SMALL BUSINESSES AND UNFAIR CONTRACT TERMS*.

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SUMMARY: 1. Introduction. – 2. Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015. – 3. The Notion of consumer in ACL and in Council Directive 93/13/EEC of 5 April 1993. – 4. The unfairness test and the terms unaffected in ACL and in Council Directive 93/13/EEC of 5 April 1993.- 5. The Australian's choice to limit the protection of business and the opportunity to extend the protection to small businesses also at European Union level.

ABSTRACT. The essay, moving from Guido Tedeschi thought, discusses a recent change in Australia law concerning the Unfair contract terms and proposes a possible reform in Europe.

1. Introduction.

As is well known, Guido Tedeschi has studied in depth the topic of standard contracts. He drafted and published (together with Ariel Hecht) the report of the Committee of Jurists, appointed by the Minister of Justice in 1958 to study the problems concerning standard contracts. In the report, it is highlighted that the problems of asymmetry arise not only because there is a sort of collective dominance position by businesses but also because customers do not read the clauses. With a modern language we could say that standard contracts determine certainly some informational asymmetry while not necessarily market power asymmetry. Here, I would like to pay homage to Guido Tedeschi by discussing a recent change in Australia Law concerning the *Unfair Contract Terms*. I will then do a proposal on a possible reform in Europe.

2. Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015

Unfair contract term protections in the Australian Consumer Law (ACL) have applied to standard form business-to-consumer contracts since 1 July 2010. A consumer contract is defined by the ACL as a "contract for: a supply of goods or services: or (b) a sale or grant of an interest in land: to an individual whose acquisition of the goods, services acquired wholly o predominantly for personal, domestic or household use or consumption" (see section 23 (3).

Very recently the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015*, passed 12 November 2015, extended the protection to small businesses.

Now the law will also apply to a standard form business-to-business contract entered into or renewed on or after 12 November 2016, where: (a) at least one of the parties is a 'small business' (i.e. employs less than 20 people, including casual employees employed on a regular and systematic basis): (b) the upfront price payable under the contract is no more than $300 000 or $1 million if the contract is for more than 12 months: (c) it is for the supply of goods or services or the sale or grant of an interest in land.

In protecting business against Unfair terms, Australian legislator has chosen to adopt a definition that incorporates both an employee-based business size threshold and a transaction value threshold.

Although some European member States protect also business against Unfair contract terms, at European Union level the protection is accorded only to the consumer.

Indeed the Council Directive 93/13/EEC of 5 April 1993 on unfair terms is referred only to contract BtoC. The Directive adopted the principle of minimum harmonization (indeed art. 8 states: "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer").

The unfair contract terms both in ACL and in the Council Directive 93/13/EEC are not binding but the contract continues to bind the parties if it is capable of operating without the unfair term.

Today, after having highlighted the main differences between the two systems, in order to understand if the disciplines protect different interests, I will consider the Australian's choice to limit the protection of business and the opportunity to extend the protection to small businesses also at European Union level.

3. The Notion of consumer in ACL and in Council Directive 93/13/EEC of 5 April 1993

The notion of consumer in ACL (also non considering the new extension of the protection) seems to be broader of that one adopted by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

The ACL required that the goods or services are acquired "predominantly" for personal, domestic or household use or consumption.

For the Directive 93/13, instead, 'consumer' means any natural person who "is acting for purposes which are outside his trade, business or profession" (see art. 2). We can't found in the Definition of the Directive any reference to the predominance of the use.

This has created uncertainties concerning the application of the EU protection in case of 'mixed' contract, e.g. contract where a person buys goods that will sometimes be used for business purposes and sometimes for social or domestic purposes.

Some Academics in Europe in the past proposed either considering always in this case the natural person to be a consumer or to consider consumer any natural person who is acting "primarily" or "mainly" for purposes which are not related to his or her trade, business or profession. In other words,

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this last proposal is to adopt the criteria of prevalence or predominance of the use. But this solution was rejected by the Court of Justice in 2005 in the Case Johann Gruber v Bay Wa. In this case the court stated that a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not be protected as consumer, unless the trade or professional purpose *is so limited as to be negligible* in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect.

The Court said that inasmuch as a contract is entered into for the person's trade or professional purposes, he must be deemed to be on an equal footing with the other party to the contract, so that the special protection reserved for consumers is not justified in such a case.

The decision concerns the interpretation of the first paragraph of Article 13 of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. This article defines a consumer as a person that concludes a contract for a purpose which can be regarded as being outside his trade or profession.

The definition indeed is very similar to that of art. 2 of the Directive so therefore the Gruber Case seems to indicate the way for the interpretation also of that notion (and in general of EU definition of consumer).

However, under the DCFR of 2009, a mixed transaction is covered by consumer protection rules if it is concluded "primarily" for non-professional purposes. It is true that this approach has not as yet expressly been implemented in any binding EU instrument but it is also true that in two recitals of two different recent Directives (the one on consumer rights of 2011 and the one on alternative dispute resolution for consumer disputes of 2013) we can read "The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer".

I believe that very soon the Court of Justice will change position on mixed contract and will accept the idea of prevalence, like in Australia.

This change seems to me to be desirable. Who acts mainly for private purposes normally acts outside her/his core business. I'll explain better later the reason why I think that a small business should only be protected when they act outside their *core business*.

4. The unfairness test and the terms unaffected in ACL and in Council Directive 93/13/EEC of 5 April 1993

In the ACL a term of a consumer contract is unfair if it: (a) would cause a significant imbalance in the parties' rights and obligations arising under the contract: and (b) it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and (c) would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on. In deciding whether a term is unfair, a court may take into account the matters that it considers relevant but must take into account: (a) the extent to which the term is transparent; and (b) the contract as a whole (art. 24, 1-2).

The first yardstick for review, causing a significant imbalance in the parties' rights, seems to be taken from UK. In general we can say that the Australian Consumer Law is based on the provision of the (Vic) Fair trading Act 1999 and that that regime was based on (UK) Unfair terms in Consumer Contracts Regulation 1999 (81-82)[2] which had implemented the Council Directive 93/13/EEC of 5 April 1993

But in Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited [2015] FCA 1204 Edelman J says:

> "Section 24(1) of the ACL requires the three elements in (a) to (c) to be satisfied before a term of a consumer contract is unfair. Each is addressed below after some broad observations about the operation of s 24.
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> Section 24 of the ACL is an example of a legislative technique that was historically less familiar to the common lawyer than it was to the civilian lawyer. It is a technique which creates broad evaluative criteria to be developed incrementally.
>
> …..
>
> Despite the origin of much of the unfair contract term definition in the UK regulations, Parliament departed from the precise terms of the UK provision. In particular, reference in UK to the requirement of "good faith" was removed from the Australian provision. The Regulation Impact Statement in Chapter 11 of the Explanatory Memorandum (pages 133 and 135) described the unset-

[2] See J.W. CARTER, *Contract and the Australian Consumer Law. A Guide*, LexisNexis Butterworths, Australia, 2011, 81-82.

> tled status of good faith in Australia and proposed that the definition should not make reference to "good faith" given that uncertainty".

In other words, Edelman J points out that Australian legislator in Section 24 of the ACL, although departing from UK regulation (with European origin) due to uncertainty over the function and meaning of the duty of good faith, has nevertheless adopted criteria that are not entirely in line with the common law culture.

Some scholars say that: "In many cases, whether a term in a standard form contract causes a significant imbalance in the parties' rights and obligations under the contract may be assessed by considering the extent to which the term detracts from the rights held by the consumer under the common law. The common law of contract provides a range of 'default' rules governing the rights and obligations of the parties to a contract. This allocation of rights and obligations, having evolved over a long period of time under constant judicial scrutiny, may be presumed to present a relatively fair balance between the interests of contracting parties. Thus, a contractual term that attempts to realign these rights may be treated with suspicion"[3].

The second element of the test for an unfair term in a standard form consumer contract qualifies the issue of imbalance. Courts must consider whether an imbalanced term is 'reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term'. It must be shown that the term protects a legitimate interest of the party who would be advantaged by the term. This requirement might be satisfied by showing that the term protects the trader from risks inherent in the transaction. The term must be also *reasonably necessary* to protect the party's legitimate interests. It seems likely that a relevant consideration will be the proportionality of the term[4].

The third element of the test for an unfair term in a standard form consumer contract is that the term would cause detriment to a party if it were to be applied or relied on. The ACL consider every kind of detriment: "whether financial or otherwise".

Art. 25 give a list of examples of the kind of contract terms that, without limiting section 24, may be unfair.

Assessment of the unfairness doesn't affected the terms that (a) define the main subject matter of a consumer contract; (b) set the upfront price payable under the contract; or (c) are required, or expressly permitted, by a law of the Commonwealth or a state or territory.

In Council Directive 93/13/EEC of 5 April 1993 "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" (art.3). The unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent (art.4.1).

The Annex contains an indicative and non-exhaustive list of the terms which may be regarded as unfair (art.3.3)[5].

The yardstick for review was an addition of the concepts of "significant imbalance" taken from English law (and used also in Section 24(1) of the ACL) and "good faith" known in German law[6].

So therefore the major difference between the tests is that art. 3 of Council Directive 93/13/EEC directs courts to consider whether an imbalanced term is 'contrary to the requirement of good faith' rather than whether the term is 'reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term' as under the ACL.

Let us now try to understand if this difference involves a radical divergence between the two disciplines.

First of all, we have to underline that in Europe there is a problem concerning who has to determine the unfairness of the term, if the ECJ or the National Court. On this topic the ECJ states that the ECJ has jurisdiction as to the interpretation of the notion of 'unfair terms' and of the criteria that national judges may or must apply, whilst it is up to national judges

[3] J. PATERSON, *The Australian Unfair Contract Terms Law: The Rise of Sustantive Unfairness as a Ground for Review of Standard Form Consumer Contract*, in *Melbourne University Law Review*, 2009, 944. See also C. WILLET, *Fairness in Consumer Contracts: The Case of Unfair Terms*, Ashgate, 2007, 47.

[4] See J. PATERSON, *op. cit.*, 944-945.

[5] The ECJ held in Case C-478/99, *Commission* v. *Sweden*, [2002] that the list did not even need to be included in the transposition of the directive

[6] H.-W. MICKLITZ AND N. REICH, *The court and sleeping beauty: The revival of the unfair contract terms directive (UCTD)*, in *Common Market Law Review*, *2014* (51), 773 and 785.

to determine, according to the interpretation provided by the ECJ, whether a particular contractual term is actually unfair in the circumstances of the case[7].

In Australia, regarding Unfair contract terms, this kind of problem doesn't exist.

Coming back to European Experience, concerning the two criteria used for review, the ECJ, in the very important Aziz case[8], states that:

> "in referring to concepts of good faith and significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, Article 3(1) of the directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (see Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 19, and *Pannon GSM*, paragraph 37).
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> As stated by the Advocate General in point 71 of her Opinion, in order to ascertain whether a term causes a 'significant imbalance' in the parties' rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.
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> With regard to the question of the circumstances in which such an imbalance arises 'contrary to the requirement of good faith', having regard to the sixteenth recital in the preamble to the directive and as stated in essence by the Advocate General in point 74 of her Opinion[9], the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.
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> In that regard, it should be recalled that the annex, to which Article 3(3) of the directive refers, contains only an indicative and non-exhaustive list of terms which may be regarded as unfair (see *Invitel*, paragraph 25 and case-law cited).
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> Furthermore, pursuant to Article 4(1) of the directive, the unfairness of a contractual term is to be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of it (*Pannon GSM*, paragraph 39, and *VB Pénzügyi Lízing*, paragraph 42). It follows that, in that respect, the consequences of the term under the law applicable to the contract must also be taken into account, requiring consideration to be given to the national legal system (*Freiburger Kommunalbauten*, précité, paragraph 21, and the order in Case C-76/10 *Pohotovost'* [2010] ECR I-11557, paragraph 59)".

The interpretation of "Significant imbalance" seems to be very similar to the Australian interpretation of the same concept: it must be considered what rules of national law would apply in the absence of an agreement by the parties in that regard.

With regard to the question of the circumstances in which such an imbalance arises "contrary to the requirement of good faith", the Court (in Aziz) states that "the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations". It seems to me that the factual outcome is basically the same as under Australian Law, since we can reasonably assume that the consumer would have

[7] See Case C-237/02, *Freiburger Kommunalbauten* v. *Hofstetter*, 1 April 2004, ECR I-3403; case 472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, Judgement 26 April 2012**,** para 22 ; Case 415–11, Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), Judgment of the Court (First Chamber) of 14 March 2013; Case 226/12, Constructora Principado SA v José Ignacio Menéndez Álvarez, Judgment of the Court (First Chamber) of 16 January 2014. Different seems to be the position of the ECJ in Océano Grupo Editorial SA v Rocio Murciano Quintero (and others) [2000] ECR I- 4941 para 25, (2005) 1 European Review of Contract Law 87, note Rutgers. On the evolution of the ECJ on this point see A. LAS CASAS - M.R. MAUGERI - S. PAGLIANTINI –, *Recent trends of the ECJ on consumer protection: Aziz and Constructora Principado, in ERCL*, 2014, 444-465. See also, more recently, S. WEATHERILL, *Contract Law of the Internal Market*, Intersentia, 2016, 118.

[8] See above footnote 17.

[9] The Advocate General Kokott in point 74 of her Opinion says: "The question whether the shift resulting from the contractual term, in relation to the statutory provisions, in the rights and obligations arising under the contract to the detriment of the consumer causes a significant imbalance can only be answered by means of a comprehensive analysis of all the individual circumstances of the agreement, as set out in Article 4(1) of the directive. A significant imbalance should be considered to be unjustified in particular where the consumer's rights and obligations are curtailed to such an extent that the party stipulating the contractual conditions could not assume, in accordance with the requirement of good faith, that the consumer would have agreed to such a provision in individual contract negotiations".

agreed to a term that protects in a proportional way, from risks inherent in the transaction, a legitimate interest of the counterparty who would be advantaged by the term.

In Constructora Principado SA v José Ignacio Menéndez Álvarez[10], the CJEU observed that the assessment of a significant imbalance is not restricted to a quantitative economic evaluation.

If what I said is true, the difference between Australia and EU Law seems to be lesser significant than it appears at first reading.

Also in Europe the assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange.

But , unlike the ACL rule, also these kind of terms must be drafted in plain, intelligible language (art.4.2).

The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of the Directive (art.1.2).

The original Commission proposal of 1990 for a Directive on unfair terms in consumer contracts did not exclude individually negotiated terms and core terms from the unfairness control. These limitations were only introduced by the Council[11].

In Europe it is argued whether the rationale to protect consumer against unfair terms is related solely to information asymmetry or also to market power[12].

The Court of Justice, even in affirmations which seem like two *obiter dicta*, has stated that the Directive 93/13 protected the weak party in general, regardless the kind of weakness considered[13].

It seems to me that the exclusion of the assessment of the unfair nature of the terms related with the definition of the main subject matter of the contract and the adequacy of the price could be explained only accepting that the Unfair Contracts terms Laws, both in Australia and in Europe, aim to react against information asymmetry (and therefore to react against a form of market failure). It seems clear that in view of solving the problem of different market power (that is a different form of market failure), such restrictions make no sense. The typi-

[10] Above f. 17

[11] See M. W. HESSELINK, *Unfair Prices in the Common European Sales Law, in English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale*, edited by L. Gullifer and S. Vogenauer, Hart Publishing, 2014, 231. See also Opinion of A.G. Trstenjak in Case C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid*, [2010] ECR I-4785, para 61.

[12] Many Authors believe that Directive 93/13 protects the consumer as the weak contractual party under the profile both of information asymmetry and of market power. See, *ex multis*, H. BEALE, *Inequality of Bargaining Power*, 6 *Oxford J. Legal Studies*, 1986, 123; M. WOLF, *Party Autonomy and Information in the Unfair Contract Term Directive*, in GRUNDMANN – KERBER – WEATHERILL (eds), *Party Autonomy and the Role of Information in the Internal Market* (Berlin/New York: 2001) 323.
This interpretation is sometimes justified by the idea (although not demonstrated but commonly accepted, above all in the past) that informative asymmetry and economic asymmetry often go together; at other times by the structural and (generic) greater weakness of the consumer with respect to the business operator. According to Kötz: "*in the 1970s ... most countries in Europe passed laws based more or less on the view that as the consumer was the 'weaker' of the contracting parties, he must be protected against contract terms forced upon him by entrepreneurs abusing their economic superiority*" (H. KÖTZ – A. FLESSNER, *European Contract Law* (Oxford: 1997) 138). On the topic, critically, see F. GOMEZ, EC Consumer Protection Law and EC Competition Law: How Related are They? A Law and Economics Perspective, in H. COLLINS (ed), *The Forthcoming EC Directive on Unfair Commercial Practices. Contract, Consumer and Competition Law Implications* (The Hague/London/New Yorker: 2004) 194 et seq.
Other Authors, on the other hand, have tried to dispute the thesis according to which the sole Directive 93/13 would be able to solve all the conflicts involving a weak party, correctly demonstrating that it aims to solve only the problem of information asymmetry (see, *ex multis*, S. GRUNDMANN, *EC Consumer and EC Competition Law: How Related are they? Examining the Existing Ec Contract Law Sources*, in H. COLLINS (*ed*), *The Forthcoming EC Directive on Unfair Commercial Practices. Contract, Consumer and Competition Law Implications*, The Hague/London/New Yorker, 2004, 211 et seq. *Contra* C. CASTRONOVO, *Autonomia privata e Costituzione europea*, in *Europa e Diritto Privato*, 2005, 45 (fn.30). Indeed the Directive regulation only aim is to protect the market from one specific kind of *market failure* (precisely, that of information asymmetry), while other regulations have the aim to protect the market from other kinds of *failures*.
On the various theories that from time to time have been represented to support the regulations in the matter of consumer law see the dedicated work of K. J. CSERES, *Competition Law and Consumer Protection*, Kluwer L.I., 2005, 172 et seq.

[13] See United cases C-240/98 a C-244/98, Oceano Grupo Editorial SA v. Rocio Murciano Quintero and others, 27 june 2000; Mostaza Claro v. Movil (C-168/05) 26 october 2006.

cal exploitative abuse is, in fact, that price and nothing is worth the fact that the clause was or was not open to negotiation between the parties[14].

If the problem to be solved were that of differing market power, consistency would require that the judicial control over unfair terms take into consideration the economic balance in the performances of contract. Therefore, the adoption of a rule similar to art. 36 of the *Nordic Contracts Act*[15] or of a rule similar to Italian art. 9 of L. 192/98 on Abuse of economic dependence (applicable in contract BtoB) or a rule like art. 102 TFUE, would be more effective.

The exclusion of the assessment of the unfair nature of the terms relate with the definition of the main subject matter of the contract and the adequacy of the price is, instead, perfectly consistent with the rationale to solve the problem of information asymmetry. Indeed, it is true the "Including the adequacy of the price to the unfairness test would aggravate the information problem instead of solving it. It is the very nature of the information problem that users of standard terms will reduce their costs by passing on risks to their customers with a view to offer a nominally lower price than their competitors. The consequence... is a race to the bottom. Falling prices are part of that development. It would therefore be inappropriate to extend the unfairness test to the adequacy of the price"[16].

5. The Australian's choice to limit the protection of business and the opportunity to extend the protection to small businesses also at European Union level

Some authors think that all businesses, perhaps even the very biggest ones, need judicial protection against non-negotiated unfair contract terms.

Other authors, on the contrary, think that in BtoB relations there is no reason to extend the consumer protection to firms.

If we agree with the idea that the rationale of Unfair contract terms Laws is that one to contrast information asymmetry, the idea that in BtoB relations there is no reason to extend the consumer protection to firms could be accept in respect of sophisticated economic actors. Indeed in case concerning sophisticated economic actors, firms and markets are structured so as to minimize the likelihood of systematic cognitive error by important decision makers within the firm. Cognitive error, then, doesn't affect this kind of contract. The sophisticated economic actors can be expected to understand how to make business contracts also when the contracts are outside their usual activities and core business.

Indeed, large businesses, businesses with relevant turnover, can't be exonerated by the principle of self-responsibility and rational management of their own business.

But I wonder what happens in a case in which the firm cannot be considered sophisticated economic actor.

Can we say that these last kind of firms (non sophisticated economic actors) are structured so as to minimize the likelihood of systematic cognitive error? Or the relations BtoB involving these kinds of

[14] For more deep arguments on this topic see M.MAUGERI, *Il controllo delle clausole abusive nei contratti fra imprese: dal modello delineato nei §§ 305 ss. del BGB a quello della CESL*, in *NGCC*, 2013, II, 109-127: Id., *Is the DCFR ready to be adopted as an Optional Instrument?*, in *ERCL*, 2011, 219-228.
Following some authors market power can influence the price but cannot influence the other terms of the contract MAROTTA-WURGLER, *Competition and the Quality of Standard Form Contracts. An Empirical Analysis of software License Agrrements*, in 5(3) *Journal of Empirical Legal Studies* , 2008, 447.

[15] Art. 36 of Contract Act, states that: '(1) An agreement may be amended or set aside, in whole or in part, if its enforcement would be unreasonable or contrary to principles of fair conduct. The same applies to other legal transactions. (2) In applying subsection 1 of this provision, consideration shall be given to the circumstances at the time of the conclusion of the agreement, the content of the agreement, and later developments.' On the basis of this article even the price may be controlled.

[16] H.-B. SCHÄFER – P.C. LEYENS, *Judicial Control of Standard Terms and european Private Law. A Law & Economics Perspective on Draft Common Frame of Reference for a European Private Law*, in LAROUCHE – CHIRICO (*edited by*), *Economic Analysis of the DCFR: The Work of the economic Impact Group within the CoPECL Network of Excellence*, Monaco, Sellier, 2009, 110.
The argument of the two authors could answer to the questions posed by M. HESSELINK on why the legislator does not extend the control also to the core terms (*Unfair Prices in the Common European Sales Law, in English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale*, edited by L. Gullifer and S. Vogenauer, Hart Publishing, 2014, 231, f.22). M. Hesselink thinks that it makes no sense a division of labour between the different laws (especially competition law and unfair contract terms law) to react against a different market failure. It is not just a problem of remedy (i.e. invalidity of the contract versus the conversion of the unfair contract price into a fair one), as the author said, but also a problem of making rules that can really solve the problem of the asymmetry. If we put all together we don't give more protection but we risk to destroy the protection already done to consumer.

firms can be affected by the same information asymmetry that we can find in BtoC relationships?

I believe that Consumers and Firms are not always in the same situation in regard to information asymmetry. Therefore, I don't believe that consumer protection could be usefully extended to every firm (considering both consumers and firms as weak contractual parties).

To explain why I believe that Consumers and Firms are not always in the same situation, let me recall that the so called "race to the bottom" (similar to that one described by Akerlof in his paper on the Market for lemons) could be tempered, in part, by the reputational effect, though such effect can actually play a relevant role only in cases of repeated interactions.

Indeed, in a context of repeated interactions, the access to information concerning the effect of a single clause becomes less expensive because of the greater ease to "understand" the same clause.

One may also think that the cost to understand the different ways of managing risk (i.e. the words and formulations of the clauses which corresponds to a certain type of risk-sharing), can be divided into the plurality of contracts that the professional party is likely to stipulate.

Such a context (of repeated interactions), in BtoB relationships, certainly exists when firms conclude contracts in the course of their usual activities and core business.

Identifying the core business of a company may appear a hard task. Please note, however, that in Italy case law referred to the core business, albeit using a different expression, in the early stages of implementation of the regulation on unfair contract terms (see Trib. Roma, 20 October 1999).

It is definitely more difficult to identify a context in which the reputational effect may operate in relations BtoC.

Indeed also in BtoC relationships we could have brand effect.

In other words, the consumer, during repeated interactions, could consider the brand. He could also better understand the meaning of the different clauses (e.g. the relations between the different words and formulations of the clauses and the corresponding different ways of managing risk).

However, the consumer makes also a number of occasional sales. It's impossible, if one does not analyse her or his life very deeply, to predict ex ante whether the brand effect (and more generally reputational effect) has played a role in the transaction or not. The judge cannot analyse so deeply the life of the different consumers.

It follows: first, that the company may not have any interest in maintaining its high regulatory standards because "not knowable and evaluated" by consumers; and secondly, that also if one cannot exclude ex ante that in some transactions the consumer would not need protection because he is theoretically able to be informed it is in fact impossible for the judge to understand when this really happens.

Therefore, a general protection of consumers is appropriate.

On the contrary, firms that *cannot be considered sophisticated economic actors*, should only be protected when they act outside their *core business*. In fact, only when firms conclude contracts outside the core business it makes sense to assume that the business probably bears marginal costs, in terms of time and money to access information, that outweigh the marginal benefit gained through the knowledge of the content of the terms.

Because of that, I agree with Australian legislator that has chosen to adopt a definition of business that incorporates an employee-based business size threshold but I think it has offered an inefficient overprotection non considering that, when the business act inside the core business, operates the reputational effect.

Australian legislator has chosen to adopt a definition of small business that incorporates a transaction value threshold.

We can argue on the determination of the cup, but I agree in general with this solution, proposed also in Europe by some authors and by *The English and The Scottish Law Commissions*.

But I believe that when a single transaction has a value that exceeds a certain limit (for example a million Euros) there is no reason to distinguish between consumers and firms. Indeed, in these cases both consumers and firms generally pay much attention to the assessment of the relevance of the contract terms and they in any case hire professionals with good knowledge and skills to manage the contract.

At the end, I believe the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* has to be taken as a model and that it is time to extend also at European Union level the protection to small business that act outside their core business (or field of expertise) in transactions with a limited upfront price.