STANDARD TRADE TERMS AND UNFAIR TERMS

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1. Standard trade terms

A large number of contracts not subject to prior negotiations are concluded daily in all branches of economic activity.

They involve not only minor transactions taking place at the grocer's or barber's but also include relevant business dealings, such as banking contracts, insurance contracts, contracts involving the supply of utilities (electricity, water, gas, etc.), contracts for the supply of telecommunication services, public transport contracts, etc.

In all these business dealings, so-called **standard trade terms** (in Italian: *condizioni generali di contratto*) are used, i.e. terms drafted in advance by one party (for instance, the bank, the insurance company, the electricity supplier, etc.) and intended to be applied to a plurality of contracts and – hence - to govern an indefinite number of identical contracts.

"Standard contracts" are associated with the large-scale industrial production of goods and services, with large-scale commerce, banking, insurance, and public service provider agencies. They comply with the requirement to uniformly regulate contractual relationships with consumers of products or with users of services (or those who distribute the products, such as agents, dealers, etc).

The nexus between large-scale production and "standard contracts" is straightforward.

In order to ensure expeditiousness and immediacy of the transaction, as well as ensuring the predictability of the costs of both the performance due and possible litigation, i.e. in order to plan and organise production, businesses have to be able to anticipate the prices and terms of sale of their products.

The Civil Code lays down specific rules applicable to standard trade terms.

According to Art. 1341, paragraph 1, CC, standard trade terms are effective, provided that at the time of the entering into the contract the other party *knew* of them or *should have known* of them by exercising ordinary diligence.

The first part of Art. 1341, paragraph 1, CC rests on a narrow definition of self-responsibility.

Where a person, in full knowledge of the terms set out by the other party accepts them, that person freely elects to consent to such terms.

The second part, however, extends the concept of self-responsibility well beyond the limits implied by the first part, as the *mere possibility of knowing of the terms* by exercising ordinary diligence *de facto* amounts to knowledge.

Therefore, in order for standard trade terms to be effective, the person seeking to rely upon them (i.e. the person drafting the terms) must provide the opportunity for the other party to know of them by exercising ordinary diligence. It may suffice, for instance, that the standard trade terms be written on a sign at the entrance to a parking lot, on a bulletin board at a bank's premises, at a bus stop, in a bus, etc.

At first glance, Art. 1341, paragraph 1, CC may seem "discounted". One could think that it is a "common sense" rule related to the responsibility of the adherent party who is subject to the consequences of his lack of attention (that is, the lack of ordinary diligence). However, it is an *extraordinary* provision, as it departs from the general principles of contract law.

To be persuaded of this, one need only consider that stating that standard trade terms become part of the contract, implies that such terms become part of the contract even where – *in the concrete* – the other party was *not* aware of them so long as the other party – *in the abstract* – could have been aware of them using ordinary diligence. Such statement implies that standard trade terms become part of the contract even if the other party has *not* given his contractual consent to them (and, indeed, also where, if that party had been aware of them, he would not have entered into the contract). Therefore, standard trade terms become part of the contract also in the absence of any agreement on such terms by the adhering party[1]. The fact that they become part of the contract despite any agreement on such terms (notwithstanding the fact that Art. 1325 CC mentions the agreement as an essential requirement of any contract) confirms the extraordinary nature of Art. 1341, paragraph 1, CC.

The extraordinary nature of Art. 1341, paragraph 1, CC is clear also if one considers the principle *ignorantia legis non excusat* (ignorance of the law excuses no one), according to which a person who is unaware of a law may not escape liability for violating that law merely because he was unaware of its existence[2]. Such principle applies in relationships between a public Authority issuing statutory provisions (the state, the regions, the provinces, the municipalities, the ministries, etc.), on the one hand, and private natural and legal persons, on the other; i.e. in relationships where the public Authority is – by definition – in a position of supremacy as opposed to the norm addressees.

According to Art. 1341, paragraph 1, CC, the same principle applies in contractual relationships between private entities, i.e. between parties which – from a formal viewpoint – are on an equal playing field, that is, between the user of standard trade terms (a bank, insurance company, gas company, etc.) and its clients/users.

Consider the purchase of a (fast) train ticket from Milan to Venice by a tourist who fails to pay the fast train supplement and, unaware that the supplement must be paid,

[1] As with reference to standard trade terms the party not only accepts terms he was aware of at the time of entering into the contract but also terms which he could have been aware of had he exercised ordinary diligence.

[2] Cf. Art. 5 Criminal Code: clearly, the rationale of such provision is that, if ignorance were an excuse, a person charged with criminal offenses (or the subject of a civil lawsuit) could merely claim that he is unaware of the law in question to avoid liability (even if that person really did know the law in question). Notwithstanding the above, the Constitutional Court held that Art. 5 Criminal Code is unconstitutional "*where it does not exclude unavoidable ignorance from the inexcusability of ignorance of the criminal law*" (cf. Constitutional Court, judgment of 24 March 1988, n. 264).

takes a fast train requiring such supplement. The tourist will have to pay the supplement and any fine to the conductor even where, had he known about it, he would have preferred to take an "ordinary" train. Indeed, had he applied ordinary diligence, he could have known of the supplement (for instance, by asking about it at the ticket office or looking at bulletin boards at the station).

From a substantial viewpoint, the application of Art. 1341 CC in favour of users of standard trade terms conceptually coincides with the application of the *ignorantia legis non excusat*-principle in the case of statutory provisions. In fact, both users of standard trade terms and lawmakers may rely on the effectiveness of – respectively - standard trade terms and statutory provisions, provided the norm addressee/the other party had the possibility of knowing the statutory provisions or the standard trade term, respectively.

Hence, a principle applicable in relationships between public authorities and private individuals (which, as such, are – by definition - characterized by the position of supremacy of the public authority) is *de facto* applied with reference to standard trade terms, i.e. in a relationship involving private persons[3].

Being able to refer – from the viewpoint of the user of standard trade terms – to the terms the latter drafted, provided the counterparty had the possibility to be aware of them using ordinary diligence, constitutes an undoubted and consistent advantage.

For this reason, legislators made an effort to "rebalance" the overall regulation of standard trade terms.

Art. 1341, paragraph 2, CC, sets forth that standard trade terms which establish - in favour of the user - limitations of liability, the power of withdrawing from the contract or of suspending its performance, or which impose time limits involving forfeitures on the other party, limitations on the power to raise defenses, restrictions on contractual freedom in relations with third parties, tacit extensions or renewals of the contract, arbitration clauses or derogations from the competence of courts *are ineffective unless specifically approved in writing*.

Needless to say, Art. 1341, paragraph 2, CC aims at protecting the contractual partner of the user of standard trade terms. It rests on the assumption that in relation to **"one-sided" terms** (i.e. the terms listed in Art. 1341, paragraph 2, CC), the *specific approval in writing* leads the adhering party to pay greater attention to their content, favourable to the user, and to their prospective implications, thereby preventing "one-sided" terms from being accepted.

Similarly to Art. 1341, paragraph 1, CC, also Art. 1341, paragraph 2, CC is an extraordinary provision, since it introduces a written form requirement (in order for the terms listed in Art. 1341, paragraph 2, CC to be effective) and, hence, departs from the *general* principle of liberty of form in contract law. Hence, Art. 1341, paragraph 2, CC may not be applied to terms in favour of the user of standard trade terms other than those listed therein, i.e. its application by way of recourse to analogy is not admissible.

For instance, a penalty clause[4] (in Italian: *clausola penale*) contained in standard trade terms and applicable in favour of its user is effective irrespective of its *specific approval in writing*. Indeed, in terms of legal method, the only way to apply Art. 1341, paragraph 2, CC to a penalty clause (i.e. to a term not listed therein), is to have recourse

[3] However, there is a difference with respect to the law, since a voluntarily act, i.e. the acceptance of the standard trade terms, is required.

[4] In contract law, a penalty clause obliges the non-performing party to pay a predetermined amount of money as compensation without the other party having to prove the exact amount of damage incurred in relation to the late performance or non-performance (cf. Art. 1382 ff. CC).

to analogy, which – as has been outlined – is not admissible with reference to extraordinary provisions.

Conversely, a claims-made clause[5] included in standard trade terms is effective only if it has been *specifically approved in writing*, given that, according to case law, from a substantive viewpoint such clause amounts to a *limitation of the liability* of the insurer.

"Standard contracts" often are presented to the other party as printed forms (like the forms used by banks or insurance companies) which at the time of the conclusion of the contract are completed with the name of the other party and other details (information about the user, amount of the loan/mortgage, information about what is to be insured etc). According to Art. 1342, paragraph 2, CC, terms added by pen or machine to the form prevail over those that are printed, even where the printed terms have not been deleted.

2. The shortcomings of Arts. 1341 ff. Civil Code

As noted, in order to protect the adhering party the legislators of the Civil Code provided that certain terms which are clearly advantageous to the user of standard trade terms (so-called **"one-sided" terms**) be *specifically approved in writing* in order to be effective (Art. 1341, paragraph 2, CC).

The underlying assumption was that the *specific approval in writing* would act as an "alarm bell" in relation to the "one-sided" terms listed in Art. 1341 paragraph 2, CC, and, therefore, would lead the adhering party to carefully read them and, if deemed necessary, open negotiations with the user of standard trade terms to obtain an amendment, or refuse to enter into the contract.

In business transactions, such function of calling the adhering party's attention, which legislators assumed to be inherent in the *specific approval in writing*, proved to be wrong. Indeed, adhering parties *specifically approve in writing* "one-sided" terms (pursuant to Art. 1341, paragraph 2, CC) without demur. Hence, the *specific approval in writing* amounts to a mere formality to be fulfilled at the request of the user of standard trade terms.

The reason for this general tendency is not related to a lack of belief - on the part of the adhering party - as to his bargaining power aimed at obtaining an amendment of the terms at issue. Certainly, a customer will occasionally refrain from objecting to an unfavorable standard trade term because he thinks it futile to negotiate over it due to the other party's superiority in economic or other respects.

However, this is not the normal case. In the financial sector where competition is particularly fierce, so that there is no belief in the financial superiority of the proposing party, standard trade terms are accepted without demur by quite experienced contractors. In such cases the customer "submits" to the proffered standard trade terms because it is not worth investing the time and money involved in reading the terms, commence negotiations and try to get the terms amended or seeking out other firms whose terms are less unfavourable in some respect or other.

A private person or even a business that has to ship a parcel abroad or purchase a mobile phone accepts the standard trade terms on offer without demur. They do so not

[5] Claims-made clauses are often included in insurance policies: according to such clauses, a claim will have to be reported to the insurer during the policy period for coverage to apply.

because they are forced on them by the drafter of such terms, but because the cost of obtaining the necessary information about the terms, commence negotiations aimed at obtaining their amendment or tracking down a more favourable offer – in short: the **transaction costs** - would be out of all proportion to the advantage to be gained.

Users of standard trade terms take advantage of this "weakness" of adhering parties by saddling customers with the risks of the deal on the assumption that for the reasons given customers will neither object nor go elsewhere. According to **EC-Directive 5 April 1993, n. 93 on unfair terms in consumer contracts** such conduct is contrary to good faith (in an objective sense), i.e. contrary to fairness.

3. Unfair terms in consumer contracts

In order to offer a remedy to the "exploitation" inherent in drafting contracts in advance, the European Parliament issued EC-Directive 5 April 1993, n. 93 on unfair terms in consumer contracts.

EC-Directive 5 April 1993, n. 93 provides for a judicial scrutiny of so-called unfair terms in consumer contracts. Hence, courts are granted the power to invalidate any contractual term – drafted in advance by a business – "*causing a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*" (Art. 3, paragraph 1, EC-Directive 5 April 1993, n. 93).

EC-Directive 5 April 1993, n. 93 has been transposed into Italian law through Art. 25 *Statute* 6 February 1996, n. 52, which introduced in Book IV of the Civil Code, at Title II ("*On Contracts in General*"), Chapter XIV-*bis* on "*Consumer contracts*" (Arts. 1469-*bis* to 1469-*sexies* CC). These provisions were ultimately transposed into the Consumer Code (*Legislative Decree* 6 September 2005, n. 206).

According to Art. 33 Consumer Code, "*In contracts between consumers and businesses, terms which, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer shall not be binding on the consumer*".

The *subjective* scope of application is any consumer contract, i.e. any contract between a business and a consumer, provided the terms of such contract have been drafted in advance by the business.

The terms **"consumer"** and **"business"** are defined in Art. 3 Consumer Code.

A consumer is a natural person who acts for purposes which are outside his business.

On the contrary, a "business" is any, natural or legal person, public or private, who is acting for purposes related to his trade, business or profession.

As a consequence, the unfair terms provisions are not applicable to contracts between two or more businesses or between two or more consumers.

For instance, a term providing for a limitation of liability in favour of the party drafting the contract in advance would not be considered unfair (pursuant to Art. 33 ff. Consumer Code) if it were to be inserted in a contract entered into between two or more businesses or between two or more consumers[6].

[6] Hence, standard trade terms which provide for a limitation of liability exclusively in favour of a carrier may be claimed – if *specifically approved in writing* (pursuant to Art. 1341, paragraph 2, CC) - against a client company. In such a case, the client company cannot claim that the term is not binding due to its "unfairness" (pursuant to Arts. 33 ff. Consumer Code).

In both cases, Arts. 33 ff. Consumer Code are not applicable, as the subjective requirement to have a contract between a business and a consumer is missing.

As far as the *objective* scope of application is concerned, Arts. 33 ff. Consumer Code are not applicable to *any* contract entered into between a business and a consumer, but only to contracts unilaterally drafted in advance by a business.

This restriction is set out in Art. 34, paragraph 4, Consumer Code, which provides that "*terms or parts of terms which have been individually negotiated are not unfair*".

Art. 34, paragraph 4, Consumer Code is of fundamental importance:

a) as it confirms that the protection granted to consumers with reference to unfair terms is *not* related to their "*structural* weakness" (if this were to be the case, the consumer would have to be *always* protected, irrespective of the *individual negotiation* of the terms or part of the terms at issue)[7];
b) as it reconciles the protection of consumers with the basic principle of contractual autonomy, which implies that parties are free to determine the contents of the contract within the limits set down by law and with the basic principle of the binding force of contract, that of *pacta sunt servanda*.

a) The alleged (structural) "weakness" of consumers

As far as the alleged "weakness" of consumers is concerned, the need for protection is related to the costs inherent in the reading of the terms, the commencement of negotiations aimed at obtaining their amendment, the search of a more favourable offer etc., in short to the transaction, which are out of all proportion to the advantage to be gained.

For that reason, the protection granted to consumers by EC-Directive 5 April 1993, n. 93 rests on the assumption that consumers will not read the terms drafted in advance by the business before entering into the contract, i.e. that they will behave in an economically rational way[8].

This means that, where the consumer were not only to have read the terms drafted in advance by the business, but were to have actually begun negotiations about those terms, there is clearly no reason to protect the consumer.

For the same reason related to transaction costs, "*the evaluation of the unfair nature of a term has no relation to the determination of the subject matter of the contract or to the adequacy of the compensation payable for the property and services, provided that such elements are identified in a clear and comprehensible manner*" (cf. Art. 34, paragraph 2, Consumer Code).

The same applies if a student were to sell his mobile phone to a fellow student and were to lay down a term excluding any liability, should the mobile phone not work properly (provided the seller was not aware of such defect).

[7] Seen from a different perspective, the consideration of consumers as the inherently "weak" party does not convince, as the classification of a contractual party as "consumer" depends on whether he is entering the contract for "*purposes which are outside his business*" (Art. 3 Consumer Code). In other words, a wealthy person would be acting as a "consumer" if he were to enter into a contract for "*purposes outside his business*". On the contrary, a plumber who were to hire-purchase a small van in the exercise of his trade is not a consumer, as he is acting for purposes which fall within his business (Art. 3 Consumer Code).

[8] Such finding raises the question of why the protection granted to consumers has not been extended to businesses entering into contracts drafted in advance by another business. Indeed, if the "weakness" is related to the transaction costs of reading the terms of a contract drafted in advance by the other party, whether somebody is acting for "*purposes which are outside his business*" (and – thus – is a consumer) or "*for purposes related to his trade, business or profession*" (and – hence – is a business) should not make any difference. It therefore comes as no surprise that EC-Directive 5 April 1993, n. 93 expressly granted to member states the option to extend such protection also to businesses, so long as consumers were ensured the "*maximum degree of protection*" (cf. Art. 8, EC-Directive 5 April 1993, n. 93).

Indeed, it is reasonable to assume that acquiring information about the legislative balance laid down in a contract drafted by a business is so costly as to discourage a consumer from a detailed reading.

Conversely, it is not reasonable to assume that the consumer does not know what the subject matter of the contract is, or the price paid, since these are elements, which can be learned without incurring significant transaction costs, at least so long as such elements are identified in a clear and comprehensible manner (cf. Art. 34, paragraph 2, Consumer Code).

b) Protection granted to consumers and binding force of contract

Art. 34, paragraph 4, Consumer Code reconciles the protection of consumers granted by Arts. 33 ff. Consumer Code with the basic principles of contractual autonomy and of the binding force of contract (*pacta sunt servanda*).

Indeed, a court scrutiny of the rights and duties laid down in consumer contracts, and – as the circumstances require - the invalidation of unfair terms *de facto* contradicts the binding force of contract, as the court may be viewed as "making the contract for the parties".

Art. 34, paragraph 4, Consumer Code clarifies that such court scrutiny is solely admissible where consumers need protection, i.e. where the assumption that they did not read the contractual terms applies.

A consumer is not inherently "weak" (as anticipated, also the wealthiest man in the world is classified as "consumer" and – hence - granted protection if he were to enter into a contract for "*purposes outside his trade, business or profession*"). Hence, a court scrutiny is not admissible where a consumer were to enter into a contract with a business where:

a.) the contract has *not* been drafted in advance by the latter; or
b.) the consumer were to have individually negotiated the terms drafted in advance by the business.

4. Terms reproducing legal provisions

Art. 34, paragraph 3, Consumer Code provides that terms that reproduce legal provisions or that are reproductions of legal provisions or implementations of principles contained in international conventions to which all member states of the European Union or the European Union are parties, are not unfair.

Such a provision is obvious, as the purpose of the EC-Directive 5 April 1993, n. 93 is to protect consumers against unfair terms in a contract drafted in advance by a business.

Thus, it is evident that if the term in question reproduces a legislative provision it is not, by definition, unfair.

Indeed, if this were not the case, there would be the absurd situation of considering unfair the very legislative provision that, by definition, provides for legislative balance, and that in consequence certainly cannot introduce a "*significant imbalance in the parties' rights and obligations under the contract*" (Art. 33 Consumer Code).

Consider, for example Art. 1892 CC on insurance contracts, which provides that "*if the contracting party, willfully or through gross negligence, misrepresents or fails to disclose circumstances which, if known to the insurer, would have caused it to withhold*

its consent to the contract, or to withhold its consent on the same conditions, the insurer can annul the contract".

In the case of a life insurance policy taken out by a consumer, a term in such contract (drafted by the insurer) stating that failure to disclose relevant medical information grants to the insurer the right to annul the insurance policy is - by definition - *not* unfair, as it coincides with the legislative solution entrenched in Art. 1892 CC.

In such cases, there is no "abuse" by the business in the drafting of the contract. Suffice it to note that even where the insurer had not inserted in the standard trade terms of the insurance contract any term governing cases of failure - by the insured party - to disclose relevant information (for instance, a significant pre-existing medical condition), the annulment of the contract would ensue from Art. 1892 CC.

5. The nullity of unfair terms

According to Art. 36 Consumer Code, terms considered unfair pursuant to Arts. 33 and 34 Consumer Code are **void**, whilst the "remaining" contract is valid. Indeed, the consumer has no interest in voiding the *whole* contract; rather, he has an interest in the nullity of the unfair terms of such contract.

In a (contract of) sale, the consumer does not want to obtain nullity of the (whole) contract, with the consequent obligation of returning the "thing" purchased (whilst receiving its price from the seller); rather, the consumer "solely" wants unfair terms not to be part of the contract.

Art. 36, paragraph 3, Consumer Code provides that "*nullity will have effect solely for the benefit of the consumer, and the court may declare nullity on its own motion*".

The law is significant because it is an expression of a so-called **"nullity of protection"**, i.e. a nullity that, contrary to the "traditional" features governing the action of nullity, may be claimed solely by the consumer.

Similarly, a court will declare the nullity of an unfair term in a consumer contract on its own motion solely where such declaration of nullity benefits the consumer.

According to Art. 36, paragraph 2, Consumer Code, terms which have the following subject matter or effect are **void** "*even if individually negotiated*":

a) terms which exempt from or limit the liability of the business in the event of the **death of or injury to the person** of the consumer resulting from an action or an omission on the part of the business;
b) terms which **exclude** or **limit** t**he claims of the consumer against the business** or against another party in the event of total or partial non-performance;
c) terms which provide for the consumer's **total acceptance of terms that the consumer could not have learned** before entering into the contract.

In this regard, under Italian law term *a)* would be void in *any* contract (i.e. not solely in the case of consumer contracts), as exemptions or limitations of liability with regard to personal injury are contrary to public order (Art. 1229, paragraph 2, CC) and – hence – void.

As far as term *b)* is concerned, its prescriptive content overlaps – in part – with the prohibition of exemptions and limitations of liability in the case the non-fulfilment of an obligation is due to gross negligence or intent by the debtor (Art. 1229, paragraph 1, CC).

With reference to term *c)*, suffice it to point out its unusual nature, i.e. the commencement - by the consumer - of negotiations on terms that, at the time of entering into the contract, he did not know.

Besides terms which are *always* void (cf. Art. 36, paragraph 2, Consumer Code: so-called **"black list"**), the Consumer Code contains a list of terms presumed unfair unless proven otherwise (the so-called **"grey list"**: cf. Art. 33, paragraph 2, lett. a - lett. v, Consumer Code)[9]. In order for those terms not to be unfair, the business will have to discharge the burden of proof that, in the case at issue, they are *not* unfair (for instance, because the business granted a particularly favourable treatment to the consumer with reference to other parts of the contract).

6. The *effective* protection of consumers

The regulation on unfair terms put in place by EC-Directive 5 April 1993, n. 93 aims at protecting consumers.

The European legislator is concerned that the statutory provisions of EC-Directive 5 April 1993, n. 93 are *effectively* applied, i.e. that its application will not be circumvented.

In such perspective, Art. 36, paragraph 5, Consumer Code provides that "*Any term providing for the application to the contract of provisions of a non-EU-member country is void whenever it results in the non-application of the provisions of this Title, provided the contract has a closer connection with the territory of any EU-member country*".

Clearly, Art. 36, paragraph 5, Consumer Code aims at preventing businesses from inserting a term in contracts entered into with consumers according to which the law of a non-EU member state is applicable, where the laws of the state chosen were not to protect the consumer from unfair terms. Such a provision is void wherever "*the contract has a closer connection with the territory of any EU-member country*".

A similar purpose is inherent in Art. 37 Consumer Code, according to which associations representing consumers or businesses[10] are entitled to sue a business that uses unfair *standard trade terms* and may petition the court to enjoin such use with reference to terms determined to be unfair pursuant to this Title.

Needless to say, the right to institute proceedings on the part of an association of consumers or businesses is justified to the extent that the unfairness of the terms in question concerns – at least prospectively – a plurality of consumers. For this reason, the right to institute proceedings involves *standard trade terms* (which, by definition, refer to contracts entered into by a plurality of consumers) and not a contract drafted in advance by a business for *individual* use.

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[9] As - by way of example – in the case of terms which impose on the consumer the payment of an amount of money in the case of the non-fulfilment or late fulfilment of his obligations. The same applies with reference to a penalty clause or other similar type of term providing for the payment – by the consumer - of a disproportionately high compensation (Art. 33, paragraph 2, lett. f, Consumer Code). Similarly, terms granting to the business the right to unilaterally amend the terms, or the product or service to be provided under the contract without serious grounds for doing so (Art. 33, paragraph 2, lett. m, Consumer Code) are presumed to be unfair.

[10] The granting of the standing to sue to association of businesses against businesses using unfair standard trade terms apparently is paradoxical (why should an association ever act against its own members?). It can be readily explained by the fact that the use of unfair terms by an individual business constitutes an act of unfair competition towards the other businesses not using unfair terms (to be convinced of this, one need only consider that every unfair term transfers the *cost* of the occurrence of a determined event to the consumer).

Art. 37 Consumer Code is significant in two ways:

- because it extends the standing to sue to associations of consumers or businesses. This is in the belief that even where an individual consumer or business does not have the economic interest to file an action to assert the unfairness of a term, several consumers – that is, an association of consumers or businesses – may have an interest;
- as it speeds up the time of *effective* implementation of the consumer protection with reference to unfair terms in consumer contracts by permitting associations of consumers or businesses to petition the court to enjoin the use of standard trade terms determined to be unfair (in other court judgments). In essence, where a certain term used by a business in its standard trade terms in consumer contracts has been considered "unfair" (in a different proceedings), an association of consumers or of businesses can seek a court order preventing other businesses from using the same unfair term (without having to wait for the court judgment).

In this way, the effective implementation of the protection envisaged by of EC-Directive 5 April 1993, n. 93 on unfair terms in consumer contracts is promoted.

7. Standard trade terms and unfair terms

Arts. 1341 ff. CC on standard trade terms and EC-Directive 5 April 1993, n. 93 on unfair terms in consumer contracts have a different background and pursue different – although to some extent overlapping - aims.

For this reason, a certain term contained the standard trade terms, may be:

a) neither a "one sided" term pursuant to Art. 1341, paragraph 2, CC, nor an unfair term pursuant to Arts. 33 ff. Consumer Code;
b) a "one-sided" term pursuant to Art. 1341, paragraph 2, CC but *not* an unfair term pursuant to Arts. 33 ff. Consumer Code;
c) an unfair term pursuant to Arts. 33 ff. Consumer Code but *not* a "one-sided" term pursuant to Art. 1341, paragraph 2, CC;
d) both a "one-sided" term pursuant to Art. 1341, paragraph 2, CC, *and* an unfair term pursuant to Arts. 33 ff. Consumer Code.

An example of case *d)* is a term providing for limited liability exclusively in favour of the party drafting the contract in advance: if it were to be inserted in standard trade terms, such term is ineffective, unless it were to have been *specifically approved in writing*. The same applies where such term were to be inserted in a consumer contract drafted in advance – by a business - for individual use (in this case, Arts. 1341 ff. CC - by definition - do not apply): the term would be void pursuant to Art. 33 Consumer Code.

As far as the scope of application of Arts. 1341 ff. CC on standard trade terms and of Arts. 33 ff. Consumer Code on unfair terms in consumer contracts is concerned:

a.) in terms of the *subjective* scope of application, Arts. 33 ff. Consumer Code are applied solely to contracts between businesses and consumers, whilst - as far as Arts. 1341 ff. CC are concerned - there is no *subjective* restriction on their scope of application;
b.) in terms of the *objective* scope of application, Arts. 1341 ff. CC apply only to standard trade terms, while the regulation on unfair terms in consumer contracts applies *also* to contracts drafted in advance by the business for *individual use*. Thus the *objective* scope of application of Arts. 33 ff. Consumer Code is broader

than that of Arts. 1341 ff. CC (as - obviously - also standard trade terms are contracts drafted in advance, whilst contracts drafted in advance for *individual use* are – by definition - not standard trade terms).

By far the most important difference between the regulation on standard trade terms (Arts. 1341 ff. CC) and Arts. 33 ff. Consumer Code on unfair terms in consumer contracts is the different conceptual approach:

i. Art. 1341, paragraph 2, CC, and Art. 1342 CC provide *solely* for a *formal review* of the standard trade terms: so long as the "one sided" standard trade terms have been specifically approved in writing, their "unfairness" to the detriment of the adherent party does not have any direct importance;

ii. on the contrary, Art. 33 ff. Consumer Code provide for a *substantve review*, i.e. for a court scrutiny of the content of any term drafted in advance by a business in consumer contracts: any term which "*causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer*" is – as a matter of principle - void.