumes that customers agree to be bound by the traders' standard terms unless they return the product within a limited period of time. Similarly, several websites simply state, 'Upon visiting this page, you agree to be bound by these terms and conditions' and this leaves customers with no reasonable opportunity to discover that they are presumed to have entered into a legally binding agreement. Under these circumstances, it is questionable whether customers ever give their consent to be bound by standard terms.

The more significant challenge of standard form contracts comes from another scenario where customers actually click 'I agree' in a digital form or sign a standard form contract in a paper form. Contrary to the first scenario, this second scenario cannot claim that customers are completely ignorant of the standard terms. However, the key concern here is the lack of customers' meaningful consent: most customers do not read the standard terms before giving their consent by clicking 'I agree' and for very few consumers who even actually read them, it is doubtful whether they can fully understand them. Recently, this long intuitive phenomenon of 'signing without reading' has been verified by empirical studies, which have found that very few people even bother to read the contracts they sign, and even fewer devote enough time to comprehending the contents of the contractual terms.¹⁸ By failing to read standard form contracts, consumers consent to standard terms without understanding their legal implications.

15 In Vietnam, it is important to emphasize that there are two separate legal concepts which are used to indicate standard form contracts – the one that parties actually sign, and general trading conditions – the ones that are published in a designed place. See more in Section 3.2, Chapter 3.

16 Apart from its important merit for the incorporation test, the notion of constructive notice is a key manifestation of formalism in Vietnamese contract law. Later, it reveals why the information paradigm is the main strategy in Vietnam to address the problems of standard form contracts. See more in Section 4.1, Chapter 3.

17 Batya Goodman, 'Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as An Adhesion Contract' (1999) 21 *Cardozo L. Rev.* 319.

18 M. Elshout, M. Elsen, J. Leenheer, M. Loos and J. Luzak, Study on Consumers' Attitudes Towards Terms and Conditions (T&Cs) (2016), <http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/terms_and_conditions_final_report_en.pdf> [Accessed 1 May 2017].

1.2.2. Oppressive Standard Terms

Apart from the lack of meaningful consent, the subsequent problems arising from standard form contracts directly relate to the quality of the contractual contents themselves. Being commonly described as ‘private legislation,’ or a ‘contract of adhesion,’¹⁹ standard form contracts are known to be a tool for traders to deliberately impose one-sided terms on the non-drafting party. Such terms range from terms serving to limit the liability of the trader for his/her products or services to extremely oppressive terms to dispel consumers’ rights.

Indeed, there are standard terms that limit substantive and procedural remedial rights that adhering parties would otherwise have. As an example of the terms that evade *substantive* legal rights, some exclusion clauses have the effect of protecting traders from legal liability, even in the event of death or personal injury on the part of consumers when this results from an act or omission by those traders. Some other terms have the effect of shirking *procedural* legal rights to access to justice such as terms that limit one party’s right to sue another party.

There are also increasingly widespread problems with the unilateral modification clause that allows traders to unilaterally vary the terms of a contract. Indeed, by virtue of this umbrella clause, the other parties’ rights are put at the mercy of the traders who are mandated to construct their own rules that best fit their interests.

The substantive problems of standard form contracts are not merely related to non-price terms as commonly thought; it is evident that traders are strategically using standard form contracts to seduce consumers by a highly complicated price structure. As will be further discussed below, corresponding to consumers’ irrationality, traders compete with each other and lure consumers with a very low, attractive upfront price, but make profits on really high, sometimes onerous, add-on costs.²⁰

Certainly, as mentioned above, one of the main advantages of standard form contracts is to allow traders to deviate from and modify the dispositive rules of contract law; however, it is widely recognized that the drafters of standard form contracts are not merely confined to using them to protect their legitimate interests, but to prevent their counterparties from acquiring rights that they deserve or at least create exceedingly disproportionate contracts to the counterparties’ detriment. Accordingly, it is time for contract law to directly pay attention to and address these problems; otherwise it is nothing but a tool that traders can use to exploit other parties.

19 Friedrich Kessler, ‘Contracts of Adhesion – Some Thoughts About Freedom of Contract’ (1943) 43 *Colum. L. Rev.* 629; Todd D. Rakoff, ‘Contracts of Adhesion: An Essay in Reconstruction’ (1983) 26(6) *Harvard Law Review* 1173; Andrew Burgess, ‘Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion’ 1986 15(4) *Anglo-American Law Review* 255.

20 See the further discussion in Section 4.1.2 of this chapter.

2. IN SEARCH OF THE LEGAL TREATMENTS OF STANDARD FORM CONTRACTS

2.1. Standard Form Contracts and Classical Contract Law

Classical contract law was formulated in the 19th century under the influence of the theories of natural law and the philosophy of *laissez-faire*. The emphasis on freedom of contract as the main paradigm of classical contract law was justified by its dual functions of simultaneously promoting private autonomy and social welfare. Freedom of contract entails both positive and negative elements. From a positive perspective, contractual parties should be allowed to pursue their own interests by deciding whether or not to contract (freedom to contract), to choose with whomever they want to contract (freedom to choose the counterparty) and to design whatever terms they desire (freedom to set contractual contents).²¹ From a negative perspective, once the contracts truly reflect the mutual consent of both parties, contractual contents should not be hampered by external controls, especially from state interference. As a result, in order to decide whether to enforce a contract, the judiciary is guided to mainly focus on the question whether the parties have voluntarily agreed to the contract, not on the substantive contents agreed by both parties.²² The test of whether the parties have agreed to the contract, in turn, is led by the rules on the formation of a contract that investigate the existence of an offer and an acceptance. An additional investigation to test whether a contract is actually the result of a free choice puts emphasis on the legal capacity of the parties, and on the existence or absence of duress, representations, or mistakes made during the contractual negotiations. Accordingly, there are two outstanding characteristics associated with the paradigm of freedom of contract under classical contract law: (i) it guarantees a broad discretion for private parties to make contracts and rejects any state interference in these private exchanges, and (ii) it entails that the enforceability of a contract does not depend on the substance of the contract, but on the process leading up to it.

Legislative control to prevent the substantive injustice of contractual contents between parties is considered to be redundant, impracticable and undesirable.²³ Such legislative control over substantive contents is redundant in the sense that procedural fairness (fairness in the process of negotiating a bargain) automatically guarantees substantive fairness (fairness in the result of a bargain). This is impractical because courts seem to be incapable of evaluating substantive unfairness, and thus doing so may introduce uncertainty. Finally and most importantly, it is undesirable since it entails that party autonomy is superseded by state paternalism. For these reasons, the ultimate

21 See the further discussion on the forms of freedom of contract under Vietnamese law in Section 1.3, Chapter 3.

22 In a famous dictum, Sir George Jessel stated 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 when 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*, 19 L.R.-Eq. 462, 465 (1875).

23 See Hugh Collins, *Regulating Contracts* (Oxford University Press, 2002) 284; Richard Epstein, 'Unconscionability: A Critical Reappraisal' (1975) 18 *Journal of Law and Economics* 283, 305-15; Alan Schwartz, 'Justice and the Laws of Contract: A Case for the Traditional Approach' (1986) 9 *Harvard Journal Law and Public Policy* 107.

function of classical contract law is no more than to ensure that an enforceable contract genuinely reflects the free will of the contracting parties; as long as contracting parties freely and voluntarily agree to enter into a contract, the contractual terms are fair *per se*, therefore the law should not examine the contents of the agreement but merely the manner of its formation.

However, the 19th century paradigm of classical contract law is hardly a basis for a modern society. In the aftermath of the advent and ubiquity of standard form contracts, especially in consumer markets, the basic premises underlying the freedom of contract have been fundamentally challenged. There is no longer a consensual foundation according to which both contracting parties individually negotiate each term before finalizing the agreement. In contrast, the ideal of an equality of bargaining power has been substituted by contracts of adhesion according to which if consumers wish to engage in daily activities, they must adhere to standard form contracts dictated by the traders on a ‘take it or leave it’ basis. The problems are not only that consumers have inferior bargaining powers or that they are unwilling to make rational choices through failing to read standard terms, but also that traders are forced to systematically seduce consumers through targeting their cognitive biases.

Accordingly, classical contract doctrines which are built upon the premise of an individually negotiated paradigm between both sophisticated parties are logically inadequate to address the problems arising from the one-sided, but unread, standard form contracts in consumer transactions. An adhering party to a standard form contract does not normally suffer from legal incapacity, a mistake, duress, misrepresentation etc., on the basis of which corresponding contractual doctrines are merely designed to police the contracting process. In other words, classical doctrines are not well suited to address the most common problems generated by standard form contracts, namely questionable consent and unfair terms.

2.2. Various Non-Contractual Approaches to Standard Form Contracts

The failure of the classical doctrines to provide an effective framework for addressing those problems arising from standard terms therefore justifies the search for alternative solutions. Overall, such solutions can be broken down into the following groups: the non-contractual approach and the contractual approach.

Under the non-contractual approach, a standard form dictated by traders should not be treated as a contract, but as ‘quasi-legislation’,²⁴ a ‘thing’,²⁵ or a ‘defective product.’²⁶ As early as in the 1970s, David Slawson viewed standard terms as a decentralised form of law making whereby private parties make the rules governing the

24 W.D. Slawson, ‘Standard Form Contracts and Democratic Control of Lawmaking Power’ (1971) 84 *Harvard Law Review* 529.

25 A.A. Leff, ‘Contract as Thing’ (1970) 19 *Am. U. L. Rev.* 131.

26 Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press 2012).

enforcement of their agreement.²⁷ While under classical contract law the consent of the parties legitimizes the contractual obligations applicable to them, for standard terms, Slawson argued that:

‘A law made by one private person for another, without the other’s consent – a standard form sought to be enforced against a person who had no reasonable opportunity to read it, for example – should be subjected to judicial review by virtue of the same authority as a court has for enforcing it in the first place.’²⁸

As a result, an administrative-law style of review is essential to legitimize such a delegated law-making power in the case of standard form contracts.²⁹ On the other hand, Authur Leff proposed that standard forms are better qualified as ‘things’ instead of contracts. Having identified the similarities between standard forms and tangible products that are available on the market, he argued that, like certain warranties attached to physical goods, the contents of standard forms should meet certain legal requirements in order to be marketable.³⁰ Accordingly, Leff suggested a legislative programme for the outright prohibition of several onerous terms in standard forms.³¹ A similar theory has recently been advocated by Margaret Jane Radin who radically proposes to apply tort theory, specifically product liability law, to deal with problems of standard form contracts.³² As Radin explains, it is essential to distinguish between World A – the world of Agreement – and World B – the world of the Boilerplate. World A includes traditional contracts which are ‘bargained-for exchanges’ between two contracting parties where each party exercises a ‘free choice’.³³ In contrast, World B contains examples of non-ideal contracts where consumers become involved in a contract ‘without knowing it, or at least without being able to do anything about it.’³⁴ Her main argument is that because standard form contracts degrade the normative concept of consent and consistently shrink ‘legal rights to the vanishing point’, they should not be enforceable as contracts. Furthermore, in order to remedy problems of the deletion of boilerplate rights, she suggests a new tort, the so-called ‘intentional deprivation of basic legal rights’ and classifies the abusive boilerplate as a defective ‘product’ under the law of product liability.³⁵

27 W.D. Slawson, ‘Standard Form Contracts and Democratic Control of Lawmaking Power’ (1971) 84 *Harvard Law Review* 529.

28 *Ibid.*, 538.

29 *Ibid.*, 554.

30 A.A. Leff, ‘Contract as Thing’ (1970) 19 *Am. U. L. Rev.* 131, 144-51, 155-57.

31 *Ibid.*

32 Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2012).

33 This type of contract is ‘typified’ by a process of negotiation where under the ideal of ‘freedom of contract’ both parties are satisfied with the deal.

34 Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* at 10.

35 *Ibid.*, at 228. In Vietnam, a similar trend of non-contractual approaches to standard forms can be witnessed. Before the introduction of the Consumer Protection Ordinance 1999, it was not uncommon that several standard forms were usually qualified as official regulations which can produce legal consequences to those governed by them. The main reason for this is that they are issued by public-owned enterprises.

Although all of these non-contractual approaches play a significant role in explaining the non-ability of classical contract law to deal with the problems of standard form contracts, they do come with shortcomings both from a practical as well as a theoretical perspective. In a practical sense, it should be unrealistic to remove from contract law the majority of current transactions that are governed by standard contract forms.³⁶ From a theoretical perspective, it is submitted that standard forms should be treated as contracts to the extent that consent can be found.³⁷

A common characteristic of these non-contractual approaches is that authors 'adhere' to a high level of quality concerning specific consent in order to evaluate the status of standard forms. Margaret Jane Radin, for instance, contends that consent to the boilerplate is significantly problematic because it deviates from an ideal of informed, particularized and bargained-for consent:³⁸ Firstly, consumers are uninformed because they normally refrain from reading standard terms.³⁹ Secondly, the lack of knowledge of a particular term renders consumers' consent to such a term non-meaningful.⁴⁰ Thirdly, given the nature of the boilerplate, consumers are normally incapable of asking for any alternation of the terms. As a consequence, the normative value of consent is degraded by the assumption that there is consent to standard terms when consumers only dicker to the bargain rather than providing their consent to each clause.⁴¹ Therefore, by hanging a contract upon a very high level of consent, the authors claim that only individually negotiated terms should be qualified as contracts, while any boilerplate should not be treated as a contract at all. However, such a high quality level of consent seems to only reflect an ideal version of the contract model, while in reality genuine consent to any

36 According to several commentators, more than 99% of all contracts concluded nowadays are standard form contracts. See W. David Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power' (1971) 84 *Harv. L. Rev.* 529, 529; Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 *U Chi L Rev* 1203, 1203-04.

37 The concept of consent has always been at a heart of contract law. As for normative theories of contract law, various schools of thought, notably the promise theory and the consent theory, have implicitly or explicitly focused on consent to legitimize the legal enforceability of contractual obligations. The promise theory, as proposed by Charles Fried, contends that a promise is the moral basis of the contract. According to this view, a promise itself is a contractual obligation, which is 'essentially self-imposed' by the party making the promise. Randy Barnett argues, however, that the manifestation of consent rather than a promise is the basis of a contract. The legal enforcement of an agreement is 'morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights.' While the difference between Barnett's theory and that of Fried is noteworthy, both theories share the common view that the legal enforceability of any contractual obligation is a moral issue: a contracting party is bound by such an obligation because that party has truly willed it. In this sense, the enforceability of a contractual obligation can therefore be defensible regardless of whatever economic efficiencies might be deprived by such an obligation. Charles Fried, *Contract As Promise: A Theory Of Contractual Obligation* (Harvard University Press, 1981); Randy E. Barnett, 'A Consent Theory Of Contract' (1986) 86(2) *Columbia Law Review* 269.

38 In a similar vein, Todd D. Rakoff argues that 'we consent to nothing but the specifically negotiated.' Todd D. Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction' (1983) 96 *Harv. L. Rev.* 1174.

39 As Radin notes, 'for a consumer to make a free choice, that consumer must have some level of information.' *Ibid.*, 103.

40 *Ibid.*

41 In these cases, consent is corrupted to fictional or hypothetical assent and then further to mere notice. Radin's proposed analytical framework consists of evaluating (i) the nature of the right to determine whether it is one that is alienable or whether it is market-inalienable; (ii) the quality of consent by the recipient; and (iii) where relevant, the extent of the social dissemination of the deletion of rights. Radin at 155.

specific contract term is nothing more than a fiction.⁴² In contrast to the high quality of specific consent, several scholars famously defend the enforcement of standard form contracts by arguing for a threshold of broad consent.⁴³ Thus, it is sufficient that consumers consent to be bound by the terms of the bargain, regardless of whether they are actually conscious of what those terms are. Coining the concept of ‘blanket assent’ to non-bargained-for terms, Llewellyn contends that consumers consent ‘to any not unreasonable or indecent terms ... which do not alter or eviscerate the reasonable meaning of the dickered terms.’⁴⁴ In a similar vein, Randy Barnett argues that given that all required consent is a manifestation of an intention to be bound, consumers should be allowed to bind themselves to the boilerplate that they do not read.⁴⁵ Therefore, although recognizing the importance of the quality of consent for the enforceability of the standard terms, what really matters in order to normatively justify enforcing standard form contracts should be the opportunity to read rather than the readership itself, a broad and feasible rather than a narrow and too high quality of consent.

For those reasons, it is submitted that contract law should not attempt to roll back the wheel of history of contracting practices through strictly adhering to a negotiating contracting paradigm, but discounting a non-negotiating contracting paradigm. In the context of Vietnamese law, this does require the current Vietnamese contract law to be modernized, not only to preserve the utility of standard form contracts but also to constrain over-reaching by drafting parties. To put it differently, it is time to overcome the concept of classical contract law and to construct a new approach to modern contract law that can provide a new way of thinking to justify a deviation from the formal ideal of the freedom of contract.

2.3. Market-Retification and Social Concepts of Contract Law

A common orthodox feature among a great number of Vietnamese scholars is that the freedom of contract in a formal sense is a single dominant ideology of Vietnamese contract law.⁴⁶ As argued above, this view of contract law can be classified as a ‘classical contract law idea’ which has been mainly shaped by the Western liberalism of the 19th century. Under this model, contract law is seen as a neutral, political and non-

42 The Explanatory Memorandum to the original proposal for the 1993 Directive on unfair terms in consumer contracts identified the idea that parties ‘understand the terms of their agreement’ as ‘something of a fiction’.

43 Randy E. Barnett, ‘Consenting to Form Contracts’ (2002) 71 *Fordham L. Rev.* 627.

44 ‘Instead of thinking about “assent” to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent.’ Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown and Company 1960) 370.

45 Randy E. Barnett, ‘Contract Is Not Promise; Contract Is Consent’ (2012) 45 *Suffolk U. L. Rev.* 647, 655. Using linguistic and philosophical literature, Lawrence M. Solan also opposed the argument that one does not consent if one does not know or understand the terms that have been proposed, Lawrence M. Solan, ‘Transparent and Opaque Consent in Contract Formation’ in Susan Ehrlich, Diana Eades and Janet Ainsworth (eds), *Discursive Constructions of Consent in the Legal Process* (Oxford University Press 2016) 118.

46 See further the discussion in Section 1, Chapter 2.

instrumentalist tool to facilitate free and voluntary undertakings.⁴⁷ However, similar to the liberal concept of contract law in the 20th century in Western societies, the current orthodoxy of Vietnamese contract law in the 21st century faces a huge problem in that it seems to be a poor fit with contracting practices currently in the markets. Not only is its presumption of formal equality between contracting parties challenged by the likelihood of abusive contracts being imposed by the stronger party on the weaker party, but also the advent of technological developments means that the negotiated contract paradigm is no longer a popular method of doing business. It is now time for a new approach to Vietnamese contract law which can bring a new way of thinking in order to modernize the current obsolete classical concept. Following the transformation of contract law in Europe, the search for a modern Vietnamese law should shift attention from the view of a contract as being a discrete, individualized undertaking that is facilitated by the law to the view of a contract as being a market transaction that the law steers, channels, and controls.⁴⁸ Accordingly, two regulatory frameworks for contract law are very promising for Vietnam: the social and the market-rational concepts.

2.3.1. Market-Retification Contract Law

Under the concept of market-rational contract law,⁴⁹ the freedom of contract is important for its functional role in achieving Pareto efficiency, but not because of its own value as such. Or to put it differently, the virtue of freedom of contract or consent is seen as a regulatory tool for both parties to enhance their wealth. In the perfect market, a free contractual exchange should be enforceable because it will make both parties better off: parties obtain something that they value more than what they give up to the other party.⁵⁰ However, it is widely recognised that, in reality, this ideal of a perfect market cannot always be achieved and therefore the freedom of contract is substituted by regulatory tools to rectify these market failures.

According to the *Coase Theorem*, rational parties can effortlessly make a perfect contract if transaction costs are zero.⁵¹ Transaction costs are defined as any costs relating to the creation of transactions including search and information costs, negotiation costs, monitoring and enforcement costs.⁵² These transaction costs may hinder welfare-enhancing transactions. Simultaneously, in conventional law and economics, individuals are predicted to make their rational choice to maximize their

47 Brigitta Lurger, 'The Future of European Contract Law between Freedom of Contract, Social Justice, and Market Rationality' (2005) 1(4) *European Review of Contract Law* 442, 447.

48 Hugh Collins, *The Law of Contract* (Cambridge University Press 2003) 8.

49 In Europe, the idea of a market-rational contract law has its own meaning of searching for the best contract law for the functional operation of a single market, Thomas Wilhelmsson, 'Varieties of Welfarism in European Contract Law' (2004) 10(6) *European Law Journal* 712.

50 Anthony T. Kronman and Richard A. Posner, *Introduction* in Anthony Kronman and Richard A. Posner (eds), *The Economics of Contract Law*, (Little Brown and Co., 1979) 1-29.

51 Ronald H. Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1; Robert D. Cooter, 'Coase Theorem' in John Eatwell, Murray Milgate and Peter Newman (eds), *The World of Economics* (Palgrave Macmillan, 1991) 51-57.

52 *Ibid.*

own preferences.⁵³ Consequently, markets cannot function perfectly and social welfare decreases if the parties are irrational and/or transaction costs are high.

More specifically, in a classic ‘Law and Economics’ textbook, Cooter and Ulen have synthesized a normative analytical framework for the purpose of creating the perfect contract. Accordingly, there are several conditions that must be satisfied:⁵⁴

- a) Individual rational decision makers, (i) who are rational agents (the decision makers must have stable preferences); and (ii) who make an unconstrained choice (the parties’ choices must be free and not subject to any other kind of restriction by private parties).
- b) An absence of transaction costs: (iii) an absence of externalities (the contract must not have negative third-party effects), iv) perfect information (the parties must be fully informed as to the nature and consequences of their choices), (v) perfect competition (there must be enough potential buyers and sellers).

In theory, if one of these requirements is absent, the contract will suffer from the imperfection of the market thus creating room for contract law to rectify the problems.⁵⁵ Furthermore, although an economic analysis of law acknowledges that contract law may provide remedies for these market failures, it also emphasizes that like market mechanisms, states may also fail to provide efficient solutions for correcting the defects of the market.⁵⁶ As a result, any legal solution must be justified by carefully assessing the costs and benefits of government interference, taking market solutions – such as signalling, screening or reputation – into consideration.⁵⁷

Accordingly, in contrast to a non-instrumentalist ideal of classic contract law, the market-rational contract law serves the useful regulatory function of overcoming the obstruction of transaction costs and rectifying the occurrence of market failure.⁵⁸ As far as standard forms are concerned, what really matters to the market-rational concept of contract law is whether social welfare is enhanced by enforcing standard form contracts, or whether *via* standard terms an associated risk is efficiently allocated to the party who can bear that risk at the least cost.⁵⁹ If standard form contracts may produce Pareto-efficiency which makes parties better off and no one worse off, the parties to such a perfect contract only require that the state faithfully enforces their agreement. However, if this is not the case, legal interferences can be justified to the

53 John Scott, ‘Rational Choice Theory’ in Gary Browning, Abigail Halcli and Frank Webster (eds) *Understanding Contemporary Society: Theories of the Present* (Sage Publications Inc. 2000) 126, 129.

54 Robert Cooter and Thomas Ulen, *Law and Economics* (6th edn, Addison-Wesley 2016) 294-99 [Chapter 8 on An Economic Theory of Contract Law].

55 *Ibid.*

56 Aristides N. Hatzis, ‘Civil Contract Law and Economic Reasoning: An Unlikely Pair?’ in Stefan Grundmann and Martin Schauer (eds) *The Architecture of European Codes and Contract Law* (Kluwer Law International, 2006) 159.

57 *Ibid.*

58 Hugh Collins, *The Law of Contract* (Cambridge University Press 2003) 26; Stefan Grundmann, ‘The Future of Contract Law’ (2011) 7 *European Review of Contract Law* 509.

59 Andrew Tutt, ‘On the Invalidity of Terms in Contracts of Adhesion’ (2013) 30(2) *Yale J. on Reg.* 439.

extent that they sufficiently correct the failures of the markets concerning standard terms in consumer contracts.

2.3.2. Social-Liberal Contract Law

Under the social-liberal concept of contract law, contract law should not be seen as merely a technical tool, but rather as a political tool for striking a balance between facilitating freedom of contract and ensuring fairness for weak and vulnerable parties.⁶⁰ Accordingly, while party autonomy is still a central value – that is why contract law is liberal – other values, such as so-called social justice,⁶¹ cooperation or solidarity should be considered as co-existing basic values to shape contract law, and that is why contract law is social.⁶² However, it should be clear that the social approach should not be seen as a complete alternative, but as ‘a complementary correction of the liberal approach’.⁶³ The social-liberal approach advocates that contract law should strike a balance between party autonomy and social solidarity,⁶⁴ between the freedom of contract and the protection of the weaker party.⁶⁵

According to the social-liberal approach, one of the main deficiencies of the liberal approach is that it merely concerns the freedom of contract in a formal way, but fails to take into account the freedom of contract in a substantive way.⁶⁶ This largely depends on the existing social constraints that make one party considerably less free than the other.⁶⁷ As a consequence, contract law, on several occasions, is actually employed to reinforce the oppressive will of the stronger party, rather than to facilitate a just exchange between the parties. Thus, to avoid the risk of domination through a contract, the paradigm of the formal freedom of contract must be superseded by means of a statutory framework of rights or replaced by a more substantive concept of equality.⁶⁸

60 Brigitta Lurger, ‘The Future of European Contract Law between Freedom of Contract, Social Justice, and Market Rationality’ (2005) 1(4) *European Review of Contract Law* 442, 447.

61 Study Group on Social Justice in European Private Law, ‘Social Justice in European Contract Law: A Manifesto’ (2004) 10(6) *European Law Journal* 653.

62 Brigitta Lurger, ‘The “Social” Side of Contract Law and the New Principle of Regard and Fairness’ in Authur Hartkamp et al. (eds), *Towards A European Civil Code* (3rd fully revised and expanded edn, Kluwer Law International 2004) 273; Brigitta Lurger, ‘Old and New Insights for the Protection of Consumers in European Private Law in the Wake of the Global Economic Crisis’ in Roger Brownsword et al., *The Foundations of European Private Law*, (Oxford: Hart Publishing) 2011, 89.

63 Florian Rödl, ‘Contractual Freedom, Contractual Justice, And Contract Law (Theory)’ (2013) 76 *Law & Contemp. Probs.* 57, 60.

64 Chantal 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*, Vol. 12. (Kluwer Law International, 2008) 178, (referring to the literature on social solidarity written by Dutch, German and Italian authors).

65 Ewoud Hondius, ‘The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis’ (2004) 27(3) *Journal of Consumer Policy* 245.

66 Stefan Grundmann, ‘European Contract Law (S) of What Colour?’ (2005) 1(2) *European Review of Contract Law* 184; Colombi Ciacchi, ‘Freedom of Contract as Freedom from Unconscionable Contracts’ in M Kelly, J Devenney and L Fox O’Mahony (eds), *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable* (Cambridge University Press 2010) 7-25; O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (Sellier, 2007) 10-11.

67 Ibid.

68 Hugh Collins, *The Law of Contract* (Cambridge University Press 2003) 31.

Accordingly, the modern concept of contract law must recognize the fact that parties who enter into markets as employees, tenants and consumers may not have an equal bargaining position in comparison to that of employers, landlords and traders.⁶⁹ Indeed, the presumption of classic contract law that parties enter into the market on an equal footing must be overturned to reflect the disparities in terms of wealth, knowledge and expertise between these parties. The social-liberal concept advocates that contract law must introduce legal measures to redress the imbalances in contractual relations between parties who are generally weaker such as employees, tenants and consumers.

The key question for the social-liberal concept of contract law is thus who, exactly, are these weaker parties that merit legal protection. In principle, social contract law depends on a combination of personal and situational elements:

‘(a) The *person oriented element* relates to the personal qualities of the parties which cause a situation of imbalance materialising in a one-sided lack of information, lack of abilities or experience. But a situation of imbalance caused by personal qualities is by itself not a sufficient basis for the provision of party protection.

(b) Every protective measure has to be justified by a *situation oriented element* in addition: the protection aims to avert certain dangers which materialise at the stage of contract conclusion or at the stage of performance of the contract.’⁷⁰

Certainly, one can immediately argue that this approach to defining a weak party that deserves to be protected may be over-inclusive since a presumed weak party is in practice not that weak at all. For example, in several specific cases it is not necessary for the state to protect consumers who are even more highly educated in this field of business than the traders. However, it should be noted that social contract law applies a typifying approach to which consumers are irrefutably presumed to be in a weak position and this is for reasons of legal certainty. To create legal security, it is not open to trader to rebut the presumption of weak consumers. In return, it does not specifically focus on the protection of the really poor and needy.⁷¹ It demonstrates that the whole of contract law is not ‘social’; it is still individualistic and allows for the operation of the principle of private autonomy.⁷²

3. STANDARD FORM CONTRACTS AND MARKET FAILURE ARGUMENTS

In order to translate the normative analytical framework of market-rational contract law to scrutinize the perfection of standard contract terms, the first step must be to identify which kinds of market failure naturally relate to standard form contracts. It is submitted

69 Ewoud Hondius, ‘The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis’ (2004) 27(3) *Journal of Consumer Policy* 245.

70 Brigitta Lurger, ‘The “Social” Side of Contract Law and the New Principle of Regard and Fairness’ in Arthur Hartkamp et al. (eds), *Towards A European Civil Code* (3rd fully revised and expanded edn, Kluwer Law International 2004) 273, 289.

71 *Ibid.*

72 *Ibid.* 288.

that, except for the condition of the absence of externalities which is less relevant due to the principle of relative effect (or privity) in contract law, the other conditions are all significant for discussing issues of standard form contracts. After that, the discussion will turn to analysing possible regulatory interventions to address these market failures.

3.1. Imperfect Information and the ‘Market for Lemons’

At the initial stage of the literature on standard terms, standard form contracts were seen as ‘effective instruments in the hands of powerful industrial and commercial overloads enabling them to impose a new feudal order of their own making upon a vast host of vassals.’⁷³ It suggests that the omnipresence of harsh terms is the result of the economic concentration of power. That is to say, standard terms are naturally one-sided since customers have no other choice but to accept these terms. However, there exists no theoretical correlation between economic concentration and the frequency of inefficient standard terms because even a monopolist would efficiently assign the rights and risks among the contractual parties if they can increase quantity and thereby still maximize their profits without reducing the quality of contractual terms.⁷⁴ Furthermore, such a theoretical claim was confirmed by empirical research conducted by Florencia Marotta-Wurgler in 2008.⁷⁵ The research analysed software licence agreements to empirically investigate the relationship between competitive conditions and the quality of standard form contracts. The key finding was that firms in both concentrated and non-concentrated sectors of the software market offered similar terms to consumers.⁷⁶ Accordingly, from an economic perspective, market failure in the case of a monopoly should not be the main reason to explain the prevalence of inefficient terms in standard form contracts. Market failure as to the quality of standard terms actually derives from the other two preconditions of the perfect market: perfect information and rational decision makers.

As mentioned above, one of the key characteristics of the perfect market is that economic players have perfect information concerning the nature and the value of the products transacted. In practice, market failure frequently occurs due to information asymmetries when two contractual parties have different access to information about the product: one party is well informed, while the other party is imperfectly informed. This theory was first proposed by G. Akerlof in his seminal paper entitled ‘The Market for “Lemons”: Qualitative Uncertainty and the Market Mechanism’.⁷⁷ Using the example of the market for second-hand cars, he reasoned that if buyers are unable to distinguish between high-quality cars and low-quality cars they will assume that all cars offered are of average quality. As a result, there will be no incentive for the sellers to provide

73 Friedrich Kessler, ‘Contracts of Adhesion – Some Thoughts About Freedom of Contract’ (1943) 43 *Colum. L. Rev.* 629.

74 Douglas G. Baird, ‘The Boilerplate Puzzle’ (2006) 104(5) *Michigan Law Review* 933.

75 Florencia Marotta-Wurgler, ‘Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements’ (2008) New York University Law and Economics Working Papers, Paper 145.

76 *Ibid.*

77 George A. Akerlof, ‘The Market for “Lemons”: Quality Uncertainty and the Market Mechanism’ (1970) 84(3) *The Quarterly Journal of Economics* 488.

high-quality cars. On the contrary, the sellers have a motivation to reduce the quality of cars offered so that they can compete with other sellers by reducing the market price to seduce potential buyers. This kind of competition will lead to a phenomenon called ‘a race to the bottom’ in that the bad quality will drive out the good.⁷⁸ It is well established that adhering parties to standard form contracts which are pre-formulated by suppliers are in a comparable position as the buyers of second-hand cars analysed above.⁷⁹ In this sense, the lack of information on the part of adhering parties will eventually lead to a race to the bottom in the standard terms market.

3.1.1. Consumers’ Rational Apathy

Customers are the typical one-shot players, while suppliers are sophisticatedly repeat players concerning their own standard form contracts.⁸⁰ Accordingly, suppliers have the incentive to invest substantial resources for drafting their terms only once, but can benefit from such self-serving terms on multiple occasions. In contrast, as one-shot players consumers face the problem that the cost of comprehending the rights and risks arising from standard form contracts is often so high that it outweighs the potential benefits.⁸¹ As a result, consumers may suffer from so-called rational apathy, which basically means that they rationally choose not to waste time and effort on becoming informed about standard terms.⁸²

3.1.2. Adverse Selection

Although consumers are rationally ignorant as to the contents of standard form contracts, the fact that no one reads standard forms leaves no competitive incentives for suppliers to offer high-quality standard terms. Indeed, suppliers may shift certain

78 Ibid.

79 Avery Katz, ‘The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation’ (1990) 89(2) *Michigan Law Review* 215; Martijn W. Hesselink, ‘Unfair Terms In Contracts Between Businesses’ in J. Stuyck and R. Schulze, (eds), *Towards a European Contract Law* (Sellier European Law Publishers 2011) 131; G. Wagner, ‘Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on consumer rights’ (2010) 3 *Erasmus L. Rev.* 47; Hans Schulte-Nölke, ‘No Market for ‘Lemons’: On the Reasons for a Judicial Unfairness Test for B2B Contracts’ (2015) 23(2) *European Review of Private Law* 195.

80 Marc Galanter, ‘Why the “Haves” Come Out Ahead’ (1974) 3 *Law & Soc’y Rev.* 95, 98-103.

81 Gillian K. Hadfield, Robert Howse, and Michael J. Trebilcock, ‘Information-based Principles For Rethinking Consumer Protection Policy’ 1998 21(2) *Journal of Consumer Policy* 131; Peter Alces, ‘Guerrilla Terms’ (2007) 56 *Emory Law Journal* 1511, 1529-30.

82 Indeed, there are various reasons to explain why it is rational for consumers to refrain from being self-aware of standard terms. Firstly, reading standard terms is time-consuming. Secondly, given their sophisticated business structure, it is common that consumers can only negotiate and contract with merely suppliers’ agents, but such agents are not ready, or even not authorized, to alter standardized contractual terms. Thus, consumers are aware that even if they read standard terms, the probability of any change to such a term is extremely low. Thirdly, in reality, consumers lack the practical opportunity to find and compare a better choice since other traders are likely to offer similar terms. See more in Michael I. Meyerson, ‘Efficient Consumer Form Contract: Law and Economics Meets the Real World.’ (1989 24) *Ga. L. Rev.* 583, 596-599; Robert A. Hillman and Jeffrey J. Rachlinski, ‘Standard-form Contracting in the Electronic Age’ (2002) 77 *NYUL Rev.* 429, 435-437.

risks to their consumers without any concerns about the loss in market share. Due to the market mechanism, other suppliers, who cannot attract consumers' attention to the high quality of their standard terms, have no choice but to modify the terms accordingly. Gradually, inefficient standard terms that only benefit the suppliers are more likely to be included, while efficient standard terms that reflect the adhering parties' preferences are less likely to be incorporated into standard form contracts. By this race to the bottom, information asymmetry can lead to an adverse selection concerning the low quality of standard terms.⁸³ However, these low-quality terms do not necessarily comply with the preferences of consumers who would have paid for a higher level of quality in standard terms if the market had offered these kinds of terms.⁸⁴ Accordingly, adverse selection leads to a decrease in social welfare and market failure.⁸⁵

The market failure of information asymmetry indicates that society would gain from an improvement in the level of quality of standard terms in consumer contracts.

3.2. Solutions to Rectify Market Failure

As mentioned above, in the view of law and economics, the existence of a market failure is in itself not sufficient to immediately call for state intervention. An additional evaluation must be undertaken to analyse whether the market still has self-healing powers; only if the market failure cannot be addressed with the aid of market mechanisms should state intervention be considered. Therefore, the following section will first investigate whether market mechanisms such as reputation or consumer learning can correct information asymmetry in standard terms.

3.2.1. The Markets' Self-Healing Powers

In theory, the prioritized mechanisms for preventing a race to the bottom as to standard terms are various forms of market mechanisms. First of all, several scholars believe that interpersonal consumer learning through screening activities will stimulate high-quality standard terms.⁸⁶ Screening mechanisms depend on consumers' attempts to gather information by learning more about the product offered through their own examination or, more compellingly, through the use of information intermediaries.⁸⁷

83 Hans-Bernd Schäfer and Patrick C. Leyens, 'Judicial Control of Standard Terms and European Private Law' in Pierre Larouche and Filomena Chirico (eds), *Economic Analysis of the DCFR—The Work of the Economic Impact Group within the CoPECL Network of Excellence* (Sellier European Law Publishers (2010) 97, 107.

84 Ibid.

85 Melvin Aron Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 *Stanford Law Review* 211, 248; Avery W. Katz, 'Standard Form Contracts' in Peter Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Springer 1998); Clayton P. Gillette, Standard Form Contracts (April 8, 2009) NYU Law and Economics Research Paper No. 09-18. Thomas Wilhelmsson, 'Cooperation and Competition Regarding Standard Contract Terms in Consumer Contracts' (2006) 17 *Eur. Bus. L. Rev.* 49.

86 Thomas Wein, 'Information Problems and Market Failure: The Perspective of Economics' in Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Walter de Gruyter 2001) 80.

87 Thomas Wein, 'Information Problems and Market Failure: The Perspective of Economics' in Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in*

However, as consumers suffer from rational apathy, it is not likely that they would like to screen businesses for relevant and necessary information.

Secondly, it is also doubtful whether a reputation mechanism is sufficiently effective to rectify a market for ‘lemons’ when it comes to standard terms. According to economics theory, through building up reputation over repeated transactions between a seller and several different customers, the high-quality seller may signal the high-quality products in the long term, thus credibly transferring reliable information to the buyer.⁸⁸ By translating such an insight into cases of standard form contracts, one can argue that there must be traders in the market who attempt to address market failure by intuitively embracing high-quality standard terms and then constantly maintaining the quality in the future. More significantly, several scholars argue that even in cases where standard terms are one-sided to the detriment of the customer, as long as the trader is a repeat player who cares about her reputation, she will refrain from invoking such terms:

‘Its expectations of doing business with other consumers in the future may dissuade it from enforcing a one-sided contract to the hilt against a particular consumer even though the business does not expect to have further dealings with that consumer.’⁸⁹

To put it differently, reputational force is expected to function well to ensure that the trader treats her customers rationally in the long term, regardless of how one-sided the standard terms are. However, in reality, while the reputation mechanism may ensure that several large and trusty firms do not invoke the most onerous terms against their sophisticated customers, total reliance on such a mechanism will put the average customers’ legitimate interests at the mercy of opportunistic traders.

Thirdly, various economists have put forward the so-called ‘minority informed consumer’ hypothesis, suggesting that a marginally informed group of buyers who are willing to read standard terms is sufficient to provide a profit incentive for sellers to offer efficient contract terms.⁹⁰ In that respect, sellers cannot discern whether they are dealing with informed buyers or non-informed buyers and they will thus respond to buyers in the aggregate and provide standard terms that match their preferences. Sellers in a competitive market will refrain from offering all buyers harsh standard terms, because by doing so they face the risk of losing marginal buyers to a competitor who offers more desirable contractual terms.⁹¹ As a result, through the mechanism of market pressure, a majority of non-reading buyers will be protected by an informed minority who are willing to pay attention to the quality of the standard terms. Nonetheless, there are several arguments against the merits of the ‘minority informed consumer’ thesis.

the Internal Market (Walter de Gruyter 2001) 80, 87-91.

88 Ibid. 92.

89 Lucian A. Bebchuk and Richard A. Posner, ‘One-sided Contracts in Competitive Consumer Markets’ (2006) 104(5) *Michigan Law Review* 827, 828.

90 Alan Schwartz and Louis L. Wilde, ‘Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis’ (1978) 127 *U. Pa. L. Rev.* 630; Alan Schwartz and Louis L. Wilde, ‘Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests’ (1983) 69 *Virginia Law Review* 1387.

91 Ibid.

Firstly, it is not unlikely in practice that sellers may discriminate between contract terms through offering different terms to reading and non-reading buyers.⁹² Secondly, the underlying assumption behind this hypothesis is that the consumer preferences of the reading and non-reading buyer are not very diverse. However, this seems to be an unrealistic assumption in the light of behavioural insights and thus it is very doubtful whether non-reading buyers can derive any benefit from preventive effect initiated by informed buyers.⁹³ Additionally, it should be emphasized that the hesitance in depending on market mechanisms has been reinforced by empirical evidence. A central question related to the ‘minority informed consumer’ hypothesis is what percentage of consumers who are willing to read standard terms should be sufficient to deter sellers from taking advantage of non-reading consumers. While the required percentage of readers needs to be at least 10% or 33% of all consumers according to Trebilcock and Dewees, or Schwartz and Wilde respectively,⁹⁴ several empirical findings have consistently shown that the percentage of reading buyers in several kinds of markets is much lower than those expected figures.⁹⁵ In 2014, Marrota-Wurgler, Yannis Bakos and David Trossen used an enormous dataset comprising clickstream data that included 48,154 visitors to the Webpages of 90 software companies over a month to examine whether customers read the companies’ standard terms (called end-user license agreements, EULA) and whether the improved accessibility of the EULA advanced reading.⁹⁶ The results of the study showed that EULA were accessed in only one or two in every 1000 shoppers (0.2%).⁹⁷ The very few shoppers who accessed the EULA page visited it for an average of about one minute, with a median of 32 seconds.⁹⁸ Thus, those few shoppers could not have read more than small portions of the EULA. These salient numbers reinforce the impression that consumers almost never read standard terms and do not depend on these terms to make their decisions.

3.2.2. Possible Regulatory Mechanisms

If the issues of inefficient standard terms cannot be self-improved by market mechanisms, it is imperative to consider possible state intervention, ranging from merely introducing

92 David Gilo and Ariel Porat, ‘The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects’ (2006) 104(5) *Michigan Law Review* 983.

93 Ted Cruz and Jeffrey Hinck, ‘Not My Brother’s Keeper: The Inability of an Informed Minority to Correct for Imperfect Information’ (1996) 47 *Hastings Law Journal* 635, 638-40.

94 Michael J. Trebilcock, ‘An Economic Approach to the Doctrine of Unconscionability’ in Barry J. Reiter and John Swan (eds) *Studies in Contract Law*. (Butterworths, 1980) 390-421; Alan Schwartz and Louis L. Wilde, ‘Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis’ (1979) 127(3) *University of Pennsylvania Law Review* 630.

95 For an overview of several readership surveys, see M. Elshout, M. Elsen, J. Leenheer, M. Loos and J. Luzak, *Study on Consumers’ Attitudes Towards Terms and Conditions (T&Cs)* (2016), <http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/terms_and_conditions_final_report_en.pdf> [Accessed 1 May 2017].

96 Yannis Bakos, Florencia Marotta-Wurgler and David R. Trossen, ‘Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts’ (2014) 43 *J. Legal Stud.* 1 (2014).

97 Bakos, Marotta-Wurgler & Trossen, at 19-22.

98 Bakos, Marotta-Wurgler & Trossen, at 19.

information-based solutions for levelling up information asymmetry to imposing regulations to control the contents of standard terms or even mandatory prohibitions of standard terms.⁹⁹ In principle, lying at one end of the regulatory spectrum, information-based solutions are preferable since they are the least intrusive mechanisms when it comes to both parties' autonomy. At the other end of the regulatory spectrum, certain inefficient standard terms should be totally banned from the market. Additionally, it is possible to establish a mechanism allowing for an ex-post review of standard terms and thus invalidating all inefficient terms. However, it is worth noting that these kinds of content-based solutions have the effect of limiting the freedom of contract and thus incur the risk of excessive paternalism. Accordingly, a direct regulation of contractual contents will only be resorted to if the information techniques do not yield the desired effects.

4. STANDARD FORM CONTRACTS AND INEQUALITY OF BARGAINING POWER ARGUMENTS

In translating the visions of the social-liberal approach into cases of standard contract terms between traders and consumers, it is necessary to justify legislative controls through identifying not only the personal qualities of consumers which cause unequal bargaining positions (the person-oriented element) but also the dangers of situations that need to be averted (the situation-oriented element). After that, the discussion will turn to analysing the possible legal methods that can be deployed to protect consumers from being exploited in their contracts with traders.

4.1. Protection of Weaker Parties in the Case of Consumer Contracts

4.1.1. Person-Oriented Elements: Lack of Bargaining Power

It is well established that due to a pre-contractual imbalance of bargaining power between traders and consumers, the former will be able to one-sidedly impose their pre-formulated terms to the latter's detriment. In general, the disparity in bargaining power between the parties can be generally broken down into following elements:

- (1) disparities in economic power, especially in non-competitive market structures;
- (2) disparities in knowledge; and
- (3) cognitive biases on the part of consumers.

⁹⁹ In theory, the first prioritized regulatory rule that law and economics scholars would call for is the provision of an efficient default rule which would be preferred by the majority of contracting parties. However, it is impossible for default rules to be sufficiently specific to cope with all contingencies that may arise in all markets. In this connection, it should be noted that the very reason why traders draft standard terms is that they would like to specify the terms for the sake of certainty and predictability. See more in Hanneke Luth, *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited*, (PhD Thesis, Erasmus School of Law (ESL), 2010) 140,154.

Firstly, F. Kessler, as early as in the 1940s, famously contended that the superior economic power of firms was a main source that might lead to exploitation in contracts:

‘The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.’¹⁰⁰

While the element of disparities in wealth between individual citizens and professional traders seems to be inherent in a free market, individuals’ bargaining positions may become weakened due to a lack of meaningful choices in the markets for goods or services which are essential to satisfy their daily demands. Indeed, in facing a choice between extremely necessary goods or services and the rejection of pre-formulated contracts, consumers have little choice but to adhere to the former.

Additionally, it is commonly argued that consumers are normally inferior to traders in terms of knowledge about product attributes. The reason for this is simple enough: while consumers are one-shot players, traders are repeat players in their field, thus they have clear incentives to always update technical knowledge and build up their expertise. For that reason, it is self-evident that traders have more bargaining power than consumers in their specific field of competence.

While these two elements have long been recognized, it has not been until recently that the third element, ‘cognitive biases’, has been found to significantly reinforce the traditional line of reasoning on the basis of unequal bargaining power between consumers and traders. Under the classic assumption of the rational choice theory, consumers are rational contracting players who can absorb all available information, adequately process such information and integrate it into their decision to maximize their preferences.¹⁰¹ However, these assumptions have been critically challenged by findings from behavioural sciences which have discovered that they are far removed from reality. It is now well established that individuals do not always act rationally; on the contrary, human reasoning is usually subject to various kinds of limitations often called cognitive biases.¹⁰² As a result, consumers systemically suffer from bounded rationality that prevents them from making rational choices in their contracts with the traders who are very sophisticated legal persons. The following subsections will be devoted to analysing the situational weakness of consumers as ‘bounded rationality’ actors when they enter into standard form contracts.

100 Friedrich Kessler, ‘Contracts of Adhesion – Some Thoughts About Freedom of Contract’ (1943) 43 *Colum. L. Rev.* 629, 640.

101 Richard A. Posner, ‘Rational Choice, Behavioral Economics, and the Law’ (1998) 50 *Stanford Law Review* 1551.

102 See Richard H. Thaler, *Misbehaving: The Making of Behavioral Economics* (2015); Daniel Kahneman, *Thinking, Fast and Slow* (2011); Amos Tversky and Daniel Kahneman, ‘Rational Choice and the Framing of Decisions’ (1986) 59 *Journal of Business Law* (Supp) S25; Cass Sunstein, ‘Behavioral Analysis of Law’ (1997) 64 *University of Chicago Law Review* 1175.

4.1.2. *Situation-Oriented Element: Cognitive Biases as to Standard Form Contracts*

Apart from the above-mentioned elements of the personal characteristics of consumers that have become well known for a long time, it is summited that modern debates about justifications for the legislative control of consumer contracts can be significantly deepened by recent discussions about the implications of new insights from behavioural economics for the capability of consumers to make rational decisions.¹⁰³ Among them, there are three behavioural patterns which are directly related to standard form contracts as *situation-oriented elements* to justify why the legislative control of unfair terms is particularly required in order to apply to the non-negotiated contract paradigm rather than the negotiated contract paradigm.

The first issue concerns the problem of *preference inconsistency*. As mentioned above, one of the underlying presumptions of the rational choice theory is that individuals have a consistent and stable set of preferences which are not influenced by irrelevant factors. However, empirical studies have demonstrated that consumers frequently suffer from psychological phenomena such as the *sunk cost* effect or the confirmation bias, which can influence consumers' consistent sets of preferences. First, the so-called *sunk cost* effect is manifested 'in a greater tendency to continue an endeavour once an investment in money, effort, or time has been made.'¹⁰⁴ Translating this effect into the context of standard contract forms, it is argued that once individuals have already invested time and effort in choosing a product, they do not wish to waste time considering standard form contracts when they are usually presented at the end of the shopping process.¹⁰⁵ Second, another connected behavioural observation of sunk cost effect to influence consumers' self-commitment to transactions is *confirmation biases* which refers to 'a preference for information that is consistent with a hypothesis rather than information that opposes it.'¹⁰⁶ Therefore, once a consumer forms a positive opinion about a product and thus decides to enter into a transaction, he will search for information that reinforces his previous belief, and then process information he encounters in a way that supports this decision.¹⁰⁷ It explains why even consumers who *do* read SFCs are not likely to evaluate their content rationally.¹⁰⁸ All of these behavioural biases are associated with a distinctive feature of consumer contracting in that traders frequently present their pre-formulated terms for consumers' acceptance after a lengthy shopping period.¹⁰⁹ At this stage, such a behavioural pattern might

103 Shmuel Becher and Esther Unger-Aviram, 'The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction' (2010) 8(3) *DePaul Business and Commercial Law Journal* 199, 214.

104 Hal R. Arkes and Catherine Blumer, 'The Psychology of Sunk Cost' (1985) 35(1) *Organizational Behavior and Human Decision Processes* 124.

105 Avery Katz, 'The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation' (1990) 89 *MICH. L. Rev.* 215, 289-90.

106 Scott Plous, *The Psychology of Judgment and Decision Making* (Mcgraw-Hill Book Company, 1993) 233.

107 *Ibid.*, 238-239.

108 'Because consumers usually encounter standard terms after they have decided to purchase the good or service, they will process the terms in the boilerplate in a way that supports their desire to complete the transaction.' See Robert A. Hillman and Jeffery J. Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 *N.Y.U. L. REV.* 429, 453.

109 Shmuel I. Becher, 'Behavioral Science and Consumer Standard Form Contracts' (2007) 68(1) *La. L. Rev.* 117.

prevent consumers from engaging in significant comparison-shopping. Consumers' evaluation of standard form contracts is thus distorted and their willingness to read the contract and act on what they find is likely to be undermined.

Second, consumers are also affected by *preference instability*. While conventional economic analysis assumes that people have clear and stable risk preferences, it has been argued that consumers have a limited ability to evaluate prospects of future contingencies and risks.¹¹⁰ The availability cascades and the prevalence of self-serving biases, such as over-optimism and over-confidence, explain why most standard terms are not evaluated correctly *ex ante*. The concept of an availability cascade suggests that people tend to think that 'risks are more serious when an incident is readily called to mind or available' while at the same time underestimating risks that are not 'available.'¹¹¹ That being the case, consumers are likely to ignore or underestimate the risks that standard terms allocate to them. Besides, individuals are unrealistically optimistic or over-confident about their general ability when they 'believe that their own risk of a negative outcome is far lower than the average person's.'¹¹² In the context of consumer contracts, over-optimism bias makes consumers tend to interpret standard terms in a more favourable manner than they really are.¹¹³

The last issue deals with the problem of *information overload*. The concept of 'information overload' is used to describe the empirical observation that people have a limited capacity to process new information and thus can become overwhelmed by a flood of choices.¹¹⁴ On that account, from a cognitive perspective, more information is not always better and in many decisional contexts, excessive information might have negative consequences.¹¹⁵ Indeed, as Russell Korobkin rightly observes, the fact that consumers are overwhelmed by abundant information has the implication that consumers focus on only a *limited* number of transactions concerning price and other 'salient' attributes.¹¹⁶ Apart from such key provisions, consumers ignore non-salient provisions.¹¹⁷

110 Russell B. Korobkin and Thomas S. Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 *CAL. L. REV.* 1051; Robert A. Hillman and Jeffery J. Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 *N.Y.U. L. REV.* 429, 450.

111 Cass R. Sunstein, *Behavioral Law and Economics* (Cambridge University Press, 2000) 5.

112 Christine Jolls, Cass R. Sunstein and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471, 1541.

113 Lawrence Solan, Terri Rosenblatt and Daniel Osherson, 'False Consensus Bias in Contract Interpretation' (2008) 108 *Columbia Law Review* 1268. Similarly, I. Becher persuasively argued that 'Over-optimism can be an important factor in a consumer's decision to waive his or her legal rights (e.g., the right to launch litigation) or to undertake some legal risks (e.g., waiving seller's legal responsibility for his own negligence). If consumers were able to objectively evaluate their risk exposure, they would probably be more careful before accepting such contractual clauses and more reluctant to be legally bound by them.' Shmuel I. Becher, 'Behavioral Science and Consumer Standard Form Contracts' (2007) 68(1) *La. L. Rev.* 117, 148.

114 David M. Grether, Alan Schwartz and Louis L. Wilde, 'The Irrelevance of Information Overload: An Analysis of Search and Disclosure' (1985) 59 *S. Cal. L. Rev.* 277, 278.

115 Davis, Charles E., and Elizabeth B. Davis. 'Information Load and Consistency of Decisions.' *Psychological Reports* 79.1 (1996): 279-288, 279.

116 Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 *The University of Chicago Law Review* 1203, 1220. In the same vein, see Melvin Aron Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 *Stanford Law Review* 211.

117 *Ibid.*

More significantly, given the fact that consumers are systematically affected by these cognitive biases, sophisticated sellers have responded strategically to exploit such biases. In an influential book published in 2012, Oren Bar Gill empirically examines designed features of three principal kinds of consumer contracts, namely credit cards, mortgages and cell phones.¹¹⁸ He has accordingly reached the conclusion that in the three above markets, through applying two strategies involving cost deferral and complexity, sellers systematically exploit their customers' biases and misperceptions.¹¹⁹ The complicated sellers tend to minimize the up-front cost of the product or even provide an up-front bonus to seduce consumers, but retain profitability with high back-end costs. Such a seductive contracting scheme is intentionally designed to respond to consumers' myopia and undue optimism.¹²⁰ Not only do consumers tend to care more about the present rather than the future, they are also over-optimistic. They underestimate the probability that bad things, which materialize contingencies, can happen to them in the future. The problem of deferred cost is compounded by the complexity of contractual terms. This complexity will compel consumers to rely on salient terms to make their decisions. As a result, consumers are seduced to pay attention to salient attractive up-front charges, and thus may end up with arrangements that are inefficient. Additionally, market forces may demand other sellers to provide similar strategies. The simple reason for this is that sellers must compete by designing a lower up-front price as a response to imperfectly rational consumers. The value of Oren Bar Gill's work is that it reflects how often sellers intentionally exploit the predictable biases of consumers.¹²¹ An intuitive impression of the possibility of the exploitation of the weaker party by the stronger party has been strongly confirmed by findings from empirical research and persuasively explained by new insights from behavioural sciences. These constitute a solid foundation for legislators to translate them into legal values of contract law.

4.2. Possible Legal Solutions

It should go without saying that since the inequality of bargaining powers hinders the opportunities for the weaker party to reach a fair contractual content, the law should react to ensure that contracts are not used as effective tools for the stronger party to abuse the weaker party. In other words, the *rationale* behind the legislative control of contract terms is the protection of an identified class of persons who are structurally weaker than their contracting partners in terms of economic, social and psychological

118 Oren Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (Oxford University Press 2012). The book has synthesised the findings of several previous works, see Oren Bar-Gill and Elizabeth Warren, 'Making Credit Safer' (2008) 157 *University of Pennsylvania Law Review* 1; Oren Bar-Gill, 'The Law, Economics and Psychology of Subprime Mortgage Contracts' (2009) 94(5) *Cornell Law Review* 1073; Oren Bar-Gill and Rebecca Stone, 'Pricing Misperceptions: Explaining Pricing Structure in the Cell Phone Service Market' (2012) 9(3) *Journal of Empirical Legal Studies* 430.

119 *Ibid.*

120 *Ibid.*

121 Regarding comprehensive comments on Oren Bar-Gill's book, see Book Symposium on Oren Bar-Gill's *Seduction by Contract*, (2014) 9(1) *Jerusalem Review of Legal Studies* 52-103.

powers, especially in situations that clearly mark a specific failure of the bargain mechanism.

If one recognizes the disparities in bargaining powers between consumers and traders, especially in the case of standard form contracts, it is worth emphasizing that the presumption of classical contract law that *'qui dit contratuel, dit juste'* no longer remains true. Thus, law should be required not only to ensure contractual procedural fairness, but also to prevent substantive unfairness in contractual content. The ultimate goal of state intervention is to rebalance equality between contracting parties by protecting consumers as assumed weaker parties from being bound by oppressive terms dictated by traders.

5. LEGISLATIVE CONTROL OF STANDARD TERMS IN CONSUMER CONTRACTS

Given the deficiency of classical contract law in dealing with problems of standard form contracts, it is time to substitute a classic concept of contract law, which entirely relies on the ideal of freedom of contract, with new concepts of regulatory contract law, which better reflect the reality of contracting practices in the information age as well as catching up with the new findings of behavioural sciences concerning consumers' irrationality. Accordingly, it is submitted that legislative control is required either to rectify market failures due to information asymmetry between suppliers and adherent parties of standard form contracts, or to address the probability that traders may design their transactions in such a way as to exploit the systematic biases of consumers.¹²² In the case of standard form contracts between consumers and traders, it is also possible to envision that both *rationales* shall be mingled to design optimal mechanisms. The following sections will be devoted to outlining three general choices that should be made by legislators to formulate their controlling schemes: (i) the legislative scope of control, (ii) legal techniques, and (iii) an institutional design for enforcement mechanisms.

5.1. Scope of Control

It is the deliberate choice of this dissertation to focus on addressing problems arising from standard form contracts between businesses and consumers. However, under the market-rectification approach, one may certainly argue that there also exists an information asymmetry as to standard terms in business-to-business contracts. As a result, if the ultimate goal of legislators is to keep the market entirely clear from inefficient standard terms, it cannot avoid integrating contracts between businesses into

¹²² In an important paper, Martijn Hesselink has persuasively analysed various possible reasons for judicially reviewing the unfairness of contractual terms. Apart from reasons of unequal bargaining and market failure, distributive justice, paternalism and the ethos of the market are plausible for justifying state interference in contractual terms. These rationales, however, logically apply not only to standard terms, but also to all kinds of contractual terms, regardless of whether terms are individually negotiated or not. Martijn W. Hesselink, 'Unfair Terms in Contracts between Businesses', in Reiner Schulze & Jules Stuyck (eds), *Towards a European Contract Law* (Munich, Sellier European Law Publishers 2011), 131.

a controlling scheme. The reasons for the legislative control of standard terms are even more persuasive in the case of contracts between large firms and small and medium-sized enterprises (SMEs). In these contracts, it is largely believed that SMEs have as little bargaining power as consumers and thus they may suffer from all the dangers of standard terms that consumers have to face. Accordingly, it is for the legislators to make a final political choice about the subjective scope of the controlling regimes. For this purpose, it is indispensable to precisely define the key concepts of consumers, SMEs, and businesses, and thereby to draw a clear boundary for controlling regimes.

Apart from making a choice as to the personal scope of controlling instruments, it is necessary for the legislators to decide whether controlling instruments should apply to all standard terms, including the adequacy of the price, or whether they should mainly target non-core terms. It is commonly believed that prices cannot be controlled without undervaluing the freedom of contract and the core tenet of market economy. Thus, once the price terms are drafted transparently and consumers have given their informed consent, legislators should refrain from questioning their adequacy. However, it should be clear from the above that by embracing consumers' irrationality, traders deliberately design a complicated price structure to seduce consumers through providing low up-front prices, but high add-on costs. Accordingly, even if legislators take a position that the core terms are immune from challenges so as to uphold contractual freedom, the core exclusion provision must be carefully designed to prevent traders from any manipulation.

5.2. Legal Techniques

While both the market-rectification approach and the social approach reach a common conclusion that legislative control is necessary to address the problems of standard terms, a key follow-up question is how legal control should take place. Several options are plausible. The first option is that legislators may prescribe information-based duties. Accordingly, suppliers are obliged not only to provide a reasonable opportunity for consumers to be aware of the existence of the standard term but also to draft terms so prudently that consumers may comprehend their meaning and legal implications. In this sense, information-based duties should be appraised according to the above-mentioned schools of thought: for classical contract law the information duty is preferable since it is the instrument with the least interference when it comes to the freedom of contract. For the market-rectification approach, given that the main problem with standard terms is information asymmetry between the parties, it is logical that the first possible solution must aim at levelling out such information asymmetry. As regards the social approach, the information rule is also welcome since it reduces the disparities in bargaining power between the parties by providing weaker parties with more relevant knowledge for them to make an informed choice. However, one should not underestimate the fact that in reality just equipping consumers with information does not mean that they can

comprehend it, nor does comprehending it mean that they can act rationally thereon.¹²³ Information-based duties must overcome the huge problem of consumers' irrationality in order to stand alone as an effective tool to address the challenges of standard terms.

The second option is that legislators may directly focus on content-based solutions to target the problems of standard terms. Accordingly, the legislators can draw up a blacklist of terms that are always regarded as unfair or inefficient and are thus invalid, or a grey list of terms that are presumed to be invalid, unless traders can provide otherwise. The most challenging task in designing such a blacklist is that it bears an inherent risk of over-inclusiveness in the sense that a blacklist of prohibited terms may include terms that are efficient and preferable for several consumers.¹²⁴ For the market-rectification approach, an outright prohibition of particular terms should only be allowed only if it could be shown that these terms 'would never be agreed to by consumers'.¹²⁵ Otherwise, this may well lead to a welfare loss for several sophisticated consumers who would still prefer shopping subject to such terms.¹²⁶ As a result, the list of totally prohibited terms must duly take into account the market structures as well as specified associated cognitive errors, and thus it must preferably be designed on the basis of comprehensive analyses of market sector specificities.

The inherent disadvantages of these blacklist and/or grey-list approaches are their under-inclusiveness. Although several onerous standard terms can be identified and integrated into these lists, traders can always find ways to circumvent the rules by creating different terms that are functionally comparable to prohibited terms; therefore the market for 'lemons' may still exist. To fill this regulatory gap, from a social approach it is possible to prescribe a general clause which provides a minimum standard of substantive fairness that all standard terms must satisfy in order to be valid. From a market-rectification perspective, a general clause on unfair terms shall be acceptable to the extent that it imposes a general duty on suppliers to draft efficient terms and thus provides the courts with a legal ground to review any inefficient standard terms.¹²⁷ Underlying a general duty is the idea that suppliers should be alerted that legal systems would refuse to enforce the socially undesirable behaviour of inserting unfair,

123 Economic and legal literature on the ineffectiveness of information-based rules is abundant, see Section 3.2, Chapter 4. Notably, several American scholars even argue that the omnipresence of mandated disclosure is harmful in the sense that it prevents the effort to find alternative ways. See O. Ben-Shahar and C.E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press, 2014).

124 European Commission Communication on unfair terms in contracts concluded by consumers presented to Council on 14 Feb 1984 (1984) EC Bull, Suppl 1/84, based on COM (84) 55 final, 14; cited by Tjakie Naudé, 'The use of black and grey lists in unfair contract terms legislation in comparative perspective', (2007) 124 *South African Law Journal* 145.

125 Hanneke Luth, *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (PhD Thesis, Erasmus School of Law (ESL), 2010) 159; G. De Geest, 'The Signing-Without- Reading Problem: An Analysis of the European Directive on Unfair Contract Terms' in H. B. Schäfer and H. J. Lwowski (eds), *Konsequenzen wirtschaftsrechtlicher Normen Festschrift für Klaus Ott* (Geburtstag 2002) 213, 225. For certain kinds of terms, such as exemption clauses for intentional losses, which consumers are unlikely to agree to, restricting these clauses can be justified.

126 Hanneke Luth, *ibid.*

127 Gerrit De Geest, 'Signing Without Reading' in Alain Marciano, and Giovanni Battista Ramello (eds), *Encyclopedia of Law and Economics* (Springer, 2016) 1-8.

inefficient standard terms into a contract. In this connection, in order to address the failure of market forces to produce efficient standard form contracts, legal procedures will be introduced to guarantee that any standard terms can be directly exposed to a review by an independent third party which shall invalidate terms if they are found to be inefficient.¹²⁸ The mere existence of adjudicators who are empowered to review and invalidate inefficient standard terms plays a key function to replace, or at least to supplement, market mechanisms through supervising and encouraging traders to withdraw onerous standard terms and to compete with each other on the basis of the quality of the standard terms.

5.3. Enforcement Mechanisms

Once the legislators agree that state control is desirable to address problems of standard terms and then deploy information and/or content-based techniques to achieve this goal, the next question is what would happen if suppliers fail to fulfil their obligations. In particular, the concern is whether traditional private law enforcement is an effective and efficient means of ensuring justice when this mechanism entirely depends on an individual claimant to initiate a case before a court challenging an unfair term.¹²⁹ Given the renowned problems of the lack of legal knowledge and/or financial capacity that affect consumers,¹³⁰ it is unwise to expect that individual litigations are effective enough to discourage unfair standard terms. Here the key question is whether collective enforcement mechanisms *via* either public authority agencies or consumer associations are needed to bundle the individual interests and thereby producing an effective warning against inefficient standard terms.

Apart from a general litigious mechanism to control the standard terms *ex post*, there are also several other options to provide specific mechanisms that directly facilitate efficient standard terms. The first option known as collective negotiations between consumer associations and traders' organizations provides a platform for both parties, who represent the collective interests of consumers and traders respectively, to engage in a meaningful bargain before finalizing their agreement into collective contracts. The second option is known as a pre-approval mechanism, under which an independent party, ideally the state agency, shall review standard terms *ex ante*, and only those terms that are fair and efficient are allowed to be used in the market. Indeed, while two *ex ante* controlling mechanisms seem to be optimal from both a market-rectification approach

128 Michael Schillig, 'Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice's Jurisprudence on Directive 93/13 on Unfair Contract Terms', (2008) 33 *European Law Review* 336.

129 Here the issue is obvious that once traders no longer receive signals that their low-quality standard terms will be exposed to a risk of being invalidated, they will reintroduce inefficient standard terms and therefore eventually drive out high-quality standard terms from the market.

130 Consumers also suffer from 'rational apathy' regarding challenging unfair terms in the courts, see Michael J. Trebilcock, 'Rethinking Consumer Protection Policy' in Charles E.F. Rickett and Thomas G. W. Telfer (eds), *International Perspectives on Consumer Access to Justice*, (Cambridge University Press 2003) 68.

and a social approach, a major concern is whether they are feasible given the mere fact that standard form contracts are nowadays pervasive in this information age.

6. CONCLUSION

This chapter has demonstrated the advent and growth of standard form contracts in the modern society and has set out a number of justifications for state interference in contractual relationships in order to address the problems pertaining to the shifting of the contracting paradigm from a negotiated contract between parties with presumably equal bargaining power to non-negotiated contracts between parties having unequal bargaining power. Built upon the formal paradigm of the 19th century, it is self-evident that classic contract law is inappropriate to cope with one-sided and unread standard terms in consumer contracts.

The mismatch between classic contract law and the widespread use of standard terms due to their enormous benefits in rationalizing contracting practice have triggered various attempts to search for their appropriate legal treatment. The most radical suggestions representing the non-contractual approach argue that since the standard forms pre-formulated by the traders lack consumers' meaningful consent, they should not be treated as a contract, but as quasi-legislation, a thing, a defective product. The main advantage of this approach is that it retains the sacred status of the principle of freedom of contract under classical contract law, while state regulations are at the same time warranted in order to prevent the potential dangers of standard forms for consumers. Although it is true that consumers do not generally provide specific consent to standard terms, it is unclear as to why such an exceptionally high level of quality is needed for specific consent to gauge the status of the standard form. Arguably, consumers' consent to standard form contracts amounts to consent to be bound by the efficient and fair terms and thereby contract law must be modernized to balance the relaxed level of consent with further requirements of contractual efficiency and fairness. To this end, the modern concepts of market-rational contract law and social-liberal contract law, which have been introduced in Europe, provide promising new thinking to better reflect the contracting practice of modern society. Under the model of market-rectification contract law, state control of standard terms is justified due to the failure of the market to provide sufficient incentives for traders to compete on the quality of the terms. Under the model of social-liberal contract law, state control of standard terms in consumer contracts is justified to protect consumers as weaker parties from being exploited by traders. Against such a backdrop, it is for the Vietnamese legislators to design a feasible regime to control standard terms in consumer contracts, which generally centres on three main policy choices regarding the boundary of the scope of control, the legal techniques and the enforcement mechanisms.

Chapter 3

CONTROL OF STANDARD TERMS IN CONSUMER CONTRACTS IN VIETNAMESE LAW

This chapter undertakes to analyse the Vietnamese law on standard terms in consumer contracts. Specifically, it seeks not only to objectively describe the control regime of standard terms in consumer contracts but also to explain how the current regime has been shaped.

This chapter consists of seven sections. In the first section, particular attention shall be paid to understanding the historical transformation of Vietnamese contract law from state disciplinary guidance to the principle of the freedom of contract. The findings will constitute a solid background against which the existing regime which controls standard form contracts will be described, and against which feasible solutions for a future regime will be proposed and later justified in Chapter 5. The second section will be devoted to depicting the rise of standard form contracts and the initial reaction of Vietnamese law to the problems arising from such a new contracting paradigm. Thereafter, a conceptual analysis of the legislative scope of control will be analysed in Section 3. Sections 4 and 5 will examine the core of the regime through scrutinizing formal control and substantive control respectively. Section 6 shall attempt to study the enforcement mechanisms, whereas the last section will conclude with some remarks.

1. LAW OF CONTRACT IN VIETNAM: A TRANSITIONAL SYSTEM

Over the past 25 years, Vietnam has shifted from a centrally planned economy to a market-oriented economy. This transformation has been intertwined with the modernization of the Vietnamese legal system, especially the development of contract law. However, in contrast to transformed socialist countries in Eastern Europe, the socialist legal ideology in Vietnam has not been superseded, but has rather been adapted to market conditions. Against this background, the following section aims to identify the implications of this eclectic feature of the Vietnamese legal system for the development of general contract law and consumer contract law in Vietnam. In order to establish the necessary background for further discussion, part 1 will briefly provide an overview of the Vietnamese legal system and highlight the distinctive features of the economic and legal reform process in Vietnam. In part 2, the discussion will be devoted to analysing the historical development of the law of contract in Vietnam, focusing particularly on the recent developments during the period of transformation from the

planned economy to the market economy. The third part will attempt to scrutinise the contents of the principle of freedom of contract as well as the idea of fairness as an increasingly competitive principle in current Vietnamese contract law. The last part will examine the rise of consumer protection law and the principle of the protection of the weaker party as its underlying paradigm. Overall, this section will provide background information for the purpose of understanding the potential functions of Vietnamese contract law in dealing with the new phenomenon in modern transactions: the standard contract terms between the consumer and the business enterprise.

1.1. Overview of the Transformation of Vietnamese Law

Vietnam's legal tradition has been influenced by a number of legal traditions, including Chinese imperial law, French civil law and the former Soviet Union's legal remnants.¹ Furthermore, the building of the law-based state over the past two decades has fostered numerous efforts to carry out legal transplantations from Western legal systems and internationally recognised practices.² This layered legal structure, with the new overlying and interacting with the old, creates the unique characteristics of Vietnamese law.³

Notwithstanding this eclectic feature, the modern Vietnamese legal system in its current form, structure and legislative techniques bears a striking resemblance to Western law, especially the European civil law tradition. Indeed, Vietnam is usually classified as a civil law country,⁴ with the absolute dominance of written laws promulgated by the

1 See John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate Publishing, Ltd., 2006) 39-62. (The author summarizes the history of legal transplantation in Vietnam with the borrowing from China, France, and the Soviet Union. It starts with the transfer of Chinese legal institutions and principles to the pre-colonial legal system. Then, the French legal model was imposed on Vietnam during the colonial period before the socialist legal system swept the French model aside); see also Pham Duy Nghia, 'Confucianism and the Conception of Law in Vietnam' in John Stanley Gillespie and Pip Nicholson (eds), *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (2005) 76-90.

2 See John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate Publishing, Ltd., 2006) 62-69. See also Pip Nicholson and Simon Pitt, 'Official Discourses and Court Oriented Reform in Vietnam' in J. Gillespie and P. Nicholson (eds), *Law and Development and the Global Discourses of Legal Transfers* (Cambridge: Cambridge University Press 2012).

3 See John Stanley Gillespie, 'Understanding Legality in Vietnam', in S. Balme and M. Sidel (eds), *Vietnam's New Order*, Palgrave-Macmillan, London, (2007) 137, 137.

4 See John Quigley, 'Socialist Law and the Civil Law Tradition' (1989) *The American Journal of Comparative Law* 781.

legislature.⁵ The judiciary does not have the power to interpret,⁶ but merely to apply laws while court judgments are not binding in subsequent cases. Legal reasoning in Vietnam is thus deductive, starting from abstract rules in major codes such as the Civil Code rather than from judicial precedents as in a common law system.

The Vietnamese legal system has been significantly transformed in the last 25 years. Since 1986 – the year of the official endorsement of the Renovation (Doi Moi) era, the changes in economic policy have been intertwined with an ambitious legal reform agenda. In order to meet the needs for developing a market economy and facilitating international economic integration, there was a plea for a complete change from ‘bureaucratic management to running the nation by law’.⁷ However, in contrast to other transitional countries in Eastern Europe, Vietnam remains a socialist country where the Communist party acting upon the Marxist-Leninist doctrine and Ho Chi Minh’s thoughts is constitutionally recognized as the leading force of the State and society.⁸ This has raised an essential issue as to whether and to what extent pro-market law reform in Vietnam can be developed in the socialist ideology system which theoretically tends to prioritize party power over law and state interests over private parties’ interests.

3

1.1.1. Towards a Private Law Framework for the Market-Based Economy

Up to 1986, the leaders of Vietnam had gradually reached a consensus that the near collapse of the Vietnamese economy had its origin in implementing an obsolete planned economy model borrowed from the old Soviet Union.⁹ In order to overcome

5 According to the 2015 Law on Promulgation of Legal Documents, the hierarchy of Vietnam’s legal system includes:

1. The Constitution. 2. Codes and Laws; Resolutions of the National Assembly. 3. Ordinances, Resolutions of Standing Committee of the National Assembly; Joint Resolutions between Standing Committee of the National Assembly and Management Board of Central Committee of Vietnamese Fatherland Front. 4. Orders, Decisions of the President. 5. Decrees of the Government; Joint Resolutions between the Government and Management Board of Central Committee of Vietnamese Fatherland Front. 6. Decision of the Prime Minister. 7. Resolutions of Judge Council of the People’s Supreme Court. 8. Circulars of executive judge of the People’s Supreme Court; Circulars of the Chief Procurator of the Supreme People’s Procuracy; Circulars of Ministers, Heads of ministerial agencies; Joint Circulars between executive judge of the People’s Supreme Court and the Chief Procurator of the Supreme People’s Procuracy; Joint Circulars between Ministers, Heads of ministerial agencies and executive judge of the People’s Supreme Court, the Chief Procurator of the Supreme People’s Procuracy; Decisions of State Auditor General. 9. Resolutions of the People’s Councils of central-affiliated cities and provinces (hereinafter referred to as provinces). 10. Decisions of the People’s Committees of provinces. 11. Legislative documents of local governments in administrative – economic units. 12. Resolutions of the People’s Councils of districts, towns and cities within provinces (hereinafter referred to as districts). 13. Decisions of the People’s Committees of districts. 14. Resolutions of the People’s Councils of communes, wards and towns within districts (hereinafter referred to as communes). 15. Decisions of the People’s Committees of communes.

6 According to Article 74 of the 1992 Constitution (revised in 2013), this power is designed to the Standing Committee of the National Assembly.

7 Carol V. Rose, ‘The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study’ (1998) *Law and Society Review* 93, 99.

8 See Article 4 of the 1992 Constitution (which was revised in 2013).

9 Dang Phong, *Tu Duy Kinh Te Viet Nam: Chang Duong Gian Nan va Ngoan Muc 1975-1989*, [Vietnamese Economic Thinking – A Road of Challenges and Breakthroughs from 1975 to 1989] (2008). See also

this precarious situation, Vietnam had to attract foreign investment and trade from Western countries in order to pursue the goal of integration with the global market economy,¹⁰ as well as relaxing controls over private enterprises with the aim of shifting from a centrally planned economy to one with significant market elements.¹¹ Actually, one of the first laws enacted in Vietnam to inaugurate the era of Renovation was the Foreign Investment Law in 1987.¹² Following the positive outcomes of the initial stage of the economic reform process, the Vietnamese government actively strengthened the comprehensive legislative framework to facilitate economic development, especially the promulgation of the 1992 Constitution and the 1995 Civil Code, which officially recognised and facilitated the development of the market economy in Vietnam.

Although the actual role of the new ‘law and economic movement’ or neo-liberalism in economic and legal reform in Vietnam is still very controversial,¹³ there is no doubt that a market economy in a globalization era needs to ensure that its legal rules are transparent, impartial and predictable.¹⁴ The new legal framework that enables private choices to be made in the market to maximize self-interest is crucial to the development of a market economy. In particular, private law should be reformed to allow for private plans and to reduce the possibility of arbitrary governmental intervention. A well-functioning contract law, for example, should be codified to recognize and facilitate private autonomy.

By understanding the need for a new legal framework guaranteeing the functioning of a market-based economy, the Vietnamese government decided to selectively borrow Western legal solutions in order to modernize private law in Vietnam rather than waiting for decades to distil modern legal rules from internal practices.

It is clear that since the commencement of the Doi Moi era, the Vietnamese government has recognised the absolute necessity of a new system of private law in which the market economy can develop; it remains unclear, however, how the ideological conflict in Vietnam should be solved. The next section will first identify this conflict before analysing how the Vietnamese government has dealt with this issue.

1.1.2. Transformation of Legal Ideology

It was a unique trait in Vietnam during the transformation process that Vietnamese leaders did not embrace social and political pluralism in spite of the willingness to

Martin Rama and Vo Van Kiet, *Making Difficult Choices, Vietnam in Transition* (International Bank for Reconstruction and Development, The World Bank, 2008).

10 See Hoang The Lien, et al., *Hoi Nhap Kinh Te Quoc Te* [International Economic Integration] (Hanoi: Judicial Press, 2008), 12.

11 See Adam Fforde and Stefan de Vylder, *From Plan to Market: The Economic Transition in Vietnam* (Oxford: Westview Press, 1996) 41.

12 See Lan Cao, ‘Reflections on Market Reform in Post-War, Post-Embargo Vietnam’ (2000) 22 *Whittier L. Rev.* 1029, 1042. The author even argued that the Foreign Investment Law was one of the most liberal codes compared with other similar acts in the world.

13 See John Gillespie, ‘Testing the limits to the “rule of law”’: Commercial regulation in Vietnam’ (2009) 8.2 *The Journal of Comparative Asian Development* 245.

14 See Lan Cao, ‘Reflections on Market Reform in Post-War, Post-Embargo Vietnam’ (2000) 22 *Whittier L. Rev.* 1029, 1029.

encourage economic and material progress.¹⁵ This has raised reasonable concerns about how the incompatibility between a new pro-market legal ideology inspired by Western countries and the socialist ideology could be resolved. Also, the law-based regulation played a relatively minor role in most of Vietnam's history, thus posing the question of whether neo-liberal reform would really be feasible in Vietnam.

It is clear from the above analysis that the very first motivation to commence economic reform in Vietnam was the goal of building a new economic and social order in which private parties would be the main actors pursuing, first, the private interest and, thereafter, public welfare. Thus, the main prioritized efforts would concentrate on enhancing a private law system which recognized property rights and facilitated private transactions. However, the Vietnamese government soon came to realize that the success of the transformation depended on a more systematic approach. Consequently, in parallel with the legal solutions borrowed from Western countries to modernise Vietnamese private law, the Vietnamese government has cautiously renovated the traditional Soviet legal ideology.

The new Constitution of 1992 for the first time officially affirmed the supremacy of the Constitution and the law by providing that all state organs and the Communist Party are bound by the rule of law. This revolutionary reform was prepared in 1991 when the Vietnamese Communist Party at its Seventh Congress had enthusiastically discussed the new concept of a 'law-based state' (Nha nuoc Phap quyen)¹⁶ and this notion was later incorporated into the amended Vietnamese Constitution in 2001.

Actually, a 'law-based state' is not a coherent legal theory which can help to sweep away the traditional ideals of socialist ideology such as the Party being paramount (Dang lanh dao tuyet doi), democratic centralism (Tap trung Dan chu) and the state's economic management (Quan ly Kinh te).¹⁷ Despite the fact that the law-based state (Nha nuoc Phap quyen) has attained various meanings in Vietnamese legal discourse, at the heart of mainstream thinking the concept of a 'law-based state' has been used to reflect at least the ideals of (1) a focus on the functions of law, rather than moral and policy instructions in adjusting the social relationship; (2) the origin of state power: state power belongs to the people; (3) the doctrine of the division of powers between the legislature, the executive and the judiciary, and (4) the independence of the courts.¹⁸

The adoption of such a concept has especially paved an important path to support neo-liberal legalism¹⁹ and by this function the 'law-based state' has been rightly

15 Mark Sidel, *Law and Society in Vietnam* (Cambridge University Press, 2008).

16 Nguyen Duy Quy, *Doi Moi Tu Duy Va Cong Cuoc Doi Moi O Vietnam* [Renovation in Thinking and the Renovation Process in Vietnam] (Hanoi: Social Sciences Press, 2009) 151.

17 See more in John Stanley Gillespie, 'Changing Concepts of Socialist Law in Vietnam' in John Stanley Gillespie and Pip Nicholson (eds), *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (2005), 45.

18 See more in Nguyen Duy Quy and Nguyen Tat Vien, *Nha Nuoc Phap Quyen Xa Hoi Chu Nghia Vietnam Cua Dan, Do Dan, Vi Dan: Ly Luan Va Thuc Tien* [Vietnam's Law-Governed Socialist State of the People, from the People, and for the People: Theory and Practice] (Hanoi: National Political Press, 2008), 10-15.

19 See more in John Stanley Gillespie, 'Changing Concepts of Socialist Law in Vietnam' in John Stanley Gillespie and Pip Nicholson (eds), *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (2005), 45.

considered as ‘a conceptual label for new legal thinking’.²⁰ Gradually, the ideas reflecting the pro-market theory such as the ‘citizen may do everything not expressly prohibited by law’ and ‘the state must not do anything except as expressly permitted by law’ have become fairly popular. It is true that in Vietnam’s history the law did not play a significant role in the political, economic and social system; however, since the Doimoi era, ‘juridical thinking has moved from the fringes to center stage in Vietnamese discourse’.²¹ The relationship between legal and economic development in Vietnam is precisely described as ‘both a push and a pull’ effect, which means that ‘a stronger legal system facilitates economic development and economic growth increases demands for legal reforms.’²²

Generally, liberal ideals supporting property and contractual rights are not necessarily precluded by the renovated socialist ideology. Indeed, Vietnamese legal development since 1986 has been modelled on many Western legal institutions, especially private law institutions, which have been voluntarily imported to lay the foundations for a market economy. However, it is also undeniable that conflicting ideologies and the unique characteristics of Vietnamese law may pose some unprecedented challenges for the reform of the Vietnamese legal system in general and private law in particular.

1.2. Historical Development of Vietnamese Contract Law

It should be noted that contrary to the development of contract law in Europe,²³ the notion of ‘freedom of contract’ was relatively new in Vietnam. It was not until very recently that Vietnam witnessed a transformation from a ‘Status’ to a ‘Contract’ society in which exchanges based on community ties have been shifted to exchanges based on the freedom of contract.²⁴ Therefore, it is widely acknowledged that the principle of ‘freedom of contract’ must be promoted and maintained as a central principle in

20 Another political umbrella is Ho Chi Minh’s thoughts, which embraced an eclectic array of Western legal principles, socialism and neo-Confucianism. See more in Truong Trong Nghia ‘The Rule of Law in Vietnam: Theory and Practice’ (2010) *The Rule of Law: Perspectives from the Pacific Rim*, 131.

21 John Gillespie, ‘The Juridification of State Regulation in Vietnam’ in John Gillespie and Albert Chen (eds) *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (London: Routledge 2010), 78.

22 Randall Peerenboom, ‘Rule of Law, Democracy and the Sequencing Debate: Lessons from China and Vietnam’ in John Gillespie and Albert Chen (eds) *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (London: Routledge 2010) 29.

23 The traditional contract law in Europe was formulated in the 19th century under the influence of neo-liberalism in which individual autonomy is considered to be the foundation stone on which the whole market economy is built, and the dominant paradigm of contract law is the principle of freedom of contract. However, modern contract law during the last 30 years in Europe seems to reflect that ‘freedom of contract’ in the contemporary period has undergone considerable restrictions due to such factors as the growth of mandatory rules protecting weaker parties like consumers. See more in Martijn W. Hesselink and others, ‘Social Justice in European Contract Law: A Manifesto’, (2004) 10.6 *European Law Journal* 653.

24 See Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas, 1861* (New York: Dorset (1986)). According to Henry S. Maine, one of the leading legal-sociologists of the day: ‘The movement of the progressive society has hitherto been a movement from Status to Contract’. This remark has reflected an idea that there has been a historical evolution from community to society. The key characteristic of the formal is the group relationships which is based on kinship, ethic, religion or other affinities. The key feature of the latter is the interaction of individuals based on an arm’s length rather than their closed relationship.

Vietnamese contract law in order to facilitate transactions because only through transactions based on party's autonomy will economic and social resources be efficiently and effectively allocated.²⁵ Accordingly, this section will analyse the historical development of contract law in Vietnam. In particular, it shall identify when and to what extent the principle of freedom of contract has been recognized in Vietnamese society.

1.2.1. Vietnamese Contract Law before the Doi Moi Era

(i) Imperial Period

The history of Vietnam's contract law can be traced back to the famous 'Quoc Trieu Hinh Luat' (the Royal Criminal Code) enacted in 1483 under the rule of King Le Thanh Tong.²⁶ The Le Code, containing 722 articles, imported a great deal from the Tang Code in China,²⁷ but it also reflected the socio-political realities of Vietnamese society. Consequently, the Le Code also contained a variety of original articles which were not seen in Chinese law and most of them were related to civil law topics such as contracts, torts, inheritances and matrimonial property.²⁸

Notwithstanding its title and the penal orientations of most of its articles, the Code also covered a variety of provisions governing certain aspects of the law on contract such as: the form of contract, the validity and nullity of a contract, the duty to perform contractual provisions and to pay damages, and even the issue of prescription.²⁹ Contrary to the Chinese Code at the time, the law of contract in the Le Code was considered to contain a number of characteristics of modern contract law.³⁰ First, the issue of freedom of consent was vigorously governed by the Le Code, according to which contracts

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- 25 See Dinh Trung Tung, *Binh Luan Nhung Noi Dung Moi Cua Bo Luat Dan Su 2005 [Commentary on the new contents of the 2005 Civil Code]* (Judicial Publisher, Hà Nội, 2005), 9. See also Ngo Huy Cuong, 'Tu Do Y Chi Va Su Tiep Nhan Tu Do Y Chi Trong Phap Luat Vietnam Hien Nay' [The Will Theory and The Reception of The Will Theory in Vietnamese Law], (2008) 2 *Legislative Studies Journal* 11, 14; Bui Thi Thanh Hang and Do Giang Nam, 'Tai Phap Dien Hoa Bo Luat Dan Su Viet Nam Dap Ung Yeu Cau Thoi Dai Phap Quyen' [Re-Codifying the Vietnamese Civil Code in the Context of the Era of the Rule of Law] (2013) 15 *The Journal of Legislative Studies* 21.
- 26 Historical Institute of Vietnam, *Quoc Trieu Hinh Luat- Luat hinh trieu Le*, [The National Criminal Code – The Le Code] (Ho Chi Minh City: Ho Chi Minh City Press, 2003).
- 27 Long after gaining independence in 938, Chinese ruling models continued to influence Vietnamese rulers. One of the main reasons to explain Vietnam's deference to the Chinese model is the high esteem in which Confucian teachings, texts, and practices – the Confucian repertoire – are held in Vietnam. 'The Vietnamese emperors believed that effective neo-Confucian virtue-rule (Duc tri) required the adoption of Chinese ideology, governmental organizations, and political-legal culture' – John Gillespie and Albert Chen, 'Comparing Legal Development in Vietnam and China: An Introduction', in John Gillespie and Albert Chen (eds) *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (London: Routledge 2010), 7.
- 28 Ta Van Tai, 'Vietnam's Code of the Le Dynasty (1428-1788)' (1982) *The American Journal of Comparative Law* 523, 524.
- 29 See Pham Duy Nghia, *Chuyen Khao Luat Kinh Te* [A Monograph on Business Law] (Vietnam National University Publisher 2004), 393. See also Nguyen Lan Quoc, 'Traditional Vietnamese Law –The Le Code – and Modern United States Law: A Comparative Analysis' (1989) 13 *Hastings Int'l & Comp. L. Rev.* 141.
- 30 Ta Van Tai, 'Vietnam's Code of the Le Dynasty (1428-1788)' (1982) *The American Journal of Comparative Law* 523, 527.

that regulated the coercive purchase of land were invalid.³¹ Parties which disregarded official measurement instruments to cheat buyers or those who used fraudulent means to sell other people's land were harshly punished.³² Second, the Le Code paid a great deal of attention to protecting the vulnerable party in contractual agreements. The Le Code's provisions on loan contracts aimed to protect the economically weaker party by imposing a maximum monthly interest rate of 2.5%, and the borrower, as a consequence, would be reimbursed with any excess amount collected.³³ More generally, the Le Code also harshly punished any person who relied on his position or power to borrow or make purchases at an unreasonably low interest rate or price or lend or to sell objects at an exorbitant interest rate or price.³⁴ Going even further, some Vietnamese scholars have even argued that the Le Code reflected the spirit of the principle of freedom of contract with many provisions having equivalent effects to those of today's Western laws.³⁵

However, it should be noted that the Le Code, which was similar to other imperial codes in East Asia, was vertical law between the sovereign and the individual.³⁶ In fact, in Vietnam at this time the state did not regulate horizontal relationships between one individual and another, and the parties relied on the Confucian 'rule of morality', custom, kinship or politics rather than formal legality to enter into and to enforce contracts.³⁷ The rare occasions on which the state paid attention to private transactions were actually not in order to help facilitate their transactions. It is more reasonable to argue that the issue of freedom of consent or the protection of the weaker party was only regulated when it more or less threatened tax collection or the social order – the twin pillars of state,³⁸ rather than having the intention of protecting private parties' interests.

(ii) The French Colonial Period

After officially establishing a semi-feudal colonial system in Vietnam towards the end of the 19th century, the French imposed a parallel legal system in which a civil law system governed French citizens, while the Nguyen Code and customary practice continued to govern Vietnamese people.³⁹ Indeed, they not only transplanted a rights-

31 Article 355.

32 Articles 187 and 382.

33 Article 587.

34 Article 683.

35 Le Net, *Contract Law in Vietnam* (Kluwer Law Intl, Published Apr 13, 2012) 37.

36 See John Gillespie, 'Private Commercial Rights in Vietnam: A Comparative Analysis' (1994) 30 *Stan. J. Int'l L.* 325. See also Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2d ed. (Cambridge: Cambridge University Press, 2006) 523-525.

37 Pham Duy Nghia, *Vietnamese Business Law in Transition* (Hanoi: World Press, 2002) 23-25; see also MOJ – Institute of Legal Sciences, *Mot So Van De Ve Phap Luat Dan Su Vietnam Tu The Ky XV Den Thoi Phap Thuoc* [A Number of Issues Concerning the Civil Law of Vietnam from the 15th Century to the Time of French Rule] (Hanoi: National Political Press, 2008) 13.

38 John Gillespie, 'Private Commercial Rights in Vietnam: A Comparative Analysis' (1994) 30 *Stan. J. Int'l L.* 325.

39 *Ibid.*

based law⁴⁰ and Western-modelled institutions into Vietnam, but also opened a law school in Hanoi for training legal personnel to administer the legal system.

During this colonial period, different Civil Codes,⁴¹ including comprehensive regulations on contracts, were promulgated to govern different regions in Vietnam. The Southern Civil Code was a complete copy of the Code Napoléon,⁴² while the Northern Civil Code and the Central Civil Code were slightly adjusted to reflect Vietnamese customs.⁴³ In these Codes, for the very first time, the concept of ‘a contract’ was legally defined as ‘an agreement through which one or several people make a commitment to one or several people in order to transfer something, to do or not do something.’⁴⁴

Unquestionably, the principle of ‘freedom of contract’ was recognized in these codes. The parties were free to determine and agree on the goods, the price, and their rights and obligations. An agreement could not contain rights and obligations which violated the law, customs, and public policy. The invalidity of contracts could also be claimed on the grounds of wilful misrepresentation, mistake, fraud, or duress. The rights and obligations of the parties to the contract were clearly expressed. Contractual liability was different from penal liability in order to reflect the ideals of French legal science.⁴⁵

However, it was not a simple matter to suddenly apply a rights-based approach to a deeply-rooted Confucian legal culture like Vietnamese society. Additionally, French laws rarely touched upon the lives of most Vietnamese people because most persons were isolated from the colonial economy.⁴⁶ As a result, these rights-based law codes did not contribute to a radical change in contract law in Vietnam. After the Soviet model was implemented in Vietnam in the 1950s, the French-based contract law was easily superseded.

40 Ibid.

41 The first code was promulgated on March 10th, 1883 and was applicable to the Southern provinces; After that, in 1931 and 1936, the promulgation of the Northern Civil Code and the Central Civil Code came into effect respectively.

42 Institute of Legal Sciences, *Mot So Van De Ve Phap Luat Dan Su Vietnam Tu The Ky XV Den Thoi Phap Thuoc* [A Number of Issues Concerning the Civil Law of Vietnam from the 15th Century to the Time of French Rule] (Hanoi: National Political Press, 2008), 30.

43 Promulgated on March 30, 1931, the Northern Civil Code has greater historical value. In this code, Colonial authorities had taken into account the Vietnamese people’s history, customs, and previous legislative successes. See Institute of Legal Sciences, *Mot So Van De Ve Phap Luat Dan Su Vietnam Tu The Ky Xv Den Thoi Phap Thuoc* [A Number of Issues Concerning the Civil Law of Vietnam from the 15th Century to the Time of French Rule] (Hanoi: National Political Press, 2008).

44 Article 664 of the North Civil Code; Article 680 of the Central Civil Code.

45 Institute of Legal Sciences, *Mot So Van De Ve Phap Luat Dan Su Vietnam Tu The Ky XV Den Thoi Phap Thuoc* [A Number of Issues Concerning the Civil Law of Vietnam from the 15th Century to the Time of French Rule] (Hanoi: National Political Press, 2008).

46 Luong V Hy, *Revolution in The Village: Tradition and Transformation in North Vietnam, 1925-1988*, (University of Hawaii Press, 1992).

(iii) The Period of the Centrally Planned Economy

Following independence from the French, a centralized legal system reflecting a Soviet-style planned economy was gradually adopted.⁴⁷ Since economic activities were formulated and implemented by government agencies, the role of laws was replaced by the dominance of the party and state policies.⁴⁸

Under this centrally planned economy, an economic contract was considered as ‘a legal instrument of the State’ to set up and develop a socialist economy.⁴⁹ The regulation on contracts was presented in an administrative decree – Decree No. 4-TTg dated 4 January 1960 of the Prime Minister regulating obligatory transactions between state-owned enterprises to implement periodical economic plans. It was later replaced by Decree No. 54-CP dated 10 March 1975 of the Government to promulgate the protocol on economic contracts which explicitly provided that ‘Entering into economic contracts is a discipline of the State. In all economic activities with others, one must enter into economic contracts’. The nature of contracts, therefore, was mandatory under the state’s arrangements.

Accordingly, the definition of a contract during this period was essentially different from that under the market economy. The principle of freedom of contract, which was introduced in Vietnam during the French colonial period, was totally undermined. Instead of being an instrument facilitating private autonomy, contracts were considered merely as a tool for carrying out State plans. Furthermore, the parties, mainly State-owned enterprises, were not allowed to freely select their contracting parties or to decide the contractual contents.

Generally, although contract law has existed in Vietnam since ancient times, it appears that, with significant influences from the neo-Confucian ideology and the Soviet law model, Vietnam’s contract law before the Doi Moi era did not have the type of rules that meet the requirement to support a modern market economy. The idea of freedom of contract introduced into Vietnam during the colonial period, however, never brought about any radical changes to Vietnamese contract law. Vietnam’s contract law up until fairly recently seemed to be more suitable for a society where traditional exchanges were based on relations, not where exchanges were based on contracts and ‘rational will’.⁵⁰

47 See Adam Fforde and Stefan de Vylder, *From Plan to Market: The Economic Transition in Vietnam* (Oxford: Westview Press, 1996) 56-63.

48 See Nicholson, Penelope (Pip), *Borrowing Court Systems: The Experience of Socialist Vietnam* (Martinus Nijhoff, 2007), 103-115. However, it should be noted that while revolutionaries in Northern Vietnam had implemented socialist theory, the nationalist Republic of Vietnam in the south retained much of the French civil law tradition until reunification in 1975.

49 Pham Huu Nghi, *Che Do Hop Dong Trong Nen Kinh Te Thi Truong O Vietnam Giai Doan Hien Nay*, [Institution of contracts in the market economy of Vietnam in the current period] (1996) PhD dissertation, 26-27.

50 Lan Cao, ‘Reflections on Market Reform in Post-War, Post-Embargo Vietnam’ (2000) 22 *Whittier L. Rev.* 1029, 1053.

1.2.2. Transformation of Contract Law from a Planned Economy-Based Ideology to a Market Economy-Based Ideology

In order to advance the economic transformation process, developing a comprehensive law on contracts so as to recognize and facilitate private transactions had to be one of the most prioritized and pressing legislative objectives for the Vietnamese government.⁵¹ Despite its importance, this area of the law was composed of underdeveloped, fragmented and even contradictory legislation until the introduction of a unified contract law system in the 2005 Civil Code. The slow development of contract law in Vietnam during the 20-year period from 1986 to 2005 actually revealed the tension between the legacy of socialist ideology and the emerging neo-liberalism which wanted to regulate the market economy.

(i) The 1989 Ordinance on Economic Contracts

The first contract law in Vietnam since the Renovation was the Ordinance on Economic Contracts introduced in 1989. Being promulgated at the beginning of the Renovation, the 1989 Ordinance was mainly driven by Marx's economic theories on a planned economy rather than neo-liberalism theory supporting the market economy.⁵²

Given this legislative context, it is not surprising that one of the first goals of introducing this law was to preserve the 'state's economic management' (*quan ly nha nuoc ve kinh te*).⁵³ Indeed, the law provided that only commercial entities with business licences (*giay phep kinh doanh*) were allowed to enter into economic contracts⁵⁴ and the contracts themselves had to comply with the 'state plan' (*ke hoach nha nuoc*).⁵⁵ Parties to a contract which was declared void faced disciplinary, administrative, or even criminal punishment.⁵⁶

Notwithstanding the dominance of the planned economy ideology, a number of provisions were introduced which supported autonomous contractual rights. The Ordinance explicitly recognized the concept of voluntariness⁵⁷ which helped shield contracting parties from duress when entering into an agreement⁵⁸ as well as guaranteeing state protection and the enforcement of contractual rights.⁵⁹ However, there existed, even among those who supported the idea of private autonomy, a concern that Vietnamese enterprises were inexperienced in doing business during the initial

51 See Carol V Rose, 'The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study' (1998) *Law and Society Review* 93, 100.

52 Nguyen Quan Hien, 'Social Structures of Contracts – A Case Study of The Vietnamese Market' (2006), 109-117.

53 John Gillespie, 'Understanding Legality in Vietnam', in S. Balme and M. Sidel eds, *Vietnam's New Order*, (Palgrave-Macmillan, London, 2007), 137, 149.

54 Article 2 of the Ordinance on Economic Contracts (OEC).

55 Article 10 of the OEC.

56 Article 39 of the OEC.

57 Article 3 of the OEC.

58 Article 4 of the OEC.

59 Article 6 of the OEC.

stages of the economic reform.⁶⁰ As a consequence, the Ordinance provided for many specific provisions regarding both the formality requirements⁶¹ and the substantive contents in the contract in order to provide detailed guidance for these parties.⁶²

Accordingly, it does not seem to be too inappropriate to conclude that the primary purpose of the Ordinance was not to provide a legal instrument to facilitate private transactions and help parties pursue economic efficiency, but to pave the way for ‘state management’ of the economy by creating formality conditions which these transactions must follow.

(ii) The 1995 Civil Code

Ten years after the beginning of the Renovation, the first Civil Code of Vietnam after the reunion of the country was enacted in 1995. The 1995 Civil Code explicitly declared in its preamble that the entire civil law of Vietnam is a ‘legal tool’ that would serve to ‘enhance civil transactions and to create a favourable environment for the socio-economic development of the country’.⁶³ Following the Romano-Germanic tradition, the Civil Code with comprehensive chapters on property law, contract law, tort law, and conflict of laws was widely considered as the ‘mother law’ of the private law system in Vietnam.⁶⁴

With regard to contracts, the 1995 Civil Code covered all contractual activities between natural persons, legal entities and other special subjects under Vietnamese law, namely family household and cooperation entities. It contained both a general part, which provided a comprehensive regulation on every stage of ‘contract life’ ranging from formation, interpretation, performance to remedies, and a specific part, which regulated various types of common contracts such as sales, gifts, rental agreements, contracts of carriage, processing contracts, and insurance contracts.

In contrast to the 1989 Ordinance on Economic Contracts, which was a product of the centrally planned economic system, the 1995 Civil Code marked an important progress in the legal reform underlined by pro-market theories. One of the first functions of the 1995 Civil Code was to create a sound competitive environment for business activities through guaranteeing fundamental principles of civil transactions such as equality, voluntarism, the freedom to enter into contracts and minimizing administrative interference in private relationships. The 1995 Civil Code was therefore established with the aim of supporting private efforts to pursue wealth maximization by

60 John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a ‘rule of Law’ in Vietnam* (Ashgate Publishing, Ltd., 2006) 148.

61 See Articles 8 and 11 of the OEC.

62 See Article 12 of the OEC.

63 The Civil Code itself is dedicated to ‘ensuring a stable and healthy community life, preserving and developing traditions of solidarity, mutual affection and love, good morals and customs and the national cultural characteristics that have been established in the long history of building up and defending the country of Vietnam’. The Code should also, according to the Preamble, contribute to ‘building a socialist oriented multi-sector market economy under State management and thus to achieving the objective of creating a rich people, a strong country, and a fair and civilized society’.

64 H. Patrick Glenn, ‘Grounding of Codification’ (1997) 31 *UC Davis L. Rev.* 765 (comparing the Vietnamese Civil Code with other civil codes in terms of philosophy, language, etc.).

conferring power on private parties to freely decide on the contents of their contracts and to enforce their transactions.

The 1995 Civil Code expressly declared that the parties' rights to freely undertake and make agreements for the establishment of civil rights and obligations were protected by law.⁶⁵ Furthermore, the parties shall act entirely voluntarily and no party may impose, prohibit, coerce, threaten or hinder the other party. As a consequence of voluntary bargains between the parties who are put on an equal footing, contracts shall be effectively binding upon them and the parties must strictly perform their own civil obligations, otherwise they may be forced to perform in accordance with the stipulations of the law.⁶⁶

Therefore, it is argued that since its independence in 1945, this was the first time that the principle of freedom of contract was recognized as a main pillar of contract law in Vietnam. It was expected to play a guiding role not only for the establishment of more detailed rules on contracts but also for the implementation and interpretation of these rules in specific cases.

In spite of the championing of pro-market institutions in the 1995 Civil Code, interventionist thinking was still irresistible among judges and bureaucrats who were mainly driven by the socialist law theory. For example, based on Article 131 which spells out a compulsory requirement of formality for a transaction to be valid, the courts actively invalidated various contracts for the reason that they did not meet the requirements of formality provided by legal documents.⁶⁷

It is worth noting that when the 1995 Civil Code was introduced into the contract law system, it did not replace the 1989 Ordinance on Economic Contracts. Up until then, an 'economic contract' was still distinguished from a 'civil contract' based on four blunt criteria including a legal person, formality, its purpose, and planning.⁶⁸ This meant that natural persons were not eligible to enter into 'economic contracts', economic contracts had to be written and related to the state plan, and all economic contracts were restricted to activities for economic purposes.⁶⁹ Furthermore, given the existence of different courts and procedural legislation on resolving contractual disputes, the ambiguous boundary between a civil contract and an economic contract was criticized as creating the problem of 'law shopping' and being vague as to which legal rules should be applied in disputed cases.⁷⁰ This situation clearly diminished the functions of the new Civil Code and unnecessarily exposed the contracting parties to uncertainty.

65 See Article 7 of the 1995 Civil Code.

66 See Article 10 of the 1995 Civil Code.

67 Nguyen Quan Hien, *Social Structures of Contracts-A Case Study of The Vietnamese Market*, Ph.D. Dissertation (2006) 130.

68 Pham Huu Nghi, 'Du thao Bo Luat Dan Su (Sua Doi) va Van De Cai Cach Hop Dong' [Issues of reforming contract regulation in the Drafted Civil Code] (2005) 4 *The State and Law Journal* 21.

69 Ibid.

70 Nguyen Quan Hien, *Social Structures of Contracts-A Case Study of The Vietnamese Market*, Ph.D. Dissertation (2006), 134.

(iii) The 1997 Commercial law

Additionally, the adoption of the Commercial Law in 1997 introduced an additional layer to the ‘economic contract’ branch. With the purpose of reducing restrictions on market entry, the 1997 Commercial Law allowed contracting parties to enter into a wider range of market transactions than the 1989 Ordinance on Economic Contracts.⁷¹ The 1997 Commercial Law also aimed to provide a more favourable legal framework to facilitate commercial activities in Vietnam by offering more favourable default rules governing all stages of the contractual circle from formation, interpretation to performance.⁷²

However, the emergence of pro-market legislation – the 1997 Commercial Law did not relieve but rather increased the uncertainty caused by the two-branch contract law regime.⁷³ Even worse, it triggered a triangular regime of Vietnamese contract law in which the 1989 Ordinance on Economic Contracts constituted the obsolete third body of contract law that often conflicted with the 1995 Civil Code and the 1997 Commercial Law.⁷⁴

Factors used to classify three kinds of contracts	Civil Contracts (1995 Civil Code)	Commercial Contracts (1997 Commercial Law)	Economic Contracts (1989 Ordinance on Economic Contracts)
Subjects	<ul style="list-style-type: none"> • Legal entities • Natural persons • Co-operative groups • Family households 	Traders – legal subjects with their businesses having been registered for commercial activities which are carried out independently and regularly	Legal entities
Acts	Civil Acts	Commercial Acts	Economic Acts
Objectives of contracts	–	Making profits	–
Forms of contracts	Civil contracts may be created verbally, in writing or through specific acts	Commercial contracts may be created verbally, in writing or through specific acts.	Economic contracts may only be created in writing

71 For example, the definition of commercial activities in Article 5 of the Commercial Law was clearly broader than the definition of economic activities in Article 1 of the Ordinance on Economic Contracts. Consequently, market entry has been relaxed to allow contracting parties to enter into to a wider range of market transactions. See more in Nguyen Quan Hien, *Social Structures of Contracts – A Case Study of The Vietnamese Market*, Ph.D. Dissertation (2006), 136-146.

72 See a detailed analysis of the 1997 Commercial Law in Claude Rohwer, ‘Progress and Problems in Vietnam’s Development of Commercial Law’ (1997) 15 *Berkeley J. Int’l L.* 275.

73 Nguyen Quan Hien, ‘Social Structures of Contracts – A Case Study of The Vietnamese Market’ Ph.D. Dissertation (2006), 139.

74 Freshfields Bruckhaus Deringer – one of the first international law firms to establish itself in Vietnam – even claimed that no one (including the authorities) could clearly separate ‘economic contracts’ from ‘civil contracts’ and ‘commercial contracts’. <http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Indochina_notes/Sector%20Update%20on%20the%202005%20Civil%20Code.pdf> [accessed 15 May 2017].

As these contract laws were adopted in different periods of economic and legal reform, the three pieces of legislation were driven by different orientations. While the 1989 Ordinance on Economic Contracts clearly advocated the centrally planned economy, the 1995 Civil Code and the 1997 Commercial Code conferred much more autonomy on contractual parties when entering into their transactions. The persistence of Vietnamese legislators in making an arbitrary distinction between civil contracts and economic contracts is a clear indication of the tension between the conflicting ideologies in which the pro-market theory may incrementally rather than suddenly and totally trump the planned economy theory.

1.2.3. Unified System of Contract Law

Technically, the remaining inconsistencies among the three pieces of legislation regulating contracts actually created a barrier to setting up a friendly legal framework for business activities for both Vietnamese enterprises and foreign investors. A new legislative effort was needed to reconsider the relationship between the legal status of economic contracts, commercial contracts and civil contracts so that a uniform contract law could be established in Vietnam.⁷⁵ It was not until 2005 that contract law was reformed after Vietnam had strengthened its effort to knock on the door of the World Trade Organization, and more political will had been established to deal with the situation of a fragmented and inconsistent contract regime.⁷⁶ Indeed, under pressure to harmonize Vietnamese laws and to bring them into line with international standards, which include, *inter alia*, the requirement of non-discrimination among economic sectors, the 1989 Ordinance on Economic Contracts was repealed and replaced by a revised Civil Code in 2005.⁷⁷ The 2005 Civil Code has successfully established a systematic contract law, which covers all kinds of contractual relationships in society.⁷⁸

75 Pham Duy Nghia, *Vietnamese Business Law in Transition* (Hanoi: World Press, 2002) 40-47. See also Nguyen Viet Ty, *Phuong Huong Hoan Thien Phap Luat Kinh Te Trong Dieu Kien Co Bo Luat Dan Su* [Possibilities for Improvements to Economic Laws Given the Existence of the Civil Code] (Ph.D. Dissertation, Hanoi Law University, Hanoi, 2002) 8-59 [unpublished]; Dinh Thi Mai Phuong, *Thong Nhat Luat Hop Dong O Vietnam* [Unifying contract law in Vietnam] (Judicial Publisher, 2005). 1-10.

76 Le Thi Hoang Oanh, *Binh Luan Cac Van De Moi Cua Luat Thuong Mai Trong Dieu Kien Hoi Nhap* [Commentary on New Provisions in the Commercial Law in the Context of Economic Integration] (Hanoi: Judicial Press, 2007) 9-15.

77 Dinh Trung Tung, *Binh Luan Nhung Noi Dung Moi Cua Bo Luat Dan Su 2005* [Commentary on the new contents of the 2005 Civil Code] (Judicial Publisher, Hà Nội, 2005) 6.

78 Article 1 of the 2005 Civil Code explicitly provides that 'The Civil Code provides the legal status, legal standards for the conduct of individuals, legal persons, and other subjects; the rights and obligations of subjects regarding personal identities and property in civil, marriage and family, business, trade, labor relations'. This can be compared with Article 1 of the 1995 Civil Code which only explicitly regulated 'civil relations' which were generally interpreted to mean relations arising in the daily lives and personal activities of individuals or organizations in order to meet living and consumption purposes: 'The Civil Code prescribes the legal position of individuals, juridical persons and other subjects and the rights and obligations of subjects in relations involving property [and] personal relations in civil interaction, and establishes legal standards for the conduct of the subjects participating in civil relations'.

The 1997 Commercial Law was also replaced by the 2005 Commercial Law, which only lays down some regulations for special kinds of commercial contracts, while important general issues such as the formation of a contract, the validity of a contract, and the interpretation of a contract are now only regulated by the 2005 Civil Code. The relationship between the 2005 Commercial Law and the 2005 Civil Code is now governed

Although a new Civil Code has been adopted in 2015,⁷⁹ the basic contents and regulations on contract law seem to have already been effectively established in the 2005 Civil Code.⁸⁰ Such a time and effort-consuming process of eliminating Soviet influence and recognizing private autonomy as the core element of the market economy in Vietnam has surely established the primary status of the principle of freedom of contract as a solid foundation for any further development of modern contract law.

1.3. Principle of the Freedom of Contract in General Contract Law

It should be evident from the above that Vietnamese scholars and legislators have tirelessly struggled to set the freedom of contract as the main paradigm of Vietnamese contract law. In this connection, the issue of how and to what extent the principle of freedom of contract in Vietnamese law facilitates and encourages free and voluntary exchange in the market economy should be further discussed.

1.3.1. Party Autonomy, Equality, and *Pacta Sunt Servanda*

As a fundamental principle of the 2005 Civil Code,⁸¹ the principle of free and voluntary undertakings and agreements is enshrined in Article 4, which reads as follows:

‘The law guarantees the freedom to undertake and agree on the establishment of civil rights and obligations if such undertakings and agreements do not breach matters prohibited by law and are not contrary to social ethics.

by the doctrine *lex specialis derogat lex generalis* which is codified by Article 4 of the 2005 Commercial Law, according to which the specific regulations on commercial contracts in the 2005 Commercial Law will take priority over more general rules laid down in the 2005 Civil Code when there are differences regarding a particular contract issue.

79 The 2015 Civil Code entered into force on 1 January 2017.

80 According to submission report No. 390/TTr-CP dated 12 October 2014 on the Draft Civil Code to the Vietnamese Parliament, the Vietnamese Government laid down three main motives for reforming the 2005 Civil Code. The first reason was to implement the provisions of the new Constitution promulgated in 2013. Among other things, the provisions on individuals’ personality rights in the 2005 Civil Code needed to be reformed to correspond to new requirements of human rights institutions in the 2013 Constitution. The second motive was to strengthen the legal framework for the development of a market economy in Vietnam. It was particularly necessary to reconsider the capacities of the property law regime for maximizing the economic value of property. Thirdly, the new Civil Code was warranted to enhance legal certainty through addressing the complicated relationship between the Civil Code and other specific laws. See Chinh Phu, To Trinh so 390/TTr-CP ngay 12 thang 10 nam 2014 ve Du thao Bo Luat Dan Su [Government, submission report No. 390/TTr-CP dated 12 October 2014 on the Draft Civil Code]. For an overview of the new contents of the 2015 Civil Code, see Do Van Dai (ed.), *Binh Luan Khoa Hoc Nhung Diem Moi Cua Bo Luat Dan Su 2015* [Scientific Commentaries on the New Issues in the 2015 Civil Code] (Hong Duc Publisher- Vietnam Lawyers Association, 2016).

81 As is well established in Vietnamese legal discourse, the fundamental principles of one area of the law reflect its essence and spirit and are guiding principles for drafting, implementing as well as interpreting the law. In practice, these principles are also very important in the sense that they can function as the legal basis for the resolution of specifically contractual issues when judges cannot find clear and direct rules governing these issues. See more in Nguyen Hoang Anh, ‘Ap Dung Nguyen Tac Phap Luat Trong Hoat Dong Xet Xu’ [Applications of the Principles of Law in Judicial Activities], 2014 (11) *Legislative Studies Journal* 53, 54.

In civil relations, parties shall be entirely voluntary and no party may force, prohibit, coerce, intimidate or hinder any other party.

All lawful undertakings and agreements shall bind the parties and must be respected by individuals, legal entities and other subjects.’

The mere fact that this Article is stipulated as the very first fundamental principle in the 2005 Civil Code conveys a strong political message that the authority of private parties to freely establish their civil rights and obligations through their agreements or undertakings is seen as the top priority of private law in Vietnam.⁸² The objective of safeguarding party autonomy in private relationships has even been further promoted by the 2015 Civil Code which explicitly declares its aims and objectives in Article 1 as follows:

‘This Code governs the legal status of and the legal standards for conduct of individuals and legal entities; the personal and property rights and obligations of individuals and legal entities in relations formed on the basis of equality, free will, asset independence and self-responsibility.’

Against this background, respect for the freedom of contract, as one of the main manifestations of party autonomy, has been ensured in both positive and negative ways. While positive freedom of contract enables contracting parties to establish their civil rights for themselves through their agreements, negative freedom of contract guarantees that the parties are free from any obligations unless those obligations are the legal consequence of their free will.

Respect for the free will of individuals is accompanied by the principle of equality which ensures that all parties are equal in civil relations.⁸³ In a transitional country like Vietnam, the principle of equality is remarkably important in two respects. First, it ensures equal treatment between a private party and the State or State-owned enterprises if they are engaged in a civil transaction.⁸⁴ In other words, the State and State-owned enterprises shall enjoy no privilege or advantage when compared to a private party. Without this requirement, it would be impossible not only to promote fair trading between the parties but also to enhance competition in the market.⁸⁵ Secondly, the parties shall have equal capacity to exercise civil rights regardless of their ethnicity,

82 It should be noted that although the principle of freedom and voluntariness of undertakings and agreements was recognised by the 1995 Civil Code, it was laid down in Article 7 after several other principles of the Civil Code. The first principle of the 1995 Civil Code was enshrined in Article 2 which calls for the interests of the state, the interests of the public and the legal rights and interests of other persons to be respected:

‘The establishment and exercise of civil rights and performance of civil obligations must not infringe upon the interests of the State, the interests of the public [or] the legal rights and interests of other persons’.

83 Art 5 of the 2005 Civil Code; Sec, 1 Art. 3 of the 2015 Civil Code.

84 It is not coincidental that the year 2005 – when the 2005 Civil Code was promulgated – also witnessed the promulgation of the new Enterprise Law which aims to ensure the equality of enterprises before the law, regardless of their form of ownership and economic sector.

85 Bui Xuan Hai, ‘Tu Do Kinh Doanh: Mot So Van De Ly Luan Va Thuc Tien’ [Freedom in Doing Business: A Number of Theoretical and Practical Issues], (2011) 5 *The State and Law Journal*, 68.

gender, social status, economic position, belief, religion, education and occupation.⁸⁶ Accordingly, Vietnamese contract law has attempted to establish a legal mechanism aiming to facilitate private transactions by allowing the parties who are placed on an equal footing to deal with each other in a free and fair manner.

Finally, the notion of self-responsibility reflects a logical consequence of a free agreement between parties who are on an equal footing. To this effect, the Civil Code recognises and ensures the well-known principle of *pacta sunt servanda* (or ‘agreements must be kept’).⁸⁷ The principle of *pacta sunt servanda* means that the contract is legally binding upon the parties.⁸⁸ Also, the principle of *pacta sunt servanda* expresses the socially acceptable value of promises between parties since the binding force of a contract ‘should be respected by individuals, legal entities and other subjects’.⁸⁹

To sum up, contract law in Vietnam has attempted to facilitate free and voluntary agreements by recognizing such agreements as having legal effect and enforcing the obligations derived from such agreements. In particular, the law of contract enables the parties to rely on their free will to efficiently carry out their business, which in turn may help to bolster the operation of the market economy.

1.3.2. Forms of Contractual Freedom

The current forms of the principle of freedom of contract in Vietnamese contract law can be further illustrated as follows:

(i) Freedom to Decide to Enter into a Contract

There is an underlying market economy assumption that the parties, which possess equal bargaining power, should be the best judges of their interests in a specific agreement. Respect for contractual freedom, in its most important facet, should allow the parties to finalise their decision as to whether or not to enter into a contract.⁹⁰ In general, nobody should intrude upon the parties’ contracting authority by arbitrarily forcing the parties to conclude a contract or hindering them from doing so.

The freedom to decide to enter into a contract shall logically include the freedom to select a contractual partner.⁹¹ This means that if a contracting party decides to enter the market, that party may freely decide who shall be his counterpart.

86 2005 Civil Code, Article 5.

87 See more in Le Minh Hung, *Hieu Luc Cua Hop Dong Theo Phap Luat Vietnam* [Validity of Contracts under Vietnamese Law], PhD dissertation, 2010.

88 Arts 7 and 388 of the 2005 Civil Code; sec. 5 Art. 3 of the 2015 Civil Code.

89 Art 4 of the 2005 Civil Code; sec. 2 Art. 3 of the 2015 Civil Code.

90 Le Thi Bich Tho, ‘Tu Do Y Chi Trong Giao Ket Hop Dong’ [The Will Theory in Entering into a Contract] in Nguyen Nhu Phat, Le Thi Thu Thuy (eds), *Mot So Van De Ly Luan Va Thuc Tien Ve Phap Luat Hop Dong Vietnam Hien Nay* [A Number of Theoretical and Practical Issues in Vietnamese Contract Law] (Ha Noi: The People’s Police Press: 2003) 35-49.

91 Phan Thong Anh, ‘Quyen Tu Do Hop Dong O Vietnam-Ly Luan Va Thuc Tien’ [Right of Freedom of Contract in Vietnam – Theoretical and Practical Issues], (2011) 23 *Legislative Studies Journal* 18, 24.

The parties' freedom to enter into a contract is, however, limited in a number of circumstances. First, some specific laws impose limitations on the parties' contractual freedom by forcing them to enter into a contract subject to a number of conditions. For instance, motor vehicle owners have to enter into insurance contracts concerning liability insurance for the civil liability of their vehicles regardless of their own decisions.⁹² Second, some other laws prohibit the parties from entering into certain kinds of transactions. For example, the 2004 Law on Competition prohibits agreements which are in restraint of competition.⁹³

(ii) Freedom to Determine the Contractual Contents

The Civil Code explicitly stipulates that the parties are entitled to freely agree upon the contents of their contract.⁹⁴ Although it also provides a list of seven items as the general contents of a contract,⁹⁵ these items, contrary to the 1995 Civil Code, are not compulsory.⁹⁶ Consequently, under the 2005 and 2015 Civil Codes, the lack of one of these items does not render the contract invalid.⁹⁷ Accordingly, the parties are fundamentally free to agree on the terms and conditions of their agreement.

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92 See more in Decree No. 103/2008/ND-CP dated 16 September 2008 of the Government on Compulsory Insurance for the Civil Liability of Motor Vehicle Owners. On 20 December 2013, the Government issued Decree No. 214/2013/ND-CP on the Amendment and Supplement to a Number of Articles of Decree No. 103/2008/ND-CP.

93 Article 8 of the 2005 Competition Law provides that:

'Agreements in restraint of competition shall comprise: 1. Agreements either directly or indirectly fixing the price of goods and services; 2. Agreements to share consumer markets or sources of supply of goods and services; 3. Agreements to restrain or control the quantity or volume of goods and services produced, purchased or sold; 4. Agreements to restrain technical or technological developments or to restrain investment; 5. Agreements to impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services or to force other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract; 6. Agreements which prevent, impede or do not allow other enterprises to participate in the market or to develop business; 7. Agreements which exclude from the market other enterprises which are not parties to the agreement; 8. Collusion in order for one or more parties to win a tender for supply of goods and services.'

Article 9 of the 2005 Competition Law stipulates that

'(1) The agreements stipulated in clauses 6, 7 and 8 of article 8 of this Law shall be prohibited. (2) The agreements in restraint of competition stipulated in clauses 1, 2, 3, 4 and 5 of article 8 of this Law shall be prohibited when the parties to the agreement have a combined market share of thirty (30) per cent or more of the relevant market.'

94 Sec. 1 Art. 398 of the 2015 Civil Code literally reads: 'Parties to a contract have the right to agree on the contents in the contract.' Art. 402 of the 2005 Civil Code.

95 Depending on the type of contract, the parties may agree on the following contents: 1. Subject matter of the contract which is property to be delivered or which is an act to be performed or not performed; 2. Quantity and quality; 3. Price and method of payment; 4. Time-limit, place and method of performing the contract; 5. Rights and obligations of the parties; 6. Liability for breach of contract; 7. Penalties for breach of contract.

96 1995 Civil Code, Article 401.

97 Nguyen Thuy Hien, 'Nhưng Quy Định Nghĩa Vụ Dân Sự và Hợp Đồng trong Bộ Luật Dân Sự 2005' [Provisions on Obligations and Contracts in the 2005 Civil Code] (2006) *Democracy and Law Journal*, Special Issue on the 2005 Civil Code 34.

(iii) Freedom to Choose the Form of s Contract

Under the Civil Code, the validity of a contract generally does not depend on any particular contractual form.⁹⁸ According to Article 124 of the 2005 Civil Code, a contract may be agreed upon verbally, in writing, or through specific acts. Moreover, in response to the gradual development of e-commerce in the digital age, the parties may enter into a contract by electronic means in the form of data messages, and this shall be deemed to be a written contract.⁹⁹

A number of exceptions to this general rule exist in certain specialized areas, however. Under the 2005 Civil Code, where the law provides that a contract must be agreed upon in writing, or must be notarized, certified or registered or that an application for permission must be made, such provisions have to be complied with.¹⁰⁰ For example, the requirement for a gift of immovable property to be in writing and notarized can be found in Article 406 of the 2005 Civil Code.¹⁰¹ As a consequence, a contract, which has to be concluded in a specific form as a compulsory condition for its validity, but fails to fulfil this requirement, shall be deemed invalid.¹⁰²

Nevertheless, the 2015 Civil Code has introduced the new ‘performance doctrine’ to relax the strict formality requirement contained in the 2005 Civil Code. Accordingly, even in the situation where the contracting parties do not satisfy the formality requirement provided by law, the contract shall not be invalid, but will still exist if one party performs its principal obligations and the other party has received the performance.¹⁰³ The introduction of this doctrine can be seen as further support for a consensual agreement once it truly manifests both parties’ will.

98 It is considered as an important reform of the 2005 Civil Code in comparison with the 1995 Civil Code. Nguyen Ngoc Khanh, ‘Nhưng Diem Moi Co Ban ve Hop Dong trong Bo Luat Dan Su 2005 [New Fundamental Issues on Contracts in the 2005 Civil Code]’ (2006) 2 *Journal of Prosecution*, 17-25.

99 Arts 33-38 of the 2006 Electronic Transaction Law; Art. 119 of the 2015 Civil Code.

100 Sec. 2 of Art. 124 and Art. 401 of the 2005 Civil Code.

101 According to a survey conducted by the Drafting Civil Code Committee, there are 11 types of contracts that have to be notarized.

102 Art. 134 of the 2005 Civil Code; see more in Pham Hoang Giang Pham Hoang Giang, ‘Anh Huong Cua Dieu Kien Hinh Thuc Hop Dong Den Hieu Luc Hop Dong’ [The Effect of the Formality Condition on the Validity of Contracts], (2007) 3 *The State and Law Journal* (2007) 47, 51.

103 Art. 129 of the 2015 Civil Code provides that:

‘A civil transaction in breach of the provision that its form is a condition for its validity shall be invalid, except for the following cases:

1. Where the civil transaction established was required to be in writing, but the written document does not conform to the provisions of law, and one or more parties have performed at least two-thirds of the obligations in the transaction, the court shall, at the request of one or more parties, issue a decision to recognize the validity of such transaction.

2. Where the civil transaction established in writing is in breach of compulsory provisions on notarization or certification, and one or more parties have performed at least two-thirds of the obligations in the transaction, the court shall, at the request of one or more parties, issue a decision to recognize the validity of such transaction. In this case, the parties are not required to carry out notarization or certification.’

(iv) Freedom to Modify or Terminate a Contract

Contractual freedom is ensured not only during the formation of transactions, but also during the performance of the contract. As the masters of their contract, the parties may at any time rescind or amend it. Article 422 of the 2015 Civil Code stipulates that a contract may be terminated by consent through negotiation,¹⁰⁴ while Article 421 provides that the parties may agree to amend a contract and to deal with any consequences resulting from such an amendment.¹⁰⁵ As a result, the freedom of contract has played an important role in helping the parties to plan their future activities as well as giving them the possibility to react to changed circumstances in the market.

To sum up, the freedom of contract embodies the starting point for the establishment of Vietnamese contract law in order to facilitate private transactions. In order to maximize economic efficiency by enabling private parties to realize their full creative potential, the principle of freedom of contract has in particular put emphasis on ensuring contracting parties' authority to decide whether or not they should enter into a contract, and, if so, with whom, as well as their authority to decide on the content of the contractual obligations undertaken without interference from the government and from other individuals.

1.3.3. Overarching Limits of the Freedom of Contract

Despite the great importance of the principle of freedom of contract, in every legal system the parties' right to enter into a contract is limited. In other words, party autonomy is never absolute and is outweighed by some other important requirements such as public policy and morality¹⁰⁶ or the principle of good faith.¹⁰⁷ Similarly, in Vietnamese law, the freedom of contract is subject to the obligation not to offend 'prohibited provisions of the law' and good morals as well as the obligation to act in good faith.¹⁰⁸ These obligations function as the two overarching limits of the freedom of contract and are thus applicable to all types of contracts and at every stage of their contractual life.

104 This Article is the equivalent of Art. 424 of the 2005 Civil Code.

105 Article 423 of the 2005 Civil Code.

106 See the French Civil Code Articles 6 and 1133; the Italian Civil Code Article 1343; the Dutch Civil Code Article 3.40; the Spanish Civil Code Articles 1255 and 1273 (3); the Swiss Code of Obligations Article 19.

107 According to Article 1:102(1) of the Principles of European Contract Law, the parties are free to enter into a contract and to determine its contents, subject to the 'requirements of good faith and fair dealing', and 'the mandatory rules established by these Principles'.

108 Pham Duy Nghia, *Chuyen Khao Luat Kinh Te* [Monograph on Economic Law] (Vietnam National University Publisher, 2004) 401; Duong Anh Son, Nguyen Ngoc Son, 'Tac Dong Cua Hinh Thuc Loi Den Viec Xac Dinh Trach Nhiem Hop Dong Nhin Tu Goc Do Nguyen Tac Thien Chi, Trung Thuc' [Effect of Fault on Determining Contractual Liability From the Perspective of the Principle of Good Faith], (2007) 1(38) *Legal Science Journal* 12; Ngo Huy Cuong, 'Tu Do Y Chi Va Su Tiep Nhan Tu Do Y Chi Trong Phap Luat Vietnam Hien Nay' [The Will Theory and its Reception in Vietnamese Law], (2008) 2 *Legislative Studies Journal* 11, 18; Do Van Dai, 'Tu Do Cam Ket, Thoa Thuan Va Gioi Han Tu Do Cam Ket Thoa Thuan- Nhin Tu Goc Do Hien Phap' [Principle of Free and Voluntary Undertaking and Agreement and its Limitations – A Constitutional Law Perspective] 2013 11 *Legislative Studies Journal* 9.

(i) Obligation Not to Offend Statutory Prohibitions and Good Morals

As an overarching limit to the freedom of contract, the obligation not to offend statutory prohibitions and good morals has played an essential role in establishing the legal framework for party autonomy. It is well established in the Vietnamese Civil Code that a civil transaction shall only be effective if the objectives and contents of the transaction are not inconsistent with statutory prohibitions and good morals.¹⁰⁹ Contracts that offend statutory prohibitions and good morals are thus invalid.¹¹⁰

Statutory prohibitions are defined as provisions of law which do not permit a subject to perform specific acts.¹¹¹ Agreements to hire someone to commit a crime, or to engage in tax evasion and unfair competition or to trade in human organs are clear examples of types of contracts that are prohibited by Vietnamese law.¹¹²

Good morals are defined as the standards of general behaviour between persons in social life which are recognized and respected by the community.¹¹³ Contracts for voluntary servitude or an agreement where one party takes advantage of another's financial difficulties are typical cases where such contracts are viewed as being against the general behaviour that society honours.¹¹⁴

Accordingly, the obligation not to offend statutory prohibitions and good morals in Vietnamese law provides a general framework to limit party autonomy. It sets a moral limit on the market to discourage and prevent a party from gaining from illegal conduct or unsavory agreements.

(ii) Obligation to Act in Good Faith

In a number of provisions, the 2005 Civil Code expressly states that all parties must act in good faith in the establishment and performance of civil rights and obligations.¹¹⁵ Different scholars have argued that the idea of good faith actually has its roots in Vietnamese traditional society where Confucian moral concepts such as benevolence played a central role in educating people.¹¹⁶ These moral concepts can typically be manifested through the 'golden rule', that is 'Do not do to others what you would not

109 Art. 122 of the 2005 Civil Code; Art. 117 of the 2015 Civil Code.

110 Art. 137 of the 2005 Civil Code; Art. 122 of the 2015 Civil Code.

111 Art. 128 of the 2005 Civil Code.

112 Hoang The Lien, et al., *Binh Luan Khoa Hoc Bo Luat Dan Su Nam 2005* [Scientific Commentary on the Civil Code of 2005], vol. 1, (National Political Press, 2008).

113 2005 Civil Code, Article 128.

114 Apparently, on the one hand, characteristics of good morals as a general, open-ended clause is suspected of leading to the corruption of legal certainty in the law of contract since it is impossible to list all categories of agreements falling within the scope of this concept. However, on the other hand, such an abstract feature helps to create a great deal of discretion for the courts to deal with future changes in society. Hoang The Lien, et al., 'Binh Luan Khoa Hoc Bo Luat Dan Su Nam 2005' [Scientific Commentary on the Civil Code of 2005], vol. 1, National Political Press, 2008.

115 See 2005 Civil Code, Articles 6, 389 and 412.

116 Hoang The Lien, et al., *Binh Luan Khoa Hoc Bo Luat Dan Su Nam 2005* [Scientific Commentary on the Civil Code of 2005], vol. 1, (National Political Press, 2008).

want them to do to you' (Ky so bat duc, vat thi u nhan).¹¹⁷ Under the influence of this golden rule, the law should require that a party has to take the interests of the other party into account. Therefore, it is not surprising that the Central Civil Code promulgated in 1936 included a provision providing that '[t]he parties have an obligation of goodwill [thanh y] in their contractual relationships'.¹¹⁸ Following that legislative tradition, the 1995, 2005 and 2015 Civil Codes all recognized good faith as a central concept in not only contractual relationships but also concerning all civil judicial acts.¹¹⁹

In contract law, the idea of good faith is embodied in major provisions governing the entire life of the contract ranging from pre-contractual negotiations, the formation of the contract itself and eventually its performance.¹²⁰ At the negotiation stage, although the parties are free to enter into a contract, the Civil Code requires the contracting parties to conduct negotiations in good faith. Thus, even before a contract is formed, the parties which are offerors can be held liable for any damage caused to innocent offerees if they enter into a contract with a third person during the time-limit for a reply by the offerees.¹²¹ The requirement of good faith during contractual negotiations also prohibits a party from conducting negotiations in bad faith under the false pretense of entering into a contract, and from concealing any material information resulting from the negotiations.¹²² Furthermore, the Civil Code expressly recognizes a standard of good faith in contractual performance. The parties are required to perform contractual obligations honestly, in the spirit of co-operation, to their best benefits.¹²³ Thus, a duty of notification, for example, has been found in numerous provisions concerning the invalidity of contracts due to the impossibility of performing the subject matter,¹²⁴ the cancellation of a contract,¹²⁵ or the unilateral termination of the performance of a contract.¹²⁶

117 See more in Pham Duy Nghia, 'Confucianism and the Conception of Law in Vietnam' in John Gillespie & Pip Nicholson, eds, *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (Asia Pacific Press, 2005) 76.

118 1936 Central Civil Code, Article 6.

119 Article 9 of the 1995 Civil Code stipulates that the parties shall act in good faith and with honesty, and shall not only be concerned and care for their own legal rights and interests, but shall also 'respect and be concerned with State interest, public interest and the legal rights and interests of other persons'. Sec. 3 of Art.3 of the 2015 Civil Code requires that 'Individuals and legal entities must establish, perform and terminate their civil rights and obligations with good faith and fair dealing'.

Article 6 of the 2005 Civil Code states that in civil relations, the parties must act with 'goodwill and honesty' in the establishment and implementation of civil rights and obligations.

120 Nguyen Anh Thu, 'De Xuat Sua Doi Bo Sung Quy Dinh Lien Quan Den Nguyen Tac Thien Chi Trong Bo Luat Dan Su nam 2005' [Proposals to Modify and Supplement Provisions Relating to the Principle of Good Faith in the Vietnamese Civil Code 2005] (2014) 3 *The Journal of Science, Vietnam National University: Legal Studies*, 61.

121 Art. 389 of the 2005 Civil Code.

122 Hoang The Lien, et al., 'Binh Luan Khoa Hoc Bo Luat Dan Su Nam 2005' [Scientific Commentary on the Civil Code of 2005], vol. 1, (*National Political Press*, 2008).

123 Arts 283 and 412 of the 2005 Civil Code. The articles were deliberately omitted from the 2015 Civil Code because they were considered to be unnecessarily repetitive concerning the requirements enshrined in Sec. 3 of Art. 3 of the 2015 Civil Code.

124 Art. 411 of the 2005 Civil Code; Art. 408 of the 2015 Civil Code.

125 Art. 425 of the 2005 Civil Code; Art. 423 of the 2015 Civil Code.

126 Art. 426 of the 2005 Civil Code; Art. 428 of the 2015 Civil Code

Additionally, Vietnamese scholars have embraced the concept of good faith due to its adaptability, which allows judges to use the concept to fill in legislative and doctrinal gaps in order to respond to social developments in Vietnam.¹²⁷ Indeed, the principle of good faith in Vietnamese contract law has been argued to have two functions: as a sword and as a shield of justice.¹²⁸ As a sword, it plays a supplementary role which allows the court to fill gaps in the law.¹²⁹ As a shield, it restricts the exercise of contractual rights if enforcing them would lead to the abuse of certain rights.¹³⁰

Accordingly, the principle of good faith, which maintains the Confucian values of Vietnam's traditional society, is embraced as an inherent limitation on contractual freedom. It does not merely mean that a party has a 'negative duty' not to deceive the other party as, by its very nature, it is a principle of fair dealing imposing a 'positive duty' on a party to take the legal rights and interests of other persons into account and then to assist and create the necessary conditions for each other to perform civil rights and obligations. In other words, the contracting parties are bound not only by the agreement's contents, which they have already voluntarily agreed, but also by those rules resulting from the requirements of goodwill and honesty.

(iii) Contractual Freedom and Contractual Justice: The Conflicting or Overlapping Values

The primary role of the principle of freedom of contract seems to be incontestable from both a theoretical and a practical perspective in Vietnamese law. However, it does not necessarily mean that Vietnamese law does not pay attention to contractual justice. There are increasing concerns among leading scholars that Vietnamese contract law has conferred 'too much power for the strong, but too little for the weak'.¹³¹ This approach has called for a greater balance between contractual freedom and the idea of protecting the weaker party, which means justified interference in the freedom of contract in order to ensure fairly substantive contents of the contract. One of the most controversial issues during the drafting of the 2015 Civil Code was the debate on adopting the concept of unforeseen circumstances to counteract the requirement of fairness in long-term contracts. Conventionally, like other jurisdictions, contract law in Vietnam commonly upholds the principle of *pacta sunt servanda*, according to which the parties must honour their obligations under a contract. Before the introduction of the 2015 Civil Code, for the sake of legal certainty *pacta sunt servanda* seemed to be an absolute principle: regardless of the fact that events may occur after the conclusion

127 Do Van Dai, 'Vi Tri Cua Bo Luat Dan Su Trong Linh Vuc Hop Dong' [The status of the Civil Code in the contract law], (2008) 7 *Law and State Journal* 12.

128 This argument in praising its functions may be inspired by the functions of good faith in some Western civil law systems such as Germany or the Netherlands (e.g., Article 242 BGB, Article 6:248 BW). Article 242 is well known as being regarded as the 'King' of the BGB and it has been used to 'moralize' the entire German legal system. See Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law*, (Oxford, 3d ed. 1998) 150.

129 Le Net, *Contract Law in Vietnam* (Kluwer Law International 2012) 62.

130 *Ibid.*

131 Nguyen Nhu Phat, 'Mot So De Xuat Sua Doi Bo Luat Dan Su Nam 2005' [A Number of Suggestions to Reform the 2005 Civil Code] <<https://thongtinphapluatdansu.edu.vn/2010/03/09/4690/>> [accessed 15 May 2017].

of a contract which render its performance more onerous for one of the parties, the contracting parties still have an obligation to perform their duties. However, from the point of view of fairness, a party's insistence on the strict performance of the contractual terms has been criticized as amounting to an abuse of a right and may be contrary to the spirit of the obligation to act in good faith.¹³² Indeed, many scholars have argued for a relaxation of the binding nature of the contract when the circumstances of the contract have fundamentally changed to such an extent that the contractual obligation becomes excessively onerous.¹³³ As a result, the doctrine of a change of circumstances has been formally recognized in the 2015 Civil Code.¹³⁴ Generally, this rule is designed to help the disadvantaged party to request the renegotiation of a fairer agreement with new conditions.¹³⁵ The new provision also allows the courts to modify or to set aside contractual provisions where a new agreement could not be reached and thus their performance would be excessively onerous because of an unforeseeable change of circumstances.¹³⁶ The introduction of the doctrine of a change of circumstances in the 2015 Civil Code implies that although party autonomy is respected as the most important value, other values such as fairness or solidarity are emerging as equally important requirements in Vietnamese contract law. In other words, the recognition of 'a change of circumstances' doctrine may be considered to be an important signal of the fairness principle as a counter-balance for the principle of freedom of contract.

However, the doctrine of a change of circumstance can at best be seen as an exception to the principle of *pacta sunt servanda*. Having previously been obsessed by excessive paternalism during the long period of the centrally planned economy, mainstream Vietnamese scholars now advocate the maximum avoidance of any limitations on the freedom of contract.¹³⁷ It stresses the prominent value of the will theory as the only legal ground to have the contract enforced and thus the law of contract has no function concerning the fairness of the outcome.¹³⁸ Quite the reverse, the law of contract should thoroughly police the contracting process to ensure that a contract truly reflects fair bargaining between two parties. As a result, although the contract shall be set aside due to defects in the quality of the consent or the voluntariness of the parties, it is rarely invalid due to the unfairness of its contents except in the extraordinary cases

132 Le Minh Hung, *Hieu Luc Cua Hop Dong Theo Phap Luat Vietnam* [Validity of Contracts Under Vietnamese Law], *PhD thesis*, 2010.

133 Le Minh Hung, 'Dieu Khoan Dieu Chinh Hop Dong Do Hoan Canh Thay Doi Trong Phap Luat Nuoc Ngoai Va Kinh Nghiem Cho Vietnam' [The Hardship Clause and a Change of Circumstances in Foreign Laws and Experiences for Vietnam], (2009) 6 *Legislative Studies Journal* 41.

134 Art. 420 of the 2015 Civil Code.

135 Ngo Quoc Chien, 'Dieu chinh Hop Dong Khi Hoan Canh Thay Doi va Viec Sua Doi Bo Luat Dan Su nam 2005' [Modification of a Contract Due to a Change of Circumstances and the Revision of the 2005 Civil Code] (2015) 13 *Legislative Studies Journal*, 31.

136 *Ibid.*

137 Nguyen Quoc Vinh, *Freedom of Contract: A Leading Principle in Contract Law of Economically Developed Countries and Its Absence in Contract Law of Vietnam* (Ph.D. Dissertation, Meiji Gakuin University, Tokyo, Japan, 2006).

138 In the post-communist era in Central Europe, Hesselink has also identified that 'the pendulum (of contract law) seems to be swinging back with a renewed faith in the capacity of individuals to take care of their own interests.' See Hesselink Martijn W., Chantal Mak, and Jacobien W. Rutgers, *Constitutional Aspects of European Private Law*, (2009). 41.

of violating statutory prohibitions or good morals. It is well established by Vietnamese contract law that a contract shall be effective when it satisfies all of the following conditions:

- (a) The subjects have civil legal capacity and the capacity for civil acts appropriate to the established civil transaction;
- (b) The subjects participating in the transaction act entirely voluntarily;
- (c) The objective and contents of the contract are not contrary to statutory prohibitions or good morals.¹³⁹

Corresponding to the above elements, the Draft Committee of the 2015 Civil Code has made considerable contributions to strengthening the legal provisions which have the effects of safeguarding a person who has limited capacity from the legal consequences of unwise choices and guaranteeing a fair bargaining process between contracting parties. As a result, the provisions on the protection of minors or persons who are mentally incompetent have been significantly reformed to perform a ‘catch-all function’ to further cover individuals whose contracting powers are limited, especially the elderly.¹⁴⁰ The rules targeting the defective consent of one of the contracting parties such as the principles of duress, threat or coercion¹⁴¹ or the principle of mistake¹⁴² have been renewed to better guarantee that a binding contract is truly a product of the parties’ free will.¹⁴³ All of the recent developments reveal that although the biggest concern for the Vietnamese Civil Code is to facilitate party autonomy and the value of contractual freedom, contractual fairness remains the main paradigm of Vietnamese contract law.

However, it is submitted that the tension between contractual freedom and contractual fairness is not as significant as is commonly held. Indeed, contractual fairness can be understood in a procedural and a substantive sense. What procedural fairness implies is curbing abuses of the bargaining process between the parties and this does not necessarily conflict with classical doctrines that aim to protect the integrity of the parties’ consent. The real contradiction between contractual freedom and contractual fairness lies in the idea of substantive fairness that implies that a contract must reflect a fair outcome between the parties. Only in this sense do mainstream Vietnamese

139 Art. 117 of the 2015 Civil Code; Art. 122 of the 2005 Civil Code.

140 It is a long tradition in Vietnamese contract law that a number of categories of persons have been assumed by the law to lack the proper capacity to give a well-considered judgment by themselves as to whether a specific transaction is in their own best interest. The 2005 Civil Code provided that minors and persons suffering from mental incompetence are groups that lack the capacity to bind themselves to a contract (Arts 18, 20, 21, 22). As a result, a contract which has been concluded by incapable persons shall be invalid upon the invocation of their representative (Art 130). A new issue proposed in the 2015 Civil Code is the expansion of the scope of persons who shall be considered to be mentally incompetent. In particular, in addition to the two mentioned groups, the 2015 Civil Code has introduced a new provision (Art. 125) which includes groups of persons who have difficulties in being aware of or being able to control their own acts and these groups are now also considered to lack mental competence.

141 Art. 127 of the 2015 Civil Code.

142 Art. 126 of the 2015 Civil Code.

143 Duong Anh Son, ‘Hop Dong Vo Hieu do Nham Lan theo Bo Luat Dan Su 2015’ [Invalidity of Contract due to a Mistake under the 2015 Civil Code], 2016, *Journal of Democracy and Law*, Available at <<http://tcdopl.moj.gov.vn/qt/tintuc/Pages/thi-hanh-phap-luat.aspx?ItemID=338>> [accessed 15 May 2017].

scholars hold a different view. Underlying their praise of the freedom of contract are two closely connected ideas. First of all, it is the dual mind-set of the distrust of state paternalism while adoring the free market economy. The ignominious failure of the planned economy model has shown that in a free market it is free exchange operating through contracts which largely drives economic growth. Secondly, since the parties are the best judges of their interests, once the contracting process is sufficiently policed to avoid procedural unfairness, they should be free to decide on the contractual outcome. As a result, the state function should be limited to ensuring that a binding contract genuinely reflects a voluntary agreement between the parties rather than reviewing its substantive unfairness.

1.4. Principle of the Protection of the Weaker Party in Consumer Contract Law

Although consumer protection has a long history in the Vietnamese legal system,¹⁴⁴ the modern era of consumer law can be traced back to the first legislation on consumer protection issued by the Standing Committee of the National Parliament in 1999 to recognize the need for the protection of the consumer as an integral player in the market economy. Therefore, it is worth noting that the legal framework for consumer protection has been introduced in parallel with the transformation of the contract law regime in Vietnam during the last 30 years.

At the very early stage of its development, consumer protection was not merely seen as protecting consumers against improper business practices, but also as an instrument to perform the objectives of state management concerning the business environment. Consumer protection has been achieved and governed by a variety of legal instruments including administrative law, criminal law, private law as well as procedural law. Among these instruments, administrative and criminal devices were more preferable methods applied by the legislators since these two devices were more suitable tools to reflect the traditional idea of state management in Vietnam.

Since the introduction of the CPL in 2010, the need for protecting consumers as vulnerable market participants has gradually become a leading *rationale* for such consumer protection legislation, especially from the perspective of contract law. Indeed, in the free market society, the law of contract is an indispensable device to enable consumers to confidently engage in transactions with traders to satisfy their needs and preferences. Nonetheless, due to the asymmetry in information, knowledge, and sophistication in drafting contractual terms between traders and consumers, consumer contracts pose a fundamental challenge to contract law in that the former may abuse their power to exploit the latter.

144 Nguyen Van Cuong argues that the Le Code in the 15th century included a number of provisions which aimed to ensure fairness and honesty in market relations between sellers (especially dealers and retailers) and buyers (consumers) and thus could be regarded as consumer protection measures; See Nguyen Van Cuong, *The Drafting of Vietnam's Consumer Protection Law: An Analysis from Legal Transplantation Theories*, PhD thesis (2011), Faculty of Law, University of Victoria at 109 <https://dspace.library.uvic.ca/bitstream/handle/1828/3404/Nguyen_Cuong_PhD_2011.pdf?sequence=1&isAllowed=y> [accessed 15 May 2017].

This section depicts the two stages of development of the consumer protection movement in Vietnam so as to understand how the principle of the protection of the weaker party has been recognized and has evolved in Vietnamese consumer law.

1.4.1. The Consumer Protection Movement at the Initial Stage: An Administrative and Criminal Law-Oriented Approach

During the period of the centrally planned economy when Vietnam suffered from a dearth in the supply of consumption materials, it was not surprising that most Vietnamese people had no idea of consumers' rights.¹⁴⁵ The modern Vietnamese consumer protection law has developed fairly recently as the fruit of the market economy where the consumer is an integral market player.

Although several laws provided for a number of provisions having implicit effects on consumer protection,¹⁴⁶ the term 'protection of consumers' rights and interests' (Bảo vệ quyền và lợi ích của người tiêu dùng) was used for the first time in the Vietnamese legal system in the Ordinance on the Quality of Goods in 1990.¹⁴⁷ Facing serious social problems caused by counterfeit products, this Ordinance was promulgated to prohibit counterfeit products and all fraudulent practices relating to the quality of goods through applying administrative law sanctions. Such an application of administrative law for the purpose of consumer protection seems to be in line with provisions under criminal law as an instrument to maintain a healthy business environment, which reflected the dominant ideology that the state was the benevolent protector of the general public.¹⁴⁸ In other words, consumer protection law at that time did not seem to be approached as a legal mechanism for protecting the legal rights of consumers *per se*, but rather as a 'state economic management' strategy for controlling the development of the market economy in Vietnam.

145 Do Gia Phan, 'The Consumer Movement in Vietnam' 2002 *Consumer Magazine*. Do Gia Phan – who was a vice president of VINASTAS – states that 'By historical conditions, during its 30 years of war for national salvation, Vietnam applied the centralized planning system for its economy. All major businesses were in the hands of the state. Goods and necessities were distributed through a system of coupons. Major services like electricity, water, transport, telecommunication, banking, health and education were state monopolies. At that time, there was no mention of the concept of consumers or of activities to protect consumers'. Cited by Diaz Pedregal Virginie and Figuié Muriel. 2007 'What Is the Place of a Consumer Movement in A Transitional Economy? The case of VINASTAS in Vietnam. In: The Third VDF-Tokyo Conference on the development of Vietnam, Saturday, June 02, 2007, Tokyo. VDF. s.l.: s.n., pp. 117-136 <http://www.grips.ac.jp/vietnam/3rdConference/Proceedings2007_3.pdf> [accessed 15 May 2017].

146 For example, Article 5 of the Ordinance on Sanctioning Crimes of Speculation, Smuggling, Dealing in Fake Goods, and Illegal Business of 1982 stipulated that persons who made or traded in fake goods could be fined and sentenced to five years' imprisonment. In serious cases, criminals could be punished with life imprisonment and the confiscation of property. Article 167 of the Criminal Code of 1985 repeated almost all of the contents of Article 5 of the Ordinance of 1982 and even stipulated that violators could be sentenced to death. Article 170 of the Criminal Code of 1985 criminalized the behaviour of deceiving customers through employing inaccurate measurement instruments. Violators could be sentenced to seven years' imprisonment.

147 Article 2 of this Ordinance stated that 'the state encourages and creates favourable conditions for organizations and/or individuals to secure and increase the quality of goods; *protecting rights and interests of consumers...*'

148 See Nguyen Van Cuong, *The Drafting of Vietnam's Consumer Protection Law: An Analysis from Legal Transplantation Theories*, PhD thesis (2011), Faculty of Law, University of Victoria at 111 <https://dspace.library.uvic.ca/bitstream/handle/1828/3404/Nguyen_Cuong_PhD_2011.pdf?sequence=1&isAllowed=y> [accessed 15 May 2017].

After that, the necessity of consumer protection in Vietnam was acknowledged by the 1992 Constitution, which made a clear declaration that

‘[a]ll illegal activities of production and business, causing harm to the interests of the state, legitimate rights and interests of the collectives and citizens must be strictly dealt with in accordance with the law. The state shall maintain a policy of protection of interests and rights of producers and consumers.’¹⁴⁹

This constitutional provision therefore paved the way for the introduction of the Ordinance on the Protection of Consumers’ Rights and Interests (the CPO) in 1999 which was the first legal document that exclusively and specifically dealt with the issue of consumer protection in Vietnam.¹⁵⁰

The CPO should be considered as the landmark legislation in the historical development of consumer law. Firstly, the CPO for the first time introduced the notion of a ‘consumer’ in the Vietnamese legal system as ‘a person purchasing and/or using goods and/or services for the purpose of consumption and/or living activities of individuals, families and organizations.’¹⁵¹ Secondly, the CPO recognized a list of consumers’ rights which were similar to the basic consumers’ rights provided for in the United Nations Guidelines for Consumer Protection.¹⁵² According to Articles 8, 9, 10, and 11 of the CPO, consumers were entitled to have (1) the right to choose, (2) the right to information, (3) the right to be safe, (4) the right to receive compensation, (5) the right to lodge complaints and denunciations or to take legal action, (6) the right to consumer education, (7) the right to participate in law-making activities relating to consumer protection, and (8) the right to set up consumer protection organizations.

However, despite its significance in the development of the consumer movement in Vietnam, due to its historical background the CPO demonstrated various shortcomings. Firstly, the provisions on consumer rights in the CPO were politically declaratory rather than legal rights with concrete, effective and enforceable mechanisms.¹⁵³ Secondly and more importantly, the CPO was formulated based on the idea of ‘state economic management’ rather than the idea of consumer empowerment.¹⁵⁴ The separate chapter

149 1992 Constitution, Article 28.

150 There were some other legal rules in many codes, laws and ordinances which provided solutions for consumer issues such as Civil Code of 1995, the Commercial Law of 1997, the Criminal Code of 1999, the Ordinance on the Quality of Goods of 1999 (amended and incorporated into the Law on the Quality of Products and Goods of 2007), the Ordinance on Advertisements of 2001, and the Ordinance on Prices.

151 1999 CPO, Article 1.

152 United Nations, *United Nations Guidelines for Consumer Protection* (as expanded in 1999), at <http://www.un.org/esa/sustdev/publications/consumption_en.pdf> [accessed 15 May 2017].

153 Vietnam Competition Administration Department, ‘*Bao Cao Tong Ket Cong Tac Thuc Thi Phap Luat Bao Ve Nguoi Tieu Dung Va Dinh Huong Xay Dung Luat Bao Ve Nguoi Tieu Dung*’ [Report on the Actual Implementation of Consumer Protection Laws and Orientation for Drafting the CPL, presented at the workshop ‘The Reality of the Implementation of Consumer Protection Laws and Orientations for Drafting the CPL’ held by VCAD and the STAR-Vietnam Project in Hanoi (11 June 2008). Indeed, the report mentioned the following specific weaknesses of the consumer law framework: (1) the lack of transparency; (2) the vagueness or abstractness of the legal rules; (3) the lack of specific sanctions for concrete violations; and (4) ineffective coordination among the relevant state authorities.

154 See Nguyen Van Cuong, *The Drafting of Vietnam’s Consumer Protection Law: An Analysis from Legal Transplantation Theories*, PhD thesis (2011), Faculty of Law, University of Victoria at 119-120 <<https://dspace>.

on the ‘state management’ of consumer protection in the CPO was obvious evidence to indicate that the notion of the state as the protector of the public was the main paradigm of consumer law at that time. As an implication of this notion, administrative law and criminal law were applied as the main instruments to fulfil this task. Private law, as a result, played a very minor role in consumer protection.¹⁵⁵ The CPO itself did not contain any provisions governing private transactions between consumers and businesses, let alone the idea of the protection of consumers as weaker parties in comparison with businesses in contractual relationships.¹⁵⁶

To sum up, although the above pieces of legislation were important steps in the consumer movement in Vietnam, they did not adequately protect consumers’ interests. The regime of consumer protection was designed under the influence of state economic management in Vietnam and thus applied administrative sanctions and criminal penalties to address violations of consumers’ rights. The idea of protecting the consumer as the weaker party was hardly known in Vietnamese consumer law during this period.

1.4.2. Introduction of the Consumer Protection Law in 2010: A New Era of a Contract-Oriented Approach

Despite the fact that the 1992 Constitution established a clear commitment on the part of the state to develop a consumer protection policy, consumer law received little attention from both legislators and scholars until the launching of a specific project in 2008 to draft the first consumer protection law for Vietnam.¹⁵⁷ From a private law perspective, until that time contracts between consumers and businesses were generally governed by the 2005 Civil Code which made no distinction between contracts between businesses and contracts between businesses and consumers.¹⁵⁸ Only during the drafting process of the new consumer law in 2008 and 2009 did Vietnamese academia witness the growing attention being paid to consumer protection law as a separate field of study. The modern point of view of considering consumers to be vulnerable market participants has gradually become the dominant *rationale* for consumer protection law in Vietnamese

library.uvic.ca/bitstream/handle/1828/3404/Nguyen_Cuong_PhD_2011.pdf?sequence=1&isAllowed=y> [accessed 15 May 2017].

155 Although a number of private law rules, particularly some rules on non-conformity in sales contracts or tort liability, to some extent ensured the protection of the consumer. For example, Article 632 states that ‘individuals, legal persons and other subjects producing and/or trading in goods which fail to meet standards of food, pharmacy or other goods, causing damage to consumers, shall be liable to pay compensation’. However, both the 1995 Civil Code and the 2005 Civil Code were certainly not established with the specific aim of protecting consumers.

156 Institute of Legal Sciences, *Phap Luat Bao Ve Nguoi Tieu Dung Vietnam – Thuc Trang Va Huong Hoan Thien*, [Legal Provisions on Consumer Protection in Vietnam The Actual Situation and Orientations for Improvement] (Hanoi: Law Science Information Bulletin, January 2008).

157 However, in 2004, one well-known scholar identified the problems of informational asymmetry in contracts between merchants and consumers and argued for a further reform of contract laws to cope with these problems. See Pham Duy Nghia, *Chuyen Khao Luat Kinh te [Monograph on Economic Laws]* (Hanoi: Hanoi National University Press, 2004) 594-95.

158 Le Hong Hanh, et al., *Bao Cao Ra Soat He Thong Phap Luat Bao Ve Nguoi Tieu Dung Tai Vietnam* [Review Report on the Legal Provisions on Consumer Protection in Vietnam] (Hanoi: The DC of the CPL, 2009).

literature.¹⁵⁹ One of the major breakthroughs in consumer law research was a report prepared by the Institute of Legal Sciences in 2008 on the current situation of legal provisions on consumer protection.¹⁶⁰ This report reached an important conclusion that market relations between consumers and businesses were asymmetric concerning the following aspects: (1) information regarding the quality, value, uses and other benefits as well as the potential risks or harmful effects of goods and services available on the market; (2) bargaining power (especially the ability to negotiate and formulate purchasing conditions due to the fact that traders are experienced market players); (3) market power; and (4) the financial capacity to assume the risks associated with the consumption of goods and services.¹⁶¹

This point of view of considering consumers to be the weaker party in comparison to businesses triggered proposals to establish a new transaction-based consumer law in addition to the general contract law.¹⁶² Indeed, supporters of this model argued that traditional contract law was based on an unrealistic assumption of equality between contracting parties and thus these rules were unfit for consumers as weaker contracting parties.¹⁶³ As a result, separate legislation built on the assumption that consumers were vulnerable market players was introduced in 2010. The CPL was explicitly established to aim at (i) ensuring fairness in civil transactions between consumers and traders, (ii) protecting the legitimate rights and interests of consumers, and (iii) enhancing the socialization of consumer protection.¹⁶⁴

Accordingly, a number of noteworthy provisions regarding consumer contracts¹⁶⁵ have been borrowed from foreign laws to establish a new contract regime governing

159 Nguyen Van Cuong, 'Mot So Van De Ve Xay Dung Luat Bao Ve QUYEN LOI Nguoi Tieu Dung' [A Number of Issues Relating to Drafting the Law on the Protection of Consumers' Rights and Interests] (2008) 129 *Journal of Legislative Studies* 29; Nguyen Ngoc Son, 'Nguoi Tieu Dung Va Phap Luat Bao Ve Nguoi Tieu Dung' [Consumers and Consumer Protection Law] (2009) 138 *Journal of Legislative Studies*; Bui Nguyen Khanh, 'Mot So Y Kien Dong Gop Cho Du Thao Luat Bao Ve QUYEN LOI Nguoi Tieu Dung' [A Number of Comments and Suggestions for the Draft Law on Consumer Protection] (2010) 5 *Journal of State and Law* 78.

160 Institute of Legal Sciences, *Phap Luat Bao Ve Nguoi Tieu Dung Vietnam – Thuc Trang Va Huong Hoan Thien*, [Legal Provisions on Consumer Protection in Vietnam. The Actual Situation and Orientations for Improvement] (Hanoi: Law Science Information Bulletin, January 2008).

161 Institute of Legal Sciences, *Phap Luat Bao Ve Nguoi Tieu Dung Vietnam – Thuc Trang Va Huong Hoan Thien*, [Legal Provisions on Consumer Protection in Vietnam. The Actual Situation and Orientations for Improvement] (Hanoi: Law Science Information Bulletin, January 2008).

162 Nguyen Nhu Phat, 'Mot So Van De Ly Luan Xung Quanh Luat Bao Ve QUYEN LOI Nguoi Tieu Dung' [A Number of Theoretical Issues Relevant to the Law on Consumer Protection] (2010) 2 *Journal of State and Law* 28.

163 Institute of Legal Sciences, *Phap Luat Bao Ve Nguoi Tieu Dung Vietnam – Thuc Trang Va Huong Hoan Thien*, [Legal Provisions on Consumer Protection in Vietnam. The Actual Situation and Orientations for Improvement] (Hanoi: Law Science Information Bulletin, January 2008) 39-47.

164 Ministry of Justice and Ministry of Industry and Trade, *An Introduction to the Consumer Protection Law* (2011), See at <http://moj.gov.vn/pbgdpl/Lists/DeCuongVanBan/View_Detail.aspx?ItemId=113> [accessed 15 May 2017].

165 Apart from regulating consumer contracts, the Consumer Protection Law contains a number of remarkable new provisions regarding both substantive law and procedural law, such as provisions on unfair commercial practices (e.g. the harassment of consumers, coercive practices, unsolicited goods and/or services) and many articles laying down the mechanisms for resolving disputes between consumers and traders in order to assist consumers in having better access to justice. Ministry of Justice and Ministry of Industry and

transactions between consumers and businesses.¹⁶⁶ The paradigm of the protection of consumers as weaker parties has been enshrined and reflected in every contractual regulation ranging from rules on general trade conditions, rules on the right to be informed,¹⁶⁷ withdrawal rights in door-to-door contracts and distance contracts.¹⁶⁸

To sum up, according to the mainstream doctrine in Vietnamese literature, there are inherent differences between the underlying principles of general contract law and consumer contract law.¹⁶⁹ Traditionally, general contract law has been developed to facilitate private transactions between parties who are on an equal footing.¹⁷⁰ Nonetheless, consumer contract regulation should be designed to address the

Trade, *An Introduction to the Consumer Protection Law* (2011), See at <http://moj.gov.vn/pbgdpl/Lists/DeCuongVanBan/View_Detail.aspx?ItemId=113> [accessed 15 May 2017].

166 The Comparative Study Report prepared by legal drafters from VCAD in September 2008 shows that the authors of the Comparative Study Report consulted provisions on consumer contracts in the following five jurisdictions: Québec (Canada), France, the EU, Taiwan, and Malaysia. See VCAD, *So Sanh Luat Bao Ve Nguoi Tieu Dung Mot So Nuoc Tren The Gioi – Bai Hoc Kinh Nghiem Va De Xuat Mot So Noi Dung Co Ban Quy Dinh Trong Du Thao Luat Bao Ve Nguoi Tieu Dung Cua Vietnam* [Comparative Study of the Consumer Protection Laws of a Number of Foreign Jurisdictions – Lessons and Recommendations for Key Contents of the Draft Law on the Protection of Consumers’ Rights and Interests in Vietnam (Hanoi: VCAD, 2008)].

167 The right to be informed is one of the eight basic rights of consumers which has been recognized by Article 8 of the CPL. It explicitly provides that consumers are entitled to be informed about three major contents including (i) accurate and complete information about organizations or individuals trading in goods or services; (ii) the contents of transactions for goods and/or services, and the source and origin of goods; (iii) invoices, vouchers and documents relating to transactions and other necessary information about goods and/or services that consumers purchase and/or use. See more in Nguyen Van Cuong, *Mot So Van De Ly Luan Ve Quyen Duoc Thong Tin Cua Nguoi Tieu Dung* [A Number of Theoretical Issues on Consumers’ Right to be Informed], (2013) 8 *The Journal of Law and State* 17-25.

168 The right of withdrawal allows consumers to be no longer bound by a contract that has legally already been entered into. It is seen as a necessary tool to ensure consumers’ right to self-determination. Under Vietnamese law, consumers are entitled to withdraw from two types of contract, namely distance contracts and door-to-door sales.

A distance contract is defined as a contract signed between consumers and traders through electronic means or over the telephone (Sec. 1, Art.3 of Decree 99/2011/ND-CP). As a result, there is an information asymmetry between the consumer and the trader and thus it is important to ensure that the consumer is able to fully understand the main elements of the contract. Therefore, the law requires traders to provide some essential information to consumers such as the quality of the goods and services, the delivery fee (if any), the means of payment, how and when the goods are to be delivered, the validity of and the price offered for the transaction, the cost of the transaction if this cost is not included in the price of the goods or services, and details on the functions of, the utility of, and instructions on the goods or services which are the object of the contract (Sec. 1, Art. 17 of Decree 99/2011/ND-CP). In case traders do not provide adequate information as required, consumers have the right to unilaterally terminate the contract which has been entered into within 10 days after the effective day of the contract and to be refunded within 30 days after the day of the termination of the contract (Sec. 2, Art. 17 of Decree 99/2011/ND-CP).

A door-to-door sale is defined as a sale carried out at the residence or working place of consumers (Sec. 3, Art. 3 of Decree 99/2011/ND-CP.) Under these circumstances, a concern is that the consumer may be faced with a potential surprise element and be put under psychological pressure. Thus, consumers are granted the right of withdrawal: within 3 working days, consumers may unilaterally terminate the contract at any time by sending a written notification to the traders. (Art. 19 of Decree 99/2011/ND-CP.)

169 Nguyen Thi Van Anh, et al., *Giao trinh Luat Bao Ve Quyen Loi Nguoi Tieu Dung* [The Textbook on Vietnamese Consumer Protection Law] (Hanoi: National Political Press, 2012) 29; Nguyen Nhu Phat, ‘Mot So Van De Ly Luan Xung Quanh Luat Bao Ve Quyen Loi Nguoi Tieu Dung’ [A Number of Theoretical Issues Relevant to the Law on Consumer Protection] (2010) 2 *Journal of State and Law* 28.

170 Hoang The Lien, et al., *Binh Luan Khoa Hoc Bo Luat Dan Su Nam 2005* [Scientific Commentary on the Civil Code of 2005] (Hanoi: National Political Press, 2008) 18.

asymmetric status between consumers and the businesses.¹⁷¹ Consequently, the drafters of the CPL were unanimous in their decision that consumer contract law should be codified as an integral part of a separate consumer act in Vietnam.¹⁷² However, it should be noted that in practice the separation between the CPL and the Civil Code is relative, rather than absolute. As general contract law also applies to consumer transactions, it is not reasonable to deny the role of private autonomy and the principle of freedom of contract in consumer contracts. Despite its position in the CPL, consumer contract law in Vietnam can only be operative in connection with the general contract law which is mostly found in the Civil Code.¹⁷³

2. RISE OF STANDARD CONTRACT TERMS AND THE REACTION OF VIETNAMESE LAW

2.1. Rise and Dilemma of Standard Contract Terms in Vietnam

In 2015, a new provision on ‘general trading conditions’ was integrated into the Vietnamese Civil Code. Although the necessity for this provision and its relationship with the provision on ‘standard form contracts’ is still controversial, the mere inclusion of a separate provision in the 2015 Civil Code at least confirms the importance of general trading conditions for the Vietnamese market.¹⁷⁴ The turning point which drew the attention of Vietnamese legislators to the phenomenon of standard form contracts was the promulgation of the CPL in 2010. As explained by the drafting committee, standard form contracts, which can be used for multiple transactions,¹⁷⁵ have undoubtedly played an important role in promoting economic efficiency by reducing transaction costs in a lengthy negotiation process, offering certainty, and minimising any misunderstanding between the parties.¹⁷⁶

171 Nguyen Thi Van Anh, et al., *Giao trinh Luat Bao Ve Quyen Loi Nguoi Tieu Dung* [The Textbook on Vietnamese Consumer Protection Law] (Hanoi: National Political Press, 2012) 22. Le Hong Hanh, et al., *Bao Cao Ra Soat He Thong Phap Luat Bao Ve Nguoi Tieu Dung Tai Vietnam* [Review Report on Legal Provisions on Consumer Protection in Vietnam] (Hanoi: The DC of the CPL, 2009) 5-10.

172 To trinh so 28/TTr-CP ngay 8/4/2010 ve Du an Luat Bao ve quyen loi nguoi tieu dung. [Submission Report No. 28/TTr-CP dated 8 April 2010 on the draft Law on the Protection of Consumers’ Rights and Interests.]; Ministry of Justice, Bao cao so 662/BC-HDTD ngay 17/3/2010 tham dinh du thao Luat Bao ve quyen loi nguoi tieu dung) [Report No. 662/BC-HDTD dated 17 March 2010 on the evaluation of the draft Law on the Protection of Consumers’ Rights and Interests].

173 See more at Do Giang Nam, ‘Su Phat Tien cua Che Dinh Hop Dong Tieu Dung: Thach Thuc va Trien Vong Doi Voi Phat Luat Hop Dong Viet Nam’ [The Development of Consumer Contract Law: Challenges and Opportunities for the Future of Vietnamese Contract Law], (2016) 4 *The Journal of State and Law* 32.

174 See more in Do Giang Nam, ‘Suggestions on Standard Terms in Draft Amendments to the 2005 Civil Code’ (2014) 20 *Vietnam Law and Legal Forum* 33; Do Giang Nam, ‘Binh Luan Ve Cac Dieu Khoan Lien Quan Hop Dong Theo Mau Va Dieu Kien Giao Dich Chung Trong Du Thao Bo Luat Dan Su 2015’ [Review of the Provisions on Standard Form Contracts in the Draft Civil Code (2015)], (2015) 5 *The Journal of Legislative Studies*, Issue 05(285) 31-41.

175 They have gradually become an inevitable part of daily transactions in Vietnam where they are prevalent in different kinds of consumer markets such as banking services, telephone services, electricity supplies and water supplies.

176 Tang Van Nghia, ‘Ban Ve Dieu Kien Giao Dich Chung Cua Doanh Nghiep’ [On the General Transaction Conditions Concerning Businesses], (2009) 3 *Journal of Democracy and Law* 21-28; Phan Thao Nguyen, ‘Ve

Nevertheless, just like the other side of the coin, standard form contracts pose a risk that the contract terms are imposed one-sidedly by these users on a ‘take it or leave it’ basis, and thus the counterparties, especially consumers in their transactions with businesses, have little opportunity to exert any influence on the contents of the contract in question.¹⁷⁷ Especially with the rise of e-commerce,¹⁷⁸ many buyers regularly enter into online transactions even without being conscious of adhering to general trading conditions. In most cases, it is not too difficult to find various unfair terms, causing a significant imbalance between the parties’ rights and obligations in general trading conditions. Several examples of such types of unfair terms commonly found in consumer contracts in Vietnam are listed in the table below.

Examples of typical types of unfair terms in standard contract terms in banking services (based on the VCA’s report) ¹⁷⁹
<p>Exclusion and limitation clauses: The Bank is not liable for any loss or damage incurred by the client which arises during the use of the service, unless this loss or damage is caused by the Bank’s intentional fault.</p> <p>Unilateral variation clauses: The Bank has the right to modify the content of the terms and conditions of e-banking services by sending a modification notice to the Client or by other means that are deemed proper by the Bank.</p> <p>Limitation or exclusion of consumers’ right to complain or the right to sue: Client acknowledges that, at certain points in time, Client is not able to gain access to, use, and operate some or all of the services provided by the Bank due to maintenance work or due to any other reason ... without any complaint.</p>

Accordingly, Vietnamese scholars and the legislature have attempted to identify the inherent problems relating to the omnipresence of general trading conditions in Vietnam and to design a legal framework to address them.

2.2. Initial Efforts by Vietnamese Scholars: From Freedom of Contract to the Principle of Fairness

As has been demonstrated, the promulgation of the 2005 Civil Code marks an important milestone in the historical development of private law when freedom of contract undoubtedly became the main pillar of Vietnamese contract law.¹⁸⁰ It was built on the

Hop Dong Mau Trong Cung Ung Thuong Mai Dich Vu’ [On Standard Contracts in Supplying Commercial Goods and Services, (2005) 4 *Journal Of State And Law* 54-56.

177 Ibid.

178 According to Vietnam’s E-Commerce and Information Technology Agency, in 2013 Vietnam’s online population had reached a total of 32.6 million users and B2C e-commerce sales amounted to US\$2.2 billion. In a more optimistic scenario, with a population of 93 million projected for 2015, about 65 to 70 percent of the population with an Internet connection will generate from \$4.08 billion to \$4.3 billion in online shopping revenue. See more at <<http://www.vietnam-briefing.com/news/vietnam-online-understanding-vietnams-e-commerce-market.html>> [assessed 1 December 2016].

179 An assessment of the contractual contents of standard terms in banks’ automatic teller machine (ATM) service contracts and banks’ e-banking service contracts. See more at <<http://www.vca.gov.vn/NewsDetail.aspx?ID=2654&CateID=1>> [accessed 15 May 2017].

180 See Section 1.2 of this chapter.

two basic assumptions that there is equal bargaining power between two contracting parties, and that such parties are capable of dealing, at arm's length, with each term in their contract, which shall, in turn, be binding on them. To put it differently, the freedom of contract depends on the proposition that, because a contract is the result of free bargaining between the parties who are on an equal footing, the contract terms are expected to be a fair agreement between them.

However, the freedom of contract paradigm in this classical contract law has faced new challenges in modern societies when general trading conditions have become an inevitable tool in the mass production of standardized goods and services.¹⁸¹ When general trading conditions are used the contracting parties no longer truly bargain, so there is in fact no or little freedom to determine the contents of the contract. Indeed, the lack of any negotiations can lead to a lack of informed consent where one party is not even aware of the existence of certain contract terms which have been pre-formulated by the other party. Here there is therefore a need to justify whether and to what extent the counterparty is bound by these terms.

2.2.1. From the Counterparty's Right to Freedom of Contract...

Acknowledging that it is unwise to prohibit the use of general trading conditions given their enormous benefits, different Vietnamese scholars have endeavoured to build a bridge between the application of general trading conditions and the counterparty's right to freedom of contract.¹⁸² In 2003, Nguyen, who later became a key member of the CPL Drafting Committee, proposed that new legislation would be vital to address the problems that general trading conditions posed and this legislation should contain three major elements: (1) the legal requirements for general trading conditions to be legally recognized; (2) the competent body and the procedure for controlling the legality of general trading conditions; and (3) the legal consequences when there have been prohibited acts related to the application of the general trading conditions.¹⁸³

During the drafting process of the CPL, Nguyen revisited this topic and argued for a 'registration' mechanism for controlling the application of general trading conditions.¹⁸⁴ In particular, the 'registration' mechanism should be established with two aims. Firstly, every consumer entering into consumer contracts must be able to identify the 'real intent' of suppliers and thus he/she could freely decide to enter into the contract or not. Secondly, the legality and 'reasonableness' of the contents of general trading conditions

181 See more in Do Giang Nam, Suggestions on Standard Terms in Draft Amendments to the 2005 Civil Code, (2014) Vol. 20 *Vietnam Law and Legal Forum* 33-40.

182 Nguyen Nhu Phat, 'Dieu Kien Thuong Mai Chung Va Nguyen Tac Tu Do Khe Uoc' [General Trading Conditions and the Principle of Freedom of Contract] (2003) 6 *Journal of State & Law* 42; Nguyen Thi Hong Hanh, 'Nhu Cau Kiem Soat Dieu Kien Thuong Mai Chung' [The Necessity for Controlling General Trading Conditions], (2009) 10 *Journal of State & Law* 36.

183 Nguyen Nhu Phat, 'Dieu Kien Thuong Mai Chung Va Nguyen Tac Tu Do Khe Uoc' [General Trading Conditions and the Principle of Freedom of Contract] (2003) 6 *Journal of State & Law* 42, 47.

184 Nguyen Nhu Phat, 'Mot So Van De Ly Luan Xung Quanh Luat Bao Ve Quyen Loi Ngoai Tieu Dung' [A Number of Theoretical Issues Relevant to the Law on Consumer Protection] (2010) 2 *Journal of State & Law* 28, 30.

shall be warranted.¹⁸⁵ The underlying idea is that since the general trading conditions offered by suppliers may be found outside the written contract, the solution should be to bring these contents to the attention of the counterparty. The registration of these general trading conditions, according to Nguyen, is a practical method to assist buyers in understanding and consenting to such terms.¹⁸⁶

The remarkable work by Nguyen should be considered as the very first efforts by the Vietnamese legal community to deal with the issue of general trading conditions.¹⁸⁷ This has raised a number of important questions including whether and under which conditions general trading conditions should be regarded as a contract. Although, to some extent, the ‘registration’ mechanism was expected by Nguyen to be able to ensure the reasonableness of the contents of general trading conditions, substantive fairness did not seem to be his main concern.¹⁸⁸ While Nguyen has appropriately stressed the necessity of the state regulation of general trading conditions, his desire to see state regulation was limited to only providing counterparties with an opportunity to make informed choices.

2.2.2. ... To a Plea for Substantive Fairness

In an effort to justify state control over general trading conditions, Pham argued that the principle of fairness should be considered as the underlying paradigm to deal with onerous terms usually presented in general trading conditions.¹⁸⁹ In particular, Pham suggested that contract law should encourage the courts to interfere in the content of the contractual relationship to protect the interests of weaker parties.¹⁹⁰ In other words, such a suggestion seems to indicate that information-based techniques may not be efficient enough to address the problems of general trading conditions, and some direct interference in the contents of a contract should be welcomed as a supplementary solution. Unfortunately, in such a short contribution, Pham did not provide any feasible proposals to elaborate his radical idea, which makes it less persuasive to convince other scholars why states should directly interfere with contractual contents if the main problems of standard terms are merely the lack of consumers’ informed consent. Nevertheless, in addressing the problems of standard contract terms, his article should

185 Ibid.

186 Ibid.

187 Inspired by Nguyen Nhu Phat’s seminal article, Phan Thao Nguyen (2005), Nguyen Thi Hong Hanh (2009) and Tang Van Nghia (2009) in their separate articles similarly argued for the necessity to control the standard form contracts and general trading conditions in Vietnam. The main rationale was to ensure the consumer’s right to the freedom of contract. Not only did they advocate that Nguyen’s proposals should be adopted, they also suggested further solutions. While Nguyen Thi Hong Hanh and Tang Van Nghia argued for a campaign to raise awareness among consumers with regard to general trading conditions before entering into their contracts, Phan even argued for a pre-approval mechanism for standard form contracts.

188 It is not obvious how the registration mechanism by itself can do away with unfair terms in general trading conditions.

189 Pham Hoang Giang, ‘Su Phat Trien Cua Phap Luat Hop Dong: Tu Nguyen Tac Tu Do Giao Ket Hop Dong Den Nguyen Tac Cong Bang’ [The Development of the Law of Contract: From the Principle of the Freedom of Contract to the Principle of Fairness], (2008) 10 *The Law and State Journal* 28, 30-31.

190 Ibid. at 31.

be praised as the very first attempt in Vietnamese literature to go beyond the paradigm of the formal freedom of contract and to argue for substantive fairness.

To sum up, although Vietnamese scholars have reached an unanimous understanding of the inherent problems of general trading conditions, they are divided with regard to what should be the main strategy for dealing with these conditions. The triumph of the paradigm of freedom of contract in Vietnamese contract law and the obsessiveness of excessive paternalism are two closely-related reasons why a majority of scholars seem to be reluctant to agree with a solution to allow direct control over the contents of contractual terms.¹⁹¹

2.3. Policy and Legislation: A Pragmatic but Contradictory Strategy

In Vietnam, the demand for new legislation to control the unfairness of standard contract terms dawned with the realisation that the 1999 CPO offered little assistance in instances of consumer contracts, while the general contract rules in the 2005 Civil Code were ill-equipped to address the inherent problems of standard form contracts between traders and consumers.¹⁹² This conventional approach by the 2005 Civil Code, accordingly to the CPL Drafting Committee, is hardly appropriate when a consumer is a contracting party in two aspects.¹⁹³ *Firstly*, consumers are widely believed to be economically and knowledgeably inferior to businesses. This belief implies that there is an unequal bargaining power between businesses and consumers; as a result, businesses could make use of their superior power to abuse consumers in their transactions.¹⁹⁴ *Secondly*, the status of a consumer as a weaker party is particularly true when it comes to standard form contracts. Since standard form contracts are mostly pre-formulated by businesses, consumers have very few possibilities to have an influence on the contractual terms. This creates, as a result, an increasing danger of being unfair to consumers.¹⁹⁵

Cumulatively, these two characteristics of standard contract terms in B2C contracts present a huge risk that the contractual terms will be one-sidedly imposed by these businesses. The ability of consumers to strike a fair bargain, on which the traditional contract theory depends, would therefore be diminished. Accordingly, it was believed

191 Under the influence of mainstream doctrine, the general control of the content of contracts is only evidenced by one exceptional case in the 2005 Civil Code where performance becomes impossible (the event of force majeure in Section 2 of Article 302). As mention above, the 2015 Civil Code has introduced the doctrine of a change of circumstances as the second exceptional case. Even though one may wonder whether Art. 405 of the 2015 Civil Code, which envisages the invalidity of exemption clauses in standard form contracts, is another case, the words ‘unless otherwise agreed upon’ included at the end of this article allow the parties to exclude the application of this rule.

192 Vietnam Competition Administration Department (VCAD) and MUTRAFF, *Bao Cao Ra Soat He Thong Phap Luat Bao Ve Nguoi Tieu Dung Tai Vietnam* [Review Report on Legal Provisions on Consumer Protection in Vietnam], (Hanoi, 2009) 6.

193 Vietnam Competition Administration Department (VCAD), *So Sanh Luat Bao Ve Nguoi Tieu Dung Mot So Nuoc Tren The Gioi – Bai Hoc Kinh Nghiem Va De Xuat Mot So Noi Dung Co Ban Quy Dinh Trong Du Thao Luat Bao Ve Nguoi Tieu Dung Cua Vietnam* [Comparative Study of the Consumer Protection Laws of a Number of Foreign Jurisdictions – Lessons and Recommendations for Key Contents of the Draft Law on the Protection of Consumers’ Rights and Interests in Vietnam] (Hanoi, 2008). 50-51.

194 *Ibid.* 51.

195 *Ibid.*

that the CPL should introduce an additional regime for consumer contract law which is aimed at protecting and safeguarding consumers' rights and ensuring fair agreements between consumers and businesses.¹⁹⁶

Starting from a theoretical justification, the Drafting Committee conducted a survey of the current position of using standard contract terms in practice¹⁹⁷ and identified four typical problems posed by standard contract terms for the Vietnamese consumer. Firstly, general trading conditions have included terms that have the effect of restricting or excluding consumers' rights.¹⁹⁸ Secondly, general trading conditions contain terms that require the consumer to bear unreasonable risks which are not statutorily imposed on the consumer.¹⁹⁹ Thirdly, general trading conditions are drafted with legal terminology that is not very easy for consumers to understand.²⁰⁰ Fourthly, general trading conditions usually only appear in fine print, which is less noticeable or may even end up deceiving customers.²⁰¹ The Drafting Committee did not intend to individualise these four problems, which could have easily been grouped into two categories. In particular, the first two problems relate to the substance of the contracts while the last two problems concern the formal aspects of contracts. Although this survey was far from comprehensive in terms of evaluating the current use of unfair terms in standard form contracts and general trading conditions, it indeed offered valuable information that partly confirmed the proposition that problems existed with standard contract terms from both a formal and a substantive perspective in Vietnam.

These theoretical and practical bases on which the Drafting Committee relied for supporting the necessity for the introduction of a new protective regime in consumer contract law in the CPL as analysed above was very much supported by the Vietnamese literature at that time.²⁰² State intervention in standard contracts is justified, but the key question is to what extent the state should intervene in the standard contracts?

As mentioned before, although Vietnamese scholars have widely acknowledged the existence of problems relating to the omnipresent use of standard form contracts in Vietnam, they are intransigent when it comes to the notion of preserving the freedom of contract. The most important proposals and policy recommendations have not been extended beyond an information paradigm aiming to redress the information asymmetry between consumers and businesses.²⁰³ In other words, according to

196 The Ministry of Industry and Trade, *Ban Thuyet Minh Chi Tiet Ve Du An Luat Bao Ve Quyen Loi Nguoi Tieu Dung*, [The Explanatory Report on the draft Law on the Protection of Consumers' Rights and Interests] (dated 8 April 2010).

197 VCA, *Bao Cao Cac Quy Dinh Ve Hop Dong Mau Va Dieu Kien Thuong Mai Chung: Phap Luat Vietnam Va Kinh Nghiem Quoc Te* [Report on the Regulation of Standard Form Contracts and General Trading Conditions – The Vietnamese Law and International Experience] (Hanoi, 2009).

198 *Ibid.* at 19.

199 *Ibid.*

200 *Ibid.* at 20.

201 *Ibid.*

202 See more in Tang Van Nghia, 'Ban Ve Dieu Kien Giao Dich Chung Cua Doanh Nghiep' [On General Transaction Conditions in Businesses] (2009) 3 *Journal of Democracy and Law* 21-28; Nguyen Thi Hong Hanh, 'Nhu Cau Kiem Soat Dieu Kien Thuong Mai Chung' [The Necessity for Controlling General Trading Conditions] (2009) 10 *Journal of State and Law* 36-39.

203 Nguyen Van Cuong, 'Mot So Van De Ve Xay Dung Luat Bao Ve Quyen Loi Nguoi Tieu Dung' [A Number of Issues Relating to Drafting the Law on the Protection of Consumers' Rights and Interests] (2008) 129 *Journal*

mainstream scholarship in Vietnam, consumer protection law is indeed justified but only so far as it seeks to address such an information paradigm in order to support the consumer's autonomy or to create a new equilibrium in the market. As a result, the only feasible method is to provide consumers with adequate information to help them protect themselves.²⁰⁴

Focusing completely on formal control, these suggestions may apparently address the last two problems directly related to the issue of transparency in standard contract terms. However, those suggestions fail to solve the first two problems connected to contractual contents. It has been widely acknowledged that information disclosure cannot guarantee that consumers make rational decisions, and thus formal control cannot make unfair terms vanish.²⁰⁵

Given the lack of any underlying theory for substantive control over standard terms in Vietnamese literature, it is surprising that the CPL introduced a list of nine prohibited terms in standard form contracts and general trading conditions. This policy choice can only be explained by looking closely at the drafting of the CPL. It seems that the Draft Committee had a very pragmatic strategy in designing such a list. The list was introduced to directly include unfair terms identified in advance via the mentioned survey as well as several typical unfair terms emanating from the comparative studies. Accordingly, as far as the question of the appropriate legal techniques is concerned, given the unsatisfactory predominant approaches in Vietnamese literature, the Drafting Committee tried to borrow legal solutions from many other jurisdictions to address the identified problems of standard contract terms in Vietnam.²⁰⁶

Additionally, the Drafting Committee was aware that consumers frequently suffered from the procedural inferiority, thereby the dependence on merely the traditional private procedural framework was insufficient to enforce consumers' rights. In the particular case of controlling standard form contracts, Nguyen's initial suggestion of a registration mechanism found support in the comparative law studies. Indeed, the Vietnamese government was particularly interested in the approval mechanism in Korea and Taiwan that requires traders to submit several kinds of standard terms to be reviewed by the competent state agency before being used in the market.²⁰⁷ Certainly, the introduction of an administrative review of standard terms may address the weakness of private law enforcement initiated by an individual consumer. Nevertheless, it is not free from criticism especially from the business community. Indeed, not only did several questions arise regarding the institutional capacity of the agency or the

of Legislative Studies 29; Bui Nguyen Khanh, 'Mot So Y Kien Dong Gop Cho Du Thao Luat Bao Ve Quyen Loi Nguoi Tieu Dung' [A Number of Comments and Suggestions for the Draft Law on Consumer Protection] (2010) 5 *Journal of State and Law* 78, 79.

204 Nguyen Van Cuong, 'Mot So Van De Ve Xay Dung Luat Bao Ve Quyen Loi Nguoi Tieu Dung' [A Number of Issues Relating to Drafting the Law on the Protection of Consumers' Rights and Interests] (2008) 129 *Journal of Legislative Studies* 29, 30.

205 See more in Section 5.2 Chapter 2.

206 See Nguyen Van Cuong, *The Drafting of Vietnam's Consumer Protection Law: An Analysis from Legal Transplantation Theories*, PhD thesis (2011), Faculty of Law, University of Victoria at 229-231 <https://dspace.library.uvic.ca/bitstream/handle/1828/3404/Nguyen_Cuong_PhD_2011.pdf?sequence=1&isAllowed=y> [accessed 15 May 2017].

207 Ibid.

right to a fair hearing for traders, but the approval mechanism was also considered to signal a return to excessive paternalism which would have overturned the respect for privately determining the contents of a contract which had only been achieved a short time previously.

Although the ambition of the drafters went further to propose an optimal framework by combining the best legal practices from all over the world in this field, the following section will argue that the current regulation has failed to provide a comprehensive framework for protecting consumers from unfair contract terms.

2.4. Overview of the Legislation Regulating Standard Terms in Consumer Contracts

As the law currently stands, there are two major pieces of legislation dealing with standard contract terms in consumer contracts: the Civil Code²⁰⁸ and the CPL. Initially, the 2005 Civil Code explicitly introduced provisions on standard form contracts which focus on the issues of interpretation and exemption clauses.²⁰⁹ It can apply to all kinds of contracts, including ones between one business and another, ones between businesses and consumers, and to a limited extent, even to ‘private’ contracts where neither party acts in the course of a business.

Simultaneously, the Drafting Committee of the 2010 CPL convincingly argued that although some provisions on standard contract terms were presented in the 2005 Civil Code, they were insufficient to protect consumers.²¹⁰ Hence, the 2010 CPL created a more detailed regulation on standard contract terms. The new regulation covers numerous important issues including the interpretation of unclear contractual terms,²¹¹ the invalidity of nine kinds of contractual terms,²¹² and the mandatory registration of standard form contracts and general trading conditions which only apply to contracts for goods/services included in the ‘list of essential goods and services’.²¹³

Additionally, during the amending process of the 2005 Civil Code it was strongly argued that the 2005 Civil Code should be upgraded to better regulate standard contract

208 Since 1 January 2017, the new provisions of the 2015 Civil Code on SFCs have superseded the ones in the 2005 Civil Code. However, as mentioned above, there are no substantive differences between them.

209 Article 407 – Standardized contracts: 1. A standardized contract is a contract which contains provisions prepared by one party according to a standard contract and given to the other party for reply within a reasonable period of time; if the offeree gives its reply of acceptance, he/she/it shall be considered as having accepted the entire content of the standardized contract offered by the offeror. 2. In cases where a standardized contract contains ambiguous provisions, the offeror of the standardized contract shall bear adverse consequences of the interpretation of such provisions. 3. In cases where a standardized contract contains provisions exempting the liability of the offeror of the standardized contract, while increasing the responsibility or abolishing legitimate interests of the other party, such provisions shall not be valid, unless otherwise agreed upon. (This English version of Article 407 can be accessed from the Ministry of Justice’s website) <http://vbqpl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=6595> [accessed 15 May 2017].

210 Government, *Submission Report No. 28/TTr-CP dated 8 April 2010 on the Draft Law on the Protection of Consumers’ Rights and Interests* (To trính so 28/TTr-CP ngày 8/4/2010 về Dự án Luật bảo vệ quyền lợi người tiêu dùng) at 4-5.

211 Article 15 of the 2010 CPL.

212 Article 16 of the 2010 CPL.

213 See Article 19 of the 2010 CPL as well as Decision 02/2012/QĐ-TTg dated 13 January 2012 of the Prime Minister promulgating the list of essential goods and services for which contract forms and general trading conditions must be registered.

terms which are applied in all kinds of contract.²¹⁴ In contrast to this high expectation, the regulation on standard contract terms in the 2015 Civil Code has been marginally reformed. *First*, the 2015 Civil Code introduces the notion of general trading conditions, which is mainly inspired by the same concept in the 2010 CPL.²¹⁵ *Secondly*, rather than prescribing a feasible mechanism to control onerous standard terms, the 2015 Civil Code merely provides a statement which is close to a political statement which states that ‘[g]eneral trading conditions must assure equality between parties’.^{216,217}

Accordingly, so far, the 2010 CPL has been the most comprehensive regulation on standard contract terms in the Vietnamese legal system. The regulation on standard terms in consumer contracts in the CPL can be classified into two kinds of legal techniques, namely formal control and substantive control. The formal control techniques are those which put emphasis on scrutinising the way standard contract terms are communicated to consumers, thus ensuring that consumers are well informed before making their decision to enter into a contract or not, while the substantive control techniques focus on policing the contractual contents, thus directly eliminating unfair terms.²¹⁸

The following parts will analyse in further detail the formal and substantive control mechanisms as well as how these legal mechanisms have been implemented in practice. To that end, the next part will study the scope of the control mechanism.

3. SCOPE OF CONTROL: STANDARD FORM CONSUMER CONTRACTS

As analysed above, there are two compelling reasons explaining why the Draft Committee has decided to introduce a separate regime in the CPL to regulate unfair terms. First, there is an unequal bargaining power between the contracting parties, and second, the contract is pre-formulated by one party and is offered to the other party on a ‘take it or leave it’ basis. Therefore, it is predictable that the scope of control over unfair terms is defined by two general concepts, namely consumer contracts and standard contract terms.

214 Ministry of Justice, *Ban Thuyet Minh Chi Tiet Ve Du An Bo Luat Dan Su Sua Doi* [The Explanation Report on the Draft Amendment of the 2005 Civil Code] (dated 5 January 2015).

215 Article 405 of the 2015 Civil Code provides that ‘General trading conditions are terms and conditions published by a party which are generally applicable to the parties offered to enter into a contract. If an offeree accepts to enter into the contract, the offeree shall be deemed to have accepted such terms and conditions’.

216 Section 3 of Article 405 of the 2015 Civil Code.

217 Until the fourth draft of the 2015 Civil Code, the article on exemption and restriction clauses was laid down as being a mandatory rule rather than a default rule under the 2005 CC. Indeed, Article 407.3 of the 2005 CC stated that ‘In cases where a standardized contract contains provisions exempting the liability of the offeror of the standardized contract, while increasing the responsibility or abolishing legitimate interests of the other party, such provisions shall not be valid, unless otherwise agreed upon’. The Draft deliberately omitted the words ‘unless otherwise agreed upon’ which implied that the parties could no longer exclude the application of this rule or derogate from or vary its effect. However, due to criticisms from the business community, the status quo has been preserved in the 2015 CC.

218 Lying at the heart of this control system is the notion of unfairness, which is regrettably missing. See more in Section 4.4.

3.1. Concept of a Consumer Contract

3.1.1. Concept of a Consumer

At the core of the control system is the notion of consumers, which is of importance not only in designing the scope of the regulation on standard contract terms in B2C transactions but also in revealing the consumer protection policy in Vietnam. Before the promulgation of the CPL in 2010, the Ordinance on the Protection of Consumers' Rights and Interests (CPO) of 1999 was the first legislation which introduced a legal definition of a consumer and which read as follows: a 'consumer means a person purchasing or using goods and services with the aim of consumption or living purposes by individuals, families, or organizations.'²¹⁹

During the drafting process of the CPL, the definition of a consumer was one of the most debatable issues. On the one hand, based on a teleological interpretation of the definition of a consumer as specified in the CPO in which the word 'organization' exists at the end of the definition, legal drafters representing the consumers' organisation (Vinastas) argued that this definition included 'legal persons'.²²⁰ The legal drafters from Vinastas and the drafting ministry stuck to their position that the definition of a 'consumer' in the CPL should be defined so as to include not only 'natural persons' but also 'legal persons'.²²¹ On the other hand, legal drafters representing the business community (the VCCI) sharply criticized the Vinastas' approach.²²² They argued that since the main *rationale* for consumer protection was that the consumer is an individual who is a weak person in terms of bargaining powers in comparison to the business community, the CPL should exclude legal persons from the concept of a 'consumer'.²²³

At the end of the CPL drafting process, the *status quo* was maintained; the notion of a consumer in the CPL was defined in exactly the same way as its definition in the CPO of 1999. Accordingly, Article 3(1) of the CPL states that a '*consumer means a person purchasing or using goods and services with the aim of consumption or living purposes by individuals, families, or organizations.*'

(i) Acquiring Goods and Services for Private Use

Under the CPL, it is an essential prerequisite that the consumer '*purchases or uses goods and services with the aim of consumption or living purposes by individuals, families, or organizations.*' The purpose of a consumer transaction is therefore positively described

219 Article 1 of the CPO.

220 See Nguyen Van Cuong, *The Drafting of Vietnam's Consumer Protection Law: An Analysis from Legal Transplantation Theories*, PhD thesis (2011), Faculty of Law, University of Victoria at 215-216. <https://dspace.library.uvic.ca/bitstream/handle/1828/3404/Nguyen_Cuong_PhD_2011.pdf?sequence=1&isAllowed=y> [accessed 15 May 2017].

221 Ibid. at 216.

222 Ibid. at 217.

223 This argument was strongly supported by different Vietnamese legal scholars, Le Hong Hanh, Tran Thi Quang Hong, 'Luật Bảo Vệ Người Tiêu Dùng Có Nên Quy Định To Chức Là Người Tiêu Dùng?' [Should the Consumer Protection Law Provide for Organisations Such as Consumers?] (2010) 20 *Journal of Legislative Studies* 24, 28.

in the CPL to require that goods and services in consumer contracts be acquired for *private uses* rather than for *professional purposes*. This requirement is argued to imply that a person is qualified as a consumer, even without any direct contractual relationship with a seller or a provider, provided that he or she acquires the goods and services as the final addressee.²²⁴

(ii) Natural/Legal Persons

As already mentioned, whether the consumer has to be a natural person or whether the notion of a ‘consumer’ should also cover legal persons was one of the controversial issues during the CPL drafting process. A number of legal scholars still argue that Article 3 of the CPL should be strictly interpreted to limit the concept of a consumer to a natural person; the word ‘organizations’ should be explained to include the case where a natural person concludes a sales contract in his own name and the goods that he has purchased are actually used by a non-profit organization of which that person is a member.²²⁵ However, the scope of a consumer was not expressly limited to natural persons during the drafting process of the CPL.²²⁶ Therefore, whether the notion of a consumer in the CPL covers legal persons is still a grey area in Vietnam, which can only be clarified by the courts.

(iii) ‘Mixed Purposes’ Transactions

One more grey issue related to the notion of a consumer in Vietnam is whether a transaction with mixed purposes should fall within the consumer protection sphere or not. This occurs when the buyer has bought the goods for both a private and a business purpose (e.g. the acquisition of a motorbike for a freelancer). In principle, there are many possible approaches to ‘mixed purpose’ transactions, namely always considering them as consumer transactions, never considering them as consumer transactions, or considering them as consumer transactions only if the goods are mainly used for private purposes. However, no such approach to mixed purposes transactions is clearly employed in the CPL.

3.1.2. *Concept of a Business*

As for the concept of the counterparty of the consumer in a transaction, the adopted CPL uses a lengthy term, which is an ‘organization or individual conducting business in goods and/or services’ (hereinafter a ‘business’).²²⁷

224 Nguyen Thi Van Anh, et al., *Giao trình Luật Bảo Vệ Quyền Lợi Người Tiêu Dùng* [The Textbook on Vietnamese Consumer Protection Law] (Hanoi: National Political Press, 2012) 26.

225 Ibid. at 25.

226 See Nguyen Van Cuong, *The Drafting of Vietnam’s Consumer Protection Law: An Analysis from Legal Transplantation Theories*, PhD thesis (2011), Faculty of Law, University of Victoria at 214-217 <https://dspace.library.uvic.ca/bitstream/handle/1828/3404/Nguyen_Cuong_PhD_2011.pdf?sequence=1&isAllowed=y> [accessed 15 May 2017].

227 This is also the term used in Article 4 of the CPO.

The question of ‘who is acting as a ‘business’ was also crucial in drafting the CPL since it is directly related to the coverage of the CPL. At the initial stage of the CPL drafting process, the counterparty in a consumer contract was only a merchant – the legal concept adopted in the 2005 Commercial Law which refers only to a registered trader, thus excludes any unregistered traders or individuals doing business without a business registration.²²⁸ However, there were strong criticisms of this approach in the process of public consultation and internal discussion at the National Assembly, which argued for the inclusion of an unregistered trader in the definition of a business in order to expand the scope of consumer protection.²²⁹ Finally, when the CPL is finally adopted by the National Assembly, Article 3(2) of the CPL will define a ‘business’ as [...] an organization or individual conducting one, several or all of the stages of the business process, from production up until the sale of goods or the provision of services on the market for profit-making purposes, including: (a) Merchants as stipulated in the Commercial Law; and (b) unregistered individuals conducting frequent and independent commercial activities [i.e. unregistered vendors].

(i) Intention of the Business to Make a Profit (*animo lucri*)

It is worth noting that Article 3(2) of the CPL explicitly requires a profit-making purpose to be a condition for defining a business. Read together with Article 3(1), Article 3(2) seems to suggest that the intention of the business to make a profit is considered to be an essential factor to distinguish a business from a consumer who acts only for private purposes. With such a definition of a ‘business’, the CPL is expected to cover almost all consumer transactions in Vietnam, even transactions between banks or insurance companies and their clients.²³⁰

As it is not totally clear how and who should bear the burden of proving the intention of the business to make a profit, either a subjective or an objective approach can be used to interpret this legal issue. If the courts strictly follow the text of Article 3(2) and apply the formal approach, it would be very challenging for consumers to prove a subjective factor such as the intention of the business to make a profit, especially in cases where businesses intentionally manipulate via transferring profits within a corporate group.

(ii) Inclusion of Legal Persons/Bodies of Public Law

As public organizations are not deemed to engage in ‘profit-seeking activities’, the wording of Article 3(2) of the CPL reveals that this law does not intend to cover relations between public organizations and their customers. This legal choice seems to be perfectly consistent with the traditional model of state management in Vietnam

228 See Nguyen Van Cuong, *The Drafting of Vietnam’s Consumer Protection Law: An Analysis from Legal Transplantation Theories*, PhD thesis (2011), Faculty of Law, University of Victoria at 218 <https://dspace.library.uvic.ca/bitstream/handle/1828/3404/Nguyen_Cuong_PhD_2011.pdf?sequence=1&isAllowed=y> [accessed 15 May 2017].

229 Ibid.

230 Ibid. at 220.

according to which public sectors are usually not placed under close and effective scrutiny by their clients.²³¹

3.2. Concept of Standard Contract Terms

It is worth noting that there are two separate concepts used in delimiting the purview of legislative control in Vietnamese law namely standard form contracts (the closest translation of ‘Hop dong theo mau’) and general trading conditions (the closest translation of ‘Dieu kien giao dich chung’).²³² While standard form contracts are defined as ‘*contracts drafted by a trader for multiple transactions with consumers*’,²³³ general trading conditions are literally described as ‘*rules and regulations on the sale and/or supply of services which are announced by a trader and are applicable to consumers*’.²³⁴ Indeed, it is widely acknowledged that the main difference between the two concepts lies in their formal presentation.²³⁵ In particular, the general trading conditions are normally contained in a separate document and may be referred to by the contract, while standard form contracts are, of course, the contract documents themselves.

Nevertheless, the co-existence of the two concepts has made the CPL unnecessarily complicated. First of all, apart from this minor difference, both of them indicate the same phenomenon, where the contract terms are formulated in advance for general and repeated use by one party, without negotiation with the other party. Additionally, the 2010 CPL has produced the same legal effects for rules concerning both the general trading conditions and standard contract forms in all the related provisions, therefore a sharp distinction between the two concepts has no actual implications in practice. Finally, the decisive factor to justify legislative control in the CPL is an imbalance of rights and obligations arising due to the absence of negotiation concerning the contract terms and the final convergence of the parties’ will.²³⁶ The focus of the Vietnamese legislators, therefore, is whether such terms are the result of the actual negotiations between the parties rather than where the standard terms are presented.

In any case, the two definitions above have provided for three major conditions for a contract term to qualify as a standard contract term under Vietnamese law.²³⁷ *Firstly,*

231 Ibid. at 220.

232 With the promulgation of the 2010 CPL, the concept of *general trading conditions* appeared for the first time in the Vietnamese legal system; however, this does not mean that the problems of *standard contract terms* were not identified before this time. Indeed, in 1995, the first Civil Code of Vietnam introduced a provision specifically regulating the issue of exemption clauses in *standard form contracts*.

233 Article 3 paragraph 5 of the 2010 CPL.

234 Article 3 paragraph 6 of the 2010 CPL.

235 Nguyen Thi Hang Nga, ‘Cach Tiep Can Cua Phap Luat Cac Nuoc Ve Khai Niem Dieu Kien Thuong Mai Chung’ [The Approaches of a Number of Foreign Jurisdictions to the Concept of General Trading Conditions] (2014) 12 *Journal of Legislative Studies* 23.

236 Government, To trinh so 28/TTr-CP ngay 8/4/2010 ve Du An Luat Bao Ve Quyen Loi Nguoi Tieu Dung [Submission Report No. 28/TTr-CP dated 8 April 2010 on the Draft Law on the Protection of Consumers’ Rights and Interests].

237 In the 2014 Draft, a ‘*standard form contract*’ is still defined with the same wording as in the 2005 CC as a contract which contains provisions prepared by one party and given to the other party for reply within a reasonable period of time; if the offeree gives its reply of acceptance, the offeree shall be considered as having accepted the entire content of the standardized contract offered by the offeror.

contract terms must be formulated in advance, which literally means that they are drafted before the conclusion of contract and do not therefore result from a meaningful negotiation between the parties. Secondly, contract terms must be drafted so as to be used in multiple transactions. Although the CPL does not explicitly require a precise number of transactions it implies that legislative control will not be applied if pre-established terms are only intended to be used once. Thirdly, contract terms must be presented to the other party upon entering into the contract. This requirement seems to be met if one party makes an offer to incorporate its standard terms in the contract.

As a result, all three requirements make it irrelevant to consider in which form the standard terms are expressed. Indeed, they can be included in the contract itself or contained in a separate instrument such as a notice publicly displayed at the issuer's premises. Additionally, the terms may be drafted to cover the complete content or individual parts of the contract. For example, a standard agreement for the sale and purchase of an apartment usually includes most of the fundamental terms, with the exception of the names of the contracting parties. In contrast, the conditions of the ATM used in a banking service, for example, may only cover an individual part of a contract.

4. FORMAL CONTROL

One of the main characteristics of standard contract terms identified by the Draft Committee of the CPL is that the language and form of standard contract terms may conceal the true legal effects of clauses that are unfavourable to the counterparty.²³⁸ Therefore, in order to directly remedy this particular problem of standard contract terms, it should be necessary to require the provision of more detailed and clearer information about the terms, thus providing a better possibility for both parties to engage in a more equally bargained negotiations.

To this effect, Vietnamese law has introduced numerous regulations focusing on the actual way in which standard contract terms are communicated between the parties. Overall, this formal control under Vietnamese law includes two sub-requirements. First, businesses are obliged to give an adequate opportunity for consumers to receive and comprehend the terms. Second, the terms must be drafted in a manner that is understandable to the consumers. These two requirements of formal control aim to guarantee a better understanding of the meaning as well as the legal effects of standard contract terms. Such an enhanced understanding enables consumers to be able to better evaluate the market and then exercise their informed choices regarding whether or not to enter into such contracts. Additionally, if consumers are well informed about their

Whereas Article 415 of the 2014 Draft states that *general trading conditions* are rules which are announced by the offeror and are generally applicable to the offeree, if the offeree gives its reply of acceptance, the offeree shall be considered as having accepted the entire content of the standardized contract offered by the offeror.

238 VCA, Bao Cao Cac Quy Dinh Ve Hop Dong Mau Va Dieu Kien Thuong Mai Chung: Phap Luat Vietnam Va Kinh Nghiem Quoc Te [Report on the Regulation on Standard Form Contracts and General Trading Conditions – The Vietnamese Law and International Experience] (Hanoi, 2009) 19.

rights and duties arising from standard contract terms, then, in the case of disputes, they will be better equipped if they seek access to justice.

The following parts will discuss in further detail the two requirements of formal control in current Vietnamese law and the legal consequences in case of non-conformity.

4.1. Businesses' Obligations to Provide Consumers with Standard Contract Terms

4.1.1. From the Incorporation Issue under General Contract Law...

According to the general rules regarding the formation of a contract, in order to integrate standard contract terms drafted by only one party into the contract, these terms must be agreed upon by the other party.²³⁹ In other words, it is not self-evident how standard contract terms pre-formulated by one party can become part of a binding agreement with the counterparty.²⁴⁰ It is thus necessary to prove that the counterparty has somehow expressed his/her consent. In theory, there are two common methods under Vietnamese law according to which the drafters of standard contract terms can successfully argue that the counterparty has given his/her consent to adhere to standard contract terms.

The first method is to demonstrate that the other party has given his/her specific consent by means of signing the contractual document in which the standard contract terms are set out.²⁴¹ If the other party has not expressly consented, the second method is based on the 'silence as acceptance' doctrine.²⁴² Under Vietnamese law, it is firmly established that when one party is totally silent without expressing his/her intent to enter into a specific transaction or not, if the party has entered into a series of contracts over a period of time, the contract has been established by his/her implied consent.²⁴³ Similarly, if one party regularly uses a form incorporating the same standard contract terms, then this party is likely to be bound by these terms.

Nevertheless, in some cases, counterparties who have agreed to sign the contract are incapable of being aware of and understanding all the standard contract terms because these terms may only be available outside the signed contract. A question may arise concerning the requirements for the incorporation of the standard contract terms into the contract. In the recent case of *Vietjet*, which was resolved before the 2015 Civil Code entered into effect,²⁴⁴ the plaintiff, who was a customer of the airline company Vietjet, brought an action against the defendant to challenge the application of general

239 Ngo Huy Cuong, 'Ban Ve Khai Niem Va Cac Dieu Kien Cua Chap Nhan Giao Ket Hop Dong Theo Bo Luat Dan Su Nam 2005' [On the Concept and Legal Requirements of Acceptance in the 2005 Civil Code], (2010) 1 *Journal of Democracy and Law* 7.

240 Nguyen Nhu Phat, 'Dieu Kien Thuong Mai Chung Va Nguyen Tac Tu Do Khe Uoc' [General Trading Conditions and the Principle of Freedom of Contract] (2003) 6 *Journal of State & Law* 42, 44.

241 Ngo Huy Cuong, 'Ban Ve Khai Niem Va Cac Dieu Kien Cua Chap Nhan Giao Ket Hop Dong Theo Bo Luat Dan Su Nam 2005' [On the Concept and Legal Requirements of Acceptance in the 2005 Civil Code], (2010) 1 *Journal of Democracy and Law* 7, 8.

242 Do Van Dai, 'Ban Ve Su Im Lang Trong Giao Ket Hop Dong' [On Silence in the Contract Formation], (2006) 17 *Journal of Prosecution* 26.

243 See Case 27/2003/HDTP-DS, The Judicial Council of the Supreme People's Court, 26 August 2003; Case 38/2004/GDT-DS, The Civil Court (Chamber) of the Supreme People's Court 29 March 2004. The doctrine of 'silence as acceptance' has been codified in Sec. 2 Art. 393 of the 2015 Civil Code.

244 Case 66/2015/DS-PT, The People's Court of Ho Chi Minh City, 15 January 2015.

trading conditions issued by the latter. Indeed, she argued that since the limitation clause (which limited the liability of the airline to pay damages of only 200,000 VND per kg when the customer's luggage became lost) was not part of their contract, she should have received damages on the basis of the real price of the objects lost. The People's Court in Ho Chi Minh City held, however, that standard terms are part of the contract when the plaintiff has constructive knowledge of their existence. In this case, it was sufficient that Vietjet had already publicized its terms and conditions and referred to them on the tickets.

The introduction of a new provision on general trading conditions in the 2015 Civil Code seems to confirm the Court's approach. Article 406 of the 2015 Civil Code reads as follows:

'1. General trading conditions are terms and conditions published by a party which are generally applicable to the parties offered to enter into a contract. If an offeree accepts to enter into the contract, the offeree shall be deemed to have accepted such terms and conditions.'

'2. General trading conditions shall only be effective with respect to the parties entering into a transaction if such trading conditions have been publicized so that such parties know or should know such conditions.'

The structure and language of Article 406, however, reveal that the general principle of the formation of contracts is directly applicable to govern the specific issue of incorporating general trading conditions into the contract. Once general trading conditions are publicized and then referred to in an offer, if a counterparty accepts the offer, he or she should be considered to be aware of such conditions. To put it differently, the counterparty has a duty to find and be acquainted with the terms and conditions.

4.1.2. ...To the Obligation of Businesses to Provide Consumers with Standard Contract Terms

In the CPL, the most relevant provision dealing with this question is Section 6 Article 12, which spells out that businesses have a duty to provide consumers, prior to a transaction, with complete and accurate information about any standard form contracts and general trading conditions. More specifically, Article 17 of the CPL states that traders, when entering into standard form contracts, must provide a reasonable period of time for a consumer to examine the contract.²⁴⁵ Article 18 of the CPL further requires any traders using general trading conditions to publicly announce such conditions prior to entering into transactions with consumers.²⁴⁶

245 Article 17. Businesses must, when entering into a standard form contract, provide a reasonable period of time for a consumer to study the contract.

246 Article 18. Businesses using general transaction conditions must be responsible for publicly announcing such conditions prior to entering into transactions with consumers.

Accordingly, it therefore seems to be clear that the CPL directly obliges businesses to make standard contract terms available to consumers so that the latter have a reasonable opportunity to read and understand the contents of the contract before deciding to adhere to these terms.

Apart from the CPL, which is considered to be general law, a number of specific regulations dealing with e-commerce have also imposed on businesses the duty to inform consumers. Decree 52/2013/ND-CP on e-Commerce, for instance, stipulates that the sales e-commerce website must provide full information about the standard contract terms concerning sales and purchases which are applicable to the goods and services offered on the website.²⁴⁷

These compulsory obligations should be welcomed in the sense that raising consumers' awareness about the content of standard contract terms may enable them to be more cautious when signing the agreement if a particular clause seems to be unfavourable as far as they are concerned. Furthermore, in the case of disputes, this could better inform consumers of their rights and duties.

3

4.2. Transparency of Standard Contract Terms

In order to enable consumers to make an informed choice regarding standard contract terms, apparently dispatching the terms to consumers in advance is not sufficient as the terms must also be stated in such plain and intelligible language that consumers are able to understand them. This transparency requirement is laid down in Section 2 of Article 14 of the CPL, which requires the language of the consumer contract to be expressed in a clear manner and must be easy to understand. Decree 99/2011/ND-CP of the Government detailing and guiding the implementation of a number of articles of the Law on the Protection of Consumers' Rights (hereinafter Decree 99/2011/ND-CP) clarifies that the language of the contract must be Vietnamese, the font size must be at least 12pt, and the paper and ink used must ensure sufficient contrast.²⁴⁸

Although these requirements are very useful in making standard contract terms readable, it is doubtful whether such requirements are adequate to make these terms understandable. Difficult legal concepts, which are always present in standard contract forms, are still obviously challenging for ordinary consumers to understand the meaning as well as the implications of these terms. Therefore, it can be argued that under the requirements of Article 14, businesses have an obligation to simplify any difficult

²⁴⁷ See Articles 28 and 32 of Decree No. 52/2013/ND-CP dated May 16, 2013 of the Government on E Commerce: 'Traders, organizations or individuals must publish the general trading conditions for goods or introductory services on their website including: a) Conditions or restrictions in the provision of goods or services such as limits on time or geographic scope, if any; b) Reimbursement policies, including the reimbursement term, the payment method, or the exchange of goods purchased, how to obtain a refund and the cost of this refunding; c) Product warranty policy, if any; d) Service standards, service delivery processes, fee schedules and other terms relating to the provision of services, including the conditions and restrictions, if any; e) The seller's obligations and the customer's obligations in each transaction.'

²⁴⁸ Article 7 of Decree 99/2011/ND-CP dated 27 October 2011 of the Government Making Detailed Provisions and Providing Guidelines for the Implementation of a Number of Articles of the Law on the Protection of Consumers' Rights.

legal language in standard contract forms and to make it plain and understandable to ordinary consumers with average literacy skills and minimum experience. Accordingly, the transparency principle prohibits not only standard contract terms that are concealed in fine print, but also such terms that are expressed and phrased in overly legal or complex, difficult or technical language. Only when the transparency principle is interpreted in such manner may it assist consumers in clearly understanding what the document actually says as well as its significance and legal effect.

The CPL, however, does not explicitly refer to any specific consequences of a failure on the part of businesses to comply with the requirement of transparency or the duty to provide consumers with standard contract terms in advance. In this respect, one could easily resort to the general contract law to advocate two possible civil remedies which can either determine that such terms have not been validly incorporated into the contract or that the contract terms are void on the basis of a mistake or fraud.²⁴⁹ Especially the argument that such a contract is void is firmly supported by a number of cases which have determined that such a contract is invalid on the ground that one party has breached the duty to inform.²⁵⁰ To date, however, there have not been any cases in which an individual consumer has relied on such a stance to challenge the validity of standard contract terms.

In another scenario, however, the terms remain as an integral part of the contract, but the supplier of these terms may be subjected to certain administrative sanctions.²⁵¹ Having said that, the civil remedy is preferable to the administrative remedy since the standard contract terms are only incorporated into the contract when consumers have constructive knowledge of their existence, so the failure of a business to provide such constructive knowledge must result in such terms not being part of the contract.

Nevertheless, the lack of transparency may at least trigger the application of the *contra proferentem* rule so as to interpret the standard contract terms in favour of consumers, which will be analysed in the following section.

4.3. Interpretation of Standard Contract Terms

Article 15 of the 2010 CPL provides that if the contents of a contract can be interpreted in different ways, the organisation or individual which is competent to resolve a dispute shall interpret the contract in favour of the consumer. In this regard, the Civil Code states that if a standard form contract contains ambiguous provisions, the offeror of the standard form contract shall bear the adverse consequences of the interpretation of such provisions.²⁵² At first sight, this appears to be a notable difference, but it infers a very similar meaning: where there is more than one plausible interpretation, the interpretation

249 Do Van Dai, 'Nghĩa Vụ Thông Tin Trong Pháp Luật Hợp Đồng Việt Nam' [The Duty to Inform in Vietnamese Contract Law], (2007) 11 *Journal of State and Law* 22.

250 Decision No. 30/2003/HDTP-DS dated 3 November 2003 of the Judges' Council of the Supreme Court. See the commentaries on this decision in Do Van Dai, *Luật Hợp Đồng Việt Nam: Bàn An Và Bình Luan Bàn An* [Vietnamese Contract Law: Cases and Commentaries] (The National Political Publisher, 2011) at 339-356.

251 Decree No. 19/2012/ND-CP dated 16 March 2012 of the Government on the Provision of Fines in the Protection of Consumers' Rights.

252 Article 407 of the 2005 CC, Section 2 Article 405 of the 2015 CC.

which is the least favourable to the supplier will prevail.²⁵³ This interpretation approach in Vietnamese law is also recognised in many other legal systems. It is traditionally called as *contra proferentem* doctrine of contractual interpretation, which provides that, where a term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provides the wording. This doctrine has been used by the Vietnamese courts when dealing with the inherent one-sidedness of standard contract terms drafted by businesses beforehand.²⁵⁴

5. SUBSTANTIVE CONTROL

While formal control is a significant tool to assist consumers in better understanding standard contract terms, the formal control itself does not make unfair terms disappear. In fact, consumers rarely read these terms, and even if they do so, they generally lack the legal and financial knowledge to understand them or to assess the inherent risks.²⁵⁵ Since it is unrealistic to expect consumers to read, understand and make their informed choice, in addition to formal control, another legal technique can be brought into the picture – the technique of substantive control, which directly focuses on the actual content of standard contract terms.

Generally, substantive control can make use of two approaches to regulate unfair terms: (i) a general provision defining what is meant by unfair terms, and (ii) a category of terms featuring those that are deemed wholly ineffective based purely on their substantive content. These two approaches are usually combined in various jurisdictions. In Vietnam, the second approach has been chosen to regulate unfair terms by listing nine kinds of clauses that are prohibited outright. It must be emphasized that apart from this exhaustive list of always banned terms, there is no general provision which provides for the concept of (un)fair terms or criteria applied to define which term is unfair or not. Given the lack of a general provision on fairness, the list of prohibited terms promulgating in Article 16 of the CPL in fact symbolizes the essential reference point in answering the key question: what is an unfair term as defined under Vietnamese law.

The following discussion will focus on the substantive control regime for standard contract terms in Vietnamese law. The first part offers a bird's-eye view of the substantive control regime in the 2005 and 2015 Civil Codes and the 2010 CPL. The second part is

253 See more in Do Giang Nam, Suggestions on Standard Terms in Draft Amendments to the 2005 Civil Code, (2014) Vol. 20 Vietnam Law and Legal Forum 33-40.

254 See the case 219/2013/DS-ST, the People's Court of Ho Chi Minh City, 4 February 2013. In this case relating to a contract for the sale of an apartment, the consumer brought an action to cancel the contract and claim damages because the trader had committed a serious breach of contractual obligations by failing to transfer the apartment to the consumer during the extended period for this purpose. Nevertheless, the trader argued that according to the sales contract between the parties the failure to transfer the apartment should not result in the buyer having the right to cancel the contract. Invoking the doctrine of *contra proferentem*, the Court held that since the relevant term included in the standard form contract pre-formulated by the trader was vague, it must be interpreted in such a way as to be more favourable to the interest of the consumer.

255 See more in Section 1.2 Chapter 2.

devoted to investigating the content of each kind of term which is prohibited, before a critical analysis of these terms is presented in the third part.

5.1. Overview of Substantive Control

As previously mentioned, apart from the CPL, the Civil Code also regulates standard contract terms, including the legal techniques for substantive control. The Civil Code only focuses on the exemption clause, which is stipulated as follows ‘[i]n cases where a standard form contract contains provisions exempting the liability of the offeror of the standard form contract, while increasing the responsibility or abolishing legitimate interests of the other party, such provisions shall not be valid, unless otherwise agreed upon’.²⁵⁶

Control over the exemption clause applies to all kinds of civil contracts including contracts between businesses, contracts between businesses and consumers as well as contracts between consumers.²⁵⁷ As argued by the Drafting Committee of the 2015 Civil Code, the language of Article 407 of the 2005 Civil Code literally suggested that the scope of the control was limited to only the standard form contract, thus excluding any kinds of general trading conditions.²⁵⁸ Based on such an assertion, the 2015 Civil Code has expanded the scope of such an exemption clause control by introducing a separate provision on control over the general trading conditions.²⁵⁹ However, other than control over the exemption clause, there has been no further effort to control any other kinds of unfair terms.

Although the substantive fairness control under the 2010 CPL is limited to consumer contracts, it is regulated to a much broader extent than that of the Civil Code. Indeed, Article 16 of the 2010 CPL sets out an exhaustive list of nine kinds of terms, including the exemption clause, which are deemed to be invalid. As regards the legal nature of the list, the terms falling within its scope are always void in all circumstances. In comparison with other jurisdictions, the legal nature of the list can be compared to a ‘blacklist’ where the terms are always deemed to be unfair and can thus be distinguished from a grey list where the terms are merely presumed to be unfair. In that sense, there is no grey list in the CPL since the terms included in the list are always to be perceived as being unfair.

To sum up, the general substantive fairness control regime in Vietnamese law can be outlined as follows:

²⁵⁶ Sec. 3 Art. 407 of the 2005 Civil Code; Sec 3 Art. 405 of the 2015 Civil Code.

²⁵⁷ Art. 1 of the 2005 Civil Code; Art. 1 of the 2015 Civil Code.

²⁵⁸ Ministry of Justice, *Ban Thuyet Minh Chi Tiet Ve Du An Bo Luat Dan Su Sua Doi* [The Explanatory Report on the Draft Amendment of the 2005 Civil Code] (dated 5 January 2015).

²⁵⁹ Sec. 3 Art. 406 of the 2015 Civil Code.

	The 2005 Civil Code and the 2015 Civil Code	The 2010 CPL
Type of contracts	All kinds of civil contracts	Consumer contracts
Types of clauses + Black list	Exclusion and limitation of liability clauses	Nine kinds of clauses
+ General clause	No	No
Legal consequences	Invalid	Invalid

5.2. Categorization of the List of Terms under Article 16 of the CPL

The structure of Article 16 of the CPL does not seem to be based on any systematic principle and can be classified into three groups:

Group 1: Terms excluding or restricting liability normally imposed by law, which include the following three terms:

- (a) a term that excludes the liability of the business towards a consumer as stipulated by law;
- (b) a term that restricts or excludes the right of a consumer to lodge a complaint or to institute legal proceedings;
- (g) a term that excludes the liability of the business when the business sells goods or supplies services through a third party.

Group 2: Terms conferring unfair unilateral decision-making authority upon the business:

- (c) a term that allows the business to unilaterally change terms in standard form contracts already agreed with the consumer; or terms and conditions of sale and the provision of services (in general trading conditions) that are not specifically specified in the contract;
- (d) a term that allows the business to unilaterally determine that a consumer has failed to discharge one or more of his/her obligations;
- (dd) a term that allows the business to fix or change the price at the time of the delivery of goods or supply of services;
- (e) a term that allows the business to unilaterally interpret contractual clauses which may be interpreted in different ways;
- (i) a term that allows the business to assign rights and obligations to a third party without the consent of the consumer;

Group 3: Terms preventing the parties from having equal rights:

A term that provides that it is mandatory for the consumer to perform his/her obligations even when the business does not perform its own obligations.

5.2.1. Terms Excluding or Restricting Liability Normally Imposed by Law

The first group of terms includes terms seeking to exclude or restrict a legal duty or obligation owed by the business to the consumer. Such terms are called ‘exemption clauses’ or ‘exclusion clauses’ and can most commonly be found in the standard form contracts in the Vietnamese market.²⁶⁰

Exemption clauses are often used not only in the standard form contracts in consumer contracts, but also in contracts between businesses.²⁶¹ In the case of contracts between businesses, as the two parties have equal bargaining power, an exemption clause may embody a true agreement as to the price and the risks undertaken by each party. In this sense, exemption clauses play an essential role in helping businesses to efficiently allocate the risks of doing business.²⁶² This function of exemption clauses has been widely supported by various Vietnamese authors for a long time, which was later evidenced by the fierce criticism of the 2005 and 2015 Drafts of the Civil Code when both drafts intended to introduce an outright prohibition on the use of exemption clauses in every kind of contract.²⁶³

However, in standard form contracts between a stronger party and a less sophisticated party, such as between a business and a consumer, it is extremely doubtful that exemption clauses, which are pre-formulated by the business, could reflect the legitimate interests of both parties. In contrast, there is a probability that exemption clauses may be imposed so as to negate the consumer’s reasonable expectations. Indeed, exemption clauses have the effect of changing the nature of rights and obligations arising from a contract to the detriment of consumers. The following are a number of examples of exemption clauses that seek to modify the business’ liability:

- Example 1: ‘Parents agree that they shall bear any risk when their children are sent to our school. Our school shall not be responsible for any accidents or losses relating to their children’
- Example 2: ‘Consumers shall carefully check the characteristics of goods before buying them. The goods which have been bought outside the business’ premises shall not be returned.’
- Example 3: ‘After the contract is in force, party B shall not return any installation fees pre-paid by party A for any reason. Party A shall not have the right to lodge a claim in this case.’

260 Le Net, ‘Gop Y Du Thao Bo Luat Dan Su (Sua Doi) Ve Dieu Khoan Mien Tru Hay Han Che Quyen Loi Trong Hop Dong’ [Suggestions on the Draft Amendments to the 1995 Civil Code Regarding Exemption and Restriction Clauses in Contracts], (2005) 2 *Journal of Legal Science*. <<https://thongtinphapluatdansu.edu.vn/2008/02/10/135/>> [accessed 15 May 2017].

261 On exemption clauses in B2B contracts, see more in Duong Anh Son, ‘Thoa Thuan Han Che Hay Mien Tru Trach Nhiem Do Vi Pham Hop Dong’ [Clauses Restricting or Exempting Liability Arising From a Breach of Contract], (2005) 4 *The Journal of Legislative Studies* 44.

262 Richard G. Lawson, *Exclusion Clauses and Unfair Contract Terms* (Sweet & Maxwell, 2011).

263 Le Net, ‘Gop Y Du Thao Bo Luat Dan Su (Sua Doi) Ve Dieu Khoan Mien Tru Hay Han Che Quyen Loi Trong Hop Dong’ [Suggestions on the Draft Amendments to the 1995 Civil Code Regarding Exemption and Restriction Clauses in Contracts], (2005) 2 *Journal of Legal Science*. <<https://thongtinphapluatdansu.edu.vn/2008/02/10/135/>> [accessed 15 May 2017].

- Example 4: ‘This Agreement constitutes the entire agreement and understanding between the parties and supersedes all prior arrangements or understandings, whether oral or written, between the parties relating to the subject matter of this Agreement.’

Accordingly, the use of exemption clauses, especially when the parties are not in positions of equal bargaining power, may lead to a consumer, as the weaker party, having his/her rights abused which therefore, in some cases, justifies a ban on exemption clauses. Under Article 16 of the CPL, there are 3 kinds of terms listed in this group.

- 1) Terms that exclude the statutory liability of the business towards the consumer

The first kind of prohibited term is one that excludes the statutory liability of the business towards the consumer. The language of Section 1(a) of Article 16 is so broad that it invalidates any terms that exclude the statutory liability of a business towards a consumer. In the context of Vietnamese law, statutory liability should be understood as including not only contractual liability stemming from failing to perform contract terms but also non-contractual liability relating to goods or services supplied.²⁶⁴

Section 1(a) of Article 16 therefore covers terms which purport to exclude liability for breaches of contract as well as for loss, damage or death or personal injury relating to goods or services supplied by a business. As far as a term in example 1 is concerned, it has the legal effect of totally excluding the legal liability of a business in the event of the death of a consumer or personal injury to the latter. This term falls within the scope of Section 1(a) of Article 16 and is therefore prohibited.

Additionally, businesses selling goods in the market have to be bound by certain implied obligations regardless of their contractual content. In particular, consumers’ right to buy merchantable goods is a statutory right from which parties cannot derogate and they are also entitled to a reasonable opportunity to examine goods and to reject them if they are faulty.²⁶⁵ Accordingly, a term in example 2 above, which has the effect of excluding liability for unsatisfactory goods, is consequently prohibited according to Section 1(a) of Article 16.²⁶⁶

264 Ngo Huy Cuong, ‘Trach Nhiem Dan Su: So Sanh Va Phe Phan’ [Civil liability: Comparison and Criticism], (2009) 5 *Journal of Legislative Studies*, 5-12.

265 Section 444 (1) of the 2005 CC states that ‘the seller must secure the use, value or properties of an object for purchase and sale; if after the purchase, the purchaser discovers a defect that devalues or reduces the use of the object already purchased, he/she/it must promptly notify the seller of the defect upon the detection thereof and is entitled to request the seller to repair or change the defective or devalued object and compensate for damage...’. Articles 22-24 of the CPL supplement the 2005 CC by providing a detailed regulation on defective goods. Indeed, businesses are liable to pay compensation for loss and damage if the goods which they supply are defective and cause loss of life or damage, including where they were unaware of the defect.

266 It must be noted in passing that as well as being invalid under this article, the use of such an exemption clause is purported to mislead consumers about their statutory rights and therefore may give rise to an administrative remedy on the basis of unfair commercial practice. Indeed, Section 1 Article 10 of the CPL prohibits any attempt by organizations or individuals trading in goods and/or services to deceive or mislead consumers via advertising activities, or hide or provide information that is incomplete, false or inaccurate about one of the following details: ... (c) The contents and characteristics of transactions between consumers and organizations or individuals trading in goods and/or services...

- 2) Terms that restrict or exclude the right of a consumer to lodge a complaint or to institute legal proceedings

The CPL has clearly provided that the right to have access to justice is one of the most important assurances for consumer protection and thus consumers are entitled to seek redress via many types of legal settlements.²⁶⁷

Any terms that can be used to prevent or hinder the consumer's right to take legal action shall be invalid. Therefore, a term as in example 3 above that purports to exclude the right of the consumer to lodge a claim is banned outright under Vietnamese law.

- 3) Terms that exclude the liability of a business when that business sells goods or supplies services through a third party

Under Vietnamese law, any activities by agents acting within the scope of their authority granted by their principal will have legal effects on the latter.²⁶⁸ However, in various standard form contracts there are 'entire agreement clauses' enabling the business to disclaim liability for oral statements made by their employees or agents, or for advertisements that do not appear in the written contract. To put it differently, 'entire agreement clauses' attempt to prevent materials extrinsic to the formal written document from being part of the latter by stating that the written form is the entire agreement between the parties. In these cases, it is unfair for consumers who reasonably rely on agents if the business is excluded from any liability for statements that were made to induce the consumers to enter into the contract. A term as illustrated in example 4 above can be characterised as an 'entire agreement clause' serving to exclude the liability of the business for the misrepresentation of a third party such as its employees or agents, which is apparently deemed invalid under Vietnamese law.

5.2.2. Terms Conferring Unfair Unilateral Decision-Making Power upon the Business

The second group concerns terms that enable the business to confer unilateral decision-making powers after the contract has entered into force without any consent having been given by the counterparty. A contract should be the result of a balance of rights and obligations between both parties, even in the case of standard form contracts where one party is not capable of having any meaningful influence on every contractual term. Therefore, it is doubtful whether such a balance could be maintained when one party has the right to vary, alter or interpret any contractual term of the contract according to his/her own will after it has already been agreed regardless of the consent of the other party. In these cases, such a term can be used as a business sword to force the consumer

²⁶⁷ Article 8 of the CPL provides that consumers are entitled to complain, denounce and take out a lawsuit or propose a social organization to take out a lawsuit in order to protect their rights under the provisions of this Law and other provisions of law involved. To this end, the CPL offers consumers four main channels through which they can resolve their complaints: negotiation, mediation, consumer arbitration, and litigation.

²⁶⁸ Articles 144-146 of the 2005 CC. See more in Ho Ngoc Hien, 'Pham Vi Dai Dien, Tham Quyen Dai Dien Nhin Tu Goc Do Ly Luan Va Thuc Te' [The Scope and the Authority of Representation from Theoretical and Practical Perspectives], (2011) 11 *Journal of State and Law* 38-54.

to accept increased costs or reduced benefits. Unfortunately, standard form contracts in numerous industries frequently make use of such broad unilateral variation clauses as can be seen below.

- Example 1: The investor has the right at its sole discretion to change the furniture design of the apartment from the original design provided in the contract.
- Example 2: All prices are subject to alteration without notice and the price applicable shall be that determined on the date of despatch.
- Example 3: Any dispute or difference which may arise with regard to the interpretation of the contract shall be determined by the seller, whose decision shall be final.
- Example 4: The club's manager may suspend or expel from the club any member whose conduct is harmful to the characteristics or interests of the club.
- Example 5: The Company shall be entitled to assign this agreement either in whole or in part. The customer shall not assign, resell, or transfer the services or his/her rights under these terms and conditions.

3

In order to address the problems of unilateral variation clauses, the CPL has prohibited five kinds of terms as follows.

1) Terms that allow a business to unilaterally change standard contract terms

It is common for some contracts to stipulate that a business is allowed to unilaterally change standard contract terms. This kind of term gives arbitrary authority to the supplier and may be applied to substantially change contractual contents on which consumers have relied. Furthermore, the consumer has not been given a reasonable opportunity to consider such changes as well as the right to terminate the contract without penalty if the changes are unacceptable.

Accordingly, the CPL has explicitly prohibited any term that permits a business to unilaterally amend terms in standard contracts regardless of the consumer's consent. The term mentioned in example 1 which has the effect of unilaterally changing the agreed furniture design under the original contract is therefore invalid according to Section 1(c) of Article 16.

2) Terms that allow a business to fix or change the price at the time of the delivery of the goods or the supply of services

The general prohibition on variation clauses is laid down in Section 1(c) above. Here, paragraph (dd) specifically refers to a variation which allows the supplier to change the price, which is one of the most important parts of an agreed contract. Example 2 above is a typical example of this kind of term.

In some cases, however, a price variation clause is not necessarily unfair provided that the new price actually reflects actual changes in market conditions. However, given that a business is much more capable of controlling changes in market conditions than

consumers, a price variation clause appears to shift the risk of commercial certainty from the business to the consumer. It is therefore unfair for consumers and thus the CPL completely prohibits the use of price variation clauses in standard consumer contracts.

- 3) Terms that allow a business to unilaterally interpret contractual clauses which may be interpreted in different ways

Similarly, paragraph (e) also prohibits terms which permit a business to reserve the right to decide what a term in a contract means. If such a term would be effective, the business would be both the judge and a party to the dispute. In that sense, impartiality cannot be ensured. Furthermore, as mentioned above, it is statutorily required that in the case of unclear standard contract terms, their interpretation shall favour consumers.²⁶⁹ As a result, the CPL prohibits any terms that allow a business to unilaterally interpret contractual clauses such as the term presented in example 3.

- 4) Terms that allow a business to unilaterally determine that a consumer has failed to discharge one or more of his/her obligations

This kind of term has a similar effect to the terms defined in paragraph (e) in the sense that it permits a business to finally decide on a contractual dispute. More specifically, an example of this kind of term can usually be found in a membership contract in which the club's manager is given excessive discretion to expel a member for misconduct due to vaguely defined misconduct criteria. Such a term in example 4 above clearly allows the supplier to unilaterally interpret the contract and to decide whether the consumer is in breach of contract. It falls within the scope of Section 1(d) of Article 16 and is therefore always invalid.

- 5) Terms that allow a business to assign rights and obligations to a third party without the consent of the consumer

Consumers, under some circumstances, are subject to terms that permit a business to assign rights and obligations to a third party without their consent. The legal position of consumers will be affected by such an assignment since they have to deal with a different party who may supply them with a poorer service. Furthermore, according to the 2005 Civil Code, in order to be effective, the assignment of obligations from obligors to third parties needs to be approved by the obligees.²⁷⁰ Therefore, a term as illustrated in example 5 is prohibited by the CPL.

²⁶⁹ Article 15 of the 2010 CPL.

²⁷⁰ Art. 315 of the 2005 CC stipulates that the obligor may transfer a civil obligation to a substitute obligor, if the obligee consents to this, except in cases where the obligation is connected with the personal identity of the obligor or where it is provided by law that such an obligation cannot be transferred.

5.2.3. Terms Preventing the Parties from Having Equal Rights

The last group includes only one kind of term which provides that ‘it is mandatory for the consumer to perform his/her obligations even when the business does not perform its own obligations’. A typical example of this type of term can be found in a contract providing for the supply of goods by means of installments, which includes a clause requiring the consumer to pay or to continue paying even if the supplier fails to make the delivery. In comparison with the exclusion clauses, a term requiring consumers to continue paying when goods are not provided is even more detrimental to the consumers in question since those clauses exclude business liability for a breach of control, but at the same time requiring the consumer to continue performing his/her obligation. This term is therefore inherently unfair and is prohibited by the CPL.

3

5.3. Critical Analysis of Substantive Control

Given the reluctance of general contract law to directly intervene in contractual contents as well as the ineffectiveness of formal control as a sole regulatory mechanism, the introduction of a substantive control regime should be highly praised. Such a regulation is essential for the protection of consumers from unfair terms which have the object or effect of eliminating their legitimate interests. Although there are compelling reasons for such control, the current regulatory framework is not free from criticism. On the one hand, the blacklist of the automatic unenforceability of numerous kinds of terms presented in Article 16 of CPL seems to have been hastily drafted without taking into account the legitimate interests of businesses or desirable economic efficiency in the market. On the other hand, merely establishing a closed list of standard contract terms, without providing a general clause defining unfair terms would omit various potentially unfair terms, which could not be anticipated at the time of promulgating the legislation. In this sense, the CPL is less likely to provide a feasible protective regime for consumers in the future.

5.3.1. Over-Inclusiveness of the Blacklist in Article 16 of the CPL

In principle, the decision to introduce clear rules in the form of an explicit list offers many advantages such as cutting the costs for consumers, seeking remedies or promoting self-imposed control by suppliers themselves.²⁷¹ Such detailed provisions increase the likelihood that controlling unfair terms will have a quick, real and proactive effect without the need to wait for the courts and administrative authorities to take action.²⁷²

271 Geraint Howells, ‘Good Faith in Consumer Contracting’ in Roger Brownsword, Norma J Hird & Geraint Howells (eds) *Good Faith in Contract: Concept and Context* (1999) 91, 98; Tjatie Naudé ‘The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective’ (2007) 124 *South African Law Journal* 130-31.

272 Giorgio de Nova, ‘Italian Contract Law and the European Directive on Unfair Terms in Consumer Contracts’ (1995) 3 *European Review of Private Law* 221 at 230; Hugh Beale ‘Unfair terms in contracts: Proposals for reform in the UK’ (2004) 27 *Journal of Consumer Policy* 289, 304.

The vital advantage of a blacklist, therefore, is to create certainty, which allows all parties to understand what constitutes unlawful terms.

From a theoretical perspective, a term should only be prohibited outright if all imaginable relevant circumstances have been carefully taken into account, which would lead to the conclusion that such a term is always unfair.²⁷³ This proposition is particularly true in Vietnam as a transitional country where the principle of freedom of contract has just been successfully established as the main paradigm of contract law. However, it seems that each kind of prohibited term has not been vigilantly drafted as far as businesses' legitimate interests are concerned.²⁷⁴ The following sections will be devoted to explaining why one must be very cautious in immediately prohibiting clauses to a wide extent.

(i) Terms that Exclude the Statutory Liability of a Business Towards a Consumer

As analysed above, the exclusion clause is problematic since it provides a shield behind which one party could exempt itself from any liability towards its counterparty. This is particularly true in consumer contracts. It is however an erroneous decision to assess exclusion clauses entirely in this negative sense.²⁷⁵ Indeed, exclusion clauses can provide a positive mechanism for allocating risks in numerous specific circumstances. The above-mentioned case of Vietjet reveals that although an exclusion clause is prohibited by the CPL, the Vietnamese courts have carefully evaluated its fairness. Indeed, it is common practice for airlines to limit their liability for damage due to uncontrolled risks during their activities. Accordingly, it seems to be unwise to completely ban all kinds of exemption clauses as in Section 1(a). A more cautious approach is necessary to enable the courts to take specific circumstances of transactions into account. In other words, several exemption clauses should be placed in the grey list rather than the blacklist of unfair terms.

(ii) Terms Conferring Unilateral Decision-Making Power Upon The Business

Similarly, terms conferring unilateral decision-making power upon the business could be abused to totally change the balance in the previously agreed upon contracts in such a manner that it is detrimental to consumers. The terms can, however, play an important role in adapting several aspects of the contract which are subject to volatile market conditions. Indeed, in a contract the performance of which extends over a considerable period of time, such as contracts supplying mobile phones or bank services, that

273 See Section 5.2 Chapter 2.

274 Looking at the historical drafting process of the CPL, it is surprising to find that these kinds of prohibited terms have been 'unanimously adopted without much objection even from the representative of VICC'. See Nguyen Van Cuong, *The Drafting of Vietnam's Consumer Protection Law: An Analysis from Legal Transplantation Theories*, PhD thesis (2011), Faculty of Law, University of Victoria at 231 <https://dspace.library.uvic.ca/bitstream/handle/1828/3404/Nguyen_Cuong_PhD_2011.pdf?sequence=1&isAllowed=y> [accessed 15 May 2017].

275 Stephen A. Smith and Patrick S. Atiyah, *Atiyah's Introduction to the Law of Contract*, (Oxford University Press, 2006) 149-154.

contract often depends on relatively changeable conditions in the market. It is however practically impossible for the business in question to communicate and receive the specific consent of every single counterparty before varying a number of terms in the general trading conditions. In other words, the business may have a legitimate interest in retaining its flexibility to vary aspects of the contract. By way of example, the general prohibition in Article 16(1)(c) has no relevance pertaining to loan agreements that involve variable rates of interest. It is partly incompatible with the provisions of the Law on Credit Institutions which prescribes that banks have the right to fix interest rates for raising capital and fees for the services provided.²⁷⁶ Consequently, it is also a mistake simply to outlaw any terms conferring unilateral decision-making power upon businesses. Rather than prohibiting them, it is more preferable to allow businesses to retain flexibility while still respecting consumers' interests. The consumer should be given a reasonable time to consider any amendments and the right to cancel before being affected by them without penalty or otherwise being worse off for having entered the contract.

Accordingly, one of the major drawbacks of the blacklist is the inflexibility that it entails. On the one hand, the blacklist in Article 16 is too rigid to take the special circumstances of specific businesses into consideration. In practice, it may be the case that the prohibited clauses are not always unfair when they are evaluated in the specific context of a particular transaction. On the other hand, the blacklist is difficult to change and is thus not adaptable to changing conditions.

5.3.2. *Pointillist Approach*

As should be clear from above analysis, the blacklist in Vietnamese law should be modified to take into account also the legitimate interests of businesses. However, even in such an ideal scenario, the legislature cannot predict all kinds of potential unfair terms; various standard contract terms that do not fall within the Article 16 blacklist but which are as equally onerous as prohibited terms may emerge in the future. The mere presence of the blacklist seems to be insufficient to protect consumers from unfair terms because it is not too difficult for businesses to find a way around the legal prohibition in the blacklist.²⁷⁷

By way of illustration, it is sufficient to analyse the ineffectiveness of the CPL in dealing with infamous standard terms in the fitness market.²⁷⁸ In this market sector, there is widespread use of terms in general trading conditions providing for a long-term membership period of two or three years within which members are liable for the remainder of the membership fee if they choose to cancel the agreement prematurely,

²⁷⁶ Article 91(1) of the Law on Credit Institutions.

²⁷⁷ Since the limitation of human knowledge and foresight, 'a legislator cannot be expected to be able to define every unfair contract situation in the process of law drafting and if he tries to be complete, he runs a risk of creating a complicated legal system, full of inconsistencies...' Juha Hayha, 'Scandinavian Techniques for Controlling Fairness in Contracts,' in Brownsword, Roger, Geraint G. Howells, & Thomas Wilhelmsson, *Welfarism in Contract Law* (Dartmouth Pub Co, 1994) 125, 147.

²⁷⁸ Report of the VCA 2015.

while the traders have rights to terminate the agreement for breaches including minor ones by members. Arguably, the traders have designed minimum clauses with severe penalties upon early termination as a trap for consumers who are over-confident that they are likely to make use of the service. However, given that the terms fall outside the rigid blacklist of prohibited terms, although the VCA has received numerous complaints from customers, it lacks the necessary legal grounds to initiate an action to challenge the use of this practice.²⁷⁹

Accordingly, the main drawback of the pointillist approach is that it does not consider the problems of standard terms as being the systematic failure of the market mechanism and thus fails to provide a systematic approach to deal with these issues. The introduction of a general clause with the general criteria of unfairness may have an important function to play in not only catching other potentially unfair terms, but also in assuring the flexibility of substantive control over unfair terms in the future. It will ensure that the Vietnamese legislation on unfair standard contract terms withstands the test of time.²⁸⁰

6. ENFORCEMENT MECHANISMS

It is unquestionable that an effective control mechanism for unfair terms in any legal system requires a combination of well-designed substantive provisions and procedural rules on which businesses and others rely to carry out their legally imposed duties. In other words, apart from substantive provisions establishing consumers' rights to fair terms, it is also very important to introduce an effective enforcement system to implement their rights. In the field of unfair terms, law enforcement can take place in various ways in which different enforcement agents (consumers, consumer protection organizations, businesses, public agencies) apply different types of enforcement (individual or collective, private or public, *ex ante* or *ex post*).

Overall, there are two distinct categories of enforcement mechanisms in Vietnam: *ex post* judicial control to ensure that an unfair term does not bind consumers, and *ex ante* administrative control to prevent unfair terms from being applied in consumer contracts. The next section will investigate to what extent the two enforcement mechanisms have been employed in tackling unfair contract terms in Vietnam.

279 However, in another case pertaining to one-sided standard terms in apartment sales contracts – which are of the greatest public concern – the VCA has had a greater incentive to invoke the general principles of the Civil Code to challenge the validity of such terms. For a further discussion, see Section 6.2 in this chapter.

280 Although the greatest advantage of general clauses is their flexibility, which helps them to adapt to changes in society, at the same time the law needs to be certain, so any general clause needs to be extensively crystallised by case law or other supplementary tools. In many legal systems, the popular mechanism for controlling unfair terms is a combination of a general clause, which establishes a fairness test and a blacklist, and/or a grey list of terms.

6.1. Judicial Enforcement

According to the CPL, unfair terms falling within the scope of the blacklist are always invalid and the civil law shall apply to declare the invalidity of such terms.²⁸¹ Therefore, adversely affected consumers can bring an action before a competent court to challenge an unfair term in a contract. In this connection, following the pursuit of private law rights by consumers, corrective control occurs after the conclusion of the contract and is carried out by the courts within the traditional law of civil procedure. The purpose is to eliminate an unfair term from a contract, thereby remedying the detrimental situation of consumers caused by such a term.

The most striking feature of such corrective control is that its effectiveness depends on the initiative of consumers. In theory, a consumer may bring an action against a business to challenge an unfair contract term, hence controlling unfairness is the main aim of this action. More frequently, however, control takes place incidentally when one of the parties has brought an action against the counterparty. Thus, a key question when the consumer fails to alert the court about the unfair nature of the terms is whether the court can rule on the unfairness *ex officio*. The answer to this question is directly related to the interpretation of the concept of invalidity provided for under Article 16 of the CPL.

Under the general legal provisions on contracts, the invalidity of a contract can be classified into two categories, namely absolute nullity and relative nullity.²⁸² The concept of absolute nullity implies that the contractual term is automatically considered null and void, whereas in the case of relative nullity, the contractual party needs to invoke the nullity within a specific limitation period.²⁸³ It means that if unfair terms are considered to be relatively null, this nullity must be invoked by one of the parties. Consequently, in order to strike out an unfair term, consumers must explicitly request the court to declare such a term invalid. In contrast, if unfair terms are deemed to be absolutely null, the party concerned has standing to commence an action for invalidity regardless of the limitation period. Thus, the courts are allowed to invoke this nullity of their own motion.²⁸⁴ It is obvious that the latter approach is preferable for consumers since the courts can help them overcome their unawareness of their legal rights.

According to the 2005 Civil Code, any contract is absolutely null and void if its content offends statutory prohibitions and good morals.²⁸⁵ Therefore, if Article 16 of the CPL is considered as a statutory prohibition in which businesses are prohibited from incorporating any terms listed in Article 16 in their standard form contracts, it is highly likely that the courts will determine that the unfair terms in Article 16 are absolutely

281 Section 2 of Article 16 of the CPL

282 Bui Dang Hieu, 'Giao Dich Dan Su Vo Hieu Tuyet Doi va Vo Hieu Tuong Doi' [Absolutely Nullity and Relative Nullity of Civil Transactions], (2001) 5 *The Journal of Legal Studies* 37; Le Thi Bich Tho, 'Phan Loai Hop Dong Vo Hieu Theo Phap Luat Vietnam' [Classification of Invalid Contracts in Vietnamese Law], (2001) 10 *Journal of State and Law* 27.

283 Bui Dang Hieu, 'Giao Dich Dan Su Vo Hieu Tuyet Doi va Vo Hieu Tuong Doi' [Absolutely Nullity and Relative Nullity of Civil Transactions], (2001) 5 *The Journal of Legal Studies* 37, 44.

284 *Ibid.*

285 Article 122 of the 2005 CC.

null and void. Furthermore, absolute nullity can be invoked without being subject to a limitation period. Consequently, a court is entitled at any moment to review the fairness of the terms categorized by Article 16 of its own motion.

A further important issue related to judicial enforcement is the question of whether the judiciary is allowed to modify unfair contract terms and how the remainder of the contract is to be treated. It is firmly established in Vietnamese law that judges are very cautious when it comes to directly interfering in the contractual content, and that authorizing judges to rewrite a contractual term is a fairly uncommon practice. Hence, it is likely that the courts will only annul an unfair term rather than modify it so as to make it fair. Moreover, it is very doubtful that the courts will strike down the remainder of the contract. Under the 2005 Civil Code, the partial invalidity of a contract is possible provided that the contract is capable of continuing its existence without the invalid term.²⁸⁶ To this effect, an unfair term will only render the entire contract totally invalid if it is a fundamental term such as the subject matter or the price. Since the nine kinds of prohibited terms in Article 16 of CPL are clearly all ancillary terms in the contract, it can be argued that the unfairness of a term in this group will not render the entire contract void.

In practice, very few civil cases related to standard terms have been brought before the Vietnamese courts. However, this does not reflect the true picture of the control over standard consumer contracts in Vietnam, because the number is very modest as compared to hundreds of unfair terms identified by the administrative agencies.²⁸⁷ Indeed, the lack of individual civil cases challenging the validity of unfair terms before the courts should be attributed to numerous limitations on judicial enforcement in the consumer context. A serious problem for judicial redress in Vietnam is that the majority of individual consumers lack sufficient knowledge about their rights.²⁸⁸ Even if they are aware of their rights, the high costs of proceedings as compared to the benefits expected from such lawsuits has barred them from approaching the courts.²⁸⁹ It is also noteworthy that in order to address the inherent problems of individual litigation, the

286 Article 135 of the 2005 CC. See more commentaries on related cases in Do Van Dai, *Luat Hop Dong Vietnam: Ban An Va Binh Luan Ban An* [Vietnamese Contract Law: Cases and Commentaries] (The National Political Publisher, 2011) at 610-633.

287 See more in the next section on administrative enforcement.

288 Nguyen Anh Tuan-Deputy Director of the VCA has stated that, up to now, one of the most pressing challenges for Vietnamese consumers is a lack of knowledge concerning their rights. See more see Ha Noi Moi, 'Giai Phap Bao Ve Quyen Loi Nguoi Tieu Dung: Yeu Ca Tam Ly Va Phap Ly' [Solutions For Protecting Consumers' Rights: Weaknesses From Both a Psychological and a Legal Perspective] <<http://hanoimoi.com.vn/Tin-tuc/Kinh-te/732600/giai-phap-bao-ve-quyen-loi-nguoi-tieu-dung-yeu-ca-tam-ly-va-phap-ly>> [accessed 15 May 2017]. This statement is shared by many Vietnamese lawyers. See more in 'Luat Bao Ve Nguoi Tieu Dung: Thuc Thi Con Nhieu Bat Cap' [Consumer Protection Law and its Ineffective Implementation] <<http://gocluatsu.com/VN/Default.aspx?case=detail&cate=17&type=2&id=2709>> [accessed 15 May 2017].

289 In early 2015, a social survey involving more than 1200 consumers was conducted by the Institute for Studies of Society, the Economy and the Environment (iSEE). It reveals that only 2 to 3 per cent of Vietnamese consumers file complaints or lawsuits when their rights have been violated. The main reason for this is that they are afraid of spending extra time and money, and they are also unaware that protection mechanisms are available. See more in iSEE *khôi đống chiến dịch bảo vệ quyền của người tiêu dùng* [iSEE launches a campaign for protecting consumers' rights] at <<http://isee.org.vn/vi/Blog/Article/isee-khoi-dong-chien-dich-bao-ve-quyen-cua-nguoi-tieu-dung-viet-nam>> [accessed 15 May 2017].

collective action mechanism has been introduced to enable consumer organizations to initiate lawsuits in the public interest even without authorization from the individuals concerned.²⁹⁰ However, these collective actions have not taken place in practice.²⁹¹

6.2. Administrative Enforcement

Apart from the practical inaccessibility of the courts, judicial control also has several limitations such as the limited effects of the court decision or the value of relief available only after the fact.²⁹² Thus, as is recognised worldwide, a judicial proceeding concerning individual contracts, if taken alone, cannot be regarded as an ideal mechanism for controlling unfair terms.²⁹³ Observing the actual implementation in various foreign legal systems has brought the inherent problems of judicial redress to the attention of the Vietnamese legislature. As a result, the new system has been intentionally designed to address these problems by granting administrative agencies enormous power to act as a watchdog over the fairness of terms in standard form contracts. Not only is administrative enforcement independent from individual litigation-based remedies, it also has the effect of preventing unfair terms from being applied in consumer contracts.

Overall, standard contract terms are reviewed by the Vietnamese administrative agencies via two mechanisms. The first mechanism is called the registration review mechanism. It obliges businesses to register their standard contract terms with the competent administrative agencies before their use in the market. This obligatory registration system is only imposed on specific kinds of goods and services which are considered to be essentially important for the daily lives of consumers. These state agencies may refuse to endorse standard form contracts if they fail to meet both the procedural and substantive requirements laid down by the CPL. The absence of an endorsement results in the legal consequence that the contract cannot be used to govern consumer contracts.

The second mechanism is called the general review mechanism, under which the administrative agencies are granted general watchdog functions to enforce statutory requirements for all standard contract terms that have not been registered on an obligatory basis. These agencies are competent to compel businesses to amend or delete terms that are considered to be contrary to consumers' rights.

290 Articles 28(1)(b) and 41.

291 One explanation is that this legislative decision has not been strongly supported by the court system. Since the Code of Civil Procedure has not provided any guidelines to implement the provisions of the CPL on collective actions, it is still impractical for consumer organizations to initiate any lawsuits before the courts. Furthermore, as rightly pointed by Quach Thuy Quynh, another important reason is the lack of a financial mechanism, see Quach Thuy Quynh, 'Bao Ve Nguoi Tieu Dung Bang Cac Vu Kien Tap The- Kinh Nghiem Nuoc Ngoai Va Cac Goi Y Hoan Thien Phap Luat' [Protecting Consumers Through Class Action Lawsuits – Lessons from Foreign Jurisdictions and Suggestions for Improving Vietnamese Law], (2013) 16 *Journal of legislative studies* 53, 56.

292 Opinion of the Economic and Social Committee on the 'Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts' OJ 2001/C 116/25 at C116/121 at 122.

293 See more in Ewoud Hondius, *Unfair Terms in Consumer Contracts* (1987).

6.2.1. Registration Review

(i) Categories of Standard Terms Subject to a Registration Review

According to Section 1 of Article 19 of the CPL, traders which provide goods or services that are on the list of essential goods and services promulgated by the Prime Minister have the obligation to register their standard contract terms with the state administrative body for consumer protection.²⁹⁴ In order to implement this legislation, the Prime Minister issued Decision No. 02/2012/QĐ-TTg and Decision No. 35/2015/QĐ-TTg²⁹⁵ promulgating the list of eleven kinds of essential goods and services for which standard contract terms must be registered.²⁹⁶

Surprisingly, although the list is called a list of essential goods and services, it does not include some important goods or services for the daily lives of consumers such as medical treatment contracts, other personal transport services (in particular, bus transport), postal contracts etc.²⁹⁷ It poses a question as to the main criteria applied by the Government in deciding whether specific kinds of goods or services should be considered as essential and thus should be subject to pre-approval by the administrative agency.

A historical analysis of the drafting process of Decision No.02/2012/QĐ-TTg reveals that the list of essential goods and services was built upon three main criteria.²⁹⁸ First, transactions are provided by businesses in the form of written standard form contracts or general trading conditions. Second, goods or services are traded in order to be used by consumers for daily consumption. Third, goods or services are provided

294 Nguyen Van Cuong has argued that the origin of this regulation may be traced back to some provisions in Taiwan's *Consumer Protection Law* regarding the role of the central government in reviewing standard contracts. See Nguyen Van Cuong, *The Drafting of Vietnam's Consumer Protection Law: An Analysis from Legal Transplantation Theories*, PhD thesis (2011), Faculty of Law, University of Victoria at 232 <https://dspace.library.uvic.ca/bitstream/handle/1828/3404/Nguyen_Cuong_PhD_2011.pdf?sequence=1&isAllowed=y> [accessed 15 May 2017].

295 Decision No. 02/2012/QĐ-TTg dated January 13, 2012 by the Prime Minister on the promulgation of the list of essential goods and services for which standard form contracts and general transaction conditions must be registered; Decision No. 35/2015/QĐ-TTg dated August 20, 2015 by the Prime Minister on amending a number of articles of Decision No. 02/2012/QĐ-TTg on the promulgation of the list of essential goods and services for which standard form contracts and general transaction conditions must be registered.

296 The eleven kinds of essential goods and services are:
Supply of electricity; Supply of tap water; Paid television services; Terrestrial fixed telephone services; Terrestrial mobile information services (form of payment: postpaid service); Internet access services; Passenger transportation by air; Passenger transportation by rail; Buying and selling residential apartments (the service activities provided by the management units of apartment buildings); Issuing of inland debit cards, open and use payment account service (applicable to individual customers), individual borrowing service (for consumption purposes); Life insurance.

297 From a different point of view, Truong Thanh Duc – a renowned lawyer in Vietnam – has argued that only three kinds of goods and services can be qualified as essential goods and services. He has then severely criticised the list issued by Decision No.02/2012/QĐ-TTg as being too broad, thus creating unjustified burdens for the business community. <<http://dddn.com.vn/thi-truong/hang-hoa-dich-vu-thiet-yeu-hay-thu-yeu-20111026105756538.htm>>, [accessed 15 May 2017].

298 Ministry of Industry and Trade, *To Trinh Ve Viec Ban Hanh Quyét Dinh Cua Thu Tuong Ve Danh Muc Hang Hoa Dich Vu Thiet Yeu* [Submission Report on the Promulgating Decision of the Prime Minister on the List of Nine Kinds of Essential Goods and Services for Which Standard Contract Terms Must be Registered] (Hanoi, 2011).

by businesses which have a monopoly or a dominant position in the supply market. Among the three criteria, the final one bears all the characteristics of the Vietnam's economy where market power in some industries is completely dominated by only one state-owned enterprise.²⁹⁹ In these cases, even when consumers are informed, they cannot find an alternative supplier. Consumers, therefore, have no opportunity to shop around and, in order to satisfy their daily demand, they have to accept the contractual terms offered by this dominant business.³⁰⁰

(ii) Authority to Receive Registrations and the Scope of Review

There is a division of power between central and local governments regarding the authority to receive registrations of standard form contracts. Decree 99/2011/NĐ-CP clearly provides that if standard form contracts belonging to the list of essential goods and services are used in two or more provinces, they will need to be pre-approved by the Ministry of Industry and Trade.³⁰¹ But if such contracts are only applied in a particular province or municipality, the local Department of Industry and Trade will have authority to review the contracts.³⁰² More specifically, the Vietnamese Competition Authority ('VCA') under the Ministry of Industry and Commerce has been given the authority to receive registrations of standard form contracts applied in multiple provinces as well as to supervise the performance of the local agencies in the whole country.³⁰³ As far as the scope of the registration review is concerned, Decree 99/2011/ND-CP provides that standard form contracts are reviewed according to three groups of issues.³⁰⁴ The first group relates to the 9 kinds of prohibited terms as provided in Article 16 of the CPL. The second group concerns requirements of transparency. The last one requires compliance with the general principle of entering into contracts as stipulated by the Civil Code.

Unsurprisingly, the first and the second group of issues are related to the substantive and formal control of standard contract terms respectively. However, the

299 A typical example is the electricity market where the Electricity of Vietnam Group (EVN) is the sole supplier. See more in Vu Ngoc Xuan, 'Competitive Electricity Market-From Theory to Practical Application in Vietnam' (2014) 2(2) *Asian Journal of Business and Management* 120.

300 However, this does not necessarily mean that the monopoly is the sole reason for a state review of standard contract terms in Vietnam. As the implementation of the registration mechanism will illustrate, the unfairness of standard contract terms in other markets which have competition between suppliers is even more prevalent.

301 Section 1 of Article 9 of Decree 99/2011/ND-CP dated 27 October 2011 of the Government Making Detailed Provisions and Providing Guidelines for the Implementation of a Number of Articles of the Law on the Protection of Consumers' Rights.

302 Section 2 Article 9 of Decree 99/2011/ND-CP dated 27 October 2011 of the Government Making Detailed Provisions and Providing Guidelines for the Implementation of a Number of Articles of the Law on the Protection of Consumers' Rights.

303 From an internally organizational point of view, a new Division on Controlling Standard Form Contracts and General Trading Conditions has been established to perform this function. Decision 848/QĐ-BCT dated on February 5th 2013 (of the Minister of Industry and Trade) on regulating the functions, tasks, powers and organizational structure of the Vietnam Competition Authority.

304 Article 13 of Decree 99/2011/ND-CP dated 27 October 2011 of the Government Making Detailed Provisions and Providing Guidelines for the Implementation of a Number of Articles of the Law on the Protection of Consumers' Rights.

general principles of contract law are also considered as a benchmark for reviewing the fairness of standard contract terms. Since one of the reasons applied by the drafters of the CPL for the introduction of a separate regime for consumer contracts is that the 2005 Civil Code's underlying philosophy is only suitable for parties who are put on an equal footing, rather than for the unequal relationship between consumers and businesses, it is worth exploring how the general principles of contract law are actually applied in practice by the state agencies to review standard contract terms.

In order to provide further guidance, Decision 14/QD-QLCT of the Chairman of the Vietnam Competition Authority has specifically outlined 15 kinds of issues that the officials at the VCA as well as the officials at the local Department of Industry and Trade in 64 provinces shall apply to check whether a standard form contract is in compliance with the rules of the CPL or not.³⁰⁵

Table: The form annexed to Decision 14/QD-QLCT of the Chairman of Vietnam Competition Authority

STT	Scope of review (Article 13 of Decree 99/2011/NĐ-CP)	Content of the specific terms inconsistent with the statutory provisions
1	The language used is Vietnamese	
2	The content must be clear and easy to understand	
3	The font size must be at least 12 pt	
4	The background paper and ink colour used must ensure sufficient contrast	
5	There must be no term that excludes the statutory liability of the business towards the consumer	
6	There must be no term that restricts or excludes the right of a consumer to lodge a complaint or to institute legal proceedings	
7	There must be no term that allows the business to unilaterally change the terms in standard form contracts already agreed with the consumer; or any terms and conditions of sale and the provision of services (in general trading conditions) that are not specified in the contract	
8	There must be no term that allows the business to unilaterally determine if a consumer has failed to discharge one or more of his/her obligations	
9	There must be no term that allows the business to fix or change the price at the time of the delivery of goods or the supply of services	
10	There must be no term that allows the business to unilaterally interpret contractual clauses which may be interpreted in different ways	

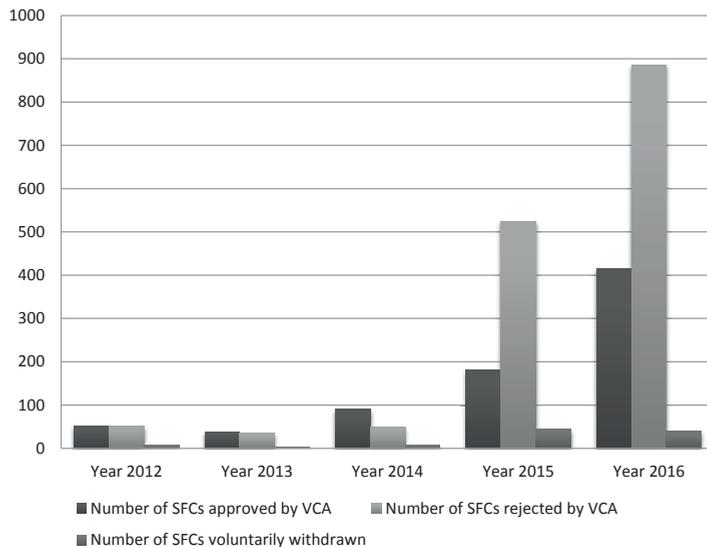
³⁰⁵ Decision 14/QD-QLCT of the Chairman of the Vietnam Competition Authority (2014) also provides for the relevant rules of procedure which apply to the registration of standard contract terms.

STT	Scope of review (Article 13 of Decree 99/2011/NĐ-CP)	Content of the specific terms inconsistent with the statutory provisions
11	There must be no term that excludes the liability of the business when the business sells goods or supplies services through a third party	
12	There must be no term that provides that it is mandatory for the consumer to perform his/her obligations even when the business does not perform its own obligations	
13	There must be no term that allows the business to assign rights and obligations to a third party without the consent of the consumer	
14	Other requirements stipulated by the consumer protection law must be fulfilled	
15	The principle of entering into a civil contract applies	

3

(iii) Actual Implementation of the Registration Review Mechanism

The VCA has been fairly active in enforcing the registration mechanism. Between 2012, when Decision No. 02/2012/QĐ-TTg came into effect, and December 2016, a total of 2,428 standard form contracts were submitted for approval by the VCA, only 776 of which were approved by this agency (see the table below).^{306, 307}



306 VCA, *Bao Cao Tong Ket 3 Nam Thi Hanh Quyét Dinh 02 Cua Thu Tuong Chinh Phu Ve Viéc Dang Ky Hop Dong Mau Va Dieu Kien Giao Dich Chung* [Report Summarizing the Three-Year Implementation of Decision No. 02/2012/QĐ-TTg] (Hanoi, November 2014). The statistics for the years 2015 and 2016 were collected via an email exchange with the Head of Department for Controlling Standard Contract Forms and General Trading Conditions.

307 The VCA has also created an online database which publishes all the standard form contracts approved by it. This is a praiseworthy step to enhance transparency and to raise public awareness of controlling unfair terms. See <http://www.vca.gov.vn/hopdongmau.aspx?CatelD=269> [accessed 15 May 2017].

Among the eleven kinds of essential goods and services qualifying for mandatory registration, the majority of reviewed contracts were in the field of sales and the purchasing of apartments. This therefore deserves further attention and will be used as a case study to understand how the VCA has actually conducted its registration process.

In apartment sales and purchasing transactions, one of the major causes of the disputes arising between developers and individual purchasers identified by the Ministry of Construction (MoC) is that contracts pre-formulated by developers contain terms which are favourable to the developers and may harm the buyers' interests. To address that issue, the Ministry of Construction (MoC) has applied a radical solution by issuing Circular No. 03/2014/TT-BXD which contains a standard form contract for apartment sales and purchases as a basis for individual purchasers to follow.³⁰⁸ Although it has been strongly criticised that such a regulation significantly intrudes into the freedom of contract as well as the rights of the developers to freely do business,³⁰⁹ the standard form contract drafted by the MoC has significantly protected individual consumers' interests, thus mitigating disputes between the parties, and facilitating the development of the real estate market in general.

This standard form contract, however, leaves a number of gaps for developers to fill in as illustrated below. The developer is usually the one who fills in such gaps, and thus he may seize this opportunity to impose one-sided terms which are significantly disadvantageous to the consumer. At least two potential unfair terms can especially be identified in Article 12. First, one term has the objective of requiring a consumer who fails to fulfil his/her obligation to pay a disproportionately high sum in compensation. Second, another term has the effect of authorising the developer (the seller) to dissolve the contract on a discretionary basis while this possibility is not equally available to the consumer.

Article 12. Responsibilities of both parties and penalties for a breach of contract.
Excerpt from 'Standard form contract for the sale and purchase of an apartment' annexed to Circular No. 03/2014/TT-BXD

1. The penalty for late payment for the apartment is agreed by both parties as follows:
 - a) If the Purchaser fails to make the payment within days from the deadline for making the payment in Clause 3 Article 3 of this contract, interest on the late payment shall be charged at % according to the interest rate announced by [name of the bank] when the payment is made over the period from the deadline to the payment date [both parties shall reach an agreement on the interest rate per day or per month].
 - b) During the performance of this contract, if the total number of days of the late payment of the amount in Clause 3 Article 3 of this contract exceeds days, the Seller is entitled to unilaterally terminate the contract according to Article 15 of this contract.

308 According to Circular 03/2014/TT-BXD, apartment purchasing and sales transactions between a developer and an individual purchaser must be in strict compliance with the standard form issued in conjunction with this Circular. More importantly, a contract signed between the developer and an individual purchaser 'shall not be recognised and shall not qualify as an ownership certificate' if it does not 'conform and/or is in accordance with the standard contract'.

309 Thai Binh Tran and Quang Dao Nguyen, One-size-fits-all contracts may not resolve disputes <<http://www.vir.com.vn/one-size-fits-all-contracts-may-not-resolve-disputes.html>> [accessed 15 May 2017].

In this case, the Seller is entitled to sell the apartment to another client without the Purchaser's consent. The Seller shall refund the payment made by the Purchaser [with or without interest depending on both parties] after deducting the penalty for breach of contract at % of the total value of this contract (not including tax).

2. The penalty for the late transfer of the apartment is agreed by both parties as follows:
 - a) If the Purchaser has paid for the apartment but the Seller fails to transfer the apartment within days from the deadline in Article 8 of this contract, the Seller must pay interest of % on the amount paid by the Purchaser to the Seller over the period from the deadline for transferring the apartment to the actual transferring date according to the interest rate announced by [name of the bank] when the payment is made [both parties shall reach an agreement on the interest rate per day or per month].
 - b) If the Seller fails to transfer the apartment after days from the deadline in Article 8 of this contract, the Purchaser is entitled to enforce this contract with a new deadline for transferring the apartment, or to unilaterally terminate the contract according to Article 15 of this contract.

In this case, the Seller must refund the amount paid by the Purchaser [with or without interest depending on both parties] and pay the Purchaser a penalty for a breach of contract at % of the total value of this contract (not including tax).

3. If the Purchaser refuses to receive the apartment when the transfer is due and the conditions for transferring the apartment are satisfied, (negotiated by both parties).
4. Other agreements (negotiated by both parties within the law)

Unfortunately, these potential unfair terms are not covered by the exhaustive list of nine prohibited terms stipulated by Article 16 of the CPL and these terms are totally consistent with the formal requirements of the CPL. However, it is undoubtedly unfair to impose disproportionate responsibilities between the parties for a breach of contract. Thus, in response to this gap left in the CPL, the VCA has actively revoked the principle of equality in the 2005 Civil Code to deal with these unfair terms.³¹⁰ Arguing that the principle of equality requires that consumers and suppliers should be on an equal footing as regards rights to end or withdraw from contracts, the VCA has declined to approve numerous standard form contracts for apartment sales and purchases which fail to satisfy this requirement. In practice, this failure is the major reason why most standard form contracts for apartment sales and purchases have not been successfully registered with the VCA.

However, a certain amount of criticism may remain concerning the legal basis for the application of the principle of equality under the 2005 Civil Code for reviewing the balance of responsibilities between businesses and consumers. Indeed, the VCA's reliance upon the principle of equality in the 2005 Civil Code is problematic. While it is true that the principle of equality concerns a constructive balance between both contracting parties, it seems to ensure that both parties have an equal legal status and

310 This information can be deduced from the answer sheet that the VCA filled in to illustrate why a specific standard term was rejected. This information was also confirmed by the Head of Department for Controlling Standard Contract Forms and General Trading Conditions in the interview conducted during my fieldwork in Hanoi in March 2015.

shall then enter into a fair bargaining process rather than requiring an absolute balance between the rights and obligations arising from their agreement. To put it simply, the principle of equality, in its ultimate goal, has only emphasized the procedural process according to which a contract can be fairly agreed between the parties; it is not purported to aim at the fairness of or an absolute balance in the contractual content.

The VCA cannot therefore legitimately invoke the principle of equality in order to support its intention to review the substantive content of the other standard contract terms not categorized in the blacklist contained in Article 16. However, an important lesson that can be learnt from the VCA's reviewing activities is the lack of a general definition of unfair terms in the CPL. Obviously, given the prevalence in the market of various potential unfair terms rather than the terms listed under Article 16, it is time to lay down a general norm which includes elements of a definition of an unfair term in consumer contracts. With this general clause, the administrative agencies will have a legitimate authority to conduct their functions, and more importantly, consumers can be protected from any potential unfair terms in the market.

6.2.2. General Review

Apart from the authority to pre-approve standard form contracts falling within the list of nine kinds of goods and services subject to registration, the VCA has also been given the authority to review all other standard form contracts. Indeed, Article 16 of Decree 99/2012/ND-CP³¹¹ provides that:

1. Where the contents of a standard form contract violate the consumer protection law or are contrary to the general principles of contract formation, the competent agency³¹² may order the business entity or individual using the said contract or terms to modify or remove those contents.
2. Where the contents of a standard form contract are unclear or may be subject to different interpretations, a competent agency may order the business entity or individual using the said contract or terms to clarify those contents.

As far as the scope of review is concerned, the VCA has been delegated with substantial discretion to control all kinds of standard contract terms. Indeed, the wording of Article 16 of Decree 99/2012/ND-CP is broad enough to equip the VCA with all legal rules available in the CPL and the Civil Code to ensure both procedural and substantive control over standard contract terms. If any standard terms fail to satisfy these statutory requirements, the VCA can order the business to modify or eliminate such terms. In that sense, such orders by the VCA have a preventative effect since they protect consumers from unfair terms even before the contract enters into force. Simultaneously, the orders

311 Article 19(2) of the adopted CPL states that: the competent State management body for the protection of consumers' rights and interests, at its discretion or at the request of consumers, may request traders to repeal or modify standard contracts [...] in cases in which these standard contracts [...] are found to infringe upon consumers' rights and interests.

312 They are the Vietnam Competition Authority or the local Department of Industry and Trade in 64 provinces.

have a collective effect in the sense that they tend to protect all consumers who may later conclude these contracts.

However, contrary to the registration mechanism for standard form contracts, there is no specific procedure for the VCA to perform its general reviewing authority. While the CPL is silent on this issue, Decree 99/2012/ND-CP simply states that if the VCA decides to exercise its reviewing authority by issuing an order to a business regarding the prohibited term, that business shall then modify or remove the violating contents and notify any consumers who have signed that contract within 10 working days after receiving such an order.³¹³ There is no further guidance as to the possibility to appeal against such a decision by the VCA.

As a matter of fact, the VCA has not officially issued any orders requiring businesses to amend their standard terms.³¹⁴ Up until now, on only two occasions has the VCA worked with businesses to review their standard terms; on both occasions, the businesses in question merely agreed to amend their contracts. One reason for this lack of activity could arguably be the lack of human resources at the VCA. With currently only five permanent officials at the Standard Form Contract and General Trading Conditions Controlling Department, it is reasonable for the VCA to make the registration mechanism its main priority.³¹⁵ Moreover, it is unrealistic to require businesses to modify or remove violating contents within 10 working days after receiving the VCA's order. This may be the reason why in two rare cases relating to banking services (banks' ATM) and health-centre contracts,³¹⁶ the VCA has deliberately chosen to negotiate with these businesses to persuade them to change their standard terms rather than using its authority to issue an official order forcing them to amend their contracts.³¹⁷

313 The law provides for administrative sanctions to be imposed on traders who ignore requests from the MoIT to remove 'unfair' terms in standard consumer contracts.

314 This information was obtained from an interview with the Head of Department for Controlling Standard Contract Forms and General Trading Conditions during my fieldwork in Hanoi in March 2015.

315 Information obtained from an interview with the Head of Department for Controlling Standard Contract Forms and General Trading Conditions during my fieldwork in Hanoi in March 2015.

316 General banking services using standard terms do not fall within the list of services subject to registration with relevant government agencies pursuant to Decision No. 02/2012/QĐ-TTg of the Prime Minister on issuing the list of essential goods and services that are required to register standard form contracts and general transaction terms. However, as mentioned above, when the number of consumer complaints was increasing according to the mass media, the hotline of the VCA and the social organizations for consumer protection during the working plan of 2014, the VCA applied Article 16 of Decree No. 99/2012/ND-CP to monitor the standard terms in banks' automatic teller machine (ATM) service contracts and banks' e-banking service. Through an assessment of the contractual contents of standard terms offered by banks, the VCA identified many terms which were not in compliance with the requirements of the CPL: (i) Regarding the procedural requirements, in most general transaction terms the font size was less than 12 point, the background colour and type colour were not sufficiently contrasting, and the line spacing was too small, making these texts difficult to read (ii) With regard to substantive control, there were many terms that are prohibited under Article 16 of the CPL. See more in the assessment of the contractual contents of standard terms in banks' automatic teller machine (ATM) service contracts and banks' e-banking services, <<http://www.vca.gov.vn/NewsDetail.aspx?ID=2654&CatelD=1>> [accessed 15 May 2017].

317 Information obtained from an interview with the Head of Department for Controlling Standard Contract Forms and General Trading Conditions during my fieldwork in Hanoi on 10 March 2015.

6.2.3. Critical Analysis of Administrative Control

Given the ineffectiveness of *ex post* judicial control in dealing with unfair terms in a timely and cost-effective manner, a new statutory framework empowering the competent state authority to address unfair terms *ex ante* seems to be more promising in Vietnam. However, the tendency to expand the scope of the approval mechanism to different kinds of standard form contracts which have already been reviewed by other state authorities has given rise to severe criticism by the business community. The overlapping of powers between the VCA and other competent authorities in specific market sectors has been widely condemned as a regrettable retreat from the hard efforts to protect the ease of doing business in general and the freedom of contract paradigm in particular.³¹⁸ Additionally, several fundamental weaknesses can be found in the procedural provisions regarding both mechanisms of administrative control including the registration review and the general review.

Firstly, the *ex ante* review mechanisms always require the VCA to have large-scale financial and human resources. An important factor in such mechanisms is the need for a great number of specialists from a variety of fields, without whom reviewing standard contract forms would soon become superficial. Therefore, such a lack of resources means that the VCA is incapable of performing its administrative control functions in an appropriate manner.

Secondly, the lack of clarity regarding the applicable procedures makes it difficult to ensure that administrative officials do not abuse their power to create more problems for businesses. Numerous important questions pertaining to the issue of fair proceedings have to be further clarified: (i) whether the VCA provides a fair hearing to the accused trader before issuing its order (ii) whether accused businesses have recourse elsewhere to challenge the VCA's order. The questions raised have resulted in reasonable concerns among the business community as to whether the absolute and exclusive powers granted to the VCA may constitute a source of corruption and whether they can ensure impartiality since the VCA is both the adjudicator and a party to the dispute.

Thirdly, as far as the pre-approval review is concerned, one may argue that the interests of businesses can be traded for the ultimate benefit of consumers and that the registration review is therefore justified as it assists consumers in clearing unfair terms from the market. Indeed, the pre-approval mechanism does no harm at all to consumers. However, a negative consequence of the pre-approval mechanism is that businesses may shift the administrative costs onto consumers by increasing prices. Additionally, when the standard contract terms are approved, it will create an artificial assumption that these terms are totally fair since the competent authority has already reviewed them. As a result, consumers would be more reluctant to bring a claim before the courts.³¹⁹

318 Duong Hong Phuong, 'Trien Khai Thuc Hien Hop Dong Theo Mau, Dieu Kien Giao Dich Chung trong Cung Ung Dich Vu Ngan Hang' [Implementing the Provisions on Standard Form Contracts and General Trading Conditions pertaining to Supplying Banking Services] (2016) No.19 Journal of Banking.

319 To this end, it is worth mentioning that the pre-approval review in Vietnam significantly departs from the renowned pre-approval mechanism in Israel where suppliers are entitled to submit their standard contracts for

7. CONCLUSION

This chapter has shown that the 2010 CPL has primarily shaped the current configuration of Vietnamese law on standard terms in consumer contracts. It has introduced the regime for controlling not only the actual ways in which standard terms are communicated between parties but also the contents of several kinds of onerous terms, and has empowered a specific state authority – the VCA – to ensure that businesses conform with such requirements. The mere fact that from the time when the CPL entered into effect until the end of 2016 almost 2,500 standard form contracts were submitted to the VCA in order to be reviewed before being circulated on the market signals its major contribution to creating a more favourable contracting environment for consumers. Nevertheless, the attempt to create a feasible framework which can maintain the advantages of standard form contracts in rationalising the contracting process while controlling their overreaching effects to the detriment of consumers is far from being a success. The lack of a fair mechanism to carry out an administrative review and the pointillism approach of substantive rules have meant that the CPL cannot escape from criticisms from both businesses and consumers. For business communities, the tendency to expand the pre-approval mechanism to different kinds of standard form contracts is viewed with a sceptical eye since it is an U-turn in the economic policy of cutting down on red tape.³²⁰ For advocates of a consumer's right to fair standard terms, the current regime is ineffective since – by primarily employing procedure-based schemes rather than substance-based schemes – it fails to truly address the inherent problems of standard form contracts and the real image of consumers.

The current controlling regime for standard terms in the CPL has been shaped by the characteristics of the transformation of the Vietnamese economy and the law during the last 30 years. In a nutshell, it is a product of an uneasy combination of (i) the movement of contract law from the ideology of the state's control over contracts during the planned economy to the paradigm of freedom of contract in a free market economy

approval to the Standard Contracts Tribunal. Under such a voluntary pre-approval mechanism, suppliers may apply to the Tribunal to have their contracts approved in order to immunize these contracts from a judicial review for a period of five years. Standard Contracts Law, 5743-1982, 37 LSI 6 (1982–83). This law replaced the previous Israeli Standard Contract Law of 1964. An English version of the Standard Contracts Law 5743-1982 is available at <http://financeisrael.mof.gov.il/FinanceIsrael/Docs/En/legislation/Others/5743-1982_Standard_Contracts_Law.pdf> [accessed 15 May 2017]. For commentaries, see Sinai Deutch, 'Consumer Contracts Law as a Special Branch of Contract Law-The Israeli Model' (2012) 29(3) *Touro L. Rev.* 695; Sinai Deutch, 'Control of Unfair Terms in Consumer Contracts in Israel: Law and Practice', (1990) 13(2) *Journal of Consumer Policy* 181, 188; Gabriela Shalev, 'Standard Contracts under Israeli Law' (1990) 10 *Tel Aviv U. Stud. L.* 229; Sinai Deutch, 'Controlling Standard Contracts – The Israeli Version' (1984) 30 *McGill LJ* 458; Kenneth Frederick Berg, 'The Israeli Standard Contracts Law 1964: Judicial Controls of Standard Form Contracts' (1979) 28(4) *International and Comparative Law Quarterly* 560.

According to Shmuel I. Becher, the Israeli approach is unique and has not yet been used by other countries, and, based on the Israeli experience, he has proposed a superior legal regime whereby sellers can obtain certification for a standard form contract from an independent third party, see Shmuel I. Becher, 'A 'Fair Contracts' Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law' (2009) 42 *University of Michigan Journal of Law Reform* 747, 751.

320 Procedure-based schemes are here mainly understood as the legal techniques deployed to make standard terms available, readable and thus comprehensive to consumers. In this sense, they are different from substance-based schemes which directly target the unfair substantive effects of standard terms.

and (ii) the movement of consumer law towards a contract law-oriented approach. The first movement marked by the promulgation of the 1995 Civil Code signifies that it is not the state but private parties who have the right and authority to freely and voluntarily specify their own distinctive sets of rules to administer their contractual relationship. According to this classical view of contracts,³²¹ once parties who have equal bargaining powers have freely entered into an agreement, it is not the function of contract law to warrant that a fair bargain has been achieved. The second movement marked by the introduction of the 2010 CPL denotes the ‘detour’ of state interference for protecting consumers as weaker parties from being subject to onerous standard form contracts dictated by businesses. Although the risks of standard terms in consumer contracts may warrant statutory control, the dominant force of the first movement in the Vietnamese literature meant that state interference had to be cautiously designed to avoid reverting to excessive paternalism in contract law. To this end, the information-based techniques – the least intrusive form of regulation – have been advocated as the main strategy to deal with the problems of standard terms in consumer contracts. These techniques include (i) the duty to bring the terms to the attention of consumers and (ii) the duty to draft standard terms transparently. Additionally, the CPL follows a pointillism approach in prohibiting several kinds of standard terms that are extremely onerous to the detriment of consumers.

As a compromise between the advocates of a free market and those who champion consumers’ rights, the existing regime fails to respond to a number of problems arising from standard form consumer contracts. On the one hand, although the information paradigm seems attractive to those who glorify the paradigm of freedom of contract, it is less likely that such a paradigm is capable of assisting consumers in making their wise choice to refrain from adhering to onerous standard terms. In contrast, businesses may exploit consumers by offering seductive terms to take advantage of consumers’ cognitive biases. On the other hand, given the fact that onerous standard terms in consumer contracts are the result of a failure by the market to control standard form contracts, a pointillism approach to addressing individual kinds of problematic terms is incapable of addressing the inherent problems in a comprehensive way. As a matter of fact, during the implementation of the CPL, it was seen that various potential unfair terms are not covered by the blacklist under Article 16 of the CPL. It thus begs a systematic solution to address the systematic problems of standard terms.

Furthermore, with the ambition of bringing the control regime into action, the legislators have empowered the VCA to pre-approve several kinds of standard form contracts before allowing them to be used in the market. Apparently, although the pre-approval mechanism is not unreasonable in several monopolized sectors, the tendency to extend the pre-approval mechanism to standard form contracts that are used in competitive market sectors is questionable. In order to perform the pre-review function in an appropriate fashion, a high level of expertise corresponding to different market sectors is an essential prerequisite. Furthermore, as far as the institutional design is

321 As mentioned above, this principle of freedom of contract marked by the promulgation of the 1995 Civil Code is perfectly in line with the ‘classical’ notion of contract law in Western society in the 19th century.

concerned, the transparent procedural rules to be applied in the process of reviewing the standard terms are important to ensure that businesses have sufficient rights to have access to justice. Unfortunately, both requirements are lacking in the current administrative review regime.

Against the shortcomings of the current regime of controlling standard terms in consumer contracts, it is time to search for a more feasible framework which must be able to combine the twin aims of accepting standardized contracting realities and inspiring fair contract practices.

Chapter 4

CONTROL OF STANDARD TERMS IN CONSUMER CONTRACTS IN EUROPEAN LAW

The purpose of this chapter is to analyse the current status of the rules on standard terms in consumer contracts in European contract law, which comes in two forms: hard law comprising regulations and directives – the *acquis communautaire*, and soft law in the form of the *acquis commun* which has been intensely developed through a number of initiatives by European comparative law scholars. Of particular importance among the existing *acquis communautaire* is Directive 93/13/EEC which sets out a minimum standard for controlling unfair terms in every kind of consumer contract in the different legal systems of the Member States. The endless flow of references concerning this Directive by national courts to the CJEU has provided opportunities for the Court to significantly clarify the aims, objectives and major contents of the Directive. Furthermore, soft law including the PECL, the ACQP and the DCFR, and even the proposal for a regulation on an optional Common European Sales Law (CESL) that was withdrawn in 2014, are valuable sources for understanding how the EU contract law on standard terms has been developed. Accordingly, this chapter shall scrutinize the standards for policing the unfairness of standard contract terms in Directive 93/13/EEC and the PECL, ACQP, DCFR and CESL.

This chapter consists of six sections. The first section will be devoted to providing an overview of the legislative control on unfair terms in EU law. The second section will focus on a conceptual analysis of the legislative scope of the control on unfair terms. The main discussion concerning the legal techniques deployed by European law to control standard terms shall be presented in Sections 3 and 4 which will analyse the principles of transparency and fairness respectively. Section 5 will then investigate the enforcement mechanisms, while the last section will provide some concluding remarks.

1. OVERVIEW OF THE LEGISLATIVE CONTROL OF UNFAIR TERMS IN THE EU

1.1. Rise of Standard Contract Terms and Three Waves of Legislation by the EU countries

Although the use of standard contract terms is not a totally modern phenomenon in Europe, their omnipresence has only been witnessed since the 19th century.¹ Throughout the course of the 20th century, most legal systems in Europe responded to these problems by promulgating legislation in which various means of controlling standard contract terms were prescribed.² In a well-known report submitted to the European Commission in 1987, Professor Ewoud Hondius attempted to categorize the legislation before the 1990s into three legislative waves.³

The first legislative wave starting in the 1930s was represented by the Italian Civil Code, which contained three provisions concentrating on incorporation and interpretation issues of standard contract terms.⁴ The main characteristic of this legislation was its focus on individual contracts rather than the use of standard contract terms in general.⁵

In contrast, the second wave of legislation, which started in Israel in the 1960s⁶ and arrived in Europe in the early 1970s,⁷ was purported to deal with standard contract terms as a marketing practice.⁸ As a consequence, legislation with a new set of remedies and enforcement mechanisms was developed aiming at improving the quality and fairness of standard contract terms.⁹

The third wave of legislation was seen in the mid-1970s when the two previous approaches were combined or at least co-existed. As a matter of fact, before the introduction of Directive 93/13/EEC, most of the national legislation on unfair terms by EC member states which belongs to the third legislative wave¹⁰ created mechanisms

1 Friedrich Kessler, 'Contracts of Adhesion--Some Thoughts About Freedom of Contract' (1943) 43 *Colum. L. Rev.* 629.

2 For the legal treatment of standard conditions in different legal system in Europe before the introduction of the 1993 Directive on Unfair Terms in Consumer Contracts, see more in K.H. Neumayer, 'Contracting Subject to Standard Terms and Condition', *International Encyclopedia of Comparative Law: Contracts in General* (1975).

3 Ewoud Hondius, *Unfair Terms in Consumer Contracts* (Molengraaff Instituut voor Privaatrecht, 1987) 223.

4 For a detailed analysis of Articles 1341, 1342 and 1370 of the Italian Civil Code, see Paolisa Nebbia, *Unfair Contract Terms in European law: A Study in Comparative and EC law* (Bloomsbury Publishing, 2007) 30-34.

5 Ewoud Hondius, *Unfair Terms in Consumer Contracts* (Molengraaff Instituut voor Privaatrecht, 1987) 223.

6 For an overview of the Israeli Standard Contracts Law 1964, see Kenneth Frederick Berg, 'The Israeli Standard Contracts Law 1964: Judicial Controls of Standard Form Contracts' (1979) 28(4) *International and Comparative Law Quarterly* 560.

7 Sweden is hailed as a pioneer of the second wave, see Ewoud Hondius, *Unfair Terms in Consumer Contracts* (Molengraaff Instituut voor Privaatrecht, 1987) 223.

8 For an analysis of the Swedish experiment in administrative control, see Ulf Bernitz, *Consumer Protection and Standard Contracts* (Almqvist & Wiksell, 1973).

9 Ewoud Hondius, *Unfair Terms in Consumer Contracts* (Molengraaff Instituut voor Privaatrecht, 1987), 5.

10 Notably, Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz) in Germany (19.12.1976), Unfair Contract Terms Act 1977 in the United Kingdom, Loi sur la protection et l'information des consommateurs des produits et des services (loi Scrivener), no 78-23, 10 January 1978 in France.

aiming at both individual conflicts and the use of general contract terms in a large number of contracts.¹¹

The differences among these three legislative waves are significant since they reflect ‘a change of outlook’ rather than a change of techniques.¹² Apparently, while the first wave of legislation only attempted to restore party autonomy, the law in the second and third wave of legislation sought to find an equitable result.¹³

1.2. Adoption of Directive 93/13/EEC and the Fourth Wave of Legislation on Unfair Terms

The first European-wide effort to address the problems of standard contract terms can be traced back to the 1970s¹⁴ when the consumer policy programmes of the EC provided a common base for adopting measures aimed at ensuring that purchasers of goods and services were protected against unfair standard contracts.¹⁵ In 1984, the EC Commission published a consultation paper in which it suggested two possibilities for action to address unfair terms.¹⁶ The first option was the enactment of a directive on unfair terms, which would include a general definition alongside a blacklist of terms which would be prohibited throughout the Community. The second one was collective negotiation between trade associations and consumer associations which would be conducted under the supervision of a government agency.¹⁷ Finally, the first proposal for a *Directive on Unfair Terms in Consumer Contracts* was submitted by the Commission on 24 September 1990. It provoked lengthy debates in the European Parliament and in the Council, and resulted in a new proposal presented by the Commission on 5 March 1992.¹⁸ On 5 April 1993, Directive 93/13/EEC on Unfair Terms in Consumer Contracts (‘Directive 93/13/EEC’)¹⁹ was finally adopted, which was later characterized by the EC Commission as ‘a milestone in consumer policy.’²⁰

Although, in 2008, the European Commission proposed a Directive on Consumer Rights²¹ of which Chapter V on ‘Consumer rights concerning contract terms’ was

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- 11 Ewoud Hondius, *Unfair Terms in Consumer Contracts* (Molengraaff Instituut voor Privaatrecht, 1987), 5.
 12 Ewoud Hondius, ‘Unfair Terms in Consumer Contracts: Towards a European Directive’ (1988) 3 *European Consumer Law Journal* 180.
 13 Ewoud Hondius, *Unfair Terms in Consumer Contracts* (Molengraaff Instituut voor Privaatrecht, 1987), 230.
 14 Paolisa Nebbia argued that the adoption of legislation, which reflected the different regulatory frameworks of unfair contract terms in the Member States, had delayed a sufficient consensus being reached at the European level so that a concrete proposal could not be produced until 1990, see Paolisa Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law* (Bloomsbury Publishing, 2007) 4-7.
 15 Council Resolution of 14 April 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy OJ C 92/1, para 19.
 16 COM (1984) 55, 9 February 1984.
 17 Ibid.
 18 See more in Leone Niglia, *The Transformation of Contract in Europe* (Kluwer Law International, 2003) 119-42.
 19 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ 1993, L95/29.
 20 Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts COM (2000) 248.
 21 Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, Brussels, 8.10.2008, COM (2008) 614 final.

intended to reform the provisions of Directive 93/13/EEC,²² the final text of the Consumer Rights Directive adopted in 2011 did not contain any provisions on unfair terms.²³ As will be discussed below, another attempt to introduce a second regime for unfair terms was suggested with the introduction of Chapter 8 of the proposed Common European Sales Law, but the proposal was later withdrawn by the European Commission.²⁴ As a result, Directive 1993/13/EEC continues to provide the legal framework which regulates unfair terms in consumer contracts in the market inhabited by more than 500 million consumers.

The adoption of Directive 93/13/EEC is based on Article 95(3) ECT (now Article 114 TFEU) in order to facilitate the establishment of the internal market and ease the divergences in national regulations on unfair contract terms among the Member States.²⁵ Directive 93/13/EEC was intended to ‘drive a wedge’²⁶ into national contract law by providing that a number of particular terms in consumer contract law should be invalid under European law, even when they were valid and effective under applicable national law. In so doing, Directive 93/13/EEC was aimed at harmonizing the national laws of the member states to reduce cross-border barriers to trade in the internal market.²⁷ Indeed, the Preamble to Directive 93/13/EEC expressly indicated that creating minimum legal rights that consumers can enjoy throughout the territory of the EC would promote confidence in the viability of the internal market. The harmonization of the regulations on unfair terms, therefore, ensures that consumers have a minimum level of protection and encourages cross-border transactions.

Additionally, the Preamble to the Directive also puts forward other justifications concerning consumer protection to support the Directive. More in particular, Recital 6 mentions the safeguarding of the citizen in his role as a consumer, while Recital 14 requires member states to ensure that unfair terms are not included in consumer contracts. Explicitly referring to the Consumer Protection Programmes of 1975 and 1981, Recital 9 reveals the purpose of consumer protection enshrined by the Directive:

22 COM (2008) 614 final. Of particular note are three issues: firstly, the proposal intended to transform Directive 1993/13/EEC into a measure of maximum harmonisation. Secondly, the proposal contained two lists, a blacklist of terms that are always unfair, and a grey list of terms which are deemed unfair unless the trader proves otherwise. Finally, the Proposal contains stricter transparency obligations. See more in Jules Stuyck, ‘Unfair Terms’ in Geraint G. Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier European Law Publ., 2009) 115-144.

23 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, OJ L 304/64.

24 COM (2011) 635 final.

25 Article 1 of the Directive clearly provides 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.

26 Hugh Collins, ‘The Directive on Unfair Contract Terms: Implementation Effectiveness and Harmonization’ in Hugh Collins (ed.), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Volume 15, Kluwer Law International, 2008) 2.

27 C. Joerges, ‘The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines: An Analysis of the Directive on Unfair Terms in Consumer Contracts’ (1995) 3 *European Review of Private Law* 175.

‘[A]cquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.’

The significance of the Directive is that it is the first important piece of EU legislation that goes to the heart of contract law²⁸ in order to directly address one of its most essential issues – the balance between respecting the freedom of the parties to choose the terms of their transaction and controlling unfair terms that are inserted into contracts by stronger parties.²⁹ As compared to the three previous approaches towards controlling unfair contract terms, the Directive has provided a unique combination of substantive rules on the fairness of contractual terms and procedural rules on eliminating unfair terms from the market.³⁰ Given the length of time in drafting Directive 93/13/EEC, it has been argued that the originally innovative force of the Directive has turned into a ‘disturbing’ element for national legislators.³¹ This argument, however, seems to underestimate the value of Directive 93/13/EEC. Not only is Directive 93/13/EEC particularly important in the case of the new Member States to the European Union since implementing Directive 93/13/EEC has led to the introduction of a new regime to control unfair terms,³² but it is also significant for those Member States which had already adopted their own legislation on unfair terms, since the implementation of the Directive has provided them with an opportunity to reconsider their legislation.³³ Suffice it to say that Directive 93/13/EEC may be regarded as a starting point for the fourth wave of legislation on unfair (standard) terms in Europe.³⁴

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- 28 Ewoud Hondius, ‘The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States’ (1995) 3(2) *European Review of Private Law* 241, 242.
- 29 Hugh Collins, ‘The Directive on Unfair Contract Terms: Implementation Effectiveness and Harmonization’ in Hugh Collins (ed.), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Volume 15, Kluwer Law International, 2008) 2.
- 30 Hans-W. Micklitz, ‘Reforming European Unfair Terms Legislation in Consumer Contracts’ (2010) 6(4) *European Review of Contract Law* 347, 348.
- 31 Paolisa Nebbia, ‘Unfair Contract Terms’ in Christian Twigg-Flesner (ed.), *The Cambridge Companion to European Private Law* (Cambridge University Press, 2010) 216, 217.
- 32 Marija Karanikic, Hans-Wolfgang Micklitz and Norbert Reich (eds), *Modernising Consumer Law: The Experience of the Western Balkans* (Nomos, 2012).
- 33 Meryll Dean, ‘Unfair Contract Terms: The European Approach’ (1993) 56(4) *The Modern Law Review* 581; Giorgio de Nova, ‘Italian Contract Law and the European Directive on Unfair Terms in Consumer Contracts’ (1995) 3.2 *European Review of Private Law* 221; Willibald Posch, ‘The implementation of the EC Directive on Unfair Contract Terms into Austrian Law’ (1997) 5.2 *European Review of Private Law* 135; Thomas Wilhelmsson, ‘The implementation of the EC directive on unfair contract terms in Finland’ (1997) 5(2) *European Review of Private Law* 151; Norbert Reich, ‘The implementation of Directive 93/13/EEC on unfair terms in consumer contracts in Germany’ (1997) 5(2) *European Review of Private Law* 165; U. Bernitz, ‘Swedish Standard Contracts Law and the EEC Directive on Contract Terms’ (1997) 5 *European Review of Private Law* 213.
- 34 See the impact of the directive on unfair terms on the laws of the Member States in *European Review of Private Law* 3.2 (1995); *European Review of Private Law* 5.2 (1997); *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts COM (2000) 248 final*; Hugh Collins (ed.), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Volume 15, Kluwer Law International, 2008.)

1.3. Directive 93/13/EEC and the Legislative Control of Unfair Terms

1.3.1. Overview of the Directive

Directive 93/13/EEC deals with unfair terms in consumer contracts. Accordingly, its scope of application is limited to contracts between a consumer and a seller or supplier of goods or services, and its ultimate goal is to require Member States to strike down any unfair terms used in these contracts. To that end, the Directive has a direct impact on the substance of contracts by providing a legal standard for controlling the fairness of terms in consumer contracts as well as requiring Member States to establish adequate and effective means to carry out these controls.

Scope of control: Not all terms in consumer contracts will be subject to scrutiny for unfairness. According to Article 3, the scope of the Directive is limited to controlling non-negotiated contract terms rather than all kinds of terms in consumer contracts. Furthermore, the subject matter as well as the price and remuneration are exempted from legislative control provided that they are drafted in plain and intelligible language. Nonetheless, the Directive does provide that an examination of the core and price terms may be relevant for determining the fairness of other contract terms.

The Principle of Fairness: The standards for assessing the unfairness of terms are provided in Articles 3 and 4 of the Directive. Article 3 defines the general clause, which is further clarified by an indicative list of terms that are considered to be unfair in the Annex to the Directive. Article 4 lists the factors to be taken into account in order to ascertain whether a term is unfair.

Lying at the heart of the Directive is Article 3(1) which generally defines the standard of fairness: *'A contractual term which has not been individually negotiated, 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.'* The test of fairness, therefore, consists of two cumulative elements: (i) 'a significant imbalance in the parties' rights and obligations to the detriment of the consumer;' (ii) 'contrary to the requirement of good faith.'

Although the greatest advantage of general clauses is their flexibility, which helps them to adapt to changes in society, at the same time the law needs to be certain so that any general clause needs to be crystallized by case law or other supplementary means. Hence, an important list of examples of unfair clauses is attached as an Annex to the Directive. According to Article 3(3) of the Directive, the Annex contains an indicative and non-exhaustive list of terms which may be regarded as unfair. Thus, a contractual term corresponding to the Annex is not automatically unfair.

As far as the legal consequences of unfair terms are concerned, the Directive provides that any unfair terms shall not bind the consumer, while leaving the rest of the contract valid, providing that it is capable of continuing in existence without the unfair terms (Article 6).

The Principle of Transparency: Apart from the fairness test, the Directive also consists of the transparency principle which reflects the strong emphasis of EU consumer policy on the information paradigm. This is comprehensively expressed in

Article 5 of the Directive: *'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.'*

Preventive control: One of the very innovative solutions of the Directive expressed in Article 7 requires the existence of adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.³⁵ It further provides that such means 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'.

In implementing such requirement, the Member States have introduced 'preventative control' through empowering an administrative agency or consumer organizations to challenge unfair terms. By way of illustration, the Office of Fair Trading (OFT) in the UK has been given the competence to apply for an injunction against any persons apparently using unfair terms drawn up for general use in consumer contracts. Since the OFT adopted its preventive powers, much progress has been made in the eradication of unfair terms.³⁶

1.3.2. Transposition of the Directive in the Member States

The Directive is merely 'minimum harmonisation' and, by virtue of Article 8, Member States were allowed to adopt or retain more stringent provisions to ensure a maximum degree of protection for consumers. Five years after the deadline for its transposition,³⁷ in 1999 the Commission published a Report on the Implementation of the Directive in the laws of the Member States.³⁸ The Report not only highlighted the various repercussions which the Directive had had for consumers and the business community, the legislation of the Member States, national jurisprudence,³⁹ and legal doctrine but

35 Hans-Wolfgang Micklitz, 'Unfair Terms in Consumer Contracts' in N. Reich, H.W. Micklitz, P. Rott and K. Tonner, *European Consumer Law* (Intersentia Publishing Ltd, 2014) 125, 159.

36 John Vickers, 'Contracts and European Consumer Law: an OFT Perspective' in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Hart Publishing, 2006) 171, 17.

37 Article 9 of the Directive provides that 'The Commission shall present a report to the European Parliament and to the Council concerning the application of this Directive five years at the latest after the date in Article 10(1)'.

38 COM (2000) 248: Report from the Commission on The Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

39 Of particular significance is the Commission's initiative to develop CLAB (a European database on unfair terms in consumer contracts) as an instrument for monitoring the practical enforcement of the Directive in the form of a database on 'national jurisprudence' governing unfair terms. It includes not only jurisprudence under specific national laws pertaining to unfair terms but also all jurisprudence which, although based on other provisions or general legal principles (good faith, equity, abuse of rights, etc.), has an unfair terms

also raised a number of questions with a view to improving the existing situation.⁴⁰ Subsequently, in 2008, an international research group, on behalf of the European Commission, published the EU Consumer Law Acquis Database.⁴¹ It provides access to information on eight consumer law directives (including the Unfair Contract Terms Directive), their transposition into the laws of 27 EU Member States, including case law,⁴² a bibliography and a comparative study. Due to the fact that many of the Directives covered were to be repealed and replaced by the Consumer Rights Directive 2011/83/EU, the Database stopped updating new information in March 2012. Consequently, up to now the EC Consumer Law Compendium's database seems to be the most updated and comprehensive report on how the Unfair Terms Directive was transposed into the laws of the Member States.

For the purpose of this dissertation, here it suffices to emphasize a number of findings of the Comparative Study as to how the Unfair Terms Directive has been transposed into the laws of the Member States.⁴³

First, a number of Member States have extended the scope of application of their national laws on reviewing contract terms by extending the notion of consumers;⁴⁴ on reviewing contractual terms reflecting mandatory provisions;⁴⁵ on monitoring individually negotiated terms;⁴⁶ or on reviewing the subject matter of the contract and the adequacy of prices.⁴⁷

Secondly, whereas, according to the Directive, unfairness only exists if a term causes an imbalance and this imbalance is furthermore contrary to the principle of good faith, many states have made a direct reference to a 'significant imbalance' without mentioning the additional criterion of 'good faith'.⁴⁸

Thirdly, many Member States have blacklisted Annex No. 1 of the Directive and have therefore provided a higher level of consumer protection.⁴⁹ Moreover, the blacklist

dimension. The uniqueness of this initiative lies in the fact that 'the Commission has decided not only to monitor systematically national case law on the application of a European Directive but also to make the information directly available to the public at the same time.' H-W. Micklitz and M. Radeideh, 'CLAB Europa – The European Database on Unfair Terms in Consumer Contracts' (2005) 28 *Journal of Consumer Policy* 325.

40 COM (2000) 248: Report from the Commission on The Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

41 EUROPA – EU Consumer Law Acquis <<http://www.eu-consumer-law.org/>> [accessed 15 May 2017].

42 As far as the Directive on Unfair Terms is concerned, the CLAB database was superseded by the EU Consumer Law Acquis Database.

43 Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier European Law Publishers, 2008).

44 For example, in Austria, Belgium, the Czech Republic, Denmark, France, Greece, Hungary and Slovakia legal persons are treated as consumers, provided that the purchase is for private use, see *ibid.*, 379.

45 Austria, Belgium, Bulgaria, Denmark, Finland, France, Greece, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Slovenia and Sweden have decided not to transpose Art. 1(2) of Directive 93/13, *ibid.*, 383.

46 This is the case in the Nordic countries (Denmark, Finland, Sweden) and also in Belgium, the Czech Republic, France, Latvia, Luxembourg, Malta and Slovenia, *ibid.*, 383.

47 This is also the case in the Nordic countries (Denmark, Finland, Sweden).

48 Seven states do not mention the additional criterion of 'good faith': Belgium, Denmark, France, Greece, Lithuania, Luxembourg and Slovakia. This legislative technique tends to result in a lowering of the burden of proof for consumers, *ibid.*, 393.

49 In Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Greece, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovenia and Spain the clauses in the Annex – insofar as they have been transposed – are always

in some Member States such as Belgium, Estonia, Malta, Portugal and Spain contains more clauses than the Annex to Directive 93/13.

Fourthly, in Article 7(2) the Directive largely leaves the Member States with the choice of collective proceedings which must be put in place in order to prevent the continued use of unfair terms. The Member States have chosen different enforcement mechanisms based on administrative measures, collective court proceedings and criminal proceedings.⁵⁰ Some member states provide for a Standard Terms Register, whose aim is to increase the protection of consumers by publicising standard terms and judgments on unfair terms which have an effect as far as notaries, registrars and judges are concerned.⁵¹

1.3.3. Role of the CJEU in the Interpretation of the Directive

In tandem with the role of EU legislators in formulating the legislative control of unfair terms in the 1993 Directive, the Court of Justice of the European Union has played an increasingly significant role in the development of the European rules on unfair terms.⁵² Given the minimum harmonization character of the UCTD as well as the open-ended and flexible nature of the terms used therein, the meaning of the legislative control on unfair terms in the EU cannot be truly grasped without the case law of the CJEU. Since the first landmark case of *Océano Group*,⁵³ over the years the national courts, by means of preliminary reference proceedings, have referred a total of more than 40 cases to the European Court, while the Commission has brought four infringement actions against Member States. They have provided the CJEU with opportunities to clarify significantly the meaning of the provisions of the UCTD.⁵⁴

Legal basis: Constitutionally, the CJEU's interpretation of the UCTD may take place in both an indirect and a direct context. Indirectly, according to Articles 258-60 TFEU, the CJEU has the task of deciding whether or not a Member State has correctly transposed EU Directives into national law. Under infringement proceedings, while the role of the CJEU is to issue sanctions against an incorrect implementation of Directives, in doing so the CJEU must usually engage in interpreting the words, phrases and concepts of the Directive in question.⁵⁵ Directly and more importantly, the CJEU

regarded as unfair (a blacklist). Germany, Hungary, Italy, the Netherlands and Portugal, in contrast, have opted for a combination of both blacklists and grey lists, *ibid.*, 396.

50 *Ibid.*, 423-28.

51 For example, Poland, Portugal and Spain, *ibid.*, 370.

52 For the influences of ECJ case law on the development of European private law, see Verica Trstenjak, 'The "Instruments" for Implementing European Private Law – The Influence of the ECJ Case Law on the Development and Formation of European Private Law' in Luigi Moccia, *The Making of European Private Law: Why, How, What, Who*, (Sellier, 2013) 77; Hans-Wolfgang Micklitz and Betül Kas, 'Overview of cases before the CJEU on European Consumer Contract Law (2008-2013) – Part II' (2014) 10(2) *European Review of Contract Law* 189.

53 Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941.

54 Hans-W. Micklitz, and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) *Common market law review* 771.

55 See Case C-144/99 *Commission v The Netherlands* [2001] ECR I-3541; Case C-372/99 *Commission v Italy* [2002] ECR I-819; Case C-478/99 *Commission v Sweden* [2002] ECR I-4147; Case C-70/30 *Commission v Spain* [2004] ECR I-7999.

has jurisdiction to interpret Directives upon the request of a national court under the preliminary reference proceedings established by a mechanism under Article 267(b) TFEU. Accordingly, any court or tribunal of a Member State may refer a question on the interpretation of the Directive to the CJEU if it considers that a decision on this question is necessary to enable it to deliver a judgement.

Interpretation v. application: Within the framework of Article 267 TFEU, the CJEU's role has been limited to providing an interpretation of the general criteria of the relevant provisions of the EU institutions' acts, including Directives. The Court has no jurisdiction with regard to the application of the national law implementing the Directive to the facts of a particular case. Although a crucial distinction between interpretation and application is often difficult to make, the CJEU has attempted to shed light on the dual level of dialogue between the CJEU and the national courts on this matter.

In the *Océano Grupo* case, the CJEU held that an exclusive jurisdiction clause conferring jurisdiction on the court for the district in which the company has its principal place of business 'satisfies all the criteria enabling it to be classed as unfair for the purposes of the Directive'.⁵⁶ With the reasons given by the Court in *Océano*, it was argued that the CJEU was in fact taking a remarkable step towards the construction of a harmonized European notion of unfairness.⁵⁷ The CJEU, therefore, is expected to have full control over and to provide a direct assessment of the unfairness of any controversial clauses referred to it.

In *Freiburger Kommunalbauten*,⁵⁸ contrary to this expectation, the CJEU did not choose to follow the approach in the *Océano* case. The difference in its approach as compared to *Océano* was due to the fact, as the Court explained, that the jurisdiction clause in *Océano* was solely for the benefit of the seller and contained no benefit in return for the consumer.⁵⁹ It was thus possible to conclude that the term was unfair without having to consider all the circumstances in which the contract had been concluded and without having to assess the advantages and disadvantages that the consumer would have under the national law which was applicable to the contract.⁶⁰ Hence, it seems that the fact that the specific contractual term at issue in *Océano* was an exclusive jurisdiction clause played a substantial role in justifying the willingness of the CJEU to qualify such a clause as unfair.⁶¹ Nevertheless, in other cases in which it is not obvious that the clause is solely for the benefit of the seller, the actual unfairness of a disputed clause should be assessed having regard to the specific balance struck by the contract.

Following the Opinion of Advocate General Geelhoed, the Court then explained that, in the context of its jurisdiction under Article 267 TFEU, 'the Court may interpret

56 Joined Cases C-240/98 to C-244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941, para. 21.

57 M. Hesselink, 'Case Note' (2006) 2 *European Review of Contract Law* 366.

58 Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Hofstetter* [2004] ECR I-3403.

59 *Ibid.*, para. 23.

60 *Ibid.*

61 In Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Györfi* [2009] ECR I-4713, the Court also held that a similar jurisdiction clause may be considered to be unfair.

general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question'.⁶² It was for the national court to decide whether a contractual term such as the one at issue in the main proceedings was unfair in the light of the particular circumstances of the case.⁶³

Therefore, within this framework, it should be necessary to distinguish between terms that cannot be held to be unfair without reference to the specific circumstances of the case, including the effects that the clause would have under national law, and other clauses which should be held unfair in an abstract way without considering the specific circumstances of the case. In the latter case, the unfairness of the terms could be directly assessed by the CJEU, whereas in the former it is for the national courts to assess the actual unfairness of the terms. However, the possible consequence of *Freiburger Kommunalbauten* is that the Directive could have different meanings in different Member States and hence the same category of terms could be deemed unfair in one legal system, but not in another.⁶⁴

In *VB Pénzügyi Lizing* a similar question was also raised by a Hungarian court concerning the role of the Court of Justice in guaranteeing the uniform application in all the Member States of the level of protection of consumers' rights as laid down by the UCTD.⁶⁵ Referring to its reasoning in *Pannon GSM*,⁶⁶ the CJEU explicitly explained that, according to Article 267 TFEU, the jurisdiction of the Court of Justice extended to the interpretation of the concept of an 'unfair term' as used in Art. 3(1) and the Annex and to the criteria which the national court may or must apply when examining a contractual term in the light of the Directive.⁶⁷ Accordingly, in *VB Pénzügyi Lizing* the Court strongly confirmed a strict division of competences between it and national courts in relation to the review of unfair terms. While the actual application of the fairness test is left to the national courts, the CJEU is competent to provide interpretations of the criteria of unfairness laid down in the Directive.⁶⁸ Indeed, it confirmed the opinion of Advocate General Trstenjak that the task of the CJEU is gradually to give 'specific expression to the abstract criteria for reviewing whether a term may be classified as unfair and, with increasing experience, to establish a profile for reviewing the unfairness of terms at the level of Community law.'⁶⁹

62 Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG*, [2004] ECR I-3403, para. 22.

63 In *Mastaza Claro*, the CJEU reiterated that it was for the national court alone to decide whether a term was unfair under the Directive. Case C-168/05 *Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421, paras 22-23.

64 See M. Hesselink, 'Case Note' (2006) 2 *European Review of Contract Law* 366, 373-75; Michael Schillig, 'Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice's Jurisprudence on Directive 93/13 on Unfair Contract Terms' (2008) 33 *European Law Review* 336, 354-355.

65 Case C-137/08 *VB Pénzügyi Lizing Zrt v Ferenc Schneider* [2009] ECR I-5347.

66 Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Györfi* [2009] ECR I-4713.

67 *Ibid.*, paras 39-43.

68 Wulf-Henning Roth, 'Case C-137/08 *VB Pénzügyi Lizing Zrt. v Ferenc Schneider*' 2011 7(3) *European Review of Contract Law* 437.

69 Para. 99.

To sum up, in the light of the case law discussed above, *VB Pénzügyi Lizing* has marked a ‘middle of the road’ approach by the CJEU to the question of whether and to what extent the CJEU controls the actual fairness of terms. On the one hand, it is clear that the *VB Pénzügyi Lizing* ruling displays a more activist role by the Court in comparison to the original restrictive approach in *Freiburger Kommunalbauten*. However, differing from the *Océano* case, the CJEU was explicit on the point that it is not within its competence to determine that a particular term is actually unfair. The Court clearly confirmed its role as the final interpreter of the provisions of the Directive⁷⁰ and thus it provided valuable guidance to be taken into account by the national courts when assessing the unfairness of a particular term.

1.4. PECL, ACQP, DCFR, CESL and their Legislative Control of Unfair Terms

1.4.1. Introduction to the PECL, ACQP, DCFR and CESL

Apart from its own merits, Directive 93/13/EEC is not free from criticism as it raises concerns over the appropriateness of its scope of control, the legislative techniques and the legitimacy of legislative interventions.⁷¹ In this connection, soft law has a role to play in assisting in the improvement of the existing *acquis communautaire*⁷² as it can be applicable in various ways as a toolbox for legislators or guidelines for judges. Of particular relevance are the Principles of European Contract Law (PECL)⁷³ and the Draft Common Frame of Reference (DCFR),⁷⁴ both of which contain rules on controlling unfair terms corresponding to those prescribed under the Directive.

To enable the development of a single-market economy, even before the European Commission initiated its activities in the area of European contract law,⁷⁵ several groups of scholars had engaged in a number of ‘non-governmental’ unification projects

70 In *Pohotovost*, the CJEU further made it clear that ‘the Court may interpret general criteria used by the European Union legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question ...’ See para. 60.

71 Hans-W Micklitz, ‘Reforming European Unfair Terms Legislation in Consumer Contracts’ (2010) 6(4) *European Review of Contract Law* 347, 348; Michael Schillig, ‘Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice’s Jurisprudence on Directive 93/13 on Unfair Contract Terms’ (2008) 33 *European Law Review* 336; Michael G. Faure and Hanneke A. Luth, ‘Behavioural Economics in Unfair Contract Terms’ (2011) 34(3) *Journal of Consumer Policy* 337.

72 Nils Jansen argued that ‘there is a new European law emerging from two processes. It is a matter of standpoint whether the Europeanisation of private law is seen primarily as the introduction of a new – pointillist, though formally binding – supra-national system of private law (*acquis communautaire*), or whether it is rather understood as an informal reconstructive continuation of the former private-law discourses of the European *ius commune (acquis commun)*’, see ‘Legal Pluralism in Europe-National Laws, European Legislation, and Non-Legislative Codifications’ in Leone Niglia, *Pluralism and European Private Law* (Hart Publishing, 2013) 109.

73 Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II Combined and Revised* (Kluwer Law International, 2000); Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (eds), *Principles of European Contract Law, Part III*, (Kluwer Law International, 2003).

74 Christian von Bar et al. (eds), *Principles Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (Outline Edition, Sellier European Law Publishers, 2008).

75 Commission Communication on European Contract Law COM (2001) 398.

seeking to elucidate materials for the better integration of European law.⁷⁶ The pioneer was the project on the Principles of European Contract Law (PECL) conducted by the Commission on European Contract Law from 1980 to 2003 under the leadership of Professor Ole Lando – the ‘Lando Commission’.⁷⁷ In a broad sense, the Principles of European Contract Law are defined as a ‘set of general rules which are designed to provide maximum flexibility and thus accommodate future development in legal thinking in the field of contract law.’⁷⁸

At the same time when the PECL had been completed, the EU Commission, in its 2003 Action Plan for European Contract Law, announced the concept of a Common Frame of Reference (CFR),⁷⁹ which is envisioned as a collection of the ‘best solutions’ for definitions, terminology, and substantive rules in European private law.⁸⁰ To this end, the Study Group on a European Civil Code headed by Professor Christian von Bar has subsequently undertaken the work of the Lando Commission.⁸¹ Meanwhile, the European Research Group on Existing EC Private Law (the ‘Acquis Group’) was set up with the purpose of restating the contents of the *acquis communautaire* and to form them into one coherent system of law.⁸² In 2007, the first volume of the Principles of the Existing EC Contract Law was published and it described itself as a sort of academic exercise subject to further discussion.⁸³ Later, within the political process of elaborating the CFR, the ‘Acquis Group’ joined the Study Group on a European Civil Code in preparing the Draft Common Frame of Reference (DCFR), which was submitted to the European Commission in December 2008.⁸⁴ The DCFR contains ‘principles, definitions, and model rules’ presented in ten ‘books’ covering various aspects of

76 For an overview of the research teams, see Ewoud Hondius, ‘Fifteen Years of European Private Law – At the occasion of the 15th birthday of the Trento/Torino Common Core of European Private Law Project’ (2009) 2 *Opinio Juris in Comparatione* 1 (paper No. 5).

77 Apart from the Lando Commission, there are other groups concentrating on other fields of private law. Of particular note is a Working Group on European Family Law led by Professor Boele-Woelki (Utrecht), Boele-Woelki *et al.* (eds), *Principles of European Family Law Regarding Parental Responsibilities* (Antwerp 2007); and the ‘Tort Law’ Group under the leadership of Professor Spier (Tilburg) which published *Principles of European Tort Law*.

78 Commission on European Contract Law, *Lando Ole/Beale Hugh: Principles of European Contract Law* (Parts I and II, 2000) p. XXVII.

79 A More Coherent European Contract Law, an Action Plan, Brussels, 12.2.2003, COM (2003) 68 final, 62. On the CFR process see Reiner Schulze, *Common Frame of Reference and Existing EC Contract Law* (Walter de Gruyter, 2008).

80 Hugh Beale, ‘The Nature and Purposes of the Common Frame of Reference’ (2008) 14 *Juridica International* 10.

81 Christian von Bar, Ole Lando and Stephen Swann, ‘Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code’ 2002 10(2) *European Review of Private Law* 183.

82 G Ajani and H Schulte-Nölke, ‘Preface – The Principles of the Existing EC Contract Law: A preliminary output of the Acquis Group’ in Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles). Contract I. Pre-contractual Obligations. Conclusion of Contract. Unfair Terms* (Sellier 2007) ix-x.

83 Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles). Contract I. Pre-contractual Obligations. Conclusion of Contract. Unfair Terms* (Sellier 2007).

84 Christian von Bar, ‘The Launch of the Draft Common Frame of Reference’ 2008 14 *Juridica International* 4.

private law.⁸⁵ Although the purpose of the DCFR is to serve as a draft for drawing up a ‘political’ Common Frame of Reference, the DCFR in essence is an academic text which sets out the results of a large European research project and invites evaluation from that perspective.⁸⁶

It was on the basis of the DCFR that the European Commission decided to set up an Expert Group to assist the Commission in the preparation of a proposal for a Common Frame of Reference in the area of European contract law.⁸⁷ Consequently, on 11 October 2011 the European Commission issued a proposal for a Regulation for Common European Sales Law (CESL) with the aim of governing cross-border transactions for the sale of goods, for the supply of digital content and for related services.⁸⁸ It is worth noting that the CESL was not intended to replace the national sales law which existed at that time, but would exist as a second contract law regime, together with and alongside the 27 national contract laws which were at that time already in place.⁸⁹ Indeed, the CESL takes the form of an optional instrument and thus the parties may choose to use the CESL to govern their transactions.⁹⁰ However, in its 2015 Work Programme the Commission decided to modify the proposal for a CESL in order to fully unleash the potential of e-commerce in the Digital Single Market.⁹¹ Although it remains to be seen whether the proposed CESL still has a role to play in the future of the EU’s digital marketplace,⁹² the CESL is still a truly valuable source to depict how EU contract law

85 It includes contracts and other juridical acts (Book II); obligations and corresponding rights (Book III); rules in relation to specific contracts such as sales, lease of goods, contracts for services, commercial agency, franchise and distributorship, loans, and personal security (Book IV); non-contractual liability arising out of damage caused to another (delict) (Book VI); unjustified enrichment (Book VII); acquisition and loss of ownership of goods (Book VIII); proprietary security in movable assets (Book IX); and trusts (Book X).

86 For a general functional analysis of non-binding instruments such as PECL, ACQP, DCFR, see O. Lando, ‘The Structure and the Legal Values of the Common Frame of Reference (CFR)’ 2007 3 *European Review of Contract Law* 245, 256.

87 In particular, the Commission tasked the Expert Group with selecting those parts of the Draft Common Frame of Reference which are of direct or indirect relevance to contract law and to restructure, revise and supplement the selected contents of the Draft Common Frame of Reference, also taking into consideration other research work conducted in this area as well as the Union *acquis*. See Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, (2010/233/EU); *OJ L 105, 27.4.2010*, p. 109-111 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010D0233>>.

88 Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>> [accessed 15 May 2017].

89 Giesela Ruhl, ‘Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime’ (2012) 19 *Maastricht J. Eur. & Comp. L.* 148.

90 Article 1 of the proposed Regulation.

91 On 9 December 2015, the European Commission published two proposals aimed at harmonising the rules on two aspects of digital economies: Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM/2015/0634 final – 2015/0287 (COD) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1450431933547&uri=CELEX:52015PC0634>> [accessed 15 May 2017]; Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM/2015/0635 final – 2015/0288 (COD) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1450431933547&uri=CELEX:52015PC0635>> [accessed 15 May 2017].

92 Martijn W. Hesselink stated that ‘the withdrawal by the European Commission of its proposal for a regulation on a Common European Sales Law represents a watershed in the development of European private law: the Common Frame of Reference is dead, the dream of a European Civil Code is over’, Martijn W. Hesselink,

has been developed. Indeed, insofar as the topic of this dissertation is concerned, the CESL reflects a new stage in the development of a European contract law with regard to the legislative control on unfair terms and thus it should at least be treated as being equal to the PECL, ACQP and DCFR.

In this regard, it is necessary to emphasize the function of legislation to provide sources of inspiration for law reform. At the outset, the Commission's Action Plan of January 2003 explicitly stated that the purpose of the CFR was to provide assistance in reviewing and improving the existing and future *acquis* in the area of contract law.⁹³ Specifically, the task of the CFR is to provide a clear definition of legal principles, fundamental principles and coherent model rules of contract law. Moreover, it is expected to operate as a toolbox for law makers including the Commission in the preparation of its proposals or for the Council and the Parliament in the process of proposing amendments⁹⁴ as well as a guide which 'could inspire the European Court of Justice when interpreting the *acquis* on contract law'.⁹⁵ Based on these proposals, the drafters of the DCFR developed model rules 'intended to help in the process of improving the existing *acquis* and in drafting any future EU legislation in the field of private law'.⁹⁶ With regard to the potential use of the PECL as a model,⁹⁷ one of the major objectives of the PECL, according to the drafters, is to serve as a tool for the institutions of the EC itself when they draft or interpret European legislation and for national courts and lawyers when they apply this legislation.⁹⁸ Additionally, one final and ultimate goal of the PECL is to serve as a basis for a 'future European Code of Contracts'.⁹⁹ Therefore, it is sufficient to argue that both of the above instruments have been drafted with the aim of improving the existing and future *acquis* in the field of contract law. The solutions provided by these instruments for the issue of controlling unfair contract terms might thus be of assistance in reviewing or improving the current rules of Directive 93/13/EEC.

Private Law, Regulation and Justice (March 7, 2016) Postnational Rulemaking Working Paper No. 2016-04 <<http://ssrn.com/abstract=2744565>>[accessed 15 May 2017].

- 93 European Commission, 'A More Coherent European Contract Law: An Action Plan' 12 February 2003, COM (2003) 68 final, paras 54-80.
- 94 European Commission, 'European Contract Law and the Revision of the Acquis: The Way Forward', 11 October 2004, COM (2004) 651 final, paras 2.1.1, 3.1.3.
- 95 European Commission, 'European Contract Law and the Revision of the Acquis: The Way Forward', 11 October 2004, COM (2004) 651 final, paras 2.1.2.
- 96 DCFR Introduction para. 24.
- 97 See more in Jan M. Smits, 'The Principles of European Contract Law and the Harmonization of Private Law in Europe' in Antoni Vacquer (ed.), *La Tercera Parte de los Principios de Derecho Contractual Europeo*, (Editorial Tirant Lo Blanch, 2005) 567.
- 98 Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II Combined and Revised* (Kluwer Law International 2000) xxiii and Art. 1:101 PECL; Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (eds), *Principles of European Contract Law, Part III* (Kluwer Law International 2003) xv ff.
- 99 Ole Lando & Hugh Beale (eds), *Principles of European Contract Law, Parts I and II Combined and Revised*, (Kluwer Law International, 2000) xxiii and Art. 1:101 PECL; Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (eds), *Principles of European Contract Law, Part III*, (Kluwer Law International 2003) x.

1.4.2. PECL and their Legislative Control of Unfair Terms

The regime for controlling the content of contractual terms not individually negotiated is concisely stipulated in Article 4:110. It reads:

‘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.’

Scope of control: Although Comment A of Article 4:110 provided by the drafters of the PECL acknowledges that Article 4:110 is based on Directive 93/13/EEC, it deliberately intends to extend the scope of application of the general clause of Directive 93/13/EEC. Specifically, this provision adopts the choice of Directive 93/13/EEC in controlling only contract terms that have not been individually negotiated with the exception of core terms. However, in contrast to the Directive, the provision intends to enlarge its scope to all contracts, including not only consumer contracts but also commercial contracts and contracts between private persons.

The Principle of Fairness: Although this provision essentially resembles the standards of fairness test provided by Articles 3 and 4 of Directive 93/13/EEC, it seems to diverge from Directive 93/13/EEC in two major aspects. Firstly, the fairness test in the PECL is articulated differently than in the Directive. The test refers to a standard of ‘fair dealing’, in addition to the requirement of ‘good faith’. However, since the relationship between the two requirements is obscure, it is not completely clear whether this modification intensifies or diminishes the standard of control. The second divergence relates to the existence of the grey list, which can supplement the general test by giving it concrete meaning. Unlike Directive 93/13/EEC, the PECL contain no such list of terms that are presumed to be unfair and this choice is justified by the fact that the PECL also encompass commercial contracts, which require greater flexibility.¹⁰⁰

The Principle of Transparency: Apart from Article 4:110, due to their systematic approach to the organisation of contract law rules, the provisions regarding terms not individually negotiated can be found elsewhere in the PECL such as the provision on the terms of incorporation not individually negotiated in a contract (Article 2:104 in Chapter 2 on Formation), the provision on the interpretation of such terms (Article 5:103: Contra Proferentem Rule and Article 5:104: Preference to Negotiated Terms in Chapter 5 on Interpretation). Accordingly, as opposed to Directive 93/13/EEC,

100 Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II Combined and Revised* (Kluwer Law International 2000), Comment C of Article 4:110.

the PECL contain a specific provision on the issue of the incorporation of terms not individually negotiated in a contract. Indeed, Article 2:104 of the PECL provides for a test of effective incorporation, which requires the user of terms not individually negotiated to undertake reasonable steps to bring them to the other party's attention before or when the contract is concluded.

1.4.3. ACQP and their Legislative Control of Unfair Terms

Although stressing that their purpose is to restate the content of the *acquis communautaire*, the Acquis Principles (ACQP) have developed a different structure for unfair terms in comparison with the structure of the UCTD. Chapter 6 ACQP entitled Non-Negotiated Terms closely resembles the original concept of the German AGB Gesetz to systematically provide for the three traditional tools for the legislative control on standard terms: inclusion in the contract (Article 6:201), the interpretation of the concept of *contra proferentem* (Article 6:203), and the fairness test (Articles 6:301–6:306).¹⁰¹

Scope of control: The *acquis* principles follow the approach of the Directive with regard to the objective scope of the control regime. Chapter 6 applies to contract terms that have not been individually negotiated, including standard contract terms. However, it expands the fairness test in B2C contracts to both B2B and C2C contracts.

The Principle of Fairness: It should be clear from the following matrix that different standards of fairness have to be distinguished between B2C, C2C and B2B contracts. According to Article 6:301(1), a general clause derived from Article 3(1) of the UCTD applies to C2C and B2C transactions. However, pursuant to Article 6:301(2), the stricter standard of a 'gross deviation' from good commercial practice is applied to test the unfairness of terms in B2C contracts. Obviously, this criterion originates from Article 3(3) of the Late Payment Directive.

Form/scope	B-to-C	B-to-B	C-to-C
Terms not individually negotiated	<ul style="list-style-type: none"> – Significant imbalance – Good faith 	<ul style="list-style-type: none"> – Gross deviation from good commercial practice 	<ul style="list-style-type: none"> – Significant imbalance – Good faith

Additionally, the *Acquis* Principles provide for two lists of unfair terms with regard to B2C transactions: the blacklist with only one clause which is unfair (Article 6:304) and the grey list of terms which may be regarded as unfair (Article 6:305). These two lists play an important role in providing an example of the general clause.

The Principle of Transparency: In conformity with Article 5, sentence 1 of Article 6:302, Directive 93/13/EEC requires that terms which have not been individually negotiated have to be drafted and communicated in plain and intelligible language. However, while Article 5 of the UCTD refers only to written terms, it is the intention of

¹⁰¹ Fryderyk 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' (2008) XIV *Juridica International* 69.

the drafters of the *Acquis* Principles that those transparency requirements should apply to all terms. Moreover, as Commentary No. 3 to Article 6:302 states, a contractual term must be transparent in order to pass the fairness test under Article 6:301.

As mentioned above, Section 2 of Chapter 6 of the *Acquis* Principles contains additional provisions that reflect the traditional methods of contract law in dealing with standard terms. First, the incorporation test requires the supplier of terms which have not been individually negotiated to take reasonable steps to draw the other party's attention to them, otherwise these terms shall not be part of the contract. Second, a traditional rule called a *contra proferentem* rule is laid down to specify that where the meaning of a term is unclear, that term is to be interpreted against the party who supplied it.

1.4.4. DCFR and its Legislative Control of Unfair Terms

Following the ACQP model and in contrast to a concise regulation in the PECL, the DCFR seems to have developed a more elaborate approach in providing a regime for the judicial control of terms not individually negotiated. Indeed, Section 4 entitled Unfair Terms ranging from Article II.-9:401 to Article II.-9:410 constitutes a comprehensive regulation concerning the fairness test which is hailed as a 'General EU Law of Unfair Terms.'¹⁰²

Scope of control: Similar to the PECL, the judicial control regime in the DCFR is not limited to contract terms between a consumer and a business (B-to-C), but is applicable to contracts between businesses (B-to-B) and non-businesses or consumers (C-to-C). However, the judicial control over B-to-B and C-to-C contracts is confined to standard terms rather than terms not individually negotiated. According to Article II.-1:109, the standard terms also require that a term has not been individually negotiated, but must be drafted in advance for several transactions involving different parties.

The Principle of Fairness: The fairness test under the DCFR diverges from the test under Article 4:110 of the PECL in two different aspects.

First of all, the standard of control is divided into three provisions which can be demonstrated by the following matrix.¹⁰³

102 Hans-W. Micklitz and Norbert Reich, 'Unfair Terms in the Draft Common Frame of Reference' (2008) *XIV Juridica International* 58, 61.

103 Extract from Hans-W. Micklitz and Norbert Reich, 'Unfair Terms in the Draft Common Frame of Reference' (2008) *XIV Juridica International* 58, 64.

Form/scope	B-to-C	B-to-B	C-to-C
Terms not individually negotiated	<ul style="list-style-type: none"> – Significant disadvantage – Good faith and fair dealing 	–	–
Standard terms		<ul style="list-style-type: none"> – Gross deviation from good commercial practice – Good faith and fair dealing 	<ul style="list-style-type: none"> – Significant disadvantage – Good faith and fair dealing

Accordingly, a term which has not been individually negotiated in B2C contracts and a term forming part of standard terms supplied by one party are qualified as unfair when they ‘significantly disadvantage’ the ‘consumer’ or ‘the other party’ respectively.¹⁰⁴ The criteria of the fairness test in B2C contracts are different in the sense that they require the terms to grossly deviate from good commercial practice.¹⁰⁵ According to Comment C of Article II.-9:405 of the DCFR, the latter standard is a derivative of Article 3(3) of the Late Payment Directive. The common element of the three unfairness tests is the reference to ‘good faith and fair dealing’ which suggests that in all three cases the content control is derived from the principle of good faith and fair dealing (Article I.-1:103 of the DCFR).

Secondly, the list of unfair terms has been reformulated and may be distinguished into a grey list and a ‘black clause’. According to Article II.-9:409 of the DCFR, in B2C contracts an exclusive jurisdiction clause in favour of the business forms a black clause that is always regarded as unfair. Furthermore, a grey list of terms that are presumed to be unfair in a B2C context is provided by Article II.-9:410 of the DCFR.

The Principle of Transparency: One of the most innovative characteristics of the DCFR concerns the duty of transparency in terms not individually negotiated. Similar to Article 5 of the UCTD, Article II.-9:402 (1) primarily requires such terms to be drafted and communicated in plain and intelligible language. The innovative feature of this requirement, however, lies in Section (2) which provides that in B2C contracts the mere fact that a term is not transparent may be sufficient to consider this term as being ‘unfair’. According to Article II.-9:407(1), in other contexts a breach of the transparency requirements may be taken into account in assessing the unfairness of a contract term. These provisions are indeed designed to remedy the vagueness of Directive 93/13/EEC in terms of the consequences of the lack of transparency.¹⁰⁶

The DCFR also contains additional provisions concerning terms not individually negotiated, particularly on the incorporation of such terms (Article II.-9:103), on their construction (Article II.-8:103 (the *contra proferentem* rule)) and on the preference for negotiated terms (Article II.-8:104). Like the PECL – and unlike Directive 93/13/

104 Article II.-9:404 defines the meaning of unfairness in B2C contracts; Article II.-9:405 defines the meaning of unfairness in B2B contracts.

105 Article II.-9:406 defines the meaning of unfairness in B2B contracts.

106 Note 3 of Article II.-9:402.

EEC – the DCFR includes a provision regarding the inclusion of terms not individually negotiated in the contract. Indeed, Article II.-9:103 requires the user to take reasonable steps aimed at drawing the other party's attention to them, either before or when the contract is concluded.

1.4.5. *CESL and its Legislative Control of Unfair Terms*

The legislative control on unfair terms can be found mainly in Chapter 8 of the CESL. The chapter consists of eight articles that are categorized into three sections: Section 1 on general rules (Article 79-81) applies to all contracts governed by CESL, Section 2 (Article 82-85) only applies to contracts between a trader and a consumer and Section 3 (Article 86) contains rules which are only applicable to contracts between traders. Overall, the provisions on unfair terms in the CESL seem to closely resemble the above-mentioned predecessor provisions. However, the CESL's provisions on unfair terms also present a number of important deviations from those of the DCFR, which deserve to be mentioned here.

Scope of control: Based on the model of the DCFR and ACQP, the judicial control regime in the CESL has been extended beyond the scope of application of the UCTD to also cover B2B contracts. However, there is a subtle difference between the CESL and DCFR. While Article II.-9:405 DCFR restricts its scope to standard terms, Article 86 of the CESL expands the control in B2B contracts to not individually negotiated terms. Thus, the concept of standard terms does not have any separate role to play with regard to the CESL's provisions on unfair terms.

The Principle of Fairness: Similar to DCFR, the CESL has suggested two different definitions of fairness in B2C and B2B contracts. As the following matrix reveals, the requirement of a 'gross deviation from good commercial practice'¹⁰⁷ that is used to review unfair terms in B2B contracts seems to be stricter than the significant imbalance requirement in the case of B2C contracts.

Form/scope	B-to-C	B-to-B
Terms not individually negotiated	<ul style="list-style-type: none"> – Significant imbalance – Good faith and fair dealing 	<ul style="list-style-type: none"> – Gross deviation from good commercial practice – Good faith and fair dealing

More significantly, one of the most remarkable contributions of the CESL to the legal development of EU law on unfair terms is the introduction of the blacklist of terms which are always unfair. The CESL goes beyond these cautious approaches in the ACQP and the DCFR by providing a blacklist under Article 84 of 11 unfair terms which are always prohibited. Additionally, the grey list of Article 85 entails a list of 23 terms which are 'presumed to be unfair'. Accordingly, the CESL has established an actual tripartite structure including a general clause, a grey list and a blacklist to control unfair terms

¹⁰⁷ As mentions above, it is a derivative of Article 3(3) of the Late Payment Directive.

in consumer contracts.¹⁰⁸ In this respect, the CESL follows the general framework in the UCTD, the ACQP and the DCFR, but at the same time, by adding the blacklist and grey list into such framework the CESL significantly enhances legal certainty for both businesses and consumers.

The Principle of Transparency: It should be emphasized that unlike the DCFR and ACQP, the CESL does not require the trader in B2B contracts to be subject to a duty to draft its terms in plain and intelligible language. Yet, similar to the UCTD, the trader in a B2C contract is subject to a duty of transparency. Additionally, possible compliance with such a duty is to be considered as an important element in assessing the unfairness of a contractual term (Article 83 (2)).

Like the DCFR, the CESL also contains numerous provisions with regard to clients' awareness of such terms as well as sanctions for a breach of the principle of transparency. Article 70 CESL, which is mandatory for both B2C and B2B contracts, establishes a duty of information that places parties supplying not individually negotiated terms under an obligation to ensure that the other party is aware of them. As a remedy for a violation of the transparency principle, according to Article 65 CESL, if there are doubts as to the meaning of a term which has not been individually negotiated, an interpretation of the term against the party who supplied it shall prevail.

To sum up, as far as the standard for a review of the fairness of terms not individually negotiated is concerned, all of the above soft law instruments share their origin in Directive 93/13/EEC, which is possibly the reason why their contents are potentially similar. However, this does not mean that they are identical to each other and that they completely adhere to Directive 93/13/EEC. Hence, it is necessary to analyse a continuous development from Directive 93/13/EEC to the CESL. More importantly, in terms of the scope of regulation, however, these instruments are much more comprehensive than the Directive. Accordingly, the instruments provide the necessary framework that could serve as a yardstick for the unfairness test. Ideally, their respective comprehensiveness would therefore assist in understanding Directive 93/13/EEC's regime for controlling terms not individually negotiated. However, it is worth noting that all of these soft law instruments leave the issue of establishing adequate and effective mechanisms for implementing substantive rules untouched. This makes Directive 93/13/EEC more compelling since it is the only valuable legislation at the EU level that provides a holistic approach to controlling the unfairness of terms.

108 It is worth mentioning that the provisions on the blacklist and grey list of unfair terms are only found in the second chapter on Unfair Terms in B2C contracts. This implies that the two lists do not automatically apply in B2B contracts. Additionally, as mentioned above, the standard of review of unfair terms in B2B contracts is stricter than those in B2C contracts. Article 86 para. 1 (b) of the CESL requires that the unfair contract term 'is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.'

2. CONCEPTUAL ANALYSIS OF THE LEGISLATIVE SCOPE OF THE CONTROL OF UNFAIR TERMS

2.1. Introduction

Directive 1993/13/EEC on unfair terms in consumer contracts has not only approximated ‘the laws, regulations and administrative provisions of the Member States relating to unfair terms’ but also shaped the basis for all European legislation on this issue. The purpose of the Directive is to prohibit the use of unfair terms in consumer contracts that have not been individually negotiated. Thus, its scope *ratione personae* is limited to contracts between a consumer and a business, while its scope *ratione materiae* is confined to terms not individually negotiated rather than all kinds of contractual terms.

While the other European instruments such as the DCFR and CESL have substantively followed the current state of affairs of the Directive, a thought-provoking question has been raised as to whether the fairness control should be expanded beyond the Directive’s scope of application.

Accordingly, the following sections will focus on a conceptual analysis of the scope of the EU legislative control on unfair terms. The concepts of a ‘consumer’ and a ‘business’ will therefore be analysed in order to discover the limits of the subjective scope of the Directive. Additionally, as far as the objective scope of control as laid down by the Directive is concerned, attention shall be given to the new concept of ‘not individually negotiated terms’ and other particular exemptions from the fairness test. The last section will be devoted to exploring to what extent other EU legislation has attempted to extend the scope of the Directive.

2.2. Subjective Scope of Control: Consumer Contracts

2.2.1. Concept of a ‘Consumer’

In EU law, the notion of a consumer has not been specifically defined in primary law, but is presented in different instruments of secondary law, which belong to a variety of spheres ranging from the consumer *acquis* to EU private international law.¹⁰⁹ Even in the current EU consumer *acquis*, each EU instrument separately defines a ‘consumer’ for its own purpose. The ‘consumer’ notion, therefore, is a ‘working, dynamic notion’ which is defined by reference to the subject matter of the legislative act concerned.¹¹⁰ However, despite being phrased differently, the definition of a consumer in the majority of the current EU directives shares a common core,¹¹¹ according to

109 Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier European Law Publishers, 2008) 673.

110 Opinion of AG Cruz Villalón delivered on 23 April 2015. C-110/14 *Horățiu Ovidiu Costea v SC Volksbank România SA*, para.18 citing M. Tenreiro, ‘Un code de la consommation ou un code autour du consommateur? Quelques réflexions critiques sur la codification et la notion du consommateur’, in L. Krämer, H.-W. Micklitz and K. Tonner (eds), *Law and Diffuse Interests in the European Legal Order; Liber amicorum Norbert Reich*, (Nomos, 1997) 349.

111 Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier European Law Publishers, 2008) 673.

which a consumer is ‘a natural person’ ‘who is acting for purposes which are outside his trade, business, commercial or other professional activity.’ Article 2(b) of the UCTD stipulates that a consumer means ‘any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession.’

On the basis of these common features which are found in EC directives in the field of consumer protection law, the concept of a consumer in ACQP and DCFR is similarly defined as ‘any natural person who is acting **primarily** for purposes which are not related to his or her trade, business or profession.’¹¹² By virtue of adding the word ‘primarily’ into the concept of a consumer, the ACQP and DCFR appear to provide a further clarification with regard to mixed-purpose transactions.¹¹³

(i) Natural or legal persons

Under EU law, the notion of a consumer covers only natural persons and does not extend to legal persons. The CJEU has consistently held that the definition of a consumer should not be given a wider interpretation. In the *Di Pinto* case,¹¹⁴ the notion of a consumer under the Doorstep Selling Directive¹¹⁵ was interpreted in a narrow sense as the CJEU reasoned that a trader canvassed with a view to the sale of his business is not to be regarded as a consumer protected by this Directive.¹¹⁶ Indeed, the Court clarified that this Directive does not afford protection to legal persons even if they are in a position similar to that of a consumer.¹¹⁷

In the joined cases in *Idealservice*,¹¹⁸ the CJEU took a similar stance in interpreting the notion of a consumer for the purposes of the UCTD. These cases concerned Idealservice MN RE Sas and Idealservice Srl which concluded two contracts with OMAI and Cape for the supply of automatic drinks dispensers, which were installed on the premises of those companies and were intended to be used solely by their staff. Both companies claimed that the clause granting jurisdiction in the contracts was unfair and could not therefore be enforced against the parties to the contracts.¹¹⁹ However, Idealservice contended that Cape and OMAI could not be regarded as consumers for the purposes of applying the UCTD since they were legal persons and they had signed the contracts in the course of their business activity.¹²⁰ The CJEU took the opportunity to confirm that the term ‘consumer’, as defined in Article 2(b) of the UCTD, must be

112 Art. 1:201 Acquis Principles (ACQP), ‘Principles of the Existing EC Contract Law’ (Acquis Principles), Contract I (Sellier, 2007); Article I.–1:105(1), Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law* (Sellier, 2008), 139.

113 *Ibid.*

114 Case C-361/89 *Criminal proceedings v Patrice Di Pinto* [1991] ECR I-01189.

115 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises OJ L 372/0031.

116 Case C-361/89 *Criminal proceedings v Patrice Di Pinto* [1991] ECR I-01189, para. 19.

117 Case C-361/89, *Criminal proceedings v Patrice Di Pinto* [1991] ECR I-01189, para. 23.

118 Joined Cases C-541/99 and C-542/99 *Cape Snc v. Idealservice Srl and Idealservice MN RE Sas v. OMAI Srl* [ECR [2001] I-09049.

119 *Ibid.*, para. 7.

120 *Ibid.*, para. 8.

interpreted as referring solely to natural persons.¹²¹ This interpretation resulted from not only a straightforward reading of the provision at issue, but also a close look at the objective of the Community legislation in question. Indeed, the intention of the UCTD is to protect the consumer which is a category of persons in a weak position *via-à-vis* the trader as regards both his bargaining power and his level of knowledge. Apparently, legal persons and companies do not generally find themselves in that weaker position, thus there is no reason to grant them protection, which, as an exception to contractual freedom, must be strictly interpreted.¹²²

(ii) Mixed contracts

As a rule, not only is a consumer a natural person, but he/she is also acting for purposes which are outside his/her trade, business or profession. In practice, the boundary between professional purposes and private purposes is not always clearly drawn. Under the ACQP and DCFR, the word ‘primarily’ is added to the concept of a consumer in order to clarify a situation referred to as a mixed purpose contract where a natural person buys goods partly for private purposes and partly for professional purposes. Indeed, the rule here is that such a transaction is considered to be a consumer contract so long as the individual is acting **primarily** for purposes which are not related to his or her trade, business or profession.¹²³

Unfortunately, this important clarification cannot be found in the UCTD or other Directives and thus it remains to be seen how the CJEU will deal with the issue of mixed contracts for the purpose of the UCTD. A question which particularly arises is to what extent the scope of application of the UCTD covers contracts that are related partly to private activity and partly to professional activity. In the *Gruber* case,¹²⁴ in interpreting the consumer provisions of Article 13 of the Brussels Convention of 1968 the CJEU provided its very first opinion on the issue of mixed contracts. In that case, among other questions, the CJEU had to determine whether a contract entered into by a farmer for the purpose of buying roof tiles was a consumer contract in view of the fact that the area of the building used for personal purposes was slightly more than 60% of the total floor area.¹²⁵ The CJEU ruled that a person concluding a mixed contract can only be treated as a consumer if ‘the trade or professional purposes is so *limited* as to be **negligible** in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect.’¹²⁶ Indeed, it required that the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded. The Court also held that the burden of proof rested with the

121 *Ibid.*, para. 17.

122 Joined Cases C-541/99 and C-542/99 *Cape Snc v. Idealservice Srl and Idealservice MN RE Sas v. OMAI Srl*, Opinion of AG Mischo, paras 14-16.

123 Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law* (Sellier, 2008) 139.

124 Case C-464/01 *Johann Gruber v Bay Wa AG* [2005] ECR I-00439.

125 *Ibid.*, para. 12.

126 *Ibid.*, para. 54.

person wishing to rely on Articles 13 to 15 of the Convention, and thus it was up to the consumer to prove that the professional use was negligible.¹²⁷ Hence, the definition of a mixed contract was interpreted in a very strict sense.¹²⁸ However, since the *Gruber* case dealt with procedural law, it is debatable whether the interpretation in this case should also be used for substantive consumer law.¹²⁹

In this connection, it should be mentioned that when drafting the Consumer Rights Directive 2011 ('CRD'), the European legislators had widely discussed the issue of mixed contracts. Although Article 2(1) of the CRD still maintains a similar definition of a consumer,¹³⁰ Recital 17 of the CRD states that 'in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be **predominant** in the overall context of the contract, that person should also be considered as a consumer'. This definition of a mixed contract is thus less strict than the one given by the CJEU in the *Gruber* case. Whereas the CRD uses the criterion of the predominant purpose in the overall context of the contract, the CJEU required in the *Gruber* case that the use for a trade or professional purpose must be so limited that it may be regarded as negligible in order for a contract to fall within the private sphere.

However, as mentioned, the concept of a consumer in EU law is of an operational and dynamic nature that is defined by the specific legislation's content and thus it might be interpreted differently according to the legal area in which it is applied. Therefore, which one of the two approaches prevails in interpreting the concept of a consumer under the UCTD is still open to question.

Against this backdrop, in the *Costea* case¹³¹ the CJEU was provided with the very first opportunity to determine whether and to what extent mixed contracts fall within the scope of the application of the UCTD. Indeed, the question that was raised before the CJEU is whether a legal professional may be regarded as a consumer when he concludes a credit agreement secured on immovable property owned by his law firm.¹³² To answer this question, Advocate General Cruz Villalón was of the opinion that if it is unclear whether a contract was concluded exclusively for personal or for professional purposes, the contracting party should be considered to be a consumer if the professional objective was not *predominant* within the overall context of the transaction.¹³³ Accordingly, in order to ascertain when mixed contracts fall within the scope of the UCTD, the criterion of the predominant purpose provided in Recital 17 in the preamble to the CRD prevails over the criterion of marginality laid down in

127 *Ibid.*, paras 50-51.

128 Geraint Howells, 'The Scope of European Consumer Law' (2005) 1(3) *European Review of Contract Law* 360, 361.

129 Paolisa Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law* (Bloomsbury Publishing, 2007) 74.

130 The wording of the definition of a consumer in those two provisions is almost identical, the sole difference being that whereas the UCTD refers only to a 'trade, business or profession', Directive 2011/83 refers to a 'trade, business, craft or profession'.

131 Case C-110/14 *Horățiu Ovidiu Costea v SC Volksbank România SA* [2015] EUECJ C-110/14

132 *Ibid.*, para. 10.

133 Case C-110/14 *Horățiu Ovidiu Costea v SC Volksbank România SA* [2015] EUECJ C-110/14, Opinion of AG Cruz Villalón, paras 38-43.

the *Gruber* case. That conclusion can be justified in the light of the shared objective and the clear link between the CRD and the UCTD.¹³⁴ However, in its judgment the CJEU managed not to take a clear position, thereby meaning that the issue of mixed transactions in the context of the UCTD has not yet been clarified by case law.^{135, 136}

2.2.2. *The Other Party to a Consumer Contract – the Concept of a ‘Seller or Supplier’*

In EU law, unlike the uniform concept of a consumer, no single term is used to indicate the other party to a consumer contract.¹³⁷ Under Article 2(c) of the UCTD, for the purposes of the Directive, the term ‘seller or supplier’ has been selected to describe the counterparty whose pre-formulated terms are subject to control. According to this provision, a ‘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’. Meanwhile, the ACQP and DCFR have chosen the general term ‘business’ to describe the other party in a consumer contract. A business is defined as ‘any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person’s self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity’.¹³⁸ Apparently, the wording of the concept of a business is formulated more broadly in order to provide clarification with regard to non-profit organisations and also to clarify that public bodies can also be businesses. It will be seen that this broad interpretation has been confirmed by the CJEU, at least for the purpose of the Directive.

134 Ibid., para.44.

135 Evelyne Terryn stated that ‘the broad interpretation of the notion of consumer in the case of dual purpose contracts advocated by the Advocate General is definitely one we can support in view of the protective aim of the mentioned instruments,’ see Evelyne Terryn, ‘Consumers, by Definition, Include Us All... But Not for Every Transaction’ 2016 24(2) *European Review of Private Law* 271, 277.

136 The CJEU however clarified how the purpose of the transaction can be determined as well as the qualification and the effect of ‘ancillary’ contracts. According to the Court, ‘all the circumstances of the case, particularly the nature of the goods or service covered by the contract in question’, must be taken into account to ascertain the purpose of the transaction, see Case C-110/14 *Horațiu Ovidiu Costea v SC Volksbank România SA* [2015] EUECJ C-110/14, para. 23.

Furthermore, the CJEU elucidated in *Costea* that the fact that a debt arising out of the principal contract is guaranteed by a mortgage taken out by a lawyer in his capacity as a representative of his law firm had no effect on the determination of the status of the person concluding the principal contract. This interpretation was confirmed by the *Tarcău* judgement. In this judgment, the Court clearly held that it is the capacity of the contracting parties that is decisive for the application of this directive and not the object of the agreement, Case C-74/15 *Dumitru Tarcău and Ileana Tarcău v Banca Comercială Intesa Sanpaolo România SA and Others* [2015] OJ C 38/17, paras 26-27.

137 That party is variously described as a ‘trader’, ‘vendor’, ‘supplier’, ‘seller’, ‘seller or supplier’ etc. Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier European Law Publishers, 2008) 691.

138 Art. 1:202 Acquis Principles (ACQP), ‘Principles of the Existing EC Contract Law’ (Acquis Principles), Contract I (Sellier, 2007); Article I.–1:105 (2) Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law* (Sellier, 2008) 139.

(i) Landlords and the concept of a ‘seller or supplier’

Article 2(c), in its English-language version, only refers to a ‘seller or supplier’ and therefore gives rise to the question of whether UCTD’s scope of application is only limited to the ‘sellers of goods’ or the ‘suppliers of services’. To put it differently, the question is whether the definition of a seller and supplier in the UCTD implies that the scope of transactions subject to a fairness control is restricted to selling goods or supplying services.

In the *Asbeek Brusse* case¹³⁹ the CJEU clarified the problem of multilingualism with regard to the UCTD.¹⁴⁰ The problem in this case is that, in its Dutch language version, to designate the other party to the contract with the consumer the terminology used is a ‘seller’ (‘verkoper’).¹⁴¹ Therefore, the CJEU was asked whether a tenancy agreement relating to premises to be used as a residence which was concluded between a landlord acting for purposes relating to his trade, business or profession and a tenant acting on a non-commercial basis falls within the scope of the Directive.¹⁴² The CJEU acknowledged that there is a degree of discrepancy between the various language versions of the concept of a seller or supplier. However, it is clear from the other language versions that the Directive is not restricted to the ‘sellers of goods’ or the ‘suppliers of services’, it rather refers more generally to any party that is acting for a business or commercial purpose.¹⁴³ Additionally, beyond the term ‘seller’ (‘verkoper’) used to designate the other party to the contract with the consumer, the legislature’s intention was not to restrict the scope of the Directive solely to contracts concluded between a seller and a consumer.¹⁴⁴ The CJEU then held that landlords acting for professional purposes fell within the scope of the UTCD.

Accordingly, the concept of a ‘seller or supplier’ must be widely interpreted to include any person who is acting for purposes relating to his trade, business or profession. Indeed, this concept can be used to refer to landlords and professional buyers who purchase from instead of selling goods to consumers. In this case, the need for a uniform interpretation of a European Union measure makes it impossible to consider one version of the text in isolation, but requires that such a measure be interpreted on the basis of both the real intention of its author and the aim that the latter seeks to achieve in the light of, in particular, the versions in all the other official languages.¹⁴⁵

139 Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, ECLI:EU:C:2013:341.

140 See more in Barbara Pozzo, ‘Multilingualism and the Harmonization of European Private Law: Problems and Perspectives’ (2012) 20(5) *European Review of Private Law* 1185.

141 Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV* ECLI:EU:C:2013:341, para 27.

142 *Ibid.*, para. 22.

143 *Ibid.*, para. 25.

144 *Ibid.*, para. 28.

145 Case C-569/08 *Internetportal und Marketing* [2010] ECR I-4871, para. 35, and Case C-52/10 *Eleftheri tileorasi and Giannikos* [2011] ECR I-4973, para. 23.

(ii) Inclusion of Public Utility Undertakings

It is very clear from the wording of Article 2(c) that companies that are wholly or partly owned by the state qualify as ‘sellers or suppliers’ provided that they act for purposes relating to their trade, business or profession. Additionally, Recital 14 to the UCTD emphasizes that the Directive also applies to ‘trades, businesses or professions of a public nature’. Obviously, this refers to public undertakings which do not have a profit motive in supplying services with a public interest function such as utilities, transport, and others. Thus, reading Article 2(c) in conjunction with Recital 14 seems to indicate that the Directive extends to any contract between consumers and public utility undertakings.¹⁴⁶

As regards the issue of the public nature of the trader, the case law concerning the issue of whether a health insurance fund established as a public law body under German law is subject to the control of the Unfair Commercial Practices Directive may be relevant. In *BKK Mobil Oil*, the CJEU explained that the concept of a trader must be determined in relation to but diametrically opposed to the concept of a consumer, which refers to any individual not engaged in commercial or trade activities.¹⁴⁷ Therefore, given that the members of the insurance fund were manifestly consumers, the fund had to be treated as a trader and whether the body at issue or the specific tasks it pursued were public or private was irrelevant.¹⁴⁸ For that reason, the definition of a trader is particularly wide and does not exclude public bodies pursuing tasks of public interest.¹⁴⁹

In the context of the UCTD, the CJEU followed this approach in *Birutė Šiba*.¹⁵⁰ In this case, the question raised before the CJEU was whether a lawyer practising a *liberal profession* might be classified as a ‘seller or supplier’ and whether a contract for legal services concluded by a lawyer with a natural person constituted a consumer contract with all the related safeguards for the natural person.¹⁵¹ The CJEU reasoned that, in the field of lawyers’ services, there was, as a general rule, some inequality between ‘client consumers’ and lawyers owing in particular to the asymmetry of information between the parties.¹⁵² Lawyers display a high level of technical knowledge which consumers may not have and the latter may therefore find it difficult to judge the quality of the services provided to them.¹⁵³ Therefore, a lawyer who provides a legal service for a fee, in the course of his professional activities, to a natural person acting for private purposes is a ‘seller or supplier’.¹⁵⁴

146 Hans-Wolfgang Micklitz, ‘Unfair Terms in Consumer Contracts’ in N. Reich, H.W. Micklitz, P. Rott and K. Tonner (eds), *European Consumer Law* (Intersentia Publishing Ltd, 2014) 125, 141.

147 Case C-59/12 *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*. [2013] para. 33.

148 *Ibid.*, paras 36-38.

149 *Ibid.*, para. 32.

150 Case C-537/13 *Birutė Šiba v Arūnas Devėnas*, ECLI:EU:C:2015:14.

151 *Ibid.*, para. 17.

152 To that effect, the CJEU cited its judgment in Joined Cases C94/04 and C202/04 *Cipolla and Others*, EU:C:2006:758, para 68. *Ibid.*, para. 23.

153 *Ibid.*

154 It is noted that a lawyer can also be a consumer for the purpose of another transaction such as in the above-mentioned case of *Costea*. According to the Opinion of Advocate General Jacobs there is ‘no personal status

Accordingly, having considered Article 2(c) of the Directive and Recital 14 to that Directive, it is clear that the public or private nature of the activities of the seller or supplier or his specific task is irrelevant to determine his status. Consequently, the requirement that he acts within a framework of a regular profit-making activity should also be irrelevant since public bodies providing services to consumers will often not do so.¹⁵⁵

2.3. Objective Scope of Control

Article 1(1) of the UCTD states, in principle, that the Directive governs all types of terms in contracts concluded between a seller or supplier and a consumer. However, the UCTD contains some important limitations of its objective scope of application which noticeably reflect the underlying philosophy behind the Directive.¹⁵⁶ First, fairness control only extends to contractual terms which have not been individually negotiated. Second, terms that relate to the definition of the ‘main subject matter of the contract’ or the adequacy of the price or remuneration are excluded from the fairness control, provided that those terms are expressed in plain, intelligible language. The third limitation of the Directive’s scope *ratione materiae* is the exemption of terms that reflect ‘mandatory statutory or regulatory provisions’ from the fairness control.

Similar limitations can also be found in the three soft law instruments with a slight linguistic variation.¹⁵⁷ The following sections will discuss the three above qualifications from these instruments respectively.

2.3.1. Concept of ‘Not Individually Negotiated Terms’

According to Article 3(1) UCTD, the fairness test does not apply to terms that have been individually negotiated. It should be noted that the starting point of the 1990 Proposal for the UCTD was that a court may assess any term in a consumer contract for fairness, regardless of whether that term is the product of a negotiation process or not.¹⁵⁸ However, German authors criticized that the control of even individually negotiated terms ‘would represent a drastic restriction of the autonomy of the individual’.¹⁵⁹ As a result, the exemption of negotiated term from the fairness test was included in the final Directive. This exemption for negotiated terms reflected the free market basis of the

of consumer or non-consumer; what counts is the capacity in which the customer was acting in entering into the particular contract’ Opinion of Advocate General Jacobs, *Gruber*, C-464/01, para. 34.

155 For the general issue of the intention of the business to make a profit (*animo lucri*) in the Acquis, see Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier European Law Publishers, 2008) 691.

156 Paolisa Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law* (Bloomsbury Publishing, 2007) 115.

157 See Article 4: 110(2) PECL; Article 6:303 ACQP; Article II.-9:406 DCFR.

158 M. Tenreiro, ‘The Community Directive on Unfair Terms and National Legal Systems’ (1995) 3 *European Review of Private Law*, 273.

159 H.E. Brandner and P. Ulmer, ‘The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission’ (1991) 28 *Common Market Law Review* 647, 652.

UCTD. Indeed, it is hailed as a victory from a consumer choice perspective.¹⁶⁰ The basic reason underlying such a limitation of the UCTD is that since the rational consumer is still capable of influencing the contents of an individually negotiated contract, he/she does not need the substantive protection afforded by the Directive.¹⁶¹

Since the UCTD is a major source for the formulation of other EU instruments, it is not surprising that the concept of ‘not individually negotiated terms’ is used by these instruments to define their objective scope of legislative control on unfair term in consumer contracts. However, the criterion of non-negotiation is provided for in detail to make it more difficult for the user to circumvent the fairness test by presenting terms as having been negotiated.¹⁶² Additionally, as will be seen later, contrary to the UCTD, the DCFR expands the subjective scope of the fairness test to B2B contracts, but in these cases the concept of standard terms rather than terms not individually negotiated is used to delineate its objective scope.

(i) Concept of ‘not individually negotiated terms’ in the UCTD

A definition of a ‘not individually negotiated term’ can be found in the first paragraph of Article 3(2), which reads:

‘A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.’

The second and third paragraphs of Article 3(2) further explain that:

‘The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.’

The most crucial criterion to determine the concept of a ‘not individually negotiated term’ is the impossibility for the consumer to influence the substance of the terms.¹⁶³ It must be the case that the supplier did not offer any such meaningful negotiations so that the consumer could have had a real chance to make a substantive change to the contractual term.¹⁶⁴ Also, the first paragraph establishes a presumption of non-

160 Hugh Collins, ‘Good faith in European Contract Law’ (1994) 14 (2) *Oxford Journal of Legal Studies* 229, 239.

161 *Ibid.*

162 Fryderyk 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’ (2008), XIV *Juridica International* 69, 72-73.

163 M. Tenreiro and J. Karsten, ‘Unfair Terms in Consumer Contracts: Uncertainties, Contradictions and Novelities of a Directive’ in H. Schulte-Nölke and R. Schulze (eds), *Europäische Rechtsangleichung und Nationale Privatrechte* (Baden-Baden, Nomos, 1999) 223, 235.

164 Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009) 161-62.

negotiation when the term has been drafted in advance particularly in the context of a pre-formulated standard contract. Since the content is fixed by the user prior to the negotiations, it is apparent in this case that the consumer is usually unable to influence the content of the terms.

Hence, the concept of a ‘not individually negotiated term’ has been given a very broad definition in the Directive. It includes not only standard contract terms but also any terms that have been drafted unilaterally with the intention of a narrow application to a single contract. This means that the scope of the fairness control is extended to every ‘pre-formulated (individual) term’,¹⁶⁵ regardless of whether this term has been pre-formulated for only a particular contract or for several contracts.¹⁶⁶

The effect of this broad definition seems to be reinforced by a provision on the burden of proof in the third paragraph of Article 3(2). It provides that any seller or supplier who claims that a standard term has been individually negotiated has the burden of proving his claim. However, one should note that the precise meaning of ‘individual negotiation’ is opaque in this rule. It raises the following question: in order to satisfy this burden of proof does the seller or supplier only have to show that some negotiations have been conducted concerning the term or does he/she have to demonstrate that negotiations did lead to some actual changes to the contents of the standard term?¹⁶⁷

The second paragraph of Article 3(2) also generates confusion that may undermine the aim pursued by the Directive.¹⁶⁸ It states that the fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of the Directive if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract. This statement has been borrowed from the German AGB of 1976 whose scope is defined by reference to standard contracts. In this case, there is in fact a risk that, if several terms of a standard contract have been individually negotiated in a particular case, the contract would lose its character of being a ‘standard contract’ and would therefore no longer be subject to the fairness control.¹⁶⁹ However, this rule is illogical in the light of the fact that the scope of the Directive is defined by reference to the nature of a term in a consumer contract. Even worse, it would imply that in some cases the Directive would not be applicable to some non-negotiated terms in consumer contracts.¹⁷⁰ That was visibly not the intention of the legislation

165 Hans-Wolfgang Micklitz, ‘Unfair Terms in Consumer Contracts’ in N. Reich, H.W. Micklitz, P. Rott and K. Tonner, *European Consumer Law* (Intersentia Publishing Ltd, 2014) 125,135.

166 However, it is not obviously clear that whether terms pre-formulated by a third party on behalf of the seller or supplier will also be subject to the fairness test.

167 M. Tenreiro and J. Karsten, ‘Unfair Terms in Consumer Contracts: Uncertainties, Contradictions and Novelities of a Directive’ in H. Schulte-Nölke and R. Schulze (eds) *Europäische Rechtsangleichung und Nationale Privatrechte* (Baden-Baden, Nomos, 1999) 223, 236.

168 Paolisa Nebbia, *Unfair Contract Terms in European law: A Study in Comparative and EC Law* (Bloomsbury Publishing, 2007) 119.

169 M. Tenreiro and J. Karsten, ‘Unfair Terms in Consumer Contracts: Uncertainties, Contradictions and Novelities of a Directive’ in H. Schulte-Nölke and R. Schulze (eds) *Europäische Rechtsangleichung und Nationale Privatrechte* (Baden-Baden, Nomos, 1999) 223, 236.

170 Ibid.

and this provision must thereby be strictly interpreted taking other provisions and the underlying rationale of the Directive into account.

(ii) Concept of ‘not individually negotiated terms’ in the DCFR and CESL

Although in addition to the concept of ‘not individually negotiated terms’ the Directive mentions ‘standard terms’, the latter concept is not defined by the Directive. In contrast, the ACQP, DCFR and CESL make a clear conceptual distinction between ‘not individually negotiated terms’ and the concept of ‘standard terms’. On the one hand, a standard term is defined as ‘a term which has been formulated in advance for several transactions involving different parties and which has not been individually negotiated by the parties.’¹⁷¹ The key element of the concept of standard terms is that they are formulated in advance for *several transactions* involving *different parties* and that they have not been individually negotiated by the parties.¹⁷² On the other hand, a term supplied by one party is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of the standard terms.¹⁷³

Additionally, the drafters of the DCFR and CESL have improved the shortcomings of the provisions on the concept of ‘not individually negotiated terms’ in the UCTD as discussed above. Not only has the confusing provision in paragraph 2 of Article 3(2) been omitted from the DCFR and CESL, the two instruments have provided further provisions to avoid the negative consequences of the concept of not individually negotiated terms. First of all, concerning the possibility of the supplier or the seller circumventing the fairness test, the DCFR and CESL provide that ‘if one party supplies a selection of terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection’.¹⁷⁴ The purpose of this provision is to crystallize the requirements for real and meaningful negotiations between the parties and thus to prevent the stronger party from creating an illusion that the term has been individually negotiated.¹⁷⁵ Accordingly, in order to determine whether a term has not been individually negotiated it is irrelevant that the supplier or the seller offers a consumer a selection of contract terms without providing him/her with a real opportunity to change the terms. Secondly, as far as the burden of proving that a term has been individually negotiated is concerned, in comparison with the UCTD, the DCFR and CESL have established complementary burden of proof rules

171 Article 6:101(3) ACQP; Article.II-1:109 DCFR; Article 2(d) of the Proposal for a Regulation of the European Parliament and of the Council on a CESL.

172 To this effect, it is similar to the definition of ‘general conditions of contract’ in Article 2:209 of PECL. The only significant difference is that the PECL refer to terms formulated in advance ‘for an indefinite number of contracts.’ According to the authors of the DCFR, this requirement seems to be too strict.

173 Article 6:101(2) ACQP; Article.II-1:110 DCFR; Article 7(1) CESL states that ‘A contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content.’

174 Article.II-1: 110 (2) DCFR; Article 7(2) CESL.

175 Christian von Bar, Eric Clive, And Hans Schulte-Nölke. *Principles, Definitions and Model Rules Of European Private Law: Draft Common Frame Of Reference (DCFR)* (Walter De Gruyter, 2009) 207.

that are friendlier to consumers. Indeed, the DCFR and CESL provide for the general assumption that a term in a consumer contract was not individually negotiated,¹⁷⁶ while the UCTD only provides for such an assumption in cases of standard contract terms as discussed above. Thirdly, while it is not obviously clear from the UCTD whether terms pre-formulated by a third party on behalf of the seller or supplier will also be subject to the fairness test, the DCFR and CESL clearly provide a positive answer to this question. In order to protect consumers, the DCFR and CESL state that terms drafted by a third person are considered to have been supplied by the business, unless the consumer has introduced them to the contract.¹⁷⁷

To sum up, the UCTD only applies to terms which have not been individually negotiated in a contract between a consumer and a supplier or seller, but the concept of a ‘not individually negotiated term’ is broadly defined. It is vital for the drafters of the UCTD that the consumer was able to influence the content of the terms, otherwise such terms will be considered as having been not individually negotiated and are thus covered by the scope of the UCTD. Accordingly, both standard terms which have been pre-formulated for several transactions and terms that have been pre-formulated even with the intention of being applied to a single contract are subject to the Directive; only the contents of genuine individual terms are beyond the scope of review. While the DCFR and CESL clearly provide a distinction between the concepts of standard terms and not individually negotiated terms, the scope of the fairness test in consumer contracts under these two instruments is still identified on the basis of the concept of ‘not individually negotiated terms.’ However, applying the concept of not individually negotiated terms to determine the objective scope of control may generate the negative consequence that the supplier or the seller can circumvent the fairness review by creating the illusion that a term has been individually negotiated. While the UCTD seems to be silent on this issue, both the DCFR and CESL have clearly denied this possibility and insisted on assessing whether the consumer has been given a genuine opportunity to influence the contractual terms.

2.3.2. Core Provisions of the Contract Excluded

According to Article 4(2), the ‘definition of the main subject matter of the contract’ and ‘the adequacy of the price’ are exempt from a judicial review of the fairness of the contractual terms in so far as these terms are in plain and intelligible language. Similar limitations to the scope of the fairness test can be found in all the other instruments.¹⁷⁸

It is worth noting that the European Commission initially sought to subject every term in a consumer contract to a fairness test and thereby the original proposal for the Directive did not include any exclusion corresponding to Article 4(2). This proposal attracted severe criticism from German scholars who were against such a wide scope

176 Article II-1:110 (4) DCFR; Article 7(4) CESL.

177 Article II-1:110 (5) DCFR; Article 7(5) CESL.

178 See Article 4:110 PECL, Article 6:303 ACQP, Article II.-9:406 DCFR and Article 80 CESL.

of control. The most influential argument was presented by Professors Brandner and Ulmer, who argued that:

‘In a free market economy parties to a contract are free to shape the principal obligations as they see fit. The relationship between the price and the goods or services provided is determined not according to some legal formula but by the mechanisms of the market. Any control by the courts or administrative authorities of the reasonableness or equivalence of this relationship is anathema to the fundamental tenets of a free market economy’.¹⁷⁹

Instead, they proposed that consumer protection should be achieved ‘not by the wholly unsuitable means of controlling the terms of the contract’, but by ‘improving the transparency in this area’.¹⁸⁰ The European Commission did indeed listen to such arguments and introduced Article 4(2) and Recital 19 in the final text of the Directive, the purpose of which was to ‘clarify the procedures for assessing the unfairness of terms and to specify their scope while excluding *anything resulting directly from contractual freedom of the parties*’.¹⁸¹

Accordingly, the legislative history of the Directive therefore reveals the dual purpose of Article 4(2). Firstly, the inclusion of Article 4(2) in the adopted version of the Directive aims to emphasize that the Directive does not seek to interfere with ‘the fundamental tenets of a free market economy’. It is totally in line with the underlying rationale for harmonizing contract law in Europe to facilitate the establishment of the internal market.¹⁸² Secondly, through the introduction of the requirement of transparency as a further prerequisite to determine whether or not a term is excluded from a fairness test, the Directive provides a legal framework to ensure the meaningfulness of the consumer’s choices regarding the price and the main subject matter of the contract.¹⁸³ However, it is also noted that Recital 19 of the preamble to the Directive emphasized that the price/quality ratio remains relevant to the assessment of the fairness of other terms. This means that the core provisions of contracts were not totally excluded from the purview of the Directive.

179 They continuously argued that fairness control over core provisions of contracts would partially abrogate the laws of the market and hence prevent the offerors of goods or services from acting in accordance with those laws; the consumer would no longer need to shop around for the most favourable offer, but could rather pay any price in view of the possibility of a subsequent control of its reasonableness. See Professors Brandner and Ulmer, ‘The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission’ (1991) 28 *Common Market Law Review* 647, p. 656.

180 Ibid.

181 See the Common Position adopted by the Council on 22 September 1992 with a view to the adoption of Council Directive 93/13/EEC on unfair terms in consumer contracts, the Council’s reasons, p. 5.

182 Michael Schillig noted that ‘a market-based approach was always bound to prevail in order to justify the Directive in light of its legal basis,’ see Michael Schillig, ‘Directive 93/13 and the “Price Term Exemption”’: A Comparative Analysis in the Light of the “Market for Lemons” Rationale’ (2011) 60(4) *International and Comparative Law Quarterly* 933.

183 As will be analysed later, it has been well established by the CJEU that the requirement for the core terms to be drafted in plain intelligible language has the same scope as that referred to in Article 5UCTD. Therefore, to avoid repetition, the analysis of transparency as a second prerequisite to exclude core terms from being subjected to the fairness test will be presented in Section 3.2 (The Principle of Transparency in the UCTD).

(i) Bank charges case: Divergent Views in the Member States and the Case Law of the CJEU

As mentioned above, the wording of Article 4(2) as well as Recital 19 provides very limited guidance and thereby the expressions ‘the main subject matter of the contract’ and the ‘adequacy of the price and remuneration’ have been interpreted in various ways.¹⁸⁴ By way of example, with regard to the issue of whether a term that quantifies the price of services performed by the seller, depending on certain bank charge contingencies, falls within the scope of Article 4(2) and is thereby exempted from the fairness test, the Supreme Court in the UK and the courts in Germany reached totally divergent views. While the UK Supreme Court stated in the case of *Office of Fair Trading v Abbey National plc* in 2009 that overdraft charges fell within the exemption and could not be assessed as to their fairness,¹⁸⁵ German courts seem to take a more consumer-friendly approach in this regard.¹⁸⁶ In particular, the German Federal Supreme Court has consistently held that the standard terms of banks, which provide for specific fees to be charged on top of the general current account fees, are subject to an assessment as to their fairness.¹⁸⁷

In this context, in the two important cases, namely *Kásler*¹⁸⁸ and *Matei*,¹⁸⁹ the CJEU significantly clarified the meaning of Article 4(2) of the Directive and thus provided valuable guidance on its application for the national courts.

In the *Kásler* case, a term in a contract for a mortgage loan denominated in Swiss francs allowed the bank to calculate the monthly repayment installment due on the basis of the selling rate of exchange for the currency applied by the bank, while the buying rate of exchange for the currency was used when the loan was advanced. The Court was asked (1) whether the contractual clause concerning the rate of exchange of the currency was covered by ‘the definition of the main subject matter of the contract’, and if that was not the case, (2) whether the difference between the buying rate of exchange and the selling rate of exchange constituted remuneration.¹⁹⁰ The Court first emphasized that Article 4(2) must be strictly interpreted, since it lays down an exception to the mechanism for reviewing the substance of unfair terms, such as that provided for

184 One expert has argued that the main subject matter of the contract cannot be the term that governs the manner and time in which claims must be made (procedural clauses), Hugh Beale, ‘Unfair Terms in Contracts: Proposals for Reform in the UK’ (2004) 27 *Journal of Consumer Policy* 289.

185 For the case annotations, see Mindy Chen-Wishart, ‘Transparency and Fairness in Bank Charges’ (2010) 126 *Law Quarterly Review* 157; Paul Davies, ‘Bank Charges in the Supreme Court’ (2010) 69(1) *Cambridge Law Journal* 21.

186 The Law Commission and the Scottish Law Commission, *Unfair Terms in Consumer Contracts: a New Approach? Issues Paper* (July 2012) paras 7.57-7.61 <http://www.scotlawcom.gov.uk/files/6113/4313/5057/Unfair_Terms_in_consumer_contracts_issues.pdf> [accessed 15 May 2017].

187 *Ibid.*, para. 7.58; Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers, Denis Tallon and Stefan Vogenauer (eds), *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law* (2nd edn, 2010), 818-20.

188 Case C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt* CJEU 30 April 2014 ECLI:EU:C:2014:282.

189 Case C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA* CJEU 26 February 2015, ECLI:EU:C:2015:127.

190 Case C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt* CJEU 30 April 2014, ECLI:EU:C:2014:282, para 35.

by the system of consumer protection put in place by the UCTD.¹⁹¹ For this purpose, concerning the first question, the Court explained that only *essential obligations* of the contract and, as such, characterize it, fall within the notion of the ‘main subject matter of the contract’.¹⁹² In contrast, *ancillary provisions* – which may supplement, but not coincide with, the terms that define the core of the contract – fall outside the scope of exemption within the meaning of Article 4(2) of the Directive.¹⁹³ In applying such an interpretation to this case, the CJEU held that it was for the national court to ‘determine, having regard to the nature, general scheme and the stipulations of the loan agreement, and its legal and factual context, whether the term setting the exchange rate for the monthly repayment instalments constitutes an essential element of the debtor’s obligations, consisting in the repayment of the amount made available by the lender.’¹⁹⁴

However, as far as the second question is concerned, having considered the wording of Article 4(2) in conjunction with Recital 19 in the preamble to the Directive, the CJEU reasoned that the second category of terms that cannot be examined as regards unfairness is limited in scope, as that exclusion concerns only the adequacy of the price or remuneration as against the services or goods supplied in exchange.¹⁹⁵ Therefore, the CJEU decided that a term that merely determines the conversion rate of the foreign currency in which the loan agreement is denominated without *any foreign exchange service being supplied by the lender* could not constitute ‘remuneration’ and thereby should not be covered under the second limb of the exclusion of Article 4(2).¹⁹⁶

Later, in the *Matei* case, the reasoning in the *Kásler* case was closely followed by the CJEU. In this case, a Romanian court asked the CJEU to consider the application of Article 4(2) of the Directive to two terms in a consumer credit contract. The first term relating to the variable nature of the rate of interest provided that ‘the bank reserves the right to alter the current rate of interest in the event of significant changes on the financial markets, the new rate of interest being notified to the borrower; the rate of interest thereby altered shall apply from the date of notification’.¹⁹⁷ The second term entitled ‘Risk Charge’ provided that, for making the credit available, the borrower could be required to pay the bank a risk charge, calculated on the basis of the balance of the loan and payable on a monthly basis throughout its duration.¹⁹⁸

As regards the variation clause, in the light of the criteria which were elaborated in the *Kásler* case, the CJEU provided four reasons why such a clause would not fall within Article 4(2) of the Directive. First of all, in the earlier case of *Invitel*,¹⁹⁹ the Court already held that a similar term relating to a mechanism for amending the prices of the

191 *Ibid.*, para. 42.

192 *Ibid.*, para. 49.

193 *Ibid.*, para. 50.

194 *ibid.*, para. 51.

195 *Ibid.*, para. 54.

196 *Ibid.*, para. 58.

197 C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA*. CJEU 26 February 2015, ECLI:EU:C:2015:127, para. 24.

198 *Ibid.*, para. 25.

199 Case C-472/10 *NFH/Invitel*, CJEU 26 April 2012, ECLI:EU:C:2012:242, para. 23.

services provided to consumers does not fall within Article 4(2).²⁰⁰ Secondly, such a clause is expressly mentioned in Paragraph 1(j) of the annex to Directive 93/13, which includes an indicative and non-exhaustive list of potentially unfair terms, and thus the inclusion in that list of terms such as those enabling the lender to alter the interest rate unilaterally would to a large extent be deprived of any effectiveness if it were to be excluded, from the outset, from the test of unfairness by virtue of Article 4(2).²⁰¹ Thirdly, the clause appears to be ancillary as it contains an adjustment mechanism enabling the lender to alter the interest rate set by a different term which is likely to be part of the main subject-matter of the contract.²⁰² Finally, the term also appears to fall outside the second limb of the scope of Article 4(2) because its unfairness is established not on account of the *alleged inadequacy* of the level of the altered interest rate as against any consideration that may have been supplied in exchange for the alteration, but by the conditions and criteria enabling the lender to make that alteration, in particular on the ground alleging ‘significant changes in the money market’.²⁰³

As regards terms providing for a ‘risk charge’ to be applied by the lender, such as those at issue in the main proceedings, according to the CJEU several elements suggest that they do not fall within one of the two categories of exclusions laid down by Article 4(2). Indeed, regarding the first limb of the exclusion, although it is for the referring national court to determine whether those terms lay down one of the essential services or whether they are ancillary, the national court is required to take into account the essential aim pursued by the ‘risk charge’ which consists of ensuring the repayment of the loan. For this purpose, the CJEU considered that the mere fact that the ‘risk charge’ may be regarded as representing a relatively important part of the APR and, therefore, the income received by the lender from the credit agreements concerned ‘*is in principle irrelevant*’ for the purposes of determining whether the terms providing for that charge define the ‘main subject-matter’ of the contract.²⁰⁴ Although it is also for the national court to examine whether the terms providing for a ‘risk charge’ to be implemented by the lender may fall within the second limb of exclusions referred to in Article 4(2) of Directive 93/13, according to the CJEU, ‘certain information in the documents submitted to the Court seems rather to indicate that that is not the case.’²⁰⁵ Indeed, the dispute did not concern the adequacy of the amount of commission as compared with a service provided by the lender 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.²⁰⁶

In both judgments, the CJEU held that Article 4(2) of the Directive must normally be given an ‘autonomous and uniform interpretation throughout the European Union’, taking into account the context of that provision and the purpose of the legislation

200 Case C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA* CJEU 26 February 2015, ECLI:EU:C:2015:127, para. 58.

201 *Ibid.*, paras 59-60.

202 *Ibid.*, para. 62.

203 *Ibid.*, para. 63.

204 *Ibid.*, para. 68.

205 *Ibid.*, para. 69.

206 *Ibid.*, para. 70.

in question.²⁰⁷ Moreover, the CJEU firmly held that exclusion in Article 4(2) must be strictly interpreted since it provides an exception to the fairness test. Notably, in contrast to the view that the structure of Article 4(2) obscurely overlaps,²⁰⁸ the CJEU further held that Article 4(2) explicitly contains two limbs: the first one covers terms concerning the ‘main subject-matter of the contract’ and the second covers terms relating to ‘the adequacy of the price and remuneration on the one hand, as against the services or goods supplied, on the other.’ As a result, a challenged contract term should be separately considered in relation to each limb of the exclusions in Article 4(2). For this purpose, while it is still for the national courts to determine whether a term falls within the scope of these two limbs, the CJEU plays an essential role in interpreting Article 4(2) so as to elaborate the criteria that national courts must apply when examining a contract term.

(ii) Terms concerning the main subject-matter of the contract

The first limb of Article 4(2) covers terms which relate to ‘the main subject-matter of the contract’. In this connection, the CJEU has consistently held that

‘contractual terms falling within the notion of the “main subject-matter of the contract”, within the meaning of Article 4(2) of Directive 93/13, 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 notion of the “main subject-matter of the contract”’.²⁰⁹

The underlying assumption to justify such an approach may be the fact that consumers normally do not pay attention to ancillary provisions which do not define the main subject-matter of the contract or the price and thereby competition in the market between sellers and suppliers does not function to protect consumers.²¹⁰ It is therefore necessary to protect the consumer by means of an external mechanism such as the judicial review of the fairness of a term. With reference to the core terms that presumably receive close attention from consumers and are thereby protected by the competitive mechanism, they should be exempted from the fairness test provided that they have been drafted in

207 Case C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282, para. 42; Case C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA*. ECLI:EU:C:2015:127, para. 49.

208 Michael Schillig, ‘Directive 93/13 and the “Price Term Exemption”: A Comparative Analysis in the Light of the “Market for Lemons” Rationale’ (2011) 60(4) *International and Comparative Law Quarterly* 933.

209 Case C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282, paras 49-51; Case C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA*. ECLI:EU:C:2015:127, para. 54.

210 Michael Schillig, ‘Directive 93/13 and the “Price Term Exemption”: A Comparative Analysis in the Light of the “Market for Lemons” Rationale’ (2011) 60(4) *International and Comparative Law Quarterly* 933, 960. Matteo Dellacasa, ‘Judicial Review of “Core Terms” in Consumer Contracts: Defining the Limits’ (2015) 11(2) *European Review of Contract Law* 152, 160-61. For a further discussion from an economic perspective, see H.B. Schäfer and P.C. Leyens, ‘Judicial Control of Standard Terms and European Private Law’, in P. Larouche and F. Chirico (eds), *Economic Analysis of the DCFR* (Munich: Sellier, 2010) 104-105.

plain and intelligible language.²¹¹ There must be a strict distinction between the core terms, which cannot be assessed for fairness, and other ancillary terms, which can be assessed. The object of the Directive is to protect consumers against the inclusion of unfair terms and that objective would basically be frustrated if Article 4(2) were to be so broadly interpreted as to cover any terms other than those falling exactly within it.²¹²

However, the question remains as to how to establish whether the term at issue actually concerns essential obligations. In the *Kásler* case, the CJEU and Advocate General Wahl offered different views on this question. In Advocate General Wahl's view, the national courts must decide in each individual case the essential obligations which must *objectively* be regarded as essential in the general scheme of the contract.²¹³ Thus, the standard applied should be 'whether that term contributes *objectively*, in one way or another, to the *legal or commercial definition of the essential characteristics of the contract*'.²¹⁴ However, the Court explained that in identifying the terms falling within the ambit of the first limb of Article 4, the national courts should consider to a wide range of contextual circumstances including 'the nature, general scheme and the stipulations of the loan agreement, and its legal and factual context'. On that account, the CJEU instructed the national courts to adopt a contextual approach to identify the essential obligations of contracts, instead of the more abstract approach based on the legal definition of a contract supported by Advocate General Wahl.²¹⁵

(iii) Terms relating to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied, on the other

The second limb of Article 4(2) covers terms relating to 'the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied, on the other' and so the starting point is to define the boundary of such a formula. Unlike the clear guidance with regard to the meaning of the main subject-matter of a contract, the CJEU has not provided criteria to identify whether a specific term related to the price falls within the ambit of the second limb of Article 4(2). Instead, the CJEU provided the following guidance to national courts:

'It follows from the wording of Article 4(2) of Directive 93/13 that the second category of terms which cannot be examined as regards unfairness *is limited in scope*, for that exclusion concerns only the adequacy of the price or remuneration as against the services or goods supplied in exchange, that exclusion being explained by the fact

211 Matteo Dellacasa, 'Judicial Review of "Core Terms" in Consumer Contracts: Defining the Limits' (2015) 11(2) *European Review of Contract Law* 152, 160-61.

212 For a different view, see Martijn W. Hesselink, 'Unfair Prices in the Common European Sales Law' in S. Vogenauer and L. Gullifer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Oxford: Hart publishing 2014) 225-36.

213 Case C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt* ECLI:EU:C:2014:282, para. 49.

214 Case C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt* ECLI:EU:C:2014:282, para. 53.

215 Hugh Beale, *Chitty on Contracts* (Sweet & Maxwell, 2015) 1066.

that no legal scale or criterion exists that can provide a framework for, and guide, such a review.²¹⁶

Nevertheless, some further guidance can be discerned from the Court's case law. Firstly, according to the CJEU, a number of terms related to the price, but not the price itself or the quality/price ratio, fall outside the scope of the second limb of Article 4(2). In the *Invitel* and *RWE* cases, the Court consistently held that a variation clause relating to a mechanism for amending the prices of the services provided to the consumer does not fall within Article 4(2). Similarly, in *Mohamed Aziz*,²¹⁷ an acceleration clause was also considered to fall outside Article 4(2). As a result, in *Matei*, the CJEU clearly held that the terms relating to *the consideration due* by the consumer to the lender or *having an impact on the actual price to be paid* to the latter by the consumer do not therefore in principle fall within the second category of terms, except as regards the question whether the amount of consideration or the price as stipulated in the contract is adequate as compared with the service provided in exchange by the lender.²¹⁸

Secondly, on the basis of *Matei*, suffice it to say that a term falling within one of the examples listed in the Annex to the Directive does not fall within the scope of Article 4(2).²¹⁹ Thirdly, in *Kásler*, the CJEU indirectly provided limited guidance on determining how a term constitutes part of the price or remuneration. In this case, the Court explained that the difference between the selling rate of exchange and the buying rate of exchange of the foreign currency could not be considered as 'remuneration' since nothing was done by the creditor in exchange for this difference. In doing so, it seems in the Court's view that exclusion in the second limb of Article 4(2) only applies if there is a distinct service in exchange for which the price or remuneration is to be paid.²²⁰

(iv) Insurance contracts

With regard to insurance contracts where this matter of defining the subject-matter is particularly difficult, Recital 19th to the Preamble of the Directive specifically states that:

'it follows, *inter alia*, that in insurance contracts, the terms which clearly define or 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.'

216 *Case C-26/13 Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt* para. 54; *Case C-143/13 Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA* CJEU 26 February 2015, ECLI:EU:C:2015:127. para. 55.

217 Hugh Beale, *Chitty on Contracts* (Sweet & Maxwell, 2015) 1066.

218 *Case C-143/13 Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA* CJEU 26 February 2015, ECLI:EU:C:2015:127. para. 56.

219 Hugh Beale, *Chitty on Contracts* (Sweet & Maxwell, 2015) 1067.

220 Hugh Beale, *Chitty on Contracts* (Sweet & Maxwell, 2015) 1068.

The case of *Van Hove* for the first time offered the CJEU the opportunity to discuss the scope of Article 4(2) in relation to insurance contracts.²²¹ The case was brought before a French court by Mr. Van Hove, a consumer, against CNP Assurance, an insurance company, with regard to terms which defined the insured risk in the event that the insured person found himself ‘unable to take up any activity, paid or otherwise’. While Mr. Van Hove claimed that the definition clause in the insurance contract was an unfair term, CNP Assurance contended that the term was exempt from the unfairness test as it covered the very subject-matter of the contract and was clear and precise for the purposes of the exception laid down in Article 4(2) of the Directive.²²² The French court referred a question to the CJEU to ask whether such a definition clause falls within the ambit of Article 4(2).

In order to determine whether a term falls within the main subject-matter of an insurance contract, following its earlier approach concerning Article 4(2) in the *Kásler* and *Matei* cases, the Court firmly explained that contractual terms falling within the concept of ‘the main subject-matter of the contract’ must be understood as being those that lay down the essential obligations of the contract.²²³ For this purpose, and referring to its earlier case law,²²⁴ the Court found that ‘the essentials of an insurance transaction are that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialization of the risk covered, with the service agreed when the contract was concluded.’²²⁵ Hence, the Court stated, referring to Recital 19 in the Preamble to the Directive, that, in insurance contracts, terms which clearly define or circumscribe the insured risk and the insurer’s liability shall not be subject to an assessment as to whether they have an unfair character since those restrictions are taken into account in calculating the premium paid by the consumer.²²⁶ Thus, it cannot be ruled out that the term at issue concerns the very subject-matter of the contract, in so far as it seems to circumscribe the insured risk and the insurer’s liability while laying down the essential obligations of the insurance contract.²²⁷

Accordingly, in this case, the particular character of insurance contracts may generate an argument that no term related to the definition of the insured risk could be submitted to the fairness test. However, taking a closer look at the judgment might reveal that the Court still follows a restrictive approach in interpreting Article 4(2). Indeed, in the field of insurance contracts, referring to Recital 19 expressly, the Court seems to establish two conditions for determining whether a term falls within the scope of Article 4(2) and is thereby exempted from the fairness test. First, the terms must clearly define or circumscribe the insured risk. Second, the restrictions on the insurer’s liability resulting from these terms have to be taken into account in calculating the premium

221 Case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA*, CJEU 23 April 2015, ECLI:EU:C:2015:262.

222 *Ibid.*, paras 18-19.

223 *Ibid.*, para. 33.

224 CPP, Case C349/96, EU:C:1999:93, para. 17; Skandia, Case C240/99, EU:C:2001:140, para.37; Case C13/06 *Commission v Greece* EU:C:2006:765, para. 10.

225 Case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA* CJEU 23 April 2015, ECLI:EU:C:2015:262, para. 34.

226 *Ibid.*, para. 35.

227 *Ibid.*, paras 36-37.

paid by the consumer. Only when these two cumulative conditions are satisfied will the term escape from the fairness test. To put it differently, a term which circumscribes the insured risk without taking into account the legitimate expectations of the consumer concerning the price may not be excluded from the control of fairness.²²⁸

2.3.3. *Terms Reflecting Mandatory Statutory or Regulatory Provisions are Excluded*

Article 1(2) excludes from the scope of the Directive ‘contractual terms which reflect mandatory statutory or regulatory provisions and the provisions of principles of international conventions to which the Member States or the Community are party.’ For this purpose, Recital 13 clarifies that ‘mandatory statutory or regulatory provisions’ include ‘rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established.’ It is obvious that with such wording the term ‘mandatory’ as referred to in Article 1(2) is not used in a normal sense to indicate a category of rules belonging to *ius cogens* which will be enforced even if the parties to a contract attempt to derogate or modify them. Instead, the term is specifically meant to include also default rules belonging to the *ius dispositivum* which can be modified by an agreement between the parties. The exclusion of such a wide category of terms from the UCTD’s scope of control seems to be justified by the assumption that national rules, which have received the approval of the democratically elected legislature, are fairly balanced and adequately take into account the interests of all parties concerned.²²⁹ Indeed, Article 1(2) is included in order to address the relationship between terms in standard contracts and the existing law, national and supranational, and to subject such terms to a review but only to the extent that they deviate from the applicable law.²³⁰

However, the question remains as to what is the precise scope of the formula ‘mandatory statutory or regulatory provisions’. A controversial case concerns the terms of public service which are pre-formulated by the supplier and then subjected to a requirement of approval by an administrative authority.²³¹ One may argue that the formula ‘regulatory provisions’ obviously includes such contractual terms and thereby excludes the provisions of public service from the ambit of UCTD’s control. Even so, this is not the only possible interpretation since Recital 14 makes it clear that the ambit of the control by the UCTD also covers trades, businesses or professions of a public nature.

228 From a UK law perspective, Hugh Beale argues that since the classification of the contract term as the main subject-matter will depend on, partially, how it is presented, the test will in fact be whether the clause permits performance which is different from what the consumer reasonably expected, Hugh Beale, ‘Unfair Terms in Contracts: Proposals for Reform in the UK’ (2004) 27 *Journal of Consumer Policy* 289, 298; Law Commission, *Unfair Terms in Contracts* (Law Com CP No. 166, 2002); Scottish Law Commission (Scot Law Com DP No. 119, SE/2005/13, 2005) 25.

229 Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.* [2013] ECR I-0000 nyr, Opinion of AG Trstenjak, para. 47.

230 *Ibid.*

231 See more in S Whittaker, ‘Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract’ (2000) 116 *LQR* 95, 118.

Against this background, in *RWE Vertrieb AG*²³² the CJEU considerably clarified the scope of Article 1(2) of the Directive. In this case, RWE supplied natural gas to consumers on the basis of either ‘standard tariff contracts’ or ‘special contracts’. While the general terms and conditions of the ‘standard tariff contracts’ were governed by German legislation (AVBGasV), such legislation did not intentionally cover ‘special contracts’. However, the wording of the standard terms of the ‘special contracts’ resembled the general terms and conditions of the ‘standard tariff contracts’ which were required by the provisions of the AVBGasV. The question referred to the Court of Justice by the BGH was whether, pursuant to Article 1(2), the Directive does not apply to contract terms that incorporate into consumer contracts a rule of national law applicable to another category of contracts that are not subject to the national legislation concerned.²³³

Referring to Recital 13 of the Preamble to the Directive, the CJEU explained that the exclusion of mandatory rules from the fairness control is justified by the fact that ‘the national legislature struck a balance between all the rights and obligations of the parties to certain contracts.’²³⁴ By doing so, the CJEU followed the opinion of Advocate General Trstenjak that terms which have received the approval of the national legislature were assumed to be sufficiently balanced and were not based on a misuse of the financial superiority of the seller or supplier and thereby the exception was aimed at standard contracts for which a fair balancing of the conflicting interests of the parties had already been achieved.²³⁵ The CJEU then held that this reasoning did not apply to the situation where a contract has merely incorporated a rule of national law applicable to another category of contracts. Indeed, such an intention by the individual parties to extend the application of those rules to a different contract *cannot be equated* with the establishment by the national legislature of a balance between all the rights and obligations of the parties to the contract.²³⁶ Consequently, the CJEU concluded that the application of the UCTD to terms such as those in special contracts for supplying gas to consumers, which were at issue in the main proceedings, was not excluded by Article 1(2) of that Directive.

Apparently, Article 1(2) does not apply to contract terms in a statutory provision which is created for a different type of contract. The question is whether Article 1(2) covers terms in a contract which has reproduced statutory provisions which would otherwise apply to such a contract. In this regard, the CJEU gave an affirmative answer by providing that the exclusion in Article 1(2) of that Directive extends to terms which reflect provisions of national law that apply between the parties to the contract independently of their choice or provisions that apply by default in the absence of other arrangements established by the parties.²³⁷

232 Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.* [2013] ECR I-0000 nyr.

233 *Ibid.*, para. 24.

234 *Ibid.*, para. 29.

235 Opinion of Advocate General Trstenjak, Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.* [2013] ECR I-0000 paras 37-43.

236 *Ibid.* para. 29.

237 *Ibid.* para. 26. The reasoning in *RWE Vertrieb AG* was confirmed in Case C-34/14 *Monika Kušionová v SMART Capital CJEU* 10 September 2014, ECLI:EU:C:2014:2189, para. 79.

As regards the specific question mentioned above, i.e., whether the exclusion laid down in Article 1(2) applies to contract terms which are not directly determined by national legislation but are approved by public authorities or regulators, while Advocate General Trstenjak's opinion provided some guidance, the CJEU did not directly consider this question. Advocate General Trstenjak noted that having regard to the purpose of that Directive, the exclusion should be strictly construed and thereby the only exclusions are contractual conditions of public authorities which are provided for by regulations or statutes.²³⁸ Indeed, in the light of the aim of Article 1(2) any legal assessment should not be altered by the fact that a case concerns the general terms and conditions of a supply undertaking which pursues objectives in the public interest. Thus, Advocate General Trstenjak's opinion seems to suggest that Article 1(2) does not apply to standard terms that have been approved by public authorities.

2.4. Policy Choice: Extension of the Legislative Scope of the Control of Unfair Terms

During several important proceedings, notably the 1999 Conference on the Unfair Contract Terms Directive which evaluated the 5-year implementation of the Directive, or the discussion on the 2007 Green Paper on the Review of the Consumer Acquis and most recently the 2016 Fitness Checks as part of the Commission's Regulatory Fitness and Performance Programme,²³⁹ there have been vigorous discussions on the legislative scope of the control of unfair terms. In general, these debates can be categorized into two themes. First, whether the fairness control should be expanded to cover individually negotiated terms and whether the core provision exemption from the fairness test should be lifted. Second, whether the fairness control should be extended to cover contracts between businesses and small and medium-sized enterprises (SMEs). The following sections will attempt to give a general impression of the discussion raised above.

2.4.1. *Extension of the Directive's Scope to Individually Negotiated Terms*

In the 2007 Green Paper on the Review of the Consumer Acquis, which included the Unfair Terms Directive, the European Commission raised a question as to whether the fairness control should be extended to cover terms that are individually negotiated between the business and the consumer.²⁴⁰ This is a highly controversial topic in European contract law and taking a closer look at the DCFR will reveal that the academic discussions

238 Ibid., para. 54.

239 For further information on the Review of EU Consumer law (Fitness Check) which covers Unfair Contract Terms Directive, see <http://ec.europa.eu/consumers/consumer_rights/review/index_en.htm> [accessed 15 May 2017].

240 The Green Paper notes that: 'The Directive on unfair contract terms currently applies to non-negotiated terms only, i.e. contractual clauses which the consumer has had no possibility to influence during the negotiation process. In practice, the Directive is in most cases applicable to pre-formulated contract terms used in mass transactions. In reality, consumers often have only a very limited possibility to influence the content of a clause even if it theoretically is open to negotiations.' COM (2006) 744 final, p. 18. <http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf> [accessed 15 May 2017].

concerning this question have not come to an end. Surprisingly enough, the DCFR's provisions on unfair terms in consumer contracts have two different versions.²⁴¹ Under version 1, the scope of the unfairness test is limited to terms which are not individually negotiated. This version, which is in line with the corresponding provision in the ACQP as well as the UCTD, is supported by the Acquis Group. However, the majority of the Study Group members held a firm position that this unfairness test needs to be extended to individually negotiated terms; therefore, version 2 ensures that all terms in a contract between a business and a consumer are subject to a review.

The divergent views could also be seen in the Member States even after the transposition of the UCTD into their national law. As the Directive is a minimum harmonization instrument, the Member States have complete discretion to grant consumers a higher level of protection through national provisions that are more stringent than those of the Directive. As a result, in the 2008 EU Consumer Law Compendium the authors reported that 10 Member States, by not having transposed this exclusion, allowed their courts or authorities to monitor individually negotiated terms.²⁴² In the most recent development, the United Kingdom has introduced the Consumer Rights Act 2015 to reform its statutory regime on controlling unfair terms and one of the crucial features of this reform is the extension of the fairness control scheme to individually negotiated terms. Notably, this reform was recommended by the Law Commissions in 2005 for three reasons: first, it would remove the uncertainty as to when a term is to be treated as individually negotiated; second, a consumer might not realize that negotiating a term would remove it from the ambit of the unfair terms controls; and third, it would help with simplification.²⁴³

Overall, the question to what extent should the discipline of unfair contract terms also cover individually negotiated terms must be seen from both practical and theoretical perspectives. From a practical standpoint, there seem to be good reasons for expanding the fairness test to cover individually negotiated terms. That is to say, as the Law Commission in the UK stated, it would remove the uncertainty in deciding whether a term has been individually negotiated. Indeed, the core concern is based on the fact that businesses can circumvent the fairness review through seeking to create an illusion that they offer consumers opportunities to negotiate contractual terms.²⁴⁴

241 In the current version of the Article the words 'which has not been individually negotiated' are put in square brackets.

242 This is the case in Denmark, Finland, Sweden, Belgium, the Czech Republic, France, Latvia, Luxembourg, Malta and Slovenia, see Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier European Law Publishers, 2008) 383.

243 Joint Report of the Law Commission, *Unfair Terms in Contracts* (Law Com No 292, Scot Law Com No. 199, 2005), para. 3.52.

244 For example, the Law Commission in the UK noted that 'During consultation, the OFT drew our attention to the problem of businesses making a practice of regularly imposing unfair terms which had a bespoke or negotiated element. An example is where a business encourages a sales force negotiating contracts with consumers to insist on very high deposits for work not yet undertaken. It might be the case that the sales person is instructed to ask for, say, a 100% deposit but to reduce the figure in the face of a reluctant consumer to anything above 75%.' See Joint Report of the Law Commission, *Unfair Terms in Contracts* (Law Com No. 292, Scot Law Com No. 199, 2005) para. 3.156.

However, to this effect, the most relevant question to be first addressed is whether the criterion of individual negotiation sufficiently protects the consumer from businesses' circumvention. A correct definition of negotiations will make it impossible or at least more difficult for businesses to avoid the fairness test. As discussed above, while the UCTD does not provide an adequate definition of individual negotiation, the DCFR and the CESL have attempted to address the UCTD's flaws. Under the DCFR and CESL, the negotiation must be so real and meaningful that it offers the consumer a genuine opportunity to influence a contractual term.²⁴⁵ Thus, a term was not 'individually negotiated' if in fact the business merely offered a simple conservation or a selection of contract terms without providing the consumer with a real opportunity to change the terms. Accordingly, from a practical aspect, a correct definition of 'individually negotiated' may be a solution to the problem of defining 'terms not individually negotiated'.²⁴⁶

Additionally, it should be noted that the introduction of 'non-individually negotiated terms' is one of the most controversial issues of the UCTD from a theoretical perspective. The exemption of negotiated terms from the fairness test seems to reflect the fact that the UCTD is the result of a compromise between the German and French approaches.²⁴⁷ It is widely known that these two main approaches were competing with each other during the origin of the Directive. On the one hand, the German tradition focused on the control of standard terms. In particular, the fairness control is justified as a reaction to the market failure which results from the information asymmetries between the parties. Accordingly, the courts' power to police contractual terms only extends to contract terms prepared for use in a number of contracts.²⁴⁸ On the other hand, the French tradition was based on a very different assumption: an unequal bargaining power between the parties. In this fairness control model, since the justification for the legislative control of unfair terms was the weaker position of consumers, it is irrelevant whether the terms were negotiated between consumers and businesses. Consequently, both individually negotiated terms and standard terms should be subject to the fairness test.²⁴⁹ Obviously, the Directive did not entirely follow either approach, but rather attempted to reconcile the two schools by inventing a new unique concept of 'non-individually negotiated terms' to define the scope of its application.

245 See Section 2.3.1.

246 The Comment to Article II.-9:403 DCFR states that due to the fact that II.-1:110 (Terms 'not individually negotiated') provides a very broad definition of what a not individually negotiated term is, the practical consequence of the divergence between the two versions of the provisions concerning whether or not to subject individually negotiated terms to the fairness test should not be overestimated. The practical relevance of the distinction is reduced even further by the burden of proof rule in paragraph 4 of that Article according to which, in business to consumer contracts, the burden of proving that a term has been individually negotiated is imposed upon the business.

247 See Paolisa Nebbia, *Unfair Contract Terms in European law: a Study in Comparative and EC law* (Bloomsbury Publishing, 2007) 137; Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier European Law Publishers, 2008) 197; Fryderyk 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' (2008) XIV *Juridica International* 69.

248 Ibid.

249 Ibid.

Although the question of ‘[T]o what extent should the discipline of unfair contract terms also cover individually negotiated terms’ still received significant attention from the European Commission, it was not ripe enough for such a substantial extension and thus the current state of European contract law remained unchanged.²⁵⁰ It should also be noted in passing that the extension of the fairness test to individually negotiated terms, from a practical perspective, is of little significance.²⁵¹ The majority of negotiated terms are likely to be the main subject-matter of a contract and/or the price/quality ratio and are thereby excluded from an assessment of their fairness in any event by virtue of Article 4(2). Therefore, a surprising reform can only take place if Article 4(2) is abolished at the same time.

2.4.2. Protection of SMEs from Unfair Terms

In the 2007 Green Paper on the Review of the Consumer Acquis, the European Commission also addressed the issue that ‘some businesses, such as individual entrepreneurs or *small businesses*, may sometimes be in a similar situation as consumers when they buy certain goods or services, which raises the question whether they should benefit to a certain extent from the same protection provided for consumers.’²⁵² Four years later, the proposal for a Regulation on CESL envisioned that this political will could be realised through introducing the first set of rules specifically concerned with SMEs in EU contract law.²⁵³ The CESL contains a section on unfair terms in contracts between traders, but by virtue of Article 7 of the proposal for a Regulation on CESL it can only be used if at least one of those parties is an SME. According to Article 86 CESL, a contract term in a contract between traders is unfair if it forms part of not individually negotiated terms and if it is of such a nature that its use largely departs from good commercial practice, contrary to good faith and fair dealing.

250 In the proposal for a Directive on Consumer Rights in 2008 as well as the proposal for CESL in 2011, only the terms not individually negotiated were subject to the unfairness test.

251 ‘The CLAB database also shows that this exclusion has not had any practical effect in the Member States which transposed it, because none of the cases in the database concerns an individually negotiated contractual term. Indeed it is fanciful to think that contracts of adherence could truly contain individually negotiated terms other than those relating to the characteristics of the product (colour, model, etc.), the price or the date of delivery of the good or provision of the service – all terms which rarely give rise to problems concerning their potential unfairness’ See Commission of the European Communities, Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts COM (2000) 248 final, p. 14.

252 COM (2006) 744 final, p. 15.

253 Actually, apart from rules concerning the control of unfair terms in B2C contracts, the *acquis communautaire* also provides for the control of terms in B2B contracts. This system can be found in the 2000 Late Payment Directive and its successor, the 2011 Late Payment Directive, which outline the control of an agreement on an excessive deferral of a payment period. Article 7 of the 2011 Directive entitled ‘Unfair contractual terms and practices’ requires the Member States to provide that a contractual term or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is either unenforceable or gives rise to a claim for damages if it is grossly unfair to the creditor. However, the scope of the Late Payment Directive is only restricted to contractual terms relating to payments. See more in Marco B.M. Loos and Ilse Samoy, ‘The Position of Small and Medium-Sized Enterprises in European Contract Law: An Introduction’ in Marco BM Loos and Ilse Samoy (eds), *The Position of Small and Medium-Sized Enterprises in European Contract Law* (Cambridge: Intersentia, 2014) 1, 6.

From a theoretical perspective, an argument for the expansion of the fairness control to SMEs can be made on the basis of either the paradigm of the ‘inequality of bargaining power’ or the transaction cost, which are commonly used to justify the control of unfair terms in consumer contracts.²⁵⁴ On the one hand, in entering into contracts with traders, SMEs can be as equally vulnerable as consumers with regard to the lack of information and their inexperience and dependence.²⁵⁵ Ole Lando convincingly argued that ‘the situation of the small professional, the farmer, the fisherman, the shopkeeper, the artisan, etc., is mostly the same as that of the consumer.’²⁵⁶ Accordingly, if the paradigm of unequal bargaining power is compelling enough to justify the unfairness test for consumers, it should also hold true for SMEs in order to protect their weaker position from being exploited by the stronger party. On the other hand, protecting SMEs against unfair terms can also be justified on the ground of the transaction-cost theory. Indeed, given that the transaction cost resulting from negotiation exceeds the benefits, SMEs, just like consumers, are rationally ignorant of the standard contract terms,²⁵⁷ thereby giving businesses no incentives to attract them by offering efficient contracts. This rational apathy on the part of SMEs may result in a ‘market for lemons’ in which information asymmetry leads to a ‘race to the bottom’ and standard contract terms are the most disadvantageous for SMEs.²⁵⁸ Thus, since the control of unfair terms is based on a market failure concerning the quality of standard contract terms, there is no persuasive reason for distinguishing between SMEs and consumers in this regard.²⁵⁹ Accordingly, under the two mentioned theories, the unfairness control should also be extended to SMEs.

However, from a practical perspective, there exists a realistic problem as to how one should differentiate between those small to medium-sized businesses that are worthy of protection as consumers and those which are, in effect, large businesses.²⁶⁰ Article 7(2)

254 Josse Klijnsma, ‘The CESL and its Unfair terms Protection for SMEs’ in Marco BM Loos and Ilse Samoy (eds), *The Position of Small and Medium-Sized Enterprises in European Contract Law* (Cambridge: Intersentia, 2014) 73, 74-77; Sander Van Loock, ‘Unfair Terms in Contracts Between Businesses: A Comparative Overview in Light of the Common European Sales Law’ in Marco BM Loos and Ilse Samoy (eds), *The Position of Small and Medium-Sized Enterprises in European Contract Law* (Cambridge: Intersentia, 2014) 83, 90-94.

255 M.W. Hesselink, ‘SMEs in European Contract Law’ in K. Boele-Woelki and W. Grosheide (eds), *The Future of European Contract Law* (Kluwer Law International, 2007) 359.

256 Ole Lando, ‘Liberal, social and “ethical” justice in European contract law’ 2006 43(3) *Common Market Law Review* 817, 829.

257 The findings from empirical research confirm the hypothesis that ‘almost no one reads standard-form contracts’ see Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, ‘Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts’ (2014) 43(1) *Journal of Legal Studies* 9.

258 Michael Schillig, ‘Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice’s Jurisprudence on Directive 93/13 on Unfair Contract Terms’ (2008) 33 *European Law Review* 336.

259 But it should be noted that ‘businesses can be expected to know when such control should be excluded. This will usually be the case where important contracts are at stake. In such cases, the parties have sufficient incentives to negotiate the details of their contract, or to take the standard terms into consideration when determining the price’ see R. Zimmermann, H. Eidenmüller, F. Faust, H. C. Grigoleit, N. Jansen and G. Wagner, ‘Towards a Revision of the Consumer Acquis’ (2011) 48 *Common Market Law Review* 1077, 1093.

260 See Ewoud Hondius, ‘The Notion of Consumer: European Union versus Member States’ (2006) 28 *Syd L Rev* 89, 95-96; Larry A. Di Matteo, ‘The Curious Case of Trans-border Sales Law: A Comparative Analysis

CESL, for example, defines an SME as a trader which employs fewer than 250 persons and has an annual turnover not exceeding € 50 million or an annual balance sheet total not exceeding € 43 million.²⁶¹ The definition, which is based on Recommendation 2003/361/EC,²⁶² has been criticized as being too complex to determine whether a contracting party can be categorized as an SME.²⁶³ Nevertheless, the necessity for the protection of SMEs from the exploitation of the stronger trader is undeniable.²⁶⁴ Therefore, to overcome the difficulties in defining SMEs, Hans Micklitz and Norbert Reich have suggested that it might be easier to extend the concept of a consumer than to introduce a new category of ‘business in need of protection’.²⁶⁵ This solution seems to be in line with Ewoud Hondius’ observation that ‘consumer protection claims have often served as a catalyst in reforming the law in general, especially contract law.’²⁶⁶

of CESL, CISG, and the UCC’ in Ulrich Magnus (ed.), *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (Seilier European Law Publishers, 2012) 25, 38.

- 261 The definition of an SME is taken from the Annex to Commission Recommendation 2003/361/EC.
- 262 Heidemann has argued that the definition is ‘identical to those used in national taxation laws to establish the thresholds for the application of stages of corporation tax or reporting duties. It is regrettable to see an intrusion of the spirit of regulatory and public law into a genuinely private law sector’, see Maren Heidemann, ‘European Private Law at the Crossroads: The Proposed European Sales Law’ (2012) 20(4) *European Review of Private Law* 1119.
- 263 In a Report to the UK Government, the Law Commission and the Scottish Law Commission rightly pointed out the following issues with regard to the definition of SMEs in Recommendation 2003/361/EC: ‘(1) Counting employees: The Recommendation states that one should count ‘annual work units’, in which part-time staff count as part employees and seasonal staff count only for the proportion of the year. For example, a fruit farm, which has 50 staff in the winter and 500 part-time pickers in June, should look not at the number of employees but at the number of ‘annual work units’ it has employed. This can be a complex sum to do. (2) Converting turnover figures: If a firm has a financial year of January to December 2010, and files its accounts in April 2011, we think that these would be the relevant figures in March 2012 when the contract is signed. If so, is the relevant conversion rate the one which applies in December 2010, April 2011, or March 2012? In a world of financial instability, this could become an important issue. (3) Linked enterprises: Recommendation 2003/361 includes complex rules to distinguish between autonomous and linked enterprises. Although these rules are not referred to specifically in the draft Regulation, we think they would apply. (4) Renewals: Under Article 35.2, a contract may be concluded by usage. Take a case in which a contract arrangement proves to be very successful; the seller grows rapidly; and both sides roll over the contract, without thinking about its terms. There is a danger that the original choice of the CESL would become invalid because (unnoticed by the parties) the seller is now too large.’ See the Law Commission and the Scottish Law Commission, *An Optional European Common Sales Law: Advantages and Problems*, Advice to the UK Government (10 November 2011) 89 <http://www.scotlawcom.gov.uk/files/6413/2205/8433/Common_European_Sales_Law_Advice.pdf> [accessed 15 May 2017].
- 264 One may argue that a simple solution can be taken from the ACQP and DCFR when the restriction of unfairness test to contracts in which one party is an SME is replaced by the general unfair tests in every B2B contract. Indeed, Article II.-9:406 DCFR on unfair terms deals with SMEs in exactly the same way as large businesses. However, the criterion of the fairness test for B2B contracts is meant to be harsher than those for B2C contracts. Accordingly, SMEs face a harsher test than consumers in proving that a term is unfair, but from a theoretical perspective this issue seems to be unsatisfactory. For criticism of the divergence between the fairness test in B2B and B2C contracts, see Phillip Hellwege, ‘It is Necessary to Strictly Distinguish Two Forms of Fairness Control!’ (2015) 4(4) *Journal of European Consumer and Market Law* 129, 133.
- 265 The authors reiterated that in the existing secondary European Union law in the field of telecommunications, energy and financial services the notion of a ‘customer’ which is distinct from that of a consumer integrates exactly those SMEs which merit protection. See Hans-W. Micklitz and Norbert Reich, *The Commission Proposal for a ‘Regulation on a Common European Sales Law (CESL)’ – Too Broad or Not Broad Enough?* (February 1, 2012). EUI Working Papers LAW No. 2012/04, 15. <<http://ssrn.com/abstract=2013183>> or <<http://dx.doi.org/10.2139/ssrn.2013183>> [accessed 15 May 2017].
- 266 See Ewoud Hondius, ‘The Notion of Consumer: European Union versus Member States’ (2006) 28 *Syd L Rev* 89, 96.

All in all, it can be concluded that from a theoretical perspective, there seem to be good grounds to extend the fairness control to cover contracts between SMEs and large businesses. However, it remains to be seen how the pragmatic issue of defining the correct scope of SMEs that deserve to be protected as much as consumers shall be resolved in European contract law.

2.5. Concluding Remarks

The aim of this section has been to analyse different conceptual aspects of the scope of the legislative control of unfair terms in the UCTD and other European instruments.

Apparently, the UCTD's scope *ratione personae* is limited to contracts between a consumer and a supplier or a seller. As regards the concept of a consumer, the CJEU has addressed two fundamental issues: (i) legal persons as consumers; and (ii) mixed purpose contracts. It seems that the CJEU has taken a very cautious approach in interpreting the concept of consumers as in a number of cases analysed the Court has consistently held the position that the Directive does not afford protection to legal persons even if they are in a position similar to that of a consumer. In the case of mixed contracts, while the Advocate General suggested the criterion of the predominant purpose as provided for in Recital 17 in the Preamble to the CRD for determining to what extent mixed contracts fall within the scope of the UCTD, the Court, regrettably, did not take a clear position on this point. Be that as it may, following the positions of the Court in its jurisprudence, it seems that the Court would not be willing to give a broad interpretation to the concept of consumers. In contrast, the concept of a 'seller or supplier' has been widely interpreted by the Court to include any person who is acting for purposes relating to his trade, business or profession. Indeed, this concept can be used to refer to landlords, lawyers or even public utility undertakings. This approach taken by the CJEU is very consistent with the underlying *rationale* behind the UCTD, which is to protect the special category of a weaker party – the consumer – from the abuse of power by the stronger party – the trader.

The UCTD's scope *ratione materiae* is confined to terms not individually negotiated rather than all kinds of contractual terms. The concept of 'not individually negotiated terms' is a new European law concept invented to harmonize the two legal traditions: the German approach, focusing on the control of standard contract terms, and the French approach, favouring the control of all kinds of terms in consumer contracts. As a result, the concept of 'not individually negotiated terms' is given such a broad definition in the Directive that it includes not only standard contract terms but also any terms that have been drafted unilaterally with the intention of narrowing their application to a single transaction. Nevertheless, the UCTD does not provide an adequate definition of 'not individually negotiated terms', thus creating the possibility for the supplier or seller to circumvent the fairness control. In this connection, the DCFR and CESL seem to better resolve this flaw by adding a stricter rule on the burden of proof in order to ensure that

only a real and meaningful negotiation that offers consumers a genuine opportunity to influence a contractual term can exempt the term from the fairness test.²⁶⁷

Additionally, the UCTD contains two important limitations on its objective scope of application: (i) terms that reflect ‘mandatory statutory or regulatory provisions’ are exempt from the fairness control (Article 1(2)), and (ii) terms that relate to the definition of the ‘main subject-matter of the contract’ or the adequacy of the price or remuneration insofar as those terms are expressed in plain, intelligible language are also exempt (Article 4(2)). As far as the former limitation is concerned, the CJEU explained that the exclusion of mandatory rules from the fairness control is justified by the fact that the national legislature has already struck a balance between all the rights and obligations of the parties to certain contracts. Thus, the CJEU ruled that Article 1(2) does not apply to contract terms in a statutory provision which have been created for a different type of contract, while it does apply to terms in a contract that have reproduced statutory provisions which would otherwise apply to such a contract.

As for the latter limitation, given the divergent views that are held among the Member States, the CJEU has provided significant guidance for the national courts. Having firmly held that such an exclusion in Article 4(2) must be strictly interpreted since it provides an exception to the fairness test, the CJEU further clarified the two-limbed structure of Article 4(2). As regards the first limb of Article 4(2) relating to the ‘main subject-matter of the contract’, it came as no surprise when the Court explained that it referred to terms that lay down essential obligations, rather than ancillary obligations enshrined in the contract. This distinction can be justified by the fact that terms reflecting ancillary obligations are often overlooked by consumers, which, as a result, gives no incentive for competition among suppliers or sellers. This explains why the law should be in place to control the fairness of such terms. As regards the second limb relating to ‘the adequacy of the price and remuneration on the one hand, as against the services or goods supplied, on the other,’ it is regrettable that the Court has not explicitly provided criteria for determining whether a specific price-related term falls within this scope. Nonetheless, certain guidance as to the scope of this limb can be inferred from the Court’s jurisprudence identifying and excluding a number of specific price-related terms or excluding terms that fall within the annexed indicative list of unfair terms.

At the same time, there have been vigorous discussions on the extension of the scope of the fairness control so as to include i) individually negotiated terms, and ii) contracts between businesses and small and medium-sized enterprises (SMEs). These questions certainly involve a policy choice and should therefore be carefully considered from both theoretical and practical aspects. It remains to be seen how the debates will shape the future of European contract law.

267 See Table 2 in the Annex to this dissertation for a comparative table on the scope of control in the UCTD, PECL, ACQP, DCFR and CESL.

3. THE PRINCIPLE OF TRANSPARENCY IN THE UCTD, PECL, ACQP, DCFR AND CESL

3.1. Introduction

Although Directive 1993/13/EEC is well known for being a substantive control regime for the contents of consumer contracts, it also provides for a legal framework governing transparency requirements in order to ensure that precise information about the provisions of contracts is provided for consumers.²⁶⁸ This is aligned with the EU policy²⁶⁹ to use the information paradigm²⁷⁰ as a favourite strategy to improve the position of consumers in the internal market.²⁷¹

Against this background, Article 5 UCTD requires contracts to be drafted in plain and intelligible language. The ultimate goal of this rule is to protect consumers from the inherent risk of standard contract terms whose meaning is hidden.²⁷² Likewise, the PECL, the Acquis Principles (ACQP), the DCFR as well as the CESL impose on suppliers or sellers a duty to draft standard contract terms in ‘plain and intelligible language’.²⁷³ However, apart from such requirements, the four mentioned instruments, as opposed to the UCTD, lay down an explicit obligation for suppliers or sellers to ensure that consumers have an opportunity to become acquainted with the terms.²⁷⁴

This therefore gives rise to the reasonable question of whether the transparency principle under the UCTD also implies a duty for the supplier to bring his terms to the consumer’s attention. In this connection, it should be noted that although the UCTD does not explicitly lay down a direct obligation for the supplier or the seller to provide

268 H Micklitz, ‘Final Report from Workshop 4, Obligation of Clarity and Favourable Interpretation to the Consumer (Art. 5)’ (The Unfair Terms Directive: Five Years on, Acts of the Brussels Conference, Brussels 1999) 160 <http://ec.europa.eu/consumers/archive/cons_int/safe_shop/unf_cont_terms/event29_02.pdf> [accessed 15 May 2017].

269 Commission Communication, ‘Healthier, Safer, More Confident Citizens: A Health and Consumer Protection Strategy: Proposal for a Decision of the European Parliament and of the Council Establishing a Programme of Community Action in the Field of Health and Consumer Protection 2007-2013’ COM (2005) 115 final.6.4.2005. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0115:FIN:EN:PDF>> [accessed 15 May 2017].

270 On the information paradigm in EU law, see Stefan Grundmann, Wolfgang Kerber, and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Walter de Gruyter, 2001); Stefan Grundmann, ‘Information, Party Autonomy and Economic Agents in European Contract Law’ 2002 39(2) *Common Market Law Review* 269; Geraint Howells, André Janssen, Reiner Schulze, *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot: Ashgate, 2005); Ilse Samoy and Marco B.M. Loos (eds), *Information and notification duties* (Antwerp:Intersentia, 2015).

271 Information disclosure rules are usually preferred to substantive, content-oriented rules and prohibitions since they interfere less with national traditions. See more in John A. Usher, ‘Disclosure Rules (Information) as a Primary Tool in the Doctrine on Measures Having an Equivalent Effect’ In Stefan Grundmann, Wolfgang Kerber, and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Walter de Gruyter, 2001) 151-161; G. G. Howells, ‘The Potential and Limits of Consumer Empowerment by Information’ (2005) 32(3) *Journal of Law and Society* 349; Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing, 2013) 92.

272 Ch. Armbrüster, ‘Standard Contract Terms and Information Rules’ in Hugh Collins (ed.), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Volume 15, Kluwer Law International, 2008) 163, 164.

273 See sections 3.1 and 4.1.

274 See sections 3.2 and 4.2.

consumers with his standard contract terms, whether the principle of transparency under the UCTD may implicitly suggest such an obligation is open to clarification. Specifically, it depends on whether the transparency principle under the UCTD might be interpreted in a narrow sense with the elimination of unclear and incomprehensible contractual terms, or in a broad sense with a further reference to positive information duties.²⁷⁵

The transparency principle governed by those above-mentioned instruments, therefore, arguably includes two separate but interconnected requirements: firstly, terms which have been pre-formulated by suppliers or sellers should be made available to the other party before concluding the contract and, secondly, the terms should be drafted in plain and intelligible language in so far as an average other party is able to understand them.²⁷⁶ Only with these two cumulative elements will the transparency principle be able to provide consumers with sufficient information to enable them to improve their position in relation to suppliers.

The following section will investigate to what extent the transparency principle is provided under each of the above documents as well as which sanctions are available for a breach of this transparency principle. Apart from a textual analysis, particular attention will be devoted to understanding the recent developments by the CJEU.

3.2. The Principle of Transparency in the UCTD

3.2.1. *Significance of the Principle of Transparency*

The legal techniques for controlling unfair terms as laid down in the Directive consist of not only substantive but also formal elements.²⁷⁷ The strong emphasis on information in EC consumer law can be seen in the requirement of transparency, which is comprehensively expressed in Article 5 of the Directive.²⁷⁸

275 Commission of the European Communities, Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts COM (2000) 248 final, 155; H Micklitz, 'Final Report from Workshop 4, Obligation of Clarity and Favourable Interpretation to the Consumer (Art.5)' (The Unfair Terms Directive: Five Years on, Acts of the Brussels Conference, Brussels, 1999) 160 <http://ec.europa.eu/consumers/archive/cons_int/safe_shop/unf_cont_terms/event29_02.pdf> [accessed 15 May 2017].

276 Marco Loos, 'Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law' (2015) 23(2) *European Review of Private Law* 179.

277 According to Hans-W. Micklitz, the concept of unfairness under the UCTD must be understood in both a formal and substantive sense. The requirement of transparency is considered to constitute unfairness in the formal sense, see Hans-W. Micklitz, 'Unfair Terms in Consumer Contract, in Norbert Reich' in Hans-Wolfgang Micklitz, Peter Rott and Klaus Tonner, *European Consumer Law* (2nd edition, Intersentia Antwerp, 2014) 125, 142. However, it is later submitted that while unfairness in the procedural sense can be used as an important factor in the assessment of unfair terms, fairness in the procedural sense must not be used as a legitimizing factor for substantively unfair term. See Section 4.

278 For an overview of the transposition of the requirement of transparency under the UCTD in Member States, see Martin Ebers, 'Unfair Contract Terms Directive' in Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Walter de Gruyter, 2008) 197, 412-21. For a recent evaluation of how Member States have implemented Article 5 UCTD, see Johanna Waelkens, 'Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts' in Ilse Samoy and Marco B.M. Loos (eds), *Information and notification duties* (Antwerp:Intersentia, 2015), 47.

‘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).’

This duty is even extended to terms which define the main subject-matter of the contract and the adequacy of the price since, pursuant to Article 4(2), it is a requirement for excluding them from the unfairness test.

The significant importance of the transparency principle for the implementation of the UCTD in the national law of the Member States has also been confirmed and explained by the case law of the CJEU. In *Commission v the Netherlands*,²⁷⁹ the Commission brought an action against the Netherlands claiming that the transposition of the Directive into Dutch law was insufficient in terms of the form and method chosen, and incomplete in terms of its effects. The Commission maintained, in particular, that the provisions of the Dutch Civil Code do not ensure that the requirement of transparency enshrined by *the provisions of Article 4(2) and Article 5* UCTD will be given proper effect in practice. Advocate General Tizzano held the opinion that a mere reference to *the court’s schematic interpretation of Dutch legislation is not sufficient for the purpose of giving clear and unambiguous effect to the UCTD’s requirements of transparency*.²⁸⁰ Indeed, he reasoned that the seller or supplier should be required to make sure at the outset that the contractual terms are plain and intelligible, thus ensuring that, before entering into the contract, the consumer may have access to all the information needed to arrive at his decision in full knowledge of the facts.²⁸¹ The CJEU followed the Advocate General’s opinions and ruled that the Kingdom of the Netherlands had failed to show that its legal system contains provisions equivalent to Articles 4(2) and 5 of the UCTD.

Accordingly, the reasoning stated by the Advocated General supported by the CJEU has emphasized the important functions of the plain and intelligible language of contractual terms in enabling the consumer to be conscious of his rights and thus to make a rational choice. Underlying this reasoning is an image of the consumer who appears to be a person who can act rationally to maximize his utility, as long as the information asymmetries existing in the marketplace are corrected.²⁸² To put it differently, it assumes that market failure which results from information asymmetries between the business as the supplier of terms and the consumer as the non-drafter of the terms can be partly addressed if sufficient information regarding the terms is provided to the consumer. Against this assumption, as a method of redressing information

279 Case C-144/99 *Commission of the European Communities v Kingdom of the Netherlands*, CJEU 10 May 2001, ECLI:EU:C:2001:257.

280 Case C-144/99 *Commission of the European Communities v Kingdom of the Netherlands*, Opinion of AG Tizzano on 23 January 2001, para. 39.

281 Case C-144/99 *Commission of the European Communities v Kingdom of the Netherlands*, Opinion of AG Tizzano on 23 January 2001, para. 31.

282 Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Bloomsbury Publishing, 2012) 47.

asymmetries, the transparency principle has an essential role to play in assisting the consumer in making informed choices.

It is apparent from the Advocate General's opinion that the transparency principle serves its function at the pre-contractual stage. It ensures that consumers are placed in a position where they have at least a chance of understanding the terms before being bound by them. Indeed, if the pre-formulated terms appear to be unbalanced and unfavourable, consumers may 'vote with their feet' and walk away from the contract.²⁸³ Additionally, consumers may have the opportunity to shop around in the marketplace for offers that are more acceptable than the original one.²⁸⁴ Of course, the potential function of the principle of transparency demands numerous prerequisite requirements, which provoke much academic criticism. The most common argument is that the ideal of the transparency principle is strongly based on the rational choice theory,²⁸⁵ which does not concur in all circumstances, on insights from behavioural economics as well as on findings from empirical research.²⁸⁶ Indeed, consumers rarely read standard contract terms²⁸⁷ and even if they do, they are generally unable to adequately assess these standard terms.²⁸⁸ Consequently, consumers, even after being given adequate information, cannot effectively make rational decisions about what is in their best interests. Although the information-orientated set of rules is not *per se* sufficient to address the problems of standard contract terms,²⁸⁹ this does not mean that the principle of transparency does not have any positive impact on the position of the consumer. At least an informed minority of consumers who benefit from the transparency requirements should be able to compare different offers to find the best suitable offer that may meet their preferences.²⁹⁰

Additionally, the function of the principle of transparency is not confined to the pre-contractual phase. The transparency of standard terms is also imperative for the consumer in a contractual relationship, especially when disputes arise.²⁹¹ A better

283 In theory, the consumer may use the information to negotiate a better deal. However, it is clear that this option is not practical in a market characterised by mass consumption, see Thomas Wilhelmsson, 'Cooperation and Competition Regarding Standard Contract Terms in Consumer Contracts' (2006) 17(1) *European Business Law Review* 51, 52.

284 *Ibid.*

285 H.W. Micklitz, 'Some Reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts' in H. Collins (ed.), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International, 2008) 19, 21.

286 Michael G. Faure, Hanneke A. Luth, 'Behavioural Economics in Unfair Contract Terms' 2011 34(3) *Journal of Consumer Policy* 337; G. G. Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005), 32(3) *Journal of Law and Society* 349.

287 Yanniss Bakos, Florencia Marotta-Wurgler, and David R. Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts' (2014) 43(1) *Journal of Legal Studies* 9.

288 Omri Ben-Shahar, 'The Myth of the 'Opportunity to Read' in Contract Law' 2009 5(1) *European Review of Contract Law* 1.

289 The main argument is that even with the transparency principle, judicial control of the fairness of content is indispensable, see Chris Willett and Martin Morgan-Taylor, 'Recognising the Limits of Transparency in EU Consumer Law' in James Devenney and Mel Kenny (eds), *European Consumer Protection* (1st edn, Cambridge: Cambridge University Press, 2012) 143.

290 Ian Ayres, and Alan Schwartz, 'No-Reading Problem in Consumer Contract Law' (2014) 66 *Stan. L. Rev.* 545.

291 Manfred Wolf, 'Party Autonomy and Information in the Unfair Contract Terms Directive' in Grundmann, Stefan, Wolfgang Kerber, and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the*

opportunity to have access to justice²⁹² is guaranteed if the consumer has an accurate understanding of his stance granted by the contractual arrangement.²⁹³ Therefore, apart from merely understanding the transparency requirements as a duty to inform consumers during the pre-contractual phase, they can also be understood as ‘a duty to reach consumers with the disclosure’ so that they possess the information contained therein when this is required for reference purposes.²⁹⁴ To that extent, it can be argued that the principle of transparency has important roles to play in protecting the rights and interests of consumers at different stages of the contractual relationship.

3.2.2. *Duty to Provide the Other Party with Terms Which Have Not Been Individually Negotiated*

The adopted version of the UCTD does not specify a direct obligation for the supplier or the seller to provide his/her standard contract terms to the consumer.²⁹⁵ However, this does not necessarily mean that the Commission was unaware of the importance of giving consumers a right to become adequately acquainted with contractual terms prior to adhering to pre-formulated standard contracts. Historically, the original version of Article 5(2) of the 1992 Proposal provided that terms which had not been individually negotiated should only be regarded as having been accepted by a consumer only when the latter had had a proper opportunity to examine the terms before the contract was concluded.²⁹⁶ The provision was later rejected by the Council because this was considered to fall within the ambit of national rules concerning the formation of contracts, which was beyond the competence of the UCTD.²⁹⁷

Internal Market (Walter de Gruyter, 2001) 313, 314.

292 Stefan Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press, 2014).

293 Chris Willett, ‘The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches’ (2011) 60 *ICLQ* 355, 376.

294 P. Mankowski, ‘Information and Formal Requirements in EC Private Law’ (2005) 6 *European Review of Private Law* 782, 787.

295 Such an obligation is expressly prescribed in a number of other EU Directives. By way of illustration, Art. 10 of the E-commerce Directive (Directive 2000/31/EC, OJ 2000, L 178/1) indicates that where a contract is concluded electronically and contract terms and general conditions are provided to the other party, these terms and conditions must be ‘made available’ in a way that allows the other party to store and reproduce them; Art. 13 of the Commercial Agency Directive (Directive 86/653/EEC, OJ 1986, L 382/17) provides that both parties may request ‘a signed written document setting out the terms of the agency contract including any terms subsequently agreed’.

296 In the explanatory memorandum the Commission clearly stated that ‘the Commission has made it compulsory for sellers or suppliers to give consumers a proper opportunity to examine all the terms before the contract is concluded, and it has introduced the principle that terms added when the contract is concluded should take precedence over standard form terms’, see European Commission, ‘Amended Proposal for a Council Directive on Unfair Terms In Consumer Contracts’ (1992) 15(1) *Journal of Consumer Policy* 97.

297 The Council position was that ‘it was considered preferable to transfer it (Article 5(2)) to the preamble (recital No 20) regarding advance awareness of the consumer, since the reference to “acceptance” was not relevant from the point of view of the overall layout of the Directive’. The Council’s Reasons, (1992) 15(4) *Journal of Consumer Policy* 483; See more in European Commission, *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* COM (2000) 248 final, p. 18.

Nevertheless, there is some evidence that reveals that the UCTD has implicitly recognised such an obligation.²⁹⁸ Of particular importance is Recital (20) in the Preamble to the UCTD, which states that whereas contracts should be drafted in plain, intelligible language, the consumer ‘should actually be given an opportunity to examine all the terms’. Also, point (i) of the Annex lists as an example of unfair terms a term which has the object or effect of binding the consumer to terms with which he/she had no real opportunity of becoming acquainted before the conclusion of the contract. This example of unfairness at least requires the terms to be provided to the consumer before the conclusion of the contract.²⁹⁹

Additionally, an indirect duty to provide information with regard to non-individually negotiated terms can be deduced from other legal requirements laid down in the UCTD. For example, the concept of good faith in the general clause on fairness could arguably be interpreted as implying a reference to procedural fairness.³⁰⁰ The requirement of ‘fair dealing’ as well as taking into account the legitimate interests of the other party as stated in the Preamble to the Directive at least entails the duty of the supplier to provide contractual terms to his/her counterparty. Furthermore, one can also argue that the requirement of intelligibility enshrined in Article 5 UCTD also requires the communication of sufficient information concerning the contractual terms.

As will be demonstrated later, recent judgements by the CJEU have consistently emphasized the relationship between Article 5 of the Directive and Recital (20) of the Preamble to the UCTD.³⁰¹ Arguably, they seem to demonstrate the CJEU’s opinion that the supplier’s obligation to provide the standard terms of a contract is considered to be an element of the principle of transparency.

3.2.3. ‘Plain and Intelligible’ Language

Under Article 5(1) UCTD terms must always be drafted in plain, intelligible language. This formulation was hailed as an important innovation which was probably inspired by the development of transparency requirements in German case law and by the ‘plain language’ movement in English-speaking countries.³⁰² However, there is no

298 To this effect, it is also worth mentioning that, in 2008, the duty to provide the other party with the terms not individually negotiated had been included in the Proposal for a Directive on Consumer Rights (COM (2008) 614/3). Indeed, Article 31 (2) of the Proposal provided that contract terms shall be made available to the consumer in a manner which gives him/her a real opportunity of becoming acquainted with the terms before the conclusion of the contract, with due regard to the means of communication used. However, the whole chapter on unfair contract terms, including this provision, was later omitted from the Consumer Rights Directive. See COM (2008) 614/3 <<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52008PC0614>> [accessed 15 May 2017].

299 Thomas Wilhelmsson, ‘Private Law Remedies against the Breach of Information Requirements of EC Law’ in Reiner Schulze, Martin Ebers und Hans Ch. Grigoleit, *Informationspflichten und Vertragsschluss im Acquis communautaire* (Mohr Siebeck, 2003) 245, 260.

300 Roger Brownsword, Geraint Howells and Thomas Wilhelmsson, ‘The EC Unfair Contract Terms Directive and Welfarism’ in Roger Brownsword, Geraint Howells and Thomas Wilhelmsson (eds), *Welfarism in Contract Law* (Aldershot 1994) 275, 279.

301 See sections 3.3 and 3.4.2

302 Ewoud Hondius, ‘The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States’ 3.2 (1995) 3(2) *European Review of Private Law* 241, 249.

further explanation in the UCTD as to what is meant by ‘plain, intelligible’ language. In this regard, a large body of literature has been devoted to understanding this concept. While acknowledging that the concepts of ‘plain’ and ‘intelligible’ need to be assessed separately, there are divided opinions among scholars as to what each concept actually means.³⁰³ On the one hand, a number of scholars seem to relate the requirement of plain language to the non-ambiguity of the words used in the standard terms and the ‘intelligibility’ requirement to the external presentation of the terms. M. Herington and S. Brothers, for instance, argue that ‘plainness’ requires that terms should not be surprising, cannot be misunderstood and do not give rise to any doubts, whereas ‘intelligibility’ encompasses both the style used and how a contract term is actually printed on paper.³⁰⁴ On the other hand, Advocate General Wahl has argued in a recent opinion that ‘plainness’ principally refers to the drafting aspect of the term while ‘intelligibility’ means being able to understand the precise meaning of the words used.³⁰⁵

Given these divergences, it is worth mentioning a ‘middle of the road’ approach offered by Martin Ebers in which he rightly acknowledges that the criteria of ‘plainness’ and ‘intelligibility’ complement each other.³⁰⁶ Rather than sharply distinguishing between the two concepts, he directly perceives ‘plain and intelligible’ language as being inseparable elements of the requirement of transparency and thus proceeds to argue that ‘plain and intelligible’ drafting comprises both formal as well as substantive aspects. The formal aspect requires that the drafting style of the terms should be sufficiently clear to enable the consumer to easily understand the contract. Indeed, the external appearance of the document should not make it difficult to obtain an overview of the terms and it should not be printed in a typeface that is difficult to read. The substantive, linguistic aspect of the requirement of plain, intelligible language requires that technical jargon, long convoluted sentences or imprecise, fragmentary statements are not used.³⁰⁷

303 Hans-W. Micklitz, ‘Unfair Terms in Consumer Contract’ in Norbert Reich, Hans-Wolfgang Micklitz, Peter Rott and Klaus Tonner, *European Consumer Law* (2nd edn, Interselia Antwerp, 2014) 125, 142.

304 M. Herington and S. Brothers, ‘Unfair Terms and Consumer Contract Regulations’ (1995) *International Insurance Law Review* 263. This approach is supported by Hans-Wolfgang Micklitz, who similarly argues that while ‘intelligibility’ relates to legibility, with the purpose of eliminating ‘small print’ from the contract which the consumer cannot readily understand, ‘plainness’ refers to the legal effect of the term, including its consequences, thereby allowing the consumer to know what to expect from the contract term, see Hans-W. Micklitz, ‘Unfair Terms in Consumer Contract’ in Norbert Reich, Hans-Wolfgang Micklitz, Peter Rott and Klaus Tonner, *European Consumer Law* (2nd edn, Interselia Antwerp, 2014) 125, 143.

305 Opinion of AG Wahl, delivered on 12 February 2014, C-26/13 Kásler and Káslerné Rábai/OTP Jelzálogbank, at footnote 27 of para. 81.

306 Martin Ebers, ‘Unfair Contract Terms Directive (93/13)’ in Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and Its Transposition in The Member States* (Sellier European Law Publishers, 2008) 197.

307 Willett similarly follows this unitary approach and summarizes that ‘terms are transparent when they are available at the point of contract; there is a reasonable opportunity to become acquainted with them; they are in clear, jargon free language and decent sized print; the sentences, paragraphs and overall contract are well structured; and appropriate prominence is given to particularly important terms’ Chris Willett, ‘The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches’ (2011) 60 *ICLQ* 355, 357.

However, apart from such lively discussions on the precise meaning of being plain and intelligible, there are still two essential questions concerning the transparency requirements that need further clarification. Firstly, whether the requirements of ‘plain and intelligible’ language must be understood in such a broad sense that they must enable the consumer to foresee which economic consequences he/she can derive from the term or whether they are limited to some sort of elimination of unclear and incomprehensible contract terms.³⁰⁸ Secondly, how does one assess ‘consumer’ transparency?³⁰⁹

In two cases the CJEU has recently had an opportunity to significantly clarify the understanding of the transparency requirements laid down in both Article 5 and Article 4(2) of the Directive, which especially sheds light on the two above questions. In the two important cases, namely *Kásler*³¹⁰ and *Van Hove*,³¹¹ the transparency requirements as they appear in Article 4(2) of the UCTD have been confirmed by the Court as having the same meaning as that referred to in Article 5 of the UCTD. As is apparent from these cases, the transparency requirements laid down by the UCTD are to be interpreted as requiring not only that the term should be formally and grammatically intelligible to the consumer, but also that the term should be drafted in a manner which allows an ‘average consumer’ to actually understand the economic consequences of the term.

In the *Kásler* case,³¹² a contractual clause concerning the rate of currency exchange could possibly be excluded from the unfairness test in so far as it was drafted in plain and intelligible language. Thus, among other questions, the CJEU was asked concerning the requirements of the plain and intelligible language whether the terms subject to the exception under Article 4(2) of the UCTD had to be merely grammatically clear and intelligible or, in addition, whether the economic consequences of such terms had to be clear and intelligible to the consumer.

The Court first pointed out that the transparency requirements in Article 4(2) do not differ from those referred to in Article 5 of the UCTD.³¹³ As regards Article 5, the Court, by referring to the interpretation highlighted in the *RWE* case,³¹⁴ emphasised that it is of fundamental importance that, before concluding a contract, the consumer has a reasonable opportunity to become acquainted with the terms of the contract and the consequences of its conclusion.³¹⁵ On this basis, the Court reasoned in *Kásler* that the requirements of the transparency of contractual terms under the UCTD ‘cannot

308 Thomas Wilhelmsson, ‘Private Law Remedies against the Breach of Information Requirements of EC Law’ in Reiner Schulze, Martin Ebers and Hans Ch. Grigoleit, *Informationspflichten und Vertragsschluss im Acquis communautaire* (Mohr Siebeck, 2003) 245, 260; Hans-W. Micklitz, ‘Unfair Terms in Consumer Contract’ in Norbert Reich, Hans-Wolfgang Micklitz, Peter Rott and Klaus Tonner, *European Consumer Law* (2nd edn, Intersentia Antwerp, 2014) 125, 143.

309 Paolisa Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC law* (Bloomsbury Publishing, 2007) 137.

310 Case C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*, CJEU 30 April 2014, ECLI:EU:C:2014:282.

311 Case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA*, CJEU 23 April 2015, ECLI:EU:C:2015:262

312 See Section 2.2.2 on the exclusion of the core provisions of a contract.

313 Case C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*, CJEU 30 April 2014, ECLI:EU:C:2014:282, para. 69.

314 On the commentaries on the *RWE* case, see more in Section 2.4.2.

315 Case C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*, CJEU 30 April 2014, ECLI:EU:C:2014:282, para. 70.

therefore be reduced merely to their being formally and grammatically intelligible'.³¹⁶ Indeed, the requirements of transparency must be understood in a broad sense in order to be consistent with the paradigm of the protection of consumers as weaker parties as enshrined in the UCTD. In comparison with its decision in *RWE*, the Court then pointed out that a term can only be considered to be transparent if it allows the consumer to foresee, on the basis of clear, intelligible criteria, the economic consequences which he/she can derive from the term.³¹⁷ The national court was therefore required to determine whether an average consumer would not only be aware of the existence of the difference between the selling rate of exchange and the buying rate of exchange of a foreign currency generally observed on the securities market, but would also be able to assess the potentially significant economic consequences for him/her resulting from the application of the selling rate of exchange for calculating the repayments for which he/she would ultimately be liable and, therefore, the total cost of the sum borrowed. This assessment had to be made in light of all relevant information, including the promotional material and the information provided by the lender to the consumer prior to the conclusion of the contract.³¹⁸

All in all, according to the CJEU in the *Kásler* case, a standard term only meets the plain, intelligible language requirements if it has been drafted in a way which enables an average consumer to actually comprehend the economic consequences emanating from the term. A similar reasoning was followed by the CJEU in the *Van Hove* case. In this case, standard terms in an insurance contract were challenged as being unfair terms on the ground that they had been drafted in such a way that a lay consumer could not understand their significance. The French court referred a question to the CJEU to ask whether this fell within the ambit of Article 4(2). In order to answer this question, it was necessary for the Court to consider two separate questions: first, whether such terms were the main subject-matter of the insurance contract and, second, whether such terms had been drafted in plain, intelligible language. While the first question was already discussed in the previous section,³¹⁹ the second question concerning the concept of plain and intelligible language should be discussed here as it was the subject of further guidance by the Court.

Referring to the *Kásler* case, the Court pointed out that the requirements of the transparency of terms cannot be reduced to the terms being merely formally and grammatically intelligible as such terms must be broadly interpreted.³²⁰ For that reason, the transparency requirements insist not only (i) that the information concerning the conditions for liability should be given to consumers prior to the conclusion of the contract, but also (ii) that the contract clearly sets out how the specific insurance arrangements work and how they relate to the wider contractual framework so that the 'consumer is in a position to evaluate, on the basis of precise, intelligible criteria,

316 *Ibid.*, para. 71.

317 *Ibid.*, para. 73.

318 *Ibid.*, para. 74.

319 See Section 2.2.2 on the exclusion of core provisions of a contract.

320 Case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA*, CJEU 23 April 2015, ECLI:EU:C:2015:262, para. 40.

the economic consequences for him which derive from it.³²¹ The Court then again referred to the ‘average consumer, who is reasonably informed and reasonably observant and circumspect’ as the yardstick which the required information provision must satisfy.³²²

Thus, it is apparent that the CJEU has consistently interpreted the requirements of ‘plain and intelligible’ language in a broad sense. Standard contract terms may only be regarded as complying with the transparency requirements if they are grammatically intelligible to the consumer and if they clearly set out the specific functioning of the contract arrangements so that the consumer can evaluate the economic consequences which he/she can derive therefrom. Indeed, it implies that ‘plain and intelligible’ language not only concerns the wording of the contract itself, but also the relevant information communicated to the consumer.

Additionally, the concept of an average consumer has been used as a benchmark to determine whether a term is transparent or not.³²³ Specifically, the yardstick is whether or not the economic consequences of the terms have been clearly presented to the consumer in order to enable an average consumer who is reasonably well informed, observant and circumspect to understand them. Indeed, according to the Court, while the supplier has a duty to draft contractual terms in understandable language, the consumer also needs to have basic knowledge in order to understand the contents of terms as well as their economic consequences, as a reasonably well-informed consumer should be able to do. This is an indication that the actual weaker position of the consumer as the counterparty seems to be irrelevant in evaluating the transparency of terms and would not therefore affect the result of the fairness test. It is obvious that referring to an average consumer instead of a weak consumer reduces the standard of transparency and thus relaxes the supplier from his/her duty to provide plain and intelligible language, thereby placing a further burden on the consumer.³²⁴

3.2.4. Consequences of a Breach of the Transparency Requirements

In contrast to a clear provision on the consequences of unfair terms, the UCTD does not explicitly specify the legal consequences if there is a breach of the transparency requirements. The connected legal consequences are a matter of interpretation. According to Article 5, sentence 2, in case of doubts, the interpretation which is most favourable to the consumer shall prevail. This interpretation rule, however, is unable

321 Ibid., para. 41.

322 Ibid., paras 47-50.

323 In contrast, by emphasizing the differences between the concept of an ‘average consumer’ as used in the Unfair Commercial Practices Directive and the more flexible benchmark of the average consumer employed by the CJEU and the national courts, Johanna Waelkens recommends searching for another term to denote the person to be referred to, such as the ‘everyday layman’ or a ‘non-jurist’, Johanna Waelkens, ‘Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts’ in Ilse Samoy and Marco B.M. Loos (eds), *Information and notification duties* (Antwerp: Intersentia, 2015) 47, 59.

324 Marco Loos, ‘Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law’ (2015) 23(2) *European Review of Private Law* 179, 188; Paolisa Nebbia, *Unfair Contract Terms in European law: a Study in Comparative and EC law* (Bloomsbury Publishing, 2007) 139-41.

to cover all cases of a breach of the transparency requirement since ambiguity is only one kind of non-transparency.³²⁵ Indeed, it does not even indicate what the consequence will be if a contract term is plain, but is nevertheless unintelligible.³²⁶ Some argue that a non-transparent clause could be considered as not being validly incorporated into the contract given the lack of contractual consent, while others posit that this clause could be assessed as unfair and thus be equally excluded from the contract.³²⁷ Arguably, the most significant view that has been supported by recent CJEU cases is that a term's lack of transparency is a strong indication that the term itself is unfair.

3.2.4.1. The Most Favourable Interpretation Rule

The most favourable interpretation rule under Article 5 UCTD is certainly derived from the well-known *contra proferentum* doctrine of contractual interpretation, which provides that, where a term is ambiguous, the preferred meaning should be the one that works against the interests of the party who has provided the wording.³²⁸ From an economic point of view, this rule is an application of the 'least cost avoider' principle in the sense that since the drafter can much more easily and cheaply avoid the ambiguities of the terms, he/she must be precluded from relying on such ambiguities.³²⁹ In this connection, the *contra proferentum* doctrine is designed to have a punitive effect in order to encourage drafters to improve their pre-formulated terms. Given that the supplier or seller in a consumer contract is always the drafter of the contract, the UCTD anticipated similar objectives to be aimed at by the *contra proferentum* doctrine and applied a more consumer-friendly language,³³⁰ which provides that where there is a doubt as to the meaning of a term, the interpretation which is most favourable to the consumer shall prevail.

With this formulation, the most favourable interpretation rule will inevitably be a sanction for the supplier, thus discouraging such suppliers from using unclear terms in

325 For arguments that the *contra proferentem* rule does not provide a sanction for all kinds of non-transparency, see Edoardo Ferrante, 'Contractual Disclosure and Remedies under the Unfair Contract Terms Directive' in Geraint Howells, André Janssen, Reiner Schulze (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot: Ashgate, 2005) 115-133.

326 An example would be where, due to legal terminology or an insufficient command of the language in which the terms are drafted, the clause is unintelligible to the consumer. See Section 2.4.2.

327 Ch. Armbrüster, 'Standard Contract Terms and Information Rules', in Hugh Collins (ed.), *Standard Contract Terms in Europe: a Basis for and a Challenge to European Contract Law* (Volume 15, Kluwer Law International, 2008) 163, 168.

328 On the relationship between the *contra proferentem* rule and standard form contracts, see more in Claus-Wilhelm Canaris and Hans Christoph Grigoleit, 'Interpretation of Contracts' in Arthur S. Hartkamp, *Towards a European Civil Code* (Kluwer Law 2011) 587-618.

329 For other rationales underlying the doctrine, see Péter Cserne, 'Policy Considerations in Contract Interpretation: The Contra Proferentem Rule from a Comparative Law and Economics Perspective' in Gavvala Radhika (ed.) *Contract Theory – Corporate Law* (ICFAI University Press, 2009) 66-104.

330 It should be noted that the rule laid down in Article 5 does not explicitly require that the terms must be supplied by the trader. Therefore, in cases where the terms have been supplied by a third party, such as a notary, the interpretation which is most favourable to the consumer should still prevail.

consumer contracts. Additionally, the burden of proof³³¹ seems to become far lighter for the consumer since it is sufficient to prove that a term does not have a clear meaning.

However, the most favourable interpretation rule is only applicable to individual consumer redress and is exempted from collective redress within the meaning of Art. 7(2) of the UCTD.³³² The rationale behind this exemption has been explained in detail by the CJEU in the *Commission v. Spain* case.³³³ In this case, Spain only transposed the general rule of a *contra proferentem* interpretation, but failed to implement the exception for collective actions. The CJEU took the view that the interpretation of terms in the context of collective actions should not adopt the most favourable to the consumer approach in order to ensure that additional terms could be found to be unfair as otherwise a potentially unfair term could be rescued by such an interpretation technique.³³⁴ It reasoned that while in individual actions the courts are required to assess unfairness *in concreto* in an already concluded contract, in collective actions contract terms should be assessed *in abstracto* in relation to contracts which have not yet been concluded.³³⁵ In the former case, an interpretation which is more favourable to the individual consumer immediately confers benefits on him/her. In contrast, in collective actions in order to obtain, by way of prevention, the most favourable result for all consumers, it is necessary to objectively interpret the term in question. Thus, the *contra proferentem* rule of interpretation is not applicable to collective actions in order to enhance the effectiveness of preventive proceedings against unfair terms.

3.2.4.2. Emerging Consequences of a Breach of the Transparency Requirements in Recent Cases Decided by the CJEU

In two landmark cases, *Invitel*³³⁶ and *RWE*,³³⁷ the CJEU had the opportunity not only to interpret the requirements of ‘plain, intelligible language’, but more importantly to address the key question as to what the consequences of a violation of the transparency requirements will be.

In the *Invitel* case the Hungarian National Consumer Protection Authority (‘NFH’) challenged a term in the general business conditions imposed by a telecom company (‘Invitel’) allowing the company to charge additional fees without clearly setting out the method for calculating those fees. In the context of public-interest proceedings, a collective action was brought by the NFH to obtain a declaration that the contested term

331 F. Bruder, ‘Burden of Proof and the Unfair Terms in Consumer Contracts Directive’ (2007) 15 *European Review of Private Law* 205.

332 Johanna Waelkens, ‘Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts’ in Ilse Samoy and Marco B.M. Loos (eds), *Information and notification duties* (Antwerp: Intersentia, 2015) 47, 69.

333 Case C-70/03 *Commission of the European Communities v Kingdom of Spain*, CJEU 9 September 2004, ECLI:EU:C:2004:505.

334 Case C-70/03 *Commission of the European Communities v Kingdom of Spain*, CJEU 9 September 2004, ECLI:EU:C:2004:505, para. 16.

335 *Ibid.*

336 Case C-472/10 *NFH/Invitel*, CJEU 26 April 2012, ECLI:EU:C:2012:242.

337 Case C-92/11 *RWE Vertrieb AG/Verbraucherzentrale Nordrhein-Westfalen eV*, CJEU 21 March 2013, ECLI:C:EU:2013:180.

was void as being unfair. The Hungarian Court decided to stay the proceedings and to refer two questions to the CJEU for a preliminary ruling concerning the effects of the finding of an unfair term (with respect to Article (6)(1) of Directive 93/13/EEC) and the possibility of declaring the term to be unfair (in the spirit of Article 3(1) in conjunction with points 1(j) and 2(d) of Annex applicable by virtue of Article 3(3)). While the first question, which raises an important issue regarding the effect of collective proceedings, will be discussed later, the second question should be analysed in depth here since it was the first time that the CEJU had directly related the breach of transparency principle to the possible unfair nature of a non-transparent term.³³⁸

In its reasoning, the CJEU pointed out that in light of points 1(j) and (l) and 2(b) and (d) of the Annex to the Directive, a term which provides for the unilateral amendment of the fees connected with the service to be provided, without clearly setting out the method for fixing those fees or specifying a valid reason for this amendment is unfair.³³⁹ With regard to the specific term in this case, according to the CJEU, the general business conditions of a consumer contract must mention the reason and the method for varying the aforementioned price and consumers must have the right to terminate the contract if they do not accept the varied terms.³⁴⁰ Taking into consideration the fact that the Annex does not suffice in automatically establishing the unfair nature of a contested term, the CJEU further related the content of the Annex to the requirement of the 20th recital of the Preamble to the Directive as well as Article 5 of the Directive, which provides that consumers should actually be given an opportunity to examine all the terms appearing in the general business conditions and that suppliers are obliged to draft terms in clear, intelligible language.³⁴¹ Therefore, it was of ‘fundamental importance’ whether the consumer could foresee, on the basis of clear, intelligible criteria, the amendment of a contract term in order to be able to assess whether or not it was fair.³⁴² The Court concluded that in order to assess the unfair nature of a term, the national court must determine, *inter alia*, whether, in light of all the terms of consumer contracts and in light of the national legislation setting out rights and obligations which could supplement standard terms, the reasons or the method for amending the fees connected with the service to be provided were set out in plain, intelligible language and whether consumers have a right to terminate the contract.³⁴³

Remarkably, this was the first time that the Court had expressly determined the consequences of a violation of the transparency principle.³⁴⁴ By stressing the ‘fundamental importance’ of clear and intelligible language for its fairness assessment, the Court seemed to indicate that the principle of transparency is an integral part of

338 Marco Loos, ‘Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law’ 2015 23(2) *European Review of Private Law* 179, 185.

339 Case C-472/10 NFH/Invitel, CJEU 26 April 2012, ECLI:EU:C:2012:242, para. 21.

340 Case C-472/10 NFH/Invitel, CJEU 26 April 2012, ECLI:EU:C:2012:242, para. 24.

341 *Ibid.*, para. 27.

342 *Ibid.*, para. 28.

343 *Ibid.*, paras 29-31.

344 C. Leone, ‘Transparency Revisited – on the Role of Information in the Recent Case-Law of the CJEU’ (2014) 10 *European Review of Contract Law* 312.

the fairness test provided in Article 3 of the Directive.³⁴⁵ To put it differently, a breach of the transparency principle may constitute an important element to assess the unfair nature of a term which may lead to the invalidity of such a term according to Article 6(1) of the Directive.

In *RWE*, the reasoning in *Invitel* was firmly restated and further clarified by the Court. This case concerned a contract term which allowed the supplier to vary gas prices unilaterally without stating the reasons for, the conditions or the scope of such a variation. It is worth mentioning that, under German law, a term which does not comply with the transparency requirements may be considered to be an unreasonable disadvantage to consumers, and, read in conjunction with a breach of the requirement of good faith, may render such a term invalid.³⁴⁶ However, given the complicated nature of the gas market, the German Court decided to stay the proceedings and to address a more detailed question to the CJEU concerning whether the lack of transparency may be compensated by other mechanisms of consumer protection which refer to the requirement that the supplier must inform its customers of every price increase in good time and that those customers have the right to have the price increase judicially reviewed, in addition to the right to terminate the contract.

In its ruling, the Court examined the balance between the fundamental idea of the protection of consumers and the legitimate interests of the business in the context of contracts for an indeterminate period.³⁴⁷ Indeed, the European legislator, as evidenced by the UCTD as well as the Second Gas Directive,³⁴⁸ has recognised that in such a context it is necessary to allow the supplier to adjust the price charged for its services. However, a standard term that allows such an unilateral adjustment to be made must meet the requirements of good faith, a fair balance and transparency.³⁴⁹ On that account, the Court deduced from Article 5 and the 20th recital in the Preamble to Directive 93/13 that in respect of transparency, the consumer must actually be given an opportunity to examine all the terms of the contract. Such information on the terms of the contract as well as the consequences of concluding it are deemed to be of ‘fundamental importance’ for the consumer since on the basis of that information the consumer can make his/her decision whether to be bound by the terms or not.³⁵⁰ Therefore, with regard to a term that allows the supplier to unilaterally vary the price, the Court set out two criteria for the national court to assess whether the transparency requirements had been met:

345 Marco Loos, ‘Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law’ (2015) 23(2) *European Review of Private Law* 179, 185.

346 Article 307 of the BGB reads as follows: ‘Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible’. See more in C. Leone, ‘Transparency Revisited – on the Role of Information in the Recent Case-Law of the CJEU’ (2014) 10 *European Review of Contract Law* 312, 318.

347 Case C-92/11 *RWE Vertrieb AG/Verbraucherzentrale Nordrhein-Westfalen eV*, CJEU 21 March 2013, ECLI:C:EU:2013:180, para. 46.

348 Directive 2003/55/EC, OJ 2003, L 176/57.

349 Case C-92/11 *RWE Vertrieb AG/Verbraucherzentrale Nordrhein-Westfalen eV*, CJEU 21 March 2013, ECLI:C:EU:2013:180, para. 47.

350 *Ibid.*, paras 41-44.

Firstly, the reason and the method for the price variation must be laid down in a transparent manner so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those prices.³⁵¹ Non-compliance with such requirements cannot be compensated by informing the consumer of a price variation in good time and granting him/her a right to terminate the contract.³⁵²

Secondly, the consumer must have the right to terminate the contract after being informed that the supplier wishes to change the price. Indeed, the right of termination must be realisable in the sense that the consumer may actually be able to exercise it.³⁵³

Consequently, the judgment of the CJEU in this case not only confirmed its reasoning in the *Invitel* case regarding the role of transparency in assessing the fairness of standard terms, but also further clarified the specific requirements of the transparency principle, at least with regard to the variation clause in a long-term contract. Lying at the heart of this decision is the CJEU's determination that a standard term must meet the requirements of good faith, a fair balance and transparency. To that extent, not only does transparency have a role to play in assessing the fairness of a term, but it also constitutes a third pillar of the fairness test.

In this connection, it should be mentioned that in special circumstances the CJEU even implements a more radical sanction to allow a violation of the transparency requirement to render the term unfair.³⁵⁴ In the *Amazon* case,³⁵⁵ which is a landmark decision in the interaction between consumer protection law, private international law³⁵⁶ and data protection law^{357, 358} the Court ruled that a choice of law clause can be considered to be unfair if this clause misleads consumers regarding the extent of the rights which they are granted:

‘A term in the general terms and conditions of a seller or supplier which has not been individually negotiated, under which the contract concluded with a consumer in the course of electronic commerce is to be governed by the law of the Member State in which the seller or supplier is established, is unfair in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of the

351 *Ibid.*, para. 49.

352 *Ibid.*, para. 51.

353 *Ibid.*, paras 53-54.

354 Similarly, in Germany, Article 307 BGB explicitly states that ‘an unreasonable disadvantage may also result from the fact that the provision is not clear and comprehensible.’

355 Case C-191/15, *Verein für Konsumenteninformation v Amazon EU Sàrl*, CJEU 28 July 2016, ECLI:EU:C:2016:612.

356 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) *OJ L 199, 31.7.2007* and Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L 177, 4.7.2008*.

357 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. *OJ L281, 23/11/1995*.

358 Michael F. Müller, ‘Amazon and Data Protection Law – The End of the Private/Public Divide in EU Conflict of Laws?’ (2016) 5 *Journal of European Consumer and Market Law* 215; Mark D. Cole, ‘European Union “Weltimmo” Reloaded: CJEU Further Clarifies the Concept of “Establishment”’ (2016) 2 *European Data Protection Law Review* 377.

Rome I Regulation he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term, this being for the national court to ascertain in the light of all the relevant circumstances.³⁵⁹

Accordingly, the cases mentioned seem to suggest that the transparency of terms is an important element of the fairness test. This means that the fairness of a term is to be determined by taking into account the extent to which the term is transparent. A breach of the transparency principle may therefore render a term unfair and thus be invalid according to Article 6(1).

3.3. The Principle of Transparency in the PECL, ACQP, DCFR

3.3.1. *Duty to Draw the Other Party's Attention to Terms Not Individually Negotiated*

Contrary to the UCTD, all three soft law instruments explicitly provide for a test as to whether non-individually negotiated terms have been incorporated into a contract, which requires the user to take reasonable steps to draw the other party's attention to them. Article 2:104 (1) of the PECL, for example, stipulates 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.’

Similar rules are contained in the Acquis Principles³⁶⁰ and the DCFR.³⁶¹ The function of such rules is to supplement the rules governing the formation of contracts.³⁶² In addition to the classical formation rules to test whether the other party has expressed his/her consent, suppliers therefore have an obligation to take reasonable steps to draw the other party's attention to terms which have not been individually negotiated. With such an obligation, the other party is granted an opportunity to take note of the contents of terms which have been pre-formulated by the supplier either before or at the time of the conclusion of the contract.³⁶³

359 Case C-191/15, *Verein für Konsumenteninformation v Amazon EU Sàrl*, CJEU 28 July 2016, ECLI:EU:C:2016:612, para 71.

360 Article 6:201 (1) ACQP reads ‘Contract terms which have not been individually negotiated bind a party who was unaware of them only if the user took reasonable steps to draw the other party's attention to them before or when the contract was concluded.’

361 Article II.-9:103 (1) DCFR stipulates that ‘Terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.’

362 Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009) Comment A to II.9-103 (1) DCFR, 617.

363 Research Group on the Existing EC Private Law, *Principles of the Existing EC Contract Law (Acquis Principles). Volume Contract I — Pre-contractual Obligations, Conclusion of Contract, Unfair Terms* (Sellier European Law Publishers, 2007) Comment B.1. No 11 to Article 6:201 ACQP, 224.

In this connection, those sets of rules further specify that terms are not sufficiently brought to the other party's attention by a mere reference to them in a contract document, even if that party signs the document.³⁶⁴ According to the explanation in the Acquis Principles and the comments annexed to the DCFR, this 'attention-drawing' requirement is met if the supplier has taken steps which, under normal circumstances, are sufficient to draw the other party's attention to the non-negotiated terms such as including the terms as part of the document signed by the parties, or reprinting the terms on the reverse side of an offer with the offer referring to them.³⁶⁵

Additionally, the Acquis Principles and the DCFR also deal with the incorporation of non-negotiated terms in contracts concluded by electronic means.³⁶⁶ Indeed, the two instruments stipulate that in such cases contract terms are not binding on the other party unless the user makes them available to the other party in a textual form. The textual form in this case means a text expressed in alphabetical or other intelligible characters by means of any support that permits the reading or recording of the information contained therein and its reproduction in a tangible form.³⁶⁷

It should be noted that although the above rules in the three soft law instruments are applicable to both B2B and B2C contracts, the Acquis Principles lay down a further requirement for non-negotiated terms insofar as they are meant to be invoked against consumers. They require that unless consumers have had a real opportunity to become acquainted with the terms before the conclusion of the contract, they will not be bound by such terms.³⁶⁸ Thus, it is argued that, with respect to B2C contracts, the Acquis Principles impose a stricter obligation on the supplier than that in the DCFR. Under the latter requirement, the supplier is required to take steps to draw the other party's attention to the terms and it is then the other party's responsibility to take actual notice of the terms. Under the Acquis Principles, however, it is the responsibility of the supplier to ensure that the consumer has a real opportunity to become acquainted with the terms.³⁶⁹ The absence of stricter requirements for the incorporation of terms into consumer contracts under the DCFR can be justified by the fact that, according to Article II.-9:407, the lack of the consumer's real opportunity to be aware of the terms' content has to be evaluated as one of the factors that must be considered in the process of assessing the unfairness of these terms.³⁷⁰

364 Article 2:104 (2) of the PECL, Article 6:201 (2) of the ACQP, Article II.-9:103 (3)(b) of the DCFR.

365 Christian von Bar, Eric Clive, and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009), Comment D to II.9-103 (1) DCFR, 618; Research Group on the Existing EC Private Law (2007), Comment B.3 no.14 to Article 6:201 ACQP, 225.

366 Article 6:201 (3) ACQP provides that 'If a contract is to be concluded by electronic means, contract terms are not binding on the other party unless the user makes them available to the other party in textual form.' Article II.-9:103 (2) requires that 'If a contract is to be concluded by electronic means, the party supplying any terms which have not been individually negotiated may invoke them against the other party only if they are made available to the other party in textual form.'

367 Article 1:304 ACQP and Article I.-1:106(2) DCFR.

368 Article 6:201 (4) ACQP.

369 Thomas Pfeiffer, 'Non-Negotiated Terms' in Schulze, Reiner (ed.), *Common Frame of Reference and Existing EC Contract Law* (Walter de Gruyter, 2008) 177, 180-81.

370 Fryderyk 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' (2008) XIV *Juridica International* 69.

3.3.2. Duty of Transparency in Terms which Have Not Been Individually Negotiated

Article II-9:402 DCFR provides for a duty of transparency in terms which have not been individually negotiated. This provision has already been part of the Acquis Principles under Article 6:302, although it has a slightly different title, namely the transparency of terms. According to both Article II-9:402 DCFR and Article 6:302 ACQP, terms which have not been individually negotiated must be drafted and communicated in plain, intelligible language.

Apparently, these provisions are derived from Article 5(1) UCTD. However, different from their counterpart, the scope of application of the DCFR and ACQP has been extended to all terms including not only written terms, as stipulated by the UCTD, but also oral terms. This departure is argued to better fulfil the requirements of Recital 20 and Recital 11 of the Preamble to the UCTD as well as to reflect the Member States' experiences which demonstrate the existence of non-negotiated oral terms.³⁷¹

Similar to the UCTD, both the DCFR and the Acquis Principles do not further specify any requirements as to whether a term is formulated in plain and intelligible language. The comments on Article II.-9:402 DCFR and Article 6:302 ACQP however indicate that the plain and intelligible requirements are applicable not only to the wording of the terms but also to their textual organisation.³⁷² With such requirements, the rule on the duty of transparency in terms which have not been individually negotiated is expected to function as a tool to enable the party not supplying the terms to discern his/her contractual rights and obligations from the contractual terms without any legal assistance.³⁷³

3.3.3. Consequences of a Breach of the Transparency Requirements

Having acknowledged that the UCTD lacks provisions on the consequences of a breach of the transparency principle, the drafters of the Acquis Principles and the DCFR have attempted to fill this lacuna. On the one hand, both the Acquis Principles and the DCFR continuously lay down the *contra proferentem* rule for ambiguous clauses with a slightly different formation in comparison with the wording of Article 5 of the UCTD.³⁷⁴ On the other hand, more importantly the Acquis Principles and the DCFR

371 Christian von Bar, Eric Clive, and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009), Comment A to Article II.-9:402 DCFR, p.658; Research Group on the Existing EC Private Law(2007), Comment A.2, to Article 6:302 ACQP (Transparency of terms), p. 239.

372 Christian von Bar, Eric Clive, and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common FrameoOf Reference (DCFR)* (Walter De Gruyter, 2009), Comment B to Article II.-9:402 DCFR, p. 658; Research Group on the Existing EC Private Law (2007), Comment B.3, No. 6 to Article 6:302 ACQP, p. 240.

373 Christian von Bar, Eric Clive, and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009) Comment A to Article II.-9:402 DCFR, p. 658 ; Research Group on the Existing EC Private Law (2007) Comment B.1, No. 4 to Article 6:302 ACQP, p. 240.

374 The drafters of the ACQP argue that the word 'always' in Article 5 UCTD seems superfluous. Therefore, this term has been omitted under Article 6:203 ACQP. Research Group on the Existing EC Private Law (2007), Comment A.2, no. 3, to Article 6:203 ACQP, p. 230.

have further provided a direct remedy where the transparency requirements have been breached. Indeed, the explanatory note to Article 6:302 ACQP states that in order to pass the fairness test, the contract terms have to be transparent.³⁷⁵ To put it differently, the position taken by the drafters of the Acquis Principles is that non-compliance with the transparency requirements is one of the decisive factors to be taken into account in assessing the fairness of the terms. To this effect, in conjunction with other factors, a lack of transparency may result in the term being rendered unfair.

Much the same as the Acquis Principles, the DCFR provides that transparency is to be taken into account in assessing the unfairness of a contract term.³⁷⁶ However, the DCFR goes further by explicitly stipulating that a term which has not been individually negotiated in a B2C contract and which breaches the duty of transparency ‘may on that ground alone be considered unfair’.³⁷⁷ It means that the lack of transparency *per se*, according to the DCFR, results in a term being rendered unfair and then not being binding on the party not supplying it.

3.4. The Principle of Transparency in the CESL

3.4.1. *Duty to Raise Awareness of Contract Terms which Have Not Been Individually Negotiated*

Article 70 CESL provides that the supplier may only invoke terms which have not been individually negotiated against the other party if that other party was aware of such terms or if the party supplying such terms took reasonable steps to draw the other party’s attention to them, either before or when the contract was concluded.³⁷⁸ Although this provision has no precursor in the UCTD, it is clearly derived from the equivalent provisions in the PECL, the Acquis Principles and the DCFR with the similar objective of ensuring that the party not supplying the term has an opportunity to become acquainted with the term before concluding the contract. However, the CESL has brought further clarification in the way this duty is formulated. Indeed, Article 70(1) CESL clearly provides for two stages to frame the duty of the supplier to raise awareness of contract terms which have not been individually negotiated.³⁷⁹ The first stage is to test whether the other party was aware of the terms. Only if there is a negative answer to the first question will the second stage be applied to oblige the supplier to take reasonable steps to draw the other party’s attention to non-individually negotiated terms.

The next important question is what constitutes ‘reasonable’ steps. Article 70(2) CESL makes it clear that it is not sufficient to merely refer to a term in a contract document, even if the consumer signs the document. However, just like the other instruments, there is no further clarification of what steps must be taken to bring

375 Research Group on the Existing EC Private Law (2007), Comment B.3, no. 6, to Article 6:302 ACQP, p. 240.

376 Article II.-9:407 DCFR.

377 Article II.-9:402 (2) DCFR.

378 Article 70(3) determines the mandatory nature of Article 70 by requiring that ‘The parties may not exclude the application of this Article or derogate from or vary its effects’.

379 Eva-Maria Kieninger, ‘Contents and Effects’ in R. Schulze (ed.), *Common European Sales Law – Commentary* (Nomos Verlagsgesellschaft, Baden Baden, 2012) 346.

contractual terms to a consumer's attention under the CESL in order to eliminate uncertainty.³⁸⁰ To address this problem, the European Parliament has recently adopted an Amendment to Article 70(2) which provides that in order to be sufficiently brought to the consumer's attention the contract terms must be (a) presented in a way which is suitable to attract the attention of the consumer to their existence; and (b) given or made available to a consumer by a trader in a manner which provides the consumer with an opportunity to comprehend them before the contract is concluded.³⁸¹

As a consequence of non-compliance with such a duty, the supplier cannot invoke the term against the other party since such a term has not been successfully integrated as a part of the contract. It is worth noting that such a legal consequence in Article 70 represents a vivid change from the Feasibility Study (FS).³⁸² Whereas under Article 70 CESL the supplier of terms which have not been individually negotiated needs to meet these requirements in order to invoke them against the other party, Article 86(1) FS provides that contract terms which have not been individually negotiated will be considered unfair if they have not been drawn to the other party's attention.³⁸³

In this connection, it should also be noted that the FS intended to add another provision dealing with surprising standard terms. Article 87 FS reads:

‘A term contained in standard terms supplied by one party which is of such a surprising nature that the other party could not have expected it is unfair for the purposes of this Section unless it was expressly accepted.’

Indeed, by means of these two provisions the expert group in its Feasibility Study had tried to introduce a novel approach to control terms which have not been individually negotiated in that such terms are deemed to be unfair because of the way in which the other party's agreement was obtained. However, this approach was not free from criticism as the surprising nature of a standard term or the fact that a term has not been sufficiently drawn to the attention of other party is a matter of the existence of a contract and thus has nothing to do with the content of the term and its fairness.³⁸⁴ For this reason, it should not therefore be dealt with in the chapter on unfair contract terms.³⁸⁵ Consequently, both provisions were subsequently dropped from the CESL.

380 Ibid.

381 See Amendment 149 of European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0159+0+DOC+XML+V0//EN>> [accessed 15 May 2017].

382 The feasibility study was prepared by an Expert Group established by the European Commission to prepare a preliminary draft of the CESL <http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf> [accessed 15 May 2017].

383 Article 86(1) FS reads ‘Terms supplied by one party and not individually negotiated are unfair for the purposes of this Section if the other party was not aware of them, or if the party supplying the terms did not take reasonable steps to draw the other party's attention to them, before or when the contract was concluded.’

384 Maud Piers, ‘Pre-Contractual Information Duties and Remedies in the CESL’ (2012) 4 *Zeitschrift für Europäisches Privatrecht* 867, 894; Giovanni De Cristofaro, ‘“Invalidity” of Contracts and Contract Terms in the Feasibility Study on a Future Instrument for European Contract Law’ in Reiner Schulze and Jules Stuyck (eds), *Towards a European Contract Law* (Sellier European Law Publishers 2011) 97, 108.

385 Giovanni De Cristofaro, ‘“Invalidity” of Contracts and Contract Terms in the Feasibility Study on a Future Instrument for European Contract Law’ in Reiner Schulze and Jules Stuyck (eds), *Towards a European*

The Commission's decision to avoid both provisions has therefore revealed that the rule on the incorporation of non-individually negotiated terms must be clearly distinguished from the rule on the fairness test.³⁸⁶ Even when a term which has not been individually negotiated is incorporated into a contract, it may nevertheless not be binding on the party not supplying it unless such a term passes the fairness test. However, if a term does not meet the incorporation test, it will not become a part of the contract and then the question of fairness does not arise.

Accordingly, Article 70 CESL provides useful additional clarification regarding the duty to raise awareness of terms which have not been individually negotiated. Indeed, it goes further than the UCTD since it may prevent the supplier from relying on terms which were not brought to the attention of the consumer. Additionally, with a two-staged model it clarifies the requirements of information duties for the supplying party. However, the question of what constitutes 'reasonable steps' has, unfortunately, not been further interpreted.

3.4.2. Duty of Transparency in Contract Terms Which Have Not Been Individually Negotiated

Article 82 CESL provides for an explicit duty for the trader to supply contract terms which have not been individually negotiated to the consumer in plain and intelligible language. This Article is placed in Section 2 of Chapter 8 within the subject of unfair contract terms in contracts between a trader and a consumer, and there is no analogous provision in Section 3 regarding unfair contract terms in contracts between businesses.³⁸⁷ Therefore, under the CESL the duty of transparency is applicable to B2C contracts only. In this connection, the scope of application of the transparency under the CESL is narrower than its counterpart in Article II.-9:402 DCFR as well as Article 6:302 ACQP, but is similar to that of Article 5 UCTD.

In substance, however, the language of Article 82 is identical to its predecessor provisions. Arguably, this choice may enhance legal certainty since the meaning of similar concepts of 'plain and intelligible language' in the UCTD has been significantly clarified by the CJEU.

3.4.3. Consequences of a Breach of the Transparency Requirements

It should be clear from the above analysis that while the UCTD does not explicitly provide for the consequences of a breach of the duty of transparency, the Acquis

Contract Law (Sellier European Law Publishers 2011) 97, 108.

386 Martijn W. Hesselink and Marco B.M. Loos have further argued that the Commission has avoided a novel approach because it wanted to bring Chapter 8 CESL on unfair contract terms as close as possible to the text of the UCTD in order to benefit from two decades of experiences and interpretative solutions provided by the CJEU, see Martijn W. Hesselink and Marco Loos, 'Unfair Contract Terms in B2C Contracts' Ad hoc Briefing Paper for the European Parliament's Committee on Legal Affairs, (May 2012) <[http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462452/IPOL-JURI_NT\(2012\)462452_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462452/IPOL-JURI_NT(2012)462452_EN.pdf)> [accessed 15 May 2017].

387 D. Mazeaud and N. Sauphanor-Brouillaud, 'Unfair Contract Terms' in R. Schulze (ed.), *Common European Sales Law – Commentary* (Nomos Verlagsgesellschaft, Baden Baden, 2012) 376, 381.

Principles and especially the DCFR have provided for solutions that shed light on this issue. However, it seems that the Commission has deliberately limited the role of the duty of transparency with regard to not only its scope of application but also the consequences of a breach of such a duty. Indeed, the radical consequence provided by Article II-9:402(2) DCFR, which stipulates that a contract term may be deemed to be unfair on the sole ground that the term is not transparent, has not been inherited by the CESL.

However, this does not necessarily mean that, in comparison with the UCTD, the CESL has not provided any improvement regarding the sanctions for a violation of transparency requirements. Article 83 Section 2 No. 1 CESL states that the individual circumstances that have to be considered in assessing unfairness must relate to the question whether the ‘trader complied with the duty of transparency’ under Art. 82 CESL. Indeed, contrary to the DCFR, apart from the ground of non-compliance with the duty of transparency, the unfairness of terms must be assessed based on a number of other factors. Nevertheless, in contrast to the corresponding provision in the UCTD,³⁸⁸ Article 83 considers non-compliance with the duty of transparency, amongst other factors, as the very first important factor to assess the unfairness of terms.³⁸⁹ To that extent, Article 83 Section 2 No. 1 has brought a further clarification as regards the direct relationship between the fairness test and the principle of transparency. This step seems to be highly consistent with well-established cases decided by the CJEU.³⁹⁰

3.5. Concluding Remarks

The foregoing analysis of the transparency requirements for terms which have not been individually negotiated in the five sets of rules reveals a continuous line of development from the UCTD to the CESL.³⁹¹ It is a trend that the duty to provide the other party with terms which have not been individually negotiated has emerged as an important part of the transparency principle under European private law. While such a duty is only implicitly imposed on the supplier under the UCTD, it is explicitly provided for by the PECL, the Acquis Principles, the DCFR and the CESL with slightly different titles such as the duty to draw the other party’s attention to terms which have not been individually negotiated or the duty to raise awareness of contract terms which have not been individually negotiated. It is worth noting that in parallel with the development of the PECL, the Acquis Principles, the DCFR and the CESL with regard to the recognition of such a duty, the well-established case law of the CJEU has further clarified the status of this duty under the UCTD. Indeed, the CJEU seems to suggest that the requirements of the principle of transparency should be broadly interpreted to include the supplier’s duty to provide the terms to the consumer. Substantially, this duty

388 Article 4(1) UCTD.

389 D. Mazeaud and N. Sauphanor-Brouillaud, ‘Unfair Contract Terms’ in R. Schulze (ed.), *Common European Sales Law – Commentary* (Nomos Verlagsgesellschaft, Baden Baden, 2012) 376, 383.

390 See Section 3.3.

391 See Table 3 in the Annex to this dissertation for a comparative table on the transparency principle in the UCTD, PECL, ACQP, DCFR and CESL.

has a similar content to other instruments: it requires the supplier to take reasonable steps to draw the other party's attention to terms which have not been individually negotiated. It is particularly important for the consumer to take note of the contents of terms which have been pre-formulated by the supplier before or at the time of the conclusion of the contract. Without this requirement, consumers may be deprived of an opportunity to be aware of the existence of certain terms and thus whether the language of such terms is comprehensible seems to be irrelevant for them.

Once the duty to provide terms which have not been individually negotiated is laid down as the first requirement of the principle of transparency, a second requirement is needed to deal with the language of such terms. Indeed, all of the sets of rules provide that terms that are not individually negotiated must be drafted in plain and intelligible language. While the UCTD lacks provisions on the consequences of a breach of the principle of transparency, the drafters of the Acquis Principles, the DCFR and the CESL have seriously attempted to make up for this deficiency. The most radical consequence offered by the DCFR – that a contract term may be deemed to be unfair on the sole ground that the term is not transparent, has not been inherited by the CESL which itself provides for a consequence according to which the non-transparency of a term is the first factor to be taken into account in assessing the unfairness of such a term. This solution under the CESL, however, is in line with the well-established case law of the CJEU which has concluded that where a term does not comply with the transparency requirements, a national court must consider this when assessing the unfairness of such a term.

Last but not least, the CJEU has shed light on the requirements of 'plain and intelligible' language under the UCTD. As the CJEU precisely stated, this rule must be broadly interpreted. It requires that the consumer should be able to comprehend the legal and economic consequences of contractual terms. Thus, not only does this concern the wording of the contract itself, but also the relevant information communicated to the consumer should be taken into consideration. The yardstick applied is whether, as far as all relevant information is taken into account, the economic consequences of the terms have been made clear to the consumer in order to enable an average consumer to understand them.

4. THE PRINCIPLE OF FAIRNESS IN THE UCTD, PECL, ACQP, DCFR AND CESL

4.1. Introduction

As explained earlier, the most striking feature of the Unfair Contract Term Directive direct control of the substance of a consumer contract by ruling out all those terms that are unfair. To that end, at its very heart is Article 3(1) – a general clause which attempts to formulate a European concept of fairness under which a term which has not been individually negotiated shall be deemed unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. This general clause is further clarified by the Annex to the Directive that includes an indicative list of terms which are regarded as unfair, as

well as by Article 4 which lists the factors to be taken into account in order to ascertain whether a term is unfair.

Since its adoption in 1993, the Directive has had a dramatic influence on Member States with regard to the legal treatment of unfair terms. The criteria of the control regime found in the Directive have been hailed as being ‘sufficiently vague to allow flexible application in a wide range of circumstances’ and, at the same time, they are ‘sufficiently clear to enable their effective application in almost all cases’.³⁹² However, apart from these remarkable merits, the substantive control regime in the Directive is not free from criticism.

In this connection, on the one hand the other European sets of rules as mentioned above have basically inherited the substance of the control regime under the Directive. On the other hand, they have attempted to avoid any possible misunderstanding that the language of the Directive may cause and they have even vitalized the control regime under the 1993 Directive. Of particular significance is the CESL proposal which suggests a reform under which the indicative list is to be replaced by two new lists: a blacklist of terms which are always unfair and a grey list of terms which are presumed to be unfair. Nonetheless, this proposal was withdrawn and thus the European regime on unfair terms is still mainly represented by the 1993 Directive.³⁹³

Notably, in contrast with the failure of the legislative initiatives, the CJEU, through preliminary rulings, has actively performed its role in interpreting the general criteria of the unfairness test and has thus provided important guidance for national courts in assessing the fairness of terms. Looking closer at the CJEU’s judgments, it is argued that a number of clauses have been blacklisted or at least grey listed as unfair terms by the CJEU.

The following sections will discuss the substantive control regime concerning unfair terms in the Directive and the other sets of rules as well as the recent case law of the CJEU.

4.2. The Principle of Fairness in the UCTD

4.2.1. *The Unfairness Test*

4.2.1.1. General Clause and the Ideal of Substantive Fairness

As mentioned above, lying at the heart of Directive is Article 3(1) which generally defines the standard of fairness:

392 Christian Twigg-Flesner, ‘Reply to Aditi Bagchi, ‘At the Limits of Adjudications: Standard Terms in Consumer Contracts’ in Larry DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press, 2015) 459.

393 The Proposal for a Directive on Consumer Rights also suggested that an indicative list in the Annex to the Directive should be replaced by two new lists: a blacklist of terms which are always unfair and a grey list of terms which are presumed to be unfair. In accordance with the goal of maximum harmonisation, such a reform would imply a true uniform legal regime to control unfair terms across Europe. But this proposal was also rejected and thus the adopted Consumer Rights Directive has not greatly changed the current regime under the 1993 Directive.

‘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.’

The wording of Article 3(1) literally suggests that, according to the UCTD, a clause is unfair if it not only causes an imbalance in the parties’ rights and obligations but that this imbalance must also be contrary to the principle of good faith. Accordingly, the core of the unfairness test consists of two cumulative criteria: (i) a significant imbalance *in the parties’ rights and obligations arising under the contract, to the detriment of the consumer* and (ii) it is contrary to good faith.

(i) Significant Imbalance

Under the UCTD, a review of the unfairness of a term is in place when there is ‘a significant imbalance in the parties’ rights and obligations arising under the contract’. The common understanding, which seems to reflect various national traditions,³⁹⁴ is that the concept of a ‘significant imbalance’ involves a lack of symmetry in the parties’ rights and obligations³⁹⁵ or ‘the substantive unfairness of the contract.’³⁹⁶

As a matter of fact, there is always an asymmetry between consumers and businesses in terms of both bargaining power and their level of knowledge; however, it is the legislative intention of the UCTD that such a ‘natural imbalance’ need not necessarily lead to an imbalance in contractual rights and obligations.³⁹⁷ As Hugh Collins succinctly explains, this first limb of the unfairness test requires that ‘if a supplier inserts into the standard form contract a particular protection or advantage, then a similar or equivalent protection should be afforded to the consumer’.³⁹⁸ Accordingly, the test which is applied to determine a significant imbalance in the parties’ rights and obligations arising under the contract is whether the substantive rights and obligations given to a supplier in ways which are unduly detrimental to the consumer are counter-balanced by a substantive benefit for the consumer. Additionally, the inclusion of the word ‘significant’ in the text is not a redundant choice as it seeks to express the idea that there is a certain threshold that the imbalance has to reach in order to be an unfair term.³⁹⁹ Undeniably, the exact level of this threshold is not determined by a choice of

394 K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, OUP, Oxford, 1998) 329.

395 Paolisa Nebbia, *Unfair Contract Terms in European law: a Study in Comparative and EC law* (Bloomsbury Publishing, 2007) 150.

396 Hugh Collins, ‘Good Faith in European Contract Law’ 1994 14 (2) *Oxford Journal of Legal Studies* 229, 249; R. Brownsword, G. Howells and T. Wilhelmsson, ‘Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts’ in C Willett (ed.), *Aspects of Fairness in Contract* (OUP, Oxford, 1996) 45; Hugh Beale, ‘Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts’ in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1995) 231, 243.

397 Colin Scott and Julia Black, *Cranston’s Consumers and the Law* (Butterworths, London/Edinburgh/Dublin, 2000) 94.

398 Hugh Collins, *The Law of Contract: Law in Context* (3rd edn, Butterworths, London, 1997) 271.

399 Geraint G. Howells and Thomas Wilhelmsson, *EC Consumer Law* (Aldershot: Ashgate, 1997), 96; Colin Scott and Julia Black, *Cranston’s Consumers and the Law* (Butterworths, London/Edinburgh/Dublin, 2000) 94.

words; thus it may ultimately depend on the attitudes of the courts.⁴⁰⁰ Hence, in order to rectify such uncertainty, the UCTD also provides for an indicative list of unfair terms which may be considered as the elaboration of the concept of a significant imbalance. By way of illustration, example (d) in the list deals with a term which permits the seller or supplier to retain sums paid by the consumer when the latter decides not to conclude or perform the contract, without providing that the consumer is to be compensated with an equivalent amount from the seller or supplier where the latter is the party which cancels the contract. This example represents a potentially unfair term according to which a right given to a trader is not balanced by a similar right given to the consumer. Nevertheless, many transactions are worded in such a way that this counterbalancing benefit between the parties' rights and obligations should be evaluated by means of a comprehensive analysis. That is to say, not only must a similar right be given to the consumer in the term itself, but also by a substantive benefit in another provision of the contract or even in another contract on which the former depends.⁴⁰¹

Whether a term causes a significant imbalance in the parties' rights and obligations may be assessed by examining the extent to which the term departs from the default rule governing the rights and obligations of the parties to a contract in the absence of an agreement between the parties.⁴⁰² The 'default' rules which are enshrined in the legislation of the civil law countries or have evolved over a long period of time under case law in the common law countries may be presumed to present a relatively fair balance between the interests of contracting parties. Indeed, it is well known that in German law the default rules have a model character when it comes to the fairness of a term (*Leitbildfunktion*): the more strongly a term deviates from the default rules, the more likely it is that such a term will be presumed to be unfair.⁴⁰³ The reason for this is that the default rules are assumed to manifest the legislator's fundamental judgment (*Gerechtigkeitsgehalt*) and thus if the parties agree on a term which refutes such a fundamental judgment, it must be viewed suspiciously.⁴⁰⁴ Although this role of default rules is not commonly laid down in the legislation of other Member States, at least it has been used in this way in practice.⁴⁰⁵ For example, in the UK, the Office of Fair Trading (OFT) (to be replaced by the Competition and Markets Authority (CMA) in

400 Geraint G. Howells and Thomas Wilhelmsson, *EC Consumer Law* (Aldershot: Ashgate, 1997), 96.

401 Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999) 259-60.

402 Thomas Wilhelmsson and Chris Willett, 'Unfair terms and standard form contracts' G. Howells, I. Ramsay, T. Wilhelmsson and D. Kraft (eds), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010) 158, 176.

403 Para 2 of Section 307 BGB provides that 'An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision is not compatible with essential principles of the statutory provision from which it deviates', see Martijn W. Hesselink, 'Unfair Terms in Contracts Between Businesses' in Reiner Schulze and Jules Stuyck *Towards a European Contract Law* (Walter de Gruyter, 2011) 131, 139; Phillip Hellwege and Lucinda Miller, 'Control of Standard Contract Terms' in Gerhard Dannemann and Stefan Vogenauer (eds) *The Common European Sales Law In Context: Interactions with English and German Law* (OUP Oxford, 2013) 423.

404 Phillip Hellwege and Lucinda Miller, 'Control of Standard Contract Terms' in Gerhard Dannemann and Stefan Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* (OUP Oxford, 2013) 423, 443.

405 Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing, 2007) 2.4.3.2.

2014) rightly recognized that all of the illustrative terms listed in the UCTD have the object or effect of changing the arrangements that would exist under the ordinary rules of contract law if the contract was silent.⁴⁰⁶ Such terms either protect the supplier from certain types of legal claims which the consumer might otherwise make, or provide rights against the consumer that the supplier would not otherwise enjoy. Therefore, the OFT's starting point in assessing the fairness of a term is normally to ask what would be the position of the consumer if the term did not appear in the contract.⁴⁰⁷ As a result, when a contractual term deviates from a default rule, this may be an indication that such a term causes a significant imbalance in the parties' rights and obligations.

(ii) Good Faith

The second limb of the test for an unfair term concerns the notion of good faith. As revealed by Mario Tenreiro,⁴⁰⁸ the inclusion of the requirement of good faith in the unfairness test must be seen in the light of two factors: first, the importance of such a principle within the framework of continental legal systems, in particular its concrete role in Germany; and second, the fact that this principle had already been adopted by one Member State – Portugal – as a general criterion for the assessment of unfair terms.⁴⁰⁹

However, it should be noted that the notion of good faith triggers numerous problems of an interpretative nature. In a comparative study of this concept across Europe, Zimmerman and Whittaker concluded that the concept of good faith meant different things within a particular legal system as well as between legal systems.⁴¹⁰ It is therefore understandable that some of the guidelines on the meaning of good faith are provided in Recital 16 of the UCTD which states 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

406 OFT, *Unfair contract terms Guidance – Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (OFT 311, 2008), p. 10 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284426/oft311.pdf> [accessed 15 May 2017].

407 *Ibid.*

408 The head of the legal department of Directorate-General XXIV of the European Commission when the UCTD was adopted.

409 Mario Tenreiro, ‘The Community Directive on Unfair Terms and National Legal Systems’ (1995) 3 *European Review of Private Law* 273, 275.

410 R. Zimmerman and S. Whittaker, *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000). In this project, the authors studied the concept of good faith in 15 legal systems and applied it to 30 hypothetical cases.

the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account.’

According to the above text, the notion of good faith under the UCTD must clearly be used in an objective rather than a subjective sense.⁴¹¹ However, it is still debatable whether ‘good faith’ may be understood as a substantive or a procedural requirement. On the one hand, the notion of good faith was arguably connected to fair and open dealing. One of the most remarkable statements along these lines is the reasoning of Lord Bingham in the case of *DGFT v FNB*, in which he argued that:

‘Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer’s necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position.’⁴¹²

To put it differently, the assessment of good faith should focus on procedural matters or the opportunity given to the consumer to influence the terms. On the other hand, it was argued that the notion of good faith was not confined to a purely procedural sense, but extended to the substantive contents of a contract.⁴¹³ The requirement of good faith, therefore, focuses on whether and to what extent the term has realized the interest of the consumer. It encompasses an overall evaluation of the interest involved.

(iii) The Relationship Between the Two Notions and its Tentative Implications for the Fairness Model Underlying the UCTD

There has also been considerable debate in the legal literature on the correct interpretation of the relationship between the two limbs of the unfairness test. More significantly, taking into account the fact that the first limb of the test – a ‘significant imbalance’ – relates to substantive fairness, while the second limb – ‘good faith’ – may be interpreted as having both procedural and substantive aspects, the issue of the relationship between the two limbs is directly connected to the question of the fairness

411 Subjective good faith is usually defined as a subjective state of mind: not knowing nor having to know of a certain fact or event (*bona fide acquisition*). Objective good faith, the concept that the general good faith clauses refer to, is usually regarded as a norm for the conduct of contracting parties: ‘acting in accordance with or contrary to good faith’. Some systems have even emphasised this distinction by introducing separate terminology for objective good faith (*Treu und Glauben*, *correttezza*, *redelijkheid en billijkheid*), see Martijn W. Hesselink, ‘The Concept of Good Faith’ in A.S. Hartkamp, E.H. Hondius, M.W. Hesselink, C.E. du Perron & M. Veldman (eds) *Towards a European Civil Code* (Kluwer Law International, The Hague/Boston/London, 2004) 471.

412 Lord Bingham in *DGFT v FNB*, at 494; For a commentary on the case, see S Whittaker, ‘Assessing the Fairness of Contract Terms: The Parties “Essential Bargain”, its Regulatory Context and the Significance of the Requirement of Good Faith’ [2004] *Zeitschrift Für Europäisches Privatrecht* 75, 86.

413 Hugh Beale, ‘Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts’ in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1995) 231, 245.

model underlying the UCTD. That is to say, the question is whether Article 3(1) should be interpreted in the sense that it is primarily concerned with substantive fairness or whether it equally makes procedural fairness a necessary prerequisite for the fairness test.⁴¹⁴ Of course, one can easily argue that both limbs of the unfairness test are aimed at substantive fairness, but, as will appear later, this is not the only way of interpreting the unfairness test.

Brownsword, Howells and Wilhelmsson have summarised at least four plausible interpretations of Article 3(1). Firstly, in the ‘two-step’ interpretation, a term is unfair if it causes (i) a significant imbalance (ii) to the detriment of the consumer. Here, the requirement of good faith is not an independent condition, but is rather automatically generated if a significant imbalance exists. Secondly, in the ‘three-step procedural’ interpretation, a term is unfair if it causes (i) a significant imbalance, (ii) to the detriment of the consumer; and (iii) it is contrary to the requirement of good faith. The requirement of good faith is an independent, *procedural condition*. Thirdly, in the ‘three-step substantive’ interpretation, a term is unfair if it causes (i) a significant imbalance, (ii) to the detriment of the consumer; and (iii) it is contrary to the requirement of good faith. The main difference with the ‘three-step procedural’ interpretation is that the requirement of good faith is a *substantive condition*. Fourthly, in the ‘three-step procedural and substantive’ interpretation, a term is unfair if it causes (i) a significant imbalance, (ii) to the detriment of the consumer; and (iii) it is contrary to the requirement of good faith. The requirement of good faith is an independent, *substantive and procedural condition*.⁴¹⁵

As far as the first approach is concerned, it has been faithfully supported by Mario Tenreiro who was directly involved in the drafting process of the UCTD.⁴¹⁶ He insists that a term is always considered to be contrary to the requirement of ‘good faith’ when it causes such a significant imbalance.⁴¹⁷ His view seems to reflect the anecdotal evidence that the fundamental reason for good faith being part of the test is to reflect

414 For the general distinction between ‘procedural’ and ‘substantive’ unfairness, see A Leff, ‘Unconscionability and the Code – The Emperor’s New Clause’ (1967) 115 *U. Pa. L. Rev.* 485. As far as the UCTD is concerned, Chris Willet has distinguished that while ‘*Procedural fairness*’ means fairness in the process leading up to the agreement, ‘*Substantive fairness*’ relates to the fairness of the substance of the terms. Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing, 2007) 2. In contrast, Paolisa Nebbia differentiates procedural and substantive good faith, see Paolisa Nebbia, *Unfair Contract Terms in European law: a Study in Comparative and EC law* (Bloomsbury Publishing, 2007) 149.

415 R. Brownsword, G. Howells, T. Wilhelmsson, ‘Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts’ in C. Willett (ed.), *Aspects of Fairness in Contract*, (Blackstone, London 1996) 25, 31-2.

416 Mario Tenreiro, ‘The Community Directive on Unfair Terms and National Legal Systems’ (1995) 3 *European Review of Private Law* 273. Similarly, Howells presumed that imbalance implies good faith. G. Howells, ‘Good Faith in Consumer Contracting’ in Roger Brownsword, Norma J. Hird and Geraint G. Howells (eds) *Good Faith in Contract: Concept and Context* (Dartmouth Publishing Company, 1999) 91, 95.

417 ‘Let us be clear: there is no way that a contractual term which causes “a significant imbalance in parties’ rights and duties arising under the contract to the detriment of the consumer” can conform with the requirement of “good faith”. Indeed, the opposite is true: a term is always regarded as contrary to the requirement of “good faith” when it causes such an imbalance.’ Mario Tenreiro, ‘The Community Directive on Unfair Terms and National Legal Systems’ (1995) 3 *European Review of Private Law* 273, 279.

national traditions that are tied to the good faith concept.⁴¹⁸ In this regard, good faith can be viewed simply as a label that explains to these national traditions what is meant by a significant imbalance.⁴¹⁹ However, it is difficult to marry this approach with the language of Recital 16 which considers good faith to be an operative criterion as it indicates that the requirement of good faith is ‘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’.

Regarding the second approach, ‘contrary to the requirement of good faith’ and a ‘significant imbalance’ are two separate and cumulative requirements of the unfairness test and the former focuses on issues of procedural fairness while the latter puts emphasis on substantive fairness. As a result, a term would be fair unless there is unfairness both in substance and procedure. In other words, it seems to imply that fairness in a procedural sense may be sufficiently used as a legitimizing factor for a substantively unfair term.⁴²⁰ Nevertheless, this approach would significantly diminish the level of consumer protection in the UCTD. A careful reading of Article 3(1) in conjunction with other provisions of the UCTD results in numerous questions as to the necessity of procedural unfairness under Article 3(1). First of all, the fact that qualified agencies in the Member States, under Article 7 of the UCTD, are empowered to take actions to prevent the continued use of unfair terms in contracts means that the primary target of such a pre-emptive challenge is the issue of the substantive unfairness of terms. Indeed, once an injunction is granted, the challenged term may be prohibited without the necessity of taking into account the negotiating process of such a term. Consequently, it must be the case that substantive unfairness itself can render a term unfair. If procedural unfairness is a cumulative requirement of unfairness, this preventive authority under Article 7 could not function in practice. This argument also holds true for the indicative list in the Annex to the Directive. Among 17 terms included in the indicative list, only one term focuses on procedural unfairness while the remaining 16 terms aim at substantive fairness.

As regards the third approach, one single important difference in comparison with the second approach is that in the third approach ‘good faith’ should be read in the substantive sense. To substantiate this approach, Brownsword, Howells and Wilhelmsson argue that dependence on questions of procedural impropriety does not effectively promote a fair European standard form, since it would be impossible to regulate unfair terms without becoming involved in secondary questions of procedural abuse, and allows traders to evade the effects of the UCTD.⁴²¹ Nonetheless, if good faith

418 Hans-W. Micklitz, *The Politics of Judicial Co-Operation in the EU: Sunday Trading, Equal Treatment and Good Faith* (Cambridge University Press, 2005) 376.

419 Indeed, the reference to good faith is argued to be no more than a ‘bow in the direction of [the] origins’ of the German law on unfair terms, which was so influential on the UCTD. Joseph Chitty, *Chitty on Contracts: General Principles* (Volume 1, Sweet & Maxwell, 2012) paras 15-34.

420 Chris Willett, ‘General Clauses and Competing Ethics of European Consumer Law in the UK’ (2012) 71 *Cambridge Law Journal* 412, 423; Chris Willett, ‘The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches’ (2011) 60 *JCLQ* 355.

421 R. Brownsword, G. Howells and T. Wilhelmsson, ‘Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts’ in C. Willett (ed.), *Aspects of Fairness in*

is merely concerned with unduly advantageous transactions, it is difficult to understand how it differs from the first limb of the test (a significant imbalance in the parties' rights and obligations).⁴²² The notion of good faith cannot therefore stand out as an additional requirement cumulated with a 'significant imbalance.'

Finally, in the fourth approach the requirement of good faith is understood as being a dual substantive and procedural condition. As a supporter of this view, Hugh Beale argues that good faith should involve a double operation. 'First it has a procedural aspect. It will require the supplier to consider the consumer's interests. However, a clause which might be unfair if it came as a surprise may be upheld if the business took steps to bring it to the consumer's attention and to explain it. Secondly, it has a substantive content: some clauses may cause such an imbalance that they should always be treated as being contrary to good faith and therefore unfair.'⁴²³

Accordingly, given the vagueness of the two notions, especially the requirement of good faith, it is not clear-cut that one of the four approaches appears as an obviously correct reading of Article 3(1). However, it is submitted that the second approach to a purely procedural interpretation of the requirement of good faith seems to be contrary to the underlying value of Article 3(1) of the UCTD which primarily concerns the protection of consumers from substantive unfairness. The concept of good faith should at least be given some substantive content and thus at least some degree of imbalance would automatically be considered to be contrary to the good faith requirement. To put it differently, a breach of the good faith requirement should in many cases be inferred directly from the content of the contractual terms. Nevertheless, this does not necessarily mean that no procedural arguments should be applied in assessing the unfairness of terms. As discussed above, the CJEU has gradually clarified that the transparency requirement is an important element to evaluate unfair terms.⁴²⁴ The extremely dangerous implication of the second approach is to consider procedural reasoning as a necessary precondition for assessing the fairness of terms. For the purpose of the UCTD, this approach should be avoided to ensure that some terms are so detrimental to the consumer that they should be invalid regardless of how procedurally fair they may be.⁴²⁵

Contract (Blackstone, London 1996) 25, 32.

422 R. Brownsword and G Howells 'The Implementation of the EC Directive on Unfair Term in Consumer Contracts – Some Unresolved Questions' (1995) *Journal of Business Law* 243, 255.

423 Hugh Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1995) 231, 245.

424 Section 3.2.4.

425 This is in line with the recent judgments of CJEU. In *Sebestyén*, the Court explicitly held that transparency cannot legitimize an unfair term: 'even assuming that the general information the consumer receives before concluding a contract satisfies the requirement under Article 5 that it be plain and intelligible, that fact alone cannot rule out the unfairness of a clause such as that at issue in the main proceedings.' Case C-342/13, *Katalin Sebestyén v Zsolt Csaba Kóvári and Others*, CJEU, 3 April 2014, ECLI:EU:C:2014:1857, para. 34.

4.2.1.2. Substantive Criteria of Unfairness in the Light of Cases Determined by the CJEU

(i) Substantive Interpretation of a ‘Significant Imbalance Contrary to the Requirement of Good Faith’

In *Mohamed Aziz*,⁴²⁶ for the first time ever the CJEU engaged in an analysis of the guiding importance of the general fairness test enshrined in the UCTD.⁴²⁷ This case involved certain terms in a loan agreement between a consumer and a bank, secured by a mortgage in which the immovable property subject to it was the consumer’s family home.⁴²⁸ As the consumer had stopped making payments, and after repeated calls for the consumer to pay, the bank instituted enforcement proceedings for the notarial instrument attesting the debt against the consumer. In parallel with the enforcement proceedings, the consumer then brought an action before the courts for a declaration seeking the annulment of a clause in the mortgage loan agreement on the ground that it was unfair, and, accordingly, for the annulment of the enforcement proceedings.⁴²⁹ The Spanish court decided to stay the proceedings and asked the CJEU, among other preliminary questions, ‘how is the concept of disproportion to be understood’ with regard to the concrete contract terms?⁴³⁰

Although the wording of the question used the term ‘disproportion’ which derives from the terminology used in point 1(e) of the Annex to the Directive, according to Advocate General Kokott the request for a preliminary ruling was to be understood as meaning that with this question the referring court was, in essence, seeking a precise clarification of the general concept enshrined in Article 3(1) of the Directive.⁴³¹ Following her opinion, the CJEU attempted to clarify the meaning of the important notions of a ‘significant imbalance’ and ‘contrary to good faith’.

As regards the notion of a ‘significant imbalance’, the CJEU, by referring to its previous judgments,⁴³² explained that the system of protection introduced by the Directive aimed to replace ‘the formal balance which the contract establishes between

426 Case C-415/11, *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, CJEU 14 March 2013, ECLI:EU:C:2013:164.

427 Hans W. Micklitz, *Unfair Contract Terms – Public Interest Litigation Before European Courts, Landmark Cases of EU Consumer Law: In Honour of Jules Stuyck* (Intersentia, Cambridge, 2013) 639.

428 The first term at issue was an acceleration clause which provided that in the event of default by the debtor in respect of just one of 396 monthly instalments, the bank could call in the total amount of the loan. The second term was a default interest clause, which provided that if the debtor defaulted he had to pay default interest of 18.75% per annum on the capital sum due. Thirdly, under a unilateral determination clause, for enforcement proceedings the lender could unilaterally determine the balance of the loan and could autonomously create an important condition for conducting the simplified mortgage enforcement proceedings. Case C-415/11, *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, CJEU 14 March 2013, ECLI:EU:C:2013:164, paras 20-22.

429 Case C-415/11, *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, CJEU 14 March 2013, ECLI:EU:C:2013:164, para. 27.

430 Case C-415/11, *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, CJEU 14 March 2013, ECLI:EU:C:2013:164, para. 31.

431 Case C-415/11, *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, CJEU 14 March 2013, ECLI:EU:C:2012:700, Opinion of AG Kokott of 8 November 2012, para. 60.

432 Case C-618/10 *Banco Español de Crédito* [2012] ECR, paragraph 76 and the case law cited therein.

the rights and obligations of the parties with an effective balance which re-establishes equality between them.⁴³³ Thus, in order to ascertain whether there is a significant imbalance to the detriment of the consumer, a national court must particularly consider ‘what rules of national law would apply in the absence of an agreement by the parties in that regard.’⁴³⁴ This ‘comparative analysis’ would enable the national court to evaluate whether and to what extent the contract placed the consumer in a legal situation which was less favourable than that provided for under national law.⁴³⁵

Subsequently, with respect to the question of the circumstances in which such an imbalance arises ‘contrary to the requirement of good faith’, the CJEU required the national court to assess whether ‘the seller or supplier, dealing fairly and equitably with the consumer, could *reasonably assume* that the consumer would have agreed to such a term in individual contract negotiations’.⁴³⁶ In this connection, Advocate General Kokott further explained that ‘it is important *inter alia* whether such contractual terms are common, that is to say they are used regularly in legal relations in similar contracts, or are surprising, whether there is an objective reason for the term and whether, despite the shift in the contractual balance in favor of the user of the term in relation to the substance of the term in question, the consumer is not left without protection’.⁴³⁷

These views of the CJEU on the interpretation of the concept of a ‘significant imbalance contrary to the requirements of good faith’ were confirmed and further clarified in *Constructora Principado SA*.⁴³⁸ In that case, the consumer had entered into a contract with the seller for the purchase of a dwelling. Under one clause of the contract, the purchaser was responsible for the payment of an urban tax, whereas according to Spanish law, this tax should be borne by the seller. While, in the light of the ‘comparative test’ in *Aziz*, this clause seemed to be unfair, the seller argued that in this case since the costs that the challenged clause imposed on the consumer were trivial if compared to the total price paid for purchasing the dwelling, no significant imbalance should be found.⁴³⁹ The question referred to the CJEU, in essence, was whether the notion of a ‘significant imbalance’ must be interpreted as meaning that the costs charged against the consumer by such a term had a significant economic impact having regard to the value of the transaction in question, or whether only the effects of such a term on the rights and obligations of the consumer must be taken into consideration.⁴⁴⁰

433 Case C-415/11, *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, CJEU 14 March 2013, ECLI:EU:C:2013:164, para. 45.

434 *Ibid.*, para. 68.

435 *Ibid.*

436 *Ibid.*, para. 69.

437 Case C-415/11, *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, CJEU 14 March 2013, ECLI:EU:C:2012:700, Opinion of AG Kokott of 8 November 2012, para. 75.

438 Case C-226/13, *Constructora Principado SA v José Ignacio Menéndez Álvarez*, CJEU 16 January 2014, ECLI:EU:C:2014:10.

439 *Constructora Principado* contended that the clause had been negotiated with the purchaser and that there was no significant imbalance when the sums claimed were compared with the total price paid by the purchaser for the purchase of his dwelling. Case C-226/13, *Constructora Principado SA v José Ignacio Menéndez Álvarez*, CJEU 16 January 2014, ECLI:EU:C:2014:10, para. 12.

440 *Ibid.*, para. 17.

Referring to its previous judgment in *Aziz*, the Court reasoned that in order to ascertain whether a term caused a ‘significant imbalance’ in the parties’ rights and obligations under a contract to the detriment of the consumer, particular account must be taken of which rules of national law would apply in the absence of an agreement by the parties in that regard.⁴⁴¹ It followed from those grounds that the question whether a significant imbalance existed could not be limited to a ‘quantitative economic evaluation’ based on a comparison between the total value of the transaction which was the subject of the contract and the costs charged against the consumer under that clause.⁴⁴² On the contrary, a significant imbalance might be sufficiently attributed to any serious impairment of the legal situation in which the consumer was placed by reason of the relevant national provisions.⁴⁴³ The CJEU also specifically referred to three forms of impairment, including: a restriction of the rights which the consumer may enjoy under the contract, a constraint on the exercise of such rights, and an imposition on the consumer of an additional obligation not envisaged by the national rules.⁴⁴⁴

Accordingly, there can be no doubt that one of the most innovative contributions presented by *Aziz*, which was closely followed in *Constructora Principado SA*, is the new methodology elaborated by the CJEU regarding the assessment of the unfairness of terms.⁴⁴⁵ If in the case of *VB Pénzügyi Lizing* the CJEU initially revealed its willingness to provide national courts with more detailed guidance to interpret the general concept of unfairness in Article 3(1) of the Directive, concrete guidance in interpreting such abstract concepts was only substantively offered by the Court in *Aziz*. Indeed, the CJEU instructed the national court to assess two constituent components determining the unfairness of contractual terms: first, in order to ascertain whether the term causes a ‘significant imbalance’ in parties’ rights and obligations, a comparative analysis with the national rules applicable in the absence of an agreement between the parties should be carried out to evaluate whether and to what extent the consumer will be in a worse position; second, in order to determine whether the requirement of good faith is satisfied, the national court must assess whether the consumer would have agreed to the term in question in the context of individual negotiations.

(ii) The Two-Step Procedure for Assessing an Unfair Term

Apart from the concrete interpretation of the concepts of a ‘significant imbalance’ and ‘good faith’, according to Advocate General Kokot, the national court is required to

441 *Ibid.*, para. 20.

442 *Ibid.*, para. 21.

443 *Ibid.*, para. 22.

444 *Ibid.*, para. 23.

445 See on more issues related to these cases, Sara Iglesias Sánchez, ‘Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: *Aziz v. Catalunyacaixa*’ (2014) 51 *Common Market Law Review* 955; Antonio Las Casas, Maria Rosaria Maugeri and Stefano Pagliantini, ‘Cases: ECJ – Recent Trends of the ECJ on Consumer Protection: *Aziz* and *Constructora Principado*’ (2014) 10 *European Review of Contract Law* 444.

comply with a two-step procedure for assessing the unfairness of a specific term.⁴⁴⁶ In the first step, it must establish whether there exists a significant imbalance in the parties' rights and obligations by way of a comparative analysis with the national rules applicable in the absence of an agreement by the parties. However, the AG acknowledged that the mere fact that the contract treated the consumer less favourably than the default rules was not conclusive evidence of unfairness in the meaning of Article 3(1).⁴⁴⁷ Indeed, in the reasoning of the AG, the wording of Article 3(1) would make contractual freedom safe because it implies that the law does in fact recognize that, in many cases, parties have a legitimate interest in organising their contractual relations in a manner which derogates from the statutory provisions. Therefore, in the second step, the national court must establish, by virtue of a comprehensive analysis, whether the 'significant imbalance' is unjustified and contrary to the requirement of good faith, and thereby fulfilling all the requirements of Article 3(1). Specifically, the national court must ask whether the consumer's rights and obligations are curtailed to such an extent that 'the party stipulating the contractual conditions could not assume, in accordance with the requirement of good faith, that the consumer would have agreed to such a provision in individual contract negotiations'.⁴⁴⁸ Although the two-step procedure, as clearly recommended by the AG, was not explicitly mentioned by the CJEU in its judgment, the Court seemed to implicitly instruct the national court to do so.⁴⁴⁹

(iii) Unfairness under the UCTD and 'Unfair Commercial Practices'

In *Pereničová and Perenič*,⁴⁵⁰ the CJEU for the first time addressed the interaction between a finding of an 'unfair commercial practice' within the meaning of the Unfair Commercial Practice Directive 2005/29/EC and a finding of an unfair term under the requirements of Directive 93/13/EEC.⁴⁵¹ In this case, the CJEU reasoned that the practice of misstating in a credit agreement an annual percentage rate of charge (APR) lower than the real rate is to be regarded as misleading within the meaning of Article 6(1)(d) of the Unfair Commercial Practice Directive insofar as it is likely to result in

446 Oliver Gerstenberg, 'Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts' 2015 21(5) *European Law Journal* 599, 606.

447 'Even if a contractual term treats the consumer less favourably than the statutory provisions, this does not inevitably shift the contractual balance such that this must be regarded as unfair within the meaning of Article 3 of Directive 93/13'. Case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2012:700, Opinion of AG Kokott of 8 November 2012, para 72.

448 *Ibid.*, para. 74.

449 By way of illustration, with regard to the acceleration clause in *Aziz*, the national court was required to assess (i) whether the seller's right to accelerate the loan was conditional upon the consumer's default of an obligation which was of essential importance within the context of the contractual relationship, (ii) whether the borrower's non-compliance was sufficiently serious in the light of the terms and the amount of the loan, and (iii) whether under national law the consumer had adequate and effective means to remedy the effects of this acceleration. See Case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, CJEU 14 March 2013, ECLI:EU:C:2013:164, para. 73.

450 Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.*, CJEU 15 March 2012, ECLI:EU:C:2012:144.

451 Bert Keirsbilck, 'The Interaction Between Consumer Protection Rules on Unfair Contract Terms and Unfair Commercial Practices: Pereničová and Perenič' (2013) 50(1) *Common Market Law Review* 247.

the average consumer making a transactional decision that he would not otherwise have taken, which is for the national court to ascertain.⁴⁵² Of particular relevance to this section is the question of whether such a finding would mean that the APR term in the contract would also be unfair under the meaning of the 1993 Directive. In this connection, it should be mentioned that Article 3(2) of the Unfair Commercial Practice Directive precludes any effects of a finding of an unfair commercial practice on the validity of the contract to which the unfair practice related. Consequently, the CJEU ruled that ‘a finding that a commercial practice is unfair has no direct effect on whether the contract is valid’ from the point of view of Article 6(1) of Directive 93/13.⁴⁵³ However, referring to the Opinion of Advocate General Trstenjak, the CJEU observed that Article 4(1) of Directive 93/13/EEC ‘gives a particularly wide definition of the criteria for making such an assessment’, by expressly including ‘all the circumstances attending the conclusion of the contract in question’.⁴⁵⁴ In those circumstances, a finding that a commercial practice is unfair is one of several grounds on which the national court may base its assessment of the unfairness of contractual terms under Article 4(1) of Directive 93/13.⁴⁵⁵ Accordingly, while the conclusion that a commercial practice is unfair does not automatically lead to the finding that a term is unfair, such a conclusion still constitutes one of the criteria for the national court to evaluate the unfairness of a contract term. The CJEU judgement hence reflects the need for ‘a coherent interpretation’⁴⁵⁶ of the two Directives since both of them share the common goal of improving the situation of the consumer as the weaker party in the transaction.⁴⁵⁷

4.2.2. Indicative List of Terms

One of the greatest advantages of general clauses is their flexibility, which helps them to adapt to changes in society. At the same time, as the law needs to be certain, any general clause requires extensive crystallization in case law or by means of other supplementary tools. Thus, together with the general clause on unfairness in the Directive, a substantial list of examples of unfair clauses is attached as an Annex to the Directive. According to Article 3(3) of the Directive, the Annex contains an ‘indicative and non-exhaustive’ list of terms that may be regarded as unfair.

4.2.2.1. Legal Significance of the Indicative list

During the preparation of the UCTD, the legal nature of the list was a controversial topic. The original proposal by the Commission contained a definition of the expression

452 Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.*, CJEU 15 March 2012, ECLI:EU:C:2012:144, para. 41.

453 *Ibid.*, para. 46.

454 *Ibid.*, para. 43.

455 *Ibid.*

456 Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.*, ECLI:EU:C:2011:788, Opinion of AG Trstenjak of 29 November 2011, para. 87.

457 Hans-W. Micklitz and Norbert Reich, ‘The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)’ (2014) 51(3) *Common Market Law Review* 771, 788.

‘unfair terms’ which provided that ‘the Annex contains a list of types of unfair terms.’ This means that the list contained in the Annex was intended to be of a binding nature and therefore terms falling within the list were unacceptable *per se*. However, in the final text adopted by the Council, notwithstanding the expressed preference of the Commission and Parliament for a list that was binding in character, the list is worded as ‘an indicative list of the terms which may be regarded as unfair’. However, the exact meaning of ‘indicative’ is very ambiguous and has therefore generated lively debates in legal literature. One may argue that the list is a grey list which contains terms that are presumably unfair. Accordingly, the burden of proof is reversed, and the seller or supplier would have to prove that the clause falling within the list is actually fair.

Over the years, the CJEU has been given a number of opportunities to clarify the legal significance of the indicative list. In *Commission v Kingdom of Sweden*,⁴⁵⁸ the CJEU emphasized that the Annex has a merely ‘indicative and exemplary character’ and that the Member States do not have an obligation to incorporate the list into their legislation.⁴⁵⁹ Of particular significance is the Court’s statement that ‘a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair’.⁴⁶⁰ Accordingly, and contrary to the Opinion of Advocate General Geelhoed,⁴⁶¹ the CJEU did not even recognize the presumptive effect of the list.

However, in its subsequent judgments, the CJEU has upgraded the legal nature of the list. Indeed, the Court has consistently held that although the indicative list does not have a presumptive effect, it does provide a strong reference point for assessing the unfairness of certain terms. In *Invitel* or *Asbeek Brusse and de Man Garabito*, for instance, the CJEU highlighted that the Annex constitutes an ‘essential element’ on which the competent court may base its assessment as to the unfair nature of terms.⁴⁶²

458 CJEU 7 May 2002, case C-478/99, *Commission of the European Communities v Kingdom of Sweden*, ECLI:EU:C:2002:281. In this case the Commission of the European Communities brought an action seeking a declaration that the Kingdom of Sweden had failed to fulfil its obligations under that UCTD to adopt the laws, regulations and administrative provisions necessary to implement in its national legal system the Annex referred to in Article 3(3) of the Directive. Indeed, the Commission insisted that in order to satisfy the requirements of *legal certainty*, it is essential for this list to be published as an integral part of the provisions of legislation implementing the Directive rather than a mere mention in the preparatory work for the law. On the contrary, the Swedish government argued that according to the Swedish legal tradition, the preparatory work is an important aid to interpreting legislation and thus the incorporation of the Annex to the Directive in the preparatory work seemed the most suitable solution. Also, the Swedish courts had already held that most of the terms set out in the Annex were unfair, where necessary by referring to the list in question, and members of the public are informed of its existence in various ways. The Court ruled that the Annex to the Directive need not be directly included in the national legislation implementing the Directive. However, it is worth mentioning that the list must be implemented in some form in order to comply with the Directive. The threshold is that Member States must choose a form and method of implementation that offer a sufficient guarantee that the public can obtain knowledge of it.

459 Case C-478/99, *Commission of the European Communities v Kingdom of Sweden*, CJEU 7 May 2002, ECLI:EU:C:2002:281, para. 22.

460 *Ibid.*, para. 20.

461 Case C-478/99, *Commission of the European Communities v Kingdom of Sweden*, ECLI:EU:C:2002:281, Opinion of AG Geelhoed delivered on 31 January 2002, para. 28.

462 Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, para. 26; Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, para. 55.

It can thus be concluded that, according to the CJEU, the inclusion of a term on the list is a strong indication that a term is unfair.

4.2.2.2. Content of the Indicative List

The Annex to the Directive contains a list of 17 potentially unfair contract terms. The structure of the Annex does not seem to be based on any systematic order;⁴⁶³ however, there must be good reasons to organise the listed terms into specific groups. Such a systematic organisation may not only assist in justifying why one kind of specific term has been included in the list, but also make the list more manageable through adding a new kind of term to the list.⁴⁶⁴ In an important work, Mindy Chen-Wishart has attempted to propose a theoretical justification for the precise scheme of the regulation on unfair terms in the UK.⁴⁶⁵ Since the core of this scheme is dramatically shaped by the adoption of the UCTD,⁴⁶⁶ the model presented therein may helpfully serve to understand and explain the pattern of control found in the 1993 Directive on unfair terms.⁴⁶⁷ Accordingly, the terms listed in the Annex can be categorised into 4 groups as follows:⁴⁶⁸

463 Roger Brownsword, Geraint Howells and Thomas Wilhelmsson, 'The EC Unfair Contract Terms Directive and Welfarism' in Roger Brownsword, Geraint Howells and Thomas Wilhelmsson (eds), *Welfarism in Contract Law* (Dartmouth: 1994) 275, 284.

464 The European Economic and Social Committee was of opinion that 'the list should be continuously adapted to experiences in the implementation process of the directive upon recommendation of the CCCon'. *Opinion on the proposal for a Council Directive on Unfair Terms in Consumer Contracts* (1991) OJ 91/C 159/13 at C-159/37.

465 Mindy Chen-Wishart, 'Regulating Unfair Terms' in Louise Gullifer and Stefan Vogenauer (eds) *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Bloomsbury Publishing, 2014) 105.

466 The Unfair Terms in Consumer Contracts Regulations 1999.

467 Mindy Chen-Wishart argued that 'Objectionable terms are of four overlapping types. First, are terms that reduce or delete the remedial rights that the adhering party would otherwise have, leaving her with no or inadequate redress and allowing the proffering party to evade substantive legal oversight of the contract. Second which may amount to the same thing, are terms that reduce the proffering party's obligations against the baseline of the main subject matter term. Third are terms that inflate the adhering party's obligations against the price term. Fourth are terms that maximise protection of the proffering party's interests by imposing disproportionate or otherwise unfair burdens or liability on the adhering party.' Mindy Chen-Wishart, 'Regulating Unfair Terms' in Louise Gullifer and Stefan Vogenauer (eds) *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Bloomsbury Publishing, 2014) 105, 111. For another means of categorization, see Roger Brownsword, Geraint Howells, and Thomas Wilhelmsson, 'The EC Unfair Contract Terms Directive and Welfarism' in Roger Brownsword, Geraint Howells and Thomas Wilhelmsson (eds), *Welfarism in Contract Law* (Dartmouth: 1994) 275, 284. Accordingly, the terms are classified under 4 groups: Group 1: Terms conferring unfair unilateral decision-making power upon the business. Group 2: Terms preventing the parties from having equal rights. Group 3: Terms governing the duration of contracts. Group 4: Terms excluding or restricting liability normally imposed by law.

468 It should be noted that in paragraph 1(i) the Annex identifies as indicatively unfair and invalid a term with the object or effect of 'irrevocably binding the consumer to [other] terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'. This is the only kind of term which does not target the substantive content of a contract, but rather the voluntary choice of the consumer before entering into the contractual relationship. This meaning of this kind of term is discussed in detail in Section 3 on Transparency requirements.

(1) Terms that Reduce or Eliminate the Trader's Primary Obligations

The first group includes terms that reduce or eliminate the trader's primary obligations, and thus may prevent the consumer from obtaining what was legitimately expected from the core terms. In detail, the UCTD targets terms with the object or effect of:

- (c) making an agreement binding on the consumer whereas the provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;
- (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer;
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement.

(2) Terms that may Inflate the Consumer's Obligations against the Core Terms

The second group comprises terms that may inflate the consumer's obligations against the core terms, which have the object or effect of:

- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his.⁴⁶⁹

469 The 2015 Consumer Rights Act in the UK adds to the list a term which has the object or effect of 'giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound' (Schedule 2, Part 1, paragraph 14).

(3) Terms that Reduce or Delete the Consumer's Rights to Redress or Background Remedial Rights

The third group includes terms that reduce or delete the consumer's right to redress what the consumer would otherwise have. Additionally, a right of access to redress is empty if the background remedial rights have been reduced in the standard terms agreed by the consumer. The Directive is especially aimed at terms that have the object or effect of:

- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract;
- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him.

(4) Terms that May Inflate the Consumer's Liabilities for Breach

The fourth group consists of terms that may inflate the consumer's liabilities for breach. This kind of term is unfair because it has effect of imposing disproportionate or otherwise unfair burdens or liability on the consumer. Accordingly, the UCTD subjects to review terms with the object or effect of:

- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.

4.2.2.3. Grey List of Unfair Terms in the Light of the CJEU's Judgments

As mentioned above, there is a division of labour between the CJEU and national courts in adjudicating unfair terms: the CJEU's power is limited to interpreting the Directive and the national courts' authority is to apply the CJEU's guidance to the specific circumstances of the cases being heard. However, given the concrete nature of the CJEU's guidance in interpreting a number of clauses listed in the Annex, there

would not be much room left for the national courts.⁴⁷⁰ In this sense, it is submitted that the CJEU has developed a grey list of unfair terms which can be pigeonholed into three broad categories:

(1) Choice of Jurisdiction Clauses (Annex 1(q))

In the landmark case of *Océano*⁴⁷¹ the CJEU dealt with a choice of local jurisdiction clause in a consumer contract which purported to confer jurisdiction on the court for the district in which the company had its principal place of business.⁴⁷² Advocate General Saggio emphasized that such a clause had the effect of creating a paradoxical situation in which ‘the consumer would be obliged to appear before a court in a place other than that where he resides precisely in order to argue that the contractual term obliging him to do so is an unfair term.’⁴⁷³ The Court found that this clause fell within the scope of paragraph 1(q) of the Annex to the Directive as one of the terms that have ‘the object or effect of excluding or hindering the consumer’s right to take legal action since the costs relating to the consumer’s entering an appearance at court could be a deterrent and cause him to forgo any legal remedy or defence, in particular when the dispute concerns only limited amounts.’ Additionally, the exclusive jurisdiction clause significantly disadvantaged the consumer because it was solely for the benefit of the seller and contained no benefit in return for the consumer.⁴⁷⁴ Accordingly, the Court then declared that such a clause ‘satisfies all the criteria enabling it to be classed as unfair for the purposes of the Directive’.⁴⁷⁵ The Court strictly followed this approach in *VB Pénzügyi Lizing* which was analysed above.⁴⁷⁶

(2) Unilateral Variation Clauses (Annex 1(j))

Variation clauses are contractual terms which enable traders to change aspects of their contract with consumers including: the price, the specifications of the goods or services, and the timing of their supply; they are prevalent in contracts whose performance takes place over an extended period of time.⁴⁷⁷ In *Invitel* the CJEU addressed the unfairness of a term in a contract for the supply of telephone services providing for the for payment

470 Hans-W. Micklitz, ‘Unfair Terms in Consumer Contract, in Norbert Reich’ in Hans-W. Micklitz, Peter Rott, and Klaus Tonner, *European Consumer Law*, (2nd edition, Interselia Antwept, 2014) 125, 157.

471 Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-04941 CJEU 27 June 2000.

472 Jules Stuyck, ‘Joined cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v. Rocio Murciano Quintero and Salvat Editore SA v. José M. Sánchez Alcón Prades et al.*, Judgment of the Full Court of 27 June 2000, nyr’ 2001 38 *Common Market Law Review* 719.

473 Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores*, Opinion of AG Saggio, para. 24.

474 Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Hofstetter* [2004] ECR I-3403, para. 23.

475 Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-04941, CJEU 27 June 2000, para. 21.

476 Case C-137/08 *VB Pénzügyi Lizing Zrt v Ferenc Schneider* [2009] ECR I-5347. See Section 1.3.3.

477 For the legal treatment of variation clauses from a state’s perspective, such as the UK, see Simon Whittaker, ‘Variation and Termination of Consumer Contracts’ in Louise Gullifer and Stefan Vogenauer (eds) *English*

of invoices by money orders by the consumer without specifying the reason for and the method of calculating these fees.⁴⁷⁸ Although having acknowledged that the supplier or seller has a legitimate interest in incorporating such a clause into its standard contract, the Court emphasized that the possibility for the consumer to foresee the amendments by the seller or supplier is of fundamental importance.⁴⁷⁹ Hence, it was highly relevant to the fairness of a term whether it provided reasons for any variations and the methods of their calculation, and whether it provided the consumer with the right to terminate the contract.⁴⁸⁰ All of these criteria were deduced from various paragraphs of the Annex⁴⁸¹ to which the CJEU explicitly referred.⁴⁸² Later, the CJEU confirmed this approach in *RWE Vertrieb AG* concerning a standard term that enabled the supplier to vary the price without indicating the grounds and conditions of such a variation.⁴⁸³

(3) Excessive Penalty Clause (Annex 1(e))

Another term which has attracted the Court's special attention is what is commonly referred to as a penalty clause according to which a consumer must pay a disproportionately high sum in compensation. As mentioned earlier, in *Aziz* the CJEU was asked to ascertain the fairness of the default interest clause which set an annual default interest of 18.75 per cent automatically on the capital sum due without the need to give notice to the debtor.⁴⁸⁴ Having referred to paragraph 1(e) of the Annex, the Court explained that the national court must ask whether the clause is disproportionate or not. For this purpose, the national court must compare the statutory interest with the interest set by the contract term in order to determine whether the latter is appropriate for securing the attainment of the objective pursued by it.⁴⁸⁵

Obviously, the above analysis should not be definitive; it is highly likely that the CJEU will have more opportunities to interpret other terms on the list and also to add new terms to the grey list of unfair terms.

and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale (Bloomsbury Publishing, 2014) 199-225.

478 Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, CJEU 26 April 2012, ECLI:EU:C:2012:242.

479 *Ibid.*, para. 28.

480 *Ibid.*, para. 29.

481 Paragraph (j) covers terms which have the object or effect of enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; Paragraph (l) covers terms which have the object or effect of providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

482 Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, CJEU 26 April 2012, ECLI:EU:C:2012:242, para. 26.

483 Case C-92/11 *RWE Vertrieb AG/Verbraucherzentrale Nordrhein-Westfalen eV*, CJEU 21 March 2013, ECLI:C:EU:2013:180.

484 See Section 4.2.1.2.

485 *Ibid.*

4.2.3. Legal Consequence of Unfairness

The legal consequence of unfair terms is provided in Article 6(1) of the Directive:

‘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’

To further clarify the precise content of the contractual remedy which Article 6(1) confers on individual consumers, the following part shall address several important questions: (i) what is the exact meaning of ‘not-binding’, (ii) is it possible for national courts to revise the content of terms found to be unfair instead of merely setting aside its application, and (iii) what is the specific impact of an unfair term on the whole contract.

4.2.3.1. The Non-Binding Nature of Unfair Terms

Article 6(1) provides that unfair terms are not to be binding on the consumer. The CJEU has consistently held that this is a mandatory provision that aims to ‘replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.’⁴⁸⁶ In 2000, the Commission held the view that the objectives of Article 6(1) at least required that:⁴⁸⁷

- the consumer must be free to refuse to honour the contractual obligation under the unfair term before the national court has adjudicated on the matter;
- any court judgment finding a term to be unfair should take effect from the time of the conclusion of the contract, hence with retroactive effect (*ex tunc*);
- the court should be *ex officio* entitled to rule on the unfairness of contractual terms.⁴⁸⁸

It must be emphasized that the concept of ‘non-binding’ was deliberately chosen by the Council as a neutral concept to enable the Member States to have flexibility in opting for any terminology that suits the context of their legal system.⁴⁸⁹ Thus, it is not surprising that the term ‘not binding on the consumer’ has been transposed through

486 See Case C-76/10 *Photovost’ SRO v Iveta Korc’kovská*, para 38; *Mostaza Claro*, paragraph 36; *Asturcom Telecomunicaciones*, paragraph 30; and Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-10847, para. 47.

487 Commission, Report on Unfair Terms Directive 93/13, COM (2000) 248, p. 19.

488 These guiding principles seem to echo the standards developed by Tenreiro. See M. Tenreiro, ‘The Community Directive on Unfair Terms and National Legal Systems. The Principle of Good Faith and Remedies for Unfair Terms’ 1995 3(2) *European Review of Private Law* 273, p. 282.

489 The original Proposal for a Council Directive on Unfair Terms in Consumer Contracts (COM (90) 322 final) set out in its Art. 3(2) that unfair terms should be ‘void’. In its Explanatory Memorandum to the Re-examined Proposal for a Council Directive on Unfair Terms in Consumer Contracts (COM (93) 11 final), the Commission emphasized that Art. 6(1) was intended to ensure that no unfair term may be enforced to the detriment of a consumer but that the precise legal classification of the penalty as relative or absolute nullity, non-existence, voidance, etc., should be left to the legal system in each Member State. The Commission thus proposed the wording ‘shall . . . not bind’ as a neutral wording that would give the Member States the necessary discretion for the transposition of Art. 6(1) into national law.

various legal concepts of national law such as non-existence, nullity, revocability, voidability and unenforceability.⁴⁹⁰ In this connection, a traditional distinction between absolute nullity and relative nullity in the Member States' legal orders deserves careful attention.⁴⁹¹ On the one hand, 'absolute' nullity entails that the contractual term in question is regarded as having not been written and does not give rise to any legal consequences.⁴⁹² Consequently, the invalidity of the term can be invoked by any interested party to the judicial proceedings, including the courts of their own motion. On the other hand, 'relative' nullity indicates that the contractual term in question initially remains in force, so long as the party concerned asserts its validity.⁴⁹³ As a result, only the contractual parties can unilaterally assert its nullity,⁴⁹⁴ and thus the consequence of the 'relative' nullity of the unfair term would not require or allow the national courts to ensure, of their own motion, that consumers will not be bound by the unfair term. With a view to maintaining the effectiveness of the UCTD, this raises the issue of whether the consequence of the 'relative' nullity or the 'absolute' nullity of the unfair terms is compatible with the objectives of Article 6(1).

While still confirming that 'Member States have a certain degree of autonomy so far as concerns the definition of the legal arrangements applicable to unfair terms',⁴⁹⁵ the CJEU has also ruled that national courts must use their full resources under national law, to ensure that Article 6(1) 'is fully effective and achieving an outcome consistent with the objective purposed by it'.⁴⁹⁶ To be more precise, as further analysed below, the CJEU has held that a national court was obliged to raise the unfairness of a term of its own motion; and where the national court has found a term to be unfair, it should be able to establish all the consequences of that finding, without waiting for the consumer, who has been fully informed of his rights, to submit a statement requesting that that term be declared invalid.⁴⁹⁷ In the *Panno* case and the cases that followed the CJEU consistently held that although the national courts are obliged to raise the issue of unfair terms *ex officio*, they cannot declare a term unfair in order to protect a consumer against his will.⁴⁹⁸ Therefore, one can argue *prima facie* that only the absolute nullity of unfair terms, which theoretically allows national courts to raise the issue of unfair terms of their own motion, can satisfy the judgments of the CJEU as to the requirements of Article 6(1). However, from a systematic coherence perspective, an absolute nullity of the unfair terms also requires that unfair terms are invalid regardless of the consumer's

490 Commission, Report on Unfair Terms Directive 93/13, COM (2000) 248, p. 19.

491 The concept of 'relative' nullity as opposed to 'absolute' nullity is used, among others, in the Belgian and French legal orders. In contrast, the concept of 'voidability' as opposed to 'nullity' is used, among others, in the Dutch, German, and Austrian legal orders.

492 Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier European Law Publishers, 2008).

493 *Ibid.*

494 In some other Member States the concepts of 'nullity' and 'voidability' can be distinguished from each other in a similar manner. V Trstenjak, 'Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU' (2013) 21(2) *European Review of Private Law* 451, 459.

495 Case C-618/10, *Banco Español de Crédito*, para. 62.

496 Case C-618/10, *Banco Español de Crédito*, para. 72.

497 Case C-397/11 *Erika Jörös v Aegon Magyarország Hitel Zrt*, CJEU 30 May 2013, para. 42.

498 See Section 5.2.2.

will; but this finding obviously contradicts the ruling in the *Panno* case. It is suggested that although Member States can choose the most suitable way to transpose the concept of ‘not binding on the consumer’ into their national laws, the consequences of unfair terms under national laws must be innovatively construed so as to be in conformity with the CJEU’s interpretation of the procedural requirements of Article 6(1).⁴⁹⁹

4.2.3.2. No Revision of Unfair Terms

A further issue related to the ‘non-binding’ nature of unfair terms is whether Article 6(1) allows national courts to revise the content of terms found to be unfair instead of merely setting aside their application for the consumer. The question was first addressed by the CJEU in *Banco Español de Crédito SA*.⁵⁰⁰ In this case, after finding the unfairness of a term relating to the interest rate for late payments in a loan agreement, the Spanish court reduced the interest rate to the statutory interest rate in order to make it acceptable. Among other issues, the CJEU was asked whether the Spanish legislation permitting courts not only to set aside but also to revise the content of unfair terms is compatible with the UCTD.⁵⁰¹

The CJEU held that Article 6(1) of the UCTD required national courts to exclude the binding effect of an unfair term as regards the consumer, without being authorized to revise the content of that term.⁵⁰² That contract must continue in existence without any amendment other than omitting the unfair terms, to the extent that such a continuation is legally possible in accordance with the applicable national law.⁵⁰³ Following the Opinion of the Advocate General, the CJEU reasoned that the power to amend an unfair

499 For example, in the Netherlands Article 6:233 BW (the Civil Code) provides that unfair terms are voidable which implies that the court cannot raise the question of the unfairness of its own motion. However, scholars have argued for the opposite result by relying on the general rule of Article 3:40(2) BW which envisages the possibility for a derogation from the general rule on annulment in cases in which the rationale of the provision at issue should lead to a different result. Later, in *Hessakkers v. Voet* (13 September 2013), in referring to the rationale of the CJEU for the doctrine, the Hoge Raad (Supreme Court) ruled that Article 6:233, as interpreted in conformity with Directive 93/13 EEC, requires the court to raise the unfairness of terms of its own motion. A. Hartkamp has thus argued that the CJEU’s case law ‘has not replaced the concept of relative nullity by absolute nullity, which would run counter to the need of consumer protection, but has added to the concept of ‘relative’ nullity an additional protection by extending the power of the courts,’ see A.S. Hartkamp, *European Law and National Private Law: Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals* (Deventer: Kluwer 2014), no.188; A.S. Hartkamp, ‘Ex officio Application in the Case of Unenforceable Contracts or Contract Clauses: EU and National Laws Confronted’, in L. Gullifer & S. Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale* (Oxford: Hart Publishing 2014) 478-480.

Differently, in Italy, the consequence of unfairness was the new concept of ‘protective nullity’ (Article 36(3) Consumer Code). According to Anna Maria Mancaleoni, the concept of ‘protective nullity’ is peculiar, since it is a nullity that protects one of the parties to the contract (the court can only declare it to the extent that it does not work to the detriment of the consumer) and, at the same time, it can be applied by the court of its own motion. Anna Maria Mancaleoni, ‘The Obligation on Dutch and Italian Courts to Apply EU Law of Their Own Motion’ (2016) 24(3) *European Review of Private Law* 553, 569.

500 Case C-618/10 *Banco Español de Crédito SA v Calderón Camino*, CJEU 14 June 2012, ECLI:EU:C:2012:349; Anthi Beka, ‘Commentary note on Case C-618/10 Banco Español de Crédito SA v Joaquín Calderón Camino, Judgment of 14 June 2012’ (2012) 9 *Zeitschrift für Gemeinschaftsprivatrecht* 326.

501 *Ibid.*, para. 37.

502 *Ibid.*, para. 65.

503 *Ibid.*

term and reduce its content to an acceptable level would contribute to *eliminating the dissuasive effect* on sellers or suppliers stemming from a strict non-application of the respective terms.⁵⁰⁴ Indeed, if it were open to the national courts to modify the content of unfair terms, the suppliers would remain tempted to use those terms in the knowledge that even if they were found to be unfair, the contract could nevertheless be revised to the extent necessary and in a way that safeguards the interests of these suppliers.⁵⁰⁵ Accordingly, it is clear from the *Banco* case that Article 6(1) of the UCTD prohibits a rule of national law that allows a national court, if it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to adjust the contract by revising the content of that term.⁵⁰⁶ Later, similar reasoning was confirmed by the CJEU in its *Brusse* judgment.⁵⁰⁷

However, after setting aside an unfair term, the following question is whether a national court is allowed to apply a national supplementary rule that, in the absence of the term in question, would otherwise be applicable. One could easily argue that permission to apply a supplementary rule would have an equivalent effect as actually revising the unfair term and thus the ‘Banco’ rule would be overturned. In the *Kasler* case, this question reached the CJEU, but the term challenged was a term relating to the main subject matter of the contract rather than an incidental term.⁵⁰⁸ Although the CJEU ruled that a national court, in accordance with the principles of the law of contract, is not precluded from deleting an unfair term and substituting it with a supplementary provision of national law, this acceptance of the applicable rule as a substitute for a contract term which has been held to be unfair is limited to the particular circumstances of this case only.⁵⁰⁹ To be more precise, given the special characteristic of the term contested, the invalidity of the unfair term would require the court to annul the contract in its entirety and thus the consumer might be exposed to particularly unfavourable consequences.⁵¹⁰ Otherwise, a supplementary rule could rescue the contract from overall invalidity and this would enable a real balance between the rights and obligations of the parties to be restored.⁵¹¹ In the recent joined cases of *Unicaja Banco*,⁵¹² it appears that

504 *Ibid.*, para. 69.

505 *Ibid.*

506 Such a prohibition of what in German is called *geltungserhaltende Reduktion* has been widely supported by legal scholars. Ewoud Hondius convincingly pointed out four specific reasons why *geltungserhaltend Reduktion* should be criticized. Firstly, in line with the CJEU’s reasoning, he argues that it does not provide suppliers with the possibility to draft a contract which is valid from the outset. Secondly, contract terms which may later be avoided do not present a correct picture of the rights and duties of the parties. Thirdly, it allows the courts to step in to help only one of the parties. Finally, arguing from the perspective of the intentions of the parties will not always reflect reality in the case of standardised contract terms. See E. Hondius, *Unfair Contract Terms – Revising the Content of a Term, Landmark Cases of EU Consumer Law: in Honour of Jules Stuyck* (Intersentia, Cambridge 2013) 629; E. Hondius, ‘Unfair contract terms and the consumer: ECJ case law, Foreign Literature, and Their Impact on Dutch Law’, (2016) 3/4 *European Review of Private Law* 452, 467.

507 Case C-488/11, *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, CJEU 30 May 2013, ECLI:EU:C:2013:341.

508 Case C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*, CJEU 30 April 2014, ECLI:EU:C:2014:282.

509 *Ibid.*, para. 82.

510 *Ibid.*, paras 83-84.

511 *Ibid.*

512 Joined Cases C-482/13 and C-484/13 *C-487/13, Unicaja Banco v. Jos. Hidalgo Rueda a.o. and Caixabank v. Manuel Maria Rueda Ledesma a.o.* CJEU 21 January 2015, paras 33-34.

the CJEU has confirmed this approach by explicitly prohibiting a general possibility for the national court to substitute a supplementary provision of national law for an unfair term.⁵¹³

Accordingly, it is submitted that, in principle, the effect of the finding of an unfair term does not allow a general application of national supplementary rules. Only in exceptional cases, where the non-binding nature of a contract term may lead to the failure of the contract itself, thereby exposing the consumer to disadvantageous consequences, are the national courts allowed to apply a national supplementary rule.

4.2.3.3. Effect of Unfair Terms on the Validity of the Contract as a Whole

Apart from providing for the ‘non-binding’ nature of unfair terms, Article 6(1) also sets out the criteria for determining the effect of unfair terms on the validity of the contract as a whole. The applicable test is whether the contract is capable of continuing its existence without the unfair terms.

In *Pereničová and Perenič*,⁵¹⁴ the CJEU was asked, among other issues, whether Article 6(1) must be interpreted as allowing national courts to declare the whole contract non-binding on the ground that that is more advantageous for the consumer. As observed by the referring court, in this case, which concerned a loan agreement, if the contract could be held to be invalid as a whole, then the consumers in question would be obliged to pay only the interest for late payments, at the rate of 9%, rather than all the charges relating to the loan which had been granted, which would be much higher than that interest.⁵¹⁵

The CJEU held that the objective pursued by the European Union’s legislature in connection with Directive 93/13 is to restore the balance between the parties while in principle preserving the validity of the contract as a whole and not to abolish all contracts containing unfair terms.⁵¹⁶ Both the wording of Article 6(1) and the requirements concerning the legal certainty of economic activities advocate an objective approach in interpreting that provision, so that the situation of one of the parties to the contract cannot be regarded as the decisive criterion for determining the fate of the contract.⁵¹⁷

Therefore, according to the CJEU, the effect of unfair terms on the validity of the contract as a whole must be assessed according to objective criteria concerning the continuation of the contract. It cannot be interpreted as meaning that a court can base its decision exclusively on a possible advantage of the annulment of the contract for the consumer. However, it cannot be ruled out that since the Directive concerns minimum harmonization, Member States can lay down national regulations providing that a contract concluded between a trader and a consumer which contains one or more

513 See more in Reinhard Steennot, ‘Public and Private Enforcement in the Field of Unfair Contract Terms’ 2015 23(4) *European Review of Private Law* 589, 601.

514 Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.*, CJEU 15 March 2012, ECLI:EU:C:2012:144.

515 *Ibid.*, para. 24.

516 *Ibid.*, para. 31.

517 *Ibid.*, para. 32.

unfair terms may be declared void as a whole if this ensures better protection for the consumer.⁵¹⁸

4.3. The Principle of Fairness in the PECL, ACQP and DCFR

4.3.1. General Clause

Based on the model of the 1993 Directive, the PECL, ACQP and DCFR all contain general clauses providing a basis for judicial control of unfair terms. While the PECL apply a single standard for controlling the unfairness of terms in B2C contracts as well as B2B contracts, the DCFR provides three different concepts of unfairness in policing unfair terms in three situations: Article II.-9:403 DCFR for B2C contracts; Article II.-9:404 DCFR for C2C contracts and Article II.-9:405 DCFR for B2B contracts. Although the existence of three different definitions of unfairness underlying these provisions might give rise to a number of interesting issues, such as the underlying reasons for judicial control over unfairness or the connection between the fairness standards in the three different provisions,⁵¹⁹ for the purpose of the present research, this section will focus on only Article II.-9:403 DCFR, which provides that:

‘In a contract between a business and a consumer, a term [that has not been individually negotiated] is unfair for the purposes of this section if it is supplied by the business and if it **significantly disadvantages** the consumer, contrary to **good faith and fair dealing**.’

Likewise, the unfairness test in B2C contracts can be found in Article 4:110 PECL⁵²⁰ as well as Article 6:301 ACQP.⁵²¹ Apparently, all three tests for unfair terms basically resemble the test for unfairness in Article 3 UCTD except for a slight deviation in their wording.⁵²²

518 Ibid., para. 35; Case C-397/11 *Jőrös v Aegon Magyarország Hitel Zrt* para. 47.

519 For arguments against the introduction of three separate definitions of fairness see Th. Pfeiffer, ‘Non-negotiated terms’ in Reiner Schulze (ed.), *The Common Frame of Reference and Existing European Contract Law* (2nd edn, Sellier European Law Publishers, Munich, 2009) 183; D. Mazeaud, ‘Unfairness and Non-Negotiated Terms’ in Reiner Schulze and Jules Stuyck (eds) *Towards a European Contract Law* (Sellier European Law Publishers, Munich, 2011) 123-129.

520 Article 4:110 PECL reads: ‘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.’

521 Article 6:301 ACQP reads: ‘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.’

522 Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009) Comment B to Article II.-9:403, p.663; Research Group on the Existing EC Private Law, *Principles of the Existing EC Contract Law (Acquis Principles)*. Volume Contract I – Pre-contractual Obligations, Conclusion of Contract, Unfair Terms. Sellier European Law Publishers (2007), Comment A to Article 6:301, p.234; Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II Combined and Revised* (Kluwer Law International 2000) Note, 270.

Generally, the unfairness test under the three sets of provisions comprises two criteria: the ‘contrary to the requirements of **good faith**’ or ‘the requirements of **good faith and fair dealing**’ criterion, and the ‘**significant imbalance** in the parties’ rights and obligations arising under the contract to the detriment of that party’ or a ‘**significant disadvantage** to the consumer’ criterion.

It should be noted that the drafters of the three sets of provisions were well aware of the lively debate on the exact meaning of each criterion as well as the relationships between the two criteria. However, given that the general clause laid down under Article 3 of the UCTD has been differently transposed among Member States, the drafters of the three sets of provisions decided to merely restate the Acquis by not giving a preference to one criterion, but to refer to both of them.⁵²³ Consequently, the compromised choices under the three sets of provisions still allow for the possibility of diverse interpretations of the unfairness test and this might prove to be superfluous – as was acknowledged by the drafters of the ACQP.⁵²⁴

(i) Significant Imbalance

Among the three sets of provisions, the PECL and the ACQP borrow the wording of the UCTD for the first criterion – a **significant imbalance** in the parties’ rights and obligations’, whereas in the DCFR this term has been replaced by the phrase ‘**significantly disadvantages**’ the consumer. The purpose of this deviation, according to the comments annexed to the DCFR, is to avoid the possible misunderstanding that the price-performance ratio of the contract could be a measure to determine unfairness.⁵²⁵ Apart from this clarification, it seems to be the case that the choice for such a different expression means that the unfairness test produces no significantly different results in comparison with the PECL and the ACQP.

Indeed, this criterion deals with judicial control of the substance of contract terms and the imbalance may be of an economic or legal character. The comments annexed to the PECL clarify that, in the first case, the economic consequences must be significantly abusive to the other party, while a mirror-image rule should be applied in the latter case to consider whether a term confers rights upon one party and not upon the other.⁵²⁶ More precisely, the comments annexed to the ACQP and DCFR have determined the requirement of a ‘significant imbalance’ in the sense that the contract terms have to be compared with the default rules that would have been applicable if the terms had

523 Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009), Note 2 to Article II.-9:403, p.664; Research Group on the Existing EC Private Law (2007), Comment A.2 to Article 6:301 ACQP, p. 235; Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II Combined and Revised* (Kluwer Law International 2000) Note 2, 270.

524 Research Group on the Existing EC Private Law (2007), Comment A.2 to Article 6:301 ACQP, p. 235.

525 Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009), Comment B to Article II.-9:403, 663.

526 Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II Combined and Revised* (Kluwer Law International 2000) Comment G to Article 4:110, 269.

not been agreed to.⁵²⁷ In this sense, this explanation seems to be coherent with the judgments of the CJEU.⁵²⁸

(ii) Good Faith and Fair Dealing

The second major difference between the fairness test under the PECL and the DCFR and the fairness test under the UCTD lies in the fact that the term ‘good faith’ has been replaced by the terms ‘good faith and fair dealing’. At first sight, the addition of the ‘fair dealing’ element to the fairness test seems to tighten the threshold of unfairness and thus be less consumer-friendly than the UCTD. However, in order to validate such a statement, it is necessary to truly grasp the meaning of the terms ‘good faith and fair dealing.’ The comments annexed to the DCFR explain that the use of the term ‘good faith and fair dealing’ would bring Article II-9:403 into line with other provisions of the DCFR⁵²⁹ which also use this pair of terms.⁵³⁰ It thus seems to imply that the notion of ‘good faith and fair dealing’ must be interpreted in the light of other provisions of the DCFR. The most relevant provision in this respect is Article I-1:103 of the DCFR which defines the expression of ‘good faith and fair dealing’ as referring to ‘a standard of conduct characterized by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question’.⁵³¹ Indeed, the comments attached to that article clarify that the element of ‘honesty’ is not further defined and has its normal meaning, while the reference to ‘openness’ denotes an element of transparency in a person’s conduct.⁵³² Additionally, the element of ‘consideration for the interests of the other party’ does not require that the other party’s interests be preferred, only that a basic level of consideration will normally be required.⁵³³ All of these elaborations indicate that good faith and fair dealing refer to an objective standard of conduct and in this sense the term ‘good faith and fair dealing’ needs to be distinguished from the notion of ‘good faith’ on its own which may refer to a subjective mental attitude, often

527 Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009), Comment B to Article II-9:403, p.663; Research Group on the Existing EC Private Law (2007), Comment B.3 to Article 6:301 ACQP, p. 237.

528 See the *Aziz* case in Section 4.2.1.2.

529 Article I-1:103 and Article II-3:301 of the DCFR: Negotiations contrary to good faith and fair dealing.

530 Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009), Comment C to Article II-9:403, 664.

531 In the comments on the PECL, a difference exists between these two notions of good faith and fair dealing. On the one hand, good faith is defined as a subjective notion to indicate the will to act honestly and equitably. On the other hand, the notion of fair dealing is closer to the idea of acting with loyalty and requires a more objective approach.

532 Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009), Comment A to Article I-1:103, 136.

533 Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009) Comment A to Article I-1:103, p. 136.

characterised by the absence of knowledge of something which, if known, would adversely affect the morality of what is done.⁵³⁴

Therefore, in using these two terms, the DCFR emphasises their synonymous meaning. Indeed, good faith as a continental civil law doctrine and fair dealing as common law terminology rather seem to be an alternative to referring to an objective standard of good contractual behaviour. Among other requirements, at the core of the notion of good faith and fair dealing is the need for a consideration of the other party.⁵³⁵ When reading this requirement in conjunction with the ‘significant disadvantage’ requirement, the good faith and fair dealing criteria are able to provide a significantly flexible fairness test. That is to say that a term is unfair if it disadvantages consumers so significantly that it does not reflect due consideration for the interests of consumers. In this respect, it is not entirely clear whether the use of the notion of ‘good faith and fair dealing’ might enhance the standard of control over the unfairness test.

4.3.2. Grey Lists of Unfair Terms

In addition to the general clause of Article II.-9:403, Article II.-9:409 DCFR considers a jurisdiction clause to be unfair in all circumstances,⁵³⁶ and Article II.-9:410 provides for a list of terms that are presumed to be unfair in a consumer contract. Through the introduction of the lists, it is the intention of the drafters to give examples of terms which typically constitute a serious legal disadvantage for consumers and will therefore be unfair according to the general fairness standard.⁵³⁷ Apart from linguistic variations, the list under Article II.-9:410 DCFR restates the Annex to the UCTD with two noteworthy exceptions: (i) paragraph (1)(i) of the Annex relating to terms with which the consumer had no real opportunity to become acquainted before the conclusion of the contract has been dropped from the list, because this provision is adequately reflected in Article II.-9:407 and (ii) some of the exceptions listed in paragraph 2 of the Annex have been moved into the listed terms themselves.⁵³⁸ Nevertheless, the most innovative change in Article II.-9:410 lies in the legal nature of the list. While the Annex to the UCTD as well as Article 6:305 ACQP merely consist of an indicative and not exhaustive list of terms that may be considered unfair,⁵³⁹ the list in the DCFR contains terms which are presumed to be unfair. As such, the list is ‘grey’ and thus it places the burden of proof on the business to show that the term is not unfair. In this regard, the DCFR has

534 Indeed, in using the notion of good faith and fair dealing, the drafters of the DCFR essentially aimed to make a distinction between objective good faith – general standard of conduct – on the one hand, and subjective good faith – in the sense of an erroneous belief – on the other. Ibid.

535 Martijn W. Hesselink and Marco Loos, *Unfair Contract Terms in B2C Contracts* (June 12, 2012) Ad hoc Briefing Paper for the European Parliament’s Committee on Legal Affairs, May 2012, PE 462.452.

536 This Article was inspired by the *Océano* case.

537 Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009) Comment A to Article II.-9:410, p. 693.

538 These changes are directly taken from Article 6:305 ACQP.

539 Article 6:305 ACQP is still entitled ‘Indicative list of unfair terms.’

obviously taken a further step to enhance the level of protection from unfair terms for consumers in comparison to the UCTD and the ACQP.

It is worth mentioning that the drafters of the DCFR were also very cautious in considering whether some of the terms in the grey list could have been transferred to the blacklist laid down under Article II.-9:410. From a consumer protection perspective, a blacklist of terms, which are always unfair, should be given preference over a grey list of terms, which are only presumed to be unfair. However, the drafters of the DCFR were also concerned that the blacklisting of terms seems to be a rigid approach.⁵⁴⁰ Consequently, the ‘grey list’ approach was selected to avoid arbitrariness as well as to ensure flexibility in the control of unfair terms in consumer contracts.⁵⁴¹

4.3.3. Legal Consequences of Unfairness

As far as the legal consequences of the unfairness of terms are concerned, similar provisions to Article 6(1) of the UCTD can be found in the DCFR,⁵⁴² the ACQP,⁵⁴³ and the PECL.⁵⁴⁴ Article II.-9:408 DCFR, for instance, provides that:

- (1) A term which is unfair under this section is not binding on the party who did not supply it.
- (2) If the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties.

Accordingly, the PECL, ACQP and DCFR also prescribe that unfair terms are not binding on the consumer, whereas the remaining contract is preserved if it is capable of continued existence without the unfair terms. The comments annexed to these articles further explain that the legal consequences of unfairness for the term itself are designed as a ‘unilateral solution’, that is to say while the consumer shall not be bound by any legal effects arising from the unfair terms, the trader is bound.⁵⁴⁵ In other words, the consumer is entitled but not obliged to invoke the non-binding effect of unfair terms. This approach is highly consistent with not only the substantive rules under Article 6(1) UCTD, but also recent developments in procedural rules according to which although the national courts may raise the issue of the unfairness of terms of their own motion, it is for the consumer who is informed of his/her rights to decide whether the terms,

540 The drafters considered that a candidate to be blacklisted could be a term that excludes or limits the liability of a business for death and personal injury caused to a consumer (cf. paragraph (1)(a)). But they argued that this example shows that there must be exceptions (e.g. terms limiting strict liability under the law on non-contractual liability for damage). Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter De Gruyter, 2009) Comment B to Article II.-9:410, p. 693-694.

541 This flexible approach can be evidenced by the fact that several terms in the list have vague notions which require judicial discretion such as ‘reasonable’, ‘unreasonable’, ‘valid reason’, ‘disproportionate’ or ‘inappropriate’.

542 Article II.-9:408 DCFR.

543 Article 6:306 ACQP.

544 Articles 4:110 and 4:116 PECL.

545 See Comments A and B to Article II.-9:408 DCFR and Commentary B.1 to Article 6:306 ACQP.

regardless of their unfairness, shall be applied or not.⁵⁴⁶ To this extent, it can be argued that the control of unfair terms is not paternalistic since while legal interference grants consumers the substantive right not to be bound by the unfair terms, it respects the ultimate autonomy of the parties in exercising their rights.

4.4. The Principle of Fairness in the CESL

4.4.1. *General Clause*

The standard of fairness in B2C contracts can be found under Article 83(1) CESL, which provides that a contractual term which has not been individually negotiated is only unfair if two constitutive elements are fulfilled. That is to say, the term, on the one hand, causes a significant imbalance for consumers and, on the other hand, was imposed contrary to the requirement of good faith and fair dealing. Additionally, Article 83(2) enumerates a list of factors which have to be taken into account when assessing the unfairness including whether the traders have complied with the duty of transparency and the nature of what is to be provided under the contract. Accordingly, the general fairness test under the CESL directly stems from Article 3(1) UCTD and seems to be fairly identical to the test of Article II.-9:403 DCFR and Article 6:301 ACQP, while the list of factors expands upon the assessment criteria stated in Article 4(1) UCTD. However, rather than using the notion of ‘good faith’ as in the UCTD, the fairness test under the CESL uses the notion of ‘good faith and fair dealing’ which is similar to that of the DCFR. It thus raises similar concerns whether ‘good faith and fair dealing’ may be understood as a twofold standard. However, the general definition in Article 2(b) CESL obviously displays the drafters’ intention to determine good faith and fair dealing as a uniform standard,⁵⁴⁷ and thus to be interpreted in a similar manner to the UCTD.⁵⁴⁸

The decision of the drafters of the CESL to adhere the formulation of the general clause to its formulation under the UCTD has been criticized as the Commission had missed the opportunity to correct the basic problems of the UCTD. First of all, the culmination of conditions for the unfairness of a term is redundant and may even render

⁵⁴⁶ See the further discussion on the doctrine of *ex officio* in Section 5.2.1 of this chapter.

⁵⁴⁷ Notwithstanding the recent rewording of that provision by the Legal Affairs Committee. The definition now reads: ‘good faith and fair dealing’ means a standard of conduct characterized by honesty, openness and, in so far as may be appropriate, reasonable consideration for the interests of the other party to the transaction or relationship in question’, see Amendment 37 as proposed by the European Parliament’s report on the proposal for a regulation on a Common European Sales Law, <<http://www.europarl.europa.eu/document/activities/cont/201309/20130925ATT71873/20130925ATT71873EN.pdf>> [accessed 15 May 2017].

⁵⁴⁸ However, the CESL differs in character from the UCTD in the sense that it aims to be a second regime of national law. Accordingly, the CJEU has to give an autonomous interpretation of what is considered unfair under the CESL, while under the UCTD, the CJEU regards the question of whether a contract term is unfair for the purposes of Art 3(1) of the Directive as a matter to be decided by the national courts in the light of the national contract laws. In this sense, the CESL establishes uniform standards of contractual fairness to consumer contracts. The ‘comparison test’ to decide whether a contract term causes a significant imbalance must be made on the basis of the default rules contained in the CESL itself and especially must have regard to two binding lists of contract terms which are either always invalid (Art. 84) or are presumed to be unfair (Art. 85).

an artificially high threshold for protecting consumers from unfair terms.⁵⁴⁹ Secondly, the use of a number of abstract concepts such as good faith and fair dealing, significant imbalance, the nature of what is to be provided under the contract and others may leave considerable room for judicial interpretation and may thus create legal uncertainty for businesses.⁵⁵⁰ However, it seems to have been the deliberate intention of the drafters of the CESL to keep the standard of fairness identical to the standard established under the UCTD in order to benefit as much as possible from the interpretative solutions so far provided by the judgments from the CJEU.⁵⁵¹

4.4.2. *Blacklist and Grey List*

The CESL's most significant deviation from the UCTD is the addition of two new lists of terms into the existing 'indicative list' of unfair terms in the Annex to the UCTD. The CESL first provides for a blacklist of terms which are prohibited outright under Article 84. Article 85 CESL further provides a grey list of terms which are deemed to be presumably unfair unless the trader proves the terms to be fair. It is clear from the structure of the CESL that the black and grey lists only apply to Section 2 of Chapter 8 on unfair terms in B2C contracts, not to Section 3, which relates to B2B contracts.⁵⁵²

The blacklist of Article 84 CESL comprises 11 unfair terms which are always prohibited. Some of the listed terms can actually be traced back to the terms of the indicative list of the UCTD and Article II.-9:410 DCFR.⁵⁵³ Additionally, Article 84 introduces a number of new items to the list.⁵⁵⁴

549 D. Mazeaud and N. Sauphanor-Brouillaud, 'Unfair Contract Terms' in R. Schulze (ed.), *Common European Sales Law – Commentary* (Nomos Verlagsgesellschaft, Baden Baden, 2012) 376, 385.

550 Ibid.

551 Hesselink, Martijn W. and Loos, Marco, Unfair Contract Terms in B2C Contracts (June 12, 2012) Ad hoc briefing paper for the European Parliament's Committee on Legal Affairs, May 2012, PE 462.452.

552 The CESL establishes a system of mandatory fairness control, even in B2B contracts, but granting to traders a wider ambit of contractual freedom. Thus, in B2B contracts, the traditional fairness test of a 'significant imbalance... to the detriment of the consumer' (Art. 83 (1)) is replaced by 'gross deviation from good commercial practice, contrary to good faith and fair dealing' (Art. 86(b)). However, many authors argue that contract terms used in business transactions should normally be subject to the same general fairness test, which also applies to consumer contracts.

553 For instance: Article 84(a) CESL actually stems from point 1(j) of the indicative list of the UCTD; Article 84(c) CESL corresponds to point 1(n) of the indicative list; Article 84(d) CESL corresponds to point 1(q) of the indicative list; Article 84(f) CESL corresponds to point 1(m) of the indicative list; and Article 84(g) corresponds to point 1(c) of the indicative list.

554 There are 5 new kinds of terms which cannot be found in the Annex to the UCTD that are always unfair: (h) Terms which require the consumer to use a more formal method for terminating the contract within the meaning of Article 8 than was used for the conclusion of the contract; (i) Terms which grant the trader a shorter notice period to terminate the contract than the one required of the consumer; (j) Terms which oblige the consumer to pay for goods, digital content or related services not actually delivered, supplied or rendered; (k) Terms which determine that non-individually negotiated contract terms within the meaning of Article 7 prevail or have preference over contract terms which have been individually negotiated.

The grey list of Article 85 CESL consists of 23 terms which are ‘presumed to be unfair’. Similar to the blacklist, the majority of the listed terms have their origin in the Annex to the UCTD,⁵⁵⁵ while a minority of the terms on the list are new.⁵⁵⁶

The existence of the black and grey lists, which provide examples of unfair terms according to the fairness standard of Article 83, brings about more legal certainty than the merely indicative list annexed to the UCTD concerning two important aspects. Firstly, the two lists are more extensive than the indicative list in the Annex to the UCTD. While there are only 17 kinds of terms contained in the UCTD list, there are 34 kinds of terms under the CESL. Secondly and more importantly, as far as the legal character of the list is concerned, the list contained in the Annex to the UCTD is only an indicative list while the grey list contains terms that are presumed to be unfair, which is one step further than a mere indication of unfairness. Although the CJEU also specified that some terms are always unfair in its interpretation of the UCTD, the introduction of the blacklist provides much more clarity as to which terms should always be considered to be unfair. Hence the introduction of the two lists will make the interpretation of the open-ended concept of unfairness much more predictable than is the case under the UCTD.⁵⁵⁷

To sum up, the most innovative feature of the CESL’s rules on unfair terms in B2C contracts is the construction of an actual tripartite structure including a general clause, a grey list and a blacklist. Inspired by the CJEU’s ruling in the *Oceano* case, the ACQP as well as the DCFR have already prohibited a jurisdiction clause in all circumstances, thereby formulating a blacklist which consists of only one single term. However, the CESL goes beyond these cautious approaches by providing for a blacklist under Article 84 consisting of 11 unfair terms which are always prohibited. Additionally, the grey list of Article 85 entails a list of 23 terms which are ‘presumed to be unfair’. In order to capture the residual category of contract terms which are not included within these

555 For example: Article 85(d) CESL corresponds to point 1(d) of the indicative list of the UCTD; Article 85(e) CESL corresponds to point 1(e) of the indicative list; Article 85(g) CESL corresponds to point 1(g) of the indicative list; and Article 85(a) CESL corresponds to point 1(q) of the indicative list.

556 There are 9 new kinds of terms which cannot be found in the Annex to the UCTD that are presumed to be unfair: (o) Terms which allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer; (p) Terms which allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract; (q) Terms which inappropriately exclude or limit the remedies available to the consumer against the trader or the defences available to the consumer against claims by the trader; (r) Terms which subject the performance of obligations under the contract by the trader, or subject other beneficial effects of the contract for the consumer, to particular formalities that are not legally required and are unreasonable; (s) Terms which require from the consumer excessive advance payments or excessive guarantees of the performance of obligations.

557 With the addition of the two lists, the CESL offers a higher level of protection to the consumer in comparison with the UCTD. Nevertheless, it should be noted that a number of Member States have already upgraded the ‘indicative list’ of Directive 93/13/EEC to the ‘blacklist’ level, at least to the extent that the terms in the ‘indicative list’ have been transposed in those states. In a total of 14 countries amounting to half of the Member States of the EU the terms in the ‘indicative list’, in so far as they have been transposed, are always considered to be unfair. Moreover, an additional five Member States have provided a higher level of consumer protection than the mandatory (minimum) protection contained in Directive 93/13/EEC by choosing to prescribe both black and grey lists, see Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier European Law Publishers, 2008).

two lists, a familiar general test of unfairness is formulated as the third component of the tripartite structure. In this respect, the CESL follows the general framework of controlling unfair terms in the UCTD, the ACQP and the DCFR, but at the same time, by adding the blacklist and grey list to such a framework, the CESL significantly enhances legal certainty for both businesses and consumers.

4.4.3. *Legal Consequences of Unfairness*

The legal consequences of unfair terms are enshrined in Article 79, the first article of Section 1 on General Provisions and therefore they are applicable to both B2C and B2B contracts. This article states that a contract term which is unfair is not binding on the other party, while the remaining contract terms continue to remain binding as long as the contract can be maintained without the unfair term. Accordingly, Article 79 CESL follows the well-established formula on the legal consequences of unfair terms, which originates from Article 6 UCTD and is confirmed by the wording of Article 6:306 ACQP and Article II.-9:408 DCFR.

4.5. Concluding Remarks

Acknowledging that the principle of transparency had undoubtedly proved to be insufficient to police unfair terms, the European Union in its 1993 Directive introduced a fairness control scheme which pays direct attention to the substance of contractual terms. The heart of this control scheme is formed by a general clause that is then defined in terms of a 'significant imbalance' and 'good faith'. Despite the different interpretations of the general clause, based on the above analysis it must be underlined that the model of fairness underlying the philosophy of the UCTD is substantive fairness, according to which a contractual term can be unfair based solely on its substantive content. That is to say, fairness in the procedural sense must not be used as a legitimizing factor for a substantively unfair term, whereas unfairness in the procedural sense can be used as an important factor in the assessment of unfair terms. The UCTD, therefore, has been hailed as an innovative and forerunner instrument which lays down the principle of fairness as one of the leading principles of European contract law.⁵⁵⁸

Accordingly, it is not surprisingly that the UCTD's fairness model serves as a strong foundation for other European instruments. The PECL, ACQP, DCFR and CESL have all adopted a similar fairness test as that enshrined in Article 3(1) of the UCTD despite some minor linguistic deviations. However, by learning from the experiences of implementing the UCTD in the Member States and its interpretation in the CJEU's judgments, the above instruments have established new legal techniques to avoid the uncertainty of applying the general test as well as to offer a higher level of protection for the consumer. Indeed, in order to concretize the general clause of the unfairness test, while the European Union initially took the approach of enumerating a merely indicative list of terms that may be considered unfair, the CJEU has increasingly developed a true

558 Geraint G. Howells and Thomas Wilhelmsson, *EC Consumer Law* (Aldershot: Ashgate, 1997), 114.

grey list of unfair terms. In turn, on the basis of such developments, the DCFR has incorporated and transferred a number of potentially unfair terms into its grey list. The CESL, on the other hand, has even gone beyond these cautious approaches by providing a blacklist of 11 unfair terms that are always prohibited and a grey list of 23 terms that are ‘presumed to be unfair’.

At the same time, it should be noted that the European Union has limited itself to the role of generally providing the criteria for assessing the unfair character of contract terms.⁵⁵⁹ The CJEU has followed this approach by holding that it is for the national courts to determine, in the light of the particular circumstances of the case in question, whether a challenged contract term is actually unfair; by contrast, the CJEU’s own role is restricted to providing interpretations of the general criteria used by the national courts. Accordingly, the CJEU and the national courts have been engaging in legal dialogue with the final objective being to get rid of unfair terms across Europe in order to protect consumers as well as to further enhance the functions of the internal market.

Indeed, the CJEU has been very active in performing its role and has shed a great deal of light on the meaning of the fairness test. To ascertain whether a significant imbalance in the parties’ contractual rights and obligations exists, the CJEU has instructed the national courts to use the benchmark of national law to carry out a comparative test. However, since suppliers or sellers may have legitimate interests for derogating from statutory provisions when determining their standard terms, the national courts must then establish whether or not the contractual arrangements of these suppliers or sellers are justified under the requirement of good faith. That is to say, whether the seller or supplier in question, when dealing fairly and equitably with the consumer, could *reasonably assume* that the consumer would have agreed to such a term in individual contract negotiations. Beyond providing interpretations of the fairness test, the CJEU has gone further by providing guidance for national courts with regard to the legal effects of the finding of unfair terms. Interestingly, most of the Court’s guidance is echoed by the commentaries on the corresponding fairness test under the ACQP and DCFR.⁵⁶⁰

5. ENFORCEMENT MECHANISMS

5.1. Introduction

Effective consumer protection always requires a holistic approach that pays attention not only to substantive rules but also to procedural tools for the enforcement of those rules.⁵⁶¹ While the UCTD does not seek to harmonise enforcement mechanisms in the

559 Recital 15 of the Directive on Unfair Terms in Consumer Contracts.

560 See Table 4 in the Annex to this dissertation for a comparative table highlighting the fairness principle in the UCTD, PECL, ACQP, DCFR and CESL.

561 James Devenney and Thomas Pfeiffer, ‘Control of Standard Terms and Collective Proceedings’ in Gerhard Dannemann and Stefan Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* (OUP Oxford, 2013) 687; Colin Scott, ‘Enforcing Consumer Protection Laws’ in G. Howells, I. Ramsay and T. Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2009) 537; Ewoud Hondius states that ‘In the absence of enforcement, the most

field of unfair terms, it prescribes two provisions that may provide guidance for the way that enforcement mechanisms should be structured in national law. Firstly, Article 6 requires Member States to specify that unfair terms ‘shall, as provided for under their national law, not be binding on the consumer’. Secondly, Article 7 requires Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers. Simultaneously, the other four instruments (PECL, ACQP, DCFR and CESL) only prescribe provisions on the legal effect of a finding that a term is unfair, but do not provide provisions on collective actions in respect of such terms. However, the lack of provisions on collective actions should be attributed to the fact that the main concerns of such instruments are substantive rules. This does not necessarily mean that such instruments prefer individual proceedings to collective proceedings in the field of unfair terms.

In general, two main important categories of enforcement mechanisms in the field of unfair terms can be identified in every Member State:

- (i) Remedial control aiming at invalidating unfair terms which are used in contracts.
- (ii) Preventive control focusing on eliminating the continued use of unfair terms such as seeking an injunction.

The first kind of mechanism is conventionally initiated by an individual consumer to protect his/her own interest via seeking a declaration to the effect that a term used in a specific contract is unfair. In the second kind of mechanism, consumer associations and/or state agencies are granted legal standing to further the collective interests of consumers via seeking an injunction to put an end to future infringements. However, in the light of the recent judgements of the CJEU, the interplay between these two different methods of enforcement should be looked at as they are regarded as complementary means of guaranteeing consumer protection against unfair terms (as can be seen in the table below).

Additionally, given that Article 8 allows Member States to adopt or retain more stringent provisions to ensure a maximum degree of consumer protection, the EU Commission has also recognized and even encouraged the practice of the ultra-preventive control of unfair terms in several Member States.⁵⁶² The main difference between preventive control and ultra-preventive control is that while the former is a negative system in the sense that once a term that is used in practice is deemed to be unfair, the court will order that this term is prohibited from being continually used, the latter is a more positive system in the sense that an *a priori* control of contractual terms is established to ensure that only qualified general trading conditions containing no unfair terms can be used in practice.

perfect laws of the world are not worth the paper they have been printed on’, Ewoud Hondius, *Unfair Terms in Consumer Contracts* (Molengraaff Instituut voor Privaatrecht, 1987) 221.

562 European Commission, Report on Unfair Terms Directive 93/13, COM (2000) 248, p. 19.

		Remedial control	Preventive control	Ultra-preventive control
Individual actions		Seeking the non-binding effect of unfair terms for individual interests	–	–
Collective actions	Consumer Associations	Seeking the non-binding effect of unfair terms for collective interests	Seeking an injunction for preventing the continued use of unfair terms	Seeking positive mechanisms for preventing unfair terms from the outset
	State Agencies			

This section will focus on the interconnection between collective and individual enforcement and between judicial and administrative enforcement in the field of unfair terms. It will argue that although private individual action is still necessary, administrative collective action as a means of control over standard terms is/should be the principal method of removing unfair standard terms from the market.⁵⁶³ To this end, individual consumers' substantive rights as enshrined in the Article 6 UCTD and the deliberations of the CJEU on the role of national courts in the enforcement of such rights will be analysed in the first part in order to examine private enforcement initiated by individual plaintiffs before the courts in order to ensure that an unfair contract term will not be binding as far as they are concerned. The next part will be devoted to scrutinizing the core question of the legal nature of collective actions in the light of the recent developments in the CJEU case law. Attention will also be paid to the institutional frameworks of collective proceedings in Germany and the UK as typical examples where the main actors in collective actions are consumer associations and state agencies respectively. Finally, the last part will outline the practice of ultra-preventive controls of unfair terms which exist in several Member States to ensure that unfair terms never come into circulation in the market.

5.2. Individual Private Enforcement

As mentioned above, the private law nature of the Directive implies that consumers must bring an action to enforce their substantive rights. However, it has been well established that the UCTD is based on the idea that the consumer is in a weak position *vis-à-vis* the business concerning both his/her bargaining power and the level of knowledge, and thus a contractual remedy as laid down in Article 6(1) could not be achieved if the consumer were to be obliged to raise the unfairness of the term him/herself. For this purpose, the further effects of Article 6(1) with respect to 'procedural law' aspects will be discussed in order to answer the important question of whether and to what extent the competent national courts are obliged to raise the unfair nature of a contract term of their own motion.

⁵⁶³ It should be noted that, due to its peculiar nature, ultra-preventive control has only been effective in a few Member States.

5.2.1. *Obligation to Invoke the Unfair Nature of All Kinds of Terms Ex Officio*

As discussed above, Article 6(1) requires Member States to specify that unfair terms ‘shall, as provided for under their national law, not be binding on the consumer’. An immediate question now arises: whether the national courts, given that individual consumers are not well equipped to enforce their contractual rights, are entitled or obliged to raise the unfairness of terms of their own motion, thereby ensuring that unfair terms are not binding on consumers.⁵⁶⁴

In *Océano*, which concerned the unfairness of a jurisdiction clause, the CJEU discussed the tension between the law of civil procedure and substantive law when it comes to unfair terms.⁵⁶⁵ It provided the CJEU with the very first opportunity to determine that for ensuring that the rights of consumers conferred in Article 6(1) are sufficiently protected, the national courts, of their own motion, are empowered to declare that an unfair term is void even though their national law of civil procedure does not provide for this.⁵⁶⁶ According to the CJEU, there seems to be two fundamental justifications for this ruling.⁵⁶⁷ Firstly, as mentioned above, the exclusive jurisdiction clause itself, which falls within the category of paragraph (q) of the Annex to the Directive, ‘satisfied all the criteria enabling it to be classed as unfair for the purpose of the Directives.’ The nature of such a term determining that the court at the supplier’s place of business will have jurisdiction rather than the court at the consumer’s place of domicile may make it difficult for the consumer to make an appearance before the pertinent court, thereby resulting in the consumer forgoing any legal remedy or being able to enter a defence.⁵⁶⁸ The second justification is the vulnerable procedural position of individual consumers in enforcing their substantive rights:

‘In disputes where the amounts involved are often limited, *the lawyers’ fees may be higher than the amount at stake, which may deter the consumer from contesting the*

564 In a civil suit, it is for the parties to take the initiative, the court only being able to act of its own motion in exceptional cases where the public interest requires its intervention. This principle reflects the situation that prevails in most of the Member States concerning the relations between the State and the individual; it safeguards the rights of the defence; and it ensures the proper conduct of proceedings by, in particular, protecting them from the delays inherent in the examination of new pleadings, see B. Fekete, ‘Raising Points of Law on the Courts’ Own Motion? Two Models of European Legal Thinking’ (2014) 21(4) *Maastricht Journal of European and Comparative Law* 652.

565 Joined Cases C-240/98 to 244/98, *Oceano Grupo Editorial v. Roc.o Murciano Quintero and Salvat Editores v. Jos. M. S.nchez Alc.n Prades ao.* (ECJ 27 June 2000); Simon Whittaker, ‘Judicial Interventionism and Consumer Contracts’ (2001) *LQR* 117; Martin Hogg, Georgios Arnokouros, Andrea Pinna, Rui Cascão, Stephen Watterson, ‘ECJ C-240/98 – C-244/98, 27 June 2000, (Océano Grupo Editorial and Salvat Editores) Scottish Case Note’ (2002) 10(1) *European Review of Private Law* 157; Jules Stuyk, ‘Joined Cases C-240/98 to C-244/98, Océano Grupo Editorial SA v. Rocio Murciano Quintero and Salvat Editore SA v. José M. Sánchez Alcón Prades et al., Judgment of the Full Court of 27 June 2000, nyr’ 2001 38(3) *Common Market Law Review* 719.

566 Joined Cases C-240/98 to 244/98, *Oceano Grupo Editorial v. Roc.o Murciano Quintero and Salvat Editores v. Jos. M. S.nchez Alc.n Prades ao.* ECJ 27 Jun. 2000, para. 29.

567 Simon Whittaker, ‘Who Determines What Civil Courts Decide? Private Rights, Public Policy and EU Law’ in D. Leczykiewicz and S. Weatherill (eds), *The Involvement of EU Law in Private Law Relationships (Studies of the Oxford Institute of European and Comparative Law* (Hart Publishing, Oxford 2013) 96, 117.

568 Joined Cases C-240/98 to 244/98, *Oceano Grupo Editorial v. Roc.o Murciano Quintero and Salvat Editores v. Jos. M. S.nchez Alc.n Prades ao.* ECJ 27 Jun. 2000, para. 22.

application of an unfair term’ and ‘[w]hile it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, *particularly because of ignorance of the law*, will not challenge the term pleaded against him on the grounds that it is unfair.’⁵⁶⁹

Therefore, the aim of the consumer protection system introduced by the UCTD would not be achieved if the consumer were him/herself obliged to raise the unfair nature of such terms and might only be attained if the national courts were to acknowledge that they had the authority to evaluate terms of this kind of their own motion.⁵⁷⁰ The national courts’ authority must therefore be regarded as constituting a proper means ‘[b]oth of achieving the result sought by Article 6 of the Directive, namely, preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers’.⁵⁷¹

Accordingly, it is the view of the CJEU that the effective protection of the consumer from unfair terms may only be realized if the national courts have the authority to evaluate, of their own motion, the fairness of a contract term and to determine that an unfair term is not binding on the consumer irrespective of whether the consumer has successfully contested the validity of such a term. The introduction of the *ex officio* doctrine in the context of the UCTD is remarkably important as it reveals a new holistic approach by the CJEU to combining the substantive law effects and civil procedural consequences of the unfairness of a contractual term to address the weak position of the consumer *vis-à-vis* the supplier. On the other hand, it creates a major concern with regard to the tension between the principle of procedural autonomy and the effective protection of consumers’ rights conferred by EU law.⁵⁷² Unsurprisingly, the *Océano* judgment has triggered considerable questions being raised by national courts before the CJEU to clarify the justifications for, the scope and the content of this *ex officio* doctrine.⁵⁷³

Firstly, by gradually developing the reasoning laid down in *Océano*, the CJEU has further clarified that the *ex officio* doctrine is not specifically restricted to jurisdiction clauses. In *Codifis* – a case determined immediately after *Océano* – the CJEU extended the competence of a national court to review the fairness of financial clauses of its own motion.⁵⁷⁴ The Court held that the UCTD precluded any national provision prohibiting a national court, upon the expiry of a limitation period, from finding, of its own motion,

569 Ibid., para. 26.

570 Ibid., para. 26.

571 Ibid., para. 28.

572 M. Ebers, ‘From *Océano* to *Asturcom*: Mandatory Consumer Law, Ex Officio Application of European Law and Res Judicata’ 2010 18(4) ERPL 823, 829.

573 For a general analysis of the national court’s duty to raise pleadings based on EU law of its own motion, see Koen Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the European Union’ (2007) 44 CML Rev. 1625, 1647.

574 Case C-473/00, *Cofidis* ECR I-10898; Jacobien W. Rutgers, ‘Cases: ECJ- *Océano Grupo/ Cofidis*’ (2005) 1(1) *European Review of Contract Law* 87.

that a contract term is unfair because such a prescription rule ‘is liable to affect the effectiveness of the protection intended by Articles 6 and 7 of the Directive.’⁵⁷⁵ That is to say, the expiry of a specific time limit cannot render the application of Community law ‘impossible or excessively difficult.’ Thus, given that the main justification for the *ex officio* authority of the national courts does not depend on the natural feature of one specific term such as the jurisdiction clause in *Océano*, but rather on the effectiveness of the protection intended by the Directive, it seems logical that this authority of the national courts to raise the unfairness of a term of their own motion can be equally applied to all sorts of unfair terms. As a matter of fact, the *ex officio* authority of national courts has so far been extended to arbitration clauses,⁵⁷⁶ penalty clauses⁵⁷⁷ and variation clauses.^{578,579}

Secondly, the CJEU held that the national courts did not only have the authority to invoke the unfair nature of a term of their own motion, but that they were obliged to do so. In *Mostaza Claro*,⁵⁸⁰ having recalled its decision in *Océano*, the CJEU reiterated that *ex officio* control was needed to protect the consumer as a weaker party *vis-à-vis* the seller or supplier, as regards both his bargaining power and his level of knowledge.⁵⁸¹ Additionally, the Court developed a new reasoning which focused on the nature and importance of the public interest upon which the protection system of Directive 93/13 relied. Indeed, the Court viewed the Directive as an instrument which was essential ‘to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory’.⁵⁸² On the basis of this twin justification, the CJEU concluded that to ensure that the protection system in the UCTD was to be effectively ensured, the Directive ‘required’, rather than merely ‘empowered’, national courts to assess of their own motion whether a contractual term was unfair.⁵⁸³ In the *Pannon* case the Court expressly upgraded the role of a national

575 *Ibid.*, para. 35.

576 Case C-168/05, *Mostaza Claro* ECR I-10421; Case C-470/12 *Pohotovost*, EU:C:2014:101.

577 Case C-618/10 *Banco Español de Crédito*, EU: C: 2012: 349; Case C-488/11 *Asbeek Brusse and de Man Garabito*, EU: C: 2013: 341.

578 Case C-472/10 *Invitel* EU:C:2012:24.

579 The *ex officio* doctrine has also been applied to other consumer protection directives, such as Directive 87/102/EEC on consumer credit (ECJ 4 Oct. 2007, Case C-429/05 *Max Rampion, Marie-Jeanne Rampion, née Godard, v. Franfinance SA, K par K SAS*); Directive 85/577/EEC on contracts negotiated away from business premises (Case C-227/08 *Eva Martin Martin v. EDP Editores, SL*. ECJ 17 Dec. 2009) and Directive 99/44/EC on consumer sales and associated guarantees (Case C-32/12 *Soledad Duarte Hueros v. Autociba SA e Automóviles Citroën España SA*. ECJ 3 Oct. 2013).

580 Case C-168/05, *Mostaza Claro*, ECJ 26 Oct. 2006; Christopher Liebscher, *Common Market Law Review* 2008 pp. 545-557; Marco B.M. Loos, *European Review of Contract Law* 2007 Vol. 4 pp. 439-445; Norbert Reich, ‘More Clarity After “Claro”? Arbitration Clauses in Consumer Contracts as an ADR (Alternative Dispute Resolution) Mechanism for Effective and Speedy Conflict Resolution, or as “Deni De Justice”?’ 2007 3(1) *European Review of Contract Law* 41; C Pavillon, ‘ECJ 26 October 2006, Case C-168-05 *Mostaza Claro v. Centro Móvil Milenium SL—The Unfair Contract Terms Directive: The ECJ’s Third Intervention in Domestic Procedural Law*’ 2007 15(5) *European Review of Private Law* 735.

581 Case C-168/05, *Mostaza Claro*, ECJ 26 Oct. 2006, paras 25-28.

582 *Ibid.*, para. 37.

583 *Ibid.*, para. 38.

court from having a ‘power’ to having an ‘obligation’.⁵⁸⁴ ‘the role thus attributed to the national court by law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, *where it has available to it the legal and factual elements necessary for that task.*’⁵⁸⁵

Thirdly, the CJEU further elucidated the content of the *ex officio* doctrine. In *VB Pénzügyi Lizing*,⁵⁸⁶ the CJEU was asked whether a national court’s obligation to assess the fairness of a contractual term meant that it was obliged to undertake, of its own motion, an examination with a view to establishing the factual and legal elements necessary to determine the fairness of a contractual term conferring exclusive territorial jurisdiction, even if national procedural law only permits this if one of the parties so requests. The Court of Justice ruled that a national court must:

‘investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of the Directive and, if it does, assess of its own motion whether such a term is unfair.’⁵⁸⁷

Accordingly, the CJEU identified a two-stage process in the exercise of the functions incumbent upon the national courts under the provisions of the UCTD. During the first stage, the national court must ascertain of its own motion whether the contractual term which is the subject of the dispute before it falls within the scope of that Directive.⁵⁸⁸ That is to say, whatever is laid down in domestic law, the national courts must determine in all cases whether or not the contested term was individually negotiated between a seller or supplier and a consumer. To that extent, since the *ex officio* duty of the national courts was not confined to cases in which they have legal and factual elements available to them, it is submitted that the Court extended the *ex officio* duties of the national courts then restricted its approach in the *Pannon* case.

As regards the second stage, the national courts must assess the fairness of a term of their own motion in the light of the requirements of consumer protection laid down by that Directive.⁵⁸⁹ However, because it was well established in the *Océano* case that an exclusive territorial jurisdiction clause must always be regarded as unfair, the CJEU did not think it was necessary to explicitly address the issue raised which was whether the national court must undertake an investigation during this second stage beyond the

584 Case C-243/08, *Pannon* ECJ 4 Jun. 2009; A. Ancery and M. Wissink, ‘ECJ 4 June 2009, *Pannon* GS Zrt. v. Erzsébet Sustikné Györfi’, 2010 *ERPL* 308; J. Stuyck, ‘Case C-243/08, *Pannon* GSM Zrt. v. Erzsébet Sustikné Györfi and Case C-40/08, *Asturcom Telecomunicaciones SL v. Maria Cristiba Rodriguez Nogueira*’, 2010 *CMLR* 883; G. Straetman and C. Cauffman, ‘Legislatures, Courts and the Unfair Terms Directive’ in P. Syrpis (ed.) *The Judiciary, the Legislature and the EU Internal Market* (CUP, Cambridge, 2012) 92-117.

585 Case C-243/08, *Pannon*, ECJ 4 June 2009, para. 32.

586 Wulf-Henning Roth, ‘Case C-137/08 *VB Pénzügyi Lizing* Zrt. v. Ferenc Schneider’ 2011 7(3) *European Review of Contract Law* 425.

587 Case C-137/08, *Pénzügyi Lizing v. Ferenc Schneider*, ECJ 9 Nov. 2010, para. 56.

588 *Ibid.*, para. 50.

589 Case C-137/08, *Pénzügyi Lizing v. Ferenc Schneider*, ECJ 9 Nov. 2010, para. 52.

legal and factual elements available to it. It was not until *Banco Español de Crédito*⁵⁹⁰ that the CJEU had another opportunity to clarify this question, thereby elucidating the connection between the seemingly diverging approaches of the CJEU in *Pannon* and in *VB Pénzugyi Lizing*.⁵⁹¹ In this case, CJEU concluded that the duty of the national courts to ascertain of their own motion the fairness of an interest clause, which falls within the scope of application of the Directive, is dependent on the availability to that court of all the legal and factual elements necessary for this task.⁵⁹² Accordingly, the obligation of the national courts to investigate *ex officio*, beyond the legal and factual elements available to them, remains restricted to the first stage of examination as to whether the Directive is applicable. If the term falls within the scope of the Directive, the national courts are still under an obligation to examine, of their own motion, the unfairness of this term, but this obligation is confined to cases when the legal and factual elements necessary for that task are available to them.⁵⁹³ To put it differently, during the second stage of examination as to whether this term is unfair, the CJEU does not require the national courts to find new facts concerning the issues raised. Such a ruling is very consistent with the opinion of AG Trstenjak in *VB Pénzugyi Lizing* who emphasized that in the laws of the Member States, civil law is characterised by the principle that it is for the parties to take the initiative, under which the parties are responsible for submitting all relevant facts on which the court must then base its decision.⁵⁹⁴ Underlying this opinion is the important issue – which will be discussed later – that, in general, the powers of the national courts are determined by national procedural law; however, procedural autonomy needs to be balanced against the requirements of the effective enforcement of private rights conferred under EU law.⁵⁹⁵

Fourthly, the CJEU has expanded the duty of the national courts to review unfair terms *ex officio* to other types of proceedings. In *Invitel*, the CJEU reasoned that the *ex officio* obligation of national courts in individual proceedings should be equally applied to any collective proceedings.⁵⁹⁶ Moreover, an *ex officio* review is required to take place not only in declaratory proceedings but also in judicial order for payment proceedings⁵⁹⁷ and enforcing proceedings.⁵⁹⁸ It signals the CJEU's willingness to not only protect individual consumers but also to police the markets when asymmetric

590 Case C-618/10, *Banco Español de Crédito v Joaquín Calderón Camino*, ECJ 14 July 2012.

591 See Verica Trstenjak, 'Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU from the Perspective of Insurance Law' (2013) 21(3) *European Review of Private Law* 451, 471.

592 ECJ 14 July 2012, Case C-618/10, *Banco Español de Crédito v Joaquín Calderón Camino*, para. 57.

593 See Verica Trstenjak, 'Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU from the Perspective of Insurance Law' (2013) 21(3) *European Review of Private Law* 451, 472.

594 Case C-137/08, *Pénzugyi Lizing v. Ferenc Schneider*, Opinion of AG Trstenjak on 6 July 2010, para. 110.

595 See Section 5.2.3.

596 Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, CJEU 26 April 2012, ECLI:EU:C:2012:242; Bert Keirsbilck, 'The Erga Omnes Effect of the Finding of an Unfair Contract Term: Nemzeti' (2013) 50(5) *Common Market Law Review* 1467; Hans-Wolfgang Micklitz, 'Unfair Terms in Consumer Contracts' in N. Reich, H.W. Micklitz, P. Rott and K. Tonner, *European Consumer Law* (Intersentia Publishing, 2014) 125, 162.

597 Case C-618/10 *Banco Español de Crédito v Joaquín Calderón Camino*.

598 Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*.

information and strategic considerations do not lead the parties to challenge those unfair terms.⁵⁹⁹

Last but not least, having impressed the critics against a strong paternalistic element in these judgments,⁶⁰⁰ the CJEU has also provided for a number of qualifications to strike a balance between *ex officio* protection and party autonomy. First of all, national courts cannot declare a term unfair in order to protect a consumer against his/her will. In the *Panno* case, the CJEU ruled that the national court is not required to exclude the possibility that the term in question may be applicable, if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status and thus benefit from the non-application of the term.⁶⁰¹ Additionally, the right to a fair trial as enshrined in Article 47 of the Charter of Fundamental Rights should be respected.⁶⁰² As a result, national courts are required to inform the parties of the fact that it considers a term to be unfair and to invite each of them to set out its arguments to challenge the views of the other party.⁶⁰³

5.2.2. Procedural Autonomy and the Doctrine of Effective Judicial Protection

While *Océano* and its follow-up judgments are now well-established case law, it should be clear that the UCTD itself does not seek to harmonise the civil procedure rules on actions for safeguarding the rights of consumers conferred by its substantive provisions. Against this background, the principle of procedural autonomy is applicable,⁶⁰⁴ and thus the enforcement of individual rights conferred by the UCTD depends on how Member States design their national procedural law.⁶⁰⁵ It is important to point out that other underlying objectives of national procedural law such as the efficiency of a rapid order for payment or the legal certainty of reasonable limitation periods are not always reconciled with the application of the UCTD by national courts of their own motion. To address this tension, the CJEU has set out general qualifications that the procedural autonomy of national rules is not absolute, but is limited by the principles

599 Stephanie Law and Fabrizio Cafaggi, 'Unfair Contract Terms – Effect of Collective Proceedings-C-472-10, Invitel' in Evelyne Terryn, Gert Straetmans and Veerle Colaert (eds) *Landmark Cases of EU Consumer Law: In Honour of Jules Stuyck* (Intersentia, 2013) 653.

600 Hans-W. Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) *Common market law review* 771, 781.

601 *Ibid.*, para. 33; J. Stuyck, 'Case C-243/08, Pannon and C-40/08, Asturcom' (2010) 47 CMLR 879.

602 Case C-472/11, *Banif Plus Bank Zrt v Csipai*, ECJ 21 Feb. 2013; H.W. Micklitz and B. Kas, 'Overview of Cases before the CJEU on European Consumer Contract Law (2008–2013) – Part I' (2014) 10(1) ERCL 1, 21-22.

603 Case C-472/11 *Banif Plus Bank Zrt v Csipai* para. 36; Case C-397/11 *Jörös v Aegon Magyarország Hitel Zrt* [2013] para. 38.

604 P. Craig and G. De Búrca, *EU Law* (Oxford University Press 2008), 320-28. In *Van Schijndel and Van Veen*, the general principle of the procedural autonomy of Member States has been clearly recognized with specific regard to the power of a national court to intervene of its own motion, see Case C-430-432/93, *Van Schijndel and Van Veen v. Stichting Pensioenfonds* ECJ 14 Dec. 1995). See more in Johanna Engström, 'National Courts' Obligation to Apply Community Law Ex Officio -The Court Showing New Respect for Party Autonomy and National Procedural Autonomy?' (2008) 1(1) *Review of European Administrative Law* 67.

605 It should be noted that EU law depends on national legislatures and courts for its enforcement. The Lisbon Treaty laid down Article 19 of the Treaty on European Union which explicitly states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

of effectiveness and equivalence.⁶⁰⁶ While the principle of effectiveness requires that national procedural law must not be framed in such a way that in practice makes it impossible or excessively difficult to exercise the rights conferred by EU law, the principle of equivalence entails that claims based on EU law must be subject to rules that are no less favorable than those governing similar domestic actions.⁶⁰⁷ On the basis of these twin principles, the CJEU has ascertained on a case-by-case basis the role of national courts in the enforcement of individual rights conferred by the UCTD.⁶⁰⁸

The principle of equivalence has an important role in ensuring that consumer protection from unfair contract terms must prevail over national procedural rules that limit the court's power to hear new defences in arbitration procedures or appeal proceedings. In *Asturcom Telecomunicaciones* the arbitration award had become final since the consumer neither appeared in the arbitration proceedings nor initiated proceedings for the annulment of the award within the relevant limitation period.⁶⁰⁹ The competent court was of the view that the arbitration clause was unfair and referred to the CJEU the question of whether it was required to determine of its own motion in *enforcement proceedings* whether the arbitration clause would be void and, accordingly, to annul the award if it found that the arbitration agreement contained an unfair arbitration clause. In its judgment, having referred to the importance of 'the principle of *res judicata*' underlying Spanish rules of procedure conferring finality on the decision,⁶¹⁰ the CJEU examined whether the principles of effectiveness and equivalence require an altered approach. Applying the principle of effectiveness to this case, the CJEU found that since the two-month limitation period was not in itself likely to make it impossible or excessively difficult to exercise the rights conferred under the UCTD, Spanish law does comply with the principle of effectiveness.⁶¹¹ Regarding the principle of equivalence, the CJEU found that Article 6 of the UCTD 'must be regarded as a provision of equal standing to national rules, which rank within the domestic legal system, as rules of public policy'.⁶¹² Accordingly, if a national court seized with an action for the enforcement of a final arbitration award is required to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that arbitration clause is unfair in the light

606 Case C-168/05, *Mostaza Claro* ECJ 26 Oct. 2006; Case C-40/08, *Asturcom*, ECJ 6 Oct. 2009; M. Ebers, 'From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Law and Res Judicata' (2010) 18(4) *ERPL* 823, 825; V. Trstenjak, 'Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU' (2013) 21(2) *European Review of Private Law* 451, 461-62.

607 However, the meaning of equivalence and effectiveness remains the subject of debate, Michal Bobek, for instance, criticized that 'the test cannot be applied at the same time without pushing into completely different directions: equivalence towards the Member States' national regime, effectiveness towards an harmonised Euro-standard', see Michal Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States' in Micklitz and De Witte, in Hans-W. Micklitz and B. De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 305, 319.

608 Reinhard Steennot, 'Public and Private Enforcement in the Field of Unfair Contract Terms' (2015) 23(4) *European Review of Private Law* 589, 607.

609 Case C-40/08, *Asturcom*, ECJ 6 Oct. 2009; See also H. Schebesta, 'Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom' (2010) 18(4) *European Review of Private Law* 847.

610 *Ibid.*, para. 38.

611 *Ibid.*, para. 46.

612 *Ibid.*, para. 52.

of Article 6 of the UCTD when it has the legal and factual elements necessary for that task available to it.⁶¹³ Similar reasoning was confirmed in *Asbeek Brusse*.⁶¹⁴ Under the approach of the Dutch law of civil procedure, in appeal proceedings the court dealing with those proceedings may rule only on the complaints which were put forward by the parties in the first claims lodged on appeal; however, the court must apply of its own motion the relevant provisions of public policy, even if these have not been invoked by the parties. Having recalled its decision in *Asturcom Telecomunicaciones*, the CJEU confirmed that Article 6 UCTD must be regarded as a provision that has equal standing with rules which have a public policy character within the national legal system.⁶¹⁵ As a result, since a court must apply national rules of a public policy character of its own motion on appeal, it must also exercise that power for the purpose of assessing, of its own motion, in the light of the criteria laid down in the UCTD, whether a contractual term falling within the scope of the Directive may be unfair.⁶¹⁶

Simultaneously, the principle of effectiveness has the great merits of challenging specific provisions of national procedural rules that restrict the courts' power to review unfair terms, especially in the wake of the over-indebtedness of European consumers due to the severe economic crisis experienced after 2008.⁶¹⁷ This tension reflects the idea that consumer protection from unfair terms is not an absolute goal but must compete with other goals intended by national procedural laws. In the first line of cases concerning the powers of the national courts in fast-track procedures concerning orders for payment, the protection of consumers must be weighed against the settlement of disputes. In *Banco Español de Crédito*, the reference for a preliminary ruling had its origin in a dispute regarding an application by the supplier for an order for the payment of an outstanding and payable pecuniary debt owed by the consumer.⁶¹⁸ Under Spanish law, the court was not allowed to assess of its own motion, *in limine litis* or at any other stage during the proceedings, whether a term relating to the interest on late payments contained in a contract concluded between a seller or supplier and a consumer was unfair where that consumer had not lodged an objection. Contrary to the opinion of AG Trstenjack who considered the expeditiousness of the fast-track procedure to carry greater weight than the protection of the consumer, the CJEU took a more consumer-friendly approach.⁶¹⁹ Rather than merely invoking its earlier decision in *Oceano*, the

613 *Ibid.*, para. 53.

614 Case C-488/11 *DF Asbeek Brusse and K de Man Grabito v Jahani BV*.

615 *Ibid.*, para. 44.

616 *Ibid.*, para. 45.

617 N. Reich, *General Principles of EU Civil Law* (Intersentia 2014), 102-06; Fernanda Nicola and Evelyne Tichadou, 'Océano Grupo: Missed Opportunities and a Second Life for EU Consumer Law' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual, Critical and Comparative Histories of European Jurisprudence* (Cambridge University Press 2017) 369.

618 Case C-618/10, *Banco Español de Crédito v Joaquín Calderón Camino* ECJ 14 July 2012. In Spain, an application may be made to a court for an order for the payment of an outstanding and payable pecuniary debt, not exceeding €30 000, where proper evidence as to the amount of that debt is provided. In the case where such an application is brought in accordance with those requirements, the debtor must pay his or her debt or may object to that payment within a period of 20 days, in which case a decision on the matter is taken within the framework of ordinary civil proceedings.

619 Peter Rott, 'Case note on Banco Español de Crédito v Joaquín Calderón Camino' (2012) 8(4) *European Review of Contract Law* 470, 473.

CJEU applied the principle of effectiveness to test whether the Spanish procedural legislation makes it impossible or excessively difficult, in proceedings initiated by sellers or suppliers against consumers, to apply the protection conferred by the Directive on those consumers. Having viewed the order for payment procedure, as well as its progress and its special features as a whole, the CJEU reasoned there was a significant risk that the consumers concerned would not lodge the objection required for a finding that an unfair term was void.⁶²⁰ A number of factors are responsible for dissuading consumers from submitting an objection: the particularly short period provided for that purpose, the costs which legal proceedings would entail in relation to the amount of the disputed debt, the unawareness of their rights, or indeed the limited content of the application for the order for payment submitted by the sellers or suppliers and thus the incomplete nature of the information available to them.⁶²¹ In those circumstances, suppliers or sellers could deliberately exploit the fast-track procedure to deprive consumers of the benefits of the protection intended by the Directive.⁶²² For that reason, the Court concluded that such national procedural rules were liable to undermine the effectiveness of the protection that the UCTD intended to confer on consumers.

In the second line of cases concerning mortgage enforcement proceedings,⁶²³ the CJEU again had to strike a balance between the necessities of respecting the efficiency of execution procedures under Member States' laws and ensuring the effective protection of consumers. In *Aziz* the CJEU had the opportunity to ascertain whether the specific characteristic of national procedural law governing mortgage enforcement proceedings was compatible with the objectives of the UCTD.⁶²⁴ More specifically, given that under Spanish law an objection to unfair terms was only possible in declaratory proceedings, but not permissible in enforcement proceedings, the question was whether the principle of effectiveness required a connection between enforcement and declaratory proceedings. The CJEU gave an affirmative answer and decided that, in order to ascertain the unfairness of a contractual term, a national court hearing the declaratory proceedings must have the power to suspend the mortgage enforcement proceedings that had been initiated on the basis of that term.⁶²⁵ The ruling of the CJEU in *Aziz* led to a reform of Spanish civil procedural law that provided the possibility for the debtor to contest the mortgage enforcement proceedings on the ground that the contractual clause upon which the enforcement was based was unfair.⁶²⁶ However,

620 Case C-618/10, *Banco Español de Crédito v Joaquín Calderón Camino* ECJ 14 July 2012, para. 54.

621 *Ibid.*

622 *Ibid.*, para. 55.

623 Sara Iglesias Sánchez, 'Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: *Aziz v. Catalunyaacaixa*' (2014) 51(3) *Common Market Law Review* 955.

624 Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*. According to Hans-W. Micklitz, *Aziz* was 'a test case, one where the CJEU was faced with the social and the societal dimension of the current economic crisis' see Hans-W. Micklitz, 'Unfair Contract Terms – Public Interest Litigation before European Courts' in Evelyne Terryn, Gert Straetmans and Veerle Colaert (eds), *Landmark Cases of EU Consumer Law: In Honour of Jules Stuyck (Intersentia 2013)* 633, 650.

625 *Ibid.* paras 57-59.

626 Law No. 1/2013 of 14 March 2013, see more in Federico Della Negra, 'The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: Sánchez Morcillo and Kušionová' (2015) 52(4) *Common Market Law Review* 1009, 111.

this first reform was obviously inadequate to meet the standard of consumer protection required by the UCTD and, as a result, more than a dozen preliminary references were lodged by national courts in Spain after the *Aziz* case.⁶²⁷

The above case studies are strong evidence of the EU's support for its policy on consumer protection. At least in the field of unfair terms, the CJEU has reinforced the primacy of the policy of consumer protection over the concept of the procedural autonomy of Member States on which the national policy of procedural justice has been built.⁶²⁸ On the basis of the principle of equivalence, the CJEU has empowered or even required national courts to overcome their limited powers to hear new defences on appeal and in arbitration proceedings by referring to 'public policy' considerations. More significantly, effective consumer protection from unfair contract terms must prevail over the benefit of fast-track orders for payment or execution procedures. This consumer-oriented approach of the CJEU in the field of unfair terms,⁶²⁹ therefore, confirmed Trstenjak and Beysen's astute observation about '[a] less stringent application of the concept of procedural autonomy of Member States... with regard to the role of national courts in the enforcement of consumer rights under the different consumer protection directives'.⁶³⁰

5.3. Collective Enforcement

Arguably, one of the UCTD's greatest features is that it explicitly pursues *ex ante* prevention, not merely *ex post* rejection to enforce unfair terms in consumer contracts. To this end, Article 7(1) requires Member States to take 'adequate and effective means' to prevent the *continued use* of unfair terms. The choices of specific means are ultimately left to the Member States; thus, based on their legal traditions, they may select various

627 See Joined Cases C-482, 484, 485 and 487/13, *Unicaja Banco*, EU:C:2015:21; Case C-169/14, *Sánchez Morcillo* and Case C-280/13, *Barclays Bank SA*, EU:C:2014:279. See the orders in Joined Cases C-537/12 & 116/13, *Banco Popular Español*, EU:C:2013:759; Case C-486/13, *Caixabank*, EU:C:2014:181; Case C-93/14, *Zurbano Belaza*, EU:C:2014:2223; Case C-208/14, *Valdivia Reche*, EU:C:2014:2330; Case C-54/14, *Villafañez Gallego*, EU:C:2014:2329; Case C-645/13, *Cajas Rurales Unidas*, EU:C:2014:2398; Cases C-602/13, *Banco Bilbao Vizcaya Argentaria*, referred on 25 Nov. 2013; Case C-8/14, *BBVA*, referred on 10 Jan. 2014; Case C-548/13, *Caixabank*, referred on 10 Jan. 2014; Case C-75/14, *Banco de Caja España de Inversiones*, referred on 11 Feb. 2014; Case C-122/14, *Aktiv Kapital Portfolio Investment*, referred on 14 March 2014; Case C-90/14, *Banco Grupo Cajatres*, referred on 2 May 2014; Case C-421/14, *Banco Primus*, referred on 10 Sept. 2014; Case C-539/14, *Sánchez Morcillo*, referred on 27 Nov. 2014; Case C-568/14, *Ismael Fernández Oliva*, referred on 9 Dec. 2014. Federico Della Negra, 'The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: Sánchez Morcillo and Kušionová' (2015) 52(4) *Common Market Law Review* 1009.

628 It simultaneously reflects the difficulties of distinguishing rights, remedies and procedures and the erosion of the principle of procedural autonomy. Walter Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37(3) *Common Market Law Review* 501.

629 Fabrizio Cafaggi and Stephanie Law, 'Unfair Contract Terms – Effect of Collective Proceedings – C-472-10, *Invitel*' in Evelyne Terryn, Gert Straetmans and Veerle Colaert (eds), *Landmark Cases of EU Consumer Law – In Honour of Jules Stuyck* (Intersentia 2013) 653, 676; H.W. Micklitz and N. Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' 2014 51(3) *CMLR* 771, 784.

630 Verica Trstenjak and Erwin Beysen, 'European Consumer Protection Law: Curia Semper Dabit Remedium?' (2011) 48(1) *CMLR* 95, 119.

mechanisms under civil law, administrative or even criminal law.⁶³¹ By doing so, EU law aims to respect and accommodate appropriately the mechanisms available in the legal systems of some Member States before the adoption of the UCTD.⁶³² However, Article 7(2) explicitly emphasizes the importance of one specific kind of means:

‘the means...shall include 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.’

Thus, in the view of the EU legislators, it is essential that administrative authorities or consumer associations should be empowered in all Member States to initiate collective proceedings to prevent the use of unfair terms; thus, collective action seems to be the most appropriate and effective instruments within the meaning of Article 7(1). In this connection, it should be mentioned that the development of collective actions in Member States also derives from the requirements of the EU Directive on Injunctions for the Protection of Consumers’ Interests⁶³³ and Regulation 2006/2004 on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws.⁶³⁴ Especially the 2009 Injunctions Directive, which includes the UCTD in its annex of applicable legislation, provides that any qualified body or organization is in principle entitled to bring an action for an injunction precluding a practice infringing European consumer protection, provided that they meet the national requirements in this regard.⁶³⁵ Taking Article 7 of the 1993 Unfair Terms Directive and the 2009 Directive together, Member States are under an obligation to establish an injunctive mechanism – which can generally be described as a ‘cease and desist order, issued by a court or other public body, whereby a court or body orders a party to stop a certain practice’⁶³⁶ – for challenging and preventing the continued use of unfair terms in practice.

Accordingly, although in principle it is ultimately left to the Member States to design their legal framework for collective actions, it should be noted that Article 7 at least provides guidance that Member States should follow to ensure that their mechanisms defend the collective interests of consumers effectively and adequately.

631 Martin Ebers, ‘Unfair Contract Terms Directive (93/13)’ in Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier European Law Publishers, 2008) 197.

632 Ibid.

633 See Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests [1998] OJ L166/51. The 1998 Directive was replaced by Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on Injunctions for the Protection of Consumers’ Interests [2009] OJ L110/30.

634 Regulation 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2004] OJ L364/1.

635 Articles 2 and 3 of the 2009 Injunctions Directive.

636 Jules Stuyck et al., *An Analysis and Evaluation of Alternative Means of Consumer Redress other than Redress Through Ordinary Judicial Proceedings* (Final report, The Study Centre for Consumer Law – Centre for European Economic Law, Katholieke Universiteit Leuven, Belgium, 2007) 14.

5.3.1. Institutional Framework for Collective Enforcement

From an institutional point of view, the existence of a system of collective actions against unfair terms gives rise to several essential questions: (i) which persons or organizations are, or should be, authorized to take action to protect the collective interests of consumers; and (ii) which procedures ought to be followed.

5.3.1.1. Power to Bring Collective Actions

The existence of a collective action first requires that persons or organizations are granted a procedural status that enables them to effectively defend the collective interests of consumers. Originally the question arose as to whether Article 7 UCTD required not only public authorities but also consumer organizations to be granted *locus standi*.⁶³⁷ In the UK, for example, under the 1994 Unfair Terms in Consumer Contracts Regulation, only the Director General of Fair Trading, not consumer organizations, had the authority to take collective actions against unfair terms.⁶³⁸ Consequently, consumer organizations were only able to ask the administrative authority to take action, which was obviously not compatible with Article 7 UCTD. As a result, the 1994 Regulation was replaced by the 1999 Regulation according to which enforcement powers were extended beyond the Director General of Fair Trading to consumer organizations and other public bodies.⁶³⁹ Given that in principle consumer organizations are granted this power under the requirement of Article 7 UCTD, the reference to national law in the formula ‘having a legitimate interest under national law in protecting consumers’ should only be interpreted to mean that Member States have the right to define which specific kinds of organizations would be empowered to take action.⁶⁴⁰

As for the *chief agents* of collective actions, it is possible and necessary to make a distinction between private and public enforcement mechanisms among Member States. While in many continental countries, such as Germany, consumer organizations have played a decisive role, in other countries, various kinds of public bodies, such as the Nordic ‘consumer ombudsmen’ or the Competition and Markets Authority (CMA) in the UK, are principal actors in combating unfair terms in the market.⁶⁴¹

637 See Meryll Dean, ‘Unfair contract terms: The European Approach’ (1993) 56(4) *The Modern Law Review* 581, 589.

638 In *R v. Secretary for Trade and Industry*, this question was referred to the CJEU. Since the new U.K. government announced that it was going to grant legal standing for consumer associations, the CJEU suspended the proceedings. See Susan Bright, ‘Winning the battle against unfair contract terms’ 2000 20(3) *Legal Studies* 331, 336; Jack Beatson, ‘The Incorporation of the EC Directive on Unfair Consumer Contracts into English law’ (1998) 6 *Zeitschrift für Europäisches Privatrecht* 957, 966.

639 See Susan Bright, ‘Winning the Battle against Unfair Contract Terms’ 2000 20(3) *Legal Studies* 331, 336.

640 Thomas Wilhelmsson, ‘Public Interest Litigation on Unfair Terms’ in Hans-W. Micklitz and Norbert Reich (eds) *Public Interest Litigation before European Courts* (Baden-Baden, 1996) 385.

641 Fabrizio Cafaggi and Hans. Micklitz, *Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community* (August 2007) EUI LAW Working Paper No. 2007/22; Thomas Wilhelmsson and Chris Willett, ‘Unfair Terms and Standard Form Contracts’ in G. Howells, I. Ramsay, T. Wilhelmsson and D. Kraft (eds), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010) 158, 183.

In Germany – the first legal system in Europe to adopt rules on collective actions in 1977 as part of a comprehensive act on standard terms (AGBG) – consumer organizations are at the forefront in the battle against unfair standard terms.⁶⁴² Under the Act on Injunctive Relief (Unterlassungsklagengesetz, UKlaG), various legal entities, including both consumer organizations and state authorities, have the right to commence injunctive actions.⁶⁴³ Among them, more than 70 consumer organizations are qualified to bring collective actions in respect of unfair terms;⁶⁴⁴ and their actual efforts have made Germany one of the most successful Member States in combating unfair terms at least in terms of the number of reported actions seeking injunctive relief.⁶⁴⁵

In the UK, before 2014, the Office of Fair Trading (OFT),⁶⁴⁶ a national authority in charge of consumer protection, was always the chief player in controlling unfair terms⁶⁴⁷ (since 2014, the powers of the OFT have been transferred to the Competition and Markets Authority).⁶⁴⁸ Under the 1999 Regulations, the OFT was obliged to investigate complaints about unfair terms and, based on such investigations, the OFT could apply for injunctive relief before the competent courts. However, the OFT's main strategy for combating unfair terms was not always legal actions as its first choice as this strategy had three main strands: firstly, publishing written guidance with emphasis on illustrative examples aimed at particular economic sectors; secondly, working with businesses to improve trading practices such as assisting in the revision of standard form contracts; and thirdly, enforcing the law through test cases as a last resort.⁶⁴⁹ Due

642 James Devenney and Thomas Pfeiffer, 'Control of Standard Terms and Collective Proceedings' in Dannemann, Gerhard, and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (OUP Oxford, 2013) 687, 700; Fabrizio Cafaggi and Hans-W. Micklitz Micklitz, *Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community* (August 2007) EUI LAW Working Paper No. 2007/22.

643 Article 3 of the Act on Injunctive Relief for consumer rights and other violations (*Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen* (Unterlassungsklagengesetz - UKlaG)) of 27 August 2002 (BGBl. I p. 3422, 4346), <http://www.eu-consumer-law.org/legislation117_en.pdf> [accessed 15 May 2017].

644 Notification from the Commission concerning Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, which codifies Directive 98/27/EC concerning the entities qualified to bring an action under Article 2 of this Directive, in Notices from Member States, OJ C84, 4 March 2016 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:087:TOC%20>> [accessed 15 May 2017].

645 European Commission, 'Report Concerning the Application of Directive 2009/22/EC' COM (2012) 635 final, p. 4.

646 Apart from OFT (CMA), other qualifying bodies may also consider complaints and apply for injunctions. They include the Department of Enterprise, Trade and Investment in Northern Ireland, a local weights and measures authority, the Financial Conduct Authority, the Office of Communications, the Information Commissioner, the Gas and Electricity Markets Authority, the Water Services Regulation Authority, the Office of Rail Regulation, the Northern Ireland Authority for Utility Regulation, and the Consumers' Association (2015 Consumer Rights Act, Schedule 3, para. 8(1)).

647 Chris Willett, *Fairness in Consumer Contracts: the Case of Unfair Terms* (Ashgate Publishing, 2007) 407; Jesse Elvin, 'The Application of the Unfair Terms in Consumer Contracts Regulations 1999' (2003) 14(1) *King's Law Journal* 39, 58.

648 The CMA is a non-ministerial Government department which works to promote competition for the benefit of consumers. It aims to make markets work well for consumers, businesses and the economy <<https://www.gov.uk/government/organisations/competition-and-markets-authority>> [accessed 15 May 2017].

649 John Vickers, 'Contracts and European Consumer Law: An OFT Perspective' in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Bloomsbury Publishing, 2006) 171, 175.

to these efforts, experiences with an administrative review in the UK were praised by the European Commission as a success story in the fight against unfair terms.⁶⁵⁰

The success stories in the battle against unfair terms in both Germany, as a typical example of a private enforcement mechanism, and the UK, having an exemplary public enforcement mechanism, seem to refute the argument that public enforcement is superior to private enforcement in protecting the collective interests of consumers.⁶⁵¹ However, one should not overlook the fact that the position of consumers' organizations under German law is fairly unique since German consumers' organizations have been heavily funded by the government.⁶⁵² This implies that adequate financial support is obviously a prerequisite for leaving control largely up to private organizations.⁶⁵³ Additionally, completely entrusting this task to private enforcement should be viewed against the economic structure and development of German society.⁶⁵⁴ In other countries where consumers' associations have traditionally been relatively weak, it seems natural to entrust this task to a strong state authority. Arguably, private collective enforcement is important, but a prominent enforcement design should be a mixture of public and private authorities.⁶⁵⁵

5.3.1.2. Main Procedural Rules

(i) Competent Courts

One of the classic issues in designing collective actions in the field of unfair terms is whether it is necessary to establish a special tribunal which only has the task of controlling unfair terms.⁶⁵⁶ Since Article 7(2) merely states that persons or organizations may take action 'before the courts or before competent administrative bodies', it does not explicitly have a final say in this debate. Therefore, Member States may grant competence to special courts such as market courts or unfair terms tribunals.⁶⁵⁷ However, it is submitted that a trend in Europe is to entrust the ordinary courts with the authority to hear disputes involving unfair terms and to grant an injunction against

650 European Commission, Report on Unfair Terms Directive 93/13, COM (2000) 248 final, p. 21.

651 On the other hand, it has been argued that public enforcement officers are not familiar with the mostly private law nature of trade practices, which can therefore be better entrusted to private law courts. See more on this debate in Willem Boom and Marco Loos, *Collective Enforcement of Consumer Law: Securing Compliance in Europe Through Private Group Action and Public Authority Intervention* (Europa law publishing, 2007); Fabrizio Cafaggi and Hans-Wolfgang Micklitz, *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement* (Intersentia 2009).

652 German consumers' associations are funded from the public purse, see: German Report on Consumer Association Activity <http://ec.europa.eu/consumers/empowerment/cons_networks_en.htm> [accessed 15 May 2017].

653 Harald Koch, 'Non-class Group Litigation under EU and German law' (2001) 11 *Duke J. Comp. & Int'l L.* 355.

654 Fabrizio Cafaggi and Hans-W. Micklitz, *Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community* (August 2007) EUI LAW Working Paper No. 2007/22.

655 Jules Stuyck, 'Public and Private Enforcement in Consumer Protection: General Comparison EU-USA, Enforcement of Consumer Rights and Legal Redress for Consumers in the EU: An Institutional Model' in Fabrizio Cafaggi and Hans-Wolfgang Micklitz, *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement* (Intersentia 2009) 63, 65-70.

656 Ewoud Hondius, *Unfair Terms in Consumer Contracts* (Molengraaff Instituut voor Privaatrecht 1987) 228.

657 This is the situation in the Scandinavian countries and some new Member States of the EU such as Poland.

these terms. In Germany, the competent court for UKlaG proceedings is the Regional Court (*Landgericht*) where the defendant has his/her place of business or, in the absence thereof, his/her place of residence.⁶⁵⁸ If such a court cannot be determined, competence lies with the court in the district where the unfair standard terms have been used or where a violation of consumer laws has taken place.⁶⁵⁹ Under English law, qualified entities may now apply to the County Court to seek an injunction against a person using standard terms which appear to be unfair in consumer contracts, rather than merely taking action at the High Court which was the case under the 1994 Regulations. The courts are empowered to grant an injunction against unfair terms if they consider this to be appropriate.⁶⁶⁰ In order to explain why opting for the ordinary courts rather than special tribunals is a general trend in Europe, it can be argued that standard form contracts have become ubiquitous and problems with unfair terms have become a daily issue in modern times. Accordingly, special tribunals only seem to be suitable in small economies with a limited number of cases involving unfair terms.

Against this background, it should be noted that concerning the issue of territorial jurisdiction over actions for an injunction, the CJEU has explicitly distinguished between the procedural status of individual consumers and that of consumers' organizations. In the *Leon* case⁶⁶¹ the CJEU was asked whether the UCTD precludes a Spanish law under which an action for an injunction initiated by a consumer protection association must be brought before the courts where the defendant is established. The CJEU reasoned that unlike individual proceedings where the consumer was the weaker party *vis-à-vis* the supplier, in the case of collective actions there was no need for protection.⁶⁶² Accordingly, national law does not necessarily provide consumer associations in collective actions with the possibility to bring cases at the place of their office.⁶⁶³

(ii) Main Procedural Rules

According to Article 7 of the UCTD, the pertinent procedural rules on seeking an injunction are a matter for the domestic legal system to decide and, in principle, these rules follow the general procedural rules under national law. In Germany, under the UKlaG, the procedural rules generally follow the procedural rules in the Code of Civil Procedure (ZPO).⁶⁶⁴ Additionally, Article 8 UKlaG specifically requires that before granting an injunction, the court shall hear the opinion of relevant state authorities if the action relates to certain general trading conditions in several sectors governed by

658 Article 6 (1) of the Act on Injunctive Relief (Unterlassungsklagengesetz, UKlaG).

659 Ibid., <<http://www.collectiveredress.org/collective-redress/reports/germany/consumerlaw>> [accessed 15 May 2017].

660 2015 Consumer Act, Schedule 3, para. 6(1).

661 Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL* CJEU 5 Dec. 2013, ECLI:EU:C:2013:800.

662 Ibid., paras 39-44.

663 Ibid., para. 53.

664 Harald Koch, 'Non-class Group Litigation under EU and German Law' (2001) 11 *Duke J. Comp. & Int'l L.* 355.

these authorities.⁶⁶⁵ If the court upholds an application for an injunction, the operative part of the judgment shall contain, *inter alia*, the wording of the standard contract term provisions objected to, an identification of the type of transaction for which these standard contract term provisions may not be used, an injunction ordering the party in question to refrain from using these standard contract term provisions, and where the judgment requires a recommendation to be withdrawn, an order requiring the judgment to be made known in the same way as the recommendation.⁶⁶⁶

In the UK, more specific statutory requirements are laid down in the 2015 Consumer Act and its precursors concerning the procedure for seeking an injunction against unfair terms before the courts. The enforcement mechanism can be generally described as a two-step approach: as the first step, private parties are responsible for the ‘barking’ by lodging complaints about alleged unfair terms with the public authorities; then, in response to these complaints, the competent public authorities are responsible for the ‘biting’ through investigating, negotiating and seeking an injunction.⁶⁶⁷

The administrative model of enforcement under English law commences at the moment when a complaint is made to the regulators⁶⁶⁸ which are under an obligation to investigate unless the complaint is obviously frivolous or vexatious.⁶⁶⁹ In order to be able to consider a submitted complaint relating to an unfair term, the regulators are entitled to obtain documents and information from any person. Thereafter, if a regulator who is considering a relevant complaint finally decides not to submit an application for an injunction in relation thereto, the reasons for this decision must be provided to the person who made the complaint.⁶⁷⁰ As mentioned above, given that various regulators are granted enforcement powers, certain solutions must be put in place to ensure that there are consistent approaches when tackling unfair terms. To this end, if a regulator other than the CMA intends to consider a relevant complaint and to apply for an injunction, it is required to notify the CMA that it intends to do so.⁶⁷¹ The regulator may only make this application if a period of 14 days, beginning with the day on which the regulator notified the CMA, has ended or, before the end of that period, the CMA has

665 For example, the court shall hear the opinion of the competent insurance regulator if the action relates to provisions in the general terms of insurance contracts, or the Federal Banking Supervisory Office if the action relates to provisions in standard contract terms which have to be approved by that Office under the terms of the Building and Loan Associations Act, the Investment Companies Act, the Mortgage Bank Act or the Ship Mortgage Bank Act.

666 Article 9 of the UKlaG.

667 Christopher Hodges, ‘Collectivism: Evaluating the Effectiveness of Public and Private Models for Regulating Consumer Protection’ in W.H. van Boom and Marco Loos (eds), *Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority Intervention* (Europa Law Publishing 2007) 207-28.

668 2015 Consumer Rights Act, Schedule 3, para. 2 (replacing the 1999 Regulations reg. 10). Up until 2014 under the 1999 Regulations, the Director General of the OFT had a duty to consider any complaint made to him unless the complaints appeared to be obviously frivolous or vexatious. From April 1, 2014, onwards the OFT was abolished and the leading role in respect of the regulatory control of unfair terms in consumer contracts was taken over by the newly-formed Competition and Markets Authority (CMA).

669 2015 Consumer Rights Act, Section 70(2), applying investigatory powers in Schedule 5 (replacing the 1999 Regulations reg. 13).

670 2015 Consumer Rights Act, Schedule 3, para. 2(3).

671 2015 Consumer Rights Act, Schedule 3, para. 4(1).

agreed that the regulator may submit this application.⁶⁷² The CMA therefore remains the leading actor in managing all complaints and then in deciding on the most effective strategy to combat the alleged unfair terms. These requirements are essential not only to ensure successful cooperation between the regulators, but also to protect businesses from multiple challenges.

After considering the complaints, the regulators may decide to apply for an injunction against an unfair term. However, before applying for an injunction, these regulators may, if they consider it appropriate to do so, engage in negotiations with the relevant business to seek an undertaking that the business in question will comply with the conditions that are mutually agreed between them concerning the use, or continued use or the alternation of the challenged unfair terms in contracts.⁶⁷³ The 2015 Consumer Act empowers the courts to grant an injunction against unfair terms as they see fit.⁶⁷⁴ The injunction may include provisions on the term to which the application relates, or indeed any term in a consumer contract of a similar kind or with a similar effect.⁶⁷⁵ Finally, the CMA is obliged to publish any injunction and any application it makes for an injunction; additionally, it is empowered to arrange for the publication of any advice and information relating to the relevant provisions of the 2015 Consumer Act.⁶⁷⁶

In practice, the action seeking an injunction to restrain the continued use of unfair terms in consumer contracts is always seen by the CMA and its precursors as a last resort. The majority of cases concerning unfair terms are settled by negotiations during which the regulators persuade the business in question, which is now under threat of litigation, to provide an undertaking to discontinue the use of unfair terms.⁶⁷⁷ It raises an interesting question as to why this course of action has been so successful in combating unfair terms and whether or not this phenomenon has been witnessed in other Member States.

(iii) Negotiations and Guidance

It is well known in the UK that the state authority in charge of consumer protection exercises its statutory powers primarily through negotiation, persuasion and consensus to amend unfair contractual terms. However, the UK is not the only example of this phenomenon. Similarly, in the Nordic countries the Consumer Ombudsman primarily combats contractual terms which are deemed to be unfair by means of negotiations with

672 2015 Consumer Rights Act, Schedule 3, para. 4(2).

673 This requirement corresponds with Article 5 of the 2009 Directive on Injunctions which provides that Member States may introduce or maintain provisions to the effect that the party that intends to seek an injunction can only start this procedure after it has tried to achieve the cessation of the infringement in consultation with the defendant. It seems to indicate that litigation should only be considered as a last resort.

674 2015 Consumer Rights Act, Schedule 3, para. 5(1).

675 2015 Consumer Rights Act, Schedule 3, para. 5(3).

676 2015 Consumer Rights Act, Schedule 3, para. 7 (replacing the 1999 Regulations reg. 15).

677 Susan Bright, 'Winning the Battle Against Unfair Contract Terms' (2000) 20(3) *Legal Studies* 331, 334. As a matter of fact, the OFT only took legal action in a few cases (*Director General of Fair Trading v First National Bank* [2000] *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52; *Office of Fair Trading v Abbey National plc and Others* [2009] UKSC 6; *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681).

the business in question; instigating a legal action before the Market Court to seek an injunction is only a last resort.⁶⁷⁸ A fear of bad publicity is clearly one of the reasons why businesses tend to comply with requests to amend their terms without having to defend themselves in court.⁶⁷⁹ However, there have been a number of supplementary ways in which regulators in the UK and the Nordic countries have attempted to induce businesses to change their practices.

Of particular importance is the regulators' practice of issuing extensive guidance on unfairness in specific business sectors.⁶⁸⁰ This has not only assisted consumers in recognizing breaches of their rights resulting in them then notifying the regulators by lodging complaints, but has also assisted businesses in understanding what is unfair, thereby encouraging self-compliance. As a result, it ensures that the circular system of 'barking and biting' can function smoothly.

Additionally, promoting self-regulation by assisting trade associations to draft codes of conduct is also an effective way of persuading businesses to ensure that they make use of fair contractual terms. In the UK, the OFT recommended and assisted business associations to create draft consumer-friendly general trading conditions for their members.⁶⁸¹ Furthermore, in order to enhance consumer confidence, the OFT officially issued the Consumer Codes Approval Scheme (CCAS) for a number of codes of conduct that meet the requirements of clear and fair terms.⁶⁸²

5.3.2. Legal Nature of Collective Actions

5.3.2.1. Deterrent Nature of Collective Actions

In *Commission v Italy*, the CJEU had an opportunity to interpret the term 'continued use' in Article 7 and thus to provide an answer to the question of whether collective action may be commenced to challenge not only the continued use of unfair terms but

678 Thomas Wilhelmson has even argued that in the Nordic countries the most important role of the consumer ombudsperson is to negotiate the development of industry-wide contract forms with business organisations. See Thomas Wilhelmson, 'The Unfair Contract Terms Directive and the Nordic Contract Model'; Peter Dyer 'Implementation of Directive 93/13/EEC in Sweden' (The Unfair Terms Directive: Five Years on, Acts of the Brussels Conference, Brussels 1999) 160 <http://ec.europa.eu/consumers/archive/cons_int/safe_shop/unf_cont_terms/event29_02.pdf> [accessed 15 May 2017].

679 Susan Bright, 'Winning the Battle Against Unfair Contract Terms' (2000) 20(3) *Legal Studies* 331, 335.

680 The CMA and its precursor – the OFT – have issued various important general guidance documents (OFT 311), unfair contract terms bulletins, as well as guidance for market sectors including Guidance on unfair terms in tenancy agreements OFT356, Guidance on unfair terms in health and fitness club agreements OFT373, Guidance on unfair terms in care home contracts OFT635, Guidance on unfair terms in consumer entertainment contracts OFT667, Guidance on unfair terms in package holiday contracts OFT668, Guidance on unfair terms in holiday caravan agreements OFT734. All OFT publications are freely available at: <www.ofi.gov.uk> [accessed 15 May 2017].

681 The OFT advised numerous business associations to draft their GTC. For example, the Society of Ticket Agents and Retailers (STAR) <<http://www.star.org.uk/media/13202/startguide.pdf>> [accessed 15 May 2017]; the National Caravan Council <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284431/ofit734.pdf> [accessed 15 May 2017].

682 BIS, Empowering and protecting consumers: government response to the consultation on institutional reform, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253701/bis-12-510-empowering-protecting-consumers-government-response-1.pdf> [accessed 15 May 2017].

also their recommendation.⁶⁸³ The Commission argued that since Article 7 has as its objective the prevention of the continued use of unfair terms, it must include establishing a preventive right of action to enable proceedings to be brought to challenge even a recommendation that a term be used.⁶⁸⁴ Thus, the Commission alleged that Article 7(3) of Directive 93/13 had not been transposed in its entirety since under Article 1469e of the Civil Code as well as Article 3 of Law No. 281/98, it is only possible to bring proceedings challenging the use of unfair terms, not their recommendation.⁶⁸⁵ The Italian government, on the other hand, emphasised that the actual, and not merely the potential, use of standard terms is an essential condition for the applicability of Article 7 of the Directive.⁶⁸⁶

The Court reiterated that ‘the imbalance between the consumer and the seller or supplier *may only be corrected* by positive action unconnected with the actual parties to the contract’.⁶⁸⁷ Such positive action may reflect the fact that a consumer organisation is able to challenge the use or a recommendation of the use of unfair contract terms in a collective action. Indeed, ‘the *deterrent nature and dissuasive purpose* of the measures to be adopted, together with their independence from any particular dispute mean that such actions may be brought even though the terms which it is sought to have prohibited have not been used in specific contracts, but have only been recommended by suppliers and sellers or their associations’.⁶⁸⁸ Therefore, the CJEU concluded that Article 7 of the Directive must be interpreted as requiring procedures to be established which may also be directed against conduct confined to recommending the use of unfair contract clauses.⁶⁸⁹

Accordingly, the CJEU clarified that collective actions may not only be taken against unfair contract terms that are already being used in practice, but also to prevent the future use of unfair contract terms. To that effect, the collective actions in Member States should be designed so as to pursue dual goals: firstly, to seek a finding that the terms which have been used are invalid and, secondly, to prevent new consumers from becoming victims of unfair contracts.

5.3.2.2. *Erga Omnes* Effect of Collective Actions

Another important issue on which neither Directive 1993/13/EEC nor Directive 2009/22/EC provides clear guidance is the scope of the binding effect of collective actions against unfair terms. Consequently, there has been a great deal of divergence

683 Case C-372/99, *Commission v. Italian Republic*, ECJ 24 January 2002. For a case annotation, see M. Loos, ‘Case note: ECJ (case C-372/99, *Commission v. Italian Republic*: Collective action under the Unfair Contract Terms Directive)’ 2003 5 *European Review of Private Law* 701.

684 Case C-372/99, *Commission v. Italian Republic*, ECJ 24 January 2002, para. 12.

685 *Ibid.*, para. 17.

686 *Ibid.*, para. 13.

687 Case C-372/99, *Commission v. Italian Republic*, ECJ 24 January 2002, para. 14.

688 Case C-372/99, *Commission v. Italian Republic*, ECJ 24 January 2002, para. 15, referring to ECJ 27 June 2000, joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial et Salvat Editores* [2000] ECR I-4941, para. 27.

689 Case C-372/99, *Commission v. Italian Republic*, ECJ 24 January 2002, para. 16.

in the Member States as to whether findings of unfair terms resulting from collective proceedings can only apply to the parties to the case or whether they also bind third parties not directly related to the case at hand.⁶⁹⁰ Most of the Member States apply a traditional concept of *res judicata* and provide that the effect of a judgment in a collective action for an injunction is strictly mandatory with respect to the parties to the proceedings (*inter partes* effects).⁶⁹¹ Conversely, in Hungary the national courts may grant injunction orders which have an effect for all consumers who have concluded contracts with the defendant traders and which contain the same standard terms, including those consumers who were not party to the injunction proceedings (*erga omnes* effects).⁶⁹²

Against this backdrop, in the landmark case of *Invitel*, the CJEU seized the opportunity to clarify the legal effects of collective actions against unfair terms.⁶⁹³ In this case, a collective action was initiated by the Hungarian national consumer protection authority against a telecom company to challenge the validity of the term in the general business conditions allowing the company to charge additional fees without clearly explaining the method for calculating those fees.⁶⁹⁴ Of significant importance was the question presented to the CJEU by the Hungarian court as to whether the Hungarian legal system is compatible with the UCTD when a national court hearing a collective action has found a term in general business conditions (GBC) to be unfair and has issued an injunction which takes effect with regard to all consumers who have concluded contracts to which the same GBC apply.⁶⁹⁵

In her Opinion, Advocate General Trstenjack reasoned that the central issue arising from the *Invitel* case was whether an injunction producing the collective effects of the finding of unfairness constituted an appropriate and effective means under the meaning of Articles 6(1) and 7(1). She persuasively argued that the underlying objective of Article 6(1) to protect consumers from unfair terms requires that the legal consequences of unfair terms apply equally, irrespective of whether an action is brought by individual consumers or by persons or organisations representing consumer

690 In her thesis, Magdalena Ogorzałek identified three kinds of the binding effect of injunctions among Member States: *inter partes*, *erga omnes* and third party, see Magdalena Ogorzałek, *The Action for Injunction in EU Consumer Law* (Doctoral Thesis, the European University Institute, 2014) <http://cadmus.eui.eu/bitstream/handle/1814/34560/2014_Ogorzalek_Author.pdf?sequence=1> [accessed 15 May 2017].

691 The Report on the Implementation of the Injunction Directive also confirmed that an injunction is only mandatory with respect to the case and the parties in question. Report from the Commission concerning the application of Directive 98/27 of the European Parliament and the Council on injunctions for the protection of consumers of 18 November 2008, COM (2008) 756 final at para. 25.

692 Bert Keirsbilck, 'The Erga Omnes Effect of the Finding of an Unfair Contract Term: Nemzeti' (2013) 50(5) *Common Market Law Review* 1467, 1469.

693 Fabrizio Cafaggi and Stephanie Law, 'Unfair Contract Terms – Effect of Collective Proceedings-C-472-10, Invitel' in Evelynne Terryn, Gert Straetmans and Veerle Colaert (eds), *Landmark Cases of EU Consumer Law – In Honour of Jules Stuyck* (Intersentia 2013) 653; Bert Keirsbilck, 'The Erga Omnes Effect of the Finding of an Unfair Contract Term: Nemzeti' (2013) 50(5) *Common Market Law Review* 1467.

694 Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, CJEU 26 April 2012, ECLI:EU:C:2012:242, paras 17-19.

695 *Ibid.*, para. 20.

interests.⁶⁹⁶ Indeed, given the general-use nature of contested terms, a judicial finding that an unfair term is not binding on all consumers who have concluded contracts with the defendant business to which the same GBC apply, including those consumers who were not parties to the injunction proceedings, ensures that the requirement of Article 6(1) is effectively implemented.⁶⁹⁷ Additionally, the *erga omnes* effect may generate an indirectly deterrent effect on other sellers or suppliers wishing to use similar terms in contracts, thus constituting an effective means to contribute objectively to the prevention of the continued use of such terms in contracts.⁶⁹⁸

In its judgment, following the Opinion of the Advocate General, the CJEU ruled that the Directive – in particular Articles 6(1) and 7(1) and (2) – allows for the existence of a provision of the same nature as that established in the Hungarian system which provides that the effects of a finding that the term in the GBC is unfair extend beyond the domain of the litigants to other consumers who have entered into similar GBC with the supplier.⁶⁹⁹ Indeed, the deterrent nature and dissuasive purpose of collective actions for injunctive relief, together with their independence in any particular dispute, imply that such actions may be brought even though the terms have not been used in specific contracts.⁷⁰⁰ The *erga omnes* effect in favour of numerous consumers who have concluded contracts with the defendant business using that term but who were not party to the collective proceedings is an effective and proportionate means to contribute to the objective of consumer protection against the use of unfair terms.

The *Invitel* case is significant in the sense that it allowed the CJEU for the first time to shed light on the complex relationship between a finding of the invalidity of an unfair term and an injunction. According to AG Trstenjack, the language of Articles 6 and 7 of UCTD produces a distinction between two categories of collective actions against unfair terms: (i) the procedure for a finding that a term is unfair and (ii) all other appropriate and effective means to be determined by the Member States. A particularly important means in the second category is an action for an injunction which aims to protect the collective interests of consumers.⁷⁰¹ Indeed, having noted that Article 7(2), which explicitly targeted unfair terms ‘drawn up for general use’, required Member States to provide for the possibility of prohibiting the general use of unfair terms and ordering measures to enforce such a prohibition, the AG emphasised that the introduction of actions for injunctions constituted a ‘procedural necessity in order to achieve the objective of the directive’.⁷⁰² Nonetheless, it is necessary to emphasise that the two categories of collective actions are mutually complementary rather than being totally unrelated. In *Invitel*, by recognising or even promoting the Hungarian

696 Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, ECLI:EU:C:2011:806, Opinion of AG on 6 Dec. 2011, paras 35-36.

697 *Ibid.*, para. 51.

698 *Ibid.*, para. 52.

699 Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, CJEU 26 April 2012, ECLI:EU:C:2012:242, para. 39.

700 *Ibid.*, para. 36.

701 C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, ECLI:EU:C:2011:806, Opinion of AG Trstenjak 6 Dec. 2011, para. 64.

702 *Ibid.*, para. 66.

legislation which provides for an extension of the invalidity of an unfair term beyond the individual contract, the CJEU blurred the boundaries between remedies for invalidity and injunctions.⁷⁰³ According to the Court, the *erga omnes* effect of a finding of unfairness on individual contracts provided for by national law removes the term from use and precludes the supplier from continuing to use it against consumers. This not only ensures the effective operation of Article 6(1) of the UCTD but also has a deterrent effect which contributes to consumer protection in the long term. However, it remains to be seen whether Member States will be obliged rather than entitled to introduce *erga omnes* effect in collective actions seeking to invalidate an unfair contract term.⁷⁰⁴

Furthermore, it should be noted that in Poland when the Court for Competition and Consumer Protection in Warsaw determines that a clause in a contract is unfair, this ruling is published and applied to any identical term in any contract proposed to consumers.⁷⁰⁵ This practice suggests that this Member State recognises the *erga omnes* effect of a declaration of unfairness in a collective action for injunctive relief extending to all consumers who have concluded contracts with other businesses using the same term.⁷⁰⁶ Hence, it raises the question of whether a finding of an unfair term in the GBC of a contract concluded between a supplier and consumers may have legal effects for other suppliers who apply identical or similar terms. In *Invitel*, although the CJEU did not explicitly take a stance on this question,⁷⁰⁷ the Advocate General noted

703 Hans-Wolfgang Micklitz, 'A Common Approach to the Enforcement of Unfair Commercial Practices and Unfair Contract Terms' in Willem Van Boom, and Amandine Garde (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Routledge, 2016) 173, 187.

704 Although Hans Micklitz argues that the opinion of the AG and the ECJ judgment read together suggest that the Member States are under an obligation to extend *res judicata* beyond the contracting parties, he calls for further clarification as to the mandatory character of the *erga omnes* effect, *ibid.*, p. 189.

For Member States which do not recognise an *erga omnes* effect while waiting for further clarification from the CJEU, from a Belgian perspective Reinhard Steennot suggests a temporary solution according to which the national courts may take the *Invitel* judgment into consideration 'as a factual element on which they can base their decision to invoke of their own motion the unfairness of the term in an individual dispute between a consumer and that seller'. Reinhard Steennot, 'Public and Private Enforcement in the Field of Unfair Contract Terms' (2015) 23(4) *European Review of Private Law* 589, 616.

705 Report from the Commission to the European Parliament and the Council concerning the application of the Injunctions Directive 98/27/EC, 18 Nov. 2008, COM (2008)756 final, 8; see more in Rafał Mańko, 'The Institutional Implications of the Unfair Terms Directive in Poland' in Jacobien Rutgers (ed.), *European Contract Law and the Welfare State* (Europa Law Publishers, 2012) 141.

706 However, on 5 August 2015 an Act Amending the Act on Competition and Consumer Protection was adopted introducing fundamental reforms of the unfair terms control system. One of the most innovative reforms is that the effect of injunctive actions is only extended to the parties involved in the dispute. Agnieszka Jablonowska, 'Extended legal effect of court rulings in unfair contract term cases – AG's opinion and the recent reform of Polish law' <<http://recent-ecl.blogspot.nl/2016/06/extended-legal-effect-of-judgments-in.html>> access 1 December 2016.

707 Hans Micklitz has argued that although the CJEU was silent on this issue, paragraph 40 provided that the application of the invalidity of an unfair term with regard to all consumers who have concluded a consumer contract to which the same GBC apply ensures that those consumers will not be bound by that term, but does not exclude the application of other types of adequate and effective penalties provided for by national legislation. Thus, this open statement by the CJEU might lead to the conclusion that it is possible to extend the non-binding nature of the unfair term to every other supplier using a similar term. Hans-W. Micklitz and Betül Kas, 'Overview of Cases before the CJEU on European Consumer Contract Law (2008-2013) – Part I' (2014) 10(1) *European Review of Contract Law* 1, 18. On the opposite view, see Bert Keirsbilck, 'The Erga Omnes Effect of the Finding of an Unfair Contract Term: Nemzeti.' (2013) 50(50) *Common Market Law Review* 1467, 1476.

in her opinion that it was not the case that the *erga omnes* effect extended to other suppliers using similar or identical terms but should be limited to only the defendant supplier.⁷⁰⁸ The reasoning for this is that a further extension of *res judicata* to other businesses using the same term would disproportionately interfere with fundamental rights, in particular the right of adversely affected businesses to be heard.⁷⁰⁹ However, in the recent case of *Biuro podróży Partner*,⁷¹⁰ the CJEU has provided a ruling that, at first sight, remarkably departs from the above opinion of Advocate General.⁷¹¹ In this case, a Polish travel agency brought an action to challenge the decision of the Polish consumer protection authority imposing a fine on it due to the finding that the company, in its standard contracts with consumers, had used terms which were regarded as being equivalent to terms which had previously been declared unlawful by a court and had been entered in the public register of unfair terms. In general, the CJEU approved the consumer-friendly approach of Polish law and ruled that:

‘The use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in a national register of unlawful standard contract terms can be regarded as an unlawful act also in relation to a seller or supplier which was not a party to the proceedings culminating in the entry in that register.’⁷¹²

In this regard, the ruling in *Biuro podróży Partner* may be considered as a further development of the *Invitel* case: not only may a judicial decision declaring particular contract terms as unfair be extended to all consumers having concluded similar standard terms with the same suppliers, but it may also produce legal effects *vis-à-vis* other sellers and suppliers. Nevertheless, reading the judgment more closely will reveal that this was not the main value which the jurisprudence had to offer. At the heart of this jurisprudence lies great emphasis on the rights of not only consumers but also traders to be given effective judicial remedies in light of Article 47 of the Charter of Fundamental Rights of the EU. Indeed, the CJEU emphasized that under the principle of effective judicial protection, a trader on whom a fine is imposed must have the possibility of challenging both the assessment of the conduct as being unlawful and the amount of the fine determined by the competent national body.⁷¹³ Of particular importance for the assessment process is that even if the administrative sanction is based on the

708 In contrast, Hugh Beale has argued that orders which have determined that terms are unfair should ideally not only be effective against individual businesses, but should also bind any trade association using the term, and preferably other sellers or suppliers who do so as well, Hugh Beale, ‘Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts’ in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 231, 256-59.

709 Case C-472/10, *Invitel*, Opinion of AG Trstenjak, paras 58-60.

710 Case C-119/15, *Biuro podróży ‘Partner’ Sp. z o.o., Sp. komandytowa w Dąbrowie Górniczej v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, CJEU, 21 December 2016, ECLI:EU:C:2016:987.

711 Also deviating from the Opinion of Advocate General Saugmandsgaard Øe delivered on 2 June 2016.

712 Case C-119/15, *Biuro podróży ‘Partner’ Sp. z o.o., Sp. komandytowa w Dąbrowie Górniczej v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, CJEU, 21 December 2016, ECLI:EU:C:2016:987, para. 47.

713 Case C-119/15, *Biuro podróży ‘Partner’ Sp. z o.o., Sp. komandytowa w Dąbrowie Górniczej v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, CJEU, 21 December 2016, ECLI:EU:C:2016:987, para. 40.

equivalence of contract terms, judicial review should seek to determine whether, in the light of all the relevant circumstances, the terms are materially identical and the sanctions are proportional.⁷¹⁴

5.4. Ultra-Preventive Mechanisms

By the virtue of Article 8, Member States are allowed to adopt or retain more stringent provisions to ensure a maximum degree of protection for consumers, thus going beyond the requirements of Article 7 which only insists on preventing the continued use of unfair terms that were already circulating in the market. Several Member States make use of ultra-preventive control measures to ensure that once general trading conditions are used, they contain no unfair terms. The EU Commission has recognized two types of ultra-preventive control mechanisms: the first possible solution is to require professionals to submit their draft contracts for approval before being used in the market.⁷¹⁵ The second mechanism is to organise collective negotiations between consumer organisations and professional associations on drafting standard form contracts.⁷¹⁶

This second mechanism of ultra-preventive control is actually the earliest form of state control over standard contracts whereby these terms cannot be circulated until they have been pre-approved by a court or administrative authority.⁷¹⁷ Under such a compulsory approval mechanism, if the state authority refuses to approve standard contracts in case they include unfair terms, then standard contracts cannot be used in practice.⁷¹⁸ However, a key problem with the pre-approval mechanism is that it is very time and resource-consuming for the state authority to scrutinize standard terms.⁷¹⁹ Given the abundance of standard contract forms in the modern economy, the state authority seems to be incapable of covering all the proposed terms.⁷²⁰ This partly

714 Case C-119/15, *Biuro podróży 'Partner' Sp. z o.o., Sp. komandytowa w Dąbrowie Górniczej v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, CJEU, 21 December 2016, ECLI:EU:C:2016:987, paras 42-45.

715 From a behavioural economics perspective, Michael G. Faure and Hanneke A. Luth have advocated more substantive control of standard terms, going beyond the fairness test. They have explicitly mentioned pre-approval and collective negotiations as two of the best mechanisms to ensure the quality of standard contract terms. Michael G. Faure and Hanneke A. Luth, 'Behavioural Economics in Unfair Contract Terms' (2011) 34(3) *Journal of Consumer Policy* 337.

716 European Commission, Report on Unfair Terms Directive 93/13, COM (2000) 248 final, p. 24. The European Commission raised following question no. 15 for further discussion: 'Should one provide for and encourage the establishment of systems that encourage the negotiation and discussion of terms with the professionals (obviously without prejudice to competition law)?' In the 'Conclusion' of the conference 'The "Unfair Terms" Directive, Five Years On: Evaluation and Future Perspectives, Brussels Conference 1-3.7.1999 (1999)' organized by the European Commission to prepare for the COM (2000) 248 final, Mario Tenreiro argued that the multi-level system of control, based on administrative control, voluntary agreements and judicial control, is likely to yield the best results in practice.

717 European Commission, Report on Unfair Terms Directive 93/13, COM (2000) 248 final, p. 25; Jean Calais-Auloy (eds) 'Clearing of the Market: the Mechanism for Controlling Unfair Terms (Art. 7)' (The 'Unfair Terms' Directive, Five Years On: Evaluation and Future Perspectives Conference, Brussels 1999), 191.

718 Ibid.

719 Thomas Wilhelmsson and Chris Willett, 'Unfair terms and standard form contracts' G. Howells, I. Ramsay, T. Wilhelmsson and D. Kraft (eds), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010) 158, 182.

720 From the quality of standard contract forms point of view, Clayton Gillette even argued that the success of a pre-approval mechanism largely depends on the institutional capacity of the agency to consider the

explains why the compulsory pre-approval mechanism is only used in certain sectors such as insurance and banking.⁷²¹

The second ultra-preventive mechanism can be found in the Netherlands where the consultation group of the Social and Economic Council (SER) offers a framework for consumer organizations and organizations representing businesses to negotiate and draft bi-partisan general trading conditions (GTC).⁷²² The SER itself is not a party to the agreement, but plays an important role as a consultant which provides parties with procedural rules and expertise.⁷²³ The dialogue between consumer associations and trade organizations on GTCs has been very successful and has resulted in bipartisan GTCs in 50 sectors of trade and industry.⁷²⁴

From a theoretical perspective, such bilateral bargaining mechanisms between consumer organizations and business associations can fully address the problems of terms which are pre-formulated by traders. On the one hand, bipartisan GTCs are bargained rather than presented on the basis of ‘take it or leave it’ for consumers as in the case of the unilateral GTCs; thus there are no longer any problems of market failure due to inherent risks of unilateral standard terms.⁷²⁵ On the other hand, the problem of an unequal bargaining power between individual consumers and businesses can at least be partially redressed by the presence of consumer organizations to negotiate with business associations.⁷²⁶ Accordingly, from the outset, the collective negotiations between consumer associations and trade organizations can produce balanced contractual terms.

Compared with the self-regulation mentioned above in the UK, the Dutch bipartisan GTC is distinctive in a number of factors. Firstly, although the CMA provides guidance to encourage traders to draft consumer-friendly general trading conditions, the general trading conditions are at best still a product of unilateral will. Whereas the SER facilitates a meaningful bargaining process between consumer associations and trader organizations; and thus, the products of such negotiations are bilateral general trading conditions.⁷²⁷ Secondly, the bi-partisan GTCs are supported by an effective complaint-handling system and the Consumer Complaints Board which helps to solve

proposed contract as a whole as well as the effect of a particular clause within it. He thus concluded that due to institutional incapacity, a pre-approval process is unlikely to prove a panacea for the issue of standard contract forms, Clayton P Gillette, ‘Pre-Approved Contracts for Internet Commerce’ (2005) 42 *Hous. L. Rev.* 975, 1012.

721 Jean Calais-Auloy, ‘Clearing of the Market: the Mechanism for Controlling Unfair Terms (Art. 7)’ (The ‘Unfair Terms’ Directive, Five Years On: Evaluation and Future Perspectives Conference, Brussels 1999) 194.

722 Thom van Mierlo, ‘Self-regulation in the Consumer Field: the Dutch Approach’, in Jacobien Rutgers (ed.), *European Contract Law and the Welfare State* (Europa Law Publishing, 2012) 105; Thom van Mierlo, ‘Consumer Protection on the Single Market: Self-Regulation for Dating Services’ in K. Boele-Woelki and F.W. Grosheide (eds), *The Future of European Contract Law, Liber Amicorum E.H. Hondius* (Kluwer Law International, 2007) 411.

723 Charlotte Pavillon, ‘Private Standards of Fairness in European Contract Law’ (2014) 10(1) *European Review of Contract Law* 85, 99.

724 For various bipartisan GTCs, see <https://www.ser.nl/en/about_the_ser/responsibilities/general_terms.aspx> [accessed 15 May 2017].

725 See more about the theory of ‘market failure’ in Section 3 Chapter 2.

726 See more about the theory of ‘unequal bargaining powers’ in Section 4 Chapter 2.

727 Charlotte Pavillon, ‘Private Standards of Fairness in European Contract Law’ (2014) 10(1) *European Review of Contract Law* 85, 100.

disputes concerning the interpretation and application of the bilateral GTCs. A ruling by a dispute committee can stimulate the parties to improve the GTC. In the words of Thom van Mierlo, ‘bi-partisan GTC, adequate complaint handling and easily accessible dispute resolution, together they form a splendid triptych, like a Dutch master.’^{728, 729}

5.5. Concluding Remarks

This section has shown that although the UCTD does not seek to harmonize enforcement mechanisms in the field of unfair terms, the developments promoted by the CJEU have significantly influenced national procedural law by virtue of the principles of effectiveness and equivalence. Of particular significance is the evolution of the CJEU’s case law which has determined that the national courts are not only entitled to but are also obliged to police *ex officio* unfair terms in consumer contracts. These judgements obviously reflect the willingness of the CJEU not only to assist individual consumers who are ill-equipped in enforcing their legal rights but also to remove the incentives of sellers and suppliers to draft future unfair terms.

However, regardless of the CJEU’s efforts to reinforce consumer protection, it seems unwise to solely depend on individual actions in the battle against unfair terms. Firstly, as long as unfair terms are not brought before the courts, the obligation of the national courts to invoke of their own motion the unfairness of a contractual term is not actually valuable. Secondly, given the nature of the unfair terms which are challenged: standard terms drafted for general use, an action initiated by an individual consumer to seek the invalidity of an unfair term does not have direct implications for the use of this term by other consumers. Accordingly, not only are various unfair terms not challenged before the courts, but also even the best judicial control cannot prevent traders from bringing unfair standard terms into the market. To this effect, state agencies and/or consumer organizations should be granted legal standing to defend the collective interests of consumers. Such collective mechanisms are needed for a dual purpose: firstly, to create procedural powers that isolated individual consumers lack when claiming individually and, secondly, to obtain a more strategic objective of not only invalidating unfair terms but also halting the continued use of such terms in the market. Indeed, in the context of an action seeking an injunction against unfair terms, the CJEU has confirmed and arguably encouraged an extension of the effects of the invalidity of unfair terms *via* widening the effects of the judgment beyond direct litigants. That is to say when the national courts set aside an unfair term, the judgment affects not only the consumers represented, but also all consumers who have concluded a contract with that particular defendant. By so doing, these judgments by the CJEU play a significant role in interweaving individual and collective enforcement proceedings and in enforcing substantive rules in the field of unfair terms.

728 Thom van Mierlo, ‘Self-regulation in the Consumer Field: the Dutch Approach’, in Jacobien Rutgers (ed.), *European Contract Law and the Welfare State* (Europa Law Publishing, 2012) 105, 108.

729 More broadly, the effective operation of this model is largely indebted to the national culture of social dialogue and resolving disputes out of court in the Netherlands, see Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Bloomsbury Publishing, 2012) 130.

As far as the institutional framework is concerned, in most Member States both consumer associations and public authorities are entrusted with the authority to protect the collective interests of consumers in the field of unfair terms. However, it has been shown that national regulatory traditions and culture are crucial factors in understanding whether consumer associations or public agencies are the leading actors in combating unfair terms. With the same line of argument, while ultra-preventive mechanisms such as collective bargaining between consumer associations and business organisations for drafting bipartisan general trading conditions are theoretically sound, their success is largely indebted to national legal culture. For legal systems that do not have a traditional culture of well-organized private associations, it would seem to be more effective to depend on strong public agencies when combating unfair terms.

4

6. CONCLUSION

This chapter has demonstrated that the configuration of the unfair terms control regime in Europe has been shaped by a continuous interplay between national law and European law. The control regime enshrined in the UCTD has inherited the characteristics of the three waves of legislation in the EU Member States which aim to control standard terms, especially in the interest of consumers. Simultaneously, when the UCTD was finally adopted in 1993, it laid the foundations for the fourth wave of legislation on unfair terms in the Member States through requiring the Member States to update their own legislation or even to introduce new laws which must meet minimum standards for protecting the consumer against an abuse of power by the seller or supplier. For this purpose, the UCTD adopted a holistic approach towards controlling unfair terms through providing: (i) substantive provisions which enshrine consumers' rights to 'transparent' and 'fair' standard terms in all market sectors, and (ii) procedural provisions which offer adequate and effective means to prevent the continued use of unfair terms. Of particular importance is that the Directive enshrines the model of substantive (un)fairness, rather than merely procedural (un)fairness and thereby allows the courts to directly review the balance between the rights and obligations arising from contractual terms. In this connection, the standard-based approach, which is manifested in the general criteria of a significant imbalance and good faith in the unfairness test, is perfectly combined with the rule-based approach, which is evidenced by the indicative list of unfair terms annexed to the Directive to ensure the safety-net function of the Directive in catching future unfair terms while providing concrete guidance to all stakeholders. At the same time, the UCTD envisions *ex ante* preventive action as an essential supplement to traditional means of *ex post* action initiated by individual consumers. There is strong evidence that actions initiated by collective associations or national consumer authorities have effectively protected consumers from being bound by unfair terms.

The interplay between European law and national law has now encouraged dialogue between the national courts which are in charge of applying the national law implementing the Directive in practice and the CJEU which is empowered to interpret the meaning of the UCTD. As a final interpreter of the provisions of the UCTD, the

CJEU has been very active in unleashing the potential power of the control regime under the UCTD and thereby playing a significant role in the development of European rules on unfair terms. The CJEU has shed light on a number of important issues ranging from the meaning of the core terms excluded from the unfairness test,⁷³⁰ the legal consequences of a violation of transparency principle,⁷³¹ the function of the national default rule as a benchmark to evaluate the unfairness of a term, the legal nature of the indicative terms listed in the Annex to the Directive,⁷³² to the doctrine of *ex officio* and other issues pertaining to the effective protection of consumers.⁷³³

To a large extent, the recent developments in the case law resonate with the equivalent provisions of the PECL, ACQP, DCFR and CESL to eventually determine the shape of the legislative control of unfair terms in European law.⁷³⁴ The future development of controlling unfair terms will arguably centre on codifying the case law to ensure legal certainty and predictability. In this respect, it can also be imagined that clarification may be added to reduce the legal uncertainty regarding the scope of the core terms, the legal sanctions for a breach of the transparency requirements, or the legal effects of collective actions. Furthermore, it is not unforeseeable that the indicative list of unfair terms may develop into a grey list of presumptively unfair terms and a limited blacklist of prohibited terms, thereby formulating a tripartite scheme for controlling the substantive unfairness of terms. More difficult questions will centre on the desirability of extending the scope of unfairness control to cover individually negotiated terms or contracts between businesses and small and medium-sized enterprises (SMEs). It remains to be seen how the debates on policy choice will shape the future control regime of unfair terms in Europe.

730 See the summary in Section 2.3 of this chapter.

731 See the summary in Section 3.4 of this chapter.

732 See the summary in Section 4.5 of this chapter.

733 See the summary in Section 5.4 of this chapter.

734 For an overview of the control regime in the UCTD, PECL, ACQP, DCFR, CESL, see table 1 in the Appendix.

Chapter 5

COMPARATIVE SYNTHESIS, EVALUATION AND SUGGESTIONS

This chapter aims to make a comparative analysis of the discussions conducted in the two previous chapters. Firstly, it will ascertain and explain the similarities and differences between Vietnamese and European law concerning standard terms. Secondly, it will evaluate the current framework of Vietnamese and European law subject to three criteria: the quality of consent, efficiency, and justice. On the basis of the findings of the preceding sections, the following section aims to directly provide an answer to the research question: what lessons from European experiences can be learnt in order to reform the current framework of Vietnamese law. In doing so, it will propose a more feasible and comprehensive scheme for the legislative control of standard terms in consumer contracts in Vietnam.

1. COMPARATIVE SYNTHESIS

1.1. Policy Choice in Designing Regimes Controlling Standard Terms

As a matter of fact, both the EU law and the Vietnamese law on standard contract terms have been developed against the background of consumer protection policies. Undeniably, both legislative schemes for controlling standard terms in the UCTD and CPL have been established with the similar objective to protect the consumer against an abuse of superior bargaining power by the seller or the supplier. At the heart of these schemes is a commonly shared presumption that the consumer, as the weaker party to the contract, needs to be protected. In Europe, the CJEU has consistently explained the *rationale* behind the UCTD for the protection of the consumer who is weaker than the trader in terms of both bargaining power and the level of knowledge:

‘The system of protection introduced by the Directive is based on the idea that the consumer is in a weak position *vis-à-vis* the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.’¹

1 Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, para. 25.

The fairness scheme in the UCTD is therefore warranted on the basis of the ‘abuse theory’ which aims to react to the unequal bargaining power between the consumer and the seller or supplier. In an identical fashion, in Vietnam, the Drafting Committee of the CPL has vindicated its actions against onerous standard terms by explicitly stating that ‘there is unequal bargaining power between businesses and consumers; as a result, businesses can manipulate their superior power and abuse consumers.’² The Drafting Committee’s position is reinforced by a shared view among Vietnamese scholars that the protection of the weaker party is a strong principle to rationalize the legislative control of standard terms.

Simultaneously, in Europe, the particular aim of the UCTD is to enhance the function of the internal market. In the Report on the implementation of the UCTD, the Commission proclaims that terms not individually negotiated have the potential to undermine not only the interests of the consenting party but also the legal and economic order as a whole:

‘General contractual terms and conditions aim to replace the legal solutions drawn up by the legislator and at the same time to replace the legal rules in force in the Community by unilaterally designed solutions with a view to maximizing the particular interests of one of the parties.’³

In the view of the EU Commission, the advent and omnipresence of general terms and conditions have brought an inherent problem to the economy that may prevent parties from an efficient arrangement where ‘a risk should be borne by the person who is best able to prevent this risk or to insure himself against it.’⁴ Against this background, there appears to be a second *rationale* justifying the fairness control in the UCTD that is driven by the very nature of standard terms. That is to say, the fairness control of standard terms is needed to address a market failure caused by information asymmetry between their suppliers and counterparties.

It should be emphasized that although Vietnamese law also takes into account the inherent nature of standard terms, the mainstream of the Vietnamese legal community has not considered the market failure concerning standard terms as an independent reason to justify the judicial control of standard terms. The Drafting Committee of the CPL was merely of the view that consumers are in a particularly vulnerable position when standard contracts are used. Indeed, given that standard terms are pre-formulated by businesses and are offered to consumers on a ‘take it or leave it’ basis, consumers do not have any opportunity to negotiate or influence the contractual terms governing their rights and duties. Accordingly, the desire to protect the consumer as the weaker party is particularly reinforced by concerns over standard contract forms, which explain and have resulted in the current Vietnamese legislative scheme for controlling onerous standard terms in consumer contracts. Taking into consideration the nature of standard

2 See the discussions in Section 2 of Chapter 3.

3 Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts COM (2000) 248, p. 11.

4 Ibid.

terms, however, the Vietnamese legislators have not paid much attention to the idea that legislative control is needed as a reaction to market failure. Depending solely on the idea of an unequal bargaining power between consumers and businesses, the Vietnamese legislators have faced a significant challenge in defending their choice to extend the scope of the legislative control of onerous standard terms beyond consumer contracts. From 2017 onwards, with the entry into force of the new 2015 Civil Code regulating, among other things, standard terms, judicial control will now apply to not only consumer contracts as provided for by the CPL but also to contracts between businesses themselves. An immediate question is whether the need for fairness control as a reaction to an abuse of power is sufficiently sound if both parties are businesses which have equal bargaining power. Unfortunately, the Drafting Committee of the 2015 Civil Code did not explicitly deal with this question and academia therefore have had ample opportunity to debate whether this is an over-regulation.

In contrast, the question of the *rationale* underlying fairness control in contracts between businesses has been widely discussed in Europe. In this connection, it should be noted that, except for the UCTD which only focuses on consumer contracts, all other European instruments studied above, including the PECL, ACQP, DCFR and CESL, provide for the legislative control of unfair standard terms in B2B contracts; and the *rationale* behind such a fairness control is to address market failure due to inherent information asymmetry between parties using standard terms and their counterparties.

To the extent that it is sufficiently effective, any legislative control of unfair terms impairs the freedom of the parties to determine their terms. In this field of unfair terms, freedom of contract has lost its place as the central paradigm of the legal system, while the principle of the protection of the weaker party has gained an increasing role in shaping the legislative scheme. Be that as it may, the role of the freedom of contract still cannot be overlooked; legislators in the EU and Vietnam have both attempted to strike a balance between protecting consumers against unfair terms and respecting the legitimate interests of business entities. In the EU, this can be seen in the exclusion of individually negotiated terms and the core provisions of contracts from the fairness test. In Vietnam, the lack of a general clause on a fairness test and the application of the information paradigm as a primary strategy to address the problems of standard terms are evidence that party autonomy and the freedom of contract still significantly shape the legislative control scheme.

1.2. Legislative Scope of the Control of Unfair Terms

Having departed from general observations, it is now time to compare in more detail the specific system of the legal control of standard terms under Vietnamese law and EU law. Three main areas should be respectively studied: the scope of the protection proposed, the legal techniques used and the enforcement mechanism employed by the respective laws.

1.2.1. *Concepts of a Consumer and a Trader*

Apparently, the first common denominator between the UCTD and CPL is that they have a similar scope *ratione personae* which is confined to contracts between a consumer and a supplier or a seller. However, there are significant differences between the concept of a consumer under Vietnamese law and his/her counterpart in EU law. Under EU law the concept of a consumer is defined as any natural person who is acting for purposes outside of his/her trade, business or profession. The CJEU has consistently demonstrated that it adopts a highly cautious approach towards interpreting the concept of a consumer and has reiterated that the Directive does not afford protection to legal persons even if they are in a position which is similar to that of a consumer. In contrast, under Vietnamese law all final addressees of transactions are protected as consumers, provided that a purchase is for private use. This means that the Vietnamese concept of a consumer provides a wider scope of protection than under Directive 1993/13. Indeed, legal persons may be treated as consumers under Vietnamese law. From a comparative point of view, such a broad concept of a consumer under Vietnamese law tends to imply that it does not necessarily trigger vigorous debates as witnessed in the EU as to whether SMEs deserve to be protected as consumers. Theoretically, SMEs are considered to be consumers under Vietnamese law and thus they enjoy an equal level of protection as that provided for any natural persons.

As far as the other party to a consumer contract is concerned, regardless of the different terminology which is used, the content of the concept of a business under Vietnamese law is fairly identical to the concept of a seller or a supplier under the UCTD. It covers all natural and legal persons in the course of their business or profession. However, given the CPL's explicit requirement for a profit-making purpose to be a condition for defining a business, this seems to implicitly exclude public organizations from the concept of a business. On the other hand, the concept of a seller or supplier has been widely interpreted by the CJEU to include landlords, lawyers or even public utility undertakings. Such a difference is significant when it comes to the necessity of controlling unfair standard terms in the areas of providing public services in the general economic interest such as water or electricity.

1.2.2. *Concepts of Standard Form Contracts and Terms Which Have Not Been Individually Negotiated*

The CPL and UCTD have a comparable scope *ratione materiae* which is confined to terms which have not been individually negotiated rather than all kinds of contractual terms. Indeed, the concept of terms which have not been individually negotiated is a new European law concept which has been devised to include not only standard contract terms but also any terms that have been drafted unilaterally with the intention of narrowing their application to a single transaction. Under Vietnamese law, there are two separate concepts, namely 'pre-formulated contracts' and 'general trading conditions', which have the same content as their European counterpart. Indeed, while the concept of general trading conditions is used to refer to standard terms which have

been formulated and published by the business to be used in multiple transactions with different consumers, the concept of pre-formulated contracts includes contractual terms which are drafted by businesses and only applied to a single transaction. However, given the CPL's identical legal treatment of both concepts, a sharp distinction between the two concepts has no significant implications in practice.

From a theoretical perspective, the most significant difference between Vietnamese law and EU law as to the legislative scope of control lies in the fact that Vietnamese law does not contain limitations on its objective scope of application as provided for by the UCTD. Indeed, it is well known that the UCTD excludes two kinds of terms from its fairness test: terms that reflect 'mandatory statutory or regulatory provisions' (Article 1(2)) and terms that relate to the definition of the 'main subject matter of the contract' or the adequacy of the price or remuneration insofar as those terms are expressed in plain, intelligible language (Article 4(2)). As far as the former is concerned, the CJEU has explained that the exclusion of mandatory rules from the fairness control is justified by the fact that national legislatures have already struck a balance between all the rights and obligations of the parties to certain contracts. As for the latter limitation, after having firmly held that such exclusion in Article 4(2) must be strictly interpreted since it provides an exception to the fairness test, the CJEU explained that the main subject matter refers to terms that lay down essential obligations, rather than ancillary obligations enshrined in the contract. This distinction can be justified by the fact that they are terms reflecting ancillary obligations that are often overlooked by consumers, which, as a result, provides no incentive for competition among suppliers or sellers and this explains why the law should be in place to control the fairness of such terms.

From a practical perspective, however, as can be seen from the legal techniques available to the Vietnamese courts, because the core terms are automatically exempt from substantive control they do not fall within the scope of the blacklist of onerous terms. Nevertheless, given the overarching scope of formal control, core terms must satisfy transparency requirements, which are comparable to the requirements provided for by the UCTD. Consequently, it can be argued that the current legal treatment of core terms is practically identical in both Vietnamese law and EU law.

1.3. Legal Techniques

Having identified the parallel rationales as to why Vietnamese law and European law design their legislative control regime around unfair standard terms, the legal techniques available for achieving their objectives also need to be compared. At first sight, it is possible and necessary to pinpoint the fact that Vietnamese law and European law pay attention to both the procedure and the substance of standard terms. In Vietnam, procedure-based schemes are laid down to make standard terms available and understandable, thereby enabling consumers to select the most suitable or acceptable deals. This is similar to the approach of all European sets of rules concerning transparency requirements. In contrast, under substance-based schemes legislative attention is transferred from focusing on the unfair procedural aspect to emphasizing the unfair substantive effects of standard terms. By adopting this approach both

Vietnamese law and European law directly protect consumers from being exploited by a number of terms that disproportionately favour businesses' own substantive interests. However, by taking a closer look at their legislative schemes one can see that the Vietnamese approach depends a great deal on procedure-based methods, while its European counterpart seems to focus more on substance-based methods. Indeed, the primary strategy of Vietnamese law to address the inherent problems of standard terms is to make use of procedure-based schemes which primarily target the transparency of the market. On the other hand, although it still emphasizes the significance of the transparency principle, the European approach predominantly focuses on protection against unfair substantive outcomes under the unfairness test. The following subsections will analyse in further detail the differences and similarities between the Vietnamese and EU approaches concerning these issues.

1.3.2. The Principle of Transparency

The most striking similarity between Vietnamese law and European law regarding the legal techniques for policing standard terms lies in their approach to the transparency of standard terms. In particular, both Vietnamese law and European law provide for two sub-categories of rules: the first subcategory requires traders to take reasonable steps to draw the attention of the consumer to the existence of standard terms; the second attempts to compel traders to draft their standard terms in plain and intelligible language.

1.3.2.1. Duty to Draw the Other Party's Attention to Terms Which Have Not Been Individually Negotiated

Although under various Member State laws the question of whether standard terms have been successfully incorporated into the contract is a matter to be determined by the general rules on the formation of a contract, under European private law this issue has become a vital part of the principle of transparency in the form of the duty to provide the other party with any terms which have not been individually negotiated. While such a duty is explicitly laid down in the PECL, the Acquis Principles, DCFR, and CESL, it is only implicitly imposed on the supplier under the UCTD. Indeed, this duty can be deduced from example (i) of the Annex according to which a term having the object of irrevocably binding the consumer to terms with which he/she has no real opportunity of becoming acquainted before the conclusion of the contract is regarded as unfair. Moreover, the CJEU seems to suggest that the requirements of the principle of transparency under the UCTD should be broadly interpreted to include the supplier's duty to provide the consumer with the terms. Substantially, this duty has a similar content to the one prescribed by the other instruments: it requires the supplier to take reasonable steps to draw the other party's attention to any terms which have not been individually negotiated.

Despite using different language, Vietnamese law effectively follows a similar approach to ensure that standard terms should be accessible to consumers. To this

effect, the CPL explicitly provides that before the conclusion of a contract, traders must provide a reasonable period for consumers to examine the standard terms. This rule undoubtedly requires the availability of not only standard terms but also a reasonable period for consumers to evaluate the risks and benefits of such standard terms. This is indeed in line with the assumption of Vietnamese legislators that rational, but busy consumers lack the necessary time and opportunity to make the best choice.

1.3.2.2. 'Plain and Intelligible' Language

In Europe, all the sets of rules which have been studied provide that terms that are not individually negotiated must be drafted in plain and intelligible language. The CJEU has shed significant light on the requirement of 'plain and intelligible' language under the UCTD and, as the CJEU has precisely stated, this rule must be interpreted broadly. It requires that the consumer should be able to comprehend the legal and economic consequences of the contractual terms. Thus, it is not only the wording of the contract itself, but also the relevant information communicated to the consumer that should be assessed.

In Vietnam, although the similar objective of the transparency of standard terms has been sought, the Vietnamese Government has taken a step further by prescribing very detailed regulations to ensure that consumers are placed in the best position to understand standard terms which are offered to them. Indeed, there are specific mandatory requirements which dictate that (i) the language of standard terms must be Vietnamese, (ii) the font size of the words used must be at least 12 pt, and (iii) the contract must be in writing. Additionally, it is submitted that the vague language of the general provision of the CPL regarding the requirement of transparency has been intentionally designed to ensure not only that standard terms shall not be concealed in fine print but also that such terms shall not be expressed in complex, difficult or technical language.

It is therefore indispensable to determine a benchmark to test whether traders have fulfilled their obligations or not. However, both the CPL and the UCTD are silent in this regard. Interestingly, this issue has been resolved in the recent decision in *Kásler* where the CJEU explicitly employed the standard of the average consumer who is reasonably well informed, observant and circumspect to test whether a contract term has been drafted in plain, intelligible language. Hence, the yardstick applied is whether, as far as all the relevant information has been taken into account, the economic consequences of the terms have been clearly presented to the consumer to enable an average consumer to understand them.

1.3.2.3. Consequences of a Breach of the Transparency Requirements

Additionally, the CPL fails to provide any effective sanctions for a breach of the transparency requirements. The traditional rule of *contra proferentem* is laid down in both the Civil Code and the CPL, but this kind of sanction seems to be ineffective to prevent businesses from drafting terms in unreadable fine print in order to exploit

consumers. When it comes to European law, although the text of the UCTD also lacks provisions on sanctions, the drafters of the Acquis Principles, the DCFR and the CESL have seriously attempted to supplement this rule. The most radical sanction offered by the DCFR is that a contract term may be deemed to be unfair on the sole ground of the non-transparency of the term. This sanction has not been inherited by the CESL which provides that the non-transparency of a term is the first factor to be taken into account in assessing the unfairness of such a term. This solution under the CESL, however, is in line with the well-established case law of the CJEU, which has concluded that where a term is not in compliance with the transparency requirements, a national court must consider this when assessing the unfairness of such a term.

1.3.3. The Principle of Fairness

As mentioned above, the general standard of fairness embodied in Article 3 of UCTD or other equivalent provisions of the PECL, ACQP, DCFR and CESL means that European law is significantly different from Vietnamese law because the latter only attempts to police a limited number of standard terms. Thus, one can easily argue that European law better protects consumers from substantive unfair terms than Vietnamese law. However, in order to verify this statement, it is necessary to carefully analyse the list of potentially unfair terms in UCTD and the blacklist of prohibited terms in the CPL. Obviously, the fact that the annexed list of UCTD is ‘indicative’ means that the terms are not considered to be absolutely unfair. For the purpose of making comparisons between European law and Vietnamese law, however, the following subsections assume that the terms identified in the annex to the UCTD are indeed deemed to be unfair.

1.3.3.1. A Blacklist and Grey List of Unfair Terms

In order to provide more concrete guidance for the general fairness clause, the UCTD has an attached Annex which encompasses ‘an indicative and non-exhaustive list of the terms which may be regarded as unfair.’ The Annex catalogues an extensive list of 17 examples of unfair terms; however, the term ‘non-exclusive list’ infers that the absence of a term from the list does not mean that this term is automatically fair. On the other hand, Vietnamese law provides for an exhaustive list of nine kinds of terms which are always prohibited from being used in standard contracts between traders and consumers.

In the tables below, the blacklist of prohibited terms as laid down in the CPL is compared to equivalent specific examples of types of unfair terms annexed to the UCTD. It is shown that eight kinds of terms laid down by the CPL have their equivalent unfair terms appended to the UCTD. There is only one kind of prohibited term under the CPL (Article 16(d)) that is not included in the annex to the UCTD; however, such terms must always be subject to a general fairness test.

Table 1: Terms that reduce or eliminate traders' primary obligations

Vietnamese law	EU law
Article 16(g) Terms excluding businesses' responsibility for the actions of their agents	Annex 1(n) Terms limiting the seller's or supplier's obligation for his agents promises or making his commitments subject to formality
Article 16(i) Terms allowing businesses to transfer rights to a third party without the consent of the consumer	Annex 1(p) Terms allowing seller or supplier to transfer rights reducing the guarantees for the consumer
Article 16(c) Terms allowing businesses to unilaterally alter the terms of a contract	Annex 1(j) Terms enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason
Article 16(e) Terms allowing businesses to unilaterally interpret contractual clauses	Annex 1(m) Terms giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract
Article 16(d) Terms enabling businesses to unilaterally determine whether the consumers have fulfilled their obligations	
	Annex 1(c) Terms making an agreement binding on the consumer whereas seller or supplier performance condition subject to its own control
	Annex 1(f) Terms authorizing the seller or supplier to discretionarily dissolve the contract
	Annex 1(g) Terms enabling the seller or supplier to terminate indefinite contract without reasonable notice
	Annex 1(k) Terms enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided

Table 2: Terms that may inflate consumers' obligations against the core terms.

Vietnamese law	European law
16(d) Terms allowing businesses to determine or increase the price at the time of the delivery of goods or the supply of services	(l) Terms providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract
16(h) Terms providing that it is mandatory for consumers to perform their obligations even when the businesses in question do not perform their own obligations	(o) Terms obliging the consumer to fulfill all his obligations where the seller or supplier does not perform his obligations
	(h) Terms automatically extending a contract of fixed duration with unreasonably early deadline

Table 3: Terms that delete consumers' remedial rights or inflate consumers' liabilities for a breach

Vietnamese law	European law
16(a) Terms excluding the liability of businesses towards consumers	(a) Terms excluding or limiting liability for death of a consumer or personal injury
16(a) Terms excluding the liability of businesses towards consumers	(b) Terms inappropriately excluding or limiting the legal rights of consumer in the event of seller, supplier or third party's total or partial non-performance
16(b) Terms restricting or excluding the rights of consumers to take legal actions	(q) Terms excluding or hindering the consumer's right to take legal rights
	(f) Terms permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract
	(d) Terms permitting the seller or supplier to retain deposit where consumer cancelling the contract
	(e) Terms requiring disproportionate consumer penalty

At first glance, there are similar types of standard terms which are considered to be so one-sided that they cannot be binding on consumers. However, when looking at the comparative analysis more closely, it reveals that various kinds of prohibited terms presented in Article 16 of the CPL have a broader scope of application than their counterparts in the Annex to the UCTD. The following subsections are devoted to analysing two kinds of such clauses.

(i) Terms that exclude the liability of businesses towards consumers as stipulated by law

Obviously, an exclusion clause is problematic since it provides a shield behind which one party could exempt itself from any liability towards its counterparty. This applies in particular to consumer contracts. However, since exclusion clauses can provide a positive mechanism for allocating risks in numerous specific circumstances, it is a questionable decision to assess exclusion clauses entirely in this negative sense, as has been observed in Vietnamese law. In contrast, EU law provides a nuanced approach to addressing this unfairness problem caused by exclusion clauses. On the one hand, some specific exemption clauses should be made unenforceable if the resulting damage is so severe that an exemption cannot be justified. Therefore, exemption clauses which have the object or effect of excluding or limiting the legal liability of the supplier for negligently causing death or personal injury would be invalid. On the other hand, one should be more cautious by considering some other exemption clauses to be presumably unfair rather than always inherently unfair. This would enable the courts to take the specific circumstances of the transactions into account.

(ii) Terms that confer unilateral decision-making power upon businesses

Similarly, terms conferring unilateral decision-making power upon businesses could be abused to totally change the balance in previously agreed contracts in such a manner that it is detrimental to consumers. These kinds of terms can, however, play an important role in adapting aspects of a contract which are subject to volatile market conditions. Indeed, in contracts of an indeterminate duration such as contracts to supply mobile phones or bank services, the performance of the contract often depends on relatively fluid conditions on the market. In these circumstances, businesses may have a legitimate interest in retaining their flexibility in order to alter certain aspects of the contract.

Vietnamese law and European law deal with unilateral variation clauses somewhat differently. According to Article 16(c) and (d), clauses allowing a trader to unilaterally vary the terms or the price are automatically invalid. However, rather than prohibiting them as in the case of Vietnam, European law allows businesses to preserve flexibility while still respecting consumers' interests. By means of interpreting paragraphs 1(l) and 2(d) of the Annex to the UCTD, the CJEU has consistently held that a unilateral variation clause is fair and is thus valid as long as (i) the contract itself indicates the conditions for changing the price and (ii) consumers must have the right to cancel the contract after having been informed that the trader wishes to change the price.⁵ Similarly, a clause allowing suppliers to unilaterally vary their terms is not unfair if consumers have been given a reasonable time to consider the amendments and the right to terminate, without penalty, before being affected by such a clause.

The two above-mentioned analyses reveal that although the list of prohibited standard terms under Vietnamese law is shorter than the one under European law, it does not necessarily mean that the former is less strict than the latter in protecting consumers. However, the real question is whether such stricter protection is legitimate or whether it turns out to be over-inclusive, thereby failing to take into account the trader's legitimate interests.

1.3.3.2. General Clause on Unfair Terms

As discussed above, the key characteristic of EU law that helps to distinguish it from Vietnamese law is the existence of a general standard of unfairness. Arguably, the lack of a general clause having the effect of catching similar potentially onerous standard terms has prevented the CPL from becoming an effective tool to be promptly responsive to social and technical developments in the future. More significantly, it implies that any onerous standard terms that fall outside the blacklist are generally binding insofar as they satisfy procedural requirements. In contrast, the mere presence of the general standard of fairness in EU law means that, in principle, standard terms are not binding unless they survive the fairness test. In this connection, it is essential to understand how the fairness test has been formulated by legislators and then interpreted by the CJEU.

⁵ Case C-472/10 *Invitel*; Case C-92/11 *RWE Vertrieb A*, Case C-26/13 *Kásler*. See the discussion in Section 4.2 Chapter 4.

The general clause laid down in Article 3 UCTD provides 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.’ The PECL, ACQP, DCFR and CESL have adopted similar fairness tests despite some minor linguistic differences. Accordingly, lying at the very heart of the fairness standard are the following two general notions: a ‘significant imbalance’ and ‘good faith’ the meaning of which has been significantly clarified by the CJEU. In particular, in order to ascertain whether a significant imbalance in the parties’ contractual rights and obligations exists, national courts must do so against the benchmark of the default rules in national law through a comparative test. However, since suppliers or sellers may have legitimate interests in derogating their standard terms from statutory provisions, the national courts must then establish whether the contractual arrangements of the suppliers or the sellers are unjustified under the requirement of good faith. That is to say, whether the seller or supplier, dealing fairly and equitably with the consumer, could *reasonably assume* that the consumer would have agreed to such a term in individual contracting negotiations.

1.3.3.3. Legal Consequences of Unfair Terms

Under Vietnamese law, the legal consequences of onerous standard terms falling within the scope of Article 16 CPL are determined by the general doctrine of invalidity prescribed by the Civil Code. Logically, since Article 16 CPL belongs to the statutory prohibitions which private parties cannot otherwise provide, the blacklisted terms are deemed to be absolutely invalid. This implies that the terms are automatically considered invalid and any interested party, including the courts or administrative agencies, can invoke this invalidity. Additionally, given the fact that such terms are completely prohibited from being used and given the traditional judicial approach of refraining from rewriting contractual terms, it is unlikely that prohibited terms will be modified by the Vietnamese courts. Furthermore, the contract shall continue to be valid if it is capable of continuing in existence without the prohibited terms.

In contrast, the legal consequences of unfair terms, according to Article 6(1) UCTAD, are phrased in the neutral concept of being ‘non-binding’, thereby leaving the Member States with a great deal of freedom to decide the precise meaning of this legal concept in the context of their legal system. Accordingly, several Member States have chosen a system of absolute nullity, while other Member States have opted for a legal sanction of relative nullity. The characteristic of the latter is that the consumer must invoke the invalidity of unfair terms and thus it seems to be difficult to align it with the CJEU’s doctrine of *ex officio* and Article 7(1) UCTD which are to ensure the effective enforcement of the law on unfair contract terms. In this connection, the CJEU has explicitly clarified that Article 6(1) of the UCTD requires national courts to exclude the binding effect of an unfair term as regards the consumer, without being authorized

to revise the content of that term to an acceptable level.⁶ There are two persuasive reasons why the CJEU does not allow the national courts to rescue the invalidity of unfair terms. Firstly, it is a matter of effectiveness since, by rescuing unfair terms, national courts may eliminate the dissuasive effect on suppliers stemming from a strict non-application of the respective terms. Secondly, it is a matter of consistency between the effects of Article 6 and Article 7 UCTD in achieving the dual aim of providing consumers with an effective and adequate remedy and discouraging suppliers from using unfair terms in their contracts.

Additionally, Article 6(1) also lays down the criteria for determining the effect of unfair terms on the validity of the contract as a whole. The test is whether the contract is capable of continuing its existence without the unfair term. However, according to the CJEU, the test must be assessed on the basis of objective criteria: it cannot be understood as meaning that a court can base its decision exclusively on a possible advantage of the annulment of the contract for the consumer.

5

1.4. Enforcement Procedures

1.4.1. Individual Private Enforcement

A common characteristic of private law is that it is not self-implementing; in principle, individual consumers must initiate their actions to enforce their rights. Accordingly, although the UCTD provides that ‘unfair terms’ are not binding on consumers, whether such private rights are realized largely depends on whether consumers are aware of their rights, and whether they have financial incentives for bringing their cases before the courts. However, the CJEU consistently held that effectively protecting the consumer against unfair terms under the 1993 Directive may only be achieved if national courts have the authority to raise issues of unfair terms of their own motion and thus unfair terms will not be binding on consumers regardless of whether they have successfully contested the validity of such terms. The CJEU has stated that the national courts are not only entitled but are also obliged to police *ex officio* unfair terms in consumer contracts. On the other hand, according to the CJEU, the non-binding nature of unfair terms should be interpreted in the sense that national courts are not allowed to modify the content of unfair terms, but are merely permitted to set aside its application towards consumers. These judgments obviously reflect the willingness of the CJEU not only to assist individual consumers who are ill-equipped to enforce their legal rights but also to remove the incentive for sellers and suppliers to draft future unfair terms.

Similarly, under Vietnamese law, the CPL only states that prohibited standard terms shall have no legal effects between the parties; however, unlike the CJEU, the Vietnamese courts have not yet provided a further interpretation. Having said this, it is submitted that when prohibited terms are used, they are absolutely invalid due to a violation of mandatory rules. Accordingly, under the well-established doctrine of absolute invalidation, the Courts shall be *ex officio* entitled to rule on the invalidity

6 Case C-618/10, *Banco Español de Crédito SA*. See the discussion in Section 4.2.3.2 of Chapter 4.

of such terms. However, it should be noted that these observations are confined to prohibited standard terms laid down in Article 16 CPL; such observations should be reconsidered if substantive control is extended to all kinds of standard terms as will be suggested below.

1.4.2. Public and Private Collective Enforcement

In the battle against unfair terms, both Vietnamese and EU legislators hold a common view that administrative agencies or consumer organizations must be endowed with appropriate and effective means to prevent the use of such terms. Such collective mechanisms are designed to attain the strategic objective of targeting standard terms which apply to multiple parties rather than to only single consumers in individual proceedings. To this end, in Vietnam the VCA has been delegated with especially wide powers to perform an *ex-ante* control of standard terms. To be more specific, it is in charge of organizing the mandatory registration of particular kinds of standard contract forms and general trading conditions used in transactions that supply or provide goods and services deemed to be essential for consumers' daily lives. To put it differently, various kinds of standard terms must be pre-approved by the VCA on a compulsory basis before being used in the market. It is suggested that although, up to now, the VCA has been fairly successful in applying this mechanism to screen standard terms, the mechanism should be confined to limited kinds of transactions. Due to its very time and resource-consuming process, it is doubtful whether the compulsory approval mechanism can be extended to more or even all kinds of transactions according to the reform plan proposed by the VCA.

In contrast, in the EU Member States consumer associations or public authorities are entrusted with the authority to initiate collective actions in the field of unfair terms. The CJEU has consistently held that collective actions against unfair terms have both deterrent and *erga omnes* effects. Firstly, collective actions may be undertaken to challenge not only terms that are used in the market but also terms that are merely suggested to be used. Secondly, a finding of an unfair term by a national court seized of a collective action for an injunction produces effects for all consumers who have concluded contracts with the defendant business to which the same general business conditions apply. In this regard, collective actions are also useful in preventing new consumers from being victims of unfair terms.

To be fair, in the EU Member States a mandatory pre-approval mechanism also exists in some particular markets such as insurance contracts, but it is not a primary strategy as in Vietnamese practice. Additionally, under threat of litigation initiated by state agencies, various standard terms are revised to meet the legal requirements; however, these actions are of a voluntary nature and, as opposed to Vietnamese practice, traders' rights to be heard in the European adjudication process are appropriately guaranteed. Moreover, under the guidance of the competent state agency, the practice of drafting bi-partisan general trading conditions between consumer associations and professional associations is encouraged in several Member States. Thus, it is fair to say that irrespective of their common views regarding the significant role of public

agencies in combating unfair terms, Vietnamese law mainly applies a rigid method of market-entry control, while European law has successfully generated a more responsive regulation planned to curb and channel corporate practices.

2. EVALUATION

In this section, the legislative schemes for controlling standard terms in Vietnamese law and European law will be evaluated in order to assess whether they are capable of enhancing the quality of consent, efficiency, or contractual justice. Although it has been submitted in chapter 1 that a consent-based approach is itself insufficient to deal with the problems of standard terms without further assessing their efficiency and fairness, the existence of mutual consent is always a prerequisite for justifying the enforceability of standard terms. The bottom line is that the legal nature of rights and duties arising from standard form contracts depends on an inquiry as to what can be considered to be consent as far as the adhering parties are concerned.

2.1. Consent

It has been argued that the most noticeable problem with standard terms is that they are pre-formulated by one party while the counterparty cannot have any influence on their content. A lack of adhering parties' consent to standard terms poses a challenge for the enforceability of such terms. However, it is submitted that consent should not be seen as a binary concept in the sense that either a contracting party gives his/her informed, particularized and bargained consent or he/she does not consent at all.⁷ In contrast, it is conceivable that one can identify a continuum of consent to different kinds of standard terms ranging from low-quality consent such as a 'mere notice' in wrap contracts to high-quality consent such as a particularized consent to one-sided terms.

At one end of the consent spectrum, a mere notice is equated with consent. Frequently, in the context of click-wrap and browse-wrap contracts, standard terms may be effectively incorporated into a binding contract as long as there is evidence that the parties have expressed their general consent by signing or clicking on to the terms for use.⁸ In this sense, consent may often be associated with a mere notice and a reasonable opportunity to discard the suggested contract terms may justify the state enforcement of standard terms. The minimum requirement of consent is self-explanatory: a contract creates a legal relationship between the parties thereto, not because the law determines that this is so but because both parties want to be bound. Consequently, if traders want to revoke contractual terms against their counterparties, the former must be able to establish that the latter have consented – even in a general sense – to their terms.

At the other end of the spectrum, particularized consent to specific terms is required to enforce several kinds of various terms which seem to be one-sided and to

⁷ See the discussion in Section 2.2 of Chapter 2.

⁸ Christine Riefa. *Consumer Protection and Online Auction Platforms: Towards a Safer Legal Framework*, (Ashgate Publishing, Ltd., 2015) 128-131.

the detriment of consumers. It is sometimes the case in several jurisdictions that, apart from the general issue of the incorporation of standard terms, there is an additional requirement of consent as to the specific issues determined by the standard terms in question which are presumed to be one-sided. For example, according to the doctrine of *'doppia firma'* ('double signature'), presumptive one-sided terms must be 'specifically approved in writing' by the adhering party in order to be successfully incorporated into the contract.⁹ Particularized consent may be theoretically sound since it is believed that the opportunity for adhering parties to understand the terms would be significantly improved. Consequently, it is likely that such parties can make their informed choice as to the suspicious terms.¹⁰

Under Vietnamese law and European law, in general, a required level of consent to create enforceable standard terms lies somewhere between the two ends of the spectrum. Indeed, not only must all terms be brought to the attention of consumers, but they must also be drafted in plain and intelligible language. The general approach to the medium level of consent should be praised since a legislative scheme that requires informed, particularized and bargained consent to every standard term is so arduous that it may entirely reverse the economic benefits of a non-negotiated paradigm in modern society.

Apart from this general view, due to the existence of the general test for unfair terms, the functions of consent under European law are more nuanced than under Vietnamese law. In fact, while under Vietnamese law a medium level of consent would make standard terms generally enforceable, with the exception of the blacklist of nine kinds of terms, a further fairness test in European law invalidates non-core terms which do not comply with the requirement of good faith and give rise to a significant imbalance in the parties' rights and obligations. The core terms – the price and the subject matter – are excluded from the fairness assessment as long as they are expressed in plain and intelligible language. Subsequently, the CJEU has consistently determined that the legal requirements for transparency laid down by Articles 4(2) and 5 UCTD are identical.¹¹ This means that a core term, which is exempt from the unfairness test, does not need to

9 For example, Article 1341 of Italian Civil Code provides that:

'General conditions, prepared by one of the parties, are binding on the other party [are incorporated into the contract] if known by the latter at the time when the contract was concluded or if he might have known thereof by using ordinary diligence. The following conditions, however, have no effect [are not incorporated] unless specifically approved in writing:

1. Conditions limiting the liability of the party who has prepared the general conditions, or giving said party a power to withdraw from the contract or to suspend the execution thereof.

2. Conditions burdening the other party with time limits for the exercise of a right or limitations to such party's power to raise defenses, or with restrictions on freedom of contract with third persons, or with tacit extension or renewal of the contract.

3. Clauses providing for arbitration or derogations from the normal venue or jurisdiction of the courts.'

Gino Gorla, 'Standard Conditions and Form Contracts in Italian Law' (1962) *The American Journal of Comparative Law* 1-20; R. Alessi, 'The Implementation and Interpretation of The Standard Contract Terms Directive in Italy' (2006) 8.2/3 *Contemporary Issues In Law* 8.2/3 173. Available at <<http://www.secola.org/vortraege/prague/IV-2Alessi.pdf>> [accessed 15 May 2017].

10 In the digital age, it has been similarly argued that Internet-based contracting allows for the possibility to provide consumers with contractual terms, which shall then customize consumers' preferences. See the discussion below on Big Data.

11 See the discussion in Section 3.2 of Chapter 4.

manifest a higher quality of consent than other non-individually negotiated terms which are subject to the unfairness test. Two scenarios will be associated with this approach in the future. On the one hand, in order to limit the scope of the core terms excluded from the fairness test, transparency requirements will have to be extensively explained. As a result, non-core terms must also be subject to a higher quality of consent. On the other hand, if the benchmark for transparency merely corresponds with a medium level of consent, several non-salient core terms may escape from the fairness test. Therefore, it raises an interesting question as to why core terms and non-core terms should not be subject to different levels of consent. In other words, core terms would only be exempt from a fairness review if they would be salient to consumers, while non-core terms do not necessarily require a high quality of consent since they are always subject to the fairness test.

In this connection, one can further contend that thanks to the advent and growth of ‘Big Data’,¹² it is very conceivable that the doctrine of ‘*doppia firma*’ will be restored through drafting standard terms that customize adhering parties’ preferences.¹³ Although this approach offers the possibility of a higher quality of consent to standard terms, in the context of European law the customization of standard terms may exclude onerous terms from being challenged as unfair terms. Indeed, by virtue of Article 5(2), a term is considered as not having been individually negotiated where it has been drafted in advance, and the consumer has not been able to influence the substance of the term. Accordingly, once standard terms are customized, traders can easily argue that consumers have already been given an opportunity to affect the contents of the terms and that these terms should therefore be excluded from the fairness test.

2.2. Efficiency

It has been contended that, from an economic perspective, the legislative control of standard terms is justified in order to rectify market failure concerning standard terms. Essential to the economic approach is the concern about welfare, but not rights *per se*. As a result, even an absence of meaningful consent to standard terms is not problematic as long as market forces are functioning effectively to drive out inefficient standard terms. Unfortunately, there is an information asymmetry between parties that leads to a market failure to protect adhering parties from being subject to inefficient terms.

Logically, in order to cure market failure, legal responses must attempt to level up asymmetrical information between parties. As has been witnessed in both Vietnamese law and European law, information obligations are imposed on drafters so as to make standard terms more transparent for adhering parties. As presented above, such transparency obligations can be broken down into two component duties. Firstly,

12 Regarding the potential of the analysis of large volumes of data, see Mayer-Schonberger, Viktor, and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work and Think*, (Hachette UK, 2013); R. Walker, *From Big Data to Big Profits: Success with Data and Analytics* (Oxford University Press, 2015).

13 Christoph Busch, ‘The Future of Pre-Contractual Information Duties: From Behavioural Insights to Big Data’ in Christian Twigg-Flesner (ed.) *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016). Available at SSRN: <<https://ssrn.com/abstract=2728315>> [accessed 15 May 2017].

the standard terms must be brought to the attention of the adhering parties, thereby reducing the cost of information acquisition. Secondly, these terms must be drafted in readable language, thereby reducing the cost of information processing. The *rationale* behind these transparency duties is twofold: firstly, they will provide opportunities for adhering parties to protect themselves from being bound by onerous standard terms, and secondly, if a sufficient number of sophisticated customers read the standard forms and ‘vote with their feet’ when they encounter inefficient terms, the above-mentioned hypothesis of minority-informed readers will be created and this will force suppliers to change such terms.¹⁴ In this sense, under the consent approach, transparency obligations have the effect of guaranteeing adhering parties’ informed consent to standard terms, while according to the market rectification approach, they are also a means of raising the level of readership concerning standard terms and thereby creating demand pressure when it comes to standard terms. However, this poses the question of to what extent can information-based solutions in Vietnamese law and European law actually rectify market failure as regards standard terms. Again, the real question is not whether several sophisticated buyers can make an informed decision to avoid inefficient terms, but how many buyers who are willing to do so are sufficient to create enough demand pressure to discipline the market. Evidence is required in order to establish that ‘mandatory disclosure’ is far superior to ‘voluntary disclosure’: the former may significantly increase the readerships of standard terms which have been empirically found to be trivial under the latter regime.

There is some evidence that the case law of the CJEU on the transparency rules laid down in Article 5 of UCTD has produced positive effects when it comes to enhancing customers’ readership and understanding of standard terms. Firstly, according to the CJEU, the requirement of plain and intelligible language implies that standard terms must be drafted in language that enables ‘the average consumer’ to foresee the economic consequences deriving from these terms. On the basis of this current status of the law, empirical research funded by the European Commission was conducted to test whether ‘shorter and simpler’ standard terms could contribute to the readability of standard terms.¹⁵ For this purpose, the research group conducted an online experiment involving 12,000 respondents in 12 Member States to study how customers react to the varied length and complexity of standard terms. The result confirmed that simplifying and shortening standard terms had beneficial effects: when standard terms were short and straightforward, 26.5% reported that they had read them compared to only 10.5% who had read the standard long and complicated terms.¹⁶ This increased readership is remarkable when it is compared to the threshold requirement of demanding pressure offered by the minority-informed readers doctrine. Theoretically, if Schwartz and Wilde were correct in their estimate that the required number of readers needs to reach 33%

¹⁴ See the discussion in Section 3 of Chapter 2.

¹⁵ M. Elshout, M. Elsen, J. Leenheer, M. Loos and J. Luzak, Study on Consumers’ Attitudes Towards Terms and Conditions (T&Cs), <http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/terms_and_conditions_final_report_en.pdf> [accessed 15 May 2017].

¹⁶ *Ibid.* 97.

to discipline the market, the 26.5% quoted above is notable in that this is sufficient to create incentives for traders to withdraw inefficient terms.

Secondly, the CJEU has signalled the necessity for Member States to pay more attention to consumers' cognitive limitations. In the *Kásler* case, the CJEU explained that the national courts should determine whether:

‘having regard to all the relevant information [...] the average consumer [...] would not only be aware of the existence of the difference [...] between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to assess the potentially significant economic consequences for him resulting from the application of the selling rate of exchange for the calculation of the repayments for which he would ultimately be liable and, therefore, the total cost of the sum borrowed.’¹⁷

Accordingly, it is not too naïve to envision that Member States will take consumer biases seriously in designing a more feasible framework for transparency requirements. In particular, mandatory disclosure would be more effective if it can ‘debias’ consumers’ cognitive bias and thus enhance the salience of terms.¹⁸ In this respect, it should focus not only on the issue of whether and how much information must be provided but also on the issue of how to provide this information.¹⁹

Apart from customized disclosure, there are additional information-based solutions which are not directly targeted at individual consumers, but at intermediary parties to indirectly signify the quality of standard terms. This is based on the premise that although consumers do not usually read standard form contracts, there are intermediaries who may assist consumers in gaining access to valuable information without much effort. Of vital importance among intermediary mechanisms are the rating and review systems. In the above-mentioned study on consumers’ attitudes towards terms and conditions, the authors also investigated whether adding a ‘quality cue’ indicating that the terms and conditions are fair may contribute to increasing trust in such terms and thereby enhance better decision-making by consumers regarding whether or not to contract.²⁰ The research outcome was positive: customer feedback, national consumer organizations’ endorsement and European consumer organizations’ endorsement demonstrated that such cues could be used to increase an effortless awareness among consumers as to the quality of standard terms.²¹ However, it remains to be seen whether these important empirical findings can be turned into a realistic mechanism. Not only will a system of customer reviews or customer ratings not function well unless there are feasible

17 Case C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt* CJEU 30 April 2014 ECLI:EU:C:2014:282, para. 74.

18 Christine Jolls and Cass R. Sunstein, ‘Debiasing Through Law’ (2006) 35.1 *The Journal of Legal Studies* 199-242.

19 George Loewenstein, Cass R. Sunstein, and Russell Golman, ‘Disclosure: Psychology Changes Everything’ (2014) 6.1 *Annu. Rev. Econ.* 391-419.

20 M. Elshout, M. Elsen, J. Leenheer, M. Loos and J. Luzak, Study on Consumers’ Attitudes Towards Terms and Conditions (T&Cs) (2016), <http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/terms_and_conditions_final_report_en.pdf> [accessed 15 May 2017].

21 *Ibid.*, pp. 99-100.

methods in place to prevent any manipulation by businesses, but customers must also be sufficiently motivated to write reviews in the first place. In practice, it has been proved that highly rated products on the two websites of Epinions and Amazon are often associated with less customer-friendly standard terms.²²

Accordingly, regardless of the remarkable role of transparency obligations in expanding the disciplinary function of the market mechanism, and since consumers' imperfect information is ineradicable, it is extremely doubtful whether information-based solutions themselves are capable of preventing inefficient terms. In this respect, the attempt by Vietnamese legislators to substantively control nine kinds of standard terms was an objective that cannot be considered to be too irrational. As far as legal certainty is concerned, this legislative choice is welcome as it makes it obvious to all stakeholders what kinds of terms are unlawful at the outset. However, from an economic perspective the outright prohibition of a particular term can only be justified if it can be shown that the term 'would never be agreed to by consumers.'²³ Unfortunately, this is not the case with several kinds of terms prohibited under Article 16 CPL.²⁴

Although several onerous standard terms can be identified and included in these lists, traders can always find ways to circumvent the rules by creating different terms that are functionally comparable to the listed terms; therefore the 'market for lemons' may still exist. To fill this regulatory gap, it seems plausible to impose a substantive obligation on suppliers to draft efficient terms and thus to provide the courts with legal grounds to review any inefficient standard terms. Contrary to Vietnamese law, there is a general test for invalidity under the UCTD so that a term which has not been individually negotiated can be declared non-binding if it is contrary to the requirement of good faith and creates a significant imbalance between rights and obligations arising from the term to the detriment of consumers. Although this general test is called an unfairness test, from an economic point of view it may have the effect of being an equivalent test for inefficient terms. This general test implies that suppliers should be alerted to the fact that legal systems will refuse to enforce inefficient standard terms as their use is considered to be socially undesirable behaviour. In order to address the failure of market forces to produce efficient standard form contracts, regulations should be introduced to guarantee that any standard terms will be directly subjected to a review by an independent third party who will invalidate terms if they are found to be inefficient.²⁵ The mere existence of adjudicators who are empowered to review and invalidate inefficient standard terms will play a key role in replacing, or at least supplementing, market mechanisms through supervising and encouraging traders to withdraw onerous standard terms and to compete in the quality of standard terms.

22 Nishanth V. Chari, 'Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study' (2010) 5 *New York University Law Review*, Available at SSRN: <<https://ssrn.com/abstract=1598510>> [accessed 15 May 2017].

23 See the discussion in Section 5.2 of Chapter 2.

24 See the discussion in Section 5.2 of Chapter 3.

25 Michael Schillig, 'Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice's Jurisprudence on Directive 93/13 on Unfair Contract Terms' (2008) 33 *European Law Review* 336-358. See the discussion in Section 3 of Chapter 2.

2.3. Contractual Justice

Apart from guaranteeing the realization of party autonomy and efficiency, the legislative control of standard terms is also required in order to stimulate contractual justice by bolstering the position of the weaker party in the contractual relationship. As discussed above, an original theme for legislative schemes to control standard terms in both European law and Vietnamese law is the consumer movement. The spirit of the Consumer Protection Programmes of 1975 and 1981 is clearly reflected in the language of Recital (9) UCTD, according to which ‘acquirers of goods and services should be protected against the *abuse of power* by the seller or supplier, in particular against *one-sided* standard contracts and the *unfair* exclusion of essential rights in contracts’. Similarly, in Vietnam, there was no scheme to regulate standard terms until the introduction of the 2010 CPL, which ultimately aims to protect the consumer who is in a weak bargaining position *vis-à-vis* the trader. Accordingly, lying at the heart of the social approach is the assumption that due to the disparities in bargaining power, consumers, without state protection, seem to be incapable of striking a fair bargain with traders. Therefore, legislative controls of consumer contracts are demanded to safeguard ‘contractual justice’ through strengthening the position of the consumer as a weaker party.

However, even when one accepts that defending contractual justice by protecting the weaker party is a legitimate motive, it still raises the question of what forms of justice does the legislative scheme which controls standard terms want to see. This question shall be dealt with in the following section in the specific context of Vietnamese and European law. More importantly, it will assess whether and to what extent European law and Vietnamese law effectively contribute to the protection of consumers from an abuse of power by traders. In this regard, it is worth recalling that an effective legislative scheme for controlling standard terms must take the real image of consumers more seriously: it needs to address the inevitable cognitive errors of consumers when they adhere to standard terms.

2.3.1. Forms of Contractual Justice

Contrary to the criteria of efficiency, contractual justice is a slippery concept. It is sufficient, for the purpose of this evaluation, to classify three forms of contractual justice (fairness), namely procedural justice, commutative justice, and distributive justice.²⁶

The first form of justice in contract law concerns procedural justice, which aims to guarantee the actual consent of the parties. It concerns the contracting process, rather than the substantive outcome of contracts, and thus it examines whether the weaker party has been provided with an opportunity to have a meaningful say with regard to

26 This vague discussion of the various forms of contractual justice is borrowed from Thomas Wilhelmsson and Chris Willett, ‘Unfair Terms and Standard Form Contracts’ in G. Howells, I. Ramsay, T. Wilhelmsson and D. with Kraft (eds), *Handbook of Research on International Consumer Law* (2010): 158-191, p. 159; K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed. Trans. Tony Weir (Oxford: Oxford University Press, 1998) 328-331.

the contents of the contract. Accordingly, the principle of transparency to promote a fair contracting process is a typical rule that is based on the idea of procedural justice.

Commutative justice aims to ensure a balance between what the parties have promised to perform. It directly concerns the terms of the contract and therefore enquires whether those terms are excessively onerous for the weaker party. In this connection, the fairness test to ascertain whether a term would cause a significant imbalance in the parties' rights and obligations arising under the contract is an important example of rules that are based on the idea of commutative justice.

Distributive justice aims to enhance the position of weaker groups of market participants at the expense of stronger groups. A typical example of such contractual social protection is the principle of social *force majeure* in the Nordic countries.²⁷

Against this vague inquiry into the various meanings of justice, it should be noted that the aims of ensuring contractual fairness might often rest on the entire mix of the forms of justice. The legal techniques laid down by Vietnamese law and European law are aimed at both contracting processes and substantive terms. Accordingly, the legislative schemes to control standard terms in consumer contracts in Vietnam and Europe are based on the ideas of procedural justice and commutative justice. However, the Vietnamese approach largely depends on the idea of procedural justice, while its counterpart seems to focus more on commutative justice. Indeed, under Vietnamese law, contractual terms that fulfil the requirements of transparency are generally enforceable even though they may still be substantively unfair terms. In contrast, under European law, contractual terms are only enforceable if they pass both the procedural and the substantive fairness test.

To be fair, according to the procedure-based scheme of Vietnamese law, substantive unfairness is not entirely disregarded but is partly and indirectly addressed. Firstly, Vietnamese legislators partially embrace substantive fairness by completely prohibiting a number of terms that are extremely onerous to consumers. Apparently, the blacklist of banned terms in the CPL can find its equivalent counterpart in the list of possible unfair terms under the UCTD; the significant discrepancy between European law and Vietnamese law, however, lies in the fact that the annexed list of the UCTD only provides concrete examples of a general standard that all standard terms are unfair if they create a significant imbalance in the parties' rights and obligations arising under the contract to the consumer's detriment. In contrast, it can be seen that Vietnamese legislators have only attempted to crack down on specific kinds of standard terms which are generally considered to be the most detrimental not only to consumers' interests but also to the public interest; other standard terms which fall outside the scope of the blacklist are enforceable so far as they satisfy the requirements of transparency. In this connection, it could also be contended that, under Vietnamese law, substantive fairness is not directly but indirectly safeguarded in the sense that it is presumptively acceptable

27 According to this principle, 'the legal consequences of delays in payment and other performance may be mitigated, if the ultimate reasons for the delay are unfavourable changes in the consumer's health, work, housing or family situation.' See, Thomas Wilhelmsson and Chris Willett, 'Unfair Terms and Standard Form Contracts' in G. Howells, I. Ramsay, T. Wilhelmsson and D. with Kraft (eds), *Handbook of Research on International Consumer Law* (2010) 158, 159.

provided that the transparency in the process resulting in the conclusion of standard contracts is secured. To put it differently, under this proposition it is sufficient to ensure procedural fairness in consumer contracts since procedural fairness itself can guarantee substantive fairness.

Prioritizing such procedural fairness over substantive fairness can be partly explained on the basis of the prevailing paradigm of information in Vietnamese contract law. For this reason, information-based rules are considered to be the best solution to rectify the unequal bargaining power between the consumer and the trader, while a direct regulation on the substance of contractual terms is strongly criticized as an excessive intrusion into party autonomy. Central to this proposition is a presumption about the image of consumers and the ideal of respecting the freedom of doing business in Vietnam. Although it is well established that the consumer deserves to be protected since he or she is a weaker party *vis-à-vis* the business, there is an expectation that if the consumer, as a rational market player, is fully equipped with sufficient information, he or she may act in a rational way to protect his or her self-interest. Additionally, the idea of supporting the freedom of doing business requires that traders should be free to organize their business and obtain the substantive outcomes that are planned by their contractual arrangements as long as they act in a procedurally fair manner. Consequently, it is not surprising that Vietnamese legislators have wholeheartedly advocated in favour of the transparency principle as the most reliable method to control standard terms.

Contrary to Vietnamese law, although the information paradigm remains the central policy of European consumer law, Directive 1993/13/EC on unfair terms is probably the most telling example which reveals the European legislators' willingness to directly control the contents of a contract between a consumer and a seller or supplier. The key message here is that transparency, despite its practical necessity, is not sufficient to control unfair standard terms, so ensuring substantive fairness should be the major priority. This priority is profoundly determined by concerns about how consumers really behave. Apart from the core aspects of the contract, consumers will usually not read standard terms even if such terms are transparent, and even if they do read them, they are generally not able to understand them or to assess the associated risks. Having said that, all standard terms dealing with these ancillary matters of which consumers are rationally ignorant shall be subject to the substantive fairness control, and the EU embraces this approach.

2.3.2. Substantive Fairness as a Ground for Judicial Review

As has been noted, the provisions of the UCTD and other European law instruments clearly promote substantive fairness through allowing for a judicial review of the contents of standard terms. At the heart of the UCTD lies a general rule prescribing 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 the landmark case of *Mohamed Aziz*, the CJEU seized the opportunity to interpret the general test:

‘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 favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.’²⁸

Additionally, the CJEU discussed under what circumstances would such a ‘significant imbalance’ be ‘contrary to the requirements of good faith’ and it concluded:

‘the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could *reasonably assume* that the consumer would have agreed to such a term in *individual contract negotiations*.’

The advent and development of the substantive fairness test as a ground for reviewing standard terms have unprecedented value. Undoubtedly, the substantive fairness test presents a significant departure from classical contract law which has primarily focused on procedural fairness in the process of contracting. However, it is submitted that the dawn of substantive review is an indispensable move to truly address problems of standard terms. As discussed above, informational-based techniques – which would be supported by classical contract theory since they are the least intrusive instruments – are not entirely effective. Firstly, notwithstanding the fact that the principle of transparency provides positive effects to enhance consumers’ readership, it is not sufficient to discipline the market of standard terms. Secondly, although other additional information-based solutions are promising in advancing the flow of information to consumers, the realization of such techniques relies on a chain of aforementioned factors. More significantly, information-based solutions themselves seem to be designed on the basis of a classic economic model involving highly rational contracting parties: consumers are ‘reasonably well-informed and reasonably observant and circumspect.’ Nevertheless, insights from behavioural sciences reveal that individuals are limited by what is called ‘bounded rationality’: consumers neither have stable preferences nor do they observe all the available information and integrate it into their decisions.²⁹ Consequently, while it is true that information-based solutions may supply the necessary information to the consumer, it does not necessarily mean that the consumer can comprehend it, nor does comprehending it mean that the consumer can act rationally thereon. Furthermore, it is

28 Case C-415/11, *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, CJEU 14 March 2013, ECLI:EU:C:2013:164. para. 68.

29 B Schüller, ‘The Definition of Consumers in EU Consumer Law’ in James Devenney and Mel Kenny (eds), *European Consumer Protection: Theory and Practice*, (Cambridge University Press, 2012) 123-142.

evident that given the fact that consumers systematically suffer from cognitive biases, suppliers tend to present attractive information to exploit consumers' biases.³⁰ For this reason, while information-based techniques are important, they are not sufficiently effective to protect the consumer from the unfairness of standard form contracts. In this sense, European law has been a forerunner in that it has long realized that the substantive review is an imperative method to address the problems of standard terms.

As regards general clauses like the unfairness test, one can easily argue that the existence of a general test makes the law unpredictable and that judges seem to be incapable of making the right decision as to which terms are unfair. Although both of them are legitimate concerns, the European legislators and later the CJEU have provided several solutions to partly navigate these concerns. First of all, the European legislators, which are bestowed with technical expertise, have significantly clarified the concept of an unfair term by categorizing 17 types of terms that are likely to be unfair. Among them, there are several kinds of terms that have the effect of targeting frequent cognitive errors by consumers such as optimistic bias and present bias:

‘Sub-paragraph (e) covers terms requiring a consumer “who fails to fulfil his obligation to pay a disproportionately high sum in compensation.” Although consumers should not be protected from paying a disproportionately high sum for goods or services generally, this recognizes that consumers may be *overoptimistic*. They may, therefore, give too little attention to the consequences of failing to do what they expect to do. Sub-paragraph (d) addresses terms which permit the seller to “retain sums paid by the consumer” where the consumer “decides not to conclude or perform the contract.” This recognizes that consumers may be focused on their *present intentions*, and give too little attention to possible changes of mind in the future.’³¹

Secondly, the European legislators have explicitly laid down factors to be taken into account in assessing the unfairness of terms. Thirdly, the CJEU seized the opportunity in the *Aziz* case to advance the objective criteria for unfairness that are accessible to stakeholders. The CJEU has guided the national courts in deducing a norm from the default rule as a benchmark to evaluate the unfairness of a standard term. Accordingly, as far as the legal meaning of the fairness test can be clarified, the attraction of the fairness test lies in the fact that it functions as a safety net to protect consumers against unfair terms across a range of diverse markets. This safety net is particularly important for the numerous markets that have not been governed by specific legislation.

Needless to say, the potential impact of the fairness control in European law largely depends on its scope of application. In this regard, it can be contended that the fairness test is not applicable to terms relating to ‘the definition of the main subject matter of the contract’ and the ‘adequacy of the price and remuneration’ as far as they are drafted in plain and intelligible language. In this sense, the European legislators have assumed that once transparency requirements are satisfied, the consumer could make an informed choice between the core terms and decide whether or not to enter into the

30 See the discussion in Section 4 of Chapter 2.

31 Law Commissions, *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills*, March 2013, paras 3.53-3.55.

contract. However, due to the bounded rationality of consumers, the question is to what extent are the transparency requirements capable of addressing unequal bargaining power between the parties and thus ensuring that the core terms are not unfair to the detriment of the consumer. In practice, the CJEU has attempted to respond to this concern by applying two lines of legal reasoning. Firstly, the CJEU has persuasively reasoned that Article 4(2) of the UCTD must be ‘interpreted strictly’ because it forms an exception to the substantive assessment of unfair terms that the UCTD prescribes. Secondly, the requirement of transparency must be ‘interpreted broadly’ to the extent that the consumer should be able to comprehend the legal and economic consequences of the contractual terms. When read together, these two arguments reveal the restrictive approach of the CJEU towards the exclusion of core terms from the fairness review. One of the key implications of the restrictive approach is that it is not the price or the remuneration term as a whole that is excluded from the fairness test. The CJEU has taken pains to explain that terms concerning ‘a mechanism for amending the prices of the service’ and terms varying ‘the method for calculating the exchange rate between the amount of the loan and the amount of repayment’ fall outside the scope of the core exemption, thereby being subject to the fairness test.

The CJEU’s approach is partially in line with insights from behavioural economics in that when making decisions individuals can at best focus on a few ‘salient’ terms such as the main price and pay little attention to the remainder of the contract, including other price-related terms. As mentioned above, in reality, individuals are not always rational actors because they frequently suffer from various kinds of cognitive biases; for example, they tend to care more about the present and systematically underestimate the probability that the adverse things which give rise to contingencies can happen to them in the future. As an attempt to seduce consumers, complicated sellers sometimes offer an attractive upfront price, but recollect profitability with high back-end costs. In this connection, it can be considered that the CJEU has followed a restrictive approach and has explicitly interpreted that the price exemption has only avoided the scrutiny of the fairness of exchange, but not other price-related terms. However, it would have been more effective if the CJEU had clarified that the price exemption should cover only the upfront price, while other contingent fees should not be excluded from the fairness control.³²

32 It can be noted that, drawing on the UK’s experiences, Australian law has provided a consumer-friendly approach to the exclusion of core terms. Article 26(1) of the Australian Consumer Law prescribes that the scrutiny of unfair terms does not apply to a term that (a) defines the main subject matter of the contract; (b) sets the upfront price payable under the contract; (c) is required, or expressly permitted by a law of the Commonwealth, a State or a Territory. Article 26(2)(a) of the ACL then explains that the *upfront price* under a standard form contract is defined as the consideration that:

(a) is provided, or is to be provided, for the supply, sale or grant under the contract; and

(b) is disclosed at or before the time the contract is entered into, but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

For a comprehensive analysis of the unfair terms regime under the ACL, see Jeannie Paterson, ‘The Elements of a Prohibition on Unfair Terms in Consumer Contracts’ (2009) 37 *Australian Business Law Review* 184; Dan Jerker B. Svantesson and Loren Holly, ‘An Overview and Analysis of The National Unfair Contract Terms Provisions’ (2010) 24.3 *Commercial Law Quarterly* 3. For a comparative analysis of the UK and

3. SUGGESTIONS

3.1. General Policy Revisited

The introduction to this dissertation identified two recent trends in the legal treatment of standard form contracts in Vietnam. The first trend advocates the expansion of the approval mechanism according to which standard forms must be reviewed by the VCA before being used in the market. The second trend, however, argues that parties are capable of protecting themselves from onerous terms as long as they are provided with sufficient information. Arguably, neither trend seems to be flawless as they mismatch the findings of Chapter 1 about the main causes of the inherent problems of standard terms in consumer contracts.

In this chapter, two common philosophies for justifying whether and to what extent the state should interfere and control standard form contracts have been studied. Firstly, the market failure arguments reveal that due to information asymmetry between the suppliers of standard form contracts and the adhering parties, a phenomenon of adverse selection occurs, according to which low quality standard terms gradually drive the high quality terms out of the market and thereby lead to the collapse of the market for standard terms.³³ Secondly, when it comes to standard terms in consumer contracts, the inequality of bargaining power arguments reinforce the fact that not only do disparities in the bargaining power between the parties hinder opportunities for the consumer to attain a fair contractual content, but the trader also systematically exploits the weakness of consumers by designing a complicated price structure to respond to consumers' cognitive biases.³⁴ Although each line of argument may stand alone to sufficiently justify state interference in contractual relationships,³⁵ it is submitted that a control mechanism can only adequately address the problems of standard terms in consumer contracts if the mechanism can overcome market failure due to information asymmetry between the parties and consumers' systematically cognitive biases.

Against this background, regardless of the fact that the transparency principle may produce positive effects for several sophisticated consumers, it is somewhat naïve to believe that effective control of the unfairness of standard terms can be achieved by only information-based solutions. Information disclosure will have little effect in the event that all suppliers offer oppressive standard terms and thus the choice of better terms is absent. Also, the information paradigm is not likely to overcome the consumer's bounded rationality. In order to sufficiently target the unfairness of standard terms a possible and feasible mechanism can be drawn from the Unfair Terms Contract Directive, which presents a comprehensive framework to address the substantive

the Australian approach, see Chris Willet, 'Transparency and Fairness in Australian and UK Regulation of Standard Terms' (2013) 37 *UW Austl. L. Rev.* 72.

33 See the discussion in Section 3 of Chapter 2.

34 See the discussion in Section 4 of Chapter 2.

35 Indeed, the market failure arguments are sufficient to justify the state control of inefficient standard terms between parties regardless of B2B or B2C contracts, while the unequal bargaining power arguments are sufficient to justify the state control of unfair consumer contracts including both individually negotiated terms and standard terms.

unfairness of standard terms directly. Additionally, during the last 20 years since the Directive entered into effect, the CJEU has significantly clarified the core aspects of the consumer protection regime such as the general clause on unfair terms, while other ‘sister’ soft law instruments including the PECL, ACQP, DCFR, and even the proposal by CESL have introduced several new techniques to improve the quality of the control regime, such as the introduction of a grey list and a blacklist of unfair terms. Having been inspired by these developments, a tripartite scheme to control substantive contents of standard terms seems to be desirable in order to effectively address the inherent problems of standard terms in Vietnam.

As the European experience also reveals, an effective mechanism to control standard terms in consumer contracts requires a consideration not only of substantive law but also of procedural law. Indeed, in order to prevent a tripartite scheme for controlling the substantive contents of standard terms from being a paper tiger, it must be supplemented by effective procedural mechanisms. One possible solution is collective proceedings according to which consumer organizations or administrative agencies are empowered to represent the collective interests of consumers to challenge the invalidity of unfair terms and to prevent the continued use of such unfair terms in practice.

On the basis of general policy, the following subsections will be devoted to suggesting a comprehensive framework for a more effective regime to control standard terms in consumer contracts in Vietnam. The suggestions will be grouped in four categories, namely (1) core terms and non-core terms distinguished, (2) towards different levels of contractual transparency, (3) towards the tripartite scheme for controlling substantively unfair terms, and (4) towards effective enforcement mechanisms.

3.2. Scope of Control Revisited: Core Terms and Non-Core Terms Distinguished

In order to trigger the fairness control of standard terms in consumer contracts, the first step of the inquiry, as a matter of fact, is to determine whether an impugned term is actually a standard term. In this connection, the current Vietnamese law provides two separate concepts of general trading conditions and standard form contracts, while making no distinction between their legal treatment.³⁶ According to the ‘market failure’ arguments, what really matters for state interference is that the standard terms are not subject to individual negotiations, and are merely presented on a ‘take it or leave it’ basis. Once a contractual term is substantively negotiated between the parties, it is obvious that consumers pay close attention to such a term, thereby signalling sufficient incentives for traders to compete on the quality of terms. As a result, it is not necessary to subject individually negotiated terms to the fairness control regime as far as traders

36 As analysed above, the prescriptive definitions of general trading conditions and standard form contracts reveal two key differences between them. Firstly, the former are frequently published in advance or are contained in separate documents to which the contract refers, while the latter are presented in the contract document itself. As a result, the former include any standard terms to be used on multiple occasions, while the latter may include pre-formulated terms by suppliers, even for single use. See the discussion in Section 2.2 of Chapter 2.

have successfully established that the terms have resulted from real bargaining between the parties. Accordingly, it is sufficient to provide a single concept of standard terms for the purpose of activating the fairness control regime, rather than maintaining the current dual concepts. The decisive character of standard terms is that suppliers dictate the terms, while consumers are not given a genuine opportunity to influence their contents. Other issues such as whether suppliers or third parties draft the terms, or whether the terms are presented in the contract document itself or in separate documents, should not be crucial to trigger the fairness control of standard terms.

Certainly, those who strictly adhere to ‘inequality of bargaining power’ arguments can quickly find that the limitations of legislative control for standard terms are under-inclusive because if the primary justification for an unfair terms regime is to protect consumers due to their weak bargaining power, this protection must equally apply to individually negotiated terms. This argument seems to be plausible on the surface, but is partly refuted from both theoretical and practical perspectives. As discussed in Chapter 1, in order to justify substantive limitations on party autonomy, a social approach to contract law requires both person-oriented and situation-oriented elements. Not only are there disparities in economic power and knowledge between an individual consumer and a trader, but there must also be situational factors that inherently endanger the rational behaviour of the consumer. Accordingly, the legislative control of unfair standard terms does not merely depend on the personal shortcomings of consumers, but also on situational elements of standard terms resulting in problems relating to consumers’ inconsistent and unstable preferences and information overload.³⁷ From a practical point of view, it is however worth emphasizing that standard form contracts are overwhelming in consumer transactions. It is thus suggested that extending legislative control to individually negotiated terms might result in little difference in practice.

What is truly significant in practice is whether the fairness control regime will also cover the price and the subject matter of the contract – the core terms of contracts. At the outset, those who support the market failure arguments will naturally exclude the price and subject-matter terms from the unfairness control regime because market forces are expected to work efficiently concerning such core terms. Indeed, while it is not always the case that consumers are able to ask their counterparties to alter the price or the main subject matter of the contract, it matters that such terms are integrated into consumers’ purchasing decision to enter into the agreement. As a result, suppliers are provided with sufficient incentives to compete on the basis of the quality of core terms, thereby gradually driving low quality core terms out of the market. Accordingly, as far as the law ensures that the core terms are transparent, the fairness control is unnecessary because market competition will ensure a just and fair allocation of the rights and obligations of the parties arising from the core terms. Regardless of the trustworthiness of this policy, as has been seen in European law, it is somewhat challenging to differentiate the core terms from those that are related to, but are not of this character. At the heart of the core terms exemption, the legislature must strictly confine the exemption to terms that are realistically subject to market discipline and not to relevant terms that are buried in the

37 See the discussion in Section 4 of Chapter 2.

fine print, which consumers typically disregard. Otherwise, the legislature will fail to protect consumers from being exploited by terms that are designed to respond to their cognitive errors.

In this regard, it should be emphasized that sophisticated suppliers may design a complex price strategy to lure consumers into entering into their contract by offering an eye-catching upfront price, but making a profit by additional fees and charges. The infamous example of a contractual term in a contract for membership of a fitness club, which was discussed as concrete proof of the ineffectiveness of Article 16 CPL in catching other potential unfair terms, can be recalled.³⁸ In an analogous case brought by the OFT before the English courts, although the minimum membership terms were considered to be part of the main subject matter of the contract and were therefore excluded from the unfairness test, the judge nevertheless held that the business model had been deliberately designed to take advantage of naive and inexperienced consumers.³⁹ Another telling example, as discussed above, are the diverging views among EU Member States regarding the question of whether a term that quantifies the price of a service depending on certain contingency charges is exempt from the unfairness test. In order to partly clarify this issue, the CJEU has held in several judgments that terms related to the price, but not the price itself, fall outside the core exemption, for example a variation clause or an acceleration clause. Furthermore, having emphasized the systematic approach to unfair terms, the CJEU has suggested that price-related terms falling within the annexed list of possible unfair terms are always subject to the unfairness test. Accordingly, it is necessary to stress that the core terms – the upfront price and the main subject matter- that are indeed exposed to market discipline due to the fact that consumers regularly take them into consideration when making their decision are exempted from unfairness control as long as they are transparent to consumers.

3.3. Formal Control Revisited: Towards Different Levels of Contractual Transparency

As mentioned above, the information-orientated set of rules is not *per se* sufficient to address the problems of standard contract terms; however, this does not necessarily mean that information rules do not have any positive impact on the position of consumers. In contrast, formal control – according to Vietnamese terminology – is an essential method to partly address the problem of consumers' unawareness of standard terms.

Formal control under Vietnamese law has been understood in a wide sense to include two elements: firstly, businesses are obliged to provide consumers with standard

38 See the discussion in Section 5.3.2 of Chapter 3.

39 The judge acknowledged that the trader 'understood that the consumer is induced to enter into their contracts because of the relatively low monthly subscriptions associated with them but that if he ceases to use the gym after between three and six months, he would be better off joining on a pay per month basis.' This is a clear example of how traders design their marketing strategy to exploit the 'present bias' of consumers. *The Office of Fair Trading v Ashbourne Management Services Ltd & Others* [2011] EWHC 1237 (Ch) (27 May 2011) para. 171.

terms and, secondly, businesses must draft standard terms in a transparent manner. In the drafting process of the 2015 Civil Code, although the first element of formal control – the issue of incorporating general trading conditions into the contract – was indeed considered, the drafting committee decided that this aspect automatically formed part of the general provisions on the formation of contracts. Accordingly, the general trading conditions must be included or referred to in the offer and other parties must then be given the opportunity to become acquainted with them before expressing their consent. Consequently, there are hardly any differences in substance between Vietnamese law and European law as to how standard terms become part of the contract, although the relevant provisions in the PECL, ACQP, DCFR or CESL provide more clarification. Once the tripartite scheme controlling substantive unfairness is formulated, Vietnamese law does not need to go beyond the current requirement of incorporation. It would be unwise to follow a somewhat absurd suggestion that standard terms are not enforceable unless businesses are able to prove that consumers have genuinely consented to such terms and, if not, the terms need to be approved by a competent agency such as the VCA. Given the backing of the tripartite scheme, it is sufficient to consider standard terms as part of a contract which is binding on a party if that party has at least had a reasonable opportunity to be aware of their contents.

A more urgent need, however, is to re-examine the functions of the second element of formal control – the issue of the transparency of standard terms. Under current Vietnamese law, in combination with businesses' obligation to make consumers aware of standard terms, the transparency of such terms offers consumers an opportunity to actually understand the standard terms and thus to protect themselves from being bound by onerous terms that they dislike. The transparency requirements deliberately perform a significant function to assist consumers in making their informed choices about whether or not to enter into standard contract forms at the pre-contractual phase. In this respect, one could therefore argue that the complete reliance on information disclosure to discipline the markets using standard terms is unsuccessful, and therefore the transparency principle is no longer valid and must be substituted by a substantive control regime. This line of argumentation, however, undervalues the rights of consumers to have access to information. Indeed, for many sophisticated consumers, the transparency of terms is very important for them in making their choice during the pre-contractual phase. For the majority of consumers, transparency may play an equally important role in assisting them in their contractual relationship, especially when disputes occur. At the performance stage, comprehensible information with regard to the exact content of the contract assists the consumer in effectively realizing his or her rights as well as preventing inappropriate behaviour by the counter-party. The principle of transparency also allows consumers to have access to justice by providing them with a correct understanding of their substantive rights under the contract.

Furthermore, insights from behavioural sciences reveal that it is feasible to distinguish between non-salient terms and salient terms to which consumers pay much more attention. This explains why Vietnamese law should follow European law in excluding the core terms from the unfairness test as long as these terms have been drafted in plain and intelligible language. However, it is essential for the Vietnamese

legislature to prescribe that in order to shield core terms from an unfairness review, the transparency of such terms must meet an extremely high threshold. The benchmark in ascertaining the transparency of core terms must necessarily take consumers' cognitive biases into account. In the language of the CJEU, the requirement of the transparency of core terms cannot be reduced to merely being formally and grammatically intelligible but must be extended to a level that allows consumers to foresee the economic consequences of the terms.

Against this backdrop, it is submitted that the transparency requirements are still necessary methods to control standard terms. However, it is vital to classify the two levels of transparency: 1) standard terms must be drafted in plain and intelligible language, and 2) the core terms must satisfy a higher threshold of transparency. While the former enables consumers to understand and make use of them when they need to, usually at the performance and dispute stage, the latter enables consumers to make their informed choice during the pre-contractual stage. In particular, at the pre-contractual stage it is assumed that consumers will pay close attention to such core terms and this therefore encourages suppliers to compete when it comes to the quality of terms; the terms do not therefore need to be assessed by the unfairness test. Be that as it may, this goal is only achieved if the core terms are so transparent and prominent that consumers truly understand their legal and economic implications.

3.4. Substantive Control Revisited: Towards a Tripartite Scheme to Control Substantively Unfair Terms

As has been noted above, one of the most important characteristics of Vietnam's current regime to control standard terms is that it follows the 'pointillist' approach by targeting several extremely onerous clauses that the legislators identified during the promulgation of the CPL. However, if one accepts that problems with standard terms are systematic, the 'pointillist' approach obviously leads to an inherent problem that not every unfair standard term is reviewable. Furthermore, this approach underestimates traders' capacity to circumvent the blacklist through applying a similarly potential unfair term, as well as failing to ensure that the CPL would still apply in the future. A systematic problem requires a systematic approach, and that is the reason why the European regime controlling unfair terms in consumer contracts subjects all kinds of potentially unfair terms to the unfairness test.

As a result, one possible suggestion is to enact a general clause on unfair terms as a legal ground for reviewing the unfairness of every term in standard form contracts. In the particular case of Vietnamese law, the inclusion of such a general clause, which provides for the criteria to determine whether a term is unfair, would act as a safety net to significantly improve the current regime in at least three aspects. First of all, a general clause on unfair terms would convey a strong message that consumers have the right to be provided with fair terms in all kinds of sectors. This is especially important in Vietnam due to the fact that only a limited number of markets are governed by specific regulations. Secondly, a general clause applies to virtually all kinds of standard terms and thereby fills in a regulatory gap in the current blacklist provided by Article 16 CPL.

Thirdly, a general clause could be used not only by consumers in *ex-post* individual proceedings but more significantly by the competent authorities in preventive actions. Consequently, the introduction of a general clause would offer a great possibility to protect consumers in all conceivable markets and would apply to virtually all standard terms regarding both *ex-ante* and *ex-post* enforcement mechanisms.

Obviously, introducing a general clause on unfair terms would come at the cost of legal certainty; be that as it may, there are supplementary solutions to reduce such uncertainty. An immediate resolution found in all European instruments on unfair terms is the existence of a grey list prescribing numerous specific terms that are presumably unfair unless the trader proves otherwise. Accordingly, it is submitted that Vietnam should follow the European approach and design a tripartite scheme for controlling the unfairness of terms in standard form contracts. At the heart of the tripartite system is a general test of unfairness, which explicitly states that virtually every standard term must be reviewed as to its fairness. To supplement the general test, a blacklist of totally prohibited terms and a grey list of terms presumed to be unfair must be formulated to balance the dual goal of legal certainty and legal flexibility in controlling unfair terms. The following subsections will be devoted to analysing this scheme in further detail.

3.4.1. Unfairness Test

Even those who support the necessity of general standards for unfair terms may argue that a separate unfairness test for standard terms is redundant because several provisions of the Civil Code may have a capturing function to fill the gap in the current framework. By way of example, Article 124 of the 2015 Civil Code may in theory be used as a legal ground to invalidate any standard term that violates good morals; an aggrieved party may also revoke a new provision prohibiting an abuse of rights to challenge the validity of outrageous standard terms.⁴⁰ More significantly, standard terms can be directly challenged by virtue of Article 404.3 of the 2015 Civil Code which literally reads as follows: ‘General trading conditions must assure equality between parties.’ Accordingly, it is simply a matter of time before the judiciary will interpret the standards of fairness from these general clauses, thereby providing detailed guidance for stakeholders.⁴¹ However, there are several challenges to the dependence on provisions on good morals or an abuse of rights in the 2015 Civil Code in order to police onerous standard terms. Firstly, the doctrine of good morals traditionally follows a transactional approach in

40 Article 12 of the 2015 Civil Code.

41 From a comparative perspective, those advocating this argument may find further support in Germany where the German courts have developed legal rules to control standard terms based on three basic provisions: the concept of assent, the invalidity of legal transactions on the ground of offending good morals (Article 138), and the invalidity of legal transactions on the ground of violating the requirement of good faith in contract performance (Article 242). However, in Germany, this judge-made law has also been criticized in several respects including uneven application by the lower courts, the absence of concrete provisions and the concern that judges might make political decisions. See Otto Sandrock and Nina Moore Galston, ‘The Standard Terms Act 1976 of West Germany,’ (1978) *The American Journal of Comparative Law* 551-572; James R. Maxeiner, ‘Standard Terms Contracting in the Global Electronic Age: European Alternatives’ *Yale Journal of International Law*, Vol. 28, No. 1, 2003, pp. 142-146 Available at SSRN: <<https://ssrn.com/abstract=1150508>> [Accessed 15 May 2017].

assessing an unfair agreement in its entirety, rather than the individual unfair terms. However, the purpose of the unfair terms regime is that it only targets individual terms rather than the entire agreement. Secondly, the applicable yardstick to measure the unfairness of standard terms should not be necessarily as high as the yardstick for good morals which is used to nullify incredibly outrageous contractual agreements. As a final shield for contract law against unfair agreements, the doctrine of good morals requires an imbalance between the rights and obligations of the parties which is of such an extent that it is analogous to fraud or duress so that society would refuse to enforce such an agreement. As opposed to the doctrine of good morals, the test for unfairness must be set at a lower standard so as to provide an adequate response to the omnipresence of standard form contracts. Thirdly, as an exception to the principle of freedom of contract, in theory, the concept of good morals must be interpreted strictly. The tendency to interpret exceptional provisions in a restrictive manner will make the courts more reluctant to deduce legal rules from the provisions on good morals, thereby prolonging the formulation of their own case law. If the legislators prescribe a separate regime for standard form contracts, judges will have more incentives to interpret such rules in a more creative way, thus securing the future of this legislation.

Accordingly, there are valid reasons for legislators to formulate a separate test which lays down a feasible guideline for controlling the unfairness of standard terms. The legislators must prescribe objective criteria for unfairness that are accessible and manageable for all stakeholders including consumers, traders, administrative agencies, and judges. By doing so, the general test of unfair terms might be utilized as a useful tool for both *ex-post* judicial review and *ex-ante* self-regulation or administrative supervision. Not only does it inform all stakeholders that standard terms would be exposed to the danger of invalidity if they fail to pass the unfairness review, but it also provides a benchmark to encourage traders to draft fair standard terms at the outset.

A good starting point for the discussion on how the general clause on unfair terms can be formulated in Vietnam might be the concept of unfairness in EU law. As already stated, at the heart of the UCTD lies Article 3(1) which 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.’

This formula for the unfairness test has inspired similar tests in the PECL, ACQP, DCFR and CESL despite some insignificant deviation in their wording.⁴² Generally, the general test for assessing the unfairness of terms consists of two limbs: (i) a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer and (ii) contrary to the requirement of good faith.

The first limb of the general test explicitly reflects the idea of substantive unfairness: it envisages a one-sided transaction according to which parties’ rights and

42 See the discussion in Section 4.3.1 of Chapter 3.

obligations are significantly asymmetrical and favour the supplier. Literally, a significant imbalance may be ascertained if there is a lack of reciprocity in the rights or obligations between the parties. By means of illustration, several potential unfair terms listed in the UCTD or the currently prohibited terms prescribed by Article 16 CPL have a common characteristic in that they give a particular right to a supplier without conferring an equivalent right on the consumer. To put it differently, if a term provides similar rights, or equally applies to both parties, no imbalance between rights and obligations will exist, and thus it is unlikely to be unfair *per se*. However, for the majority of transactions, this analysis cannot be confined to whether a term provides equal rights to both parties, but must be extended to the entire contract. In particular, it needs to consider whether a clause imposing obligations on only the consumer is balanced by the existence of another clause conferring favourable rights on the consumer.⁴³ Apart from considering the reciprocity of rights and obligations, evaluating the challenged term on the basis of the default rule is also a useful method to ascertain whether such a term causes a ‘significant imbalance’ in the parties’ rights and obligations to the detriment of consumers. The default rules that are enshrined in the legislation presumably present a fair balance between the interests of contracting parties. They are assumed to manifest the legislator’s judgment as to the fairness of terms, and therefore if the standard terms dictated by one party significantly deviate from this judgment, the fairness of such terms might be challenged. Specifically, the degree to which standard terms vary from the default rules is an important factor in assessing the unfairness of terms: the greater the deviation from the consumer’s position is, the more likely it is that there is an imbalance between the parties’ interests. Accordingly, it would be advisable for Vietnam to base the unfair terms test on this criterion of a significant imbalance in the rights and obligations.

Nevertheless, an explicit reference to the second limb – contrary to the requirement of good faith – without any further explanation may lead to different interpretations of the prohibition on unfair terms. One potential pitfall is that it could have the effect of interpreting the concept of unfairness along the lines of cumulative requirements of procedural and substantive unfairness. As analysed above, under Vietnamese contract law, good faith is a vague concept frequently understood in both a procedural and a substantive sense. In a substantive sense, the principle of good faith requires that a contracting party should not merely consider his/her own interests but should also give due consideration to the legitimate interests of his/her counterparty. However, in a procedural sense, the requirement of good faith at the pre-contracting stage implies that parties are prohibited from conducting negotiations in ‘bad faith’ such as concealing material information regarding the transaction.⁴⁴ Accordingly, it is not unlikely that the above test for unfair terms could be loosely understood by Vietnamese readers

43 The most common example is that of a unilateral variation clause frequently found in long-term contracts. It is unrealistic in this case to evaluate whether a term causes a significant imbalance by considering the reciprocity of rights or obligations in a narrow sense. On the contrary, the reciprocity of rights must be understood in a wider sense: it is acceptable if the supplier’s right to increase the price according to a prescribed manner is balanced by the consumer’s right to withdraw from the contract.

44 See the discussion in Section 3.3.2 of Chapter 2.

as meaning that a term would be unfair and invalid if, and only if, two cumulative requirements are satisfied: the terms must create a significant imbalance in the parties' rights and obligations to the detriment of the consumer, and the trader must act in 'bad faith' during the contracting process. In this connection, it would provide the undesirable effect that fairness in a procedural sense may justify unfairness in the substance of contracts. This approach would be contrary to the ultimate objective of Vietnam's regime for controlling standard terms, which is to eliminate substantively unfair terms regardless of procedural fairness.

Certainly, under EU law, the requirement of good faith is not confined to a purely procedural aspect but is extended at least to the substantive content of the contract. By focusing on an 'overall evaluation of the interest involved,' the concept of good faith is used to assess to what extent the terms realize a balance between the legitimate benefit of the supplier and that of the consumer.⁴⁵ This has been partly confirmed by the CJEU when the Court decided:

'With regard to the question of the circumstances in which such an imbalance arises, contrary to the requirement of good faith, having regard to the sixteenth recital in the Preamble to the Directive...the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.'⁴⁶

The concept of good faith therefore primarily implies that the seller or supplier should not merely ensure his/her own interest without taking the consumer's legitimate interests into consideration. The content of potentially unfair clauses listed in the Annex to the UCTD explains that these legitimate interests consist of the following substantive rights: acquiring adequate legal redress, avoiding a disproportionate penalty or receiving the performance legitimately expected. Therefore, a correct interpretation of the concept of good faith must mainly include substantive requirements and 'any purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected.'⁴⁷

Accordingly, there are two possible approaches that the Vietnamese legislators can follow. Firstly, the concept of unfair terms can be directly transplanted into Vietnamese law, but with a clear explanation that the second limb of good faith must be predominantly understood in the substantive sense. The ultimate objective is to avoid a situation where substantively harsh terms are not unfair merely because traders have acted in good faith to draft them in a transparent and prominent way. The second approach would be to omit the element of good faith, but still inherit its spirit through requiring that the standard terms must duly reflect consumers' legitimate interests. However, although this kind of scenario may prevent the confusion of bundling the

45 See the discussion in Section 4.3 of Chapter 3.

46 Case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, CJEU 14 March 2013, ECLI:EU:C:2013:164, para. 69.

47 *Director General of Fair Trading v First National Bank* [2001] UKHL 52 (25 October 2001), para. 36.

ideas of procedural fairness and substantive fairness together, it may lose the golden value of the concept of good faith as a general moral norm in contract law.

3.4.2. A Grey List and a Blacklist

(i) Grey List of Presumably Unfair Terms

Besides the desire for a general test for unfair terms, another suggestion is to compile an extensive grey list of terms which are presumed to be unfair. By offering non-exhaustive examples of unfair terms, the grey list may appropriately address the disadvantages of both the blacklist and the general test. Firstly, although the grey list contains terms which are presumed to be unfair, it still enables traders to prove that the terms are indeed fair in certain circumstances. In the absence of a grey list, the presence of a blacklist of terms which are always prohibited in the current CPL has been severely criticized in that it overkills several clauses which still have legitimate functions to play in contracts. Secondly, the introduction of a grey list would place the burden of proof on traders to reverse the assumption that the terms included in the list are unfair. Traders would have to provide persuasive evidence to establish that the term is particularly required to protect their legitimate interests and that it does not create a significant imbalance if particular circumstances of a contract are seriously taken into account. In the absence of a grey list, the burden of proof will be placed on the party challenging the term, thereby still exposing the consumer to the probability of a general unawareness of the existence of potentially unfair terms.

For those reasons, the grey list plays an essential role in controlling unfair terms *ex post*: it not only avoids excessive paternalism in controlling standard terms, but also provides more protective means than just exemplifying the general test of unfair terms. At the same time, the introduction of a grey list is crucial to enhance the preventive control of unfair terms. A non-exhaustive list of terms which are likely to be unfair will increase the likelihood of quick proactive control. As a minimum checklist of unfair terms, it provides guidance for traders who, acting in goodwill, are willing to withdraw unfair terms from their contracts. Furthermore, a grey list may provide a solid basis which can be used by consumers' organizations or competent state authorities when negotiating collective agreements with business associations. In this sense, a non-exhaustive grey list of presumably unfair terms is helpful when addressing the traditional problems of individual litigation and may boost the development of self-regulation concerning standard terms in consumer contracts.

Accordingly, a fairly simple suggestion for the Vietnamese legislature is to borrow the list of potentially unfair terms in the annex to the UCTD and then to upgrade them to a grey list of presumably unfair terms. It is sufficient to categorize them into the three following groups.

Group 1: Terms that reduce or eliminate traders' primary obligations include:

- (i) Terms limiting the seller's or supplier's responsibility for his agent's promises or making his commitments subject to formality;⁴⁸
- (ii) Terms allowing the seller or supplier to transfer rights which reduce guarantees for the consumer;⁴⁹
- (iii) Terms enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason;⁵⁰
- (iv) Terms giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;⁵¹
- (v) Terms making an agreement binding on the consumer whereas the seller's or supplier's performance is subject to his own control;
- (vi) Terms authorizing the seller or supplier to dissolve the contract on a discretionary basis;
- (vii) Terms enabling the seller or supplier to terminate an indefinite contract without reasonable notice;
- (viii) Terms enabling the seller or supplier to alter unilaterally, and without a valid reason, any characteristics of the product or service to be provided.

Group 2: Terms that may inflate consumers' obligations against the core terms include:

- (ix) Terms providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or a supplier of services to increase his price without in both cases giving the consumer the corresponding right to cancel the contract;⁵²
- (x) Terms obliging the consumer to fulfil all of his obligations where the seller or supplier does not perform his obligations;⁵³
- (xi) Terms automatically extending a contract of fixed duration with an unreasonably early deadline.

Group 3: Terms that delete consumers' remedial rights or inflate consumers' liabilities for a breach include:

- (xii) Terms inappropriately excluding or limiting the legal rights of the consumer in the event of the seller's, supplier's or third party's total or partial non-performance;⁵⁴

48 Currently Article 16(g) CPL.

49 Currently Article 16(i) CPL.

50 Currently Article 16(c) CPL.

51 Currently Article 16(e) CPL.

52 Currently Article 16(d) CPL.

53 Currently Article 16(h) CPL.

54 Currently Article 16(a) CPL.

- (xiii) Terms permitting the seller or supplier to retain any sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (xiv) Terms permitting the seller or supplier to retain a deposit when the consumer has cancelled the contract;
- (xv) Terms requiring a disproportionate consumer penalty.

(ii) Blacklist of Totally Prohibited Terms

Needless to say, for the sake of legal certainty a blacklist of entirely prohibited terms appears to be a better means than a grey list. However, as a legal technique, a blacklist of terms is the most extreme form of state interference in party autonomy. The introduction of an extensive list of terms which are prohibited outright, but nevertheless failing to catch other equivalent unfair terms, may trigger an incorrect perception of an imbalance between the freedom of contract and consumer protection in Vietnamese contract law. It generates an inflated impression that consumer protection is stricter than it actually is, which indeed results in more harm than good when it comes to the development of consumer protection law in Vietnam. Furthermore, as discussed above, there are several clauses which seem to be unfair and are thus laid down in Article 16 CPL but may still be justifiable in specific circumstances. Accordingly, it is advisable to introduce a long grey list of presumably unfair terms, but also to maintain, in a blacklist, a limited number of terms that are always unfair in all circumstances. Apart from a limited blacklist which is applicable to all kinds of trade sectors, it is more feasible to establish within sector-specific areas, such as banking or transportation, a particular blacklist of terms based on the latest case law.

Having said that, it is necessary to shorten the current blacklist of Article 16 to three kinds of terms that will always be prohibited in all circumstances:⁵⁵

- (i) Terms which have the effect of restricting traders' liability for the death and personal injury of consumers;⁵⁶
- (ii) Terms which have the effect of excluding or hindering the consumer's right to take legal action *via* judicial proceedings or arbitration;⁵⁷
- (iii) Terms which have the effect of providing traders with an exclusive right to interpret any term of the contract.

⁵⁵ The first two kinds of terms are entirely prohibited because they deprive individuals of their constitutional rights, namely the right to life and bodily integrity and the right to have access to justice which cannot be waived by private agreements.

⁵⁶ Article 8.1 CPL prescribes that consumers have rights to be secure, in the form of the rights to life, health, property and other legitimate rights and interests, in entering into transactions, and in using goods and/or services supplied by traders. Article 10.8 CPL provides that traders shall not trade in goods and services which are standard and which cause harm to the life, health, and property of consumers.

⁵⁷ Article 8.7 CPL prescribes that consumers have the right to make complaints, denunciations or initiate lawsuits or ask social organizations to initiate lawsuits to protect their rights and interests in accordance with the provisions of this law and other relevant legal provisions.

3.4.3. Methodical Approach to an Evaluation of the Unfairness of Standard Terms

As a matter of fact, even if the Vietnamese legislature successfully introduces a feasible test for ascertaining the fairness of standard terms, the courts will still have a great deal of authority to interpret the test and to apply it to concrete disputes. Certainly, the existence of a blacklist and a grey list would significantly assist the judiciary in evaluating the unfairness of terms: considering whether a challenged term corresponds to any terms laid down in the blacklist and grey list would be the first step that the courts would take. Once an impugned term is found to be equivalent to one of the clauses that are always prohibited in any circumstances, it is a simple task for the courts to declare that such a term is invalid. More frequently, the challenged terms would be found to be in the grey list in which case the courts could assume that these terms are unfair, unless traders could prove otherwise. In the third scenario, if the terms have not been pigeonholed into the blacklist and grey list, under the tripartite scheme they would still be subject to the unfairness test. In the last two scenarios, the courts must adopt a methodical approach to ascertain the unfairness of terms, but when the terms fall within the grey list their task is more relaxed due to the assistance of legislative guidance.

The most arduous task is for the courts to apply a general unfairness test to consider the fairness of standard terms that have not been 'grey listed' by the legislature. In this case, the functions of the judiciary will be much more challenging than the current role of the VCA which is merely confined to a rule-based analysis of whether a reviewed term bears similar characteristics to the prohibited term laid down in the blacklist of Article 16 CPL. In order to ascertain the unfairness of terms, judges must go beyond a rule-based evaluation to measure the overall imbalance in the interests of the parties. In principle, the challenged term may be considered to be not unfair once it is balanced against other advantages for consumers. Accordingly, in order to assess the unfairness of a particular term, judges should follow a two-step procedure: firstly, they should carefully identify the parties' interests, and then they should perform a proportional analysis in order to weigh whether the term – as a rational means to protect the legitimate interests of traders – is the least restrictive with regard to the legitimate interests of consumers. By way of an example, in applying the two-step procedure to ascertain the unfairness of a variation clause in a long-term contract, judges are required to identify traders' legitimate interests to vary the price to correspond to market fluctuations and then to weigh whether the variation clause is formulated in such a way that consumers' legitimate interests are duly protected. Thus, the variation clause, which may appear to be *prima facie* unfair to the detriment of consumers and therefore black listed by the current Article 16 CPL, may be valid as far as the traders' rights to vary the price are merely revoked according to strict conditions prescribed in the contract and consumers are granted a right to cancel the contract after being informed about the price variation.

In weighing the parties' interests, one of the key lessons which has been learnt from European experiences is that the courts may compare the reviewed term with the default rule that presumably embodies a fair balance between the interests of the parties. The use of the default rule as an external standard according to which terms are to be judged has a number of significant implications. Firstly, it contrasts an

individually negotiated paradigm with a non-individually negotiated paradigm: when a term is negotiated, the parties are free to depart from the default rules, but when a term is the result of a negotiated process, any departure from a default rule would be questionable. More importantly, the use of statutory guidance to analyse contractual rights and obligations is common practice by Vietnamese judges. Strictly adhering to formalism, Vietnamese judges frequently refrain from following their own justice agenda but justify their judgments by revoking contract rules laid down in legislation. Against this background, the use of a default rule as a benchmark to ascertain an unfair term provides a uniform standard with substantive grounds that are accessible to any interested parties, thereby offering legal certainty and predictability.⁵⁸ Accordingly, a review of the unfairness of standard terms begins by considering to what extent a challenged term derogates from consumers' legitimate interests that would have been granted if the term had been supplied by default rules. However, a departure from the default rules to the advantage of suppliers does not necessarily mean that the term is unfair to the detriment of the consumer. Indeed, suppliers may have legitimate interests in changing the terms that the law would otherwise provide as long as this is justified. Accordingly, it is necessary to engage in a thorough proportionality analysis by means of a scaled test: the more the term derogates from the default rule, the stronger the suppliers' legitimate interests must be.⁵⁹

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3.5. Towards Feasible and Effective Enforcement Mechanisms

The newly proposed tripartite scheme of content control will provide that all standard terms must be subject to an unfairness test and once terms are found to be unfair, they will be unenforceable. Against this background, it can be expected that several consumers who are informed about their rights to fair standard terms and offered a reasonable opportunity to understand the terms will be capable of protecting themselves in the pre-contractual phase. Gradually, once the number of sophisticated consumers

58 Additionally, it is conceivable that, in the absence of relevant default rules, the courts can make use of further external standards which presumably reflect a fair balance between parties' contractual rights and obligations. The first kind of yardstick is obviously trade usage or business custom, which is frequently incorporated into codes of conduct offered by trade associations in particular sectors, notably the banking and insurance sectors. Certainly, the widely repeated use of a term in specific areas does not necessarily mean that the term is not unfair *per se*; however, when the incriminated term departs from market practice, this will set the alarm bells ringing. Secondly, once the guidance drafted by the VCA is realized, it will represent good practice concerning the unfairness of terms in several business sectors. Although the courts are not bound by such good practice, it constitutes an important source which can be used by the courts to assess an unfair term in individual litigation cases. Thirdly, although two-sided general trading conditions resulting from a collective agreement between consumers' organizations and trade associations in specific sectors have yet to see the light of day in Vietnam, they are not unpopular in other jurisdictions, typically in the Netherlands.

59 It is worth re-emphasizing that the goal of the unfairness test is not to seek a perfect balance between the interests of the parties, but more modestly to refuse the enforcement of terms that produce an unjustified imbalance in these interests to the detriment of consumers. In other words, it is essential to appreciate that one of the main advantages of standard terms is that they enable traders to depart from the default rules to satisfy and guarantee their legitimate interests; therefore, the role of judicial review is to confine and prevent an unacceptable departure from the recognized benchmarks of a fair arrangement of rights and duties between parties to the detriment of consumers.

who are willing to read standard terms before consenting thereto reaches a tipping point, traders will receive sufficient incentives to withdraw unfair terms from the market. Theoretically, this can happen according to the minority-informed readers doctrine; however, it is fairly naïve to place complete trust in consumers' capacity to protect themselves from unfair terms in the pre-contractual phase. In a similar vein, regardless of the shift of substantive rules from a pointillist approach to a systematic approach to unfair terms, it cannot be excluded that individual consumers themselves are poorly equipped to bring private law actions in the post-contractual phase. Accordingly, it is appropriate to design a system of enforcement that can bundle individual consumers together so that they can have sufficient capacity to effectively challenge unfair standard terms. In particular, it is submitted that the current pre-registration mechanism conducted by the VCA is inefficient and collective actions should be advocated as an effective, proactive mechanism to control the fairness of standard terms.

3.5.1. Reforming the Collective Enforcement Mechanism

As early as 2010 when the CPL was promulgated, Vietnamese legislators acknowledged that the traditional judicial redress was ineffective in enforcing the substantive provisions of standard terms. Therefore, a system of administrative control has been established to review and approve several kinds of standard form contracts before allowing them to be used in the market. Up until now, it cannot be refuted that the pre-approval mechanism conducted by the VCA is the most effective mechanism to protect consumers against onerous standard terms in Vietnam. The success of this mechanism, as this dissertation has argued, largely depends on the limited purview and the methods of review: the VCA is merely empowered to verify that approved standard form contracts do not contain any prohibited terms. This does not require the administrative agency to do anything beyond merely comparing whether the terms in question are identical to prohibited terms which are clearly laid down in Article 16 CPL. It thus follows that due to the clarity of the blacklist, there has not been wide disagreement between the administrative agency and suppliers regarding this issue. However, under the new proposed control regime – where virtually every standard term must be assessed according to the fairness test – it is unlikely that the current pre-approval mechanism for standard terms, as used by the VCA, will still be an appropriate means. The greatest problem is that the VCA appears to lack the institutional capacity as an adjudicator to objectively assess the appropriateness of standard terms.

Against this background, there are two options in implementing the new proposed control regime: firstly, the pre-approval mechanism can be retained but it must be revised in order to correspond to the proposed substantive law. Secondly, instead of maintaining the pre-approval mechanism, the collective action mechanism should be introduced to promote the preventive control of standard terms.

According to the first scenario, traders who desire to use standard form contracts in transactions that supply or provide goods and services deemed to be essential for consumers' daily lives must still submit the terms for prior approval, but before a new tribunal that can be called Vietnam's Standard Terms Council. On the basis of the newly

proposed tripartite scheme for the substantive fairness of standard terms, the Standard Terms Council will evaluate the correctness of the contractual terms before allowing them to be used in the market. The Standard Terms Council will rectify the VCA's institutional incapacity to conduct the current pre-approval mechanism as follows.⁶⁰ Firstly, the Standard Terms Council will be comprised of a bench of judges including not only civil servants in the VCA but also lawyers, economists, legal academics and representatives of consumers organizations. Secondly, the Standard Terms Council will hold hearings during which traders can defend their positions, and other interested parties can make comments. By doing so, the Standard Terms Council, contrary to the case of pre-approval by the VCA, will redress the lack of expertise when assessing the appropriateness of standard terms, while its procedural rules will ensure traders' right to be heard. However, whatever the likelihood of standard terms being appropriately assessed by the Standard Terms Council, the introduction of the Standard Terms Council cannot avoid the fierce criticism that the proposed plan will extend the scope for standard terms to be mandatorily pre-validated. As a long-term strategy, one further conceivable reform step is to use a voluntary approval mechanism as a substitute for the mandatory approval mechanism. Beyond the list of particular types of standard form contracts that must be mandatorily approved, traders may voluntarily submit their terms to the Standard Terms Council. The incentives to encourage traders to do so are not only a good trademark to attract consumers, but also a legal guarantee: once standard form contracts are approved, they would qualify for 'safe haven' treatment and would be immune from judicial redress for a limited period.

Shifting the pre-approval mechanism from a mandatory basis to a voluntary basis is very likely not only to dismiss the criticism against the current mechanism but also to be attractive to all stakeholders. It helps to forestall the condemnation, as mentioned above, that the pre-approval mechanism is generally considered to be an unjustified method for controlling unfair standard terms and, even worse, a factor which severely hinders the ease of doing business in Vietnam. Furthermore, from a theoretical perspective, a voluntary pre-approval mechanism appears to be attractive for traders. It provides legal certainty since traders can clarify in advance whether a particular kind of term is valid on the basis of the standard of fairness and once standard terms are approved, they are immune from judicial review. For consumers, the approval mechanism performs the function of a respectful and trustworthy agent who can assure consumers that once standard contracts are allowed to be used, they reflect the balanced interests of both parties. Eventually, the pre-approval mechanism will further reduce the risk of litigation and enhance consumers' confidence to enter into standard contracts with traders. However, from a practical perspective, a fundamental problem with the pre-approval mechanism is that it is very time-consuming for the state authority to scrutinize standard terms. Additionally, although the legislative control of standard terms has received sufficient political support, it is uncertain whether the

60 This suggestion has been partly inspired by the Israeli model of the Standard Terms Tribunal. See the discussion in Section 4.4 of Chapter 2.

implementation of this legislation is so important that it can justify the establishment of a special tribunal to perform this function.

The most feasible option, therefore, is to maintain the advantages of an *ex-ante* proactive control of standard terms and simultaneously to utilize the institutional capacity of the judicial system. In other words, while the enforcement mechanism does not necessarily generate a system to verify standard terms prior to their use in the market, it does produce a deterrent effect which discourages traders from including unfair terms in their contracts. In order to achieve this goal, consumers' organizations and the competent state agencies must be given the necessary preventive authority to enforce the prohibition of unfair standard terms. In the context of Vietnamese law, the preventive control mechanisms should deal with the following matters.

As far as the institutional framework is concerned, the effectiveness of the collective actions mainly depends on two important issues, namely who should be given the power to take action in order to protect the collective interests of consumers, and which procedures must be followed. Although standing to instigate collective actions should be granted to both consumers' organizations and various administrative agencies, the present weak capacity of consumers' organizations suggests that the VCA should function as the chief agent in enforcing unfair terms provisions. However, the decisive role of the VCA must be redefined: its main authority will not be to pre-approve several kinds of standard terms, but to investigate complaints about all potentially unfair standard terms, and then on the basis of the results of such an investigation, to apply for injunctive relief before the competent courts. Accordingly, the validity of standard form contracts will no longer totally rely on the pre-screening powers of the VCA but will eventually be decided by the competent courts. In the context of Vietnam, the reform will provide two theoretical implications: Firstly, it signals that the VCA's standing power is derived from the collective interests of consumers and it is appropriately obliged to respond to the voices of consumers. Secondly, it addresses the current concerns surrounding the lack of due process in assessing the fairness of terms, and particularly guarantees traders' rights to be heard and to fair trial.

The enforcement procedures can be visualized as a circular of barking and biting methods: during the first step, consumers may log complaints about alleged unfair terms they are faced with; then, based on the information provided, the VCA is obliged to investigate, negotiate and seek an injunction. Additionally, due to the fact that various state agencies and consumers' organizations are empowered to bring collective actions, the VCA should be given a coordinating function to ensure a consistent approach to enforcing the law. For this purpose, other state agencies and consumers' organizations must notify the VCA in good time that they intend to initiate a case against unfair terms, and the VCA will decide the most effective strategy to combat these terms. In practice, it is unlikely that the VCA will have to frequently challenge the unfairness of standard terms before the courts since enforcing the law by means of test cases is a last resort. Under the threat of litigation, the VCA has various additional weapons to encourage and support traders to improve the quality of standard terms. It can invite traders to engage in dialogue to amend the contractual terms which are deemed to be unfair. In order to enhance consumer confidence, the VCA may issue the Consumer Codes

Approval Scheme for a number of codes of conduct that meet the requirements of clear and fair terms. Additionally, as a leading agency against unfair standard terms, the VCA can cooperate with other competent agencies to issue guidance on unfairness in specified business sectors. Such guidance will not only educate consumers so that they can understand their rights but also assist businesses in self-compliance with the law. Consequently, it ensures that the circular system of ‘barking and biting’ can operate smoothly.

Additionally, it is essential to clarify the legal nature of collective actions. As mentioned above, the final sanction which is available to the VCA and other competent authorities including consumers’ organizations is injunctive relief – a court judgment to prohibit the continued use of the unfair term. The fundamental question, which ultimately affects the effectiveness of collective actions, is whether a finding that a term is unfair and is thus prohibited can only apply to the parties to the case or whether it can also bind third parties that are not directly related to the case at hand. Under Vietnamese procedural law, a traditional concept of *res judicata* will be applied to provide the effect that an injunction is strictly mandatory with respect to the parties to the proceedings (*inter partes effects*). Accordingly, if a consumers’ organization is a plaintiff which alleges the unfairness of a standard term, the finding of the unfairness of that term will have effect as far as all consumers who are members of that organization are concerned, but it will not be binding concerning other consumers, even if they have concluded contracts containing the same term with that trader. Apparently, an *inter partes effect* would be ineffective because it requires all consumers to bring actions against the unfairness of that same term once again. Therefore, it would be more effective if the courts could grant injunction orders which apply to all consumers who have concluded contracts containing the same standard term with the defendant trader, including those consumers who were not party to the injunction proceedings (*erga omnes effect*). By doing so, the law would have a deterrent effect and would contribute to consumer protection in the long term: it would prohibit the term from being used in general and preclude suppliers from continuing to use it against the consumer.

3.5.2. Improving an Individual Enforcement Mechanism

Although collective actions play a primary role in effectively enforcing the prohibition against unfair terms, it does not imply that individual actions should be less meaningful. It is of significant importance that not only would individual consumers be given legal standing to enforce their substantive private rights if they so wish, but, given their vulnerable procedural position, several measures must also be taken to ensure that consumers do not lose their procedural rights.

As analysed above, given the fact that the blacklist of terms laid down in Article 16 CPL is qualified as a statutory prohibition which private parties cannot transgress, terms which fall within the scope of Article 16 would be absolutely nullified and thus the courts can raise and assess the nullity of terms of their own motion. The following issue to be discussed is that under the newly proposed tripartite scheme to control the unfairness of terms, while the doctrine of *ex officio* will logically apply to several

terms falling within the blacklist, it is not clear whether this doctrine can be equally applicable to assess the unfairness of other terms. Certainly, the general application of the doctrine of *ex officio* would contribute to addressing the procedural risk that even when contractual disputes are incidentally brought before the courts, consumers, due to their ignorance concerning their rights, will not raise the unfairness of terms, and if this risk can thereby be avoided this will enhance the effective protection of consumers from unfair terms. To achieve this goal, one may argue that it is sufficient to regard the prohibition against unfair terms in consumer contracts as a public policy and thus considering unfair terms to be absolutely null and void. However, from a systematic coherence perspective, it seems to be incompatible with the conventional view that a contract shall not be absolutely null and void if it merely concerns private rights. A more feasible approach is to adopt the concept of protective nullity, which can be deduced from the new provisions on the invalidity of a contract concluded by a minor, in order to prescribe a legal sanction for unfair terms. The peculiarity of the doctrine of invalidity in the case of a minor as one contracting party is that it is a protective nullity according to which the court can only declare the invalidity of that contract to the extent that it is detrimental to the minor and that once the minor has full legal capacity he/she can ratify its validity. In the same vein, it is possible to translate the concept of protective nullity to the legal consequences of unfair terms in order to achieve a correct balance between *ex officio* protection and party autonomy: the courts are obliged to inform consumers of the fact that they consider a term to be unfair, but consumers are entitled to choose otherwise.

Additionally, it is necessary to clearly prescribe that the courts are not allowed to salvage unfair terms through modifying their content to an acceptable level. Otherwise, traders would not have a reason to stop using unfair standard terms because they would be aware that even in the worst-case scenario, the terms could still be revised to a level that is reasonable as far as their interests are concerned. Finally, one of the most important features of Article 16 CPL that must be preserved is the partial enforcement of the contract. The proposed fairness regime will distinguish between a particular unfair standard term, on the one hand, and the remaining terms of standard form contracts, on the other: the former is held to be unenforceable, while the latter are left intact. By refusing a binary concept which would endorse either enforcing the whole standard form contract or not enforcing it, this approach not only protects consumers' substantive right of not being bound by unfair terms, but also facilitates the inherent benefits of fair standard terms. Accordingly, it is essential that legislation should clarify that the unfairness of terms has no effect on the remaining terms of standard form contracts as long as the contract is capable of continuing in existence without the unfair terms.

4. CONCLUSION: BEYOND THE POWER OF CLASSICAL CONTRACT LAW

‘[T]heory-induced blindness: once you have accepted a theory and used it as a tool in their thinking, it is extraordinarily difficult to notice its flaws. If you come upon an observation that does not seem to fit the model, you assume that there must be a perfectly good explanation that you are somehow missing.’

Daniel Kahneman, *Thinking, Fast and Slow*, 277 (2011)

In the above quoted text, Daniel Kahneman- the Nobel prize laureate – has described the phenomenon of the ‘theory-induced blindness’ of scholars’ minds which appears to perfectly portray the dilemma facing Vietnamese academics as to the strategy for controlling standard terms in consumer contracts. Although acknowledging that the paradigm of the 19th century classical contract law hardly offers a basis for modern consumer contracting practice, the search for the feasible treatment of standard terms in consumer contracts has not been able to completely escape the grips of the ideal of freedom of contract. Indeed, the positive aspect of freedom of contract, or consumers’ ability to freely design their contracting framework, is rarely realized in the contracting practice with which consumers are confronted in their daily transactions. To be more specific, if almost no one reads standard form contracts before designating their consent, one can hardly speak of the positive freedom of consumers to choose their contractual rights and duties. Meanwhile, the negative aspect of freedom of contract, which excludes any external intervention in contractual content, has continued to operate to avert general rules on direct control over the substantive unfairness of standard terms. As evidenced in the 2010 CPL and the 2015 Civil Code, the two most important pieces of legislation in this context, the primary strategy of Vietnamese law to address the inherent problems of standard terms has been repeatedly confined to procedure-based schemes which merely aim to guarantee the informed consent of the parties. However, it is obvious that the risk of overreaching in standard form contracts lies not only in the negotiation process but also in the substantive terms contained within the agreement. The conventional assumption that procedural fairness automatically guarantees substantive fairness can be significantly challenged in the light of new insights from behavioural sciences which reveal the real and true image of consumers. Certainly, the model of highly competent and rational contracting parties underlying classical contract law does not accurately reflect the decision-making process of consumers. As consumers systematically suffer from cognitive biases, they are unable to sufficiently understand most standard contract terms regardless of whether they have been given adequate information. Therefore, although procedure-based solutions are greatly appreciated when addressing the issue of a lack of meaningful consent from the consumer side, on their own they cannot completely negate unfair contract terms.

Simultaneously, the European approach seems to be more effective in constraining traders from drafting oppressive standard terms to the detriment of consumers, while maintaining the use of standard form contracts in rationalizing the contracting process. One of the most important lessons that European experiences have to offer is that an effective control of standard terms unquestionably demands a different approach which

looks far beyond the paradigm of classical contract law. First of all, the control scheme must follow a hybrid approach which not only guarantees the procedural fairness of the contracting process, but also directly polices the substantive unfairness of contractual contents. Underlying this regime is a clear policy that while traders are granted fairly unconstrained freedom to unilaterally draft ‘law’ governing their transactions with consumers, their standard terms will only be enforceable as long as they are not unfair to the detriment of consumers. Secondly, once the consumers’ right to substantively fair terms is ensured, it is equally significant to consider the effectiveness of the available mechanisms which consumers may utilize in exercising their rights. For this purpose, the control scheme must go beyond the classical model of traditional private litigation to establish adequate collective or administrative mechanisms to combat unfair standard terms.

As early as the 19th century, Rudolf von Jhering – a famous German jurist – observed that:

‘[T]he reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn’t grow in his back garden.’⁶¹

While it is true that experiences from foreign legal systems must always be considered with great caution, the benefit of studying comparative law lies in broadening the jurists’ horizons. In particular, it may assist jurists in overcoming their ‘induced-theory blindness’ through enlightening them with new thinking models, fresh compelling arguments, different feasible solutions and modern trends to address similar problems. In this sense, European law is a good model for Vietnamese lawyers to think outside the current box in order to finding viable mechanisms to control standard terms in consumer contracts.

61 Cited by Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd ed. Trans. Tony Weir. (Oxford: Oxford University Press, 1998) 17.

SUMMARY

Nowadays, standard form contracts are so ubiquitous in Vietnamese society that a person cannot participate in the ordinary life without them. Despite the benefits of reducing transaction costs and thus enhancing the efficiency of mass production and mass distribution in the modern markets, the omnipresence of standard form contracts poses a significant challenge to the fundamental assumptions underlying classical contract law. Firstly, contrary to the assumption of the classical contract model that contracting parties will negotiate all the important terms before materializing their agreement into contracts, standard form contracts are unilaterally pre-drafted by the traders, and thus the adhering parties cannot meaningfully influence their contents. Secondly, the assumption of classical contract model that both contracting parties are put on equal footing is also significantly deviated from. In the case of consumer contracts, it is widely acknowledged that there is usually an unequal bargaining power between consumers and businesses and thus it is not likely that the stronger will not abuse his/her power to exploit the weaker through contracts. Consequently, it is highly doubtful whether standard form contracts are truly the fruit of adhering parties' consent, whether the famous maxim '*Qui dit contractuel, dit juste*' remains true, and whether the standard form contracts are not inefficient. In fact, there is an increasing number of standard form contracts that contain terms unnecessarily one-sided to the detriment of the consumers.

To deal with the new phenomenon of standardisation of contracts, various efforts have been witnessed in Vietnam in recent years. Of particular importance is the first attempt by the Vietnamese legislators in 2010 to prescribe a specific regulation of standard terms in consumer contracts and to delegate the regulatory powers to the Vietnamese Competition Authority (VCA) in order to pre-approve several kinds of standard form contracts. Since then, there have been two emerging trends in the legal literature concerning the legal treatment of standard terms in consumer contracts. The first trend advocates an expansion of the current pre-approval mechanism according to which standard forms must be reviewed by the competent agency (the VCA) before being used in the market. The second trend argues that the public approval of standard form contracts is a regrettable retreat from a newly established paradigm of freedom of contract. Despite acknowledging the problems of standard forms, the second trend concludes that parties are capable of protecting themselves from onerous terms as

long as they are equipped with sufficient information. These two trends somewhat reflect the wider debates regarding (i) the proper role of the state in regulating private ordering and (ii) the real image of consumers who are assumed to be a weaker party in comparison to businesses. Given the historical development of Vietnamese contract law, it is not difficult to explain mainstream scholars' mistrust of any positive state interference into standard form contracts. The ghosts of excessive paternalism during the planned economy are too obsessive for them to tolerate any substantive rules rather than information-based solutions in dealing with the problems of standard terms in consumer contracts. However, the insights from behavioural sciences seem to suggest that the formal version of the freedom of contract paradigm, based on a model of highly competent and rational parties, does not accurately reflect the decision-making process by consumers. Indeed, the effectiveness of information-based solutions is open to question since due to their cognitive biases, consumers regardless of being equipped with adequate information are unable to sufficiently understand the standard contract terms and thus cannot make rational decisions.

Simultaneously, from an international perspective, it is worthy to note that a classic model of contract law in Western society from which Vietnamese law borrowed has experienced a movement so-called the materialization of contract law to better correspond to the new phenomena of the modern economy such as standardisation of the contracting process. Arguably, this modern version of contract law can provide a more promising start to not only preserve the utility of standard form contracts but also to constrain the overreaching by drafting parties within a normative framework of contract law.

Against the above backdrop, this research aims to evaluate the current framework and, from a comparative law perspective, propose feasible solutions to reform Vietnamese legislative controls of standard terms in consumer contracts. To this end, this dissertation seeks to answer the following questions: (i) What are the rationales justifying the control of standard terms in consumer transactions? (ii) How do Vietnamese law and European law deal with the problems of standard terms in consumer contracts? (iii) What lessons from European experiences can be learnt in order to reform the current framework of Vietnamese law?

To answer the first question, Chapter 2 argues for the desirability and feasibility of the legal framework for controlling standard terms in consumer contracts. The chapter commences with the review of various attempts for an appropriate legal treatment of standard terms. It finds that the most radical suggestions representing the non-contractual approach argue that since the standard forms pre-formulated by the traders lack consumers' meaningful consent, they should not be treated as a contract, but as quasi-legislation, a thing, a defective product. The main advantage of this approach is that it retains the sacred status of the principle of freedom of contract under the classical contract law, while the state regulations are at the same time warranted to prevent the potential dangers of standard forms for consumers. Although it is true that the consumers do not generally provide specific consent to standard terms, it is unclear as to why such an exceptionally high level of quality is needed for specific consent to gauge the status of standard forms.

Arguably, consumers' consent to standard form contracts is amount to consent to be bound by the efficient and fair terms and thereby contract law must be modernised to balance the relaxed level of consent with further requirements of contractual efficiency and fairness. To this end, modern concepts of market-rational contract law and social-liberal contract law, which have been introduced in Europe, provide a promising system of thoughts to better reflect the contracting practice of modern society. Under the model of market-rectification contract law, state control of standard terms is justified due to the failure of the market to provide sufficient incentives for traders to compete on the quality of the terms. Under the model of social-liberal contract law, state control of standard terms in consumer contracts is justified to protect consumers as the weaker party from being exploited by traders. Against such a background, it is for the Vietnamese legislators to design a feasible regime standard terms in consumer contracts, which generally centres on three main policy choices regarding (i) the scope of control, (ii) the possible legal techniques ranging from information-based solutions to content-based solutions, and (iii) the feasible enforcement mechanisms.

On the basis of the normative framework laid down in Chapter 2, Chapter 3 analyses the Vietnamese law on standard terms in consumer contracts: it seeks not only to objectively describe the control regime of standard terms in consumer contracts but also to explain how the current regime has been built up. It shows that the 2010 Consumer Protection Law (CPL) introduced the regime for controlling not only the actual manner in which standard terms are communicated between parties but also the contents of several kinds of onerous terms, and empowered a specific state authority – the VCA – to ensure that businesses conform with such requirements. The mere fact that until the end of 2016, about 2,500 standard form contracts were submitted to be reviewed by the VCA before being circulated on the market signals its major contribution to creating a more favourable contracting environment to the consumers. Nevertheless, the attempt to create a feasible framework which can maintain the advantages of standard form contracts in rationalising the contracting process while controlling their overreaching effects to the detriment of consumers is far from being a success. The lack of a fair mechanism to perform an administrative review and the pointillism approach of substantive rules have subjected the CPL to criticisms from both business and consumer sides. For business communities, the trend to expand the pre-approval mechanism to different kinds of standard form contracts is viewed with a sceptical eye since it is a U-turn in the economic policy of cutting down on red tape. For advocates of consumers' rights to fair standard terms, the current regime is ineffective since – by primarily employing the procedure-based schemes rather than substance-based schemes – it fails to truly address the inherent problems of standard form contracts and the real image of consumers.

Chapter 3 explains that the current controlling regime of standard terms as embodied in the CPL has been shaped by the characteristics of the transformation of the Vietnamese economy and law during the last 30 years. In a nutshell, it is a product of an uneasy combination of (i) the movement of contract law from the ideology of the state disciplinary over contract during the planned economy to the paradigm of freedom of contract in a free market economy and (ii) the movement of consumer law towards

a contract law-oriented approach. The first movement marked by the promulgation of the 1995 Civil Code signifies that it is not the state but private parties who have the right and power to freely and voluntarily specify their own distinctive sets of rules to administer their contractual relationship. According to this classical view of contract, once parties who have equal bargaining powers have freely entered into an agreement, it is not the function of contract law to warrant that a fair bargain had been achieved. The second movement marked by the introduction of the 2010 CPL denotes the ‘detour’ of state interference for protecting consumers as a weaker party from being subject to onerous standard form contracts dictated by businesses. Although the risks of standard terms in consumer contracts may warrant statutory control, the dominant force of the first movement in the Vietnamese literature raises an equally important issue that state interference should be cautiously designed to avoid the return of excessive paternalism in contract law. To this end, the information-based techniques have been advocated as the main strategy to deal with the problems of standard terms in consumer contracts. These techniques include (i) the duty to bring the terms to the attention of consumers and (ii) the duty to draft standard terms in a transparent manner. Additionally, the CPL follows a pointillism approach in prohibiting several kinds of standard terms that are extremely onerous to the detriment of consumers.

As a compromise between free marketers and consumers’ rights advocates, the existing regime fails to respond to a number of problems arising from standard form consumer contracts. On the one hand, although the information paradigm looks attractive to those who glorify the paradigm of freedom of contract, it is less likely that such a paradigm is capable of assisting the consumers in making their wise choice to refrain from adhering to onerous standard terms. In contrast, businesses may exploit consumers by offering seductive terms to take advantage of consumers’ cognitive biases. On the other hand, given the fact that onerous standard terms in consumer contracts result from a failure of the market as to standard form contracts, a pointillism approach to addressing individual kinds of problematic terms is incapable of addressing the problems in a comprehensive way. As a matter of fact, during the implementation of the CPL, it was evidenced that various potential unfair terms are not covered by the blacklist under Article 16 of the CPL. It thus demands a systematic solution to addressing the systematic problems of standard terms.

Furthermore, with the ambition to bringing the control regime into an action, the legislators have empowered the VCA to pre-approve several kinds of standard form contracts before allowing them to be used in the market. Apparently, although the pre-approval mechanism is not unreasonable in several monopolized sectors, the tendency to extend the pre-approval mechanism to standard form contracts that are used in competitive market sectors is questionable. In order to perform the pre-review function appropriately, a high level of expertise corresponding to different market sectors is an essential prerequisite. Furthermore, as far as the institutional design is concerned, the transparent procedural rules to be applied in the process of reviewing the standard terms are important to ensure the business’s rights to access to justice. Unfortunately, both requirements are lacking in the current administrative review regime.

Given the shortcomings of the current regime of controlling standard terms in consumer contracts, it is time for Vietnam to search for a more feasible framework which must be able to combine the twin aims of accepting standardised contracting realities and inspiring fair contracting practices. For that purpose, Chapter 4 looks at how European law as a potential source of inspiration for modernizing Vietnamese law has been designed to address the problems of standard terms in consumer contracts. This chapter demonstrates that the configuration of the unfair terms control regime in Europe has been shaped by a continuous interplay between national law and European law. The control regime enshrined in the 1993 Directive on Unfair Contract Terms (UCTD) has inherited the characteristics of the three waves of legislation in the EU Member States, which aim to control standard terms, especially in the interest of consumers. Simultaneously, when the UCTD was finally adopted in 1993, it laid the foundation for the fourth wave of legislation on unfair terms in the Member States through requiring the Member States to update their own legislation or even to introduce the new laws which must meet the minimum standards for protecting the consumer against the abuse of power by the seller or supplier. For this purpose, the UCTD adopts a holistic approach towards controlling unfair term through providing: (i) substantive provisions which enshrine the consumers' rights to 'transparent' and 'fair' standard terms in all market sectors, and (ii) procedural provisions which offer adequate and effective means to prevent the continued use of unfair terms. Of particular importance is that the Directive enshrines the model of substantive (un)fairness, rather than merely procedural (un)fairness and thereby allowing the courts to directly review the balance between the rights and obligations arising from contractual terms. In this connection, the standards-based approach, which is manifested in the general criteria of 'significant imbalance' and 'good faith' in the unfairness test, is perfectly combined with the rule-based approach, which is evidenced by the indicative list of unfair terms annexed to the Directive to ensure the safety-net function of the Directive in catching future unfair terms while providing concrete guidance to all stakeholders. At the same time, the UCTD envisions *ex-ante* preventive action as an essential supplement to traditional means of *ex-post* action initiated by individual consumers. It is practically evidenced that the actions initiated by collective associations or national consumer authorities have effectively protected consumers from being bound by unfair terms.

The interplay between European law and national law has now persisted in the dialogue between the national courts which are in charge of applying the national law implementing the Directive in practice and Court of Justice of European Union (CJEU) which is empowered to interpret the meaning of the UCTD. As a final interpreter of the provisions of the UCTD, the CJEU has been very active in unleashing the potential power of the control regime under the UCTD and thereby playing a significant role in the development of European rules on unfair terms. In particular, the CJEU has shed light on a number of important issues ranging from the meaning of the core terms excluded from the unfairness test, the legal consequences of the violation of transparency principle, the function of the national default rule as a benchmark to evaluate the unfairness of terms, the legal nature of the indicative terms listed in the

Annex to the Directive, to the doctrine of *ex officio* and other issues pertaining to the effective protection of consumers.

The chapter also argues that, to a large extent, the recent developments of case law resonate with the equivalent provisions of the Principles of European Contract Law (PECL), Acquis Principles (ACQP), Draft Common Frame of Reference (DCFR) and Proposal for a Regulation on an Optional Common European Sale Law (CESL) to eventually determine the shape of legislative control of unfair terms in European law. The future development of unfair term control will arguably centre on codifying the case law to ensure legal certainty and predictability. To this effect, it can also be imagined that clarification may be added to reduce the legal uncertainty regarding the scope of the core terms, the legal sanctions for the break of transparency requirements, or the legal effects of collective actions. Furthermore, it is not hard to foresee that the indicative list of unfair terms may develop into a grey-list of presumptively unfair terms, and a limited blacklist of prohibited terms, thereby formulating a tripartite scheme for controlling the substantive unfairness of terms. More difficult questions will centre on the desirability of the extension of the scope of unfairness control to cover individually negotiated terms or contracts between businesses and small-and-medium-sized enterprises (SMEs). It remains to be seen how the debates around the policy choice will shape the future control regime of unfair terms in Europe.

A comparative analysis of the discussions conducted in the two previous chapters is provided in Chapter 5. It not only ascertains the similarities and differences between Vietnamese law and European law concerning standard terms, but also evaluates the current framework of Vietnamese law and European law under three criteria: the quality of consent, efficiency, and justice. Specifically, the chapter provides a comparative review of the three main subjects which constitute the system of legal control over standard terms under Vietnamese law and EU law namely: the scope of control, the legal techniques and the enforcement mechanism provided for in the respective laws. As far as the scope of control is concerned, the first common point between the UCTD and the CPL is that they have a similar scope *ratione personae*, which is confined to contracts between a consumer and a supplier or the seller and have a comparable scope *ratione materiae* which is confined to terms not individually negotiated rather than all kinds of contractual terms. However, the Vietnamese concept of consumers provides a wider scope of protection than Directive 1993/13 since legal persons may be treated as consumers under Vietnamese law. Arguably, such a broad concept of the consumer under Vietnamese law implies that it would not necessarily trigger vigorous debates as witnessed in the EU as to whether SMEs deserve to be protected as consumers. Additionally, the sharpest difference between Vietnamese law and EU law relating to the legislative scope of control lies in the fact that Vietnamese law does not contain limitations on its objective scope of application as provided for by the UCTD.

Regarding the legal techniques, it is possible to point out that Vietnamese law and European law pay attention to both the procedure and substance of standard terms. However, by taking a closer look at their legislative schemes, one can see that the Vietnamese approach depends a great deal on procedure-based methods, while its European counterpart seems to focus more on substance-based methods. Indeed, the

primary strategy of Vietnamese law to address the inherent problems of standard terms is the procedure-based schemes, which primarily target the transparency of the market. On the other hand, although it still emphasises the significance of the transparency principle, the European approach predominantly focuses on the protection against unfair substantive outcomes under the unfairness test. The key characteristic of EU law that helps to distinguish it from Vietnamese law is the existence of a general standard of unfairness. Arguably, the lack of a general clause having the effect of catching similar potentially onerous standard terms has prevented the CPL from becoming an effective tool to be promptly responsive to social and technical developments in the future. More significantly, it implies that any onerous standard terms that fall outside the blacklist are generally binding insofar as they satisfy procedural requirements. In contrast, the mere presence of the general standard of fairness in EU law means that, in principle, standard terms are not binding unless they survive the fairness test.

When it comes to enforcement procedures, both Vietnamese and EU legislators hold a common view that administrative agencies or consumer organisations must be endowed with appropriate and effective means to prevent the use of onerous standard terms. Such collective mechanisms are designed to attain the strategic objective of targeting standard terms which apply to multiple parties rather than to only single consumers in individual proceedings. To this end, in Vietnam, the VCA has been delegated with especially broad powers to perform an *ex-ante* control over standard terms. To be more specific, various kinds of standard terms must be compulsorily pre-approved by the VCA before being used in the market. In the EU Member States, the mandatory pre-approval mechanism also exists in some particular kinds of markets such as insurance contracts, but not as the primary strategy as in Vietnamese practice. Rather than mandatory pre-approval mechanism, consumer associations or public authorities are generally entrusted with the power to initiate collective actions in the field of unfair terms. Certainly, under threat of litigation initiated by state agencies, various standard terms are revised to meet the legal requirements. However, these actions are of voluntary nature, and unlike Vietnamese practice, the traders' rights to be heard in European adjudication process are appropriately guaranteed. Moreover, under the guidance of the competent state agency, the practice of drafting bi-partisan general trading conditions between consumer associations and professional association is encouraged in several Member States. Thus, it is fair to argue that irrespective of their common views regarding the significant role of the public agency in the combat against unfair terms, the Vietnamese law mainly applies a rigid method of market-entry control, while European law has successfully generated a more responsive regulation planned to curb and channel corporate practices.

The legislative schemes for controlling standard terms in Vietnamese law and European law are then evaluated to assess whether they are capable of enhancing the quality of consent, efficiency, or contractual justice. Firstly, the chapter finds that under Vietnamese law and European law, in general, a required level of consent to create enforceable standard terms lies somewhere between the two ends of the spectrum of consent: one where a 'mere notice' is equated to consent and the other where particularized consent to specific term is required. It concludes that the approach to

the medium level of consent under both Vietnamese law and European law should be praised since a legislative scheme that requires informed, particularized and bargained consent to every standard term is so arduous that it may completely reverse the economic benefits of non-negotiated paradigm in modern society. Secondly, Chapter 5 tests whether the legal techniques employed by Vietnamese law and European law are capable to cure market failure with regard to standard terms due to an asymmetrical information between parties. It has shown that the case law of the CJEU on the transparency rules laid down in Article 5 of UCTD has produced positive effects on enhancing customers' readership and comprehensibility of standard terms. However, since consumers' imperfect information is ineradicable, it is highly doubtful whether information-based solutions are in themselves capable of preventing inefficient terms.

Thirdly and most significantly, this chapter ascertains to what extent legislative controls over consumer contracts have safeguarded contractual fairness through strengthening the position of the consumer as the weaker party. For this purpose, it should be noted that the aims of ensuring contractual fairness might often rest on a mix of forms of justice. The legal techniques laid down by Vietnamese law and European law are aimed at both contracting processes and substantive terms; nevertheless, the Vietnamese approach largely depends on the idea of procedural justice, while its counterpart seems to focus more on commutative justice. Indeed, under Vietnamese law, contractual terms that fulfil the requirements of transparency are generally enforceable even though they may still be substantively unfair terms. In contrast, under European law, contractual terms are enforceable only if they pass both procedural and substantive fairness test. It is submitted that the emergence of substantive review is an indispensable move to truly address problems of standard terms. Given the fact that the consumers systematically suffer from cognitive biases, suppliers tend to present attractive information to exploit consumers' biases. For this reason, while information-based techniques are important, they are not sufficiently effective to protect consumers from the unfairness of standard form contracts. In this sense, European law has been a forerunner who has long realized that substantive review is an imperative method to address the problems of standard terms.

On the basis of the findings of the preceding sections, the last section of Chapter 5 proposes a comprehensive framework for a more effective regime to control standard terms in consumer contracts in Vietnam. Firstly, it suggests that the transparency requirements are still necessary methods to control standard terms; however, it is vital to classify the two levels of transparency: i) the standard terms must be drafted in plain and intelligible language, and ii) the core terms must satisfy a higher threshold of transparency. While the former enables consumers to understand and make use of the terms when they need to, usually at the performance and dispute stages, the latter enables consumers to make their informed choice at pre-contractual stage. In particular, at the pre-contractual stage, it is assumed that consumers will pay close attention to such core terms, and this thus encourage suppliers to compete on the quality of terms; the terms do not, therefore, need to be assessed by unfairness test. Be that as it may, this goal is only achieved if the core terms are so transparent and prominent that the consumers truly understand their legal and economic implications.

Secondly, it proposes that Vietnam should follow the European approach and design a tripartite scheme for controlling the unfairness of terms in standard form contracts. At the heart of the tripartite system is a general test of unfairness, which explicitly states that virtually every standard term must be reviewed as to its unfairness. Under the particular circumstance of Vietnamese law, the inclusion of such general clause, which provides for the criteria to determine whether a term is unfair, would convey a strong message that consumers have the right to be provided with fair terms and offer enormous capability for protecting consumers in all conceivable markets, for all standard terms and regarding both *ex-ante* and *ex-post* enforcement mechanisms. To supplement the general test, a blacklist of totally prohibited terms and a grey list of terms presumed to be unfair must be formulated to balance the dual goal of legal certainty and legal flexibility in controlling unfair terms.

Finally, it recommends that collective actions should be advocated as an effective, proactive mechanism to control the fairness of standard terms. To be more precise, under the new proposed control regime – where virtually every standard term must be assessed by a fairness test – it is unlikely that the current pre-approval mechanism of standard terms by the VCA is still an appropriate means. The greatest problem is that the VCA appears to lack institutional capacity as an adjudicator to objectively assess the appropriateness of standard terms. In that regard, there are two options to implement the new proposed control regime: firstly, the pre-approval mechanism can be retained but it must be reformed to correspond to the proposed substantive law. Secondly, instead of maintaining the pre-approval mechanism, the collective action mechanism should be introduced to promote the preventive control of standard terms. Arguably, the most feasible option is to maintain the advantages of an *ex-ante* proactive control of standard terms and simultaneously to utilise the institutional capacity of the judicial system. In other words, while the enforcement mechanism does not necessarily generate a system to verify standard terms prior to their use in the markets, it does produce a deterrent effect which discourages traders from including unfair terms in their contracts. In order to achieve this goal, it is vital that consumer organizations and the competent state agencies should be equipped with preventive powers to enforce the prohibition of unfair standard terms.

SAMENVATTING

TOEZICHT OP ALGEMENE VOORWAARDEN IN CONSUMENTENCONTRACTEN NAAR VIETNAMEES RECHT: LESSEN UIT EUROPA

Algemene voorwaarden worden tegenwoordig zo veel gebruikt in de Vietnamese samenleving dat eigenlijk niemand aan het dagelijks leven kan deelnemen zonder ermee in aanraking te komen. Hoewel het wijdverbreide gebruik van algemene voorwaarden het voordeel heeft dat transactiekosten lager zijn en zo de efficiency van grootschalige productie en distributie in de moderne markt wordt verbeterd, brengt dit ook grote uitdagingen met zich mee wat betreft de fundamentele aannames die ten grondslag liggen aan het klassieke contractenrecht. Ten eerste geldt hier niet, in tegenstelling tot in het klassieke contractmodel, dat de contractpartijen onderhandelen over alle belangrijke voorwaarden alvorens hun overeenkomst neer te leggen in een contract, doordat algemene voorwaarden van tevoren eenzijdig zijn opgesteld door ondernemers, en de partijen die ermee instemmen geen werkelijke invloed kunnen hebben op de inhoud. Ten tweede wordt ook sterk afgeweken van het klassieke contractprincipe dat beide contractpartijen gelijkwaardig zijn. Bij consumentenvoorwaarden wordt breed erkend dat er meestal sprake is van een ongelijkwaardige onderhandelingspositie tussen consument en ondernemer, en dat het om die reden onwaarschijnlijk is dat de sterkere partij geen misbruik zal maken van haar macht en dus de zwakkere partij zal uitbuiten. Dit maakt het hoogst twijfelachtig of algemene voorwaarden werkelijk het resultaat zijn van wederzijdse instemming, of het beroemde motto ‘*Qui dit contractuel, dit juste*’ nog steeds geldt, en of algemene voorwaarden niet eigenlijk erg inefficiënt zijn. Er is zelfs in een groeiend aantal algemene voorwaarden sprake van onnodig eenzijdige bepalingen ten nadele van de consument.

De afgelopen jaren zijn in Vietnam verschillende pogingen gedaan om goed om te gaan met het nieuwe fenomeen van standaardisering. Op dit punt is de eerste poging door de Vietnamese wetgever in 2010 van groot belang: toen werd specifieke regelgeving ingevoerd voor algemene voorwaarden in consumentencontracten en kreeg de *Vietnamese Competition Authority* (de VCA) de bevoegdheid om verschillende soorten algemene voorwaarden eerst goed te keuren. Sindsdien zijn er in de juridische literatuur twee stromingen te onderscheiden wat betreft de juridische benadering van algemene voorwaarden in consumentencontracten. De eerste stroming pleit voor

uitbreiding van het bestaande goedkeuringsinstrument dat ertoe verplicht algemene voorwaarden te laten beoordelen door de bevoegde instantie (hier de VCA) voordat ze in de markt mogen worden gebruikt. De tweede stroming stelt dat de algemene acceptatie van algemene voorwaarden een betreurenswaardige ontwikkeling is ten nadele van het nieuwverworven principe van contractvrijheid. Hoewel de problemen met algemene voorwaarden worden erkend, concludeert de tweede stroming dat partijen zichzelf goed kunnen beschermen tegen onredelijk bezwarende voorwaarden als ze maar voldoende informatie ontvangen. De twee stromingen geven in zekere zin de bredere discussie goed weer, waarin het gaat om (i) de juiste rol van de overheid in het reguleren van *private ordering* (autonomie der partijen) en (ii) het reële beeld van consumenten, die gezien worden als de zwakkere partij ten opzichte van ondernemers. Gezien de ontwikkelingen in het Vietnamees contractenrecht is het niet moeilijk een verklaring te vinden voor het wantrouwen van mainstream academici als het gaat om positieve overheidsbemoeienis met betrekking tot algemene voorwaarden: Het spook van het excessief paternalisme ten tijde van de planeconomie is voor hen nog te sterk aanwezig om inhoudelijke regelgeving te kunnen accepteren in plaats van *information-based* oplossingen. Inzichten uit de gedragswetenschap lijken er echter op te wijzen dat de formele opvatting aangaande het principe van contractvrijheid op basis van een model van *'highly competent and rational parties'* geen accurate weergave vormt van het werkelijke besluitvormingsproces van consumenten. Er wordt zelfs getwijfeld aan de effectiviteit van *information-based* oplossingen omdat consumenten, mede door hun cognitieve biases en ongeacht of ze adequate informatie ontvangen, niet in staat blijken om algemene voorwaarden voldoende te begrijpen en dus geen rationele beslissing kunnen nemen.

Tegelijkertijd is het vanuit internationaal perspectief nuttig te vermelden dat de nadruk in het klassieke Westerse contractmodel, waarop het Vietnamees recht gedeeltelijk is gebaseerd, sindsdien is verschoven van procedure naar inhoud (zogenoemde *materialization*) om beter aan te sluiten bij nieuwe aspecten van de moderne economie, bijvoorbeeld de standaardisering van het contractproces. Deze moderne versie van het contractenrecht zou een veelbelovender begin kunnen vormen om in een normatief kader voor contractenrecht niet alleen het nut van algemene voorwaarden in stand te houden, maar ook beperkingen te stellen om te voorkomen dat de opstellende partij te ver gaat.

Tegen deze achtergrond heeft dit onderzoek als doel het huidige kader te evalueren en om vanuit een rechtsvergelijkend perspectief haalbare oplossingen te suggereren voor hervorming van het wettelijk toezicht in Vietnam op algemene voorwaarden in consumentencontracten. Hiertoe zoekt dit proefschrift antwoord op de volgende vragen: (i) Wat zijn de argumenten voor toezicht op algemene voorwaarden in consumententransacties? (ii) Hoe wordt er in het Vietnamees recht en in het Europees recht omgegaan met de problemen met algemene voorwaarden in consumentencontracten? (iii) Wat kunnen we leren van Europa en toepassen in Vietnam om het wettelijk kader te hervormen?

In antwoord op de eerste vraag wordt in Hoofdstuk 2 beargumenteerd dat het wenselijk en ook haalbaar is om te zorgen voor een goed wettelijk kader voor toezicht

op algemene voorwaarden in consumentencontracten. Allereerst wordt een kort overzicht gegeven van verschillende pogingen om te komen tot een geschikte aanpak in wetgeving wat betreft algemene voorwaarden. Hierin komt naar voren dat de meest radicale ideeën binnen de niet-contractuele benadering suggereren dat, omdat er bij algemene voorwaarden zoals voor-geformuleerd door ondernemers geen sprake is van *meaningful consent* door de consument, deze niet als contract dienen te worden beschouwd, maar als quasi-wetgeving. Het belangrijkste voordeel van deze benadering is dat het het heilige principe van contractvrijheid onder het klassieke contractenrecht in ere houdt, en dat overheidsregelgeving er bovendien voor zorgt dat de potentiële risico's voor consumenten worden ingeperkt. Het is uiteraard waar dat consumenten over het algemeen niet expliciet instemmen met algemene voorwaarden, maar het is ook onduidelijk waarom dit uitzonderlijk hoge niveau van instemming nodig zou zijn om de status van algemene voorwaarden te beoordelen.

Bij algemene voorwaarden kan worden gesteld dat de instemming van de consument betekent dat deze gebonden is aan efficiënte en eerlijke voorwaarden, en om die reden dient het contractenrecht te worden gemoderniseerd om het minder strenge instemmingsniveau in evenwicht te brengen met verdere vereisten van contractuele efficiëntie en eerlijkheid. Om dit doel te bereiken vormen de moderne begrippen *market-rational contract law* en *social-liberal contract law*, die inmiddels in Europa worden gehanteerd, een veelbelovend handvat om een betere weerspiegeling te geven van de contractpraktijk in de moderne maatschappij. In het model van *market-rectification contract law* wordt overheidstoezicht op algemene voorwaarden als gerechtvaardigd gezien vanwege het falen van de markt om ondernemers voldoende te stimuleren hun concurrentiepositie te verbeteren door goede voorwaarden te bieden. In het model van *social-liberal contract law* wordt overheidstoezicht op algemene voorwaarden in consumentencontracten gerechtvaardigd gezien om consumenten, zijnde de zwakkere partij, te beschermen tegen misbruik door ondernemers. Tegen deze achtergrond heeft de Vietnamese wetgever de taak om een haalbaar regime te bedenken voor toezicht op algemene voorwaarden in consumentencontracten, waarin drie beleidskeuzes een belangrijke rol spelen: (i) de reikwijdte van het toezicht, (ii) de mogelijke juridische technieken, van *information-based* tot *content-based* oplossingen, en (iii) haalbare instrumenten voor afdwingbaarheid.

Op basis van het normatieve kader in Hoofdstuk 2 wordt in Hoofdstuk 3 een analyse gemaakt van het Vietnamees recht met betrekking tot algemene voorwaarden in consumentencontracten: het doel is niet alleen om een objectieve beschrijving te geven van het toezichtstelsel voor algemene voorwaarden in consumentencontracten, maar ook om uit te leggen hoe het huidige regime tot stand is gekomen. Hier wordt duidelijk dat de *Consumer Protection Law* (CPL) uit 2010 niet alleen een toezichtstelsel vormt voor de wijze waarop algemene voorwaarden tussen partijen worden gecommuniceerd maar ook voor de inhoud van verschillende soorten onredelijke bezwarende voorwaarden, en dat op basis van de CPL een overheidsinstantie – de VCA – de bevoegdheid heeft gekregen om ervoor te zorgen dat ondernemers aan dergelijke eisen voldoen. Alleen al het feit dat er eind 2016 ongeveer 2500 sets algemene voorwaarden aan de VCA ter beoordeling waren voorgelegd, voordat ze in de markt werden gebruikt, duidt

erop dat dit een belangrijke bijdrage vormt bij het creëren van een voor consumenten gunstiger contractomgeving. De pogingen om een haalbaar kader vast te stellen waarin de voordelen van algemene voorwaarden in de vorm van het rationaliseren van het contractproces tot hun recht komen, en ook tegelijkertijd te voorkomen dat dit proces te ver gaat ten nadele van de consument, zijn tot nog toe echter verre van succesvol. Op de CPL is zowel vanuit de bedrijfswereld als vanuit consumenten al veel kritiek gekomen vanwege het gebrek aan een rechtvaardig instrument voor het uitvoeren van de administratieve controle en vanwege de pointillistische benadering van inhoudelijke regelgeving. Binnen de bedrijfswereld wordt sceptisch gekeken naar uitbreiding van het goedkeuringsinstrument naar een aantal andere soorten algemene voorwaarden, omdat dit tegenstrijdig is met het economische beleidsstreven om de bureaucratie te verminderen. De pleitbezorgers van consumentenrechten op eerlijke algemene voorwaarden beschouwen het huidige regime als ineffectief omdat het er niet in slaagt de problemen die inherent zijn aan algemene voorwaarden en aan het realistische beeld van consumenten werkelijk aan te pakken – omdat het vooral gebruik maakt van *procedure-based* regelingen in plaats van *substance-based* regelingen.

In Hoofdstuk 3 wordt ook uitgelegd dat het huidige toezichtstelsel voor algemene voorwaarden als vastgesteld in de CPL vorm heeft gekregen binnen de hervorming van de Vietnamese economie en wetgeving van de afgelopen 30 jaar. Samengevat is dit het resultaat van een ongemakkelijke combinatie van (i) de beweging in het contractenrecht van de ideologie van overheidsbemoediging ten tijde van de planeconomie in de richting van het voorbeeld van contractvrijheid in een vrijemarkteconomie, en (ii) de beweging in het consumentenrecht naar een contractenrecht-georiënteerde benadering. De eerste beweging, gemarkeerd door de inwerkingtreding van het Burgerlijk Wetboek van 1995 (Vietnamese *Civil Code*), houdt in dat niet de overheid maar particuliere partijen het recht en de bevoegdheid hebben om vrijelijk en vrijwillig hun eigen regels vast te stellen voor hun contractuele verhoudingen. Volgens deze klassieke opvatting had, zodra partijen met gelijkwaardige onderhandelingspositie zich vrijwillig hadden vastgelegd in een contract, het contractenrecht geen enkele taak meer om ervoor te zorgen dat er een eerlijke transactie tot stand kwam. De tweede beweging, gemarkeerd door de invoering van de CPL in 2010, vormt een ‘omweg’ in de vorm van overheidsbemoediging ter bescherming van consumenten als zwakkere partij tegen het opleggen van onredelijk bezwarende algemene voorwaarden door ondernemers. Hoewel de risico’s van algemene voorwaarden in consumentencontracten aanleiding kunnen zijn voor wettelijk toezicht, stelt de eerste beweging, die in de Vietnamese literatuur de overhand heeft, dat het belangrijk is dat overheidsbemoediging voorzichtig dient te worden vormgegeven om te voorkomen dat het excessieve paternalisme terugkeert in het contractenrecht. Om dit te bereiken wordt gepleit voor het gebruik van *information-based* technieken als voornaamste strategie om de problemen van algemene voorwaarden in consumentencontracten aan te pakken. Deze technieken omvatten (i) de plicht om de voorwaarden onder de aandacht van de consument te brengen en (ii) de plicht om algemene voorwaarden transparant op te stellen. Daarnaast volgt de CPL een pointillistische benadering om een aantal vormen van algemene voorwaarden die uiterst bezwarend zijn ten nadele van consumenten volledig uit te bannen.

Omdat het een compromis vormt tussen de voorstanders van een vrije markt en de voorvechters van consumentenrechten, slaagt het huidige toezichtstelsel er niet in een aantal problemen die zich voordoen bij algemene voorwaarden goed op te lossen. Aan de ene kant, hoewel het *information-based* model aantrekkelijk lijkt voor degenen die de contractvrijheid voorstaan, is het niet zo waarschijnlijk dat een dergelijk model consumenten kan helpen bij de verstandige keuze om eventueel af te zien van het instemmen met onredelijk bezwarende algemene voorwaarden. Ondernemers kunnen consumenten juist zelfs uitbuiten door verleidelijke voorwaarden te bieden en zo misbruik te maken van de cognitieve biases van consumenten. Aan de andere kant, gegeven het feit dat onredelijk bezwarende algemene voorwaarden in consumentencontracten worden veroorzaakt door een falen van de markt, kunnen in een pointillistische benadering de afzonderlijke problemen met problematische voorwaarden ook niet overkoepelend worden aangepakt. Bij de invoering van de CPL werd bijvoorbeeld duidelijk dat een aantal mogelijk onredelijk bezwarende voorwaarden niet was opgenomen in de zwarte lijst onder Artikel 16 van de CPL. Er is dus een systematische oplossing nodig om de systematische problemen op te lossen.

Vanuit de ambitie om het toezichtstelsel tot actie te bewegen heeft de Vietnamese wetgever de VCA de bevoegdheid gegeven om verschillende soorten algemene voorwaarden te beoordelen voordat ze in de markt mogen worden gebruikt. Het lijkt er echter op dat, hoewel dit goedkeuringsmechanisme in een aantal gemonopoliseerde sectoren niet onredelijk is, er twijfels bestaan bij de neiging om dit instrument uit te breiden naar algemene voorwaarden die worden gebruikt in concurrerende marktsectoren. Om een dergelijke beoordeling goed uit te voeren is een hoog niveau aan kennis van verschillende marktsectoren vereist. Wat betreft de institutionele structuur is transparantie in procedurele regelgeving van doorslaggevend belang in het beoordelingsproces, om de rechten van de ondernemer op toegang tot de rechtspleging te garanderen (*access to justice*). Helaas ontbreken deze beide vereisten in het huidige administratieve toezicht.

Gezien de tekortkomingen in het huidige toezichtstelsel voor algemene voorwaarden in consumentencontracten is het tijd voor Vietnam om op zoek te gaan naar een beter haalbaar kader om het dubbele doel te kunnen realiseren: acceptatie van de realiteit van algemene voorwaarden en het stimuleren van eerlijke contractpraktijken. Met dit doel wordt in Hoofdstuk 4 gekeken naar de manier waarop Europees recht omgaat met de problemen van algemene voorwaarden in consumentencontracten en of dit inspiratie kan opleveren voor het moderniseren van het Vietnamees recht. In dit hoofdstuk wordt aangetoond dat de configuratie van het toezichtstelsel voor onredelijk bezwarende voorwaarden in Europa vorm heeft gekregen in een uitwisseling tussen nationaal recht en Europees recht. Het toezichtstelsel als vastgelegd in de Richtlijn betreffende onredelijk bezwarende bedingen in consumentenovereenkomsten (*Unfair Terms in Consumer Contracts Directive*; de Richtlijn) heeft elementen in zich van de drie wetgevingsgolven in de EU-Lidstaten, die gericht waren op verbetering van toezicht op algemene voorwaarden, met name in het belang van de consument. De Richtlijn die uiteindelijk in 1993 werd ingevoerd legde de basis voor de vierde wetgevingsgolf in de Lidstaten: de Lidstaten moesten toen hun eigen wetgeving up-to-date brengen of zelfs

nieuwe wetgeving invoeren om te voldoen aan de minimumeisen voor de bescherming van de consument tegen machtsmisbruik door verkoper of leverancier. Hiertoe omvat de Richtlijn een alomvattende aanpak voor toezicht op onredelijk bezwarende voorwaarden met: (i) inhoudelijke bepalingen die de rechten van de consument op ‘transparante’ en ‘eerlijke’ algemene voorwaarden in alle marktsectoren vastleggen, en (ii) procedurele bepalingen met adequate en effectieve middelen om te zorgen dat onredelijk bezwarende voorwaarden niet meer gebruikt worden. Het is met name van belang dat de Richtlijn de criteria van inhoudelijke (on)eerlijkheid vastlegt, en niet alleen van procedurele (on)eerlijkheid; zo kan de rechter direct het evenwicht beoordelen tussen de rechten en de verplichtingen die voortvloeien uit contractvoorwaarden. Hier wordt de *standard-based* aanpak, die blijkt uit de algemene criteria voor significante disbalans en *good faith* in de eerlijkheidstest, perfect gecombineerd met de *rule-based* aanpak, die blijkt uit de indicatieve lijst van onredelijk bezwarende voorwaarden in de Annex bij de Richtlijn die moet dienen als vangnet door toekomstige onredelijk bezwarende voorwaarden te ondervangen en tegelijkertijd alle stakeholders concrete instructies te geven. Ook voorziet de Richtlijn in *ex-ante* preventieve procedures als essentiële aanvulling op de traditionele *ex-post* procedures die door individuele consumenten worden begonnen. De praktijk heeft aangetoond dat de procedures die zijn aangespannen door collectieve samenwerkingsverbanden of nationale consumentenautoriteiten hebben geresulteerd in effectieve bescherming van de consument tegen onredelijk bezwarende voorwaarden.

De wisselwerking tussen het Europees recht en het nationaal recht heeft vorm gekregen in de dialoog tussen de nationale rechters die verantwoordelijk zijn voor toepassing van het nationaal recht waarmee de Richtlijn in de praktijk is geïmplementeerd en het Europees Hof (*Court of Justice of the European Union*) dat de bevoegdheid heeft om de betekenis van de Richtlijn te interpreteren. Als hoogste orgaan voor het interpreteren van de bepalingen van de Richtlijn is het Hof erg actief (geweest) in het activeren van de mogelijkheden van het toezichtstelsel onder de Richtlijn, en het speelt daarmee een belangrijke rol in de ontwikkeling van Europese regelgeving op het gebied van onredelijk bezwarende voorwaarden. Het Hof heeft vooral helderheid geschapen met betrekking tot een aantal belangrijke kwesties, variërend van de betekenis van de kernbedingen die zijn uitgesloten van de eerlijkheidstest, de juridische gevolgen van schending van het transparantieprincipe, de functie van het nationaal recht als benchmark voor het beoordelen van de eerlijkheid van voorwaarden, en de juridische aard van de indicatieve lijst in de Annex bij de Richtlijn, tot de *ex officio* doctrine en andere kwesties die verband houden met de effectieve bescherming van de consument.

In Hoofdstuk 4 wordt ook beargumenteerd dat de recente ontwikkelingen in de jurisprudentie veelal een weerklank zijn van de *Principles of European Contract Law* (PECL), de *Acquis Principles* (ACQP), de *Draft Common Frame of Reference* (DCFR) en de *Common European Sales Law* (CESL) met als doel de uiteindelijke vorm te bepalen van het toezicht op onredelijk bezwarende voorwaarden in Europees recht. In de toekomst zal de ontwikkeling van het toezicht op onredelijk bezwarende voorwaarden draaien om het codificeren van jurisprudentie om te zorgen voor rechtszekerheid en voorspelbaarheid. Het is wellicht ook mogelijk meer helderheid te scheppen om de rechtsonzekerheid te verkleinen wat betreft de kernbedingen, de

juridische gevolgen van het schenden van de transparantievereisten, of het juridische resultaat van groepsgedingen. Het is bovendien misschien mogelijk de indicatieve lijst van onredelijk bezwarende voorwaarden verder uit te werken tot een grijze lijst van vermoedelijk onredelijk bezwarende voorwaarden en een beperkte zwarte lijst van verboden voorwaarden, met als resultaat een drieledig regime voor inhoudelijk toezicht op eerlijke voorwaarden. Moeilijkere kwesties zijn die van de wenselijkheid van het uitbreiden van de scope van toezicht naar individueel onderhandelde voorwaarden of contracten tussen grotere ondernemingen en MKB-bedrijven. Het moet nog blijken hoe het overleg over de beleidskeuzes vorm zal geven aan het toekomstige toezichtstelsel voor onredelijk bezwarende voorwaarden in Europa.

In Hoofdstuk 5 worden Hoofdstuk 3 en Hoofdstuk 4 naast elkaar gelegd. Hierin komen niet alleen de verschillen en overeenkomsten aan de orde tussen Vietnamees recht en Europees recht met betrekking tot algemene voorwaarden, maar wordt ook het bestaande kader beschreven van het Vietnamees en Europees recht aan de hand van drie criteria: het instemmingsniveau, efficiency, en rechtvaardigheid. Hoofdstuk 5 geeft specifiek een vergelijkend overzicht van de drie belangrijkste onderdelen waaruit het wettelijk toezichtstelsel bestaat betreffende algemene voorwaarden naar Vietnamees recht en EU-recht: de scope van het toezicht, de juridische technieken, en de afdwingbaarheid in de verschillende rechtssystemen. Wat betreft de reikwijdte van het toezicht is de eerste overeenkomst tussen de Richtlijn en de CPL dat ze een vergelijkbare *ratione personae* scope hebben, die zich beperkt tot contracten tussen een consument en een leverancier of verkoper, en ook een vergelijkbare *ratione materiae* scope, die zich beperkt tot voorwaarden die niet afzonderlijk worden onderhandeld – dus niet alle soorten contractvoorwaarden. Het begrip ‘consument’ geniet naar Vietnamees recht echter een bredere bescherming dan in Richtlijn 1993/13, omdat onder Vietnamees recht ook rechtspersonen kunnen gelden als consument. Dit brede begrip ‘consument’ zou kunnen betekenen dat er niet noodzakelijkerwijs pittige discussies hoeven ontstaan, zoals we in de EU hebben gezien, als het gaat om de vraag of een MKB-bedrijf ook het recht heeft om als consument te worden beschermd. Verder is het duidelijkste verschil tussen Vietnamees recht en EU-recht met betrekking tot de reikwijdte van het recht het feit dat het Vietnamees recht geen beperkingen legt op de objectieve toepassing, zoals dat wel gebeurt in de Richtlijn.

Wat betreft juridische technieken kan worden vastgesteld dat in zowel het Vietnamees recht als in het Europees recht aandacht bestaat voor zowel procedure als inhoud van algemene voorwaarden. Als we echter beter kijken naar hun wettelijke regelingen komt naar voren dat de Vietnamese benadering sterk gebaseerd is op *procedure-based* methoden, terwijl in Europa een sterke nadruk ligt op *substance-based* methoden. In het Vietnamees recht is de primaire strategie voor de inherente problemen met algemene voorwaarden die van *procedure-based* regelgeving, die vooral gericht is op markttransparantie. Aan de andere kant, ondanks de sterke nadruk op het transparantieprincipe, richt de Europese benadering zich vooral op bescherming tegen inhoudelijk onredelijk bezwarende resultaten, zoals deze volgen uit de eerlijkheidstest. Wat het EU-recht vooral onderscheidt van het Vietnamees recht is dat er een algemene standaard bestaat voor wat onredelijk bezwarend is of niet (de eerlijkhedenstandaard).

Er kan worden gesteld dat, doordat de CPL geen algemene bepaling bevat voor het ondervangen van vergelijkbare mogelijk onredelijk bezwarende algemene voorwaarden, de CPL geen effectief instrument vormt waarmee in de toekomst snel gereageerd kan worden op sociale en technische ontwikkelingen. Dit betekent bovendien dat oneerlijk bezwarende algemene voorwaarden die niet op de zwarte lijst staan algemeen bindend zijn voor zover ze voldoen aan de procedurele eisen. In EU-recht betekent de algemene eerlijkhedenstandaard juist dat algemene voorwaarden in principe niet bindend zijn tenzij ze de eerlijkhedenstest doorstaan.

Wat betreft afdwingbaarheid is zowel de Vietnamese als de EU wetgever van mening dat administratieve instanties of consumentenorganisaties over geschikte en effectieve middelen dienen te beschikken om het gebruik van onredelijk bezwarende voorwaarden te voorkomen. Dergelijke collectieve instrumenten zijn specifiek bedoeld voor algemene voorwaarden in meerpartijen-situaties, niet voor afzonderlijke procedures door individuele consumenten. In Vietnam heeft hiervoor de VCA bijzonder brede bevoegdheden gekregen voor het uitoefenen van *ex-ante* toezicht op algemene voorwaarden: verschillende soorten algemene voorwaarden dienen verplicht vooraf te worden goedgekeurd door de VCA voordat ze in de markt worden gebruikt. In de EU-Lidstaten bestaat er in een aantal specifieke sectoren ook een verplicht goedkeuringsmechanisme, bijvoorbeeld de verzekeringssector, maar daar is het geen primaire strategie zoals het wel is in Vietnam. In Europa hebben consumentenorganisaties de bevoegdheid om groepsgedingen te starten op het gebied van onredelijk bezwarende voorwaarden. Om procedures door overheidsinstanties te voorkomen, worden verschillende soorten algemene voorwaarden herzien om te voldoen aan de wettelijke eisen; dit is echter op vrijwillige basis en, anders dan in Vietnam, zijn in het Europese gerechtelijke proces voldoende garanties opgenomen voor de rechten van ondernemers om gehoord te worden. Onder leiding van de bevoegde overheidsinstelling wordt in verschillende Lidstaten bovendien gestimuleerd dat er tussen consumentenorganisaties en bedrijfsverenigingen algemene handelsvoorwaarden tweezijdig worden opgesteld. Er kan daarom redelijkerwijs gesteld worden dat, ongeacht de mening die ze delen wat betreft de grote rol die de VCA speelt in de strijd tegen onredelijk bezwarende voorwaarden, het Vietnamees recht vooral gebruik maakt van de rigide methode van *market-entry control*, waar Europees recht met succes responsievere regelgeving heeft voortgebracht om bedrijfspraktijken in te perken en te kanaliseren.

De wetgeving voor het toezicht op algemene voorwaarden in het Vietnamees recht en Europees recht worden vervolgens beschreven om te beoordelen of het hierin mogelijk is verbetering te brengen in de elementen instemming, efficiëntie, of contractuele rechtvaardigheid. Ten eerste komt in dit hoofdstuk naar voren dat in het algemeen naar Vietnamees en Europees recht het vereiste instemmingsniveau voor afdwingbaarheid van algemene voorwaarden ergens tussen de twee uitersten van het spectrum ligt: helemaal aan de ene kant volstaat een simpele kennisgeving, en helemaal aan de andere kant geldt de eis dat specifiek moet worden ingestemd met iedere afzonderlijke voorwaarde. De conclusie luidt dat de aanpak voor de middenweg in instemmingsniveau naar zowel Vietnamees als Europees recht prijzenswaardig is, omdat een rechtssysteem dat weloverwogen, verbijzonderde en onderhandelde

instemming vereist voor iedere algemene voorwaarde zodanig moeizaam werkt dat het de economische voordelen van niet-onderhandelde contracten in de moderne samenleving volledig teniet doet. Ten tweede worden in Hoofdstuk 5 de juridische technieken beoordeeld die in Vietnamees en Europees recht worden gebruikt voor het repareren van marktfalen door asymmetrische informatievoorziening tussen partijen. Hieruit blijkt dat er verschillende aanwijzingen zijn dat de jurisprudentie van het Hof ten aanzien van de transparantievoorschriften in Artikel 5 van de Richtlijn positieve resultaten heeft opgeleverd voor het verbeteren van leesbaarheid en begrijpelijkheid van algemene voorwaarden voor de consument. Omdat gebrekkige informatievoorziening aan consumenten echter onuitroeibaar blijkt, is het hoogst twijfelachtig of *information-based* oplossingen inefficiënte voorwaarden kunnen voorkomen.

Ten derde wordt in dit hoofdstuk vooral vastgesteld in hoeverre wettelijk toezicht op consumentencontracten eerlijkheid in contracten heeft gewaarborgd door de zwakke positie van de consument te versterken. Hier dient te worden vermeld dat de doelstellingen in het waarborgen van eerlijkheid in contracten wellicht vaak afhangen van de mix van juridische mogelijkheden. De juridische technieken als vastgelegd in Vietnamees recht en Europees recht richten zich zowel op contractprocessen als op inhoudelijke voorwaarden. De Vietnamese benadering legt echter sterke nadruk op het idee van procedurele rechtvaardigheid, terwijl er in Europa meer nadruk lijkt te liggen op commutatieve rechtvaardigheid. Naar Vietnamees recht zijn voorwaarden die voldoen aan de eisen van transparantie in het algemeen afdwingbaar, ondanks het feit dat ze inhoudelijk onredelijk bezwarende voorwaarden kunnen bevatten. Volgens Europees recht echter zijn voorwaarden alleen afdwingbaar als ze zowel de procedurele als de inhoudelijke eerlijkheidstest doorstaan. Er wordt gesteld dat de voorgestelde toekomstige inhoudelijke beoordeling een noodzakelijke verandering is om de problemen met algemene voorwaarden werkelijk het hoofd te bieden. Aangezien consumenten systematisch cognitieve biases hebben, zorgen leveranciers ervoor aantrekkelijke informatie te leveren om daarvan gebruik te maken. Hoewel *information-based* technieken belangrijk zijn, zijn ze dus onvoldoende effectief om de consument te beschermen tegen de onredelijk bezwarende aspecten van algemene voorwaarden. Het Europees recht loopt hierin vóór en is zich er al lange tijd van bewust dat inhoudelijke beoordeling noodzakelijk is om de problemen met algemene voorwaarden aan te pakken.

Op basis van deze bevindingen wordt in de laatste paragraaf van Hoofdstuk 5 een voorstel gedaan voor een uitgebreid kader om te komen tot een effectiever toezichtstelsel voor algemene voorwaarden in consumentencontracten in Vietnam. Ten eerste wordt gesteld dat de eisen voor transparantie noodzakelijk blijven in het toezicht op algemene voorwaarden, maar dat het essentieel is om hierin twee niveaus te onderscheiden: i) algemene voorwaarden dienen te worden opgesteld in heldere en begrijpelijke taal, en ii) kernbedingen dienen te voldoen aan een nog hogere transparantiedrempel. Het eerste onderdeel stelt de consument in staat om de voorwaarden te begrijpen en gebruiken wanneer nodig, meestal tijdens uitvoering en bij conflicten, en het tweede stelt de consument in staat om een gefundeerde keuze te maken alvorens in te stemmen. Met name in de precontractuele fase wordt verondersteld dat consumenten

goed letten op dergelijke kernbedingen en dat zo leveranciers worden aangespoord tot concurrentie op de kwaliteit van hun voorwaarden; zo hoeven de voorwaarden niet getest te worden op (on)eerlijkheid. Dit doel kan echter alleen worden bereikt als de kernbedingen verplicht zó transparant en duidelijk zijn dat de consument hun juridische en economische betekenis ook werkelijk begrijpt.

Ten tweede wordt voorgesteld dat Vietnam de Europese benadering zou moeten volgen en een driedelig stelsel zou moeten opzetten voor het toezicht op (on)eerlijkheid in algemene voorwaarden in algemene voorwaarden. De kern van het driedelig stelsel is de algemene eerlijkheidstest, die expliciet stelt dat vrijwel iedere algemene voorwaarde op eerlijkheid dient te worden beoordeeld. In het Vietnamees recht zou het opnemen van een dergelijke algemene bepaling, met daarin de criteria voor eerlijkheid van een voorwaarde, sterk het signaal afgeven dat consumenten recht hebben op eerlijke voorwaarden in alle handelssectoren en zou dit goede mogelijkheden creëren voor bescherming van consumenten in alle denkbare markten, voor vrijwel alle algemene voorwaarden en voor zowel het *ex-ante* als *ex-post* afdwingen ervan. Naast de algemene eerlijkheidstest zou een zwarte lijst moeten worden opgesteld van absoluut verboden voorwaarden en een grijze lijst van voorwaarden die vermoedelijk onredelijk bezwarend zijn, om evenwicht te brengen tussen de tweeledige doelstelling van rechtszekerheid en juridische flexibiliteit in het toezicht op onredelijk bezwarende voorwaarden.

Ten slotte wordt aanbevolen om groepsgedingen te stimuleren als effectief en proactief instrument in het toezicht op eerlijke algemene voorwaarden. Meer specifiek: binnen het nieuw-voorgestelde toezichtstelsel – waarin vrijwel elke algemene voorwaarde in een eerlijkheidstest dient te worden beoordeeld – is het onwaarschijnlijk dat het huidige goedkeuringsmechanisme voor algemene voorwaarden door de VCA nog geschikt is. Het grootste probleem is dat de VCA niet de institutionele capaciteit van ‘rechter’ lijkt te hebben om de geschiktheid van algemene voorwaarden objectief te beoordelen. Er zijn daarom twee opties om het voorgestelde toezichtstelsel te implementeren: ten eerste kan het goedkeuringsmechanisme worden hervormd om te voldoen aan de voorgestelde inhoudelijke wetgeving; ten tweede kan in plaats van het goedkeuringsmechanisme het groepsgeeding worden ingevoerd om preventief toezicht op algemene voorwaarden te stimuleren. De meest haalbare optie lijkt te zijn de voordelen van proactief *ex-ante* toezicht op algemene voorwaarden te handhaven en tegelijkertijd gebruik te maken van de institutionele capaciteit van het gerechtelijk systeem. Met andere woorden, hoewel dit niet per se een regime oplevert waarin algemene voorwaarden voorafgaand aan hun gebruik in de markt worden gecheckt, bevat dit zeker goede afschrikmiddelen waardoor ondernemers minder snel onredelijk bezwarende voorwaarden zullen opnemen in hun contracten. Om dit doel te bereiken is het voldoende als consumentenorganisaties en de bevoegde overheidsinstanties preventieve bevoegdheden krijgen voor het handhaven van het verbod op onredelijk bezwarende algemene voorwaarden.

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APPENDIX

Table 1: An overview of unfair terms control in the UCTD, PECL, ACQP, DCFR and CESL

	Scope of control	Information-based rules: Transparency principle	Content-based rules: Fairness principle	Enforcement mechanism
UCTD	<ul style="list-style-type: none"> - B2C - Terms not individually negotiated - Core terms excluded 	<ul style="list-style-type: none"> - Plain and intelligible language 	<ul style="list-style-type: none"> - General clause: <ul style="list-style-type: none"> i) significant imbalance ii) good faith - Indicative list of 17 potentially unfair terms 	<ul style="list-style-type: none"> - Ex ante prevention of unfair terms - Ex post rejection to enforce unfair terms
PECL	<ul style="list-style-type: none"> - B2B & B2C & C2C 	<ul style="list-style-type: none"> - Plain and intelligible language - Duty to draw the other party's attention to terms not individually negotiated 	<ul style="list-style-type: none"> - General clause: <ul style="list-style-type: none"> i) significant imbalance ii) good faith & fair dealing - No indicative list 	
ACQP	<ul style="list-style-type: none"> - Terms not individually negotiated 		<ul style="list-style-type: none"> - General clause - Indicative list unfair terms 	
DCFR	<ul style="list-style-type: none"> - Core terms excluded 		<ul style="list-style-type: none"> - General clause - Grey list of unfair term 	
CESL			<ul style="list-style-type: none"> - General clause - Grey list of unfair term - Black list of unfair term 	

Table 2: An overview of the scope of control of unfair terms in consumer contracts in the UCTD, PECL, ACQP, DCFR and CESL

Conceptual analysis of scope of control		UCTD	PECL	ACQP	DCFR	CESL
Subjective scope	Concept of consumer	<ul style="list-style-type: none"> Natural persons Acting for purposes which is outside his trade, business or profession 		<ul style="list-style-type: none"> Natural persons Acting primarily for purpose which is outside his trade, business or profession 		
	Seller or supplier/business	Seller or supplier acting for purposes relating to in his trade, business or profession		Business acting for acting for purposes relating to the person's self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity		
Objective scope	Negotiated terms or standard terms	Terms not be 'individually negotiated'	Terms not be 'individually negotiated'	Terms not be 'individually negotiated'	Version 1: Not individually negotiated terms Version 2: Individually negotiated terms	Terms not be 'individually negotiated'
	Terms excluded	<ul style="list-style-type: none"> Main subject matter of the contract and the adequacy of the price to be paid as long as they are drafted in plain and intelligible language Terms reflecting mandatory legislative provisions 				

Table 3: An overview of the principle of transparency in the UCTD, PECL, ACQP, DCFR and CESL

Transparency principle	UCTD	PECL	ACQP	DCFR	CESL
Duty to raise awareness of contract terms not individually negotiated	Implicitly mentioned through Recital 20 and Annex 1(i)	Terms not individually negotiated can be integrated into contracts as long as: i) Traders took reasonable steps to draw the consumers' attention to the terms ii) Consumers express their consent			
Duty of transparency	Terms must be drafted in plain and intelligible language				
Legal sanctions for breach of transparency requirements	– Contra proferentem rule		– Contra proferentem rule – The non-compliance with the duty of transparency is one of factors to assess the unfairness	– Contra proferentem rule – The breach of the duty of transparency may on that ground alone be considered unfair	– Contra proferentem rule – The non-compliance with the duty of transparency is one of factors to assess the unfairness

Table 4: An overview of the principle of fairness in the UCTD, PECL, ACQP, DCFR and CESL

	UCTD	PECL	ACQP	DCFR	CESL
Criteria of unfairness test	i) Good faith ii) Significant imbalance	i) Good faith and fair dealing ii) Significant imbalance	i) Good faith ii) Significant imbalance	i) Good faith and fair dealing ii) Significant disadvantage	i) Good faith and fair dealing ii) Significant imbalance
Factors that must be considered when assessing the fairness of a term	i) The nature of the goods or services ii) All the circumstances at the time the contract was made iii) All the other terms	i) The nature of performance to be rendered ii) All the other terms iii) All the circumstances at the time the contract was made	i) The nature of what is to be provided ii) Circumstances during the conclusion of the contract iii) All other terms iv) Terms of other contract on which the contract depends	i) The nature of what is to be provided ii) Circumstances during the conclusion of the contract iii) All other terms iv) Terms of other contract on which the contract depends	i) Compliance with duty of transparency ii) The nature of what is to be provided iii) Circumstances during conclusion of the contract iv) All other terms v) Terms of other contract on which the contract depends
Examples of potentially unfair terms – indicative list or grey list of presumptive unfair terms	Indicative list includes 17 kinds of terms in the Annex	None	Indicative list includes 17 kinds of terms (taken from the Annex)	Grey list includes 17 kinds of terms (taken from the Annex)	Grey list includes 23 kinds of terms
Black list of terms that are always unfair	None	None	Black list includes only one term – an exclusive jurisdiction clause	Black list includes only one term – an exclusive jurisdiction clause	Black list includes 23 kinds of terms
Legal consequences of unfairness	<ul style="list-style-type: none"> – A term which is unfair is not binding on the consumer – The other terms continue to remain binding if the contract can be maintained without the unfair terms 				

CURRICULUM VITAE

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