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Unfair Terms, Protective Nullity and Court's Powers: Certain Reference Points after Jörös' and Asbeek Brusse's Rulings

Review. *The article examines the cases of Jörös (Case C- 397/11,) and Asbeek Brusse,(case C-488–11), both dated 30 may 2013, as a starting point for a more general analysis of the ECJ's approach to the legal consequences to be drawn by the national Court from finding that a contractual term is unfair. The work focuses on the question of whether the interest of the consumer — at the basis of the remedy under consideration — is compatible with the general public interest and with the duty of the National Court to declare the nullity of its own motion, perhaps in contrast with the individual interest of the party. The paper criticizes the “Pannon ruling”, and points out how the more recent Banif Plus judgment (2012) has refined that ruling, even when the partial nullity is concerned. If the duty of the National Court to declare the nullity of its own motion aims to guarantee general interest and the values held by the Constitution — the A. argues — there is no way the consumer can “oppose” the declaration and express his own interest to preserve the contract. Consistently with this idea of consumer protection, in the recent Jörös judgment the ECJ partially reviewed the so called Perenicova jurisprudence, and clarifies that the National Court is required to determine whether or not the contract can continue to maintain its effects on the basis of objective criteria.*

Keywords: *European Union, European Union law, European market, European Court, case law, judgment, court rulings, consumer contracts, unfair terms, protective nullity.*

1 ■ The internal (European) market cannot be achieved without employing certain rules of minimal harmonization concerning substantive control in the field of consumer contracts. The Unfair Contract Terms Directive (UCTD), Council Directive 93/13/EEC of 5 April 1993, is one of the primary tools

for achieving such goals. The scope of the Directive covers all transactions that involve contracts between a seller or supplier and a consumer. Its rules concern contractual terms not individually negotiated, which shall be regarded as “unfair” if, contrary to the requirement of good faith (taking into account the nature of the goods or services

for which the contract was concluded, all the circumstances attending the conclusion of the contract and all the other terms of the contract), it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

According to Article 6, § 1 of the UCTD, member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. It is left to national legislation to determine the appropriate remedy. Nevertheless, the remedy must be in line with the consequences provided by Article 6, § 1. In most continental systems the appropriate legal remedy would be the nullity of the term; but the legal consequences provided for the Directive do not completely fit with the traditional approach to the concept of invalidity and with the rules governing the nullity of the contract as provided in many Member States law (particularly the four civilian systems, French, German, Italian, Spanish)

Given the legal nature of European Directives (and the need of their implementation), as well as the subject matter of the UCTD, the role of the European Court of Justice (ECJ) proves to be instrumental in providing a more coherent interpretation of the rules contained therein. Moreover, one might say that the practice of the ECJ has a decisive impact on addressing the main issues concerning the powers of the National Court and the effects of its judgment and elaborating a new concept of partial invalidity: the so called "protective nullity" (see article 36 Italian consumer code) ^[1].

The Court of Justice returned to the issue of unfair terms in consumer con-

tracts by means of two coeval and, somehow, complementary, judgements. (JörÖs, case C — 397/11 and Asbeek Brusse case C-488/11), both of 30 May 2013, which announce their relevant role in clarifying the position of Luxembourg's Court and clear up any doubts and misunderstandings raised by some precedent.

The issue of judicial review of unfair contract terms or, rather, of an actual function of protective nullity, according to a pattern entirely provided with by jurisprudence^[2], has to be broken down and articulated in at least three levels. The first issue, that has been widely discussed by the doctrine, concerns the power-duty of the National Courts to determine of it's own motion the invalidity of an unfair term, without waiting for the consumer to make an application in that regard, as restated by JörÖs' judgment.

The second one, that more recently drew the Court's attention, concerns the partial invalidity concept. The issue of establishing how to fill the gaps due to the invalidity of the unfair terms: shall the contract continue to bind the parties only if it is capable of continuing in existence without the unfair terms, or can the term be supplied by reference to default rules?

Finally, the focus is on — even if the connection with the aforementioned question is clear — what criteria will guide the decisions concerning the continuation in existence of the "amputated" contract: if, when assessing whether a contract which contains one or more unfair terms can continue to exist without those terms, the National Court hearing the case can base its decision solely on a possible advantage for one of the parties (the consumer).

The last rulings deal with the above last two questions, after less than one year since Banco Español de Crédito SA (judgment 14 June 2013 Case C-618/10) had

somehow — in our opinion not without a certain ambiguity — announced the Court’s idea about those issues.

2. Before considering the judgments of 30 May 2013, and in general terms, addressing the central issue of the fate of the contract after the removal of the unfair term, even if the European Court’s orientation appears to be clear and consolidated in this respect, it’s necessary to make some considerations as regards the first mentioned profile, as well.

It’s worth mentioning that, starting from *Océano* (judgment 27 June 2000 in Joined Cases C-240/98 to C 244/98) the Court of Justice seems to have carried out a patient weaving action, which led to outline the shape of the protective nullity.

A first essential step towards this direction marks the distance between *Océano*’s start and the principle laid down by *Mostara Claro* a few years later. In *Océano*, the Court, after having clearly introduced the function of protection of the above nullity, (“it should be noted that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier as regards both is bargaining power and his level of knowledge. This lead to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms”) seizes the assumption presented by the Advocate-General in his conclusions (“Moreover, as the Advocate General pointed out in paragraph 24 of his Opinion, the system of protection laid down by the Directive is based on the notion that the imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract.”) leading to the conclusion that: “the protection provided for consumers by the Directive entails the national court being able to determine of its

own motion whether a term of a contract before it is unfair when making its preliminary assessment”.

Starting from the same premises, *Mostaza –Claro* (judgment 26 October 2006, Case C-168/05), in highlighting the purpose of the EU provision, goes beyond and underlines that Article 6(1) of the Directive must be regarded as “a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them”. Therefore: “the nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair”.

In the transition from the former to the latter judgment, the assessment of the unfair nature of the abusive term converts from a court’s power, that is the possibility to determine of its own motion whether a term is unfair, even in the absence of the consumer application, into a duty. Thus, what *Mostaza Claro* makes clear is supposed, however, to be underlying in *Océano*. Italian Supreme Court in a sort of fruitful remote dialogue with Luxembourg Court, highlights” The previously common use of the term obligation, instead of that of power, has been meant, in this judgment, as awareness of the concept of duty of the Court to raise nullity whenever the contract is an integral part of the application. Therefore this is not specifically power but obligation, as the verb “can “used in Art.1421 Italian Civil Code has to be understood “must “, where the application implies the issue to be raised and no problem concerning the correspondence between what has been asked and what has been ruled arises” (Ital-

ian Corte di Cassazione, Joint Division 8 May 2012, no.14828).

The change of perspective and the gain in systematic terms are not, therefore, negligible. In *Océano* the protective function of the nullity justifies the “availability of the remedy, being seized from the sole consumer’s choices, allowing a vicarious initiative of the National Court; in *Mostaza Claro* nullity regains, together with the possibility to be declared by the Court of its own motion, the main function of protecting the general (public) interest on which the next judgments, up to the most recent, will insist. This is clearly stated in *Asturcom* (Court of Justice judgment 6 October 2009, in case C-40/08) where the Court reasoned that “In view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy”; laying down the principle pointed out now by *Asbeek Brusse* when returning on it, with the purpose of founding the Court’s competence.

Starting from *Mostaza Claro*, therefore (and only starting from this judgment), it should be noted that the distinctive feature of the so called *protective nullity* is the negative one, that is a remedy not actionable by the supplier or seller, rather than the positive character of being actionable by a unique contractor and specifically the party in whose interest the remedy is provided for (the consumer).

This represents a change of direction, not without consequences on the future development of the European Court’s thinking concerning protective nullity and particularly on the responses which it is seeking to give to the issue of the management of the contract with unfair terms, as regards the criteria to be adopted when deciding about

its fate, issue which was addressed by the two judgments of May 2013.

Significantly, the change underlying in the sequence *Océano-Mostaza Claro* has been strongly pointed out in judgments where the Court has been called upon to solve the aforementioned matter, as in the more recent of 2013 or those preceding it of June 2012, *Banco Espanol de Crédito*. In these judgments the European Court remarks that “The role attributed to the national court by European Union law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task”. Thus, under para 41, the judgment of 30 May 2013, *Asbeek Brusse* in case C-488/11 with reference to *Banco Espanol* and *Banif Plus Bank* (Court of Justice 21 February 2013, in Case C-472/11).

But previously in *Pannon* (judgment of 4 June 2009, case C.243/08) where the issue was to conciliate its power to declare the nullity of its own motion and the (counter) interest of the consumer, the Court, in reaffirming that the National Court seized of the action is therefore required to ensure the effectiveness of the protection intended to be given by the provisions of the Directive, laid down an equivalent principle.

3. Once the nullity, even if “protective”, has been placed into the more congenial framework of nullity protecting a public interest (i.e. nullity for breach of mandatory rules) and the Directive (as a whole) has been considered as a provision of equal standing to national rules of public policy (see the dual point in *Pohotovost’s* ruling s.r.o. of 16 November 2010 in case C.76/10), it follows from this that the Court fully carries out its duty to raise it of its own motion, and thus, no initiative aiming at preventing the judgment of nullity is left to the party.

Thus, if not a review, but at least a more specific statement of the principle laid down by Pannon, is needed.

Referring to Pannon: “In carrying out that obligation (that of assessing of its own motion the unfair nature of a term) the national court is not, however, required under the Directive to exclude the possibility that the term in question may be applicable, if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status.” Thus: the national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, “except if the consumer opposes that non-application.”

The above outcome is, in our view, a consequence of an interpretation of the whole “guarantee” tool introduced by the Directive 93/13/EC, not yet set free, also in procedural terms, from an unbalanced point of view in favor of the consumer. Then, the much more articulated argumentation whereby, more recently, the Court achieves the same result in the above mentioned judgment *Banif Plus bank Zrt* of 21 February 2013, appears to be very clarifying in this respect. In this judgment, the role of the consumer does not depart from the usual procedural guidelines and the possible “opposition” to the declaration of nullity changes into a (less subversive) opportunity of the consumer, now fully informed, to make observations to the National Court and set out its view on the matter. The European Court holds that, as a general rule, “where the national court, after establishing, on the basis of the matters of fact and law at its disposal, or which were communicated to it following the measures of inquiry which it undertook of its own motion, that a term comes within the scope of the Directive, finds, following an assessment made of its own motion, that

that term is unfair, it is, as a general rule, required to inform the parties to the dispute of that fact and to invite each of them to set out their views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure”. The European Court points out that the National Court has the duty “to take into account, where appropriate, the intention expressed by the consumer when, 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 “.

The relevance of the interest of the consumer — with no doubt at the basis of the remedy under consideration and which is clear, e.g. in the wording of art. 36 Italian Consumer Code (Nullity works only at the benefit of the consumer and can be declared by the Court of its own motion)- returns to regain full compatibility with the possibility that the nullity of the term is declared by the Court of its own motion; and, conversely, this regime doesn’t sacrifice anything for the relevance of the particular interest of the party which the law wants to protect. The legal principle which follows from this assumption, as a matter of fact, does not contemplate an (inedited) late initiative (opposition) concerning the possible declaration of nullity of the term being allowed to the party which failed to make an application in that regard or didn’t oppose it in compliance with procedural preclusions; thus no breach is opened in the National Court’s powers to declare the nullity of its own motion.

It follows a “normal” compliance with the procedural principles which leads the Court not to be paralyzed within the power to declare the nullity of the term of its own motion starting from a consumer’s oppo-

sition, but, rather, to be able to keep into account the opinion that the consumer expresses in the procedure, in order to better assess the substantial volition of the party and its adhesion to the contractual term, and, in doing so, excluding the unfairness of this latter to be regarded as “individually negotiated”.

This doesn't mean that a new, even if resolving, consumer's consent (and an approval to the unfair term) can be introduced into the process^[3]; in doing so, the party would re-acquire the control of the remedy concerning the invalidity according to the classic pattern of relative nullity (the invalidity in the party's interest). But, rather, that means that the “opposition” introduces further elements of fact starting from which the National Court can differently assess or (the primal) consumer's acceptance of the term or the effect of the term within the contract, in order to avoid the unbalancing outcome. It should be noted, therefore, that the consumer's role and its possible interest in the maintenance of the term results to be, in our opinion, replaced in order not to undermine the Court's power to declare the nullity of the terms of its own motion and, first of all, the preeminent attention of the law to the implied general interest.

4. Setting “protective nullity” completely free from the underlying ambiguities of Oceano's approach is an essential precondition aiming at breaking up the node of the fate of the private contract where one or more terms have been judged unfair.

As a matter of fact, it's clear that a “management” of the contract with unfair terms, completely pervaded by the supremacy of the party's interest, couldn't fail to affect the whole assessment and therefore also the moment following to the judgment of nullity of the term and the decision on the “resilience” of the so amputated contract:

the alternative, therefore, between partial nullity and nullity of the contract as a whole.

When appearing, EC rules and the imperative statement of partial nullity were rightly celebrated as a sure and fit lifting of the remedy from any assessment which, in the name of the parties' interest, would have reopened the way to a focus also on the supplier or seller's interest in terms of which the unfair term could have been recognized as distinctive feature of essentiality, leading to the nullity of the contract as a whole^[4].

But, once the Oceano's approach has been adopted together with the imperative input for interpreting the EC intervention — and in particular the remedy of nullity — being in compliance with a great and declared protection of the consumer, how excluding that such subjective, unilateral, parameter, at least as priority, had to become a reference point with the purpose of deciding on the continued existence of the contract without the unfair terms?

An extremely significant excerpt of Perenicova (judgment of 15 March 2012, case C 453/10) gives further evidence that the above question does not fit in only with a mere dialectical exercise. According to the judgment: “Article 6(1) of Directive 93/13 must be interpreted as meaning that, when assessing whether a contract concluded with a consumer by a trader which contains one or more unfair terms can continue to exist without those terms, the court hearing the case cannot base its decision solely on a possible advantage for one of the parties, in this case the consumer, of the annulment of the contract in question as a whole. That directive does not, however, preclude a Member State from providing, in compliance with European Union law, that a contract concluded with a consumer by a trader which contains one or more unfair terms is to be void as a whole where that will ensure better protection of the consumer.”

The Court, called upon to address the above preliminary issue, starting from the assumptions concerning content and purpose of Directive 93/13 and from the emphasis on the objective of the protection of the consumer, expresses the full legitimacy of choices of the national legislators whereby the assessment of the unfair terms would lead to the nullity of the contract as a whole, not because the voidance of the unfair terms would compromise the continuation in existence of the latter, but in order to ensure a better protection of the consumer. The Court doesn't notice that, this way, the natural distinctive feature of protective nullity — being nullity which, in principle, does not compromise the contract as a whole — with its purpose of the protection of the consumer, results to be consigned to the exercise of discretion of the national Court, which will have to refer again to a subjective parameter, even if referred to the sole consumer party.

In this framework the rulings by the judgments of 30 May 2013 seem to have the merit not only of expressly addressing the other, even if related, issue referring, firstly, to establish if and how filling the gap in the contract caused by the abrogation of the unfair term, but also to achieve, starting from this profile, the reset of protective nullity and in doing so, confirming some reference points already identified in the mentioned pathway and clarifying some ambiguities.

It's significant that the Court, in the first of the two last judgments (First Chamber of 30 May 2013 Erika Jöros, case C-397/11), starting from the same assumptions of Perenicova, draws from this latter other, and maybe more consistent, consequences.

Since, as in Perenicova and as the Court now reminds: "the objective pursued by the European Union legislature in connection with Directive 93/13 consists, not in annulling all contracts containing unfair terms, but in restoring the balance between the

parties while in principle preserving the validity of the contract as a whole"; thus the legal principle to be drawn from the EU rules and laid down in Perenicova, has to be amended: "Article 6(1) of Directive 93/13 must be interpreted as meaning that the national Court, when finding a contract concluded with a consumer by a trader contains one or more unfair terms, must, on one hand, without waiting for the consumer to make an application in that regard, draw all the consequences which can arise under national law in order that the clause at issue is not binding on the consumer; on the other hand, assess, in principle and on the basis of objective criteria, if the contract under consideration is capable to continue in existence without that clause".

We think that the above entails also the uncertain compatibility with the Directive of internal rules whereby the nullity of the contract follows the unfairness of one or more terms or under which the Court is allowed to declare such nullity on the basis of the sole consideration of the consumer's interest.

A different approach which stresses — in our view — a different time where the regime of protective nullity has finally been outlined according to a coherent pattern, without losing sight of its double function protecting the general interest besides that of the weak contractor.

5. It is also in our opinion that the second recent judgment *Asbeek Brusse* can be interpreted in the light of a more mature approach to the coexistence between protection of the consumer and guarantee for general interests in a view to clarifying the issue concerning the application of (national) default rules to replace the unfair clauses which have been declared void.

The Court is asked, this time, to say "whether Article 6 of the directive can be interpreted as meaning that it allows

a national court, in the case where it has established that a penalty clause is unfair, instead of disapplying that clause, merely to mitigate the amount of the penalty provided for by that clause, as it is authorised to do by the national law and as the consumer has requested.”

Basically analogous is the question submitted to the Court in *Banco Espanol*, i.e. the question whether “Articles 2 of Directive 2009/22 and 6(1) of Directive 93/13 must be interpreted as precluding legislation of a Member State, such as Article 83 of Legislative Decree 1/2007 of Spanish legislation, which allows a national court, when finding an unfair term in a contract concluded between a seller or supplier and a consumer is void, to modify that contract by revising the content of that term “.

In order to achieve the answer, in both the cases negative, the Court needs to call the wording of Art 6 of Directive 93/13 and in particular para.1). second sentence, where it is stated that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. (paragraph 64 of *Banco Espanol* and similarly paragraph 56 *Asbeek Brusse*).

Thus the Court rules: “It follows... from the wording of Article 6(1) that the national courts are required only to exclude the application of an unfair contractual term in order that it does not produce binding effects with regard to the consumer, without being authorized to revise its content. That contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible”

This is enough to alarm the doctrine, particularly the Italian doctrine ^[5], usually inclined to admit the introduction of the legal rules (even if not mandatory) in the

body of the contract where the unfair term has been deleted, replacing the contractual rule contained in the void term, according to the position which has been put forward when applying art.1341 Italian civil code. ^[6].

In the past, as we know, the above conclusion raised some objections, so a certain skepticism about the practicability of such “integration “concerning consumer contracts has opened up again.

As a matter of fact, the European Court is supposed to exclude definitively this practicability and this produces effects out of hand on the fate of the contract which, much often, would be totally void on the basis of such assumptions (the absence of any regulation of substantial profiles within the contractual relationship, after removing the unfair clause, as well as the preclusion to the introduction of default rules).

The strength of the principle could be reduced when referred to the issues submitted to the Court and therefore fitting in, concretely, with decisions. The Article 6 para 1 of the Directive 93/13, as strictly interpreted, according to *Banco Espanol de Credito*, opposes a provision of a Member State, such as Art. 83 of (Spanish) Royal Legislative Decree no 1/2007, which allows a national court, when it has established that a term of a contract concluded between a supplier or seller and a consumer is unfair and should be declared void, to integrate this contract by revising the content of such a term. And according to *Asbeek Brusse*’s ruling, Article 6 para 1: “does not allow the national court, in the case where it has established that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair, merely, as it is authorized by national law, to reduce the amount of the penalty imposed on the consumer by that clause, but requires it to exclude the application of that clause in its entirety with regard to the consumer.”

The above decision has to be considered as a signal of mistrust of the Court toward interventions, somehow, “manipulative” of the contractual content by a national Court and this makes plausible the idea that ECJ intends to block the path to the National Court’s role, more than to the introduction of default rules.

Surely, we can’t deny that the rigid interpretation of Art.6 no.1 of the UCTD and in particular the reference to the principle which lays down that “the contract where unfair terms have been deleted must continue to bind the parties upon the same terms “seems to fit in, once more, with an objective of extreme protection of the consumer, connected with a punitive vision of the assessment of unfairness. Hopefully the abrogation of the contract as a whole occurs every time it contains an unfair term concerning an aspect of the discipline, however necessary for the continuation in existence of the bargain, assuming that the nullity of the whole contract can be convenient for the consumer and represents, however, a cost for the supplier or seller, and in doing so, acting much efficaciously as deterrent. The interest of the consumer and/or the general interest in a contract discipline more profitable for the consumer is supposed to prevail again, as a meaning that an use of nullity (this time total) would affect again the alternative between maintenance and continuation in existence for the purpose of preventing the bad practices of the suppliers and sellers to the detriment of the consumer. Objective on which the Court has been insisting for a long time (Cofidis, judgement, 21 November 2002, Case C-473/00).

The point of view of the consumer, therefore, should prevail when the “resilience” of the contract upon the primal terms after the abrogation of the term is uncertain, in line-with the Perenicova’s ruling. It is true that the idea whereby total nullity — and therefore a last opportunity to cancel the

transaction — fits in better with the interest of the consumer is as arguable as the one whereby the maintenance of the contract ensures the best protection.

We see, once more, and now decisively, all the ambiguity of a consumer- oriented approach to protective nullity carried out in an extreme way such as to lead to the belief that the decision on the whether and how, when not consigned more or less directly to the full availability of the remedy, calls upon the national Courts to mimic the delayed choices for the benefit of the consumer.

But the outcome of such operation appears to be unreasonable as well as unfounded, since it must be admitted that the National Court’s assessment will never be able to coincide with that, completely subjective, of the consumer. The decision inevitably will show an interpretation of the supposed benefit of the party completely drawn from the examination of interests under the contract and/or filtered by external parameters, calling upon a judgment laid down according equity or objectives of the so called contractual justice.

The recognition that it’s not possible to find a reference provision, even underlining and indirect, supporting the realization of the most profitable interest of the consumer, acting as EC-oriented canon and able to determine the contract invalidity, is sufficient to exclude the above mentioned outcome: the aforementioned opinion would lead to assume the consumer’s interest as a decisive factor in a management of the (whole) contract oriented towards the benefit of the protected party.

Thus, we address again the matter regarding the re-definition of the model of nullity under consideration as well as the function of the protective remedy.

6. Accepting that protective nullity responds both to private interest and public interest can’t lead to the idea that this deter-

mines a deviation from the general canon of absolute nullity (to be declared by the Court of its own motion), thus the Court, from time to time, would be called upon to solve a conflict between the two interests, and in doing so, deciding about the fate of the contract according to the supremacy to be granted to the consumer's interest: this would entail the Court being obliged to fail to declare the nullity of the terms even when finding the necessary requirements, if it considers that remedy to be likely to cause a detriment to the consumer or, to the contrary, in assuming the relevant outcome as more profitable for the weaker party, deciding on the total abrogation of a contract which would be capable to continue in existence without the unfair term.

The objective aimed at ensuring certain and fast bargains and therefore the efficiency of competitive market is not to be considered as "other" than that which aims to rebalance the contractual position of the less far sighted and informed party: the latter is, therefore, a necessary precondition of the former. The purpose of protection of one of the parties to a contract, rather, emerges as individual and general interest at the same time, and so carried out by a nullity such as the protective one: the Court is not, therefore, asked to decide, from time to time, which of the two interests, potentially in conflict, has to prevail, but to ensure the actual realization of the interest of the consumer, so far as general (public) interest as well.

The objective of protection of the interest of the consumer, so understood, is, however, intrinsic to the structure of the remedy which doesn't allow the professional to submit a statement requesting that that term be declared invalid, and it is also guaranteed by the substantial requirements for claiming the remedy of nullity, that is, in this case, a *functional* one.^[7]

After intercepting the elements claiming the "protective" intervention, as outlined

in the discipline concerning the control of the unfairness of terms (i.e. the significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer) nullity, when declared by the national Court of its own motion, is simply nullity. Thus, when the Court is asked to draw the consequence of a partial or total annulment, the pathway of argumentations and decisions doesn't show a further and different flexibility aimed at favoring the consumer, than that ensured, first of all, by the criteria to be used when assessing the unbalancing effect of the term under consideration.

Such approach seems to be, therefore, completely in line with an interpretative rule as now laid down in *Asbeek Brusse*, interpreted as meaning that (only) a corrective intervention of the Court has to be excluded but not the application of default rules^[8].

After re-constructing in such a way, the model of "protective nullity", it's necessary to return to the pathway of arguments of the Court in order to assess the meaning given to the reference to intangibility of the contract where an unfair term has been removed. Objections could be raised when considering that it's still a national rule which, both in *Banco Espanol de Credito* and *Asbeek Brusse*, introduced such a National Court's power and that such integration is supposed to compromise the allegation concerning the intangibility of the contract, defended by the European Court (and laid down by the Directive 93/13).

Nevertheless, despite the Court's reasoning seems to linger on the vaguely punitive purpose, it's just this idea which supports a re-definition of the principle where the fate of the contract without unfair terms is intended to be anchored. The Court points out that as far as the objective of protection of the consumer is concerned, any saving of the term imposed by the supplier or seller

would reveal to be counter-productive: “That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non- application with regard to the consumer of those unfair terms in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers...It follows, therefore, that such a power, were it granted to the national court, would not be such as to ensure, by itself, such efficient protection of the consumer as that resulting from non-application of the unfair terms. (paragraph 69 and 71 Banco Espanol and now 58 Asbeek Brusse).

The perspective whereby the admissibility of the substitution of the contractual term with the legal discipline (when necessary) is, in principle, contested by part of Italian doctrine in this framework, seems to be, in some ways, reversed. The principle which would set up the contract amputated of the unfair terms as intangible does not replicate, in the framework of the European consumer legislation, the traditional opposition toward techniques of supplying by reference to legal rules in the territories which have been left to the action of private autonomy^[9] (as consequence of an integration of the contract with the discipline not binding for the parties but consigned to dispositive provisions) but on the contrary, it intends to signal the role of a dismantling intervention toward manifestations of private autonomy, when they appear to be the result of the contractual abuse of power exercised by the supplier or the seller. The difference is not negligible taking into consideration that the long terms objective of protection of the consumer and the defense of “intangibility” (not of the contract but) “of the same terms “of the agreement, impose

not to completely remove the regulation of the profile involved in term to be declared as unfair according to national law (where it is necessary for saving the bargain), but, on the contrary, *to remove just the conventional source of such regulation, which any judicial amendment would keep alive.*

Such an interpretation of the Court’s thinking could be contested in affirming that it seems to entail, however, a reduction of the rigidity of the principle which would lay down the contract continuing in existence (if in the presence of other requirements) only “upon those terms “, once that the unfair terms have been removed; it can’t be denied that the legal integration modifies the terms of the agreement.

In the assumption, however, that the European Court aimed at the outcome entailing, at any cost, the guarantee of the elimination of the unbalancing effects due to the imposed contractual term from the order of interests agreed between consumer and seller or supplier, the “intangibility “so (maybe) over-referred in the same way as in the wording of Art.6 no.1 of the Directive 93/13 will appear, more modestly, as radical removal from the contract of the original agreed terms (revealed as unfair) as “deviation “from the legal regime concerning parties’ rights and obligation imposed to the seller or supplier.

These deviations would, somehow, result to be recovered by means of the judicial intervention, just (and only) in the sense of giving to the contractual relationship a different structure if compared to that which would have derived if this aspect wouldn’t have been impinged by any private agreement (which represents, in its turn, the premise to judicial “review “) and would have been entrusted to legal discipline.

The above interpretation of the orientation of the Court, in our view, is more consistent with discipline and political purpose of the opposition to unfair terms, and gener-

ally, with the approach of all the Consumer Contract European law and with the result, in terms of “governance” of relationships between consumers/suppliers or sellers, intended to be reached. The techniques of correction of the contract by judicial intervention, which we can find in national laws, do not seem — despite the opinion of a part of doctrine — to call upon judgments laid down according equity or objectives of the so called contractual justice; they rather tend to redevelop, within the order of interests entrusted to the contract, a balance, however within the framework of that bargain^[8]; this, when occurring judicial intervention following the abrogation of the unfair terms, would call upon the National Court to reformulate, even if in a more equal form, just that distribution of rights and obligations which the seller or supplier intended to influence by means of the forbidden unfair terms. In the European Court’s opinion, this would, somehow, compromise the total and definitive elimination of the effects of the unfair term, that “protective nullity” intends to ensure.

The call to the compliance with the primal terms of the contract, in the meaning here preferred, denies at the same time the idea — moreover lacking in sound regulatory and systematic basis — that in the pres-

ence of rules of control on the unfairness of terms and, generally, when the focus is on substantial control of the contract (through the so called functional nullity), the power to declare nullity is related to the power to carry out a correction of the contract, aimed at achieving the balance of the position of each party according to external parameters (equity, justice, solidarity, etc.).^[10]

It’s just in this respect that the impact of the European Court’s orientation, so reconstructed, promises to be significant as far the relationships between EU law and national law are concerned.

As, if the contract where unfair terms have been removed, also in a view to a conservative objective in the interest of the consumer, the Directive admits in principle, according to the Courts, integrations being carried out by domestic default rules, but not in case when the legal discipline is, in its turn, medium of judicial integration, the Court’s skepticism seems to focus on the effectiveness of the judicial intervention intended this time as recovery of a desired contractual justice; this represents, therefore, a reason for reflection for those who research for the supposed legitimacy of such judicial intervention in disciplines of European source.

References (transliterated)

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2. For an overview see GAVRILOVIC N., *The Unfair Contract Terms Directive through the Practice of the Court of Justice of the European Union: Interpretation or something more?* ERCL, 2013, 2, P. 163
3. The view is taken by PAGLIANTINI, S. *Nullità di protezione, integrazione dispositiva e massimo effetto utile: variazioni sul tema dell’asimmetria contrattuale*, in *Persona e mercato*, 2/2012, 107–108
4. MAZZAMUTO S., *Brevi note in tema di conservazione o caducazione del contratto in dipendenza della nullità della clausola abusiva*, in *Contratto e impresa*, 1994, P. 1097
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6. For earlier reflections on the topic, see DE NOVA G. Nullità relativa, nullità parziale e clausole vessatorie non specificamente approvare per iscritto, in Riv.dir.civ. 1976, P. 486.
7. SCALISI V., L'invalidità e l'inefficacia, Manuale di diritto privato europeo, vol. II, Proprietà Obbligazioni Contratti, Milano 2007. P. 487.
8. See also, ROTT P. , Case note on Banco Español de credito v.Joaquí Calderón Camino, European Review of Contract Law, 2012, 4, P. 477
9. For this argument, see FERRI G.B., La 'cultura del contratto e la struttura del mercato', in Riv. dir. comm., 1997, P. I
10. ALESSI R., Transazioni commerciali e redistribuzione tra le parti del costo del ritardato pagamento: per una lettura del d.lgs. 231/2002 al riparo dall'ambiguo richiamo all' "equità", Studi in onore di Antonio Palazzo, Diritto Privato, 3 Proprietà e rapporti obbligatori, Torino, 2009, P 1