

The European Union’s Influence on English Consumer Contract Law

Geraint G. Howells*

ABSTRACT

The European Union has introduced many consumer protection laws. As the U.K. prepares to leave the Union it is timely to reflect on the impact of Europe on U.K. consumer law. Unfair terms is taken as a case study as it involved the U.K. adopting a good faith standard which has traditionally been seen as alien to common law traditions. There is also a divergent impression given as the Court of Justice of the European Union has appeared open to using the rules to protect consumers, whereas the House of Lords/Supreme Court has found against consumers in three cases where the unfairness test was raised. However, it is argued that the U.K. has been able to handle the European test and there is nothing intrinsic in the common law approach that runs counter to the European unfair terms regime. All regimes struggle with finding the right balance of consumer protection. However, criticism can be made of the unwillingness to refer key issues to Luxembourg under the preliminary reference procedure. The freedom of the U.K. to deviate from European law will turn on any Brexit deal, but it is unlikely there will be much demand for change in this area of law.

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* Dean and Chair Professor of Commercial Law, City University of Hong Kong. Thanks to Christian Twigg-Flesner, Chris Willett, and Thomas Wilhelmsson for valuable comments. Research assistance from Raphaele Teenie Chan is acknowledged with thanks and was supported by a grant from City University of Hong Kong Project No. 9380074.

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INTRODUCTION

In 1973, when the United Kingdom joined the European Union (“EU”),¹ consumer protection was starting to be recognised as an important social policy requiring specific legal regulation. In 1962, the Molony Committee issued its *Final Report on Consumer Protection*,² and in 1971, the Crowther Committee issued its *Consumer Credit: Report of Committee*.³ These reports promoted a vision of enhancing consumer autonomy, while removing the worst practices from the market. Accordingly, the Fair Trading Act 1973⁴ established the Office of Fair Trading and the National Consumer Council.⁵ In 1968, the landmark Trade Descriptions Act⁶ had attempted to address misleading advertising and promotion.⁷ There were also embryonic rules on product safety.⁸ The 1893 Sale of Goods Act⁹ was still in force, but needed reform. It was reenacted in 1979 with major reforms introduced by the Sale and Supply of Goods Act 1994.¹⁰ In 1974, a comprehensive Consumer Credit Act was adopted.¹¹ Thus, there was a patchwork of laws with a nascent and evolving consumer protection philosophy.

In subsequent years, EU legislation has touched almost every aspect of consumer law. In the field of contract law, there have been

1 See European Communities Act 1972, c. 68 (UK).

2 MOLONY COMMITTEE, FINAL REPORT OF THE COMMITTEE ON CONSUMER PROTECTION, 1962, Cmnd. 1781 (UK); see Aubrey L. Diamond, *The Molony Committee: Final Report of the Committee on Consumer Protection*, 26 MOD. L. REV. 66 (1963).

3 CROWTHER COMMITTEE, CONSUMER CREDIT: REPORT OF COMMITTEE, 1971, Cmnd. 4596 (UK).

4 Fair Trading Act 1973, c. 41 (UK).

5 See *id.* Both have subsequently been abolished, with the former being replaced by the Competition and Markets Authority. See Enterprise and Regulatory Reform Act 2013, c. 24, pt. 3 (UK).

6 Trade Descriptions Act 1968, c. 29 (UK).

7 *Id.*

8 The Consumer Protection Act 1961 and the Consumer Safety Act 1978 preceded the comprehensive rules of the Consumer Protection Act 1987, which EU-inspired regulations subsequently added to. See Consumer Protection Act 1987, c. 43 (UK); Consumer Safety Act 1978, c. 38 (UK); Consumer Protection Act 1961, 9 & 10 Eliz. 2 c. 40 (UK).

9 Sale of Goods Act 1893, 56 & 57 Vict. c. 71 (UK).

10 Sale and Supply of Goods Act 1994, c. 35 (UK); Sale of Goods Act 1979, c. 54 (UK).

11 Consumer Credit Act 1974, c. 39 (UK).

rules on doorstep¹² and distance selling¹³ combined in the Consumer Rights Directive;¹⁴ unfair terms;¹⁵ sale of goods;¹⁶ consumer credit;¹⁷ and in relation to specific contracts such as package travel¹⁸ and timeshare.¹⁹ There is no doubt that U.K. consumer policy has been heavily influenced and shaped by the EU,²⁰ even if the U.K. has still had its own policy initiatives.²¹

As Brexit looms,²² it's timely to consider if the EU influence on U.K. consumer law is embedded and aligned with the U.K.'s national legal culture to the extent that its influence will remain once the U.K. leaves the EU. Of course, no one yet knows the form any Brexit will take, and this will affect the scope for the U.K. to develop an independent policy. If there is a soft Brexit, and the U.K. achieves a Norwegian-style arrangement with the EU,²³ the U.K. may remain largely bound to EU consumer law. The U.K. would simply have less say in fashioning EU rules. However, assuming any new arrangement gives the U.K. some freedom to develop an independent consumer policy, the question is whether the U.K. would likely choose an alternative course from that set by the EU.

Unfair contract terms will be used as our case study. The choice of this topic from the wide field of consumer contracting needs to be explained. Consumer information and the right of withdrawal are possibly the two most distinctive planks of EU consumer policy. The EU introduced rules requiring mandatory disclosure in consumer con-

12 Council Directive 85/577, 1985 O.J. (L 372) 31 (EC).

13 Council Directive 97/7, 1997 O.J. (L 144) 19 (EU).

14 Council Directive 2011/83, 2011 O.J. (L 304) 64 (EU).

15 Council Directive 93/13, 1993 O.J. (L 95) 29 (EC).

16 Council Directive 99/44, 1999 O.J. (L 171) 12 (EU).

17 Council Directive 87/102, 1987 O.J. (L 42) 48 (EC); *see also* Council Directive 2008/48, 2008 O.J. (L 133) 66 (EU).

18 Council Directive 90/314, 1990 O.J. (L 158) 59 (EC).

19 Council Directive 94/47, 1994 O.J. (L 280) 83 (EU); *see also* Council Directive 2008/122, 2009 O.J. (L 33) 10 (EU).

20 *See generally* GERAINT HOWELLS & THOMAS WILHELMSSON, *EC CONSUMER LAW* (1997); GERAINT HOWELLS ET AL., *RETHINKING EU CONSUMER LAW* 6 (2018).

21 *See* DEP'T FOR BUS. INNOVATION & SKILLS, *ENHANCING CONSUMER CONFIDENCE BY CLARIFYING CONSUMER LAW: CONSULTATION ON THE SUPPLY OF GOODS, SERVICES AND DIGITAL CONTENT* (2012); DEP'T OF TRADE AND INDUS., *CM 4410, MODERN MARKETS: CONFIDENT CONSUMERS* (1999). These led to the Consumer Rights Act 2015, c. 15 (UK).

22 *See* Alex Hunt & Brian Wheeler, *Brexit: All You Need to Know About the UK Leaving the EU*, BBC NEWS (Oct. 26, 2017), <http://www.bbc.com/news/uk-politics-32810887> [<https://perma.cc/B6CS-CK5F>].

23 *See* Halvard Haukeland Fredriksen & Christian N.K. Franklin, *Of Pragmatism and Principles: The EEA Agreement 20 Years On*, 52 *COMMON MKT. L. REV.* 629, 629–31 (2015).

tracts.²⁴ For specific selling arrangements²⁵ and contracts where consumers are considered particularly vulnerable,²⁶ it provided for cooling-off periods—allowing the consumer to withdraw from the contract without the need for any reason within a specified period. These were implemented by the U.K., for the most part, onto a blank canvas given the limited previous regulation of these topics. There was no previous legal culture for these rules to challenge, and indeed, they have been well received and fairly uncontroversial. By contrast, sales law is central to national legal culture, and its reform can be a sensitive topic, but the U.K. has avoided any clash with EU legal policy in that area. The Consumer Sales Directive's nonconformity obligations²⁷ reflect U.K. traditions. Its minimum harmonization clause has allowed the U.K. to keep its remedy regime with an automatic right to reject nonconforming goods, without having to accept the Directive's preference for cure remedies.²⁸ There was the need to add performance-based remedies on repair and replacement, but these were simply added on as additional options for consumers.²⁹

The Unfair Terms in Consumer Contracts Directive³⁰ is also a minimal harmonization clause, but it has been chosen for study as it has posed more challenges for the U.K. Rather than the previous U.K. combination of procedural controls on contract formation and punctual regulation of specific potentially unfair terms, it introduces a general fairness control on consumer contract terms. It demands that the U.K. come to terms with the good faith principle. The regime has the potential to afford a higher floor of protection than the previous U.K. law in some regards. It therefore required some adaptation by U.K. law.

As Chris Willett notes, open-textured fairness tests need to operate against some background ethic.³¹ Fairness might, for instance, be

²⁴ See HOWELLS ET AL., *supra* note 20 (Chapter 3: Pre-Contractual Information Duties and the Right of Withdrawal).

²⁵ See Council Directive 2011/83, art. 9, 2011 O.J. (L 304) 64, 78 (EU).

²⁶ Life assurance contracts are one example. See Directive 2002/83 of the European Parliament and of the Council of 5 November 2002 Concerning Life Assurance, art. 35, 2002 O.J. (L 345) 1, 27 (EC).

²⁷ Council Directive 99/44, art. 2, 1999 O.J. (L 171) 12, 14–15 (EU).

²⁸ It has chosen itself to finesse the right to reject by differentiating between a short-term right to reject within the thirty days, see Consumer Rights Act 2015, c. 15, § 22 (UK), and a final subsequent right to reject with the latter being subject to a deduction for use, see *id.* § 24.

²⁹ *Id.* § 23.

³⁰ Council Directive 93/13, 1993 O.J. (L 95) 29 (EC).

³¹ Chris Willett, *General Clauses and the Competing Ethics of European Consumer Law in the UK*, 71 CAMBRIDGE L.J. 412, 414 (2012).

judged against a belief that traders should be allowed, as far as reasonable, to look after their self-interest and that consumers should be relied upon to protect themselves. Alternatively, a more protective regime might be adopted recognizing the difficulties consumers face in the marketplace and the obligations traders should have towards consumers.

It is often assumed that the common law emphasises laissez-faire values that may sit uneasily with the EU's general fairness test, which is assumed to have a protective ethic. Applying a general standard certainly requires a different mindset to the traditional common law approach based on specific rules. But one should be cautious about quickly painting English law as fixed to common law caveat emptor principles. Leone Niglia, for example, sees English law and German law as being more open to intervention, compared to France and Italy, who were reluctant to challenge unfair terms as their states were heavily involved as suppliers.³² Indeed, within the EU, and probably each national legal system, there are debates about what ethic should underpin consumer contracting.³³ Therefore, it may be too easy to paint the policy issues raised by the fairness standard as posing peculiarly English problems. Nevertheless, the extent to which the U.K. has comfortably embraced the new civilian (German) law inspired regime may be a good predictor of the extent to which the U.K. will seek to maintain or retreat from the EU rules if it has that freedom under any post-Brexit arrangements. These rules stand out as ones that are most challenging for the common law in form and substance to adopt. They will be in the first line of fire if the U.K. wants to signal it is striking an independent consumer policy.

The broad conclusion is that as Europe develops its rules on unfairness, the U.K. is unlikely to oppose the rules more than other states. There has been a regrettable reluctance to refer cases using the preliminary reference procedure, and the bank charges case of *Office of Fair Trading v. Abbey National plc*³⁴ is an unfortunate case, but it can be explained by exceptional circumstances. However, it is to be expected that a range of views on contractual fairness will exist within society and be reflected in court judgments. These will exist in all systems, and the common law is not unique in that regard. The U.K. con-

³² LEONE NIGLIA, *THE TRANSFORMATION OF CONTRACT IN EUROPE* 14–15 (2003); see PAOLISA NEBBIA, *UNFAIR CONTRACT TERMS IN EUROPEAN LAW: A STUDY IN COMPARATIVE AND EC LAW* 34–36 (2007).

³³ See, e.g., Willet, *supra* note 31, at 413–14.

³⁴ [2009] UKSC 6, [2010] 1 AC 696.

sumer law has developed within a European context, and although variations may exist between European states in regards to consumer protection, they share common values that are distinct from, for example, those of the United States.³⁵ It is unlikely that the U.K. will wish to fork off on a completely different path even if allowed to do so. For all the Brexit rhetoric, the U.K. shares many European values. U.S. readers will be intrigued to discover in the European Unfair Terms in Consumer Contracts Directive a regime that is far more paternalistic than their own.³⁶ However, any conclusion must be tentative, as there have still only been relatively few decisions, and in particular, only in recent years has the Court of Justice of the European Union (“CJEU”) begun to flesh out its substantive understanding of fairness.

I. UNFAIRNESS—TRADITIONAL COMMON LAW CONTROLS

The common law traditionally favours freedom of contract.³⁷ At one time, this included the freedom to include exclusion clauses or otherwise potentially harsh terms if freely accepted by the other party. In practice, however, the common law frequently found ways to achieve justice. As Paolisa Nebbia noted, elements of fairness permeate the law, for “behind the facade of the ‘hands off’ approach to contracts, there exists a clear reluctance of courts to allow exploitation of the others by means of a contract.”³⁸ This is another important warning against painting the common law as wedded to a liberal laissez-faire market conception of contracting. Protection was achieved by the common law through techniques such as finding the unfair terms had not been incorporated³⁹ or using the *contra proferentem* interpretation rule.⁴⁰ There was a particular reluctance to allow exclusion of

³⁵ Geraint Howells & Thomas Wilhelmsson, *EC and US Approaches to Consumer Protection—Should the Gap Be Bridged?*, 17 Y.B. EUROPEAN L. 207 (1997).

³⁶ See generally RESTATEMENT OF CONSUMER CONTRACTS (AM. LAW INST., Proposed Draft 2017).

³⁷ Lord Toulson provides a modern restatement of this general principle. See *Prime Sight Ltd. v. Lavarello* [2013] UKPC 22, [47] (“Parties are ordinarily free to contract on whatever terms they choose and the court’s role is to enforce them.”).

³⁸ NEBBIA, *supra* note 32, at 28.

³⁹ *E.g.*, *Chapelton v. Barry Urban Dist. Council* [1940] 1 KB 532 at 532 (explaining that a deckchair ticket was a “mere voucher or receipt,” not a contractual document).

⁴⁰ See, *e.g.*, *Houghton v. Trafalgar Ins.* [1954] 1 QB 247 at 247 (concluding that car insurance exclusion for excessive load meant weight, not number of people (six) in car); *Andrews Bros. (Bournemouth), Ltd. v. Singer & Co.* [1934] 1 KB 17 at 17 (explaining that phrase “all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded” not applicable because “new” was an express term in relation to car); *Wallis, Son & Wells v.*

negligence⁴¹ or to excuse fundamental breach.⁴² Unless there is a signature,⁴³ the common law could be demanding as to the lengths it expected contractors to go to in order to draw onerous terms to the attention of the other party.⁴⁴ There is also the possibility to intervene on the ground of duress, including economic duress⁴⁵ and undue influence.⁴⁶

The English common law therefore provided tools to promote procedural fairness. However, unlike the United States, it did not have an overarching unconscionability doctrine.⁴⁷ The English unconscionability doctrine is narrow and only protects extremely vulnerable persons whose condition is exploited.⁴⁸ The attempt by Lord Denning to introduce a general principle of “inequality of bargaining power” in *Lloyds Bank Ltd. v. Bundy*⁴⁹ was unsuccessful.⁵⁰ However, by the time the U.K. joined the EU, these common law controls were also being joined by statutory controls on unfair terms, which made it less necessary for the courts to resort to manipulating common law rules to achieve just results.⁵¹

Pratt & Haynes [1911] AC 394 (HL) 395–96 (explaining that “no warranty expressed or implied” did not cover description condition).

41 See, e.g., *Can. Steamship Lines Ltd. v. The King* [1952] AC 192 (PC) 193 (appeal taken from Can.).

42 See, e.g., *Levison v. Patent Steam Carpet Cleaning Co.* [1978] 1 QB 69 at 70 (Eng.) (carpet lost when sent for cleaning); *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co.* [1959] AC 576 (PC) 576–77 (goods delivered to consignee without requiring bill of lading).

43 See *L’Estrange v. F. Graucob Ltd.* [1934] 2 KB 394 at 395 (Eng.).

44 *Interfoto Picture Library v. Stiletto Visual Programmes Ltd.* [1987] EWCA (Civ) 6 (Eng.).

45 *Dimskal Shipping Co. S.A. v. Int’l Transp. Workers Fed’n* [1992] 2 AC 152 (HL) 165 (Lord Goff of Chieveley) (“[I]t is now accepted that economic pressure may be sufficient to amount to duress . . . provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract.”); see EDWIN PEEL, *THE LAW OF CONTRACT* 10-005 (Sweet & Maxwell 13th ed. 2011) (1962).

46 *Barclays Bank Plc v. O’Brien* [1994] 1 AC 180 (HL) 180.

47 See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965); James P. Nehf, *The Impact of Mandatory Arbitration on the Common Law Regulation of Standard Terms in Consumer Contracts*, 85 GEO. WASH. L. REV. 1693 (2017).

48 See PEEL, *supra* note 45, at 10-042 to 10-044.

49 [1975] 1 QB 326 (Eng.).

50 *Nat’l Westminster Bank Plc. v. Morgan* [1985] 1 AC 686 (HL) 687.

51 *Photo Prod. Ltd. v Securicor Transp. Ltd.* [1980] AC 827 (HL) 851 (finding the exemption valid when security firm employee started a fire that destroyed factory and stock).

II. U.K. PRE-DIRECTIVE STATUTORY CONTROLS

Statutory controls on exclusion clauses have existed in the U.K. since the Railway and Canal Traffic Act 1854.⁵² This act only allowed transport operators to use exclusion clauses which were just and reasonable.⁵³ Controls on exclusion clauses have been found in hire-purchase legislation since the Hire-Purchase Act 1938, where the legislation made the implied conditions of merchantability and fitness for purpose nonexcludable. A more comprehensive approach to prevent contracts excluding implied terms in sales legislation was proposed by the Molony Committee in 1962⁵⁴ and the Law Commission in 1969.⁵⁵ This led to the Supply of Goods (Implied Terms) Act 1973,⁵⁶ which for sale and hire-purchase contracts prevented the exclusion or restriction of the implied term as to title.⁵⁷ This was also not allowed in consumer contracts with regard to the implied terms of merchantability, fitness for particular purpose, and correspondence with description or sample; in other contracts, these terms had to be fair and reasonable.⁵⁸

The Law Commission's *Exemption Clauses: Second Report*⁵⁹ recommended broader controls. These were enacted in the Unfair Contract Terms Act 1977.⁶⁰ The Act's name, however, was misleading. It was narrower than the title suggested, as it did not control unfair terms beyond exclusion and limitation clauses, but it was also broader, as it covered notices as well as contract terms.⁶¹ Its original title—Avoidance of Liability Act—might have been more accurate.⁶²

As the U.K. was entering the EU, it was developing its own approach to unfair terms.⁶³ It moved beyond the common law to include substantive as well as procedural controls, but these were punctual and focused on exclusion and limitations of liability.⁶⁴ By contrast, the

⁵² Railway and Canal Traffic Act 1854, 17 & 18 Vict. c. 31 (UK).

⁵³ *Id.* § 7.

⁵⁴ See MOLONY COMMITTEE, *supra* note 2, at 431–35.

⁵⁵ THE LAW COMM'N & THE SCOTTISH LAW COMM'N, EXEMPTION CLAUSES IN CONTRACTS FIRST REPORT: AMENDMENTS TO THE SALE OF GOODS ACT 1893, 1969, Law Com. No. 24, Scot. Law Com. No. 12, ¶ 3(a); THE LAW COMM'N & THE SCOTTISH LAW COMM'N, EXEMPTION CLAUSES SECOND REPORT, 1975, Law Com. No. 69, Scot. Law Com. No. 39, ¶ 28.

⁵⁶ Supply of Goods (Implied Terms) Act 1973, c. 13 (UK).

⁵⁷ *Id.* § 8.

⁵⁸ Sale of Goods Act 1979, c. 54, §§ 4, 12 (UK).

⁵⁹ EXEMPTION CLAUSES SECOND REPORT, *supra* note 55.

⁶⁰ Unfair Contract Terms Act 1977, c. 50 (UK).

⁶¹ See *id.*

⁶² See CHRIS WILLETT, FAIRNESS IN CONSUMER CONTRACTS: THE CASE OF UNFAIR TERMS 84 (2007).

⁶³ See Unfair Contract Terms Act 1977, c. 50 (UK) (codification of this approach).

⁶⁴ See, e.g., *id.* pt. I, § 2 (avoidance of liability for negligence, breach of contract, etc.).

EU would adopt legislation which covered all unfair terms, not just exclusion or limitation clauses.⁶⁵ However, the EU law would be limited to contract terms (not covering noncontractual notices), consumer contracts, and essentially terms in standard form contracts.⁶⁶ No terms would be automatically unfair; rather, they would be subject to a general test backed up by an indicative list of potentially unfair terms.⁶⁷ This switch from bright-line rules to a general test was a challenging element of the U.K. reform.

III. GENERAL CONSIDERATIONS

The Unfair Terms in Consumer Contracts Directive⁶⁸ arrived in the U.K. with a fanfare. Much has been made of the introduction of a general fairness test and specifically its inclusion of a good faith standard. This has famously been described as an “irritant” promoting internal dynamics within the English common law⁶⁹ and as “mysterious and exciting” to the English lawyer.⁷⁰ Has the EU standard been well integrated into U.K. legal culture or does the ghost of common law thinking affect its application?

To make this assessment, it is first necessary to discover how demanding the EU conception of contractual unfairness is. The content of the Directive’s test of unfairness needs to be examined in the light of CJEU case law. Where does the balance lie between procedural and substantive unfairness? Does procedural fairness require more than merely being open and transparent? How demanding is the transparency test? Does a more co-operative ethic underpin the Directive so that to act in good faith a contractor must meaningfully take the interests of the other party into account? If so, does that imply imposing limits on what can be contracted for, or does it merely require giving the consumer a meaningful opportunity to understand the terms offered? Did the EU Directive’s test of unfairness move the U.K. law on to address issues of general substantive unfairness? In other words, can terms per se breach the fairness standard because their use demonstrates a lack of good faith, no matter how transpar-

⁶⁵ See, e.g., Council Directive 93/13, art. 3, 1993 O.J. (L 95) 29, 31 (EC) (covering terms which have not been individually negotiated).

⁶⁶ To be more precise, terms which have not been individually negotiated. See *id.*

⁶⁷ See *id.*

⁶⁸ Council Directive 93/13, 1993 O.J. (L 95) 29 (EC).

⁶⁹ Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 11 (1998).

⁷⁰ Hugh Collins, *Good Faith in European Contract Law*, 14 OXFORD J. LEGAL STUD. 229, 249 (1994).

ently they are presented?⁷¹ How deep the Directive strikes into the heart of the contractual bargain also depends upon the scope of the exemption of what have been labelled “core terms.”

We shall see that the European legislation and jurisprudence contain some degree of ambiguity about the content of the unfairness standard. When this is combined with the distribution of powers between the CJEU (which interprets EU law) and national courts (which apply it), there is obvious scope for any disagreements of approach at the national level to be camouflaged. This can make the task of evaluating the acceptance of the European rules complex.

Inevitably there are mixed signals. We shall see many instances where the English courts have seemingly embraced the European approach, the regulator has adopted CJEU jurisprudence, and the legislature has recently embedded the EU rules firmly in primary legislation. However, the Supreme Court judgments seem less consumer friendly in tone than those from the CJEU, with a marked reluctance to refer questions to the CJEU for guidance. The Law Commission had also initially argued for a change of wording away from good faith to the more familiar tests for common law lawyers of fairness and reasonableness. There has thus been rich case law and reform debate which we will explore for signs of how firmly wedded the U.K. is to the European model of protecting consumers against unfair terms.

The CJEU has steered a careful line when handling the unfairness test. Cases normally come to it by means of a preliminary reference from national courts.⁷² This is a co-operative procedure between the CJEU and national courts.⁷³ Its role is to interpret EU law, but it is for national courts to apply the test to the facts of the case.⁷⁴ It has described the unfairness test as vague.⁷⁵ It has therefore wanted to ensure it can give guidance on the test and indeed the annex of indicatively unfair terms.⁷⁶ Yet, if it were to determine whether every term referred was unfair it would risk straying too far into the national courts’ terrain. Indeed, the fairness assessment needs to take account

⁷¹ Chris Willett, *The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches*, 60 INT’L & COMP. L.Q. 355, 360 (2011).

⁷² See Consolidated Version of the Treaty on the Functioning of the European Union art. 267, July 6, 2016, 2016 O.J. (C 202) 47, 164.

⁷³ *Id.*

⁷⁴ See *id.*

⁷⁵ See Case C-137/08, VB Pénzügyi Lízing Zrt. v. Schneider, 2010 E.C.R. I-10847, ¶ 88.

⁷⁶ See *id.*

of national law and the factual matrix,⁷⁷ and different national consumer cultures may also be relevant as they may call for different solutions.⁷⁸ The important issue is, how strong are these differences? If they are reasonably modest, harmonised regimes can still operate effectively, whilst allowing for their reflection in the application of the general principles. Given the prominence of global marketing and branding, the differences between consumer cultures may be becoming less pronounced, though enforcement cultures may still be one area of divergence. More pragmatically, if the CJEU regularly tried to apply the test to terms, it would risk overburdening itself with work given the potentially large number of unfair terms that might be referred.⁷⁹

A classic statement of the Court's approach is found in *VB Pénzügyi Lízing Zrt. v. Schneider*⁸⁰:

Article 267 TFEU must be interpreted as meaning that the jurisdiction of the Court of Justice of the European Union extends to the interpretation of the concept of 'unfair term' used in Article 3(1) of Directive 93/13 on unfair terms in consumer contracts and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case.⁸¹

However, the Court has at times been willing to determine that some terms are definitely unfair. In the first referral under the Directive, *Océano Grupo Editorial SA v. Murciano Quintero*,⁸² the Court held a jurisdiction clause in a contract for the sale of encyclopaedias must be unfair as it designated the Barcelona courts as the forum to hear disputes, but this was where the business was based but none of the defendants were domiciled.⁸³ Realising the potentially overwhelming workload it might have created for itself, the Court backtracked in

⁷⁷ See Case C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Hofstetter*, 2004 E.C.R. I-3412, ¶¶ 22–25.

⁷⁸ See THOMAS WILHELMSSON ET AL., *PRIVATE LAW AND THE MANY CULTURES OF EUROPE* (2007).

⁷⁹ Advocate General Trstenjak in *VB Pénzügyi Lízing Zrt.*, 2010 E.C.R. I-10847, ¶ 96, refers with approval to the warning of Advocate General Geelhoed in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG*, 2004 E.C.R. I-3412, about the risk of overload.

⁸⁰ Case C-137/08, 2010 E.C.R. I-10847.

⁸¹ *Id.* ¶ 2.

⁸² Joined Cases C-240/98 to C-244/98, 2002 E.C.R. I-4963.

⁸³ *Id.* ¶¶ 21–25.

Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v. Hofstetter.⁸⁴ The CJEU distinguished its decision to make a definitive ruling in *Océano*, as the jurisdiction clause there was solely for the benefit of the seller and contained no benefit in return for the consumer.⁸⁵ In the subsequent case of *VB Pénzügyi Lízing Zrt.*, whilst leaving the decision to national courts, it could not resist making clear its hostility to such jurisdiction clauses.⁸⁶ The Court has on several occasions not been shy to make its inclination known. This has been particularly prevalent in relation to terms giving a supplier the right to vary the contract.⁸⁷ Nevertheless, the differentiation in function between the CJEU and national courts lubricates the relationship and can help avoid direct conflicts. However, it makes our task of assessing the commitment of national courts to the European philosophy underpinning the Directive more difficult, as the national courts can often say they are simply following instructions to determine the fairness of terms *in concerto*. The assessment is made even more difficult as there remains some fuzziness around the actual test.

IV. THE DIRECTIVE'S UNFAIRNESS STANDARD

Article 3(1) of the Unfair Terms in Consumer Contracts Directive provides: “A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”⁸⁸

Article 4(2) provides:

Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied [sic] in exchange, on the other, in so far as these terms are in plain intelligible language.⁸⁹

There is an Annex of indicatively unfair terms.⁹⁰ Inclusion in the Annex does not create any formal presumption of unfairness, though

⁸⁴ Case C-237/02, 2004 E.C.R. I-3412.

⁸⁵ *Id.* ¶¶ 23–25.

⁸⁶ *VB Pénzügyi Lízing Zrt.*, 2010 E.C.R. I-10847, ¶¶ 49–56.

⁸⁷ *See, e.g.*, cases cited *infra* notes 213, 215–21.

⁸⁸ Council Directive 93/13, art. 3(1), 1993 O.J. (L 95) 29, 31 (EC).

⁸⁹ *Id.* art. 4(1), at 31.

⁹⁰ *Id.* at 33–34.

in practice courts take notice of whether challenged terms are similar to those found in the Annex. The Annex includes exclusion and limitation clauses and even penalty clauses which the common law has traditionally struck down.⁹¹ However, it also extends to terms that unfairly impose liabilities and obligations on parties. Many terms in the Annex are more about ensuring there is balance between the two parties—this fits in with the requirement that there be a significant imbalance. These have been classified as terms (1) giving one party control over the contract terms or the performance of the contract, and (2) controlling the duration of the contract.⁹² It can be argued that several examples in the Annex express a rather formal understanding of unfairness. They are premised on the unfairness arising because the supplier has a right that the consumer does not.⁹³ It would seem that fairness could be formally achieved if suppliers drafted contracts giving consumers mirror-image rights, even if in reality consumers are unlikely to invoke them.

A. Significant Imbalance—The Substantive Requirement

Whether the Directive is underpinned by a protective social justice ethic⁹⁴ beyond procedural fairness depends upon how one reads the fairness standard and role of good faith therein. There are two core requirements besides the need for a consumer to have suffered detriment: (1) a significant imbalance (2) that is contrary to good faith. The former is a substantive fairness requirement. Does this have to be combined with procedural unfairness? To answer this, the key question is whether good faith has a substantive as well as a procedural content.

However, the requirement of significant imbalance indicates that there must be some substantive unfairness. An obvious way in which a term produces a significant imbalance is by taking away legal rights that the consumer would otherwise have. That is why exclusion and limitation clauses are such obvious targets of this regulation. Equally increasing the consumer's obligations beyond that allowed for under the law explains why penalty clauses are frequent targets. The CJEU has said:

⁹¹ See *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.* [1915] AC 79 (HL). *But see* *Cavendish Square Holding BV v. Talal El Makdessi* [2015] UKSC 67, [2016] AC 1172.

⁹² See HOWELLS & WILHELMSSON, *supra* note 20, at 106–07.

⁹³ Council Directive 93/13, annex ¶ 1(c), (d), (f), (l), 1993 O.J. (L 95) 29, 33 (EC).

⁹⁴ One might categorise it as having a distributive justice goal. See Geraint G. Howells, *Contract Law: The Challenge for the Critical Consumer Lawyer*, in *PERSPECTIVES OF CRITICAL CONTRACT LAW* 327, 327–47 (Thomas Wilhelmsson ed., 1993).

[T]o ascertain whether a term causes a ‘significant imbalance’ in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.⁹⁵

This adopts the default rule comparison approach. It fits in with German law, which heavily influenced the drafters of the Directive, under which the assessment is made against default rules. However, in many areas, the law gives a degree of discretion, and abuse of that discretion might also create an unfair imbalance. For instance, there might be the freedom to require notification of claims. However, if the particular contractual obligation to notify is too onerous, this might be a significant imbalance. Whilst the comparison with the default rule approach may be useful in many contexts, a more practical test of imbalance may be required in some instances.

One approach is to ask whether the consumer would reasonably accept the term if it was drawn to their attention. Thomas Wilhelmsson has labelled this the “possible agreements test” and noted the parallel with the law seeking to ensure legitimate expectations are secured.⁹⁶ The CJEU has used this as part of the good faith test.⁹⁷ However, it might be better to ask that question to establish whether there is a substantive imbalance.⁹⁸ This approach gives a standard by which to assess the imbalance. If an imbalance is found, then the separate question of whether it was contrary to good faith can be considered. This might include the transparency of the term, any justifications for using it, and how it impacts the legal and factual context. The possible agreement test looks at the fairness from the consumer’s perspective,

⁹⁵ Case C-415/11, *Aziz v. Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunya-caixa)*, 2013 EUR-Lex CELEX LEXIS 164, ¶ 68 (Mar. 14, 2013).

⁹⁶ HOWELLS ET AL., *supra* note 20, at 41; Hans-W. Micklitz & Norbert Reich, *The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)*, 51 COMMON MKT. L. REV. 771, 790 (2014).

⁹⁷ See *Aziz*, 2013 EUR-Lex CELEX LEXIS 164, ¶ 69.

⁹⁸ *Cavendish Square Holding BV v. Talal El Makdessi* [2015] UKSC 67, [262], [2016] AC 1172 (Lord Hodge SCJ).

but the good faith standard also raises the distinct question of the extent to which the supplier must take account of the consumer's interests. However, the significant imbalance requirement ensures there must be some substantive imbalance. The intriguing question is whether the good faith requirement means there must always be additional procedural unfairness.

B. Good Faith—Mixed Substantive and Procedural Standard

Unlike in the original proposal,⁹⁹ good faith in the final text is not an independent test of unfairness, but rather is linked to the establishment of a significant imbalance. Good faith therefore sounds procedural in nature. Recital 15 provides:

Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account.¹⁰⁰

Many of these requirements reflect procedural concerns, and many parallel those found in the guidelines on reasonableness found in the U.K.'s Unfair Contract Terms Act 1977.¹⁰¹ However, even if good faith is considered to be a procedural standard, it can take a range of forms. A weak form might only require a clear conscience and transparent procedures, whereas a stronger form might require a contractor to take some account of the legitimate interests of the

⁹⁹ *Proposal for a Council Directive on Unfair Terms in Consumer Contracts*, art. 2, 1990 O.J. (C 243) 2 (EC). It was already integrated into the general formula by the time of the *Amended Proposal for a Council Directive on Unfair Terms in Consumer Contracts*, art. 3(1), 1992 O.J. (C 73) 7 (EC).

¹⁰⁰ Council Directive 93/13, 1993 O.J. (L 95) 29, 30 (EC).

¹⁰¹ Unfair Contract Terms Act 1977, c. 50, § 11, sch. 2 (Eng., Wales, N. Ir.).

other party. Taking account of the other party's legitimate interests is clearly mentioned in the Directive's recital.¹⁰²

In regards to the weaker form of "fair dealing" good faith, there is still scope for different regimes to impose varying requirements as to how far the trader must go to draw the term to the consumer's attention. To give just one example, one only must think of internet transactions to see the wide variety of options that traders have for informing consumers of their terms and the scope for different interpretations regarding the accessibility of terms provided by hyperlinks.¹⁰³

How much stronger than "fair dealing" good faith is the requirement to take account of the other's legitimate interests? How strong a constraint is this on the self-interest model that normally underpins contracts? The CJEU has interpreted this as requiring more than procedural protection and has seemed to place substantive limits on contractual freedom by requiring the courts to determine "whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations."¹⁰⁴ However, what is reasonable to traders—and even justified and necessary under their business model—may appear harsh to the consumer. Of course, consumers will always dislike terms being enforced that cause them harm, and that is why the assessment must be made at the moment of contract formation. Nevertheless, the extent to which the trader must place himself in the consumer's place is still open to debate. This is a novel principle which clearly forces the U.K. to think beyond its traditional understanding of fairness.

The strongest form of good faith goes beyond mere procedural controls and has a substantive core that ensures seriously imbalanced terms—that are unlikely ever to have a justification—are always deemed unfair no matter how transparently they are presented. Some of the terms in the Annex of indicatively unfair terms might be explained on this basis. Whilst the U.K. was familiar with striking down exclusion clauses on this basis, the Directive opens up the possibility

¹⁰² Cf. Roger Brownsword, *Two Concepts of Good Faith*, 7 J. CONT. L. 197, 210–11 (1994); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 672 (1963).

¹⁰³ They were not deemed suitable for disclosing a right of withdrawal under the Distance Selling Directive in Case C-49/11, *Content Services Ltd v. Bundesarbeitskammer*, 2012 EUR-Lex CELEX LEXIS 419 (Mar. 6, 2012).

¹⁰⁴ Case C-415/11, *Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunya-caixa)*, 2013 EUR-Lex CELEX LEXIS 164, ¶ 69 (Mar. 14, 2013).

that a wider variety of terms can be found to be per se unfair—though all need to be subject to assessment.

It is well known that good faith has its origin in continental “civil law” where it controlled substantively unfair bargains. Hugh Collins has noted:

A better translation of this idea into English law would be to discard the terminology of good faith and to refer instead to the equitable idea of acting in good conscience or not unconscionably. For the civil law idea encompasses all the variety of instances when one party has abused the social practice of making promises. It involves taking advantage of another's trust either by encouraging misplaced reliance or by securing an unduly advantageous transaction.¹⁰⁵

It is particularly the element of unduly securing an advantageous transaction that would give it a substantive dimension reflecting welfarist values. This explains why civilian lawyers favourable to the consumer interest fought so fiercely for its inclusion, even when not as an independent test of unfairness.¹⁰⁶

Hugh Beale commented:

I suspect that good faith has a double operation. First, it has a procedural aspect. It will require the supplier to consider the consumer's interests. However, a clause which might be unfair if it came as a surprise may be upheld if the business took steps to bring it to the consumer's attention and to explain it. Secondly, it has a substantive content: some clauses may cause such an imbalance that they should always be treated as . . . unfair.¹⁰⁷

Good faith may therefore contain both procedural and substantive dimensions. Indeed, breach of good faith might involve an assessment of a matrix of procedural and substantive elements. An exclusion of liability for death caused by negligence is probably always going to be unfair. For less egregious terms, there may be a sliding scale whereby a term is easier to defend the more transparent it is and

¹⁰⁵ See Collins, *supra* note 70, at 250.

¹⁰⁶ See Mário Tenreiro, *The Community Directive on Unfair Terms and National Legal Systems: The Principle of Good Faith and Remedies for Unfair Terms*, 3 EUR. REV. PRIV. L. 273, 279 (1995).

¹⁰⁷ Hugh Beale, *Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts*, in *GOOD FAITH AND FAULT IN CONTRACT LAW* 231, 245 (Jack Beatson & Daniel Friedmann eds., 1995) (footnote omitted).

the less substantively unfair it is.¹⁰⁸ There is a tendency, one might even say preference, for treating the test as a composite one that avoids the need to dissect the provision and allows for greater judicial discretion. The more ambiguous the test, the easier it is for national courts to apply the rules with a national character, and the harder it is to claim they are not loyal to the EU law.

C. *Unfairness—Significant Imbalance and Good Faith: An Amalgam Test?*

The impression that the Directive's fairness test is an amalgam of procedural and substantive justice is supported by the view of the CJEU in *Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*¹⁰⁹:

[I]t should be noted that, in referring to concepts of good faith and significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, Article 3(1) of the directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated.¹¹⁰

Although good faith has largely been a creature of the civilian tradition, the concept must be given an autonomous European interpretation. In any event, its content differs within civil law countries.¹¹¹ In *Aziz*, the CJEU stated: "[I]n order to assess whether the imbalance arises 'contrary to the requirement of good faith', it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations."¹¹²

As suggested above, this may be a better test of whether there is significant imbalance rather than lack of good faith. The fact that the Court uses this test in the context of good faith indicates that use of a substantively unfair term can be contrary to good faith.

How loyal has the U.K.'s jurisprudence been to the EU approach? The CJEU's reluctance to disaggregate the elements of unfairness makes it harder to criticise national judges for not following European law given the ambiguity that surrounds the unfairness stan-

¹⁰⁸ See Willett, *supra* note 71, at 356 (noting that the role of transparency in legitimizing substantively unfair terms is unclear).

¹⁰⁹ Case C-415/11, 2013 EUR-Lex CELEX LEXIS 164 (Mar. 14, 2013).

¹¹⁰ *Id.* ¶ 67 (citation omitted).

¹¹¹ See Reinhard Zimmermann & Simon Whittaker, *Preface* to GOOD FAITH IN EUROPEAN CONTRACT LAW, at xiii (Reinhard Zimmermann & Simon Whittaker eds., 2000).

¹¹² *Aziz*, 2013 EUR-Lex CELEX LEXIS 164, ¶ 76.

dard. This is especially true given the encouragement the CJEU has at times given national courts to interpret terms based on national conditions. In fact, the U.K.'s Supreme Court has recently considered the test to be opaque.¹¹³ At an abstract level, courts can mouth the same formula. One has to read judgments carefully, however, to assess whether they have fully accepted the European policy or have given the principles a common law gloss. This process can resemble a game of smoke and mirrors. The U.K.'s highest court has been unsympathetic to challenges regarding unfair terms on each of the three occasions it has been called on to assess them. This seems at the very least to call out for assessment of whether its approach is unduly conservative and therefore indicates a likelihood to adopt a different approach if freed from the constraints of European law.

The U.K. Supreme Court's record, at least on its face, contrasts with the CJEU, which seems to be going out of its way to use the unfair terms legislation proactively to protect consumers affected by social crises—such as Spanish mortgage reposessions in the wake of the global economic crisis and Eastern European foreign currency loans affected by the rise in value of the Swiss franc.

The U.K.'s House of Lords, as the Supreme Court was previously called, heard *Director General of Fair Trading v. First National Bank Plc*.¹¹⁴ This concerned the practice of banks rescheduling loans, but once the outstanding debt had been repaid, requesting interest on the delayed payments.¹¹⁵ A term allowing such recovery was necessary as under the County Courts (Interest on Judgment Debts) Order 1991 there was no power for the courts to award postjudgment interest with respect to regulated consumer credit agreements.¹¹⁶ It was also relevant that the agreement was a “simple rate” agreement under which interest is payable at the contractual rate on the amount of principal advanced outstanding together with accrued unpaid interest existing at the date of judgment, until the judgment is discharged by payment.¹¹⁷ This contrasts with “flat rate” agreements, where the default provisions have the effect of accelerating payment of the entire remaining unpaid instalments.¹¹⁸ The challenged term was contained

¹¹³ See *Cavendish Square Holding BV v. Talal El Makdessi* [2015] UKSC 67, [105], [2016] AC 1172 (Lords Neuberger & Sumption, with whom Lord Carnwath agreed).

¹¹⁴ [2001] UKHL 52, [2002] AC 481.

¹¹⁵ *Id.* [2].

¹¹⁶ County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art. 2, ¶ (3)(a) (UK).

¹¹⁷ *First Nat'l Bank Plc* [2001] UKHL 52, [22], [2002] 1 AC 481.

¹¹⁸ *Id.*

within the standard form contract.¹¹⁹ The right to recover interest was mentioned on the claim form issued when seeking to enforce debt.¹²⁰ This right was also included in a standard form letter sent to consumers.¹²¹

At first instance, Justice Evans-Lombe appreciated “the words ‘good faith’ are not to be construed in the English law sense of absence of dishonesty but rather in the continental ‘Civil law’ sense.”¹²² He understood good faith contained both a substantive and procedural dimension and “a court considering whether a given term of a contract is an ‘unfair term’ will look at all the circumstances of the case and its judgment will be based on an amalgam of perceived substantive and procedural unfairness.”¹²³

Nevertheless, the High Court judge thought the clause was fair, as it was needed to protect the right to recover interest that was not prohibited by the statutory regime.¹²⁴ The House of Lords agreed.¹²⁵ Lord Millett felt that

[i]f [the consumer’s] attention were drawn to the impugned term, ie that interest should continue to be paid on the outstanding balance after as well as before judgment, he might well be surprised at the need to spell this out, but he would surely not be at all surprised by the fact. It is what he would expect.¹²⁶

There was thought to be no procedural unfairness, though best practice would have been to draw attention to the courts’ powers to do justice under the time order provisions of the Consumer Credit Act 1974.¹²⁷

The Court of Appeal took a different stance and thought there was unfairness. Significant imbalance came from the bank being able to recover more than it could under the statutory regime. It felt more should have been done to draw the consumer’s attention to this clause, which would bring an unfair surprise at the time he thought he

¹¹⁹ *Id.* [1].

¹²⁰ *Id.* [23].

¹²¹ *Id.* [24].

¹²² *Dir. Gen. of Fair Trading v. First Nat’l Bank Plc* [2000] 1 WLR 98 [35] (Eng.) (emphasis removed).

¹²³ *Id.* [38] (emphasis removed).

¹²⁴ *Id.* [48].

¹²⁵ *First Nat’l Bank Plc* [2001] UKHL 52, [2002] 1 AC 481.

¹²⁶ *Id.* [55].

¹²⁷ *Id.* [22]–[23], [65]–[66]; *see also* Consumer Credit Act 1974, c. 39 (UK).

had cleared the debt.¹²⁸ Surprisingly, only the House of Lords judgment makes mention of the bank having written to debtors explaining the position,¹²⁹ but presumably such evidence was before the other courts. Taking this extra step to explain the term seems to make the behaviour more acceptable, but it actually should be irrelevant as it is postcontractual—and assessment should be at the time the contract is made.

Interestingly, the judges seem to be performing the task—that would later be set out by the CJEU in *Aziz*—of asking, what would the average consumer reasonably expect if the term had been drawn to their attention?¹³⁰ Some judges thought consumers would expect to pay interest on all outstanding amounts. The term was needed given the background rules on interest in the county court. Others would have expected more steps to have been taken to bring to the consumer's attention the obligation to pay such interest after having completed payment of outstanding debts. The various viewpoints seem within the reasonable bounds of judicial discretion; though the latter may seem to be more critical of postcontractual conduct than the contract term itself. They reflect differences of opinion that could be found in any European national court and do not seem to derive from a particular common law approach.

The judgements contained some important statements on the unfairness test which demonstrated an awareness of the European context. Some of the key passages deserve to be cited in full.

Lord Bingham said:

The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer The require-

¹²⁸ *Dir. Gen. of Fair Trading v. First Nat'l Bank Plc* [2000] QB 672, [35] (Eng.) (Gibson LJ).

¹²⁹ *See First Nat'l Bank Plc* [2001] UKHL 52, [24], [2002] 1 AC 481 (Lord Bingham of Cornhill).

¹³⁰ *See Aziz*, 2013 EUR-Lex CELEX LEXIS 164, ¶ 69.

ment of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the regulations are designed to promote.¹³¹

Lord Millett said:

There can be no one single test of this. It is obviously useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion. The list is not necessarily exhaustive; other approaches may sometimes be more appropriate.¹³²

Lord Steyn noted the overlap between procedural and substantive fairness when he said:

It has been pointed out by Hugh Collins that the test "of a significant imbalance of the obligations obviously directs attention to the substantive unfairness of the contract": "Good

¹³¹ *First Nat'l Bank Plc* [2001] UKHL 52, [17], [2002] 1 AC 481 (Lord Bingham of Cornhill).

¹³² *Id.* [54] (Lord Millett).

Faith in European Contract Law,” (1994), 14 Oxford Journal of Legal Studies 229, 249. It is however, also right to say that there is a large area of overlap between the concepts of good faith and significant imbalance.¹³³

These dicta indicate an appreciation of the European origin and an understanding that it is an amalgam of procedural and substantive fairness. The result in this case was treated as disappointing by many consumer activists. This may be unfair as what was being objected to was the practice of renegotiating loans and failing to make the full impact of the agreement clear. There is nothing inherently unfair in reserving the right to default interest under the main contract. This decision has also been praised for adopting a very pro-European approach to interpretation.¹³⁴ There are indeed nods in that direction, but equally, one also sees a tendency to favour procedural unfairness. However, as the CJEU blends the two tests, this is again perhaps not a judgment that can be described as un-European. Certainly there were signs the judges were open to the influence of European concepts. The result can probably be defended as falling within the bounds of a reasonable application of the principles to the facts. Perhaps the most salient criticism is that the House of Lords was too ready to accept that the understanding of good faith was settled and did not merit a reference to the European Court.¹³⁵ This is a theme we will return to in our discussion of the core-terms exemption in *Office of Fair Trading v. Abbey National plc*.¹³⁶

The most recent case to go to the Supreme Court—*Cavendish Square Holding BV v. Talal El Makdessi, ParkingEye Ltd. v. Beavis*¹³⁷—is interesting because of the way it applied the CJEU unfairness test as laid down in *Aziz*. Lord Toulson would have found an £85 charge, for overstaying a two-hour free parking offer, created a significant imbalance as it was a greater imposition than the damages normally recovered.¹³⁸ Lord Mance, by contrast, did not consider it a significant imbalance, as he weighed the charge not against the legal position, but rather against the practical benefit of having obtained two hours free parking.¹³⁹ The legal comparison seems more in line

¹³³ *Id.* [37] (citing Hugh Collins, *supra* note 70, at 249).

¹³⁴ Mel Kenny, *Orchestrating Sub-Prime Consumer Protection in Retail Banking: Abbey National in the Context of Europeanized Private Law*, 19 EUR. REV. PRIV. L. 43, 57 (2011).

¹³⁵ See *supra* note 96.

¹³⁶ See *infra* Part V.

¹³⁷ [2015] UKSC 67, [2016] AC 1172.

¹³⁸ *Id.* [295], [307].

¹³⁹ *Id.* [197].

with the European position as stated in *Aziz*, but as noted above, both legal and practical imbalance should probably be relevant.

However, it was with regard to applying the *Aziz* good faith test—whether the supplier “could reasonably assume that the consumer would have agreed to the term”—that the most interesting differences emerged. Lord Toulson argued that it had not been proven that a consumer would accept the term and noted that, for some consumers, this was a large sum that applied even if the overstay was short.¹⁴⁰ He argued that Lords Neuberger and Sumption had instead applied a test of whether the term was reasonable, because it was reasonable for the supplier to include the term.¹⁴¹ They were persuaded by the prominence of the term and the fact that the car park had good reasons to impose the charge to ensure compliance.¹⁴² Along with Lord Mance, they considered the risk of payment a good tradeoff for two hours of free parking.¹⁴³ They also relied on the view of Advocate General Kolkott in *Aziz* that default interest may be justified under national law if it encouraged compliance. However, it must not be more excessive than necessary to achieve the intended objectives. Both default interest and charges as in *ParkingEye v. Beavis* are unusual as they can be justified in order to ensure compliance, but what makes commercial sense may not be acceptable to consumers. On balance, the Supreme Court’s decision is probably within the scope of a national court’s discretion when applying the test. The differences between courts hearing the same case, and even within the Supreme Court, seem to indicate there is no singular common law approach to assessing unfairness.

V. CORE (EXEMPT) TERMS

From the general test, we now turn to the issue of which terms are not assessable for their fairness. Does the approach of the U.K. court—in particular the Supreme Court in *Office of Fair Trading v. Abbey National plc*—reflect a particular desire of the common law to shield a wide range of terms from review? Hugh Collins described as a victory for the supporters of free competition the decision of the Council of Ministers to amend the text by, in article 4(2), excluding from review the main subject matter of the contract and the adequacy

¹⁴⁰ *Id.* [310].

¹⁴¹ *Id.* [315].

¹⁴² *Id.*

¹⁴³ *Id.* [112].

of the price or remuneration paid for the goods or services.¹⁴⁴ Recital 19 explains: “[A]ssessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied.”¹⁴⁵

This exemption was in fact introduced in response to German academic criticisms that the controls should not interfere too much with personal autonomy in the operation of market economy.¹⁴⁶ Thus, the U.K. courts are certainly not alone in believing market forces should discipline such terms, and allowing their challenge would interfere with freedom of contract. In relation to price, it was also suggested there might be unnecessary challenges even in competitive markets due to ignorance of other market factors.¹⁴⁷ The question is then how broadly the exemption should be interpreted.

It is assumed that core terms relating to the main subject matter, price, and remuneration are aspects that the consumer can be expected to turn his or her mind to, and so the market can control them. What the law needs to regulate are those more technical terms that consumers will not think to consider or even be able to evaluate and yet can cause unfair surprises.¹⁴⁸ On this basis, core terms should only be excluded if consumers could have been expected to take account of them.¹⁴⁹ This core ancillary distinction is familiar to civil lawyers,¹⁵⁰ and Willett explains this as only exempting those terms “genuinely reflecting reasonable consumer expectations.”¹⁵¹

The policy of distinguishing terms that are so core that the parties can be expected to have negotiated them seems sensible. They may not have negotiated them, but the consumer is expected to take some responsibility for the bargain struck. There seems also to be a lot of

¹⁴⁴ See Collins, *supra* note 70, at 238.

¹⁴⁵ Council Directive 93/13, 1993 O.J. (L 95) 29, 30 (EC).

¹⁴⁶ Hans Erich Brandner & Peter Ulmer, *The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission*, 28 COMMON MKT. L. REV. 647, 648–49 (1991).

¹⁴⁷ THE LAW COMM’N & THE SCOTTISH LAW COMM’N, UNFAIR TERMS IN CONSUMER CONTRACTS: A NEW APPROACH? §§ 3.27–3.34 (2012); THE LAW COMM’N & THE SCOTTISH LAW COMM’N, UNFAIR TERMS IN CONTRACTS: A JOINT CONSULTATION PAPER § 3.57 (2002) [hereinafter JOINT CONSULTATION PAPER].

¹⁴⁸ See Michael Schillig, *Directive 93/13 and the ‘Price Term Exemption’: A Comparative Analysis in the Light of the ‘Market for Lemons’ Rationale*, 60 INT’L & COMP. L.Q. 933, 938 (2011). See generally Beale, *supra* note 107.

¹⁴⁹ See Schillig, *supra* note 148, at 948–55.

¹⁵⁰ See Anne de Moor, *Common and Civil Law Conceptions of Contract and a European Law of Contract: The Case of the Directive on Unfair Terms in Consumer Contracts*, 3 EUR. REV. PRIV. L. 257, 268 (1995).

¹⁵¹ WILLETT, *supra* note 62, at 249.

sense in the Law Commission's view that what falls into the core may depend upon how the terms are presented, as this can influence the consumer's reasonable expectations.¹⁵² It gave the following example:

So in a contract for a "holiday with travel by air," a clause in the "small print" allowing the company, in the event of air traffic control strikes, to carry the consumer by rail and sea seems to be reviewable for fairness; but it can be argued that if the holiday is "with travel by air or, in the event of strikes, by rail and sea," the option of mode of travel *might* be part of the definition of the main subject matter.¹⁵³

One might doubt whether companies would ever word offers in the second manner, but that explains why terms that allow for such alternatives in the first example need to be subject to assessment for their fairness.

The exemption of core terms could be interpreted as the EU placing relatively little weight on substantive fairness. However, this depends upon whether the exemption is interpreted broadly or narrowly. The broad interpretation given by the Supreme Court in *Office of Fair Trading v. Abbey National plc*¹⁵⁴ (the bank charges case) is one of the reasons why some commentators question the commitment of the English courts to embracing the Directive's protective philosophy. It took the view that, as regards price, the main control came through transparency.¹⁵⁵ By contrast, German law, which influenced the Directive's drafting, only exempted a narrow range of mutual obligations without which there could not be a contract due to lack of specification and determinability of the main content.¹⁵⁶

The terminology of "core terms" is not found in the Directive. It suggests a narrow exemption, but the use of "core" may be rejected by those who argue that it is impossible to define such a core or essential bargain. Indeed, it is true that a contract is a package of terms which all affect the price and value of the bargain, but the need to draw such a line seems implicit in the directive only excluding terms defining the *main* subject matter.¹⁵⁷ This definitional problem will arise whenever there is a carve out from the general regime for certain terms. The

¹⁵² See generally JOINT CONSULTATION PAPER, *supra* note 147.

¹⁵³ *Id.* § 3.23.

¹⁵⁴ [2009] UKSC 6, [110]–[111], [2010] 1 AC 696.

¹⁵⁵ *Id.*

¹⁵⁶ See Schillig, *supra* note 148, at 950.

¹⁵⁷ Elizabeth Macdonald, *The 'Core Exemption' from the Fairness Test in Unfair Terms Legislation*, 29 J. CONT. L. 121, 134 (2012) (noting that the adjective "main" has not been used to restrict the scope of the core terms).

challenge is to find a way to determine which terms can and which terms cannot be reviewed on a logical basis.

The description “core” fits well with the *main* subject-matter definition, but most debate has centred on whether the price is similarly restricted to the main elements or whether the whole pricing package is excluded from review. Moreover, it seems clear that only the adequacy is nonassessable. Other aspects such as how the price is computed, timing, and payment method might be reviewable. Also, charges payable on default are reviewable, but the bank charges case showed that careful drafting might bring charges within the main pricing structure and insulate them from review. There is a lot to be said for the Australian approach of only exempting the upfront price from review.¹⁵⁸

Academic commentators have tended to favour the restrictive approach to the exemption, using the logic that terms should only be excluded from review if consumers should be expected to pay attention to them. Unfair terms legislation controls terms that parties are unlikely to consider and may not even appreciate the significance of.

This market control justification for the core-terms exemption is supported because the exemption only applies when the term is in plain and intelligible language.¹⁵⁹ The removal of the exemption is thus an important sanction for the use of unintelligible language. The language should not just be formally and legally correct, but it should be presented in such a way that the consumer can understand and make use of the information.

The House of Lords in *Director General of Fair Trading v. First National Bank Plc* seemed happy to draw this distinction between core and ancillary or incidental terms. It was emphasised that the exemption for core terms should be restrictively applied. The Court sought to avoid the “main purpose of the scheme [being] frustrated by endless formalistic arguments as to whether a provision is a definitional or an exclusionary provision.”¹⁶⁰ Equally, the Court noted that price should be kept within limits as “in a broad sense all terms of the contract are in some way related to the price,” and it was noted that even price escalation clauses should be subject to review.¹⁶¹

¹⁵⁸ See *Competition and Consumer Act 2010* (Cth) sch. 2 s 26(1)(b) (Austl.). See generally Chris Willett, *Transparency and Fairness in Australian and UK Regulation of Standard Terms*, 37 U.W. AUSTL. L. REV. 72 (2013).

¹⁵⁹ Council Directive 11/83, arts. 7(1), 8(1), 2011 O.J. (L 304) 64, 76–77.

¹⁶⁰ *First Nat'l Bank Plc* [2001] UKHL 52, [34], [2002] 1 AC 481 (Lord Steyn).

¹⁶¹ *Id.* [34], [54] (Lords Steyn & Millett).

However, the bank charges case of *Office of Fair Trading v. Abbey National plc*¹⁶² is the most troubling case for those seeking to conclude that the U.K. courts have embraced the European approach to fairness. The Court seemed to take an unduly restrictive approach as to which terms were assessable for their fairness. This was so even based on the Directive's wording and case law at the time. Subsequent CJEU case law seems to strengthen that assessment. Its failure to refer the issue of the reviewability of bank charges to the European Court is the most criticised aspect of the Supreme Court's decision. Hopefully, the case is an aberration based on its particularly sensitive facts and future courts will draw a different line around which terms are excluded from review.

The case involved a challenge by the Office of Fair Trading regarding excessive bank charges incurred when customers had various irregular activity, such as exceeding overdraft limits, not paying amounts due to insufficient funds, or paying amounts despite there being insufficient funds.¹⁶³ These were not held to be penalty charges, as they were allowed for under the agreement and did not arise on breach.¹⁶⁴ Such charges were central to the financing of the "free-if-in-credit" model that most British current accounts operated under.¹⁶⁵ The question was whether they were subject to review under the Unfair Terms in Consumer Contracts 1999 Regulations.¹⁶⁶ The Regulations exclude assessment, so long as it is in plain intelligible language, of a term not relating "(a) to the definition of the main subject matter of the contract, or (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange."¹⁶⁷

¹⁶² See generally Mindy Chen-Wishart, *Bank Charges: A Lesson in Interpreting EC Law*, 125 L.Q. REV. 389 (2009); Mindy Chen-Wishart, *Transparency and Fairness in Bank Charges*, 126 L.Q. REV. 157 (2010); Mindy Chen-Wishart, *Unfairness of Bank Charges*, 124 L.Q. REV. 561 (2008); Paul S. Davies, *Bank Charges in the Supreme Court*, 69 CAMBRIDGE L.J. 21 (2010); Kenny, *supra* note 134; Macdonald, *supra* note 157; Elizabeth Macdonald, *Bank Charges and the Core Exemption: Office of Fair Trading v Abbey National Plc*, 71 MOD. L. REV. 987 (2008); Phillip Morgan, *Bank Charges and the Unfair Terms in Consumer Contracts Regulations 1999: The End of the Road for Consumers?*, 2010 LLOYD'S MAR. & COM. L.Q. 208; Schillig, *supra* note 148; Simon Whittaker, *Unfair Contract Terms, Unfair Prices and Bank Charges*, 74 MOD. L. REV. 106 (2011); Willett, *supra* note 31.

¹⁶³ See *Abbey Nat'l plc* [2009] UKSC 6, [1], [2010] 1 AC 696.

¹⁶⁴ *Id.* [82]–[89]. This was despite recognition that the law should not allow the control to be circumvented by how the agreement was framed. See *id.* Also, it does not need to be a default clause to be subject to review. See *id.* [89].

¹⁶⁵ See *id.* [114].

¹⁶⁶ *Id.*

¹⁶⁷ The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, § 6(2).

The High Court and Court of Appeal held the bank charges were subject to review, albeit by slightly different routes.¹⁶⁸ The Supreme Court disagreed.¹⁶⁹ Judge Andrew Smith at first instance held that the exclusion of terms relating to the adequacy of the price and remuneration was not limited to the main subject matter.¹⁷⁰ However, the exclusion did not apply to the charges. The charges were not in relation to the whole package of a current account and would not be so recognised by the typical consumer opening an account.¹⁷¹ Moreover, the description “free-if-in-credit” connoted that there was no price to pay if the account was in credit.¹⁷² Looking into the adequacy of the charges was irrelevant, as they did not intrude upon the essential bargain.¹⁷³ Neither were the charges excluded from review because they were related to a separate service.¹⁷⁴ This approach was criticised by the Supreme Court for failing to appreciate that these charges formed an important part of the income stream for banks.¹⁷⁵ It was not considered right to only consider an account that was always in credit.¹⁷⁶

The Court of Appeal took a rather European approach. It adopted the view that the contract should be analysed as a package, but it divided it into the “core or essential bargain” and “incidental or ancillary provisions.”¹⁷⁷ This distinction seems to conform to the EU policy, but it was rejected by the Supreme Court. Lord Mance picked up on the Court of Appeal mentioning lack of negotiation¹⁷⁸ as a reason for reviewing such ancillary terms. Only nonnegotiated terms are subject to review under the Directive, and Lord Mance used the infelicitous wording of the Court of Appeal to suggest its error was so obvious that the *acte claire* doctrine could apply to justify not making a reference.¹⁷⁹ But it seems clear that the Court of Appeal was talking about the policy behind the core/ancillary distinction rather than the

168 *Abbey Nat'l plc* [2009] UKSC 6, [2010] 1 AC 696 (UKSC) 696.

169 *Id.*

170 *Office of Fair Trading v. Abbey Nat'l plc* [2008] EWHC (Comm) 875 [344].

171 *Id.* [398].

172 *Id.* [399].

173 *Id.* [400].

174 *Id.* [402].

175 *Abbey Nat'l plc* [2009] UKSC 6, [105], [2010] 1 AC 696.

176 It was also criticized by Elizabeth Macdonald for taking an unduly common law approach. See Macdonald, *supra* note 162, at 995–98. She agreed with the outcome but criticised the judge's reasoning for placing too much emphasis on the expression “exchange” in the regulation and approaching the expression “goods and services” too narrowly.

177 *Abbey Nat'l plc v. Office of Fair Trading* [2009] EWCA (Civ) 116 [49], [104] (Eng.).

178 See *Abbey Nat'l plc* [2009] UKSC 6, [52], [64], [67], [109], [2010] 1 AC 696.

179 See *id.* [108] (Lord Mance SCJ).

reason for a finding of unfairness in a particular term. The Directive applies to those terms that are unlikely to be negotiated, whereas one might expect negotiation to occur and market forces to prevail for core terms. For example, if a buyer goes to purchase a car, the buyer expects to use standard terms, but the buyer will most likely negotiate on the price or core aspects, such as which accessories are included. That is why they are excluded from review. The rest are subject to review because it is understood there will be no negotiation. It may be less realistic to argue that consumers could negotiate any part of a standard bank current account. This should not lead us to abandon the core/ancillary distinction. Consumers may wish to avoid contracts with unfavourable core terms or, at least, can be taken to have entered the deal with their eyes wide open to the risk.

Ancillary terms may not be subject to negotiation, but the real reasons for this and the justification for their inclusion in the protective regime were recognised by the Court of Appeal when it agreed with the Law Commission that “[c]onsumers are much less likely to take into account terms which only apply in certain circumstances (whether or not those circumstances involve a default).”¹⁸⁰ The lack of negotiation explains why such terms need to be subject to an assessment. It is unfair to suggest that the Court of Appeal was stating that in making such an assessment in individual cases, actual lack of negotiation was relevant. Rather, it explained why those types of terms should be subject to review. The Supreme Court was seeking justification for not making a preliminary reference to the CJEU.

The Supreme Court viewed the charges as part of the overall package involved for “free-if-in-credit” accounts and excluded them from review. The deal was free banking in return for banking charges if the account was used fecklessly.¹⁸¹ The charges were an “important part of the revenue that [the banks] generate from the current account services.”¹⁸² They amounted to thirty percent of revenue stream, and such charges were paid by twenty percent of current account customers totaling twelve million.¹⁸³ Seventy-seven percent of consumers incurring charges in the last year had heard of them.¹⁸⁴ The Court of Appeal was seen as being too elaborate and creating uncertainty by

¹⁸⁰ *Abbey Nat'l Plc* [2009] EWCA (Civ) 116 [105] (quoting JOINT CONSULTATION PAPER, *supra* note 147, § 3.32).

¹⁸¹ *See id.* [17].

¹⁸² *Id.* [88].

¹⁸³ *Id.* [1], [36], [47], [87].

¹⁸⁴ *See id.* [105].

opening up an exploration of which terms were so essential that consumers could be expected to pay attention to them.¹⁸⁵ Lord Mance noted consumer protection was limited to transparency.¹⁸⁶ He thought regard should be given

to the view which the hypothetical reasonable person would take of its nature and terms. But there is no basis for requiring it to do so by attempting to identify a “typical consumer” or by confining the focus to matters on which it might conjecture that he or she would be likely to focus.¹⁸⁷

This seems at odds with the European notion of the average consumer that was subsequently found to apply to the assessment of the fairness of terms.¹⁸⁸ It also seems to adopt a supplier-focused perspective rather than focusing on what consumers might reasonably expect.

The case may be explained by the circumstances surrounding the litigation. The banks had recently been battered by the effects of the global financial crisis and the need to redress misselling on payment protection insurance (“PPI”).¹⁸⁹ The Supreme Court clearly did not want to deal them a third blow. It was also conscious of the impact on the courts. Morgan notes that the banks would be facing an “Armageddon claim” if this challenge was allowed and that “the Supreme Court must be well aware that one appellate decision can be the death blow to a financial institution. Given the economic climate and the state support for the banking sector, the taxpayer would be left to pick up the bill.”¹⁹⁰

He wondered if this was the “hidden theme behind the judgment.”¹⁹¹ Lord Walker also noted the many thousands of claims that had been stayed in county courts pending this decision.¹⁹² There is a suspicion that the Supreme Court prioritised the security of the banks. The lower courts had the luxury of knowing their judgment could be appealed. The Supreme Court knew any decision allowing the unfairness of the charges to be reviewed might dramatically impact banks.

¹⁸⁵ See *id.* [45] (Lord Walker SCJ).

¹⁸⁶ See *id.* [113] (Lord Mance SCJ). Presumably, this was meant in relation to terms excluded from review only.

¹⁸⁷ *Id.* [113] (Lord Mance SCJ).

¹⁸⁸ See *id.* [91]–[92].

¹⁸⁹ See Graeme Wearden, *How the PPI Scandal Unfolded*, GUARDIAN (May 5, 2011, 10:07 AM), <https://www.theguardian.com/business/2011/may/05/how-ppi-scandal-unfolded>.

¹⁹⁰ Morgan, *supra* note 162, at 214 (footnote omitted).

¹⁹¹ *Id.*

¹⁹² *Abbey Nat'l plc* [2009] UKSC 6, [17], [2010] 1 AC 696, [17].

This pro-bank stance seems confirmed by the Supreme Court's view that the issue of the charges being exempt from review was *acte claire* and so did not need to be referred to the CJEU.¹⁹³ The decision not to refer was made despite their Lordships' interpretations being in stark contrast to the Court of Appeal.¹⁹⁴ We have already noted Lord Mance's attempt to justify the nonreferral on the basis that the Court of Appeal had clearly misunderstood the rule by their reference to negotiation. Lord Walker simply stated "the lower courts were clearly wrong."¹⁹⁵ The Lordships who had reservations about whether the core/ancillary distinction was *acte claire* were persuaded by the argument that even if correct in law, the Court of Appeal had wrongly applied it on the facts.¹⁹⁶

The decision not to refer seems difficult to justify. It was not only the Court of Appeal that took a different approach. The first instance judge, whose work had been commended,¹⁹⁷ also held the terms reviewable. The decision runs counter to the House of Lords in *Director General of Fair Trading v. First National Bank Plc*, where the core terms concept was invoked and default charges were seen as one, but not the only, term relating to price that remained subject to review.¹⁹⁸ In that case, it was said that artificial contract drafting should not affect the ability to review. This seems to be what has happened here. The charges were not payable on breach and so were not penalty clauses, but their place inside the contractual performance framework should not immunize them from review. The German Supreme Court has in fact subjected such charges to review.¹⁹⁹ One might, of course, level the same criticism of not making a preliminary reference at the German Supreme Court. It did not apparently ever consider that the

¹⁹³ *Id.* [49], [115].

¹⁹⁴ *See id.* [116], [117], [120].

¹⁹⁵ *Id.* [49].

¹⁹⁶ *See id.* [50] (Lord Walker SJC); *id.* [91] (Lord Phillips P); *id.* [117] (Lord Mance SCJ).

¹⁹⁷ *See id.* [38] (Lord Walker SCJ).

¹⁹⁸ *See First Nat'l Bank Plc* [2001] UKHL 52, [25]–[26], [2002] 1 AC 481.

¹⁹⁹ The German Supreme Court assessed whether an overdraft was fair without even considering whether it was subject to assessment. Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 21, 1997, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ] 137, 43. See discussion in UNFAIR TERMS IN CONSUMER CONTRACTS: A NEW APPROACH?, *supra* note 147, 84–86. It notes that direct comparison is difficult because the structure of German banking is different with fees being paid for accounts. German law also proceeds on the basis of assessing unfairness against default rules. Price and main subject matter are not reviewable as there are no default rules, but ancillary terms and additional prices have traditionally been reviewable. *See* Hein Kötz, *Schranken der Inhaltskontrolle bei den Allgemeinen Geschäftsbedingungen der Banken*, 20 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 332, 344–46 (2012); *see also* Schillig, *supra* note 148, at 954–58.

reviewability would be contested and might be a matter needing a reference.²⁰⁰

The Supreme Court decision looks even more insecure when assessed against the later CJEU decision in *Kásler v. OTP Jelzálogbank Zrt.*²⁰¹ In that case, the Court accepted the core/ancillary term distinction.²⁰² This suggests that if there had been a review it would be the Supreme Court which was clearly wrong and not the Court of Appeal. The Supreme Court might have defended itself by noting the CJEU had called upon national courts to take the responsibility for determining what are essential characteristics.²⁰³ However, this involved such a crucial and contested debate over the scope of the exemption that a preliminary reference to Luxembourg was surely required.

In a typically British way, the matter of bank charges was resolved by negotiation between the OFT and banks reducing the level of the charges and the Law Commission being asked to look at the test. There was subsequent legislative amendment to enhance the controls by introducing the requirement of prominence before core terms are excluded from review.²⁰⁴

VI. PLAIN AND INTELLIGIBLE LANGUAGE

The concept of intelligibility has been interpreted by the CJEU in a manner that has assured a high level of consumer protection. Contract terms must be drafted in plain and intelligible language.²⁰⁵ The sanction for failing to do so is that the term should be interpreted in the manner most favorable to the consumer.²⁰⁶ Also, very importantly, if core terms are not so drafted they will still be subject to assessment for fairness.²⁰⁷ Most of the debate has turned on determining from whose perspective intelligibility should be judged. What may be plain and intelligible to a lawyer familiar with a product sector may not be

²⁰⁰ See Schillig, *supra* note 148, at 943.

²⁰¹ Case C-26/13, 2014 EUR-Lex CELEX LEXIS 282 (Apr. 30, 2014).

²⁰² *Id.* ¶¶ 49–51.

²⁰³ *Id.* ¶ 51; see also Case C-96/14, Van Hove v. CNP Assurances, 2015 EUR-Lex CELEX LEXIS 262, ¶ 27 (Apr. 23, 2015); Case C-143/13, Matei v. SC Volksbank România SA, 2015 EUR-Lex CELEX LEXIS 127, ¶ 53 (Feb. 26, 2015).

²⁰⁴ Consumer Rights Act 2015, c. 15, § 64(1)–(2) (UK).

²⁰⁵ Council Directive 93/13, art. 5, 1993 O.J. (L 95) 29, 31 (EC). This is backed up by a rule of interpretation which states that the meaning most favourable to the consumer should prevail (although this does not apply in collective actions, as it might save terms that were harmful to the consumer). *Id.*

²⁰⁶ *Id.* Injunction actions are also possible, in which case this interpretative rule does not apply. This is so as not to protect terms that are potentially unfair to consumers.

²⁰⁷ *Id.* art. 4(2).

intelligible to a nonlawyer or even a lawyer unfamiliar with the jargon associated with a particular product or service.

The concept of the average consumer is often berated by consumer advocates. In the commercial practices context, it has been taken to represent a consumer who is far more assiduous than the real average consumer.²⁰⁸ However, it was called upon in this context to ensure that legal and technical jargon should be eschewed.²⁰⁹ To my knowledge, no commentator had previously posited a version of transparency quite as bold as the CJEU has espoused. This requires not only that the terms be formally and grammatically intelligible, but that its consequences can be understood by the average consumer.²¹⁰ So, for example, the power to vary contracts has to be set out so that consumers can understand when and to what extent it may be used. Equally, it might be necessary to spell out the economic consequences for the consumer—rather than leave them implicit so that many consumers may fail to recognise them. In the consumer credit context, the law moves beyond passive information to an active duty to explain.²¹¹ The CJEU seems to be nudging contract drafters in the same direction.

The plain and intelligible requirement is part of a broader transparency test. Transparency as such is not mentioned in the Directive, but many aspects such as the legibility, size, and prominence of the terms could fall for consideration within the context of the good faith test. There have been calls, for example, for this test to require that the terms be made intelligible by the way they were set out—e.g., terms excluding or limiting liability should be placed in the same section as the obligations that are being excluded, or at least there should be cross-referencing.²¹²

In the context of determining whether core terms are immune from scrutiny, the CJEU has given some very strong guidance on what level of transparency is required. *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt*²¹³ involved a unilateral variation of general business conditions to require the consumer to pay expenses incurred if payment was made by money order, but without stating how these would be calculated. The Court ruled that the power to vary the con-

208 Rosella Incardona & Cristina Poncibò, *The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution*, 30 J. CONSUMER POL'Y 21, 32 (2007).

209 See WILLETT, *supra* note 62, at 328–32.

210 Van Hove, 2015 EUR-Lex CELEX LEXIS 262, ¶¶ 7–8.

211 See Council Directive 2008/48/EC, art. 5(6), 2008 O.J. (L 133) 66, 75 (EC).

212 See WILLETT, *supra* note 62, at 331.

213 Case C-472/10, 2012 EUR-Lex CELEX LEXIS 242 (Apr. 26, 2012).

tract had to provide the method for fixing fees and the reasons for amendment.²¹⁴ These had to be set out in plain and intelligible language that allowed consumers to foresee, on the basis of clear, intelligible criteria, the amendments that the supplier could make.²¹⁵

The same requirement about intelligibility and predictability of any term giving a power of amendment was also present in *RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen e.V.*,²¹⁶ which concerned a term allowing for variation in gas prices. The Court stressed the fundamental importance of intelligible information being provided to consumers before they entered the contract so that they could decide whether to be bound.²¹⁷

Kásler v. OTP Jelzálogbank Zrt did not involve a variation of terms, but rather a complex mechanism for pricing and repayment of a foreign currency loan. It is an important decision because the Court makes explicit the requirement that intelligibility should not be restricted to mere formal or grammatical intelligibility.²¹⁸ The standard to be used to assess intelligibility is that of “the average consumer, who is reasonably well informed and reasonably observant and circumspect.”²¹⁹ The CJEU was rather protective of the average consumer, as it required not only that the consumer understood the difference between buying and selling rates, but also the significant economic consequences that may result from the application of the selling rate to the calculation of repayments and the total sum repaid.²²⁰

The need for more than formal and grammatical intelligibility was again applied in *Matei v. SC Volksbank România SA*.²²¹ It was questioned whether consumers would be able to foresee what the “significant changes in the money market” were that would justify variation and whether the reasons justifying a “risk charge” had been set out.²²² This same requirement of appreciation of the economic consequences is also present in *Van Hove v. CNP Assurances SA*.²²³ This concerned

²¹⁴ *Id.* It is unclear whether the case was about the power to vary the contract by including these expenses or the fact that the new term failed to specify the method of calculating expenses.

²¹⁵ *Id.* ¶ 28.

²¹⁶ Case C-92/11, 2013 EUR-Lex CELEX LEXIS 180 (Mar. 21, 2013).

²¹⁷ *Id.* ¶ 44.

²¹⁸ *Kásler*, 2014 EUR-Lex CELEX LEXIS 282, ¶¶ 71–72.

²¹⁹ *Id.* ¶ 74.

²²⁰ *Id.*

²²¹ Case C-143/13, 2015 EUR-Lex CELEX LEXIS 127, ¶¶ 73–78 (Feb. 26, 2015).

²²² *Id.* ¶¶ 76–77.

²²³ Case C-96/14, 2015 EUR-Lex CELEX LEXIS 262 (Apr. 23, 2015).

a phrase in an insurance contract that only paid out on “total incapacity for work.”²²⁴ There was concern that this could not be recognized as being different from the French social security concept of “partial permanent incapacity.”²²⁵

In all these cases, the CJEU left the assessment to the national courts but laid out very clearly how extensive the requirement of intelligibility was. In particular, any power of variation must set the reasons for and method of variation in a manner that was intelligible to the average consumers so they could predict when variation might occur and what consequences there might be. It is clear that merely reserving the right to vary a term would not be sufficient.

From a U.K. perspective, this interpretation of intelligibility is particularly interesting, as it may affect some established rules on variation of interest rate in credit contracts. The Court of Appeal in *Nash v. Paragon Finance Plc*²²⁶ held that a mortgagee’s right to set the interest rate should not be used dishonestly, for an improper purpose, capriciously, or arbitrarily. However, generally mortgagees were free to set the rate based on the market and their commercial considerations.²²⁷ The Consumer Credit (Agreements) Regulations 1983 had required a statement indicating the circumstances in which any variation of the rate or amount of any item entering into the calculation of APR may occur.²²⁸ In the first instance of *Lombard Tricity Finance Ltd v. Paton*,²²⁹ the judge concluded that “‘statement of circumstances’ require[s] a reference to external factors by which the debtor can judge whether the variation is being properly exercised[, e.g.,] by a reference to base rates, retail price indices or other such guidelines as the creditor may care to choose.”²³⁰ This seems to be in line with the CJEU’s thinking, but the Court of Appeal thought otherwise.²³¹ It felt that listing all possible circumstances would run counter to the statutory intention of gathering all information in one place, known as the “holy ground” or, as Staughton LJ dubbed it, the “child’s guide.”²³² *HSBC Bank Plc v. Brophy*²³³ concerned a credit card agreement for which it

224 *Id.* ¶ 2.

225 *Id.* ¶¶ 46–47.

226 [2001] EWCA (Civ) 1466 [32] (Eng.).

227 *Id.* [28]. This was applied in *Swift 1st Ltd. v. McCourt*, [2012] NICH 33 [32]–[34] (N. Ir.).

228 The Consumer Credit (Agreements) Regulations 1983, SI 1983/1553, sch. 1, ¶ 19 (UK).

229 [1989] 1 All ER 918 (Eng.).

230 *Id.* at 922.

231 *Id.* at 920.

232 *Id.*

233 [2011] EWCA (Civ) 67 (Eng.).

was required that there be “[a] term stating the credit limit or the manner in which it will be determined or that there is no credit limit.”²³⁴ The Court of Appeal took a similar approach and held it was

deliberately broad and is apt to cover any arrangements for the determination of the credit limit that may be agreed between the parties in cases where there is neither a fixed credit limit nor the absence of any credit limit. In my view the meaning of clause 3 is clear: it provides for the Bank to determine the credit limit from time to time at its discretion by notifying the debtor of its amount.²³⁵

The result in both the Consumer Credit Act cases would have been the unenforceability of the contracts. If the CJEU case law on intelligibility were to be used, these terms might be challengeable under unfair terms rather than credit law.

VII. LOWER-LEVEL JUDGEMENTS

Although it is important for testing the receptiveness of European law in U.K. jurisprudence, there is a risk of unduly focusing on Supreme Court case law. Given that many unfair terms will never reach that level, the approach of first instance courts and the regulator may be a better way to assess the practical impact. There are many lower instance court decisions that seem receptive to consumer protection and welcoming of the European concepts. An excellent early example of this was *London Borough of Newham v. Khatun*.²³⁶ The court held that the Unfair Terms in Consumer Contracts Regulations 1999 applied to contracts relating to land.²³⁷ In coming to this conclusion, it undertook extensive research into the background of the European legislation and compared different language versions of the Directive.²³⁸ In particular, the judge noted the French version used “biens” instead of goods and that in French law biens included movable property.²³⁹ The High Court in *Barclays Bank plc v. Kufner*²⁴⁰ also held that the rules protected guarantors, at least if both the borrowers and guarantor are consumers.²⁴¹ In doing so, it followed the CJEU jurisprudence in a related consumer context of *Bayerische Hy-*

²³⁴ *Id.* [15].

²³⁵ *Id.* [18].

²³⁶ [2004] EWCA (Civ) 55.

²³⁷ *Id.* [83].

²³⁸ *See id.* [68]–[70].

²³⁹ *Id.*

²⁴⁰ [2008] EWHC (Comm) 2319.

²⁴¹ *Id.* [29].

*pothetken v. Dietzinger*²⁴² and did not follow the unreported case of *Bank of Scotland v. Singh*.²⁴³

There have been other instances of the courts being willing to apply the rules in a manner that promoted the regulation of terms. In *Bairstow Eves London Central Ltd. v. Smith*,²⁴⁴ an estate agent's commission of 3% with an early bird discount to 1.5% if paid within ten days was held to be reviewable as the operative price was said to be 1.5%.²⁴⁵ There was a clear desire to keep the nonreviewability of the price within strict bounds.²⁴⁶ In *Foxtons Ltd v. O'Reardon*,²⁴⁷ although the amount of an estate agent's commission could not be reviewed, this did not prevent the fairness of the timing of the payment (on exchange rather than completion) from being reviewed.²⁴⁸ A clause in an architect's contract requiring payment of legal costs on an indemnity basis was struck down as onerous and not sufficiently drawn to the consumer's attention despite being in the industry-used standard form.²⁴⁹ The unfairness test has been used to strike down arbitration clauses, though the case law shows how the application of the test is sensitive to particular facts.²⁵⁰

VIII. ENFORCEMENT

The case law of the CJEU has been far richer and more expansive than might have been predicted.²⁵¹ We have concentrated on the few cases dealing with the substantive rules, but many of the cases have surprisingly focused on ensuring procedural protection. CJEU case

²⁴² Case C-45/96, 1998 E.C.R. I-1214.

²⁴³ Unreported, June 17, 2005 (QB).

²⁴⁴ [2004] EWHC (QB) 263.

²⁴⁵ *Id.* [27]–[30].

²⁴⁶ *See id.*

²⁴⁷ [2011] EWHC (QB) 2946.

²⁴⁸ *Id.* [67].

²⁴⁹ *Munkenbeck & Marshall v. Harold* [2005] EWHC (TCC) 356 [15].

²⁵⁰ *See Mylcris Builders Ltd. v. Buck* [2008] EWHC (TCC) 2172; *Zealand & Zealander v. Laing Homes Ltd.* [2000] 2 TCLR 724. On the other side of the line, based on particular facts, were arbitration clauses in *Heifer International Inc. v. Christiansen* [2007] EWHC (TCC) 3015. Adjudication clauses have been upheld in *Domsalla v. Dyason* [2007] EWHC (TCC) 1174. *See also Westminster Bldg. Co. v. Beckingham* [2004] EWHC (TCC) 138; *Bryen & Langley Ltd. v. Boston* [2005] EWCA (Civ) 973; *Allen Wilson Shopfitters & Builders Ltd. v. Buckingham* [2005] EWHC (TCC) 1165. Although not held to be incorporated, in *Picardi v. Cuniberti*, the judge obiter was persuaded the adjudication clause was unfair. [2002] EWHC (TCC) 2923 [111], [123], [128]–[234]. These adjudication cases were influenced by it sometimes being the consumer party that proposed them; the cheap speedy nature of the procedure, and the possibility to challenge the adjudication. *See Lovell Projects Ltd. v. Legg* [2003] BLR 452.

²⁵¹ *See Micklitz & Reich, supra* note 96, at 785–86. *See generally* HOWELLS ET AL., *supra* note 20, ch. 4.

law has been concerned with controlling the use of arbitration clauses,²⁵² ensuring procedural time limits do not prevent redress,²⁵³ and requiring that interlocutory remedies be available.²⁵⁴ Perhaps the most significant innovation has been the requirement placed on national courts to adopt an *ex officio* doctrine to consider unfair terms of their own motion.²⁵⁵

The *ex officio* doctrine represents a departure for English civil procedure. The *ex officio* doctrine makes more sense in the civilian system where judges prepare the court file and might therefore be expected to raise unfairness of their own motion. Although, this doctrine may still be novel for many civilian jurisdictions. It has been formally introduced into English law by the Consumer Rights Act 2015.²⁵⁶ This places a duty on the court to consider whether the term is fair—even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it.²⁵⁷ However, it goes on to provide—in line with CJEU jurisprudence—that this duty only applies if the court considers that it has sufficient legal and factual material before it to enable it to consider the fairness of the term.²⁵⁸ Normally, of course, the standard form contract will be all that is needed to alert the judge to potential unfairness. However, unless judicial training and subsequent practice is amended, it is unlikely that common law judges will be alert to this obligation. Their practice is to leave it to the parties to make legal arguments. Although the U.K. has adopted the *ex officio* doctrine in legislation, it is difficult to see that it will affect practice. The reality is that it will be rare that anyone will notice or bring to account a judge that fails to challenge unfair terms. However, in one such case, the CJEU recently signalled there may be state liability if courts fail to discover and take action against unfair terms *ex officio*.²⁵⁹

²⁵² See Case C-342/13, *Sebestyén v. Zsolt Csaba Kovári*, 2014 EUR-Lex CELEX LEXIS 1857, ¶¶ 25–30 (Apr. 3, 2014).

²⁵³ Case C-473/00, *Cofidis SA v. Fredout*, 2002 E.C.R. I-10898, ¶¶ 35–36.

²⁵⁴ See *Aziz*, 2013 EUR-Lex CELEX LEXIS 164, ¶¶ 43, 59.

²⁵⁵ *Océano Grupo Editorial SA*, 2002 E.C.R. I-4963, ¶ 32; see also Case C-40/08, *Asturcom Telecomunicaciones SL v. Rodríguez Nogueira*, 2009 E.C.R. I-9579, ¶ 58; Case C-168/05, *María Mostaza Claro v. Centro Móvil Milenium SL*, 2006 ECR I-10421, ¶ 62.

²⁵⁶ Consumer Rights Act 2015, c. 15 (UK).

²⁵⁷ *Id.* § 71(2).

²⁵⁸ *Id.*; see also Case C-243/08, *Pannon GSM Zrt. v. Erzsébet Sustikné Györfi*, 2009 ECR I-4713.

²⁵⁹ See Case C-168/15, *Milena Tomášová v. Slovenská Republika*, 2016 EUR-Lex CELEX LEXIS 602 (July 28, 2016). There was no liability as at the time the extent of the court's duty had not been fully set out.

The introduction of the *ex officio* doctrine persuaded the Law Commission that it should not press its earlier proposal²⁶⁰ that the burden of proof should be reversed.²⁶¹ However, being alerted to an issue and proving unfairness are two separate steps. The burden of proof may well not be vital in many cases. However, if the test becomes “What can consumers be reasonably assumed to be willing to accept?” there may be cases where lack of evidence of what is normal might be persuasive. Lord Toulson’s dissent in *ParkingEye*²⁶² raised this issue, but many judges, like the majority in that case, may feel confident to decide these cases on limited evidence.

Another major innovation from EU law has been the use of injunctions to control unfair terms. The Court of Appeal in *Office of Fair Trading v. Foxtons Ltd.*²⁶³ also upheld the efficacy of the injunction. The High Court had held that an injunction should not stop the use of the term in existing individual contracts as there may be circumstances which justify its use in particular cases.²⁶⁴ However, the Court of Appeal noted this would undermine the scheme of protection.²⁶⁵ The courts have not been open to the use of Group Litigation Order in these types of cases if they shut out consideration of individual circumstances.²⁶⁶

IX. U.K. CONSUMER LEGISLATION

The U.K. legislature has been faithful to the EU approach. It implemented the Directive by the Unfair Terms in Consumer Contracts Regulations 1994.²⁶⁷ These have been amended on several occasions, with the most important being the replacement of the original regulations with the Unfair Terms in Consumer Contracts Regulation

²⁶⁰ UNFAIR TERMS IN CONSUMER CONTRACTS: A NEW APPROACH?, *supra* note 147, § 2.28; LAW COMM’N & SCOTTISH LAW COMM’N, UNFAIR TERMS IN CONTRACTS: REPORT ON A REFERENCE UNDER SECTION 3(1)(E) OF THE LAW COMMISSIONS ACT 1965 § 3.57 (2005) [hereinafter UNFAIR TERMS IN CONTRACTS: REPORT ON A REFERENCE].

²⁶¹ LAW COMM’N & SCOTTISH LAW COMM’N, UNFAIR TERMS IN CONSUMER CONTRACTS: ADVICE TO THE DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS § 7.94 (2013) [hereinafter UNFAIR TERMS IN CONTRACTS: ADVICE].

²⁶² *Cavendish Square Holding BV v. Talal El Makdessi* [2015] UKSC 67, [309], [2016] AC 1172 (Lord Toulson).

²⁶³ [2009] EWCA (Civ) 288 (Eng.).

²⁶⁴ *Office of Fair Trading v. Foxtons Ltd.* [2008] EWHC (Ch) 1662 (Eng.).

²⁶⁵ *See Foxtons Ltd.* [2009] EWCA (Civ) 288 [49]–[51].

²⁶⁶ *See, e.g., Tew v. BoS (Shared Appreciation Mortgages) No 1 plc* [2010] EWHC (Ch) 203 [13] (Eng.).

²⁶⁷ Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159.

1999.²⁶⁸ This was considered necessary as the original Regulations were not thought to correctly and fully implement the Directive.²⁶⁹

The Law Commission has done a lot of work on unfair terms.²⁷⁰ Initially it had a threefold ambition of producing a unified consumer regime, extending the rules at least to cover small businesses, and drafting the provisions in simpler form and language that was more accessible to ordinary consumers. Ultimately, only the first of these objectives was achieved. The Consumer Rights Act 2015 has introduced major reforms. It has repealed both the Unfair Contract Terms Act 1977, as regards consumer contracts, and the Unfair Terms in Consumer Contracts Regulations 1999 and it replaced them with a unified regime the core elements of which are centred around the EU approach.

The Law Commission had proposed rewording the fairness test. It preferred a test of whether a clause is “fair and reasonable” to what it described as the “complex and unfamiliar” phrase “contrary to the requirements of good faith, [the term] causes a significant imbalance in the rights and obligations arising under the contract, to the detriment of the consumer” found in the Directive and Regulations.²⁷¹ Though it considered the substance was the same.²⁷² It maintained this position as late as 2012 in its Issues Paper.²⁷³ Only in 2013 did it change its tune, arguing the test “no longer appears to give rise to much confusion,” and therefore

[w]e have been persuaded by the strong arguments put to us that the words of the UTD should be changed only if there is a good reason to do so. We therefore recommend that the fairness test set out in articles 3(1) and 4(1) of the UTD should be replicated in the new legislation.²⁷⁴

²⁶⁸ Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/20.

²⁶⁹ Some of the changes included granting standing to consumer organisations to seek injunctions; extending the definition of seller and supplier to contracts which are not a sale or supply of goods; removing from the Regulations some material that had only been in recitals to the Directive; and making the *contra proferentum* rule inapplicable to injunction proceedings. See NEBBIA, *supra* note 32, at 42.

²⁷⁰ See JOINT CONSULTATION PAPER, *supra* note 147; UNFAIR TERMS IN CONTRACTS: REPORT ON A REFERENCE, *supra* note 260 (containing a draft bill and Explanatory Memorandum); UNFAIR TERMS IN CONSUMER CONTRACTS: A NEW APPROACH?, *supra* note 147; UNFAIR TERMS IN CONTRACTS: ADVICE, *supra* note 261.

²⁷¹ UNFAIR TERMS IN CONTRACTS: REPORT ON A REFERENCE, *supra* note 260, app. A, Explanatory Notes ¶ 9 (alteration in original).

²⁷² *Id.* app. A ¶ 2.

²⁷³ UNFAIR TERMS IN CONSUMER CONTRACTS: A NEW APPROACH?, *supra* note 147, § 2.28.

²⁷⁴ UNFAIR TERMS IN CONSUMER CONTRACTS: ADVICE, *supra* note 261, §§ S.32, 6.42.

The final wording in the Consumer Rights Act 2015 is faithful to the Directive's formulation. This may be more out of pragmatism than enthusiasm.²⁷⁵ Case law was emerging and guidance had been provided. No doubt the government was wary of challenge from the Commission if it deviated too far from the Directive's wording. Possibly, in a post-Brexit world, it may be more acceptable to revert to common law nomenclature. However, the same arguments against disturbing the settled position will remain relevant.

The Directive subjects all terms to the unfairness test, but it only provides an indicative "grey" list of terms that may be considered unfair. There is no black list. The Consumer Rights Act 2015 adopts this general approach but does maintain a complete bar on exclusion or restriction of negligence liability for death or personal injury²⁷⁶ and also certain exclusions of liability in consumer contracts relating to goods, digital content, and services.²⁷⁷

Besides the blacklisting of certain terms, the Consumer Rights Act 2015 contains some provisions going beyond the protection afforded by the Directive. These are allowed as the Directive is a minimal harmonisation measure. For instance, the Act applies to all terms, not just nonnegotiated terms.²⁷⁸ Like the Unfair Contract Terms Act 1977, it extends to notices.²⁷⁹ This is seen as important with regard to End User Licence Agreements. The government has noted that "click-wrap licences" may have contractual status, but "shrink-wrap" or "browse-wrap licences" may only be caught as notices.²⁸⁰

Following the case of *Office of Fair Trading v. Abbey National plc*, the Law Commission was asked to look again at the core exclusions. It made recommendations that have been included within the legislation to ensure the core terms really meet consumer expectations. Thus core terms are only excluded from review if transparent and prominent.²⁸¹ Transparent terms must be expressed in plain and intelligible language and be legible.²⁸² Prominency requires the term to be brought to the consumer's attention in such a way that the aver-

²⁷⁵ See generally Paula Giliker, *The Consumer Rights Act 2015—A Bastion of European Consumer Rights?*, 37 LEGAL STUD. 78 (2017).

²⁷⁶ Consumer Rights Act 2015, c. 15, § 65 (UK).

²⁷⁷ *Id.* §§ 31, 47, 57.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ Consumer Rights Act 2015, c. 15, Explanatory Notes ¶ 296 (UK).

²⁸¹ *Id.* § 64(2).

²⁸² *Id.* § 64(3).

age consumer would be aware of it.²⁸³ This approach to enhanced transparency seems quite in line with the EU Directive.

The Law Commission's recommended additions to the grey list of terms have been given effect too. The indicative list of unfair terms has been extended to include terms which have the object or effect of

(a) requiring that, "where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied";²⁸⁴

(b) "permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it"²⁸⁵ and

(c) "giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound."²⁸⁶

X. CONCLUSIONS

This approach to enhanced transparency seems to go beyond but still be in line with the spirit of the EU Directive.²⁸⁷ The legislator preferred to avoid moving away from the EU wording when offered the option by the Law Commission. Its adherence to the EU model may be lukewarm.²⁸⁸ It may be based on pragmatic considerations of the costs of change and the desire not to attract the supervisory attention of the Commission. But the longer it remains, the less likely it is that it will be removed, even if allowed post-Brexit. Even when advocated by the Law Commission, it was seen as a change of form rather than substance.

²⁸³ *Id.* § 64(4). "Average consumer" is given the normal, but contested, EU definition of someone who is "reasonably well-informed, observant and circumspect." *Id.* § 64(5).

²⁸⁴ *Id.* sch. 2, pt. 1, ¶ 5. This seeks to achieve parity of treatment between terms that require sums paid up front to be retained, *see id.* ¶ 4, and terms which require monthly payments to continue to be made. *See UNFAIR TERMS IN CONSUMER CONTRACTS: A NEW APPROACH?*, *supra* note 147, § 8.51. This addresses the issue in *Office of Fair Trading v. Ashbourne Mgmt. Servs. Ltd.* [2011] EWHC (Ch) 1237 [104] (Eng.).

²⁸⁵ Consumer Rights Act 2015, c. 15, sch. 2, pt. 1, ¶ 12.

²⁸⁶ *Id.* ¶ 14. Legislation might default to a reasonable price, but such a term would have ousted the court's jurisdiction. *See UNFAIR TERMS IN CONSUMER CONTRACTS: A NEW APPROACH?*, *supra* note 147, § 8.56.

²⁸⁷ *See* Christian Twigg-Flesner, *Standard Terms in Consumer Contracts: The Challenges of Law Reform in English Law*, in *COMPARATIVE CONTRACT LAW: BRITISH AND AMERICAN PERSPECTIVES* 427, 438 (Larry A. DiMatteo & Martin Hogg eds., 2016) (going so far as to conclude that "the EU's unfair terms regime [has become] firmly established in domestic law").

²⁸⁸ *See generally* Gilliker, *supra* note 275.

The legal rules are also underpinned by detailed guidance from the Competition and Markets Authority²⁸⁹ that draws heavily on CJEU case law as well as behavioural-economics research. Indeed, the regulators have from the start, when the Office of Fair Trading was responsible, taken a proactive enforcement policy and made extensive use of their powers to promote standards through guidance and negotiation backed up by the potential for collective injunction actions. Regulators have an incentive to support the EU approach as it gives them more substantive and procedural powers to deal with consumer detriment. One should not underestimate the impact an effective regulator can have on changing the market culture. It is easy to pay too little attention to the lower profile regulatory work in comparison to case law. However, regulatory action is the front line of day-in-day-out enforcement action against unfair terms. Its adherence to the European model might be stronger than the courts'—as traditional common law thinking may hold less of a sway over regulators. Also, there are strong networks at the EU level between regulators, and this may help build up a common enforcement approach committed to the European model.

However, the courts are important, as they are the ultimate arbiters. Are they, as Teubner predicted,²⁹⁰ reconstituting the fairness test along English/common law lines? It is dangerous to make too broad statements about the stance of the judiciary. In contrast to regulators, who speak with an institutional voice, the judiciary are individuals who often speak with conflicting voices. We have noted plenty of instances of courts supporting regulatory control of unfair terms. Many judgments from the lowest to the highest courts have also clearly sought to embrace the European approach to controlling unfair terms. The combination of procedural and substantive dimensions implicit in the European fairness test has been appreciated. The transparency approach is in keeping with the U.K. procedural norms of fair and open dealings and has been signalled as an important protection for consumers. However, it is too soon to tell if the courts will wholeheartedly embrace the strong version of transparency that requires consumers to be able to understand how the contractual relationship will develop and impact them. It is certainly at odds with existing case law relating to interest rate variations under credit law, but the princi-

²⁸⁹ See generally COMPETITION & MKTS. AUTH., UNFAIR CONTRACT TERMS GUIDANCE, CMA 37 (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf.

²⁹⁰ See generally Teubner, *supra* note 69.

ple has not been tested since the CJEU firmly developed this line of jurisprudence. The lack of a proactive appreciation of the need to revisit that case law is, however, a potential concern. There is also just not enough evidence of whether a strong version of good faith, which promotes substantive justice by taking account of the likely acceptance of terms by the consumer, will be warmly embraced. *ParkingEye* might suggest a robust, market-oriented line is favoured that is reluctant to find terms substantively unfair. However, it would be rash to read too much into one judgment where, on the facts, the arguments were finely balanced.

Probably the strongest case suggesting a tendency for the reconstitution of the fairness test along common law lines²⁹¹ is *Office of Fair Trading v. Abbey National plc*. This favoured a liberal-market-based self-reliance approach to contractual fairness by excluding bank charges from assessment for their fairness. However, even in this case the Supreme Court framed its decision to allow for the possibility that EU law might require that the core/ancillary distinction should be drawn. In less contentious circumstances, it might well be able to work within that framework. After all, as the House of Lords, it had accepted such an approach in *First National Bank v Office of Fair Trading*.

Although the U.K.'s highest court has rejected three allegations of unfairness, in all those cases—as the claim passed through the system—some judges would have been favourable to the consumer. Even the majority in *ParkingEye* would have struck down the term if the amounts charged had been considered excessive. Indeed, the CJEU itself recognises that potentially unfair terms, such as default interest, can be justified in some circumstances.

The important point to note is that there have been a variety of approaches to the assessment of fairness by English judges. Some have embraced the European principles and a protective ethic; others are more supportive of a self-interest/self-reliant perspective. But the fact that such a range of opinions exists within the common law world indicates that there is nothing unique about being a common law lawyer that drives one automatically to a particular stance purely because of a common law mindset. It may be too easy to typecast the common law as more laissez-faire than civilian regimes and jump on particular judgments as evidence of a return to form. We have already noted that the Unfair Contract Terms Act 1977 in fact had marked the U.K. out

²⁹¹ See *id.*

as having one of the more interventionist consumer protection regimes within the EU.

The U.K. courts' experience with unfair terms may simply reflect the inherent complexity of deciding where to draw the line to determine what is unfair. This is an issue which courts in all jurisdictions face. Courts in civil law countries may face similar difficulties in applying the directive to the hard cases that tend to be litigated, especially before the higher courts. Indeed, the European regime foresees scope for discretion on the application of the principles depending on the surrounding national legal context and culture. It is too early to state that the common law traditions have impacted upon the U.K. courts' approach to unfairness or that the common law has a stronger pull in the direction of market-driven solutions than the civil law. It may, of course, be that in England, general political ideology makes more people favour one contractual ethic than another, but such divergent values exist across Europe and are allowed for under the European regime. There may be some differences in approaches to consumer protection between systems, but given global branding and the development of common approaches internationally to consumer protection,²⁹² they are probably less marked in consumer law than in other areas such as corporate governance or labour law.²⁹³

The House of Lords in *Director General of Fair Trading v. First National Bank Plc* and Supreme Court in *Office of Fair Trading v. Abbey National plc* have been criticised for not seeking preliminary references. This may be more a dissatisfaction with that procedure, which can be inordinately long, than any desire to shield a common law-derived interpretation from challenge. Though, in the banking charges case, there did seem to be an imperative to bring that litigation to a speedy resolution.

The vagueness of the content of the European test combined with the national courts' discretion as to application will probably prevent any direct confrontation between national and European courts. However, there is certainly potential for national courts to provide a distinct national flavour to the assessment of unfairness. This may be encouraged by Brexit, especially if the legislation were to be reworded using common law terminology. Depending on the form of Brexit and the arrangements for any supervision of U.K.-EU arrangements, one can foresee that the courts may be more likely to test the boundaries

²⁹² See HANS W. MICKLITZ & MATEJA DUROVIC, INTERNATIONALIZATION OF CONSUMER LAW: A GAME CHANGER 1–2 (2017).

²⁹³ See Teubner, *supra* note 69, at 24–25.

of any new discretion than the regulator or Parliament simply because bringing a case is easier than amending the law. However, so long as the wording in the legislation remains unamended, this should be a constraint on the freedom of the courts. It must be arguable that Parliament intended to have the meaning given to it in European law so long as the law remains the same. This should also cover interpretations by the CJEU, at least until the U.K. leaves the EU. There is also an arguable case that since subsequent judgments merely interpret the law in force, they should also be binding. However, as the law becomes dated and is subject to possible amendments, the position may become messier. This is why it is to be hoped that a solution can be found that gives U.K. law a clear relationship to EU law.

The CJEU is just starting to flesh out its understanding of unfairness. It could be useful for it to do more to flesh out the criteria of unfairness to counter any unhealthy diversity of application across Europe. Though some variation may be inevitable or even desirable because of the way unfair terms controls sit alongside other national law and legal and consumer cultures. Before any firm judgment can be made on the relationship between EU and national law, we need more instances of national case law on the key aspects the CJEU has fleshed out: on the core/ancillary terms distinction, on strong interpretation of intelligibility, and on whether a consumer would have accepted the terms if they had been drawn to her attention. Only then can we see if national divergences appear and if the U.K.'s common law tradition distinguishes it from civilian law states.

The conservative approach of the common law to contractual fairness may often be overstated. In many ways, English law has been very open to consumer protection. Focusing on legal tradition may also be a red herring. National approaches may be discernable, but they may only partly reflect legal traditions and be as much about the political ideology that dominates the market. There may be in fact just as many differences between jurists within legal systems as there are between systems. Most shades of legal thinking about consumer protection can be found in all European legal systems. It may be wrong to see this as a debate between legal cultures. The real conflict may be between business and consumer interests or, perhaps more accurately, between those who favour an ethic of self-interest/self-reliance and those who advocate a more protective ethic.²⁹⁴ The most important divides may be based on interests (consumers vs. traders), and these

²⁹⁴ See generally Willett, *supra* note 31.

are pan-European. After all, consumer and business interest organisations manage to produce common pan-European positions relatively easily.²⁹⁵ If Europe had been recognised more as a forum for resolving these tensions, rather than divisions being viewed as created by national borders, we might not have Brexit.

As part of the REFIT programme,²⁹⁶ the European Commission is reviewing this area of law.²⁹⁷ It would be helpful if the CJEU case law could be codified into law where this would aid clarification. It is to be hoped that the U.K. will have some way to influence these reforms. It is highly likely that the U.K. would want to adhere to the basic EU approach of controlling unfair terms. This may seem overly paternalistic to many Americans, but that perhaps indicates that the consumer and legal culture of the U.K. is embedded within a European context. There may be shades of opinion, but the basic principle of protecting consumers from unfair terms is well established and likely to remain in the U.K. even after Brexit—regardless of whether the U.K. will be formally and legally bound to EU law. If this is true for unfair terms law, it is probably also true for other aspects of EU consumer contract law. However, in these uncertain times, we have to wait with bated breath to see the impact of Brexit, once we know what “Brexit means Brexit” means!

²⁹⁵ There are a number of EU-level business representative associations. BEUC is the European Consumer Organisation.

²⁹⁶ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Regulatory Fitness*, at 3, COM (2012) 746 final (Dec. 12, 2012) (“[T]he Commission will launch a Regulatory Fitness and Performance Programme (REFIT) . . . [to] identify burdens, inconsistencies, gaps and ineffective measures.”)

²⁹⁷ *See Better Regulation: Why and How*, EUR. COMMISSION, http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_023_evaluation_consumer_law_en.pdf (last visited July 29, 2017).

