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.

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 supplies 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).

[128] 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.

[129] The relationship between the UCTD and national rules of procedure is discussed specifically in Section 5 below.

[130] 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.

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[131].

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).

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[132].
- 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[133].

[131] 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.

[132] 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).

- Failure to meet the transparency requirements can be an element in the assessment of the unfairness of a given contract term[134] and can even indicate unfairness[135].

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[136] 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[137] 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[138], 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[139].

In light of the above, the Court[140] 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[141].

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[133] 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-484/08 *Caja de Ahorros Monte de Piedad de Madrid*, paragraphs 40-44.

[134] Case C-472/10 *Invitel*, point 1 of the operative part and paragraphs 30 and 31; Case C-226/12 *Constructora Principado*, paragraph 27.

[135] Case C-191/15 *Verein für Konsumenteninformation v Amazon*, point 2 of the operative part and paragraphs 65-71.

[136] Since Case C-237/02 *Freiburger Kommunalbauten.*

[137] 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.

[138] Corresponds to Article 267 of the Treaty on the Functioning of the European Union (TFEU).

[139] Case C-186/16 *Andriciuc*, paragraphs 32 and 33.

[140] After Case C-240/98 *Océano Grupo Editorial*, point 2 of the operative part.

[141] 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[142]. 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[143].

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[144]. The particularity of such contract terms is that, under the minimum standard of Article 4(2) UCTD[145], the assessment of their unfairness under Article 3(1) is excluded[146] or limited[147] 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[148]. Article 4(2) must also be interpreted uniformly throughout the European Union, taking into account the purpose of the UCTD[149]. 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[150], and (b) whether such contract terms are drafted in plain intelligible language[151].

[142] Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortés.*

[143] Case C-118/17 *Dunai*, paragraphs 57-64 and Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortés*.

[144] 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.

[145] Where Member States have not transposed this limitation contained in Article 4(2) UCTD into their national law (See Annex 2 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.'

[146] Regarding the main-subject-matter of the contract.

[147] Excluding an assessment of the adequacy of the price or remuneration.

[148] Case C-186/16 *Andriciuc* 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).

[149] Case C-143/13 *Matei and Matei*, paragraph 50.

[150] Case C-143/13 *Matei and Matei* paragraph 53.

[151] Case C-51/17 *OTP Bank and OTP Faktoring*, paragraph 68, Case C-118/17 *Dunai*, paragraph 49.

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**[152]. By contrast, terms that are merely **ancillary** cannot fall within the concept of 'main subject matter of the contract'[153]. 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[154].

The Court[155] 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[156] 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[157]. The Court considered[158] 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[159]. By contrast, the Court considered a term defining the currency conversion mechanism to be an ancillary arrangement[160].

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)[161], the unfairness test may include an assessment of the *adequacy* of the price and

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[152] Case C-186/16 *Andriciuc*, 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.
[153] Case C-186/16 *Andriciuc*, paragraph 36; Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 50; and Case C-96/14 *Van Hove*, paragraph 33.
[154] Case C-26/13 *Kásler and Káslerné Rábai*, paragraphs 50 and 51.
[155] Case C-186/16 *Andriciuc*, paragraphs 37 and 38.
[156] Case C-186/16 *Andriciuc*, paragraphs 39-41.
[157] Case C-26/13 *Kásler and Káslerné Rábai.*
[158] Case C-186/16 *Andriciuc*, paragraph 41, Case C-119/17, *Lupean*, paragraph 17.
[159] Case C-119/17, *Lupean*, paragraphs 18-21.
[160] Case C-26/13 *Kásler and Káslerné Rábai.*
[161] National law may give courts the possibility to assess the adequacy of the price even where such terms are clear and intelligible (See Annex 2 to this Notice).

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[162] 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[163] 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[164].

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[165].

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[166]. On this basis the Court[167] 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.'*

[162] E.g. Case C-143/13 *Matei and Matei*, paragraph 56.
[163] Case 472/10 *Invitel*, paragraph 23.
[164] In Case 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."
[165] 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.
[166] Case C-26/13 *Kásler and Káslerné Rábai*, paragraphs 57 and 58.
[167] Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 58, confirmed, for instance, in Case C-143/13 *Matei and Matei*, paragraph 70.

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[168]) **contract terms** that are within the scope of the UCTD[169].

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[170] 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[171]. In this connection, the position or perspective of consumers to whom the relevant terms are addressed has to be taken into account[172]; 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,
    - 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[173].

[168] Unless the national transposition applies also to contract terms that have been negotiated individually (See Annex 2 to this Notice).
[169] C-119/17 *Lupean*, paragraph 23, Case C186//16 *Andriciuc*, paragraph 43 and the case law cited there.
[170] Recital 20 also expresses that 'the consumer should actually be given an opportunity to examine all the terms'.
[171] Case C-96/14 *Van Hove*, paragraph 50.
[172] Case C-96/14 *Van Hove*, paragraph 48.
[173] Opinion of Advocate General Hogan of 15 May 2019 in Case C-621/17 *Kiss*, paragraph 41.

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'[174]. 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[175]:

> *'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*** *[…][176].'*
>
> *'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 […][177].'*

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[178] 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 […][179].'*

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

[174] Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo and Others*, paragraphs 48 and 49.
[175] E.g. Case C-186/16 *Andriciuc*, 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.
[176] References to Cases C-26/13 *Kásler and Káslerné Rábai*, paragraphs 71 and 72, and C-348/14 *Bucura*, paragraph 52.
[177] References to Cases C-26/13 *Kásler and Káslerné Rábai*, paragraph 75 and C-96/14 *Van Hove*, paragraph 50
[178] For instance, in Case C-186/16 *Andriciuc*, paragraph 48, quoted here.
[179] 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.

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[180]:

> *'[…] 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***.
>
> *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 […]*[181] *,*

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[182] and to the interests and fees due, including their adaptation, under a consumer credit agreement[183]. 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[184]. 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[185]. 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[186] and have to take into account also the **promotional material and information provided by the lender in the negotiation** of the loan agreement[187].

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[188].

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[180] E.g. Case C-186/16 *Andriciuc*, paragraph 47 quoted here. The same language can be found in Case C-143/13 *Matei and Matei*, paragraph 74.
[181] References to Case C-348/14 *Bucura*, paragraph 66.
[182] E.g. Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 73-74.
[183] Case C-348/14 *Bucura*, paragraphs 45-66.
[184] Case C-186/16 *Andriciuc*, paragraphs 49 -51.
[185] Case C-186/16 *Andriciuc*, paragraph 50.
[186] Case C-186/16 *Andriciuc*, paragraph 43, Case C-119/17 *Lupean*, paragraph 23.
[187] Case C-186/16 *Andriciuc*, paragraph 46; Case C-143/13 *Matei and Matei*, paragraph 75; Case C-26/13 *Kásler and Káslerné Rábai*, paragraph 74.
[188] 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-

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[189].

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[190] 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.

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[191], the Consumer Rights Directive[192], the Consumer Credit Directive[193], the Mortgage Credit Directive[194], the Package Travel Directive[195], the European Electronic Communications Code[196], Regulation (EC) No 1008/2008 on air services[197] and Directives 2009/72/EC and 2009/73/EC[198] concerning common rules for the internal market in electricity natural gas. Such acts may also regulate the compulsory content of the relevant contracts[199] and contain rules on the admissibility of contract changes and their transparency[200].

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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, Articles 5 and 6 of Directive 2008/48/EC on credit agreements for consumers, Article 14 of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property or Article 5 of Directive (EU) 2015/2302 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.

[189] Case C-472/10 *Invitel*; Case C-92/11 *RWE Vertrieb*; Case C-143/13 *Matei and Matei.*

[190] Case C-125/18 *Gómez del Moral* (pending on 31 May 2019).

[191] Directive 2005/29/EC.

[192] Directive 2011/83/EC.

[193] Directive 2008/48/EC.

[194] Directive 2014/17/EU.

[195] Directive (EU) No 2015/2302.

[196] Directive (EU) 2018/1972.

[197] 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.

[198] 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. 55–93*; 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. 94–136*.

[199] E.g. Article 7 of Directive (EU) 2015/2302 on package travel and linked travel arrangements; Article 10 of Directive 2008/48 on credit agreements for consumers; Article 21 and Annex II of the Directive 2002/22/EC; 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. 10–35*; Article 4 of Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015

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[201].

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[202], 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[203] and, thereby, of presenting the total cost of the credit in the form of a single mathematical formula[204]. Therefore, the failure to indicate the annual percentage rate of charge (APR) as required under EU consumer credit rules[205] 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[206]. 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.

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[207] of Directive 2014/17/EU 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

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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. 1–18*; Articles 102 and 103 and Annexes referred to therein of Directive (EU) 2018/1972; Annex I 1. a) of Directive 2009/72/EC and Annex I 1. a) of Directive 2009/73/EC.

[200] E.g. Articles 10 and 11 of Directive (EU) 2015/2302, Article 11 of Directive 2008/48/EC, Annex I 1. b) of Directive 2009/72/EC and Annex I 1. b) of Directive 2009/73/EC contain rules on the admissibility of contract changes and their transparency.

[201] See, for instance, Case C-76/10 *Pohotovosť*, 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*.

[202] Now Directive 2008/48/EC, previously Directive 87/102/EEC.

[203] Cases C-448/17 *EOS KSI Slovensko*, paragraph 63 and C-348/14 *Bucura*, paragraph 57.

[204] 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.

[205] Now required under Directive 2008/48/EC. In Case C-448/17 *EOS KSI Slovensko* and Case C-76/10 *Pohotovost'* Directive 87/102/EEC was still applicable to the relevant consumer credit contracts.

[206] 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.

[207] Pursuant to Article 43 of Directive 2014/17/EU, this Directive shall not apply to credit agreements existing before 21 March 2016.

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[208] transparency requirements stemming from Directive 2003/55/EC[209] 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

[208] 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. […]"

[209] In Joined Cases C-359/11 and C-400/11 *Schulz and Egbringhoff*, 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 and Directive 2003/55/EC (replaced by Directive 2009/72/EC and Directive 2009/73/EC respectively). The content of the contracts at issue being determined by German legislative provisions that are mandatory, the UCTD was not applicable.

with a consumer and takes his legitimate interests into account. In this respect, the Court[210] 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:

> *' 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 [...][211]. '*

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[212] 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[213]. 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)[214], 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[215].

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[210] Case C-421/14 *Banco Primus*, paragraph 60. See also Case C-186/16 *Andriciuc*, paragraph 57.

[211] Reference to Case C-415/11 *Aziz*, paragraph 69.

[212] 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 Andriciuc, 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.

[213] See Section 3.4.2.

[214] 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 *Andriciuc* 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".

The indicative list of contract terms in the Annex[216] 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[217]. 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.

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**[218], 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[219].

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[220].

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*[221]'. This does not necessarily require that the term must have a significant economic impact with regard to the value of the transaction[222]. 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[223].

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[224]. In this context, the difficulty for the

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[215] 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.
[216] See also Section 3.4.7. on the role of the Annex.
[217] 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.
[218] 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 *Andriciuc*, paragraph 59.
[219] The latter aspect is referred to, for instance, in Case C-415/11 *Aziz*, paragraph 74.
[220] Case C-421/14 *Banco Primus*, paragraph 59; Case C-415/11 *Aziz* paragraph 68; Case C-226/12 *Constructora Principado*, paragraph 23.
[221] Case C-226/12 *Constructora Principado*, paragraph 23 and the first indent of the operative part.
[222] Case C-226/12 *Constructora Principado*, paragraph 22 and the first indent of the operative part.
[223] Case C-226/12 *Constructora Principado*, paragraph 26.
[224] 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

consumer to prevent the continued use of the type of contract term in question may also be relevant[225].

The Court has described the assessment of a significant imbalance in the rights and obligations of the parties as follows[226]:

> *'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 […][227].*
>
> *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.*
>
> *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 […][228]. 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 […][229].'*

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

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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.

[225] 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.

[226] Case C-226/12 *Constructora Principado*, paragraphs 21-24.

[227] Reference to Case C-415/11 *Aziz*, paragraph 68.

[228] Reference to Case C 472/11 *Banif Plus Bank*, paragraph 40.

[229] Reference to Case C-415/11 *Aziz*, paragraph 71.

to be **justified in light of the importance of the consumer's obligation and the seriousness of the failure** to comply with it[230]. In other words, they have to be proportionate[231]. 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[232].

The Court[233] 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[234] 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.'*

[230] E.g. Case C-415/11 *Aziz,* paragraph 73; Case C-421/14 *Banco Primus*, paragraph 66.
[231] 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;".
[232] Case C-415/11 *Aziz, p*aragraph 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.
[233] 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.
[234] Case C-415/11 *Aziz*, paragraph 74.

In relation to the proportionality[235] and, thereby, unfairness of sanctions set out in contract terms, the Court has furthermore specified[236] 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[237], regardless of whether they have been applied[238].

3.4.4. Possible unfairness of the price or remuneration

As mentioned above[239], 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[240]. For instance, regarding the possible unfairness of an ordinary interest rate laid down in a loan agreement, the Court has stated[241] 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

[235] Point 1(e) of the Annex to the UCTD.
[236] Case C-377/14 *Radlinger Radlingerová*, paragraph 101.
[237] Case C-377/14 *Radlinger Radlingerová*, paragraph 101.
[238] 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 incompliance with contractual obligations, has been withdrawn.
[239] Sections 3.1. and 3.2.2. Joined Cases C-96/16 and C-94/17 *Banco Santander Escobedo Cortés.*
[240] 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 *Andriciuc*, paragraphs 52-58.
[241] Case C-421/14 *Banco Primus*, paragraph 67, second indent.

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[242].

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)[243].

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 contact terms.[244]

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*[245]. 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[246].

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[247]. This means that, after establishing that a contract term covered by Article 4(2)[248] 'is not in plain intelligible language', its unfairness normally still has to be assessed under the criteria of Article 3(1)[249]. Conversely, lack of transparency is not an indispensable element in the assessment of unfairness under Article 3(1)[250] so that also contract terms that are perfectly transparent can be unfair under Article 3(1) in light of their unbalanced content[251].

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

[242] Case C-186/16 *Andriciuc*, paragraph 54.
[243] Case C-186/16 *Andriciuc*, paragraphs 55 and 56.
[244] 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.
[245] Case C-602/13 *BBVA*, paragraph 50.
[246] Case C-421/14 *Banco Primus*, point 4 of the operative part and paragraph 73.
[247] 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).
[248] See Section 3.2.1.
[249] This is confirmed implicit or explicitly in several rulings, for instance in Cases C-421/14 *Banco Primus*, paragraph 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.
[250] 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.
[251] 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 […]."

Annex, in general, and Point 1(i) 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[252] or refer to the lack of transparency and unfairness of contract terms in one breath[253].

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[254], terms which determine the consumer's core obligations in loan agreements[255] or with regard to choice-of-law clauses[256].

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[257], this omission of information or the misleading character of the term can imply its unfairness. The Court[258], after recalling the criterion of a significant imbalance in the rights and obligations of the parties, stated that

[252] 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."
[253] 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 an 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."
[254] Case C-472/10 *Invitel*, paragraphs 21-31; Case C-92/11 *RWE Vertrieb*, paragraph 40-55.
[255] Case C-26/13 *Kásler and Káslerné Rábai*, Case C-348/14 *Bucura*, Case C-186/16 *Andriciuc* and Case C-119/17 *Lupean*, paragraphs 22-31.
[256] Case C-191/15 *Verein für Konsumenteninformation v Amazon.*
[257] Article 6 of Rome I Regulation.
[258] 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

'[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[259]. 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[260].

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[261]. 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[262]. 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.[263]*'*

Where a Member State[264] has adopted a 'black list' of terms that are always considered to be unfair[265], contract terms that are contained in such lists will not have to be assessed under the national provisions transposing Article 3(1).

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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."

[259] 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 *Pohotovosť*, paragraphs 56 and 58.

[260] Case C-478/99 *Commission v Sweden* paragraph 11.

[261] Case C-478/99 *Commission v Sweden* paragraph 11.

[262] 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.

[263] Case C-472/10 *Invitel*, first part of paragraph 26.

[264] See Annex 2 to this Notice.

[265] Case C-143/13 *Matei and Matei*, paragraph 61.

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)[266] : C-76/10 *Pohotovost'*; C-415/11 *Aziz*[267]*;* 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* [268], Case C-348/14 *Bucura*[269], 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*[270] relating to the exchange rate conversion mechanism for a mortgage loan denominated in foreign currency;
    - Case C-143/13 *Matei and Matei*[271] in relation to to unilateral changes in the interest rate;
- Point 1(q)[272]:
    - 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)[273]; Case C-266/18 *Aqua Med* concerns statutory provisions on jurisdiction;
    - C-240/08 *Asturcom Telecommunicaciones*; 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.

[266] Terms "requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation ".
[267] Paragraph 74.
[268] Paragraphs 21-31.
[269] Paragraph 60.
[270] In particular paragraph 73.
[271] In particular,paragraph 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."
[272] "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'".
[273] 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.

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.