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Remarks on the Italian Implementation of Directive 93/13 *

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Summary: 1. A puzzling 'spillover': Is there anything 'unexpected' in the making of European Law? What is wrong with it? 2. The Italian and German legal systems vis-à-vis Directive 93/13: An inverted mirror. – 3. The implementation of Directive 1993/13 in the Italian legal system. 4. 'Good faith' (unintention, honesty) or 'good faith and fair dealing' ('fairness', 'requirement of good faith', 'Treu und Glauben', 'buona fede e correttezza')? An initial attempt to prevent spillovers. 5. An unsuccessful 'spillover': Defining 'consumer'. 6. A statutory 'spillover': Asymmetric contracts between businesses (B2B). 7. Widening of the definition ('consumer' and 'traveler', 'consumer' and 'microbusiness'). 8. A denied spillover: The saga of 'liability rules' vs. 'invalidity rules' principle. 9. The general theory of contract law and the (pseudo) 'spillover': The influence of Directive 93/13 on civil law - A tale of disgraceful deposits and other occurrences. 10. The general theory of contract law and the (systemic) 'spillover': The influence of Directive 93/13 on civil law - nullity, default rules, legal infrastructures. 11. Legal infrastructures and case-law (systemic) 'spillovers': The case of the ex parte payment order as an example of the influence of Directive 93/13 on civil procedure.

1. A puzzling 'spillover': is there anything 'unexpected' in the making of European Law? What is wrong with it? – Compared to the original view of consumer law put forward by the most insightful legal scholars at the beginning of its trajectory – asserting that «*the originality of consumer law, in terms of its principles and concepts, lies merely in revealing a reality that preexisted it*» and that «*if the general theory of contract can*

(*) È il testo della mia relazione al seminario su *Spillover Effects of Implementation of EU Law. A Threat to the Coherence of National Private Law?*, Ruhr Universität Bochum 22-23 June 2023, di cui un primo schema è stato già pubblicato in *Scritti in memoria di Rodolfo Sacco*, Torino, Utet, 2024, I, pp. 143-166.

and must be revised... it is due not to recent distortions, but to long-standing shortcomings that now come fully to light» [01] – we are now faced with the emergence of 'spillover' effects and 'surprise' rules.

These phenomena suggest a lack of oversight and foresight in the decision-making processes that shape the direction and development of the legal system, which unfolds in a manner not entirely under control. This occurs due to an information deficit, through self-generating legal disciplines that evolve along trajectories that are partly systematic, but also partly random.

Over time, the developments of European consumer law within Italian law have undergone significant changes. Initially, its impact may have seemed limited and not immediately clear. However, as time has passed, consumer law has progressively gained importance and has become a prominent component of civil law.

Some even argue that consumer law has become the cornerstone of general contract law [02].

In any event. it has exerted a significant influence on legislation, the culture of civil law, conceptual frameworks, and the remedial infrastructures of the legal system. This discipline of contract law aligns itself with the regulation of the market and achieves this by governing individual exchange acts rather than the overall behavior of the market as

01 G. Rouhette, *Droit de la consommation et théorie générale du contrat*, in *Études Rodière*, Paris, Dalloz, 1981, p. 255 ff. : «*l'originalité du droit de la consommation, quant aux principes et notions, n'est que de révéler une réalité qui lui préexistait*» and «*si la théorie générale du contrat peut et doit être rectifiée ... c'est en raison non pas d'alterations* récentes, mais de *déficiences anciennes, qui apparaissent déshormais en pleine lumière*».

02 This idea is discussed in academic literature with various nuances. See e.g. V. Roppo, *Parte generale del contratto, contratti del consumatore e contratti asimmetrici* (*General law of contracts, consumer contracts, and asymmetric contracts*), in E. Navarretta (ed.) *Il diritto europeo dei contratti fra parte generale e norme di settore* (*European Contract Law between General Principles and Sector-Specific Rules*), Milano, Giuffrè, 2007, p. 289 ff.

a whole [03].

Directive 93/13 is no longer considered a peripheral or specialized area regulated by a separate «*specialized private law*» (*Sonderprivatrecht*), but rather an integral part of the broader civil law framework. This perspective is reflected in the Italian implementation of the directive. Initially (1996-2005), it was incorporated into the general framework of contract law within the 'civil code'. However, in 2005, it was included in the so-called consumer «*code*» [04].

In a broader sense, these harmonization interventions imply a new form of contract regulation that differs from the traditional approach found in civil codes. In the civil codes, the subject of the contract is considered as an 'abstract' and 'neutral' entity. However, in these harmonization efforts, the subject is considered in terms of their economic and social qualities, which constitutes a significant difference. Some authors say that, in these cases, the law has 'removed the blindfold' that traditionally, and indeed for valid reasons, covers the eyes of justice.

Besides, the new configuration of domestic law reflects a significant shift, with a considerable portion of domestic legislation originating from European sources. This trend highlights the growing influence and integration of European law within national

03 F. Denozza, *Mercato, razionalità degli agenti e disciplina dei contratti*, in G. Gitti *et al.* (curr.), *I contratti per l'impresa*, Bologna, il Mulino, 2012, I, pp. 69 ff., part. p. 81: «*neo-liberal theses do not deny – except on an abstract theoretical level, practically completely irrelevant – the idea, dominant for most of the last century, that the market is not a spontaneous order, which asserts itself naturally when the impediments to its unfolding have been eliminated, but it is an artificial construction which must be continuously supported by interventions aimed at preventing and remedying its failures. The difference with respect to the dominant ideas in the first decades after the Second World War does not lay in the repudiation of the idea that the markets should be somehow controlled, but in the idea of being able to control the markets starting from the government of individuals rather than from the government of large aggregates. Thus we move from a regime of control over consumption and overall investments, to intervention on the rights of the individual consumer and individual shareholder, from a regime of control over the money supply in circulation, to the regulation of intermediaries, banks, etc. It is therefore not surprising that by observing the legislation as a whole, one can notice (although comparisons of this kind may not make much sense) an increase and not a decrease in the rules. From this point of view – entity, extent and complexity of regulation – the neo-liberal period shows much more affinities with the immediately preceding one than it does with the handed down image of Manchesterian capitalism. No surprise therefore that the affirmation of the reasoning of the economic analysis of law, a juridically rigorous version of neo-liberal ideas, did not lead to a return to a harmonious system, but to the creation of an enormously jagged system along the fault lines marked by the infinite hypotheses of market failure that can be configured from time to time*». See also L. Nivarra, *Diritto privato e capitalismo. Regole giuridiche e paradigmi di mercato*, Napoli, Editoriale scientifica, 2010.

04 However, the consumer code cannot be considered a sector-specific regulation since it is a so-called «horizontal» or «conditional» regulation.

legal systems [05]. In this fragmented and Balkanized system of legal sources, it appears that the reference to the overall 'system' as a tool and limit for legal interpretation has been diminished or lost. The diverse origins and sources of law within this system have contributed to a more complex and multifaceted legal landscape, making it challenging to maintain a unified and coherent approach to interpretation.

On one hand, it is important to recognize that European sources of law form a relatively independent compound of objective law, built upon its own concepts and subject to binding interpretation by the ECJ.

On the other hand, the substantive law of the European Union is not inherently complete or self-sufficient. It requires integration with the legal systems of member countries. Therefore, a process of coordination is necessary to harmonize it with the relevant internal provisions applicable to specific areas such as contracts, liability, forms of protection, and more.

Moreover, it is essential to keep in mind that EU private law, due to its institutional structure, normative content, and supranational nature, cannot be studied solely through traditional theories of sources and dogmatics [06]. It is important to acknowledge that European law, by its very nature, introduces notions and rules that may not be fully compatible with the diverse legal systems of individual member states.

Therefore the establishment of consumer law through European legal harmonization inevitably brings about a conflict between national law and European law.

European law outlines the objectives to be pursued, which, in theory, national legislators should implement considering the distinct characteristics of their respective domestic legal systems. However, in practice, this implementation does not always occur smoothly. Consequently, European law frequently clashes with the categories, divisions, and instruments of domestic law, occasionally creating separate spheres that deviate from the systemic evolution of law (e.g., through maximum harmonization).

European law relies on the consumer-friendly jurisprudence of the ECJ, an institution that has often viewed its role as primarily political, with the aim of advancing the inter-

05 According to a survey conducted by the Department of Community Affairs for *Il Sole 24 Ore*, covering the five-year period from 2014 to 2019, it was found that 177 out of the 299 legislative decrees published in Italy (59.2%) were enacted to implement European directives or decisions (A. Magnani, *La Ue è inutile? Il 60% dei decreti legislativi italiani 'nasce' a Bruxelles*, *Il Sole 24 Ore*, 11 May 2019, *www.ilsole24ore.com/art/la-ue-e-inutile-60percento-decreti-legislativi-italiani-nasce-bruxelles-ACh9ZAB*).

06 See in this regard L. Nivarra, *Al di là del particolarismo giuridico e del sistema: il diritto civile nella fase attuale dello sviluppo capitalistico*, in *Riv. crit. dir. priv.*, 2012, p. 211 ff., part. p. 240: «*the idea of the legal System is also behind our shoulders, and it has been replaced by a polyarchic and horizontal structure of law and sources of law*»; cfr. A. Zoppini, *Il diritto privato e le «libertà fondamentali» dell'Unione Europea (principî e problemi della* Drittwirkung *nel mercato unico)*, in F. Mezzanotte (ed.), *Le libertà fondamentali del Trattato e il diritto privato*, Roma, RomaTrePress, 2016, p. 12.

nal market without strict adherence to compatibility with national legal systems. The Court's creative interpretations have often resulted in unforeseen developments of the regulatory tools introduced by legislation [07], it could be argued then that this interaction between European law and national legal systems, particularly in the context of consumer law, by its very nature, lays the groundwork for 'spillovers'.

Consumer law develops gradually based on the present opportunities from time to time, without a predetermined general plan, somewhat randomly, and certainly not systematically. As a result, the overall outcome may appear disorganized and, even more so, give rise to the phenomenon of 'spillover' [08].

Therefore, the influence of European law and the jurisprudence of the Court of Justice often leads to unexpected outcomes and produces consequences that were not anticipated by the European legislator. This can result in outcomes that are not entirely connected or even disconnected from the original purpose of harmonization envisioned by the legislator [09].

Indeed, some cases discussed herebelow plausibly do not represent an example of the 'spillover' effect, but rather an example of the impact that specific regulations, expanded and contextualized through the principles elaborated by the ECJ (especially effectiveness), can have on other areas of the legal and institutional system.

There are two aspects to consider in this regard: firstly, it must be acknowledged that European consumer law introduces modifications of national systems, based on cooperative coordination and the principle of the primacy of European law, which could be somewhat related to the concept of a 'System'. However, this presents the significant drawback that there is no 'system' that can be defined as such, and therefore, it is incapable of introducing that systematic constraint that serves as a guiding principle and limitation for the interpreter.

Secondly, the emergence of «*spillover effects*» and «*jack-in-the-box rules*» also

07 See in this regard the sharp wording used by P.G. Monateri, *La neutralizzazione del diritto pubblico nazionale da parte del diritto comunitario: un destino inevitabile? (The neutralization of national public law by European Union law: an inevitable fate?)*, in M. Atelli (cur.), *Giurisdizione della Corte dei Conti e responsabilità amministrativo-contabile a dieci anni dalle riforme*, Roma, Satura, 2005, p. 299 ff.: the Treaties «*are interpreted by the Court of Justice on the basis of their 'spirit', as 'fundamental rules' that give life to a 'structure of the Union', which in turn serves as an interpretative canon of the rules themselves, even in an anti-literal sense. The antithesis between the drafting practice of European standards and the interpretative practice of European standards is therefore complete and total ... it is a construct of thought that could well fall within the categories of 'magical realism'*».

08 Cf., on this topic and on the idea and taxonomy of 'spillover' effects, A. Johnston, *'Spillovers' from EU Law into National Law: (Un)intended Consequences for Private Law Relationship*, in D. Leczykiewicz, S. Weatherill (eds.), *The involvement of EU Law in Private Law Relationships*, Oxford, Hart Publishing, 2013, Oxford Legal Studies Research Paper No. 69/2012.

09 T. Wilhelmsson, *Jack-in-the-box Theory of European Community Law*, in L. Kramer, H.-W. Micklitz e K. Tonner (curr.), *Liber amicorum Norbert Reich*, Baden-Baden, Nomos, 1997, p. 177 ss.

suggests that decision-makers may make choices that are potentially unchecked due to an information deficit [10]. The point here is that these modifications of domestic law occur outside of a predefined and pre-deliberated framework of changes, thus also outside of a specific, explicit, and publicly debated political deliberation. In a certain sense, they are self-generative disciplines that develop along partly organic and partly random lines, without a democratic mandate.

The elements introduced by EU law are therefore capable of not only modifying existing norms but also generating new norms that may not have been anticipated in the decision-making process. This occurs through the integration of these elements with the fundamental principles of European law. Such integration leads to modifications in the internal system and various domains of substantive and procedural law. These modifications arise both from the normative changes introduced by EU law and the necessity to adapt pre-existing legal institutions to meet the specific requirements of European law, as interpreted by the ECJ [11]. However, it is important to note that these changes are introduced episodically, often lacking a unified and cohesive design.

2. The Italian and German legal system vis-à-vis with Directive 93/13: An inverted mirror. – In German law, the implementation of the directive resulted in a reform of the *AGBG* (General Terms and Conditions Act), its expansion, and its integration into the *BGB* (German Civil Code). The doctrinal and jurisprudential resolution of the issue of mass contracts stemmed from the general clauses of the BGB (§ 138, § 241), which in turn led to the development of the AGBG.

On the other hand, in Italian law, certain provisions concerning mass contracts were already included in the original text of the Civil Code of 1942. Specifically, Article 1341 of the Civil Code deals with the effectiveness of general contract terms, subject to the knowledge or potential knowledge of the adhering party (as stated in the first paragraph) [12] while the second paragraph deals with the unfairness of specific terms in mass contracts, such as withdrawal, renunciation, determination of competent courts, arbitration, and limitations of liability [13].

10 P. Melograni, *Saggio sui potenti*, Bari, Laterza, 1977, rprnt. Torino, Einaudi, 2019 («*the reality of power is different from appearances. A leader knows very little about the world around him, and very little is able to transform it*»).

11 See Monateri cited above, at note 7.

12 Art. 1341 c.c.it., 1st para.: « General terms prepared by one of the contracting parties are only effective against the other, if at the time of conclusion of the contract the latter knew them or should have known them using ordinary diligence».

13 Art. 1341 cc.it., 2nd para.: «If they are not specifically approved in writing, such terms are in any case void, which establish, in favor of the person who prepared them, limitations of liability, the right to withdraw from the contract or to suspend its execution, or sanction the responsibility of the other contracting party forfeitures, limitations on the right to raise objections, restrictions on contractual freedom in relations with third parties, tacit extension or renewal of the contract, arbitration clauses or derogations from the jurisdiction of the judicial authority».

In parallel, Article 1342 of the civil code stipulated that in contracts concluded through the use of forms or standard documents, any additions made by the parties would prevail over the pre-printed text, even if not crossed out. This provision also referred back to Article 1341, specifically addressing the issue of unfair terms.

At the time of their introduction, these rules held significant importance.

Notably, in the Minister of Justice's Report to the King dated 16 March 1942, the new regulations were connected to the «*need to ensure the uniformity of the content of all contract of an identical nature, for a more precise determination of the risk involved*», and therefore the need to organize the business activity on the basis of standardization and of an overall forecast of the costs inherent in customer relations, which cannot vary from single contract to contract (these are, in fact, businesses destined to translate into a myriad of contracts, needing, for the very definition of the product and organization of the business itself, a high quotient of standardization).

It therefore specifies that «*today's [1942] economic life is also based on a rapid execution of contracts, which is the condition for an acceleration of the production; to this requirement the need for freedom of negotiation must be sacrificed, which would impose obstacles that are often insurmountable*».

Lastly, he adds that he wants to «*remedy any abuse, first of all by giving legal effectiveness only to the general conditions that the customer had known or should have known at the time of the contract [...] secondly by declaring particularly serious clauses null and void, if on the same your attention has not been specifically called*».

In the 1960s and 1970s, Italian scholars recognized the need to modernize the system, highlighting the inadequacy of the civil code's regulations in providing effective protection for weaker parties in adhesion contracts.

Many of these reform attempts drew inspiration from the German experience, focusing on concepts such as «*Gute Sitten*», good faith and fairness, deviations from default rules, information requirements, and an analogical interpretation of the list of unfair terms.

However, it is noteworthy that the pre-existing legal provisions limited the judiciary's exploration of new paths for protection through the application of general clauses like «*ordre public*» and «*good faith*» [14].

The two legal systems come therefore to the stage of implementation of the directive from two specular and inverse positions, which it seems to me interesting to underline with regard to the topic of 'spillovers' of directive 1993/13.

14 See V. Roppo, *Contratti standard. Autonomia e controlli nella disciplina delle attività negoziali di impresa*, Milano, Giuffrè, 1975 (reprint, 2017), p. 232.

3. The implementation of Directive 1993/13 in the Italian legal system. – It is indeed crucial to examine how Member States implement European directives, as European law significantly overlaps with the system of contract law and contains the potential for a substantial modification of it.

The inclusion of Union legal regimes into the domestic legal system requires careful consideration to understand the actions taken by national legislators.

In the case of the Italian legislator, as maybe in other Member States, there is a tendency to implement directives without genuine efforts at harmonization, and sometimes without any harmonization efforts at all. However, in the case of Directive 93/13, which was a historic event awaited for fifty years, there was some debate surrounding its implementation.

The implementation of the directive in Italy does not differ significantly from the European text. Interestingly, the Italian text even adopted a term (the famous «*despite good faith*») derived from a translation error in the Italian version of the directive. Although this error has been corrected by the European legislator (albeit after 22 years!) [15], it remains unmodified in the Italian text.

This provision assumes therefore a different meaning in the Italian context and needs to be interpreted accordingly, within the limits set by Article 8 of Directive 93/13.

Another relevant debate took place regarding the choice of where to insert the implementing rules. There was discussion on whether to proceed with implementation through a «*special statute*» as previously done for civil law directives [16], or whether to insert the implementation text in the Civil Code [17].

The options considered included inserting it in the section dedicated to agreements between parties alongside the existing regulation of general conditions of contract (Articles 1341-1342) [18], in the Fifth Book of the Civil Code regulating the professional ex-

15 By the *Amendments to Council Directive 93/13/CEE, of 5 April 1993, concerning unfair termis in consumers' contracts*, in *GUE* 4 June 2015, L 137, p. 13 the Italian text was amended as follows: instead of «*si considera abusiva se, malgrado il requisito della buona fede, determina*» («it is deemed unfair if, notwithstanding the requirement of good faith…»), «*si considera abusiva se, in contrasto con il requisito della buona fede, determina*» («it is deemed unfair if, contrary to the requirement of good faith…»).

16 Unlike those on Company Law, which for obvious reasons have led to an overall and radical modification of the company regulations contained in the Fifth Book of the It. Civil Code.

17 The law of obligations and contracts for a set of reasons had been the most resistant to the changes brought about first by the advent of the Constitution in 1948, then by the work of the Constitutional Court starting from 1953, then by the social legislation of the 1960s and 70s and finally from the harmonization of European legislation starting from the 70s-80s as regards civil law in particular.

18 See above, notes 11-12.

ercise of economic activities (Article 2062) [19], or in a new chapter (Chapter XIV-bis) at the end of the general part of the contract (Articles 1321-1469). Ultimately, the new regulation of 'consumer contracts' was included in the general discipline of the contract in a separate chapter.

These aspects seems to me significant for understanding the relationship between «*special private law*» and «*general private law*», which is profoundly affected by the topic under discussion.

4. 'Good faith' (unintention, honesty) or 'good faith and fair dealing' ('fairness', 'Treu und Glauben', 'buona fede e correttezza')? An attempt to prevent spillovers? – The distinction between «*regardless of good faith*» and «*contrary to good faith*» holds important theoretical significance. The interpretation of the provision relies on the term «*good faith*» used in the text, which determines the extent of the judge's authority and the parties' expectations when seeking the application or opposition to the remedy at law.

In other Member States, the implementation of the directive has followed different approaches. In U.K. it has been stated that a clause is considered «*unfair*» when it is «*contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract, and is to the detriment of the consumer*» (Consumer Rights Act 2015, paragraph 62).

In Germany, reference is made to the principle of «Gebot von Treu und Glauben» (duty of loyalty and good faith): «*Bestimmungen in Allgemeinen Geschäftsbedingungen sind unwirksam, wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen. Eine unangemessene Benachteiligung kann sich auch daraus ergeben, dass die Bestimmung nicht klar und verständlich ist*» (BGB, § 307, 1° co.) [20]

In France, there is no reference to good faith, but rather to all elements relevant at the time of contract conclusion. The original wording, in force until 2016, states: «*dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat … Sans préjudice des règles d'interprétation … le caractère abusif d'une clause s'apprécie en se référant, au moment de la conclusion du contrat, à toutes les circonstances qui entourent sa conclusion, de même qu'à toutes les autres clauses du contrat. Il s'apprécie également au regard de celles contenues dans un autre contrat*

19 Art. 2062 c.c.it.: «*The professional exercise of economic activities, is governed by laws and regulations*».

20 «*Provisions in the General Terms and Conditions are ineffective if they unreasonably disadvantage the contractual partner of the user contrary to the requirements of good faith. An unreasonable disadvantage may also arise from the lack of clarity and comprehensibility of the provision*».

lorsque la conclusion ou l'exécution de ces deux contrats dépendent juridiquement l'une de l'autre» (Code consomm. L 132-1) and later, as of 10 October 2016: «*dans les contrats conclus entre professionnels et consommateurs, sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat … sans préjudice des règles d'interprétation … le caractère abusif d'une clause s'apprécie en se référant, au moment de la conclusion du contrat, à toutes les circonstances qui entourent sa conclusion, de même qu'à toutes les autres clauses du contrat*» (Code consomm. L 212-1) [21].

In the Italian legal system the legal provision deems unfair (vessatorie) terms «*che determinano, malgrado la buona fede, un significativo squilibrio dei diritti e degli obblighi…*» («*that, despite [or regardless of] good faith, result in a significant imbalance between the rights and obligations*»).

The wording used in the provision seems to imply a negative view of «good faith». It suggests that unfairness and imbalance can occur regardless of the presence of good faith.

According to a first possible interpretation the judge should not to consider the subjective good faith of the professional or their lack of malice when assessing the imbalance.

However, the interpretation, in accordance with the directive's intention, should in any

21 «*In contracts concluded between professionals and non-professionals or consumers, terms are unfair if their purpose or effect is to create, to the detriment of the non-professional or the consumer, a significant imbalance between the rights and obligations of the parties to the contract. Without prejudice to the rules of interpretation provided for in Articles 1156 to 1161, 1163 and 1164 of the Civil Code, the abusive nature of a clause is assessed by referring, at the time of the conclusion of the contract, to all the circumstances surrounding its conclusion, as well as to all the other clauses of the contract. It is also assessed with regard to those contained in another contract when the conclusion or the execution of these two contracts are legally dependent on each other*» (L 132-1), and, respectively, «*in contracts concluded between professionals and consumers, unfair terms are those which have the purpose or effect of creating, to the detriment of the consumer, a significant imbalance between the rights and obligations of the parties to the contract. Without prejudice to the rules of interpretation … the unfairness of a clause is assessed by referring, at the time of the conclusion of the contract, to all the circumstances surrounding its conclusion, as well as to all the other clauses of the contract. It is also assessed with regard to those contained in another contract when the two contracts are legally linked in their conclusion or their execution*» (L 212-1).

case focus on countering imbalances with objective good faith as well [22].

A different interpretation, proposed by some authors, is that the Italian law actually refers to objective good faith. According to this interpretation, the phrase «regardless of despite good faith» means that a judgment of good faith is not necessary at all.

Nullity should solely depend on the existence of an imbalance. In this view, the judgment is based on fairness, understood as equity and the balance of rights and obligations, rather than on good faith [23].

This interpretation was intended to protect, to the extent possible, the system of the Civil Code from potential disruptive effects that could arise from the reintroduction of the concept of good faith. So it may said it was an attempt to prevent disruptive 'spill-overs'.

The concept of good faith and fairness has traditionally held in Italian law a more limited meaning compared to German one.

In traditional judicial interpretation, good faith has played a marginal role. It is possible to argue that the different role played by good faith in the current state of the Italian legal system can be traced back to the introduction of European harmonized law.

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22 See ECJ, 15 March 2012, in case C-453/10, *Pereničová*, para. 45 ff.: «*the determination of unfairness represents one element among others on which the competent judge can base, according to Article 4(1) of Directive 93/13 [Article 34 of the Italian cod. cons.], his assessment of the abusive nature of contractual clauses... However, this determination does not have a direct impact on the assessment, from the perspective of Article 6(1) of Directive 93/13 [Article 36 of the Italian cod. cons.], of the validity of the credit agreement entered into*». In legal scholarship, see F.D. Busnelli, *Una possibile traccia per una analisi sistematica della disciplina delle clausole abusive*, in C.M. Bianca and F.D. Busnelli (eds.), *Commentario al capo XIV bis del codice civile: dei contratti del consumatore*, Padova, Cedam, 1999, pp. 25 ff. (which also considers good faith as the basis for the analogical application of the new provision; in this regard, see also A. Barenghi, *sub art. 1469-bis*, in Id. (ed.), *La nuova disciplina delle clausole vessatorie nel Codice civile*, Napoli, Jovene, 1996, p. 52 ff.; P. Sirena, *La categoria dei contratti d'impresa e il principio della buona fede*, in *Riv. dir. civ.*, 2006, I, p. 415 ff.). It should be noted that the reference to subjective good faith was later confirmed in the *Commission Report on the Consumer Code*, despite the Council of State suggesting to specify the reference to objective good faith (p. 17: «*the current text offers a higher level of protection to the consumer, allowing for the qualification of contractual clauses that result in a significant imbalance between the performances, to the detriment of the consumer, despite the subjective good faith of the other contracting party, without requiring further determination of the violation of the rules of good faith*»).

23 It seems to me that this was the underlying thought of L. Mengoni, *La disciplina delle 'clausole abusive' e il suo innesto nel corpo del codice civile* (*The regulation of 'unfair terms' and its integration into the Civil Code*), in *Rass. giur. en.el.*, 1997, p. 295 ff. However, also refer to C. Castronovo, *Profili della disciplina nuova delle clausole c.d. vessatorie, cioè abusive, in Europa e diritto privato* (*Profiles of the new regulation of so-called unfair or abusive clauses in European and private law*), 1998, pp. 5 ff., and F. Piraino, *La buona fede in senso oggettivo* (*Objective good faith*), Torino, Giappichelli, 2015, p. 491 ff. (who emphasizes the distinction between rules of balance, based on equitable criteria, and rules of good faith, relevant only in relationships based on negotiation between the parties).

Good faith in the civil code had a role in the interpretation of contracts (Article 1366 of the Italian Civil Code) [24], the behavior of the parties in negotiations and drafting/executing (formazione del contratto) (art. 1337 It. c.c.)[25], in the course of performance (1375 It. c.c.)[26] and in the obligations generally speaking (art. 1175 c.c.)[27].

Specifically, in Italian legal thought, the concept of good faith had come to be recognized as having the function of introducing new obligations between the parties within the contractual framework. Some even argued that these obligations could deviate from legal provisions [28].

Hence, good faith was attributed a supplementary role similar to that of Article 1374 of the Italian Civil Code. Just as Article 1374 allows for the supplementation of contracts by the judge, the concept of good faith was seen as providing a basis for the introduction of additional obligations beyond what is explicitly stated in the contract [29].

However, the breach of obligations of good faith was limited to a compensatory remedy, without affecting the validity of the contract. This was based on the principle of distinguishing between rules of conduct and rules of validity in contract law.

The typical grounds for nullity or cancellation of a contract due to the conduct of one of the parties did not include violations of the obligation of good faith [30].

On the other hand, the judicial use of good faith in interpreting contracts tended to emphasize its role as a tool to invoke pre-existing rules and obligations. In this context, good faith served as a guiding principle for the courts to interpret contractual provisions in line with established norms and expectations [31].

Indeed, the implementation of Directive 93/13 introduces a potentially disruptive element of novelty by attributing to the violation of the rule of good faith and fairness a new meaning in terms of the validity of the contract. This new interpretation relies on a concrete assessment by the judge, which represents an atypical approach in the Italian legal system, as nullity issues are traditionally determined by specific legal provisions rather than judicial discretion. This shift towards a more discretionary approach to de-

24 Art. 1366 c.c.it. «*the agreement must be interpreted in good faith*».

25 Art. 1337 c.c.it. «*the parties must behave in good faith in negotiations and in execution of the contract*».

26 Art. 1375 c.c.it. «*the contract must be performed in good faith*».

27 Art. 1175 c.c.it. «*the debtor and the creditor must behave according to the rules of fairness*».

28 S. Rodotà, *Le fonti di integrazione del contratto*, Milano, Giuffrè, 1970.

29 Art. 1374 c.c.it. «*the parties are binded not only to what is expressed in the contract, but also to all the consequences deriving therefrom according to the law, or, failing that, according to custom and equity*».

30 See L. Mengoni, *Autonomia privata e Costituzione*, in *Banca, borsa*, 1997, p. 1 ff. Cf. however F.D. Busnelli, *Note in tema di buona fede ed equità*, in *Riv. dir. civ.*, 2011, I, p. 552.

31 See M. Barcellona, *Diritto, sistema e senso. Lineamenti di una teoria*, Torino, Giappichelli, 1996.

termining the validity of contracts represents a significant departure from traditional norms and practices.

5. Two unsuccessful 'spillovers': Definition of 'consumer'. *Scope of collective injunction* – The highlighted features (consumer law being a discipline of the general part of the contract and the regulation of the market through the discipline of the contract) explain why the legitimacy or opportunity of a regulation of unfair terms limited to consumer contracts has been questioned from the beginning.

It has been argued at the time that discrimination against consumer contracts compared to other contracts on the market did not appear justified, precisely because of the ratios behind regulatory intervention: the asymmetries of bargaining power and the need to address market failures occur not only in the final market of goods and services, but also in intermediate markets. Furthermore, the removal of barriers to competition in the context of building the internal market, the establishment of a regulatory environment capable of harmonizing the costs arising from legislation on the contractual activities of businesses in the market, and the promotion of fairer contractual relations in market exchanges were all factors that supported the need for intervention.

Scholars argue however that the mere presence of contractual 'weakness' is not sufficient to justify intervention in the contract. Instead, it is necessary for the legislator to «specify and qualify» this weakness «*by defining a category of individuals who typically demonstrate a need for protection, justifying on these bases the exceptions to subjective egalitarianism of traditional private law*», so that contractual 'weakness' (information, bargaining power) represents «*if anything, the ratio of new disciplines that derogate from the classic rules of the contract: the 'weak' party is on the contrary too generic a category to reach the nomothetic dimension*». Moreover, such an outcome would be «*in contradiction with the principle of generality of the rule which characterizes objective law*».

From a similar standpoint, it has been additionally argued that the terms «*fair*» and «*balanced*» are not self-contained in terms of meaning. «*Their communicative function relies on their relationship with the paradigm or model according to which they are applied. These terms indicate the outcome of an evaluation that occurs within a framework external to their own field, meaning that their significance is not contained within the expressions themselves*» [32].

Following these considerations, the Italian Constitutional Court was tasked with addressing the issue of the legitimacy of such interventions, including from a constitutional perspective. The Court acknowledged that the decision to focus this type of intervention on specific areas of the market falls within the discretion of the legislator. In

32 Thus, respectively, A. Nicolussi, *I consumatori*, in L. Nivarra (ed.), *Gli anni settanta del diritto privato*, Milano, Giuffrè, 2008, p. 422 f. (italics in the original), and D. Messinetti, *Il 'falso' problema normativo della giustizia contrattuale*, in *Riv. crit.dir.priv.*, 2009, p. 617.

other words, it is up to the legislator to determine the scope and extent of regulations addressing unfair terms in contracts within individual sectors of the market [33].

Coming to the issue of the definition of consumer, which is necessary to identify in order to delimit the scope of application of the regulation the thesis of ECJ jurisprudence, which emphasizes the exclusive 'consumer purpose' in determining the application of consumer contract regulations, has indeed prevailed. According to this perspective, consumer contracts should primarily serve the 'consumer purpose', and only contracts with an entirely marginal 'non-consumer purpose' may be considered without excluding the application of consumer contract regulations. In other words, the focus is on protecting consumers in transactions where the primary intention is for personal use or consumption, rather than for commercial or professional purposes [34].

One may identify an unsuccessful 'spillover' attempt in this context.

The term 'spillover' refers to an attempt to expand the application of consumer contract regulations to contracts that do not strictly fall within the category of consumer contracts.

In this case, it seems that there was an effort to extend the reach of consumer contract regulations beyond their intended scope.

However, this attempt was not successful, and the application of consumer contract regulations remained limited to contracts specifically intended for consumer purposes.

Indeed, there was an additional unsuccessful 'spillover' attempt in the first major dispute based on the regulation of unfair terms. The attempt aimed to extend the application of the injunction provisions, which appeared to have a broader scope, to include business-to-business (B2B) relationships. The argument put forth was that since the injunction provisions regulated market activity, they could also be applied to B2B relationships.

However, this attempt did not succeed, and the application of the injunction provisions

33 Const. Court of Italy, 22 November 2002, n. 469 (Contri), in *Foro it.*, 2003, I, c. 332 f.

34 Although it is known that: (a) in European law there is a tendency to shift the emphasis from the exclusive consumer purpose to the prevailing consumer purpose: for instance, in the directive on consumer rights (2011/83/EU), recital 17 explicitly expands the notion of a consumer to include cases where the individual has acted for reasons that are professional but limited enough not to appear predominant (see also, in the same vein, recital 18 of directive 2013/11 on ADR and recital 12 of directive 2014/17 on consumer mortgage credit); (b) in turn, in legal scholarship, facing the problem of cumulative purposes and of neutral purposes, there is a proposal to introduce a distinction between 'acts of the profession' and 'acts related to the profession', as well as between 'habitual acts related to the profession' and 'non-habitual acts related to the profession' (the latter to be included in the scope of application of consumer contracts regulation). For further clarification on this point, let me refer to A. Barenghi, *Diritto dei consumatori*, Milano, Wolters-Kluwer, 2020, p. 40, p. 44 ff.

remained limited to consumer contracts [35].

6. A statutory 'spillover': Asymmetric contracts between businesses (B2B). – The issue of whether corrective action is needed for contracts in B2B (business-to-business) areas has primarily emerged within the legislative sphere.

The legislator, recognizing the regulatory needs and protection mechanisms present in consumer-business relationships, has introduced a discipline analogous to that of consumer contracts in certain B2B areas. This recognition of similarities and the implementation of corresponding measures reflect the understanding that similar issues of fairness and power imbalances can arise in B2B transactions. Consequently, these legislative actions have led to discussions about the inclusion of such regulations within the broader framework of 'consumer law', as they address similar material concerns and seek to establish safeguards in contractual relationships beyond traditional consumer transactions.

The regulation on industrial subcontracting, as defined in Law 192/1998, addresses the issue of abuse of economic dependence and applies to all contracts between businesses. This provision aims to prevent unfair practices and protect the weaker party in a business relationship, similar to the principles underlying consumer protection laws [36].

Another relevant aspect is the regulation against delayed payments in commercial transactions, which implements a European Directive and introduces strict rules regarding payment terms, default interest, and nullity of clauses that are «grossly unfair to the detriment of the creditor». This regulation, outlined in Legislative Decree 231/2002 (implementation of directive 2000/35/EEC), reflects the need to address unfair practices in business-to-business transactions, particularly concerning delayed

35 The decision of the Court of Rome – while judging several dozen of unfair terms in the forms recommended or used by the Italian Banking Association and of two large banks such Banca popolare di Milano and Banca Fideuram – rejected this argument: *MFD vs. Banking Association (ABI), Banca Fideuram , Banca popolare di Milano*: Trib. Rome, 21 January 2000 (Lamorgese), in *Giur. it*., 2000, c. 247, followed by App. Rome, 24 September 2002 (Bernabai), in *Giur. it*., 2003, I, c. 119; and by Cass., 31 May 2008, n. 13051 (Salmè), in *Foro it*., 2008, I, c. 2474. Such decisions seem very useful (especially the first one, because the scope of the dispute then progressively narrowed in the subsequent levels of judgement) to appreciate the surprising delay of Italian banks in adapting to the European directive on *Unfair terms in consumer contracts*.

36 «The abuse by one or more companies of the state of economic dependence in which a customer or supplier company is found is prohibited. It is meant by economic dependence the situation in which a company is able to determine, in commercial relations with another company, an excessive imbalance of rights and obligations. Economic dependence is assessed also taking into account the real possibility for the party who has suffered the abuse to find satisfactory alternatives on the market».

payments [37].

The discipline of the 'commercial affiliation' or 'franchising' contract in Italy, governed by Law 129/2004, addresses the specific characteristics and requirements of this type of contractual relationship.

The Act 129/2004 introduces specific provisions to protect the interests of the 'weak' business, typically the franchisee, in the franchising relationship. The Act establishes requirements for the form and content of the contract, ensuring that essential information is provided to the franchisee before entering into the agreement.

The objective of this regulatory framework is to ensure transparency, fairness, and balance in franchising contracts. It aims to prevent the abuse of power by the franchisor and provide adequate safeguards for the franchisee. By addressing the specific needs and vulnerabilities of the franchisee, the legislation contributes to the overall objectives of fair contractual relations in the market [38].

The discipline relating to commercial relations within the agri-food chain in Italy, as established by Legislative Decree 24 January 2012, No. 1, converted into Law 24 March 2012, No. 27, had introduced specific provisions aimed at protecting the interests of the 'weak' contractors within this sector [39]. The legislation addresses the relationships between different actors in the agri-food supply chain, such as farmers, producers, distributors, and retailers.

The notion of «*market contracts law*» refers to the idea of a comprehensive legal framework that encompasses various types of contracts where one party is engaged in business activities.

These contracts involve interactions between businesses and consumers, users, or

37 «*The clauses relating to the payment term, the rate of default interest or compensation for recovery costs, for any reason envisaged or introduced in the contract, are null and void when they are seriously unfair to the detriment of the creditor. The judge declares, even ex officio, the nullity of the clause having regard to all the circumstances of the case, including the serious deviation from commercial practice in contrast with the principle of good faith and fairness, the nature of the goods or service object of the contract, the existence of objective reasons for derogating from the rate of statutory default interest, the terms of payment or the flat-rate amount due as compensation for recovery costs*».

38 «At least thirty days before signing a contract of commercial affiliation the franchisor must deliver to the aspiring affiliate a complete copy of the contract from to subscribe» (art. 4). « The franchisor must hold, at all times, vis-à-vis of the aspiring affiliate, a behavior inspired by loyalty, correctness and good faith and must promptly provide, to the aspiring affiliate, any data and information that the same deems necessary or useful for the purpose of stipulating the contract commercial affiliation, unless it is information objectively confidential or the disclosure of which would constitute violation of third party rights» (art. 6). «If one party has provided false information, the other party can request the cancellation of the contract pursuant to article 1439 of the civil code as well as compensation for damages, if due» (art. 8).

39 Refer now to Directive 2019/633/UE and Law 22 April 2021, No. 53, Article 7.

other agents who are also operating within their business capacity. The concept of «market contracts law» aims to avoid the «*abandonment of the fundamental concept of contract law while acknowledging the existence of different categories of contracts that reflect current economic and social values*» [40].

7. Widening of the definition ('consumer' and 'traveler', 'consumer' and 'microbusiness'). – The legislator, who previously used the terms 'consumer' and then 'tourist' to define the recipient of protection concerning the regulation of package travel, now adopts the term 'traveler'.

In recital 7, Directive 2015/2302/EU on package travel justifies the extension of the concept of a traveler to also include professionals (who do not travel as part of a general agreement instrumental to their business). According to recital 7 of Directive 2015/2302, «*In order to avoid confusion with the definition of 'consumer' used in other Union legislation, it is appropriate to define the persons protected by this directive as 'travelers'*».

«*It is not always easy to distinguish between consumers and representatives of small businesses or self-employed professionals who book travel related to their commercial or professional activities through the same channels used by consumers. This type of traveler often requires a similar level of protection*».

The position of small and micro-business owners assumes significance in consumer law in various other aspects. Firstly, in the regulation of unfair commercial practices, micro-enterprises are included as beneficiaries of protection, along with consumers.

However, generally speaking, there is also a general challenge of overcoming the persistent diversity of legal systems among Member States, which hinders the operations of businesses, especially small ones, beyond national borders and the establishment of cross-border relationships with consumers.

8. A denied spillover: the saga of the 'liability rules' vs. 'invalidity rules' principle: *Cass., s.u., 19 dicembre 2007, n. 26725*. – «*Regarding the nullity of a contract due to contravention of mandatory rules in the absence of an explicit provision in this regard (so-called 'virtual nullity'), the traditional approach should be confirmed. Unless otherwise stipulated by law, only the violation of non-derogable rules concerning the validity of the contract can lead to its nullity, while the breach of other imperative rules relating to the conduct of the contracting parties may give rise to liability. Consequently, in the context of financial intermediation, the violation of duties of information towards the client and proper execution of transactions, which the law imposes on authorized entities providing financial investment services (specifically, according to Article 6, Law No. 1/1991), can result in pre-contractual liability with consequent damages*». Such is the principle of law

40 G. Oppo, *Categorie contrattuali e statuti del rapporto obbligatorio*, in *Riv. dir. civ.*, 2006, III, p. 43 ff.

affirmed in a famous 2007 Supreme Court judgment [41].

«*The petitioner, alleging the violation of Article 1418 of the Civil Code and Law No. 1 of January 2, 1991, Article 6, criticized the appellate court for affirming that the violation of the provisions through which the aforementioned Article 6 imposes certain behaviors on financial intermediaries towards their clients, affecting these provisions in the pre-contractual or execution phase but not the content of the contract, could not result in its nullity*».

«*Otherwise – argues the petitioner – it would never be possible to derive the nullity of a contract from the violation of imperative rules that impose limits on the parties' freedom concerning external aspects of the transaction, such as the quality of the parties or the prerequisites and procedures of contracting. Conversely, there are numerous cases (for example: lack of authorization to carry out brokerage activities, failure to fulfill preliminary obligations in currency matters, and similar situations) in which the violation of rules unrelated to the content of the contract has been deemed sufficient to cause nullity*».

Such is the answer of the Court: «*The rules in question have an imperative character. They are established not only in the interest of the individual party but also in the general interest of the integrity of financial markets. These rules are binding on the will of the contracting parties. However, this significance alone is not sufficient to demonstrate that the violation of one or more of these rules leads to the nullity of contracts entered into by the intermediary with the client. It is evident that their violation cannot be devoid of legal consequences – as will be discussed – but it does not necessarily result in the nullity of the contract*».

The key lies in *distinguishing between rules of conduct for the parties and rules pertaining to the validity of the contract*. The violation of the former, both in the pre-contractual phase and in the implementation of the relationship, unless otherwise provided by law, gives rise to liability and may be grounds for contract termination if it constitutes a form of non-compliance with the general duty of protection and specific performance obligations imposed on the party.

However, it does not affect the formation of the contractual act, at least not in a way that renders it null and void.

41 This issue has generated a major discussion in Italian literature: see, *inter alios*, E. Scoditti, *Regole di comportamento e regole di validità: i nuovi sviluppi della responsabilità precontrattuale*; G. D'Amico, *Regole di validità e regole di comportamento nella formazione del contratto*, in *Riv. dir. civ.*, 2002, I, p. 37 ff.; A.A. Dolmetta, *Strutture rimediali per la violazione di «obblighi di fattispecie» da parte di intermediari finanziari (con peculiare riferimento a quelli di informazione e di adeguatezza operativa)*, *www.ilcaso.it*, sez. II, *dottrina, opinioni e interventi*; F. Sartori, *La (ri)vincita dei rimedi risarcitori: note critiche a Cassazione, (S.u.) 19 dicembre 2007, n. 26725*, in *www.ilcaso.it*, sez. II, *dottrina, opinioni e interventi*, doc. n. 92; D. Maffeis, *Discipline preventive nei servizi di investimento. Le sezioni unite e la notte (degli investitori) in cui tutte le vacche sono nere*, in *Contratti*, 2008, p. 403 ff.; F. Galgano, *Il contratto di intermediazione finanziaria davanti alle Sezioni unite della Cassazione*, in *Contratto e impresa*, 2008,p. 3 ff.

The fundamental obligation for each party to act in good faith and fairness, as stated in the civil code, leads to consequences that may, under certain conditions, affect the survival of the contract (such as annulment for fraud or duress, rescission for gross disparity, or termination for non-performance) and always entail contractual or pre-contractual liability. However, these consequences are evidently not considered sufficient to determine the radical nullity of the contract (although it may be subject to annulment, rescission, or termination), even though the obligation to act with good faith and fairness is unquestionably of an imperative nature.

This is also because the aforementioned duty of good faith and the duties of conduct, in general, are inherently linked to the circumstances of the specific case, making it impractical, in principle, to consider them as validity requirements that need to be examined according to predetermined rules in order to ensure legal certainty.

The assumption that, in modern legislation (also influenced by European regulations), the distinction between rules of validity and rules of conduct is becoming blurred, and there is a trend to apply the principle of good faith in the assessment of the validity of the act, is not sufficient to demonstrate that the above-mentioned principle has already been uprooted from the system of the civil code. It is possible that such an evolutionary tendency is indeed present in various sectors, but there is a difference between a tendency and an established principle. It should also be noted that the increasingly fragmented and less systematic nature of modern legislation requires caution in inferring from specific sectoral provisions the existence of new principles to advocate their general value and assert their applicability in sectors and cases not explicitly contemplated by specific and well-defined provisions.

Moreover, there has never been any doubt that the legislator can isolate specific behavioral circumstances by elevating the corresponding prohibition to the rank of a validity rule for the act. However, this falls within the scope of the already mentioned provision of the third paragraph (not the first paragraph) of the aforementioned Article 1418 of the civil code. In other words, these are still particular provisions that, in light of the aforementioned framework of the civil code, cannot be elevated to a general principle or applied in sectors where similar provisions do not exist, especially when, as in the present case, the alleged nullity should fall into the peculiar category of so-called protective nullities, i.e., nullities of a relative nature, which already have a special character in themselves».

9. The general theory of contract law and the 'spillover': the influence of the Directive 93/13 on civil law – A tale of disgraceful deposits and other occurences. – In recent case law, there have been attempts to extend the scope of consumer remedies and shape protective measures in a manner similar to consumer contracts, precisely beyond their original domain of application.

This includes invoking principles such as good faith, or in other cases, assessing the

lack of merit of the interests under Article 1322 of the Italian Civil Code [42]. This category seemingly appears to counter agreements of particular severity. However, this provision is not considered capable of pursuing instances of contractual justice, as they tend to be vague and insubstantial, especially when seeking to establish a 'balance between performances' by appealing to constitutional principles. This assessment is based not only on the historical origin of the codified provision but also on the inconsistency and vagueness of a generic claim to shape acts of private autonomy for the purpose of social utility [43].

Many doubts have been raised about the ease with which numerous judicial cases, the one mentioned being just one of the relevant ones, have used constitutional principles – particularly the principle of solidarity – in order to assert control over the fairness of the contract through Article 1322 of the Civil Code regarding the worthiness of interests, or the conflict with the rule of good faith permeated by the constitutional rule of solidarity (Art. 2 It. Const.), often neglecting, it is said, a deeper examination of the interpretive framework and resources of the system [44].

Indeed, beyond the situations where the content of the contractual rule directly conflicts with an inviolable right, when nullity can easily occur thanks to the receptive filter of public order, it is more difficult to accept that nullity or lack of worthiness can be invoked before a principle such as solidarity, which not only expresses a directive of conduct but also addresses, in addition to individuals, the legislator. Obstacles in this direction do exist, starting with the classic distinction between rules that pertain to the behavior and therefore the liability of the parties, and rules that instead concern the contents and validity of the contract [45].

Furthermore, other objections must be taken into account. The first resides in the very

42 Art. 1322 c.c. It., under the heading '*party autonomy*' the cornerstone norm prescribes in the first para. that «*the parties are free to determine the content of the contract within the limits imposed by the law*» and adds in the second para. that «*the parties may also enter into contracts that do not fall under specific regulations, provided that they aim to protect interests recognized by the legal system [interessi meritevoli di tutela secondo l'ordinamento giuridico]*».

43 In the most recent (and indeed overflowing) literature, see extensively on this matter F. Azzarri, *Principio di trasparenza e prospettive rimediali: a proposito dei mutui (ai consuamtori) e dei leasing (ai professionisti) indicizzati a una valuta straniera* [*Principle of transparency and remedial perspectives: concerning mortgages (for consumers) and leasing (for professionals) indexed to a foreign currency*], in *Nuove leggi civ. comm.*, 2022, p. 129 ff., and futher literature cited therein.

44 V. D. Carusi, *Storia della caparra infame. Il diritto dei contratti tra «interpretazione analogica» e istanze di «giustizia materiale»* (*A tale of the disgraful deposit: Contract law between 'analogical interpretation' and demands for 'substantive justice'*), in A. D'Angelo-V. Roppo (eds.), *Annuario del contratto 2016*, Torino, Giappichelli, 2017, p. 43 ff.

45 Among others, v. F. Azzarri, cit.; E. Navarretta, *Il contratto «democratico» e la giustizia contrattuale* (*The 'democratic' contract and contractual justice*), in *Riv. dir. civ.*, 2016, p. 1267 ss.; in contrario, v. P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti* (*Civil law within constitutional legality according to the Italian-European system of sources*), IV, *Attività e responsabilità*, Napoli, ESI, 2020, p. 115 ss.

latitude of the solidaristic precept, the penetration of which into the contract, at least for the sake of certainty, should be circumscribed in its conforming scope and presuppositions by the primary intervention of the legislator, as it is not conceivable to attribute to the judge an indiscriminate power of controlling the contractual balances. Then, the connection between the principle of solidarity and nullity, regardless of the technical means used to 'embed' it into civil law (namely, the judgment of worthiness or objective good faith), would end up bypassing the apparatus of contractual remedies (invalidity, rescission, specific consumer remedies) [46].

In a system of written law, such extensive leeway is not principle-consented for judges, and one sometimes gets the impression, while reading jurisprudential records, that, following the integration of internal legal systems into European law, there is a temptation to act like a common law judge without being subject to the constraints and lacking the traditional training of a judge in that environment

One of such cases was decided by the Constitutional Court, in two subsequent decisions, which are almost identical to each other, both pronounced following a referral of the constitutional question by the Court of Tivoli. The question was declared manifestly inadmissible in both cases: Constitutional Court, 24 Oct. 2013, No. 248 and Constitutional Court, 2nd Apr. 2014, No. 77.

«*In a civil lawsuit filed to obtain the refund of a sum that the plaintiffs claimed to have paid as an advance (approximately one-third of the agreed amount) for the purchase of a property, which could not take place due to the non-disbursement of a bank loan intended to cover the remaining price, the Court of Tivoli, before which the case was brought, raised a constitutional question regarding Article 1385, paragraph 2, of the Civil Code. The court questioned the constitutionality of the provision, which does not allow for a fair reduction of the amount to be retained or the double amount to be refunded in cases of manifest disproportion or justified reasons when the party who paid the advance is in default or when the party who received it is in default. According to the referring court, in this specific case, there is a need for a balanced protection of the rights of the non-defaulting party (i.e., the seller) to receive the advance, and the opposing interest of the defaulting party (i.e., the prospective buyer) not to lose a significant and excessive amount of money due to their own default, for which they have made every effort to find a solution, albeit with some negligence. However, the automatic nature of the provision in question does not leave room for the judge to apply any restorative remedy based on objective fairness and the overall contractual balance. Hence, the doubt about its 'unreasonableness'*»;

46 See B. Grunewald, *Numerus clausus der Gestaltungsklagen und Vertragsfreiheit*, in *ZZP*, 1988, p. 164, where a sentence by Werner Flume is mentioned, regarding *Geschäftsgrundlage*, warning «*daß diese Rechtsgestaltung nicht die Angelegenheit eines jeden Tages sein kann, wenn auch jeder Tag die Anregung geben mag*» (W. Flume, *Allgemeiner Teil des Bürgerlichen Rechts*, II, *Das Rechtsgeschäft*[3], Berlin-Heidelberg-New York, Springer, 1979, p. 528).

«*The referring court, on one hand, fails to fully investigate the actual scope of the agreements concluded by the contracting parties in order to assess whether the legal designation aligns with the actual function of the confirmatory deposit ('caparra confirmatoria'). On the other hand, it overlooks the potential intervention by the judge in relation to a contractual clause that reflects, as argued in this case, an unfair and significantly unbalanced regulation of the parties' conflicting interests. This is due to the court's ability, ex officio, to declare the nullity (total or partial) of the clause under Article 1418 of the Civil Code, based on its inconsistency with the principle of Article 2 of the Constitution (regarding the fulfillment of non-derogable duties of solidarity) which directly applies to the contract*, in conjunction with the principle of good faith, *to which it ascribes normative force. This approach aims to align the contractual relationship with the protection of the interests of the negotiating partner, to the extent that it does not conflict with the interests of the obligated party*» [47].

However regarding the law of deposit, it is relevant to see what recent case-law says: «*Given the structural and functional differences between the penalty clause and the confirmatory deposit ('caparra confirmatoria'), the power of reduction granted to the judge by Article 1384 cannot be applied to the confirmatory deposit. While the penalty clause serves the purpose of coercion and predetermined compensation in case of non-performance, the confirmatory deposit also serves as a partial advance payment in cases of performance. Furthermore, Article 1384, by granting the judge the power to modify the content of private agreements, is a provision that cannot be analogously applied as it is exceptional compared to the general rule established by Article 1322, which requires respect for the contractual autonomy of the parties*» [48].

«*The power of the judge to reduce the penalty, as provided for in Article 1384, cannot be exercised for the confirmatory deposit ('caparra confirmatoria'). This is due to the exceptional nature of the provision, which precludes its analogical application, as well as the structural differences between the two institutions. While both the penalty clause and the confirmatory deposit serve the function of pre-determining damages in case of non-performance, the confirmatory deposit also serves as a partial advance payment*

47 The Court refers to some decisions of the Italian Supreme Court such as Cass. 1994, n. 10511; Cass., 1994, n. 3775; Cass., 2005, n. 18128; Cass. 2009, n. 20106.

48 See Court of App. Firenze, 9 January 2023, n. 43, *Immobiliare Nievole* (in the specific case, the first-instance judgment had ordered the payment of double the agreed-upon confirmatory deposit, amounting to 180 million lire [equivalent to 92,962.24 euros], and the appellate court had reduced the amount that the party receiving the deposit could retain to 10,000 euros); *contra*, see D. Carusi, *op. cit*. Cf. It. Cass., 29 November 2022, n. 35068, *S.C.M.*: «*in the context of a preliminary contract, both the confirmatory deposit and the penalty clause, stipulated for the case of non-performance, reveal the common intention to induce the obligated party to fulfill their obligations. Therefore, both can coexist within the same contract. However, these two institutions differ in their scope of application. The confirmatory deposit is applicable when, as a result of withdrawal, the contract cannot be fulfilled anymore, while the penalty clause is applicable when the non-defaulting party prefers to demand specific performance or termination of the contract*».

in the event of performance» [49]; «*the structural and functional differences between the penalty clause and the confirmatory deposit prevent the analogical application of the exceptional provision that allows for the reduction of an excessively high penalty*», and therefore «*a judgment of the appellate court that has arbitrarily reduced the confirmatory deposit due to it being deemed excessive should be quashed without remand*» [50].

10. The general theory of contract law and the 'spillover': the influence of the Directive 93/13 on civil law - nullity, default rules, legal infrastructures. – In European law, unfair terms are deemed ineffective and cannot produce any legal effect. This principle is based on Article 6 of Directive 93/13/EEC and aims to enhance the effectiveness of rules regarding unfair terms in contracts. Moreover, according to the ECJ, the rule prohibits the revision or modification of unfair clauses.

The Court of Justice considers the effectiveness of the remedy to be compromised when professionals can rely on judicial integration or correction to obtain some form of protection for the interests included in the unfair clause, even if the criteria for such protection differ. In other words, allowing professionals to seek judicial intervention or correction would undermine the purpose of ensuring the ineffectiveness of unfair terms [51].

Therefore, the ECJ considers the application of supplementary or mandatory rules by the judge to be highly exceptional. Such an approach is only deemed permissible where it is necessary for the survival of the contract and the termination of the contract could jeopardize the effective protection of the consumer.

When the nullity of non-essential terms creates a void that needs to be filled, applying provisions of law regarding matters such as forfeiture, burden of proof, or competent court may not be a viable solution. Penalty clauses and the determination of default interest are additional examples where the possibility of integrating or applying contract law provisions becomes relevant.

Excluding the possibility of such integration or application in cases involving unfair terms not only nullifies the advantages obtained through those unfair terms but also deprives the professional party of the remedies that would typically be available to the contracting parties in those areas. This includes the exercise of autonomy that would normally be recognized in contractual matters, including the part that goes beyond the principle of fairness.

The balance between protecting consumers from unfair terms and preserving the contractual autonomy of the parties can be complex. The courts must carefully assess each case to ensure that the remedies and consequences of unfair terms are proportionate

49 It. Court of Cass., 25 August 2020, n. 17715, *V.L.*

50 It. Cass., 30 June 2014, n. 14776, *Unione generale immobiliare*.

51 See ECJ, 14 June 2012, C-618/10, *Banco Español*.

and align with the principles of fairness and legal certainty. While unfair terms are void and should not be enforced, the approach to penalties and default interest should consider the legitimate interests of both parties and aim to achieve a just outcome in line with the objectives of consumer protection and contract law.

Domestic law contemplates a power of moderation on the part of the judge (see art. 1384 of the civil code)[52]. Excluding the opportunity for integration or application of contract law provisions in the field of consumer protection serves to enhance the deterrent effect of remedies against unfair terms on businesses. The risk at stake, however, is not only the acquisition of unfair benefits but also the overall contractual benefits obtained. By applying the principles of effectiveness and dissuasiveness in consumer protection, European law has assigned a punitive function to nullity.

But the remedy must also be proportionate. The generalized denial of the judge's power of moderation, even when this is envisaged by the legislator, is not consistent with this principle. It is not clear why, where the national law provides for it, it cannot be the judge who 'moderates' the effects of the clause in such a way that the remedy is in any case dissuasive and effective, as well as, precisely, proportionate to the seriousness of the imbalance.

Another example is that of supplementary rules. According to the jurisprudence of the ECJ, if the supplementary rule determines a structure of contractual interests, in the event that the judge has to apply it in place of the clause declared void because it is unfair, it ends up leading to a revision of the contract which diminishes the effectiveness of the prohibition of unfair terms.

In this sense, the Court of Justice has even excluded not only the possibility of giving rise to the reduction of the penalty, but even the possibility of ordering compensation for the consumer's default (while the non-contractual liability is reserved) [53]. In such cases, again, the need of coordination of European law, and of its judicial configurations, with the system of domestic law is at the very least problematic [54].

52 «*The penalty can be reduced fairly by the judge, if the principal obligation has been partially performed or if the amount of the penalty is grossly excessive, always having regard to the interest that the creditor had in the performance*».

53 See ECJ, 7 November 2019, C-349/18 to C-351/18, Kanyeba et al., § 74.

54 These issues are discussed in depth, inter alios, by A. D'Adda, *Nullità parziale e tecniche di adattamento del contratto*, Padova, 2008; Id., *Giurisprudenza comunitaria e 'massimo effetto utile per il consumatore': nullità (parziale) necessaria della clausola abusiva e integrazione del contratto*, in *Contratti*, 2013, p. 23; S. Pagliantini, *Post-vessatorietà ed integrazione del contratto nel decalogo della CGUE*, in *Nuova giur. civ.*, 2019, p. 561 ff.; G. Vettori, *Il diritto privato europeo fra legge, Corti e diritti*, in *Riv. trim. dir. proc. civ.*, 2018, p. 1341 ff.; P. Iamiceli, *Nullità parziale e integrazione del contratto nel diritto dei consumatori tra integrazione cogente, nullità 'nude' e principi di effettività, proporzionalità e dissuasività delle tutele*, in *Giust. civ.*, 2020, p. 713 ff.

11. Legal infrastructures and jurisprudential 'spillovers': the case of the ex parte payment order as an example of the influence of Directive 93/13 on civil procedure. – With four judgments dated 17 May 2022, the ECJ raised a significant issue in domestic civil procedure [55]. As far as Italian law is concerned, such issue was resolved by the Court of Cassation, in joint session, with its decision dated 6 April 2023, n. 9479 [56], substantially revising civil procedural law regarding ex parte orders, their execution, and the limitations of delayed opposition.

The Supreme Court, on the basis of the ECJ judgements, therefore prescribes: (a) that the motivation of the payment order must necessarily contain a reference to the assessment of the non-unfairness of the contractual terms; (b) that following issuance of the payment order, when such motivation is missing, the enforcement judge has the duty to detect ex officio the existence of an unfair term; (c) in case of missing reasoning on unfairness and of failure to warn about the possibility of asserting said abusiveness only within a certain term the consumer debtor has the faculty to file a belated opposition; (d) to this aim Art. 650 c.p.c. must be disapplied.

It seems clear that this mode of reasoning goes well beyond the interpretation of national law (it should be noted, moreover, that the appeal is decided 'in the interest of the law' as permitted by Italian procedure, because the dispute had already been resolved at the time). In fact, it involves a substantial revision of national procedural norms, driven by the need for cooperative coordination with European law and the case law of the ECJ.

The case involved the issuance of an ex parte order, which is an order to pay or deliver based on written evidence, issued by the Judge without hearing the other party (*inaudita altera parte*), with the provision that the debtor can initiate regular adversarial proceedings within 40 days. In this case, the ex parte order was issued in favor of a professional, without the court detecting ex officio the presence of an unfair clause that introduced a forum different from the mandatory consumer forum.

The consumer who was subject to the ex parte order complained in the legal proceedings that the judge who issued the payment order failed to raise the unfairness of a clause that deviated from the principle of the mandatory consumer forum. The question at hand was whether or not the directive allows for a non-opposed ex parte order to prevent the subsequent finding of invalidity of unfair clauses.

The response from the European Court of Justice (ECJ) was that a payment order that has not been opposed and has become definitive should not preclude the enforcement

55 in C-600/19, Ibercaja Banco; sentenza in cause riunite C-693/19, SPV Project 1503, e C831/19, Banco di Desio e della Brianza; sentenza in C-725/19, Impuls Leasing Romania; sentenza in C-869/19, Unicaja Banco; sentenza in cause riunite C-693/19, SPV Project 1503, e C831/19, Banco di Desio e della Brianza

56 Such decision is summarized in the present chapter.

judge from identifying the unfair clause (and consequently, the invalidity of the order, even if it has become definitive). In other words, the non-opposed ex parte order does not prevent the court from examining and invalidating unfair contractual terms.

To address the imbalance between consumers and professionals, the national court needs to examine on its own initiative (ex officio) the unfairness of a contractual term that falls under the scope of Directive 93/13. This means that if the court has the necessary legal and factual elements to determine the unfairness of a term (which, according to Article 6(1), does not bind the consumer), it must carry out such an examination. The court has the responsibility to ensure that unfair terms are not enforceable against consumers. This requirement is aimed at protecting consumers and upholding the principles of fairness and consumer rights.

Member States are responsible for ensuring that their national procedures meet the requirements set by EU law while providing adequate protection to consumers against unfair terms. While ensuring consumer protection, Member States are not obligated to disregard their own procedural rules, as long as those rules are equivalent to similar domestic situations and do not unduly hinder the effective exercise of rights granted by EU law. In this case, the principle of equivalence is respected because «national law does not allow the enforcement judge to review an order that has the authority of res judicata, even in the presence of a possible violation of national rules of 'ordre public'» [57]. However, in a dynamic and complex process of integration, the internal discipline on the process, where necessary, must be flexed to the point of being adequate and congruent with the standards required by Euro-unitary law [58].

The omission of the judge of the interim proceedings, if not remediable in a subsequent venue, would definitively prevent the substantial gap existing in the process itself from being filled in order to be able to exercise, for the first time, one's defense in opposition to the ex parte order with full knowledge of the facts [59]. In other words, the *provocatio ad opponendum* that the interim order triggers would otherwise be missing, requiring that the debtor take action within a certain period to otherwise avoid the so-called *impositio silentii* on the issued ex parte order.

Precisely the impediment to the process, deferred, on the preliminary ruling of the unfairness of the clauses, consequent to the omission of the judge, frustrates the right of action and defense of the consumer.

This outcome is the result of a balance that the ECJ has carried out, oriented towards the «adequacy between protection needs and available forms of protection», between the needs of certainty of legal relationships, presided over by the principle of immutability of the decision, and those of effectiveness of the consumer protection imposed

57 *Ibercaja Banco.*

58 It. Court of Cass., S.U., 30 ottobre 2020, n. 24107

59 *Ibercaja Banco.*

by the directive, giving prevalence to the latter.

The outcome seems consistent with the principles of hearing and the full deployment of the right of action and defense in court which represent, together with the independence and impartiality of the judge, as well as the motivation of judicial measures, the cornerstones of the «due process» of which to articles 47 CFRUE and 6 ECHR and which, likewise, constitute the indefectible nucleus of the fundamental guarantees also administered by the Constitution, articles 24 and 111, as «supreme principles of the Italian constitutional order» [60] pertaining to the jurisdictional function.

The necessary tie between supranational and internal legal systems, which is necessary to make effectiveness of protection real in its dual declination: negative (aimed at overcoming the obstacles that, at a national level, stand in the way to the full realization of the freedoms and rights recognized by the Union) and positive (aimed at identifying the measures and remedies suitable for the full expansion of the protection of those freedoms and rights).

A way, which, at the same time, however, is such as to preserve, as far as the aforementioned pre-eminent principle makes it possible, the margins of procedural autonomy, an area in which it is possible to translate, in cooperative terms, the persistent value of the procedural system national.

The national judge is therefore required to examine ex officio unfairness, provided that the elements of law and of fact already in its possession give rise to serious doubts in this regard, having therefore to adopt disclosure measures necessary to complete the file, asking the parties to provide additional information for this purpose.

Still in the context of the interim procedure, in which, precisely, the participation of the consumer-debtor is allowed only in the subsequent and unnecessary phase of opposition to the ex parte payment order, the ECJ stated that the duty of the judge to disapply an unfair contractual term may concern even only «*a part of the credit asserted*» and, in this case, «*the judge has the right to partially reject said claim, provided that the contract can exist without any other modification or revision or integration, a circumstance which falls to the said judge verify*» [61].

60 It. Const. Court, 22 Oct. 2014, n. 238. Art. 47 states: «Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice». Art. 6 states: «In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society...».

61 *Profi Credit Bulgaria.*

The articles 633-644 c.p.c. [62] make it possible for the judge to control unfair terms of the contract stipulated between the professional and the consumer, thus, based on the results of the official findings, to lead to the rejection of the interim claim (which does not preclude the re-submission of the request: art. 640, last paragraph, of the Code of Civil Procedure), or to its permitted partial acceptance [63].

The judge will therefore have to urge the petitioner to «*provide proof*» of the credit also from the point of view that the related entitlement, in part or in full, is not excluded from the profiles of contractual abuse found, to this end requesting that it be relevant documentation has been produced (first of all, the contract on which the credit is based) and/or that the necessary clarifications have been provided.

The obligation of the judge's in function of the effectiveness of consumer protection does not go so far as to require that the exercise of the investigative powers, in the hands of the same judge, be such as to make it exorbitant with respect to the structure, function and purpose of the *inaudita altera parte* phase as configured by the national legislator, in which the condition of admissibility of the application for an ex parte order is still the «written proof» (articles 633, paragraph 1, n. 1, and 634 of the Code of Civil Procedure).

Therefore, where the assessment of unfairness imposes, due to its complexity, an evidentiary phase that is not consistent with this configuration (e.g., requesting to listen to witnesses or expert witnesses), the judge will have to reject the application for an ex parte payment order, which the plaintiff may in any case repropose on the basis of more congruent probative elements.

62 Art. 633 c.p.c.: «*Upon the request of a creditor for a specific sum of money or a certain quantity of fungible goods, or for the delivery of a specific movable object, the competent judge may issue an order for payment or delivery in the following cases. If there is written evidence of the claimed right. If the claim relates to fees for judicial or extrajudicial services or reimbursement of expenses incurred by lawyers, court clerks, judicial officers, or anyone else who has provided their services in connection with a legal proceeding. If the claim relates to fees, rights, or reimbursements owed to notaries in accordance with their professional law, or to other individuals practicing a liberal profession or art for which there is a legally approved tariff. The order may also be issued even if the right depends on a counter-performance or condition, provided that the petitioner provides elements that reasonably suggest the fulfillment of the counter-performance or the occurrence of the condition*». Art. 634 c.p.c.: «*Written evidence admissible under Article 1(1) includes private written policies and unilateral promises, as well as telegrams, even if they lack the requirements prescribed by the Civil Code. For claims relating to the supply of goods and money, as well as services provided by entrepreneurs engaged in commercial activities and self-employed individuals, including those provided to non-commercial entities, authenticated extracts from accounting records governed by Articles 2214 and following of the Civil Code are also considered valid written evidence. These extracts must be properly stamped and authenticated in accordance with legal requirements. Additionally, authenticated extracts from accounting records required by tax laws are accepted as valid written evidence if they are maintained in compliance with the prescribed rules for such records*».

63 It. Court of Cass., S.U., 1° marzo 2006, n. 4510.

The system in this way satisfies the request for protection that Union law requires not to find obstacles in the procedural model of domestic law, which with this request would, on the other hand, come into conflict if interpreted in the sense that the control over the unfairness of the clauses cannot be fulfilled in the interim proceeding, since it would necessarily imply the contradictory of the parties, both by reason of the factual circumstances on which it is based (art. 34, 1st paragraph, cons. code), and by reason of the loss of speed typical of the ritual that such an evaluation would require, with the consequence that the decree would have to be issued in any case and that control postponed to the opposition proceedings.

The Supreme Court, on the basis of the ECJ judgements, therefore prescribes that the motivation (provided for by art. 641 of the code of civil procedure) of the payment order must necessarily contain a reference to the assessment of the non-unfairness of the contractual terms that are relevant to the discussion, even in summary terms and also per relationem to the introductory appeal.

This, it is said, to allow the consumer debtor to «assess with full knowledge of the facts» [64] whether or not it is necessary to file an opposition against the interim order.

The payment order must therefore identify the aspect of the contract which affects the acceptance, in whole or in part, of the creditor's request and which therefore excludes its unfairness.

Furthermore, ECJ provides that in the ex parte order it will be necessary to insert the warning that in the event of no opposition the party «*will lose the possibility of asserting the possible abusive nature*» of the clauses of the contract [65].

The Supreme Court notes that this clarification fits well the art. 641 provision where it provides that warning is given to the debtor that in case of non-opposition the decree will become final and no longer contestable [66].

Once the order presents the aforementioned motivation and warning, the protection of the consumer is to be considered respectful of the principle of effectiveness and the

64 *Ibercaja Banco.*

65 *Ibercaja Banco.*

66 Art. 641 It. c.p.c.: «*If the conditions provided in Article 633 are met, the judge, by a reasoned decree to be issued within thirty days from the filing of the petition, orders the other party to pay the requested sum or deliver the requested object or quantity of goods, or alternatively, the amount specified in Article 639, within a period of forty days. The decree explicitly warns that opposition can be filed within the same period according to the following articles, and in the absence of opposition, enforcement proceedings will be initiated. When there are valid reasons, the time limit can be reduced to ten days or extended to sixty days. If the respondent resides in one of the other European Union states, the time limit is fifty days and can be reduced to twenty days. If the respondent resides in other states, the time limit is sixty days and, in any case, cannot be less than thirty days nor exceed one hundred twenty days. In the decree, except for decrees issued based on titles that already have enforceable effect under existing provisions, the judge determines and orders the payment of costs and fees*».

maturation of the term referred to in art. 641 c.p.c., without any objection having been proposed, will no longer allow subsequent disputes on the question of unfairness of the contractual clauses.

In the event of non-compliance with these provisions, when the enforcement judge is called to detect the existence of the abusive clause, art. 650 c.p.c. on delayed opposition, with the necessary adjustments.

The enforcement judge has the power/duty to detect ex officio the existence of an unfair term which affects the existence or the amount of the credit covered by the order.

To this aim, he will have to carry out a summary investigation, first of all acquiring the deed from which the credit derives, inviting the creditor to produce the deed from which the credit derives when he sets the hearing.

As a result, if the clause is to be considered unfair, he informs the parties and particularly the consumer-debtor that within 40 days – that in the case the consumer does not appear before the court is to be served through the clerk's office – he can file an opposition to an ex parte order and thus assert (only and exclusively) the unfairness of the term affecting the recognition of the credit subject to the ex parte payment order.

Before the maturity of the aforementioned term, the judge will abstain from proceeding with the sale or assignment of the asset or credit.

Through the conforming interpretation of paragraph 1 of the art. 650 c.p.c., the absence of reasons for the ex parte payment order in terms of assessment of unfairness and the failure to warn about the possibility of asserting said abusiveness only within a certain term constitute a hypothesis attributable to the regulatory provision of «unforeseeable circumstances or force majeure», which gives the consumer debtor the faculty, even though he is the recipient of the notification of the order, to file a belated opposition even though he has had knowledge of the order whose ritual notification he was the recipient.

Such interpretation is not inhibited by the legislative statement and is supported by the already highlighted reasons for the effectiveness of consumer protection due to its structural position of weakness due – not only, but significantly – to an information deficit that can only be overcome thanks to an external intervention: that of the official relief of the judge.

It is an interpretation which, in bringing the provision of national law which contemplates the aforementioned general clauses into conformity with Union law, and it does not, however, fall short of the prescriptive scope plausibly attributable to the same paragraph 1 of the art. 650 c.p.c., since the «*fortuitous event*» or «*force majeure*»

envisaged therein were assumed [67] precisely in the meaning of «*cause ... not imputable*» or of «circumstances not dependent on ... the will» impeding the exercise of the right of action and defense in court (and in the non-conflicting interpretation of this Court as an «*external impeding force*» and «*fact of an objective nature detached from the human will*») [68], as opposed to a conduct (precisely that of making the deadline for filing an objection «*run unnecessarily*») put in place «*voluntarily or negligently*».

The further adaptation of the internal procedural law concerns the term within which to propose the delayed opposition, since the last paragraph of the art. 650 c.p.c., in establishing that the «*opposition is no longer admitted after ten days from the first act of execution*», contains a provision which, unlike that of paragraph 1 of the same provision, does not allow – according to the hermeneutical criteria that can also be used to give entrance to a reading that complies with supranational law – an interpretation that can deviate from the tenor of the statement which strictly defines the perimeter in which it is possible to propose the opposition, such as to jeopardize the right to exercise it in any different hypothesis.

To this aim, therefore, it is necessary to disapply the last paragraph of the art. 650 c.p.c. and find the term of 40 days from the art. 641 of the Code of Civil Procedure, i.e. a term that is still taken from within the discipline dictated for opposition to an ex parte payment order and whose compliance with the criterion of effectiveness cannot be doubted.

67 It. Const. Court 20 May 1976, n. 120: «*declares the constitutional illegitimacy of the art. 650, first paragraph, of the code of civil procedure in the part in which it does not allow the late opposition of the defendant who, despite having been aware of the payment order, has not been able, due to unforeseeable circumstances or force majeure, to lodge an opposition within the term set in the decree*».

68 It. Court of Cassation, 20 November 1996, n. 10170 and It. Court of Cassation, 4 July 2019, n. 17922.