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GENERAL CLAUSES AND THE COMPETING ETHICS OF EUROPEAN CONSUMER LAW IN THE UK

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ABSTRACT. *EU 'general clauses' on fairness offer significant potential for improved consumer protection. However, the Supreme Court has interpreted the unfair terms general clause and a related provision by reference to an underlying ethic of self interest and self reliance'; and the same approach is possible under the unfair practices general clauses. This is a significant threat to consumer protection. A more protective ethic may be intended at EU level; and a particular line of argument may be needed to persuade the Supreme Court of this.*

KEYWORDS: *Consumer law; EU general clauses; fairness ethics; Supreme Court*

I. INTRODUCTION

This article deals with "general clauses" and associated provisions in EU consumer law.[1] "General clause" is used here to refer to a rule that is "general" in two senses. First, its scope of application is relatively general, i.e. it applies to a broad range of legal/factual circumstances. Second, it is "general" in that the criteria to be applied are very open textured (i.e. rather vague and/or numerous); making it difficult to decide how they should be interpreted. For instance, key to this article is the general clause from the Unfair Terms in Consumer Contracts Directive (UTCCD). This covers most terms in virtually any type of consumer contract; provides that such terms should not be "unfair"; and explains this by reference to other broad, open textured concepts, i.e. "significant imbalance" and violation of "good faith".[2] A purely domestic example is the open textured "reasonableness" test under the

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[1] G. Howells, "General Clauses in European Consumer Law", in H. Micklitz (ed.), *Verbraucherrecht in Deutschland* (Baden-Baden 2005); S. Grundman and D. Mazeaud, *General Clauses and Standards in European Contract Law* (Leiden 2005) and, in particular, therein, S. Whittaker, "Theory and Practice of the "General Clause" in English Law: General Norms and the Structuring of Judicial Discretion".

[2] 93/13/EEC; implemented by the Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999, S.I. 99/2083. The general clause itself is contained in art. 3 (1)/reg. 5 (1); see below, section II.A on terms/contracts covered.

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Unfair Contract Terms Act (UCTA) 1977; which is applicable to many types of exemption clause in both consumer and commercial contracts.[3]

It is argued here that general clauses dealing with "fairness"[4] are a hugely significant element of the EU "acquis" that has "Europeanised" UK consumer law in recent years; and that they offer significant potential for improved protection compared to pre-existing domestic law.[5] However, the open textured nature of these general clauses (and some associated provisions upon which they depend)[6] means that they can often only be given real practical meaning and direction by reference to some background ethic:[7] some vision of the ideal market and civil order.[8] One possibility is an ethic based on values of trader *self interest* and consumer *self reliance*; while the other option is an ethic that aims to *protect* consumers against the weaknesses that they suffer relative to traders.

Trader self interest and consumer self reliance are two sides of the same coin. Fostering trader self interest is about affording traders maximum freedom to achieve their self interested goals. So there should be minimal legal interference with the substantive distribution of rights and obligations that traders provide for in their standard terms; and similarly limited interference with the substantive outcomes that result from trade practices generally. This means, first of all, that general clauses should be understood to set relatively low, undemanding standards of substantive fairness. Not only does this foster trader self interest; it also means that consumers must take self reliant action to absorb the losses caused by the low standards of substantive fairness.

Apart from actually setting low standards of substantive fairness, the ethic of self interest/reliance also takes the position that, even where there is substantive unfairness, this is routinely acceptable; so long as there has been formal transparency. Again trader self interest is fostered-traders get the substantive outcomes they want (at the relatively small price of presenting these transparently). The corollary is that the transparency is considered to enable consumers to take self

[3] See s. 11 for the test itself; II.A below on coverage.

[4] i.e. the UTCCD unfair terms clause; and the various general clauses from the Unfair Commercial Practices Directive (2005/29/EC) (implemented by the Consumer Protection from Unfair Trading Regulations 2008, S.I. 08/1277).

[5] On the potential for protection levels to be *lowered* (in particular due to the "full harmonisation" clause in art 4 of the Unfair Commercial Practices Directive) see G. Howells, "The Rise of European Consumer Law" (2006) Sydney Law Review 63 at 79–86.

[6] The key provision is that excluding "price" terms from review under the general clause on unfair terms (UTCCD art 4 (2)/UTCCR reg. 6 (2) (b)).

[7] This arguably reflects the Weberian idea of logic or rationality involving "substantive" value judgments (in contrast to purely "formal" rationality which denies such value judgments) (M. Weber, *The Theory of Social and Economic Organization*, translated by T. Parsons (London 1947), 184–186; also R. Brownsword, *Contract Law: themes for the twenty-first century*, 2nd ed., (Oxford, 2006), 288–293).

[8] On the ideologies of consumer law see G. Howells and T. Wilhelmsson, "EC and U.S. Approaches to Consumer Protection-Should the Gap be Bridged?" (1997) Yearbook of European Law 207.

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reliant action to protect their interests. So, before agreeing to contract terms or taking some decision based on a trade practice, the expectation is that consumers take advantage of the transparency: by informing themselves of the risks and taking appropriate action to protect their interests, e.g. going elsewhere or insuring against the risks.

The alternative ethic is one of protection. Here the priority is to protect consumers from the financial and social impact of harsh terms and practices; and there is a strong belief that transparency does little, in practice, to achieve this. So general clauses are understood to set high standards of substantive fairness and, if these standards are not met, transparency is not routinely treated as a "defence".

The ethic of self interest/reliance that I have described is obviously closest to traditional freedom of contract thinking; although it is a bit more protective than some versions of freedom of contract. This is because the ethic depicted here does at least insist on traders acting transparently.[9] The protective ethic is probably closest to the sociological concept of "need rationality".[10] By this I mean that it recognises the vulnerabilities and weaknesses of consumers: vulnerability to the impact of harsh terms and practices and limited ability to make use of transparency to self protect against such terms and practices.

In terms of economic analysis, the protective ethic arguably gleans most support from the work of behavioural economics. As we have seen, the protective ethic does not trust that transparency will necessarily help consumers to protect their interests. This is broadly in congruence with the behavioural economics message that transparency is of limited use in helping consumers to make rational choices.[11]

It is difficult to say for sure that particular decision makers are influenced by one or other of the above ethics; especially given the variety of factors that may influence decision making. Nevertheless, the claim here is that there is indeed significant evidence to suggest that the Supreme Court has interpreted the unfair terms general clause and

[9] An entirely libertarian version of freedom of contract would arguably keep traders free of even the obligation to be transparent (more emphasis on self interest); expecting consumers to take the self reliant initiative to overcome any lack of transparency (more emphasis on self reliance) (C. Willett, *Fairness in Consumer Contracts* (Aldershot 2007), 26–7).

[10] T. Wilhelmsson, *Critical Studies in Private Law* (Leiden 1992).

[11] G. Howells, "The Potential and Limits of Consumer Empowerment by Information" (2005) 32 J. Law Soc. 349; I. Ramsay, *Consumer Law and Policy* (Oxford 2007), 71–85; and O. Ben-Shahar, "The Myth of the "Opportunity to Read" in Contract Law" (2009)5 E.R.C.L. 1. There may be a temptation to link self interest/reliance to "Pareto" efficiency, which focuses on whether *individuals* are better or worse off after an exchange; and to connect the protective ethic to the "Kaldor-Hicks" criterion, which focuses on whether *society* is better off. But, both of these concepts are insufficiently determinate to provide a basis for either of the competing ethics. Pareto efficiency is grounded in notions of individual autonomy; yet there is no accepted notion of autonomy (e.g. the text above highlights how a protective ethic is partly based on questioning whether transparency really allows for genuinely rational-autonomous-choices). Equally, in relation to Kaldor Hicks, people are very likely to disagree about whether protection or the pursuit of self interest/reliance is good for society. See generally M.J. Trebilcock, *The Limits of Freedom of Contract* (Boston 1993), 7, 17 and 19–20.

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a related provision[12] by reference to an underlying ethic of self interest and self reliance. The effect has been to limit the protective potential of the general clause; notably, in cases where it might provide protection that was not available under pre-existing domestic law. It is argued that this could be a huge threat to consumer protection, especially if the Supreme Court was to apply the ethic of self interest/reliance routinely across the vast parts of UK consumer law covered by the various general clauses. However, it is suggested that there is some scope to argue that a more protective ethic may be intended at EU level; and the article concludes by considering the arguments that might persuade the Supreme Court either to agree with this or at least to refer the matter to the ECJ.[13]

II. The Importance and Protective Potential of General Clauses

Europeanisation of UK consumer law has brought a great increase in the use of general clauses on "fairness": specifically, the tests of unfairness applicable to contract terms under the UTCCD[14] and to commercial practices under the Unfair Commercial Practices Directive (UCPD).[15] These general clauses[16] are an enormously important part of the EU consumer "acquis" that has "Europeanised" UK consumer law over the past 25 years.[17] There are many *other* important elements of the acquis. However, these other elements deal with rather *specific* rights or obligations arising at *particular points* in *particular types of relationship*: e.g. that specific information must be supplied to consumers in distance selling contracts and that these contracts can be cancelled for a period after conclusion;[18] or that that certain remedies are available for non conforming goods.[19]

[12] I.e. the provision excluding "price" from review under the general clause-see note 6 above.
[13] On different ethics *across the EU* see G. Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 M.L.R. 11.
[14] See note 2 above; C. Willett, *Fairness in Consumer Contracts*, note 9 above; and T. Wilhelmsson and C. Willett, "Unfair Terms and Standard Contracts" in G. Howells, I. Ramsay and T. Wilhelmsson, *Handbook of Research on International Consumer Law* (Cheltenham 2010), 158–191.
[15] See note 4 above; G. Howells, H. Micklitz and T. Wilhelmsson, *European Fair Trading Law* (Ashgate 2006); OFT/BERR, *Guidance on the Consumer Protection from Unfair Trading Regulations* (OFT/BERR, 2008); and C. Willett, "Fairness and Consumer Decision Making" (2010) 33 J.C.P. 247–273.
[16] On their inter-relationship see S. Orlando, "The Use of Unfair Contractual Terms as an Unfair Commercial Practice" (2011) 7 E.R.C.L. 25.
[17] On Europeanisation see C. Twigg-Flesner, *The Europeanisation of Contract Law* (London 2008); and, C. Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law* (Cambridge 2010).
[18] 97/7/EC, arts. 4, 5 & 6 and Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, regs. 7, 8 and 10.
[19] 99/44/EC, art. 3 and Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg. 5.

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The general clauses are of much broader application; catching an enormous range of trader-consumer issues; and, in important respects, offering greater potential for protection than pre-existing law.[20]

A. The General Clause on Terms[21]

First of all, we see the breadth of application in the fact that the EU general clause on unfair terms applies to all trade sectors: every conceivable type of (trader-consumer) contract for the supply of goods; the sale, lease and mortgaging of land; and (the huge myriad of) services (including insurance, education, utilities and the broad range of other financial services).[22] The coverage of insurance and land related contracts extended the scope for protection from the domestic (UCTA) regime.[23]

Further, within this vast range of sectors and contracts, the EU general clause applies to most types of term.[24] So, for a start, it covers the vast array of ways in which traders might exclude or restrict their liabilities: e.g. in relation to non delivery of goods or services; poor quality services; misrepresentation. It also went beyond the domestic UCTA regime in covering not only terms exempting trader liabilities;[25] but also the huge number of ways in which potentially unfair obligations and liabilities might be imposed on consumers: e.g. high default charges; price increase, fuel surcharge etc clauses; "opportunistic" renewal of long term contracts by setting unreasonably early deadlines by which consumers must indicate that they do not wish to renew; or unfair enforcement methods, e.g. allowing entry to the consumer's home, taking possessions, property etc.[26]

The huge importance of the general clause on unfair terms is further emphasised by the fact that (unlike the domestic UCTA regime) its scope of application is not restricted to private law claims. Terms that

[20] Cf. H. Micklitz, "Reforming European Unfair Terms Legislation in Consumer Contracts" (2010) 6 E.R.C.L. 347.

[21] This operates alongside the pre-existing domestic general clause on exemption clauses (Unfair Contract Terms Act-UCTA- 1977, s. 11); as well as the various common law rules on incorporation, construction etc; generally C. Willett, *Fairness in Consumer Contracts*, note 9 above.

[22] UTCCD, art. 1 (1) (UTCCR, reg. 4 (1)) refers simply to "contracts concluded between a seller or supplier and a consumer"; only specific types of contract having nothing to do with consumer law are excluded (e.g. employment, family law-recital 10 to the Preamble).

[23] Excluded by UCTA Schedule 1, 1 (a) & (b).

[24] UTCCD, art. 1(1) refers simply to "terms", all being covered except those positively excluded: terms reflecting mandatory statutory provisions (art. 1 (2)), individually negotiated terms (art. 3 (1)) and main subject matter and price terms (art. 4 (2)). [UTCCR, regs. 4 (1), 4 (2) 5 (1) and 6 (2) respectively].

[25] UCTA only covers various types of exemption clause: ss. 2–8.

[26] General incorporation and construction rules aside, common law and equitable controls on obligation or liability imposing terms are mainly restricted to specific types of terms, e.g. penalties, deposits and forfeiture of property. See H. Collins, "Fairness in Agreed Remedies" in C. Willett (ed.), *Aspects of Fairness in Contract* (London 1996), 97; and L. Smith, "Relief Against Forfeiture: a Restatement" [2001] C.L.J. 178.

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are unfair under the EU general clause are also subject to *preventive* control, in particular, by the Office of Fair Trading (OFT), local authority trading standards and sector specific regulators.[27]

B. The General Clause on Practices

Vast swathes of the trader-consumer relationship are also now covered by the EU general clauses on unfair practices from the UCPD. There are general clauses on "misleading practices" and "aggressive practices" (the main operative provisions in practice); as well as an overriding general clause, catching practices that are "contrary to the requirements of professional diligence".[28] It seems that this is intended to encapsulate, but possibly sometimes extend beyond, what would be caught by the general clauses on misleading practices and on aggressive practices.[29]

The implementing regime provides for both preventive and criminal law sanctions for violation of the relevant general clauses.[30] In so doing, it replaces central pillars of the home grown consumer protection regime, i.e. the regimes on false trade descriptions and misleading pricing;[31] while complementing other more dedicated home grown rules, e.g. those on harassment of debtors[32] and the regulatory rules on financial services.[33] It has also replaced the previous EU regime on misleading advertising.[34]

Although the UCPD general clauses do not apply in private law as such; private law is likely to be affected by them.[35] First of all, compliance with the standards set by the general clauses inevitably affects contracting *practice. S*econd, the courts may develop contract law incrementally in ways that reflect the general clauses. Finally, the Law Commissions have produced proposals for private law remedies for breach of the general clauses.[36]

[27] Based on UTCCD art. 7, regs. 10–15 UTCCR grant powers to seek assurances and, ultimately, court injunctions, to prevent the continued use of unfair terms. Art. 6/reg. 8 (1) deal with private law, rendering unfair terms not binding on consumers.

[28] UCPD, arts. 5–9/CPUTR, regs. 3–7.

[29] See Micklitz, in Howells et al, note 15 above, at p. 121. There is also a list of 31 practices that are in all circumstances considered to be unfair, i.e. without application of the general clauses (UCPD, Annex 1/CPUTR, Schedule 1).

[30] CPUTR, reg. 26 (preventive-"enforcement orders") and regs. 8–18 (criminal).

[31] Trade Descriptions Act 1968 and Consumer Protection Act 1987, Part III (relevant parts of both repealed by CPUTR, Schedule 4).

[32] Administration of Justice Act 1970, s. 40

[33] I.e. Financial Services Authority regime; in particular see the "Treating Customers Fairly" initiative: www.fsa.gov.uk/pages/doing/regulated/tcf/

[34] 84/450/EEC, repealed by the UCPD; and the corresponding UK Control of Misleading Advertisements Regulations 1988, SI 1988/915, repealed by the CPUTR.

[35] UCPD art. 3 (4) and S. Whittaker, "The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws", in S. Weatherill and U. Bernitz, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Oxford 2007), 139.

[36] Law Commission, *A Private Right of Redress for Commercial Practices* (2008); and *Consumer Redress for Misleading and Aggressive Practices*, Law Com. 332 (London 2012).

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In terms of the activities covered, the range of application of the general clauses is enormous. They cover practices[37] "before, during or after" any "commercial transaction".[38] So, in relation to almost all conceivable goods or services, there is a "cradle to grave" regime covering practices such as advertising, persuasion and negotiation at the pre-contractual stage; post contractual alterations or variations; performance, delivery etc by the trader; performance, payment etc by the consumer; complaint handling; after sales service; and enforcement by either party.

There are numerous ways in which there is scope for greater protection than under pre-existing law.[39] For a start, the general clause on misleading practices is actually sub-divided into a provision on "misleading actions" and a provision on "misleading omissions".[40] It is well known that there has never been such a general rule against omissions in domestic law. Then there is the "undue influence" limb of the *aggressive practices* general clause. This catches exploitation of a "position of power" through "pressure", which "significantly impairs" (or is likely to so impair) the average consumer's "freedom of choice or conduct"; specifically by significantly limiting the ability of this average consumer to take an "informed decision".[41] Previously, criminal and preventive rules focussed mainly on the specific problem of harassment of debtors.[42] The undue influence element of the aggressive practices general clause seems to have the potential to cover much more. For example, greater trader knowledge/skill could be said to create a "power relationship" and the potential for "pressure" at the sales stage. In this context, some high pressure selling might well amount to undue influence; where, for instance, consumers are put on the spot to make quick decisions (the decision may, then, not be "informed", as it was not thought through). *Post* contractually, the power relationship and pressure might come, for instance, from vulnerability when struggling with commitments; allowing traders to pressure consumers into new commitments, refinancing etc.[43] Clearly, these examples go well beyond what is covered by rules on harassment of debtors. In addition, they extend beyond the traditional scope of domestic private law undue influence. Inter alia, this requires a special relationship of trust and confidence

[37] Any "act, omission, course of conduct or representation" (UCPD art. 2 (d)/CPUTR, reg. 2 (1)).
[38] UCPD, art. 3 (1)/ CPUTR, reg. 2 (1).
[39] For a full account see C. Willett, "Fairness and Consumer Decision Making", note 15 above.
[40] UCPD, arts. 6 & 7/CPUTR, regs. 5 & 6.
[41] And thereby causes him to take or be likely to take a transactional decision he would not take otherwise: UCPD, arts. 8 and 2 (j)/CPUTR, regs. 7 (1) & (3) (b).
[42] Administration of justice Act 1970, s. 40.
[43] C. Willett, note 15 above.

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(rather than just a "relationship of power"); and has, in practice in modern times, been restricted to the "bank guarantee" scenario.[44]

III. Regulators, Judges and Competing Ethics

This section considers two cases on the unfair terms general clause that have reached the (now) Supreme Court. The terms in question are not covered by the pre-existing domestic UCTA regime;[45] so the cases provide an important indication of the attitude of the Supreme Court to the extended potential for protection offered by the European general clauses. What we find is that the Supreme Court has not taken advantage of this potential: that there is evidence to suggest that it interpreted the open textured concepts by reference to an ethic of self interest and self reliance. This is in contrast to the OFT and Court of Appeal who seem to have interpreted the same concepts by reference to a more protective ethic.

A. Measuring Unfairness in Substance

1. The test

Under the general clause, a term is 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"[46]

To be unfair, a term must cause a significant imbalance in rights and obligations to the detriment of the consumer; and it must violate the requirement of good faith.[47] However one interprets the other ("good faith") element of the test;[48] it is certainly clear that "significant imbalance" etc goes to the issue of unfairness *in substance*.[49]

The point is that "significant imbalance" is an open textured concept. What is an "imbalance" and when is it "significant"? How exactly are we to measure the impact of a term (of a certain distribution of rights and obligations) on the interests of the parties? In *DGFT v First National Bank* (*First National Bank*), the then House of Lords said that there is a significant imbalance where the term "tilts" the rights and obligations "significantly" in favour of the trader; whether by granting the trader a "beneficial option, discretion or power; or by the imposing

[44] *RBOS v Etridge (No. 2)* [2002] 2 A.C. 773 for a summary of the cases and a re-statement of the rules.
[45] The terms-one concerning the payment of contractual interest on a judgement debt, the other concerning bank charges-are not exemption clauses.
[46] UTCCD, art. 3 (1)/ UTCCR, reg. 5 (1).
[47] *DGFT v First National Bank* [2001] 3 W.L.R. 1297, Lord Bingham at 1307–8.
[48] See below on this.
[49] *DGFT v First National Bank* [2001] 3 W.L.R. 1297, Lord Bingham at 1307–8.

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on the consumer of a disadvantageous burden, risk or duty".[50] But this does little more than spell out the categories of term that we already know are *covered* by the test. It takes us no further. When is the "tilting" carried out by any such term "significant"? In this context, how are we to measure the actual impact of the term on the parties' respective interests? It is submitted that this will inevitably be done either by reference to a background ethic of protection; or by reference to an ethic more wired to values of self interest/reliance.

2. Possible ethics

Interpretation of provisions by reference to an *ethic of protection* means interpreting them such as to protect consumers against the vulnerabilities that they suffer relative to traders.[51] In measuring fairness in substance, this means focussing on the *impact* of the term or practice on consumers. If this is serious, there is a strong presumption of unfairness; which is only overturned if the needs of traders are demonstrated to be greater than those of consumers. So, one would ask: to what extent does the trader really need to use the term or practice in question? Has it been rigorously demonstrated that there will be a serious impact on traders if they are not able to use the term or practice? Overall: taking into account the relative socio-economic needs and resources of the parties, does not being able to use the term or practice impact the trader as much as using it impacts the consumer?

In making this assessment, it must be remembered that traders may be in a stronger position to absorb financial losses[52] than private consumers. Also, the impact on traders (at least larger businesses) can usually be conceived of in purely financial terms: an impact on the profitability of the firm. In the case of consumers a financial loss[53] might have a real impact on the budget of the average consumer or family; but also have "knock-on" effects on family life, social inclusion, dignity etc. Another possibility is that there is an impact on what might be regarded as important "social citizenship" rights: e.g. involving withdrawal of services of general interest,[54] or restrictions on access to justice.[55]

[50] Lord Bingham, p. 1307.
[51] This can be linked to "need-rationality" (above, note 10); and to agendas such as welfarism, social justice and distributive justice: see R. Brownsword, G. Howells and T. Wilhelmsson, *Welfarism in Contract Law* (Aldershot 1994).
[52] E.g. through insurance, spreading losses across different divisions of the business, tax deductions etc.
[53] E.g. caused by a price escalation clause or a high charge for some form of consumer default.
[54] H. Micklitz, "Universal Services: nucleus for a Social European Private Law", in M. Cremona, *Market Integration and Public Services in the European Union* (Oxford, 2011), ch. 3.
[55] E.g. terms allowing very restrictive periods within which to make claims and terms or practices requiring expensive or other formalities for a claim to be made.

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In contrast to a protective ethic, there is an ethic that emphasises trader freedom to maximise self interest; and expects that consumers will exercise self reliance. So, in measuring fairness in substance, a key priority is the right of traders to pursue *self interest* by maximising what is received from consumers; and minimising what must done for, or paid out to, consumers. The priority is the right of traders to do these things; even in those cases where traders could get by without doing them better than consumers will get by if these things are done to them. So there should be minimal legal interference in relation to the substance of the terms. In short, the law should not set a demanding (a high) standard of substantive fairness. The corollary is that consumers are left to their *self reliant* devices to absorb any losses.

3. Regulatory and judicial approaches

In *First National Bank*, The OFT and Court of Appeal both seem to have interpreted the "significant imbalance" concept by reference to a broadly *protective* ethic. Both took the view that a term allowing for contractual interest to continue to be applied to a judgment debt[56] *did* cause a significant imbalance in rights and obligations, i.e. it was unfair in substance. This was based, largely, on the view that the impact on consumers would be unacceptably detrimental (i.e. that their debt would be added to significantly by the interest).[57] In other words, "significant imbalance" was understood strongly by reference to the economic impact on consumers: this was how to measure fairness in substance.

In contrast, the House of Lords did not believe the term caused "significant imbalance" to the detriment of consumers.[58] In coming to this conclusion, the House of Lords did acknowledge the potential financial hardship for consumers.[59] However, for the House of Lords, because courts are unable to award statutory interest in such cases,[60] it was, in effect, *necessary* for the banks to charge interest at the contractual rate.[61] Doing so did not cause a significant imbalance in rights and obligations to the detriment of consumers. The analysis was that banks only lent on the basis that they would always recover interest on the sum in question until it was paid off. If banks were not able to ensure this (by charging interest at the contractual rate after judgment),

[56] Such a term is used by banks because there is a statutory ban on *courts* adding interest to judgement debts (see County Courts (Interests on Judgments) Order 1991).
[57] [2000] Q.B. 672.
[58] *DGFT v First National Bank* [2001] 3 W.L.R. 1297, Lord Bingham at 1308, Lord Steyn at 1313–4, Lord Hope at 1316 and Lord Millett at 1319.
[59] Ibid.
[60] Note 56 above.
[61] Lord Steyn at 1314.

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according to the House of Lords, there would actually be an imbalance in favour of consumers. Indeed, banks would stop lending money.[62]

It is arguable, then, that "significant imbalance" was understood by reference to an essentially *self interested* ethic. Key was the right of traders to pursue self interest; the right to maximise what is received from consumers- to recover the full interest in all cases. Emphasising the focus on bank self interest is the fact that there was no analysis of *relative* need;[63] no asking whether the impact on the Bank of not using the term would be greater or less than the impact on consumers of the term being used. So, there does not appear to have been any consideration as to the amount that Banks would lose if they could not charge post judgment interest to the minority of customers that reach this stage of default; i.e. whether these losses would actually be relatively small and perhaps could be absorbed by the Bank. Neither was there any consideration as to how any losses suffered by the Bank might be weighed against any losses that would be suffered by the vulnerable (already seriously indebted) customers; i.e. whether the use of the term would hit such consumers harder than not using the term would hit banks.

The obvious corollary of this focus on bank self interest, is an expectation of consumer *self reliance* (those affected by the build up of interest are expected to take steps to absorb the "losses" caused by the build up of contractual interest, e.g. by reducing other outgoings).[64]

Finally, to reiterate an important point, this apparent prioritisation of self interest/reliance took place in relation to a term that was not covered by the pre-existing UCTA regime. The House of Lords approach could, therefore, be read as an attempt to restrict the greater potential for protection brought by the European general clause.

B. Substantive and Procedural Fairness

1. Possible ethics

Under an ethic of *self interest/reliance*, even if there is found to be substantive unfairness; this is generally acceptable, so long as there is procedural fairness, i.e. the terms or practices have been presented in a formally transparent manner. This is about trader self interest in that traders get the substantive outcomes they want; so long as they fulfil the formal procedural requirement of transparent documentation.

[62] Lord Bingham at 1308–9, Lord Steyn at 1313–4, Lord Hope at 1316 and Lord Millett at 1319.
[63] Measuring *relative* need is fundamental to a protective ethic (III. A. 2. above).
[64] The expectation of this form of self reliance is being inferred here; but the House of Lords also explicitly made mention of a letter the banks sent to consumers at the time of the judgement referring to the accrual of interest on top of the judgement debt. This was viewed as helping to justify the term (in that consumers might now manage their affairs accordingly, e.g. by paying off the amount quickly): Lord Bingham, [2001] 3 W.L.R. at 1310.

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The corollary of such an approach is an expectation that consumers can (because of the transparency) act in a *self reliant* way to protect their interests. So, they are expected to read and understand the terms; and then to take further self reliant responsibility to protect their interests. This might be by searching out traders that offer fairer terms; negotiating a change; insuring against trader non performance;[65] or by avoiding action or inaction that triggers detrimental consequences under the terms.

By contrast, under a *protective* ethic, terms that are sufficiently substantively unfair are *not* readily legitimised by transparency. The point is that the fundamental priority of a protective ethic is to protect consumers against unduly detrimental substantive consequences. With this in mind, there is a strong focus on the limitations of transparency in helping consumers to protect themselves against such harsh substantive consequences.

The protective ethic takes seriously the evidence of behavioural science as to the perennial information difficulties faced by consumers-the host of factors that tend to prevent consumers taking rational decisions.[66] Consumers will usually not read standardised information even if it is transparent;[67] and even if they do read it, they will often find it very difficult to understand it or to assess the risks.[68] Consumers are most likely to choose between suppliers on the basis of what they perceive to be the really core aspects of the transaction-the basic nature of the goods or services and the basic price they can expect to pay in the normal performance of the contract; but, crucially, *not* on the basis of the ancillary exclusions, charges etc usually dealt with in the standard terms.[69] So, if consumers are unlikely even to engage with the standard terms, it is considered unrealistic to expect them to be taking the sort of self reliant (self protecting) action described above. Indeed, even those consumers who read and understand the standard terms will find it difficult to exercise self reliance in the sense of going elsewhere. This is because, as suggested, *most* consumers are choosing on the basis of the core issues; and this is where there is likely to be the

[65] E.g., typically, to protect against terms excluding the trader's liability for breach of contract.

[66] See G. Howells (above note 11), I Ramsay (above note 11) and O. Ben-Shahar (above note 11); and See C. Willett, "The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches" (2011) 60 I.C.L.Q. 355–385.

[67] Due to such factors as lack of time, prior psychological commitment to the purchase, "over optimism" (C. Willett, *Fairness in Consumer Contracts*, above note 9, 22–26, 59–62).

[68] See M.J. Trebilcock, "An Economic approach to Unconscionability", in B. Reiter and J. Swann (eds.), *Studies in Contract law* (Butterworths 1980), 416–417. This is due to the large number of terms, the complexity of the issues, lack of expertise etc (C. Willett,above note 9).

[69] C. Willett, above, note 9; and on notions of "contractual" and "competitive" transparency and their recognition by the ECJ see H. Micklitz, "Unfair Terms in Consumer Contracts", in H. Micklitz, N. Reich and P. Rott, *Understanding EU Consumer Law* (Cambridge 2009), 135–138.

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competitive discipline that produces choices between the substantive offerings of different traders (not on the ancillary issues in the standard terms).[70] Further, self reliance in the form of negotiating for changes to terms is wholly unrealistic; given the limited importance of most individual consumers to traders.

So, under a protective ethic, transparency would not routinely be considered to legitimise substantively unfair ancillary terms (i.e. terms that are not central to how consumers perceive the transaction).[71] Self reliance is taken to be unrealistic in such cases. Indeed, the problem is all the more significant because the lack of competitive discipline is likely to increase the level of substantive unfairness.

We now turn to particular open textured provisions that could be understood either by reference to a protective ethic that focuses on protection from substantive unfairness; or an ethic of self interest/reliance that allows such substantive unfairness to be legitimised by transparency.

2. "Good Faith"

We saw above that, in order for a term to be unfair, there must be a significant imbalance in rights and obligations *and* there must be a violation of the "requirement of good faith". "Good faith" is another open textured concept. In *First National Bank*, Lord Steyn (in the House of Lords) said that: "Any purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected".[72]

This does not state explicitly, but does strongly suggest, that procedural fairness (including transparency) cannot routinely legitimise a term that is sufficiently unfair in substance. However, there was no positive support from the other three judges for this. So, there was no clear choice of ethic by the House of Lords in the context of the good faith concept.[73] More recently, however, we did receive a much clearer indication as to the preferred ethic of the (now) Supreme Court. This arose in the context of the provision excluding the "price" from review under the general clause.

[70] V. Goldberg, "Institutional Change and the Quasi Invisible Hand" (1974) 17 J. Law Econ. 461 at 483; C. Willett, above note 9, at pp. 24–25.

[71] A protective ethic could, of course, also go further and protect against transparent, but substantively unfair, terms that *are* core to the transaction.

[72] [2001] 3 W.L.R. 1297 at 1313.

[73] For a full discussion see C. Willett, "The Functions of Transparency", above, note 66. On the facts, the actual term was viewed as sufficiently transparent to satisfy good faith, but we do not know whether this would have been viewed as enough to legitimise a substantively unfair term; because, as we saw above, the House of Lords did not view the term as unfair in substance.

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3. The 'Price Exclusion' Issue

Insofar as a term is plain and intelligible, there is to be no assessment of fairness which relates to: " … the adequacy of the price or remuneration as against the services or goods supplied in exchange."[74]

In short, if there is plain language, the law does not review the substantive fairness of the "price" under the general clause on unfairness. This is obviously intended to preserve a degree of freedom of contract; or put in the language of this article, *trader self interest/consumer self reliance.* The trader's *self interest* in charging what he chooses is promoted by the fact that the price escapes review; but this is only so long as it is transparent;[75] the transparency being viewed as enabling the consumer to exercise *self reliance* by informing himself as to the price and "shopping around" for the best deal, i.e. making an "informed choice". To this extent it can certainly be said that the EU regime opts for an ethic of self interest and reliance (or informed freedom of choice); over one of protection.[76]

However, the key question here is what is the intended *extent* of this ethic of self interest/reliance? The point is that, just like "significant imbalance" and "good faith", the provision is very open-textured; leaving open precisely what *is* the "price or remuneration". There is also very limited background textual guidance. The preamble to the UTCCD refers to the "quality/price ratio" as a way of depicting what is intended to be excluded.[77] This is really only a slightly different way of expressing what is already fairly clear from the main text; i.e. that what is excluded is an assessment of whether the price is too high, given the quality of the goods or services received. However, it does not tell us what the "price" *is*; and how many of the various charges potentially made under a contract it is intended to cover: *any* charge for any goods or services supplied, only charges for *some* such goods or services or only charges for the *main* goods or services supplied? There remains, in short, significant scope for debate as to the range of charges that should be treated as being the "price" and excluded from review under the general clause-the range of charges that (so long as they are transparent) are *allowed* to be substantively unfair (in that they escape review under the general clause).

The recent well known bank charges litigation involved terms that provided for large charges to be made in various circumstances. This included, for example, where consumers exceed agreed overdraft

[74] UTCCD, art. 4 (2)/UTCCR, reg. 6 (2) (b).
[75] I.e. in plain and intelligible language.
[76] See H. Collins, "Good Faith in European Contract Law" (1994) 14 O.J.L.S. 229 at 238.
[77] Recital 19.

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facilities.[78] Under the contractual provisions, exceeding the overdraft facilities is not treated as a default or breach. Rather, it is depicted as a choice made by the consumer. Following the same logic, the obligation to pay the charge is not characterised as compensation for a loss suffered by the bank; but, rather, as a charge for the *service* of the bank in allowing the payment in question to go through.[79]

The approach of the OFT (and the Court of Appeal) was that the only charges that should be treated as the "price"[80] are those that the typical consumer would perceive as "essential" to the bargain; or (put in another way) *what consumers would reasonably expect to pay in the normal due performance of the contract*. The bank charges in the case in question were not viewed by either the OFT or the Court of Appeal as falling into this category (given that consumers do not typically expect to take an unauthorised overdraft in the due, normal course of things).[81]

This seems to be an understanding of the "price" concept that is grounded in a protective ethic; although the Court of Appeal actually misunderstood the precise nature of the issue. The argument was that it was the *absence of negotiation* in the case of non essential terms that led to the conclusion such terms were not intended to be viewed as "price" terms and to escape review under the general clause.[82] Yet individually negotiated terms are *separately* excluded from review under the general clause.[83] Patently, then, some non negotiated terms are indeed intended to be treated as "price" terms and excluded from review on *this* basis. The real point,[84] is that the "essential to the bargain" test is (at least *relatively*) protective because it understands the price exclusion as only intended to cover those charges that[85] have a realistic chance of being subject to market discipline. Following the analysis set out above,[86] a charge is only likely to be subject to the competitive discipline of the market if it is one that is central to how consumers would perceive the bargain/what one would reasonably expect to pay in the normal, due

[78] *OFT v Abbey National and others* [2009] UKSC 6; and see S. Whittaker, "Unfair Contract Terms, Unfair Prices and Bank Charges" (2011) 74 M.L.R. 106.

[79] This is to avoid any risk of the tem being characterised as a "penalty clause"; which would make it unenforceable at common law. Note also that the Court of Appeal and Supreme Court analysis was that payments by consumers were to be regarded in law as being in exchange for the "whole package" of services offered by the banks (Lord Walker [2009] UKSC 6 at [6], for instance).

[80] See S. Whittaker, above, note 78, at p. 108, on whether what is excluded from review is a particular form of *assessment* (the "adequacy") of a price term (as decided by the Court of Appeal and Supreme Court), or whether it is a price *term* itself.

[81] *Abbey National plc and Others v OFT* [2009] EWCA Civ. 116. See also S. Whittaker, above, note 78, in support of the Court of Appeal's focus on the perspective of the "average consumer" and their "genuine choice", such an approach being in line with the analysis in the text immediately following above as to what is likely to be subject to market discipline.

[82] See note 81 above at [52].

[83] UTCCD, art. 3 (1)/UTCCR, reg. 5 (1).

[84] This was not actually articulated by the CA/OFT.

[85] despite not actually being negotiated.

[86] Above, at notes 69–70 and related text.

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performance of the contract. If charges are subject to market discipline, there is some chance of improved choice (alternative market offerings); so that consumers might at least have some chance of acting in a self reliant way by shopping around. In addition, the competitive discipline may mean that the charges that are fairer in substance (so that application of the legal test may not matter so much). If terms are *not* central enough to the bargain to be subject to competitive discipline; then, under a protective ethic, they should not be understood as "price" terms that (so long as they are transparent) escape a review of their substantive fairness.

The Supreme Court, however, rejected the idea of distinguishing between charges that were (based on consumer perceptions) essential and non essential; considering such an approach to be too complex and even to compromise the European law principle of "legal certainty".[87] For the Supreme Court, identifying the "price" (for the purposes of whether there could be a review of *adequacy*[88] under the general clause) was "a matter of objective interpretation by the court".[89] It was accepted that charges arising in circumstances of default were not the "price".[90] However, beyond this, the key point is that the "objective interpretation" favoured by the Supreme Court seemed, effectively, to be carried out by reference to the *technical provisions of the contract*. If these provisions (as in *Abbey*) defined the charge as payable for services that the consumer chose to take up, then, for the Supreme Court, they were "price" terms. For the Supreme Court, once the charge was one for services in this way, there was no principled way of drawing a distinction[91] between charges that would be seen by consumers as being essential to the bargain and those that would, in reality be viewed as much more peripheral. For the Supreme Court, it seems, all such charges were generally "price" terms; and were therefore excluded from review under the general clause. For the Supreme Court, this reflected the notion of "consumer choice" underlying the whole existence of the "price exclusion".[92]

Of course, the point has already been made above that everyone knows that the price exclusion is *to some extent* about freedom of choice/self interest/reliance; the real issue being: to *what* extent? The reference to "price" does not, by any means, automatically lead us to

[87] *OFT v Abbey National and others* [2009] UKSC 6, Lord Mance at [112] and [115].
[88] Only an assessment of "adequacy" is excluded. Unreasonable price *increases*, for example, are certainly reviewable under the general clause (UTCCD Annex/UTCCR Schedule 2, para 1 (l)).
[89] *OFT v Abbey National and others* [2009] UKSC 6, Lord Mance at [116].
[90] See note 89 above at [102] and affirming the view that the "interest after judgment" term in *First National Bank* was correctly viewed as such a default provision, as was the term in *Bairstow Eves London Central Ltd v Smith* [2004] EWHC 263 (QB).
[91] I.e. the sort of distinction made by the OFT and CA.
[92] Lord Walker at [44], citing Hugh Collins, "Good Faith in European Contract Law", above note 76.

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the conclusion that it must cover all charges technically described as being in exchange for services provided by the trader,[93] that there is no way of distinguishing between types of charge. It is true that distinctions may be *easier* to draw in some systems, e.g. Germany, where it turns on whether the obligation to pay the charge derives from a statute.[94] However, in the absence of a test such as this, it is surely highly technical and formalistic to say that, as the Supreme Court appear to have said, that there is no way of looking behind what the contract technically provides for.[95] Of course, one way to do precisely this is to base the distinction on our underlying understanding as to the nature of standard contracts.[96] In other words, there is the possibility of drawing the sort of distinction drawn by the OFT/Court of Appeal; which broadly only excludes from control those charges genuinely central to how the bargain would be generally perceived; and which are therefore more likely to be subject to market discipline.[97] The Supreme Court chose not to take such an approach.

So, the underlying ethic being applied by the Supreme Court (in understanding the notion of "price") could be said to be one of self interest/reliance. So long as the charge is transparent (in plain and intelligible language), traders are to be given maximum scope to pursue self interest. Scope to impose charges that will escape legal review is provided by allowing traders to exercise their power to draft the contract in such a way as to determine what counts as the price: label the charge as being for trader services and it qualifies as the price.[98] Implicitly, self reliance is expected from consumers in response. They must either take special care to avoid inadvertently going overdrawn and thereby triggering the charge; or seek to negotiate removal of the charge on an ad hoc, individual basis when it is imposed.

Once again, we must remember that the term in question was one that was not controlled by UCTA; so the Supreme Court approach could be viewed as an attempt to restrict the greater potential for protection brought by the European general clause.

[93] The Hugh Collins point (ibid), although relied on for support by the Court, is, not, in my view, that all charges are the price provisions; simply that the broad notion of art. 4 (2) is one of consumer choice.

[94] If provided for by statute, it is not viewed as a price under UTCCD art. 4 (2) (BGH, 30/11/2004-XI ZR 200/03, [2005] Neue Juristische Wochenschrift 1275); but if provided for purely on the basis of the terms, with no statutory background, it is generally the "price" under art. 4 (2) (BGH, 14/10/1997-XI ZR 167/96, [1998] Neue Juristische Wochenschrift 383).

[95] P. Davies," Bank Charges in the Supreme Court" [2010] C.L.J. 21 at 22.

[96] M. Chen-Wishart, "Transparency and fairness in bank charges" (2010) 126 L.Q.R. 157 at 160–161.

[97] It may be that there is *now* more competition over bank charges, due to publicity making them more central to how the bargain is perceived; but not when the case was decided.

[98] This scope is not to be restricted by applying a test that looks beyond what the contract technically provides for. Self interest is further emphasised by the fact that a reason for concluding the charges to be part of the price was the amount of money (£30 million) that they made for the banks annually, e.g. Lord Phillips, at [88].

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IV. Is There Really an Underlying Ethic of Self Interest/Reliance?

So, can it really be said that there is an identifiable trend involving the Supreme Court interpreting the UTCCD general clause by reference to an ethic of self interest/reliance; in cases where a more protective interpretation would extend protection relative to pre-existing domestic law? One might argue that we cannot read a deep seated ethic of self interest/reliance into these decisions, that there were other explanations for the approach taken in both cases. In *First National Bank*, the House of Lords may have felt that holding the term to be unfair would have meant failing to send the important signal that there was a need for reform of certain broader elements of the legal framework. For example, for some judges, the term was made necessary by the ban on the *courts* awarding *statutory* interest on the judgment amount; i.e. this ban made it inevitable that banks would stipulate for contractual interest.[99] Perhaps the term was held not to be unfair by these judges partly in order to signal to Parliament that courts should be given the power to award statutory interest (making the term unnecessary). A further point is that, for some of the judges, the *term* itself was not the problem. The amount payable under the term might well be reduced if the court exercised its review powers under the ss. 136–9 of the Consumer Credit Act (CCA). The point is that defaulting consumers do not normally turn up at court, so they do not request exercise of these powers. The proper solution then, for some judges, was to make provision to ensure either that consumers were aware of the need to ask for a review;[100] or that the review was carried out automatically.[101] So, it could be said that these judges found the term not to be unfair partly to emphasise the need for such reforms.

The problem is that the policy goals just outlined could equally have been achieved by interpreting the concept of unfairness in such a way as to find the term to be *unfair*. For example, a finding of unfairness may well have led to the banks applying pressure on Parliament to allow courts to award statutory interest (so that they would not need to stipulate for it contractually); or applying pressure to improve the operation of the CCA powers (so that the term would be more likely to be held to be fair on the future[102]).

In short the House of Lords did not need to measure fairness in substance as they did in order to achieve the policy goals in question.

[99] Note 56 above and *DGFT v First National Bank* [2001] 3 W.L.R. 1297, Lord Hope at 1316 and Lord Millett at 1320.
[100] Lord Rodger at 1322.
[101] Lord Millett at 1320.
[102] Because of the scope for its harsh consequences to be mitigated through exercise of the powers.

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This suggests that an ethic of self interest/reliance was indeed a reasonably significant motivating factor in the approach taken.

Turning to the *Abbey* decision, can it definitively be said to be based on an ethic of self interest/self reliance? One view might be that it cannot; because a different decision might have been arrived at if the case had been framed differently by the OFT. It will be recalled that what is excluded from review under the general clause is an assessment as to the "adequacy" of the "price"-generally taken to refer to the question as to whether the price is too high *for what is received in return*. What if the OFT had argued that they were not questioning this, but rather the way in which the term treated consumers *unequally:* requiring those consumers affected by the relevant charges to subsidise other consumers? The argument would be that the charges generate sufficient income for the Banks to enable them not to impose standing charges on consumers generally.[103] So, there is unequal treatment in that those consumers who, for example, go overdrawn without authorisation are treated very harshly; while other consumers obtain an unfair benefit in that they avoid paying standing charges. Possibly this sort of assessment would have been covered by the test of unfairness; it not being a review as to the "adequacy" of the price. Indeed, Lord Phillips hinted at one point that there might be another way of challenging the fairness of the charges; and it is generally assumed that he may have been referring to the sort of unequal treatment argument just outlined.[104]

However, even if the Supreme Court would have been prepared to review the unequal treatment issue under the general clause, and even if this could have been viewed as evidence of a protective ethic, it does not change the fact that there was an ethic of self interest/reliance at play in the context of reviewing the "adequacy" issue. The "unequal treatment" analysis will not apply to all charges. When it does not apply there is, from a protective perspective, still a case for reviewing the adequacy of such charges; assuming that they are not sufficiently central to the bargain as to be subject to market discipline. Yet, the Supreme Court approach to interpretation of the provision would seem to exclude such a review; so it can still be said to be based on an ethic of self interest/reliance.[105]

What of the possibility that the *Abbey* decision was influenced not so much by an ethic of self interest/reliance but (i) by a concern to avoid the delay/court clogging that might be caused by the large numbers of

[103] This is openly admitted by the Banks.

[104] *OFT v Abbey National and others* [2009] UKSC 6, at [91]; J. Devenney, "Gordian Knots in Europeanised Private Law" (2011) 62 N.I.L.Q. 33 at 53–4.

[105] Indeed, why did the Court not choose, ex officio, to assess whether the equality argument brought these terms under the general clause (see Joined Cases C-240/98 to C-244/98, *Oceano Group Editorial SA v Murciano Quintero* [2000] ECR I-4941 and Case C-243/08, *Pannon Gsm Zrt v Erzsebet Sustikné Györfi* [2009] ECR I-9579, requiring national courts to assess fairness ex officio)?

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private claims that were pending and that would go ahead if the charges were held to be subject to the general clause on unfairness; and (ii) by a desire not to worsen the banking crisis by exposing the Banks to these claims and possibly depriving them of the income generated by the charges in the future.[106]

This is not a very convincing line of reasoning. A considerable range of factors affect both the workload of the courts (numbers of disputes in consumer and other fields, availability of legal aid, "no win no fee" legal services etc); and the vulnerability of the banking system (national and international economic conditions, levels of quantitative easing, new revenue raising schemes etc). Therefore, it does not seem very plausible for the Supreme Court to imagine that a decision affecting the enforceability of these bank charges could necessarily, in itself, make a significant impact on either court workload or the viability of the banking system. However, the Court *could* certainly count on the fact that a very direct consequence of excluding these charges from review under the general clause would be to foster bank self interest and require consumer self reliance (in that banks would make/save a lot of money and consumers would lose a lot of money).

Overall, then, the strong possibility remains that the Supreme Court has been at least partly influenced by an underlying ethic of self interest/reliance in its approach to the European general clauses on fairness. It is certainly well accepted that common law judicial reasoning has often remained influenced in recent years by strong individualistic values.[107] Indeed, the fact that the cases we have examined involved *preventive* control[108] may emphasise that strong elements of traditional "common law individualism" were at work. One aspect of this tradition was that cases were brought by individuals (here consumers) against other individuals (here traders), based on what happened to the particular parties to the action and affecting no-one else. There were no direct implications for how other (traders) could act or how other (consumers) could be treated. Other individual consumers would need to take the *self reliant* initiative to try their own luck based on their own circumstances. The move to the more European model of preventive control challenges this individualistic tradition.[109] It means that

[106] Delaying the pending claims was only explicitly mentioned as a reason for not making a reference to the ECJ (*OFT v Abbey National and others* [2009] UKSC 6, Lord Walker at [50]); while the large income generated by the charges was mentioned, but in response to the OFT argument that the charges could not be viewed as central to the bargain (above, note 81 and related text). See discussion of the impact of the banking crisis in J. Devenney, above note 104, at 52.

[107] H. Beale, "The impact of the decisions of the European Courts on English contract law: the limits of voluntary harmonization" (2010) 18 E.R.P.L. 501; and C. Willett, "Social justice in the OFT versus Commutative Justice in the Supreme Court", in Micklitz (ed.) *Social Justice in European Private Law* (Cheltenham 2011).

[108] They were OFT actions for injunctions under UTCCR, regs. 10–15, rather than actions by private individuals.

[109] Willett, above, note 107.

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decisions can affect the whole market directly. Trader *self interest* is affected much more substantially-they cannot use the term against consumers generally. Consumer *self reliance* is compromised significantly-the consumer collective is protected from the term without even being required to choose between the two self reliant courses of action, i.e. managing their affairs better to restrict the potential impact of the term or litigating to challenge its legality. From the point of view of an ethic of self reliance, they get quite a lot for nothing! Such consequences may make the Supreme Court particularly reluctant to set high standards of fairness.

Finally, application of an ethic of self interest/reliance in such a way as to limit the reach of general clauses would also flow logically from the well known aversion to general principles that is a feature of common law reasoning;[110] and the preference for the *incremental* development of solutions to a problem.[111] There was a century of experience of developing incremental, common law based approaches to control of exemption clauses.[112] By the time of the UCTA general clause in 1977, there was a general acceptance of these as a "problem", as "unfair", in at least some forms; but as a problem that the common law solutions were, ultimately, not equipped to deal with properly.[113] This may partly explain why the judicial approach to exemption clauses under the UCTA general clause has actually been quite protective.[114] In the case of the non exemption clauses now controlled by the EU general clause, it may be that (given the lack of a common law tradition of even considering these to be generally problematic[115]) it seems like quite a large leap for the Supreme Court (contrary to piecemeal, incremental instincts) to assess fairness in such a way as, routinely, to find these unfair.

V. Broader Implications of the Ethic of Self Interest/Reliance

It may be then that an underlying ethic of self interest/reliance has had an important influence on the approach of the Supreme Court, especially where preventive control is concerned. Our case study has focussed on the UTCCD general clause and involved particular types of term. Clearly, however, such an approach may threaten levels of

[110] Beale, above, note 107.
[111] Beale, above, note 107.
[112] E.g. requiring greater notice for incorporation of onerous terms (*Spurling v Bradshaw* [1956] 1 W.L.R. 461); and contra proferentem construction (*Hollier v Rambler* Motors [1972] 2 QB 71).
[113] Willett, *Fairness in Consumer Contracts*, above note 9, pp. 395–401.
[114] E.g. in *Smith v Bush* [1990] 1 AC 831, the fairness of an exemption clause was measured, inter alia, by reference to the heavy financial loss it imposed on relatively poor consumers; and it was not legitimised by its relative transparency.
[115] Controls on penalties, forfeiture etc were based on traditions specific to those terms; not on a judicial perception that obligation/liability imposing terms all had a general potential for unfairness. Generally see H. Collins, above note 26.

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protection much more broadly. Of course, in practice, most "decisions" on fairness are made by the OFT under the auspices of their regulatory powers; but the *First National Bank* and *Abbey* decisions show just how unstable a protective OFT policy can be when challenged; and in the face of a policy of self interest/reliance by the Supreme Court. It must also be remembered just how many types of contract and types of term are potentially covered by this general clause; and how much ground is covered by the general clause on practices, where a similar approach is possible.

First, it is clear that the Supreme Court approach to the price exclusion issue would mean that very many types of charge would escape review under the general clause on unfair terms.[116] Second, the ethic of self interest/reliance might be applied by the Supreme Court across the board under the general clause on unfair terms; especially to terms not controlled under pre-existing law, i.e. those involving imposition of obligations and liabilities on consumers. So, we could expect that such terms would very often not be viewed as unfair by the Supreme Court. An ethic of self interest/reliance might well predominate both in the way in which fairness in substance is measured under the "significant imbalance" concept; and in giving a routinely legitimising role to transparency under the "good faith" concept.[117]

Third, it seems plausible to suggest that a similar ethic of self interest/reliance could be applied, when unpacking the often equally open textured (and extremely broadly applicable) general clauses on *practices*. So, for instance, one limb of the general clause on aggressive practices involves "coercion" or "harassment" that significantly impairs the "freedom of choice or conduct" of the "average consumer;" thereby causing, or being likely to cause him to take a transactional decision he would not take otherwise.[118] It is vital here to note the distinction from the "undue influence" limb of the general clause. There, the restriction on "freedom of choice" must be one caused by a lack of "informed" decision making.[119] In other words, the focus is on the "informed consent" element of freedom of choice. But, under the coercion/harassment limb, the concept of "freedom of choice" is *not* qualified by the notion of "informed" decision making. It appears,

[116] E.g. the terms in *OFT v Foxtons* [2009] EWHC Ch 1681, where the High Court applied the "central to the bargain" test, concluding that (even if they had been in plain intelligible language, which they were not) fees for peripheral services were not covered by the price exclusion; yet they were expressed technically as payments for services, so would surely be covered by the exclusion based on the Supreme Court approach in *Abbey*.

[117] In *Foxtons* (above note 116) the lack of transparency persuaded the High Court that the terms-which they decided caused "significant imbalance" as they offered minimal services for the payments made-were contrary to good faith and therefore unfair. Might the Supreme Court be more inclined to understand "good faith" such that it would have been satisfied if the terms had been transparent?

[118] UCPD, art. 8/UTCCR, reg. 7 (1).

[119] Above, note 41 and related text.

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then, that the focus must be on the other aspect of restricted freedom of choice; i.e. "choice constraint" in the sense of alternatives that are in some way unreasonable or unfair *in substance*.[120] So, the coercion/harassment limb seems to be concerned with pressures or threats that are in some way illegitimate at least in part because they would present the average consumer with alternatives that have unfair substantive consequences.[121] But, as where the substantive fairness of *terms* is concerned, how exactly are we to assess what substantive consequences are unfair when it comes to the concept of "freedom of choice"; and when is any restriction on freedom of choice to be taken to have been brought about by pressures that are sufficient to amount to "coercion or harassment"?

There is reference in guidance to factors such as time, location, nature, persistence, abusive language, exploitation of misfortune, obstructing consumer enforcement of rights and threats to take unlawful action.[122] These provide some direction; but they do not indicate what *degree* of trader pressure is acceptable or how to measure what sort of alternatives impose unacceptably detrimental *substantive* consequences, such that we can say that freedom of choice has been "significantly" impaired. Of course, the issue is as to the impact on the freedom of choice of the "average consumer"; who is defined as being "reasonably well informed, reasonably observant and circumspect".[123] However, this formula does not help here; as it goes to how well *informed, careful and alert* consumers may be expected to be (i.e. cognitive factors). This is not relevant to a concept that is concerned with whether consumers have been coerced or harassed through giving them alternatives that are *substantively* unfair.

If a protective ethic was the guiding light for such matters, the focus would be on the impact on consumers of the relevant alternatives, in the context of the relative socio-economic needs of the parties. The question would be whether these alternatives have seriously detrimental socio-economic effects on consumers. To the extent that traders plead *their* need to use the practice; the focus would be on the *relative* socio-economic needs of the parties. Does the trader lose as much by not using this practice as consumers lose through the substantively detrimental alternatives that they are faced with?

[120] "Choice constraint" is the *other* element (along with *informed* choice) in traditional Aristotelian freedom of choice: R. Faden and T. Beauchamp, *A History and Theory of Informed Consent* (New York 1986), ch. 7. See the similar notion of a lack of "practicable choice" in economic duress (e.g. *Universe Tankships Inc of Monrovia v ITWF* [1983] 1 A.C. 366); which must involve assessment of the *substantive* nature and consequence of the alternatives.

[121] Willett, note 15 above.

[122] UCPD, art. 9/UTCCR, reg. 7 (2); and H. Collins, "Harmonisation by Example: European Laws against Unfair Commercial Practices" (2010) 73 M.L.R. 89 on the utility of these guidelines.

[123] UCPD, Preamble, recital 18/UTCCR, reg. 2 (2).

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So, take the example of practices requiring consumers to go through time consuming or costly formalities to enforce their rights. This has the potential to amount to coercion/harassment; the guidance referring as it does to "any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract."[124] A protective approach will measure whether a given practice is restrictive of freedom of choice by focussing on how inconvenient, costly, stressful etc the process is for consumers, given their average budget, family, work commitments etc; and how much consumers lose by *not* going through these formalities (i.e. how much is the typical claim, what impact this loss would have on the typical earner etc). If what traders stand to lose by not insisting on this process[125] is not so significant for traders as the impact of either alternative for consumers; then this might suggest that there is undue restriction of freedom of choice and, therefore, coercion/harassment.

But, if the guiding ethic is self interest/reliance, the starting point would be the right of *traders to pursue self interest*: to insist on this process because it is convenient and because it may reduce some risks of vexatious claims; notwithstanding that the impact on traders of not doing it is less than the impact on consumers when it is done. Then there would be the greater expectation of *consumer self reliance*-in terms, for example, of being prepared to expect a fair degree of hassle in enforcing rights, to take time to sort it out etc. "Coercion and harassment" and "significant impairment of freedom of choice" would be constructed and understood along these lines: the former requiring quite extreme and unconscionably bad behaviour and the latter requiring quite an extreme impact on consumers.

The "undue influence" general clause[126] is also open textured. For instance, how are we to measure when consumers are prevented by pressure from making an "informed decision"? If understood by reference to an ethic of self interest/reliance, a routine interpretation might be that if trader pressure is followed by a formal transparent explanation of risks, consumers have now been enabled to take an "informed decision"; so that there is no undue influence. In other words, the key concepts of "pressure" and "informed decision making" are constructed by reference to the expectation that consumers take *self reliant* responsibility to withstand pressure and overcome the difficulties involved in reading the standardised information. This allows traders maximum (*self interested*) scope in terms of sales tactics, so long as they provide standardised transparent explanations of the risks.

[124] UCPD, art. 9 (d)/UTCCR reg. 7 (2) (d).
[125] E.g. the costs of one or two illegitimate claims that might have been deterred by a more rigorous process.
[126] Above, note 41.

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Such an approach would obviously represent a low level of protection. From a protective perspective, the information is unlikely to be read and even if it is, it is unlikely to overturn the psychological commitment to the transaction that will have been strengthened by the pressure.[127]

VI. Future Prospects for an Autonomous eu Ethic of Protection

This article has highlighted the enormous importance of European general clauses to UK consumer law; the potential that these have brought for improved protection; the unavoidability of reading these by reference to an underlying substantive rationality; and, in this regard, the threat posed to protection by the ethic of self interest/reliance arguably brought to bear by the Supreme Court. But, I would suggest that something more protective may be intended at EU level.

It is true that, in certain respects, EU consumer policy can rightly be depicted as more market and business oriented than protective or socially oriented.[128] For a start, much of the acquis, including the UTCCD and UCPD, were adopted under art 95 of the Treaty; the fundamental concern of which is completion of the internal *market*. In addition, the very significant role played by information disclosure rules in the acquis[129] demonstrates a significant faith in formal transparency; which, as the discussion above has demonstrated, can be said to be in congruence with an ethic of self interest/self reliance. However, this is only a part of the picture. In legislating to complete the internal market, art 95 of the Treaty (under which the UTCCD and UCPD were adopted) provides that the Commission, in its proposals, will take as a base a "high level of protection".[130] Further, this "high level of protection" is specified as a fundamental "solidarity" right in article 38 of the Charter of Fundamental Rights (CFR). It is hard to see how a "high level of protection" and "solidarity" can be achieved by an approach based solely on self interest/reliance. Arguably, then, the essential legislative EU ethic (which should inform the way that the

[127] Above, note 11 and related text. Recently, in a decision on the general clause on misleading actions and omissions, the High Court (HC) understood the "average consumer" concept by reference to a protective ethic; recognising that such a consumer will not necessarily read all information provided (*OFT v Purely Creative* [2011] EWHC Ch 106). Logically, then, under the undue influence general clause, pressure should be taken to make it even less likely that information will be read; but will the Supreme Court would support or reject such an approach?

[128] Generally see H. Micklitz, "Jack is out of the Box-the Efficient Consumer Shopper", JFT 3-4/2009 s. 417–43; on the protective elements in services of general interest, H. Micklitz, above, note 54.

[129] See above, note 18 and S.Weatherill, *EU Consumer Law and Policy* (Cheltenham 2005) 84–112.

[130] Art. 95 (3) and UCPD, Preamble, recital 1. See also European Commission policy statements on interpreting the unfair practices general clauses in light of the "most recent findings of behavioural economics", in European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, COM 1666 (European Commission 2009), at 32; and above, note 11 and related text on how behavioural economics research highlights the limits of transparency.

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general clauses are understood) is at least relatively more protective than that being applied by the Supreme Court.

What of the EU *judicial* ethic? As far as the ECJ is concerned, there is a mixed picture. Undoubtedly in the barrier to trade cases one might find greater support for the ethic of self interest/reliance. For instance, national transparency rules have been more likely to be accepted as necessary measures of protection; while more substantive protections have often been found to be barriers to trade that are not really needed for consumer protection.[131] However, the barrier to trade case law is not necessarily a good guide to ECJ philosophy for our present purposes. The starting point in this case law is the Treaty paradigm of free movement/removal of barriers to trade. It is then for national authorities to make the case that a given national rule is necessary for consumer protection in the national context; while not imposing too significant a barrier to trade. It is self evidently easier to satisfy these criteria in the case of rules requiring simple transparency by traders; than it is in the case of rules that impose more substantive restrictions on trader activities. So, in barrier to trade cases there could be said to be inbuilt bias towards limited protection.[132] But here we are concerned with general clauses contained in directives. The whole point of harmonisation through a directive is that the removal of national rules representing barriers to trade is adjudged not to be sufficient to achieve market integration. Rather, positive harmonisation through a directive is needed. In this context, instead of an inbuilt bias towards relatively limited protection, the role of the ECJ is simply to assess the level of protection intended by the directive in the light of its market integration and other goals (including, e.g. a "high level of protection").

The ECJ approach to the UTCCD and UCPD is an intriguing one. In one batch of cases it has been quite determinedly protective. For example, it has emphasised the need for precise and clear means of national implementation; and the obligation on national courts to review fairness "ex officio". Importantly, the Court has said clearly that these interpretations are required in order to recognise the weaker position of consumers and to provide proper protection.[133]

When it comes to the UTCCD and UCPD general clauses, the ECJ has been more neutral; saying that it will tell national courts how to *interpret* the law; but leave it to national courts to apply this law to

[131] S. Weatherill, "Who is the "Average Consumer"?" in U. Bernitz and S. Weatherill, *The Regulation of Unfair Commercial Practices*, above note 35, 115.

[132] The ECJ may even often have accepted the more substantive protections if the national authorities had made a more rigorous case as to why they were needed to protect consumers. Weatherill, above note 131.

[133] Case C-144/99, *Commission v The Netherlands* [2001] ECR I-3541 and Joined Cases C-240 to C-244/98, Oceano *Grupo Editorial SA v Murciano Quintero* [2000] ECR I-4941.

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the facts.[134] Certainly, in the cases we have considered, part of what the House of Lords/Supreme Court was doing was indeed applying the law to the facts. So, in *First National Bank*, it was deciding how the test of unfairness applied to a particular term; and, in *Abbey*, whether particular terms were "price" terms within the meaning of the law. But, it is arguable that the Court was also "interpreting" the concepts. It was determining whether to measure "significant imbalance"/fairness in substance by reference to business self interest or by reference to the relative socio economic needs of the parties. It was deciding whether labelling a charge as the "price" generally depends on how central the charge is to the bargain (whether it is likely to be subject to market forces); or upon how it is formally depicted in the contract. These are questions about how to understand concepts in the general course of things. They are surely, therefore, issues of *interpretation*; and can be distinguished from the (albeit closely related and perhaps sometimes overlapping) issues as to how the concepts are then *applied* to particular terms. The same is surely true of how one measures questions of coercion, harassment and "freedom of choice" (by reference to business self interest or by reference to relative need?); and whether, transparency is routinely sufficient to satisfy "good faith" (in the context of contract terms) or to ensure "informed decision making" where "undue influence" is alleged. Are these not all, in part at least, questions of interpretation?

If these *are* issues of interpretation, then they would appear to be issues on which the ECJ should provide guidance to national courts. In fact, the ECJ has often, in giving "interpretations", simply repeated the basic language of the test.[135] However, now there is also authority to the effect that the *interpretive* role of the ECJ extends to providing national courts:

> "all the elements … which could be useful to decide the case before them … Among the elements which it can provide … the Court could … indicate the criteria allowing it to distinguish between the various possibilities in individual sets of facts".[136]

The suggestion here does seem to be of a broader interpretive role. Might this involve elaborating on issues such as how to measure

[134] Case C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* [2004] ECR I-3403; Joined Cases Case C-261 and C-299/07, *VTB-VAB v Total Belgium* [2009] ECR I-2949.

[135] See *Freiburger* and *VTB-VAB* above, note 134 and Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v Osterreich Zeitungsverlag GmbH* [2010] ECR I-0000.

[136] Case C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid v Asociacion de Usarios de Servicios Bancarios (Ausbanc)* [2010] ECR I-000, at [70] (confirming that the UTCCD minimum clause allows member states to ignore the art 4 (2) "price" exclusion and subject price terms to the general clause); and see Casde C-358/08, *Aventis Pasteur SA v O' Byrne* [2010] ECR I-000, a reference under the Product Liability Directive, where quite a significant degree of interpretive guidance was provided.

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fairness in substance and whether or not formal transparency is routinely to be viewed as a "defence" for traders where terms and practices are concerned? If the ECJ *was* to provide such guidance, there has to be a reasonable chance that it would provide guidance inspired by a protective ethic rather than an ethic of self interest/reliance. This would reflect the "high level of protection" and "solidarity" policies in, respectively, the Treaty and the CFR; as well as being consistent with the avowedly protective approach taken by the Court to issues such as means of implementation and "ex officio" review of fairness.[137]

But, even if the ECJ was to unpack the general clauses by reference to a moderately protective, autonomous EU ethic, this would only be sure to alter the approach of the Supreme Court if the Court was prepared to make an ECJ reference. National courts are supposed to make ECJ references where there is a plausible difference of view over how a rule should be *interpreted* (i.e. the issue is not *acte clair*); and where this difference of view would affect the *application* of that rule to the facts of the case in question.[138] Yet, so far, the Supreme Court has refused to refer in relation to either the UTCCDD general clause or the price exclusion issue; taking the view that these criteria were not satisfied.[139]

In the light of this, when the OFT next argues for a protective interpretation of one of the general clauses before the UK courts, it is important that it emphasises the support for a protective approach from the Treaty, the CFR and, potentially, the ECJ. It is especially important that the OFT also spells out very systematically the concrete interpretations that flow from such an EU ethic of protection: that fairness in substance[140] should be measured by reference to a rigorous comparison of the relative socio-economic needs of the parties; and that "good faith"[141] and "informed decision" making[142] should not, routinely, be equated with formal transparency. The OFT should also seek to highlight the clear difference between such interpretations and those inspired by an ethic of self interest/reliance.

This sort of approach would generally strengthen the case for protective interpretations. However, it might also improve the prospects of obtaining an ECJ reference. This is because it highlights not only that there is a real difference of view over interpretation; but that the more protective interpretations are very plausible (because they may well

[137] See note 133 above and related text.
[138] Case C-238/81, *CILFIT v Minister of Health* [1982] ECR 1257.
[139] [2001] 3 W.L.R. 1297, Lord Bingham at 1307; [2009] UKSC 6, at [49], [50], [115], [117] and [120], but Lords Phillips and Neuberger dissented, believing that the interpretation was not *acte clair* (at [91] and [120]); and see Whittaker, above, note 78 on the relationship between interpretation and application points in *Abbey*.
[140] I.e. under the "significant imbalance" and "freedom of choice" (coercion/harassment) provisions.
[141] Under the UTCCD general clause.
[142] Under the undue influence general clause.

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reflect the EU legislative and judicial ethic). Even then, of course, there will often remain scope to deny a reference by arguing that the differing interpretations would still produce the same result when applied to the facts. However, this scope is surely restricted when the alternative interpretations are rigorously unpacked and contrasted in the way described. Whether, for instance, transparency is, or is not, generally sufficient to satisfy good faith, or ensure an "informed decision", is a matter that will surely make a real difference to whether or not many terms and practices are found to be unfair. If the Supreme Court were to accept that different underlying ethics do make a real practical difference, we might be closer to an obtaining an ECJ reference. Such a reference might reveal whether general clauses should be understood by reference to an ethic of self interest/reliance or an ethic of protection.

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