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Abstract: In this paper, the transparency requirement, regulated in Article 5 UCTD, is discussed. This provision requires traders to draft terms that are to be incorporated into contracts with consumers in plain and intelligible language. The paper discusses the function of the transparency requirement, the different elements, and the consequences of a breach of the requirement: should the contra proferentem rule be applied, is the term lacking transparency unfair, or could it be argued that such term never was incorporated into the contract to begin with? And does it actually matter?

Keywords: transparency requirement; unfair terms; contra proferentem rule; intelligibility; transparency

Résumé: Cet article traite de l'obligation de transparence prévue à l'article 5 de la Directive sur les clauses abusives. Cette disposition exige des professionnels qu'ils rédigent les clauses devant être intégrées dans les contrats avec les consommateurs dans un langage clair et compréhensible. L'article examine la fonction de l'obligation de transparence, ses différents éléments et les conséquences d'un manquement à cette obligation : la règle contra proferentem doit-elle être appliquée, la clause manquant de transparence est-elle abusive, ou pourrait-on faire valoir que cette clause n'a jamais été incorporée dans le contrat ? Et est-ce vraiment important ?

Zusammenfassung: In diesem Artikel wird das in Artikel 5 der Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen geregelte Transparenzgebot

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erörtert. Diese Vorschrift verpflichtet Gewerbetreibende, Klauseln, die in Verträge mit Verbrauchern aufgenommen werden sollen, in klarer und verständlicher Sprache abzufassen. In dem Aufsatz werden die Funktion des Transparenzgebots, die verschiedenen Elemente und die Folgen eines Verstoßes gegen das Gebot erörtert: Sollte die contra proferentem-Regel angewandt werden, ist die intransparente Klausel missbräuchlich oder könnte man argumentieren, dass eine solche Klausel nie in den Vertrag aufgenommen wurde? Und ist es überhaupt wichtig, welche dieser Folgen einen derartigen Verstoß darstellt?

1 Introduction

Article 5, first and second sentences, of the 1993 Unfair Contract Terms Directive (UCTD)[1] provides that 'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.' Whereas the second sentence codified the *contra proferentem* rule, well-known in all EU Member States, the first sentence introduced a novelty in European consumer law. For the first time, 'transparency' was added to the legal toolbox.

The two parts of Article 5 UCTD are interrelated: if a term is unclear, doubts about its meaning may quickly arise. Applying the *contra proferentem* rule in such a case may mean that the term survives the unfairness test under Article 3 (1) UCTD. However, if the term is first subjected to the unfairness test, the unclear nature of the term may contribute to it being deemed unfair and therefore not binding. Application of the *contra proferentem* rule then no longer comes into play.

The extent of the transparency requirement and its relationship with the *contra proferentem* are unclear at best. In this paper, therefore, I examine what requirements result from the transparency requirement and what the consequences of a breach of the transparency requirement are. In doing so, in Section 2 I will examine the function performed by the transparency requirement and I will distinguish between linguistic and grammatical intelligibility, economic transparency and formal transparency. In Section 3, I will focus on the consequences that a breach of the transparency requirement may have. Should, in such a case, the *contra proferentem* rule be applied or is an intransparant term to be considered unfair? Or are there different consequences that could be considered? Section 4 contains a brief conclusion.

1 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJEC* 1993, L 95/29.

2 The Transparency Requirement's Function and the Resulting Requirements

2.1 Function and Criterion

It follows from Article 5, first sentence, UCTD that Terms and Conditions (T&Cs) used in a consumer contract must be drafted in plain and understandable language. The function of this transparency requirement is to enable the average consumer to assess their legal position at the time of concluding the contract[2] (and again at a later date if she so desires).[3] This is because the other party must be able to foresee at the time of concluding the contract, on the basis of clear and comprehensible criteria, which economic consequences result from the term.[4] In doing so, according to the Court of Justice (CJEU), it is up to the trader to prove that the term was drafted in plain and intelligible language.[5] *Gardiner* notes in this regard that the transparency requirement should make it easier for consumers to make informed decisions and enforce their rights.[6] *Van Boom* adds that it should enable consumers to compare different offers.[7]

In assessing whether the transparency requirement is met, the CJEU held that the standard of the 'average' consumer, defined as a consumer 'who is reasonably well informed and reasonably observant and circumspect', is to be applied.[8] Decisive is whether such a consumer, after having read all relevant factual

2 Incidentally, *Van Boom* rightly notes in his recent opinion for the Dutch Lawyers Association that the fact that T&Cs are usually not read in practice before the conclusion of a contract implies that attempts to formulate clauses in T&Cs in a more comprehensible way (and thus to improve their transparency) can therefore only have limited results, see W.H. van Boom, 'Duidelijk and begrijpelijk. Over teksten en transactiebesluiten in het privaatrecht', in W.H. van Boom, G. van der Bruggen, T. Cramwinckel, H. Pander Maat, T. Sanders, A. Verburg, *Klare taal, Handelingen Nederlandse Juristenvereniging 152/2023* (Deventer: Wolters Kluwer, 2023) 263–264.

3 CJEU 20 September 2017, case C-186/16, ECLI:EU:C:2017:703 (*Andriciuc*) no 45; CJEU 27 January 2021, joint cases C-229/19 and C-289/19, ECLI:EU:C:2021:68 (*Dexia Nederland BV*) no 50; in this way also BGH 14 May 1996, XI ZR 257/94, *BB* 1996, 1402.

4 CJEU 3 March 2020, case C-125/18, ECLI:EU:C:2020:138 (*Gómez del Moral Guasch*) no 51; CJEU 12 January 2023, case C-395/21, ECLI:EU:C:2023:14 (*Lithuanian lawyer's fee*) no 37. In this sense also HR 22 November 2019, ECLI:NL:HR:2019:1830, *NJ* 2022/204 (*Euribar*).

5 CJEU 10 June 2021, joint cases C-776/19 t/m C-782/19, ECLI:EU:C:2021:470 (*VB and others/BNP Paribas and others*) no 89.

6 C. Gardiner, *Unfair contract terms in the digital age. The challenge of protecting European consumers in the online marketplace* (Cheltenham/Northampton: Edward Elgar Publishing, 2022) 77.

7 Van Boom, n 3 above, 301.

8 CJEU 16 July 1998, case 210/96, ECLI:EU:C:1998:369 (*Gut Springenheide*); CJEU 20 September 2017, case C-186/16, ECLI:EU:C:2017:703 (*Andriciuc*) no 47; CJEU 3 March 2020, case C-125/18,

information, including the advertising and information provided by the trader, should have understood what economic consequences would result from the term.[9] The yardstick therefore contains an objective and normative concept. Objective, because it assumes the *average* consumer against whom the clause is invoked.[10] Normative, because the consumer is *deemed* to have taken cognizance of the relevant factual data, such as the information provided by the trader, even if it was clear to the trader at the time the contract was concluded that the consumer in fact had not read the information. Because of the objective nature of the test, it seems to me that any factual knowledge of this specific consumer (either from their own knowledge or on the basis of assistance provided to them) is in principle irrelevant for assessing whether the term is in plain and intelligible language, precisely because it was drafted in advance and the consumer was not able to influence its wording. However, this interpretation is not entirely certain. In *OTP Bank/Ilyés and Kiss*,[11] the CJEU held that when applying the test, the court should 'take into account *all* of the circumstances of the case in the main proceedings as they existed at the time when the contract was concluded' (italics by me). This suggests that circumstances concerning the individual consumer concerned, such as a certain level of education or the possible presence of expert assistance, may also be taken into account when assessing whether the term was drafted in plain and intelligible language. Moreover, the judgment does not make it clear whether the trader (at the time the contract was concluded) must also have been aware of those circumstances concerning the consumer himself. In my opinion, however, it would seem obvious to require this, because only in such case could the trader provide additional information or an explanation of the term if so required. Yet, with this consideration the Court of Justice seems to have partly abandoned an all too objective standard and to leave some room for a judgment that is more tailored to the person of the consumer (or to the group of persons to which the consumer belongs).

ECLI:EU:C:2020:138 (*Gómez del Moral Guasch*) no 51; CJEU 16 July 2020, joint cases C-224/19 and C-259/19, ECLI:EU:C:2020:578 (*Caixabank and Banco Bilbao Vizcaya Argentaria*) no 68.

9 CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (*Kásler*) no 74; CJEU 26 February 2015, case C-143/13, ECLI:EU:C:2015:127 (*Matei*) no 73–74; CJEU 23 April 2015, case C-96/14, ECLI:EU:C:2015:262 (*Van Hove*) no 41; CJEU 3 September 2020, joint cases C-84/19, C-222/19 and C-252/19, ECLI:EU:C:2020:631 (*Profi Credit Polska SA*) no 74; CJEU 12 January 2023, case C-395/21, ECLI:EU:C:2023:14 (*Lithuanian lawyer's fee*) no 37.

10 CJEU 20 September 2017, case C-186/16, ECLI:EU:C:2017:703 (*Andriciuc*) no 47.

11 CJEU 20 September 2018, case C-51/17, ECLI:EU:C:2018:750 (*OTP Bank/Ilyés and Kiss*) no 82.

2.2 Linguistic and Grammatical Intelligibility

For the consumer to be able to compare offers and to make informed decisions, it is first and foremost required that a term be comprehensible linguistically and grammatically. This is by no means self-evident. *Van Boom*[12] discusses the following term in the description of the coverage of (admittedly) an old funeral insurance policy of an insurance company:

> The insured are entitled to a Funeral Service with a hearse – two 1st class following cars – (…) – condolence register – grave rights + coffee table up to a maximum amount of forty guilders.

After the death of the consumer's mother, a conflict arose over the interpretation of the term describing the insurance coverage. The conflict revolved around the legal question of whether the limitation of compensation to 40 guilders refers to the coffee table, or to the coffee table plus the cost of the grave itself. According to the ADR body dealing with the case, this term is clear and can only be read in one way:

> As Insurer correctly argues, the insured services are enumerated by use of the "–" sign. The grave rights and coffee table are listed as one entity or service. This becomes all the more clear because the "+" sign has been used. The coffee table and grave rights together are subject to a maximum fee of 40 guilders.[13]

Linguistically and grammatically – and following the time-honoured mnemonic BODMAS (Brackets, Order, Division/Multiplication, Addition/Subtraction) – frankly, I would have come to the opposite outcome. But at the very least, the conclusion here must be that the wording used, including the '+' and '–' sign, are ambiguous. This view is strengthened by the fact that these days, grave fees in The Netherlands cost an average of € 175 to € 185 per year and often must be paid at once for a period of 20 or 30 years.[14] Assuming the cheapest option (20 years at € 175), this amounts to € 3500. If

12 Van Boom, n 2 above, 296–297. The term (translated by me) reads in Dutch: 'De verzekerden hebben recht op een Uitvaartdienst met een lijkauto – twee 1ste klas volgauto's – (…) – condoleance-register – grafrechten + koffietafel tot een maximaal bedrag van veertig gulden.'

13 Geschillencommissie Financiële Dienstverlening Kifid 14 May 2019, no 2019–337 (accessed at www.kifid.nl/uitspraken; my translation). The original Dutch text of the judgment reads: 'Zoals Verzekeraar terecht aanvoert, worden de verzekerde diensten opgesomd door gebruik van het "–" teken. De grafrechten en de koffietafel zijn opgesomd als één geheel of dienst. Dit wordt temeer duidelijk omdat gebruik is gemaakt van het "+" teken. Voor de koffietafel en de grafrechten tezamen geldt een maximale vergoeding van ƒ 40,-.'

14 See www.consumentenbond.nl/uitvaart/grafrechten (edited on 6 February 2023, accessed 13 June 2023).

it is assumed that this insurance was taken out in 1970 or 1980,[15] this corresponds to 1362.60 and 2710.36 guilders, respectively.[16] That makes a maximum of 40 guilders for the reimbursement for coffee table and grave rights *together* almost equivalent to an exclusion of the reimbursement of these costs even as long ago as in 1970 or 1980. This seems to me to contradict the prominent mention of the term 'grave rights' in the provision describing the insurance coverage: these costs are obviously higher than renting following cars for a couple of hours, so for that reason the average consumer may assume that the grave rights are also substantive covered.

2.3 Economic Transparency

But even if a text is linguistically and grammatically comprehensible, this does not mean that a consumer has understood it. A simple test conducted by *Van Boom* among 150 highly educated people speaks volumes in this regard:[17] of these people – educated higher than the average Dutch person –, two-thirds did not understand a simple legal text. Therefore, mere linguistic and grammatical intelligibility is not sufficient, according to established CJEU case law.[18] Instead, the CJEU has consistently held that the transparency requirement is not met if the average consumer[19] does not have, before or at the time of conclusion of the contract, all the information necessary to reach an informed decision on the desirability of concluding the contract on the terms offered by the trader.[20] Which information is needed should be based on the information available to the trader at the time the contract was concluded.[21] This implies

15 In any case, the insurance contract was concluded in or before 1986, as the insurance coverage included the cost of the funeral of the consumer's father, who died that year.

16 The amounts were calculated using the calculation tool at www.inflatiecalculator.nl (accessed 13 June 2023).

17 Van Boom, n 2 above, 299–300.

18 CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (*Kásler*) no 69–72; CJEU 26 February 2015, case C-143/13, ECLI:EU:C:2015:127 (*Matei*) no 73–74; CJEU 23 April 2015, case C-96/14, ECLI:EU:C:2015:262 (*Van Hove*) no 33; CJEU 20 September 2017, case C-186/16, ECLI:EU:C:2017:703 (*Andriciuc*) no 44–48; CJEU 20 September 2018, case C-51/17, ECLI:EU:C:2018:750 (*OTP Bank/Ilyés and Kiss*) no 73; CJEU 5 June 2019, case C-38/17, ECLI:EU:C:2019:461 (*GT/HS*) no 33 and 36; CJEU 3 March 2020, case C-125/18, EU:C:2020:138 (*Gómez del Moral Guasch*) no 46 and 50; CJEU 16 July 2020, joint cases C-224/19 and C-259/19, ECLI:EU:C:2020:578 (*Caixabank and Banco Bilbao Vizcaya Argentaria*) no 66; CJEU 12 January 2023, case C-395/21, ECLI:EU:C:2023:14 (*Lithuanian lawyer's fee*) no 36.

19 When T&Cs are intended for a particular target group, the average member of that target group should be considered, cf van Boom, n 3 above, 265–266.

20 CJEU 20 September 2017, case C-186/16, ECLI:EU:C:2017:703, *NJ* 2018/248 (*Andriciuc*) no 47 and 48; CJEU 12 January 2023, case C-395/21, ECLI:EU:C:2023:14 (*Lithuanian lawyer's fee*) no 38.

21 CJEU 9 July 2020, case C-452/18, ECLI:EU:C:2020:536 (*Ibercaja Banco*) no 49; CJEU 18 November 2021, case C-212/20, ECLI:EU:C:2021:934 (*M P and B P/Bank A*) no 52.

that, in the case of a long term contract, the trader cannot be expected to predict precisely how the economic burden that may be associated with an indexation mechanism included in the contract will evolve: such a degree of precision is obviously impossible. However, according to the CJEU, the trader may be expected to state the criteria used by it in calculating a price change so that the other party is able to calculate and assess the price change itself.[22] In this context, *Van Boom* rightly warns that it follows that a term should not leave the trader too much discretion in the exercise of his powers.[23] In the case of a mortgage loan with a variable interest rate, this means that the trader must provide information on the development of the index on the basis of which the interest rate is determined, since the fluctuations in the index allow the other party to understand the extent of the risk assumed by it.[24] If a term involves a particular risk for a consumer, the consumer should be expressly warned of that risk.[25] The focus on the moment of contract conclusion means that later provision of this information cannot bring about that a term is judged as sufficiently transparent after all, even if in reality most consumers will start reading T&Cs at most at the moment when something does not go as they had expected or wished.[26]

However, when assessing the economic transparency[27] of the term, the advertising carried out by or on behalf of the trader and the information provided during the formation of the contract by the trader or any other person who participated in the formation of the contract with the consumer on behalf of the trader should be taken into account.[28] These circumstances are the trader's responsibility (who, in this regard, could have changed the T&Cs used before the conclusion of the contract) and may also lead to justified expectations on the part of the consumer.

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22 CJEU 18 November 2021, case C-212/20, ECLI:EU:C:2021:934 (*M P and B P/Bank A*) no 51 and 53.

23 Van Boom, n 2 above, 302–303.

24 CJEU 9 July 2020, case C-452/18, ECLI:EU:C:2020:536 (*Ibercaja Banco*) no 52–54.

25 CJEU 10 June 2021, case C-609/19, ECLI:EU:C:2021:469 (*BNP Paribas/VE*) no 54.

26 Behavioural economics research (see the many references in M.G. Faure and H. Luth, 'Behavioural economics in unfair contract terms. Cautions and considerations' *Journal of Consumer Policy* 2011/3, 348–349; Y. Adar and S.I. Becher, 'Ending the license to exploit: administrative oversight of consumer contracts' *Boston College Law Review* 62 (2021) 2413; S. Bienenstock and C. Desrieux, 'Abusive contract terms: Is unenforceability a deterrent sanction?' *European Journal of Law &Economics* 2022 (54) 188; Gardiner, n 7 above, 77–78 and 102) shows that the vast majority of consumers do not read T&Cs (at least not before entering into a contract), and that in so doing they also act rationally, since the content of the T&Cs rarely becomes relevant, it takes a long time to read them, and they cannot then be negotiated anyway.

27 The term is taken from W.H. van Boom, 'Letsel en verzekering: uitleg en inhoudstoetsing van algemene verzekeringsvoorwaarden' *Verkeersrecht* 2020/57, 103; see also van Boom, n 2 above, 301.

28 CJEU 10 June 2021, case C-609/19, ECLI:EU:C:2021:469 (*BNP Paribas/VE*) no 45.

The CJEU ruled that a mere reference to a statutory provision by a trader is in any case not sufficient to satisfy a legal duty to provide information.[29] It can be inferred that such a reference in T&Cs does not meet the transparency requirement: for the average consumer, references to legal provisions will be incomprehensible. And the Court is of course right: even if it could be argued that the average consumer can be expected to understand a legal text, they can in any case not be expected to look up the text of these legal provisions themselves to see what rights and obligations arise for them from the contract. To give an example, I found the following provision in a health statement for a life insurance policy:[30]

> The undersigned declare that the answers and information provided by or on behalf of them when applying for this insurance are complete and in accordance with the truth. They are aware that if, after the conclusion of the insurance, it appears that one or more questions have been answered incorrectly or incompletely, the insurer may invoke the consequences which the Civil Code, in particular Articles 928–930 and 982–983 of Book 7, attaches to this, such as the cancellation of the insurance, the refusal of the payment or the limitation of the amount of the payment.

The average consumer who has read this text will probably understand that concealing the truth or inaccurate answering the questions may have dire consequences, but this term does not indicate to the average consumer when this is the case and what sanction may be imposed in which case.

The CJEU also considers that a term stating that a contract is governed, for example, by Luxembourg law does not satisfy the transparency requirement if it misleads the average consumer by giving them the impression that only Luxembourg law applies to the contract, whereas in reality the consumer can rely on the protection offered by the mandatory law of their own Member State.[31] The Court seems to suggest that if the choice of law clause does contain a reference to those mandatory rules, it would not be unfair. In my opinion, however, a mere reference to these mandatory rules will not result in the average consumer knowing which rights and obligations derive from the contract either. After all, the consumer cannot be expected to look up the text of that mandatory law to see what rights they can derive

29 CJEU 26 March 2020, case C-66/19. ECLI:EU:C:2020:242 (*Kreissparkasse Saarlouis*) no 42–47.

30 The original text in Dutch reads: 'De ondergetekenden verklaren dat de door of namens hen verstrekte antwoorden en gegevens bij de aanvraag van deze verzekering volledig en overeenkomstig de waarheid zijn. Zij zijn ermee bekend dat wanneer na het sluiten van de verzekering blijkt dat één of meer vragen onjuist of onvolledig zijn beantwoord, de verzekeraar de gevolgen kan inroepen die het Burgerlijk Wetboek, in het bijzonder de artikelen 928–930 en 982–983 van Boek 7 hieraan verbindt, zoals het opzeggen van de verzekering, het weigeren van de uitkering of het beperken van de hoogte van de uitkering.'

31 CJEU 28 July 2016, case C-191/15, ECI:EU:C:2016:612 (*Verein für Konsumenteninformation/Amazon EU*) no 66–71.

from that mandatory law. At most, the average consumer will infer from such a reference that sometimes rules apply other than those of the legal system mentioned in the term.

The transparency requirement imposes strict requirements on terms which determine the amount of the price payable to the trader or which allow for modification of that price. This is, of course, quite understandable from the function performed by the transparency requirement. If consumers are to be able to make informed decisions about contracting and be able to compare different offers, they must be able to calculate and predict the price, both at the time of contracting and at the time when that price would be changed. This requirement is not met if the price is based on a variable that the consumer cannot estimate. For example, the CJEU ruled that a term in a contract with a lawyer indicating only the lawyer's hourly rate, without giving any further indication of the total amount charged to the consumer, does not satisfy the transparency requirement. According to the Court, the lawyer may be expected to provide an estimate of the foreseeable or minimum number of hours to perform a particular service, or that the lawyer would be contractually required to provide interim invoices or reports at reasonable intervals indicating the number of hours of work already performed.[32]

The Court ruled in a similar vein in the case of a foreign currency credit agreement. In such an agreement, it should at least be clear to the consumer what the effect is of a sharp depreciation of the currency in which they receive their income compared to the currency in which the periodic payments for the repayment of the loan and for interest are to be made and that, as a result of that exchange rate risk, the loan could potentially become economically burdensome for them.[33] To this end, the creditor will have to transparently explain the mechanism for calculating the loan, expressed in the foreign currency, and the applicable exchange rate, so that the average consumer can estimate the total cost of the loan[34] and is able to determine the current exchange rate at any time.[35] This requirement may be fulfilled if the consumer would have received, at the time of the conclusion of the contract, a form containing additional information on the exchange rate risk, containing concrete examples of the calculation of the risk in case of a depreciation of the own national currency compared to the currency used

32 CJEU 12 January 2023, case C-395/21, ECLI:EU:C:2023:14 (*Lithuanian lawyer's fee*) no 40–44.

33 CJEU 20 September 2018, case C-51/17, ECLI:EU:C:2018:750 (*OTP Bank/Ilyés and Kiss*) no 74 and 75; CJEU 10 June 2021, case C-609/19, ECLI:EU:C:2021:469 (*BNP Paribas/VE*) no 50.

34 CJEU 5 June 2019, case C-38/17, ECLI:EU:C:2019:461 (*GT/HS*) no 34; CJEU 10 June 2021, case C-609/19, ECLI:EU:C:2021:469 (*BNP Paribas/VE*) no 44.

35 CJEU 18 November 2021, case C-212/20, ECLI:EU:C:2021:934 (*M P and B P/Bank A*) no 53; CJEU 10 June 2021, joint cases C-776/19 t/m C-782/19, ECLI:EU:C:2021:470 (*VB and others/BNP Paribas and others*) no 65.

in the credit agreement.[36] However, in the case of a credit agreement that does not specify the annual percentage rate of charge, but only includes the mathematical equation by which this rate of charge can be calculated, the transparency requirement is not met.[37]

2.4 Formal Transparency

The Unfair Contract Terms Directive does not seem to contain any rules on the provision of T&Cs to consumers. As such, the foregoing dealt with *substantive* transparency: the requirement that terms in T&Cs be in plain and intelligible language is made in light of the possibility of the consumer obtaining information in order for them to be able to give informed consent regarding the content of the contract.[38] However, the CJEU already ruled in 2013 that it follows from the transparency requirement not only that the trader must draft its T&Cs in clear and comprehensible language, but – in connection with recital (20) in the preamble – also that 'the consumer must actually be given an opportunity to examine all the terms of the contract' because it is 'of fundamental importance for a consumer' that they receive '(i)nformation, before concluding a contract, on the terms of the contract and the consequences of concluding it'. According to the Court, '(i)t is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier.'[39] In this respect, the Court points at transparency in the formal sense: *formal transparency*. Formal transparency is not so much about the content of the T&Cs, but about actually giving the consumer the opportunity to become acquainted with them and to decide on whether to conclude the contract after having read them.[40]

However, formal transparency goes beyond merely actually providing general terms and conditions. The possibility of being able to take note of the contents of the T&Cs before concluding a contract implies that these should also be *accessible* to the consumer. This requirement is not fulfilled if the T&Cs provided are illegible because

36 CJEU 20 September 2018, case C-51/17, ECLI:EU:C:2018:750 (*OTP Bank/Ilyés and Kiss*) no 77.

37 CJEU 20 September 2018, case C-448/17, ECLI:EU:C:2018:745 (*EOS KSO Slovensko/Danko and Danková*) no 65–68.

38 See also J. Luzak and M. Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' *Journal of EU Consumer and Market Law* 2019/3, 97–107, 99.

39 CJEU 21 March 2013, case C-92/11, ECLI:C:EU:2013:180 (*RWE Vertrieb*) no 43–44; see also CJEU 16 January 2014, case C-226/12, ECLI:EU:C:2014:10 (*Constructora Principado*) no 25; CJEU 21 April 2016, case C-377/14, ECLI:EU:C:2016:283 (*Radlinger*) no 64; CJEU 21 December 2016, joint cases C-154/15, C-307/15 and C-308/15, ECLI:EU:C:2016:980 (*Gutiérrez Naranjo*) no 50; CJEU 20 September 2018, case C-51/17, ECLI:EU:C:2018:750 (*OTP Bank/Ilyés and Kiss*) no 77.

40 See Luzak and Junuzović, n 38 above, 99.

the stored information is not accessible (the paper copy of the T&Cs is damaged or otherwise illegible, or the stored electronic file contains bugs or errors and therefore cannot be opened). The unreadability can also be caused by the fact that the T&Cs are printed in Gothic letters, the terms are presented in a colour that is difficult to distinguish from the background, or are printed or depicted in such a small font size that they are no longer readable for the average consumer (or, if the trader addresses a specific target group, e.g. pensioners: the average member of that group) without a magnifying glass.[41] Also the overall structure of the T&Cs, in particular in the case of stacking sets of T&Cs by means of cross-references and hyperlinks or regulating related topics in very different places in the T&Cs may imply that the average consumer is no longer able to assess the entirety of the rights and obligations. In this regard, reference can be made to digital services, such as social media services, where it is quite common for the various digital services to have separate *Terms of Use*, in addition to a general set of T&Cs for all services provided by the service provider and one or more privacy policies.[42] In all these cases, the transparency requirement contained in Article 5 UCTD has been violated.

3 Consequences of Breaches of the Transparency Requirement

3.1 Contra Proferentem Rule or Unfairness Testing?

The Unfair Contract Terms Directive does not explicitly prescribe which consequences are attached to the fact that a term does not comply with the transparency requirement.[43] A prima facie obvious consequence is the application of the *contra proferentem* rule, which after all is included in the same Article of the Directive. Application of the *contra proferentem* rule means that when a term can be interpreted in two plausible ways, it will be interpreted against the trader. This approach appears to be favourable to the consumer, but it is not always so. Indeed, a term may not be unreasonably onerous

41 See, e.g., BGH 3 February 1986, case II ZR 201/85, *NJW-RR* 1986, 1311, in which case the German Supreme Court held (in a commercial contract!) that T&Cs do not become part of the contract if these are readable only with a magnifying glass (and even then only with effort); see also M. Fornasier, comment 80 to § 305 BGB, in W. Krüger, *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 2, Schuldrecht: Allgemeiner Teil I* (9th ed, Munich: C H Beck, 2022).

42 Cf Gardiner, n 6 above, 127.

43 See also C.M.D.S. Pavillon, 'De invloed van Europese richtlijnen op de Nederlandse regeling van algemene voorwaarden (afdeling 6.5.3 BW)', in A.S. Hartkamp, C.H. Sieburgh and L.A.D. Keus (eds), *De invloed van het Europese recht op het Nederlands privaatrecht, deel II* (2nd ed, Deventer: Kluwer, 2013) no 31.

if interpreted in favour of the consumer, and thus it survives the content test, whereas it would be considered unfair if interpreted in favour of the trader.

Consider, for example, the following term in a Dutch disability insurance policy regarding the determination of the insured's benefit:

> As long as the insured is incapacitated for work, the degree of incapacity for work, the amount of the benefit and the period for which it will apply will be determined by the company based on information from medical and other experts to be appointed by the company. The policyholder will be notified of this determination as soon as possible after receiving it. If the policyholder has not notified his objection within 30 days, he shall be deemed to accept the company's position.[44]

According to the insurance company, this term did not bring about the unilateral determination of its obligations under the contract, and the objection period included in the last sentence of the term was not an expiration period. In its view, this meant that if the objection period had expired, it was up to the consumer to prove that the insurance company's position on the degree of incapacity for work was incorrect. However, the consumer argued that the term contained an expiration period and that once it had expired, they were deemed to have agreed to the benefit determination as established by the insurance company.[45]

Application of the *contra proferentem* rule here meant that the insurance company's position had to be followed – after all, in that interpretation the term contained (at most) a rule of evidence, whereas in the consumer's reading it would concern the forfeiture of the right to oppose the degree of incapacity for work determined by the insurance company, and the extent of the benefit and the duration of the period to which the determination would apply. The *Hoge Raad*, the Dutch Supreme Court, indeed applied the *contra proferentem* rule and then noted that the term did not prevent the consumer from submitting the insurance company's position to a grievance committee or a court for review, even if the consumer did not respect the objection period specified in the term. The Court held that '(t)hus interpreted, the objection period does not have a separate meaning.'[46] Subsequently,

44 The original text reads in Dutch: 'Zolang verzekerde arbeidsongeschikt is, zullen de mate van arbeidsongeschiktheid, de omvang van de uitkering en de periode waarvoor deze zal gelden, worden vastgesteld door de maatschappij aan de hand van gegevens van door de maatschappij aan te wijzen medische en andere deskundigen. Van deze vaststelling zal telkens zo spoedig mogelijk na ontvangst daarvan aan verzekeringnemer mededeling worden gedaan. Indien verzekeringnemer niet binnen 30 dagen zijn bezwaar heeft kenbaar gemaakt, wordt hij geacht het standpunt van de maatschappij te aanvaarden.'

45 See Hoge Raad 28 September 2018, ECLI:NL:HR:2018:1800, *NJ* 2020/68 (*Consultant/Nationale-Nederlanden Schadeverzekering*) point 3.7.3.

46 Hoge Raad 28 September 2018, ECLI:NL:HR:2018:1800, *NJ* 2020/68 (*Consultant/Nationale-Nederlanden Schadeverzekering*) point 3.8.4; the original text reads: 'Aldus uitgelegd komt aan de bezwaartermijn geen afzonderlijke betekenis toe.'

the Supreme Court ruled that the term was not unfair, even though the term (still) resulted in a slight deterioration of the consumer's position on a number of points.[47]

Application of the *contra proferentem* rule therefore resulted in the term being upheld. However, if the Dutch Supreme Court had followed the consumer's reading, the term would be presumed to be unfair under Article 6:237 under g BW (*Burgerlijk Wetboek*, i.e. the Dutch Civil Code) as it provides for the forfeiture of the consumer's rights as a sanction for not respecting the requirement to launch their objection within 30 days. As a consequence, unless the trader would submit evidence that the term in fact was fair, a court would have to hold the term to be unfair and thus to invalidate it. This demonstrates that the order in which the two instruments are to be applied – assessing the term for unfairness or applying the *contra proferentem* rule – may lead to different results.

From the case-law of the Court of Justice it follows that the transparency requirement is to be seen above all in the light of the assessment of whether a term is unfair: in *Verein für Konsumenteninformation* v *Amazon EU*, the CJEU held that 'the unfairness of such a term may result from a formulation that does not comply with the requirement of being drafted in plain and intelligible language set out in Article 5 of Directive 93/13.'[48] In *VB and others* v *BP Paribas and others*, the Court made it clear that 'the transparency nature of a contractual term, as required under Article 5 of Directive 93/13, is one of the elements to be taken into account in the assessment of whether that term is unfair' by the national court.[49]

The CJEU's case-law clearly goes in the direction, which is advocated by the *Bundesgerichtshof*, the German Supreme Court. In that approach, at first the term must be interpreted in the *least* customer-friendly way possible ('kundenfeindlichsten Auslegung'). This means interpreting the term in favour of the *trader*. The term thus interpreted is assessed against the open standard of the unfairness test and may then be held to be unfair. If it is not, and the term therefore 'survives' the unfairness test, it is valid. At that point, however, the *contra proferentem* rule would be applied.[50] *Waelkens* argues, in my view correctly, that this is also the correct

47 Hoge Raad 28 September 2018, ECLI:NL:HR:2018:1800, *NJ* 2020/68 (*Consultant/Nationale-Nederlanden Schadeverzekering*) points 3.8.5–3.8.7.

48 CJEU 28 July 2016, case C-191/15, ECLI:EU:C:2016:612 (*Verein für Konsumenteninformation/Amazon EU*) no 68.

49 CJEU 10 June 2021, joint cases C-776/19 t/m C-782/19, ECLI:EU:C:2021:470 (*VB and others/BNP Paribas and others*) no 94; in this way also CJEU 18 November 2021, case C-212/20, ECLI:EU:C:2021:934 (*M P and B P/Bank A*) no 58. See also European Commission, Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, *OJEC* 2019, C 323/4, 34.

50 See, for instance, BGH 12 May 2016, VII ZR 171/15, *BGHZ* 210, 206, *NJW* 2016, 2878; BGH 20 July 2017, VII ZR 259/16, *NJW* 2017, 2762; see also E. Gottschalk, 'Das Transparenzgebot und allgemeine

application of the *contra proferentem* rule under the Unfair Contract Terms Directive.[51] In the case reviewed by the Dutch Supreme Court, this would mean that it would first be assessed whether the term contained an unreasonably onerous sunset clause. Only if the trader had succeeded in proving that the term was not unfair would it pass the unfairness test. And only in that case, the *contra proferentem* rule would be applied.

Moreover, *the contra proferentem* rule can only be applied in cases where the ambiguity consists in the fact that a term can be interpreted in two plausible ways. This possibility does not exist when the ambiguity does not relate to the interpretation of the term, but to other circumstances. For example, the *contra proferentem* rule cannot be applied to remove the ambiguity about the total amount of costs that a consumer will have to pay for the work of the lawyer who only mentioned their hourly rate. And the ambiguity about the operation of the exchange rate risk in the case of a credit agreement in foreign currency is not removed by interpreting the term in a consumer-friendly way. In such cases, the lack of transparency concerns the *content* of the term resulting in the consumer not being (or having been) able to make an informed decision as to the conclusion of the contract.

The approach defended above – first assessing the unfairness of the term, only then (possibly) applying the *contra proferentem* rule – does mean that there seems to be little room left for the *contra proferentem* rule: if the consumer cannot oversee the economic consequences of a term that can reasonably be susceptible to more than one interpretation, by definition that term will considered lacking transparency and thus likely to be found unfair.

3.2 Unfairness?

From the above, it follows that the *mere* fact that a term is not transparent does not automatically mean that it is unfair. Whether this is the case must be determined based on an overall assessment of the term, which also takes into account other factors, such as the other terms included in the contract and the extent to which the

Geschäftsbedingungen' *Archiv für die civilistische Praxis* 206 (2006) 577–578, with references to lower courts.

51 Cf J. Waelkens, 'Article 5 Unfair Terms Directive 93/13/EEC: transparency and interpretation in consumer contracts', in M.B.M. Loos and I. Samoy (eds), *Information and notification duties* (Cambridge/Antwerp/Portland: Intersentia, 2015) 68; in this sense implicitly also E. Neppelenbroek, 'De verstrekking van juridische voorwaarden in het voorportaal van de cloud' *Contracteren* 2020/4, 138, who claims that once the first hurdle (the transparency requirement) has been taken the second hurdle (*contra proferentem*-rule) awaits.

term deviates to the detriment of the consumer from the otherwise statutory provisions.[52]

An example of a case where the trader succeeded in proving that the intransparant term was nevertheless fair is offered by a judgment of the Court of Appeal Arnhem-Leeuwarden.[53] That case concerned a term under which the consumer was entitled to transfer a mortgage loan in order to benefit from a decrease in interest rates, but which obliged them in such case to pay an interest retention fee to the bank. According to the Court of Appeal, the average consumer could not understand how the interest retention fee would be calculated. However, the court considered that the bank was entitled to rely on the fact that the consumer would have agreed to the term if it had been negotiated in a fair and equitable manner, because the term gave the consumer the right (and not the obligation) to benefit from an interest rate decrease despite the fixed-interest period. The lack of transparency therefore did not carry sufficient weight, according to the court, to consider the term unfair. In cassation, the Dutch Supreme Court confirmed this view.[54] In this case, therefore, the positive effects the term would (also) have for the consumer were clearly demonstrable.

There is therefore no *automatic* link between the breach of the transparency requirement and the judgment that the term is unfair. However, in my opinion, the starting point should be that an intransparant term is in fact regarded as unfair, unless the opposite is demonstrated by the trader.[55] After all, in such cases it concerns a term that (even) the 'average consumer' – as understood by the Court of Justice – could not easily understand and of which they could therefore not properly assess the economic consequences. Therefore, in the case of an intransparant term, the consumer's interest in *informed* consent is compromised. In my opinion, this implies that an intransparant term can only be considered fair in exceptional cases, where the possible positive effects of the term should be easily demonstrable by the trader.

The Unfair Contract Terms Directive only contains minimum harmonisation.[56] On that basis, the Court recently held that the Directive does not preclude a rule of national law that the lack of transparency of a term in a consumer contract automatically leads to a finding that it is unfair.[57] This means that in such case the unfairness test itself is not applied. However, as such a rule of national law

52 CJEU 12 January 2023, case C-395/21, ECLI:EU:C:2023:14 (*Lithuanian lawyer's fee*) no 47 and 49.

53 Court of Appeal Arnhem-Leeuwarden, location Arnhem, 29 September 2020, ECLI:NL:GHARL:2020:7801 (*X et al/Volksbank*).

54 Hoge Raad 7 October 2022, ECLI:NL:HR:2022:1388 (*X/Volksbank*).

55 See in a similar vein also Neppelenbroek, n 51 above, 138; van Boom, n 2 above, 303.

56 Cf art 8 UCTD.

57 CJEU 12 January 2023, case C-395/21, ECLI:EU:C:2023:14 (*Lithuanian lawyer's fee*) no 49–51.

automatically qualifies the intransparant term as being unfair, all consequences that the Court of Justice has attached to the unfairness of the term apply.

The sanction attached to the unfairness of a term is far-reaching. According to established case-law of the Court of Justice, the national court may not in any way give effect to the unfair term nor replace it by the otherwise applicable default law, unless the invalidity of the term would lead to the invalidity of the contract as a whole.[58] This consequences may be so severe that a court could be reluctant to hold a term unfair.

3.3 The Special Case of Formal Transparency

In the case where there is a lack of *formal* transparency, a different approach could be argued for. Already in its *RWE Vertrieb* judgment,[59] the Court of Justice pointed to recital (20) of the preamble to the Unfair Contract Terms Directive, requiring traders to provide the consumer with an actual opportunity to examine all the terms before the conclusion of the contract, which the Court considered of fundamental importance. As the Unfair Contract Terms Directive does not provide for a specific rule regarding formal transparency, the Court could only take this into account as a matter of unfair terms legislation. However, one could argue, the fact that this recital precedes a recital on *unfair* terms,[60] and that the Directive only explicitly attaches consequences to the use of such terms[61] could be understood as signalling that Member States are free to establish or maintain alternative approaches preventing terms that lack formal transparency from binding consumers. Only where such alternative approaches are missing or ineffective, the Directive steps in those cases where the term's lack of transparency leads it to it being unfair. Such an approach would seem to be in line with the minimum harmonisation nature of the UCTD.

If this argument would be accepted, this would have important consequences. Where national law prevents intransparant terms from having effect, the unfairness test is not applied. Therefore, also the consequences of unfairness as developed under the case-law of the Court of Justice do not apply. This means that in case of a lack of formal transparency – the terms were not provided to the consumer before the conclusion of the contract or were illegible or not accessible to the consumer – the national court could resort to the application of the otherwise applicable default

58 See, for instance, CJEU 27 January 2021, joint cases C-229/19 and C-289/19, ECLI:EU:C:2021:68 (*Dexia Nederland*) no 66–67.

59 CJEU 21 March 2013, case C-92/11, ECLI:C:EU:2013:180 (*RWE Vertrieb*) no 43.

60 Recital (21).

61 See art 6 UCTD.

rules. This would mean that the breach of formal transparency has a lesser impact on the position of the parties than a breach of substantive transparency would have.

There are good reasons to make such a distinction. Where in the case of an unfair term, the trader has tried to incorporate a provision that disturbs the contractual balance between the rights and obligations of the parties, this need not be the case here. Instead, in the case of a lack of formal transparency, the consumer could not take the T&Cs into account when deciding whether to contract. The consumer thus must have made their decision to contract based on the core terms – the price and the description of the goods or services offered by the trader – and their knowledge of the law that (apart from the T&Cs) would have been applicable to that contract. Rendering the T&Cs ineffective but allowing the parties to rely on the otherwise applicable law therefore seems to honour the consumer's reasonable expectations of the contract and the economic consequences deriving from the contract, as well as the justified interests of the trader. In fact, the consumer is put in precisely the same position as they would have been if the trader had not attempted to incorporate the T&Cs in the contract in the first place.

There are several ways in which such sanction could be introduced. Let me just mention three approaches that have, in fact, been adopted in Member States. Various national codifications simply provide that where the consumer, at the time of the conclusion of the contract, was not provided with the opportunity to take note of the T&Cs, these shall not be part of the contract.[62] A slightly more complicated (or sophisticated, if you will) approach is taken under Dutch law. According to Articles 3:33, 35 and 232 BW, T&Cs are incorporated into the contract if the consumer was aware of their existence and did not actively protest their incorporation. However, where the T&Cs were not provided to the consumer before or at the time of the conclusion of the contract, under Articles 6:233 under b and 234 BW the consumer may avoid all of the T&Cs, or any term thereof, giving the consumer the possibility to invalidate only terms that are detrimental to them, but have terms applied that are actually to their advantage. At least in theory these approaches are also available when the T&Cs have been provided but are illegible or inaccessible.[63] This is certainly the case under Estonian law, where such rule applies both for breaches of substantive and formal transparency.[64]

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62 See for instance art 1119 para 1 of the French Civil Code; § 305 para 2 of the German Civil Code and art 5.23, first sentence, of the Belgian Civil Code.

63 The German Supreme Court in fact did apply the transparency requirement of § 305 para 2 of the German Civil Code when it held that T&Cs do not become part of the contract if these are readable only with a magnifying glass (and even then only with effort), see BGH 3 February 1986, case II ZR 201/85, *NJW-RR* 1986, 1311. See for Dutch law M.B.M. Loos, *Algemene voorwaarden* (3rd ed, Den Haag: Boom, 2018) no 160–161.

64 See § 37, para 3, of the Law of Obligations Act, which provides that T&Cs 'the contents, wording or presentation of which are so uncommon or unintelligible that the other party cannot, based on the

4 Conclusion

This paper focused on the requirements that result from the transparency requirement and the consequences of a breach of that requirement. It was made clear in Section 2 that the function of the transparency requirement is to enable the average consumer to assess their legal position at the time of contracting (and, if so desired, also later). This function is linked to the idea that the consumer should be able to make an informed decision on the conclusion of the contract at the time of its conclusion. It logically follows from this function that the terms contained in T&Cs must be linguistically and grammatically comprehensible, but that in itself is not sufficient. What is required is that the consumer must also be able to understand the content of the terms. In this paper, this element of transparency was called 'economic transparency'. It requires that the average consumer be able to understand the economic consequences that the term has. This therefore places substantive requirements on the wording used in the T&Cs. Finally, it has become clear that the readability of the T&Cs is also a factor to be considered in determining whether the terms contained therein meet the transparency requirement. This means that the document containing the terms must be accessible, the text must not be damaged, and the presentation in form, colour and font size must be such that the average consumer or, if the T&Cs are intended for a particular group of consumers, the average member of that group can take note of the contents of them.

Section 3 explained that and why an intransparant term must first be subjected to the unfairness test, and that only if it proves not to be unfair can the *contra proferentem* rule be applied. It was also argued that although there is no *automatic* link between the breach of the transparency requirement and the judgment that the term is unfair, the starting point should be that an intransparant term is in fact regarded as unfair, unless the trader proves otherwise. This in fact implies a reversal of the burden of proof, which operates in much the same manner as a grey list would. Finally, it was argued that in cases where formal transparency was breached, an alternative approach could be considered, providing that terms lacking formal transparency simply are deemed not to be part of the contract or are to be avoided for lack of transparency as such. Therefore, the court would not need to determine whether these terms are unfair. An advantage of this alternative approach would be that the court would not be bound by all consequences that the Court of Justice attaches to the finding that a term is unfair, which implies that default law could be

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principle of reasonableness, have expected them to be included in the contract or which the party cannot understand without considerable effort are not deemed to be part of the contract.' A consolidated version of this Act (version of 2023) is available in English at https://www.riigiteataja.ee/en/eli/ee/506112013011/consolide/current (accessed on 20 June 2023).

relied upon by the parties. This may prevent a court from shying away from attaching any consequences to the lack of transparency as courts may find the consequences of holding a term unfair too far-reaching.

This paper has shown that the transparency requirement has a key role to play in the regulation of T&Cs. It places high demands on the trader, not only regarding linguistic and grammatical intelligibility but also with regard to economic transparency and plain old-fashioned legibility and accessibility of the terms. This paper has also demonstrated that the fact that the European legislator has failed to attach clear consequences to a breach of the transparency requirement has opened possibilities for national legislators and courts to develop proper sanctions for a breach of transparency. Sometimes the proper sanction may indeed be unfairness of the term or application of the *contra proferentem* rule, but on other occasions just not applying the intransparant term and resorting to default rules may offer a more appropriate solution. Perhaps this shows best that minimum harmonisation may sometimes indeed offer better solutions than the European legislator can produce.