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European Unfairness and American Unconscionability: A Letter From a European Lawyer to American Friends

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Abstract: The Unfair Contract Terms Directive (UCTD) and the Common Law doctrine of unconscionability in the United States both pursue the same aim: they seek to protect consumers against abuse of power by traders who are in a position to exploit the asymmetry of the contracting process. However, both sets of rules rest on different premises. In particular, they allocate trust differently between courts and markets. This accounts for deep-running differences despite apparent similarities. This contribution analyses these similarities and differences by commenting on the unconscionability doctrine as expressed in the Draft Restatement of consumer contracts from a European point of view.

Résumé: La directive sur les clauses abusives et la Common Law des États-Unis visent toutes deux le même objectif en matière de clauses abusives: empêcher que les professionnels n'abusent du pouvoir que leur confère l'asymétrie de la relation contractuelle. Toutefois, les deux corps de règles procèdent de prémisses différentes. En particulier, les deux systèmes répartissent différemment la confiance qu'ils accordent respectivement au juge et au marché. De là découlent des différences d'approche assez profondes en dépit d'apparentes similarités. La présente contribution analyse ces similarités et ces différences en commentant à partir du droit européen des clauses abusives la doctrine exprimée dans le projet de Restatement du droit américain des contrats de consommation.

Zusammenfassung: Die EG-Klausel-Richtlinie 93/13 ebenso wie das Konzept des US-Common Law von der 'unconscionability' (Sittenwidrigkeit / Unzumutbarkeit) verfolgen beide das gleiche Ziel – namentlich den Schutz von Verbrauchern vor Anbietern, die ihre überlegene Verhandlungsmacht missbräuchlich ausüben. Beide Normregime gehen jedoch von unterschiedlichen Prämissen aus. Insbesondere setzen sie für Ihr Schutzkonzept in unterschiedlichem Maße auf Markt- oder aber auf gerichtliche Kontrolle und Kräfte. Hierin liegt auch der Grund für tiefgrei-

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fende Unterschiede – trotz vordergründiger Vergleichbarkeit. Der vorliegende Beitrag behandelt diese Parallelen ebenso wie die Unterschiede, indem er das Konzept des US-Common Law von der ‘unconscionability’ in der Form, die ihm das Restatement gibt, aus der Perspektive Europäischen Rechtsdenkens analysiert.

I Introduction: A Transatlantic Look at European Law

Commenting on the draft US Restatement of the Law of Consumer Contracts (hereafter ‘the Draft Restatement’) is a wonderful opportunity to look at European Law through an unusual lens. The Draft Restatement, now in its fifth version, has been several years in the making and is up for a final round of discussion. While the text has ripened, some questions are still under discussion. The Reporters kindly shared some of them asking what seemed a mix of easy, hard and unsettling questions.¹ The present contribution is an attempt to answer them as best I can. In this sense, it is a letter to American friends about EU law. More precisely, this contribution focuses on Section 5 of the Draft Restatement, which is devoted to unconscionability.

The unconscionability doctrine is restated as follows:²

A contract term is unconscionable if it is:

- (1) substantively unconscionable, namely fundamentally unfair or unreasonably one-sided, and
- (2) procedurally unconscionable, because it results in unfair surprise or results from the absence of meaningful choice on the part of the consumer.

Two elements are thus normally required for a term to be held unconscionable: substantive and procedural unconscionability. Both elements need not be present in equal measure, as courts follow a sliding scale approach:

1 1) Can a term be held unenforceable on grounds of unfairness/unconscionability if the consumer has a choice to pay more and remove it from the contract? Or if it was salient and known prior to contracting? 2) More generally, what aspects of procedural fairness suffice to render a term that is substantively unfair still enforceable? Is there any doctrine analogous to the American ‘sliding scale’? 3) If rebuttable presumptions of unfairness are used (which, we take it, is the nature of grey list), what does it take to rebut the presumptions? 4) Is there any different treatment between ‘core’ and ‘non-core’ terms under the unfairness jurisprudence? 5) Can price be unconscionable?

2 The full text of Section 5 is annexed to the introduction of this special issue.

a greater degree of one of the elements in this subsection means that a lesser degree of the other element is necessary to establish unconscionability.

This approach logically results in an exception to the requirement that both elements be present: in some cases, one element may be sufficient:

An exceptionally high degree of substantive unconscionability is sufficient to make a standard contract term unconscionable.³

The European equivalent of this doctrine is the ban on unfair contract terms as expressed in the Unfair Contract Terms Directive (hereafter ‘UCTD’).⁴ This directive and the case law relating to it therefore form the basis for these comments on Section 5 of the Draft Restatement.

Section II calls unconscionability and unfairness two sister doctrines and outlines their common purpose. Section III analyses differences in how the two doctrines operate: while pursuing the same goals, European unfairness and US unconscionability rest on different normative underpinnings and are characterised by different *modi operandi*. Section IV considers whether the two doctrines lead to different outcomes by focusing on two test questions: whether and when prices can be unfair/unconscionable and what bearing the salience of a term has on its unfairness/unconscionability. Section V concludes and answers, to the extent possible, the questions raised by the Reviewers.

II Two Sister Doctrines

Both unconscionability and unfairness serve an anti-abuse function.⁵ Their rationales are expressed in similar terms (1) and the illustrative lists largely overlap (2).

³ The Draft Restatement is silent as to whether the complement is true (i.e. whether extreme procedural unconscionability would be sufficient). This hypothesis seems of lesser practical relevance as there would be little incentive to have the term declared unenforceable.

⁴ Directive 93/13/EEC on unfair terms in consumer contracts, *OJ* 1993 L 95/29.

⁵ On the anti-abuse function of the unfair contract terms directive: H.-W. Micklitz, in N. Reich, H.-W. Micklitz, P. Rott and K. Tonner, *European Consumer Law* (2nd ed, Cambridge-Antwerp-Portland: Intersentia, 2014) para 3.19; P. Rott, ‘Unfair Contract Terms’, in C. Twigg-Fleschner, *Research Handbook on EU Consumer Law and Contract Law* (Cheltenham: Edward Elgar, 2016) 287–313, 289. As the Reporters write in the introduction to this special issue, ‘the unconscionability doctrine protects consumers against egregiously unfair terms’.

1 Identical Rationales

The rationale underpinning both doctrines is the same: since it is usually impractical to negotiate consumer contracts, such contracts are made of unilaterally drafted boilerplate which is neither read nor, in the unlikely event a consumer does want to read it, easily understood. This asymmetric contracting environment creates an opportunity for unscrupulous traders to insert terms that are unreasonably favourable to themselves. Unconscionability in the US and unfairness in the EU offer a response to this risk by empowering courts to declare certain terms unenforceable when they would be excessively detrimental to consumers.

These common goals are expressed in similar terms on either side of the Atlantic. In the recitals of the UCTD, the *ratio legis* behind the European ban on unfair terms is expressed in the following terms:

acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.⁶

The Court of Justice further explained the type of asymmetry that justifies the protection afforded by the directive:

the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.⁷

Neither of these statements would seem out of place in the context of the Draft Restatement.⁸ Indeed, in their first comment on Section 5, the Reporters write:

The doctrine of unconscionability has the primary goal of protecting contracting parties against fundamentally unfair and unreasonably one-sided terms. It thus represents one of

⁶ UCTD, recital 9 (referring to the very first European programmes on consumer protection adopted respectively in 1975 and 1981).

⁷ Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial*, EU:C:2000:346, para 25 (settled case law).

⁸ ‘Bargaining power’ in this passage does not refer to supply and demand forces at market level, but to the situational bargaining power at the level of an individual transaction. Thus, in the language of the Court, the bargaining power of consumers would be weak even in a highly competitive market. For example, consumers may – collectively and at an abstract level – enjoy bargaining power in the mobile telecoms market, where competition is fierce. Yet – individually and for all practical purposes – one consumer entering a phone contract is still in a weaker position vis-à-vis the carrier. Indeed, in *Mostaza Claro*, where the same paragraph is repeated, a mobile phone contract was at issue. Case C-168/05 *Mostaza Claro*, EU:C:2006:675, para 25.

the primary safeguards necessary in an environment in which complex terms are adopted without meaningful scrutiny by consumers. Because consumers rarely read or review the non-core, standard contract terms, and because such faintly reviewed terms may nevertheless be adopted [...], the doctrine of unconscionability is a primary tool against the inclusion of intolerable terms in the consumer contract.⁹

In both cases, the doctrine is clearly designed to operate as a limited exception to the fundamental principles of contractual freedom and enforceability of contracts. As the Reporters also write:

ex post scrutiny by courts is only intended to uproot terms so unfair that they would be unlikely to survive in an environment of meaningful free choice, or that stealthily peel off the value that consumers bargained for.¹⁰

Under UCTD, the 'imbalance in the parties' rights and obligations arising under the contract' has to be 'significant', which seems to express a lower threshold of unfairness than do some phrases US courts have used to characterise the required severity of substantive unconscionability, such as 'shock the conscience' or 'oppressive'.¹¹ But US courts also use somewhat milder expressions, such as 'unreasonably harsh' or 'fundamentally unfair',¹² which could well coincide with the European standard of 'significant imbalance'. Terminology apart, the emphasis in the case law of the Court of Justice is less on how egregious the contractual imbalance ought to be in order to trigger consumer protection than on the active role of national courts to re-establish contractual justice – and even eliminate any imbalance. In this vein, the Court has ruled that article 3 of UCTD

aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.¹³

Within the framework of UCTD, the main limiting principle to the reach of unenforceability on grounds of unfairness is not expressed in terms of intensity but of scope.¹⁴ The core terms of a contract are immune from scrutiny unless they are obscure:

⁹ Comment 1, 74.

¹⁰ *Ibid.*

¹¹ Comment 3 (substantive unconscionability), 74.

¹² *Ibid.*

¹³ Case C-168/05 *Mostaza Claro*, EU:C:2006:675, para 36, and Case C-40/08 *Asturcom Telecomunicaciones*, EU:C:2009:615, para 30.

¹⁴ This restriction was introduced at a late stage in the adoption process of the directive after the draft directive – which envisaged fairness scrutiny for all contract terms (even individually negotiated ones). It was forcefully criticised as an unwarranted interference with free market: M. Schilleg, 'Directive 93/13 and the "price term exemption": a comparative analysis in the light of the "mar-

Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.¹⁵

This limitation to ‘non-core’ terms will be further examined below (IV.1). For present purposes, suffice it to say that both doctrines share a common purpose: giving courts a tool to protect consumers contractual abuses of power by traders while causing only limited disruption to the fundamental principles of contract law. The fact that different tools are used to delineate the contours of the exception to the *pacta sunt servanda* principle points to differences which will be further explored below, but does not call this fundamental identity of purpose into question.

2 Similar Illustrations

The non-exhaustive lists of examples offered in both texts to illustrate the notion of unconscionable or unfair terms are broadly similar, which confirms that both doctrines essentially aim at the same targets. In the Draft Restatement, Section 5 (d) lists three categories of unfair terms: those that decrease the trader’s liability, the those that increase the consumer’s liability and those that restrict the consumer’s ability to seek redress. While the Annex to UCTD contains a longer list of 17 categories of terms (the ‘grey list’), both enumerations largely overlap. As is illustrated in more detail in the table at the end of this article, this is mainly due to the fact that the grey list in the directive is more detailed than subsection (d).

The different degrees of precision in both texts may be explained by different contexts. In the Draft Restatement, an explicit choice was made to ‘encourage the continued development of the substantive-unconscionability doctrine in the com-

ket for lemons rationale” (2011) *International & Comparative Law Quarterly* 933; H.-E. Brandner and P. Ulmer, ‘The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission’ (1991) 28 *Common Market Law Review* 647–662. See Scottish Law Commission Issue Paper, ‘Unfair terms in consumer contracts: a new approach?’ (25 July 2012), para 4.7 *et seq.*, available at: http://www.lawcom.gov.uk/app/uploads/2015/06/unfair_terms_in_consumer_contracts_issues.pdf [<https://perma.cc/8SL6-KPQ4>]. On the importance of scope in modulating judicial control over unfair terms, see also H. Schulte-Nölke, No Market for ‘Lemons’: On the Reasons for a Judicial Unfairness Test for B2B Contracts (2015) *European Review of Private Law* 2 195, 201.

¹⁵ UCTD, art 4(2).

mon-law method, case by case' rather than adopt a grey- or blacklist.¹⁶ This seems eminently in line with the very nature of a restatement, whose mission is precisely to restate the common law, not to legislate. By contrast, UCTD is a piece of legislation whose *raison d'être* is to harmonise (widely) diverging national laws.¹⁷ In such a context, broad principles without further guidance through fairly precise examples run the risk of being interpreted according to (widely diverging) national traditions.

This said, it should be noted that the European grey list is not only more precise than Section 5 d); it is also broader in scope, in two different senses. First, it includes items dealt with in the Draft Restatement under Section 3 subsection (c) (Modification of Standard Contract Terms) and Section 4 (Discretionary Obligations).¹⁸ This difference is probably one of structure rather than one of substance: unlike the Draft Restatement, EU consumer law does not have specific provisions on Modification of Standard Contract Terms or Discretionary Obligations. The second difference in scope is one of substance: the grey list contains terms which would not be unfair under section 5 of the Draft Restatement.¹⁹ In other words, EU protection extends wider than is justified under the approach followed in the Draft Restatement. Such dissimilarities in the coverage of protection are not accidental, they reflect deeper differences in how the two doctrines operate and in their normative underpinnings, to which the next section turns.

III Two Different Modi Operandi

The doctrine of unconscionability is expressed as a structured rule consisting of a two-pronged test and an exception. In comparison, the EU prohibition of unfair terms is less structured. There is, in other words, a contrast between the sliding scale approach in the US and a more holistic assessment in the EU (1). In addition, procedural unconscionability and good faith, despite apparent similarities, are not functionally equivalent (2).

¹⁶ Reporters' notes, 87.

¹⁷ On initial wide divergences of approaches to unfair terms in national laws, see G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (Abingdon: Routledge, 2017) hereafter '*Rethinking EU Consumer Law*', 133 *et seq.*

¹⁸ For a more precise comparison, see table in the Annex. None of the categories of terms listed in the Annex of the UCTD corresponds to § 6 (Deception) or § 8 (Contract Terms and the Parol Evidence Rule). EU Law deals with situations considered under both these sections as unfair commercial practices.

¹⁹ On this point, I defer to the Reporters.

1 The Sliding Scale Approach v Holistic Approach

The apparent difference between the European Unfairness test and the Unconscionability doctrine is that rules do not have the same structure. Article 3 UCTD provides that

A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The central requirement of a 'significant imbalance' is clearly similar to substantive unconscionability, but it is less obvious if 'good faith' captures the same factual elements as procedural unconscionability (see III 2). Rather than introducing a distinction between a procedural and a substantive element, Article 3 *prima facie* seems refer to both a subjective element, relating to intent (good faith) and an objective element (imbalance).

Importantly, it is not clear that this provision points to two distinct elements (a violation of the principle of good faith and a significant imbalance) that need to be shown separately and cumulatively in all – or even most – circumstances. On the contrary, the drafting lends itself to a finding that a grossly imbalanced contract is, because of this very imbalance, contrary to good faith. Elsewhere in EU consumer law, a two-pronged test is clearly expressed as such,²⁰ which is an indication that if the EU legislator had intended to lay two cumulative requirements for unfairness, it would have done so clearly. It is also noteworthy that Article 4 UCTD gives one list of factors to take into consideration when assessing the unfairness of a term – not two (there could conceivably have been one for imbalance and another one for the good faith requirement).²¹ In other words, the drafting on these provisions suggests a holistic evaluation of unfairness, rather on than a separate showing of bad faith and substantive unfairness, let alone a strict relationship between the two elements.

The Court of Justice, far from articulating a structured test, has repeatedly ruled that

20 See art 5 of Directive 2005/29/EC on Unfair Commercial Practices ('UCPD'), OJ 2005 L 149/22.

21 On the functional necessity of 'clear unclarity' in this test, see H.-W. Micklitz and N. Reich, 'The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 Common Market Law Review, Issue 3, 771, 785 and 808. It was only in Case C-415/11 Aziz, EU: C:2013:164 that the Court was called upon to clarify separately the notions of imbalance and good faith.

in referring to concepts of good faith and significant imbalance between the rights and obligations of the parties, Article 3 of the Directive merely defines *in a general way* the factors that render unfair a contractual term that has not been individually negotiated.²²

In other cases, the Court makes clear that the criteria laid down in Article 3(1) – good faith and significant imbalance – and the relevant facts listed in Article 4 (1) – the nature of the goods or services and all the circumstances attending the conclusion of the contract – should be taken ‘*as a whole*’ when assessing whether the contract terms are unfair.²³ It is thus quite clear that the Court is not intent on structuring the test for unfairness any more than it is in the provisions of the directive.²⁴

In sum, the assessment of unfairness under UCTD is less structured than that of unconscionability under Section 5. ‘Significant imbalance’ resembles substantive unconscionability, but the sliding scale approach is unfamiliar to a European lawyer in the context of unfair terms²⁵ and it is not clear that good faith is functionally equivalent to procedural unconscionability.

2 Procedural Unconscionability v Good Faith

At first glance, good faith and procedural unconscionability have something in common thematically: they both relate to the contractual process and, at the same time, do not seem to be equivalent functionally, since, as just explained, procedural unconscionability is a self-standing requirement while good faith is not. This section takes a closer look at similarities and differences between the two and concludes that the requirements of procedural unconscionability and good faith are very different. This is not mainly due to structural differences between the US and the EU test. Rather, the deeper difference lies in the normative underpinnings of both requirements. These claims will be explained in three points. The first is a preliminary point relating to the respective bearing of the two criteria on

²² Case C-237/02 *Freiburger Kommunalbauten*, EU:C:2004:209, para 19. See also Case C-243/08 *Pannon GSM*, EU:C:2009:350, para 37; Case C-137/08 *VB Pénzügyi Lízing Zrt*, EU:C:2010:659, para 42; Case C-415/11 *Aziz*, EU:C:2013:164, para 67, emphasis added. The phrase ‘in a general way’ is also found in recital 15 of UCTD.

²³ Case C-478/99 *Commission v Sweden*, EU:C:2002:281, para 11; Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid*, EU:C:2010:309, para 33; Case C-137/08 *VB Pénzügyi Lízing Zrt*, EU:C:2010:659, para 40, emphasis added.

²⁴ On this point, see also below, text at footnotes 32 and 34.

²⁵ I could not find any reference in the Court case law or in textbooks to idea that a bit more bad faith could compensate for a bit less imbalance.

the scope of protection. In this regard, there is no real need for a functional equivalent to procedural unconscionability under EU law (a). Turning to the substance of both criteria, their proximity lies in their object and function: good faith and procedural unconscionability relate to the contracting process and aim to tease apart deceit from square dealing (b). Yet, the normative underpinnings of both notions are quite different (c).

a) No Need for Procedural Unconscionability under EU Law

EU law of unfair terms, because it does not operate as a two-pronged test, does not require a separate showing of a defect in the contracting process. In other words, the US unconscionability test contains an additional requirement that is not part of the EU unfairness test. This would normally imply that the US test is harder to satisfy. While this may well be the case (as mentioned in relation to the illustrations contained in the grey list), it is not clear that any difference in the scope of protection is attributable to the operation of the procedural unconscionability requirement. This is because the framework of the UCTD partly obviates the need for a separate showing of procedural unconscionability as the directive only applies to contract terms which have not been individually negotiated.²⁶ Since, under the US common law, standard terms are, by nature, considered to meet the minimum required quantum of procedural unconscionability,²⁷ it follows that the directive only applies where the minimum quantum of procedural unconscionability required under the Draft Restatement is in any event met. Therefore, the presence of a self-standing procedural unconscionability requirement in the Draft Restatement and its absence in UCTD probably do not have much practical bearing. The real differences lie elsewhere. To understand where, it is necessary to first acknowledge an apparent similarity: both criteria relate to the contracting process.

b) A Common Theme: the Contracting Process

There is not a lot of guidance on the good faith requirement in UCTD. This is due to the fact that, for almost 20 years after the adoption of the directive, the Court of

²⁶ UCTD, art 3(1).

²⁷ Reporter's Notes, 94.

justice did not receive a single question on the interpretation of the unfairness test, let alone specifically on the good faith element in it.²⁸

In the directive itself, recital 16 contains the only elaboration on the good faith requirement.

Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be *supplemented* by a means of making an overall evaluation of the different interests involved; whereas *this constitutes the requirement of good faith*; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account.²⁹

While not everything in this paragraph is perfectly clear, starting with the notion that good faith ‘*supplements*’ the ‘general criteria’ for assessing unfairness – when, in article 3 of the directive, it seems to *be* one of these criteria –, it is apparent that good faith is about how the imbalance of power between the contracting parties was handled during the contracting process and how the consumer was led to accept the contract terms and whether her legitimate interests were considered.

Good faith, like procedural unconscionability, is about the contracting process: ‘the strength of the bargaining positions of the parties’ points to the possibility of pressure or coercion, as does the reference to an ‘inducement’. On the contrary, the circumstance that the goods or services were sold or supplied ‘to the special order of the consumer’ would seem to indicate that the consumer should not have been surprised by terms when she had an opportunity to inspect them before placing her order. Among ‘all the circumstances attending the conclusion of the contract’, which must be taken into account to assess the unfairness of a term in general³⁰ – and possibly good faith in particular – are unfair commercial practices.³¹ A finding that a practice leading to the conclusion of a contract was

28 *Rethinking EU Consumer Law*, n 18 above, 299. On the active reluctance of UK Courts to refer questions on this notion, see H.-W. Micklitz and N. Reich, ‘The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)’ (2014) 51 Common Market Law Review, Issue 3, 771, 785.

29 UCTD, Recital 16, emphasis added.

30 UCTD, art 4(1).

31 Case C-453/10 *Pereničova*, EU:C:2012:144, para 44 and 47 (misrepresentation of the true interest rate in a consumer credit contract).

unfair is not in itself decisive for the assessment of unfairness,³² but it would make sense to consider it as at least a very strong indication of a behaviour ‘contrary to the requirement of good faith’.³³

The only other piece of guidance on good faith comes from the first case in which the Court was called upon to interpret the good faith requirement. In *Aziz*, the Court articulated what commentators have called the ‘possible agreement test’.³⁴ According to them, the test ‘overcomes the discussions on whether, in addition to substantive unfairness, the Directive requires procedural unfairness as well to trigger the sanctions of the Directive’. The test prescribes using a counterfactual:

in order to assess whether the imbalance arises ‘contrary to the requirement of good faith’, it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations³⁵

National courts are therefore asked to imagine the negotiation of terms which, in fact, are standard terms (otherwise the directive would not apply). More precisely, they have to imagine how the trader would imagine such a negotiation. The question they have to ask is whether the trader could imagine that, if he had not been playing any tricks on the consumer, she would have agreed to the terms. The test thus rests on speculation (of the court) about speculation (of a trader) about an imaginary negotiation. As has been noted, ‘the consumer is here a very hypothetical figure’.³⁶ The convoluted nature of the *Aziz* test may be attributable to a basic characteristic of the good faith requirement: good faith can only mean good faith *of the trader*. Therefore, the focus has to be on his subjective intent or state of mind. Nonetheless, the test seems fraught with substantial evidentiary difficulties for any court trying to apply it with any rigour. If this test does overcome any discussion, it is probably through evaporation.

Leaving aside the levels of speculation in this test, how does it substantively compare to the test for procedural unconscionability articulated in the Draft Restatement? The Reporters write that the question courts should ask is

whether an ordinary consumer would be aware of the term or would expect its inclusion, and thus would take it into account when making contracting decisions.³⁷

³² *Ibid.*

³³ Again, the fact that the Court does not clarify this – because it considers the assessment of unfairness ‘as a whole’ – indicates its unwillingness to structure this assessment.

³⁴ *Rethinking EU Consumer Law*, n 18 above, 149 and 152.

³⁵ Case C-415/11 *Aziz*, EU:C:2013:164, para 55.

³⁶ *Rethinking EU Consumer Law*, n 18 above, 152.

³⁷ Comments, 81.

There is a basic similarity between the two tests. Both try to capture the elusive reality of a meaningful agreement to terms that have not, in fact, been negotiated or read, but they resort to slightly different proxies. The *Aziz* test asks how the consumer would presumably react to the term *assuming she was made aware of it* and the question is whether she would agree to it or not. Under the Draft Restatement's test, courts are not invited to consider a hypothetical situation in which the consumer would have been made aware of the term. Rather, they should consider whether the ordinary consumer would normally either be aware that such a term is in the contract (for example because it has been highlighted in promotional material) or expect it to be there (based on a general perception of market realities). If the term is likely to be on the radar of an ordinary consumer, the question is whether such a consumer would take it into account when making contracting decisions (either way: by agreeing to it or by declining to enter the contract).

Thus, where the *Aziz* test runs on a curious counterfactual (the aware consumer), the test in Section 5 of the restatement relates to an ordinarily inattentive consumer. With these different benchmarks in mind, one question is common to both tests: 'how would the consumer have reacted to the term?', but the courts are expected to answer it on a different axis: perception of fairness in Europe, perception of relevance in the US. These differences stem from divergent normative underpinnings.

c) Different Normative Underpinnings

Since the EU test is not as structured as the two-pronged US test, and since the scope of application of the directive obviates the need for a minimum requirement of procedural unconscionability, it is not immediately clear to a European commentator why the procedural unconscionability requirement is needed. The explanation is immediately forthcoming in the Comments on Section 5 of the Draft Restatement: the unconscionability doctrine is premised on the notion that consumers trade-off fairness of a contract against price:

While the principal element of the unconscionability doctrine is the substantive prong that identifies such intolerable terms, the doctrine recognizes that sometimes consumers *may choose to accept harsh terms in exchange for another benefit* (such as low price). The doctrine asks whether consumers in fact meaningfully chose to accept a harsh term by also requiring (except in rare circumstances) a showing of some quantum of procedural unconscionability.³⁸

38 Comment 1, 76, emphasis added.

The requirement of an element of procedural unconscionability thus expresses the value accorded to free choice under the Common Law. This value choice was vividly expressed by Easterbrook, J.:

People are free to opt for bargain-basement adjudication – or, for that matter, bargain-basement tax-preparation services; air carriers that pack passengers like sardines but charge less; and black-and-white television. In competition, prices adjust and both sides gain. ‘Nothing but the best’ may be the motto of a particular consumer but is not something the legal system foists on all consumers.³⁹

The Common law respects that consumers have different preferences regarding price and other features of a deal and this respect extends to letting consumers waive their right to legal protection, provided it is established that they benefited from a good price in return, and were given a meaningful choice.

One would be hard pressed to find language similar to that of Judge Easterbrook in the case law of the Court of Justice interpreting the UCTD. There are several reasons why this could be the case. It could simply be a consequence of the less structured EU test: since there is no clear obligation to show in all cases something akin to procedural unconscionability, there is evidently also no reason to elaborate on a rationale for such a non-requirement. Relatedly, since the directive on unfair contract terms is one of minimum harmonisation, it may be that the degree of protection that the law affords to a right to choose a low price at the expense of unfavourable terms is left to national law.

Is there also a more principled reason why the above *dictum* of Judge Easterbrook would seem out of place in an ECJ judgment? Is the normative commitment to free choice less strong in EU law than it is in the US common law? This is not obvious, but cannot be ruled out.⁴⁰

Consumer choice does matter in EU law. The whole internal market project aims at creating a level playing field for businesses *and* widening the choice avail-

39 *Carbajal v H & R Block Tax Servs, Inc*, 372 F 3d 903, 906 (7th Cir 2004) (Easterbrook, J.) cited in the Reporters’ Notes, 87. In this passage, Judge Easterbrook writes about substantive (not procedural) unconscionability. In a sense, therefore, I am taking this quote out of context. I am only using it as a very clear expression of a value choice. I (not Judge Easterbrook) am saying that this value choice is structurally expressed in the requirement for procedural unconscionability.

40 To some extent, this question goes to the issue frames by Whitman in terms of an opposition between consumerism and ‘producerism’ and, within consumerism, to the tension between an approached centered on a right to buy products cheaply and a rights-based approach. J.Q. Whitman, ‘Consumerism Versus Producerism: A Study in Comparative Law’ (2007–2008) 117 *Yale Law Journal* 340. For a discussion, see H.-W. Micklitz, F. Esposito and A.-L. Sibony, ‘The Bright and Adventurous Future of Consumer Law Research’, in H.-W. Micklitz, F. Esposito and A.-L. Sibony (eds), *Research Methods in Consumer Law: A Handbook* (Edward Elgar: Cheltenham, 2018).

able to European consumers. EU Consumer Law, which forms part of this harmonisation enterprise, certainly seeks to protect – and even increase – consumers' choice.⁴¹ Indeed, this pro-market orientation is criticised by eminent consumer law scholars.⁴² In EU policy parlance, the protection of choice is a component of the broader notion of 'economic interests of consumers' used in the Treaty and found in numerous policy documents.⁴³ Undoubtedly, the economic interests of consumers include the opportunity to shop for bargain-priced goods and services. In addition, it is documented that the drafters of UCTD, by adding Article 4(2) – which was not part of the Commission's initial proposal – were intent on expressing a value choice in favour of the fundamental principles of a liberal economic order. As Advocate General Trstenjak has explained,

in the unanimous view of legal theorists, the intention of the legislature in including Article 4(2) is to restrict judicial review as to whether the terms of consumer contracts are unfair in the interest of the parties' freedom to arrange their own affairs and in the interest of a functioning market based on competition in respect of price and efficiency.⁴⁴

While UCTD expresses a commitment to protecting consumer choice, it does not specifically deal with the trade-off between terms and price, unlike the common law restated in Section 5. EU case law on unfair terms is silent on whether a bargain-basement defence is available under UCTD. Given the number of referrals from national courts on the interpretation of UCTD,⁴⁵ this suggests that the question is not an important one at national level.

However, for the sake of the argument, let us imagine a choice-loving EU Member State, Choceland, whose law on unfair terms is inspired from Section 5

⁴¹ This surfaces in UCTD Recital 7.

⁴² The authors of *Rethinking EU Consumer Law*, n 18 above, 2 write 'the starting point for the analysis in this book is our belief that the European consumer law and policy in recent times have risked over-emphasising the internal market goal'. See also, eg, H.-W. Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic' *Journal of Consumer Policy*: 35 (2012), 283–296; S. Weatherill, 'Empowerment is not the only Fruit', in D. Leczykiewicz and S. Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing: Oxford, 2016).

⁴³ Art 169 TFEU (describing the goals of EU consumer protection). Regarding policy documents, see for a recent example the Impact Assessment for the recent 'Modernisation Directive', SWD(2018) 96 final.

⁴⁴ Opinion of Advocate General Trstenjak in Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid*, EU:C:2009:682, para 62. See also AG Wahl's Opinion in Case C-26/13 *Kásler*, EU:C:2014:85, para 33 *et seq.*

⁴⁵ At the time of writing, 118 cases have been referred to the Court on UCTD, 65 about art 3 specifically and 54 about art 4 specifically (the latter two categories overlap).

of the Draft Restatement and where judge Easterbrook's *dictum* cited above would be in line with how local judges view the importance of consumer choice. Let us further imagine that a consumer in Choiceland purchased a new high-end phone and was offered a choice between two options: Option 1: buying the phone for 1000€ and, in the event of any litigation arising out of the contract, being able to sue the seller in Choiceland or, Option 2: buying the same phone at the discount price of 800€ but, in the event of any litigation arising out of the contract, she would have to litigate in California.⁴⁶ Under EU law, such a choice-of-forum clause would be unfair.⁴⁷ The phone shows signs of malfunctioning and the consumer cannot obtain a replacement. Despite having chosen Option 2, she sues the seller before a lower court of Choiceland. The trader raises the objection that the court does not have jurisdiction and the sitting judge has to decide whether the choice-of-forum clause is enforceable against the consumer or if the seller can avail himself of the bargain-basement defence. Citing Easterbrook J. as persuasive authority, the lower court upholds the claim of the trader and denies jurisdiction. The Court of Appeals seized of the matter, understandably, is in doubt and decides to refer a question to the Court of Justice. The referring court asks whether the national law, which denies protection in this case because the consumer has been given a clear choice between bad terms and a good price, is compliant with the UCTD. As mentioned, the directive is silent on this question and it would seem entirely suitable for a national court to seek the interpretive guidance of the Court on this matter. In its answer, the Court would, in all probability, consider three elements.

First, Article 4(1) of the directive directs national courts to consider 'all the circumstances attending the conclusion of the contract'. This certainly includes the choice menu offered to consumers. It should follow that national courts are not precluded from giving weight to the circumstance that consumers were given an option between an offer combining good terms and high price and another made up of bad terms and good price.

The second element the Court would certainly have regard to is the second paragraph of article 4, which provides that

Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract *nor to the adequacy of the price and remuneration*, on the one

⁴⁶ I thank Fabrizio Esposito for suggesting this example.

⁴⁷ Joined cases C-240/98 to C-244/98 *Océano Grupo Editorial*, EU:C:2000:346, para 24 (recognising that the national court has the last word, but strongly suggesting that such a choice-of-court term is unfair, referring inter alia to the fact that the term belongs to the category listed under letter q in the Annex (grey list).

hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.⁴⁸

According to this provision, what national courts may not scrutinise for unfairness is the adequacy of the price *for the goods or services*. This provision says nothing about the power of courts to review the adequacy of price *for the contract terms*. Article 4(2) being an exception (all B2C and not-individually negotiated contract terms are reviewable, except those described in this paragraph), it follows that it should be interpreted narrowly.⁴⁹ Therefore, a national court reviewing contract clauses in the light of the choice given to consumers between good terms and good price may find that a contract term which could, in most circumstances, be considered unfair, is nonetheless binding if it was ‘in plain intelligible language’ and consumers were given a choice between the bad terms & low-cost option and a better terms & higher price option. This would be in line with the case law which repeatedly stresses that national courts enjoy a degree of discretion in appraising the unfairness of contract terms. In other words, the consideration of Article 4(2) does not lead to reversing the finding under Article 4(1) that the courts of Choiceland can indeed take into account the clear choice offered to the consumer to waive her right to local courts in exchange for a 200€ discount.

Third, the Court would turn to its procedural case law. In this regard, two lines of cases seem relevant. One offers some support to a bargain-basement defence as a matter of EU law and the other much less. The first procedural element relates to the *audi alteram partem* principle.⁵⁰ A national court, having found on its own motion that a term was unfair, was under a duty to request parties to comment on this finding. The right to a fair trial implies that parties had a right to be appraised of this finding which could change the issue of the proceedings. The Court confirmed that such a procedural duty of courts under national law was not only compliant with EU law, but EU law itself also required that the rights of defence be protected and that the *audi alteram partem* principle was a component of these rights.⁵¹ In this context of a finding of unfairness raised *ex officio*, the trader could very well opt for a bargain-basement defence. If a national court were under a duty to consider such a defence inadmissible (say, under the law of Justland, a Member State with a different orientation from Choiceland), that would

48 Emphasis added.

49 Case C-26/13 *Kásler*, EU:C:2014:282, para 49–54. See also AG Wahl’s Opinion in this case, EU:C:2014:85, para 68 stressing that only the adequacy of price is covered by the exception, not the terms that determine how the price is calculated or how the calculation may be modified.

50 Case C-472/11, *Banif Plus Bank*, EU:C:2013:88.

51 *Ibid*, para 29.

seem to stand in the way of the genuine exercise of rights of defence, which are protected both under national and under EU law (although, this may not be conclusive if other defences were available). The judgment in *Banif Plus* is far from being authority for the recognition of a bargain-basement defence *under EU Law*, but it does suggest that it would at least be coherent with the procedural case law of the Court that some scope for this defence exists, as a matter of EU law and not only national law.

The second procedural element to consider is the oft-repeated holding that the protection against unfair terms is mandatory. The imperative character of UCTD has been asserted in connection with the duty of courts to examine of their own motion the unfairness of contract terms falling within the scope of the directive⁵² and in relation to their duty to declare those terms unenforceable.⁵³ As such, these holdings are not in contradiction with a bargain-based defence as the duties of national courts arise only in connection with genuinely unfair clauses and a clause would not be unfair if the defence is upheld. Yet, the insistence on the duty of courts to be pro-active is not, in spirit, very amicable to a bargain-based defence.

For example, the Court held that ‘such an imbalance [as envisaged by the directive] between the consumer and the seller or supplier may only be corrected by *positive action unconnected with the actual parties to the contract*’⁵⁴ and that the aim was to ‘*re-establish equality*’ between the parties.⁵⁵ These holdings cannot be taken as evidence that EU law is more paternalistic than US common law when it comes to price/terms trade-offs because such trade-offs were not at issue in any of the cases. But they may be illustrative of the normative underpinnings of UCTD in general. The intuition expressed here is that EU law and US law on unfair terms display a different topography of trust. US law seems to trust markets more and EU law seems to trust courts more.

Indirectly, this line of case law offers insights into the Court’s thinking on whether the protection available under the directive can be waived in that the rationale for the robust procedural duties of national courts is ‘the nature and importance of the *public interest* underlying the protection which the Directive confers on consumers’.⁵⁶ This view stands in contrast to the emphasis on consumer choice (clearly a private interest) and seems in line with the spirit of recital 16

⁵² Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial*, EU:C:2000:346, para 26.

⁵³ Case C-168/05 *Mostaza Claro*, EU:C:2006:675, para 36; Case C-137/08 *VB Pénzügyi Lízing*, EU:C:2010:659, para 47, and Case C-618/10 *Banco Español de Crédito*, EU:C:2012:349, para 40.

⁵⁴ Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial*, EU:C:2000:346, para. 27, emphasis added.

⁵⁵ Case C-618/10 *Banco Español de Crédito*, EU:C:2012:349, para. 40 and case-law cited.

⁵⁶ Case C-168/05 *Mostaza Claro*, EU:C:2006:675, para 38, emphasis added.

of the directive cited above, which suggests that interests other than the individual interest of the consumer deserve consideration in the context of unfair terms. In this vein, Howells and co-authors, while they too recognise that there is to date no authority to support their view, opine that

The function of the Directive could [...] be seen as an obligatory insurance against unfair terms, administered by the business.⁵⁷

The referral from the Choiceland court of appeals would indeed be a test case for their reading of the directive as adopting an ‘insurance-like, welfarist approach to consumer protection’. My prediction is that, in a case such as this one, a mandatory-insurance-like approach would be very likely to prevail, if only because in addition to being unfair under UCTD, the choice-of-forum clause would also run against the Brussels I Regulation, which cannot be contracted around.⁵⁸ The consequence would be that the consumer can in any event sue in Choiceland, and therefore would get an advantageous bargain to the detriment of the trader. This should dissuade traders from offering such choices and thereby deprive the consumer of an opportunity for a bargain price. More generally, the Court would probably be quite prepared to deny the consumer and the trader the benefit of trading off rights and price in the name of public policy.

A doctrine that would seem to accord with all the above arguments and considerations could take the form of a bifurcated approach to the bargain-basement defence: if the term is not only unfair but is also against EU public policy (whose scope the Court would need to determine),⁵⁹ no bargain-basement defence would be available (as a matter of EU law). If the term is unfair but does not violate EU public policy, there is scope (as a matter of EU law) for a bargain-basement defence and the exact scope of the defence is to be determined by national law.

Clearly, this doctrine is in need of testing. In this regard, the illustration provided by the Reporters for procedural unconscionability would be a case in point:

A fitness centre advertises two membership plans: Plan 1 charges a lower membership fee but requires a two-year commitment and imposes an early-termination fee. Plan 2, titled ‘No

⁵⁷ *Rethinking EU Consumer Law*, n 18 above, 131, 153 and 164.

⁵⁸ Under art 18 of the Brussels I Regulation, the consumer has a right to sue the trader before the courts of the Member State where she is domiciled when the trader directs his activities to that state (Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial, *OJ* 2001 L 12, 1).

⁵⁹ For an example of such determination, see Case C-191/15, *Verein für Konsumenteninformation v Amazon*, EU:C:2016:612, para 66 (determining that traders do enjoy some choice – within the boundaries of the Rome I Regulation – when it comes to choice-of-law clauses in consumer contracts).

Contract', charges a higher membership fee, but allows consumers to terminate with no penalty anytime. The zero-termination-fee feature is made explicit in the marketing of the 'No Contract' plan. By virtue of the explicit advertising, the possibility, and cost, of early termination become known to consumers. Consumers can weigh the value of the choice. Accordingly, the termination penalty in Plan 1 is not procedurally unconscionable.⁶⁰

The term could fall under item (d) in the grey list,⁶¹ but this alone would not be conclusive, except in Member States which have transposed it as a blacklist. In this case, the terms meet the transparency requirement under Article 5 UCTD and, whether or not a bargain-basement defence is available, it would seem that a good faith defence would be functionally equivalent to it, so that the Court would probably be able to eschew a question about the scope of the bargain-basement defence (this might in practice render the testing of the above doctrine difficult). An Advocate General, if not the Court, might answer the question. Hopefully, he or she would urge the Court not to read into the directive a 'mandatory insurance' against salient termination fees.

Another context in which the status of a bargain-basement defence could be discussed would be a revision of the UCTD. If the Commission, which is generally keen to promote a pro-market perspective, would, in a legislative proposal, define a category of cases for which, as a matter of EU law, a bargain-basement defence should be available, this would doubtless trigger a heated debate. It is not difficult to imagine various interest groups taking stances in favour or against such a radical innovation (businesses in favour, consumer associations against and Member States also against any further harmonisation of contract law). While such a proposal would be unlikely to succeed politically, the interesting aspect would be the cost-benefit analysis that would have to be conducted as part of the impact assessment. In an ex-ante perspective, denying consumers the choice to enter bargain-basement contracts certainly harms them (this would be the rationale for introducing the defence explicitly in legislation). However, in an ex-post perspective, a difficult empirical question would arise: whether or not consumers are better off accessing bargain-basement contracts depends on whether their probability assessment at the time of choosing the bargain is correct. If consumers are overly optimistic and harsh term are more likely to be enforced than they think

⁶⁰ Comments, 82.

⁶¹ It depends on what the contract provides in case of termination by the trader: idem (d) reads: 'permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract' (I am assuming that, in the example, the consumer pays upfront the amount of the penalty clause and it reimbursed at the end of the two year period).

and/or if those terms imply greater losses than what consumers had imagined, it is very possible that consumers would be better off with mandatory insurance.

It seems likely that the fate of a bargain-basement defence under EU law will not be settled any time soon, whether in legislation or case law. A legislative solution being even more unlikely, it would take the Court to resolve the tension between trust-in-markets and trust-in-courts. How it would go about this remains to be seen. What the foregoing discussion at least shows is that, while the value of protecting consumer choice did play an important role in giving UCTD its final shape (in particular Article 4(2)), it is not the *raison d'être* of the reference to good faith. In this sense, good faith appears to be a very different requirement from procedural unconscionability. This said, rules with different normative underpinnings may nevertheless lead to the same outcomes. To this, the next section turns.

IV Comparing Outcomes

This section focuses on two inter-related questions asked by the Reporters⁶²: under EU law, can prices be unfair? (1)⁶³ and does salience matter (2)?⁶⁴

1 Can Prices be unfair?

In principle, prices are exempt from a finding of unfairness under UCTD.⁶⁵ Article 4 paragraph 2, already cited, provides that core terms (subject-matter of the contract and price) cannot be struck down unless they are obscure.

Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or good supplied in exchange, on the other, in so far as these terms are in plain intelligible language.

⁶² See n 2 above.

⁶³ See also the contribution of Fernando Gómez in this volume.

⁶⁴ I have rephrased this question thinking this was a meaningful way to answer question 1 and part of question 2 (see n 2 above).

⁶⁵ But Member States may give their court unlimited jurisdiction to review core terms (minimum harmonisation). See Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid*, EU:C:2010:309, para 44. For a critical elaboration on this issue, see Y. Atamer, *Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer – Insights from Behavioural Law and Economics* (2017) 80(4) *Modern Law Review* 624 (arguing for regulation rather than courts' scrutiny where intervention can be justified).

The rationale for this exclusion, discussed above, is not spelt out in the directive.⁶⁶ This is not surprising given how difficult it was to reach the compromise expressed in this provision between consumer protection the principles of party autonomy and freedom of contract.⁶⁷ In *Kásler*, in line with this embarrassed silence, the Court embraced a thin justification for the exclusion (despite the thorough discussion of the Advocate General in this case): there is no legal benchmark for a fair price

the exclusion of a review of contractual terms as to the quality/price ratio of a supply of goods or services is explained by the fact that no legal scale or criterion exists that can provide a framework for, and guide, such a review.⁶⁸

This justification is hardly convincing as courts routinely assess situations in the absence of a proper legal benchmark. The Court would be aware of this: what is the legal benchmark for how the trader thinks about the consumer thinking about the fairness of a term she is hypothetically aware of (*Aziz*)?

If one were to restate EU Law, one should, therefore, feel at liberty to put forward a better rationalisation for the exclusion of core-terms as per Article 4 (2). It is entirely possible to do so in a manner consistent both with the approach taken in the Draft Restatement and with the *travaux préparatoires* of the directive: the binding force of contract should be preserved when it is reasonable to assume that the consumer was aware of the terms which express the essential aspects of the bargain and gave a meaningful assent. Consistently with this rationale, the exception should be lifted – and courts should be allowed to hold that core terms are not enforceable – when there are reasons to believe that assent was, in reality, not meaningful due to the fact that the core terms lacked clarity or were otherwise difficult to understand. In other words, prices *can* be unfair under UCTD if the price term falls foul of the ‘plain intelligible language’ requirement.

The Court has taken a broad view of this requirement. In line with the Draft Restatement’s approach, transparency is not interpreted in a formalistic way. It is not strictly about plain English (or French or Hungarian). Rather, the Court has held that

⁶⁶ Recital 19, added together with art 4(2) is minimalist. It was difficult enough to agree on the drafting and would probably have been impossible to give a principled justification for the compromise which was reached (see above n 15).

⁶⁷ See references cited above n 45.

⁶⁸ Case C-26/13 *Kásler*, EU:C:2014:282, para 55 (misquoting para 69 of the AG Opinion).

the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism [determining the price], so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.⁶⁹

The requirement is therefore that the economic meaning of the term is intelligible to the consumer. This seems to parallel the restated US rules, under which ‘Prices are not always salient, and nonsalient, egregious prices (as well as salient but underappreciated egregious price dimensions) can be found unconscionable’.⁷⁰ Under either set of rules, non-salience is what triggers the scrutiny for unfairness of price terms. Therefore, salience is the next issue to consider.

2 Does Salience Matter?

As is clear from the foregoing, both EU Law and the Draft Restatement struggle to capture the elusive reality of meaningful assent. In the case-law just discussed, the European Court of Justice tries to do it by interpreting the transparency requirement as one of ‘enhanced intelligibility’.⁷¹ In the Draft Restatement, the Reporters put forward the notion of salience. (Enhanced) transparency and salience are embedded in the respective normative framework of UCTD and the Draft Restatement and, for this reason, are deeply different despite their apparent proximity (a). Nonetheless, both raise similar evidentiary issues (b).

a) Salience and Transparency: their different Roles

In the context of the Draft Restatement, salience serves to restate and reshape the test for procedural unconscionability, which US Courts have been struggling to interpret in a meaningful manner.⁷² In line with the market-based reasoning exposed above (III 2 c), the Reporters define a salient term as one which is likely to affect the contracting decisions of a substantial number of consumers. Salient terms are presumed to be policed by market forces and therefore not to require

⁶⁹ Case C-26/13, *Kásler*, EU:C:2014:282, para 75. See also Case C-96/14 *Van Hove*, EU:C:2015:262, para 50; Case C-186/16 *Andriuc and Others*, EU:C:2017:703, para. 44 and the case-law cited.

⁷⁰ Reporters’ Notes, 93.

⁷¹ *Rethinking EU Consumer Law*, n 18 above, 153.

⁷² Reporters’ Notes, 94.

the attention of courts.⁷³ Non-salient terms, on the contrary, are not the object of competition among traders and deserve to be scrutinised for unfairness.

In the system of the UCTD, salience, as defined by the Reporters, does not matter as such for the reasons explained above: the alternative between policing by the market and policing by courts is not part of the European conceptual tool-box for thinking about the proper scope of protection. Instead, the closest notion to salience to be found in the framework of the UCTD is transparency. Like salience, transparency is key to defining the scope of protection against unfair terms: as per Article 4(2), if a core term is not transparent, it loses its immunity against a finding of unfairness. But transparency is also a general requirement expressed in Article 5:

In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.

Transparency, therefore, does not only play a role in identifying contract terms whose fairness can be reviewed in all Member States (the directive being one of minimum harmonisation, core terms may be reviewable without limitation under national laws). It also forms part of the harmonised substantive fairness assessment for all reviewable terms.⁷⁴ Since the phrase ‘plain, intelligible language’ has the same meaning in Article 4(2) and in Article 5,⁷⁵ the transparency standard developed by the Court in its case law on insufficiently transparent core terms (about the scope of review) also applies in general to all reviewable terms (as part of the substantive review). Given the unstructured nature of the fairness assessment under UCTD (III 1), it is not particularly surprising that transparency does not play a role as well-defined as that of salience in the Draft Restatement. Salience is a litmus test for procedural unconscionability. Transparency is a general requirement applicable to all consumer contracts and the directive only specifies the consequence of violating this requirement in the special case of core terms: they lose their immunity against a finding of unfairness. In all other cases, the consequences of a lack of transparency will depend on national law and/or an overall assessment taking all other aspects of unfairness into account.

Despite the different underlying frameworks in which they take place, the assessment of salience and transparency raise common questions when it comes to defining the evidentiary requirements.

⁷³ *Ibid.*

⁷⁴ See the contribution of Fernando Gómez in this issue.

⁷⁵ Case C-448/17 *OS KSI Slovensko*, EU:C:2018:745, para 60–61 and case law cited.

b) Proving Salience or Transparency: Common Questions

A term is salient if it is likely to affect the contracting decision of a substantial number of consumers. But what does it take to prove that a term is salient?

The termination fee in the gym membership is given as an illustration of a salient term.⁷⁶ This is a simple example: the options are clear and the choice is not overwhelming. The surcharge for a flexible gym membership is apparent in the same way as, when booking an air-ticket, the surcharge for flexibility is usually apparent (cheap tickets are generally not flexible and flexible tickets are advertised as such and much more expensive). It is reasonable, based on ordinary experience and common sense, to expect consumers to take this information into account when making a choice. The approach would be the same under a salience standard, focusing on market outcomes and on a large enough number of consumers or under a transparency standard, focusing on the average consumer in a single transaction.

How should courts proceed in harder cases, when marketing and advertising are not as explicit as in the above hypothetical, say when the surcharge for extra luggage or the definition of what counts as a carry-on is not so apparent or easy to visualise, or when choice becomes more complicated because there are numerous options and/or price dimensions. Should the evidentiary burden be the same when the available options are not offered by one trader but more (say one gym promotes Plan 1 and another gym, promotes Plan 2 with equal clarity and vigour)? The Court would probably not enter that territory and insist that it is the duty of national courts to weigh ‘all the circumstances’, thus not ruling out that, in some circumstances, a choice between competing offers could be relevant. It is to be noted in this regard that the exact role of courts and parties would be left to national law: whether the trader bears the burden of adducing evidence that the consumer was given a meaningful choice or whether the court could rely on judicial notice to find that other traders on the market offered a higher price but better terms is an issue which would come within the procedural autonomy of Member States.⁷⁷

Implicitly or explicitly, courts will rely on behavioural hypotheses. Indeed, this is what the Court of Justice itself does, in an arguably confusing way when, on the one hand, it refers to the average consumer, who is deemed to be ‘reasonably well-

⁷⁶ See above text at n 61.

⁷⁷ Many cases referred to the Court for interpretive guidance on UCTD pertain to (very) high interest loans, with APR of 56 % (Case C-453/10 *Pereničová*, EU:C:2012:144) or even 95 % (Case C-76/10 *Pohotovosts*, EU:C:2010:685). In these cases, it seems inevitable that courts take judicial notice that the interest rates are considerably higher than market rates.

informed and reasonably observant and circumspect⁷⁸ and, on the other, tempers the high expectations of rationality and competence associated with the fictional average consumer by holding that not only the language should be clear but the economics of the contract should be intelligible in a concrete way, allowing the consumer to visualise the financial impact of the contract. In other words, the case law on transparency contains the seeds of two different orientations: a restrictive one, under which it would be enough for a trader invoking a transparency defence to prove that a somewhat heroic ‘average consumer’ would be able to make an informed choice, and a more expansive one, under which the limited numeracy and cognitive capacities of ordinary consumers are taken into account.⁷⁹ It is remarkable that both approaches are found in the very same cases. The reference to the average consumer immediately precedes the more humane assessment.⁸⁰ To date, it seems that the Court is paying lip service to the average consumer, but is in effect changing the meaning of the standard by admitting that – for all practical purposes if not in so many words – the same average consumer is normally inattentive to terms, averse to boilerplate and innumerate.⁸¹

Since many of the unfair terms cases referred to the Court of Justice pertain to loans, it is in such cases that the Court had developed the enhanced intelligibility standard. The case law is in line with regulatory standards of intelligible financial information. In this regard, the ‘PRIIPs’ Regulation, which was not at stake in any of the cases (it applies to investment products, not to loans), may provide further inspiration.⁸² It sets out high standards of readability – higher than the rules on mortgages –⁸³ and goes to some length to make the information relatable for consumers. The PRIIPs contains plain language requirements, for example, clear

78 Case C-26/13 *Kásler*, EU:C:2014:282, para 74; Case C-96/14 *Van Hove*, EU:C:2015:262, para 47; Case C-186/16 *Andriuc and Others*, EU:C:2017:703, para 47.

79 For an analysis of the behavioural hypotheses underpinning the case law on unfair contract terms, see *Rethinking EU Consumer Law*, n 18 above, 151–152, concluding that the Court is more open to the notion that consumers are boundedly rational in the context of unfair terms than it is in its case law on unfair commercial practices.

80 *Kásler*, para 71–75, esp para 74 and *Van Hove*, para 40–50, esp para 47 (cases cited n 70).

81 The only explicit admission is that the average consumer is ignorant of the law: Case C-488/11 *Asbeek*, EU:C:2013:341, para 32 (holding that consumers are generally poorly informed about complex national rules on lease contracts).

82 Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), *OJ* 2014 L 352, 1–23.

83 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property, *OJ* 2014 L 60, 34–85, though this directive does prescribe the use of some user-friendly tools, such as warnings.

headings such as ‘What are the risks and what could I get in return?’,⁸⁴ but also requires that numerical information be supplemented by a narrative explanation⁸⁵ and that the possible maximum loss of invested capital be stated (thus triggering loss aversion).⁸⁶ The regulation also attempts to make the key information intuitively easy to understand by prescribing the use of an (empirically tested) numerical scale displaying horizontally the level of risk of the investment product (on a scale of 1 to 7).⁸⁷

Whether or not the Court will in the future rely on this particular regulation by analogy, it will have to consider what traders must do to meet the transparency standard. If the average consumer morphs into a normally optimistic, loss averse, and otherwise boundedly rational figure, the evidentiary requirements for the transparency defence will undoubtedly be raised.

This issue seems just as important in the context of the Draft Restatement. Whether a large enough number of consumers are likely to take any given information into account when making a contractual choice is an assessment that is bound to embed behavioural hypotheses. An elaboration on these issues is probably for the next Restatement of consumer contract law.

V Conclusion

Unfairness and Unconscionability are two sister doctrines. As we know, sisters can be quite different, especially when they have been raised on different continents. While both are the daughters of Justice and Contract, Unconscionability takes more after her father (Contract) and Unfairness takes more after her mother (Justice). Unconscionability is more meticulous and structured. Unfairness is somewhat less orderly (her sister might use a stronger term). Unconscionability strongly believes in the goodness of markets and competition, while Unfairness places more trust in courts.

Their godparents – the Reporters and the Court of Justice respectively – having themselves been educated in different legal cultures, told them different stories

84 PRIIPs Regulation, n 83 above, art 8.

85 *Ibid.* The narrative explanation needs to be provided both to explain the summary risk indicator and the risks which are materially relevant to the PRIIP and which are not adequately captured by the summary risk indicator.

86 *Ibid.*

87 Studies available from https://ec.europa.eu/info/sites/info/files/consumer-testing-study-executive-summary-2015_en.pdf [Executive summary: <https://perma.cc/9K3L-CTLC>; Full study: <https://perma.cc/WX7F-FNJ2>]. The horizontal display is shown at p. 3 of the executive summary.

about their mission. When they meet at family reunions, the daughters, who have the difficult task of keeping both parents content, will still for some time discuss the best criteria or proxies for meaningful consent. For now, I will let them review the provisional answers to the Reporters' questions that I have been able to compile after interviewing at some length Fairness and Unconscionability, whom I both thank.

Is there in Europe any doctrine analogous to the American 'sliding scale'?

No, the European test is not structured in the same way. While there is an equivalent to substantive unconscionability, there is no equivalent to procedural unconscionability. There is also no need for one in order to delineate the scope of protection. Regarding the assessment of unfairness, two notions have some proximity with procedural unconscionability: good faith and transparency, but there is no doctrine that holds that more bad faith or less transparency will result in a lesser imbalance being necessary to hold a term unfair. This can be attributed to the circumstance that the European unfairness test rests on normative premises that differ markedly from the approach followed in the Draft Restatement. In EU law, the alternative between policing by the market and policing by court is not part of intellectual apparatus for thinking about the role of courts.

If rebuttable presumptions of unfairness are used (grey lists), what does it take to rebut the presumptions?

The grey list is not technically a list of presumptions.⁸⁸ To the extent the grey list does in fact function as a set of presumptions – and it does –⁸⁹, the strength of the presumption is not uniform across the EU. This is to do with the minimum harmonisation nature of the directive. In some Member States, the examples from

88 The nature of the Grey list was at issue in Case C-478/99, *Commission/Sweden*. Sweden had not reproduced the grey list in its law transposing the directive, and the Court held that this was not in violation of its duty to transpose since the grey list was accessible in preparatory documents which are normally consulted by lawyers. The Court held the grey list 'is of indicative and illustrative value, it constitutes a source of information'.

89 See Rott, n 6 above, 298–299.

the grey list (and some more) are on a blacklist (of irrebuttable presumptions),⁹⁰ while other Member States have grey lists (simple presumptions).⁹¹ In addition to the grey list having explicitly different binding or persuasive force in various Member States, there is another reason why it does not take the same evidentiary effort to rebut the presumption (where it is rebuttable): in order to assess whether a contract is materially imbalanced (substantive unconscionability), a national court has to ascertain how much worse-off a consumer is because of the term than she would otherwise have been. This depends on the default rule under national law so that the same term in the same factual circumstances could be unfair in one Member State and not in another because of different default rules. For these reasons, what it takes to rebut a presumption from the grey list is a question that can only be answered under (some) national laws.

Is there any different treatment between ‘core’ and ‘non-core’ terms under the unfairness jurisprudence?

There is: core terms are in principle immune to a finding of unfairness unless they are insufficiently transparent. For core terms, therefore, the transparency requirement plays a role that is analogous to procedural unconscionability. It has to be established in order for the term to be reviewable. Once a term is reviewable, whether it is a core or a non-core term, does not lead to a different assessment in principle.

Can price be unconscionable?

Yes, price terms can be unfair if they are not expressed in plain, intelligible language, which is a substantially more demanding standard than linguistic clarity. The Court interprets it to mean that the average consumer – who is not necessarily attentive to the fine print or good in math – needs to understand what the price means in concrete terms. In some Member States, price terms

⁹⁰ This is, for example, the case in Belgium (art VI.83 Code de Droit Economique).

⁹¹ This is, for example, the case in Hungary (see Case C-472/11, *Banif Plus Bank*, EU:C:2013:88, para 9). Some Member States, such as France, have both a grey- and a blacklist (art L212-1 Code de la consommation).

(core terms in general) are not immune to a finding of unfairness, irrespective of how they are expressed: Member States can choose not to offer a transparency defence to traders.

Can a term be held unenforceable on grounds of unfairness if the consumer has a choice to pay more and remove it from the contract? Or if it was salient and known prior to contracting?

This is definitely the hardest question of all. It has not been debated in a European context, probably because the underlying premise of both versions of the question are not the stuff EU law is made of. This goes both for the normative premise that choice deserves very strong protection and for the premise that salient terms are sufficiently policed by competitive markets and need not be policed by courts. Nonetheless, I have tried to imagine how the Court would go about answering this question if it were raised. I have concluded, tentatively, that, if the national law of a Member State would follow the approach of the Draft Restatement, it would not *per se* be incompatible with the UCTD but the Court would not let the protection of consumer choice prevail over what it considers the public interest, so that the scope of the bargain-basement defence would probably be narrower under UCTD than under the Draft Restatement. It would also vary across Member States.

Correspondence between the non-exhaustive lists of illustrations in the Restatement and in the UCTD

Restatement	UCTD Annex ('grey list')
§ 5.1 (1) unreasonably exclude or limit the business's liability or the consumer's remedies that would otherwise be applicable for: (A) death or personal injury for which, in the absence of a contractual provision in the consumer contract, the business would be liable, or (B) any loss to the consumer caused by an intentional or negligent act or omission of the business	(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier

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- § 5.2** (2) unreasonably expand the consumer's liability, the business's remedies, or the business's enforcement powers that would otherwise be applicable in the event of breach of contract by the consumer
- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract
 - (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation
 - (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so
 - (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early
 - (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract
 - (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided
 - (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality
 - (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his
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- § 5.3** (3) unreasonably limit the consumer's ability to pursue or express a complaint or seek reasonable redress for a violation of a legal right.
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him
 - (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.
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§ 3 (c) A modification of standard contract terms in a consumer contract is enforceable only if it is proposed in good faith and if it does not have the effect of undermining an affirmation or promise made by the business that was made part of the basis of the original bargain between the business and the consumer.	(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement
§ 4 (b) A term in a contract that purports to grant the business absolute and unlimited discretion to determine its contractual rights and obligations unconstrained by the good-faith obligation is unenforceable by the business.	(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone (f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract

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