

Piotr Sitnik

University of London

piotr.sitnik@city.ac.uk

ORCID: <https://orcid.org/0000-0003-1279-3864>

Unfair contract terms legislation as a tool for striking out excessive price clauses? Practice of the Court of Justice of the European Union and Polish courts

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Under Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter as “the Directive” or “Directive 93/13”) assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language. After more than 25 years of application of the Directive, it remains true that, whilst price, as primary consideration conferred upon traders by customers, is exempted from a fairness assessment, irregularities surrounding the conclusion of a contract are liable to have a bearing on the financial standing of consumers in other areas regulated by the law of obligations, many of which are far from ancillary to the purpose of any contract.

The foregoing, coupled with the fact that development of unfair terms legislation and, in particular the substantive requirements

of unfairness of terms in consumer contracts, has been inextricably connected with and subordinated under the progress and expansion of the internal market, means that the so-called price exemption, enshrined in Article 4(2) of the Directive, has not been challenged and is generally followed in EU Member States' legal systems. This paper aims at offering an insight into the judicial approach of the European court towards the price term exemption, preceded by a topical summary of the axiological underpinnings of the unfair terms legislation. This is then followed by an analysis of the Polish judicial approach as an example of a practical transposition into an EU national legal system of the price term exemption. Crucially, it appears that scrutiny is centred around the ways in which a price may be altered and consumer economic interests are protected under the guise of purely legal and not equitable (economic) mechanisms.

1. Axiology behind Directive 93/13 – compromise between protection of consumer interests and development of the internal market

More generally, the substantive content of EU consumer rights, including the regulation of unfair terms in consumer contracts, was born out of a host of underlying policy considerations aimed at equipping the average consumer with tools to benefit the most from the internal market. It is the inextricable connection between consumer welfare and the internal market that has permeated the evolution of consumer rights within the Community. The most significant remnant of this process is the still prevailing view that to make it so that information pertaining to possible market choices available to consumers goes a long way in terms of addressing pressing consumer needs¹. To redress the inequality of bargaining

¹ G. Straetmans, *Misleading Practices, the Consumer Information Model and Consumer Protection*, "Journal of European Consumer and Market Law" 2016, issue 5, pp. 200–206.

power between traders and consumers, the latter group must be empowered by being properly informed of the variety of potential consumer options, and the consequences of entering into any one of them². Micklitz, Reich and Hagen have remarked that “European consumer policy – coupled with the European Economic Constitution and European consumer law – is based on an assumption of rational-acting consumers and suppliers and is deeply rooted in the information paradigm”³.

In the words of the CJEU, Directive 93/13 has two primary objectives: on the one hand, as evidenced by its Article 1 and the second recital in its preamble, to approximate the provisions in force in the Member States relating to unfair terms in contracts concluded with consumers; and on the other hand, as indicated by its fifth and eighth recitals, to improve consumer information on the applicable rules of law⁴. As early as in 2000, the CJEU conceded that the system of controlling unfairness in consumer contracts was based upon the premise that the consumer is in an underprivileged position as against the trader he contracts with, as regards both his bargaining power and his level of knowledge, a disadvantage which leads him to assent to terms drawn up in advance by the trader or seller, the content of which he is unable to influence⁵. The resultant imbalance of rights and obligations

² S.I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, “American Business Law Journal” 2008, vol. 45, issue 4, pp. 724–729; E. Macdonald, *Inequality of Bargaining Power and “Cure” by Information Requirement*, in: *Comparative Contract Law: British and American Perspectives*, ed. by L. DiMatteo, M. Hogg, Oxford 2015, p. 157 et seq.; M. Schilling, *Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice’s Jurisprudence on Directive 93/13 on Unfair Contract Terms*, “European Law Review” 2008, vol. 33, pp. 336–343.

³ H.-W. Micklitz, L.A. Reisch, K. Hagen, *An Introduction to the Special Issue on “Behavioural Economics, Consumer Policy, and Consumer Law”*, “Journal of Consumer Policy” 2011, vol. 34, issue 3, p. 271.

⁴ *Commission v Sweden*, paragraph 10.

⁵ Judgment of 27 June 2000, *Oceano Grupo*, C-240/98, EU:C:2000:346, paragraph 25. This iteration has been repeated in a number of later judgments. See, for example, judgment of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraph 25; judgment of 6 October 2009, *Asturcom Tel-*

is best solved, according to the Court's case law, via positive action detached from the actual parties to any particular contract. Abstract control of fairness, directed at bettering the position of all consumers as a whole by means of a hypothetical projection of their welfare is thought of as the preferred judicial and legislative tool to regulate the consumer contracts market⁶. Directive 93/13 is broadly intended to ensure that principles of EU law related to consumer protection and a balance between the contractual parties' rights and obligations are complied with by removing from consumer contracts unfair terms as a manifestation of the imbalance between the contracting parties⁷.

As proclaimed by recital 7 to Directive 93/13, policing of unfair contract terms in consumer contracts is geared towards aiding sellers and suppliers in prospering on the internal market and at home. It is envisioned that competition will thus be stimulated through the bolstering of choice among citizens of the Member States. In this way one may attest that Directive 93/13 is merely a continuation of the trends in the development of the EU consumer protection regime analysed above as the want to maintain the internal market and ensure consumer welfare through the widening of consumer choice and enhanced competition is deeply entrenched. The very first recital to the preamble of Directive 93/13 states that it was adopted with the aim of progressively establishing the internal market. Next two recitals point towards a corollary that marked divergences in national legislation as applied to unfair terms in

ecomunicaciones, C-40/08, EU:C:2009:615, paragraph 29; judgment of 9 November 2010, *Pénzügyi Lízing*, C-137/08, EU:C:2010:659, paragraph 46.

⁶ Judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 41; judgment of 30 May 2013, *Jörös*, C-397/11, EU:C:2013:340, paragraph 26; judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 41; judgment of 30 May 2013, *Asbeek Brusse*, C-488/11, EU:C:2013:341, paragraph 39; judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 53; judgment of 29 November 2016, *Sales Sinués*, Joined Cases C-381/14 and C-385/14, EU:C:2016:252, paragraph 23.

⁷ Judgment of 30 April 2014, *Barclays Bank*, C-280/13, EU:C:2014:279, paragraph 43.

consumer contracts shall be suppressed so that traders and sellers are able to function on the market on equal terms, thus realizing the internal market ideal of allowing individuals and entities to pursue independent management of their own affairs under conditions as unconstrained as possible⁸.

The fifth and sixth recitals to Directive 93/13 have been called upon to underscore the fact that consumers are often not familiar with the national rules of law of another Member State, particularly in the field of consumer protection. This is why the courts should be particularly vigilant as regards terms which confer jurisdiction on courts of another EU Member State or subject a consumer contract to foreign law. In economic terms, the fifth recital declares that the foregoing devices as applied by sellers or suppliers may have the effect of deterring consumers from entering into transactions with suppliers from another Member State which, consequently, results in impediments to the development of a fully functional internal market. This is why removal of unfair terms is considered a fit for purpose tool to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own. The CJEU has also shown awareness of the fact that sellers may insert into consumer contract terms that differentiate between the law applicable to the substance, as it were, of the contract and the law applicable for procedural purposes, such as an action for an injunction⁹. Assessment of such terms may vary due to the principle of minimum harmonization (i.e. that detailed safeguarding provisions vary from Member State to Member State). In the context of Article 6(1), the CJEU has remarked that national legislation regulating the sphere of consumer protection governed by Directive 93/13 cannot, even

⁸ In this connection, it has been forcibly argued that the ability to manage one's own affairs, market economy and competition are interdependent. See: V. Šmejkal, *Competition law and the social market economy goal of the EU*, "International Comparative Jurisprudence" 2015, vol. 1, issue 1, pp. 36–41; K. Riesenhuber, *Privatrechtsgesellschaft: Entwicklung, Stand und Verfassung des Privatrechts*, Tübingen 2007, p. 13 et seq.

⁹ Judgment of 28 July 2016, *Amazon SARL*, C-191/15, EU:C:2016:612, paragraph 55.

in the absence of full harmonization, alter the scope and, therefore, the substance of that protection and thus affect the strengthening of the effectiveness of that protection by the adoption of uniform rules of law in respect of unfair terms¹⁰.

2. Approach of the Court of Justice of the European Union to the price exemption

Excluded from the fairness review are provisions which relate to the adequacy of the price and remuneration as against the services or goods supplied in exchange. This rather convoluted formulation is not straightforward, and it appears it is different from “price”¹¹. It is submitted that the wording of “adequacy” refers to the quality of consideration provided by both parties in a contractual exchange. In other words, a court is tasked here with ensuring there is fairness in exchange (not to be confused with equality in exchange) in that the benefit conferred by one party is not drastically lower in value

¹⁰ Judgment of 21 December 2016, *Gutierrez Naranjo*, Joined Cases C-154/15 and C-307/15, EU:C:2016:980, paragraph 65.

¹¹ Notably, the UK Supreme Court in *Office of Fair Trading v Abbey National plc* [2009] UKSC 6 held that the exclusion encompassed not only the “essential” price or remuneration terms but that it was extended to “any monetary price or remuneration payable under the contract” (at [41] and [46]). The Court in that case also posited that the language of “adequacy” suggests that it is not the term itself that is excluded from assessment. Instead the term is excluded from certain kinds of assessment (on grounds of the price/quality ratio) but can plausibly be subject to challenge on other grounds (for example, on the ground that it is unfair because of some other discriminatory effect). E. McKendrick, *Contract Law*, Basingstoke 2015, pp. 318–319. P. Mikłaszewicz has observed that the Polish regulation of the exception may be marginally broader in that it refers directly to “price or remuneration” and to any relation therebetween. P. Mikłaszewicz, *Art. 3851*, in: *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna*, ed. by K. Osajda, Legalis, side no. 20. For a thorough analysis of the case law of the Court of Competition and Consumer Protection on clauses permitting a change of price, please see: A. Ejmont, *Analiza orzecznictwa Sądu Okręgowego – Sądu Ochrony Konkurencji i Konsumentów w zakresie klauzul dopuszczających zmianę ceny*, „Transformacje Prawa Prywatnego” 2008, issues 3–4, pp. 5–38.

than the corresponding benefit received from the counterparty¹². Questions of consideration should analyse value in objective terms wherever possible, that is by reference to the price of a good or service at hand (or “remuneration” as prescribed by the letter of Article 4(2)) and comparing it with the utility value of such a good or service)¹³. Only limited guidance, if any, may be derived from other instruments of EU law, particularly the Consumer Credit Directive¹⁴.

¹² Consider the observations of P.S. Atiyah: “Court attempts to fix fair and reasonable prices or their equivalent are, it may be thought, attempts to discover the market price which the parties would have negotiated for themselves if they, and not the court, had actually done this. I do not doubt that the market price of a commodity plays a significant part in any judicial decision determining a fair and reasonable price, but there are difficulties in treating this entire judicial exercise as parasitic on the market. First, there are some commodities for which there is no market at all, such as pain and suffering and personal injury, and yet courts have to fix prices for these in tort actions. Furthermore, the prices fixed by the courts in tort actions then feed into or affect the market price for other goods for which there is a market, for example, liability insurance; perhaps also the market value of legal services may be affected by this legal fixing of prices for personal injury [...] even where the court makes some attempt to look at the hypothetical contract which the parties might have made in order to fix the fair and reasonable price to be paid by one for some good obtained or taken from the other, it is for the court itself to determine under what rules this hypothetical bargain would have been conducted [...] there is the more general point I have already made, namely that even the market itself is not a construct of neutral rules. The extent to which the market is based on the enforcement of binding contracts and the nature of the permissible bargaining process – permitting, for instance, the use of skill and foresight but not force or fraud – are such that ideas of justice in any event have a role to play in the fixing of prices. P.S. Atiyah, *Contract and Fair Exchange*, “University of Toronto Law Journal” 1985, vol. 35, issue 1, pp. 19–20.

¹³ Finding a definite formula in this regard is important. For an exhaustive account of the travails faced by the Spanish courts in the absence of transposition of Article 4(2), see: N. Álvarez Lata, *The Impact of the Terminology of the European Directives on Consumer Rights on the Spanish Law: The Construction of a New Legal Language*, “European Review of Private Law” 2012, vol. 20, issues 5–6, pp. 1316–1319.

¹⁴ In the judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, at paragraph 47, the CJEU refused to consider the concept of “the total cost of the credit to the consumer” from Article 3(g) of Directive 2008/48 as guid-

The exclusion has been explained by reference to the fact that no legal scale or criterion exists that can provide a framework for, and guide, such a review¹⁵. Whilst the exemption in 4(2) explicitly mentions terms regulating the price or remuneration, it does not cover, as the CJEU has held, mechanisms for the amendment of prices of services tendered under a concluded contract¹⁶. Gener-

ance for the purposes of qualifying terms providing for a possibility of altering interest rates under a consumer credit contract as attaching to “price” or “main subject matter of the contract” pursuant to Article 4(2) of Directive 93/13.

¹⁵ Judgment of 30 April 2014, *Kásler*, C-26/13, EU:C:2014:282, paragraph 55; judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 55. Common law systems, particularly American law, knows of the “fair and reasonable price” concept. A federal agency, the Federal Acquisition Regulation (FAR) requires contracting officers, prior to signing most contracts, to establish whether or not the price is “fair and reasonable”. Determination of the fairness and reasonableness of a price involves, in broad terms, a comparison of the offered price to historical prices paid for the same or similar items. However, the FAR, in case of procurement proceedings whose value exceeds \$700,000, may demand that a contractor present certified “cost-or-pricing data” (48 Code of Federal Regulations (CFR) 15.403-4). Therefore, contractors are generally required to furnish proof of the costs they have incurred or are projected to incur, plus a reasonable margin normally expressed in a percentage of the sum of costs. The model is therefore one of cost-based pricing. See: D.J. Oyer, *Cost-Based Pricing: A Guide for Government Contractors*, Oakland, California 2012, pp. 276 et seq. Notwithstanding, alternatives models exist, particularly value-based pricing based upon a reasonable value of a good of service taking the average market price as a point of reference. The uncertain status of the desired pricing model to be espoused by the unfair contract terms regime is also reflected in the remarks contained within the *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts* (COM/2000/0248 final), which asks more questions than provides answers: “Unfair terms shift the burden of risks and obligations by externalising the costs in question. This has two major consequences: firstly, the prices of products and services do not reflect true costs, creating distortions to competition in favour of less efficient firms and leading to lower quality products and services; secondly, the costs incurred by society are higher, because the risks and obligations are borne by persons other than those who could bear them most efficiently from the economic viewpoint”.

¹⁶ Judgment of 26 April 2012, *Invitel*, C-472/10, EU:C:2012:242, paragraph 23. This entails indexation clauses in loan contracts – see further: S. Whittaker, *Unfair Contract Terms, Unfair Prices and Bank Charges*, “Modern

ally, cases before the CJEU have focused on whether a disputed term attaches to the adequacy of price or remuneration as against the services or goods supplied in exchange within Article 4(2). The official documents of the European Union have specifically underscored that “Terms concerning the price do indeed fall within the remit of the Directive, since the exclusion concerns the adequacy of the price and remuneration as against the services or goods supplied in exchange and nothing else. The terms laying down the manner of calculation and the procedures for altering the price remain entirely subject to the Directive”¹⁷.

That regard should be had not to the “price” or “remuneration” itself but to the adequacy thereof to goods or services supplied for in exchange (in other words, fairness in exchange between the parties) was confirmed and showcased in *Kásler*, where the Court considered whether the consideration provided by the consumer in the form of payment for the foregoing difference corresponded to any tangible (or ascertainable) consideration flowing from the bank to the consumer¹⁸. The Court answered in the negative, holding that the difference between the selling rate and the buying rate lies beyond the scope of the exemption delineated by the term “adequacy”, hinting that it forms part of the price or remuneration for services¹⁹. Another disputed term, one which determined the

Law Review” 2011, vol. 74, issue 1, pp. 109–117 (against the backdrop of the British case of *Office of Fair Trading v Abbey National plc* [2009] UKSC 6).

¹⁷ *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts* (COM/2000/0248 final).

¹⁸ Judgment of 30 April 2014, *Kásler*, C-26/13, EU:C:2014:282, paragraph 31.

¹⁹ Judgment of 30 April 2014, *Kásler*, C-26/13, EU:C:2014:282, paragraph 57. This conjures up the observations of the UK Supreme Court in the seminal judgment in *Abbey National plc* where the notion of consideration was similarly stretched to cover additional charges seemingly separate from the “basic” consideration flowing from a consumer to a trader. Abbey National Bank imposed charges on consumers who, having used an unplanned overdraft, made a payment request (whether by standing order, direct debit or using an ATM or debit card). The bank would proceed to make the payment as requested, and then charge fees (which could include “paid item” charges and unauthorised

conversion rate of the foreign currency in which a loan agreement was denominated with a view to calculating applicable repayment instalments, was held not to constitute “remuneration” as no corresponding foreign exchange service was stipulated in exchange²⁰. Consequently, within the purview of the Directive are clauses which unilaterally impose a fee or another type of charge on the consumer, whilst excluded are terms which stipulate some kind of benefit to be conferred by the consumer onto the supplier or trader in exchange²¹. This bears resemblance to how English law

overdraft fees) which accrue on a daily basis whilst the unauthorised overdraft continues. The Supreme Court held that charges for unauthorised overdrafts were not the prices paid in exchange for the transactions in question, nor default charges designed to discourage customers from overdrawing on their accounts without prior arrangement, but were monetary consideration for the package of banking services supplied to current account customers, and therefore such charges were an important part of the defendants’ charging structure and it was irrelevant that they were contingent and that the majority of customers did not incur them. The inference has been subject to heavy criticism in the academic literature as unrealistic and consumer-unfriendly, with the judges admittedly considering the point of view of a consumer but also that of a trader or supplier. E. Macdonald, *Bank Charges and the Core Exemption: Office of Fair Trading v Abbey National Plc*, “Modern Law Review” 2008, vol. 71, issue 6, pp. 997–998 (commenting on the judgment of the Court of Appeal, subsequently appealed to and cited in the Supreme Court); M. Chen-Wishart, *Transparency and fairness in bank charges*, “Law Quarterly Review” 2010, issue 126, pp. 159–162; P. Morgan, *Bank charges and the Unfair Terms in Consumer Contracts Regulations 1999: the end of the road for consumers?*, “Lloyd’s Maritime and Commercial Law Quarterly” 2010, issue 2, pp. 212–214. The key argument to the contrary rests upon the premise that unplanned overdraft fees are penalties and therefore cannot form part of the remuneration proper. The High Court of Australia has doubted whether additional charges constitute consideration in *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30. E. Peel, *The rule against penalties*, “Law Quarterly Review” 2013, issue 129, pp. 152–157; K. Dharmananda, L. Firios, *Penalties arising without breach: the Australian apogee of orthodoxy*, “Lloyd’s Maritime and Commercial Law Quarterly” 2013, issue 2, pp. 145–150.

²⁰ Judgment of 30 April 2014, *Kásler*, C-26/13, EU:C:2014:282, paragraph 58.

²¹ See the judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraphs 69–70, where the Court went as far as inferring, answering the

(and, more generally, common law systems) approach the question of remuneration, with legislators and courts alike being rather hostile to gifts (gratuitous conferrals of benefits) whilst declining to inspect the adequacy of remuneration, in accordance with the maxim that consideration must be sufficient but need not be adequate²². Elements of consideration which merely have impact upon the price or remuneration will generally not be within the scope of the exemption²³. This may have sweeping consequences in practice. For any and all mechanisms which have bearing upon, say, interest rates in credit contracts, will not be caught by the price exemption, and it will be “in principle irrelevant” that they highly influence the amount of income ultimately achieved by a seller or supplier²⁴.

Claimants may seek to circumvent, as it were, the net cast by the price term exemption by pleading that unfairness of adisputed term stemmed not from alleged inadequacy of the level of the

question whether a “risk charge” fell within the price exemption, that, based on the information submitted before the CJEU, the indication is that “that is not the case”. Further, it was confirmed that the fact that the seller levied a gratuitous charge without offering any meaningful consideration in exchange, this weighed heavily against the clause falling within the scope of the exemption, and in favour of subjecting the clause to unfair terms scrutiny under Article 3(1).

²² E.g. W.W. Story, *A Treatise on the Law of Contracts*, Clark, New Jersey 2006, pp. 680–688; D. Taylor, R. Taylor, *Contract Law Directions*, Oxford 2017, pp. 76–88.

²³ Judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 56. This view has been generalized to cover terms representing mechanisms for altering the rate of interest or amending the prices of services. C. Willett, *Transparency and Fairness in Australian and UK Regulation of Standard Terms*, “University of Western Australia Law Review” 2013, vol. 37, issue 1, p. 76; P. Rott, *The Adjustment of Long-Term Supply Contracts: Experience from German Gas Price Case Law*, “European Review of Private Law” 2013, vol. 21, issue 3, pp. 730–739 (in the context of adjustments of gas prices); G.G. Howells, *The European Union’s Influence on English Consumer Contract Law*, “George Washington Law Review” 2017, issue 85, pp. 1937–1940 (analysing a number of cases from several jurisdictions, from New Zealand to Germany).

²⁴ Judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 68. Mechanisms for altering interest rates would not, I submit, fall within the “main subject matter” exemption either. In particular, they cannot be said to be separable from the interest rate itself, in other words are non-separable

altered interest rate as against any consideration that may have been supplied in exchange for the alteration, but the conditions and criteria enabling the lender to make that alteration²⁵. The CJEU has sought guidance as to the character of a particular term purportedly attaching to price or remuneration from the letter of certain typified terms in the “grey” list constituting the Annex to the Directive. In this connection, it has been held that since terms authorising the lender, within the context of a loan or a consumer credit contract unilaterally to alter the rate of interest are expressly mentioned in Paragraph 1(j) of the Annex, they cannot fall within the price exemption²⁶. Further, references have been made to the Annex’s objective in an attempt to bolster its utility in singling out terms that should be subject to particular scrutiny²⁷.

therefrom, and as such shall be considered ancillary (judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 62).

²⁵ This is implied in the judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 63.

²⁶ Judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 59. This could be interpreted as being in alignment with calls of several eminent scholars like Micklitz and Stuyck in favour of turning the “grey”, indicative list into a “black” list which would group terms that shall be automatically rendered invalid. See: H.-W. Micklitz, *The Proposal on Consumer Rights and the Opportunity for a Reform of European Unfair Terms Legislation in Consumer Contracts*, EUI LAW Working Paper No. 2010/12, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698703 (access: 18.11.2018); J. Stuyck, *Unfair terms*, in: *Modernising and Harmonising Consumer Contract Law*, ed. by G.G. Howells, R. Schulze, Munich 2009, pp. 141–144; M. Tenreiro, *Community Directive on Unfair Terms and National Legal Systems*, “European Review of Private Law” 1995, vol. 3, issue 2, pp. 280–281. In September 2016, the Council of Bars and Societies of Europe submitted a proposal for the reform of the list which envisages two lists, one grey and one black: *CCBE Proposal for a Revision of Directive 93/13/EC on Unfair Terms in Consumer Contracts*, 16 September 2016, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/EPL_Position_papers/EN_EPL_20160916_CCBE_proposal_for_a_revision_of_Directive_9313EC_on_unfair_terms_in_consumer_contracts.pdf (access: 18.11.2018).

²⁷ Judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 60. For a comprehensive overview of uses the grey list in Directive 93/13 is put to, and how the uses vary across the EU Member States, see: T. Naudé,

3. Position under Polish law

Polish courts have largely followed the CJEU's general guidance and the letter of Directive 93/13 as well as Article 385¹ § 1 of the Civil Code which mandates that no assessment of unfairness attaches to "price or remuneration" (note that no mention is made of the "adequacy" of such price or remuneration as against the services or goods supplied in exchange). For instance, an intervention has been deemed warranted where the trader reserved for itself the right to correct the prices for services rendered after their commencement, even where the clause in question explicitly stipulated that such changes must be justified. It is against Article 632 § 1 of the Polish Civil Code to demand an increase of flat rate remuneration even where the magnitude or cost of the works undertaken by the contractor has escalated. Even in the absence of such a provision, the consumer could have availed himself of a guaranteed right to withdraw from the agreement, which is granted to all consumers in the event of any annex or amendment to the agreement post-conclusion²⁸. The consumer has the right to expect that the remuneration set between the parties is binding on them both, and that it shall not be subject to one-sided increases. No guidance was given as to the factors justifying an increase, and the court in that case stressed that price is the most important element of a consumer contract, thus moving an inch closer to substantive fairness. It is truly a curious development of the law based upon Directive 93/13 that whilst direct control of the price in consumer contracts is prohibited (under the cloak of "main subject matter of the contract"), the courts will attempt, perhaps in a bid to make up for this shortcoming, an expansive and purposive interpretation of all provisions increasing or otherwise impacting the price.

The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective, "South African Law Journal" 2007, issue 124, pp. 128–140.

²⁸ Judgment of the Appellate Court for Warsaw of 11 October 2013, ref. number VI ACa 221/13, Lex no. 1416432.

3.1. Control of contractual alternation mechanisms

Under Polish law, any unilateral change to a consumer contract must be exacted for important reasons specified *a priori* in the agreement. In addition, the courts have found a duty of the trader to give the consumer a chance to acquaint himself with the trader's intention to introduce such changes beforehand, and consent of the consumer is essential for any changes to go through²⁹. It appears, however, that phrasing which implies the permissibility of changes other than those envisaged in the agreement (such as "the agreement may be amended due to important reasons, in particular...") is not likely to be found unfair³⁰.

Economic interests of the consumer may also be grossly violated in relation to contests or competitions organized for the benefit of clients of a given establishment, say a bank. Such contests may not be, once set up, stipulated to be terminable at any time and for any reason, and it is an insufficient safeguard of consumer interests that information about such a fact is to be published online³¹. The organizer is also not entitled to change the prize as it pleases – the consumer has a legitimate expectation that it remains the same throughout the duration of the contest³². For it is conceivable that a consumer previously agreed to open an account with the bank in question, took out a credit card (for which he regularly incurs charges) for the purpose of participating in the competition, therefore its direct termination may trigger in the consumer feelings

²⁹ Resolution of the Supreme Court of 22 September 2016, ref. number I CSK 814/15, Lex no. 2284198; judgment of the Supreme Court of 14 May 2015, ref. number II CSK 768/14, Lex no. 1751865; judgment of the Supreme Court of 19 March 2007, ref. number III SK 21/06, Lex no. 396113.

³⁰ Judgment of the Court of Competition and Consumer Protection of 9 March 2011, ref. number XVII AmC 3356/10, Lex no. 1215194.

³¹ Judgment of the Appellate Court for Warsaw of 21 December 2011, ref. number VI ACa 873/11, Lex no. 1642385.

³² Judgment of the Appellate Court for Warsaw of 15 February 2012, ref. number VI ACa 1101/11, Lex no. 1642374; judgment of the Appellate Court for Warsaw of 4 October 2011, ref. number VI ACa 282/11,) Lex no. 1130437.

of disappointment, lost chance, discomfort. Such a consumer is ready to go to great lengths to win – he may share his personal data with the bank or continue to unknowingly perform non-cash transactions long after the contest is terminated with winning the contest being the sole objective in his mind.

We can see how the concept of violation of consumer interests transcends the traditional meaning of “loss”, even taking account of *lucrum cessans* (lost benefits). What is also apparent is that whilst lost chance might not form sufficient grounds for recovery under the traditional principles of civil law³³, it is often quantifiable as an economic encumbrance. Disappointment is typically non-recoverable unless a serious mental impairment is caused thereby. What is recoverable, however, is financial loss engendered by virtue of these disadvantages. It is not indispensable to warp the notion of “loss” in order to properly serve and safeguard consumer interests. What effectively is being claimed, I submit, is the financial equivalent for the time lost (or, to put it more accurately, the money-making opportunities taken away) on not being able to pursue a quantifiable objective capable of being expressed in monetary units. This view may appear reductive and take lightly the mental and intellectual side of human sensibilities and actual real-life experiences, however one must remember that the courts remedy this type of discomfort by means of pecuniary compensation. The courts must be able to quantify the extent of violation a consumer’s interests suffered (which need not be equal to “loss” in its traditional sense, understood as *damnum emergens* and *lucrum cessans*), and this is done typically by reference to the financial value of opportunities a consumer was forced to forfeit as a result of a trader’s conduct. In other words, the consumer claims (often inadvertently as the ultimate amount of damages is determined by a judge) for an amount he could have reasonably produced himself had it not been for an infraction of his interests in the gravity and

³³ Pertinently, participants in lotteries have been held to be barred from claiming for the prize amount where they had been deprived of an opportunity to win.

frequency perpetrated by the trader. Account may be taken of the latter's superior bargaining position to adjust this amount.

3.2. Price hikes under the guise of consumer liability expansion

Limitations or exclusions of liability have also been struckdown where a trader purported to burden its customer, in a contract for delivery of construction materials, with a duty to reload the materials onto a suitable vehicle in the event that delivery proved impossible on account of the lack of a paved road, mechanical insufficiencies of a bridge or another unpredicted situation; the consumer was also obliged to provide convenient access to the site³⁴. It was held that the clause effectively obliged the customer to pay the price for the materials in full despite the necessity of incurring additional expenses related to the non-performance of its duties by the seller. It also excluded the seller's liability in respect of the consequences of its inability to perform in accordance with the agreement arising due to circumstances beyond its control, and, crucially, predicated the performance of the agreement on circumstances on which the consumer had no bearing whatsoever. Also, such phrasing as "another unpredicted situation" was found to be too vague, thus encouraging the seller to overly rely on the exclusion clause. Economic interests of the consumer were therefore put in danger in two distinct ways: (1) by potentially imposing on the consumer a duty to provide for an alternative means of transport to ensure performance of the contract; (2) by depriving the consumer of compensation due thereto by virtue of non-performance of the contract. The consumer was obliged to relieve the trader of its duties even where the inability to deliver the materials arose due to the operation of force majeure, and in any event due to reasons unattributable to the consumer.

³⁴ Judgment of the Appellate Court for Warsaw of 11 October 2013, ref. number VI ACa 221/13, Lex no. 1416432.

4. Conclusions

As discussed above, the European court has stopped short of scrutinizing the price stipulated in the consumer contract in question. The primary reason behind that is, alongside the fact that unfair terms control was originally envisaged as a tool for bolstering the internal market, the Directive's focus on the pre-contractual stage of a consumer transaction. For a crucial objective of Directive 93/13 is restoration of balance between the parties whilst, at the same time, preserving the validity of the contract in issue as a whole, and not abolishing all contracts containing unfair terms³⁵. The fate of the contract as a whole shall not be determined exclusively by reference to the actual situation of the parties to the contract. Instead, it is possible to depart from the overarching principle that the contract containing unfair terms must continue in existence unless it is objectively incapable, following the removal of the successfully contested term(s), of continuing in existence and not where it is found and substantiated that the parties would not have entered into the contract at all without what was subsequently found to be an unfair term³⁶. Furthermore, it cannot be the sole justification for the preservation of validity of a contract that to do so would be beneficial to the consumer considering the factual constellation at hand³⁷. Whilst the Directive envisages the task placed before national legislators as ensuring balance between traders or sellers and consumers, which cannot be equated with mandating that contracts containing unfair terms be by default invalidated as a whole, it could be the case in a particular situation that to invalidate a contract under such circumstances would constitute the best means of attaining the Directive's objective.

³⁵ Judgment of 15 March 2012, *Perenicova and Perenic*, C-453/10, EU:C:2012:144, paragraph 31.

³⁶ Opinion of Advocate General Tizzano delivered on 22 September 2005 in the judgment of 10 January 2006, *Ynos*, C-302/04, EU:C:2006:9, paragraph 79.

³⁷ Judgment of 15 March 2012, *Perenicova and Perenic*, C-453/10, EU:C:2012:144, paragraph 33.

It deserves mentioning that both the Directive and the Polish transposition, whilst shying away from grappling head-first with the adequacy of price or remuneration stipulated in a consumer contract as against the quality of services of goods supplied in exchange, envisage other legal mechanisms which limit consumer exposition to excessive prices. As evidenced by the “grey list” of exemplary unfair clauses annexed to the Directive and reproduced in Article 385³ of the Civil Code, a material violation of a consumer’s interests contrary to good faith may manifest itself in a plethora of circumstances. These include clauses imposing only on the consumer a duty to pay a specified amount in the event of abandoning the conclusion or the performance of the contract; clauses that exclude or substantially limit liability towards the consumer in the event of non-performance or undue performance of an obligation; clauses entitling the other contracting party to change the contract unilaterally without an important reason specified in the contract; or terms allowing the other contracting party to transfer the rights and convey duties arising from the contract without the consumer’s consent. In the context of discussing various technical types of unfair terms, judges and commentators alike have engaged in arguments concerning the impact of such contractual impositions or limitations of potential liability upon the economic wellbeing of consumers.

STRESZCZENIE

Klauzule abuzywne w umowach konsumenckich
jako narzędzie w walce z postanowieniami narzucającymi
zbyt wysokie ceny. Praktyka Trybunału Sprawiedliwości
Unii Europejskiej oraz sądów polskich

Zgodnie z art. 4 ust. 2 Dyrektywy Rady 93/13/EWG z dnia 5 kwietnia 1993 r. w sprawie nieuczciwych warunków w umowach konsumenckich ocena abuzywności klauzuli umownej nie powinna dotyczyć ani określenia głównego przedmiotu umowy, ani relacji ceny i wynagrodzenia do dostarczonych w zamian towarów lub usług, o ile warunki te zostały wyrażone prostym i zrozumiałym językiem. Artykuł opisuje stosunek Trybunału

Sprawiedliwości Unii Europejskiej do zakazu wydawania opinii o adekwatności ceny, co poprzedzono podsumowaniem aksjologicznych fundamentów uregulowań dotyczących klauzul abuzywnych. Następnie dokonano analizy podejścia sądów polskich jako przykładu praktycznej transpozycji do systemu wewnętrznego państwa członka Unii Europejskiej zakazu oceny adekwatności ceny. Co istotne, wydaje się, że ocena skupia się na sposobach służących zmianie już ustalonej ceny, a interesy konsumentów chronione są jedynie za pośrednictwem mechanizmów o charakterze czysto prawnym, a nie ekonomicznym.

Słowa kluczowe: ceny usług i towarów; klauzule abuzywne; umowy konsumenckie; Dyrektywa Rady 93/13/EWG z dnia 5 kwietnia 1993 r. w sprawie nieuczciwych warunków w umowach konsumenckich

SUMMARY

Unfair contract terms legislation as a tool
for striking out excessive price clauses? Practice
of the Court of Justice of the European Union
and Polish courts

Under Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language. This paper aims at offering an insight into the judicial approach of the Court of Justice of the European Union towards the price term exemption, preceded by a topical summary of the axiological underpinnings of the unfair terms legislation. This is then followed by an analysis of the Polish judicial approach as an example of a practical transposition into an EU national legal system of the price term exemption. Crucially, it appears that scrutiny is centred around the ways in which a price may be altered and consumer economic interests are protected under the guise of purely legal and not equitable (economic) mechanisms.

Keywords: prices of services and goods; unfair clauses; consumer contracts; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

BIBLIOGRAPHY

- Atiyah P.S., *Contract and Fair Exchange*, "University of Toronto Law Journal" 1985, vol. 35, issue 1.
- Álvarez Lata N., *The Impact of the Terminology of the European Directives on Consumer Rights on the Spanish Law: The Construction of a New Legal Language*, "European Review of Private Law" 2012, vol. 20, issues 5–6.
- Becher S.I., *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, "American Business Law Journal" 2008, vol. 45, issue 4.
- Council of Bars and Societies of Europe, *CCBE Proposal for a Revision of Directive 93/13/EC on Unfair Terms in Consumer Contracts*, 16 September 2016.
- Chen-Wishart M., *Transparency and fairness in bank charges*, "Law Quarterly Review" 2010, issue 126.
- Dharmananda K., Firios L., *Penalties arising without breach: the Australian apogee of orthodoxy*, "Lloyd's Maritime and Commercial Law Quarterly" 2013, issue 2.
- Ejmont A., *Analiza orzecznictwa Sądu Okręgowego – Sądu Ochrony Konkurencji i Konsumentów w zakresie klauzul dopuszczających zmianę ceny, „Transformacje Prawa Prywatnego”* 2008, issue 3–4.
- Howells G.G., *The European Union's Influence on English Consumer Contract Law*, "George Washington Law Review" 2017, issue 85.
- Macdonald E., *Bank Charges and the Core Exemption: Office of Fair Trading v Abbey National Plc*, "Modern Law Review" 2008, vol. 71, issue 6.
- Macdonald E., *Inequality of Bargaining Power and "Cure" by Information Requirement*, in: *Comparative Contract Law: British and American Perspectives*, ed. by L. DiMatteo, M. Hogg, Oxford 2015.
- McKendrick E., *Contract Law*, Basingstoke 2015.
- Micklitz H.-W., *The Proposal on Consumer Rights and the Opportunity for a Reform of European Unfair Terms Legislation in Consumer Contracts*, "EUI LAW Working Paper" No. 2010/12.
- Micklitz H.-W., Reisch L.A., Hagen K., *An Introduction to the Special Issue on "Behavioural Economics, Consumer Policy, and Consumer Law"*, "Journal of Consumer Policy" 2011, vol. 34, issue 3.
- Mikłaszewicz P., Art. 385¹, in: *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna*, ed. by K. Osajda, Legalis.
- Morgan P., *Bank charges and the Unfair Terms in Consumer Contracts Regulations 1999: the end of the road for consumers?*, "Lloyd's Maritime and Commercial Law Quarterly" 2010, issue 2.

- Naudé T., *The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective*, "South African Law Journal" 2007, issue 124.
- Oyer D.J., *Cost-Based Pricing: A Guide for Government Contractors*, Oakland, California 2012.
- Peel E., *The rule against penalties*, "Law Quarterly Review" 2013, issue 129.
- Riesenhuber K., *Privatrechtsgesellschaft: Entwicklung, Stand und Verfassung des Privatrechts*, Tübingen 2007.
- Rott P., *The Adjustment of Long-Term Supply Contracts: Experience from German Gas Price Case Law*, "European Review of Private Law" 2013, vol. 21, issue 3.
- Schillig M., *Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice's Jurisprudence on Directive 93/13 on Unfair Contract Terms*, "European Law Review" 2008, vol. 33.
- Story W.W., *A Treatise on the Law of Contracts*, Clark, New Jersey 2006.
- Straetmans G., *Misleading Practices, the Consumer Information Model and Consumer Protection*, "Journal of European Consumer and Market Law" 2016, issue 5.
- Stuyck J., *Unfair terms*, in: *Modernising and Harmonising Consumer Contract Law*, ed. G.G. Howells, R. Schulze, Munich 2009.
- Šmejkal V., *Competition law and the social market economy goal of the EU*, "International Comparative Jurisprudence" 2015, vol. 1, issue 1.
- Taylor D., Taylor R., *Contract Law Directions*, Oxford 2017.
- Tenreiro M., *Community Directive on Unfair Terms and National Legal Systems*, "European Review of Private Law" 1995, vol. 3, issue 2.
- Whittaker S., *Unfair Contract Terms, Unfair Prices and Bank Charges*, "Modern Law Review" 2011, vol. 74, issue 1.
- Willet C., *Transparency and Fairness in Australian and UK Regulation of Standard Terms*, "University of Western Australia Law Review" 2013, vol. 37, issue 1.