

# Unfair terms control and the ex officio doctrine

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## Short summary of previous sessions & forward

- Consumer law focussed on consumer *choice and information*
  - *Provide necessary information*
  - *Prevent misleading information/influence (unfair practices)*
  - Ensure transparency of information
- But how about content of contract?
  - Mass transactions different from traditional contract law!
  - Think e.g. caveat emptor vs extensive product regulation
  - Importance of unfair terms control
  - Role of judge

# Introduction – meet mr A

- Mortgage contract in Spain, concluded before financial crisis
  - Loses job, stops paying
  - Bank calls in the credit: *acceleration clause*
  - Very easy enforcement – court doing enforcement cannot check the contract
  - Court competent to check the contract cannot stop enforcement!
  - Common practice: homes unsold, bank can then buy for fraction of value;
  - debtor left with significant debt still!
- 
- => CJEU Aziz 2013

# Standard contract terms

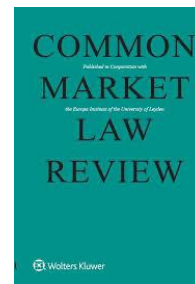
- Advantages
  - Standardisation of contracts
  - Decrease in transaction costs (efficiency)
- Disadvantages
  - Content often unknown to parties/counterpart
  - Content often unbalanced (drafted to detriment of counterparty)
- Often accepted without discussion
  - Either accept or no contracting possible
  - No room for negotiations
  - <https://m.youtube.com/watch?v=xZGh9bHmvRg>

# Interventions against unfair contract terms

1. **Incorporation**: which standard contract terms apply?
  - Offer and acceptance
  - Attention of other party sufficiently drawn to terms?
2. **Interpretation**
  - Contra proferentem/pro consumer rule – art 5 Directive 93/13
  - But not in injunctions – why?
3. **Substantive control**: Directive 93/13/EEC

# The Unfair Contract Terms Directive (93/13/EC): legislative history

- In the making since first consumer programme (1975)
- Establishing level playing field between companies subject to control (eg France, UK, Germany) and not (eg Italy, Greece)
- First proposal in 1991
- Second proposal: price control out, approved
- Minimum harmonization
  
- Teubner, MLR 1998
  - Good faith at article 3 is legal irritant for common law



# What's the purpose?

- Schulte Nolke: ultimately regulation reduces transaction costs
  - For sellers: confirms that they can use standard terms
  - For consumers: tells them they don't really need to read
  - But then why focus on information/transparency?



# Thirty years UCTD in action

- The inception: joint cases C-240/98 u/i C-244/98 (*Océano Grupo*)
  - Arbitration clause held to be unfair
- The freeze: case C-237/02 (*Freiburger Kommunalbauten*)
  - National court to decide on unfairness, taking into account nat. legal system
- 2003-2009: UCTD “sleeping beauty”:
  - 1993-2009: 43 CJEU decisions & AG opinions mentioning ‘unfair term’
- 2010-12 September 2024: 300+ CJEU judgment and orders re UCTD
  - 2005-12 September 2024: ca 100 CJEU decisions & AG opinions mentioning UCPD
- What happened?



# Core provisions of UCTD

- Art. 1 Scope
- Art. 3 Unfairness test and reference to indicative list of terms
- Art. 4 (2) Exclusion for core terms
- Art. 5 Transparency requirement
- Art. 6 ‘unfair term does not bind consumer’
  - 2 lines developed by CJEU
    - Ex officio control by courts
    - Unfair term may not have any effect, not even indirectly

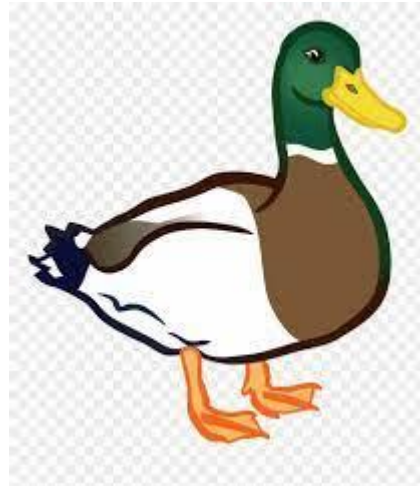
# Unfair Contract Terms Directive: scope (Art. 1)

“harmonise rules on unfair terms in contracts” between B and C

Excluded from scope:

- Terms reflecting mandatory statutory or regulatory provisions
  - CJEU 10 September 2014, case C-34/13, (*Kušionová*): default rules also excluded
- Terms imposed by legislator replacing unfair terms excluded
  - CJEU 20 September 2018, case C-51/17, (*OTP Bank/Ilyés and Kiss*)
- Provisions or principles of international conventions (mainly: transport)

# What do unfair terms look like?



# Art 3: Unfair contract terms

## 1. Clause is unfair if

- (Not-individually negotiated)
  - Causes
  - Contrary to good faith
  - A significant imbalance
  - In the parties' rights and obligations under contract
  - To the detriment of the consumer
- 
- Test: moment of conclusion of contract (Art. 4 (1))
    - CJEU 14 March 2013, case C-415/11, ECLI:EU:C:2013:164 (*Aziz*)

## 2. European list: indicative, non-exhaustive

# Non-negotiated

## Non-negotiated terms in B2C-contracts

- Presumption if terms is preformulated
  - CJEU 7 November 2019, joint cases C-349/18 u/i C-351/18, ECLI:EU:C:2019:936 (*Kanyeba*)
    - National law decisive as to whether a contract is concluded
- Consumer doesn't need to prove!



# Significant imbalance

- In the rights and obligations
  - Not necessarily direct monetary imbalance C-618/10, ECLI:EU:C:2012:349 (Banco Español de Crédito)
- In comparison with otherwise applicable national rules
  - Established since C-415/11, ECLI:EU:C:2013:164 (*Aziz*)
- Contrary to good faith?
  - Hypothetical bargain – could trader reasonably assume that consumer would agree in individual negotiations? (also *Aziz*)
- Other terms of contract relevant
  - Eg case C-51/17, ECLI:EU:C:2018:750 (*OTP Bank/Ilyés and Kiss*)

# Different methods to assess unfairness

- Compare with annex
- Significant imbalance (does the consumer have more duties than rights?  
Do the consumer and seller have very asymmetrical rights?)
- Comparison with statutory provisions
- “personal experience and ethical values”
- Hypothetical negotiations (among informed parties of comparable strength)
- See H. Schulte-Nolke (ERPL 2023)

## Art 4.2: Core terms excluded from **test**

The assessment under art 3 does not concern:

- **Definition of main subject matter** of contract
  - CJEU 16 January 2014, case C-226/12, (*Constructora Principado*)
- **Adequacy of price and remuneration** as against the services or goods supplied in exchange
  - CJEU 23 April 2015, case C-96/14, (*Van Hove*)
- **In so far as these terms are in plain and intelligible language**
  - Transparency requirement, Art. 5
  - CJEU 23 April 2015, case C-96/14, (*Van Hove*)
- Notion of core terms **interpreted restrictively**
  - CJEU 30 April 2014, case C-26/13, (*Kásler*)



## Art 5: Transparency requirement and *contra proferentem*-rule

Terms in writing?

- (a) Then drafted in plain and intelligible language
  - (b) In case of doubt: interpretation most favourable to consumer
- 
- Merely grammatically understandable not enough
    - CJEU 30 April 2014, case C-26/13, (*Kásler*)
  - Core terms are not in plain and intelligible language?
    - Then subject to unfairness test



# What does transparency mean?

- “plain and intelligible language” hints to literal comprehensibility
  - Plus of course requirements of other directives (like UCPD, small prints are bad)
- Consumer must have **real opportunity** to take account of all terms of contract
  - case C-472/10, (*Invitel*)
  - case C-92/11, (*RWE Vertrieb*)
- Average (!) consumer must be able to understand **economic consequences** of term
  - Requires clear and extensive information (and advice?) in case of complex (financial) products
  - Undermines exception for core terms, especially for complex (financial) products
  - Eg C-186/16, ECLI:EU:C:2017:703 (*Andriciuc*)

# Consequences of lack of transparency

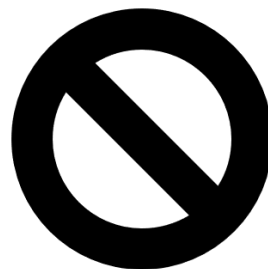
- Not transparent = unfair?
  - Generally not enough
- CJEU 28 July 2016, case C-191/15, (*Amazon EU*)
  - Mere breach of transparency may be sufficient for unfairness
- CJEU 7 November 2019, joint cases C-419/18 and 483/18, (*Profi Credit Polska II*)
  - Breach of transparency requirement ‘decisive’ when determining unfairness
- Strong influence of German law, where directly mentioned as factor

# Transparency requirements for (price) modification clauses

- CJEU 21 March 2013, C-92/11, (*RWE Vertrieb*)
  - Grounds for change in contract
  - Right to terminate in contract in case trader makes use of clause
    - Actual possibility to terminate when use is made?
  
- CJEU 26 November 2015, case C-326/14, (*A1 Telekom Austria*)
  - Price indexation clause referring to objective standard suffices
    - Then no right to terminate required

## Art. 6: ‘unfair term does not bind consumer’

- Two lines in CJEU case law
  - Unfair term may not have any effect, not even indirectly
  - Ex officio control by courts
- **Mixed regime:**
  - Weaker party protection
  - Public policy
- Consumer as *defendant* or as *claimant*



# Why?

- *“Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his or her bargaining power and his or her level of knowledge”*
- *“Article 6(1) [...] is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them”*
- *“the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the parties to the contract”*
- Put the consumer in the same situation as if unfair term had never existed

# Ex officio control by courts

- CJEU 27 June 2000, joint cases C-240/98 u/i C-244/98, (*Océano Grupo*)
  - Possibility of *ex officio* control accepted
- CJEU 4 June 2009, case C-243/08, (*Pannon*)
  - Court has a *duty* to test unfair terms of its own motion
- CJEU 4 June 2015, case C-497/13, (*Faber*)
  - Courts must ascertain whether a consumer case may be at stake and thus whether it has a *duty* to perform unfair terms control ex officio
- What if court does not test of its own motion?
  - CJEU 28 July 2016, case C-168/15, (*Tomášová*)
    - State liability as of CJEU *Pannon*

# Unfair term may not have any effect, not even indirectly

- Invalidity of term, not of contract
  - CJEU 15 March 2012, case C-453/10, (*Pereničová*)
- Term not reduced or amended
  - CJEU 14 June 2012, case C-618/10, (*Banco Español de Crédito*)
- Term **not** replaced
  - By open norm: CJEU 3 October 2019, case C-260/18, (*Dziubak*)
  - By default rule, unless contract otherwise invalid: CJEU 27 January 2021, joint cases C-229/19 and 289/19, (*Dexia Nederland*)
    - Not even if trader invoked default rule instead: CJEU 26 January 2017, case C-421/14, (*Banco Primus*)



# Step-by-step ex officio

- Is one of the parties a **consumer**?
  - Court can infer from context
- Does the trader's claim or defense depend on (written) contract terms?
  - Check **trader's submission!**
  - Dutch courts: "repeat" players must submit contract!
- Are these contract terms **pre-drafted**?
  - GTCs
- Once terms available: **unfairness test** applied
- Draw all **consequences** under national contract law
- Similar to Serbian rules on usurious contracts (art 109+141 law of obligations?)
  - But **consumer can reject** consequences!



# Limitations

- Consequences of unfairness in national law difficult to arrange
- Compare with Serbian Supreme Court 2 April 2019
- Stay of enforcement in line with *Aziz*
- Replacement of terms more difficult under CJEU case law!
- *Dziubak*: stark alternative between invalidity and keeping the unfair term?
- Duty to *renegotiate* under court supervision (C269/19, Banca B. SA/A.A.A)
- Change underway?

Make It Stringent: A Plea for an Unfair Terms Regulation  
Matthias Lehmann, Danny Busch

*European Review of Private Law*  
Volume 31, Issue 6 (2023) pp. 1175 – 1196

# Thank you for listening!

- Questions?



# Further materials

## The Annex (ex Art. 3 (3))

- ‘indicative and non-exhaustive list of the terms which may be regarded as unfair’
  - Indicative but essential aspect of unfairness test
    - CJEU 26 April 2012, case C-472/10, ECLI:EU:C:2012:242 (*Invitel*)
- Implemented in accordance with national practices
  - From Sweden – legislative history enough? to “gold-plating” in black and grey lists (DE, NL) to setting lists by decree (FR)
- Not much case law at EU level, except
  - (Price) change clauses
  - Possibility to go to court (arbitration, forum clauses)
- Case-inflow and literature shows annex is alive in national disputes

# Unfair terms and where to find them (1)

- CJEU case-law mainly *long-term*, often complex contracts
  - Utilities and telecom (*Pannon, Invitel, RWE Vertrieb, A1 Telekom Austria*)
  - Mortgage loans (especially foreign currency) (*Aziz, Kásler, OTP Bank, Dziubak, Banco Primus, Gutiérrez Naranjo, ERSTE Bank, Kušionová*)
  - Rental agreements (*Asbeek Brusse*)
  - Insurance (*Van Hove*)
  - Other consumer credit contracts (*Banco Español de Crédito, Pereničová, Radlinger/Finway, Dexia Nederland*)

## Unfair terms and where to find them (2)

- What is unfair?
  - Always depends on national court + default rules
  - But some hints from case law: acceleration of debt for minor breach, arbitration/jurisdiction clauses, fees that obviously do not correspond to a cost or service, penalty clauses, (price) change clauses;
  - Terms that can mislead the consumer as to the extent of their rights and duties (*Amazon EU*)
  - Remains controversial: what about rent increases?

# Case law CJEU on unfairness test

- CJEU 14 March 2013, case C-415/11, ECLI:EU:C:2013:164 (*Aziz*)
  - Yardstick: otherwise applicable national rule
  - Could trader reasonably assume *consumer* would agree in individual negotiations?
- CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (*Kásler*)
  - Average consumer conform CJEU *Gut Springenheide*
- CJEU 21 April 2016, case C-377/14, ECLI:EU:C:2016:283 (*Radlinger/Finway*)
  - Penalty clause: cumulative effect of sanctions for same breach of contract
- CJEU 20 September 2018, case C-51/17, ECLI:EU:C:2018:750 (*OTP Bank/Ilyés and Kiss*)
  - Other terms of contract relevant
  - Including terms later replaced by legislator because of unfairness
  - Credit contract in foreign currency: consumer must be made clear what effect of significant depreciation of home currency vis-à-vis currency for periodic payment is (interest, repayment)