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Consumers as Unassisted Minors: Asymmetrical Sanction for Unfair Contract Terms

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Abstract: The consumer distance contract regulated within the European Union was compared to the Roman law solution known by its medieval name as negotium claudicans, thus to the contract with unassisted pupilli (children under the age of puberty, i.e., minors). This article builds on this comparison and applies it to yet another EU directive which follows even more closely the idea to interfere with the binding nature of contractual terms. The recent case law of the CJEU regarding the sanction enclosed in the Article 6(1) of Directive 93/13/EEC, its implementation into national laws, and the standpoints of various legal doctrines especially in Polish law inspire to ask about the nature of sanction for unfair contract terms and its importance for the modern discussion on the typology of nullity. The paper tries to answer these questions by marrying solutions applied in different times and contexts. It compares the EU sanction with the Roman law of contracts with unassisted minors and with its legacy in European and South African law. Both examples, according to us, are related by the similar nature of the sanctions which bear strikingly similar characteristics: they are asymmetrical and escape the modern typologies of nullity.

Keywords: consumer law; unassisted minors; unfair contract terms; nullity; Roman law; comparative law

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1. Introduction

The doctrinal development of the EU sanction for unfair contract terms resembles the historical evolution of the sanction applied to transactions by unassisted minors in Roman law. First, in both, the weaker party to the transaction is not bound by the unfair term (EU) or the provision imposing the obligation (Roman law). Second, the sanction may serve to penalize the counterparty, i.e., the weaker party to the transaction has a claim against the counterparty, while the counterparty does not. Third, the weaker party may choose to knowingly perform based on such a provision, in which case restitution is impossible. In EU law, it is so due to informed consent; in Roman law, due to the performance of natural obligation. Fourth, the application of sanctions may affect the collapse of the entire contract, in which case it becomes necessary to answer how the parties will be settled. In the EU, the sanction cannot be applied to the main obligations of the contract, which requires defining the essential obligations and also discerning when the contract cannot continue to be in existence without the unfair terms (de Elizalde and Leskinen 2018); in Roman law, it is possible to apply sanction to the essential obligations only by maintaining that the weaker party retains natural obligation towards the other party. Nowadays, in civil law countries, transactions with unassisted minors are considered inchoate due to a long historical evolution of sanction, in which the interest of the counterparty has been more guarded than in the case of the sanction protecting unassisted minors as developed in Roman law. Even in Roman law itself, however, the punitive nature of the sanction against the party contracting with an unassisted minor was mitigated in the face of the need to maintain social equilibrium. Given the historical parallels, it is not excluded that the currently eminently penal nature of the EU sanction will be modified in the future;

however, it is barely possible, due to one important difference: in the case of unassisted minors, they may be sellers and suppliers unlike in the case of consumers.

The recent case law of the CJEU regarding the sanction enclosed in the Article 6(1) of Directive 93/13/EEC, its implementation into national laws, and the standpoints of various legal doctrines inspired us to ask about the nature of the sanction for unfair contract terms and its importance for the modern discussion on the typology of nullity. Although it has been projected to be implemented differently in EU member states in order to preserve the consistency of individual national civil laws, its understanding is constantly being developed by the CJEU, which affects the application of national sanctions. The evolving nature of the sanction is particularly relevant in Polish law, where it was applied to famous loan agreements indexed with a foreign currency exchange rate (Ziemblicki and Lewandowski 2021). In 2021, the Polish Supreme Court (III CZP 6/21) compared the operation of the sanction to an inchoate transaction with an unassisted minor, called in Polish legal scholarship negotium claudicans. This paper firstly argues that the evolution of the EU sanction resembles to a higher degree the original history of the Roman negotium claudicans which in ancient law and in ius commune was understood differently than a modern inchoate transaction. Secondly, the evolution of sanctions to clarify or adjust their operation in order to achieve social equilibrium is nothing new: it is a natural consequence of the pluralism of civil law sanctions and the blurred boundaries, despite attempts to obliquely outline their types in the science of civil law. The paper tries to prove this historical analogy by marrying solutions applied in absolutely different times and contexts. In the first part, the example of asymmetrical sanction for unfair contract terms introduced by EU law in the Article 6(1) of Directive 93/13/EEC is analyzed and in the second part, its implementation in Polish law (Article 3851′ §1 of the Civil Code) and other European legal orders. In the third part, its connection with the Roman law solution of contracts concluded with unassisted minors (the so called negotium claudicans) is presented merged with the evolution in the Western legal tradition, and in the fourth part the analysis is grounded in the recent discussion of typology of nullity and the cognate concept of *limping contract* applied in South African law nowadays.

2. EU Neutral and Asymmetrical Sanction for Unfair Contract Terms

The sanction contained in Directive 93/13/EEC was to be formulated in such a neutral way that each member state could choose the type of legal consequence appropriate to its private law. Hence, the committee working on the directive considered two proposals for a legal sanction: "the unfair terms...shall be void or void as against the consumer" (Tenreiro 1995). This second sanction was presented to Parliament. Using the term "void as against the consumer", an attempt was made to avoid the discussion of whether an unfair term should be "void", "voidable", "nonexistent", "void ex tunc or ex nunc, erga omnes or inter partes". Parliament wanted to leave this issue to the member states. It therefore began to seek a formulation that was more neutral, far removed from national legal traditions and indicating only the practical effect—an objective that the member states could achieve in any way they wanted. As it turned out, it was not an easy task.

It should be reminded that the proposal of sanctions *void as against the consumer* has already appeared in the past and was not the result of the mere invention of a committee of experts. It was taken over from the Council Common Position of 22 September 1992 with regard to the adoption of the directive on unfair terms in consumer contracts. Article 6(1) of the Position, in addition to this single amendment, was moved to the proposal as Article 6(1) of Directive 93/13/EEC. However, the European Parliament considered that this concept was not sufficiently new and neutral. It decided to vote for a new version, which was accepted by the committee working on the directive and by the European Commission and finally, in Directive 93/13/EEC, was included the version: *not be binding on the consumer*. The notion of *nonbinding* was considered a novelty of EU law that had no equivalent in national sanction systems which usually applied either voidness or voidability.

The notion of unfair contract terms and nonbinding sanction go beyond the previous concepts of good faith and deception. The right of withdrawal and sanctions for nonconformity of goods and unfair contract terms reshuffle the current legal tradition. The basic argument that unfair terms should not bind consumers is based on the belief that such terms could not be justified in agreement between the parties (Hesselink 2016).

The fact that the phrase "not binding on the consumer" is "open" and does not explain the type of sanction to be applied was also an assumption of the creators of the DCFR (DCFR 2009). It was repeated in II.-9:408: "(1) A term which is unfair under this Section is not binding on the party who did not supply it". The transition from "not be binding on the consumer" in the directive to "nonbinding" in the DCFR was due to the nature of the DCFR. As a scholarly important although not implemented project of common EU private law, it contained the sanction of "not binding on". This is indicated by the explanation given by the authors of the DCFR. The effect of nonbinding sanction on the consumer is a unilateral solution, whereby one party is not bound by an unfair term, while the one who imposed it is bound by it: this means that it is up to the party not bound by the term whether such term should be applied or not. An assigned sanction can exist without further definition of the specific legal meaning of the term "not binding". However, each time, the term has been clarified by the CJEU. The meaning of the term is that such a term has no legal effect on the party who has not introduced it into the contract. On the other hand, such a contractual party, if it wants to, can raise it against the other party who introduced it into the contract. Hence, the consumer can, but does not have to raise the unilateral voidness of the contract term.

In the light of the examples given by the authors of the DCFR, it becomes clear that they accept the literal unilateral voidness of an unfair term. It is not effective against the consumer, but it is effective against the consumer's counterparty. For this reason, if there was an unfair term in the contract that limited the consumer's right to withdraw from the contract only if a defect is found, the seller cannot invoke its unfairness. Therefore, the consumer, if they consider it beneficial to them, may use this unfair term and withdraw immediately instead of asking for repair or replacement. However, in case of doubt, if the consumer is not aware of the unfairness of the contract term, the sanction for unfairness is to be taken into account by the court itself and does not depend on the consumer invoking it. It must be protected against the unfairness of the contract term. Therefore, the court is obliged to assess the fairness or unfairness of a term every time and present it to the consumer, who decides whether they want to be bound by it.

Under EU law, the nonbinding by a contractual term is distinguished by the consumer's ability to invoke the unilateral voidness of a contractual provision deemed unfair by a court. The sanction applies only to secondary contract terms—it does not apply to issues relevant to the existence of the contract. An argument against the unilateral voidness of a term cannot be that the contract is now less advantageous to the contracting party imposing the term—it is in their interest to provide adequate contract terms to avoid their possible disadvantage. A continuation of the proposal contained in the DCFR was Article 79 of CESL, which states that: "A contract term which is supplied by one party and which is unfair under Sections 2 and 3 of this Chapter is not binding on the other party". In this case, again, this means a unilateral voidness whereby the party which has not introduced an unfair term is not bound by it, while the other party is (Schulze 2012). It also clearly reveals the idea, already present in the DCFR, that this effect of unfairness of contract terms also applies to business-to-business (B2B) relationships, although subject to different unfairness criteria for B2C and B2B contracts. It is also clear from the ACQP Article 6:306 and Directive 93/13/EEC. An unfair contract term not individually negotiated is not binding. Such a solution was adopted in Art. 6:301 [2] ACQP (Jansen and Zimmermann 2008). After all, all these drafts were aimed at presenting and, in a way, summarizing what had existed so far in European law through Directive 93/13/EEC and the case law of the European Court of Justice and later the Court of Justice of the European Union. Article 6(1) of the Directive is therefore beginning to acquire its own particular significance. It is primarily developed in

the case law of the CJEU. The development of the autonomous meaning of sanctions for unfair contract terms at the EU level in fact limits the scope of possibilities that national legislators can choose to implement Article 6(1) of Directive 93/13/EEC.

3. Asymmetrical Sanction in Polish Law and in a Comparative Perspective

In the case of EU law, Article 6(1) of Directive 93/13/EEC reads as follows:

> "Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms".

Here the most intriguing aspect is the sanction that should be implemented by the national legislators. The consumer shall be protected against unfair terms by applying a sanction which causes that such a term shall *not be binding on the consumer*. In order to implement Directive 93/13/EEC, the Polish legislator introduced Article 385^1 into the Civil Code, which is almost a literal translation of the European act. This also applies to the phrase used to designate a legal sanction. The Polish legislator provided that provisions of the contract not individually agreed with the consumer "are not binding on the consumer" if they shaped their rights and obligations in a manner contrary to good faith, strikingly infringing their interests. The Civil Code calls them "prohibited contractual provisions". The literal wording of Art. 385^1 §1 of the Civil Code arouses controversy in Polish doctrine. Other European countries have followed a simpler path and introduced their own well-known concepts—absolute or relative nullity, etc.—in the place of the EU formula. Only Italy made the directive's formulation the basis for a new special kind of nullity sanction—the so-called nullity of protection (*nullità di protezione*) regulated separately in the Consumer Code, which is considered to be a relative nullity. Although no longer an EU member state, England, just like Poland, explicitly repeated the formulation of the EU directive. Such formula "not be binding on the consumer" evidently bears a similar unilateral effect regarding contractual terms as the Roman idea that pupillus sibi non obligat—that the unassisted minor was not obligated to the other party. The unfairness of contract terms caused an asymmetrical position of the consumer, which is now balanced by an asymmetrical sanction which liberates the consumer from the obligation to comply with any such term. Needless to say, such mechanism is applied in order to prevent the nullity of the whole contract and still not harm the consumer. Prima facie, it seems to be absolutely in line with the principle of ius commune created on the basis of Roman law: utile per inutile non vitiatur—this principle is nowadays codified as partial nullity, but this kind of sanction still does not express the idea hidden behind the formula "not be binding on the consumer". The asymmetry should have a penal character for the supplier, and it should be the consumer only that may invoke the ineffectiveness of such term or decide freely that such term still may be applied, i.e., the supplier cannot invoke the ineffectiveness of such term which is elegantly justified by the universal Roman legal principle—nemo audiatur propriam turpitudinem. What type of sanction does the phrase "not binding on the consumer" imply, and whether the supplier may still be bound by such term is a matter of concern.

In the Polish doctrine, the most controversial is the phrase "not binding" on the consumer. This turned out to be a surprise and caused some doubts as to whether the legislator wanted to introduce a new type of sanction. If this were to be the case, a view was expressed that it would be a sanction that is unknown to the legal language, or to the legal doctrine, unprecedented in the civil law tradition, and thus causing considerable interpretation problems (Skory 2005). The phrase used by the European legislator and repeated by the Polish legislator indicates the one-way nature of the sanction (Trzaskowski 2013), which may mean that the contract clause does not bind the consumer but may bind the contracting party: "the legislator seems to cut through this natural element of the bond relationship, making it unbalanced" (Skory 2005). As a result, the sanction introduced by

the legislator was explained by means of the existing conceptual framework of Polish civil law. The interpretation which gives it the meaning of the sanction of invalidity would not only be an unnecessary repetition of Art. 58 §3 of the Civil Code but could unjustifiably worsen the situation of a consumer who would not be able to consent to apply such unfair terms if their absence was more unfavorable than their application. The experience of difficulties in interpreting the directive's sanction and the sanction contained in Article 385^1 §1 of the Civil Code implementing the directive's provision contributes to a wider discussion on the need to strictly categorize sanctions in private law and to allow only their closed catalog—numerus clausus. It turns out that flexibility in determining the legal consequences of using unfair terms in contracts may lead to more just and effective solutions, without fear of threatening the principle of legal certainty.

Doubts as to the application of sanctions are all the greater because Article 385^1 §1 of the Polish Civil Code explicitly repeats the EU provision. Therefore, the Polish legislator did not explicitly determine which of the existing types of sanctions applies to unfair contract terms, creating thus a sui generis sanction (Pisuliński 2017). What in the Polish doctrine seemed completely strange and new, however, turned out to be justified if one looks at the justifications for the relevant articles of the DCFR and CESL. The unspecified nature of the sanctions is confirmed there, and this is a statement entirely in line with the intention of the EU legislator. In the case of the DCFR and CESL, however, the unilateral voidness of the condition is indicated by a clear request to further bind the counterparty by such term. The clear sui generis character of the unilateral voidness of an unfair contract term is that it is not binding on one party and that the same term is effective on the other. In fact, this would be the way to define the contractor's reference to the fact that an unfair term, which they themselves have illegally inserted into the contract, is now effective only against them; and the sanction of the invalidity of the entire contract would then be the most favorable solution for them, hence the idea of the EU legislator to introduce a solution that would preserve the entire contract and at the same time eliminate what is disadvantageous for the consumer, in order to ensure the material equality of parties. The solution is the unilateral introduction of unfair terms causes their unilateral effectiveness. It is possible, however, that their application will fulfil the role of penalty for the contracting party, as in the case of a term regulating liability for delay or improper performance. In CJEU 27 January 2021, Joined Cases C-229/19 and 289/19, ECLI:EU:C:2021:68 (Dexia Nederland), the Court ruled that when a trader has inserted an unfair penalty clause, that provision cannot be replaced by an otherwise applicable default rule on damages. Earlier, the Court ruled that such a substitution is also not possible by the trader invoking (directly) a default rule instead of a contractual provision: CJEU 26 January 2017, Case C-421/14, ECLI:EU:C:2017:60 (Banco Primus). This means that the nonbinding by a term on the basis of Article 6(1) of the directive actually leads to the punishment of the trader, as the trader can no longer claim damages. It seems that the second basis for assessing the neutrality of the notion of "nonbinding" would be a case concerning a situation in which a consumer has performed a term that has proved to be unfair. In that case, the key question would be whether they can get back a benefit from the contractor in such a situation, and if so, on what basis. In fact, the court decision of 21 December 2016 in Joined Cases C-154/15, C-307/15 and C-308/15 touched upon the second issue: the national case law has to fulfill what the CJEU considered a bottom-line of Art. 6(1), namely, to allow the restitutory effects connected with a finding of unfairness by a court. It means that the consumer retains the right to repayment of amounts paid on the basis of contractual term regardless of its economic effects for the trader (Pisuliński 2017). Consequently, the meaning of the EU sanction appears to have a less neutral character than it seemed to bear. However, the restitutory character of the sanction proves to give the EU solution a more specific character in the context of historical examples.

4. Unassisted Minor and Negotium Claudicans

A sanction of invalidity of unfair terms is aimed at protecting the consumer against the use of the dominant position by the supplier. Consumer protection is undoubtedly a sign of modern times. The contractual inequality of the consumer is an irreplaceable assumption of EU legislators. The aim is to restore true freedom of contract so that the consumer being aware of the terms, having all the necessary information, can freely decide to conclude a contract. The experience of difficulties in interpreting the directive's sanction and the sanction contained in Article 385^1 §1 of the Polish Civil Code implementing the provision of the directive is a contribution to a broader discussion on the need for strict categorization of sanctions in private law. It turns out that flexibility in determining the legal consequences of using unfair terms in contracts may be a more appropriate and effective solution which will not endanger the legal order.

The regulation initiated by the EU directive was inserted into the private law unification projects: the Principles of the Existing EC Contract Law (Acquis Principles), Draft Common Frame of Reference and draft of Common European Sales Law. Moreover, Article 6:306 ACQP, Article II.-9:408 DCFR and Article 79 CESL, as well as the commentaries of the legal doctrine regarding these draft laws, are following the EU concept of sanction for unfair contract terms. The gradually developed case law of the CJEU around the directive provision and doctrinal disputes around the Polish regulation make it necessary to ask the question about the nature of the introduced sanction. Placing the solution in a broader context gives an opportunity to assess it from the point of view of European legal tradition.

It is not the first time when consumer protection is compared to the ancient model of protecting minors, and thus it is not unprecedented to invoke negotium claudicans and Roman law in the context of EU law. Hans Nieuwenhuis used this analogy in the context of the previous directive regulating distance contracts—Directive 97/7/EC. He very subtly argued that vesting to consumers the right of withdrawal from the distance contract without giving any reason urges us to ask: "Can we still call this European consumer distance contract a contract?" (Nieuwenhuis 2003). In fact, he pointed out that the binding nature of a contract is called into question when consumer can unconditionally exercise such a right, and consequently it creates—according to Nieuwenhuis—transaction similar to a limping contract—negotium claudicans. It puts the seller (modern e-commerce firms) into an inferior position by creating an unfair asymmetry. As Nieuwenhuis argued a modern e-commerce firm can hardly "avoid doing business with adult consumers", while "[t]he Roman merchant could easily avoid concluding contracts with pupilli (boys younger than fourteen)". One may obviously extend his question and ask what about distance contracts concluded with consumers under the age of puberty which is not however the main goal of this paper. We are more focused on analyzing why such comparison between the ancient model of negotium claudicans and modern solutions applied to the consumers in the EU law is legitimate and enriching the modern legal discussions. Hans Nieuwenhuis, referring to the medieval concept of negotium claudicans, cited in this respect the fragment of Justinian's Digest—D. 19,1,13,29 Ulpian, *Edict*, book 32—which inspired medieval jurist Accurssius to invent the name—negotium claudicans. The fragment reads: the contract of a pupil with the contractor without the consent of the guardian only came into effect one way—ex uno latere constat contractus (D. 19,1,13,29 Ulpian, *Edict*, book 32). The very same fragment plays a key role in our analysis. In this paper, we are offering an analogical reflection although on quite a different level. While Nieuwenhuis was concerned with essential terms of the distance contracts, the possibility of annulling the entire contract by the consumer which he considered an unfair solution, we are focused on the fate of nonessential unfair terms of consumer contracts which place too much burden on the protected party to the contract. Moreover, Nieuwenhuis associated a consumer distance contract with a limping contract because of the possibility to withdraw from the contract, which makes such transaction voidable at the wish of the consumer. In fact, the original meaning of negotium claudicans worked in a slightly different manner—the contract on the side of the pupillus was ineffective ex lege and ex tunc, from the very beginning of

transaction, so it did not have to be rescinded by the minor; however, "what he pays after reaching puberty cannot be recovered" (D. 12,6,13, 1 Paulus, *Sabinus*, book 10). Interestingly enough, also in the ancient model, the protection of pupilli raised a similar concern whether it was not too burdensome for the supplier. That is why, it is the sanction for unfair contract terms as interpreted by the CJEU and as applied in Polish law that resembles to a higher degree the characteristic not only of the historical concept of negotium claudicans rooted in the European legal tradition, but also of the modern notion of *limping contract* applied in South African law. Respecting the differences between these legal areas, we would like to draw conclusions from analyzing EU law in an historical and comparative perspective for the subject of the invalidity of contracts and the modern discussion on the typology of nullity.

The reference to the historical perspective for the subject of European Union law concerning contract law should not be surprising. When the European Union, by virtue of the 1997 Distance Contracts Directive (and previously the 1985 Doorstep Selling Directive) and recodified in the 2011 Consumer Rights Directive, established specific consumer rights of withdrawal from the contract, it turned out that the consumer policy of the European Union introduced solutions already known in the historical development of law which originated in Roman law (regulations of the aedilitian edict), although EU law applied them in its own way, not always in line with the legal tradition (Longchamps de Bérier 2005; Jansen and Zimmermann 2008). The regulations of Polish and EU law regarding the sanction imposed on unfair contract terms bear the similar striking analogy with Roman law and European legal tradition. In fact, historical experience helps to bring out the essence and show the nature of the discussed sanction for unfair contract terms, as well as point out the differences between today's solution and the ancient model.

The example of contracts concluded with unassisted minors always come up when the concept of absolute and relative nullity is discussed, or any other typology of what is generally called the invalidity of legal transactions. A special case of such transaction applied in Roman law—later known as negotium claudicans —in the case of contracts concluded with unassisted minors (infantia maiores or impuberes, i.e., before reaching the age of puberty, and not younger than 7 years old)—opens up the discussion on the typology of legal sanctions to more flexible approaches which may help to accept the existence of sui generis sanctions, and the need to shape sanctions not according to the assumed distinctions (top-down) but to the requirements of effectiveness and fairness in exercising a social control over a particular case (bottom-up).

The reason why we decided to compare these specific and prima facie unrelated solutions is the asymmetrical character of the sanction. It seemed that the time when in his *Glosa ordinaria*, Accursius called the original Roman concept with the name of negotium claudicans—a limping contract—the idea hidden behind the ancient model will not return to the European legal order. Since the 16th century till the present day in civil law tradition negotium claudicans stopped being understood as a unilaterally void act. It started to mean an inchoate transaction: a legal act which validity is suspended entirely, and it is awaiting possible ratification or approval of its validity at a later date; in the absence of such validation, the act becomes void. The idea that a contract of sale concluded by the unassisted minor without the consent of the guardian is a unilaterally void transaction, and not an inchoate contract—temporarily invalid contract but with the possibility of becoming a valid transaction, seemed only the subject of Roman law scholarship and the doctrine of South African Roman-Dutch law. In fact, in the latter, the concept of limping contract (negotium claudicans), based mainly on Justinian's Digest, is still in use (Scott 2013).

Today, this famous characteristic of a "limping contract" is reappearing in the EU directive, which recognizes the asymmetrical character of the sanction's—"not binding on . . . "—unilateral voidness of the unfair contractual term towards the consumer and its validity towards the contracting party.

In Roman law, an impubes (girls 7–12 years old and boys 7–14 years old) as a seller had a claim for payment of the price without the obligation to release the goods; and as a

buyer, they could demand the release of the goods, but without having to pay the price. The contract only came into effect one way—ex uno latere constat contractus (D. 19,1,13,29 Ulpian, *Edict*, book 32). The pupil's claim could only be realized under the condition of his own performance, because the contractor was protected by the defense on the grounds of deception—exceptio doli (Wacke 1980). Importantly, they could not ask for exceptio non adimpleti contractus, since the contract had not arisen on the side of the pupil, so they merely could have employed retentio to push the pupil to counterperformance or to make them get the approval of the guardian. The problem appeared if the contractor performed their own performance. They could not force the performance due to them from the impubes on the basis of the concluded contract, since they had no contractual actio against the pupil (Ernst 1998). This was the case until the time of Antoninus Pius (2nd c. AD), who granted the contractor a condictio to claim unjust enrichment, enlarging the protection of the contractor and on the other hand maintaining the unilateral voidness of the contract, limiting the liability of the impubes only to the actual enrichment (locupletior) which the pupil received from the contractor. The contractor was still not entitled to demand the performance from the impubes—they could only recover what they had performed to the pupil himself. However, this issue was limited to bilaterally onerous contracts only. In the case of gratuitous contracts rendered for the benefit of the impubes such as receiving a donation without the consent of the tutor, it was a completely valid transaction. It was clear that the other way around would not be valid: a donation rendered by the impubes without the guardian's consent, or a stipulation to provide money. The structure of this invalidity was explained by Justinian according to a formal criterion: the part of the contract that was giving them a superior position (melior condicio) was valid from the side of the impubes and the part that was placing them in an inferior position (deterior condicio) was invalid (I. 1,21). This is why, the impubes who was selling an item had claim towards the buyer for the price (actio venditi) but could not have been sued for the delivery of the item (actio empti). Hence, in *Glossa ordinaria,* Accursius called this transaction: negotium claudicans (Viaro 2011; Wallinga 2011; Nieuwenhuis 2003; Labruna 1962). The assessment of the superior or inferior position of the impubes did not depend on the economic effects of the transaction, i.e., the contract was unilaterally void, even if financially beneficial for the unassisted minor. From the point of view of the texts transmitted in the Justinian's Digest, it emerges that Roman law was rather focused on the protection of the contracting party with the impubes and the improvement of their situation, because they suffered more severe legal and economic consequences of such a contract. It is interesting to note, however, that most of the texts that refer to unilaterally void contracts with an unassisted minor (ex uno later) are enclosed in book 18 of the Digest, in the fifth title, which deals with the various circumstances of the termination of a contract of sale and the availability of the right of withdrawal from the contract (*De rescinenda venditione et quando licet ab emptione discedere*). As for the context itself, the solutions provided are, on the one hand, adjacent to the subject of sales contracts with a reserved period of time to be reckoned with (D. 18,5,6 Paulus, *Edict*, book 2) or the case of a double sales contract of the same thing (D. 18,5,7,1 Paulus, *Questions*, book 5). On the other hand, unilaterally void contracts with unassisted minors are referred to among transactions concluded with persons of different status, e.g., with the freedmen (D. 19,1,13,26-29 Ulpian, *Edict*, book 32). The question about the unilateral voidness of a legal transaction is therefore, in Roman legal thought, placed between the issue of the modification of the binding force of the contract, especially of emptio venditio, and the differentiation of the validity of a contract due to a subjective factor, i.e., with minors and freedmen.

A similar criterion for evaluating the effectiveness of transaction with an unassisted minor was introduced in the South African Roman-Dutch Law doctrine. To this day, the Roman meaning of limping transaction is still used there, where the emphasis is on the protection of the minor and not the contractor. The law therefore provides for ways in which the minor can get a benefit from the counterparty. The counterparty is then entitled to restitutio in integrum, rei vindicatio or condicio indebiti if the object of the performance

was money (Scott 2013). The universal solution is that the obligation of the minor is a natural one. If they want, they can perform the contract thus concluded, although they cannot be sued to do so. Tony Honoré proposed to identify five types of invalidity of contracts in Roman-Dutch law with possible extension to nine types (Honoré 1958). Among the main five of them, he listed: unilaterally or bilaterally void contracts; unilaterally or bilaterally voidable contracts; and inchoate contracts. He gave two examples of unilaterally void contracts. First of all, a contract with an unassisted minor, and secondly, a contract concluded with a drunk person; unlike in English common law, in Roman-Dutch, law such contract is unilaterally void, not unilaterally voidable. In fact, the case of contracts with unassisted minors was a core example which moved Honoré to defend the difference between unilaterally void and unilaterally voidable contracts, and further to prove how various kinds of invalidity are present in private law, which serve for the sake of extending social control over private transactions.

The concept of a unilaterally void contract was also present in English common law in the case of agreements between adults and minors, which were treated as honorary agreements. They bound only the adult, were void with regard to a minor, and in the case of agreements between two minors, they did not bind any of them (Rudden 1999). Over time, in English common law, the criterion used for establishing the validity of contracts concluded with minors became, however, an economic advantage. Regardless of the binding nature of the contract, if it was globally profitable for the minor, it was completely effective (Scott 2013). This gave rise to the idea in English law, which is also present in continental law, that contracts concluded by minors in small matters of everyday life are valid (e.g., Art. 20 KC of the Polish Civil Code), unlike in German law, which still preserves the Justinian differentiation into the melior or deterior position of the pupil which, however, does apply only to delineate between transactions that are effective or void, and does not serve to introduce unilateral ineffectiveness of onerous contracts. In common law, however, this possibility was used to a much greater extent. It seems that the idea of unilaterally void legal transaction present in Roman law, in mixed jurisdictions systems and partly present in common law has been overlooked by the continental legal tradition surely in the case of transactions carried out by unassisted minors. However, it still has explanatory potential in the case of sanctions for unfair contract terms contained in the EU directive and its various implementations especially in Polish law.

One should remember that in 200 BC was introduced into Roman law a new protected category of *minores viginti quinque annis*—those who are under 25 years old. It should be understood that it covered those who already passed the age of puberty—12 or 14 years old, but were still unexperienced and "weak and deficient in sense and subject to many kinds of disadvantage" on the market (Wacke 1980). *Lex Laetoria* introduced a possibility that *minor* can ask praetor for *restitutio in integrum* if the transaction of *minor* was unfavorable to him. In effect, the contract will be annulled, and the parties to such contract will return to the pre-contractual situation. From this solution the civil law tradition inferred the idea of voidability—rescindability of the contract as different form of nullity. Due to intervention of Justinian the difference between *pupillus* and *minor* is not any more clear in sources. That is why the special protection created for *minor* somehow extends in some sources to *pupillus*. Nevertheless, the case of sanction for transaction with unassisted minors at least in civil law tradition is very often used to describe the clear division between voidness and voidability—absolute and realtive nullity—and the case of Roman idea of *restitutio in integrum* granted for *minores* was at the heart of such modern distinctions (Scalise 2014). What I would like to emphasize is a different kind of sanction applied in Roman law to unassisted *pupillius*—minor under the age of puberty which in fact differs from the *restitutio in integrum* and even more properly is applied to cases nowadays associated with minors—children under the age of puberty. What is quite interesting, that in South African law similar merger of two regimes has taken effect when the *minor* was allowed to claim *restitutio in integrum* (Gangwar 2022).

In Polish doctrine and Supreme Court jurisprudence, the sanction is referred to as a Janus face of modern negotium claudicans—the inchoate transaction: consumer can decide to approve or invoke the voidness of an unfair contract term upon informed consent, and when invoking voidness, the restitutory claims for unjust enrichment start to operate if the parties have already performed, but the contract cannot stand still without unfair contract terms. It is true even more if negotium claudicans is taken within original the Roman law context. With regards to the unfair contract term which does not influence the whole transaction and does not constitute a synallagmatic performance, the consumer may sue the party on the basis of unfair contract term; however, the other party cannot. Moreover, with regards to the unfair contract terms which affect the existence of the whole synallagmatic transaction, the unilateral voidness cannot be applied in EU law, but if it was to be applied, it would render similar or better results than the current solution. If the consumer sues the other party to perform there is an offset against what they have done, or a *retention* of performance. If the consumer did not perform and the other party did, the contracting party may sue the consumer only for unjust enrichment, and similarly, if the consumer performed only in part, there would be a claim for unjust enrichment limited by an offset, since to natural obligations, an offset can also be applied. This approach is also justified by the still-inspiring example of the South African regime (Gangwar 2022), and may also indicate that the Roman idea of a limping transaction can be combined with restiutio in integrum, as in Justinian's time, to offer an alternative theoretical explanation of consumer protection.

5. Negotium Claudicans and Typology of Nullity: Historical Analogy

The inspiration to take on this effort to compare the EU sanction with the regulation of contracts with unassisted minors and with the legacy of Roman law comes from two directions. Firstly, from the ideas of Tony Honoré regarding the typology of invalidity and the sanction for contracts concluded with unassisted minors in the field of Roman-Dutch law and South African law (Honoré 1958). Secondly, from the recent proposal of Ronald J. Scalise Jr. in relation to the typology of nullity on the basis of Louisiana law (Scalise 2014), and the role which Roman law and contracts with unassisted minors played in his analysis.

Since the 16th century, the notion of *negotium claudicans* changed its meaning in the legal doctrine of civil law to become an inchoate transaction. When an unassisted minor concludes a contract with a person of full legal capacity, such a transaction is ineffective: it is waiting to be rejected or confirmed either by the tutor or another representative of the minor or by themselves when they enter the age of puberty. In Polish legal doctrine, such a sanction is called suspended ineffectiveness. Usually, the party to such a contract with an unassisted minor can establish a period in which such confirmation or rejection should be made, and if nothing happens, such a transaction is considered entirely ineffective. This solution is well grounded in other legal orders of continental Europe: Austria (Art. 865 ABGB), Germany (§ 107–108 BGB) and Switzerland (Art. 19–19b ZGB) (Cfr. Dörner 2021), which confirms that modern civil law in Europe, although evolved from the negotium claudicans concept, no longer preserves its original meaning and barely mentions the Latin name, and if it does, as in the case of Polish law, it already contains a different legal doctrine. Accursius who invented the name negotium claudicans understood it just as Romans did when he was making his comment to the fragment of Justinian's Digest, D. 19,1,13,29 (Ulpian, *Edict*, book 32), and in fact, the Roman way of explaining what was later to be called negotium claudicans was entirely different This understanding seems to be abandoned completely by the doctrine of civil law with regards to the effect of acts performed by an unassisted minor, but continues in some jurisdictions with regards to the criteria of delineating legal transactions which requires and which does not require the consent of a minor's legal representative (Cfr. Dörner 2021). Surprisingly, legal effects of the acts of an unassisted minor in the line of Roman law still continues to develop in South African law as a legacy of Roman-Dutch law. We would like to take on the original Roman understanding of negotium claudicans and present that not everything that is

deemed to be new in the field of legal sanctions is always unprecedented. Moreover, we would like to add another argument in favor of the statement that the modern typology of nullity is losing its clear and well-defined character. Nowadays we observe numerous typologies of legal sanctions; however, we can observe as well that modern legislators, like Roman jurists, begin to introduce more and more freely legal sanctions that elude well-established classifications—sometimes it is intentional, sometimes it is a matter of imprecise or inconsistent legal wording of the statute. What is more, it happens that when jurists want to classify such newly invented sanctions and draw conclusions from the assumed types of nullity, it results in unfair consequences or a lack of flexibility in relation to issues being resolved by a specific provision of the legislation. In fact, problems with classifying a *limping contract* in South African law and similar problems with the interpretation of the sanction introduced by Article 6(1) of Directive 93/13/EEC and Article 385^1 §1 of the Polish Civil Code are examples of a case-by-case determination of the content of a sanction, rather than a successful extension of juristic typologies. Obviously, there is a question of what happens if a minor is a consumer. In South African law, the regime of limping transaction has been modified in the case of consumer contracts by the Consumer Rights Act, which introduced a special provision for unassisted minors. However, it is still not clear whether it has introduced absolute or relative nullity.

Such discussion around a new formula for expressing a sanction of invalidity confirms the existence of a wider phenomenon: the ambiguity and diversity of the wording used to define sanctions, whether nullity/voidness, voidability, or ineffectiveness or others. Acceptance of the "nonbinding" wording may, after all, from the point of view of legal practice, be regarded as one of the forms of invalidity or voidability depending on the adopted scope of the two concepts—as it was proved by the legal doctrine of a majority of EU member states, which reinterpreted the EU sanction according to their already-known legal framework. However, when a simple classification is not possible, the features of such a sanction, which are, after all, most important for both parties to the contract, turn out to be decisive. However, the problem of the precise determination of sanctions is nothing new. Moreover, even the modern legislator, although aware of the basic types of sanctions, does not maintain discipline in the clear formulation of sanctions. In Roman law and the Roman law scholarship, more than 30 terms were used for what we may now call voidness or voidability, but it was not causing any problem of delimitation between them, since Roman jurists were rather interested in the question of the "enforceability" of a legal transaction rather than top-down distinctions from which one may infer consequences in a particular case. In this context, Roman law should be considered closer to the attitude of common law (Scalise 2014). Pandectistic scholars tried to systematize Roman terms adopting as a general notion invalidity, which was then distinguished between ipso iure and other ways of challenging a legal act (Zimmermann 1996). Although even then, the idea of relative nullity/voidness already caused an interpretative issue (Honoré 1958; Zimmermann 1996). However, as J. Preussner-Zamorska pointed out, exactly the same problem with the difficulty of arranging sanctions in a logical way is present in contemporary Polish civil law (Preussner-Zamorska 1983). Even the use of the concepts of ineffectiveness or invalidity is not always unequivocal. Moreover, the legislator uses different terms related to the invalidity, ineffectiveness, or voidability of a legal act. Among the used expressions, there are, e.g., "it does not come into effect" or "is not concluded". Creating types of sanctions has not proved useful in this respect. The inevitable lack of precision in the formulation of sanctions confirms that subsequent attempts to standardize or systematize sanctions may prove unsuccessful. The modern doctrine of civil law recognizes that the flexible nature of sanctions is a better solution. Hence, the already aged proposal of the first book of what was to be a new Polish civil code includes a provision introducing the so-called "moving" sanction. It is a move away from the current postpandectistic sanction system. In addition to the voidness sanction, it gives the court the power to choose the most appropriate sanction in a given case and provides only an exemplary catalog of sanctions. The proposed new system of regulation begins to resemble the one used in the precodification legal orders

of ius commune or ancient Roman law. Interestingly, the doctrine of making sanctions more flexible was also expressed in Article 385^1 §1 of the Civil Code. It was argued that such an unspecified sanction was an "unclear mechanism" and "a threat to the certainty and predictability of sanctions" (Gutowski 2016). On the other hand, some scholars allowed the idea that such provision should allow the court to "choose the right sanction every time" (Trzaskowski 2013).

The evolution of sanctions to clarify or adjust their operation to achieve social equilibrium is nothing new: it is a natural consequence of the pluralism of civil law sanctions and the blurred boundaries between their types painstakingly outlined in the developing science of civil law. One of the most famous examples of a sanction whose understanding is evolving is the sanction for unfair contract terms, which in the hermeneutic process is increasingly illuminated, clarified in the CJEU jurisprudence, which evaluates the ways of its national implementation. From the Polish point of view, this sanction has a remarkably crucial social significance in relation to loans indexed in Swiss francs, and the dogmatic attractiveness comes from the spoof of the implementation of the sanction, which in the Polish legal order has not been directly qualified to any typical sanction, but whether it is treated as a sanction sui generis, or as similar in its effect to negotium claudicans. The experience of Roman law gives us not the same, but a similar example of the evolution of sanctions, which dictates that we look at the plurality of sanctions and their ultimately open catalog as the normal state of affairs. The parallel Roman example concerns precisely negotium claudicans, but in its original—not modern—sense, that is, the sanction for acts done by a pupil without the guardian's consent. At its origins, this sanction was intended to protect a specific value: the inexperience of an immature person, who could only act for their legal benefit, without the ability to contract obligations. The mode of operation of the sanction, however, evolved due to the need to protect the counterparty. The doctrine of Roman jurists and the legislative interventions of the emperors led to the sanction being given a new character that was more in line with the social equilibrium. This sanction then evolved in the continental European legal tradition to the form of an inchoate transaction, which today the Polish Supreme Court applies by similarity to the sanction for unfair contract terms. In my view, this confirms the vitality of Roman law: first, the sanction served in a similar context—for the protection of the weaker party to the transaction—and second, it can even be argued that the original source understanding of the sanction could also effectively serve to describe and qualify the sanction for unfair contract terms due to its similarity. The world of sanctions between nullity and repudiation is wide. For this reason, the key is to ask what values we want to protect and adjust the sanction accordingly.

6. Conclusions

The sanction of unilateral voidness of a legal transaction, which has been known for a long time, is now used differently than it was in the past. In the European legal tradition, which includes Roman-Dutch Law and Roman law, the sanction of unilateral voidness of a legal transaction was applied only to the contract with an unassisted minor and caused the voidness of one of the essential terms of a contract either on the basis of the theory of placing a minor in a superior or inferior position (in Roman law) or on the theory of the economic viability of the transaction as in the English common law doctrine. The interpretation of Article 6(1) of Directive 93/13/EEC in the CJEU jurisprudence, on the other hand, means that in the European Union, the unilateral voidness of a legal transaction can be applied to a wider range of actors: consumers. However, it is limited only to nonessential terms of the contract and is based on the theory of unfair terms and the criterion of consumer benefit. If the EU legislator, in determining the sanction for an unfair contract term, did not introduce the limitation that the sanction for the unfairness of a contract term cannot concern the essential terms that determine the essence of a contract, it would mean a great return to the European continent of the "limping contract" in its ancient Roman meaning: a transaction that is unilaterally void. In accordance with Article 6(1) of Directive 93/13/EEC, this sanction is already applicable to nonessential contract terms. Within the European Union,

the most important justification for consumer rights does not lie in the type of goods, the type of contract, or the place of transaction that the EU single market is deemed to be, but primarily in the category of persons who carry out the transaction. The other mentioned criteria are present, but only as subgroups of consumer contracts. The transfer of focus from specific types of transactions to a specific person performing transactions must have led to a lack of uniform contract rules for the common market. The legal reality was divided in the current model into the world of the consumer and the world of the nonconsumer (the contractor/the supplier). In this sphere as well, the move from contract to status that has been taking place in law during the 20th and 21st century is once again confirmed (Maine 1908). Although Roman law was governed by different statutes, which was also the basis for the protection of the minor, in the case of a person contracting in an economic market, it led to a simple extension of the special regulations protecting contractors on the aedilitian market, granting the same rights when purchasing items at any kind of market. Historical and comparative legal experience shows that the idea of asymmetrical legal sanctions can serve to protect specific goods: the interest of the consumer or the interest of the creditor. The proposed opening of a catalog of sanctions in Polish private law is an opportunity to make the legal order more flexible by providing a wider range of instruments taking into account the demands of utility and equity.

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