

Article

Francesca Corletto*

Towards a Protective *Condictio*? The *Bank M* Case in the Prism of Restitutory Remedies: A Reconstructive Proposal

<https://doi.org/10.1515/ercl-2024-2007>

Abstract: The aim of the paper is to provide a reconstructive reading of the case *Bank M* in the light of the core principles of the system of protection established by Directive 93/13, as well as, more generally, the regulation of restitutionary remedies derivable from national laws and the general principles of EU law. The analysis takes particularly into account the Italian civil lawyer's point of view, as before the advent of *Bank M*, the Italian Supreme Court had already ruled on the same subject, establishing an unprecedented version of the *condictio*: an asymmetrical *condictio*, which has been defined, with a significant expression, as 'protective *condictio indebiti*'. Since both Courts allow the non professional party to pursue restitutory claims to which the professional party is not entitled as well, one might be led to believe that the same starting question was resolved in the same way in both cases, and therefore that, as a result of the case *Bank M*, a 'protective *condictio indebiti*' such as that established by the Italian Supreme Court can be said to have been established (also) in European contract law. However, for the reasons to be explained below, it is believed that the CJEU did not intend to introduce a unilateral or asymmetrical claim for recovery of undue payment, but merely permitted the consumer to demand what, under domestic law, he or she would have obtained by exercising the general action of unjust enrichment. It will be seen how the general content of restitutory protection is articulated in the system established by the UCTD, in the light of the most relevant ECJ's case-law on this subject, with the ultimate aim of verifying whether the 'protective *condictio indebiti*' outlined by Italian case-law can enter fully into European contract law.

Keywords: consumer contracts; protective voidness; restitution; *condictio*; unjust enrichment; unfair contract terms directive

*Corresponding author: Francesca Corletto, PhD in Private Law, Università degli Studi di Padova, Padua, Italy, E-mail: francesca.corletto@phd.unipd.it

Résumé: L'objectif de cet article est de proposer une lecture reconstructive de l'affaire *Bank M* à la lumière des principes fondamentaux du système de protection établi par la directive 93/13, ainsi que, plus généralement, de la réglementation des restitutions découlant des lois nationales et des principes généraux du droit de l'Union européenne. L'analyse prend particulièrement en compte le point de vue du juriste civil italien, étant donné qu'avant la survenue de l'affaire de la *Bank M*, la Cour suprême italienne avait déjà statué sur le même sujet, établissant une version sans précédent de la *condictio*: une *condictio* asymétrique, qui a été définie, par une expression significative, de "*condictio indebiti* protectrice". Étant donné que les deux tribunaux permettent au non professionnel d'agir en restitution, droit dont ne bénéficie pas le professionnel, on pourrait être amené à croire que la même question de départ a été résolue de la même manière dans les deux cas et que, par conséquent, à la suite de l'affaire *Bank M*, une "*condictio indebiti* protectrice" aurait été établie (également) dans le droit européen des contrats. Toutefois, pour les raisons qui seront expliquées ci-dessous, nous pensons que la CJUE n'entend pas introduire une action unilatérale ou asymétrique en répétition de l'indu, mais qu'elle se borne à légitimer le consommateur à exiger ce qu'il aurait obtenu, en vertu du droit national, en exerçant l'action générale d'enrichissement sans cause. Nous verrons comment le contenu général de la protection restitutive s'articule dans le système établi par la directive concernant les clauses abusives dans les contrats conclus avec les consommateurs, à la lumière de la jurisprudence de la Cour de justice la plus pertinente en la matière, dans le but ultime de vérifier si la "*condictio indebiti* protectrice" esquissée par la jurisprudence italienne peut entrer pleinement dans le droit européen des contrats.

Zusammenfassung: Der Beitrag stellt die Entscheidung des EuGHs in Sachen M-Bank in den Rahmen der Kernprinzipien eines Verbraucherschutzes und der Verbraucherschutzziele nach der AGB-Richtlinie 93/13, zudem jedoch allgemeiner der Prinzipien des Rückabwicklungs- und Restitutionsrechts, die sich aus den nationalen Rechtsordnungen und den allgemeinen Rechtsprinzipien des EU-Rechts ableiten lassen. Bei der Analyse liegt ein spezielles Augenmerk auf dem italienischen Recht, da vor dem EuGH auch die italienische Corte di Cassazione (Supreme Court) denselben Gegenstand zu entscheiden hatte und eine bisher so unbekannte asymmetrische Form des Bereicherungsausgleichs etabliert hatte, die auch bereits als 'schutzorientierte *condictio indebiti*' umschrieben wurde. Da beide Gerichte dem Verbraucher Bereicherungsansprüche einräumen, die in der gleichen Form die Anbieterseite nicht haben soll, mag man versucht sein anzunehmen, dass beide Gerichte den Fall im Wesentlichen gleich gelöst haben und dass – durch das EuGH-Urteil in Sachen M-Bank – nunmehr auch auf EU-Ebene die genannte 'schutzorientierte *condictio indebiti*' etabliert worden sei. Aus den Gründen, die

näher erörtert werden, ist dies freilich aus Sicht des Verf. irreführend und anerkennt der EuGH keinen einseitigen oder asymmetrischen Anspruch auf Bereicherungsausgleich (ungerechtfertigter Zahlungen), sondern wollte nur dem Verbraucher zusprechen, was er oder sie unter nationalem (polnischem) Recht im Wege der ungerechtfertigten Bereicherung erhalten hätte. Es wird sich erst noch erweisen müssen, wie allgemein diese Aussage dann auch im System der AGB-Richtlinie verankert sein soll, namentlich im Rahmen der zentralen EuGH-Rechtsfälle in dieser Materie, um dann zu dem Schluss zu kommen, dass und ob wirklich das EU-Recht eine ‘schutzorientierte *condictio indebiti*’ im Sinne des italienischen Rechts auch selbst fordert (oder nur dem nationalen Recht gestattet).

1 Introduction

In the case *Bank M* of 15 June 2023,¹ the CJEU ruled for the first time on the specific topic of the legal consequences, in particular the restitutionary consequences, of the annulment of a consumer contract in its entirety – due to the fact that the contract at stake contained unfair terms and it was not capable of continuing in existence without the unfair terms. The judgment is part of the heated case-law debate that has arisen around foreign currency indexed variable-rate mortgage loans.² This debate is of central importance for European contract law, as it has given impetus to the development of consumer law to an extent so far unprecedented in European contract law.³

Given that, as clarified in the case *Kásler*, a standardised clause in a foreign currency loan determining the exchange rate of monthly instalments may be declared unfair under the conditions set out therein,⁴ the question arose as to how the presence of such a clause affected the entire contract in two respects. First, in the light of Article 6 para 1 of the Unfair Contract Terms Directive,⁵ it had to be determined whether the contractual regulation could be maintained after the

¹ Case C-520/21, *Arkadiusz Szcześniak v Bank M* [2023] ECLI:EU:C:2023:478.

² For a broader analysis of this phenomenon, see S. Grundmann and N. Badenhoop, ‘Foreign Currency Loans and the Foundations of European Contract Law – A Case for Financial and Contractual Crisis?’ (2023) *European Review of Contract Law* 1–36.

³ Grundmann and Badenhoop, n 2 above, 6.

⁴ See case C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282, paras 59, 75 and 80. See also cases C-118/17, *Zsuzsanna Dunai v ERSTE Bank Hungary Zrt* [2019] ECLI:EU:C:2019:207, paras 48 and 49 and C-421/14 *Banco Primus SA v Jesús Gutiérrez García* [2017] ECLI:EU:C:2017:60, para 64.

⁵ Art 6 para 1 UCTD states that ‘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’.

elimination of an unfair term – as ruled in principle⁶ – or whether the elimination of the latter would make the survival of the contract legally impossible. Secondly, and consequently, it had to be clarified what consequences, in terms of restitutionary effects, the termination of the entire contract would have in the latter hypothesis.

The first question was answered in cases *Dunai* and *Dziubak*, where the Court clarified that if the unfair term is essential, in that it defines the main subject matter of the contract, the survival of the latter does not seem legally possible, a circumstance which in any case it is for the referring court to assess according to an objective approach.⁷ In particular, the maintenance of the contract does not seem possible when, according to the provisions of domestic law, the elimination of the unfair term would result in a change in the nature of the main subject matter of the contract.⁸ In this case, therefore, the CJEU authorises national courts to consider not only the unfair term, but also the entire contract, as void.⁹

This landmark case-law has set the basis for the second question, which has been defined in the most recent case *Bank M*. In this case the CJEU established that Article 6 para 1 and Article 7 para 1 UCTD must be interpreted as not precluding a judicial interpretation of national law according to which the consumer has the right to seek compensation from the credit institution going beyond reimbursement of the monthly instalments paid and the expenses paid in respect of the performance of

6 According to settled case-law, art 6 para 1 UCTD is to be interpreted as meaning that the contract in question must, in principle, subsist without any alteration other than that resulting from the removal of the unfair terms. If that condition is met, the contract in question may be upheld, provided that, in accordance with the rules of domestic law, such survival of the contract without the unfair terms is legally possible, which is to be verified according to an objective approach. See, to that effect, case C-118/17, *Dunai*, n 4 above, paras 40 and 51 and Joined Cases C-70/17 and C-179/17 *Abanca Corporación Bancaria SA v Alberto García Salamanca Santos and Bankia SA v Alfonso Antonio Lau Mendoza and Verónica Yuliana Rodríguez Ramírez* [2019] ECLI:EU:C:2019:250, para 57.

7 See case C-118/17, *Dunai*, n 4 above, para 52, where reference is made to a risk clause in the exchange rate. In para 54, recalling Joined Cases C-96/16 and C-94/17 *Banco Santander and Escobedo Cortés* [2018] ECLI:EU:C:2018:643, para 74, the CJEU points out that, although in *Kásler* the Court has accepted ‘that a national court may substitute a supplementary provision of domestic law for an unfair contractual term in order to ensure the continued existence of the contract, it follows from the Court’s case-law that that possibility is limited to cases in which the cancellation of the contract in its entirety would expose the consumer to particularly unfavourable consequences, such that the latter would be penalised’.

8 Case C-260/18 *Kamil Dziubak, Justyna Dziubak v Raiffeisen Bank International AG* [2019] ECLI:EU:C:2019:819, para 45.

9 It is debated whether the CJEU has ruled that in such cases the contract must invariably be declared null and void, or whether it has remitted full discretion to the national courts to do so, as would seem to emerge from cases C-118/17, *Dunai*, n 4 above, paras 48 and 52; C-51/17, *OTP Bank and OTP Faktoring* [2018] ECLI:EU:C:2018:750, para 68, and C-186/16, *Ruxandra Paula Andriciuc and Others v Banca Românească SA* [2017] ECLI:EU:C:2017:703, para 43.

that agreement together with the payment of default interest at the statutory rate from the date on which notice is served, provided that the objectives of Directive 93/13 and the principle of proportionality are observed. They must be interpreted as precluding a judicial interpretation of national law according to which the credit institution is entitled to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served.

In the absence of a specific regulation on this point in Directive 93/13,¹⁰ and in view of the fact that in the European context the regulation on restitution is characterised more by principles than by detailed rules,¹¹ this ruling can be seen as a landmark in the definition of a European law on restitution. In this respect, the *Bank M* case is undoubtedly of great interest for scholars in all Member States called upon to deal with cases similar to the one decided by the CJEU.

It is especially so for the Italian civil lawyers, since, even before the advent of *Bank M*, the Italian Supreme Court had already ruled on the same subject with a judgment with only apparently similar content. This is the United Sections ruling of 4 November 2019, No 28314,¹² in which the Supreme Court defined the *modus operandi* of the nullity¹³ of an investment contract concluded between a professional

10 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts merely provides that unfair terms ‘shall [...] not be binding on the consumer’ (art 6 para 1) and that ‘Member States shall ensure that [...] adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers’ (art 7 para 1). The consequences for restitution are not legislated and, in principle, left to national law. On this point see, for all, Grundmann and Badenhop, n 2 above, 17.

11 Grundmann and Badenhop, n 2 above, 17. Reference is made to what will be said about this in Section 4 below.

12 Cass, Sez Un, 4 November 2019, n 28314, in *Foro italiano* 2020, 3, I, 934. Also in Italy, therefore, the banking-financial sector is the field where questions that have given new impetus to the debate on protective nullity emerged. This is due to the fact that in this sphere, more than in others, asymmetrical transactions subtend economic interests that are significantly relevant also for the weaker contractual party. See, in this regard, the reflections made by M. Girolami, ‘voce Nullità di protezione’, in *Enciclopedia del diritto, I Tematici*, vol I (Milan: Giuffrè, 2021) 707 *et seq*; see also L. Mengoni, ‘Problemi di integrazione della disciplina dei contratti del consumatore nel sistema del codice civile’, in *Studi in onore di Rescigno*, vol III, *Obbligazioni e contratti* (Milan: Giuffrè, 1998) 541.

13 Nullity is frequently recognised by the Italian legislator as the most suitable instrument for achieving the results that the EU legislator set out to achieve with the drafting and enactment of consumer protection regulation. The EU legislator, with the intention of distancing itself as far as possible from the models of reference of single Member States, often uses neutral legal formulas, not referable to the doctrinal, legislative or jurisprudential elaborations proper to the legal culture of this or that particular Member State (consider, in particular, the expression ‘non-binding’ recurring in

party, the financial intermediary, and a party with less bargaining power, the client-consumer.¹⁴

In that case the United Sections held that the nullity at stake was not subject to the discipline of the restitutionary consequences of nullity under ordinary law, resulting from the combined provisions of Articles 1422 and 2033 of the Italian Civil Code. This choice was justified ‘in the light of the peculiar legal regime of protective nullities’.¹⁵ According to the Court, the protective *rationale* of the invalidity at stake would be reflected in the discipline of the restitutionary effects resulting from its declaration, with an univocal correspondence between relative legitimation and the deactivation of the restitutory protection for the business party:¹⁶ the latter, in addition to not being legitimated to the nullity action, could not even avail itself of the direct effects of its declaration, acting counter-contentiously or autonomously, for the recovery of the objective undue payment.¹⁷ The protective nullity would thus be characterised by a special restitutionary regime: a unilateral recovery of an undue

UCTD, later transposed by the Italian legislator first in the expression ‘inefficacia’ and then in the expression ‘nullità’. See, on this point P.M. Putti, ‘L’invalidità nei contratti del consumatore’, in N. Lipari (eds), *Trattato di diritto privato europeo*, vol III, *L’attività e il contratto* (Padua: Cedam, 2003) 478–479.

¹⁴ Strictly speaking, in the case decided by the Italian Supreme Court, the voidness of the investment contract did not derive from the presence in it of unfair terms, but from the intermediary’s breach of the written form requirement that the domestic legislation (art 23 of Legislative Decree No 58 of 24 February 1998) places in order to protect the client. However, a comparison can be made between the Italian case and *Bank M*, since both cases deal with the restitutionary consequences of the voidness of a contract stipulated between a business party and a consumer, due to a conduct by the former which goes against the protection objectives of the latter (the insertion of unfair terms in one case, the breach of the formal requirement in the other).

¹⁵ Cass, Sez Un, 4 November 2019, n 28314, in *Foro italiano* 2020, 3, I, 934, para 17.1.2. The term ‘protective nullity’ is to be meant as those nullities, deriving from or inspired by EU law, established for the purpose of protecting the interests of the weaker contractual party (see n 13 above). The special legal regime of protective nullity is to be understood as that deriving from art 33 *et seq* of the Italian Consumer Code, and in particular art 36, which is considered to be the paradigmatic rule of the institute. That provision constitutes an evolution of the rule from which it was taken, art 1469-*quinquies* of the Italian Civil Code (now repealed), which in turn was enacted in implementation of Directive 93/13. Art 36 of the Italian Consumer Code provides that clauses considered unfair pursuant to art 33 and 34 ‘shall be null and void while the contract remains valid for the rest’, and then specifies that ‘voidness operates only for the benefit of the consumer and may be detected *ex officio* by the judge’. The characteristics of the voidness referred to in art 36 of the Italian Consumer Code are also found in the nullities contained in banking and financial regulation, which includes, precisely, Legislative Decree 58/1998. See, in this regard, Girolami, n 12 above, 707.

¹⁶ See G. Passagnoli, ‘Analisi di un falso principio: nullità speciali e restituzione unilaterale’ (2021) *Persona e mercato* 262.

¹⁷ See Cass, Sez Un, 4 November 2019, n 28314, in *Foro italiano* 2020, 3, I, 934, para 17.1.2., where the Court stated that the financial intermediary cannot rely on the direct effects of such nullity and is

payment, which operates for the exclusive benefit of the protected party. This unprecedented version of the institute of objective undue payment has been defined, with a significant and effective expression, as ‘protective *condictio indebiti*’,¹⁸ to emphasise the close link between the protective function of voidness and the correlated modulation of the restitutory regime deriving therefrom.

Since both Courts allow the consumer to pursue restitutionary claims to which the professional party is not entitled as well, one might be led to believe that the same starting question was resolved in the same way in both cases, and therefore that, as a result of the case *Bank M*, a ‘protective *condictio indebiti*’ such as that established by the Italian Supreme Court can be said to have been established (also) in European contract law. However, for the reasons to be explained below, it is considered that the principle of law formulated by the CJEU should not be read in these terms. In fact, it is believed that the CJEU does not in any way intend to alter the rules on the recovery of undue payments in order to protect the consumer, by introducing a unilateral or asymmetrical *condictio*, but merely authorises the consumer to demand what, under domestic law, he or she would have obtained by exercising an action with different prerequisites, namely the action of unjust enrichment. The aim of the following reflections is therefore to provide a reconstructive reading of the case *Bank M* in the light of the core principles of the system of protection established by Directive 93/13, as well as, more generally, the restitution system derived from the general principles of EU law, in order to outline the regulation of restitution established by this ruling.

2 The Case *Bank M*: The Case and the Issue

In the present case, a consumer and his wife concluded a mortgage loan contract with Bank M in 2008. The loan was indexed to the Swiss franc (CHF), as the contract provided that the monthly loan instalments were to be paid in Polish zloty (PLN) after conversion using the Swiss franc’s selling rate, in accordance with the table of foreign currency rates applied by the bank on the day of payment of each monthly instalment.¹⁹

The consumer then brought an action against Bank M, seeking payment of a sum corresponding to half of the gain that the bank allegedly made from the monthly

consequently not entitled to bring counter claims or independent actions under Articles 1422 and 2033 of the Civil Code.

¹⁸ The expression was conceived by A. Dalmartello, ‘Conseguenze del giudizio di vessatorietà: dalla post-vessatorietà alla *condictio indebiti* di protezione’ (2023) *Rivista di diritto bancario* 79–103.

¹⁹ Case C-520/21, *Bank M*, n 1 above, para 13.

instalments paid under the contract during a certain period, plus default interest at the statutory rate (the other half being due to his wife, who was not a party to the main proceedings). In support of his claim, the appellant argued that the conversion clauses determining the exchange rate were unfair, that their presence rendered the loan contract totally null and void, and that the bank therefore received those instalments without any legal basis.²⁰

In its response, Bank M contended that the applicant's action should be dismissed, arguing that the mortgage loan agreement should not be annulled in so far as it did not contain unfair terms; and that, if that agreement were to be annulled, it would be Bank M alone, and not the consumer, which would be in a position to claim payment of a debt in respect of the use of the capital without legal basis.²¹

The Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie, which is the referring court, observes that, according to settled national case-law, conversion clauses such as those at issue in the main proceedings are undoubtedly unfair and, following the approach inaugurated in *Dziubak*, their deletion entails the invalidity of the entire loan contract. That being so, the Court has no doubts as to the consequences of the declaration of invalidity of the loan agreement, in terms of its radical ineffectiveness *ab initio* and the obligation for both parties to return the services rendered in performance of that contract as undue;²² on the other hand, it is disputed whether the parties may (also) claim, in addition to the sums respectively paid in performance of the agreement, the payment of other amounts on the account of the use of funds over a certain period without any legal basis. The legal grounds most often invoked by the parties in support of such claims are said to be undue performance and unjust enrichment.

That circumstance, together with the fact that the CJEU had not yet ruled on this subject matter in the light of Directive 93/13, prompted the referring court to make a reference to the ECJ for a preliminary ruling. The question referred to the Luxembourg Court is, therefore, whether Articles 6 para 1 and 7 para 1 of Directive 93/13, as well as the principles of effectiveness, legal certainty and proportionality, allow the parties to a mortgage loan contract, which has been declared void on the ground that it contains unfair terms, to pursue, in addition to the reimbursement of the sums paid in the performance of that agreement (the bank – loan principal, and the consumer – monthly payments, fees, commissions and insurance premiums)

²⁰ Case C-520/21, *Bank M*, n 1 above, paras 14 and 15.

²¹ Case C-520/21, *Bank M*, n 1 above, para 16.

²² Specifically, on the one hand, the bank may claim from the consumer the repayment of the equivalent of the loan principal and, on the other hand, the consumer may claim from the bank the repayment of the equivalent of the monthly instalments paid, as well as the expenses collected by the bank. In addition, each party may also demand payment of default interest at the statutory rate from the date on which the notice is served. See Case C-520/21, *Bank M*, n 1 above.

and statutory interest for late payment from the date of the demand for payment, any other claims (including remuneration, compensation, reimbursement of expenses or indexation of the amounts paid).

The CJEU has held that, in the event of annulment of a mortgage loan contract on the ground that it cannot continue in existence after the excision of the unfair terms, the possibility for a consumer to assert claims that go beyond reimbursement of the monthly instalments paid and the expenses paid in respect of the performance of that contract together with, where applicable, payment of default interest at the statutory rate from the date on which the notice is served is not in itself contrary to the objectives of Directive 93/13, subject to determination by the referring court. On the contrary, it may help to deter sellers or suppliers from including unfair terms in contracts concluded with consumers inasmuch as the inclusion of such terms leading to the nullity of a contract in its entirety could lead to financial consequences exceeding the restitution of the amounts paid by the consumer and, where appropriate, the payment of default interest. It is therefore permissible to uphold such claims, provided that, in so doing, the objectives of Directive 93/13 and the principle of proportionality are observed, an assessment which falls to be made by the referring court.

In contrast, to grant a credit institution the right to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement and, therefore, to receive remuneration for the use of that capital by the consumer, as well as, as appropriate, the payment of default interest, could undermine the protective objectives pursued by the directive. Such an interpretation of national law could weaken the deterrent effect on professionals of the annulment of that contract. Indeed, there would be a risk of creating situations in which it would be more advantageous for the consumer to continue the performance of the contract containing an unfair term rather than exercising his or her rights under UCTD. In the CJEU's view, that is what would happen if consumers were exposed to the risk of having to pay such a fee when they assert the rights conferred on them by the directive. The CJEU observes, moreover, that, in accordance with the principle *nemo auditur propriam turpitudinem allegans*, a party cannot be allowed to derive economic advantages from his, her or its unlawful conduct or to be compensated for the disadvantages caused by such conduct. The invalidity of the mortgage loan contract is in fact a consequence of the bank's use of unfair terms. Therefore, the bank cannot be compensated for the loss of a profit similar to that which it hoped to derive from that contract.

As it is self-evident, the exact scope of the principle of law set by the CJEU is played out between the framing of the claims formulated by the parties, on the one hand, and the definition of the objectives of protection pursued by UCTD, on the other hand. To this end, the following discussion will revolve around these points. It will be

seen how the general content of restitutory protection is articulated in a multilevel context, between European law and national laws, with the ultimate aim of verifying whether the ‘protective *condictio indebiti*’ outlined by Italian case law can enter fully into European contract law.

3 Restitutory Protection: The General Meaning and the Remedies Attributable to the Category

For a complete framing of the issues addressed by the CJEU, on the one hand, and the Italian Supreme Court, on the other hand, it is necessary to clarify an essential point, namely what is meant, in general, by restitutory protection; that is, to find the identifying *quid* that constitutes its distinctive feature. This is followed by a brief examination of the principle of unjust enrichment, the pivot of the whole subject matter, and how it is specified where restitutory protection operates in contractual matters.

Restitution means re-establishing the factual and legal conditions that characterised the subject’s situation before a certain alteration or change occurred; an alteration that must be removed, re-establishing the original situation and thereby restoring the value of the rules. It is necessary, of course, for this alteration and/or change to be illegitimate, i.e. *contra ius*, or, at least, not justified by the law, i.e. *sine causa*. The need to restore the *status quo ante* may arise not only from the infringement and/or alteration of a subjective right, ascribable to a situation *lato sensu* of belonging,²³ but also in hypotheses where, apart from the infringement of rights, there have been alterations or transfers of wealth or utilities that do not find justification under the law (for example, in valid contracts). Thus, remedies for undue performance or unjust enrichment must be provided as well. Therefore, the *quid* identificative of restitutory protection consists in the need to react to a factual situation that conflicts with the legal one.

The cases that give rise to this form of protection are, in principle, the infringement of a right; the appropriation of utilities that are the subject of another person’s right or which otherwise belong to others; and unjustified wealth transfers. The latter two cases are usually juxtaposed because they give rise to a case of unjust

²³ This is typically the case with property rights and rights that have historically been modelled on the same pattern, such as personal rights and rights to intangible goods (copyright, patents, trade marks).

enrichment: in both cases, indeed, a person enriches himself at the expense or to the detriment of another, without just cause.²⁴

The principle underlying unjust enrichment (and the actions directed at it) is that no one may enrich himself at the expense of others, without a cause to justify it. It is a principle of commutative justice that has its roots in Roman law²⁵ (just consider *condictio* and *restitutio in integrum* and Pomponius' famous maxim in the *Digesta*: '*jure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiores*')²⁶ and that today permeates both civil law and common law systems.²⁷ In various legal systems (including the Italian one, the Swiss one, the German one and the English one) this principle is expressed by means of a general clause²⁸ and is specified in a series of cases that give rise to restitutionary claims (against unjustified enrichment).²⁹

In this regard, it cannot escape notice that, among the cases of unjustified enrichment, there is one that, in almost all legal systems (see Article 2033 *et seq* of the Italian Civil Code; 1376 *Code Civil*; § 812 *BGB*) is treated differently for historical reasons: it is the recovery of undue payments.³⁰ Derived from the Roman *condictio*,

24 See E. Moscati, 'voce Indebito (pagamento e ripetizione dell')', in *Enciclopedia del diritto* XXI (Milan: Giuffrè, 1971) 95; P. Gallo, 'Arricchimento senza causa e quasi contratti (i rimedi restitutori)', in *Trattato di diritto civile* diretto da R. Sacco (Turin: UTET, 1996) 111.

25 P. Gallo, 'I rimedi restitutori in diritto comparato', in *Trattato di diritto comparato* diretto da R. Sacco (Turin: UTET, 1997) 165 *et seq* states that, despite their diversity, the national regulations in the various EU Member States have their common origin in the Roman discipline of the *condictio*. The *condictio* was precisely the action provided for by Roman law to return to the *status quo ante*. See also K. Zweigert and H. Kötz, *Introduction to Comparative Law. Unjust Enrichment* (Milan: Giuffrè, 1995) 247.

26 The maxim is recalled by A. Di Majo, *La tutela civile dei diritti* (Milan: Giuffrè, 2003) 325 and by P. Sirena, 'The DCFR – Restitution, unjust enrichment and related issues' (2008) *European Review of Contract Law* 445.

27 Zweigert and Kötz, n 25 above, 246.

28 In the Italian legal system this general clause has a residual value, a sign of an approach that is wary of such a principle. There is a tendency to solve the problem of unjust enrichment on the basis of specific actions (*negotiorum gestio*, recovery of undue payments, *in rem* or possessory actions, rescission for damage).

29 Just to mention the most recurring ones, one may recall the repetition of undue payments, the obtaining, without title, of utilities due to others, and the hypotheses in which the enrichment of a subject depends on an activity of the plaintiff himself. See Di Majo, n 26 above, 329.

30 For a survey of the essential features of the institute in the best known civil law and common law systems, see L. Di Via, 'La ripetizione dell'indebito', in N. Lipari (ed), *Manuale di diritto privato europeo* (Padua: CEDAM, 2003) 685–690, and Di Majo, n 26 above, 335–345, where there are also notes on the relationship between recovery of undue payment and unjust enrichment in each system considered.

it is the remedy through which restitutionary protection acts in contractual matters. Indeed, the institute allows for restitution of the service rendered when the contractual title that constituted its justification has ceased to exist: this happens, typically, when the contract is declared null and void (as stated by Article 1422 of the Italian Civil Code) or when it is annulled or rescinded or terminated.³¹ Since the basis of the restitutionary obligation is the failed contract, which renders the performance received *sine titulo*, restitutions that are the consequence of void or avoided or terminated contracts have the form of contractual obligations (and actions). As a result, restitutionary obligations must be bilateral and reciprocal: only thereby do they give rise to the restoration of the *status quo* which is the very core of restitutionary protection.

It should also be pointed out that some legal systems, including the Italian one, provide for a general action for unjust enrichment (see Article 2041 of the Italian Civil Code),³² which, in addition to the action for the recovery of undue payments, plays a residual role in the protection against unjustified displacement of assets. This means that, provided the necessary conditions are met, the recovery of undue payments should prevail over the general action for unjust enrichment. If, on the other hand, the conditions for an action to recover undue payments are not met, but the case is one of enrichment for reasons not recognised by the law, it will be possible to obtain (restitutionary) protection by means of the general action for unjust enrichment.

³¹ While recovery of undue payment is considered a natural consequence of the invalidity of the contract, its congruity with respect to restitutions resulting from the termination of contract is less certain, despite the express reference in art 1463 of the Italian Civil Code. See, in this regard, the remarks made by A. Nicolussi, 'Le restituzioni de iure condendo' (2012) *Europa e diritto privato* 783, as well as by Di Majo, n 26 above, 348 *et seq.* From this point of view, it is curious to observe how both the German *BGB* and the DCFR refer to the difference between restitution consequent to the invalidity of the contract and restitution for its termination, each being subject to a different regime. For the difference between *Ungerechtfertigte Bereicherung* and *Rücktritt* in German law see, for all, H. Brox, W.D. Walker, *Allgemeines Schuldrecht* (45th ed, Munich: C H Beck, 2019) 178 *et seq* and 552 *et seq.* On the difference between 'Restitution' and 'Unjust Enrichment' in the DCFR, see Sirena, n 26 above, 445 *et seq.*

³² For a survey of the main features of the general action of unjust enrichment, see Gallo, n 24 above, and A. Trabucchi, 'Arricchimento ((azione di) – B) diritto civile' in *Enciclopedia del diritto* III (Milan: Giuffrè, 1958). On the relationship between *condictio* and the general action for unjust enrichment, as well as on whether or not they fall under the same principle, see Moscati, n 24 above, 95; Gallo, n 24 above, 111 *et seq.*; F. Astone, *L'arricchimento senza causa* (Milan: Giuffrè, 1999) 23 *et seq.*; Di Majo, n 26 above, 327–328.

4 Restitutionary Protection in European Contract Law, Between Principles and Detailed Rules

Although there is no source of primary or secondary EU law in which to find an organic regulation on restitution, the study of European private law nevertheless makes it possible to reconstruct a system of restitutionary protection in European contract law. Having made this clarification, one can therefore rightly speak of a European law of restitutionary protection, which takes the form mainly of general principles.³³ Some of these – the principles of private autonomy, good faith and fairness, and unjust enrichment – are fundamental principles of the EU law, also common to the legal traditions of the Member States, which find their particular application in the area under consideration. Others have been developed by scholars and ECJ's case-law in the light of the system of protection established by UCTD: they are therefore principles on which the entire discipline of consumer contracts is based and to which, therefore, the restitution regime inherent in them must be subject; they include, in addition to the aforementioned principles of private autonomy and good faith and fairness, the principle of consumer equality, the principle of no penalisation and the principle of procedural autonomy.

The principle of private autonomy not only plays a fundamental role in the private law of all Member States, but also constitutes the underlying *rationale* of the Fundamental Freedoms of EU primary law, as well as of most acts of secondary law, including, in particular, the UCTD.³⁴ Indeed, European contract law has as its objective the protection of private autonomy and, where this is not sufficient, paternalistic protection.³⁵ This principle can be seen in the provision of disclosure obligations, which provide consumers with a more solid ground for exercising their party autonomy in a meaningful way.³⁶ The autonomous will of the parties must also be respected when it comes to restoring the property spheres of the parties to an invalid contract by means of mutual restitution of the services rendered in the performance of that contract. The general meaning of this principle in restitution

³³ In the thesis held by Grundmann and Badenhoop, n 2 above, 16–17 and 27–29, the overall framework of EU restitution law would also know a further formant, represented no longer by general principles, but by particular provisions: Articles 23 and 24 of the 2014 MCD, the application of which, however, has been very little discussed both in doctrine and in case-law so far.

³⁴ S. Grundmann, 'The Structure of European Contract Law' (2001) *European Review of Private Law* 505–528.

³⁵ S. Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) *Common Market Law Review* 269.

³⁶ See Grundmann and Badenhoop, n 2 above, 17, 20. In case-law, see case C-26/13, *Kásler*, n 4 above, paras 72–75.

law is in fact that restitution must place the parties in the same position as they would have been if they had not concluded the contract.

The principle of good faith and fairness is one of the most important principles of European contract law. It is a principle common to the Member States,³⁷ and it constitutes the central objective of the UCTD.³⁸ This is, moreover, the only principle directly expressed in the text of the directive, notably in Article 3 para 1, which constitutes the key rule of the entire directive on unfair terms, since it codifies the *criteria* on which the unfairness judgment is based. The principle of good faith and fairness operates not only ‘upstream’ of the unfairness judgment, but also ‘downstream’, namely at the level of restitution, implying the re-establishment of the legal and factual situation in which the parties would have found themselves if they had not concluded the contract;³⁹ for this to happen, the parties – both parties – are obliged to return benefits received.⁴⁰ The aim is to promote solutions in which the justified interests and expectations of both parties are safeguarded as far as possible, i.e. in a duly balanced manner and without giving priority to one party unilaterally. This implies that windfall profits (i.e. those that could not have been achieved in any market scenario) are to be regarded as unjustified and therefore have to be returned.⁴¹

As for unjust enrichment – and restitutionary obligations arising therefrom – there are several indications that this is a fundamental principle of European restitution law. First of all, the DCFR dedicates an entire book to unjust enrichment,⁴² thus making it clear that in this matter there is a core of principles and general rules

37 For a general overview see S. Whittaker, R. Zimmermann, ‘Good Faith in European Contract Law: surveying the legal landscape’, in R. Zimmermann, S. Whittaker, *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000) 7–62.

38 Grundmann and Badenhoop, n 2 above, 18–19.

39 In *Dunai*, the CJEU held that art 6 para 1 UCTD must be interpreted as meaning that a contractual term held to be unfair must be regarded, in principle, as if it had never existed, so that it cannot have any effect on the consumer, and that it has the consequence of restoring the consumer to the factual and legal situation in which he would have found himself in the absence of that term. See C-118/17, *Dunai*, n 4 above, para 41, where reference is made to Joined Cases C-154/15, C-307/15 and C-308/15 *Francisco Gutiérrez Naranjo and Ana María Palacios Martínez v Cajasur Banco and Banco Bilbao Vizcaya Argentaria SA* [2016] EU:C:2016:980, para 61.

40 In particular, in the case of foreign currency loans, the principle of good faith and fairness requires that the repayment claims of both parties – on the one hand, the bank seeking repayment of the loan principal and, on the other hand, the consumer seeking repayment of all instalments and interest – be subject to the same logic and exchange rate. See on this point Grundmann and Badenhoop, n 2 above, 19.

41 Grundmann and Badenhoop, n 2 above, 21.

42 This is the seventh book, entitled ‘Unjustified Enrichment’.

that are shared by national legal systems.⁴³ Important comparative law studies show that one can thus speak of a true European law of unjustified enrichment.⁴⁴ In turn, the CJEU has recognised that restitution of (unjust) enrichment constitutes a general principle that is common to the legal systems of the Member States;⁴⁵ within these limits, its discipline finds application in the EU legal order, supplementing the legislation enacted by it.⁴⁶ Indeed, the ECJ recognises the institution of the recovery of undue payments first of all as one of the aspects in which the direct effectiveness of EU rules is articulated, arising from the hypotheses in which, since undue sums of money have been paid or received by public administrations, in breach or misapplication of EU rules, the persons concerned seek their recovery.⁴⁷ It is also known to apply in the case of the nullity of a contract, as a remedy to obtain the return of (undue) services rendered in the performance of the void contract.⁴⁸ In most cases, EU law does not bind the States as to the specific action with which to give concrete expression to the principle, but merely fixes the standard of protection to be guaranteed, leaving the Member States the power to identify the form and means with which to give concrete expression to the desired scope of protection.⁴⁹

From the UCTD derives the principle of consumer equality, according to which consumers must be treated equally, but not more favourably than their professional

43 See P. Sirena, 'Unjustified enrichment and restitution: a European law perspective' (2018/2) *Rassegna di diritto civile* 657.

44 See, for all: D. Visser, 'Unjustified Enrichment in Comparative Perspective', in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 970 *et seq*; K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung* (Tübingen: Mohr Siebeck, 1996) 538 *et seq*; R. Zimmermann, *Grundstrukturen eines Europäischen Bereicherungsrechts* (Tübingen: Mohr Siebeck, 2005); R. Zimmermann, D. Johnston, *Unjustified Enrichment. Key Issues in Comparative Perspective* (Cambridge: Cambridge University Press, 2002).

45 See ECJ, Grand Chamber, 16 December 2008, C-47/07, *P Masdar (UK) Ltd v Commission of European Communities* [2008] ECR I-9761, paras 44–47, and in particular: '44. According to the principles common to the legal systems of the Member States, a person who has suffered a loss which increases the assets of another person, without there being any legal basis for that enrichment, is generally entitled to restitution, to the extent of that loss, from the person who has enriched himself [...] 47. Since unjust enrichment, as defined above, is a source of non-contractual obligation common to the legal systems of the Member States, the Community cannot avoid applying the same principles to itself when a natural or legal person accuses it of having enriched itself unjustly to its detriment'.

46 On the European dimension of the principle of unjustified enrichment, see P. Sirena, 'Towards a European Law of Unjustified Enrichment' (2012) *ODCC* 113–134; Sirena, n 26 above, 445–454; Sirena, n 43 above, 657 *et seq*.

47 Case C-259/87, *Greece v Commission* [1990] ECR I-2845, para 2. See also L. Daniele, 'La restituzione dell'indebito in diritto comunitario' (1981) *Rivista di diritto europeo* 425, 433.

48 See C-47/07, *P Masdar (UK) Ltd v Commission of European Communities* [2008] ECR I-9761, n 45 above, para 55.

49 Grundmann and Badenhop, n 2 above, 22.

counterparts.⁵⁰ Aware of the asymmetries of information and bargaining power between professionals and consumers, the directive on unfair terms aims to re-establish equality between them, and in so doing responds to the ultimate goal of correcting the market failure.⁵¹ In particular, the directive aims to replace the formal balance established by the contract between the rights and obligations of the parties with a real balance that restores equality between them;⁵² certainly not to create an inequality in the opposite direction, to the advantage of the consumer and to the detriment of the seller or supplier. Translating this objective to the restitutive level, the general idea is not to over-protect consumers, but simply to restore the balance between the parties by compensating their respective spheres of property through restitutive obligations.⁵³ Therefore restitutive obligations should not generate any windfall profit either for the consumer or for the supplier.⁵⁴

Consistent with this, Article 6 para 1 UCTD is not intended to penalise either contractual party. Just like the consumer,⁵⁵ the professional party should not be adversely affected by any solution found. Of course, the UCTD aims at discouraging unfair practices in the drafting of contractual terms. However, there is no indication, either in the recitals or in any of the provisions, that the purpose of the directive is to penalise the user of unfair terms.

Finally, the principle of procedural autonomy, within the limits of respect for the principles of equivalence and effectiveness, mainly concerns procedural rules, such as those establishing limitation periods for the exercise of actions arising from unfair terms, such as actions for restitution.⁵⁶ In this regard, the CJEU has clarified that Articles 6 para 1 and 7 para 1 UCTD permit actions for restitution to be subject to a limitation period, provided that the period is not less favourable than that provided for similar actions at national level (principle of equivalence) and does not render practically impossible or excessively difficult the exercise of rights conferred by EU

⁵⁰ Grundmann and Badenhoop, n 2 above, 18.

⁵¹ Evidence of this is, for instance, the obligation to draft the clauses setting out the essential performance of the contract in a clear and comprehensible manner, recently specified by the CJEU in *Kásler*. See case C-26/13 *Kásler*, n 4 above, paras 51–58.

⁵² Case C-260/18, *Dziubak*, n 8 above, para 39.

⁵³ Grundmann and Badenhoop, n 2 above, 18.

⁵⁴ As Grundmann and Badenhoop, n 2 above, 18 point out, there is, moreover, no indication, either in the recitals or in the text of the directive, that the granting of windfall profits to the customer or to the consumer is a purpose pursued by the UCTD.

⁵⁵ See Case C-260/18, *Dziubak*, n 8 above, para 48, where the CJEU states that the annulment of a contract in its entirety cannot expose the consumer to particularly detrimental consequences, so that the latter would be penalised.

⁵⁶ Grundmann and Badenhoop, n 2 above, 19–20.

law (principle of effectiveness).⁵⁷ Therefore such a time limit may not start to run from a time when the consumer is not yet in a position to assess for himself the unfairness of a contractual term.⁵⁸

5 The System of Protection Established by Directive 93/13

The second source of European law on restitution is the system of protection established by the UCTD. As already mentioned, the directive does not contain specific rules on restitution. In regulating the consequences of the unfairness of a term, Articles 6 para 1 and 7 para 1 of the directive do not in fact regulate the consequences in terms of restitution, either in the case of the nullity of a single term or in the case of the nullity of the entire contract. This is because the determination of those consequences is in principle left to national law,⁵⁹ in accordance to the principle of procedural autonomy conferred on the Member States, subject to compliance with the principles of equivalence and effectiveness.⁶⁰

Nevertheless, the aforementioned provisions contain legal entanglements of fundamental importance for the development of a system of restitution related to consumer contracts. It is precisely thanks to these legislative points of reference that the CJEU has been able to develop, particularly in recent years, a wide case-law, which constitutes the main body of case-law to look at when speaking of European law of restitution.

As it will be seen below, this case-law is not always straightforward, since it affects in different ways the aspects that need to be defined in order for the discipline on unfair terms to be effectively harmonised.⁶¹ The framework is not made any clearer by the deliberately generic vocabulary used by the Court so as not to contradict the linguistic choices made by the drafters of the directive and to make the reasoning accessible to the courts of all Member States.⁶² It is therefore not

57 Joined cases C-698/18 and C-699/18, *Raiffeisen Bank and BRD Groupe Société Générale* [2020] ECLI:EU:C:2020:537, paras 57–58.

58 Case C-485/19 *Profi Credit Slovakia* [2021] ECLI:EU:C:2021:313, paras 61–64.

59 Grundmann and Badenhop, n 2 above, 17.

60 See joined cases from C-776/19 to C-782/19, *BNP Paribas Personal Finance* [2021] ECLI:EU:C:2021:470 paras 27 and 81, and joined cases C-224/19 and C-259/19, *CY v Caixabank SA and LG and PK v Banco Bilbao Vizcaya Argentaria SA* [2020] ECLI:EU:C:2020:578, para 83, and the case-law cited therein.

61 M. Dellacasa, ‘«Clausola abusiva ... e poi?» Integrazione e nullità del contratto nella giurisprudenza della Corte di Giustizia’ (1/2023) *Accademia, Rivista dell’Associazione dei Civilisti Italiani* 28.

62 Dellacasa, n 61 above, 30.

surprising that significantly different readings of certain aspects of this case-law have been proposed by scholars. In spite of all this, it is by no means an easy task to reconstruct the framework of restitution related to consumer contracts and, consequently, to identify the conforming interpretation that will allow the national court to determine whether the rule to be applied to the case at hand is compatible with EU law or not. This section and Section 7 will illustrate the main results reached by this case-law, which may be considered as fragments of a system that is still in development.

Following the direction opened by the leading case *Kásler*, we learn that not only in the case where the contract, after the unfair term has been excised,⁶³ remains binding on the parties according to the same terms, but also in the case where the contract cannot be maintained without the unfair terms, it is for the Member States to determine in their national legislation how to give effect to such a declaration.⁶⁴ This point is underlined in the *Bank M* case too.⁶⁵

The fact that Article 6 para 1 leaves in principle to national law⁶⁶ the determination of the consequences of the unfairness of a contractual term cannot alter the scope nor, as a consequence, the substance of the protection guaranteed to consumers by UCTD. National legislation must therefore ensure that the objectives pursued by the directive are achieved.⁶⁷ First of all, those rules must in any case ensure the re-establishment of the legal and factual situation in which the consumer would have found himself in the absence of that unfair term,⁶⁸ in particular by conferring on the consumer a right to the restitution of the benefits which the trader

⁶³ See case C-520/21, *Bank M*, n 1 above, para 56; Joined Cases from C-776/19 to C-782/19, *BNP Paribas Personal Finance*, n 60 above, para 36; case C-19/20, *Bank BPH SA* [2021] ECLI:EU:C:2021:341, para 44; case C-600/19, *Ibercaja Banco* [2022] ECLI:EU:C:2022:394, para 24; Joined Cases C-698/18 and C-699/18, *Raiffeisen Bank and BRD Groupe Société Générale*, n 57 above, paras 52–53; Joined Cases C-70/17 and C-179/17, *Abanca Corporación Bancaria SA and Bankia SA*, n 6 above, para 52; Joined Cases C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo and Others*, n 39 above, para 57; case C-618/10, *Banco Español de Crédito* [2012] ECLI:EU:C:2012:349, para 65; case C-243/08, *Pannon GSM* [2009] ECLI:EU:C:2009:350, para 35.

⁶⁴ Case C-472/20, *Lombard Lízing*, [2022], ECLI:EU:C:2022:242, para 55 and case C-483/16, *Sziber* [2018] ECLI:EU:C:2018:367, para 34.

⁶⁵ See case C-520/21, *Bank M*, n 1 above.

⁶⁶ Indeed, Article 6 para 1 of Directive 93/13 provides that Member States shall provide that unfair terms shall not be binding on the consumer ‘as provided for under their national law’. On this point, see case C-40/08, *Asturcom Telecomunicaciones* [2009] ECLI:EU:C:2009:615, para 57.

⁶⁷ See case C-19/20, *Bank BPH SA*, n 63 above, para 59.

⁶⁸ See case C-520/21, *Bank M*, n 1 above, para 57; Case C-395/21, *DV v MA* [2023] ECLI:EU:C:2023:14, para 54; case C-472/20, *Lombard Lízing*, n 64 above, para 50; case C-19/20, *Bank BPH SA*, n 63 above, para 50; Joined Cases C-698/18 and C-699/18, *Raiffeisen Bank*, n 57 above, para 54; case C-118/17, *Dunai*, n 4 above, para 41; Joined Cases C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo and Others*, n 39 above, paras 61–62.

has unfairly acquired to his detriment by relying on that unfair term.⁶⁹ The absence of such an effect could indeed undermine the dissuasive purpose of the directive.⁷⁰ Secondly, these rules must not be detrimental to the purpose of deterring professionals from including unfair terms in contracts concluded with consumers.⁷¹ Lastly, the measures adopted for these purposes must ultimately aim at restoring the balance between the parties to the contract by redressing the asymmetry between their respective positions in the contractual relationship.⁷² More specifically, the directive seeks to replace the formal balance, which the contract determines between the rights and obligations of the parties, with a real balance, aimed at restoring equality between the professional and the consumer,⁷³ in accordance with the aforementioned principles of consumer equality and non-penalisation of the business that permeate the entire system of protection established by the UCTD. Whichever way national legislators decide to regulate restitution following the termination of consumer contracts, these are the operational implications that must necessarily occur so that the goals set by the European legislator can be achieved.

On the basis of what has been said so far, if a core term is found to be unfair, so that the contract could not legally exist without it, the rule set out in Article 6 para 1 is that the contract is null and void in its entirety (unless the consumer objects⁷⁴),

⁶⁹ See case C-520/21, *Bank M*, n 1 above, para 65; case C-472/20, *Lombard Lizing*, n 64 above, paras 50, 51 and 55; Joined Cases C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo and Others*, n 39 above, paras 62, 63, 65 and 66, where the Court clarified that the national court's obligation to disapply an unfair term requiring the payment of sums found to be undue implies, in principle, a corresponding restitutory effect as regards those sums.

⁷⁰ Case C-520/21, *Bank M*, n 1 above, para 66.

⁷¹ Case C-520/21, *Bank M*, n 1 above, para 61.

⁷² Directive 93/13 is based on the assumption that the consumer is in a position of inferiority vis-à-vis the professional in terms of bargaining power and information: see case C-520/21, *Bank M*, n 1 above, para 54; Joined Cases from C-776/19 to C-782/19, *BNP Paribas Personal Finance*, n 60 above, para 82; Joined Cases C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, n 6 above, para 49; case C-26/13, *Kásler*, n 4 above, paras 39 and 40; and Joined Cases from C-240/98 to C-244/98, *Océano Grupo Editorial* [2000] ECLI:EU:C:2000:346, para 25.

⁷³ See case C-472/20, *Lombard Lizing*, n 64 above, paras 51 and 55; case C-125/18, *Gómez del Moral Guasch* [2020] ECLI:EU:C:2020:138, para 62; case C-118/17, *Dunai*, n 4 above, para 40, and case C-483/16, *Sziber*, n 64 above, para 34; Joined Cases C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo and Others*, n 39 above, para 55.

⁷⁴ The consumer's right to effective protection includes his right to waive his rights, provided that such waiver is the result of free and informed consent. Directive 93/13 does not go so far as to make mandatory the system of protection against the use of unfair terms by traders established in favour of consumers. Therefore, when a consumer prefers not to make use of that system of protection, the latter is not applied. See case C-600/19, *Ibercaja Banco*, n 63 above, paras 25, 26 and 28; case C-125/18, *Gómez del Moral Guasch*, n 73 above, para 58; case C-269/19, *Banca B SA v AAA* [2020]

with all the consequences that this entails under national law, also as regards restitutions.

However, where the declaration of invalidity of the contract would expose the consumer to particularly harmful consequences, so as to penalise him or her and undermine the deterrent effect of the invalidity of the contract, Article 6 para 1 does not preclude the national court, in application of the principles of contract law, from eliminating the unfair term by replacing it with a supplementary provision of national law,⁷⁵ or, failing that, from inviting the parties to the contract to renegotiate the content of the term,⁷⁶ or, again, ensure that the consumer is ultimately in the situation he or she would have been in if the term held to be unfair had never existed,⁷⁷ indicating, where appropriate, last-resort remedies provided by national law.⁷⁸

The detrimental consequences to which the consumer may be exposed following the declaration of invalidity of the contract include compensation exceeding his financial capacity,⁷⁹ but also the situation of legal uncertainty in which the consumer may find himself or herself following the declaration of invalidity (in particular

ECLI:EU:C:2020:954, para 29; case C-19/20, *Bank BPH SA*, n 63 above, paras 46 and 48; case C-395/21, *DV v MA*, n 68 above, para 55.

⁷⁵ See case C-26/13, *Kásler*, n 4 above, paras 80–83; Joined Cases C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, n 6 above, paras 56–57; case C-260/18, *Dziubak*, n 8 above, para 48; case C-125/18, *Gómez del Moral Guasch*, n 73 above, paras 61–62; case C-269/19, *Banca B*, n 74 above, paras 32 and 33; case C-472/20, *Lombard Lizing*, n 64 above, para 56 and case C-395/21, *DV v MA*, n 68 above, para 56.

⁷⁶ See case C-269/19, *Banca B*, n 74 above, paras 41–44. The court must determine the framework of those negotiations and they must be aimed at establishing a real balance between the rights and obligations of the contracting parties that takes account, in particular, of the consumer protection objective underlying UCTD.

⁷⁷ Cases C-269/19, *Banca B*, n 74 above, para 41, and C-472/20, *Lombard Lizing*, n 64 above, para 56.

⁷⁸ See case C-472/20, *Lombard Lizing*, n 64 above, paras 57–58 and its reading by Dellacasa, n 61 above, and S. Pagliantini, ‘Trent’anni di direttiva 93/13, postvessatorietà restitutoria ed il vuoto di un’interpretazione conforme a tutto tondo’ (1/2023) *Accademia* 10–11. The fact remains that the court’s jurisdiction cannot go beyond what is strictly necessary to restore the balance between the parties to the contract and thus to protect the consumer from the particularly harmful consequences that the annulment of the agreement at stake might cause: see cases C-472/20, *Lombard Lizing*, n 64 above, para 59, and C-269/19, *Banca B*, n 74 above, para 44.

⁷⁹ In the case of a credit agreement, such a cancellation would, in principle, result in the immediate payment of the balance due under the credit agreement, which could exceed the consumer’s financial capacity and would, therefore, tend to penalise the consumer rather than the creditor, who would not, as a result, be deterred from including such clauses in the contracts he proposes: see case C-26/13, *Kásler*, n 4 above, paras 83–84; Joined Cases C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, n 6 above, para 58, as well as cases C-125/18, *Gómez del Moral Guasch*, n 73 above, para 63, and C-269/19, *Banca B*, n 74 above, para 34.

where national law allows the professional to claim remuneration for services rendered on a basis other than that of the null and void contract) and, again, the fact that the invalidity of the contract may affect the validity and effectiveness of the acts performed under that contract.⁸⁰ It follows that the application of the rules of national law governing the consequences – including restitution – of the nullity of the contract is subject to the condition that they are not particularly harmful to the consumer.⁸¹

Therefore, where, pursuant to Article 6 para 1, the contract is to be declared null and void in its entirety, and this nullity does not cause any inconvenience to the consumer as regards restitution, the provisions of national law concerning restitution for services rendered under the contract declared null and void shall apply. However, national laws do not provide for a double regime of restitution depending on whether a *b-to-b* or a *b-to-c* contract is declared null and void, but a single regime of restitution based on the discipline of recovery of undue payments, leading to bilateral and reciprocal restitution. This means that, in principle, the professional and the consumer are entitled to claim from each other the reimbursement of the equivalent of any undue performance made under the void contract.⁸² This regime of restitution is certainly compliant with the protection goals pursued by the UCTD, since bilateral and mutual restitution guarantees the restoration of the legal and factual situation prior to the conclusion of the contract containing unfair terms and, at the same time, is capable of restoring the balance between the parties to the contract, without any penalisation for one or the other.

6 Protective Voidness and Restitutionary Protection: Two Keys to Interpretation

Since the present contribution seeks to make a comparison between the European and the Italian case-law on the subject of the restitutive consequences of the nullity of a contract concluded with consumers by sellers or suppliers, at this point it is useful to explain how this issue is dealt with in Italian civil law.

⁸⁰ Case C-395/21, *DV v MA*, n 68 above, paras 61–62.

⁸¹ See S. Pagliantini, ‘Mutui indicizzati e il mito di un consumatore ‘costituzionalizzato’: la ‘dottrina’ della Corte di Giustizia da *Árpád Kásler a Dziubak*’ (5/2019) *Le Nuove Leggi Civili Commentate* 1258 *et seq.* As AG Wahl stated in his conclusions to the *Kásler* case, this is a teleological interpretation of art 6 conducted from a cost-benefit perspective for the consumer.

⁸² S. Pagliantini, ‘Un giro d’orizzonte sulle nullità del terzo millennio’ (2021) *Persona e mercato* 16.

The analysis focuses on the concept of protective nullity, which the Italian legislature identified as the most appropriate instrument for achieving the results sought by the EU legislature in drafting and enacting a specific consumer protection law. This concept has been constructed in accordance with the protection objectives set by the EU legislature, and in a different manner from the other forms of invalidity known to the Italian legal system, in particular the nullity governed by Articles 1418 *et seq* of the Italian Civil Code. It is therefore an unprecedented form of invalidity, which departs from the traditional nullity-voidability binomial established by the Civil Code. More specifically, it is an ‘ancipite’ invalidity, responding both to the general interests and to the individual claims of the weaker party to the contract,⁸³ and which can only be invoked by the latter,⁸⁴ with a case characterised by *prima facie* inefficacy⁸⁵ and recognisable *ex officio*, taking into account the procedural behaviour of the protected party.⁸⁶ The increasing presence of protective nullity in the contractual scenario has meant that protective nullity has been acquired by the system as a ‘*tertium genus* of invalidity’⁸⁷ flanking the classical nullity and voidability.

Due to the differences between the nullity governed by the Civil Code and the ‘new’ protective nullity, two opposing interpretations of protective nullity and the system that can be built around it have emerged, each of which has important implications for restitutionary protection.

Some authors have seen an irreducible gap between protective nullity and ‘traditional’ nullity. They have spoken in this regard now of ‘systems that are parallel to each other’⁸⁸ now of ‘a model of nullity antithetical to the codified one’.⁸⁹ The idea that the expression ‘protective’ is a sign of abandonment of the general contract law categories and their discipline and opens the way to different solutions aimed at protecting the weaker party has thus been reinforced.⁹⁰ From this point of view,

⁸³ Thus Cass, Sez Un, 12 December 2014, n 26242 and 26243 (2015) *Nuova Giurisprudenza Civile Commentata*, I, 299 *et seq*, para 3.13.2. For an analytical examination of the individual profiles touched upon by the ruling, see M. Girolami, ‘Le nullità dell’art. 127 T.U.B. (con l’obiter delle Sezioni Unite 2014)’ (2015) *Banca, borsa, titoli di credito* 172 *et seq*.

⁸⁴ Cass, Sez Un, 12 December 2014, n 83 above, para 3.10; 3.12.1 and 3.13.3.

⁸⁵ Cass, Sez Un, 12 December 2014, n 83 above, para 3.9.

⁸⁶ Cass, Sez Un, 12 December 2014, n 83 above, para 3.13.2.

⁸⁷ The expression is by Girolami, n 12 above, 723. V. Scalisi, ‘Nullità e inefficacia nel sistema europeo dei contratti’ (2001) *Europa e diritto privato* 504–505; A. Gentili, ‘La “nullità di protezione”’ (2008) *Europa e diritto privato* 79 and G. Amadio, ‘Nullità speciali: problema o sistema?’, in G. Amadio, *Lezioni di diritto civile* (Turin: Giappichelli, 2014) also adhere to this approach.

⁸⁸ A.A. Dolmetta, ‘All’essenza della nullità di protezione: l’operatività “a vantaggio”. Per una critica ricostruttiva di Cass. SS. UU., n. 28314/2019’ (2020) *Rivista di diritto bancario* 98.

⁸⁹ Scalisi, n 87 above, 504–505.

⁹⁰ See Pagliantini, n 82 above, 31 *et seq*.

in the name of the protection of the weaker party, the nullity rules of the Code may in any way be derogated from in any way as regards the substantive and procedural consequences of the declaration of nullity;⁹¹ and in particular that, once a protective nullity has been declared, it is not subject to the regulation of the consequences of the general nullity regime.⁹²

The Italian Supreme Court shares this order of ideas, and so, in case No 28314 of 2019, develops, by way of judicial interpretation, a protective *condictio*, i.e. a unilateral recovery of undue payments in favour of the client-consumer. Such an approach produces disruptive consequences at the systemic level: it would create, indeed, an internal dualism with regard to nullity, concerning, on the one hand, the *modus operandi* of the remedy, and on the other hand, as its direct consequence, the restitutionary regime that derives from it. In particular, there would be a dual regime of restitution: bilateral in the case of the nullity of *b-to-b* contracts, and unilateral in the case of the nullity of *b-to-c* contracts. This would undermine an important cornerstone of the system, namely the unity of the approach to restitutionary protection resulting from the nullity of the contract as a justification for mutual patrimonial attributions between the parties.

At the outcome of the Court's ruling, there was no lack of criticism from authors who consider that 'traditional' nullity set by the Civil Code and protective nullity do not constitute antithetical paradigms, but are two different forms of an institution that is unitary in its foundation and *modus operandi*. On the one hand, it is noted that protective nullity, like Civil Code nullity, protects both public order and private order interests. On the other hand, it is observed that when it affects the entire contract, nullity of protection determines its radical and *ab origine* ineffectiveness, just like Civil Code nullity.

Given this premise, it is difficult to avoid the consequence that the retroactive determination of the lapse of title gives all the parties to the contract, and not only to the customer or consumer, the possibility of recovering the service provided in performance of the contract.⁹³ From this point of view, the restitution regime of the *b-to-c* contract should be entirely identical to that of the *b-to-b* contract, being based on bilateral and reciprocal restitution obligations on the part of the professional, on the one hand, and the customer or consumer, on the other. Each party to the contract is thus obliged to return the service received, without the possibility of *soluti retentio*, and is entitled to receive the service provided in return. There should therefore be a

91 See M. Girolami, 'L'uso selettivo della nullità di protezione: un falso problema?' (2020) *Nuova Giurisprudenza Civile Commentata* 154.

92 Thus A. Alamanni, 'Nullità selettiva e ordini di investimento: espediente linguistico o ampliamento dello statuto della nullità di protezione?' (2022) *Actualidad Jurídica Iberoamericana* 16-bis junio 2022.

93 R. Rordorf, 'Buona fede e nullità selettiva nei contratti di investimento finanziario' (2020) *Questione Giustizia*, www.questionegiustizia.it.

single restitution regime resulting from the nullity of the contract, given by the discipline of objective undue payment (Article 2033 *et seq* of the Italian Civil Code).

The question is which of the two interpretations is supported by the European restitution law. In this regard, the *Bank M* case, which is the latest act of a system in the making, comes to the rescue.

7 The Answer to the Question Referred for a Preliminary Ruling: A Reconstructive Proposal

The *Bank M* case adds a further element to the system of protection provided by the UCTD: on the one hand, it establishes the consumer's right to claim from the bank a set-off that goes beyond the reimbursement of the monthly instalments paid and the costs paid for the performance of the loan agreement, as well as the payment of default interest at the statutory rate from the date on which the notice is served; on the other hand, it denies the bank the right to claim from the consumer a set-off that goes beyond the reimbursement of the capital paid for the performance of that agreement, as well as the payment of default interest at the statutory rate from the date on which the notice is served.

Since it is undeniable that, in the name of consumer protection, the Court has thus introduced an asymmetric restitution mechanism (since the consumer can claim restitution to which the professional is not entitled as well), the question is whether this asymmetry is similar to that envisaged by the Italian Supreme Court in case No 28314 of 2019. If this were the case, a protective *condictio indebiti* of European rank would be sanctioned by case-law, disrupting the system deriving from the UCTD and establishing a true and proper unilateral restitutionary statute of protection, that would complete the system of invalidity of *b-to-c* contracts, as in the Italian case. Such a conclusion can only be drawn where, according to the *Bank M* case, it is clear that what the consumer – and not the professional – is entitled to is the restitution of a service provided in performance of the contract and which has become undue after the contract has been declared null and void. Otherwise, the asymmetry of restitution established by the *Bank M* case does not involve the institution of the recovery of undue payments, but is placed at a different level.

7.1 Towards a Protective *Condictio*?

The subject of an action for the recovery of undue payment is the service provided under an invalid or terminated contract, together with interest, the date of which

varies according to whether the *accipiens* acted in good or bad faith. A careful reading of the ruling shows that the bank and the consumer have asked the referring court not only to order the repayment of the services provided under the contract (in the case of the consumer, the loan instalments and the interest, and in the case of the bank, the capital lent), but also to order the repayment of other and different consideration. In particular, the consumer seeks to recover the profit made by the bank from the use of the sums of money (the monthly instalments and the interest) received under the loan agreement declared void for containing unfair terms; the bank, for its part, seeks to recover remuneration for having placed the capital at the consumer's disposal.

Moreover, it appears that the referring Court never questioned the applicability of the rules on the recovery of undue payments to both parties: the Court notes that national law allows the recovery of undue payments made. The question referred to the CJEU for a preliminary ruling, on which the Court ruled, therefore does not concern the recovery of undue payments, but the additional claims of the parties, namely the recovery of profit, on the one hand, and the payment of remuneration, on the other. Strictly speaking, therefore, the *Bank M* case does not affect the rules on the recovery of undue payment, which are considered to be fully applicable to both parties, but it gives the consumer the right to obtain a benefit which he would not have been able to obtain by means of an action for the recovery of undue payment, namely the profit made by the professional as a result of the use of funds for a certain period of time without a legal basis.

The difference between the *Bank M* case and the Italian case is therefore self-evident. While the Italian Supreme Court denies the professional the right to recovery of undue payments, if the action of nullity is exercised by the consumer in good faith, this does not happen in *Bank M*. In this case, the asymmetry does not depend on how the restitution of the services provided under the void contract is structured, but on the fact that, while the business party does not receive any remuneration for the consumer's use of the capital (and this on the basis of the principle *nemo auditur suam turpitudinem allegans*), the consumer is entitled to the reimbursement of the profit made by the business party. The *Bank M* case therefore does not introduce a 'protective *condictio indebiti*' of European rank.

Considering what has been said so far, it would appear that neither the UCTD nor the case-law of the ECJ expressly provides for a unilateral *condictio indebiti* as a consequence of the nullity of a contract concluded between a professional and a consumer. However, evidence to the contrary seems to emerge from the recent *DV v MA* case. In this case, in relation to a contract for the provision of legal services which has been declared null and void on the grounds of the unfairness of the clause defining the mechanism of the professional's remuneration, the Court stated that the restoration of the situation in which the consumer would have found himself or

herself in the absence of that clause, even if the services had been provided, meant in principle that the consumer was relieved of the obligation to pay the fees established on the basis of that clause;⁹⁴ except, finally, to provide for a mechanism of dispositive integration of the contract, for fear of the hypothesis that national law would allow the business party to claim compensation for such services on a basis other than that of the contract declared void and that there would thus be a case of voidness to the detriment of the consumer.

On the one hand, the *DV* case seems to establish *ex professo* a unilateral *condictio indebiti* as a protective restitution regime. In reality, this cannot be the case because, otherwise, the CJEU would not have provided for the possibility of maintaining the contract by replacing the void term with a supplementary statutory provision. That is to say, if the asymmetrical *condictio indebiti*, as it appears from the case in question, really achieved the objectives pursued by the system of protection established by the directive, it would be superfluous to provide for the possibility of maintaining the contract by means of its dispositive supplement.⁹⁵

However, it is difficult to determine how the CJEU would approach a national law which might provide for such a refusal of an action for recovery of sums unduly paid. Indeed, the Court seems to remain neutral with regard to the choices made by individual national legislators.⁹⁶ Significantly, in the wake of the *DV* case, some authors have observed that a national law which, after the termination of the contract, does not grant any compensation to the unfair business party who provided the legal services⁹⁷ seems to be compatible with EU law. On the other hand, it is also true that the Court has considered the variable of a national law which, notwithstanding the nullity of the contract, gives the professional another legal basis for claiming the consideration for the services provided. Hence, in order to avoid a nullity which could be detrimental to the consumer, the contract is saved so that the business party is paid a fee for the services provided that is equal to the minimum price of those services under the national reference scale of charges. This makes it reasonable to think that, although the ECJ does not openly oppose the possibility

⁹⁴ Case C-395/21, *DV*, n 68 above, para 58.

⁹⁵ So much so that S. Pagliantini, 'Post-vessatorietà e integrazione del contratto nel decalogo della CGUE' (2019/3) *Nuova Giurisprudenza Civile Commentata* 561 *et seq.*, states that a premium restitution for the consumer would neutralise the assumption of dispositive integration. This conclusion is also reached by Dalmartello, n 18 above, 102.

⁹⁶ This hypothesis would, moreover, be reflected in the statement in case C-269/19, *Banca B*, n 74 above, paras 39 and 40, according to which Directive 93/13 is not intended to recommend uniform solutions as to the consequences to be drawn from the declaration of the unfairness of a contractual term.

⁹⁷ Pagliantini, n 82 above, 12.

of a unilateral *condictio indebiti* at a theoretical level, in the present case it prevents it from operating by the dispositive integration of the contract.

In addition, elsewhere in the same ruling, it is stated, more cautiously, that if the application of the relevant provisions of national law makes it impossible to maintain the contract after the price term has been excised, Article 6 para 1 does not preclude its invalidity, even if this would result in the professional not receiving any remuneration for his services.⁹⁸ Here the Court seems to be saying that, if the unfairness of the price term is established, Article 6 para 1 of the UCTD does not preclude the entire contract from being declared null and void and the application of the rules of national law governing the consequences of the nullity of the contract, even if, on the basis of those rules, the professional does not receive any remuneration for the service, even though it has been fully performed. This is not because the rules of national law provide *tout court* for an asymmetrical recovery of undue payment in order to regulate restitution in *b-to-c* contracts, but because, on the one hand, the contract has been declared void and the business can therefore no longer claim performance from the consumer and, on the other hand, because national law does not allow restitution of the performance of a service.

So how about the ‘protective *condictio*’ developed by the Italian Supreme Court? The finding that Directive 93/13 is not openly in conflict with a national law providing for a unilateral *condictio* means that the solution developed by the Italian court can be seen as a consumer protection that can be maintained at national level, in the light of the ‘minimum harmonisation’ nature of the UCTD. However, the many theoretical and applicational uncertainties highlighted by scholars in this regard mean that the precedent should be treated with caution, and not be taken as a general rule for determining the effects of protective nullity.⁹⁹

7.2 The Claim for Unjust Enrichment, Disgorgement of Profits and Related Issues

As we have seen, the *Bank M* case recognises the general legitimacy of the consumer’s being able to demand pecuniary claims in addition to the basic ones, that is, in

⁹⁸ Case C-395/21, *DV*, n 68 above, para 59.

⁹⁹ For a critique of the unilateral *condictio* established by Cass 28314/2019 see, for all, Passagnoli, n 16 above, 262 *et seq*; S. Monticelli, ‘La nullità selettiva secondo il canone delle Sezioni Unite: un responso fuori partitura’ (2020) *Nuova Giurisprudenza Civile Commentata* 165 *et seq* and Dalmartello, n 18 above, 86, who considers that the outcome reached by the Italian Supreme Court in Case No. 28314/2019 is neither consistent nor desirable and believes that, with the exception of the special case of performance of acts, the regulation on restitution laid down in the Civil Code is consistent with protective nullity without excessive variations.

addition to the restitution of the services provided under the contract concluded with the business party and declared null and void for containing unfair terms.¹⁰⁰ Specifically, the consumer is entitled to receive a sum equal to the profit made by the professional through the use of the loan instalments and the interest received under the void contract, without any legal basis. The problem then arises of identifying the means by which this right can be enforced, given that the *condictio indebiti* does not help in this respect for the reasons outlined above.

It is therefore necessary to find the legal framework of the business' profit that the consumer is seeking to obtain. This profit can be considered as unjust enrichment. Indeed, the professional obtains an economic advantage from the use of the sums obtained under a contract that is null and void, and this nullity is the consequence of the unfair terms inserted by the business party itself; therefore, the financial increase obtained by the professional cannot be said to be based on a lawful cause and, therefore, constitutes unjust enrichment.

Such a qualification – it goes without saying – presupposes a broad concept of unjustified enrichment, encompassing any situation in which wealth is misappropriated or does not reach its proper destination according to the law.¹⁰¹ This is, moreover, the notion of unjust enrichment in a harmonised version of EU law:¹⁰² as stated in the conclusions of AG Collins, the notion of unjust enrichment has a broad content, potentially encompassing all claims for the recovery of sums used without a 'contractual justification'.¹⁰³

A clarification should be sought immediately. When we speak of unjust enrichment as a general source of obligations, we usually refer to cases in which there is a correlation between enriched assets and other assets that are deprived of this enrichment as a result of the same fact: the behaviour of the enriched party, which consists in the (unjustified) appropriation of a utility that is the exclusive property of the impoverished party. Restitution therefore normally has the function of restoring the property of the impoverished party, in full compliance with the general meaning of restitutionary protection as explained in paragraph 4 above.

In the present case, however, the profit made by the bank derives from the use of the sums wrongly received would not, under normal conditions and in accordance to the law, have accrued to the consumer. The consumer's right to recover this profit is not, therefore, a mere 'giving back', as it would be called in Anglo-Saxon doctrine, but is justified in order to prevent the insertion of unfair terms by professionals in

¹⁰⁰ Pagliantini, n 82 above, 17.

¹⁰¹ Thus C. Castronovo, S. Mazzamuto, *Manuale di diritto privato europeo*, vol II, *Proprietà, Obbligazioni, Contratti* (Milan: Giuffrè, 2007) 183.

¹⁰² This can be deduced from the pages of Sirena, n 43 above, 657 *et seq.* and Castronovo, Mazzamuto, n 101 above, 181 *et seq.*, 181–191.

¹⁰³ Conclusions AG Collins, (§ 20).

contracts concluded with consumers from being regarded as a source of economic advantage. Restitution of profit, as the *Bank M.* case itself makes clear, thus falls within the scope of ‘appropriate and effective means’ aimed at preventing the insertion of unfair terms in contracts concluded between a seller or supplier and consumers, as referred to in Article 7 para 1 of the UCTD. As the AG noted in its conclusions, this is a measure with both a proactive and a dissuasive function.

Since the basic idea of this approach is that the business party should not benefit from its own pre-contractual unfairness, the measure introduced by the *Bank M* case evokes the Anglo-Saxon concept of *disgorgement of profits*, which, although it originated as a remedy for the restitution for the wrongful act,¹⁰⁴ is also used in English law as a general remedy against the breach of equitable duties and the general duty of fairness and good faith. It must be said, however, that the institution has struggled to find its own identity in *civil law* systems; so much so that it is not codified in the written law.¹⁰⁵ Moreover, its foundation and discipline are rather debated in doctrine. Scholars have noted that profit (what medieval jurists called *commodum*) differs conceptually from unjust enrichment:¹⁰⁶ while the latter is the diversion of wealth from the assets of the impoverished, the former is the surplus value obtained from the exploitation of that benefit. For this reason, some scholars argue that the action for enrichment cannot be used to recover the profit,¹⁰⁷ and that for this purpose there must be another and further remedy of restitution, which some see in the *negotiorum gestio*;¹⁰⁸ others, on the contrary, argue that the profit

104 The so-called account and disgorgement of profits obliges the wrongdoer to return the gain obtained through the infringement of another’s right. The remedy has traditionally been recognised by English equity for the protection of industrial and intellectual property, as well as in cases of breach of a duty of confidence or fiduciary duty. See Sirena, n 43 above, 673 *et seq.*, where numerous references in doctrine and case law.

105 See E. Hondius, A. Janssen (eds), *Disgorgement of Profits. Gain-Based Remedies throughout the World* (2015). In Italian literature see P. Pardolesi, *Profitto illecito e risarcimento del danno* (Trento, 2005) and A. Albanese, *Ingiustizia del profitto e arricchimento senza causa* (Padua: Cedam, 2005).

106 For all, R. Sacco, *L’arricchimento ottenuto mediante fatto ingiusto* (Turin: UTET, 1959) 3, 129.

107 For German law see, F.C. von Savigny, *System des heutigen römischen Rechts*, V, Beylage XIV, *Die Conditionen* (Berlin, 1840) 515 and, more recently, K. Larenz and C.W. Canaris, *Lehrbuch des Schuldrechts, II, Besonderer Teil*, 2 (13th ed, Munich: C H Beck, 1994) 266 *et seq.* and D. Reuter and M. Martinek, *Ungerechtfertigte Bereicherung* (2nd ed, Tübingen: Mohr Siebeck, 2016) §7, 549 *et seq.*; for English law, see, for all, P. Birks, ‘Unjust Enrichment and Wrongful Enrichment’ (2000–2001) *Texas Law Review* 1767 *et seq.*; P. Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (Wellington, 2002) 25 *et seq.*; for Italian law, see Sacco, n 106 above, and P. Trimarchi, *L’arricchimento senza causa* (Milan: Giuffrè, 1962) 53.

108 For all, P. Sirena, *La gestione di affari altrui. Ingerenze altruistiche, interferenze egoistiche e restituzione del profitto* (Torino: Giappichelli, 1999).

must be returned as part of the unjust enrichment, without the need to activate further remedies.¹⁰⁹

Although one cannot but agree with the conceptual distinction that exists between enrichment and profit in the aforementioned sense, one nevertheless agrees with the approach according to which, at least in cases similar to the one at issue, the only remedy which allows the consumer to obtain pecuniary claims additional to the restitution of the service provided is the action for unjust enrichment, since, on the one hand, the conditions for the exercise of any other action, whether typical or atypical, are not met, and, on the other hand, the action for unjust enrichment remains the legal instrument of last resort provided for by the legal systems in order to obtain benefits to which one is entitled and which cannot be obtained by the exercise of any other action.

Lastly, given that, on the basis of the thesis set out above, the consumer would have to bring both an action for the recovery of an undue payment and an action for unjust enrichment, it must be said that the combination of the two actions does not appear to be precluded by the principle of subsidiarity which in some legal systems, such as the Italian and French legal systems (Article 2042 of the Italian Civil Code and Article 1303-3 of the French *Code Civil*) characterises the discipline of the action. Indeed, this principle must be interpreted as prohibiting only cumulative actions, but not integrative ones (which occur when the action for enrichment offers the party concerned different or additional benefits to those provided by the main action, as in the present case).¹¹⁰ Even the most recent Italian case-law on this subject does not seem to deny this direction. It limits itself to precluding the action for unjust enrichment where the other action, based on the contract, the law or general clauses, is dismissed on the grounds of limitation or lapse of the right claimed, or for lack of proof of the existence of the damage suffered, or in the case of contractual nullity, where the nullity results from the illegality of the contract for contravention of mandatory rules or public order.¹¹¹

109 This is the thesis that is gaining ground in Italy. See Albanese, n 105 above, 354 *et seq*; A. Nicolussi, 'Proprietà intellettuale e arricchimento ingiustificato: la restituzione dei profitti nell'art. 45 TRIPS' (2002) *Europa e diritto privato* 1003 *et seq*; A. Plaia, 'La violazione della proprietà intellettuale tra risarcimento e restituzione' (2003) *Riv dir comm*, I, 1035 and A. Plaia, *Proprietà intellettuale e risarcimento del danno* (Turin: Giappichelli, 2005) 32, 172.

110 See P. Sirena, 'Note critiche sulla sussidiarietà dell'azione generale di arricchimento senza causa' (2005) *Riv trim* I 105 *et seq*. In favour of supplementary exercise, but against alternative exercise, see C. Castronovo, *La nuova responsabilità civile* (3rd ed, Milan: Giuffrè, 2006) 651 *et seq*.

111 See Cass, Sez Un, 5 December 2023, n 33954, and M. Maggiolo, 'Le Sezioni Unite e la sussidiarietà dell'azione generale di arricchimento' (2024) *Rivista di diritto bancario* 1, 7 *et seq*.

7.3 The Restitutive Asymmetry Resulting from the Case *Bank M* and the Delicate Balance Between Opposing Principles

While maintaining the obligation of each party to return the (unjustified) benefits received under a contract that has subsequently been declared void, the *Bank M* case nevertheless institutionalised a form of asymmetry in restitution, in that the consumer's right to obtain restitution of the profit made by the professional is not matched by a similar right on the part of the professional to obtain remuneration for making capital available to the consumer.

The solution suggested by the case in question is gaining ground: one need only think of the results achieved in the French experience¹¹² or in the *mBank SA* case,¹¹³ where the Court, repeating the same arguments as in *Bank M*, prevents a bank from being awarded compensation by reducing the compensation claimed by the consumer concerned by way of reimbursement of the sums paid under the contract in question by the equivalent of the interest that that institution would have received if the contract had remained in force.

This restitutionary asymmetry, which is also justified in the light of the scope pursued by Article 7 para 1,¹¹⁴ as well as the principle *nemo auditur propriam turpitudinem allegans* evoked by both AG Collins¹¹⁵ and the ECJ,¹¹⁶ may raise some problems of coordination with other fundamental principles of the European restitution system, such as the principle of equality of the parties and the principle of non-penalisation of the professional.

Some scholars have pointed out that, just as the bank's restitution claim cannot justifiably go beyond the recovery of the service provided under the void contract, for fear of undermining the deterrent purpose of the UCTD, the same should apply to the consumer. The question arises as to whether the consumer does not in fact make an unjustified profit, contrary to the principle of proportionality, from the surplus over the repayment of the loan instalments and the expenses, commissions and insurance premiums paid in the meantime.¹¹⁷ In this case, the protection granted by the CJEU would result in *overprotection* of the consumer.

Since the consumer's right to recover the profit made by the professional is not a mere 'giving back', for the reasons explained in Section 7.2, one could also agree with

¹¹² Joined Cases from C-776/19 to C-782/19, *BNP Paribas Personal Finance*, n 60 above.

¹¹³ Case C-140/22, *SM, KM v mBank SA, Rzecznik Finansowy* [2023] ECLI:EU:C:2023:965, paras 62–65.

¹¹⁴ Case C-520/21, *Bank M*, n 1 above, paras 71–73 and 76–78.

¹¹⁵ Conclusions of AG Collins, (§ 60).

¹¹⁶ Case C-520/21, *Bank M*, n 1 above, paras 81–82.

¹¹⁷ This is the question posed by Pagliantini, n 82 above, 17; see also C. Bresci, 'Transparency Claims, Intellectual Services and Consumer Contracts: A Case Of Consumer Over-Protection and Under-Protection?' (4/2023) *European Review of Contract Law* 394 *et seq.*

the assertion that the above case does not lead to an exact restoration of the situation prior to the finding of unfairness¹¹⁸ and could even see a punitive value in the restitution of the enrichment imposed on the professional.

The question therefore remains as to whether the solution proposed by the *Bank M* case represents the best possible balance between two opposing principles of equal value or whether it is rather the case that, in the name of consumer protection, the ECJ is interpreting the principle of deterrence laid down in Article 7 broadly, even to the detriment of the principles of consumer equality and non-penalisation of the business.

8 Conclusions

The *Bank M* case represents a milestone in the definition of a European restitution law. It can rightly be said that the legal principles and the hermeneutical criteria set out therein will from now on constitute the first point of reference for the reconstruction of what happens in the field of restitution when a contract concluded between a business party and a consumer is declared null and void as a result of conduct on the part of the former which is contrary to the aims of protection of the latter pursued by Directive 93/13. This reconstruction allows important conclusions to be drawn about the dynamics of restitution in European contract law, with both practical and interpretative consequences.

It follows from a reading of the *Bank M* case that, in the hypothesis of the nullity of a consumer contract due to the presence of unfair terms, the parties are undoubtedly obliged to reciprocally return the services rendered, without *soluti retentio* in favour of one or the other. The nullity of a contract concluded between a professional and a consumer thus establishes, in principle, bilateral and reciprocal obligations of restitution of undue payments on both parties, which are indispensable in order to restore the *status quo ante* sought by the directive, in full compliance with the principles of equality between the consumer and the professional, the prohibition of penalising one of the parties and, more generally, the prohibition of unjust enrichment and the principle of good faith and fairness.

Although it does not establish a 'protective *condictio indebiti*' of European rank, the *Bank M* case allows the consumer to recover the profit made by the professional through the inclusion of unfair terms in the contract, since this constitutes unjust enrichment; on the other hand, it does not allow the professional to obtain remuneration for the use of the capital by the consumer, since such an effect would frustrate the dissuasive objective pursued by Article 7 of the UCTD. The case-law

¹¹⁸ Pagliantini, n 82 above, 17.

of ECJ thus shows us that, from a EU law perspective, the consequences of the proven unfairness of a term in a contract concluded between a professional and a consumer, both in terms of the annulment of the contractual regulation and in terms of the activation of the resulting restitutionary protection are nothing other than the result of a delicate and complex balancing of the various interests underlying the protection of consumers against unfair terms (and, more generally, the need to prevent and/or correct the market failure caused by the presence of such terms in standardised transactions). On the one hand, there is the need to restore the consumer's balance with his professional counterpart (a balance which was lost precisely as a result of the insertion of unfair terms): this is done by means of the recovery of undue payments. On the other hand, there is the long-standing scope of dissuading professionals from inserting such terms in contracts concluded with consumers, an objective presided over by Article 7 para 1 of the directive:¹¹⁹ this is the direction in which the recovery of profits in favour of the consumer, not offset by remuneration for the business party, is heading.

At the level of interpretation, the case under consideration shows that European private law must be understood according to its own parameters, which are different from those traditionally used for the interpretation of national law. It is therefore necessary to create a real system of European private law: a new dogmatics in which effective solutions can be found, capable of resolving the conflicts of interpretation that may arise in its application.¹²⁰ This hermeneutic approach postulates the need to examine the content of the directive, to analyse its genesis and *rationale*, in order to ascertain whether the interpretation offered of it is in line with the cultural logic and the underlying legislative policy objectives, and whether it is also the result of the uniform application of the normative dictate in the various Member States of the European Union.¹²¹

¹¹⁹ See case C-269/19, *Banca B*, n 74 above, para 38.

¹²⁰ Thus J. Basedow, 'L'esigenza di una dogmatica per il diritto privato europeo', in Aa Vv, *Quaderni di diritto privato europeo*, edited by Jannarelli, Piepoli and Scannicchio (Bari, 1998) 17 *et seq.*

¹²¹ Putti, n 13 above, 481.