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DEPARTMENT OF CIVIL LAW**



YORDAN NIKOLAEV PANGEV

UNFAIR TERMS IN CONTRACTS

ABSTRACT

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Members:

Prof. Tanya Yosifova, PhD

Assoc. Prof. Silviya Tsoneva, PhD

Assoc. Prof. Ventsislav Petrov, PhD

Prof. Grigor Grigorov, PhD

Assoc. Prof. Angel Shopov, PhD

Reserve members:

Prof. Kameliya Tsolova, PhD

Prof. Lyuba Panayotova, PhD

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I. GENERAL CHARACTERISTICS OF THE DISSERTATION

1. Relevance of the research

This dissertation is devoted to unfair contract terms. There are numerous reasons that led to the selection of this topic.

First, our civil law literature lacks a comprehensive study devoted to the concept of unfair terms. It is included as part of courses on Consumer Law, but these courses address only the basic aspects of the legal framework. Our legal doctrine includes articles on the issues of unfair terms, but most of them focus on procedural matters without examining in detail the substantive legal aspects of the framework. The lack of detailed research on unfair terms in Bulgaria also has historical roots. Prior to September 9, 1944, there were works devoted to the permissible content of contracts under general terms and conditions, but no comprehensive study was conducted, as the issue was relatively new. The term “unfair term” does not appear in the works from this period, but it is clearly stated that the existence of a significant imbalance between the rights and obligations of the parties, to the detriment of the party accepting the general terms and conditions, is an undesirable situation that must be subject to appropriate legal sanctions. During the socialist period, issues concerning the determination of the content of contracts based on general terms and conditions and the possibility of judicial review of that content were scarcely addressed in our legal literature. Following the changes that took place in the early 1990s, as part of the conditions for Bulgaria’s accession to the EU, Council Directive 93/13/EEC of April 5, 1993, on unfair terms in consumer contracts (Directive 93/13)¹ was transposed into the Law on Consumer Protection and Trade Rules (LCPT), which has since been repealed by the currently effective Law on Consumer Protection (LCP). With the creation of specific regulations regarding unfair terms, interest in the permissible content of contracts has been revived.

Second, the legal framework governing unfair terms in Bulgaria is relatively new. It was initially included in the LCPT, which was subsequently repealed in 2005 by the current LCP. The late adoption of rules aimed at eliminating unfair terms can be explained by the socioeconomic system in Bulgaria prior to 1990. Other European countries have already accumulated substantial experience in preventing the use of unfair terms. In 1976, Germany adopted the Act on General Terms and Conditions. This was the first piece of legislation to regulate the concept of unfair terms. Shortly thereafter, laws regarding unfair terms were enacted in England in 1977, in France in 1978, and in a number of other countries.

Third, the practice of drafting contracts unilaterally is becoming increasingly common today, and there are entire sectors in which one party has the sole discretion to decide whether or not to enter into a contract. In light of current developments in social relations and technology, I believe that in the near future, the conclusion of mass contracts will become the norm. This necessitates a detailed

¹ OB L 95, 21.4.1993.

examination of the legal framework aimed at eliminating the imbalance between contracting parties that arises in contractual relationships when the content of the contract is drafted by only one party.

2. Subject and purpose of the research

The purpose of this dissertation is to provide a more comprehensive study of the concept of unfair terms, which is currently lacking in Bulgaria. This will help clarify the concept and the consequences that arise from their inclusion in contracts. An analysis of the regulatory framework substantiates the need for legislative changes. The main argument is that the regulation should be removed from the LCP, since the concept of unfair terms is of a general nature and should apply to all contracts whose content is unilaterally determined by one of the contracting parties. However, this must be done while maintaining a high level of protection for consumers, who are the weaker party in their relationships with professionals². A similar approach has been adopted in the legislation of countries such as France and Germany, and I believe it would be appropriate in Bulgaria as well. For the sake of completeness, it should be noted that the idea of applying the concept of unfair terms to all contracts has also been advocated within the European Community. Furthermore, the dissertation identifies weaknesses in the legal framework and its interpretation. In this regard, specific proposals have been made on how these weaknesses can be addressed in order to improve the legislation.

3. Research methods

A combination of scientific methods was used in this study. The legal-dogmatic method was applied. In addition, I used the historical method to trace the origins of the concept of unfair terms and the reasons that led to the need to introduce the possibility of regulating the content of contracts. The comparative law method is heavily emphasized, as Bulgarian legislation transposes Directive 93/13. This directive, in turn, has largely adopted the achievements of French and German legislation, which have had laws on unfair terms in place since the 1970s. Drawing on the positive practices of countries that have applied this legal concept for a longer period can contribute to its clarification and further development. The teleological method of interpreting the legislation helps clarify the reasons for the introduction of this legal concept and elucidates its essence.

4. Scope and structure of the dissertation work

The dissertation consists of 220 pages, including a title page, table of contents, list of abbreviations, introduction, three chapters, conclusion, and bibliography.

The work contains 876 footnotes, including references to works by Bulgarian and foreign authors, citations of case law, and explanations of the main text. The work cites 113 works in

² The provisions of Chapter Six of the LCP apply to both traders and suppliers who enter into contracts with consumers. In this abstract, for the sake of brevity and convenience, the term “**professional**” will be used, which should be understood to mean “trader and supplier” within the meaning of the LCP. As an exception, when quoting the text of a statutory provision, the term used by the legislature will be retained.

Bulgarian and 73 works in foreign languages – English, French, Italian, and Spanish. A total of 51 textbooks, study aids, monographs, commentaries, and guides in Bulgarian and 33 in foreign languages were used. The dissertation cites 60 articles and studies in Bulgarian and 40 articles and studies in foreign languages. There are references to 2 books that are not legal literature.

II. BRIEF PRESENTATION OF THE MAIN CONTENT OF THE DISSERTATION

Introduction

The introduction outlines the subject, objectives, and methodology of the study.

Chapter One

1. The study begins by examining the concept of a clause. It is noted that the term “clause” is defined as “*a separate article or provision in a contract.*” The terms “term” and “provision” are also used as synonyms. As for the concept itself, it can be examined from two perspectives. The first is the formal aspect, in which a clause refers to a linguistically distinct part of the contract – an article, a paragraph, etc. This part of the contract’s content has semantic and logical autonomy. The second is the substantive aspect, in which the provision is understood as that part of the contract’s content from which legal consequences arise. It defines the rights and obligations of each party and regulates other issues that may arise from the contract – such as the parties’ interpretation of certain terms used in the contract, the applicable law, and others. For the purposes of this dissertation, the term “clause” is used in its substantive sense, as this is relevant to clarifying the concept of unfair terms.

2. “Unfair term” is a legal-technical and legal term, enshrined in both our legislation and our legal literature. It refers to two things. First, it is the legal concept that allows for the regulation of the content of contractual clauses that have been drafted unilaterally. Second, the “unfair term” refers to a provision that creates a significant imbalance in the rights and obligations of the two parties to the contract.

A brief historical overview of the origins of the concept of unfair terms is provided. It is noted that the need for such regulation stems from the growing importance of contracts governed by general terms and conditions, in which there is a significant imbalance between the rights and obligations of the parties. The drafter would draft the terms of the contract exclusively in his own favor, without taking into account the interests of the other party, and would shift all or nearly all of the adverse consequences that might arise from the contract onto that party. The dissertation traces the development of the unfair terms concept in some European countries.

3. Several general topics are examined, with the aim of moving from the general to the specific, thereby facilitating an understanding of the concept of unfair terms. The first issue concerns the concept of a contract and the main theories explaining its effect and its binding force on the parties. It is noted that a contract constitutes a lawful legal fact falling within the category of legal acts. A legal definition is provided in Article 8, paragraph 1 of the Law of Obligations and Contracts (LOC).

However, due to the imprecision of the provision, it is clarified that a contract is a lawful legal fact consisting of declarations of intent that coincide in content, but opposite in direction, of two parties (more than one person may participate on each side), the consequence of which is the creation, preservation, modification, transfer, or termination of rights and/or legal obligations.

The main theory explaining the binding force of contracts in civil law is that of the autonomy of will. It gained prominence in the 18th and 19th centuries, when classical liberalism emerged in Western Europe, emphasizing individual freedom and minimal state intervention in relations between parties. This idea is expressed in the principle of *laissez faire, laissez passer*. In contract law, the binding force of contracts was explained almost entirely by the will of the contracting parties. They are binding because the parties have chosen to be bound by them. In the literature, autonomy is defined as “a phenomenon through which an individual creates a rule that he or she can invoke immediately and to which he or she is subject”³. That is why, when concluding a contract, the will of the parties plays the most essential role, provided they act freely. If their will has been vitiated, then the contract itself will be invalid. There is also criticism in the legal doctrine regarding the theory of the autonomy of will. It fails to explain why, in certain cases, contracts are enforceable against third parties. Furthermore, it does not clarify the binding force of dispositive rules regarding matters not addressed by the parties when there is no explicit reference to statutory provisions. Legal literature has expressed the view that the theory of the autonomy of will is applicable only when the parties are economically and socially equal. This shortcoming of the theory in question stems from the fact that only in such a situation a balance can be achieved between rights and obligations, and the interests of both parties to the contract would be taken into account.

3.1. The three principles that can be derived from the theory of the autonomy of the will are outlined: the freedom to contract, the binding force of the contract (*pacta sunt servanda*), and its relative effect. Attention is focused on the principle of the freedom to contract. According to this principle, every party is free to decide whether to enter into a contract, with whom to enter into it, and what its content should be. In Bulgarian law, this principle is clearly articulated in Article 9 of the LOC. However, freedom of contract is not unlimited, as the parties’ options are subject to certain limits. The cited provision of the LOC establishes two main restrictions: a contract must not conflict with mandatory provisions of law or with good morals.

In view of the aforementioned shortcoming of the theory of the autonomy of the will, it has been proposed that a fourth principle – that of contractual fairness – should be added to the three discussed principles. In contractual relationships, fairness is considered in two aspects: procedural and substantive. In terms of procedural fairness, a contract should be concluded with each party acting freely and independently of external influences. It is assumed that when all procedural requirements

³ Sacco, R., De Nova, G. *Le contrat*. Bruxelles: Bruylant, 2023, p. 19.

related to the conclusion of the contract are met, the party has freely formed its will. As for substantive fairness, it relates to the content of the contract and is most often expressed in the requirement for equivalence of performance. In the legal doctrine, equivalence is viewed as a subjective criterion, insofar as the parties are free to determine the value of their respective performances on their own⁴. This is one of the most striking manifestations of the autonomy of will, whereby a party's personal assessment of whether its performance is equivalent to what it will receive is the primary factor in determining whether equivalence exists, without it necessarily being the case in reality. Nevertheless, it is not ruled out that, in certain cases, legal consequences may be provided for in the event of a breach of objective equivalence.

3.2. In this regard, it is interesting to consider whether the concept of unfair contract terms is consistent with the principles of freedom of contract and contractual fairness. The legal framework governing unfair terms arose in response to the need to regulate the content of contracts concluded under general terms and conditions. Such contracts are characterized by the fact that they restrict the party required to accept them in its ability to participate in determining the contract's content. In these cases, that party is effectively limited to the choice of whether to enter into the contract or not. This results in the exclusion of one of the elements of freedom of contract, although an interpretation of the provisions of Article 16 (2) of the LOC and Article 298 (3) of the Law on commerce (LC) suggests that the contracting parties have the option to agree on terms different from the general terms and conditions. However, this option is largely theoretical and would be applicable only in extremely rare cases. That is why it is necessary to provide for a mechanism that strikes a balance in the parties' ability to influence the content of the contract. Since the terms are determined unilaterally, the party drafting them is limited in the conditions it can propose. In this regard, the existence of the concept of unfair terms reveals a close connection to the principle of freedom of contract. Indeed, we can speak of unfair terms only in cases where this principle is restricted by one of the contracting parties, thereby depriving the other party of the opportunity to participate in shaping the contract's content. This legal concept limits the contractual freedom of the party proposing the general terms and conditions. The terms of a contract must be formulated in a manner that does not conflict with the requirement of good faith and does not result in a significant imbalance between the rights and obligations of the parties. This restriction on the freedom to draft contract terms is intended to protect the party that must accept the pre-drafted clauses. This creates the conditions for ensuring equivalence between the rights and obligations of the contracting parties. This is a combination of the principle of freedom of contract with the principle of contractual fairness.

4. Next, the dissertation examines the concept of contracts governed by general terms and conditions. Under Bulgarian law, there is no general legal definition of this concept. Such a definition

⁴ Kalaydzhev, A. Law of obligations. General part. Eighth edition. S.: Sibi, 2020, p. 57; Zimmerman, R. The Law of Obligations Roman Foundations of the Civilian Tradition. Cape Town: Juta & Co, Ltd, 1992, p. 266.

is provided only with respect to the general terms and conditions of insurance contracts in Article 348, paragraph 1, first sentence, of the Insurance Code. According to the aforementioned provision, “general terms and conditions are standardized clauses applicable to an unlimited number of insurance contracts.” A general definition applicable to all contracts is derived from legal doctrine, whereas in some foreign laws it is expressly established. In the Netherlands, Article 6:231(a) of the Dutch Civil Code provides that “a contract based on general terms and conditions means one or more contractual clauses or provisions drafted for inclusion in multiple contracts, with the exception of clauses and provisions that specify the nature of the obligation to be performed, and to the extent that such clauses and provisions are formulated clearly and unambiguously“. In Germany, § 305 of the German Civil Code states that “general terms and conditions are all pre-formulated clauses that are intended for use in more than two contracts and are offered by one party at the time the contract is concluded“. In the definition provided, the requirement that the terms and conditions be intended for use in more than two contracts is noteworthy. It should be noted that this does not create an obligation for the party using the general terms and conditions to enter into multiple contracts. The requirement refers solely to the intention that the terms and conditions be used in at least three contracts. Nevertheless, the main characteristics of general terms and conditions under Bulgarian, German, and Dutch law largely overlap. These are provisions drafted in advance by one party and intended for use in the conclusion of multiple contracts of the same type.

Another characteristic recognized by legal doctrine is that general terms and conditions are formulated in an abstract way. From a linguistic perspective, general terms and conditions resemble the way legal norms are drafted. Like the latter, they are drafted to be used numerous times.

There is a dispute regarding which parts of a contract’s content may be governed by general terms and conditions. One view holds that general terms and conditions may define both the essential and non-essential elements of a contract⁵. The other view holds that the *essentialia negotii* of contracts cannot be established by general terms and conditions, which regulate only the *accidentalia negotii*⁶. Preference should be given to the first view. There are no legal restrictions on the matters that may be regulated by general terms and conditions. Furthermore, given the purpose of this type of contract, it cannot be concluded that they can establish only the non-essential content of contracts. A party is free to stipulate in advance the entire content under which it wishes to enter into contracts, including the essential terms.

In summary, it can be said that general terms and conditions should be viewed as a set of abstractly formulated clauses governing all or part of the contractual content, which are intended to be used by a given party to enter into multiple contracts of the same type.

⁵ Kalaydzhiev, A. Op. cit., p. 84; Popov, K. Contract under general terms and conditions. – Bulgarian Law, 2001, No. 8, 41-44.

⁶ Dannemann, G., Schulze, R. German Civil Code. Volume I: Books 1-3: §§ 1-1296. Munich: C. H. Beck, 2020, p. 444.

4.1. After clarifying the concept of standard-form contracts, their legal framework is examined. A comparison is made between the general rules in the LOC and the LC and those in the LCP. The LCP holds that, for a consumer to be bound by a standard-form contract, two conditions must be cumulatively met. The consumer must have expressed consent to the general terms and conditions, and furthermore, they must have been provided to the consumer. Similar to the rules in the LOC and the LC, the general terms and conditions must be accepted in writing. This is the intent of Article 147a, paragraph 2 of the LCP, which stipulates that consent must be confirmed by a signature. With regard to the requirement for delivery, there are differences here from the provisions of the LC. The general terms and conditions must be provided regardless of whether the contract is consensual, formal, or real. Furthermore, there is a requirement that the copy provided be signed by the merchant or by a person authorized by the merchant – Article 147a, paragraph 3 of the LCP. This requirement, similar to the provisions of the LC, aims to ensure that the consumer has the opportunity to familiarize themselves with the content of the general terms and conditions. The requirement that the consumer be informed of all terms of the contract is also set forth in Recital 20 of Directive 93/13. *De lege ferenda*, it has been proposed to establish a provision under which general terms and conditions are not binding on the consumer when they are not provided to the consumer at the time the contract is concluded. The need for a specific provision arises from widespread non-compliance by professionals when contracts are concluded electronically. In the vast majority of these cases, consumers simply acknowledge that they have read the general terms and conditions without receiving a signed copy.

The LCP places the burden of proof on the professional to demonstrate that the consumer has agreed to the general terms and conditions and has received a copy of them. Article 147a, paragraph 5 of the LCP states that “a clause in an individual contract stating that the consumer has agreed to the general terms and conditions and has received a copy thereof does not constitute proof that these facts have occurred”. This provision has been criticized because it is considered to contradict the concept of a private document and its evidentiary value⁷. The rationale behind the legislature’s adoption of this provision is that it will prevent consumers from being bound by general terms and conditions that they did not have a realistic opportunity to review and receive.

The rules governing the conclusion, amendment, and interpretation of general terms and conditions should be consolidated into a single statutory act, and it would be best for this to be the LOC. The reason for this is that the LOC regulates the fundamental institutions of the law of obligations, as the law is codified in nature. Among these are contracts governed by general terms and conditions. They apply to both commercial and civil legal relationships. Furthermore, consolidating the regulations within the LOC will facilitate better systematization, standardization of the rules, and a reduction in exceptions. Last but not least, this will ensure the protection of

⁷ Kalaydzhev, A. Op. cit., p. 88.

consumers, who currently enter into numerous contracts under general terms and conditions that deviate from the general rules – a finding that has also been noted in legal doctrine⁸. The fragmented regulatory framework makes it difficult for them to familiarize themselves with the specific rules applicable to certain contracts under general terms and conditions, as it is hard to determine which legislative act contains the relevant provisions. Consequently, consumers are unaware of their rights under a given law and, accordingly, do not exercise them. As an example of how to create a unified regulatory framework for contracts governed by general terms and conditions, we can look to German law. Unlike the case-by-case regulation of general terms and conditions in our legislation, in the German Civil Code, the provisions are contained in Book Two of the Code. Exceptions to the general rules for concluding contracts under general terms and conditions are expressly provided for in § 305a of the German Civil Code for certain types of contracts in which the parties would be bound by the general terms and conditions even without complying with the requirements of § 305(2) of the German Civil Code.

5. As noted above, the term “unfair term” is a legal and technical term. The definition is contained in Article 143, paragraph 1 of the LCP. According to this provision, “an unfair term in a contract concluded with a consumer is a clause that is to the consumer’s detriment, does not meet the requirement of good faith, and leads to a significant imbalance between the rights and obligations of the trader or supplier and the consumer.” This provision transposes the legal definition set forth in Article 3 of Directive 93/13, which states that “where a contractual term has not been individually negotiated, it shall be regarded as unfair if, contrary to the requirement of good faith, it creates, to the detriment of the consumer, a significant imbalance between the rights and obligations arising from the contract.” It is accepted that the cited provisions constitute general and abstract provisions that must be specified by the court when deciding each individual case.

From the definitions provided, we can identify the characteristics that a contractual provision must possess in order to be considered unfair. The clause must cumulatively possess the following characteristics: 1) it must not have been individually negotiated; 2) it must have been concluded in violation of the principle of good faith; 3) it must create a significant imbalance between the rights and obligations of the parties; 4) it must have been concluded to the detriment of the party that agreed to the clause.

Based on the characteristics outlined above, it can be concluded that unfair terms constitute an unlawful, complex legal fact. In order to fully elucidate the concept of an unfair term, it is necessary to examine separately its characteristics, which were outlined.

5.1. After listing the characteristics of the unfair terms, the discussion moved on to clarifying the content of each one. The first characteristic is that the term must not have been individually

⁸ Sukareva, Z. Consumer Law. S: Nova Zvezda, 2022, 100-102.

negotiated. This refers to a provision that has been drafted in advance and, consequently, the consumer has not had the opportunity to influence its content. The case law of the Court of Justice of the European Union has clarified that individually negotiated terms are those in which the consumer had the actual opportunity to influence their content. When making this assessment, it must be determined whether the consumer actually had the ability to influence the determination of the contract's content. This does not necessarily mean that the consumer must have proposed the clause and that it must have become part of the contract's content. It is sufficient that there was a discussion regarding a particular provision with a real possibility that it could become part of the contract. Informing the consumer of certain terms and obtaining the consumer's explicit consent to them does not render them individually negotiated. Since this is a fact that is difficult to prove, the provision of Article 146, paragraph 4 of the LCP places the burden on the professional to prove that a particular clause was individually negotiated. This provision establishes a rebuttable presumption that, in contracts concluded with consumers, the terms are, in principle, unilaterally drafted by the professional, thereby making them subject to assessment as to whether they are unfair. An additional safeguard for consumers is provided in Article 146, paragraph 3 of the LCP, which stipulates that the fact that certain terms have been individually negotiated does not preclude the application of Chapter Six of the LCP to the remainder of the contract. *De lege ferenda*, it has been proposed that the requirement that the clause be drafted unilaterally be included in the legal definition set forth in Article 143, paragraph 1 of the LCP, following the example of Article 3 of Directive 93/13.

5.2. The second characteristic of the unfair terms is that they are concluded in violation of the requirement of good faith. The various meanings attributed to the term "good faith" are briefly outlined. This dissertation holds that, pursuant to Article 143, paragraph 1 of the LCP, good faith should be understood as a requirement for certain conduct on the part of the professional. Recital 16 of Directive 93/13 explicitly provides that the professional must take the consumer's interests into account. This understanding is further elaborated by specifying that the professional must assess, acting in good faith and fairly, whether they can reasonably expect the consumer to agree to a particular term during individual negotiations. It is noteworthy that good faith, as defined in Directive 93/13, is linked to the conduct of the parties – and in particular that of the professional – prior to the conclusion of the contract. This has led to the conclusion that the good faith referred to in the directive is pre-contractual good faith. The question of which consumer should be taken into account – when making the assessment as to whether they would have agreed to the term in individual negotiations – has been examined in the context of the good faith assessment. It is proposed that this will be the average consumer. This concept will make it possible to determine whether a relatively well-informed, observant, and cautious person would have agreed to the terms had they had the opportunity to participate in negotiations regarding the content of the contract. Thus, the court will be able to assess, based on an objective criterion, whether the professional complies with the requirement of good faith.

De lege ferenda, it has been proposed that the requirement that the clause be concluded in violation of the good faith requirement set forth in Article 143, paragraph 1 of the LCP be removed as a criterion for unfairness. This is justified by the fact that the assessment of whether the agreement is contrary to the requirement of good faith is, to a large extent, synonymous with the significant imbalance between the rights and obligations of the parties.

In the dissertation, it is argued that, in the future, the regulation of unfair terms should be incorporated into the LOC and become an institution of contract law, regardless of the status of the contracting parties. This necessitated an examination of how to proceed if the requirement of good faith is retained upon the adoption of a general regulation in the LOC, since the “average consumer” can no longer be used as a criterion for assessing whether a particular behavior is in good faith. Instead, it has been proposed that the concept of the “reasonable person” be adopted into our law. It is understood that this is a person who is careful, observant, and possesses the knowledge that society requires of its members to protect their own interests and the interests of others. Through this concept, we could once again make an objective assessment of whether the terms under consideration would have been accepted if the addressee had had a realistic opportunity to negotiate.

5.3. The third characteristic of the unfair terms is the existence of a significant imbalance between the rights and obligations of the parties. This is the basis for determining whether a term is unfair. It can be defined as an unjustified or unnecessary lack of reciprocity, a lack of consideration, or a disproportion between rights and obligations. It is argued that the adjective “significant” used in the provision allows one to conclude that, in principle, a certain imbalance between the rights and obligations of the parties to a contractual relationship is permissible. The paper examines how to assess whether the imbalance is significant. First, this is done by comparing the situation to the dispositive rules that would apply in the absence of a specific clause. These rules are considered to take into account the interests of both parties to the legal relationship and therefore do not create a significant imbalance. With regard to the dispositive legal provisions, it is generally accepted that the more the proposer has deviated from them, the greater the likelihood of creating a significant imbalance. Furthermore, in a comparative analysis of dispositive law provisions and contractual clauses, the latter may create a significant imbalance not only in cases of unequal value of the performances; that is, the imbalance is not solely of an economic nature. The Court of Justice of the European Union has clarified that significant inequality may result from “*a restriction of the rights that substantive law grants to the consumer*” when an “*obstacle to the exercise of rights*” is created and, finally, in cases where an “*additional obligation not provided for by law*” is imposed⁹. Based on the criteria listed for assessing significant imbalance, it can be concluded that such imbalance may manifest itself both as economic inequality and as a legal imbalance between the rights and obligations of the parties, since the inequality between the parties is not always quantified.

⁹ Decision from 16.01.2014, case C-226/12, Constructora Principado SA c/peony José Ignacio Menéndez Álvarez.

Furthermore, Article 145, paragraph 1 of the LCP provides that the assessment of whether a clause is unfair is made at the time the contract is concluded. It also encompasses additional criteria that must be examined – the subject matter of the contract, all circumstances related to its conclusion, as well as all other terms of the contract or of any other contract on which it depends. Of these, it is generally accepted that an examination of all clauses of the contract, including the terms of other contracts when they form a single unit, is relevant to determining significant imbalance. The need for such a comprehensive assessment of the entire contractual content stems from the fact that while one clause may create an imbalance between the parties, other provisions may provide for outcomes favorable to the consumer that balance the legal relationship and eliminate the imbalance.

5.4. The fourth characteristic of the unfair terms is that the significant imbalance is to the detriment of the consumer. A brief explanation is provided of how the term “harm” is used in Bulgarian law, noting that Article 143, paragraph 1 of the LCP assigns a meaning to the term that differs from its common usage. The dissertation holds that, in the context of unfair terms, it is important which of the contracting parties benefits from the significant imbalance between rights and obligations. In one case, the lack of equivalence would be irrelevant to the law, while in the other, it would result in the nullity of the clause. It is precisely in this context that the term “harm” is used. It indicates that the resulting imbalance must be to the detriment of the consumer. The study explains that the requirement that the consumer have suffered harm is not among the characteristics of unfair terms listed in Article 143, paragraph 1 of the LCP. However, this does not mean that the use of unfair terms by the professional is incapable of causing harm to the consumer. In such a case, the consumer could seek compensation for such harm either concurrently with a declaration of the contracts’s nullity or in a separate proceeding thereafter.

6. After clarifying the characteristics of the unfair terms, the scope of the legal provisions was examined. Article 145, paragraph 2 of the LCP provides that “the assessment of an unfair contract term does not include determining the main subject matter of the contract, nor the correspondence between the price or remuneration, on the one hand, and the goods or services to be supplied or performed in exchange, on the other hand, provided that these terms of the contract are clear and understandable”. From this provision, it follows that, as a general rule, the assessment of whether a term is unfair concerns only the provisions relating to the non-essential content of the contract. As an exception, the unfair nature of the terms governing the *essentialia negotii* of the contract may also be assessed when they are not formulated in a clear and comprehensible manner. The requirement regarding the manner of formulating the contractual content necessitated an examination of one of the principles of consumer law – that of transparency. It has been established that the requirement for clarity and comprehensibility is a manifestation of this principle. The principle of transparency influences contracts in three ways.

First, when a clause in a contract is not worded in a clear and understandable manner, it must be interpreted in the manner most favorable to the party who accepted it.

Second, when the terms relating to the main subject matter of the contract, as well as the price-consideration ratio, are not clear and understandable, the restriction preventing them from being examined for unfairness is lifted. When there are unclear and incomprehensible provisions, the court has the opportunity to assess whether they create a significant imbalance between the rights and obligations of the parties, to the detriment of the consumer.

Third, the use of vague and incomprehensible clauses may serve as an indication that the terms of the agreement are unfair, since a lack of transparency may create a significant imbalance between the contracting parties. It is generally accepted in legal doctrine that when it is established that a particular provision is not formulated in a clear and comprehensible manner, the court must first determine whether it is unfair. Only if the answer is negative will the *contra proferentem* rule apply. The requirement to examine whether an unclear and incomprehensible term is unfair, and the consequences that would result from such a finding, must apply both to provisions governing the non-essential content of the contract and to those determining its essential content. Consequently, in certain situations, a lack of transparency may render the clause non-binding on the consumer.

7. Next, the dissertation outlines to which parties the regulations governing unfair terms in Bulgaria apply.

7.1. The concept of a consumer has been clarified. Its legal definition is set forth in § 13 (1), item 1 of the Supplementary Provisions of the LCP. A consumer can only be a natural person. Such a person acquires the status of a consumer if, on the one hand, the actions they perform do not fall within the scope of their professional activity. On the other hand, their counterparty must be acting within the scope of their professional activity. This means that consumer status is contingent upon the status of the other party to the legal relationship. In addition, the concept of the “average consumer” is examined. This is an abstract category used to assess whether the professional’s actions comply with the regulatory framework. The average consumer is presumed to be relatively well-informed, reasonably observant, and prudent.

7.2. After clarifying the concept of a consumer, the discussion moved on to the concepts of “trader” and “supplier” as defined in the LCP. The differences with the concept of “trader” as used in the LC were outlined. *De lege ferenda*, it was proposed to replace the terms “trader” and “supplier” with “professional,” which would combine the two concepts.

8. At the end of Chapter One, the concept of unfair terms was distinguished from similar legal concepts.

8.1. The first comparison was with the abuse of rights. Part of the doctrine considers the use of unfair terms by one of the contracting parties to be an expression of the abuse of rights. The

dissertation supports the second view, according to which, although there are some common features, the two legal concepts must be distinguished from one another.

8.2. The second comparison made was with voidability due to extreme necessity and manifestly disadvantageous terms. The purpose of the legal provisions governing these two institutions is to protect the weaker party in the legal relationship. In both cases, there is an imbalance between the parties, but the reasons for this are different. In cases of extreme necessity, a party is in a more disadvantageous position than its counterparty because it has an urgent need for funds to meet its basic needs, which significantly limits its ability to negotiate. The regulation of unfair terms aims to protect consumers, who are considered the weaker party due to a combination of factors, such as a lack of information, economic inequality, and others. In countries where the concept of unfair terms applies regardless of the parties' status, legislative intervention in contractual relationships is justified by the fact that one party to the legal relationship is deprived of the ability to influence the content of the contract and is therefore unable to protect its interests.

8.3. Third, the nullity resulting from the use of unfair terms was compared to that resulting from a violation of good morals. A number of similarities between the two grounds for nullity were pointed out. Legal doctrine has held that, prior to the enactment of specific provisions in the LCP, clauses that we now classify as unfair were declared null on the basis of Article 26, paragraph 1, third suggestion of the LOC. The dissertation argues that the concept of unfair terms has a narrower scope than the ground for nullity under Article 26, paragraph 1, third suggestion of the LOC, therefore, the two should not be conflated.

8.4. Fourth, a comparison is made between unfair terms and surprise terms.

Chapter Two

1. This chapter analyzes the lists of unfair terms. These lists represent the technique used by the legislature to formulate legal provisions.

There are two known approaches to drafting legal provisions. One is the general, non-casuistic approach, in which the provisions contain general wording. They are drafted in an abstract manner that allows them to be applied to a wide range of real-life situations. This approach is characteristic of more developed legal systems. It was used when the first codes were adopted. The general approach to formulating legal provisions enables the courts and legal doctrine to develop and adapt the application of the norms to specific cases, while at the same time ensuring the stability and predictability of the law. The other approach used by the legislature to formulate provisions is the casuistic approach. Historically, it emerged earlier than the general approach. Under this approach, the legal facts that must be fulfilled to give rise to legal consequences are described in much greater detail. Its advantages include greater clarity of the provision and easier application. The disadvantage is that it creates the possibility, in many scenarios, that the rule may fail to apply or may be easily

circumvented by the parties involved. The casuistic approach creates the risk of gaps in the law, which is undesirable.

2. The regulation of unfair terms combines the two approaches to drafting provisions. Article 143, paragraph 1 of the LCP contains the general provision defining the concept of an unfair term. This statutory provision is a relatively defined rule that can be applied to a wide variety of contracts, thereby ensuring comprehensive and effective consumer protection. It outlines the elements that must be present in order for a contractual term to be classified as unfair. Article 143, paragraph 2 of the LCP lists contractual clauses, employing a casuistic approach. Through this approach, the legislature has identified specific terms that it considers unfair. This enumeration of contractual clauses in the law, influenced by Recital 16 and Article 3, paragraph 3 of Directive 93/13 as well as legal doctrine, has been established using the term “list”.

3. The paper outlines the three types of lists used in connection with unfair terms – “white,” “gray,” and “black” – as well as their characteristics.

3.1. The dissertation holds that “white lists” should be considered to be those lists containing clauses that are likely to create a significant imbalance between the rights and obligations of the contracting parties. The terms in these lists are potentially unfair, but are not prohibited a priori. In such cases, the court must determine whether all the elements of an unfair term are present. “White lists” serve an indicative function, providing guidance on the types of cases in which clauses may be deemed unfair. They facilitate the application of the general provision on unfair terms by helping to clarify the concept of unfairness. A number of parties – the court, professionals, and consumers – can draw on these lists for information. In this way, the court will be able more easily to determine when a term is unfair. Professionals can use them as a guide to avoid including certain provisions in their contracts. And consumers would find it easier to identify when the contracts they have entered into contain unfair terms.

3.2. In the case of “gray lists,” there is a rebuttable presumption that the clauses contained therein are unfair. The burden is on the professional to prove that, even though the provision is formally included in a “gray list,” it is not unfair. The professional must demonstrate that the clause does not create a significant imbalance between rights and obligations to the detriment of the consumer, or prove that he acted in good faith.

3.3. There is an irrefutable presumption that clauses included on the “black lists” are unfair. The inclusion of a particular clause on a “black list” means that it is automatically considered incompatible with the principles of good faith and equality between the parties to the contract.

3.4. What the conditions contained in the “black” and “gray” lists have in common is that the court is relieved of the obligation to verify whether all the prerequisites leading to the unfairness of the term have been met – namely, that it creates a significant imbalance between the rights and obligations of the parties to the contract, to the detriment of the consumer, and that this is a

consequence of a breach of the requirement of good faith. The dissertation argues that the court will nevertheless have to verify whether the clause was individually negotiated and whether the parties qualify as a professional and a consumer, respectively. If one of these two conditions is not met, then the clause – even if it appears on one of the two types of lists – should not be deemed invalid.

A comparison of “white,” “gray,” and “black” lists shows that they provide different levels of consumer protection. The weakest protection is provided by “white” lists, which offer guidance and supplement the general provision defining the concept of an unfair term. “Gray” lists offer better protection. They shift the burden of proof and require the professional to establish the validity of the terms included in the contract. “Black” lists provide the highest level of consumer protection. They delineate the limits of the professional’s freedom of contract, which cannot be exceeded. If it is established that a particular clause is included on a “black” list, this leads to the direct conclusion that the clause is null.

The list under Article 143, paragraph 2 of the LCP falls into the “black list” category. The introduction of an irrebuttable presumption that the terms listed in this provision are always unfair was enacted with the 2019 amendment to the LCP. The Bulgarian government has informed the European Commission that the level of consumer protection in Bulgaria is higher than that provided for in Directive 93/13. This was done in fulfillment of the obligation under Article 8a of Directive 93/13.

4. After clarifying the nature of the various lists of unfair terms, the next step was to categorize the terms described in Article 143, paragraph 2 of the LCP into separate groups, which would be of both theoretical and practical benefit. Grouping the terms from the “black list” will make it easier to study them. Their common characteristics can be identified. Consequently, it will be easier to identify them and determine the reasons why they are considered unfair.

This dissertation examines some of the proposals put forward in legal doctrine regarding the grouping of clauses. It identifies the criteria used to determine which clause belongs in which group. Based on this prior research, a proposal was made for a new classification of unfair terms, after which each provision on the list was analyzed. The terms described in Article 143, paragraph 2 of the LCP can be divided into six groups.

4.1. The first group includes clauses related to the conclusion of the contract. These are described in Article 143, paragraph 2, items 10, 18, and 19 of the LCP. In the case of these provisions, the imbalance stems from the professional’s conduct during the pre-contractual stage of their relationship with the consumer. The rule set forth in Article 12 of the LOC establishes a specific requirement regarding the conduct of the parties when they negotiate and conclude contracts—they must act in good faith. This means that when conducting negotiations, the parties must act honestly, honorably, and fairly. Specific obligations for parties in pre-contractual relationships are derived from the principle of good faith. Despite the existence of a general provision in the LOC, in a number of

scenarios the legislature has deemed it necessary to specify concrete manifestations of the requirement for good faith. In relationships between professionals and consumers, there are detailed rules governing the conduct of professionals so that such conduct may be deemed to be in good faith. Particular emphasis is placed on the obligation to provide information, with the aim of enabling the consumer to make an informed decision about whether to enter into a contract. Article 4 of the LCP describes in detail the minimum information that must be provided to the consumer. Another manifestation of this principle is the requirement that terms drafted unilaterally be written in a clear and understandable manner, so that the consumer can independently extract the necessary information and assess the consequences of the contract. The first group consists precisely of such clauses, which have led to a violation of the requirement for informed consent.

4.2. The second group consists of provisions concerning the performance of the contract. These are listed in Article 143, paragraph 2, items 3, 11, 12, 13, and 14 of the LCP. These clauses were divided into two subgroups, as one part relates to how the performance due is determined, and the other to the performance itself. This necessitates a brief outline of what consideration and performance entail. The reason for the unfairness of the terms regarding the performance due lies in the fact that the professional has, from the outset, reserved the right to be the one who determines exactly what the performance due under the contract will be after its conclusion. This is not a clause that was drafted during negotiations, consequently, the consumer had no opportunity to influence the method prescribed for determining the required result. However, the restriction on the use of clauses that unilaterally establish the performance is not absolute. The professional may include such provisions provided they have a valid basis for doing so or if they provide for the possibility of terminating the contract. In the case of clauses related to performance, the imbalance stems from the professional's ability to determine on their own whether the performance of their obligations is accurate, or to subject performance to conditions that depend entirely on their will.

4.3. The third group covers provisions related to nonperformance. These are Article 143, paragraph 2, items 1, 2, 5, and 15 of the LCP. Their unfairness stems from the fact that they restrict consumers' rights arising from the concept of non-performance or require them to pay unreasonably high damages.

4.4. The fourth group includes provisions concerning the termination or extension of the contract—Article 143, paragraph 2, items 4, 6, 7, 8, and 9 of the LCP. These are ancillary provisions through which the parties may specify the conditions under which a contract may be terminated or extended. The unfairness of the terms concerning the right to terminate the contract may stem from the fact that the grounds for exercising this right are not clearly defined or that a reciprocal right for the consumer is not provided. The unfair nature of the terms regarding the extension of the contract stems from the inadequate time frame available to the consumer to decide whether to terminate the

contract or extend it. This hinders the consumer's ability to make an informed decision, creating a significant imbalance to the consumer's detriment.

4.5. The fifth group contains provisions concerning procedural rights. Only Article 143, paragraph 2, item 17 of the LCP falls under this group. Several distinct clauses can be identified in this provision. The first excludes or impedes the right to bring a claim. The second relates to the exclusion or impediment of the consumer's ability to use other means to resolve the dispute. The third term concerns arbitration agreements. The fourth clause pertains to the methods of proof and the allocation of the burden of proof. What these four terms have in common is that they limit or alter the rights consumers have to resolve disputes with professionals, which is what makes them unfair.

4.6. The sixth and final group consists of clauses that do not fall under the previous groups. These are listed in Article 143, paragraph 2, items 16 and 20 of the LCP. The clause described in item 16 relates to the possibility for the professional to transfer rights or obligations under the contract without the consumer's consent, which may result in a reduction of the consumer's guarantees. This inequality stems from the fact that the consumer's situation may deteriorate without the consumer having been previously informed of this possibility and having consented to assume this risk. With regard to the clause described in Article 143, paragraph 2, item 20 of the LCP, a proposal has been made to repeal it.

4.7. After categorizing the terms listed in Article 143, paragraph 2 of the LCP into six groups, the discussion turned to the exceptions provided for in Article 144 of the LCP regarding the application of the irrebuttable presumption concerning the terms on the list. The conditions under which the terms specified in Article 143, paragraph 2 of the LCP may not be considered unfair were outlined.

5. Chapter Two concludes with a summary and proposals *de lege ferenda* regarding the lists of unfair terms.

Chapter Three

1. This chapter examines the consequences of including unfair terms in a contract and the means for their elimination. Recital 21 and Article 6, paragraph 1 of Directive 93/13 provide for a requirement that unfair terms in contracts between consumers and sellers or suppliers shall not be binding on consumers, while at the same time the contracts shall continue to be valid for the parties under the other terms and conditions, when they can be performed without the unfair terms. The general formulation used "shall not be binding" allows Member States to choose the specific means by which the aim of the terms not being binding on the consumer is achieved. In Bulgaria, it is accepted that unfair terms are null - Article 146, paragraph 1 of the LCP. This necessitated the dissertation to outline the main features of contract invalidity in order to fully reveal the specific features of nullity in the case of unfair terms. Attention was paid to the issue of the confirmation of

invalid contracts, because according to the practice of the Court of Justice of the European Union, consumers can state that they wish to be bound by the unfair terms in contracts that should not initially bind them. Clarifying the possibility and methods of confirmation of ineffective contracts helped to provide proposals *de lege ferenda*.

2. The most significant difference between the general rules on nullity and those on unfair terms is that when the court establishes the presence of such a clause in a consumer contract, it does not immediately declare it null and void. It is obliged to give both parties the opportunity to present their arguments, thus respecting the *audi alteram partem* principle. However, there is a difference in the possibilities available to the parties. The professional is limited to presenting evidence and presenting arguments to justify that the clause is not unfair, and thus to refute the court's finding. The consumer has wider possibilities. On the one hand, he can present evidence and argue why he considers the clause to be unfair, thus supplementing or confirming the court's findings. On the other hand, the consumer has the opportunity to express a desire to be bound by the term, despite its unfairness. This option of the consumer is accepted as part of his right to effective protection, including the possibility of waiving his rights. For this reason, the court is obliged to take into account the possible desire of the consumer. The latter knows that in principle the unfair term does not bind him, but nevertheless objects to its non-application, thus freely and fully informedly expressing his agreement with it. Thus, with the implementation of an additional legal fact, representing an additional expression of will on the part of the consumer, the invalid clause is confirmed. The consumer's right to waive the protection provided to him by the institute of unfair terms can be exercised both in court and out of court. This is perceived as an expression of the idea that Directive 93/13 aims to prevent consumers from being bound by clauses that they do not actually know or with which they have not had the opportunity to become familiar. Once consumers are informed about the content of the clauses, they can make an independent decision whether to bind them or not. Furthermore, the Court of Justice of the European Union points out that protection against unfair terms is not mandatory for consumers and they decide for themselves whether to benefit from it.

In the dissertation, the practice of the Court of Justice of the European Union, which allows for the confirmation of unfair terms, is criticized. It is pointed out that the protection against such clauses is a matter of public interest. Furthermore, the regulation of unfair terms consists of public policy norms. In this regard, it is considered inappropriate to leave it to the individual judgment of each consumer to decide whether to apply the regulation of unfair terms or not. It should be noted that the possibility of confirmation of unfair terms may lead to a limitation of the deterrent effect that the non-application of the clause has. The professional knows that although unfair, the clause could be confirmed by consumers and would find application in some of the contracts concluded by him. Therefore, it is proposed that the practice of the Court of Justice of the European Union, which allows consumers to confirm unfair terms in contracts, should be amended.

3. Next, the paper examines the prerequisites for partial nullity of unfair terms under Article 146, paragraph 5 of the LCP. The said provision stipulates that the presence of unfair terms in a contract concluded with a consumer does not lead to its nullity if the contract can be applied without these clauses. It is noteworthy that, unlike partial nullity under the LOC, the LCP is disinterested in whether the parties would have concluded the contract without the null clause. This is due to the enhanced protection that is intended to be provided to the consumer. The legislator seeks to preserve the entire contract, only without the terms that are to the detriment of the weaker party to the transaction. In this case, the common will of the parties is not sought as to whether they would have concluded the contract without the unfair term. Moreover, it is difficult to speak of a common will of the parties, since the terms have been drawn up unilaterally by the professional. The contractual content actually reflects only his will.

4. The question of what happens to the gap in the contract left by an invalid clause is also considered. Can the contractual content be filled? The general provisions are set out in Article 26, paragraph 4 of the LOC. First of all, the null part of the contract is replaced automatically by the mandatory rules of the law. This hypothesis is possible only in the case of nullity, which is based on a contradiction with the law within the meaning of Article 26, paragraph 1, first suggestion of the LOC. For this reason, replacement with mandatory legal rules will not be applicable in the case of partial nullity caused by the use of unfair terms. In the second hypothesis, there are no mandatory legal norms with which to fill the contractual content. The provision of Article 26, paragraph 4 of the LOC does not explicitly state how to proceed in this situation. The doctrine emphasizes that in this case the dispositive rules of the law must be applied¹⁰. A departure from this understanding is observed in the case law of the Court of Justice of the European Union regarding the partial invalidity of unfair terms. It assumes that the national court cannot replace the established unfair terms with dispositive provisions of national law, nor by interpreting the will of the parties to fill the gap created in the contract. The arguments for this understanding are that if the court had such an opportunity, this would thwart the deterrent effect of the non-application of the unfair term. This is because professionals would take the risk of including unfair terms in contracts knowing that the relevant provisions would be replaced in the event of a possible dispute. There is one exception to the stated rule of inapplicability of the dispositive provisions of the law in the event of established unfairness. This concerns cases where the removal of the unfair term would lead to the invalidity of the contract in its entirety and this would expose the consumer to particularly adverse consequences. In the described hypothesis, the court has the option, after establishing the unfair nature of a given agreement, to apply a dispositive provision of the law instead in order to preserve the contract. The wording used, “particularly adverse consequences”, is abstract and subject to refinement. Its purpose is to allow the court to make a specific assessment for each individual case. It must take into account

¹⁰ Mitev, K. On partial invalidity. – Legal Thought, 2004, No. 4, 48-61.

the existing and foreseeable circumstances, including the consequences of the substantive and procedural provisions that will apply when declaring the contract null and void.

5. In summary, it can be said that the Court of Justice of the European Union places emphasis on the deterrent effect that the institute of unfair clauses aims to achieve. Therefore, the partial nullity of unfair clauses is combined with the non-application of the dispositive provisions of the law to fill the gap in the contract. The Court of Justice of the European Union's understanding is that the deterrent effect cannot be achieved only by removing the unfair term, but a sanction for the professional is also necessary, since the declaration of nullity cannot be qualified as a type of sanction. This view seems controversial to me. In all likelihood, it is dictated by the more frequent use of the so-called protective nullity, which aims to protect one of the parties to the legal relationship, which is considered weaker. However, I think that the sanctioning function of nullity cannot be completely ruled out. Rather, we can speak of a combination of the two functions – protective and sanctioning. The legal doctrine is united that one of the main functions of the nullity is the sanction. By depriving the contract of the effect that the parties wanted, they are “punished” for their unlawful conduct. The professional will have to bear the adverse consequences of the exclusion of the unfair terms from the contract, which in my opinion constitutes a sanction. On the other hand, the consumer will be protected from the inclusion of vicious clauses in the contract.

5.1. The court only needs to establish whether there is an unfair term in the contract and on this basis declare it null and void. In the event that the contract cannot be performed without this stipulation, the entire contract must be declared null and void. Replacing the unfair term with a dispositive rule should actually constitute a finding by the court regarding the actual content of the contract, in order to avoid disputes concerning the rights and obligations of the parties arising from the legal relationship. The practice of the Court of Justice of the European Union, which recognizes the possibility of the court's assessment of whether or not to apply a dispositive rule, rather goes beyond the described functions of introducing certainty and clarity into the relations between the parties. In addition, the dissertation states that instead of the sought-after restoration of equality in the legal relationship, the non-application of the dispositive rules can create a significant imbalance, but this time to the detriment of the professional. This is why I believe that the practice of the Court of Justice of the European Union should be reconsidered.

6. The regulation related to the possible consequences of the use of unfair terms in contracts could be improved in several aspects.

6.1. In view of the described practice of the Court of Justice of the European Union allowing the consumer to declare that he wants to be bound by the unfair term, the adopted solution in Article 146, paragraph 5 of the LCP for partial nullity needs to be clarified. Although the LCP uses the term nullity, there is a significant deviation from the understandings established in practice and doctrine about the institute of nullity of contracts. The consumer can take advantage of the opportunity

provided to him both in a pending legal process and out of court. Void transactions, however, as a rule, cannot manifest their typical effect. An exception is allowed only through the adoption of validation laws. Therefore, the ability to confirm the unfair clause by a unilateral declaration of will of one of the parties to the contract could be better explained if we assume that there is a pending invalidity. This type of invalidity corresponds to a greater extent to the specifics regarding the non-binding nature of unfair terms outlined by the Court of Justice of the European Union. On the one hand, unfair terms will not be binding on the consumer from the moment the contract is concluded. On the other hand, when the consumer becomes aware of their unfair nature and the consequences that follow, he will be able to decide at his own discretion whether to be bound by these terms. This declaration of will must be made freely and in an informed manner. It constitutes an additional legal fact, a *conditio sine qua non*, in order to give rise to the legal effect provided for in these terms. The current version of Article 146, paragraph 5 of the LCP was adopted before the Court of Justice of the European Union made its interpretation of Directive 93/13. In this regard, the legislator was not able to bring the law into line with the mandatory interpretation of Article 6, paragraph 1 of Directive 93/13. Therefore, *de lege ferenda*, it could be provided in the LCP that unfair terms are pending invalid. This would be in line with the established case law of the Court of Justice of the European Union on the interpretation of Directive 93/13.

6.1.1. For the sake of completeness, I should note that in my opinion, the interpretation given by the Court of Justice of the European Union regarding the consumer's ability to confirm unfair terms in the contract should be reconsidered. The reasons are as follows. Providing consumers with the opportunity to assess whether to benefit from the protection provided to them by the institute of unfair terms can be considered from another perspective. The provision of Article 6, paragraph 1 of Directive 93/13, respectively the national provisions transposing it, are accepted as public policy norms. It follows that these norms are regulated to protect the interests of society as a whole, and not to protect the individual interest of the individual subject. In view of the objectives pursued by the regulation of unfair terms, I do not consider it appropriate to provide individual consumers with the opportunity to assess whether to benefit from the legal protection. In the doctrine and in Article 1102, paragraph 2 of the French Civil Code it is explicitly stated that public policy rules are a limit to the freedom of contract. Therefore, the parties are not able to change or derogate from the application of a public policy rule by their will. Ultimately, in the case of unfair terms, there is a significant inequality between the rights and obligations of the parties to the detriment of the consumer. This situation has come about because of the behavior of the professional who unilaterally drafted the content of the contract. This is precisely what vitiates the concluded contract, which is why it is only necessary to establish the non-binding nature of the unfair terms, thus restoring objective equality between the contracting parties. In addition, the possibility of confirming unfair terms by the consumer would prevent the achievement of some of the objectives outlined in recitals 6 and 7 of Directive 93/13 – facilitating the construction of the internal market, stimulating competition. Some

professionals would continue to use unfair terms, knowing that consumers could confirm them. If the consumer declared that he did not wish to benefit from the protection granted to him, this would mean that the professional in question would secure more favourable conditions, which would put him in a more advantageous position compared to his competitors. Achieving advantages by using unlawful means, in turn, hinders not only the construction of the European Union internal market, but also the national market.

If the practice of the Court of Justice of the European Union is changed in the indicated direction, then the proposal *de lege ferenda* to amend Article 146, paragraph 5 of the LCP will not be necessary. Then the partial nullity, as currently regulated, will fully and accurately reflect the provisions of Directive 93/13 and the interpretation of the Court of Justice of the European Union.

6.2. I believe that the practice of the Court of Justice of the European Union regarding the possibility of filling the gaps in the contract left by the unfair term needs to be reconsidered. First of all, the application of the dispositive rules of the law, if any, should be allowed. This should be possible whenever an unfair term is removed from the contract, and not only when the stipulation would lead to the nullity of the entire contract and this would put the consumer in an extremely disadvantageous position. Dispositive norms are not unfair and they take into account the interests of both professionals and consumers. The current case law emphasizes the deterrent effect that must be achieved through the institution of unfair clauses. It serves as a justification for the decisions of the Court of Justice of the European Union and an argument for adopting the view that dispositive norms should be applied in a relatively small number of cases. However, the Court of Justice of the European Union does not take into account that the measures need to be proportional to the gravity of the violations committed – in this case, the use of unfair terms. In addition, there are other measures that are able to guarantee the deterrent effect of the regulation of unfair terms. The Commission for consumer protection has the power to draw up guidelines and recommendations in relation to specific unfair terms. It can also impose fines and pecuniary sanctions for failure to comply with the prohibition on the use of unfair terms - Article 203, paragraph 1, item 3 of the LCP and Article 228 of the LCP. The sanctions in the above provisions are in accordance with the requirements of Article 8b of Directive 93/13 and are able to guarantee the deterrent effect of the regulation.

6.2.1. In the hypothesis where the unfair term leads to the nullity of the contract in its entirety and there are no dispositive norms with which to preserve its effect, I find it appropriate to allow the court to perform a conversion of the void contract. The doctrine and our case law are unanimous that conversion of null contracts is allowed. Therefore, there should be no obstacle to applying the conversion when the nullity is caused by a clause of an unfair nature. For this purpose, two prerequisites must be met. First, after the null term is removed, the contract must fulfill the factual composition of another type of contract that is valid. Second, it is necessary to examine the presumed will of the parties. Only after the court establishes that the parties would have concluded the new

contract, it must perform the conversion. However, this does not mean seeking their consent, but, according to the circumstances and data of the case, searching for their presumed common will. In my opinion, the possibility of conversion would be in line with the objectives pursued by Directive 93/13. On the one hand, the court will remove the unfair term without supplementing or amending the rest of the content of the contract, only giving a new interpretation of the type of contract that has been concluded. This would help to strengthen the effectiveness of consumer protection. In the majority of the Court of Justice of the European Union decisions examined in this chapter, the disputes concerned consumer credit contracts or real estate credit contracts. In cases where the contracts were considered null and void, this was due to the unfair nature of the clauses determining the interest rate, which constitute an essential part of the contractual content. The nullity of these types of contracts would place consumers at an extremely disadvantage, as they would have to repay the entire principal amount in one lump sum. If the court could convert the null contracts into a consumer loan contract, in compliance with the requirements of Article 240, paragraph 2 of the LOC, consumers would be able to repay the principal amount in accordance with the repayment plan and would not be at risk of having to repay the entire principal amount in one lump sum. This would ensure a high level of consumer protection and encourage consumers to seek their rights under consumer law. On the other hand, with the possibility of converting the contract, professionals would be deterred from using unfair terms.

7. The dissertation examines some procedural issues to which the Court of Justice of the European Union has explicitly addressed in its decisions.

7.1. The first preliminary reference, related to Directive 93/13, concerned the question of whether the court has the possibility to examine of its own motion the unfair nature of the terms of a contract concluded with a consumer. The Court of Justice of the European Union gave a positive answer, recognizing that the court may carry out an inspection on its own initiative. In its later decisions, the interpretation was further developed, and from an opportunity for the court it has grown into an obligation to monitor *ex officio* for the presence of unfair terms. The court's obligation to carry out an inspection of its own motion is provided for in Chapter Two of the Code of Civil Procedure, which lists the principles of our civil procedure. The provision of Article 7, paragraph 3 of the Code of Civil Procedure prescribes that the court monitors of its own motion the presence of unfair terms in a contract concluded with a consumer, and that it provides the parties with the opportunity to express an opinion on these issues.

7.2. Despite the court's obligation to monitor *ex officio* for the presence of unfair terms in contracts, situations may arise in which the court act does not indicate whether a check has been made, or it is only found that there are no unfair terms in the contract, without stating reasons. In the doctrine, this problem is explicitly emphasized in the injunction proceedings. In it, a formal check of the submitted application is carried out, and in cases where the court accepts the application as

justified, the enforcement order is issued without stating reasons. In the absence of reasons, it cannot be understood whether the court has carried out the necessary check. Of course, uncertainty as to whether the obligation under Article 7, paragraph 3 of the Code of Civil Procedure has been fulfilled may arise not only in relation to injunction proceedings, but also in the claim proceedings.

The Court of Justice of the European Union has held that where the court has ruled only on the unfairness of some of the clauses of a contract, this cannot prevent the consumer from raising the issue of the unfairness of the remaining terms in other proceedings. The Court of Justice of the European Union's case-law has been further developed, as consumers are recognised as having the possibility of bringing claims to establish the unfairness of contractual terms even in cases where they have been examined *ex officio* by the court, but the latter has not set out reasons in its decision and has not indicated that if the consumer does not invoke the unfairness of the clauses, this possibility will be precluded.

7.3. Next, the issues regarding the possibility of consumers to protect themselves against unfair terms when enforcement proceedings have been initiated against them are examined. It is assumed that in this hypothesis, the consumer should have the opportunity to protect himself against unfair terms in contracts if two prerequisites are met. The defective terms were the reason for initiating enforcement and the issue of their unfairness was not explicitly addressed in the proceedings preceding the enforcement process.

8. The dissertation examines the issues regarding the limitation periods for declaring the unfairness of a contractual clause and for the return of the given under such a clause. Since unfair terms are null and void, the consumer should not be limited by a period within which he can ask the court to declare it. As for his ability to request the return of the given under an unfair term, then a 5-year limitation period is provided for on the basis of Article 110 of the LOC. With regard to the starting point, the Court of Justice of the European Union assumes that the limitation period for a claim based on a given under an unfair term begins to run from the moment of entry into force of the decision establishing the unfair nature of the clause, unless the professional proves that the consumer knew or could reasonably have known about the unfairness before the court's ruling. The dissertation proposes how to refine this practice of the Court of Justice of the European Union, which will help both to effectively protect consumers and to ensure security in civil transactions. It is expressed in the fact that the limitation period for the return of what a consumer has given under an unfair term should start to run from the entry into force of the decision declaring its unfair nature, but this should not lead to a period exceeding 10 years from the moment when the property transfer was carried out.

9. Next, the dissertation examines the powers of the Commission for consumer protection. This is necessary in order to fully reveal the possibilities for dealing with unfair terms in contracts. Part of the powers of the Commission for consumer protection are also related to the definition or approval of contractual content, which is directly related to the requirements for offering clear, understandable

and fair contractual terms to consumers. Another part concerns the administrative-punitive powers that the Commission for consumer protection has to sanction professionals using unfair terms.

Conclusion

The dissertation concludes with a summary of the results of the study of unfair terms in contracts.

III. MAIN CONTRIBUTIONS OF THE DISSERTATION AND SUMMARY OF THE PROPOSALS DE LEGE FERENDA

The main contributions of the dissertation are as follows:

- This is the first comprehensive study on the subject of unfair terms in Bulgaria;
- The dissertation examines and summarizes the accumulated practice of the Court of Justice of the European Union;
- The analysis of the institute of unfair terms was made taking into account its relationship with a number of civil law institutes - contracts under general terms and conditions, invalidity;
- In the case of general terms and conditions contracts, proposals were made de lege ferenda to modernize and improve their regulation, which is currently highly fragmented. The main proposal is related to consolidating the regulation in the LOC, where both the general provisions related to the general terms and conditions and the exceptions would be established. As for general terms and conditions contracts concluded with consumers, an idea was given to create a provision that would explicitly state that the general terms and conditions are not binding on the consumer when they are not handed over to him at the time of the conclusion of the contract;
- The characteristics of unfair terms were analyzed in detail;
- It was proposed that the requirement that the term was drafted unilaterally to be included the legal definition in Article 143, paragraph 1 of the LCP, and not to derive it from Article 146, paragraph 1 of the LCP;
- It was proposed that the requirement for a contradiction with good faith to be dropped from the features qualifying a clause as unfair. Good faith referred to in Article 143, paragraph 1 of the LCP and in Article 3, paragraph 1 of Directive 93/13 is the one that the parties must observe when negotiating and concluding contracts. It is regulated in Article 12 of the LOC, and it is not necessary to be contained in another separate provision. With this change, the elements of unfair terms will be the following: 1) the clause is drafted unilaterally; 2) it creates a significant imbalance between the rights and obligations of the parties and 3) this is to the detriment of the addressee of the unilaterally drawn up clauses;
- Next, it was proposed that the regulation of unfair terms be moved to the LOC, and systematically it should be located after the provisions on contracts under general terms and

conditions. This should be done while maintaining the high level of protection provided to consumers. It was justified that this is an institute of the law of obligations, not of consumer law. In this regard, the rules on unfair terms should be applicable to all unilaterally drawn up contracts, regardless of the quality of the parties;

- A proposal was made on how to determine whether the offeror has drawn up a given agreement in contradiction with the requirement of good faith, in the event that a regulation of unfair clauses is created in the LOC and their current characteristics are preserved. This can be done through the figure of the reasonable person, which can be received in our law. Thus, it will be possible to determine on the basis of an objective criterion whether the addressee of the offer to conclude a contract would agree to the proposed terms if he had a real opportunity to influence the contractual content;

- It was proposed that the terms “trader” and “supplier” to be replaced with “professional”. It would be collective for both concepts;

- An analysis of the lists of unfair terms was carried out, clarifying the characteristics of the so-called “white”, “grey” and “black lists”;

- It has become clear that at the present time the list under Article 143, paragraph 2 of the LCP belongs to the “black” list category;

- It was proposed that some of the clauses contained therein be separated into a separate “white” list;

- The various opinions on the grouping of the clauses contained in the lists of unfair terms were systematized. A proposal was made for a new division into six groups;

- The paper substantiates the idea of specifying some of the clauses contained in Article 143, paragraph 2 of the LCP, which will improve consumer protection;

- The consequences of establishing unfairness were studied in full. From the analysis of the legislation and the accumulated practice of the Court of Justice of the European Union, conclusions were drawn that help to improve the regulation.

- It was proposed to abandon the current practice of the Court of Justice of the European Union, according to which the consumer can choose whether to benefit from the protection provided by the institute of unfair terms.

- In the event that the proposal to change the practice of the Court of Justice of the European Union regarding the consumer's ability to choose whether to be bound by an unfair clause is not adopted, the dissertation accepted that a change to Article 146, paragraph 1 of the LCP is necessary. It consists in explicitly providing that unfair terms are pending invalid and not null and void;

- It was concluded that the decisions of the Court of Justice of the European Union, which prohibit national courts from applying the dispositive provisions of the law to fill gaps in the contract that are due to the established unfairness of a given clause, should be reconsidered;

- The limitation periods applicable to a request for the return of a given item under an unfair term have been analyzed. It was proposed that the limitation period for the return of a given item by a consumer under an unfair term should begin to run from the entry into force of the decision declaring its unfair nature, but that this should not lead to a period exceeding 10 years from the moment when the property transfer was carried out;

- Some procedural issues were also examined, and de lege ferenda proposals were made to ensure effective consumer protection. This includes changes to the claim, injunction and enforcement procedures;

- Guidelines were given on how the powers of the Commission for consumer protection could be further developed in order to limit the use of unfair terms by professionals;

- Proposals have been made de lege ferenda to unify and improve the terminology used in the regulation of unfair terms. This will contribute to its better understanding and, accordingly, will have a positive impact on law enforcement.

IV. PUBLICATIONS ON THE TOPIC OF THE DISSERTATION

1. Unfair terms and the abuse of law. – In: Collection 70 years of the Law on Obligations and Contracts. Plovdiv: Sibi, Paisii Hilendarski University publishing house, 2022;

2. Comparative law notes on unfair clauses. – In: Collection of papers from the Scientific Conference “Law in the 21st Century - Challenges and Perspectives”. Plovdiv: Paisii Hilendarski University publishing house, 2023;

3. Does consumer law provide special protection for minors and underage consumers? – Studia Iuris, No. 2, 2024.