International and European Business Law
by Schulze / Lehmann

EU Consumer Law

Article-by-Article Commentary

Schulze / Arroyo Amayuelas

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Article-by-Article Commentary

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Preface

Consumer law is one of the most significant areas in which EU legislation has a decisive influence on the law in the Member States. EU consumer law therefore plays a central role in everyday life and legal practice in all Member States. In recent years, it has expanded considerably and undergone major changes, in particular with regard to the new challenges of digitalization and sustainability, with a number of legal acts being newly enacted or revised (such as the Sale of Goods Directive, the Digital Content Directive, the Cross-Border Portability Regulation, the revised Product Liability Directive, and the Repair Directive). In addition, case law on existing instruments in the field of consumer protection has developed in many respects, including with regard to the Directives on Unfair Terms, Consumer Rights, Consumer and Mortgage Credit, Timeshare and Package Travel and Anti-Discrimination.

In view of this significant expansion and change in legislation, the main aim of the "EU Consumer Law Commentary" is to provide guidance to lawyers in practice, legal scholars, and legal educators on the wealth of current standards. It keeps readers up to date in a comprehensive and easy-to-understand manner in a single volume. By commenting on each article individually, it provides quick access to the provisions and their interpretation through case law and doctrine. For each of the legal acts, the comments on the articles follow a uniform basic structure: Part A provides a brief overview of the "general features" of the provision in question, in particular its purpose and legal context. Part B, the "Explanation," forms the main part of the commentary and deals with the scope of the provision in question as well as its individual components and the matters regulated by it in separate subsections, following the structure of the provision in question as far as possible. The orderly and weighted presentation and selection of topics is intended to facilitate orientation with regard to the interpretation and application of the provisions in legal practice.

The commentary was created by a team of authors from several EU member states, reflecting the European nature of the legislation it covers. With their wide range of experience in legal advice and judicial work, research and teaching, the authors hope to contribute to a common understanding and consistent application of European consumer law. The authors and editors are particularly concerned with engaging in a stimulating exchange with the users of the commentary. We are therefore grateful for comments, criticism, and suggestions from all those for whom the "EU Consumer Law Commentary" is intended.

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I. GENERAL CONSUMER CONTRACT LAW

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Unfair Contracts Terms Directive)

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A. General features

The UCTD is unquestionably a milestone in the process of harmonising European consumer law.[1] It is a key text not only because of its strong impact on substantive con- 1

[1] Josipović *ERPL* 2024, 335 (337).

tract law[2] but also because it displays, compared to other directives, certain peculiarities that make it unique and underline its systematic centrality in contract law. First of all, it is the only directive among those concerning consumer protection that has such a general and transversal scope of application, applying to any contract between a professional and a consumer, regardless of the content, object, form, or cause of the contract (→ Art. 1 mn. 10 et seqq.). Moreover, it intentionally operates, far more markedly than the other directives, at the level of principles, relying largely on normative statements with an indefinite content and, from the outset in its general opening clause in Art. 3(1), emphasising its grounding in the general principle of good faith (→ Art. 3 mn. 12).[3]

2 The qualitative leap in the level of consumer protection that the UCTD introduced in many European legal systems is beyond doubt. Drawing on the experience developed since the 1970s in some European jurisdictions regarding the control of general terms and conditions,[4] for the first time the UCTD required all Member States to adopt a system of substantive **control of the terms** unilaterally drafted in contracts between professionals and consumers. This system is centered on a general unfairness clause and is complemented by the non-binding nature of the terms declared to be unfair. With its transposition, the resistance that in several Member States courts and legislatures had opposed to such a model of substantive control was thus finally overcome.

3 Moreover, the importance of this directive emerges at an even higher level, given that in the thirty-two years since its entry into force it still represents the most significant example of the increasingly creative role of the CJEU. Indeed, the CJEU's copious case law in the area of unfair terms constitutes one of the most systematic manifestations of the principle of effectiveness of judicial protection, an undisputed protagonist in the evolution of European private substantive but also, in many respects, procedural law (→ Art. 7 mn. 8-10).[5]

B. The evolution of the Directive and its implementation over time

I. The evolution of the regulatory text

4 Conversely, while the evolution of the Directive has been of great significance in terms of its interpretation by the Courts (and especially by the CJEU), it has been much

[2] Hondius *ERPL* 1995, 241 (242): 'it goes to the heart of contract law'; Schulze/Zoll, p. 243 (243); Rutgers, p. 279 (280). As recognised already in European Commission, 'Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts', 27 April 2000, COM(2000) 248 final, C 323/9, p. 35, the Directive has had an enormous impact on legal doctrine, giving birth to a huge number of articles and monographs on the subject of unfair contractual terms in every Member State.

[3] European Commission, 'Commission notice. Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts', 27 September 2019 (OJ C 323), p. 5: 'Council Directive 93/13/EEC is a principle-based piece of legislation. It protects consumers from unfair terms in all types of business-to-consumer contracts and, in that sense, is a key instrument to ensure fairness in the internal market.'.

[4] See, mainly: in Germany, the *Gesetz zur Regelung der Allgemeinen Geschäftsbedingungen*, or *AGB-Gesetz*, of 1976; in the UK, the Unfair Contract Terms Act of 1977; in France, the so-called *Loi Scrivener* of 1978. UCTD is, therefore, the result of a compromise between different models, primarily the German and the French model, as correctly pointed out by Schulze/Zoll, p. 243 (244). At the same time, given its nature as a minimum harmonisation directive, it is also 'a minimum compromise between the very differing starting points in Europe' (Howells/Twigg-Flesner/Wilhelmsson, p. 130).

[5] Paradoxically, according to Fornasier *ERPL* 2023, 1143 (1145), UCTD has had an even greater impact on the Member States' procedural law than on substantive contract law.

less substantial on the normative level. After its entry into force, the text of the Directive has not undergone many significant changes, with only a few notable exceptions.[6] Among these, we may recall: (i) the introduction in 2011, by the CRD, of Art. 8a, concerning the obligation of Member States to inform the Commission in the event of the adoption of stricter measures, which extend the assessment of unfairness to individually negotiated contractual terms or adequacy of price or remuneration, or contain lists of contractual terms that are to be considered unfair (→ Art. 8a mn. 8 et seq.); ii. the introduction in 2019, via the so-called Omnibus Directive, of Art. 8b, aimed at strengthening the so-called enforcement of this directive (as well as other EU consumer directives), by establishing a more effective system of sanctions to ensure better enforcement (→ Art. 8b mn. 13-23).

However, it is also worthwhile to recall the missed, and far more incisive reform, **5** which was brought about by the Proposal for a so-called 'horizontal' directive on consumer rights[7] back in 2008 (the 'Proposal'). The Proposal envisaged the repeal of as many as four EU directives, including the UCTD. The provisions contained in these directives would have been transfused within a unitary and organic regulatory measure, which aspired to stand not as a mere compilation of existing rules but as a true microsystem, rationally ordered and, in some respects, even innovative, of European consumer law. The Proposal embraced a full harmonisation model, which would have prevented Member States from maintaining or introducing provisions capable of providing consumers with a different (lesser or even greater) level of protection than that granted by the directive itself. That project aimed to overcome the limit of fragmentation resulting from the different ways and levels of transposition adopted over time by the Member States. However, that project was found to be overly ambitious at the time[8] and thus aborted, at least as far as the UCTD is concerned (→ Art. 8a mn. 2). The instrument that ultimately followed the proposal, namely abovementioned CRD, was far less ambitious in its structure and scope, and, though also of full harmonisation, limited itself, with the introduction of the aforementioned Art. 8a, requiring Member States to notify the Commission of certain types of stricter provisions that may have been adopted for greater consumer protection (→ Art. 8a mn. 2).

Also aborted was the further reform that was emerging in 2011 under the so-called **6** 'optional instrument', namely the CESL.[9] The CESL envisaged a scope of application in consumer relations no longer limited to terms that were not individually negotiated (and thus extended far beyond the phenomenon of general terms and conditions: this at least in the final version, which was, however, never approved). Conversely, it was envisaged that substantive control would also be extended to business-to-business relations but, in that case, only in the case of non-individually negotiated terms (see Art. 86(1)).

II. Interpretation and application of the Directive

1. The UCTD in the case-law of the CJEU

The importance of the directive in terms of jurisprudential development is, on the **7** other hand, there for all to see and is evidenced by all the statistical data, of which I will

[6] Josipović *ERPL* 2024, 335 (337).

[7] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Consumer Rights', 8 October 2008, COM (2008) 614 final.

[8] See Weatherill *ERPL* 2009, 368 (368 et seqq.).

[9] See Schulze, 'Common European Sales Law (CESL)', Baden-Baden 2012. See, in particular, Chapter 8 CESL.

quickly summarise only the most recent. Since its adoption, there have been more than 200 judgments and orders so far in which the CJEU has ruled on references for preliminary rulings concerning the UCTD.[10] The pronouncements range from pure substantive law of contract and obligation to civil procedural law, the proper conformation and application of which have been deemed crucial to ensuring adequate judicial protection for the rights of consumers adhering to unfair terms.

8 The chronological progression also indicates a considerable increase in rulings over the past decade, coinciding with the various lawsuits filed by savers who were parties to financial loan or guarantee agreements against financial institutions in the wake of the 2009 financial crisis.[11] The CJEU's first ruling on the directive arrived relatively late, in the year 2000,[12] which was followed, again in that decade, by no more than a dozen decisions. It is mainly, however, in the last fourteen years that the CJEU's interpretive activity has been progressively and inexorably intensifying year after year. From about 9 pronouncements per year in 2013, 2014 and 2015, there have been 23 decisions in 2019, 22 in 2020, 25 in 2021, etc. In 2023 there were about 30 rulings and orders, while those issued in 2024 were 15.

2. The reasons behind the intense elaboration of the CJEU on the Directive

9 Several reasons lie behind this jurisprudential prominence.

10 First and foremost, the already highlighted generality of the UCTD, of which the pivotal norm, namely Art. 3, is testimony, which centres the substantive protection of the consumer on a general clause that in turn contains references to numerous general and indeterminate concepts, connoted by undoubted margins of vagueness, such as 'abusiveness,' 'good faith,' 'significant imbalance,' etc. Equally indicative of this technique are also, just to give two other examples, Art. 4 (transparency) and Art. 6 (generic reference to a 'non-binding term,' without further qualification.

11 Second, the lacunarity of the Directive. Not only are the present rules formulated in very general terms, but they leave uncovered large areas of regulation that would have required – and indeed over time have required – direct action to fill in the gaps. The main case in point is the absence of any indication as to the fate of the contract following the elimination from it of individual unfair terms declared by the court to be non-binding: an issue that some authors have labelled with the evocative expression of 'post-unfairness'[13] (→ Art. 6).

12 As a consequence, **the UCTD relies heavily on national laws**, not constituting, by itself considered, a self-sufficient microsystem. On the contrary, it presupposes the necessary completion with the principles of individual domestic systems, into which it itself integrates by bringing its own order of values based on contractual justice and thus, not neutral: the principle of good faith itself integrates with the concept of good faith already in use in national systems, changing it in depth.[14]

13 A third factor that may have affected the subsequent development of the directive is the fact that it is **a minimum harmonisation Directive** (→ Art. 8). This has meant that,

[10] Schulze/Zoll, p. 242 (243).

[11] This is highlighted by Schulze/Zoll, p. 242 (244). As some authors put it, the 2009 financial crisis worked as the input for the 'Awakening of Sleeping Beauty' (Micklitz/Reich *CMLR* 2014, 771 (771)). See also Wiewiórowska-Domagalska/de Elizalde/Josipović *ERPL* 2024, 311 (311).

[12] CJEU 27.6.2000 – Joined cases C-240/98, C-241/98, C-242/98, C-243/98 and C-243/98, ECLI:EU:C:2000:346 – *Océano Grupo Editorial*.

[13] This expression is commonly used, in particular, by the Italian doctrine: see, in particular, Pagliantini, p. 1 (4) ('postvessatorietà').

[14] See Collins *OJLS* 1994, 229 (229 et seqq.).

beyond the minimum harmonised core, significant differences in regulation between Member States have remained or subsequently created. This circumstance, rather than reducing the room for manoeuvre granted to the CJEU, has instead further enhanced it, since the Court, faced with national rules that are expansive in protection, and therefore stricter than the EU ones, has found itself having to decide quite a few preliminary questions concerning the conformity of these with the minimum standards imposed by the Directive (as a rule, with positive decisions).

Of particular interest, moreover, is the circumstance that not a few Member States **14** (e.g., Germany)[15] spontaneously decided to extend the provisions of the UCTD beyond its own subjective scope, i.e., also to relationships between contracting parties not qualified as professionals or consumers. This gave the UCTD an even more expansive scope at least in those national legal systems, effectively binding them to a far greater extent to the CJEU's guidance.

C. Appreciation and criticism of the Directive: a generally positive but mixed balance sheet

This evolution has not, however, gone without criticism. It has recently been pointed **15** out by some scholars[16] that the Directive has proven itself very well, indeed excellently, as long as it has remained faithful to its original vocation, namely that of being an instrument aimed at reacting to a regulatory imbalance imposed by the professional on the consumer by introducing a substantive type of protection consisting in the removal of unbalanced terms from the contractual regulations. As a tool, then, to remedy a classic market failure originating from the inherent asymmetry that plagues the consumer-professional relationship and prevents consumers from optimally exercising their contractual freedom. The balance of the more than 30-year application of the UCTD, on the other hand, would be less convincing if one looks at the creative interpretation that the case law of the CJEU has proposed over time. Under the banner of a maximally pervasive conception of the principle of the effectiveness of judicial protection, the CJEU would have ended up bending the Directive into a tool for affirming the primacy, always and in any case, of the consumer's interest over all other interests[17] forcing the Member States' courts and their legislators to comply with such deemed excessive readings.[18]

These are, however, overly drastic judgments. Beyond some excesses, the basic ap- **16** proach, based on the need to provide support for consumer autonomy, objectively conditioned and jeopardised by the long-established phenomenon of standardisation of mass contracts, remains convincing and effective.[19] There is no doubt, moreover,

[15] Germany transposed the Directive by modifying the already existent *AGB-Gesetz* (see Reich *ERPL* 1997, 165 (165 et seqq)), whose provisions then merged into § 307 BGB et seqq. in 2002 (see Pfeiffer *NJW* 2017, 913 (913 et seqq.)).

[16] E.g., Pagliantini, p. 1 (3 et seq.).

[17] See Palmieri/Pardolesi *Foro it.* 2023, 369 (369).

[18] See Palmieri/Pardolesi *Foro it.* 2023, 369 (375), who have spoken, in this regard, of a veritable 'paroxysmal protectionism' of the European judicial matrix, aimed at the 'systematic and furious prevarication of every other interest'. See also Pagliantini, p. 1 (4), negatively stigmatising the increasingly 'punitive scope' of the protection thus assured to the consumer.

[19] As correctly pointed out by Wiewiórowska-Domagalska/de Elizalde/Josipović *ERPL* 2024, 311 (311), UCTD 'has served to tackle serious economic grievances and situations of over-indebtedness. It fulfilled the purpose of a social safety net amid the financial crisis and after. Therefore, it brought EU law to the attention of citizens as able to tackle their pressing needs On the business side, the overall economic interest at stake has made the UCTD a central piece of legislation, especially for banks and credit companies.'.

that the directive has stimulated a fruitful dialogue both between national courts and the CJEU[20] and, albeit indirectly, between the national courts themselves. Today, far more than thirty years ago, these courts increasingly engage with one another – even from a distance – and take into account interpretative developments that originate in neighbouring jurisdictions and then have entry into the jurisprudence of the CJEU.

Art. 1

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

Bibliography: Barenghi, *Diritto dei consumatori*, 3rd edn, Milan 2024; Brandner/Ulmer, 'Some Critical Remarks on the Proposal Submitted by the EC Commission' *CMLR* 1991, 647; De Cristofaro/Zaccaria (eds), *Commentario breve al diritto dei consumatori*, 2nd edn, Padua 2013; Hondius, 'The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States', *ERPL* 1995, 241; Josipović, T., Scope of Application of the Unfair Contract Terms Directive, Is it time for a New Compromise?, *ERPL* 2024, 335; Micklitz, 'Unfair Terms in Consumer Contracts' in Reich/Micklitz/Rott/Tonner (eds), *European Consumer Law*, 2nd edn, Cambridge 2014, p. 136; Micklitz/Reich, 'The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)' *CMLR* 2014, 771; Rott, 'Unfair contract terms', in Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law*, Cheltenham/Northampton 2016, p. 287; Rutgers, 'Unfair terms in consumer contracts' in Vogenauer/Gullifer (eds), *English and European perspectives on Contract and Commercial Law, Essays in honour of Hugh Beale*, London 2014, p. 279; Schulte-Nölke, 'The Objectives of Directive 93/13/EEC on Unfair Contract Terms: An Overview after 30 Years of Case Law' *ERPL* 2024, 315; Schulze/Zoll, '§ 4 Missbräuchliche Vertragsklauseln', in Schulze/Zoll, *Europäisches Vertragsrecht*, 3rd edn, Baden-Baden 2021, p. 244; Tenreiro/Karsten, 'Unfair terms in consumer contracts: uncertainties, contradictions and novelties of a Directive', in Schulte-Nölke and Schulze (eds), *Europäische Rechtsangleichung und nationale Privatrechte*, 1999, p. 223; Wilhelmsson, 'Various Approaches to Unfair Terms and Their Background Philosophies', *Jur Int* 2008, 51.

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A. General features

1 Art. 1, the opening provision of the directive, has a **rather heterogeneous content**.

2 Para 1 serves as an introduction to the directive as a whole, setting out its principal purpose. In the final part of this paragraph, however, we already encounter a rule concerning the delimitation of the scope of application of the directive, namely the positive criterion according to which the directive refers to unfair terms in contracts concluded between a seller or supplier and a consumer. This clarification must be read in conjunction with that contained in Art. 2, which defines the concept of unfair terms (i) and the concepts of consumer (ii) and seller and supplier (iii) (→ Art. 2).

[20] See e.g., Arroyo Amayuelas, p. 141 et seqq.

Para 2, on the other hand, goes directly to the heart of defining the directive's objective scope, by establishing the negative criterion that excludes from this scope terms reflecting mandatory statutory or regulatory provisions. From this perspective, para 2 is to be read in conjunction with both Art. 2(a) and Art. 3, whose paras 1 and 2 in turn identify a further criterion for exclusion from the objective scope of application, namely the case of terms that have been individually negotiated. **3**

B. Explanation

I. The purpose of the Directive[1]

The general objective of the UCTD is providing for **a high level of consumer protection**.[2] As recognised by the European Commission itself,[3] this objective is twofold, since it encompasses two purposes: (i) ensuring effective protection for consumers, who are generally the weaker party, from unfair contract terms imposed by sellers or suppliers without individual negotiation; and (ii) promoting the development of the Internal Market by harmonising national rules at a minimum level to support this protection. **4**

The idea behind this regulatory approach is **5**

> [T]hat the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.[4]

The UCTD thus aims to bring a remedy to situations of contractual asymmetry, both of information[5] and bargaining power,[6] which cause the consumer to accept unfair contractual conditions. The remedy is a substantive and effective one, consisting in the removal of the unfair term from the contract, with the purpose of recreating a substantive balance between the parties.[7] **6**

According to the CJEU's case-law, the UCTD as a whole **7**

> [C]onstitutes, in accordance with Art. 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the European Community and, in particular, to raising the standard of living and the quality of life throughout the Community.[8]

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[1] On the purposes of the Directive see Schulte-Nölke *ERPL* 2024, 315 (315 et seqq.). See also Micklitz/Reich *CMLR* 2014, 771 (771 et seqq.).

[2] The legal basis for the UCTD is Art. 114 TFEU (former Art. 100a EEC Treaty). The Directive also serves to realise the objectives in Art. 169 TFEU and in Art. 38 CFREU.

[3] See European Commission, 'Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts', 27 April 2000, COM(2000) 248 final, C 323/9.

[4] CJEU 17.5.2018 – case C-147/16, ECLI:EU:C:2018:320 para 54 – *Karel de Grote*. Similar statements can be found in CJEU 30.5.2013 – case C-488/11, ECLI:EU:C:2013:341 para 31 – *Asbeek Brusse*; CJEU 17.7.2014 – case C-169/14, ECLI:EU:C:2014:2099 para 22 – *Sánchez Morcillo and Abril García*; CJEU 3.9.2015 – case C-110/14, ECLI:EU:C:2015:538 para 18 -*Costea*.

[5] CJEU 17.5.2018 – case C-147/16, ECLI:EU:C:2018:320 para 59 – *Karel de Grote*.

[6] CJEU 3.9.2015 – case C-110/14, ECLI:EU:C:2015:538 para 27 – *Costea*.

[7] CJEU 17.7.2014 – case C-169/14, ECLI:EU:C:2014:2099 para 22 – *Sánchez Morcillo and Abril García*; CJEU 7.8.2018 – joined cases C-96/16 and C-94/17, ECLI:EU:C:2018:643 para 69 – *Banco Santander and Escobedo Cortés*.

[8] CJEU 26.10.2006 – Case C-168/05, ECLI:EU:C:2006:675 para 37 – *Mostaza Claro*; CJEU 6.10.2009 – Case C-40/08, ECLI:EU:C:2009:615 para 51 – *Asturcom Telecomunicaciones*.

8 The protection offered by the Directive is, therefore, a matter of 'public interest'.[9]

9 The statement of the directive's purpose is not a mere political declaration of intent lacking legal significance. On the contrary, it plays a decisive role in the teleological interpretation of the directive's provisions. In particular, it is in light of this purpose that the meaning and function of the unfairness test can be more clearly understood (→ Art. 3).

II. Contracts concluded between a seller or supplier and a consumer

10 The directive applies to 'all' contracts entered into by sellers or suppliers with a consumer.[10] In practice, given the very broad concept of 'seller and supplier' (→ Art. 2), the objective scope of the directive encompasses all consumer contracts (i.e., contracts between a professional and a consumer),[11] 'in all sectors of economic activity'.[12] As already pointed out, this is the broadest material scope of any consumer law directive.

11 Recital 10 provides for a very short list of exceptions, *inter alia* including contracts relating to employment,[13] contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organisation of companies or partnership agreements. Some of these exclusions, however, likewise follow from the fact that, in such cases, the parties to the contract do not fall within the definition of 'consumer'.[14]

12 The Directive does not give a definition of 'contract'. It has been ruled that in the absence of any harmonised rule of the general aspects of contract law at the level of the EU, the formation, conclusion and validity of contracts are regulated by national law.[15] The notion itself of contract should therefore be assessed according to the applicable national law.[16]

13 The CJEU has held that 'the purpose of the contract is (…) irrelevant in determining the scope of the directive'.[17] Indeed, it is solely by reference to the capacity of the

[9] CJEU 26.10.2006 case C-168/05, ECLI:EU:C:2006:675 para 3 – *Mostaza Claro*; CJEU 4.6.2009 – Case C-243/08, ECLI:EU:C:2009:350 para 31 – *Pannon GSM*; CJEU 30.4.2014 – Case C-26/13, ECLI:EU:C:2014:85 para 78 – *Kásler*.

[10] Recital 10.

[11] Josipović *ERPL* 2024, 335 (360).

[12] CJEU 6.7.2017 – case C-290/16, ECLI:EU:C:2017:523 para 44 – *Air Berlin*; CJEU 20.4.2023 – C-263/22, ECLI:EU:C:2023:311 para 32 – *Ocidental*.

[13] CJEU 21.3.2019 – case C-590/17 ECLI:EU:C:2019:232 para 32 – *Pouvin Dijoux*.

[14] According to the AG in para 56 of case C-590/17 *Pouvin Dijoux*, recital 10 'provides illustrative examples of types of legal transactions that will fall short of Art. 1(1) read in conjunction with Art. 2(b) and (c) of the directive'.

[15] See CJEU 3.2.2021 – case C-922/19, ECLI-EU:C:2021:91 para 45 – *Stichting Waternet v MG*. See, however, Barenghi, p. 285 et seq., according to whom the concept of contract should be assessed at the European level and would encompass any negotiated transaction that takes the form of an act between living persons having pecuniary content: such a classification would make it possible to also apply the consumer protection rules to negotiations that formally take the form of unilateral acts but which, in substance, have the content of an economic transaction, the settlement of which is prepared by the professional.

[16] See CJEU 3.2.2021 – case C-922/19, ECLI-EU:C:2021:91 para 45 – *Stichting Waternet v MG*. See also Josipović *ERPL* 2024, 335 (362 fn. 2).

[17] See CJEU 30.5.2013 – case C-488/11, ECLI:EU:C:2013:341 para 30 – *Asbeek Brusse*; CJEU 15.1.2015 – case C-537/13, ECLI:EU:C:2015:14 para 21 – *Šiba*. And see also CJEU 19.11.2015 – case C-74/15, ECLI:EU:C:2015:772 – *Dumitru Tarcău*, and CJEU 4.9.2016 – case C-534/15, ECLI:EU:C:2016:700 – *Dumitraș*, concerning a contract providing immovable property as security or a contract of guarantee concluded between a natural person and a credit institution in order to secure contractual obligations owed by a commercial company to that credit institution under a credit agreement, where that natural person has

contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, that the directive defines the contracts to which it applies.[18]

The fact that the contract does not provide a monetary consideration is, therefore, also irrelevant.[19] According to the Guidance, therefore 14

> [A]lso contracts between consumers and providers of social media services must be considered to be covered by the UCTD regardless of whether consumers have to pay certain amounts of money or whether the consideration for the services consists in consumer generated content and profiling.[20]

III. The exclusion from the Directive's scope of application of terms reflecting mandatory provisions

Pursuant to Art. 1(2) contractual terms which reflect mandatory, statutory or regulatory provisions, or the provisions of international conventions applying to consumer contracts whose parties are Member States of the Union, with special regard to the conventions in the field of transport,[21] are not subject to the provisions of the Directive, and are therefore excluded from its scope of application.[22] This exclusion is based on the presumption that 'in principle, (…) the national legislature struck a balance between all the rights and obligations of the parties to certain contracts'.[23] It follows that extending the unfairness control to such terms (so-called 'declaratory terms') would indirectly mean allowing national courts to assess the fairness of national statutory law in the field of contract law,[24] with an unjustified interference by the EU in the national legislators' sovereignty, beyond the purpose of the directive.[25] The Member States can, however, extend consumer protection also to terms reflecting mandatory law.[26] 15

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no trade, business or professional link with the company. In this regard see also Josipović *ERPL* 2024, 335 (361).

[18] See CJEU 4.9.2016 – C-534/15, ECLI:EU:C:2016:700 para 28 – *Dumitraș*; CJEU 21.3.2019 – case C-590/17 ECLI:EU:C:2019:232 para 23 – *Pouvin Dijoux*; CJEU 10.6.2021 – C-198/20, ECLI:EU:C:2021:481 para 24 – *MN and Others v X Bank S.A.*; CJEU 20.4.2023 – C-263/22, ECLI:EU:C:2023:311 para 32 – *Ocidental*. See also Josipović *ERPL* 2024, 335 (362).

[19] See European Commission, 'Commission notice. Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts', 27 September 2019 (OJ C 323), p. 12.

[20] Ibid.

[21] The reference is mainly to the following international instruments: Convention for the Unification of Certain Rules for International Carriage by Air, agreed at Montreal on 28 May 1999. Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999. Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by the Protocol of 2002.

[22] As noted by Josipović *ERPL* 2024, 335 (374), the extension of this exclusion is, in the end, left to each Member State: 'The more such mandatory regulatory provisions, the narrower the scope of application of the UCTD'.

[23] CJEU 20.9.2018 – case C-51/17, ECLI:EU:C:2018:750 para 53 – *OTP Bank and OTP Faktoring*; CJEU 13.9.2012 – case C-92/11, ECLI:EU:C:2012:566 para 28 – *RWE Vertrieb*. The latter decision also clarifies (see point 1 of the operative part) that mandatory rules of national law that apply to specific groups of customers are not considered mandatory rules under Art. 1(2) UCTD if a contract term extends their applicability to other customers. See also recital 13 of the UCTD.

[24] Josipović *ERPL* 2024, 335 (367).

[25] See, nevertheless, recital 14: 'Member States must however ensure that unfair terms are not included, particularly because this Directive also applies to trades, business or professions of a public nature'.

[26] According to the CJEU, this would be a case of extended transposition, i.e., application of the directive beyond its objective scope of application, as described in Art. 1(2): CJEU 21.12.2021 – C-243/20, ECLI:EU:C:2021:1045 paras 61–63 – *DP and SG v Trapeza Peiraios*. As one can read in the European Commission, 'Report from the Commission on the implementation of Council Directive 93/13/EEC of

16 Since Art. 1(2) is a provision defining the scope of application of the Directive, the verification whether the provision reflects a mandatory statutory or regulatory rule is a preliminary assessment that must be performed ex officio by the national court when establishing whether the Directive, as a whole, can apply or not.[27] This assessment is, therefore, preliminary with respect to the one concerning the unfairness of the term, and must be rendered precisely in order to decide whether the judge can proceed with the unfairness control or not.

17 As stated in recital 13, the concept of 'mandatory statutory or regulatory provisions' must be intended in a **broader meaning** than the one referred to in many legal systems, since it includes both cogent rules in strict sense and dispositive rules, i.e., rules which 'shall apply between the contracting parties provided that no other arrangements have been established'.[28] In other words, it comprises all rules that oblige the parties to the contract, regardless of whether the latter are allowed to derogate from them or not.[29]

18 The CJEU has clarified that the exclusion set out in Art. 1(2) also applies when a mandatory regulation is introduced after the contract has been signed, requiring an arrangement that substitutes an unfair contract term,[30] as it frequently occurred in many Member States in the aftermath of the 2009 financial crisis.[31]

19 The exclusion set out in Art. 1(2) requires two separate and cumulative conditions:[32] that a term reproduces the content of a statutory provision;[33] that the statutory has a cogent or a dispositive character.[34]

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5 April 1993 on unfair terms in consumer contracts', 27 April 2000, COM(2000) 248 final, C 323/9, 'several Member States have not transposed this limitation on the scope of the Directive (A, DK, FIN, F, NL, S, EL, B) without this leading to problems of application'.

[27] See CJEU 30.5.2013 – case C-488/11, ECLI:EU:C:2013:341 para 33 – *Asbeek Brusse*.

[28] See also CJEU 21.3.2013 – C-92/11, ECLI:EU:C:2013:180 para 26 – *RWE Vertrieb*; CJEU 30.4.2014 – C-280/13, ECLI:C:2014:279 para 31 – *Barclays Bank*; CJEU 10.9.2014 – C-34/13, ECLI:EU:C:2014:2189 para 77 – *Kušionová*; CJEU 20.9.2017 – case C-186/16, ECLI:EU:C:2017:703 para 28 – *Andriciuc*; CJEU 7.12.2017 – case C-446/17, ECLI:EU:C:2017:954 para 25 – *Woonhaven Antwerpen*; CJEU 20.9.2018 – case C-51/17, ECLI:EU:C:2018.750 para 52 – *OTP Bank and OTP Faktoring*; CJEU 3.4.2019 – case C-266/18, ECLI:EU:C:2019:282, para 33 – *Aqua Med*; CJEU 3.3.2020 – case C-125/18, ECLI:EU:C:2020:138 para 31 – *Gómez del Moral Guasch*.

[29] See CJEU 21.3.2013 – case C-92/11, ECLI:EU:C:2013:180 para 26 – *RWE Vertrieb*; CJEU 30.4.2014 – case C-280/13, ECLI:C:2014:279 para 31 and 42 – *Barclays Bank*; CJEU 10.9.2014 – case C-34/13, ECLI:EU:C:2014:2189 para 77 – *Kušionová*; CJEU 7.12.2017 – case C-446/17, ECLI:EU:C:2017:954 para 25 – *Woonhaven Antwerpen;* CJEU 20.9.2017 – case C-186/16, ECLI:EU:C:2017:703 para 29 – *Andriciuc*; CJEU 3.4.2019 – case C-266/18, ECLI:EU:C:2019:282 para 33 – *Aqua Med*.

[30] CJEU 20.9.2018 – case C-51/17, ECLI:EU:C:2018.750 paras 62–64 – *OTP Bank and OTP Faktoring*. However, as this latter decision clarifies, such provision may not deprive consumers of the rights they may derive from invalidity of the contract because of the unfair nature of a contract term (see also CJEU 14.3.2019 – case C-118/17, ECLI:EU:C:2019:207 paras 51–55 – *Dunai*; CJEU 2.9.2021 – case C-932/19, ECLI:EU:C:2021:673 paras 39–40 – *JZ v OTP Jelzálogbank Zrt. and Others*; CJEU 5.5.2022 – case C-567/20, ECLI:EU:C:2022:352 paras 48–64 – *A.H. v Zagrebačka banka d.d.*).

[31] See Josipović *ERPL* 2024, 335 (369).

[32] Josipović *ERPL* 2024, 335 (368). See also CJEU 14.3.2019 – case C-118/17, ECLI:EU:C:2019:207 para 46 – *Dunai*.

[33] CJEU 30.4.2014 – C-280/13, ECLI:C:2014:279 para 40 – *Barclays Bank*. It is, however, not necessary that the term literally reproduces the wording of the statutory provision: CJEU 6.7.2023 – C-593/22, ECLI:EU:C:2023:555 para 27 – *FS and WU v First Bank SA* (a 'material equivalence' is sufficient).

[34] See CJEU 10.9.2014 – C-34/13, ECLI:EU:C:2014:2189 para 78 – *Kušionová*; CJEU 3.4.2019 – C-266/18, ECLI:EU:C:2019:282 para 31 – *Aqua Med*; CJEU 3.3.2020 – C-125/18, ECLI:EU:C:2020:138 para 31 – *Gómez del Moral Guasch*; CJEU 9.7.2020 – case C-81/19, ECLI:EU:C:2020:532 para24 – *NG and OH v SC Banca Transilvania SA*.

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