

## COMMISSION NOTICE

**Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts**

(Text with EEA relevance)

(2019/C 323/04)

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## INTRODUCTION

Council Directive 93/13/EEC <sup>(1)</sup> is a principle-based directive. It protects consumers against unfair terms in all types of business-to-consumer contracts. In this way, it is a central instrument in order to achieve fairness in the Internal Market.

Since its adoption 26 years ago, the UCTD has been interpreted through numerous decisions of the Court of Justice of the European Union (‘the Court’), in particular preliminary rulings, through which the Court has further developed many of the general principles laid down in the UCTD. The Court’s interpretation is not limited to the criteria for the substantive assessment of contract terms and to the consequences to be drawn from the unfairness of contract terms, but also has implications for the national rules of procedure insofar as those rules are relevant to the effective protection against unfair contract terms.

<sup>(1)</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (‘the UCTD’) (OJ L 95, 21.4.1993, p. 29); amended through Directive 2011/83/EU of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

The Fitness Check of 2017 <sup>(2)</sup> in the areas of consumer and marketing law included a comprehensive evaluation of the UCTD. It found that the principle-based approach of the UCTD is effective and contributes to a high level of consumer protection. However, the evaluation also identified a certain lack of clarity concerning the interpretation of this Directive and its application as regards for example: (i) the scope of exemptions for terms concerning price and the main subject matter; (ii) the legal consequences of the non-binding nature of unfair contract terms; and (iii) the obligation of national courts to take an active role in applying the UCTD in individual cases. Therefore, the Fitness Check Report recommended addressing these issues through specific Commission guidance.

Against this background, the Commission proposal of 11 April 2018 <sup>(3)</sup> amending different consumer protection directives is, as regards the UCTD, confined to proposing the insertion of a provision on penalties. At the same time, the Commission Communication 'A New Deal for Consumers' of 11 April 2018 <sup>(4)</sup> announced that the Commission would adopt guidance on the UCTD in 2019 to clarify questions that have arisen in the application of the Directive.

The main purpose of this Guidance Notice (hereinafter referred to as 'this Notice') is to present, in a structured way, the interpretation which the Court has provided on the key concepts and provisions of the UCTD, in light of specific cases dealt with by the courts of the Member States. In this way, the Commission would like to increase awareness of this case law amongst all interested parties, such as consumers, businesses, the authorities of the Member States, including national courts, and legal practitioners, across the EU, and, thereby, facilitate its application in practice.

Although the UCTD has achieved a high level of consumer protection and the harmonisation of key concepts in the protection against unfair contract terms in the internal market, **there are specificities in the Member States that market participants and legal practitioners will also have to take into account.** Such specificities may relate to a broader scope of the national rules transposing the UCTD, or may consist in more detailed or stricter rules regarding the unfairness of contract terms. Examples include a black list of contract terms that are always considered as unfair, lists of contract terms which are presumed to be unfair, the assessment also of contract terms that have been negotiated individually, the assessment of the unfairness of contract terms defining the main subject-matter or of the adequacy of the price or remuneration even where such terms are transparent. There may also be less demanding requirements for considering a contract term to be unfair under the general unfairness provision, for instance where the national transposition does not require that the imbalance in the rights and obligations of the parties is significant or that that the imbalance in the rights and obligations is contrary to the requirements of good faith. Such rules are possible, in principle, under the minimum harmonisation provision in Article 8 UCTD <sup>(5)</sup>. Annex II to this Notice contains an overview of the notifications made by the Member States under Article 8a UCTD <sup>(6)</sup>, which reflect deviations from the UCTD.

This Notice is based on the minimum standard provided by the UCTD and cannot provide a comprehensive picture of the application of the UCTD in the individual EU Member States, including the decisions of national courts and other competent bodies on the assessment of specific contract terms. In addition to different information sources available in the Member States, information on the national provisions transposing the UCTD, on case law and on legal literature is available in the Consumer Law Database which is accessible via the E-justice portal <sup>(7)</sup>.

Where not specified otherwise, articles referred to in this Notice are those of the UCTD. Where the notion 'contract term' or 'term' is used it refers to 'not individually negotiated contract terms' within the meaning of Article 3(1) UCTD. Where quotations from the text of the UCTD or from Court rulings contain visual highlighting, such emphasis has been added by the Commission.

<sup>(2)</sup> Final report of 23.5.2017, SWD(2017) 208 final.

<sup>(3)</sup> Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, COM(2018) 185 final. At the time of adoption of this Notice, the Council and the European Parliament had agreed, in principle, on the insertion into the UCTD of a new Article 8b on penalties.

<sup>(4)</sup> COM(2018) 183 final.

<sup>(5)</sup> Section 2.1.

<sup>(6)</sup> This information is also available on the website of DG Justice and Consumers: [https://archieftc01.archiefweb.eu/archives/archiefweb/20171125145225/http://ec.europa.eu/consumers/consumer\\_rights/rights-contracts/directive/notifications/index\\_en.htm#HR](https://archieftc01.archiefweb.eu/archives/archiefweb/20171125145225/http://ec.europa.eu/consumers/consumer_rights/rights-contracts/directive/notifications/index_en.htm#HR)

<sup>(7)</sup> [https://e-justice.europa.eu/content\\_text\\_of\\_the\\_directive-628-en.do#partDisplayArea](https://e-justice.europa.eu/content_text_of_the_directive-628-en.do#partDisplayArea)

This Notice covers in Section 1 the objectives and the scope of the UCTD, while Section 2 relates in particular to the principle of minimum harmonisation and the relationship with national law in general. Section 3 discusses the assessment of the transparency and (un)fairness of contract terms under Articles 3, 4 and 5. Section 4 explains the implications of the unfairness of contract terms for the rights and obligations of the parties under Article 6(1). Section 5 covers in detail the procedural requirements for the assessment of contract terms, including the obligation for national courts to take an active role in the assessment of contract terms. Finally, Section 6 discusses some particularities of injunction proceedings.

The principles developed by the Court in relation to procedural guarantees under the UCTD, including the principle of *ex officio* control, apply *mutatis mutandis* to other pieces of EU consumer legislation<sup>(8)</sup>. Likewise, this Notice takes into account certain rulings concerning other consumer protection directives insofar as they are relevant also to the UCTD.

While preliminary rulings are addressed to the referring court and to national courts at large, which are obliged to apply them directly, they concern all national authorities dealing with unfair contract terms, including administrative authorities enforcing the UCTD and ministries responsible for proposing legislation. It is for the Member States to examine to what extent their rules and practices comply with the UCTD as interpreted by the Court and, where relevant, how compliance can be improved in order to protect consumers effectively against unfair contract terms.

This Notice is addressed to the EU Member States and to Iceland, Liechtenstein and Norway as signatories of the Agreement on the European Economic Area<sup>(9)</sup> (EEA). References to the EU, the Union or the Single Market should therefore be understood as references to the EEA or to the EEA market.

This Notice is intended purely as a guidance document — only the text of the EU legislation itself has legal force. Any authoritative reading of the law has to be derived from the text of Directive 93/13/EEC and directly from the decisions<sup>(10)</sup> of the Court as they have been handed down to date and will be handed down in the future.

This Notice takes into account rulings of the Court published **until 31 May 2019** and cannot prejudice further developments of the Court's case law.

The views expressed in this Notice cannot prejudice the position that the European Commission might take before the Court.

The information contained in this Notice is of a general nature and does not specifically address any particular individuals or entities. Neither the European Commission nor any person acting on behalf of the European Commission is responsible for any use that may be made of the following information.

## 1. OBJECTIVES AND SCOPE OF THE UCTD

### Article 1

1. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.
2. The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.

<sup>(8)</sup> At least in relation to consumer contract law. See Case C-377/14 *Radlinger Radlingerová*, paragraphs 60-74, in particular paragraph 62 with references to other rulings: with regard to Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31), Case C-227/08, *Martín Martín*, paragraph 29, with regard to Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12), Case C-32/12, *Duarte Hueros*, paragraph 39. In relation to Directive 1999/44/EC see, furthermore, Case C-497/13 *Froukje Faber*, paragraphs 42-48. With regard to Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, p. 48) replaced by Directive 2008/48/EC of the European Parliament and of the Council (OJ L 133, 22.5.2008, p. 66), see Case C-429/05 *Rampion*, paragraph 69 and operative part and Case C-76/10 *Pohotovost*, paragraph 76.

<sup>(9)</sup> OJ L 1, 3.1.1994, p. 3.

<sup>(10)</sup> Usually judgments and sometimes orders.

*Article 2*

For the purposes of this Directive:

- (a) 'unfair terms' means the contractual terms defined in Article 3;
- (b) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
- (c) 'seller or supplier' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

*Article 3(1) and (2)*

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

*Recital 6*

Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own, it is essential to remove unfair terms from those contracts;

*Recital 9*

Whereas in accordance with the principle laid down under the heading 'Protection of the economic interests of the consumers', as stated in those programmes: 'acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts';

*Recital 10*

Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; whereas those rules should apply to all contracts concluded between sellers or suppliers and consumers; whereas as a result inter alia contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements must be excluded from this Directive;

*Recital 11*

Whereas the consumer must receive equal protection under contracts concluded by word of mouth and written contracts regardless, in the latter case, of whether the terms of the contract are contained in one or more documents;

*Recital 13*

[...] whereas in that respect the wording 'mandatory statutory or regulatory provisions' in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established;

### 1.1. The objectives of the UCTD

The UCTD aims at approximating national laws in order to raise the level of protection of consumers against unfair not individually negotiated terms in contracts concluded between a seller or supplier and a consumer.

Therefore, the UCTD has a double objective:

- the effective protection of consumers as the typically weaker party against unfair contract terms which are used by sellers or suppliers and have not been individually negotiated, and
- contributing to the establishment of the Internal Market through the minimum harmonisation of the national rules aiming at this protection.

The Court <sup>(11)</sup> has emphasised the role of the UCTD in connection with the overall objectives of the EU when stating that

‘[...] [i]t should also be noted that, according to the Court’s case-law, that directive as a whole constitutes, in accordance with Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the European Community and, in particular, to raising the standard of living and the quality of life throughout the Community [...]’ <sup>(12)</sup>.

In that connection, the Court has repeatedly qualified protection under the UCTD as a matter of ‘public interest’ <sup>(13)</sup>. As expressed in Article 114 of the Treaty on the Functioning of the EU (TFEU) <sup>(14)</sup>, the legal basis for the UCTD, as well as in Article 169 TFEU and in Article 38 of the Charter of Fundamental Rights of the EU <sup>(15)</sup>, the UCTD provides for a high level of consumer protection.

According to the settled case law of the Court <sup>(16)</sup>, the system of protection introduced by Directive 93/13/EEC is based on

‘[...] the idea [...] that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms[...].’

The UCTD thus aims to address situations of inequality of the parties in relation to contract terms, which can be due to an *asymmetry of information or expertise* <sup>(17)</sup> or *bargaining power* <sup>(18)</sup> in relation to the contract terms.

In particular, through the non-binding character of unfair contract terms under Article 6(1) the UCTD aims to create an *effective balance* <sup>(19)</sup> between the parties under the contract, by removing the imbalance created by unfair contract terms <sup>(20)</sup>, in order to compensate for the weaker position of consumers <sup>(21)</sup>.

Furthermore, the UCTD aims to deter sellers or suppliers from using unfair terms in the future <sup>(22)</sup>. The Commission recalls that in its 2000 report <sup>(23)</sup> on the implementation of the UCTD, it stressed the harmful effects of the use of unfair contract terms for the legal and economic order of the EU as a whole and underlined the significance of the UCTD beyond the protection of individual consumers directly affected by unfair contract terms.

<sup>(11)</sup> For instance, Case C-40/08 *Asturcom Telecomunicaciones*, paragraph 51.

<sup>(12)</sup> Reference to Case C-168/05 *Mostaza Claro*, paragraph 37.

<sup>(13)</sup> Case C-243/08 *Pannon GSM*, paragraph 31; Case C-168/05 *Mostaza Claro*, paragraph 3; Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 78.

<sup>(14)</sup> At the time of adoption Article 100a of the Treaty establishing the European Economic Community.

<sup>(15)</sup> Hereinafter referred to as ‘the Charter’.

<sup>(16)</sup> The quotation below is from Case C-147/16 *Karel de Grote*, paragraph 54. At the end of that paragraph, the Court refers to Case C-488/11 *Asbeek Brusse*, paragraph 31, and Case C-110/14 *Costea*, paragraph 18 and the case-law cited there. Similar statements can be found in many other rulings, e.g. in Case C-169/14 *Sánchez Morcillo*, paragraph 22.

<sup>(17)</sup> This aspect is addressed particularly in Case C-147/16 *Karel de Grote*, paragraph 59.

<sup>(18)</sup> This aspect is stressed in Case C-110/14 *Costea*, paragraph 27.

<sup>(19)</sup> E.g. Case C-421/14 *Banco Primus*, paragraph 41; Case C-169/14 *Sánchez Morcillo and Abril García*, paragraph 23; Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo and Others*, paragraphs 53 and 55.

<sup>(20)</sup> Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortés*, paragraph 69.

<sup>(21)</sup> E.g. Case C-169/14 *Sánchez Morcillo and Abril García*, paragraph 22 and the case-law cited.

<sup>(22)</sup> Opinion of Advocate General Pitruzella in Case C-260/18 *Dziubak*, paragraph 53.

<sup>(23)</sup> Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, 27.4.2000, COM(2000) 248 final, p. 13.

## 1.2. The scope of the UCTD

### 1.2.1. The notions of 'seller or supplier', 'consumer' and of 'contracts concluded between a seller or supplier and a consumer'

As laid down in Article 1(1) UCTD, the UCTD applies to 'contracts concluded between a seller or supplier and a consumer'.

For a contract to be covered by the UCTD, it is necessary to establish that one party to the contract is a seller or supplier, as defined in Article 2(c), and the other party a consumer<sup>(24)</sup> within the meaning of Article 2(b). This is without prejudice to the fact that the Member States are not, a priori, prevented from extending the scope of the national rules transposing the UCTD also to other contracts, applying it, for instance, also to contracts concluded between two sellers or suppliers or between two consumers.

#### 1.2.1.1. The definitions of 'seller or supplier' and 'consumer'

Whereas, according to Article 2(b), consumers have to be natural persons, pursuant to Article 2(c), a seller or supplier can be a legal or natural person.

In order to establish whether a given person is a seller or supplier or a consumer it is important to look at the balance of power between the parties in relation to the contract in question. Typical factors are the asymmetry of information, knowledge and expertise or bargaining power. The notions of 'seller or supplier' and 'consumer' are **functional concepts** based on the role of the parties in relation to the contract at issue. At the same time, the notion of 'consumer' is objective and reflects the typically weaker position of the seller or supplier's counterpart, meaning that superior knowledge and experience of a specific consumer does not disqualify such person from being a 'consumer' for the purposes of the UCTD<sup>(25)</sup>.

The Court explained this functional approach as follows<sup>(26)</sup>:

'53 It is therefore by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, that the directive defines the contracts to which it applies [...]'<sup>(27)</sup>

'55 [It follows that] the notion of "seller or supplier", within the meaning of Article 2(c) of Directive 93/13 is a functional concept, requiring determination of whether the contractual relationship is amongst the activities that a person provides in the course of their trade, business or profession [...]'<sup>(28)</sup>

In order to establish whether a natural person who pursues a trade, business or profession is a seller or supplier or a consumer, it is important to establish whether the contract in question relates to one of these activities or not.

Despite certain variations of the term 'seller or supplier' in different language versions<sup>(29)</sup> of Article 2(c) UCTD, this notion has to be interpreted uniformly<sup>(30)</sup> and in light of the objectives of the Directive<sup>(31)</sup>. This means that more restrictive terminology used in certain language versions of the UCTD and in the national transposition cannot restrict the types of contracts covered by the UCTD and, thereby, its scope of protection<sup>(32)</sup>. In fact, 'seller or supplier' pursuant to Article 2(c) will have to be interpreted in the same way as the term 'trader' in other consumer protection directives, and the case law in relation to the terms 'trader' and 'consumer' in other directives is, in principle, also relevant for the UCTD<sup>(33)</sup>.

<sup>(24)</sup> It is also possible that more than one seller or supplier and/or more than one consumer are parties to the contract.

<sup>(25)</sup> Case C-590/17 *Pouvin Dijoux*, paragraphs 25-28 with references to Case C-110/14 *Costea*, paragraph 21 regarding the notion of 'consumer'; Case C-74/15 *Tarcău*, paragraph 27; Case C-534/15 *Dumitraș*, paragraph 36; and Case C-535/16 *Bachman*, paragraph 36.

<sup>(26)</sup> E.g. in Case C-147/16 *Karel de Grote*, paragraphs 53 and 55, which are quoted here.

<sup>(27)</sup> Case C-488/11 *Asbeek Brusse*, paragraph 30; and Case C-110/14 *Costea*, paragraph 17 and the case-law cited.

<sup>(28)</sup> Reference, by analogy, to the order of 27 April 2017 in Case C-535/16 *Bachman*, paragraph 36 and the case-law cited.

<sup>(29)</sup> Case C-488/11 *Asbeek Brusse*, paragraph 25.

<sup>(30)</sup> Case C-488/11 *Asbeek Brusse*, paragraph 26.

<sup>(31)</sup> Case C-488/11 *Asbeek Brusse*, paragraph 31.

<sup>(32)</sup> Case C-488/11 *Asbeek Brusse*, paragraphs 27-30; Case C-147/16 *Karel de Grote*, paragraphs 40-42.

<sup>(33)</sup> See, for instance, the reference in paragraph 51 of Case C-147/16 *Karel de Grote* to Case C-59/12 *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, which concerns Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 22).

The Court <sup>(34)</sup> has stated that the definition of ‘seller or supplier’ in Article 2(c), has to be interpreted **broadly**:

‘47 Article 2(c) of the directive defines the term “seller or supplier” as any natural or legal person who, in contracts covered by this directive, is acting for purposes relating to his trade, business or profession, whether publicly or privately owned.

48 It is clear from the wording itself of that provision that the EU legislature intended a broad definition to be given to the notion of “seller or supplier” [...] <sup>(35)</sup>.’

Therefore, every natural or legal person is a seller or supplier when the contract relates to their professional activity, including where the activity is of a public nature or in the public interest <sup>(36)</sup> or governed by public law <sup>(37)</sup>. Organisations or bodies that pursue a task of public interest or charitable or ethical goals will qualify as sellers or suppliers in relation to contracts on the sale of products or the services of any kind to consumers. In this respect, it is immaterial that an activity is carried out on a ‘not-for-profit’ basis. According to the Court <sup>(38)</sup>,

‘[i]t follows that Article 2(c) of Directive 93/13 does not exclude from its scope of application entities that pursue a task in the public interest, nor those that are governed by public law [...] <sup>(39)</sup>. Furthermore, [...], since tasks of a public nature and in the public interest are often conducted on a not-for-profit basis, the fact that a body is a not-for-profit organisation is irrelevant to the definition of the notion of “seller or supplier”, within the meaning of that provision.’

This means that, for instance, also contracts relating to health and care services will, in principle, be covered, regardless of the legal nature of the provider.

The Court has also specified that, in order to be considered a ‘seller or supplier’, it is **not necessary** that a contract reflects a person’s **main activity** and can thus relate to a complementary or ancillary activity <sup>(40)</sup>. Therefore, for instance, a loan offered by a company to its employees <sup>(41)</sup> or a loan granted to a student by an education establishment <sup>(42)</sup> can be covered.

In sum, whether a person qualifies as a ‘seller or supplier’ or a ‘consumer’ must be assessed **on a case-by-case basis in relation to the specific contract at issue, taking account of** the nature and purpose of the contract in question and **the fact that the UCTD aims at the protection of consumers as the typically weaker party**.

This also means that a given natural person can be a ‘seller or supplier’ in relation to certain contracts, e.g. a lawyer in relation to a contract on the provision of legal services <sup>(43)</sup>, and a ‘consumer’ in relation to other contracts, e.g. a loan taken out for private purposes <sup>(44)</sup>. In this respect, the Court <sup>(45)</sup> has stated:

‘In such a situation, even if a lawyer were considered to display a high level of technical knowledge [...] <sup>(46)</sup>, he could not be assumed not to be a weak party compared with a seller or supplier. [...] the weaker position of the consumer vis-à-vis the seller or supplier, which the system of protection implemented by Directive 93/13 is intended to remedy, relates both to the consumer’s level of knowledge and to his bargaining power under terms drawn up in advance by the seller or supplier the content of which that consumer is unable to influence.’

<sup>(34)</sup> Case C-147/16 *Karel de Grote*, paragraphs 47 and 48.

<sup>(35)</sup> Reference to Case C-488/11 *Asbeek Brusse*, paragraph 28 and the case law cited.

<sup>(36)</sup> Case C-147/16 *Karel de Grote*, paragraphs 49-51.

<sup>(37)</sup> Case C-59/12 *Zentrale zur Bekämpfung des unlauteren Wettbewerbs*, paragraph 32.

<sup>(38)</sup> Case C-147/16 *Karel de Grote*, paragraph 51.

<sup>(39)</sup> Reference, by analogy, to Case C-59/12 *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, paragraph 32.

<sup>(40)</sup> Case C-590/17 *Pouvin Dijoux*, paragraph 37, Case C-147/16 *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen*, paragraphs 57 and 58.

<sup>(41)</sup> Case C-590/17 *Pouvin Dijoux*.

<sup>(42)</sup> Case C-147/16 *Karel de Grote*.

<sup>(43)</sup> Case C-537/13 *Šiba*.

<sup>(44)</sup> Case C-110/14 *Costea*.

<sup>(45)</sup> Case C-110/14 *Costea*, paragraph 27.

<sup>(46)</sup> Reference to Case C-537/13 *Šiba*, paragraph 23.



Furthermore, a natural person acting, under an ancillary contract, as a guarantor for a contract concluded between two commercial entities has to be considered as a consumer where that person acted for purposes outside his trade, business or profession, and has no functional link with the borrowing company. A functional link may consist, for instance, in being a director of that company or holding non-negligible shares in it <sup>(47)</sup>.

#### 1.2.1.2. Contracts concluded between a seller or supplier and a consumer

As soon as there is a seller or supplier on one side and a consumer on the other side, the contract is deemed to be covered by the UCTD as expressed by the second whereas-clause of Recital 10. Recital 10 clarifies that the UCTD applies to *all* contracts concluded between sellers or suppliers and consumers.

This implies that the UCTD applies to all contracts concerning the purchase of goods and the supply of services and the Court has clarified that the UCTD is indeed intended to apply ‘*in all sectors of economic activity*’ <sup>(48)</sup>.

Recital 10 further explains that *inter alia* contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements <sup>(49)</sup> ‘must be excluded’ from its scope. As limitations of the scope of the Directive, those examples <sup>(50)</sup> will have to be interpreted narrowly <sup>(51)</sup>.

The UCTD does *not require* that the consumer has to provide *monetary consideration* for a good or service. The Court has not considered monetary consideration to be necessary. It <sup>(52)</sup> has, for instance, held that private persons who provide a guarantee for a loan taken out by another party may be protected under the UCTD even though the guarantee contract does not stipulate any monetary consideration for a specific service. Therefore, also contracts between consumers and providers of social media services must be considered to be covered by the UCTD regardless of whether consumers have to pay certain amounts of money or whether the consideration for the services consists in consumer generated content and profiling <sup>(53)</sup>.

Where an ancillary contract, for instance a guarantee contract, is concluded between a seller or supplier and a consumer, that contract is covered by the UCTD, even if the main contract, for instance a loan, is concluded between two commercial companies and is therefore outside its scope <sup>(54)</sup>.

The Court has ruled on a limited number of specific cases where national courts had doubts about the classification of a given contract and has clarified that the following types of contracts are covered by the UCTD:

- residential tenancy agreements concluded between, on the one hand, an individual acting on a non-commercial basis and, on the other hand, a real estate professional <sup>(55)</sup>,
- contracts on the supply of legal services <sup>(56)</sup>,

<sup>(47)</sup> Cases C-74/15 *Dumitru Tarcău* and C-534/15 *Dumitraș*, paragraphs 34-40.

<sup>(48)</sup> Case C-290/16 *Air Berlin*, paragraph 44.

<sup>(49)</sup> The Court may provide further clarifications on this category of contracts in Case C-272/18 *Verein für Konsumenteninformation v TVP Treuhand- und Verwaltungsgesellschaft für Publikumsfonds mbH & Co KG* (pending on 31 May 2019) concerning fiduciary agreements concluded between a managing partner and other limited partners in a limited partnership under German law.

<sup>(50)</sup> As expressed by the Advocate General in paragraph 56 of Case C-590/17 *Pouvin Dijoux*, Recital 10 ‘provides illustrative examples of types of legal transactions that will fall short of Article 1(1) read in conjunction with Article 2(b) and (c) of the directive’.

<sup>(51)</sup> See, with regard to employment contracts, Case C-590/17 *Pouvin Dijoux*, paragraph 32.

<sup>(52)</sup> Cases C-74/15 *Dumitru Tarcău* and C-534/15 *Dumitraș*.

<sup>(53)</sup> This is confirmed by the common position of national authorities within the network of enforcement authorities created under Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) (OJ L 364, 9.12.2004, p. 1) concerning the protection of consumers on social networks available at [http://europa.eu/rapid/press-release\\_IP-17-631\\_en.htm](http://europa.eu/rapid/press-release_IP-17-631_en.htm) (November 2016). See also the concept of remuneration according to Recital 16 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36).

<sup>(54)</sup> Cases C-74/15 *Dumitru Tarcău*, paragraph 26 and C-534/15 *Dumitraș*, paragraph 31.

<sup>(55)</sup> Case C-488/11 *Asbeek Brusse*, paragraphs 32-34.

<sup>(56)</sup> Case C 537/13 *Šiba*, paragraphs 23 and 24.

- a mortgage credit contract concluded by a lawyer for private purposes <sup>(57)</sup>,
- a contract concluded by a free educational establishment by which it grants one of its students repayment facilities for sums which the students owe in respect of registration fees and costs connected with a study trip <sup>(58)</sup>,
- a contract of guarantee or a contract providing security concluded between a natural person and a credit institution in order to secure contractual obligations owed by a commercial company to the credit institution under a credit agreement, where the guarantor acted for purposes outside his trade, business or profession and has no link of a functional nature with that company <sup>(59)</sup>,
- a mortgage loan which an employer granted to an employee and his spouse for private purposes <sup>(60)</sup>.

#### 1.2.2. Not individually negotiated contract terms (Article 3(1) and (2) UCTD) <sup>(61)</sup>

According to Article 2(a) in conjunction with 3(1), only contract terms which have not been negotiated individually are subject to the UCTD. Article 3(2) contains certain presumptions and provisions on the burden of proof for the question of whether a given contract term has not been negotiated individually. Along with Recitals 9 and 11, Article 3(2) also gives examples of what kind of contract terms are covered. Typically, but not exclusively, 'standard' <sup>(62)</sup>, standardised <sup>(63)</sup> or pre-formulated <sup>(64)</sup> contract terms, often found in so-called 'terms and conditions' will be covered.

It is not decisive in which form the terms are set out, e.g. printed, online or off-line, handwritten or even oral <sup>(65)</sup>, in what way the contract was concluded, e.g. privately or in the form of a notarial deed, in which part of the contract the terms are placed or whether they are contained in one or in different documents. What matters is that they contribute to defining the rights and obligations of the parties and that no individual negotiations have taken place on the specific term(s) in question.

Whether *individual negotiations* have taken place on a particular contract term is a matter of facts to be assessed by the national courts. According to the first paragraph on Article 3(2), where a contract term has been drafted 'in advance', for instance in the case of a 'pre-formulated standard contract', the term is '[is] always [to] be regarded as not individually negotiated'. The third subparagraph of Article 3(2) provides that, where a seller or supplier considers that 'a standard term' has been negotiated individually, the *burden of proof* is incumbent on such seller or supplier. According to the second paragraph of Article 3(2), where certain aspects of a term or a specific term have been negotiated individually, this does not mean that the *other* contract terms have been negotiated individually. The consumer's signature at the end of the contract or in order to confirm individual clauses does certainly not indicate that contract terms were negotiated individually.

The Court may give further guidance on this criterion and on the concept of 'negotiation' <sup>(66)</sup>.

When this Notice refers to 'unfair contract terms' or 'contract terms', such references relate to 'not individually negotiated contract terms' even where the words 'not individually negotiated' are not repeated. This is without prejudice of the fact that in some Member States the protection of the UCTD applies also to individually negotiated contract terms <sup>(67)</sup>.

<sup>(57)</sup> Case C-110/14 *Costea*.

<sup>(58)</sup> Case C-147/16 *Karel de Grote*.

<sup>(59)</sup> Cases C-74/15 *Dumitru Tarcău* and C-534/15 *Dumitraș*.

<sup>(60)</sup> Case C-590/17 *Pouvin Dijoux*. The Court held that the notion of 'consumer' under Article 2(b) of the Directive covers the employee of an undertaking and his spouse, who conclude a loan contract with that undertaking, reserved, principally, to members of staff of that undertaking, with a view to financing the purchase of real estate for private purposes. The notion of 'seller or supplier' under Article 2(c) of the Directive covers such an undertaking, where it concludes such a loan contract in the context of its professional activity, even if granting loans does not constitute its main activity.

<sup>(61)</sup> In some Member States (see Annex II), also contract terms that have been negotiated individually are subject to the rules on unfair contract terms.

<sup>(62)</sup> Article 3(2).

<sup>(63)</sup> Recital 9.

<sup>(64)</sup> Article 3(2); Case C-191/15 *Verein für Konsumenteninformation v Amazon*, paragraph 63.

<sup>(65)</sup> Recital 11.

<sup>(66)</sup> Case C-452/18 *Ibercaja Banco* (pending on 31 May 2019).

<sup>(67)</sup> See the relevant notifications by Member States under Article 8a as presented in Annex II.

### 1.2.3. Exclusion of contract terms reflecting mandatory statutory or regulatory provisions (Article 1(2) UCTD)

Under Article 1(2), contract terms which reflect mandatory statutory or regulatory provisions or the provisions or principles of international conventions to which the Member States or the Union are party, are not subject to the provisions of the UCTD. The Court <sup>(68)</sup> has stressed that, as an exception from the intended protection of consumers against unfair contract terms, *Article 1(2) has to be interpreted narrowly*:

‘[...] a national court must take account of the fact that, having regard to the purpose of that directive, namely the protection of consumers against unfair terms included in contracts concluded with consumers by sellers or suppliers, the exception provided for in Article 1(2) of the directive is to be strictly construed [...] <sup>(69)</sup>.’

In order to exclude assessment under the UCTD, it has to be determined that the contract term reflects a mandatory statutory or regulatory provision.

For the purposes of Article 1(2) and in line with Recital 13, a provision is *mandatory* if

- it applies to the parties of the contract independently of their choice,
- but also where it is of a supplementary nature and therefore applies by default, that is to say in the absence of other arrangements established by the parties to the contract <sup>(70)</sup>.

In those cases, the exclusion from the scope of the UCTD is justified by the fact that

‘[...] in principle, it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts <sup>(71)</sup>.’

This applies, in principle, also where a mandatory provision is adopted after the conclusion of the contract and imposes an arrangement that replaces an unfair contract term <sup>(72)</sup>.

At the same time, the exception in Article 1(2) has to be limited strictly to the question regulated by such mandatory rules <sup>(73)</sup>. Furthermore, mandatory rules of national law applying to particular groups of customers do not constitute a mandatory rule for the purposes of Article 1(2) UCTD insofar as a contract term makes them applicable to other customers <sup>(74)</sup>.

The Court <sup>(75)</sup> has clarified that the exception of Article 1(2) does not apply where national rules give the parties different options, for instance, for determining the competent court.

The Court may provide further guidance on Article 1(2) based on three requests for preliminary rulings pending at the time of adoption of this Notice <sup>(76)</sup>.

<sup>(68)</sup> The citation is from Case C-51/17 *OTP Bank v Ilyés and Kiss*, paragraph 54. The same statement can be found, for instance, in Cases C-186/16 *Andrić*, paragraph 31 and C-34/13 *Kušionová*, paragraph 77.

<sup>(69)</sup> Reference to Case C-186/16 *Andrić and Others*, paragraph 31, and the case-law cited there.

<sup>(70)</sup> Cases C-266/18 *Aqua Med*, paragraph 33, C-446/17 *Woonhaven Antwerpen*, paragraph 25, C-186/16 *Andrić*, paragraph 29; C-280/13 *Barclays Bank*, paragraphs 31 and 42, C-34/13 *Kušionová*, paragraph 77, C-92/11 *RWE Vertrieb*, paragraph 26.

<sup>(71)</sup> Case C-51/17 *OTP Bank v Ilyés and Kiss*, paragraph 53, Case C-92/11 *RWE Vertrieb*, paragraph 28. See also Recital 13 of the UCTD.

<sup>(72)</sup> Case C-51/17 *OTP Bank v Ilyés and Kiss*, paragraphs 62-64. However, such provision may not deprive consumers of the rights they may derive from invalidity of the contract because of the unfair nature of a contract term. See Section 4.3.2.1 and Case C-118/17 *Dunai*, paragraphs 51-55.

<sup>(73)</sup> In Case C-51/17 *OTP Bank v Ilyés and Kiss*, the Court found that a standard contract term relating to the foreign exchange risk in a foreign-currency denominated mortgage loan agreement is not excluded from the scope of the UCTD, even if national law contains mandatory provisions on the currency conversion mechanism.

<sup>(74)</sup> Case C-92/11 *RWE Vertrieb*, point 1 of the operative part: ‘Article 1(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that that directive applies to provisions in general terms and conditions, incorporated into contracts concluded between a supplier and a consumer, which reproduce a rule of national law applicable to another category of contracts and are not subject to the national legislation concerned.’

<sup>(75)</sup> Case C-266/18 *Aqua Med*, paragraphs 35-38.

<sup>(76)</sup> Cases C-125/18 *Gómez del Moral*, C-779/18 *Mikrokasa* and C-81/19 *Banca Transilvania*, pending on 31 May 2019.

Article 1(2) UCTD, furthermore, excludes from the scope of the UCTD the provisions or principles of international conventions to which the Member States of the Union are party, and refers specifically to international conventions in the transport area <sup>(77)</sup>.

#### 1.2.4. Interplay with other EU legislation

The UCTD applies to contracts concluded between sellers or suppliers and consumers in all sectors of economic activity <sup>(78)</sup>. Thus, also other provisions of EU law, including other consumer protection rules, may apply to a given contract, depending on the type of contract in question. Other relevant rules, which may apply in parallel, could be horizontal rules on pre-contractual information and on the right of withdrawal in Directive 2011/83/EU <sup>(79)</sup> on consumer rights, or on unfair commercial practices in Directive 2005/29/EC <sup>(80)</sup>. Similarly, rules relating to particular types of contracts may apply in addition to the UCTD, for instance, Directive 2008/48/EC <sup>(81)</sup> on credit agreements for consumers, Directive 2008/122/EC <sup>(82)</sup> on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, Directive 2014/17/EU <sup>(83)</sup> on credit agreements for consumers relating to residential immovable property, Directive (EU) 2015/2302 <sup>(84)</sup> on package travel and linked travel arrangements, Directive (EU) 2018/1972 <sup>(85)</sup> establishing the European Electronic Communications Code, Regulation (EC) No 1008/2008 <sup>(86)</sup> on air services, Directive 2009/72/EC <sup>(87)</sup> concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, or Directive 2009/73/EC <sup>(88)</sup> concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC <sup>(89)</sup>. In addition, rules in the area of judicial cooperation in civil matters, for instance on the applicable law <sup>(90)</sup> and jurisdiction <sup>(91)</sup> and procedural rules, such as on small claims <sup>(92)</sup> or on the European Payment Order <sup>(93)</sup> may apply in cases involving unfair contract terms.

<sup>(77)</sup> Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), agreed at Montreal on 28 May 1999.

Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999. Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by the Protocol of 2002 (the Athens Convention).

<sup>(78)</sup> Case C-290/16 *Air Berlin*, paragraph 44.

<sup>(79)</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

<sup>(80)</sup> OJ L 149, 11.6.2005, p. 22.

<sup>(81)</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66).

<sup>(82)</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (OJ L 33, 3.2.2009, p. 10).

<sup>(83)</sup> Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

<sup>(84)</sup> Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ L 326, 11.12.2015, p. 1).

<sup>(85)</sup> OJ L 321, 17.12.2018, p. 36. Recital 260 provides that end-users should be informed, inter alia, of any quality of service level, conditions for promotions and termination of contracts, applicable tariff plans and tariffs for services subject to particular pricing conditions.

<sup>(86)</sup> Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3).

<sup>(87)</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55).

<sup>(88)</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

<sup>(89)</sup> The relationship between the UCTD and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ L 176, 15.7.2003, p. 57) was discussed in Case C-92/11 *RWE Vertrieb*, where the Court applied both instruments in a complementary fashion.

<sup>(90)</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

<sup>(91)</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

<sup>(92)</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31.7.2007, p. 1).

<sup>(93)</sup> Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399, 30.12.2006, p. 1). The question of the relationship between this Regulation and the UCPD is raised in Joined Cases C-453/18 and 494/18 *Bondora* (pending on 31 May 2019).

Some sector-specific acts explicitly clarify that they are without prejudice to the UCTD. Examples are Directive 2009/72/EC<sup>(94)</sup>, Directive 2009/73/EC<sup>(95)</sup>, Directive 2014/17/EU<sup>(96)</sup> and Directive (EU) 2018/1972<sup>(97)</sup>.

Because of Article 1(2) UCTD, which is discussed in Section 1.2.3, contract terms that reflect mandatory provisions, including those set out in sector-specific legislation, or provisions of international conventions are excluded from the scope of the UCTD.

Otherwise, where sector-specific legislation was adopted after the adoption of the UCTD, one will have to consider that such legislation can exclude the application of the UCTD only insofar it provides so explicitly<sup>(98)</sup>. This will normally not be the case<sup>(99)</sup>, so that the UCTD will generally apply in addition to sector-specific rules.

Where other EU provisions apply in addition to the UCTD, one will, in general, favour an interpretation that preserves as much as possible the *effet utile* of the UCTD and of a potentially conflicting provision. For instance, rules of procedure should not jeopardise the effectiveness of the protection against unfair contract terms under the UCTD.

Other EU provisions may have to be taken into account when assessing the transparency and unfairness of contract terms under the UCTD. For instance, the fact that a seller or supplier resorted to unfair commercial practices within the meaning of Directive 2005/29/EC<sup>(100)</sup> may be an element in the assessment of the unfairness of individual contract terms<sup>(101)</sup>. At the same time, such a finding has no direct effect on the assessment of the validity of the contract from the point of view of Article 6(1) of the UCTD<sup>(102)</sup>.

The relationship between sector-specific rules and the UCTD with particular regard to transparency/pre-contractual information requirements<sup>(103)</sup> or the compulsory content of contracts<sup>(104)</sup> is discussed below in Section 3.3.2.

<sup>(94)</sup> The introductory part of Point 1 of the Annex to Directive 2009/72/EC (OJ L 211, 14.8.2009, p. 55) reads as follows: 'Without prejudice to Community rules on consumer protection, in particular [...] and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, the measures referred to in Article 3 are to ensure that customers [...]'.  
<sup>(95)</sup> The introductory part of Point 1 of the Annex to Directive 2009/73/EC (OJ L 211, 14.8.2009, p. 94) reads as follows: 'Without prejudice to Community rules on consumer protection, in particular [...] and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, the measures referred to in Article 3 are to ensure that customers: [...]'.  
<sup>(96)</sup> Recital 50 of Directive 2014/17/EU (OJ L 60, 28.2.2014, p. 34) contains the following text: '[...] The provisions of this Directive concerning ancillary products and services (for instance concerning the costs of opening and maintaining a bank account) should be without prejudice to [...] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [...]'.  
<sup>(97)</sup> Recital 258 of Directive (EU) 2018/1972 (OJ L 321, 17.12.2018, p. 36) contains the following text: 'In addition to this Directive, the requirements of existing EU consumer protection law relating to contracts, in particular Council Directive 93/13/EEC [...], apply to consumer transactions relating to electronic communications networks and services'. Similar language is contained in Recital 30 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51).  
<sup>(98)</sup> Case C-290/16 *Air Berlin*, paragraphs 45 and 46.  
<sup>(99)</sup> In Case C-290/16 *Air Berlin*, point 2 of the operative part and paragraphs 45-52, the Court considered that the rules on pricing freedom established in Article 22(1) of Regulation (EC) No 1008/2008 on air services (OJ L 293, 31.10.2008, p. 3) do not exclude the application of the UCTD in relation to contract terms concerning pricing.  
<sup>(100)</sup> OJ L 149, 11.6.2005, p. 22.  
<sup>(101)</sup> Case C-453/10 *Pereničová and Perenič*, point 2 of the operative part, second last sentence: 'A finding that such a commercial practice is unfair is one element among others on which the competent court may, pursuant to Article 4(1) of Directive 93/13, base its assessment of the unfairness of the contractual terms relating to the cost of the loan granted to the consumer.'  
<sup>(102)</sup> Case C-453/10 *Pereničová and Perenič*, last sentence of point 2 of operative part.  
<sup>(103)</sup> For instance Article 5 and 6 of Directive 2008/48/EC on consumer credit (OJ L 133, 22.5.2008, p. 66) or Article 5 of Directive (EU) 2015/2302 on package travel and linked travel arrangements (OJ L 326, 11.12.2015, p. 1).  
<sup>(104)</sup> See, for instance Article 10 of Directive 2008/48/EC on consumer credit (OJ L 133, 22.5.2008, p. 66) — add provisions — and Article 7 of Directive (EU) 2015/2302 on package travel and linked travel arrangements (OJ L 326, 11.12.2015, p. 1).

### 1.2.5. Application of the UCTD to traders established in third countries

Whether the UCTD is applicable to a contract concluded between a consumer resident in an EU Member State and a non-EU and non-EEA trader or professional<sup>(105)</sup> is determined in principle by Regulation (EC) No 593/2008<sup>(106)</sup> (Rome I).

Article 6(1) and (2) of the Rome I Regulation provides that:

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

- (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
- (b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

Therefore, whenever a professional (i.e. a trader or 'seller or supplier') from a third country carries on an activity in a Member State or directs its activities to consumers who have their habitual place of residence in a Member State, those consumers will benefit from the protection under the UCTD and the consumer protection rules of their Member State. This applies even where the parties choose the law of the third country as the applicable law. However, Article 5 of the Rome I Regulation contains particular rules for contracts of carriage.

In addition, Article 6(2) UCTD provides:

Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

This provision may grant the consumer extra protection since it applies in every case where the law of a third country is chosen but where there is a close connection with a Member State. The conditions of its application are thus broader than those of Article 6 of the Rome I Regulation.

Furthermore, the Court has held<sup>(107)</sup> that, under Article 3(1) UCTD, a contract term whereby a contract concluded with a consumer is to be governed by the law of the Member State in which the seller or supplier is established is unfair if it does not unambiguously specify that consumers can still rely on the mandatory consumer protection rules of the country of their usual residence under Article 6(2) of the Rome I Regulation. Without this specification, it may mislead the consumer by giving him/her the wrong impression that only the chosen law applies to the contract. The same logic must apply where the law of a non-EU Member State is chosen by way of a contract term within the meaning of Article 3(1) UCTD<sup>(108)</sup>.

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Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.

<sup>(105)</sup> 'Trader' is the term used in many EU consumer protection directives ('seller or supplier' under the UCTD), whereas the Rome I Regulation uses the term 'professional'.

<sup>(106)</sup> OJ L 177, 4.7.2008, p. 6.

<sup>(107)</sup> Case C-191/15 *Verein für Konsumenteninformation v Amazon*, in particular point 2 of the operative part.

<sup>(108)</sup> See Common position of national authorities within the CPC network concerning the protection of consumers on social networks (November 2016), [http://europa.eu/rapid/press-release\\_IP-17-631\\_en.htm](http://europa.eu/rapid/press-release_IP-17-631_en.htm).

*Article 8a UCTD* <sup>(109)</sup>

1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions:

- extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration; or,
- contain lists of contractual terms which shall be considered as unfair[.]

2. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website.

3. The Commission shall forward the information referred to in paragraph 1 to the other Member States and the European Parliament. The Commission shall consult stakeholders on that information.

*Recital 17*

Whereas, for the purposes of this Directive, the annexed list of terms can be of indicative value only and, because of the cause of the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws;

The UCTD and national law interact in different ways. There are

- provisions which transpose the UCTD into national law, including those which extend their scope or lay down more stringent requirements, and
- provisions of national law, whether of a substantive or procedural nature, that cover additional aspects, but which have to be taken into account when courts have to rule on cases involving unfair contract terms.

### 2.1. **Minimum harmonisation and extension of scope (Article 8 and 8a UCTD), including the role of national supreme courts**

Under Article 8, Member States may ensure a higher level of consumer protection than the one provided for by the UCTD <sup>(110)</sup>. Article 8a UCTD <sup>(111)</sup> obliges Member States to notify national rules which contain stricter standards or extend the scope of the national rules transposing the UCTD <sup>(112)</sup>.

For instance, Member States may apply the national rules transposing the UCTD also to contract terms that were negotiated individually <sup>(113)</sup> or to business-to-business relations or to transactions between consumers <sup>(114)</sup>.

They may also make them more stringent, in particular by applying a less demanding threshold for considering a contract term to be unfair. They may, for instance, adopt a 'black list' of contract terms which are always considered to be unfair without requiring a case-by-case assessment under the general unfairness test of Article 3(1) UCTD <sup>(115)</sup> and/or different types of grey list(s). Further information regarding the Annex to the UCTD can be found in Section 3.4.7.

<sup>(109)</sup> Article 8a was added through Article 32 of Directive 2011/83/EU on consumer rights (OJ L 304, 22.11.2011, p. 64).

<sup>(110)</sup> This is confirmed, for instance, in paragraph 55 of Case C-191/15 *Verein für Konsumenteninformation v Amazon*: '[...] It must be observed in this respect that the level of protection of consumers still varies from one Member State to another, in accordance with Article 8 of Directive 93/13, so that the assessment of a term may vary, other things being equal, according to the applicable law.' The Court also confirmed this in Case C-453/10 *Pereničová and Perenič*.

<sup>(111)</sup> Inserted through Article 32 of Directive 2011/83/EU (OJ L 304, 22.11.2011, p. 64).

<sup>(112)</sup> The notified national rules can be found in Annex II and at: [https://ec.europa.eu/info/notifications-under-article-8a-directive-93-13-eec\\_en](https://ec.europa.eu/info/notifications-under-article-8a-directive-93-13-eec_en)

<sup>(113)</sup> Mentioned explicitly in Article 8a(1) first indent.

<sup>(114)</sup> The latter two instances are not mentioned explicitly in Article 8a.

<sup>(115)</sup> In paragraph 61 of Case C-143/13 *Matei and Matei*, the Court confirmed that a 'black list' of terms to be regarded as unfair is one of the more stringent measures that Member States may adopt or retain in the area covered by the UCTD to ensure a maximum degree of protection for the consumer which is compatible with EU law.

National law may, for instance, also provide that lack of transparency can lead directly to the invalidity of contract terms without having to apply the unfairness-test under Article 3(1) <sup>(116)</sup>.

The Court <sup>(117)</sup> has also clarified that, because of Article 8, there is no obligation for Member States to require, in accordance with Article 4(2) <sup>(118)</sup>, that the definition of the main subject matter or the adequacy of the price and remuneration can be assessed only if the relevant terms are not in plain intelligible language.

The Court <sup>(119)</sup> has confirmed that the case law of national supreme courts does not come within the ambit of stricter national measures pursuant to Article 8. Nevertheless, where national supreme courts elaborate certain criteria for the assessment of the unfairness of contract terms that lower courts will *de facto* have to respect if they do not wish to be overruled or which lower courts are even formally bound by, this is, in principle, compatible with the UCTD. However, the criteria used by national supreme courts have to comply with the case law of the Court and must not prevent the competent court from offering consumers an effective remedy for the protection of their rights or from referring a question to the Court for a preliminary ruling <sup>(120)</sup>.

## 2.2. Other provisions of national law

Other national rules that may apply to cases involving unfair contract terms include general provisions of contract law, in particular on the formation and validity of contracts, as well as the rules of procedure for proceedings before national courts. Such questions are not specifically regulated in the UCTD, but may have a significant impact on its application.

For instance, while applying to the assessment of individual contract terms contained in a business-to-consumer contract, the UCTD does not as such regulate the validity of contracts as a whole. It is possible, however, that, under national contract law, the unfairness of one or more contract terms leads to the invalidity of the contract in its entirety, for instance, where the contract cannot be performed without arrangements for essential duties of the parties. This possibility is contemplated in Article 6(1) UCTD and is discussed in Section 4.

Furthermore, there are rules in national law which may provide for the invalidity of the contract as a whole, for instance, where it violates a legal prohibition, is usurious or otherwise violates the requirements of basic morality. Moreover, under national law, consumers may be able to avoid contracts because their conclusion was based on fraudulent or aggressive behaviour by the seller or supplier, which may correspond to misleading, aggressive or otherwise unfair commercial practices within the meaning of Directive 2005/29/EC <sup>(121)</sup>.

Where such instances coincide with the presence of unfair contract terms, the UCTD will normally be without prejudice to such national rules, as long as such rules do not call into question the effectiveness of the UCTD, in particular its Article 6(1) <sup>(122)</sup>. The Court <sup>(123)</sup> has indicated that, in principle, the rules on the invalidity of contracts have to be considered under their own logic <sup>(124)</sup> and that, where they coincide with unfair contract terms, such rules are acceptable under Article 8 UCTD insofar as they lead to more advantageous results for consumers than the minimum of protection required by the UCTD <sup>(125)</sup>.

<sup>(116)</sup> See also Section 4, where the relationship between transparency and unfairness is described.

<sup>(117)</sup> Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid*, paragraphs 41–44.

<sup>(118)</sup> The function of Article 4(2) is further explained in Section 3.1.

<sup>(119)</sup> Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortés*, paragraph 69.

<sup>(120)</sup> Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortés*, paragraphs 62–71; Case C-118/17 *Dunai*, paragraphs 60–64.

<sup>(121)</sup> OJ L 149, 11.6.2005, p. 22.

<sup>(122)</sup> Article 6(1) is discussed in detail in Section 4 and, as regards its procedural implications, in Section 5.

<sup>(123)</sup> E.g. in Case C-453/10 *Pereničová and Perenič*.

<sup>(124)</sup> See Case C-453/10 *Pereničová and Perenič*, paragraphs 46 and 47 in fine:

‘46 Consequently, a finding that a commercial practice is unfair has no direct effect on whether the contract is valid from the point of view of Article 6(1) of Directive 93/13.

47 [...] A finding that such a commercial practice is unfair is one element among others on which the competent court may, pursuant to Article 4(1) of Directive 93/13, base its assessment of the unfairness of the contractual terms relating to the cost of the loan granted to the consumer. Such a finding, however, has no direct effect on the assessment, from the point of view of Article 6(1) of Directive 93/13, of the validity of the credit agreement concluded.’

<sup>(125)</sup> Case C-453/10 *Pereničová and Perenič*, paragraph 35: ‘Directive 93/13 does not therefore preclude a Member State from laying down, in compliance with European Union law, national legislation under which a contract concluded between a trader and a consumer which contains one or more unfair terms may be declared void as a whole where that will ensure better protection of the consumer.’



It should be emphasised that, within its scope, *EU law takes precedence over national law* and that the *national authorities, including the courts, are obliged to interpret national law as much as possible in conformity with EU law* in order to ensure its effectiveness. In the words of the Court <sup>(126)</sup>,

'[...] [I]t must be recalled [...] that a national court, when hearing a case between individuals, is required, when applying the provisions of domestic law, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive [... (127)].'

Where national law, including the rules of procedure, cannot be interpreted in conformity with EU law, national courts, have to set them aside and base themselves directly on Union law <sup>(128)</sup>. The Court <sup>(129)</sup> has confirmed that national courts have the duty to give full effect to the UCTD, if necessary refusing of their own motion to apply any conflicting provision of national legislation, even if adopted subsequently. It is, therefore, not necessary for the courts to request or await the prior setting aside of such provision by legislative or other constitutional means. This includes cases where national law does not provide for the *ex officio* assessment of unfair contract terms or even prevents it, whereas such control is required by the UCTD <sup>(130)</sup>, or where national law otherwise infringes the UCTD or the principles of *equivalence* or *effectiveness* <sup>(131)</sup>.

At the same time, the Member States are obliged to amend rules that do not comply with the UCTD, including in cases where there is uncertainty about their interpretation <sup>(132)</sup>.

### 3. THE GENERAL UNFAIRNESS TEST AND TRANSPARENCY REQUIREMENTS

#### 3.1. Unfairness and transparency in general

##### Article 3(1) and (3)

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. [...]

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

<sup>(126)</sup> E.g. Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco*, paragraph 38.

<sup>(127)</sup> Reference to Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 64.

<sup>(128)</sup> Case 106/77 *Simmenthal*, paragraphs 21-26 The principles established in *Simmenthal* have been confirmed, for instance, in Case C-689/13 *PFE*, paragraphs 40 and 41:

'40 A national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means [...]' (reference to Case 106/77 *Simmenthal*, paragraphs 21 and 24, and, Case C-112/13 A, paragraph 36).

'41 Any provision of a national legal system and any legislative, administrative or judicial practice that might impair the effectiveness of EU law by withholding from the national court with jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions that might prevent EU rules from having full force and effect are incompatible with those requirements, which are the very essence of EU law [...]' (reference to Case 106/77 *Simmenthal*, paragraph 22, and Case C-112/13 A, paragraph 37).

<sup>(129)</sup> Case C-118/17 *Dunai*, paragraph 61.

<sup>(130)</sup> This is implied by Case C-168/15 *Milena Tomášová*, where the Court ruled that, under certain conditions, the Member States are liable to compensate consumers for damage caused by the fact that a court adjudicating at last instance did not assess relevant contract terms of its own motion although it was required to do so under the UCTD, even if there was no explicit rule in that respect in national law. Cases C-618/10 *Banco Español de Crédito*, C-49/14 *Finanmadrid*, C-176/17 *Profi Credit Polska* and C-632/17 *PKO* are examples where the Court found that national courts were required to assess the unfairness of contract terms of their own motion even though national law did not provide for such assessment. The question of *ex officio* control of the unfairness of contract terms is discussed in detail in Section 5.

<sup>(131)</sup> The relationship between the UCTD and national rules of procedure is discussed specifically in Section 5 below.

<sup>(132)</sup> In Case C-144/99 *Commission v Netherlands*, paragraph 21, the Court stressed the requirement of legal certainty in connection with the transposition of the UCTD.

*Article 4*

1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.

*Article 5*

In the case of contracts where all or certain terms offered to the consumer are in writing, *these* terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).

*Recital 16*

[...] whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account;

*Recital 20*

Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail;

*Point 1 (i) of the Annex to the UCTD referred to in Article 3(3)*

1. *Terms which have the object or effect of:*

[...]

- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

Article 3(1) contains the **general test** under which the unfairness of contract terms used by sellers or suppliers is to be assessed. This general test has to be reflected in the rules of the Member States and has to be applied by their authorities on a case-by-case basis when assessing individual terms.

In addition to the general test in Article 3(1), Article 3(3) refers to an Annex which contains an indicative and non-exhaustive list of contract terms that *may* be regarded as unfair<sup>(133)</sup>.

Furthermore, the UCTD contains **transparency requirements** for sellers or suppliers using not individually negotiated contract terms. These are expressed in the rules that contract terms have to be (drafted) in plain, intelligible language (Articles 4(2) and 5 UCTD) and in the requirement that consumers must be given the real opportunity to become acquainted with contract terms before the conclusion of the contract (Point 1(i) of the Annex and Recital 20).

<sup>(133)</sup> In Case C-143/13 *Matei and Matei*, paragraph 60, the Court refers to the Annex as a 'grey list'. However, there may be certain variations in the understanding of the term 'grey list' in the transposition of the Member States, which may include a merely indicative list as in the Annex to the UCTD, but also a legal presumption that the listed terms are unfair.

Under the UCTD, transparency requirements have three functions:

- According to Article 5, second sentence, contract terms that are not drafted in plain, intelligible language have to be interpreted in favour of the consumer <sup>(134)</sup>.
- Under Article 4(2), the main subject matter or the adequacy of the price and remuneration set out in the contract are subject to an assessment under Article 3(1) only insofar as such terms are not in plain intelligible language <sup>(135)</sup>.
- Failure to meet the transparency requirements can be an element in the assessment of the unfairness of a given contract term <sup>(136)</sup> and can even indicate unfairness <sup>(137)</sup>.

The Court has provided guidance both on the transparency requirements sellers or suppliers have to meet and on the criteria for the general unfairness test. More details on transparency can be found in Section 3.3, whereas Section 3.4 provides more information on the general unfairness test.

At the same time, the Court has repeatedly insisted <sup>(138)</sup> that, while its role is to give guidance on the interpretation of transparency and unfairness, **it is for the national authorities, in particular the national courts, to assess the transparency and unfairness of specific contract terms in light of the specific circumstances of each case.** The Court <sup>(139)</sup> has expressed this in the following way:

‘42 While it is true that the Court, in exercising the jurisdiction conferred on it by Article 234 EC <sup>(140)</sup>, in *Océano Grupo Editorial and Salvat Editores*, paragraph 22, interpreted the general criteria used by the Community legislature in order to define the concept of unfair terms, it cannot however rule on the application of those general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question (see *Freiburger Kommunalbauten*, paragraph 22).

43 It is for the national court, in the light of the foregoing, to assess whether a contractual term may be categorised as unfair within the meaning of Article 3(1) of the Directive.’

It is for the national court to determine whether, having regard to the particular circumstances of the case, a term meets the requirements of good faith, balance and transparency.

The same is true with regard to the examination of whether a contract terms falls within the concept of ‘main subject matter of the contract’ or whether its examination relates to ‘the adequacy of the price and remuneration’ within the meaning of Article 4(2) of the UCTD <sup>(141)</sup>.

In light of the above, the Court <sup>(142)</sup> has generally refrained from providing a final assessment of the unfairness of a specific contract term, leaving this assessment to the referring national court. However, in certain cases, the Court has nevertheless provided fairly clear indications as to the unfairness of a given contract term <sup>(143)</sup>.

<sup>(134)</sup> The third sentence of Article 5, however, deviates from this principle in relation to collective procedures aiming to prevent the continuous use of a contract term (see also Case C-70/03 *Commission v Spain*, paragraph 16).

<sup>(135)</sup> However, where Member States have opted not to transpose this requirement, the national authorities may assess the possible unfairness of the main-subject-matter or of the price or remuneration even if the relevant contract terms are presented in a clear and intelligible manner. See Case C-484/08 *Caja de Ahorros Monte de Piedad de Madrid*, paragraphs 40-44.

<sup>(136)</sup> Case C-472/10 *Invitel*, point 1 of the operative part and paragraphs 30 and 31; Case C-226/12 *Constructora Principado*, paragraph 27.

<sup>(137)</sup> Case C-191/15 *Verein für Konsumenteninformation v Amazon*, point 2 of the operative part and paragraphs 65-71.

<sup>(138)</sup> Since Case C-237/02 *Freiburger Kommunalbauten*.

<sup>(139)</sup> The citation is from Case C-243/08 *Pannon GSM*, paragraphs 42 and 43. Similar language can be found, for instance in Case C-421/14 *Banco Primus*, paragraph 57; Case C-415/11 *Aziz*, paragraph 66 and the case law cited there; Case C-226/12 *Constructora Principado*, paragraph 20 Case C-472/10 *Invitel*, paragraph 22 and Case C-237/02 *Freiburger Kommunalbauten*, paragraphs 23-25 and the operative part.

<sup>(140)</sup> Corresponds to Article 267 of the Treaty on the Functioning of the European Union (TFEU).

<sup>(141)</sup> Case C-186/16 *Andrić*, paragraphs 32 and 33.

<sup>(142)</sup> After Case C-240/98 *Océano Grupo Editorial*, point 2 of the operative part.

<sup>(143)</sup> Case C-191/15 *Verein für Konsumenteninformation v Amazon*, paragraph 71 and point 2 of the operative part; Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial*, paragraphs 21-24.

National courts may develop more specific criteria for the assessment of the unfairness of contract terms, as long as they comply with the methodology established by the Court<sup>(144)</sup>. Insofar as, in the interest of ensuring uniform interpretation of the law, national supreme courts adopt binding decisions concerning the modalities for implementing the UCTD, such decisions may not prevent individual courts from ensuring the full effect of that directive and from offering consumers an effective remedy, nor from requesting the Court to provide a preliminary ruling<sup>(145)</sup>.

This Notice cannot cover the abundant case law on the assessment of particular types of contract terms in the Member States.

### 3.2. Contract terms relating to the main subject matter of the contract or the price and remuneration (Article 4(2) UCTD)

Contract terms relating to the main subject matter of the contract or the price and remuneration are within the scope of the UCTD<sup>(146)</sup>. The particularity of such contract terms is that, under the minimum standard of Article 4(2) UCTD<sup>(147)</sup>, the assessment of their unfairness under Article 3(1) is excluded<sup>(148)</sup> or limited<sup>(149)</sup> if they are drafted in plain, intelligible language or, in other words, if such terms meet the transparency requirements of the UCTD.

Since Article 4(2) of the UCTD lays down an exception to the application of the unfairness-test under Article 3(1), that provision must be strictly interpreted<sup>(150)</sup>. Article 4(2) must also be interpreted uniformly throughout the European Union, taking into account the purpose of the UCTD<sup>(151)</sup>. It is for national courts to determine in individual cases whether a given contract term (a) relates to the definition of the main subject matter of the contract or whether the examination of its unfairness would imply an assessment of the adequacy of the price and remuneration<sup>(152)</sup>, and (b) whether such contract terms are drafted in plain intelligible language<sup>(153)</sup>.

#### 3.2.1. Contract terms relating to the definition of the main subject matter of the contract

The Court has stated that contract terms falling within the concept of the ‘main subject matter of the contract’, within the meaning of Article 4(2) of the UCTD, must be understood as being **those that lay down the essential obligations of the contract and, as such, characterise it**<sup>(154)</sup>. By contrast, terms that are merely **ancillary** cannot fall within the concept of ‘main subject matter of the contract’<sup>(155)</sup>. In order to determine whether a term falls within the concept of the ‘main subject matter of the contract’ the nature, the general scheme and the stipulations of the contract and its legal and factual context have to be considered<sup>(156)</sup>.

<sup>(144)</sup> Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortés*.

<sup>(145)</sup> Case C-118/17 *Dunai*, paragraphs 57-64 and Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortés*.

<sup>(146)</sup> See, for instance, Cases C-348/14 *Bucura*, paragraph 50, C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid*, paragraph 32, and C-76/10 *Pohotovost*, paragraph 72.

<sup>(147)</sup> Where Member States have not transposed this limitation contained in Article 4(2) UCTD into their national law (See Annex II to this Notice), the unfairness of such terms, including the adequacy of the price, can be assessed regardless of any lack of transparency. In Case C-484/08 *Caja de Ahorros Monte de Piedad* the Court confirmed that such national transposition is covered by Article 8. In point 1 of the operative part the Court stated: ‘Articles 4(2) and 8 of Council Directive 93/13/EEC [...] must be interpreted as **not** precluding national legislation, [...], which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language.’

<sup>(148)</sup> Regarding the main-subject-matter of the contract.

<sup>(149)</sup> Excluding an assessment of the adequacy of the price or remuneration.

<sup>(150)</sup> Case C-186/16 *Andriiciu*, paragraph 34; Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 42, and Case C-96/14 *Van Hove*, paragraph 31. The Court has been asked to provide further interpretation on this matter in Case C-84/19 *Credit Profi Polska* (pending on 31 May 2019).

<sup>(151)</sup> Case C-143/13 *Matei and Matei*, paragraph 50.

<sup>(152)</sup> Case C-143/13 *Matei and Matei*, paragraph 53.

<sup>(153)</sup> Case C-51/17 *OTP Bank and OTP Faktoring*, paragraph 68, Case C-118/17 *Dunai*, paragraph 49.

<sup>(154)</sup> Case C-186/16 *Andriiciu*, paragraph 35; Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid*, paragraph 34; Case C-96/14 *Van Hove*, paragraph 33.

<sup>(155)</sup> Case C-186/16 *Andriiciu*, paragraph 36; Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 50; and Case C-96/14 *Van Hove*, paragraph 33.

<sup>(156)</sup> Case C-26/13 *Kásler and Káslerné Rábai*, paragraphs 50 and 51.

The Court <sup>(157)</sup> has expressed this as follows in relation to foreign currency loans:

'37 In the present case, a number of elements in the documents before the Court indicate that a term, [...], incorporated into a loan agreement concluded in a foreign currency between a seller or supplier and a consumer without being individually negotiated, on terms by which the loan must be repaid in the same currency, is covered by the notion of "main subject matter of the contract" within the meaning of Article 4(2) of Directive 93/13.

38 [...] the fact that a loan must be repaid in a certain currency relates, in principle, not to an ancillary repayment arrangement, but to the very nature of the debtor's obligation, thereby constituting an essential element of a loan agreement.'

In this regard, the Court <sup>(158)</sup> has stressed the difference between contract terms stipulating that the loan has to be repaid in the same foreign currency in which it was issued and contract terms under which a loan dominated in foreign currency had to be repaid in the national currency according to the selling rate of exchange applied by the bank <sup>(159)</sup>. The Court considered <sup>(160)</sup> that a contractual term, incorporated into a loan agreement denominated in a foreign currency, according to which the loan must be repaid in the same foreign currency as that in which it was contracted, lays down an essential obligation characterising that contract. It thus relates to the 'main subject matter of the contract' within the meaning of Article 4(2). In that respect, it is irrelevant if the amount of the loan is made available to the consumer in local currency and not in the currency stipulated in the contract <sup>(161)</sup>. By contrast, the Court considered a term defining the currency conversion mechanism to be an ancillary arrangement <sup>(162)</sup>.

### 3.2.2. Contract terms relating to the price and remuneration

Terms relating to the price and remuneration, i.e. the financial obligations of the consumer, **are, in principle, subject to the unfairness test under Article 3(1)**. However, under Article 4(2) <sup>(163)</sup>, the unfairness test may include an assessment of the *adequacy* of the price and remuneration, or, as expressed in Recital 19, of 'the quality/price ratio of the goods or services supplied', only where the relevant terms are not transparent. By contrast, the unfairness of other aspects relating to the price or remuneration, such as the possibility of or the mechanism for unilateral price changes, is to be assessed even if the relevant terms are fully transparent.

The Court <sup>(164)</sup> has described the limitation in the assessment of such contract terms in the following way in relation to a loan contract:

'Terms relating to the consideration due by the consumer to the lender or having an impact on the actual price to be paid to the latter by the consumer thus do not, in principle, fall within the second category of terms, except as regards the question whether the amount of consideration or the price as stipulated in the contract is adequate as compared with the service provided in exchange by the lender.'

The Court <sup>(165)</sup> has further clarified that contract terms on *price changes* are fully subject to the unfairness test under Article 3(1):

'[...] However, this exclusion cannot apply to a term relating to a mechanism for amending the prices of the services provided to the consumer.'

This is consistent with the fact that the Annex to the UCTD sets out conditions which terms on price changes normally have to meet in order not to be considered unfair <sup>(166)</sup>.

<sup>(157)</sup> Case C-186/16 *Andriciu*, paragraphs 37 and 38.

<sup>(158)</sup> Case C-186/16 *Andriciu*, paragraphs 39-41.

<sup>(159)</sup> Case C-26/13 *Kásler and Káslerné Rábai*.

<sup>(160)</sup> Case C-186/16 *Andriciu*, paragraph 41, Case C-119/17 *Lupean*, paragraph 17.

<sup>(161)</sup> Case C-119/17, *Lupean*, paragraphs 18-21.

<sup>(162)</sup> Case C-26/13 *Kásler and Káslerné Rábai*.

<sup>(163)</sup> National law may give courts the possibility to assess the adequacy of the price even where such terms are clear and intelligible (See Annex II to this Notice).

<sup>(164)</sup> E.g. Case C-143/13 *Matei and Matei*, paragraph 56.

<sup>(165)</sup> Case C-472/10 *Invitel*, paragraph 23.

<sup>(166)</sup> In Case C-472/10 *Invitel*, paragraph 24, the Court went on to say: 'With regard to a contract term providing for an amendment of the total price of the service provided to the consumer, it should be pointed out that, in light of points 1(j) and (l) and 2(b) and (d) of the annex to the Directive, the reason for and the method of the variation of the aforementioned price must, in particular, be set out, the consumer having the right to terminate the contract.'

Furthermore, the Court considers that the fact that a certain fee should have been included in the calculation of the total cost of a consumer loan under Directive 2008/48/EC does not indicate that the contract term setting out that fee is covered by Article 4(2) UCTD <sup>(167)</sup>.

Finally, the Court has clarified that the adequacy of the price or remuneration is excluded from the unfairness-assessment only if the relevant terms lay down a real remuneration for a product or service provided <sup>(168)</sup>. On this basis the Court <sup>(169)</sup> has ruled

'[...] that the exclusion cannot apply to terms that [...] merely determine the conversion rate of the foreign currency in which the loan agreement is denominated, in order to calculate the repayment instalments, without however any foreign exchange service being supplied by the lender in making that calculation and do not, therefore, constitute "remuneration", the adequacy of which as consideration for a service supplied by the lender could be assessed to determine its unfairness pursuant to Article 4(2) of Directive 93/13.'

### 3.3. Transparency requirements

#### 3.3.1. Transparency requirements under the UCTD

The transparency requirements of the UCTD **apply to all types of** (not individually negotiated <sup>(170)</sup>) **contract terms** that are within the scope of the UCTD <sup>(171)</sup>.

The Court has interpreted the **requirement in Articles 4(2) and 5** according to which contract terms have to be in plain, intelligible language, **broadly**. In this connection, the Court also has taken into account that, under point 1(e) of the Annex to the UCTD, the fact that consumers had no real opportunity of becoming acquainted with a contract term <sup>(172)</sup> is an indication of their unfairness.

Although the Court has not specifically addressed many of the factors mentioned below, in the Commission's view, the following factors will be relevant for assessing whether a given contract term is plain and intelligible within the meaning of the UCTD:

- whether the consumer had the real opportunity of becoming acquainted with a contract term before the conclusion of the contract; this includes the question of whether the consumer had access to and was given the opportunity to read the contract term(s); where a contract term refers to an annex or to another document, the consumer must have access also to those documents;
- the comprehensibility of the individual terms, in light of the clarity of their wording and the specificity of the terminology used, as well as, where relevant, in conjunction with other contract terms <sup>(173)</sup>. In this connection, the position or perspective of consumers to whom the relevant terms are addressed has to be taken into account <sup>(174)</sup>; this will also include the question of whether the consumers to whom the relevant terms are addressed are sufficiently familiar with the language in which the terms are drafted;
- the way in which contract terms are presented. This might include aspects such as:
  - the clarity of the visual presentation, including font size,
  - the fact of whether a contract is structured in a logical way and whether important stipulations are given the prominence they deserve and are not hidden amongst other provisions,

<sup>(167)</sup> Case C-143/13 *Matei and Matei*, in particular paragraph 47. Furthermore, the fact that a fee does not correspond to an actual service means that its assessment would not concern the adequacy of that fee, paragraph 70.

<sup>(168)</sup> Case C-26/13 *Kásler and Káslerné Rábai*, paragraphs 57 and 58.

<sup>(169)</sup> Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 58, confirmed, for instance, in Case C-143/13 *Matei and Matei*, paragraph 70.

<sup>(170)</sup> Unless the national transposition applies also to contract terms that have been negotiated individually (See Annex II to this Notice).

<sup>(171)</sup> C-119/17 *Lupean*, paragraph 23, Case C-186/16 *Andriciuc*, paragraph 43 and the case law cited there.

<sup>(172)</sup> Recital 20 also expresses that 'the consumer should actually be given an opportunity to examine all the terms'.

<sup>(173)</sup> Case C-96/14 *Van Hove*, paragraph 50.

<sup>(174)</sup> Case C-96/14 *Van Hove*, paragraph 48.

— or whether terms are contained in a contract or context where they can reasonably be expected, including in conjunction with other related contract terms etc.

For example, contract terms whose impact can only be understood when reading them jointly, should not be presented in such a way that their joint impact is obscured, e.g. through placing them in different parts of the contract <sup>(175)</sup>.

The Court has drawn from Articles 4(2) and 5, sometimes referring also to Recital 20 and the Annex to the UCTD, in particular Points 1(i) and (j), transparency standards, including information requirements, which go beyond the aspects referred to above. In that respect, the Court also uses the term ‘substantive transparency requirements’ <sup>(176)</sup>. According to the Court, transparency *requires more than contract terms being formally and grammatically intelligible and implies that consumers must be able to evaluate the economic consequences* of a contract term or contract <sup>(177)</sup>:

‘44 As regards **the requirement of transparency of contractual terms**, as is clear from Article 4(2) of Directive 93/13, the Court has ruled that that requirement, also repeated in Article 5 thereof, **cannot be reduced merely to their being formally and grammatically intelligible**, but that, to the contrary, since the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, in particular as regards his level of knowledge, that requirement of plain and intelligible drafting of contractual terms and, therefore, **the requirement of transparency laid down by the directive must be understood in a broad sense** [...] <sup>(178)</sup>.’

‘45 Therefore, the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring also that the contract should set out transparently the specific functioning of the mechanism to which the relevant term relates and the relationship between that mechanism and that provided for by other contractual terms, **so that that consumer is in a position to evaluate**, on the basis of clear, intelligible criteria, **the economic consequences** for him which derive from it [...] <sup>(179)</sup>.’

This broad understanding of transparency entails that sellers and suppliers have to provide clear information to consumers on contract terms and their implications/consequences before the conclusion of the contract. The Court has repeatedly emphasised the importance of such information so that consumers can understand the extent of their rights and obligations under the contract before being bound by it. The Court <sup>(180)</sup> has stated that

‘[...] it is settled case-law that **information, before concluding a contract**, on the terms of the contract and the consequences of concluding it, **is of fundamental importance for a consumer**. It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier [...] <sup>(181)</sup>.’

The Court has specified the requirements further, in particular with regard to contract terms which are essential for the extent of the obligations consumers accept to undertake, for instance with regard to contract terms relevant for establishing the payments which consumers have to make under a loan contract. Some of those rulings concern in particular mortgage credit contracts (denominated) in a foreign currency or indexed to a foreign currency. The Court has summarised the standard to be expected from sellers and suppliers as follows <sup>(182)</sup>:

‘[...] it is for the national court, when it considers all the circumstances surrounding the conclusion of the contract, to ascertain whether, in the case concerned, **all the information likely to have a bearing on the extent of his commitment have been communicated to the consumer, enabling him to estimate in particular the total cost of his loan**.

<sup>(175)</sup> Opinion of Advocate General Hogan of 15 May 2019 in Case C-621/17 Kiss, paragraph 41.

<sup>(176)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo and Others*, paragraphs 48 and 49.

<sup>(177)</sup> E.g. Case C-186/16 *Andriuciu*, paragraphs 44 and 45, which are quoted here. Similar statements can be found, for instance, in Cases C-26/13 *Kásler and Káslerné Rábai*, paragraphs 71 and 72, C-191/15 *Verein für Konsumentenforschung v Amazon*, paragraph 68 and C-96/14 *Van Hove*, paragraph 40 with further references.

<sup>(178)</sup> References to Cases C-26/13 *Kásler and Káslerné Rábai*, paragraphs 71 and 72, and C-348/14 *Bucura*, paragraph 52.

<sup>(179)</sup> References to Cases C-26/13 *Kásler and Káslerné Rábai*, paragraph 75 and C-96/14 *Van Hove*, paragraph 50.

<sup>(180)</sup> For instance, in Case C-186/16 *Andriuciu*, paragraph 48, quoted here.

<sup>(181)</sup> Reference to Cases C-92/11 *RWE Vertrieb*, paragraph 44 and C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo and Others*, paragraph 50.

<sup>(182)</sup> E.g. Case C-186/16 *Andriuciu*, paragraph 47 quoted here. The same language can be found in Case C-143/13 *Matei and Matei*, paragraph 74.

First, whether the terms are drafted in plain intelligible language enabling an average consumer, that is to say a reasonably well-informed and reasonably observant and circumspect consumer to estimate such a cost and,

second, the fact related to the failure to mention in the loan agreement the information regarded as being essential with regard to the nature of the goods or services which are the subject matter of that contract

play a decisive role in that assessment [...] <sup>(183)</sup>

The Court has applied these standards, for instance, to the functioning of the currency conversion mechanisms applying to mortgage loans indexed to a foreign currency <sup>(184)</sup> and to the interests and fees due, including their adaptation, under a consumer credit agreement <sup>(185)</sup>. Furthermore, the Court has applied these transparency standards to the fact that, in relation to loans taken out in foreign currencies, consumers bear the risk of the depreciation of the currency in which they receive their income <sup>(186)</sup>. Such depreciation may indeed affect their ability to pay back the loan. In such cases, the Court requires the seller or supplier to set out the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency and asks national courts to check whether the seller or supplier has communicated to the consumer all the relevant information enabling him/her to assess their financial obligations <sup>(187)</sup>. It will also be relevant whether the seller or supplier gave appropriate prominence to such important information.

The Court has further stated that national courts, when assessing compliance with transparency requirements, have to *check* whether consumers received the required information <sup>(188)</sup> and have to take into account also the **promotional material and information provided by the lender in the negotiation** of the loan agreement <sup>(189)</sup>.

Where the nature of the contract term requires sellers or suppliers to provide certain information or explanations prior to the conclusion of the contract, they will also have to bear the burden to prove that they provided consumers with the necessary information in order to be able to claim that the relevant terms are plain and intelligible <sup>(190)</sup>.

While the rulings on transparency often relate to contract terms defining the main subject matter of the contract or the remuneration or contract terms that are closely related to those core aspects of the contract, the transparency requirements under Article 5 are not limited to the type of terms referred to in Article 4(2) UCTD. Transparency, including predictability, is an important aspect, also in relation to unilateral changes to the contract, in particular price changes, for instance, in loan contracts or in long-term supply contracts <sup>(191)</sup>.

While all contract terms have to be in plain intelligible language, it is likely that the extent of the pre-contractual information obligations for sellers or suppliers stemming from the UCTD depends also on the significance of the contract term for the transaction and its economic impact.

The Court <sup>(192)</sup> has been requested to give guidance on the transparency criteria for the inclusion in a mortgage loan contract of an index for the applicable interest rate established by a national bank.

<sup>(183)</sup> References to Case C-348/14 *Bucura*, paragraph 66.

<sup>(184)</sup> E.g. Case C-26/13 *Kásler and Káslerné Rábai*, paragraphs 73-74.

<sup>(185)</sup> Case C-348/14 *Bucura*, paragraphs 45-66.

<sup>(186)</sup> Case C-186/16 *Andriuciu*, paragraphs 49-51.

<sup>(187)</sup> Case C-186/16 *Andriuciu*, paragraph 50.

<sup>(188)</sup> Case C-186/16 *Andriuciu*, paragraph 43, Case C-119/17 *Lupean*, paragraph 23.

<sup>(189)</sup> Case C-186/16 *Andriuciu*, paragraph 46; Case C-143/13 *Matei and Matei*, paragraph 75; Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 74.

<sup>(190)</sup> The Court has not yet ruled on this question in relation to the UCTD but it has been asked to provide interpretation in Case C-829/18 *Crédit Logement* (pending on 31 May 2019). One element is that it is difficult for consumers to prove the absence of such information. Furthermore, EU directives providing for specific pre-contractual information obligations confirm that this obligation lies with the trader, e.g. Articles 5 and 6 of Directive 2011/83/EU on consumer rights (OJ L 304, 22.11.2011, p. 64), Articles 5 and 6 of Directive 2008/48/EC on credit agreements for consumers (OJ L 133, 22.5.2008, p. 66), Article 14 of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property (OJ L 60, 28.2.2014, p. 34) or Article 5 of Directive (EU) 2015/2302 (OJ L 326, 11.12.2015, p. 1) on package travel and linked travel arrangements. Some of them have also codified the principle that the burden of proof in this respect is on the trader, for instance, in Article 6(9) of Directive 2011/83/EU and Article 8 of Directive (EU) 2015/2302.

<sup>(191)</sup> Case C-472/10 *Invitel*; Case C-92/11 *RWE Vertrieb*; Case C-143/13 *Matei and Matei*.

<sup>(192)</sup> Case C-125/18 *Gómez del Moral* (pending on 31 May 2019).



### 3.3.2. Transparency requirements stemming from other EU acts

Various EU acts regulate in a detailed fashion the pre-contractual information that traders have to provide to consumers in general or with regard to specific kinds of contracts. Examples include the Unfair Commercial Practices Directive<sup>(193)</sup>, the Consumer Rights Directive<sup>(194)</sup>, the Consumer Credit Directive<sup>(195)</sup>, the Mortgage Credit Directive<sup>(196)</sup>, the Package Travel Directive<sup>(197)</sup>, the European Electronic Communications Code<sup>(198)</sup>, Regulation (EC) No 1008/2008 on air services<sup>(199)</sup> and Directives 2009/72/EC<sup>(200)</sup> and 2009/73/EC<sup>(201)</sup> concerning common rules for the internal market in electricity natural gas. Such acts may also regulate the compulsory content of the relevant contracts<sup>(202)</sup> and contain rules on the admissibility of contract changes and their transparency<sup>(203)</sup>.

The UCTD is without prejudice to such provisions and the consequences of the failure to comply with them as set out in such specific instruments<sup>(204)</sup>.

Insofar as specific pre-contractual and contractual information requirements apply, they will also have to be taken into account for the transparency requirements under the UCTD, on a case-by-case basis, and in light of the purpose and scope of those instruments.

Thus, for instance, in relation to EU consumer credit legislation<sup>(205)</sup>, the Court has stressed the importance of borrowers having to hand in all information which could have a bearing on the extent of their liability<sup>(206)</sup> and, thereby, of presenting the total cost of the credit in the form of a single mathematical formula<sup>(207)</sup>. Therefore, the failure to indicate the annual percentage rate of charge (APR) as required under EU consumer credit rules<sup>(208)</sup> is ‘decisive evidence’ as to whether the term of the agreement relating to the total cost of the credit is drafted in plain intelligible language. This is true also where the necessary information on the calculation of the APR is not provided<sup>(209)</sup>. The same must apply if the indicated APR is erroneous or misleading. If the information on the total cost of the loan required under EU consumer credit rules is not provided or if the indication is misleading, the relevant terms will, therefore, be deemed not to be plain and intelligible.

<sup>(193)</sup> Directive 2005/29/EC (OJ L 149, 11.6.2005, p. 22).

<sup>(194)</sup> Directive 2011/83/EU (OJ L 304, 22.11.2011, p. 64).

<sup>(195)</sup> Directive 2008/48/EC (OJ L 133, 22.5.2008, p. 66).

<sup>(196)</sup> Directive 2014/17/EU (OJ L 60, 28.2.2014, p. 34).

<sup>(197)</sup> Directive (EU) 2015/2302 (OJ L 326, 11.12.2015, p. 1).

<sup>(198)</sup> Directive (EU) 2018/1972 (OJ L 321, 17.12.2018, p. 36).

<sup>(199)</sup> OJ L 293, 31.10.2008, p. 3. Under this Regulation, air fares/rates available to the general public shall include the applicable conditions. The final price shall at all times be indicated and shall include the applicable air fare/rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition, at least the air fare/rate, taxes, airport charges and other charges, surcharges or fees, such as those related to security or fuel must be specified.

<sup>(200)</sup> OJ L 211, 14.8.2009, p. 55.

<sup>(201)</sup> OJ L 211, 14.8.2009, p. 94.

<sup>(202)</sup> E.g. Article 7 of Directive (EU) 2015/2302 on package travel and linked travel arrangements (OJ L 326, 11.12.2015, p. 1); Article 10 of Directive 2008/48/EC on credit agreements for consumers (OJ L 133, 22.5.2008, p. 66); Article 21 and Annex II of the Directive 2002/22/EC (OJ L 108, 24.4.2002, p. 51); Articles 14 and 15 of Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (OJ L 172, 30.6.2012, p. 10); Article 4 of Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ L 310, 26.11.2015, p. 1); Articles 102 and 103 and Annexes referred to therein of Directive (EU) 2018/1972 (OJ L 321, 17.12.2018, p. 36); Annex I 1. a) of Directive 2009/72/EC (OJ L 211, 14.8.2009, p. 55) and Annex I 1. a) of Directive 2009/73/EC (OJ L 211, 14.8.2009, p. 94).

<sup>(203)</sup> E.g. Articles 10 and 11 of Directive (EU) 2015/2302 (OJ L 326, 11.12.2015, p. 1), Article 11 of Directive 2008/48/EC (OJ L 133, 22.5.2008, p. 66), Annex I 1. b) of Directive 2009/72/EC (OJ L 211, 14.8.2009, p. 55) and Annex I 1. b) of Directive 2009/73/EC (OJ L 211, 14.8.2009, p. 94) contain rules on the admissibility of contract changes and their transparency.

<sup>(204)</sup> See, for instance, Case C-76/10 *Pohotovost*, which next to the assessment of unfair contract terms concerned the failure to provide information on the annual percentage rate of charge (APR) under a consumer credit contract and the sanctions to be applied in that case. See, in particular, paragraphs 74-76. See also Case C-143/13 *Matei and Matei*.

<sup>(205)</sup> Now Directive 2008/48/EC (OJ L 133, 22.5.2008, p. 66), previously Directive 87/102/EEC (OJ L 42, 12.2.1987, p. 48).

<sup>(206)</sup> Cases C-448/17 *EOS KSI Slovensko*, paragraph 63 and C-348/14 *Bucura*, paragraph 57.

<sup>(207)</sup> Case C-448/17 *EOS KSI Slovensko*, in particular point 3 of the operative part, as well as paragraphs 63-68, following up on Case C-76/10 *Pohotovost*, in particular paragraphs 68-77.

<sup>(208)</sup> Now required under Directive 2008/48/EC (OJ L 133, 22.5.2008, p. 66). In Case C-448/17 *EOS KSI Slovensko* and Case C-76/10 *Pohotovost* Directive 87/102/EEC (OJ L 42, 12.2.1987, p. 48) was still applicable to the relevant consumer credit contracts.

<sup>(209)</sup> Case C-448/17 *EOS KSI Slovensko*, paragraph 66 and point 3 of the operative part. The Court considered that the provision only of a mathematical formula for the calculation of the APR without the information necessary to calculate the APR is equivalent to failing to provide the APR.

As regards mortgage credit contracts with consumers, all the rulings so far handed down by the Court related to contracts concluded before the entry into application of Directive 2014/17/EU<sup>(210)</sup> on credit agreements for consumers relating to residential property. For this reason, the Court has not yet ruled on the relationship between specific information requirements under Directive 2014/17/EU and the transparency requirements under the UCTD. Directive 2014/17/EU imposes high transparency standards by requiring clear and comprehensible general information about credit agreements to be made available to consumers through the European Standardized Information Sheet (ESIS) and the calculation of the Annual Percentage Rate of Charge (APR). In relation to foreign currency loans, Article 23(6) of Directive 2014/17/EU requires that creditors and intermediaries disclose to the consumer, in the ESIS and in the credit agreement, the arrangements available for him/her to limit exposure to the exchange rate risk during the lifetime of the credit. Where there is no provision in the credit agreement to limit the exchange rate risk to which the consumer is exposed to a fluctuation of less than 20 %, the ESIS shall include an illustrative example of the impact of a 20 % fluctuation in the exchange rate.

The Court has applied<sup>(211)</sup> transparency requirements stemming from Directive 2003/55/EC<sup>(212)</sup> concerning common rules for the internal market in natural gas and the UCTD in a complementary fashion.

The fact of whether a seller or supplier has complied with sector-specific requirements is an important element when assessing compliance with the transparency requirements under the UCTD. However, given the parallel applicability of the UCTD with sectorial legislation, compliance with such instruments does not automatically indicate compliance with all transparency requirements under the UCTD. Furthermore, the fact that a specific act does not contain specific information requirements does not exclude information obligations under the UCTD on contract terms that sellers or suppliers add on their own initiative.

### 3.4. Unfairness assessment under Articles 3 and 4(1) UCTD

#### 3.4.1. *The framework for the assessment under Articles 3(1) and 4(1)*

Contract terms are to be regarded as unfair under Article 3(1) if,

- contrary to the requirements of good faith,
- they cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Although the Court has so far not been asked to explain the relationship between those two criteria, the wording of Article 3(1) and of Recital 16 suggest that the absence of good faith is linked to the significant imbalance in the rights and obligations created by a contract term. Recital 16 refers to the bargaining power of the parties and explains that the requirement of 'good faith' relates to the question of whether a seller or supplier deals fairly and equitably with a consumer and takes his legitimate interests into account. In this respect, the Court<sup>(213)</sup> finds it particularly relevant to consider whether the seller or supplier could reasonably assume that the consumer would have agreed to the term in individual negotiations:

<sup>(210)</sup> Pursuant to Article 43 of Directive 2014/17/EU (OJ L 60, 28.2.2014, p. 34), this Directive shall not apply to credit agreements existing before 21 March 2016.

<sup>(211)</sup> Case C-92/11 *RWE Vertrieb*. See in particular point 2 of the operative part: 'Articles 3 and 5 of Directive 93/13 in conjunction with Article 3(3) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC must be interpreted as meaning that, in order to assess whether a standard contractual term by which a supply undertaking reserves the right to vary the charge for the supply of gas complies with the requirements of good faith, balance and transparency laid down by those directives, it is of fundamental importance:

- whether the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges. The lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation; and
- whether the right of termination conferred on the consumer can actually be exercised in the specific circumstances. [...]

<sup>(212)</sup> In Joined Cases C-359/11 and C-400/11 *Schulz and Egbrinshoff*, the Court ruled on transparency requirements adjusting contract for the supply of electricity and gas covered by universal supply obligation. The Court held that national legislation which determines the content of this type of consumer contracts and allows the price of that supply to be adjusted, but which does not ensure that customers are to be given adequate notice, before that adjustment comes into effect, of the reasons and preconditions for the adjustment, as well as its scope, is against the transparency provisions of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC — Statements made with regard to decommissioning and waste management activities (OJ L 176, 15.7.2003, p. 37) and Directive 2003/55/EC (OJ L 176, 15.7.2003, p. 57), replaced by Directive 2009/72/EC (OJ L 211, 14.8.2009, p. 55) and Directive 2009/73/EC (OJ L 211, 14.8.2009, p. 94) respectively. The content of the contracts at issue being determined by German legislative provisions that are mandatory, the UCTD was not applicable.

<sup>(213)</sup> Case C-421/14 *Banco Primus*, paragraph 60. See also Case C-186/16 *Andriciu*, paragraph 57.

‘With regard to the question of the circumstances in which such an imbalance arises “contrary to the requirement of good faith”, it should be stated that, having regard to the 16th recital of Directive 93/13, the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations [...]’<sup>(214)</sup>.

This confirms that, for the purposes of Article 3(1), the concept of good faith is an objective concept linked to the question of whether, in light of its content, the contract term in question is compatible with fair and equitable market practices that take the consumer’s legitimate interests sufficiently into account. It is, thereby, closely linked<sup>(215)</sup> to the (im)balance in the rights and obligations of the parties.

The assessment of a **significant imbalance** requires an examination as to how a contract term influences the rights and obligations of the parties. Insofar as there are *supplementary rules* from which the contract term deviates, those will be the *primary yardstick* for assessing a significant imbalance in the rights and obligations of the parties<sup>(216)</sup>. Where there are no relevant statutory provisions, a significant imbalance will have to be assessed in light of *other points of reference*, such as fair and equitable market practices or a comparison of the rights and obligations of the parties under a particular term, taking into account the nature of the contract and other related contract terms.

Pursuant to Article 4(1)<sup>(217)</sup>, the unfairness of a contract term has to be assessed taking into account

- the nature of the goods or services to which the contract relates,
- all the other terms of the contract or of another contract on which it is dependent, and
- all the circumstances attending the conclusion of the contract.

The Member States may deviate from this general unfairness-test only for the benefit of consumers, i.e. only if the national transposition makes it easier to conclude that a contract term is unfair<sup>(218)</sup>.

The indicative list of contract terms in the Annex<sup>(219)</sup> to the UCTD is an essential element on which the assessment as to whether a given term is unfair under Article 3(1) may be based<sup>(220)</sup>. By contrast, where a given contract term is covered by a national ‘black list’, there is no need to carry out a case-by-case assessment based on the criteria of Article 3(1). A similar logic will apply where a Member State has adopted a list of contract terms that are presumed to be unfair.

<sup>(214)</sup> Reference to Case C-415/11 *Aziz*, paragraph 69.

<sup>(215)</sup> In his conclusions of 21 March 2019 in Case C-34/18 *Ottília Lovasné Tóth*, paragraphs 56-62, Advocate General Hogan even suggests that the absence of good faith is not a separate condition for the unfairness of a contract term at all, although some statements of the Court (e.g. in Case C-186/16 *Andrić*, paragraph 56: ‘[...] it is for the referring to assess [...] first, the possible failure to observe the requirement of good faith and second, the existence of a significant imbalance within the meaning of Article 3(1) of Directive 93/13.’) do not necessarily support this position.

<sup>(216)</sup> See Section 3.4.2.

<sup>(217)</sup> The Court reminded the national courts of this provision in several rulings, e.g. Case C-226/12 *Constructora Principado*, the second indent of the operative part and paragraph 30; Case C-415/11 *Aziz*, paragraph 71; Case C-243/08 *Pannon GSM*, paragraph 39; Case C-137/08 *VB Pénzügyi Lízing*, paragraph 42; Case C-421/14 *Banco Primus*, paragraph 61; Case C-186/16 *Andrić*, paragraph 53. Case C-421/14 *Banco Primus*, paragraph 61, first sentence reads as follows: ‘In addition, pursuant to Article 4(1) of the directive, the unfairness of a contractual term must be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all of the circumstances attending its conclusion’.

<sup>(218)</sup> For instance, where the national transposition of Article 3(1) does not require the absence of good faith or that the imbalance has to be ‘significant’. See also Section 2.1 on minimum harmonisation.

<sup>(219)</sup> See also Section 3.4.7 on the role of the Annex.

<sup>(220)</sup> Case C-472/10 *Invitel*, paragraphs 25 and 26; Case C-243/08 *Pannon GSM*, paragraphs 37 and 38; Case C-76/10 *Pohotovost*, paragraphs 56 and 58; Case C-478/99 *Commission v Sweden*, paragraph 22. Section 3.4.7.

### 3.4.2. *The relevance of statutory provisions and the significance of the imbalance*

When assessing whether a contract term ‘causes a significant imbalance in the parties’ rights and obligations, to the detriment of the consumer’, national courts have to carry out, in the first place, a **comparison of the relevant contract term with any rules of national law which would apply in the absence of the contract term** <sup>(221)</sup>, i.e. supplementary rules. Such regulatory models can be found in particular in national contract law, for instance in the rules setting out the consequences of a party’s failure to fulfil certain contractual obligations. This may include, the conditions under which penalties, such as default interest, may be requested or provisions on the statutory interest rate <sup>(222)</sup>.

Such comparative analysis will enable the national court to evaluate whether and to what extent the contract term places the consumer in a legal situation less favourable than under the otherwise applicable contract law. The contract term may make the legal situation less favourable for consumers for instance where it restricts the rights that consumers would otherwise enjoy, or may add a constraint on their exercise. It may also impose an additional obligation on the consumer not envisaged by the relevant national rules <sup>(223)</sup>.

The imbalance in the rights and obligations to the detriment of the consumer is **significant** if there is a ‘*sufficiently serious impairment of the legal situation in which the consumer [...] is placed by reason of the relevant national provisions*’ <sup>(224)</sup>. This does not necessarily require that the term must have a significant economic impact with regard to the value of the transaction <sup>(225)</sup>. Therefore, for instance, a contract term which imposes on the consumer payment of a tax where under the applicable national legislation this tax should be borne by the seller or supplier can create a significant imbalance in the parties’ rights and obligations, regardless of the amounts which the consumer eventually will have to pay under such contract term <sup>(226)</sup>.

The effect of a contract term will also depend on its consequences under the national legal system applicable to the contract, which means that other legal provisions, including rules of procedure may have to be taken into account as well <sup>(227)</sup>. In this context, the difficulty for the consumer to prevent the continued use of the type of contract term in question may also be relevant <sup>(228)</sup>.

The Court has described the assessment of a significant imbalance in the rights and obligations of the parties as follows <sup>(229)</sup>:

‘21 In that regard, the Court has held that in order to ascertain whether a term causes a “significant imbalance” in the parties’ rights and obligations under a contract to the detriment of the consumer, particular account must be taken of which rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force [...]’ <sup>(230)</sup>.

22 It thus appears that the question whether that significant imbalance exists cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract and the costs charged to the consumer under that clause.

23 On the contrary, a significant imbalance can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules.

<sup>(221)</sup> Case C-415/11 *Aziz*, paragraph 68; Case C-226/12 *Constructora Principado*, paragraph 21; Case C-421/14 *Banco Primus*, paragraph 59; Case C-186/16 *Andriciu*, paragraph 59.

<sup>(222)</sup> The latter aspect is referred to, for instance, in Case C-415/11 *Aziz*, paragraph 74.

<sup>(223)</sup> Case C-421/14 *Banco Primus*, paragraph 59; Case C-415/11 *Aziz* paragraph 68; Case C-226/12 *Constructora Principado*, paragraph 23.

<sup>(224)</sup> Case C-226/12 *Constructora Principado*, paragraph 23 and the first indent of the operative part.

<sup>(225)</sup> Case C-226/12 *Constructora Principado*, paragraph 22 and the first indent of the operative part.

<sup>(226)</sup> Case C-226/12 *Constructora Principado*, paragraph 26.

<sup>(227)</sup> Case C-421/14 *Banco Primus*, paragraph 61, second sentence: ‘[...], the consequences of the term under the law applicable to the contract must also be taken into account, requiring consideration to be given to the national legal system’. See also Case C-415/11 *Aziz*, paragraph 71 and the case law cited; Case C-237/02 *Freiburger Kommunalbauten*, paragraph 21, and the order in Case C-76/10 *Pohotovost*, paragraph 59.

<sup>(228)</sup> Case C-421/14 *Banco Primus*, first indent of point 3 of the operative part and paragraph 59; Case C-415/11 *Aziz*, paragraphs 68 and 73.

<sup>(229)</sup> Case C-226/12 *Constructora Principado*, paragraphs 21-24.

<sup>(230)</sup> Reference to Case C-415/11 *Aziz*, paragraph 68.

24 In that regard, the Court has confirmed that, pursuant to Article 4(1) of the Directive, the unfairness of a contractual term is to be assessed taking into account the nature of the goods or services for which the contract in question was concluded and by referring to all the circumstances attending its conclusion, as well as all the other clauses in the contract [...] <sup>(231)</sup>. In that respect, it follows that the consequences of the term under the law applicable to the contract must also be taken into account, requiring consideration to be given to the national legal system [...] <sup>(232)</sup>.

Where contractual arrangements infringe a statutory provision of national or EU contract law from which the parties may not deviate by way of contract, such contractual stipulations will generally be invalid already directly by virtue of such provisions. Not individually negotiated contract terms deviating from such provisions are likely to violate also Article 3(1) UCTD.

#### 3.4.3. Sanctions or consequences of the consumer's failure to comply with contractual obligations

In order not to cause a significant imbalance to the detriment of the consumer, sanctions or consequences attached to the consumer's failure to comply with contractual obligations have to be **justified in light of the importance of the consumer's obligation and the seriousness of the failure** to comply with it <sup>(233)</sup>. In other words, they have to be proportionate <sup>(234)</sup>. This assessment has to include the question of whether the contract term derogates from statutory provisions which would apply in the absence of a contract term on that question and, where the term leads to a particular procedure, the procedural means available to the consumer <sup>(235)</sup>.

The Court <sup>(236)</sup> has presented the relevant criteria with regard to so-called 'acceleration' or early repayment clauses in mortgage credit agreements which allow the creditor to start mortgage enforcement proceedings in the following way:

'[...] Article 3(1) and (3) of Directive 93/13 and Points 1(e) and (g) and 2(a) of the annex thereto must be interpreted as meaning that, in order to assess the unfairness of a contractual term accelerating the repayment of a mortgage, [...], the following are of decisive importance:

- whether the right of the seller or supplier to cancel the contract unilaterally is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question,
- whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the contractual term and amount of the loan,
- whether that right derogates from the rules applicable in the absence of agreement between the parties, so as to make it more difficult for the consumer, given the procedural means at his disposal, to take legal action and exercise rights of the defence, and
- whether national law provides for adequate and effective means enabling the consumer subject to such a contractual term to remedy the effects of the unilateral cancellation of the loan agreement.

It is for the referring court to carry out that assessment in relation to all the circumstances of the particular case before it.'

With regard to default interests, the Court <sup>(237)</sup> has explained this test as follows:

'[...], regarding the term concerning the fixing of default interest, it should be recalled that, in the light of paragraph 1(e) of the annex to the Directive, read in conjunction with Articles 3(1) and 4(1) of the directive, the national court must assess in particular, [...], first, the rules of national law which would apply to the relationship between the parties, in the event of no agreement having been reached in the contract in question or in other consumer contracts of that type and, second, the rate of default interest laid down, compared with the statutory interest rate, in order to determine whether it is appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them.'

<sup>(231)</sup> Reference to Case C-472/11 *Banif Plus Bank*, paragraph 40.

<sup>(232)</sup> Reference to Case C-415/11 *Aziz*, paragraph 71.

<sup>(233)</sup> E.g. Case C-415/11 *Aziz*, paragraph 73; Case C-421/14 *Banco Primus*, paragraph 66.

<sup>(234)</sup> This is also reflected in Point 1 (e) of the Annex to the UCTD: 'requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation';

<sup>(235)</sup> Case C-415/11 *Aziz*, paragraphs 73 and 74; Joined Cases C-537/12 and C-116/13 *Banco Popular Español Banco de Valencia*, paragraphs 70 and 71. Regarding the compliance of rules of procedure with the UCTD, see section 6.

<sup>(236)</sup> Case C-421/14 *Banco Primus*, paragraph 66, Joined Cases C-537/12 and C-116/13 *Banco Popular Español Banco de Valencia*, paragraph 71, based on Case C-415/11 *Aziz*, paragraphs 73 and 75.

<sup>(237)</sup> Case C-415/11 *Aziz*, paragraph 74.

In relation to the proportionality<sup>(238)</sup> and, thereby, unfairness of sanctions set out in contract terms, the Court has furthermore specified<sup>(239)</sup> that it is necessary to evaluate the *cumulative effect* of all the penalty clauses in the contract in question, regardless of whether the creditor actually insists that they all be satisfied in full.

Even if only the *cumulative effect* of the sanctions makes them disproportionate, *all* relevant contract terms have to be considered as unfair<sup>(240)</sup>, regardless of whether they have been applied<sup>(241)</sup>.

#### 3.4.4. Possible unfairness of the price or remuneration

As mentioned above<sup>(242)</sup>, under the minimum standard of the UCTD, the adequacy of the price or remuneration is to be assessed under Article 3(1) only if the contract terms determining the applicable price or remuneration are not drafted in plain intelligible language. For their assessment under Article 3(1), insofar as the relevant national law does not contain supplementary rules, for instance, market practices prevailing at the time when the contract was concluded, will have to be taken into account when comparing the consideration to be paid by the consumer and the value of a particular good or service<sup>(243)</sup>. For instance, regarding the possible unfairness of an ordinary interest rate laid down in a loan agreement, the Court has stated<sup>(244)</sup> that

‘where the national court considers that a contractual term relating to the calculation of ordinary interest, [...], is not in plain intelligible language, within the meaning of Article 4(2) of that directive, it is required to examine whether that term is unfair within the meaning of Article 3(1) of the directive. In the context of that examination, it is the duty of the referring court, *inter alia*, to compare the method of calculation of the rate of ordinary interest laid down in that term and the actual sum resulting from that rate with the methods of calculation generally used, the statutory interest rate and the interest rates applied on the market at the date of conclusion of the agreement at issue in the main proceedings for a loan of a comparable sum and term to those of the loan agreement under consideration;’

Taking into account also the ‘requirement of good faith’ in Article 3(1), the Commission considers that only fair and equitable market practices can be considered for this assessment.

#### 3.4.5. Circumstances at the time of the conclusion of the contract

According to Article 4(1), the unfairness of a contract term, i.e. the significant imbalance against the requirements of good faith, has to be assessed taking into account the nature of the contract, other contract terms and other related contracts, as well as ‘all the circumstances attending the conclusion of the contract’. The latter aspect does not include circumstances manifesting themselves during the performance of the contract. However, the circumstances attending the conclusion of the contract must include all the circumstances which were known, or could reasonably have been known, to the seller or supplier and which could affect the future performance of the contract<sup>(245)</sup>.

One example for such circumstances is the risk of variations in the exchange rate inherent to contracting a loan in a foreign currency, which may materialise only during the performance of the contract. In such cases it will be for national courts to assess, in light of the knowledge and expertise of the lender, whether the consumer’s exposure to the exchange rate risk is in line with the requirements of good faith, i.e. constitutes a fair and equitable practice and, gives rise to a significant imbalance within the meaning of Article 3(1)<sup>(246)</sup>.

Where contract terms are amended or replaced, it makes sense to take into account the circumstances prevailing at the time of the amendment or replacement when assessing the new contract terms<sup>(247)</sup>.

<sup>(238)</sup> Point 1(e) of the Annex to the UCTD.

<sup>(239)</sup> Case C-377/14 *Radlinger Radlingerová*, paragraph 101.

<sup>(240)</sup> Case C-377/14 *Radlinger Radlingerová*, paragraph 101.

<sup>(241)</sup> See also section 4.3.3 and Case C-421/14 *Banco Primus*, point 4 of the operative part and paragraph 73. A reference for a preliminary ruling (Case C-750/18 A, B v C — ongoing at 31 May 2019) where the Court had been asked to provide guidance on the question of whether the cumulative effect may be limited to sanctions related to the same non-compliance with contractual obligations, has been withdrawn.

<sup>(242)</sup> Sections 3.1 and 3.2.2. Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortés*.

<sup>(243)</sup> Including, for instance, where currency fluctuations may lead to an imbalance in the rights and obligations of the parties through putting an increased burden on the consumer, Case C-186/16 *Andrić*, paragraphs 52-58.

<sup>(244)</sup> Case C-421/14 *Banco Primus*, paragraph 67, second indent.

<sup>(245)</sup> Case C-186/16 *Andrić*, paragraph 54.

<sup>(246)</sup> Case C-186/16 *Andrić*, paragraphs 55 and 56.

<sup>(247)</sup> The Court has been asked to provide further interpretation in Case C-452/18 *Ibercaja Banco* (pending on 31 May 2019) concerning a novation of a loan contract.

The significant imbalance has to be considered with regard to the content of a contract term and *regardless of how it has been applied in practice* <sup>(248)</sup>. For instance, where a contract term allows a seller or supplier to demand immediate full repayment of the loan if the consumer fails to pay a certain number of monthly instalments, the unfairness has to be assessed based on the number of unpaid monthly instalments required in the contract. It cannot be based on the number of monthly instalments which the consumer had actually failed to pay before the seller or supplier invoked the relevant term <sup>(249)</sup>.

#### 3.4.6. Relevance of lack of transparency for the unfairness of contract terms

Lack of transparency does not automatically lead to the unfairness of a given contract term under Article 3(1) of the UCTD <sup>(250)</sup>. This means that, after establishing that a contract term covered by Article 4(2) <sup>(251)</sup> 'is not in plain intelligible language', its unfairness normally still has to be assessed under the criteria of Article 3(1) <sup>(252)</sup>. Conversely, lack of transparency is not an indispensable element in the assessment of unfairness under Article 3(1) <sup>(253)</sup> so that also contract terms that are perfectly transparent can be unfair under Article 3(1) in light of their unbalanced content <sup>(254)</sup>.

However, insofar as contract terms are not plain and intelligible, i.e. where sellers or suppliers do not comply with transparency requirements, this circumstance can contribute to finding a contract term unfair under Article 3(1) or can even indicate unfairness. Point 1(i) of the Annex, in general, and Point 1(j) of the Annex, with particular regard to unilateral changes to contract terms, confirm that lack of transparency may be decisive for the unfairness of contract terms.

Several judgments refer to lack of transparency as a(n) (important) element in the assessment of the unfairness at least of particular types of contract terms <sup>(255)</sup> or refer to the lack of transparency and unfairness of contract terms in one breath <sup>(256)</sup>.

<sup>(248)</sup> Case C-602/13 *BBVA*, paragraph 50.

<sup>(249)</sup> Case C-421/14 *Banco Primus*, point 4 of the operative part and paragraph 73.

<sup>(250)</sup> Although, in line with the principle of minimum harmonisation, national law may provide that lack of transparency can have this immediate consequence. See Section 2 on the relationship of the UCTD with national law and § 307 (1) of the German Civil Code (BGB).

<sup>(251)</sup> See Section 3.2.1.

<sup>(252)</sup> This is confirmed implicit or explicitly in several rulings, for instance in Cases C-421/14 *Banco Primus*, paragraphs 62-67, in particular in paragraph 64 and the second indent of paragraph 67, Case C-119/17 — *Lupean*, paragraphs 22-31, or C-118/17 *Dunai*, paragraph 49.

<sup>(253)</sup> Lack of transparency is not mentioned as a condition in Article 3(1). This is different only for contract terms defining the main-subject matter or whose assessment would require an examination of the adequacy of the price or remuneration.

<sup>(254)</sup> Confirmed in Case C-342/13 *Katalin Sebestyén*, paragraph 34: 'However, even assuming that the general information the consumer receives before concluding a contract satisfies the requirement under Article 5 that it be plain and intelligible, that fact alone cannot rule out the unfairness of a clause [...].'

<sup>(255)</sup> E.g. Case C-472/10 *Invitel*, paragraph 28 and end of point 1 of the operative part: 'It is for the national court, [...], to assess, with regard to Article 3(1) and (3) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, the unfair nature of a term included in the general business conditions of consumer contracts by which a seller or supplier provides for a unilateral amendment of fees connected with the service to be provided, without setting out clearly the method of fixing those fees or specifying a valid reason for that amendment. As part of this assessment, the national court must determine, inter alia, whether, in light of all the terms appearing in the general business conditions of consumer contracts which include the contested term, and in the light of the national legislation setting out rights and obligations which could supplement those provided by the general business conditions at issue, the reasons for, or the method of, the amendment of the fees connected with the service to be provided are set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract.'

Case C-92/11 *RWE Vertrieb*, point 2 of the operative part: 'Articles 3 and 5 of Directive 93/13 in conjunction with Article 3(3) of Directive 2003/55/EC [...] must be interpreted as meaning that, in order to assess whether a standard contractual term by which a supply undertaking reserves the right to vary the charge for the supply of gas complies with the requirements of good faith, balance and transparency laid down by those directives, it is of fundamental importance:

- whether the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges. [...]; and
- whether the right of termination conferred on the consumer can actually be exercised in the specific circumstances.

It is for the national court to carry out that assessment with regard to all the circumstances of the particular case, including all the general terms and conditions of the consumer contracts of which the term at issue forms part.'

<sup>(256)</sup> E.g. Case C-191/15 *Verein für Konsumenteninformation v Amazon*, paragraph 65: 'It is for the national court to determine whether, having regard to the particular circumstances of the case, a term meets the requirements of good faith, balance and transparency.' See also Joined Cases C-70/17 and C-179/17 *Abanca Corporación Bancaria and Bankia*, paragraph 50 and Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 40.

Case C-92/11 *RWE Vertrieb*, paragraph 47: 'A standard term which allows such a unilateral adjustment must, however, meet the requirements of good faith, balance and transparency laid down by those directives.'

The Court has stressed the significance of transparency for the fairness of contract terms, for instance, with regard to clauses which allow the seller or supplier to change the rates to be paid by consumers in long-term contracts <sup>(257)</sup>, terms which determine the consumer's core obligations in loan agreements <sup>(258)</sup> or with regard to choice-of-law clauses <sup>(259)</sup>.

The Court has indicated explicitly that, in relation to a choice-of-law clause that fails to acknowledge the fact that, under the Rome I Regulation consumers can always rely on the more advantageous rules of their Member State of residence <sup>(260)</sup>, this omission of information or the misleading character of the term can imply its unfairness. The Court <sup>(261)</sup>, after recalling the criterion of a significant imbalance in the rights and obligations of the parties, stated that

'[i]n particular, the unfairness of such a term may result from a formulation that does not comply with the requirement of being drafted in plain and intelligible language set out in Article 5 of Directive 93/13. [...]

One may thus conclude that, depending on the content of the contract term at issue and in light of the impact of the lack of transparency, **the possible unfairness of a contract term can be closely related to its lack of transparency or the lack of transparency of a contract term may even indicate its unfairness.** This may be the case, for instance, where consumers cannot understand the consequences of a term or are misled.

Indeed, where consumers are put in a disadvantageous position based on contract terms which are unclear, hidden or misleading, or where explanations necessary to understand their implications are not provided, it is unlikely that the seller or supplier was dealing fairly and equitably with the consumer and took their legitimate interests into account.

#### 3.4.7. Role of the Annex referred to in Article 3(3) UCTD

As stated in Article 3(3) UCTD, the list in the Annex to the UCTD contains 'only' an indicative and non-exhaustive list of the terms which *may* be regarded as unfair. The Court has stressed this on different occasions <sup>(262)</sup>. The non-exhaustive character of the Annex and the minimum harmonisation principle under Article 8 UCTD mean that national law may extend the list or use formulations leading to stricter standards <sup>(263)</sup>.

Since the list is only indicative, the terms contained therein should not automatically be considered unfair. This means that their unfairness still has to be assessed in light of the general criteria defined in Articles 3(1) and 4 UCTD <sup>(264)</sup>. The Court has specified that terms listed in the Annex need not necessarily be considered unfair and, conversely, terms not appearing in the list may none the less be regarded as unfair <sup>(265)</sup>. Nevertheless, the *Annex is an important element in the assessment of the unfairness of contract terms.* In the words of the Court,

'if the content of the annex does not suffice in itself to establish automatically the unfair nature of a contested term, it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term <sup>(266)</sup>.'

<sup>(257)</sup> Case C-472/10 *Invitel*, paragraphs 21-31; Case C-92/11 *RWE Vertrieb*, paragraphs 40-55.

<sup>(258)</sup> Case C-26/13 *Kásler and Káslerné Rábai*, Case C-348/14 *Bucura*, Case C-186/16 *Andriuc* and Case C-119/17 *Lupean*, paragraphs 22-31.

<sup>(259)</sup> Case C-191/15 *Verein für Konsumenteninformation v Amazon*.

<sup>(260)</sup> Article 6 of Rome I Regulation.

<sup>(261)</sup> Case C-191/15 *Verein für Konsumenteninformation v Amazon*, paragraph 68, an extract of which is quoted here. The preceding paragraph 67 reads: 'In those circumstances, [...], a pre-formulated term on the choice of the applicable law designating the law of the Member State in which the seller or supplier is established is unfair only in so far as it displays certain specific characteristics inherent in its wording or context which cause a significant imbalance in the rights and obligations of the parties.'

<sup>(262)</sup> Case C-472/10 *Invitel*, paragraph 25; Case C-243/08 *Pannon GSM*, paragraphs 37 and 38; Case C-137/08 *VB Pénzügyi Lízing*, paragraph 42; and order in Case C-76/10 *Pohotovost*, paragraphs 56 and 58.

<sup>(263)</sup> Case C-478/99 *Commission v Sweden*, paragraph 11.

<sup>(264)</sup> Case C-478/99 *Commission v Sweden*, paragraph 11.

<sup>(265)</sup> Case C-237/02 *Freiburger Kommunalbauten*, paragraph 2; Case C-478/99 *Commission v Sweden*, paragraph 20. In Case C-143/13 *Matei and Matei*, paragraph 60, the Court referred to the Annex as a 'grey list' It is, however, possible that in some national laws, there are 'grey lists' in the sense that there is a (rebuttable) legal presumption that specific types of contract terms are unfair.

<sup>(266)</sup> Case C-472/10 *Invitel*, first part of paragraph 26.



Where a Member State <sup>(267)</sup> has adopted a ‘black list’ of terms that are always considered to be unfair <sup>(268)</sup>, contract terms that are contained in such lists will not have to be assessed under the national provisions transposing Article 3(1).

Otherwise, national authorities have to examine the term under Article 3(1), using the Annex as indication for what will normally constitute a significant imbalance in the rights and obligations of the parties contrary to the requirements of good faith.

In its case law, the Court has referred to the following points of the Annex:

- Point 1(e) <sup>(269)</sup>: C-76/10 *Pohotovost*; C-415/11 *Aziz* <sup>(270)</sup>; Joint Cases C-94/17 and C-96/16 *Banco Santander Escobedo Cortés*, concerning late payment interests;
- Point 1(e): C-377/14 *Radlinger Radlingerová* concerning the cumulative effect of contractual sanctions,
- Points i), (j) and (l) in conjunction with point 2(b) and (d): C-92/11 *RWE Vertrieb*, C-472/10 *Invitel* <sup>(271)</sup>, Case C-348/14 *Bucura* <sup>(272)</sup>, concerning price variation clauses,
- Points 1(j) and (l) in conjunction with points 2 (b) and (d):
  - Case C-26/13 *Kásler and Káslerné Rábai* <sup>(273)</sup> relating to the exchange rate conversion mechanism for a mortgage loan denominated in foreign currency;
  - Case C-143/13 *Matei and Matei* <sup>(274)</sup> in relation to unilateral changes in the interest rate;
- Point 1(q) <sup>(275)</sup>:
  - C-240/98 *Océano Grupo Editorial*; C-137/08 *VB Penzügyi Lízing*; C-243/08 *Pannon GSM*; specifying that jurisdiction clauses which oblige the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile and which will make it difficult for him to enter an appearance, are, in principle, covered by point 1(q) <sup>(276)</sup>; Case C-266/18 *Aqua Med* concerns statutory provisions on jurisdiction;
  - C-240/08 *Asturcom Telecomunicaciones*; C-342/13 *Katalin Sebestyén* in relation to arbitration clauses;
  - C-415/11 *Aziz*, paragraph 75, regarding foreclosure clauses in mortgage loan agreements and their assessment in connection with the available legal remedies.

One of the merits of the Annex is that it can help to find a common basis when Member States coordinate their enforcement actions in relation to unfair contract terms. The Annex to the UCTD and the different types of annexes in the national transpositions also make it clearer to sellers or suppliers what kind of contract terms are problematic, and can help enforcement bodies to enforce the UCTD in a formal or informal manner.

<sup>(267)</sup> See Annex II to this Notice.

<sup>(268)</sup> Case C-143/13 *Matei and Matei*, paragraph 61.

<sup>(269)</sup> Terms ‘requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation’.

<sup>(270)</sup> Paragraph 74.

<sup>(271)</sup> Paragraphs 21-31.

<sup>(272)</sup> Paragraph 60.

<sup>(273)</sup> In particular paragraph 73.

<sup>(274)</sup> In particular, paragraphs 59 and 74; Paragraph 74 reads as follows: ‘It follows, in particular from Articles 3 and 5 of Directive 93/13 and Paragraph 1(j) and (l) and Paragraph 2(b) and (d) of the annex to that directive that it is of fundamental importance, for the purpose of complying with the requirement of transparency, to determine whether the loan agreement sets out transparently the reasons for and the particularities of the mechanism for altering the interest rate and the relationship between that mechanism and the other terms relating to the lender’s remuneration, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.’

<sup>(275)</sup> ‘terms which have the object or effect of “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract”’.

<sup>(276)</sup> Case C-240/98 *Océano Grupo Editorial*, operative part and paragraphs 22-24; Case C-137/08 *VB Penzügyi Lízing*, paragraphs 54-56; Case C-243/08 *Pannon GSM*, paragraph 41.

## 4. NON-BINDING CHARACTER OF UNFAIR CONTRACT TERMS (ARTICLE 6(1) UCTD)

## Article 6

1. 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.

2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States

## Recital 21

Whereas Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions;

## 4.1. The nature and role of Article 6(1) UCTD in the protection against unfair contract terms

The Court <sup>(277)</sup> regularly emphasises the central role of Article 6(1) in the system of protection of consumers under the UCTD, which

‘[...]is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge [...]’ <sup>(278)</sup>.

The non-binding character of unfair contract terms under Article 6(1) is a **mandatory rule** through which the UCTD aims to tackle this inequality and create an *effective balance* <sup>(279)</sup> between the parties under the contract. In the words of the Court <sup>(280)</sup>:

‘[...] Article 6(1) of the directive, according to which unfair terms are not binding on the consumer, is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.’

Given that protection of consumers against unfair contract terms under the UCTD is a matter of **public interest**, the Court <sup>(281)</sup> has repeatedly stated that Article 6(1) is **of equal standing to the rules of public policy laid down in the law of the Member States**:

‘The Court has, furthermore, held that, in view of the nature and importance of the public interest underlying the protection which the directive confers on consumers, Article 6 thereof must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy [...]. It must be held that that classification extends to all the provisions of the directive which are essential for the purpose of attaining the objective pursued by Article 6 thereof.’

<sup>(277)</sup> E.g. Case C-421/14 *Banco Primus*, paragraph 40, quoted here.

<sup>(278)</sup> reference to Case C-169/14 *Sánchez Morcillo and Abril García*, paragraph 22 and the case-law cited.

<sup>(279)</sup> Cases C-421/14 *Banco Primus*, paragraph 41, C-169/14 *Sánchez Morcillo and Abril García*, paragraph 23, Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo and Others*, paragraphs 53 and 55.

<sup>(280)</sup> Case C-488/11 *Asbeek Brusse*, paragraph 38 with references to Case C-618/10 *Banco Español de Crédito*, paragraph 40, and Case C-472/11 *Banif Plus Bank*, paragraph 20.

<sup>(281)</sup> E.g. Joined Cases C-154/15, C-307/15 and C-308/15 *Naranjo Gutierrez*, paragraph 54; Case C-488/11, *Asbeek Brusse*, paragraph 44, quoted here. In that paragraph the Court refers to the previous decisions in Case C-40/08 *Asturcom Telecomunicaciones*, paragraph 52, and Case C-76/10 *Pohotovost*, paragraph 50.

The mandatory or imperative character of Article 6(1) means that this provision is binding on all parties and authorities and cannot, in principle, be deviated from. Article 6(2) UCTD confirms this by specifying that consumers cannot lose their rights under the UCTD even if the contract is governed by the law of a country other than a Member State through an agreement on choice of the applicable law <sup>(282)</sup>.

The imperative character of Article 6(1) also implies that **consumers cannot**, in principle, **waive this protection**, neither by way of contract <sup>(283)</sup> nor by unilateral declaration, whether directly or indirectly. This certainly applies prior to the settlement of any dispute on specific claims related to the unfairness of contract terms <sup>(284)</sup>.

The substantive implications of Article 6(1) are presented in sub-sections 4.2, 4.3 and 4.4. Procedural guarantees stemming from Article 6(1) are discussed in Section 5. The substantive consequences flowing from the unfairness of contract terms apply independently of court proceedings and regardless of whether the unfairness of contract terms is raised by the consumer or *ex officio* by a court.

#### 4.2. The legal effect of ‘not being binding on the consumer’

The notion of unfair contract terms not being binding on consumers can be translated into different legal concepts at national level as long as the protection sought by the UCTD is achieved. Nevertheless, the *invalidity* of unfair contract terms would appear to achieve the intended protection most effectively. The Court <sup>(285)</sup> has emphasised that

‘[...] Article 6(1) of Directive 93/13 must be interpreted as meaning that a contractual term held to be unfair must be regarded, in principle, **as never having existed**, so that it **cannot have any effect on the consumer**. Therefore, the determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he would have been in if that term had not existed.’

The non-binding character of unfair contract terms follows directly from the UCTD and does not require any prior declaration of unfairness or invalidity of a contract term by a court or another authorised body. However, such declarations provide legal certainty regarding the (un-)fairness of a given contract term, in particular in cases where there may be different views on its unfairness.

Therefore, the non-binding character cannot depend on whether or when a consumer raised the unfairness of a given contract term or contested its validity, as the Court <sup>(286)</sup> has confirmed when stating that

‘[...] Article 6(1) of the Directive must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand.’

This also implies that consumers cannot be prevented, in principle, from requesting a seller or supplier to remove a given unfair term from the contract, from asking a national court that a contract term be declared invalid or from objecting to claims from sellers or suppliers based on unfair contract terms because of any applicable limitation periods <sup>(287)</sup>. The same applies to the power of national courts to assess the unfairness of contract terms of their own motion. The Court <sup>(288)</sup> has stated that

<sup>(282)</sup> See section 1.2.5 on traders established in third countries.

<sup>(283)</sup> Whether by individually negotiated terms or by contract terms within the meaning of Article 3(1) UCTD.

<sup>(284)</sup> The Court has, however, clarified that, in court proceedings, after being informed about the unfairness of a contract term, consumers may decide not to rely on this protection (See Sections 4.3.3, as well as 5.5.1 and 5.5.5). In Case C-452/18 *Ibercaja* (pending on 31 May 2019) the Court is called to consider contract terms contained in a novation agreement according to which a consumer waived the right to make restitution claims based on contract terms that may have been unfair in connection with a ‘settlement’ concerning the consequences of an unfair contract term and may give further guidance on this principle.

<sup>(285)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*, paragraph 61.

<sup>(286)</sup> Case C-243/08 *Pannon GSM*, paragraph 28 quoted here.

<sup>(287)</sup> The fact that also consumers will generally be subject to time-limits for using remedies in ongoing proceedings or may be subject to reasonable limitation periods when claiming the restitution of payments made on the basis of unfair contract terms is a different matter, see Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*, paragraphs 69-70.

<sup>(288)</sup> Case C-473/00 *Cofidis*, paragraph 38. The obligation of national courts to assess the unfairness of contract terms of their own motion (*ex officio*) is discussed in Section 5.

‘[...] [t]he protection conferred on consumers by the Directive precludes a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibits the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair.’

Where, in connection with an individual dispute or a collective action, a national court finds a given term to be unfair, such finding or declaration applies *ex tunc*. This means that it must have effect from the conclusion of the contract or the moment when the relevant term was inserted into the contract and *not ex nunc* from the time of the judgment <sup>(289)</sup>.

#### 4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties

This section discusses the principle that unfair contract terms have to be set aside and may not be revised (Sub-section 4.3.1) and the specific circumstances under which gaps in the contract caused by the elimination of an unfair term may be filled (Sub-section 4.3.2).

##### 4.3.1. The principle: Setting aside unfair contract terms and prohibition from revising them

Under Article 6(1), while unfair contract terms are not binding on consumers, the remainder of the contract continues to bind the parties ‘if it is capable of continuing in existence without the unfair terms.’ The Court <sup>(290)</sup> has stressed repeatedly that

‘[...], in accordance with Article 6(1) of Directive 93/13, **national courts are merely required to refrain from applying an unfair contractual term** in order that it may not produce binding effects with regard to the consumer, **without being empowered to revise the content of that term. That contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible** [...]’ <sup>(291)</sup>.

This means, for instance, with regard to unfair penalty clauses, that national courts may not reduce the amount payable under the contract term to an acceptable level, but simply have to discard the term in its entirety <sup>(292)</sup>.

The revision of unfair contract terms would, in fact, imply that the terms in question would remain partially binding and that sellers or suppliers would somewhat benefit from having used such terms. This would undermine the effectiveness of Article 6(1) UCTD and remove the dissuasive effect that Article 6(1) UCTD seeks to achieve by considering unfair contract terms not to be binding <sup>(293)</sup>. The removal of such dissuasive effect would also be inconsistent with the objective of combatting the continued use of unfair contract terms reflected in Article 7(1) UCTD <sup>(294)</sup>.

<sup>(289)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*, operative part and paragraphs 73-75.

<sup>(290)</sup> Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortés*, paragraph 73. In Case C-618/10 *Banco Español de Crédito*, the Court established the fundamental principles concerning the consequences to be drawn from the non-binding character of unfair contract terms. They have been confirmed in numerous cases, e.g. Case C-488/11 *Asbeek Brusse*; Case C-26/13 *Kásler and Káslerné Rábai*; Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco y Caixabank*; Case C-421/14 *Banco Primus*, paragraph 71; and Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*, paragraphs 57-61.

<sup>(291)</sup> Reference to Case C-421/14 *Banco Primus*, paragraph 71 and the case-law cited.

<sup>(292)</sup> E.g. Case C-488/11 *Asbeek Brusse*, paragraph 59: ‘[...] Article 6(1) of the directive cannot be interpreted as allowing the national court, in the case where it establishes that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair, to reduce the amount of the penalty imposed on the consumer instead of excluding the application of that clause in its entirety [...]’.

<sup>(293)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*, paragraphs 60 and 62.

<sup>(294)</sup> E.g. Case C-488/11 *Asbeek Brusse*, paragraph 58: ‘The Court has also observed that that interpretation is, moreover, borne out by the objective and overall scheme of the directive. In this connection, it has pointed out that, given the nature and significance of the public interest which constitutes the basis of the protection guaranteed to consumers, the directive requires Member States, as is apparent from Article 7(1) thereof, to provide for adequate and effective means “to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers”. If it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of the directive, since it would weaken the dissuasive effect on sellers or suppliers of the straightforward non-application of those unfair terms with regard to the consumer (*Banco Español de Crédito*, paragraphs 66 to 69).’

Following the same logic, also the **partial deletion** of an unfair contract term is inadmissible, as, generally, it will be equivalent to a revision of a contract term by altering its substance <sup>(295)</sup>.

This may be different only in cases where what may look like one ‘contract term’ is, in reality, composed of different contract terms within the meaning of Article 3(1). This may be the case in particular where a contract term contains two (or more) stipulations that can be separated from each other in such a way that one of them can be deleted, while the remaining stipulations are still clear and comprehensible and can be assessed on their own merits.

So far, the Court has given only a few indications regarding the criteria for determining what constitutes a contract term in its own right. It distinguishes, for instance, between contract terms setting out the fundamental obligations for the consumer to pay back a loan in a given currency and terms setting out the currency conversion mechanism <sup>(296)</sup>, which are therefore, by definition, separate contract terms. The same applies to terms setting out the price to be paid by the consumer and a mechanism for price changes in long-term contractual relations <sup>(297)</sup>.

The Court <sup>(298)</sup> has also distinguished between a term determining the ordinary interest rate to be paid for a mortgage loan and a term on late payment interest, even if the latter is defined as a top-up to the ordinary interest rate. Having established that ordinary interest and default interest have very different functions, the Court explained that

‘[...] those considerations apply regardless of the way in which the contractual term determining the default interest rate and that fixing the ordinary rate of interest are worded. In particular, they apply not only when the default interest rate is fixed independently of the ordinary interest rate, in a separate contractual term, but also when the default interest rate is fixed in the form of an increase in the ordinary interest rate by a certain number of percentage points. In the latter case, as the unfair term consists in that increase, Directive 93/13 requires solely that that increase be annulled.’

In connection with partial deletion, so far the Court has not indicated whether the ‘blue pencil doctrine’, applied, for instance, by the German Supreme Court, is compatible with the UCTD <sup>(299)</sup>. Under this doctrine, a distinction is made between the inadmissible revision <sup>(300)</sup> of a contract term and the permissible deletion of an unfair stipulation contained in a contract term if the remaining content of the term can apply without any further intervention. However, the Court has ruled that, in relation to a term in a mortgage credit agreement which allowed the bank to call in the entire loan after the consumer had failed to pay a single monthly instalment, the early repayment obligation *cannot be separated* from the condition of (only) one unpaid monthly instalment *without altering the substance* of those terms. In that case, the clause was thus not severable.

In sum,

- what matters for the severability of contract terms is the content or function of particular stipulations rather than the way in which they are presented in a given contract and that
- a partial deletion is not possible where two parts of a contract term are linked in such a way that the removal of one part would affect the substance of the remaining contract term.

In this connection, it is, not excluded that a single paragraph/number in a contract contains more than one contract term within the meaning of Article 3(1) UCTD. Conversely, it is possible that two paragraphs/numbers or even provisions in different documents form a single contract term, in light of their content.

<sup>(295)</sup> The Court confirmed this in Joined Case C-70/17 and C-179/17 *Abanca Corporación Bancaria and Bankia*, paragraph 55: ‘In the present case, the mere removal of the ground for termination making the terms at issue in the main proceedings unfair would ultimately be tantamount to revising the content of those terms by altering their substance. Therefore, those terms cannot be maintained in part without directly adversely affecting the dissuasive effect referred to in the preceding paragraph.’

<sup>(296)</sup> Case C-26/13 *Kásler and Káslerné Rábai* and Case C-186/16 *Andriuc* in connection with Article 4 (2).

<sup>(297)</sup> Case C-472/11 *Invitel* and Case C-92/11 *RWE Vertrieb*.

<sup>(298)</sup> Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortes*, in particular paragraphs 76 and 77.

<sup>(299)</sup> In Joined Case C-70/17 and C-179/17 *Abanca Corporación Bancaria and Bankia*, the Court did not directly comment on this question although, in Case C-70/17, the Spanish Supreme Court had specifically referred to this doctrine.

<sup>(300)</sup> Also referred to as ‘geltungserhaltende Reduktion’ in German doctrine and jurisprudence.

The principle that national courts may not revise unfair contract terms applies regardless of whether unfairness is invoked by the consumer or is considered *ex officio*.

However, this principle does not affect the right of the parties to amend or replace an unfair contract term with a new one, within their contractual freedom. If the new term is a contract term within the meaning of Article 3(1) UCTD, it will have to be assessed on its own merits pursuant to Articles 3, 4 and 5 UCTD. At the same time, the amendment or replacement of an unfair contract term cannot, in principle, remove the consumer's rights stemming from the non-binding character of the amended/replaced term, such as restitution claims<sup>(301)</sup>. The Court may shed more light on these questions in connection with so-called novation agreements<sup>(302)</sup>.

The principle that unfair contract terms simply have to be eliminated from the contract, whereas the remainder of the contract continues to bind the parties, does not raise difficulties in cases where the contract can be performed without the unfair contract term(s). For example, this can be the case for contractual penalties such as late payment interests<sup>(303)</sup>, clauses limiting the trader's liability for improper performance, or choice-of-law, jurisdiction or arbitration clauses. Cases where this is more complicated are discussed in Section 4.3.2.

#### 4.3.2. *The exception: Filling gaps in the contract to avoid its nullity*

According to Article 6(1) UCTD, the remainder of the contract will continue to apply only if the contract 'is capable of continuing in existence without the unfair terms'.

Whether the continuity of the contract is possible without the unfair term requires a 'legal assessment under the applicable national law'<sup>(304)</sup>. This implies a case-by-case analysis as to whether the contract can, legally or technically, be performed without the unfair contract term. Therefore, the assessment cannot be based on purely economic considerations. The examination as to whether the contract can continue in existence has to be *objective*, i.e. it cannot be based on the interests of only one party<sup>(305)</sup>. This will entail that it should not matter whether the seller or supplier would not have concluded the contract without the unfair term or whether the deletion of the term renders the contract less attractive from an economic point of view.

A contract cannot be performed, i.e. 'cannot continue in existence', if a term defining its main subject matter or a term that is essential for the calculation of the remuneration to be paid by the consumer is removed<sup>(306)</sup>. This applies, for instance, to the designation of the currency in which payments have to be made<sup>(307)</sup> or to a term determining the exchange rate in order to calculate the repayment instalments for a loan denominated in a foreign currency<sup>(308)</sup>.

At the same time, account must be taken of the fact that Article 6(1) aims to restore the balance between the parties through removing unfair terms from the contract while, in principle, preserving the validity of the contract as a whole, and not at the invalidity of all contracts containing unfair terms<sup>(309)</sup>. However, a Member State may provide that a contract containing unfair terms may be declared invalid as a whole where this ensures better consumer protection<sup>(310)</sup>.

The nullity of the contract may have negative consequences for the consumer, for instance the obligation to pay back the whole loan immediately rather than in the agreed instalments, which may run counter to the protection intended by the UCTD. Therefore, the Court<sup>(311)</sup> has recognised that, exceptionally, under certain conditions, national courts may replace an unfair contract term with a supplementary provision of national law in order to avoid the nullity of the contract. In relation to a case where recourse to a supplementary provision avoided the nullity of a loan agreement indexed in foreign currency caused by the unfairness of the currency conversion mechanism, the Court stated:

<sup>(301)</sup> Section 5.4.

<sup>(302)</sup> Case C-452/18 *Ibercaja* (pending on 31 May 2019).

<sup>(303)</sup> Case C-618/10 *Banco Español de Crédito*; Case C-488/11 *Asbeek Brusse*; Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortés* etc.

<sup>(304)</sup> In Case C-618/10 *Banco Español de Crédito*, paragraph 65, and Case C-488/11 *Asbeek Brusse*, paragraph 57 the CJEU stated that '[the] contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is **legally** possible.'

<sup>(305)</sup> Case C-453/10, *Pereničová and Perenič*, paragraph 32, Case C-118/17 *Dunai*, paragraph 51.

<sup>(306)</sup> Case C-118/17 *Dunai*, paragraph 52.

<sup>(307)</sup> Case C-186/16 *Andriuc* paragraphs 35 and 37.

<sup>(308)</sup> Case C-26/13 *Kásler and Káslerné Rábai*.

<sup>(309)</sup> Case C-453/10 *Pereničová and Perenič*, paragraph 31, Case C-118/17 *Dunai*, paragraph 51, Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 82, and Case C-618/10 *Banco Español de Crédito*, paragraph 40.

<sup>(310)</sup> Case C-453/10, *Pereničová and Perenič*, paragraph 35.

<sup>(311)</sup> Case C-26/13 *Kásler and Káslerné Rábai*, paragraphs 80 and 81.

'80 However, it does not follow, in a situation such as that in the main proceedings, that Article 6(1) of Directive 93/13 precludes the national court, in accordance with the principles of the law of contract, from deleting an unfair term and substituting for it a supplementary provision of national law.

81 On the contrary, replacing an unfair term with such a provision which, as is clear from the thirteenth recital in the preamble to Directive 93/13, is presumed not to contain unfair terms, in that it leads to the result that the contract may continue in existence in spite of the fact that Clause III/2 has been deleted and continues to be binding for the parties, is fully justified in the light of the purpose of Directive 93/13.'

The Court further explained that '*the particularly unfavourable consequences*' of the annulment of the contract for the consumer could jeopardise the intended dissuasive effect of the elimination of the unfair contract term<sup>(312)</sup>.

Therefore, according to the case law to date<sup>(313)</sup>, before replacing unfair contract terms with 'supplementary rules of national law' national courts have to assess whether

- *objectively* the elimination of an unfair contract term would otherwise lead to the nullity of the contract as a whole,
- *and* whether this has *particularly negative consequences* for the consumer<sup>(314)</sup>, in light all relevant provisions of national law, including the rules of procedure<sup>(315)</sup>.

The UCTD neither defines the term '**supplementary provision of national law**' nor uses it. In a different context, it refers to '*rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established*'. This quasi-definition reflects what is generally understood to be the function of supplementary provisions, and, when using this term in connection with Article 6(1), the Court indeed refers to Recital 13 of the UCTD<sup>(316)</sup>.

The Court may further expand on the interpretation of the concept of 'supplementary provisions of national law'. It may clarify, for instance, whether it relates exclusively to provisions which specifically regulate the rights and obligations of the parties to a contract or whether it may also encompass general provisions of contract law<sup>(317)</sup>. Where such general provisions allow for the creative adaption of the contract, the question arises as to whether this is, in fact, equivalent to a non-admissible 'revision' of the relevant contract term(s)<sup>(318)</sup>.

The Court<sup>(319)</sup> has indicated that, *under specific circumstances*, statutory provisions that serve as a model or reference for contract terms but which are not technically supplementary provisions may be used to replace an unfair contract term in order to prevent the nullity of the contract.

The Court may also still clarify whether, under very specific circumstances, other forms of filling the gap left by an unfair contract term may be admissible<sup>(320)</sup>.

<sup>(312)</sup> Case C-26/13 *Kásler and Káslerné Rábai* paragraph 83.

<sup>(313)</sup> The Court confirmed the principles established in Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 85, in Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco y Caixabank*, paragraph 33, and in Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortés*, paragraph 74 and Joined Case C-70/17 and C-179/17 *Abanca Corporación Bancaria and Bankia*, paragraphs 56-63.

<sup>(314)</sup> The Court emphasised the condition that the consequences must be 'particularly negative' for consumers so that the latter would be 'penalised' in Cases C-118/17 *Dunai*, paragraph 54, C-96/16 and C-94/17 *Banco Santander and Escobedo Cortés*, paragraph 74, C-51/17 *OTP Bank and OTP Faktoring*, paragraph 61 or that it is 'contrary to the interests' of the consumer, *Dunai*, paragraph 55.

<sup>(315)</sup> Joined Case C-70/17 and C-179/17 *Abanca Corporación Bancaria and Bankia*, paragraphs 61 and 62.

<sup>(316)</sup> Case C-26/13 *Kásler and Káslerné Rábai*, paragraphs 80-81; Case C-92/11 *RWE Vertrieb*, paragraph 26; Case C-280/13 *Barclays Bank*, paragraphs 31 and 42; Case C-7/16 *Banco Popular Español and PL Salvador*, paragraph 21; Case C-446/17 *Woonhaven Antwerpen BV CVBA v Berkani and Hajji*, paragraph 25.

<sup>(317)</sup> Case C-260/18 *Dziubak* (pending on 31 May 2019). This case concerns, amongst other questions, the consequences to be drawn from the potential nullity of a contract term setting out the currency conversion mechanism for a loan denominated in a foreign currency.

<sup>(318)</sup> In his opinion of 14 May 2019 in Case C-260/18 *Dziubak*, Advocate General Pitruzzella, considers that the notion of supplementary provision has to be interpreted narrowly in the sense that it only applies to provisions which can as such replace the unfair contract term, without requiring 'creativity' by the judge, given that such 'creativity' would, in his view, correspond to a revision of unfair contract terms (paragraphs 77-79).

<sup>(319)</sup> Joined Case C-70/17 and C-179/17 *Abanca Corporación Bancaria and Bankia*, paragraph 59.

<sup>(320)</sup> Case C-126/18 *Gómez del Moral Guasch* (pending on 31 May 2019), which involves the potential nullity of the reference in a mortgage credit contract to an index for the applicable interest rate. If this contract term were to be unfair, there would be no agreement on the applicable interest rate.

When assessing the **particularly negative consequences for consumers**, national courts have to take into account the *interests of the consumer* at the time when the question arises before the national court <sup>(321)</sup>. In cases where the continuation of the contract is legally impossible following the elimination of an unfair contract term *and where the continuation of the contract would be contrary to the consumer's interests*, the Court has specified that national courts may not preserve the validity of the contract <sup>(322)</sup>. In such cases, national law may thus not prevent consumers from relying on the nullity of the contract under Article 6(1) UCTD <sup>(323)</sup>.

To date, the Court has not ruled explicitly <sup>(324)</sup> on whether the national court has to establish the consumer's interest in the nullity of the contract based exclusively on objective criteria or, rather, on the consumer's preference as expressed within the proceedings. Nevertheless, there are good arguments for respecting the consumer's preference, taking into account that the consumer may even insist, in court proceedings, that an unfair term is applied <sup>(325)</sup>.

#### 4.3.3. *The application of supplementary provisions in other cases*

So far, the Court has not ruled specifically on the question of whether supplementary provisions of national law may be applied where the deletion of a contract term does not lead to the nullity of the contract, such as clauses on penalties, but where this does not imply a 'revision' of the unfair term by the national court. The Court <sup>(326)</sup> has ruled that the approach of a national supreme court which did not apply any statutory default interests after removing an unfair clause on late payment interests from a contract was compatible with the UCTD. However, the Court has not stated that this result was required by the UCTD. Nevertheless, the case law discussed under point 4.3.2. may suggest that recourse to supplementary provisions is possible only where the contract would otherwise be void.

#### 4.3.4. *Possible application of unfair contract terms despite their unfairness?* <sup>(327)</sup>

The Court <sup>(328)</sup> has held that, in cases where the contract can continue to exist without an unfair term <sup>(329)</sup>, and after the judge has informed the consumer of the unfairness and non-binding nature of an unfair contract term, the consumer may decide not to rely on this protection so that in fact the contract term is applied.

### 4.4. **Restitution of advantages obtained through unfair contract terms**

Another consequence of the non-binding character of unfair contract terms is that, where consumers have made payments based on unfair contract terms, they must be entitled to the reimbursement of such payments <sup>(330)</sup>:

'62 It follows that the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts.

63 The absence of such restitutory effect would be liable to call into question the dissuasive effect that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) of that directive, is designed to attach to a finding of unfairness in respect of terms in contracts concluded between consumers and sellers or suppliers.'

<sup>(321)</sup> Opinion of Advocate General Pitruzzella of 14 May 2019 in Case C-260/18 *Dziubak*, paragraph 60. This is to be distinguished from the assessment of the unfairness of the contract term under Article 3(1), which takes into account the circumstances at the conclusion of the contract.

<sup>(322)</sup> Case C-118/17 *Dunai*, paragraph 55.

<sup>(323)</sup> Case C-118/17 *Dunai*, paragraphs 51-55.

<sup>(324)</sup> In Case C-118/17 *Dunai*, paragraphs 53-55, the consumer's interest in the nullity of the contract seemed to coincide with consumer's request. In his opinion of 14 May 2019 in Case C-260/18 *Dziubak*, paragraph 67, Advocate General Pitruzzella considers the consumer's preference to be decisive. In Joined Cases C-70/17 and C-179/17 *Abanca Corporación Bancaria*, paragraphs 61 and 62, the Court refers to an assessment to be carried out by the national judge, in light of the applicable national law, but does not exclude that the national judge raises this question with the consumer.

<sup>(325)</sup> See Section 4.3.3 below.

<sup>(326)</sup> Joined Cases C-94/17 and C-96/16 *Banco Santander Escobedo Cortés*.

<sup>(327)</sup> See also Points 5.5.1 and 5.5.5 below.

<sup>(328)</sup> Case C-243/08 *Pannon GSM*. See subsequent confirmation, for instance, in Case C-472/11 *Banif Plus Bank*, paragraphs 27 and 35 and in Joined Case C-70/17 and C-179/17 *Abanca Corporación Bancaria and Bankia*, paragraph 63.

<sup>(329)</sup> Joined Case C-70/17 and C-179/17 *Abanca Corporación Bancaria and Bankia*, paragraph 63.

<sup>(330)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutierrez Naranjo*, paragraphs 62 and 63, quoted here; Case C-483/16 *Sziber*, paragraph 53.



Only provisions related to legal certainty, in particular *res judicata* and reasonable limitation periods, may limit such **restitutory effect** <sup>(331)</sup>. At the same time, Member States, including national legislators and courts, may not limit in time the effect of a finding that a given contract term is unfair <sup>(332)</sup> and thereby, for instance, exclude restitution claims for the time prior to such finding <sup>(333)</sup>:

'Article 6(1) of Council Directive 93/13/EEC [...] must be interpreted as precluding national case-law that temporally limits the restitutory effects connected with a finding of unfairness by a court, in accordance with Article 3(1) of that directive, in respect of a clause contained in a contract concluded between a consumer and a seller or supplier, to amounts overpaid under such a clause after the delivery of the decision in which the finding of unfairness is made.'

In this connection, the Court recalled that it is for the Court alone, in the light of the fundamental requirement of a general and uniform application of EU law, to decide upon the temporal limitations to be placed on the interpretation it lays down in respect of a rule of EU law <sup>(334)</sup>. In general, the interpretation given by the Court of a rule of EU law must be applied by the national courts also to legal relationships arising and established before the Court's judgment since its interpretation establishes how the relevant rule must be, or ought to have been, understood and applied from the time of its entry into force <sup>(335)</sup>. Therefore, the Court may limit the effect in time of its rulings only in 'altogether exceptional cases' in application of the general principle of legal certainty if two cumulative conditions are met: (i) the market participants concerned have acted in good faith and (ii) there is a risk of serious difficulties due to the 'retroactive' application of the Court's case law <sup>(336)</sup>.

## 5. REMEDIES AND PROCEDURAL GUARANTEES REQUIRED BY ARTICLES 6(1) AND 7(1) UCTD

### 5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of equivalence and effectiveness in general

#### Article 6

1. 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.

[...]

#### Article 7

1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

[...]

#### Article 47 of the Charter of Fundamental Rights

##### *Right to an effective remedy and to a fair trial*

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

[...]

<sup>(331)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutierrez Naranjo*, paragraphs 67-69.

<sup>(332)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutierrez Naranjo*, paragraphs 70-71. The Court clearly distinguishes such temporal limitation from reasonable limitation periods for bringing proceedings laid down in national law.

<sup>(333)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutierrez Naranjo*. The quoted passage is from the operative part.

<sup>(334)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutierrez Naranjo*, paragraph 70, referring to Case 309/85, *Barra and Others*, paragraph 13.

<sup>(335)</sup> Case C-92/11 *RWE Vertrieb*, paragraph 58 with references to previous case law.

<sup>(336)</sup> Case C-92/11 *RWE Vertrieb*, paragraph 59 with references to previous case law.

Articles 6(1) and 7(1) are the provisions of the UCTD laying down in which way consumers are to be protected against unfair contract terms and complement each other <sup>(337)</sup>.

The implications of the non-binding nature of unfair contract terms for the rights and obligations of the parties are presented in Section 4 above. This section discusses the implications of Article 6(1), in conjunction with Article 7(1) and the principles of *equivalence* and *effectiveness*, for the rules of procedure and the powers and obligations of national courts.

Article 7(1) UCTD reflects, with particular regard to unfair contract terms, the general right to an effective remedy against the violation of rights and freedoms guaranteed by EU law enshrined in Article 47 of the Charter of Fundamental Rights of the EU <sup>(338)</sup>.

While Articles 6(1) and 7(1) do not contain any specific rules of procedure, their objectives can be accomplished only if national rules of procedure contribute to their achievement and do not raise unjustified obstacles for consumers in order to rely on the protection afforded to them by the UCTD.

In the absence of harmonisation of the rules of procedure in an instrument of EU law, the Court has stressed the *procedural autonomy* of the Member States <sup>(339)</sup>, but also their responsibility for ensuring that rights deriving from EU law are effectively protected <sup>(340)</sup>. The Court has established that, insofar as the Member States' rules of procedure affect the application of rights laid down in EU law, such rules have to comply with the principles of *equivalence* and *effectiveness* <sup>(341)</sup>. It has referred to those principles as the embodiment of the general obligation of the Member States to ensure judicial protection of an individual's rights under EU law <sup>(342)</sup>.

**Equivalence** means that the procedural rules for safeguarding rights deriving from EU law must not be less favourable than those applying to the protection of similar rights under domestic law <sup>(343)</sup> or governing similar domestic actions <sup>(344)</sup>.

**Effectiveness** implies that the national rules of procedure may not make it virtually or in practice <sup>(345)</sup> impossible or excessively difficult for citizens, including consumers, to exercise rights under EU law <sup>(346)</sup>.

The Court has described the meaning of *equivalence* and *effectiveness* as follows <sup>(347)</sup>:

'In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law [...].'

The Court has developed these principles further with regard to consumer law and especially the UCTD, drawing from them a number of specific procedural requirements in order to ensure that consumers are effectively protected against unfair contract terms also in the reality of court proceedings.

<sup>(337)</sup> E.g. Joined Cases C-154/15, C-307/15 and C-308/15 *Gutierrez Naranjo*, paragraphs 53-56.

<sup>(338)</sup> Case C-176/17 *Profi Credit Polska*, paragraph 59. The Court has also explained that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and confirmed by Article 47 of the Charter, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini*, paragraph 61.

<sup>(339)</sup> E.g. Case C-49/14 *Finanmadrid*, paragraph 40; Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial*; Case C-168/05 *Mostaza Claro*; Case C-40/08 *Asturcom Telecomunicaciones*. Recently, Case C-618/10 *Banco Español de Crédito*; Case C-137/08 *VB Pénzügyi Lízing*; and Case C-453/10 *Pereničová and Perenič*.

<sup>(340)</sup> Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini*, paragraph 61.

<sup>(341)</sup> Joined Cases C-430/93 and 431/93 *Van Schijndel*; Case C-432/05 *Unibet (London) Ltd. and Unibert (International) Ltd.*; Case C-126/97 *Eco-Swiss China Time Ltd*; Case C-49/14 *Finanmadrid*, paragraph 40.

<sup>(342)</sup> Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini*, paragraph 49.

<sup>(343)</sup> Case C-377/14 *Radlinger and Radlingerová*, paragraph 48; Case C-49/14 *Finanmadrid*, paragraph 40; Case C-169/14 *Sánchez Morcillo and Abril García*, paragraph 31 and the case law cited.

<sup>(344)</sup> Case C-567/13 *Nóra Baczó*, paragraphs 42-47.

<sup>(345)</sup> Both terms can be found in the Court's case law.

<sup>(346)</sup> Case C-49/14 *Finanmadrid*, paragraph 40; Case C-196/14 *Sánchez Morcillo and Abril García*, paragraph 31 and the case law cited.

<sup>(347)</sup> Joined Cases C-430/93 and 431/93 *Van Schijndel*, paragraph 17.

Depending on the circumstances of the case and the questions raised by the referring courts, the Court has based those requirements on:

- the *effectiveness* <sup>(348)</sup> of the non-binding nature of unfair contract terms under Article 6(1) UCTD,
- the requirement of adequate and effective means to prevent the continued use of unfair contract terms under Article 7(1) UCTD <sup>(349)</sup>,
- the fundamental right to an effective remedy according to Article 47 of the Charter <sup>(350)</sup>,
- as well as, depending on the applicable national law, the principle of *equivalence* <sup>(351)</sup>.

The Court refers to Article 7(1), sometimes supported by Article 47 of the Charter, and *effectiveness* almost interchangeably as a legal source for guarantees related to the effectiveness of the procedural protection against unfair contract terms <sup>(352)</sup>.

The procedural requirements relate to the remedies and procedural rights available to consumers, on the one hand, and duties of national courts, on the other hand. Essentially they include the principles that

- consumers must have effective remedies to raise the unfairness of relevant contract terms and
- that national courts are obliged to assess the unfairness of contract terms of their own motion (*ex officio*).

The Court has further developed these procedural guarantees in light of specific types of procedure and procedural situations, such as ordinary civil proceedings <sup>(353)</sup>, appeal procedures <sup>(354)</sup>, judgments in default <sup>(355)</sup>, actions for the annulment of an arbitration award <sup>(356)</sup>, enforcement of an arbitration award <sup>(357)</sup>, injunctions <sup>(358)</sup>, different kinds of payment order procedures <sup>(359)</sup>, mortgage enforcement procedures <sup>(360)</sup>, voluntary auctions <sup>(361)</sup>, and insolvency procedures <sup>(362)</sup>. The Court has also been requested to consider the relationship between Regulation (EC) No 1896/2006 <sup>(363)</sup> creating a European order for payment procedure and the procedural guarantees under the UCTD <sup>(364)</sup>.

While most preliminary rulings concerned cases where consumers were in the position of the defendant or debtor <sup>(365)</sup>, the Court has applied these principles also to proceedings where the consumer requested to declare a contract term invalid.

<sup>(348)</sup> The Court applies *effectiveness* of the protection under the UCTD as a standard for the assessment of procedural constraints as well as a positive requirement underlying, in particular, *ex officio* control, e.g. Case C-176/17 *Profi Credit Polska*, paragraph 44; Case C-49/14 *Finanmadrid*, paragraph 4. See also Case C-497/13 *Froukje Faber*, paragraphs 42-47 concerning Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12).

<sup>(349)</sup> E.g. Case C-176/17 *Profi Credit Polska*.

<sup>(350)</sup> E.g. Case C-176/17 *Profi Credit Polska*.

<sup>(351)</sup> E.g. Case C-40/08 *Asturcom Telecomunicaciones*, Case C-76/10 *Pohotovost'* and Case C-488/11 *Asbeek Brusse*.

<sup>(352)</sup> For instance, in Case C-176/17 *Profi Credit Polska* the Court refers to Article 7(1) whereas in Case C-618/10 *Banco Español de Crédito* the Court relies on effectiveness.

<sup>(353)</sup> Case C-32/12 *Duarte Hueros*, Case C-497/13 *Froukje Faber*, both concerning Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12).

<sup>(354)</sup> Cases C-488/11 *Asbeek Brusse* and C-397/11 *Erika Jörös*.

<sup>(355)</sup> Where the defendant did not appear in Court; Case C-147/16 *Karel de Grote*, paragraphs 24-37.

<sup>(356)</sup> Case C-168/05 *Mostaza Claro*.

<sup>(357)</sup> Cases C-168/05 *Mostaza Clara*, C-40/08, *Asturcom Telecomunicaciones*, C-76/10, *Pohotovost'* and C-168/15 *Tomášová*.

<sup>(358)</sup> Case C-472/10 *Invitel*.

<sup>(359)</sup> Case C-243/08 *Pannon GSM*, Case C-137/08 *VB Pénzügyi Lízing*, Case C-618/10 *Banco Español de Crédito*, Case C-49/14 *Finanmadrid*; Case C-176/17 *Profi Credit Polska*; Case C-632/17 *PKO*.

<sup>(360)</sup> E.g. Case C-415/11 *Mohammed Aziz*; Case C-169/14 *Sanchez Morcillo*; Case C-32/14 *Erste Bank Hungary*; Case C-421/14 *Banco Primus* etc.

<sup>(361)</sup> Case C-34/13 *Kušionová*.

<sup>(362)</sup> Case C-377/14 *Radlinger Radlingerová*.

<sup>(363)</sup> OJ L 399, 30.12.2006, p. 1.

<sup>(364)</sup> Joined Cases C-453/18 and C-494/18 *Bondora* (pending on 31 May 2019).

<sup>(365)</sup> Including where they had to bring remedies against enforcement requested by a seller or supplier.

Although the context and the specificities of each type of procedure have to be taken into account when assessing the compatibility of specific provisions with the UCTD, **the standards and tests developed by the Court apply to all types of procedure.**

The Court has emphasised repeatedly <sup>(366)</sup>, that procedures which give creditors the possibility of a more expedient enforcement of their claims based on titles other than judgments obtained in declaratory proceedings and which entail no or only limited substantive checks by national courts, must not deprive consumers of their right to proper protection against unfair contract terms. This means that **the specific type of procedure which a seller of supplier chooses, or which otherwise applies, cannot reduce the fundamental procedural guarantees required by the UCTD for the benefit of consumers.** In the words of the Court <sup>(367)</sup>:

‘[...] the specific characteristics of court proceedings cannot constitute a factor which is liable to affect the legal protection from which consumers must benefit under the provisions of Directive 93/13.’

At the same time, it is **necessary**, in connection with the *effectiveness* principle <sup>(368)</sup>, **to look at the national rules of procedure in their proper context and in their entirety.** The Court <sup>(369)</sup> has expressed this as follows:

‘43 [...] with regard to the principle of effectiveness, it should be noted that the Court has consistently held that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies [...]

44 In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings[...].’

This means that account has to be taken of the protection which national rules provide against unfair contract terms at different stages of the procedure, for instance in the phase before the issuing of a payment order and at the enforcement or opposition stage <sup>(370)</sup> or in connection with the remedies against mortgage enforcement based on a notarial deed <sup>(371)</sup>.

National courts are obliged to apply these procedural guarantees also where national provisions would otherwise prevent them from doing so, and must disregard case law of national supreme courts insofar as it is incompatible with the UCTD as interpreted by the Court <sup>(372)</sup>.

All procedural guarantees stemming from EU law apply to cases involving unfair contract terms, even if they are not specifically mentioned in this Notice. This includes the procedural rights mentioned in Article 47 of the Charter, including the right to a fair hearing <sup>(373)</sup> and the equality of arms <sup>(374)</sup>. The principle of effective judicial protection of consumers does not, in itself, afford consumers a right to a second level of jurisdiction <sup>(375)</sup> for the assessment of contract terms. However, such right may be based on Article 7(1) UCTD in conjunction with the principle of equality of arms, guaranteed under Article 47 of the Charter, where, in the same proceedings, sellers or suppliers have the right to appeal a decision regarding the unfairness of contract terms <sup>(376)</sup>.

<sup>(366)</sup> E.g. Case C-618/10 *Banco Español de Crédito*, paragraph 55; Case C-415/11 *Aziz*; Case C-76/10 *Pohotovost'* and Case C-77/14 *Radlinger Radlingerová*, paragraph 50.

<sup>(367)</sup> Case C-77/14 *Radlinger Radlingerová*, paragraph 50. The Court refers to the previous judgment in Case C-34/13 *Kušionová*, paragraphs 52 and 53 and further case-law cited therein.

<sup>(368)</sup> Or Article 7(1) UCTD.

<sup>(369)</sup> The quoted passages are from Case C-49/14 *Finanmadrid*, paragraphs 43 and 44. The same or similar wording can be found, for instance in Cases C-618/10 *Banco Español de Crédito*, paragraph 49, C-415/11 *Mohammed Aziz*, paragraph 5, C-8/14 *BBVA*, paragraph 26, C-377/14 *Radlinger Radlingerová*, paragraph 50, paragraphs 54 and 55.

<sup>(370)</sup> Case C-49/14 *Finanmadrid*; Case C-176/17 *Profi Credit Polska*; Case C-632/17 *PKO* and Case C-448/17 *EOS KSI Slovensko*.

<sup>(371)</sup> Cases C-415/11 *Aziz* and C-32/14 *ERSTE Bank Hungary*.

<sup>(372)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutierrez Naranjo*, paragraph 74, referring to previous case law. See also Case C-118/17 *Dunai*, paragraph 64.

<sup>(373)</sup> Case C-119/15 *Biuro prodróży 'Partner'*.

<sup>(374)</sup> Case C-169/14 *Sanchez Morcillo*, paragraphs 44-51.

<sup>(375)</sup> Case C-169/14 *Sanchez Morcillo*, paragraph 36.

<sup>(376)</sup> Case C-169/14 *Sanchez Morcillo*, paragraphs 44-51.

## 5.2. The principle of *ex officio* control of unfair contract terms<sup>(377)</sup>

### 5.2.1. Link to Articles 6(1) and 7(1)

In order to compensate for the structurally weaker position of consumers, who may not be aware of their rights and may, therefore, not raise the unfairness of contract terms, national courts, as a neutral instance, play an active role in proceedings involving unfair contract terms. Since its ruling of 4 June 2009<sup>(378)</sup>, the Court has consistently held that **national courts are under an obligation to assess unfair contract terms of their own motion** (*ex officio*), i.e. even if the unfairness of contract terms is not raised by the consumer:

‘1. Article 6(1) of Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand.

2. The national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application. That duty is also incumbent on the national court when it is ascertaining its own territorial jurisdiction.’

The Court has repeatedly confirmed this requirement<sup>(379)</sup>:

‘[...] the Court has stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task [...]’<sup>(380)</sup>.

*Ex officio* control aims to achieve the result sought by Article 6(1) in individual cases and contributes to the objective of Article 7 as it may act as a deterrent to the use of unfair contract terms at large<sup>(381)</sup>. The obligation of *ex officio* control applies *a fortiori* where a consumer, in substance, challenges the validity or fairness of the contract without, however, referring specifically to the legal provisions on unfair contract terms<sup>(382)</sup>.

### 5.2.2. Relationship with principles of civil procedure

Across the Member States, the guiding principle in civil proceedings<sup>(383)</sup> is party disposition (or party autonomy). This usually implies that it is in the sole discretion of the parties to define the subject matter and extent of the proceedings so that the judge cannot grant a claim that has not been made (*ultra petita*) or to grant more than was claimed (*extra petita*). It is also widely accepted that it is primarily the responsibility of the parties to present the facts relied on in order to substantiate their requests as well as to submit the necessary evidence. In general, each party will bear the burden of proof for the facts supporting their submission, unless there are specific provisions shifting or alleviating the burden of proof for certain questions.

It is generally recognised that, while the parties have to provide the facts, it is for the court to make the necessary legal qualifications<sup>(384)</sup>, which is expressed in the principles *da mihi factum dabo tibi jus* and *iura novit curia*. It is also normal that courts have to consider certain imperative rules, often referred to as matters of public policy, of their own motion, i.e. without having to be prompted by the parties.

<sup>(377)</sup> More detailed implications of the *ex officio* principle are presented in the sub-sections below.

<sup>(378)</sup> Case C-243/08 *Pannon GSM*, operative part. Under earlier case law, starting in Joined Cases C-240/98-244/98 *Océano Grupo Editorial* and confirmed in several subsequent rulings, the Court required that national courts had to have the power to examine unfair contract terms of their own motion. This development in the case law of the Court is explained in Case C-168/15 *Milena Tomášová*, paragraphs 28-31.

<sup>(379)</sup> E.g. Case C-421/14 *Banco Primus*, paragraph 43, quoted here.

<sup>(380)</sup> References to Cases C-415/11 *Aziz*, paragraph 46 and the case law cited, and C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo and Others*, paragraph 58.

<sup>(381)</sup> Case C-168/05 *Mostaza Claro*, paragraphs 27 and 28; Case C-473/00 *Cofidis*, paragraph 32; Case C-240/98 *Océano Grupo Editorial*, paragraph 28.

<sup>(382)</sup> Case C-397/11 *Erika Jöros*, paragraphs 30, 35 and 36.

<sup>(383)</sup> An overview of the guiding principles in the Member States, including implications for consumer cases, can be found in Chapter 3 of the Evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, JUST/2014/RCON/PR/CIVI/0082 — Strand 2 Procedural Protection of Consumers.

<sup>(384)</sup> See also Case C-497/13 *Froukje Faber*, paragraph 38.

Within this general framework, there are differences between the Member States regarding the extent to which the courts may or are obliged to adopt a more active role in the proceedings<sup>(385)</sup>, including a more inquisitorial or investigative role, for instance by asking questions, giving hints or feedback, but also regarding the taking of evidence.

*Ex officio* control of the unfairness of contract terms is fundamentally the procedural consequence of the fact that the unfairness of contract terms and their non-binding nature are mandatory rules of public policy which apply *ex jure* and which are legal aspects that, therefore, do not depend on any party invoking it. *Ex officio* control of unfair contract terms is, therefore, not in conflict with the fundamental principles of civil proceedings such as party disposition. Nevertheless, specific national provisions may make *ex officio* control difficult or impossible. For further details on such instances, see Sections 5.4, 5.5 and 5.6.

### 5.2.3. *Ex officio* control and total passivity on the part of the consumer

Consumers are generally expected to use available remedies and not to stay completely passive in order to benefit from protection under the UCTD. The Court has acknowledged that the *effectiveness* principle cannot be stretched so far as to require a national court to make up fully for a consumer's total inertia<sup>(386)</sup> in cases where they can bring effective remedies under reasonable conditions<sup>(387)</sup>. Accordingly, the mere fact that a consumer may have to bring court proceedings and use remedies in order to obtain protection against unfair contract terms is *not automatically* contrary to the principle of effectiveness<sup>(388)</sup>. At the same time, the Court's case law implies that national courts have to assess the unfairness of contract terms of their own motion even where consumers stayed completely passive, where such intervention is required by the *equivalence* principle, as discussed in Section 5.3, or by Article 7(1) or the effectiveness principle, as discussed in Section 5.4.

## 5.3. Obligations stemming from the principle of equivalence

### 5.3.1. *Ex officio* control of unfair contract terms

Under the principle of *equivalence*<sup>(389)</sup>, national courts or tribunals are obliged to consider binding rules of EU law of their own motion in all cases where domestic law obliges them or gives them at least the power or discretion to raise points of law based on binding domestic rules of their own motion. As stated above, the non-binding character of unfair contract terms set out in Article 6(1) and all the provisions of the UCTD essential for attaining this objective must be treated as *equivalent* to public policy considerations recognised under the law of the Member States. This status will apply to all provisions of the UCTD that are relevant when assessing the unfairness of a contract term and drawing the consequences from this finding.

The Court<sup>(390)</sup> has explained this in the following way,

'44 [...] in view of the nature and importance of the public interest underlying the protection which the directive confers on consumers, Article 6 thereof must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy[...]. It must be held that that classification extends to all the provisions of the directive which are essential for the purpose of attaining the objective pursued by Article 6 thereof.

<sup>(385)</sup> A more active role of judges may also depend also on factors such as whether one party is identified as the weaker party, e.g. a consumer, or on whether a party is represented, in particular by a lawyer.

<sup>(386)</sup> C-40/08 *Asturcom Telecomunicaciones*, paragraph 47. See also Case C-137/08 *VB Pénzügyi Lízing*, paragraph 56; Case C-415/11 *Aziz*, paragraph 47; Case C-472/11 *Banif Plus Bank*, paragraph 24.

<sup>(387)</sup> C-40/08 *Asturcom Telecomunicaciones*, paragraphs 41-46. In the case at issue the consumer had neither participated in the arbitration proceedings initiated against her by the trader nor brought an action for annulment of the arbitration award within two months. However, in this case, the Court considered that there was an obligation for the national courts to assess the compliance of the arbitration award with the UCTD based on the equivalence principle.

<sup>(388)</sup> Case C-32/14 *ERSTE Bank Hungary*, paragraph 63.

<sup>(389)</sup> The *ex officio* obligations based on the equivalence principle are explained, for instance, in Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen*, paragraphs 13 and 14, with reference to previous case law:

'13 Where, by virtue of domestic law, courts or tribunals must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned (see, in particular, the judgment in Case 33/76 *Rewe v Landwirtschaftskammer für das Saarland*, paragraph 5).

14 The position is the same if domestic law confers on courts and tribunals a discretion to apply of their own motion binding rules of law. Indeed, pursuant to the principle of cooperation laid down in Article 5 of the Treaty, it is for national courts to ensure the legal protection which persons derive from the direct effect of provisions of Community law (see, in particular, the judgment in Case C-213/89 *Factortame and Others*, paragraph 19).'

<sup>(390)</sup> E.g. Case C-488/11 *Asbeek Brusse*, paragraphs 44-46, quoted here. In this ruling the Court also referred to Cases C-40/08 *Asturcom Telecomunicaciones*, paragraphs 52 and 54, C-76/10 *Pohotovost*, paragraph 5.

45 It follows that, where the national court has the power, under internal procedural rules, to examine of its own motion the validity of a legal measure in the light of national rules of public policy, [...], it must also exercise that power for the purposes of assessing of its own motion, in the light of the criteria laid down in the directive, whether a contractual term coming within the scope of that directive may be unfair.

46 The national court is also under such an obligation where, under the domestic legal system, it merely has a discretion to consider of its own motion whether such a term is in conflict with national rules of public policy [...].'

Therefore, national courts have to assess the unfairness of relevant contract terms of their own motion whenever national law obliges them or gives them the possibility to check *ex officio* compliance with *any public policy considerations* mentioned in the relevant national provisions, including, for instance, legal prohibitions, basic morality<sup>(391)</sup>, or public policy in general<sup>(392)</sup>. In this respect, the Court<sup>(393)</sup> has stated, for instance, that,

'where the court seised with a view to the enforcement of an arbitration award may, of its own motion, discontinue the application of that arbitration award where that award imposes on the party concerned an objectively impossible payment, prohibited by law or contrary to basic morality, that court must, where it has available to it the legal and factual elements necessary for that task, examine, of its own motion, within the context of the enforcement proceedings, also whether a penalty<sup>(394)</sup> laid down by a credit contract or an arbitration clause<sup>(395)</sup> is unfair.'

The obligation of *ex officio* control based on the *equivalence* principle applies to all types and stages of the procedure, including judgments in default<sup>(396)</sup>, appeal proceedings<sup>(397)</sup>, or enforcement proceedings<sup>(398)</sup> whenever national law empowers national judges to examine compliance with rules of public policy.

Therefore, **national courts are obliged to apply the relevant national provisions on *ex officio* control *mutatis mutandis* in order to assess the unfairness of contract terms of their own motion**<sup>(399)</sup>.

Unlike under the *effectiveness* principle, this obligation is independent of any further assessment as to whether, without such *ex officio* control, there is no effective protection against unfair contract terms.

### 5.3.2. Other obligations based on the principle of equivalence

The principle of *equivalence* applies likewise to other procedural rules. For instance, the Court<sup>(400)</sup> has ruled that less advantageous rules for the intervention of consumer associations in relation to an objection to a payment order based on the unfairness of contract terms as compared to the rules applying to disputes concerning exclusively national law would infringe the *equivalence* principle.

The same must apply to any time-limits, rights to be heard, conditions for interim measures, rights to object or appeal and indeed all other procedural arrangements.

## 5.4. *Ex officio* assessment and the effectiveness of remedies

### 5.4.1. The applicable test

Under Article 7(1) UCTD or the *effectiveness* principle<sup>(401)</sup>, national law has to provide remedies which allow consumers to invoke the unfairness of contract terms, and those remedies have to be effective. This implies that consumers must be able to bring such remedies *under reasonable conditions*, meaning that there must not be requirements or limitations which make it *practically impossible or excessively difficult* for them to obtain the required protection. Moreover, consumers may be prevented from using legal remedies not only by procedural obstacles, but also because of their *limited knowledge or information*.

<sup>(391)</sup> Case C-76/10 *Pohotovost*.

<sup>(392)</sup> Case C-147/16 *Karel de Grote*.

<sup>(393)</sup> Case C-76/10 *Pohotovost*.

<sup>(394)</sup> See in particular paragraph 53 of the order.

<sup>(395)</sup> See, in particular paragraph 51 of the order.

<sup>(396)</sup> Case C-147/16 *Karel de Grote*, paragraphs 24-37.

<sup>(397)</sup> Case C-397/11 *Erika Jöros*, paragraphs 30, 35, 36 and 38; Case C-488/11 *Asbeek Brusse*, paragraph 45.

<sup>(398)</sup> E.g. Case C-40/08 *Asturcom Telecomunicaciones*, Case C-76/10 *Pohotovost*, Case C-49/14 *Finanmadrid*

<sup>(399)</sup> Regarding the question of possible legislative adaptations, see Section 5.6.

<sup>(400)</sup> Case C-448/17 *EOS KSI Slovensko*, point 1 of the operative part.

<sup>(401)</sup> Case C-632/17 *PKO*, paragraph 43 and Case C-567/13 *Nóra Baczó*, paragraphs 52 and 59 are examples showing that the right to an effective remedy under Article 7(1) UCTD and Article 47 of the Charter have to be assessed under the same criteria as the principle of *effectiveness*.

Therefore, in order to establish whether there are effective remedies, the Court <sup>(402)</sup> applies the **overarching test** as to whether there is a **significant risk that consumers will not benefit from effective protection**

- either because specific procedural requirements or limitations make it excessively difficult (or even practically impossible) to bring any available remedies,
- **or**, alternatively, because consumers do not have the necessary knowledge of their rights or do not receive the necessary information in order to use the remedies effectively.

This test is reflected in several rulings, for instance, with regard to payment order proceedings <sup>(403)</sup>:

‘There is a **significant risk** that the consumers concerned will not lodge the objection required, be it because of the particularly short period prescribed for that purpose, or because they might be dissuaded from defending themselves in view of the costs which legal proceedings would entail in relation to the amount of the disputed debt, **or** because they are unaware of or do not appreciate the extent of their rights, or indeed because of the limited content of the application for the order for payment lodged by the seller or supplier, and thus the incomplete nature of the information available to them [...]’

As explained in Section 5.1, it is, in connection with *effectiveness*, necessary to consider the relevant rules of procedure in their entirety, taking into account its different stages <sup>(404)</sup>. Relevant factors for the assessment of effectiveness are discussed in Section 5.4.2 below.

Where there is a significant risk that consumers may not object to a payment order, the Court established that **national courts must assess the unfairness of contract terms of their own motion at some stage of the procedure and at the latest before the enforcement is carried out against a consumer** <sup>(405)</sup>. In the words of the Court <sup>(406)</sup>,

‘Indeed, effective protection of the rights conferred on the consumer by Directive 93/13 can be guaranteed only if the national procedural system allows the court, during the order for payment proceedings or the enforcement proceedings concerning an order for payment, to check of its own motion whether terms of the contract concerned are unfair [...]’

That means that,

- where there is a significant risk that the consumer will not use remedies against a payment order, the court is obliged to assess the unfairness of relevant contract terms of its own motion *before* issuing the payment order <sup>(407)</sup>.

On the other hand,

- where *ex officio* control did not take place before the order is granted, it has to be carried out, as a last resort, at the enforcement stage <sup>(408)</sup>.

<sup>(402)</sup> Case C-618/10 *Banco Español de Crédito*, in particular, paragraphs 52-54; Case C-176/17 *Profi Credit Polska*, paragraphs 61-72.

<sup>(403)</sup> Case C-176/17 *Profi Credit Polska*, paragraph 69. Other references include Case C-49/14 *Finanmadrid*, paragraph 52; Case C-122/14 *Aktiv Kapital Portfolio*, paragraph 37 and Case C-618/10 *Banco Español de Crédito*, paragraph 54.

<sup>(404)</sup> E.g. Case C-49/14 *Finanmadrid*, paragraphs 43 and 44, with reference *inter alia* to Case C-618/10 *Banco Español de Crédito*, paragraph 49 and Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León*, paragraph 34, and Case C-470/12 *Pohotovost*, paragraph 51.

<sup>(405)</sup> Case C-176/17 *Profi Credit Polska*, paragraphs 44, 61-64 and 71; Case C-49/14 *Finanmadrid*, paragraphs 45 and 46; Case C-122/14 *Aktiv Kapital Portfolio*, paragraph 30; Case C-448/17 *EOS KSI Slovensko*, paragraphs 45, 46 and 49; and Case C-632/17 *PKO*, paragraph 49. All those cases concerned payment order procedures and are based on Case C-618/10 *Banco Español de Crédito*.

<sup>(406)</sup> Case C-176/17 *Profi Credit Polska*, paragraph 44.

<sup>(407)</sup> Case C-618/10 *Banco Español de Crédito*, paragraph 57, Case C-176/17 *Profi Credit Polska*, paragraph 44 and Case C-632/17 *PKO*, paragraph 49.

<sup>(408)</sup> Case C-49/14 *Finanmadrid*. In his conclusions, AG Szpunar referred to the *ex officio* examination at the enforcement stage as ‘the last resort’.



Similarly,

- if the checks carried out at an earlier stage of the procedure did not cover all relevant contract terms, national courts are obliged to assess other relevant contract terms including of their own motion even if the earlier checks were completed with a decision that has the effect of *res judicata* under the national rules of procedure<sup>(409)</sup>.

The Court<sup>(410)</sup>, has also specified that the fact that the unfairness of contract terms is assessed by a *court official below the status of magistrate* before a payment order is issued does not provide the required protection. This means that, if there is a significant risk that a consumer will not lodge an objection, a *judge* still has to assess the unfairness of contract terms, if necessary of their own motion, and, at the latest, at the stage of enforcement.

Regarding specifically mortgage enforcement, the Court<sup>(411)</sup> considered it acceptable, in principle, that enforcement proceedings can be initiated based on a notarial deed without *prior judicial ex officio* control of unfair contract terms. However, this is compatible with the UCTD only insofar as consumers can take legal action against such enforcement under reasonable conditions, including the availability of interim measures, and if *ex officio* control of the unfairness of contract terms is guaranteed in the ensuing declaratory proceedings.

Therefore, mortgage enforcement based on a notarial deed is not compatible with the UCTD if no effective remedies are available to consumers or if there is a significant risk that consumers will not use them. There are no effective remedies, for instance, where consumers cannot object to the enforcement based on the unfairness of contract terms in the enforcement proceedings, whereas in declaratory proceedings in which the unfairness of contract terms can be assessed they cannot obtain the suspension of the enforcement proceedings<sup>(412)</sup>.

The logic of these principles must apply *mutatis mutandis* to all types of procedure<sup>(413)</sup>.

#### 5.4.2. Relevant factors for the effectiveness of remedies

When assessing the *effectiveness* of remedies the specificities of the procedure in question will have to be taken into account. Furthermore, the impact that particular obstacles may have on the ability of consumers to bring remedies or the effect that limited knowledge and information may have in this respect, should take into account the perspective of more vulnerable consumers. Such consumers may be particularly reluctant to use available remedies even where the contract terms used against them are clearly unfair<sup>(414)</sup>.

The following **factors** are **alternative**. This means that ineffectiveness of the remedy can be caused either by a single requirement, for instance high or discriminatory court fees<sup>(415)</sup>, or by a combination of different requirements, e.g. a short time-limit combined with the need to take a lawyer<sup>(416)</sup> or the need to make detailed submissions<sup>(417)</sup>. While most of the aspects referred to below concern procedural law, it is immaterial, in this context, whether a given factor is qualified as a matter of procedural or substantive law<sup>(418)</sup> in the relevant Member State. The list below is not exhaustive but reflects the most common examples stemming from the case law of the Court.

<sup>(409)</sup> Case C-421/14 *Banco Primus*, point 2 of the operative part and paragraph 52. While this case relates to mortgage enforcement, the same logic must apply to other types of procedures. The assessment of rules on *res judicata* under the effectiveness principles, including with regard to *ex officio* control is discussed specifically under point 5.4.2, where inter alia paragraph 52 of *Banco Primus* is quoted.

<sup>(410)</sup> Case C-448/17 *EOS KSI Slovensko*, in particular paragraphs 49-54.

<sup>(411)</sup> Case C-32/14 *ERSTE Bank Hungary*, paragraph 65 and operative part.

<sup>(412)</sup> Case C-415/11 *Aziz*, point 1 of the operative part and paragraphs 43-64.

<sup>(413)</sup> Case C-618/10 *Banco Español de Crédito*, paragraph 55; Case C-415/11 *Aziz*; Case C-76/10 *Pohotovost'* and Case C-77/14 *Radlinger Radlingerová*, paragraph 50.

<sup>(414)</sup> E.g. Case C-76/10 *Pohotovost'* and Case C-168/15 *Milena Tomášová*.

<sup>(415)</sup> Case C-176/17 *Profi Credit Polska*, paragraphs 67 and 68.

<sup>(416)</sup> Case C-618/10 *Banco Español de Crédito*, paragraph 52.

<sup>(417)</sup> For instance if the consumer immediately has to set out the complaints against the challenged act, e.g. a court order, and adduce facts and evidence, Case C-176/17 *Profi Credit Polska*, paragraphs 65 and 66.

<sup>(418)</sup> This can be debatable, for instance, with regard to limitation periods.

## Rules on jurisdiction

The Court has stated that the right to an effective remedy applies to the rules of jurisdiction as well as to the rules of procedure<sup>(419)</sup>. While Regulation (EU) No 1215/2012<sup>(420)</sup> on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters contains protective rules for consumers in relation to cross-border proceedings<sup>(421)</sup>, a similar protection may not exist under national rules on jurisdiction in domestic cases. Jurisdiction rules, directly or indirectly<sup>(422)</sup>, obliging consumers to bring their cases or defend themselves in courts that are some distance away from their place of residence may discourage consumers from using remedies, in particular insofar as physical presence is required in the proceedings at issue<sup>(423)</sup>. Here national courts have to examine whether the distance to the court generates overly high travel costs for the consumer such as to deter him/her from entering an appearance in the proceedings brought against him/her<sup>(424)</sup>.

However, the fact that a certain case has to be heard not by the local court, but by a higher level court, which is further away and may require higher fees does not automatically imply an infringement of Article 7(1) UCTD<sup>(425)</sup>. Furthermore, consumer organisations bringing collective proceedings are not in the same position as individual consumers regarding jurisdiction rules<sup>(426)</sup>.

## Time limits

According to settled case law, it is compatible with EU law to lay down 'reasonable' time-limits for bringing proceedings in the interests of legal certainty<sup>(427)</sup>. Reasonable time-limits are not in themselves liable to make it virtually impossible or excessively difficult to exercise rights conferred by EU law<sup>(428)</sup>.

Short time-limits can be problematic already because of the little time they give to consumers to consider their options, which may often involve a legal assessment, including the need to seek legal advice. So far, the Court has considered the length of time-limits on a case-by-case basis and mainly in conjunction with other circumstances, so that there is *no absolute scale as to what time-limits are reasonable and which ones are not*.

Thus, the Court has considered a two-month time-limit to challenge an arbitration award following its notification to be reasonable<sup>(429)</sup>. In contrast, it<sup>(430)</sup> considered a 20-day time-limit to object to a payment order as 'particularly short', but also took into account the obligation to be represented by a lawyer and the associated fees, which may dissuade consumers from defending themselves.

In relation to extrajudicial enforcement of a lien<sup>(431)</sup>, the Court took into account that a sale by auction could be contested within 30 days of the notice of enforcement of the charge and that consumers had a period of three months following the public auction to take steps. Furthermore, interim measures were available to suspend or terminate the enforcement during the substantive assessment. On that basis, the Court concluded that the legislation in question did not make it excessively difficult for consumers to rely on protection under the UCTD.

<sup>(419)</sup> Case C-632/17 *PKO*, paragraph 45.

<sup>(420)</sup> OJ L 351, 20.12.2012, p. 1; the Regulation has repealed Council Regulation (EC) No 44/2001 (OJ L 12, 16.1.2001, p. 1).

<sup>(421)</sup> Pursuant to Article 17(3) of Regulation (EU) No 1215/2012 (OJ L 351, 20.12.2012, p. 1), these rules are not applicable to contracts of transport other than contracts which, for an inclusive price, provide for a combination of travel and accommodation. Moreover, Articles 19 and 25 of Regulation (EU) No 1215/2012 allow the parties to a contract to derogate in certain cases from the rules on jurisdiction. The Court has been requested to provide interpretation in this respect in Case C-629/18 *EN, FM, GL v Ryanair* (pending on 31 May 2019).

<sup>(422)</sup> For instance, by giving a seller or supplier the option of suing a consumer in a court other than a court of their place of residence.

<sup>(423)</sup> In Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial*, paragraph 21 the Court considered that such jurisdiction arrangements in non-negotiated contract terms satisfy all the criteria to be classed as unfair for the purposes of the UCTD.

<sup>(424)</sup> Case C-266/18 *Aqua Med*, paragraph 54, Case C-567/13 *Baczó and Viznyiczai*, C-567/13, paragraphs 49 to 59.

<sup>(425)</sup> Case C-567/13 *Baczó and Viznyiczai*, paragraphs 52-59.

<sup>(426)</sup> Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León*.

<sup>(427)</sup> Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral*, paragraph 5; Case C-261/95 *Palmisani*, paragraph 28; and Case C-2/06 *Kempter*, paragraph 58; Case C-40/08 *Asturcom Telecomunicaciones*, paragraph 41.

<sup>(428)</sup> Case C-255/00 *Grundig Italiana*, paragraph 34; Case C-40/08 *Asturcom Telecomunicaciones*, paragraph 41.

<sup>(429)</sup> Case C-40/08 *Asturcom Telecomunicaciones*, paragraphs 44-46.

<sup>(430)</sup> Case C-618/10 *Banco Español de Crédito*, in particular paragraphs 52-54.

<sup>(431)</sup> Case C-34/13 *Kusionová*, in particular paragraph 55.

Concerning a transition arrangement for a new right to object to mortgage enforcement based on the unfairness of contract terms<sup>(432)</sup>, the Court<sup>(433)</sup> held that the four-week period for forming opposition in relation to pending proceedings was, in principle, reasonable and proportionate<sup>(434)</sup>. Nevertheless, the Court considered that the fact that the affected consumers were informed of this right only through the official journal of the Member State but not personally by the relevant court<sup>(435)</sup> created a significant risk that the time-limit would expire without the consumers' being able to exercise their rights, which infringed the effectiveness principle and thereby the UCTD<sup>(436)</sup>.

The Court has referred to a two-week time-limit to object to a payment order based on a promissory note as a 'brief period'<sup>(437)</sup>. It considered this period to be particularly problematic where the defendant has to organise his defence within these two weeks by submitting all his complaints and adducing facts and evidence.

The Court<sup>(438)</sup> also considered that a period of 15 days combined with the requirement to give reasons for an objection against a payment order may dissuade a consumer from using this remedy.

### Service

The fact that the measure or decision that may be challenged is served on the consumer before the time-limit starts to run provides at least a minimum guarantee that the consumer is informed about the existence of the relevant measure of decision<sup>(439)</sup>. The required standard of service may also be relevant when assessing the risk of consumers' not using available remedies, along with the information that is provided to consumers when the document is being served on them.

### Legal fees and obligation to take a lawyer

Court fees and fees for legal advice and representation can also be, on their own, a factor deterring consumers from using remedies. Important is not only the absolute amount, but also, for instance, the ratio with the value of the claim or their discriminatory character. Lawyers' fees will have to be taken into account where consumers are formally obliged to be represented by a lawyer or where there is, at least in practice, a need to take a lawyer.

Mechanisms aiming to compensate for the consumer's financial difficulties, such as legal aid, also have to be taken into account<sup>(440)</sup> and may at least reduce the impact of fees.

The Court<sup>(441)</sup> has considered that the obligation to be represented by a lawyer for cases exceeding a value of EUR 900 and the associated fees, as a factor which may dissuade consumers from defending themselves.

The Court<sup>(442)</sup> has found that a rule under which the defendant must pay three quarters of the court fees where he lodges an objection against an order for payment, to be in itself capable of deterring a consumer from lodging an objection.

### Need to justify the use of the remedy

The obligation to make substantial submissions regarding the legal and factual elements of the case, including evidence, when bringing a remedy, is liable to dissuade consumers from bringing a remedy, especially if this is linked to a short time-limit<sup>(443)</sup>. The same applies where consumers have to indicate reasons for using the remedy for objecting to a payment order within a period of 15 days<sup>(444)</sup>.

<sup>(432)</sup> Introduced following the Court's ruling in Case C-415/11 *Aziz*.

<sup>(433)</sup> Case C-8/14 *BBVA*.

<sup>(434)</sup> Case C-8/14 *BBVA*, paragraphs 30 and 31.

<sup>(435)</sup> Case C-8/14 *BBVA*, paragraphs 33-42 and operative part. The time-limit started to run from the day following the publication of the new law in the Official Journal.

<sup>(436)</sup> Case C-8/14 *BBVA*, paragraphs 40 and 41.

<sup>(437)</sup> Cases C-176/17 *Profi Credit Polska*, in particular paragraphs 65, 66 and 70. This case concerned payment order proceedings based on a promissory note. See also C-632/17 *PKO* concerning general payment order proceedings.

<sup>(438)</sup> Case C-448/17 *EOS KSI Slovensko*, in particular paragraphs 51-53.

<sup>(439)</sup> Case C-40/08 *Asturcom Telecomunicaciones*, paragraph 45, concerned the service of an arbitration award.

<sup>(440)</sup> Case C-567/13 *Nóra Baczó*, paragraph 55.

<sup>(441)</sup> Case C-618/10 *Banco Español de Crédito*, in particular paragraphs 52-54.

<sup>(442)</sup> Case C-176/17 *Profi Credit Polska*, in particular paragraphs 67 and 68.

<sup>(443)</sup> E.g. Case C-176/17 *Profi Credit Polska* and Case C-632/17 *PKO*.

<sup>(444)</sup> Case C-448/17 *EOS KSI Slovensko*.

Even if there is no formal obligation to take a lawyer, the need to justify the remedy may create the need to involve a lawyer, which, in light of the time needed and associated costs, as discussed above, may be an additional factor dissuading consumers from using the remedy.

#### Availability of interim measures

The Court<sup>(445)</sup> has repeatedly stressed the significance of the availability of interim measures in particular in order to halt or suspend enforcement against a consumer while the court is assessing the unfairness of relevant contract terms. Without interim measures, there is a risk that the protection against unfair contract terms comes too late and is, therefore, not effective. Interim relief is particularly important in relation to enforcement concerning the consumer's home<sup>(446)</sup>, involving evictions, but is relevant also for other enforcement measures. The Court<sup>(447)</sup> has summarised the legal position as follows:

'44 [...]the Court has also held that the legislation of a Member State does not comply with Directive 93/13 where, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, did not permit the court before which declaratory proceedings had been brought, which had jurisdiction to assess the unfairness of such a term, to grant interim relief, including, in particular, the staying of those enforcement proceedings [...]'<sup>(448)</sup>.

45 Finally, the Court has ruled as being contrary to Directive 93/13, national legislation which does not allow the court responsible for the enforcement, in mortgage enforcement proceedings, either to assess of its own motion or at the consumer's request, the unfairness of a term contained in the contract which gives rise to the debt claimed and which constitutes the basis of the right to enforcement, or to grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of the final decision of the court hearing the declaratory proceedings before which the consumer argues that that term is unfair[...]'<sup>(449)</sup>.

Interim measures can be essential not only to suspend enforcement against consumers, but also in cases where consumers take legal action to request a declaration of invalidity of certain contract terms<sup>(450)</sup>.

Article 7(1) may also require that national courts must have the *possibility to grant interim relief of their own motion*, where

- the grant of such relief is necessary in order to ensure the full effectiveness of a later judgment involving unfair contract terms
- and where there is a significant risk that consumers will not request interim measures<sup>(451)</sup>.

Finally, *not only the complete absence of interim measures may infringe the effectiveness of remedies, but also the fact that it is difficult for consumers to obtain interim relief* in light of, for instance, tight time-limits, submissions to be made or securities or evidence to be provided.

<sup>(445)</sup> E.g. Case C-415/11 *Aziz*; Case C-34/13 *Kušionová*; Case C-280/13 *Barclays Bank* and Case C-32/14 *ERSTE Bank Hungary*. The Court made general statements on the need for national courts to be able to adopt interim measures for the full effectiveness of court decisions concerning the protection of rights granted by EU law in Cases C-213/89 *Factortame and Others*, paragraph 21; Case C-226/99 *Siples*, paragraph 19; and Case C-432/05 *Unibet*, paragraph 67.

<sup>(446)</sup> E.g. Case C-34/13 *Kušionová*, paragraphs 63-66 with further references, inter alia, to case law of the European Court of Human Rights and Article 7 of the EU Charter of Fundamental Rights, encompassing the right to accommodation.

<sup>(447)</sup> Case C-32/14 *ERSTE Bank Hungary*, paragraphs 44 and 45.

<sup>(448)</sup> References to Cases C-415/11 *Aziz*, paragraph 64 and C-280/13 *Barclays Bank*, paragraph 36.

<sup>(449)</sup> Joined Cases C-537/12 and C-116/13 *Banco Popular Español and Banco de Valencia*, paragraph 60; and Case C-169/14, *Sánchez Morcillo and Abril García*, paragraph 28.

<sup>(450)</sup> Joined Cases C-568/14 to C-570/14 *Ismael Fernández Oliva*. This case concerned the possibility of obtaining interim relief individual proceedings while a collective legal action is pending.

<sup>(451)</sup> The Court established this requirement in connection with reimbursement claims based on the unfairness of contract terms and parallel collective legal proceedings which lead to the suspension of the individual action. Joined Case C-568/14 to C-570/14 *Ismael Fernández Oliva*, paragraphs 32-37. The significant risk was based on the fact that, in view of the conduct and complexities of the national procedure the consumers may have been unaware of their rights or may not have appreciated their extent. As it reflects a general principle, this requirement would appear to reply also in other procedural situations.

### Lack of knowledge and information

Consumers will often be unaware of their rights or may not appreciate the extent of their rights, or may find it difficult to assess the legal situation because of the limited information provided to them, for instance, in a payment order which they may oppose<sup>(452)</sup>. Lack of knowledge or limited information can create the risk that consumers will not use available remedies<sup>(453)</sup>. The Court confirmed<sup>(454)</sup> that the information provided to consumers in the decision that may be challenged or in connection with it is vital. This will include information on the fact that the act can be challenged, as well as on what grounds it can be challenged and in what form, and on the relevant time-limit. Furthermore, limited information on the substance of the claim may make it difficult for consumers to judge the chances of success when challenging certain acts, such as payment orders. It is not impossible either that, depending on its content, the information provided to consumers can dissuade consumers from using the available remedies.

So far, the Court<sup>(455)</sup> has given only a few indications as to how a significant risk that consumers will not bring remedies based on lack of knowledge or information can be established. In any event, the examination of this risk will have to take into account the typical situation of consumers, including vulnerable consumers, in the type of procedure in question.

### *Res judicata* and limitation periods in general

Like time-limits, limitation periods and the rules on the finality of decisions of courts or other bodies (*res judicata*) are linked to the principle of legal certainty. While both limitation periods and *res judicata* are legal obstacles for bringing proceedings, *res judicata* may also have the effect that a court is prevented from (re-)considering certain questions of substantive law, including at the appeal or enforcement stage, whether on the request of a party or of the court's own motion.

Despite the fact that *res judicata* and limitation periods may, in some circumstances, be at odds with 'material justice', the Court has recognised the value of legal certainty in the legal order of the Union and the Member States. On this basis, the Court<sup>(456)</sup> has confirmed that the *effectiveness* of consumer law does not, in principle, require setting aside the domestic rules on *res judicata* and reasonable time-limits, including limitation periods:

'68 [...] it is true that the Court has also recognised that consumer protection is not absolute. In particular, it has ruled to the effect that EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision, regardless of its nature, contained in Directive 93/13 [...]'<sup>(457)</sup>.

69 Likewise, the Court has previously held that in the interests of legal certainty it is compatible with EU law to lay down reasonable time-limits for bringing proceedings [...]'<sup>(458)</sup>.

70 Nevertheless, the application of a procedural rule, such as a reasonable limitation period, is to be distinguished from a temporal limitation of the effects of an interpretation of a rule of EU law. [...]

### — *Res judicata*

In light of these findings of the Court, the principle of *res judicata* will generally prevail in cases that have been completed by a final court decision which can no longer be challenged. This applies even if that decision infringed the UCTD and/or where the jurisprudence on the assessment of a specific type of contract term has changed.

<sup>(452)</sup> Case C-618/10 *Banco Español de Crédito*, paragraph 54.

<sup>(453)</sup> This follows already from the formula through which the Court defines the presence of a significant risk. Furthermore, the fact that unawareness or lack of appreciation of the extent of consumer or procedural rights can in itself justify *ex officio* intervention. The Court confirmed this in Joined Cases C-568/14 to C-570/14 *Ismael Fernández Oliva*, paragraph 33, when it stated that '[...], in view of the conduct and complexities of the national procedure in question in the main proceedings, [...], there is a not insignificant risk that the consumer concerned may not make such an application, even though the substantive conditions required under national law for the grant of interim relief may be satisfied, because he is unaware of or does not appreciate the extent of his rights.'

<sup>(454)</sup> Case C-8/14 *BBVA*, paragraphs 36-40.

<sup>(455)</sup> The Court considered a rather specific situation in Case C-8/14 *BBVA*, paragraphs 33-42.

<sup>(456)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo* paragraphs 68-70.

<sup>(457)</sup> Joined Cases C-537/12 and C-116/13 *Banco Popular Español and Banco de Valencia*, paragraph 60, and Case C-169/14 *Sánchez Morcillo and Abril García*, paragraph 28.

<sup>(458)</sup> Case C-40/08 *Asturcom Telecomunicaciones*, paragraph 41.

However, it is still necessary to examine whether the specific *res judicata* rule in question disproportionately or excessively limits remedies or prevents *ex officio* control in relation to the unfairness of contract terms.

As explained under Section 5.4.1, a national rule on *res judicata* **will not be compatible with the effectiveness principle where it prevents *ex officio* control of contract terms before a claim is enforced** against a consumer while there are no effective remedies or there is a significant risk that consumers will not use the available remedies<sup>(459)</sup>. Likewise, the Court<sup>(460)</sup> has ruled that, if a court has examined only some relevant contract terms, *res judicata* cannot prevent the assessment of additional contract terms at a later stage, whether at the consumer's request or of the court's own motion:

'Thus, in the case where, in a previous examination of a contract in dispute which led to the adoption of a decision which has become *res judicata*, the national court limited itself to examining of its own motion, with regard to Directive 93/13, one or certain terms of that contract, that directive requires a national court, [...], before which a consumer has properly lodged an objection to enforcement proceedings, to assess, at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose, the potential unfairness of other terms of that contract. In the absence of such a review, consumer protection would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13 [...]'<sup>(461)</sup>.

Furthermore, as discussed in Section 5.3.1, courts may be obliged to assess the unfairness of contract terms of their own motion under the *equivalence* principle<sup>(462)</sup> where national rules of procedure empower the courts to examine matters of public policy despite an otherwise applicable *res judicata* rule.

#### — *Limitation periods*

As stated above, the Court<sup>(463)</sup>, in principle, considers reasonable limitation periods to be acceptable in the interests of legal certainty, for instance, in relation to claims for reimbursement of overpaid amounts based on unfair contract terms. So far, the Court has not decided what would constitute a reasonable limitation period in that respect and has not ruled on its starting point. However, the Court has been asked to provide guidance on the latter aspect<sup>(464)</sup>.

A distinction has to be made between limitation periods laid down in law and the temporal limitation of the effects of a court's ruling on the unfairness of a contract term and the associated consequences<sup>(465)</sup>, such as the entitlement of consumers to reimbursement<sup>(466)</sup>, such temporal limitation being inadmissible<sup>(467)</sup>.

In any event, as stated in Section 4.2, the non-binding character of unfair contract terms cannot in itself be subject to limitation periods. This implies that consumers can always rely on this protection when confronted with claims from sellers or suppliers based on unfair contract terms, either by invoking unfairness themselves or by way of *ex officio* control, without being time-barred<sup>(468)</sup>. The same must apply to requests to declare contract terms unfair in individual proceedings or injunctions within the meaning of Article 7(2) UCTD.

<sup>(459)</sup> Case C-176/17 *Profi Credit Polska*, paragraphs 44, 61-64 and 71; Case C-49/14 *Finanmadrid*, paragraphs 45 and 46; Case C-122/14 *Aktiv Kapital Portfolio*, paragraph 30; Case C-448/17 *EOS KSI Slovensko*, paragraphs 45, 46 and 49; and Case C-632/17 *PKO*, paragraph 49. All those cases concerned payment order procedures and are based on Case C-618/10 *Banco Español de Crédito*.

<sup>(460)</sup> Case C-421/14 *Banco Primus*, paragraph 52, quoted here. In the case at issue the first examination had been done *ex officio*, but the rule would have to be the same if the first examination takes place at the consumer's request.

<sup>(461)</sup> Reference to Case C-415/11, *Aziz*, paragraph 60.

<sup>(462)</sup> Case C-421/14 *Banco Primus*, paragraph 47 in fine with a reference to Case C-40/08 *Asturcom Telecomunicaciones* paragraph 53; Case C-76/10 *Pohotovost*.

<sup>(463)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*, paragraph 69. However, in the case at issue, Spanish law did not provide for a limitation period for such claims.

<sup>(464)</sup> Cases C-698/18 *SC Raiffeisen Bank SA* and C-699/18 *BRD Groupe Société Générale SA* (pending on 31 May 2019).

<sup>(465)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*, paragraph 75.

<sup>(466)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*, paragraph 70 with references to previous rulings in other areas of law.

<sup>(467)</sup> See Section 4.4 with a quotation from the operative part of Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*.

<sup>(468)</sup> Case C-473/00 *Cofidis*, paragraph 38.

## 5.5. What does *ex officio* control imply?

### 5.5.1. Fundamental obligations

*Ex officio* control requires a pro-active intervention by national courts, independently of the parties' submissions <sup>(469)</sup>, both regarding

- the examination as to whether a relevant contract term is unfair and, therefore, non-binding, and
- the consequences to be drawn from a finding that the term in question is unfair in order to ensure that the consumer is not bound by that term.

National courts may apply unfair terms only if, exceptionally, a consumer, who has been informed of his rights, opposes the non-application of unfair contract terms <sup>(470)</sup>. The Court has stated that

'[t]he national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application. [...]' <sup>(471)</sup>.

The full effectiveness of the protection provided for by the directive requires the national court that has found of its own motion that a term is unfair to be able to establish all the consequences of that finding, without expecting the consumer, who has been fully informed of his rights, to submit a statement requesting that that term be declared invalid [...]' <sup>(472)</sup> <sup>(473)</sup>.

The obligation of *ex officio* control may also require judges to order interim measures of their own motion where this is necessary for the effectiveness of the remedy and where there is a significant risk that consumers may not apply for interim relief <sup>(474)</sup>.

Moreover, judges are obliged to inform the parties on the outcome of the *ex officio* assessment of a contract term and the conclusions to be drawn so that they can be heard on this question <sup>(475)</sup>.

### 5.5.2. Aspects to be examined

The duty for national courts to assess the unfairness of contract terms of their own motion requires that they examine all prerequisites for finding a term unfair <sup>(476)</sup>, including, insofar as the individual steps are necessary under the relevant national transposition, the questions of

- whether the contract terms falls with the scope of the Directive <sup>(477)</sup>, which requires that
  - there is a contract between a seller or supplier and a consumer <sup>(478)</sup>,
  - the term in question was not individually negotiated <sup>(479)</sup>,

<sup>(469)</sup> Case C-497/13 *Froukje Faber*, point 1 of the operative part and paragraphs 46-48; Case C-137/08 *VB Pénzügyi Lízing*, point 3 of the operative part and paragraphs 45-51; Case C-397/11 *Erika Jörös*.

<sup>(470)</sup> Case C-488/11 *Asbeek Brusse*, paragraph 49; Case C-618/10 *Banco Español de Crédito*, paragraph 63; Case C-472/11 *Banif Plus Bank*, paragraph 27. See also Sections 5.5.1 and 5.5.5.

<sup>(471)</sup> Case C-243/08 *Pannon GSM*, point 2 of the operative part.

<sup>(472)</sup> Reference to Case C-397/11 *Erika Jörös*, C-397/11, paragraph 42.

<sup>(473)</sup> Joined Cases C-154/15, C-307/15 and C-308/15 *Gutierrez Naranjo*, paragraph 59.

<sup>(474)</sup> See Joined Cases C-568/14 to C-570/14 *Ismael Fernández Oliva*.

<sup>(475)</sup> This is important with regard to consumers as well as sellers and suppliers, as follows for instance from Cases C-243/08 *Pannon GSM*, C-472/11 *Banif Plus Bank*, paragraphs 29-35, C-488/11 *Asbeek Brusse*, paragraph 52 and C-119/15 *Biuro podróży 'Partner'*, paragraphs 22-47. See also Section 5.5.4.

<sup>(476)</sup> Case C-137/08 *VB Pénzügyi Lízing*, paragraph 49 and the subsequent paragraphs. Regarding the substantive criteria to be taken into account please see Section 3.

<sup>(477)</sup> Case C-137/08 *VB Pénzügyi Lízing*, paragraphs 49-51. For questions relating to the scope of the UCTD, see Section 1.2.

<sup>(478)</sup> Case C-497/13 *Froukje Faber*, point one of the operative part and paragraphs 46-48. This ruling concerns Directive 1999/44/EC (OJ L 171, 7.7.1999, p. 12), but applies *mutatis mutandis* to the UCTD. Furthermore, in order to establish whether the terms in question falls within the scope of the UCTD, courts inevitably have to investigate whether there is a contract between a seller or supplier or a consumer.

<sup>(479)</sup> Case C-137/08 *VB Pénzügyi Lízing*, paragraphs 49-51. Courts have to take into account that Article 3(2) UCTD contains a specific rule on the burden of proof regarding the question of whether a pre-formulated contract term was negotiated individually or not.

- the term in question does not reflect mandatory rules within the meaning of Article 1 (2);
- whether or not the contract term is covered by Article 4(2) and if that is the case, whether it fulfils the transparency requirements;
- whether the contract term is unfair, i.e. whether, contrary to the requirement of good faith, it creates a significant imbalance in the rights and obligations of the parties to the detriment of the consumer, including a possible lack of transparency of the relevant terms, or, where appropriate, whether it corresponds to one of the terms contained in a black or grey list.

### 5.5.3. Availability of the necessary legal and factual elements

The main element for the assessment of the unfairness of contract terms is the contract with all its terms. However, as explained above, before the unfairness of a term is to be assessed other elements have to be considered, e.g. whether one party is a consumer, whether a term was negotiated individually, or whether a seller or supplier provided any necessary information to the consumer before the conclusion of the contract.

One problem may be that, in a given case, the national court may not have all necessary factual and legal elements in order to rule on the unfairness of a contract term. The Court acknowledges this when employing in many rulings formulations such as ‘where [the national court] has available to it the necessary legal and factual elements’<sup>(480)</sup>.

At the same time, the Court has made it clear that *ex officio* control implies a pro-active approach to obtain access to the elements necessary for the assessment of contract terms<sup>(481)</sup>, for instance when it used the term ‘investigate’ in relation to examining the prerequisites of Article 3(1) UCTD<sup>(482)</sup>:

‘[...], the Court has held that that national court **must investigate of its own motion whether a term in a contract concluded between a seller or supplier and a consumer falls within the scope of the Directive and**, if it does, assess of its own motion whether such a term is unfair [...]’<sup>(483)</sup>.

The Court<sup>(484)</sup> has also emphasised that national courts have to obtain the necessary clarifications for the question of whether one party is a consumer if there is at least some indication that this may be the case:

‘[...], the principle of effectiveness requires a national court before which a dispute relating to a contract which may be covered by that directive has been brought to determine whether the purchaser may be classified as a consumer, even if the purchaser has not expressly claimed to have that status, as soon as that court has at its disposal the matters of law and of fact that are necessary for that purpose **or may have them at its disposal simply by making a request for clarification.**’

Therefore, if there are indications that the relevant contract may be a consumer contract, a national court is under the obligation to investigate this issue even if the parties have not raised it. Such pro-active approach would indeed appear to be required by the mandatory character of Article 6(1).

<sup>(480)</sup> E.g. Case C-176/17 *Profi Credit Polska*, paragraph 42: ‘Against that background, it should, in the first place, be pointed out that, whilst, in accordance with settled case-law, a national court is bound to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair and by so doing to compensate for the imbalance existing between the consumer and the seller or supplier, that is so only if the national court has available to it the legal and factual elements necessary for that task’. In this paragraph the Court refers to Cases C-377/14 *Radlinger and Radlingerová*, paragraph 52 and the case-law cited there, and C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo and Others*, paragraph 58.

<sup>(481)</sup> Case C-497/13 *Froukje Faber*, point one of the operative part and paragraphs 46-48, Case C-137/08 *VB Pénzügyi Lízing*, point 3 of the operative part and paragraphs 45-51.

<sup>(482)</sup> The Court used this term in Case C-137/08 *VB Pénzügyi Lízing*, paragraph 56 and confirmed it in Case C-472/11 paragraph 24 which is quoted here.

<sup>(483)</sup> References to Cases C-137/08 *VB Pénzügyi Lízing*, paragraph 56, and C-618/10 *Banco Español de Crédito*, paragraph 44.

<sup>(484)</sup> Case C-497/13 *Froukje Faber* in particular, paragraphs 44 and 46. The quotation is from paragraph 46. Although this case concerned Directive 1999/44/EC (OJ L 171, 7.7.1999, p. 12), it addresses a horizontal question of consumer contract law and is applicable *mutatis mutandis* to the status of consumer under the UCTD.



Likewise, if there are indications that a claim may be based on contract terms which were not negotiated individually, but not all elements are immediately available to complete this examination, national courts will have to raise this question with the parties in order to obtain the necessary clarifications and evidence<sup>(485)</sup>. Where sellers or suppliers were obliged to provide specific information to consumers, courts have to check whether consumers received the required information<sup>(486)</sup>.

Insofar as particular rules of procedure, e.g. in payment order or enforcement proceedings, do not allow the courts to make a substantive assessment despite the availability of those elements<sup>(487)</sup> or do not give them access to those elements<sup>(488)</sup>, including the contract on which the claim is based, such procedural restrictions cannot remove the obligation to ensure *ex officio* control.

This interpretation is supported by the following considerations:

- Already the formulation used by the Court and the context of the different rulings suggest that the Court acknowledges the *fact* that, *in practice*, it will not be possible for a national court to carry out the necessary assessment without access to those elements<sup>(489)</sup>.
- In the majority of cases the Court took into account that the referring court did have access to the necessary elements. Furthermore, in several of those rulings, the Court used the formulation ‘... **even when/even though**<sup>(490)</sup> *it has available to it the matters of law and fact necessary to that end ...*’, indicating an *a fortiori* reasoning as opposed to a legal condition.
- If national rules of procedure could prevent *ex officio* control simply by denying courts access to the necessary elements, this would undermine the right to an effective remedy.
- Where *ex officio* control is required because of the *equivalence* principle, such control could be prevented in practice where national rules of procedure deny the courts access to the necessary elements.

The Court<sup>(491)</sup> confirmed this interpretation, when, after establishing the existence of a significant risk that consumers will not lodge an objection to a payment order<sup>(492)</sup>, it considered that the issuing of a payment order without any prior *ex officio* examination of the unfairness of contract terms was incompatible with Article 7(1) UCTD. The Court came to this conclusion although it was aware that, under the relevant rules of procedure, national courts did normally not have access to the legal and factual elements for this examination<sup>(493)</sup> and without mentioning access to such elements as a condition for its finding<sup>(494)</sup>, when it stated that

‘[...] Article 7(1) of Directive 93/13 must be interpreted as precluding a procedure which authorises the issue of an order for payment where the court dealing with an application for an order for payment does not have the power to examine whether the terms of that agreement are unfair, if the detailed rules for exercising the right to lodge an objection against such an order do not enable observance of the rights which the consumer derives from that directive to be ensured.’

<sup>(485)</sup> In this connection they have to take into account the provisions on the burden of proof in Article 3(2). See Section 1.2.2.1. If in a given Member State also individually negotiated contract terms are subject to the provisions transposing the UCTD, this assessment is, of course, not necessary.

<sup>(486)</sup> Section 3.3.1, Case C-186/16 *Andrić*, paragraph 43, Case C-119/17 *Lupean*, paragraph 23.

<sup>(487)</sup> Case C-618/10 *Banco Español de Crédito*.

<sup>(488)</sup> Case C-176/17 *Profi Credit Polska* and Case C-632/17 *PKO*.

<sup>(489)</sup> Case C-632/17 *PKO*, paragraph 38: ‘[...]’, in circumstances such as those at issue in the main proceedings, a national court is not in a position to examine whether a contractual term is unfair so long as it does not have available to it all the factual and legal elements for that purpose’. The Court refers to the same finding in Case C-176/17 *Profi Credit Polska*, paragraph 47.

<sup>(490)</sup> Cases C-618/10 *Banco Español de Crédito*, paragraph 57, C-49/14 *Finanmadrid*, paragraph 36; C-32/14 *ERSTE Bank Hungary*, paragraph 43. In other cases, for instance in Case C-488/11 *Asbeek Brusse*, paragraph 40, the Court used the formulation ‘as soon as it has available the necessary factual and legal elements’.

<sup>(491)</sup> Case C-176/17 *Profi Credit Polska* and Case C-632/17 *PKO*.

<sup>(492)</sup> Case C-176/17 *Profi Credit Polska*, paragraphs 69 and 70; Case C-632/17 *PKO*, paragraphs 45-49.

<sup>(493)</sup> Case C-632/17 *PKO*, paragraphs 37 and 38; Case C-176/17 *Profi Credit Polska*, paragraph 47.

<sup>(494)</sup> Case C-632/17 *PKO*, paragraph 49, which is quoted here and which contains a reference to the previous ruling in Case C-176/17 *Profi Credit Polska*, paragraph 71.

Therefore, in cases where the UCTD requires *ex officio* control, national courts must be obliged to obtain the necessary elements for the *ex officio* assessment by interpreting national rules in conformity of EU law or, if that is not possible, by, setting aside the conflicting national rules.

#### 5.5.4. Conclusions to be drawn from the unfairness assessment

At the end of the assessment, national courts have to draw the consequences stemming from the unfairness of relevant contract terms and their non-binding character, in compliance with the principles set out in Section 4. Depending on the claim, the type of procedure and the nature of the contract term, this could lead, for instance, to the rejection or limitation of a claim against a consumer that is fully or partially based on unfair contract terms or the termination or limitation of the enforcement, or a declaration of invalidity.

As stated above, before a national court decides to disapply a contract term which it has assessed of its own motion and which it considers to be unfair, it has to hear both parties on this question <sup>(495)</sup>.

Furthermore, consumers may decide not to rely on this protection in court proceedings after having been informed of the unfair nature and the non-binding character of the contract terms in question, in which the competent will have to apply the unfair contract term <sup>(496)</sup>. In light of the mandatory character of Article 6(1) UCTD, such declaration should be valid only where the judge is satisfied that the consumer has fully understood the legal situation and that their declaration is not based on misconceptions or pressure by other parties.

#### 5.6. Implications of *ex officio* control, effectiveness and equivalence for the national rules of procedure

Where EU law requires *ex officio* control of the unfairness of contract terms, national courts have to ensure such control by interpreting and applying national law as much as possible in conformity with EU law <sup>(497)</sup>. Where this is impossible and national rules of procedure do not comply with the principle of *effectiveness* and/or do not guarantee an effective remedy, national courts have to set such national rules aside in order to carry out the *ex officio* checks required by EU law <sup>(498)</sup>.

Moreover, the principles of *ex officio* control and *effectiveness* may require the Member States to make certain adaptations or corrections in their legislation insofar as national rules of procedure and substance are in conflict with these principles as described in the sub-sections above. The Member States are, therefore, invited to examine all national provisions that may be in conflict with the guarantees required by the UCTD as interpreted by the Court.

Where *ex officio* control is required by the *equivalence* principle <sup>(499)</sup>, national courts are obliged to apply the relevant national provisions *mutatis mutandis* in order to assess the unfairness of contract terms of their own motion. However, if those provisions do not explicitly cover actions based on EU law, there is a risk that national courts may fail to carry out this control based solely on those national provisions. Therefore, compliance with the *equivalence* principle may require legislative adaptations as well.

Finally, the Court <sup>(500)</sup> has clarified that a decision by a national court adjudicating at last instance which does not comply with its obligation to assess the unfairness of contract terms of its own motion may constitute a sufficiently serious infringement of EU law that could trigger the liability of the Member State for damages caused to consumers.

<sup>(495)</sup> Case C-472/11 *Banif Plus Bank*, paragraphs 29-35, Case C-488/11 *Asbeek Brusse*, paragraph 52: '[...], it must be recalled that the principle of *audi alteram partem*, as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure (*Banif Plus Bank*, paragraphs 31 and 36)'.  
<sup>(496)</sup> Case C-243/08 *Pannon GSM*. See also Case C-488/11 *Asbeek Brusse*, paragraph 49, Case C-618/10 *Banco Español de Crédito*, paragraph 63, and Case C-472/11 *Banif Plus Bank*, paragraph 27, Joined Cases C-70/17 and C-179/17 *Abanca Corporación Bancaria and Bankia*, paragraph 63.

<sup>(497)</sup> This is a general principle of EU law which the Court reiterated, for instance, in Case C-397/11 *Erika Jörös*, paragraph 32.

<sup>(498)</sup> See Sections 2.2 and 5.2 as well as Case C-118/17 *Dunai*, paragraph 61.

<sup>(499)</sup> Section 5.3.1.

<sup>(500)</sup> Case C-168/15 *Milena Tomášová*.

### 5.7. *Ex officio* control of unfair contract terms and out-of-court proceedings

The case law of the Court on procedural guarantees stemming from the UCTD is addressed exclusively to ‘courts and tribunals’ within the meaning of Article 267 TFEU. The Court has held that arbitral tribunals cannot make preliminary references<sup>(501)</sup>.

With regard to the UCTD, the Court<sup>(502)</sup> ruled that its case law on the *ex officio* duty for national courts does not apply to notaries when affixing the enforcement clause to an authentic document. However, assessment of the procedure in its entirety may take into account the role of notaries, under the relevant national law, when drawing up such documents<sup>(503)</sup>. At the same time, guarantees in the pre-judicial phase cannot replace access to a full judicial assessment by a judge<sup>(504)</sup>.

However, the Court has clarified that, in connection with arbitration proceedings initiated by traders against consumers, insofar as they are admissible under the applicable national law, there must be effective judicial control of arbitration awards in appeal and enforcement proceedings<sup>(505)</sup>. Based on the *equivalence* and *effectiveness*<sup>(506)</sup> principles, this may imply an obligation for the courts to assess of their own motion the unfairness of relevant contract terms, including of contract terms allowing the seller or supplier to resort to arbitration, if necessary at the enforcement stage. National rules on such proceedings that jeopardise the application of the principle of effective judicial protection against unfair contract terms must be considered as contrary to the UCTD<sup>(507)</sup>. Contract terms under which traders may impose arbitration proceedings on consumers are likely to be unfair if they exclude or hinder the consumer’s right to take legal action or exercise a legal remedy<sup>(508)</sup>, including where they prevent effective judicial control of unfair contract terms.

Regarding dispute settlement procedures initiated by consumers, Directive 2013/11/EU on alternative dispute resolution (ADR) for consumer disputes<sup>(509)</sup> contains important guarantees *inter alia* for agreements between a consumer and a trader to submit complaints to an ADR entity, as well as for the fairness and legality of proceedings before recognised ADR-entities. Within the scope of Directive 2013/11/EU, an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer prior to a dispute if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute. This applies *a fortiori* where such agreement is contained in a not-individually negotiated contract term.

<sup>(501)</sup> Case C-125/04 *Denuit*. See also Case Case C-503/15 *Margarit Panicello* in relation to the procedure before a *Secretario Judicial* (Registrar) regarding an action for the recovery of lawyers’ fees.

<sup>(502)</sup> Case C-32/14 *ERSTE Bank Hungary*, paragraphs 47-49.

<sup>(503)</sup> Case C-32/14 *ERSTE Bank Hungary*, paragraphs 55-58.

<sup>(504)</sup> This follows, for instance from Case C-32/14 *ERSTE Bank Hungary*, in particular paragraph 59, and Case C-448/17 *EOS KSI Slovenko*, paragraphs 44-54.

<sup>(505)</sup> Case C-40/08 *Asturcom Telecomunicaciones*, Case C-76/10 *Pohotovost*.

<sup>(506)</sup> To see whether consumers are effectively protected, one would have to look at the guarantees during the entire procedure, including the requirements for the agreement to submit a dispute to arbitration, the procedural guarantees in the arbitration proceedings, the risk of consumers’ not using remedies against an arbitration award because of their limited knowledge and information, as well the guarantees at the judicial stage, including *ex officio* assessment of unfair contract terms.

<sup>(507)</sup> This follows from the rulings on the UCTD in relation to Articles 6(1), 7(1) and the principle *effectiveness*. Furthermore, the Court’s ruling in Joined Cases C-317/08, C-318/08, C319/08 and C-320/08 *Alassini*, which relates to Directive 2002/22/EC (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51), expresses the general principle that national laws on settlement procedures may not prevent effective judicial protection of consumers and end users (See, in particular, the operative part and paragraphs 49, 53, 54, 58, 61, 62 and 65).

<sup>(508)</sup> See point 1(q) of the Annex to the UCTD and Case C-342/13 *Katalin Sebestyén*, paragraph 36. Insofar as national law prohibits arbitration proceedings against consumers, such clauses will be invalid already under the relevant national provisions.

<sup>(509)</sup> Article 10 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (OJ L 165, 18.6.2013, p. 63): ‘an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.’

## 6. INJUNCTIONS IN THE COLLECTIVE INTEREST OF CONSUMERS (ARTICLE 7(2) AND (3) UCTD)

## Article 7

1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.
2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.
3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.

Article 7(2) and (3) UCTD complement Directive 2009/22/EC on injunctions for the protection of consumers' interests<sup>(510)</sup> with particular regard to injunctions in the collective interest of consumers in order to prevent the continued use of unfair contract terms by individual sellers or suppliers or groups of them. Pursuant to Article 7(1), also injunction proceedings have to be adequate and effective<sup>(511)</sup>. In light of the deterrent and dissuasive purpose of such actions, as well as their independence from any particular dispute, authorised persons or organisations, such as consumer associations, may bring injunction proceedings even though the relevant terms have not yet been used in specific contracts<sup>(512)</sup>. Conversely, the Court held that Article 7(1) and (2) and Article 47 of the Charter do not oblige Member States to allow a consumer organisation to intervene in support of individual consumers in proceedings concerning the enforcement of potentially unfair contract terms<sup>(513)</sup>, unless this is required by the *equivalence* principle<sup>(514)</sup>.

The principles of *equivalence* and *effectiveness* and *ex officio* control, as well as Article 47 of the Charter, apply equally to injunctions in the collective interests of consumers, while their particular nature has to be taken into account.

In particular, Article 6(1), read in conjunction with Article 7(1) and (2), requires that contract **terms which are declared unfair in an action for an injunction are neither binding on the consumers who are parties to the action nor on those who have concluded with the same seller or supplier a contract to which the same terms apply**<sup>(515)</sup>. A term deemed to be unfair in such a procedure is considered to be unfair also in all future contracts between that trader and consumers<sup>(516)</sup>. **National courts** adjudicating individual cases are obliged to take this effect of injunctions into account as part of their *ex officio* duties and **may not consider the relevant term to be fair and valid**.

The Court has also recognised, in principle, the possibility to increase protection against unfair contract terms under Article 8 by creating a national register of contract terms found to be unfair in final court rulings based on which an enforcement authority may fine also *other sellers or suppliers* using equivalent terms. However, in light of Article 47 of the Charter, such sellers or suppliers have to have an effective judicial remedy against the decision declaring the terms to be equivalent and against the decision fixing the amount of the fine<sup>(517)</sup>.

<sup>(510)</sup> Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110, 1.5.2009, p. 30).

<sup>(511)</sup> Case C-472/10 *Invitel*, paragraph 35.

<sup>(512)</sup> Case C-372/99 *Commission v Italy*, paragraph 15.

<sup>(513)</sup> Case C-470/12 *Pohotovost'*, paragraph 54.

<sup>(514)</sup> See Section 5.3 with a reference to Case C-448/17 *EOS KSI Slovensko*.

<sup>(515)</sup> Case C-472/10 *Invitel*, paragraphs 38-40; Case C-191/15 *Verein für Konsumenteninformation v Amazon*, paragraph 56.

<sup>(516)</sup> Case C-472/10 *Invitel*, paragraphs 43 and 44.

<sup>(517)</sup> Case C-119/15 *Biuro podróży 'Partner'*, paragraphs 22-47.

Despite the clear benefits of collective actions under Article 7(2), such actions must not undermine the right of consumers who bring parallel individual actions seeking a declaration of the unfairness of a contract term to dissociate themselves from the collective action regarding similar terms used in contracts of the same type. As explained by the Court<sup>(518)</sup>, individual and collective actions under the UCTD are complementary and have different purposes and legal effects. A collective action for an injunction aims at the abstract, general assessment of whether a contract term is unfair, whereas an individual action entails a specific examination of the contract term in the light of the particular circumstances of the case<sup>(519)</sup>. Consequently, collective actions can have only a limited procedural impact on individual actions, justified in particular by the sound administration of justice and the need to avoid incompatible judicial decisions. Thus, Article 7 precludes a national rule requiring a court automatically to suspend an individual action brought before it by a consumer until a final judgment in a parallel collective action brought by an association is handed down<sup>(520)</sup>.

In this context, interim measures should be available within the individual action, both at the consumer's request and of the court's own motion, for as long as appropriate, pending a final judgment in an ongoing collective action<sup>(521)</sup>. This is relevant especially when interim relief is necessary to ensure the full effectiveness of the judgment in the individual action.

Regarding jurisdiction rules, the Court has accepted that a national rule under which actions for an injunction brought by consumer protection associations must be brought before the courts where the defendant, i.e. the seller or supplier, is established or has its address do not infringe the effectiveness principle<sup>(522)</sup>. The Court considered that consumer associations are not in the same weak position as individual consumers when requesting injunctions against sellers or suppliers, and referred to Article 4(1) of Directive 2009/22/EC<sup>(523)</sup>.

The Court has further held that the Union rules on jurisdiction mean that an action for an injunction brought by a consumer protection association for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of the Brussels Convention<sup>(524)</sup>. That interpretation is valid also for the Brussels I Regulation<sup>(525)</sup>. This implies that the jurisdiction can be attributed to a court where the harmful event took place, which is to be understood broadly with regard to consumer protection, covering not only situations where an individual has personally sustained damage but also, in particular, the undermining of legal stability by the use of unfair terms<sup>(526)</sup>. The law applicable to such an action must be determined in accordance with Article 6(1) of the Rome II Regulation<sup>(527)</sup>, whereas the law applicable to the assessment of a particular contractual term must always be determined pursuant to the Rome I Regulation<sup>(528)</sup>, whether that assessment is made in an individual action or in a collective action<sup>(529)</sup>.

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<sup>(518)</sup> Joined Cases C-381/14 and C-385/14, *Sales Sinués and Drame Ba*, paragraph 30.

<sup>(519)</sup> Opinion of Advocate General Szpunar in Joined Cases C-381/14 and C-385/14, *Sales Sinués and Drame Ba*, paragraph 72.

<sup>(520)</sup> Joined Cases C-381/14 and C-385/14 *Sales Sinués and Drame Ba*, paragraphs 39 and 43.

<sup>(521)</sup> Joined Cases C-568/14 to C-570/14 *Ismael Fernández Oliva*. See also Section 5.3.2.

<sup>(522)</sup> Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León*, paragraphs 49-53.

<sup>(523)</sup> Under that provision, the courts of the Member State where the defendant is established or has its address have jurisdiction to hear actions for an injunction brought by consumer protection associations from other Member States.

<sup>(524)</sup> Case C-167/00 *Henkel*, paragraph 50 as regards Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention).

<sup>(525)</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1), that was repealed and replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council (OJ L 351, 20.12.2012, p. 1); see Case C-548/12 *Brogstitter*, paragraph 19; Case C-191/15 *Verein für Konsumenteninformation v Amazon*, paragraph 38.

<sup>(526)</sup> Case C-167/00 *Henkel*, paragraph 42.

<sup>(527)</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40).

<sup>(528)</sup> Regulation (EC) No 593/2008 (OJ L 177, 4.7.2008, p. 6).

<sup>(529)</sup> Case C-191/15 *Verein für Konsumenteninformation v Amazon*, paragraphs 48-60.

## ANNEX I

## List of Court cases mentioned in this Notice

Case number and name	Issues	Section in the Notice
<b>1976</b>		
33/76 — Rewe v Landwirtschaftskammer für das Saarland	Reference for a preliminary ruling: Bundesverwaltungsgericht — Germany	5.3. Obligations stemming from the principle of equivalence  5.4. <i>Ex officio</i> assessment and the effectiveness of remedies
<b>1978</b>		
106/77 — Amministrazione delle finanze dello Stato v Simmenthal	Discarding by the national court of a law contrary to Community law	2.2. Other provisions of national law
<b>1988</b>		
309/85 — Barra v Belgian State	Non-discrimination — Access to non-university education — Repayment of amounts unduly paid	4.4. Restitution of advantages obtained through unfair contract terms
<b>1990</b>		
C-213/89 — The Queen v Secretary of State for Transport, ex parte Factortame	Rights derived from provisions of Community law — Protection by national courts — Power of national courts to grant interim relief when a reference is made for a preliminary ruling	5.3. Obligations stemming from the principle of <i>equivalence</i>  5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies
<b>1995</b>		
Joined cases C-430/93 and C-431/93 Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten	Treatment of an occupational pension fund as an undertaking — Compulsory membership of an occupational pension scheme — Compatibility with the rules of competition — Whether a point of Community law may be raised for the first time in cassation, thereby altering the subject-matter of the proceedings and entailing an examination of facts	5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general  5.3. Obligations stemming from the principle of <i>equivalence</i>

Case number and name	Issues	Section in the Notice
<b>1997</b>		
C-261/95 — Palmisani v INPS	Social policy — Protection of employees in the event of the insolvency of their employer — Directive 80/987/EEC — Liability of a Member State arising from belated transposition of a directive — Adequate reparation — Limitation period	5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies
<b>1999</b>		
C-126/97 — Eco Swiss China Time Ltd v Benetton International NV	Competition — Application by an arbitration tribunal, of its own motion, of Article 81 EC (ex Article 85) — Power of national courts to annul arbitration awards	5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general
<b>2000</b>		
Joined cases C-240/98 — Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98).	Unfair terms in consumer contracts — Jurisdiction clause — Power of the national court to examine of its own motion whether that clause is unfair	3.1. Unfairness and transparency in general  3.4. Unfairness assessment under Articles 3 and 4(1) UCTD  5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general  5.2. The principle of <i>ex officio</i> control of unfair contract terms
<b>2001</b>		
C-144/99 — Commission v Netherlands	Failure by a Member State to fulfil its obligations — Directive 93/13/EEC — Unfair terms in consumer contracts — Incomplete transposition of the directive into national law	2.2. Other provisions of national law
C-226/99 — Siples	Common Customs Code — Appeals — Suspension of implementation of a decision of the customs authorities	5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies

Case number and name	Issues	Section in the Notice
<b>2002</b>		
C-167/00 — Verein für Konsumenteninformation v Karl Heinz Henkel	Brussels Convention — Article 5(3) — Jurisdiction in matters relating to tort, delict or quasidelict — Preventive action by associations — Consumer protection organisation seeking an injunction to prevent a trader from using unfair terms in consumer contracts	6. Injunctions in the collective interest of consumers (Article 7(2) and (3) UCTD)
C-255/00 — Grundig Italiana SpA v Ministero delle Finanze	Internal taxes contrary to Community law — Recovery of sums paid but not due — National legislation retroactively reducing time-limits for bringing proceedings — Compatibility with the principle of effectiveness	5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies
C-372/99 — Commission of the European Communities v Italian Republic	Failure by a Member State to fulfil its obligations — Directive 93/13/EEC — Unfair terms in contracts concluded with consumers — Means to prevent the use of those clauses	6. Injunctions in the collective interest of consumers (Article 7(2) and (3) UCTD)
C-473/00 — Cofidis	Action brought by a seller or supplier — National provision prohibiting the national court from finding a term unfair, of its own motion or following a plea raised by the consumer, after the expiry of a limitation period	4.2. The legal effect of ‘not being binding on the consumer’  5.2. The principle of <i>ex officio</i> control of unfair contract terms
C-478/99 — Commission v Sweden	Failure by a Member State to fulfil its obligations — Directive 93/13/EEC — Unfair terms in consumer contracts — Obligation to reproduce in national legislation the list of terms which may be regarded as unfair contained in the annex to Directive 93/13	3.4. Unfairness assessment under Articles 3 and 4(1) UCTD



Case number and name	Issues	Section in the Notice
<b>2004</b>		
C-70/03 — Commission v Spain	Failure of a Member State to fulfil obligations — Directive 93/13/EEC — Unfair terms in consumer contracts — Rules of interpretation — Rules concerning conflict of laws	1.2. The Scope of the UCTD 3.1. Unfairness and transparency in general
C-237/02 — Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter.	Unfair terms in consumer contracts — Contract for the building and supply of a parking space — Reversal of the order of performance of contractual obligations provided for under national law — Clause obliging the consumer to pay the price before the seller or supplier has performed his obligations — Obligation on the seller or supplier to provide a guarantee	3.1. Unfairness and transparency in general 3.4. Unfairness assessment under Articles 3 and 4(1) UCTD
<b>2005</b>		
C-125/04 — Guy Denuit	Reference to the Court — National court or tribunal within the meaning of Article 234 EC — Arbitration panel	5.7. <i>Ex officio</i> control of unfair contract terms and out-of-court proceedings
<b>2006</b>		
C-168/05 — Mostaza Claro	Unfair terms in consumer contracts — Failure to raise the unfair nature of a term during arbitration proceedings — Possibility of raising that objection in the context of an action brought against the arbitration award	1.1. The objectives of the UCTD 5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general 5.2. The principle of <i>ex officio</i> control of unfair contract terms
<b>2007</b>		
C-429/05 — Rampion and Godard	Directive 87/102/EEC — Consumer credit — Right of the consumer to pursue remedies against the grantor of credit for non-performance or performance not in accordance with the contract relating to the goods or services financed by the credit — Conditions — Indication in the offer of credit of the goods or service being financed — Credit facility enabling the credit granted to be used on a number of occasions — Possibility for the national court to raise of its own motion the right of the consumer to pursue remedies against the grantor of credit	Introduction

Case number and name	Issues	Section in the Notice
C-432/05 — Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern.	Principle of judicial protection — National legislation not providing for a self-standing action to challenge the compatibility of a national provision with Community law — Procedural autonomy — Principles of equivalence and effectiveness — Interim protection	5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general  5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies
<b>2008</b>		
C-2/06 — Kempter KG v Hauptzollamt Hamburg-Jonas	Export of cattle — Export refunds — Final administrative decision — Interpretation of a judgment of the Court — Effect of a preliminary ruling given by the Court after that decision — Review and withdrawal — Time-limits — Legal certainty — Principle of cooperation — Article 10 EC	5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies
<b>2009</b>		
C-40/08 — Asturcom Telecomunicaciones	Consumer contracts — Unfair arbitration clause — Measure void — Arbitration award which has become final — Enforcement — Whether the national court responsible for enforcement can consider of its own motion whether the unfair arbitration clause is null and void — Principles of equivalence and effectiveness	1.1. The objectives of the UCTD  4.1. The nature and role of Article 6(1) UCTD in the protection against unfair contract terms  5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general  5.2. The principle of <i>ex officio</i> control of unfair contract terms  5.3. Obligations stemming from the principle of <i>equivalence</i>  5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies  5.7. <i>Ex officio</i> control of unfair contract terms and out-of-court proceedings
Case C-227/08, Martín Martín	Article 4 — Consumer protection — Contracts negotiated away from business premises — Right of cancellation — Obligation on the trader to give notice of that right — Contract void — Appropriate measures	Introduction

Case number and name	Issues	Section in the Notice
C-243/08 — Pannon GSM Zrt. v Erzsébet Sustikné Gyórfi	Unfair terms in consumer contracts — Legal effects of an unfair term — Power of and obligation on the national court to examine of its own motion the unfairness of a term conferring jurisdiction — Criteria for assessment	<p>1.1. The objectives of the UCTD</p> <p>3.1. Unfairness and transparency in general</p> <p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p> <p>4.2. The legal effect of ‘not being binding on the consumer’</p> <p>4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties</p> <p>5.2. The principle of <i>ex officio</i> control of unfair contract terms</p> <p>5.5. What does <i>ex officio</i> control imply?</p>
<b>2010</b>		
C-76/10 — Pohotovosť s.r.o. v Iveta Korčkovská.	Directive 93/13/EEC — Unfair terms — Directive 2008/48/EC — Directive 87/102/EEC — Consumer credit contracts — Annual percentage rate of charge — Arbitration proceedings — Arbitration award — Power of the national court to examine of its own motion whether certain terms are unfair	<p>Introduction</p> <p>3.2. Contract terms relating to the main subject matter of the contract or the price and remuneration (Article 4(2) UCTD)</p> <p>3.3. Transparency requirements</p> <p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p> <p>4.2. The legal effect of ‘not being binding on the consumer’</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p> <p>5.3. Obligations stemming from the principle of <i>equivalence</i></p> <p>5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies</p>

Case number and name	Issues	Section in the Notice
C-137/08 — VB Pézúgyi Lízing Zrt. v Ferenc Schneider.	Criteria for assessment — Examination by the national court of its own motion of the unfairness of a term conferring jurisdiction — Article 23 of the Statute of the Court of Justice	<p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p> <p>5.2. The principle of <i>ex officio</i> control of unfair contract terms</p> <p>5.5. What does <i>ex officio</i> control imply?</p>
Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Giorgia Iacono v Telecom Italia SpA and Multiservice Srl v Telecom Italia SpA	Principle of effective judicial protection — Electronic communications networks and services — Directive 2002/22/EC — Universal Service — Disputes between end-users and providers — Mandatory to attempt an out-of-court settlement	<p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p> <p>5.7. <i>Ex officio</i> control of unfair contract terms and out-of-court proceedings</p>
C-484/08 — Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc).	Consumer contracts — Article 4(2) — Terms defining the main subject-matter of the contract — Assessment by the courts as to their unfairness — More stringent national provisions designed to afford a higher level of consumer protection	<p>2.1. Minimum harmonisation and extension of scope (Article 8 and 8a UCTD), including the role of national supreme courts</p> <p>3.1. Unfairness and transparency in general</p> <p>3.3. Transparency requirements</p>
C-542/08 — Barth v Bundesministerium für Wissenschaft und Forschung	Freedom of movement for persons — Workers — Equal treatment — Special length-of-service increment for university professors provided for by national legislation held to be incompatible with Community law by a judgment of the Court — Limitation period — Principles of <i>equivalence</i> and <i>effectiveness</i>	5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies

Case number and name	Issues	Section in the Notice
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C-453/10 — Pereničová and Perenič v SOS financ spol. s r. o.	Consumer credit agreement — Incorrect statement of annual percentage rate of charge — Effect of unfair commercial practices and unfair terms on the validity of the contract as a whole	<p>1.2. The Scope of the UCTD</p> <p>2.1. Minimum harmonisation and extension of scope (Article 8 and 8a UCTD), including the role of national supreme courts</p> <p>2.2. Other provisions of national law</p> <p>4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p>
C-472/10 — Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt	Article 3(1) and (3) — Articles 6 and 7 — Consumer contracts — Unfair terms — Unilateral amendment of the terms of a contract by a seller or supplier — Action for an injunction brought in the public interest and on behalf of consumers by a body appointed by national legislation — Declaration of the unfair nature of a term — Legal effects	<p>3.1. Unfairness and transparency in general</p> <p>3.3. Transparency requirements</p> <p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p> <p>4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p> <p>6. Injunctions in the collective interest of consumers (Article 7(2) and (3) UCTD)</p>

Case number and name	Issues	Section in the Notice
C-472/11 — Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai	Examination by the national court, of its own motion, as to whether a term is unfair — Obligation on the national court, once it has found, of its own motion, that a term is unfair, to invite the parties to submit their observations before drawing conclusions from that finding — Contractual terms to be taken into account in the assessment of that unfairness	<p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p> <p>4.1. The nature and role of Article 6(1) UCTD in the protection against unfair contract terms</p> <p>4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties</p> <p>5.2. The principle of <i>ex officio</i> control of unfair contract terms</p> <p>5.5. What does <i>ex officio</i> control imply?</p>
C-618/10 — Banco Español de Crédito SA v Joaquín Calderón Camino	Consumer contracts — Unfair term concerning interest on late payments — Order for payment procedure — Powers of the national court	<p>2.2. Other provisions of national law</p> <p>4.1. The nature and role of Article 6(1) UCTD in the protection against unfair contract terms</p> <p>4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p> <p>5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies</p> <p>5.5. What does <i>ex officio</i> control imply?</p>
<b>2013</b>		
C-32/12 — Duarte Hueros	Directive 1999/44/EC — Rights of the consumer in the event of lack of conformity in a product — Minor nature of that lack of conformity — Rescission of the contract not possible — Powers of the national courts	<p>Introduction</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p>

Case number and name	Issues	Section in the Notice
C-59/12 — Zentrale zur Bekämpfung unlauteren Wettbewerbs	Directive 2005/29/EC — Unfair commercial practices — Scope — Misleading information circulated by a health insurance fund which is part of the statutory social security system — Fund established as a public law body	1.2. The scope of the UCTD
C-92/11 — RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV	Directive 2003/55/EC — Internal market in natural gas — Directive 93/13/EEC — Articles 1(2) and 3 to 5 — Contracts between suppliers and consumers — General conditions — Unfair terms — Unilateral alteration by the supplier of the price of the service — Reference to mandatory legislation designed for another category of consumers — Applicability of Directive 93/13 — Obligation of use of plain and intelligible language and transparency	1.2. The scope of the UCTD 3.3. Transparency requirements 3.4. Unfairness assessment under Articles 3 and 4(1) UCTD 4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties 4.4. Restitution of advantages obtained through unfair contract terms
C-143/13 — Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA	Unfair terms in contracts concluded between a seller or supplier and a consumer — Article 4(2) — Assessment of the unfairness of contractual terms — Exclusion of terms relating to the main subject-matter of the contract or the adequacy of the price and remuneration as long as they are in plain intelligible language — Terms including a ‘risk charge’ charged by the lender and authorising it, under certain conditions, unilaterally to alter the interest rate	2.1. Minimum harmonisation and extension of scope (Article 8 and 8a UCTD), including the role of national supreme courts 3.1. Unfairness and transparency in general 3.2. Contract terms relating to the main subject matter of the contract or the price and remuneration (Article 4(2) UCTD) 3.3. Transparency requirements 3.4. Unfairness assessment under Articles 3 and 4(1) UCTD
C-397/11 — Erika Jörös v Aegon Magyarország Hitel Zrt	Unfair terms in consumer contracts — Examination by the national court, of its own motion, as to whether a contractual term is unfair — Consequences to be drawn by the national court from a finding that the term is unfair	5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general 5.2. The principle of <i>ex officio</i> control of unfair contract terms 5.3. Obligations stemming from the principle of <i>equivalence</i> 5.5. What does <i>ex officio</i> control imply?

Case number and name	Issues	Section in the Notice
C-413/12 — Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL	Action seeking an injunction brought by a regional consumer protection association — Jurisdiction of local courts — No remedy against a decision declining jurisdiction delivered at first instance — Procedural autonomy of the Member States — Principles of equivalence and effectiveness	5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies  6. Injunctions in the collective interest of consumers (Article 7(2) and (3) UCTD)
C-415/11 — Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)	Consumer contracts — Mortgage loan agreement — Mortgage enforcement proceedings — Powers of the court hearing the declaratory proceedings — Unfair terms — Assessment criteria	3.1. Unfairness and transparency in general  3.4. Unfairness assessment under Articles 3 and 4(1) UCTD  5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general  5.2. The principle of <i>ex officio</i> control of unfair contract terms  5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies
C-488/11 — Asbeek Brusse and de Man Garabito	Unfair terms in consumer contracts — Residential tenancy agreement between a landlord acting on a commercial basis and a tenant acting on a non-commercial basis — Examination by the national court, of its own motion, as to whether a contractual term is unfair — Penalty clause — Annulment of the clause	1.1. The objectives of the UCTD  1.2. The scope of the UCTD  4.1. The nature and role of Article 6(1) UCTD in the protection against unfair contract terms  4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties  5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general  5.3. Obligations stemming from the principle of <i>equivalence</i>  5.5. What does <i>ex officio</i> control imply?



Case number and name	Issues	Section in the Notice
<p>Joined Cases C-537/12 and C-116/13 Banco Popular Español SA v María Teodolinda Rivas Quichimbo and Wilmar Edgar Cun Pérez and Banco de Valencia SA v Joaquín Valldeperas Tortosa and María Ángeles Miret Jaume</p>	<p>Article 99 of the Rules of Procedure of the Court of Justice — Consumer contracts — Mortgage loan agreement — Mortgage enforcement proceedings — Powers of the national court responsible for enforcement — Unfair terms — Criteria for assessment</p>	<p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p>
<b>2014</b>		
<p>C-26/13 — Kásler and Káslerné Rábai</p>	<p>Unfair terms in a contract concluded between a seller or supplier and a consumer — Articles 4(2) and 6(1) — Assessment of the unfairness of the contractual terms — Exclusion of terms relating to the main subject matter of the contract or the adequacy of the price and the remuneration provided they are drafted in plain intelligible language — Consumer credit contracts denominated in foreign currency — Terms relating to the exchange rate — Difference between the buying rate of exchange applicable to the advance of the loan and the selling rate of exchange applicable to its repayment — Powers of the national court when dealing with a term considered to be unfair — Substitution of the unfair term by a supplementary provision of national law — Whether lawful</p>	<p>1.1. The objectives of the UCTD</p> <p>1.2. The scope of the UCTD</p> <p>2.2. Other provisions of national law</p> <p>3.2. Contract terms relating to the main subject matter of the contract or the price and remuneration (Article 4(2) UCTD)</p> <p>3.3. Transparency requirements</p> <p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p> <p>4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties</p>
<p>C-34/13 — Kušionová v SMART Capital</p>	<p>Consumer credit agreement — Article 1(2) — Term reflecting a mandatory statutory provision — Scope of the directive — Articles 3(1), 4, 6(1) and 7(1) — Security for credit in the form of a charge on immovable property — Whether it is possible to enforce the charge by means of a sale by auction — Judicial review</p>	<p>1.2. The scope of the UCTD</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p> <p>5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies</p>

Case number and name	Issues	Section in the Notice
C-169/14 — Sánchez Morcillo and Abril García	Article 7 — Charter of Fundamental Rights of the European Union — Article 47 — Consumer contracts — Mortgage loan agreement — Unfair terms — Mortgage enforcement proceedings — Right to an appeal	<p>1.1. The objectives of the UCTD</p> <p>4.1. The nature and role of Article 6(1) UCTD in the protection against unfair contract terms</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p> <p>5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies</p>
C-226/12 — Constructora Principado SA v José Ignacio Menéndez Álvarez	Consumer contracts — Contract for the purchase of immovable property — Unfair terms — Criteria for assessment	<p>3.1. Unfairness and transparency in general</p> <p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p>
C-280/13 — Barclays Bank v Sara Sánchez García and Alejandro Chacón Barrera	Thirteenth recital in the preamble — Article 1(2) — Consumer contracts — Mortgage loan agreement — Mortgage enforcement proceedings — National statutory and regulatory provisions — Contractual balance	<p>1.2. The scope of the UCTD</p> <p>4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties</p> <p>5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies</p>
C-342/13 — Katalin Sebestyén v Zsolt Csaba Kővári and Others	Contract for a mortgage loan concluded with a bank — Clause providing for the exclusive competence of a single arbitration tribunal — Information on the arbitration procedure provided by the bank at the conclusion of the contract — Unfair terms — Criteria for assessment	3.4. Unfairness assessment under Articles 3 and 4(1) UCTD
Joined Cases C-359/11 and C-400/11 — Alexandra Schulz v Technische Werke Schussental GmbH und Co. KG and Josef Egbringhoff v Stadtwerke Ahaus GmbH	Directives 2003/54/EC and 2003/55/EC — Consumer protection — Internal market in electricity and natural gas — National legislation determining the content of consumer contracts covered by a universal supply obligation — Unilateral adjustment of the price of the service by the seller or supplier — Information, with adequate notice before the adjustment comes into effect, as to the reasons and preconditions for that adjustment and its scope	3.3. Transparency requirements

Case number and name	Issues	Section in the Notice
C-470/12 — Pohotovosť s. r. o. v Miroslav Vašuta	Consumer credit contract — Unfair terms — Directive 93/13/EEC — Enforcement of an arbitration award — Application for leave to intervene in enforcement proceedings — Consumer protection association — National legislation which does not allow such an intervention — Procedural autonomy of the Member States	5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies  6. Injunctions in the collective interest of consumers (Article 7(2) and (3) UCTD)

## 2015

C-32/14 — ERSTE Bank Hungary v Attila Sugár	Unfair terms in consumer contracts concluded between a seller or supplier and a consumer — Mortgage loan agreement — Article 7(1) — Stopping the use of unfair terms — Adequate and effective means — Acknowledgement of the debt — Notarised instrument — Affixation of the enforcement clause by a notary — Enforceable order — Notary's obligations — Examination by the national court of its own motion of unfair terms — Judicial review — Principles of equivalence and effectiveness	5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general  5.2. The principle of <i>ex officio</i> control of unfair contract terms  5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies  5.7. <i>Ex officio</i> control of unfair contract terms and out-of-court proceedings
C-74/15 — Tarcău	Article 1(1) and Article 2(b) — Unfair terms in consumer contracts — Contracts of guarantee or providing security concluded with a credit institution by natural persons acting for purposes outside their trade, business or profession and not having any link of a functional nature with the commercial company in respect of which they act as guarantors or sureties	1.2. The scope of the UCTD
C-96/14 — Jean-Claude Van Hove v CNP Assurances SA	Insurance contract — Article 4(2) — Assessment of the unfairness of contractual terms — Exclusion of terms relating to the main subject-matter of the contract — Term intended to ensure that mortgage loan repayments are covered — Borrower's total incapacity for work — Exclusion from cover in the event of recognised fitness to undertake an activity, paid or otherwise	3.2. Contract terms relating to the main subject matter of the contract or the price and remuneration (Article 4(2) UCTD)

Case number and name	Issues	Section in the Notice
C-110/14 — Costea	Article 2(b) — Concept of ‘consumer’ — Credit agreement concluded by a natural person who practises as a lawyer — Repayment of a loan secured on a building owned by the borrower’s law firm — Borrower who has the necessary knowledge to assess the unfairness of a term before signing the agreement	1.1. The objectives of the UCTD 1.2. The scope of the UCTD
C-348/14 — Maria Bucura v SC Bancpost SA	Directive 87/102/EEC — Article 1(2)(a) — Consumer credit — Concept of ‘consumer’ — Directive 93/13/EEC — Articles 2(b), 3 to 5 and 6(1) — Unfair terms — Examination by the national court of its own motion — Terms drafted ‘in plain, intelligible language’ — Information which the creditor must provide	3.2. Contract terms relating to the main-subject-matter of the contract or the price and remuneration (Article 4(2) UCTD) 3.3. Transparency requirements 3.4. Unfairness assessment under Articles 3 and 4(1) UCTD
Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 Unicaja Banco, SA v José Hidalgo Rueda and Others and Caixabank SA v Manuel María Rueda Ledesma and Others	Contracts concluded between sellers or suppliers and consumers — Mortgage contracts — Default interest clauses — Unfair terms — Mortgage enforcement proceedings — Moderation of the amount of interest — Powers of the national court	2.2. Other provisions of national law 4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties
C-497/13 — Froukje Faber v Autobedrijf Hazet Ochten BV	Directive 1999/44/EC — Sale of consumer goods and associated guarantees — Status of the purchaser — Consumer status — Lack of conformity of the goods delivered — Duty to inform the seller — Lack of conformity which became apparent within six months of delivery of the goods — Burden of proof	Introduction 5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general 5.5. What does <i>ex officio</i> control imply?
C-537/13 — Šiba	Scope — Consumer contracts — Contract for the provision of legal services concluded between a lawyer and a consumer	1.2. The scope of the UCTD

Case number and name	Issues	Section in the Notice
C-567/13 — Baczó and Vizsnyiczai v Raiffeisen Bank Zrt	Article 7 — Mortgage loan agreement — Arbitration clause — Unfairness — Action by consumer — National procedural rule — Lack of jurisdiction of the court hearing the action by a consumer for a declaration of invalidity of a standard contract to hear the application for a declaration of unfairness of terms in the same contract	5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general  5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies
C-602/13 — (BBVA) Banco Bilbao Vizcaya Argentaria SA v Fernando Quintano Ujeta and María Isabel Sánchez García	Contractual relationship between a seller or a supplier and a consumer — Mortgage contract — Default interest clause — Early repayment clause — Mortgage enforcement proceedings — Moderation of the amount of interest — Powers of the national court)	3.4. Unfairness assessment under Articles 3 and 4(1) UCTD  5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general  5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies

## 2016

C-7/16 — Banco Popular Español and PL Salvador S.A.R.L. v Maria Rita Giraldez Villar and Modesto Martínez Baz	Article 99 of the Rules of Procedure of the Court of Justice — Directive 93/13/EEC — Unfair terms — Assignment of a claim — Right of the debtor to extinguish his debt — Conditions governing the exercise of that right	4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties
C-49/14 — Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and Others	Unfair terms — Order for payment procedure — Enforcement proceedings — Powers of the national court responsible for enforcement to raise of its own motion the fact that the unfair term is invalid — Principle of <i>res judicata</i> — Principle of effectiveness — Charter of Fundamental Rights of the European Union — Judicial protection	2.2. Other provisions of national law  5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general  5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies  5.5. What does <i>ex officio</i> control imply?

Case number and name	Issues	Section in the Notice
C-119/15 — Biuro podróży Partner Sp. z o.o, Sp. komandytowa w Dąbrowie Górniczej v Prezes Urzędu Ochrony Konkurencji i Konsumentów	Directive 93/13/EEC — Directive 2009/22/EC — Consumer protection — Erga omnes effect of unfair terms entered in a public register — Financial penalty imposed on a seller or supplier having used a term held to be equivalent to a term in the register — Seller or supplier who was not a party to the proceedings giving rise to the declaration that the term in question was unfair — Article 47 of the Charter of Fundamental Rights of the European Union — Concept of ‘court or tribunal against whose decisions there is no judicial remedy under national law’	5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general  5.5. What does <i>ex officio</i> control imply?  6. Injunctions in the collective interest of consumers (Article 7(2) and (3) UCTD)
C-122/14 — Aktiv Kapital Portfolio AS, Oslo, succursale à Zug, formerly Aktiv Kapital Portfolio Investment v Angel Luis Egea Torregrosa	Unfair terms in consumer contracts — Order for payment procedure — Enforcement proceedings — Powers of the national court responsible for enforcement to raise of its own motion the fact that the unfair term is invalid — Principle of effectiveness — Principle of res judicata)	5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies
Joined Cases C-154/15, C-307/15 and C-308/15 Gutierrez Naranjo and Others	Consumer contracts — Mortgage loans — Unfair terms — Article 4(2) — Article 6(1) — Declaration of nullity — Limitation by the national court of the temporal effects of the declaration of nullity of an unfair term	1.1. The objectives of the UCTD  3.3. Transparency requirements  4.1. The nature and role of Article 6(1) UCTD in the protection against unfair contract terms  4.2. The legal effect of ‘not being binding on the consumer’  4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties  4.4. Restitution of advantages obtained through unfair contract terms  5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general  5.2. The principle of <i>ex officio</i> control of unfair contract terms  5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies  5.5. What does <i>ex officio</i> control imply?

Case number and name	Issues	Section in the Notice
C-168/15 — Tomášová v Slovenská republika	Credit agreement containing an unfair term — Enforcement of an arbitration award in accordance with that term — Member State liability for damage caused to individuals by breaches of EU law attributable to a national court — Conditions of engagement — Existence of a sufficiently serious breach of EU law	<p>2.2. Other provisions of national law</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p> <p>5.2. The principle of <i>ex officio</i> control of unfair contract terms</p> <p>5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies</p>
C-191/15 — Verein für Konsumenteninformation v Amazon EU Sàrl	Judicial cooperation in civil matters — Regulations (EC) No 864/2007 and (EC) No 593/2008 — Consumer protection — Directive 93/13/EEC — Data protection — Directive 95/46/EC — Online sales contracts concluded with consumers resident in other Member States — Unfair terms — General terms and conditions containing a choice-of-law term applying the law of the Member State in which the company is established — Determination of the applicable law for assessing the unfairness of terms in those general terms and conditions in an action for an injunction — Determination of the law governing the processing of personal data of consumers	<p>1.2. The scope of the UCTD</p> <p>2.1. Minimum harmonisation and extension of scope (Article 8 and 8a UCTD), including the role of national supreme courts</p> <p>3.1. Unfairness and transparency in general</p> <p>3.3. Transparency requirements</p> <p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p> <p>6. Injunctions in the collective interest of consumers (Article 7(2) and (3) UCTD)</p>
C-377/14 Radlinger Radlingerová v Finway a.s.	Article 7 — National rules governing insolvency proceedings — Debts arising from a consumer credit agreement — Effective judicial remedy — Point 1(e) of the annex — Disproportionate amount of compensation — Directive 2008/48/EC — Article 3(l) — Total amount of credit — Point I of Annex I — Amount of drawdown — Calculation of the annual percentage rate — Article 10(2) — Obligation to provide information — <i>Ex officio</i> examination — Penalty	<p>Introduction</p> <p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p> <p>5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies</p> <p>5.5. What does <i>ex officio</i> control imply?</p>

Case number and name	Issues	Section in the Notice
Joined Cases C-381/14 and C-385/14 — Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA (Catalunya Banc S.A.)	Rectification order	6. Injunctions in the collective interest of consumers (Article 7(2) and (3) UCTD)
C-534/15 — Dumitraș	Article 1(1) — Article 2(b) — Status of consumer — Assignment of a debt by novation of loan agreements — Contracts providing immovable property as security entered into by individuals not having any professional relationship with the new debtor company	1.2. The scope of the UCTD
Joined Cases C-568/14 to C-570/14 Ismael Fernández Oliva and Others v Caixabank SA and Others	Article 99 of the Rules of Procedure of the Court of Justice — Contracts concluded between sellers or suppliers and consumers — Mortgage contracts — 'Floor' clause — Collective proceedings — Individual action with the same subject matter — Interim relief	5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies 5.5. What does <i>ex officio</i> control imply? 6. Injunctions in the collective interest of consumers (Article 7(2) and (3) UCTD)
C-689/13 — PFE (Puligienica Facility Esco SpA) v Airgest SpA	Directive 89/665/EEC — Article 1(1) and (3) — Review procedures — Application for annulment of the decision awarding a public contract by a tenderer whose bid was not successful — Counterclaim brought by the successful tenderer — Principle of the primacy of EU law	2.2. Other provisions of national law

## 2017

C-186/16 — Andriuciu and Others	Article 3(1) and Article 4(2) — Assessment of the unfairness of contractual terms — Loan agreement concluded in a foreign currency — Exchange rate risk born entirely by the consumer — Significant imbalance in the parties' rights and obligations arising under the contract — Time at which the imbalance must be assessed — Scope of the concept of terms drafted in 'plain intelligible language' — Level of information to be procured by the bank	1.2. The scope of the UCTD 3.1. Unfairness and transparency in general 3.2. Contract terms relating to the main subject matter of the contract or the price and remuneration (Article 4(2) UCTD) 3.3. Transparency requirements 3.4. Unfairness assessment under Articles 3 and 4(1) UCTD 4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties
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Case number and name	Issues	Section in the Notice
C-290/16 — Air Berlin	Transport — Common rules for the operation of air services in the European Union — Regulation (EC) No 1008/2008 — Provisions on pricing — Article 22(1) — Article 23(1) — Information required on presentation of fares and rates available to the general public — Obligation to indicate the actual sum of taxes, charges, surcharges or fees — Pricing freedom — Invoicing of handling fees in the event of cancellation of a flight booking by a passenger or failure to present for boarding — Consumer protection	1.2. The scope of the UCTD
C-421/14 — Banco Primus SA v Jesús Gutiérrez García	Contracts concluded between sellers or suppliers and consumers — Unfair terms — Mortgage loan agreements — Mortgage enforcement proceedings — Limitation period — Function of the national courts — Res judicata	1.1. The objectives of the UCTD 3.1. Unfairness and transparency in general 3.4. Unfairness assessment under Articles 3 and 4(1) UCTD 4.1. The nature and role of Article 6(1) UCTD in the protection against unfair contract terms 4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties 5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general 5.2. The principle of <i>ex officio</i> control of unfair contract terms 5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies
C-446/17 — Woonhaven Antwerpen BV CVBA v Khalid Berkani and Asmae Hajji	Article 99 of the Rules of Procedure of the Court of Justice — Unfair terms — Rental contract concluded between a recognised social housing association and a tenant — Model rental contract made binding by an act of national legislation — Directive 93/13/EEC — Article 1(2) — Inapplicability of that directive	1.2. The scope of the UCTD 4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties under the contract
Case C-503/15 Margarit Panicello	Article 267 TFEU — Registrar — Definition of 'a court or tribunal' — Compulsory jurisdiction — Exercise of judicial functions — Independence — Lack of jurisdiction of the Court	5.7. <i>Ex officio</i> control of unfair contract terms and out-of-court proceedings

Case number and name	Issues	Section in the Notice
C-535/16 — Bachman	Article 2(b) — Unfair terms in consumer contracts — Notion of ‘consumer’ — Natural person having concluded an agreement for novation with a credit institution in order to meet repayment obligations to that institution in respect of credit obtained by a commercial company	1.2. The scope of the UCTD
<b>2018</b>		
C-51/17 — OTP Bank and OTP Faktoring Követeléskezelő Zrt v Teréz Ilyés and Emil Kiss	Scope — Article 1(2) — Mandatory statutory or regulatory provisions — Article 3(1) — Concept of ‘contractual term which has not been individually negotiated’ — Term incorporated in the contract after its conclusion following the intervention of the national legislature — Article 4(2) — Plain and intelligible drafting of a term — Article 6(1) — Examination by the national court of its own motion as to whether a term is unfair — Loan contract denominated in a foreign currency concluded between a seller or supplier and a consumer	1.2. The scope of the UCTD 3.3. Transparency requirements 4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties
Joined Cases C-96/16 and C-94/17 Banco Santander Escobedo Cortés	Unfair terms — Scope — Assignment of debts — Loan agreement concluded with a consumer — Criteria for assessing the unfairness of a contractual term setting the default interest rate — Consequences of that unfairness	1.1. The objectives of the UCTD 2.1. Minimum harmonisation and extension of scope (Article 8 and 8a UCTD), including the role of national supreme courts 3.4. Unfairness assessment under Articles 3 and 4(1) UCTD 4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties
C-147/16 — Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen	Unfair terms in consumer contracts concluded between a seller or supplier and a consumer — Examination by the national court of its own motion of the question of whether the contract is within the scope of that directive — Article 2(c) — Notion of ‘seller or supplier’ — Higher educational establishment financed mainly by public funds — Contract for an interest-free repayment plan for registration fees and share of costs of a study trip	1.1. The objectives of the UCTD 1.2. The scope of the UCTD

Case number and name	Issues	Section in the Notice
C-119/17 — Liviu Petru Lupean, Oana Andreea Lupean v. SC OTP BAAK Nyrt.,	Unfair terms in consumer contracts — Article 3(1), Article 4(1) and Article 5 — Assessment of the unfair character of contract terms — Credit agreement concluded in a foreign currency — Exchange rate risk entirely imposed on the consumer — Significant imbalance in the parties' rights and obligations under the contract — main subject matter of the credit agreement	<p>3.2. Contract terms relating to the main subject matter of the contract or the price and remuneration (Article 4(2) UCTD)</p> <p>3.3. Transparency requirements</p> <p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p>
C-176/17 — Profi Credit Polska S.A. w Bielsku Białej v Mariusz Wawrzosek	Unfair terms in consumer contracts — Directive 2008/48/EC — Order for payment procedure founded on a promissory note that secures the obligations arising from a consumer credit agreement	<p>2.2. Other provisions of national law</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p> <p>5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies</p> <p>5.5. What does <i>ex officio</i> control imply?</p>
C-448/17 — EOS KSI Slovensko s.r.o. v Ján Danko and Margita Danková	Unfair terms — Article 4(2) and Article 5 — Obligation to draft terms in plain intelligible language — Article 7 — Actions brought before the courts by persons or organisations having a legitimate interest in protecting consumers against the use of unfair terms — National law making the possibility for a consumer protection association to intervene in the proceedings subject to the consumer's consent — Consumer credit — Directive 87/102/EEC — Article 4(2) — Obligation to indicate the annual percentage rate in the written agreement — Agreement containing only a mathematical formula for calculating the annual percentage rate without the information necessary to make that calculation	<p>3.3. Transparency requirements</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p> <p>5.3. Obligations stemming from the principle of <i>equivalence</i></p> <p>5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies</p> <p>5.7. <i>Ex officio</i> control of unfair contract terms and out-of-court proceedings</p> <p>6. Injunctions in the collective interest of consumers (Article 7(2) and (3) UCTD)</p>
C-483/16 — Sziber v ERSTE Bank Hungary Zrt	Article 7(1) — Loan agreements denominated in foreign currency — National legislation providing for specific procedural requirements when the fairness of terms is challenged — Principle of equivalence — Charter of Fundamental Rights of the European Union — Article 47 — Right to effective judicial protection	<p>4.4. Restitution of advantages obtained through unfair contract terms</p> <p>5.5. What does <i>ex officio</i> control imply?</p>

Case number and name	Issues	Section in the Notice
C-632/17 — Powszechna Kasa Oszczędności (PKO) Bank Polski S.A. w Warszawie v Jacek Michalski	Article 99 of the Rules of Procedure of the Court of Justice — Consumer protection — Directive 93/13/EEC — Unfair terms in consumer contracts — Directive 2008/48/EC — Order for payment procedure based on bank ledger excerpts — Impossible for the court, in the absence of an action brought by a consumer, to examine the unfairness of the contractual terms	<p>2.2. Other provisions of national law</p> <p>5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general</p> <p>5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies</p> <p>5.5. What does <i>ex officio</i> control imply?</p>
<b>2019</b>		
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	Articles 6 and 7 — Unfair terms in consumer contracts — Accelerated repayment clause of a mortgage loan contract — Declaration that the clause is unfair in part — Powers of the national court when dealing with a term regarded as ‘unfair’ — Replacement of the unfair term with a provision of national law	<p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p> <p>4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties</p> <p>5.5. What does <i>ex officio</i> control imply?</p>
C-118/17 — Dunai v ERSTE Bank Hungary Zrt	Article 1(2) — Article 6(1) — Loan contract denominated in a foreign currency — Exchange difference — Substitution of a legislative provision for an unfair term declared void — Exchange rate risk — Continued existence of the contract after the unfair term has been deleted — National system for a uniform interpretation of law	<p>1.2. The scope of the UCTD</p> <p>2.2. Other provisions of national law</p> <p>3.2. Contract terms relating to the main subject matter of the contract or the price and remuneration (Article 4(2) UCTD)</p> <p>3.3. Transparency requirements</p> <p>3.4. Unfairness assessment under Articles 3 and 4(1) UCTD</p> <p>4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties</p> <p>5.2. The principle of <i>ex officio</i> control of unfair contract terms</p> <p>5.6. Implications of <i>ex officio</i> control, <i>effectiveness</i> and <i>equivalence</i> for the national rules of procedure</p>

Case number and name	Issues	Section in the Notice
Case C-266/18 — Aqua Med sp.z.o.o.	Article 1(2) — Scope of the directive — Contractual term conferring territorial jurisdiction on the court determined pursuant to the general rules — Article 6(1) — Review of unfairness of the court's own motion — Article 7(1) — Obligations and powers of the national court	1.2. The scope of the UCTD 3.4. Unfairness assessment under Articles 3 and 4(1) UCTD 5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies
C-590/17 — Pouvin and Dijoux	Scope — Article 2(b) and (c) — Concepts of 'consumer' and of 'seller or supplier' — Finance for the purchase of a home — Mortgage loan granted by an employer to its employee and to his spouse, the jointly and severally liable co-borrower	1.2. The scope of the UCTD

#### Cases pending on 31 May 2019

C-125/18 — Gómez del Moral Guasch	Article 1 (2) — Article 4 (2) — Article 6 (1) — Article 7 (1) — Article 8	1.2. The scope of the UCTD 3.3. Transparency requirements
C-260/18 — Dziubak	Article 1(2) — Article 6(1)	4.3. Consequences of the unfairness of contract terms for the rights and obligations of the parties
C-272/18 — Verein für Konsumentinformation	Concerning fiduciary agreements concluded between a managing partner and other limited partners in a limited partnership under German law	1.2. The scope of the UCTD
C-452/18 — Ibercaja Banco	Annex paragraph (q) — Article 3 — Article 4 (2) — Article 6	1.2. The scope of the UCTD 4.2. The legal effect of 'not being binding on the consumer'
Joined cases C-453/18 and C-494/18 — Bondora	Article 6(1) — Article 7(1)	5.1. The significance of Articles 6(1) and 7(1) UCTD and of the principles of <i>equivalence</i> and <i>effectiveness</i> in general

Case number and name	Issues	Section in the Notice
Joined cases C-698/18 — Raiffeisen Bank SA and C-699/18 BRD Groupe Societe Generale SA	Article 2 point (b) — Article 6(1) — Article 7(2) — Article 8 — Recitals 12, 21 and 23	5.4. <i>Ex officio</i> assessment and the <i>effectiveness</i> of remedies
C-779/18 — Mikrokasa and Revenue Niestandaryzowany Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty w Warszawie	Article 1(2)	1.2. The scope of the UCTD
C-829/18 — Crédit Logement	Article 1(2) — Article 3(1) — Article 4 — Article 5 — Article 6(1) — Article 7(1) — point 1(i) of the Annex	3.3. Transparency requirements
C-81/19 — Banca Transilvania	Article 1(2) — Article 3(1) — Article 4 — Article 5 — Article 6(1) — Article 7(1) — point 1(i) of the Annex	1.2. The scope of the UCTD
C-84/19 — Profi Credit Polska	Article 1(2) — Article 3(1) Article 4(2) - Directive 2008/48/EC	3.2. Contract terms relating to the main subject matter of the contract or the price and remuneration (Article 4(2) UCTD)

## ANNEX II

**Overview of notifications under Article 8a UCTD <sup>(1)</sup>**

This table reflects information which the Member States have notified to the Commission under Article 8a of Directive 93/13/EEC (UCTD). It does not represent a complete overview of the national transposition measures for Directives 93/13/EEC and can provide only a rough indication of some particularities of the relevant national law. For instance, depending on the precise formulation in the relevant national provisions, a 'grey list' can have different legal implications.

This information is also accessible on the following website, which will be updated regularly:

[https://ec.europa.eu/info/notifications-under-article-8a-directive-93-13-ee\\_en](https://ec.europa.eu/info/notifications-under-article-8a-directive-93-13-ee_en)

BELGIUM	National law contains a list of standard contract terms considered unfair in all circumstances (i.e. a black list).
BULGARIA	National law contains a list of standard contract terms considered unfair in all circumstances (i.e. a black list).
CZECHIA	National law also covers the unfairness of individually negotiated contract terms, and contains a list of contract terms considered unfair in all circumstances (i.e. a black list).
DENMARK	National law does not go beyond the minimum standard of the UCTD.
GERMANY	National law contains two black lists of standard contract terms considered unfair.
ESTONIA	National law contains a list of standard contract terms considered unfair in all circumstances (i.e. a black list).
IRELAND	National law does not go beyond the minimum standard of the UCTD.
GREECE	National law contains a list of standard contract terms considered unfair in all circumstances (i.e. a black list).
SPAIN	National law has broadened the scope of the unfairness assessment to contract terms relating to the definition of the main subject matter of the contract and to the adequacy of the price or remuneration, regardless of whether such terms are in plain, intelligible language.  National law also contains lists of terms considered unfair in all circumstances (i.e. black lists).

<sup>(1)</sup> Status of 31 May 2019.

FRANCE	National law also covers the unfairness of individually negotiated contract terms and contains a list of terms considered unfair in all circumstances (i.e. a black list) and a list of terms considered unfair unless it is proven that they are fair (i.e. a form of grey list).
CROATIA	National law does not go beyond the minimum standard of the UCTD.
ITALY	National law contains a list of contract terms considered unfair in all circumstances (i.e. a black list), including where such terms have been negotiated individually, and a list of contract terms which are presumed to be unfair in the absence of proof to the contrary (i.e. a form of grey list). The list has been extended compared to the Annex to the UCTD.
CYPRUS	National law does not go beyond the minimum standard of the UCTD.
LATVIA	National law does not go beyond the minimum standard of the UCTD.
LITHUANIA	National law contains no provisions going beyond the minimum standard of the UCTD.
LUXEMBURG	National law has broadened the scope of the unfairness assessment to individually negotiated contract terms and to the main subject matter.  National law contains a black list of contractual terms which are considered unfair in all circumstances (i.e. a black list) which has been extended compared to the UCTD.
HUNGARY	National law contains a list of terms considered unfair in all circumstances (i.e. a black list) and a list of terms considered unfair until the contrary is proven (i.e. a form of grey list).
MALTA	National law has broadened the scope of the unfairness assessment to individually negotiated contract terms and to the adequacy of the price or remuneration, regardless of whether such terms are in plain, intelligible language.  National law contains a list of standard contract terms that may be unfair which lists some additional terms compared to the Annex to the UCTD.
NETHERLANDS	National law contains a list of contract terms considered unfair in all circumstances (i.e. black list) and a list of contract terms which may be considered as unfair (i.e. a form of grey list). The list has been extended compared to the UCTD.



AUSTRIA	National law contains a black list and a grey list of standard contract terms considered unfair and partially extends the assessment of unfairness to individually negotiated contract terms.
POLAND	National law contains a list of terms which are considered to be unfair in case of doubt (i.e. a form of grey list) and which goes beyond the Annex to the UCTD.
PORTUGAL	National law has broadened the scope of the unfairness assessment to contract terms relating to the definition of the main subject matter of the contract and the adequacy of the price or remuneration, regardless of whether such terms are in plain, intelligible language.  National law contains a list of standard contract terms that are strictly prohibited (i.e. a black list) and a list of contract terms that are prohibited in certain circumstances (i.e. a form of grey list).
ROMANIA	National law contains an indicative list of terms considered unfair, which has been extended compared to the Annex to the UCTD.
SLOVENIA	National law extends the unfairness assessment to contract terms relating to the main subject matter of the contract and to the adequacy of the price or remuneration, regardless of whether such terms are in plain, intelligible language.
SLOVAKIA	National law contains a black list of contract terms that are unfair in all circumstances.
FINLAND	National law has broadened the scope of the unfairness assessment to individually negotiated contract terms and to the adequacy of the price or remuneration, regardless of whether such terms are in plain, intelligible language.
SWEDEN	National law extends the unfairness assessment to contract terms relating to the definition of the main subject matter of the contract and to the adequacy of the price or remuneration, regardless of whether such terms are in plain, intelligible language, as well as to individually negotiated contract terms.
UNITED KINGDOM	National law does not go beyond the minimum standard of the UCTD. However, the indicative list in the Annex to the UCTD has been extended.