

THE UNFAIR CONTRACT TERMS DIRECTIVE: MEANING AND FURTHER DEVELOPMENT

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The harmonisation of consumer law in Europe has been an important objective within the EU. Efforts have focused not only on improving the functioning of the internal market, but also on securing a high level of consumer protection in the Member States. With regard to consumer contracts, the Unfair Contract Terms Directive has come to play a key role, not least due to the case law of the European Court of Justice in this area in recent years. This article examines the need for an unfairness test of standard contracts and argues that the directive can be expanded to also include individually negotiated contract terms, and terms that relate to the main subject matter of the contract, the adequacy of the price, and changed circumstances. Such amendments would result in a greater correspondence between EU law and Swedish and Nordic law. Although full harmonisation is not possible in the short term, I will argue that a revision should point in this direction. However, I will begin my account with a presentation of the directive and how it has been implemented in Swedish law.

1 INTRODUCTION

The Directive on Unfair Terms in Consumer Contracts was adopted in 1993 and has formed an important part of consumer protection in the EU.¹ The preamble to the directive states that the directive aims to facilitate the establishment of an internal market and to protect consumers acquiring goods or services through contracts.² It emphasises that a seller or supplier should protect consumers against the abuse of power, in particular with regard to one-sided standard contracts and the unfair exclusion of essential rights in contracts.³ The preamble however also points out that the directive is designed as a minimum directive only.⁴ In the directive, a distinction can be made between the transparency requirements set out in Article 5, the unfairness test set out in Articles 3 and 4, the non-binding effect of unfair contract terms under Article 6 and injunctions in the common interest of consumers under Article 7. The presentation below aims to present an overview of these provisions in the directive.

The idea of appropriate and effective remedies is a basic idea in the Unfair Contract Terms Directive. In order to compensate for the fact that consumers often do not know

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¹ See Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts [1993] OJ L 95/29. Regarding the importance of consumer law in the EU, see the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Articles 114, 169; the Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Article 38.

² Recital 6.

³ Recital 9. The term 'seller or supplier' is defined in Article 2 as '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 or privately owned'. In the following, I will use the word 'seller' when referring to this definition of 'seller or supplier'.

⁴ Recital 12; Article 8.

their rights, the European Court of Justice has prescribed that the national courts are obliged to examine *ex officio* whether a contract term is unfair. If a national court concludes that a term is unfair, the term shall not apply unless the consumer insists that it should. The requirement of *ex officio* review is subject to a certain duty to investigate, which means that the national courts are obliged to take the initiative to gathering the evidence needed to determine whether a contract term is unfair under the directive.⁵ In the present article, I will however ignore the procedural aspects, although they are important and well worth examining.

2 THE TRANSPARENCY REQUIREMENTS

2.1 REQUIREMENTS OF THE DIRECTIVE

The transparency requirements are expressed in Article 5, which states that terms offered to the consumer in writing must always be drafted in plain, intelligible language, and that the interpretation most favourable to the consumer shall prevail in cases where there is doubt as to the meaning of a contract term.⁶ The preamble emphasises that the transparency requirements entail that the seller is under obligation to ensure that the consumer is given opportunity to review the terms.⁷ If the transparency requirements are not met, a contract term may according to Article 4, be subjected to an assessment of unfairness, even if it concerns the main subject matter or the adequacy of the price of a good or service. The requirements apply solely to non-individually negotiated contract terms.⁸ Furthermore, the indicative list of unfair terms includes terms the purpose or effect of which are to irrevocably bind the consumer to terms, which he has no real opportunity of becoming acquainted with before the conclusion of the contract.⁹

The European Court of Justice has ruled that the requirements of transparency cannot be reduced to simply a matter of formal and grammatical comprehensibility. The contract terms must also provide clear, intelligible criteria that enable the consumer to evaluate the economic consequences of the terms prior to the conclusion of the agreement.¹⁰ The court further states that 'the consumer' in the requirements of transparency should be understood as an average consumer, ie a reasonably well informed, observant and circumspect consumer.¹¹ The consumer is however assumed to be at a disadvantage, which means that

⁵ See Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms [2019] OJ C 323/04, 44–61.

⁶ See Commission Notice (n 5) 25–29. Compare, for example, Hans-W Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 *Common Market Law Review* 771, 786–788; Marco BM Loos, 'Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law' (2015) 52 *European Review of Private Law* 179; Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Taylor & Francis 2017) 129, 152–153; Nils Jansen, 'Unfair Contract Terms' in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) 943–944.

⁷ Recital 20.

⁸ Commission Notice (n 5) 25.

⁹ Annex point 1 (i).

¹⁰ Case C–186/16 *Ruxandra Paula Andriciu and Others v Banca Romaneasca SA* EU:C:2017:703, paras 44–45. See also Commission Notice (n 5) 26–27.

¹¹ See, for example, *Andriciu* (n 10) para 47; Case C–26/13 *Árbat Kásler and Rábai Hajnalka Káslerné v OTP Jelzálogbank ZRT* EU:C:2014:282, para 39. Compare Loos (n 6) 188; Howells et al (n 6) 151–152.

the requirements of transparency should be interpreted broadly and that consideration should be given to whether the consumer has been sufficiently informed of the relevant circumstances to be able to understand the meaning and consequences of the terms. The guidance on how to interpret and apply the directive issued by the Commission mentions a number of factors that may affect the assessment. These include, for example, whether important stipulations have been given a prominent place and whether the terms are placed in a contract or context where they may reasonably be expected.¹²

Regulations on a seller's duty to provide information or disclosure to consumers can also be found in other parts of the EU legislation, such as the directives on consumer rights, unfair commercial practices, consumer credit and package travel.¹³ Compliance with sector-specific acts of this kind is an important factor when examining whether the requirements of transparency under the Unfair Contract Terms Directive are met.¹⁴ However, the fact that a sector-specific act lacks information requirements in a particular respect does not prevent the establishment of such requirements under the Unfair Contract Terms Directive, which allows the directive to play a complementary role in relation to the other acts.¹⁵

2.2 IMPLEMENTATION OF THE REQUIREMENTS IN SWEDISH LAW

In Swedish law, Article 5 of the Unfair Contract Terms Directive has been implemented through the introduction of Section 10 in the Consumer Contracts Act. This rule stipulates that if there is doubt as to the meaning of a contract term, the term shall be interpreted in favour of the consumer. The rule has been criticized for not making sufficiently clear that it is the interpretation most favourable to the consumer that should apply.¹⁶ It has also been argued that the scope of the rule has been interpreted in an overly restrained manner in case law.¹⁷

Furthermore, the first sentence of Article 5, ie that a contract term must be drafted in plain, intelligible language, has not been implemented in the act. Swedish courts are, however, obliged to apply this part of the article even if it is not included in the act.¹⁸ An argument could further be made for the introduction of a rule that draws the reader's attention to the strict requirements that the European Court of Justice has deemed follow from the transparency requirements – including that they constitute a complement to the information requirements in other directives. A requirement of clarification of unexpected and onerous

¹² Commission Notice (n 5) 25–26.

¹³ See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L 304/62; Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers [2008] OJ L 133/66; Directive (EU) 2015/2302 of The European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements [2015] OJ L 326/1.

¹⁴ Case C-453/10 *Jana Pereničová Vladislav Perenič v SOS finance, spol. sr. o.* EU:C:2012:44, para 43. Compare Jansen (n 6) 944.

¹⁵ Commission Notice (n 5) 209.

¹⁶ See, for example, Ulf Bernitz, *Standardavtalsrätt* (9th edn, Nordstedts Juridik 2018) 110.

¹⁷ *ibid* 110.

¹⁸ *ibid* 109–110.

contract terms has admittedly developed in Swedish case law.¹⁹ But this requirement already applied when the directive was implemented.

3 THE UNFAIRNESS TEST

3.1 REQUIREMENTS OF THE DIRECTIVE

Article 3 of the Unfair Contract Terms Directive sets out the basic criteria for assessing whether a contract term is unfair (the unfairness test). The article stipulates that a contract term, which has not been the subject of individual negotiation, shall be considered unfair if it, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. The article further states that a contract term has been the subject of individual negotiation if it has been drafted in advance, and the consumer has therefore not been able to influence the content of the term – something that especially applies to pre-formulated standard contracts. Furthermore, it is important to remember that the unfairness test, according to Article 4, does not cover the adequacy of the price and the main subject matter of the contract, if the transparency requirements are fulfilled.

With regard to the question of whether a contract term causes a significant imbalance to the detriment of the consumer, the European Court of Justice has ruled that national courts must take into account what non-mandatory contract law rules apply under domestic law if the term has not been incorporated.²⁰ A deviation from the rules does not have to render significant financial consequences for the consumer in order to be relevant. It is enough that the default rules are undermined in a sufficiently serious manner.²¹ This provides the national courts with a broader assessment framework and enables them to consider contract terms unfair more often than would be the case if the decisions were based solely on a quantitative economic assessment. If there are no default rules, the question of whether or not there is an imbalance must be assessed in the light of other points of reference, such as what constitutes fair and equitable market practices.²² The national courts can also take into account the *acquis communautaire* and the transparency requirements.²³

Article 3 further refers to an annex containing an indicative, non-exhaustive list of terms, which may be considered unfair.²⁴ The list includes terms containing personal injury disclaimers, undue restrictions on the consumer's rights in the event of breach of contract, unilateral confiscation of advances, disproportionately large compensation amounts in the event of non-payment, seller's unilateral right to alter the characteristics of a product or service without valid reason, seller's unilateral right to determine whether the delivered

¹⁹ *ibid* 70.

²⁰ See Case C–237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG. v Ludger Hofstetter and Ulrika Hofstetter* EU:C:2004:209; Case C–415/11 *Mohamed Aziz v. Caixa d'Estalvis de Catalunya* EU:C:2013:164, para 68; Case C–226/12 *Constructura Principado SA v José Ignacio Menéndez Álvarez* EU:C:2014:10, para 21; Case C–421/14 *Banco Primus SA v Jesús Gutiérrez García* EU:C:2017:60, para 59; *Andrić* (n 10), para 59. See also Commission Notice (n 5) 31–32. Compare Micklitz and Reich (n 6) 771, 776–778; Howells et al (n 6) 141, 147; Jansen (n 6) 941–942.

²¹ See *Constructora Principado* (n 20) paras 22 and 23. See also Commission Notice (n 5) 31; Jansen (n 6) 939.

²² Commission Notice (n 5) 30.

²³ Loos (n 6) 189; Jansen (n 6) 943.

²⁴ Commission Notice (n 5) 35–36.

product or service complies with the contract and restrictions on the consumer's right to go to court. Although the list is only indicative, the European Court of Justice has emphasised that the list is an essential part of the assessment of whether a term is unfair.²⁵

With regard to the question of whether the imbalance is contrary to good faith, the preamble to the directive emphasises that the bargaining power of the parties and whether the consumer was encouraged to accept the terms, must be taken into account.²⁶ The seller can fulfil the requirement of good faith by acting fairly and equitably towards the consumer and by considering the consumer's legitimate interests. According to the European Court of Justice, the national court must examine whether the seller, dealing fairly and equitably with the consumer, could reasonably have assumed that the consumer would have agreed to such a term in an individual negotiation.²⁷ In such an assessment, the kind of hypothetical test sometimes referred to as a *possible agreement test*, thus becomes crucial.²⁸ What is to be understood by 'dealing fairly and equitably' can, however, be specified in different ways.

Article 4 states that the unfairness of a term shall be assessed, taking into account the nature of goods and services for which the contract was concluded, all circumstances attending the conclusion of the contract as well as all other terms of the contract or of another agreement on which the term depends.²⁹ This means that each assessment must be made individually. A burdensome contract term does not have to be unfair if, for example, the disadvantaged person is compensated in other respects or if a fair and equitable seller could reasonably assume that, the consumer would have accepted the term in an individual negotiation.

How the unfairness test works can be illustrated with the help of the following example. Assume that a seller has disclaimed his liability under the provisions of the law. In such a case, point 1 (b) in the indicative list of unfair contract terms, stating that a contract term provided by the seller is unfair if it unduly restricts the consumer's legal rights, is applicable. The fact that the seller has limited the consumer's rights through the disclaimer is an indication of the unfairness of the term in question. However, the seller can neutralise this initial assessment by presenting facts, which show that he, as a fair and equitable person, could reasonably assume that the consumer would accept the term in an individual negotiation.

3.2 IMPLEMENTATION OF THE REQUIREMENTS IN SWEDISH LAW

In Swedish law, the courts have had significant opportunities to adjust or override an unfair contract term by applying Section 36 of the Contracts Act since 1976. Unlike in the directive, no exemption is made for contract terms that have been negotiated individually or that relate to the main subject matter of the contract or the adequacy of the price. During implementation, it was established that Swedish contract law essentially meets the requirements set by the directive. Some adjustments were however made, for example in Section 11 of the Consumer Contracts Act, which states that circumstances that occur after

²⁵ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* EU:C:212:242, para 26. Compare Micklitz and Reich (n 6) 789; Howells et al (n 6) 138, 145–146; Jansen (n 6) 945–946.

²⁶ Recital 16.

²⁷ *Aziz* (n 20), para 69. See also Commission Notice (n 5) 29–30; Howells et al (n 6) 148–149.

²⁸ Micklitz and Reich (n 6) 790–791; Howells et al (n 6) 148; Jansen (n 6) 944–945.

²⁹ Commission Notice (n 5) 33–34; Compare Jansen (n 6) 940.

a contract has been entered into may not be taken into account if this is to the detriment of the consumer in that a contract term that would otherwise be deemed unfair cannot be overridden or adjusted.

Even if Swedish law essentially meets the requirements set by the directive, it is only in recent years that any major attention has been paid to the directive. The interpretation of the requirement of good faith made by the European Court of Justice (the possible agreement test) is a novelty in Swedish law, but the courts should be able to apply the requirement without difficulty within the framework of the current legislation.

4 THE NON-BINDING NATURE OF UNFAIR CONTRACT TERMS AND PROHIBITIONS IN THE COMMON INTEREST OF CONSUMERS

4.1 REQUIREMENTS OF THE DIRECTIVE

Article 6 states that Member States shall ensure that unfair contract terms are not binding on the consumer. In other respects, however, the Contract shall remain binding on the parties if it can survive without the unfair terms. The European Court of Justice has emphasised that unfair terms can have no effect on consumers. The court points out that any effort to make the terms partially binding would eliminate the deterrent effect that the rule seeks to establish.³⁰ If a contract term is disregarded, the resultant gap can however if necessary be filled with a supplementary rule, if the contract can survive in other respects.³¹

Article 7 of the directive further states that Member States should ensure the existence of effective means to prevent the continued use of unfair terms. This includes ensuring that persons and organisations with a legitimate interest in protecting consumers can initiate proceedings under national law wherein courts and administrative authorities can determine whether contract terms designed for general use are unfair and respond appropriately to prevent future use of such terms.³² The article complements the purely contractual provisions and means that for example government authorities may prohibit the use of an unfair term.

4.2 IMPLEMENTATION OF THE REQUIREMENTS IN SWEDISH LAW

The implementation of Article 6 in Swedish law has been inadequate. The requirements cannot be found in either Section 11 of the Consumer Contracts Act or Section 36 of the Contracts Act. The fact that the European Court of Justice has ruled that a contract term that falls within the scope of the directive is not to be adjusted but declared non-binding, needs to be clearly expressed in Swedish legislation.³³ The current wording allows much room for misinterpretation of how the rules apply.

³⁰ Case C-421/14 *Banco Primus SA v Jesús Gutiérrez García* EU: C:2017:60; Joined Cases C-154/15, C-307/15 and C-308/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU* EU:C:2016:980, para 61. See also Commission Notice (n 5) 39–41; Howells et al (n 6) 154.

³¹ *Kásler* (n 11) paras 80 and 81. See also Commission Notice (n 5) 41–43.

³² Commission Notice (n 5) 63–64. Compare Micklitz and Reich (n 6) 794; Reinhard Steennot, ‘Public and Private Enforcement in the Field of Unfair Contract Terms’ (2015) 23 *European Review of Private Law* 589; Howells et al (n 6) 155.

³³ Compare Bernitz (n 16) 180–182.

Article 7 has been implemented in Swedish law through Section 3 of the Consumer Contracts Act, which states that a special court (Patent- och marknadsdomstolen) can prohibit a seller from future use of a term that is unfair to the consumer, if prohibition can be justified from a general point of view. A state authority (Konsumentombudsmannen, KO) exercises the supervision in this area and has the right to bring an action before the court. The court's grounds for assessment are well in line with the directive's provision that a term may not, in breach of the requirement of good faith, give rise to a significant imbalance in the parties' rights and obligations that is to the detriment of the consumer. An important task for KO has been to reach agreements with sellers' organisations on standard terms in various areas. Such agreements can clean up the market and result in KO not having to bring actions before the court.³⁴

5 WHY REGULATE STANDARD CONTRACTS?

The preamble to the Unfair Contract Terms Directive states that the directive has been adopted to promote the creation of more uniform rules across Europe and to prevent sellers from abusing their power vis-à-vis consumers by incorporating one-sided standard contracts.³⁵ The question is, however, why the use of standard contracts can disadvantage consumers.

Characteristic of the use of standard contracts is that such use makes it hard for consumers to influence the design of terms in individual negotiations, thus limiting their choice to either adopting or rejecting the terms in their entirety.³⁶ In deciding whether this is to the detriment of consumers, we have reason to examine how the market for standard contracts works.³⁷ Assume that the question is whether sellers should introduce a warranty or not. If the consumers are willing to pay more for the warranty than it costs the sellers to introduce it, the standard contract will include the warranty; if the consumers are not willing to pay more, the companies will refrain from introducing the warranty. Admittedly, there are no individual negotiations about the terms and each consumer is offered either to buy the product under the current terms or to waive the contract. Nevertheless, it can be argued that the important thing for consumers is not whether the terms can be individually negotiated, but that the market has the ability to offer the terms that consumers want.

The analysis above is based on the assumption that all consumers value a standard contract equally. This need of course not be the case, which means that some consumers will be disadvantaged by the market's supply of standard contracts. In order for it to be profitable for sellers to offer alternative standard contracts, however, consumers must be willing to pay the additional costs that these give rise to. The same applies here as in relation to the seller's opportunities to maintain a wide range of products: economies of scale mean that companies only offer a limited number of products. Admittedly, the legislator could prescribe that sellers

³⁴ See Bernitz (n 16) 209–221.

³⁵ Recital 6, 9.

³⁶ Compare Friedrich Kessler, 'Contracts of Adhesion' (1943) 43 *Columbia Law Review* 629, 640. See also Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29 *Melbourne University Law Review* 1.

³⁷ 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; Russel Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 *University of Chicago Law Review* 1203.

must offer alternative standard contracts. However, such legislation is not to the advantage of consumers who prefer being able to buy the product at the lower price that uniform standard contracts give rise to.

In order to be able to assess whether a standard contract is to the detriment of the consumer, consideration must also be given to whether consumers have had the opportunity of forming an opinion about what the terms offered actually mean.³⁸ Obtaining, comparing and deciding on contractual terms takes time and effort and a consumer must therefore assess whether the extra costs that this entails are covered by the profit gained by such an activity, which means that the consumer often chooses to consider price and quality only.³⁹ Assume that a contract term limits the seller's liability – a provision that entails a cost saving of SEK 100 per item for the seller – and that the consumers, had they, as informed persons paid attention to this provision, would have been prepared to pay SEK 150 for the seller to waive the limitation of liability. In this situation, both parties would have been better off if the limitation of liability had been removed and the price was increased by, for example, SEK 125: the value of such a regulation would have increased by SEK 25 for both the seller and the buyer. The fact that the limitation of liability still exists is because consumers only take the price of the product into account. This means that a company that waives the term and instead raises the price will lose its customers.

This mechanism poses a problem not only for uninformed consumers, but also for consumers who are informed and wish to negotiate better terms.⁴⁰ The practical difficulties involved in negotiating terms are often so great that it is not profitable for the customer to initiate negotiations.⁴¹ If the terms are not perceived to be so poor that they discourage the customer from entering into the contract altogether, the customer will have no incentive to educate himself further on the contents of the terms before entering into the contract. This mechanism will result in consumers refraining from forming an opinion of the terms, even if a majority of them – as informed persons – would have preferred other terms. This creates a vicious circle and reduces the likelihood of there ever being a large enough group of informed buyers willing to bear the costs required to achieve market discipline.

³⁸ Compare, for example, George A Akerlof, 'The Market for "Lemons" and the Market Mechanism' (1970) 84 *Quarterly Journal of Economics* 488; Korobkin (n 37) 1216–1218; Hans-Bernd Schäfer and Claus Ott, *The Economic Analysis of Civil Law* (Edward Elgar 2004) 370–373; Jansen (n 6) 966.

³⁹ See, for example, Omri Ben-Shahar, 'The Myth of the "Opportunity to Read" in Contract Law' (2009) 5 *European Review of Contract Law* 1; Michael G Faure and Hanneke A Luth, 'Behavioral Economics in Unfair Contract Terms' (2011) 34 *Journal of Consumer Policy* 337.

⁴⁰ Compare, for example, Avery Katz, 'The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation' (1990–1991) 89 *Michigan Law Review* 215, 282–288.

⁴¹ The seller may find it difficult to distinguish between good consumers, who fulfil their obligations, and bad consumers, who do not. A consumer who requests more far-reaching protection than the standard contract offers may therefore arouse suspicion in the seller (who might think the consumer belongs in the latter category). As a consequence, the seller might not agree to deviate from the standard contract unless he is compensated for the additional risk that an agreement with the consumer might involve. Although the consumer may break this resistance if he can convince the seller that he is a good consumer, this complicates the contract and is not always possible. This can result in the consumer refraining from raising the issue and instead accepting the bad terms, if they are not perceived as so poor that they discourage the consumer from concluding the contract altogether. Compare Omri Ben-Shahar and John AE Pottow, 'On the Stickiness of Default Rules' (2005–2006) 33 *Florida State University Law Review* 651; Lucian A Bebbchuk and Richard A Posner, 'One-Sided Contracts in Competitive Consumer Markets' in Omri Ben Shahar (ed), *Boilerplate: The Foundation of Market Contracts* (Cambridge University Press 2007) 3, 11.

Admittedly, sellers risk losing their trustworthiness if consumers subsequently notice that they are shifting the distribution of risk to their own advantage, but in the case of terms that regulate rare events that involve limited amounts of money, the number of dissatisfied customers will likely remain small. Furthermore, the dissatisfied customers may well be inclined to continue entering into contracts on sellers' terms if they do not expect to find better terms in other standard contracts on the market.

It can be argued that it is in a seller's interest to voluntarily inform consumers of the fact that the company is offering better terms than its competitors do. If consumers, as informed persons, are prepared to pay a price that covers the company's costs for improving the terms of the contract, the company should of course inform consumers of the content of the terms. The problem with this is, however, that if the consumers are convinced that it is in their interest to pay a higher price for improved contract terms, this will benefit all sellers, which means that the seller in question must bear the full cost while only benefitting from part of the profit.⁴² The seller can of course highlight certain terms, but will by doing so run the risk of misleading consumers, since there might be other parts of the contract that are less favourable to the consumer and that the seller thus wishes not to draw attention to.

6 THE UNFAIR CONTRACT TERMS DIRECTIVE AS A MEANS OF NUANCED INTERVENTION

The fact that consumer markets for standard contracts have shortcomings justifies the legislator intervening to rectify the irregularities. The Unfair Contract Terms Directive is part of such an intervention at EU level. Characteristic of the directive is that it is based on what can be called nuanced intervention. The background to this claim is that the directive, unlike mandatory rules, emphasises the importance of the seller meeting certain transparency requirements and that the question of whether a contract term should be non-binding for the consumer is answered by means of an unfairness test.

With regard to the transparency requirements, these aim to persuade sellers to inform consumers about the meaning and consequences of the contractual terms, especially unexpected and burdensome terms. If the consumer is made aware of the unfavourable terms, the probability of him refraining from entering into the agreement will increase. If a sufficiently large number of consumers decide to forgo the offer, the seller may voluntarily choose to remove the terms in the hope that he will thereby be able to sell more goods or services.⁴³ Even if each individual consumer has little chance of influencing the content of the terms, a group of consumers may stand a better chance of changing the terms and disciplining the market. To what extent is an empirical question that is difficult to answer. However, the transparency requirements are aimed at making it easier for consumers to enter into contracts in an informed manner. The importance placed on consumers being able to

⁴² Compare, for example, Oren Bar-Gill, 'The Behavioral Economics of Consumer Contracts' (2007–2008) 92 *Minnesota Law Review* 749, 758–761.

⁴³ See Francis Herbert Buckley, 'Three Theories of Substantive Fairness' (1990–1991) 19 *Hofstra Law Review* 33, 63. However, this presupposes that the seller cannot discriminate by offering informed and uninformed consumers different standard contracts. See Korobkin (n 37) 1237. Compare, for example, Oren Gazal-Ayal, 'Economic Analysis of Standard Form Contracts: The Monopoly Case' (2007) 24 *European Journal of Law and Economics* 119.

make an informed choice is a prominent feature also in other consumer directives, such as the Unfair Commercial Practice Directive and the Consumer Rights Directive.⁴⁴

The unfairness test is characterised by the fact that it takes into account not only the individual term, but also the content of the contract in its entirety and the circumstances at the time of the conclusion of the contract, which makes a nuanced assessment possible. Insofar as there are non-mandatory rules in the Member States, these will be the primary yardstick for assessing any significant imbalance in the rights and obligations of the parties. What constitutes fair and equitable market practices provides another yardstick and one, it can be argued, that should be based on what the parties, as informed persons would have contracted.⁴⁵ The unfairness test can be based on certain principles, such as that the party able to prevent a loss at the lowest cost or to insure itself against a certain risk at the lowest cost should be the party bearing the responsibility. This creates incentives for sellers to introduce terms that correspond to expectations in a functioning market for contract terms. The meaning of 'fairly and equitably' is admittedly not unequivocal. It can however be argued that the requirement is consistent with the view that it is of crucial importance whether or not the seller could reasonably have assumed that the consumer, as an informed person, would have accepted the term.⁴⁶ It could perhaps also be argued that a seller, dealing fairly and equitably, should dissuade consumers from entering into overly risky and hazardous contracts, such as those sometimes found in the markets for certain types of credit agreements and dangerous goods. From a consumer protection point of view, a modification in this direction may be warranted.

One problem with using an unfairness test based on individual circumstances is that it can be hard to foresee the outcome and that a national court do not always have sufficient knowledge of how the market works to be able to assess what constitutes fair and equitable market practices. It could however be argued that this problem would be solved if the assessment were to be standardised to some extent. The indicative list of unfair contract terms may form the basis of such a standardised assessment. Although the list is only indicative, the European Court of Justice has ruled that it is an essential part of the assessment. It would therefore not be a giant leap to making it a regular presumption that the terms enumerated in the list are unfair by amending the directive. That would consequently mean that a seller introducing a term included in the list would have to be able

⁴⁴ With regard to regulations on the duty to provide information, behavioral science offers important insights into how the information should be formatted in order to help recipients make an informed decision. See Rosella Incardona and Cristina Poncibó, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) 30 *Journal of Consumer Policy* 21, 34. Compare Garaint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349; Thomas Wilhelmsson and Christian Twigg-Flesner, 'Pre-Contractual Information Duties in the Acquis Communautaire' (2006) 2 *European Review of Contract Law* 441; Ben-Shahar (n 39); Sophie Bienenstock, 'Consumer Education: Why the Market Doesn't Work' (2016) 42 *European Journal of Law and Economics* 237, 255.

⁴⁵ Compare, for example, Hans Schulte-Nölke, 'No Market for "Lemons": On the Reasons for a Judicial Unfairness test for B2B Contracts' (2016) 23 *European Review of Private Law* 195, 213; Hein Kötz, 'Unfair Exemption Clauses' (1987) *Svensk Juristtidning* 473.

⁴⁶ The relationship between the requirement of significant imbalance and the requirement of good faith is unclear. However, the Commission writes that 'This confirms that, for the purpose of Article 3 (1), the concept of good faith is an objective concept linked to the question of whether, in light of its content, the contract term in question is compatible with fair and equitable market practices that take the consumer's legitimate interests sufficiently into account. It is thereby, closely linked to the (im)balance in the rights and obligations of the parties.' Commission Notice (n 5) 30.

to fully prove that the unfairness test was not met with regard to the circumstances in the present case.

No list of contract terms always deemed unfair has been attached to the directive. There are however, other EU directives on consumer contracts that provide consumers with rights that they may not waive. The rules in these directives are different to an indicative list or a list of regular presumption in that they do not provide the seller with an opportunity to prove that the deviation in question does not meet the criteria of the unfairness test. There are admittedly cases in which it would be better to use a mandatory rule than an unfairness test that takes the circumstances of the individual case into account. It can however be argued that the choice between mandatory rules and an unfairness test should be based on uniform principles and not be made randomly. This implies that the Unfair Contract Terms Directive should be coordinated with other consumer contract directives in such a way that for each directive, an assessment is made of whether it is sufficient that the terms that deviate from the rules are subjected to an unfairness test, or whether the rules should be mandatory.

The Unfair Contract Terms Directive stipulates that there should be effective means to prevent the continued use of unfair terms, for example through authorities banning the use of unfair contract terms in advance. Although such bans will naturally be based on what is typically considered unfair, they still offer sellers a more nuanced assessment of their terms than would be the case if mandatory rules were applied, since they take into consideration not only the individual term but also the content of the agreement as a whole. The method does not presuppose that an individual dispute has arisen, but enables organisations and authorities to attack unfair terms at an early stage. In its practical application, it can also lead to authorities or organisations negotiating better contract terms with the sellers. Such agreements provide a way of disciplining the market and result in contracts more in line with what the parties, as informed persons, would generally have contracted in a functioning market for standard contracts.⁴⁷

7 FURTHER DEVELOPMENTS OF THE DIRECTIVE

7.1 THE IMPORTANCE OF INDIVIDUAL NEGOTIATIONS

It has been discussed whether the Unfair Contract Terms Directive should only apply to terms which have not been the subject of any individual negotiation between the parties.⁴⁸ Such a restriction exists in the directive, but is absent in Swedish law. The fact that the directive only covers non-individually negotiated terms may seem natural if the purpose is to check unilaterally established standard contracts.⁴⁹ It is however difficult to draw a sharp line between individually negotiated terms and terms that have not been individually negotiated, and a consumer may need protection in both cases.

The market does not always function in an acceptable way in individual negotiations. Experienced sellers often know how to go about getting their customers to accept an offer.

⁴⁷ It is important that authorities, consumer organizations and companies in various ways make it easier for consumers to distinguish between 'good' and 'bad' contract terms. There have for example been suggestions of non-legal approaches that make the contract terms more transparent by building on market devices such as ratings and labeling. See Ben-Shahar (n 39) 21–24.

⁴⁸ See, for example, Howells et al (n 6) 165; Jansen (n 6) 967.

⁴⁹ See, for example, Hans Schulte-Nölke (n 45) 195, 213.

There are various methods of persuasion that involve sellers playing on consumers' over-optimism, errors of thought, preconceived notions, time constraints, stress, fear, willingness to be right and so on, to bring about a contract.⁵⁰ An experienced seller can use factors like these to his advantage and thereby persuade consumers to enter into contracts, which they would otherwise never have considered. Cases where a seller systematically takes advantage of consumers' limited ability to make well-thought-out and informed choices, by for example instructing his salespersons to use different types of sales tricks in their contact with customers, are especially serious.

There is therefore a strong case for including individually negotiated terms in a future revised version of the Unfair Contract Terms Directive. Such an extension of the scope of the directive would safeguard consumers' ability to enter into contracts of their own free, rational, and informed will and would appear to be a natural complement to the Unfair Commercial Practice Directive. In assessing whether a term is unfair, national courts could then take into account the case law that has emerged on aggressive and misleading commercial practices in the European Court of Justice.

7.2 THE SIGNIFICANCE OF TERMS RELATING TO THE MAIN SUBJECT MATTER AND THE ADEQUACY OF THE PRICE

One limitation of the unfairness test is that it – unlike Swedish law – does not cover terms relating to the main subject matter of the contract and the adequacy of the price, if these terms meet the transparency requirements. However, terms relating to the adequacy of the price are only exempt from the test when they define the main subject matter of the contract.⁵¹ This means that there are a number of price provisions, such as ancillary price terms and price adjustment clauses that are covered by the test. Furthermore, a court can consider price when assessing whether other contract terms are unfair. The European Court of Justice has also taken a restrictive approach to exemptions in case law.⁵² Taking another step in this direction, by completely abolishing the exemptions for terms relating to the main subject matter and the adequacy of the price in a new directive, would therefore not seem to be inconsistent with the court's intentions.

It has been argued that judicial review of the unfairness of terms, which relate to the main subject matter of the contract or the adequacy of the price, is incompatible with a functioning market economy and presupposes assessment criteria that would be difficult to apply.⁵³ However, an unfairness test of such terms should not seek to determine which goods or services contracts should cover. Its only aim should be to ensure that no significant

⁵⁰ Various techniques, based on the fact that there are certain common human characteristics that increase our tendency to agree, such as our will to reciprocate favours, behave consistently, act like others, accommodate people we like, and obey legitimate authorities, have been described. See Paul Benett Marrow, 'Crafting a Remedy for the Naughtiness of Procedural Unconscionability' (2003–2004) 34 *Cumberland Law Review* 11; Robert B Cialdini, *Influence: Science and Practice* (5th edn Pearson Education 2009).

⁵¹ See, for example, Fernando Gómez Pomar, 'Core versus Non-Core Terms and Legal Controls over Consumer Contract Terms: (Bad) Lessons from Europe?' (2019) 15 *European Review of Contract Law* 177, 187.

⁵² See, for example, Pomar (n 51) 188.

⁵³ See, for example, Schulte-Nölke (n 45) 201–203. Compare. Matteo Dellacasa, 'Judicial Review of "Core Terms" in consumer Contracts: Defining the Limits' (2015) 11 *European Review of Contract Law* 152, 158–162; Pomar (n 51) 185–187.

imbalance in the rights and obligations of the parties has arisen due to unfair business practices, and such testing would provide a much-needed complement to the transparency requirements in the directive and the Member States' rules on unfair exploitation and mistake.⁵⁴ The unfairness test could prove an important tool not least in the efforts to prevent sellers from taking advantage of consumers' inability to form adequate perceptions of price through different types of sophisticated and deceptive price schemes. Allowing for terms relating to the adequacy of the price to be subjected to an unfairness test need therefore, not result in general price control or the like and would harmonise with Swedish law.

Furthermore, if the price was subjected to an unfairness test, it can be argued that the seller should have the burden of proving that the price is not unfair if it significantly exceeds the market price. Invalidation of contracts containing unfair prices is not always the best solution, since it is often in the consumer's interest that the contract remains valid. It would therefore be preferable to offer the consumer the opportunity to choose between having the contract invalidated and allowing the current or an otherwise reasonable price to apply.⁵⁵

7.3 THE SIGNIFICANCE OF CHANGED CIRCUMSTANCES

Unlike Swedish law, the directive does not take into account circumstances that occur after the conclusion of the contract, which means that changed circumstances are not considered in the unfairness test. This may seem strange considering that long-term consumer contracts in particular can be unfavourable to the consumer. Examples of long-term contracts of particular importance for consumers are contracts regarding credit, tenancy and basic services.⁵⁶ Introducing an article on the effects of changing circumstances should however not present any major problems.⁵⁷ Such an article could state that a court, if the fulfilling of a contract has become very burdensome for a consumer or the value of the consideration has decreased, may adjust the contract by either balancing it or declaring it terminated. It would however be reasonable to demand that the change in circumstances was unforeseeable to the consumer and that the consumer could not reasonably have anticipated the risk of the occurred.

7.4 TOWARDS FULL HARMONISATION

The Unfair Contract Terms Directive is a minimum directive. In order to increase harmonisation in the field of consumer law, the Commission in 2008 presented a proposal for a directive on full harmonisation of consumer rights, which included a section on unfair

⁵⁴ Compare Dellacasa (n 53) 165. Atamer believes that ex post judicial control has its weaknesses and discusses tools which could counterbalance consumer biases on which the techniques rely, for example by unifying price information, facilitating comparison-shopping, informing consumers of their usage data and making switching easier. See Yesim A Atamer, 'Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer – Insights from Behavioral Law and Economics' (2017) 80 *Modern Law Review* 224. Regarding mistake and unfair exploitation, see, for example, Sebastian Lohsse, 'Validity' in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) 659–673, 701–706.

⁵⁵ Compare Dellacasa, (n 53) 174–176. See also Káslér (n 11) paras 76–85.

⁵⁶ Howells et al (n 6) 165.

⁵⁷ Regarding changed circumstances, see, for example, Thomas Rűfner, 'Change of Circumstances' in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) 899–92.

contract terms.⁵⁸ However, due to criticism from, among others, the Nordic countries, this section was never included in the directive.⁵⁹ Full harmonisation would admittedly facilitate trade in the internal market, and the EU has made efforts to achieve such harmonisation. It would however also prevent Member States from introducing more ambitious consumer legislation than the directive allows. Furthermore, the basic principles of subsidiarity and proportionality in EU law must be taken into account.

The question of whether a contract term is unfair has also been made dependent on whether it deviates from the default rules in the Member States. In order to be successful full harmonisation would therefore demand that a greater part of contract law in the Member States was harmonised.⁶⁰ It has however been emphasised that the European Court of Justice has gradually developed a more independent view of what characterises the assessment of unfairness. This is evident in for example the transparency requirements, the invocation of the *acquis communautaire*, the possible agreement test and the emphasis on the indicative list of unfair terms being an essential part of the unfairness test.⁶¹ There is nothing to prevent further development in this direction and my proposal that the overall benchmark for the assessment of unfairness should be whether a contract term to significant extent deviates from what the parties could be assumed to have contracted, could form part of a more independent examination.

8 CONCLUSIONS

The Unfair Contract Terms Directive has, not least due to the case law of the European Court of Justice, come to play an important part in the control of standard contracts in consumer markets in Europe. This article explains why such control is needed and discusses the directive's role as a control instrument. In the article, I have shown how the transparency requirements and the unfairness test have given the directive the character of what may be called nuanced intervention. The fact that the European Court of Justice has ruled that the indicative list of unfair terms is essential to the assessment of unfairness, has however meant

⁵⁸ Proposal for a Directive for the European Parliament and of the Council on consumer rights, COM (2008) 614 final. In 2011, the Commission also presented a proposal for a Regulation on a Common European Sales Law (CESL), see Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law, COM (2011) 635 final. The proposal included rules on unfair contract terms. However, it only applied to cross-border trade and was designed as an 'optional instrument' in that it was only applicable in cases where the parties agreed that it should be. The proposal was never implemented.

⁵⁹ See Howells et al (n 6) 130.

⁶⁰ The question of whether there is a need for greater coordination of private law in Europe has been discussed within the EU. One of the manifestations of this discussion is the Draft Common Frame of Reference (DCFR), which was presented in 2009. In the 'full edition' of this document the rules are commented. See Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, vol. 1, full edition (Oxford University Press 2010). The DCFR is however not anchored in the political institutions of the EU and therefore so far only has the character of soft law. If nothing else, it can be viewed as a source of inspiration for future legislation and as a toolbox for the harmonisation of various concepts and rules. Mention should also be made of the work carried out by the so-called Lando Commission, which resulted in the Principles of European Contract Law (PECL). Regarding the efforts to harmonise European contract law, see also Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018).

⁶¹ See Jansen (n 6) 943. Compare Oliver Gestenberg, 'Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts' (2015) 21 *European Law Journal* 599, 604.

that the need for a nuanced and fair assessment of each individual case must be weighed against the need for standardised assessment and predictability.

As has been pointed out, there are however, some cases in which a list of contract terms always deemed unfair would be needed. The article has further emphasised the need for coordinating the Unfair Contract Terms Directive with provisions in other consumer directives in such a way that the directives state whether an unfairness test is sufficient to determine if a deviation from the provisions should be allowed or whether the regulations should be made mandatory.

The article has also emphasised the need for an overall benchmark for the unfairness test and suggested that the assessment should be based on what the parties, as informed persons, could be assumed to have contracted in a functioning market for standard contracts. The standardised assessment could thus be based on what is normally the case, and the individualised assessment on what could be assumed to apply in the case at hand. Although the details of such a solution can be discussed further, and some modifications of the benchmark may be warranted, it is well in line with the interpretation of the requirement of good faith made by the European Court of Justice, and it is my hope that such a benchmark will be introduced in the future.

The scope of the current directive on unfair contract terms is restricted in that the directive does not take into account individually negotiated terms, terms regarding the main subject matter of the contract and the adequacy of the price or circumstances that occur after the conclusion of the contract. As has been pointed out in the article, the rationale for maintaining these restrictions can be called into question. A removal of the restrictions would mean that the assessment of unfairness would largely correspond to the assessment of unfairness in Swedish and Nordic law.

Whether the Unfair Contract Terms Directive should constitute a full harmonisation directive has been subject to much controversy. The answer to the question depends on how far the harmonisation of consumer contract rules will reach and to what extent contract law in general will be harmonised in the future. In the short term, however, it seems unlikely that an introduction of a full harmonisation directive would be successful, although the case law of the European Court of Justice and amendments to the directive may point in this direction.

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