

Review Article

The Legal Notion of the Indicative List of Unfair Terms Provided In the European Directive (93/13) Of Unfair Terms in Consumer Contracts

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Abstract: This paper detects the notion of the Indicative list provided in the European Directive (93/13) of unfair terms in consumer contracts including its notion, function and the obligation of the European Member States to transpose its content literally into their legal systems. The study concluded the indicative notion of the list and the right of member states to involve into their legal systems the appropriate ways to implement its function regardless the way of this implementation. It also concluded the importance of that list to unify the application of the principle of Good faith between European Member States.

Keywords: Indicative List of unfair terms, European Directive (93/13), Unfair Terms in Consumer Contracts, Consumer Protection.

INTRODUCTION

Understanding the legal notion of unfair terms is an important and essential subject when studying the legislative control of the use of contract terms. This notion has to be considered when determining the nature, the core and the limits of this control.¹ The use of these terms comes as a result of the inequality of power between the contracting parties.² The European Directive (93/13) of unfair terms in consumer contracts recognizes the principle of good faith to determine the fairness of the term in question, but the challenge which appears in this issue is that member states are still in difference with regard to the organization of that principle.³ For this reason, Article (3/3) of the Directive (93/13) provides an Annex of indicative and non-exhaustive list of the terms which may be regarded as unfair. The aim of this Annex is to facilitate the application of the principle of good faith of the term in question. It contains two parts: the first is an indicative and non-exhaustive list containing (17) terms that may be regarded as unfair if they have certain objects

¹ O Abd- El- Bakee, *the contractual protection for Consumer* (El- Maaref institution for publishing: Alexandria 2004) 405.

² See M Schillig, *Inequality of bargaining power versus market for lemons: legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms* (2008) 33-3 *European Law Review Journal* 338; A S Komarov, *Internationality, uniformity and observance of good faith as critical in international of CIGS: some remarks on article (7/1)* (2006) 25 *Journal of Law and Commerce* 75-85 available at:

<http://www.uncitral.org/pdf/english/CISG25/Komarov.pdf> Visited on 14-3-2010.

³ See: M. Fayyad, 'The Transportation of the European Directive 85/374/EEC of Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?', *Global Journal of Comparative Law* 1 (2) (2012): 194; M. Fayyad, 'Misleading Advertising Practices in Consumer Transactions: Can Arab Lawmakers Gain an Advantage from European Insight?', *Arab Law Quarterly* 26 (3) (2012): 287, A. Gray, 'Good faith and termination for convenience clauses in Australia', *International Journal of Private Law*, 5 (4) (2012): 352.

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or effects,⁴ while the second contains (5) exceptions for the first one. This list has an indicative value; because of the minimal character of the Directive (93/13), the (MS) can adopt more restrictive terms in their legal systems.⁵ The examination of the function of this list requires first to address its legal nature and then its role in assessing the fairness of the term in question.

1- The legal nature of the List of the Directive (93/13)

Examining the legal notion of the list (grey or black list) in addition to its content will help us to understand its legal nature. This is to help us to investigate how the list deals with the term in question and the legal sanction when this term is used.

1.1- The Grey List of the Directive (93/13)

The decision of the legal nature of the list must begin with determining whether it is a grey or a black list. The first refers to a list of terms that can quite simply be considered unfair, but which on the basis of an examination of the actual instant may also prove not to be unfair.⁶ The black one indicates a list of terms which are necessarily considered unfair. If the term in question is a typical instance in relation to the terms which are contained in the black list, it is unfair.⁷

In both of the letters and the spirit of the Directive (93/13), the list of the Annex is undoubtedly a grey one.⁸ The nature of the Annex was, however, subsequently further clarified in *Commission of the European Communities v Sweden* (C-478/99),⁹ when the Court pointed out that a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may nonetheless be regarded unfair. This does not limit the discretion of the national authorities to determine the unfairness of the term;¹⁰ the (MS) are not prevented from transforming the list from its grey nature into a list which is completely or partly black. It is apparent from the historical background of the Directive (93/13) that the list is not intended to be a binding list of terms; it contains an illustrative collection of terms that are *potentially* unfair.¹¹

It is, according to article (3/3) of the Directive (93/13), an indicative and *non-exhaustive* list of the terms, which *may be regarded unfair*. It will be for the national court or the authorized administrative bodies, having regard to all the

⁴ M Dean, *unfair contract terms: the European approach* (1993) 56-4 Modern law Review 587; T Wilhelmsson, *The implementation of the EC directive on unfair contract terms in Finland* (1997) 5 European Review of Private Law 157.

⁵ Recital (17) of the directive; see also P Nebbia, *unfair contract terms in EC Law* (Hart publications: London 2007)152.

⁶ See P Nebbia and T Askham, *EU consumer law* (Richmond Law & Tax LTD: UK, 2004) 259; R. Brownsword, G. Howells and T. Wilhelmsson, "The EC Unfair Contract Terms Directive and Welfarism" in R. Brownsword, G. Howells and T. Wilhelmsson, *Welfarism in Contract Law* (Dartmouth: 1994) 279; V Roppo, final report from workshop 3. the definition of unfairness: the application of Article 3 (1), 4 (1)- and of the annexes of the Directive, Acts of the Brussels conference, 1-3 July 1999 (Luxembourg, Office of official publications of the European 138; M Dean, *unfair contract terms: the European approach* (1993) 56-4 Modern law Review 586.

⁷ N Reich, *The implementation of Directive 93/13/EEC on unfair terms in Consumer contracts in Germany* (1997) 5 European Review of Private Law 165; E Houndous, *the reception of the directive on unfair terms in consumer contracts by member states* (1995) 3 European Review of private law 245; V Roppo, final report from workshop 3. the definition of unfairness: the application of Article 3 (1), 4 (1)- and of the annexes of the Directive, Acts of the Brussels conference, 1-3 July 1999 (Luxembourg, Office of official publications of the European 138.

⁸ C Joerges, translated from Germany by L Fraser and P Wilkins, *the Europeanization of Private law as a Rationalization process and the contest of Disciplines- an Analysis of the Directive on unfair terms in consumer contracts* (1995) European review of priv 176; T Bourgoignie, *European community consumer law and Policy: from Rome to Amsterdam* (1998) 6 Consumer law Journal 450; M Dean, *unfair contract terms: the European approach* (1993) 56-4 Modern law Review 586; A P Monteiro, *The impact of the directive on unfair terms in Consumer contracts on Portuguese Law* (1995) 3 European Review of private Law 238; See G De Nova, *Italian Contract law and the European Directive on unfair terms in consumer contracts* (1995) 3-2 European Review of Private Law 223; P Nebbia, *unfair contract terms in EC Law* (Hart publications: London 2007) 152.

⁹ ECJ 478/99, 2002, E.C.R. I-4147; see also Collins, "Good Faith in European Contract Law" (1994) 14 *Oxford Journal of Legal Studies* 229; P Hughes, *Directors' personal liability for cartel activity under UK and EC law - a tangled web* (2008) 29-11 European Commercial Law Review 632.

¹⁰ ECJ 478/99, 2002, E.C.R. I-4147; see M Schillig, *Inequality of bargaining power versus market for lemons: legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms* (2008) 33-3 European Law Review Journal 351; R. Brownsword, G. Howells and T. Wilhelmsson, "The EC Unfair Contract Terms Directive and Welfarism" in R. Brownsword, G. Howells and T. Wilhelmsson, *Welfarism in Contract Law* (Dartmouth: 1994) 284.

¹¹ M Dean, *unfair contract terms: the European approach* (1993) 56-4 Modern law Review 586.

relevant factors in the individual case, to ascertain whether the term in question is also unfair *de facto*.¹² The conclusive criterion to decide that is whether the balance between the rights and obligations under the contract is breached to the detriment of consumers contrary to the requirement of good faith.¹³ The fact that the list has an indicative character means that its terms are not automatically unfair.¹⁴ This authorizes national courts to assess the character of the terms in the light of the general criteria of article (3/1) and article (4) of the Directive (93/13). However, the list is an invaluable manner to assess the notion of unfairness.¹⁵ In short, what can be said is that if the term falls within this list, it is *likely* to be held unfair; if the term falls outside the list, it is *likely* to be held not unfair.¹⁶

There are three reasons to rule out the black notion of the list:¹⁷ the black list cannot take into consideration the special problems of specific enterprises (contracts which have long time duration); it is not easy to be amended; and finally although it may offer a maximum protection for consumers, but its scale of protection will be reduced by time because it will not contain the new used terms.¹⁸ Moreover, many (MS) made objections against the use of the black list because it requires extensive changes in their legal systems.¹⁹

The list does not make a distinction between terms which are unfair *per se* and terms which under certain circumstances become unfair.²⁰ Many (MS) (e.g. Belgium; Spain...etc) adopt a black list in their legal systems and therefore provide a higher level of protection for consumers.²¹

1.2- The Content of the List of the Directive (93/13)

The terms of the list have different characters; they have a common notion, on which they are drafted by one contracting party to the detriment of the counter party.²² Specific examples of terms, which may be considered unfair and therefore invalid, are included in this list. Reading the list carefully gives the impression that it contains two groups of terms:²³ the first group contains terms that are mostly be considered unfair and void, while the second one contains terms that may be considered unfair if they have specific effects. These two groups can be clarified as follow:

¹² W Posch, *The implementation of the EC Directive on Unfair Contract Terms into Austrian Law* (1997) 5 European Review of Private Law 139.

¹³ ECJ 478/99 (2002) ECR I-4147; M Dean, unfair contract terms: the European approach (1993) 56-4 Modern law Review 587.

¹⁴ H Micklitz and N Reich, *understanding EU consumer law* (Centro de Formacao Juridica e Judiciaria: Brussels 2009) 178.

¹⁵ The Report submitted from the commission of the European union on the implementation of council Directive 93/13/EEC of 5 APRILE 1993 on unfair terms in consumer contracts, Brussels, 27/4/2000, COM (2000) 16.

¹⁶ : M. Fayyad, 'Fundamental Breach of Contract in Terms of the UN Sales Convention and Emirates Law: A Comparative Legal Study', *Arab law Quarterly Journal* 33 (2) (2019): 109- 151; M. Fayyad, 'Classification of Contractual Agreements in Comparative and Islamic Jurisdictions: Does it Make Any Sense?', *Arab Law Quarterly* 27 (3) (2013): 203-229.

¹⁷ For more details, see: S Andrews, *Background report of Consumer policy*, OECD workshop on Consumer distribute and redress in the Global marketplace (19-20 April 2005) Washington DC; The Report submitted from the commission of the European union on the implementation of council Directive 93/13/EEC of 5 APRILE 1993 on unfair terms in consumer contracts, Brussels, 27/4/2000, COM(2000); H Micklitz and N Reich, *understanding EU consumer law* (Centro de Formacao Juridica e Judiciaria: Brussels 2009) 178; P Nebbia, *unfair contract terms in EC Law* (Hart publications: London 2007) 153.

¹⁸ For more details about the advantages of the Grey List, see: H Beale, *unfair contracts in Britain and Europe* (1989) Journal of current legal issues 246.

¹⁹ Especially the Scandinavian countries; see T Wilhelmsson, *The implementation of the EC directive on unfair contract terms in Finland* (1997) 5 European Review of Private Law 159.

²⁰ M Schillig, *Inequality of bargaining power versus market for lemons: legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms* (2008) 33-3 European Law Review Journal 351

²¹ E Houndous, *the reception of the directive on unfair terms in consumer contracts by member states* (1995) 3 European Review of private law 251.

²² H Micklitz and N Reich, *understanding EU consumer law* (Centro de Formacao Juridica e Judiciaria: Brussels 2009) 193; J Stuyck, *European consumer law after the treaty of Amsterdam: consumer policy in or beyond the internal market?* (2000) 37 Commercial Law Review Journal 357.

²³ G Scott, *Unfair terms in consumer contracts in the European community* (1993) 4 Products liability law Journal 97; H Micklitz and N Reich, *understanding EU consumer law* (Centro de Formacao Juridica e Judiciaria: Brussels 2009) 178; M. Fayyad, 'A glance at unfair terms in consumer transactions in Arab legal systems and Islamic law: what Arab lawyers can learn from the European experience?', *International Journal of Private Law* 5 (2) (2012): 209.

Group (1) contains terms that are *mostly be considered* as unfair.²⁴ These terms aim to exclude or restrict liability for death or personal injury of consumers, limit or exclude the liabilities of a seller arising from the actions of his subordinates or representatives, exclude the right of a consumer to take legal actions or exercise any other legal remedies, impose on the consumer a burden of proof where the applicable law makes obligate the seller to do that and authorize the seller or supplier to determine whether the supplied goods or services are in conformity with the contract or give him the exclusive right to interpret any term of the contract. Group (2) contains terms that are also considered unfair if they are not individually negotiated. These terms are:²⁵

1- Terms that exclude the legal liability of the seller or supplier, so as they aim to inappropriately exclude or limit the legal rights of a consumer vis-à-vis a seller or a supplier; bind a consumer to fulfill his obligations, whereas the provided goods or services can only be determined by depending on the seller own will; oblige the consumer to fulfill his obligations in spite of the seller does not perform his obligations;²⁶

2- Terms that empower the seller or supplier to control the terms of the agreement, so as they aim to authorize the seller or supplier to dissolve a contract of a determined duration on a discretionary basis, where a consumer has not the same rights, enable the seller to terminate a contract of undetermined duration without a reasonable notice, where there are serious grounds to do so, automatically extend a contract of a fixed duration, where the consumer does not indicate his intention of this extension; enable the seller or supplier altering the terms of the contract unilaterally without a valid reason that is specified in the contract; authorize the seller or supplier to alter the price of goods or services at the time of delivery.²⁷ In contrast, the consumer is not authorized to cancel the contract if the final price is too high in relation to the price that was agreed when the contract was made;²⁸

3- Terms that aim to impose an extremely unreasonable compensation upon the counter party (the consumer) where he does not perform or delay to perform his obligations. Thus they aim to allow the seller maintaining sums which are paid by the consumer if the latter decides not to conclude or perform the contract while the consumer has not the same right, require any consumer who fails to fulfill his obligation to pay a disproportionately high sum of compensation and allow the seller to retain the sums paid for services or goods not yet supplied by him where he dissolves the contract.²⁹

Finally, three exclusions of this list dealing with the financial service sector are provided. These exclusions authorize the bank to terminate and modify the contract terms and change the rate of interest individually. This list provides three advantages to the provider of the financial services sector if he immediately informs the consumer.³⁰ It provides the following rights to the seller or supplier:³¹ (a) unilaterally terminates the of indeterminate duration without

²⁴ G Scott, *Unfair terms in consumer contracts in the European community* (1993) 4 Products liability law Journal 97; M. Fayyad, 'Measures of the Principle of Good Faith in European Consumer Protection and Islamic Law, a Comparative Analysis', *Arab Law Quarterly* 28 (3) (2014): 216..

²⁵ See C Willett, *the Directive on Unfair Terms in Consumer Contracts and its implementation in the United Kingdom* (1997) 5 European Review of Private Law 231; P Nebbia, *unfair contract terms in EC Law* (Hart publications: London 2007) 152.

²⁶ See P Nebbia, *unfair contract terms in EC Law* (Hart publications: London 2007) 152-153.

²⁷ E Lomnicka, "*unilateral variation in banking contracts: An unfair terms*" in P Cartwright, *Consumer protection in Financial services* (Kluwer law international: The Hague- London- Boston 1999) 109.

²⁸ See E Houndous, *the reception of the directive on unfair terms in consumer contracts by member states* (1995) 3 European Review of private law 249; E Hondius, *EC Directive on unfair terms in consumer contract* (1994) 7 Journal of contract law 39; The Report submitted from the commission of the European union on the implementation of council Directive 93/13/EEC of 5 APRILE 1993 on unfair terms in consumer contracts, Brussels, 27/4/2000, COM(2000).

²⁹ G Scott, *Unfair terms in consumer contracts in the European community* (1993) 4 Products liability law Journa 98; A Lete, *The non implementation of the EC Directive on Unfair Contract Terms in Spain* (1997) 5 European Review of Private Law 213; ; M. Fayyad, 'Organization of Contractual Agreements in Islamic Law, a Comparative Legal Study with Western Legal Systems', *European journal of Social Science* 55 (1) (2017): 48.

³⁰ S J Johnson, *Resolving Ambiguities in Insurance Policy Language: The Contra Proferentem Doctrine and The Use of Extrinsic Evidence* (2003) American bar association Journal 23; T Reeves, *opposite attack, plain English with a European interpretation* (1997) 147 New Law Journal 90.

³¹ See: the annex of the Directive (93/13); see also E Hondius, *unfair terms in consumer contracts, towards a European Directive* (1998) 3 European consumer law Journal 189; G Alpa, *the implementation of the EC directive on unfair contract terms in Italy* (1997) 5 European Review of Private Law 187; W Posch, *The implementation of the EC Directive on Unfair Contract Terms into Austrian Law* (1997) 5 European Review of Private Law 142; P Nebbia, *unfair contract terms in EC Law* (Hart publications: London 2007)153; H Micklitz and N Reich, *understanding EU consumer law* (Centro de Formacao Juridica e Judiciaria: Brussels 2009) 178.

notice, where *there is a valid reason*; (b) alters the rate of interest payable by the consumer or due to the latter, or the amount of other charges of financial services without notice, where *there is a valid reason and that the consumer is free to dissolve the contract in this case*; (c) unilaterally alters the conditions of the contract of indeterminate duration and *that the consumer is free to dissolve the contract in this case*.

The above exceptions are allowed in two cases: (a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control; (b) contracts for the purchase or sale of foreign currency, traveler's checks or international money orders denominated in foreign currency.

2- The Function of the List of the Directive (93/13)

The examination of the importance of the list requires the investigation of its duty and its legal obligatory for the (MS). This will help us to understand whether the (MS) are bound to literally include their legal systems with the list or not.

2.1- The Duty of the List of the Directive (93/13)

The list refers to the common used contract terms which create significant imbalance in rights and obligations between the contracting parties. It seeks to highlight the asymmetry of this imbalance, to finally get over its consequences.³² One scholar argued that the list does not declare the absolute prohibition of the implementation of the enumerated terms; it only refers to the fact that such types of terms meet the criteria of unfairness laid down in article (3) of the Directive (93/13) and the seller or supplier has to prove the opposite to avoid its consequences.³³ Another scholar claimed that it is used to identify those terms that *may* violate the requirements of fairness which determined by the provisions of Directive (93/13).³⁴ The above two claims are accepted. In short, the list summarizes some clear terms may result in significant disproportion upon the consumer's side.³⁵ The question which arises here is that, why does the Directive (93/13) provide the list although the test of fairness is already provided in other articles of the Directive (93/13)? The explanatory memorandum of the Directive (93/13) answers this question; it provided *they are terms which appear unquestionably unfair*. It adds *it was not easy for the commission to set out the different approaches of the (MS), when addressing the use unfair contract terms*.³⁶ Thus, this list attempts to address the differences of approach between the civil law (that uses broader tests) and the common law (that uses limited rules for test) legal systems.³⁷ In this context, this list aims to harmonize the implementation of the principle of good faith between the (MS).³⁸ This harmonization can be reached by providing unified group of terms, which may be considered unfair and therefore violate the requirements of the principle of good faith.³⁹

In the view of the commission, the list may enhance the internal market measures and supplies consumers with better information.⁴⁰ This result can be reached by providing more specific terms to the general criteria of fairness laid

³² H Micklitz and N Reich, *understanding EU consumer law* (Centro de Formacao Juridica e Judiciaria: Brussels 2009) 191; M Dean, *unfair contract terms: the European approach* (1993) 56-4 Modern law Review 587; see also: G Jakubonyte, *the Protection of Lithuanian Consumers against Unfair Contract Terms* (2006) 29 Journal of Consumer Policy 79; Ulf Bernitz, *Swedish standard contracts law and the EEC Directive on contract terms* (1997) 5 European Review of Private Law 213.

³³ J Fazekas, *Approximation of Hungarian Consumer law- the implementation of the EC Directive on unfair contract terms into the Hungarian Law* (2001) 8-2 Consumer law journal 169.

³⁴ M Dean, *unfair contract terms: the European approach* (1993) 56-4 Modern law Review 587.

³⁵ P Nebbia, *unfair contract terms in EC Law* (Hart publications: London 2007)152; J Fazekas, *Approximation of Hungarian Consumer law- the implementation of the EC Directive on unfair contract terms into the Hungarian Law* (2001) 8-2 Consumer law journal 170; M Schillig, *Inequality of bargaining power versus market for lemons: legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms* (2008) 33-3 European Law Review Journal 351.

³⁶ See the explanatory memorandum of the Directive (93/13); see also E Houndous, *the reception of the directive on unfair terms in consumer contracts by member states* (1995) 3 European Review of private law 249.

³⁷ M Dean, *unfair contract terms: the European approach* (1993) 56-4 Modern law Review 587.

³⁸ R. Brownsword, G. Howells and T. Wilhelmsson, "The EC Unfair Contract Terms Directive and Welfarism" in R. Brownsword, G. Howells and T. Wilhelmsson, *Welfarism in Contract Law* (Dartmouth: 1994) 291.

³⁹ E Hondius, *Non-implementation of the Directive on Unfair Contract Terms: the Dutch case* (1997) 5 European Review of Private Law 198.

⁴⁰ The commission claim in the case (144/99), the ECJ 144/99 (2001) ECR I-3541 Para 17; C Joerges, translated from Germany by L Fraser and P Wilkins, *the Europeanization of Private law as a Rationalization process and the contest of Disciplines- an Analysis of the Directive on unfair terms in consumer contracts* (1995) European review of private Law 176.

down in article (3/1) of the Directive (93/13). The list constitutes a very useful tool for sellers and suppliers when they draw up their standard agreements, so many disputes can be avoided.⁴¹ The commission added that the criteria of precision and information can be met if there is a clear list of terms, which refers to the features of the prohibited imbalance.

However, the list is not intended only to provide examples and indications to the occurrence of unfairness; it aims to serve as a source of information as well.⁴² It may help national courts to interpret the general criteria of fairness which the Directive (93/13) provides. It supplies national courts, other competent bodies, affected groups, individual consumers and sellers and suppliers - including those from other (MS) – with criteria that may help them to interpret the conception of unfairness.⁴³

2.2- The legal obligatory of the List of the Directive (93/13)

The question of whether the (MS) are bound to imply the list in their legal systems or not will be discussed in this point. The Directive (93/13) does not provide a clear answer, so this obligation has to be discussed under article (249) of the (EC) treaty.⁴⁴ The nature and the content of obligations, which are imposed on the (MS) by this article, are determined by the content, the scope and the characteristics of the directives.⁴⁵ These obligations are required to be transposed by the (MS) into their national legislations or have to be implemented by some other ways.⁴⁶ In short, two contradictory claims are recorded for this question:⁴⁷ the first claim is supported by the commission and argues that the (MS) are totally obligated to literally transpose the list in their legal systems, while the other claim is supported by the (ECJ) and denies this obligation by claiming that the (MS) are free to adopt the list and have only to carry out the objectives of the Directive (93/13).

(a) The first argument was adopted by the commission when claimed that, although the list is "indicative", the (MS) are under the obligation to include it in the transposition instrument so as to familiarize legal experts and the general public with its existence. The content of the list should be part and parcel of the national legal instruments.⁴⁸ The following supports this claim: (1) the general advocate "*Tenreiro*", who attended the legislative procedures of the Directive (93/13), supported this claim. He indicated that, at the early stage of approving the Directive (93/13), the (MS) were required to at least print the indicative list in the process of implementing the Directive (93/13) in their legal systems. Even if this obligation was not declared to be mandatory, it is mandatory for the (MS) to literally adopt the list in their legal systems;⁴⁹ (2) article (8) of the Directive (93/13) provides its *minimal character* and recital (17) of the Directive (93/13) authorizes the (MS) to *add new terms*, formulate *more strengthen* ones (which restrict further the freedom of sellers or suppliers), or modify the scope within the meaning of paragraph (2) of the Annex.⁵⁰ This can be understood as the literal adoption of the list in the (MS) legal systems is the minimum obligation that the (MS) have to keep when implementing the Directive (93/13); (3) this claim concerts with the (ECJ) decision No. 263/95 which held that, in order to satisfy the requirements of the legal uncertainty, the individuals of the (MS) should have the benefit of

⁴¹ M Schillig, *Inequality of bargaining power versus market for lemons: legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms* (2008) 33-3 European Law Review Journal 351.

⁴² ECJ 365/93 (1995) ECR I-499 Para 9; see also The Report submitted from the commission of the European union on the implementation of council Directive 93/13/EEC of 5 APRILE 1993 on unfair terms in consumer contracts, Brussels, 27/4/2000, COM(2000).

⁴³ ECJ 478/99, ECR I-4147; E Hondius, *unfair terms in consumer contracts, towards a European Directive* (1998) 3 European consumer law Journal 189.

⁴⁴ This article stipulates that *a directive shall be binding, as to the result to be achieved, upon each (MS) to which it is addressed, but shall leave to the national authorities the choice of form and methods.*

⁴⁵ K Lenaerts and T Corthaut, *of birds and hedges: the role of primacy in invoking norms of EU law* (2006) 31-3 European Law Review 293.

⁴⁶ S Drak, *"Twenty years after Von Colson: the impact of "indirect effect" on the protection of the individual's community rights"* (2005) 30-3 European Law Review 329.

⁴⁷ ECJ 236/95 (1996) ECR I-4459; see also p Nebbia, *unfair contract terms in EC Law* (Hart publications: London 2007)154; S Lefevre, *Interpretative communications and the implementation of Community law at national level* (2004) 29-6 European Law Review 808.

⁴⁸ The Commission of the European Communities, represented by L. Parpala and P. Stancanelli, acting as Agents, with an address for service in Luxembourg, ECJ 478/99, ECR I-4147.

⁴⁹ M Tenreiro, *The community Directive on unfair terms in national legal systems. The principle of good faith and remedies for unfair terms* (1995) 3 European review of private law 283; M Dean, *unfair contract terms: the European approach* (1993) 56-4 Modern law Review 582.

⁵⁰ The opinion of Advocate General "*Geelhoed*", Para 15.

the clear and the precise legal situation, which enable them to ascertain the full extent of their rights.⁵¹ This right cannot be reached without the literal adoption of the list.

(b) The second claim opposes the first one and denies the obligation of the (MS) to literally and verbally adopt the list in their legal systems. It was adopted by many (MS),⁵² which argued that the first claim has triggered two types of problems.⁵³ Firstly, certain countries have refused to transpose the list as it stands.⁵⁴ The national authorities of these (MS) claim that the list may create confusions and adversely affects the objectives of the consumer protection because certain terms are already outlawed in their domestic legal orders. They also fear that, national courts may tend to confine their review to the terms in this list, to the detriment of the general assessment criterion⁵⁵ Secondly; the case law has shown that the way of drafting the list has weakened its practical impact. Many terms of the list are somewhat unclear.⁵⁶ A single term in the list may deal with a large numbers of different contractual terms. This claim adds that the claim of the commission seems to be assessed against the background of the third paragraph of article (249) of the (EC) treaty. Under that provision, *a directive must be binding as to the result to be achieved.*⁵⁷ The national authorities remain competent to determine the ways and the methods of this implementation.⁵⁸ This paragraph can be understood as each (MS) has the obligation to adopt, in its national legal system, *all measures* that are necessary to ensure that the directive is fully effective, *in accordance with the objective which it pursues.*⁵⁹ The (MS) must establish a specific legal framework in the area in question. The legal position under national law must be sufficiently precise and clear.⁶⁰ Individuals must be in a position to be aware of all their rights and, where necessary, must be able to assert them before the national courts. The last-mentioned condition is of particular importance where the directive in question accords rights to nationals of other MS, which will normally not be familiar with the principles of legal orders other than that of their own country.⁶¹

Moreover, the transposition of the directive into domestic law does not necessarily require that, its provisions have formally and literally be incorporated into the national law. Thus, the existence of general principles of constitutional or administrative law may meet that implementation.⁶² Depending on the content of the directive, a general legal context may ensure the full application of the directive and sufficiently meet its provisions.

The (ECJ) settled the above debate in the case (478/99) and supported the second claim. It decided that inasmuch as the list of the Directive (93/13) has an indicative and illustrative value; it constitutes a source of information to both of the national authorities, which are responsible for implementing the measures of the directives and for individuals, whom are affected by those measures. The (MS) must therefore, in order to achieve the results that are

⁵¹ ECJ 236/95 (1996) ECR I-4459; see also S Drak, "Twenty years after Von Colson: the impact of "indirect effect" on the protection of the individual's community rights" (2005) 30-3 European Law Review 335; K Ioannou, *Recent developments in the application of Community law in Greece* (1989) 14-6 European Law Review 467.

⁵² Kingdom of Sweden, represented by L. Nordling and A. Kruse, acting as Agents, with an address for service in Luxembourg, supported by Kingdom of Denmark, represented by J. Molde, acting as Agent, with an address for service in Luxembourg and by Republic of Finland, represented by T. Pynna and E. Bygglin, acting as Agents, with an address for service in Luxembourg, ECJ 478/99, ECR I-4147.

⁵³ The Report submitted from the commission of the European union on the implementation of council Directive 93/13/EEC of 5 APRILE 1993 on unfair terms in consumer contracts, Brussels, 27/4/2000, COM(2000) 16.

⁵⁴ Namely Finland; Sweden and Denmark.

⁵⁵ See T Wilhelmsson, *The implementation of the EC directive on unfair contract terms in Finland* (1997) 5 European Review of Private Law 159.

⁵⁶ P Nebbia, *unfair contract terms in EC Law* (Hart publications: London 2007) 154.

⁵⁷ P Craig, *the legal effect of Directives: policy, rules and exceptions* (2009) 34-3 European Law Review 349.

⁵⁸ K Lenaerts and T Corthaut, *of birds and hedges: the role of primacy in invoking norms of EU law* (2006) 31-3 European Law Review 294.

⁵⁹ P Nebbia, *unfair contract terms in EC Law* (Hart publications: London 2007)154.

⁶⁰ R Loof, *temporal aspects of the duty of consistent interpretation in the first and third pillars* (2007) 32-6 European Law Review 888.

⁶¹ See K Ioannou, *Recent developments in the application of Community law in Greece* (1989) 14-6 European Law Review 461; M Tenreiro, *The community Directive on unfair terms in national legal systems. The principle of good faith and remedies for unfair terms* (1995) 3 European review of private law 279; M Dean, *unfair contract terms: the European approach* (1993) 56-4 Modern law Review 586; P Nebbia, *unfair contract terms in EC Law* (Hart publications: London 2007)154.

⁶² Opinion of Advocate General "Geelhoed", Para 34.

sought by the directive, *choose a form and method* that guarantee the awareness of individuals of these measures.⁶³ Therefore, the (MS) are not obliged to literally and verbally adopt the list in their legal systems.⁶⁴

The decision of (ECJ) seems rational and agrees with the objectives of the list. The degree, to which the (MS) are free to choose the methods of carrying out the objectives of the directive, depends on the content of the directive. It can be seen from the scheme of the Directive (93/13) in question that, it consists of two parts.⁶⁵ The first part is normative and binding, while the second one is indicative and illustrative. The normative and binding part of the Directive (93/13) consists of the rules that are provided in articles (3/1); (3/2); (4) and (5). These provisions are inseparably linked to the main test of fairness according to the Directive (93/13). The indicative and illustrative part of the Directive (93/13) is the Annex of the Directive (93/13). As mentioned above, it aims to create constant criteria to the application of the first part. On the basis of the Directive (93/13), the list must be disassociated from the criterion which mentioned in article 3(1).⁶⁶

In short, the (MS) are not bound to literally adopt the list in their legal systems. The list has no binding notion and is not intended to create rights and obligations for individuals. The (MS) are free to adopt the way which enables consumers and individuals to get an access to their rights and obligations that are provided by the Directive (93/13).

CONCLUSION

In order to ensure a fair and unified application of the test of fairness provided by the principle of good faith in consumer transactions in the member states of the European Union, the Directive (93/13) constitutes an indicative and non-exhaustive List of terms (Grey List) in its Annex that may be considered unfair. Contract terms that correspond with the content of this List may be unfair, but it is not sure to consider them as unfair (they are not automatically unfair). The List constitutes a very useful device for sellers and suppliers when drafting contracts to avoid the use of unfair terms. The (MS) are not bound to adopt the List in their legal system literally, but they are only bound to supply consumers with their rights and obligations when making contracts with undertakings. That list is not intended only to provide examples and indications to the occurrence of unfairness; it aims to serve as a source of information as well. It may help national courts to interpret the general criteria of fairness which the Directive (93/13) provides. It supplies national courts, other competent bodies, affected groups, individual consumers and sellers and suppliers - including those from other (MS) - with criteria that may help them to interpret the conception of unfairness.

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⁶³ ECJ 478/99, ECR I-4147 Para 22.

⁶⁴ See R Loof, *temporal aspects of the duty of consistent interpretation in the first and third pillars* (2007) 32-6 European Law Review 894; The Report submitted from the commission of the European union on the implementation of council Directive 93/13/EEC of 5 APRILE 1993 on unfair terms in consumer contracts, Brussels, 27/4/2000, COM(2000); S Lefevre, *Interpretative communications and the implementation of Community law at national level* (2004) 29-6 European Law Review 813.

⁶⁵ The opinion of Advocate General "Geelhoed", Para 35.

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