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Beyond Consumer Law – Small Enterprises, Independent Contractors and other Professional Weak Parties

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Abstract: The need to protect weak parties from unfair standard contract terms does not only exist in b2c relationships, as one could at first sight believe. In business contracts also, entrepreneurs and other professionals can be subservient to their counterparty. Accordingly, this may result in an asymmetrical situation posing the same problems that are usually addressed in consumer contracts. On the grounds of these introductory considerations, this paper aims at analysing the problem from a European point of view, with special attention to the Italian legal system. A variety of different solutions – depending on the single rationales of the different legal systems at issue – emerges, offering de iure condendo a good starting point for a fresh and novel pragmatic approach.

Résumé: Le besoin de protéger les parties faibles contre les clauses abusives dans les contrats d'adhésion existe ailleurs que dans les seuls rapports entre consommateurs et professionnels, contrairement à ce qu'il y paraît de prime abord. Dans les rapports d'affaires également, on observe des cas où un entrepreneur ou autre commerçant est dominé par l'autre partie. Par conséquent, il peut y avoir des situations s'assymétrie analogues à celles qui existent dans les contrats à la consommation. A partir de ce constat très simple, cet article vise à analyser cette difficulté d'une perspective européenne, en prêtant une attention particulière au droit italien. Une variété de solutions émerge ainsi – fondée sur des raisons propres à chaque système juridique – offrant de lege ferenda un bon point de départ pour une approche innovante d'inspiration pragmatique.

Zusammenfassung: Schutzbedürftig in Klauselverträgen sind – anders als das auf den ersten Blick den Anschein haben mag – keineswegs nur Verbraucher (in b2c-Verträgen). Auch im Verhältnis zwischen beruflich tätigen Parteien kann ein Unternehmer oder sonst beruflich Tätiger der Gegenpartei unterlegen sein. Dies kann zu ähnlich asymmetrischen Konstellationen führen, wie sie typischer Weise

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für Verbraucherverträge diskutiert werden. Gestützt auf diese Grundüberlegung, analysiert der vorliegende Beitrag das Schutzproblem aus Europäischer Perspektive – mit Konkretisierungen namentlich aus dem italienischen Recht. Zu Tage gefördert wird dadurch eine ganze Anzahl unterschiedlicher Lösungen – je nach Ansatz in den verschiedenen Rechtsregimen –, die einen guten Ausgangspunkt bilden mögen für einen stärker kohärenten und pragmatischen Ansatz.

1 Substantive Control on Standard Contract Terms in Business Contracts

Anyone can be affected by the unfairness of a standard contract term imposed by the counterparty, including professionals in b2b relations. Therefore, my topic goes beyond consumer law and aims at considering these discrete cases.

It has been argued, especially as regards the use of contract terms, that 'also the enterprise, big or small, may need protection against unfairness'.[1] This is, in fact, the choice made by the German legislator: it is well known that the rules included in §§ 307 *et seq* BGB apply to contracts with entrepreneurs, as well as to consumer contracts, regardless of their size and even in cases when parties have equal bargaining power (see § 310 BGB).[2] Similarly, Article 4.110 (the former Article 6.110) of the *Principles of European Contract Law* (the so-called PECL) drawn up by the Commission on European Contract Law, set up by Ole Lando, applies to unfair terms which have not been individually negotiated by consumers as well as by professionals. The rules provided on procedural fairness are to apply to any contract, even those between enterprises and businesspeople, entitling the disadvantaged party to have the clause set aside and modified.

Although big business enterprises could negotiate and get better conditions if only they read contract terms carefully, they do not do it in practice. They are only interested in the essential terms, such as the quality of the goods or services, the

1 O. Lando, 'Should Business Enterprises Benefit from Consumer Protection', in I. Schwenzer and G. Hager (eds) *Festschrift für Peter Schlechtriem zum 70. Geburtstag* (Tübingen: Mohr Siebeck, 2003) 578. Similarly, H. Schulte-Nölke, 'No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts' (2015) *European Review of Private Law* 195 *et seq*.

2 For a first commentary on these provisions see J. Basedow, § 305, in F.J. Säcker, R. Rixecker, H. Oetker, B. Limperg (eds), *Münchener Kommentar zum BGB* (Munich: C H Beck, 2019) para 1 *et seq* and especially 34 *et seq*; W. Wurmnest, § 307, *ibid*, para 1 *et seq*; J. Basedow, § 310, *ibid*, para 2 *et seq*; P.F. Schlosser, § 310, in M. Martinek (ed), *J. von Staudingers Kommentar zum BGB, Buch 2* (Berlin: Sellier – de Gruyter, 2013) para 1 *et seq*.

price, the time of delivery etc. Reading and negotiating the terms of the numerous contracts to which a firm subscribes would in fact be costly and time-consuming. This would cause transaction costs, which on average could ultimately end up being higher than the benefit deriving from a successful negotiation.[3] This information asymmetry creates moral hazard problems, so that the outcome is lower in terms of global welfare, automatically generating Pareto inefficiencies. The legislative intervention therefore intends to avoid this second-best outcome.

The extent of protection to be granted in business contracts, however, was one of the most controversial issues debated during the preparation of the General Terms and Conditions Act (AGBG) in 1976.[4] Moreover, it was very much criticised even after the rules were inserted in the BGB with the *Schuldrechtsmodernisierung* of 2002.[5] This holds, in particular, in consideration of how these provisions were applied by the courts. Indeed, through § 307 BGB the judicial control over the standard contract terms in business contracts has been very broad and has gone much beyond the sanctioning of grossly one-sided terms that alter the spirit of the bargained-for deal.[6]

According to this provision, the standard contract terms are 'ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user'.[7] While delimiting the scope of application of the judicial control over standard contract terms, § 310 (1) BGB provides that in contracts with an entrepreneur, reasonable account must be taken of the practices and customs for those business dealings. Moreover, although the 'grey' and the 'black' list of §§ 308 and 309 BGB do not apply beyond consumer contracts, the clauses listed here are still taken into account to a considerable extent by the judges in their evaluation of unfairness. These lists have an indicative effect on whether the relevant term leads to a disproportionate disadvantage, and this makes it much easier for the courts to evaluate the general terms and conditions in business relationships.[8]

3 For these considerations Lando, n 1 above, 577 *et seq*.

4 See Basedow, § 310, n 2 above, para 3 and Schlosser, n 2 above, para 1 with further references.

5 Among others see K.P. Berger, 'Abschied von der Privatautonomie im unternehmerischen Geschäftsverkehr?' (2006) *Zeitschrift für Wirtschaftsrecht* 2149. In the German press, describing the political discussion on the topic see J. Jahn, 'Vertragsfreiheit soll wachsen', Frankfurter Allgemeine Zeitung, 16 March 2010, http://www.faz.net/aktuell/wirtschaft/recht-steuern/kritik-an-strenger-kontrolle-vertragsfreiheit-soll-wachsen-1952089.html (last visited 17 January 2019).

6 This result could also be achieved through § 138 BGB stating the invalidity of transactions contrary to public policy.

7 For an unofficial translated version of the BGB see https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0417 (last visited 17 January 2019).

8 Basedow, § 310, n 2 above, para 7 *et seq*.

Therefore, in case law there is no substantial difference between b2c and b2b contracts as regards unfair contract terms,[9] although a *Differenzierungsgebot* was specifically asked for in the parliamentary debate of § 310 BGB, so that professionals would be guaranteed the flexibility they need in drafting their contracts, and to avoid an excessive limitation of the parties' autonomy.[10] In both situations the burden of proof is reversed, and the party presenting the pre-formulated terms has to bring evidence to the fact that the terms were bargained in an environment of free choice with meaningful informed assent, and do not undermine the value that the counterparty could rationally expect from the contract. This use of the terms in the lists as clues for assessing the unfairness, however, seems to undermine the intentions of this legislator, who had foreseen a specific evaluation of the *Angemessenheit* of the terms on a case by case basis.

Furthermore, it is noteworthy that this adequacy control takes place whenever a term has not been negotiated in detail (§ 305 (1) 3 BGB), which – according to the established case law[11] – can only be assumed when the user of the term has actually been available to bargaining and has granted the counterparty the possibility to influence its content in order to protect its economic interests. This is generally denied when terms are unilaterally pre-disposed and the relation is asymmetrical.[12] Yet, the control is not limited to these cases, and the rules do not require the existence of imbalances in the parties' bargaining power, so that the provisions apply even in cases where the parties were free in their choices of drafting an agreement and of entering into it.[13]

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9 Berger, n 5 above, 2150 *et seq*.

10 For the *Bundesrat* see *Stellungnahme zum Entwurf eines Gesetzes zur Modernisierung des Schuldrechts* [2001], BT-Drucks 14/6857 [2001], 17. For the *Bundestag* see BT-Drucks 14/6857 [2001], 54.

11 BGH judgement of 22 January 2012, *Neue Juristische Wochenschrift* 2013, 856; BGH judgement of 19 May 2005, *Neue Juristische Wochenschrift* 2005, 2543, 2544; BGH judgement of 18 April 2002, *Neue Juristische Wochenschrift* 2002, 2388. For a critical discussion see T. Miethaner, *AGB-Kontrolle versus Individualvereinbarung* (Tübingen: Mohr Siebeck, 2010) 156 *et seq* and 211 *et seq*; as well as T. Miethaner, 'AGB oder Individualvereinbarung – die gesetzliche Schlüsselstelle „im Einzelnen ausgehandelt"' (2010) *Neue Juristische Wochenschrift* 3121, 3127; N. Jansen, 'Klauselkontrolle im europäischen Privatrecht' (2010) *Zeitschrift für Europäisches Privatrecht* 69, 93 *et seq*.

12 Berger, n 5 above, 2152 *et seq*.

13 Critical on this point: K.P. Berger, 'Für eine Reform des AGB-Rechts im Unternehmerverkehr' (2010) *Neue Juristische Wochenschrift* 467 *et seq*; T. Drygala, 'Die Reformdebatte zum AGB-Recht im Lichte des Vorschlags für ein einheitliches europäisches Kaufrecht' (2012) *Juristenzeitung* 985 *et seq*; E.-M. Kieninger, 'AGB-Kontrolle von grenzüberschreitenden Geschäften im unternehmerischen Verkehr', in P. Jung, P. Lamprecht, K. Blasek and M. Schmidt-Kessel, *Einheit und Vielheit im Unternehmensrecht. Festschrift für Uwe Blaurock zum 70. Geburtstag* (Tübingen: Mohr Siebeck, 2013) 177, 187; R. Koch, 'Das AGB-Recht im unternehmerischen Verkehr: Zu viel des Guten oder Bewegung in die richtige Richtung?' (2010) *Betriebsberater* 1811.

This, however, seems to have gone too far.[14] If entrepreneurs remain on a fair and level playing field, they should be free to define their standard contract terms. One must consider whether it is really necessary to provide even big firms with such an invasive protection from general contract terms, as their situation differs greatly from that of consumers and small enterprises. Indeed, such rules seem to make it unjustly difficult for stipulators to use and enforce standard terms. Therefore, the counterparty could object or negotiate but does not, in order to save the costs. One could argue that business parties should be responsible for their own choices. If they decide to spare the costs of reading the standard contract terms and do not negotiate a clause, even if they have the chance and the power to do it, then they do not deserve protection.

It does not come as a surprise that many big enterprises contracted away from these very protective rules: by moving their seat to Switzerland and applying Swiss law that foresees no such invasive control over general contract terms, they escape the application of the German rules in their b2b relations.[15]

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14 Many scholars have been advocating for limitations and changes in these rules, see among others K. Lenkaitis and S. Löwisch, 'Zur Inhaltskontrolle von AGB im unternehmerischen Geschäftsverkehr' (2009) *Zeitschrift für Wirtschaftsrecht* 441 *et seq*; C. Kessel and A. Stomps, 'Haftungsklauseln im Geschäftsverkehr zwischen Unternehmern' (2009) *Betriebsberater* 2666 *et seq*; F. Becker, 'Die Reichweite der AGB-Inhaltskontrolle im unternehmerischen Geschäftsverkehr aus teleologischer Sicht' (2010) *Juristenzeitung* 1098 *et seq*; Berger, n 13 above, 465 *et seq*; M. Güners and T. Ackermann, 'Die Indizwirkung der §§ 308 und 309 BGB im unternehmerischen Geschäftsverkehr' (2010) *Zeitschrift für das gesamte Schuldrecht* 400 *et seq*; Koch, n 13 above, 1819 *et seq*; L. Leuschner, 'AGB-Kontrolle im unternehmerischen Verkehr' (2010) *Juristenzeitung* 875 *et seq*; A. Kollmann, 'AGB: Nicht nur theoretische Probleme (in) der Praxis' (2011) *Neue Juristische Online-Zeitschrift* 625 *et seq*; Drygala, n 13 above, 983 *et seq*; W. Müller and A. Schilling, 'AGB-Kontrolle im unternehmerischen Geschäftsverkehr' (2012) *Betriebsberater* 2319 *et seq*; W. Müller, 'Die AGB-Kontrolle im unternehmerischen Geschäftsverkehr – Standortnachteil für das deutsche Recht' (2013) *Betriebsberater* 1355 *et seq*; H. Oetker, 'AGB-Kontrolle im Zivil-und Arbeitsrecht' (2012) 212 *Archiv für die civilistische Praxis* 203 *et seq*. In favour of these rules, but advocating for a different application depending on the specific elements of the case: Basedow, § 310, n 2 above, para 16 *et seq*; F. Graf von Westphalen, '30 Jahre AGB-Recht – Eine Erfolgsbilanz' (2007) *Zeitschrift für Wirtschaftsrecht* 149 *et seq*; F. Graf von Westphalen, 'AGB-rechtliche Schutzschranken im unternehmerischen Verkehr: Rückblick und Ausblick' (2011) *Betriebsberater* 195 *et seq*; F. Graf von Westphalen, 'AGB-Kontrolle – Kein Standortnachteil' (2013) *Betriebsberater* 1357 *et seq*; J. Niebling, 'AGB-Recht – Aktuelle Entwicklungen zu Einbeziehung, Inhaltskontrolle und Rechtsfolgen' (2014) *Monatsschrift für Deutsches Recht* 636, 638.

15 Berger, n 5 above, 2149; K.P. Berger, 'Schiedsgerichtsbarkeit und AGB-Recht', in H. Schulte-Nölke, F.C. Genzow and B. Grunewald (eds), *Zwischen Vertragsfreiheit und Verbraucherschutz. Festschrift für Friedrich Graf von Westphalen* (Cologne: Schmidt, 2010) 14; T. Pfeiffer, 'Flucht ins schweizerische Recht? Zu den AGB-rechtlichen Folgen der Wahl schweizerischen Rechts', in Schulte-Nölke, Genzow and Grunewald (eds), this note above, 555 *et seq*.

2 The Problem of Weak Business Parties

Not all business parties, however, are well informed; nor are they always counselled when entering into commercial transactions. Many would not have the tools and the sophistication to understand the contract terms that are offered to them and are able to negotiate in order to achieve their commercial goals. In b2b transactions it can happen that one party does not have the same strength as the other and there may be strong differences in their bargaining power, so that there are similar qualities of asymmetry as in b2c relationships. Even in contractual relationships between entrepreneurs there can be predominance of one party over the other.

In many cases a strong party can damage the contractual equilibrium to its advantage, thereby creating inefficient and/or detrimental contracts. Information asymmetries are not linked to the production capacity of the parties, but rather to a variety of factors, sometimes connected to the complexity of goods and services offered, often in relation to the ability of one party to impose its conditions in the bargain. As far as experience and ability in commercial traffic are concerned, sometimes slight differences can be found between professionals and consumers. Even the formers may not actually have the possibility to recognise (and consequently to protect themselves against) adverse effects that could result from standard contract terms. It may also be that an entrepreneur is aware of the general conditions of contract for the area in which he operates,[16] but the fact that he knows and understands the consequences does not also mean that he is able to object to their application.

This is the case, for example, in the relationship between a trader and a large retailer, between a manufacturer and a purchasing centre, between an independent and a general contractor, between farmers, processors, traders and large operators in the food supply chain.[17] Enterprises could be in a weak position vis-à-vis a supplier. Just like consumers, they might be exposed to standard terms of business laid down by the counterparty, which they can hardly change, having very little contracting power. They do not deal with each other at arm's length with equal positions. Moreover, they usually have no other option, given that standard con-

16 Berger, n 5 above, 2151.

17 The weak bargaining power of the farmers, processors, traders in their relations with large operators is explicitly recognized by the Commission *Proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain* COM (2018) 0173 final – 2018/0082 (COD). This proposal intends to prohibit certain unfair trading practices in the food supply chain and restricts the ways in which contracts are made, varied or terminated, as well as the content of what is agreed between businesses in their contracts.

tract terms tend to align, this implying that going to another supplier they will get similar terms. It might even be the case between a lawyer and a client such as a bank, an insurance or a big firm, especially when it is the lawyer's main client.

The stronger party might overreach and force the counterparty to accept unfair terms. These are conditions that shift the risk upon the other party for an impediment or other contingencies, which the stipulator could prevent, overcome, take upon him at a lower cost. It could also be that the stipulator's cost of insuring against the risk is lower than the other party's cost. A protection of the weaker professional seems therefore appropriate, as acknowledged even by the critics of the German solution.[18]

Not all professional parties to transactions accumulate experience and expertise in recognising the various aspects of the transaction and some of them, just like consumers, do not have the same experience and expertise to draw on. An independent contractor, for example, is often in a weak position vis-à-vis the big enterprise. Big businesspeople, on the other hand, can afford to get advice if they not understand a term and have better prospects of negotiating favourable terms. Furthermore, in case of a problem, it is more likely that it is solved amicably, and they are not forced to abide by the unfair contract term.[19] In these situations, a stronger firm could force the counterparty to agree to unconscionable terms that would not have survived in an environment of free choice, for example limiting the ability to pursue a complaint or to seek reasonable redress and claim for compensation. Such clauses may alter considerably or even eviscerate the core deal terms that were negotiated and bargained.

It may be difficult to define the criteria that identify the individuals or entities belonging to the category of 'weak' businesses. This definition might entail some uncertainties as to the scope and application of protective rules, and it could lead to unpredictability in business relations. As for European countries, a definition of micro, small and medium-sized enterprises can be found in the Commission Recommendation of 6 May 2003 that considers elements such as staff number, turnover and balance sheet total.[20] Size, however, does not necessarily imply in-

18 Berger, n 5 above, 2156: '*Wenn auf beiden Seiten eines Rechtsgeschäfts Unternehmer stehen, ist die kein Garant für das Funktionieren der Richtigkeitsgewähr des Vertragskonsenses. Die AGB-Kontrolle ist auch im unternehmerischen Geschäftsverkehr sinnvoll und geboten. Erforderlich ist aber eine Neukalibrierung der Eingriffs- und Kontrollschwelle für die AGB-rechtliche Inhaltskontrolle vor dem Hintergrund der im Gesetz angelegten Differenzierung zwischen b2c und b2b-Geschäft*'. See also Basedow, § 310, n 2 above, para 18.

19 Lando, n 1 above, 586 *et seq*.

20 In detail, according to art 2 of the Annex to the Commission recommendation of 6 May 2003 n 361 concerning the definition of micro, small and medium-sized enterprises, *OJ* 2003, L 124/36 (Staff headcount and financial ceilings determining enterprise categories) '(1) The category of micro,

formation asymmetries, economic dependence or unsophistication in business transactions. Therefore, it does not seem appropriate to rely only on quantitative criteria. The identification of situations that need to be protected should, in fact, also consider other elements that point to the existence of an asymmetry between the parties as concerns their bargaining power.

In consideration of these cases and of the very different solutions that can be given to the question, it seems important to analyse if and under which conditions the rules protecting consumers in their commercial transactions should be applied in b2b relationships.

3 Weak Business Parties – Why Protect them?

In the b2b cases where one can recognise an imbalance of contractual power, the private autonomy and contractual freedom of both parties cannot be properly exercised. This translates into the possibility for one of the parties to overreach and impose on the other unreasonably one-sided contractual conditions. The content of a contract stipulated under these conditions corresponds therefore only formally, but not substantively, to the will of both parties, albeit the mutual assent. The weak party is faced with the choice of whether to accept the proposed contract or not to enter into it, and this constitutes a strong limitation of its autonomy.

One could of course argue that in these cases there is a lower need of protection for the professionals in comparison to consumers, because freedom of contract should be regarded as a cornerstone in the market economy and professionals have to consider the risks they are taking in the course of their activity.[21] No one is obliged to carry out a business activity and access to trade is free and never necessary. One could therefore claim that those who do it voluntarily should bear the

small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. (2) Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million. (3) Within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million'. Enterprises are all entities engaged in an economic activity, irrespective of their legal forms. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, partnerships or associations regularly engaged in an economic activity (art 1).

21 For an analysis of these considerations see M. Mogendorf, *Der strukturell unterlegene Unternehmer* (Tübingen: Mohr Siebeck, 2016) 20 *et seq*.

risks inherent to commerce, and should therefore fall beyond the sphere of protection expressly ensured by the legislator.

This area should be limited only to the fundamental sectors relating to necessary goods: the law should for example monitor the work-related conditions and the relation between salaried employees and employers, it should protect tenants versus landlords, the insured versus the insurer, the consumer versus the professional. Apart from these areas, contract law should only facilitate the efforts of contracting parties to independently maximise the joint gains from transactions. The business enterprise, whatever its size, should take care of itself, and needs no protection. It faces parties that are business partners and should be ready to read the counterparty's general conditions. Furthermore, a professional is less optimistic as regards the contingencies and risks dealt with in the standard form contracts.

This position is not shared by all scholars. Even those who advocate an ample freedom of contract for firms and aim at making contract law a merchants' law without redistributive or fair legal rules that do not maximise joint surplus,[22] only apply their theories to 'sophisticated parties', thus excluding small enterprises and independent contractors from their analysis.[23] The stronger party may have abused his power by taking advantage of the other party's weakness, and this may suffice to set aside or modify the contract.[24] A small enterprise may have the same difficulties as a consumer in understanding the terms of the stipulator's general conditions. He might also be in a state of dependence on the stipulator (he owes money, or he is the main customer) that forces him to accept unfair terms.

Evidently, the choice to protect the weak professional from the general terms of contract imposed by the counterparty is a policy decision which can be freely scaled in its breadth and intensity. It is not necessary to intervene in all cases, but there are many reasons that lead in the direction of regulation.

A legislator should in fact consider distributional goals as well as contractual fairness, and of course a competitive market depends heavily on an effective freedom of contract, which cannot be limited to a mere and unsubstantial assertion. When an entrepreneur is structurally dependent on his counterparty and there is asymmetrical information, strong firms are tempted to overreach and there can hardly be a healthy competition. As for standard contract conditions, one can assume that conditions which unjustly benefit the strong part at the expense of the weak one will come to prevail, instead of those that would be better in terms of economic efficiency.

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22 See for example A. Schwartz and R. Scott, 'Contracts theory and the limits of contract law' (2003) 113 *Yale Law Journal* 541 *et seq*.

23 Schwartz and Scott, n 22 above, 545 *et seq*.

24 Lando, n 1 above, 587.

A limitation of permissible contracting to protect the weak party confines the opportunity for the strong party to impose unpredictable and not apparent (therefore not justified) costs on the counterparty. It allows the unsophisticated entrepreneur to only analyse and compare the main performance of the contract he is getting into, without having to pay the costs of an in-depth analysis of all the contractual conditions, which perhaps concern very rare and marginal situations. A re-balancing of the parties' forces by means of an authoritative intervention limiting abusive and unfair contract terms would lead to more efficient contractual relations, reducing the final costs to the advantage of the whole market system.[25]

Protective measures for the benefit of an entrepreneur that is structurally in a subservient position may also be important to ensure the stability of an economic sector.[26] This is what happens, for example, in the case of *subfornitura* in Italian law[27] and *sous-traitance* under French law.[28] Here the rules setting limits to permissible contracting aim at avoiding the possibility that the exploitation of the strong party in a contractual chain leads to the insolvency of the subcontractors, who are generally small or medium enterprises, generating risks for the firms in the chain, possibly for the whole economic system. This happens also for standard contract terms. If, in a certain branch of the market, general conditions are unfavourable for weak entrepreneurs (for example by making it very difficult for them to bring actions through a choice of forum clause naming a forum abroad or an amendment of the applicable law), this could lead in periods of economic crisis to an insolvency that would have been avoidable with more balanced general contract conditions.

On the other hand, one must consider that excessively protectionist and unjustifiably invasive legislation could create entrance barriers to certain markets. The subsequent cost increase could reduce the profit margin, thereby discouraging those who would be strong parties from entering that market.

All that said, it is clear that in this field it is necessary to find a fair balance in the regulation. However, a certain limitation of contractual freedom with regard to the imposition of general conditions of contract seems appropriate.

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25 Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *The Quarterly Journal of Economics* 488 *et seq*.

26 Mogendorf, n 21 above, 23 *et seq*.

27 *Legge* 18 June 1998 no 192 *sulla disciplina della subfornitura nelle attività produttive*.

28 *Loi* no 75–1334 of 31 December 1975, according to which a subcontracting agreement stipulates that '*un entrepreneur confie par un sous-traité, et sous sa responsabilité, à une autre personne appelée sous-traitant l'exécution de tout ou partie du contrat d'entreprise ou d'une partie du marché public conclu avec le maître de l'ouvrage*' (art 1).

4 Regulating Asymmetrical b2b Relationships

This is the direction taken by many law systems. Provisions were introduced that, albeit confined to specific sectors and to certain contractual relations, express the same general concern to prohibit excessive contractual imbalances of rights and obligations. Thus, they aim at bringing the real market closer to the ideal market and, at the same time, at guaranteeing the justice of the individual relationship.

Indeed, some legislators started already in the 60s/70s to identify situations of structural weakness of entrepreneurs deemed deserving of protection, and to draft protective rules. This is the case, for example, for the *franchisee* in the US,[29] the subcontractor in the French legislation,[30] the German law on standard business terms of 1976.[31] Considering the subjection of one entrepreneur to another, the economic consequences of exploitation are comparable to situations such as those of consumers or workers. Other examples such as the paragraphs regulating the sales representative (*Handelsvertreter*, § 84 *et seq* HGB) in Germany or the Italian rules on procedural fairness in the negotiation of standard contract terms (Articles 1341, 1342 cod civ) were even older.

However, it is not possible to identify in the various legal systems common general figures or categories that would make a legal assessment possible, for example a recognised notion of the typical cases of subordination of one entrepreneur to another. Different regulation techniques are used to protect a weak professional depending on the specific domain, so that it seems impossible to recognise general principles on this topic. This gives rise to the doubt that the certainty of law and the predictability of the solutions which a judge could provide for other similar cases are severely undermined or, in any case, that it is not an effective form of protection for the weak professional party.

This issue is particularly evident if one considers the Italian system and its different provisions protecting entrepreneurs and other professional parties from unfair contract terms.

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29 The Federal Trade Commission promulgated in 1978 the Trade Regulation Rule *Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities Ventures* – 16 C F R 436.

30 *Loi* no 75–1334 of 31 December 1975.

31 *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (*AGB-Gesetz*) of 9 December 1976, BGBl I, 3317. It is well known that, after the *Schuldrechtsmodernisierung* of 2002 reforming and modernising the German law of obligations, its content was transferred in the §§ 307 *et seq* BGB, that were already discussed above, see 1.

5 The Italian Case: Procedural Fairness in the Rules of the *Codice Civile*

An analysis of the protection of business parties against unfair contract terms in Italy has to start from the rules of the *codice civile* of 1942, still significant in this context. From a regulatory perspective the first norms to consider are Articles 1341 and 1342 cod civ on unilaterally predisposed standard contract terms.[32]

According to these provisions the pre-formulated contract terms drafted by one party are binding only if at the time when the parties entered into the contract, the counterparty knew them or should have known them with due diligence (Article 1341 (1)). Moreover, certain terms that are particularly advantageous for the pre-disposing party or place special burdens or costs on the other have to be specifically agreed to in writing. These are the unfair terms (*clausole vessatorie*) exhaustively listed[33] in Article 1341 (2): limitations of liability, clauses that give one party the power to terminate the contract or to interrupt the performance, forfeitures and deadlines, restrictions to the possibility of counterclaiming, restrictions to the freedom of contracting with others, tacit prolongation or renewal of the contract, arbitration or choice of forum clauses. Furthermore, according to Article 1342 cod civ, whenever a party predisposes forms and uses them to enter into standardised contracts, the terms that are added prevail upon those stated in the form if they are inconsistent, even if the latter have not been erased.

These provisions apply to uniform and pre-formulated terms that one party lays down and that are meant to be equally used for an indefinite set of contracts, regardless of whether they are meant to be offered to consumers or to business parties.[34] It is relevant that they have not been individually negotiated by the parties and that one of them was only offered the choice to accept them or not, without being able to influence the substance of the terms.[35] The rules do not apply to

32 For a first analysis of these provisions see A. Zaccaria, 'Art. 1341' and 'Art. 1342', in G. Cian and A. Trabucchi, *Commentario breve al codice civile* (Padova: Wolters Kluver – Cedam, 2018) 1437 *et seq* with further references.

33 Cass civ no 12044/2014; Cass civ no 15591/2007, Cass civ no 6314/2006; Cass civ no 20744/2004.

34 See recently Cass civ no 7605/2015; Cass civ no 12153/2006, Cass civ no 11757/2006; Cass civ no 15385/2000. Moreover, F. Carresi, 'Il contratto', in P. Schlesinger (ed), *Trattato di diritto civile e commerciale Cicu-Messineo* (Milano: Giuffré, 1987) 219; C.M. Bianca, *Diritto civile*, vol III, 'Il contratto' (Milano: Giuffré, 2000), 342 *et seq*; R. Sacco and G. De Nova, 'Obbligazioni e contratti', in P. Rescigno (ed), *Trattato di diritto privato* (Torino: Utet, 1999) 104.

35 See more in detail R. Scognamiglio, 'Dei contratti in generale', in A. Scialoja and G. Branca, *Commentario del codice civile* (Bologna-Roma: Zanichelli, 1992) 262 *et seq*.

contracts concluded by parties having the same bargaining power[36] that freely negotiated the terms of the contract,[37] nor to cases in which both parties spontaneously agreed to use a specific contractual scheme, considering it appropriate to define their interests in the contract.[38]

Article 1341 and 1342 cod civ represented an important innovation when they entered into force in 1942, because they recognised that very often the freedom of contract and the equality between contract parties – which represented the unexpressed assumption of all nineteenth-century codifications[39] – existed only formally and that in real transactions parties often fail to be on the same level and to have the same bargaining power.[40] However, it only stops at the level of advance disclosure rules and with time it became evident that it created a presumption of meaningful assent that in fact was not guaranteed. Italian courts were inflexible in their interpretation of the provisions: a double signature was considered enough and no form of *Inhaltskontrolle* following the German rules was ever allowed.[41] This way, it did not affect the length of standard forms and did not mean that the party assenting to the terms actually took notice and reviewed them. In practice, it was quite the opposite.

Imposing no assessment on the content of the terms and setting no limits to permissible contracting, this provision soon showed that, though increasing transaction costs, it did not produce substantial benefits, so that the Directive 13/1993 on unfair terms in consumer contracts was greeted with enthusiasm by courts as well as by scholars.[42]

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36 Cass civ no 6886/1987.

37 Cass civ no 11757/2006; Cass civ no 15385/2000; Cass civ no 4847/1986.

38 Cass civ no 136/1987.

39 It is well known that these codifications were imbued in a more or less conscious way of economic and political liberalism, see for all F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung* (Göttingen: Vandenhoeck und Ruprecht, 1967) 468 *et seq*.

40 '*Libertà di contratto ed eguaglianza formale dei contraenti apparivano (allorché prevalevano le teorie economiche del laisser faire, laissez-passer) i presupposti non solo del conseguimento degli interessi particolari (dei contraenti), ma anche dell'interesse generale della società*' V. Roppo, *Il contratto* (Bologna: Il Mulino, 1977) 34. On this topic see also E. Navarretta, 'Principio di uguaglianza, principio di non discriminazione e contratto' (2013) *Rivista di diritto civile* 547 *et seq*.

41 Literature on this topic is very broad. See for all Bianca, n 34 above, 368 *et seq*; M. Nuzzo, 'Condizioni generali di contratto', in N. Irti (ed), *Dizionario del diritto privato*, I, *Diritto Civile* (Milano: Giuffré, 1980) 157 *et seq*; G. Capo, 'La normativa sull'affiliazione commerciale e la tutela contrattuale dell'imprenditore "debole". Appunti per uno studio sulla disciplina della contrattazione 'asimmetrica' tra imprese', in *Scritti in onore di V. Buonocore*, IV (Milano: Giuffré, 2005) 4344 *et seq*.

42 See A.M. Azzaro and P. Sirena, 'Il giudizio di vessatorietà delle clausole', in E. Gabrielli and E. Minervini (eds), *I contratti dei consumatori*, I (Torino: UTET, 2005) 43 *et seq*; G. Alpa and S. Patti

These rules were transposed in 1996 and are currently set in Articles 33 *et seq* of the so-called 'consumer code' (d lgs 6 September 2005, no 206), that reorganised and collected in a comprehensive regulatory framework all the rules concerning consumer contracts that were otherwise scattered in different contexts. Accordingly, unfair terms that cause a significant imbalance of the rights and obligations arising from contracts are void in consumer contracts.[43]

No general application of the rules protecting consumers from unfair contract terms is therefore allowed. As the position of the provisions in the Italian law system makes clear, the 'substantive' control on contract terms with an unfairness test is restricted to b2c relations. Although many scholars consider it irrational to distinguish cases with identical information asymmetries and interests at stake,[44] the case-law[45] – following the lead of the ECJ that always advocated an interpretation of the concept of consumer in its strict sense[46] – has always been adamant when applying these rules only to the protection of individuals, not companies, and to individuals who carry out entrepreneurial and professional activities only when they are entering into contracts for the satisfaction of the needs of everyday life unrelated to the exercise of such activities. Even the Constitutional Court was called upon to rule on this topic and it did not consider it necessary to extend the scope of these rules into b2b relations.[47] Businesses are therefore excluded, even

(eds), *Le clausole vessatorie nei contratti con i consumatori* (Milano: Giuffré, 1997) with further references.

43 For an analysis of these provisions see among others S. Patti, 'Le condizioni generali di contratto e i contratti del consumatore', in P. Rescigno and E. Gabrielli, *Trattato dei contratti*, *I contratti in generale*, I (Torino: UTET, 2006) 345 *et seq* with further references.

44 And therefore advocate for a wider application of the rules on unfair contract terms so G. Amadio, 'Il terzo contratto. Il problema', in G. Gitti and G. Villa, *Il terzo contratto* (Bologna: Il Mulino, 2008) 23 *et seq* with further references.

45 Cass civ no 15531/2011; Cass Civ no 21763/2013; Cass civ no 5705/2014; Cass civ no 17848/2017: '*La qualifica di consumatore spetta solo alle persone fisiche, quindi non alle società, e la stessa persona fisica che svolga attività imprenditoriale e professionale potrà essere considerata alla stregua del semplice consumatore soltanto allorché concluda un contratto per la soddisfazione di esigenze della vita quotidiana estranee all'esercizio di dette attività*'.

46 See among others Case 269/95 *Benincasa* [1997] ECR 3788, 3800 (CJEU), where the ECJ had to decide if a prospective franchisee should be qualified as professional or consumer in the moment he enters into the contract; it stated that a contract has a commercial nature if it concerns a prospective enterprise of a trade by one of the parties. For further rulings of the ECJ on the topic compare Case 361/89 *Di Pinto* [1991] ECR 1189 (CJEU); Case 89–91 *Shearson Hutton* [1993] ECR 139 (CJEU); Case 45/96 *Dietzinger* [1996] ECR 1199 (CJEU); Cases 541–542/99 *Idealservice* [2001] ECR 9049 (CJEU).

47 Corte cost 22 November 2002, no 469, in *Corriere giuridico* (2003) 1005 *et seq* and Cass civ ord no 14561/2002.

in those cases where there actually are asymmetrical relations and imbalances in bargaining power.

The Italian legislator, however, has not been deaf to the needs of weak business parties, especially after the recent economic developments that, since the world financial crisis, have brought to light the importance of protecting small entrepreneurs and, more generally, weak business parties. Indeed, a recent interesting trend in the legislation goes in the direction of defending these professionals with the means of considerably influencing the private autonomy of their strong counterparties.[48] In these provisions, that to some extent might be considered *avant-garde* when expressing a general direction in the legislation, the existence of an imbalance situation between powers is generally assessed on the basis of specific contract types, so that an evaluation of an actual situation and the recognition of an imbalance is not necessary.

6 Enacting Rules on Substantive Fairness

Mandatory rules for the protection of weaker professionals from unfair clauses can of course be found in the legislation combating late payments in commercial transactions (Article 7d lgs 9 October 2002 no 231[49]). Small and medium-sized enterprises indeed have a high risk of bankruptcy because of delays in the payments for their invoices and this challenge became even more prominent as credit lines and bank loans became less available following the financial crisis.[50] This puts them in a subordinate position to the debtor, since their existence depends on the regularity of payments. As provided by Article 7 Directive 2011/7,[51] the Italian legislation prohibits the abuse of freedom of contract to the disadvantage of the creditor, who might not be in a position to negotiate fair agreements as regards payments.[52]

48 On this topic see for all V. Roppo, 'Contratto di diritto comune, contratto del consumatore, contratto con asimmetria di potere contrattuale: genesi e sviluppi' (2001) *Rivista di diritto privato* 769 *et seq*; G. Capo, *Attività di impresa e formazione del contratto* (Milano: Giuffré, 2001) 188 *et seq* with further references.

49 It is well known that this set of rules was adopted for the implementation of Dir 00/35 and subsequently amended by d lgs 9 November 2012 no 192 implementing Dir 11/7.

50 This was specifically stated by the European Commission https://ec.europa.eu/growth/smes/support/late-payment_en (last visited 17 January 2019).

51 See also the Recital 28, Dir 11/7.

52 For an analysis of this provision see among others M. Benedetti, 'La nullità delle clausole derogatorie', in M. Benedetti and S. Pagliantini, *La nuova disciplina dei ritardi di pagamento nelle transazioni commerciali* (Torino: Giappichelli, 2013) 89; T. Pasquino, 'D.lgs. 9 ottobre 2002, n. 231

According to Article 7d lgs 9 October 2002 no 231 on late payments in commercial transactions, which is also applicable to self-employment,[53] a contract term relating to the payment deadline, the rate of interest for late payment or the compensation for recovery costs is unenforceable if it is grossly unfair to the creditor. Judges can ex post scrutinise the conditions the parties agreed to, taking into account any gross deviation from good commercial practices, contrary to good faith and fair dealing. Specific limits to possible contracting are stated in *comma* 3 and 4: a term is always void if it excludes interest for late payment or compensation for recovery costs. In these cases, it is noteworthy that the scrutiny of a judge is followed by a replacement of the private ordering: if a court finds that an unfair term in a commercial transaction is void, it can modify that contract by revising the content of that term, replacing it with the terms (for example regarding the payment period) provided by the law.[54]

Apart from these provisions, that are common to all Member States, a first set of mandatory rules restricting permissible contracting in b2b situations and striking down unconscionable terms and provisions can be found in the law of 1998 regulating subcontracting agreements (*subfornitura*), a contractual model often used for outsourcing or in vertically integrated production chains.[55] This contractual scheme is generally used by a big company in order to entrust the execution of a productive phase to an independent contractor, so that they are characterised by a manifest economic advantage of one party over the other and by strong in-

(come modificato dal d.lgs. 9 novembre 2012 n. 192)', in E. Gabrielli (ed), *Commentario del codice civile*, *Delle obbligazioni* (Torino: UTET, 2013) 688 *et seq*.

53 This is provided by art 2 *legge* 22 May 2017 no 81. On this topic see M. Mattioni, 'La tutela del lavoro autonomo nelle transazioni commerciali (art. 2) e le clausole e le condotte abusive (art. 3 commi 1–3)', in G. Zilio Grandi and M. Blasi, *Commentario breve allo statuto del lavoro autonomo e del lavoro agile* (Milano: Giuffré, 2018) 265 *et seq*.

54 This provision has been very much discussed. On this topic see Benedetti, n 52 above, 101 *et seq*; Pasquino, n 52 above, 688 *et seq*; S. Pagliantini, 'Profili sull'integrazione del contratto abusivo parzialmente nullo', in G. D'Amico and S. Pagliantini (eds), *Nullità per abuso ed integrazione del contratto* (Torino: Giappichelli, 2013) 67 *et seq*; V. Cuocci, 'Brevi note sulla direttiva comunitaria relativa ai ritardi di pagamento nelle transazioni commerciali e sulla sua attuazione in Germania' (2006) *Contratto e impresa/Europa* 349 *et seq* with further references.

55 *Legge* 18 June 1998 no 192 *sulla disciplina della subfornitura nelle attività produttive*. For a discussion of this regulatory framework and of subcontracting in general see A. Bertolotti, *Il contratto di subfornitura* (Torino: UTET, 2000) 178 *et seq* with further references. It is well known that these rules rely heavily on the already-mentioned French legislation on the *sous-traitance* (*Loi* no 75–1334 of 31 December 1975, see n 28 above).

formation asymmetries. This brings about the superiority of one party over the other as regards their bargaining power.[56]

These rules include a provision prohibiting the abuse of economic dependence (Article 9) which in its *comma* 3 provides that the agreement achieving an abuse of the economic dependence of one firm is void. Economic dependence is defined here as a situation in which a firm can determine, in its contractual relations with another firm, a disproportionate inequality of rights and obligations, also considering the actual possibilities for the weaker firm to find satisfactory alternatives on the market.

It applies to all other asymmetrical contractual relations such as franchising, leasing, supply contracts etc,[57] so that it is generally agreed upon that – also in consideration of the fact that Italian competition law has no corresponding general prohibition of the abuse of dominant position – this rule sets a cross-sector principle for any asymmetrical b2b relation characterised the superior bargaining power of one party.[58] It even applies to professionals who are economically depend on single clients.[59] One can therefore consider it a general clause in the Italian legal system which prohibits the imposition of unjustifiably vexatious contractual provisions, thus setting mandatory restrictions on contracting. Accordingly, any term making it possible for one party to exploit a hold-up situation where the counterparty made relationship-specific investments is void.

56 On this topic see among others L. Renna, 'L'abuso di dipendenza economica come fattispecie transtipica' (2013) *Contratto e impresa* 375 *et seq*.

57 See almong others L. Delli Priscoli, 'Il divieto di abuso di dipendenza economica nel franchising, fra principio di buona fede e tutela del mercato' (2006) *Giurisprudenza di merito* 2153 *et seq*; V. Pinto, 'L'abuso di dipendenza economica "fuori dal contratto" tra diritto civile e diritto antitrust' (2000) *Rivista di diritto civile* 400; Capo, n 41 above, 4299 *et seq* and 4345 *et seq*. In the recent case law see Cass civ no 25606/2018, Trib Roma 24 January 2017, no 1239 *DeJure*; Trib Milano 17 June 2016 *Foro italiano* (2016) I 3636; Cass civ sezioni unite no 24906/2011.

58 Renna, n 56 above, 390 *et seq* with further references also in case law; G. Colangelo, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti* (Torino: Giappichelli, 2004). From a comparative perspective, this is also the case in other legal systems, such as Germany or France, that served as models for the Italian legislator, see § 20 (2) 1 GWB; art 8 no 2, *Ordonnance no* 86–1243.

59 See, explicitly, art 3 (4) *legge* 22 May 2017 no 81. On this topic see especially P.P. Ferraro, 'Le professioni intellettuali e abuso di dipendenza economica' (2018) *Corriere giuridico* 217 *et seq*; G. Cavallini, 'Il divieto di abuso di dipendenza economica e gli strumenti del 'nuovo' diritto civile a servizio del lavoro autonomo', in Zilio Grandi and Blasi, n 53 above, 265 *et seq*. This was generally recognised by scholars even before this provision came into force, but the courts never had the chance to tackle the problem, see E. Minervini, *L'equo compenso degli avvocati e degli altri liberi professionisti* (Torino: Giappichelli, 2018) 11; A. Perulli, 'Il jobs act degli autonomi: nuove (e vecchie) tutele per il lavoro autonomo non imprenditoriale' (2017) *Rivista italiana di diritto del lavoro* 185 *et seq*.

Such a rule allows the courts to control pervasively the content of the agreements between firms in order to protect the weaker part. In their evaluation they are free to consider both the economic aspects and the normative contents of the contract. They can declare void any unfair term that forces on the weaker party obligations, constraints or costs that are unfair compared to the advantages attributed to the stronger party and of course they can award compensation for damages.

This private enforcement goes hand in hand with a form of public enforcement. Indeed, starting from 2001 the Italian Antitrust Authority (*Autorità garante per la concorrenza e il mercato*) can intervene (Article 9 *comma* 3 *bis*, also applying to the continued use of grossly unfair contractual terms that allow late payment in contravention of d lgs 231/2002[60]) sanctioning with warnings and fines parties abusing of another's economic dependence with agreements that may have an impact on fair competition and on the markets. These rules have been very efficient and useful in order to guarantee a proper functioning of the markets, while at the same time protecting structurally dependent firms.[61]

7 Recent Developments in the Italian Legislation

In more recent years, one may truly identify a legislative tendency that seems to recognise in the law of consumer protection the model for a sort of 'statute for the weaker party', which is then differentiated in consideration of the peculiar aspects of weakness characterising the single cases.[62]

Firstly, with Article 8 *legge* 24 March 2012 no 27, the scope of the rules on unfair trading practices in Articles 18 *et seq codice del consumo* was expanded in order to include microenterprises. It was considered that, although they carry out entrepreneurial and professional activities, these particularly small firms[63] need to be protected from more sophisticated counterparties. Following indications coming from the European institutions, these kinds of enterprises, considered

60 See *Autorità Garante della Concorrenza e del Mercato*, provv 23 November 2016, no 26251, with comments by V.C. Romano, 'Problemi scelti in tema di abuso di dipendenza economica da ritardo nei pagamenti commerciali' (2017) *Danno e responsabilità* 380 *et seq*.

61 Renna, n 56 above, 374 *et seq*.

62 Minervini, n 59 above, 12 *et seq*.

63 According to art 18 (1) *d-bis* a microenterprise is an entity, a company or an organization, irrespective of its legal form, engaged in an economic activity, including self-employment and family businesses, that employs fewer than 10 persons and has an annual turnover and/or annual balance sheet total that does not exceed 2 million euro (see also art 2 (3) Commission recommendation of 6 May 2003, concerning the definition of micro, small and medium-sized enterprises, n 20 above).

'particularly important for the development of entrepreneurship and job creation'[64] were given the same protection as consumers.[65]

Such an alignment of b2c and b2b rules, however, is still exceptional,[66] and it does not include small or medium-sized enterprises, even though these are equally considered in the Commission recommendation of 6 May 2003 defining these concepts. The concept of 'weaker entrepreneur' has therefore to undergo a process of stratification into different sub-categories, each one characterised by its own protection regime, so that one has to carefully determine the status of the parties to asymmetric negotiations.

This emerges again when considering the recent rules on self-employment in *legge* 22 May 2017 no 81. Here there are specific provisions on the contracts' substantive fairness: Article 3 (1) and (2) states that certain terms causing a substantial imbalance in the contractual relations are unfair, and therefore not binding, and give rise to liability.[67] The list includes clauses that enable the customer to alter unilaterally the contract terms or to terminate a long-term contract without reasonable notice, as well as clauses that fix a payment period longer than 60 calendar days. Apart from the inconsistencies with other provisions such as the legislation opposing late payments in commercial transactions as regards the payment period, these rules, that clearly recall the provisions on unfair terms in consumer contracts, introduce limits to permissible contracting only in those cases where the weak party is a self-employed professional. They provide an ex post scrutiny as well as a claim for damages. Entrepreneurs are explicitly excluded from the scope of the legislation according to Article 1 *legge* 22 May 2017, no 81.

The newly inserted Article 13-*bis legge* 31 December 2012, no 247[68] on fair remuneration and unfair contract terms for lawyers (the so-called *equo compenso*

64 See Recital 8 Commission recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

65 D. Valentino, 'Timeo Danaos et dona ferentes. La tutela del consumatore e delle microimprese nelle pratiche commerciali scorrette' (2013) *Rivista di diritto civile* 1157 *et seq* and 1168 *et seq* with further references.

66 S. Pagliantini, 'Il nuovo regime della trasparenza nella direttiva sui servizi di pagamento' (2009) *I contratti* 1165 *et seq*; S. Pagliantini, 'Per una lettura dell'abuso contrattuale: contratti del consumatore, dell'imprenditore debole e della microimpresa' (2010) *Rivista di diritto commerciale* I 409 *et seq*.

67 See Perulli, n 59 above, 173 *et seq*; A. Perulli, 'Le tutele civilistiche: il ritardo nei pagamenti; le clausole e condotte abusive', in L. Fiorillo and A. Perulli (eds), *Il jobs act del lavoro autonomo e del lavoro agile* (Torino: Giappichelli, 2018) 27 *et seq*; Mattioni, n 53 above, 275 *et seq*; Ferraro, n 59 above, 217 *et seq*.

68 This provision was inserted in this law regulating the lawyers' profession by art 19-*quaterdecies decreto legge* 16 October 2017 no 148 that was converted into *legge* 4 December 2017 no 172 and

avvocati) is even more insightful. Despite its heading, this provision does not apply only to contracts stipulated by lawyers (also working in partnerships or professional organisations) but also to all other self-employed professionals (entrepreneurs are again explicitly excluded from the scope of the provisions, see Article 1 *legge* no 81/2017, as referred to by these rules[69]) when their contractual parties are strong clients such as banks, insurance firms or big enterprises.[70] It presumes (*comma* 3) that in such relations clients overreach and take advantage of their dominant position, unilaterally imposing contract terms, so that it sets specific standards for the remuneration (*comma* 2) as well as for the content of contract terms (*comma* 4–8).

The substantive boundaries to permissible contracting concern terms undermining the core bargain between the professional and its strong client, that are considered unfair and therefore void if they make the contract unreasonably one-sided to the detriment of the weak professional. Especially nine are listed in *comma* 5 without a possibility of evaluation (*comma* 6): these range from terms allowing the client to alter unilaterally the contract (*a*) or to claim additional services free of charge (*c*) to terms setting a payment period of 60 days (*f*) or providing that the professional has to provide for the advance payments covering the administrative costs (*d*). It is interesting to see that there is a 'black list' of unfair terms in this specific area of business contracts.

Moreover, and this is the real novelty, the boundaries to private contracting concern also the remuneration itself. *Comma* 2 considers the remuneration fair if it is proportionate considering 'the amount and the quality of the contracted work as well as the content and characteristics of the professional services, complying with the parameters set by the Ministry of Justice'. Judges are called upon to consider the bargain and to step in directly on it between the stronger and the weaker party, because the unfairness – and thus the iniquity of the contract – is also (but not only) assessed in consideration of a fair compensation, determined *ex ante* and on the basis of abstract and general considerations (such as the value of the claim) by parameters set authoritatively.[71]

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subsequently modified by art 1 (487) *legge* 27 December 2017 no 205. On the very tormented legislative process that led to these provisions see R. Danovi, 'L'onorario dell'avvocato tra parametri ed equo compenso' (2018) *Corriere giuridico* 589 *et seq*.

69 Art 19-*quaterdecies* (2) *decreto legge* 16 October 2017 no 148 – as subsequently modified by art 1 (487) *legge* 27 December 2017 no 205 – extends the scope of the rules.

70 These are defined *a contrario* by the EC recommendation 2003/361.

71 For these parameters see *decreti* no 140/2012 for accountants, no 46/2013 for labour consultants (*consulenti del lavoro*) and no 55/2014 for lawyers.

This provision causes a significant disruption, because, as is well known, the European rules on unfair terms in consumer contract specifically state that the assessment of the unfair nature of the terms shall not relate 'to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language' (Article 4 subs 2 Directive 93/13, implemented in Italy in Article 34 (2) *codice del consumo*).[72] Despite the similarities in their structure with the rules on consumer contracts and despite the identity of the terms and concepts used, these provisions are quite unique in their normative content.

8 Some Reflections on the Italian System

The image emerging from this short description is that of a very fragmented regulatory context with specific sectoral rules providing substantive boundaries over standard contracting and inconsistent lists of unfair terms that sometimes leave the possibility of evaluation, and sometimes do not. In some of these provisions only professionals who prove to be in a weak and exploitable position are protected, sometimes the asymmetry in bargaining power is presumed given a certain situation.

Some scholars are inclined to recognise significant systematic repercussions in these legislative processes. They identify in rules such as these a new contractual paradigm for asymmetrical b2b relations. This model is conceived as significantly different from that of the traditional and common contract law of the *codice civile*. It would include the whole sphere of relations between professionals where unsophisticated parties are involved and where one party has very little or no bargaining power, recognising in these cases the consequences of physiological market situations, not of pathological elements depending on the subjective features of the real contractual relations.[73] The discussion on the so-called *terzo contratto* ('third contract' for B2b transactions as opposed to a 'first contract' that is

72 See Cass civ no 21600/2013; Cass civ no 19559/2015; Cass civ no 15408/2016: '*il controllo giudiziale sul contenuto del contratto stipulato con il consumatore (...) è circoscritto alla componente normativa del contratto stesso, mentre è preclusa ogni valutazione afferente le caratteristiche tipologiche e qualitative del bene o del servizio fornito, o l'adeguatezza tra le reciproche prestazioni, richiedendosi soltanto che l'oggetto del contratto e il corrispettivo pattuito siano individuati in modo chiaro e comprensibile*'. On this topic see G. Alpa, 'L'equo compenso per le prestazioni professionali forensi' (2018) *Nuova giurisprudenza civile commentata* 716 *et seq*.

73 See especially Roppo, n 40 above, 786 *et seq*.

individually bargained between the parties, according to 'classic' contract law, and a 'second contract' for b2c transactions) is by now quite broad.[74]

These authors identify a common thread governing the area of business contracting in asymmetric situations especially in the following normative texts: the legislation on subcontracting and on the abuse of economic dependence, the regulation on late payments and the rules on franchising.[75] They then extend these principles to all other cases, even if they are not directly considered in the scope of the regulation.

If one specifically considers the area at stake, this solution seems highly hypothetical and unrealistic. The different legal rules in question do not share the same rationale. It does not seem possible to recognise common legal categories such as, for example, a standard notion of subordination of one entrepreneur to another. Nor do the lists of unfair terms overlap. It is therefore impossible to reconstruct a general legal framework for the protection of weak professionals from unfair contract terms. *De lege lata* the protection of unsophisticated parties needs significative improvement because it depends on the specific scope of single isolated provisions, so that the certainty of law and the predictability of the solutions are undermined. Nevertheless, the Italian example shows an interesting general tendency that matches a path trending also in the European legislation: here one can identify in recent proposals the same intention of granting more protection to certain structurally weak positions in specific b2b situations such as the contractual relations in the food supply chain[76] and in the sale of online intermediation services.[77]

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74 This phrase was proposed by R. Pardolesi, 'Prefazione', in Colangelo, n 58 above, XIII. For a critical discussion of the issues involved and further references, see V. Roppo, 'Parte generale del contratto, contratti del consumatore e contratti asimmetrici (con postilla sul "terzo contratto")' (2007) *Rivista di diritto privato* 669 *et seq*; Amadio, n 44 above, 9 *et seq*; G. D'Amico, 'La formazione del contratto', in Gitti and Villa, n 44 above, 37 *et seq* and especially 41 *et seq*; A. Gianola, 'Terzo contratto' (2009) *Digesto delle discipline privatistiche, sezione civile*, agg IV, 571 *et seq*; R. Franco, *Il terzo contratto: da ipotesi di studio a formula problematica. Profili ermeneutici e prospettive assiologiche* (Milano: Wolters Kluver, 2010) 35 *et seq*; E. Minervini, 'Il "terzo contratto"' (2009) *I contratti* 493 *et seq*; M. Bianchini, La contrattazione d'impresa tra autonomia contrattuale e libertà di iniziativa economica, Part I (Torino: Giappichelli 2011) 405 et seq.

75 *Legge* 6 May 2004, no 129. This regulation however does not include any provision on standard contract terms, so it was not relevant in this context. In franchising relationships, a protection is granted through art 9 *legge* no 192/1998 (see above).

76 One example is the *Proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain* (2018/0082(COD)).

77 *Proposal for a regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services* (2018/0112 (COD)).

A central issue concerning the Italian rules, however, is related to the fragility of the Italian judicial system and the ineffectiveness of private enforcement. Small firms hardly assert their rights and claims, even when they are directly recognised by the law. Lawyers and other self-employed professionals tend as well to be reluctant to bringing an action before the courts, especially if this concerns their contractual relation with an important client, because they fear they might lose that client. Provisions often turn out to be useless. Furthermore, it is not irrelevant that there is no clear and well-established case law in this matter that might render the solutions more foreseeable. If we then take into account the well-known systemic slowness of the Italian Judiciary, it is unsurprising that these rules protecting small professionals have not had a significant impact in practice.

A difference seems to have been brought about when a form of public enforcement through the Antitrust Agency was introduced for the abuse of economic dependence and for late payments (for both cases see Article 9 *comma* 3-*bis legge* 18 June 1998, no 192[78]). When this public authority was granted a disciplinary power and sanctions for the infringement of the rules to the protection of the weak were enforced, these rules become effective.[79] Indeed, it should not be underestimated that the exacerbation of social and economic differences and asymmetries on the market does not enhance competition. On the contrary, it only creates even stronger inequalities that force the weaker actors out of the market.

At least as far as the Italian system is concerned, it seems therefore important to enact for the protection of weak professional parties a mixed system in order to find a good balance between public and private enforcement. It should indeed aim at combining the protection of the damaged parties with private claims (aiming at declaring certain terms void and allowing a compensation for damages) with rules guaranteeing the compliance by the stronger parties.

9 Conclusions

The Italian example shows that the right solution for the issue at stake cannot be found abstractly. It entails a policy decision that has to consider the peculiar traits of the different legal systems where it is rooted.

One can agree on the fact that parties of equal bargaining power should be allowed to distribute the risks of their enterprise as they think fit, even if this distribu-

78 This provision was added by art 11 *comma* 2 *legge* 5 May 2001 no 57 and later amended by art 10 *comma* 2 *legge* 11 November 2011 no 180.

79 See in particular *Autorità Garante della Concorrenza e del Mercato*, provv 23 November 2016, no 26251.

tion is unbalanced. If they have the choice to decide whether to make use of their contractual freedom, then they should bear the consequences. This freedom should not be unlimited, but this is already recognised in every legal system providing general rules sanctioning grossly unjust terms that are against good faith and fair dealing.[80] It would be superfluous to provide with a formal enactment a particular discipline when this has already been encompassed in our general principles in force which due to their width may be better tailored according to the specific case.

Instead, when considering asymmetrical transactions, where one party cannot recognise unfair contract terms or cannot protect himself against them through negotiations, a substantive control limiting permissible contracting is appropriate in order to avoid inefficiencies and unfairness. The differences in bargaining power should be taken into consideration for the protection of the weak professional party. Abstract definitions of dependence based only on quantitative criteria and 'black' lists of unfair contract terms without a possibility of evaluation should be avoided. The rules should grant the judge the possibility of considering the characteristics of the single case, evaluating the party's effective need for protection and the best solution for the case.

This way, we seem to go back to a regime based on the status of the parties, considering their professional role and their social and economic position, as well as their size, in order to identify the legal rules provided for their protection. Big, small, medium-sized, micro entrepreneurs, self-employed, consumers; all have their own legally relevant status. Even though the codifications of the 19th century Europe moved consciously away from a law based on status to a law based on contracts,[81] we can currently recognise a trend in the regulatory framework that enhances the notion of status with provisions that reflect the social and economic position of the parties to contracts, so that contract law is deconstructed and then reshaped according to the different statuses with the scope of counterbalancing disparities and asymmetries.[82]

80 In Germany see § 138 and § 242 BGB; in Italy see artt 1337 and 1375 cod civ.

81 The codifications moved away from the "stiffness of the status" to the "mobility of the contract", so P. Rescigno, 'Premessa', in P. Rescigno (ed), *Trattato di diritto dei contratti*, vol I, *I contratti in generale* (Torino: UTET, 2006) XXXVII *et seq*.

82 See also R. Scognamiglio, 'Statuti dell'autonomia privata e regole ermeneutiche nella prospettiva storica e nella contrapposizione tra parte generale e disciplina di settore' (2005) *Europa e diritto privato* 1015 *et seq*.