

**Unfair Terms in EU Consumer
Contract Law:
The Criteria of Good Faith and Significant
Imbalance in The Context of Agreements
Between Consumers and Providers of
Financial Services**

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Abstract

This thesis describes and analyze the implementation of Council Directive No. 93/13/EEC of 5 April 1993 of unfair contract term between consumer and financial services providers. The Directives regulated standard form contract or pre-formulated term between consumer and seller or supplier. The thesis discusses the background of the Directive, the scope of the Directive, the consequences of unfair contract term to the contract, transparency requirement and the requirement of good faith and significant imbalance. According to the Directive, assessment of unfairness in the term of contract shall not relate to main subject matter of the contract and to the adequacy of the price and remuneration against the services or goods supplies in exchange. However, the terms are subject to unfairness test if there is lack of transparency requirement in contract. To further study about the implementation and the interpretation of the Directive, the thesis will analyze the case between consumer and financial services provider referred to ECJ from 2021-2023.

Keywords: Consumer protection, Unfair contract term, Directive 93/13/EEC, good faith, transparency, significant imbalance, standard term contract.

Foreword

This thesis is produced during my scholarship period at Lund University, which was funded by Swedish Institute, as part of the SI Scholarship for Global Professional Programme.

I would like also to thank my supervisor Prof. Niklas Arvidsson from Lund University School of Economics and Management for the guidance and knowledge he has given me throughout the process of writing my thesis.

I would like to dedicate this thesis to my family and friends. I am very grateful for their prayer and endless support during my study.

And above all I want to thank Lord Jesus Christ for answering my prayer and give me strength in all circumstances. To God be the glory!

Abbreviations

BGB	Bürgerliches Gesetzbuch
CJEU	The Court of Justice of the European Union
EU	European Union
ECJ	European Court of Justice
PECL	Principles of European Contract Law
STC	Standard Term Contract
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UCTD	Unfair Contract Terms Directive

1. Introduction

1.1 Background

European Union (“EU”) consumer contract law regulates several Business-to-Consumer contractual matters, including the right of withdrawal, legal guarantees, and unfair contract terms.¹ There are several rules in relation with consumer protection in EU, including Consumer rights directive², consumer sales and guarantees³, rules promoting the repair of goods⁴ and the Unfair Contract Terms Directive⁵. EU consumer protection legislation is needed because the consumer must deal with many legal issues in everyday transactions with seller and consumer usually in a weak position because the lack of legal knowledge and less economic resources compared to the seller.

Consumers often take loans from financial services’ institutions like bank or leasing companies for mortgage, leasing cars, or listed company’s shares. Signing agreement with financial services institution give them financial power to buy property, car or share and repay the purchase in a long term with some interest. The reason for consumers to buy property, car, or shares with loan from financial services institution because they prefer to hold the fund for emergency, or they prefer to invest the cash in cryptocurrency, gold bar, mutual funds, and other type of investments.

Consumer have a weak position compared to financial services institution as the financial services institution provide the loan and usually have a standard loan agreement that the consumer have no power to change or influence its terms and

¹ European Commission, 'Consumer Contract Law' (*European Commission*) https://commission.europa.eu/law/law-topic/consumer-protection-law/consumer-contract-law_en accessed 26 April 2023

² Directive 2011/83/EU of the European Parliament and of the Council on consumer rights (Text with EEA Relevance) [2011] OJ L 304/64.

³ Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (Text with EEA Relevance) [2019] OJ L 136/28.

⁴ *ibid.*

⁵ The Council Directive No. 93/13/EEC of 5 April 1993 on Unfair terms in consumer contracts [1993] OJ L 95/29

conditions. In order to protect the consumer in EU, The Commission aims to encourage transparency and make sure that when the consumer taking loan from financial services, they must be well-informed before making their decision and feel confident that they are well protected.⁶

The protection of credit consumer was needed mainly because credit agreement provided by financial services institution usually in standard form and most of the consumer are unable to negotiate the term individually. There are two Directives which are applicable inter alia to consumer credit agreements with financial institution which are 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 87/102/102/EEC (“Consumer Credit Directive”) and The Council Directive No. 93/13/EEC of 5 April 1993 on Unfair terms in consumer contracts (“UCTD”). UCTD aim to protect European consumer from unfair term and condition in standard contract for goods and services they purchase.⁷ The Directive applies to every form of contract on the purchase of goods and services, for instance online and off-line-purchases of consumer goods, gym subscriptions or contracts on financial services such as loan.⁸ On the other hand, Consumer Credit Directive’s objective is to establish an advance level of consumer protection and safeguard access to safe and simple credit solutions across the EU.⁹

The Treaty on the Functioning of the European Union (“TFEU”) regulates that the area of consumer protection falls under a shared competence between EU and the Member States.¹⁰ Member States are obliged to implement and enforce EU rules once the legislation in consumer protection is adopted through the common legislative procedure.

⁶ European Commission, 'Consumer Finance and Payments' (*European Commission*) <https://finance.ec.europa.eu/consumer-finance-and-payments_en> accessed 26 April 2023.

⁷ Lexnexis EU Law Expert, 'The EU Unfair Terms in Consumer Contracts Directive' (Lex Nexis, 3 April 2023) <<https://www.lexisnexis.co.uk/legal/guidance/the-eu-unfair-terms-in-consumer-contracts-directive#:~:text=The%20'fairness%20test'.-According%20to%20the&text=Where%20there%20is%20a%20significant,the%20requirement%20of%20good%20faith.>> accessed 14 April 2023.

⁸ European Commission, 'Unfair Contract Term Directive' (*European Commission*) <https://commission.europa.eu/law/law-topic/consumer-protection-law/consumer-contract-law/unfair-contract-terms-directive_en> accessed 12 May 2023.

⁹ Eurofinas, 'Consumer Credit Directives' (Eurofinas) <<https://www.eurofinas.org/policy-focus/consumer-credit-directive>> accessed 26 April 2023.

¹⁰ Jana Valant, *Consumer Protection in the EU* (European Parliamentary Research Services 2015) 3.

Unfair Contract Term Directive drafting begin at 1970s.¹¹ At first, the Unfair Contract Term Directive include negotiated and standard form contract. The scope of the Directive is now limited to term that has not been individually negotiated. The Directive was considered “a victory for the consumer point of view” because in the preamble of the Directive, customer should be protected from the abuse of power by the seller or supplier, especially against one-sided contract and the unfair treatment of customer rights in the contract. The UCTD was established on the concept that the justification for managing standard term is to correct the “abuse of power” between seller and consumer.¹² The goal of the Directive is to support the free movement of standard contract form while at the same time protecting consumer from abuse of power by seller or supplier, especially against unequal standard contract and the unfair exclusion of fundamental rights in contract.¹³

The Directive focused on consumer contracts based on standard form and left other cases¹⁴ outside its scope. In order to accommodate the other cases outside the Directive’s scope, Unfair Contract Term Directive was made minimum harmonization Directives. This means that European Union law give same standard rights for consumer in all European Union and the Directive gives foundation on which national law of Member States can develop. The Member State are allowed to impose more extensive rules on consumer protection than what the Directive stipulates. In national level, the government can protect consumer by imposing stricter rules against individualized term and unfairness rules to business-to-business contract which are both outside the scope of the Directive. The UCTD has been amended by Directive (EU) 2019/2161 of 27 November 2019.¹⁵ Furthermore, the thesis will focus in the credit agreement between consumer and financial service institution and assess the term with the application of rules from UCTD.

¹¹ Grant Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (1st edn, Routledge 2018) 136.

¹² Hein Kotz, *European Contract Law* (2nd edn, Oxford University Press 2017) 133.

¹³ Howells, Twigg-Flesner and Wilhelmsson (n 11) 136.

¹⁴ Cases related to individually negotiated contract between consumer and seller or supplier are left outside the scope of the Directive. However, the Directive was made minimum harmonization Directive that enable Member State to protect consumer against individual negotiated term and business to business contract which are outside of the Directive.

¹⁵ Directive (EU) 2019/2161 of The European Parliament and of The Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules (text with EEA relevance) [2019] OJ L 328/7.

1.2 Purpose and research question

At a general level the purpose of this thesis is to describe and analyze the notion of unfair contract terms in consumer contracts and the assessment of unfair contract terms according to the Unfair Contract Term Directive. This will be done with a particular focus on how the Directive is to be interpreted in the context of agreements between customers and providers of financial services. The thesis will describe how to assess the Unfair contract term using good faith and balance requirement and analyze an indicative and non-exhaustive list of the terms regarded as unfair in the Annex of Unfair Contract Term Directive. To fulfill the purpose, the thesis will answer the following question:

- (1) What is meant by “unfair terms” in contract?
- (2) How are the assessments of good faith and significant imbalance made?
- (3) Which terms are considered unfair according to Annex of Unfair Contract Term Directive?
- (4) How do the Court of Justice in European Union interpret Unfair Contract Term Directive to assess fairness in agreement between customer and financial service provider?

1.3 Delimitations

The thesis will be focused on assessment on the unfair term in contract according to Unfair Contract Term Directive and Commission Notice of Guidance on the Interpretation and application of Council Directive 93/13/EEC on the unfair terms in consumer contracts and delve into many cases related to unfair term in contract. The thesis will not cover ex officio role of court related to unfair contract term and the substitution of the unfair contract term by the national court. The main purpose is to understand the legal interpretation of unfair contract term in Unfair Contract Term Directive, the assessment of the unfair contract term and the analysis of terms described in the Annex of Unfair Contract Term Directive and cases related to Unfair Term in credit agreement between Bank and customer. The term that will be assessed in this thesis specifically is the unfair term in credit agreement between consumer and consumer or retail financial services. A more in-depth look into Article 3 of Unfair Contract Term Directive will be executed in order to understand contractual term that was regarded as unfair.

1.4 Materials and method

The method used for this thesis will be legal dogmatics research. In legal dogmatic research, the research question relates to what is valid law, and the material examined in order to arrive at an answer which is normative material (the sources of law) is read and interpreted in accordance with the expert legal culture.¹⁶ The focus on valid law is the characteristic both of judges in the exercise of their functions as judges and for academic legal research irrespective of whether it is based on natural law theory or a legal theory which can be seen as positivistic.¹⁷

Accordingly, the thesis uses different resources for describing the term mentioned and analyzing the issue regarding unfair contract term. Legal instrument, relevant doctrine, scholarly literatures, and academic journal article will be used for the analysis. The relevant sources of law when addressing consumer protection and unfair contract term prohibition at EU level include Treaty of the European Union, The Treaty on the Functioning of the EU, The Unfair Contract Term Directive, and the principles derives from the above sources of law. Various other legal sources such as Commission's guidelines, literature and case law will be used as well. The legal literature contain material regarding Unfair terms in contract from Laurence Koffman, Hein Kötz, Hugh Collins, Grant Howells, Vivienne Kendall and Ewan McKendrick provide insight on the issue of unfair contract terms and allow for thorough analysis into the literature review. I will also analyze the latest case law from the Court of Justice regarding unfair term in contract, especially related to credit agreement between consumer and retail financial service provider. The thesis also includes an examination of which kind of normative material and what kind of argumentative pattern (for example teleological interpretation or literal interpretation) the CJEU uses.¹⁸ The cases that will be analysed in Chapter 3 will be cases related to agreement between consumer and retail financial services referred to ECJ in the period of 2021-2023. There are two reasons for choosing the case. The first is reason is the cases contain the latest interpretation and implementation of UCTD by ECJ and the second reason is most of the cases that

¹⁶ Ulla Neergard, Ruth Nielsen and Lynn Roseberry, *European Legal Method - Paradoxes and Revitalisation* (DJOF Publishing 2011) 105.

¹⁷ *ibid.*

¹⁸ *ibid* 106.

was referred to ECJ in the last three years are related to question regarding unfair contract term in agreement between retail financial institution and consumer.

1.5 Structure

The thesis consists of five chapters. The first chapter consist of background, purpose and research question, methodology, and delimitations of the thesis.

The second chapter provides a general overview of the Unfair Terms Directive, the status of directives in EU-law, the meaning of minimum harmonization and the difference between the Directive and other rules on consumer contracts within EU-law. This chapter will also describe about the scope of UCTD, consequences of the unfair term to the agreement, and the meaning of standard term contract. The chapter will also analyze exemptions from the fairness and transparency test and analysis of the content in exhaustive and indicative list of term in Annex of Unfair Contract Term Directive. This chapter also provide examples other clause that were not specified in the Annex of Unfair Contract Term Directive but regarded as an unfair term in contract.

The third chapter focuses on the assessment of fairness in contract with good faith requirement. The chapter will discuss “fair and open dealing” principle in good faith. This chapter will also discuss assessment of fairness in contract with significant imbalance requirement. The chapter will discuss the term in costumer contract so in favors of the business that makes it significantly imbalanced with the customer’s right. In this chapter, author will describe and analyze the judgement from CJEU related to good faith requirement to assess unfair contract term in recent years (2021-2023).

The fourth chapter focuses on the assessment of fairness in contract in relation with significant imbalance requirement. In this chapter, the author will assess CJEU judgement related to unfair contract term that causes significant imbalance between consumer and retail financial service provider in recent years.

The fifth chapter will summarize the document, makes legal analysis, and provides conclusions according to the research.

2. An Overview of The Unfair Contract Terms Directive

2.1 Introduction

The purpose of this chapter is to give general description of the UCTD including minimum harmonization of the UCTD, the scope, exception and the implication of the UCTD to Member State and protection of consumer in EU. To achieve this purpose, the first section will describe general overview of UCTD among other sources of EU Law, the second section will describe and analyze meaning of Minimum Harmonization of UCTD, the third section will describe the scope of UCTD, the consequences of unfair term to the contract and the meaning of so-called Standard Term Contract and the advantage of the seller in using standard contract term. The fourth section will discuss list of potentially unfair terms in Annex of UCTD and the fifth section will discuss the transparency requirement and the implementation of the transparency requirement to assess unfairness. The conclusion section will summarize the chapter in a concise manner.

2.2 Directives as Secondary Sources of EU Law

The sources of EU law consist of two categories: primary and secondary. EU various Treaties are the primary sources of EU law. The most important Treaties in EU currently are Treaty on European Union (“TEU”) and the Treaty on the Functioning of the European Union (“TFEU”) as the Treaties layout a framework on which the Union is based.¹⁹ TEU and TFEU become law in Member State after ratification and need not pass thenational legislation before it become enforced.²⁰ TEU and TFEU provide essential framework, guidelines, and regulatory tools for the functioning of the EU. The Treaties should be the first reference when

¹⁹ Karen Davies, *Understanding European Union Law* (4th edn, Routledge 2011) 56.

²⁰ Elspeth Berry, Matthew J Homewood and Barbara Bogusz, *Complete EU Law: Text, Cases and Materials* (Oxford University Press 2013) 64.

researching EU law. EU law is not specifically dependent on the Treaties because most of the detail implementing objectives and policies of the EU can be found in secondary legislation.

In connection with consumer protection, Article 4 (2) (f), 12, 114 (3) and 169 of TFEU and Article 38 of the Charter of Fundamental Rights of the European Union form the primary law for consumer protection policy.²¹ Article 169 TFEU regulate that the Union shall take high level of protection concerning the health, safety and economic interests of consumers and Member States should be allowed to introduce stricter protective measures for consumer in accordance with the Treaties.

Secondary sources include secondary legislation, case law of the Court of Justice, general principles as “stated” by the Court and international agreements entered by the Union.²² Article 288 TFEU set five kinds of secondary legislation in the EU.²³ The secondary legislation consists of Regulations, Directives, Decisions, Recommendations and Opinions.

Regulations will apply automatically and usually do not require implementing legislation. Member States are not required to have an action since Regulation are applied uniformly across entire EU. Regulation becomes part of national legislation in Member State on the date mentioned within the Regulation or on the twentieth day following that of its publication in the Official Journal of the European Union (Article 297 TFEU). In the event Regulation requires implementation action by Member State, they must follow the requirements of the Regulations otherwise it will result in the breach of EU law.

Directives are not directly applicable because Member State must transpose Directives into national legislation.²⁴ Member State can choose the form and method in which the implementation will be made. Directives are binding to Member State(s) to whom it applied. All directives have deadline and it will be specified in the directive. If there is no date specified, Article 297 TFEU states that the date of implementation should be the twentieth day following its publication in the Official Journal of the European Union. Occasionally, the law in Member State already corresponds with the Directives therefore Member State will not be required

²¹ Valant (n 10).

²² Davies (n 19) 55.

²³ Berry, Homewood and Bogusz (n 20) 68.

²⁴ *ibid.*

to perform any implementation. The Member State then must inform the Commission of the existing national law that already correspond with the Directives.

Decisions may be applied to all or certain Member States, or to business or individuals. There is no obligation to implement Decisions into legislation since it has direct applicability. Article 297 (2) TFEU regulates that Decision will take effect once the addressee of the Decision have been notified. All Decision will be published in the Official Journal of the European Union and taking effect according to the date mentioned in the Decision or, on the twentieth day after its publication if the Decision has no specific date.

Other source of secondary legislation is Recommendations and Opinions. Neither of these two legal instruments has binding effect. Even though they are not legally binding, national court should take them into account.²⁵ They are occasionally referred to as “soft law.” Aside from secondary legislation, there are also other sources of EU law. These sources are Decisions of the Court of Justice and International agreements and Conventions.

2.3 Minimum Harmonization of Unfair Contract Term Directive

Directives are not directly applicable in Member States and must be transposed into national law before it is applicable in Member States.²⁶ Directive also have general application unlike Decision. Member State must adopt a law to transpose Directive to national law. There are two harmonization requirements in Directives, minimum harmonization, and maximum harmonization. In the minimum harmonization requirement, the Directive sets minimum standards for Member State to follow. In this case, Member States can choose to set higher standard than the Directives in national law. In maximum harmonization, Member State must adopt law with minimum and maximum standard in accordance with the Directives.

²⁵ Davies (n 19) 59.

²⁶ Publications Office of the EU, 'European Union Directives' (*EUR Lex*) <[15](https://eur-lex.europa.eu/EN/legal-content/summary/european-union-directives.html#:~:text=In%20the%20case%20of%20minimum,those%20set%20in%20the%20directive.> accessed 26 April 2023</p></div><div data-bbox=)

Conventionally, many consumer protection Directives were minimum harmonization Directives.²⁷ This means that Member States are allowed to establish various level of protection, keeping higher level of protection or improving the protection with other national law.²⁸ UCTD is one of a minimum harmonization Directives. Under Article 8 UCTD, Member States may apply a higher level of consumer protection than regulated by UCTD.²⁹ Article 8a UCTD regulate Member State to notify rule that contain stringent standard or extend the scope of national rules transposing the UCTD. Therefore, Member States may apply stricter rule in national law, such as transposing the UCTD to contract term that were negotiated individually or to business-to-business relations or to transactions between consumers. Another example of more stringent rule is having a black list of contract term which are always considered unfair without demanding a case-by-case assessment under the general unfairness test of Article 3 (1) UCTD and different type of grey list. Member State can also regulate in national law that lack of transparency can resulted in the invalidity of contract terms without the application on unfairness test under Article 3 (1) UCTD.

2.4 Scope of Unfair Contract Term Directive and The Consequences of Unfair Contract Term to Contract

2.4.1 Scope of Unfair Contract Term Directive

Consumers have struggled with varying national requirements and language barriers when it comes to contractual terms. The Unfair Contract Terms Directive (“UCTD”) will address these issues by freeing consumers from unfair contract terms and mandating that Member States to take action to prevent sellers from using such terms. The Directive describes “unfair terms” as “contractual terms, not negotiated individually, which contrary to the requirement of good faith, cause a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”³⁰

²⁷ Howells, Twigg-Flesner and Wilhelmsson (n 11) 19.

²⁸ Norbert Reich and others, *European Consumer Law* (2nd edn, Intersentia Publishing 2014) 40.

²⁹ Commission Notice : Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts [2019] OJ 1 323/4/15

³⁰ Vivienne Kendall, *EC Consumer Law* (Chancery Law Publishing Ltd 1994) 145.

The UCTD's objective scope of application includes standard contract and pre-formulated terms. Standard contract is defined "standard business conditions which have been pre-formulated for a number of cases and which are used by the offeror against the consumer."³¹ Standard contract consist of contractual terms that are not usually negotiated between the seller and the consumer. The Directive also applies to terms that have not been individually negotiated. If a term has been created in advance and the consumer has had no influence over its meaning or content, it is considered not to have been individually negotiated, particularly in pre-formulated standard contracts.³² If a seller asserts that a particular term has been individually negotiated, they must bear the burden of proof.

Article 3 (2) UCTD regulated pre-formulated term as:

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.

The term can be suspected as pre-formulated if under normal circumstances, customer has no opportunity to change the contents.³³ If there is single term that has been negotiated between the parties, the remaining terms in the contract will be subjected to review according to Article 3 (2) UCTD.

UCTD excluded two terms from the scope of UCTD application, even if they are pre-formulated. The first term is mandatory statutory or regulatory provisions and the provisions or principles of international conventions. The second term that was excluded from the scope of UCTD is core provisions of the contract and the balance between performances and price. The core provisions of the contract may be interpreted in several ways. For example, within the sales contract, core provision of the contract covers the description of the type of goods to be delivered and the quantity of the goods.³⁴ However, all the minor details in the description of the

³¹ Hans-W Micklitz, Norbert Reich and Peter Rott, *Understanding EU Consumer Law* (1st edn, Intersentia 2009) 128.

³² Kendall (n 30) 145.

³³ Micklitz, Reich and Rott (n 31) 129.

³⁴ Grant Howells and Thomas Wilhelmsson, *EC Consumer Law* (Ashgate Publishing Company 1997) 95.

goods, exclusion clause related to the detail do not relate to the core provision of the contract. It is similar interpretation with exclusion of price term. Even though the price term excluded from the UCTD, indexation clause and other term affecting the price could be within the scope of the Directives. The reason for the exclusion of this clause is because the EC Council wish to exclude term that is resulting from the contractual freedom of the parties.³⁵

Price terms that define the primary purpose of the contract are excluded from the fairness test. Ancillary price terms and price adjustment clauses, on the other hand, are subject to the test.³⁶ The unfairness test can help prevent sellers from exploiting consumers' inability to form accurate perceptions of price through complex and deceptive pricing strategies. Moreover, some argue that the seller should bear the responsibility of demonstrating that the price is not unfair, particularly if it significantly exceeds the market price.

But for this term to be excluded, Article 4 UCTD regulates that the term of the contract should be in plain intelligible language or to be specific, the transparency requirements must be fulfilled.³⁷ It is not sufficient that the term is clear and precise for legal purposes, except in contracts normally entered only on legal advice.³⁸ There are some characteristics to determine if terms are in “plain intelligible language”. In a contract with consumer, the seller or supplier should refrain from using technical legal terminology such as “consequential loss”, “time is of the essence” and “force majeure”. In the event when legal term must be used in the contract, the seller or supplier should explain in the document about the meaning of the legal term. Plain and intelligible language also is not solely related to the word used, but also related to the style of document. Long sentences and many cross referencing do not support for intelligibility. Long documents could be accompanied by summaries but the seller must make sure that summaries should not mislead the consumer.

³⁵ *ibid* 94.

³⁶ *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* [2014] ECJ Case C-26/13, ECLI:EU:C:2014:282.

³⁷ Ola Svensson, 'The Unfair Contract Terms Directive: Meaning and Further Development' [2020] 3(2) *Nordic Journal of European Law* 27.

³⁸ Laurence Koffman and Elizabeth Macdonald, *The Law of Contract* (7th edn, Oxford University Press 2010).

Regarding the subjective application of the UCTD, Article 2 UCTD regulated that the provisions in UCTD only applied to contracts between sellers or suppliers and consumers. Consumer is defined as “any natural person who, in contracts covered by this Directive, is acting for the purposes which are outside his trade, business or profession.”³⁹ Consumer only referred to natural person and broader interpretation of consumer had been denied by the ECJ.⁴⁰

Meanwhile, the seller or supplier are defined 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 owned or privately owned.”⁴¹ With this definition, the contract that formulated by private person are excluded for this Directives.

2.4.2 Standard Term Contract

According to Article 3 UCTD, pre-formulated standard contract contain term that has been drafted in advance, not individually negotiated and therefore the consumer has not been able to influence the content of the term.⁴² Standard Terms Contract (“STC”) may provide seller or supplier advantages over consumers, including information advantage (the seller knows exactly what is in the contract, while the other party must analyse the standard contract terms to identify potential pitfalls) aside from transaction costs (the seller or supplier pays the lawyer once and uses the draft for multiple transactions, whereas the consumer must analyse such a pre-formulated contract on a one-time basis).⁴³ The two-advantage lead to an imbalance between the standard contact term user (seller or supplier) and the other contracting party (consumer).

There is a possibility that this imbalance may occur as a result of an imbalanced bargaining power between the parties in general, particularly if the STC user is a seller whereas the other party is a consumer or if the STC user is a large enterprise

³⁹ Micklitz, Reich and Rott (n 31) 133.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Svensson (n 37) 27.

⁴³ Rafal Manko, 'Unfair Contract terms in EU Law' (Library Briefing Library of the European Parliament, 19 September 2013)

<[https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130624/LDM_BRI\(2013\)130624_REV1_EN.pdf#:~:text=The%20UTD%20limits%20the%20scope%20of,is%20followed%20in%20the%20CESL%20proposal.&text=The%20UTD%20limits%20the,in%20the%20CESL%20proposal.&text=limits%20the%20scope%20of,is%20followed%20in%20the](https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130624/LDM_BRI(2013)130624_REV1_EN.pdf#:~:text=The%20UTD%20limits%20the%20scope%20of,is%20followed%20in%20the%20CESL%20proposal.&text=The%20UTD%20limits%20the,in%20the%20CESL%20proposal.&text=limits%20the%20scope%20of,is%20followed%20in%20the)> accessed 3 May 2023.

whereas the other party is a small medium enterprise. Additionally, there are also condition that leads consumer to approve any unfair contract term. The condition could be lack of awareness (many consumers do not think of the risk at the time of buying goods or services, lack of time (consumers do not wish to spend time reading the STC), lack of knowledge (“small print” terms are too difficult to understand without specialist expertise), lack of bargaining power (even if the consumer want to negotiate, the seller or supplier will refuse), and lack of choice (all seller or supplier of the same goods or services using similar terms in their contract).

2.4.3. Consequences of Unfair Contract Term to The Contract

If there is doubt about the meaning of a term in contract, Article 5(2) UCTD regulate that the interpretation that is most favorable to the consumer shall prevail. The principle is called *contra preferentem rules* and exists in most Member States.⁴⁴ However, there is exception on *contra preferentem* rules. Article 5 (3) UCTD view that *contra preferentem rules* is unapplicable to actions against consumer association.

According to Article 6 UCTD, the legal consequences of the unfair term in contract is that the term is not binding to the consumer. The contract itself continues to bind the parties regardless of the invalidity of the unfair contract term, if the contract can remain in force without the unfair term. The principle is called partial nullity and it is derived from Community law.⁴⁵

If the unfair contract term becomes invalid, the question remains whether the national court have the authority to modify the content of term to be in accordance with the requirement of the Directives. In *Banco Español de Crédito SA v Joaquín Calderón Camino*, ECJ decide that the national court should not have the authority to modify the contract in order to bring the term in accordance with the UCTD.⁴⁶ The ECJ view that the decision under Article 6 (1) is either/or decision. Therefore, the choice should be either the term should be non-binding because it is unfair or the term should bind because it is fair. ECJ view that Article 6 (1) UCTD regulate national court only to exclude the application if unfair contract term without having

⁴⁴ Reich and others (n 28) 152.

⁴⁵ *ibid* 153.

⁴⁶ *Banco Español de Crédito, SA v Joaquín Calderón Camino* [2012] ECJ Case C-618/10, ECLI:EU:C:2012:349.

the authority to change the term. The contract must continue in existence without any modification to the contract other than deletion of unfair terms, in so far as such continuity if possible, according to national law.⁴⁷

The Advocate General view in her Opinion that the national court should not revise the content of the agreement because it will compromise the long-term goal of Article 7 UCTD.⁴⁸ If the national court are given power to change the term, the seller or supplier would be tempted to use the unfair terms, because the seller or supplier knew that even if the terms were declared invalid, the contract will be modified by national court. ECJ also regard that any attempt from the national court to modify the unfair contract term is not allowed under EU law and national court should ascertain what the national rules applicable to the case and applying the interpretative methods recognized by domestic law while ensuring that Article 6 (1) UCTD if fully applicable and achieving outcome in accordance with UCTD's objectives.⁴⁹

Furthermore, in its case law regarding unfair contract terms, CJEU elaborate some rules.⁵⁰ The first rule is national law may provide that the whole contract be void if better serves the protection of consumers. The second rule is an unfair term is not binding regardless of whether the consumer contests its validity, but if the consumer explicitly requests it, the national court may apply such a term. Third rule is when assessing whether a consumer contract containing one or more unfair terms can continue to exist without those terms, the national court should not base its decision entirely on the possibility of an advantage for the consumer, but rather take a balanced view and may not recast unfair treatment as it sees fit.⁵¹ Lastly, CJEU rules that national court should not change the unfair term. The judge shall have the responsibility of acting in his own motion, which means national courts are entitled to determine that a contractual term is unfair if neither party has requested it. National law may not limit this power of the judge which sourced directly from EU Law. However, all the relevant legal and factual data shall be made available to the court. Most Member States translated the broad notion of the “non-binding”

⁴⁷ Reich and others (n 28) 153.

⁴⁸ *Banco Español de Crédito, SA v Joaquín Calderón Camino* (n 46), para 69.

⁴⁹ *ibid*, para 72.

⁵⁰ Manko (n 43) 4.

⁵¹ *Ibid*.

character of unfair terms into their own conceptual framework, using wide notion such as “non-existent” (e.g., France) or void (e.g., Germany).⁵²

2.5 Status of Indicative List

The unfairness criteria mentioned in Article 3 (1) UCTD are substantiated in a non-exhaustive list referred to in Article 3 (3) UCTD. The so-called “indicative” list contains potentially unfair terms. These potentially unfair terms must be read in conjunction with the criteria outlined in Article 3 (1) UCTD as they clarify the distinction and indicate the types of terms that the European legislator sought to counter. The indicative and non-exhaustive list does not create presupposition of unfairness.⁵³ Overall, national legislation has included the list, though sometimes with variations in content in order to accommodate national requirements. For instance, Austria has “black” list of terms which are always considered as unfair while Germany have two list consist of “black” (always considered unfair) and grey (presumed to be unfair) list of unfair term.⁵⁴

“C-478/99 Commission v Sweden ECLI:EU:C:2002:281

Inasmuch as the list contained in the annex to the Directive is of indicative and illustrative value, it constitutes a source of information both for the national authorities responsible for applying the implementing measures and for individuals affected by those measures. As noted by the Advocate General in paragraph 48 of his Opinion, Member States must therefore, in order to achieve the result sought by the Directive, choose a form and method of implementation that offer a sufficient guarantee that the public can obtain knowledge of it.”⁵⁵

The Annex contains varieties of examples of “an indicative and non-exhaustive list of the terms which may be regarded as unfair.” Because the list is only an “indicative”, the list usually called “grey list” rather than a “black list”.⁵⁶ The exact meaning of indicative is still unclear. Member States was given the rights by the preamble of the Directive to let the scope of the terms “be the subject of

⁵² Manko (n 43) 3.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Reiner Schulze and Fryderyk Zoll, *European Contract Law* (3rd edn, Bloomsbury Publishing 2021).

⁵⁶ Howells and Wilhelmsson (n 34) 105.

amplification or more restrictive editing...in their national laws”.⁵⁷ The court can also decide a term to be fair even though the term was included in the Annex. Member State and user of contract must prove that the term in the Annex is unfair and produce an argument to support the claim. The Annex of the Directive should be considered by national court when applying national general clauses. Some countries such as United Kingdom has used the Annex as a checklist for business when drafting a standard contract.

The term in the Annex could be differentiated into 4 groups.⁵⁸

1. Terms giving one party dominance for contract terms or the performance of the contract;
2. Terms which administer the duration of the contract;
3. Terms which avert equal rights between parties;
4. Exclusion, limitation, and penalty terms.

Terms giving one party dominance for contract terms or the performance of the contract comprises terms that enable the seller or supplier to change the terms of the contract unilaterally without a valid reason which is mentioned in the contract.⁵⁹

Terms which administer the duration of the contract comprises terms that enable the seller or supplier to terminate a contract of indeterminate duration without reasonable notice and terms that automatically extend a contract of fixed duration where the consumer does not indicate otherwise.⁶⁰

Terms which prevent the parties having equal rights comprises terms that allow the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract.⁶¹

Exclusion, limitations, and penalty terms comprises terms which have the purpose or impact of excluding or limiting the legal obligation of a seller or supplier in the event of the death of consumer or personal injury resulting from an act or omission

⁵⁷ *ibid.*

⁵⁸ *ibid* 106.

⁵⁹ *ibid.*

⁶⁰ *ibid* 107.

⁶¹ *ibid.*

of that seller or supplier, or excluding or limiting the legal rights of the consumer in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations.⁶²

Annex 2 of the UCTD provides a certain degree of leniency for financial service providers when it comes to clauses on termination and the right to modify terms.⁶³ In such cases, if the provider provides the required information in a timely manner, the term may not be considered unfair. Moreover, it is permissible for the seller or supplier to end a contract of indefinite duration without giving notice if there is a valid reason, but they must promptly inform the other party or parties involved.

This exception appears controversial as it stipulates termination on the consumer if the seller or supplier no longer wishes to fulfil the contract in the form concluded. The major principle of contract law namely *pacta sunt servanda* is considerably limited consequently.

There are also unfair contract terms that are not listed in the Annex of UCTD, but can be regarded as unfair depending on the context of the contract and the party's positions. The example of the unfair contract terms is in case *BNP Paribas Personal Finance SA v VE*.⁶⁴ The ECJ found that the credit agreement contain unfair contractual term which is term that stated “the term of the loan would be extended by five years and the scheduled installments in euro would be allocated first to interest when changes in the exchange rate increased the cost of the loan for the borrower” and the term which stated “if maintaining the amount if repayments in euro did not allow the full balance of the account to be repaid over the initial remaining term, plus five years, monthly installment would be increased.”⁶⁵ The ECJ view that the term is unfair because it is liable to cause a significant imbalance in the parties' rights and obligations under the agreement where the seller could not reasonably expect that consumer would agree, in individual contract negotiations, to an excessive foreign exchange risk as the result of those term.⁶⁶

⁶² *ibid.*

⁶³ Reich and others (n 28) 158.

⁶⁴ *BNP Paribas Personal Finance SA v VE* [2021] ECJ Case C-609/19, ECLI:EU:C:2021:469. Para 11.

⁶⁵ *ibid.*

⁶⁶ *ibid.*, para 71.

2.6 Transparency Requirement

The requirement of transparency is extensively established in Article 5 UCTD which stated: “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 favorable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).”⁶⁷

Member States are required to incorporate the principle of transparency in their national law for UCTD implementation. According to the Advocate General in *Commission v Netherlands*, sellers or suppliers should ensure that clauses are written in plain and intelligible language and that consumers have the necessary information before concluding a contract.⁶⁸ The ECJ relies on this reasoning in *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* and clarifies that transparency applies even to terms beyond the scope of UCTD's Article 4(2), such as those related to price/quality ratio and the main subject of the contract.⁶⁹

Article 5 UCTD stated that contract must be offered to the consumer in plain intelligible language. Therefore, it can be concluded that the principle of transparency in UCTD can be assessed from two separate standards: *plainness* and *intelligibility*.⁷⁰ Plainness refers to the legal effect of a term, for example with regards to an exemption clause. Ambiguous formulations must not put the seller or supplier in a position to improve his legal position at the consumer's expense. Intelligibility refers to legibility; it purports to eliminate from the contract the so-called “small print” which the consumer unable to readily understand. The user is required to design the standard business conditions plainly, both from an editing and optical point of view. However, the requirement of intelligibility also contains a qualitative component. According to its purpose, the requirement of intelligibility consist the requirement for information. Terms must not mislead the consumer about the length of his rights and obligation. However, “intelligibility” includes the linguistic component in order to achieve the protective scope of the Directive. If the

⁶⁷ Article 5 The Council Directive No. 93/13/EEC of 5 April 1993 on Unfair terms in consumer contracts.

⁶⁸ *Commission of the European Communities v Kingdom of the Netherlands* [2001] ECJ Case C-144/99, ECR 2001 I-03541 ECLI:EU:C:2001:257.

⁶⁹ *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECJ Case C-92/11, ECLI:EU:C:2013:180.

⁷⁰ Reich and others (n 28) 143.

seller or supplier is aware of circumstances under which a term is linguistically not intelligible for the consumer or if he could have known about that fact using reasonable care, then the seller or supplier is required to make translation or to otherwise ensure its intelligibility. The user of the term is responsible for ensuring that the consumer obtain the contract in intelligible language, preferably in his national language.

Article 5's opening sentence establishes the transparency principle, stating that written terms must be drafted in easily understandable language.⁷¹ The European Court of Justice has stated in *Ruxandra Paula Andriciuc and Others v Banca Românească SA* that ensuring transparency in contracts is not solely about their formal and grammatical clarity.⁷²⁷³ The contract term must also provide clear, intelligible criteria that enable consumers to assess the economic implications of the terms before agreeing to them. Additionally, the court specifies that the term "consumer" in relation to transparency standards refers to an average consumer who is reasonably informed, attentive, and cautious. The standard is that the consumer should be able to assess his legal position using the information provided for to him.⁷⁴

The regulation related to this Article is a positive rule of interpretation, which stipulate that if there is uncertainty about the meaning of a term, the interpretation that is most advantageous to the consumer should be applicable.⁷⁵ The consumer is assumed to be at disadvantage, which means that the requirements of transparency should be interpreted broadly and that consideration should be given to whether the consumer has been sufficiently informed of the relevant circumstances to be able to understand the meaning and consequences of the terms. The guidance on how to interpret and apply the Directive issued by the Commission mentions a number of factors that may affect the assessment, including whether important stipulations have been given a prominent place and whether the terms are placed in a contract or context where they may be reasonably expected.

⁷¹ Schulze and Zoll (n 55). 187

⁷² *Ruxandra Paula Andriciuc and Others v Banca Românească SA* [2017] ECJ Case C-186/16, ECLI:EU:C:2017:703.

⁷³ Svensson (n 37) 25.

⁷⁴ Reich and others (n 28). 144.

⁷⁵ Howells and Wilhelmsson (n 34). 108.

Transparency requirements aim to persuade sellers to inform consumers about the meaning and consequences of the contractual terms, especially unexpected and burdensome terms. If the consumer is made aware of the unfavorable terms, the probability of him refraining from entering into agreement will increase. If a sufficiently large number of consumers decide to forgo the offer, the seller may voluntarily choose to remove the terms in the hope that he will thereby be able to sell more goods and services. Even if each individual consumer has a little chance of influencing the content of the terms, a group of consumers may stand a better chance of changing the terms and disciplining the market. The transparency requirements are aimed at making it easier for consumers to enter contracts in an informed manner. The importance place in consumers being able to make an informed choice is a prominent feature also in other consumer directives, such as Unfair Commercial Practice Directive and the Consumer Rights Directive.⁷⁶

Rules on a seller's duty to provide information or disclosure to consumers can also be found in the other parts of the EU legislation, such as directives on consumer rights, unfair commercial practices, consumer credit and package travel.⁷⁷

Aside from the term must be plain and intelligible, the term should also be accessible to the consumer. This principle can be concluded from point (i) of the Annex, according to which a term which has the object or effect of irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract is to be regarded unfair. This can be concluded that even the contract that has been signed by the consumer, could be regarded unenforceable if the standard contract is presented to the consumer in the late stage of the contracting process that the consumer had no opportunity of becoming acquainted with its content. Other part of the Directive may also indirectly support the idea that consumer must have access to the contract terms. UCTD indirectly demands that the standard terms to be handed over to the consumer. The exemption granted by the Insurance Practices Regulation to insurance companies for co-operation for the establishment of standard policy

⁷⁶ Svensson (n 37) 33.

⁷⁷ Ibid 26.

conditions applies only if the conditions are accessible to any interested person and are provided upon request.

2.7 Summary and conclusions

UCTD is part of EU secondary legislation and Member States are required to transpose the consumer protection to national legislation. Member States must inform the Commission when they already have national law that correspond to the Directive. UCTD is a minimum harmonization Directive which means that the Directive give Member State minimum standard to follow. According to Article 8 UCTD, Member State may apply a higher level of consumer protection that what is regulated from UCTD. UCTD scope of application includes standard contract and a pre-formulated term. A term can be assumed to be pre-formulated if consumer has no opportunity to change the term. UCTD excluded some term of the scope of UCTD application. But for this term to excluded, it must be drafted in plain intelligible language or to be specific, the transparency requirement must be fulfilled. The legal consequences of unfair term in contract is the term itself become invalid and not binding to the consumer. The contract continues to bind the parties regardless the invalidity of the unfair contract term, if the contract can remain in force without the unfair term. In the Annex of UCTD, there are terms that is indicative to regarded as unfair. Even though the term is indicative, it must be assessed in conjunction with criteria listed in Article 3 (1) UCTD. The principle of transparency in UCTD can be assessed from the plainness and intelligibility of the terms. The regulation related to transparency is a positive rule interpretation meaning that interpretation most beneficial to the consumer should be adopted.

3. The requirement of good faith

3.1 Introduction

“Standard terms contracts” are part of business and consumers transactions on daily basis. Standard term contracts contain terms which are not negotiated between consumer and seller or supplier, but proposed by the seller or supplier to the consumer.⁷⁸ Standard terms contract is using approach of “take it or leave it.” The Directives defines unfairness using two criteria which are “good faith” and “significant imbalance.” CJEU inviting national courts to also consider: the nature of goods or services for which the contract was concluded, all the circumstances attending the conclusion of the contract, and the consequences of the term under the national applicable to the contract when assessing unfairness in contract.⁷⁹ This chapter’s purpose is to give general description of unfair contract term criteria from UCTD and analyse whether term in contract lack of good faith and therefore could be considered as unfair. To achieve this purpose, the first section will describe and analyse criteria for unfair contract term according to UCTD, good faith principle in EU law and good faith requirement for fair contract. The second section will analyse rulings from ECJ regarding the assessment of good faith in unfair contract term. The conclusion section will summarize the discussion regarding good faith requirement according to UCTD and make conclusion in a concise manner.

3.2 Criteria of Unfair Contract Term

3.2.1 The criteria for unfair contract term test

UCTD apply the test of fairness to non-individually negotiated terms in contracts between consumer and sellers or suppliers. The term is considered unfair when in contrast to the requirement of good faith, the term creates a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer. There are two criteria to determine whether a certain term can be considered as unfair. The first criteria are that the term creates a significant

⁷⁸ Manko (n 43).

⁷⁹ Ibid 3.

imbalance in the rights and obligations of the parties to the detriment of the consumer. The second criteria are the term is unfair if it is contrary to the requirement of good faith. The condition of “to the detriment of the consumer” could be seen as a separate criterion, but it does not compute much to the unfairness test.⁸⁰

The two basic criteria in the fairness test leads to a conclusion that they emulate substantive unfairness and procedural unfairness. “Significant imbalance” focuses on substantive unfairness (unfairness in the content of the contractual rights and obligations) and that “good faith” is focuses on procedural unfairness (unfairness in the way in which the contract was made, such as the lack of any realistic opportunity for the consumer to become acquainted with the terms).⁸¹

The earlier draft of UCTD shows that the relationship between the two criteria was thought to be alternative rather than cumulative grounds of unfairness.⁸² The earlier draft of UTC regulated that the term considered unfair if:

“It causes to the detriment of the consumer a significant imbalance in the parties’ rights and obligations arising under the contract, or

It causes the performance of the contract to be unduly detrimental to the consumer, or

It causes the performance of the contract to be significantly different from what the consumer could legitimately expect, or

It is incompatible with the requirement of good faith.”⁸³

Although the earlier draft of the UCTD shows that the two criteria are alternative, the final version of the Directive shows that the criteria must be cumulative. The consumer must show together the absence of good faith and significant imbalance in the parties’ rights and obligations before the Court can conclude if a term is “unfair.”

⁸⁰ Koffman and Macdonald (n 38). 258.

⁸¹ *ibid.*

⁸² Ewan McKendrick, *Contract Law* (15th edn, Hart Publishing 2023) 384.

⁸³ *ibid.*

There are factors relevant to unfairness test that CJEU inviting national courts to consider.⁸⁴ The factors are the nature of goods or services for which the contract was concluded, all the events in relation with the conclusion of the contract, the outcomes of the term under the national law applicable to the contract. Subsequently, the CJEU provides other factors that the national court to consider in assessing unfair contract term.⁸⁵ The other factors include other contractual terms, the default rules of national law which supplement the contract (implied terms), whether the term was drafted in plain intelligible language, and whether the consumer has a right to cancel the contract. Article 4 UCTD stated that unfairness of a term shall be assessed considering all circumstances attending the conclusion of the contract as well as other terms of the contract or of another agreement on which the term depends.⁸⁶ Each unfair contract term must be evaluated separately. Even if a contract term is difficult to carry out, it may not be deemed unfair if the disadvantaged person is compensated in other ways or if a fair seller could reasonably assume the consumer would accept the term in individual negotiations. An example is if a seller limits a consumer's legal rights through a disclaimer, it may be seen as an unfair contract term. However, the seller can challenge this conclusion by providing evidence that they acted fairly and reasonably, and that the consumer would have agreed to the term through individual negotiations.

The CJEU view that it is within the authority of national court to decide whether the term is considered unfair.⁸⁷⁸⁸ The role of the ECJ is restricted on the interpretation of relevant EU Law.⁸⁹ Nevertheless, there are terms which the CJEU considers perhaps unfair in all circumstances, because they depose consumers of the very effectiveness of protection of their rights under the UCTD. The example of these terms is a term about choice of jurisdiction which regulate that any dispute arising under a consumer contract to be held in a court or arbitration tribunal close

⁸⁴ Manko (n 43) 3.

⁸⁵ Ibid.

⁸⁶ Svensson (n 37) 28.

⁸⁷ Manko (n 43) 3.

⁸⁸ *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECJ Case C-237/02, ECR 2004 I-03403 ECLI:EU:C:2004:209.

⁸⁹ Stephen Weatherill, *EU Consumer Law and Policy* (2. ed, Elgar 2013) 151.

to the seller or supplier's place of business.⁹⁰ This is based on rules in Article 6 (2) that regulated

Most EU Member State have attained the idea of defining unfairness of a term by utilizing a wide concept. The exact formulation of such concepts is varying, including “good faith” (e.g., Germany), “good morals” (e.g., Poland), “honest business practices” (Denmark) or unreasonableness” (Sweden).⁹¹

3.2.2 Good faith principle in EU Law

Most civil law jurisdiction imposes the duty of good faith and fair dealing to each party in the performance and enforcement of a contract. Good faith is a general term that was used to describe honest dealing.⁹² Depending on the context, good faith could require an honest belief or objectives, faithful act of duties, observance of fair dealing standards, or an absence of fraudulent intent. Acting in good faith means that the party of the contract will uphold the contract and not stand in the way of another party to successfully perform their obligation in contract or from reaping the benefits of the agreed-upon contract.

Good faith principle is found in most civil law jurisdictions. According to § 242 BGB⁹³, parties are to perform their contractual obligations “according to the requirement of good faith in relation to good business practice”. Good faith and fair dealing are also found in Article 1.7 UNIDROIT Principle of International Commercial Contract 2016 which regulate that “each party must act in accordance with good faith and fair dealing in international trade”. The good faith principle is also found in Principles of European Contract Law (“PECL”) Article 4: 107 which stated: “A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed.”⁹⁴

⁹⁰ Manko (n 43).

⁹¹ Ibid.

⁹² Legal Information Institute, 'Good Faith' (Cornell Law School, January 2023) <https://www.law.cornell.edu/wex/good_faith> accessed 27 April 2023.

⁹³ The Bürgerliches Gesetzbuch, abbreviated BGB, is the civil code of Germany.

⁹⁴ Cecile Chainais, Ghislain Guillaume and Aline Tenenbaum, *European Contract Law Materials for Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (European Law Publisher 2008) 176.

3.2.3 Good faith as requirement for fair contract

When deciding if any term is unfair and causing imbalance in contrary to good faith requirement, ECJ view that the Court must consider whether the supplier or seller is dealing fairly and equitably with the consumer and could have reasonably assumed that the consumer would agree to the term had they been given opportunity to be in individual contract negotiation.⁹⁵⁹⁶ The seller can fulfil the requirement of good faith by acting fairly and equitably towards the consumer and by considering the consumer's legitimate interests.

When assessing good faith, it should be analysed the strength of bargaining position of the parties, whether the consumer got encouragement to agree with the term, whether the goods and services supplied or ordered according to special request of the consumer, and the length where the seller or supplier dealt fairly with the consumer.⁹⁷ Recital 16 of the UCTD states as follows:

“Whereas in making an assessment of good faith, particular regard shall be had to the strength of bargaining position 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 interest he has to take into account.”

The recitals shows that good faith aim further than restraining advantage taking and demand sufficient account to be taken of the legitimate interests of the consumer.⁹⁸

Good faith principle is applicable to all contracts, including consumer contracts. The two criteria for the Court to determine whether the contract has good faith are reasonableness and intent.

A company or person entering a contract must act within reason to uphold their end of the bargain.⁹⁹ If one party fails to uphold their end of the bargain, the court will examine their reasons for the failure. If the court finds that the reason is unrelated

⁹⁵ Svensson (n. 37) 28.

⁹⁶ *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECJ Case C-415/11, ECLI:EU:C:2013:164. para 69.

⁹⁷ Ewan McKendrick (n 33), p. 385.

⁹⁸ Koffman and Macdonald (n 38). P. 266.

⁹⁹ Johnson May Attorney and Counsellors, Good Faith & Fair Dealings in Contracts, <<https://www.johnsonmaylaw.com/blog/good-faith-fair-dealings-contracts>> accessed 27 April 2023.

to the contractual relationship or no logical reason, the Court then will decide the action of the party is in bad faith. For example, when consumers are engaged in a car insurance contract with a company. When the consumer submits an accident claim and the car insurance denies the consumer claim or examines the claim in an extended amount of time, the car insurance company could be considered acting unreasonably. If the car insurance company could not give logical or relevant reason to deny its consumer claim, then the court could find their action to be in bad intent.

After the Court analysed a situation for reasonableness, they will look to intent. The Court will examine whether the company purposely withholding their end of the bargain or intend to harm the other party of the contract. As an example of a bad faith intent, the car insurance company denies the claim of the consumer even if they are aware that there is no logical reason or reasonable basis to deny the claim. A second example of bad intent is if two parties entered a sales contract, but the seller did not disclose that the seller already had a sales contract with another party. Regardless of the reason, the seller has acted with the requisite of bad intent because the seller is not disclosing all necessary information and intends to deceive the buyer.

Good faith and fair dealing go together in contract. If the sellers use difficult and vague language in contrast with the purpose of confusing the other party, then there is a lack of fair dealing. The general requirement for contractual good faith requires the parties to act in honesty and in accordance with standard of fair dealing in contract negotiations. Additionally, in relation to contracts that have been negotiated and formed, a general requirement of contractual good faith required the parties to honour the contract based on the fundamental norm of *pacta sunt servanda*.¹⁰⁰

According to the CJEU in *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, determining whether a term is unfair and goes against the principle of good faith hinges on whether a seller or supplier can reasonably expect that the consumer would have accepted such a term in negotiations if they

¹⁰⁰ Reinhard Zimmermann and Simon Whittaker, *Good Faith in European Contract Law* (Cambridge University Press 2000) 136.

had been dealt with fairly and equitably.¹⁰¹¹⁰² The court's duty is to assess whether the average consumer in the same position as the individual consumer in question would have accepted the term if the contract had been negotiated on an individual basis. According to the opinion of Advocate General Kokott, which was heavily relied upon by the CJEU, it is important to consider whether the contract terms are commonplace or unusual, and whether they are objectively justified. A term may be considered unfair if it is excessive in relation to the reasonable objective that it aims to achieve. However, the CJEU also recognizes that parties may have legitimate reasons for regulating their contractual affairs in different ways, and that the potential impact of a term alleged to be unfair must be examined broadly and from both parties' perspectives. Nevertheless, it's crucial to note that consumers can't automatically rely on protection against unfair contract terms simply because they made a bad deal.

3.3 Interpretation of UCTD in Cases against Financial Service's Providers

To analyse more about the assessment of good faith in standard contract, this section will analyse the implementation and interpretation of UCTD from ECJ in the period of 2021-2023.

In the first case is *Ocidental – Companhia Portuguesa de Seguros v LP*, the Court view that concerning Article 4 (2) and Article 5 of UCTD, consumer must always be afforded the opportunity, before the conclusion of a contract, to become acquainted with all the terms that the latter contract contains.¹⁰³ From this case, the assessment of unfair contract term is determined by the requirement of transparency of contractual terms. The Court view that the requirement must be considered widely and the consumer should have reasonably well informed and reasonably observant and circumspect, in a position to understand the specific functioning of the term in contract and review the potentially significant economic consequences of such terms for his or her financial obligation. The Court also clarified that the requirement of transparency also applies to a term related to the main subject of the

¹⁰¹ *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (n 96).

¹⁰² Paul S Davies, *JC Smith's The Law of Contract* (Oxford University Press 2016) 225.

¹⁰³ *Ocidental – Companhia Portuguesa de Seguros de Vida SA v LP* [2023] ECJ Case C-263/22, ECLI:EU:C:2023:311.

contract. Additionally, according to 20th recital of UCTD, contract should not only draft in plain, intelligible language, but the consumer should also given opportunity to review all the terms.

The Court view that in the context of assessment of good faith, the national court must consider, the strength of bargaining positions of the parties and whether the consumer had an inducement to agree to the term concerned. In the context of assessment of the term causes a significant imbalance in the contracting parties rights and obligation arising under the contract to the detriment of the consumer, the national court assess whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such term in individual contract negotiations. In order to assess whether a term of contract can cause imbalance to the detriment of the consumer, account must be taken to all circumstances known by the seller at the time the contract was concluded and can influence the subsequent performance of the contract. The national court must determine whether the consumer received all information likely have a bearing on the scope of his or her obligations under the contract enabling him or her to assess in particular the consequences of that contract. The fact that consumer was unable to become acquainted with contractual term prior to the conclusion of the contract is an essential element in the assessment of whether the term is unfair.

Aside from that, in relation with Article 3 (1) and Article 4 to 6 UCTD, the Court rules that when national court found that where the term relating to the exclusion or limitation of cover against the insured risk in insurance contract is unfair, the court is required to exclude the application of that term in order that it may not produce binding effect to the consumer.

In *QE v Caisse régionale de Crédit mutuel de Loire-Atlantique et du Centre Ouest*, the banking institution agree to give loan to QE for purchasing immovable property repayable over 20 years.¹⁰⁴ Bank started to accelerated repayment procedure since QE is not paying the loan. According to loan agreement, bank could proceed with accelerated repayment procedure automatically, without any duty for formalities or

¹⁰⁴ *QE v Caisse régionale de Crédit mutuel de Loire-Atlantique et du Centre Ouest* [2022] ECJ Case C-600/21, ECLI:EU:C:2022:970.

formal written demand, if the delay of payment is more than 30 days. The Court view that the term regarding accelerated repayment procedure has not been individually negotiated and creates a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

In *CaixaBank, S.A v X*, The Court, consumer entered into credit agreement secured by a mortgage with the banking institution in the amount of EUR 130 000 with arrangement fee for the services received in the amount of EUR 845.¹⁰⁵ Consumer seeking annulment of the term relating arrangement fee and reimbursement of the sum paid. In regards of assessment if requirement of good faith, national court must assess whether the seller or supplier dealing fairly and equitably with the consumer, could reasonably assume that consumer would agree for such term in individual contract negotiation.

Assessment of significant imbalance can be concluded by having quantitative economic evaluation based on comparison between total value transaction with the cost charged to the consumer and serious impairment of consumer's legal rights envisage by national rules.

The Court view that arrangement fee for services is within the main subject of the contract as it represents one of the main components of the price. The Court also view that the an arrangement intended to remunerate services connected with the examination, constitution and personal processing of an application for a mortgage loan or credit may not create significant imbalance in the parties rights and obligations arising under the contract to the detriment of the consumer, unless the service provided in return do not reasonably relate to services provided in connection with the management or disbursement of the loan, or the amount charged to the consumer are disproportionate to the amount of the loan.

As for requirement of transparency, the Court view that national court required to ascertain whether the borrower has been placed in a position to assess the economic consequences for him or her, to understand the nature of the services provided in return for the cost provided and to ascertain that there is no overlap between the

¹⁰⁵ *Caixabank SA v X* [2023] ECJ Case C-565/21, ECLI:EU:C:2023:212.

various cost provided for in the contract or between the services for which those costs are paid.

In *VF v Nova Kreditna Banka Maribor d.d.*, the court of Appeal in Maribor, Slovenia asks ECJ whether national court may decide the term unfair with only one of the criteria fulfilled (significant imbalance criteria is fulfilled while good faith criteria is not examined).¹⁰⁶ The Court view that the requirement of “good faith” is inherent in the examination of unfairness of a contractual term. However, the ECJ ruled that according to Article 8 of UCTD, Member States can regulate a higher level of protection of consumer through a stringent national law. In Slovenian law, the contractual term is unfair where it causes a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer, without carrying out examination of “good faith”. Therefore, the ECJ rules that Article 3 (1) and Article 8 UCTD must be interpreted as not precluding national legislation which permits conclusion of a contract is unfair where it causes a significant imbalance to the detriment of the consumer without examining the “good faith” requirement.

In *YB v Union of Creditos Inmobiliaros SA*, the Juzgado de Primera Instancia No 2 de Ibiza (Court of first instance No 2 of Ibiza, Spain) requests a preliminary ruling regarding clause imposing the reference index for mortgage loan (“IRPH”) and its substitution in a mortgage loan contract.¹⁰⁷ Under the contract, YB as consumer must pay the interest according to IRPH. YB request nullity of the disputed clause because of its abusive nature and request the IRPH to be replace by Euribor index retroactively since the beginning of the contract. According to ECJ, Article 3(1) of UCTD must be interpreted that national court must determine whether seller has acted in good faith with indicator provided for by law and whether the clause makes things unfair for the buyer compared to the seller's rights and obligations. The fact that the term is not drafted in a clear manner is not the only factor to determine if the term has an unfair character.

¹⁰⁶ *VF v Nova Kreditna Banka Maribor dd* [2022] ECJ Case C-405/21, ECLI:EU:C:2022:793.

¹⁰⁷ *YB v Unión de Créditos Inmobiliarios SA R* [2021] ECJ Case C-79/21, ECLI:EU:C:2021:945.

3.4 Summary and conclusions

Standard term contracts contain terms which are negotiated between consumer and seller or supplier. UCTD define a term unfair using two criteria of “good faith” and causing “significant imbalance.” Although the earlier draft of the UCTD shows that the two criteria were proposed to be alternative, the final version of the Directive shows that the criteria are cumulative. Aside the two criteria, there are also elements to consider which are the nature of goods or services for which the contract was concluded, all the circumstances attending the conclusion of the contract, and the consequences of the term under the national law applicable to the contract. CJEU also provides other factors to consider when assessing standard terms which are other contractual terms, the default rules of national law which supplement the contract (implied terms), whether the term was drafted in plain intelligible language, and whether the consumer has a right to cancel the contract. The CJEU view that it is within the authority of national court to decide whether the term is considered unfair. The ECJ believes that in determining whether a term is unfair and creates an imbalance contrary to the requirement of good faith, it is essential to evaluate whether the supplier or seller is treating the consumer fairly and equitably. Additionally, the Court must assess whether it would have been reasonable for the supplier or seller to assume that the consumer would have accepted the term if they had the chance to negotiate the contract individually. The overall obligation of contractual good faith necessitates that the parties engage in honest conduct and adhere to a standard of fair treatment during the process of concluding a contract. According to cases interpreted by CJEU in the last three years, the requirement of transparency should be considered widely and the consumer should have been reasonably well informed and reasonably observant and circumspect, in a position to understand the specific functioning of the term in contract and review the potentially significant economic consequences of such terms for his or her financial obligation. The Court also view that in the context of assessment of good faith, the national court must consider, the strength of bargaining positions of the parties and whether the consumer had an inducement to agree to the term concerned.

4. The requirement of significant imbalance in contract

4.1 Introduction

The purpose of this chapter is to describe the requirement of significant imbalance in unfair contract terms and assess the latest case law regarding unfair contract term especially in agreement between consumer and retail financial provider. To achieve this purpose, the first section will describe significant imbalance requirement and how to assess whether term in contract created a significant imbalance to parties' rights and obligations. The second section will analyse the interpretation of UCTD by CJEU regarding significant imbalance in standard contract between consumer and financial services providers. The summary section will provide summary and conclusion of the chapter in concise manner.

4.2 Significant imbalance test

The second test of unfairness in contract is the term must cause a significant imbalance in the contractual obligation to the detriment of the consumer. It is not sufficient to show only that there is an imbalance but the imbalance must be significant. According to Article 4 (2) UCTD, assessment of unfairness shall not relate to main subject matter of the contract and to the adequacy of the price and remuneration against the services or goods supplies in exchange. The significant imbalance requirement refers to significant imbalances in terms of warranties, conditions, the agreed remedies, and the exclusion clauses.¹⁰⁸ The imbalance test might be used to assess the term in question and simply ask whether there are any corresponding rights provided for the other party.¹⁰⁹ This approach could be seen from the “grey list” in the Annex of UCTD. Paragraph 1 (d) of the Annex provide the example of imbalance rights between the parties:

¹⁰⁸ Hugh Collins, 'Good Faith in European Contract Law' [1994] 14(2) Oxford Journal of Legal Studies <<https://doi.org/10.1093/ojls/14.2.229>> accessed 10 May 2023.

¹⁰⁹ Koffman and Macdonald (n 42).

“Permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract.”

From the term above, the imbalance could be seen when no equivalent compensation received by consumer when seller or supplier cancelling the contract while on the other hand, the seller or supplier could retain sums paid by the consumer when consumer is the one cancelling the contract.

In relation with the question of whether a contract term causes a significant imbalance to the detriment of the consumer, The ECJ has ruled that national courts must consider what non-mandatory contract law rules apply under domestic law if the term has not been incorporated.¹¹⁰¹¹¹ A departure from the established rules does not necessarily have to result in significant financial implications for the consumer to be considered important. It is sufficing that the default rules are sufficiently undermined in an important manner. This grants the national courts a wider evaluative framework, allowing them to deem contract terms unfair more frequently, as opposed to relying solely on a quantitative economic analysis. In situations where there are no default rules in place, the determination of an imbalance must be evaluated based on other reference points, such as the principles of fair and equitable market practices. The national court can also consider transparency requirement in determining whether there is significant imbalance in the term.¹¹²

¹¹⁰ Svensson (n 37) 27.

¹¹¹ *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (n 96).

¹¹² Svensson (n 37) 27.

4.3 Cases related to significant imbalance requirement

4.3.1 Joined cases C-229 and C-289/19

The parties in Joined cases C-229/19 and C-289/19 is Dexia Nederland BV (“Dexia”), a bank based in Netherland and two consumer (XXX and Z). The dispute begin when the consumers refuse to pay final statements drawn up by Dexia, as a result of late payment of monthly instalment. In the agreement, consumer agree to lease a share for a fixed period while on the other hand bank acquires shares on behalf of the consumer. At the end of the agreement, the shares will be sold by Dexia and the consumer will receive income from the sale of those shares, after deduction of the balance of the principal and any monthly instalments still payable to the bank. Furthermore, Dexia terminated the leasing agreement early because of late payment, based on the specific terms and conditions of the agreements. On the termination of the agreement, Dexia drew up final statements according to Article 6 and 15 of the leasing agreement. The articles read as follows:

“6. If (a), despite a letter of formal notice, the lessee does not pay one or more monthly instalments or does not perform any other obligation arising under the agreement or under any other leasing agreement similar to the agreement at issue in the present case, or if (b) the lessee petitions for the winding up of the bank or if the bank is declared insolvent, the bank is authorised to terminate the contract and all similar leasing agreements with immediate effect and to require payments of all outstanding balance of the total amount(s) under the existing leasing agreement(s), which are similar to the present agreement, and to sell the shares on the stock exchange or otherwise at a time determined by the bank. The bank shall deduct the proceeds of sale from the sum owed to it by the lessee. Any positive balance shall be paid by the bank to the lessee.

15. ... In the event of termination of the agreement, the lessee’s claim shall consist of an amount equal to the market value of the shares on the date of termination, after deduction of an amount corresponding to the present value of the unpaid

balance of the total amount leased. The present value is calculated in accordance with Article 7A:1576e(2) of the BW.”¹¹³

The referring court Hoge Raad der Nederlanden (Supreme Court of Netherlands) view that Article 6 of the Agreements created a significant imbalance in the parties right and obligations arising under the contract to the detriment of the consumer. According to the Hoge Raad der Nederlanden, the calculation method in Article 6, does not take into consideration the advantage which Dexia receives from termination. Depending on the interest rate and the date of termination of the contract, the advantage that Dexia receives from an early termination may be very exceptional.

In Case C-229/19, Dexia terminated leasing agreement in advance with XXX after sending formal notification. Dexia gave final statement to consumer based on Article 6 and 15 of the agreement. XXX wants to annul the two-leasing agreement and the repayment of the sums paid to Dexia. According to Gerechtshof the Amsterdam (Court of Appeal, Amsterdam), even though Dexia could have a potential advantage in the event of premature termination of the contract, it is compulsory to discover whether after considering all circumstances of the case, at the date on which the contracts were concluded, the clause that determine potential advantage for Dexia is unfair, for example, by comparing that term with those normally used in similar cases.

In Case C-289/19, Dexia terminate early two share leasing agreement with Z under the basis of Article 6 and 15 of the agreement. Z then refuses to pay final statement to Dexia. Dexia admit that it has failed to comply with its due diligence obligation regarding Z financial situation, but Dexia claim to be entitled to receive one third of the monthly installments that had not been paid by Z. In its considerations, the CJEU ruled that under Article 3 (1) UCTD, a term is regarded as “unfair” if it causes a significant imbalance in the parties’ rights and obligations arising under the contract concluded between the seller or supplier, to the detriment of the consumer. The court held that assessment to determine whether a term causes a “significant imbalance” in the parties’ rights and obligations under a contract to the detriment of the consumer, consideration on which rules of national law would apply in the

¹¹³ *Dexia Nederland BV v XXX and Z* [2021] ECJ Joined Cases C-229/19 and C-289/19, ECLI:EU:C:2021:68. Para 15.

absence of an agreement by the parties. National court can use comparative evaluation to assess whether the contract has placed the consumer in legal situation less favorable than provided for by the national law. The national court must assess, considering all circumstances attending the conclusion of the contract, whether a term fixing in advance an advantage for supplier in the event of premature termination of the contract, could create such a significant imbalance between the rights and obligations of the parties during the performance of the contract, even though that imbalance could occur only if certain circumstances were to arise and in other circumstances, that term could even benefit the consumer.

4.3.2 Case C-609/19

This case C-609/19 is between BNP Paribas Personal Finance SA and VE concerning unfairness of terms in mortgage loan agreement denominated in a foreign currency.¹¹⁴ Advancement of the repayment term was declared by BNP Paribas after unpaid monthly instalment and the enforcement judge in Tribunal de grande instance de Libourne (regional Court, Libourne, France) ordered the compulsory sale of the property. BNP Paribas also applied for authorisation to attach VE's earnings. VE as consumer view that he was misled by BNP Paribas Personal Finance about the clause in the loan agreement since the agreement exposed him to an uncapped foreign exchange risk. The loan agreement contain several terms regarding currency conversion mechanism, which have the effect of integrating a foreign exchange risk into the monthly instalments paid by the consumer. Those terms relate to the rules for allocating payments to interest, the operation of the accounts in Swiss francs (the account currency) and in euro (the payment currency) as well as the extension of the term of the loan for a period of five years. The CJEU view that in context of loan agreement denominated in foreign currency, the requirement of transparency of the term of agreement is important and information provided before the conclusion of a contract on the term of contract is fundamentally essential for a consumer. The contractual terms are to be drafted in plain, intelligible language and accordingly that they be transparent and understood in broad sense. The term in the agreement must be understood formally and grammatically intelligible to the consumer, but also that an average consumer, who

¹¹⁴ *BNP Paribas Personal Finance SA v VE* (n 64).

is reasonably well informed and reasonably observant and circumspect, is in the position to understand the specific functioning of that term and thus evaluate, based on clear intelligible criteria, the potentially significant economic consequences if such a term for his or her financial obligations. The contract should be drafted in manner that allow the consumer to evaluate the economic consequences for him resulted from the contract.

The CJEU view that the consumer must be clearly informed that when participating in loan agreement denominated in foreign currency. The consumer should be informed that he is can have foreign exchange risk which may be economically difficult to bear in the event of depreciation of the currency. The seller should explain possible scenarios in the exchange rate and the risk of the exchange rate to the consumer. The absence of terms or explanations informing the consumer about certain risk related with loan agreement denominated in foreign currency can confirm the lack of transparency. The CJEU also view that the terms of loan agreement which regulated that payment at fixed intervals are allocated first to interest and which provides in order to pay the account balance, which may increase significantly as a result of variations on the exchange rate between the account currency and the payment currency, for an extension of the term of the agreement and for an increase in monthly instalments, are liable to cause a significant imbalance in the parties' rights and obligations under that agreement, to the detriment of the consumer, where the seller or supplier could not reasonably expect, in compliance with the requirement of transparency in relation to the consumer, that the consumer would have agreed, in individual contract negotiations, to a disproportionate foreign exchange risk as a result of those term.

4.4 Summary and conclusions

Standard contract term is unfair if the term create a significant imbalance of rights and obligations of the parties to the detriment of consumer. The national court should assess whether the unfair contract term create imbalance significantly. The significant imbalance test is not applicable to term related to main subject of the contract or term related to price, unless the requirement of transparency is not fulfilled. The significant imbalance in contract could occur in terms of warranties, conditions, agreed remedies and exclusion clause. The imbalance could also be seen

when no equivalent compensation received by consumer while on the other hand the seller or supplier receive sum paid by the consumer. According to rulings by CJEU, the national court must assess whether the term fixing the potential advantage for seller is liable to create such significant imbalance. The CJEU also view that the terms of loan agreement which stipulate that payment at fixed intervals allocated first to interest which may increase as the result of variations in exchange rate are liable to cause a significant imbalance in the parties' rights and obligations arising under that agreement, to the detriment of the consumer.

5. Summary and conclusions

Unfair term in contract is a term that is contrary to the requirement of good faith, which causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer. There are two key criteria in the definition of an "unfair term." The first is that the term must cause a significant imbalance in the rights and obligation of the parties to the detriment of the consumer and the second is that the term is contrary to the requirement of good faith. The unfairness of contractual term should be assessed at the conclusion of the contract, and the assessment must not relate to the main content of the contract nor the adequacy of the price against the goods or services. Where the contract is in writing, it must be written in plain, intelligible language. If there is doubt about the meaning of the term, the interpretation more favorable to the consumer will apply. To assess whether the imbalance has developed contrary to the requirement of good faith, the court must consider if the seller or supplier that has dealt fairly and equitably with the consumer, could reasonably assumed that the consumer would agree to the term has they been subjected to individual negotiation. The two criteria for the Court to determine whether the contract has good faith are reasonableness and intent. The requirement of significant imbalance is met if a term is so weighted in favor of the supplier as to affect the parties' rights and obligation under the contract significantly in his favor.

However, the assessment of unfair contract term does not solely depend on the criteria of good faith and significant imbalance. The fairness of a contract shall also consider the nature of the subject matter of the contract and by reference to all circumstances existing when the term was agreed and to all the other terms of the contract or of any other contract in which it depends. Not all terms in consumer contract are subject to the assessment for fairness under UCTD. The exclusion for the assessment applied to term regulating mandatory statutory or regulatory provisions and the provisions or principles of international conventions. The second exclusion from the scope of UCTD is definition of the main subject matter of the

contract nor to the adequacy of the price of the remuneration, as against the goods and services supplied in exchange. But for this term to be excluded, the term should be in plain intelligible language or to be specific, the transparency requirements must be fulfilled. Aside from the term must be plain and intelligible, the term should also be accessible to the consumer. Even the contract that has been signed by the consumer could be regarded unenforceable if the standard contract is presented to the consumer in the late stage of the contracting process that the consumer had no opportunity of becoming acquainted with its content.

The annex of UCTD contain a grey list of term that may regarded as unfair. The term listed in the indicative and non-exhaustive list can be divided into four separate group, which are: terms giving one party dominance for contract terms or the performance of the contract, terms which administer the duration of the contract, terms which avert equal rights between the parties and an exclusion, limitation, and penalty terms. Even though the term listed in the Annex of UCTD, the court still have to assess whether after considering all circumstances related to the contract the term can be considered unfair.

Unfair terms in contract will not be binding on the consumer and the contract will continue to bind the parties in the absence of those terms if it can exist without them. If the contract term become invalid, ECJ view that national court should not have the authority to modify the contract. ECJ regard that any attempt from national court to modify the unfair contract term is violation against EU law and national court should not use supplementary interpretation of the contract. The national court is entitled to determine a term is unfair even neither party requested it.

Many consumers must deal with standard contract term in agreement with a financial service's provider. Consumer usually in a weak position because consumer is unable to negotiate the term or influence any changes of the term.

In recent cases referred to CJEU, many consumers brought claim against financial services provider because the term in the contract causing the detriment of the consumer. From the cases, CJEU view regarding transparency requirement, that consumer should be provided with opportunity to become acquainted with all the term in consumer contract before concluding the contract. CJEU view regarding assessment of good faith, national court should consider the the strength of

bargaining positions of the parties and whether the consumer had an inducement to agree to the term concerned. In order to assess whether a term of contract can cause imbalance to the detriment of the consumer, account must be taken to all circumstances known by the seller at the time the contract was concluded and can influence the subsequent performance of the contract. The national court must determine whether the consumer received all information regarding the scope of his or her obligations under the contract and therefore supported him or her to assess the consequences of that contract.

The CJEU view that a term that allows accelerated repayment without any obligation of formal written notice could create a significant imbalance in the rights and obligations of the parties as defined in the contract, which would disadvantage the consumer. To determine a significant imbalance, it is possible to conduct a quantitative economic evaluation by comparing the total transaction value with the cost imposed on the consumer, as well as examining the extent to which the consumer's legal rights, as outlined in national regulations, are seriously impaired.

Regarding the transparency requirement, the Court holds the view that the national court should verify whether the borrower has been given the opportunity to assess the economic consequences, comprehend the nature of the services provided in exchange for the associated costs, and ensure that there is no duplication of costs within the contract or overlap between the services for which those costs are charged. According to CJEU, Article 3(1) of UCTD must be interpreted that national court must determine whether seller has acted in good faith with indicator provided for by law and whether the clause makes things unfair for the buyer compared to the seller's rights and obligations. In *Dexia Nederland BV v XXX and Z*, the term is considered unfair if it fixing potential advantage to seller because the term could create a significant imbalance between the rights and obligations of the parties during the performance of the contract, even though that imbalance could occur only if certain circumstances were to arise and in other circumstances, that term could even benefit the consumer.

In *BNP Paribas Personal Finance SA v VE*, the CJEU view that in context of loan agreement denominated in foreign currency, the requirement of transparency of the term of agreement is important and information provided before the conclusion of

a contract on the term of contract and the consequences of concluding it, is of fundamental importance for a consumer. The Court view that the consumer must be clearly informed that when entering the loan agreement denominated in foreign currency, the borrower is exposing himself to a foreign exchange risk which may be economically difficult to bear in the event of depreciation of the currency in which the borrower receives his or her income. The absence of terms or explanations informing the consumer about the existence of specific risk associated with loan agreement denominated in foreign currency can confirm that the requirement of transparency is not satisfied.

The CJEU view that term in loan agreement that prioritize interest payments and allow for the extension of the agreement and increased monthly instalments due to significant fluctuations in exchange rates can lead to a substantial imbalance in the rights and obligations of the parties, disadvantaging the consumer. The seller or supplier could not reasonably anticipate, in compliance with the requirement of transparency, that the consumer would have agreed, in individual contract negotiations, to bear an excessive foreign exchange risk resulting from such terms.

Term within the agreement with financial service providers could be considered unfair if it is not individually negotiated, in contrary to requirement of good faith, causing significant imbalance of rights and obligation of consumer, lack of transparency while concluding the contract and limiting consumer rights of his or her obligation provided by national law. Even if a contract term is burdensome, it may not be deemed unfair if the disadvantaged person is compensated in other ways or if a fair seller could reasonably assume the consumer would accept the term in individual negotiations. The seller can prove that term in contract is fair by providing evidence that they acted fairly and reasonably, and that the consumer would have agreed to the term through individual negotiations.

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