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INTRICACIES OF SIGNIFICANT IMBALANCE AS THE CORNERSTONE OF PROTECTION AGAINST UNFAIR TERMS IN CONSUMER CONTRACTS UNDER EU LAW

1. INTRODUCTION

Significant imbalance in the rights and obligations of the parties to a consumer contract is codified in Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[1] (hereinafter as "the Directive" or "Directive 93/13") as one, next to good faith, requirement of substantive unfairness of terms in consumer contracts. Under the scheme of the Directive, a substantive inquiry follows a procedural one. For a judge seized of a dispute concerning a purportedly unfair clause must first decide whether the matter falls at all within the ambit of the legislation. To this end, it must be ascertained that a given contract is governed by the terms of the Directive (excluded are, *inter alia*, contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements). Next, it must be decided that the term in question was not individually negotiated with the consumer. This is left to the discretion of the judge to decide, however guidance is given by Article 3(2) under which 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". Finally, excluded from the assessment are terms defining the main subject matter of the contract or the adequacy of price and remuneration relative to the services or goods supplied in exchange (Article 4(2)). It is also worth noting that consumer contracts should be drafted in plain, intelligible language (Article 5 of Directive 93/13), and the consumer should actually be given an opportunity to examine all the terms. Should any doubts arise, the interpretation

[1] OJ L 95, 21.4.1993, pp. 29–34.

most favourable to the consumer should prevail. Only after the foregoing considerations are taken into account may the court set out to analyse the disputed term at hand through the prism of the substantive fairness criteria enshrined in Article 3(1). Such assessment shall take into account the nature of the goods or services for which the contract was concluded and refer, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent (Article 4(1)).

By reference to the preamble of Directive 93/13 alone one can decode the primary motivations behind the seemingly paternalistic approach of the unfair terms regime. Consumers are asserted to not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services, and lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State (recital 5). Another goal is the furtherance of the internal market and the desire to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own (recital 6). Of importance are also the economic interests of consumers, in accordance with Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy[2] and Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy[3]. An overall evaluation of the different interests involved is necessary (recital 16).

The principal aim of the paper is to showcase the heterogeneous nature of the significant imbalance requirement. A comprehensive account is given of the semantic, legal and practical connotations of the term by reference to the case law of the CJEU and that of Polish courts. An evolution is recorded from the initial position, under which scrutiny of significant imbalance consisted of an of exercise in balancing the advantages and disadvantages of a given clause as against the consumer's position to what appears to be the modern two-prong test which focuses on a comparative analysis between the contractual term in issue and national rules which would apply in the absence of any agreement between the parties. As the CJEU has consistently applied a narrow interpretation of significant imbalance, leaving its application to particular cases to national courts, its usefulness as a tool to strike out unfair clauses at EU level is limited. Consequently, it is for the national courts to perform at least two, as I demonstrate in the paper, important functions. First, they are tasked with applying a purposive interpretation to extend the benefit of substantive unfairness to vulnerable consumers pursuant to national laws, customs and sensitivities. Further, they shall

[2] OJ C 92, 25.4.1975, p. 1.
[3] OJ C 133, 3.6.1981, p. 1.

fill the gaps which inevitably appear in practice including, *inter alia*, the question of interplay between the two substantive fairness criterions – significant imbalance and good faith.

2. GROWING PAINS: EMERGENCE OF THE CONCEPT IN EU CASE LAW

As a preliminary point, it must be recalled that the CJEU's task in the field of expounding upon the general meaning of the criteria in Article 3(1) of the Directive is generally limited to defining "in a general way the factors that render unfair a contractual term"[4] and interpreting "general criteria used by the Community legislature in order to define the concept of unfair terms"[5]. In the early case of *Freiburger Kommunalbauten*, in the context of abstract control proceedings the CJEU implied that the "significant imbalance in the parties' rights and obligations" could be restated as an exercise in balancing the advantages and disadvantages of a given clause as against the consumer's position, within the context of a Member State's national law[6]. The disputed clause in that case mandated that, in a sale of a parking space, the entire sum was to be payable by the consumer buyer upon production by the construction company of a security (a bank guarantee on the facts) in respect of any and all claims the consumers could have by virtue of non-performance or undue performance of the contract. The drafter of the clause posited that the bank guarantee properly counterbalances

[4] Case C-478/99 *Commission v Sweden*, ECLI:EU:C:2002:281, paragraph 17; Case C-342/13 *Sebestyen*, ECLI:EU:C:2014:1857, paragraph 26; Case C-537/12 *Banco Popular Espanol*, ECLI:EU:C:2013:759, paragraph 64. L. Niglia, *The Rules Dilemma – The Court of Justice and the Regulation of Standard Form Consumer Contracts in Europe*, "Columbia Journal of European Law" 2006, Vol. 13, issue 1, p. 134. For more on the CJEU's reluctance to attempt overarching and universal definitions of broad ethical concepts, see: J. Basedow, *The Court of Justice and Private Law: Vacillations*, *General Principles and the Architecture of the European Judiciary*, "European Review of Private Law" 2010, Vol. 18, issue 3, p. 456 et seq.; F. Cafaggi, *Self-Regulation in European Contract Law*, "European Journal of Legal Studies" 2007, Vol. 1, issue 1, pp. 178–182.

[5] Case C-237/02 *Freiburger Kommunalbauten*, ECLI:EU:C:2004:209, paragraph 22; Case C-243/08 *Pannon GSM*, ECLI:EU:C:2009:350, paragraph 42. G. Straetmans, C. Cauffman, *Legislatures*, *courts and the Unfair Terms Directive*, (in:) P. Syrpis (ed.), *The Judiciary*, *the Legislature and the EU Internal Market*, Cambridge 2012, p. 102 et seq.; C. Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law*, London 2013, pp. 48–50; P. Rott, *What is the Role of the ECJ in EC Private Law – A Comment on the ECJ Judgments in Oceano Grupo*, *Freiburger Kommunalbauten*, *Leitner and Veedfald*, "Hanse Law Review" 2005, Vol. 1, issue 1, p. 6 et seq. The generality of the criterion is confirmed also by recital 15 to the Directive ("Whereas it is necessary to fix in a general way the criteria for assessing the unfair character of contract terms").

[6] *Freiburger Kommunalbauten*, paragraph 15.

the disadvantages to which a consumer might be exposed as a result of the obligation to pay the price before performance of the contract. The balance consisted in, on the one hand, reversing the order in which the respective performances of a consumer contract were to be rendered (with the consumer performing first), thus reducing the risk sustained by the trader in connection with a sizable construction undertaking whilst, on the other, ensuring the proper construction of the parking space contracted for on account of provision of sufficient funds facilitating the smooth operation of the contractor. This was countered by the consumer, who called upon the "equality of arms" principle[7] which, in his estimation, necessitated contemporaneous performance of both parties' duties. The CJEU relegated the proceedings to the national court as consideration had to be given to domestic law in respect of distilling the detailed substantive criteria indicating significant imbalance, however two cases were distinguished: one where the effectiveness of the legal protection of the rights which the Directive affords to the consumer is undermined (and unfairness can be inferred on the basis of consideration of all the circumstances surrounding the conclusion of the contract in issue and without having to assess the advantages and disadvantages, in other words, the substance of the contested term)[8]; and another situation where the effectiveness is not so brazenly impeded and there is a need to have regard to the substantive test laid down in Article 3(1). It generally appears that *Oceano Grupo* conflated substantive unfairness examined through the prism of Article 3(1) with procedural ineffectiveness, further developed in cases like *Invitel*[9]. As it was the first case on the interpretation of Article 3(1) to ever come before the CJEU, the Court first applied the substantive test (albeit neglecting to break it down into constituent parts, instead treating all of the requirements together in paragraphs 21–24 of its judgment), to then make a sweeping assertion based on procedural fairness[10].

[7] Now codified in the Charter of Fundamental Rights (Article 47).

[8] This was the case in Case C-240/98 *Oceano Grupo*, ECLI:EU:C:2000:346, where the clause in issue conferred jurisdiction on the courts of Barcelona, Spain, a city in which none of the consumers involved were domiciled but where the trader had its principal place of business. See also paragraph 23 in *Freiburger Kommunalbauten*.

[9] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242.

[10] The utility of this differentiation is put into question by the fact that it has not been explicitly referred to post-*Freiburger Kommunalbauten* (although it found expression shortly beforehand, in Case C-473/00 *Cofidis*, ECLI:EU:C:2002:705, paragraphs 33–36), however it could indicate that there are levels to a clause being abusive of the contractual balance between the parties. Importantly, the Court in *Pannon GSM* appeared uneasy with how *Oceano Grupo* was disposed of, and purported to distinguish it on the grounds that it interpreted the general criteria used by the Community legislature to define the concept of unfair terms whilst direct application of those criteria to a particular case is impermissible (*Pannon GSM*, paragraph 42). In the meantime, this is exactly what the Court in *Oceano Grupo* did by explicitly declaring a term unfair. See also: E. Poillot, *The European Court of Justice and General Principles Derived from the Acquis Communautaire*, "Oslo Law Review" 2014, issue 1, pp. 72–77; N. Reich, *A European Contract Law, or an EU Contract Law Regulation for Consumers?*, "Journal of Consumer Policy" 2005, Vol. 28, issue 4, p. 388

It is premature to say that claimants could rely on Articles 3 and 6 interchangeably, however *Oceano Grupo*, if it were to be upheld nowadays, appears to create such an avenue. I would submit that the "undermining of effective consumer protection" argument could apply, as a way of circumventing the unfairness test under Article 3(1) of Directive 93/13, where the term in question is so radically lopsided that it benefits only one side of the bargain. On the contrary, where the imbalance between the rights of the parties is significant and not all-encompassing, the general rules would apply[11].

Aside from the differentiation made above, early CJEU cases rendered little theoretical substantiation regarding the meaning of "significant imbalance", and were largely reduced to making proper inferences in respect of specific contract clauses. So, in *Oceano Grupo*, a term conferring exclusive jurisdiction on a consumer, one that was convenient for the trader, was held to adversely impact the consumer's right to defence (right to be heard or the right of representation) by making it radically easier for the trader to enter an appearance in court if need be[12]. *Cofidis*, without explicit regard to Article 3(1), surmised that protection afforded by the Directive extends to cases where the consumer is unaware of his rights or is deterred from enforcing them due to exorbitant costs of judicial pro-

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et seq.; M. Hogg, G. Arnokouros, A. Pinna, R. Cascão, S. Watterson, *ECJ C-240/98 – C-244/98*, *27 June 2000*, *(Océano Grupo Editorial and Salvat Editores) Scottish Case Note*, "European Review of Private Law" 2002, Vol. 10, issue 1, pp. 157–173; K. Sein, *Protection of Consumers against Unfair Jurisdiction and Arbitration Clauses in Jurisprudence of the European Court of Justice*, "Juridica International" 2011, Vol. XVIII, pp. 54–62; B. Fauvarque-Cosson, D. Mazeaud, *European Contract Law: Materials for a Common Frame of Reference: Terminology*, *Guiding Principles*, *Model Rules*, Berlin 2008, 171 et seq.

[11] I base this tentative proposition on the phrasing of paragraph 23 of the judgment in *Freiburger Kommunalbauten*, which refers, in the context of hindering effective consumer protection, to "a term which was solely to the benefit of the seller and contained no benefit in return for the consumer". A mention in paragraph 71 of Case C-143/13 *Matei*, ECLI:EU:C:2015:127, appears to lend support to this hypothesis – the CJEU appeared to be ready to outrightly declare a term unfair provided that a number of preconditions was established (particularly that the disputed term burdened the consumer with a fee for which no consideration flew in such a consumer's direction).

[12] *Oceano Grupo*, paragraphs 23–24. G. Straetmans, C. Cauffman, *Legislatures*, *courts and the Unfair Terms*..., p. 100; V. Lazić, *Procedural Justice for 'Weaker Parties' in Cross-Border Litigation under the EU Regulatory Scheme*, "Utrecht Law Review" 2014, Vol. 10, issue 4, p. 113 et seq.; L. E. Gillies, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts*, London 2016, pp. 99–100; S. Yuthayotin, *Access to Justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer Protection Mechanisms*, Berlin 2013, pp. 119–120. For a discussion of aspects peculiar to arbitration, see: A. J. Belohlávek, *B2C Arbitration: Consumer Protection in Arbitration*, Huntington 2012, p. 112 et seq.

ceedings[13]. The clause in issue in *Mostaza Claro*[14] purported to refer any disputes arising under a challenged mobile telephone contract for arbitration to the European Association of Arbitration in Law and in Equity. *Pénzügyi Lízing* concerned a similar clause, one that conferred jurisdiction in any dispute on a specific court. The Court again, just as in *Oceano Grupo*, explained that the imbalance between the parties here is introduced by the fact that the consumer's ability to enter an appearance and have a day in court is impaired. On the flipside, the trader gains an unfair advantage by reserving for himself the right to deal with all consumer claims in one court, regardless of where the claimant lives. One must bear in mind that such clauses are particularly one-sided in the context of the EU internal market which greatly facilitates arm's-length sales between traders and consumers located in different Member States, and distances between the counterparties may be sizable. Further, in *Invitel* the Court mandated that national courts shall, when considering a term that subjected consumers to money order fees (fees incurred in relation with paying invoices issued by a telephone network operator), examine the reasons for or the method of calculating the additional fees and, specifically, whether the consumer has the right to terminate the contract upon being informed of such fees[15]. Even though the additional fees were inserted in small print in the contract in issue, they had to be specifically brought to the attention of the consumer, and it was a manifestation of imbalance between the parties that the trader had the means of executing and concealing such terms from the consumer[16].

The CJEU has propounded the idea that it is the imbalance between a consumer and a seller or supplier that actually empowers legislators to intervene and

[13] *Cofidis*, paragraph 34. M. Piers, *Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations*, "Journal of International Dispute Settlement" 2011, Vol. 2, issue 1, pp. 226–228. American scholars have referred to an imperfect information paradigm where the imperatives of efficiency and universality make the public goal of informed and confident consumers practically unattainable. See: S. I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, "American Business Law Journal" 2008, Vol. 45, issue 4, pp. 733–773; *Standard Form Contracts: A Call for Reality*, "St. Louis University Law Journal" 2000, issue 44, p. 909 et seq.

[14] Case C-168/05 *Mostaza Claro*, ECLI:EU:C:2006:675.

[15] *Invitel*, paragraph 30.

[16] Interestingly, there are outliers to the contrary found in Polish case law. See the judgment of the Appellate Court for Warsaw of 15 February 2013, ref. number VI ACa 1113/12, "Monitor Prawa Bankowego" 2014, issue 3, pp. 29–34, where mere attachment to a consumer credit contract of a table of fees, commissions, legal costs and enforcement proceedings is sufficient so long as the contract clearly indicates that the attachment(s) constitute an integral part of the agreement. See, critically: B. Paxford, *Wyrok SA z dnia 15 lutego 2013 r., VI ACa 1113/12*, „Monitor Prawniczy" 2014, issue 6, pp. 317–321; K. Lehmann, *Glosa do wyroku s. apel. z dnia 15 lutego 2013 r., VI ACa 1113/12*, „Monitor Prawa Bankowego" 2014, issue 3, pp. 49–56; for wider context, see: T. Czech, *Efektywność instrumentów prawnych ochrony kredytobiorcy konsumenta w świetle orzecznictwa sądowego*, „Prawo w Działaniu" 2014, issue 20, p. 280 et seq.

strive towards assisting the parties in achieving contractual equilibrium[17]. To that end, courts shall use all legal and factual elements necessary, and the CJEU has identified, somewhat to the disappointment of a substantive fairness enthusiast, the duty of national courts to assess unfair terms of their own motion as a device fit for purpose[18]. Positive action unconnected with the actual parties to any given contract is said to best serve the interests of conflicted consumers.

3. MATURATION OF THE CONCEPT – EXPLANATIONS IN LATER JURISPRUDENCE AND DOCTRINE

One mechanism invented by the CJEU as regards mitigating the imbalance of rights and obligations between the parties involves the right of the consumer, to consent, as it were, to an unfair term. This was first articulated in *Pannon GSM* where the CJEU accorded to the consumer the right not to assert a disputed term's unfair or non-binding status in the event that the domestic court seized of the dispute informs the consumer of a finding of unfairness[19]. The point was strengthened in *Banif Plus Bank* where the CJEU accepted the practice of a national court which afforded the consumer an opportunity to set out his own

[17] The role of the courts has been identified as "compensation" for such imbalance wherever necessary. See: Case C-421/14 *Banco Primus*, ECLI:EU:C:2017:60, paragraph 43; Case C-415/11 *Aziz*, ECLI:EU:C:2013:164, paragraph 46; Case C-154/15 *Gutierrez Naranjo*, ECLI:EU:C:2016:980, paragraph 58. The concept is not new as the idea of compensation was prominently featured in the Guidelines for Consumer Protection adopted by the General Assembly of the United Nations by virtue of Resolution 39/248 in April 1985. See: P. Merciai, *Consumer Protection and the United Nations*, "Journal of World Trade Law" 1986, Vol. 20, issue 2, p. 214 et seq.

[18] *Aziz*, paragraph 46; Case C-280/13 *Barclays Bank*, ECLI:EU:C:2014:279, paragraph 34; Case C-169/14 *Sanchez Morcillo*, ECLI:EU:C:2014:2099, paragraph 24; Case C-377/14 *Radlinger and Radlingerová*, ECLI:EU:C:2016:283, paragraph 52; Case C-32/14 *ERSTE Bank Hungary*, ECLI:EU:C:2015:637, paragraph 41. For more, see: F. Cafaggi, *On the Transformations of European Consumer Enforcement Law: Judicial and Administrative Trialogues*, *Instruments and Effects*, (in:) F. Cafaggi, S. Law (eds.), *Judicial Cooperation in European Private Law*, Cheltenham 2017, pp. 239–244; C. Pavillon, *ECJ 26 October 2006*, *Case C-168-05 Mostaza Claro v. Centro Movil Milenium SL – The Unfair Contract Terms Directive: The ECJ's Third Intervention in Domestic Procedural Law*, "European Review of Private Law" 2007, issue 5, pp. 744–746.

[19] *Pannon GSM*, paragraph 35. This facet of judicial treatment of unfair terms has been criticized as overreaching and according too much latitude to the judiciary under the guise of empowering the consumer. See: M. Kenny, *The Law Commissions' 2012 Issues Paper on Unfair Terms: Subverting the System of 'Europeanized' Private Law?*, "European Review of Private Law" 2013, issue 3, pp. 886–887. For a more moderate view, see: J. P. Devenney, *Gordian Knots in Europeanised Private Law: Unfair Terms*, *Bank Charges and Political Compromises*, "Northern Ireland Legal Quarterly" 2011, Vol. 62, issue 1, pp. 39 et seq. More generally: S. Whittaker, *Judicial Interventionism and Consumer Contracts*, "Law Quarterly Review" 2001, issue 117, p. 217 et seq.

views on the unfairness of a term in issue. The Court went on to say that the relevant intention of the consumer may be taken into account where "conscious of the non-binding nature of an unfair term, that consumer states nevertheless that he is opposed to that term being disregarded, thus giving his free and informed consent to the term in question"[20].

The two ground-breaking cases, decided within one week from each other, were *RWE Vertrieb*[21] and *Aziz*. They offered comprehensive guidance as to the principles (or "general criteria") governing the meaning of "significant imbalance"[22]. *RWE Vertrieb* concerned contracts concluded between natural gas suppliers and consumers. German law lays down terms and conditions to be used in gas supply contracts, which gas operators are obliged to follow (standard tariff contracts). A number of obligations attach to these terms, most importantly the consumer's right to terminate in the event of a variation or amendment to the terms. The claimants in *RWE Vertrieb* entered into contracts which were not governed by the said regulations (special contracts). The contracts provided for a mechanism of amendment that did not accord to consumers the right to terminate. The Court held that to restore the balance between the parties a proviso must be inserted in gas supply contracts that prepares consumers for situations where an increase in the fees is applied. Specifically to this end, information duties shall be imposed on gas suppliers which shall explain to their consumers conceivable potential consequences of an increase. Further, the right of termination must not be purely formal or theoretical (left "on paper" and qualified with implausible caveats)[23]. Crucially, the consumer shall be facilitated in that, in the event that an amendment giving rise to the right of termination is exacted, he has a wealth of options open to him, including the right to change his gas supplier. This could well imply that gas supply contracts should not stipulate contractual penalties for termination, and even (although this was not articulated by the Court) perhaps that the consumer should be informed of other competitive options available on the market.

In *Aziz*, the Court steered towards caution by declining to provide its own substantive directives governing the meaning of "significant imbalance", following instead the guidance of Advocate General Kokott that "[i]t is not possible to assess whether a term causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, without a comparison with the legal situation under national law in the event that the parties themselves have not made any contractual provision"[24]. Deference to national law means that

[20] Case C-472/11 *Banif Plus Bank*, ECLI:EU:C:2013:88, paragraph 35.

[21] Case C -92/11 *RWE Vertrieb*, ECLI:EU:C:2013:180.

[22] *RWE Vertrieb* also contains a number of explanations concerning the scope of the "plain and intelligible language" requirement featured in Articles 4(1) and 5 of Directive 93/13.

[23] *RWE Vertrieb*, paragraph 54.

[24] Opinion of Advocate General Kokott in *Aziz*, paragraph 71.

the CJEU abdicated its power to intervene in the actual consequences of a domestic regulation governing consumer contract terms, blindly treating any and all national regulations as permissible[25]. Thus, freedom of contract is preserved, even more so since most provisions in modern contractual codifications impose only a floor of obligations, which may be relatively freely modified by the contractual parties themselves[26]. It is worth mentioning that the Advocate General's views went even further in that she posited that even where the position of the consumer is less favourable than that envisaged in national provisions, there is still room for consideration and such an arrangement should not be automatically struck down as unfair[27]. The Court conflated the two substantive criteria of good faith and significant imbalance and offered a mixed subjective-objective standard. For under the *Aziz* test the national court seized of a dispute shall ascertain, by reference to the trader's actual conduct, whether he acted fairly and equitably; second, a determination must be made whether the consumer would have agreed to the term in issue had it been brought to his attention in individual negotiations[28]. In its analysis of the specific contract terms in issue, the Court attached importance, in respect of the term concerning unilateral determination by the lender of the amount of unpaid debt, to the fact that the term hindered the consumer in taking legal action and exercising defence (although subject to the relevant national

[25] Confirmed in *Banco Primus*, paragraph 58: "It is thus clear that the Court must limit itself to providing the referring court with guidance which the latter must take into account in order to assess whether the term at issue is unfair".

[26] An illustration of this phenomenon with respect to three major legal systems is offered in: C. Valcke, *Convergence and Divergence Between the English*, *French and German Conceptions of Contract*, University of Toronto Faculty of Law, Legal Studies Research Series, No. 08-14, pp. 10–45.

[27] Opinion of Advocate General Kokott in *Aziz*, paragraph 72. This proposition, it appears, has been rejected resoundingly in later iterations of the overarching principle, particularly in *Banco Primus*: (paragraph 59): "In order to ascertain whether a term causes a 'significant imbalance' in the parties' rights and obligations under a contract to the detriment of the consumer, particular account must be taken of which rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force." See: K. Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis*, Oxford 2014, pp. 73–75; P. Rott, *Unfair Contract Terms*, (in:) C. Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham 2016, pp. 299–301; G. Howells, M. Durovic, *The Rise of EU Consumer Law between Common Law and Civil Law Legal Traditions*, (in.) F. de Elizalde (ed.), *Uniform Rules for European Contract Law?: A Critical Assessment*, Oxford 2018, pp. 128–129; C. Mak, *On Beauty and Being Fair – The Interaction of National and Supranational Judiciaries in the Development of a European law on Remedies*, (in:) K. Purnhagen, P. Rott (eds.), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz*, Berlin 2014, pp. 827–828.

[28] A similar conflation is found in the recent Case C-186/16 *Andriciuc*, ECLI:EU:C:2017:703, paragraph 57.

rules)[29]. R. Mańko has noted that the idea of juxtaposing the situation of the consumer under a disputed contractual term with the arrangements imposed by the relevant *ius dispositivum* is derived from the German notion of *Leitbild des dispositiven Gesetzrechts*, however no explanation was given in the judgment as to why the concept was embraced[30].

Whilst *Aziz* was a step forward in that the CJEU attempted to address the convoluted issues of good faith and significant imbalance, it introduced a significant amount to confusion due to its rather sweeping propositions and a broad-brush approach. In *Constructora Principado* the Court followed the construction proffered in *Aziz* by limiting the ambit of an inquiry into significant imbalance to a comparative analysis between the contractual term in issue and national rules which would apply in the absence of any agreement between the parties[31]. In addition, courts shall have regard to the legal situation of the consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms[32].

A recent elucidation of the factors underlying instances of "imbalance in the parties' rights and obligations" came in the case of *Verein fur Konsumenteninformation v Amazon EU Sarl* (C-191/15) , where the Court pointed to an insertion of a choice of law clause in favour of a jurisdiction other than that of the consumer's own (i.e. that of his habitual residence), which is likely to prevent them from bringing an action against their counterparty, chiefly due to lack of familiarity with the law applicable to their registered office. Regrettably, even this latest development merely adds to the succession of cases (not that lengthy at that) where the concept of imbalance has been shed light on in a piecemeal fashion. Because the CJEU is firmly chained to the idea that Directive 93/13 concerns itself principally (if not exclusively[33]) with what is termed procedural unfairness of terms in consumer contracts, and the letter of Articles 3 and 4 of the Directive makes it apparent that it is the conclusion of a consumer contract that is being regulated[34]. An explicit reference is made in Article 4(1) to "the time of conclusion of the contract" when delineating the scope of circumstances which may be validly picked

[29] *Aziz*, paragraph 75.

[30] R. Mańko, *The Use of Extra-Legal Arguments in the Judicial Interpretation of European Contract Law: A Case Study on Aziz v Catalunyacaixa (CJEU, 14 March 2013, Case C-415/11)*, "Law and Forensic Science" 2015, Vol. 10, issue 2, p. 21.

[31] Case C-226/12 *Constructora Principado*, ECLI:EU:C:2014:10, paragraph 21.

[32] *Sebestyen*, paragraph 27.

[33] A court may conduct an investigation into the substance of an alleged unfair contract term governing the adequacy of price and remuneration where the relevant term is not expressed in plain intelligible language (Article 4(2) of Directive 93/13).

[34] Pronouncements have been made to the effect that procedural imbalance of rights is a sign of, and is amplified by imbalance in the substantive rights and obligations. See: case C-169/14 *Sanchez Morcillo*, ECLI:EU:C:2014:2099, paragraph 46; Case C-413/12 *Asociacion de Consumidores Independientes de Castilla y Leon*, ECLI:EU:C:2013:800, paragraph 50.

up on when arguing the unfairness of a term (the reference is repeated again towards the end of the provision so as to disperse any and all doubts as to whether substantive unfairness is to be considered). Little assistance is to be gleaned from the Court's assertion that examination of instances of imbalance must be carried out with reference to national rules which are applicable where no agreement between the parties is discernible, the devices the consumer has at their disposal under national law to render the unfair term in disputes inapplicable, the nature of the goods and services covered by the contract at issue and all the circumstances surrounding the conclusion of the contract. The first observation merely pushes the task of determining what makes up an "imbalance" down to national courts (and potentially does damage to the ideal of consistency as national courts may take a more or less consumer-friendly approach), and the other two repeat the provisions of the Directive. It may only be surmised that the Court is liable to take a more sensitive approach as regards services where the consumer is at a particular disadvantage and operates at a significant information deficit. Sophisticated sectors, e.g., banking and insurance, come into mind. Aside from this being a mere conjecture, another roadblock relates again to the limited scope of inquiry – sophistication of the financial industry and contracts utilized thereby consists more in the fact that they stipulate risks which may not reveal themselves until long after the contract has been signed. Any imbalance liable to ensue later in the contractual relationship (e.g. by virtue of a sharp currency rate change) may be latent at the time of contract formation. Within the context of an onerous arbitration clause, courts are called upon to take positive action unconnected with the actual parties to the contract in order to correct the imbalance between the consumer and the seller or supplier. Provided that they have available to it the necessary legal and factual elements, the national court or tribunal is required to assess of its own motion the unfair nature of the contractual terms which give rise to the debt determined in that arbitration award when, under national rules of procedure, it is required to assess of its own motion, in similar enforcement proceedings, whether an arbitration clause is in conflict with national rules of public policy[35].

Notwithstanding, attempts have been made to stretch the idea of "imbalance in the parties' rights and obligations" in at least two ways. First, it must be considered whether in assessing unfairness regard may be had to circumstances which arose after the contract was concluded. For consumer contract terms may trigger consequences long after they were signed[36]. Take a gym plan contract which stipulates high contractual penalties for early termination or mandates that the consumer pays the entire amount of, say, a year-long plan upfront and stands to lose

[35] Case C-470/12 *Pohotovosť*, ECLI:EU:C:2014:101, paragraph 42; *Pannon GSM*, paragraph 32.

[36] Long-term, framework contracts are of note here. See, by reference to franchising agreements: E. C. Spencer, *The Applicability of Unfair Contract Terms Legislation to Franchise Contracts*, "University of Western Australia Law Review" 2013, Vol. 37, issue 1, pp. 156–175.

the money should they terminate early. The penalty clause in question may get upheld as fair if a short-sighted view is taken and only the parties' rights and obligations at the time of conclusion of the contract are taken into account. It appears that the current letter of the Directive facilitates such a reading and may therefore render unjust results as regards long-term consumer contracts[37].

The second avenue of stretching the scope of "parties' rights and obligations" rests upon broadening it beyond the strictly legal understanding seemingly employed by the courts. Even though the CJEU has alluded to terms like "bargaining position", "bargaining power" and "contractual advantage" on a handful of occasions, as demonstrated above, the terms have barely any teeth in failing to give meaningful guidance on what factors to take into account in deciding on the fairness of a term. The *Amazon EU* case limited itself to reiterating what we already knew, i.e. that a broad interpretation of "imbalance" is favoured, however it still appears that the inquiry entails merely the legal rights obligations of the parties, and this is potentially broadened only by reference to merely procedural constraints, such as expression of terms in plain intelligible language, dependence on another contract, an opportunity to influence the substance of the term. It is difficult to gather much from this rhetoric, aside from the Court's apparent sensitivity to the knowledge of the consumer at the time of conclusion of the contract. The more the consumer knows about the transactional dynamic, the market as a whole, the more aggressive terms the trader is entitled to put forward. In other words, the permissibility of consumer contract terms hinges to a large extent on two factors, neither of which is connected directly to the bargaining position of the consumer. First, the level of familiarity of the consumer with the circumstances within which the trader operates is relevant. This entails, at least post-*Amazon EU*, the language the trader does business in. Ordinarily, however, one should add to this a host of market-related variables, such as (depending perhaps on the sophistication of the business) applicable interest rates, price swings, fluctuation of currency rates, supply and demand, regulatory and political measures etc. The second key factor is the negotiation process between the parties. The Directive's focus on the formal aspect of unfairness has put a disproportionate strain on the exercise in negotiation, which is liable to, ironically, take the focus away from the substance of negotiations. It is tempting and, looking at the letter of the law as it stands today, viable to argue that an extensive negotiation followed by a refusal by the trader to include any of the consumer's suggestions in the ultimate terms of the contract complies with the Directive's minimum requirements. The trader could sensibly maintain that the consumer was able to influence the substance of the term but was inept at convincing the trader of the strength of their arguments.

[37] The term "relational contract" has been gaining traction in this context, particularly in the common law world, after it was used by Leggatt J in the English case of *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB).

4. FURTHER REVERBERATIONS

An in-depth reading of later cases, notably *Banco Primus*, reveals a foray into, first, lumping good faith and significant imbalance together, but also an example of the comparative analysis as applied to substantive unfairness. The approach, which, admittedly, does a little more than muddle the waters on the delineation between the two factors, does touch upon the economic interests of the consumer. The court in that case analysed a clause relating to ordinary interest, which provided for the calculation thereof on the basis of a formula under which the outstanding loan principal and interest accrued was divided by the number of days in a financial year, namely 360 days, and not 365 days representing a calendar year[38]. The CJEU instructed the relevant national court "to compare the method of calculation of the rate of ordinary interest laid down in that term and the actual sum resulting from that rate with the methods of calculation generally used, the statutory interest rate and the interest rates applied on the market at the date of conclusion of the agreement at issue in the main proceedings for a loan of a comparable sum and term to those of the loan agreement under consideration"[39]. Importantly, the impact of adoption of a 360-day calculation period, which did not overlap with an ordinary calendar year, upon the amount to be repaid and the amount of interest due, had to be considered. For our purposes, it is commendable that the CJEU referred to the market rate of interest as it represents a significant step in providing a frame of reference for courts when assessing unfairness, particularly for judges reluctant to take a more activist role. It appears clear from the passage cited that a conclusion in favour of unfairness of a clause is warranted where there is a marked deviation from the market standard.

The Court in *Banco Primus* also made comments on another disputed clause, namely one that entailed a so-called accelerated repayment procedure under which, in the event of repeated default on the part of a lendee, the entire amount of the loan (or a significant portion of it) is called in by the bank. On the facts of *Banco Primus*, the default lasted 7 months before the bank demanded the repayment. In such a context, the CJEU held, that a national court should, first, examine whether there is a causal link between the right of the bank to call in the totality of the loan at hand and the consumer's failure to regularly pay loan instalments (with the CJEU couching this generally in terms of "non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question"). Next, it shall be considered whether an instance of non-compliance (a particular instance, it appears[40]) is sufficiently

[38] *Banco Primus*, paragraph 20.

[39] *Ibidem*, paragraph 65.

[40] Although, conceivably, the court could examine this by reference to documents only, engaging in a hypothetical exercise, relying, for instance, on numbers on the face of the document.

serious considering the amount and term of the loan. Another factor is whether the right to demand the accelerated repayment is contrary to "applicable common law rules"[41] in the absence of contractual provisions mitigating its potentially harsh effects, and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.[42] Economic undertones are also present when analysing certain procedural arrangements connected with enforcing unpaid debts. Notably, in the second instalment of the *Sanchez Morcillo* saga, the Court upheld a clause which allowed for an assessment of unfairness of a contract term forming the basis of an enforcement order provided that a negative conclusion was capable of rendering mortgage proceedings invalid[43]. Such a term was held to no longer expose the consumer the risk of final and irreversible loss of their dwelling in a forced sale before a court has even been able to assess the unfairness of the contractual term upon which the seller or supplier bases his application for mortgage enforcement[44]. The Court, as demonstrated above, couched its reasoning not only in terms of furnishing consumers an opportunity to have their case heard by a court at second instance, but also in terms of preventing them from losing their homes, thus embracing the economic aspect of unfairness.

5. *GUTIERREZ NARANJO* – FLOOR CLAUSES

A recent case which explored in depth the real-life consequences of contractual imbalance of rights and obligations is *Gutierrez Naranjo*. There, the CJEU grappled with so-called floor clauses which establish, within the confines of a loan agreement, the minimum rate below which a variable interest rate of interest cannot fall, regardless of attendant market conditions, throughout the duration of a loan. Legally, the question was whether consumers were entitled to repayments of sums incurred and paid on the basis of provisions subsequently held to be unfair[45]. The Spanish Supreme Court had found that "floor clauses" were objectively lawful, neither unusual or extravagant, their use had long been tolerated

[41] Reference to "common law" is somewhat puzzling. It gets at, it is submitted, universally applicable law (i.e. statutes and universally binding secondary legislation).

[42] *Banco Primus*, paragraph 66.

[43] *Sanchez Morcillo* C-539/14, paragraph 40.

[44] *Ibidem*, paragraph 47.

[45] For a discussion of the factual background, see S. C. Lapuente, *A Critical Analysis of the CJUE Judgment of 21 December 2016: Retroactive Nullity Yes*, *but Not Unfair Transparency Test of Floor Clauses*, "Cuadernos de Derecho Transnacional" 2017, Vol. 9, issue 1, pp. 383–388. In English: Á. Pereda, M. Corbacho, *Spain: consumer protection – floor clauses*, "Journal of International Banking Law and Regulation" 2017, Vol. 32, issue 9, pp. N111–N113.

on the market for credit agreements for immovable property, that the banking institutions had complied with the regulatory requirement for information, that the fixing of a minimum interest rate responded to the necessity of maintaining a minimum return on the mortgage loans in question in order to enable the banking institutions to cover the costs of production involved and continue to provide such financing, and that the clauses were calculated in such a way so as not to involve significant changes to the initial amounts to be paid[46]. Consequently, the Spanish court limited, in reliance upon the principle of legal certainty, the temporal effects of its judgment – only amounts overpaid after the date of its publication[47].

The Court inferred that a temporal limitation is unwarranted and impermissible where there has been a finding of unfairness. Although the Court expressed its judgment primarily in reliance upon Article 6(1), arguing the obligation to ensure unfair terms are not binding on the consumer is not limited in time and the effect of that temporal limitation is an incomplete and insufficient protection that cannot constitute an adequate or effective means of preventing the use of unfair terms, as required by the Directive[48], this determination ties into the concept of significant imbalance and consumer economic interests. For the prohibition on limiting the temporal effects of a finding of unfairness, coupled with the restitutory effect that national law shall have (i.e. that consumers shall be restored to the position they were in before entering into a contract "tainted" by unfair terms), is instrumental in ensuring that a proper balance is injected into contractual relationships involving consumers. The CJEU created here a synergy between the effects of Articles 3(1) and 6(1) rescuing, as it were, the practical significance of the former by preventing a national legal provision from shielding sellers and suppliers from the full extent of their liability by virtue of an unfair term. With economic interests of the consumers afforded extensive protection, it will be interesting to see whether there any other factual constellations which would push the European court to pursue this avenue of invoking Article 6(1). Despite receiving criticism on account of perceived judicial overreach consisting in an overruling of a judgment of a supreme national court[49], it demonstrates readiness

[46] As reported in *Gutierrez Naranjo*, paragraph 24.

[47] F. Pertíñez Vílchez, *La incompatibilidad con la Directiva 93/13 de la limitación temporal de los efectos restitutorios vinculados a la declaración judicial del carácter abusivo de una cláusula contractual. Comentario de la sentencia de 21 diciembre 2016*, *Gutiérrez Naranjo*, "Revista Europea de Derecho Comunitario" 2017, issue 57, pp. 671 et seq.

[48] See paragraphs 51–64 of the judgment. In other words, provisions of national law, to which Article 6(1) of Directive 93/13 refers, may not adversely affect the substance of the right of that the consumers acquire under that provisions. C. Mak, *Gutiérrez Naranjo – On Limits in Law and Limits of Law (August 30, 2017)*, Amsterdam Law School Research Paper No. 2017-38; Centre for the Study of European Contract Law Working Paper Series No. 2017-06.

[49] D. Sarmiento, *An Instruction Manual to Stop a Judicial Rebellion (before it is too late, of course)*, 2 February 2017, https://verfassungsblog.de/an-instruction-manual-to-stop-a-judicial-rebellion-before-it-is-too-late-of-course/ (accessed: 31.12.2018).

on the part of the Court to invoke other principles within Directive 93/13 to bolster the effect of a finding of substantive unfairness.

6. POSITION UNDER POLISH LAW

Generally, it shall be noted that the Polish regulation avails itself of the term "gross violation of the consumer's interests" which is semantically different from "significant imbalance in the parties" rights and obligations". Whilst it is generally acknowledged that the notions are synonymous (or they should be so interpreted), calls have been made for a higher standard of diligence in implementation[50]. Contractual imbalance (which, on its face, is tied, at least to an extent, to "significant imbalance" under Article 3(1) of Directive 93/13) has been examined as part of the good faith test, and the second prong (i.e. the "gross violation" of the consumer's interests under Article 385[1] paragraph 1 of the Civil Code) only serves the purpose of determining whether the contractual imbalance is sufficiently intense[51].

In the broadest terms, "gross violation of the consumer's interests" is defined in Polish case law as a gross disproportion between the rights and interests of the consumer and the trader, to the detriment of the former[52]. A violation must be "gross" – alternative formulations have included "significant", "relevant"[53], "drastic" or "egregious"[54]. "Gross" has also been understood as "patent", "indisputable" and "apparent" in relation to a particular adverse characteristic or breach of loyalty towards the consumer[55]. Courts have made assessments dependent on whether a given clause deviates from "contractual practice", acknowledging that

[50] K. Rymanowska-Mrugała, *Dostosowanie prawa polskiego w zakresie niedozwolonych klauzul w umowach konsumenckich do regulacji unijnej*, „Acta Universitatis Wratislaviensis" 2014, Vol. 316, issue 1, pp. 122–125.

[51] Judgment of the Supreme Court of 15 January 2016, ref. number I CSK 125/15, OSNC-ZD 2017/1/9.

[52] The first pronouncement of the principle at the highest judicial level came in the judgment of the Supreme Court of 14 April 2003, ref. number I CKN 308/01, LEX No. 80243. A similar iteration is "a significant deviation from the principle of fair proportion or rights and obligations" – see the judgment of the Appellate Court for Warsaw of 20 February 2015, ref. number VI ACa 250/14, LEX No. 1754203.

[53] See, for example, the judgment of the Supreme Court of 15 January 2016, ref. number I CSK 125/15, OSNC-ZD 2017/1/9; judgment of the Supreme Court of 8 June 2004, ref. number I CK 635/03, LEX No. 846537; judgment of the Appellate Court for Warsaw of 15 November 2017, ref. number VII ACa 950/17, LEX No. 2471080; judgment of the Appellate Court for Warsaw of 26 April 2016, ref. number VI ACa 551/15, LEX No. 2071249.

[54] Judgment of the Supreme Court of 13 October 2010, ref. number I CSK 694/09, LEX No. 786553.

[55] Judgment of the Appellate Court for Warsaw of 26 April 2013, ref. number VI ACa 1571/12, LEX No. 1339417.

it is a fluid concept[56]. Consequently, even an unused clause may be considered unfair and struck down as such where it is liable to exert pressure on a consumer to assent to terms which are in the vested interest of the other party. Further, it has been contended that a consumer's interest is an objective concept, one that is ascribed to a given agent which happens to act as a consumer. In this theory, consumers have rights even before they enter into a contractual arrangement. This is explained as follows: a contractual term may "arise" or "spring into life" only after an agreement is concluded, therefore any interest the term purportedly impinges upon must have existed, in one form or another, before the agreement was entered into[57].

As a rule, assessment of whether a gross violation of a consumer's interests occurred is objective, and it is insufficient for a party to argue that, in retrospect, a contract term detrimentally affected their interests given their individual preferences or expectations[58]. It was early on that the Polish Supreme Court recognized the significance of consumers' economic interest, with "economic situation of the consumer", together with organizational inconvenience, loss of time, unreasonable treatment and violation of privacy professed as principal elements of the definition of "interests" in Article 385[1] of the Civil Code[59]. These criteria will be applicable to individual contracts with varying intensity depending on the situational context and the imbalance of rights and obligations they create[60]. In making an assessment,

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[56] Judgment of the Supreme Court of 13 April 2012, ref. number I CSK 428/11, LEX No. 1130420. More on this: A. Oponowicz, *Niedozwolone postanowienia wzorców umów zawieranych z konsumentami – zmienne tendencje w polskim orzecznictwie sądowym*, „Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2014, issue 4, pp. 30–31.

[57] M. Skory, *Klauzule abuzywne w polskim prawie ochrony konsumenta*, Kraków 2005, pp. 169–171.

[58] Judgment of the Appellate Court for Kraków of 13 November 2014, ref. number I ACa 1092/14, LEX No. 1648959. It is difficult to discern whether judges see a possibility of there occurring a violation of an economic interest without a concurrent violation of some other private interest. One Appellate Court-level judgment could be taken to mean that a violation of an economic interest is an extreme case and, as it were, a culmination of (a series of) violations of private, non-economic interests. See: judgment of the Appellate Court for Warsaw of 13 March 2014, ref. number VI ACa 1733/13, LEX No. 1454669.

[59] Judgment of the Supreme Court of 8 June 2004, ref. number I CK 635/03, LEX No. 846537; judgment of the Supreme Court of 13 October 2010, ref. number I CSK 694/09, LEX No. 786553; judgment of the Appellate Court for Warsaw of 6 March 2013, ref. number VI ACa 1241/12, LEX No. 1322083. These interests have been referred to as "unquantifiable". See: judgment of the Appellate Court for Warsaw of 13 March 2014, ref. number VI ACa 1733/13, LEX No. 1454669. See: M. Hejbudzki, *Klauzule odmowy realizacji złożonego przez konsumenta zamówienia w transakcjach typu business to consumer*, (in:) M. Królikowska-Olczak, B. Pachuca-Smulska (eds.), *Ochrona prawna konsumenta na rynku mediów elektronicznych*, Warszawa 2015, pp. 199–200.

[60] Courts are at liberty to take account of certain individual characteristics of given consumers, e.g. the fact that they are seniors or children, or the reputation of a trader company. See: judgment of the Appellate Court for Warsaw of 3 February 2016, ref. number VI ACa 12/15, LEX No. 2026414. Assessment of the gravity of a violation of a consumer's interests shall take account

courts shall be wary of the fact that conclusion of a consumer contract normally implies a high level of engagement and activity of a consumer related to, *inter alia*, the need to become familiarized with and choose from a wide array of offers available from traders and suppliers on the modern competitive market[61]. Other points of reference include the fact whether the consumer is aware, at the time of conclusion of the contract in dispute, of the total value of consideration they are expected to confer on the trader (it is a gross violation of consumer interests if the contract reserves for the trader the right to vary the price due without clearly articulating the grounds for it). It has been held that such mechanisms not only expose consumers to the threat of sustaining economic loss, but also deprive them of satisfaction related to successful completion of a deal[62].

Such a broad understanding of interest is at times, somewhat controversially and in passing, qualified by the fact that it should not violate the legitimate interest of a trader in conducting its business activity[63]. The type and specificity of a sector in which a given trader operates is also of significance. The Supreme Court, in a case concerning the alleged unfairness of clauses used by Allegro.pl, Poland's leading online e-commerce platform, overturned the Appellate Court's holding on exactly this ground. Here, of particular importance was the mass character and sheer magnitude of transactions in which Allegro acted as an intermediary and processor. Therefore, to distinguish whether the parties to a transaction are consumers or businesses acting as professional traders may prove excessively complicated. Difficulties abound especially since where both parties to an auction are natural persons, they are both consumers as against Allegro[64]. In a highly regulated sector

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of, inter alia, certain objective criteria attaching to the amount of consideration conferred by both parties, in tandem with a host of subjective criteria depending on the contractual relationship in question. A court cannot conclude its assessment with an analysis of the respective amounts of consideration themselves. For to establish the actual balance of rights and obligations one must consider certain substantive elements, subjective from the point of view of a given contractual party See: judgment of the Appellate Court for Warsaw of 11 December 2015, ref. number VI ACa 1815/14, LEX No. 2005410; M. Bednarek, (in:) E. Łętowska (ed.), *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, Warszawa 2012, p. 769.

[61] Judgment of the Supreme Court of 13 October 2010, ref. number I CSK 694/09, LEX No. 786553.

[62] Judgment of the Appellate Court of Warsaw of 9 April 2014, ref. number VI ACa 1828/13, LEX No. 1527305.

[63] Judgment of the Supreme Court of 13 October 2010, ref. number I CSK 694/09, LEX No. 786553; judgment of the Appellate Court for Warsaw of 9 April 2014, ref. number VI ACa 1828/13, LEX No. 1527305.

[64] Judgment of the Supreme Court of 13 August 2015, ref. number I CSK 611/14, LEX No. 1771389. The Supreme Court also accepted Allegro's efforts in terms of drafting internal guidelines and procedures which, on the whole, tended towards protecting the buyer even where both parties were consumers or where the seller was a consumer and the buyer not. The judgment has had profound consequences, and its exact ramifications have not been acknowledged nor realized in the literature. There have been more than 50 reported cases where the prominence of arguments pertaining to the trader's position within a given market or industry sector, its track record in terms

such as provision of electricity to consumers, traders face a host of additional obligations derived from the general concept of good faith, in particular to cooperate with administrative authorities and land owners with a view to duly performing their obligations, and to clearly defining the rights and obligations of respective parties in their standard contracts. This high threshold is typically explained by reference to the scarcity of the good the traders deal in and dearth of meaningful alternatives on the market, in other words – limited competition[65].

A recent case posits that the starting point in assessing the occurrence of a "gross violation of consumer interest" shall be the distribution of rights and obligations as provided for by dispositive laws (i.e. provisions that would have bound the parties had the matter not been regulated in the contract at hand – in line with *Aziz*) and in the absence of such relevant provisions – the general principles of and value judgments accepted in contract law, the nature of the fundamental contractual relationships enumerated in the Civil Code, correspondence of the disputed clause with its putative objectives, and, finally, the customarily shaped empirical precepts[66]. Importantly, it appears a court may refer, in scrutinizing modern contracts not codified in the Civil Code, to similar codified contractual types (such as mandate contracts or agency contracts) to make inferences regarding the desirability of a given arrangement.

6.1. TYPE OF AGREEMENT IN DISPUTE AS A GUIDING FACTOR

The courts have attempted to derive guidance for the purposes of assessing the magnitude of a violation of consumer interest from the type of agreement in dispute. In the context of a mortgage loan agreement, predicating a bank's right to terminate upon termination by the consumer of a related savings account with the bank has been held to amount to a gross violation of such a consumer's economic interests[67]. The court in that case went on analyse at length the nature

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of customer satisfaction (e.g. share of positive reviews), and, perhaps most controversially, the need to preserve widely perceived economic freedom is discernible. It is premature to assess the precise extent of impact of the judgment, however it is already evident that lower instance courts have accepted and embraced the trader-friendly tenor of the Supreme Court judgment. On a side note, it is worth mentioning that the new Entrepreneurship Law of 6 March 2018 (Official Journal of Laws of 2018, item 646) refers in Article 9 to the need for traders to act in accordance with reasonable interests of consumers (which could be used to qualify and limit the ambit of protection).

[65] Judgment of the Appellate Court of Warsaw of 9 April 2014, ref. number VI ACa 1828/13, LEX No. 1527305.

[66] Judgment of the Appellate Court for Katowice of 8 March 2018, ref. number I ACa 915/17, LEX No. 2475090.

[67] Judgment of the Court of Competition and Consumer Protection of 24 August 2012, ref. number XVII AmC 2600/11, LEX No. 2545868. Analogous observations have been made with regard to insurance policies. See, for example: judgment of the Appellate Court for Warsaw of 20 April 2017, ref. number VI ACa 67/16, LEX No. 2331726.

of a mortgage loan, accentuating its long-term character and detachment from other banking services that me offered at any time by the lender. Moreover, where the bank decided to amend the terms and conditions of a savings account (by, for example, increasing account management fees), the consumer would merely have a theoretical right to defend themselves from such changes by terminating the agreement. This would, however, lead, on the facts, to a breach of the related mortgage loan agreement. In this way the consumer's termination right is rendered illusory. Significant imbalance in the parties' rights and obligations manifests itself in two ways: first, by connecting rights stemming from two independent agreements; second, by effectively depriving the consumer of the right to contest adverse decisions of the bank throughout the duration of a bank account agreement. The right to contest adverse decisions made arbitrarily by the trader has been invoked in the context of a utility company's prerogative to issue corrective invoices without reserving for the consumer any recourse to have the basis of a correction verified. The trader, it has been held, cannot waive its duty to make accurate readings and records of electricity or water meters by empowering itself to correct its determinations *ex post* and arbitrarily charge the consumer for outstanding sums[68].

Further, imposition of a mechanism, within the context of a contract for the purchase of a newly constructed home, of price indexation according to an objective indicator none of the parties can influence or manipulate, shall not be equated with the creation of a right, on the part of the construction company, to "specify or to increase the price" contrary to Article 1(l) of the Annex to Directive 93/13 and Article 385^3 point 20 of the Polish Civil Code[69]. Where both parties are able to ascertain, with a marked degree of certainty, the ultimate gravity of the final consideration (such as the price to be paid for a home) by reference to commonly available market indicators, it is difficult to substantiate a claim that determination of the price was left entirely within the discretion of the trader or supplier. The conclusion does not change where it is the trader or supplier who performs a calculation of the final price by reference to an indexation indicator so long as the consumer is within his rights to challenge such a calculation. The Supreme Court went on to draw upon the nature and condition of the construction market, noting its technical and legal characteristics as well as the fact that often times it is external, market factors that influence the content, size and inter-relation of consideration conferred by parties upon each other. Specifically, the construction company's need to remain on the market with a view to performing its obligations towards the consumer was stressed, which makes it necessary for the consumer to render consideration that has sufficient purchasing power for the trader to stay in business. For only by staying in business can a trader fulfil its obligations towards a consumer. That the court noticed this inter-relation of mutual interests

[68] Judgment of the Appellate Court for Warsaw of 11 June 2015, ref. number VI ACa 1045/14, LEX No. 1916598.

[69] Judgment of the Supreme Court of 2 April 2015, ref. number I CSK 257/14, LEX No. 1710338.

is commendable – and it is worth noting that no reference was made to the bargaining position of either party[70]. Further, the court intimated that account shall be taken of the stage of the investment process at which a particular consumer contract is entered into. For a consumer who purchases a home at a very early stage of the process must be aware and accepting of the potential subjection to an indexation clause because the true purchasing power of their consideration is difficult to ascertain. Generally, it has been held that the type of business activity undertaken by a trader and the specificity of goods or services rendered thereby shall play a factor in determining unfairness[71].

There are, however, limits to the reliance a trader may place on the type of services provided under the agreement when imposing potentially onerous requirements on the consumer. Consequently, an insurer cannot call upon the peculiarity of an immediate "assistance" type insurance policy to burden a consumer with a duty to bring a claim under their policy within 5 days of incidence of a medical emergency event[72].

6.2. INDICATORS OTHEN THAN TYPE OF AGREEMENT

Reliance is placed on a claimant consumer's investment into a contract they have entered into. Therefore, in the context of a unit-linked life insurance policy involving certain investment elements, emphasis was put on the fact that the consumer entrusted the defendant insurer with a substantial sum of money, even a slight decrease of which materially affected their interests[73]. Since such a high-risk policy is maintained by an insurer at the expense of an insuring party, such a party should be entitled to withdraw its funds in any amount without punishment in the form of withdrawal fees. An insurer cannot justify its decision to introduce such fees or limits of withdrawal by reference to "optimization and adjustment of fees to the actual cost of the services tendered".

The element of choice is of some prominence too. A consumer cannot be subjected to convoluted contractual arrangements effectively depriving him

[70] Such references do, however, appear in the case law. Courts are particularly wary of utility contracts (adhesion contracts for the provision of utilities such as water or electricity), in the context of which it has been held that abuse of a privileged bargaining position strikes at the heart of significant imbalance of the parties' rights and obligations. See: judgment of the Appellate Court for Warsaw of 13 March 2014, ref. number VI ACa 1733/13, LEX No. 1454669.

[71] Judgment of the Supreme Court of 13 August 2015, ref. number I CSK 611/14, LEX No. 1771389.

[72] Judgment of the Appellate Court for Warsaw of 9 February 2012, ref. number VI ACa 1472/11, LEX No. 1213380.

[73] Judgment of the Appellate Court for Warsaw of 19 June 2013, ref. number VI ACa 1545/12, LEX No. 1402977; D. Leśniak, E. Sienicka, *Zmiany ubezpieczeniowych funduszy kapitałowych w trakcie trwania umowy ubezpieczenia na życie. Wybrane zagadnienia*, „Prawo Asekuracyjne" 2013, issue 3, p. 53 et seq.

of choice regarding the type of burden he is bound to bear. A standard type of life insurance policy ubiquitous on the Polish market in mid-2000s was extendable to instances of serious sickness, pursuant to an additional amount paid on top of whatever premium was payable under the baseline policy. Where an insured decided to trigger the payment procedure in respect of serious sickness, their survivors were no longer able to claim by virtue of their death and the policy was terminated. As premiums in respect of death and serious sickness were distinct and were calculated and paid separately, it was unfair to deny consumers choice as to the type of policy they wished to draw from following an insured event[74]. This was all the more true as insurers were reluctant to unbundle the two policy types. Equally, consumers cannot be deprived of the option of conducting business through proxies, especially where they have justified reasons to do so, such as a debilitating illness[75].

The foregoing has bounds, however. It is a gross violation of consumers' interests to unwarrantedly expand the compensatory liability of a consumer under the guise of additional payments, for example under a telecommunications services agreement – payments on top of regular monthly premiums should typically be justified by reference to general principles of civil liability (incidence of harm, causal relationship, fault)[76]. Judges have assessed certain additional fees in terms of whether they are justified by real costs borne by the trader in exchange. A debt management fee of PLN 40 and a fee for a letter of remainder of PLN 20 laid down by a bank administering a consumer credit contract has been thought of as excessive and economically unjustified. Further, the language of "debt management" was deemed too ambiguous as it failed to disclose exactly what services were being tendered. This, in turn, rendered consumer unable to question any fees the bank in fact charged, considering the ambit of "debt management" can potentially be very broad. With regard to the second charge with respect to letters of reminder, the judgment continued, it was possible to ascertain the scope of services offered, however the real costs of producing and sending such a letter were markedly lower, therefore this created an unreasonable economic inequality entitling the trader to undeserved economic benefit[77]. Specifically, it was no defence for the bank to argue that the high cost of letters of remainder was justified by reference to the loss the bank sustained by virtue of the consumer's failure to pay

[74] Judgment of the Supreme Court of 14 April 2009, ref. number III SK 37/08, OSNP 2010/23–24/303.

[75] Judgment of the Appellate Court for Warsaw of 13 March 2014, ref. number VI ACa 1733/13, LEX No. 1454669.

[76] Judgment of the Supreme Court of 13 April 2012, ref. number I CSK 428/11, LEX No. 1130420.

[77] The bank is obliged to accept the economic risk of ensuring that a sufficient number of debtors will regularly pay their instalments for the bank to maintain liquidity. See: judgment of the Court of Competition and Consumer Protection of 12 May 2016, ref. number XVII AmC 3004/14, LEX No. 2182440.

off their loan instalments in time. The Appellate Court for Warsaw underscored, on the other hand, that it is loan interest charged by the bank that serves the role of a security in respect of such circumstances, not excessive additional payments for administration of consumer debt recovery[78].

6.3. DECENCY AND REASONABLENESS

There is an evolving and ever-increasing body of case law and commentary which builds into the substantive unfairness test, underpinned by good faith and significant imbalance (or "gross violation of consumers' interests), a requirement of 'decency' and 'reasonableness'"[79]. The Supreme Court officially confirmed the validity of the decency test in its judgment of 29 August 2013[80]. The case concerned a contract for the provision of telecommunications services under which the services provider reserved for itself the right to claim from the user additional compensation under general principles of tort, going above and beyond the amount of penalties stipulated in the contract. The Court applied the decency test, opening its discussion by a helpful assertion that verification of "decency" is subsumed under reasonableness, therefore one should talk about a reasonableness test. The test requires an examination of whether a disputed clause is inconsistent with the general behaviour standards of entrepreneurs and businesses as against consumers and how the rights and obligations of the consumer would be shaped had the challenged clause not been stipulated. If the consumer's situation would have been better had dispositive provisions of law applied, the standard

[78] On a side note, a fee of 15 PLN for letters of reminder has also been found excessive and therefore unfair, and judges are on occasion very specific, even delving into the exact costs of postage and stamps. See: judgment of the Appellate Court for Warsaw of 23 April 2013, ref. number VI ACa 1526/12, LEX No. 1331152. The Court in this case also posited that administration of debt recovery does not generate any additional costs in terms of employment for the bank as such activities are already within the remit of duties of bank employees (the Court relied, it appears, on a generalized and typical bank employment contract as there is no evidence that contracts of the particular defendant bank in that case were examined). Hence, the only additional burden on the bank consists in the cost of distributing letters of reminder and other instruments of debt recovery. In this respect, the court emphasized, banks are free to seek the services of a specialized debt recovery firm.

[79] Generally, see: E. Wieczorek, *Art. 385[1]*, (in:) M. Glicz, M. Serwach (eds.), *Prawo ubezpieczeń gospodarczych. Komentarz. Tom II. Prawo o kontraktach w ubezpieczeniach. Komentarz do przepisów i wybranych wzorców umów*, Warszawa 2010, pp. 135–140; K. Doliwa, *Dobra wiara jako wyrażenie języka prawnego*, „Monitor Prawniczy" 2008, issue 6, p. 302 et seq.; W. J. Kocot, *Odpowiedzialność przedkontraktowa*, Warszawa 2013, pp. 33–47.

[80] Ref. number I CSK 660/12, LEX No. 1408133. There were *obiter* comments tacitly endorsing the test in the judgment of the Supreme Court of 19 March 2007, ref. number III SK 21/06, OSNP 2008, No. 11–12, item 181.

clauses shall be deemed unfair[81]. The latter formulation is heavily influenced by the *Aziz* judgment of the CJEU[82]. The crucial aspect, however, that the Court failed to address is the relation of the reasonableness test to the otherwise default test under Article 385[1] paragraph 1 of the Civil Code, which employs the concepts of good faith and significant imbalance. The reference to *Aziz* (taking account of the legal situation the consumer would have faced under applicable laws had there been no consumer contract clause in place) is of limited assistance, unfortunately, because, as I demonstrated previously, the European Court wrongly conflated both concepts into a hybrid whose particulars and constitutive elements are difficult to ascertain. Alternatively, it may be that the reasonableness test indeed is intended to conflate the two aspects of substantive unfairness and could be used interchangeably with the two-prong test. That would, in my opinion, be a significant departure from the letter of Article 3(1) of Directive 93/13 and require a full argument before a competent court followed by a considered judgment. The Supreme Court has not engaged in such an endeavour, instead handing down a judgment that is difficult to reconcile with the language of the Directive but is, at least on its face, an extension of the CJEU case law, which only goes to show the potentially dramatic doctrinal consequences of *Aziz*.

[81] Interestingly, the Court did not follow its own recommendation in the immediate case. Having agreed with the conclusion of the Appellate Court that general provisions of the Civil Code (Article 484 paragraph 1) afford the consumer a higher level of protection than the clause in dispute by prohibiting claims in damages going beyond the stipulated amounts of contractual penalties unless the parties agree otherwise (and there was an express agreement on the part of the consumer), the Court concluded that this was not sufficient to find unfairness. This fact, the Court stated, proved a violation of good faith (disproportion of rights and obligations of the parties), but did not show significant imbalance. This could mean that the reasonableness test attaches only to good faith and is not an overarching gloss over the two-prong substantive fairness test, however the Court's reasoning is too confused to warrant a definitive view. This is all the more so since the Court also mentioned in passing that no evidence was adduced to the effect that the disputed clause contravened the general behaviour standards of entrepreneurs and businesses as against consumers. Again, this probably means that at least two criteria must be met for a clause to clear the reasonableness test: (1) the situation of the consumer in terms of his rights and obligations as against the seller or supplier would be better under dispositive provisions of law and in the absence of the disputed clause; (2) the clause must contravene the general behaviour standards of entrepreneurs and businesses as against consumers. Still, these findings are only little more than tentative, and the exact position of the reasonableness test within the substantive fairness scheme is uncertain.

[82] The Polish Supreme Court had espoused a similar test back in 2007, and by the time the judgment in *Aziz* was rendered the test had been well established in Polish case law. See, *inter alia*, the judgment of the Appellate Court for Warsaw of 5 November 2008, ref. number VI ACa 973/08, OSA 2011/1/61–71; judgment of the Appellate Court for Warsaw of 25 May 2010, ref. number VI ACa 1256/09, LEX No. 1125298; judgment of the Appellate Court for Warsaw of 11 October 2011, ref. number VI ACa 421/11, LEX No. 1171445; judgment of the Appellate Court for Warsaw of 29 December 2011, ref. number VI ACa 855/11, LEX No. 1164713; judgment of the Appellate Court for Warsaw of 24 October 2012, ref. number VI ACa 549/12, LEX No. 1281152.

The Supreme Court elaborated upon the decency test in its judgment of 27 November 2015[83] where it was explained that the reasonableness test is a way in which decency of a contractual provision can be assessed. The court then reiterated the classic passage from *Aziz*, namely that what is assessed is the conformity of a clause with the general ideal of behaviour of traders as against consumers and one shall consider what a consumer's rights and obligations would look like had it not been for the purportedly unfair clause. I submit that this is unhelpful although it clears up the relation between decency and reasonableness. Nevertheless, if the standard of decency is merely "a" way of establishing reasonableness, are there any other potential applicable thresholds?[84] Some relief, however, is found in the latter part of the aforementioned judgment's reasoning. For the Supreme Court confirmed that the decency test is ancillary as against good faith and significant imbalance. It is unknown whether "ancillary" means "optional", albeit it hints that it should not on any account override the two statutory standards. The reasoning continues by asserting that the decency test should only be used for the purpose of ascertaining whether the conditions for substantive unfairness under Article 385^1 paragraph 1 of the Civil Code have been fulfilled. Unfortunately and regrettably, this again conflates reasonableness and good faith, and it is impossible to decipher whether reasonableness is merely an add-on or a legitimate "version" of the good faith standard. Further, the "ancillary" comment is puzzling considering what followed (in the same sentence, it shall be added), for it is difficult to conceptualize the ancillary character of a test used exclusively for the purpose of assessing substantive unfairness. Moreover, what follows if, hypothetically speaking, the decency test points towards the unfairness of a clause whilst other considerations suggest otherwise? Since decency is merely an ancillary indicator, should it be discarded at a judge's whim where they in good conscience consider a clause to be in good faith? Judicial discretion will continue to broaden until the status of the reasonableness test is clarified, particularly its inter-relation with the two codified precepts of substantive unfairness. Because of the conceptual problems noted above, and because it is unclear whether reasonableness brings into the conversation anything above and beyond what is already covered by good faith and significant imbalance, reasonableness, I submit, should be abandoned, especially if it could conceivably provoke a decrease in the level of protection afforded to consumers.

Confusion abounds if one were to consider authority rendered at lower instances. In its judgment of 11 June 2015 (which preceded the Supreme Court pronouncement discussed in the preceding paragraph)[85], the Appellate Court

[83] Ref. number I CSK 945/14, LEX No. 1927753.

[84] There is Appellate Court-level authority that any assessment of unfairness of consumer contract terms "demands" an analysis of the clause's decency. See: judgment of the Appellate Court for Warsaw of 30 November 2015, ref. number VI ACa 1609/14, LEX No. 2004474.

[85] Judgment of the Appellate Court for Warsaw of 11 June 2015, ref. number VI ACa 1045/14, LEX No. 1916598.

for Warsaw insisted that an assessment of reasonableness of a contractual term (which sits at the core of compliance with the overarching requirement of good faith) necessitates an inquiry into such a term's decency[86]. The Court in that case went on to say that a judge confronted with such a question shall hypothesise a general model of behaviour traders should display as against consumers, and that the model should take account of the reality of the free market. Importantly, the judgment underscored that it is the consumer that should ultimately benefit from intense competition among traders and suppliers[87]. Still, however, the assessment is only secondary to the *Aziz* test, in other words – a judge is allowed to resort to an extra-legal examination of decency only where it is impossible to determine how the rights and obligations of the parties are regulated by statutory provisions that would have held in the absence of an agreement between the consumer and the trader. In contrast, the same court in its judgment of 13 March 2014[88] expressed a more limited view, holding that the decency test *may* be used to make a determination regarding the unfairness of a term. Another Appellate Court-level pronouncement holds that verification of decency of a term is warranted (perhaps mandated) only in respect of abstract control proceedings[89].

6.4. INTERPLAY BETWEEN GOOD FAITH AND SIGNIFICANT IMBALANCE

The question of how good faith and significant imbalance interact is relatively unexplored with reference to Directive 93/13 whilst, within the Polish context, and this is a reverberation of the CJEU's tepid pronouncements and suggestions, it has become an axiom that a gross violation of consumer interests will usually constitute a breach of the requirement of good faith, whilst the latter need not in and of itself qualify as a gross violation[90]. It may be supposed, therefore, that good faith is a more encompassing and momentous concept, on the other hand, however, a sufficiently egregious violation of a consumer interest (or, in other words, an instance of sufficiently significant imbalance in the parties' rights and obligations) will automatically be treated as having been done in bad faith, without

[86] The same court has ruled that decency shall underlie any assessment of unfairness at large, hence its significance should not be confined to good faith only. See the judgment of the Appellate Court for Warsaw of 20 February 2015, ref. number VI ACa 250/14, LEX No. 1754203.

[87] Judgment of the Appellate Court for Warsaw of 27 January 2011, ref. number VI ACa 770/10, LEX No. 897993.

[88] Ref. number VI ACa 1733/13, LEX No. 1454669.

[89] Judgment of the Appellate Court for Warsaw of 27 January 2011, ref. number VI ACa 770/10, LEX No. 897993.

[90] Judgment of the Supreme Court of 13 October 2010, ref. number I CSK 694/09, LEX No. 786553; judgment of the Supreme Court of 27 November 2015, ref. number I CSK 945/14, LEX No. 1927753.

an extensive further inquiry. For the notions are typically conflated in academic literature and case law alike, however it has been pronounced that a substantive assessment of a clause should start with a basic examination of whether good faith has been breached (perhaps an instinctive yet principled "yes" or "no" steeped in an understanding of good faith established pursuant to past case law and statute), only to be followed by the assessment of the type and character of the breach[91]. One judicial panel has defined a gross violation of a consumer's interest as a manifestation of the legally relevant character of contractual imbalance (a breach of good faith recognized at law as legally relevant as regards the parties' rights and obligations)[92].

The relationship between good faith and significant imbalance is elucidated upon in the judgment of the Appellate Court for Szczecin of 2 August 2017[93]. It is a rare example of a case where the court refused to recognize a consumer contract term as unfair despite finding that it was contrary to the requirement of good faith. The dispute in that case concerned a loan denominated in the Swiss franc (CHF). The claimant argued that the agreement they signed failed to specify and spell out the manner in which the rate of the Swiss franc was to be calculated by the defendant bank for the purposes of currency conversion. A currency rate chart appended to the agreement merely laid down, they maintained, numerical values representing the applicable rates. The disputed indexation clause effectively imposed on consumers rates adopted unilaterally by the bank, upon which the exact magnitude of a consumer's liability under the agreement was to be calculated. This, in the opinion of the claimants, amounted to a situation where the bank usurped the right to share, in a lopsided manner, to decidedly affect the financial situation of the claimant consumers. Pertinently, the rates utilized by the bank deviated from standard market rates, to the detriment of the consumer.

The court drew a line between good faith and the interests of the parties. First, it recognized that the bank reserved for itself the right to unilaterally regulate the instalment amount by determining the rates as well as the applicable rate of spread (the difference between selling and exchange rates). The bank's right to determine the buying and selling rates of CHF was unlimited. No information was explicitly provided as to the manner in which the currency rates were calculated or otherwise adopted by the bank, and a mere reference was made to resolutions adopted by the bank's management board. This was, in the opinion of the Appellate Court, insufficient to secure the consumer's interests. For objective factors, that is factors verifiable for the consumer, such as the applicable exchange rates of CHF, have a limited bearing on the overall cost of the loan taken

[91] Judgment of the Supreme Court of 27 November 2015, ref. number I CSK 945/14, LEX No. 1927753.

[92] Judgment of the Appellate Court for Warsaw of 11 December 2015, ref. number VI ACa 1815/14, LEX No. 2005410.

[93] Ref. number I ACa 263/17, LEX No. 2369623.

out by the defendant consumer. The bank's profit margin (the premium levied on the CHF selling rate as provided for in the bank's currency rate chart) should not have been concealed.

A breach of the requirement of good faith notwithstanding, no gross violation of the consumer's interests was found. Having reiterated the Supreme Court's position that an inquiry must be made into whether the trader (here – the bank) could have reasonably anticipated (assuming it treated the consumer fairly, equitably and taking into account their legally justified claims) that the consumer would have consented to the clause in dispute had it been individually negotiated[94], the Appellate Court for Szczecin found no violation of the claimants' interests on chiefly economic grounds. It was shown in evidence before the judge at first instance that the average difference between the exchange rate adopted by the defendant bank and the theoretical rate based upon the interbank currency market stood at PLN 0.0078 in the years 2008–2016. This meant that payments made by the claimant towards settling the loan between 2008 and 2015 exceeded the amount he would have paid based upon the interbank currency market rate by CHF 3.37. Such a slight difference was deemed insufficient to strike down the disputed contract term. The court based its reasoning not on the average exchange rate of the National Bank of Poland but on the interbank currency market rate, as the latter represents a realistic market figure and not a hypothetical supposition employed chiefly for the purposes of financial calculation and conversion.

The ratio of the case is unclear, and it is possible that its outcome has momentous economic and political undertones. Perhaps its reasoning is to be confined to the rather peculiar set of facts and its political context. Undeniably, an opposite decision would have led to a floodgates effect, especially considering the litigiousness of claimants who were detrimentally affected by the sudden hike of the Swiss franc exchange rate in January 2015. Notwithstanding, a number of tentative corollaries could be drawn. First, the Supreme Court's axiom concerning the absence of automatism in finding breaches of good faith and consumer interests has been finally tested in practice at a high judicial level. Second, the Appellate Court accorded much weight to the economic dimension of the parties' relationship when assessing the question of significant imbalance of the parties' rights and obligations. When analysing good faith, it seemed sufficient that the bank had given itself a high degree of latitude in setting out currency rates. This observation may mean a plethora of things. It could be read as an outright rejection of arguments in favour of treating consumer choice as a viable defence for traders. On a competitive market of bank loans, the consumer had an opportunity to shop around.

[94] Judgment of the Supreme Court of 15 January 2016, ref. number I CSK 125/15, LEX No. 1968429. The formulation is similar in that adopted in *Aziz*, however it appears the CJEU referred it more to the requirement of good faith (see paragraph 69 of the judgment).

Looking from another angle, even though the rates themselves were not considered unfair, the mere fact that they were unilaterally imposed by the bank cleared the first stage towards a finding of substantive unfairness. This thread could be explored purposively. For the sake of argument, suppose the consumer was allowed a choice between a range of currency rates depending on other conditions of the loan. Suppose the consumer could choose a more attractive exchange rate tied to stricter payment deadlines. Conceivably, this is not contrary to good faith – but would it grossly violate the consumer's interests if the deadlines deviated markedly from the benchmark envisaged by the "basic" version of the contract? Value judgments and risky quantifications are unavoidable as is, as shown in the case analysed above, expert evidence.

The case could also form the groundwork for a broader theory on where economic ramifications of potential consent to a consumer contract term lie in a judicial assessment of substantive unfairness. I submit the Court was correct in assessing the actual economic loss sustained in the context of the claimants' interest. In doing so, however, the requirement of good faith was stretched to cover at least some information duties of the bank[95]. The breach of the good faith requirement appears to have rested on two pillars: (1) insufficient information on the premium the bank put on top of interbank currency market exchange rates, with mere references to resolutions of the management board; (2) unilateral power of the bank to shape currency rates[96]. The Appellate Court, it is submitted, elevated the status of economic interests by adopting a serious, quantifiable, mathematical approach to economic encumbrances. The court assessed the actual loss sustained by the claimants in comparison to the available market rate (lost benefits – *lucrum cessans*) and decided that due to its relatively low magnitude a term that merely gave an option to grossly violate a consumer interest was not unfair. This could be reformulated as follows: where a trader does not make excessive use of a power it accorded to itself unilaterally, this will not warrant judicial intervention. A larger point is that the court endorsed a "law in action" method of reasoning. A breach of good faith, it could be posited, means merely that a term gives the trader a hypothetical right to grossly breach a consumer interest (or to introduce a significant imbalance in the parties' rights and obligations. However, it is only when the trader actually makes excessive use of this right can we talk about substantive unfairness (creation of a right + use

[95] In this connection, see the judgment of the Appellate Court for Warsaw of 13 March 2014, ref. number VI ACa 1733/13, LEX No. 1454669, where it was implied that a consumer contract should clearly set out relevant consumer rights and prerogatives as codified in statutory law, which could potentially impose significant costs on traders.

[96] Interestingly, the bank did not have the right to vary the currency rates charged after the conclusion of the contract. This would have triggered Article 385^3 point 10 of the Civil Code (which reproduces Article 1(j) of the Annex to Directive 93/13 that prohibits terms enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract).

of that right = substantive unfairness). This attempt at distilling a principle is by all means tentative, however it could, coupled with a sophisticated mathematical approach to quantifying the magnitude of a breach of a consumer's economic interest, inject structure into an area mired in judicial discretion. These considerations may be all the more momentous considering that the observations of the Appellate Court for Szczecin have been confirmed in an analogous case before the Appellate Court for Katowice[97].

7. FINAL REMARKS

As discussed above, several important facets that give rise to the importance of the requirement of significant imbalance appear to be in flux, although there is a clear consumer-friendly streak in the practice of national courts as opposed to the CJEU which has preferred a moderate position focused strictly on the legal character of the parties' position. The role of national law is difficult to overestimate, for it is the means of legal recourse a consumer has at their disposal under national law render the unfair term inapplicable that shall serve as a consideration in determining substantive unfairness. It appears evident that European law on the matter tends to overvalue and overemphasize the procedural aspects of contractual imbalance. Courts are quick to examine the mode of entry, change and termination of a particular contract whilst overlooking the practical effects of the substance of the contractual terms at hand and the burden they may impose on the consumer subjected thereto. The picture is not that straightforward, though, and I sought to prove that attempts have been made to broaden the ambit of "imbalance in the parties' rights and obligations" by directing attention to the circumstances which arose as a consequence of the contract's conclusion and, second, by explicitly resorting to other terms of social and economic provenance whose conceptual and practical ramifications may conceivably be more far-reaching such as "bargaining position", "bargaining power" and "contractual advantage". Crucially, however, whilst it is accepted that the level of familiarity of the consumer with the circumstances within which the trader operates is relevant, the CJEU is reluctant to recognize that a host of market-related variables should also be considered, such as (depending perhaps on the sophistication of the business) applicable interest rates, price swings, fluctuation of currency rates, supply and demand, as well as relevant regulatory and political measures. Further, significant imbalance has recently been used to import a host of information duties, ultimately leaving the ultimate decision to sign a contract with the consumer, and

[97] Judgment of the Appellate Court for Katowice of 8 March 2018, ref. number I ACa 915/17, LEX No. 2475090.

it appears that a more sensitive approach as regards services is warranted where the consumer is at a particular disadvantage and operates at a significant information deficit.

Another unsolved puzzle in the case law of the CJEU is the conflation of good faith and significant imbalance in *Aziz* as explained above. The insistence on referring to the national rules of contract law is consistent with the Directive's self-professed tendency towards partial harmonization, however it fails to redress losses suffered by consumers from countries where dispositive contract laws are vague (or, for that matter, where no dispositive laws exist and the burden is placed on the judiciary to fill the blanks). The *Banco Primus* case could signal, however, that the *Aziz* formula could be extended beyond a merely legal comparison of rights and obligations and encompass certain economic considerations. The court in that case resorted to an economic comparison of interest rates imposed on the particular consumer and an average market rate. This is a notable extension and as such should be welcomed – it may be the case that what cannot be achieved by reference merely to the letter of national law, is attainable where regard is had to the market conditions affecting the entry into transactions. Significant imbalance lays the groundwork for drawing links between Article 3(1) of Directive 93/13, the core of substantive unfairness, and other provisions of the Directive, notably Article 6, which have been used to strike down or at least question unfair clauses where protection afforded by the former provision was deemed insufficient.

The foregoing corollaries drawn by reference to EU law have been complemented by an analysis of the relevant trends in Polish case law. Notably, the consumer's interest is objectified and it is generally irrelevant that a contract term detrimentally affects their individual preferences or expectations. An assessment of unfairness should consider a host of circumstances favourable to the consumer, particularly the need to become familiarized with and choose from a wide array of offers available from traders and suppliers on the modern competitive market. Problems may arise where courts have excessive regard to the subjectively perceived peculiarities and nature of a trader's business activity as this creates a risk of over-extending the protective reach of the Directive. On the other hand, the nature of the underlying contract containing an unfair term shall be taken into account, as shall be the consumer's freedom to choose the mode of providing consideration to the trader.

Polish courts have proposed the concept of decency, which has evolved into a reasonableness test, as a competing theoretical explanation of significant imbalance. As analysed above, the status of the test is unclear – in particular, it has not been definitively determined whether the test is an ancillary or a subsidiary test to the one envisaged in Article 3(1) of the Directive. It appears that the normative content of both tests is akin, however the courts on occasion have attempted to apply both thresholds cumulatively. Compatibility of the reasonableness test

with the Directive is also uncertain as, I submit, it constitutes an unnecessary gloss over the normative test.

Finally, the conceptual problem of delineation between good faith and significant imbalance is yet to appear before the CJEU. Although it has become an axiom that a gross violation of consumer interests will usually constitute a breach of the requirement of good faith, whilst the latter need not in and of itself qualify as a gross violation, the distinctions between the two made by Polish appellate courts rest upon the economic dimension of the parties' relationship when assessing the question of significant imbalance of the parties' rights and obligations. It appears that the key here is a comparative exercise and an economic (even mathematical) calculation. We shall wait until the Supreme Court renders its opinion on the matter, I submit however that the appellate authority discussed above could form the basis of a broader theory on where economic ramifications of potential consent to a consumer contract term lie in a judicial assessment of substantive unfairness.

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INTRICACIES OF SIGNIFICANT IMBALANCE AS THE CORNERSTONE OF PROTECTION AGAINST UNFAIR TERMS IN CONSUMER CONTRACTS UNDER EU LAW

Summary

Significant imbalance in the rights and obligations of the parties to a consumer contract term is, together with good faith, a fundamental pillar of substantive protection against unfair terms. It is the primary tool provided by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts with a view to mitigating differences in bargaining power between professional traders and consumer on the ever-expanding capitalistic market within the EU. The paper comprehensively reviews the meaning of the "significant imbalance" element by reference to a cross-section of judgments handed by the CJEU and Polish courts. Generally, albeit with a few notable exceptions, the former court has engaged in a subjective-objective exercise aimed at discovering what the balance of rights and obligations would have been between the parties in the particular dispute at hand had it not been for the purportedly unfair clause. Besides that, the requirement has been utilized to impose ad bolster a host of information duties levied on traders so that protection is extended to cases where the consumer is unaware of their rights or are deterred from enforcing them due to procedural obstacles or prohibitive costs of judicial or administrative proceedings. The requirement of significant balance, rooted in the idea that the disproportion of market power between the parties to a disputed term necessitates government or judicial intervention to achieve or restore contractual equilibrium, is shown from a plethora of angles: its ideological foundations, practical connotations, its emphasis on consumer vulnerability and approach to economic power. Assistance and inspiration re gleaned from Polish jurisprudence where numerous questions either unanswered by the CJEU or left to the consideration of national courts, particularly the relation between reasonableness, on the one hand, and significant imbalance and good faith on the other, as well as between significant imbalance and good faith, have been tackled.

KEYWORDS

significant imbalance in the parties' rights and obligations, consumer interests, unfair terms, Directive 93/13, good faith

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znacząca nierównowaga praw i obowiązków stron, interesy konsumenta, klauzule niedozwolone, Dyrektywa 93/13, dobre obyczaje