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Unfair clauses and administrative sanctions

A note

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I*

In 2014, following an administrative procedure for infringement of the legislation on consumer protection, the autonomous government of Andalusia imposed a fine of 81.000 € on Unicaja Banco S.A. The charge was "introducing unfair clauses into the contracts" concluded by the bank with its customers. Such practice is explicitly forbidden by Article 49.1.i) of the *Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios* of 2007 (the central piece of national legislation in the field of consumer protection) and may be punished with an administrative sanction.

Unicaja Banco S.A. filed an application for judicial review before the regional administrative court (*Sala de lo Contencioso-Administrativo del Tribunal Superior de Justicia de Andalucía*), challenging the legality of the fine. The applicant's main argument was that the administration may not impose an administrative sanction for the introduction of unfair clauses into contracts if the clauses in question have not been declared unfair previously by a civil court. In other words, it held that characterising a given contractual clause as unfair is an intrinsically civil question, which may not be decided by public administration. So, in the applicant's view, the administration has certainly a statutory power to fine the introduction of unfair clauses into contracts, but the exercise of such power is subject to a precondition: a declaration of unfairness by a civil court.

On 31 March 2016, the regional administrative court ruled for the applicant and annulled the fine. Then the autonomous government of Andalusia appealed to the *Sala de lo Contencioso-Administrativo del Tribunal Supremo*, the highest administrative court. Its judgement of 16 October 2017 upheld the appeal, thus confirming the legality of the administrative decision to impose a fine for infringement of the prohibition to introduce unfair clauses into contracts even in the absence of any previous declaration of unfairness by civil courts.

In substance, the Supreme Court used two arguments. First, it stressed that the relevant legislation does not condition the administration's power to fine for using unfair clauses to any previous finding by another body. The statute of 2007 simply defines the infringements in the field of consumer protection and the corresponding administrative sanctions, without any further requirement. In this context, affirming that a previous declaration of unfairness by civil

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courts is needed would amount to make the statutory power of the administration to sanction certain practices simply ineffective. Thus the Supreme Court implicitly says that administrative sanctions are an independent response against unfair clauses, not a mere accessory of civil remedies.

The second argument used by the Supreme Court is that public administration (in this case, the autonomous government of Andalusia, which has concurrent competence in the field of consumer protection) has no standing to file an action before the civil courts, asking them to declare that a given contractual clause is unfair. Consequently, if a previous declaration by civil courts is required, the exercise of the administration's statutory power would depend on random and unpredictable circumstances, i.e. that the affected individuals or a consumers' organization seek and obtain a favourable civil ruling.

Having said that, the judgement of 16 October 2017 makes it clear that the administrative finding of unfairness, which justifies the imposition of a fine, exhausts its effects in the administrative sphere and does not condition at all the civil disputes which could arise out of the same contractual clause. And it goes without saying that the administrative decision to impose a fine is subject to judicial review by administrative courts.

As an additional argument, the Supreme Court mentions Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts. Its Article 7 requires Member States to adopt "provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies as to whether contractual terms drawn up for general use are unfair". The specific reference to "competent administrative bodies" as an alternative to courts would imply, according to the Supreme Court, that public administration may exercise its statutory power in this field without any need of a previous decision by civil courts.

The judgement of 16 October 2017 has been followed by other Supreme Court decisions in the same sense.

II

So far, the case. The relevant legal framework is basically established by the above-mentioned statute of 2007, which consolidates Spanish legislation in the field of consumer protection[1]. The transposition of EU directives on consumer protection into national law is to be found in this piece of legislation. So the statutory definition of unfair clauses does not deviate from Directive 93/13/CEE, nor do the corresponding statutory remedies: the statute of 2007 regulates injunctions to stop the use of unfair clauses, as well as actions to annul or terminate contracts with unfair clauses. Standing to seek those civil remedies is given not only to the affected consumer, but also to a variety of public and private entities: a national agency called *Instituto Nacional de Consumo*, the autonomous regions, officially recognised consumers' organizations

[1] See generally M. Rebollo Puig and M. Izquierdo Carrasco (ed.), *La defensa de los consumidores y usuarios*, Iustel, Madrid, 2011; and S. Cámara Lapuente, *Contratos y protección jurídica del consumidor*, Ediciones Olejnik, Santiago de Chile, 2018.

and the *Ministerio Fiscal*[2]. Consequently, from the point of view of private law, one can say that Spanish legislation does not go beyond what EU law requires.

However, the statute of 2007 is more stringent than EU law in that it envisions administrative sanctions for certain infringements in this area, including, as has been seen, "introducing unfair clauses into the contracts" concluded with consumers. Directive 93/13/CEE does not envision such a response against unfair clauses. And more recently Directive 2009/22/CE of the European Parliament and the Council of 23 April 2009, on injunctions for the protection of consumers' interests, does not speak about administrative sanctions for unfair clauses either. The power of public administration to impose fines for the use of unfair clauses in contracts with consumers is thus a national rule.

A first question that arises is whether such a national rule is in conformity with EU law. In the absence of precedents of the European Court of Justice in this respect, one can probably say that EU law does not prevent Member States from allowing administrative sanctions to repress unfair clauses[3]. Although Directive 93/13/CEE only imposes on Member States a specific duty to provide some civil remedies against unfair clauses, its Article 7 says in more general terms that "Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers." So administrative sanctions can be seen as an "adequate and effective means" to fight against unfair clauses. An additional argument is that Article 8 of Directive 93/13/CEE provides that "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer." And a similar statement is found in Directive 2009/22CE.

In sum, the civil remedies established by Directive 93/13/CEE are a minimum, which do not exclude more stringent national measures, such as administrative sanctions. Needless to say, these administrative sanctions must comply with general standards concerning the exercise of the States' *ius puniendi* (legality, proportionality, *non bis in idem*, etc.).

Still with regard to the relationship between EU law and national law in this field, one could ask a further question: does EU law request some kind of punitive response against unfair clauses in contracts concluded with consumers? Is the absence of any punitive response "adequate and

[2] The *Ministerio Fiscal* (also called *Ministerio Público*) is the institution in charge of public prosecution. However, along with that function, it takes part also in some non-criminal cases as an objective advocate of legality and the general interest (Article 124 of the Constitution). It is more than an *amicus curiae*, because it may take the initiative, as happens in the field of consumer protection.

It is worth noting that, in a comparative perspective, a *ministère public* (to use the well-known French term) is one of the technical solutions for the protection of so-called "diffuse interests". See M. Cappelletti, *Judicial Process in Comparative Perspective*, Clarendon Press, Oxford, 1989, p. 275-279.

[3] In its judgement *Bankia v. Marí Moreno* (C-109/17) of 19 September 2018, the European Court of Justice examined a similar question concerning unfair commercial practices, not unfair clauses. It said that Directive 2005/29 of the European Parliament and the Council of 11 May 2005, on unfair commercial practices, gives Member States a wide margin to choose effective remedies and request them to establish a system of sanctions (paragraphs 31 and 42). This can be read as a sign that, even though EU law concerning unfair clauses does not mention sanctions, it is not hostile to their adoption by national law in the field of consumer protection.

effective" for consumer protection? Sometimes economic regulation cannot be based only on civil remedies[4]. This is probably the case of unfair clauses, at least for two reasons.

One is that the prejudice inflicted on the single consumer by an unfair clause is frequently modest, so that the consumer will not have a strong motive to start civil litigation. Unfair clauses are thus a typical domain of "small claims", which explains why both Directive 93/13/CEE and Directive 2009/22/CE provide consumers' organizations (as well as other entities different from single consumers) with standing to seek civil remedies. In this context, the mere possibility that public administration imposes fines for the use of unfair clauses can be an effective way to protect consumers whose interest is economically modest.

The other reason has to do with deterrence. Companies which deal with consumers can be tempted to draft their standardised contracts knowing that they contain unfair clauses, but hoping that no civil reaction will take place or simply speculating that time runs in their favour. In other words, those companies can try to experiment with newly designed unfair clauses, in the hope that they will pass through. Such temptation can be counterbalanced by the risk of being fined by public administration, independently from any civil proceeding.

For these reasons, the *effet utile* of EU law in this field perhaps needs a punitive instrument.

III

Once the legal framework of administrative sanctions for the use of unfair clauses in Spain has been clarified, it is possible to go back to the judgement of 16 October 2017.

Starting with the second argument used by the Supreme Court (namely, that public administration lacks standing to start civil proceedings in order to declare that a given clause is unfair), it is not conclusive. As was noticed above, some administrative bodies have standing to seek civil remedies against unfair clauses under Spanish law. These include, among others the *Instituto Nacional de Consumo*. Certainly, this agency has its own legal personality and is technically different from the *Administración General del Estado*, i.e. the administrative organization directly dependent on the executive. And it is also clear the statutory power to impose sanctions for the use of unfair clauses belongs to the executive, not to that agency. However, in this case, the sanction was not imposed by the national executive, but by the Andalusian autonomous executive; and the wording of the relevant provision in the statute of 2007 is not transparent in this point, because (contrary to what happens at national level, where it mentions a specific agency) at regional level it speaks of regional "organs or agencies" competent in the area of consumer protection[5].

Having noticed this ambiguity, the crucial point lies elsewhere. Even if one accepted that the executive lacks standing to bring civil actions against unfair clauses under Spanish law, this consideration alone would not justify the imposition of administrative sanctions for the use of unfair clauses without a previous declaration of unfairness by a civil court. The statutory power to punish such practice would not disappear: public administration might, in any event, impose

[4] See K. Hawkins, "Law as Last Resort", in R. Baldwin, C. Scott and C. Hood (ed.), *Regulation*, Oxford University Press, Oxford/New York, 1998, p. 288 and ff.

[5] Article 54 of the *Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios* of 2007.

fines on companies whose contractual clauses had already been declared unfair by a civil court; which, by the way, is probably the most frequent situation. One should not forget that, after all, interpreting private contracts is an inherently civil question.

So the crucial point is whether the statutory power to impose administrative sanctions for the use of unfair clauses should be construed as an independent regulatory mechanism, even in the hypothesis that the holder of that power had standing in civil proceedings. In other words, the true question is whether the effectiveness of such statutory power demands not to make it dependent on civil judgements. And this leads to the first argument used by the Supreme Court.

It was an undoubtedly solid argument, at least from the point of view of economic regulation. On giving public administration the power to fine for the use of unfair clauses, the statute of 2007 does not make it dependent on any previous judicial decision. Literal interpretation is clear. And, as noticed when the relationship between Spanish legislation and EU directives was examined, a good reason to envision administrative sanctions for the use of unfair clauses is precisely to protect consumers in those situations where initiating civil proceedings would be unworthy. Thus, the teleological foundation of the judgement of 16 October 2017 is not at all negligible, either.

IV

However, beyond the needs of economic regulation, one should be aware of the implications of such approach. In a wider perspective which takes into account the institutional position of public administration, accepting that it may declare the unfairness of private contracts without any intervention of civil courts touches some basic features of the dividing line between private law and administrative law.

On the one hand, such approach implicitly accepts the possibility of divergent decisions about a same contractual clause. It would be thinkable that public administration imposes a fine for the use of a given clause, that the legality of such fine is later confirmed by the administrative court and that, nevertheless, a civil action on grounds of unfairness against the very same clause is rejected by civil courts. True, the judgement of 16 October 2017 recalls that administrative findings about unfair clauses exhaust their effects in the administrative sphere. Although the judgement of 16 October 2017 does not mention it explicitly, it is clear that under Spanish law there is no burden to refer civil questions arising in administrative cases to a civil court: both public administration and administrative courts (when reviewing administrative decisions) may rule those civil questions *incidenter tantum*, i.e. only as far as they are a precondition of the administrative decision[6]. Nevertheless, the mere possibility of divergent administrative and civil decisions on a same clause is troublesome, among other reasons because an administrative declaration of unfairness later contradicted by civil courts would *de facto* lose legitimacy: the heart of the matter is that the legal system can end up punishing somebody for an act which is valid. By the way, the opposite situation is less distressing: there can be good reasons to invalidate an administrative sanction imposed for the use of a clause which has already been declared unfair by civil courts. For example, in a judgement of 24 November 2009, the Supreme

[6] Article 4 of the *Ley de la Jurisdicción Contencioso-Administrativa* of 1998. This statute regulates judicial review of administrative action.

Court found that, in spite of a previous civil declaration of unfairness, the company's behaviour had not been malicious and consequently the fine imposed on it was unjustified[7].

On the other hand, the statutory power to impose administrative sanctions for the use of unfair clauses without any previous intervention of civil courts involves accepting that public administration may have a relevant role in legal relations between private persons. And this can be problematic in a liberal perspective. Notice that the exorbitant privileges of public administration (basically its power to define the rights and duties of individuals in a unilateral and authoritative manner) are normally conferred in order to protect interests whose holder is public administration itself, not to safeguard the social order generically[8]. The standard means to achieve this latter objective is legislation defining what is valid and what is invalid in private relations. And one should not overlook that legislating in general terms about contractual clauses is not the same as intervening in single contractual relations, which for public administration are always *res inter alios acta*.

The purpose of this remark is not to suggest that the very possibility of administrative intervention in private situations involves necessarily a violation of the Constitution, nor that it is incompatible with liberal-democratic principles. It is simply a warning: statutory powers of this kind should not be created indiscriminately. Making public administration function as a sort of policeman in private affairs can be justified only when individuals are not fully able to fight for their rights by themselves. Such an intrusive instrument of control is not a necessary consequence of legislation which restricts freedom of contract.

There is a full scale of imaginable restrictions on freedom of contract, which go from denying legal protection to some agreements (e.g. prostitution, gambling, etc.) to imposing obligatory conditions (e.g. rent control). So prohibiting some clauses considered to be unfair, as happens in the field of consumer protection, is one more imaginable restriction. And giving public administration the power to fine is still something else.

A final observation, precisely about freedom of contract and public law. Freedom of contract is a relatively recent principle in historical terms[9]. It was not firmly established before the liberal revolutions. In more remote periods, not all agreements were recognised as contracts, nor were the parties free to draft new contractual patterns. This is why the maxim *pacta sunt servanda*, introduced by natural law theorists in the 17th century, was originally revolutionary. Such long tradition perhaps explains why contract is not usually mentioned in modern constitutions and declarations of rights, in amazing contrast with property. And when exceptionally it is given constitutional relevance, as in the Constitution of the United States, it is to protect the creditor[10].

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[7] See M. Rebollo Puig, M. Izquierdo Carrasco and A. Bueno Armijo, "Potestad sancionadora: infracciones y sanciones", in M. Rebollo Puig and M. Izquierdo Carrasco (ed.), *op. cit.*, p. 789.

[8] This is acutely observed by M. Rebollo Puig, M. Izquierdo Carrasco and A. Bueno Armijo (*loc. cit.*, p. 788), quoting E. García de Enterría's reservations about using administrative sanctions to protect non-administrative interests.

[9] See L. Díez-Picazo, *Fundamentos de Derecho Civil Patrimonial*, vol. I, 2nd ed., Tecnos, Madrid, 1983, p. 93 and ff.

[10] Article I, section 10 of the US Constitution. It is well known how one of the immediate reasons behind the calling of the Philadelphia Convention was the Federalists' concern about States' legislation which allowed the repudiation of debts. See Ch. A. Beard, *An Economic Interpretation of the Constitution of the United States*, The Free Press, New York, 1986, p. 179 and ff. This book was originally published in 1913.

Debtors were (and are) already protected by the traditional principle of *favor debitoris*. Is this the reason why, in constitutional terms, contract is less important than property? This question deserves to be examined.