# CONSUMER PROTECTION AND FREEDOM OF CONTRACT IN THE DIRECTIVE 93/13/ECC ON UNFAIR TERMS IN CONSUMER CONTRACTS

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***Abstract***

In our paper we will treat consumer protection and its impact on freedom of the will of contracting parties, mainly as regulated by the Directive 93/13/ECC on unfair terms in consumer contracts.

According to Flume and Larenz, as a procedural principle of justice in contract formation, „contractual freedom includes not only voluntariness of each party's consent, but also, equal bargaining power." Parties are having a freedom to contract when businesses deal fairly with consumers, but in consumer contracting, the economic and juridical imbalances between trade participants give the party with superior bargaining power a notable advantage by defining terms in advance, so the weaker party is unable to negotiate and express its free will. As a part of the consumer protection framework, unfair contract regulations aim to correct the inequality of bargaining and market power between consumers and small businesses on one side and large businesses, on the other, and aim to remove the unfavorable consequences arising from imbalanced contracts. The prohibition of unfair terms is a sanction for the mala fides of the party with superior position in contract.

Legislative intervention in consumer contracts pretends to strengthen a consumer's position by avoiding imbalance of market power between contracting parties, by introducing specific rules which consist on fixing part of the rights and obligations of the parties, control of unfair terms and conditions and information requirements.

From the point of view of businesses, judicial intervention into contract terms can be considered as a restriction of freedom of contract. According to them, these regulations are unequal and unjust because they limit the freedom of professionals by over-regulation of standardised contracts and imposing several restrictions.

**Keywords:** Consumer protection, freedom of contract, consumer contracts, contractual imbalance, unfair terms.

## 1. Introduction

There is no Law on consumer protection as a special branch of law. This notion entered the legal dictionary from the 1970s „in an era when consumer laws and policies were produced."[1] Many authors think that this is a technical term rather than an autonomous legal

[1] Alhusban, Ahmad: The Importance of Consumer Protection for the Development of Electronic Commerce: The Need for Reform in Jordan, A Thesis Submitted for the Degree of Doctor of Philosophy in Law at University of Portsmouth, April 2014, available at http://eprints.port.ac.uk/16340/1/Thesis_Oct_2014_last.pdf [accessed 20.12.2016], p. 41.

area.[1] The most intensive legislative activity is reflected in the adoption of consumer directives. In relation to this, overall acquis communautaire can be divided into consumer and non consumer acquis.[2] The largest number of consumer protection directives regulate different aspects of contractual relations between consumers and businesses, but always with so-called „patchwork method", or only specific issues related to such contracts.[3] The most important directive in the field of consumer protection at this time is the horizontal Directive (2011/83/EU)[4] of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC[5] on unfair terms in consumer contracts and Directive 1999/44/EC[6] of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees and repealing Council Directive 85/577/EEC[7] to protect consumer in respect of contracts negotiated away from business premises and Directive 97/7/EC[8] of the European Parliament and of the Council on the protection of consumers in respect of distance contracts.

Business to consumers transactions which are characterized by the inequality of bargaining power, has encouraged legal scientist to consider consumer protection issues. As a result, many attempts have been made to strengthen a consumer's position by introducing specific and practical regulations in the field of European consumer law.[9]

In commercial life, parties are having a „freedom to contract". The freedom of contract, in cases where traders behave fairly and honestly with consumers are rarely a problem, but in concluding contracts with consumers, the reality can be different. Consumers are more likely to be weaker or more vulnerable to the contract.[10]

The process of contract formation has changed in response to economic realities.The businesses does not have enough time and money to conclude contracts through individual negotiations. In order to save time and avoid difficulties in negotiating, and to facilitate planning, modern industries have introduced a new system of contracting, ie pre-printed and mass-produced contracts with a standard form that can be used continuously or over and over again.[11] In that case, consumers may not have the possibility to negotiate the terms of the contract before the conclusion of the contract.[1]

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[1] Wilhelmsson, T.: Is There a European Consumer Law and Should There Be One?, Centro Studie Ricerche di diritto comparato e straniero, diretto da M. J. Bonell, 2000, available at http://w3.uniroma 1.it/idc/centro / publications/41wilhelmsson.pdf, p. 19-23; etc., cited in Petrović, Anita: Politika zaštite potrošača u funkciji izgradnje unutranjeg europskog tržišta, Zbornik radova, II Međunarodna Konferencija Bosna i Hercegovina i Euroatlantske Integracije, Trenutni izazovi i perspektive, Bihać, 2014, available at http://eprints.ibu.edu.ba/id/eprint/3091 [accessed 25.09.2016], p. 542.

[2] Twigg-Flesner, C.: The Europeanization of Contract Law, Current controversies in law, Rutledge-Cavendish, London and New York, 2008., p. 51, cited in Petrović, Anita: op. cit., p. 542.

[3] Petrović, Anita: op. cit., p 549.

[4] OJ L 304/64, 22.11.2011.

[5] OJ L 95, 24.01.1993, in the following text Directive 93/13/EEC or Directive on unfair terms in consumer contracts.

[6] OJ L 171 , 07.07.1999.

[7] OJ L 372, 31.12.1985, No longer in force, Date of end of validity: 13/06/2014.

[8] OJ L 144, 4.6.1997, No longer in force, Date of end of validity: 13/06/2014.

[9] Alhusban, Ahmad: op. cit., p. 61.

[10] National Consumer Agency: Identifying and avoiding the use of unfair terms in consumer contracts, Unfair Terms in Consumer Contracts, Ireland, Dublin, June 2014, available at http://ccpc.ie/sites/default/files/NCA-guide-to-unfair-terms-in-contracts.docx [accessed 15.09.2016], p. 3.

[11] Kessler, Friedrich: Contracts of Adhesion - Some Thoughts About Freedom of Contract, Columbia Law Review, Vol. 43, 1943, available at https://pdfs.semanticscholar.org/c771/0e052126683c39dbcf 3753aefd77bb4d0666.pdf [accessed 15.01.2018], p. 361, cited in Hussein, Ismail A.: Freedom of contract and

A standard contract is a contract that is concluded through fully or partially pre-arranged unilateral terms and conditions from a party having a stronger bargaining position and the other party has little or no ability to negotiate more favorable terms and is thus placed in a „take it or leave it position". Intention of businesses is these contracts to be applied in a similar manner in a number of typical cases, regardless of individual differences.[2] With these features, a standard-form agreement leads to the emergence of the following legal problems: firstly, because the other party in the contract signs a standard form, this does not necessarily mean that he has met all the provisions or terms of the document and accordingly accepted them; ordinary consumers or suppliers often do not read the text written in small print, and even if they read it, there is a high possibility that they do not understand the legal jargon or the legal meaning of the clauses unless they are explained to them, and secondly, the standard contracts are mostly used by businesses with stronger bargaining power; the weaker party in need of goods or services is often in a position not to find better contractual terms and conditions, because the author of a standard contract has a monopoly or because all competitors use the same terms or conditions.[3]

Standard contracts are often adhesion contracts. The term „adhesion contract" or „contract d'adhesion" was first introduced by the French expert of Civil Law Saleilles in 1901. in the „De la declaration de Vente". According to him, „adhesion contracts are defined as pre-formulated stipulations in which the offeror's will is predominant and the conditions are dictated to an undetermined number of acceptants and not to one individual party." [4]

## 2. Limiting party Autonomy in EU Consumer Law

Contractual **freedom** includes the idea of **equal** bargaining power. As a procedural principle of justice in contract formation, contractual freedom includes not only voluntariness of each party's consent, but also, equal bargaining power.[5]

The laws on unfair contract terms are part of the consumer protection framework and aim to correct the imbalance between the parties by preventing the inclusion of abusive clauses in contracts concluded between businesses and consumers. Incorporation of these provisions, as an unfair commercial practice, creates an imbalance between parties at the time the contract is concluded. Inequality in negotiating power has often been seen as a

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consumer protection in English, American and Islamic Law, available at https://www.researchgate.net/profile/Ismail_Hussein/publication/260158094_FREEDOM_OF_CONTRACT_AND_CONSUMERS_IN_ENGLAND_AMERICA_SUDAN_AND_ISLAMIC_LAW/links/00b7d52fcc41d14bf1000000/FREEDOM-OF-CONTRACT-AND-CONSUMERS-IN-ENGLAND-AMERICA-SUDAN-AND-ISLAMIC-LAW [accessed 15.12.2016], p. 3.

[1] National Consumer Agency: op. cit., p. 3.

[2] Hussein, Ismail A.: op. cit., p. 6.

[3] Slawson, W.D.: Standard Form Contracts and the Democratic Control of Lawmaking Power, Harv.L.Rev. 84 (1970-71), p. 529, cited in Hussein, Ismail A.: op. cit., p. 7.

[4] Bolar, Vera: The Contract of Adhesion, American J. of Comp. Law, Vol.17 (1972), p. 57, cited in Hussein, Ismail A.: op. cit., p. 7.

[5] Flume, Warner: Allgemeiner teil des Bürgerlichen rechts: Zweiter band: das rechtsgeschäft, 4th ed., Springer, Berlin, Heidelberg, 1992, p. 10, Larenz, Karl: Lehrbuch des schuldrechts: Band I: Allgemeiner teil, C.H. Beck Verlag, 1987, p. 76–79, cited at Rödl, Florian: Contractual freedom, contractual justice, and contractual law (theory), Law and contemporary problems, 76 (2013): 57, available at http://scholarship. law.duke.edu/cgi/viewcontent.cgi?article=4360&context=lcp [accessed 15.09.2016], p. 61-62.

justification in establishing clear limits to the principle of freedom of contract, especially with regard to unfair provisions which are non-binding on the weaker party in a contractual relationship.[1]

According to Grundmann, the instruments which are used for limiting the freedom of contract in EU contract law in general, are classified in two groups: mandatory substantive solutions and information rules.[2]

The intervention in the contractual agreements by mandatory legal provisions consist of: fixation of parts of the rights and obligations of the parties by the law, which cannot be changed by parties agreements less favourable to the customer, and secondly, through control of the terms of the agreement by general clauses or a list of unfair terms concretizing the general clause. The two types of provisions constitute limitations of freedom of contract.[3] The new consumer rules aim is to align and harmonise national consumer rules also in area of the information consumers need to get before they purchase something, and their right to cancel online purchases. Information rules are important for maintaining the balance between contracting parties.[4] According to Howells: „Consumers have less information than traders and so have difficulty in making decisions that reflect their true preferences. There are insufficient motivating factors and traders are not encouraged to give the data on their own initiative, and as a result, the law should require to provide data. There are not sufficient incentives for traders to volunteer information, so the law needs to require that the information be provided. Once this information is provided, consumers can protect their own interests by selecting the goods or services closest to their preferences."[5]

In relation to mandatory substantive solutions, „the provision regarding the duty to inform is the „softest" available of all instruments which limits party autonomy, because there is a minimum interference with the freedom of contract of parties."[6] In connection with this, Lurger admits: „Information obligations improve the quality of the contractual decision of a responsible customer. After the receipt of the information, they leave the customer to the general rules of contract law, especially to the principle of „pacta sunt servanda"."[7]

Information rules intervene less with the autonomy of parties than mandatory substantive solutions, so they emphasized in mandatory documents and soft law of EU.[8]

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[1] Comşa, Paul: A fresh approach to unfair terms in commercial contracts: are the latest law amendments beneficial to consumers?, Challenges of the Knowledge Society, Private Law, CKS Proceedings, Vol. 4, no. 1, Romania: Nicolae Titulescu, University of Bucharest, 2014, available at http://cks.univnt.ro/uploads/cks_2014_articles/index.php?dir=02_private_law%2F&download=CKS+2014_private_law_art.011.pdf [accessed 20.11.2016], p. 105.

[2] Grundmann, Stefan: Information, Party autonomy and economic agents in European contract law, Common Market Law review, Kluwer Law International, Vol. 39, 2002, available at http://grundmann.rewi.hu-berlin.de/Publikationen/3.53%20Inform._Party_Auton._and%20Econ._Agents_in_ECL.pdf [accessed 15.09.2016], cited in Beresnevičius, Saulius: Limitation of party autonomy in European Contract Law (Master Thesis), University of Amsterdam, Supervisor: Chantal Mak, 2011, available at http://dare.uva.nl/cgi/arno/show.cgi?fid=339326, [accessed 15.12.2016], p. 5.

[3] Lurger, Briggita: The „Social" Side of Contract Law and the New Principle of Regard and Fairness, in: Hartkamp, Arthur et al., Towards European Civil Code – Nijmegen: Kluwer Law International, 2004. p. 280.

[4] Grundmann, Stefan: op. cit., p. 18, cited in Beresnevičius, Saulius: op. cit., p. 22.

[5] Howells, G.: The Potential and Limits of Consumer Empowerment by Information, Journal of Law and Society Volum 32, No 3, September 2005, p. 355, cited in Beresnevičius, Saulius: op. cit., p. 22.

[6] Lurger, Briggita: op. cit., p. 279.

[7] Ibid.

[8] Beresnevičius, Saulius: op. cit., p. 24.

### 3. Consumer Contracts

The Directive 93/13/EEC is applicable to terms in contracts concluded between „a seller of goods or supplier of services", or „business" and „a consumer" (B2C). It does not apply to contracts between one business and another business (B2B) or to contracts between one consumer and another consumer (C2C).

„Business to consumer" is expressed with the B2C acronym, and it exists in both the offline and online environment. The acronym B2C can be described as an „exchange of goods and services from traders to consumers, in contrast to exchange between business (B2B)."[1]

Concerning the formation and elements of the contract, the same elements of contract formation and contract must be taken into account in both types of contracts (B2C and B2B). The difference occurs with regard to the protection provided by law.[2] So, in relation to consumers, „the law began to take measures to protect the vulnerable parties to a contract by dictating certain provisions and conditions, listing certain provisions as contrary to the law or illegal, void, voidable or unenforceable, and introducing special requirements for information[3] ... to ensure that there is no fraud, coercion or unfair terms and conditions in the contract, the classical interpretation of the contract is still applicable from the courts."[4]

B2B contracts are governed by the contractual rules on general terms and conditions. Therefore „B2B contracts should be regulated by law in order to correct gross deviations from legal principles and good commercial practice, provided that any such general terms or conditions are to be considered unfair to the other party". The Council of Bars and Law Societies of Europe considers that the standard provided by Art. 3(3) of The Late Payment Directive[5] is appropriate to protect the „weaker" party, e.g. a non-consumer.[6]

With regard to examination of contractual terms by court and exclusion as well as the limitation of liability clauses, there must be a clear distinction between B2C and B2B relations: „since consumers usually cannot influence the content of the contract, nor have any other real alternative to turn to, and thus the freedom of contract completely loses its

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[1] Alhusban, Ahmad: op. cit., p. 49.
[2] Ibid, p. 50.
[3] Atiyah, P.S.: Essey on Contract (1986), Essay 12: „Freedom of Contract and New Right", p. 475, cited in Kimel, Dori: Neutrality Autonomy, and Freedom of Contract, (2001) OJLS, p. 153, cited in Alhusban, Ahmad: op. cit., p. 61.
[4] Alhusban, Ahmad: op. cit., p. 61.
[5] Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions: Art. 3(3) Interest in case of late payment: „3. Member States shall provide that an agreement on the date for payment or on the consequences of late payment which is not in line with the provisions of paragraphs 1(b) to (d) and 2 either shall not be enforceable or shall give rise to a claim for damages if, when all circumstances of the case, including good commercial practice and the nature of the product, are considered, it is grossly unfair to the creditor. In determining whether an agreement is grossly unfair to the creditor, it will be taken, inter alia, into account whether the debtor has any objective reason to deviate from the provisions of paragraphs 1(b) to (d) and 2. If such an agreement is determined to be grossly unfair, the statutory terms will apply, unless the national courts determine different conditions which are fair" cited in Council of Bars and Law Societies of Europe (CCBE): Position Paper on certain Principles of European Contract Law: Freedom of contract, Standard terms of contract, Notion of professional and consumer, Remedies and damages, Brussels, 2008, available at www.ccbe.eu/NTCdocument/EN_CCBE_ Position_Pap1_1205761121.pdf [accessed 15.12.2016], p. 4.
[6] Council of Bars and Law Societies of Europe (CCBE): op. cit., p. 4.

justification, in the B2B agreements the situation is completely different. That is where freedom of contratct still retains its legitimate place as a starting point."[1]

### 4. Standard Form Contracts or Adhesion Contracts

The difference between standard terms and individualy negotiated terms was first introduced into the Directive on Unfair Terms in Consumer Contracts, and it was restricted to B2C contracts.[2] Later, the Draft Common Frame of Reference[3] in Art. II.-9:405, and the Common European Sales Law[4] in Art. 86, extended the distinction between standard terms and negotiated terms to the area of B2B relationships.[5]

Standard terms are terms, which are pre-formulated and imposed by one contracting party to another,[6] which are also called „contracts of adhesion", which are offered to the customer on a take-it-or-leave-it basis.[7] Unfair terms are traditionally incorporated into adhesion contracts.

Kessler stated that: „Standard contracts are typically used by enterprises with strong bargaining power. 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 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. Thus, standardized contracts are frequently contracts of adhesion; they are a prendre ou à laisser."[8]

According to Alhusban, besides to the general conditions of adhesion contracts whereby the terms of the contract are pre-formulated by the stronger bargaining power and absence of negotiations, adhesion contracts are connected to the idea of monopolizing the goods and services that form the subject matter of the contract.[9]

Rakoff's model of an adhesion contract[10], which requires that seven characteristics[11] be present before providing protection to the weaker party, did not include the monopolistic

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[1] Schwenzer, Ingeborg and Whitebread, Claudio Marti: International B2B Contracts-Freedom Unchained, Penn St. JL & Int'l Aff. 4 (2015), available at http://elibrary.law.psu.edu/jlia/vol4/iss1/4 [accessed 15.12.2016], 2015, p. 43.

[2] Ibid, Art. 3(1) of Directive 93/13/EEC: „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."

[3] Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Interim Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), 2008, available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf [accessed 01.08.16], (in the following text DCFR).

[4] Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0635&from=EN [accessed 11.12.16], (in the following text CESL).

[5] Schwenzer, Ingeborg, and Whitebread, Claudio Marti: op. cit., p. 38.

[6] Beresnevičius, Saulius: op. cit., p. 26.

[7] Hesselink, W. M.: Unfair terms in contracts between businesses, Centre for the Study of European Contract Law Working Paper Series No 2011/07, p. 3, cited in Beresnevičius, Saulius: op. cit., p. 26.

[8] Kessler, Friedrich: op. cit., p. 632.

[9] Alhusban, Ahmad: op. cit., p. 204.

[10] Rakoff, Todd D.: Contract of Adhesion: an Essay in Reconstruction, Harvard Law Review, Vol. 96, no. 6, 1983, p. 1173-1177.

[11] According to Rakoff, seven characteristics of an adhesion contract are: „(1) the document whose legal validity is at issue is a printed out form that contains many terms and clearly purports to be a contract; (2) the form has

character as a condition to be considered in terms of the adhesive nature of a contract, but he points out that two characteristics: standardization and the take it or leave it basis, are not sufficient elements to determine whether the contract is adhesive or not.[1]

## 5. Problems on Freedom of Contract and its Control in the Directive on Unfair Terms

Everywhere in the world there is a continued violation of freedom of contract by businesses through standardized forms which constitute a way for the exploitation of economic power against the poor.[2] There are some ways in which the problem of freedom of contract is controlled in the consumer protection regulations, concretely in the Directive on unfair terms in consumer contracts.

For ensuring a high level of consumer protection, consumer contracts should be limited to a framework drawn up by legislation rather than leaving it to that framework by business who will represent it solely on the basis of freedom of contract.[3]

Because of widespread use of the adhesive contracts and real disparity in bargaining power, according to new principles of law, today contractual relations are subject to a test of fairness which aims to ensure that economic power is not used by businesses that may impose unwanted or unexpected contractual provisions to a weaker counterparty. As a result, certain contractual provisions are always considered to be unfair and prohibited by law in order to correct the imbalance between contracting parties in terms of negotiating power.[4] According to Marella: „The intervention of the state in terms of limiting of freedom of contract is required because the unfair contract disregards the weak party's fundamental rights."[5]

Consumer protection legislation limits the principle of freedom of contract by imposing a pre-contractual duty to provide information before concluding the contract to ensure that the consumer has the opportunity to make an informed decision and give power to consumers through providing the right to withdraw from the contract.[6]

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been drafted by, or on behalf of, one party to the transaction; (3) the drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine; (4) the form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent; (5) after the parties have dickered over whatever terms are open to bargaining, document is signed by the adherent; (6) the adhering party enter into few transactions of the type represented by the form – few, at least in comparison with the drafting party; and (7) the principle of obligation of the adhering party in the transaction considered as a whole is payment of the money", Ibid, p. 1176.

[1] Alhusban, Ahmad: op. cit., p. 61.

[2] Hussein, Ismail A.: op. cit., p. 8.

[3] Peppet, Scott R.: Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts, (2012) 59 Ucla Law Review, p. 733, cited in Alhusban, Ahmad: op. cit., p. 70.

[4] Alhusban, Ahmad: op. cit., p. 207.

[5] Marella, Maria R.: The Old and the New Limits to Freedom of Contract in Europe, European Review of Contract Law 2, no. 2, 2006, available on http://www.degruyter.com/view/j/ercl.2006.2.issue-2/ercl.2006.019/ercl.2006.019.xml [accessed 07.02.16], p. 267.

[6] Alhusban, Ahmad: op. cit., p. 207.

### 6. When might the Directive apply?

Directive on unfair terms may apply to a term in a contract which has not been individually negotiated. According to Art. 3 (2) of Directive: „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 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."

### 7. The Flexible concept of „Consumer" and „Professional"

Consumer regulations apply if one party is a professional[1] (or under DCFR a „business") and the other party is a consumer. According to Art. 2 of Directive 93/13/EEC, „consumer" means „any natural person who (…) is acting for purposes which are outside his trade, business or profession".[2]

As a rule, the average consumer shall be reasonably well informed and reasonably observant and circumspect.[3] The case law of the European Court of Justice established that an average consumer „is a critical person, conscious and circumspect in his or her market behaviour" and „shall inform about the quality and price of products and make efficient choices".[4]

Regarding the concept of „professional", Art. 2 of Directive 93/13/EEC defines „seller or supplier" as meaning „any natural or legal person who (…) is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned".

### 8. Terms and Contracts Excluded from the scope of Directive

There are certain terms, which are excluded from the scope of the Directive 93/13/EEC. These terms refer to „the definition of the main subject matter of the contract" and „the adequacy of the price and remuneration, as against the goods and services supplied". The exception applies only if „the terms in question are drafted in plain, intelligible language (Art. 4(2) of Directive), so consumers should be able to read and understand terms before becoming bound by them."[5]

According to National Consumer Agency of Ireland, in deciding, the court would consider any accompanying documentation such as brochures or leaflets, which were

[1] The Directive 93/13 mentions in Art. 1(1) that it applies „to unfair terms in contracts concluded between a seller or supplier and a consumer".

[2] It is almost similar to the definition given by Art. I.-1:105 of DCFR, which states that „consumer means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession".

[3] As regards the average consumer's obligations see, for instance, the reasoning made by the European Court of Justice in Case C-220/98 (Estee Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH), January 13th 2000, paragraphs 27, 30 and 32, available on http://curia.europa.eu/juris/showPdf.jsf?text=&docid=101761&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=182778 [accessed 07.03.16], cited in Comşa, Paul: op. cit., p. 104.

[4] See Case law and Guidance, available at https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.guidance.showArticle&elemID=15 [accessed 07.03.16], referred in Comşa, Paul: op. cit., p. 104.

[5] National Consumer Agency: op. cit., p. 8.

provided by the business to the consumer. Requirement for plain, intelligible language cannot be fulfilled if the meaning of the provision is not clear for a typical or average consumer. When there is a doubt about the meaning of a written term, the interpretation that is most favorable for the consumer prevails.[1]

The Directive do not apply to: any contracts of employment; any contracts relating to succession rights; any contracts relating to rights under family law; any contracts relating to the incorporation and organization of companies or partnerships; any terms in business-to-business agreements; and any terms which reflect: mandatory, statutory or regulatory provisions of any state; or the provisions or principles of international conventions to which Member States or the Community are party. These contracts are excluded from the test of fairness.[2]

### 9. Unfairnes of term in a Consumer Contract

A contract term which has not been individually negotiated will be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties rights and obligations under the contract to the detriment of the consumer (Art. 3(1) of Directive), taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent (Art. 4(1) of Directive). „Good faith" and contractual balance are emphasized as fundamental factors determining the fairness of the contract.

According to Comşa, regarding the definition of unfair terms, there are two different approaches in European law. The first approach is not to define specific contract terms which are deemed to be unfair, but instead by providing the general definition of unfair terms and by providing exemplificative list of specific terms that could be deemed unfair.[3] A second approach is by providing a general definition of unfair terms.[4] This is the case of the PECL[5], the UNIDROIT Principles (2010)[6] and the U.S. Uniform Commercial Code[7]. For example, in accordance with Art. 4.110(1) of PECL: „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

[1] Ibid.
[2] Ibid, p. 9.
[3] „This is the case of the French, English and German legislation and the Directive 93/13/EEC on unfair terms in consumer contracts", in James Gordlev, Von Mehren, Arthur Taylor: An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials, Cambridge University Press, 2006, p. 493-494, cited in Comşa, Paul: op. cit., p. 105.
[4] Comşa, Paul: op. cit., p. 107.
[5] The Principles of European Contract Law 2002, (Parts I, II, III), available at http://www.transnational.deusto.es/emttl/documentos/Principles%20of%20European%20Contract%20Law.pdf [accessed 15.06.2013], (in the following text PECL).
[6] UNIDROIT Principles of International Commercial Contracts 2010, available at http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf [accessed 15.06.2013], (in the following text UNIDROIT Principles), cited in Comşa, Paul: op. cit., p. 106.
[7] The Uniform Commercial Code (UCC) of the United States of America first published in 1952 that have been put into law with the goal of harmonizing the law of sales and other commercial transactions across the United States of America.

rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded."

### 9.1. The test of Unfairness

As noted above, judicial intervention into contract terms can be regarded as a limitation on the fundamental right of freedom of contract. Contracts have at least two parties having a fundamental right to freedom of contract. „The right to freedom of contract is not just a one-way street", so „when applying this right, judges must balance the right of the one party against the same right of the other party." As a result, "it cannot be said that any judicial intervention in the contractual provisions is a restriction of the principle of freedom of contract."[1]

Schulte-Nölke emphasizes that the fundamental right of freedom of contract can thus function in two directions: sometimes it may instruct or oblige the judge not to interfere in a particular contract, and sometimes a judge may even be obliged to intervene in favor of one party.[2]

The reasons for judicial intervention in the contractual provisions or terms are grouped into two main categories: either the protection of individual contracting parties or the protection of the „the market".[3]

Court control over standard terms of business is mandatory, which means that it cannot be excluded or limited by standard terms of business (Art. 81 of Draft CESL).[4] The parties have tha right to avoid court control by way of individually negotiated terms. Moreover, in commercial contracts, the parties should be authorized to exclude court control altogether. The exclusion for individually negotiated terms provides a rule that must be applied freely in order to preserve party autonomy.[5]

For reasonable judgments, in relation to unfairness of particular provisions of contract, judges must have a clear idea about a „fair rule". Standards on fair rule can be determined from the „grey" and „black" lists that can be read as specific applications of the unfairness test. Also, such standards may arise from non-mandatory rules of contract law, since the same rules can be interpreted as expressing the concept of contractual fairness of the certain legal system.[6]

The fairness test is increasingly regarded as a matter of fact rather than a matter of law.[7] The Directive on unfair terms provides that when assessing wheather a term is fair or not, account must be taken of: „the strength of the bargaining position of the parties; whether the consumer was offered an inducement to agree to the particular term; whether the goods or

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[1] Schulte-Nölke, Hans: No Market for „Lemons": On the Reasons for a Judicial Unfairness Test for B2B Contracts, European Review of Private Law, Vol. 23, no. 2, 2015, Kluwer Law International, available at https://www.elsi.uni-osnabrueck.de/fileadmin/documents/.../ERPL2015_195_HSN.pdf [accessed 02.12.16], p. 203.

[2] Ibid.

[3] Ibid, p. 205-206.

[4] Eidenmuller, Horst and Faust, Florian and Grigoleit, Hans Christoph and Jansen, Nils and Zimmermann, Reinhard: Towards a Revision of the Consumer Acquis, Common Market Law Review, Vol. 48, 2011, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1807943&download=yes [accessed 05.09.16], p. 9.

[5] Ibid.

[6] Ibid.

[7] Eidenmuller, Horst и Faust, Florian и Grigoleit, Hans Christoph и Jansen, Nils и Zimmermann, Reinhard: op. cit., p. 12.

services were sold or supplied under the special order of the consumer; and whether the seller or supplier has dealt with the consumer fairly and equitably."[1]

A party in disadvantaged position has the responsibility to take the initiative to remove or modify a terms which seems to be unfair. As stated in Art. 4(2) of Directive, „assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language." However, the rules in Chapter 4 of PECL for „Invalidity of contract" can help the disadvantaged party, namely the rules of error, inaccurate communication, fraud, or the acquisition of obviously excessive advantage from the weakness of the party. According to Lando: „As the jurisprudence of several countries shows, the courts tend to find „procedural" dishonesty in cases in which the power of bargaining is unequal, and in cases where there is an apparent or gross disparity between the value and the price. If these rules cannot help the disadvantaged party and, if there is a case of gross unfairness, a general clause of good faith and fair dealing of Art. 1:201 of PECL can be invoked to remove the unfair provision or term": „(1) Each party must act in accordance with good faith and fair dealing; (2) The parties may not exclude or limit this duty."[2]

### 9.2. Duty of the Judge to act on their own Motion

The Court of Justice considers that national courts have the power to determine the unfair terms of the standard contracts on their own initiative, even if neither party demands it.[3] Only the courts can declare a particular provision or term in a consumer contract unfair or not, relying on particular legal and factual data. The court must take into account all the interests involved, in particular the public interest.[4]

### 9.3. Criteria of Unfairness under EU Law

The Directive defines unfairness[5] by relying on broadly formulated standards of „good faith" as in the German tradition and „significant imbalance in the rights and obligations" as in French Law.[6] The Court of Justice noted that it is up to the national court to decide on the unfairness of a specific term.[7] Member States, respectively national courts shall assess „the unfairness of a contractual term, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the

[1] National Consumer Agency: op. cit., p. 9.
[2] Lando, Ole: Salient Features of the Principles of European Contract Law: A Comparison with the UCC, Pace International Law. Review, Vol. 13, no. 339, 2001, available at http://digitalcommons.pace.edu/pilr/vol13/iss2/4 [accessed 25.09.2016], p. 360.
[3] Mańko, Rafał: op. cit, p. 3.
[4] National Consumer Agency: op. cit., p. 13.
[5] Art. 3(1) of 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."
[6] Grundmann, Stefan and Mazeaud, Denis: General Clauses and standards in European contract law: Comparative Law, EC Law and Contract Law Codification, Hague: Kluwer Law International, 2006, cited in Mańko, Rafał: Unfair contract terms in EU law, Unfair Terms Directive and Common European Sales Law, Library Briefing, Library of the European Parliament, 130624REV1, 2013, available at www.europarl.europa.eu /RegData/.../2013/.../LDM_BRI(2013)130624_REV1_EN.pd [accessed 15.12.16], p. 3.
[7] Mańko, Rafał: op. cit, p. 3.

other terms of the contract or of another contract on which it is dependent"[1] and the consequences of the term in accordance with the national law applicable to the contract. Later, the Court of Justice added other factors which the national courts should take into account, such as: the dispositive or default rules of the national legislation that complement the agreement; whether the term was drafted in plain, intelligible language, and whether the consumer has a right to cancel the contract.[2]

### 9.3.1. „Contrary to the Requirement of Good Faith ..."

The preamble to the Directive explains that „good faith" is based on an „overall evaluation of the different interests involved; ... whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account; ...".[3] According to National Consumer Agency of Ireland, the concept of „good faith" can be equated with the principle of fair and open dealing: **„**fair dealing requires that the supplier does not take advantage or not to abuse the consumer's necessity, lack of experience and lack of knowledge of the subject matter of the contract, or weak bargaining position**"** and **„**open dealing requires that terms be expressed fully, clearly and readably with no hidden traps for the consumer.**"**[4]

### 9.3.2. „…A Contractual term which ... causes a significant Imbalance in the Parties' Rights and Obligations ..."

Unfair is a term in a contract, which gives a significant advantage to the seller or supplier without providing an equal benefit to the consumer.[5] The significant imbalance shall be assessed, taking into account determinants provided in Art. 4(1) of Directive cited above.

### 9.4. Criteria under National Laws

The unfairness of a term in national laws is defined by referring to broader concepts, such as: „good faith" in German law, „good morals" in Poland), „honest business practices" in Denmark, „unreasonableness" in Sweden, etc.[6]

## *10. Examples of Contract terms which may be unfair*

The annex to the Directive 93/13 is treated as a „grey list" which is contrary to the „black list" in which certain terms are automatically regarded as unfair. Therefore, the Council of Bars and Law Societies of Europe (CCBE) considers such „non-exhaustive list" of

[1] Art. 4(1) Directive 93/13/EEC.
[2] Mańko, Rafał: op. cit., p. 3.
[3] Preamble of the Directive 93/13/EEC.
[4] National Consumer Agency: op. cit., p. 10.
[5] Ibid, p. 11.
[6] Mańko, Rafał: op. cit., p. 3.

standard terms as a basis for consumer protection.[1] National laws have different approaches to the implementation of lists of unfair terms.[2]

*A term that appears on the „grey list" may not always be considered to be unfair the judge has the right to decide which provision is unfair, and its fairness or unfairness will depend on all the surrounding circumstances concerning parties.*

*Specific categories of terms that may be unfair to the consumer are listed below: (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-a-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; (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone; (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 fulfill his obligation to pay a disproportionately high sum in compensation; (f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or 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; (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; (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early; (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract; (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; (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; (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; (o) obliging the consumer to fulfill all his obligations where the seller or supplier does not perform his; (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; (q) excluding or hindering the consumer s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer*

[1] Council of Bars and Law Societies of Europe (CCBE): op. cit., p. 11.

[2] Mańko, Rafał: „... some have a „black" list of terms which are always considered unfair (e.g. Austria), some have a „grey" list of terms which are presumed to be unfair, but the presumption may be rebutted (e.g. Poland), some have two lists, one „black" as always unfair, and another „grey" which presumed to be unfair (e.g. Germany), and France has a list which is only indicative and does not create any presumptions", op. cit., p. 3.

*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.*[1]

Lists („black" and „gray") that prohibit certain unfair terms give the frames to the application of the unfairness test. The „gray" list is formulated as indicative, non-exhaustive lists of unfair terms, as prohibition tools that provide room for assessment.

### *11. Effect of Unfairness of a term on a Contract*

*The preamble of a Directive on Unfair Contract Terms provides: „Whereas Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions."*

*If a court decides that a contract term is unfair, the specific provision will not be legally binding on the consumer and neither can the supplier apply, enforce or rely on that term.*[2]*. It is important to note that if a term is declared unfair, it does not end the contract as a whole. If the contract can survive without the existence of the unfair term, other terms of the contract will continue to be legally binding to parties.*[3]

*National legislators usually consider abusive clauses to be null or void, nonexistent, or unwritten, while the other part of the contract remains in force. For example this legal solution was adopted by Austria, Croatia, Finland, France, Greece, Italy, Portugal, Spain, etc.*[4]

The Court of Justice of the EU, in its case law developed several rules on effect of unfair term in contract, considering that: „national legislation may provide that the whole contract is null or void if it serves better for consumer protection; an unfair term is not binding regardless of whether the consumer contests its validity, but if the consumer explicitly requests it, the national court may apply such a term; when assessing whether a consumer contract containing one or more unfair terms can continue to exist without those terms, the national court cannot base its decision solely on a possible advantage for the consumer but rather needs to represent an objective point of view; the national court may not rewrite the unfair term."[5]

### 12. Problems of Minimum Harmonisation

The Directives are general legal acts which requires Member States to achieve a certain result, leaving the national authorities free choice on the form and methods of implementing them into the national legal order. A large number of directives in the EU consumer law or Consumer Aquis exist because most consumer directives are based on a legislative technique of approximation of laws in the EU - the principle of minimum

[1] Annex of Directive, Terms referred to in Art. 3 (3).
[2] Commerce Commission New Zeland: Unfair Contract Terms Guidelines, February 2015, available at https://www.comcom.govt.nz/dmsdocument/12977 [accessed 01.02.18], p. 6.
[3] National Consumer Agency: op. cit., p. 12.
[4] For more see: http://ec.europa.eu/justice/contract/files/expert groups/unfair_contract_terms_en.pdf [accessed 07.03.2014], referenced in Comșa, Paul: op. cit., p. 107.
[5] Mańko, Rafał: op. cit., p. 4.

harmonization[1], which is the definition of a common minimum standard from which the Member States can deviate to establish higher standards of protection, as well as to make adjustments to the national context in the process of implementation. Taking into account that they differ within the EU, „some Member States will have to increase their level of consumer protection, while others will actually be forced to lower their standards."[2]

According to Eidenmuller et al., the Directive on Unfair Contract Terms „does not significantly contribute to a unification of European private law, taking into account that it is based on the principle of minimum harmonization and that the application and interpretation of the unfairness test is entrusted to national courts applying the standards of fairness based on national principles and policies."[3]

### 13. Maximum Harmonization

Maximum harmonization does not allow Member States to deviate from the rules of an EU directive, even if this would lead to a higher level of consumer protection. The Commission wants to intervene in the consumer contract law of the Member States because of the well functioning of the internal market, whose development is hampered by differences in national legislations. The maximum harmonization will put an end to the legal fragmentation of the single market and legislation in the area of consumer contract law which causes uncertainty among both consumers and businesses regarding which rules apply cross-border.[4]

As a result, there is a Consumer Rights Directive which is a maximum harmonization directive. According to Article 1 of this Directive: „The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders." This Directive ensures that one uniform set of rules will apply in the whole EU and guarantees the same protection to all consumers and stimulates cross-border trade.[5] There can be made a question „whether such a unique and ideal level of consumer protection really exists, taking into account the different national circumstances, priorities and preferences."[6]

The Directive in Article 4 provides that Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.

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[1] Petrović, Anita: op. cit., p. 549.

[2] Van Boom, Willem H.: The Draft Directive on Consumer Rights: Choices Made and Arguments Used, Journal of Contemporary European Research, Issue 3, 2009, p. 458, cited in Lindahl, Filip: The Consumer Rights Directive, Improved as a cross-border-only Regulation and toward a European Consumer Code influenced by the Common Frame of Reference?, Master's thesis in Commercial and Tax Law (European Consumer Contract Law), Tutor: Vladimir Bastidas, Jönköping University, Jönköping, May 13 2013, available at http://www.diva-portal.org/smash/get/diva2:623054/FULLTEXT01.pdf [accessed 06.08.16], p. 18.

[3] Eidenmuller, Horst and Faust, Florian and Grigoleit, Hans Christoph and Jansen, Nils and Zimmermann, Reinhard: op. cit., p. 14.

[4] Commission of the European Communities: Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, Brussels, October 8, 2008, COM(2008), 614/3, p. 2, cited in Van Boom, Willem H.: op. cit., p. 4.

[5] Puglia, Massimiliano: The full harmonisation directives, The Hungarian Competition Authority (GVH) 25 Jubilee Conference, Budapest, 11 November 2015, available at http://www.gvh.hu/en//data/cms1032695/3_1_Massimiliano_Puglia.pdf [accessed 20.01.2018], p. 5.

[6] Lindahl, Filip: op. cit., p. 40.

## 14. Consumer Rights Directive

The Consumer Rights Directive was formally adopted by the Member States of the EU on the 10th of October 2011. The new rules are transposed in domestic legislation by the 13th of December 2013 and applied in all Member States no later than the 13th of June 2014.[1] Directive especially aims to unify the rules governing the business-to-consumer relationship in the fields of definitions (Chapter I), consumer information for contracts other than distance or off-premises contracts (Chapter II), consumer information and right of withdrawal for distance and off-premises contracts (Chapter III), other consumer rights (Chapter IV) and general provisions (Chapter V).

The Consumer Rights Directive contains provisions on: Information to be given before a consumer buys goods or services on the trader's premises; Information to be given before a consumer buys goods or services away from the trader's premises, or at a distance; Cancellation rights and responsibilities where the consumer buys goods or services away from the trader's premises or at a distance; Delivery times for goods, clarifying what deadlines for delivery should be and where responsibilities lie if there is a problem; Post-contract customer help lines, where existing customers must be charged no more than the basic rate for phone calls; Additional payments which would need to have active or express consent of the consumer eg pre-ticked boxes which the consumer must „un-tick" will no longer be allowed; Fees charged for a particular method of payment.[2]

## 15. Conslusion

Freedom of contract, as stated above includes not only voluntariness of each party's consent, but also, equal bargaining power. Unfair contract terms create an imbalance between parties at the time the contract is concluded. In imbalanced contracts the weaker party is unable to negotiate and express its free will, so party with superior bargaining power has a notable advantage by defining terms in advance.

In order to achieve balanced relationship between businesses and consumers, and to overcome the negative consequences arising from unbalanced contracts, unfair contract laws imposes directions on businesses when dealing with consumers, as a part of consumer protection system.

Businesses support the opinion that the excessive regulation of standardized contracts, particularly in terms of unfair terms and conditions, turned into an attack on the principle of freedom of contract. Generally, regulations on consumer protection are unequal, because they limit the freedom of professionals subject to several restrictions by mandatory substantive solutions, which consist of fixing part of the rights and obligations of the parties by law and control of the provisions of the contract through general clauses or a unfair terms list; and the information rules.

As regulated by Directive, rules on unfair terms are compatible with the principle of freedom of contract and beneficial to society, because they reduce social and economic inequalities between participants in consumer contracts, but from the perspective of the

[1] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, available at http://ec.europa.eu/consumers/consumer_rights/rights-contracts/directive/index_en.htm [accessed 25.12.2016].

[2] Department for Business, Innovation & Skills: New proposals on consumer rights across Europe, First published: 20 August 2012, Part of: Consumer protection, Announcements, available at https://www.gov.uk/government/news/new-proposals-on-consumer-rights-across-europe [accessed 15.01.17].

economic development, they represent a trade barrier and as such **are** expected to **have negative effects** on perpetual economic growth.

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