UNIVERSITY OF AMSTERDAM

UvA-DARE (Digital Academic Repository)

Through a magnifying glass: A study of the concept of transparency in European consumer contract law

Junuzović, M.

Publication date
2024

Document Version
Final published version

Link to publication

Citation for published version (APA):
Junuzović, M. (2024). *Through a magnifying glass: A study of the concept of transparency in European consumer contract law*. [Thesis, fully internal, Universiteit van Amsterdam].

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

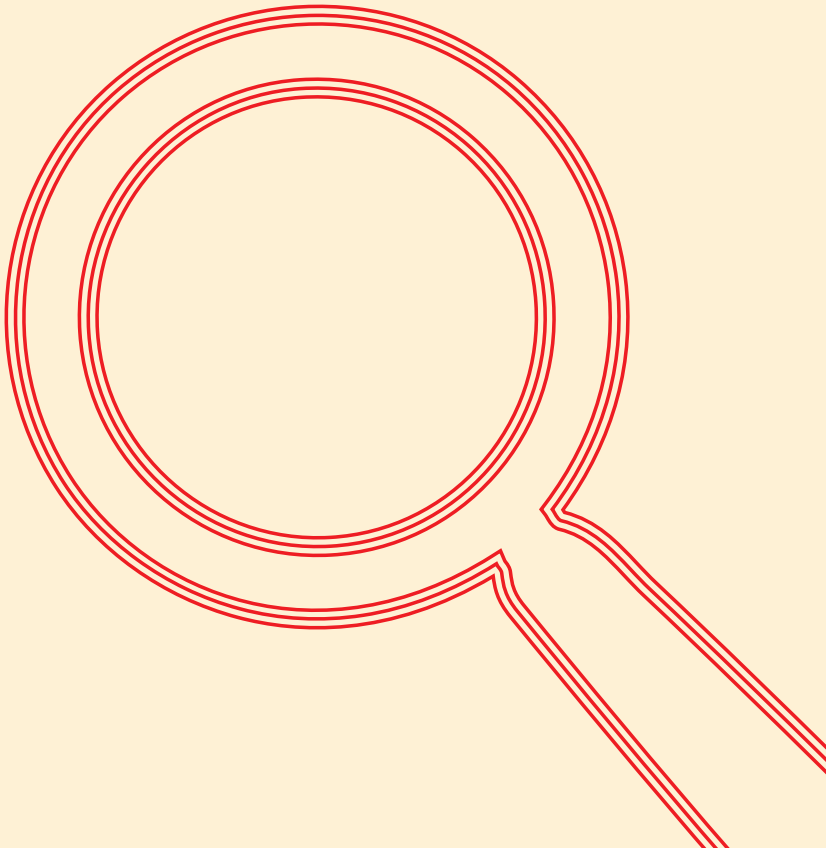
Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, P.O. Box 19185, 1000 GD Amsterdam, The Netherlands. You will be contacted as soon as possible.

UvA-DARE is a service provided by the library of the University of Amsterdam (https://dare.uva.nl)

Download date:09 Nov 2026

Through a Magnifying Glass:

A Study of the Concept of *Transparency* in European Consumer Contract Law



Mia Junuzović

Through a Magnifying Glass:
A Study of the Concept of Transparency in European Consumer Contract Law

Mia Junuzović

Layout: Proefschrift AIO | Annelies Lips
Cover: Proefschrift AIO |Guntra Laivacuma
Printing: Proefschrift AIO

ISBN: 978-94-93353-98-5
© 2024 Mia Junuzović

All rights reserved. No part of this thesis may be reproduced or transmitted in any form or by any means without prior permission of the copyright holder, or, when applicable, with permission of the publishers of the scientific journals.

Through a Magnifying Glass: A Study of the Concept of Transparency in European Consumer Contract Law

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
prof. dr. ir. P.P.C.C. Verbeek
ten overstaan van een door het College voor Promoties ingestelde commissie,
in het openbaar te verdedigen in de Aula der Universiteit
op woensdag 11 september 2024, te 11.00 uur

door Mia Junuzović
geboren te Koper

Promotiecommissie

Promotores:	prof. mr. dr. M.B.M. Loos	Universiteit van Amsterdam
	prof. dr. mr. J.A. Luzak	University of Exeter
Overige leden:	prof. dr. C. Mak	Universiteit van Amsterdam
	dr. K.J. Cseres	Universiteit van Amsterdam
	dr. A.E. Oderkerk	Universiteit van Amsterdam
	prof. dr. P.W. Rott	Universität Oldenburg
	prof. dr. E. Mišćenić	University of Rijeka

Faculteit der Rechtsgeleerdheid

Table of contents

CHAPTER 1: Introduction **13**

1 The concept of transparency **14**
2 The opacity of transparency in EU consumer law **18**
3 The lack of concrete and coherent guidance on online transparency in EU consumer law **21**
4 The role of transparency in EU consumer law **25**
5 Research objectives and questions **29**
6 Research scope and exclusions from it **32**
7 Methodology **37**
8 Book structure **38**

CHAPTER 2: The concept of transparency in European consumer law – an analysis of the UCTD, the CCD and the CRD **41**

2.1 The concept of transparency under the UCTD **42**
2.1.1 The development of the transparency concept under the UCTD **42**
2.1.1.1 The adoption and content of the UCTD 42
2.1.1.2 The UCTD's transparency requirement 43
2.1.2 The objective of transparency under the UCTD **44**
2.1.3 The interpretation and assessment of transparency under the UCTD **49**
2.1.3.1 The meaning of the requirement to draft contract terms in plain, intelligible language 49
2.1.3.2 The scope of the assessment of transparency 52
2.1.3.3 Factors relevant for the assessment of transparency 57
2.1.3.4 The relevant context for the assessment of transparency 58
2.1.4 Contractual consequences of a breach of transparency under the UCTD **63**
2.2 The concept of transparency under the CCD **68**
2.2.1 The development of the transparency concept under the CCD **68**
2.2.1.1 The adoption and content of the CCD 68
2.2.1.2 The CCD's information model and transparency concept 71
2.2.1.3 The revision of the CCD and the adoption of the CCD 2023 74
2.2.2 The objective of transparency under the CCD **76**
2.2.3 The interpretation and assessment of transparency under the CCD **79**
2.2.3.1 The meaning of the requirements of clarity, conciseness and prominence 79

2.2.3.2 Standardisation of the pre-contractual consumer credit information and the APR 82
2.2.3.3 The obligation to give adequate explanations of pre-contractual credit information 89
2.2.4 Contractual consequences of a breach of transparency under the CCD 91
2.3 The concept of transparency under the CRD 94
2.3.1 The development of the transparency concept under the CRD 94
2.3.1.1 The adoption and content of the CRD 94
2.3.1.2 The CRD's information model and transparency concept 96
2.3.1.3 The impact of fitness checks, the MD and the DMFSD 2023 on the CRD 98
2.3.2 The objective of transparency under the CRD 101
2.3.3 The interpretation and assessment of transparency under the CRD 103
2.3.3.1 The meaning of the requirements of clarity, comprehensibility, plainness, intelligibility and legibility 103
2.3.3.2 The presentation of electronic orders and prohibition of opt-outs 109
2.3.3.3 Standardisation of the information on the right of withdrawal 113
2.3.3.4 Transparency of online marketplaces 114
2.3.4 Contractual consequences of a breach of transparency under the CRD 116

CHAPTER 3: The concept of transparency in German law implementing the UCTD, the CCD and the CRD 121

3.1 The concept of transparency in German law implementing the UCTD 122
3.1.1 The development of the transparency concept 122
3.1.1.1 Transparency within the control of incorporation of standard contract terms 124
3.1.1.2 Transparency within the interpretation of standard contract terms 129
3.1.1.3 Transparency within the control of content of standard contract terms 130
3.1.2 The objective of transparency 135
3.1.3 The interpretation and assessment of transparency 137
3.1.3.1 The systematisation of transparency in German literature 137
3.1.3.2 Relevant factors for the assessment of transparency in German case law 141
3.1.4 Contractual consequences of a breach of transparency 151
3.2 The concept of transparency in German law implementing the CCD 155
3.2.1 The development of the transparency concept 155
3.2.2 The objective of transparency 157
3.2.3 The interpretation and assessment of transparency 158
3.2.3.1 Standardisation of consumer credit information 158

3.2.3.2 Obligation to provide adequate explanations of consumer credit information 161
3.2.3.3 Clarity and comprehensibility of contractual credit information 166
3.2.4 Contractual consequences of a breach of transparency 172
3.3 The concept of transparency in German law implementing the CRD 174
3.3.1 The development of the transparency concept 174
3.3.2 The objective of transparency 177
3.3.3 The interpretation and assessment of transparency 178
3.3.3.1 The meaning of the requirements of clarity, comprehensibility and prominence 178
3.3.3.2 Transparency of the online order button 185
3.3.3.3 Standardised withdrawal instructions 194
3.3.4 Contractual consequences of a breach of transparency 196

CHAPTER 4: The concept of transparency in Croatian law implementing the UCTD, the CCD and the CRD 201

4.1 The development of consumer protection within Croatian law 202
4.2 The concept of transparency in Croatian law implementing the UCTD 206
4.2.1 The development of the transparency concept 206
4.2.1.1 The implementation of the UCTD's transparency requirement in Croatian law 206
4.2.1.2 Differences between the transparency concept under the UCTD and the ZZP 2022 207
4.2.2 The objective of transparency 209
4.2.3 The interpretation and assessment of transparency 210
4.2.3.1 The impact of the *Franak* case on the interpretation and assessment of transparency of standard contract terms 210
4.2.3.2 The requirement of plainness 212
4.2.3.3 The requirement of noticeability 213
4.2.3.4 The requirement of intelligibility 214
4.2.3.5 The application of the average(?) consumer benchmark 219
4.2.4 Contractual consequences of a breach of transparency 220
4.3 The transparency concept in Croatian law implementing the CCD 225
4.3.1 The development of the transparency concept 225
4.3.2 The objective of transparency 227
4.3.3 The interpretation and assessment of transparency 228
4.3.3.1 Standardisation or equal visibility of pre-contractual consumer credit information 228
4.3.3.2 Obligation to provide adequate explanations of consumer credit information 230

4.3.3.3 Clarity and conciseness of contractual credit information 230
4.3.3.4 Transparency of information on variable interest rates 231
4.3.3.5 Transparency of information on conversion of consumer credit agreements denominated in or pegged to Swiss francs 235
4.3.4 Contractual consequences of a breach of transparency 236
4.4 The transparency concept in Croatian law implementing the CRD 236
4.4.1 The development of the transparency concept 236
4.4.1.1 Changes to the regulation of transparency of online orders with a payment obligation under the ZZP 2022 238
4.4.1.2 The transposition of the MD 239
4.4.2 The objective of transparency 240
4.4.3 The interpretation and assessment of transparency 240
4.4.3.1 Clarity, comprehensibility and simplicity of online information 240
4.4.3.2 Easily noticeable information regarding online orders with a payment obligation 242
4.4.3.3 Language requirements 244
4.4.4 Contractual consequences of a breach of transparency 245

CHAPTER 5: The concept of transparency in English law implementing the UCTD, the CCD and the CRD 249

5.1 Introduction to English contract and consumer law 250
5.2 The concept of transparency in English law implementing the UCTD 253
5.2.1 The development of the transparency concept 253
5.2.1.1 The transparency concept in common law 253
5.2.1.2 The implementation of the UCTD in English law 255
5.2.1.3 The adoption of the Consumer Rights Act 2015 257
5.2.2 The objective of transparency 260
5.2.3 The interpretation and assessment of transparency 261
5.2.3.1 Transparency requirements in common law 261
5.2.3.2 Transparency requirements in statutory law 267
5.2.4 Contractual consequences of a breach of transparency 281
5.3 The concept of transparency in English law implementing the CCD 286
5.3.1 The development of the transparency concept 286
5.3.1.1 The 1974 Consumer Credit Act 286
5.3.1.2 The implementation of the CCD's transparency concept 287
5.3.1.3 The introduction of the Financial Conduct Authority and the Consumer Credit Sourcebook 289
5.3.1.4 The introduction of the FCA's Consumer Duty and the intended reform of the CCA 1974 291
5.3.2 The objective of transparency 293

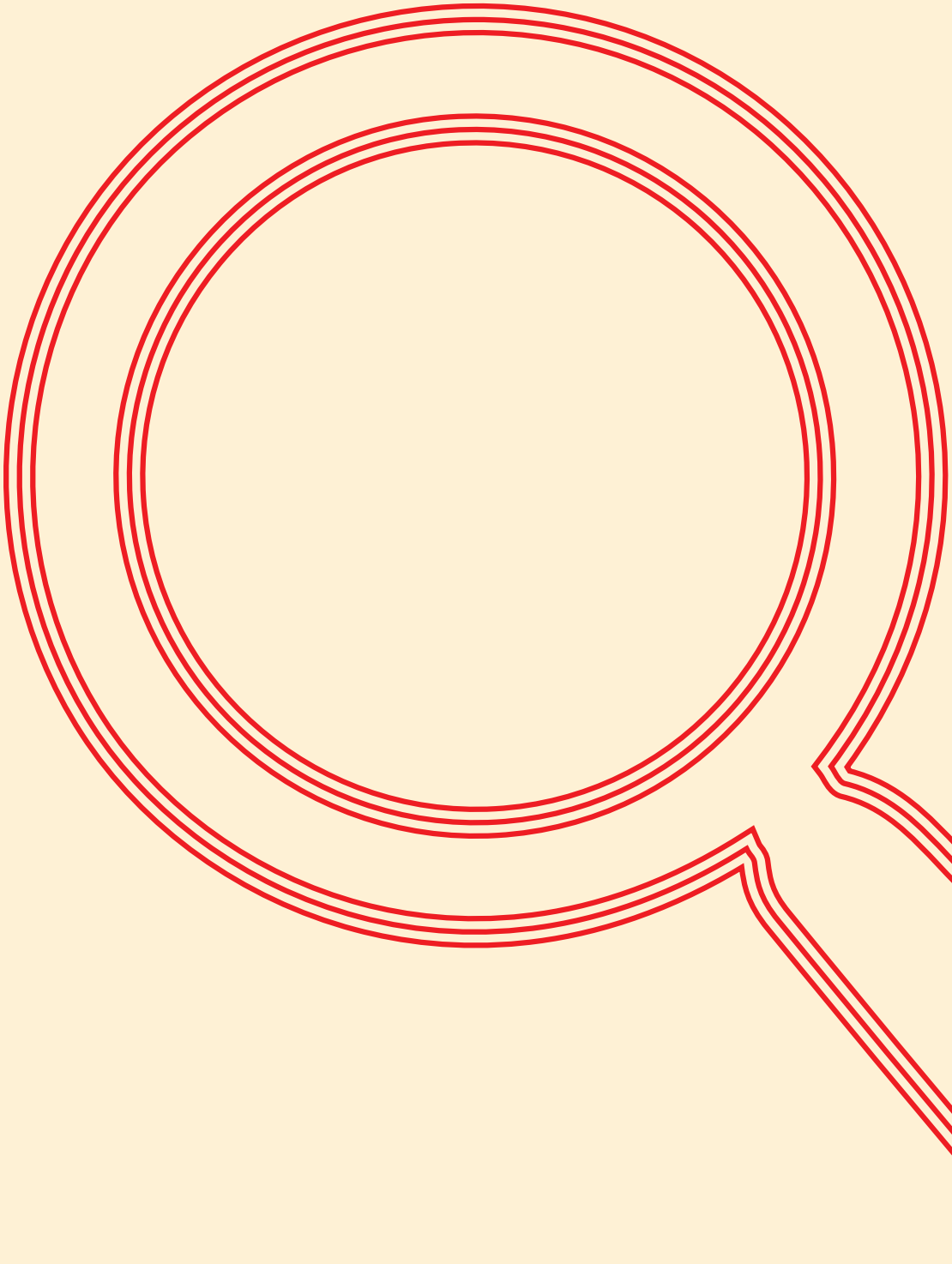
5.3.3 The interpretation and assessment of transparency 294
5.3.3.1 Prominence of pre-contractual credit information 294
5.3.3.2 Standardisation of pre-contractual consumer credit information 296
5.3.3.3 Provision of adequate explanations of pre-contractual consumer credit information 297
5.3.3.4 Clarity and conciseness of contractual credit information 298
5.3.3.5 The consumer understanding outcome within the FCA's Consumer Duty 300
5.3.4 Contractual consequences of a breach of transparency 302
5.4 The concept of transparency in English law implementing the CRD 306
5.4.1 The development of the transparency concept 306
5.4.1.1 The implementation of EU distance-selling law 306
5.4.1.2 The implementation of the CRD's transparency concept 308
5.4.2 The objective of transparency 310
5.4.3 The interpretation and assessment of transparency 311
5.4.3.1 Availability of (pre-)contractual information 311
5.4.3.2 Clarity and comprehensibility of (pre-)contractual information 312
5.4.3.3 Prominence of information regarding online orders with a payment obligation 316
5.4.4 Contractual consequences of a breach transparency 318

CHAPTER 6: What's transparency got to do with it? A comparative analysis of the discrepancies in the interpretation and assessment of the transparency concept in EU, German, Croatian and English law 323

6.1 Delineation of key issues in the interpretation and assessment of the transparency concept under the UCTD, the CCD, and the CRD 324
6.2 Discrepancy between the objectives of transparency and its interpretation and assessment in practice 325
6.2.1 Lack of a dual transparency assessment 327
6.2.2 Lack of clarity with regard to contractual consequences for breaches of transparency 334
6.3 Lack of a uniform taxonomy of the transparency concept 337
6.3.1 Lack of a uniform transparency taxonomy across jurisdictions 338
6.3.2 Lack of a uniform transparency taxonomy within the same jurisdiction 343
6.4 Lack of consideration of the impact of digitalisation on the transparency concept 346
6.4.1 Lack of adaptation of transparency tools to the online environment 347
6.4.2 Lack of consideration for the transparent design of the online environment 351

EPILOGUE: Concluding remarks and recommendations 363

Bibliography 373
Case law index 389
Summary 395
Samenvatting 401
Acknowledgements 407



CHAPTER 1

Introduction

1. The concept of transparency

Transparency has become a fundamental concept, or even the norm, in various domains, including law, governance, policy, and business.[1] Transparency can be expressed in various dimensions, including political, substantive, operational, and procedural.[2] Political and substantive transparency concerns access to decision-making mechanisms and the establishment of rules that define the desired content of regulations, standards, and provisions. Operational and procedural transparency pertains to the rules that determine organisational structures and governance processes.

The rise of transparency as a virtue[3] or ideal that should shape the functioning of society[4] has not been accompanied by sufficient conceptual analysis or critique.[5] While it is assumed to be authoritative, transparency remains a concept that is under-analysed[6] and lacks a clear definition.[7] Scholars who have attempted to define transparency at an abstract level associate it with various characteristics, such as openness, visibility, clarity, and the absence of opacity and secrecy.[8] Yet,

1. Ida Koivisto, 'Thinking Inside the Box: The Promise and Boundaries of Transparency in Automated Decision-Making' (2020) 2020/01 *EUI Working Paper AEL* 3; Ida Koivisto, 'The Anatomy of Transparency: The Concept and its Multifarious Implications' (2016) 2016/09 *EUI Working Paper MWP* 1; Anne Peters, Towards 'Towards Transparency as a Global Norm' in Anne Peters & Andrea Bianchi (eds) *Transparency in International Law* (Cambridge University Press 2013) 534–536; Aarti Gupta, 'Transparency Under Scrutiny: Information Disclosure in Global Environmental Governance' (2008) 8(2) *Global Environmental Politics* 1; Lars Thøger Christensen and Joep Cornelissen, 'Organizational transparency as myth and metaphor' (2015) 18(2) *European Journal of Social Theory* 132-133; Ognyan Seizov and Alexander J. Wulf, 'Communicating Legal Information to Online Customers Transparently: A Multidisciplinary Multistakeholderist Perspective' (2021) 33(2) *Journal of international consumer marketing* 162-163.
2. Rolf H. Weber, 'From disclosure to transparency in consumer law' in Klaus Mathis and Avishalom Tor (eds) *Consumer Law and Economics* (Springer 2021) 83.
3. Mark Fenster, 'The Opacity of Transparency' (2006) 91 *Iowa Law Review* 888; Clare Birchall, 'Introduction to 'Secrecy and Transparency': The Politics of Opacity and Openness' (2011) 28(7-8) *Theory, Culture and Society* 8-9.
4. Lars Thøger Christensen and Joep Cornelissen, 'Organizational transparency as myth and metaphor' (2015) 18(2) *European Journal of Social Theory* 132-137.
5. Ida Koivisto, 'The Anatomy of Transparency: The Concept and its Multifarious Implications' (2016) 2016/09 *EUI Working Paper MWP* 2; Aarti Gupta, 'Transparency Under Scrutiny: Information Disclosure in Global Environmental Governance' (2008) 8(2) *Global Environmental Politics* 1.
6. Aarti Gupta, 'Transparency Under Scrutiny: Information Disclosure in Global Environmental Governance' (2008) 8(2) *Global Environmental Politics* 1; Ognyan Seizov and Alexander J. Wulf, 'Communicating Legal Information to Online Customers Transparently: A Multidisciplinary Multistakeholderist Perspective' (2021) 33(2) *Journal of international consumer marketing* 162-163.
7. Ida Koivisto, 'The Anatomy of Transparency: The Concept and its Multifarious Implications' (2016) 2016/09 *EUI Working Paper MWP* 2; Lars Thøger Christensen and Joep Cornelissen, 'Organizational transparency as myth and metaphor' (2015) 18(2) *European Journal of Social Theory* 133; Ognyan Seizov, Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 152-154; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of Consumer Policy* 310-313.
8. Anne Peters, Towards 'Towards Transparency as a Global Norm' in Anne Peters & Andrea Bianchi (eds) *Transparency in International Law* (Cambridge University Press 2013) 534–535; Ida Koivisto, 'The Anatomy of Transparency: The Concept and its Multifarious Implications' (2016) 2016/09 *EUI*

these attempts reveal that transparency is a vague and ambiguous concept, prone to contradictions.[9] Even the dictionary definition of transparency, as per the Oxford English Dictionary (OED), is not sufficiently clear. The OED describes transparency as the state, quality, or condition of being transparent.[10] Furthermore, the OED provides multiple definitions of the adjective 'transparent', which vary based on the specific context in which the adjective is employed. These definitions encompass aspects such as visibility, apparentness, openness, clarity, understandability, and obviousness.[11]

The above example demonstrates that the definition of transparency can vary depending on its context, making it difficult to provide a universal definition. Therefore, it is necessary to consider how different disciplines that rely on transparency define it. In the field of law, transparency is often linked to the obligation of providing information or the right to access and receive information. For instance, law requires that public authorities make their policies, decisions, and the reasoning behind them transparent to the public.[12] This means that public authorities either have to *publish relevant information about these acts* or *make information accessible upon request*.[13] Furthermore, law demands from businesses to be transparent about their activities by *proactively providing information about these activities* through reporting and auditing.[14] Businesses also have to be transparent about the goods and services that they offer on the market, which means that they have to *provide information about their characteristics and the conditions under which they are being sold* to potential consumers.[15]

Similar to other fields of law, European Union (EU) consumer law seldom offers an independent definition of transparency, apart from the trader's obligation to furnish consumers with information information. Typically, EU legislation expresses transparency through specific requirements such as clarity, comprehensibility,

---

Working Paper MWP 2-8; Mark Fenster, 'The Opacity of Transparency' (2006) 91 *Iowa Law Review* 885; Lars Thøger Christensen and Joep Cornelissen, 'Organizational transparency as myth and metaphor' (2015) 18(2) *European Journal of Social Theory* 133; Deirdre Curtin, "Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency' (2017) 23 (1-2) *European Law Journal* 32.

9. Lars Thøger Christensen and Joep Cornelissen, 'Organizational transparency as myth and metaphor' (2015) 18(2) *European Journal of Social Theory* 139-141; Anoeska Wilhelmina Geertruida Johanna Buijze, *The principle of transparency in EU law* (Utrecht University Repository 2013) 27-29.

10. See definitions of transparency under Points 1.a., b., c. and 2.a. in the Oxford English Dictionary available here: https://www-oed-com.proxy.uba.uva.nl/view/Entry/204968?redirectedFrom=transparency#eid (accessed 8 May 2024).

11. See definitions of transparent available here: https://www-oed-com.proxy.uba.uva.nl/view/Entry/204969?redirectedFrom=transparent#eid (accessed 8 May 2024).

12. For a detail account of transparency as a principle of law, see Anoeska Wilhelmina Geertruida Johanna Buijze, *The principle of transparency in EU law* (Utrecht University Repository 2013) 4, 27-77.

13. Mark Fenster, 'The Opacity of Transparency' (2006) 91 *Iowa Law Review* 888; Deirdre M. Curtin and Päivi Leino, 'In search of transparency for EU law-making: Trilogues on the cusp of dawn' (2017) 54(6) *Common Market Law Review* 1673-1674

14. Lars Thøger Christensen and Joep Cornelissen, 'Organizational transparency as myth and metaphor' (2015) 18(2) *European Journal of Social Theory* 139-144; Clare Birchall, Introduction to 'Secrecy and Transparency': The Politics of Opacity and Openness (2011) 28(7-8) *Theory, Culture and Society* 14.

15. Jasper P. Sluijs, Florian Schuett and Bastian Henze, 'Transparency regulation in broadband markets: Lessons from experimental research' (2011) 35(7) *Telecommunications Policy* 593-594.

legibility, conciseness, and prominence.[16] Also, EU consumer law sometimes standardises the format of mandatory consumer information or imposes specific design requirements, aiming to enhance the comprehensibility and comparability of the information.[17] Differently than mandating **WHAT** information has to be provided, transparency, standardisation and design requirements specify **HOW** information has to be provided. As such, these requirements enable a more thorough analysis of transparency that extends beyond simply defining transparency through the provision of information.

This thesis does not scrutinise information requirements, but instead focuses primarily on the transparency, standardisation and design requirements mandated by EU consumer law when exploring the concept of transparency. This approach allows for a clear separation between the *provision of mandatory information* and the *transparent provision* of that mandatory information to consumers. Much of the literature regarding transparency in EU consumer law does not make a clear distinction between what information the law mandates and how this information ought to be presented. Exceptions to this are studies discussing the concept of transparency under the Unfair Contract Terms Directive (UCTD)[18] and the case law of the Court of Justice of the European Union (CJEU) based on this directive,[19] as well as more recent studies discussing how the transparency of information mandated by EU consumer law can be enhanced.[20]

16. See, for instance, Articles 6 and 7 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights OJ L 304, p. 64–88 (CRD), Articles 5(3), 6 or 7(5) of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements OJ L 326, p. 1–33 (PTD), or Article 19 of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services OJ L 136, p. 1–27 (CSGD).

17. See, for example, Annexes II and III of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers, OJ L 133, p. 66–92 (CCD) or Annexes I and II of the PTD.

18. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, p. 29–34 (UCTD).

19. Francesca Brunetta d'Usseaux, 'Formal and substantive aspects of the transparency principle in European Private Law' (1998) *Consumer Law Journal* 320-338; Johanna Waelkens, 'Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts', in Ilse Samoy and Marco B.M. Loos (eds), *Information and Notification Duties* (Intersentia 2015) 47, 61-63; Martin Ebers, 'Unfair Contract Terms Directive (93/13)', in Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers (eds), *EU Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier 2008) 245-246; Marco B.M. Loos, 'Double Dutch – On the role of the transparency requirement with regard to the language in which standard contract terms for B2C-contracts must be drafted' (2017) 6(2) *Journal of European Consumer and Market Law* 55, 59.

20. Maartje Elshout et al., 'Study on consumers' attitudes towards Terms and Conditions (T&Cs)' (2016) 26-103; Genevieve Helleringer and Anne-Lise Sibony, 'European consumer protection through the behavioral lens' (2017) 23 (3) *Columbia Journal of European Law* 624; Ognyan Seizov, Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 152-168; Arianna Rossi, Rossana Ducato, Helena Haapio and Stefania Passera, 'When Design Met Law: Design Patterns for Information Transparency' (2019) 122-123(5) *Doctrine Rechtsleer* 98-121; Zsolt Ződi, 'The limits of plain legal language: understanding the comprehensible style in law' (2019) 15 *International Journal of Law in Context* 251-260; Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) 39 *Legal Studies* 385-397; Benedikt Schmitz and Charlotte Pavillon, 'Measuring Transparency in Consumer Contracts: The

A notable example of a conceptual study on transparency is the comprehensive analysis of transparency in the digital economy, which is based on EU consumer and data protection law and was conducted by Jabłonowska and Tagiuri in 2023.[21] Jabłonowska and Tagiuri rightly acknowledge that the conceptual richness and diverse meanings of transparency may not be familiar to many stakeholders in EU consumer and data protection law, such as judges, lawyers and scholars.[22] This highlights the need for further conceptual studies on transparency, emphasising its importance and additional benefits. Such studies aim to offer insights and recommendations on how transparency can be used as a tool to protect consumers, particularly in the digital age[23] – a goal that this thesis also aims to achieve, as elucidated in Sections 5 and 6 of this chapter.

This chapter outlines and explains the approach the thesis takes in studying transparency. Sections 2, 3, and 4 explore the concept of transparency in EU consumer law, identifying gaps in its definition, its application in the online environment, and its role. Section 5 describes the research objectives and questions addressed in this thesis, while Section 6 defines its scope. Section 7 explains the adopted methodology, and Section 8 provides an overview of the book's structure.

Usefulness of Readability Formulas Empirically Assessed' (2020) 9(5) *Journal of European Consumer and Market Law* 195-200; Ognyan Seizov and Alexander J. Wulf, 'Communicating Legal Information to Online Customers Transparently: A Multidisciplinary Multistakeholderist Perspective' (2021) 33(2) *Journal of international consumer marketing* 162-175; 1081-1083, Alexander J. Wulf and Ognyan Seizov, 'The Principle of Transparency in Practice: How Different Groups of Stakeholders View EU Online Information Obligations' (2020) 28(5) *European Review of Private Law* 1081-1083, 1089-1092; Marco B.M. Loos and Joasia Luzak, Update the Unfair Contract Terms Directive for Digital Services (2021) 42-47; Alexander J. Wulf and Ognyan Seizov, '"Please understand we cannot provide further information": evaluating content and transparency of GDPR-mandated AI disclosures' (2022) *AI & Society* 251-256; Alexander J. Wulf and Ognyan Seizov, 'How to Improve Consumers' Understanding of Online Legal Information. Insights from a Behavioral Experiment' (2022) *European Journal of Law and Economics* 563-582; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 128-134; Rolf H. Weber, 'The Disclosure Dream – Towards a New Transparency Concept in EU Consumer Law' (2023) 67 *Journal of European Consumer and Market Law* 69-70; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 321-330.

21. In their analysis, Jabłonowska and Tagiuri identify seven distinct notions of transparency: transparency as access to the medium over time, transparency as the presentation of information that facilitates understanding, transparency as formulations that facilitate understanding, transparency as non-ambiguity and logical intelligibility, transparency as the absence of deception and confusion, transparency as completeness, and transparency as non-arbitrariness. See Agnieszka Jabłonowska and Giacomo Tagiuri, 'Rescuing transparency in the digital economy: in search of a common notion in EU consumer and data protection law' (2023) *Yearbook of European Law* 16-38.

22. Agnieszka Jabłonowska and Giacomo Tagiuri, 'Rescuing transparency in the digital economy: in search of a common notion in EU consumer and data protection law' (2023) *Yearbook of European Law* 38-41.

23. Ibid, 38-41.

2. The opacity of transparency in EU consumer law

EU consumer policy has mandated the transparent provision of information about products and services available on the EU market to consumers for nearly four decades. However, it has not provided a clear definition of transparency.

The 1975 *Preliminary programme of the European Economic Community for a consumer protection and information policy* (1975 *Preliminary programme*), which established consumer policy at the EU level,[24] emphasised the obligation of traders to provide consumers with detailed information about products and services, including information about the risks associated with their use in order to prevent misleading advertising of products and services.[25] Although the 1975 *Preliminary programme* highlighted that this information should be clear, unambiguous, legible, accurate or sufficient,[26] it did not elaborate on the meaning of these requirements.

The 1990 *Three-year action plan of consumer policy in the EEC* (1990 *Action Plan*) of the European Commission (the Commission) mentioned transparency explicitly for the first time. This plan demanded that consumer policy strives to ensure the "*greatest possible degree of relevant disclosure or transparency*" and observed that "*much of the existing legislation regulating the market sectors, does not ensure adequate transparency*".[27] The 1990 *Action Plan* did not further define the concept of transparency or give examples of transparent disclosure. It did, however, equate transparency with the "*greatest possible degree of relevant disclosure*",[28] raising the question whether transparency is an autonomous concept in EU consumer policy or merely a synonym for information disclosure.

The notion that consumers require transparent information has been further strengthened through consumer agendas adopted over the past two decades. For instance, in 2012, *A European Consumer Agenda - Boosting confidence and growth* (2012 *European Consumer Agenda*) pointed out that providing consumers with clear, reliable and comparable information, as well as the tools to understand it, is pivotal to enhancing consumer knowledge and empowerment.[29] The 2020 *New Consumer Agenda Strengthening consumer resilience for sustainable recovery* (2020 *New Consumer Agenda*) emphasises the potential of consumers in playing an active role in the green and digital transition in the EU.[30] This potential should be unleashed through measures that empower consumers to make greener choices while purchasing products and

24. Jana Valant (European Parliamentary Research Service), 'Consumer protection in the EU: Policy Overview' (2015), 1, available at: https://epthinktank.eu/2015/09/03/consumer-protection-in-the-eu-policy-overview/ (accessed 8 May 2024).
25. Preliminary programme of the European Economic Community for a consumer protection and information policy OJ C 92, p. 1–1, points 8, 15(a)(i), 19(iii).
26. Ibid, points 35(i), 19(v), 34.
27. COM (90) 98 final: Three-year action plan of consumer policy in the EEC (1990-1992) [2(b)(i)].
28. Ibid.
29. COM (2012) 0225 final: A European Consumer Agenda - Boosting confidence and growth [4.2.].
30. COM (2020) 696 final: New Consumer Agenda – Strengthening consumer resilience for sustainable recovery [1 and 5].

services and promote a secure digital environment for consumers.[31] Many of these measures focus on providing consumers with better, more reliable, more targeted and easier to understand information about goods and services, allowing them to make informed choices that support the economic and social objectives of the EU.[32] The 2020 *New Consumer Agenda* also emphasises the importance of transparency obligations in tackling information asymmetries between traders and consumers, which are particularly prevalent in the online environment.[33] Still, the 2020 *New Consumer Agenda* does not specify the type of information that could be considered better, more reliable, more targeted, or more understandable, nor does it define the scope of the term 'transparency obligations'.

EU consumer law refers to the concept of transparency even more frequently than EU consumer policy. However, instead of providing a definition of transparency, EU consumer law primarily associates it with the obligation to provide information. For example, the Sale of Goods Directive (SGD) states that pre-contractual information requirements concerning the existence and terms of commercial guarantees should be provided "*in order to ensure that there is transparency*".[34] The Distance Marketing of Consumer Financial Services Directive (DMFSD) aims to ensure the consumer receives an appropriate level of information before and after the conclusion of the contract "*in the interests of transparency*".[35] The Package Travel Directive (PTD) mandates that traders must furnish information that allows for differentiation between packages and linked travel arrangements "*for the sake of transparency*"."[36]

The Consumer Credit Directive (CCD) specifies that consumers should be provided with certain pre-contractual and contractual information "*in order to ensure full transparency*".[37] In 2020, the Commission evaluated the effectiveness of the CCD and concluded that it was adversely impacted by the length, complexity, timing of delivery, and method of providing pre-contractual credit information online.[38] This indicates that the directive did not achieve the desired full transparency of credit information. In 2021, the Commission proposed a revision of the CCD,[39] leading to the adoption of the 2023 Consumer Credit Directive (CCD 2023),[40] set to repeal and replace the CCD as of November 2026. Among other aims, the CCD 2023 seeks to further enhance the standardisation of information on essential credit aspects. It

31. Ibid, 5-9.
32. Ibid, 6-9.
33. Ibid, 10-14.
34. Recital 62 of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods OJ L 136, p. 28–50 (SGD).
35. Recital 21 of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services OJ L 271, p. 16–24 (DMFSD).
36. Recital 9 PTD.
37. Recital 32 CCD.
38. Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [30-34].
39. COM/2021/347 final: Proposal for a Directive of the European Parliament and of the Council on consumer credits [1-3]. See my analysis of this proposal in Chapter 2, Section 2.2.1.2.
40. Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC OJ L, 2023/2225 (CCD 2023).

requires credit providers to adjust the format of this information with respect to the online environment and introduces a ban on opt-outs.[41] However, it does not further define transparency.

EU consumer law also imposes numerous transparency requirements on mandatory consumer information, such as plainness, intelligibility, legibility, clarity, comprehensibility, and prominence, without providing sufficient guidance on how to interpret and apply them. Additionally, the Commission and the CJEU have yet to interpret many of these requirements in a comprehensive and harmonised manner. Until 2019, the Commission rarely addressed transparency requirements in its guidance documents, which offer guidance on the intended interpretation of EU law. For instance, in the 2012 *Consumer Credit Guidance*, the Commission briefly outlines the requirements of clarity, conciseness, and prominence, but solely within the context of consumer credit advertising.[42] In the 2014 *Consumer Rights Guidance*, which remained in effect until 2021, the Commission simply reaffirmed traders' obligation to furnish consumers with clear, comprehensible, plain and intelligible information about online contracts.[43] However, it did not offer any guidance on how to interpret these requirements or their relationship to one another.

In 2019, the Commission published the *Unfair Contract Terms Guidance*, which is the first guidance that explains the factors relevant for assessing the plainness and intelligibility of contract terms.[44] These factors pertain to the examination of the accessibility, comprehensibility, and visual presentation of contract terms.[45] When elaborating on these factors, the Commission focuses on the access and opportunity to read contract terms, the inclusion of contract terms in an annex of another document, the clarity of the wording, terminology, and language of contract terms, the font size, the structure of the contract, and the prominence of important information.[46]

To date, the CJEU has provided the most extensive (albeit not exhaustive) guidance on the interpretation and assessment of transparency under the UCTD by interpreting traders' obligation to draft standard contract terms in plain and intelligible language. This requirement obliges traders to make their contract terms available to consumers and ensure that contract terms are clear and understandable to consumers, both grammatically and in terms of their legal and economic consequences. However, the CJEU has not yet transposed this interpretation to other

41. See Articles 10, 11 and 15 CCD 2023.
42. Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [11].
43. European Commission, DG JUSTICE (June 2014): Guidance document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [17-18 and 40].
44. C(2019) 5325 final: Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts [26-29].
45. Ibid, 26-29.
46. Ibid, 26.

EU directives that contain the same transparency requirements as the UCTD, such as the Consumer Rights Directive (CRD), despite having the opportunity to do so. This raises the question of whether the concept of transparency is intended to have the same meaning across EU consumer law or if transparency can have different meanings under different directives and regulations, even when the transparency requirements are worded in the same manner.

3. The lack of concrete and coherent guidance on online transparency in EU consumer law

Although the European legislature began regulating online consumer contracts back in the 1990s, the transparency of the online environment has only been subject to increased regulation since 2019. This is striking since the need for guidance regarding the transparent provision of consumer information may even be greater in the online environment. When purchasing online, consumers often rely on comparison tools to better understand the features of the available goods and services. However, despite the presence of such tools, online consumers still need to examine multiple disclosures in order to conclude a single contract. Behavioural research indicates that online consumers tend to primarily focus on the main transaction, such as purchasing goods, and often only pay attention to certain aspects of this transaction, such as price and delivery terms, while overlooking other factors like data and privacy protection.[47] Furthermore, the absence of direct contact with traders makes it more challenging for consumers to assess the reliability of a trader or the quality of the goods or services being provided.[48]

For instance, the CRD, which regulates the conclusion of online consumer contracts was introduced in 2011. However, it took the Commission 10 years to adopt more detailed guidance on how it should be applied. In its 2021 *Consumer Rights Guidance*, the Commission offers direction on the interpretation of various transparency requirements in the online environment. For instance, the Commission acknowledges that traders may sometimes struggle to present all the mandatory consumer information in a clear and comprehensible way on a single webpage due to its extensive volume.[49] In that case, they should layer the information using hyperlinks, which should feature a prominent link on the homepage directing to the linked page.[50] Besides this general guidance on the use of hyperlinks, the Commission did not provide any additional guidance or examples regarding where traders should provide mandatory information or links to this information on their website or app,

47. Joseph Turrow, Michael Hennessy and Amy Bleakley, 'Consumers' Understanding of Privacy Rules in the Marketplace' (2008) 42(3) *The Journal of Consumer Affairs* 411-424.
48. Joasia Luzak, 'Online Disclosure Rules of the Consumer Rights Directive: Protecting the Passive or the Active Consumers?' (2015) 4(3) *Journal of European Consumer and Market Law* 79-87.
49. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [22].
50. Ibid, 23.

when they should limit the use of hyperlinks as it could affect transparency, when and how they should make information more prominent through font size or style, whether they should use tables, symbols, and other visual tools, etc. Thus, when it comes to presenting information to consumers online, business organisations have actually offered more comprehensive recommendations than the Commission has so far. These recommendations also include visual examples of good practices in presenting consumer information online.[51] Although it appears that the Commission has facilitated the creation of these recommendations,[52] in its 2021 *Consumer Rights Guidance*, it only refers to the recommendation on layering information[53] and does not indicate whether it endorses any other transparency practices.

Furthermore, the absence of clear guidance on the interpretation of transparency in the online context is also apparent in the case of more recent legislation. For instance, in 2019, the European legislature modernised the CRD and the Unfair Commercial Practices Directive (UCPD),[54] introducing provisions aimed at enhancing transparency in online marketplaces.[55] These provisions include the obligation to provide consumers with general information about the ranking parameters used to display offers,[56] a requirement that the Commission has interpreted consistently in both directives. The 2021 *Consumer Rights Guidance* explains that the CRD requires online marketplaces to provide consumers only with general information about the ranking parameters and their relative importance (and not also an explanation of the reasons behind the ranking) because consumers "*require concise information that is easy to understand*".[57] This information "*must be made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented*".[58] The same explanation can be found in the Commission's 2021 *Unfair Commercial Practices Guidance*.[59] While both guidance documents emphasise the need for accessible and

51. Self-regulatory initiative for a better presentation of information to consumers from 19 July 2019, 4-16, available here: https://commission.europa.eu/document/94f2c3a0-6be1-41c6-ba21-3a67ef7d3bee_en (accessed 8 May 2024).
52. Ibid, 3.
53. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [23].
54. Whilst the CRD only applies to marketplaces that facilitate the conclusion of consumer contracts, the UCPD applies to price comparison tools and online search engines as well. See 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [38-39].
55. Articles 3 and 4 of Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules OJ L 328, p. 7–28 (Modernisation Directive, or MD).
56. See Articles 6a and 7(4a) within Articles 4(5) and 3(4) MD. See also Paola Iamiceli, 'Online Platforms and the Digital Turn in EU Contract Law: Unfair Practices, Transparency and the (pierced) Veil of Digital Immunity' (2019) 15(4) *European review of contract law* 410-413.
57. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [40].
58. Ibid, [39].
59. 2021/C 526/01: Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [91-92].

comprehensible information, the Commission missed the opportunity to clarify which specific information practices of online marketplaces are in line with these requirements. For example, the Commission did not specify when and to what extent marketplaces should present information on ranking parameters via hyperlinks, whether marketplaces should present this information in a specific visual manner to make the relationship with the offer clear, or whether and how marketplaces should (not) highlight some elements of this information through font size, style, or colour.

In the 2021 *Unfair Commercial Practices Guidance*, the Commission provides more comprehensive guidance on transparently conveying information about paid advertising in search results. Alongside the obligation for online marketplaces to disclose information about the ranking criteria for search queries, the UCPD also prohibits undisclosed paid advertising in search results.[60] To ensure transparency, search results that include advertisements or have higher rankings because of payments must be clearly and prominently indicated. These indicators should visually differentiate them from the general online interface, making it challenging for consumers to overlook the disclosure when viewing the search results.[61] When payments for achieving higher rankings influence the positioning of all displayed results and are included as ranking parameters, information regarding these payments can be communicated through a single clear and prominent statement on the search results page. This statement should be separate from and supplementary to the general information provided about ranking parameters.[62] The Commission has also given examples of actions taken against online marketplaces that have resulted in a greater transparency of information in advertisements on search results. Marketplaces have improved transparency by labelling products that are ranked according to payments and providing additional explanations of the rankings through links.[63] Furthermore, marketplaces have replaced labels such as "sponsored" with more explicit terms like "ad", "advert", or "advertisement", and made these terms more prominent.[64]

In addition to the UCPD, the Digital Markets Act (DMA) also governs the ranking of search results for specific online platforms known as "gatekeepers" since its adoption in 2022. Gatekeepers are large digital platforms that offer core platform services, including online search engines, app stores, and messenger services.[65] Among other things, the DMA requires gatekeepers to transparently, fairly, and non-discriminatorily rank third-party products and services that are

60. Article 3(7) MD.
61. 2021/C 526/01: Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [92].
62. Ibid.
63. Ibid, 93.
64. Ibid.
65. Articles 1(2) and 2(1) and (2) Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 OJ L 265, p. 1–66 (Digital Markets Act, or DMA).

similar to those offered by the gatekeeper itself.[66] The DMA does not provide further clarification on transparent ranking methods. Therefore, it is still uncertain whether the understanding of transparency in relation to search results and ranking criteria under the DMA will coincide with the interpretations based on the UCPD.

The DMA forms part of the Digital Services Package together with the Digital Services Act (DSA), which applies to online intermediaries and platforms, such as online marketplaces, social networks, content-sharing platforms, app stores, and online travel and accommodation platforms.[67] The DSA imposes two notable transparency obligations on online platforms. First, the DSA requires providers of very large online platforms and search engines to provide a "*concise, easily-accessible and machine-readable*" summary of their terms and conditions "*in clear and unambiguous language*".[68] This obligation aligns with behavioural science insights that advocate summarising consumer information to increase transparency.[69] Yet, the DSA lacks specific definitions for the numerous transparency requirements it imposes on these summaries, resulting in uncertainty about the criteria for assessing their transparency. An example of an act that provides such certainty is the 2019 *Commission Implementing Regulation*, which establishes a template for the summary of consumer contracts related to electronic communications services.[70] This regulation is a commendable and essential effort to employ legal information design strategies in order to enhance the transparency of consumer information.[71] It covers various aspects, such as (but not limited to) the length of the summary, its layout, including headings and margins, font size and colour, the incorporation of symbols, icons, graphics, hyperlinks, and pop-ups. Additionally, it emphasises the importance of using short sentences and avoiding technical language, jargon, and acronyms.[72]

66. Recital 52 and Article 6(5) DMA.
67. Recital 41 and Sections 1-3 of Chapter III of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC OJ L 277, p. 1–102 (Digital Services Act, or DSA).
68. Recital 48 and Article 14(5) DSA.
69. David Horton, 'Flipping the Script: Contra Proferentem and Standard Form Contracts' (2009) 80(2) *University of Colourado Law Review* 473; Michael Faure and Hanneke Luth, 'Behavioural Economics in Unfair Contract Terms' (2011) 34(3) *Journal of Consumer Policy* 338; Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 129-130; Rolf H. Weber, 'From disclosure to transparency in consumer law' in Klaus Mathis and Avishalom Tor (eds) *Consumer Law and Economics* (Springer 2021) 83-85; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 129-130; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 329-330.
70. See the Annex to the Commission Implementing Regulation (EU) 2019/2243 of 17 December 2019 establishing a template for the contract summary to be used by providers of publicly available electronic communications services pursuant to Directive (EU) 2018/1972 of the European Parliament and of the Council OJ L 336, p. 274–280 (Commission Implementing Regulation 2019/2243).
71. Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 329-330.
72. Recitals (4) to (8) of Commission Implementing Regulation 2019/2243.

Secondly, the DSA prohibits providers of online platforms from deceiving, manipulating, or preventing their users from making free and informed decisions through the design, organisation, or operation of their online interfaces.[73] Even though the DSA does not provide examples of online interface design that is (not) compatible with this obligation, it stipulates that the Commission can adopt guidelines on the application of this obligation to specific practices.[74] These practices include making specific choices more prominent during the decision-making process, repeatedly asking for a choice that the consumer has already made (e.g., through intrusive pop-ups), and making it more difficult to terminate a service compared to subscribing to it.[75] This represents the first instance of an EU consumer law act that explicitly delegates the power to offer specific guidance on transparency in the online environment to the Commission.

It is worth noting that the 2023 Distance Marketing of Consumer Financial Services Directive (DMFSD 2023), which aims to amend the CRD regarding financial services contracts concluded remotely and to revoke the current DMFSD, includes a comparable article.[76] However, instead of empowering the Commission to develop guidance on the transparency of online interface design, as seen in the DSA, the DMFSD 2023 mandates Member States to adopt measures addressing at least one of the three market practices mentioned above. Consequently, Member States may formulate rules specifically for online interfaces of financial services providers that differ from the guidelines designed by the Commission. This represents yet another missed opportunity to establish a coherent approach to information transparency in the online sphere, considering transparency requirements under various EU acts.

4. The role of transparency in EU consumer law

On an abstract level, the role of transparency is to enable visibility.[77] On a practical level, the role of transparency, just like its meaning, depends on the context and

73. Recital 67 and Article 25 DSA.

74. Article 25(3) DSA. As van Dam explains, Member States bear the primary responsibility for implementing legally binding rules established at the EU level. These rules are enshrined in primary legislation, such as the EU Treaties, as well as secondary legislation, including regulations, directives, and decisions. The European Commission aids Member States in implementing EU law through non-binding guidance documents. These documents, issued in various forms like working documents, guidelines, communications, or letters, provide additional support in interpretation and application of EU law. See J. C. A. van Dam, 'Guidance documents of the European Commission: a typology to trace the effects in the national legal order' (2017) 10(2) *Review Of European Administrative Law* 75-77.

75. Article 25(3) DSA.

76. Article 1(4) of Directive (EU) 2023/2673 of the European Parliament and of the Council of 22 November 2023 amending Directive 2011/83/EU as regards financial services contracts concluded at a distance and repealing Directive 2002/65/EC OJ L, 2023/2673 (DMFSD 2023) incorporates Article 16e into the CRD, which deals with transparency of online interface design.

77. Ida Koivisto, 'The Anatomy of Transparency: The Concept and its Multifarious Implications' (2016) *EUI Working Paper MWP* 2016/09 3; Rolf H. Weber, 'From disclosure to transparency in consumer law' in Klaus Mathis and Avishalom Tor (eds) *Consumer Law and Economics* (Springer 2021) 83.

the legal area in which it is applied. The systematisation of transparency, proposed by Fung, Graham, and Weil, illustrates its various roles. They distinguish three generations of transparency policies: the first generation involves right-to-know policies that guarantee public access to information related to governance and hold public institutions accountable.[78] The second generation encompasses targeted transparency policies that require private or public entities to collect, standardise, and provide information to help individuals make informed choices.[79] Lastly, the third generation involves collaborative transparency policies that merge information from the first- and second-generation policies with technology and the internet to generate personalised and individualised data.[80]

Whereas EU consumer law seems to assign several roles to transparency, such as increasing market transparency and comparability of offers[81] or ensuring legal certainty,[82] it largely focuses on what Fung, Graham and Weil consider second generation transparency.[83] Namely, despite criticism rooted in insights from behavioural science, which challenges the notion that consumers are rational actors who make decisions solely based on information,[84] the primary role that EU consumer law assigns to transparency is to enable consumers to choose suitable, or even optimal, goods and services on the EU market.[85]

In practice, the process of choosing a suitable product, trader, and transaction channel can be complex. Consumers need access to information about the characteristics of the products, which they must read and understand. However, understanding and comparing complex goods and services can be challenging. For example, selecting the best credit product that suits a consumer's financial situation and needs may involve considering and comparing different types of credit products, such as credit cards, revolving credit, or goods credit. Occasionally, consumers may

78. Archon Fung, Mary Graham and David Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press 2007) 25.
79. Ibid, 25 and 28.
80. Ibid, 25.
81. See, for instance, Recitals 19 and 43 CCD.
82. See, for instance, Recital 44 CRD. See also Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 310-313.
83. Looking at the legislative acts adopted since 2019, which I discuss in Section 3 of this Chapter, one can observe that EU consumer law increasingly regulates algorithmic transparency. As a result, there is an increasing emphasis on transparency cooperation policies.
84. Vanessa Mak, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2012) 1(4) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 258-259; Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43(1) *The Journal of legal studies* 6-8, 22-27; Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014) 79-93; Rolf H. Weber, 'From disclosure to transparency in consumer law' in Klaus Mathis and Avishalom Tor (eds) *Consumer Law and Economics* (Springer 2021) 76-81; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 100-103.
85. Examples include Recital 16 PTD, Recital 43 MCD and Recital 19 CCD. See also Vanessa Mak, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2012) 1(4) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 256, or my analysis of this objective in the context of the UCTD, CCD and CRD in Chapter 2, Sections 2.1.2., 2.2.2. and 2.3.2.

have to consider and compare different types of goods or services that can act as substitutes for credit products. For instance, instead of opting for goods credit to buy a car or a washing machine, consumers might choose to lease these products. To make an informed decision, they need to understand and compare the terms of different types of contracts, such as consumer credit and leasing contracts. Even after deciding on the product and contract type, consumers still have to choose a trader and decide whether to conduct the transaction offline or online.

Some directives attempt, albeit to a limited extent, to assist the consumer in their decision-making process by regulating transparency. For instance, the CRD,[86] the GDPR[87] and the CCD 2023[88] prohibit the use of default options, such as pre-ticked boxes. The rationale behind this prohibition is that the consumer's consent should not be inferred but rather should result from an affirmative action, indicating the consumer's "*freely given, specific, informed and unambiguous*" agreement.[89] Other examples are standardised information forms, which are included in the PTD,[90] the CCD,[91] the CCD 2023[92] and the CRD.[93] For instance, the CCD compels traders to furnish consumers with pre-contractual information regarding consumer credit through a standardised information form. This facilitates consumers in comparing credit offers and making an informed decision on whether to conclude a credit agreement.[94] The CCD 2023 aims to further enhance and standardise essential credit information by separating it from other mandatory credit information, specifying the maximum length for this information, and requesting creditors to customise it for the online environment.[95]

Given the complexity involved in choosing suitable or optimal products and services, it is understandable that scholars have discussed and criticised the role of information in guiding the decision-making process of consumers.[96] Regrettably, the European legislature rarely utilises insights from behavioural economics when regulating transparency, despite the potential benefits of such insights in

86. Article 22 CRD.
87. Recital 32 and Article 4(11) GDPR.
88. Article 15 CCD 2023.
89. Recital 32 GDPR and Recital 49 CCD 2023.
90. Annexes I and II PTD.
91. Articles 5(1) and 6(1) and Annexes II and III CCD.
92. Articles 10 and 11 and Annexes I and II CCD 2023.
93. Annexes II and III CCD.
94. Article 5(1) CCD. Also, on its website, the European Commission specifies that the lender must provide the consumer with standardised information to facilitate easy comparison of offers, see here: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/retail-financial-services/credit/consumer-credit_en (accessed 8 May 2024).
95. Articles 10 and 11 and Annexes I and II CCD 2023.
96. Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43(1) *The Journal of legal studies* 1-2; Vanessa Mak, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2012) 1(4) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 258-259; Omri Ben-Shahar and Carl E. Schneider, 'The failure of mandated disclosure' (2011) 159(3) *University of Pennsylvania Law Review* 711-719.

designing information to influence consumer decision-making.[97] Scholars have thus far predominantly explored whether consumers read mandated disclosures[98] and whether and how mandatory information can be improved.[99] While much of the academic discussion centres on the effectiveness or ineffectiveness of mandated disclosures in informing consumers, the specific role of transparency requirements in fostering informed decision-making is often overlooked and not thoroughly analysed.

Scholarship discussing the concept of transparency under the UCTD is an exception in this regard. Scholars distinguish between formal and substantive transparency based on the CJEU's case law,[100] which highlights the importance of

97. Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 312-330. I further discuss and substantiate this issue throughout Chapter 2.

98. Omri Ben-Shahar and Carl E. Schneider, 'The failure of mandated disclosure' (2011) 159(3) *University of Pennsylvania Law Review* 705-709; Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014) 79-93; Florencia Marotta-Wurgler and Daniel L. Chen, 'Does Contract Disclosure Matter?' (2012) 168(1) *Journal of institutional and theoretical economics* 100-110; Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43(1) *The Journal of legal studies* 6-8, 22-27; Maartje Elshout et al., 'Study on consumers' attitudes towards Terms and Conditions (T&Cs)' (2016) 20-25; Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) 39 *Legal Studies* 385-397; Benedikt Schmitz and Charlotte Pavillon, 'Measuring Transparency in Consumer Contracts: The Usefulness of Readability Formulas Empirically Assessed' (2020) 9(5) *Journal of European Consumer and Market Law* 195-200.

99. Omri Ben-Shahar and Adam Chilton, 'Simplification of Privacy Disclosures: An Experimental Test' (2016) 45 (S2) The Journal of legal studies S45-S66; Maartje Elshout et al., 'Study on consumers' attitudes towards Terms and Conditions (T&Cs)' (2016) 26-103; Genevieve Helleringer and Anne-Lise Sibony, 'European consumer protection through the behavioral lens' (2017) 23 (3) Columbia Journal of European Law 624; Ognyan Seizov, Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) Journal of consumer policy 158-168; Wendy Wagner and Will Walker, Incomprehensible! A Study of How Our Legal System Encourages Incomprehensibility, Why It Matters, and What We Can Do About It (Cambridge University Press 2019) 247-270; Arianna Rossi, Rossana Ducato, Helena Haapio and Stefania Passera, 'When Design Met Law: Design Patterns for Information Transparency' (2019) 122-123(5) Doctrine Rechtsleer 98-121; Zsolt Ződi, 'The limits of plain legal language: understanding the comprehensible style in law' (2019) 15 International Journal of Law in Context 251-260; Alexander J. Wulf and Ognyan Seizov, 'The Principle of Transparency in Practice: How Different Groups of Stakeholders View EU Online Information Obligations' (2020) 28(5) European Review of Private Law 1089-1092; Ognyan Seizov and Alexander J. Wulf, 'Communicating Legal Information to Online Customers Transparently: A Multidisciplinary Multistakeholderist Perspective' (2021) 33(2) Journal of international consumer marketing 162-175; Marco B.M. Loos and Joasia Luzak, Update the Unfair Contract Terms Directive for Digital Services (2021) 42-47; Alexander J. Wulf and Ognyan Seizov, '"Please understand we cannot provide further information": evaluating content and transparency of GDPR-mandated AI disclosures' (2022) AI & Society 251-256; Alexander J. Wulf and Ognyan Seizov, 'How to Improve Consumers' Understanding of Online Legal Information. Insights from a Behavioral Experiment' (2022) European Journal of Law and Economics 563-582; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) Journal of consumer policy 321-330.

100. Francesca Brunetta d'Usseaux, 'Formal and substantive aspects of the transparency principle in Euro- pean Private Law' (1998) *Consumer Law Journal* 320-338; Johanna Waelkens, 'Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts', in Ilse Samoy and Marco B.M. Loos (eds), *Information and Notification Duties* (Intersentia 2015) 47, 61-63; Martin Ebers, 'Unfair Contract Terms Directive (93/ 13)', in Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers (eds), *EU Consumer Law Compendium: The Consumer Acquis and its transposition*

information on contract's terms and consequences for the decision-making process of consumers[101] and requires this information to be accessible, grammatically intelligible, and comprehensible in terms of its legal and economic implications.[102] Formal transparency ensures the availability and readability of information on contract terms, while substantive transparency safeguards consumers' comprehension of the legal and economic consequences of this information.[103] The information regarding the terms and consequences of the contract should be formally and substantively transparent in order to provide a suitable basis for the consumer's decision on whether or not to enter into a contract.[104] Section 2 of this Chapter explains that the CJEU has not yet applied its interpretation of transparency under the UCTD to other EU consumer law directives. Hence, it is not surprising that many scholars have not yet extended the analysis of formal and substantive elements of transparency and their influence on consumers' decision-making processes to other EU directives.

5. Research objectives and questions

The topic of the (transparent) provision of mandatory information is well-embedded in academic discourse. Within this discourse, two specific approaches hold relevance for the determination of the objectives of this thesis. The first approach revolves around studies that derive insights from behavioural sciences in order to address questions regarding the efficacy of mandatory information. These studies explore whether consumers genuinely engage with the mandatory information,

in the Member States (Sellier 2008) 245-246; Marco B.M. Loos, 'Double Dutch – On the role of the transparency requirement with regard to the language in which standard contract terms for B2C-contracts must be drafted' (2017) 6(2) *Journal of European Consumer and Market Law* 55, 59; Mia Junuzović, 'Transparency of (Pre-)Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?' (2018) 14 *Croatian Yearbook of European Law and Policy* 72-98; Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 99-107; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 83-90.

101. See, e.g., Case C-92/11 *RWE Vertrieb*, point 44; Case C-226/12 *Constructora Principado*, point 25; Case C-26/13 *Kásler*, point 70; Case C-348/14 *Bucura*, point 51; Case C-154/15 *Gutiérrez Naranjo*, point 50.

102. Case C-143/13 *Matei*, points 72-74; Case C-96/14 *Van Hove*, points 40-41; Case Case C-348/14 *Bucura*, point 55; Case C-186/16 *Andriciuc*, points 44-51; Case C-51/17 *OTP Bank and OTP Faktoring*, points 73-78; Case C-448/17 *EOS KSI Slovensko*, point 61; Case C-227/18 *VE*, points 33-40; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, points 29-35; Case C-38/17 *GT*, points 32-35; Case C-191/15 *Verein für Konsumenteninformation/Amazon*, points 65-71.

103. Francesca Brunetta d'Usseaux, 'Formal and substantive aspects of the transparency principle in Euro- pean Private Law' (1998) *Consumer Law Journal* 320-338; Johanna Waelkens, 'Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts', in Ilse Samoy and Marco B.M. Loos (eds), *Information and Notification Duties* (Intersentia 2015) 47, 61-63; Martin Ebers, 'Unfair Contract Terms Directive (93/ 13)', in Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers (eds), *EU Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier 2008) 245-246; Marco B.M. Loos, 'Double Dutch – On the role of the transparency requirement with regard to the language in which standard contract terms for B2C-contracts must be drafted' (2017) 6(2) *Journal of European Consumer and Market Law* 55, 59.

104. See, e.g., Case C-26/13 *Kásler*, points 71-75.

how this information can potentially influence their behaviour, and whether there are methods to enhance it and attain the desired behavioural impact.[105] Also, such studies typically critique or question the information paradigm, which is based on the idea of an empowered consumer who is capable of accessing, processing, and utilising information to make decisions in the marketplace.[106] Unlike the economic rationale behind the information paradigm, which advocates for *more* information, the behavioural rationale argues for *better* information instead.[107]

However, studies that rely on behavioural insights often do not distinguish between providing information and providing *transparent* information,[108] or they equate transparency with the provision of *effective* information, meaning information that impacts consumers' behaviour.[109] Consequently, these studies usually analyse the effectiveness of laws that mandate information disclosures without considering whether and to what extent these laws ensure the transparency of the mandatory information. For example, one of the most heavily criticised aspects of mandatory information disclosures is their excessive length, which can overwhelm consumers and impede their ability to read and understand the disclosed information.[110] However, a lengthy disclosure may be incompatible with various transparency requirements that consumer law imposes on mandatory information, such as clarity, legibility, comprehensibility, or conciseness. These requirements aim to ascertain the kind of information that can be deemed as *better information from a legal standpoint*, safeguarding consumers against both long and short non-transparent disclosures. Taking into account the aforementioned concerns, one of the objectives of this thesis is to examine the degree to which EU consumer law, which imposes numerous transparency requirements on mandatory information, actually compels traders to formulate and present this information in a way that enables consumers to access, read, and comprehend it.

The second relevant approach pertains to the examination of transparency under the UCTD. As mentioned earlier, the CJEU interpreted the meaning,

105. Omri Ben-Shahar and Carl E. Schneider, 'The failure of mandated disclosure' (2011) 159(3) *University of Pennsylvania Law Review* 711-719; Florencia Marotta-Wurgler and Daniel L. Chen, 'Does Contract Disclosure Matter?' (2012) 168(1) *Journal of institutional and theoretical economics* 100-110; Vanessa Mak, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2012) 1(4) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 258-259; Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43(1) *The Journal of legal studies* 1-2; Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014) 79-93;

106. Vanessa Mak, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2012) 1(4) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 258-259.

107. Rolf H. Weber, 'From disclosure to transparency in consumer law' in Klaus Mathis and Avishalom Tor (eds) *Consumer Law and Economics* (Springer 2021) 83-84.

108. Florencia Marotta-Wurgler and Daniel L. Chen, 'Does Contract Disclosure Matter?' (2012) 168(1) *Journal of institutional and theoretical economics* 100-117.

109. Omri Ben-Shahar and Adam Chilton, 'Simplification of Privacy Disclosures: An Experimental Test' (2016) 45 (S2) *The Journal of legal studies* S45-S66.

110. Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014) 94-107.

objectives, scope, and consequences of breaching transparency under this directive. Scholars have extensively analysed the CJEU's interpretation, and the Commission has included this interpretation in its *Unfair Contract Terms Guidance*.[111] However, as I observed in Section 2, the CJEU has not expanded its interpretation of transparency, based on the UCTD, to other directives, even when they have similar or identical transparency requirements. Furthermore, despite notable exceptions, such as the 2023 transparency study by Jabłonowska and Tagiuri mentioned above,[112] neither scholarship[113] nor the Commission has adequately addressed the issue of whether transparency requirements should have a harmonised meaning across EU consumer law.

This thesis aims to bridge this gap and provide a more concrete understanding of the concept of transparency in EU consumer law. The analysis in this thesis includes the notion of transparency in the UCTD, but also extends to the transparency notions in other directives, namely the CCD and the CRD. By exploring transparency across multiple directives, this thesis seeks to offer a comprehensive and in-depth understanding of the transparency concept in EU consumer law. Section 6 further elaborates on the rationale behind the selection of these directives.

Taking the aforementioned objectives into consideration, the central research question that this thesis aims to answer is as follows:

What is the meaning and scope of the concept of transparency under the UCTD, the CCD and the CRD, and to what extent can transparency meet the objective(s) that these directives assign to it?

To answer the main research question, I have identified the following research sub-questions, which form a framework for analysing the concept of transparency in European consumer contract law.

1) What are the objectives of transparency and what are the contractual consequences of the lack of transparency?
2) How do EU and national legislatures, courts and enforcement authorities interpret and assess transparency under the UCTD, the CCD and the CRD?
3) Does digitalisation affect the interpretation and assessment of transparency?
4) To what extent do the interpretation and assessment of transparency in EU, German, Croatian and English law converge or diverge?

111. See Chapter 2.
112. Agnieszka Jabłonowska and Giacomo Tagiuri, 'Rescuing transparency in the digital economy: in search of a common notion in EU consumer and data protection law' (2023) *Yearbook of European Law* 1-41.
113. Joasia Luzak and I discuss this question and critique the differences in the CJEU's interpretation of transparency under the UCTD and the CCD in Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 101-102.

5) Considering the objectives of transparency as a benchmark, what are the best practices currently applied in the assessment of transparency of consumer information and how can this assessment be improved?

While my thesis pursues its own independent research objectives and questions, it is also part of a larger research project titled "The ABC of Online Disclosure Duties: Towards a More Uniform Assessment of the Transparency of Consumer Information in Europe". The project was funded by the Dutch and German Research Councils (NWO and DFG) and led by Prof. Joasia Luzak. This interdisciplinary research project delves into the topic of consumer information transparency, combining legal insights with perspectives from economics and communication sciences. As a result, the project develops European guidelines for national enforcement authorities to assess the transparency of consumer information.[114]

The project identifies best practices for evaluating transparency through qualitative research and explores methods to improve transparency through quantitative research and literature reviews. Furthermore, the project incorporates insights from my doctoral research, which highlights disparities in interpreting and applying transparency requirements across EU consumer contract law, as well as the detrimental effects of insufficient harmonisation. Additionally, my dissertation references arguments and findings that have already been published in three separate papers, including one authored by myself, another co-authored with Prof. Luzak, and a third co-authored with the entire project team.[115]

6. Research scope and exclusions from it

As explained earlier, the concept of transparency is well-embedded in EU consumer law, with numerous directives referring to it, establishing various transparency requirements and/or prescribing the format of consumer information. While academic studies are increasingly focusing on enhancing the transparency of mandated disclosures in EU consumer law,[116] the interpretation and assessment of transparency requirements beyond the UCTD are under-analysed.

---

114. More information about this project is available here: https://www.nwo.nl/en/projects/464-15-192 (accessed 8 May 2024). The project's empirically motivated guidelines for transparent disclosures can be found in Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 321-330.

115. Mia Junuzović, 'Transparency of (Pre-)Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?' (2018) 14 *Croatian Yearbook of European Law and Policy* 69-98; Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 97-107; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 307-333.

116. Vanessa Mak, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2012) 1(4) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 258-259; Ognyan Seizov,

My doctoral thesis aims to shed further light on the interpretation and evaluation of transparency in various areas of EU consumer law. In order to accomplish this, it examines the notion of transparency within the framework of two additional directives, alongside the UCTD. Although there are several EU consumer law directives that incorporate the concept of transparency and could have been included in this doctoral research, I have chosen to restrict my analysis to the UCTD, CCD, and CRD. This decision enables a comprehensive and comparative exploration of transparency within the legal sources associated with these directives.

I have selected these directives for three reasons. Firstly, they include several transparency requirements, some of which may be perceived as similar or identical from a linguistic standpoint.[117] Additionally, the CCD and the CRD also stipulate the format for mandatory consumer information, dictating how traders should transparently provide information to consumers.[118] Secondly, these directives differ in their scope and level of harmonisation. The UCTD is a principle-based, horizontally applicable directive, that relies on minimum harmonisation.[119] In contrast, the CRD and the CCD exclusively apply to sales contracts and consumer credit contracts,

Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 152-168; Arianna Rossi, Rossana Ducato, Helena Haapio and Stefania Passera, 'When Design Met Law: Design Patterns for Information Transparency' (2019) 122-123(5) *Doctrine Rechtsleer* 98-121; Zsolt Ződi, 'The limits of plain legal language: understanding the comprehensible style in law' (2019) 15 *International Journal of Law in Context* 251-260; Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) 39 *Legal Studies* 385-397; Benedikt Schmitz and Charlotte Pavillon, 'Measuring Transparency in Consumer Contracts: The Usefulness of Readability Formulas Empirically Assessed' (2020) 9(5) *Journal of European Consumer and Market Law* 195-200; Ognyan Seizov and Alexander J. Wulf, 'Communicating Legal Information to Online Customers Transparently: A Multidisciplinary Multistakeholderist Perspective' (2021) 33(2) *Journal of international consumer marketing* 162-175; 1081-1083, Alexander J. Wulf and Ognyan Seizov, 'The Principle of Transparency in Practice: How Different Groups of Stakeholders View EU Online Information Obligations' (2020) 28(5) *European Review of Private Law* 1089-1092; Marco B.M. Loos and Joasia Luzak, Update the Unfair Contract Terms Directive for Digital Services (2021) 42-47; Alexander J. Wulf and Ognyan Seizov, '"Please understand we cannot provide further information": evaluating content and transparency of GDPR-mandated AI disclosures' (2022) *AI & Society* 251-256; Alexander J. Wulf and Ognyan Seizov, 'How to Improve Consumers' Understanding of Online Legal Information. Insights from a Behavioral Experiment' (2022) *European Journal of Law and Economics* 563-582; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 128-134; Rolf H. Weber, 'The Disclosure Dream – Towards a New Transparency Concept in EU Consumer Law' (2023) 67 *Journal of European Consumer and Market Law* 69-70; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 321-330.

117. Such as plainness, clarity, intelligibility, and comprehensibility.

118. Annexes II and III CCD and Annex I CRD.

119. SWD (2017) 209 final: Report of the Fitness Check on Directive 2005/29/EC, Council Directive 93/13/EEC, Directive 98/6/EC, Directive 1999/44/EC, Directive 2009/22/EC and Directive 2006/114/EC [5, 7, and 41].

respectively,[120] and both are based on full harmonisation.[121] Yet, the CCD is limited to credit products and services, whereas the CRD covers a wider array of products and services.[122] The combination of similarities and differences in terms of scope, level of harmonisation, and regulation of transparency in these three directives offers an opportunity to explore whether the interpretation and assessment of transparency converge or diverge among them. Additionally, since my thesis also explores the impact of digitalisation on the interpretation and assessment of transparency, it is essential to examine directives that are applicable to online contracts. Both the UCTD and the CRD are generally applicable to the majority of online contracts, whereas the CCD only applies when consumer credit is sought. Therefore, these directives can provide valuable insights into the relationship between transparency and digitalisation in consumer transactions.

The research does not include more recent legislation regarding the transparency of online consumer contracts, such as the Digital Content Directive (DCD),[123] the DMA or the DSA because these acts were not implemented or applicable in the national legal systems of the Member States during the research period. As a result, these legislative acts are not suitable for conducting a comparative analysis of the transparency concept across national jurisdictions, which is a key aspect of the research. Additionally, in October and November 2023, the European legislature adopted directives that amended the CCD and the CRD – the CCD 2023 and the DMFSD 2023. Although these directives have not yet been transposed in national legal systems, the research examines how they address the transparency issues previously identified when examining older provisions of the CCD and CRD. However, this research does not provide an extensive discussion of these new directives as they have not been transposed yet. Further research will be necessary to evaluate their impact on the transparency concept and their interaction with other EU acts related to information transparency in the online sector.

As previously discussed, the lack of a harmonised interpretation of the concept of transparency at the EU level may lead to different understandings and evaluations of transparency at the national level. To explore this issue, my research goes beyond examining how the European legislature, the CJEU, and academia perceive transparency under the UCTD, the CCD, and the CRD. It also investigates the opinions of national legislatures, judges, and scholars regarding transparency by analysing transparency provisions in national laws that implement these directives.

120. Articles 3-8 CRD and Article 2 CCD. The CRD contains provisions that could be seen as horizontally applicable, such as Article 5. Yet, due to the major exceptions from its scope, limiting its applicability to two types of contracts (off-premises and distance contracts), it is more appropriate to consider it a sector-specific directive rather than a horizontally applicable one.

121. SWD(2017) 169 final: Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU [6-7]; Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [6, 12].

122. Article 3(1) CRD and Article 2(1) CCD.

123. Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services OJ L 136, p. 1–27 (Digital Content Directive, or DCD).

Although all EU Member States' legal systems could have been considered, I have chosen to focus my research on three specific legal systems: German, Croatian, and English. This selection allows for a comprehensive analysis of transparency within distinct national contexts.

As legal acts rarely define transparency, and legislatures provide only limited guidance on its interpretation and assessment, my study of transparency relies to a large extent on case law. Case law presents practical instances of how courts have interpreted and implemented transparency requirements in specific situations, bridging the gaps in the legislative framework. Moreover, case law demonstrates the continuous evolution and adjustment of the law, offering a dynamic perspective on the development and assessment of transparency over time.

To explore the extent to which the interpretation and assessment of transparency converge or diverge in different legal systems, I have chosen to contrast two civil law systems with a common law system. By examining case law from different legal systems (civil law and common law), the research allows for a comparison of how transparency requirements are understood in various jurisdictions. Common law systems are less prescriptive compared to civil law systems. In these systems, case law establishes legal precedents that have an impact on future judgments[124] and judges have a central role in the development of law. They decide which precedents to apply in each new case and adopt generally binding legal decisions.[125]

I have chosen to include English law as the representative common law system in my research. The English common law system is larger compared to other common law systems in the EU, such as those in Malta and Ireland. When I started my doctoral research in 2016, the United Kingdom (UK) was a member of the EU. However, the UK exited the EU on 31st January 2020, after completing the withdrawal process commonly known as Brexit.[126] Despite the UK no longer being a member of the EU, English law still has the potential to offer valuable insights into the interpretation and evaluation of consumer information transparency. In English law, the transparency of contract terms was initially guaranteed through rules on incorporation and interpretation stemming from common law. However, in order to comply with EU law, the UK legislature had to further supplement these rules with statutory law.[127] Furthermore, despite the UK's departure from the EU, the contribution of English law to understanding transparency in EU consumer law remains pertinent. This is because the UK legislature has implemented all three directives mentioned in this thesis, and English courts have interpreted the transparency requirements outlined in each of these directives.

---

124. Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1966) 15 (3) *The American Journal of Comparative Law* 424-426, 431-432.
125. Ibid, 424-425.
126. Information on the withdrawal process is available here: https://eur-lex.europa.eu/content/news/Brexit-UK-withdrawal-from-the-eu.html (accessed 8 May 2024).
127. Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428-437.

As the majority of legal systems in the EU are based on civil law, it is appropriate for this study to examine the two different civil law systems. Civil law systems rely on codified laws and assign a less prominent role to judges, who apply and interpret the provisions of the relevant legal statute to the specific facts of a case.[128] While civil law courts may follow one another's reasoning in practice, they are only obligated to do so in specific circumstances.[129]

Among the civil law systems within the EU, I have chosen to analyse German and Croatian law due to their distinct approaches to consumer protection. German law has one of the most advanced systems of consumer protection in the EU, which has required traders to provide consumers with transparent information for several decades.[130] Croatian law is characterised by a relatively young system of consumer protection. Even before Croatia joined the EU, its contract law included provisions protecting consumers.[131] However, a comprehensive consumer protection system was only introduced during the process of joining the European Union,[132] making this system just over a decade old. The provisions for consumer protection are distributed among numerous laws, which results in the fragmentation of consumer law.[133] Furthermore, Croatia is often not included in comparative studies regarding the implementation of EU law, especially when compared to countries like Germany or the UK. This is partly because the Croatian language is not widely spoken or understood beyond Croatia. As a Croatian citizen with a legal education in Croatia, I have unique insights into the Croatian legal system that many scholars outside of Croatia do not possess.

The purpose of comparing these national legal systems is to gain a better understanding of how they perceive the concept of transparency in consumer law. This comparison aims to determine if their interpretations and evaluations of consumer information transparency align or differ. Additionally, the study aims to identify the most effective approaches to assessing transparency, considering the intended objectives of transparency as a benchmark.

---

128. Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1966) 15 (3) *The American Journal of Comparative Law* 426-427 and 431-432.
129. Ibid, 426-427.
130. MüKoBGB/Wurmnest, 8. Aufl. 2019, BGB § 307 Rn. 56; Ulrich Schumacher, 'Die Aufwertung des Transparenzgebots und die Konsequenzen für das Mietrecht – Neun Thesen' (2003) 1 *Neue Zeitschrift für Miet- und Wohnungsrecht* 14; Jürgen Basedow, 'Transparenz als Prinzip des (Versicherungs-) Vertragsrechts' (1999) 25 *Versicherungsrecht* 1045.
131. Marko Baretić, 'Zaštita potrošača u Republici Hrvatskoj nakon ulaska u Europsku Uniju – jesmo li implementacijom europskog prava izgradili sustav zaštite potrošača?' in Thierry Bourgoignie and Tatjana Jovanić (eds) *Strengthening consumer protection in Serbia/Jačanje zaštite potrošača u Srbiji* (University of Belgrade 2013) 67.
132. Ibid. See also Emilia Mišćenić, 'Usklađivanje prava zaštite potrošača u Republici Hrvatskoj' (2013) 4(1) *Godišnjak Akademije pravnih znanosti Hrvatske* 145-146.
133. Ibid, 150-155. See also Ivica Crnić, 'Zaštita prava potrošača i novi Zakon o obveznim odnosima' (2006) 45(6) *Pravo u gospodarstvu* 172-173; Marko Baretić, 'Je li europsko uređenje ugovornog prava zaštite potrošača optimalni regulacijski okvir' in Jakša Barbić (ed) *Zaštita potrošača u Republici Hrvatskoj* (Modernizacija prava, knjiga 29 2016) 88, 91; Emilia Mišćenić, 'Croatian Consumer Protection Law: From Legal Approximation to Legal Fragmentation (Part I)' (2019) 23 *Studia Iuridica Toruniensia* 189-197.

7. Methodology

My thesis utilises the comparative research method to investigate how EU, German, Croatian, and English laws interpret and evaluate the concept of transparency, focusing on the implemented provisions of the UCTD, CCD, and CRD. The comparison seeks to identify both similarities and differences[134] in these jurisdictions' approaches to transparency of consumer information. The object of the comparison[135] is the concept of transparency, which includes not only explicit mentions of transparency but also requirements that embody it, such as clarity, comprehensibility, or prominence, as well as regulatory tools intended to guarantee transparency, like standardised information forms and other design-related requirements. The research focuses on transparency, standardisation and design requirements that apply to both pre-contractual and contractual information. It also investigates the objectives and contractual consequences associated with these requirements.

In my study of the transparency concept, I describe and analyse legislation, guidance documents interpreting legislation, case law, and literature, with a focus on examining how EU and national legislatures, courts, and enforcement authorities interpret and assess the transparency of consumer information. Although my analysis primarily revolves around case law, I also consider guidelines and rules developed by enforcement authorities, where they are available and relevant.[136] While conducting the analysis of legal sources and literature, I primarily relied on online research,[137] except for a two-month research stay at the University of Zagreb and a two-day visit to the Humboldt University of Berlin. However, I acknowledge that this approach may have led to the potential oversight of any relevant cases and literature that were not accessible in the online databases used during my research. The cut-off date for the analysis of case law is 31st December 2022, with the exception of a few key EU cases and one English case from 2023.

134. Marieke Oderkerk, 'The Need for a Methodological Framework for Comparative Legal Research: Sense and Nonsense of "Methodological Pluralism" in Comparative Law' (2015) 79(3) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 597-598.

135. Ibid, 597-598 and 610.

136. For instance, in the English legal system, the Financial Conduct Authority (FCA), which serves as the financial conduct regulator, has the authority to both enforce and establish regulations for consumer credit. To that regard, see HM Treasury, Department for Business, Innovation & Skills, 'A new approach to financial regulation: transferring consumer credit regulation to the Financial Conduct Authority' (2013) [9-11]. For this reason, in order to understand how the English legal system views the concept of transparency in the context of consumer credit information, it is necessary to consider not only the interpretation of this concept by the UK legislature and English courts but also by the FCA.

137. I have used the following online databases: the online library of the University of Amsterdam (https://uba.uva.nl/en/home), Curia (https://curia.europa.eu/jcms/jcms/j_6/en/), Beck online (https://beck-online-beck-de.proxy.uba.uva.nl/Home), Westlaw UK (https://uk-westlaw-com.proxy.uba.uva.nl/Browse/Home/WestlawUk?comp=wluk&transitionType=Default&contextData=(sc.Default), IUS-info (https://www.iusinfo.hr) and Hrčak (https://hrcak.srce.hr).

In my research, I adopt an internal perspective[138] to compare and evaluate practices related to the interpretation and assessment of transparency in EU, German, Croatian and English law. This means that I accept the reliance of the UCTD, the CCD, and the CRD on traders' obligation to provide transparent consumer information and the underlying objectives of transparency as a given. I do not question the effectiveness of this legislative choice or whether and when (transparent) mandated disclosures can influence consumers' decision-making process and behaviour. My primary focus is to investigate whether EU and national legislatures, courts, and (where applicable) enforcement authorities interpret and assess transparency in accordance with the objectives outlined in these directives. Throughout the comparison of different practices in the interpretation and assessment of transparency, I rely on the objectives of transparency stated in these directives to evaluate existing practices and provide recommendations for enhancing the assessment of transparency.

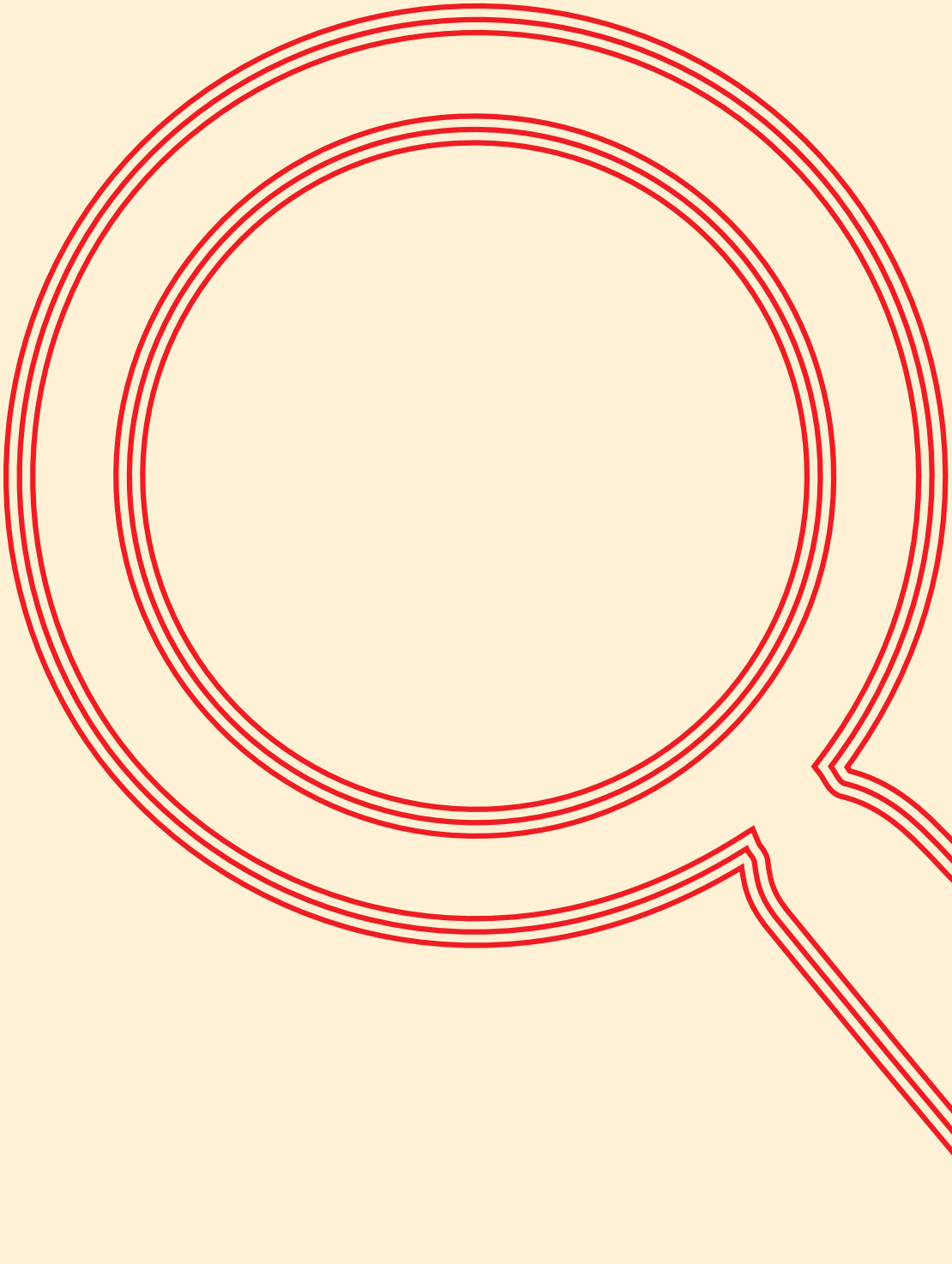
8. Book structure

Chapters 2, 3, 4, and 5, of the thesis explore the first three sub-research questions, examining the concept of transparency within three directives and four jurisdictions. These chapters analyse the meaning of transparency, its objectives, and the contractual consequences of breaching it, as well as the impact of digitalisation on transparency. Chapter 2 establishes the EU legal framework for the study and investigates transparency under the UCTD, CCD, and CRD. It identifies gaps and inconsistencies in the interpretation and assessment of consumer information transparency, highlighting unanswered questions related to transparency that arise under EU law. The aim is to examine if national laws provide answers to these questions. Chapters 3, 4, and 5 investigate the concept of transparency in German, Croatian, and English law, respectively. They identify relevant national practices in interpreting and assessing consumer information transparency and evaluate the extent to which these practices address the observed issues at the EU level.

Chapters 6 and 7 present the key findings of the study, tackling the fourth and fifth research sub-questions, while also responding to the main research question. Chapter 6 critically examines the main findings concerning the interpretation and evaluation of transparency, both within and across the four jurisdictions that were studied. Lastly, Chapter 7 identifies current best practices regarding the interpretation and assessment of transparency and offers recommendations to European and national legislatures and enforcement authorities that could enhance their understanding of transparency in alignment with its intended goals.

138. Martijn Hesselink, 'A European Legal Method? On European Private Law and Scientific Method' (2009) 15(1) *European Law Journal* 21, 33-34.

1



CHAPTER 2

The concept of transparency in European consumer law – an analysis of the UCTD, the CCD and the CRD

2.1. The concept of transparency under the UCTD

2.1.1. The development of the transparency concept under the UCTD

2.1.1.1. The adoption and content of the UCTD

The UCTD was adopted in 1993, in the face of divergent national laws that regulate unfair contract terms[139] and with the aim of approximating these laws[140] in order to facilitate cross-border commerce.[141] It obliges Member States to ensure that unfair contract terms are not legally binding on consumers[142] and to take measures to prevent the ongoing use of such terms in consumer contracts.[143] The UCTD is a horizontal directive, which means that it applies to the entire economy rather than specific sectors.[144] It is also a principle-based directive, which means that it establishes the criteria by which the behaviour of traders will be evaluated in specific cases.[145]

In terms of scope, the UCTD applies both to online and offline contracts[146] and focuses on terms that have not been individually negotiated.[147] Therefore, all individually negotiated terms, including terms that reflect mandatory and statutory provisions, as well as provisions of international law, are excluded from the scope of the UCTD.[148] Additionally, the UCTD is a minimum harmonisation directive which means that Member States are permitted to regulate the subject matter falling within its scope in a more stringent manner, if this results in better consumer protection.[149]

The UCTD covers only business-to-consumer (B2C) relationships[150] and considers as unfair contractual terms that, contrary to the principle of good faith, lead to a significant imbalance between the contractual rights and obligations of the parties involved, to the detriment of the consumer.[151] Contract terms pertaining to the definition of the main subject matter and the adequacy of price and remuneration for goods or services (core contract terms)[152] fall under the ambit of the UCTD. However, these terms are not subject to unfairness assessment if they are written in plain, intelligible language.[153] The obligation to draft contract terms in plain,

139. Recitals 2 and 3 UCTD.
140. Article 1(1) UCTD.
141. Recital 5 UCTD.
142. Article 6(1) UCTD.
143. Article 7(1) UCTD.
144. SWD (2017) 209 final: Report of the Fitness Check on Directive 2005/29/EC, Council Directive 93/13/EEC, Directive 98/6/EC, Directive 1999/44/EC, Directive 2009/22/EC and Directive 2006/114/EC [5].
145. Ibid, 7 and 41.
146. Ibid, 8.
147. Recital 12 and Article 3(1) and (2) of the UCTD.
148. Articles 3(1) and (2), and 1(2) of the UCTD. However, Member States are at liberty to extend the application of the UCTD to terms that are excluded from its scope.
149. Article 8 UCTD.
150. Article 1(1) UCTD.
151. Article 3(1) UCTD.
152. Hugh Beale, 'Unfair Terms in Contracts: Proposals for Reform in the UK' (2004) 27(3) Journal of Consumer Policy 297-298.
153. Article 4(2) UCTD.

intelligible language applies not only to core contract terms, but also to all contract terms according to the UCTD.[154] Additionally, the UCTD provides that any ambiguous terms should be interpreted in a manner most favourable to the consumer.[155] It can, therefore, be observed that the UCTD expresses the concept of transparency through the requirement of drafting contract terms in plain, intelligible language. This requirement not only establishes *how* standard contract terms should be drafted in consumer contracts, but it also imposes an obligation on traders to make these terms available to consumers.[156]

2.1.1.2. The UCTD's transparency requirement

As mentioned in the previous section, the UCTD requires traders to draft contract terms **in plain, intelligible language**.[157] This obligation can be found in Article 4(2) of the UCTD, which determines the scope of control over unfairness of core contract terms. Article 5 of the UCTD imposes a general obligation to draft terms in a transparent manner. Apart from mandating transparency of contract terms, Article 5 of the UCTD also includes an interpretation rule stating that any ambiguity in the meaning of a term should be interpreted in the manner most favourable to the consumer. The obligation of traders to draft contract terms in plain, intelligible language was introduced based on the recommendation of the European Economic and Social Committee (EESC)[158] and the European Parliament (the Parliament),[159] which were inspired by practices of some Member States and specifically the German Federal Court of Justice (Bundesgerichtshof, or the BGH).[160]

The UCTD does not define the meaning and scope of the requirement to draft contract terms in plain, intelligible language, and its recitals do not provide for a more specific interpretation of this requirement. For almost two decades, since the adoption of the UCTD, the transparency requirement has not garnered significant

154. Article 5 UCTD.

155. Ibid. The CJEU confirmed in its case law that the transparency requirement from Article 4(2) UCTD has the same scope as the transparency requirement in Article 5 UCTD. See, e.g., Case C-26/13 *Kásler*, point 69.

156. See, e.g., Case C-472/10 *Invitel*, point 27; Case C-92/11 *RWE Vertrieb*, point 44, Case C-26/13 *Kásler*, point 67. See also Hans-W. Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) *Common Market Law Review* 786-788.

157. Stefan Grundmann, 'A Modern Standard Contract Terms Law from Reasonable Assent to Enhanced Fairness Control: A view on Digital Environments and Post-Transaction Assent' (2019) 15(2) *European Review of Contract Law* 156-158; Glenn Heirman, 'Core terms: interpretation and possibilities of assessment' (2017) 6(1) *Journal of European Consumer and Market Law* 32-33.

158. Opinion on the proposal for a Council Directive on unfair terms in consumer contracts OJ C 159, p. 34–37, point 2.5.

159. COM(90) 322/final/2 - C3-0319/90 - SYN 285: *Report of the Committee on Legal Affairs and Citizens' Rights on the proposal from the Commission to the Council for a Directive on unfair terms in consumer contracts* 20.

160. The German Federal Supreme Court took cognisance of transparency while exercising substantive control of standard contract terms already in the 1950s. The 1976 Standard Terms of Business Act codified its case law and required the drafting party to bring standard terms to the attention of the other party, who also had to have the chance to get acquainted with and accept these terms. See, for instance, Reinhard Zimmermann, 'Consumer Contract Law and General Contract Law: The German Experience' (2005) 58(1) *Current Legal Problems* 433, and Otto Sandrock and Nina Moore Galston, 'The Standard Terms Act 1976 of West Germany' (1978) 26(4) *The American Journal of Comparative Law* 560, 568.

attention from national courts, the CJEU, or the Commission. However, since 2012,[161] the CJEU has received an increased number of references from national courts regarding the interpretation of the transparency requirement under the UCTD.[162] The increased number of references concerning transparency of contract terms is part of a general increase of UCTD-based references since 2008, which could be, at least partially, triggered by the social and economic consequences of the financial crisis.[163] In response to inquiries about the transparency of contract terms, the CJEU significantly broadened the transparency requirement of the UCTD beyond its textual basis[164] and interpreted various aspects of the requirement, including its meaning, scope, and the relevant factors and context to evaluate its application. I will further elaborate on this in Section 2.2.3.

Initially, the Commission did not provide any guidance concerning the interpretation of the transparency requirement of the UCTD. In 2017, in the *Report on the Fitness Check of consumer and marketing law*, the Commission acknowledged the existing ambiguity regarding the content of the transparency requirement and its legal consequences, despite the guidance provided by the CJEU in its transparency case law.[165] Subsequently, in 2019, 26 years after the adoption of the UCTD, the Commission finally issued guidance on the interpretation and evaluation of transparency under the UCTD. This guidance included clarifications regarding the meaning and scope of the transparency requirement.[166] Nevertheless, despite the interpretations that the CJEU and the Commission have offered thus far, there are still some aspects of the transparency requirement that remain uncertain.

2.1.2. The objective of transparency under the UCTD

Prior to determining the objective of transparency under the UCTD, it is important to establish the objective of the UCTD's unfairness control system. This is because transparency is a crucial component of unfairness control and should, therefore, be examined with respect to the objective of this system. The UCTD aims to strike a balance between protecting consumers and fostering the development of an internal

161. Case C-472/10 *Invitel*, points 27-31.
162. Case C-143/13 *Matei*, points 72-74; Case C-96/14 *Van Hove*, points 40-41; Case C-348/14 *Bucura*, point 55; Case C-186/16 *Andriciuc*, points 44-51; Case C-51/17 *OTP Bank and OTP Faktoring*, points 73-78; Case C-448/17 *EOS KSI Slovensko*, point 61; Case C-227/18 *VE*, points 33-40; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, points 29-35; Case C-38/17 *GT*, points 32-35.
163. Hans-W. Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) *Common Market Law Review* 607-608 and 771-772; Mónika Józon, 'Unfair contract terms law in Europe in times of crisis: Substantive justice lost in the paradise of proceduralisation of contract fairness' (2017) *Journal of European Consumer and Market Law* 158-159.
164. Fernando Gómez Pomar, 'Core versus Non-Core Terms and Legal Controls Over Consumer Contract Terms: (Bad) Lessons from Europe?' (2019) 15(2) *European Review of Contract Law* 184.
165. SWD (2017) 209 final: Report of the Fitness Check on Directive 2005/29/EC, Council Directive 93/13/EEC, Directive 98/6/EC, Directive 1999/44/EC, Directive 2009/22/EC and Directive 2006/114/EC [95].
166. C(2019) 5325 final: Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts [20-36].

market.[167] Schillig argues that this attempt is most evident in Article 4(2) of the UCTD, which excludes core contract terms, such as the subject matter of the contract or the price, from the assessment of unfairness.[168] The provision in question was not included in the Commission's initial draft but was introduced at the Council of Ministers' initiative. The Council believed that the corrective forces of the free market would ultimately safeguard consumers as well.[169] The exclusion of core contract terms from unfairness control reflects the free-market approach considering that, in such a market, parties are free to shape their contractual obligations as they wish.[170] Traders are free to choose which goods or services they wish to offer, consumers are free to choose whether or not they want to accept the trader's offer, and market laws will determine prices and other core terms.[171]

The UCTD subjects core terms to the assessment of unfairness only if they are not drafted in plain, intelligible language. According to Micklitz, this implies that the transparency requirement of the UCTD provides consumers with a minimum level of protection.[172] This is because courts will always be able to assess whether *any* standard contract term, including a core contract term, has been drafted in plain, intelligible language.[173] This reasoning aligns with the CJEU's interpretation in the case of *Caja de Ahorros*, where the CJEU had to answer the question of whether Article 4(2) of UCTD determines the scope of this directive in a way that prevents Member States from extending the system of unfairness control to core contract terms, which are drafted in plain, intelligible language.[174] The CJEU clarified that Member States are allowed to develop national rules that are more stringent than those prescribed by the UCTD, as long as these rules provide consumers with a higher level of protection.[175] This means that the UCTD's rule, whereby the absence of transparency in core contract terms can result in the potential assessment of their unfairness, represents the minimum level of protection that EU law provides to consumers.[176] For this reason, the CJEU ruled that Member States were permitted to provide consumers with a greater level of protection by expanding the scope of unfairness control to include transparent core contract terms.[177]

Schillig argues that the transparency requirement of the UCTD is redundant, at least in relation to core contract terms.[178] He believes that the case law of the CJEU and the underlying regulatory framework of the UCTD can be best explained based on

167. Michael Schillig, 'Directive 93/13 and the 'Price Term Exemption': A Comparative Analysis in the Light of the 'Market for Lemons' Rationale' (2011) 60(4) *International and Comparative Law Quarterly* 937.
168. Ibid, 937-940.
169. Ibid, 937-938.
170. Ibid, 938.
171. Ibid, 938.
172. Ibid, 366.
173. Ibid, 366.
174. Case C-484/08 *Caja de Ahorros*, point 24.
175. Ibid, point 40.
176. Ibid, points 42-43.
177. Ibid, point 44.
178. Michael Schillig, 'Directive 93/13 and the 'Price Term Exemption': A Comparative Analysis in the Light of the 'Market for Lemons' Rationale' (2011) 60(4) *International and Comparative Law Quarterly* 959-960.

the rationale of the 'market of lemons'. According to this rationale, consumers accept standard contract terms without reading them because it is inefficient to scrutinise the fine print, negotiate for more favourable terms, and evaluate competing offers.[179] As a consequence, traders have an incentive to exploit consumers' lack of readership, and their behaviour will remain unnoticed as long as consumers fail to read contract terms and do not look for better offers.[180] Furthermore, traders who provide low-quality terms can gain a competitive edge in the market, leading others to follow suit, thus flooding the market with customer-unfriendly contract terms.[181] Schillig believes that a robust, autonomous mechanism for reviewing contract terms can address this issue.[182] Thus, he advocates for a market-oriented interpretation of the UCTD that focuses on whether markets offer consumers sufficiently competitive terms, rather than a consumer-oriented interpretation that focuses on whether consumers understood a specific contract term.[183]

The case law of the CJEU, based on the UCTD, does not echo Schillig's criticism. Instead, it emphasises the importance of the transparency requirement as a means of consumer protection. This supports Micklitz's argument that transparency is the minimum standard for consumer protection within the UCTD. This case law demonstrates that the goal of transparency under the UCTD is to ensure that **consumers can make well-informed decisions** regarding products and services in the market. The CJEU has repeatedly emphasised that pre-contractual information is of utmost importance for consumers, as they rely on this information to determine whether to enter into a contract and understand its terms and consequences.[184] In order to rely on this information in their decision-making process, consumers must have the opportunity to examine contract terms and comprehend their economic and legal repercussions.[185] As a result, a trader's failure to provide transparent information regarding the terms and consequences of a contract before its conclusion cannot be rectified by providing this information after its conclusion.[186]

179. Ibid, 940-941.
180. Ibid, 942.
181. Ibid.
182. Ibid.
183. Michael Schillig, 'Directive 93/13 and the 'Price Term Exemption': A Comparative Analysis in the Light of the 'Market for Lemons' Rationale' (2011) 60(4) *International and Comparative Law Quarterly* 958-961. See also, Michael Faure and Hanneke Luth, 'Behavioural Economics in Unfair Contract Terms' (2011) 34(3) *Journal of Consumer Policy* 351.
184. Case C-92/11 *RWE Vertrieb*, point 44; Case C-226/12 *Constructora Principado*, point 25; Case C-26/13 *Kásler*, point 70; Case C-348/14 *Bucura*, point 51; Case C-154/15 *Gutiérrez Naranjo*, point 50.
185. Case C-26/13 *Kásler*, point 71-75; Case C-143/13 *Matei*, point 76; Case C-96/14 *Van Hove*, point 50; Case C-348/14 *Bucura*, point 55; Case C-186/16 *Andriciuc*, point 51; Case C-51/17 *OTP Bank and OTP Faktoring*, point 78; Case C-448/17 *EOS KSI Slovensko*, point 61; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, point 29; Case C-38/17 *GT*, point 32; Case C-621/17 *Kiss and CIB Bank*, point 37; Case C-452/18 *Ibercaja Banco*, point 44; Case C-34/18 *Lovasné Tóth*, point 62; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 73; Case C-212/20 *A. S.A.*, points 41-43; Case C-263/22 *Ocidental - Companhia Portuguesa de Seguros de Vida*, point 31; Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, point 39.
186. Case C-92/11 *RWE Vertrieb*, point 51.

Transparency case law highlights how the CJEU has adopted the information paradigm, which considers consumers as rational market participants capable of accessing, processing, and relying on information when making decisions.[187] Since traders may not have the incentive to disclose all relevant information to consumers, European consumer law obliges them to do so.[188] However, the case law of the CJEU also demonstrates that there are limitations to the trader's obligation to provide information to consumers. For example, the UCTD mandates traders to elucidate the content of statutory provisions mentioned in their contractual terms.[189] Yet, it does not require them to inform consumers about the substance of procedural provisions, such as the allocation of the burden of proof or the interpretation of these provisions in established case law,[190] unless the contractual terms are formulated in a manner that can impact consumers' comprehension of the consequences of concluding a contract.[191]

Empirical studies have consistently questioned the information paradigm upon which the transparency case law of the CJEU is based. Scholars contend that information is irrelevant as consumers do not read it,[192] that the amount of information or its complexity can even undermine the consumer's ability to

187. Case C-26/13 *Kásler*, points 71-75; Case C-143/13 *Matei*, point 76; Case C-96/14 *Van Hove*, point 50; Case C-348/14 *Bucura*, point 55; Case C-186/16 *Andriciuc*, point 51; Case C-51/17 *OTP Bank and OTP Faktoring*, point 78; Case C-448/17 *EOS KSI Slovensko*, point 61; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, point 29; Case C-38/17 *GT*, point 32; Case C-621/17 *Kiss and CIB Bank*, point 37; Case C-452/18 *Ibercaja Banco*, point 44; Case C-34/18 *Lovasné Tóth*, point 62; Case C-125/18 *Gómez del Moral Guasch*, point 50; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 73; Case C-212/20 *A. S.A.*, points 41-43; Case C -655/20 *Gómez del Moral Guasch II*, point 29; Case C-670/20 *ERSTE Bank Hungary*, points 22-23; Case C-263/22 *Ocidental - Companhia Portuguesa de Seguros de Vida*, points 26-31; Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, points 36-45; Case C-265/22 *Banco Santander*, points 51-58. For scholarly remarks, see Vanessa Mak, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2012) 1(4) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 258-259; Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) *Journal of Law and Society* 355; Thomas Wilhelmsson and Chris Willett, 'Unfair terms and standard form contracts' in Geraint Howells, Iain Ramsay, Thomas Wilhelmsson and David Kraft (eds) *Handbook of Research on International Consumer Law* (Edward Elgar Publishing Limited 2010) 161.

188. Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) *Journal of Law and Society* 355.

189. Case C-472/10 *Invitel*, point 29; Case C-92/11 *RWE Vertrieb*, points 50-51; Case C-191/15 *Verein für Konsumenteninformation/Amazon*, point 69.

190. Case C-34/18 *Lovasné Tóth*, 68-70.

191. Case C-191/15 *Verein für Konsumenteninformation/Amazon*, points 67-71.

192. Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) *Journal of Law and Society* 356-357; Omri Ben-Shahar and Carl E. Schneider, 'The Failure of Mandated Disclosure' (2011) 159(3) *University of Pennsylvania Law Review* 671-672; Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014) 79-93; Florencia Marotta-Wurgler and Daniel L. Chen, 'Does Contract Disclosure Matter?' (2012) 168(1) *Journal of institutional and theoretical economics* 100-110; Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43(1) *The Journal of legal studies* 6-8, 22-27; Maartje Elshout et al., *Study on consumers' attitudes towards Terms and Conditions (T&Cs)* (2016) 20-25; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 77-78.

understand it[193] and that consumers cannot make good or optimal decisions.[194] Nevertheless, many critics of the information paradigm recognise that there is room to enhance the transparency of consumer information and are exploring ways to improve it.[195]

Despite criticism from academia, the CJEU has not adapted its interpretation of transparency under the UCTD to recognise the limited impact of information on consumer behaviour.[196] In contrast, the Commission is increasingly recognising the challenges consumers face when it comes to processing, comparing, and relying on information during their decision-making process.[197] The question, however, is

193. Oren Bar-Gill, Omri Ben-Shahar, 'Regulatory techniques in consumer protection: A critique of European consumer contract law' (2013) 50 *Common Market Law Review* 118; Martien Schaub, 'How to Make the Best of Mandatory Information Requirements in Consumer Law' (2017) 25(1) *European Review of Private Law* 29-30; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 321-330.

194. Michael Faure and Hanneke Luth, 'Behavioural Economics in Unfair Contract Terms' (2011) 34(3) *Journal of Consumer Policy* 351-352; Thomas Wilhelmsson, 'Cooperation and competition regarding standard contract terms in consumer contracts' (2006) 17(1) *European Business Law Review* 51–72; Yeşim Atamer, 'Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer – Insights from Behavioural Law and Economics' (2017) 80(4) *Modern law review* 627-632.

195. Omri Ben-Shahar and Adam Chilton, 'Simplification of Privacy Disclosures: An Experimental Test' (2016) 45 (S2) *The Journal of legal studies* S45-S66; Maartje Elshout et al., '*Study on consumers' attitudes towards Terms and Conditions (T&Cs)* (2016) 26-103; Ognyan Seizov, Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 158-168; Wendy Wagner and Will Walker, *Incomprehensible! A Study of How Our Legal System Encourages Incomprehensibility, Why It Matters, and What We Can Do About It* (Cambridge University Press 2019) 247-270; Ognyan Seizov, Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 152-168; Arianna Rossi, Rossana Ducato, Helena Haapio and Stefania Passera, 'When Design Met Law: Design Patterns for Information Transparency' (2019) 122-123(5) *Doctrine Rechtsleer* 98-121; Zsolt Ződi, 'The limits of plain legal language: understanding the comprehensible style in law' (2019) 15 *International Journal of Law in Context* 251-260; Ognyan Seizov and Alexander J. Wulf, 'Communicating Legal Information to Online Customers Transparently: A Multidisciplinary Multistakeholderist Perspective' (2021) 33(2) *Journal of international consumer marketing* 162-175; 1081-1083; Marco B.M. Loos and Joasia Luzak, Update the Unfair Contract Terms Directive for Digital Services (2021) 42-47; Alexander J. Wulf and Ognyan Seizov, 'The Principle of Transparency in Practice: How Different Groups of Stakeholders View EU Online Information Obligations' (2020) 28(5) *European Review of Private Law* 1089-1092; Alexander J. Wulf and Ognyan Seizov, '"Please understand we cannot provide further information": evaluating content and transparency of GDPR-mandated AI disclosures' (2022) *AI & Society* 251-256; Alexander J. Wulf and Ognyan Seizov, 'How to Improve Consumers' Understanding of Online Legal Information. Insights from a Behavioral Experiment' (2022) *European Journal of Law and Economics* 563-582; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 321-330.

196. In 2023, the CJEU continues to rely on the average (i.e., reasonably well-informed and reasonably observant and circumspect) consumer benchmark and emphasises that consumers require an adequate amount of information about the consequences of contract terms in order to make sensible and informed choices. See, for example, Case C-263/22 *Ocidental - Companhia Portuguesa de Seguros de Vida*, points 26-29, and Case C-265/22 *Banco Santander*, points 53-59.

197. Flash Eurobarometer 525 – Ipsos European Public Affairs, *Monitoring the level of financial literacy in the EU* (2023) [6-31]; European Commission, Directorate-General for Education, Youth, Sport and Culture, 'Guidelines for Teachers and Educators on Tackling Disinformation and Promoting Digital Literacy through Education and Training' (Publications Office of the European Union 2022) [13-24]; London Economics, *Consumer vulnerability across key markets in the European Union* (2016) 138-167;

whether the UCTD's transparency requirement is intended to ensure that traders provide consumers with accessible, readable, and understandable information, allowing them to make informed decisions. In view of this, the following sections will explore whether and to what extent the interpretation and evaluation of transparency align with its objective under the UCTD.

2.1.3. The interpretation and assessment of transparency under the UCTD

2.1.3.1. The meaning of the requirement to draft contract terms in plain, intelligible language

The development of the CJEU's case law on transparency under the UCTD framework began with the cases *Invitel* and *RWE Vertrieb*, both of which dealt with the issue of transparently providing information on unilateral cost adjustments in long-term contracts.[198] In *Invitel*, the telecommunications operator introduced a new provision in its general terms and conditions regarding money order fees. These fees may be charged for payments made using a money order.[199] The term in question stipulated that the trader had the right to impose additional charges on consumers for expenses incurred through the use of this payment method (e.g., postal fees). However, it did not specify how these charges would be calculated.[200] *Invitel* demonstrated that traders must provide consumers with the opportunity to review contract terms and have a positive obligation to inform them about the presence of terms that enable unilateral adjustments to charges, along with the reasons for such adjustments or the method by which they are made.[201] In order to inform consumers about these matters, traders must formulate contract terms in a way that enables consumers to anticipate changes resulting from these terms, based on clear and intelligible criteria.[202]

The CJEU continued this line of reasoning in the *RWE Vertrieb* case. In this particular case, gas suppliers were required to enter into standard tariff contracts according to the national legislation, while also being permitted to enter into special contracts based on the principle of freedom of contract.[203] In cases of standard tariff contracts, the relevant legislation permits traders to unilaterally modify gas prices without specifying the reasons, terms, or extent of the amendment, provided that consumers are notified of such changes.[204] One of the gas suppliers, *RWE Vertrieb*, has applied rules derived from this legislation in its standard contract terms,

---

C(2019) 5325 final: Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts [26-29]; Recitals (4) to (8) of Commission Implementing Regulation 2019/2243.

198. Case C-472/10 *Invitel*, points 17-20; Case C-92/11 *RWE Vertrieb*, points 17-23.
199. Case C-472/10 *Invitel*, point 18.
200. Ibid.
201. Case C-472/10 *Invitel*, points 29-30. See also
Hans-W. Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) *Common Market Law Review* 786.
202. Case C-472/10 *Invitel*, points 26-29.
203. Case C-92/11 *RWE Vertrieb*, point 32.
204. Ibid, points 18.

which include the right to unilaterally modify gas prices in this manner, for special contracts.[205] As these special contracts were concluded based on freedom of contract, the national legislation regulating standard tariff contracts did not apply.[206] The CJEU has ruled that these special contracts and their terms, which permit unilateral adjustments of gas charges, are covered by the UCTD and must meet the criteria of good faith, balance, and transparency.[207] It has further reiterated that consumers must have the opportunity to examine contract terms[208] and the contract terms must outline the reasons and method for any changes in costs, ensuring that consumers can anticipate, based on clear and intelligible criteria, the consequences of such changes.[209] Finally, the CJEU clarified that the trader's obligation to inform consumers about unilateral adjustments of costs could not be fulfilled by simply referring to the contractual or statutory provisions.[210] This duty must be fulfilled prior to the conclusion of the contract.[211]

These cases demonstrate the significance of making contract terms accessible to consumers, including the content of references to contractual or statutory provisions, and providing information that allows them to anticipate unilateral adjustments in costs. Such measures are essential to meet the transparency requirement of the UTCD. However, these cases do not provide an explanation of the meaning of the requirement to draft contract terms in plain, intelligible language, nor do they offer examples of contract terms governing unilateral cost adjustments that would meet this requirement.

In 2014, the CJEU provided explicit interpretation of the obligation to draft contract terms in plain, intelligible language in the case of *Kásler*.[212] The *Kásler* case involves a mortgage denominated in a foreign currency (Swiss francs) but payable in the domestic currency (Hungarian forints).[213] The contract allowed the lender to unilaterally decide the amount of monthly instalments that consumers had to pay in Hungarian forints.[214] The national court asked the CJEU if the requirement of transparency would be fulfilled when contract terms are grammatically clear and intelligible to consumers, or if consumers also had to be able to comprehend the economic rationale behind a contract term and its connection to other terms of the contract.[215] The CJEU explained that the system of protection under the UCTD is grounded on the belief that consumers are at a disadvantage compared to traders, particularly regarding their knowledge level. Therefore, the requirement of transparency should be broadly understood, obliging traders to provide consumers

205. Ibid, points 17-19 and 32.
206. Ibid, points 32-33.
207. Ibid, point 47.
208. Ibid, point 43.
209. Ibid, point 49.
210. Case C-92/11 *RWE Vertrieb*, points 50-52.
211. Ibid, point 51.
212. Case C-26/13 *Kásler*, points 70-73.
213. Ibid, points 20-22.
214. Ibid, point 24.
215. Ibid, question 2 in point 35.

with contract terms that are comprehensible both grammatically and in terms of their economic implications.[216] The CJEU has repeatedly applied this formula since then,[217] including in cases adjudicated in 2023.[218]

Besides the economic consequences of the contract, the case *Verein für Konsumenteninformation/Amazon* shows that consumers also need to be able to understand the legal consequences of a contract.[219] In this case, the trader neglected to notify the consumer that, in addition to the law chosen in the contract (i.e., the law of the trader's country of establishment), the law of the consumer's country of residence also applied on the basis of statutory law.[220] Due to a lack of transparency, the consumer was misled about the level of protection they had.[221]

As scholarship observes,[222] the CJEU's transparency case law indicates that contract terms must be **formally transparent**, i.e., they must be available to the consumer[223] and grammatically clear and intelligible.[224] Besides formally transparent, contract terms also need to be **substantively transparent**, i.e., they need to enable the consumer to comprehend the economic and legal consequences of the contract.[225]

216. Ibid, point 71-75.

217. Case C-143/13 *Matei*, point 76; Case C-96/14 *Van Hove*, point 50; Case C-348/14 *Bucura*, point 55; Case C-186/16 *Andriciuc*, point 51; Case C-51/17 *OTP Bank and OTP Faktoring*, point 78; Case C-448/17 *EOS KSI Slovensko*, point 61; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, point 29; Case C-38/17 *GT*, point 32; Case C-621/17 *Kiss and CIB Bank*, point 37; Case Case C-452/18 *Ibercaja Banco*, point 44; Case C-34/18 *Lovasné Tóth*, point 62; Case C-125/18 *Gómez del Moral Guasch*, point 50; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 73; Case C-212/20 *A. S.A.*, points 41-43; Case C -655/20 *Gómez del Moral Guasch II*, point 29; Case C-670/20 *ERSTE Bank Hungary*, points 22-23.

218. Case C-263/22 *Ocidental - Companhia Portuguesa de Seguros de Vida*, points 26-31; Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, points 36-45; Case C-265/22 *Banco Santander*, points 51-58.

219. Case C-191/15 *Verein für Konsumenteninformation/Amazon*, points 67-68.

220. Ibid, points 69-71.

221. Ibid, point 71.

222. Francesca Brunetta d'Usseaux, 'Formal and substantive aspects of the transparency principle in European Private Law' (1998) *Consumer Law Journal* 320-338; Johanna Waelkens, 'Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts', in Ilse Samoy and Marco B.M. Loos (eds), *Information and Notification Duties* (Intersentia 2015) 47, 61-63; Martin Ebers, 'Unfair Contract Terms Directive (93/13)', in Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers (eds), *EU Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier 2008) 245-246; Marco B.M. Loos, 'Double Dutch – On the role of the transparency requirement with regard to the language in which standard contract terms for B2C-contracts must be drafted' (2017) 6(2) *Journal of European Consumer and Market Law* 55, 59; Mia Junuzović, 'Transparency of (Pre-)Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?' (2018) 14 *Croatian Yearbook of European Law and Policy* 72-98; Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 99-107; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 83-90.

223. See, e.g., Case C-472/10 *Invitel*, point 27; Case C-92/11 *RWE Vertrieb*, point 43; Case C-26/13 *Kásler*, point 67; Case C-51/17 *OTP Bank and OTP Faktoring*, point 76.

224. Case C-26/13 *Kásler*, point 75; Case C-96/14 *Van Hove*, point 40.

225. Case C-26/13 *Kásler*, points 71-75; Case C-143/13 *Matei*, point 76; Case C-96/14 *Van Hove*, point 50; Case C-348/14 *Bucura*, point 55; Case C-186/16 *Andriciuc*, point 51; Case C-51/17 *OTP Bank and OTP Faktoring*, point 78; Case C-448/17 *EOS KSI Slovensko*, point 61; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, point 29; Case C-38/17 *GT*, point 32; Case C-621/17 *Kiss and CIB Bank*, point 37; Case C-452/18 *Ibercaja Banco*, point 44; Case C-34/18 *Lovasné Tóth*, point 62; Case C-125/18 *Gómez del Moral Guasch*, point 50; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 73; Case C-212/20 *A. S.A.*, points 41-43; Case C -655/20 *Gómez del Moral Guasch II*, point 29; Case C-670/20 *ERSTE Bank*

Case law always refers jointly to plainness and intelligibility, making it unclear whether they have independent meanings, whereby one fosters formal transparency while the other one fosters substantive transparency. Admittedly, it may not always be possible to clearly distinguish between the formal and substantive transparency of contract terms. On one hand, the lack of formal transparency can sometimes be the very reason for the absence of substantive transparency. For example, if a contract term is excessively long, its length may hinder the consumer from comprehending its syntax and meaning. On the other hand, in certain situations, consumers may still be able to grasp contract terms despite their lack of formal transparency. For instance, if traders fail to present information in a table format where required by law, this does not automatically imply that the consumer would be unable to understand the information.

Since the CJEU's transparency case law connects plainness and intelligibility with formal and substantive aspects of transparency,[226] it is important to consider how these aspects relate to one another. The *Matei* case illustrates that, even when contract terms are grammatically intelligible, consumers still may not be able to grasp the consequences which such terms have on their economic position.[227] This case pertained to two credit agreements, one of which was secured by a mortgage. Under the agreements in question, the bank reserved the right to change the interest rate "*in the event of significant changes in the financial markets*".[228] The CJEU ruled that, while the formulation is grammatically plain and intelligible, it is prima facie non-transparent. This is because there is doubt as to whether consumers can anticipate the interest rate increase based on such a criterion.[229] Therefore, the *Matei* case clarified that contract terms cannot meet the transparency requirement of the UCTD if they are only formally transparent and not substantively transparent as well. The CJEU's case law has not yet provided an answer to the question of whether contract terms that are only substantively transparent and not formally transparent would comply with this requirement.

2.1.3.2. The scope of the assessment of transparency

The CJEU has elaborated on the scope of the requirement of drafting contract terms in plain, intelligible language in numerous cases, with a majority of them specifically focusing on the transparency of credit agreements.[230] In the opinion of the CJEU, this

Hungary, points 22-23; Case C-263/22 *Ocidental - Companhia Portuguesa de Seguros de Vida*, points 26-31; Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, points 36-45; Case C-265/22 *Banco Santander*, points 51-58.

226. See Case C-154/15 *Gutiérrez Naranjo*, points 48-49, where the CJEU explicitly adopted the distinction between formal and substantive aspects of transparency.

227. Case C-143/13 *Matei*, points 26 and 76.

228. Ibid, point 26.

229. Ibid, point 76.

230. Case C-26/13 *Kásler*, points 71-75; Case C-143/13 *Matei*, point 76; Case C-96/14 *Van Hove*, point 50; Case C-348/14 *Bucura*, point 55; Case C-186/16 *Andriciuc*, point 51; Case C-51/17 *OTP Bank and OTP Faktoring*, point 78; Case C-448/17 *EOS KSI Slovensko*, point 61; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, point 29; Case C-38/17 *GT*, point 32; Case C-621/17 *Kiss and CIB Bank*, point 37; Case C-452/18 *Ibercaja Banco*, point 44; Case C-34/18 *Lovasné Tóth*, point 62; Case C-125/18 *Gómez del Moral Guasch*,

requirement demands that traders provide consumers with an **adequate amount of information** that will assist them in their decision-making process.[231] The CJEU has given guidance on the specific information that consumers require in order to make an informed decision on a case-by-case basis.

For instance, in the case law regarding foreign currency lending, the CJEU provided an explanation on how creditors should inform consumers about the foreign exchange risk associated with borrowing in a foreign currency to meet the transparency requirement of the UCTD. The *Andriciuc* case specifically dealt with mortgage and consumer credit agreements entered into by individuals who receive their income in the Romanian Leu, but have their loans denominated and payable in Swiss francs.[232] This means that the consumers bear the entire foreign exchange risk, specifically the risk of an increase in payment instalments in the event of the Romanian Leu depreciating against the Swiss franc.[233] The CJEU has clarified that the national court should evaluate whether consumers have been provided with all the pertinent information to determine the magnitude of their financial obligations, specifically the total cost of their loans.[234] This involves evaluating whether the terms of the disputed credit agreements were formulated in a way that would allow an average consumer to accurately estimate the total cost of credit, even without including essential information about the foreign exchange risk. The CJEU also highlighted the importance of clearly informing consumers who enter into credit agreements in a foreign currency about the potential exposure to exchange rate fluctuations, which could be challenging to bear in cases where currencies fluctuate on the market.[235] For this reason, the CJEU concluded that creditors "*must be required to set out the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, particularly where the consumer borrower does not receive his income in that currency*".[236]

In *BNP Paribas Personal Finance*, the CJEU recalled the usefulness of informing consumers about the foreign exchange risk through quantitative simulations, which must be based on sufficient, objective and accurate data and communicated in plain, intelligible language.[237] According to the CJEU, these simulations can help to attract the consumer's attention to possible negative economic consequences resulting from

---

point 50; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 73; Case C-212/20 *A. S.A.*, points 41-43; Case C -655/20 *Gómez del Moral Guasch II*, point 29; Case C-670/20 *ERSTE Bank Hungary*, points 22-23; Case C-263/22 *Ocidental - Companhia Portuguesa de Seguros de Vida*, points 26-31; Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, points 36-45; Case C-265/22 *Banco Santander*, points 51-58.

231. Case C-186/16 *Andriciuc*, points 44-47; Case C-51/17 *OTP Bank and OTP Faktoring*, points 71-78; Case C-452/18 *Ibercaja Banco*, point 53; Case C-125/18 *Gómez del Moral Guasch*, points 54-56; Case C-776/19 *BNP Paribas Personal Finance*, point 73; Case C-670/20 *ERSTE Bank Hungary*, point 34; Case C-265/22 *Banco Santander*, point 53.
232. Case C-186/16 *Andriciuc*, point 8.
233. Ibid, point 9.
234. Ibid, points 44-47.
235. Ibid, point 50.
236. Ibid.
237. Case C-776/19 *BNP Paribas Personal Finance*, point 73.

contract terms linked to a foreign currency.[238] In the *OTP Bank and OTP Faktoring* case, the CJEU recognised that the creditor has supplied consumers with information regarding the foreign exchange risk. However, it is up to the national court to determine whether this information was adequate, considering the guidelines set forth in *Andriciuc*.[239] In *ERSTE Bank Hungary*, the CJEU clarified that the creditor cannot meet the transparency requirement of the UCTD by only providing abundant information to the consumer about the foreign exchange risk, as long as this information assumes a stable exchange rate between the account currency and the payment currency throughout the duration of the contract.[240]

While the CJEU's understanding of the scope of the requirement of drafting contract terms in plain, intelligible language seems to create **positive information obligations** for traders,[241] these obligations are not limitless. For example, cases regarding credit agreements, which impose additional charges on the consumer, illustrate that traders do not have a general obligation to provide a comprehensive list of services covered by these charges. In *Kiss and CIB Bank*, the CJEU clarified that contract terms that do not explicitly define the services offered in exchange for management charges and disbursement commission do not automatically violate the transparency requirement of the UCTD. However, it is necessary for consumers to be able to comprehend or deduce the nature of these services by examining the contract as a whole.[242] While reinforcing this reasoning in *Profi Credit Polska 2*, the CJEU stated that the consumer should have the ability to ensure that there is no overlap between various fees or between the services for which different fees are being charged.[243]

The CJEU also illustrated the **boundaries of creditors' information obligations** in cases involving loans tied to foreign currencies and adjustable interest rates. For example, in the *A. S.A.* case, the CJEU acknowledged that creditors cannot predict the economic fluctuations that may arise from the pegging mechanism, especially in the context of a 40-year loan agreement.[244] Furthermore, in cases *VE*, *ERSTE Bank Hungary/Orsolya Czakó* and *GT*, the CJEU acknowledged that the precise information on the total credit amount and the applicable exchange rate can only be determined with certainty on the day the funds are disbursed to the consumer.[245] However, the CJEU has considered in all of these cases that the creditor is required to provide

238. Ibid.
239. Case C-51/17 *OTP Bank and OTP Faktoring*, points 71-78.
240. Case C-670/20 *ERSTE Bank Hungary*, points 31-33.
241. Hans-W. Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) *Common Market Law Review* 786-788. See also Joasia Luzak, Foreign currency loans? Inform consumers of risks! - CJEU in Andriciuc (C-186/16) (Recent developments in European Consumer Law, 21 September 2017).
242. Case C-621/17 *Kiss and CIB Bank*, point 54.
243. Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 75.
244. Case C-212/20 *A. S.A.*, points 51-53.
245. Case C-227/18 *VE*, points 34-36; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, points 30-32; Case C-38/17 *GT*, points 34-36.

the consumer with information concerning the criteria that the bank employs to determine the exchange rate at the moment of the contract's conclusion.[246]

In *Ibercaja Banco* the CJEU acknowledged that, due to the fluctuating nature of a variable interest rate, its value cannot be determined in the credit agreement for the entire duration of the agreement.[247] Since fluctuations of interest rates falls outside of the control of creditors, they cannot be required to provide consumers with concrete information on the economic consequences of fluctuations of the interest rate throughout the agreement. Still, creditors must provide the consumer with data illustrating past fluctuations of the variable interest rate.[248] According to the CJEU's explanation in *Gómez del Moral Guasch*, such data can provide the consumer with an objective indication of the economic consequences of the variable interest rate and can be used for comparison with other mechanisms for calculating the interest rate.[249]

Lovasné Tóth is another case that illustrates the limitations of a trader's information obligations, specifically when it comes to informing consumers about the content of legal provisions relevant to their contractual rights. As mentioned in Section 2.1.2., the CJEU's transparency case law mandates traders to inform consumers about the content of legal provisions incorporated into the contract[250] or the existence of mandatory provisions of international private law.[251] However, it does not require them to inform consumers about procedural provisions concerning the allocation of the burden of proof and their interpretations in case law.[252]

It is remarkable that the CJEU's interpretation of the scope of the UCTD's transparency requirement does not address *how* traders should provide information to consumers, but rather focuses on *what* information they should provide. As my analysis reveals, the CJEU believes that traders, being experts in their field, must ensure that consumers can comprehend the terms of the contract by furnishing them with a significant amount of information. This should then enable the consumer to (easily)[253] understand and compare complex information.[254] Yet, as Pasoz stresses, it is questionable to what extent consumers can benefit from complex financial information, such as extensive simulations on the likely evolution of the relevant currencies, especially when these simulations end up deviating from the actual

246. Case C-227/18 *VE*, point 34; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, point 32; Case C-38/17 *GT*, point 34.
247. Case C-452/18 *Ibercaja Banco*, point 52.
248. Ibid, point 53.
249. Case C-125/18 *Gómez del Moral Guasch*, points 54-56.
250. Case C-472/10 *Invitel*, point 29; Case C-92/11 *RWE Vertrieb*, points 50-51.
251. Case C-191/15 *Verein für Konsumenteninformation/Amazon*, point 69.
252. Case C-34/18 *Lovasné Tóth*, 68-70.
253. See the CJEU's reasoning in Case C-452/18 *Ibercaja Banco*, points 49-56. In this case, the CJEU held that if the creditor provides consumers with all necessary information, consumers should be able to easily determine the difference between amounts payable for an interest rate determined by a floor term (i.e., a term that sets out the minimum and maximum interest rate for a credit) and those payable in the absence of a floor term.
254. Case C-186/16 *Andriciuc*, points 49-51; Case C-776/19 *BNP Paribas Personal Finance*, points 71-78; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 75; Case C-125/18 *Gómez del Moral Guasch*, points 54-56.

outcomes.[255] Moreover, behavioural research, including studies published by the Commission since 2016, has heavily disputed the conviction that consumers can (easily) determine and compare financial figures solely based on the information provided by the creditor.[256] These studies show that few consumers fully understand the meaning of financial figures, such as an annual percentage rate of charge, and experience difficulty comparing financial products based on current information practices.[257] Additionally, the 2023 Flash Eurobarometer indicates that only 18% of respondents across the EU possess a high score for their overall level of financial literacy.[258] The CJEU's focus on ensuring that traders provide consumers with *more* information is, therefore, not consistent with behavioural studies, which show that consumers need *better* information.[259]

255. Ricardo Pazos, 'Loans concluded in a foreign currency – their main subject matter and the transparency requirement' (2018) 15(3) *Zeitschrift für das Privatrecht der Europäischen Union* 112.

256. Jinkook Lee and Jeanne M. Hogarth, 'The Price of Money: Consumers' Understanding of APRs and Contract Interest Rates' (1999) 18(1) *Journal of Public Policy and Marketing* 67; Fernando Gómez Pomar, 'Core versus Non-Core Terms and Legal Controls Over Consumer Contract Terms: (Bad) Lessons from Europe?' (2019) 15(2) European Review of Contract Law 191; Massimo Caratelli, 'Transparency of Price Conditions in Consumer Credit: The Usage of the APR' in Franco Fiordelisi, Philip Molyneux and Daniele Previati (eds) *New Issues in Financial and Credit Markets* (Palgrave Macmillan 2010) 154-155.

257. London Economics, *Consumer vulnerability across key markets in the European Union* (2016) 339-347; Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 37-38; Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [33].

258. Flash Eurobarometer 525 – Ipsos European Public Affairs, *Monitoring the level of financial literacy in the EU* (2023) [17-18].

259. Ognyan Seizov, Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 152-168; Arianna Rossi, Rossana Ducato, Helena Haapio and Stefania Passera, 'When Design Met Law: Design Patterns for Information Transparency' (2019) 122-123(5) *Doctrine Rechtsleer* 98-121; Zsolt Ződi, 'The limits of plain legal language: understanding the comprehensible style in law' (2019) 15 *International Journal of Law in Context* 251-260; Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) 39 *Legal Studies* 385-397; Benedikt Schmitz and Charlotte Pavillon, 'Measuring Transparency in Consumer Contracts: The Usefulness of Readability Formulas Empirically Assessed' (2020) 9(5) *Journal of European Consumer and Market Law* 195-200; Ognyan Seizov and Alexander J. Wulf, 'Communicating Legal Information to Online Customers Transparently: A Multidisciplinary Multistakeholderist Perspective' (2021) 33(2) *Journal of international consumer marketing* 162-175; 1081-1083, Alexander J. Wulf and Ognyan Seizov, 'The Principle of Transparency in Practice: How Different Groups of Stakeholders View EU Online Information Obligations' (2020) 28(5) *European Review of Private Law* 1089-1092; Marco B.M. Loos and Joasia Luzak, Update the Unfair Contract Terms Directive for Digital Services (2021) 42-47; Alexander J. Wulf and Ognyan Seizov, '"Please understand we cannot provide further information": evaluating content and transparency of GDPR-mandated AI disclosures' (2022) *AI & Society* 251-256; Alexander J. Wulf and Ognyan Seizov, 'How to Improve Consumers' Understanding of Online Legal Information. Insights from a Behavioral Experiment' (2022) *European Journal of Law and Economics* 563-582; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 128-134; Rolf H. Weber, 'From disclosure to transparency in consumer law' in Klaus Mathis and Avishalom Tor (eds) *Consumer Law and Economics* (Springer 2021) 83-84; Rolf H. Weber, 'The Disclosure Dream – Towards a New Transparency Concept in EU Consumer Law' (2023) 67 *Journal of European Consumer and Market Law* 69-70; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 321-330.

2.1.3.3. Factors relevant for the assessment of transparency

Despite the fact that CJEU case-law primarily establishes positive information obligations for traders and explains which information the CJEU deems relevant to the consumer's decision-making process, it also offers some guidance on how traders should transparently provide consumers with information. The CJEU considers the following factors when assessing transparency:

- traders must give consumers the opportunity to examine contract terms;[260]
- traders must draft contract terms in a grammatically intelligible manner;[261]
- traders should refrain from using opaque formulations[262] or causing ambiguity by presenting two alternative options for fulfilling the same obligation;[263]
- creditors should pay attention to the language they use in pre-contractual and contractual documentation to ensure that they have clearly informed consumers about the foreign exchange risk;[264]
- traders should inform consumers about the content of legal provisions they refer to in their contract terms, provided that these provisions contain information relevant for the comprehension of their economic consequences[265] or provide information on the applicable law.[266]

The CJEU's transparency case law is far from exhaustive and does not address many different factors that may affect the transparency of consumer information. For instance, the CJEU has not yet considered the extent to which traders can rely on technical terminology, how they should structure information, whether attention should be paid to the amount of information provided, if emphasis should be placed on certain information over other, whether all information should be provided at once or if it should be layered. The CJEU's interpretation of transparency is solely based on specific legal disputes and the questions posed by national courts during these disputes. As a result, it is unsurprising that its case law does not offer comprehensive

260. Case C-26/13 *Kásler*, points 71-75; Case C-143/13 *Matei*, point 76; Case C-96/14 *Van Hove*, point 50; Case C-348/14 *Bucura*, point 55; Case C-186/16 *Andriciuc*, point 51; Case C-51/17 *OTP Bank and OTP Faktoring*, point 78; Case C-448/17 *EOS KSI Slovensko*, point 61; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, point 29; Case C-38/17 *GT*, point 32; Case C-621/17 *Kiss and CIB Bank*, point 37; Case C-452/18 *Ibercaja Banco*, point 44; Case C-34/18 *Lovasné Tóth*, point 62; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 73; Case C-212/20 *A. S.A.*, points 41-43; Case C-263/22 *Ocidental - Companhia Portuguesa de Seguros de Vida*, point 31; Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, point 39.

261. Case C-26/13 *Kásler*, point 75; Case C-143/13 *Matei*, point 76; Case C-96/14 *Van Hove*, point 50; Case C-348/14 *Bucura*, point 55; Case C-186/16 *Andriciuc*, point 51; Case C-51/17 *OTP Bank and OTP Faktoring*, point 78; Case C-448/17 *EOS KSI Slovensko*, point 61; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, point 29; Case C-38/17 *GT*, point 32; Case C-621/17 *Kiss and CIB Bank*, point 37; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 73; Case C-212/20 *A. S.A.*, points 41-43; Case C-452/18 *Ibercaja Banco*, point 44; Case C-34/18 *Lovasné Tóth*, point 62.

262. Case C-143/13 *Matei*, point 76.

263. Case C-139/22 *mBank*, point 55.

264. Case C-609/19 *BNP Paribas Personal Finance*, point 54; Case C-670/20 *ERSTE Bank Hungary*, points 31-33.

265. Case C-34/18 *Lovasné Tóth*, points 64-70.

266. Case C-191/15 *Verein für Konsumenteninformation/Amazon*, points 67-68.

guidance on all the various factors that could be relevant for evaluating the transparency of consumer information.

It is, however, remarkable that the Commission, which issues guidelines and interpretative documents on the application of EU law,[267] did not offer any guidance on the application of the UCTD's transparency requirement until 2019. Although the Commission's interpretative documents are not legally binding, they provide Member States and businesses with valuable and necessary insights on how to apply EU law in practice. The Commission's 2019 *Unfair Contract Terms Guidance* identifies the following factors as relevant for assessing whether contract terms are drafted in plain and intelligible language:

- examination of the accessibility of contract terms: determining whether the consumer had access to the contract terms and an opportunity to read them, particularly in cases where they are included as an annex to the contract or another document;[268]
- examination of the comprehensibility of contract terms: determining whether the wording and specific terminology used in a contract term are clear, both on its own and when considered alongside other contract terms, and whether the consumer, who is the intended recipient of the contract terms, is sufficiently familiar with the language in which they are written; [269]
- examination of the presentation of contract terms: determining whether the contract terms are visually presented in a clear manner (e.g., appropriate font size), whether the contract is structured logically (e.g., the placement of a contract term within the contract aligns with reasonable expectations; contract terms that can only be understood when read together should not be placed in different sections of the contract), and whether important information is adequately highlighted (and not e.g., being hidden among other information).[270]

While the Commission refers to the transparency case law of CJEU in its analysis, it also acknowledges that this case law does not address several of the aforementioned factors.[271] Therefore, it remains to be seen whether the CJEU will endorse the views of the Commission on transparency in the future.

2.1.3.4. The relevant context for the assessment of transparency

Although the UCTD does not refer to any consumer benchmark,[272] the CJEU has held in the majority of its cases that the transparency of information provided to consumers

267. J. C. A. van Dam, 'Guidance documents of the European Commission: a typology to trace the effects in the national legal order' (2017) 10(2) *Review Of European Administrative Law* 75-82.
268. C(2019) 5325 final: Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts [26].
269. Ibid.
270. Ibid.
271. Ibid, 25-27.
272. James Devenney and Thomas Pfeiffer, 'Control of Standard Terms and Collective Proceedings' in Gerhard Dannemann and Stefan Vogenauer (eds) *The Common European Sales Law in Context: Interaction with English and German Law* (Oxford University Press 2013) 697.

should be evaluated with regard to the benchmark of the **average consumer**. The CJEU initially started applying this benchmark in the case law concerning the freedom of movement of goods.[273] In its judgement in *Gut Springenheide*, the CJEU defined an average consumer as a "*reasonably well informed and reasonably observant and circumspect*" consumer.[274] In the context of the assessment of transparency of contract terms pursuant to the UCTD, the CJEU first applied this benchmark in *Kásler*.[275] Thereafter, the CJEU has continued to rely on this benchmark in many more cases, including, for example, *Matei*, *Van Hove*, *Bucura*, *Andriciuc*, *OTP Bank and OTP Faktoring*, *Gómez del Moral Guasch (II)*, *Ibercaja Banco*, *Profi Credit Polska 2*, *A. S.A.*, *Ocidental*, *D.V.*, *Banco Santander*.[276] In cases such as *Verein für Konsumenteninformation/Amazon*, *Lovasné Tóth*, *Kiss and CIB Bank* and *Profi Credit Polska*, the CJEU does not refer to the average consumer benchmark or any other consumer benchmark, but it is unclear whether there is a specific reason behind this omission.

The UCTD does specify that the unfairness of a contract term must be assessed taking into account all the circumstances surrounding the conclusion of the contract.[277] In *Kásler*, the CJEU confirmed that the transparency of a contract term also must be **assessed in light of its (pre-)contractual context**. Specifically, when assessing the transparency of a contract term, national courts must consider all the information that the trader provided to the consumer during contract negotiations. This includes other terms of the contract, promotional information,[278] and advertising related to the type of contract that has been concluded.[279] Per *Van Hove*, this assessment also includes examining the broader contractual framework of which the contract forms a part.[280] Furthermore, as shown in *Caixabank*, the assessment must consider the information that the trader is obliged to provide to the consumer according to national legislation.[281] In addition, *Gómez del Moral Guasch* indicates that easily accessible information, such as the calculation method for variable interest rates in credit agreements published by the Spanish Central Bank, should be taken into account when assessing the transparency of a contract term.[282] However, the case *Banco Santander*, decided in 2023, shows that the CJEU does not expect an average

273. Bram B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015) 29.
274. Case C-210/96 *Gut Springenheide*, point 31.
275. Case C-26/13 *Kásler*, point 74.
276. Case C-143/13 *Matei*, point 75; Case C-96/14 *Van Hove*, point 47; Case C-348/14 *Bucura*, point 66; Case C-186/16 *Andriciuc*, point 51; Case C-51/17 *OTP Bank and OTP Faktoring*, point 78; Case C-125/18 *Gómez del Moral Guasch*, point 51; Case C-452/18 *Ibercaja Banco*, point 55; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 74; Case C-212/20 *A. S.A.*, points 42-43; Case C -655/20 *Gómez del Moral Guasch II*, point 29-34; Case C-263/22 *Ocidental - Companhia Portuguesa de Seguros de Vida*, points 26-31, Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, point 40; Case C-265/22 *Banco Santander*, points 54-60.
277. Article 4(1) UCTD.
278. Case C-26/13 *Kásler*, points 74-75; Joined Cases C-224/19 and C-259/19 *Caixabank and Banco Bilbao Vizcaya Argentaria*, point 68; Case C-565/21 *Caixabank*, points 33 and 43.
279. Case C-565/21 *Caixabank*, point 40.
280. Case C-96/14 *Van Hove*, point 48.
281. Case C-565/21 *Caixabank*, points 40 and 42.
282. Case C-125/18 *Gómez del Moral Guasch*, points 52-53.

consumer to conduct legal research.[283] This means that a mere reference to such a publication by the Spanish Central Bank, which does not provide information on the calculation method itself, might not suffice.[284] Lastly, according to *OTP Bank and OTP Faktoring*, developments which occurred after the contract's conclusion, like the adoption of legislation amending certain terms contained in the contract, should not be part of the assessment.[285]

The evaluation of contract terms' transparency against the benchmark of an average consumer, taking into account all relevant (pre-)contractual information provided by the trader, is both a normative and objective exercise.[286] This exercise is normative because it assumes that the consumer is familiar with the relevant information, even if the trader was aware that the consumer had not read this information at the time of the contract's conclusion. Additionally, it is an objective exercise because the assessment of transparency takes into account a specific consumer image and not the individual consumer who received the (pre-)contractual information. As *Caixabank* shows, this means that the consumer's general knowledge of a contract term or the fact that the term is well known are not factors that may be considered when evaluating the term's transparency.[287] Furthermore, as *mBank* demonstrates, the consumer's relevant knowledge in the field is also immaterial.[288] Finally, a consumer's declaration expressing full awareness of potential risks arising from a loan in a foreign currency is not pertinent for assessing the trader's compliance with the transparency requirement.[289]

Esposito and Grochowski criticise the CJEU's choice to apply the average consumer benchmark in its transparency case law instead of employing more context-specific benchmarks.[290] This is because the CJEU's transparency case law highlights the importance of considering specific transaction-related circumstances when evaluating transparency.[291] Despite relying on the average consumer benchmark, Loos argues that the CJEU could potentially allow for the inclusion of a consumer's personal circumstances in the assessment of transparency under the UCTD. This might apply in cases where the trader was or should have been aware of these circumstances, possibly due to obligations arising from sector-specific legislation.[292] For instance, the CCD obliges banks to collect personal information from consumers

283. Case C-265/22 *Banco Santander*, point 60.
284. Ibid, points 56-60.
285. Case C-51/17 *OTP Bank and OTP Faktoring*, points 79-83.
286. Bram B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015) 63-66; Marco B.M. Loos, 'Transparency Under the UCTD: Could You Please Explain what these Terms are Supposed to Mean?' (2020) 9(1) *Journal of European Consumer and Market Law* 26.
287. Case C-565/21 *Caixabank*, point 41.
288. Case C-139/22 *mBank*, points 60-70.
289. Case C-670/20 *ERSTE Bank Hungary*, point 32.
290. Fabrizio Esposito and Mateusz Grochowski, 'The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration' (2022) 18(1) *European Review of Contract Law* 8-10.
291. Ibid.
292. Marco B.M. Loos, 'Transparency Under the UCTD: Could You Please Explain what these Terms are Supposed to Mean?' (2020) 9(1) *Journal of European Consumer and Market Law* 26.

in order to evaluate their creditworthiness before granting credit.[293] Such personal information can be included in the transparency assessment as part of the UCTD.[294]

Academics have criticised the use of the average consumer benchmark in European consumer law as it does not align with the actual behaviour of consumers.[295] Consumers are not highly rational actors who base their decisions (solely) on relevant information.[296] On the contrary, consumers suffer from bounded rationality and behavioural biases,[297] which, for example, make it difficult to compare prices and goods or services, or cause them to be overly optimistic or inert about the future. Furthermore, instead of relying on relevant information, consumers often take shortcuts in their decision-making process and base their choices on other factors such as familiarity with the retailer, the products or services being offered, recommendations, emotions they are experiencing at that moment, or nudges by the trader.[298]

The 2016 study *Consumer vulnerability across key markets in the EU*, mandated by the Commission, recognised that consumers are often not as rational as EU law considers them to be.[299] Moreover, all consumers can be vulnerable due to many factors, such as age, education, complexity of the sector in which a transaction is taking place, etc.[300] Helberger et al. assert that the concept of consumer vulnerability may not adequately

293. Ibid, 26-27.
294. Ibid.
295. Udo Reifner and Isabel Herwig, 'Consumer education and information rights in financial services' (2003) 12(2) Information & Communications Technology Law 128-130; Rossella Incardona and Cristina Poncibò, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) 30(1) *Journal of Consumer Policy* 29-34; Vanessa Mak, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2012) 1(4) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 258-259; Vanessa Mak and Jurgen Braspenning, 'Errare humanum est: Financial Literacy in European Consumer Credit Law' (2012) 35(3) *Journal of Consumer Policy* 310-314, 316-319; Bram B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015) 177-178; Irina Domurath, 'The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law' (2018) 2 *Journal of European Consumer and Market Law* 124–137; Fabrizio Esposito and Mateusz Grochowski, 'The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration' (2022) 18(1) *European Review of Contract Law* 11-31; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 94-96.
296. Vanessa Mak, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2012) 1(4) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 258-259; Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43(1) *The Journal of legal studies* 6-8, 22-27; Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014) 79-93; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 100-103; Rolf H. Weber, 'From disclosure to transparency in consumer law' in Klaus Mathis and Avishalom Tor (eds) *Consumer Law and Economics* (Springer 2021) 76-81.
297. Herbert A. Simon, 'A Behavioral Model of Rational Choice' (1955) 69(1) *The Quarterly Journal of Economics* 99-118; Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1124–1131; Amos Tversky and Daniel Kahneman, 'Rational Choice and the Framing of Decisions' (1986) 59(4) *Journal of Business* S251–S278.
298. Maartje Elshout et al., *Study on consumers' attitudes towards Terms and Conditions (T&Cs)* (2016) 20-24.
299. London Economics, *Consumer vulnerability across key markets in the European Union* (2016) 138-167.
300. Ibid.

account for external factors affecting consumers in the online environment.[301] They argue that the digital architecture behind this environment is universally incomprehensible to consumers.[302] This creates structural digital asymmetry, which extends beyond information asymmetry.[303] Since digital asymmetry is a structural issue, solely providing more information cannot effectively address it.

It should be noted that the UCTD precedes the introduction of the average consumer benchmark in EU law.[304] Furthermore, the UCTD was adopted long before the concept of consumer vulnerability became more widespread and topical due to the use of insights from behavioural economics in the EU,[305] and before broader concerns about the practices of digital service providers and online architecture led to a further reconsideration of this concept.[306] Consequently, it is unsurprising that the UCTD lacks any consumer benchmarks and may not fully address consumer vulnerabilities. However, Luzak and Loos advise the European legislature to consider including a direct mention of an adequate consumer protection benchmark in the UCTD.[307] Additionally, they suggest considering the feasibility of utilising a vulnerable consumer, instead of an average consumer, as a benchmark for evaluating the transparency of standard terms and conditions, especially in the online sphere.[308]

Unlike the CJEU, the Commission does not link the assessment of transparency of contract terms to the average consumer benchmark in its *Unfair Contract Terms Guidance*. Instead, it explains that this assessment must consider the group of consumers that the trader is targeting and determine whether that group is sufficiently familiar with the language used in the trader's contract terms.[309] This means that the assessment of transparency of contract terms has to be done with reference to the targeted consumer benchmark, which focuses on the average consumer of the group of consumers to whom the contract terms are addressed.[310] For instance, when the terms of a contract are aimed at a vulnerable group of

301. Natali Helberger et al., *EU Consumer Protection 2.0: Structural asymmetries in digital consumer markets* (2021) 7-24 and 49-52.
302. Ibid, 18-24 and 49-52.
303. Natali Helberger et al., *EU Consumer Protection 2.0: Structural asymmetries in digital consumer markets* (2021) 50-52.
304. The CJEU used the concept of the average consumer for the first time in 1998. See Case C-210/96 *Gut Springenheide*, point 31.
305. London Economics, *Consumer vulnerability across key markets in the European Union* (2016) 138-167; Maartje Elshout et al., *Study on consumers' attitudes towards Terms and Conditions (T&Cs)* (2016) 20-24; Natali Helberger et al., *EU Consumer Protection 2.0: Structural asymmetries in digital consumer markets* (2021) 7-24, 49-52; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 132.
306. Natali Helberger et al., *EU Consumer Protection 2.0: Structural asymmetries in digital consumer markets* (2021) 7-24, 49-52.
307. Marco B.M. Loos, Joasia Luzak, *Update the Unfair Contract Terms directive for digital services* (2021) 45-46. See also Joasia Luzak, 'The Steady Creep of an Average Consumer as a Reference Consumer in the Assessment of the Transparent Provision of Mandatory Information' (2020) 5 *Tijdschrift voor Consumentenrecht & handelspraktijken* 265-274.
308. Marco B.M. Loos, Joasia Luzak, *Update the Unfair Contract Terms directive for digital services* (2021) 45-46.
309. C(2019) 5325 final: Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts [26].
310. Ibid.

consumers, like the elderly, it is necessary to evaluate their transparency taking into account the average elderly consumer. The targeted benchmark consumer enables the consideration of consumer groups who may not be as well-informed and cautious as the average consumer determined by the CJEU, thereby promoting inclusivity. However, in the digital realm, both businesses and consumers would benefit from guidelines that provide more specific guidance on the practical application of this benchmark.[311]

2.1.4. Contractual consequences of a breach of transparency under the UCTD

As a preliminary point, it should be noted that the understanding of the consequences of breaching the transparency requirement will be influenced by the role assigned to this requirement in the broader framework of unfairness control. For example, as noted by Willett, transparency serves a procedural function within the unfairness test.[312] It is part of the process leading to the conclusion of a contract, and its primary purpose is to enable the consumer to meaningfully consent to a contract.[313] Willett points out that the lack of transparency leads to a lack of awareness of the risks contained in the contract and makes it impossible to compare with the terms offered by other traders.[314] As a result, consumers are unable to provide meaningful consent to contractual terms and the terms do not become a part of the contract.[315]

Other authors assign varying degrees of importance to the transparency requirement in testing standard terms for unfairness. For example, Beale argues that the general test of unfairness should be interpreted in a manner that places greater emphasis on transparency.[316] Micklitz believes that the transparency requirement serves a significant purpose in the unfairness test of the UCTD. It guarantees a minimum level of consumer protection by making sure that even core contract terms, which would typically be exempt from unfairness scrutiny, must undergo such scrutiny if they lack transparency.[317] AG Trstenjak, in her opinion in *RWE*, argued that transparency, alongside good faith and balance between contractual parties, is an element of fairness to which great importance is attached.[318] In support of her argument, AG Trstenjak referred to the UCTD's *travaux préparatoires*, which, in her opinion, show that the European and Social Committee proposed the introduction of

311. Natali Helberger et al., *EU Consumer Protection 2.0: Structural asymmetries in digital consumer markets* (2021) 79.
312. Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Aldershot 2007) 39.
313. Ibid, 39-40.
314. Ibid.
315. Ibid.
316. Hugh Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in Jack Beatson and Daniel Friedman (eds) *Good Faith and Fault in Contract Law* (Oxford University Press 1997) 247-251, 260-261.
317. Hans-W. Micklitz, 'Reforming European Unfair Terms Legislation in Consumer Contracts' (2010) 6(4) *European Review of Contract Law* 366.
318. Opinion of AG Trstenjak in Case C-92/11 *RWE Vertrieb*, points 62-63.

transparency as an additional requirement of fairness.[319] AG Trstenjak also believed that the fact that transparency was not part of Article 3(1) of the UCTD, which contains the unfairness formula, but was prescribed in a separate article, namely Article 5 of the UCTD, meant that transparency, as a fairness criterion, was given great importance.[320]

A view contrary to that of AG Trstenjak has been expressed by AG Hogan in his opinions to two cases from 2019 – *Lovasné Tóth* and *Gyula Kiss*. In the aforementioned cases, AG Hogan called upon the CJEU to clarify that the transparency requirement enshrined in Article 5 UCTD does not constitute a separate requirement of fairness.[321] According to AG Hogan, Article 5 UCTD should be understood merely as an interpretative rule, which "*may serve to mitigate any potentially harsh or unfair interpretations*".[322] This means that the unfairness of a non-transparent contract term could only be considered if such a term still creates an imbalance between the parties to the consumer's detriment after it has been interpreted in their favour.[323] The CJEU has ignored the appeal of AG Hogan and did not address his claims in *Lovasné Tóth* and *Gyula Kiss*.

Moreover, the CJEU's reasoning in cases *Verein für Konsumenteninformation/ Amazon* and *Gyula Kiss* suggests that its interpretation of the role of the transparency requirement within the assessment of unfairness could be more in line with the opinion of AG Trstenjak than with that of AG Hogan. The CJEU arguably alluded in 2016 already, in the case *Verein für Konsumenteninformation/Amazon*, that transparency is a separate requirement of fairness. In this case, the trader's general terms and conditions specified that the law applicable in case of a dispute is the law of the country of their establishment.[324] Yet, according to mandatory rules of international law, the law of the consumer's country of residence was also applicable. The CJEU reached the conclusion that by failing to inform the consumer about the protection they were entitled to under mandatory provisions, the trader misled them into mistakenly believing that only the law of one jurisdiction was applicable.[325] The unfairness of the term in question stemmed from "*certain specific characteristics inherent in its wording or context which cause a significant imbalance in the rights and obligations of the parties*".[326] The CJEU continued by expressly confirming that unfairness could be the result of non-compliance with the transparency requirement of Article 5 of the UCTD.[327]

While *Verein für Konsumenteninformation/Amazon* showed that the fairness of a contractual term could be contested on the basis of its lack of transparency, it indicated that a mere lack of transparency might not automatically lead to

319. Ibid, point 62.
320. Ibid, points 62-63.
321. Opinion of AG Hogan in Case C-34/18 *Lovasné Tóth*, points 85-89; Opinion of AG Hogan in Case C-621/17 *Kiss and CIB Bank*, point 59.
322. Opinion of AG Hogan in Case C-34/18 *Lovasné Tóth*, point 86.
323. Ibid. See also Opinion of AG Hogan in Case C-621/17 *Kiss and CIB Bank*, point 60.
324. Case C-191/15 *Verein für Konsumenteninformation/Amazon*, points 29-30, 61.
325. Ibid, points 66-71.
326. Ibid, point 67.
327. Ibid, point 68.

unfairness.[328] Namely, it was the **significant imbalance** between the parties' right and obligations **caused by the lack of transparency** that ultimately rendered the term unfair.[329] The CJEU applied similar reasoning in the case *mBank*. It held that, where a trader introduces ambiguity by proposing alternative performance options, one of which significantly distorts the contractual balance to the detriment of the consumer, this warrants an unfairness assessment.[330] In *Gómez del Moral Guasch II*, *D.V.* and *Banco Santander*, the CJEU clarified that the lack of transparency alone cannot render a contract term unfair under the UCTD.[331] However, the case *D.V.* confirms that the UCTD's minimum harmonisation character permits Member States to introduce such a consequence for lack of transparency in their national law.[332]

In the 2019 *Gyula Kiss* case, the CJEU explicitly established the criteria that national courts should consider when assessing the unfairness of contractual terms. This clarification helps to define the role of the transparency requirement in the UCTD's unfairness test. In this case, the CJEU explained that "*the transparent 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*".[333] Besides transparency, on the basis of Article 3(1) of the UCTD, national courts have to evaluate whether there is a breach of the requirement of good faith and whether there is an existence of a significant imbalance between the contractual parties to the consumer's detriment.[334] Finally, on the basis of Article 4(1) of the UCTD, the possible unfairness of a contract term has to be assessed considering the nature of the goods or services, which are the subject of the contract, all the circumstances surrounding the conclusion of the contract and all other terms of the contract (including those of an ancillary contract).[335] On the basis of CJEU's case law, the Commission concluded in its *Unfair Contract Terms Guidance* that the "*failure to meet the transparency requirements can be an element in the assessment of the unfairness of a given contract term and can even indicate unfairness*".[336] In my opinion, this is a well-put summary of the role of transparency within the UCTD's unfairness control system.

Where the lack of transparency contributes to a contract term being considered unfair, Article 6(1) of the UCTD renders such a term non-binding on the consumers.[337]

---

328. Hans Fredrik Marthinussen, 'Unfair Contract Terms' in Javier Plaza Penadés and Luz M. Martínez Velencoso (eds) *European Perspectives on the Common European Sales Law* (Springer 2015) 106.
329. Case C-191/15 *Verein für Konsumenteninformation/Amazon*, point 67.
330. Case C-139/22 *mBank*, points 55.
331. Case C -655/20 *Gómez del Moral Guasch II*, point 37; Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, points 47-52; Case C-265/22 *Banco Santander*, point 66.
332. Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, points 49-51. For a detailed analysis of this case see Caterina Bresci, 'Transparency Claims, Intellectual Services and Consumer Contracts: A Case of Consumer Over-Protection and Under-Protection?' (2023) 19(4) *European Review of Contract Law* 394–421.
333. Case C-621/17 *Kiss and CIB Bank*, point 49.
334. Ibid, points 49-51.
335. Ibid, point 52.
336. C C(2019) 5325 final: Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts [21-22].
337. Giovanni De Cristofaro '"Invalidity" of Contracts and Contract Terms in the Feasibility Study on a Future Instrument for European Contract Law' in Reiner Schulze and Jules Stuyck (eds) *Towards a*

The CJEU's case law shows that only the specific unfair contract term will not be binding on the consumer, while the rest of the contract should continue to exist, if possible.[338] Hence, while the non-binding effect of a specific unfair term is a typical consequence of unfairness, the nullification of an entire contract due to the unfairness of one or more of its terms is an exceptional case.[339] The entire contract will be annulled only if it cannot exist without the unfair term(s) and no other instrument remedying the invalidity of the contract can be employed.[340]

Under the UCTD, national courts are not supposed to amend or replace unfair terms. This is to prevent traders from intentionally using unfair terms in their contracts, knowing that these terms will be changed if they are deemed unfair, without any risk on the traders' part.[341] National courts have the authority to substitute an unfair term with an appropriate provision of national law, if such a provision exists, in cases where removing the term from the contract would render the entire contract invalid to the detriment of the consumer.[342] For instance, the CJEU ruled in *Kásler* that the national court could replace the unfair term with a statutory provision to ensure the contract's validity and protect the consumer.[343] Since loan agreements under dispute in *Kásler* could probably not continue to exist without the unfair term, their annulment would trigger the consumer's obligation to repay the loan.[344] The CJEU held the view that such an interpretation penalises the consumer rather than the trader and, as a result, is not compatible with the UCTD.[345] The CJEU applied the same reasoning in *Gómez del Moral Guasch II*.[346]

Cases *Dziubak* and *Lombard Lízing* show that some national rules are not suitable to replace unfair contract terms. These include general principles of law or established custom[347] and soft law instruments, such as a non-binding opinion of the

European Contract Law (Sellier 2011) 104-107.

338. Case C-453/10 *Pereničová and Perenič*, points 30-32.

339. Ibid, points 30-36.

340. In its case-law, the CJEU asks the national court to try to prevent the annulment of the contract, for example by applying default rules or by ordering the parties to renegotiate the terms of the contract, under the supervision of the national court. Regarding the application of default rules, see, e.g., Case C-26/13 *Kásler*, points 80-84; Joined cases C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco en Caixabank*, points 32-33; Joined Cases C-96/16 and C-94/17 *Banco Santander*, point 74; Joined Cases C-70/17 and C-179/17 *Abanca Corporación Bancaria*, points 56-63; Case C -655/20 *Gómez del Moral Guasch II*, point 63-68. Regarding ordering parties to renegotiatie the terms of the contract, see Case C-269/19 *Banca B.*, point 42; Case C-6/22 *M.B. and Others*, point 61.

341. Case C-618/10 *Banco Español de Crédito*, points 64-71; Joined cases C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco en Caixabank*, points 28-31; Case C-421/14 *Banco Primus*, points 71-73. See also C(2019) 5325 final: Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts [39].

342. Joined cases C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco en Caixabank*, points 32-33; Joined Cases C-96/16 and C-94/17 *Banco Santander*, point 74; Joined Cases C-70/17 and C-179/17 *Abanca Corporación Bancaria*, points 56-63. See also C(2019) 5325 final: Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts [41-43].

343. Case C-26/13 *Kásler*, points 80-84.

344. Ibid.

345. Ibid, points 83-84.

346. Case C -655/20 *Gómez del Moral Guasch II*, point2 63-68.

347. Case C-260/18 *Dziubak*, points 57-62.

highest national court.[348] These rules do not have the same presumption of fairness as default provisions of national law[349] and cannot be equated with these provisions.[350] If unfair terms cannot be replaced and the entire contract must be annulled, consumers have the option to renounce reliance on the unfairness of such terms, in order to avoid the adverse consequences of annulling the entire contract.[351] Consequently, consumers may consent to being bound by unfair terms.[352] However, this does not impose a positive obligation on consumers to declare in court that they wish to rely on the application of the UCTD.[353]

Apart from indicating unfairness of a contract term or being a factor in the assessment of its unfairness, a breach of transparency can also be addressed through the interpretation rule outlined in Article 5 of the UCTD. This rule stipulates that, when there is uncertainty regarding the meaning of a contract term, the interpretation that is most favourable to the consumer should prevail. It is important to note that this interpretation rule does not apply to collective proceedings which aim to determine whether traders commonly employ unfair contract terms and, if so, to prevent their future use. In the case of *Commission v. Spain*, the CJEU clarified that while in individual cases, interpreting an ambiguous contract term in a way that benefits the consumer immediately is advantageous, in collective actions, an objective interpretation can lead to a more frequent prohibition of non-transparent terms.[354] Apart from this statement regarding the objective pursued by the said interpretation rule, the CJEU's case law lacks clarity regarding its supposed application.

In academic literature, this interpretation rule has mostly been referred to as interpretation *contra proferentem* or the interpretation against the drafter.[355] Willett points out that there are at least two ways of interpreting the rule in question. First, a term could be interpreted in a manner that makes it harmless or less unfair to the consumer,[356] which is the solution AG Hogan advocates.[357] Second, a term could be interpreted in a way that makes it unfair, so it has to be set aside.[358] Micklitz further explains that the second solution is based on the German model and means that an ambiguous term has to be interpreted in the most unfavourable way in order

348. Case C-472/20 *Lombard Lízing*, points 34-43.
349. Case C-260/18 *Dziubak*, points 59-61.
350. Case C-472/20 *Lombard Lízing*, point 42.
351. Case C-260/18 *Dziubak*, points 53-55.
352. Ibid, point 53.
353. Case C-140/22 *mBank*, point 56.
354. Case C-70/03 *Commission v Spain*, point 16.
355. Ewoud Hondius, 'Unfair Contract Terms and the Consumer: ECJ Case Law, Foreign Literature, and Their Impact on Dutch Law' (2016) 24(3/4) *European Review of Private Law* 462-463; Geraint Howells, Christian Twigg-Flesner, Thomas Wilhelmsson, *Rethinking EU consumer law* (Routledge 2017) 139.
356. Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Aldershot 2007) 329.
357. Opinion of AG Hogan in Case C-34/18 *Lovasné Tóth*, point 86; Opinion of AG Hogan in Case C-621/17 *Kiss and CIB Bank*, point 60.
358. Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Aldershot 2007) 329; James Devenney and Thomas Pfeiffer, 'Control of Standard Terms and Collective Proceedings' in Gerhard Dannemann and Stefan Vogenauer (eds) *The Common European Sales Law in Context: Interaction with English and German Law* (Oxford University Press 2013) 696-697.

to see whether such interpretation renders it unfair.[359] In practice, applying the *contra proferentem* rule as a sanction for lack of transparency in line with AG Hogan's approach benefits the trader more than the consumer, since the term would escape the unfairness test.[360] Therefore, interpreting a non-transparent contract term in favour of the consumer and *then* subjecting it to the unfairness test, in line with the German approach, provides a higher level of protection for consumers.

As Loos points out, a breach of the transparency requirement can lead to different consequences in practice.[361] For instance, if the consumer has not had the chance to familiarise themselves with the terms of the contract, these terms may not be included in the contract. If the consumer does not comprehend the contract terms, they may either not be included in the contract or, if they are included, they may be considered unfair and therefore not legally binding on the consumer. Transparency can be a determining factor in evaluating the unfairness of contract terms or may prompt the interpretation of ambiguous terms against the trader.[362] Ultimately, the specific consequences for breaching the transparency requirement of the UCTD vary depending on the solutions outlined in national law. The national chapters will further examine the contractual repercussions attributed to such breaches under German, Croatian, and English law.

2.2. The concept of transparency under the CCD

2.2.1. The development of the transparency concept under the CCD

2.2.1.1. The adoption and content of the CCD

The first directive regulating consumer credit at the level of the EU was the 1987 Directive on consumer credit (1987 Directive).[363] The 1987 Directive represented the EU's initial attempt to ensure greater transparency of contract terms in the realm of consumer credit, by obligating credit providers to communicate information on credit costs and conditions.[364] Although this directive only provided for minimum harmonisation, allowing Member States to still implement stricter national provisions and demand a higher level of consumer protection, it also marked the initiation of standardisation for certain rules regarding consumers' rights and remedies across

359. Hans-W. Micklitz, 'Some reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts' in Hugh Collins (ed) *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008) 28-29.

360. Marco B.M. Loos, 'Crystal Clear? The Transparency Requirement in Unfair Terms Legislation' (2023) 19(4) *European Review of Contract law* 291-294.

361. Marco B.M. Loos, 'Transparency of standard terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law' (2015) 23(2) *European Review of Private Law* 180.

362. Ibid, 181.

363. Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (1987 Directive).

364. Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 113-114.

Europe.[365] However, the consumer credit market has undergone significant changes over the years, resulting in the introduction of many new financial products that the 1987 Directive could not effectively address. This has necessitated Member States to implement more specific national rules.[366] These advancements resulted in market fragmentation, which prompted the EU to adopt the currently applicable CCD in 2008, after a lengthy legislative procedure.

The Commission has introduced a proposal for a new directive on consumer credit already in 2002.[367] The main aim of the proposed directive was to establish a consumer credit market that is more transparent and efficient, leading to increased competition in the provision of credit offers. This would bring benefits to both consumers and creditors.[368] The Commission's initial proposal was ambitious, considering its suggested scope, manner of harmonisation, and extent of consumer protection duties imposed on the creditors. For instance, protection was also extended to guarantors – individuals who would guarantee the repayment of the loan.[369] The harmonisation formula moved away from minimum to maximum, meaning that Member States would no longer be able to regulate in a more stringent manner areas falling within the scope of new rules.[370] Additionally, an innovative but highly contested duty of responsible lending was introduced. Under said duty creditors, before granting credit to consumers, were obliged to take a number of steps in order to assess whether consumers would be able to honour their commitments and could be held liable on the basis of such an assessment.[371]

While the Economic and Social Committee criticised the Commission for not being bolder, such as proposing more detailed definitions of key concepts, more explicit obligations to calculate and indicate costs, and establishing EU-wide criteria for defining maximum interest rates and usury,[372] reconciling divergent national and stakeholders' positions was a difficult and lengthy task. [373] Although some of the proposed measures were abandoned (guarantor's protection) or modified (full

365. Ibid, 114. See also Wim Kösters, Stephan Paul, and Stefan Stein, 'An Economic Analysis of the EU Commission's Proposal for a New Consumer Credit Directive' (2004) 39(2) *Intereconomics* 84.
366. Ibid, 84.
367. COM(2002) 443 final: Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers [200-248].
368. Ibid, 202.
369. Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 115.
370. Ibid, 114-115.
371. Yeşim M. Atamer, 'Duty of Responsible Lending: Should the European Union Take Action?' in Stefan Grundmann and Yeşim M. Atamer (eds) *Financial Services, Financial Crisis and General European Contract Law: Failure and Challenges of Contracting* (Kluwer Law International 2011) 191-192. See also Stefan Grundmann and Christian Hofmann, 'EC Financial Services and Contract Law – Developments 2007–2010' (2010) 6(4) *European Review of Contract Law* 480.
372. COM(2002) 443 final – 2002/0222 (COD): Opinion of the European Economic and Social Committee on the "Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers" [2 and 3-6].
373. Daniela Vandone, *Consumer Credit in Europe Risks and Opportunities of a Dynamic Industry* (Heidelberg: Physica 2009) 100.

harmonisation character of the whole CCD[374] and the duty of responsible lending[375]), the European legislature still managed to push forward full harmonisation of certain important instruments of consumer protection.

The CCD applies to all credit agreements above 200 and not exceeding 75 000 euro, besides some loans such as mortgages, certain leasing agreements, agreements where credit is granted free of interest or other charges, credit between employees and employers, etc.[376] According to Benöhr, the CCD relies on three instruments to achieve its goals: information requirements, standardisation of cost calculation through the implementation of a uniform annual percentage rate of charge (APR), and specific consumer rights, such as the right of withdrawal and the right of early repayment of credit.[377] These instruments aim to enhance consumer protection by increasing market transparency and addressing the weaker position of consumers in contracts with creditors.[378] This aligns with trends in the regulation of consumer credit, aiming, as Ramsay points out, to enhance market competitiveness, instil trust in the utilisation of consumer credit, achieve contract fairness, and combat over-indebtedness.[379]

Out of the three consumer protection instruments mentioned above, which are the pillars of the CCD, this thesis analyses two instruments in the following paragraphs – information requirements and cost calculation. These instruments either **encompass transparency requirements** (the obligation to draft credit information in a *clear*, *concise* and *prominent* manner[380]) or **facilitate transparency** by prescribing a **standardised format** for the presentation of information (APR,[381] Standard European Consumer Credit Information form (SECCI)[382]) and obliging creditors to provide **adequate explanations** of credit information.[383] Specific consumer rights, such as the rights of withdrawal and early repayment of credit, are not consumer protection instruments directly linked to the trader's obligation to provide transparent information on consumer credit. Therefore, they are beyond the scope of this thesis.

374. See Recitals 9, 10 and 11 CCD.
375. The scope of the duty was significantly narrowed during the adoption process of the CCD. While creditors remain obligated to evaluate the creditworthiness of consumers before granting credit, they are no longer required to conduct extensive background checks. Their liability for this assessment only applies if Member States establish such liability in their national laws. For a more in-depth analysis of the duty's scope under the current CCD see, for example, Yeşim M. Atamer, 'Duty of Responsible Lending: Should the European Union Take Action?' in Stefan Grundmann and Yeşim M. Atamer (eds) *Financial Services, Financial Crisis and General European Contract Law: Failure and Challenges of Contracting* (Kluwer Law International 2011) 383, 393-395.
376. The full list of exceptions is in Article 2(2) CCD.
377. Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 116-119. Daniela Vandone is of the opinion that the CCD's objectives are aimed to be achieved through regulation of four areas – information, assessment of households' creditworthiness, rights concerning credit agreements, and creditors and credit intermediaries – see Daniela Vandone, *Consumer Credit in Europe Risks and Opportunities of a Dynamic Industry* (Heidelberg: Physica 2009) 101-102.
378. Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 116-117.
379. Iain Ramsay, 'Consumer credit regulation after the fall: International dimensions' (2012) 1(1) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 24-26.
380. Articles 6(1) and 10(2) CCD.
381. Annex I to the CCD.
382. Annex II to the CCD.
383. Article 5(6) CCD.

2.2.1.2. The CCD's information model and transparency concept

One of the most prominent features of the CCD is its information model. As Grundmann and Hofmann note, the 1987 Directive was the first directive that introduced information requirements into European contract law, but the CCD developed an extensive information model.[384] In their opinion, this information model, which is at the same time standardised and more personalised, pre-contractual and contractual, "*seems impressive and almost a bit exuberant*".[385] The 1987 Directive solely focused on prescribing a minimal amount of information that had to be included in advertisements and credit agreements. These minimal information requirements were limited in scope and primarily centred on the credit's cost.[386] Furthermore, the directive in question has included an illustrative list of other contractual terms that Member States may consider essential and, therefore, mandate their inclusion in credit agreements.[387]

The CCD links the amount and content of information that creditors must provide to consumers to the stage of the (pre)contractual process.[388] This process consists of three stages: the advertising stage, the pre-contractual stage, and the contractual stage.[389] The CCD prescribes a separate, minimum list of mandatory information for each stage. Creditors are required to provide this information to consumers. However, the CCD does not specifically regulate how the information requirements should be furnished at different stages of the (pre-)contractual process. As a result, it is unclear whether creditors can fulfil their contractual information obligations by referring to the same information already provided before the contract's conclusion, or if they need to provide the same information to the consumer again.

In my view, the CCD expresses the concept of transparency through the requirements of clarity, conciseness and prominence, the standardisation of the credit information's format and the obligation to provide adequate explanations of credit information. Regarding **pre-contractual information**, Articles 5 and 6 of the CCD outline the specific information that creditors must provide to consumers before the contract is finalised, as well as how to provide it. While Article 5 of the CCD outlines the general pre-contractual information requirements for credit

384. Stefan Grundmann and Christian Hofmann, 'EC Financial Services and Contract Law – Developments 2007–2010' (2010) 6(4) *European Review of Contract Law* 478. See also Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing 2005) 98.

385. Stefan Grundmann and Christian Hofmann, 'EC Financial Services and Contract Law – Developments 2007–2010' (2010) 6(4) *European Review of Contract Law* 478.

386. For instance, Article 3 of the 1987 Directive specified that credit offers advertisements must include a declaration of the annual percentage rate of charge. Article 4 mandated that written credit agreements should contain a statement of the annual percentage rate of charge, as well as the conditions under which this charge could be modified. Article 6, which pertained to credit in the form of an advance on a current account, stated that traders must inform consumers about the credit limit, annual interest rate, applicable fees, conditions for potential amendments, and the termination process.

387. Article 4(3) and the Annex to the 1987 Directive.

388. Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 117.

389. Ibid.

agreements, Article 6 focuses on specific agreements, such as credit in the form of an overdraft facility. In particular, Article 5(1) of the CCD specifies that creditors must provide consumers with 19 pieces of information regarding the credit's terms and conditions. This information concerns the identity and contract details of the creditor (and credit intermediary, where applicable[390]), a description of the main features of the product, the costs of credit, and other important legal aspects.[391] It should be noted that the list of 19 pieces of information that must be provided before entering into a credit agreement represents the minimum amount of mandatory information that creditors must provide to consumers. Article 5(1) of the CCD also mentions that creditors have the option to provide consumers with additional information.

Creditors must provide mandatory pre-contractual information by means of the **Standard European Consumer Credit Information form** (**SECCI**) and any additional information in a separate document.[392] However, the CCD does not always require creditors to provide the SECCI before the credit agreement is finalised. In situations where a consumer initiates an online credit agreement using a method of distance communication that does not support the provision of information through SECCI, the SECCI can be provided after the agreement is concluded.[393] Finally, Article 5(6) of the CCD obliges Member States to regulate when and how creditors must provide **adequate explanations** of pre-contractual credit information to consumers in order to enable them to assess whether a credit is suitable to their financial needs and situation.

Article 6 of the CCD prescribes information requirements for credit agreements in the form of the overdraft facility and other specific credit agreements.[394] These agreements are regulated in a separate article because the European legislature deemed it appropriate for them to be subject to a more lenient information model that does not impose an excessive burden on creditors.[395] Yet, considering that creditors still have to provide consumers with up to 14 pieces of pre-contractual information,[396] it is questionable whether this information model is truly lighter. The number of information requirements may slightly increase or decrease depending on the type of credit agreement. Creditors have the option, but are not obligated, to provide consumers with mandatory pre-contractual information regarding overdrafts and other specific credit agreements using a second standardised form,

390. Recital 24 of the CCD explains that pre-contractual information duties generally apply to credit intermediaries, except where suppliers of goods or services act as credit intermediaries in an ancillary capacity. In such cases, the creditor bears the responsibility to ensure that consumers receive all necessary pre-contractual information, either from the credit intermediary (if agreed upon by the creditor and the intermediary) or through another appropriate means. According to Article 3(f), credit intermediaries are defined as natural or legal persons who, for a fee, present or offer consumer credit, assist consumers with preparatory work regarding credit agreements, or conclude credit agreements on behalf of the creditor, provided they are acting in the course of their trade, business, or profession.
391. Annex II CCD.
392. Article 5(1) CCD.
393. Article 5(3) CCD.
394. Article 2(3), (5) and (6) CCD enumerates these specific agreements.
395. Recital 23 CCD.
396. Paragraphs 1-3 of Article 6 CCD prescribe information requirements for specific agreements.

the **European Consumer Credit Information form** (**ECCI**).[397] If they decide not to use ECCI, they have to ensure that all the mandatory information is communicated in an **equally prominent** fashion.[398] In cases where the conclusion of these types of agreements takes place online, at the consumer's request using means of distance communication that do not enable the provision of all mandatory information, creditors are once again permitted to provide this information after the contract has been concluded.[399]

Besides the pre-contractual consumer credit information, the CCD also **standardises the calculation of the total cost of consumer credit**, in the form of the APR. The APR was one of the landmark innovations of the 1987 Directive and the only matter amended in its two minor revisions.[400] Although the 1987 Directive already defined the APR, it did not establish any method for or an example of its calculation. The 1990 and 1998 amendments established a mathematical formula for the calculation of the ARP and further regulated the nuances of its estimation respectively.[401] However, since both amendments provided a list of illustrative examples of different possible ways of calculating the APR, they did not standardise the calculation of the credit cost throughout the entire EU.[402]

The CCD notes that the previously applicable manner of regulation of the APR did not enable the comparability of the APR throughout the EU as Member States were still allowed to take different cost factors into consideration when calculating the APR.[403] To that end, the CCD aims to both standardise how traders calculate the APR and which costs they consider in their calculation.[404] The FCA expects consumers to rely on the APR to compare consumer credit offers available across the EU to decide whether to enter into a consumer credit agreement.[405]

Article 10 of the CCD regulates the provision of **contractual credit information**. Article 10(2) of the CCD focuses on the provision of contractual information for credit agreements in general and obliges creditors to provide consumers with 22 pieces of information. Article 10(5) of the CCD prescribes the provision of contractual information in cases of specific credit agreements, such as overdraft facilities, and mandates the provision of 9 pieces of information. In cases of all types of consumer

397. Article 6(1) CCD.
398. Article 6(1) CCD.
399. Article 6(7) of the CCD, governing the conclusion of specific credit agreements via distance communication means, specifies that this is only the case if Article 10 of the CCD, which regulates the provision of contractual information, is applicable.
400. See Council Directive 90/88/EEC amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (Directive 90/88/EEC), and Directive 98/7/EC amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (Directive 98/7/EC).
401. Daniela Vandone, *Consumer Credit in Europe Risks and Opportunities of a Dynamic Industry* (Heidelberg: Physica 2009) 105-106.
402. See Annex III to Directive 90/88/EEC and Annex II to Directive 98/7/EC.
403. Recital 43 CCD.
404. Ibid.
405. Recitals 19 and 43 CCD.

credit agreements, the CCD obliges creditors to include mandatory contractual information in a **clear** and **concise** manner in the agreement.

2.2.1.3. The revision of the CCD and the adoption of the CCD 2023

Before analysing the concept of transparency under the CCD, it is necessary to mention that the Commission assessed the effectiveness, efficiency, coherence, relevance, and EU added value (i.e., additional value compared to national practices) of the CCD in 2020. Furthermore, the Commission also evaluated its compatibility with other EU directives on consumer law.[406] The evaluation revealed that the length, complexity, and timing of the delivery of pre-contractual credit information, as well as how traders provide it in the online environment, have a negative impact on its effectiveness.[407] In 2021, the Commission proposed a revision of the CCD,[408] commencing a two-year process that led to the adoption of the CCD 2023 on 18 October 2023. The CCD 2023 shall repeal the CCD on 20th November 2026, after a two-year implementation period for Member States and a one-year implementation period for credit providers.[409]

The CCD 2023 introduces significant changes to its predecessor, the CCD, both in terms of scope and substantive consumer credit rules. Notably, it expands the scope to include providers of emerging credit forms like Buy-Now-Pay-Later (BNPL),[410] which have seen explosive growth in recent years,[411] as well as existing credit forms such as leasing with an option to purchase the leased product.[412] Additionally, the CCD 2023 includes rules that cover different areas of consumer credit provision. These rules encompass tying and bundling practices, advisory services, unsolicited credit granting, conduct of business obligations, staff requirements, financial education, and arrears management, among others.[413] Furthermore, it offers a more detailed framework for the creditworthiness assessment, requiring Member States to adopt specific rules fleshing out this framework,[414] obliges Member States to implement measures limiting the costs of credit,[415] and prescribes additional criteria for Member States to consider when determining penalties for infringements of the CCD 2023.[416] As explained in Chapter 1, the CCD 2023 will come into effect in November 2026, which is well beyond the research period of this thesis. This renders it unsuitable for the comparative legal research undertaken in this study. However, the adoption of the

406. Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [3-5].
407. Ibid, [30-34].
408. COM/2021/347 final: Proposal for a Directive of the European Parliament and of the Council on consumer credits [1-3]. For an analysis of this proposal see Olha O. Cherednychenko, 'The proposal for a new EU Consumer Credit Directive: towards responsible lending in the digital age?' (2022) *Law and Financial Markets Review* 3-23.
409. Article 48 CCD 2023.
410. Recitals 15, 16 and 17, and Article 2 CCD 2023.
411. For example, in the Netherlands, the number of BNPL transactions increased by 35% in 2021, see Dutch Authority for the Financial Markets, 'Buy Now, Pay Later: A study of a new market trend' (2022) [8].
412. Recitals 15, 19, and Article 2 CCD 2023.
413. See Articles 14-17 and 32-36 CCD 2023.
414. Articles 18 and 19 CCD 2023.
415. Article 31 CCD 2023.
416. Article 44 CCD 2023.

CCD 2023 presents an opportunity to critically evaluate the modifications it brings to the transparency concept of the CCD. It also allows for an examination of whether these changes effectively address the transparency issues identified in this chapter.

Regarding the concept of transparency, the CCD 2023 introduces the requirement of comprehensibility, further expands on the obligation of creditors to provide adequate explanations of pre-contractual credit information, and prohibits opt-outs. Notably, the CCD 2023 adds the requirement of comprehensibility to the transparency concept, which was not present in CCD. It mandates creditors to provide consumers with clear and comprehensible general information regarding credit agreements, [417] pre-contractual consumer credit information,[418] and information about personalised offers.[419] Regrettably, CCD 2023 fails to clarify the meaning of this requirement or provide any explanation for its inclusion.

Furthermore, the CCD 2023 introduces several alterations to the SECCI and the ECCI. Firstly, it imposes specific transparency requirements on these forms, emphasising the need for their clarity, comprehensibility, and legibility.[420] Secondly, it introduces a two-tier information system, necessitating both forms to present essential mandatory credit information on the first page (up to a maximum of two pages), separate from the remaining mandatory information.[421] Thirdly, it requests creditors to adjust both of these forms according to the medium and channel used for contract completion, in order to ensure that consumers can easily access all essential information, even on mobile phones.[422] The departure from the Commission's proposal to confine key credit information to one page[423] is regrettable, raising questions about whether creditors can transparently deliver this information to consumers when it exceeds one page.

Additionally, the CCD 2023 further clarifies the creditor's obligation to provide adequate explanations of (pre-)contractual consumer credit information. Although it does not provide specific instructions on how creditors should deliver these explanations, the CCD 2023 proposes that creditors should tailor them according to the specific circumstances related to the credit offer.[424] This involves taking into account the consumer's need for assistance, their level of knowledge and experience, and the unique characteristics of different credit products. While these explanations are not intended as personal recommendations, it seems necessary to customise them according to the consumer's specific situation. Lastly, the CCD 2023 prevents creditors from inferring the consumer's agreement for the conclusion of a credit agreement or the purchase of ancillary services by using default options, such as pre-selected checkboxes.[425]

417. Article 9(1) CCD 2023.
418. Articles 10(1) and 11(1) CCD 2023.
419. Article 13 CCD 2023.
420. Article 10(1) and (6), Article 11(1), and Article 11(5) CCD 2023.
421. Recital 37, Article 10(3), (4) and (5), and Article 11(2), (3) and (4) CCD 2023.
422. Recital 37, Article 10(6), and Article 11(5) CCD 2023.
423. COM/2021/347 final: Proposal for a Directive of the European Parliament and of the Council on consumer credits [10].
424. Recital 45 CCD 2023.
425. Article 15 CCD 2023.

2.2.2. The objective of transparency under the CCD

Before establishing the objective of transparency under the CCD, it is helpful to examine the general objective that the CCD aims to accomplish. The objective of the CCD is twofold – to contribute to the development of a more transparent and efficient consumer credit market, and to ensure a high level of consumer protection in this field.[426] This objective is not new in European consumer (credit) law. As explained in Section 2.1.2., the UCTD shares the same dual objective. Additionally, the 1987 Directive also aimed to, on one hand, establish a European market for consumer credit and, on the other hand, safeguard consumers who are purchasing credit.[427] Considering that the foundation of a common market in consumer credit was laid in the 1980s, the CCD focuses on improving the market, or in its own words, facilitating the "*emergence of a well-functioning internal market in consumer credit*".[428] In its *Consumer Credit Guidance*, the Commission expressed the view that the provision of credit information is instrumental to the achievement of the dual objective of the CCD.[429] The CJEU also held that the provision of pre-contractual[430] and contractual credit information[431] fosters consumer protection and a well-functioning internal market.

Whereas the CCD does not distinguish between the objective of creditor's information obligations and their transparency obligations, it appears that they both primarily aim to **facilitate consumers' informed choice**. The CCD specifies that pre-contractual information should "*enable consumers to make their decisions in full knowledge of the facts*"[432] and "*compare different offers in order to take an informed decision on whether to conclude a credit agreement*".[433] The CCD recognises that consumers may not be able to make an informed choice about credit solely based on pre-contractual information and explains that creditors must assist consumers in their decision-making process by providing adequate explanations.[434] When it comes to contractual information, the CCD explains that a credit contract has to contain all necessary information in a clear and concise manner to "*enable the consumer to know his rights and obligations under the credit agreement*".[435]

In my opinion, the concept of transparency in the CCD aims to help consumers in making informed choices among various credit offers and to enhance their understanding of their legal rights and obligations. This understanding aligns with

426. Recitals 7 and 8 CCD. See also Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [2].
427. Case C-76/10 *Pohotovost'*, point 67.
428. Recital 7 CCD. The CJEU held that recitals 7-9 CCD lay down the CCD's objectives in Case C-449/13 *CA Consumer Finance SA*, point 21, and Case C-377/14 *Radlinger and Radlingerová*, point 61.
429. Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [2].
430. Case C-449/13 *CA Consumer Finance SA*, point 21.
431. Case C-377/14 *Radlinger and Radlingerová*, point 61; Case C-42/15 *Home Credit Slovakia*, point 32; Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, point 72.
432. Recital 19 CCD.
433. Article 5(1) and 6(1) CCD.
434. Recital 27 and Article 5(6) CCD.
435. Recital 31 CCD.

the objective that the UCTD seems to assign to transparency. As noted in Section 2.1.3.1., the CJEU has interpreted the transparency requirement of the UCTD as intending to ensure that consumers can make informed decisions about goods and services in the market. In order for this objective to be achieved, consumers must have the opportunity to review contract terms and comprehend their legal and economic implications.

It appears that the CJEU has begun aligning its case law concerning the transparency of contractual credit information based on the CCD with its case law regarding transparency based on the UCTD from 2020 onwards. In the *Home Credit Slovakia* case, which was decided in 2016, the CJEU left room for uncertainty as to whether the purpose of transparency under the CCD was to enable consumers to make an informed choice of credit. Specifically, the CJEU indicated that the objective of transparent contractual information could merely be to allow consumers to acquaint themselves with their contractual rights and obligations.[436] However, in more recent cases such as *Kreissparkasse Saarlouis* and *Volkswagen Bank*, which were decided in 2020 and 2021 respectively, the CJEU clarified that the objective of transparent contractual credit information is to facilitate consumers' informed choice of credit, enabling them to understand the economic and legal consequences of a credit agreement.[437]

Furthermore, the case law of the CJEU regarding the purpose of the obligation to provide adequate explanations and the APR demonstrates that the CJEU considers the promotion of consumers' informed decision-making as a transparency objective. With regard to the obligation to provide adequate explanations, the CJEU acknowledges that consumers may require additional support, apart from the credit information provided prior to entering into a contract, to make an informed choice regarding the most suitable credit option for their financial needs and circumstances.[438] This additional assistance must take the form of personalised explanations of pre-contractual credit information, which the creditor must provide to the consumer in order to assist them in making an informed choice.[439] With regards to the APR, the CJEU held that this instrument has the objective of enabling consumers to assess the extent of their financial commitment.[440]

Unlike the CJEU, the Commission appears to mainly concentrate on the objective of pre-contractual information, without addressing the objective of contractual information or transparency in general. In its *Consumer Credit Guidance*, the Commission finds that the objective of pre-contractual credit information is to "*provide the consumer with the information needed to compare different offers and*

436. Case C-42/15 *Home Credit Slovakia*, point 34.
437. Case C-66/19 *Kreissparkasse Saarlouis*, points 35 and 37-49; Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 90-95, 99-102 and 131-138.
438. Case C-449/13 *CA Consumer Finance SA*, point 41.
439. Ibid, point 41-42.
440. Case C-377/14 *Radlinger and Radlingerová*, point 90.

to make an informed decision as to whether or not to enter into the credit agreement".[441] Furthermore, in its *Evaluation of the CCD* from 2020, the Commission concluded that standardised credit forms compartmentalise pre-contractual credit information in an easily understandable and well-structured format across the EU.[442] However, the Commission also observed that pre-contractual credit information provided in the form of SECCI proved to be deficient in terms of length, comprehensibility of technical language, adaptability to the online environment and timeliness.[443] Essentially, because of deficiencies in transparency, the Commission has concluded that this specific information form is not fully effective in achieving its objective of assisting consumers in making informed credit choices.[444]

In addition to promoting informed choice, the CCD's standardisation requirements appear to aim at enhancing **legal certainty** by ensuring the comparability of credit information across the EU. With the goal of facilitating cross-border trade, the European legislature attempted to harmonise information obligations across the EU.[445] This approach aims not only to help traders reduce expenses related to providing goods and services to consumers but also to enhance the comparability of their offers. In order to achieve comparability when presenting consumer credit offers throughout the EU, the European legislature has attempted to standardise pre-contractual consumer credit information through the SECCI and the ECCI.[446] The Commission has clarified that creditors are prohibited from altering the SECCI, as doing so could potentially impede its clarity, conciseness, and prominence, thus leading to consumer confusion.[447] Furthermore, in order to ensure comparability in the presentation of consumer credit costs, the CCD has standardised the calculation of credit costs in the form of the APR.[448] The CJEU has clarified that the standardisation of the APR aims to enhance market transparency, as it assists consumers in comparing various credit offers and assessing the magnitude of their obligations.[449]

My analysis leads to the conclusion that the CCD sets ambitious goals for information transparency. The achievement of these goals depends on how

441. Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [10].
442. Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [32].
443. Ibid, [32-34].
444. Ibid, [32-34 and 91-92].
445. Recitals 4-8 and 19 and Article 5(1) CCD. See also Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 311; Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 99-100.
446. Recital 43, Article 19, and Annex I CCD.
447. Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [12-14].
448. Recital 19 CCD. See also Recital 43 CCD and Case C-377/14 *Radlinger and Radlingerová*, point 90.
449. Case C-377/14 *Radlinger and Radlingerová*, point 90.

transparency is interpreted and evaluated in practice. As argued and substantiated in Chapter 1, consumers cannot reasonably be expected to base their choices on just any information but require transparent information that is accessible, readable, and understandable. Additionally, standardisation requirements can only contribute to legal certainty if they ensure sufficient comparability of both the form and content of consumer credit information. The following sections, therefore, explore whether and to what extent the interpretation and assessment of transparency under the CCD align with the objectives attributed to it by this directive.

2.2.3. The interpretation and assessment of transparency under the CCD

2.2.3.1. The meaning of the requirements of clarity, conciseness and prominence

The CCD imposes the requirements of clarity and conciseness on contractual credit information[450] and the requirement of prominence on pre-contractual information concerning overdrafts and other specific credit agreements.[451] Thus far, the Commission provided scarce guidance on the interpretation of the CCD's transparency requirements and only in the context of consumer credit advertising.[452] The *Consumer Credit Guidance* specifies that, in order to be **clear**, information "*should not be difficult to find, nor should it be hidden among other information*".[453] In order to be **concise**, information "*should describe the offer concisely, in other words, not by lengthy or rambling descriptions*".[454]

The CJEU has provided further clarification on the interpretation of the clarity and conciseness requirements in its case law pertaining to the transparency of contractual credit information. In *Home Credit Slovakia*, the CJEU elaborated how creditors should provide contractual information in several documents. The CJEU ruled that, when credit information is disclosed across multiple documents, those documents must have clear and precise cross-references so that the information can be included in the contract in a clear and concise manner.[455] Furthermore, the CJEU has clarified that the purpose of contractual documents is to ensure that consumers are given a genuine opportunity to be apprised of their rights and obligations under the credit agreement.[456]

On the basis of the Commission's interpretation of transparency in the *Consumer Credit Guidance* and the CJEU's interpretation in the case *Home Credit Slovakia*, I have classified the requirements of clarity and conciseness as those of formal transparency

450. Article 10(2) and (5) CCD.
451. Article 6(1) CCD.
452. Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [11].
453. Ibid.
454. Ibid.
455. Case C-42/15 *Home Credit Slovakia*, point 34.
456. Ibid.

in my previous work.[457] This is because the interpretations of transparency in the *Consumer Credit Guidance* and *Home Credit Slovakia* case solely focused on ensuring that credit information is easily accessible, not excessively long and not presented in small print.[458] Additionally, as Luzak and I have argued, the CJEU's use of the notion "*apprise*"[459] in *Home Credit Slovakia* suggested that requirements of clarity and conciseness may only require creditors to ensure that consumers are aware of their contractual rights and obligations, without also requiring them to ensure that consumers understand them.[460] Such an interpretation of transparency stood in stark contrast to the interpretation of transparency in UCTD-based case law. The CJEU clearly required creditors to draft terms of consumer credit agreements in a manner that enables consumers to understand the economic and legal consequences that stem from them.[461]

However, as I mentioned before, the case law of the CJEU subsequent to the *Home Credit Slovakia* case appears to elucidate that the requirements of clarity and conciseness have a substantive element. In 2020, the CJEU determined in the *Kreissparkasse Saarlouis* case that creditors cannot fulfil the requirements of clarity and conciseness by merely referencing national legislation that stipulates the conditions for the exercise of the consumer's right of withdrawal.[462] The CJEU further explained that "*knowledge and good understanding, on the part of the consumer, of the information that must be mandatorily included in the credit agreement*" are imperative for the consumer's exercise of the right of withdrawal and the proper performance of the credit contract.[463] For this reason, creditors have to inform consumers of the conditions of their right of withdrawal in a clear and concise manner.[464]

The CJEU recognised the need for compliance with substantive transparency even further in 2021, in *Volkswagen Bank*, which concerns three joint cases.[465] The judgment of the CJEU in these cases demonstrates that the requirements of clarity and conciseness indeed oblige creditors to provide consumers with credit information that allows them to understand the economic and legal implications of a

457. Mia Junuzović, 'Transparency of (Pre-)Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?' (2018) 14 *Croatian Yearbook of European Law and Policy* 81-85; Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 101-102.

458. Mia Junuzović, 'Transparency of (Pre-)Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?' (2018) 14 *Croatian Yearbook of European Law and Policy* 82-84; Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 101.

459. According to the Oxford English Dictionary, "apprised" means "To be informed or aware, to know". See under point b. here: https://www-oed-com.proxy.uba.uva.nl/view/Entry/9830?rskey=pxFSBx&result=2&isAdvanced=false#eid (accessed 8 may 2024).

460. Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 101.

461. See my analysis in Section 2.1.3. and in Mia Junuzović, 'Transparency of (Pre-)Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?' (2018) 14 *Croatian Yearbook of European Law and Policy* 76-85.

462. Case C-66/19 *Kreissparkasse Saarlouis*, points 39-49.

463. Ibid, point 45.

464. Ibid, points 45-49.

465. Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 92-101 and 128-138.

credit contract. With respect to the comprehensibility of the economic consequences of a contract, the CJEU has outlined the conditions for informing consumers about the late-payment interest rate and the compensation for early credit repayment in a clear and concise manner. The CJEU has ruled that the credit agreement must specify the late-payment interest rate that is applicable at the time of the contract's conclusion, in the form of a percentage, enabling consumers to become aware of the consequences of a delay in payment,[466] and explain the mechanism for the adjustment of this rate.[467]

Where creditors adjust the late payment interest rate in accordance with a base rate, which is established and published by the central bank of a Member State in an easily accessible official journal, the CJEU has considered that they can inform consumers about the late payment interest rate by referencing this base rate.[468] However, the CJEU held that an average consumer who is reasonably observant and circumspect can only comprehend how the late-payment interest rate adjusts based on a reference to a base rate if the credit agreement clearly outlines the procedure for calculating the late-payment interest rate.[469] This meant that the contract had to explain the calculation method in a manner that is "*readily understood by an average consumer who does not have specialist knowledge in the financial field and which enables him or her to calculate the rate of late-payment interest based on the information provided in the credit agreement*" and specify the frequency of possible changes.[470]

In relation to the transparent provision of information regarding the calculation of a compensation for early credit repayment, the CJEU ruled that the credit agreement must specify the method of calculation in a way that is easily understandable for an average consumer, enabling them to determine the exact amount of compensation payable.[471] This means that simply mentioning a financial arithmetic framework that a national court has developed does not fulfil the requirement of providing clear and concise information about the right of early repayment.[472]

When it comes to the comprehensibility of the legal consequences of a contract, the CJEU has explained how creditors must inform consumers about the existence of and conditions for out-of-court redress mechanisms in a clear and concise manner.[473] The CJEU has emphasised the importance of providing transparent information on out-of-court redress mechanisms in order to enable consumers to make informed decisions on whether it is appropriate for them to initiate an out-of-court redress procedure and how to go about it.[474] Creditors cannot provide consumers with the

466. Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 92.
467. Ibid, points 92-94.
468. Ibid, points 94-95.
469. Ibid.
470. Ibid.
471. Ibid, points 96-100.
472. Ibid, point 101.
473. Ibid, points 128-138.
474. Ibid, points 135.

information needed to make this decision through referencing online rules of procedure or other acts that govern out-of-court redress mechanisms.[475]

The aforementioned analysis leads me to the conclusion that the requirements of clarity and conciseness are meant to enhance both the **formal and substantive transparency** of credit information. On one hand, these requirements facilitate formal transparency by ensuring that the information is not excessively long and can be easily accessed, even if it is contained in multiple documents. On the other hand, they contribute to substantive transparency by demanding that information is presented in a way that allows consumers to understand and calculate the cost of credit, as well as comprehend how to exercise their legal rights. In my opinion, this interpretation of the requirements of clarity and conciseness under the CCD is consistent with the understanding of the plainness and intelligibility requirement under the UCTD, as both aim to ensure that consumer information is accessible, readable, and understandable.

It can be observed that the CJEU does not distinguish between the requirements of clarity and conciseness in its case law. It also does not explicitly refer to them as a single transparency requirement, as is the case with the case law based on the UCTD. This leaves room for discussion as to whether these transparency requirements have independent meanings and whether one of them refers to formal transparency and the other to substantive transparency. I will further explore this question in national chapters relating to the implementation of the CCD's transparency concept.

Unlike the requirements of clarity and conciseness, the requirement of **prominence** has thus far only been briefly interpreted. According to the Commission, credit information should be presented "*in text that is neither too small nor too difficult to read compared to other text*" in order to be considered prominent.[476] Taking into consideration that this interpretation of prominence revolves around the readability of information, I would categorise it as a **formal transparency** requirement.

2.2.3.2. Standardisation of the pre-contractual consumer credit information and the APR

The CCD provides for the standardisation of the presentation of pre-contractual consumer credit information and the standardisation of the calculation of the APR. Several studies acknowledge the potential of standardisation in enhancing information transparency.[477] Research has shown that the way information is

475. Ibid, points 136-138.

476. Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [11].

477. David Horton, 'Flipping the Script: Contra Proferentem and Standard Form Contracts' (2009) 80(2) *University of Colourado Law Review* 473; Michael Faure and Hanneke Luth, 'Behavioural Economics in Unfair Contract Terms' (2011) 34(3) *Journal of Consumer Policy* 338; Akos Rona-Tas and Alya Guseva, 'Information and Consumer Credit in Central and Eastern Europe' (2013) 41(2) *Journal of Comparative Economics* 428; Maartje Elshout et al., *Study on consumers' attitudes towards Terms and Conditions (T&Cs)* (2016) 96-103; Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 129-130; Rolf H. Weber, 'From disclosure to transparency in consumer law' in Klaus Mathis and Avishalom Tor (eds) *Consumer Law and Economics* (Springer 2021) 83-85; Alexander J. Wulf and Ognyan Seizov, '"Please understand we cannot provide

presented to consumers can impact their ability to understand information.[478] Furthermore, experiments have indicated that consumers benefit from the presentation of the information in a uniform manner as it enables them to compare offers on the market more easily.[479]

It appears that the European legislature has introduced standardisation requirements for credit information in order to enhance the comparability of credit offers and simplify consumer credit information.[480] As previously mentioned, the CCD requires creditors to provide pre-contractual credit information in a standardised form known as the SECCI.[481] The SECCI categorises information into five groups – the creditor's identity and contact details, a description of the main features of the product, credit costs, other significant legal aspects, and, if applicable, additional information regarding distance marketing of financial services.[482] Each section is presented as a table with two columns. The left column includes all mandatory information that the creditor must specify, while the right column provides additional explanations. The left column also provides further explanations of certain terms (e.g., total amount of credit, APR, sureties, etc.) for consumers. The right column guides creditors on correctly completing the SECCI with pre-contractual information.

In principle, the CCD does not allow creditors to provide mandatory pre-contractual credit information in any other form.[483] The CCD adopts a lighter disclosure model only for specific consumer credit agreements, such as overdraft facilities, which allows creditors to offer less pre-contractual information and to decide how to present it.[484] In this scenario, creditors have the flexibility to choose whether to present the information in a standardised form, known as the ECCI,[485] or in some other form, provided they disclose all mandatory information in an equally prominent manner.[486]

It appears that the European legislature believed that the SECCI would ensure transparency in providing mandatory pre-contractual credit information. This belief

---

further information": evaluating content and transparency of GDPR-mandated AI disclosures' (2022) *AI & Society* 252-256.

478. Maartje Elshout et al., *Study on consumers' attitudes towards Terms and Conditions (T&Cs)* (2016) 96-103; Joasia Luzak, Alexander Johannes Wulf and

479. Akos Rona-Tas and Alya Guseva, 'Information and Consumer Credit in Central and Eastern Europe' (2013) 41(2) *Journal of Comparative Economics* 428; Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 129-130.

480. Recitals 19 and 43 CCD; Catherine Garcia and Willem H. Van Boom, 'Information Disclosure in the EU Consumer Credit Directive: Opportunities and Limitations' in James Devenney and Mel Kenny (eds) *Consumer Credit, Debt and Investment in Europe* (Cambridge University Press 2012) 54-55; Guido Comparato and Irina Domurath, 'Financialisation and its implications for private autonomy in consumer credit law' (2018) *Centre for the Study of European Contract Law Working Paper Series No. 2018-01* 237.

481. Article 5(1) CCD.

482. Annex II CCD.

483. Article 5(1) CCD.

484. Recital 23 CCD.

485. Article 6(1) CCD.

486. Ibid.

is evident in the explanation for why any additional pre-contractual information offered by creditors to consumers, beyond what is required by the CCD, must be provided in a separate document from the SECCI. According to the *Consumer Credit Guidance*, "*this aims to guarantee the prominence, clarity and conciseness of the standard information as distinct from any other additional information*".[487] This suggests that the SECCI is seen as a tool that helps with achieving clarity, conciseness, and prominence in pre-contractual credit information. In the previous section, I explained that the interpretation and assessment of the clarity, conciseness, and prominence requirements, as provided by the Commission and the CJEU so far, indicate that these requirements should promote both formal and substantive transparency. If the purpose of the SECCI is to uphold these transparency requirements, then this form should also focus on enhancing both the formal transparency and substantive transparency of consumer credit information.

The analysis of the SECCI's format leads me to the conclusion that the SECCI only standardises **what** information creditors must provide to consumers, but it does not establish **how** they should formulate this information when completing the form in question. Therefore, it is still possible for creditors to complete the SECCI in a non-transparent manner. For example, creditors could use complex technical language or include lengthy descriptions or fine print. Furthermore, although the SECCI aims to ensure both formal and substantive transparency of credit information, the current form suggests that it may only be suitable for promoting **formal transparency**.

The Commission found in its *Evaluation of the CCD* that the SECCI improved formal transparency by providing information in "*an easily understandable and well-structured format*".[488] However, it also considered the SECCI deficient in terms of its length and complexity, suitability for the digital environment and timing. When it comes to length and complexity, the *Evaluation of the CCD* concluded that the length and amount of pre-contractual information that the SECCI provide is problematic.[489] Research shows that information overload is one of the key factors that have a negative impact on consumers' ability to understand information.[490] This is because consumers' ability to process information is limited. Moreover, the excessive provision of information may obscure the objective of informing consumers as it can divert their attention from the most pertinent information.[491] For instance, even though consumers might be interested in having all the necessary information about their rights and obligations included in the contract itself when a dispute arises, they

487. Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [12].
488. Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [32].
489. Ibid, [32-34].
490. Michael Faure and Hanneke Luth, 'Behavioural Economics in Unfair Contract Terms' (2011) 34(3) *Journal of Consumer Policy* 344, 346, 348.
491. Jeffrey Davis, 'Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts' (1977) 63(6) *Virginia Law Review* 847-856.

may not require the same level of information to make an informed decision about whether to conclude the contract.[492]

Besides inadequate length and amount of information, the Commission observed in the *Evaluation of the CCD* that the use of excessive technical language in the SECCI might impede its comprehensibility to consumers.[493] Complex documents, such as the SECCI, are particularly unsuitable for assisting consumers with low financial literacy, as they struggle to comprehend intricate information relating to interest rates and the APR.[494] The 2019 *Behavioural study on digitalisation of the marketing and distance selling of financial services*, which was mandated by the Commission, offered concrete recommendations for improving the SECCI. These include: presenting information as early as possible, specifically during the pre-contractual stage; utilising side-by-side comparisons for various financial services offered by the same provider or on price comparison portals; and visually emphasising differences between offers by incorporating colour coding.[495] Unfortunately, the Commission did not incorporate these recommendations in its 2021 *Proposal for a Directive on consumer credits*.[496]

Another major deficiency of the SECCI is its unsuitability to the digital environment. The 2019 *Behavioural study on digitalisation of the marketing and distance selling of financial services* emphasised that the SECCI needs to be adapted to the online environment and the means of online communication.[497] Furthermore, in the *Evaluation of the CCD*, the Commission pointed out that creditors can provide the SECCI online through a hyperlink, which weakens the probability that consumers will open and read it.[498] Moreover, when sharing information online, creditors may utilise tactics that could potentially hinder the consumer's comprehension of the information. For instance, they might manipulate the information by concealing or excessively highlighting it, or by employing opaque pricing systems.[499] This suggests that providing the SECCI online may not guarantee formal (accessibility and readability) or substantive (comprehensibility) transparency of pre-contractual information.

It is remarkable that the format of the SECCI does not change depending on whether creditors provide it offline or online. This could make the SECCI unsuitable for all means of distance communication as well. For instance, due to its format and length, the SECCI may not be easily accessible and readable on smaller devices,

492. Ibid, 906.
493. Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [33].
494. Ibid.
495. Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 136.
496. See Annex I of COM/2021/347 final: Proposal for a Directive of the European Parliament and of the Council on consumer credits.
497. Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 136-137.
498. Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [33].
499. Ibid.

such as tablets and particularly smartphones. Whereas the CCD recognises that creditors might not be able to provide the SECCI through all means of distance communication,[500] it does not in any way adapt the SECCI's format to the online environment. The CCD merely shifts the moment in which creditors must provide the SECCI in such cases. Instead of providing the SECCI pre-contractually, creditors can provide it *after* the contract's conclusion. This indicates that the CCD does not prioritise the matter of transparency regarding pre-contractual information for online credit agreements made through distance communication methods that do not allow for the use of the SECCI.

This is a missed opportunity as behavioural research shows that consumers display significantly less engagement and caution in an online environment[501] and that the way information is presented online can impact their behaviour.[502] Furthermore, this suggests that in such situations, pre-contractual information is not deemed crucial for consumers' decision to be bound by a credit agreement. This is contrary to the objective of pre-contractual information under the CCD, as outlined in Section 2.2.2, which primarily aims to enable consumers to make informed choices. Furthermore, this contradicts the importance that the CJEU places on pre-contractual credit information in protecting the informed consent of consumers under the UCTD.[503]

---

500. Article 5(3) CCD.

501. Jorna Leenheer et al., *Study on the effects of online displays of sustainability* (2014) 23-24; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 80, 96, 102-103.

502. Maartje Elshout et al., *Study on consumers' attitudes towards Terms and Conditions (T&Cs)* (2016) 26-103; Genevieve Helleringer and Anne-Lise Sibony, 'European consumer protection through the behavioral lens' (2017) 23 (3) *Columbia Journal of European Law* 624; Ognyan Seizov, Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 159-158; Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 44-45, 54-55, 130; Joasia Luzak, 'Will the imaginary active consumers please stand up? Case note to Walbusch Walter Busch (C-430/17)' (2019) *Maastricht Journal of European and Comparative Law* 6; Arianna Rossi, Rossana Ducato, Helena Haapio and Stefania Passera, 'When Design Met Law: Design Patterns for Information Transparency' (2019) 122-123(5) *Doctrine Rechtsleer* 98-121; Alexander J. Wulf and Ognyan Seizov, 'The Principle of Transparency in Practice: How Different Groups of Stakeholders View EU Online Information Obligations' (2020) 28(5) *European Review of Private Law* 1089-1092; Alexander J. Wulf and Ognyan Seizov, '"Please understand we cannot provide further information": evaluating content and transparency of GDPR-mandated AI disclosures' (2022) *AI & Society* 251-256; Alexander J. Wulf and Ognyan Seizov, 'How to Improve Consumers' Understanding of Online Legal Information. Insights from a Behavioral Experiment' (2022) *European Journal of Law and Economics* 563-582; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 128-134; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 321-330.

503. Case C-26/13 *Kásler*, points 71-75; Case C-143/13 *Matei*, point 76; Case C-96/14 *Van Hove*, point 50; Case C-348/14 *Bucura*, point 55; Case C-186/16 *Andriciuc*, point 51; Case C-51/17 *OTP Bank and OTP Faktoring*, point 78; Case C-448/17 *EOS KSI Slovensko*, point 61; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, point 29; Case C-38/17 *GT*, point 32; Case C-621/17 *Kiss and CIB Bank*, point 37; Case C-452/18 *Ibercaja Banco*, point 44; Case C-34/18 *Lovasné Tóth*, point 62; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 73; Case C-212/20 *A. S.A.*, points 41-43.

As detailed in Section 2.2.1.3., the CCD 2023 mandates creditors to tailor the SECCI and the ECCI to the medium and channel used for contract conclusion, ensuring consumers can easily access all essential information, even on small screens.[504] This represents a positive improvement compared to the CCD, which allows for their post-contractual provision. However, the CCD 2023 does not allow flexibility for adapting these forms to the online setting by explicitly permitting modifications to their table format or shortening them. This is striking considering the Commission's *Evaluation of the CCD* determined that the table format of the SECCI is difficult to read on mobile devices and that navigating through the pre-contractual information may require more than 30 swipes.[505]

Furthermore, as outlined in Section 2.2.1.3., the CCD 2023 seeks to distinguish between mandatory consumer credit information based on importance and restrict the length of essential mandatory information within the SECCI and the ECCI.[506] Although the CCD 2023 requests creditors to clearly distinguish the necessary mandatory information from the rest of the mandatory details, it still allows creditors to present essential credit information in a document of up to two pages. Apart from the potential challenge of creditors adapting a two-page document for small screens while maintaining readability, clarity, and comprehensibility, there is a risk that consumers might miss this document amidst other information provided by the creditor. Unfortunately, the CCD 2023 does not specify how creditors should ensure that consumers notice and acknowledge the importance of this new section of the SECCI and ECCI.

The Commission's *Evaluation of the CCD* also indicates that the timing of the provision of the SECCI is generally flawed.[507] The CCD does not regulate how much time should pass before providing the SECCI to the consumer and finalising the contract. In practice, creditors prioritise the quick delivery of credit rather than ensuring that consumers have sufficient time to review the SECCI and make informed decisions based on it.[508] The CCD 2023 does not specify the timing for creditors to provide consumers with the SECCI and the ECCI. It only requires that creditors remind consumers of their right of withdrawal within one to seven days after the contract is signed or a consumer submits a binding credit offer. In cases where pre-contractual credit information is provided less than one day before a consumer becomes bound by a credit agreement or offer, the CCD 2023 requires that creditors also remind consumers of their withdrawal right.[509]

Standardisation can be a valuable tool in simplifying the complexity of information. Once information is standardised throughout the market, it becomes easier for consumers to compare and comprehend contractual terms, as they will know

504. Recital 37, Article 10(6), and Article 11(5) CCD 2023.
505. Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [110].
506. Recital 37, Article 10(3), (4) and (5), and Article 11(2), (3) and (4) CCD 2023.
507. Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [34].
508. Ibid.
509. Recital 38 and Article 10(1) CCD 2023.

what information to anticipate and where to locate it.[510] However, it appears that the CCD does not regulate the standardisation of pre-contractual credit information in a way that promotes transparency.[511] According to my analysis, creditors are still able to conceal information from consumers or present it in a way that may not be easily readable or understandable for consumers. While the SECCI may have improved the formal transparency of credit information to some extent, it appears to disregard the importance of ensuring substantive transparency.[512] Moreover, any potential benefit of standardisation might be lost because the CCD does not always require creditors to provide pre-contractual consumer credit information using the SECCI document. Therefore, the SECCI does not appear to ensure either formal or substantive transparency of credit information in the online environment. Furthermore, the CCD 2023 only partially addresses these issues, as demonstrated earlier.

In addition to the standardisation of pre-contractual credit information, the CCD's information model greatly relies on the use of the APR, which has been harmonised across the European Union. Article 3 of the CCD defines the APR as "*the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit*". Article 19 of the CCD specifies the parameters for calculating the APR. Annex I of the CCD outlines and elucidates the precise mathematical formula that creditors must use to determine the APR. The primary purpose of the CCD is to standardise the calculation and disclosure of credit costs through the use of the APR, thereby facilitating easier comparison of credit offers for consumers.[513] The CCD views the APR as a valuable tool that aids consumers in making informed choices by simplifying and enhancing the comparability of various credit offers. Given that the APR strives to improve consumers' understanding of the total cost of credit, it appears to me that it serves as an instrument of **substantive transparency**.

However, research indicates that consumers frequently struggle to comprehend the meaning of the APR[514] or how to use the APR when provided with other cost figures alongside it.[515] It is important to bear in mind that, in addition to the APR, the CCD mandates creditors to furnish consumers with information pertaining to other factors that are relevant for determining the financial impact of credit on their

510. Catherine Garcia and Willem H. Van Boom, 'Information Disclosure in the EU Consumer Credit Directive: Opportunities and Limitations' in James Devenney and Mel Kenny (eds) *Consumer Credit, Debt and Investment in Europe* (Cambridge University Press 2012) 54-55.

511. Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 103-105.

512. Ibid, 103-106.

513. Recital 19 CCD. See also Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [4, 14].

514. Jinkook Lee and Jeanne M. Hogarth, 'The Price of Money: Consumers' Understanding of APRs and Contract Interest Rates' (1999) 18(1) *Journal of Public Policy and Marketing* 67; Fernando Gómez Pomar, 'Core versus Non-Core Terms and Legal Controls Over Consumer Contract Terms: (Bad) Lessons from Europe?' (2019) 15(2) *European Review of Contract Law* 191; Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [33].

515. Massimo Caratelli, 'Transparency of Price Conditions in Consumer Credit: The Usage of the APR' in Franco Fiordelisi, Philip Molyneux and Daniele Previati (eds) *New Issues in Financial and Credit Markets* (Palgrave Macmillan 2010) 154-155.

overall financial situation. These factors encompass the duration of the agreement, the borrowing rate, monthly repayment amount, late payment interest rates, costs linked to exerting the right to early repayment, and so forth.[516] For this reason, it is highly unlikely that consumers will be able to make optimal financial choices based solely on the APR, as in certain situations, other factors may be equally or more significant when selecting the appropriate consumer credit product.[517]

The standardisation of the APR calculation is definitely an important step towards enhancing transparency of credit costs across the EU. However, it is also necessary to safeguard the provision of transparent pre-contractual information on other aspects of credit to empower consumers to make informed choices. Unfortunately, my analysis reveals that the CCD fails to guarantee substantive transparency in pre-contractual credit information and sometimes falls short in ensuring its formal transparency as well.

2.2.3.3. The obligation to give adequate explanations of pre-contractual credit information

The CCD requires Member States to ensure that creditors furnish consumers with adequate explanations of pre-contractual credit information, allowing them to assess whether a credit product is suitable for their financial situation.[518] The CCD recognises that consumers might not be able to choose a consumer credit product solely on the basis of the mandatory pre-contractual information and may require additional assistance.[519] This assistance should be provided in the form of additional explanations of the mandatory pre-contractual information to consumers, as well as the key features and effects that a specific credit product may have on them, including the repercussions of payment arrears.[520] It is evident that the duty to provide adequate explanations aims to enhance the consumer's understanding of credit products. Thus, I perceive this obligation as facilitating **substantive transparency**.

While the CCD indicates that the obligation to provide adequate explanations aims to enhance the transparency of credit information, it does not clearly define the meaning and scope of this obligation, nor its connection with other provisions of the CCD. The requirement to offer adequate explanations of credit products, together with the duty to evaluate the consumer's creditworthiness prior to granting credit, is a remnant of the responsible lending obligation found in the Commission's initial

516. Article 5(1) CCD. See also Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [17-19].
517. The fact that the calculation of other cost elements, which are relevant for the calculation of the actual cost of credit, is not standardised across the EU is also recognised in Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [4-6].
518. Recital 27 and Article 5(6) CCD. See also Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [12-13].
519. Recital 27 CCD.
520. Article 5(6) CCD.

proposal, which served as the foundation for the adoption of the CCD.[521] As Benöhr explains, the initially proposed obligation of responsible lending required creditors not only to assess the consumer's ability to repay a specific loan, but also to evaluate their overall financial situation in terms of financial soundness.[522] In order to carry out such an assessment, creditors would need to undertake specific checks, such as consulting central databases regarding payments arrears prior to granting credit.[523]

The duty of responsible lending was strongly criticised, especially by the financial sector, because to be effective, it should also have provided for damage compensation under national law in case of breach.[524] As Grundmann and Hofmann point out, this would mean that consumers could be exempted from repaying the credit as they would not have incurred its costs if they had been properly advised.[525] This solution did not seem to be compatible with the principles of European contract law, which expects consumers to make an informed but independent decision and abide by it (*pacta sunt servanda*).[526]

In my opinion, *CA Consumer Finance SA* and *Schyns* suggest that the CJEU recognises the importance of the trader's obligation to furnish consumers with adequate explanations of credit products. This obligation is seen as a means to enhance the comprehensibility of pre-contractual credit information. In both cases, the CJEU highlighted the need for consumers to receive additional assistance when selecting a suitable loan. They also emphasised that it is the responsibility of the creditor to provide consumers with adequate explanations of credit products, in order to enable them to make well-informed decisions about obtaining credit.[527] Furthermore, in *Schyns*, the CJEU explained that the CCD enables Member States to require creditors to select the most appropriate consumer credit product for the consumer.[528] The CJEU held that professionals may be in a better position to determine which of their credit products best suits the financial circumstances of a particular consumer and, in doing so, assist consumers in making informed decisions for which they ultimately bear responsibility.[529]

In *CA Consumer Finance SA*, the CJEU indicated that the obligation to provide adequate explanations of consumer credit products should encompass the findings pertaining to the creditworthiness of the consumer. The CJEU acknowledged that the CCD does not explicitly mandate creditors to assess the consumer's creditworthiness prior to furnishing adequate explanations, and that creditors may rely solely on the information received from the consumer for these explanations.[530] Nevertheless, the

521. Article 8 CCD. See also Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 119-120. For a commentary on the original proposal see Udo Reifner, 'Responsible Credit in European Law' (2018) 4(2) *Italian Law Journal* 438-441.
522. Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 119.
523. Ibid.
524. Stefan Grundmann and Christian Hofmann, 'EC Financial Services and Contract Law – Developments 2007–2010' (2010) 6(4) *European Review of Contract Law* 480.
525. Ibid.
526. Ibid.
527. Case C-449/13 *CA Consumer Finance SA*, points 41-42; Case C-58/18 *Schyns*, point 30.
528. Case C-58/18 *Schyns*, point 24-36.
529. Ibid, points 30-34.
530. Case C-449/13 *CA Consumer Finance SA*, point 45.

CJEU emphasised that creditors have to consider the assessment of the consumer's creditworthiness "*in so far as that assessment means that the explanations provided need to be adapted*".[531] Therefore, although the CCD does not explicitly require creditors to assess the consumer's creditworthiness before providing them with adequate explanations about credit products based on that assessment, the case-law of the CJEU may implicitly require them to do so. This is because creditors will have to modify their explanations if their conclusion regarding the suitability of a credit product for a particular consumer changes following the creditworthiness assessment. Considering that such modifications might be ineffective and costly, it is likely that creditors will first conduct the creditworthiness assessment in practice and then provide consumers with additional explanations.

As detailed in Section 2.2.1.3, the CCD 2023 offers further clarification regarding the content of the obligation to furnish adequate explanations.[532] Specifically, it states that creditors should tailor these explanations according to the specific circumstances in which the credit is being offered. This should take into account the consumer's need for assistance, their level of knowledge and experience, and the nature of the credit product. While the requirement to provide adequate explanations does not oblige creditors to give personal recommendations to consumers, the CCD 2023 indicates that creditors should individualise these explanations to suit the consumer's personal situation.

Unfortunately, similar to the CCD, the CCD 2023 leaves it up to the Member States to decide whether and how creditors should meet their obligation to provide adequate explanations of credit information. Consequently, the potential impact of this obligation on improving the transparency of credit information at the EU level remains untapped. As noted by Garcia Porras and Van Boom, the ambiguity regarding the intended meaning and scope of the obligation to provide adequate explanations of credit information at the EU level, combined with the discretion granted for national implementation, could result in varying approaches adopted by Member States in practice.[533] I will examine whether this is the case and to what extent in the following national chapters, which investigate how Croatian, English, and German law implement the CCD's transparency concept.

2.2.4. Contractual consequences of a breach of transparency under the CCD

The CCD does not explicitly envisage the consequences for breaching any of its provisions, which also includes those related to ensuring credit information transparency. It delegates the responsibility of establishing dissuasive, effective,

531. Ibid.
532. Recital 45 and Article 12 CCD 2023.
533. Catherine Garcia and Willem H. Van Boom, 'Information Disclosure in the EU Consumer Credit Directive: Opportunities and Limitations' in James Devenney and Mel Kenny (eds) *Consumer Credit, Debt and Investment in Europe* (Cambridge University Press 2012) 36.

and proportionate penalties for violating its provisions to the Member States.[534] The CCD 2023 has introduced additional criteria for Member States to consider when defining penalties. Specifically, the CCD 2023 mandates that Member States should ensure that sanctions in coordinated actions against traders engaging in widespread infringements or infringements with an EU dimension should include the option to impose fines through administrative procedures and/or judicial proceedings.[535] Furthermore, the CCD 2023 requires Member States to ensure that competent authorities can disclose any administrative sanction imposed for CCD violations, as long as such disclosure does not significantly undermine financial markets or result in disproportionate harm to the parties concerned.[536] As explained in Chapter 1, my research focuses on the contractual consequences of transparency breaches, making penalties beyond the scope of my thesis.

The CJEU's case law provides examples of consequences for breaches of the CCD's information obligations, but it has not yet addressed cases of breaches of its transparency obligations. For instance, in the *Radlinger and Radlingerová* case, the CJEU clarified that national courts must examine whether creditors comply with their information obligations under the CCD on their own initiative. They should also apply all the consequences that national law stipulates in cases of non-compliance.[537] In this case, the violation of an information obligation was sanctioned by national law through the application of a discounted interest rate, determined by the Czech National Bank, which was in effect on the date the contract was concluded.[538] The CJEU explained that the national court has to decide whether such a sanction is dissuasive, effective, and proportionate, while the CJEU can only offer its guidance on the interpretation of these concepts.[539] When it comes to penalties that involve the forfeiture of the creditor's contractual interest and the implementation of another interest rate, the CJEU ruled that the national court should compare the amount the creditor would have received if the information obligations were met, with the amount the creditor will receive if the penalty interest rate is applied.[540] The difference between these amounts has to be genuinely dissuasive.[541] The CJEU emphasised that penalty interest rates could not be considered genuinely dissuasive if the amount of interest received by the creditor based on the penalty, is not significantly lower than the amount they would have received if they had complied with their information obligation.[542]

In *Pereničová and Perenič*, the CJEU concluded that providing incorrect information about the APR could amount to an unfair commercial practice.[543] The

534. Article 23 CCD.
535. Article 44(2) CCD 2023.
536. Article 44(3) CCD 2023.
537. Case C-377/14 *Radlinger and Radlingerová*, point 60-74.
538. Ibid, points 23-25.
539. Ibid, point 73.
540. Case C-565/12 *LCL Le Crédit Lyonnais*, point 50.
541. Ibid, point 51.
542. Ibid, point 52.
543. Case C-453/10 *Pereničová and Perenič*, points 37-41.

existence of such an unfair commercial practice is one of the elements on which national courts can base their evaluation of the unfairness of a contract term concerning the cost of credit.[544] In the case of *Volkswagen Bank*, the CJEU has ruled that there is no specific time limit for consumers to exercise their right of withdrawal if the creditor neglected to include the necessary information regarding the right of withdrawal in the credit agreement or failed to communicate it at a later stage.[545] The absence of a time limit does not depend on whether the consumer was unaware of their right to withdraw and not responsible for the lack of awareness.[546]

As the mentioned cases relate to breaches of the CCD's information rather than transparency requirements, it is uncertain whether the CJEU would apply the same reasoning in situations where creditors have provided consumers with (correct) mandatory credit information, albeit in a formally and/or substantively non-transparent manner.

The case law of the CJEU does, however, indicate that a failure to meet the information requirements under the CCD could potentially constitute a violation of the transparency requirement of the UCTD. In the case of *Pohotovost'*, which was based on the 1987 Directive, the CJEU determined that the creditor's omission to disclose the APR, an essential piece of information under EU consumer credit law, could be a decisive factor in assessing whether a trader has drafted a contract term in plain and intelligible language, as required by the UCTD.[547] The CJEU held that the national court should decide this case by applying national law that transposes the 1987 Directive, which establishes precise sanctions for instances where the APR is not stated.[548] Nevertheless, the CJEU still observed that the breach of the UCTD's transparency requirement would open up the possibility of the assessment of unfairness of the contested term.[549] If the contractual term were deemed unfair, it would no longer be binding on the consumer.[550] This CJEU followed this reasoning in *EOS KSI Slovensko*,[551] and the Commission adopted it in its *Unfair Contract Terms Guidance*.[552]

Since EU law does not clearly establish the contractual consequences of a breach of transparency under the CCD, the following national chapters examine the consequences of such breaches in German, Croatian and English law.

544. Ibid, points 37-47.
545. Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 113-118.
546. Ibid, point 118.
547. Case C-76/10 *Pohotovost'*, points 69-77.
548. Ibid, points, 73-76.
549. Ibid, point 77.
550. Article 6(1) UCTD.
551. Case C-453/10 *Pereničová and Perenič*, points 37-47; Case C-448/17 *EOS KSI Slovensko*, points 64-65.
552. C(2019) 5325 final: Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts [30-31].

2.3. The concept of transparency under the CRD

2.3.1. The development of the transparency concept under the CRD

2.3.1.1. The adoption and content of the CRD

In 2008, the Commission put forward a proposal for a directive regulating consumer rights.[553] In Weatherill's words, the adoption of a directive on *consumer rights* sounded like a landmark in the development of the system of EU consumer protection.[554] Thus, it is not surprising that the Commission's proposal has attracted significant attention from the academic community.[555]

According to the initial draft, this directive was meant to replace four directives, namely the Doorstep (DSS)[556] and Distance-Selling (DSD)[557] Directives, the UCTD and the Consumer Sales Directive,[558] which provided most of the regulatory framework for consumers' contractual rights at EU level.[559] These were minimum harmonisation directives, which allowed Member States to regulate matters within their jurisdiction more rigorously. The Commission believed that minimum harmonisation resulted in a fragmented regulatory framework, causing significant compliance costs for businesses operating across borders[560] and a low level of consumer confidence in

553. COM/2008/0614 final: Proposal for a Directive of the European Parliament and of the Council on consumer rights.

554. Stephen Weatherill, 'The Consumer Rights Directive: How and why a quest for "coherence" has (largely) failed" (2012) 49(4) *Common Market Law Review* 1280.

555. For commentaries on the Commission's proposal see Hans-W Micklitz and Norbert Reich, 'Crónica de Una Muerte anunciada: The Commission Proposal for a "Directive on Consumer Rights"' (2009) 46(2) *Common Market Law Review* 471-519; Christian Twigg-Flesner and Daniel Metcalfe, 'The Proposed Consumer Rights Directive – Less Haste, More Thought?' (2009) 5(3) *European Review of Contract Law* 368-391; Joasia Luzak, 'Information duties in the new proposal for the Directive on consumer rights' in Martijn Willem Hesselink and Marco B.M. Loos (eds) *Het Voorstel voor een Europese richtlijn consumentenrechten : een Nederlands perspectief* (Boom Juridische uitgevers 2009); Ewoud Hondius, 'The Proposal for a Directive on Consumer Rights: The Emperor's New Clothes?' (2011) 19 (2) *European Review of Private Law* 163-166; Jan Smits, 'Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights' (2010) 18 (1) *European Review of Private Law* 5-14; Simon Whittaker, 'Unfair Contract Terms and Consumer Guarantees: The Proposal for a Directive on Consumer Rights and the Significance of "Full Harmonisation"' (2009) 5 (3) *European Review of Contract Law* 223-247; Willem H. van Boom, 'The Draft Directive on Consumer Rights: Choices Made and Arguments Used' (2009) 5(3) *Journal of Contemporary European Research* 452-464.

556. Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises OJ L 372, p. 31–33 (Doorstep Selling Directive).

557. Directive 97/7/EC on the protection of consumers in respect of distance contracts OJ L 144, p. 19–27 (Distance Selling Directive).

558. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees OJ L 171, p. 12–16 (Consumer Sales Directive).

559. Proposal for a Directive of the European Parliament and of the Council on consumer rights COM(2008) 614 final, point 130; Stefan Grundmann, 'The EU Consumer Rights Directive: Optimizing, Creating Alternatives, or a Dead End?' (2013) 18(1) *Uniform Law Review* 100-101; Stephen Weatherill, 'The Consumer Rights Directive: How and why a quest for "coherence" has (largely) failed" (2012) 49(4) *Common Market Law Review* 1286.

560. Hans-W Micklitz and Norbert Reich, 'Crónica de Una Muerte anunciada: The Commission Proposal for a "Directive on Consumer Rights"' (2009) 46(2) *Common Market Law Review* 471, 474-477; Christian Twigg-Flesner and Daniel Metcalfe, 'The Proposed Consumer Rights Directive – Less Haste, More Thought?'

cross-border shopping.[561] For these reasons, the Commission concluded that the new directive on consumer rights should be based on full harmonisation.

Despite the Commission's arguments, both the scope of the original proposal and the proposed level of harmonisation faced strong opposition. For instance, Grundmann noted that all larger Member States with robust civil law traditions were opposed to full harmonisation in fundamental aspects of civil law, such as unfair contract terms.[562] Although the Parliament accepted the proposed scope, it did not agree to full harmonisation for all areas within the scope of the proposal. The Parliament believed that a consumer rights directive should fully harmonise the regulation of unfair terms, but it did not consider full harmonisation necessary in the area of sales and consumer information.[563] The Council contended that the directive ought to solely govern aggressive marketing methods, specifically, doorstep and distance selling.[564] Reconciling the diverging views of all the involved stakeholders required a compromise. As a result, the CRD repealed and replaced only the DSS and the DSD in their entirety.[565] In regard to unfair contract terms and sales, the CRD has included provisions concerning the delivery of goods, the transfer of risk, the prohibition of charging excessive fees for using payment methods and contacting traders via telephone, as well as the prohibition of additional charges without explicit consumer consent.[566] Despite having a considerably narrower scope than initially envisioned by the Commission, the CRD represented the biggest reform work in the field of general contract law at EU level at the time of its adoption.[567]

The CRD regulates both offline and online contracts. It has a wide scope as it applies to any contract between a trader and a consumer, including contracts for the provision of water, gas, electricity, or district heating, when supplied on a contractual basis. Article 3(3) of the CRD provides a list of 13 specific types of contracts that are excluded from the scope of the CCD, such as healthcare, gambling, financial services, telecommunications, etc.[568] However, in recent years, the scope of the CRD has been expanded with the adoption of the Modernisation Directive (MD) and the DMFSD 2023. The MD expanded the CRD's scope regarding online marketplaces and platforms, and Member States were obligated to transpose it by 2022.[569] The DMFSD 2023 will extend the scope of the CRD to include financial services concluded at a

(2009) 5(3) *European Review of Contract Law* 371-372; Thomas Wilhelmsson, 'The abuse of the "confident consumer" as a justification for EC consumer law' (2004) 27(3) Journal of Consumer Policy 318.

561. Ibid.

562. Stefan Grundmann, 'The EU Consumer Rights Directive: Optimizing, Creating Alternatives, or a Dead End?' (2013) 18(1) *Uniform Law Review* 102.

563. Ibid.

564. Ibid.

565. Stephen Weatherill, 'The Consumer Rights Directive: How and why a quest for "coherence" has (largely) failed' (2012) 49(4) *Common Market Law Review* 1290-1292.

566. Article 18-20 CRD.

567. Stefan Grundmann, 'The EU Consumer Rights Directive: Optimizing, Creating Alternatives, or a Dead End?' (2013) 18(1) *Uniform Law Review* 98.

568. The full list of exceptions can be found in Article 3(3) CRD. See also Stephen Weatherill, 'The Consumer Rights Directive: How and why a quest for "coherence" has (largely) failed' (2012) 49(4) *Common Market Law Review* 1291-1292.

569. Article 4(5) MD.

distance, once it becomes effective on 19th June 2026.[570] The CRD fully harmonises the regulation of consumer contracts falling within its scope and provides that Member States can maintain or introduce more stringent provisions only where this directive expressly allows them to do so.[571] In order to regulate consumers' contractual rights, the CRD primarily focuses on consumer information and the right of withdrawal.[572]

In the following section, I will describe the CRD's information model and transparency concept. Since my thesis specifically focuses on the transparency of online consumer information, I will concentrate on the CRD's provisions regarding online contracts and omit the analysis of the CRD's provisions that regulate other types of contracts, such as off-premises contracts.

2.3.1.2. The CRD's information model and transparency concept

The CRD's information model, entailing information requirements for on-premises, off-premises, and distance contracts, constitutes the main focus of this directive.[573] As Hall, Howells, and Watson note, this model is embodied in four comprehensive articles, comprising 64 sub-paragraphs regulating the information that traders should provide, the timing and format of the information, the burden of proof, and more.[574] It is noteworthy that the CRD's information list is not necessarily exhaustive since it is *additional* to the information lists contained in the Services Directive[575] and the E-Commerce Directive[576,577] Furthermore, the CRD's information model has been further expanded following the introduction of the MD.

Articles 6 and 8 of the CRD stipulate the information that traders must provide to consumers when entering into an online contract, as well as the manner in which it should be provided. Article 6(1) of the CRD includes a comprehensive list

570. Article 1(4) DMFSD 2023.
571. Article 4 CRD.
572. Similarly, Grundman is of the opinion that the CRD relies on two instruments – information and the right of withdrawal (in Stefan Grundmann, 'The EU Consumer Rights Directive: Optimizing, Creating Alternatives, or a Dead End?' (2013) 18(1) *Uniform Law Review* 108-109), while Tonner and Fangerow introduce the level of harmonisation as a third instrument (in Klaus Tonner and Kathleen Fangerow, 'Directive 2011/83/EU on Consumer Rights: A New Approach to European Consumer Law?' (2012) 1(2) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 70).
573. Elizabeth Hall, Geraint Howells and Jonathon Watson, 'The Consumer Rights Directive – An Assessment of Its Contribution to the Development of European Consumer Contract Law' (2012) 8(2) *European Review of Contract Law* 142; Stefan Grundmann, 'The EU Consumer Rights Directive: Optimizing, Creating Alternatives, or a Dead End?' (2013) 18(1) *Uniform Law Review* 108-109, Klaus Tonner and Kathleen Fangerow, 'Directive 2011/83/EU on Consumer Rights: A New Approach to European Consumer Law?' (2012) 1(2) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 70.
574. Elizabeth Hall, Geraint Howells and Jonathon Watson, 'The Consumer Rights Directive – An Assessment of Its Contribution to the Development of European Consumer Contract Law' (2012) 8(2) *European Review of Contract Law* 142. For a detailed account of the CRD's information duties see Leonieke Tigelaar, 'How to Sanction a Breach of Information Duties of the Consumer Rights Directive?' (2019) 27(1) *European Review of Private Law* 30-34.
575. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, p. 36–68 (Services Directive).
576. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market OJ L 178, p. 1–16 (E-Commerce Directive).
577. Recital 12 and Article 6(8) CRD.

of mandatory pre-contractual information, consisting of 20 pieces of information covering various aspects of an online contract. This includes information about the goods or services, the trader's identity, costs, the right of withdrawal, guarantees, contract duration, and the functionality and interoperability of digital content, among others. Furthermore, Article 6(a) of the CRD, introduced by the MD, sets out specific information that online marketplaces must provide to consumers and specifies how they should do so.[578] However, it also grants Member States the authority to impose additional information requirements on online marketplaces.[579]

The CRD acknowledges that traders may at times provide consumers with pre-contractual information through remote communication methods, which may not facilitate the provision of all mandatory information.[580] In these cases, traders must provide consumers with at least five pieces of information regarding the characteristics of the goods or services, the trader's identity, price, the right of withdrawal, and the duration of the contract, prior to entering into a contract.[581]

The CRD also imposes certain information obligations on traders relating to costs. When consumers make an electronic order that involves a payment obligation, the trader must clearly notify them that by taking such action, they will be required to make a payment, thereby ensuring that they are fully aware of the consequences of placing an order.[582] Furthermore, a trader must obtain the consumer's explicit consent for any payment in addition to the payment for the trader's main obligation.[583] This means that the CRD prevents traders from obtaining the consumer's consent through default options, which the consumer has to reject to avoid incurring additional costs.[584] It can be observed that the CRD does not make a distinction between pre-contractual and contractual information. Specifically, all the information that the trader has provided to the consumer prior to entering into a contract will become an essential part of that contract and can only be modified through an agreement between the trader and the consumer.[585]

The concept of transparency in the CRD encompasses various transparency requirements and standardises the information pertaining to the consumer's right of withdrawal. The CRD obliges traders to provide consumers with mandatory information on online contracts in a **clear and comprehensible manner**.[586] It also obliges them to provide the same information in **plain and intelligible language**, in a manner appropriate for distance communication.[587] The CRD introduces a presumption of **legibility** of this information, under the condition that the trader

578. Article 4(5) MD.
579. Article 6(a)(2) CRD.
580. Article 8(4) CRD.
581. Ibid. See also Case C-430/17 *Walbusch Walter Busch*, points 31-47.
582. Article 8(2) CRD.
583. Article 22 CRD.
584. Ibid. See also Case C-249/21 *Fuhrmann-2*, points 30-34.
585. Article 6(5) CRD.
586. Article 6(1) CRD.
587. Article 8(1) CRD.

has presented it on a durable medium.[588] The mandatory information on electronic orders entailing a payment obligation needs to be provided in a **clear and prominent manner**[589] and information on additional costs can only be presented by means of **opt-ins**.[590] Traders must provide consumers with a **standardised withdrawal form**,[591] which they can use to exercise their right of withdrawal.[592] The MD has removed this requirement for situations where traders utilise means of distance communication that offer limited space or time to display the mandatory information.[593] Furthermore, traders can (but are not obliged to) use **standardised instructions on withdrawal** when providing consumers with information on the right and effects of withdrawal.[594] If traders use these instructions correctly, by filling them in with the relevant text choices and providing them to consumers, they will be deemed compliant with their information obligations regarding the right of withdrawal under the CRD.[595]

Between 2017 and 2022, the Commission conducted a review of the effectiveness and appropriateness of the CRD, including its provisions regarding pre-contractual information and standard contract terms. In this regard, the Commission proposed amendments to the CRD through the MD, which was adopted in 2019, and through the DMFSD 2023, which was adopted in 2023. The subsequent section provides a brief overview of the impact of these fitness checks and directives on the CRD.

2.3.1.3. The impact of fitness checks, the MD and the DMFSD 2023 on the CRD

The Commission conducted a fitness check of the CRD, the results of which were published in 2017. In its *Report on the implementation of the Consumer Rights Directive*, the Commission acknowledged certain deficiencies related to the transparent provision of information under the CRD. The Commission's evaluation revealed the need to investigate ways to streamline the presentation of pre-contractual information and standard terms and conditions, as well as enhance transparency in online marketplaces.[596] Unfortunately, the Commission failed to address these problems in its proposal for the MD from 2018.[597] The MD introduced amendments to the UCTD, the UCPD, the Price Indication Directive (PID) and the CRD.[598] None of the amendments introduced by the MD simplified the CRD's information model.[599] Despite missing the opportunity to enhance the regulation of information transparency in the digital

588. Ibid.
589. Article 8(2) CRD.
590. Article 22 CRD.
591. Article 6(1)(h) and Annex I(B) to the CRD.
592. Article 11(1) CRD.
593. Article 4(7) MD.
594. Article 6(4) CRD and Annex I(A) to the CRD.
595. Ibid.
596. SWD(2017) 169 final: Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU [7-9].
597. COM/2018/0185 final: Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83/EU as regards better enforcement and modernisation of EU consumer protection rules [18-20].
598. Ibid, [17-20].
599. Article 4 MD.

environment through the MD, the Commission initiated another fitness check of the CRD in 2022.[600] This fitness check aims to explore whether the CRD, the UCTD, and the UCPD guarantee a high level of consumer protection in the online environment.

The most notable revision of the CRD's information model by the MD is the introduction of Article 6(a). This article outlines the specific information that online marketplaces are required to furnish and emphasises the necessity of presenting this information in a clear and comprehensible manner, tailored to the chosen method of remote communication.[601] The information that online marketplaces must provide includes general information on the main parameters that determine the ranking of offers presented to the consumer and their relative importance compared to other parameters. This information must also include details about the identity of the trader, whether EU consumer rights are applicable to the contract, and how the marketplace provider and the provider of goods, services, or digital content share contractual obligations.[602] Furthermore, Article 6(a)(2) of the CRD it also allows Member States to impose additional information requirements on online marketplaces.[603]

Article 6(a) of the CRD reiterates certain transparency requirements, including clarity, comprehensibility, and suitability for distance communication means. This article also regulates (albeit to a limited extent) **how** online marketplaces need to provide information on the ranking parameters of offers. It prescribes that this information must be "*made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented*".[604]

As previously explained, the European legislature adopted the DMFSD 2023 on 22nd November 2023, broadening the scope of the CRD to include financial services contracts concluded remotely.[605] The DMFSD 2023 introduces a dedicated chapter into the CRD, which incorporates rules on financial services contracts concluded at a distance. This includes provisions regarding pre-contractual information disclosure, the right of withdrawal, and ensuring online fairness.[606] Much like the CCD 2023, the DMFSD 2023 will only be integrated into the national legal systems of Member States in 2026, well after the completion of this study's research period. Consequently, this directive is not suitable for conducting comparative legal research across EU jurisdictions. However, similar to the CCD 2023, the introduction of the DMFSD 2023 offers a chance to critically evaluate the modifications it brings to the CRD's transparency concept and assess whether these changes effectively address the transparency issues discussed in this chapter.

600. Information about the Fitness Check of EU consumer law on digital fairness is available here: https://ec.europa.eu/info/law/law-topic/consumer-protection-law/review-eu-consumer-law_en (accessed 8 May 2024).
601. Article 6(a)(1) CRD.
602. Ibid.
603. Article 6(a)(2) CRD.
604. Article (6)(a)(1)(a) CRD.
605. Recitals 9-12 DMFSD 2023.
606. Recital 14 DMFSD 2023.

The DMFSD 2023 imposes identical transparency requirements for mandatory information as the CRD, namely, clarity and comprehensibility.[607] Different from the CRD, the DMFSD 2023 includes rules on how to present information in the online environment, introduces an online withdrawal button for all distance contracts concluded on an online interface, and requires Member States to ensure that financial services providers do not create, organise, or operate their online interfaces in a way that distorts or hinders consumers' ability to make free and informed decisions.

The DMFSD 2023 allows financial service providers to layer mandatory information, except for information about the trader's identity and main business, key characteristics of the financial service, total price, presence of additional taxes or costs, and the existence, conditions, and exercise of the right of withdrawal.[608] In situations where information is layered, consumers should have the possibility to view, save, and print all the mandatory information as a single document.

Furthermore, the DMFSD 2023 introduces an online withdrawal button for all types of distance contracts concluded on an online interface in the CRD.[609] It requires traders to facilitate the withdrawal from an online contract through a designated withdrawal function clearly marked with the phrase "*withdraw from contract here*" or another equally clear wording.[610] Traders must ensure that the withdrawal button remains easily accessible and visible on the online interface throughout the entire withdrawal period.[611] However, they are allowed to use hyperlinks to direct the consumer to the withdrawal function.

Finally, the DMFSD 2023 requires Member States to ensure that financial services providers do not design their online interfaces in a way that hinders consumers from making free and informed choices.[612] Consequently, Member States must adopt measures that address at least one of the following market practices: highlighting specific choices when asking consumers to make a decision, repeatedly asking consumers to make a choice after they have already done so, particularly through intrusive pop-ups, and making it more difficult to terminate a service compared to subscribing to it. Moreover, the DMFSD 2023 allows Member States to implement stricter measures concerning the design of online interfaces for providers of financial services.

As depicted above, the CRD, along with its modifications through the MD and the DMFSD 2023, encompasses various transparency, standardisation, and design requirements applicable to consumer information. The following sections elaborate on the objectives assigned to transparency by the CRD, the interpretation and assessment of transparency within the CRD framework, and the contractual ramifications in cases where traders breach their transparency obligations.

607. See Article 16a(1) within Article 1(4) DMFSD 2023.
608. See Article 16a(7) within Article 1(4) DMFSD 2023.
609. See Article 11a within Article 1(3) DMFSD 2023.
610. See Article 11(a)(1) within Article 1(3) DMFSD 2023
611. Recital 37 DMFSD 2023.
612. Recital 41 and Article 16e within Article 1(4) DMFSD 2023.

2.3.2. The objective of transparency under the CRD

Before examining the objective of transparency under the CRD, it is useful to consider the objective pursued by the CRD. Similar to the UCTD and the CCD, the CRD has a dual objective. On one hand, it aims to achieve a high level of consumer protection.[613] On the other hand, it promotes the creation of an internal market.[614] Scholars observe that the reasoning behind the adoption of the CRD is primarily economical. [615] Before the introduction of the CRD, the Commission argued that the fragmentation of the regulatory framework had caused significant compliance costs for traders who wished to operate across the EU.[616] This situation has resulted in a lack of consumer confidence in cross-border trade and insufficient cross-border shopping within the EU,[617] especially in the online environment.[618]

The CRD views the full harmonisation of consumer information as one of the key instruments in reducing regulatory barriers to cross-border trade and ensuring a high standard of consumer protection.[619] The CRD stipulates that the harmonisation of consumer information, alongside the harmonisation of other important regulatory tools such as the right of withdrawal, will reduce compliance costs for traders and facilitate their participation in cross-border trade, ultimately enhancing consumers' confidence in the internal market.[620] This rationale is not surprising considering that EU consumer law recognises consumers as active market participants, whose actions are crucial for the progress of the internal market and who should not face obstacles in engaging in cross-border trade due to disparities in national consumer laws.[621]

The CJEU has emphasised on several occasions in its case-law based on the CRD that providing information to consumers contributes to achieving the objective of the CRD to ensure a high level of consumer protection.[622] The CJEU has clarified that the primary purpose of the obligation to provide transparent information under the

613. Recital 3 CRD.
614. Recital 4 CRD.
615. Hans-W Micklitz and Norbert Reich, 'Crónica de Una Muerte anunciada: The Commission Proposal for a "Directive on Consumer Rights"' (2009) 46(2) *Common Market Law Review* 474-477; Christian Twigg-Flesner and Daniel Metcalfe, 'The Proposed Consumer Rights Directive – Less Haste, More Thought?' (2009) 5(3) *European Review of Contract Law* 371-372; Thomas Wilhelmsson, 'The abuse of the "confident consumer" as a justification for EC consumer law' (2004) 27(3) Journal of Consumer Policy 318-319.
616. Hans-W Micklitz and Norbert Reich, 'Crónica de Una Muerte anunciada: The Commission Proposal for a "Directive on Consumer Rights"' (2009) 46(2) *Common Market Law Review* 474-477; Christian Twigg-Flesner and Daniel Metcalfe, 'The Proposed Consumer Rights Directive – Less Haste, More Thought?' (2009) 5(3) *European Review of Contract Law* 371-372.
617. Ibid.
618. Recital 5 CRD.
619. Ibid.
620. Recital 6 CRD.
621. Thomas Wilhelmsson, 'The abuse of the "confident consumer" as a justification for EC consumer law' (2004) 27(3) Journal of Consumer Policy 320.
622. Case C-649/17 *Amazon EU*, point 39; Case C-430/17 *Walbusch Walter Busch*, point 34; Case C-266/19 *EIS*, point 39; Case C-380/19 *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, point 26; Case C-249/21 *Fuhrmann-2*, point 21; Case C-179/21 *Victorinox*, point 38; Case C-536/20 *Tiketa*, point 29.

CRD is to guarantee that traders effectively communicate the terms of a contract and its implications to consumers. Additionally, traders must furnish consumers with the essential information required for the satisfactory execution of a contract, as well as the exercise of contractual rights.[623] According to the CJEU, the information regarding the contractual terms and their consequences is intended to enable consumers to make a decision on whether to engage in a contractual relationship with a trader.[624] This indicates that the objective of the obligation to provide transparent information under the CRD is to facilitate the **consumer's informed choice**.

Moreover, I find the CJEU's reasoning concerning the objective of information disclosure under the CRD to be similar to the reasoning expressed in its transparency case law based on the UCTD and the CCD. This case law expects consumers to make a decision on whether to enter into a consumer contract based on their understanding of the contract's economic and legal consequences.[625] When discussing the aim of the duty to provide information, the CJEU typically explicitly refers to transparency.[626] However, as seen in its CCD-based case law, the CJEU does not differentiate between the objective of providing information and the objective of transparency under the CRD. This suggests that the CJEU may assign the same objective to information disclosure and information transparency.

Similar to the CCD, in addition to the primary goal of facilitating informed consumer choice, the CRD imposes standardisation requirements on information about the right of withdrawal with the aim of increasing **legal certainty**. The CRD clarifies that the implementation of a standardised withdrawal form was designed to tackle inconsistencies in the exercise of the right of withdrawal throughout the EU. These discrepancies posed considerable obstacles for traders operating across borders, leading to compliance difficulties.[627] Furthermore, the introduction of this information form aims to enhance legal certainty and streamline the withdrawal process by standardising both the content and presentation of information on the right of withdrawal. In this regard, the CRD also prohibits Member States from imposing presentational requirements on the standardised withdrawal form, such as font size. However, with the introduction of the MD, traders are no longer obliged to use this form if the distance communication means do not provide sufficient space or time to display the mandatory information.[628]

Achieving the objectives of informed choice and legal certainty requires more than traders simply providing consumers with any information about the economic

623. Case C-380/19 *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, point 33; Case C-249/21 *Fuhrmann-2*, points 21-30; Case C-179/21 *Victorinox*, point 26; Case C-536/20 *Tiketa*, point 42.
624. Case C-430/17 *Walbusch Walter Busch*, points 36 and 46; Case C-380/19 *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, points 33-34; Case C-249/21 *Fuhrmann-2*, point 30; Case C-179/21 *Victorinox*, points 26 and 42; Case C-536/20 *Tiketa*, point 42.
625. See my analysis in sections 2.1.2. and 2.2.2. of this Chapter.
626. Case C-430/17 *Walbusch Walter Busch*, point 46; Case C-380/19 *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, point 33; Case C-179/21 *Victorinox*, points 26 and 42; Case C-536/20 *Tiketa*, point 42.
627. Recital 44 CRD.
628. Article 4(7) MD.

and legal consequences of the contract. These goals can only be accomplished when traders offer consumers transparent information, meaning information that is accessible, readable, and understandable to them, and can be compared across the EU. While transparency does not guarantee that consumers will read information about the contract's consequences or compare various offers on the market, it should, at the very least, ensure that consumers can rely on information during their decision-making process. In the following sections, I will evaluate whether the interpretation and evaluation of transparency based on the CRD aligns with the pursuit of the objectives of informed choice and legal certainty ascribed to information transparency in this directive.

2.3.3. The interpretation and assessment of transparency under the CRD

2.3.3.1. The meaning of the requirements of clarity, comprehensibility, plainness, intelligibility and legibility

As explained earlier, the CRD obliges traders to ensure that the mandatory information concerning online contracts they have to provide consumers with is **clear and comprehensible**[629] and **plain and intelligible**.[630] In its first guidance on the CRD from 2014, the Commission did not provide any interpretation of the transparency requirements mentioned above but only reiterated the trader's duty to offer consumers clear, comprehensible, plain and intelligible information regarding online contracts.[631] In 2021, the Commission adopted a new, more detailed guidance document on the application and interpretation of the CRD (*Consumer Rights Guidance*), which also includes interpretations of the transparency concept within the CRD.[632] This interpretation incorporates the Commission's perspective on the clarity and comprehensibility requirements, but does not address the plainness and intelligibility requirements or make any cross-references to their interpretation under the UCTD.[633]

The Commission recognises that online traders might not be able to provide clear and comprehensible information on the same web page.[634] Consequently, the Commission advocates that traders provide consumers with information at the point when it is most relevant to the transaction. Regrettably, the CJEU's ruling in the 2023 case *Sofatutor* does not follow the Commission's position. In the example of the information about the right of withdrawal, this case shows that the CJEU

629. Article 6(1) CRD.
630. Article 8(1) CRD.
631. European Commission, DG JUSTICE (June 2014): Guidance document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [17-18 and 40].
632. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [22-45].
633. Ibid.
634. Ibid, [22].

considers that traders must provide consumers with all relevant information at the time of concluding a contract.[635] This is the case even if the contract distinguishes between a free trial period and a paid period, starting with an automatic renewal of the contract after the trial period ends. As Jabłonowska points out, this reasoning ignores the problems consumers face in the subscription economy, such as the fact that contract renewal only occurs significantly after the conclusion of the initial contract.[636] Moreover, it perpetuates a fictitious image of the consumer whose need for protection is limited to receiving sufficient information when entering into the contract.[637] Thus, the Commission's approach, although overturned by the CJEU, better reflects the reality and information needs of online consumers, especially when entering into long-term contracts.

Furthermore, the Commission believes that traders should have the option to layer the information on specific topics rather than forcing customers to scroll through lengthy web pages.[638] The Commission recognises that the CRD does not oblige traders to provide consumers with all the mandatory pre-contractual information when they use means of distance communication that provide limited space or time to display such information.[639] However, the Commission clarifies that such means of distance communication are only those that do not allow traders to organise information in a way that meets the requirements of clarity and comprehensibility.[640] For example, the Commission holds that smartphones cannot be considered as means of distance communication with limited disclosure possibilities because they allow the use of features such as expandable headings, hyperlinks and content trees. These features can lead consumers to a more comprehensive presentation of information.[641]

The Commission's approach appears to be in line with behavioural research. Studies show that hyperlinks are a useful tool to highlight, clarify and connect information.[642] However, research also shows that consumers cannot always be trusted to take action to access information via hyperlinks.[643] Moreover, the possibility of layering information may lead traders to hide or display information in places where consumers will not easily notice it.[644] Therefore, the use of hyperlinks may be more

635. Case C-565/22 *Sofatutor*, points 46-48.
636. Agnieszka Jabłonowska, CJEU rules on the right of withdrawal in the subscription economy (C-565/22, Sofatutor) (Recent developments in European Consumer Law, 8 October 2023).
637. Ibid.
638. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [22-23].
639. Ibid, [45].
640. Ibid, [45-46].
641. Ibid, [46].
642. Ognyan Seizov, Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 160.
643. Joasia Luzak, 'Will the imaginary active consumers please stand up? Case note to *Walbusch Walter Busch*: Case C-430/17 *Walbusch Walter Busch GmbH & Co. KG v. Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV*, EU:C:2019:47' (2019) 26(5) *Maastricht journal of European and comparative law* 717-718.
644. Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 44-45, 54-55, 130.

appropriate for providing consumers with information that legislatures consider less relevant, or that makes it easier for consumers to understand the mandatory information. This approach has been endorsed by the DMFSD 2023, which prohibits financial services providers from layering certain essential mandatory information and allows them to layer the less important mandatory information.[645]

Also, the Commission holds that traders cannot meet the requirements of clarity and comprehensibility by simply providing in their general terms and conditions mandatory pre-contractual information that consumers must accept in order to continue with their transaction.[646] Instead, traders must bring the individual elements of the mandatory information to the consumer's attention.[647] It is worth noting that the Commission adopted this view following the request for a preliminary ruling in the *Tiketa* case, in which the CJEU took a different position on the issue. In *Tiketa*, the CJEU clarifies that the CRD does not prohibit traders from including information in general terms and conditions within a click-wrap agreement, where consumers accept the terms by ticking a box and clicking on a specific link,[648] thereby overturning the Commission's approach.

The CJEU's reasoning sharply contrasts with behavioural research, which demonstrates that the legal consequences of click-wrap agreements are often unclear to consumers.[649] Consumers tend to click through online agreements without realising that by doing so, they are agreeing to the terms and conditions set by the trader. The act of clicking in the online environment does not provide the same level of clarity as a paper signature in terms of indicating the legal significance of the agreement. Additionally, website design can make it challenging for consumers to notice the trader's terms and conditions.[650] Furthermore, the format of many wrap agreements can discourage consumers from carefully reading the agreement, particularly when they are not required to click on the link to the terms and conditions in order to complete a transaction.[651]

Unfortunately, the case law of the CJEU does not establish a connection between providing mandatory consumer information through hyperlinks and any particular transparency requirement. Additionally, it does not interpret the requirements of plainness, intelligibility, clarity, and comprehensibility stated in the CRD. Even prior

645. Article 16(a)(7) CRD.
646. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [22-45].
647. Ibid, [22].
648. Case C-536/20 *Tiketa*, point 46.
649. Nancy S. Kim, *Wrap Contracts: Foundations and Ramifications* (Oxford Academic 2014) 53-62; Juliet M. Moringiello, 'Signals, Assent and Internet Contracting' (2005) 57(4) *Rutgers Law Review* 1307-1311, 1346-1349; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 102-103.
650. Nancy S. Kim, *Wrap Contracts: Foundations and Ramifications* (Oxford Academic 2014) 53-62; Jonathan A. Obar and Anne Oeldorf-Hirsch, 'The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services' (2020) 23(1) *Information, Communication and Society* 128–147; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 115-116.
651. Ibid.

to the implementation of the CRD, the CJEU missed the opportunity in the *Content Services* case to associate the use of a hyperlink with the requirements of clarity and comprehensibility, as mandated by the DSD.[652] In *Tiketa*, the CJEU explains that traders must bring the information in general terms and conditions, which the consumer accepts via a click-wrap agreement, to the consumer's attention in a clear and comprehensible manner.[653] However, the CJEU leaves it to the referring court to examine whether the trader met the requirements of clarity and comprehensibility, without giving guidance on the factors relevant to this assessment.[654] Moreover, the CJEU ignores Recital 27 of the MD in *Tiketa*, which states that merely presenting mandatory consumer information in standard terms and conditions is incompatible with the requirements of clarity and comprehensibility. I will delve into this matter further in section 2.3.3.4. while examining the transparency obligations of online marketplaces.

The CJEU also refrains from interpreting the CRD's transparency requirements when considering how traders must inform consumers about their right of withdrawal when the means of distance communication do not allow for the full disclosure of the standardised withdrawal form in *Walbusch Walter Busch*.[655] The CJEU recalls that the duty of traders to provide consumers with clear, comprehensible, plain, and intelligible pre-contractual information applies to information about the right of withdrawal.[656] It further explains that in cases where means of distance communication do not make it possible to provide information on the right of withdrawal through a standardised form, traders are free to provide this information by other means, in plain and intelligible language.[657] However, the CJEU does not clarify which other disclosure techniques meet the criteria of plainness and intelligibility. Nevertheless, in line with this ruling, the MD removed the requirement to provide the standard withdrawal form in situations where remote communication methods do not provide sufficient space or time to display the mandatory information.[658]

In the *absoluts-bikes* case, the CJEU explains how traders should transparently provide consumers with information regarding the manufacturer's commercial guarantee.[659] However, the CJEU provides this explanation to clarify when such an information obligation exists, rather than linking it to one of the transparency requirements of the CRD. The CJEU recognises that the trader is not always required to inform the consumer of the existence and terms of the manufacturer's commercial guarantee.[660] This obligation arises when the trader emphasises the existence of a manufacturer's commercial guarantee for sales or advertising purposes, with the

652. Article 4(2) Distance Selling Directive. See Case C-49/11 *Content Services*, points 31-37.
653. Case C-536/20 *Tiketa*, points 46-47 and 53.
654. Ibid, point 47.
655. Case C-430/17 *Walbusch Walter Busch*, points 29-30.
656. Ibid, points 31, 33, and 40.
657. Case C-430/17 *Walbusch Walter Busch*, points 40-47.
658. Article 4(7) MD.
659. Case C-179/21 *Victorinox*, points 40-46.
660. Ibid, point 40.

aim of enhancing the competitiveness and attractiveness of their offer compared to competitors.[661] According to the CJEU, the existence of such a disclosure obligation in these circumstances is necessary to ensure that consumers are not misled by unclear, ambiguous or incomplete information about the various guarantees and their relationship to each other.[662] Moreover, it allows consumers to understand that the manufacturer's commercial guarantee does not originate from the trader and whether it can be enforced through the trader.[663]

This analysis leads me to the conclusion that the meaning of the requirements of clarity, comprehensibility, plainness, intelligibility in the CRD has still not been sufficiently explored and established at the EU level. Additionally, the existing interpretations of the requirements of clarity and comprehensibility support their classification as **formal transparency** requirements. The Commission's interpretation of these requirements relates only to the accessibility of consumer information. The Commission emphasises the importance of directing consumers' attention to the different elements of the mandatory information and ensuring that consumers can access information when they need it, rather than scrolling through lengthy disclosures. To achieve this, the Commission considers that traders could layer the mandatory information throughout the contractual process. In its case law, the CJEU also touches on the issue of accessibility of mandatory information on online contracts by clarifying that traders can provide this information in general terms and conditions using a click-wrap agreement. However, the CJEU does not explain how this disclosure method relates to the requirements of clarity and comprehensibility.

In my view, the focus on formal transparency is not consistent with the objective of transparency under the CRD, which aims to facilitate informed consumer choice. Even if a trader's website is well-structured and provides timely and accessible information, this does not guarantee that the information is devoid of technical or legal language, is easy to understand in terms of grammar and syntax, or that the different elements of the mandatory information are understandable as a whole. If none of the transparency requirements in the CRD guarantees that consumers can understand the mandatory information, it is questionable whether these requirements will motivate traders to provide consumers with information that effectively supports their decision-making process.

Admittedly, in the *absoluts-bikes* case, the CJEU seems to take **substantive transparency** into account by underscoring the importance of consumers not being misled by unclear information about various guarantees and being able to understand the origin and enforceability of the manufacturer's commercial guarantee.[664] Yet, as explained earlier, the CJEU associates these substantive transparency considerations with the existence of the trader's disclosure duty in relation to the manufacturer's commercial guarantee, rather than attributing them to any of the CRD's transparency

661. Case C-179/21 *Victorinox*, points 42-46.
662. Ibid, point 46.
663. Ibid.
664. Ibid, points 42-46.

requirements. Furthermore, as noted by Jabłonowska, the CJEU adopts the language of the UCPD when referring to the importance of consumers not being misled by non-transparent information.[665] In my opinion, this is a missed opportunity, as the CRD contains several transparency requirements that still require interpretation.

Moreover, while the CJEU borrows the language of the UCPD in the *absoluts-bikes* case, it does not rely on its UCTD-based transparency case law to interpret any of the CRD's transparency requirements. This is remarkable since the CRD and the UCTD articulate transparency in the same manner by requiring traders to draft contractual information in plain and intelligible language. The CJEU's case law on transparency under the UCTD shows that plain and intelligible contract terms enable consumers to grasp the implications that these terms have on their economic and legal rights.[666] The question is whether this interpretation always applies to the requirement of plainness and intelligibility, or only in the context of the application of the UCTD's unfairness control system.

In my opinion, the understanding of plainness and intelligibility based on the UCTD should be applicable to the transparency requirements of the CRD. Although the CJEU has not interpreted the CRD's transparency requirements, it seems to have associated the goal of enabling consumers to make informed choices with transparency in several cases.[667] In my view, this can only be achieved by ensuring that transparency requirements safeguard both the formal and substantive transparency of information. As I observe in Section 2.2.3.1., the CJEU seems to have recognised this in the context of the CCD, aligning its interpretation of the CCD's clarity and conciseness requirements with the interpretation of plainness and intelligibility under the UCTD. It is yet to be seen whether the CJEU will adopt the same approach to interpreting transparency under the CRD in the future.

The CRD allows Member States to maintain or introduce **language requirements** for consumer information for online contracts,[668] which could promote both the **formal and substantive** transparency of such information. Firstly, it is likely that only information in a language that consumers are familiar with can capture their attention. Secondly, as the CRD specifies, regulating the language in which traders must provide information can ensure that consumers can easily understand it.[669] However, the optional nature of language requirements implies that the CRD does not view these requirements as crucial for ensuring transparency of consumer information.

---

665. Agnieszka Jabłonowska, Pre-contractual information in multi-party settings: mobilizing legitimate interests to restrict consumer protection? (C-179/21 absoluts-bikes) (Recent developments in European Consumer Law, 15 December 2022).
666. See my analysis in the Section 2.1.3.1. of this Chapter.
667. Case C-430/17 *Walbusch Walter Busch*, points 36 and 46; Case C-380/19 *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, point 33-34; Case C-249/21 *Fuhrmann-2*, point 30; Case C-179/21 *Victorinox*, points 26 and 42; Case C-536/20 *Tiketa*, point 42.
668. Article 6(7) CRD.
669. Ibid.

Besides requiring traders to provide consumers with clear, comprehensible, plain, and intelligible information in relation to online contracts, the CRD also requires them to ensure the **legibility** of this information. Although this transparency requirement has not been interpreted by the Commission or the CJEU, in my view, its meaning appears to be quite straightforward – it ensures that the information is easily readable, or, in other words, **formally** transparent.

However, the CRD is unlikely to ensure the legibility of consumer information in all cases. This is because the CRD presumes that the trader meets the legibility requirement if the information is provided on a durable medium,[670] i.e., an instrument that allows the information to be stored and reproduced without any possibility of alteration for a specific period.[671] The CRD does not provide for such a presumption in the case of off-premises contracts. In my view, this presumption may adversely affect information transparency. The mere provision of information by a trader on a durable medium does not automatically guarantee its legibility. The legibility of the information may be compromised by technical problems or deliberate concealment of information by the trader, such as presenting it in a small font or using a white font on a white background.

Scholars note that the introduction of numerous transparency requirements in the CRD, the relationship between which is unclear, creates legal uncertainty for traders and may lead to inconsistent application of transparency in practice.[672] Moreover, it may lead to varying standards of consumer protection, which the CRD aims to prevent.[673] In my perspective, due to their limited interpretation and assessment at the EU level, the transparency requirements upon which the CRD relies are stripped of their essence – transparency.

2.3.3.2. The presentation of electronic orders and prohibition of opt-outs

According to the CRD, it is important to ensure that consumers can fully read and understand the main elements of the contract prior to proceeding with an online order.[674] For this reason, the CRD requires traders to make consumers aware of the main elements of the online contract in a **clear** and **prominent** manner, **directly before** they place their order.[675] These elements include information about the main characteristics of the goods or services, the price, and, if applicable, the duration of

670. Article 8(1) CRD.
671. Article 2(10) CRD.
672. Elizabeth Hall, Geraint Howells and Jonathon Watson, 'The Consumer Rights Directive – An Assessment of Its Contribution to the Development of European Consumer Contract Law' (2012) 8(2) *European Review of Contract Law* 166; Alberto De Franceschi, 'The EU Digital Single Market Strategy in Light of the Consumer Rights Directive: The 'Button Solution' for Internet Cost Traps and the Need for a More Systematic Approach' (2015) *Journal of European Consumer and Market Law* 146.
673. Recital 34 CRD specifies that traders' consideration of the specific needs of consumers who are particularly vulnerable due to factors such as mental, physical and psychological weakness, age or credulity during the provision of pre-contractual information should not lead to different consumer protection standards.
674. Recital 29 CRD.
675. Article 8(2) CRD.

the contract as well as the consumer's contractual obligations. [676] The CRD specifies that the information on the online contract's main elements should be "*displayed in the close vicinity of the confirmation required for placing an order*".[677]

The Commission noted in its *Consumer Rights Guidance* that the term "directly before" clarifies the temporal aspect of the duty to provide information and means "immediately before".[678] The Commission believes that the phrases "prominent" and "in close proximity" imply stricter presentation standards compared to the requirements of clarity, comprehensibility, plainness and intelligibility.[679] They require traders to present information in a way that allows consumers to view and read it prior to submitting an order, without needing to navigate away from the page where they can place the order.[680] Based on the Commission's interpretation, I would classify all the aforementioned requirements as requirements facilitating **formal transparency**. This is because they ensure the information is accessible and visible.

Additionally, the Commission's interpretation of prominence, based on the CRD, appears to be compatible with the interpretation of prominence under the CCD. In both cases, prominence serves to ensure the visibility of the information. In my opinion, it is a positive development that the Commission has given the same meaning to the requirement of prominence in two different EU consumer law directives. This ensures a certain level of consistency in the interpretation of transparency requirements across EU consumer law.

As mentioned previously, the aim of the different transparency requirements imposed by the CRD on information regarding the main components of an online contract is to guarantee that such information is both clear and easy to understand. However, it appears that the Commission's interpretation does not completely align with this objective. As mentioned in Chapter 1, accessibility is indeed an important aspect of formal transparency, but it is not the exclusive element of formal transparency, let alone transparency in general. In order to reconcile its interpretation with the CRD's objective, the Commission should, on one hand, offer guidance to traders on how to ensure the readability of information related to the main elements of the agreement, thereby further enhancing formal transparency. On the other hand, the Commission should also explain how traders can ensure that consumers can easily comprehend the information, thereby safeguarding substantive transparency. Nevertheless, it seems unlikely for such alignment to occur, given that the Commission has solely focused on the accessibility and visibility of information in its interpretation of the general requirements of clarity and conciseness, which the CRD imposes on all mandatory information.

676. Ibid.
677. Recital 39 CRD.
678. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [44].
679. Ibid.
680. Ibid.

In addition to enforcing transparency requirements on the information related to the main elements of an online contract, the CRD also governs how traders must present the button that consumers utilise to make an electronic order. The CRD asks traders to mark an order button in an **easily legible manner**.[681] Whereas the CRD allows traders to mark the order button with any **unambiguous formulation** that indicates the payment obligation, it also provides an example that they can use in the form of the phrase "*order with obligation to pay*".[682] The CRD explains that an unambiguous formulation is intended to notify consumers that they will incur a payment obligation with traders when they click on the order button. [683]

The CJEU clarified in the *Fuhrmann 2* case that traders are required to label the order button in a way that allows consumers to ascertain without any doubt that they are agreeing to make a payment for an order.[684] Thus, traders cannot expect consumers to deduce the payment obligation from the circumstances of the order process.[685] Furthermore, the CJEU offered the national court some guidance on how to evaluate whether a trader has clearly labelled the order button. In this regard, the CJEU stated that, by examining solely the wording on the order button, the national court should analyse whether the trader employed phrases that imply the initiation of a payment obligation.[686] In this assessment, the national court should take into account the language used in everyday communication and the perception of an average, reasonably informed, cautious, and observant consumer.[687] In my opinion, both the CRD and the CJEU's interpretation of it demonstrate that the obligation of clear labelling of an order button is intended to ensure that consumers understand they will be responsible for payment when they place an electronic order. Therefore, it appears to me that the labelling requirements ensure **substantive transparency** of the information regarding payment obligations.

It is worth noting that the DMFSD 2023 introduces a separate button solution for consumers to exercise their right to withdraw from distance contracts concluded on an online interface, similar to the aforementioned online order button.[688] Specifically, the DMFSD 2023 requires traders to enable consumers to withdraw from an online contract using a withdrawal function, which should be clearly labelled with the words "*withdraw from contract here*" or any other explicit expression, presented in a easily readable manner.[689] This withdrawal button should be easily accessible and prominently displayed on the online interface throughout the entire withdrawal period.[690] It can be observed that the labelling requirements for the withdrawal button are similar to those for the CRD's online order button. Moreover, online withdrawal

681. Article 8(2) CRD.
682. Ibid.
683. Recital 39 CRD.
684. Case C-249/21 *Fuhrmann-2*, point 30.
685. Ibid, points 30 and 34.
686. Ibid, points 32-34.
687. Ibid, point 33.
688. Recital 37 and Article 11(a)(1) within Article 1(3) DMFSD 2023.
689. Article 11(a)(1) within Article 1(3) DMFSD 2023.
690. Recital 37 DMFSD 2023.

and order buttons are rare examples within EU directives that specify how traders can present information in a transparent manner.

The DMFSD 2023 also emphasises the necessity for consumers to easily find the withdrawal button.[691] Consequently, it prevents traders from imposing additional requirements for consumers to access the withdrawal function, such as downloading an application, especially if they did not initially conclude the contract through that application. However, under the DMFSD 2023, traders are allowed to use hyperlinks to direct consumers to the withdrawal function. In this regard, the withdrawal button differs from the online order button, which does not explicitly permit the use of hyperlinks. As mentioned earlier, behavioural research suggests that hyperlinks may not always be an effective means of conveying information, as consumers may not take action to access the information[692] and traders may hide or disclose the information in places where consumers may overlook it.[693] The DMFSD 2023 does not offer specific guidance on how traders ought to incorporate hyperlinks into their websites or impose limitations on the number of links traders can utilise. Therefore, it remains uncertain whether EU and national authorities will effectively address the design and integration of the withdrawal button into the online interfaces of traders, guaranteeing that this button truly enhances the transparency of information regarding the exercise of the right of withdrawal.

Another solution, on which the CRD relies upon to ensure greater transparency of costs, is the prohibition of opt-ins for additional payments. Specifically, Article 22 of the CRD mandates that traders must obtain explicit consent from consumers for any payment that is in addition to the payment for the trader's main obligation. While traders cannot request consumers to opt-out, they are allowed to ask them to opt-in. In the case of *eBookers*, which pertained to air travel costs, the CJEU ruled that the specific requirement of opting-in is intended to prevent traders from enticing consumers into purchasing optional services without their explicit agreement to the purchase of such services.[694] The CJEU stated that additional charges beyond airfares are not mandatory or essential for the provision of transportation services for passengers or cargo.[695] As a result, consumers may choose to either accept or reject them.[696] Because it is the consumer's decision to determine whether to purchase additional services, traders should communicate information about said services in a clear, transparent, and unambiguous manner at the start of the booking process. Furthermore, consumers should be given the option to opt-in for these services.[697]

691. Ibid.
692. Joasia Luzak, 'Will the imaginary active consumers please stand up? Case note to *Walbusch Walter Busch*: Case C-430/17 *Walbusch Walter Busch GmbH & Co. KG v. Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV*, EU:C:2019:47' (2019) 26(5) *Maastricht journal of European and comparative law* 717-718.
693. Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 44-45, 54-55, 130.
694. Case C-112/11 *ebookers.com*, point 15.
695. Ibid, point 14.
696. Ibid.
697. Case C-112/11 *ebookers.com*, point 14.

Although CJEU based its interpretation of the link between transparency and opt-ins on the Operation of Air Services Regulation,[698] it explicitly stated that the specific requirement of opt-ins for optional price supplements in air travel corresponds to the CRD's prohibition of opt-outs for additional payments.[699] Therefore, it seems to me that the CJEU's reasoning in *eBookers* should apply to the prohibition of opt-outs in the CRD. As the prohibition aims to draw the consumer's attention to the possibility of different price variations and enhance price comparability, I believe it promotes both **formal** and **substantive** price transparency.

2.3.3.3. Standardisation of the information on the right of withdrawal

The European legislature has introduced a standardised withdrawal form to tackle differences in the exercise of the right of withdrawal across the EU. These differences have resulted in considerable compliance expenses for traders who desire to operate across borders. The purpose of implementing this form is to enhance legal certainty and streamline the withdrawal process.[700] The model withdrawal form, which the consumer can (but is not obliged to) use to exercise the right of withdrawal,[701] standardises both the content and the presentation of the information on the right of withdrawal.[702] The CRD prohibits Member States from imposing any additional formal requirements on the model withdrawal form,[703] including presentational requirements such as font size.[704] Furthermore, the CRD offers traders standardised instructions for withdrawal. These instructions include pre-drafted information about the right to withdraw and the consequences of withdrawal. Traders are also provided with various textual alternatives from which they can select the ones that are applicable to their contract(s).[705] The CRD does not require traders to utilise the standardised instructions for withdrawals when disclosing this right to consumers. Nevertheless, if they accurately complete and employ these instructions, they are deemed to have fulfilled the CRD's information obligations pertaining to the right of withdrawal.[706]

As various studies suggest that the standardisation of information could help consumers in their decision-making process,[707] standardising information on the

698. Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community (Operation of Air Services Regulation).
699. Case C-112/11 *ebookers.com*, points 15-16.
700. Recital 44 CRD.
701. Article 11(1) CRD.
702. Annex I(B) to the CRD.
703. Article 11(1) CRD.
704. Recital 44 CRD.
705. Article 6(4) CRD and Annex I(A) to the CRD.
706. Article 6(4) CRD.
707. David Horton, 'Flipping the Script: Contra Proferentem and Standard Form Contracts' (2009) 80(2) *University of Colourado Law Review* 473; Michael Faure and Hanneke Luth, 'Behavioural Economics in Unfair Contract Terms' (2011) 34(3) *Journal of Consumer Policy* 338; Akos Rona-Tas and Alya Guseva, 'Information and Consumer Credit in Central and Eastern Europe' (2013) 41(2) *Journal of Comparative Economics* 428; Maartje Elshout et al., *Study on consumers' attitudes towards Terms and Conditions (T&Cs)* (2016) 96-103; Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 129-130; Rolf H. Weber, 'From disclosure to

right of withdrawal through a harmonised EU model form may be beneficial to improve **substantive transparency**. While the CRD's attempt to harmonise and simplify information regarding the right of withdrawal is praiseworthy, there are significant doubts about the effectiveness of the model withdrawal form and instructions in enhancing transparency. Firstly, the CRD does not require traders to use the standardised withdrawal instructions in all cases, which is a missed chance. These instructions offer a consistent and comprehensive set of information concerning consumers' rights and obligations, encompassing details such as the initiation and duration of the withdrawal period, as well as the process and timeframe for cost reimbursement.

Secondly, the CRD does not adapt the model withdrawal form for the digital environment, nor does it mandate traders to use it while concluding contracts through distance communication methods which do not permit complete disclosure of the form.[708] This raises questions about when and how traders should use this form online. In its *Consumer Rights Guidance*, the Commission clarified that means of communication that facilitate the provision of information in layers, including small-screen devices like smartphones, are not considered distance communication means that prevent the full disclosure of mandatory pre-contractual information.[709]

Although the Commission failed to provide specific guidance on how traders can provide the model withdrawal form on devices like smartphones, its reasoning suggests that it might be sufficient if traders provide the model withdrawal form through a hyperlink or an expandable content tree. This would direct consumers to a more detailed presentation of information.[710] Yet, in order to ensure both formal and substantive transparency of this withdrawal form, it is important to consider how traders can effectively draw the consumer's attention to it and adapt it for the online environment, while maintaining its accessibility, readability, and comprehensibility. Moreover, if traders are able to employ various disclosure techniques to present the model withdrawal form online, this may lead to a lack of standardisation in practice, raising doubts about the necessity of an EU model withdrawal form.[711]

2.3.3.4. Transparency of online marketplaces

As explained in Section 2.3.1.2., the MD introduced a specific article in the CRD in 2019 which imposes information requirements on online marketplaces. These requirements include providing information on how the marketplace ranks offers presented to consumers, specifying the identity of traders on the marketplace,

transparency in consumer law' in Klaus Mathis and Avishalom Tor (eds) *Consumer Law and Economics* (Springer 2021) 83-85; Alexander J. Wulf and Ognyan Seizov, '"Please understand we cannot provide further information": evaluating content and transparency of GDPR-mandated AI disclosures' (2022) *AI & Society* 252-256.

708. Article 8(4) CRD.

709. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [45-46].

710. Ibid, [46].

711. Joasia Luzak, 'Will the imaginary active consumers please stand up? Case note to Walbusch Walter Busch (C-430/17)' (2019) *Maastricht Journal of European and Comparative Law* 6-7.

disclosing how the marketplace and participating traders share contractual obligations, and indicating whether consumers benefit from their EU rights.[712] Online marketplaces are required to provide this information in accordance with specific transparency requirements.

First, Article 6(a) of the CRD imposes the requirements of **clarity** and **comprehensibility** on the mandatory information regarding online marketplaces. However, this may seem redundant as the CRD already prescribes the same transparency requirements in Articles 6(1) and 8(1), which apply to online contracts in general. Nevertheless, Recital 27 of the MD introduced into the CRD an explanation of the requirements of clarity and comprehensibility. The mentioned recital clarified that these requirements aim to prevent providers of online marketplaces from solely providing mandatory information in standard terms and conditions or similar contractual documents. This reasoning aligns with the Commission's interpretation of the clarity and comprehensibility requirements under the CRD,[713] which I discussed in Section 2.3.3.1. As explained in the same section, the CJEU has not explicitly interpreted the requirements of clarity and comprehensibility thus far.

However, in the *Tiketa* case, which pertains to the purchase of event tickets through an online marketplace, the CJEU held that the CRD permits traders to furnish pre-contractual information regarding online contracts solely in their general terms and conditions, which the consumer accepts by using a checkbox.[714] Although the adoption of the MD, including Recital 27, precedes the CJEU's decision in *Tiketa*,[715] the latter case is based on facts that occurred prior to the introduction of the MD and its implementation in national laws of Member States.[716] This could explain why the CJEU has adopted a reasoning that goes against the interpretation of clarity and comprehensibility requirements under the MD. Moreover, it demonstrates how the absence of a definition or guidance on the meaning of transparency requirements in legal acts can result in an interpretation that does not align with the legislature's understanding of transparent disclosure techniques. Admittedly, it is possible that the CJEU will maintain its position and disregard the explanation in the aforementioned recital, as recitals are relevant for the interpretation of directives, but not legally binding.

As discussed in Section 2.3.3.1., the current interpretations of clarity and comprehensibility under the CRD only ensure the **formal transparency** of online pre-contractual information. Additionally, Recital 27 of the MD does not introduce a substantive aspect to these transparency requirements, leaving the question open as to whether the Commission and the CJEU will introduce this aspect in the future. As elaborated in Section 2.3.3.1., the CJEU appears to refer to substantive

712. Article 6(a)(1) within Article 4(5) MD.
713. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [22-45].
714. Case C-536/20 *Tiketa*, point 46.
715. The MD was adopted on 27 November 2019. Article 7 of the MD specifies that the deadline for its implementation was 28 May 2022.
716. Case C-536/20 *Tiketa*, points 14-21.

transparency under the CRD in the *absoluts-bikes* case by emphasising the importance of consumers not being misled by non-transparent information regarding various guarantees and their ability to understand the origin and enforceability of the manufacturer's commercial guarantee.[717] However, the CJEU does not link this substantive understanding of transparency to the existence of any of the CRD's transparency requirements, but solely to the existence of a trader's disclosure duty. Consequently, it remains to be seen whether the CJEU will apply similar reasoning to the interpretation of the requirements of clarity and comprehensibility in the future.

Second, Article 6(a) obliges online marketplaces to provide the information on the ranking of offers in **a specific section of the online interface**, which consumers can **access directly and easily** from the webpage on which the marketplace presents offers.[718] While neither the MD nor the Commission has provided guidance on these requirements so far, as they appear to address the issue of information accessibility, I would categorise them as **formal transparency** requirements.

Looking at the existing definitions and interpretations of transparency requirements imposed by the CRD on online marketplaces, it appears to me that these requirements solely focus on ensuring accessibility, which is just one component of formal transparency. In my opinion, this approach is inadequate in guaranteeing that consumers are equipped to make well-informed choices. It is not sufficient to grant consumers access to information; they must also be able to read and understand the information in order to effectively utilise it while making decisions.

2.3.4. Contractual consequences of a breach of transparency under the CRD

As scholars have observed, the European legislature missed the opportunity to harmonise sanctions in the event of breaches of information requirements during the process of adopting the CRD.[719] In addition to not prescribing a general sanction for breaching information requirements, the CRD also does not establish a general sanction for breaching transparency requirements. Prior to 2019, the CRD only stated that Member States must impose effective, proportionate, and dissuasive sanctions for violations of its provisions.[720]

In 2019, the MD introduced additional requirements for penalties into the CRD. Apart from the obligation to adopt effective, proportionate, and dissuasive penalties, the MD also introduced a list of indicative criteria that enforcement authorities

717. Case C-179/21 *Victorinox*, points 42-46.
718. Article 6(a)(1)(a) within Article 4(5) MD.
719. Elizabeth Hall, Geraint Howells and Jonathon Watson, 'The Consumer Rights Directive – An Assessment of Its Contribution to the Development of European Consumer Contract Law' (2012) 8(2) *European Review of Contract Law* 152; Christian Twigg-Flesner and Daniel Metcalfe, 'The Proposed Consumer Rights Directive – Less Haste, More Thought?' (2009) 5(3) *European Review of Contract Law* 380-381.
720. Article 24 CRD.

should consider when imposing penalties.[721] Furthermore, the MD establishes a minimum standard for the maximum amount of fines in cases of widespread violations of its provisions or violations with a EU dimension.[722] As mentioned in Chapter 1, my thesis examines the contractual consequences assigned to breaches of transparency, meaning that sanctions such as penalties are beyond the scope of my research.

The CRD stipulates various contractual consequences for violations of specific information requirements related to cost information and the right of withdrawal. If traders neglect to inform consumers about any additional costs, the CRD states that consumers shall not be burdened with such costs.[723] While this sanction clearly applies in cases where traders have not informed consumers about the costs in question, it remains uncertain whether it also applies in cases where the information provided by traders was not, for example, clear and comprehensible.

When it comes to electronic orders with a payment obligation, if traders fail to label the order button in line with the CRD, consumers will not be bound by the contract or the order.[724] Since the CRD provides clear instructions on how traders can transparently inform consumers about electronic orders, this appears to be a consequence attached to a breach of transparency. Hall, Howells, and Watson rightly highlight that this sanction raises questions about its practical application.[725] For example, depending on whether an electronic order implying a payment constitutes an offer or an acceptance of an offer, the contract may not be finalised, or consumers may be exempted from the obligation to make a payment.[726] Therefore, national legislatures should outline the practical implications of this sanction.

The CRD prescribes different consequences for cases where traders fail to inform consumers on their right of withdrawal. These include the extension of the withdrawal period to 12 months [727] and waiving the consumer's liability for any deterioration of the goods.[728] As Weatherill points out, these sanctions emerged from the CJEU's case law on the right of withdrawal since the previously applicable directives on doorstep and distance selling did not explicitly regulate this matter.[729] Furthermore, the trader's failure to provide consumers with information on the right

721. Article 24(2) within Article 4(13) MD.
722. Article 24(3) and (4) within Article 4(13) MD.
723. Article 6(6) and 22 CRD. See also Elizabeth Hall, Geraint Howells and Jonathon Watson, 'The Consumer Rights Directive – An Assessment of Its Contribution to the Development of European Consumer Contract Law' (2012) 8(2) *European Review of Contract Law* 152.
724. Article 8(2) CRD. See also Alberto De Franceschi, 'The EU Digital Single Market Strategy in Light of the Consumer Rights Directive: The 'Button Solution' for Internet Cost Traps and the Need for a More Systematic Approach' (2015) *Journal of European Consumer and Market Law* 145.
725. Elizabeth Hall, Geraint Howells and Jonathon Watson, 'The Consumer Rights Directive – An Assessment of Its Contribution to the Development of European Consumer Contract Law' (2012) 8(2) *European Review of Contract Law* 152.
726. Ibid.
727. Article 10(1) CRD.
728. Article 14(2) CRD; Joasia Luzak, 'To Withdraw or Not To Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking Into Account Its Behavioural Effects on Consumers' (2014) 37(1) *Journal of Consumer Policy* 95.
729. Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing 2005) 114.

of withdrawal relieves them from the obligation to bear costs for the performance of services.[730] The CJEU explained in the case *DC* that consumers benefit from this far-reaching consequence regardless whether they acted in good or bad faith.[731]

The CJEU clarified in *Hamilton*, a case decided upon the DSS, that providing consumers with inaccurate information regarding their right of withdrawal is equivalent to not providing them with any information at all. [732] This is because both situations are equally misleading for consumers in terms of their rights.[733] The CJEU elaborated further on this issue in the case of *Rust-Hackner*, which was decided based on directives that regulate life assurance. It clarified that if the consumer becomes aware of the right of withdrawal through other sources, the absence or inaccuracy of information cannot be rectified.[734] This arises from the fact that the absence or inaccuracy of information considerably hinders the consumer's capacity to exercise their right of withdrawal in comparison to the situation where the consumer had been provided with accurate information.[735]

It is yet to be seen whether the CJEU will adopt the same line of reasoning in cases where, for instance, the information provided by the trader is illegible or not understandable to the consumer. Given that the CJEU considers inaccurate information to be equivalent to no information, as both instances lead to consumers being misled about their rights, this same logic could be extended to violations of transparency requirements. For example, consumers could be misled about their rights when they are unable to read the information presented or when they cannot sufficiently comprehend it due to its technical or legal language.

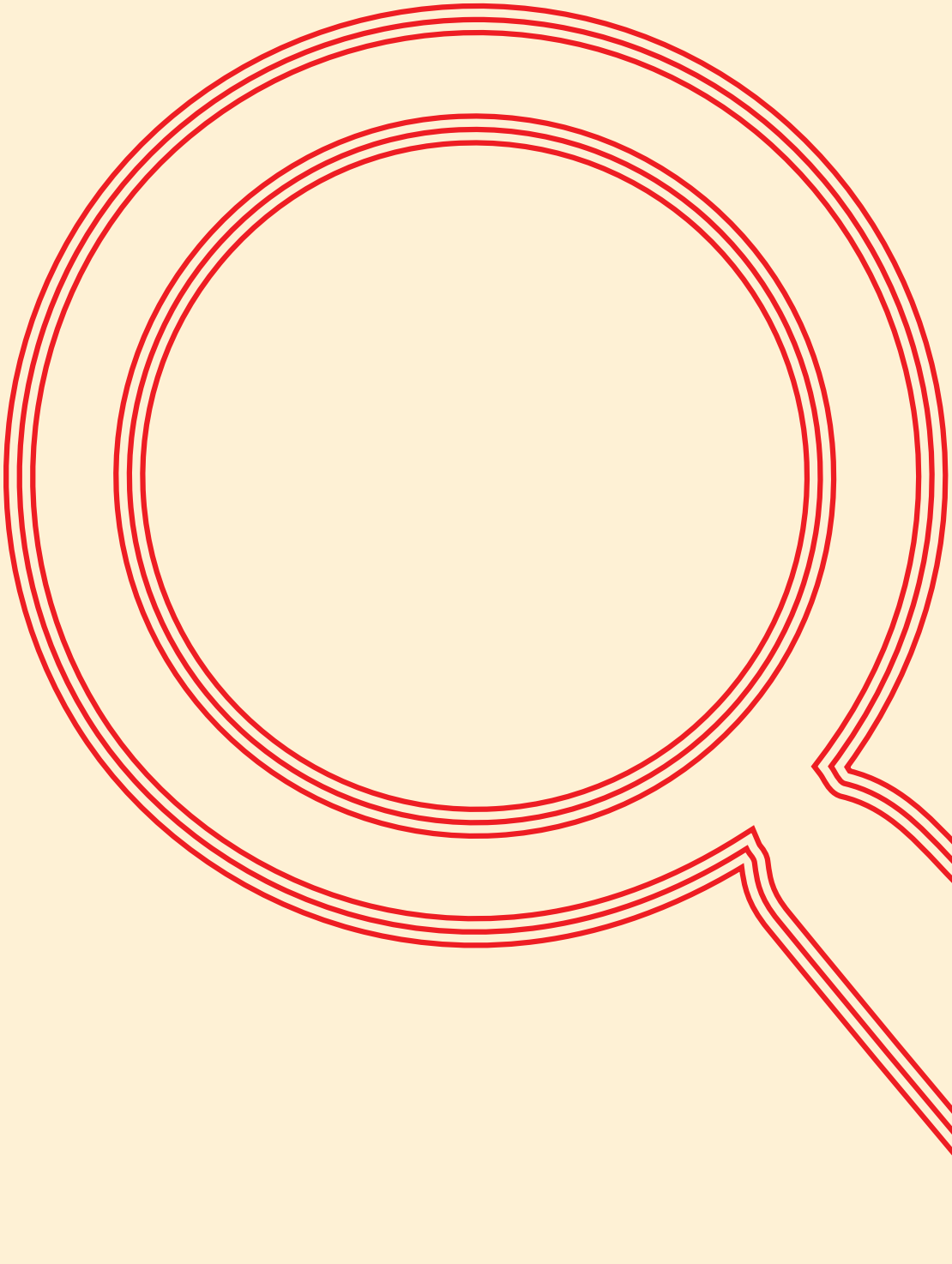
The CRD is not the only directive that applies to consumer contracts falling within its scope. For instance, online consumer contracts that include standard terms and conditions are also subject to the UCTD, which requires traders to draft contract terms in plain, intelligible language. In its *Unfair Contract Terms Guidance*, the Commission clarified that traders' adherence to information obligations specified in sector-specific legislation, like the CRD, is a significant aspect in determining whether the trader has complied with the transparency requirement of the UCTD.[736] While complying with the CRD's information requirements does not guarantee automatic compliance with the UCTD's transparency requirement, the absence of compliance strongly suggests that the trader violated the UCTD's transparency requirement.[737] This includes cases where the trader provided erroneous or

730. Article 14(4)(a)(i) and (5) CRD.
731. Case C-97/22 *DC*, points 25-34. See also the analysis of this case in Joasia Luzak, Services performed, no right to payment - CJEU in DC (C-97/22) (Recent developments in European Consumer Law, 26 May 2023).
732. Case C-412/06 *Hamilton*, point 35.
733. Ibid.
734. Joined Cases C-355/18, C-356/18 and C-479/18 *Rust-Hackner*, points 86-90.
735. Ibid, points 83-90.
736. C(2019) 5325 final: Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts [29-31].
737. Ibid, [30-31].

misleading information.[738] As a result, non-transparent information provided in online contracts based on the CRD may also be subject to sanctions under the UCTD. As mentioned in Section 2.1.4., the UCTD indicates that lack of transparency may be an element in assessing or signalling the unfairness of a contract term and requires non-transparent contract terms to be interpreted in the most favourable way for consumers.

As demonstrated throughout this chapter, the UCTD, the CCD, and the CRD do not clearly define the various transparency requirements they impose. Furthermore, the Commission and the CJEU do not always provide guidance on the desired interpretation and assessment of consumer information transparency. Moreover, current interpretations of transparency often do not align with the ambitious goals outlined by these directives, which aim to promote informed consumer choice – a shared objective across all the directives – and legal certainty – a goal specifically tied to standardisation requirements in the CCD and the CRD. The following national chapters analyse how transparency requirements, as envisioned in the UCTD, the CCD, and the CRD, are interpreted and applied in German, English, and Croatian law. These chapters also assess to what extent the national interpretations of transparency correspond with the transparency objectives laid out in these directives.

738. Ibid, [30].



CHAPTER 3

The concept of transparency in German law implementing the UCTD, the CCD and the CRD

3.1. The concept of transparency in German law implementing the UCTD

3.1.1. The development of the transparency concept

The requirement of transparency of standard contract terms was initially developed as a judge-made principle in German law.[739] Between 1976 and 2002, the transparency of standard contract terms was evaluated by courts according to the regulations of the Standard Contract Terms Act (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen, or the AGBG).[740] Although the AGBG did not explicitly refer to transparency, the courts have established a comprehensive system for evaluating the transparency of standard contract terms. This system is based on rules that govern the incorporation, interpretation, and content control of these terms.[741]

Since the UCTD was adopted in 1993, it can be observed that the introduction of the requirement of transparency of standard contract terms in German law predates the introduction of this requirement at the EU level. Therefore, it is not surprising that the German legislature did not initially explicitly transpose the UCTD's transparency provisions.[742] As the requirement of transparency applicable to standard contract terms had already been well-established in case law, the national legislature considered its codification to be redundant.[743] However, in *Commission v Netherlands*, the CJEU clarified that, for the sake of legal certainty, the transparency provisions of the UCTD could only be implemented by statute and not

739. MüKoBGB/Wurmnest, 9. Aufl. 2022, BGB § 307 Rn. 58; Ulrich Schumacher, 'Die Aufwertung des Transparenzgebots und die Konsequenzen für das Mietrecht – Neun Thesen' (2003) 1 *Neue Zeitschrift für Miet- und Wohnungsrecht* 14; Jürgen Basedow, 'Transparenz als Prinzip des (Versicherungs-) Vertragsrechts' (1999) 25 *Versicherungsrecht* 1045; Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht. Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 944-945. Some of the pivotal judgements worth mentioning in this regard are: BGH 11 June 1980, VIII ZR 174/79, NJW 1980, 2518; BGH 29 September 1983, VII ZR 225/82, NJW 1984, 171; BGH 23 March 1988, VIII ZR 58/87, NJW 1988, 1726; BGH 24 November 1988, III ZR 188/87, NJW 1989, 222 and BGH 17 January 1989, XI ZR 54/88, NJW 1989, 582.

740. Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz) vom 09.12.1976. Bundesgesetzblatt Jahrgang 1976 Teil I Nr. 142, Seite 3317 (AGBG).

741. Tim Gero Joppich, *Die Kodifikation des Transparenzgebots in § 307 BGB* (Peter Lang 2009) 2; Von Gerrick von Hoyningen-Huene, 'Unwirksamkeit von AGB bei bloßer Intransparenz?' in Friedrich Graf von Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 180.

742. Ulrich Schumacher, 'Die Aufwertung des Transparenzgebots und die Konsequenzen für das Mietrecht – Neun Thesen' (2003) 1 *Neue Zeitschrift für Miet- und Wohnungsrecht* 14; Thomas Pfeiffer and Boris Schinkels, 'Schuldrechtsmodernisierung und AGB-Gesetz' in Hans-Wolfgang Micklitz, Thomas Pfeiffer, Klaus Tonner und Armin Wilingmann, *Schuldrechtsreform und Verbraucherschutz* (Nomos Verlagsgesellschaft, Baden-Baden 2001) 170.

743. Reinhold Thode, 'Die wichtigsten Änderungen im BGB-Werkvertragsrecht: Schuldrechtsmodernisierungsgesetz und erste Probleme - Teil 2' (2002) 7 *Neue Zeitschrift für Baurecht und Vergaberecht* 364; Friedrich Graf von Westphalen, 'AGB-Recht ins BGB - Eine erste "Bestandsaufnahme"' (2002) 1 *Neue Juristische Wochenschrift* 16.

through case law.[744] Therefore, during the 2002 reform of the Law of Obligations, which involved transferring the AGBG's provisions to the German Civil Code (Bürgerliches Gesetzbuch, or the BGB),[745] the German legislature codified the UCTD's transparency requirement.[746]

Scholarship observes that the concept of transparency is reflected in the rules governing the incorporation, interpretation, and control over the content of standard contract terms.[747] Incorporation rules stipulate that specific violations of transparency, such as the failure to reference standard contract terms and/or the consumer's ability to become aware of their contents,[748] as well as the surprising character of contract terms, prevent their incorporation into the contract.[749] The interpretation rule states that any standard contract terms that are unclear must be interpreted in favour of the trader.[750] Rules regarding content control provide that the absence of transparency in standard contract terms in certain cases creates an unfair disadvantage for consumers, potentially leading to the invalidity of said terms.[751]

In 2021, prior to enacting the Law for Fair Consumer Contracts (Gesetz für faire Verbraucherverträge),[752][753] the German Federal Government (Bundesregierung) contemplated whether to develop new rules on transparency of standard contract terms.[754] This consideration was prompted by a resolution of the German Federal Council (Bundesrat) from 2016, which urged the Federal Government to explore

744. Case C-144/99 *Commission v The Netherlands*, points 13-22. See comments by Helmut Heinrichs, 'Das neue AGB-Recht und seine Bedeutung für das Mietverhältnis' (2003) 1 *Neue Zeitschrift für Miet- und Wohnungsrecht* 10; Friedrich Graf von Westphalen, 'AGB-Recht ins BGB - Eine erste "Bestandsaufnahme"' (2002) 1 *Neue Juristische Wochenschrift* 16; Thomas Pfeiffer and Boris Schinkels, 'Schuldrechtsmodernisierung und AGB-Gesetz' in Hans-Wolfgang Micklitz, Thomas Pfeiffer, Klaus Tonner und Armin Wilingmann, *Schuldrechtsreform und Verbraucherschutz* (Nomos Verlagsgesellschaft, Baden-Baden 2001) 170.

745. Bürgerliches Gesetzbuch (BGB) vom 02.02. 2002 (BGBl. I S. 42, 2909; 2003 I S. 738).

746. Tim Gero Joppich, *Die Kodifikation des Transparenzgebots in § 307 BGB* (Peter Lang 2009) 1-3, 10; Robert Köch, 'Auswirkungen der Schuldrechtsreform auf die Gestaltung Allgemeiner Geschäftsbedingungen – Teil I' (2002) 44 *Zeitschrift für Wirtschafts- und Bankrecht* 2174-2175; Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 437; Helmut Heinrichs, 'Das neue AGB-Recht und seine Bedeutung für das Mietverhältnis' (2003) 1 *Neue Zeitschrift für Miet- und Wohnungsrecht* 6-7, 10-11; Reinhold Thode, 'Die wichtigsten Änderungen im BGB-Werkvertragsrecht: Schuldrechtsmodernisierungsgesetz und erste Probleme - Teil 2' (2002) 7 *Neue Zeitschrift für Baurecht und Vergaberecht* 365; Friedrich Graf von Westphalen, 'AGB-Recht ins BGB - Eine erste "Bestandsaufnahme"' (2002) 1 *Neue Juristische Wochenschrift* 16.

747. MüKoBGB/Wurmnest, 9. Aufl. 2022, BGB § 307 Rn. 59; Von Gerrick von Hoyningen-Huene, 'Unwirksamkeit von AGB bei bloßer Intransparenz?' in Friedrich Graf von Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 180.

748. Previously § 2 (1) AGBG, now § 305 (2) BGB.

749. Previously § 3 AGBG, now § 305c (1) BGB.

750. Previously § 5 AGBG, now § 305c (2) BGB.

751. Previously § 9 (1) AGBG, now the second sentence of § 307 (1) BGB.

752. Gesetz für faire Verbraucherverträge vom 17.08.2021. Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 53.

753. As the explanatory memorandum clarifies, this law aims to further improve the position of consumers vis-à-vis businesses and to ensure that the conclusion of contracts takes place under fairer conditions and that the content of contracts is subject to fairer regulations. See BT-Drs. 19/26915 1.

754. BT-Drs. 19/26915 12.

enhancing the clarity and comparability of standard contract terms by limiting their scope, prescribing uniform sectoral guidelines, and obliging traders to highlight the relevant points of the standard contract terms in the text of the contract. Additionally, the Federal Council proposed that changes to existing contracts through new standard contract terms should be clearly presented in a summary. However, the Federal Government found that existing laws on the inclusion, interpretation, and control of the content of standard contract terms already ensured transparency of such terms. Therefore, introducing further rules would require significant regulatory effort without substantial consumer benefit.

The existing rules on the inclusion, interpretation, and content control of standard contract terms offer a thorough framework for the analysis of the transparency concept in German law regarding standard contract terms. However, according to scholars, these rules do not offer a clear-cut systematisation of the transparency concept in German law. In practice, the lack of transparency in standard contract terms can be addressed based on any of these rules.[755] Nonetheless, the following sections build upon this systematisation to illustrate the evolution of the transparency concept and its implications within the German legal framework for standard contract terms.

3.1.1.1. Transparency within the control of incorporation of standard contract terms

In situations where standard terms constitute an externally distinct part of the contract, § 305 (2) of the BGB stipulates that these terms may only be incorporated into the contract if the trader directs the other party to them, offering them the chance to familiarise themselves with their contents and consent to their application.[756] It is worth observing that § 305 (2) BGB governs the inclusion of a *set* of standard contract terms into a contract. The trader must draw the consumer's attention to their standard contract terms through an explicit written or oral reference. This reference should not be concealed or inconspicuous but should be always easily identifiable to an average and attentive customer.[757] For instance, only terms disclosed under a heading titled "standard contract terms" will be considered the trader's standard contract terms.[758] In cases where standard contract terms form part of the contractual text, traders do not need to explicitly refer to them.[759]

In addition to requiring traders to inform consumers about the presence of standard contract terms, § 305 (2) BGB also obliges them to provide consumers with a reasonable opportunity to familiarise themselves with the content of the terms.[760] This

755. Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht. Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 949.
756. § 305 (2) BGB. See also MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 56.
757. MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 66.
758. BGH 14 January 1987, IVa ZR 130/85, NJW 1987, 2431; MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 66.
759. MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 67.
760. Ibid, Rn. 74.

condition is typically fulfilled when traders send or hand over their standard contract terms to consumers, or orally inform them about the contents of the terms before or, at the latest, at the time of concluding the contract.[761] In the case of online contracts, traders must make their standard contract terms available during the ordering process[762] and ensure that consumers cannot overlook them.[763] This condition can be fulfilled if consumers click on a link referring to downloadable standard contract terms before placing an online order[764] or if the trader instructs consumers via a pop-up window to read standard contract terms, which they then can open and print via a hyperlink.[765] In contrast, this condition is not satisfied if consumers accidentally come across the trader's standard contract terms while browsing the website.[766] This reasoning aligns with the approach of the CJEU in the *Tiketa* case, wherein it was established that traders may present their standard contract terms in a click-wrap agreement that consumers can access through a designated link and confirm by ticking a box.[767]

Apart from being easily accessible, standard contract terms must also be legible to be included in the contract. For example, traders should draft these terms using a font size that ensures readability[768] and present them in the same language as the rest of the offer.[769] Recent case law suggests that traders are now permitted to include more extensive standard terms in online contracts,[770] whereas initially, only clearly structured and not overly extensive standard terms were allowed.[771] This approach is based on the assumption that consumers are accustomed to using screens for work and shopping, and that the internet enables them to engage more with standard contract terms compared to a physical store, since they can, for example, enlarge and download the terms.[772] As explained in previous chapters, such an approach contradicts behavioural research, which indicates that consumers are significantly less engaged and cautious online.[773] Additionally, factors such as length, complexity, and timing of information disclosure have an impact on the effectiveness of online information.[774]

761. Ibid.
762. BGH, 12 January 2017, I ZR 253/14, GRUR 2017, 402; MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 76; Dennis Fritz, 'Click & Collect und Call & Collect – Vertragsschluss und AGB' (2021) 24 *Neue Juristische Wochenschrift* 1700.
763. Ibid, Rn. 78.
764. Ibid.
765. BGH, 29 July 2021, III ZR 179/20, NJW 2021, 3179.
766. OLG Hamburg 13 June 2002, 3 U 168/00, MMR 2002, 677.
767. Case C-536/20 *Tiketa*, point 46.
768. BGH, 3 February 1986, II ZR 201/85, NJW-RR 1986, 1311; OLG Nürnberg, 3 March 2021, 13 U 2366/20, BeckRS 2021, 11218; MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 80.
769. MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 79.
770. OLG Köln, 19 February 2020, 6 U 184/19, MMR 2020, 710; MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 77.
771. MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 76.
772. OLG Köln, 19 February 2020, 6 U 184/19, MMR 2020, 710; MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 77.
773. Jorna Leenheer et al., *Study on the effects of online displays of sustainability* (2014) 23-24; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 80, 96, 102-103.
774. Jeffrey Davis, 'Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts' (1977) 63(6) *Virginia Law Review* 847-856, 906; Michael Faure and Hanneke Luth, 'Behavioural Economics in Unfair Contract Terms' (2011) 34(3)

Furthermore, when consumers conclude online contracts through mobile devices, they often overlook the standard terms and conditions. This oversight is primarily due to the limited visibility of these terms on small screens, and in some cases, certain devices may lack the necessary memory capacity to store them.[775] Fornasier suggests that this issue could be resolved by either waiving the requirement of prior notice or presenting consumers with only essential information.[776] Janal suggests that traders who offer mobile versions of their websites should make sure that the standard contract terms are easily readable.[777] She highlights that readability on small screens can be improved by emphasising important information in a larger font, using hyperlinks, or integrating expandable text passages.[778] Janal also acknowledges the challenges of improving the readability of lengthy texts on small screens, as there is a risk of users scrolling past important information.[779] Additionally, not all web browsers on smartphones provide the ability to save standard contract terms, and mobile device users typically do not have immediate access to a printer for printing said contract terms.[780]

Janal's suggestions are in line with the Commission's approach, which also supports the idea of displaying information in layers on small screens. This can be achieved through the use of expandable headings, hyperlinks, and content trees.[781] However, as discussed in Chapter 2, behavioural research casts doubt on the

Journal of Consumer Policy 344, 346, 348; Maartje Elshout et al., *Study on consumers' attitudes towards Terms and Conditions (T&Cs)* (2016) 26-103; Ognyan Seizov, Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 159-158; Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 44-45, 54-55, 130; Joasia Luzak, 'Will the imaginary active consumers please stand up? Case note to Walbusch Walter Busch (C-430/17)' (2019) *Maastricht Journal of European and Comparative Law* 6; Arianna Rossi, Rossana Ducato, Helena Haapio and Stefania Passera, 'When Design Met Law: Design Patterns for Information Transparency' (2019) 122-123(5) *Doctrine Rechtsleer* 98-121; Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 128-139; Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [33]; Alexander J. Wulf and Ognyan Seizov, 'The Principle of Transparency in Practice: How Different Groups of Stakeholders View EU Online Information Obligations' (2020) 28(5) *European Review of Private Law* 1089-1092; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 128-134; Alexander J. Wulf and Ognyan Seizov, '"Please understand we cannot provide further information": evaluating content and transparency of GDPR-mandated AI disclosures' (2022) *AI & Society* 241-256; Alexander J. Wulf and Ognyan Seizov, 'How to Improve Consumers' Understanding of Online Legal Information. Insights from a Behavioral Experiment' (2022) *European Journal of Law and Economics* 563-582; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 321-330.

775. MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 78.
776. Ibid.
777. Ruth Janal, 'Die AGB-Einbeziehung im „M-Commerce"' (2016) 44 *Neue Juristische Wochenschrift* 3202.
778. Ibid, 3203.
779. Ibid.
780. Ibid.
781. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [46].

effectiveness of hyperlinks in enhancing consumers' decision-making.[782] It also demonstrates that layering information may result in the disclosure of information in places where consumers could potentially miss it, and that consumers may not always be trusted to effectively access layered information in practice.[783] Therefore, in order to provide consumers with a genuine opportunity to familiarise themselves with the trader's standard contract terms when concluding contracts through mobile devices, it is necessary to make adjustments to the presentation and length of these terms to accommodate small screens. In addition to utilising various techniques to organise and structure information effectively online, traders may also consider offering consumers a concise summary of the standard contract terms that are specifically tailored for small screens. This appears to be a more efficient way of informing consumers about the essential elements of such terms.[784]

While § 305 (2) of the BGB regulates the inclusion of a set of standard contract terms, § 305c (1) of the BGB prohibits the inclusion of individual standard contract terms that are exceptionally unusual, especially in their outward appearance, to the point where the other party to the contract could not reasonably anticipate them. Such a surprising term exists when there is a discrepancy between the content of the term and the consumer's reasonable expectations regarding said content.[785] The reasoning behind § 305c (1) of the BGB is that consumers frequently neglect to acquaint themselves with standard contract terms, either because they do not read them or because they lack the legal or commercial expertise to identify the unusual nature of a specific term.[786]

The assessment of whether a contractual term is deemed unexpected, meaning whether a consumer could have reasonably anticipated its incorporation in the contract, relies on the understanding of a hypothetical average consumer, rather than the specific party involved in the agreement.[787] In German law, the average consumer benchmark applies to a reasonably informed (though not legally educated), attentive, and circumspect consumer who possesses a typical understanding of language, logic,

782. Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 44-45, 54-55, 130.

783. Ibid. See also Joasia Luzak, 'Will the imaginary active consumers please stand up? Case note to Walbusch Walter Busch (C-430/17)' (2019) *Maastricht Journal of European and Comparative Law* 6.

784. David Horton, 'Flipping the Script: Contra Proferentem and Standard Form Contracts' (2009) 80(2) *University of Colourado Law Review* 473; Michael Faure and Hanneke Luth, 'Behavioural Economics in Unfair Contract Terms' (2011) 34(3) *Journal of Consumer Policy* 338; Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 129-130; Rolf H. Weber, 'From disclosure to transparency in consumer law' in Klaus Mathis and Avishalom Tor (eds) *Consumer Law and Economics* (Springer 2021) 83-85; Alexander J. Wulf and Ognyan Seizov, '"Please understand we cannot provide further information": evaluating content and transparency of GDPR-mandated AI disclosures' (2022) *AI & Society* 254-256; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 128-130; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 329-330.

785. BT-Drs. 7/3919 19-20; MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305c Rn. 1.

786. MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305c Rn. 1.

787. Helmut Heinrichs, 'Die Entwicklung des Rechts der Allgemeinen Geschäftsbedingungen im Jahre 1995' (1996) 21 *Neue Juristische Wochenschrift* 1383.

technical knowledge, and mathematical comprehension.[788] Although a consumer's reasonable expectations can be based on customary practices within a specific contract category, this is not a requirement for a contract term to have a surprising effect.[789] The surprising effect may also result from the type of expectations that an average consumer would rightly form based on factors like advertising, pre-contractual negotiations, or the placement of a term in an unconventional location within the contract.[790]

Schmidt and Gottschalk view incorporation control provisions as promoting formal transparency.[791] This is because they prioritise evaluating the outward appearance of standard contract terms rather than their substance.[792] Pfeiffer, Ulmer, Habersack, and Graf von Westphalen appear to have a more substantive understanding of the connection between the general incorporation rule stated in § 305 (2) BGB and transparency.[793] They highlight that this rule assumes the transparency of standard contract terms to consumers, as their consent to these terms implies comprehension. Pfeiffer, Ulmer, and Habersack also highlight the significance of elements such as font size, colour, style, structure, and language when evaluating the transparency of standard contract terms for the purpose of their inclusion in the contract.[794]

As explained above, § 305 (2) BGB ensures the accessibility and readability of standard contract terms by considering the language, font, and structure of the terms, as well as how traders make them available to consumers. Therefore, in my perspective, this incorporation rule promotes **formal transparency** of standard contract terms. However, I do question whether § 305 (2) BGB sufficiently guarantees the formal transparency of standard contract terms in the digital realm. Since traders

788. BGH 25 November 2015, VIII ZR 360/14, NJW 2016, 936; MüKoBGB/Wurmnest, 9. Aufl. 2022, BGB § 307 Rn. 69; Thomas Pfeiffer, Was kann ein Verbraucher? Zur Relevanz von Informationsverarbeitungskapazitäten im AGB-Recht und darüber hinaus (2011) ½ *Neue Juristische Wochenschrift* 3. For a further analysis of the average consumer benchmark, see Section 3.1.3.4. of this Chapter.

789. Ingo Koller, 'Das Transparenzgebot als Kontrollmaßstab AGBs' in Jürgen Fritz Baur, Klaus Jürgen Hopt und Karl Peter Mailänder, *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März* (De Gruyter 1990) 682.

790. BGH 24 September 1980, VIII ZR 273/79, NJW 1981, 117; BGH 21 June 2001, IX ZR 69/00, NJW-RR 2002, 485; MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305c Rn. 7. See also Ingo Koller, 'Das Transparenzgebot als Kontrollmaßstab AGBs' in Jürgen Fritz Baur, Klaus Jürgen Hopt und Karl Peter Mailänder, *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März* (De Gruyter 1990) 682-683; Helmut Heinrichs, 'Das Transparenzgebot und die EG-Richtlinie über missbräuchliche Klauseln in Verbrauchtverträgen' in Friedrich Graf von Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 160.

791. BeckOK BGB/Schmidt, 53. Aufl. 2020, BGB § 307 Rn. 44; Eckart Gottschalk, 'Das Transparenzgebot und allgemeine Geschäftsbedingungen' (2006) 206(4) *Archiv für die civilistische Praxis* 589-591.

792. Ibid.

793. AGB-RechtKo/Pfeiffer, 6. Aufl. 2013, BGB § 305 Rn. 88-89; AGB-RechtKo/ Ulmer/Habersack, 11. Aufl. 2011, BGB § 305 Rn. 150-154; Friedrich Graf von Westphalen, 'AGB-Recht ins BGB - Eine erste "Bestandsaufnahme"' (2002) 1 *Neue Juristische Wochenschrift* 17; Hans Erich Brandner, 'Transparenz als Maßstab der Inhaltskontrolle? Eine Problemskizze' in Peter Löffelmann und Hermann Korbion, *Festschrift für Horst Locher zum 65. Geburtstag* (Werner-Verlag 1990) 317.

794. AGB-RechtKo/Pfeiffer, 6. Aufl. 2013, BGB § 305 Rn. 88-89; AGB-RechtKo/ Ulmer/Habersack, 11. Aufl. 2011, BGB § 305 Rn. 150-154.

can incorporate more extensive standard terms into online contracts, the accessibility and readability of these terms in the online environment may be compromised.

When it comes to § 305c (1) BGB, Köndgen observes that this incorporation rule promotes transparency by encouraging traders to direct consumers' attention, at the very least, to the content of those terms that may not align with their general expectations.[795] If Article § 305c (1) of the BGB were to require an evaluation of whether a standard contractual term aligns with the average consumer's comprehension of the contract's content, it could be argued that this rule promotes substantive transparency. However, § 305c (1) of the BGB appears to primarily concentrate on identifying if traders present standard contract terms in an unusual location within the contract, rather than on the formulation of these terms.[796] Therefore, it appears to me that this provision also focuses on facilitating **formal transparency**.

3.1.1.2. Transparency within the interpretation of standard contract terms

The interpretative rule stated in § 305c (2) of the BGB stipulates that in cases where there is uncertainty regarding the interpretation of standard contractual terms, such doubts should be resolved in favour of the consumer. This rule applies after a contractual provision has been interpreted and there are at least two possible interpretations of said provision.[797] Köndgen highlights that the interpretation rule is a clear manifestation of the concept of transparency, as it assigns responsibility to the trader for terms that are ambiguous or not sufficiently clear.[798] In practice, this rule can lead to both the most consumer-unfriendly and the most consumer-friendly interpretation. The most consumer-unfriendly interpretation usually applies in collective proceedings, while the most consumer-friendly interpretation applies in individual proceedings.[799]

---

795. Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 949. See also Ingo Koller, 'Das Transparenzgebot als Kontrollmaßstab AGBs' in Jürgen Fritz Baur, Klaus Jürgen Hopt und Karl Peter Mailänder, *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März* (De Gruyter 1990) 681-682.

796. BGH 24 September 1980, VIII ZR 273/79, NJW 1981, 117; BGH 21 June 2001, IX ZR 69/00, NJW-RR 2002, 485. See also Ingo Koller, 'Das Transparenzgebot als Kontrollmaßstab AGBs' in Jürgen Fritz Baur, Klaus Jürgen Hopt und Karl Peter Mailänder, *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März* (De Gruyter 1990) 682-683; Helmut Heinrichs, 'Das Transparenzgebot und die EG-Richtlinie über missbräuchliche Klauseln in Verbrauchtverträgen' in Friedrich Graf von Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 160.

797. AGB-RechtKo/Lindacher/Hau, 6. Aufl. 2013, BGB § 305c Rn. 124; Helmut Heinrichs, 'Die Entwicklung des Rechts der Allgemeinen Geschäftsbedingungen im Jahre 1996' (1997) 21 *Neue Juristische Wochenschrift* 1411; Helmut Heinrichs, 'Die Entwicklung des Rechts der Allgemeinen Geschäftsbedingungen im Jahre 1995' (1996) 21 *Neue Juristische Wochenschrift* 1384.

798. Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 949. See also Friedrich Graf von Westphalen, AGB-Recht ins BGB - Eine erste "Bestandsaufnahme"' (2002) 1 Neue Juristische Wochenschrift 17, and MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305c Rn. 44.

799. MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305c Rn. 30.

The most consumer-unfriendly interpretation determines whether an interpretation of a contract term that is unfavourable to consumers would place them at an unreasonable disadvantage and thus make the term invalid.[800] In collective proceedings,[801] this method of interpretation ensures that traders cannot reuse non-transparent standard contract terms, which have been deemed invalid in such proceedings, in the future.[802] The most consumer-friendly interpretation involves selecting the interpretation of a contract term that is most advantageous to consumers, out of the various possible interpretations of the term.[803] This method helps to minimise the adverse consequences arising that stem from the lack of transparency of a standard term in an individual case. However, one notable drawback is that it does not consider the potential consequences of an interpretation that is unfavourable to consumers, and, therefore, does not prevent traders from using disputed and non-transparent terms in future agreements with other consumers.

Some scholars advocate for implementing a two-stage approach when interpreting ambiguous standard contract terms in individual proceedings,[804] which the BGH has been applying in recent years.[805] The first step of this approach involves checking whether interpreting a contract term in the most consumer-unfriendly manner makes it unreasonably detrimental and invalid. If this examination does not result in the invalidation of an ambiguous term, the subsequent step is to interpret it in the most consumer-friendly manner. This appears to be the most effective technique for preserving transparency in standard contract terms, as it ensures that the most disadvantageous and non-transparent terms are eliminated from the market, while also preserving terms that can be understood in a consumer-friendly manner. Since the interpretation rule in § 305c (2) BGB primarily addresses the consequences of the lack of transparency in standard contract terms, I analyse this rule further in section 3.1.4. of this chapter.

3.1.1.3. Transparency within the control of content of standard contract terms

In the previous sections, I have established that the incorporation rules from § 305 (2) BGB and § 305c (1) BGB aim to promote formal transparency in standard contract terms. Furthermore, the interpretation rule specified in § 305c (2) BGB deals with the consequences resulting from the lack of transparency in standard contract terms. Apart from these provisions, the second sentence of § 307 (1) BGB explicitly regulates the role of transparency within the system of the control of content of standard

800. Hans Erich Brandner, 'Transparenz als Maßstab der Inhaltskontrolle? Eine Problemskizze' in Peter Löffelmann und Hermann Korbion, *Festschrift für Horst Locher zum 65. Geburtstag* (Werner-Verlag 1990) 318.
801. See, e.g., OLG Brandenburg 30 October 2019, 7 U 25/18, NJW-RR 2020, 16.
802. AGB-RechtKo/ Ulmer/Schäfer, 11. Aufl. 2011, BGB § 305c Rn. 61, 65-66.
803. MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305c Rn. 30-34.
804. Ibid, Rn. 31. See also AGB-RechtKo/ Ulmer/Schäfer, 11. Aufl. 2011, BGB § 305c Rn. 61, 64-66.
805. BGH 11 February 1992, XI ZR 151/91, NJW 1992, 1097; BGH 29 April 2008, KZR 2/07 NJW 2008, 2172; BGH 18 March 2015, VIII ZR 185/14, NJW 2015, 1594; BGH 8 September 2021, VIII ZR 97/19, BeckRS 2021, 30598; BGH 10 June 2020, VIII ZR 289/19, NJOZ 2021, 375. See also OLG Frankfurt 24 May 2019, 10 U 5/18, BeckRS 2019, 12877.

contract terms since 2002. This provision states that the lack of **clarity** ("*klar*") and **comprehensibility** ("*verständlich*") in standard contract terms may lead to an unreasonable disadvantage for the party that concluded the contract with the trader.

It should be observed that German law utilises the terms "*klar*" and "*verständlich*" to represent transparency requirements, which are sometimes expressed as "*plain*" and "*intelligible*" in EU law and at other times as "*clear*" and "*comprehensible*". In Chapter 1, I have discussed and criticised the unclear and inconsistent wording of transparency requirements in EU law. To avoid any potential confusion, I will use the terms "*clear*" and "*comprehensible*" when referring to German requirements "*klar*" and "*verständlich*" throughout this chapter. When mentioning EU law in this chapter, I will follow the precise wording used in the relevant directive.

If standard contract terms result in an unreasonable disadvantage, contrary to the principle of good faith, they shall be deemed invalid.[806] The German legislature stated that the regulation of the transparency requirement in § 307 (1) of the BGB was not intended to alter the evaluation of the transparency of standard contract terms, but solely to codify the existing case law.[807] However, this assertion is not entirely accurate, as the codification expanded the scope of the transparency requirement to include declaratory contract terms and terms that govern price and performance.[808] Although these types of contract terms are still not subject to content control, § 307 (3) of the BGB subjects them to transparency control.

Declaratory contract terms are standard contract terms that reflect the law and whose transparency could not have been assessed under the previously applicable law.[809] According to Armbrüster, transparency control does not apply to all types of declaratory contract terms.[810] While transparency control applies to declaratory terms that aim to replicate statutory provisions but are worded differently, inaccurately, or incompletely by traders (declaratory terms in the broader sense), it does not extend to declaratory terms that reproduce statutory provisions verbatim (declaratory terms in the narrower sense).[811] The control of transparency of declaratory contract terms, in the broader sense, is limited to those parts of the contract terms that deviate from the law.[812] The exclusion of declaratory contract terms, in the narrower sense, from transparency control is based on the principle of the separation of powers. Subjecting declaratory contract terms that simply reflect the content of the law to judicial review would lead to the judiciary indirectly controlling legislation adopted through a

806. See the first sentence of § 307 (1) BGB.
807. BT-Drs. 14/6040 153-154.
808. Christian Armbrüster und Volker Wiese, 'Die Folgen der Schuldrechtsreform für vor dem 1. 1. 2002 begründete Dauerschuldverhältnisse' (2003) 9 *Deutsches Steuerrecht* 338.
809. Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 443.
810. Ibid, 443-447.
811. See, for instance, BGH 14 August 2019, IV ZR 279/17, NJW 2019, 3582.
812. Ibid. See also Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 446-447.

democratic process through a judicial procedure that is neither designed nor suitable for such a purpose.[813]

Furthermore, German law also exempts from transparency scrutiny those standard contract terms that merely refer to a specific statutory provision without specifying its contents.[814] The BGH deems these standard contract terms as transparent, particularly if the referenced statutory provisions are easily accessible to everyone.[815] According to the BGH, requiring traders to inform consumers about the content of legal provisions mentioned in their standard contract terms could have counterproductive effects, potentially resulting in contract terms that are excessively detailed, confusing, or incomplete. Armbrüster explained that obliging traders to clarify the content of the law they reference in their standard contract terms would essentially create another independent information obligation, as traders would have to explain provisions enacted by the legislature.[816] Thus, German law permits traders to refer to statutory provisions in their standard contract terms without informing consumers about their contents.

It is important to note that this reasoning goes against EU law, as the CJEU has consistently clarified in its case law that traders must specify the content of the legal provisions they mention in their standard terms.[817] The CJEU ruled that contractual terms referencing national law provisions do not enable consumers to ascertain the extent of their contractual rights and obligations, or verify whether the contract contains all the mandatory information.[818] It is also clear from the CJEU's case-law that an average consumer cannot be expected to conduct legal research.[819] Furthermore, if traders are not required to clarify the content of legal provisions they mention in their standard contract terms, they might simply rely on references to legal provisions instead of providing specific information to consumers. Also, if multiple contract terms in a single agreement are drafted in this way, the agreement's comprehensibility would be greatly compromised, especially considering that the BGH also permits dynamic references to the law, which link contract modifications to changes in statutory provisions.[820]

Regarding the contract terms governing price and performance, it should be noted that there is no consensus in the literature on whether the control of transparency for these terms was possible under the previous law. Heinrichs argues that the BGH had already been evaluating the transparency of contract terms

813. Ibid, 443-444.
814. Ibid, 444-446.
815. BGH 22 November 2016, XI ZR 434/15, BeckRS 2016, 115038; BGH 14 January 2014, XI ZR 355/12, NJW 2014, 924.
816. Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 444-446.
817. Case C-472/10 *Invitel*, point 29; Case C-92/11 *RWE Vertrieb*, points 50-51; Case C-191/15 *Verein für Konsumenteninformation/Amazon*, point 69.
818. Case C-66/19 *Kreissparkasse Saarlouis*, points 40-49.
819. Case C-265/22 *Banco Santander*, points 56-60.
820. Cases concerning dynamic references to law are, for example, BGH 14 January 2014, XI ZR 355/12, NJW 2014, 924; BGH 12 October 2007, V ZR 283/06, NJW-RR 2008, 251.

determining prices, even prior to the broadened concept of transparency based on Article 8 AGBG.[821] Conversely, other scholars emphasise that the BGH only assessed the transparency of *ancillary* price agreements[822] and rejected transparency control of contract terms regulating price and performance.[823] The justification for excluding content (and previously transparency) control over contract terms that establish price and performance relies on the argument of upholding the free market. In this kind of market, establishing price and performance should be solely influenced by market dynamics and the intentions of the parties involved in the contract, rather than being controlled by the courts, which lack the necessary market knowledge and information to determine price and performance.[824] Nevertheless, given that the UCTD does subject these specific contract terms to transparency control,[825] aligning German law with EU law necessitates expanding the scope of transparency to include these terms as well.

When it comes to interpreting the transparency requirement, German scholars have observed, based on case law, that this requirement necessitates the clear and comprehensible disclosure of both the legal and economic consequences of standard contract terms.[826] The importance of transparently disclosing both the legal and economic implications of standard contract terms has been repeatedly emphasised in German case law.[827] This interpretation aligns with the CJEU's interpretation of transparency under the UCTD. As explained in Section 2.1.2., the CJEU's case law

821. Helmut Heinrichs, 'Das neue AGB-Recht und seine Bedeutung für das Mietverhältnis' (2003) 1 *Neue Zeitschrift für Miet- und Wohnungsrecht* 10-11.

822. Reinhold Thode, 'Die wichtigsten Änderungen im BGB-Werkvertragsrecht: Schuldrechtsmodernisierungsgesetz und erste Probleme - Teil 2' (2002) 7 *Neue Zeitschrift für Baurecht und Vergaberecht* 364-365; Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 948.

823. Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 442.

824. Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 948; Stephan Meder, 'Die Zulässigkeit einer isolierten Bepreisung des Auslandseinsatzes von Kreditkarten' (1996) 29 *Neue Juristische Wochenschrift* 1853.

825. Article 4(2) UCTD.

826. MüKoBGB/Wurmnest, 9. Aufl. 2022, BGB § 307 Rn. 63-67; Friedrich Graf von Westphalen, 'AGB im ersten Halbjahr 2018' (2018) 31 *Neue Juristische Wochenschrift* 2239-2240; Tim Gero Joppich, *Die Kodifikation des Transparenzgebots in § 307 BGB* (Peter Lang 2009) 11; Robert Köch, 'Auswirkungen der Schuldrechtsreform auf die Gestaltung Allgemeiner Geschäftsbedingungen – Teil I' (2002) 44 *Zeitschrift für Wirtschafts- und Bankrecht* 2174-2175; Wolfgang Römer, 'Gerichtliche Kontrolle Allgemeiner Versicherungsbedingungen nach den §§ 8, 9 AGBG' (1999) 3 *Neue Zeitschrift für Versicherung und Recht* 102-104, Von Gerrick von Hoyningen-Huene, 'Unwirksamkeit von AGB bei bloßer Intransparenz?' in Friedrich Graf von Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 180.

827. BGH 31 December 2015, VII ZR 100/15, NJW 2016, 401; BGH 25 November 2015, VIII ZR 360/14, NJW 2016, 936; BGH 28 May 2014, VIII ZR 179/13, NJW 2014, 802; BGH 14 January 2014, XI ZR 355/12, NJW 2014, 924; BGH 7 February 2019, III ZR 38/18, NJW-RR 2019, 942; BGH 20 November 2019, IV ZR 159/18, NJW-RR 2020, 92; BGH 14 August 2019, IV ZR 279/17, NJW 2019, 3582; OLG Karlsruhe 28 February 2019, 6 W 81/18, MMR 2020, 52; OLG München 10 January 2019, 29 U 1091/18, VuR 2019, 429.

also emphasises that the transparency requirement entails consumers being able to examine contract terms and comprehend their legal and economic implications.[828]

The interpretation of transparency in the context of content control seems to have been derived from the certainty criterion, which requires a precise depiction of the factual and legal context of a contractual term to eliminate undue discretion.[829] This interpretation stems from case law regarding unilateral price adjustment clauses, particularly the decisions of the BGH on such clauses in magazine subscription contracts. The BGH has recognised that price adjustment clauses can be valid. However, the court emphasised that their validity is contingent upon these clauses being formulated in a way that enables consumers to foresee the extent of potential price changes at the time of the conclusion of the contract and assess whether such changes are justified.[830]

It is worth noting that the BGH had also referred preliminary questions to the CJEU on the transparency of price adjustment clauses in the *RWE Vertrieb* case. The CJEU adopted a similar reasoning as the BGH. It stated that contract terms should describe the reason for and method behind price changes and highlighted that such terms should enable consumers to foresee potential price changes based on clear, intelligible criteria.[831] Furthermore, the CJEU has dealt with a question raised by the BGH concerning the timing of informing consumers about price adjustments and has clarified that this information must be provided to consumers prior to entering into a contract. It has explained that the absence of information regarding price changes before the conclusion of the contract cannot be remedied by the fact that consumers will receive information about price changes during the execution of the contract and will have the right to terminate the contract if they do not agree to the changes.[832]

Both German case law and scholarship indicate that the evaluation of transparency in the context of controlling the content of standard contract terms encompasses both **formal** and **substantive** transparency.[833] However, formal

---

828. Case C-26/13 *Kásler*, points 71-75; Case C-143/13 *Matei*, point 76; Case C-96/14 *Van Hove*, point 50; Case C-348/14 *Bucura*, point 55; Case C-186/16 *Andriciuc*, point 51; Case C-51/17 *OTP Bank and OTP Faktoring*, point 78; Case C-448/17 *EOS KSI Slovensko*, point 61; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, point 29; Case C-38/17 *GT*, point 32; Case C-621/17 *Kiss and CIB Bank*, point 37; Case C-452/18 *Ibercaja Banco*, point 44; Case C-34/18 *Lovasné Tóth*, point 62; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 73; Case C-212/20 *A. S.A.*, points 41-43; Case C-263/22 *Ocidental - Companhia Portuguesa de Seguros de Vida*, point 31; Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, point 39.

829. See, for instance, Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 437-439; Peter Präve, 'Versicherungsbedingungen und Transparenzgebot' (2000) 51 *Versicherungsrecht* 140-142.

830. BGH 11 June 1980, VIII ZR 174/79, NJW 1980, 2518. See also, for example, cases BGH 9 May 2001, IV ZR 138/99, NJW 2001, 2012 (the economic disadvantages argument), or BGH 17 January 1989, XI ZR 54/88, NJW 1989, 582 (the legal certainty argument).

831. Case C-92/11 *RWE Vertrieb*, points 49-50.

832. Ibid, points 51-55.

833. Eckart Gottschalk, 'Das Transparenzgebot und allgemeine Geschäftsbedingungen' (2006) 206(4) *Archiv für die civilistische Praxis* 591-592; Hans-Peter Schwintowski, 'Die Bedeutung interdisziplinären Arbeitens von Rechts- und Sprachwissenschaft' (2003) 632 *Neue Juristische Wochenschrift* 634-635; Lilian Gutkin, *Die Europäisierung der AGB-Kontrolle von Preisänderungsklauseln* (Duncker & Humbolt 2018) 172-183. See cases such as BGH 22 March 2018, IX ZR 99/17, NJW 2018, 2193; BGH 25 February

transparency appears to be subordinate to substantive transparency, as German courts primarily evaluate the formal transparency of contractual terms to determine if its absence hinders consumers' comprehension of the contract, thus impacting substantive transparency.[834] Similar to EU law, I have not observed any cases where German law treats clarity and comprehensibility as separate transparency requirements with independent meanings. Rather, it treats them as a single transparency requirement. Section 3.1.3 provides further analysis and substantiation of these observations.

3.1.2. The objective of transparency

In German law, the requirement of transparency of standard contract terms serves the dual purpose of promoting communication and market transparency.[835] Communication transparency is based on the idea that standard contract terms are a valuable tool for consumers in various situations. Despite the fact that many consumers might not read standard contract terms,[836] German scholars emphasise that standard contract terms are an important source of information for consumers about to enter into a contract.[837] Furthermore, standard contract terms serve as an informational resource for consumers throughout the execution of a contract, should they desire to comprehend their contractual rights and responsibilities and how to effectively uphold them.[838] German case law emphasises that the lack

2016, VII ZR 156/13, NJW 2016, 1575; BGH 22 November 2016, XI ZR 434/15, BeckRS 2016, 115038; BGH 14 January 2014, XI ZR 355/12, NJW 2014, 924; BGH 24 November 1988, III ZR 188/87, NJW 1989.

834. See, for instance, BGH 22 March 2018, IX ZR 99/17, NJW 2018, 2193; BGH 25 February 2016, VII ZR 156/13, NJW 2016, 1575; BGH 22 November 2016, XI ZR 434/15, BeckRS 2016, 115038; BGH 14 January 2014, XI ZR 355/12, NJW 2014, 924; BGH 24 November 1988, III ZR 188/87, NJW 1989.

835. Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 946-948; Ingo Koller, 'Das Transparenzgebot als Kontrollmaßstab AGBs' in Jürgen Fritz Baur, Klaus Jürgen Hopt und Karl Peter Mailänder, *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März* (De Gruyter 1990) 674.

836. Omri Ben-Shahar and Carl E. Schneider, 'The failure of mandated disclosure' (2011) 159(3) *University of Pennsylvania Law Review* 705-709; Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014) 79-93; Florencia Marotta-Wurgler and Daniel L. Chen, 'Does Contract Disclosure Matter?' (2012) 168(1) *Journal of institutional and theoretical economics* 100-110; Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43(1) *The Journal of legal studies* 6-8, 22-27; Maartje Elshout et al., 'Study on consumers' attitudes towards Terms and Conditions (T&Cs)' (2016) 20-25; Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) 39 *Legal Studies* 385-397; Benedikt Schmitz and Charlotte Pavillon, 'Measuring Transparency in Consumer Contracts: The Usefulness of Readability Formulas Empirically Assessed' (2020) 9(5) *Journal of European Consumer and Market Law* 195-200; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 77-78.

837. Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 438-439; Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 947.

838. Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische*

of transparency regarding standard contract terms may deter consumers from asserting their rights.[839] This can happen because non-transparent contract terms prevent consumers from, for example, determining the scope of their rights and the period during which they can exercise them,[840] or from comparing the higher cost of their contract with other offers on the market and deciding whether to terminate the existing contract.[841] In terms of market transparency, German law emphasises the idea that consumers should use contract terms that contain essential information about the trader's offer when making market decisions.[842] Moreover, when multiple offers are available, consumers evaluate the existing offers to discover which offer best suits their needs.[843] As consumers are unable to negotiate the standard terms of a contract and can only make a decision on whether to enter into a contract based on information provided by traders, ensuring transparency of these standard contract terms is vital for enhancing the clarity and comprehensibility of offers that are available on the market.[844]

Similar to EU law,[845] German law embraces the information paradigm and treats consumers as rational actors, who rely on information when comparing offers available on the market, entering into a contract or enforcing their rights. Yet, the objective that German law assigns to the transparency requirement of standard contract terms appears to be broader than the aim pursued by the UCTD. The case law of the CJEU, which is based on the UCTD, highlights the crucial role of transparent pre-contractual information regarding contract terms and their consequences in promoting the consumer's informed decision-making.[846] However,

Wochenschrift 947.

839. OLG Karlsruhe 11 March 2016, 8 U 138/14, NJW 2016, 2670; BGH 14 March 2018, XII ZR 31/17, NJW 2018, 1811; BGH 25 February 2016, VII ZR 156/13, NJW 2016, 1575; BGH 29 April 2015, VIII ZR 104/14, NJW 2015, 2244.

840. BGH 14 March 2018, XII ZR 31/17, NJW 2018, 1811; BGH 25 February 2016, VII ZR 156/13, NJW 2016, 1575; BGH 29 April 2015, VIII ZR 104/14, NJW 2015, 2244.

841. BGH 25 November 2015, VIII ZR 360/14, NJW 2016, 936; BGH 9 May 2001, IV ZR 138/99, NJW 2001, 2012.

842. See, for example, BGH 14 August 2019, IV ZR 279/17, NJW 2019, 3582 and BGH 20 November 2019, IV ZR 159/18, NJW-RR 2020, 92.

843. Marina Tamm, *Verbraucherschutzrecht: Europäisierung und Materialisierung des deutschen Zivilrechts und die Herausbildung eines Verbraucherschutzprinzips* (Mohr Siebeck 2011) 349-354; Jörg Rosenow und Kai Schaffelhuber, 'Neues zur Transparenzkontrolle im AGB-Recht' (2001) *Zeitschrift für Wirtschaftsrecht* 2212; Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 946-947.

844. Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 946-947.

845. See my analysis in Section 2.1.2. of Chapter 2.

846. Case C-92/11 *RWE Vertrieb*, point 44; Case C-226/12 *Constructora Principado*, point 25; Case C-26/13 *Kásler*, point 70; Case C-348/14 *Bucura*, points 51 and 55; Case C-143/13 *Matei*, point 76; Case C-154/15 *Gutiérrez Naranjo*, point 50; Case C-96/14 *Van Hove*, point 50; Case C-186/16 *Andriciuc*, point 51; Case C-51/17 *OTP Bank and OTP Faktoring*, point 78; Case C-448/17 *EOS KSI Slovensko*, point 61; Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó*, point 29; Case C-38/17 *GT*, point 32; Case C-621/17 *Kiss and CIB Bank*, point 37; Case C-452/18 *Ibercaja Banco*, point 44; Case C-34/18 *Lovasné Tóth*, point 62; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, point 73; Case C-212/20 *A. S.A.*, points 41-43; Case C-263/22 *Ocidental - Companhia Portuguesa de Seguros de Vida*, point 31; Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, point 39.

this case law does not address the importance of the transparency requirement in ensuring transparency and comparability of different offers available in the market or informing the public about the content of traders' standard contract terms.

Similar to the goal of informed choice, achieving communication and market transparency depends on whether consumers are able to access, read, and comprehend the information regarding standard contract terms when entering into contracts, exploring the market for the best offers, or asserting their rights. While German law generally recognises the importance of both formal and substantive transparency in standard contract terms, it is questionable whether courts always adequately consider these two aspects of transparency. Sections 3.1.1.1. and 3.1.1.3. of this chapter have already indicated that the examination of transparency of standard contract terms included in online contracts and terms citing statutory provisions may not account for substantive transparency. Section 3.1.3. further explores the interpretation and assessment of transparency of standard contract terms in German law and the extent to which they align with the pursuit of communication and market transparency.

3.1.3. The interpretation and assessment of transparency

3.1.3.1. The systematisation of transparency in German literature

German literature extensively explores the systematisation of transparency by incorporating several operational criteria. Armbrüster and Präve suggest that the requirement of transparency includes elements such as comprehensibility, certainty, and completeness.[847] Comprehensibility relates to the wording and systematic arrangement of contract terms, with the goal of ensuring that consumers comprehend the scope of standard contract terms and their economic implications. Certainty emphasises the clarity and precision of all legal and factual consequences resulting from standard contract terms. Finally, completeness requires that all rights, obligations, and mandatory information be comprehensively outlined. Instead of the completeness criterion, Heinrichs mentions the ban on misleading contract terms, which prohibits terms that have the potential to mislead consumers regarding the extent of their rights and obligations.[848] The necessity for such a replacement is debatable, considering that the criteria of clarity and completeness may already sufficiently ensure the transparency of the scope of rights and obligations included in standard contract terms.

To the aforementioned criteria of comprehensibility, certainty, completeness, and prohibition of misleading contract terms, Wolf additionally includes the criteria

847. Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 437-439; Peter Präve, 'Versicherungsbedingungen und Transparenzgebot' (2000) 51 *Versicherungsrecht* 140-142.

848. Helmut Heinrichs, 'Das Transparenzgebot und die EG-Richtlinie über missbräuchliche Klauseln in Verbrauchtverträgen' in Friedrich Graf von Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 166-168.

of recognisability, accuracy, and differentiation.[849] Recognisability does not appear to have a distinct meaning from the criterion of comprehensibility, as described above.[850] Accuracy focuses on the truthfulness of the content of standard contract terms[851] and seems to correspond to the criteria of certainty and completeness, as elucidated above.[852] Furthermore, it is also similar to the ban on misleading contract terms because it prevents traders from deceiving consumers about their rights and obligations.[853] The requirement of differentiation asks that different groups of typical standard contract terms are not treated in the same way.[854] Similar systematisations can be found in the works of von Hoyningen-Huene, Pfeiffer, and Fuchs. Von Hoyningen-Huene relies on Wolf's systematisation, although he does not mention the criteria of recognisability and accuracy.[855] Pfeiffer's systematisation includes most of the aforementioned criteria: clarity and comprehensibility, certainty, completeness, correctness, and the prohibition of misleading contract terms.[856] Fuchs essentially offers the same systematisation as Pfeiffer, albeit omitting the criterion of completeness.[857]

Brandner introduces the criteria of concretisation and the prohibition of obfuscating contract terms, in addition to the existing criteria of clarity, comprehensibility, and the ban on misleading contract terms.[858] Concretisation focuses on the precision, clarity, and completeness of the factual background of contract terms, and it appears to be a more specific expression of the criterion of certainty. The prohibition of obfuscating contract terms can be viewed as a more particular form of the prohibition of misleading contract terms. It applies to situations where terms, which may initially seem sufficiently clear in terms of their content, have hidden adverse consequences that are masked by the remainder of the contract or other surrounding circumstances.

German scholars have, furthermore, attempted to systematise the transparency requirement in light of its **formal** and **substantive** elements. To that end, Basedow observes formal, linguistic, and substantive elements of the transparency requirement.[859] In his systematisation, formal transparency includes factors such as font size, type, and colour, the utilisation of paragraphs, headings, and references, and the arrangement of standard contract terms across one or multiple documents.

849. Wolf in Wolf/Horn/Lindacher, AGB-Gesetz, 4. Aufl. 1999, § 9 Rn. 148-154.
850. Ibid, Rn. 148.
851. Ibid, Rn. 153-154.
852. Ibid.
853. Ibid, Rn. 154.
854. Ibid, Rn. 152.
855. Gerrick von Hoyningen-Huene, 'Unwirksamkeit von AGB bei bloßer Intransparenz?' in Friedrich Graf von Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 180.
856. AGB-RechtKo/Pfeiffer, 6. Aufl. 2013, BGB § 307 Rn. 253-269.
857. AGB-RechtKo/Fuchs, 11. Aufl. 2011, BGB § 307 Rn. 335-343.
858. Hans Erich Brandner, 'Transparenz als Maßstab der Inhaltskontrolle? Eine Problemskizze' in Peter Löffelmann und Hermann Korbion, *Festschrift für Horst Locher zum 65. Geburtstag* (Werner-Verlag 1990) 319-324.
859. Jürgen Basedow, 'Transparenz als Prinzip des (Versicherungs-) Vertragsrechts' (1999) *Versicherungsrecht* 1045, 1052.

Linguistic transparency tackles the length, structure, precision, and completeness of sentences, as well as the use of technical or colloquial language. Basedow also observes that even when standard contract terms are formally and linguistically transparent, their legal content can still lack substantive transparency if the legal rights and obligations of contractual parties remain unclear. Gottchalk supports Basedow's systematisation.[860]

Differing from Basedow and Gottschalk, Schwintowski does not differentiate between formal and linguistic transparency.[861] Instead, he considers the comprehensibility of language, as well as the clarity of the form and structure of standard contract terms, to fall within the ambit of formal transparency. He also argues that substantive transparency involves multiple factors related to the formulation of the content of standard contract terms, including clarity, precision, accuracy, completeness, and timeliness.[862] While most of these factors can be assessed in the context of content control, Schwintowski highlights that timeliness pertains to inclusion control. This is because it focuses on whether the consumer could have familiarised themselves with the standard contract terms before concluding the contract.

Gutkin provides a comprehensive analysis of formal and substantive transparency within the context of standard contract terms governing price adjustments in German case law.[863] In her systematisation, formal transparency focuses on comprehensibility in both a formal and grammatical sense.[864] In its formal sense, comprehensibility relates to the visual presentation of contract terms, which includes the use of headings and paragraphs. In its grammatical sense, comprehensibility pertains to the clarity of linguistic design, including the language employed in the contract, the use of technical terms, and legal references. Substantive transparency aims to prevent the inclusion of misleading and deceptive language in standard contract terms. Moreover, it requires a level of certainty, ensuring that the description of a contract term's legal and factual consequences is specific enough for consumers to understand and determine their rights and obligations.[865] Gutkin's interpretation of the ban on misleading contract terms and the requirement of certainty aligns with the perspectives of other German scholars, as discussed above.

Although there is considerable overlap in the various transparency systematisations proposed by German scholars, a universally accepted framework has not yet emerged.[866] As discussed in the previous two chapters, this thesis advocates

860. Eckart Gottschalk, 'Das Transparenzgebot und allgemeine Geschäftsbedingungen' (2006) 206(4) *Archiv für die civilistische Praxis* 591-592.
861. Hans-Peter Schwintowski, 'Die Bedeutung interdisziplinären Arbeitens von Rechts- und Sprachwissenschaft' (2003) 632 *Neue Juristische Wochenschrift* 634.
862. Ibid, 634-635.
863. Lilian Gutkin, *Die Europäisierung der AGB-Kontrolle von Preisänderungsklauseln* (Duncker & Humbolt 2018) 172-185 and 207-255.
864. Ibid, 172-183.
865. Ibid, 207-210.
866. MüKoBGB/Wurmnest, 9. Aufl. 2022, BGB § 307 Rn. 61; Helmut Heinrichs, 'Das Transparenzgebot und die EG-Richtlinie über missbräuchliche Klauseln in Verbrauchtverträgen' in Friedrich Graf

for a systematisation of transparency based on formal and substantive transparency. Formal transparency refers to the accessibility and readability of consumer information, while substantive transparency ensures the comprehensibility of that information. Expanding on this systematisation, the following section examines German case law regarding transparency as applied under the second sentence of § 307 (1) BGB, which implements the UCTD's transparency requirement safeguarding plainness and intelligibility of standard contract terms. Additionally, as highlighted by Köndgen and Heinrichs, the case law on transparency in the field of content control relates to the essence of controlling the transparency of standard contract terms in German law.[867]

While both German scholarship and case law indicate the presence of formal and substantive elements of the transparency requirement, it seems that substantive transparency takes priority over formal transparency. In cases where German courts dealt with issues of formal transparency, their primary objective was to determine whether the lack of formal transparency had an impact on the consumer's comprehension of the contract.[868] Essentially, they sought to ascertain if the lack of formal transparency resulted in a lack of substantive transparency. This implies that, in the area of content control, the transparency requirement is always understood in its substantive meaning. Whether the criteria for evaluating transparency are related to formal factors such as the use of headings and paragraphs, or substantive factors such as the use of technical language, the purpose of the evaluation is to determine whether an average consumer could have understood the standard contract terms. This approach aligns with the reasoning in the *Matei* case, where the CJEU ruled that consumers might not be able to grasp the economic implications of contract terms, even if they are formally transparent. In that case, the CJEU found that a grammatically plain and intelligible phrase such as "*in the event of significant changes in the financial markets*" did not allow consumers to anticipate when an increase in interest rates might occur.[869] Nevertheless, it should be noted that the incorporation rule outlined in § 305 (2) BGB promotes formal transparency by ensuring the accessibility and legibility of standard contract terms, as elucidated in Section 3.1.1.1. Thus, a lack of formal transparency may result in the terms not being incorporated into the contract, thereby eliminating the need for content control. Section 3.1.4,

---

von Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 166-168; Hans Erich Brandner, 'Transparenz als Maßstab der Inhaltskontrolle? Eine Problemskizze' in Peter Löffelmann und Hermann Korbion, *Festschrift für Horst Locher zum 65. Geburtstag* (Werner-Verlag 1990) 317-319.

867. Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 945; Helmut Heinrichs, 'Das Transparenzgebot und die EG-Richtlinie über missbräuchliche Klauseln in Verbrauchtverträgen' in Friedrich Graf von Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 161.

868. See, for example, BGH 22 March 2018, IX ZR 99/17, NJW 2018, 2193; BGH 25 February 2016, VII ZR 156/13, NJW 2016, 1575; BGH 22 November 2016, XI ZR 434/15, BeckRS 2016, 115038; BGH 14 January 2014, XI ZR 355/12, NJW 2014, 924; BGH 24 November 1988, III ZR 188/87, NJW 1989.

869. Case C-143/13 *Matei*, point 76.

which elaborates on the contractual consequences of a breach of transparency, discusses this further.

The following section illustrates the relevant factors for assessing the transparency of standard contract terms in German case law regarding content control and examines whether this assessment safeguards both formal and substantive transparency. Lastly, it is important to note that, unlike EU law, German law does not limit the regulation of fairness and transparency in standard contract terms exclusively to consumer contracts.[870] Therefore, the case law used as the basis for analysing the assessment of transparency in the following section is not limited to consumer contracts. This is not problematic since if a contract term is considered non-transparent in a business-to-business (B2B) scenario, it is more likely to be found non-transparent in a business-to-consumer (B2C) scenario as well. However, the opposite may not necessarily be true as contract terms that are transparent in B2B cases could still be deemed non-transparent in B2C cases. Consequently, while B2B cases exemplify the minimum level of protection provided by the transparency requirement, they may not always represent the degree of protection extended to consumers.

3.1.3.2. Relevant factors for the assessment of transparency in German case law

3.1.3.2.1. Linguistic design of standard contract terms

In the realm of linguistic design, German courts have evaluated the usage of **ambiguous**, **legal**, and **industry-specific terms**. The utilisation of contract terms that necessitate interpretation does not inherently breach the transparency requirement. Nonetheless, the utilisation of such terms depends on the non-drafting party's capability to obtain the pertinent information required to ascertain their meaning without seeking external help.[871] The negative impact of **ambiguity** on transparency can be observed in a case involving the advertising of a motor vehicle.[872] The contract allowed for automatic renewal after five years unless it was terminated in writing three months before the end of the period. The BGH highlighted that the ambiguous definition of when the contract started, which could be interpreted in at least two different ways, made it impossible to determine the exact moment for calculating the termination period. In this instance, the lack of transparency resulted in an unreasonable disadvantage, as it impeded the effective exercise of the right to terminate the contract.

Another example of ambiguity can be found in a case involving liability for material defects of a property, where two different contractual terms governed the

870. MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 1-4; Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 441-442.

871. BGH 9 December 2015, VIII ZR 349/14, NJW 2016, 2101.

872. BGH 14 March 2018, XII ZR 31/17, NJW 2018, 1811.

limitation period for such liability.[873] While one term indicated that the limitation period began five years after the acceptance of the property, another term stated that the same period began upon handover *or* acceptance of the property. Such ambiguous phrasing regarding the commencement of the liability period could have undermined the effective exercise of rights associated with liability for material defects. Other examples include a case where two contract terms envisaged different expiration periods for the identical type of damage claim, rendering it implausible for the consumer to effectively assert their claim,[874] as well as a situation where an energy supply contract mandated the consumer's obligation to pay "*on-site collection costs*" without clarifying the specific activities falling under such costs.[875]

As previously explained, § 307 (3) of the BGB subjects declaratory contract terms, in the broader sense, to transparency control.[876] This means that **legal terms**, which do not sufficiently indicate their origin from statutory provisions, fail to meet the transparency requirement. For example, the BGH determined that the transparency requirement was not fulfilled in an insurance contract where the term "*net income*" was not properly defined, as the definition of this term varies across different legal domains.[877] Other examples of legal terms rendering it impossible for a layperson to independently ascertain their meaning encompass terms like "*essential contractual provision*"[878] or "*cardinal obligations*".[879] Conversely, legal terms that are clearly defined in statutory provisions and are reproduced verbatim in the trader's standard contract terms will fulfil the transparency requirement.[880]

The existence of a breach of the transparency requirement may sometimes depend on the extent to which the meaning of specific legal terms differs from their meaning in everyday language. For example, as per the BGH, since the notion of "*compensation for damages*" is also used in everyday language, it necessitates additional clarification in the contract.[881] In another instance, the BGH determined that the notion of "*prospectus liability*" lacked transparency because the understanding of the term 'prospectus' in everyday language differed greatly from its meaning in commercial law and the relevant contract.[882] On the contrary, the notion of "*operating costs*" in lease agreements is equally comprehensible in both legal and everyday language.[883] Besides being clearly defined by law and regulated in a rental property cost catalogue, this concept has also maintained the same meaning in practice for an extended period. In addition to ensuring alignment between legal and everyday

873. BGH 25 February 2016, VII ZR 156/13, NJW 2016, 1575.
874. BGH 29 April 2015, VIII ZR 104/14, NJW 2015, 2244.
875. BGH 26 June 2019, VIII ZR 95/18, NJOZ 2020, 300.
876. Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 443-447.
877. BGH 6 July 2016, IV ZR 44/15, NJW 2017, 388.
878. BGH 9 December 2015, VIII ZR 349/14, NJW 2016, 2101.
879. BGH 20 July 2005, VIII ZR 121/04, NJW-RR 2005, 1496.
880. BGH 4 April 2018, IV ZR 104/17, NJW 2018, 1544.
881. Ibid.
882. BGH 8 May 2013, IV ZR 84/12, NJW 2013, 2739.
883. BGH 10 February 2016, VIII ZR 137/15, NJW 2016, 1308.

language, the BGH suggests enhancing transparency of contractual terms that reference legal concepts by providing examples that explain the legal content of those terms.[884]

When traders use **industry-specific terms** in a manner that deviates from their conventional use, the transparency requirement will likely not be met. For instance, modifying the definition of "*private liability insurance*" to include coverage for damages caused by a third party during their personal activities contradicts the transparency requirement.[885] Such alteration does not comply with the requirement of transparency as policyholders would usually anticipate this insurance to provide coverage for damages arising from personal activities, regardless of whether they are the injured or the causing party. Similarly, modifying the definition of "*occupational disability insurance*" in a manner that deviates from the customary criteria for assessing the inability to participate in a professional activity violates the transparency requirement.[886] This is because the assessment of the inability to pursue a professional activity was changed to be determined by a fictitious sedentary office job rather than the policyholder's actual previous occupation.

However, if a term is interpreted differently across various professions relevant to a specific industry, it may not necessarily violate the transparency requirement. For example, in an insurance contract that covers pathological disorders resulting from physical reactions in accidents and excludes disorders from psychological reactions, the BGH ruled that the absence of a clear distinction between physical and psychological reactions did not constitute a breach of transparency.[887] The BGH has acknowledged the diverse medical, psychological, and philosophical viewpoints regarding the classification of pathological disorders. Notwithstanding, it concluded that this degree of ambiguity did not prevent the policyholder from understanding that the insurance policy covered health damages caused by physical reactions, while excluding psychological ones.

3.1.3.2.2. Structural design of standard contract terms

German courts have examined the utilisation of **headings**, **paragraphs**, **references**, and **font highlighting** in relation to the structural design of standard contract terms. The impact of **headings and paragraphs** on transparency becomes evident through a case involving the prioritisation of ordinary creditors' claims over profit-sharing creditors' claims. In this instance, the BGH asserted that the use of headings and paragraphs enhanced the clarity of the information on the order of claims.[888] The BGH maintained that the nature of claims from profit-sharing creditors and ordinary creditors was easily distinguishable from the heading of the contract term titled "*Subordination*". Additionally, it emphasised that the disputed term consisted

884. BGH 22 November 2016, XI ZR 434/15, BeckRS 2016, 115038.
885. BGH 13 September 2017, IV ZR 302/16, NJW 2017, 3711.
886. BGH 15 February 2017, IV ZR 91/16, NJW 2017, 2346.
887. BGH 23 June 2004, IV ZR 130/03, NJW 2004, 2589.
888. BGH 22 March 2018, IX ZR 99/17, NJW 2018, 2193.

of three paragraphs explaining the subordination of profit-sharing creditors' claims. The BGH concluded that both the heading and the paragraphs effectively helped creditors understand the relationship between their claims, whether they considered the term as a whole or its individual paragraphs.

The case law related to banking charges shows how the use of paragraphs can negatively affect the transparency of contractual terms. In these cases, one paragraph would typically cover the terms that detailed the annual interest amount to be repaid, while another paragraph would specify that the interest must be paid in quarterly instalments throughout the year.[889] This spatial separation of information concerning interest rates hindered consumers from recognising that one paragraph had a price-increasing effect on the other paragraph. However, a spatial separation of information is advantageous for transparency when contract terms govern related but distinct concepts, such as different forms of liability for damages.[890]

As explained in Section 3.1.1.3., the BGH has concluded that standard contract terms that incorporate **references to legal provisions** generally do not violate the transparency requirement, particularly when the referred provisions are easily accessible.[891] This position is based on the belief that compelling businesses to disclose the complete regulatory content they refer to in their contract terms has the potential to impede transparency. This could result in contract terms that are excessively detailed, confusing, or incomplete. Moreover, even the inclusion of dynamic references to legal provisions, where contractual changes are tied to alterations in these provisions, can satisfy the transparency requirement, as long as they are clearly identifiable.[892] This reasoning contradicts the CJEU's case law on transparency under the UCTD. As per the CJEU, the UCTD's transparency requirement obliges traders to clarify the contents of the legal provisions they mention in their standard terms.[893] In addition, the CJEU applied the same reasoning in the *Kreissparkasse Saarlouis* case, which relates to the evaluation of transparency under the CCD. This was in response to preliminary questions from the Regional Court (Landgericht, or LG) of Saarbrücken. The CJEU reiterated that creditors cannot inform consumers about contract terms by simply referring to national legislation.[894] Such references do not allow consumers to determine the scope of their contractual rights and obligations or confirm if the contract includes all the mandatory information.[895]

The BGH also expressed support for the use of **cross-references**. It clarified that while certain contract terms are sufficiently transparent on their own, this

889. BGH 24 November 1988, III ZR 188/87, NJW 1989, 222; OLG Bremen 18 March 1991, 6 U 4/91 NJW 1991, 1837.
890. BGH 12 October 2005, IV ZR 162/03, NJW 2001, 292.
891. BGH 22 November 2016, XI ZR 434/15, BeckRS 2016, 115038; BGH 14 January 2014, XI ZR 355/12, NJW 2014, 924.
892. BGH 14 January 2014, XI ZR 355/12, NJW 2014, 924; BGH 12 October 2007, V ZR 283/06, NJW-RR 2008, 251.
893. Case C-472/10 *Invitel*, point 29; Case C-92/11 *RWE Vertrieb*, points 50-51; Case C-191/15 *Verein für Konsumenteninformation/Amazon*, point 69.
894. Case C-66/19 *Kreissparkasse Saarlouis*, point 44.
895. Ibid, points 40-49.

may not be the case when they are considered in the context of other contract terms.[896] Therefore, the BGH stated that traders can use cross-references to ensure the clarity and comprehensibility of a contract term, both individually and within the contract as a whole. However, the BGH also emphasised that complex chains of references could obscure the content of contract terms and potentially violate the transparency requirement. An illustrative example of this opacity was a complex referral system that ultimately led to the trader's annual report, which envisaged that policyholders could only participate in the distribution of the trader's additional profit if their guaranteed retirement capital surpasses a certain threshold.[897] This reasoning appears to be consistent with the approach taken by the CJEU in *Home Credit Slovakia*. In that case, the CJEU held that credit information, which is spread across various documents, must be clearly and accurately cross-referenced within those documents.[898]

The positive impact of **font highlighting** on transparency is evident from a case involving interconnected contracts. In this case, the contract clearly stated in bold font that the termination of one insurance contract would not automatically terminate another linked contract.[899] According to the BGH, the highlighted presentation of information regarding the termination of linked contracts facilitated the policyholder's understanding of the economic consequences associated with exercising this right.

3.1.3.2.3. Transparent design of standard contract terms regulating price changes

In situations involving long-term contracts or contracts with time- or value-based remuneration, the definitive price for the provided service is uncertain at the moment of contract conclusion. This uncertainty stems from possible changes in costs, shifts in market conditions, or dependence on definitive outcomes. Gutkin emphasises that the BGH recognises the trader's interest in maintaining the balance between the originally agreed performance and price by modifying the price,[900] and the consumer's interest in anticipating such price changes.[901] While the final price cannot be determined at the time of contract formation, the contract should transparently explain the method for calculating cost changes. This means that the contract should clearly and precisely outline the criteria upon which charges will be based, ensuring that consumers can verify any modifications.[902]

As stated in Section 3.1.1.3., the BGH started developing its case-law on the transparent design of standard terms governing price changes in the 1980s.

896. BGH 25 February 2016, VII ZR 156/13, NJW 2016, 1575.
897. BGH 13 January 2016, IV ZR 38/14, NJW 2016, 1646.
898. Case C-42/15 *Home Credit Slovakia*, point 34.
899. BGH 12 March 2014, IV ZR 295/13, NJW 2014, 1658.
900. See, for instance, BGH 13 June 2007, VIII ZR 36/06, NJW 2007, 2540; BGH 13 December 2006, VIII ZR 25/06, NJW 2007, 1054; BGH 11 October 2007, III ZR 63/07, NJW-RR 2008, 134.
901. Lilian Gutkin, *Die Europäisierung der AGB-Kontrolle von Preisänderungsklauseln* (Duncker & Humbolt 2018) 226-227 and 243-248.
902. OLG München 30 November 2016, 15 U 1298/16, NJW 2017, 2127; BGH 25 November 2015, VIII ZR 360/14, NJW 2016, 936.

However, in 2011, the BGH referred preliminary questions to the CJEU regarding the transparency and timing of information regarding price adjustments in the *RWE Vertrieb* case. In this case, the CJEU affirmed that contract terms must explain the reason and method behind price changes based on clear and intelligible criteria to enable consumers to anticipate potential price changes.[903] Also, the CJEU stressed that traders must provide this information to consumers before the conclusion of a contract.[904]

German case law shows that the inclusion of factors such as **numerical references**, **examples of forthcoming costs** relevant to the price calculation, or explicit disclosure of the **criteria** used in the price calculation, can ensure the transparency of terms governing price adjustments. For instance, the inclusion of a contract term stipulating the **minimum attorney fee** contributes to substantive transparency.[905] In another scenario, additional costs for advertising borne by tenants in a shopping mall could can be specified by referencing a **certain percentage** of the rent, specifying a **maximum amount** for advertising costs, or prescribing a **membership fee**.[906] The transparency requirement, however, does not oblige traders to provide consumers with exhaustive information regarding all potential future expenses.

Such extensive disclosure at the same time carries the risk of being incomplete and overwhelming for consumers due to its length, level of detail, and complexity.[907] According to the BGH, providing illustrative **examples** of future costs helps to ensure transparency. For instance, in the context of electricity supply agreements, the BGH considered information stating that prices will be adjusted based on fluctuations in costs related to the purchase of energy and the use of distribution networks, or changes in the energy industry and legal provisions, as transparent.[908]

Furthermore, the transparency requirement does not require traders to disclose the precise mathematical formula used to calculate costs. For example, in a lease agreement where the consumer must pay the residual value of the leased vehicle, the BGH determined that the trader is not required to reveal the exact calculation method for determining the agreed residual value.[909] Instead, for the sake of transparency, it would be enough for the contract to include **all the relevant criteria** for determining the due amount. The BGH expressed a similar opinion in a case related to endowment insurance. The BGH stated that the trader was not required to disclose the calculation method for determining the surrender value. This was because the consumer would not be able to effectively use this method to calculate the surrender value without external help.[910] Instead, the consumer needed a summary of the surrender values mentioned in their contract in order to compare them with other market offers.

---

903. Case C-92/11 *RWE Vertrieb*, points 49-50.
904. Ibid, points 51-55.
905. OLG München 30 November 2016, 15 U 1298/16, NJW 2017, 2127.
906. BGH 13 April 2016, XII ZR 146/14, NJW 2016, 2489.
907. BGH 25 November 2015, VIII ZR 360/14, NJW 2016, 936.
908. Ibid.
909. BGH 28 May 2014, VIII ZR 179/13, NJW 2014, 802.
910. BGH 9 May 2001, IV ZR 138/99, NJW 2001, 2012.

It can be observed that German law provides more guidance for evaluating the transparency of terms governing price modifications as compared to EU law. The analysis conducted in section 2.1.3.2. reveals that the case law of the CJEU does not address the manner in which traders should present information regarding such terms, but rather focuses on the type of information they should supply. As demonstrated above, German case law specifies certain factors that can assist consumers in comprehending the financial impact of terms regulating price adjustments, such as incorporating numerical references or providing examples of future expenses. This provides traders with more guidance on how to draft terms transparently. Furthermore, the BGH appears to be more critical than the CJEU regarding the type of information consumers can comprehend concerning price adjustment terms. Unlike the CJEU's approach, which advocates for additional obligations on traders to provide positive information,[911] the BGH emphasises instances when certain information may not be beneficial to consumers because they are unlikely to be able to rely on it without external assistance.

3.1.3.2.4. The application of the average consumer benchmark

In German law, the evaluation of transparency is not conducted with respect to the specific contracting party, but rather with respect to an hypothetical contracting party, which can be deemed as representative of an average party within a particular type of contract.[912] This could be, for instance, an average consumer purchasing a car or telecommunications services, or an average professional providing architectural services.[913] Similar to EU law, German law stipulates that standard contract terms must be evaluated based on the understanding of an normally informed, reasonably observant and circumspect consumer.[914]

An average consumer should be able to access, read, and comprehend information without the assistance of experts or requiring extensive internet research.[915] This criterion was not fulfilled, for instance, in a case from 2019

911. Hans-W. Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) *Common Market Law Review* 786-788; Joasia Luzak, Foreign currency loans? Inform consumers of risks! - CJEU in Andriciuc (C-186/16) (Recent developments in European Consumer Law, 21 September 2017). See also my analysis in Section 2.1.3.2. for a further substantiation of this claim.

912. MüKoBGB/Wurmnest, 9. Aufl. 2022, BGB § 307 Rn. 69; BGH 29 April 2015, VIII ZR 104/14, NJW 2015, 2244; BGH 9 October 2014, III ZR 33/14, NJW 2015, 152; BGH 7 February 2019, III ZR 38/18, NJW-RR 2019, 942. See also Giorgio Cian, 'Auslegung und Transparenzgebot in der Regelung der AGB und der Verbraucherverträge nach italienischem und deutschem Recht' (1998) 3 *Zeitschrift für Europäisches Privatrecht* 589-590.

913. BGH 29 April 2015, VIII ZR 104/14, NJW 2015, 2244; BGH 9 October 2014, III ZR 33/14, NJW 2015, 152; BGH 11 July 2019, VII ZR 266/17, NJW 2019, 2997. See also Hans-Peter Schwintowski, 'Transparenz und Verständlichkeit von Allgemeinen Versicherungsbedingungen und Prämien' (1998) 3 *Neue Zeitschrift für Versicherung und Recht* 98; Giorgio Cian, 'Auslegung und Transparenzgebot in der Regelung der AGB und der Verbraucherverträge nach italienischem und deutschem Recht' (1998) 3 *Zeitschrift für Europäisches Privatrecht* 589-590.

914. BGH 25 November 2015, VIII ZR 360/14, NJW 2016, 936; BGH 7 February 2019, III ZR 38/18, NJW-RR 2019, 942. See also MüKoBGB/Wurmnest, 9. Aufl. 2022, BGB § 307 Rn. 69.

915. OLG Stuttgart 27 March 2019, 4 U 184/18, BeckRS 2019, 4577.

concerning 'Riester contracts', which pertain to state-supported private pensions in Germany.[916] In this case, the bank's standard contract terms included a variable interest rate, with 30% determined by an interest rate recalculated every 3 months, and the remaining 70% linked to an interest rate recalculated every 10 years. These terms also stated that the interest rates, on which these calculations were based, would be published by the German Central Bank (Deutsche Bundesbank). The Higher Regional Court (Oberlandesgericht, or OLG) of Stuttgart emphasised that an average consumer would not be able to determine the relevant interest rates, which are crucial for calculating individual interest rates, with clarity and certainty through a general online search or a targeted search on the website of the German Central Bank. Furthermore, while the lack of transparency in the standard contract terms could have been remedied by contacting the German Central Bank, consumers are not expected to seek third-party assistance to determine their contractual rights and obligations. The BGH does expect the average consumer to carefully read and process standard contract terms.[917] Contract terms may in some cases also include anglicisms. For instance, the BGH found the use of anglicisms such as "*bots*" or "*cheats*" within the standard contract terms of the game World of Warcraft acceptable because it corresponds to the linguistic usage of the target public.[918]

German law does not require an average consumer to possess a good grasp of economics[919] and anticipates a lower level of knowledge from consumers when they enter into mortgage agreements compared to when they purchase audiobooks. For example, the BGH noted that first-time property buyers or individuals lacking financial expertise were increasingly entering into mortgage agreements. It was, therefore, necessary for lenders to formulate their standard contract terms in a manner that clearly highlighted the adverse consequences of these terms, such as cost increases, for customers without necessitating extensive research or additional information.[920] In contrast, concerning audiobook sales, OLG Hamm discovered that consumers who purchase audiobooks generally have the required technical proficiency to perform tasks like downloading, storing, and playing audiobooks on physical devices.[921] As a result, standard contract terms for such agreements could be formulated assuming a basic understanding of the limitations imposed on consumers' rights regarding the use of audiobooks.

While some industries may seem complex and hard to understand for the average consumer, this does not imply that the information provided to consumers in such industries should be simplified. Nor does it mean that as the complexity of an industry increases, the simplicity of consumer information should increase as well. In fact, the content of a contractual term cannot be less complicated than the subject

916. Ibid.
917. See, for instance, BGH 7 February 2019, III ZR 38/18, NJW-RR 2019, 942.
918. BGH 12 January 2017, I ZR 253/14.
919. See, for instance, BGH 17 January 1989, XI ZR 54/88, NJW 1989, 582.
920. BGH 24 November 1988, III ZR 188/87, NJW 1989; BGH 10 July 1990, XI ZR 275/89, NJW 1990, 2383.
921. OLG Hamm 15 May 2014, 22 U 60/13, NJW 2014, 3659.

matter it addresses or the laws on which it is based.[922] Complex contract terms often meet the transparency requirement when traders use them in a manner customary within a specific industry. For example, the BGH found a contract term regulating the exclusion of pathological disorders arising from psychological reactions to accidents from insurance coverage to be transparent due to its common usage in the insurance sector.[923] The fact that this term is a technical term, which requires expert knowledge in medicine, psychology, or philosophy to be accurately understood, did not affect the outcome of the transparency assessment. Even if the average consumer may not have the expertise to differentiate between physical and psychological reactions, as long as the trader clearly communicates the exclusion of certain reactions from insurance coverage, the contract term can be considered transparent.

In another case, the BGH expected an average policyholder to understand the meaning of "*increased exertion of force*" when evaluating the extent of muscle activity covered by their insurance, even if the trader's standard contract terms did not provide examples defining this concept.[924] The BGH acknowledged that consumers might not always be aware of the activities covered by the term "*increased exertion of force*" in specific cases. This is because courts need to assess whether certain activities involve greater muscle force, taking into account the policyholder's physical condition and other circumstances present in a particular case. Nevertheless, the BGH concluded that an average policyholder should understand that this concept refers to the use of force that goes beyond regular daily physical activities.

These cases suggest that the BGH sometimes accepts that an average consumer has a general understanding of the meaning of a contract term, without necessarily understanding its actual practical implications. However, it is questionable whether such an approach aligns with the CJEU's case law. As discussed in Section 2.1.3.2., the CJEU expects traders to provide consumers with sufficient information on the practical implications of contract terms. This obligation can be fulfilled by providing examples of the practical effects that a term may have for the consumer or by explaining the criteria relevant to determining the specific consequences of the term.

Although an average consumer must adopt an informed and circumspect approach when dealing with contracts, which includes reading and processing technical terms beyond their expertise, they are still regarded as legal laypersons.[925] For instance, standard terms in an insurance contract cannot demand that an

922. BGH 7 February 2019, III ZR 38/18, NJW-RR 2019, 942.
923. BGH 23 June 2004, IV ZR 130/03, NJW 2004, 2589.
924. BGH 20 November 2019, IV ZR 159/18, NJW-RR 2020, 92.
925. BGH 14 August 2019, IV ZR 279/17, NJW 2019, 3582; BGH 4 April 2018, IV ZR 104/17, NJW 2018, 1544; BGH 13 September 2017, IV ZR 302/16, NJW 2017, 3711; BGH 15 February 2017, IV ZR 91/16, NJW 2017, 2346; BGH 9 December 2015, VIII ZR 349/14, NJW 2016, 2101; BGH 8 May 2013, IV ZR 84/12, NJW 2013, 2739; BGH 17 January 1989, XI ZR 54/88, NJW 1989, 582. See also MüKoBGB/Wurmnest, 9. Aufl. 2022, BGB § 307 Rn. 69; Friedrich Graf von Westphalen, 'AGB-Recht ins BGB - Eine erste "Bestandsaufnahme"' (2002) 1 *Neue Juristische Wochenschrift* 16; Von Gerrick von Hoyningen-Huene, 'Unwirksamkeit von AGB bei bloßer Intransparenz?' in Friedrich Graf von Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 180; Helmut Heinrichs, 'Das Transparenzgebot und die EG-Richtlinie über missbräuchliche Klauseln in Verbrauchtverträgen' in Friedrich Graf von

average policyholder undertake complex legal evaluations. This situation may arise when the contract mandates the average policyholder, in the event of a legal dispute, to minimise expenses and choose the most efficient litigation strategy, such as consolidating claims into a single lawsuit.[926] While an average policyholder may seek legal aid in case of a lawsuit, this does not change the fact that standard contractual terms should be easily understandable to them when entering into the agreement.

While German law requires traders to provide clear definitions of legal concepts,[927] it also permits them to simply reference legal provisions. Notably, referring to the law is not deemed a violation of the transparency requirement, especially when the relevant legal provisions are easily accessible.[928] As outlined in Sections 3.1.1.3. and 3.1.3.2.2., this viewpoint is not compatible with the stance of the CJEU. The CJEU has consistently maintained in its case law that traders have an obligation to clarify the content of legal provisions they reference in their standard terms.[929] This is because contractual clauses that only make reference to national legal provisions do not enable consumers to determine their contractual rights and obligations.[930] Additionally, the CJEU clarified in the case of *Banco Santander* that it does not expect an average consumer to conduct legal research.[931]

Rott highlights that older German case law is in line with this approach of the CJEU.[932] The BGH initially considered consumers as ignorant of the law,[933] and the OLG Schleswig even asserted that only lawyers can comprehend terms which solely refer to legal provisions without specifying their content.[934] However, he has observed a shift in the stance of German courts over the past decade, which could potentially be attributed to the widespread accessibility of legislation online.[935] As elucidated earlier, the BGH now generally accepts legal references,[936] and the OLG Rostock, for instance, held that even an individual without legal expertise could reasonably be expected to consult the Civil Code.[937]

Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 165-166.

926. BGH 14 August 2019, IV ZR 279/17, NJW 2019, 3582.

927. BGH 6 July 2016, IV ZR 44/15, NJW 2017, 388; BGH 8 May 2013, IV ZR 84/12, NJW 2013, 2739.

928. BGH 22 November 2016, XI ZR 434/15, BeckRS 2016, 115038; BGH 14 January 2014, XI ZR 355/12, NJW 2014, 924.

929. Case C-472/10 *Invitel*, point 29; Case C-92/11 *RWE Vertrieb*, points 50-51; Case C-191/15 *Verein für Konsumenteninformation/Amazon*, point 69.

930. Case C-66/19 *Kreissparkasse Saarlouis*, points 40-49.

931. Case C-265/22 *Banco Santander*, point 60.

932. Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 386.

933. Ibid. See also BGH 17 January 1989, XI ZR 54/88, NJW 1989, 582 and BGH 4 July 2002, I ZR 81/00, BeckRS 2002, 7277.

934. Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 386. See OLG Schleswig 27 March 1995, 4 RE-Miet 1/93, NJW 1995, 2858.

935. Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 386.

936. See, for example, BGH 12 October 2007, V ZR 283/06, NJW-RR 2008, 251; BGH 14 January 2014, XI ZR 355/12, NJW 2014, 924; and BGH 22 November 2016, XI ZR 434/15, BeckRS 2016, 115038.

937. Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 386. See OLG Rostock 29 May 2006, 3 U 167/05,

3.1.4. Contractual consequences of a breach of transparency

Failure to comply with the obligation to provide clear and comprehensible contract terms to consumers has several consequences within German law. As explained at the beginning of this chapter, the incorporation of standard contract terms, their interpretation, and their validity depend on their transparency. The first consequence for breaching transparency is the **inability to incorporate standard terms into the contract**. As elucidated in Section 3.1.1.1., as per § 305 (2) of the BGB, if traders fail to ensure that consumers are adequately informed about the existence and content of their standard contract terms and consent to their application, these terms will not be integrated into the contract.[938] Furthermore, even when traders inform consumers about their terms and provide them with an opportunity to acquaint themselves with these terms, § 305c (1) BGB stipulates that surprising terms, i.e., terms that are so unusual that consumers would not expect them to be included in the contract, will not become part of the contract.[939]

It can be observed that EU law does not include a comparable consequence for breaching transparency since the UCTD does not regulate the incorporation of standard contract terms. Preventing the inclusion of non-transparent standard contract terms in the agreement is a laudable outcome, particularly given the power imbalance between traders and consumers. Considering that consumers can only accept the trader's terms without being able to influence their contents, it is essential to give them an opportunity to familiarise themselves with these terms. As discussed earlier, I believe that § 305 (2) BGB and § 305c (1) BGB should be viewed as provisions promoting formal transparency. If this is the case, breaching formal transparency under German law has significant consequences.

The second form of consequence for a breach of transparency involves **interpreting ambiguous contract terms against their drafter**.[940] As explained in Section 3.1.1.2., this rule practically results in applying the most consumer-unfriendly interpretation in collective proceedings, while favouring the most consumer-friendly interpretation in individual proceedings. The consumer-unfriendly interpretation requires courts to construe contract terms with multiple possible meanings in a manner that is the most detrimental to consumers, potentially resulting in them being considered unfair and invalid. The most consumer-friendly interpretation requires the exact opposite – the ambiguous contract term must be understood in a way that benefits the consumer the most.

Given that the primary goal of the consumer-friendly interpretation is to uphold an ambiguous contract term in its most beneficial form, a significant drawback of this approach is its inability to eliminate non-transparent standard contract terms

NJW 2006, 3217.

938. § 305 (1) BGB. See also Eckart Gottschalk, 'Das Transparenzgebot und allgemeine Geschäftsbedingungen' (2006) 206(4) *Archiv für die civilistische Praxis* 568.

939. BT-Drs. 7/3919 19.

940. § 305c (2) BGB.

from the market. This challenge can be addressed through a two-step approach, advocated for in scholarship[941] and, in some cases, taken up by German courts.[942] In the first step, courts would apply the most consumer-unfriendly interpretation in order to determine whether this interpretation makes the term unfair. If the term withstands this interpretation, courts will then establish its definitive meaning using the most consumer-friendly interpretation in the second step. This approach strengthens the transparency of standard contract terms by eliminating unclear terms that unreasonably disadvantage consumers and ensuring that less harmful terms are interpreted in a manner that benefits consumers, at the very least.

The third consequence for breaching transparency involves declaring a standard contract term to be **unfair** and thus **invalid**. Unlike the UCTD, which does not explicitly address the connection between breaches of transparency and the unfairness of contract terms, the BGB specifies that non-transparent contract terms can lead to an unreasonable disadvantage for the consumer.[943] If courts determine that a non-transparent contract term, which violates the principle of good faith, puts the consumer at an unreasonable disadvantage, they will render that term invalid. There is a division among scholars regarding the circumstances under which the lack of transparency in standard contract terms may lead to their invalidity. There is no consensus on whether a breach of transparency alone is sufficient to render standard contract terms invalid[944] or whether it must be combined with other deficiencies related to their content.[945] Furthermore, there are conflicting opinions regarding which of these approaches receives more support in the literature.[946]

941. MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305c Rn. 31; AGB-RechtKo/ Ulmer/Schäfer, 11. Aufl. 2011, BGB § 305c Rn. 61, 64-66.

942. BGH 11 February 1992, XI ZR 151/91, NJW 1992, 1097; BGH 29 April 2008, KZR 2/07 NJW 2008, 2172; BGH 18 March 2015, VIII ZR 185/14, NJW 2015, 1594; OLG Frankfurt 24 May 2019, 10 U 5/18, BeckRS 2019, 12877; BGH 8 September 2021, VIII ZR 97/19, BeckRS 2021, 30598; BGH 10 June 2020, VIII ZR 289/19, NJOZ 2021, 375.

943. See the second sentence of Article 307 (1) BGB. See for cases where the courts have sanctioned a lack of transparency in this manner BGH 22 March 2018, IX ZR 99/17, NJW 2018, 2193; BGH 14 March 2018, XII ZR 31/17, NJW 2018, 1811; BGH 15 February 2017, IV ZR 91/16, NJW 2017, 2346; BGH 21 September 2016, VIII ZR 27/16, NJW 2017, 325; BGH 25 February 2016, VII ZR 156/13, NJW 2016, 1575; BGH 10 February 2016, VIII ZR 137/15, NJW 2016, 1308; BGH 13 January 2016, IV ZR 38/14, NJW 2016, 1646; BGH 29 April 2015, VIII ZR 104/14, NJW 2015, 2244.

944. MüKoBGB/Wurmnest, 9. Aufl. 2022, BGB § 307 Rn. 59, 60; Ulrich Schumacher, 'Die Aufwertung des Transparenzgebots und die Konsequenzen für das Mietrecht – Neun Thesen' (2003) 1 *Neue Zeitschrift für Miet- und Wohnungsrecht* 15; Reinhold Thode, 'Die wichtigsten Änderungen im BGB-Werkvertragsrecht: Schuldrechtsmodernisierungsgesetz und erste Probleme - Teil 2' (2002) 7 *Neue Zeitschrift für Baurecht und Vergaberecht* 365-366.

945. Robert Köch, 'Auswirkungen der Schuldrechtsreform auf die Gestaltung Allgemeiner Geschäftsbedingungen – Teil I' (2002) 44 *Zeitschrift für Wirtschafts- und Bankrecht* 2174-2175.

946. For instance, Armbrüster is of the opinion that the dominant view in literature is the one according to which a breach of transparency must be accompanied by a disadvantage in terms of content in order to result in the invalidity of a standard contract term (Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 439-440). Contrarily, Köch takes the view that literature predominantly agrees that the lack of transparency of a contract term alone can lead to its invalidity (Robert Köch, 'Auswirkungen der Schuldrechtsreform auf die Gestaltung Allgemeiner Geschäftsbedingungen – Teil I' (2002) 44 *Zeitschrift für Wirtschafts- und Bankrecht* 2174-2175).

I believe that the phrasing of the second sentence of § 307 (1) BGB clearly indicates that a mere lack of clarity and comprehensibility in a standard contract term is enough to potentially lead to an unreasonable disadvantage, thus making the term invalid. Moreover, it is evident that the German legislature, perceives this provision in this way. Specifically, when codifying the transparency requirement, the German legislature explained that a violation of this requirement alone has the potential to render a contract term invalid, without requiring any additional content-related detriment.[947]

However, this does not imply that *any* lack of transparency will result in the invalidity of a contract term. As noted by Graf von Westphalen, a breach of transparency must unreasonably disadvantage a consumer, indicating that the consumer's position must be worsened.[948] This scenario occurs, for example, when there is a risk that consumers may become discouraged from exercising their rights or that traders may be able to evade consumer claims due to a lack of transparency in formulating contract terms.[949] In contrast, contract terms that are non-transparent but actually improve the consumer's position will not be deemed unfair.[950] This approach is logical because it ensures that terms favourable to consumers remain valid.

The relationship between the role of transparency and the consequences for its breach within the areas of incorporation, interpretation, and content control of standard contract terms remains uncertain.[951] Gottschalk asserts that German law mandates the sequential use of transparency control mechanisms in four steps.[952] The process unfolds as follows: first, determining whether contractual terms can be classified as standard contract terms; second, applying incorporation control rules based on § 305 (2) and § 305c (1) BGB; third, interpreting the meaning of the terms; and finally, assessing their appropriateness once their meaning is established. However, this approach to transparency control does not appear to consider the guidance provided by the German legislature. The German legislature distinguishes between incorporation control and content control, emphasising that incorporation control,

947. BT-Drs. 14/6040 153-154.

948. Friedrich Graf von Westphalen, 'AGB-Recht ins BGB - Eine erste "Bestandsaufnahme"' (2002) 1 *Neue Juristische Wochenschrift* 17.

949. OLG Karlsruhe 11 March 2016, 8 U 138/14, NJW 2016, 2670.

950. Ibid.

951. Ulrich Schumacher, 'Die Aufwertung des Transparenzgebots und die Konsequenzen für das Mietrecht – Neun Thesen' (2003) 1 *Neue Zeitschrift für Miet- und Wohnungsrecht* 14-15; Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 949; Ingo Koller, 'Das Transparenzgebot als Kontrollmaßstab AGBs' in Jürgen Fritz Baur, Klaus Jürgen Hopt und Karl Peter Mailänder, *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März* (De Gruyter 1990) 677-679; Von Gerrick von Hoyningen-Huene, 'Unwirksamkeit von AGB bei bloßer Intransparenz?' in Friedrich Graf von Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 180-181; Helmut Heinrichs, 'Das Transparenzgebot und die EG-Richtlinie über missbräuchliche Klauseln in Verbrauchtverträgen' in Friedrich Graf von Westphalen und Otto Sandrock, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 159-161.

952. Eckart Gottschalk, 'Das Transparenzgebot und allgemeine Geschäftsbedingungen' (2006) 206(4) *Archiv für die civilistische Praxis* 565-566.

unlike content control, does not encompass an assessment of the appropriateness of a contract term.[953] Therefore, it appears that the German legislature intends to uphold a distinction between these two mechanisms.

Furthermore, during incorporation control, any lack of transparency could result in the determination that a non-transparent term was not included in the contract. As a result, there is no need for further examination of the clause's content. In the case of content control, only when a breach of transparency has caused a reasonable disadvantage for the consumer, will it lead to the invalidity of a term. Therefore, in addition to establishing a breach of the transparency requirement, courts must also assess the negative impact this breach has on the consumer's position. However, in practice, it can be challenging to clearly differentiate between the assessment of transparency in incorporation control and content control.[954] For example, in situations where a contractual provision is placed under an incorrect heading, this could lead to the conclusion that this provision should not be included in the contract. Moreover, this provision could be seen as preventing consumers from understanding the extent of their rights and obligations under the contract, leading to an unreasonable disadvantage for the consumer.

A distinction can be made between these control mechanisms based on the specific aspect of transparency they aim to represent. The focus of incorporation control should be on assessing whether the trader's standard contract terms were easily accessible to consumers and structured in a way that allowed them to acknowledge and recognise their existence and content. This relates to the examination of formal transparency. The focus of content control should be on determining whether the lack of transparency in contract terms prevented consumers from understanding the actual legal or economic implications of the contract they entered into, thereby placing them at a disadvantage in the transaction. This relates to the evaluation of substantive transparency. By adopting this approach, both breaches of formal and substantive transparency would result in significant legal consequences. In both cases, non-transparent terms would ultimately not become part of the consumer contract. Furthermore, this differentiation helps to separate these control mechanisms in line with the guidelines set by the German legislature.

953. BT-Drs. 7/3919 19.

954. MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305 Rn. 56, 57; MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305c Rn. 4, 5.

3.2. The concept of transparency in German law implementing the CCD

3.2.1. The development of the transparency concept

The CCD was incorporated into German law in 2009, with the majority of its provisions being integrated into the BGB, specifically in §§ 491-505.[955] However, in order to maintain the clarity of the BGB, the BGB itself did not include the detailed provisions that specify mandatory pre-contractual and contractual information for consumer credit agreements.[956] Instead, these provisions were incorporated into Articles 247 and 247a of the Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuche, or the EGBGB).[957] Danco and Herresthal highlight that the comprehensive information requirements associated with consumer credit agreements, which were introduced during the implementation of the CCD, were new to German credit law.[958] This introduction represents a departure from the previous legal framework for consumer credit in Germany. Previously, German law did not generally require creditors to provide comprehensive information on consumer credit contracts or the credit risks associated with them.[959] As Metz emphasises, creditors only had to provide consumers with information in specific cases, such as when consumer credit was linked to life insurance, when new credit forms were being offered, or when debt conversion carried disadvantages.[960]

Regarding the concept of transparency, German law, similar to the CCD, imposes standardisation and transparency requirements on both pre-contractual and contractual consumer credit information. In terms of providing pre-contractual information, German law closely adheres to the CCD. Creditors are required to furnish mandatory pre-contractual information for all forms of consumer credit, except for overdraft facilities, debt conversion, and consumer credit agreements

955. BT-Drucks. 16/11643 1-5.

956. MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 4, 5; Josten, *Kreditvertragsrecht* (Beck 2017) 197; Christian Gercke, *Schadensersatz wegen vorvertraglicher Informationspflichtverletzung beim Verbraucherkredit* (Springer 2014) 116; Johannes Ady, 'Die Umsetzung der Verbraucherkreditrichtlinie in deutsches Recht und besondere verbraucherpolitische Aspekte' (2009) 23 *Zeitschrift für Wirtschafts- und Bankrecht* 1061-1062.

957. Einführungsgesetz zum Bürgerlichen Gesetzbuche vom 21.09.1994. (BGBl. I S. 2494; 1997 I S. 1061) (EGBGB).

958. Anne Danco, 'Die Novellierung der Verbraucherkreditrichtlinie' (2003) 18 *Zeitschrift für Wirtschafts- und Bankrecht* 857; Carsten Herresthal, 'Die Verpflichtung zur Bewertung der Kreditwürdigkeit und zur angemessenen Erläuterung nach der neuen Verbraucherkreditrichtlinie 2008/48/EG' (2009) 25 *Zeitschrift für Wirtschafts- und Bankrecht* 1174-1175.

959. Carsten Herresthal, 'Die Verpflichtung zur Bewertung der Kreditwürdigkeit und zur angemessenen Erläuterung nach der neuen Verbraucherkreditrichtlinie 2008/48/EG' (2009) 25 *Zeitschrift für Wirtschafts- und Bankrecht* 1174-1175; Petra Buck-Heeb, 'Aufklärungs- und Beratungspflichten bei Kreditverträgen -- Verschärfungen durch die EuGH-Rechtsprechung und die Wohnimmobilienkredit-Richtlinie' (2015) 5 *Zeitschrift für Bank- und Kapitalmarktrecht* 178.

960. Rainer Metz, 'Erläuterungspflichten bei Verbraucherkrediten' (2012) 28 *Neue Juristische Wochenschrift* 1990-1991.

secured by mortgages, using the SECCI (Europäische Standardinformationen für Verbraucherkredite).[961] Creditors can also choose to disclose the information on overdraft facilities and debt conversion via the ECCI (Europäische Verbraucherkreditinformationen).[962] If they do not use the ECCI, creditors have to ensure that all mandatory information on overdraft facilities and debt conversion is **equally presented and emphasised** ("*gleichartig zu gestalten und hervorzuheben*").[963] In addition to the obligation of providing standardised pre-contractual credit information to consumers, creditors must also furnish them with **adequate explanations** regarding their credit product(s). The obligation to provide adequate explanations about credit products stems from the CCD and, like the extensive mandatory information requirements, was new in German credit law.[964]

When it comes to the provision of contractual information, German law appears to diverge from the CCD. While the CCD mandates that traders include mandatory information in the consumer credit agreement in a clear and concise manner,[965] German law stipulates that this information should be conveyed in a **clear** ("*klar*") and **comprehensible** ("*verständlich*") way.[966] The German legislature does not provide an explanation for the replacement of the requirement of conciseness with the requirement of comprehensibility. It merely states that, in accordance with the CCD, contractual information related to consumer credit must be both clear and concise *as well as* comprehensible to the borrower.[967]

Another difference lies in the fact that German law allows creditors to communicate contractual information regarding the right of withdrawal through a standardised information form called "*Muster für eine Widerrufsinformation für Allgemein-Verbraucherdarlehensverträge*".[968] Although the CCD does not explicitly require the use of standardised information forms for contractual information, both the German legislature and the BGH do not consider the use of such a form for the right of withdrawal to be against the principle of full harmonisation of the directive. This is because the use of this information form is voluntary for creditors.[969] However, the compliance of the German withdrawal information form with the

961. Article 247 § 2 EGBGB in connection with Annex 4 to Article 247 § 2 EGBGB. See also BT-Drucks. 16/11643 122-123; MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 491a Rn. 9; Johannes Ady, 'Die Umsetzung der Verbraucherkreditrichtlinie in deutsches Recht und besondere verbraucherpolitische Aspekte' (2009) 23 *Zeitschrift für Wirtschafts- und Bankrecht* 1065.

962. Article 247 § 2 EGBGB in connection with Annex 5 to Article 247 § 2 EGBGB. See also BT-Drucks. 16/11643 122-123; MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 491a Rn. 9; Johannes Ady, 'Die Umsetzung der Verbraucherkreditrichtlinie in deutsches Recht und besondere verbraucherpolitische Aspekte' (2009) 23 *Zeitschrift für Wirtschafts- und Bankrecht* 1065.

963. Article 247 § 2 EGBGB. See also MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 491a Rn. 12.

964. BT-Drucks. 16/11643 78-79; MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 18, 19.

965. Article 10(2) CCD.

966. Article 247 § 6 EGBGB. See also BT-Drucks. 16/11643 127-128.

967. BT-Drucks. 16/11643 127.

968. Article 247 § 6 EGBGB in connection with Annex 7 to Article 247 § 6 EGBGB. See also BT-Drucks. 16/11643 122-123; MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 492 Rn. 31.

969. BT-Drucks. 17/1394 21-22; BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881; BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440.

CCD's transparency requirements has been contested at EU level, which I will further analyse in section 3.2.3.3.

3.2.2. The objective of transparency

The concept of transparency, as applied in German law implementing the CCD, seems to **enable consumers to make informed choices**. As stated in Section 2.2.2., the objectives of the CCD appear to pursue the same objective. The guidelines provided by the German legislature highlight that the primary goal of transparency is to empower consumers to make responsible decisions regarding whether to enter into a particular agreement.[970] Before the conclusion of a contract, creditors must provide consumers with mandatory credit information, presented in a standardised form. This standardised form should promote the clarity and completeness of the credit information,[971] allowing consumers to compare credit offers and determine whether to conclude a contract.[972]

Furthermore, the goal of informed choice arises from the creditor's obligation to offer adequate explanations regarding consumer credit products. The creditor's role is not to advise the consumer on whether a loan is suitable for their needs and financial circumstances. Instead, the creditor should provide the consumer with the necessary information to enable them to make an independent decision.[973] The information included in the consumer credit contract must also be transparent, enabling the consumer to understand their contractual rights and obligations and make informed decisions about when to assert them.[974] The objective of transparency in German consumer credit law appears to be more limited than the objective of transparency in German law pertaining to standard contractual terms. As detailed in Section 3.1.2., in German law regulating standard contract terms, the transparency requirement is intended to promote communication and market transparency.[975]

As reiterated and explained in previous chapters, achieving the goal of informed choice depends on traders providing consumers with information that is both formally and substantively transparent. This means that consumers should be able

970. BT-Drucks. 16/11643 78-79. See also MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 1; MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 4, 5.

971. BT-Drucks. 16/11643 122.

972. Ibid, 78. See also MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 4, 5; Ralf Josten, *Kreditvertragsrecht* (Beck 2017) 136; Christian Gercke, *Schadensersatz wegen vorvertraglicher Informationspflichtverletzung beim Verbraucherkredit* (Springer 2014) 116; Ulrich Kulke, 'Das Gesetz zur Umsetzung der Verbraucherkreditrichtlinie, des zivilrechtlichen Teils der Zahlungsdiensterichtlinie sowie zur Neuordnung der Vorschriften über das Widerrufs- und Rückgaberecht – Teil 2' (2009) 10 *Verbraucher und Recht* 378-379.

973. BT-Drucks. 16/11643 78-79. See also Ralf Josten, *Kreditvertragsrecht* (Beck 2017) 136.

974. BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440; BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881.

975. Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 946-948; Ingo Koller, 'Das Transparenzgebot als Kontrollmaßstab AGBs' in Jürgen Fritz Baur, Klaus Jürgen Hopt und Karl Peter Mailänder, *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März* (De Gruyter 1990) 674.

to access, read, and comprehend the information. The upcoming section assesses whether the standardisation and transparency requirements imposed by German law on credit information are interpreted and evaluated in a way that ensures both aspects of transparency are maintained.

3.2.3. The interpretation and assessment of transparency

3.2.3.1. Standardisation of consumer credit information

As explained in Section 3.2.1., German law requires creditors to provide specific pre-contractual and contractual credit information through standardised information forms, the form and content of which is prescribed by law. While the use of the SECCI is mandatory,[976] the use of the ECCI and the standardised information form on the right of withdrawal is voluntary.[977]

Creditors must not combine the mandatory pre-contractual information with any additional information they want to give to consumers, but they must present this additional information separately from the mandatory information.[978] Scholars have noted that the purpose of this spatial separation is to help consumers differentiate between essential and supplementary credit information.[979] The way in which German law regulates the usage of the SECCI and the ECCI seems to be fully in line with the CCD. When creditors accurately fill out these information forms, it is assumed that they have met their information duties under German consumer credit law.[980] The same assumption applies to online pre-contractual credit information, as its standardisation complies with distance-selling law,[981] and to the standardised information form on the right of withdrawal.[982]

Scholars emphasise that creditors must adhere closely to the design and content of the sample information forms in the EGBGB in order to be compliant with the law.[983] Modifications to the format and font size seem to be allowed as long as the information remains readable and visible to the consumer.[984] However, changes of

976. Annex 4 to Article 247 § 2 EGBGB.
977. Annex 5 to Article 247 § 2 EGBGB and Annex 7 to Article 247 § 6.
978. Article 247 § 6 EGBGB.
979. MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 4, 5.
980. BT-Drucks. 16/11643 123; MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 491a Rn. 10; Ralf Josten, *Kreditvertragsrecht* (Beck 2017) 136; Peter Bülow and Markus Artz, *Verbraucherkreditrecht* (Beck 2016) 177-178; Johannes Ady, 'Die Umsetzung der Verbraucherkreditrichtlinie in deutsches Recht und besondere verbraucherpolitische Aspekte' (2009) 23 *Zeitschrift für Wirtschafts- und Bankrecht* 1065; Martin Schmidt-Kessel und Stephan Schäfer, 'Wie flexibel ist die Musterwiderrufsbelehrung?' (2013) 48 *Zeitschrift für Wirtschafts- und Bankrecht* 2241-2242; Gerd Nobbe, 'Neuregelungen im Verbraucherkreditrecht – Ein kritischer Überblick' (2011) 14 *Zeitschrift für Wirtschafts- und Bankrecht* 627-628.
981. BT-Drucks. 16/11643 123; MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 491a Rn. 10.
982. MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 492 Rn. 31-32; Peter Bülow and Markus Artz, *Verbraucherkreditrecht* (Beck 2016) 380.
983. MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 491a Rn. 11; Peter Bülow and Markus Artz, *Verbraucherkreditrecht* (Beck 2016) 380.
984. BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881; OLG Stuttgart 5 February 2015, 2 U 81/14, BeckRS 2016, 3090. See also Peter Bülow and Markus Artz, *Verbraucherkreditrecht* (Beck 2016) 380.

the content that surpass linguistic editing are generally prohibited.[985] While German law appears to encourage strict adherence to the design and content of sample information forms to ensure substantive transparency of credit information, the EGBGB only specifies the content of the information form regarding the right of withdrawal.[986] Creditors should complete this form by choosing from the text options specified by the law. Unlike the standardised withdrawal form, creditors are primarily responsible for the drafting of the content of the SECCI and the ECCI. The SECCI and ECCI specify the mandatory information that traders must provide and the order in which it should be presented, but they do not specify how creditors must present this information.[987] Creditors must, therefore, independently formulate the information relevant for the specific consumer credit agreement. Additionally, as Artz and Bülow point out, creditors have the choice to exclude any information from the SECCI and the ECCI that is not applicable to a particular type of consumer credit.[988] Yet, this may change the sequence in which the information is presented and potentially compromise the comparability of the information provided by various creditors.[989]

The German legislature seems to believe that standardised information forms effectively convey crucial information about consumers' rights and obligations in a clear and comprehensive way, thus aiding them in comparing and selecting from various credit offers.[990] This suggests that the German legislature considers these forms as fostering substantive transparency of consumer credit information. I have not encountered any German cases that offer insight into how courts evaluate the transparency of the SECCI or the ECCI specifically. Scholars note that creditors will adhere to the law as long as they correctly fill out the SECCI and the ECCI with all the mandatory credit information.[991] In my opinion, this is not sufficient to guarantee the formal and substantive transparency of these forms, considering the flexibility creditors have in formulating their content. Therefore, courts should always assess the clarity and comprehensibility of the text inserted by creditors in these forms. Cases concerning the standardised information form on the right of withdrawal highlight that courts have taken into account both the creditor's adherence to the information and transparency requirements.[992] Therefore, it is possible that courts could employ a similar approach when assessing the SECCI and the ECCI.

Although behavioural research highlights the benefits of standardisation in helping consumers make informed decisions, there is disagreement over whether

985. OLG Celle 2 December 2015, 3 U 108/15, BeckRS 2016, 2741; OLG Köln 3 July 2017, 12 U 86/16, BeckRS 2017, 127239.
986. See Annex 7 to Article 247 § 6 EGBGB.
987. See Annexes 4 and 5 to Article 247 § 2 EGBGB.
988. Peter Bülow and Markus Artz, *Verbraucherkreditrecht* (Beck 2016) 177-178.
989. Ibid. See also MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 491a Rn. 11.
990. BT-Drucks. 16/11643 78, 122. See also Ralf Josten, *Kreditvertragsrecht* (Beck 2017) 136.
991. Peter Bülow and Markus Artz, *Verbraucherkreditrecht* (Beck 2016) 177-178; Ralf Josten, *Kreditvertragsrecht* (Beck 2017) 136.
992. See, e.g., OLG Stuttgart 5 February 2015, 2 U 81/14, BeckRS 2016, 3090; OLG Celle 2 December 2015, 3 U 108/15, BeckRS 2016, 2741; OLG Köln 3 July 2017, 12 U 86/16, BeckRS 2017, 127239; BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440; BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881.

the design and content of the SECCI, the ECCI, and the standardised withdrawal information form truly promote formal and substantive transparency. Since German law adheres to the CCD in determining the structure and content of the SECCI and the ECCI, the analysis presented in Section 2.2.3.2. is also applicable here. Because the SECCI and ECCI do not mandate how creditors should provide information to consumers, but rather specify what information must be provided, there is a possibility that creditors may complete these forms in a way that lacks formal and/or substantive transparency. This could involve the use of complex technical terminology, lengthy explanations, or fine print. In my opinion, these forms might be more effective in achieving **formal transparency** rather than ensuring substantive transparency. For instance, research shows that the SECCI improves formal transparency of by providing credit information in "*an easily understandable and well-structured format*".[993] However, research also highlights various limitations of the SECCI, such as its length, complexity, compatibility with the digital environment, and timing.[994]

As mentioned earlier, the standardised withdrawal information form is different from the SECCI and the ECCI because creditors must complete it by selecting from various text options as mandated by law. It is important to note that the CCD does not suggest the standardisation of contractual credit information; it merely specifies that traders must provide this information in a clear and concise manner.[995] As Rott explains, the German legislature introduced the withdrawal information form prior to the adoption of the CCD and its implementation into German law.[996] This step was intended to mitigate the heightened risk of withdrawal for traders. Following the implementation of the CCD, consumers gained a perpetual right of withdrawal in situations where creditors had failed to adequately inform them of their withdrawal rights, as the CCD does not establish a maximum withdrawal period. Furthermore, the German legislature expanded the scope of consumer credit provisions, including the perpetual right of withdrawal, to include mortgage credit agreements. During the implementation of the Mortgage Credit Directive (MCD)[997] in 2016, the legislature scrapped the perpetual right of withdrawal for mortgage credit contracts.[998] However, this right remains in force for consumer credit agreements and mortgage agreements concluded before 2016, provided that creditors did not correctly inform consumers about their withdrawal rights.

---

993. Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [32].
994. Ibid, [32-34].
995. Article 10(2) CCD.
996. Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 280-283.
997. Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 Text with EEA relevance OJ L 60, p. 34–85 (MCD).
998. Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 280-281.

Given that the CCD aims to fully harmonise the provision of consumer credit information across the EU, it is questionable whether this objective is compatible with the introduction of standardised information forms at the national level.[999] The German legislature and the BGH maintain that the standardised information form regarding the right of withdrawal does not contradict EU law, mainly because it is voluntary for creditors to use.[1000] The CJEU is yet to clarify whether the introduction of this information form is in line with the CCD. However, based on its decision in the *Kreissparkasse Saarlouis* case, it appears that the German withdrawal form may not completely adhere to the CCD's requirements of clarity and conciseness. This is because the form refers to provisions of national law instead of clearly and concisely specifying the calculation of the withdrawal period.[1001] I will further discuss the incompatibility of the German withdrawal information form with the CCD's requirements of clarity and conciseness in Section 3.2.3.3.

In my opinion, relying on legal provisions alone to provide consumer information does not guarantee formal or substantial transparency. Since consumers can only access this information by searching for the relevant provision, such information should not be considered sufficiently accessible. Furthermore, it is questionable to what extent an average, layman consumer, can be expected to read and comprehend legal provisions. German law seems to support the idea that traders should not be required to rephrase or interpret national law provisions in their contract terms, as this could potentially result in confusing or misleading wording.[1002] Therefore, it allows them to simply reference national law provisions. However, this approach essentially shifts the risk of misinterpreting legal provisions onto the consumer. Moreover, as explained in Section 3.1.1.3., this approach clearly contradicts the CJEU's rulings.[1003]

3.2.3.2. Obligation to provide adequate explanations of consumer credit information

As discussed in Section 2.2.3.3., Article 5(6) of the CCD mandates Member States to ensure that creditors provide adequate explanations of pre-contractual information regarding consumer credit to consumers. The purpose of this obligation is to enable consumers to evaluate if a particular credit product is suitable for their needs and financial situation. The CCD recognises that consumers may not be able to make informed decisions solely based on standardised credit information. They may require personalised information to assess the suitability of a credit product for their

999. Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 116-119.

1000. BT-Drucks. 17/1394 21-22; BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881; BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440.

1001. Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 383-386.

1002. BGH 22 November 2016, XI ZR 434/15, BeckRS 2016, 115038; BGH 14 January 2014, XI ZR 355/12, NJW 2014, 924. See also Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 443-447; Jürgen Niebling, 'AGB-Recht: Aktuelle Entwicklungen zum Transparenzgebot' (2020) 11 *Monatsschrift für Deutsches Recht* 653.

1003. Case C-66/19 *Kreissparkasse Saarlouis*, points 40-49; Case C-265/22 *Banco Santander*, points 56-60.

financial circumstances.[1004] While the CCD requires Member States to include the obligation to provide adequate explanations of credit information in their national legal frameworks, it does not specify when and how traders should furnish consumers with these explanations.[1005] Consequently, the CCD does not fully harmonise the creditor's obligation to provide adequate explanations.

Consistent with the illustrative examples provided by the CCD,[1006] § 491a (3) of the BGB stipulates that creditors are required to provide consumers with adequate explanations of the mandatory pre-contractual information, as well as the key features and implications of the contract, including the repercussions of default. However, the BGB does not expressly specify the scenarios in which creditors are required to provide these explanations. Instead, it only states that traders must offer such explanations when deemed appropriate.[1007] The German legislature clarified that § 491a (3) BGB does not require creditors to provide adequate explanations in every situation, nor does it oblige creditors to clarify every piece of information provided to consumers.[1008] For instance, if consumers comprehend the pre-contractual information, creditors are not required to furnish supplementary explanations of said information.[1009] However, the German legislator did not specify how creditors should verify whether consumers understood the pre-contractual information. For example, it remains unclear whether a consumer indicating their understanding by ticking a box on a form would suffice to exempt creditors from providing explanations of the credit information.

Bülow and Artz conclude that creditors should be exempt from providing adequate explanations if they are certain that consumers understood the information that they shared with them.[1010] Yet, it seems to me that it could be challenging for creditors to assess whether consumers have truly understood the relevant credit information and to determine when they require additional explanations. For instance, some consumers may falsely claim to understand the terms and conditions of the contract, simply aiming to expedite the loan approval process. Others might mistakenly believe they have understood the information provided. Hence, it would have been beneficial if the German legislature had outlined how creditors could ascertain consumers' comprehension of credit information before deciding against providing adequate explanations. Alternatively, the legislature could have given illustrative examples where the risk of consumers not understanding credit information justifies the need for further explanations.

However, the German legislature explained that the extent of the obligation to provide adequate explanations depends on the distinct features of the credit products offered by a lender, along with the consumer's discernible ability to comprehend

1004. Recital 27 CCD. See also MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 16, 17.
1005. Recital 27 CCD and Article 5(6) CCD.
1006. Article 5(6) CCD.
1007. § 491a (3) BGB.
1008. BT-Drucks. 16/11643 79.
1009. Ibid.
1010. Peter Bülow and Markus Artz, *Verbraucherkreditrecht* (Beck 2016) 186-187.

them.[1011] Creditors do not have to provide these explanations in person; they can be communicated in writing or over the phone.[1012] In the online environment, creditors can utilise information boxes or chat interfaces. Moreover, creditors must tailor their explanations to the average consumer, unless it is evident that they need to adapt the explanations for a different type of consumer.[1013] The more difficult it is for a consumer to understand a credit agreement, the stricter the obligation to provide adequate explanations.[1014]

German scholars have paid considerable attention to the obligation of providing adequate explanations, particularly in terms of its legal nature. Nobbe has categorised the different perspectives presented in the literature into three streams.[1015] The first stream perceives the obligation to provide additional explanations as a quasi-obligation to offer advice.[1016] This entails assessing the consumer's needs and selecting an appropriate credit product (limited to the products offered by the creditor and without considering alternative options), or potentially indicating the unsuitability of a specific product. The second stream acknowledges that the obligation to provide adequate explanations does not imply an obligation to offer advice.[1017] While explaining the main features of the contract, the creditor can rely on the knowledge level of an average consumer, instead of the specific individual involved in the case. Therefore, the creditor does not need to investigate the consumer's financial situation. The third stream, with which Nobbe himself agrees, presents a balanced view by placing the obligation to provide additional explanations between clarification and consultation.[1018] This last perspective aligns with the view of the German legislature.[1019]

In my opinion, the third stream, which places the obligation to offer adequate explanations between the duty to provide information and the duty to offer advice, offers the most convincing definition. Ady stresses that the obligation to provide adequate explanations should not be confined to a vague and general depiction of the consumer credit agreement.[1020] Nonetheless, as several scholars emphasise, it should

1011. BT-Drucks. 16/11643 78-79.
1012. Ibid, 78-79. See also MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 24-26.
1013. BT-Drucks. 16/11643 79.
1014. Ibid.
1015. Gerd Nobbe, 'Neuregelungen im Verbraucherkreditrecht – Ein kritischer Überblick' (2011) 14 *Zeitschrift für Wirtschafts- und Bankrecht* 628-629.
1016. Ibid, 628.
1017. Ibid.
1018. Gerd Nobbe, 'Neuregelungen im Verbraucherkreditrecht – Ein kritischer Überblick' (2011) 14 *Zeitschrift für Wirtschafts- und Bankrecht* 628. Examples of authors who opt for this approach include Ulrich Kulke, 'Das Gesetz zur Umsetzung der Verbraucherkreditrichtlinie, des zivilrechtlichen Teils der Zahlungsdiensterichtlinie sowie zur Neuordnung der Vorschriften über das Widerrufs- und Rückgaberecht – Teil 2' (2009) 10 *Verbraucher und Recht* 379-380; Petra Buck-Heeb, 'Aufklärungs- und Beratungspflichten bei Kreditverträgen -- Verschärfungen durch die EuGH-Rechtsprechung und die Wohnimmobilienkredit-Richtlinie' (2015) 5 *Zeitschrift für Bank- und Kapitalmarktrecht* 178; Peter Bülow and Markus Artz, *Verbraucherkreditrecht* (Beck 2016) 185-186.
1019. BT-Drucks. 16/11643 79.
1020. Johannes Ady, 'Die Umsetzung der Verbraucherkreditrichtlinie in deutsches Recht und besondere verbraucherpolitische Aspekte' (2009) 23 *Zeitschrift für Wirtschafts- und Bankrecht* 1066-1067.

also not be expanded to an obligation to identify the most suitable product for the consumer, as the consumer must retain autonomy to make their own decisions.[1021] Consequently, the obligation to provide adequate explanations constitutes a product-related obligation. While it goes beyond the duty to provide information, it does not include personalised advice that takes into account the consumer's specific circumstances, such as their income, expenses, or assets.[1022] Instead, it can be based on the consumer's preferences.[1023] Such an understanding of the obligation to provide adequate explanations also seems to be in line with the CCD 2023. As outlined in Section 2.2.3.3., the CCD 2023 states that creditors should customise these explanations based on the circumstances in which the credit is being offered, the consumer's need for assistance, their level of understanding and experience, and the characteristics of individual credit products. Although the explanations are not meant to be personalised recommendations, it appears that they should be tailored to the consumer's specific circumstances.

There is uncertainty surrounding whether the German legislature has implemented a separate requirement for creditors to assess the creditworthiness of consumers. This is because a negative outcome of the creditworthiness assessment does not automatically prevent the creditor from providing credit to a consumer.[1024] However, this does not mean that creditors are absolved from considering the consumer's financial situation. As Bartlitz and Hoffmann explain, the duty to assess the consumer's creditworthiness should be seen as a requirement for fulfilling the duty to provide adequate explanations of the credit agreement.[1025] They emphasise that an explanation of a credit product can only be considered adequate when it is based on pertinent information about the consumer. This viewpoint appears to be in line with EU law. Although the CCD does not explicitly mandate creditors to perform a creditworthiness assessment prior to providing explanations about credit products, the CJEU requires them to revise previously given explanations if they are incompatible with the results of the creditworthiness assessment.[1026]

1021. Carsten Herresthal, 'Die Verpflichtung zur Bewertung der Kreditwürdigkeit und zur angemessenen Erläuterung nach der neuen Verbraucherkreditrichtlinie 2008/48/EG' (2009) 25 *Zeitschrift für Wirtschafts- und Bankrecht* 1179; Rainer Metz, 'Erläuterungspflichten bei Verbraucherkrediten' (2012) 28 *Neue Juristische Wochenschrift* 1993-1994; Petra Buck-Heeb, 'Aufklärungs- und Beratungspflichten bei Kreditverträgen -- Verschärfungen durch die EuGH-Rechtsprechung und die Wohnimmobilienkredit-Richtlinie' (2015) 5 *Zeitschrift für Bank- und Kapitalmarktrecht* 178.

1022. MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 20, 21; Gerd Nobbe, 'Neuregelungen im Verbraucherkreditrecht – Ein kritischer Überblick' (2011) 14 *Zeitschrift für Wirtschafts- und Bankrecht* 628-629; Petra Buck-Heeb, 'Aufklärungs- und Beratungspflichten bei Kreditverträgen -- Verschärfungen durch die EuGH-Rechtsprechung und die Wohnimmobilienkredit-Richtlinie' (2015) 5 *Zeitschrift für Bank- und Kapitalmarktrecht* 178-179; Ralf Josten, *Kreditvertragsrecht* (Beck 2017) 149-150.

1023. Gerd Nobbe, 'Neuregelungen im Verbraucherkreditrecht – Ein kritischer Überblick' (2011) 14 *Zeitschrift für Wirtschafts- und Bankrecht* 629.

1024. David Bartlitz, 'Die Sanktionierung von Verstößen gegen die Erläuterungs- und Bonitätsprüfungspflicht im Verbraucherkreditrecht' (2016) 8 *Zeitschrift für Wirtschafts- und Bankrecht* 347.

1025. Jochen Hoffmann and David Bartlitz, 'Erläuterungs- und Bonitätsprüfungspflicht im Verbraucherkreditrecht' (2014) 49 *Zeitschrift für Wirtschafts- und Bankrecht* 2303-2304. See also Peter Bülow and Markus Arta, *Verbraucherkreditrecht* (Beck 2016) 186.

1026. Case C-449/13 *CA Consumer Finance SA*, points 40-49.

As the primary objective of the obligation to provide adequate explanations is to improve understanding of credit information by consumers, empowering them to independently assess the appropriateness of a particular credit offer, it seems to promote **substantive transparency**. However, the extent to which this obligation can enhance transparency of credit information depends on how creditors actually deliver the explanations. For example, it is questionable whether creditors can standardise adequate explanations of their credit products.[1027] Bartlitz and Hoffmann reject the possibility of fulfilling the obligation to provide adequate explanations through standardised information forms.[1028] Their stance is that the CCD requires creditors to provide individualised explanations based on the consumer's financial situation. According to them, such personalised explanations cannot be achieved through the utilisation of standardised information forms.

To ensure that explanations of credit information are useful to consumers, I believe it is essential that these explanations go beyond a simple repetition of the pre-contractual information in the SECCI or the ECCI. Metz points out that current practices of German banks reveal a primary focus on achieving compliance by disseminating consumer credit information, rather than ensuring that consumers receive personalised information.[1029] Therefore, within the framework of the obligation to provide adequate explanations, banks offer consumers materials such as a 31-page brochure or a 2-page explanatory document, which partially repeat the information already provided in the SECCI. This approach not only overwhelms individuals with excessive information but also disregards the well-documented fact that consumers struggle to understand financial information.[1030]

Valuable standardised explanations could include incorporating illustrative examples that clarify concepts such as the interaction between the APR and the borrowing rate, or the fluctuations of variable interest rates in the market.

1027. Ralf Josten, *Kreditvertragsrecht* (Beck 2017) 149. For example, while Bülow, Arts, Schürnbrand and Weber accept the standardisation of adequate explanations (Peter Bülow and Markus Artz, *Verbraucherkreditrecht* (Beck 2016) 185-186; MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 24-26), Hoffmann and Bartlitz reject it (Jochen Hoffmann and David Bartlitz, 'Erläuterungs- und Bonitätsprüfungspflicht im Verbraucherkreditrecht' (2014) 49 *Zeitschrift für Wirtschafts- und Bankrecht* 2302-2303).

1028. Jochen Hoffmann and David Bartlitz, 'Erläuterungs- und Bonitätsprüfungspflicht im Verbraucherkreditrecht' (2014) 49 *Zeitschrift für Wirtschafts- und Bankrecht* 2302-2303.

1029. Rainer Metz, 'Erläuterungspflichten bei Verbraucherkrediten' (2012) 28 *Neue Juristische Wochenschrift* 1994-1995. Martin Schmidt-Kessel and Stephan Schäfer argue that the legislature and the courts also adopted an approach that focuses on ensuring compliance of the creditors rather than consumer protection in 'Wie flexibel ist die Musterwiderrufsbelehrung?' (2013) 48 *Zeitschrift für Wirtschafts- und Bankrecht* 2243.

1030. Jinkook Lee and Jeanne M. Hogarth, 'The Price of Money: Consumers' Understanding of APRs and Contract Interest Rates' (1999) 18(1) *Journal of Public Policy and Marketing* 67; Fernando Gómez Pomar, 'Core versus Non-Core Terms and Legal Controls Over Consumer Contract Terms: (Bad) Lessons from Europe?' (2019) 15(2) European Review of Contract Law 191; Massimo Caratelli, 'Transparency of Price Conditions in Consumer Credit: The Usage of the APR' in Franco Fiordelisi, Philip Molyneux and Daniele Previati (eds) *New Issues in Financial and Credit Markets* (Palgrave Macmillan 2010) 154-155; London Economics, *Consumer vulnerability across key markets in the European Union* (2016) 339-347; Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 37-38; Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [33].

Additionally, as mentioned by Herresthal, the online sphere offers plenty of opportunities for standardised explanations of important contract terms, explanatory calculations, and self-assessment tools.[1031] Furthermore, by utilising algorithms, creditors can develop a wide range of customised standardised explanations, specifically designed for an average individual with a particular background. These explanations can be formulated based on the personal information supplied by the individual consumer.

3.2.3.3. Clarity and comprehensibility of contractual credit information

As previously stated, Article 247 § 6 of the EGBGB mandates creditors to incorporate mandatory information into a consumer credit agreement in a manner that is **clear** ("*klar*") and **comprehensible** ("*verständlich*"). Notably, the EGBGB diverges from the CCD, which requires creditors to present contractual information in a clear and **concise** manner.[1032] As mentioned in Section 3.2.1., the German legislature did not provide an explanation for why the EGBGB omitted the requirement of conciseness in favour of the requirement of comprehensibility, nor did it clarify the relationship between the requirements of clarity, conciseness, and comprehensibility. It merely stated that contractual credit information must be clear and concise in accordance with Article 10 of the CCD, as well as comprehensible to the consumer.[1033] German courts have interpreted the requirements of clarity and comprehensibility in cases concerning the provision of information regarding the right of withdrawal, particularly in mortgage credit agreements, which I will further discuss in this section. Similar to the case law on unfair contract terms, the German courts have not assigned separate meanings to the requirements of clarity and comprehensibility.[1034] Additionally, the BGH briefly addressed the relationship between these requirements and the requirement of conciseness,[1035] which I will discuss later in this section.

Although the CCD does not regulate mortgage contracts,[1036] the German legislature has extended the scope of the national legal provisions implementing it to mortgage contracts.[1037] The CCD applied to mortgage contracts in German law until the implementation of the MCD.[1038] As a result, Article 247 § 6 of the EGBGB has implemented the same transparency requirements – clarity and comprehensibility – for all contractual credit information, regardless of whether it involves a mortgage or not. It is apparent that Article 247 § 6 of the EGBGB implements Article 10 (2) of

1031. Carsten Herresthal, 'Die Verpflichtung zur Bewertung der Kreditwürdigkeit und zur angemessenen Erläuterung nach der neuen Verbraucherkreditrichtlinie 2008/48/EG' (2009) 25 *Zeitschrift für Wirtschafts- und Bankrecht* 1179.
1032. Article 10(2) CCD.
1033. BT-Drucks. 16/11643 127.
1034. LG Stuttgart 26 May 2014, 44 O 7/14 KfH, BeckRS 2016, 6486; OLG Stuttgart 5 February 2015, 2 U 81/14, BeckRS 2016, 3090; OLG Stuttgart 24 May 2016, 6 U 222/15, BeckRS 2016, 105816; OLG Stuttgart 24 April 2014, 2 U 98/13, BeckRS 2014, 10515; BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881; BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440.
1035. Ibid.
1036. Article 2(2) CCD.
1037. § 491 (1) BGB. See also MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491 Rn. 3, 4.
1038. MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491 Rn. 3, 4.

the CCD, which outlines the contractual information creditors have to provide to consumers in a clear and concise way.[1039] According to the CJEU's ruling in *Dzodzi*, when national legislation transposes EU law in a broader manner than required by EU law, it becomes necessary to ensure compliance within this broader scope to maintain the uniform application of EU law within national law.[1040] Furthermore, the CJEU explicitly reaffirmed in the *Kreissparkasse Saarlouis* case that the interpretation of the CCD is applicable to mortgage credit contracts, as the German legislature had broadened the scope of Article 10 of the CCD to include mortgage credit law.[1041] Therefore, the examination of German case law pertaining to mortgage agreements offers an appropriate framework for analysing the interpretation and evaluation of the clarity and comprehensibility requirements set forth in the EGBGB, and their connection with the CCD's requirement of conciseness.

For example, German courts have interpreted the requirements of clarity and comprehensibility in cases concerning the transparency of information on the right of withdrawal, which creditors included in the mortgage agreement by means of checkboxes (referred to as *Checkbox cases*).[1042] In these cases, creditors presented different scenarios regarding the exercise of the right of withdrawal under a common heading labelled 'The right of withdrawal'. Next to each relevant scenario regarding the right of withdrawal was a checkbox indicating whether the relevant information applied to the individual agreement. When assessing the clarity and comprehensibility of these checkboxes, courts of different instances considered whether an average consumer would understand that only the information next to the selected checkbox applies to their particular contract.[1043] German courts have determined that an average consumer would carefully read a mortgage contract before agreeing to a financially burdensome loan. Additionally, the courts anticipate that an average consumer would comprehend that they should solely review the information highlighted by the creditor, given the prevalent use of checkboxes in various types of contracts. As long as the creditor has clearly marked the box containing the information relevant for a specific contract, such a method of presenting information regarding the right of withdrawal is regarded as consistent with the requirements of clarity and comprehensibility.[1044]

The courts' focus on evaluating whether an average consumer can understand the meaning and intended usage of checkboxes in contracts may indicate a substantive interpretation of the requirements of clarity and comprehensibility. Nonetheless, the courts' assessment of the transparency of checkboxes is limited to

1039. BT-Drucks. 16/11643 127; BGH 23 February 2016, XI ZR 101/15, NJW 2016; BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440.
1040. Case C-297/88 *Dzodzi v Belgian State*, points 29-43.
1041. Case C-66/19 *Kreissparkasse Saarlouis*, points 23-29.
1042. LG Stuttgart 26 May 2014, 44 O 7/14 KfH, BeckRS 2016, 6486; OLG Stuttgart 5 February 2015, 2 U 81/14, BeckRS 2016, 3090; OLG Stuttgart 24 May 2016, 6 U 222/15, BeckRS 2016, 105816; OLG Stuttgart 24 April 2014, 2 U 98/13, BeckRS 2014, 10515; BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881; BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440.
1043. Ibid.
1044. MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 492 Rn. 29.

determining whether the creditor has effectively directed the consumer's attention to the correct information, rather than considering the transparency of their content. In my opinion, this approach only ensures the **formal transparency** of such checkboxes. Another example of a formal transparency assessment can be observed in a case where the BGH ruled that the creditor clearly provided information on the right of withdrawal, even though this right was not explicitly mentioned in the credit agreement.[1045] Instead, the agreement pointed to the information contained in separate annexes to the contract through two different references. Nevertheless, the BGH stated that it can be reasonably expected for consumers to thoroughly read the credit agreement and become aware of their right of withdrawal.

As detailed in Section 2.2.3.1., the CJEU also applied a formal transparency assessment to cross-references within credit agreements, as exemplified in the *Home Credit Slovakia* case. In this case, the CJEU elucidated the manner in which creditors should present contractual information across multiple documents.[1046] The CJEU emphasised that when credit information spread across various documents, those documents must contain clear and precise cross-references. This ensures the clear and concise integration of information into the contract, giving consumers the opportunity to get apprised with their rights and obligations within the credit agreement. Despite the CJEU's formal approach to assessing the transparency of cross-references, I have doubts about whether the BGH's position meets the standard set in *Home Credit Slovakia*. This is because it is questionable whether a credit agreement that does not explicitly mention the right of withdrawal, but instead refers to information on this right in various annexes through multiple references, truly enables consumers to grasp the scope of their contractual rights and obligations.

The BGH briefly addressed the relationship between the EGBGB's requirements of clarity and comprehensibility with the CCD's requirement of conciseness in one of the *Checkbox cases*. The BGH determined that providing the information on the right of withdrawal using checkboxes not only fulfils the requirements of clarity and comprehensibility but also meets the requirement of conciseness.[1047] The BGH dismissed the plaintiff's claim that the requirement of conciseness meant that the credit contract should be short and precise, without irrelevant checkboxes. According to the BGH, the average consumer should recognise that unchecked checkboxes do not apply to their particular contract and should ignore them. However, the BGH did not clarify how these transparency requirements interact with each other, nor did it indicate whether it viewed conciseness as synonymous with or a prerequisite for clarity and/or comprehensibility.

However, German courts, including the BGH, have explained that clarity and comprehensibility do not require the prominent presentation ("*auffallend*") of

1045. BGH 17 September 2019, XI ZR 662/18, BKR 2020, 33.
1046. Case C-42/15 *Home Credit Slovakia*, point 34.
1047. BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881.

information regarding the right of withdrawal.[1048] Specifically, when the plaintiff argued that the contractual information about the right of withdrawal was not sufficient visual prominence, German courts concluded that creditors are not required to highlight this information visually. This is because both the CCD and the EGBGB only require contractual information to be clear, comprehensible, and concise. The courts further noted that the CCD, along with the corresponding provisions of German law implementing it, explicitly impose the requirement of prominence only on certain credit information, such as advertisements. As neither the CCD nor the EGBGB explicitly mandates prominence for contractual information, the courts inferred that this specific requirement cannot be considered as part of the clarity and comprehensibility requirements. The BGH strengthened this argument by highlighting that clarity and comprehensibility should apply equally to all contractual information.[1049] Consequently, if prominence is to be derived from clarity and comprehensibility, all contractual information (and not only information about the right of withdrawal) would need to be visually highlighted.

In a 2019 case concerning the transparency of information regarding the repayment fee in case of withdrawal from the credit agreement, the BGH adopted a more **substantive** approach to evaluating clarity and comprehensibility.[1050] The credit agreement initially provided a general explanation stating that the consumer was obliged to pay the borrowing rate for the period between obtaining and repaying the loan in the event of withdrawal, along with a clarification on how this period should be calculated. The agreement then specified the exact amount of interest to be paid per day, which in this instance was 0 euros. The BGH scrutinised whether this information was comprehensible to an average consumer and concluded that an average consumer could reasonably be expected to understand that information regarding the consequences of withdrawal would usually be standardised across different credit products, rather than tailored specifically to each individual agreement. In the present case, where the agreement stated an amount of 0 euros, the BGH anticipated that an average consumer would interpret this as the creditor essentially waiving the repayment fee.

Additionally, in the aforementioned case, the BGH assessed the transparency of the information concerning the consumer's right of withdrawal and the calculation of the repayment fee.[1051] It concluded that providing a comprehensive specification covering all possible grounds for termination according to national law would not improve the transparency of this information. Instead, it may cause the relevant information to be obscured among examples that do not apply to the specific

1048. OLG Stuttgart 24 April 2014, 2 U 98/13, BeckRS 2014, 10515; OLG Stuttgart 5 February 2015, 2 U 81/14, BeckRS 2016, 3090; OLG Stuttgart 24 May 2016, 6 U 222/15, BeckRS 2016, 105816; BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440; BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881; BGH 5 December 2017, XI ZR 253/15, BeckRS 2017, 140388.

1049. BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440; BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881.

1050. BGH 5 November 2019, XI ZR 650/18, NJW 2020, 461.

1051. Ibid.

circumstances of the consumer. The BGH also highlighted that the creditor was not obliged to disclose the exact mathematical equation used to calculate the repayment fee. To ensure that this information was clear and comprehensible for the consumer, the BGH considered it sufficient for the creditor to provide a broad outline of the main factors on which the calculation is based. This stance aligns with the CJEU's position in the *Volkswagen Bank* case, where it confirmed that the contract does not need to specify all grounds for contract termination as outlined in national law, nor the specific formula for calculating late-payment interest.[1052]

Since the *Checkbox* cases occurred prior to the aforementioned case, this sequence of events suggests that the BGH gradually developed a more substantive assessment of the transparency of credit information. However, the *Kreissparkasse Saarlouis* case challenges this perspective and demonstrates that the CJEU adopts a more substantive approach to assessing transparency, at least when it comes to information about the right of withdrawal. In this specific case, a term in a mortgage credit contract stated that the withdrawal period began after the conclusion of the contract, but not before the consumer had received all mandatory information as specified in § 492 (2) of the BGB.[1053] This provision is often part of the information on the right of withdrawal, including the legislature's sample withdrawal information form.[1054] The BGH deemed it compatible with the CCD's requirements of clarity and conciseness, as well as the relevant implementing legislations, specifically § 492 (2) of the BGB and Article 247 § 6 of the EGBGB.[1055] LG Saarbrücken, however, held that the term in question lacked transparency, as consumers were not only required to look up § 492 (2) of the BGB, but also had to trace the reference to Article 247 § 6 of the EGBGB, which they then had to interpret and apply to their particular contract.[1056]

The CJEU agreed with the referring court and confirmed that the CCD requires the creditor to provide the consumer with clear and concise information on how to calculate the withdrawal period.[1057] Furthermore, it clarified that a term that provides this information by referencing provisions of national law does not enable the consumer to ascertain the scope of their contractual obligations.[1058] Such a term also does not enable the consumer to ascertain whether the creditor has included all mandatory information in the credit agreement, or to verify the commencement of the withdrawal period.

Interestingly, the CJEU's judgment in the *Kreissparkasse Saarlouis* case marks a turning point in its case law on transparency of consumer information under the CCD. As elaborated in Section 2.2.3.1, up until 2020, the CJEU interpreted the

1052. Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 88 and 103-112.
1053. LG Saarbrücken 17 January 2019, 1 O 164/18, BKR 2019, 190. See also Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 383.
1054. Ibid, 383-386.
1055. Ibid, 383. As Rott observes, this is established case law since BGH 22 November 2016, XI ZR 434/15, BeckRS 2016, 115038.
1056. LG Saarbrücken 17 January 2019, 1 O 164/18, BKR 2019, 190.
1057. Case C-66/19 *Kreissparkasse Saarlouis*, points 39-49.
1058. Ibid, points 39-49.

requirements of clarity and conciseness as facilitating formal transparency by requiring creditors to avoid using long or rambling descriptions[1059] and to clearly and precisely cross-reference credit information contained in different documents.[1060] However, cases decided after 2020 demonstrate that these requirements also possess a substantive aspect. This aspect revolves around the question of whether consumers were provided with information that is comprehensible to them and enables them to make informed decisions.[1061]

As Rott observes, this case did not prompt the BGH to alter its case law.[1062] Quite the opposite, the BGH and other German courts had already indicated that they felt obliged to abide by the sample withdrawal information form, which was formulated by the German legislature and makes reference to national law, even prior to the CJEU delivering its judgement in *Kreissparkasse Saarlouis*.[1063] This is because the information form triggers an irrefutable presumption that the creditor has fulfilled their information obligations under credit law in cases where the creditor does not deviate from it. Rott highlights that the BGH refused to apply the CJEU's reasoning shortly after its publication, asserting that the explicit wording of German law prevented any reinterpretation in light of the ruling in *Kreissparkasse Saarlouis*.[1064] Additionally, he notes that, in this specific case, the BGH did not need to interpret Article 247 § 6 of the EGBGB in contradiction to German law in order to align with the *Kreissparkasse Saarlouis* ruling. This is because the creditor had deviated from the prescribed sample withdrawal information form. Consequently, the BGH could have used this deviation as a reason to disregard the presumption established by Article 247 § 6 of the EGBGB and instead assess the transparency of the provided information regarding the right of withdrawal.

Although the above analysis covers a limited number of cases specifically addressing the requirements of clarity and comprehensibility, it appears to me that German courts, particularly the BGH, place greater importance on formal transparency rather than substantive transparency when assessing the transparency of contractual credit information. Furthermore, the BGH's insistence on the permissibility of including references to national law provisions disregards the transparency case law of the CJEU and violates EU law. Additionally, the analysed cases indicate that German courts typically focus on either formal or substantive transparency when interpreting clarity and comprehensibility, but not both aspects of transparency. As explained in Section 3.2.2., such an approach does not complement the objective of enabling informed consumer choice.

1059. Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [11].
1060. Case C-42/15 *Home Credit Slovakia*, point 34.
1061. Case C-66/19 *Kreissparkasse Saarlouis*, points 45-49; Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 94-95 and 135-138.
1062. Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 384-386.
1063. Ibid.
1064. Ibid.

3.2.4. Contractual consequences of a breach of transparency

The CCD allows Member States to decide how to sanction infringements of its provisions, including provisions which encompass information and transparency requirements.[1065] These sanctions must be effective, dissuasive, and proportionate. German credit law does not differentiate between breaches of information and breaches of transparency and standardisation requirements. This stands in contrast to German law regarding standard contract terms, which does provide for specific consequences for transparency violations, as explained in Section 3.1.4.

German credit law does envisage contractual consequences for breaches of information obligations. For example, the creditor's non-compliance with the obligation to provide pre-contractual credit information could be addressed through damages for *culpa in contrahendo*[1066]or injunctive relief.[1067] As explained in Section 3.2.1., creditors will usually provide pre-contractual credit information by using standardised information forms. Schürnbrand and Weber emphasise that violations of the obligation to provide pre-contractual credit information through standardised information forms occur when the creditor fails to provide the form within the required timeframe, or when the form is incomplete or incorrect.[1068] Also, as discussed in Section 3.2.3.1., creditors must closely adhere to the design and content of the sample information forms in the EGBGB in order to comply with the law.[1069] Case law shows that courts have examined the extent to which a creditor's information form regarding the right of withdrawal adhered to the legal sample form.[1070] In situations where the creditor has deviated from the prescribed legal sample, courts have assessed the clarity and comprehensibility of the information presented by the creditor. This suggests that the evaluation of compliance with the duty to provide pre-contractual credit information may occasionally require an examination of the transparency of the information.

German law seems to provide for two specific breaches in situations where the creditor failed to provide mandatory contractual credit information or failed to ensure that this information is correct. Firstly, German law envisages the invalidity of a consumer credit agreement that does not include mandatory information,[1071] under

1065. Article 23 CCD.
1066. MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 9; Ralf Josten, *Kreditvertragsrecht* (Beck 2017) 153.
1067. MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 491a Rn. 55.
1068. MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 9.
1069. MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 491a Rn. 11; Peter Bülow and Markus Artz, *Verbraucherkreditrecht* (Beck 2016) 380.
1070. OLG Stuttgart 5 February 2015, 2 U 81/14, BeckRS 2016, 3090; OLG Celle 2 December 2015, 3 U 108/15, BeckRS 2016, 2741; OLG Köln 3 July 2017, 12 U 86/16, BeckRS 2017, 127239; BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440; BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881. See also Martin Schmidt-Kessel und Stephan Schäfer, 'Wie flexibel ist die Musterwiderrufsbelehrung?' (2013) 48 *Zeitschrift für Wirtschafts- und Bankrecht* 2242; Peter Bülow and Markus Artz, *Verbraucherkreditrecht* (Beck 2016) 380-381.
1071. § 494 (1) BGB. See also MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 492 Rn. 42; Ralf Josten, *Kreditvertragsrecht* (Beck 2017).

the condition that the consumer neither receives nor utilises the loan.[1072] Secondly, if the agreement fails to mention or incorrectly specifies the credit costs, such costs can be modified or waived entirely. For instance, the absence of information regarding the borrowing rate, the APR, or the total credit amount triggers a reduction of the borrowing rate to the statutory interest rate.[1073] If the indicated APR is too low, this may result in a reduction of the borrowing rate equal to the percentage difference between the actual and indicated APR.[1074] Also, the consumer cannot be held liable for any costs that the contract does not specify.[1075] If the contract does not clearly specify the conditions under which costs can be adjusted, it is not possible to make adjustments that would disadvantage the consumer.[1076] It is unclear whether these consequences would apply in cases where the creditor provides contractual information that lacks clarity and comprehensibility. In my opinion, it would be reasonable if this were the case, especially in situations where the lack of transparency leads to the same outcomes as the failure to provide (accurate) information. Similar to cases where consumers did not receive information or were given incorrect information, consumers would likely encounter difficulties in making informed decisions regarding credit based on information that is not sufficiently clear and comprehensible to them.

Finally, if the creditor fails to inform the consumer about their right of withdrawal from the credit contract or provides them with information that is not correct or lacks transparency, the withdrawal period cannot commence,[1077] resulting in the consumer's perpetual right of withdrawal.[1078] As explained in section 2.2.4, the CJEU confirmed the perpetual nature of the consumer's right of withdrawal in the *Volkswagen Bank* case, based on three preliminary references from LG Ravensburg.[1079] The CJEU has noted that the CCD does not impose a deadline for consumers to exercise their right of withdrawal when the creditor omits mandatory information regarding this right in the credit agreement and fails to communicate it at a later stage.[1080] Furthermore, the CCD does not require the exercise of the right of withdrawal to be contingent on the consumer being unaware of it and not responsible for their ignorance.[1081] This means that under such circumstances, the consumer cannot be held responsible for abusing their right of withdrawal. This approach

1072. Article 494(2) BGB. See also Ralf Josten, *Kreditvertragsrecht* (Beck 2017) 240-242.
1073. Article 494(2) BGB.
1074. § 494 (3) BGB.
1075. § 494 (4) BGB.
1076. Ibid.
1077. § 494 (6) BGB. See also MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 492 Rn. 42.
1078. Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 380-383.
1079. See LG Ravensburg 7 January 2020, 2 O 315/19, BKR 2020, 151, LG Ravensburg 5 March 2020, 2 O 328/19, 2 O 280/19, 2 O 334/19, BeckRS 2020, 3265 and LG Ravensburg 31 March 2020, 2 O 294/19, 2 O 249/19, VuR 2020, 277.
1080. Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 113-118.
1081. Ibid, point 118.

provides for a significant sanction for violations of disclosure obligations regarding the right of withdrawal. This will remain unchanged under the CCD 2023.[1082]

The position of the CJEU regarding the impact of a consumer's awareness (or lack thereof) of their right of withdrawal, and how it influences the exercise of that right, differs from the position held by the BGH. Specifically, the BGH considered that consumers who can be expected to have been aware of their right of withdrawal cannot rely on the trader's breach of information and transparency obligations to exercise this right after the withdrawal period has expired.[1083] As Feldhusen emphasises[1084] and the *Volkswagen Bank* case demonstrates, such reasoning of the BGH is inconsistent with EU law.

3.3. The concept of transparency in German law implementing the CRD

3.3.1. The development of the transparency concept

The German legislature transposed the CRD into German law in 2013,[1085] and this directive entered into force in 2014.[1086] As Busch notes, the German legislature integrated the majority of the CRD's provisions into two main clusters: §§ 312-312k of the BGB and §§ 355-361 of the BGB.[1087] The first cluster pertains to the scope of application and rules that govern all consumer contracts.[1088] Furthermore, it includes provisions regarding off-premises, distance contracts, and e-commerce transactions. Additionally, it covers rules concerning the mandatory nature of consumer law and the burden of proof. The second cluster includes provisions regulating the right of withdrawal.[1089]

While § 312d of the BGB sets out the duty to provide information regarding online contracts, Article 246a of the EGBGB outlines the detailed information obligations for these contracts and incorporates the CRD's transparency requirements.[1090] As

1082. Recital 64 and Article 26(2) CCD 2023.
1083. BGH 16 July 2014, IV ZR 73/13, NJW 2014, 2723; BGH 17 September 2019, XI ZR 662/18, BKR 2020, 33.
1084. Claire Feldhusen, 'Angabepflichten des Darlehensgebers: Europäisches Verbraucherleitbild als Maßstab?' (2020) *Verbraucher und Recht* 87-90.
1085. BT-Drucks. 17/12637. See also Christiane Wendehorst, 'Das neue Gesetz zur Umsetzung der Verbraucherrechterichtlinie' (2014) 9 *Neue Juristische Wochenschrift* 577.
1086. Sascha Vander, 'Reform des Fernabsatzrechts. Probleme und Fallstricke der neuen Widerrufsbelehrung' (2015) 2 *Multimedia und Recht* 75; Thomas Hoeren and Carsten Föhlisch, 'Ausgewählte Praxisprobleme des Gesetzes zur Umsetzung der Verbraucherrechterichtlinie' (2014) *Computer und Recht* 242; Christian Alexander, 'Die Umsetzung der Verbraucherrechte-Richtlinie und die Auswirkungen auf das Lauterkeitsrecht' (2014) *Wettbewerb in Recht und Praxis* 501.
1087. Christoph Busch, 'Implementation of the Consumer Rights Directive in Germany' (2014) 2 *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 119.
1088. Ibid.
1089. Ibid.
1090. BT-Drucks. 17/12637 51. See also Malte Kramme, 'Die Einbeziehung von Pflichtinformationen in Fernabsatz- und Außergeschäftsraumverträge' (2015) 5 *Neue Juristische Wochenschrift* 279-280; Christiane Wendehorst, 'Das neue Gesetz zur Umsetzung der Verbraucherrechterichtlinie'

with the implementation of the CCD, the German legislature relied on this regulatory technique to preserve the structure and readability of the BGB.[1091] However, as Wendehorst has pointed out, consumers and traders bear the burden of managing two separate sets of laws in order to determine the applicable information and transparency requirements.[1092]

In line with the CRD, German law imposes various transparency requirements on (pre-)contractual information and standardises the information regarding the right of withdrawal. It mandates that traders must provide consumers with information about online contracts in a **clear** ("*klar*") and **comprehensible** ("*verständlich*") manner, tailored to the means of distance communication used.[1093] Unfortunately, the German legislature did not offer any additional guidance regarding the meaning and scope of these transparency requirements.[1094] German law imposes the requirements of clarity and comprehensibility on all pre-contractual information regarding online contracts and stipulates that this information becomes an integral part of the contract, unless the parties agree otherwise.[1095]

The German legislature did not utilise the opportunity provided by the CCD to enforce language requirements for information on online contracts.[1096] Consequently, traders operating in Germany can provide information in languages other than German. Wendehorst notes that traders need to assess which language is comprehensible for the specific group of consumers they are targeting.[1097] While it may be possible to provide information in English to experienced consumers in cases where English is the usual language of the transaction, this may not apply to transactions involving the average German consumer.[1098] Traders may assume that consumers negotiating in a specific language, even if only through visiting their website, can comprehend the relevant (pre-)contractual information in that language.[1099] Föhlisch and Dyakova conclude that transparency requirements demand traders to present, at the very least, their offer and the (pre-)contractual information about their goods or services in the same language.[1100] However, Janal emphasises

(2014) 9 *Neue Juristische Wochenschrift* 581; Marina Tamm, 'Informationspflichten nach dem Umsetzungsgesetz zur Verbraucherrechterichtlinie' (2014) 1 *Verbraucher und Recht* 12-15; Christiane Bierekoven and Andreas Crone, 'Umsetzung der Verbraucherrechterichtlinie Neuerungen im deutschen Schuldrecht – Ein erster Überblick' (2013) 11 *Multimedia und Recht* 687.

1091. BT-Drucks. 17/12637 51. See also MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 1-7.
1092. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 1-7.
1093. § 312d (1) BGB and Article 246a § 1 and § 4 EGBGB.
1094. BT-Drucks. 17/12637 75.
1095. § 312d (1) BGB. See also BT-Drucks. 17/12637 54; Malte Kramme, 'Die Einbeziehung von Pflichtinformationen in Fernabsatz- und Außergeschäftsraumverträge' (2015) 5 *Neue Juristische Wochenschrift* 279-280.
1096. Christoph Busch, 'Implementation of the Consumer Rights Directive in Germany' (2014) 2 *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 120.
1097. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 79-82.
1098. Ibid.
1099. Ibid.
1100. Carsten Föhlisch and Tanya Dyakova, 'Fernabsatzrecht und Informationspflichten im Onlinehandel Anwendungsbereich nach dem Referentenentwurf zur Umsetzung der Verbraucherrechterichtlinie' (2013) 1 *Multimedia und Recht* 6. See also Ruth Janal, 'Spezialregelungen für Verträge über digitale Inhalte in Theorie und Praxis' (2017) 9 *Verbraucher und Recht* 336.

that traders frequently offer specific information to consumers in German but utilise English as the language of the contract.[1101]

Similar to the CRD, German law mandates that traders must provide certain information[1102] about the goods or services offered directly before the consumer places an online order involving a payment obligation, in a **clear** ("*klar*"), **comprehensible** ("*verständlich*") and **prominent** manner ("*in hervorgehobener Weise*").[1103] Notably, the German legislator did not implement Article 8(2) of the CRD word for word, as it introduced the requirement of comprehensibility, which this article does not prescribe. Nevertheless, German law remains consistent with EU law, as Article 6(1) of the CRD requires that all mandatory information concerning online contracts (including information related to online orders with payment obligations) must be clear and comprehensible. Additionally, the trader must organise the ordering process in a manner that necessitates the consumer's explicit confirmation of the payment commitment.[1104] If the consumer needs to initiate an order by clicking on a button, the button should be clearly labelled with easily readable text, such as "*Order and pay*" ("*zahlungspflichtig bestellen*") or any other wording that is equally clear and unambiguous.[1105]

In 2022, Germany enacted provisions implementing the MD's specific information and transparency requirements for operators of online marketplaces,[1106] which amended the CRD in 2019, as discussed in Sections 2.3.1.2. and 2.3.3.4. The German legislature employed the same regulatory technique as when implementing the CRD's information and transparency requirements for online contracts. Specifically, § 312l BGB outlines the general obligation to provide information about contracts concluded on online marketplaces, while Article 246d EGBGB specifies the information that operators of online marketplaces are required to provide and the manner in which they must provide it.[1107] Maume reiterated concerns about the user-friendliness of this regulatory technique.[1108]

In accordance with the CRD, Article 246d § 2 (1) of the EGBGB specifies that online marketplace providers must provide consumers with information as outlined in Article 246d § 1 of the EBGB in a **clear** ("*klar*") and **comprehensible** ("*verständlich*") manner, taking into account the means of distance communication used. Furthermore, in line with the CRD, Article 246d § 2 (2) of the EGBGB mandates that providers of online marketplaces must make information regarding the ranking and comparison of goods, services, or digital content available to consumers in

1101. Ruth Janal, 'Spezialregelungen für Verträge über digitale Inhalte in Theorie und Praxis' (2017) 9 *Verbraucher und Recht* 336.
1102. This information concerns the main characteristic of the goods or the service, the total price, the duration of the contract or the conditions for the termination of an indeterminate contract and (if applicable) the minimum duration of the consumer's obligations.
1103. § 312j (2) BGB.
1104. § 312j (3) BGB.
1105. Ibid.
1106. HK-BGB/Hans Schulte-Nölke, 11. Aufl. 2021, BGB § 312l Rn. 1.
1107. BT-Drucks. 19/27655 35-38. See also HK-BGB/Hans Schulte-Nölke, 11. Aufl. 2021, BGB § 312l Rn. 1-3.
1108. BeckOK BGB/Maume, 67. Ed. 1.8.2023, EGBGB Art. 246d § 1 Rn. 1.

a specifically designated section of the online user interface. This section must be **directly and easily accessible** from the website displaying the offers.

Finally, German law standardises information on the consumer's right of withdrawal in line with the CRD. Traders are required to inform consumers about the conditions, time limits, and procedures for exercising their right of withdrawal, as well as provide them with a **standardised withdrawal information form** ("*Muster-Widerrufsformular*").[1109] Consumers can decide whether or not to utilise this form in order to exercise their right of withdrawal.[1110] If traders provide consumers with information about the conditions, time limits, and procedures for exercising the right of withdrawal by relying on and correctly completing **standardised withdrawal instructions** ("*Muster für die Widerrufsbelehrung*I"),[1111] German law deems that they have fulfilled their information obligations regarding the right of withdrawal.[1112] When drafting the standardised withdrawal instructions, traders need to select the appropriate pre-drafted textual options provided by the legislature that pertain to their contract. In order to benefit from the assumption of compliance, traders must ensure that their form mirrors the legal sample, in both content and design.[1113]

3.3.2. The objective of transparency

German law implementing the CRD suggests that transparency aims to **foster the informed consumer choice**. The German legislature emphasised that traders must provide information on online contracts in a language that consumers understand.[1114] Furthermore, it specified that it is necessary to provide consumers with transparent information during online transactions so that they can accurately determine if and when they want to pay for goods or services.[1115] Additionally, German scholars point out the significance of consumers being able to understand the information regarding the terms and conditions of a trader in order to evaluate whether an online contract is suitable for them.[1116]

As explained in Section 3.2.2., this objective is consistent with the purpose of transparency in German credit law. In this context, transparency seeks to empower consumers to make informed decisions about entering into a specific agreement,[1117]

1109. Article 246a § 1 (2) EGBGB. See also MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 51, 56.
1110. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 55.
1111. Annex 1 to Article 246a § 1 para. 2 S. 2.
1112. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 51; Sascha Vander, 'Reform des Fernabsatzrechts. Probleme und Fallstricke der neuen Widerrufsbelehrung' (2015) 2 *Multimedia und Recht* 75-77.
1113. BT-Drucks. 17/12637 75; MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 51-56; BeckOK BGB/Martens EGBGB Art. 246a § 1 Rn. 34-35; Recht der elektronischen Medien/Schirmbacher, 4. Aufl. 2019, EGBGB Art. 246a Rn. 153-155.
1114. BT-Drucks. 17/12637 75.
1115. BT-Drucks. 17/7745 1, 6.
1116. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 1-7; Hans Christoph Grigoleit, 'Besondere Vertriebsformen im BGB' (2002) 16 *Neue Juristische Wochenschrift* 1156; Marina Tamm, 'Informationspflichten nach dem Umsetzungsgesetz zur Verbraucherrechterichtlinie' (2014) 1 *Verbraucher und Recht* 14-15.
1117. BT-Drucks. 16/11643 78-79. See also MüKoBGB/Weber, 9. Aufl. 2023, BGB § 491a Rn. 1-3.

enabling them to compare credit offers,[1118] comprehend their contractual rights and obligations, and determine when to enforce them.[1119] As elucidated in Section 3.2.2., the objective of consumer informed choice seems to be more restricted compared to the transparency objective in German law governing standard contract terms. The latter aims to achieve communication and market transparency[1120] for consumers interested in a particular contract[1121] as well as for anyone interested in the trader's standard terms and the market in general.[1122]

In my opinion, in order to facilitate informed consumer choices, it is essential that information regarding online contracts is accessible, readable, and understandable to consumers, i.e., formally and substantively transparent. In the following section, I will examine whether the interpretation and assessment of transparency under German law, which implements the CRD's concept of transparency, aligns with the goal of enabling consumers to make informed decisions.

3.3.3. The interpretation and assessment of transparency

3.3.3.1. The meaning of the requirements of clarity, comprehensibility and prominence

3.3.3.1.1. Provision of clear and comprehensible (pre-)contractual information on online contacts

As elaborated in Section 3.3.1., German law places the requirements of clarity and comprehensibility on (pre-)contractual information pertaining to online contracts,[1123] which then becomes integral to the contract upon its conclusion.[1124] Furthermore, the same transparency requirements apply to the specific information obligations of

1118. BT-Drucks. 16/11643 78. See also MüKoBGB/Schürnbrand/Weber, 8. Aufl. 2019, BGB § 491a Rn. 9; Ralf Josten, *Kreditvertragsrecht* (Beck 2017) 136; Christian Gercke, *Schadensersatz wegen vorvertraglicher Informationspflichtverletzung beim Verbraucherkredit* (Springer 2014) 116; Ulrich Kulke, 'Das Gesetz zur Umsetzung der Verbraucherkreditrichtlinie, des zivilrechtlichen Teils der Zahlungsdiensterichtlinie sowie zur Neuordnung der Vorschriften über das Widerrufs- und Rückgaberecht – Teil 2' (2009) 10 *Verbraucher und Recht* 378-379.

1119. BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440; BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881.

1120. Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 946-948; Ingo Koller, 'Das Transparenzgebot als Kontrollmaßstab AGBs' in Jürgen Fritz Baur, Klaus Jürgen Hopt und Karl Peter Mailänder, *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März* (De Gruyter 1990) 674.

1121. Christian Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 438-439; Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht
Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 947.

1122. Johannes Köndgen, 'Grund und Grenzen des Transparenzgebots im AGB-Recht Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 946-947. See, for example, BGH 14 August 2019, IV ZR 279/17, NJW 2019, 3582 and BGH 20 November 2019, IV ZR 159/18, NJW-RR 2020, 92.

1123. § 312d (1) BGB and Article 246a § 1 and § 4 EGBGB.

1124. § 312d (1) BGB. See also BT-Drucks. 17/12637 54; Malte Kramme, 'Die Einbeziehung von Pflichtinformationen in Fernabsatz- und Außergeschäftsraumverträge' (2015) 5 *Neue Juristische Wochenschrift* 279-280.

providers of online marketplaces.[1125] Unfortunately, the German legislature has not provided any guidance on how to apply these requirements to information about contracts concluded on online marketplaces. It has merely outlined the information that online marketplace providers should furnish consumers with regarding ranking parameters, without specifying how they should present this information in a clear and comprehensible manner.[1126] According to Maume, the clarity and comprehensibility requirements for online marketplace operators correspond to the transparency requirements applicable to (pre-)contractual information about online contracts in general.[1127] Thus, he emphasises that interpretations of clarity and comprehensibility within the framework of (pre-)contractual information concerning online contracts can be expanded to encompass the particular information requirements imposed on operators of online marketplaces.[1128]

Based on case law, Wendehorst concludes that the requirements of clarity and comprehensibility focus on the layout of the text, including elements such as letters ("*druckbild*"), structure ("*aufbau*") and amount ("*umfang*").[1129] Scholars maintain that the assessment of clarity and comprehensibility of information should be undertaken with regard to an average layperson[1130] or a typical Internet user.[1131] Still, although the German legislature has specified that information must be presented in a language that is consumer-friendly, it has not specified the consumer benchmark against which the clarity and comprehensibility of such information should be evaluated.[1132] Conversely, the legislature's guidance underlines the obligation of traders to consider the vulnerabilities of their consumers, as long as they can reasonably identify those vulnerabilities. This guidance reflects Recital 34 of the CRD and enables courts to evaluate the clarity and comprehensibility of information, considering the vulnerable consumer benchmark when traders target vulnerable consumers.

Wendehorst argues that traders should have the ability to mandatory pre-contractual information regarding online contracts into standard contract terms, as long as the clarity and comprehensibility of the information are maintained.[1133] This perspective aligns with the CJEU's decision in *Tiketa*. While the CJEU acknowledged that traders must clearly and comprehensibly draw consumers' attention to the information contained in their general terms and conditions,[1134] it ruled that the CRD does not prohibit traders from including this information in their general terms and

1125. § 312l BGB and Article 246d § 2 EGBGB.
1126. BT-Drucks. 19/27655 35-36.
1127. BeckOK BGB/Maume, 67. Ed. 1.8.2023, EGBGB Art. 246d § 2 Rn. 1.
1128. Ibid.
1129. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 79-82.
1130. Ibid.
1131. Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 480; Benjamin Raue, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 441.
1132. BT-Drucks. 17/12637 75.
1133. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 79-82.
1134. Case C-536/20 *Tiketa*, points 46-47 and 53.

conditions.[1135] This reasoning contrasts with Recital 27 of the MD, which clarifies that the requirements of clarity and comprehensibility aim to prevent mandatory information from being solely provided in standard terms and conditions or other contractual documents. The reasoning in *Tiketa*, however, is based on a case with facts predating the introduction of the MD and its incorporation into national legal systems, which could be the reason why it diverges from the interpretation of clarity and comprehensibility requirements outlined in the MD. Nevertheless, it is also conceivable that the CJEU will uphold its position and disregard the clarification provided by the legislator in the aforementioned recital, given that recitals are not legally binding.

Furthermore, German law also permits the use of links for the disclosure of the individual elements of the mandatory pre-contractual information. Wendehorst suggests that traders should organise the text layout in a way that allows consumers to easily find relevant information, even without conducting a specific search.[1136] But her argument is based on cases that preceding the implementation of the CRD into German law.[1137] For instance, she refers to a case from 2002 in which the OLG Karlsruhe ruled that the disclosure of information through links was incompatible with the requirements of clarity and comprehensibility.[1138] The OLG Karlsruhe ruled that providing information on the trader's identity via a link labelled "*Contact*"," instead of on the first web page of the website, did not comply with the requirements of clarity and comprehensibility. This was because the consumer had to actively search for essential information.

In contrast, the case law of the BGH reveals that the use of (even multiple) links to provide mandatory information about online contracts is in accordance with the requirements of clarity and comprehensibility. For example, as early as 2003, the BGH established that providing information about the trader's identity through two links was sufficiently clear and comprehensible.[1139] To access this information, the consumer had to follow a link on the first page of the trader's website titled "*Contact*" to another link titled "*Imprint*". The BGH underscored that presenting information via two links corresponded to consumers' online purchasing habits and did not violate the requirements of clarity and comprehensibility.

The BGH upheld this stance in a 2017 case, relying on the provisions of German law implementing the CRD. In this case, the consumer had to navigate through four separate links to access information about the trader's telephone number.[1140] While acknowledging that providing information through four links might not be fast and efficient, the BGH considered such a method of information provision to be customary on the internet and not in violation of the requirements of clarity and

1135. Ibid, point 46.
1136. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 80.
1137. Ibid.
1138. Ibid.
1139. BGH 20 July 2006, I ZR 228/03, MMR 2007, 40.
1140. BGH 5 October 2017, I ZR 163/16, GRUR 2018, 100.

comprehensibility. Therefore, contrary to Wendehorst's suggestion, it appears that German law expects consumers to search for information through (multiple) links. Although EU law allows for the use of links, it remains uncertain whether the CJEU would consider providing information through multiple links as complementary to the trader's obligation to draw the consumer's attention to the mandatory information in a clear and comprehensible manner.

Unlike the CJEU, German courts have evaluated the clarity and comprehensibility of labelling and the placement of links on websites. In this context, Wendehorst highlights a case from 2005, where the OLG Hamm concluded that presenting the information on the right of withdrawal under a heading titled "*Information about the seller*", only accessible through a link labelled "*Me*", was not clear and comprehensible.[1141] The OLG Hamm stated that a consumer seeking information about their right of withdrawal would not expect to find this information by clicking on a link concerning the trader's identity. Therefore, the court concluded that the consumer would only accidentally come across this information. In the aforementioned 2017 case regarding the disclosure of information through four links, the BGH noted that all links were clearly and comprehensibly labelled with language such as "*How would you like to contact us*"[1142] and were presented within a clear context (e.g., "*Contact us*")[1143].[1144] If this were not the case due to unclear link headings or the inclusion of links in an unrelated text, the BGH might have concluded that the trader did not fulfil the requirements of clarity and comprehensibility.

Apart from the possibility of using links, unambiguous wording is generally important to ensure clarity and comprehensibility of information in online contracts. This was highlighted in a case from 2018, which was ruled by the OLG München. In this case, the trader did not provide clear and comprehensible information about the delivery timeframe for a newly advertised smartphone on their website, even though customers were able to place orders for it.[1145] The OLG München ruled that the statement "*The article is available soon. Secure your copy now!*"[1146] did not make it sufficiently clear and comprehensible to the consumer when the ordered smartphone would be available and delivered. The OLG München stressed that the term 'soon' did not adequately clarify to the consumer when the ordered smartphone would be available and delivered. Specifically, this term did not provide consumers with a specific delivery date as required by law, nor did it establish a reasonably determinable delivery date that would inform consumers of the latest possible date for receiving the smartphone they had ordered.

1141. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 80. See OLG Hamm 14 April 2005, 4 U 2/05, NJW 2005, 2319.
1142. In German "Wie möchten Sie uns kontaktieren?".
1143. In German "Kontaktieren Sie uns".
1144. BGH 5 October 2017, I ZR 163/16, GRUR 2018, 100.
1145. OLG München 17 May 2018, 6 U 3815/17, GRUR-RR 2019, 31. See also case note by Sebastian Altmann, 'Aussage "Der Artikel ist bald verfügbar" ist wettbewerbswidrig' (2018) 23 *Gewerblicher Rechtsschutz und Urheberrecht, Praxis im Immaterialgüter und Wettbewerbsrecht*.
1146. In German "Der Artikel ist bald verfügbar. Sichern Sie sich jetzt Ihr Exemplar!"

From my perspective, these cases reveal that the requirements of clarity and comprehensibility in German law primarily prioritise **formal transparency** rather than substantive transparency of information pertaining to online contracts. This interpretation and evaluation of clarity and comprehensibility predominantly focus on the accessibility of such information, such as its inclusion within the trader's standard contract terms and the use of multiple links, as well as its readability, including proper labelling of links and logical placement of information within the text. This approach aligns with the positions upheld by both the Commission and the CJEU thus far. However, the effectiveness of this approach in achieving the objective of enabling informed consumer choice is questionable, as behavioural research suggests that consumers do not actively seek out information.[1147] The case from 2002, in which the OLG Karlsruhe deemed the inclusion of a link titled "*Contact*" for revealing the trader's identity as non-transparent because it necessitated the consumer to actively search for essential information, aligns more closely with this behavioural research than newer German case law.[1148]

3.3.3.1.2. Provision of clear, comprehensible and prominent information on online orders with a payment obligation

As stated in Section 3.3.1., according to German law, traders are required to disclose the main characteristics of the goods or services they offer, along with the total price, the duration of the contract, or the conditions for terminating an indefinite contract, and, if applicable, the minimum duration of the consumer's obligations before the consumer proceeds to place an online order that involves a payment obligation. Traders should provide this information in a **clear** ("*klar*"), **comprehensible** ("*verständlich*") and **prominent** ("*in hervorgehobener Weise*") manner.[1149]

When offering guidance on the application of this provision, the German legislature explained the meaning of the requirements of clarity and comprehensibility but did not elaborate on the requirement of prominence.[1150] According to the legislature, the requirements of clarity and comprehensibility dictate that pre-contractual information should be limited to the mandatory information stipulated by law. This information must clearly stand out from the surrounding text and other design elements on the trader's website. It should be easy to grasp and readily recognisable, taking into account factors such as font style, size, and colour. Although the German legislature did not specify which of these characteristics are related to clarity and which are related to comprehensibility, it did provide additional interpretation of the comprehensibility requirement. In this context, the legislature

1147. Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 44-45, 54-55, 130; Joasia Luzak, 'Will the imaginary active consumers please stand up? Case note to Walbusch Walter Busch (C-430/17)' (2019) *Maastricht Journal of European and Comparative Law* 6.

1148. OLG Karlsruhe 27 March 2002, 6 U 200/01, MMR 2002, 618.

1149. § 312j (2) BGB.

1150. BT-Drucks. 17/7745 11.

noted that comprehensibility demands from traders to convey information using clear and unambiguous language, free from any confusing or distracting additions.[1151]

According to Roth's analysis, based on the legislature's interpretation, the requirement of clarity mainly relates to the visual presentation of the information.[1152] This implies that traders must ensure that information is not hidden but is easily recognisable, considering its font size, style, and colour. Moreover, the content of the information should be limited to relevant information for the contract to avoid any potential confusion among consumers, and this information should be easily distinguishable from other information on the trader's website. As for the requirement of comprehensibility, Roth does not find its meaning entirely certain.[1153] He notes that the focus of comprehensibility appears to be on the design of the information's content, in contrast to clarity, which emphasises its visual attributes. However, he argues that the obligation to avoid adding confusing or distracting elements to the information's content already stems from the requirement of clarity, blurring the distinction between these two transparency requirements. Roth observes that a feature seemingly exclusive to the requirement of comprehensibility is the trader's responsibility to articulate the information's content in a linguistically clear and unambiguous manner. He highlights that the average consumer should be used as the yardstick for assessing the clarity and unambiguity of the information. Due to the lack of specific explanations in the legislature's guidance regarding the requirement of prominence, Roth does not assign it an independent meaning.[1154] He argues that prominence essentially strengthens the trader's responsibility to guarantee that the mandatory information regarding an electronic order involving a payment obligation is visually discernible from other content on their website.

It seems that the guidance provided by the German legislature does not make the meaning and scope of the transparency requirements as clear as Roth had suggested. The OLG Köln disagreed with Roth's analysis, partly because he did not assign a separate meaning to the requirement of prominence. From a linguistic perspective, the OLG Köln deemed it more logical to interpret both clarity and comprehensibility as concerning the drafting of the information's content, with prominence related to visual design.[1155] To support its opinion, the OLG Köln reiterated that Article 8(2) of the CRD imposes only two transparency requirements for the same information – clarity and prominence.

However, case law also lacks clear definitions of the requirements clarity, comprehensibility, and prominence, as German courts sometimes assess the same features in connection with different transparency requirements. For example,

1151. Ibid.
1152. Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 480-481.
1153. Ibid, 481.
1154. Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 481.
1155. OLG Köln 14 February 2014, 6 U 120/13, MMR 2015, 393; OLG Köln 3 February 2016, 6 U 39/15, MMR 2016, 602; OLG Köln 7 October 2016, 6 U 48/16, GRUR-RR 2017, 108.

the OLG Köln considered various factors such as a picture, font size, and colour when assessing the prominence of information. The OLG Köln did not deem the information sufficiently prominent due to a photo occupying a quarter of the page and the mandatory information being presented in a smaller font, less captivating colour, and not in bold compared to the rest of the information on the website.[1156] Additionally, the OLG Köln held that the requirement of prominence necessitated separating the mandatory information regarding an online order from the remaining information on the website. This separation could be accomplished by placing the information within a text block.[1157] Finally, this visual design would only meet the requirement of prominence if the information were positioned above the button through which an order is placed. Placing the information below the button may not be sufficient since, according to the OLG Köln, consumers pay less attention to information placed below the button.[1158]

In contrast, the OLG Hamm took a different approach by considering the connection between a picture and accompanying information, as well as the font colour used in the information, when evaluating its clarity and comprehensibility. The OLG Hamm determined that the combination of a visual depiction showing a sun umbrella, along with mandatory information about the product, effectively conveyed all the essential characteristics of the item to the consumer in a clear and comprehensible way.[1159]

The different interpretations and assessments of clarity, comprehensibility, and prominence in the context of online orders with payment obligations do not lend themselves to clear demarcation of their meanings and scopes. However, most interpretations seem to encompass both **formal** and **substantive transparency**. This is noteworthy because German law appears to consider the requirements of clarity and comprehensibility as constituent elements of formal transparency when applied generally to online (pre-)contractual information, as explained in section 3.3.3.1.1.

Furthermore, in certain instances where clarity and comprehensibility were considered as a single transparency requirement, they were interpreted to prioritise substantive transparency, while prominence was focused on formal transparency. In my opinion, it is preferable to assign distinct meanings to the requirements of clarity and comprehensibility, which remain the same regardless of whether these requirements are applied alongside prominence. In this regard, it seems logical to interpret the requirement of clarity as being related to formal transparency and the requirement of comprehensibility as being associated with substantive transparency. This interpretation aligns with the guidance provided by the German legislature, which highlights that the focus of the requirement of comprehensibility is on the clarity and unambiguity of the information's content – in other words, substantive

1156. OLG Köln 7 October 2016, 6 U 48/16, GRUR-RR 2017, 108.
1157. OLG Köln 14 February 2014, 6 U 120/13, MMR 2015, 393; OLG Köln 3 February 2016, 6 U 39/15, MMR 2016, 602.
1158. OLG Köln 7 October 2016, 6 U 48/16, GRUR-RR 2017, 108.
1159. OLG Hamm, 14 March 2017, 4 W 34/16, 4 W35/16, GRUR-RR 2017, 359.

transparency.[1160] This approach would also ensure the preservation of both formal and substantive transparency in cases where these requirements should be applied without the requirement of prominence.

3.3.3.2. Transparency of the online order button

In the event of concluding a consumer contract in electronic commerce that involves a payment obligation, the trader must organise the ordering process in such a way that the consumer explicitly confirms their commitment to undertake the payment obligation.[1161] If the consumer needs to place an order by clicking on a button, the button should have easily readable words like "*Order and pay*" or any other phrasing that eliminates any ambiguity.[1162] Raue argues that the button solution should not be limited to electronic orders on traders' websites but should also be extended to smartphone apps, e-book readers, game consoles, smart TVs, and any other platform or device that enables the provision of services for payment via an internet connection.[1163]

Germany strongly advocated for the introduction of the button solution ("*Button-Lösung*") at the EU level and implemented this solution into German law in 2012, prior to the rest of the provisions of the CRD.[1164] The button solution aims to tackle commercial practices that offer services that seem to be free but, in reality, include hidden costs clauses.[1165] By stipulating how traders should present information on payment obligations, the legislature had the intention of streamlining the process

1160. BT-Drucks. 17/7745 11.

1161. § 312j (3) BGB.

1162. Ibid.

1163. Benjamin Raue, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 442.

1164. Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 477; Benjamin Raue, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 438-439; Gerald Spindler, Christian Thorun and Annelies G. Blom, 'Die Evaluation der Button-Lösung. Ergebnisse einer empirischen Studie' (2015) 1 *Multimedia und Recht* 3; Lena Rudkowski and Deborah Werner, 'Neue Pflichten für Anbieter jenseits der „Button-Lösung". Paid Content-Verträge nach der Verbraucherrechte-Richtlinie' (2012) 11 *Multimedia und Recht* 714-715; Christiane Wendehorst, 'Das neue Gesetz zur Umsetzung der Verbraucherrechterichtlinie' (2014) 9 *Neue Juristische Wochenschrift* 579-580; Christiane Bierekoven and Andreas Crone, 'Umsetzung der Verbraucherrechterichtlinie. Neuerungen im deutschen Schuldrecht – Ein erster Überblick' (2013) 11 *Multimedia und Recht* 689-690; Marina Tamm, 'Kostenfallen im Internet nach neuer Rechtslage' (2012) 6 *Verbraucher und Recht* 217; Ruth Janal, 'Alles neu macht der Mai: Erneute Änderungen im Recht der besonderen Vertriebsformen' (2012) 49 *Zeitschrift für Wirtschafts- und Bankrecht* 2318; Thomas Hoeren and Carsten Föhlisch, 'Ausgewählte Praxisprobleme des Gesetzes zur Umsetzung der Verbraucherrechterichtlinie' (2014) *Computer und Recht* 243.

1165. BT-Drucks. 17/7745 1 and 6; MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312j Rn. 1, 2; Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 477-478; Benjamin Raue, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 438-439; Gerald Spindler, Christian Thorun and Annelies G. Blom, 'Die Evaluation der Button-Lösung. Ergebnisse einer empirischen Studie' (2015) 1 *Multimedia und Recht* 3; Marina Tamm, 'Kostenfallen im Internet nach neuer Rechtslage' (2012) 6 *Verbraucher und Recht* 217-218; Christoph Busch, 'Does the Amazon Dash Button Violate EU Consumer Law? Balancing Consumer Protection and Technological Innovation in the Internet of Things' (2018) 2 *Journal of European Consumer and Market Law* 80.

of determining whether a payment obligation was sufficiently recognisable in the event of a dispute.[1166] The German legislature also offered additional guidance on **the definition of a button** in the online environment. The term 'button' is broadly defined as "*any graphical control element that allows the user to initiate an action or give feedback to the system*".[1167] This definition includes elements such as hyperlinks and checkboxes, provided that their activation triggers the ordering process.[1168] As Tamm emphasises, the term button should be technologically neutral to accommodate future technological developments.[1169]

Nonetheless, the case law concerning Amazon's 'dash button' demonstrates how the utilisation of new technologies can raise questions about the applicability of provisions pertaining to electronic orders with payment obligations. This occurs even though these provisions are designed to maintain technological neutrality. The dash button is essentially a thumb-sized electronic device that can be placed on household appliances such as a washing machine, and it can be connected to Wi-Fi.[1170] By physically pressing the dash button, consumers can swiftly make a purchase and restock their household supplies and food, for instance. To set up the dash button, consumers must install the Amazon Shopping App on their smartphone and specify the desired product they wish to order by pressing the dash button.[1171] At this stage, they are provided with details such as the main characteristics, price, and quantity of the product. Once the dash button is configured in the app, consumers only need to press the physical electronic device to place their order. After placing the order, they will receive a push notification with information about the order, along with a 15-minute window to cancel it.

The LG München determined that Amazon's dash button falls within the definition of the term 'button' as set out in § 312j (3) of the BGB.[1172] Although the German legislature referred to graphical interfaces on websites when explaining the concept of a button, the LG München emphasised that the provisions governing the button solution are open to emerging technological developments. Consequently,

---

1166. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312j Rn. 1, 2; Benjamin Raue, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 439.

1167. BT-Drucks. 17/7745. On page 12 it reads in German: "*Schaltfläche im Sinne dieser Regelung ist jedes grafische Bedienelement, das es dem Anwender erlaubt, eine Aktion in Gang zu setzen oder dem System eine Rückmeldung zu geben*".

1168. BT-Drucks. 17/7745 12; MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312j Rn. 24-29; Marina Tamm, 'Kostenfallen im Internet nach neuer Rechtslage' (2012) 6 *Verbraucher und Recht* 223; Benjamin Raue, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 442; Christian Alexander, 'Neuregelungen zum Schutz vor Kostenfallen im Internet' (2012) 28 *Neue Juristische Wochenschrift* 1988; Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 481.

1169. Marina Tamm, 'Kostenfallen im Internet nach neuer Rechtslage' (2012) 6 *Verbraucher und Recht* 223.

1170. LG München 1 March 2018, 12 O 730/17, BeckRS 2018, 2468; OLG München 10 January 2019, 29 U 1091/18, MMR 2019, 532.

1171. Ibid.

1172. LG München 1 March 2018, 12 O 730/17, BeckRS 2018, 2468. See also MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312j Rn. 24-29.

the LG München concluded that the term 'button' can also encompass devices like the dash button.[1173] Unfortunately, the OLG München, which ruled on the case in the second instance, failed to address the question of whether the dash button should, indeed, be considered a button within the meaning of § 312j (3) of the BGB.[1174]

According to Hergenröder and Müller, the guidance provided by the German legislature has clarified that the second sentence of § 312j (3) of the BGB only applies to graphical control elements like hyperlinks and not to haptic control elements like the dash button.[1175] Still, this does not mean that new technologies like the Amazon dash button are completely exempt from the provisions regulating electronic orders. Instead, it implies that the evaluation of the dash button's compliance with the law should only be based on the first sentence of § 312j (3) of the BGB, which broadly establishes that traders must design their ordering processes in a manner that requires explicit acknowledgment of the payment obligation by the consumer.[1176] Hergenröder and Müller emphasise that the guidance provided by the legislature indicates that only this sentence is meant to address emerging technological developments.[1177] The categorisation of new technology as a button determines the relevance of certain labelling obligations. The subsequent section investigates these labelling obligations and explores case law that interprets such requirements, which includes the case law regarding the Amazon dash button.

3.3.3.2.1. Labelling of the order button

In the case of electronic orders involving a payment obligation, which are submitted through an order button, the trader must label this button in an easily readable manner. According to § 312j (3) of the BGB, traders can fulfil this obligation by labelling the button with text like "*Order and pay*"[1178] or similar unambiguous wording that explicitly establishes a link between the ordering act and the subsequent payment.[1179] In cases where consumers must register to place an order, the obligation to pay cannot arise from clicking on a button labelled "*Register*" or "*Next*".[1180] Phrases like "*Order*" or

1173. LG München 1 March 2018, 12 O 730/17, BeckRS 2018, 2468.

1174. OLG München 10 January 2019, 29 U 1091/18, MMR 2019, 532. See also Karsten Müller, 'OLG München: Verbraucherrechtsverstoß auf Knopfdruck – Dash Button die Zweite' (2019) 11 *Verbraucher und Recht* 433.

1175. Cyril Hergenröder, 'Die Vereinbarkeit sogenannter „Dash Buttons" mit den zivilrechtlichen Regelungen zum E-Commerce' (2017) 5 *Verbraucher und Recht* 177-178; Karsten Müller, 'Verstoß gegen Fernabsatzrecht bei Bestellungen über Dash Buttons' (2018) 6 *Verbraucher und Recht* 234.

1176. Ibid.

1177. Ibid.

1178. In German: "*zahlungspflichtig bestellen*".

1179. BT-Drucks. 17/7745 11-12. See also Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 481; Matthias Bergt, 'Praktische Probleme bei der Umsetzung neuer gesetzlicher Vorgaben im Webshop' (2012) 49 *Neue Juristische Wochenschrift* 3543; Christian Alexander, 'Neuregelungen zum Schutz vor Kostenfallen im Internet' (2012) 28 *Neue Juristische Wochenschrift* 1988; Marina Tamm, 'Kostenfallen im Internet nach neuer Rechtslage' (2012) 6 *Verbraucher und Recht* 223.

1180. BT-Drucks. 17/7745 12; LG Leipzig 26 July 2013, 08 O 3495/12, BeckRS 2013, 13273; LG Berlin 17 July 2013, 97 O 5/13, MMR 2013, 780. See also Benjamin Raue, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 442.

"*Place an order*" which do not clearly indicate the obligation to make a payment are also inadequate, as they might encompass complimentary services like subscribing to newsletters or receiving free product samples.[1181] The German legislature has even provided additional examples of sufficiently transparent wording, which are "*Order for a fee*",[1182] "*Pay-as-you-go contract*"[1183] or "*Buy*"[1184].[1185] Furthermore, the legislature emphasised that the font of the button should be legible. This means that consumers should be able to easily recognise the letters at a normal screen resolution.[1186] This avoids the use of buttons with dark red text on a red background[1187] or with the text "*Try it now for free*" on a yellow background and "*Afterwards for a fee*" on a grey background.[1188] Finally, other graphic elements on the button should not distract from the wording that indicates the payment obligation.[1189]

Both literature and case law suggest that the choice of wording for the button label depends on the specific nature of the contract. For example, on online auction platforms, phrases such as "*Submit bid*",[1190] "*Confirm bid*"[1191] or "*Binding bid*"[1192] may be appropriate.[1193] In contrast, the term "*Buy*" may not be suitable in case of subscriptions because it does not properly convey the long-term nature of the consumer's commitment.[1194] Similarly, the formulation "*Try it now for free – afterwards for a fee*"[1195] does not suffice when a fee-based subscription, preceded by a free trial period, is initiated with a single click.[1196] Such a formulation is not sufficient even when the trader separated the text in a way that the upper part of the button stipulated "*Try it now for free*" and the lower part specified "*Afterwards for a fee*".[1197] The inadequacy arises from the fact that this wording does not clearly communicate to consumers that they are already committing to a payment despite the initial free trial period.

Furthermore, the trader cannot combine the button involving an obligation to pay with other statements, such as an acknowledgement of their general terms and conditions or the information on the right of withdrawal.[1198] This is to ensure

1181. BT-Drucks. 17/7745 12. See also Benjamin Raue, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 442.
1182. In German: "kostenpflichtig bestellen".
1183. In German: "zahlungspflichtigen Vertrag schließen".
1184. In German: "kaufen".
1185. BT-Drucks. 17/7745 12.
1186. Ibid.
1187. Ibid.
1188. OLG Köln 7 October 2016, 6 U 48/16, GRUR-RR 2017, 108.
1189. BT-Drucks. 17/7745 12.
1190. In German: "gebot abgeben".
1191. In German: "gebot bestätigen".
1192. In German: "verbindlich bieten".
1193. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312j Rn. 24-29; Benjamin Raue, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 442.
1194. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312j Rn. 24-29.
1195. In German: "Jetzt gratis testen - danach kostenpflichtig"
1196. OLG Köln 3 February 2016, 6 U 39/15, MMR 2016, 602.
1197. OLG Köln 7 October 2016, 6 U 48/16, GRUR-RR 2017, 108.
1198. BT-Drucks. 17/7745 12; LG Berlin 30 June 2016, 52 O 340/15, MMR 2017, 50. See also Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 481.

that consumers do not inadvertently overlook essential information related to the agreement simply because they are solely focused on the purchase. For example, when a consumer clicks on a button labelled "*Buy*"," simultaneously indicating they want to receive the service immediately and waiving their right of withdrawal, such a combination of statements is not considered transparent.[1199]

German courts disagreed on whether the clarity of a payment obligation should be solely obvious based on the label of the order button, or whether it could also be inferred from the context of the ordering process. The LG Berlin argued that the assessment of the button's label should consider not only the text displayed on the button but also the overall context, including the design of the ordering process and the nature of the transaction.[1200] However, the Local Court of Bottrop (Amtsgericht Bottrop, or AG Bottrop) expressed concerns about the compatibility of this interpretation with EU law.[1201] These concerns emerged in a case related to the booking of multiple hotel rooms on the online platform Booking.com. The consumer was required to pay a cancellation fee of 2,240 euros as they failed to show up. The consumer contested these charges, leading the hotel owner to file a lawsuit with the AG Bottrop. The AG Bottrop raised a question regarding whether the label on the order button, which simply states "*Complete booking*", transparently communicated the corresponding payment obligation, without considering other factors of the ordering process. According to the AG Bottrop, in everyday language, the term 'booking' within the phrase "*Complete booking*" does not inherently imply the obligation to make a financial payment; it is often used to indicate a reservation or pre-order without any charges.

This prompted the AG Bottrop to submit a preliminary reference to the CJEU asking whether the assessment of the transparency of the labelling of the order button should be limited to the text on the button alone.[1202] The CJEU responded in the affirmative, emphasising that traders cannot expect consumers to deduce the payment obligation from the circumstances of ordering process.[1203] Rather, they must label the order button in such a way that consumers can see with absolute certainty that they are committing to pay for an order.[1204]

Although the CJEU did not explicitly state whether it considered the wording "*Complete booking*" to be transparent or not, it did give the referring court guidance on how to evaluate the transparency of this wording. The CJEU held that the national court must determine whether the trader has used terms that can be linked to the establishment of a payment obligation.[1205] In making this assessment, the national court must consider everyday language and the perception of an average, reasonably

1199. LG Berlin 30 June 2016, 52 O 340/15, MMR 2017, 50.
1200. LG Berlin 31 January 2019, 16 O 284/17, BeckRS 2019, 60030.
1201. AG Bottrop 24 March 2021, 12 C 158/19, BeckRS 2021, 51045.
1202. Ibid. See also Case C-249/21 *Fuhrmann-2*, point 18. For a brief analysis of the two cases, see Fabrizio Esposito and Lucila de Almeida, 'European Union Litigation' (2022) 18(3) *European review of contract law* 265-267.
1203. Case C-249/21 *Fuhrmann-2*, points 30 and 34.
1204. Ibid, point 30.
1205. Ibid, points 32-34.

informed, circumspect, and observant consumer.[1206] It remains to be seen how the AG Bottrop will apply this guidance in practice. However, given the AG Bottrop's concerns about whether the term "*Complete booking*" effectively conveys a financial payment obligation in everyday language, it would not be surprising if this court ultimately finds that this phrase lacks transparency.

Referring back to the Amazon dash button discussed in Section 3.3.3.2., it can be observed that this button lacked any labelling indicating a payment obligation. This button only featured the logo of the specific product available for purchase (e.g., the Tide logo for detergent or the Heineken logo for beer) and a pushable surface for the placement of an order. Because Amazon did not label the dash button with the words "*Order and Pay*" or an equivalent unambiguous phrase, LG München determined that it violated § 312j (3) of the BGB.[1207] It can be recalled that the OLG München left the question whether the Amazon dash button qualifies as a button unanswered.[1208] Following the aforementioned reasoning of the CJEU mentioned, if the Amazon dash button were to be considered a button according to § 312j (3) of the BGB, its design would likely need to be altered to include wording indicating the payment obligation. Taking into account the current size and layout of the Amazon dash button, the design could be revised to incorporate the product's logo along with the price and the phrase "*Buy now*"."[1209]

As explained in Section 2.3.3.2., the labelling requirements for an order button are meant to ensure substantive transparency regarding the initiation of a payment obligation in EU law. This is because they aim to ensure that consumers fully understand and are aware that by clicking the electronic order button, they are committing to making a payment. In contrast, the interpretation and assessment of the labelling of an order button in German law seem to place importance on **both formal and substantive transparency**. The focus on formal transparency is evident through the significance given to the legibility of the button, which traders cannot undermine by using illegible font sizes or combining low-contrast font colours, as clarified by the German legislature.[1210] The emphasis on substantive transparency is evident through the intended purpose of correctly labelling the button, which is to clearly and unequivocally inform consumers that placing an order will result in a financial obligation.[1211] The latter approach to labelling order buttons is even more appropriate for achieving informed consumer choice, a goal that both the CRD and the German law, which implements this directive, connect to transparency.

1206. Ibid, point 33.
1207. LG München 1 March 2018, 12 O 730/17, BeckRS 2018, 2468.
1208. OLG München 10 January 2019, 29 U 1091/18, MMR 2019, 532.
1209. Cyril Hergenröder, 'Die Vereinbarkeit sogenannter „Dash Buttons" mit den zivilrechtlichen Regelungen zum E-Commerce' (2017) 5 *Verbraucher und Recht* 177-178; Karsten Müller, 'Verstoß gegen Fernabsatzrecht bei Bestellungen über Dash Buttons' (2018) 6 *Verbraucher und Recht* 234. See also BT-Drucks. 17/7745 11-12.
1210. BT-Drucks. 17/7745 12.
1211. Ibid, 11-12.

3.3.3.2.2. Arranging the ordering process

In the event of electronic orders that involve a payment obligation, § 312j (2) BGB requires the trader to organise the ordering process in such a way that it requires the consumer's explicit confirmation of the order placement. As detailed in Section 3.3.3.1.2., before the consumer confirms the order, the trader must clearly, comprehensibly, and prominently present the main characteristics of the goods or services being offered, their total price, the contract duration, and the terms for terminating indefinite or automatically renewable contracts.[1212] When such an order is facilitated through a button, the trader must label the order button with unambiguous wording that is easy to read,[1213] as discussed in the preceding section.

Important considerations with regards to how traders should structure their order process to comply with § 312j (2) BGB pertain to determining the timing and placement of the aforementioned mandatory information and its connection to the order button. The German legislatur eclarified that the mandatory information must have a **temporal and spatial connection** to the order button.[1214] The purpose of requiring a temporal link between the mandatory information and the order button is to allow the consumer to become aware of the relevant information while placing the order.[1215] This means that the mandatory information should be provided towards the end of the ordering process, right before the consumer is required to confirm the order explicitly, rather than at the beginning or during this process.[1216]

The mandatory information must also have a spatial correlation to the button.[1217] This means that the mandatory information and the button should be presented in close proximity to each other. Moreover, when the consumer is about to press the button, their attention should be directed towards the mandatory information.[1218] The purpose of establishing a spatial connection is to clearly communicate to the consumer that the obligation to make payment for the electronic order, the terms of which are described in the mandatory information, arises at the moment when they

---

1212. § 312j (2) BGB.

1213. § 312j (3) BGB.

1214. BT-Drucks. 17/7745 10. See also Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 480; Lena Rudkowski and Deborah Werner, 'Neue Pflichten für Anbieter jenseits der „Button-Lösung". Paid Content-Verträge nach der Verbraucherrechte-Richtlinie' (2012) 11 *Multimedia und Recht* 713; Christian Alexander, 'Neuregelungen zum Schutz vor Kostenfallen im Internet' (2012) 28 *Neue Juristische Wochenschrift* 1988.

1215. BT-Drucks. 17/7745 10.

1216. Ibid. See also Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 480; Lena Rudkowski and Deborah Werner, 'Neue Pflichten für Anbieter jenseits der „Button-Lösung". Paid Content-Verträge nach der Verbraucherrechte-Richtlinie' (2012) 11 *Multimedia und Recht* 713.

1217. BT-Drucks. 17/7745 10. See also Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 480; Benjamin Raue, Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel *Multimedia und Recht* 441.

1218. BT-Drucks. 17/7745 10; Christian Alexander, 'Neuregelungen zum Schutz vor Kostenfallen im Internet' (2012) 28 *Neue Juristische Wochenschrift* 1988.

press the button.[1219] Consequently, it is insufficient to offer the information through a link or a downloadable document.[1220] Furthermore, the mandatory information and the order button should both be visible on the screen at standard resolution, eliminating the need for consumers to scroll up or down the webpage.[1221] It is worth noting that the German legislature does not address the restriction on scrolling in the context of devices with limited screen space, such as smartphones.

Scholars conclude that this implies scrolling is permissible only in cases where the screen resolution differs from the standard settings. [1222] Consequently, the prohibition on scrolling does not apply to devices with smaller screens, such as mobile phones.[1223] Raue suggests that instead of focusing on whether the consumer had to scroll through a small screen, the most important thing to consider should be whether an average user could perceive the information immediately before placing an order.[1224] Bergt disagrees with the legislature's ban on scrolling, arguing that the wording of the law does not support such a prohibition.[1225] He emphasises that, considering the various screen sizes, traders should position the mandatory information above the order button. In this case, consumers would not be able to miss this information since they would have to scroll past it to reach the button.

Empirical research conducted in Germany reveals that traders are still uncertain about how to integrate the temporal and spatial requirements regarding the placement of mandatory information alongside the order button in their online shops.[1226] Although it appears that traders have successfully implemented the labelling requirements for order buttons, they still face difficulties in presenting and positioning the mandatory information correctly in relation to the button.

German case law does not appear to offer a clear perspective on where and how traders should display this information in their online shops. However, courts have conflicting opinions on whether traders should place the mandatory information above or below the button, for instance. In this regard, the OLG Köln has established that traders have the option to present the mandatory information either above or below the button.[1227] This decision is based on understanding that the requirements

---

1219. BT-Drucks. 17/7745 10. See also Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 480

1220. BT-Drucks. 17/7745 10-11. See also Benjamin Raue, Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel *Multimedia und Recht* 441.

1221. BT-Drucks. 17/7745 11. See also Hans-Peter Roth, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 480; Lena Rudkowski and Deborah Werner, 'Neue Pflichten für Anbieter jenseits der „Button-Lösung". Paid Content-Verträge nach der Verbraucherrechte-Richtlinie' (2012) 11 *Multimedia und Recht* 714.

1222. Lena Rudkowski and Deborah Werner, 'Neue Pflichten für Anbieter jenseits der „Button-Lösung". Paid Content-Verträge nach der Verbraucherrechte-Richtlinie' (2012) 11 *Multimedia und Recht* 714

1223. Benjamin Raue, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 441.

1224. Ibid, 441.

1225. Matthias Bergt, 'Praktische Probleme bei der Umsetzung neuer gesetzlicher Vorgaben im Webshop' (2012) 49 *Neue Juristische Wochenschrift* 3542.

1226. Gerald Spindler, Christian Thorun and Annelies G. Blom, 'Die Evaluation der Button-Lösung. Ergebnisse einer empirischen Studie' (2015) 1 *Multimedia und Recht* 4.

1227. OLG Köln 7 October 2016, 6 U 48/16, GRUR-RR 2017, 108.

of temporal and spatial proximity are met as long as both the information and the button are completely visible on the screen without the need for scrolling. However, the OLG Köln also recognised that consumers may give varying levels of attention to the information below the button compared to when the information is positioned above the button. The LG Berlin came to a different conclusion, stating that traders should only position the information above the button because consumers tend to pay less attention to information placed after the button.[1228] Furthermore, it compared the placement of the information above the button to a signature, which is usually positioned after the relevant text.

Unfortunately, EU law does not clearly stipulate whether traders should position mandatory information for orders with payment obligations above or below the order button and if they must ensure that consumers do not need to scroll through the webpage to access this information. According to the Commission's *Consumer Rights Guidance*, traders must present the mandatory information in a manner that allows consumers to view and read it before finalising an order, without needing to navigate away from the order page.[1229] This implies that, similar to OLG Köln, the Commission believes the information may be placed both above or below the button, as long as it is in close proximity to the button.

In my opinion, the requirements of temporal and spatial connection between the mandatory information and the order button justify prohibiting scrolling. Furthermore, this prohibition should not only apply to screens with standard resolution, as consumers frequently use their mobile phones to conclude online contracts. Additionally, it is better to oblige traders to place the mandatory information above the button, aligning with the idea that this information should be presented at the end of the ordering process, just before the consumer confirms the order. This practice also increases the chances that consumers will not solely focus on the order button and overlook the information below it, regardless of whether scrolling is necessary. To increase legal certainty for traders, the European legislature should regulate this issue.

Similar to EU law, the requirements of temporal and spatial proximity between the mandatory information for electronic orders with payment obligations and the order button in German law serve to ensure the accessibility of this information and ensure its **formal transparency**. These requirements specify when and where traders must provide the information in their order process. If traders present the information at the time of the consumer's order, close to the button indicating the financial obligation, there is a chance that the consumer will read and consider this information before deciding to proceed with the order. However, these requirements do not contribute to the readability or comprehensibility of the information because they do not determine how merchants should draft the mandatory information.

1228. LG Berlin 17 July 2013, 97 O 5/13, MMR 2013, 780.

1229. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [44].

3.3.3.3. Standardised withdrawal instructions

Traders must provide customers with information regarding the conditions, time limits, and procedures for exercising their right of withdrawal. This can be done using **standardised withdrawal instructions**, which must include a **standardised withdrawal information form** that customers can utilise to withdraw from the contract.[1230] The standardised withdrawal instructions are in accordance with those mandated by the CRD, which include details about the right of withdrawal and its implications. However, it is important to note that the German legislature has developed standardised information forms specifically intended to inform consumers about their right of withdrawal prior to the European legislature.[1231] These forms are designed to simplify traders' compliance with complex legal requirements regarding the information on the right of withdrawal.[1232] The German legislature maintains that the implementation of standardised, EU-wide withdrawal instructions streamlines the way in which traders inform consumers about their rights and facilitates consumers' ability to exercise those rights.[1233]

According to Schirmbacher, the standardisation of the provision of information regarding the right of withdrawal in the CRD enables Germany to preserve its approach to standardised information forms.[1234] When traders adhere to the contents of the standardised withdrawal instructions without making any changes, they are deemed compliant with their obligation to transparently inform the consumer of their right of withdrawal under German law.[1235] To complete the withdrawal instructions, traders must choose from the pre-drafted textual options specified by the law, according to the type of contract they offer.[1236] For instance, regarding the information about the withdrawal period, traders have the option to choose from five different text versions depending on whether the contract concerns the provision of services, standard sale of goods, or partial delivery of goods. Therefore, to complete the information pertaining to the withdrawal period, they simply need to insert the option that applies to their contract.

As Martens points out, making changes to the content or layout of the standardised withdrawal instructions puts traders at risk of not complying with German law.[1237] To my understanding, German courts have not yet provided clear guidance on the extent to which traders must comply with the legal template based

---

1230. Article 246a § 1 (2) and § 2 (2) EGBGB.
1231. Recht der elektronischen Medien/Schirmbacher, 4. Aufl. 2019, EGBGB Art. 246a Rn. 146; Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 380-383.
1232. Recht der elektronischen Medien/Schirmbacher, 4. Aufl. 2019, EGBGB Art. 246a Rn. 146.
1233. BT-Drucks. 17/12637 81.
1234. Recht der elektronischen Medien/Schirmbacher, 4. Aufl. 2019, EGBGB Art. 246a Rn. 146.
1235. BT-Drucks. 17/1394 12. See also MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 51-56; BeckOK BGB/Martens EGBGB Art. 246a § 1 Rn. 35; Recht der elektronischen Medien/Schirmbacher, 4. Aufl. 2019, EGBGB Art. 246a Rn. 153; Sascha Vander, 'Reform des Fernabsatzrechts. Probleme und Fallstricke der neuen Widerrufsbelehrung' (2015) 2 *Multimedia und Recht* 77; Ruth Janal, 'Der Beginn der Widerrufsfrist im neuen Fernabsatzrecht' (2015) 2 *Verbraucher und Recht* 43-44.
1236. Article 246a § 1 EGBGB.
1237. BeckOK BGB/Martens EGBGB Art. 246a § 1 Rn. 34-35.

on the relevant provisions of German law that implement the CRD. It is worth noting that German case law pertaining to standardised withdrawal information forms is predominantly based on § 355 BGB. This article generally governs the right of withdrawal for consumer contracts, along with specific provisions that regulate, for instance, consumer credit contracts[1238] or doorstep selling.[1239]

Two cases, although predating the incorporation of the CRD into German law, deserve mention here because they involve online contracts.[1240] In one case, the BGH determined that various alterations made by the trader to the standardised withdrawal information form, such as modifications to its layout, font size, and content, were not allowed.[1241] In particular, the trader was not allowed to rearrange the information form by merging information about the right of withdrawal and its consequences. These should have been presented as separate sections with different headings, rather than combined into a single section titled "*The right of withdrawal*". Moreover, although minor deviations in terms of format and font size were generally acceptable, the BGH emphasised that this did not include using an excessively small font size, which could make it difficult for an average consumer to read the information.[1242] Finally, the BGH held that the trader should not have used the legal term "*Consumer*" without further explanation, but the personal pronoun "*You*", as the legal example intended. It is noteworthy that Wendehorst continues to refer to this case while examining the standardisation of withdrawal instructions within the realm of online contracting,[1243] despite it being decided before the implementation of the CRD.

In another case, the trader modified the text of the standardised information form, specifically focusing on the section pertaining to the information about the commencement of the withdrawal period.[1244] Firstly, the trader did not specify that the calculation of the withdrawal period begins only when the consumer receives the information form in writing. Secondly, the trader neglected to include all the legal grounds upon which the calculation of the withdrawal period could be based. The BGH determined that these modifications of the content of the standardised information form obscured the clarity and completeness of the information regarding the commencement of the withdrawal period.

These two cases illustrate that the standardisation of information regarding the right of withdrawal in online contracts aimed to improve the understandability of this information for an average consumer. This suggests that the standardised withdrawal instructions intend to facilitate **substantive transparency** of the information on

1238. See, e.g., BGH 13 January 2009, XI ZR 118/08, NJW-RR 2009, 709; BGH 10 March 2009, XI ZR 33/08, NJW 2009, 3572; BGH 23 June 2009, XI ZR 156/08, NJW 2009, 3020, 785; BGH 12 July 2016, XI ZR 564/15, BKR 2016, 463.
1239. See, e.g., BGH 4 July 2002, I ZR 55/00, BKR 2002, 872; BGH 2 February 2011, VIII ZR 103/10, NJW-RR 2011; OLG Saarbrücken 6 August 2015, 4 U 156/14, NJW-RR 2016, 630.
1240. See, e.g., BGH 9 December 2009, VIII ZR 219/08, NJW 2010, 989; BGH 1 December 2010, VIII ZR 82/10, NJW 2011, 1061.
1241. BGH 1 December 2010, VIII ZR 82/10, NJW 2011, 1061.
1242. Ibid.
1243. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 51-56.
1244. BGH 9 December 2009, VIII ZR 219/08, NJW 2010, 989.

the right of withdrawal in German law. In the mentioned cases, the BGH examined the changes traders made to the standardised information form in terms of their impact on the comprehensibility of the information on the right of withdrawal for an average consumer.[1245] Still, it remains to be seen whether German courts will adopt the same approach when evaluating traders' compliance with the standardised withdrawal instructions introduced after the implementation of the CRD. Some German scholars appear to rely on case law from different legal areas that predate the CRD's implementation, expecting that German courts, especially the BGH, will uphold the same approach towards assessing the transparency of the standardised withdrawal instructions.[1246]

3.3.4. Contractual consequences of a breach of transparency

The CRD requires Member States to adopt sanctions for breaches of national legislation enforcing its provisions, including the provisions regulating the transparent disclosure of information to consumers. These sanctions must be effective, proportionate, and dissuasive.[1247] Busch notes that the provisions of German law implementing the CRD rarely specify sanctions.[1248] Scholars point out that these sanctions are derived from general provisions of private law, which means that violations of a trader's obligations to provide pre-contractual information can result in claims for damages based on *culpa in contrahendo* or claims for injunctive relief.[1249]

The CRD has established specific penalties for violations of information obligations relating to certain aspects of online contracts, and these penalties have also been incorporated into German law. For example, if traders fail to inform consumers about additional costs beyond the agreed remuneration for the trader's main contractual obligation, consumers are not required to bear these costs.[1250] Furthermore, if the trader fails to inform the consumer about their right of withdrawal, the withdrawal period will not commence until the trader fulfils their duty to provide information. This grants the consumer the right to withdraw from

1245. Ibid. See also BGH 1 December 2010, VIII ZR 82/10, NJW 2011, 1061.
1246. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 51-56; Recht der elektronischen Medien/ Schirmbacher, 4. Aufl. 2019, EGBGB Art. 246a Rn 146.
1247. Article 24(1) CRD.
1248. Christoph Busch, 'Implementation of the Consumer Rights Directive in Germany' (2014) 2 *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 121.
1249. MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 154; Christoph Busch, 'Implementation of the Consumer Rights Directive in Germany' (2014) 2 *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 121; Marina Tamm, 'Informationspflichten nach dem Umsetzungsgesetz zur Verbraucherrechterichtlinie' (2014) 1 *Verbraucher und Recht* 16-17.
1250. Article 22 CCD and § 312a (2) BGB. See also MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 152, 153; Christiane Wendehorst, 'Das neue Gesetz zur Umsetzung der Verbraucherrechterichtlinie' (2014) 9 *Neue Juristische Wochenschrift* 579; Christiane Bierekoven und Andreas Crone, 'Umsetzung der Verbraucherrechterichtlinie. Neuerungen im deutschen Schuldrecht – Ein erster Überblick' (2013) 11 *Multimedia und Recht* 689; Christian Alexander, 'Die Umsetzung der Verbraucherrechte-Richtlinie und die Auswirkungen auf das Lauterkeitsrecht' (2014) *Wettbewerb in Recht und Praxis* 505.

the online contract within a period of up to 12 months and 14 days from the beginning of the withdrawal period.[1251]

These sanctions do not differentiate between breaches of information requirements and breaches of transparency and standardisation requirements. The same approach applies to breaches of transparency and standardisation requirements stemming from German law implementing the CCD, as explained in section 3.2.4. The approach to transparency breaches under national law implementing CCD and the CRD differs from the approach under German law governing standard contract terms, which envisions specific consequences for transparency violations, as explained in section 3.1.4. Nevertheless, although it is not certain whether the aforementioned sanctions apply in cases where traders fail to convey information transparently, I believe they should. Firstly, the obligation to provide clear, comprehensible, and prominent information during the conclusion of an online contract is an integral part of the trader's information obligations. Therefore, traders are not solely obliged to provide any form of information; they are obliged to provide information of a certain quality. Secondly, to uphold the objective of transparency, which aims to ensure informed consumer choice, it is necessary to penalise traders not only for failing to provide consumers with all the mandatory information, but also for providing information that consumers cannot access, read, or understand.

The CRD does appear to provide one specific sanction for the breach of transparency of information regarding online contracts, which is implemented in German law.[1252] As explained in Section 3.3.3.2., when an online order results in a payment obligation, the legislature provides specific instructions on labelling the button that triggers such an order. However, although the labelling requirements in German law align with those in the CRD, the penalty for violating them varies. While the CRD specifies that non-compliance should release the consumer from being bound by the order,[1253] German law stipulates that the contract does not enter into force.[1254] Consequently, under German law, consumers face a disadvantage as they lack the option to unilaterally enforce the contract anyway.[1255] Therefore, they are unable to, for example, reaffirm the initial conclusion of the contract and then demand

1251. Article 10 CRD; Article 356(3) BGB. See also MüKoBGB/Wendehorst, 9. Aufl. 2022, BGB § 312d Rn. 152, 153; Ruth Janal, 'Der Beginn der Widerrufsfrist im neuen Fernabsatzrecht' (2015) 2 *Verbraucher und Recht* 47.

1252. Article 8(2) CRD; § 312j (2) and (4) BGB.

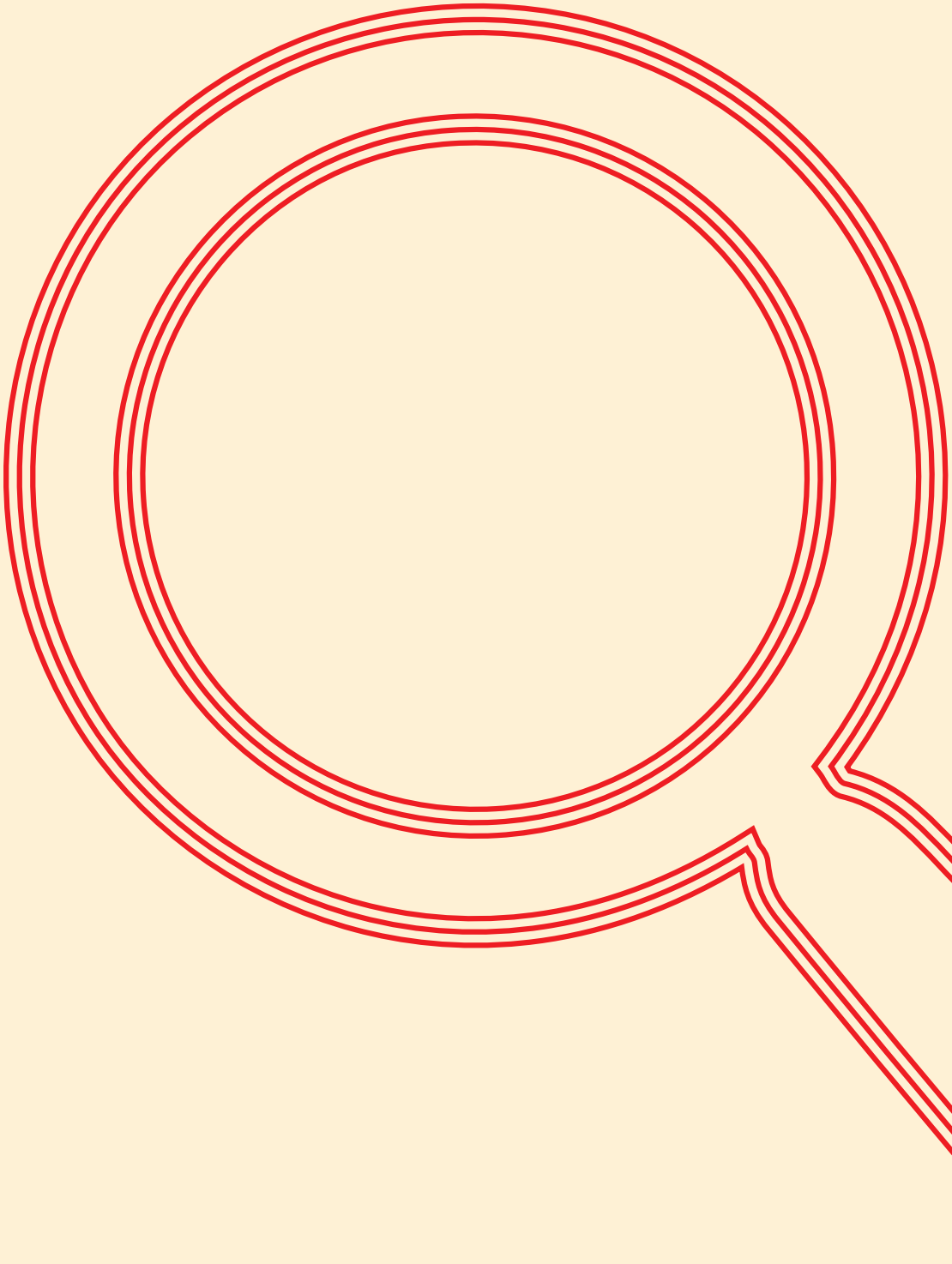
1253. Article 8(2) CRD.

1254. § 312j (4) BGB; Benjamin Raue, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 442; Alexander Weiss, 'Die Untiefen der "Button"-Lösung' (2013) 7 *Juristische Schulung* 590; Lena Rudkowski and Deborah Werner, 'Neue Pflichten für Anbieter jenseits der „Button-Lösung". Paid Content-Verträge nach der Verbraucherrechte-Richtlinie' (2012) 11 *Multimedia und Recht* 714; Christiane Wendehorst, 'Das neue Gesetz zur Umsetzung der Verbraucherrechterichtlinie' (2014) 9 *Neue Juristische Wochenschrift* 579-580; Marina Tamm, 'Kostenfallen im Internet nach neuer Rechtslage' (2012) 6 *Verbraucher und Recht* 223-224, Ruth Janal, 'Alles neu macht der Mai: Erneute Änderungen im Recht der besonderen Vertriebsformen' (2012) 49 *Zeitschrift für Wirtschafts- und Bankrecht* 2317-2318.

1255. Christoph Busch, 'Implementation of the Consumer Rights Directive in Germany' (2014) 2 *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 121; Alexander Weiss, 'Die Untiefen der "Button"-Lösung' (2013) 7 *Juristische Schulung* 591.

performance of the contract at the original price if the contract does not enter into force and prices subsequently rise. This has prompted several German scholars to question the German penalty for lack of transparent information provision regarding online orders with payment obligations as being contradictory to EU legislation[1256] – a perspective with which I agree.

1256. Benjamin Raue, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 442-443; Alexander Weiss, 'Die Untiefen der "Button"-Lösung' (2013) 7 *Juristische Schulung* 590; Lena Rudkowski and Deborah Werner, 'Neue Pflichten fr Anbieter jenseits der „Button-Lösung". Paid Content-Verträge nach der Verbraucherrechte-Richtlinie' (2012) 11 *Multimedia und Recht* 714-715.



CHAPTER 4

The concept of transparency in Croatian law implementing the UCTD, the CCD and the CRD

4.1. The development of consumer protection within Croatian law

Various foreign legal systems have influenced the development of Croatian private law, as different nations and states governed Croatian territory before it gained independence in 1992.[1257] A single code regulating civil law in its entirety was only applicable during the time when the current territory of Croatia was part of the Austrian and Austro-Hungarian Empires.[1258] After their downfall, private relationships were not codified under a single, overarching legal act.[1259]

From 1978 until 2005, while Croatia was part of the Socialist Federalist Republic of Yugoslavia,[1260] the Civil Obligations Act (Zakon o obveznim odnosima 1978, or ZOO 1978) was the main instrument regulating contractual relations between natural and legal persons. The ZOO 1978 governed specific consumer contractual relationships, including instalment sale, financial leasing, and consumer credit, as well as certain consumer rights, such as the right of withdrawal.[1261] Despite the existing provisions in the ZOO 1978 that pertained to consumers, scholars highlight that the systematic development of Croatian consumer law only began during the country's EU accession process.[1262]

The introduction of the first Consumer Protection Act (Zakon o zaštiti potrošača 2003, or ZZP 2003) in 2003 marked the beginning of the development of Croatian consumer law. [1263] In just a decade, during its accession to the EU, Croatia

1257. Petar Klarić and Martin Vedriš, *Građansko pravo: Opći dio, stvarno pravo, obvezno i nasljedno pravo* (Narodne Novine 2014) 20.

1258. Ibid.

1259. Ibid, 18-19.

1260. Zakon o obveznim odnosima 1978 29/1978, 39/1985, 46/1985, 57/1989, NN 53/1991, 73/1991, 3/1994, 111/1993, 107/1995, 7/1996, 91/1996, 112/1999, 88/2001 (ZOO 1978).

1261. Marko Baretić and Siniša Petrović, 'Enforcement and Effectiveness of Consumer Law in Croatia' in Hans-Wolfgang Micklitz and Geneviève Saumier (eds) *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 203; Marko Baretić, 'Zaštita potrošača u Republici Hrvatskoj nakon ulaska u Europsku Uniju – jesmo li implementacijom europskog prava izgradili sustav zaštite potrošača?' in Thierry Bourgoignie and Tatjana Jovanić (eds) *Strengthening consumer protection in Serbia/Jačanje zaštite potrošača u Srbiji* (Liber Amicorum Svetislav Taboroši 2013) 67; Emilia Mišćenić, 'Usklađivanje prava zaštite potrošača u Republici Hrvatskoj' (2013) 4(1) *Godišnjak Akademije pravnih znanosti Hrvatske* 146-147.

1262. Marko Babić, 'Zaštita prava potrošača i izvori trgovačkog prava' (2015) 9(1) *Poslovna izvrsnost* 75; Marko Baretić, 'Zaštita potrošača u Republici Hrvatskoj nakon ulaska u Europsku Uniju – jesmo li implementacijom europskog prava izgradili sustav zaštite potrošača?' in Thierry Bourgoignie and Tatjana Jovanić (eds) *Strengthening consumer protection in Serbia/Jačanje zaštite potrošača u Srbiji* (Liber Amicorum Svetislav Taboroši 2013) 67; Emilia Mišćenić, 'Usklađivanje prava zaštite potrošača u Republici Hrvatskoj' (2013) 4(1) *Godišnjak Akademije pravnih znanosti Hrvatske* 145-146; Dunja Šarić, 'Dodatne obveze trgovaca kod sklapanja ugovora na daljinu' (2016) 6 *Računovodstvo i financije*; Ana Pošćić, 'Zaštita potrošača u hrvatskom pravu – dobar ili loš primjer zakonodavstva' (2004) 9 *Pravo i porezi* 82-83; Ivica Crnić, 'Zaštita prava potrošača i novi Zakon o obveznim odnosima' (2006) 45(6) *Pravo u gospodarstvu* 170-173; Zvezdan Čadjenović, Emilia Miscenic, Jadranka Dabović-Anastasovska, Nada Dollani, Nenad Gavrilović, Marija Karanikić Mirić, Zlatan Meškić and Neda Zdraveva, 'EU Consumer Contract Law' (2010) 3 *Civil Law Forum for South East Europe-Collection of studies and analyses* 424.

1263. Zakon o zaštiti potrošača NN 96/2003. For comments on the introduction of the ZZP 2003 see Marko Baretić, 'Zaštita potrošača u Republici Hrvatskoj nakon ulaska u Europsku Uniju – jesmo

has adopted a multitude of consumer protection rules.[1264] It not only created a legal framework but also started developing a consumer policy by adopting various consumer protection programmes. These national programmes identify the most relevant aspects of consumer protection that need attention during a specific period. For instance, the first National programme for consumer protection 2005-2006 focused on developing consumer law and policy, as well as building institutions.[1265] The following programmes focused on enhancing consumer protection in important sectors, including finance, banking, health, food safety, environment, and tourism,[1266] as well as consumer education, information, and empowerment.[1267]

The current programme, which spans from 2021 to 2024, aims to further develop tools that will enable consumers to easily exercise their rights.[1268] The programme acknowledges that the Covid-19 pandemic unveiled existing flaws in the consumer protection system, resulting in a violation of rights for every fifth citizen. Additionally, it highlights the influence of digitalisation on consumer rights and emphasises the necessity of transparent information regarding online products and services, along with empowering consumers to make sustainable consumption decisions. Lastly, considering that Croatia entered the Eurozone on 1st January 2023, the programme emphasised the significance of minimising the impact of the transition to the euro on prices and informing consumers about the modalities and consequences of this transition.

Despite efforts to strengthen consumer protection in Croatia, commentators question whether Croatia has succeeded in building a coherent system of consumer protection.[1269] Given the significant amount of consumer legislation that needed to be introduced within a limited timeframe, as well as its frequent modifications, it is open to debate whether Croatia has successfully aligned this legislation with the existing legal framework and the needs of Croatian consumers.[1270] Croatian consumer law is fragmented and often challenging to navigate. There is a multitude of consumer protection rules that can be found in different legal sources, which vary

---

li implementacijom europskog prava izgradili sustav zaštite potrošača?' in Thierry Bourgoignie and Tatjana Jovanić (eds) Strengthening consumer protection in Serbia/Jačanje zaštite potrošača u Srbiji (Liber Amicorum Svetislav Taboroši 2013) 67-68; Emilia Mišćenić, 'Usklađivanje prava zaštite potrošača u Republici Hrvatskoj' (2013) 4(1) Godišnjak Akademije pravnih znanosti Hrvatske 147.

1264. Marko Baretić, 'Je li europsko uređenje ugovornog prava zaštite potrošača optimalni regulacijski okvir' in Jakša Barbić (ed) *Zaštita potrošača u Republici Hrvatskoj* (Modernizacija prava, knjiga 29 2016) 73-75.

1265. Nacionalni program zaštite potrošača za razdoblje 2005.-2006. NN 31/2005.

1266. Nacionalni program zaštite potrošača za razdoblje 2007.-2008. NN 84/2007; Nacionalni program zaštite potrošača za razdoblje 2009.-2012. NN 30/2010.

1267. Nacionalni program zaštite potrošača za razdoblje od 2013. do 2016. godine NN 90/2013; Nacionalni program zaštite potrošača za razdoblje od 2017. do 2020. godine NN 20/2018.

1268. Nacionalni program zaštite potrošača za razdoblje od 2021. do 2024. godine NN 29/2021.

1269. Marko Baretić, 'Nepoštene odredbe u potrošačkim ugovorima s posebnim osvrtom na ugovore banaka i osiguravajućih društava' in Marko Baretić and others *Obveze trgovaca u sustavu zaštite potrošača* (Narodne Novine 2003) 73; Emilia Mišćenić, 'Usklađivanje prava zaštite potrošača u Republici Hrvatskoj' (2013) 4(1) *Godišnjak Akademije pravnih znanosti Hrvatske* 150-155.

1270. Marko Baretić, 'Nepoštene odredbe u potrošačkim ugovorima s posebnim osvrtom na ugovore banaka i osiguravajućih društava' in Marko Baretić and others *Obveze trgovaca u sustavu zaštite potrošača* (Narodne Novine 2003) 73.

in terms of hierarchy. However, the relationship between these sources is not always apparent or clear.[1271] For instance, the conclusion of a consumer credit agreement may, at the same time, be subject to the provisions of the Consumer Credit Act (Zakon o potrošačkom kreditiranju, or ZPK),[1272] the Credit Institutions Act (Zakon o kreditnim institucijama, or ZKI),[1273] the currently applicable Consumer Protection Act (Zakon o zaštiti potrošača 2022, or ZZP 2022)[1274] and the Civil Obligations Act (Zakon o obveznim odnosima, or ZOO)[1275].[1276] Determining which law applies to a specific case, while ensuring that its interpretation remains in line with the requirements of EU law, is not a simple task.

Prior to the implementation of dedicated consumer legislation, certain obligations concerning information were present in general contract law and applied to consumer contracts. For instance, during that period, it was feasible to infer these information obligations from the principle of good faith, which is a fundamental aspect of contract law. According to Gorenc, this principle establishes various obligations beyond the primary contractual duties, including obligations pertaining to providing information.[1277] The principle of good faith entails the parties behaving in a trusting and well-intentioned manner towards one another, keeping each other informed about the status of their contract, avoiding hypocritical conduct, being open and honest when entering into the contract and being committed to fully and properly fulfilling their contractual obligations, among other things.[1278]

Thus, the origins of (pre-)contractual consumer information can be traced back to general contract law, which mandates parties to act in an open and honest manner when entering into a contract and to consistently communicate relevant information to the other party throughout the contractual agreement.[1279]

1271. Ivica Crnić, 'Zaštita prava potrošača i novi Zakon o obveznim odnosima' (2006) 45(6) *Pravo u gospodarstvu* 172-173; Marko Baretić, 'Je li europsko uređenje ugovornog prava zaštite potrošača optimalni regulacijski okvir' in Jakša Barbić (ed) *Zaštita potrošača u Republici Hrvatskoj* (Modernizacija prava, knjiga 29 2016) 88, 91.

1272. Zakon o potrošačkom kreditiranju NN 75/2009, 112/2012, 143/2013, 147/2013, 9/2015, 78/2015, 102/2015, 52/2016, 128/2022 (ZPK).

1273. Zakon o kreditnim institucijama NN 159/2013, 19/2015, 102/2015, 15/2018, 70/2019, 47/2020, 146/2020, 151/2022 (ZKI).

1274. Zakon o zaštiti potrošača NN 19/2022, 59/23 (ZZP 2022).

1275. Zakon o obveznim odnosima N 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23 (ZOO).

1276. Marko Baretić, 'Je li europsko uređenje ugovornog prava zaštite potrošača optimalni regulacijski okvir' in Jakša Barbić (ed) *Zaštita potrošača u Republici Hrvatskoj* (Modernizacija prava, knjiga 29 2016) 91-92.

1277. Vilim Gorenc, *Zakon o obveznim odnosima s komentarom* (Računovodstvo, revizija i financije Plus 1998) 11. The author calls this the additional function of the principle of good faith. Besides this function, he recognises the principle's concretisation function (answers the question how to fulfil the obligation; it does not suffice to read the contract literally, one must take into account the purpose of the contractual relationship), its limitation function (parties must restrain themselves whilst exercising their rights) and its correction function (allows for the correction of the contract's deficiencies or the correction of its content in cases of significant change of circumstances).

1278. Vilim Gorenc, *Zakon o obveznim odnosima s komentarom* (Računovodstvo, revizija i financije Plus 1998) 11.

1279. Marko Baretić, 'Nepoštene odredbe u potrošačkim ugovorima s posebnim osvrtom na ugovore banaka i osiguravajućih društava' in Marko Baretić and others *Obveze trgovaca u sustavu zaštite potrošača* (Narodne Novine 2003) 71-72.

Despite these information obligations, the duty to offer transparent consumer information has been incorporated into Croatian legislation by adopting EU law.[1280] This duty is based on the notion that consumers are weaker parties vis-à-vis traders due to their limited bargaining power and knowledge, and that providing them with comprehensive information can empower them. Baretić recalls that extensive traders' information obligations are one of the most important instruments of consumer law.[1281] Because consumers suffer from an information deficit, traders must give them detailed information on various aspects of the contract.[1282] At the same time, traders must ensure that they provide consumers with information in a clear, understandable and visible, i.e., transparent, manner.[1283] Currently, information obligations and transparency requirements can be found in various national acts that transpose European consumer law across sectors including banking and finance, insurance, e-commerce, and others.[1284] Furthermore, the current National programme for consumer protection emphasises the importance of (transparent) consumer information, particularly in the online environment.[1285]

In the Croatian legal system, case law does not carry the same legal weight as a precedent and is considered only as an indirect source of law.[1286] Also, the ability to comprehend and research the development of Croatian case law in consumer law is hindered by the fact that national case law is not consistently published and accessible online. Considering this constraint, this chapter examines the interpretation and evaluation of various transparency requirements using the available case law and explores the extent to which the content of these requirements converges in different consumer law domains.

1280. As Mišćenić points out, special features of consumer law distinguish it from the general law of obligations, which has a subsidiary application in B2C relationships. Consumers, like other contracting parties, can be protected through the law of obligations. However, it is important to note that the law of obligations is based on different principles. While the law of obligations emphasises contractual freedom, consumer law emphasises the necessity of protecting consumers – the weaker contractual parties – through special measures such as the right of withdrawal. See Emilia Mišćenić, 'Usklađivanje prava zaštite potrošača u Republici Hrvatskoj' (2013) 4(1) *Godišnjak Akademije pravnih znanosti Hrvatske* 154. On how weaker party protection limits contractual freedom see Marko Baretić, 'Je li europsko uređenje ugovornog prava zaštite potrošača optimalni regulacijski okvir' in Jakša Barbić (ed) *Zaštita potrošača u Republici Hrvatskoj* (Modernizacija prava, knjiga 29 2016) 75-77.

1281. Marko Baretić, 'Je li europsko uređenje ugovornog prava zaštite potrošača optimalni regulacijski okvir' in Jakša Barbić (ed) *Zaštita potrošača u Republici Hrvatskoj* (Modernizacija prava, knjiga 29 2016) 78.

1282. Ibid.

1283. Ibid.

1284. Ibid, 82-91.

1285. Nacionalni program zaštite potrošača za razdoblje od 2021. do 2024. godine NN 29/2021.

1286. Petar Klarić and Martin Vedriš, *Građansko pravo: Opći dio, stvarno pravo, obvezno i nasljedno parvo* (Narodne Novine 2014) 23.

4.2. The concept of transparency in Croatian law implementing the UCTD

4.2.1. The development of the transparency concept

4.2.1.1. The implementation of the UCTD's transparency requirement in Croatian law

Croatia incorporated the UCTD into its legal system ten years prior to joining the EU through the ZZP 2003.[1287] With regard to the transparency, the ZZP 2003 envisaged that the unfairness of core contract terms could not be examined if said terms were plain ("*jasan*"), easily intelligible ("*lako razumljiv*") and easily noticeable ("*lako uočljiv*").[1288] The same requirements applied to all written contract terms.[1289] The ZOO 2003 mandated the interpretation of ambiguous ("*dvojben*") or unintelligible ("*nerazumljiv*") contract terms in a manner more favourable for the consumer, except in cases of collective redress.[1290]

The Consumer Protection Act 2007 (Zakon o zaštiti potrošača 2007, or ZZP 2007)[1291,1292] replaced the ZZP 2003. It retained the same rule regarding the interpretation of ambiguous or unintelligible contract terms[1293] but slightly modified the transparency requirements for contract terms. Namely, unlike the ZZP 2003, which imposed the same transparency requirements to all contract terms, the ZZP 2007 envisaged that core contract terms had to be **plain** ("*jasan*"), **easily intelligible** ("*lako razumljiv*") and **noticeable** ("*uočljiv*").[1294] In relation to written contract terms, the ZZP 2007 stipulated that these terms had to be **plain** ("*jasan*"), **intelligible** ("*razumljiv*") and **easily noticeable** ("*lako uočljiv*").[1295] Despite numerous changes in the law,[1296] the regulation of transparency has remained unchanged.

1287. Zakon o zaštiti potrošača NN 96/2003 (ZZP 2003). See Marko Baretić, 'Zaštita potrošača u Republici Hrvatskoj nakon ulaska u Europsku Uniju – jesmo li implementacijom europskog prava izgradili sustav zaštite potrošača?' in Thierry Bourgoignie and Tatjana Jovanić (eds) *Strengthening consumer protection in Serbia/Jačanje zaštite potrošača u Srbiji* (Liber Amicorum Svetislav Taboroši 2013) 67; Ivica Crnić, 'Zaštita prava potrošača i novi Zakon o obveznim odnosima' (2006) 45(6) *Pravo u gospodarstvu* 196-197.

1288. Article 84 ZZP 2003.

1289. Article 85 ZZP 2003.

1290. Article 86 ZZP 2003.

1291. Zakon o zaštiti potrošača NN 79/2007 (ZZP 2007).

1292. Marko Babić, 'Zaštita prava potrošača i izvori trgovačkog prava' (2015) 9(1) *Poslovna izvrsnost* 76.

1293. Article 101(1) ZZP 2007.

1294. Article 99 ZZP 2007.

1295. Article 100 ZZP 2007.

1296. Although the ZZP 2007 was amended in 2009, 2012, and 2013, none of the changes concerned transparency. See Zakon o izmjenama i dopunama Zakona o zaštiti potrošača NN 79/2009, Zakon o izmjenama i dopunama Zakona o zaštiti potrošača NN 78/2012, and Zakon o izmjenama Zakona o zaštiti potrošača NN 56/2013. Furthermore, the regulation of the transparency remained unaltered after the introduction of the Consumer Protection Act 2014 (Zakon o zaštiti potrošača 2014, or ZZP 2014) and its amendments in 2015 and 2019. See Zakon o zaštiti potrošača NN 41/14, Zakon o izmjenama i dopunama Zakona o zaštiti potrošača NN 110/2015, and Zakon o izmjenama i dopunama Zakona o zaštiti potrošača NN 14/2019.

Hence, the currently applicable ZZP 2022, regulates transparency in the same way as the ZZP 2007.[1297]

It is worth mentioning that the ZZP 2022 expresses transparency in a different manner compared to the Croatian language version of the UCTD.[1298] While both legal sources require contract terms to be plain and intelligible, the ZZP 2022 introduces the requirement of **noticeability**. Moreover, the ZZP 2022 mandates that core contract terms are **easily** intelligible and that written contract terms are **easily** noticeable. Both approaches can be seen as aiming to enhance consumer protection against non-transparent contract terms to a greater extent than the UCTD.[1299] Since the UCTD is a minimum harmonisation directive, Member States are allowed to adopt higher consumer protection standards than what the UCTD requires. I will analyse whether this is the situation in Section 4.2.3.

4.2.1.2. Differences between the transparency concept under the UCTD and the ZZP 2022

The Croatian legislature did not provide any explanation of requirements of plainness, intelligibility, and noticeability prior[1300] to or after their adoption. Due to the lack of guidance, it is unclear why the Croatian legislature implemented the requirement of noticeability and why it differentiated between contract terms that need to be noticeable/intelligible and those that need to be easily noticeable/intelligible. It is also uncertain whether these solutions have any implications for the interpretation and evaluation of transparency, and if they do, what those implications are.

Scholars indicate that the legislature may have introduced the requirement of noticeability in order to ensure that traders would not attempt to draft terms in fine print or conceal important contract terms within less significant text.[1301] Crnić associates the requirement of noticeability solely with the font size of contract terms.[1302] He asserts that, by requiring traders to ensure that their terms are easily visible, the legislature attempted to counter the practice of traders drafting standard contract terms in smaller font size than the rest of the contract terms. Miščenić believes that, by addressing such disclosure techniques through the requirement for

1297. See Articles 56, 57 and 58 ZZP 2022.

1298. Articles 4(2) and 5 of the Croatian language version of the UCTD, available here: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:31993L0013&from=EN (accessed 8 May 2024).

1299. Emilia Mišćenić and Silvija Petrić, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima* (Narodne Novine 2020) 137-138.

1300. Documents pertaining to the adoption of the ZZP 2007, which originally formulated the transparency requirements in their current form, can be found here: https://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=7834 (accessed 8 May 2024).

1301. Marko Baretić, 'Nepoštene odredbe u potrošačkim ugovorima s posebnim osvrtom na ugovore banaka i osiguravajućih društava' in Marko Baretić and others *Obveze trgovaca u sustavu zaštite potrošača* (Narodne Novine 2003) 74-75, 83-84; Emilia Mišćenić and Silvija Petrić, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima* (Narodne Novine 2020) 137-138.

1302. Ivica Crnić, 'Zaštita prava potrošača i novi Zakon o obveznim odnosima' (2006) 45(6) *Pravo u gospodarstvu* 198.

easily noticeable contract terms, the Croatian legislature has introduced a higher level of consumer protection than EU law envisages.[1303]

At first glance, the ZZP 2022 appears to imply that all written terms of a contract must be easily noticeable, *except for core terms*.[1304] Scholars who have commented on the requirement of noticeability have not yet addressed the question of what distinguishes noticeable contract terms from easily noticeable ones, and why core terms may be presented in a less noticeable manner than other terms. The High Commercial Court possibly supported this legislative distinction regarding the requirement of noticeability, as it clarified that the level of noticeability necessary for core contract terms decreases over time.[1305] Namely, it can be recalled that the distinction between noticeable and easily noticeable contract terms was absent in the ZZP 2003. ZZP 2003 required traders to ensure that all contract terms, including core terms, were easily noticeable.[1306] Unfortunately, the High Commercial Court did not consider the potential implications of this alteration.

To my mind, the distinction between noticeable and easily noticeable contract terms might be misplaced and futile. It seems peculiar that the ZZP 2022 stipulates that all written contract terms, *other* than core contract terms, should be easily noticeable. It would make more sense if the trader was required to exert even more effort in drawing the consumer's attention to the core terms of a contract, such as price and subject matter, rather than ancillary terms regulating, for example, warranty. Perhaps the difference between the regulation of the noticeability requirement in the ZZP 2003 and the ZZP 2022 can be explained by the possibility that the Croatian legislature might have simply forgotten to remove the adjective 'easily' for written contract terms or neglected to add it for core contract terms. It is also plausible that the legislature assumed consumers primarily focus on core contract terms and thus concluded that such terms do not require additional emphasis. In any case, the distinction between noticeable and easily noticeable contract terms may be futile, as the ZZP 2022 mandates that **all written contract terms** should be easily noticeable. In my view, this should encompass written core contract terms as well, notwithstanding the textual differences.

The ZZP 2022 also distinguishes between the level of intensity of the intelligibility requirement. As previously mentioned, the ZZP 2022 mandates that all written contract terms must be intelligible, but it specifically emphasises that core contract terms should be easily intelligible. The ZZP 2003, the legislation that implemented the UCTD, did not make such a distinction but simply required that both core contract terms and written terms in general were easily intelligible.[1307] The difference in the regulation of intelligibility in the ZZP 2022, akin to the noticeability requirement,

1303. Emilia Miščenić, 'Unfair Contract Terms in the Contract Law of the Republic of Croatia' (2012) 1 *Civil Law Forum for South East Europe, Collection of Studies and Analyses - Second Regional Conference* 209.
1304. Articles 56 and 57 ZZP 2022.
1305. High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13.
1306. Articles 85 and 86 ZZP 2003.
1307. Articles 84 and 85 ZZP 2003.

may stem from the possibility that the national legislature inadvertently omitted the adjective 'easily' for written contract terms or mistakenly added it for core contract terms. However, the increased intensity of the intelligibility requirement could also be interpreted as setting a higher standard for the clarity of core contract terms, thus potentially affording Croatian consumers greater protection compared to the UCTD.

Although the Croatian legislature did not provide guidance on the meaning of the requirements of plainness, intelligibility, and noticeability, Croatian courts have interpreted them in recent years. Therefore, the following sections will explore the objective of the transparency concept in Croatian law regarding standard contract terms and attempt to concretise this concept through an analysis of relevant case law.

4.2.2. The objective of transparency

In Croatian law on unfair contract terms control, the objective of enhancing transparency appears to be centred around **facilitating the consumer's decision-making process**.[1308] To my knowledge, there is no explicit mention of the objective to increase market transparency in Croatian unfair contract terms law. This omission could be attributed to the fact that the concept of transparency has primarily been discussed by civil courts, which seem to prioritise individual consumer protection rather than fostering a transparent (EU) market. It should be noted that Croatian case law addressing the objective of transparency in the realm of unfair contract terms control primarily concerns the transparency of information on credit agreements. This case law began to develop significantly from 2012 onwards. This progress was prompted by the *Franak* case, which concerned legal proceedings initiated by the consumer organization "Potrošač – Hrvatski savez udruga za zaštitu potrošača" (Potrošač) against several banks for infringing consumers' collective interests.[1309] I discuss this case law in depth in Section 4.2.3.

The *Franak* case demonstrates the importance of aiding consumers in their decision-making process, both before the conclusion of a contract and during its execution. In this case, the Croatian Commercial Court, the Supreme Court, and the Constitutional Court have emphasised the importance of providing consumers with transparent information prior to entering into a contract.[1310] The courts have deemed this information crucial in shaping the consumer's decision to enter into a contractual relationship. Therefore, it was of utmost importance that consumers received transparent information, that is, information that was plain, intelligible, and noticeable, before concluding a contract.

Furthermore, after the conclusion of the contract, transparency continues to hold significance as consumers must be able to rely on contractual information to assert their rights. This objective of transparency is evident in the deliberation of

1308. Darko Marečić, 'Nepoštene ugovorne odredbe u potrošačkim ugovorima' (2012) 11 *Pravo i porezi* 50.
1309. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012.
1310. Ibid. Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14; Constitutional Court of the Republic of Croatia, judgement of 13 December 2016, U-III-2521/2015.

the Supreme Court in the *Franak* case. When evaluating the transparency of variable interest rate clauses in consumer credit contracts, the Supreme Court determined that these clauses did not objectively establish the criteria for altering interest rates.[1311] This was problematic because consumers should have been able to ascertain whether a change in the interest rate was justified based on these criteria.

Throughout this thesis, I argue that traders should offer consumers information that is both formally and substantively transparent to aid them in making informed decisions. This implies that consumers should be able to access, read, and understand the information provided. The following section examines whether the interpretation and evaluation of transparency in Croatian unfair contract terms law adhere to both aspects of transparency.

4.2.3. The interpretation and assessment of transparency

4.2.3.1. The impact of the Franak case on the interpretation and assessment of transparency of standard contract terms

To my knowledge, Croatian case law shedding light on the interpretation and evaluation of the requirements for plainness, intelligibility, and noticeability within the realm of unfair contract terms predominantly centres on the transparency of information pertaining to credit agreements. In my previous work, I examined the evolution of the interpretation and assessment of transparency in the context of the pivotal *Franak* case, which is arguably the most significant Croatian case on the subject to date.[1312] Accordingly, some sections of this chapter include findings from my previously published research.

As mentioned above, in the *Franak* case, the consumer organisation, Potrošač, initiated court proceedings against eight banks in 2012 for breaching the collective interests of consumers.[1313] The *Franak* case commenced at the Commercial Court in Zagreb and went through appeals at the High Commercial Court in Zagreb and the Supreme Court. It also involved a constitutional complaint before the Constitutional Court, and ultimately concluded with a retrial at the High Commercial Court in Zagreb.[1314] While the Franak case involved various legal questions, my analysis is specifically focused on interpreting and evaluating transparency and its role in assessing the fairness of credit contract terms, in line with the topic of this thesis.[1315]

1311. Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.

1312. See Mia Junuzović, 'Transparency of (Pre-)Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?' (2018) 14 *Croatian Yearbook of European Law and Policy* 69-98, and Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 307-333.

1313. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012.

1314. For a comprehensive analysis of all judgements and decisions Croatian courts adopted in the *Franak* case see Emilia Mišćenić and Silvija Petrić, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima* (Narodne Novine 2020) 163-207.

1315. For an analysis of the case, which focuses on the notion of consumer credit, consequences of unfairness and core contract terms, see Emilija Miščenić, 'Croatian case Franak: Effective or

Before delving deeper into the interpretation and assessment of transparency by Croatian courts in the *Franak* case and subsequent case law, it is essential to explain the central issues in this case. The case law falling within the scope of my analysis discusses the transparency and fairness of two specific types of contractual terms – terms that provide for a variable interest rate (variable clauses) and terms that link the value of the contractual obligation to Swiss francs (currency clauses).[1316] Variable clauses allowed banks to unilaterally adjust interest rates without specifying clear and objective criteria for such adjustments.[1317] In some cases, the criteria for altering interest rates were laid down in the bank's general terms and conditions,[1318] whereas in other instances, these criteria were set by the bank's management after the contract was concluded.[1319]

Regarding currency clauses, it is important to highlight that tying the value of a contractual obligation to a foreign currency was not only explicitly permitted under Croatian law[1320] but also a widespread practice.[1321] This practice became popular due to concerns about the stability of the national currency, the Croatian kuna, which was introduced in 1994 after the country gained independence. Following its introduction, the Croatian National Bank initially pegged the kuna to the German mark and later, when the mark ceased to exist, to the euro.[1322] The aim of pegging the national currency to a secure foreign currency was to protect the real value of obligations, providing advantages for both banks and consumers.[1323] Consequently, it was considered a safer and more popular choice to save and borrow in foreign currencies such as the German mark, euro, and Swiss franc.

A significant portion of the credit agreements involved in the *Franak* case featured both variable and currency clauses. Due to the continuous appreciation of the Swiss franc, the value of monthly credit instalments increased significantly.[1324] The severity of this situation prompted the collective action in the *Franak* case. The interpretation and evaluation of the transparency of variable and currency clauses were pivotal in this case,

"Defective" Protection of Consumer Rights?' (2016)5 *Harmonius Journal of Legal and Social Studies in South East Europe* 184-209.

1316. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012; High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13; Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.

1317. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012.

1318. Ibid.

1319. Ibid.

1320. Article 53 ZOO.

1321. Tatjana Josipović and Hano Ernst, 'Recent crisis-motivated reforms in Croatian private law' 2015 13(1) *Evropski Pravnik* 78.

1322. Ibid, 78-79.

1323. Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.

1324. Studies suggest an average increase in monthly repayments for households of around 220 euros. For more information on the economic impact of these loans, see Ana Kundid Novokmet, 'Troubles with the Chf Loans in Croatia: The Story of a Case Still Waiting to Be Closed' (2021) 14(2) *Journal of Risk and Financial Management* 3-5.

as the courts deemed both types of terms to be core contract terms.[1325] Therefore, to assess their fairness, the courts first needed to establish that they lacked transparency.

The study of the *Franak* case within this thesis serves a dual purpose. Firstly, it illustrates how different national courts interpret and evaluate the transparency of standard contract terms. Unlike the CJEU or German courts, Croatian courts have treated the requirements of plainness, intelligibility, and noticeability as distinct transparency requirements with separate meanings. The following sections reflect this approach and discuss these requirements individually. Secondly, as I have argued in my previous work, the *Franak* case demonstrates the challenges faced by national courts in determining how to interpret and evaluate the transparency of standard contract terms in the absence of clear guidance at the EU level.[1326] In particular, the first judgment in this case predates the CJEU's decision in *Kasler*, which underscored the importance of assessing both the formal and substantive transparency of standard contract terms.[1327] The final decision in the *Franak* case came a few months after the CJEU's ruling in the *Andriciuc* case,[1328] which provided specific guidance on the (pre-)contractual information that national courts should consider when assessing whether creditors have adequately informed consumers about the risks associated with currency clauses. Both of these cases dealt with key issues discussed in the *Franak* case, which I will examine in Section 4.2.3.4.

4.2.3.2. The requirement of plainness

In the *Franak* case, Croatian courts paid scant attention to the requirement of plainness. None of the courts involved in the case provided a comprehensive explanation of whether or why they believed variable and currency clauses fulfilled the plainness requirement. The Commercial Court, which initially decided the case, did not interpret the plainness requirement but focused solely on assessing the noticeability and intelligibility requirements.[1329] Conversely, the High Commercial Court and the Supreme Court, which heard the case in subsequent instances, briefly addressed the plainness requirement. They concluded that variable clauses were considered plain because they explicitly stated the bank's discretion to modify the interest rate.[1330] Similarly, they deemed currency clauses plain because they clearly and unambiguously linked the loan's value to the Swiss franc.[1331] This line of reasoning was subsequently followed by other national courts in similar disputes.[1332]

1325. For a more detailed analysis of the nature of variable and currency clauses see Emilija Miščenić, 'Croatian case Franak: Effective or "Defective" Protection of Consumer Rights?' (2016)5 *Harmonius Journal of Legal and Social Studies in South East Europe* 202-206.

1326. Mia Junuzović, 'Transparency of (Pre-)Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?' (2018) 14 *Croatian Yearbook of European Law and Policy* 89-93.

1327. Case C-26/13 *Kásler*, points 71-75.

1328. Case C-186/16 *Andriciuc*, points 44-50.

1329. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012.

1330. Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.

1331. High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13; Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.

1332. See, for instance, Municipal Court of Rijeka, judgement of 28 September 2017, P-123/2015; Municipal Court of Zagreb, judgement of 21 October 2016, P-4459/15; Municipal Court of Zagreb, judgement

In my opinion, this indicates that the plainness requirement primarily centres on whether the content of contract terms is articulated in an unambiguous manner. For example, if the disputed variable clauses had not explicitly stated that interest rates were subject to change or that such changes were dependent on the banks' discretion, the courts may not have deemed them as plain. Therefore, it appears that the plainness requirement in Croatian law simply ensures that consumers can read contract terms. Consequently, I would consider this requirement as ensuring **formal transparency** of standard contract terms.

4.2.3.3. The requirement of noticeability

When examining the requirement of noticeability, Croatian courts have focused on the location and presentation of disputed contract terms within the contact. The first instance court in the *Franak* case examined the noticeability requirement in relation to both variable and currency clauses, while other courts have focused on examining the noticeability of currency clauses.

When assessing the noticeability of variable clauses, particularly in instances where the criteria for changing the interest rate were specified in the bank's general terms and conditions, the Commercial Court noted that some consumers did not receive these general terms and conditions.[1333] Instead, they simply acknowledged their familiarity with the terms by signing the credit agreement. However, the Commercial Court also acknowledged that the terms and conditions of the bank could be included in a credit agreement without consumers reading them, as the law assumes that consumers should have been familiar with the trader's terms and conditions if they were adequately disclosed.[1334] In relation to this matter, the Commercial Court acknowledged that certain consumers were directed to the terms and conditions of the banks, which were published on their websites or made accessible at their premises.[1335]

The courts adjudicating the *Franak* case disagreed on whether currency clauses had been sufficiently noticeable. The court of first instance believed that complex terms, such as currency clauses, required special emphasis. Inspired by the English case *Spurling v Bradshaw*,[1336] the Commercial Court ruled that banks should have warned consumers about these terms by marking them with red ink on the first page of the contract, accompanied by a red hand pointing to them.[1337] Other courts have deemed it acceptable for creditors to disclose currency clauses on the first page of the credit agreement [1338] or to refrain from concealing these clauses in the contract through headings.[1339] In addition, the courts emphasised that currency clauses had

of 25 August 2017, P-4741/16; Municipal Civil Court of Zagreb, judgement of 27 September 2017, P-7372/15.

1333. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012.
1334. Ibid.
1335. Ibid.
1336. *J Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461. I discuss this case in Chapter 4, which concerns English law.
1337. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012.
1338. High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13.
1339. High Commercial Court of the Republic of Croatia, judgement of 14 June 2018, Pž-6632/17.

not been drafted in a font size smaller than the rest of the clauses,[1340] but without further contemplating what type of font size would count as sufficiently noticeable or too small. As Croatian courts have linked the requirement of noticeability to the questions of accessibility and readability of contract terms, I would classify it as a requirement of **formal transparency**.

Another approach, observed in the rulings of the Municipal Court in Sisak, links the assessment of contract terms' noticeability with the evaluation of their understandability.[1341] This court has emphasised that the ease of noticing a contract term partly depends on how a bank presents and formulates the general terms and conditions. Moreover, the court concluded that a consumer's ability to understand the meaning of a specific term affects their ability to notice it.

Since the noticeability of contract terms also depends on consumers' ability to comprehend them, assessing whether contract terms are visually highlighted may not be sufficient to determine their noticeability. It is also important to consider whether this visual emphasis effectively draws the consumer's attention to specific terms, which depends on other factors, including how the terms are integrated into the contract, as well as their readability and comprehensibility to the consumer. Therefore, while the requirement of noticeability may not directly ensure the intelligibility of contract terms, its absence may indeed impact it.

4.2.3.4. The requirement of intelligibility

In the *Franak* case, most courts evaluated the intelligibility of variable clauses by determining whether it was reasonable to expect consumers to comprehend their economic implications.[1342] Courts have agreed that variable clauses meet the requirement of intelligibility only if they clearly specify objective criteria for interest rate changes. In this case, variable clauses failed to meet this requirement. They either listed multiple criteria for changing interest rates without clearly indicating their correlation, or they did not provide any criteria at all, leaving the decision on interest rate adjustments at the discretion of the bank.[1343] Thus, in both scenarios, the banks failed to provide consumers with contract terms that clearly and objectively outlined the criteria for changing interest rates. As a result, consumers were not provided with the necessary information to fully comprehend the economic impact of variable clauses. Subsequent case law has consistently upheld this line of reasoning.[1344] Moreover, this reasoning is in line with EU law, as the CJEU has stated

1340. High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13.
1341. Municipal Court of Sisak, judgement of 3 March 2017, P-371/15; Municipal Court of Sisak, judgement of 11 August 2017, P-357/15.
1342. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012; High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13.
1343. Ibid.
1344. See, for instance, Municipal Court of Varaždin, judgement of 12 July 2016, P-543/15, confirmed in Regional Court of Zagreb, judgement of 21 February 2017, Gž-6858/2015; Municipal Court of Zagreb, judgement of 21 November 2017, P-7241/15, confirmed in Regional Court of Slavonski Brod, judgement of 26 February 2018, Gž-59/2018; Municipal Court of Zadar, judgement of 3 December 2015, P-233/15, confirmed by Regional Court of Zadar, judgement of 23 March 2016, Gž-152/16;

on several occasions that the consumer should have the ability to anticipate and verify any contractual modifications based on the information received from the trader.[1345]

The Commercial Court, which adjudicated the case in the first instance, also found the currency clauses to be unintelligible.[1346] It noted that entering into credit agreements in foreign currency carries a significant risk, which increases with the duration of the contract. The Commercial Court then compared the risk associated with entering into credit agreements in a foreign currency linked to the national currency, such as the euro, with the risk associated with entering into the same type of agreements linked to a freely floating currency in the market, such as the Swiss franc. The Commercial Court concluded that due to the Croatian National Bank's maintenance of the peg of the kuna to the euro, contracts in euros carried significantly less risk for consumers. Conversely, contracts in another floating currency, including the Swiss franc, posed much higher risks for consumers. Furthermore, it emphasised that banks actively encouraged consumers to opt for Swiss franc loans to benefit from lower interest rates, without adequately alerting or informing them about the risks associated with fluctuations in the value of this currency in the market. As banks failed to provide consumers with adequate information about such risky currency clauses, the Commercial Court ruled that consumers could not have genuinely comprehended them.

The High Commercial Court, which heard the *Franak* case in the second instance, upheld the Commercial Court's ruling only for the part regarding the lack of transparency (and fairness) of variable clauses.[1347] Unlike the Commercial Court, the High Commercial Court deemed currency clauses to be transparent and hence concluded that their fairness could not be examined. Essentially, the High Commercial Court found that the currency clauses were comprehensible to any Croatian citizen, since they were lawful and widely used in Croatian society.[1348] This meant that an average consumer, considered reasonable, informed, and circumspect, should also be familiar with them. The Supreme Court, as a court of third instance, upheld the decision of the High Commercial Court.[1349] It is worth noting that both the High Commercial Court and the Supreme Court considered the CJEU's interpretation of the transparency requirement under the UCTD in the *Kásler* case, which was published after the initial judgment in the *Franak* case.

The Constitutional Court has determined that the Supreme Court's argumentation for excluding currency clauses from the unfairness test was insufficient, resulting in the acknowledgment of a violation of the Potrošač's right to a fair trial.[1350] Specifically, the Constitutional Court determined that while the

Municipal Court of Virovitica, judgement of 2 December 2016, P-261/16, confirmed by Regional Court of Varaždin, judgement of 6 March 2018, Gž-71/2017.

1345. See my analysis of the relevant EU case law in Section 2.1.3.1.

1346. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012.

1347. High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13.

1348. Ibid.

1349. Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.

1350. Constitutional Court of the Republic of Croatia, judgement of 13 December 2016, U-III-2521/2015.

Supreme Court's assessment of the intelligibility of variable clauses aligned with the reasoning in *Kásler*, its evaluation of the intelligibility of currency clauses did not. The Supreme Court scrutinised whether banks, both before and during the contract, supplied consumers with adequate information about variable clauses to enable them to understand their economic implications.[1351] In relation to this matter, the Supreme Court determined that the information provided by banks to consumers was inadequate and excessively technical.[1352] However, when assessing the intelligibility of currency clauses, the Supreme Court focused on the reasons behind their incorporation into the Croatian legal system and their extensive usage within Croatian society, instead of evaluating the degree to which banks adequately communicated the economic implications of these clauses to consumers.[1353]

The Constitutional Court did not contest the Supreme Court's authority to differentiate between the level of information banks should provide to consumers regarding the financial implications of variable and currency clauses. However, the Constitutional Court determined that the reasoning presented by the Supreme Court was inadequate.[1354] This is because, similar to variable clauses, banks failed to sufficiently and transparently inform consumers about the nature, meaning, and consequences of currency clauses. As a result, the Constitutional Court set aside part of the Supreme Court's decision rejecting the Potrošač's claim regarding the unfairness of currency clauses. The Constitutional Court referred this part of the case back to the Supreme Court for a retrial.[1355]

The Supreme Court acted in accordance with the decision of the Constitutional Court, annulling the portion of the High Commercial Court's ruling that deemed currency clauses transparent, and requested that court reassess thee transparency (and fairness) of these clauses.[1356] Furthermore, the Supreme Court held that the key element in this reassessment was to take into account whether the defendant banks knew or should have known how the Swiss franc would fluctuate in the future and neglected to inform consumers accordingly.

In accordance with the mandate from the Supreme Court, the High Commercial Court conducted a reassessment of the plainness, intelligibility, and noticeability of currency clauses.[1357] While it reaffirmed its previous conclusion that currency clauses were sufficiently plain and noticeable, it acknowledged that its evaluation of the intelligibility of these clauses had been narrow. This assessment focused solely on the formal and grammatical aspects of the written terms. Taking into account the legality and frequent usage of currency clauses in Croatia, the High Commercial Court determined that they were clear and thus understandable to the average consumer,

1351. Ibid.
1352. Ibid.
1353. Ibid.
1354. Ibid.
1355. Ibid.
1356. Supreme Court of the Republic of Croatia, decision of 3 October 2017, Revt-575/16.
1357. High Commercial Court of the Republic of Croatia, judgement of 14 June 2018, Pž-6632/17.

who would be aware that these contract terms make the principal amount dependent on the exchange rate of the Swiss franc against the kuna.

However, the High Commercial Court has observed that subsequent interpretations of the transparency requirement of the UCTD by the CJEU, as well as by the Croatian Constitutional Court and Supreme Court, have provided clarification that the lack of adequate pre-contractual information may also render written standard contract terms unintelligible.[1358] Therefore, the High Commercial Court concluded that it needed to investigate whether the banks had provided transparent pre-contractual information to consumers that would help them understand the financial implications of a currency clause in Swiss francs. This information should be understandable to an average consumer who, although familiar with currency clauses, may not possess expert knowledge.

Since the *Franak* case was a collective dispute, the High Commercial Court considered it necessary to restrict its investigation to the information regarding currency clauses that banks shared with all consumers through advertising.[1359] The court decided to exclude any analysis of other pre-contractual information that consumers may have received during their individual contract negotiations. The High Commercial Court observed that all the banks, in their advertisements and promotional materials, promoted the possibility of entering into credit agreements with currency clauses in various currencies. However, this information solely pertained to the initial contractual interest rate and did not include additional details, such as the risks associated with foreign exchange clauses, even though the banks were aware of these risks. Although the High Commercial Court still presumed that the average consumer understood how currency clauses functioned, it concluded that the specific contract terms incorporating these clauses were incomprehensible because consumers lacked awareness of the specific risks associated with the Swiss franc as a currency. Consequently, in the *Franak* case, both variable and currency clauses were ultimately deemed unintelligible.

Based on the Franak case and subsequent case law dealing with the same issues,[1360] it can be concluded that Croatian courts consider the requirement of intelligibility as ensuring the economic comprehensibility of contract terms for consumers, in other words, their **substantive transparency**. That being said, as mentioned in Section 4.2.3.1. and argued in my previous work, this case also demonstrates the challenges that national courts encounter when determining the components of a transparency assessment in the absence of clear criteria at

1358. Ibid.

1359. Ibid.

1360. See, for instance, Municipal Court of Varaždin, judgement of 12 July 2016, P-543/15, confirmed in Regional Court of Zagreb, judgement of 21 February 2017, Gž-6858/2015; Municipal Court of Zagreb, judgement of 21 November 2017, P-7241/15, confirmed in Regional Court of Slavonski Brod, judgement of 26 February 2018, Gž-59/2018; Municipal Court of Zadar, judgement of 3 December 2015, P-233/15, confirmed by Regional Court of Zadar, judgement of 23 March 2016, Gž-152/16; Judgement P-261/16 of the Municipal Court in Virovitica from 2 December 2016, confirmed Regional Court of Varaždin, judgement of 6 March 2018, Gž-71/2017.

the EU level.[1361] Firstly, national courts have faced difficulties in determining when consumers can reasonably be expected to understand currency clauses. As mentioned earlier, the courts generally agreed that variable clauses were not comprehensible to consumers, as they failed to provide clear, objective criteria for interest rate changes or presented multiple criteria without clarifying their interrelationship. However, due to the widespread use of currency clauses in Croatia and the general familiarity of Croatian society with such clauses, courts disagreed on when an average consumer can reasonably be expected to comprehend these clauses. In Section 4.2.3.5., I will discuss this issue further.

Secondly, national courts grappled with the question of what information banks should give to consumers in order to make currency clauses comprehensible. In the *Andriciuc* case and subsequent case law, the CJEU clarified that creditors must offer consumers clear pre-contractual information, which includes quantitative simulations, about their exposure to exchange rate risks.[1362] These simulations are intended to alert consumers about potential negative financial consequences that may arise from currency clauses.[1363] Furthermore, creditors need to ensure that the information they provide to consumers does not rely on the assumption that the exchange rate between the account currency and the payment currency will remain constant throughout the contract's duration.[1364]

However, in collective disputes such as the *Franak* case, national courts may struggle to determine what information to base their transparency assessment on, given the variation in both the quantity and quality of pre-contractual information provided by banks to individual consumers. As explained in Chapter 2, the case law of the CJEU on the transparency of currency clauses primarily focuses on defining the information that creditors must provide to consumers. National courts can certainly benefit from the increased clarity regarding the information about the risks of currency clauses that the CJEU expects creditors to provide, as a result of the development of its case law in this area. However, this case law still lacks comprehensive guidance on how creditors should transparently present this information, including considerations such as the structure, length, or complexity of the information. Without such guidance, it is not surprising that national courts adopt different approaches to interpreting and assessing the transparency of standard contract terms. This is perhaps even more true for Croatian courts, which do not yet identify themselves as European courts.[1365]

1361. Mia Junuzović, 'Transparency of (Pre-)Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?' (2018) 14 *Croatian Yearbook of European Law and Policy* 89-93, and Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 307-333.

1362. Case C-186/16 *Andriciuc*, point 50; Case C-776/19 *BNP Paribas Personal Finance*, point 73; Case C-670/20 *ERSTE Bank Hungary*, points 31-33.

1363. Case C-776/19 *BNP Paribas Personal Finance*, point 73.

1364. Case C-670/20 *ERSTE Bank Hungary*, points 31-33.

1365. Emilia Mišćenić, 'Croatian Consumer Protection Law: From Legal Approximation to Legal Fragmentation (Part I)' (2019) 23 *Studia Iuridica Toruniensia* 212.

4.2.3.5. The application of the average(?) consumer benchmark

When evaluating the intelligibility of variable and currency clauses, Croatian courts have considered whether these clauses were understandable to various groups, such as the general public, the average consumer, and financial experts. For instance, the High Commercial Court and the Supreme Court have determined that variable clauses were generally unintelligible and unintelligible to the average consumer due to their inclusion of multiple criteria for interest rate adjustments that were not adequately connected.[1366] Furthermore, various national courts have also determined that comprehending the significance and economic ramifications of variable clauses necessitates a certain level of economic and banking expertise that is exclusive to financial professionals.[1367] In contrast, concerning the currency clauses, the High Commercial Court concluded that both an average, well-informed, reasonable, careful, and circumspect consumer, as well as the Croatian public in general, should have been able to understand them, given their widespread use in society.[1368] The Commercial Court, which delivered the first ruling in the *Franak* case, determined that both the variable and currency clauses were incomprehensible to anyone other than financial experts, let alone the average consumer.[1369]

These divergent approaches of national courts do not appear to be entirely consistent with the EU benchmark of the average "*reasonably well-informed and reasonably observant and circumspect*" consumer. The average consumer benchmark, which the CJEU has consistently applied in its UCTD-based transparency case law, sets out the expected conduct of an individual model consumer rather than the general public or society as a whole.[1370] However, it is worth noting that apart from clarifying that the average consumer is not expected to possess expert knowledge or undertake legal research, UCTD-based case law lacks clear and comprehensive examples of how national courts should apply the average consumer benchmark. Nonetheless, both Croatian and EU law agree in recognising that the average consumer should not be assumed to have expert knowledge.

In its first judgement in the *Franak* case in 2015, the Supreme Court assessed the comprehensibility of currency clauses by considering a hypothetical individual who closely resembles the average consumer of the CJEU, without specifically mentioning the average consumer benchmark.[1371] The Supreme Court assessed the intelligibility of currency clauses by taking into account a reasonably circumspect model consumer. It stressed that any reasonably prudent adult, when entering into long-term credit agreements, should understand that social, particularly economic, conditions

1366. High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13; Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.
1367. Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14; Municipal Court of Rijeka, judgement of 28 September 2017, P-123/2015; Municipal Civil Court of Zagreb, judgement of 27 September 2017, P-7372/15; Municipal Court of Varaždin, judgement of 12 July 2016, P-543/15.
1368. High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13.
1369. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012.
1370. See my analysis of the application of the average consumer benchmark in the context of the UCTD in Section 2.1.3.4.
1371. Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.

that impact currency fluctuations evolve over time. Moreover, the Supreme Court expressed confidence in the awareness of Croatian consumers regarding the significance and implications of currency clauses. This confidence stemmed from the country's long-standing practice of borrowing and saving money in foreign currencies, as well as the widespread use of such clauses in everyday transactions.

The argument put forth by the Supreme Court, stating that a prudent adult should be aware of how societal and economic changes impact currency fluctuations in the market, appears to be reasonable. However, it seems that the Supreme Court has conflated the familiarity of a reasonably circumspect model consumer with currency clauses, with the comprehensibility of these clauses to said model consumer. This approach does not seem to align with EU law. It is contentious to suggest that a consumer's familiarity with certain social phenomena, such as currency clauses, should be the decisive factor in assessing the intelligibility of contract terms that contain such clauses. In fact, the CJEU's transparency case law underscores that consumers must have the ability to establish a clear connection between the information provided by the creditor and the potential negative consequences associated with contract terms.[1372]

In this context, being familiar with a social phenomenon or business practice does not grant consumers a comprehensible understanding of their specific contract; at best, it offers a general understanding. As Mišćenić and Petrić rightly emphasise that the prevalence of currency clauses in business practices does not inherently make them understandable to consumers.[1373] This holds true especially since consumers often lack the necessary knowledge of how these clauses function in real-life situations, as they do not regularly engage in credit agreements. EU law recognises this knowledge gap and seeks to address it by requiring creditors to furnish consumers with transparent information concerning the different aspects of a credit agreement, instead of expecting that consumers will independently research the meaning and potential implications of contract terms.[1374] As detailed in Section 2.1.3.2., this obligation encompasses providing consumers with information that exemplifies or illustrates the development of future costs and risks.

4.2.4. Contractual consequences of a breach of transparency

A breach of transparency under the ZZP 2022 may lead to various consequences. The first consequence is outlined in Article 58(1) of the ZZP 2022, which states that ambiguous or incomprehensible contract terms should be interpreted in a manner that is more favourable to the consumer. It is worth noting that the ZZP 2022 establishes a different interpretation rule for ambiguous contract terms compared to the UCTD. The UCTD requires that any doubts about the meaning of a contract

1372. See my analysis in Section 2.1.3.
1373. Emilia Mišćenić and Silvija Petrić, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima* (Narodne Novine 2020) 178-182, 187, 219-223.
1374. Ibid, 178-179.

term be resolved through interpretation that is most favourable to the consumer.[1375] As I explained in Section 2.1.4., this interpretation rule has resulted in different interpretations regarding its practical application. According to Willett, there are at least two potential interpretations of the rule in question. Firstly, a term can be interpreted in a way that makes it less harmful or unfair to the consumer.[1376] Secondly, a term could be interpreted in a way that makes it unfair and not binding on the consumer.[1377]

Croatian scholars argue that rather than requiring the adoption of the most advantageous interpretation, the rule in ZZP 2022 instructs judges to select the interpretation that is more advantageous to the consumer from the available interpretations of a term that is open to different meanings.[1378] This perspective aligns with the opinion of AG Hogan, who believes that the rule for interpreting ambiguous terms is primarily designed to mitigate possible harsh or unfair interpretations, rather than to enable an assessment of their unfairness.[1379] However, this approach differs from the one adopted in German law. As explained in Section 3.1.4, German law increasingly favours a two-step approach to interpret ambiguous contract terms.[1380] In the first step, courts adopt the least consumer-friendly interpretation to assess if this interpretation deems the term unfair. If the term withstands this interpretation, courts proceed to determine the term's definitive meaning by applying the most consumer-friendly interpretation in the second step. Neither the CJEU nor the Commission has confirmed whether EU law favours either of these approaches.

The second consequence of breaching transparency can be found in Article 56 of the ZZP 2022, which allows for the review of the unfairness of non-transparent core contract terms. However, as seen in the *Franak* case, different courts may have conflicting opinions on the transparency of a core contract term and its eligibility for an unfairness assessment.

The third consequence resulting from breaching transparency occurs when such a breach creates a significant imbalance in the rights and obligations of the parties,

1375. Article 5 UCTD.

1376. Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Aldershot 2007) 329.

1377. Ibid. See also James Devenney and Thomas Pfeiffer, 'Control of Standard Terms and Collective Proceedings' in Gerhard Dannemann and Stefan Vogenauer (eds) *The Common European Sales Law in Context: Interaction with English and German Law* (Oxford University Press 2013) 696-697; Hans-W. Micklitz, 'Some reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts' in Hugh Collins (ed) *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008) 28-29.

1378. Marko Baretić, 'Nepoštene odredbe u potrošačkim ugovorima s posebnim osvrtom na ugovore banaka i osiguravajućih društava' in Marko Baretić and others *Obveze trgovaca u sustavu zaštite potrošača* (Narodne Novine 2003) 83; Ana Poščić, 'Nepoštena klauzula u potrošačkim ugovorima' (2006) 43(2) *Zbornik radova Pravnog fakulteta u Splitu* 169; Ivica Crnić, 'Zaštita prava potrošača i novi Zakon o obveznim odnosima' (2006) 45(6) *Pravo u gospodarstvu* 198; Darko Marečić, 'Nepoštene ugovorne odredbe u potrošačkim ugovorima' (2012) 11 *Pravo i porezi* 50.

1379. Opinion of AG Hogan in Case C-34/18 *Lovasné Tóth*, point 86; Opinion of AG Hogan in Case C-621/17 *Kiss and CIB Bank*, point 60.

1380. MüKoBGB/Fornasier, 9. Aufl. 2022, BGB § 305c Rn. 31. See also BGH 11 February 1992, XI ZR 151/91, NJW 1992, 1097; BGH 29 April 2008, KZR 2/07 NJW 2008, 2172; BGH 18 March 2015, VIII ZR 185/14, NJW 2015, 1594; OLG Frankfurt 24 May 2019, 10 U 5/18, BeckRS 2019, 12877; BGH 8 September 2021, VIII ZR 97/19, BeckRS 2021, 30598; BGH 10 June 2020, VIII ZR 289/19, NJOZ 2021, 375.

to the detriment of the consumer, contravening the principle of good faith and leading to the unfairness of a non-transparent term. According to Article 59(1) of the ZZP 2022, determining the unfair nature of a contractual term results in its nullity. Case law has shown that a lack of transparency leads to the unfairness and nullity of a term only if it is accompanied by breaches of the balance between the parties' rights and obligations and the principle of good faith.[1381] However, the perspective adopted by the High Commercial Court during the *Franak* case retrial suggests that the absence of transparency of a core contract term may itself create an imbalance between the rights and obligations of the parties involved and potentially breach the principle of good faith.[1382] This, in turn, can result in the unfairness of said term.

Croatian scholars have differing opinions regarding whether the absence of transparency in a core contract term should result in its unfairness. For instance, Baretić and Petrović question the legitimacy of the viewpoint held by the High Commercial Court, emphasising that the law explicitly states that the unfairness of transparent core contract terms cannot be evaluated.[1383] Thus, according to them, the mere absence of transparency in core contract terms cannot automatically result in unfairness. Instead, they view it as a factor that allows for the examination of the fairness of such terms. In stark contrast, Mišćenić and Petrić argue that transparency has a crucial role in assessing the fairness of core contract terms, asserting that the lack of transparency frequently leads to their unfairness.[1384] They support this stance by citing Croatian and European case law, particularly the CJEU's decision in the case *Verein für Konsumenteninformation/Amazon*. As explained in Section 2.1.3.1., in said case, the CJEU concluded that the unfairness of a contract term resulted from "*certain specific characteristics inherent in its wording or context which cause a significant imbalance in the rights and obligations of the parties*".[1385]

As discussed in Section 2.1.4, the case *Verein für Konsumenteninformation/Amazon* illustrated that the fairness of a contractual term can be challenged based on its lack of transparency. However, in that specific case, the lack of transparency made the term unfair because it created a significant imbalance between the rights and obligations of the parties.[1386] Moreover, in the cases *Gómez del Moral Guasch II*, *D.V.* and *Banco Santander*, the CJEU clarified that a lack of transparency alone cannot deem a contract term unfair under the UCTD[1387] unless Member States have incorporated

1381. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012; High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13; Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.
1382. High Commercial Court of the Republic of Croatia, judgement of 14 June 2018, Pž-6632/17.
1383. Marko Baretić and Siniša Petrović, 'Control of Price Related Terms in Standard Form Contracts in Croatia' in Yeşim M. Atamer and Pascal Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Springer 2020) 328.
1384. Emilia Mišćenić and Silvija Petrić, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima* (Narodne Novine 2020) 157-159, 197-198, 204-206.
1385. Case C-58/14 *Amazon EU*, point 67.
1386. Case C-191/15 *Verein für Konsumenteninformation/Amazon*, point 67.
1387. Case C -655/20 *Gómez del Moral Guasch II*, point 37; Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, points 47-52; Case C-265/22 *Banco Santander*, point 66.

such a consequence for transparency breaches into their national law.[1388] Finally, in the *Gyula Kiss* case, the CJEU emphasised that compliance with the UCTD's transparency requirement is an element in the assessment of unfairness of a contract term.[1389] Based on the CJEU's case law, the Commission concluded that a trader's failure to fulfil their transparency obligations can be a factor in evaluating the unfairness of a specific contract term and may indicate its unfair nature.[1390]

Once a non-transparent contractual term, which violates the balance of rights and obligations between parties and the principle of good faith, is found to be unfair and therefore null and void, it should be treated as if it never existed.[1391] The *Franak* case illustrates that consumers whose rights were infringed due to such terms could rely on the judgment resulting from collective proceedings to support their individual claims for damages.[1392] In the same case, the Commercial Court went a step further by ordering the banks to offer new contract terms to consumers.[1393] These new terms had to specify the principal repayment in Croatian kuna and include a fixed interest rate.[1394] Should the banks fail to offer consumers such terms, the judgment itself would serve as a replacement.[1395]

Higher courts subsequently overturned this order.[1396] Because the plaintiff, Potrošač, had not requested the court of first instance to demand specific actions from the banks in the event that unlawful conduct was established, the order violated the rules of civil procedure, which prohibit courts from exceeding the scope of the plaintiff's claim.[1397] Furthermore, the High Commercial Court emphasised that, generally, courts cannot impose compensatory measures in collective proceedings.[1398] They can only do so in individual disputes. In collective proceedings, courts are restricted to imposing specific abstract legal protection measures on banks, such as publishing the judgement or disclosing information that they had initially withheld from consumers.[1399] In individual proceedings, courts have the authority to order compensatory measures, such as the payment of damages, once unfairness has been established.[1400]

1388. Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)*, points 49-51.
1389. Case C-621/17 *Kiss and CIB Bank*, point 49.
1390. C(2019) 5325 final: Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts [21-22].
1391. Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14
1392. Darko Marečić, 'Nepoštene ugovorne odredbe u potrošačkim ugovorima' (2012) 11 *Pravo i porezi* 54.
1393. Marko Baretić, 'Nepoštene odredbe u potrošačkim ugovorima s posebnim osvrtom na ugovore banaka i osiguravajućih društava' in Marko Baretić and others *Obveze trgovaca u sustavu zaštite potrošača* (Narodne Novine 2003) 86.
1394. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012.
1395. Ibid.
1396. High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13; Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.
1397. High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13.
1398. Ibid.
1399. Ibid.
1400. For example, see Judgement P-318/15 of the Municipal Court in Sisak from 29 December 2016, Judgement P-215/16 of the Municipal Court in Split from 16 February 2017 or Municipal Court of Rijeka, judgement of 28 September 2017, P-123/2015.

It should be mentioned that, in addition to the ZZP 2022, the ZPK envisions one specific consequence for the utilisation of non-transparent and unfair terms in consumer credit contracts. This consequence involves converting credit agreements denominated in or pegged to Swiss francs to agreements denominated in or pegged to euros.[1401] As Mišćenić and Petrić explained, starting in 2013, the Croatian legislature took measures to address the impact of the appreciation of the Swiss franc on loans tied to the currency.[1402] It implemented various legislative measures, including capping interest rates, strengthening banks' information obligations, and temporarily setting a maximum exchange rate between Swiss francs and kuna. However, Mišćenić and Petrić point out that all these measures introduced by the Croatian legislature in parallel with the *Franak* case could not resolve the issue of potential nullity of the disputed credit contracts.[1403] This scenario would occur if the collective consumer protection procedure were to deem contract terms relating to currency clauses as invalid, resulting in the nullification of the entire contract or the terms governing currency clauses. It is believed that nullifying the entire contract would have negative implications for both consumers and banks, whereas nullifying only the currency clauses and converting the loans into kuna would be detrimental to the banks' interests.

The legislative conversion, motivated by macroeconomic considerations and aimed at restoring the balance between consumers and banks, was implemented prior to the final decision in the *Franak* case[1404] and sparked legal proceedings initiated by both banks[1405] and consumers. Additionally, the conversion was subject to a preliminary reference from the Municipal Civil Court in Zagreb in the *Zagrebačka banka* case. This court sought clarification on whether Article 6(1) of the UCTD precluded national legal provisions, such as the conversion in question, which restrict courts from upholding a consumer's claim for full reimbursement of benefits gained by the creditor as a result of unfair contract terms and regulate the conversion of the consumer's credit agreement.[1406] Although the CJEU has left the final decision to the national courts, it stated that the contractual provisions governing the conversion appeared to align with mandatory rules of national law and, thus, were not subject to the UCTD.[1407]

From a consumer perspective, the main question that arose in Croatian case law was whether the legislative conversion provided adequate compensation to

1401. Section IV.A of the ZPK.
1402. Emilia Mišćenić and Silvija Petrić, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima* (Narodne Novine 2020) 335.
1403. Ibid, 335-339.
1404. Ibid.
1405. For instance, various banks submitted proposals for the initiation of the procedure for assessing compliance of the legislative conversion with the Croatian Constitution, which the Constitutional Court considered and rejected. An analysis of the decision of the Constitutional Court can be found in Emilia Mišćenić and Silvija Petrić, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima* (Narodne Novine 2020) 208-216.
1406. Case C-567/20 *Zagrebačka banka*, points 15-30.
1407. Ibid, points 52-64.

affected consumers. The most recent development in this context is the adoption of the Supreme Court's legal stance on the legal effects of the conversion, which was based on the evaluation of three different legal viewpoints.[1408] The first opinion held that consumers who entered into conversion agreements were not entitled to compensation for overpaid amounts. This was based on the potential difference between the total amount owed, due to the invalidity of variable and currency clauses, and the amount received from the bank's loan conversion calculation. The second opinion allowed for compensation if there was a detrimental difference between these amounts that affected the consumer.

The Supreme Court, by a majority vote, has adopted the third legal opinion. According to this opinion, consumers who have entered into a loan conversion agreement have the right to receive default interest on overpaid amounts charged by the bank during the loan conversion calculation, starting from the date of each individual payment up until the conversion day. This approach seems to strike a balance between compensating consumers and avoiding overburdening creditors.

Finally, in addition to relying on specific solutions outlined in consumer protection legislation, consumers can also seek recourse for transparency violations under general contract law. For example, depending on the specific circumstances, a lack of transparency during pre-contractual negotiations could result in the contract being void due to fraud, excessive damages, or even nullified because of usury.[1409]

4.3. The transparency concept in Croatian law implementing the CCD

4.3.1. The development of the transparency concept

Similar to the UCTD, the CCD was also incorporated into Croatian law before the country's accession to the EU in 2009 through the ZPK. The ZPK has subsequently undergone multiple amendments to align with changes at the EU level[1410] and introduce new provisions aimed at improving the disclosure of information on variable and currency clauses, for instance.[1411] The ZPK closely follows the CCD's

1408. All three opinions, along with the information regarding the number of votes each opinion has received, can be found on the website of the Supreme Court: https://www.vsrh.hr/vrhovni-sud-republike-hrvatske-donio-pravno-shvacanje-o-pravnim-ucincima-sporazuma-o-konverziji.aspx (accessed 8 May 2024).

1409. For instance, see the analysis of Silvija Petrić in Emilia Mišćenić and Silvija Petrić, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima* (Narodne Novine 2020) 249-257.

1410. For instance, the most recent amendments to the ZPK, made in December 2023, implement Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU OJ L 438, p. 1-37. See Zakon o izmjenama i dopunama Zakona o potrošačkom kreditiranju NN 156/2023.

1411. Zakon o potrošačkom kreditiranju NN 112/2012, NN 143/2013, NN 147/2013, NN 9/2015, NN 78/2015, NN 102/2015, NN 52/2016, NN 128/22 (ZPK).

information and transparency requirements.[1412] In most cases, the ZPK requires creditors to provide pre-contractual credit information to consumers by means of a **standardised information form**.[1413] In cases where the use of a standardised form is not obligatory, the mandatory information must be **equally visible** ("*jednako vidljiv*").[1414] Moreover, the ZPK demands from creditors to provide consumers with adequate explanations about the pre-contractual credit information.[1415]

Furthermore, the ZPK obliges creditors to provide contractual information to consumers in a **clear** ("*jasan*") and **concise** ("*sažet*") manner.[1416] It is noteworthy that the Croatian word "*jasan*" is used to convey both the word "*clear*" found in the CCD and the word "*plain*" found in the UCTD. This word is also consistently used in various legal sources, such as the Croatian language versions of the UCTD and the CCD,[1417] and in Croatian laws, such as the ZZP 2022[1418] and the ZPK. Given that the Croatian versions of the UCTD and CCD are deemed the original texts of these directives[1419] rather than translations, it can be asserted that the European legislature considers "*plain*" and "*clear*" to be expressing the same transparency requirement. Section 4.3.3.3. delves into the alignment of the interpretation and assessment of the term "*jasan*" in Croatian law between the ZPK and the ZZP 2022. Additionally, while this chapter relies on the transparency language found in the directives under investigation in this thesis, Chapter 6, which conducts a comparative analysis and consolidates the findings from earlier chapters, explores the linguistic inconsistencies observed across all legal systems in greater depth.

Furthermore, the ZPK imposes specific information obligations on creditors regarding the disclosure of information regarding variable interest rates, which are not present in the CCD. For example, it establishes the criteria for calculating variable interest rates and specifies how creditors should explain these criteria to consumers.[1420] Similarly, it outlines the obligations of creditors in informing consumers who have loans denominated in or pegged to Swiss francs about their right to convert them into loans denominated in or pegged to the euro.[1421] The ZPK

1412. A detailed overview of the ZPK's information model can be found in Emilia Miščenić, 'Nepoštene odredbe u ugovorima o kreditu' in Vesna Tomljenović, Silvija Petrić and Emilia Miščenić (eds) *Nepoštene ugovorne odredbe: Europski standardi i hrvatska provedba* (Pravni fakultet u Rijeci 2013) 130-141.
1413. Annexes I and II of the Regulation on the obligation of informing consumers (Pravilnik o obvezi informiranja potrošača NN 9/2019, or POIP).
1414. Article 6(2) ZPK.
1415. Article 5(8) ZPK.
1416. Articles 10(2) ZPK.
1417. See Articles 4(2) and 5 of the Croatian language version of the UCTD, available here: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:31993L0013&from=EN (accessed 8 May 2024), and Article 10(1) of the Croatian language version of the CCD, available here: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32008L0048&from=EN (accessed 8 May 2024).
1418. Articles 56 and 57 ZZP 2022.
1419. C. J. W. Baaij, *Legal Integration and Language Diversity: Rethinking Translation in EU Lawmaking* (Oxford University Press 2018) 25-29.
1420. Article 11.a ZPK.
1421. Articles 19.c and 19.d ZPK.

mandates creditors to offer this conversion option to all consumers,[1422] irrespective of whether the currency clauses in their agreements were found to be non-transparent in a specific case.

The alignment of these measures with EU law is not entirely clear. The CCD does not address the conversion of credit agreements, which suggests that the regulation of this matter is not within its scope and, therefore, the responsibility of Member States. Additionally, the European Central Bank (ECB) holds the view that EU law does not prohibit the conversion of credit agreements, as long as it is fair and proportionate.[1423] However, it is unclear whether the introduction of additional information and transparency requirements for borrowing rates aligns with the CCD. The CCD seems to permit national provisions governing economic aspects concerning borrowing rates, like rate modifications or contract termination due to such modifications, rather than allowing for changes in the disclosure of information. Consequently, it seems that the Croatian legislature may have breached the CCD's principle of maximum harmonisation regarding information disclosure[1424] by prescribing additional information and transparency obligations regarding the borrowing rate for creditors.

4.3.2. The objective of transparency

Within the ZPK, the concept of transparency aims to **enhance informed consumer choice**. Croatian consumer credit law does not explicitly emphasise the goal of fostering a more transparent consumer credit market. Similar to the domain of unfair contract terms law, the issue of transparency of credit information has primarily been addressed through litigation, which focuses on consumer protection. This could perhaps explain the lack of express consideration of the objective of enhancing market transparency, as discussed in Section 4.2.2.

Consumers should be able to make an informed decision regarding entering into a credit agreement based on transparent pre-contractual credit information. This is evident from Article 5(8) of the ZPK, which necessitates the provision of adequate explanations pertaining to the credit agreement, and Article 6(1) of the ZPK, which governs the dissemination of information on specific credit agreements. Both provisions clearly state that the information provided by creditors to consumers regarding the credit product should enable them to compare credit offers and determine whether to enter into an agreement.[1425]

Even after the contract is finalised, maintaining information transparency plays an important role in enabling consumers to safeguard their rights. As previously

1422. Article 19.a(2) ZPK.
1423. Opinion of the European Central Bank of 18 September 2015 on the conversion of Swiss franc loans, CON/2015/32.
1424. Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 115-117.
1425. See also Romana M. Vučković, 'Predugovorno obavješćivanje jamaca u potrošačkom kreditiranju' (2017) 67 *Zbornik Pravnog fakulteta u Zagrebu* 513-515.

mentioned, the ZPK provides consumers with the option to convert loans originally denominated in or pegged to Swiss francs to loans denominated in or pegged to euro.[1426] To decide whether to accept this conversion, consumers need to be provided with transparent information regarding its process and implications, and be able to understand and verify the calculation of the conversion.[1427] Similarly, in the case of credit agreements with variable interest rates, consumers have the right to early repayment if the interest rate increases.[1428] In order to exercise this right, consumers must understand the reasons behind changes in the interest rate and make a decision on whether they accept the change. Therefore, it is the creditor's responsibility to provide transparent information to consumers regarding the reasons and mechanisms behind changes in variable interest rates, with the goal of facilitating this decision-making process.[1429]

As discussed in previous chapters, the goal of informed choice can only be fulfilled if creditors furnish consumers with information that is transparent both formally and substantively. This implies that consumers should have the ability to access, read and understand the provided information. In this context, the following section examines whether the interpretation and evaluation of standardisation and transparency requirements in Croatian consumer credit law uphold both aspects of transparency.

4.3.3. The interpretation and assessment of transparency

4.3.3.1. Standardisation or equal visibility of pre-contractual consumer credit information

The ZPK closely adheres to the CCD when it comes to providing pre-contractual information on consumer credit. Generally, mandatory pre-contractual information must be given using a standardised information form, the SECCI, which is used across the EU.[1430] However, the use of a standardised information form is optional in situations involving overdrafts, other specific agreements, and online credit agreements. If creditors choose to provide pre-contractual information for overdrafts and other specific agreements using a standardised information form, they must use the ECCI.[1431] The comments made in Section 2.2.3.2. regarding the lack of standardisation in the content of these information forms, and the potential loss of benefits of information standardisation due to their voluntary use in the online context, also apply here, as Croatian law fully mirrors the CCD in this regard.

In the case of concluding overdrafts and other specific credit agreements, where creditors have the option to not rely on the ECCI, they must ensure that all mandatory

1426. Article 19.a ZPK.
1427. Articles 19.c, 19.d and 19.e ZPK.
1428. Article 11.a(6) ZPK.
1429. Articles 11 and 11.a ZPK.
1430. Article 2 and Annex I of the POIP.
1431. Article 2 and Annex II of the POIP.

information is equally visible ("*jednako vidljiv*").[1432] It can be noted that the phrasing of this requirement slightly differs from the CCD, which calls for information to be equally prominent,[1433] as well as from its Croatian language version, which stipulates that information should be equally noticeable ("*jednako uočljiv*").[1434]

As clarified in Section 2.2.3.1., the CJEU has not given an interpretation of the CCD's requirement of prominence, but the Commission has. According to the Commission's interpretation, prominence is meant to guarantee that credit information is not excessively small or difficult to read compared to other text.[1435] This requirement aims to ensure the readability of information, contributing to formal transparency.

In the context of unfairness control, Croatian courts have presented different interpretations of the requirement of noticeability, as discussed in Section 4.2.3.3. Besides considering whether specific contract terms subjected to noticeability assessment were written in a smaller font size compared to other terms,[1436] the High Commercial Court in the *Franak* case has also examined whether these terms were presented on the first page of the contract[1437] or concealed within it.[1438] In the same case, the Commercial Court considered whether creditors had effectively alerted consumers to these terms by highlighting them in a specific manner.[1439] Given that courts have focused on factors contributing to the accessibility and readability of information in their assessment of noticeability, it seems that this requirement also ensures formal transparency.

It is worth mentioning that the High Commercial Court's interpretation of noticeability, which focuses on whether credit information is easy to find and not concealed within the contract, is in line with the Commission's interpretation of the requirement of clarity under the CCD.[1440] Although the CJEU has not explicitly endorsed or rejected the Commission's interpretations of prominence and clarity, it has indicated that clarity has a substantive component, at least when considered alongside conciseness, as it ensures that consumers are able to understand the legal and economic consequences of a credit contract.[1441] While it is unclear how Croatian courts will interpret the visibility requirement of the ZPK, it is evident that current interpretations of the CCD's transparency requirements at the EU level do not

1432. Article 6(1) ZPK.
1433. Ibid.
1434. See Article 6(1) CCD in the Croatian language version, available here: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32008L0048&from=EN (accessed 8 May 2024).
1435. Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [11].
1436. High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13.
1437. Ibid.
1438. High Commercial Court of the Republic of Croatia, judgement of 14 June 2018, Pž-6632/17.
1439. Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012.
1440. Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [11].
1441. Case C-66/19 *Kreissparkasse Saarlouis*, point 45; Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 94-95.

provide clear guidance to national courts regarding the exact meaning, scope, and relationship between different transparency requirements.

4.3.3.2. Obligation to provide adequate explanations of consumer credit information

The European legislature acknowledges that consumers may not always fully comprehend credit information and has given Member States the flexibility to decide when and how creditors should provide consumers with additional explanations of mandatory pre-contractual credit information.[1442] Regrettably, the Croatian legislature incorporated the relevant provisions of the CCD into the ZPK without utilising the discretion given by the European legislature to determine the circumstances in which the obligation to provide adequate explanations arises and how creditors should fulfil it. As a result, the ZPK merely requires credit providers to provide additional explanations to help consumers assess whether a credit product is suitable for their needs and financial situation.[1443] These explanations should include additional clarification of mandatory pre-contractual information, as well as the essential features of the product and its implications for the consumer, including the potential consequences of payment arrears.[1444]

Furthermore, the ZPK does not establish a clear link between the obligation to provide adequate explanations and the creditor's duty to assess the consumer's creditworthiness. As mentioned in Section 2.2.3.3., the CJEU suggested in the *CA Consumer Finance SA* case that there is a logical order for fulfilling these obligations, with the creditworthiness assessment preceding the provision of adequate explanations of the pre-contractual credit information.[1445] According to the ZPK, creditors must obtain relevant information from consumers to assess their creditworthiness.[1446] If necessary, creditors may also obtain this information by consulting available credit databases. However, the ZPK does not elucidate whether or how the creditworthiness assessment influences the content of the adequate explanations regarding pre-contractual credit information.

Conclusively, the interaction between the obligations to provide transparent pre-contractual consumer credit information, offer adequate explanations of this information, and assess the consumer's creditworthiness is unclear in Croatian law. Thus, it remains to be seen whether and to what extent these obligations will be interpreted as improving the substantive transparency of consumer credit information in Croatian law.

4.3.3.3. Clarity and conciseness of contractual credit information

Similar to the CCD, the ZPK requires creditors to provide contractual information to consumers in a clear ("*jasan*") and concise ("*sažet*") manner. I have not found any

1442. Article 5(6) CCD.
1443. Article 5(8) ZPK.
1444. Ibid.
1445. Case C-449/13 *CA Consumer Finance SA*, point 45.
1446. Article 8(1) ZPK.

interpretations of these requirements in the context of the application of the ZPK. Therefore, it is uncertain whether these requirements ensure both formal and substantive transparency of contractual credit information.

As previously mentioned, the terms "*plain*" and "*clear*", found in the UCTD and the CCD respectively, are both represented by the same word in Croatian – "*jasan*".[1447] Although the precise meaning and scope of the clarity requirement under the ZPK is unknown, Croatian courts have interpreted the requirement of plainness when applying provisions on unfair contract terms control. As explained in Section 4.2.3.2., the plainness requirement within the framework of unfair contract terms control primarily aims to ensure that the subject matter of a contract term is free from ambiguity. However, it does not appear guarantee the consumer's understanding of the implications of a specific contract term. Therefore, it appears that the plainness requirement mainly promotes formal transparency. It is yet to be seen whether Croatian courts will interpret the ZPK's clarity requirement in the same way.

A comparison with EU law suggests that Croatian courts should also adopt a substantive approach to assessing and interpreting the aforementioned transparency requirements. This is evident from the CJEU case law, which demonstrates that requirements of clarity and conciseness ensure that credit information enables consumers to get apprised with their rights and obligations under a credit agreement,[1448] as well as to understand the economic and legal implications of the agreement.[1449] Additionally, developing a substantive approach to transparency alongside formal transparency considerations is indispensable for achieving the goal that Croatian consumer credit law attributes to transparency, which is to enable informed consumer choice.

4.3.3.4. Transparency of information on variable interest rates

With regards to contractual information, Article 5(1) of the ZPK mandates creditors to provide an additional piece of information when compared to its European counterpart. The ZPK requires creditors to warn consumers about the risks associated with changes in exchange and interest rates, as well as the consequences of a consumer's loss of income for loan repayment.[1450] When it comes to variable interest rates, the Croatian legislature recently provided creditors with more precise instructions on how to inform consumers about these rates. These instructions

---

1447. Articles 10(2) and 10(5) ZPK. In the example of bank charges, Mišćenić (formerly Čikara) observes that presenting information accurately and transparently simultaneously can be challenging. For instance, it may be more accurate to separately calculate and display different bank charges, such as administrative fees and fees associated with refinancing. However, it is questionable whether this can be done in a clear and concise manner. See Emilija Čikara, 'Prijevremena otplata kredita prema novom Zakonu o potrošačkom kreditiranju' (2010) 31(1) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 169-170.

1448. Case C-42/15 *Home Credit Slovakia*, point 34.

1449. Case C-66/19 *Kreissparkasse Saarlouis*, point 45; Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 94-95.

1450. Article 5(1)(u) ZPK.

were influenced by the collective proceedings initiated by Potrošač, as described in Section 4.2.2. of this Chapter.

Creditors offering variable interest rates are obliged to furnish consumers with specific information about these rates in a clear and unambiguous manner.[1451] Firstly, they must define a parameter upon which the variable interest rate changes.[1452] This parameter should be clear and familiar to consumers. However, the assessment of whether a specific parameter meets this criterion will not be conducted on a case-by-case basis. Instead, the parameters that have been deemed as clear and familiar to consumers include EURIBOR, LIBOR, NRS, the income on treasury bills of the Ministry of Finance, and the average interest rate on citizens' deposits.[1453] It should be noted that this list is exhaustive. Secondly, creditors are required to provide qualitative and quantitative information on how the parameter may fluctuate throughout the duration of the contract and how such fluctuations would affect the level of the variable interest rate.[1454] Thirdly, creditors need to determine the periods in which the change of the interest rate is considered.[1455]

In addition to providing the aforementioned information to consumers, creditors also need to warn them about all the risks associated with variable interest rates.[1456] While a creditor can unilaterally select the parameter by which variable interest rates change, the Ministry of Finance clearly believes that this does not compromise the transparency of the parameter for consumers.[1457] This is because creditors can only choose among the parameters stipulated by the law,[1458] which are deemed to be clear and familiar to consumers.[1459]

In the *Franak* case, one bank provided information regarding adjustments to variable interest rates by specifying that the interest rate was determined in accordance with the bank's Decision on interest and fees.[1460] The variable interest rate was linked to the three-month LIBOR for the Swiss franc, which increased based on the creditor's funding costs. The interest rate was adjusted every quarter and the interest was calculated monthly using a specific mathematical method. The Supreme Court concluded that the disputed contract terms mirrored the provisions of the consumer credit legislation that were in effect at that time.[1461] These terms explicitly outlined the factors governing the determination of the interest rate, the method for establishing these factors, and the criteria influencing them. For these reasons,

1451. Article 11.a(4) ZPK. See also Tatjana Josipović and Hano Ernst, 'Recent crisis-motivated reforms in Croatian private law' 2015 13(1) *Evropski Pravnik* 80.
1452. Article 11.a(1)(a) ZPK.
1453. Article 11.a(2) ZPK.
1454. Article 11.a(1)(b) ZPK.
1455. Article 11.a(1)(c) ZPK.
1456. Article 11.a(4) ZPK.
1457. This reasoning was applied in Constitutional Court of the Republic of Croatia, judgement of 11 October 2018, U-III/5124/2017, and Constitutional Court of the Republic of Croatia, judgement of 11 October 2018, U-III/5087/2017.
1458. Ibid.
1459. Article 11.a(2) read in conjunction with Article 11.a(1)(a) ZPK.
1460. Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.
1461. Ibid.

the Supreme Court considered these terms to be in line with the requirement of intelligibility arising from unfair contract terms legislation.[1462]

This assessment can be compared to the approach of the CJEU in the case of *Gómez del Moral Guasch*, which provides guidance on how national courts can evaluate the transparency of contract terms governing variable interest rates under the UTCD. According to the CJEU, it is important that essential information concerning the calculation of the interest rate is easily accessible to ensure that a reasonably observant and circumspect consumer can understand how the interest rate is determined.[1463] The fact that the national central bank periodically publishes this information in the official gazette appears sufficient in this regard.[1464] Furthermore, the CJEU observed that the national legislation in effect at the time obliged creditors to furnish consumers with information regarding changes in the parameter used to determine variable interest rate adjustments. The CJEU stressed that this information can provide consumers with an objective indication of the economic impact of the variable interest rate and can be utilised for comparing it with other methods of calculating the interest rate.[1465]

The aforementioned assessment of intelligibility conducted by the Supreme Court does not appear to align entirely with the reasoning of the CJEU in the case of *Gómez del Moral Guasch*. Specifically, this assessment fails to consider whether essential information regarding the calculation of the interest rate was easily accessible to consumers and whether the provided information enabled consumers to comprehend how the interest rate was calculated. As explained by Mišćenić and Petrić, the interest rate was determined within the internal document of the creditor, which, in practice, may remain unknown and inaccessible to consumers.[1466] Furthermore, the specific functioning of the LIBOR for Swiss franc and its impact on the creditor's funding costs were not adequately defined.[1467] Finally, the mathematical method used to calculate interest rates was not explained to consumers, despite the availability of explanations and examples of this method in secondary legislation at the time the credit agreement was concluded.[1468]

Furthermore, the consumer credit legislation in effect at that time mandated that creditors provide both qualitative and quantitative explanations regarding the correlation between changes in parameters and adjustments to variable interest rates.[1469] They were also required to inform consumers about the potential risks involved. It does not look like the Supreme Court in the *Franak* case examined

1462. Ibid.
1463. Case C-125/18 *Gómez del Moral Guasch*, point 53.
1464. Ibid.
1465. Ibid, points 54-56.
1466. Emilia Mišćenić and Silvija Petrić, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima* (Narodne Novine 2020) 173.
1467. Ibid.
1468. Emilia Mišćenić and Silvija Petrić, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima* (Narodne Novine 2020) 173.
1469. See article 11.a of the Law on Amendments to the Consumer Credit Act (Zakon o izmjenama i dopuni Zakona o potrošačkom kreditiranju NN 112/2012).

whether the creditor provided this information to consumers and in what manner.[1470] As mentioned above, in *Gómez del Moral Guasch*, the CJEU clearly explained the significance of examining this data, especially when national legislation mandates creditors to provide it.[1471] Such data can offer consumers an indication of the economic impact of the variable interest rate and can be utilised for comparison purposes.

The new information obligations regarding variable interest rates could potentially restrict the creditor's ability to manipulate interest rates and provide more certainty concerning how interest rates are calculated. However, it is questionable whether these obligations can enhance transparency of variable interest rates for consumers. The assumption that the five parameters prescribed by the ZPK are clear and familiar to consumers is not supported by behavioural research. Furthermore, the 2023 study on financial literacy conducted by the Croatian National Bank (Hrvatska Narodna Banka, or HNB) and the Croatian Financial Services Supervisory Agency (Hrvatska agencija za nadzor financijskih usluga, or Hanfa) has revealed that only one-third of Croatian citizens possess the knowledge to perform intricate financial tasks, such as calculating complex interest rates.[1472] This finding raises serious doubts about the effectiveness of the assumption of clarity and familiarity of the aforementioned five parameters to consumers. As Baretić correctly emphasises, consumers are likely to encounter difficulties in comprehending highly specific financial terms without possessing or relying on expert knowledge.[1473] This is the case even when the ZPK defines and explains such terminology.

As explained earlier, besides determining the parameter based on which the variable interest rate is subject to change, the ZPK mandates creditors to furnish consumers with information about the potential fluctuations of the parameter and their impact on the variable interest rate. Since this information must be presented in a clear and unambiguous manner, there seems to be some room for safeguarding the transparency of this information. Regrettably, in the *Franak* case, the High Commercial Court and the Supreme Court did not take this opportunity to assess the formal and substantive transparency of the information related to the calculation of the variable interest rate.

Therefore, it is uncertain to what extent the measures introduced by the ZPK regarding informing consumers about variable interest rates can maintain both formal and substantive transparency of this information. Considering the lessons learned from the *Franak* case, it seems unlikely that requiring creditors to provide consumers with additional technical information about the calculation of variable interest rates will facilitate their decision-making process unless both the formal and substantive transparency of this information are guaranteed.

1470. Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.
1471. Case C-125/18 *Gómez del Moral Guasch*, points 54-56.
1472. Hrvatska narodna banka i Hrvatska agencija za nadzor financijskih usluga, 'Mjerenje financijske pismenosti i financijske uključenosti u Hrvatskoj – 2023.' (2023) [10].
1473. Marko Baretić, 'Je li europsko uređenje ugovornog prava zaštite potrošača optimalni regulacijski okvir' in Jakša Barbić (ed) *Zaštita potrošača u Republici Hrvatskoj* (Modernizacija prava, knjiga 29 2016) 93-94.

4.3.3.5. Transparency of information on conversion of consumer credit agreements denominated in or pegged to Swiss francs

As mentioned in Section 4.3.1., the ZPK provides consumers with the opportunity to convert loans that are denominated in or pegged to Swiss francs into loans that are denominated in or pegged to euros.[1474] Notably, when this measure was adopted in 2015, Croatian courts had not yet identified currency clauses as non-transparent or unfair.[1475] However, the Croatian legislature implemented this measure in order to protect Croatian consumers from the substantial economic consequences of the appreciation of the Swiss franc.[1476] Through the conversion of credit agreements tied to the Swiss franc, the legislature aimed to ensure that consumers could repay their loans on fair terms, reflecting the accurate value of the borrowed amount.[1477] This measure sparked controversy and raised concerns about its constitutionality.[1478] However, these concerns were ultimately dismissed by the Constitutional Court, which deemed the measure legitimate, necessary, and suitable.[1479]

The ZPK states that the conversion of credits denominated in or pegged to Swiss francs to credits denominated in or pegged to euros depends on the consumer's acceptance.[1480] In order to allow consumers to make an informed decision about whether to accept the conversion, the legislature has specified the information that creditors must provide to them and how it should be provided. The ZPK also details the methodology that creditors must adhere to when calculating the conversion.[1481] Furthermore, it requires creditors to produce a comprehensive breakdown of all factors that affect the conversion calculation, which consumers can utilise for verification purposes.[1482] Creditors are required to publish this calculation on their websites and ensure it is accessible to consumers using their personal identification numbers.[1483] To help consumers verify the information, creditors must furnish them with a detailed overview of their general terms and conditions, as well as any pertinent decisions regarding interest rates and daily exchange rates applicable to the relevant agreements.[1484] The conversion calculation should provide a clear overview of all relevant modifications, allowing consumers to comprehend how the remaining credit amount was calculated.[1485]

In my opinion, the aim of this conversion calculator is to improve the **substantive transparency** regarding the conversion of consumer credit agreements that are in

1474. Section IV.A ZPK.
1475. This has only been done in High Commercial Court of the Republic of Croatia, judgement of 14 June 2018, Pž-6632/17.
1476. Prijedlog zakona o izmjeni i dopunama Zakona o potrošačkom kreditiranju s Konačnim prijedlogom zakona P.Z./899 1-4.
1477. Prijedlog zakona o izmjeni i dopunama Zakona o potrošačkom kreditiranju s Konačnim prijedlogom zakona P.Z./899 1-5.
1478. Constitutional Court of the Republic of Croatia, decision of 4 April 2017, U-I-3685/2015.
1479. Ibid.
1480. Article 19.e (5) ZPK.
1481. Article 19.c ZPK.
1482. Article 19.d(1) ZPK.
1483. Article 19.d(1) ZPK.
1484. Article 19.d(2) ZPK.
1485. Article 19.e(4) ZPK.

Swiss francs or pegged to the Swiss franc. Its purpose is to enable consumers to understand the calculation process behind the conversion of credit and to make an informed decision about whether to accept or reject it. However, the effectiveness of the conversion calculator will depend on consumers' ability to comprehend and process a significant amount of information, ranging from the terms and conditions set by banks to the decisions on interest rates and daily exchange rates. Therefore, it is important that this information is accessible, readable, and understandable for consumers, allowing them to verify the accuracy of their credit conversion calculations.

4.3.4. Contractual consequences of a breach of transparency

As mentioned previously, the CCD empowers Member States to decide how to sanction violations of its provisions, including provisions related to information and transparency requirements, in a manner that is effective, dissuasive, and proportionate.[1486] The ZPK sanctions breaches of information and transparency requirements predominantly by means of fines,[1487] which is a type of sanction that falls outside the scope of this thesis. In addition to fines, the ZPK allows for the conversion of agreements initially in Swiss francs or pegged to the Swiss franc into agreements denominated in or pegged to the euro, which can also be viewed as a sanction for the use of non-transparent and unfair currency clauses.[1488]

Furthermore, consumers may be entitled to seek compensation from creditors who have employed such non-transparent and unfair currency clauses based on the *Franak* case.[1489] The *Franak* case also serves as an example that adhering to the ZPK's information obligations concerning variable interest rates may indicate compliance with the transparency concept under the ZZP 2022,[1490] as explained in Section 4.3.3.4.

4.4. The transparency concept in Croatian law implementing the CRD

4.4.1. The development of the transparency concept

The Croatian legislature incorporated the CRD into Croatian law through the Consumer Protection Act 2014 (Zakon o zaštiti potrošača 2014, or ZZP 2014).[1491] In 2015

1486. Article 23 CCD.
1487. See Articles 26, 26.a and 27 ZPK.
1488. Section IV.A ZPK.
1489. Regional Court of Zagreb, judgement of 6 September 2016, Gž-4854/16; Regional Court of Osijek, judgement of 9 November 2018, Gž-1832/2017; Regional Court of Varaždin, judgement of 9 February 2017, Gž-874/16; Regional Court of Zagreb, judgement of 23 August 2016, Gž-5480/16; Regional Court of Varaždin, judgement of 19 January 2018, Gž-794/2018.
1490. High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13; Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14.
1491. Prijedlog zakona o zaštiti potrošača, s Konačnim prijedlogom zakona VII-1143/2014 (Proposal of the Consumer Protection Act, with the final proposal of the act VII-1143/2014) 2-3. See also Dunja Šarić,

and 2019, amendments were made to the ZZP 2014, introducing changes such as the implementation of fines for failure to comply with information and transparency requirements for online contracts, as well as the conduction of market inspections.[1492] As mentioned in Section 4.1, the Croatian legislature introduced the new Consumer Protection Act in 2022 (the ZZP 2022). The main objective behind the adoption of the ZZP 2022 was to align Croatian law with the European consumer acquis and to implement the MD.[1493] The ZZP 2014 and the ZZP 2022 both regulate the transparency of online contracts in almost identical ways. However, there is one notable difference between these two laws when it comes to regulating transparency of online orders that require payment. This distinction will be explained in Section 4.4.1.1.

When it comes to regulating the provision of information regarding online contracts, the ZZP 2022 largely follows European legislation. In alignment with the CRD, Article 60(2) of the ZZP 2022 states that the pre-contractual information traders provide to consumers about online contracts becomes an integral part of the contract after its conclusion. As a result, the same transparency requirements apply to both the pre-contractual and contractual information in the context of online contracts. This information must be presented in a **clear** ("*jasan*") and **comprehensible** ("*razumljiv*") manner,[1494] a terminology also utilised in the Croatian version of the CRD.[1495]

As detailed in Section 4.3.1, the Croatian term "*jasan*" serves to encompass both the English term "*clear*" found in the CCD and the term "*plain*" found in the UCTD. Furthermore, the term "*razumljiv*" is employed to encompass both the English term "*intelligible*" found in the UCTD and the term "*comprehensible*" found in the CRD. These terms can be found in various legal sources, including the Croatian language versions of the UCTD, the CCD, and the CRD.[1496] As previously observed, the Croatian versions of the UCTD, the CCD, and the CRD are considered the original texts of these directives rather than mere translations.[1497] Consequently, it could be argued that the European legislature considers terms like "*plain*" and "*clear*" as well as "*intelligible*" and "*comprehensible*" to express the same transparency requirements.

The ZZP 2022 stipulates that traders must adapt both pre-contractual and contractual information to the means of distance communication used. This information must be conveyed in **simple** ("*jednostavan*") and comprehensible language

'Dodatne obveze trgovaca kod sklapanja ugovora na daljinu' (2016) 6 *Računovodstvo i financije* 171.

1492. See Article 19 of Zakon o izmjenama i dopunama Zakona o zaštiti potrošača NN 14/2019.

1493. Konačni prijedlog Zakona o zaštiti potrošača P.Z.E. br. 175 (Final Proposal of the Consumer Protection Act P.Z.E. br. 175) 93-94.

1494. Article 60(1) and (2) ZZP 2022.

1495. See Article 6(1) of the Croatian language version of the CRD available here: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32011L0083&from=EN (accessed 8 May 2024).

1496. See Articles 4(2) and 5 of the Croatian language version of the UCTD, available here: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:31993L0013&from=EN (accessed 8 May 2024), Article 10(1) of the Croatian language version of the CCD, available here: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32008L0048&from=EN (accessed 8 May 2024), and Article 6(1) of the Croatian language version of the CRD available here: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32011L0083&from=EN (accessed 8 May 2024).

1497. C. J. W. Baaij, *Legal Integration and Language Diversity: Rethinking Translation in EU Lawmaking* (Oxford University Press 2018) 25-29.

and, if provided on a durable medium, in a **legible** ("*čitljiv*") format.[1498] Notably, the requirement of simplicity is not present in the CRD, which mandates that the same information should be drafted in plain and intelligible language.[1499] This distinction and its potential implications will be further discussed in Section 4.4.3.1. Additionally, it is worth mentioning that the Croatian legislature took advantage of the opportunity provided by the European legislature to establish language requirements for traders operating within the Croatian territory. Consequently, although information pertaining to online contracts may be presented in various languages and scripts, it must always be available in the **Croatian language** and in the **Latin script**.[1500]

Additionally, the ZZP 2022 complies with the CRD in terms of standardising information concerning the right of withdrawal. Firstly, it requires traders to furnish consumers with a standardised model withdrawal form, which consumers can use to exercise their right of withdrawal.[1501] Secondly, the ZZP 2022 provides traders with the choice to use standardised withdrawal instructions, which include pre-drafted information about the right of withdrawal and its implications.[1502] The instructions are provided with multiple textual options that traders can choose from, depending on their contract(s). Although traders are not obliged to utilise these instructions, accurately completing and utilising them leads to the assumption of compliance with the information requirements obligations related to the right of withdrawal under the ZZP 2022.[1503]

4.4.1.1. Changes to the regulation of transparency of online orders with a payment obligation under the ZZP 2022

In line with the CRD, the ZZP 2022 mandates traders to ensure that consumers explicitly acknowledge their payment obligation when placing an order.[1504] Also, it specifies how traders must inform consumers that submitting an online order triggers a payment obligation. When an electronic order entails an obligation to make a payment, the trader must present consumers with specific information in a **clear** ("*jasan*") and **easily noticeable** ("*lako uočljiv*") manner.[1505]

It can be observed that the ZZP 2022 deviated from the ZZP 2014 by introducing the requirement to provide easily noticeable information about electronic orders with payment obligations. Namely, the ZZP 2014 stipulated that traders must provide information about online orders requiring payment in a **clear** ("*jasan*") and **visually prominent** ("*vidno istaknuto*") way.[1506] Since the CRD requires traders to provide information about such orders to consumers in a *clear and prominent* way,[1507]

1498. Article 72(1) ZZP 2022.
1499. Article 8(1) CRD.
1500. Article 60(7) ZZP 2022.
1501. Article 81(1) and (2) ZZP 2022.
1502. Article 65(1) ZZP 2022.
1503. Article 65(2) ZZP 2022.
1504. Article 74(2) ZZP 2022
1505. Article 74(1) ZZP 2022.
1506. Article 67(1) ZZP 2014.
1507. Article 8(1) CRD.

the wording of the ZZP 2014 seems to align more closely with the transparency terminology of the CRD than that of the ZZP 2022.

Furthermore, the ZZP 2022 also mandates traders to label order buttons that initiate a payment obligation in an **easily noticeable** manner.[1508] This labelling must include the phrase "*order with obligation to pay*" or other similarly unambiguous expressions that unmistakably convey the presence of a payment obligation. While this wording corresponds with the ZZP 2014,[1509] it differs from the CRD, which requires traders to label the online order button in an *easily legible* manner.[1510]

Unfortunately, when the ZZP 2022 was implemented, the Croatian legislature failed to provide an explanation for the inclusion of the requirement to present information about online orders with payment obligations in an easily noticeable manner.[1511] The ZZP 2022 departs from the language used in both the CRD and the ZZP 2014. One plausible explanation for this departure is that the ZZP 2022 aims to provide greater consumer protection against non-transparent design in the online environment compared to the CRD. Alternatively, the ZZP 2022 may attempt to align transparency requirements from various directives within the same national statute. Since the CRD aims to fully harmonise the provision of information regarding online agreements,[1512] Member States cannot deviate from the consumer protection standards outlined in the CRD.

The aforementioned differences, as well as the potential implications of the requirement to provide easily noticeable information about online orders with payment obligations, will be further explored in Section 4.4.3.2.

4.4.1.2. The transposition of the MD

As explained in Section 2.3.1.3., the information model of the CRD was modified in 2019 through the MD. The MD included Article 6(a) in the CRD, which specifies the information online marketplaces must disclose to consumers. It also states that this information should be presented in a clear and comprehensible way, adapted to the methods of distance communication,[1513] and permits Member States to impose additional information requirements on online marketplaces.[1514] The Croatian legislature has incorporated Article 6(a) into the ZZP 2022 by means of Article 61, without introducing any additional information requirements or providing specific guidance on the transparency requirements that apply to online marketplaces.[1515]

However, the Croatian legislature incorporated Recital 27 of the MD, which elucidates that mandatory information online marketplaces must furnish consumers

1508. Article 74(3) ZZP 2022.
1509. Article 67(3) ZZP 2014.
1510. Article 8(1) CRD.
1511. See Konačni prijedlog Zakona o zaštiti potrošača P.Z.E. br. 175 (Final Proposal of the Consumer Protection Act P.Z.E. br. 175).
1512. Recitals 7-9 CRD.
1513. Article 6(a)(1) within Article 4(5) MD.
1514. Article 6(a)(2) within Article 4(5) MD.
1515. Konačni prijedlog Zakona o zaštiti potrošača P.Z.E. br. 175 (Final Proposal of the Consumer Protection Act P.Z.E. br. 175) 113.

with cannot solely be included in standard terms and conditions or similar contractual documents, into Article 61(2) of the ZZP 2022. Moreover, the Croatian legislature provided an explanation for this limitation, which is absent in the MD. Specifically, it clarified that this information should not be included within standard terms and conditions as it is considered crucial to present it in the most clear and comprehensible manner possible.[1516] This approach ensures that consumers can easily understand this essential information without being distracted by other extensive provisions typically present in traders' terms and conditions.[1517]

Although this reasoning can be applied to all online contracts, the Croatian legislature specifically mentions it in relation to contracts concluded on online marketplaces. This is probably because the European legislature explicitly addresses the inclusion of mandatory information in the standard terms and conditions of traders only in this domain.

4.4.2. The objective of transparency

Similar to the areas of unfair contract terms and consumer credit law, Croatian law governing the formation of online contracts seems to rely on transparency as a means of promoting informed consumer choice. This objective is clearly stated in the initial proposal that led to the adoption of the CPA 2014, which incorporated the CRD into the Croatian legal system. In this proposal, the Croatian legislature explains that the trader's obligation to provide transparent information to consumers regarding different aspects of online transactions aims to empower consumers to make well-informed purchasing decisions.[1518] This objective remains significant even after the conclusion of an online contract, as consumers have a 14-day period to review the contract and verify that it corresponds to the pre-contractual information they received from the trader.[1519]

As previously discussed, in order to further the objective of informed choice, it is essential to interpret and evaluate transparency in a way that ensures online information is accessible, readable, and comprehensible for consumers. The upcoming section explores whether and to what degree Croatian law, which incorporates the transparency concept of the CRD, can accomplish this aim.

4.4.3. The interpretation and assessment of transparency

4.4.3.1. Clarity, comprehensibility and simplicity of online information

Croatian case law concerning online contracts mainly addresses questions regarding whether traders have provided consumers with information about the online contract

1516. Konačni prijedlog Zakona o zaštiti potrošača P.Z.E. br. 175 (Final Proposal of the Consumer Protection Act P.Z.E. br. 175) 113.
1517. Ibid.
1518. Prijedlog zakona o zaštiti potrošača, s Konačnim prijedlogom zakona VII-1143/2014/Proposal of the Consumer Protection Act, with the final proposal of the act VII-1143/2014 85.
1519. Administrative Court of Split, judgement of 31 August 2018, Usl-377/17.

and whether the contract has been properly concluded.[1520] To my knowledge, neither the Croatian legislature nor Croatian courts have yet interpreted the requirements of **clarity** and **comprehensibility** in the context of providing information about online contracts. As discussed in Section 4.4.1, the ZZP 2022 incorporates the same transparency terminology found in the provisions implementing the UCTD and the CRD. This terminology is also present in the Croatian language versions of the UCTD and the CRD.[1521] Unfortunately, due to the lack of interpretation and evaluation of these transparency requirements, it remains uncertain whether they are intended to carry the same meaning, irrespective of whether they pertain to standard contract terms or the conclusion of online agreements.

The same ambiguity can also be observed in relation to EU law. As outlined in Section 2.3.3.1, the CJEU has not yet applied its UCTD-based interpretation of transparency to any of the transparency requirements in the CRD. This is striking, given that these directives include transparency requirements that are either identical or can be considered synonymous. Furthermore, current interpretations of the clarity and comprehensibility requirements at the EU level primarily emphasise the need for formal transparency of online information. In contrast, interpretations of the requirement to draft standard contract terms in plain and intelligible language aim to ensure both formal and substantive transparency of such terms.

While this has not occurred yet, it is conceivable that Croatian courts could transpose the interpretations of the requirements of plainness and intelligibility developed in unfair contract terms case law to the realm of online contracting. In such a scenario, the requirement of clarity/plainness ("*jasan*") would necessitate traders to present information in an unambiguous manner, as explained in Section 4.2.3.2. This would enhance the readability of the information, making this requirement a **formal transparency** requirement. If the requirement of comprehensibility/intelligibility ("*razumljiv*") required traders to present information in a way that allows consumers to understand the economic implications of online contracts, it would be seen as a requirement of **substantive transparency**, as explained in Section 4.2.3.4.

It is worth noting that the ZZP 2022 introduces an additional transparency requirement for information regarding online contracts, namely **simplicity** ("*jednostavan*"), which is not present in the CRD. While the CRD mandates that information must be drafted in *plain and intelligible language*,[1522] the ZZP 2022 requires

1520. Municipal Court of Velika Gorica, judgement of 22 April 2016, Povrv-1675/15; Municipal Civil Court in Zagreb, judgement of 3 March 2017, Povrv-14598/15; Municipal Civil Court of Zagreb, judgement of 13 September 2017, Povrv-16916/15; Municipal Court of Virovitica, judgement of 30 June 2017, Povrv-133/17; Municipal Civil Court of Zagreb, judgement of 28 June 2017, P-5009/15.

1521. See Articles 4(2) and 5 UCTD, available in Croatian at: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:31993L0013&from=EN (accessed 8 May 2024), and Articles 6(1) and 8(1) CRD, available in Croatian at: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32011L0083&from=EN (accessed 8 May 2024).

1522. Article 8(1) CRD.

the same information to be drafted in simple ("*jednostavan*") and intelligible ("*razumljiv*") language.[1523] The Croatian version of the CRD uses the same expressions.[1524]

Unfortunately, to the best of my knowledge, neither the Croatian legislature nor the Croatian courts have yet interpreted the requirement of simplicity in the context of online contracting. However, an example of a possible understanding of this requirement can be found in the 2011 Law on Amendments to the Law on Electronic Communications (Zakon o izmjenama i dopunama Zakona o elektroničkim komunikacijama 2011, or ZIDZEK 2011).[1525] Although this act has been replaced by the Electronic Communications Act in 2022 (Zakon o elektroničkim komunikacijama 2022, or ZEK 2022)[1526] and is no longer in effect, it provided a definition of simplicity. Specifically, ZIDZEK 2011 stipulated that contract terms should be expressed in simple language, understandable to an average user of telecommunication services, without specific education.[1527]

This definition of simplicity was applied in a case involving an online telecommunications contract, the validity of which was disputed by the consumer. After determining that the contract had been made available to the consumer in compliance with the law, the Municipal Civil Court in Zagreb noted that the contract's terms were formulated using simple language, as stipulated by the ZIDZEK 2011.[1528] If Croatian courts adopt the same interpretation of simplicity when adjudicating cases based on the provisions governing the provision of information about online contracts in the ZZP 2022, I would categorise this requirement as one of **substantive transparency**. This is because the aforementioned interpretation of the simplicity requirement places emphasis on the comprehensibility of information for consumers.

My analysis leads me to conclude that in the Croatian law, the requirements of clarity/plainness, comprehensibility/intelligibility, and simplicity can be interpreted to ensure that both formal and substantive aspects of transparency of consumer information are maintained. Yet, as explained above, it is not entirely clear whether the CRD safeguards both aspects of transparency. In my view, maintaining both formal and substantive transparency of consumer information is necessary in light of the objective of transparency in online contracting, which is to facilitate informed consumer choice, as discussed in section 4.4.2.

4.4.3.2. Easily noticeable information regarding online orders with a payment obligation

When an electronic order entails an obligation to make a payment, the trader must present consumers with specific information in a **clear** ("*jasan*") and **easily noticeable**

1523. Article 72(1) ZZP 2022.
1524. See the Croatian language version of Article 8(1) CRD at: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32011L0083&from=EN (accessed 8 May 2024).
1525. Zakon o izmjenama i dopunama Zakona o elektroničkim komunikacijama NN 90/2011, or ZIDZEK 2011).
1526. Zakon o elektroničkim komunikacijama NN 76/22, or ZEK 2022).
1527. Article 41(2) ZIDZEK 2011.
1528. Municipal Civil Court of Zagreb, judgement of 28 June 2017, P-5009/15.

("*lako uočljiv*") manner.[1529] The ZZP 2022 differs from the CRD in that it requires information to be easily noticeable, whereas the CRD requires the information to be prominent.[1530] Furthermore, the ZZP 2022 differs from previously applicable legislation, since the ZZP 2014 required traders to provide the mandatory information regarding online orders with a payment obligation in a clear ("*jasan*") and **visually prominent** ("*vidno istaknuto*") way.[1531]

As mentioned in Section 4.4.1, it seems that the ZZP 2014 was more in line with the CRD compared to the ZZP 2022. Although the ZZP 2014 included the term "*visual*" in the prominence requirement, the CRD clarifies in Recital 39 that the transparency concept, particularly in the context of electronic orders involving payment obligations, aims to ensure that specific information is sufficiently visible. Therefore, the addition of the word "*visual*" should not have led to any differences in interpreting or assessing the prominence requirement. It could have been included by the Croatian legislature for clarification or implementation purposes, aligning with the explanation provided in Recital 39 of the CRD.

Furthermore, the ZZP 2022 also mandates that traders to label orders placed through the activation of a field on the screen or a similar function in an easily noticeable way by using the phrase "*order with obligation to pay*" or an equivalent unambiguous expression, effectively conveying the existence of a payment obligation.[1532] In contrast to the ZZP 2022, the CRD requires the order button to be labelled in an easily legible manner.[1533] It is not immediately clear whether these requirements will result in any practical differences. In my opinion, both requirements could be interpreted in a similar manner, by stipulating that the font style, colour, size of the label, as well as its contrast with the background, should not hinder the consumer's ability to read it.

As mentioned in Section 4.4.1.2., the Croatian legislature did not provide an explanation for the introduction of the requirement to display information about online orders with payment obligations in an easily noticeable manner. One possible explanation may be the legislator's aim to harmonise transparency requirements from different directives within a single national statute. As explained in Section 4.2.1.1., the requirement of providing (easily) noticeable information can also be found in the provisions of the ZZP 2022 that govern the transparency of standard contract terms. Although I have not come across specific interpretations of the requirement to provide easily noticeable information about online orders with a payment obligation, it is worth noting that Croatian courts have previously interpreted the requirement of noticeability in unfair contract terms case law related to the *Franak* case. When interpreting and assessing noticeability, Croatian courts considered various factors, such as whether traders adequately published or made their standard contract

1529. Article 74(1) ZZP 2022.
1530. Article 8(1) CRD.
1531. Article 67(1) CPA.
1532. Article 74(1) ZZP 2022.
1533. Article 8(1) CRD.

terms available to consumers, the placement of certain terms within the contract (including whether they were hidden under headings), and whether all information was presented in the same font size.[1534]

This approach to the requirement of noticeability seems to prioritise the **formal transparency** of information, with a focus on the accessibility and readability of information. However, as exceptions, two courts adopted a more substantive approach to this requirement. One court examined whether traders had warned consumers about certain terms, while another court held that the consumer's ability to understand the meaning of a specific term influenced their ability to notice it.[1535]

Since the CRD emphasises the importance of ensuring that specific information related to electronic orders with an obligation to pay is sufficiently visible,[1536] the formal transparency approach, which prioritises accessibility and readability, seems to be more in line with the CRD. However, it is crucial to interpret at least one of the other applicable transparency requirements in a substantive manner at both the EU and national levels to guarantee that information regarding such orders can aid consumers in making informed decisions.

4.4.3.3. Language requirements

According to Article 60(7) of the ZZP 2022, traders operating in Croatia must always provide information regarding online contracts in the **Croatian language** and in the **Latin script**.[1537] However, this article explicitly permits traders to present this information in other languages and scripts too. The Croatian legislature has not explicitly clarified the reasoning behind implementing these requirements. In essence, establishing language requirements for consumer information can contribute to improving the readability and comprehensibility of information for consumers. In a market such as the EU, which transcends national borders, traders have the chance to offer their products and services in numerous countries, particularly online.

In cases where traders are based in one country but conduct business in multiple countries, a significant number of their target consumers may not have proficiency in any of the languages used to provide information. As a result, these consumers may struggle to fully comprehend the information related to their rights and obligations. Additionally, many consumers in different EU Member States may only be fluent in their native language(s) or even just the language spoken in their specific region. Given these language differences, it is understandable that national legislatures would want to require traders operating within their country to offer information in a language that the majority of their citizens are likely to understand.

Despite the presence of several languages and scripts that are officially used in specific regions of the country, the Croatian language and Latin script are the only languages and scripts officially used throughout the entire territory of Croatia.

1534. See Section 4.2.3.3.
1535. Ibid.
1536. Recital 39 CRD.
1537. Article 60(7) ZZP 2022.

Therefore, if the goal of the Croatian legislature was to improve the readability of information for Croatian consumers without overly burdening traders with the need to comply with multiple languages and scripts used within the country, the choice of the Croatian language and Latin script seems reasonable. However, even in these circumstances, there may still be consumers residing in Croatia who will not benefit from these requirements because their native language is Italian or because they use the Cyrillic script. Nevertheless, this does not diminish the potential positive impact that language requirements can have on the readability of information for the majority of consumers in a specific country.

In my view, language requirements can facilitate both **formal and substantive transparency** by enhancing the noticeability, readability, and comprehensibility of consumer information and may even be considered prerequisites thereof. Consumers are more likely to notice and engage with information presented in a language they command. However, language requirements do not inherently guarantee the formal and substantive transparency of information. For example, Croatian consumers may notice relevant information because it is available in Croatian, but they may struggle to read and understand the information due to its length, sentence structure, or grammar. Moreover, even if they can read information in Croatian, they may still find it difficult to comprehend how a particular contract affects their financial situation if the information is presented in technical or legal language.

4.4.4. Contractual consequences of a breach of transparency

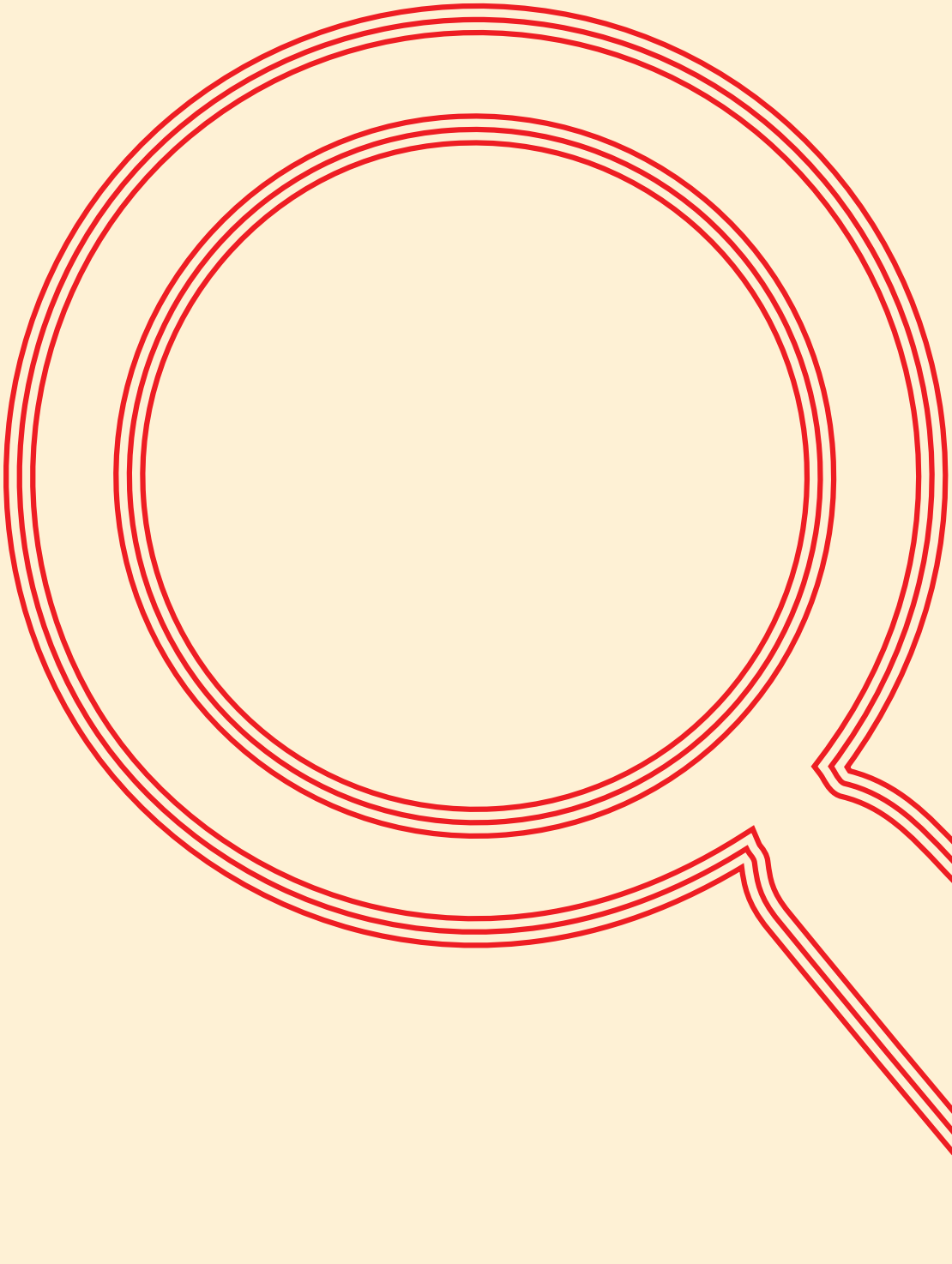
The ZZP 2022 establishes two categories of consequences for transparency breaches. Firstly, breaches of information and transparency requirements are usually subject to fines. This type of consequence falls outside the scope of this thesis.[1538]

Secondly, ZZP 2022 sets out various specific consequences if traders fail to provide consumers with information regarding certain aspects of the contract as instructed by the law. For example, if consumers place an electronic order that includes a payment obligation by pressing a button that is not clearly labelled with the words *"order with an obligation to pay" ("narudžba s obavezom plaćanja")*, the order will not be legally binding, resulting in the contract being null and void.[1539] Furthermore, if traders do not clearly and comprehensibly inform consumers about any additional costs, and consumers have not explicitly agreed to such costs, they will not be required to pay them.[1540] Consumers who have, nonetheless, paid these costs have the right to demand restitution.[1541] Finally, if traders fail to provide consumers with information about their right of withdrawal in plain and intelligible language, this right will be extended for an additional 12 months.[1542]

1538. See Chapter VII of ZZP 2022.
1539. Article 74(4) ZZP 2022.
1540. Article 51(1) ZZP 2022.
1541. Article 52(2) ZZP 2022.
1542. Article 80 ZZP 2022.

These contractual consequences for breaches of transparency, derived from the CRD, are aimed at protecting consumers' interests by ensuring their access to transparent mandatory information about online contracts. However, their contribution to promoting transparency depends on how rigorously courts evaluate a trader's compliance with transparency requirements, rather than solely focusing on compliance with information requirements. To enhance transparency, it is crucial that the compliance assessment encompasses not only whether the required information was provided, but also the way in which it was presented. This means considering whether traders provided consumers with readable, accessible, and understandable information. Such an evaluation not only ensures that consumers have received specific information but also that they have received quality information that they can potentially utilise when making decisions.

4



CHAPTER 5

The concept of transparency in English law implementing the UCTD, the CCD and the CRD

5.1. Introduction to English contract and consumer law

English contract law is based on common law, statutory law, international conventions and EU law.[1543] Among these legal sources, common law, defined as the set of legal rules and principles developed through court decisions,[1544] stands out. The most noticeable difference between civil and common law lies in the fact that common law mainly relies on case law, whereas civil law mainly relies on legislation.[1545]

Common law consists of cases previously decided by (in principle) higher courts, referred to as precedents, which are meant to guide subsequent similar cases until the same or higher courts choose to modify them.[1546] Still, common law is also based on statutory law, which judges interpret and apply,[1547] and can be amended by it.[1548] In contrast to civil law, where statutes hold greater authority and case law serves as a secondary source of law, common law systems evolve through the decisions made by the courts.[1549]

Fundamental rules of English contract law can be found in common law. It covers a broad range of topics in contract law, including the definition and characteristics of contracts, their content, reasons for rendering contracts void, handling of illegal contracts, contract performance, their implications for third parties, and available contractual remedies.[1550] Common law rules that are particularly relevant in consumer law relate to the incorporation and interpretation of contract terms. These rules revolve around how contract terms should be adequately brought to the consumer's attention in order to be legally binding, essentially addressing the prominence and

1543. Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 1-003.

1544. Hugh Beale, Benedicte Fauvarque-Cosson, Jacobien Rutgers and Stefan Vogenauer (eds), *Cases, Materials and Text on Contract Law, 3rd edition* (Hart Publishing 2018) 88; Andrew Burrows, *English Private Law* (Oxford University Press 2013) 10; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 4; Martin Partington, *Introduction to the English Legal System* (Oxford University Press 2013) 49; Alisdair Gillespie and Siobhan Weare, *The English legal system* (Oxford University Press 2017) 13.

1545. Hugh Beale, Benedicte Fauvarque-Cosson, Jacobien Rutgers and Stefan Vogenauer (eds), *Cases, Materials and Text on Contract Law, 3rd edition* (Hart Publishing 2018) 88; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 8, 12; Časlav Pejović, 'Civil law and common law: Two different paths leading to the same goal' (2001) 40(155) *Poredbeno pomorsko pravo* 9.

1546. Časlav Pejović, 'Civil law and common law: Two different paths leading to the same goal' (2001) 40(155) *Poredbeno pomorsko pravo* 9-11. See also Andrew Burrows, *English Private Law* (Oxford University Press 2013) 23; Martin Partington, *Introduction to the English Legal System* (Oxford University Press 2013) 54.

1547. Časlav Pejović, 'Civil law and common law: Two different paths leading to the same goal' (2001) 40(155) *Poredbeno pomorsko pravo* 10; Patrick Selim Atiyah, 'Common Law and Statute Law' (1985) 48(1) *The Modern Law Review* 3.

1548. Patrick Selim Atiyah, 'Common Law and Statute Law' (1985) 48(1) *The Modern Law Review* 5; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 17; Martin Partington, *Introduction to the English Legal System* (Oxford University Press 2013) 54.

1549. John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 20-21.

1550. Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 1-004.

transparency of such terms.[1551] Furthermore, these rules require that any ambiguous contract terms must be interpreted *contra proferentem*, meaning against the party who drafted them, thus penalising the lack of transparency in contract terms.[1552] While rules regarding the interpretation of non-transparent contract terms were originally established in common law, it should be noted that the interpretation of ambiguous terms in consumer contracts has also been governed by statutory law since the incorporation of the UCTD into English law in 1994.[1553]

The evolution of English consumer law reflects a similar pattern. While common law continues to hold significance in the realm of English consumer law, Cartwright highlight a shift over time, where statutory law has emerged as the predominant source of regulation for consumer contracts.[1554] Furthermore, the statutory law that governs consumer contracts has developed into a separate and distinct body of law, which is independent from the broader English contract law that is established on statutes and common law.[1555] Therefore, consumer contracts are predominantly regulated by statutory consumer laws nowadays, with general statutory laws applying only when specific regulations for consumer contracts are not present.[1556]

To conduct a critical analysis of how the concept of transparency is interpreted and evaluated in English law, it is important to consider the historical context in which this concept developed. The evolution of English law demonstrates the growing importance of statutory law, partly influenced by the need to implement the extensive body of EU consumer law.[1557] During the process of transposing various directives from the consumer acquis, the UK legislature consistently opted for the "copy-out" technique. This approach involved aligning the language of these directives with domestic legal terminology, rather than adapting it to align with domestic legal concepts, a method known as the "elaborative technique".[1558] While the "copy-out" technique offers the advantage of reducing the risk of misinterpretation or improper

1551. See, for instance, *Robert Henderson and Others v Charles Henry Stevenson* (1875) 2 R. (H.L.) 71, or *J Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461.

1552. Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 16-111-113, 18-012; Hugh Beale, *Chitty on contracts: Volume II: Specific Contracts, 35th edition* (Sweet & Maxwell 2023) 41-463; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 4-5; Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428-429.

1553. Section 6 Unfair Terms in Consumer Contracts Regulations 1994 No. 3159 from 1st July 1995 (UTCCRs 1994).

1554. John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 4-5.

1555. Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 1-009-010.

1556. Ibid, 1-010.

1557. Ibid, 1-014. See also John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 4-5.

1558. The transposition of EU law through the use of the 'copy-out' technique was considered a key guiding principle for effectively implementing EU law. See Department for Business, Energy & Industrial Strategy, 'Transposition guidance: how to implement EU Directives into UK law effectively' (2018) [3, 11-12].

transposition of EU law,[1559] it comes with a drawback. It may obscure the integration of EU rules or principles that could be partially or completely unfamiliar to English law, or that already exist within the national legal framework.[1560] Consequently, an analysis of the transparency concept, considering the national legal context in which it has evolved, requires examining the common law rules that previously influenced this concept, despite their inapplicability in cases where specific statutory laws govern transparency in consumer contracts.

As explained in Chapter 1, the UK ceased to be an EU Member State on 31 January 2020, marking the completion of the widely known Brexit withdrawal process.[1561] The majority of EU laws that were applicable in the UK before Brexit still remain in force as 'retained EU law' unless amended by the UK legislatures.[1562] This includes the implementation of English law incorporating the UCTD, the CCD, and the CRD. As a result, UK consumers still benefit from similar rights as they did before Brexit, especially when engaging in transactions with UK traders.[1563] However, they may face challenges in enforcing redress rights for online purchases from EU traders. UK traders must continue to comply with consumer protection laws in EU countries where they conduct business and may face consumer claims and regulatory actions.[1564] However, judgments from the courts of EU Member States will not be automatically recognised and enforced in the UK. Another consequence of Brexit is the reduced influence of the UK and the EU on each other's consumer protection laws.[1565] Although currently aligned, it is anticipated that consumer protection laws in the UK and EU will diverge in the future.

For the present analysis, English law provides valuable insights into the transparency of consumer information. This is because the UK legislator has implemented all three directives discussed in this thesis, and English courts have interpreted the transparency requirements outlined in each of these directives.

1559. Paula Giliker, 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive' (2015) 23(1) *European Review of Private Law* 11.

1560. Ibid, 13-16. See also Paula Giliker, 'The Consumer Rights Act 2015 – a bastion of European consumer rights?' (2017) 37(1) *Legal Studies* 79-80.

1561. Information on the withdrawal process is available here: https://eur-lex.europa.eu/content/news/Brexit-UK-withdrawal-from-the-eu.html (accessed 8 May 2024).

1562. Lorraine Conway (House of Commons Library), 'Brexit: UK consumer protection law' (2021) Briefing Paper 9126 5-8. Moreover, the ongoing legislative process in the area of consumer law in the UK pertains to the revision of the Consumer Protection from Unfair Trading Regulations. This revision aims to implement the Unfair Commercial Practices Directive (UCPD), which falls outside the scope of my research. See more information here: https://www.gov.uk/government/publications/digital-markets-competition-and-consumers-bill-supporting-documentation/enhancing-consumer-rights-policy-summary-brief#:~:text=The%20Bill%20will%20introduce%20new,such%20as%20fake%20reviews%20online (accessed 8 May 2024).

1563. Lorraine Conway (House of Commons Library), 'Brexit: UK consumer protection law' (2021) Briefing Paper 9126 13.

1564. Ibid, 13-14.

1565. Ibid, 16-22.

5.2. The concept of transparency in English law implementing the UCTD

5.2.1. The development of the transparency concept

5.2.1.1. The transparency concept in common law

Prior to its regulation in statutory law, common law developed certain rules governing the concept of transparency in standard contract terms.[1566] These rules address issues concerning related to the inclusion and interpretation of contractual terms, and they aim to either penalise or reduce the impact of contract terms that lack transparency.[1567] Although these rules are not specific to consumer contracts and apply to contracts in general, they also serve to protect consumers when they enter into contracts based on the trader's standard contract terms.[1568]

The rules governing the inclusion of standard contract terms aim to ensure that the counterparty of a trader is made aware of these terms' existence. This allows them to decide whether or not to familiarise themselves with the terms. Traders can incorporate their standard contract terms into the agreement by obtaining the counterparty's signature. This means that traders can provide these terms to the counterparty during the signing and entering into the agreement.[1569] Alternatively, if the trader does not physically provide the standard contract terms to their counterparty, the terms may still be included by means of a notice indicating where the terms are disclosed.[1570] In the latter scenario, traders must provide their counterparty with reasonable notice of their standard contract terms before or at the time of concluding the contract.[1571]

1566. Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428-430; Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) *Legal Studies* 2-3; Michael Lobban, 'Contractual Terms and their Performance' in William Cornish et al (eds) *The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law* (Oxford University Press 2010) 473-475.

1567. Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428-429; Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) *Legal Studies* 2-3.

1568. Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428-429.

1569. Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 16-005-007; Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428.

1570. Ibid.

1571. Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 16-009; Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American*

The requirement for reasonable notice compels traders to take reasonable measures to draw their standard contract terms to the counterparty's attention. However, it does not dictate that traders must ensure their counterparty genuinely notices, reads, or understands their standard contract terms.[1572] Traders should make sure to explicitly highlight any particularly onerous terms to the counterparty. These are terms that the counterparty would not reasonably anticipate being included in the standard contract terms.[1573] Still, the obligation to highlight particularly burdensome or unusual contract terms is limited under common law. It does not apply in cases where standard contract terms have been incorporated by signature, except in exceptional circumstances, such as duress, undue influence, or misrepresentation.[1574]

The rules regarding the interpretation of standard contract terms aim to minimise the negative effects of non-transparent terms for the party who did not draft write them. As mentioned in Section 5.1., even prior to the adoption of a comparable interpretative rule in statutory law,[1575] English common law allowed for the possibility of construing the meaning of an ambiguous contract term *contra proferentem*, i.e., in a way that is least favourable to the drafter of the terms.[1576] However, as pointed out by Twigg-Flesner, this type of transparency control has its limitations since it relies on whether non-transparent contract terms can be subjected to such an interpretation. As a result, in situations where the wording of the contract terms does not allow for an interpretation against the trader, those terms remain legally binding and effective.[1577]

Perspectives (Oxford University Press 2015) 428; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 211-212.

1572. Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428.

1573. *J Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461; *Thornton v Shoe Lane Parking Ltd* [1971] R.T.R. 79. See also Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 16-012; Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 211-212.

1574. *Parker v South Eastern Railway Co* (1877) 2 C.P.D. 416; *L'Estrange v F Graucob Ltd* [1934] 2 K.B. 394. See also Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 16-006.

1575. See section 6 UTCCRs 1994.

1576. Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 16-111-113; Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 429; Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) *Legal Studies* 2-3; Edwin Peel, 'Contra proferentem revisited' (2017) 133 *Law Quarterly Review* 6-7; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 211-212.

1577. Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 429.

5.2.1.2. The implementation of the UCTD in English law

As demonstrated in the preceding section, the common law rules regarding the transparency of standard contract terms had their drawbacks. Even particularly onerous or unusual contract terms that traders failed to prominently disclose could still be incorporated into contracts through signature.[1578] Additionally, non-transparent contract terms that were not suitable to be interpreted against the party responsible for drafting them would remain binding and effective. These limitations raised concerns about whether common law offers adequate protection against non-transparent and unfair contract terms, prompting initiatives to enhance protection through legislation.[1579]

As a result, the UK legislature introduced the Unfair Contract Terms Act in 1977 (UCTA 1977),[1580] marking the beginning of statutory control of fairness and transparency of standard contract terms.[1581] Although it encompassed a broader personal scope, as it pertained to both B2C and B2B agreements, its substantive scope was more limited compared to the UCTD. Specifically, it only allowed for the examination of contractual provisions that limited or excluded a party's liability,[1582] subjecting the use of such terms to a reasonableness test.[1583] The reasonableness test required an assessment of whether a contentious contractual provision was fair and reasonable, taking into account the circumstances that existed at the time the contract was formed, which were, or should have been, reasonably known or considered by the parties.[1584] Although the UCTA 1977 does not explicitly govern the transparency of limitation and exclusion clauses, the intelligibility of these clauses is one of the factors that can be considered when determining their fairness and reasonableness.[1585]

1578. Ibid. See also Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) *Legal Studies* 3.

1579. Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 429; Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) *Legal Studies* 3.

1580. Unfair Contract Terms Act 1977 Chapter 50 from 26th October 1977. For a detailed account of the provisions of the Unfair Contract Terms Act 1997 (UCTA 1977), see Elizabeth Macdonald, 'Mapping the Unfair Contract Terms Act 1977 and the Directive on unfair terms in consumer contracts' (1994) *Journal of Business Law* 441-462.

1581. Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 429-430.

1582. Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 18-069; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 216-217.

1583. For a detailed account of UTCA's reasonableness test, see Elizabeth Macdonald, 'Unfair Contract Terms Act – Thirty Years On' in Andrew Burrows and Edwin Peel (eds) *Contract Terms* (Oxford University Press 2007) 164-172.

1584. Section 11(1) UCTA 1977.

1585. *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd.* [1999] C.L.C. 1243; Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) *Legal Studies* 3.

While the UCTA 1977 continued to apply to consumer contracts,[1586] in 1994, the UK legislature also introduced the Unfair Terms in Consumer Contracts Regulations (UTCCRs 1994), which incorporated the UCTD into English law. The UTCCRs 1994 explicitly governed the evaluation of transparency in standard contract terms and exclusively applied to consumer contracts.[1587] Regulations 3 of the UTCCRs 1994 stipulated that it was not possible to examine the fairness of a core contract term "*in so far as it is in plain, intelligible language*".[1588] Regulation 6 of the UTCCRs 1994 required traders to ensure that any written contract term "*is expressed in plain, intelligible language*"." It also stated that any doubts regarding the meaning of a term should be interpreted in a manner that is most favourable to the consumer.[1589]

Conway emphasised that, although the 1994 UTCCRs did not prescribe a specific penalty for breaching transparency, such a breach was relevant in assessing whether and to what extent consumers could claim the unfairness of contract terms.[1590] In her opinion, this suggested that the concept of transparency, as applicable to standard terms in consumer contracts and rooted in EU law, sharply contrasted with common law.[1591] This is because, despite a few exceptions, common law assumes that a party who signs a contract is bound by it, regardless of whether they have read and understood the contract.[1592]

However, the contrast between the regulation of transparency of standard contract terms in EU law and English common law may not be as pronounced as Conway suggests. This is because EU law also does not require traders to ensure that consumers read and understand their standard terms. Specifically, the UCTD requires traders to make their standard terms available to consumers and ensure they are sufficiently understandable to an average, reasonably informed, and observant consumer, in case consumers choose to familiarise themselves with these terms.[1593]

In 1999, the Unfair Terms in Consumer Contract Regulations (UTCCRs 1999) repealed and replaced the UTCCRs 1994. This was done to address the provisions in the UTCCRs 1994 that did not adequately reflect the UCTD, including the limited application to contracts concerning goods and services, as well as the definitions of terms such as 'seller' and 'supplier'.[1594] It should be noted that the UTCCR 1999 did not

1586. Competition & Markets Authority, 'What's new? An overview of changes to unfair contract terms law in the Consumer Rights Bill' (2015) CMA37(c)con [3-4].
1587. Section 3(1) UTCCRs 1994. See also Hugh Beale, *Chitty on contracts: Volume II - Specific Contracts, 35th edition* (Sweet & Maxwell 2023) 41-244-245.
1588. For a detailed analysis of its provisions, see Alison Padfield, 'The impact on English contract law of the EC Directive on unfair terms in consumer contracts' (1995) 10(5) *Journal of International Banking Laws* 175-182.
1589. Ibid.
1590. Lorraine Conway (Business & Transport Section, House of Commons Library), 'The Unfair Terms in Consumer Contracts Regulations' (1996) Research Paper 96/93 12.
1591. Ibid.
1592. Alison Padfield, 'The impact on English contract law of the EC Directive on unfair terms in consumer contracts' (1995) 10(5) *Journal of International Banking Laws* 179; Lorraine Conway (Business & Transport Section, House of Commons Library), 'The Unfair Terms in Consumer Contracts Regulations' (1996) Research Paper 96/93 12.
1593. See Section 2.1.3. of Chapter 2.
1594. Susan Bright, 'Winning the battle against unfair contract terms' (2000) 20(3) *Legal Studies* 332.

modify the provisions relating to transparency of standard contract terms described above, as outlined in the UTCCR 1994.[1595]

5.2.1.3. The adoption of the Consumer Rights Act 2015

The regulation of transparency in standard terms in consumer contracts under English law remained unchanged for two decades until 2015, when the Consumer Rights Act (CRA 2015) came into effect.[1596] The CRA 2015 merged the legislation governing unfair terms in consumer contracts existing at that time, specifically the UCTA 1977 and the UTCCRs 1999.[1597] It should be noted that, from this point onwards, the UCTA 1977 only applies to B2B relationships.[1598]

The CRA 2015 simplifies and consolidates the regulation of the most significant consumer rights related to contracts for goods, services, and digital content.[1599] It also addresses the regulation of unfair terms in consumer contracts. Before its introduction, the UK government consulted the English and Scottish Legislative Commissions (Law Commission) on two separate occasions to determine the required amendments to the law concerning unfair terms in consumer contracts.[1600] On both occasions, the Law Commission proposed changes to the concept of transparency.[1601] At the core of these proposed changes was the reformulation of how the transparency of contract terms is expressed. Instead of requiring contract terms to be drafted in "*plain, intelligible language*"," the Law Commission suggested that contract terms should be required to be "*transparent*"." In 2005, the Law Commission argued that the concept of transparency should encompass that a contract term must be: a) in plain language, b) clearly presented, c) legible, and d) available to the consumer.[1602] Additionally, it should be possible to establish the unfairness of a contract term solely or predominantly due to the term's lack of transparency.

In its updated report from 2013, the Law Commission maintained its proposal to modify the expression of the transparency concept. However, it slightly revised the requirements that should constitute the transparency concept. This time, the Law Commission asserted that the concept of transparency should encompass the requirements that contract terms are: a) in plain, intelligible language, b) (if in written form) legible, and c) readily available to consumers.[1603]

1595. Sections 6(2) and 7 Unfair Terms in Consumer Contract Regulations 1999 No. 2083 (UTCCRs 1999).
1596. Consumer Rights Act 2015 Chapter 15 from 26th March 2015 (CRA 2015). For a detailed account of its provisions, see Alec Samuels, 'The Consumer Rights Act 2015' (2016) *Journal of Business Law*.
1597. Competition & Markets Authority, 'What's new? An overview of changes to unfair contract terms law in the Consumer Rights Bill' (2015) CMA37(c)con [3-4].
1598. Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford University Press 2018) 213.
1599. Hugh Beale, *Chitty on contracts: Volume II - Specific Contracts, 35th edition* (Sweet & Maxwell 2023) 41-247-256.
1600. The Law Commission and The Scottish Law Commission, 'Unfair terms in contracts: Report on a reference under section 3(1)(e) of the Law Commissions Act 1965' (2005) SE/2005/13, and The Law Commission and The Scottish Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013).
1601. Ibid.
1602. The Law Commission and The Scottish Law Commission, 'Unfair terms in contracts: Report on a reference under section 3(1)(e) of the Law Commissions Act 1965' (2005) SE/2005/13 [41, 42, 158-159].
1603. Ibid, [37-41].

Additionally, the Law Commission has proposed the inclusion of a prominence test alongside the transparency test, specifically applying to those contract terms that are typically exempted from unfairness control.[1604] To satisfy the prominence test, traders must present contract terms in a manner that enables the average consumer to become aware of them.[1605] It is worth noting that the requirement of prominence appears to be in line with the requirement of clear presentation of contract terms as stated in the Law Commission's 2005 report. This is because the aim of the requirement of clear presentation of contract terms is to enable consumers to review the standard contract terms.[1606] In my opinion, consumers can only do this if they are aware of the existence of the standard contract terms and know where to find them. For this reason, it seems that the two proposals from the Law Commission do not substantially differ in terms of the specific transparency requirements that constitute the transparency concept.

However, the Law Commission provided more comprehensive guidance on the intended scope of the requirement of prominence in its 2013 report, as opposed to its 2005 report, which focused on the requirement of clear presentation. Specifically, the Law Commission clarified that the assessment of contract terms' prominence should be based on the average, reasonably informed, observant, and circumspect consumer, as defined in EU law.[1607] Moreover, as stated by the Law Commission, the level of prominence of contractual terms should depend on their nature. The more unusual or burdensome a contractual term is, the more prominent it needs to be.[1608]

The Law Commission stated that the transparency test and the prominence test were distinct examinations, although they did overlap. While contract terms that are prominent are usually both available and legible, terms that are drafted in plain and intelligible language do not necessarily have to be prominent. By keeping these tests separate, it became easier to determine which terms should be transparent and which terms should be both transparent and prominent.[1609] According to the Law Commission, all contract terms must satisfy the transparency test, implying that they should be available, drafted in plain and intelligible language, and legible.[1610] However, only those contract terms that are generally exempt from unfairness control should also be prominent, i.e., presented in a way that ensures an average consumer would become aware of them.[1611]

It is noteworthy that the transparency concept, as adopted in the CRA 2015, does not entirely align with the suggestions of the Law Commission. Specifically, the CRA 2015 mandates that all written contract terms and notices must be **transparent**,

1604. Ibid.
1605. The Law Commission and The Scottish Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) [42-45].
1606. The Law Commission and The Scottish Law Commission, 'Unfair terms in contracts: Report on a reference under section 3(1)(e) of the Law Commissions Act 1965' (2005) SE/2005/13 [35].
1607. The Law Commission and The Scottish Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) [42].
1608. Ibid, [42-45].
1609. Ibid, [45].
1610. Ibid.
1611. Ibid.

meaning they should be in **plain and intelligible language** and **legible**.[1612] Therefore, according to the CRA 2015, the concept of transparency encompasses plainness, intelligibility, and legibility. In contrast to the Law Commission's proposal, the CRA 2015 does not explicitly require contract terms to be available in order to qualify as transparent. Section 64 of the CRA 2015, which governs the exclusion of core contract terms from the fairness assessment, also contains the same transparency concept. Following the recommendation of the Law Commission, the CRA 2015 mandates that core contract terms must be both transparent and **prominent**, meaning they must be presented in a way that allows an average, reasonably well-informed, observant, and circumspect consumer to become aware of them.[1613] Lastly, Section 69 of the CRA 2015 stipulates that in situations where standard contract terms and notices can be interpreted differently, the interpretation that is most favourable to the consumer must be upheld.

Transparency control under the CRA 2015 encompasses standard contract terms, consumer notices, and individually negotiated contract terms.[1614] According to the CRA 2015, a consumer notice "*includes an announcement, whether or not in writing, and any other communication or purported communication*".[1615] The Competition & Markets Authority (CMA) explained in its *2015 Unfair Contract Terms Guidance* that consumer notices are often encountered in places like shops, car parks, or online.[1616] These consumer notices contain wording that, although not included in the trader's standard contract terms, relates to similar types of rights and obligations.[1617] Consequently, the evaluation of transparency under the CRA 2015 extends to "*any wording directed by traders to consumers which has an effect comparable to that of a potentially unfair contract term*".[1618]

In 2014, the CMA took over regulatory oversight of fairness and transparency in consumer contract terms from the Office of Fair Trading (OFT).[1619] The CMA has the authority to handle complaints regarding the unfairness of contract terms intended for general use.[1620] It can also request a court to issue an injunction against traders who seem to be employing unfair contract terms. Similar to its predecessor, the OFT, the CMA issues guidelines that clarify its interpretation of the applicable law.[1621] While these guidelines are not legally binding on the courts, the CMA adheres to

1612. Section 68 CRA 2015.
1613. Section 64 CRA 2015, in particular (2), (4) and (5).
1614. Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [9-11].
1615. Section 61(8) CRA 2015.
1616. Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [9].
1617. Ibid, [8-11].
1618. Ibid, [9].
1619. Hugh Beale, *Chitty on contracts: Volume II - Specific Contracts, 35th edition* (Sweet & Maxwell 2023) 41-245, 41-310.
1620. Ibid, 41-310.
1621. Ibid.

them when exercising its regulatory control powers.[1622] Therefore, these guidelines offer valuable insights into understanding the concept of transparency in English law regarding unfair contract terms.

5.2.2. The objective of transparency

The transparency concept in English law on unfair contract terms control aims to safeguard consumers from **unfair surprise**[1623] and facilitate their **informed choice**.[1624] The objective of protecting against unfair surprise has been discussed in case law, relevant guidelines, and scholarship.[1625] It requires contract terms to be comprehensible to consumers, aiming to shield them from being unpleasantly surprised by the contents of the terms at a later stage.[1626]

The objective of informed consumer choice can be derived from case law and relevant guidelines. Case law demonstrates that the essence of the transparency concept is to ensure that consumers understand how contract terms affect their rights and responsibilities.[1627] As articulated by the CMA, transparency "*is not a matter of rigid requirements*" but necessitates that "*consumers have a real chance to learn and understand, by the time the contract becomes binding, the nature and consequences of their obligations*".[1628] When consumers have a clear understanding of contract terms, they can make an informed choice on whether they want to be bound by a particular contract.

The informed consumer choice objective appears to be more challenging compared to the objective of protection against unfair surprise. This is because informed choice requires the provision of information of a certain quality, allowing consumers to assess whether a trader's offer meets their needs and to compare different market offers and choose the most suitable one. Conversely, the objective

1622. Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [5-7].

1623. *Director General of Fair Trading v First National Bank Plc* [2002] 1 A.C. 481; *Office of Fair Trading v Abbey National plc and others* [2009] 2 W.L.R. 1286; *The Office of Fair Trading v Foxtons Limited* [2009] C.T.L.C. 188. See also Susan Bright, 'Unfairness and the Consumer Contract Regulations' in Andrew Burrows and Edwin Peel (eds) Contract Terms (Oxford University Press 2007) 179; Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [34].

1624. *Office of Fair Trading v Abbey National plc and others* [2009] 3 W.L.R. 1215; Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [30-32].

1625. *Director General of Fair Trading v First National Bank Plc* [2002] 1 A.C. 481; *Office of Fair Trading v Abbey National plc and others* [2009] 2 W.L.R. 1286; *The Office of Fair Trading v Foxtons Limited* [2009] C.T.L.C. 188. See also Susan Bright, 'Unfairness and the Consumer Contract Regulations' in Andrew Burrows and Edwin Peel (eds) Contract Terms (Oxford University Press 2007) 179; Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [34].

1626. Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [34].

1627. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1; *The Office of Fair Trading v Foxtons Limited* [2009] C.T.L.C. 188; *The Office of Fair Trading v Ashbourne Management Services Ltd and Others* [2011] C.T.L.C. 237.

1628. Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [34].

of protection against unfair surprise only necessitates that consumers can grasp the content of the agreement they are entering into. The suitability of the agreement for consumers is not relevant for the purpose of achieving this objective.

Nonetheless, it seems that achieving both objectives requires both formal and substantive transparency of information. Consumers can only make well-informed decisions about contracts and avoid unpleasant surprises about the contract's content if they can access, read, and understand the information provided by traders. Consequently, the following section examines whether the concept of transparency in English law regarding the control of unfair contract terms is interpreted and assessed in a way that upholds both formal and substantive transparency of information.

5.2.3. The interpretation and assessment of transparency

5.2.3.1. Transparency requirements in common law

5.2.3.1.1. Clarity and unambiguity

Before the transposition of the UCTD's transparency requirement into English law, courts assessed the transparency of standard contract terms within the framework of interpreting contract terms and applying the reasonableness test. Within the context of interpreting contract terms, the requirements of **clarity** and **unambiguity** played an important role in determining the enforceability of a contract term that limited or excluded the liability of the trader.[1629] As Lord Scrutton explained in 1927 in the case *Gordon Alison & Co v Wallsend Shipway and Engineering & Co*, "*if a person was under a legal liability and wished to get rid of it he can only do so by using clear words*".[1630] Although these requirements originated from general contract law, they applied to consumer cases in the absence of more specific consumer regulations.

The *Beck & Co v Szymanowski & Co* case illustrates that traders had to draft exemption clauses in a clear and unambiguous manner to ensure their enforceability. In this case, the dispute centred around a contract for the sale of a specific quantity of reels, each containing 200 yards of sewing cotton.[1631] The contract explicitly stated that it would be assumed that the delivered goods met the specifications mentioned in the contract, unless the buyer informed the seller otherwise within 14 days of receiving the goods. Several months after the delivery, the buyers discovered that each reel of cotton contained 185 yards of sewing cotton instead of the specified 200 yards. This discovery prompted them to file a lawsuit for breach of contract.

The majority opinion in *Beck & Co v Szymanowski & Co* emphasised that the exemption clause should be interpreted in accordance with the *contra proferentem* rule. As explained in Section 5.1., this rule ensures that any uncertainty or ambiguity regarding the meaning of the clause would be resolved against the trader and in

1629. Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 18-008.
1630. *Gordon Alison & Co Ltd v Wallsend Slipway Co Ltd* (1927) 27 Ll. L. Rep. 285.
1631. *Ernest Beck & Co v K Szymanowski & Co* [1924] A.C. 43. Another example can furthermore be found in the case *Canada Steamship Lines Ltd v King, The* [1952] A.C. 192.

favour of their counterparty.[1632] In the specific case, the House of Lords concluded that the exemption clause unequivocally applied only to the cotton that was physically delivered.[1633] Any remaining quantity, despite being specified in the contract, was never actually delivered and hence falls outside the purview of the exemption clause.[1634] Consequently, the buyers have succeeded in their claim for damages relating to the undelivered cotton.

Conklin, Hyde, and Parente observe that the rules governing the interpretation of contract terms represent, perhaps, the closest equivalent in common law to the obligation of drafting contract terms in plain and intelligible language.[1635] While courts would not rewrite contract terms, they would employ interpretative rules, with the *contra proferentem* rule being of particular importance, to mitigate the adverse consequences of contract terms lacking transparency.[1636] Consequently, traders had to draft contract terms in a clear and unambiguous fashion to ensure that they would be interpreted in a specific manner.[1637]

When interpreting the wording used in exemption clauses, courts considered the contractual context in which the clause operated and the shared intention of the contracting parties.[1638] Considering the contractual context enabled a critical assessment of general and broad statements, which, although they may cover a wide range of circumstances, could potentially contradict the main objective of the contract.[1639] Examining the common intention of the contracting parties did not necessitate that courts scrutinise how either of the parties understood the wording of the contractual terms.[1640]

This approach to the interpretation of contract terms appears to be similar to that used in European consumer law. Specifically, in European consumer law, the transparency of the language of the terms is evaluated based on the benchmark of a reasonably informed and observant consumer.[1641] Since the examination of contract terms' clarity and unambiguity in common law includes considering how contract terms could have been reasonably understood by the parties involved, I would classify clarity and unambiguity as requirements of **substantive transparency**.

1632. Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 16-111-113, 18-012; Hugh Beale, *Chitty on contracts: Volume II: Specific Contracts, 35th edition* (Sweet & Maxwell 2023) 41-463; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 4-5; Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428-429.
1633. *Ernest Beck & Co v K Szymanowski & Co* [1924] A.C. 43.
1634. Ibid.
1635. Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) *Legal Studies* 2-3.
1636. Ibid.
1637. Ibid, 3.
1638. Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 18-008-010.
1639. Ibid.
1640. Ibid.
1641. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1.

Another example of a substantive understanding of clarity can be seen in the case of *Overseas Medical Supplies v Orient Transport Services*, regarding the application of the reasonableness test under UCTA 1977.[1642] This case pertained to a contract for the transportation of specific equipment to an exhibition in Iran. The contract was based on the standard terms and conditions of the British International Freight Association, which mandated the freight forwarder to provide insurance for the equipment. However, the freight forwarder failed to fulfil this obligation. Consequently, when the equipment was lost, the freight forwarder relied on the liability limitation clause contained in these standard terms and conditions.

The disputed clause, which restricted the liability of the freight forwarder, allowed the plaintiff to only recover 1/14th of their losses.[1643] This clause did not pass the reasonableness test due to several factors, including its lack of clarity. The Court of Appeal affirmed the view expressed by the first instance judge who stated that the counterparty of the freight forwarder was aware of the "*formal existence and extent of the term*" but did not "*fully comprehend its implications*".[1644] This interpretation connects clarity to the counterparty's capacity to comprehend the consequences of a contract term imposed upon them.[1645] In my view, such an interpretation warrants the categorisation of the requirement of clarity as a component of **substantive transparency**.

5.2.3.1.2. Prominence

As explained in Section 5.2.1.3., the CRA 2015 mandates that traders must ensure core contract terms are transparent and prominent. According to the CRA 2015, the requirement of prominence necessitates that traders bring core contract terms to the consumer's attention in a manner that ensures an informed and observant consumer would become aware of them.[1646] However, prior to the introduction of the requirement of prominence in statutory law, courts assessed the prominence of standard contract terms in the context of their incorporation into the contract.[1647] Therefore, any contract terms that the trader failed to adequately bring to the attention of their counterparty would not become part of the contract.[1648] Similar to the requirements of clarity and unambiguity, the requirement of prominence of standard contract terms in common law developed within general contract law rather than specific consumer law.

1642. *Overseas Medical Supplies Ltd v Orient Transport Services Ltd*. [1999] C.L.C. 1243.
1643. Ibid.
1644. Ibid.
1645. See also *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600; *Street v Mountford* [1985] A.C. 809; *El Makdessi v Cavendish Square Holdings BV* [2016] A.C. 1172.
1646. Section 64(4) and (5) CRA 2015.
1647. Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) *Legal Studies* 3; Chris Willet, 'Transparency and Fairness in Australian and UK Regulation of Standard Terms' (2013) 37(1) *University of Western Australia Law Review* 82.
1648. Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) *Legal Studies* 3.

Nonetheless, as mentioned before, this requirement was also applicable to consumer cases in the absence of specific consumer protection rules.

As early as 1875, in the case of *Henderson v Stevenson*, the House of Lords examined the issue of whether an exclusion clause, printed on the back of a travel ticket, with no reference to it on the front, was validly incorporated in the contract.[1649] The House of Lords emphasised that the trader did not draw the consumer's attention to the disclosure of their terms and conditions on the back of the travel ticket.[1650] Consequently, the exclusion clause relied upon by the trader was not validly incorporated into the contract.[1651] *Henderson v Stevenson* clarified that traders have an obligation to bring consumers' attention to their contract terms through some form of notice, but did not establish what requirements such notice had to meet.

In 1877, in the case of *Parker v South Eastern Railway*, the Court of Appeal clarified that traders are required to bring their standard contract terms to the attention of consumers through a **reasonable notice**. The Court determined in this case that the inclusion of a contract term, which exempted the trader from liability for the loss of luggage and was printed on the back of the luggage deposit ticket, was dependent on how the trader provided the ticket to the counterparty. Specifically, such an exclusion clause could only become part of the contract if the trader provided the consumer with a reasonable notice indicating that the text on the back of the ticket contained their standard contract terms.[1652] The requirement to make contract terms available to consumers through reasonable notice did not necessitate traders to ensure that consumers actually noticed, let alone read and understood the contract terms.[1653] The Court of Appeal ordered a retrial in this case and did not, therefore, evaluate whether a reasonable notice was given.

The case of *Spurling v Bradshaw* provides an example of a reasonable notice concerning a contract term that excludes the liability of a warehouse operator for any negligence arising from the storage of goods in a B2B case.[1654] In this case, Bradshaw delivered several barrels of orange juice to Spurling's warehouse for storage. A few days later, Spurling sent Bradshaw a "*landing account*" which, on its front, referred to the trader's contract terms printed in small font on the back.[1655] Additionally, Spurling sent Bradshaw an invoice for storage on the same day, along with a note at the bottom stating that the goods had been stored in accordance with the trader's terms and conditions, and at the owner's risk.[1656] Given that the contractual terms, which relieved the trader from liability for goods storage, were not surprising or unusual within the relevant industry, the Court of Appeal determined that the trader

1649. *Robert Henderson and Others v Charles Henry Stevenson* (1875) 2 R. (H.L.) 71.
1650. Ibid.
1651. Ibid.
1652. *Parker v South Eastern Railway Co* (1877) 2 C.P.D. 416.
1653. Ibid. See also Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428.
1654. *J Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461.
1655. Ibid.
1656. Ibid.

had fulfilled the requirement of providing reasonable notice.[1657] The Court of Appeal did not find it problematic that the notice was given after the contract was concluded, as Bradshaw had already received numerous landing accounts in the past. Moreover, after receiving this specific landing account, Bradshaw neither objected to it, nor removed the goods from the warehouse and continued to pay the warehouse rent.

In the online realm, the case of *Spreadex Limited v Cochrane* demonstrates how a contractual clause, which held the consumer liable for unauthorised trades made on their account, was not included in the contract.[1658] Mr. Cochrane had the option to access four contractual documents by clicking the link "*View*" before agreeing to the traders' terms, one of which contained the disputed contract term.[1659] The High Court noted that had Mr. Cochrane attempted to review the documents, he would have come across the Customer Agreement comprising of 49 pages densely filled with intricate paragraphs.[1660] The High Court determined that it would be highly unlikely for the consumer to have read the contentious contractual term stipulated within this document, let alone comprehend its meaning or consequences.[1661]

The extent to which traders must bring their contract terms to the attention of their counterparty is dependent on the nature of the terms. Particularly, if traders attempt to include terms that are unusually burdensome or surprising, they are required to specifically draw the attention of the counterparty to these terms. As observed by Twigg-Flesner, in such cases, a generic notice referencing the trader's terms and conditions would not suffice.[1662] The way in which traders should give notice of onerous or unusual contract terms was established in the case of *Spurling v Bradshaw*, even though the case itself did not deal with the issue of incorporating such terms. In this case, Lord Denning established the famous Red Hand Rule, which pronounced that particularly onerous or unusual contract terms "*need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient*".[1663] Henceforth, traders were required to inform their counterparties about regular contract terms through a reasonable notice, and they had to use a **specific notice** to explicitly highlight any unusual or disadvantageous terms.

In the context of online contracts, Jones suggests that the obligation to provide a specific notice could be fulfilled by highlighting the text of exceptionally burdensome or unusual contract terms in bold.[1664] Highlighting contract terms in bold may seem like a simple way to create an electronic equivalent of Lord Denning's Red Hand Rule; however, it should not be the sole factor in assessing compliance with the specific

1657. Ibid.
1658. *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm).
1659. Ibid.
1660. Ibid.
1661. Ibid.
1662. Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428.
1663. *J Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461.
1664. Simon Jones, 'Forming electronic contracts in the United Kingdom' (2000) *International Company and Commercial Law Review* 302.

notice requirement. Even if text is in bold, it may still go unnoticed if it is hidden behind hyperlinks or placed in an unexpected location on the trader's website. Furthermore, consumers may become desensitised to bold text if numerous terms are highlighted in this manner. Therefore, it is crucial to consider other factors, such as how and where the trader has disclosed these terms on their website, to ensure they are not easily overlooked.

An illustration of a failure to meet the specific notice requirement can be found in the B2C case *Thornton v Shoe Lane Parking*. In this case, the Court of Appeal ruled that a contract term, which excludes the liability of a parking space operator for a personal injury that may occur within the parking space, could not be effectively incorporated into the contract through a broad reference on a parking ticket.[1665] The parking ticket, which was issued prior to entering the car park, had a statement at the bottom left specifying that it was subject to the conditions displayed on the premises.[1666] The trader's terms and conditions were displayed on the walls of the reception area and on a pillar at the entrance lane.[1667] Due to the unusual and burdensome nature of the exclusion clause, which restricted the consumer's legal rights and was not commonly known, the Court of Appeal determined that a broad statement on a parking ticket, given to the consumer after the contract was made, could not provide sufficient notice.[1668] It may be noted that, in contrast to the B2B case *Spurling v Bradshaw*, *Thornton v Shoe Lane Parking* emphasised the trader's obligation to bring unusual and onerous contract terms to the attention of consumers at or before the conclusion of a contract.[1669] Additionally, the Court of Appeal considered the warnings displayed on the walls to be too generic and easily overlooked.[1670]

In common law, the prominence requirement imposed a duty on traders to adequately notify their counterparties of their standard contract terms. This duty became stricter when the contract term in question became more unusual or burdensome. However, the common law's prominence requirement did not necessitate that traders ensure consumers received contract terms that were sufficiently understandable. As the assessment of prominence solely focused on the accessibility and presentation of contract terms, rather than on their comprehensibility, I would classify the prominence requirement, as established in common law, as a requirement of **formal transparency**.

1665. *Thornton v Shoe Lane Parking Ltd* [1971] R.T.R. 79.
1666. Ibid.
1667. Ibid.
1668. Ibid.
1669. Ibid.
1670. Ibid.

5.2.3.2. Transparency requirements in statutory law

5.2.3.2.1. Plainness and intelligibility in the understanding of English courts

5.2.3.2.1.1. OFT v Abbey National

As explained in Section 5.2.1.2., English statutory law has explicitly incorporated the concept of transparency in the control of unfair contract terms upon the transposition of the UCTD. However, it took more than a decade before English courts interpreted the requirements of plainness and intelligibility. One of the key cases regarding the interpretation of these requirements in English law implementing the UCTD is *OFT v Abbey National*. This case dealt with transparency and the nature of certain bank charges.[1671] The OFT initiated proceedings against seven banks and one building society that used terms in their contracts to impose changes on consumers when they applied for overdrafts that had not been agreed upon in advance.[1672] Regardless of whether such unarranged overdrafts were approved, they charged additional fees for any request that resulted in or would have resulted in an unarranged overdraft, if executed. To put it simply, borrowing money through unarranged overdrafts constituted a more expensive way of borrowing money than through arranged overdrafts, as emphasised by some of the banks in their terms and conditions.

Justice Smith, from the High Court of Justice, Queen's Bench Division, Commercial Court, delivered the judgment in the first instance of *OFT v Abbey National*. It is worth noting that the central issue in *OFT v Abbey National* revolved around whether the OFT had the authority to assess the fairness of the relevant charges and whether these charges qualified as core contract terms exempt from unfairness control.[1673] As a result, the majority of the extensive observations made by the courts adjudicating this case, along with scholars studying it, primarily concentrated on the exemption of core contract terms from unfairness control.[1674]

Justice Smith provided the most valuable analysis regarding the transparency concept,[1675] while higher courts made only limited references to it.[1676] However, due to the parties involved in the dispute not making a request to the courts to determine if the disputed charges were unfair, the courts did not assess their fairness or consider the role of transparency within the assessment of unfairness. In the case of *OFT v*

1671. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1.
1672. Ibid.
1673. Ibid; *Office of Fair Trading v Abbey National plc and others* [2009] 2 W.L.R. 1286; *Office of Fair Trading v Abbey National plc and others* [2009] 3 W.L.R. 1215. See also Hugh Beale, *Chitty on contracts: Volume II - Specific Contracts, 35th edition* (Sweet & Maxwell 2023) 41-377.
1674. Elizabeth Macdonald, 'Bank Charges and the Core Exemption: Office of Fair Trading v Abbey National Plc' (2008) 71(6) *Modern Law Review* 987-998; Phillip Morgan, 'Bank charges and the Unfair Terms in Consumer Contracts Regulations 1999: the end of the road for consumers?' (2010) 2 *Lloyd's Maritime and Commercial Law Quarterly* 208-215; Paul S. Davies, 'Bank Charges in the Supreme Court' (2010) 69(1) *Cambridge Law Journal* 21-24; Simon Whittaker, 'Unfair Contract Terms, Unfair Prices and Bank Charges' (2011) 74(1) *Modern Law Review* 106-134.
1675. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1.
1676. *Office of Fair Trading v Abbey National plc and others* [2009] 2 W.L.R. 1286; *Office of Fair Trading v Abbey National plc and others* [2009] 3 W.L.R. 1215.

Abbey National, Justice Smith had to determine if the OFT was permitted to assess the fairness of the bank charges in question. This entailed addressing whether the terms governing these charges were core contract terms exempt from fairness evaluation.[1677] Before determining whether the disputed terms imposing fees for unarranged overdrafts constituted core contract terms, Justice Smith evaluated whether they were drafted in plain, intelligible language.

In his assessment, he highlighted several factors relevant to plainness and intelligibility requirements.[1678] He emphasised that failing to meet these transparency requirements allowed courts to scrutinise the unfairness of core contract terms and could also be pertinent to establishing the unfairness of contract terms. Furthermore, he acknowledged the *contra proferentem* rule contained in the then-applicable UTCCRs 1999.[1679] He underscored that breaches of the obligation to draft terms in plain, intelligible language are not limited only to ambiguous terms. Moreover, contract terms could be obscure yet still have a singular meaning for those capable of understanding them. Finally, he specified that the benchmark consumer against whom the plainness and intelligibility of contract terms should be evaluated is a typical consumer, reasonably well-informed, observant, and circumspect. Justice Smith observed that this benchmark consumer, commonly referred to as the average consumer, is consistently applied by the CJEU in cases involving consumer law.[1680]

It is worth noting that Justice Smith actually applied the average consumer benchmark in the field of unfair contract terms control several years before the CJEU did. As described in Section 2.1.3.4., the CJEU first applied the average consumer benchmark in the 2014 case *Kásler*. However, Justice Smith delivered his judgment in *OFT v Abbey National* in 2008. Moreover, besides *OFT v Abbey National*, English courts have also utilised the average consumer benchmark, representing a rational and well-informed consumer who is capable of reading and identifying contract terms, in other cases that occurred prior to *Kásler*.[1681] These cases will be discussed further below.

Concerning the meaning and scope of the requirements for plainness and intelligibility, Justice Smith clarified that these requirements entail "*not only that the actual wording of individual clauses or conditions be comprehensible to consumers, but that the typical consumer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract.*"[1682] In addition, he highlighted that the phrase 'plain, intelligible language' was broad enough to cover the need for a clear presentation of contract terms. This meant that an assessment of plainness and intelligibility of contract terms included an evaluation of whether they were presented clearly and in an accessible manner, potentially using headings or bold print. Furthermore, Justice

1677. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1.
1678. Ibid.
1679. Ibid.
1680. Ibid.
1681. *Office of Fair Trading v Abbey National plc and others* [2009] 3 W.L.R. 1215; *The Office of Fair Trading v Foxtons Limited* [2009] C.T.L.C. 188; *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1; *The Office of Fair Trading v Ashbourne Management Services Ltd and Others* [2011] C.T.L.C. 237.
1682. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1.

Smith clarified that the expression 'term' did not only refer to a specific contractual term or condition. Instead, this expression should be understood as focusing on how the contract outlines certain rights and obligations, regardless of whether they are governed by one or multiple contractual terms or conditions.

From my perspective, Justice Smith's interpretation of the requirements for plainness and intelligibility encompasses both **formal** and **substantive transparency**. His interpretation acknowledges the importance of presenting and formulating contract terms in a clear manner, while also ensuring that consumers can understand the implications of these terms. Additionally, it appears that Justice Smith viewed plainness and intelligibility as separate requirements, with plainness focusing on the formal transparency of contract terms and intelligibility ensuring their substantive transparency. This is evident from Justice Smith's explicit disagreement with the defendants' argument that the phrase 'plain, intelligible language' only applies to the wording of contract terms, as such an interpretation would render intelligibility meaningless.[1683]

In this case, Justice Smith determined that certain contract terms were not drafted in plain and intelligible language. The main factor contributing to the lack of transparency of these terms was their ambiguity. Some contract terms had an ambiguous meaning due to the way they were phrased.[1684] Others became ambiguous when considered in conjunction with other contract terms[1685] or supplementary documents such as booklets[1686] and leaflets.[1687] Additionally, Justice Smith recognised that four out of eight defendants had neglected their responsibility to use plain and intelligible language when formulating contractual provisions pertaining to specific terms in their agreements with consumers. However, he concluded that despite lacking plainness and intelligibility in "*certain specific and relatively minor respects*", the contract terms of these defendants were generally plain and intelligible.[1688]

Unfortunately, Justice Smith did not provide further explanation as to why he considered certain violations of the requirements for plainness and intelligibility as minor. However, it seems that his interpretation of the duty to draft contractual terms in plain and intelligible language focused on ensuring transparency of the contract as a whole, rather than solely on the transparency of individual terms.[1689] Therefore, it appears that he did not consider the lack of transparency in the contract terms to have a significant negative impact on the overall transparency of the contract. This interpretation is supported by his statement that the contract terms of the four defendants were "*largely*" in plain and intelligible language.[1690] In line with EU law,[1691]

1683. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1.
1684. Ibid.
1685. Ibid.
1686. Ibid
1687. Ibid.
1688. Ibid.
1689. Ibid.
1690. Ibid.
1691. See Section 2.1.3.4. of Chapter 2.

Justice Smith's approach to assessing the transparency of contract terms focused on considering the context in which they operated and the circumstances surrounding the conclusion of the contract.[1692]

It can be observed that both the Court of Appeal and the Supreme Court refrained from providing further explanations or elaborations on the concept of transparency. The Court of Appeal briefly discussed the issue of transparency only to decide whether to grant the appeals of two banks, Abbey and HBOS, against Justice Smith's determination that certain terms in their contracts lacked transparency.[1693] While these banks disputed Justice Smith's conclusions, they did not contest his reasoning regarding the meaning and scope of the transparency concept, as described above.[1694] Therefore, the Court of Appeal has affirmed Justice Smith's conclusions regarding the absence of transparency in certain contractual terms of Abbey and HBOS.[1695] However, the Court of Appeal did not delve into whether it agreed with Justice Smith's rationale regarding the meaning and scope of the concept of transparency, as this was not a matter being appealed.[1696]

The Supreme Court has endorsed the findings regarding the transparency of most contract terms on appeal and has acknowledged minor shortcomings in the transparency of certain terms on appeal.[1697] However, it did not explicitly state whether it agreed with Justice Smith's interpretation of the meaning and scope of the transparency concept since this issue was not being appealed.[1698] Instead, like the Court of Appeal, the Supreme Court also focused on addressing the central issue in the dispute[1699] – whether the (transparent) disputed contract terms qualified as core contract terms and whether their fairness could be scrutinised.[1700]

5.2.3.2.1.2. OFT v Foxtons

In the case of *OFT v Foxtons*, Justice Mann of the High Court of Justice Chancery Division was tasked with determining whether Foxtons, an estate agency company, employed unfair contract terms in its standard form contracts with multiple landlords.[1701] The terms in question governed the conditions whereby Foxtons could seek commission, such as for contract renewals or extensions.

In his assessment of plainness and intelligibility of the disputed terms, Justice Mann explicitly endorsed the principles established in *OFT v Abbey National*.

1692. See Section 6(1) UCCTRs 1999, which were applicable to consumer contracts at the time Justice Smith's judgement in *OFT v Abbey National* was delivered. A comparable provision can now be found in Section 62(5) CRA 2015.
1693. *Office of Fair Trading v Abbey National plc and others* [2009] 2 W.L.R. 1286.
1694. Ibid, 1329-1330.
1695. Ibid, 1286 1330.
1696. *Office of Fair Trading v Abbey National plc and others* [2009] 2 W.L.R. 1286.
1697. *Office of Fair Trading v Abbey National plc and others* [2009] 3 W.L.R. 1215.
1698. Ibid.
1699. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1; *Office of Fair Trading v Abbey National plc and others* [2009] 2 W.L.R. 1286; *Office of Fair Trading v Abbey National plc and others* [2009] 3 W.L.R. 1215.
1700. *Office of Fair Trading v Abbey National plc and others* [2009] 3 W.L.R. 1215.
1701. *The Office of Fair Trading v Foxtons Limited* [2009] C.T.L.C. 188.

As a result, he concluded that these transparency requirements focused on the comprehensibility of the wording and the implications of contract terms for an average consumer – someone who is rational, well-informed, and reads the contract.[1702] Similar to the *OFT v Abbey National* case, the main factor that led Justice Mann to identify violations of the requirements for plainness and intelligibility was the ambiguity of certain contract terms.[1703]

In addition to identifying ambiguity in contract terms, Justice Mann also examined how a misplaced **reference** could affect the plainness and intelligibility of a contract term. In this context, he concluded that an error in referencing should not be considered so significant as to render an otherwise plain and intelligible contract term non-transparent.[1704] In my opinion, Justice Mann's reasoning strengthens the argument that English law on unfair contract terms includes both **formal** and **substantive** elements within the concept of transparency. Moreover, it underscores the link between these elements by emphasising that not all violations of formal transparency will necessarily negatively affect substantive transparency, which seems to be the central aspect of the transparency evaluation.

Taking into account the CJEU's ruling in *Home Credit Slovakia*, there arises a question as to whether Justice Mann's conclusion regarding the importance of referencing errors for the sake of plainness and intelligibility aligns with EU law. In the context of consumer credit law, the CJEU recognised the significance of clear and precise cross-referencing for transparency.[1705] It emphasised that such referencing is crucial for enabling consumers to become aware of their rights and obligations.[1706] In the case of *OFT v Foxtons*, Justice Mann did not consider the misplaced reference to impact an average consumer's ability to understand their rights and obligations. He concluded that such a consumer would likely notice the misplaced reference and still understand the term, as it was otherwise formulated in plain and intelligible language.[1707]

Justice Mann regarded the lack of plainness and intelligibility of the contract terms in *OFT v Foxtons* as a crucial element in their unfairness. He concluded that the terms regarding the renewal commission diverged from what a typical consumer would anticipate, as they suggested multiple situations where such a commission was applicable, instead of specifying a one-time fixed fee.[1708] In his opinion, using plain and intelligible contract terms could have changed the expectations of a typical consumer.[1709] However, as Foxtons neglected to effectively communicate their unusual contract terms to consumers and did not sufficiently clarify the costs involved, they violated the principle of good faith and distorted the balance between

1702. Ibid.
1703. Ibid.
1704. Ibid.
1705. Case C-42/15 *Home Credit Slovakia*, point 34.
1706. Ibid.
1707. *The Office of Fair Trading v Foxtons Limited* [2009] C.T.L.C. 188
1708. Ibid.
1709. Ibid.

the parties involved.[1710] Therefore, Justice Mann deemed the contested contract terms to be unfair.

OFT v Foxtons demonstrates that the lack of plainness and intelligibility of contract terms can play a significant role in determining whether they are unfair, particularly when the terms deviate from the expectations of an average consumer. As pointed out by Justice Mann, in such situations, consumers can rely only on the language used in the contract terms to realise that their expectations do not match the actual content of the terms. When the language of these unusual or unexpected contract terms is plain and intelligible, consumers who read them have the opportunity to comprehend their true meaning. However, it is a separate question as to whether this alone is enough for the contract terms to pass the fairness test.

OFT v Foxtons suggests that the transparency assessment is a crucial part of the unfairness assessment, and it must be considered alongside the requirements of good faith and the balance between the parties' contractual rights and obligations. This interpretation of the role of transparency within the framework of the unfairness control aligns with EU law, discussed in Section 2.1.4.

5.2.3.2.1.3. OFT v Ashbourne Management

In the case of *OFT v Ashbourne Management*, Justice Kitchin analysed the transparency and fairness of contract terms for gym clubs that specified a minimum membership duration for consumers.[1711] He pointed out that the language used in the entire contract was inconsistent, and the contract did not clearly state that consumers would not be able to terminate the agreement before the minimum period elapsed.[1712] It is worth noting that, unlike Justice Mann, Justice Kitchin did not endorse or refer to the interpretation of transparency in the case *OFT v Abbey National*.

Justice Kitchin noticed discrepancies in the language utilised on both the front and back pages of the contracts being examined. These disparities were related to the phrasing of the condition that required consumers to maintain a gym membership for a specified minimum duration. This obligation was sometimes referred to as a "*minimum membership*", while other times it was mentioned as a "*minimum membership period*" or as the consumer being required to stay a member for "*the minimum period of…*", and so on.[1713] Justice Kitchin recognised that employing consistent language throughout the contract enhances its plainness and intelligibility. However, he held that, in the specific case at hand, even with the differences in articulating the minimum membership prerequisite throughout the contract, an average consumer reading the agreement would still be able to understand that they were undertaking a gym membership with a minimum duration.[1714]

1710. Ibid.
1711. *The Office of Fair Trading v Ashbourne Management Services Ltd and Others* [2011] C.T.L.C. 237.
1712. Ibid.
1713. Ibid.
1714. Ibid.

Furthermore, Justice Kitchin determined that a typical consumer would also understand that the obligation to maintain the membership for a specific duration implied that they were not allowed to terminate the agreement before this period concluded. Hence, it was not essential for the contract to explicitly state the lack of the right to terminate before the minimum membership period expired in order to ensure plainness and intelligibility.[1715] For these reasons, Justice Kitchin found the contract terms governing the minimum membership duration for gym clubs in *OFT v Ashbourne Management* to be sufficiently plain and intelligible.[1716]

In my perspective, *OFT v Ashbourne Management* reinforces the argument that the assessment of plainness and intelligibility in English unfair contract terms law does not revolve around whether contract terms are entirely free from errors or drafted in the clearest and most comprehensible manner possible. Instead, the primary consideration is whether **substantive transparency** was achieved, or in other words, whether contract terms were comprehensible enough for an average consumer who reads them, despite possible errors or inconsistencies.

Additionally, in the 2023 case *Eternity Sky Investments Limited v Xiaomin Zhang*, Justice Bright, citing *OFT v Ashbourne Management*, further clarified the application of the average consumer benchmark in assessing substantive transparency. He explained that the assessment of the transparency of contract terms should consider the perspective of an average consumer concluding a specific type of consumer contract, rather than an average consumer entering any type of consumer contract.[1717] Therefore, the way traders present contract terms might be perceived as transparent to the average consumer in certain types of contracts, but not in others.[1718]

5.2.3.2.1.4. Overy v Paypal

In the case of *Overy v Paypal*, Justice Hegarty QC examined whether Paypal's gambling and lottery policy, which was the reason for Paypal's termination of its payment service to Mr. Alfred Overy, was unfair due to a breach of transparency requirements.[1719] Mr. Overy had opened a business account with Paypal, which he used to organise an online competition with the aim of selling his house.[1720] During the competition, Paypal suspended and eventually terminated Mr. Overy's account, leading to the failure of his competition. Paypal asserted that it had the right to suspend and terminate Mr. Overy's account because he did not obtain prior approval

1715. Despite of their plainness and intelligibility, Justice Kitchin ultimately found the contract terms regulating minimum membership period for gym clubs to be unfair in *The Office of Fair Trading v Ashbourne Management Services Ltd and Others* [2011] C.T.L.C. 237. The terms in question were found to be unfair for various reasons, including the fact that they set out a business model constructed to "*take advantage of the naivety and inexperience of the average consumer using gym clubs at the lower end of the market*" (at 279).

1716. *The Office of Fair Trading v Ashbourne Management Services Ltd and Others* [2011] C.T.L.C. 237.

1717. *Eternity Sky Investments Ltd v Zhang* [2023] EWHC 1964 (Comm).

1718. Ibid.

1719. *Overy v Paypal (Europe) Ltd* [2012] EWHC2659 (QB).

1720. Ibid.

from Paypal before conducting his online competition, which was classified as a gambling activity according to Paypal's gambling and lottery policy.[1721]

In his examination of the unfairness of Paypal's gambling and lottery policy, Justice Hegarty QC determined that the only potential basis for the unfairness of the provisions of this policy would be a breach of their transparency.[1722] Therefore, in order to assess whether the provisions of the gambling and lottery policy were unfair, he examined whether these provisions were drafted in a plain and intelligible language.[1723] Justice Hegarty QC did not make reference to Justice Smith's interpretation of the transparency concept in *OFT v Abbey National*. Instead, he presented his own interpretation of the requirement that contract terms should be drafted in plain and intelligible language, which necessitates that contract terms are "*readily comprehensible by a lay person*".[1724] This suggests that his understanding of transparency focuses on the comprehensibility of contract terms, i.e., their **substantive** transparency.

However, it seems to me that Justice Hegarty QC, in his evaluation of the intelligibility of Paypal's gambling and lottery policy, solely focused on aspects pertaining to formal transparency. He believed that the provisions of the policy which outlined the need for prior authorisation were intelligible because they were sufficiently prominent. Specifically, Justice Hegarty QC observed that the first page of Paypal's gambling and lottery policy specified the requirements for prior authorisation in bold text and provided a designated email address for any inquiries regarding the policy. Interestingly, he explicitly acknowledged that it may not have been immediately evident from the policy when exactly prior authorisation was necessary. This raises the question, in my opinion, of whether the policy was genuinely comprehensible to an average consumer.

Despite the lack of comprehensibility in Paypal's gambling and lottery policy, Justice Hegarty QC concluded that it was evident the policy covered a wide range of gambling activities. It seems he expected Mr. Overy to recognise this and engage with the policy. If Mr. Overy had indeed engaged with the policy, he would have noticed the provisions concerning prior authorisation, as they were prominently displayed. It appears that Judge Hegarty QC did not consider it problematic that the provisions may not have comprehensibly indicated when prior authorisation was required. This is because Mr. Overy could have used the provided email address to contact the trader and resolve any uncertainties about the policy's content.

From my perspective, this implies that Justice Hegarty QC interpreted the requirements of plainness and intelligibility as a means to ensure substantive transparency. However, despite of this, he examined the intelligibility of Paypal's gambling and lottery policy terms from the standpoint of **formal transparency**. This is because his assessment of intelligibility focused on the presentation of the contract

1721. Ibid.
1722. Ibid.
1723. Ibid.
1724. Ibid.

terms within the policy rather than examining whether those terms clearly indicated their impact on the consumer's rights and obligations.

One might question whether Justice Hegarty QC's formal assessment of the intelligibility of Paypal's gambling and lottery policy terms could have been swayed by his conclusion that Mr. Overy did not qualify as a consumer according to the UCCTRs 1999 in effect at that time. This determination was rooted in his belief that Mr. Overy had exhibited an intention to utilise his account for business purposes, evidenced by his opening of a business account with Paypal and his submission of all the required business-related information and documentation to Paypal.[1725] Thus, it is plausible that Justice Hegarty QC expected a higher level of diligence from Mr. Overy, which is appropriate for B2B transactions. However, it is noteworthy that he did not mention the UCTA 1977 when discussing transparency. Instead, he only referred to the requirements of plainness and intelligibility derived from the UCCTRs 1999. Moreover, it seems that he did so as a precaution in case his conclusion that Mr. Overy's is not a consumer was challenged. Therefore, it appears that Justice Hegarty QC presented his interpretation of the transparency concept in a way that would be applicable to consumer contracts as well.

5.2.3.2.2. Plainness and intelligibility in the understanding of the CMA

In addition to English courts, the CMA also interpreted the meaning and scope of the requirements of plainness and intelligibility. In its *2015 Unfair Contract Terms Guidance*, the CMA cited CJEU case law to emphasise that consumers must be able to "*have a proper understanding of the contract for sensible and practical purposes*".[1726] This means that the contract should clearly and understandably delineate all rights and obligations "*so that the consumer is able to see how they relate to each other, and can foresee and evaluate, at the time of conclusion of the contract, the consequences they may have in the future*".[1727] The CMA emphasised the importance of giving careful consideration to contracts addressing intricate and technical matters. It suggested that traders should furnish consumers with supplementary information regarding complex contract terms, so as to ensure that they comprehend the wording and ramifications of such terms.[1728] Interestingly, when explaining the meaning of the requirements of plainness and intelligibility, the CMA did not refer to the interpretation of these requirements provided in *OFT v Abbey National* but to EU case law. This does not appear to be a problem, as both EU and English case law demonstrate that the obligation to draft contract terms in plain and intelligible language guarantees that an average, reasonably informed and observant consumer comprehends both the wording and the implications of a contract.

1725. See the extensive analysis in *Overy v Paypal (Europe) Ltd* [2012] EWHC2659 (QB).
1726. Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [31].
1727. Ibid.
1728. Ibid.

The CMA also provided practical recommendations on how to achieve plainness and intelligibility of contract terms.[1729] For example, the CMA highlighted the importance of using everyday language in its usual meaning and avoiding vague wording and legal terminology. Additionally, it underlined the significance of structuring contract terms clearly by making sentences concise, organising the contractual text logically with understandable headings, and refraining from using statutory references, detailed definitions, and excessive cross-referencing.

In my opinion, the CMA's interpretation of the obligation to draft contract terms in plain and intelligible language incorporates elements of both **formal** and **substantive transparency**. Formal transparency is apparent in the focus on the language and structure of contract terms to guarantee readability. Substantive transparency is evident in the necessity to ensure that consumers can comprehend the practical implications of contract terms for their situation. Although the CMA's interpretation of transparency encompasses both formal and substantive aspects, the CMA did not specify whether it considers these aspects equally important, nor did it clarify whether it regards plainness and understandability as a single requirement or as two distinct requirements.

5.2.3.2.3. Legibility of contract terms

The CRA 2015 imposes the requirement of legibility on all written contract terms. However, the meaning and scope of this requirement have received limited attention in English law. The Law Commission, which advocated for the inclusion of the legibility requirement within the concept of transparency, did not specify the exact criteria for meeting this requirement.[1730] For instance, it did not offer any guidance regarding the appropriate font sizes or styles that could potentially improve or hinder the legibility of contract terms. During the consultation process for the reports related to laws concerning unfair contract terms, several stakeholders, including the Finance & Leasing Association (FLA), raised concerns about the clarity and objectivity of the legibility requirement. The FLA proposed that the meaning and scope of legibility should be accurately specified in order to avoid unwarranted complaints about font size or font colour used in contract terms.[1731] However, for the sake of simplicity, the Law Commission has made the decision not to provide extensive recommendations regarding the interpretation of the legibility requirement. Instead, it has stated that contract terms should be considered legible as long as the majority of consumers who use a specific product are capable of reading them.[1732]

The CMA's *2015 Unfair Contract Terms Guidance* provides a concise explanation of the meaning and scope of the legibility requirement. The CMA explicitly states that the print of written contracts should be clear, taking into account factors such

1729. Ibid, [32-35].
1730. The Law Commission and The Scottish Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) [37-40].
1731. Ibid, [39].
1732. Ibid, [40].

as font size, colour, background, and paper quality.[1733] Although the guidance does not explicitly mention online contracts, all these elements, except for paper quality, should also be applicable to online contracts. In the online context, the aspect of paper quality could be translated into considerations related to potential technical constraints of a website that might affect legibility, such as whether a website is optimised for different screen resolutions. It is worth noting that the CMA's guidance on the meaning of the legibility requirement essentially reflects the guidance provided by the OFT on the UCCTRs 1999.[1734]

Looking at case law, the 2022 case of *Longley v PPB Entertainment* provides valuable insights into assessing the legibility of contract terms. Justice Ellenbogen evaluated the legibility of a specific contract term by examining its placement within the trader's standard contract terms.[1735] Furthermore, she considered whether each part of the contract relevant to this term was adequately identified.

The factors that determine whether contract terms are legible, such as font size, colour, background, paper quality, and placement within the trader's terms and conditions, primarily concern **formal transparency**. Moreover, legibility is a fundamental aspect of formal transparency, and without it, achieving substantive transparency would be nearly impossible. After all, if consumers cannot read contract terms, they have no opportunity to understand them. However, legibility should not be considered a requirement of substantive transparency because it does not directly aim to ensure that consumers comprehend contract terms. Specifically, contract terms that are legible can still be entirely unintelligible to consumers if they include jargon, complex definitions, or foreign words, for example.

5.2.3.2.4. Prominence of contract terms

As explained in Section 5.2.1.3., the CRA 2015 imposes an additional transparency requirement on the drafting of core contract terms, which is not explicitly mandated by the UCTD – the requirement of **prominence**. The CRA 2015 defines a core contract term as prominent if it *is brought to the consumer's attention in such a way that an average consumer would be aware of the term*".[1736] In this context, the average consumer is someone "*who is reasonably well-informed, observant and circumspect*".[1737]

It is worth noting that the CRA 2015 does not specify that the average consumer benchmark should apply to other transparency requirements or provide a definition of this benchmark in relation to other requirements. However, the application of the average consumer benchmark to the assessment of plainness and intelligibility of

1733. Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [33].
1734. Office of Fair Trading, 'Unfair contract terms guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999' (2008) OFT 311 [86].
1735. *Longley v PPB Entertainment Ltd* [2022] EWHC 977 (QB).
1736. Section 64(4) CRA 2015.
1737. Section 64(5) CRA 2015.

contract terms has been established in case law.[1738] Nevertheless, in my opinion, the UK legislature missed an opportunity to improve legal clarity within the domestic legal system by not explicitly stating whether the average consumer benchmark applies to the evaluation of all transparency requirements specified in the CRA 2015.

The evaluation of the prominence of core contract terms under the CRA 2015 is considered separate from the transparency evaluation, which includes the requirements of plainness, intelligibility, and legibility. It is seen as an additional measure to protect consumers from hidden charges and other ambiguous contract terms regarding the contract's subject matter.[1739] It is evident that the CRA 2015 defines the requirement of prominence in much greater detail than any other transparency requirement.

As explained in Section 5.2.1.3., the Law Commission advocated for the introduction of the requirement of prominence into the CRA 2015. As McKendrick points out,[1740] the Law Commission believed that the prominence requirement had the potential to increase consumer awareness of core contract terms and motivate them to consider these terms when making purchasing decisions.[1741] As a result, it was expected to enhance competitive pressure on these terms. Additionally, the Law Commission hoped that introducing the prominence requirement would address the issue of hidden price terms[1742] and lead to a clearer presentation of the contract's main subject matter.[1743]

The CRA 2015 incorporates these suggestions and not only mandates that core contract terms must be prominent but also defines the requirement of prominence in the manner proposed by the Law Commission.[1744] Nonetheless, Willett argues that the meaning and scope of the requirement of prominence remain open for debate.[1745] He emphasises that the requirement of prominence does not indicate, for instance, if core terms must be highlighted, separated from other terms in the contract, given equal prominence in other pre-contractual materials, or made more prominent if they are unusual or burdensome.

1738. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1; *Office of Fair Trading v Abbey National plc and others* [2009] 2 W.L.R. 1286; *Office of Fair Trading v Abbey National plc and others* [2009] 3 W.L.R. 1215; *The Office of Fair Trading v Foxtons Limited* [2009] C.T.L.C. 188; *The Office of Fair Trading v Ashbourne Management Services Ltd and Others* [2011] C.T.L.C. 237.

1739. Hugh Beale, *Chitty on contracts: Volume II - Specific Contracts, 35th edition* (Sweet & Maxwell 2023) 41-408; Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford University Press 2018) 345-346.

1740. Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford University Press 2018) 345.

1741. The Law Commission and The Scottish Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) [14-28].

1742. Ibid, [18].

1743. Ibid, [26].

1744. The definition of prominence, as suggested by the Law Commission: "*By prominent we meant that the term was presented in such a way that a reasonably circumspect consumer would be aware of it*." (The Law Commission and The Scottish Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) [16]). This aforementioned definition is reflected in Section 64 (4) CRA, which provides: "*A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.*" and Section 64 (5), which provides: "*In subsection (4) "average consumer" means a consumer who is reasonably well-informed, observant and circumspect.*"

1745. Chris Willett, 'Re-theorising consumer law' (2018) 77(1) *Cambridge Law Journal* 206.

The CMA's *2015 Unfair Contract Terms Guidance* clarifies that the level of prominence, i.e., the degree to which the trader has to bring the attention of an average consumer to core contract terms, should be contingent on the potential risk or detriment to the consumer.[1746] In other words, "*a term that is potentially surprising, or particularly onerous, or inherently difficult to understand, is likely to require greater prominence than terms which are none of those things*".[1747] The CMA places special emphasis on the interpretation of the prominence requirement, considering it to be "*a condition created by new domestic legislation and not yet the subject of any judicial consideration*".[1748]

However, McKendrick questions the novelty of the prominence requirement, asserting that it simply makes explicit what was previously implicit in evaluating the requirements of plainness and intelligibility.[1749] McKendrick's observation is supported by Justice Smith's ruling in *OFT v Abbey National*, wherein he stated that the t to draft plain and intelligible contract terms is extensive enough to include an evaluation of how the trader presents those terms to the consumer.[1750] Furthermore, his assessment of plainness and intelligibility encompassed the evaluation of whether contract terms were presented clearly and in an accessible manner, with the use of helpful headings or bold print.[1751]

Moreover, certain aspects of the statutory requirement of prominence align with one of the oldest transparency tests developed in English law – the test of prominence of contract terms developed in common law, as discussed in Section 5.2.3.1.2. The prominence requirement, both in common law and statutory law, aims to draw the consumer's attention to the existence of the trader's contract terms. Additionally, both sources of regulation of the prominence requirement seem to link the level of prominence required by traders to the potential disadvantage these terms may pose to consumers. Thus, one may question whether the prominence requirement based in statutory law merely formalises an established practice in common law, or if it truly adds an extra layer of protection for consumers.

The CMA asserts that the essence of prominence is to ensure that traders bring core contract terms to the attention of consumers in a manner that makes it "*likely to enable the average consumer to understand and appreciate the essential features of the bargain when making purchasing decisions, particularly so that he or she can compare and decide between different products on offer*".[1752] The interpretation of prominence should, therefore, not only refer to the utilisation of large or bold print or any other forms of textual highlighting.[1753] Instead, to determine whether a core contract term is prominent, besides looking at visual highlighting, it should be considered whether

1746. Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37, [44].
1747. Ibid.
1748. Ibid, [42].
1749. Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford University Press 2018) 345-346.
1750. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1.
1751. Ibid.
1752. Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [44].
1753. Ibid, [45].

"*any such formal prominence is likely to be practically effective in the transaction and, if it is, whether the degree of prominence achieved is, in all the circumstances, sufficient to meet the requirements of the legislation*".[1754] Furthermore, in order to evaluate whether core contract terms are not only formally but also practically and effectively prominent, one must take into consideration the circumstances surrounding the contract's conclusion, the nature of the contract term, and its relationship with other contract terms.[1755] Additionally, the interpretation of the CMA indicates that prominence is not solely determined by the availability and presentation of contract terms. Instead, the CMA appears to believe that the main purpose of prominence is to ensure that traders present contract terms to consumers in a manner that allows them to understand, compare, and make decisions based on those terms, thus reflecting a **substantive** understanding of this requirement.

This perspective differs to some extent from the understanding of prominence in common law, as discussed in Section 5.2.3.1.2. Based on common law, English courts simply examined whether traders directed consumers' attention to the existence of their terms sufficiently. They did not consider whether traders brought their terms to the attention of consumers in a way that would enable them to understand and compare contract terms. This approach to prominence indicates a **formal** understanding of this transparency requirement.

Looking at case law based on the CRA 2015, one can find examples of cases supporting both a substantive and a formal interpretation of the requirement of prominence. The 2021 case of *R. (Donegan) v Financial Services Compensation Scheme* serves as an example of a **substantive** understanding of prominence. This case concerned, among other things, the transparency of the contract terms of an investment firm, London Capital & Finance PLC (LCF), that sold bonds to investors, most of whom were individuals.[1756] Although LCF claimed that investments in its bonds, which were subsequently invested in different UK companies, were secured, this was not the case.[1757] When LCF collapsed, thousands of retail investors lost significant sums of money.[1758] LCF failed to transparently disclose in their terms that the bonds were non-transferable and, therefore, not covered by the Financial Services Compensation Scheme (FSCS).[1759] The FSCS offers financial protection to individuals who suffer losses due to their investment with financial service providers regulated by the FCA.[1760]

1754. Ibid.
1755. Ibid, [45-46].
1756. *R. (on the application of Donegan) v Financial Services Compensation Scheme Ltd* [2021] EWHC 760 (Admin).
1757. Thomas Donegan et al, 'The effect of contractual unfairness under the Consumer Rights Act 2015 on the transferability of bonds following the High Court's decision in R. (Donegan) v Financial Services Compensation Scheme' (2023) 38(8) *Journal of International Banking Law and Regulation* 265.
1758. *R. (on the application of Donegan) v Financial Services Compensation Scheme Ltd* [2021] EWHC 760 (Admin).
1759. Thomas Donegan et al, 'The effect of contractual unfairness under the Consumer Rights Act 2015 on the transferability of bonds following the High Court's decision in R. (Donegan) v Financial Services Compensation Scheme' (2023) 38(8) *Journal of International Banking Law and Regulation* 265-267.
1760. Ibid, 266.

Justice Bourne acknowledged that the provisions of LCF regarding the non-transferability of bonds and the absence of regulatory protection were prominently and clearly stated.[1761] However, he deemed this formal dimension of prominence insufficient. This was because the relevant provisions failed to refer to or explain how the non-transferability of the bonds led to the absence of regulatory protection. Justice Bourne noted that LCF held a much stronger bargaining position than potential investors and imposed crucial terms without adequately explaining their rationale or practical implications.[1762] He also expressed doubt that any buyer would have agreed to these non-transferability provisions in individual negotiations.[1763]

Conversely, the case of *Longley v PPB Entertainment* from 2022 offers an example of a **formal** interpretation of the requirement of prominence. In this case, Justice Ellenbogen deemed a contract term suitably prominent because it was adequately highlighted in the table of contents and within the trader's standard contract terms.[1764] Additionally, she considered that the titles of the relevant headings were formulated in such a way that it might have been reasonable to expect that the consumer is likely to have a specific interest in the disputed contract term. This led her to conclude that any reasonable user would be aware of the term's existence and nature and would have a fair opportunity to read it, should they wish to do so. Such an understanding awards prominence a more formal, signalling function. While prominence ensures that the consumer becomes aware that they should have a particular interest in a contract term, it does not enable them to understand the term's essential features.

In conclusion, the meaning and significance of the prominence requirement under the 2015 CRA remains somewhat ambiguous. This requirement has been interpreted in both a formal and substantive manner. Aside from making it challenging to determine the meaning of prominence, the inconsistencies in interpretation also make it difficult to ascertain the relationship between prominence and other transparency requirements, such as plainness and intelligibility.

5.2.4. Contractual consequences of a breach of transparency

English unfair contract terms law appears to have two main consequences for breaching transparency. Firstly, the impact of ambiguous contract terms can be reduced through interpretation. Secondly, the lack of transparency in contract terms plays a significant role in determining their unfairness. According to Section 69(1) of the CRA 2015 , contract terms or notices with multiple possible meanings should be interpreted in the way **most favourable to the consumer**. The *2015 Unfair Contract Terms Guidance* from the CMA further emphasises that the purpose of this interpretation

1761. *R. (on the application of Donegan) v Financial Services Compensation Scheme Ltd* [2021] EWHC 760 (Admin).
1762. Ibid.
1763. Ibid.
1764. *Longley v PPB Entertainment Ltd* [2022] EWHC 977 (QB).

rule is to safeguard consumers in individual disputes.[1765] It is applied when there is uncertainty regarding the meaning of a contractual term, even after interpreting it according to the principles of contractual interpretation.[1766] It also enables courts to enforce contracts while minimising interference with the parties' agreement.[1767]

This rule of interpretation is not entirely new to English law. In common law, the adverse consequences arising from ambiguity in contract terms that have been duly included in a contract were dealt with through the *contra proferentem* rule.[1768] The *contra proferentem* rule requires contract terms to be interpreted in the least favourable manner for the party that drafted them.[1769] However, it may not be entirely clear whether or to what extent the obligation to interpret contract terms in the most favourable manner for the consumer overlaps with the *contra proferentem* rule. In *OFT v Abbey National*, Justice Smith noted that the obligation to interpret contract terms in the most favourable manner for the consumer "*operates similarly to the principle that a contract is to be construed contra proferentem*."[1770] In his view, this obligation did not necessarily demand the court to interpret contract terms in a manner that rendered them less favourable to the party who drafted the contract.[1771] Instead, it required that the interpretation of an ambiguous contract term be more burdensome for the drafter than for the consumer.[1772] In another case, *OFT v Foxtons Ltd*, on behalf of the Court of Appeal, Lord Moore-Bick expressed the view that the interpretation most favourable to the consumer "*reflects a canon of construction well known to English law, the so-called contra proferentem rule, which in this context invariably operates in favour of the consumer*."[1773]

While the two interpretation rules share similarities in that they both facilitate the interpretation of contract terms to the disadvantage of the drafter, one rule seems to prioritise the most negative interpretation for the drafter, while the other focuses on the most positive interpretation for the consumer.[1774] Nevertheless, it is not entirely clear whether the application of these two rules leads to different interpretations in practice. For instance, Twigg-Flesner highlights that the application of the *contra proferentem* rule in common law is restricted. If a contract term is ambiguous and

---

1765. Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [32].
1766. Ibid.
1767. *CC Construction Ltd v Mincione* [2021] EWHC 2502 (TCC).
1768. Hugh Beale, *Chitty on contracts: Volume 1: General Principles, 35th edition* (Sweet & Maxwell 2023) 16-111-113, 18-012; Hugh Beale, *Chitty on contracts: Volume II: Specific Contracts, 35th edition* (Sweet & Maxwell 2023) 41-463; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 4-5; Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428-429.
1769. Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428-429.
1770. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1.
1771. Ibid.
1772. Ibid.
1773. *Office of Fair Trading v Foxtons Ltd* [2010] 1 W.L.R. 663.
1774. Michael Herington and Stuart Brothers, 'Unfair terms and consumer contracts regulations' (1995) 3(8) *International Insurance Law Review* 2-3.

cannot be reasonably interpreted against its drafter, it will still be considered legally binding and enforceable.[1775]

In my opinion, this also applies to the interpretation of ambiguous contract terms in favour of the consumer. This rule of interpretation seems to require choosing the most consumer-friendly interpretation from the available options. However, it does not necessarily guarantee that the chosen interpretation will be advantageous to the consumer. It simply means that, among the possible interpretations (some of which may not be consumer-friendly), the chosen one is the most favourable to the consumer. As a result, contract terms that cannot be reasonably interpreted in a genuinely favourable way for the consumer will still be binding and effective (unless they fail the unfairness test).

As mentioned above, the interpretation of contract terms in a manner most advantageous to consumers is applicable in individual disputes. Lord Moore-Bick held in *OFT v Foxtons Ltd* that a term, which is understood in its most consumer-friendly meaning and can be deemed fair based on that interpretation, does "*by definition not create a significant imbalance in the parties' rights and obligations contrary to the requirement of good faith*".[1776]

In my opinion, such an interpretation undermines the effectiveness of transparency as a tool for consumer protection. This is because it reduces the potential unfairness of a contract term and allows it to avoid scrutiny for unfairness. In individual cases, only the most disadvantageous contract terms that lack transparency and cannot be interpreted in a manner that renders them fair even through a consumer-friendly interpretation will be subject to fairness assessment. This differs from collective proceedings, where it seems that a breach of transparency can only be addressed through unfairness assessment. In such proceedings, the examination is limited to determining whether the lack of transparency of a contract term, either on its own or in combination with other factors, made it unfair.

The impact of breaching transparency on the unfairness of a contractual term in English law is not straightforward. As per Section 62(4) and (6) of the CRA 2015, contractual terms and notices are deemed unfair if they create a significant imbalance in the rights and obligations of the parties, to the detriment of the consumer and in violation of good faith. There is a consensus that the test for unfairness comprises two components: the requirement of good faith and the requirement of a significant imbalance.[1777] English scholars like Bright and Willett interpret the requirement of good faith as a part of procedural fairness and the requirement of significant imbalance

1775. Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in Larry DiMatteo and Martin Hogg (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 428-429.

1776. *Office of Fair Trading v Foxtons Ltd* [2010] 1 W.L.R. 663.

1777. *Longley v PPB Entertainment Ltd* [2022] EWHC 977 (QB). See also Susan Bright, 'Winning the battle against unfair contract terms' (2000) 20(3) *Legal Studies* 347; Chris Willet, 'Transparency and Fairness in Australian and UK Regulation of Standard Terms' (2013) 37(1) *University of Western Australia Law Review* 76-77; Chris Willett, 'General Clauses and Competing Ethics of European Consumer Law in the UK' (2012) 71(2) *The Cambridge Law Journal* 419.

as a part of substantive fairness.[1778] It is important to note that the framework of procedural and substantive fairness differs from the framework of formal and substantive transparency used in this thesis. The framework of procedural and substantive fairness seems to be derived from the work of Arthur Allen Leff and aims to differentiate between the contracting process and the content of the contract.[1779]

In English scholarship, the framework of procedural and substantive fairness is often used to determine what makes a contract term unfair. It helps to clarify whether unfairness arises from substantive unfairness, procedural unfairness, or a combination of both.[1780] Within this framework, some scholars classify transparency as an element of procedural unfairness.[1781] Bright, for example, suggests that transparency is encompassed by the good faith requirement, which she views as a component of procedural unfairness.[1782] Her analysis appears to find support in the case of *Interfoto v Stiletto*, in which Lord Bingham connected transparency with good faith.

In *Interfoto v Stiletto*, Lord Bingham emphasised that the good faith requirement concerns fair and open dealing.[1783] In *Director General of Fair Trading v First National Bank*, he further outlined the core elements of the good faith requirement, which has become known as the Bingham orthodoxy.[1784] According to this orthodoxy, fair dealing essentially implies that traders should not take advantage of consumers' vulnerability.[1785] Openness requires "*that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps*" and "*appropriate prominence should be given to terms which might operate disadvantageously to the customer*".[1786] In summary, the Bingham orthodoxy defines good faith as a matter of fair and open dealing, with openness requiring that contract terms are clear, legible, and prominent, that is, transparent.

The 2022 case *Longley v PPB Entertainment* also affirms that transparency can be considered a component of good faith. Justice Ellenbogen held that a lack of

1778. Susan Bright, 'Winning the battle against unfair contract terms' (2000) 20(3) *Legal Studies* 347; Susan Bright, 'Unfairness and the Consumer Contract Regulations' in Andrew Burrows and Edwin Peel (eds) Contract Terms (Oxford University Press 2007) 178-180; Chris Willet, 'Transparency and Fairness in Australian and UK Regulation of Standard Terms' (2013) 37(1) *University of Western Australia Law Review* 73-75.

1779. Arthur Allen Leff, 'Unconscionability and the Code. The Emperor's New Clause' (1967) 115(4) *University of Pennsylvania Law Review* 487.

1780. Susan Bright, 'Winning the battle against unfair contract terms' (2000) 20(3) *Legal Studies* 347; Susan Bright, 'Unfairness and the Consumer Contract Regulations' in Andrew Burrows and Edwin Peel (eds) Contract Terms (Oxford University Press 2007) 174; Chris Willet, 'Transparency and Fairness in Australian and UK Regulation of Standard Terms' (2013) 37(1) *University of Western Australia Law Review* 76-77.

1781. Susan Bright, 'Unfairness and the Consumer Contract Regulations' in Andrew Burrows and Edwin Peel (eds) Contract Terms (Oxford University Press 2007) 179-180; Chris Willet, 'Transparency and Fairness in Australian and UK Regulation of Standard Terms' (2013) 37(1) *University of Western Australia Law Review* 73-74; Chris Willett, 'General Clauses and Competing Ethics of European Consumer Law in the UK' (2012) 71(2) *The Cambridge Law Journal* 422-424.

1782. Susan Bright, 'Unfairness and the Consumer Contract Regulations' in Andrew Burrows and Edwin Peel (eds) Contract Terms (Oxford University Press 2007) 179-181.

1783. *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433.

1784. Meryll Dean, 'Defining Unfair Terms in Consumer Contracts. Crystal Ball Gazing? Director General of Fair Trading v First National Bank plc' (2002) 65(5) *The Modern Law Review* 775-776.

1785. *Director General of Fair Trading v First National Bank Plc* [2002] 1 A.C. 481.

1786. Ibid.

transparency, in a broader sense, could contradict the requirement of good faith.[1787] This, along with the requirement of significant imbalance between the parties' rights and obligations, constitutes part of the unfairness test.[1788] Furthermore, Justice Ellenbogen stated that any lack of transparency cannot affect the parties' contractual rights as transparency is a distinct requirement from the assessment of fairness under the CRA 2015.[1789] Although breaching transparency may not necessarily result in the unfairness of a contract term, it could trigger regulatory action by the CMA.[1790]

In other words, only the most serious breaches of transparency that violate the requirement of good faith and result in a significant imbalance between the rights and obligations of the parties can lead to unfairness. As highlighted by Bright, this can happen when a consumer is not adequately informed or cannot fully understand a contractual term that significantly affects their rights and obligations.[1791] The case of *OFT v Foxtons* supports the view that a lack of transparency can contribute to the determination of unfairness in a contract term. In this case, Justice Mann found that the contract terms governing the payment of a renewal commission on multiple occasions, instead of a one-off fee, contradicted the expectations of an average consumer.[1792] Drafting these terms in plain and intelligible language may have altered the consumer's reasonable expectations to align with the true intended meaning of the terms.[1793] However, as a result of Foxtons' failure to make the disputed terms sufficiently prominent and intelligible, there was a discrepancy between the consumer's reasonable expectations and the actual meaning of the terms, making them unfair.[1794] The CRA 2015 stipulates that consumers are not bound by unfair contract terms.[1795] Nevertheless, this does not automatically invalidate the entire contract. Instead, consumers can choose to rely on an unfair contract term.[1796] Otherwise, the contract will continue to apply between the parties without the unfair term, whenever possible.[1797]

The role of transparency in assessing unfairness in English law is in line with EU law, as discussed in Section 2.1.4. I agree with the understanding that the lack of substantive transparency in contractual terms can be a basis for deeming them unfair. My analysis of the concept of transparency in English law shows that both formal and substantive aspects of transparency are well-established in the law governing unfair contract terms, with substantive transparency being given priority in principle over formal transparency. This interpretation aligns with the goals associated with

1787. *Longley v PPB Entertainment Ltd* [2022] EWHC 977 (QB).
1788. Ibid.
1789. Ibid.
1790. Ibid.
1791. Susan Bright, 'Unfairness and the Consumer Contract Regulations' in Andrew Burrows and Edwin Peel (eds) Contract Terms (Oxford University Press 2007) 185-186.
1792. *The Office of Fair Trading v Foxtons Limited* [2009] C.T.L.C. 188.
1793. Ibid.
1794. Ibid.
1795. Section 61(1) and (2) CRA 2015.
1796. Section 61(3) CRA 2015.
1797. Section 67 CRA 2015.

transparency in English law, which seek to safeguard consumers against unfair surprises and foster informed consumer choice. However, the case of *Overy v Paypal* highlights an instance where the judge merely paid lip service to substantive transparency. In other words, despite referring to substantive transparency, the judge did not genuinely assess whether the contract terms facilitated consumer understanding. This approach to the assessment of transparency does not adhere to the aforementioned objectives.

5.3. The concept of transparency in English law implementing the CCD

5.3.1. The development of the transparency concept

5.3.1.1. The 1974 Consumer Credit Act

The introduction of the Consumer Credit Act in 1974 (CCA 1974) marked a pivotal moment in consumer protection for consumer credit in English law. The CCA 1974 was regarded as one of the most comprehensive and sophisticated consumer credit laws of its time.[1798] It was considered beneficial for consumer protection because it introduced concepts such as a mandatory authorisation regime for credit providers, joint liability of creditors and suppliers for defective goods, and the regulation of consumer credit advertisements and agreements.[1799]

As Ramsay explains, the initial objective of the regulatory credit framework for consumers in England was to promote the growth of a competitive consumer credit market that would establish a fair balance between businesses and consumers.[1800] Within this framework, consumer credit information played a crucial role.[1801] Under the CCA 1974, debtors had the right to access information and documents regarding consumer credit before, at the time of, and after the conclusion of the contract.[1802] The CCA 1974 imposed only one transparency requirement on consumer credit information – prominence. This requirement applied to contractual information related to the credit's APR and ensured that creditors did not present the APR in a less prominent manner than other financial information.[1803]

1798. Roystone Miles Goode, 'The Consumer Credit Act 1974' (1975) 34 (1) *Cambridge Law Journal* 81.

1799. Howard Johnson, Consumer credit and deregulation (1993) 12(6) *International Banking and Financial Law* 63. See also Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Ashgate 2005) 302-304.

1800. Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Hart Publishing 2012) 380. See also Sarah Brown, 'Consumer credit relationships – protection, self-interest/reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law' (2016) 36(2) *Legal Studies* 246-247.

1801. Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Hart Publishing 2012) 410.

1802. Roystone Miles Goode, 'The Consumer Credit Act 1974' (1975) 34 (1) *Cambridge Law Journal* 95-97, 98-99, 106; Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Hart Publishing 2012) 410. See Sections 44, 55 and 60 Consumer Credit Act 1974 Chapter 39 from 31st July 1974 (CCA 1974).

1803. Section 2(6) of the Consumer Credit (Agreements) Regulations 1983 No. 1553 (CCARs 1983).

In 2006, the CCA 1974 underwent significant changes in order to address contemporary challenges in financial regulation[1804] and increase the transparency and fairness of the consumer credit regulatory framework.[1805] According to Patient, the 2006 reform covered four main areas of regulation: the scope of the CCA 1974, post-contractual information, fairness, alternative mechanisms for redress, and enforcement by the OFT.[1806] Regarding credit information, it seems that the 2006 amendments mainly focused on the information provided to consumers after the contract is finalised, instead on the information given to consumers prior to entering into a contract. Specifically, the reforms focused on providing account statements and additional information for debtors who are in default.[1807] Consequently, the previously applicable transparency requirements, which stressed the legibility and prominence of consumer credit information, remained in effect.

It is worth noting that, as of 2006, the Financial Ombudsman Service (FOS), an independent entity responsible for resolving disputes between consumers and creditors, has been given the authority to handle complaints pertaining to all activities of authorised consumer credit providers.[1808] To my knowledge, most cases handled by the FOS thus far involve financial products such as mortgages,[1809] insurance[1810] or investments.[1811] When it comes to consumer credit cases, the emphasis appears to be on post-contractual information requirements, such as statements of accounts[1812] and default notices.[1813] Given their limited relevance for the topic of this thesis, I will not further examine the FOS cases.

5.3.1.2. The implementation of the CCD's transparency concept

In 2011, another reform of consumer credit legislation took place, driven by the need to implement the CCD.[1814] This directive was incorporated into English law through six regulations,[1815] with two of them specifically focusing on the provision of information

1804. Julie Patient, 'The Consumer Credit Act 2006' (2006) 21(6) *Journal of International Banking Law and Regulation* 309. For an account of the reform process, see Eva Lomnicka, 'The reform of consumer credit in the UK' (2004) *Journal of Business Law* 129-130.

1805. Julie Patient, 'The Consumer Credit Act 2006' (2006) 21(6) *Journal of International Banking Law and Regulation* 309; Sarah Brown, 'Consumer credit relationships – protection, self-interest/reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law' (2016) 36(2) *Legal Studies* 247. See Department of Trade and Industry, Fair, clear and competitive: a consumer credit market for the 21st century (White paper 2003) [5-6].

1806. Julie Patient, 'The Consumer Credit Act 2006' (2006) 21(6) *Journal of International Banking Law and Regulation* 309.

1807. Ibid, 311.

1808. More information about the Financial Ombudsman Service can be found here: https://www.financial-ombudsman.org.uk/consumers/complaints-can-help (accessed 8 May 2024).

1809. See, for instance, *Mr and Mrs A v The Mortgage Matters Partnership*, ref: DRN3731146.

1810. See, for instance, *Mr G v Aviva*, ref: DRN4889019.

1811. See, for instance, *Mr J v Abshire Smith Global*, ref: DRN7267417.

1812. See, for instance, *Mr and Mrs T v NatWest*, ref: DRN2394877.

1813. See, for instance, *Mr D v Payday*, ref: UK DRN0578343.

1814. Department for Business, Innovation & Skills, 'Guidance on the regulations implementing the Consumer Credit Directive updated for EU Commission Directive 2011/90/EU' (2010) BIS/10/1053 [3-4].

1815. The Consumer Credit (EU Directive) Regulations 2010 No. 1010, the Consumer Credit (Total Charge for Credit) Regulations 2010 No. 1011 (subsequently amended by the Consumer Credit (Total Charge for Credit) (Amendment) Regulations 2012 No. 1745), the Consumer Credit (Disclosure

before and at the time of contract conclusion.[1816] The 2011 regulations brought about significant changes to the provisions concerning the transparency of pre-contractual and contractual consumer credit information. Regarding contractual information, the Consumer Credit (Agreements) Regulations 2010 (CCARs 2010) specified the necessary content for consumer credit agreements and required creditors to present contractual credit information in a **clear** and **concise** manner.[1817] This aligns with the CCD, which also imposes the same two transparency requirements on contractual consumer credit information.[1818]

The changes concerning the provision of pre-contractual consumer credit information were more extensive. The Consumer Credit (Disclosure of Information) Regulations 2010 (CCDIRs 2010), which implemented the CCD's provisions regarding pre-contractual credit information, required credit providers to convey this information to consumers using the EU standardised information form known as **the SECCI**.[1819] Similar to the CCD, the CCDIRs 2010 required credit providers to disclose any information not covered by the SECCI in a separate document.[1820] However, the CCDIRs 2010 provide more extensive explanations on the formatting of the information in the SECCI, in comparison to the CCD. After credit providers have filled out the SECCI, they are allowed to remove these explanations, as well as any asterisks, gridlines, and boxes.[1821] Removing any elements from the SECCI that are not relevant to a specific contract entered into with an individual consumer can indeed shorten and enhance the comprehensibility of this form for consumers. However, it raises questions about its compatibility with the CCD, which seeks full harmonisation in the provision of pre-contractual consumer credit information and does not permit creditors to alter the format of the SECCI.

The CCD also includes instructions on how to fill out the SECCI form and envisages that they should be removed once completed. However, the CCD does not propose removing other design elements from the form, such as gridlines and boxes. Allowing credit providers to exclude significant design elements from the SECCI under the CCDIRs 2010 could hinder the standardisation and comparability of these forms for cross-border credit providers. In England, some credit providers may choose to keep the SECCI in its table format, while others may decide to remove this format. Consequently, consumers may not realise that these forms contain the same type of consumer credit information, despite the differences in their design. A similar issue may arise when the SECCI is presented without a table format in England but is provided in that

---

of Information) Regulations 2010 No. 1013 (CCDIRs 2010), the Consumer Credit (Agreements) Regulations 2010 No. 1014, the Consumer Credit (Amendment) Regulations 2010 No. 1969, and the Consumer Credit (Advertisements) Regulations 2010 No. 1970 (CCARs 2010). See also Department for Business, Innovation & Skills, 'Guidance on the regulations implementing the Consumer Credit Directive updated for EU Commission Directive 2011/90/EU' (2010) BIS/10/1053 [3-4].

1816. The CCARs 2010 and the CCDIRs 2010.
1817. Sections 3(2) and 8(1) CCARs 2010.
1818. Article 10(2) CCD.
1819. Section 8(1) of the CCDIRs 2010. SECCI can be found in Schedule 1 to the CCDIR 2010.
1820. Section 8(4) CCDIRs 2010.
1821. Section 8(3) CCDIRs 2010.

format in other EU Member States. This situation could impede the use of the SECCI as a tool to promote transparency and comparability of pre-contractual consumer credit information.

In addition to allowing credit providers to make changes to the design of the SECCI, the CCDIRs 2010 also mandate that they fill out the form with pre-contractual consumer credit information in a **clear** and **easily legible** manner and present this information in an appropriate row.[1822] This differs from the CCD, which does not explicitly require testing the suitability of consumer credit information presented through the SECCI against any transparency requirement. Therefore, it can be observed that this is another aspect in which the CCDIRs 2010 deviate from the CCD.

In line with the CCD, the CCDIRs 2010 permit the inclusion of mandatory information regarding about overdrafts using a shorter, standardised EU information form known as **the ECCI**.[1823] Alternatively, credit providers can present this information in a way that guarantees all the mandatory information is presented in an equally prominent manner.[1824] If pre-contractual information for overdrafts is provided using the ECCI, the same guidelines for completing it apply as in the case of the SECCI.[1825]

5.3.1.3. The introduction of the Financial Conduct Authority and the Consumer Credit Sourcebook

In 2014, England underwent another significant reform of consumer credit law. This reform stemmed from the shift of responsibility for regulating and enforcing the consumer credit framework from the OFT to a new regulatory body, the Financial Conduct Authority (FCA).[1826] What makes this change of regulator impactful in shaping English consumer credit law is the fact that the FCA, in contrast to the OFT, possesses not only enforcement powers but also rule-making authority.[1827]

Before the transfer of the consumer credit regime to the FCA, the regulation and enforcement of most financial services were under the jurisdiction of the Financial Services Authority (FSA), while the enforcement of consumer credit legislation remained with the OFT.[1828] This division presented challenges due to certain overlap in the mandates of these two regulators, each possessing distinct powers.[1829] As

1822. Ibid.
1823. Section 11(1) CCDIRs 2010.
1824. Ibid.
1825. Section 11(2) CCDIRs 2010.
1826. HM Treasury, Department for Business, Innovation & Skills, 'A new approach to financial regulation: transferring consumer credit regulation to the Financial Conduct Authority' (2013) [5]. See also Sarah Brown, 'EU and UK Consumer Credit Regulation: Principles, Conduct, and Consumer Protection: Divergence or Convergence of Approach?' (2015) 26(4) *European Business Law Review* 571-572.
1827. HM Treasury, Department for Business, Innovation & Skills, 'A new approach to financial regulation: transferring consumer credit regulation to the Financial Conduct Authority' (2013) [9-11]. See also Andrea Fejős, 'Achieving Safety and Affordability in the UK Payday Loans Market' (2015) 38(2) *Journal of Consumer Policy* 183.
1828. Eva Lomnicka, 'The future of consumer credit regulation: a chance to rationalise sanctions for breaches of financial services regulatory regimes?' (2013) 34(1) *Company Lawyer* 13.
1829. Ibid.

pointed out by Lomnicka, the coexistence of these two regulatory regimes meant that numerous firms that provided both consumer credit and other financial services had to navigate the requirements of two regulators with significantly different policies and approaches.[1830] Given these circumstances, it was deemed advantageous to transfer the regulation and enforcement of all financial products and services to a single authority in order to enhance the integrity of the financial system, the functioning of the financial market, and consumer protection.[1831]

When the CMA succeeded the OFT, it appears that the problem of overlapping powers was successfully resolved. Despite the fact that both the CMA and the FCA have the power to regulate unfair contract terms in consumer agreements related to financial services, these regulatory bodies have clearly defined their specific responsibilities through a Memorandum of Understanding.[1832] Therefore, the FCA possesses the authority to regulate the unfairness of contract terms in financial service agreements, such as consumer credit agreements, that consumers enter into with authorised firms or their appointed representatives when conducting regulated activities.[1833]

The transfer of the consumer credit regime to the FCA has not only shifted the authority responsible for enforcing consumer credit legislation but has also changed the way certain aspects of consumer credit are regulated. As mentioned earlier, the FCA has the power to establish rule-making instruments, which are included in a comprehensive regulatory instrument called the Handbook.[1834] In 2014, the Consumer Credit Sourcebook (CONC) became part of the Handbook.[1835]

The CONC is a specialised sourcebook for the application of consumer credit regulations,[1836] encompassing both binding rules and non-binding guidance.[1837] Given that the CONC provides further specifications for certain provisions of the CCA 1974,[1838] it can be concluded that CONC supplements the statutory consumer credit regime.[1839]

1830. Ibid.

1831. HM Treasury, Department for Business, Innovation & Skills, 'A new approach to financial regulation: transferring consumer credit regulation to the Financial Conduct Authority' (2013) [6].

1832. Chapter 1.1.1C.G. of the Unfair Contract Terms Regulatory Guide (UNFCOG). See Competition and Markets Authority and Financial Conduct Authority, 'Memorandum of Understanding between the Competition and Markets Authority and the Financial Conduct Authority on the use of concurrent powers under consumer protection legislation' (2016) [7-8].

1833. Ibid, [7].

1834. Financial Conduct Authority, 'Reader's Guide: An introduction to the Handbook' (2019) [3].

1835. HM Treasury, Department for Business, Innovation & Skills, 'A new approach to financial regulation: transferring consumer credit regulation to the Financial Conduct Authority' (2013) [12-13].

1836. Financial Conduct Authority, 'Consumer Credit Sourcebook' (Release 37 2019) [1/3].

1837. Andrea Fejős, 'Achieving Safety and Affordability in the UK Payday Loans Market' (2015) 38(2) *Journal of Consumer Policy* 183. More information on the status of all the provisions that can be found in FCA's rule-making instruments can be found in Financial Conduct Authority, 'Reader's Guide: An introduction to the Handbook' (2019) [11-12].

1838. Such as those concerning, for instance, the provision of adequate explanations of pre-contractual information. See Dennis Rosenthal, *Consumer Credit Law and Practice – A Guide* (Bloomsbury Professional 2018) 125-129, 303-304.

1839. Sarah Brown, 'Consumer credit relationships – protection, self-interest/reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law' (2016) 36(2) *Legal Studies* 230-231, 247; Sarah Brown, 'EU and UK Consumer

While the FCA enforces consumer law on the basis of its Handbook and other regulatory tools, in the Memorandum of Understanding it entered into with the CMA, the FCA also made a commitment to consider all relevant guidance on breaches of consumer law.[1840]

The case of *Harrison v Black Horse* highlights that courts may consider the rules outlined in specialist sourcebooks.[1841] Despite not specifically pertaining to the application of the CONC, this case involved the utilisation of the Insurance Conduct of Business Sourcebook (ICOBS), which carries the same legal status as the CONC.[1842] Therefore, it is reasonable to assume that English courts may also take into consideration the rules contained in the CONC when resolving consumer credit disputes. However, the case of *Plevin v Paragon Personal Finance* clarified, using the example of the ICOBS as well, that courts are not legally bound by the rules found in the FCA's specialist sourcebooks.[1843] Instead, when determining whether creditors have breached their obligations arising from consumer credit law, courts may consider whether they have adhered to the rules specified in specialist sourcebooks.

The most significant innovation brought about by the CONC concerning the transparency of consumer credit information relates to the creditor's obligation to provide adequate explanations of the pre-contractual credit information. By implementing a set of rules and guidance, the CONC outlines the requirements for fulfilling this obligation. It specifies which credit information needs to be explained and provides guidance on determining the appropriate level and extent of the explanation.[1844] From the perspective of EU law, this does not seem to pose an issue, as the CCD grants Member States the power to regulate this obligation.[1845]

5.3.1.4. The introduction of the FCA's Consumer Duty and the intended reform of the CCA 1974

In 2022, the FCA introduced the Consumer Duty, which establishes a standard for the level of care that financial firms must provide to customers in the retail financial markets, including the consumer credit market.[1846] The duty aims to set expectations that are adaptable and responsive to the emerging products, services, and business models that are increasingly developing in the digital environment.[1847] It seeks to safeguard consumers against existing and potential sources of harm, while also offering firms greater clarity on the FCA's expectations.[1848]

Credit Regulation: Principles, Conduct, and Consumer Protection: Divergence or Convergence of Approach?' (2015) 26(4) *European Business Law Review* 573.

1840. Competition and Markets Authority and Financial Conduct Authority, 'Memorandum of Understanding between the Competition and Markets Authority and the Financial Conduct Authority on the use of concurrent powers under consumer protection legislation' (2016) [5].
1841. *Harrison v Black Horse Ltd* [2011] C.T.L.C. 105.
1842. Financial Conduct Authority, 'Reader's Guide: An introduction to the Handbook' (2019) [5-9, 11-12].
1843. *Plevin v Paragon Personal Finance Ltd and another* [2014] 1 W.L.R. 4222.
1844. See Chapter 4 CONC.
1845. Recital 27 and Article 5(6) CCD.
1846. Financial Conduct Authority, 'FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty' (2022) [3-17].
1847. Ibid, [3].
1848. Ibid.

The FCA has implemented the Consumer Duty in a gradual manner, whereby certain products and services were included within its ambit starting from 31st July 2023, while others will come under its purview from 31st July 2024.[1849] The duty is applicable to firms engaged in regulated activities within the UK.[1850]

This includes companies that are operating within the temporary permissions regime that was established following the UK's withdrawal from the EU, regardless of whether they conduct regulated business through a UK-based establishment or provide cross-border services.

The Consumer Duty encompasses the following components:[1851]

- The **Consumer Principle**, which articulates the general behavioural standard the FCA expects of firms, further elaborated upon by other aspects of the Consumer Duty.
- The **'cross-cutting rules'**, which elaborate on how the FCA expects firms to conduct themselves to ensure positive outcomes and provide guidance to firms in interpreting the four outcomes.
- The **'four outcomes'**, which consist of rules and guidance that outline specific expectations regarding firms' conduct across key dimensions of the relationship between firms and consumers: product and service governance, pricing and value, consumer understanding, and consumer support.

Out of the aforementioned components, the FCA's consumer understanding outcome is particularly relevant to the topic of transparency of consumer credit information. This outcome aims to guarantee that firms empower consumers to comprehend their products and services, including their features, risks, and the consequences of their decisions, by delivering relevant information in a timely and comprehensible manner.[1852] To assist firms in achieving this objective, the FCA offers extensive guidance on how they should provide information to consumers to facilitate their effective decision-making process. Additionally, it provides illustrative examples of good and poor practices in this context.[1853] Section 5.3.3.5 expands on the content of the consumer understanding outcome, its impact on the concept of transparency in consumer credit law, and its connection to both formal and substantive transparency.

Furthermore, in 2022, the UK government announced its intention to reform the CCA 1974 and transfer the majority of its rules from statute to FCA rules.[1854] The UK government acknowledged that, although the CCA 1974 represented a significant

1849. See the explanation on the FCA's website, available here: https://www.fca.org.uk/publications/policy-statements/ps22-9-new-consumer-duty (accessed 8 May 2024).
1850. Financial Conduct Authority, 'FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty' (2022) [16].
1851. Ibid, [16].
1852. Ibid, [71-72].
1853. Ibid, [73-91].
1854. HM Treasury, 'Reforming the Consumer Credit Act 1974: Consultation' (2022) [14].

piece of legislation, introducing a wide range of consumer protections, the landscape for consumer credit products has undergone significant changes in the past five decades.[1855] As a result, many credit products that exist today did not exist when the CCA 1974 was adopted. To adapt to this evolving landscape, the UK government has periodically transferred parts of the CCA 1974 from statutory law to the more flexible regulatory framework of the FCA.[1856]

As stated in Section 5.3.1.3., a significant reform involving consumer credit law took place in 2014, shifting regulatory and enforcement powers in this area from the OFT to the FCA. The UK government emphasised that various stakeholders have expressed the necessity for further modifications to the CCA 1974 since this transfer. This is mainly due to the intricate nature of the prevailing regulatory framework, which includes both the CCA 1974 and the rules set by the FCA.[1857] In the first phase of the reform process, the UK government released a consultation on the reform of the CCA 1974[1858] and its corresponding response.[1859] However, as the UK government intends to publish a second consultation in 2024,[1860] the reform of the CCA 1974 will not be concluded before the finalisation of this thesis. However, this legislative development accentuates the importance of FCA rulemaking in the consumer credit market. Sections 5.3.3.4 and 5.3.3.5 examine crucial examples of how this rulemaking has impacted the concept of transparency up to this point.

5.3.2. The objective of transparency

The aim of the transparency concept in English consumer credit law seems to be to help consumers make **informed choices**. For example, academic discussions on information and transparency requirements in consumer credit law emphasise the objective of empowering consumers to make informed decisions.[1861] Furthermore, this objective is evident in various guidance documents concerning consumer credit. The 2003 White Paper of the Department of Trade and Industry highlighted the significance of offering consumers with transparent information prior to and during a credit agreement, enabling them to make informed decisions in the field of consumer credit.[1862] Furthermore, the *Guidance on the regulations implementing the CCD* specified that pre-contractual consumer credit information should be presented to consumers in a standardised information

1855. Ibid, [6, 14-16].
1856. Ibid, [6-7, 14-15].
1857. Ibid.
1858. Ibid, [6-10].
1859. Ibid, [7-28].
1860. Ibid, [29].
1861. Sarah Brown, 'Consumer credit relationships – protection, self-interest/reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law' (2016) 36(2) *Legal Studies* 246-251; Margaret Griffiths, 'Consumer credit advertising - transparent at last?' (2006) 11(3) *Communications Law* 75; Geraint Howells, 'The consumer credit litigation explosion' (2010) 126 *Law Quarterly Review* 618-620; Andrea Fejős, 'Achieving Safety and Affordability in the UK Payday Loans Market' (2015) 38(2) *Journal of Consumer Policy* 184.
1862. Department of Trade and Industry, 'Fair, clear and competitive: a consumer credit market for the 21st century' (White paper 2003) [33-35].

form in order to aid comparability and consumer understanding.[1863] Although enhancing the comparability of consumer credit information can also be viewed as a means of promoting market transparency, the *Guidance on the regulations implementing the CCD* primarily associates comparability with consumer understanding.

Additionally, the objective of informed consumer choice is perhaps most notable in the work of the FCA, particularly in its recently adopted Consumer Duty. As explained in Section 5.3.1.4., one of the four outcomes essential to the Consumer Duty is the consumer understanding outcome, where the FCA offers comprehensive guidance on how financial firms, including credit providers, should transparently provide information to consumers. The FCA emphasises that firms must offer consumers understandable and timely information to enable them to make informed decisions, ultimately aiming to increase the likelihood of customers achieving positive outcomes.[1864] Prior to the adoption of the Consumer Duty, the objective of informed consumer choice was perhaps most evident in the CONC's regulation of the credit provider's obligation to provide adequate explanations to consumers regarding their credit products. According to CONC, this obligation serves the purpose of allowing consumers to assess the suitability of the contract for their financial needs and situation.[1865]

The objective of transparency in English consumer credit law partially corresponds with the goal of transparency in unfair contract terms law, as both areas aim to facilitate informed consumer choice through transparent information. However, unlike unfair contract terms law, English consumer credit law does not prioritise the objective of safeguarding consumers against unfair surprises. As explained earlier, consumers can only make decisions about their credit contracts based on information that they can access, read, and comprehend. Consequently, the subsequent section examines whether the interpretation and evaluation of transparency in English consumer credit law uphold its formal and substantial components.

5.3.3. The interpretation and assessment of transparency

5.3.3.1. Prominence of pre-contractual credit information

As stated in Section 5.3.1.2., the CCDIRs 2010 introduce a less strict information framework for overdraft agreements, in line with the CCD. This means that credit providers are obliged to provide consumers with a reduced amount of information compared to other types of consumer credit agreements. Credit providers have the choice to present this information using a standardised form exclusively designed for overdrafts, known as the ECCI. If they decide not to utilise the ECCI, they still have a

1863. Department for Business, Innovation & Skills, 'Guidance on the regulations implementing the Consumer Credit Directive updated for EU Commission Directive 2011/90/EU' (2010) BIS/10/1053 [6]
1864. Financial Conduct Authority, 'FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty' (2022) [71-72].
1865. Paragraphs (1) of CONC 4.2.5.R.

duty to ensure that all mandatory pre-contractual information regarding overdrafts is **equally prominent**.[1866]

Although prominence was the first transparency requirement imposed on consumer credit information in English law,[1867] its interpretation has not been established in the context of providing pre-contractual information on overdraft agreements. However, the CONC provides insights into the meaning of the prominence requirement in the context of consumer credit advertising,[1868] statements related to mortgage agreements,[1869] and warnings pertaining to peer-to-peer (P2P) agreements secured against the consumer's home.[1870] In all of these scenarios, the CONC envisions that prominence requires presenting information in a way that is likely to capture the attention of an average consumer.[1871] Therefore, it is reasonable to assume that, at the very least, the FCA, which is responsible for enforcing consumer credit rules based on the CONC, would be inclined to adopt the same interpretation of prominence when it comes to pre-contractual information regarding overdrafts.

Similar to the CONC, the previously applicable *Guidance on the regulations implementing the CCD* also provided further insights into the potential interpretation of prominence in the context of advertising for consumer credit.[1872] This guidance document associated the requirement of prominence with the question of whether the information sufficiently stood out.[1873] In assessing whether the information stood out sufficiently, consideration had to be given to the nature and context of the medium used.[1874] In the online context, another factor relevant for prominence was the ease with which consumers could locate information on the credit provider's website.[1875] The *Guidance on the regulations implementing the CCD* also clarified that credit providers must present each piece of mandatory information in consumer credit advertisements with equal prominence, preventing them from selectively highlighting specific items.[1876] In the case of online consumer credit advertising, this meant that credit providers could only use links to disclose mandatory information if each piece of this information was "*equally accessible, together and more prominent than any other information*".[1877]

Based on these interpretations, it can be inferred that the prominence requirement primarily relates to the accessibility and readability of consumer credit

1866. Section 11(1) CCDIRs 2010.
1867. Section 2(6) CCARs 1983.
1868. CONC 3.2.3.G.
1869. CONC 4.1.5.R. and CONC 4.1.6.G.
1870. CONC 4.3.6.R. and CONC 4.3.7.G.
1871. CONC 3.2.3.G., CONC 4.1.6.G and CONC 4.3.7.G.
1872. Department for Business, Innovation & Skills, 'Guidance on the regulations implementing the Consumer Credit Directive updated for EU Commission Directive 2011/90/EU' (2010) BIS/10/1053 [22-27].
1873. Section 5(6)d CCADR; Department for Business, Innovation & Skills, 'Guidance on the regulations implementing the Consumer Credit Directive updated for EU Commission Directive 2011/90/EU' (2010) BIS/10/1053 [26].
1874. Ibid.
1875. Ibid, [27].
1876. Ibid, [26].
1877. Ibid, [27].

information, thus justifying its classification as a **formal transparency** requirement. It should be noted that the prominence requirement has also been interpreted as a formal transparency requirement in EU consumer credit law, ensuring that the text is of sufficient size and not difficult to read.[1878] Consequently, the formal interpretation of prominence in English consumer credit law aligns with EU law.

5.3.3.2. Standardisation of pre-contractual consumer credit information

In accordance with the CCD, the CCDIRs 2010 stipulate that credit providers must furnish consumers with pre-contractual information on consumer credit using the SECCI. There are only a few exceptions outlined in the law where the use of this standardised information form is not obligatory. While the format of the SECCI remains consistent with the CCD requirements, the CCDIRs 2010 provide guidance on how to accurately complete this information form. According to English law, credit providers must ensure that they present the information in line with the accompanying instructions and place it in the relevant section in a clear and easily legible manner.[1879] Credit providers have permission to remove accompanying instructions, asterisks, gridlines, and boxes from the SECCI once they have completed it.[1880]

The UK legislature correctly recognised the necessity for additional clarification regarding how credit providers should complete the SECCI. This is because the SECCI simply outlines the information that credit providers must disclose, without specifying how to transparently present this information. However, it seems that the CCDIRs 2010 do not ensure that the SECCI will be filled out in a manner that enhances the understandability of pre-contractual consumer credit information.

The CCDIRs introduce only one requirement that could potentially contribute to promoting substantive transparency in the context of pre-contractual consumer credit information, and that requirement is clarity. However, as explained in Section 5.3.3.4., the way clarity is interpreted in English consumer credit law seems to focus on the legibility and visibility of consumer credit information, which pertains to formal transparency rather than substantive transparency. Moreover, the possibility for credit providers to remove graphical elements from the SECCI, such as gridlines and boxes, could compromise the comparability of the information provided through the SECCI and is not envisaged in the CCD. Therefore, while the SECCI might ensure formal transparency, its capacity to achieve substantive transparency remains uncertain.

1878. See Section 2.2.3.1. of Chapter 2.
1879. Section 8(3) CCDIRs 2010. See also Department for Business, Innovation & Skills, 'Guidance on the regulations implementing the Consumer Credit Directive updated for EU Commission Directive 2011/90/EU' (2010) BIS/10/1053 [36].
1880. Section 8(3) CCDIRs 2010.

5.3.3.3. Provision of adequate explanations of pre-contractual consumer credit information

The lack of substantive transparency considerations within the interpretations of the requirements of clarity, conciseness, and prominence could potentially be addressed through the creditor's **obligation to provide adequate explanations** of credit information. Although the CCD introduced this obligation, it delegated the regulation of its scope and content to the Member States.[1881]

In English law, the CONC includes comprehensive rules and guidance on how credit providers should fulfil the obligation of providing adequate explanations of pre-contractual consumer credit information. Before finalising a consumer credit agreement, credit providers must furnish consumers with comprehensive explanations regarding various aspects of the agreement. These explanations should cover items such as the cost of the credit and any potential consequences that the consumer may not anticipate.[1882] These explanations should empower consumers to evaluate whether the agreement is suitable for their financial needs and situation.[1883] Furthermore, credit providers should advise consumers to thoroughly review the credit information, encourage them to ask questions about the contract, and ensure that they are given the chance to do so.[1884]

In addition to specifying the rules for disclosing information, the manner of disclosure, and its purpose, the CONC also provides guidance on the factors credit providers should consider when determining the appropriate level and extent of explanations for this information.[1885] These factors include elements such as (but not limited to) the type of credit, the amount and duration of the loan, both actual and potential costs, the purpose of the credit, and the extent to which the consumer appears to understand the credit agreement.[1886] Even in situations where the consumer asserts or implies that they do not require explanations, the credit provider is still obligated to continue providing adequate explanations[1887] and cannot encourage the consumer to waive their right to receive these explanations.[1888]

Regarding the provision of pre-contractual adequate explanations online, the CONC stipulates that consumers should receive a thorough set of responses to frequently asked questions (FAQs) or have the option to communicate with a representative of the credit provider via online channels.[1889] They should also have the opportunity to read the pre-contractual information and its accompanying explanations.[1890] The credit provider cannot fulfil the obligation of providing adequate explanations by simply giving the consumer a link directing them to this information

1881. Recital 27 and Article 5(6) CCD.
1882. Paragraphs (1) and (2) of CONC 4.2.5.R.
1883. Paragraphs (1) of CONC 4.2.5.R.
1884. Ibid.
1885. CONC 4.2.7.G.
1886. Ibid.
1887. CONC 4.2.9.R.
1888. CONC 4.2.10.R.
1889. CONC 4.2.18.G.
1890. CONC 4.2.19.G.

if the consumer can still enter into the consumer credit agreement without opening the link.[1891]

In my view, the regulation regarding the obligation to provide adequate explanations of pre-contractual credit information in English law aims to ensure **substantive transparency** of credit information. However, it is true that even with such explanations, consumers may still not fully understand the credit information. However, the CONC states explicitly that the main goal of this obligation is to empower consumers to evaluate the appropriateness of a consumer credit agreement and resolve any doubts they may have, which suggests that a certain level of comprehension of the agreement is expected.

However, there may still be practical challenges in providing adequate explanations of credit information online. Unfortunately, the CONC does not offer comprehensive guidance on how credit providers can effectively use interactive online tools such as chats or personalised questionnaires to provide consumers with adequate explanations. Instead, it suggests that credit providers can fulfil their obligation by simply having a FAQs section on their website. This approach seems to be inconsistent with EU law, as the aim of the obligation to provide adequate explanations is to enable consumers to make informed decisions about credit and appears to be more focused on personalised information.[1892]

Furthermore, the CONC also fails to address certain issues, such as the placement of these frequently asked questions on the creditor's website. It is also questionable whether consumers are likely to actively search for this information on the credit provider's website, especially if their attention is not directed towards it. While this level of flexibility could benefit credit providers by allowing them to compete in innovating and enhancing how they provide credit information to consumers, it might also pose challenges for standardising credit information. Therefore, it may be necessary to reconsider, particularly in the online context, which tools credit providers can use to improve consumers' understanding of pre-contractual consumer credit information without compromising its clarity and comparability.

5.3.3.4. Clarity and conciseness of contractual credit information

Similar to the CCD, the CCARs 2010 oblige credit providers to ensure the clarity and conciseness of the mandatory information included in consumer credit agreements.[1893] The CCARs 2010 specify that the requirement of **clarity** necessitates that "*the wording, apart from any signature, is to be easily legible and of a colour which is readily distinguishable from the background medium upon which the information is displayed*".[1894] This interpretation of clarity also aligns with the CCDIRs 2004, which mandated that

1891. Ibid.
1892. See Chapter 2, Section 2.2.3.3.
1893. Section 3(2) of CCARs 2010.
1894. Section 3(3) CCARs 2010.

pre-contractual consumer credit information should be easily readable and presented in a sufficiently distinctive colour, as mentioned in Section 5.3.1.1.[1895]

In addition to the CCARs 2010, the CCDIRs 2010 also apply the clarity requirement to pre-contractual information conveyed through the SECCI.[1896] While the CCDIRs 2010 mention the need for legibility of information, they do not explicitly specify that clarity necessitates using a font colour distinct from the background where the information is presented. However, it is worth noting that the CCDIRs 2004, the regulations that initially introduced transparency requirements for pre-contractual consumer credit information in English law, did indeed demand both legibility and the use of a sufficiently distinguishable font colour.[1897] Since the clarity requirement primarily pertains to the legibility and visibility of information, it can be deduced that it focuses on the readability of the information and is, therefore, a **formal transparency** requirement. Additionally, it can be observed that neither the CONC nor the previously applicable *Guidance on the regulations implementing the CCD* from the Department of Business, Innovation & Skills[1898] offer an alternative interpretation of clarity that would justify its classification as a substantive transparency requirement.

The only document interpreting the meaning of the **conciseness** requirement was the *Guidance on the regulations implementing the CCD* from the Department of Business, Innovation & Skills. However, the interpretation contained therein did not differentiate between this requirement and the requirement for clarity. It indicated that clarity and conciseness would probably not be achieved if information was presented in separate documents or scattered in such a way that makes it unlikely to be read or have an impact.[1899] Based on this interpretation, conciseness should be classified as a **formal transparency** requirement, with a primary focus on the accessibility and readability of information. While it is possible that the interpretation from the *Guidance on the regulations implementing the CCD* may still influence the assessment of the conciseness of credit information, it is important to note that this guidance is no longer in effect.

It is remarkable that the present interpretations of clarity and conciseness do not adequately guarantee the comprehensibility, or to put it differently, the substantive transparency of (pre-)contractual information regarding consumer credit. This lack of focus on substantive transparency represents a missed chance considering the objective of fostering well-informed decision-making by consumers within the realm of English consumer credit law. Additionally, the interpretations of these requirements, which fail to incorporate the need for substantive transparency of credit information, differs from the understanding of clarity and conciseness in EU

1895. Section 4(1) CCDIRs 2004.
1896. Section 8(3)(e) CCDIRs 2010.
1897. Section 4(a) CCDIRs 2004.
1898. Department for Business, Innovation & Skills, 'Guidance on the regulations implementing the Consumer Credit Directive updated for EU Commission Directive 2011/90/EU' (2010) BIS/10/1053.
1899. Ibid, [40-41].

consumer credit law. As elaborated in Section 2.2.3.1., the interpretations of clarity and conciseness in EU law ensure both formal and substantive transparency of credit information. This approach is more in line with the objective of promoting informed consumer choice, as opposed to the formal approach to clarity and conciseness observed in English law.

5.3.3.5. The consumer understanding outcome within the FCA's Consumer Duty

One of the pillars of the Consumer Duty is the **consumer understanding outcome**, which outlines how financial firms, including creditors, can empower consumers to make informed decisions.[1900] The FCA acknowledges the presence of multiple legal and regulatory disclosure obligations that apply to financial firms and stresses the importance of firms complying with all these obligations.[1901] Nevertheless, to align with the expectations set out in the Consumer Duty by the FCA, firms need to expand their perspective on the purpose and desired outcomes of providing information to consumers. When firms have discretion in explaining essential information about their products and services, the FCA emphasises the importance of adhering to the recommendations provided within the consumer understanding outcome.[1902]

To facilitate efficient decision-making, the FCA mandates financial firms to approach the provision of information with a consumer-centric perspective. This entails recognising the information consumers require, providing it at the appropriate time, and presenting it in a format that allows them to comprehend the product and make choices that optimise their chances of a positive outcome.[1903] Furthermore, the FCA emphasises that financial firms should present information in a way that is understandable to the targeted recipient.[1904] This should empower consumers to assess the advantages, risks, and expenses associated with the financial options available, taking into account their own financial circumstances.

To enhance communication effectiveness, the FCA recommends several specific practices:[1905]

- **Layering:** The FCA highlights research indicating that consumers tend to rely more on the first information they encounter when making decision. They are less likely to read the information they have to actively search for or that is hidden. Therefore, it instructs financial firms to present essential information upfront, including instructions for required actions and the consequences of inaction, while also incorporating cross-references or links for additional information. The FCA underscores the importance of financial firms effectively structuring information by consolidating all relevant information on a specific topic in

1900. Financial Conduct Authority, 'FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty' (2022) [71-91].
1901. Ibid, [75-76].
1902. Ibid.
1903. Ibid, [71-72].
1904. Ibid, [74, 80-81].
1905. Ibid, [74-75].

one place or by layering it through links. Furthermore, it stresses the need for consistency and coherence in describing information across different documents.

- **Engaging:** The FCA encourages financial firms to employ different visual cues, such as headings, layout, bullet points, fonts, tables, graphs, diagrams, graphics, audio-visuals, and interactive media, to present information in a manner that promotes consumer engagement and enables consumers to easily identify crucial information. Furthermore, it offers examples of proven practices that enhance consumer comprehension, such as adopting a question-and-answer format to communicate important contract terms and utilising explanatory icons to summarise and illustrate important terms.
- **Relevance:** The FCA requires financial firms to customise their information, including the level of detail, depending on the intended recipient and the specific product in question. It emphasises the importance of avoiding unnecessary disclaimers and ensuring that consumers do not miss important information due to information overload. The FCA recommends that financial firms communicate concisely, help consumers navigate the information effectively and bring the most important information to the consumer's attention in an accessible way.
- **Simplicity:** The FCA requests firms to ensure their information is logically structured, refrain from using jargon and technical terms, or provide clear explanations of these terms in plain and intelligible language. Additionally, the FCA acknowledges that using absolute costs and standardised terms can promote simplicity and improve consumer comprehension, making it easier for them to compare different options that are available.
- **Timeliness:** The FCA expects financial firms to communicate with customers at relevant stages throughout the product lifecycle, allowing them to effectively process and evaluate information.

The FCA expects financial firms to deliver information effectively, irrespective of the communication channel they employ.[1906] They should also customise the information they provide in the digital environment for various media, such as computers, tablets, and smartphones. When it comes to smartphones, they should take into account the amount of information that customers can meaningfully engage with through this channel. Firms may also consider adopting a layered approach, where certain information is given priority and presented upfront, while additional information is provided later or through other channels. Lastly, the FCA requests that firms test the understandability of their information for consumers and track the impact of this information throughout the customer journey.[1907]

In my opinion, the FCA's understanding of transparency in relation to the consumer understanding outcome supports both the **formal** and **substantive transparency** of the information that financial firms provide to consumers. The

1906. Ibid, [79].
1907. Ibid, [82-87].

FCA provides various illustrative examples to help firms enhance the accessibility, readability, and comprehensibility of their information. This includes evaluating factors such as the quantity and length of information, its design and structure, as well as its relevance, simplicity, and timeliness.

This concept of transparency aligns with the objective of promoting informed consumer choice, a goal embedded in English consumer credit law, as demonstrated in section 5.3.2. Furthermore, maintaining this interpretation is crucial to uphold this objective as the interpretation and evaluation of transparency and standardisation requirements in English consumer credit law only ensure the formal transparency of consumer credit information, as evidenced in Sections 5.3.3.1., 5.3.3.2. and 5.3.3.4. Additionally, although the interpretation and assessment of transparency in both EU and English consumer credit law seem to converge in their pursuit of both formal and substantive transparency, there is a clear need for more comprehensive guidance on the provision of transparent information at the EU level. In this regard, EU regulators may draw inspiration from the practices of the FCA.

It is yet to be seen how the FCA will implement its expectations derived from the consumer understanding outcome when credit providers are required to use the SECCI to provide pre-contractual credit information to consumers. The FCA recognises that financial firms are sometimes obliged to use specific templates to present key information about their products and services, which limits their flexibility in the presentation of information.[1908] In my opinion, a template like the SECCI should not hinder credit providers from adhering to the FCA's recommendations regarding effective provision and design of information. This is because the SECCI mainly specifies the required information that credit providers must provide, its arrangement, and tabular format. However, the SECCI does not dictate the specific content of this information. Therefore, credit providers have the flexibility to decide the amount and length of the information, the simplicity of the language used, and whether to incorporate tools like examples or visual cues such as headings or bullet points.

5.3.4. Contractual consequences of a breach of transparency

The CCA 1974 and the CONC stipulate that, in cases where pre-contractual or contractual information has not been provided in the prescribed manner, creditors can enforce a consumer credit agreement only through a court order.[1909] This form of sanction is referred to as "redeemable unenforceability" of consumer credit agreements, as the agreement's initial unenforceability can be remedied through a court order. As Collins highlights, improper execution of consumer credit agreements can lead to two possible outcomes.[1910] The first option enables the court to refuse the

1908. Ibid, [75-76].
1909. Sections 55, 60, 65 and 127 CCA 1974. See also CONC 4.2.3.G.
1910. Daniel M. Collins, 'Misleading APRs in consumer credit agreements: a new influence?' (2012) 7 *Journal of Business Law* 637-638.

creditor's application for an enforcement order, thereby rendering the agreement unenforceable.[1911] The second option allows the court to enforce the order while reducing or waiving any amount or surety payable by the debtor as compensation for any damage resulting from the breach of information requirements.[1912]

It is uncertain whether the same sanction would be applicable in cases where creditors have provided information but have not complied with transparency requirements. However, it seems to me that the CCA 1974 and the CONC provide sufficient room to apply the sanction of redeemable unenforceability for transparency violations. This is because they do not limit the application of this sanction solely to breaches of the content of pre-contractual and contractual information. On the contrary, they appear to cover breaches concerning the information format as well.[1913] Additionally, the court's discretion in granting the order and reducing payments under the contract may enable it to distinguish, if necessary, between breaches of information and breaches of transparency requirements.

In relation to pre-contractual information, the CCA 1974 and the CONC indicate that the sanction of redeemable unenforceability applies if creditors fail to provide this information in the manner specified by the CCDIRs 2010.[1914] These regulations stipulate that credit providers must fill out standardised information forms (such as the SECCI or the ECCI) in line with accompanying guidelines. This ensures that the information is clear, easily legible, and presented in the appropriate sections.[1915] Given that the use of a standardised information form is optional for overdrafts, if credit providers choose to convey mandatory pre-contractual information regarding overdrafts to consumers in a different manner, they must still guarantee that each piece of this information is given equal prominence.[1916] It seems to me that in cases where credit providers fail to complete the SECCI and the ECCI in a clear and legible manner, or fail to ensure that all essential information about overdrafts is given equal prominence, the pre-contractual information will not comply with the CCDIRs 2010. Therefore, in my opinion, breaches of transparency requirements concerning pre-contractual consumer credit information should be subject to the sanction of redeemable unenforceability.

Regarding contractual information, the CCA 1974 stipulates that the sanction of redeemable unenforceability shall be applied if this information has not been provided in accordance with the CCARs 2010.[1917] Additionally, the CCA 1974 highlights that implementing regulations may incorporate provisions to ensure that contractual information is adequately brought to the consumer's attention and that no part of the

1911. Section 127(1) CCA 1974.
1912. Section 127(2) CCA 1974.
1913. For pre-contractual information, see Section 55(1) CCA 1974 and CONC 4.2.3.G. and for contractual information see Section 60(1) and (2) CCA 1974.
1914. See Section 55(1) CCA 1974 and CONC 4.2.3.G.
1915. Section 8(3) CCDIRs 2010 and Section 11(1) and (2) CCDIRs 2010.
1916. Section 11(1)(b) CCDIRs 2010.
1917. Sections 60(1) and (2) and 65 CCA 1974.

contract is given inadequate or excessive prominence.[1918] From my perspective, this establishes a foundation for penalising violations of transparency with redeemable unenforceability. Although the CCARs 2010 do not govern the prominence of mandatory contractual information, they do require creditors to incorporate such information into the contract in a clear and concise manner.[1919] Accordingly, if the mandatory contractual information is not clear and concise, one could argue that the creditor has not complied with the CCARs 2010. Consequently, the contract should only be enforceable through a court order.

Furthermore, information transparency can be a factor in assessing the fairness of a consumer credit relationship. The unfair relationship test was introduced into the CCA in 2006[1920] and is outlined in Sections 140A to 140C of the CCA 1974. The unfairness of the relationship between the creditor and the debtor may arise due to the terms of the agreement (or any associated agreement), the manner in which the creditor has exercised or enforced their contractual rights, or any actions or omissions they may have made before or after the conclusion of the agreement.[1921] Courts have broad discretion in determining whether the relationship between the creditor and the debtor is unfair and what the consequences of such a determination will be. For example, courts have the authority to consider all relevant factors they deem appropriate[1922] and can make a determination of unfairness even after the credit relationship has already been terminated.[1923] Furthermore, when determining the implications of such a finding, courts have the authority to order the creditor to reimburse any amount paid by the debtor, decrease any outstanding amount stated in the agreement, return any collateral, nullify any obligations of the debtor, modify any terms of the agreement, and so forth.[1924] Scholars have devoted considerable attention to the unfair relationship test, commenting on the broad powers granted to

1918. Section 60(2)(b) CCA 1974.
1919. Section 3(2) and (3) CCARs 2010.
1920. Lara McMurtry, 'Consumer Credit Act mortgages: unfair terms, time orders and judicial discretion' (2010) 2 *Journal of Business Law* 108-109; Eva Lomnicka, 'Unfair credit relationships: five years on' (2012) 8 *Journal of Business Law* 715. The unfair relationship test has replaced the extortionate bargain test, which was found to be too burdensome in practice and, therefore, rarely applied by courts. For an analysis of the extortionate bargain test see, for instance, Eva Lomnicka, 'The reform of consumer credit in the UK' (2004) *Journal of Business Law* 137; Julie Patient, 'The Consumer Credit Act 2006' (2006) 21(6) *Journal of International Banking Law and Regulation* 311-312; Geraint Howells, 'The consumer credit litigation explosion' (2010) 126 *Law Quarterly Review* 637; Lara McMurtry, 'Consumer Credit Act mortgages: unfair terms, time orders and judicial discretion' (2010) 2 *Journal of Business Law* 111-112; Eva Lomnicka, 'Unfair credit relationships: five years on' (2012) 8 *Journal of Business Law* 713-714.
1921. Section 140A(1) CCA 1974.
1922. Section 140A(2) CCA 1974.
1923. Section 140A(4) CCA 1974.
1924. Section 140B CCA 1974.

courts,[1925] delving into the concept of unfairness[1926] and expressing doubts about the effective application of such a broad and uncertain test in practice.[1927]

The case of *Plevin v Paragon Personal Finance* appears to shed light on the question of whether a consumer's lack of comprehension of a consumer credit agreement could render a credit relationship unfair.[1928] Lord Sumption, who delivered the leading judgment in this case, emphasised that "*sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non-commercial debtor*".[1929] The Supreme Court recognised that it was challenging to determine the exact point at which the debtor's informational deficit' becomes so severe that it renders the entire credit relationship unfair.[1930] Nonetheless, it is asserted that a tipping point, beyond which the relationship cannot be considered fair if the consumer is kept in the dark, certainly exists.

In the *Plevin v Paragon Personal Finance* case, the consumer's lack of understanding of the contract was due to the omission of certain information rather than a lack of transparency of the information provided. Specifically, Mrs. Plevin, who purchased an insurance policy as part of a package agreement with a consumer credit contract, was unaware that two-thirds of her insurance premium constituted a commission. The Supreme Court recognised that it could have been assumed that Mrs. Plevin had knowledge of a portion of her insurance premium being allocated as a commission.[1931] However, since she was not informed that most of her insurance premium was going towards the insurance commission, the Supreme Court believed that she was unable to make an informed decision regarding the purchase of the insurance policy. As a result, Mrs. Plevin was deprived of crucial information necessary for making a transactional decision, which made the credit relationship unfair.[1932]

1925. Sarah Brown, 'Consumer credit relationships – protection, self-interest/reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law' (2016) 36(2) *Legal Studies* 233-235; Julie Patient, 'The Consumer Credit Act 2006' (2006) 21(6) *Journal of International Banking Law and Regulation* 312; Daniel M. Collins, 'Misleading APRs in consumer credit agreements: a new influence?' (2012) 7 *Journal of Business Law* 637-638.

1926. Sarah Brown, 'Consumer credit relationships – protection, self-interest/reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law' (2016) 36(2) *Legal Studies* 242-246; Julie Patient, 'The Consumer Credit Act 2006' (2006) 21(6) *Journal of International Banking Law and Regulation* 312-314; Geraint Howells, 'The consumer credit litigation explosion' (2010) 126 *Law Quarterly Review* 638; Lara McMurtry, 'Consumer Credit Act mortgages: unfair terms, time orders and judicial discretion' (2010) 2 *Journal of Business Law* 113-124.

1927. Geraint Howells, 'The consumer credit litigation explosion' (2010) 126 *Law Quarterly Review* 638-639.

1928. *Plevin v Paragon Personal Finance Ltd and another* [2014] 1 W.L.R. 4222.

1929. Ibid.

1930. Ibid.

1931. Ibid.

1932. Notably, the Supreme Court has overturned the approach taken by the Court of Appeal. In *Harrison v Black Horse Ltd* [2011] C.T.L.C. 105, the Court of Appeal emphasised that the disclosure of insurance commission is not required by the relevant rules in the Insurance Conduct of Business Sourcebook (ICOBS). As a result, the court concluded that it would be contradictory to force creditors to disclose the insurance commission to avoid the credit relationship being considered unfair, especially if they are not obligated to disclose the commission under the applicable statutory regime. This directly contradicts the stance taken by the Supreme Court in *Plevin v Paragon Personal Finance Ltd and another* [2014] 1 W.L.R. 4222. In this case, the Supreme Court held that the assessment of the

Although this case involves the omission of information rather than the provision of non-transparent information, it illustrates how a consumer's lack of knowledge in a consumer credit relationship can result in the unfairness of this relationship. It is possible that such lack of knowledge arises not only from the creditor's failure to provide information, but also from the lack of transparency of the information provided. If the information given by the creditor to a consumer is so unclear that the consumer is unable to comprehend their contractual rights and obligations, this can also result in a significant deficit in knowledge and understanding.

5.4. The concept of transparency in English law implementing the CRD

5.4.1. The development of the transparency concept

5.4.1.1. The implementation of EU distance-selling law

EU-based distance-selling legislation was initially incorporated into English law in 2000 through the Consumer Protection (Distance Selling) Regulations 2000 (CPRs 2000),[1933] which transposed the DSD.[1934] Under Section 7 (2) of the CPRs 2000, traders were required to present mandatory pre-contractual information in online contracts in a clear and comprehensible manner, tailored to the means of distance communication employed. For instance, if an online contract was concluded over the internet, it would be considered appropriate for the trader to convey the pre-contractual information clearly and comprehensibly through their website.[1935] In contrast to legislation on unfair contract terms and consumer credit, which defines at least some of the transparency requirements it imposes,[1936] the CPRs 2000 did not provide definitions for either of the two transparency requirements they specified. It is worth noting that the CPRs 2000 underwent minor amendments in 2005, but these changes did not pertain to the provisions governing the transparency of information in online contracts.[1937]

The UK legislature implemented the CRD into English law in 2013 by enacting the Consumer Contracts (Information, Cancellation and Additional Charges)

---

unfairness of a credit relationship cannot be based solely on compliance or non-compliance with statutory requirements.

1933. The Consumer Protection (Distance Selling) Regulations 2000 No. 2334 (CPRs 2000).

1934. Department of Trade and Industry and Office of Fair Trading, 'A guide for businesses on distance selling' (2006) OFT698 [4]. See also Paul Meads, 'E-consumer protection - distance selling' (2002) *International Company and Commercial Law Review* 13(4) 179; Mary Donnelly and Fidelma White, 'The distance selling directives - A time for review' (2005) 56 *Northern Ireland Legal Quarterly* 200; Simon Jones, 'Forming electronic contracts in the United Kingdom' (2000) *International Company and Commercial Law Review* 306-307.

1935. Department of Trade and Industry and Office of Fair Trading, 'A guide for businesses on distance selling' (2006) OFT698 [12]. See also See also Mary Donnelly and Fidelma White, 'The distance selling directives - A time for review' (2005) 56 *Northern Ireland Legal Quarterly* 217.

1936. See for instance Sections 64(3) and (4) and 68 CRA 2015 or Section 3(3) CCARs.

1937. The Consumer Protection (Distance Selling) (Amendment) Regulations 2005 No. 689 (CPARs 2005).

Regulations 2013 (CCRs 2013).[1938] To safeguard consumers from excessive and non-transparent payment surcharges at the national level, the UK legislature transposed Article 19 of the CRD one year ahead of the remaining provisions of the CRD.[1939] The article in question requires Member States to prohibit traders from charging fees for the use of a specific means of payment that exceed its actual cost. This requirement was implemented through the Consumer Rights (Payment Surcharges) Regulations 2012 (CRRs 2012).[1940] Even prior to the implementation of the CRD into English law, the OFT's investigation into the domestic market highlighted the lack of transparency in pricing policies of travel companies.[1941] Giliker highlights that the OFT uncovered that travel companies, particularly airlines, frequently employed the practice of 'drip-pricing' which involves adding surcharges for credit and debit card usage only after consumers have already gone through several steps of the booking process.[1942] This meant that consumers would only find out the total price in the final step of their booking process. For example, a family of four, paying with a credit or debit card, would only discover at the end of the booking process that their total booking price would increase by 48 British pounds due to these surcharges.[1943]

It seems that the CCRs 2013 have not received much attention from the academic community. Scholars who have analysed these regulations have mainly focused on giving an outline of the CCRs 2013 provisions and their incorporation into the national legal system.[1944] A topic that has garnered more attention in the realm of online contracts, at times in reference to the CCRs 2013 and at other times in relation to other legal sources, revolves around the formation of online contracts and the incorporation of standard terms and conditions within them.[1945]

1938. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 No. 3134 (CCRs 2013). See also Oliver Bray and Susan Perkins, 'The new Consumer Contracts Regulations: key changes and implications' (2014) *Computer and Telecommunications Law Review* 98; Oliver Price, Christina Fleming and Charles Russell Speechlys, 'The impact and content of the new UK Consumer Contracts Regulations' (2015) *Compliance & Risk* 2.

1939. Paula Giliker, 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive' (2015) 23(1) *European Review of Private Law* 16-25.

1940. The Consumer Rights (Payment Surcharges) Regulations 2012 No. 3110 (CRRs 2012).

1941. OFT's press release concerning the investigation available at: https://webarchive.nationalarchives.gov.uk/20140402175249/http://oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/card-surcharges/ (accessed 8 May 2024).

1942. Paula Giliker, 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive' (2015) 23(1) *European Review of Private Law* 19.

1943. Ibid.

1944. See for instance Paula Giliker, 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive' (2015) 23(1) *European Review of Private Law*; Oliver Bray and Susan Perkins, 'The new Consumer Contracts Regulations: key changes and implications' (2014) *Computer and Telecommunications Law Review*; Oliver Price, Christina Fleming and Charles Russell Speechlys, 'The impact and content of the new UK Consumer Contracts Regulations' (2015) *Compliance & Risk*.

1945. See for instance Faye Fangfei Wang, 'The incorporation of terms into commercial contracts: a reassessment in the digital age' (2015) *Journal of Business Law*; Hasan A. Deveci, 'Consent in online contracts: old wine in new bottles' (2007) *Computer and Telecommunications Law Review*; Phillip Johnson, 'All wrapped up? A review of the enforceability of "shrink-wrap" and "click-wrap" licences in the United Kingdom and the United States' (2003) *European Intellectual Property Review*; Simon Jones, 'Forming electronic contracts in the United Kingdom' (2000) *International Company and Commercial Law Review*.

The limited engagement of scholars with the CCRs 2013 may stem from several factors. As pointed out by Giliker, the UK legislature adopted a copy-out technique to incorporate the CCRs 2013 into English law.[1946] This approach aimed at directly transposing the CRD into the national legal system with minimal adaptations. Given that the CCRs 2013 closely mirror the CRD, comments on the UK transposition may have offered little added value to English scholars. Furthermore, during the same period, there was a more comprehensive ongoing domestic reform of consumer law, which ultimately resulted in the implementation of the CRA 2015.[1947] As a result, it is possible that the focus of the academic community shifted towards the CRA 2015, which led to significant changes in the national consumer law landscape.

While some provisions implementing the CRD were transferred into the CRA 2015,[1948] none of these provisions pertained to the regulation of transparency in online contracts. Instead, their focus was on describing goods and digital content, including pre-contractual information about goods, digital content, and the trader's identity in the contract, as well as default rules regarding the delivery of goods and the transfer of risk.

5.4.1.2. The implementation of the CRD's transparency concept

Similar to its predecessor, the CPRs 2000, and in accordance with the CRD, the CCRs 2013 require traders to provide or make available mandatory pre-contractual information to consumers on online contracts in a manner that is **clear** and **comprehensible**, suitable for the methods of remote communication.[1949] Notably, the CCRs 2013 do not provide specific definitions of the requirements of clarity and comprehensibility. Additionally, unlike the CRD, which not only mandates clarity and comprehensibility but also requires plainness and intelligibility of pre-contractual information concerning online contracts,[1950] the CCRs 2013 explicitly refer only to the former requirements. This deviation may appear inconsistent with the copy-out technique, which aimed to literally implement EU law, unless the UK legislature considered plainness and intelligibility to be synonymous with clarity and comprehensibility. I will revisit this point in Section 5.4.3.2., which deals with the interpretation and evaluation of the requirements of clarity and comprehensibility.

The CCRs 2013 go a step further than the CRD by defining the meaning of the requirement of **availability** of mandatory pre-contractual information on online contracts. Specifically, the CCRs 2013 state that "*something is made available to a consumer only if the consumer can reasonably be expected to know how to access it*".[1951] However, the CCRs 2013 do not stipulate whether the requirement to make information

1946. Paula Giliker, 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive' (2015) 23(1) *European Review of Private Law* 21-23.
1947. Ibid, 23-25; Paula Giliker, 'The Consumer Rights Act 2015 – a bastion of European consumer rights?' (2017) 37(1) *Legal Studies* 80-81, 85.
1948. Ibid, 80-81.
1949. Section 13(1)(a) CCRs 2013.
1950. See Article 8(1) CRD.
1951. Section 8 CCRs 2013.

available imposes any additional obligations on traders for transparent information disclosure. As the mandatory pre-contractual information becomes an integral part of the online contract, unless the contractual parties explicitly agree otherwise, the same transparency requirements must be applied to the contractual information.[1952]

In line with the CRD, the CCRs 2013 establish specific information and transparency requirements for electronic orders, which include a payment obligation. Just before consumers confirm an order, traders are obliged to inform them in a **clear** and **prominent** manner about the essential features of the goods or services being offered, the price and any additional costs, as well as the duration of the contractual relationship.[1953] Traders must also ensure that consumers explicitly acknowledge that their order carries an obligation to pay,[1954] meaning that they can no longer rely on pre-selected options.[1955]

If the consumer needs to place an electronic order with a payment obligation through a button or another similar function, traders must **label** this button or function in an easily legible way, which unambiguously indicates that consumers will incur a financial obligation by placing an order.[1956] As an example of such an unambiguous labelling, the CCRs 2013 indicate the formulation "*Order with an obligation to pay*".[1957] Commentators furthermore emphasise traders should replace buttons with formulations like "*Order now*" or "*Confirm*" with formulations which, albeit similar, indicate more clearly that the order entails a monetary obligation, like "*Pay now*" or "*Confirm purchase*".[1958] If traders fail to ensure that consumers have explicitly acknowledged their order, which implies an obligation to make the payment, or if they fail to label their button in a sufficiently unambiguous manner, consumers will not be bound by the order or the contract.[1959] It can be observed that the information and transparency requirements for online orders entailing a payment obligation under the CCRs 2013 are in line with the requirements specified in the CRD.[1960]

In relation to the provision of information about the right of withdrawal, the CCRs 2013 require traders to provide consumers with a withdrawal form that is standardised at the EU level and which consumers can use to withdraw from the contract.[1961] Furthermore, the CCRs 2013 include withdrawal instructions that are also standardised at the EU level and which traders can provide to consumers.[1962] According

1952. Section 13(6) and (7) CCRs 2013.
1953. Section 14(2) and Schedule 2 CCRs 2013.
1954. Section 14(3) CCRs 2013.
1955. Oliver Bray and Susan Perkins, 'The new Consumer Contracts Regulations: key changes and implications' (2014) *Computer and Telecommunications Law Review* 99; Oliver Price, Christina Fleming and Charles Russell Speechlys, 'The impact and content of the new UK Consumer Contracts Regulations' (2015) *Compliance & Risk* 4.
1956. Section 14(4) CCRs 2013.
1957. Section 14(4) CCRs 2013.
1958. Oliver Price, Christina Fleming and Charles Russell Speechlys, 'The impact and content of the new UK Consumer Contracts Regulations' (2015) *Compliance & Risk* 4.
1959. Section 14(5) CCRs 2013.
1960. See Section 2.3.3.2. of Chapter 2.
1961. Section 13(1)(b) and part B of Schedule 3 of the CCRs 2013.
1962. Section 13(3) and part A of Schedule 3 of the CCRs 2013.

to the CRD, traders must fulfil these instructions by choosing predetermined text options.[1963] Traders who provide consumers with accurately completed withdrawal instructions will be deemed to have fulfilled their information obligations regarding the right of withdrawal.[1964] Consequently, the CCRs 2013 also align with the CRD in terms of regulating the standardisation of information concerning the right of withdrawal.[1965]

The UK was not obliged to incorporate the MD, which introduced modifications to the CRD, including specific information obligations for online marketplaces, as this directive came into effect after the conclusion of the Brexit transition period.[1966] However, UK companies that sell their goods and services to EU consumers must adhere to the rules set by the MD. Failure to comply with the MD can result in claims from EU consumers and actions taken by EU regulators and courts.[1967] However, as the consumer protection frameworks of the UK and EU begin to diverge, there is uncertainty regarding the willingness of UK courts and regulators to enforce penalties against UK traders for breaches of EU consumer protection laws that have not been transposed into English law.[1968]

5.4.2. The objective of transparency

The objective of transparency in English law governing online contracts appears to be centred around facilitating consumers' ability to make informed choices. This objective is evident in scholarly articles discussing information and transparency requirements related to online agreements.[1969] Furthermore, the available guidance documents issued by various authorities over time emphasise this objective and highlight the idea that when provided with clear and simple information, consumers can utilise it to determine whether to conclude an online agreement. For example, in their document titled "*A guide for businesses on distance-selling*," the Department of Trade and Industry and the OFT explained to traders that distance-selling law requires the provision of clear information to consumers "*so that they can make an informed choice about whether or not they wish to buy from you*".[1970] The OFT, in its guidance document *IT consumer contracts made at a distance*, advised traders selling to

1963. Part A of Schedule 3 of the CCRs 2013.
1964. Section 13(3) CCRs 2013.
1965. See Section 2.3.3.3. of Chapter 2, which discusses the standardisation of the information on the withdrawal right under the CRD.
1966. Lorraine Conway (House of Commons Library), 'Brexit: UK consumer protection law' (2021) Briefing Paper 9126 17.
1967. Ibid, 13-14. See also the analysis of Harrison Clark Rickerbys Solicitors, available here: https://www.hcrlaw.com/blog/omnibus-directive-what-it-means-for-businesses-with-eu-consumers/ (accessed 8 May 2024).
1968. Ibid.
1969. Faye Fangfei Wang, 'The incorporation of terms into commercial contracts: a reassessment in the digital age' (2015) *Journal of Business Law* 96-97; Mary Donnelly and Fidelma White, 'The distance selling directives - A time for review' (2005) 56 *Northern Ireland Legal Quarterly* 214.
1970. Department of Trade and Industry and Office of Fair Trading, 'A guide for businesses on distance selling' (2006) OFT698 [4].

less experienced consumers to offer definitions and explanations of complex terms because these "*help consumers to make informed choices*".[1971]

The CMA stressed that consumers need accurate and transparent information about online car rentals to effectively identify and compare offers. This enables them to "*make an informed choice about which vehicle to rent*".[1972] In 2019, the Department for Business, Energy & Industrial Strategy (BEIS), as part of its review of the CCRs 2013, also emphasised the significance of providing transparent information to consumers. According to BEIS, consumers need clear and upfront information in order to understand the contracts they are entering into.[1973] With this understanding, consumers can make more informed choices and are more likely to secure better deals.[1974]

The goal of transparency in English law regarding online contracts is in line with the objectives of transparency in consumer credit law and, to some extent, unfair contract terms law. In all of these legal areas, the main aim of transparency is to facilitate informed consumer choice. However, unlike unfair contract terms law, the English law governing online contracts does not include the objective of protecting consumers from unfair surprises through transparent information. As mentioned before, consumers can only make well-informed decisions regarding their credit contracts when they have access to, can read, and understand the provided information. Therefore, the following section examines whether the interpretation and assessment of transparency in English online contract law address both its formal and substantive aspects.

5.4.3. The interpretation and assessment of transparency

5.4.3.1. Availability of (pre-)contractual information

As stated in Section 5.4.1.2., traders are required to make the mandatory (pre-) contractual information regarding online contracts available to consumers in a manner that reasonably ensures their awareness of how to access it.[1975] Wang explains that this requirement aims to ensure that the information is brought to the consumer's attention and that they are provided with an opportunity to familiarise themselves with the content of the information.[1976]

The *Implementing guidance* concerning the CCRs 2013 indicates that traders could meet the obligation to make (pre-)contractual information available by providing a link to the relevant information.[1977] Furthermore, academic discussions

1971. Office of Fair Trading, 'IT consumer contracts made at a distance: Guidance on compliance with the Distance Selling and Unfair Terms in Contracts Regulations' (2005) OFT 672 [17].
1972. Competition & Markets Authority, 'Online car rental intermediaries: Consumer law compliance summary' (2017) [5 and 7].
1973. Department for Business, Energy & Industrial Strategy, Consumer Contracts Regulations Review: Call for evidence (2019) [8].
1974. Ibid.
1975. Section 8 CCRs 2013.
1976. Faye Fangfei Wang, 'The incorporation of terms into commercial contracts: a reassessment in the digital age' (2015) *Journal of Business Law* 96.
1977. Department for Business, Innovation & Skills, 'Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013: Implementing Guidance' (2013) BIS/13/1368 [Section D, point 3] Section D, point 3.

also acknowledge that providing a link on the trader's website is sufficient to bring the information to the consumer's attention.[1978] Meads suggests that traders should place the link to their business terms next to the button through which consumers submit their orders, marked with the phrase "*I Accept*".[1979] Once the consumer indicates consent by clicking such a button, the online agreement is formed.[1980] Scholars emphasise that common law in different jurisdictions acknowledges the enforceability of online contracts, commonly referred to as click-wrap contracts.[1981] As outlined in Section 2.3.3.1., this perspective aligns with the CJEU's decision in the *Tiketa* case, which explains that the CRD does not prohibit traders from presenting information within general terms and conditions in a click-wrap agreement.[1982]

It appears that under English law, traders are considered compliant with the requirement of information availability if consumers can reasonably be expected to know how to access the information, suggesting that this requirement pertains to **formal transparency**. Notably, the definition and understanding of the information availability requirement share similarities with how the requirement of prominence is interpreted in English unfair contract terms law. In English unfair contract terms law, the requirement of prominence obliges traders to bring core contract terms to the consumer's attention in a manner that ensures an informed and observant consumer would become aware of them.[1983] Furthermore, as stated in Section 5.4.1.2., the CCRs 2013 also impose the requirement of prominence on mandatory information regarding online orders that involve payment. Section 5.4.3.3 examines the significance of this requirement and establishes a parallel with the requirement of information availability.

5.4.3.2. Clarity and comprehensibility of (pre-)contractual information

The *Implementing guidance* related to the CCRs 2013 does not elaborate on the meaning of the requirements of **clarity** and **comprehensibility**.[1984] However, interpretations of one or both of these requirements can be found in the previously applicable guidance documents issued by the former consumer law regulator, the OFT. In its guidance

1978. Paul Meads, 'E-consumer protection - distance selling' (2002) *International Company and Commercial Law Review* 13(4) 180.

1979. Ibid. See also Faye Fangfei Wang, 'The incorporation of terms into commercial contracts: a reassessment in the digital age' (2015) *Journal of Business Law* 96; Hasan A. Deveci, 'Consent in online contracts: old wine in new bottles' (2007) *Computer and Telecommunications Law Review* 223.

1980. Ibid, 96.

1981. Ibid, 88-89. See also Andrew Burrows, *English Private Law* (Oxford University Press 2013) 11; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013) 10-11; Hasan A. Deveci, 'Consent in online contracts: old wine in new bottles' (2007) *Computer and Telecommunications Law Review* 226; Phillip Johnson, 'All wrapped up? A review of the enforceability of "shrink-wrap" and "click-wrap" licences in the United Kingdom and the United States' (2003) *European Intellectual Property Review* 102; Simon Jones, 'Forming electronic contracts in the United Kingdom' (2000) *International Company and Commercial Law Review* 302; Faye Fangfei Wang, 'The incorporation of terms into commercial contracts: a reassessment in the digital age' (2015) *Journal of Business Law* 93.

1982. Case C-536/20 *Tiketa*, point 46.

1983. See Sections 5.2.3.1.2. and 5.2.3.2.4.

1984. Department for Business, Innovation & Skills, 'Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013: Implementing Guidance' (2013) BIS/13/1368.

document *IT consumer contracts made at a distance*, the OFT explained how traders can ensure that the pre-contractual information they present on their websites to consumers is offered in a clear and comprehensible manner.[1985] To meet these transparency requirements, the OFT recommended that traders include an "*About us*" page on their website, accessible through a direct link from their homepage. This page should provide information about the trader. Additionally, the OFT advised traders to have a "*Terms and Conditions*" page on their website. Furthermore, the OFT suggested that traders provide their terms and conditions in a single printable document, to ensure that consumers do not miss any important contract terms.

When it comes to drafting contract terms and conditions, the OFT emphasised the importance of ensuring that these terms are understandable to consumers, without requiring legal advice. The OFT also gave examples of both good and bad practices in terms of providing information.[1986] Among the good practices, the OFT emphasised the utilisation of plain language, keeping sentences short, and employing subheadings to organise related topics. Among the bad practices, the OFT pinpointed the use of technical or legal jargon and excessive cross-referencing. In order to make sure that the language used is understandable for consumers, the OFT recommended that traders who sell to less experienced consumers include a glossary to explain complex terms, for instance.[1987]

It should be emphasised that the OFT's guidance document *IT consumer contracts made at a distance* does not explicitly state whether the obligation to provide understandable information arises from the requirement of clarity, comprehensibility, or both. Additionally, it is worth noting that the guidance was derived not only from the distance selling regulations in force at the time, namely the Consumer Protection (Distance Selling) Regulations 2000 (CPDSRs 2000), but also from the UTCCRs 1999 and the Electronic Commerce Regulations 2000 (ECRs 2000).[1988] Therefore, it is uncertain whether the obligation to supply consumers with understandable information arises from the CPDSRs 2000 or from other legal sources.

Furthermore, as explained in Section 5.4.1.2., the CRD mandates that the same (pre-)contractual information for online contracts should be presented in a clear and comprehensible and plain and intelligible manner. However, the CCRs 2013 do not specifically mention the need for information to be plain and intelligible. As mentioned in the introduction, the approach taken by the UK legislature in transposing EU law has often involved a copy-out technique, aiming to adopt EU legislation verbatim rather than adapting it to the national legal framework.[1989] Despite the use of this technique

1985. Office of Fair Trading, 'IT consumer contracts made at a distance: Guidance on compliance with the Distance Selling and Unfair Terms in Contracts Regulations' (2005) OFT 672 [12].
1986. Ibid.
1987. Ibid, [17].
1988. Ibid, [12].
1989. The transposition of EU law by means of the 'copy-out' technique is highlighted as one of the main guiding principles of effective transposition of EU law. See Department for Business, Energy & Industrial Strategy, 'Transposition guidance: how to implement EU Directives into UK law effectively' (2018) [3, 11-12].

to transpose the CRD into English law,[1990] it appears that the UK legislature made an exception by not incorporating the requirements of plainness and intelligibility in the CCRs 2013. The exact reason for this deviation remains unknown.

A plausible explanation for the omission of the requirements of plainness and intelligibility may be attributed to the treatment of these requirements as synonymous with clarity and comprehensibility. Scholars have also pointed out the resemblances between the obligations of drafting information "*in a clear and comprehensible manner*" and "*in plain and intelligible language*"."[1991]

Treating the requirements of clarity and comprehensibility as equivalent to the requirements of plainness and intelligibility would explain why the UK legislature incorporated only one set of requirements into English law. This would also clarify why the OFT did not explicitly differentiate between all these requirements when explaining that traders should present information in online contracts in a way that is understandable to consumers.

As mentioned earlier, the CMA, the UK's competition and consumer authority, took over the OFT's duties in 2014.[1992] The CMA has not yet explicitly interpreted the requirements of clarity and comprehensibility, nor has it equated them with the requirements of plainness and intelligibility in the 2015 CRA. Although the CMA acknowledged that the CCRs 2013 mandate traders to provide consumer information in a clear and comprehensible manner, it concluded that merely complying with the information requirements of the CCRs 2013 does not automatically guarantee compliance with the transparency and fairness requirements of the CRA 2015.[1993] Thus, it appears that the CMA considers the CCRs 2013 as **primarily focused on ensuring that traders adhere to information requirements** for online contracts, rather than safeguarding the formal and substantive transparency of consumer information, which is a role predominantly attributed to the CRA 2015.

It is remarkable that, thus far, the OFT has provided more guidance on the interpretation and evaluation of clarity and comprehensibility in comparison to the CMA. The OFT acknowledged the importance of aspects pertaining to **formal transparency**, such as the utilisation of subheadings and the avoidance of excessive cross-referencing.[1994] Furthermore, it has emphasised the necessity of using language that is comprehensible to consumers and integrating glossaries to clarify complicated terms.[1995] This, in turn, serves to promote **substantive transparency**.

1990. Paula Giliker, 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive' (2015) 23(1) *European Review of Private Law* 21-23.
1991. Mary Donnelly and Fidelma White, 'The distance selling directives - A time for review' (2005) 56 *Northern Ireland Legal Quarterly* 217; Simon Whittaker, 'Distinctive features of the new consumer contract law' (2017) *Law Quarterly Review* 54.
1992. Hugh Beale, *Chitty on contracts: Volume II - Specific Contracts, 35th edition* (Sweet & Maxwell 2023) 41-245, 41-310.
1993. Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [139].
1994. Ibid, [12].
1995. Ibid, [12, 17].

In 2018, the High Court of Justice interpreted the **clarity** requirement in relation to contracts that consumer entered into with an online secondary ticket provider. In response to legal action initiated by the CMA, the High Court of Justice issued an enforcement order against the trader Viagogo AG, instructing them to furnish consumers with more transparent information regarding the sale of secondary tickets on their website.[1996] The High Court of Justice has specified the improvements that Viagogo AG needs to make regarding information transparency. It has emphasised the necessity for Viagogo AG to display the provided information clearly and prominently.[1997]

In Section C of the enforcement order, the High Court of Justice has provided a glossary of terms, which includes definitions for the requirements of clarity and prominence. According to this glossary, the requirement of clarity dictates that information must be presented in plain English and, to the extent that the reseller could determine based on the information it had, it must be complete, correct, and not misleading.[1998] Based on this interpretation, I would classify the requirement of clarity as a **formal transparency** requirement, as its main focus appears to be on preserving the readability of the information.

It should be noted, however, that the enforcement order against Viagogo AG, in which the High Court of Justice provided an interpretation of the requirement of clarity, is not based exclusively on the CCRs 2013. This order also relies on the provisions of the CRA 2015, the Consumer Protection from Unfair Trading Regulations 2008 (CPUTRs 2008), and the ECRs 2002. Since the High Court of Justice did not specify the legal source it applied at different points, it is not completely certain whether the requirement of clarity it interpreted originates from the CCRs 2013. Furthermore, in this case, the High Court of Justice did not explicitly mention the requirement of comprehensibility, even though the CCRs 2013 impose this requirement on all pre-contractual information that traders must provide in online contracts. Instead, the High Court of Justice examined all information in this case against the requirements of clarity *and prominence*.

As explained in Section 2.3.3.1, the CJEU has not yet provided an interpretation of the requirements for clarity and comprehensibility under the CRD, and the Commission has understood these requirements to relate to formal transparency. This approach does not sufficiently safeguard the transparency objective of the CRD, which aims to ensure that consumers can make informed choices. A similar contradiction arises from the interpretations given by the CMA and the High Court of Justice, as English law governing online contracts also links information transparency to the objective of informed choice, as demonstrated in Section 5.4.2. Consequently, only the OFT's interpretation of clarity and comprehensibility fully aligns with the transparency objective, as it encompasses both formal and substantive transparency.

1996. *Competition and Markets Authority v Viagogo AG* (*CMA v Viagogo*) (2018) FS-2018-000011, 1-3.
1997. Ibid, 5-7, 9, 11-15.
1998. Ibid, 22.

5.4.3.3. Prominence of information regarding online orders with a payment obligation

As mentioned in Section 5.4.1.2., traders must inform consumers about the main characteristics of the goods or services provided,[1999] price[2000] or any other costs,[2001] and the duration of the contractual relationship[2002] in a clear and **prominent** manner[2003] directly before they place an online order entailing a payment obligation. To my knowledge, English law does not appear to provide specific guidance on how to interpret and assess the transparency of the online ordering process or the online order button based on the provisions implementing the CRD. For example, when assessing the application of provisions implementing the UCPD, the UK Advertising Standards Authority (ASA) scrutinised factors such as the positioning, colour, and size of the online order button to determine if it misled consumers regarding the consequences of clicking on it.[2004]

However, the High Court of Justice and the CMA provided more general guidance on the meaning of the requirement of prominence when it comes to information provided in the online environment. The High Court of Justice interpreted the requirement of prominence in the context of contracts with Viagogo AG, an online secondary ticket provider. While the High Court of Justice considered the requirement of prominence alongside the requirement of clarity,[2005] it treated them as distinct requirements.[2006] In Section C of the enforcement order, which contains a glossary of terms, it is stated that prominent information should be clearly visible, presented in an appropriate font, size, colour, and position to ensure easy identification, readability, and understanding by consumers.[2007] Additionally, consumers should not be obliged to take any action to access this information, except when explicitly permitted by the enforcement order.[2008] For instance, consumers may need to take action to access information regarding event restrictions, which is presented in a pop-up display after confirming the ticket purchase.[2009] Besides the information on event restrictions, information on the trader's postal address could be displayed in a similar manner.[2010] This suggests that requiring consumers to click on a link to access information may only be compatible with the requirement of prominence in certain situations.

The High Court of Justice's explicitly considered consumers' ability to comprehend information when interpreting the requirement for prominence.[2011] However, it is important to note that, in this interpretation, the understandability

1999. Point (a) of Schedule 2 CCRs 2013.
2000. Points (f) and (h) of Schedule 2 CCRs 2013.
2001. Point (g) of Schedule 2 CCRs 2013.
2002. Points (s) and (t) of Schedule 2 CCRs 2013.
2003. Section 14(2) CCRs 2013.
2004. ASA Ruling on Amazon Europe Core Sarl 30 October 2019, available at: https://www.asa.org.uk/rulings/amazon-europe-core-sarl-G19-1021643.html (accessed 8 May 2024).
2005. *Competition and Markets Authority v Viagogo AG* (*CMA v Viagogo*) (2018) FS-2018-000011, 5-7, 9, 11-15.
2006. Ibid, 22 and 27.
2007. Ibid, 22 and 27.
2008. Ibid, 27.
2009. Ibid, 11-12.
2010. Ibid, 12-13.
2011. Ibid, 22 and 27.

of information is solely associated with certain formal aspects of its disclosure, such as placement, font size, and colour. While elements like visibility, suitable font size and colour, and immediate accessibility contribute to consumers' comprehension, it is questionable whether these factors alone guarantee genuine understanding of rights and obligations in an online agreement. Even if information is easily accessible and catches consumers' attention because of its appropriate size and colour, this does not automatically ensure that its content is formulated in a way that consumers are likely to understand. Considering that the interpretation by the High Court of Justice primarily focuses on the accessibility and readability of information, this interpretation justifies classifying this requirement as one related to **formal transparency.**

The CMA also provided an interpretation of the requirement of prominence when offering guidance to online car rental intermediaries on appropriately disclosing prices and consumer obligations.[2012] For example, when it comes to providing information about legal obligations for consumers renting a car, the CMA highlighted its importance in facilitating informed consumer choices. Furthermore, it stressed the necessity for such information to be easily accessible and comprehensible. Although the CMA mentions that information on consumers' legal obligations should be clear and prominent, it primarily emphasises how traders should disclose this information to meet the requirement of prominence. Specifically, the CMA specifies that online car rental intermediaries must ensure that information about consumers' legal obligations is no more than one click away from the total price. While this information can be presented in a 'Key facts' document, it cannot be solely provided in the trader's terms and conditions. The CMA suggests that warnings regarding legal requirements for items such as snow chains or child seats could be highlighted when presenting charges associated with these requirements.

Furthermore, the CMA expressed similar opinions regarding the disclosure of prices. The CMA emphasised the importance of prices in the decision-making process of consumers and highlighted the significance of prices being easy to locate and understandable.[2013] This means that all compulsory fees must be included in the headline price. If the headline price includes fees that could not have been reasonably calculated at the time, the CMA has demanded that online car rental intermediaries should provide a warning explaining how these fees will be calculated and displayed in close proximity to the total price. To comply with the requirement of close proximity, online car rental intermediaries must provide this information no more than one click away. In addition to the necessity of highlighting the price, the CMA has emphasised the importance of ensuring clarity, accuracy, and timeliness. However, it has not provided a specific interpretation of these requirements.

It seems that the CMA has interpreted the requirement of prominence only as a need for **formal transparency**. While the CMA underscores the significance

2012. Competition & Markets Authority, 'Online car rental intermediaries: Consumer law compliance summary' (2017) [14].
2013. Ibid, [10].

of ensuring that consumers can easily find and comprehend information about their obligations and prices, its main focus when interpreting the requirement of prominence is on explaining how traders should disclose the information to ensure it is easily accessible. For example, the CMA does not consider how traders should also provide information to consumers in a manner that ensures they comprehend the economic impact of such costs.

Finally, it is worth considering the extent to which the requirement of prominence, imposed on the pre-contractual information regarding electronic orders with a payment obligation, is similar to the requirement of information availability, generally imposed on the pre-contractual information regarding online contacts. While both requirements allow for the disclosure of information through links, there are some differences. For instance, the *Implementing guidance on the CCRs 2013* did not specify whether there is a limit to how many times consumers are expected to click on a link to access information on online contracts when discussing links in relation to the requirement of making information available.[2014] In contrast, when discussing the use of links in relation to the requirement of prominence, the CMA emphasised that the relevant information should not be more than just one click away.[2015]

Furthermore, case law also appears to place restrictions on the incorporation of links within the prominence requirement. As previously mentioned, the High Court of Justice highlighted in its enforcement order against Viagogo AG that the prominence requirement implies that consumers should typically not be required to take any action to access information, unless explicitly authorised by the enforcement order.[2016] Conclusively, despite their similarities, the requirements of prominence and availability may, to some extent, differ. However, specific differences between them cannot be conclusively determined based on the available interpretations of their meaning.

5.4.4. Contractual consequences of a breach transparency

The CCRs 2013 set out four specific consequences for breaches of its provisions concerning information and (possibly) transparency requirements. Firstly, in the event that a trader neglects to inform consumers about delivery charges, recurring costs for contracts of indefinite duration, and the expense of returning goods in a manner specified by the CCRs 2013, consumers are not obliged to incur these costs.[2017] Section 13(1) of the CCRs 2013 state that traders must provide this information in a clear and understandable manner, suitable for the method of distance communication

2014. Department for Business, Innovation & Skills, 'Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013: Implementing Guidance' (2013) BIS/13/1368 [Section D, point 3].
2015. Competition & Markets Authority, 'Online car rental intermediaries: Consumer law compliance summary' (2017) [10 and 14].
2016. *Competition and Markets Authority v Viagogo AG* (*CMA v Viagogo*) (2018) FS-2018-000011 27.
2017. Section 13(5) CCRs 2013.

used. However, it is still unclear whether this consequence specifically applies to violations of information requirements, transparency requirements, or both.

Secondly, if a trader does not supply customers with the necessary information regarding the right of withdrawal as per the CCRs 2013, the withdrawal will be prolonged.[2018] As explained in Section 5.4.1.2., just like the CCD, the CCRs 2013 mandate traders to provide consumers with a standardised withdrawal form to facilitate the exercise of their right of withdrawal.[2019] Additionally, the CCRs 2013 require traders to provide consumers with information on the existence of their right of withdrawal, along with the conditions, time limits, and procedures for exercising this right.[2020] Traders can fulfil this obligation by presenting the information in a clear and comprehensible manner or by using standardised withdrawal instructions.[2021] If the trader provides information regarding the right of withdrawal using standardised withdrawal instructions, correctly filled with the pre-formulated text available in Schedule 3 of the CCRs 2013, it will be assumed that the information regarding the right of withdrawal was adequately provided.[2022] To the best of my knowledge, there is no discussion on the topic of standardisation or transparency of providing information about the right of withdrawal in online contracts in English sources. Therefore, similar to the first consequence, it remains unclear whether the extension of the withdrawal period is intended for breaches of information requirements, transparency requirements, or both.

Thirdly, in cases of online orders that require payment, if the trader does not label the button activating the order in accordance with the CCRs 2013, consumers will not be bound by the contract or the order.[2023] The purpose of the rules regarding labelling online order buttons is to ensure that consumers are clearly aware of their payment obligation when they click the button.[2024] The CCRs 2013 provides an example of the label ("*Order with an obligation to pay*"), which seems to satisfy the requirement of sufficient unambiguity.[2025] Wherever the trader decides to use another formulation to label the order button, it will be necessary to ensure its compliance with the requirement of unambiguity. Irrespective of the chosen formulation, the trader must present the label in an easily legible manner.[2026] Unlike the first two consequences, the consequence related to the inadequate labelling of the order button appears to primarily focus on traders' adherence to transparency requirements.

Fourthly, the CCRs 2013 envision the inclusion of a contract term in online contracts, which mandates compliance with all provisions of the CCRs 2013 governing

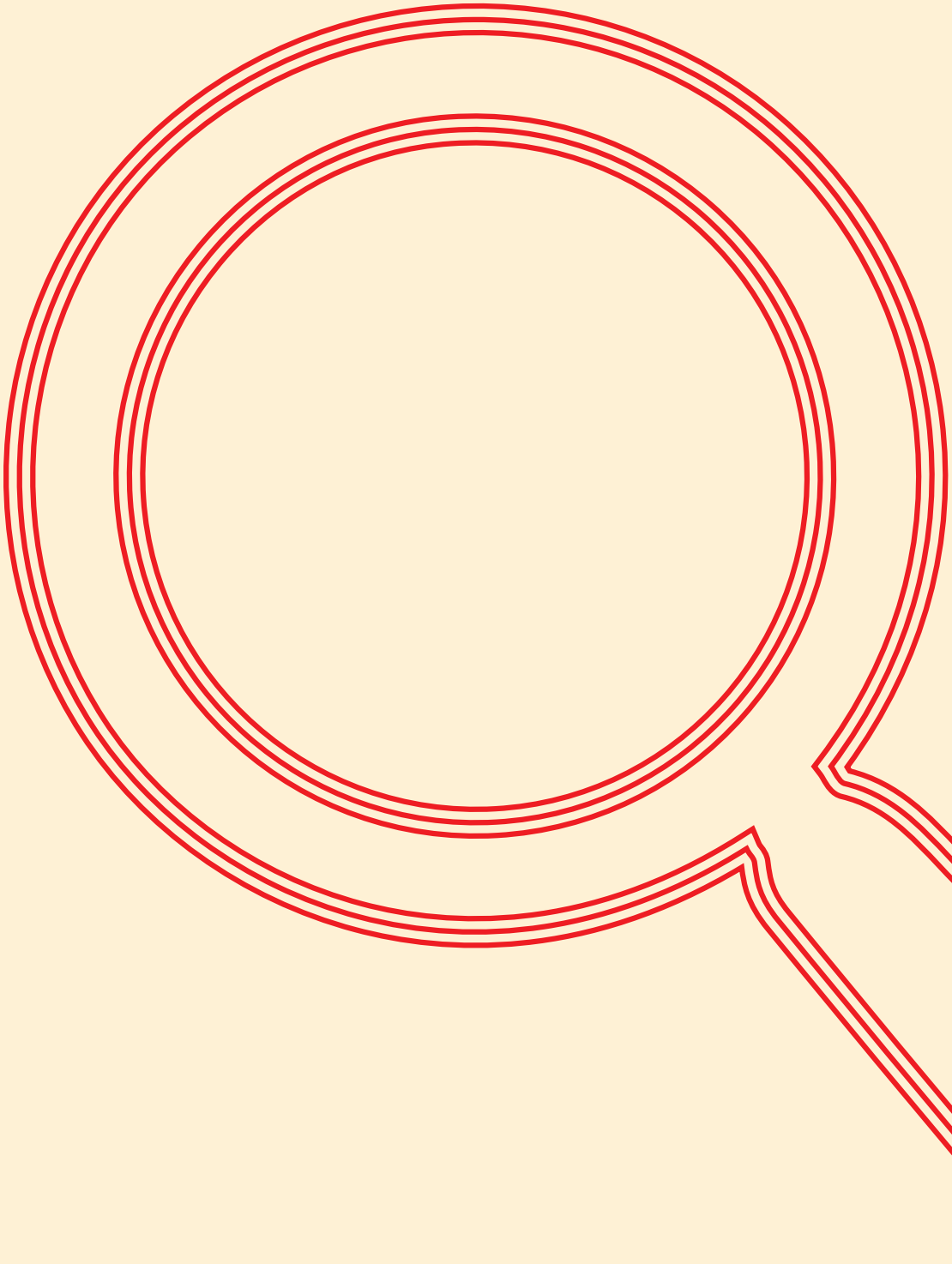
2018. Section 31 CCRs 2013.
2019. Section 13(1)(b) and part B of Schedule 3 of the CCRs 2013.
2020. Section 13(1)(a) and 13(3) in conjunction with Section 31 CCRs 2013.
2021. Section 13(1)(a) and 13(3) CCRs 2013.
2022. Section 13(3) CCRs 2013.
2023. Section 14(3), (4) and (5) CCRs 2013.
2024. Oliver Price, Christina Fleming and Charles Russell Speechlys, 'The impact and content of the new UK Consumer Contracts Regulations' (2015) *Compliance & Risk* 4.
2025. Section 14(4) CCRs 2013.
2026. Ibid.

information requirements.[2027] Whittaker points out that this means if an online contract fails to include all mandatory information, this would amount to a breach of contract.[2028] The consequences for this breach would be derived from general contract law. While transparency requirements are an essential part of provisions that prescribe information requirements, it remains unclear whether this consequence also applies to violations of transparency requirements.

While some (if not all) of the aforementioned consequences may be linked to breaches of transparency, it remains unclear if the CCRs 2013 adequately address such breaches. When the CCRs 2013 specify consequences for breaching information obligations, it is not always certain if they would also be interpreted as consequences for breaching transparency requirements in practice.

It is worth noting that, according to the CCRs 2013, potential breaches of transparency of (pre-)contractual information concerning online contracts may be examined under unfair contract terms legislation. Under the CCRs 2013, the information provided to consumers prior to entering into online contracts becomes an integral part of the contract.[2029] Since this information is usually pre-drafted, these contracts are also governed by the provisions of the CRA 2015, which relate to transparency and fairness.[2030] The CMA has clarified that adherence to the information requirements of the CCRs 2013 does not automatically ensure compliance with the transparency and fairness provisions of the CRA 2015.[2031] This suggests that information provided by traders to consumers, based on the CCRs 2013, may still need to undergo the transparency test under the CRA 2015 in certain cases. However, relying on the unfair contract terms law to sanction breaches of transparency, rather than directly utilising the CCRs 2013, appears insufficient in light of the objective of promoting informed consumer choice through transparency under the CCRs 2013.

2027. Section 18 CCRs 2013.
2028. Simon Whittaker, 'Distinctive features of the new consumer contract law' (2017) *Law Quarterly Review* 51.
2029. Section 13(6) and (7) CCRs 2013.
2030. See Sections 5.2.1.3., 5.2.3.2. and 5.2.4.
2031. Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 [139].



CHAPTER 6

What's transparency got to do with it? A comparative analysis of the discrepancies in the interpretation and assessment of the transparency concept in EU, German, Croatian and English law

6.1. Delineation of key issues in the interpretation and assessment of the transparency concept under the UCTD, the CCD, and the CRD

This thesis explores the evolution, purpose, interpretation, assessment, and implications of the concept of transparency in EU, German, Croatian, and English law, within the framework of the UCTD, the CCD, and the CRD. The belief that well-informed European consumers can contribute to driving the EU economy forward by making informed and optimal choices is at the heart of EU consumer law and policy. Consumers who possess the necessary knowledge should have the ability to select the best options available in the market and assert their rights in case of contractual breaches. Conversely, individuals who lack information, feel overwhelmed by information, or are confronted with incomprehensible information might choose not to engage in the market or make choices that are suboptimal.

EU law recognises consumers as the weaker party in contractual relations due to their limited resources to independently obtain necessary information. As a result, traders are mandated to provide consumers with comprehensive information about their products and services. However, despite the advancements in consumers' rights to information, behavioural studies indicate that consumers frequently fail to read or comprehend contract terms. This issue becomes more pronounced in the online sphere, where consumers face the challenge of navigating various disclosures without direct contact with traders or the ability to evaluate the quality of their intended purchase.

The UCTD, the CCD, and the CRD regulate the obligations of traders in providing transparent information and adhering to certain standardisation and design requirements. However, they do not clearly specify the meaning of the transparency requirements they impose, nor do they guarantee that the prescribed or standardised format for mandatory information effectively enhances consumer information transparency. Additionally, both the CJEU and the Commission offer limited guidance on the interpretation and evaluation of the transparency, standardisation and design requirements outlined in these directives, thereby allowing Member States, national courts, and enforcement authorities to develop their own interpretations of transparency. As a result, a noteworthy issue arises – there appears to be a lack of transparency regarding the meaning and scope of the transparency concept within EU consumer law.

In this chapter, I identify and analyse three main issues in the interpretation and assessment of the concept of transparency under the UCTD, the CCD, and the CRD in EU, German, Croatian, and English law. Firstly, there exists a discrepancy between the objectives attributed to transparency and its interpretation and assessment in practice. Secondly, there is a lack of a uniform transparency taxonomy across all jurisdictions examined. Lastly, insufficient consideration is given to the influence of digitalisation on the concept of transparency.

6.2. Discrepancy between the objectives of transparency and its interpretation and assessment in practice

My analysis reveals that the UCTD, the CCD, and the CRD set an ambitious goal for the transparency concept – specifically, **enabling consumers to make well-informed decisions in the market**.[2032] These directives anticipate that consumers will have the ability to utilise information about available goods and services in the market in order to compare, conclude and withdraw from contracts. The information must possess certain qualities – it should be plain, intelligible, concise, prominent, and standardised – and its purpose is to help consumers understand the economic and legal implications of contracts. As I argue throughout this dissertation, achieving the aim of enabling informed consumer choice requires interpreting and assessing the transparency requirements imposed on consumer information both in a formal and substantive manner. This involves considering whether an (average) consumer can reasonably be expected to access, read, and understand the (pre-)contractual information provided by the trader.

Admittedly, as explained in Chapter 2, the goal of informed consumer choice extends beyond the transparency obligations of traders; it also encompasses their mandatory information obligations. This raises the question of how these two types of obligations relate to each other. In my view, the CJEU has provided the clearest explanation of the relationship between information and transparency requirements, given the objective of informed decision-making, in its case law based on the UCTD. The CJEU has explained that consumers base their decisions to enter into or terminate a contract on the information supplied by the trader.[2033] Hence, mandatory information requirements are the initial step towards aiding consumers in making informed choices. The transparency requirement compels traders to provide consumers with mandatory information in a way that ensures it is readily accessible, readable, and comprehensible from grammatical, economic, and legal viewpoints. Considering that transparency guarantees the accessibility, readability, and comprehensibility of mandatory information, it is essential for facilitating consumers' informed decision-making.

The relationship between transparency, information requirements, and their connection to the goal of informed consumer choice becomes less straightforward when examining the CCD and the CRD. However, several recitals and provisions within these directives acknowledge the role of transparency in ensuring consumers' ability to read and comprehend the mandatory information provided by traders.[2034]

2032. See my analysis of the objective of transparency under each of these directives in Chapter 2, Sections 2.1.2., 2.2.2. and 2.3.2.

2033. See Chapter 2, Section 2.1.3.1.

2034. See, for instance, Recitals 27 and 33, Articles 5(1) and (6), 6(1), 10(2) CCD and Recitals 34 and 39, Articles 6(1) and 8(1) and (2) CRD. For an elaborate account of the objectives of transparency within the CCD and the CRD see Chapter 2, Sections 2.2.2. and 2.3.2.

This information serves as the basis for making decisions regarding consumer credit and online contracts. Moreover, as demonstrated in Section 2.2.2., the CJEU has been aligning its interpretation of transparency under the CCD with the case law derived from the UCTD. This alignment is beneficial because a significant amount of this case law deals with transparency issues related to consumer credit contracts. Initially, the CJEU caused some uncertainty regarding whether the CCD's transparency concept has an independent value beyond the requirement for traders to allow consumers to familiarise themselves with their contractual rights and obligations.[2035] However, cases from 2020 and 2021 have revealed that transparency plays a more fundamental role.[2036] It aims to facilitate consumers' comprehension of the economic and legal consequences of a credit agreement, thus improving their ability to make informed decisions regarding credit.

Compared to the UCTD and the CCD, the CRD offers the least clarity regarding the relationship between transparency, information requirements, and the objective of informed choice. Although the CJEU has not yet clarified the role of the CRD's transparency concept in relation to its information model, it explicitly mentions transparency when discussing the objective of information obligations.[2037] This suggests that the CJEU ascribes the same objective of ensuring informed consumer choice to both information and transparency requirements.[2038]

In addition to the primary goal of facilitating informed consumer choice, the standardisation requirements outlined in the CCD and the CRD also aim to enhance **legal certainty**. With the intention of promoting cross-border trade, especially in the online realm, the European legislature sought to harmonise information obligations across all Member States.[2039] This approach aims to not only enable traders to minimise the expenses associated with offering their goods and services to consumers but also enhance the comparability of their offers. To achieve comparability in the presentation of offers available on the market to consumers across the EU, the European legislature has, at times, sought to standardise the way in which traders must convey information to consumers. As discussed in Chapter 2, examples of such standardisation in the CCD and the CRD include the standardisation of the APR, pre-contractual credit information, and right of withdrawal information.

After examining the objective of transparency obligations in German, English, and Croatian law, it becomes apparent that all three legal systems share the goal of

2035. Case C-42/15 *Home Credit Slovakia*, point 34.
2036. Case C-66/19 *Kreissparkasse Saarlouis*, points 35 and 37-49; Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 90-95, 99-102 and 131-138.
2037. Case C-430/17 *Walbusch Walter Busch*, point 46; Case C-380/19 *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, point 33; Case C-179/21 *Victorinox*, points 26 and 42; Case C-536/20 *Tiketa*, point 42.
2038. See my analysis of the objective of transparency under the CRD in Section 2.3.2.
2039. Recitals 4-8 and 19 and Article 5(1) CCD, and Recitals 5-6 CRD. See also Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 311.

facilitating informed consumer choice.[2040] Yet, only German law explicitly recognises the significance of transparency in enhancing legal certainty within the market.[2041] Furthermore, the English law on unfair contract terms attributes the objective of protecting against unfair surprise to transparency. This ensures that consumers can understand the contents of the specific agreement they are entering into.[2042] However, unlike the goal of making an informed choice, the objective of protecting against unfair surprise does not consider whether consumers can choose a suitable agreement from the options available in the market. This objective is not mentioned in other areas of English law or in the legal systems I have reviewed.

The achievement of the aforementioned objectives – namely, informed consumer choice, legal certainty, and protection against unfair surprise – depends on the interpretation and evaluation of transparency, as well as the consequences for its violation. Firstly, to attain these objectives, a dual assessment of transparency is necessary, which means that the interpretation and evaluation of mandatory consumer information must consider both its formal and substantive aspects. Secondly, in order to prevent these objectives from becoming a dead letter, it is crucial to establish clear and effective consequences for breaches of transparency obligations. In the forthcoming analysis, I will demonstrate how neither of these conditions is currently being fulfilled in practice.

6.2.1. Lack of a dual transparency assessment

Up until now, both EU and national authorities have assessed the transparency of information from both a formal and substantive standpoint solely within the framework of unfair contract terms control.[2043] At the EU level, in its extensive case law subsequent to the 2014 *Kásler* case, the CJEU has consistently maintained that the evaluation of transparency of standard contract terms should not be limited to a mere examination of their formal and grammatical comprehensibility.[2044] Instead, the CJEU clarified that national authorities must also assess whether traders have formulated standard contract terms in a manner that an average consumer can comprehend the economic and legal implications of these terms.

Similar lines of reasoning, highlighting the importance of evaluating both the formal and substantive transparency of standard contract terms, have emerged in all three legal systems being examined. Notably, in both German and English law, the assessment of formal and substantive transparency of standard contract terms predates the CJEU's decision in *Kásler*. German scholars, for example, have been

2040. See Chapter 3, Sections 3.1.2., 3.2.2. and 3.3.2., Chapter 4, Sections 4.2.2., 4.3.2. and 4.4.2., and Chapter 5, Sections 5.2.2., 5.3.2. and 5.4.2.
2041. See Chapter 3, Sections 3.1.2. and 3.3.2.
2042. See Chapter 5, Section 5.2.2.
2043. See Chapter 2, Sections 2.1.3., Chapter 3, Section 3.1.3., Chapter 4, Section 4.2.3., Chapter 5, Section 5.2.3.
2044. See Chapter 2, Section 2.1.3.1.

discussing the formal and substantive transparency control of standard contract terms based on German case law for the past three decades.[2045]

In English law, the consideration of formal and substantive transparency elements in the control of unfair contract terms can be traced back to common law.[2046] However, common law cases typically involve considerations regarding either formal or substantive transparency. Nevertheless, the case *OFT v Abbey National*, where Justice Smith interpreted the transparency requirement derived from the UCTD as including both formal and substantive transparency, also predates the *Kásler* case.[2047] Unlike German and English courts, Croatian courts appear to have adopted a dual transparency evaluation influenced by the case law of the CJEU. This development is especially notable in the (in)famous case involving the transparency of standard contract terms in Croatia, the *Franak* case.[2048]

Despite the conceptualisation of transparency in the area of unfair contract terms control as encompassing both formal and substantive aspects across all jurisdictions I have researched, there are instances where transparency assessments are not aligned with this understanding. At the EU level, the CJEU has clarified the scope of the transparency requirement under the UCTD, stating that traders must provide consumers with sufficient information to help them make informed decisions.[2049] While the CJEU determined on a case-by-case basis the specific information that traders should provide to consumers, it offered limited guidance on *how* to provide this information. This represents a missed opportunity, given that behavioural studies clearly show that the quality of information provided to consumers is more important than the quantity of information provided, as detailed throughout this thesis.

In Germany, the BGH has consistently held that references to legal provisions do not violate the transparency requirement, particularly if the referred provisions are easily accessible to everyone.[2050] Moreover, the BGH deems considers dynamic references to legal provisions, which connect contractual modifications to changes in those provisions, to be in line with the transparency requirement, as long as they are clearly identifiable. This stance is contrary to the transparency case law of the CJEU under the UCTD. This case law, which includes the German *Kreissparkasse Saarlouis* case, prohibits traders from only referring to national legislation when informing consumers about contract terms, as such references do not allow consumers to determine the scope of their rights and obligations under the contract or whether all

2045. See Chapter 3, Section 3.1.3.
2046. See Chapter 5, Section 5.2.3.1.
2047. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1. See my analysis of this case in Chapter 5, Section 5.2.3.2.1.1.
2048. See Chapter 4, Section 4.2.3. See also my analysis in Mia Junuzović, 'Transparency of (Pre-) Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?' (2018) 14 *Croatian Yearbook of European Law and Policy* 91.
2049. See Chapter 2, Section 2.1.3.2.
2050. See Chapter 3, Section 3.1.3.2.2.

mandatory information is included in the contract.[2051] The BGH has not yet adjusted its approach.[2052]

Croatian and English law offer examples of instances in which national courts have faced challenges when examining the substantive transparency of standard contract terms. For example, the Croatian *Franak* case highlights the struggle of national courts when faced with limited guidance on interpreting and evaluating transparency at the EU level. Croatian courts grappled with determining when consumers could reasonably be expected to comprehend specific contract terms and what information traders should have provided to aid their understanding.[2053] The English case *Overy v Paypal* illustrates that a national court can, despite adopting a substantive understanding of transparency, still evaluate contract terms only from a formal transparency perspective, concentrating on the presentation of contract terms rather than their content.[2054]

When it comes to interpreting and assessing transparency in consumer credit law, both formal and substantive elements of transparency are recognised, albeit with some flaws, in EU and English law. As documented in Section 2.2.3.1., the CJEU initially interpreted all the transparency requirements imposed by the CCD on consumer credit information as requirements of formal transparency, which involve evaluating factors such as the length and font size of the information or the clarity of cross-references. However, recent judgements delivered in 2020 and 2021 indicate that the CCD's requirements of clarity and conciseness also have a substantive aspect. These requirements aim to ensure that an average consumer, without specialist knowledge in the financial field, can acquire knowledge and a good understanding of the credit contract based on the mandatory information provided by the creditor.[2055] Despite the positive developments in the CJEU's case law on transparency under the CCD, other tools provided by this directive, like standardised information forms (the SECCI and the ECCI), as well as the obligation to provide adequate explanations of pre-contractual information, appear insufficient in ensuring comprehensive transparency of consumer credit information.

Unfortunately, the SECCI and the ECCI only standardise the information that needs to be provided to consumers, without addressing the question of how creditors should draft this information or adapt these forms for the online environment.[2056] As discussed in Section 2.2.1.3., the European legislature adopted the CCD 2023 in October 2023. This new legislation will repeal the current CCD and will be applicable to creditors throughout the EU starting from November 2026. The CCD 2023

2051. Case C-472/10 *Invitel*, point 29; Case C-92/11 *RWE Vertrieb*, points 50-51; Case C-191/15 *Verein für Konsumenteninformation/Amazon*, point 69; Case C-66/19 *Kreissparkasse Saarlouis*, points 39-49; Case C-265/22 *Banco Santander*, point 60.

2052. Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 384-386.

2053. See Chapter 4, Section 4.2.3.4.

2054. See Chapter 5, Sections 5.2.3.2.1.4.

2055. Case C-66/19 *Kreissparkasse Saarlouis*, point 45; Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 94-95.

2056. See Chapter 2, Section 2.2.3.2.

brings forth modifications to the SECCI and the ECCI, which have the potential to improve both formal and substantive transparency. Firstly, the CCD 2023 imposes transparency requirements on these forms, such as clarity, comprehensibility, and legibility,[2057] which could be interpreted as encompassing both formal and substantive transparency elements. Secondly, the CCD 2023 tackles the issue of excessive length of these forms by implementing a two-tier information system. Both forms are required to present essential mandatory credit information on the first page (limited to a maximum of two pages), distinct from the remaining mandatory information.[2058] Thirdly, both forms need to be adjusted to suit the medium and channel used for concluding contracts, guaranteeing that consumers see all essential information at a glance, even on mobile phones.[2059] While the CCD 2023 appears to be aimed at safeguarding the formal and substantive transparency of standardised credit information forms, it remains uncertain whether the dual transparency evaluation of these forms will be implemented in practice.

Furthermore, the potential role of the creditor's obligation to offer adequate explanations of pre-contractual consumer credit information in enhancing the substantive transparency of said information is insufficiently explored at the EU level.[2060] This is because the CCD allows Member States to determine whether and how creditors should provide these explanations.[2061] Despite providing a more detailed explanation of the nature of this obligation, the European legislature did not utilise the CCD 2023 to clarify how creditors can deliver these explanations to consumers.[2062]

In several instances, English law seems to prioritise formal transparency at the expense of substantive transparency in consumer credit matters. Firstly, it appears that all transparency requirements imposed on consumer credit information under English law are seen as promoting formal transparency.[2063] Secondly, while English consumer credit law offers guidance to creditors on completing the SECCI and the ECCI appropriately, these instructions primarily emphasise the importance of legibility and readability, which are aspects of formal transparency.[2064] Thirdly, the effectiveness of the creditor's obligation to provide adequate explanations of credit information to enhance substantive transparency is questionable.[2065] Although English law specifies when and how creditors should provide explanations of pre-contractual credit information to consumers, it also allows creditors to fulfil this obligation by simply offering a section on their website with FAQs. This raises doubts about whether this obligation will lead to the provision of more information about

2057. Article 10(1) and (6), Article 11(1), and Article 11(5) CCD 2023.
2058. Recital 37, Article 10(3), (4) and (5), and Article 11(2), (3) and (4) CCD 2023.
2059. Recital 37, Article 10(6), and Article 11(5) CCD 2023.
2060. See Chapter 2, Section 2.2.3.3.
2061. Recital 19 and Article 5(6) CCD.
2062. Article 12 CCD 2023.
2063. See Chapter 5, Sections 5.3.3.1. and 5.3.3.4.
2064. See Chapter 5, Section 5.3.3.2.
2065. See Chapter 5, Section 5.3.3.3.

consumer credit agreements, rather than ensuring that the credit information is more easily understood by consumers.

Despite these shortcomings, the FCA's Consumer Duty has improved the understanding of the concept of transparency in English consumer credit law by providing comprehensive guidance on interpreting and evaluating transparency. The FCA introduced the Consumer Duty after Brexit, in 2022. As explained in Section 5.3.1.4., the Consumer Duty establishes a standard for the level of care that financial firms must provide to customers in the retail financial markets, including the consumer credit market. Within the Consumer Duty, the FCA provides various illustrative examples to assist financial firms in improving the accessibility, readability, and comprehensibility of their information.[2066] This involves evaluating factors such as the volume and length of information, its design and structure, as well as its relevance, simplicity, and timeliness. In my view, EU regulators may take inspiration from the FCA's detailed and specific guidance on providing information in the financial sector, which is also based on behavioural insights.

Similar to English law, German consumer credit law offers examples of cases that involve the interpretation and evaluation of transparency requirements imposed on consumer credit information, which prioritise formal transparency over substantive transparency.[2067] Furthermore, the German legislature has introduced a standardised withdrawal information form for consumer credit agreements, the compatibility of which with the CCD is debatable.[2068] The case law of the CJEU suggests that the German withdrawal form might not align with the transparency requirements outlined in the CCD. This discrepancy arises because the form includes references to provisions in national law regarding the calculation of the withdrawal period, rather than clearly specifying this period. Additionally, there is uncertainty surrounding the effectiveness of the obligation to provide adequate explanations as a means to enhance substantive transparency of credit information. This is because German law fails to clarify when and how which creditors should furnish these explanations to consumers.[2069]

In contrast to the other legal systems I have examined, Croatian law implementing the CCD lacks examples demonstrating the interpretation and assessment of its transparency concept.[2070] This makes it difficult to determine whether it ensures the formal and/or substantive transparency of credit information. Moreover, Croatian law introduces certain information and transparency requirements, including a conversion calculation, with the aim of enhancing the substantive transparency of information regarding the conversion of credit agreements from Swiss francs to euros.[2071] However, the correct use of the conversion calculator relies on consumers'

2066. See Chapter 5, Section 5.3.3.5.
2067. See Chapter 3, Section 3.2.3.3.
2068. See Chapter 3, Section 3.2.3.1.
2069. See Chapter 3, Section 3.2.3.2.
2070. See Chapter 4, Sections 4.3.3.1., 4.3.3.2., 4.3.3.3. and 4.3.3.4.
2071. See Chapter 4, Section 4.3.3.5.

capability to comprehend and process a significant amount of intricate information, giving rise to concerns regarding the efficiency of this tool.

The interpretation and assessment of transparency, based on the CRD and the national laws implementing it, exhibit the most divergence in approaches. It is worth noting that the CRD permits Member States to uphold or introduce language requirements for consumer information in online contracts.[2072] Such requirements have the potential to enhance both the formal and substantive transparency of consumer information. Presenting information in a language familiar to consumers increases the likelihood of capturing their attention and ensuring readability and understanding.[2073] However, the optional nature of language requirements in the CRD suggests that they are not deemed essential for ensuring information transparency.

The current interpretations of the transparency requirements in the CRD at EU level only ensure formal transparency of online information and the MD has not introduced a substantive dimension to these requirements.[2074] Other tools, such as the button solution or the prohibition of opt-outs, which the CRD used to improve the transparency of information in online contracts, seem to support both formal and substantive transparency.[2075] In addition, pending changes to the CRD based on the DMFSD 2023, in particular the rules on the transparent design of online interfaces of financial services providers and the online withdrawal button, may also be suitable for improving both formal and substantive transparency.[2076]

The German legislator did not seize the opportunity offered by the CRD to impose language requirements on online disclosures, meaning that traders in Germany may provide information to consumers in a language other than German.[2077] In doing so, however, traders must ensure that the information is comprehensible to the targeted consumer. For instance, this may be because the use of another language is customary for the transaction or was utilised during the negotiation phase. Since German law requires traders to ascertain the language proficiency of the targeted consumer, it provides a mechanism for ensuring both formal and substantive transparency of online information, even in the absence of explicit language requirements.

Yet, German courts have mainly interpreted provisions that implement the transparency requirements of the CRD as necessitating a formal assessment of the transparency of information in relation to online contracts.[2078] Exceptions in this respect can be observed in the assessment of the transparency of information regarding the right to withdraw from online contracts, as well as the transparency of online orders that require payment.[2079] While the latter appears to encompass both

2072. Article 6(7) CRD.
2073. See Chapter 2, 2.3.3.1.
2074. See Chapter 2, Sections 2.3.3.1. and 2.3.3.4.
2075. See Chapter 2, Section 2.3.3.2.
2076. See Chapter 2, Section 2.3.1.3.
2077. See Chapter 3, Section 3.3.1.
2078. See Chapter 3, Section 3.3.3.1.1.
2079. See Chapter 3, Sections 3.3.3.2. and 3.3.3.3.

formal and substantive transparency considerations, the former appears to prioritise substantive transparency.

Unlike the German legislator, the Croatian legislator opted to regulate language requirements for information about online contracts.[2080] Croatian law mandates that traders must provide information regarding online contracts in the Croatian language and in the Latin script.[2081] However, it also permits them to offer this information simultaneously in other languages. While the Croatian legislator did not provide explicit reasons for introducing language requirements for online information, it is plausible that this decision aimed to improve the readability and comprehensibility of such information for Croatian consumers. As discussed in Section 4.4.3.3., although language requirements can contribute to both formal and substantive transparency and may even be seen as a prerequisite for transparency, they do not inherently guarantee transparency of consumer information. This is because online information presented in a consumer's native language can still be difficult to read and comprehend due to various factors. These factors, include, for example, length, sentence structure and grammar, or the use of technical and legal terminology.

Similar to the area of consumer credit law, in Croatian law implementing the CRD, there is a lack of instances illustrating the interpretation and assessment of transparency concerning information on online contracts.[2082] Hence, it remains uncertain whether Croatian law guarantees formal and/or substantive transparency of online consumer information beyond safeguarding that this information is made available to consumers in the Croatian language and Latin script.

English courts and regulators have focused on determining the placement of information about online contracts on traders' websites, as well as the font, size, and colour of this information, and whether links can be used to disclose it.[2083] These considerations primarily pertain to formal transparency.

My analysis indicates that the interpretation and evaluation of transparency across these four legal systems frequently lack a dual assessment of transparency. Even when courts and enforcement authorities interpret transparency as comprising both formal and substantive elements, they encounter difficulties implementing the dual assessment of transparency in practice. Specifically, under the CCD and the CRD, various examples show that EU, German, and English law do not always adequately ensure substantive transparency of consumer information. Unfortunately, it appears that Croatian law, which implements the CCD and the CRD, does not sufficiently prioritise transparency in general, making it unlikely that a dual assessment of transparency will be ensured.

2080. See Chapter 4, Section 4.4.1.
2081. Article 60(7) ZZP 2022.
2082. See Chapter 4, Sections 4.4.3.1. and 4.4.3.2.
2083. See Chapter 5, Section 5.4.3.

6.2.2. Lack of clarity with regard to contractual consequences for breaches of transparency

To enhance the effectiveness of transparency as a consumer protection tool in EU law, it is imperative to impose sanctions for breaches thereof. As discussed in Chapter 1, my research investigates the contractual repercussions outlined by the UCTD, CCD, and CRD for violations of transparency and standardisation requirements.

My analysis indicates that both the CCD and the CRD lack specific sanctions for transparency violations. In general, these directives entrust Member States with the responsibility of setting up dissuasive, effective, and proportionate penalties for the breach of their respective provisions.[2084] The CCD 2023 and the MD have introduced additional criteria for Member States to consider when determining penalties. As elucidated in Section 2.2.4., the CCD 2023 requests Member States to guarantee that penalties in coordinated actions against traders engaged in widespread infringements or infringements with a Union dimension should encompass the possibility of imposing fines through administrative procedures and/or legal proceedings.[2085] Furthermore, the CCD 2023 requires Member States to ensure that competent authorities have the ability to publicly disclose any administrative penalties imposed for CCD infringements, as long as this does not seriously jeopardises financial markets or cause disproportionate damage to the parties involved.[2086]

As outlined in Section 2.3.4., the MD incorporated into the CRD a set of indicative criteria for enforcement authorities to consider when imposing penalties.[2087] It has also established a minimum standard for the maximum amount of fines in cases involving widespread infringements or infringements with an EU dimension.[2088] Despite the more complex criteria that the penalties must adhere to under the CCD 2023 and the MD, it is necessary to conduct a thorough examination of national laws to ascertain if any of the penalties imposed by Member States specifically address transparency breaches. Given that my research primarily focuses on the contractual consequences of transparency breaches, sanctions such as penalties are outside the scope of my thesis.

Unfortunately, the CCD and the CRD do not outline specific contractual consequences for breaches of transparency. As explained in Section 2.2.4., the CJEU's case law based on the CCD has primarily addressed breaches related to information requirements, rather than transparency. It is still uncertain whether the CJEU would use the same approach in cases where creditors have provided consumers with accurate mandatory credit information, but in a manner that is formally and/or substantively non-transparent.

2084. Articles 23 CCD and 24(1) CRD.
2085. Article 44(2) CCD 2023.
2086. Article 44(3) CCD 2023.
2087. Article 24(2) within Article 4(13) MD.
2088. Article 24(3) and (4) within Article 4(13) MD.

The CRD outlines several sanctions for breaches of specific information obligations but does not specify whether these sanctions could also apply to cases involving breaches of transparency.[2089] For instance, if traders fail to provide consumers with certain mandatory information, they will not have to bear additional costs,[2090] their withdrawal period will be extended for 12 months[2091] and they will not be held liable for any deterioration of the goods.[2092] The ambiguity arises when considering whether these sanctions also apply to situations in which traders did provide the mandatory information to consumers but in an unclear and incomprehensible manner. Essentially, it remains unclear whether cases of providing unclear and incomprehensible information can be considered equivalent to situations where no information was provided at all, leading to the same sanction.

Exceptionally, the consequence that the CRD attaches to infringements of labelling requirements related to online orders with a payment obligation, namely that consumers will not be bound by the agreement or order,[2093] could be construed as a sanction for transparency violations. Such an interpretation arises from the fact that the CRD offers clear instructions on how merchants should transparently inform consumers about online orders. The aforementioned observations concerning the lack of clarity regarding the contractual consequences of breaches of transparency, as well as a tendency to concentrate solely on breaches of information obligations, are applicable to German, Croatian, and English laws implementing the CCD and the CRD.[2094]

In contrast to the CCD and the CRD, the UCTD does establish a contractual consequence for breaches of its transparency requirement by directing courts to address the lack of transparency in standard contract terms through the application of the *contra proferentem* rule.[2095] According to this rule, if there is any doubt about the meaning of a contract term, the interpretation that is most favourable to the consumer should be applied.[2096] However, the effectiveness of this sanction is debatable.[2097] The application of the *contra proferentem* rule is limited to cases involving contract terms that are ambiguous and can be interpreted in more than one way. Furthermore, the *contra proferentem* interpretation rule could be viewed as a lenient sanction that potentially benefits the trader, as it may render an ambiguous provision acceptable rather than offering a strong remedy for the lack of transparency to the advantage of the consumer. Moreover, despite the general agreement that this rule requires courts to interpret non-transparent standard contract terms against the drafting trader,

2089. See Chapter 2, Section 2.3.4.
2090. Articles 6(6) and 22 CRD.
2091. Article 10(1) CRD.
2092. Article 14 (2) CRD.
2093. Article 8(2) CRD.
2094. See Chapter 3, Sections 3.2.4. and 3.3.4., Chapter 4, Sections 4.3.4. and 4.4.4., and Chapter 5, Sections 5.3.4. and 5.4.4.
2095. See my analysis of this interpretation rule in Chapter 2, Section 2.1.4.
2096. Article 5 UCTD.
2097. Marco B.M. Loos, 'Crystal Clear? The Transparency Requirement in Unfair Terms Legislation' (2023) 19(4) *European Review of Contract law* 291-294.

neither the UCTD nor the CJEU's case law, which is based on this directive, provides specific guidance on the exact methodology for such interpretation.

The three national legal systems I examined differ in their application of the *contra proferentem* rule. In German law, non-transparent standard contract terms are interpreted in a way that is least favourable to the consumer at first, to determine whether such an interpretation renders them unfair and therefore not binding on the consumer.[2098] Only if such an interpretation does not render the terms unfair, they will be interpreted in a way that is most favourable to the consumer. In Croatian and English law, it appears that the *contra proferentem* rule compels courts to interpret non-transparent standard contract terms in the way most advantageous for the consumer, likely to prevent the unfairness of a contractual term.[2099] Unfortunately, the CJEU has not clarified which interpretation is required under the UCTD. It is worth noting that if the German interpretation of the *contra proferentem* rule were adopted at the EU level, the interpretations under English and Croatian law may be deemed insufficiently protective of consumers. Conversely, if the English and Croatian approaches were to be followed, the German approach would be seen as providing greater consumer protection and would not require any adjustments, considering the UCTD's minimum harmonisation nature.

In addition, although the UCTD does not specify whether a lack of transparency could render a contract term unfair, the case law of the CJEU and the Commission's *Unfair Contract Terms Guidance* show that failure to comply with the UCTD's transparency requirement is a factor to be considered when evaluating the unfairness of a particular contract term, potentially indicating unfairness.[2100] Given the limited effectiveness of the only contractual consequence associated with a breach of transparency under the UCTD, namely the application of the *contra proferentem* interpretation rule, it is necessary to establish transparency as a significant factor in assessing unfairness. In my opinion, the most effective approach is to classify non-transparent contract terms, which violate the principles of good faith and balance between the contractual parties, as unfair.

When examining national law, it seems that the lack of transparency of a standard contract term may have an impact on declaring such a term unfair.[2101] German law recognises that non-transparent contract terms may result in an unreasonable disadvantage for the consumer.[2102] If such a disadvantage arises contrary to the requirement of good faith, it will result in the nullity and voidness of such terms. In Croatian law, a breach of transparency, when combined with breaches of good faith and imbalance in contractual rights and obligations, can result in unfairness and nullity of a term.[2103] Similarly, in English law, a breach of transparency

2098. See Chapter 3, Section 3.1.4.
2099. See Chapter 4, Section 4.2.4., and Chapter 5, Section 5.2.4.
2100. See Chapter 2, Section 2.1.4.
2101. See Chapter 3, Section 3.1.4.
2102. § 307 (1) BGB.
2103. See Chapter 4, Section 4.2.4.

may render a contract term unfair and unenforceable if it contradicts the good faith requirement and creates a significant imbalance between the parties' contractual rights and obligations.[2104]

In summary, my analysis uncovers shortcomings in the way the UCTD, CCD, and CRD tackle contractual consequences pertaining to breaches of consumer information transparency. Firstly, in cases where contractual consequences are assigned to transparency breaches, the scope and application of those consequences is not always clearly defined. Secondly, sector-specific directives, such as the CCD and CRD, do not offer specific contractual consequences for violations of transparency. Instead, they solely outline consequences for breaches of information obligations, creating uncertainty regarding the applicability of such consequences to cases involving transparency violations.

6.3. Lack of a uniform taxonomy of the transparency concept

As identified in Chapter 1, although the concept of transparency is embedded in various EU consumer law directives, which make references to transparency, establish different transparency requirements, or specify the format of consumer information, there is a lack of comprehensive analysis regarding the interpretation and evaluation of transparency beyond the UCTD. My research aims to bridge this gap by examining transparency through the prism of the requirements that define it, such as clarity, comprehensibility, or prominence, as well as standardised information forms and other design-related requirements, as outlined in the UCTD, the CCD, and the CRD.

In my investigation into transparency, I have analysed various sources, such as legislation, guidance documents that interpret legislation, case law, and literature. My focus has been on exploring how legislatures, courts, and enforcement authorities in the EU, Germany, Croatia, and the UK interpret and evaluate the transparency of consumer information. In Chapter 1, when setting the context for my research, I proposed that the lack of a harmonised interpretation of transparency at the EU level could potentially result in varying interpretations and assessments of transparency at the national level.

My analysis of the concept of transparency in the UCTD, the CCD, and the CRD, and its implementation in German, English, and Croatian law, reveals a lack of a uniform taxonomy of transparency. Furthermore, this lack of a uniform taxonomy of transparency is evident not only when comparing the concept of transparency in selected national laws with this concept in EU law, but also when examining its interpretation and evaluation within each jurisdiction under review. The following sections delve deeper into these findings.

2104. See Chapter 5, Section 5.2.4.

6.3.1. Lack of a uniform transparency taxonomy across jurisdictions

The highest level of convergence in the interpretations of the concept of transparency within EU, German, English, and Croatian law is observed in the domain of unfair contract terms legislation. All four legal systems emphasise that plainness and intelligibility compel traders to ensure that standard contract terms are understandable to consumers, both in terms of their wording and their potential implications.[2105] Despite this shared understanding of the meaning of plainness and intelligibility, differences arise regarding whether these requirements have distinct meanings. Additionally, the unfair contract terms legislation in Croatia and the UK incorporate transparency requirements that are not found in the UCTD.

EU law always refers to plainness and intelligibility together, without assigning them separate meanings.[2106] This implies that they form a single transparency requirement, promoting both formal and substantive transparency. This approach is also present in German law.[2107] In contrast, Croatian law, and to some extent, English law, seem to consider plainness and intelligibility as separate transparency requirements with differing meanings. In Croatian law, plainness primarily involves expressing the content of contract terms without ambiguity, whereas intelligibility aims to improve consumers' comprehension of the economic implications associated with the contract terms.[2108] English law does not unambiguously specify whether plainness and intelligibility have separate meanings. However, Justice Smith's reasoning in *OFT v Abbey National* suggests that plainness and intelligibility may have distinct meanings, with plainness referring to formal transparency and intelligibility ensuring substantive transparency.[2109]

Furthermore, it is noteworthy that the unfair contract terms legislation in both Croatia and the UK incorporate additional transparency requirements for standard contract terms, which are not present in the UCTD. In particular, according to Croatian law, along with being plain and intelligible, standard contract terms should also be (easily) noticeable.[2110] The requirement of noticeability pertains to the placement and presentation of contract terms within the contract, ensuring that traders do not conceal the terms within the contract or draft them in a small font size.[2111] As outlined in Section 4.2.1.2., Croatian unfair contract terms law seemingly mandates that all written terms, *except for core terms*, should be easily noticeable.[2112]

2105. Chapter 2, Section 2.1.3.1., Chapter 3, Section 3.1.3., Chapter 4, Section 4.2.3. and Chapter 5, Section 5.2.3.2.
2106. See Chapter 2, Sections 2.1.3.1. and 2.1.3.3.
2107. See Chapter 3, Sections 3.1.1.3. and 3.1.3.
2108. See Chapter 4, Sections 4.2.3.2. and 4.2.3.4.
2109. *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1. See my analysis of this case in Chapter 5, Section 5.2.3.2.1.1.
2110. Articles 52 and 53 CPA.
2111. Chapter 4, Section 4.2.2.4.
2112. Articles 56 and 57 ZZP 2022. The High Commercial Court highlighted that the required intensity of noticeability of core contract terms lowered over time in High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13.

From my perspective, the distinction between noticeable and easily noticeable contract terms seems misplaced, as it appears more logical to require greater effort from the trader to highlight core contract terms, such as price and subject matter, than ancillary terms. This approach can be observed in English unfair contract terms law, which obliges traders to bring core contract terms to the consumer's attention, ensuring that an average consumer would be aware of the terms.[2113] As outlined in Section 5.2.3.2.4., English law makes a distinction between assessing the prominence of core contract terms and conducting a transparency assessment, which evaluates the plainness, intelligibility, and legibility of a term. The requirement of prominence acts as an extra safeguard to ensure that consumers are protected from unclear terms that govern the subject matter of the contract. In my opinion, the English approach is preferable and could be adopted at the EU level.

The imposition of additional transparency requirements on standard contract terms in English and Croatian unfair contract terms laws does not conflict with the UCTD. Since this directive aims for minimum harmonisation, Member States have the freedom to introduce measures that provide more extensive protection of consumers than specified in the UCTD.[2114] As previously established, it appears that both the Croatian and English legislatures have found it necessary to enhance the level of consumer protection offered by the UCTD by developing a more rigorous concept of transparency.[2115]

Unlike the UCTD, interpretations of the transparency concept based on the CCD in the analysed jurisdictions exhibit more divergence than convergence. At the EU level, the CJEU initially interpreted the CCD's clarity and conciseness requirements by emphasising the necessity of clear and precise cross-referencing between various documents relevant to the consumer credit agreement.[2116] This interpretation has raised uncertainties regarding whether these requirements aim to ensure the consumer's comprehension of their rights and obligations, or if they merely focus on formal aspects of transparency, such as the availability and readability of contractual credit information.[2117]

Since 2020, the CJEU has been developing its transparency case law based on the CCD in a more substantive direction, clarifying that the requirements of clarity and conciseness should enable the consumer to comprehend the information in the credit agreement.[2118] The CJEU explained that a consumer should be able to ascertain whether and how to exercise their contractual rights[2119] or calculate costs

2113. Section 64(4) and (5) CRA 2015.
2114. Article 8 UCTD.
2115. Chapter 4, Section 4.2.1.2., and Chapter 3, Section 3.2.1.3.
2116. Case C-42/15 *Home Credit Slovakia*, point 34.
2117. See my analysis of this case in Chapter 2, Section 2.2.3.1., and in Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 101-102.
2118. See Chapter 2, Section 2.2.3.1.
2119. Case C-66/19 *Kreissparkasse Saarlouis*, points 39-49; Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 128-138.

based on the provided information.[2120] Although the CJEU did not explicitly extend its interpretation of the UCTD's plainness and intelligibility requirement to the CCD's transparency requirements, its recent case law suggests that the transparency concept under both directives aims to ensure both formal and substantive transparency, indicating some degree of overlap. The requirement of prominence has received relatively little attention at the EU level when compared to clarity and conciseness. According to the Commission, prominence obliges traders to ensure that credit information is neither too small nor too difficult to read.[2121]

In contrast to the CCD, which requires creditors to present contractual information in a clear and concise manner, German law implementing this directive demands that creditors provide this information in a clear and comprehensible manner.[2122] German courts have interpreted clarity and comprehensibility as requiring that the contractual credit information provided by the creditor should be understandable to an average consumer. This interpretation closely resembles the interpretation of clarity and conciseness by the CJEU.[2123] Despite this similarity, the BGH approached the assessment of the creditor's compliance with the CCD's transparency requirements differently from the CJEU when it comes to including references to statutory provisions. While the BGH finds such references compatible with the requirements of clarity and comprehensibility,[2124] the CJEU is of the opinion that they do not allow consumers to determine the scope of their contractual obligations and, therefore, are not in line with the requirements of clarity and conciseness.[2125] Similar to EU law, the requirement of prominence has also received limited attention in German consumer credit law. It appears that German courts view this requirement as necessitating optical emphasis,[2126] a more demanding interpretation of prominence than the one offered at the EU level.

Unfortunately, I have not come across any interpretations of the transparency requirements that the CCD imposes on consumer credit information in Croatian law,[2127] which hinders their comparison with other legal systems under examination. English law that implements the CCD provides limited interpretations of clarity and conciseness. It primarily focuses on the formal aspects of transparency, such as ensuring that the wording is legible and displayed in a colour distinguishable from

2120. Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank*, points 96-100.
2121. Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final [11].
2122. Article 247 § 6 EGBGB.
2123. See Chapter 3, Section 3.2.3.3.
2124. As Rott observes, this is established case law since BGH 22 November 2016, XI ZR 434/15, BeckRS 2016, 115038. See Peter Rott, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 383.
2125. Case C-66/19 *Kreissparkasse Saarlouis*, points 39-49.
2126. OLG Stuttgart 24 April 2014, 2 U 98/13, BeckRS 2014, 10515; OLG Stuttgart 5 February 2015, 2 U 81/14, BeckRS 2016, 3090; OLG Stuttgart 24 May 2016, 6 U 222/15, BeckRS 2016, 105816; BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440; BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881; BGH 5 December 2017, XI ZR 253/15, BeckRS 2017, 140388.
2127. See Chapter 4, Section 4.3.3.

its background.[2128] Additionally, it aims to prevent the dissemination of information in a manner that could hinder its readability or impact. This interpretation diverges from the recent CJEU case law mentioned above, which acknowledges the importance of providing consumers with comprehensible credit information, apart from considering formal aspects. It is worth mentioning that following Brexit, English authorities are no longer obliged to adhere to CJEU judgments.[2129] However, as explained in section 6.2.1, the new Consumer Duty introduced by the FCA seems to add a substantive aspect to the concept of transparency in English consumer credit law. Lastly, under English law, the requirement of prominence necessitates presenting information in a way that is likely to attract the attention of an average consumer when entering into a specific type of agreement.[2130] While bearing resemblance to the understanding of prominence in English unfair contract terms law, this interpretation deviates from the ones adopted in EU and German consumer credit law.

Compared to the UCTD and the CCD, the jurisdictions I have examined offer more limited interpretations of the CRD's transparency requirements, such as clarity, comprehensibility, plainness, intelligibility, and prominence. The existing interpretations share some similarities, particularly in recognising the compatibility of using links to provide online information with the transparency concept of the CRD. They also acknowledge the importance of visual design elements in presenting information. However, differences arise when it comes to linking these factors to specific transparency requirements.

Despite the CRD's aim to harmonise consumer information provision across the EU, the CJEU has yet to clarify the meaning of any transparency requirement it imposes. Additionally, the Commission has only provided limited interpretation of the CRD's transparency concept. Both the Commission and the CJEU have assessed the suitability of using hyperlinks to disclose mandatory information under the CRD.[2131] The Commission argued that traders cannot satisfy the requirements of clarity and comprehensibility when they include mandatory information solely in their general terms and conditions, which consumers must accept to proceed with their transactions.[2132] However, the Commission also recognised that traders might face difficulties in offering clear and comprehensible information on the same webpage, and should have the possibility to layer information on specific topics. Furthermore, the Commission briefly clarified the requirement of prominence, stating that it enforces stricter presentation standards in comparison to clarity, comprehensibility, plainness, and intelligibility.

2128. See Chapter 5, Section 5.3.3.4.
2129. Lorraine Conway (House of Commons Library), 'Brexit: UK consumer protection law' (2021) Briefing Paper 9126 13-14.
2130. See Chapter 5, Section 5.3.3.1.
2131. See Chapter 2, Section 2.3.3.2.
2132. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [22-45].

While the CJEU has not interpreted any of the CRD's transparency requirements to date, it overruled the Commission's position regarding the inclusion of mandatory information within general terms and conditions. The CJEU specified that the CRD does not prohibit traders from presenting this information in their terms and conditions within a click-wrap agreement.[2133] However, the CJEU did not connect the possibility of providing mandatory information via a hyperlink with any specific transparency requirement.

Like EU law, German law also considers the inclusion of mandatory pre-contractual information regarding online contracts in standard contract terms to be in line with the requirements of clarity and comprehensibility.[2134] Furthermore, the BGH goes even further by endorsing the use of multiple links to provide mandatory information on online contracts.[2135] The court considers this approach consistent with the requirements of clarity and comprehensibility, given its customary nature on the internet. Different than the CJEU, German courts have also assessed the clarity and comprehensibility of labelling and positioning links on websites, highlighting the importance of unambiguous wording and placing information under relevant headings or in appropriate contexts to comply with these transparency requirements.[2136] In the context of online orders with a payment obligation, German law offers various interpretations of clarity, comprehensibility, and prominence.[2137] These interpretations focus on the visual design of mandatory information, such as font size, colour, and the placement of information. However, they do not allow for a clear demarcation of the meaning of these requirements.

Similar to my analysis of Croatian law implementing the CCD, I have not come across any interpretations of the transparency requirements based on the Croatian law implementing the CRD.[2138] This lack of interpretation hinders a meaningful comparison with transparency requirements in other jurisdictions. Like Croatian law, English law implementing the CRD also does not expound on the meaning of clarity and comprehensibility requirements. Additionally, like EU and German law, English law allows traders to convey (pre-)contractual information through links and recognises the enforceability of click-wrap agreements. However, unlike EU and German law, which link the use of links to the requirements of clarity and comprehensibility, English law associates the use of links with the requirements of information availability and prominence. Regarding the requirement of prominence, in addition to the use of links, English law also mentions visual design elements such as font size, colour, and the positioning of information.

In conclusion, my analysis indicates that despite some degree of convergence, particularly in the realm of unfair contract terms, the legal systems I have studied

2133. Case C-536/20 *Tiketa*, point 46.
2134. See Chapter 3, Section 3.3.3.1.1.
2135. BGH 5 October 2017, I ZR 163/16, GRUR 2018, 100.
2136. See Chapter 3, Section 3.3.3.1.1.
2137. See Chapter 3, Section 3.3.3.1.2.
2138. Chapter 4, Section 4.4.3.

demonstrate a significant level of divergence regarding the interpretation and evaluation of various transparency requirements. Furthermore, even in instances where similar factors are acknowledged as significant for assessing transparency, different legal systems often associate them with distinct transparency requirements.

6.3.2. Lack of a uniform transparency taxonomy within the same jurisdiction

The lack of a uniform transparency taxonomy is apparent not just across different jurisdictions but also within them. In the context of EU law, it remains unclear whether and to what degree transparency requirements stated in different directives, despite being linguistically synonymous, are intended to convey the same meanings. For example, the UCTD mandates that traders formulate standard contract terms in plain and intelligible language,[2139] while CRD requires them to furnish consumers with clear, plain, comprehensible, and intelligible (pre-)contractual information regarding online contracts.[2140] Furthermore, the CCD 2023 requires creditors to provide consumers with clear and comprehensible general information about credit agreements,[2141] pre-contractual consumer credit information,[2142] and information concerning personalised offers.[2143] Additionally, clarity can be found in other provisions of the CRD, which impose this requirement along with the requirements of prominence and legibility on online orders with a payment obligation,[2144] and in the provisions of the CCD, which demand that creditors ensure mandatory contractual credit information is clear and concise.[2145]

The OED reveals that the words plain, clear, intelligible, and comprehensible could be understood as having similar meanings. For instance, the OED defines the word "*plain*" by referencing the words "*clear*" and "*intelligible*", suggesting they could possibly be understood as synonyms.[2146] Also, the OED defines the meaning of the word "*clear*" by referencing the word "*intelligible*",[2147] and the meaning of the word "*intelligible*" by referencing the word "*comprehensible*".[2148] Despite their potential linguistic similarities, these transparency terms have not yet been interpreted in exactly the same way at the EU level.

2139. Articles 4(2) and 5 UCTD.
2140. Articles 6(1) and 8(1) CRD.
2141. Article 9(1) CCD 2023.
2142. Articles 10(1) and 11(1) CCD 2023.
2143. Article 13 CCD 2023.
2144. Articles 8(2) and (3) CRD.
2145. Article 10(2) CCD.
2146. See Point 3. of the definition of the word plain in the Oxford English Dictionary available here: https://www-oed-com.proxy.uba.uva.nl:2443/view/Entry/266559?rskey=WcetZm&result=7&isAdvanced=false#eid (accessed 8 may 2024).
2147. See Point 7. of the definition of the word clear in the Oxford English Dictionary available here: https://www-oed-com.proxy.uba.uva.nl:2443/view/Entry/34078?rskey=2NHdSn&result=1&isAdvanced=false#eid (accessed 8 may 2024).
2148. See Point 3. of the definition of the word intelligible in the Oxford English Dictionary available here: https://www-oed-com.proxy.uba.uva.nl:2443/view/Entry/97408?redirectedFrom=intelligible#eid (accessed 8 may 2024).

As explained in Section 6.3.1., the CJEU consistently maintained that the UCTD requires traders to ensure that their standard contract terms are grammatically intelligible and intelligible in terms of their legal and economic consequences. Although the CJEU did not reiterate this rationale when adjudicating based on the CCD and the CRD, it did offer a similar interpretation of the CCD's requirements of clarity and conciseness.[2149] Notably, the CJEU has explained that these requirements protect the consumer's capacity to comprehend contractual credit information and empower them to exercise their legal rights to calculate costs. However, the CJEU has not yet interpreted the clarity and comprehensibility requirements of the CRD,[2150] which, according to their dictionary meanings, could be understood as synonyms of plainness and intelligibility, as explained above. Furthermore, the absence of interpretation makes it uncertain if the CRD's requirements of plainness and intelligibility can be interpreted in the same way as those outlined in the UCTD. There is also ambiguity regarding whether the requirements of clarity and comprehensibility contained in the CCD 2023 correspond to the UCTD's plainness and intelligibility requirement and/or the CRD's requirements of clarity and comprehensibility. This uncertainty arises because the CCD 2023 does not provide a definition of these requirements or an explanation of their meaning.

Similar problems can be observed at the national level. As highlighted in Chapter 3, German law treats the requirements of plainness and clarity as linguistic synonyms, expressing them with the same word – "*klar*". Similarly, German law conveys the requirements of intelligibility and comprehensibility with a single term – "*verständlich*". However, German authorities have not interpreted these requirements uniformly across all analysed legal areas. It does appear that the requirement of clarity and comprehensibility ("*klar und verständlich*") may have the same meaning in German law transposing the UCTD and the CCD. Specifically, under German unfair contract terms law, traders are required to disclose the economic and legal implications of standard contract terms in a way that is understandable for an average consumer.[2151] Similarly, German consumer credit law demands creditors to ensure that an average consumer can comprehend credit information.[2152] The fact that the BGH interpreted the compatibility of references to provisions of national law in the same way under German unfair contract terms and consumer credit laws also supports the conclusion that these requirements are intended to have the same meaning in these legal areas.[2153]

However, based on German law, which transposes the CRD, the German legislature and the German courts have interpreted these requirements differently. For instance, according to the German legislature, information that is clear and comprehensible ("*klar und verständlich*") is restricted to mandatory information, clearly stands out from the

2149. See Chapter 2, Section 2.2.3.1.
2150. See Chapter 2, Section 2.3.3.1.
2151. See Chapter 3, Section 3.1.3.
2152. See Chapter 3, Section 3.2.3.3.
2153. Chapter 3, Sections 3.1.3.2.2. and 3.2.3.3.

rest of the text, easy to grasp, and readily identifiable based on its font style, size, and colour.[2154] In contrast to the German legislature, which seems to mandate the evaluation of both the content and design of information within these requirements, German courts have typically associated these requirements with the visual design of the information. Particularly, when assessing the clarity and comprehensibility of information, courts have considered factors such as font colour and the background upon which traders have presented information, whether traders have combined information with images, the number of hyperlinks they have used, how these hyperlinks have been integrated into their website, and whether the information was ambiguous.[2155]

Like German law, Croatian law considers certain transparency requirements to be synonymous from a linguistic perspective.[2156] Specifically, Croatian law expresses the requirements of plainness and clarity with the word "*jasan*" and the requirements of intelligibility and comprehensibility with the word "*razumljiv*". In Croatian unfair contract terms law, the requirement of plainness ("*jasan*") states that the subject matter of standard contract terms should be expressed in an unambiguous manner. The requirement of intelligibility ("*razumljiv*") dictates that these contract terms should be understandable in terms of both grammar and economic implications. Unfortunately, to the best of my knowledge, these requirements, although also present in the provisions of Croatian law implementing the CCD and the CRD, have not yet been interpreted based on said provisions. For this reason, it remains unclear whether these terms will be interpreted uniformly across different areas of Croatian law. Nevertheless, as previously explained, the Croatian language versions of the UCTD, the CCD, and the CRD also treat these requirements as linguistic synonyms.[2157] Since the Croatian versions of these directives are considered the original texts and not mere translations, it could be argued that the European legislator views terms like "*plain*" and "*clear*", as well as "*intelligible*" and "*comprehensible*, as expressing the same transparency requirements.

In English law implementing the UCTD, the requirements of plainness and intelligibility safeguard the comprehensibility of the wording and legal consequences of standard contract terms.[2158] This understanding of plainness and intelligibility differs from the interpretation of the requirement of clarity, which, as mentioned above, may be considered a linguistic equivalent of both of these requirements in English law implementing the CCD and the CRD. Specifically, in English consumer credit law, the clarity requirement ensures that the information is easily legible and presented in a colour that is clearly discernible from its background.[2159] Establishing

2154. See Chapter 3, Section 3.3.3.1.2.
2155. See Chapter 3, Sections 3.3.3.1.1. and 3.3.3.1.2.
2156. See Chapter 4, Sections 4.2.1.1., 4.2.3., 4.3.1., 4.3.3., 4.4.1. and 4.4.3.
2157. See Articles 4(2) and 5 of the Croatian language version of the UCTD, available here: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:31993L0013&from=EN (accessed 8 May 2024), Article 10(1) of the Croatian language version of the CCD, available here: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32008L0048&from=EN, (accessed 8 May 2024), and Article 6(1) of the Croatian language version of the CRD available here: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32011L0083&from=EN (accessed 8 May 2024).
2158. See Chapter 5, Section 5.2.3.2.
2159. See Chapter 5, Section 5.3.3.4.

the meaning of the requirement of clarity under English law implementing the CRD poses a challenge. English authorities have interpreted this requirement while adjudicating based on various national provisions, including those that implement the CRD.[2160] In such instances, clarity required traders that ensure that the information they provide to consumers is in plain language, complete, correct, and not misleading. While it is uncertain whether this interpretation of clarity is specifically derived from the provisions of English law implementing the CRD, it is worth noting that it differs from interpretations of clarity found in the other two legal domains.

In conclusion, these examples demonstrate a striking and, in my opinion, unnecessary problem. Even though both EU and national laws include transparency requirements that could be seen as linguistically synonymous, different authorities often interpret them differently across legal fields or fail to specify if they are meant to have the same meaning. This lack of clarity and certainty regarding the meaning and scope of transparency requirements undermines the potential effectiveness of the transparency concept as a tool for consumer protection.

6.4. Lack of consideration of the impact of digitalisation on the transparency concept

As outlined in Chapter 1, while the European legislator began regulating online consumer contracts in the 1990s, it was not until 2019 that the regulation of transparency in the online environment intensified. This is noteworthy, considering that the necessity for clear guidance on transparent disclosures online is arguably more significant than offline. According to behavioural studies, consumers tend to read online information sparingly.[2161] Moreover, online consumers are required to familiarise themselves with multiple disclosures in order to complete a single transaction. In such situations, consumers usually prioritise the primary transaction, such as the purchase of goods, by focusing on certain aspects like price and delivery terms while overlooking others like data and privacy protection.[2162] Furthermore, the lack of direct interaction with traders makes it more challenging for consumers to evaluate the credibility of a trader or the quality of goods and services being offered.[2163]

The European legislature acknowledges that online consumers face additional disadvantages, such as an information deficit and the inability to physically inspect their orders.[2164] However, EU law fails to adequately address how digitalisation affects

2160. See Chapter 5, Section 5.4.3.2.

2161. Yannis Bakos, Florencia Marotta-Wurgler and David R. Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43(1) *The Journal of Legal Studies* 32-33; Ian Ayres and Alan Schwartz, 'The no-reading problem in consumer contract law' (2014) 66(3) *Stanford Law Review* 547-548.

2162. Joseph Turrow, Michael Hennessy and Amy Bleakley, 'Consumers' Understanding of Privacy Rules in the Marketplace' (2008) 42(3) *The Journal of Consumer Affairs* 411-424.

2163. Joasia Luzak, 'Online Disclosure Rules of the Consumer Rights Directive: Protecting the Passive or the Active Consumers?' (2015) 4(3) *Journal of European Consumer and Market Law* 79-87.

2164. See Chapter 1.

the transparency of information provided to consumers in relation to standard contract terms, consumer credit, and online contracts. This represents a missed opportunity, given the valuable insights provided by various behavioural studies that aim to enhance the provision of consumer information in the online realm.[2165]

My analysis of the interpretation and assessment of transparency in the online context reveals two main findings, substantiated in the sections below. Firstly, transparency tools such as standardised information forms or the obligation to provide adequate explanations of credit information are not properly adjusted for the online environment. Secondly, the issue of the transparent design of the online environment does not receive enough attention.

6.4.1. Lack of adaptation of transparency tools to the online environment

As mentioned above, behavioural studies demonstrate that specific disclosure techniques can capture consumers' attention, particularly in the online environment. Nevertheless, the European legislature overlooked these insights when designing the standardised information forms in the CCD and the CRD.[2166] Furthermore, it seems that the CCD and the CRD utilise certain disclosure techniques that contradict the findings of behavioural research as mandated by the Commission. For example, despite earlier behavioural research raising doubts about the effectiveness of a table format, the SECCI and the ECCI were still designed in such a format.[2167]

At the time of adopting the SECCI, the ECCI,[2168] the standardised withdrawal form and the standardised withdrawal instructions,[2169] the European legislature appears to have been cognisant of their unsuitability for the online environment.

2165. Maartje Elshout et al., *Study on consumers' attitudes towards Terms and Conditions (T&Cs)* (2016) 26-103; Genevieve Helleringer and Anne-Lise Sibony, 'European consumer protection through the behavioral lens' (2017) 23 (3) *Columbia Journal of European Law* 624; Ognyan Seizov, Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 159-158; Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 44-45, 54-55, 130; Joasia Luzak, 'Will the imaginary active consumers please stand up? Case note to Walbusch Walter Busch (C-430/17)' (2019) *Maastricht Journal of European and Comparative Law* 6; Arianna Rossi, Rossana Ducato, Helena Haapio and Stefania Passera, 'When Design Met Law: Design Patterns for Information Transparency' (2019) 122-123(5) *Doctrine Rechtsleer* 98-121; Alexander J. Wulf and Ognyan Seizov, 'The Principle of Transparency in Practice: How Different Groups of Stakeholders View EU Online Information Obligations' (2020) 28(5) *European Review of Private Law* 1089-1092; Alexander J. Wulf and Ognyan Seizov, '"Please understand we cannot provide further information": evaluating content and transparency of GDPR-mandated AI disclosures' (2022) *AI & Society* 241-254; Alexander J. Wulf and Ognyan Seizov, 'How to Improve Consumers' Understanding of Online Legal Information. Insights from a Behavioral Experiment' (2022) *European Journal of Law and Economics* 563-582; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 128-134; Joasia Luzak, Alexander J. Wulf, Ognyan Seizov, Marco B. M. Loos, Mia Junuzović, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) *Journal of consumer policy* 321-330.

2166. Chapter 1, Sections 1.2.2.2. and 1.3.2.3.

2167. Chapter 1, Sections 1.2.2.2. See also Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 103-105.

2168. See my analysis of these credit information forms in Chapter 2, Section 2.2.3.2.

2169. See my analysis of these withdrawal information forms in Chapter 2, Section 2.3.3.3.

Both the CCD and the CRD acknowledge that the standardised information forms prescribed may not be suitable for contracts entered into through certain methods of distance communication, which enable only limited disclosure.[2170] However, instead of adapting the format of standardised information forms to such media, the CCD and the CRD grant traders the option to either provide the standardised information forms to the consumer after the conclusion of the agreement or completely exempt them from the obligation to provide information in a standardised form.

Furthermore, the Commission's *Evaluation of the CCD* questions the efficacy of the SECCI.[2171] Specifically, it acknowledges that the format and length of the SECCI are not adequately suited to the online environment and mobile technology. The SECCI's format is not user-friendly on mobile screens, which may cause consumers to merely skim through the information or skip it altogether. Furthermore, the SECCI can presently be provided solely through a hyperlink, reducing the likelihood that consumers will access it.

Unfortunately, the CCD 2023 falls short in effectively addressing these issues. Under the CCD 2023, the SECCI and the ECCI distinguish between essential credit information that creditors must provide on the first page, which is limited to a maximum of two pages, and the remaining mandatory information.[2172] The CCD 2023 stipulates that both forms should be tailored for the specific medium and channel used to conclude contracts, guaranteeing that consumers view all essential information at a glance, even on mobile phones.[2173] Still, it is questionable whether creditors can effectively adjust a two-page document to small screens without compromising its accessibility, readability, and comprehensibility. The Commission's *Evaluation of the CCD* recognises that the table format of the SECCI is not easily readable on mobile technology, and it may require over 30 swipes to navigate through the pre-contractual information under the CCD.[2174] Nevertheless, the CCD 2023 retained the table format of the SECCI and the ECCI, did not shorten these forms,[2175] and did not provide any guidance on how creditors can adapt these information forms to digital media that only allows for limited disclosure.

Additionally, the CJEU missed the opportunity to clarify how traders can transparently provide information on the right of withdrawal under the CRD via small-screen devices, such as smartphones, in the *Walbusch Walter Busch* case.[2176] Although the CJEU reiterated that traders are not obliged to utilise the standardised information form concerning the right of withdrawal in such cases, it did not offer

2170. Articles 5(3) CCD and 6(7) CCD and Article 8(4) CRD. See also Case C-430/17 *Walbusch Walter Busch*, point 46.
2171. Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [33 and 61].
2172. Recital 37, Article 10(3), (4) and (5), and Article 11(2), (3) and (4) CCD 2023.
2173. Recital 37, Article 10(6), and Article 11(5) CCD 2023.
2174. Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [110].
2175. See Annexes I and II to the CCD 2023.
2176. Case C-430/17 *Walbusch Walter Busch*, points 31, 33, and 40-47.

any guidance on how they can ensure sufficient transparency of the information on the right of withdrawal.[2177]

Similar to EU law, the national legal systems I have analysed give limited attention to the manner in which traders should present standardised information forms in the online environment. For example, both German and Croatian law conform to the content and format of standardised information forms as prescribed by the CCD and the CRD, but they do not offer specific guidance on how traders should provide these forms to consumers online.[2178] English law also merely follows the CRD in relation to standardising the information about the right of withdrawal.[2179] While national legislators may not alter the wording of these directives to adapt them to the digital environment due to their full harmonisation nature, they or the relevant national public authorities could issue guidance for traders on this matter.

However, English law imposes additional transparency requirements on the SECCI by mandating creditors to present the conveyed information in accordance with accompanying instructions, placed in the relevant section, in a clear and easily legible manner.[2180] Furthermore, English law allows creditors to remove accompanying instructions, asterisks, gridlines, and boxes from the SECCI once it is completed. The CCD does not allow credit providers to remove graphical elements, such as gridlines and boxes, from the SECCI. Yet, given the unsuitability of the SECCI's table format for the online setting, removing such elements could be advantageous for adapting the SECCI to the online context.

Apart from the standardised information forms, EU law also fails to address how creditors should fulfil their obligation to provide adequate explanations of pre-contractual consumer credit information found online in the CCD. As stated in Section 2.2.3.3., the CCD ensures that consumers receive assistance in selecting a product that suits their financial needs and situation by requiring Member States to compel creditors to offer adequate explanations of pre-contractual consumer credit information. The case law of the CJEU suggests that it views the provision of adequate explanations as a means to improve the comprehensibility of pre-contractual credit information for individual consumers.[2181] Yet, neither the CJEU nor the Commission has provided guidance on how creditors could or should fulfil this obligation online. This lack of guidance has led to a problematic practice, as revealed in the Commission's *Evaluation of the CCD*, showing that creditors exploit the CCD's vague formulation of the obligation to provide adequate explanations to avoid offering individualised information to consumers.[2182]

The absence of clear guidelines regarding the manner in which traders should adequately explain pre-contractual consumer credit information to consumers at

2177. Ibid.
2178. See Chapter 3, Sections 3.2.3.1. and 3.3.3.3., and Chapter 4, Sections 4.3.3.1. and 4.4.1.
2179. See Chapter 5, Section 5.4.1.2.
2180. See Chapter 5, Section 5.3.3.2.
2181. See Chapter 2, Section 2.2.3.3.
2182. Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final [107-108].

the EU level may be attributed to the CCD, which grants Member States the ability to further regulate this obligation. However, my analysis reveals that the national legal systems I examined provide limited guidance on how traders can fulfil this obligation online. As far as I am aware, German and Croatian law do not offer further specific instructions on how creditors should provide adequate explanations of pre-contractual credit information online.[2183] German scholarship does consider whether and to what extent these explanations can be standardised.[2184] For example, Herresthal highlights that the online environment offers opportunities for standardised explanations of essential terms, calculation examples, and self-assessment.[2185]

In terms of standardising adequate explanations of consumer credit information, English law stipulates that creditors can meet this obligation by providing consumers with comprehensive responses to FAQs.[2186] In addition to FAQs, English law envisions that creditors can offer consumers the chance to interact with their representative online. Finally, English law explicitly states that creditors cannot fulfil this obligation by providing explanations through a link that consumers do not have to access to before entering into a contract. This restriction ensures that consumers will have the opportunity to read the pre-contractual credit information and its explanations.

The idea of standardising adequate explanations of credit information raises potential issues from the perspective of responsible lending. Although the CCD does not directly regulate responsible lending, the case law of the CJEU suggests that the obligation to provide adequate explanations intends to assist consumers in making informed decisions about credit.[2187] It acknowledges that creditors may have a better understanding of which of their credit products is most suitable for a specific consumer's financial situation. This recognition of the obligation to offer adequate explanations seems to emphasise the importance of providing personalised information. Standardised explanations or FAQs can only further clarify credit information if consumers already have some knowledge about the type of product they require and how it may affect their circumstances.

Furthermore, even though the CCD 2023 does not offer guidance on how creditors should provide consumers with adequate explanations of credit information, it indicates that creditors should customise these explanations based on the specific circumstances in which the credit is being offered.[2188] This includes

---

2183. See Chapter 3, Section 3.2.3.2., and Chapter 4, Section 4.3.3.2.

2184. Jochen Hoffmann and David Bartlitz, 'Erläuterungs- und Bonitätsprüfungspflicht im Verbraucherkreditrecht' (2014) 49 *Zeitschrift für Wirtschafts- und Bankrecht* 2302-2303; Carsten Herresthal, 'Die Verpflichtung zur Bewertung der Kreditwürdigkeit und zur angemessenen Erläuterung nach der neuen Verbraucherkreditrichtlinie 2008/48/EG' (2009) 25 *Zeitschrift für Wirtschafts- und Bankrecht* 1179.

2185. Carsten Herresthal, 'Die Verpflichtung zur Bewertung der Kreditwürdigkeit und zur angemessenen Erläuterung nach der neuen Verbraucherkreditrichtlinie 2008/48/EG' (2009) 25 *Zeitschrift für Wirtschafts- und Bankrecht* 1179.

2186. See Chapter 5, Section 5.3.3.3.

2187. See Chapter 2, Section 2.2.3.3.

2188. Recital 45 CCD 2023.

considering the consumer's need for assistance, their knowledge and experience, and the nature of individual credit products. While the explanations are not intended to constitute a personal recommendation, it seems that they must be adapted to the consumer's personal situation, which argues against standardising them.

In summary, my analysis highlights the lack of adaptation of transparency tools, such as standardised consumer information forms, and the obligation to provide adequate explanations of consumer credit information in the online context. This is problematic because behavioural research indicates the need to improve the design of consumer information online, including tools that can enhance consumer understanding. It is regrettable that despite the recent revisions to both the CCD and the CRD by the European legislature, none of these processes were utilised to ensure that the tools safeguarding information transparency under these directives are better suited for the digital age.

6.4.2. Lack of consideration for the transparent design of the online environment

The most comprehensive rules regarding the (transparent) design of the online environment, according to my analysis, are related to online orders with payment obligations in the CRD, the withdrawal function in the DMFSD 2023, and the prohibition of opt-outs in the CRD and the CCD 2023. In the case of online orders that require payment, the CRD stipulates that traders must furnish consumers with clear and prominently displayed information regarding the key aspects of the online contract, directly prior to them placing their order.[2189] They should display this information in the close vicinity of the confirmation required for placing an order. According to the Commission, the term 'directly before' refers to the temporal aspect of information disclosure and means 'immediately before'.[2190] The terms 'prominent' and 'in close vicinity' urge traders to present information in a way that enables consumers to view and read it prior to submitting an order, without having to leave the page where they can place the order.

The CRD also mandates that traders label buttons or similar functions, through which consumers can submit an online order, in an easily legible and unambiguous manner.[2191] The CRD presents a unique example of how traders can present information in a transparent manner by specifying that the button can be labelled with the phrase "*order with obligation to pay*". The CJEU clarified that traders must label the order button in a manner that leaves no doubt for consumers that they are committing to pay for an order. This means that consumers cannot be expected to deduce the payment obligation from the circumstances of the ordering process.[2192]

2189. Article 8(2) CRD. See my analysis in Chapter 2, Section 2.3.3.2.
2190. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [44].
2191. Article 8(2) CRD.
2192. Case C-249/21 *Fuhrmann-2*, points 30-34.

Furthermore, the CJEU clarified that it is the responsibility of national courts determine whether a trader has labelled the order button transparently. This can be achieved by evaluating the language used on the button and assessing whether it implies the creation of a payment obligation. The examination should be conducted from the perspective of an average, reasonably informed, circumspect, and observant consumer, taking into account everyday language.

Even though the European legislature, the Commission, and the CJEU have elaborated on how traders should present mandatory information regarding online orders with a payment obligation and design online order buttons, there are still some unanswered questions. For instance, EU law does not clarify whether traders should position the mandatory information above or below the order button, whether this information should be always visible without the need for scrolling, or how traders should make it more prominent compared to other information on their website.

Additionally, it is worth mentioning that the DMFSD 2023 introduced an online button within the CRD for the purpose of withdrawing from any type of a distance contract concluded on an online interface.[2193] The DMFSD 2023 requires traders to make sure that consumers have the option to withdraw from an online contract using a withdrawal function, labelled with the phrase "*withdraw from contract here*" or another unambiguous wording.[2194] Traders must ensure that the withdrawal button is easily accessible and visible on the online interface throughout the entire withdrawal period.[2195] Furthermore, the DMFSD 2023 emphasises the importance of the withdrawal function being easily accessible and simple to find for consumers. This implies that traders should not compel consumers to take extra steps, like installing an application, just to access the withdrawal function, particularly if they did not conclude the contract through that application. However, the DMFSD 2023 does allow traders to utilise hyperlinks to direct consumers to the withdrawal function.

Given that the DMFSD 2023 allows for the use of hyperlinks to display the withdrawal button, the effectiveness of this button in improving the transparency and simplicity of the online contract withdrawal process with financial service providers depends on how these links are integrated into the trader's online platform. In the following text, I explore existing interpretations and evaluations regarding the use of links to transparently disclose consumer information in the online sphere. I also consider the application of behavioural insights to determine when links can either benefit or disadvantage consumers. Furthermore, I discuss the potential role of Article 16e, which will be incorporated in the CRD through the DMFSD 2023, in promoting the transparent design of the online environment. This provision seems to offer a way to prevent financial service providers from making the process of terminating a financial service more complicated than concluding it.

2193. See Chapter 2, Section 2.3.1.3.
2194. Article 11(a)(1) within Article 1(3) DMFSD 2023.
2195. Recital 37 DMFSD 2023.

At the national level, German law provides the most comprehensive approach to the button solution.[2196] Concerning the labelling of the order button, German law provides numerous examples of both compliant and non-compliant formulations. For instance, in addition to the words "*order and pay*" ("*zahlungspflichtig bestellen*"), the German legislature specifies that the trader can also label the order button with the phrases "*order for a fee*" ("*kostenpflichtig bestellen*"), "*pay-as-you-go-contract*" ("*zahlungspflichtigen Vertrag schließen*"), and "*buy*" ("*kaufen*").[2197] However, terms such as "*register*", "*next*", "*order*", or "*place an order*" do not imply any obligation to make a payment. Additionally, the national legislature highlights that the font must be legible, ensuring that consumers can easily identify the letters at a normal screen resolution. Therefore, traders should be cautious when selecting font and background colours for the order button to ensure its visibility and clarity are not compromised.

In addition to providing more examples of transparent labelling for an order button than EU law, German law also offers guidance on how traders should present mandatory information related to the order in relation to the order button.[2198] For instance, it specifies that traders must present mandatory information at the conclusion of the ordering process, rather than at the commencement or throughout said process.[2199] This approach ensures that the consumer is able to make note of the information when they place the order. This is in line with EU law, as the Commission has stated that traders should provide the mandatory information immediately before the consumer places their order.

Furthermore, the German legislator specifies that both the mandatory information regarding online orders with an obligation to pay and the order button must be visible at the same time on a standard screen resolution, without the need for scrolling.[2200] In this regard, the German legislature provides clarity to the arrangement of the ordering process by prohibiting scrolling, at least in certain cases. However, even German law does not comprehensively address how traders should organise the online ordering process. For instance, it is unclear how traders should arrange this process on smaller screens like mobile phones. Furthermore, German case law highlights disagreements on whether the mandatory information can be placed both above and below the order button or only above it.[2201]

Croatian law imposes a different transparency requirement for labelling the online order button when compared to the CRD. While the CRD mandates traders to label the online order button in an *easily legible* manner,[2202] Croatian law implementing the CRD compels traders to label this button in an *easily noticeable*

2196. See my analysis in Chapter 3, Section 3.3.3.2.
2197. BT-Drucks. 17/7745 12.
2198. See Chapter 3, Section 3.3.3.2.2.
2199. BT-Drucks. 17/7745 10.
2200. See Chapter 3, Section 3.3.3.2.2. and BT-Drucks. 17/7745 11.
2201. LG Berlin 17 July 2013, 97 O 5/13, MMR 2013, 780; OLG Köln 7 October 2016, 6 U 48/16, GRUR-RR 2017, 108.
2202. Article 8(1) CRD.

manner.[2203] Unfortunately, the Croatian legislature does not offer an explanation for replacing the CRD's legibility requirement with the noticeability requirement.[2204] This substitution could be seen as an attempt to improve consumer protection against the non-transparent design of the online environment, in comparison to the level of consumer protection provided by the CRD. Alternatively, it could be viewed as a way to aligns transparency requirements from various directives within a single national statute. However, since the CRD seeks to fully harmonise the provision of information regarding online agreements,[2205] it is questionable whether Member States can impose transparency requirements that depart from the CRD. However, it remains uncertain whether these requirements diverge in meaning, as Croatian law, to my knowledge, does not offer additional guidance on applying the noticeability requirement to the online order button or on organising the online ordering process.

While English law addresses the interpretation and evaluation of the prominence requirement in the online context, it does not specifically elaborate on the transparency of the button solution based on provisions implementing the CRD.[2206] However, when considering provisions implementing the UCPD, the ASA examined factors such as the positioning of the order button, its colour intensity, and the font size of the information displayed on it to determine whether it misled consumers about the consequences of clicking on it.[2207]

Besides addressing the design of online orders with a payment obligation, the CRD also prohibits traders from inferring the consumer's consent for payments that are additional to the payment for the main contractual obligation through opt-outs. The CJEU clarified that this prohibition aims to protect consumers from being induced into purchasing optional services. As consumers should have the freedom to decide whether to purchase additional services, traders should transparently provide information about them at the beginning of the booking process, enabling consumers to opt-in to purchase such services. However, EU law provides little guidance on how traders should design opt-ins. For instance, it is uncertain whether consumers can opt-in to agreeing to several disclosures with just one click throughout the order process, or where traders must display opt-ins (e.g., below or above the order button) and in what font size and colour. It is worth noting that the CCD 2023 introduced the same prohibition of opt-outs for consumer credit agreements.[2208] To my knowledge, none of the three legal systems I analysed further discuss the design of opt-ins in the online environment.

Compared to the rules governing online orders with payment obligations and the prohibition of opt-outs, the legal systems I have examined offer less clear and sometimes even conflicting guidance on when traders can provide mandatory

2203. Article 74(1) ZZP 2022.
2204. See Chapter 4, Section 4.4.1.1.
2205. Recitals 7-9 CRD.
2206. See Chapter 5, Section 5.4.3.3.
2207. ASA Ruling on Amazon Europe Core Sarl 30 October 2019, available at: https://www.asa.org.uk/rulings/amazon-europe-core-sarl-G19-1021643.html (accessed 8 May 2024).
2208. Article 15 CCD 2023.

consumer information through hyperlinks, the number of links they can use, and how they should incorporate links into their websites. At the EU level, the Commission and the CJEU expressed different views regarding whether traders can include the mandatory information prescribed in the CRD within their general terms and conditions, accessible through a hyperlink that the consumer accepts to proceed with the transaction.[2209]

The Commission has stated that presenting information in such a manner contradicts the requirements of clarity and comprehensibility of the CRD.[2210] It held that traders ought to direct the consumer's attention towards the individual elements of mandatory information. Furthermore, while recognising that it might be difficult for traders to incorporate all mandatory information on a single web page, the Commission maintained that traders should prioritise conveying information to consumers exactly at the moment when it is most pertinent to the transaction. Additionally, the Commission proposed that traders should be allowed the flexibility to present information in layers whenever it is deemed necessary and clarified that traders can utilise expandable headings, hyperlinks, and content trees on devices such as smartphones in order to guide consumers towards a more detailed presentation of information.

This approach is in line with behavioural research, which emphasises the limited effectiveness of solely providing information through a hyperlink and expecting consumers to take action to access it.[2211] While traders may utilise hyperlinks to hide or reveal information in locations where consumers may overlook it,[2212] behavioural research also demonstrates that hyperlinks can be effective in emphasising, elucidating, and interconnecting information. Consequently, hyperlinks appear to be more appropriate for disclosing consumer information that the legislature deems to be of lesser importance. As explained in Section 2.2.3.1., the DMFSD 2023 seems to support this approach by prohibiting financial services providers from layering certain essential mandatory information, while allowing them to layer the less significant mandatory information. If traders are allowed to use hyperlinks to provide mandatory consumer information, it is crucial that they explicitly bring consumers' attention to them.[2213]

However, the CJEU's case law overrules the Commission's approach. The CJEU has ruled that traders should provide consumers with all mandatory information

---

2209. See Chapter 2, Section 2.3.3.1.

2210. 2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [22-23 and 45-46].

2211. Joasia Luzak, 'Will the imaginary active consumers please stand up? Case note to *Walbusch Walter Busch*: Case C-430/17 *Walbusch Walter Busch GmbH & Co. KG v. Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV*, EU:C:2019:47' (2019) 26(5) *Maastricht journal of European and comparative law* 717-718.

2212. Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 44-45, 54-55, 130.

2213. Ognyan Seizov, Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 160.

before the contract's conclusion.[2214] Furthermore, the CJEU held that the CRD does not prohibit traders from including this information in general terms and conditions within a click-wrap agreement, where consumers indicate their acceptance by checking a box and clicking on a hyperlink.[2215] While the CJEU also emphasised that traders should bring the information in their terms and conditions to the attention of consumers in a clear and comprehensible way in the case of click-wrap agreements, it unfortunately did not provide any guidance on how traders could achieve this. In contrast to the Commission's perspective, the CJEU's reasoning differs from findings in behavioural research, which reveal that consumers often do not fully understand the legal implications of click-wrap agreements.[2216] Website design can make it difficult for consumers to understand traders' terms and conditions.[2217] Also, the layout of click-wrap agreements may discourage careful reading, especially when finalising the transaction does not require clicking on the link containing the terms and conditions.[2218]

Furthermore, the CJEU's reasoning differs from the explanation of the requirements of clarity and comprehensibility provided by the European legislator in Recital 27 of the MD. This recital clarifies that the requirements of clarity and comprehensibility prohibit the provision of mandatory information exclusively in standard terms and conditions or other contractual documents. The difference in perspectives could be attributed to the fact that the CJEU developed its reasoning based on a case that predates the introduction of the MD and its integration into national legal systems. However, it is also possible that the CJEU will maintain the same position when deciding based on the MD, as recitals are not legally binding. This example highlights how the absence of a binding definition or guidance regarding the meaning of transparency requirements in legal acts can lead to an interpretation that differs from the legislature's understanding of transparent disclosure.

When examining German law, one can observe that German courts have endorsed the disclosure of mandatory information about online contracts through hyperlinks,[2219] provided that the trader clearly labels and integrates them into the website.[2220] Moreover, the BGH considered that providing information through four

2214. Case C-565/22 *Sofatutor* ECLI:EU:C:2023:735, points 46-48.
2215. Case C-536/20 *Tiketa*, points 46-47 and 53.
2216. Nancy S. Kim, *Wrap Contracts: Foundations and Ramifications* (Oxford Academic 2014) 53-62; Juliet M. Moringiello, 'Signals, Assent and Internet Contracting' (2005) 57(4) *Rutgers Law Review* 1307-1311, 1346-1349; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 102-103.
2217. Nancy S. Kim, *Wrap Contracts: Foundations and Ramifications* (Oxford Academic 2014) 53-62; Jonathan A. Obar and Anne Oeldorf-Hirsch, 'The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services' (2020) 23(1) *Information, Communication and Society* 128–147; Caterina Gardiner, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022) 115-116.
2218. Ibid.
2219. See, for example, BGH 20 July 2006, I ZR 228/03, MMR 2007, 40 or BGH 5 October 2017, I ZR 163/16, GRUR 2018, 100. A more detailed analysis of the use of links in German law can be found in Section 2.3.2.1. of Chapter 2.
2220. OLG Hamm 14 April 2005, 4 U 2/05, NJW 2005, 2319; BGH 5 October 2017, I ZR 163/16, GRUR 2018, 100.

different links is in line with the requirements of clarity and comprehensibility, as consumers are accustomed to this method of disclosure in the online sphere.[2221] It is questionable whether such an understanding of the use of hyperlinks for the provision of mandatory information is compatible with EU law, as the CJEU has not clarified whether traders can utilise multiple hyperlinks to provide mandatory consumer information. Furthermore, the introduction of the MD might restrict the use of links for online marketplace providers, if the CJEU adopts the reasoning outlined in Recital 27 of this directive.

Croatian law lacks provisions regarding the manner in which traders should present consumer information online.[2222] Therefore, it is unclear whether and how traders can utilise hyperlinks to disclose mandatory information. Comparable to German law, English law also permits the provision of mandatory consumer information through the use of links and examines the use of links in relation to the requirements of information availability and prominence.[2223] When it comes to applying the requirement of prominence, English law presents contrasting views on the utilisation of hyperlinks to disclose consumer information. The CMA contends that the prominence requirement enables the information to be disclosed through a single hyperlink.[2224] On the contrary, the High Court of Justice argues that hyperlinks are typically not compatible with prominence and should only be explicitly allowed in certain circumstances.[2225] These divergent opinions indicate that the relationship between using links to provide consumer information and the requirement of prominence may not be entirely clear.

Furthermore, in its Consumer Duty, the FCA emphasises that consumers usually rely on the initial information they come across when making decisions.[2226] They are less likely to read information that requires active searching or is hidden. As a result, the FCA instructs financial firms to present important information at the beginning, including instructions for necessary consumer actions or the consequences of inaction. It suggests using links to consolidate information on a specific topic in one location or to provide supplementary information. This approach aligns with the Commission's stance on information layering and is in line with findings from behavioural research, as discussed earlier.

Apart from the rules on online orders with a payment obligation, the prohibition of opt-outs, and limited guidance on using links to disclose mandatory consumer information, the Commission and the CJEU do not address other factors related to the design of the online environment based on the UCTD, the CCD, and the CRD. These factors include (but are not limited to) font size, colour combinations,

2221. BGH 5 October 2017, I ZR 163/16, GRUR 2018, 100.
2222. See Chapter 4, Section 4.4.3.
2223. See Chapter 5, Sections 5.4.3.1. and 5.4.3.3.
2224. Competition & Markets Authority, 'Online car rental intermediaries: Consumer law compliance summary' (2017) [10 and 14].
2225. *Competition and Markets Authority v Viagogo AG* (*CMA v Viagogo*) (2018) FS-2018-000011 27.
2226. Financial Conduct Authority, 'FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty' (2022) [74-75]. Also, see my analysis in Chapter 5, Section 5.3.3.5.

pictures, symbols, animations, or other disclosure techniques that might influence consumers' choices.

A positive development in this context is the introduction of Article 16e into the CRD via the DMFSD 2023. This article introduces changes to the CRD applicable to online financial service providers starting from June 2026, as detailed in Section 2.3.1.3. The DMFSD 2023 mandates Member States to ensure that traders offering financial services contracts at a distance refrain from designing, organising, or operating their online interfaces in a manner that deceives, manipulates, distorts, or impairs consumers' ability to make free and informed decisions in the online environment.[2227] Furthermore, the DMFSD 2023 requires Member States to implement measures addressing at least one of the three specified market practices. These practices consist of drawing attention to specific options when prompting consumers to make a decision, continuously requesting consumers to make a choice after they have already done so, particularly through intrusive pop-ups, and making the process of cancelling a service more difficult than subscribing to it. The DMFSD 2023 also empowers Member States to implement strict measures when regulating the design of the online environment for financial service providers.

As mentioned earlier, the DMFSD 2023 permits traders to use hyperlinks to direct consumers to the online button they can use to withdraw from their contract. Behavioural research indicates that hyperlinks can have negative effects on consumers if traders use them to obscure or conceal information.[2228] This raises concerns about whether allowing the use of hyperlinks to convey crucial information about the withdrawal process contributes to transparency. The DMFSD 2023 grants Member States the opportunity to address this issue in relation to providers of financial services. Specifically, they can ensure that financial services cannot make the process of terminating a financial service more difficult to consumers compared to the process of concluding it. In my perspective, it would be advantageous for Member States to seize this opportunity to provide guidance on how traders should and should not use hyperlinks to disclose the withdrawal button, thereby safeguarding its effectiveness in aiding consumers' decision-making process.

The DMFSD 2023 has the potential, at the very least, to draw attention to the importance of transparent design in the online environment for national legislatures and regulators. This is crucial, considering research indicating that online traders, particularly in the financial sector, use behavioural insights to influence consumer emotions or behaviour and steer them towards specific choices that may not always

2227. Recital 41 and Article 16e within Article 1(4) DMFSD 2023.

2228. Ognyan Seizov, Alexander J. Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 160; Joasia Luzak, 'Will the imaginary active consumers please stand up? Case note to *Walbusch Walter Busch*: Case C-430/17 *Walbusch Walter Busch GmbH & Co. KG v. Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV*, EU:C:2019:47' (2019) 26(5) *Maastricht journal of European and comparative law* 717-718; Suter et al., *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report* (2019) 44-45, 54-55, 130.

be responsible or necessary.[2229] However, the limited scope of Article 16e is a missed opportunity. First, this article only applies to financial service providers instead of being applicable to all online traders.[2230] Secondly, there is uncertainty surrounding the application of the DMFSD 2023 to consumer credit providers. The DMFSD 2023 specifies that if there is specific EU legislation that governs financial services, prescribing rules on pre-contractual information, adequate explanations, or the right of withdrawal, only the provisions of sector-specific legislation will be applicable.[2231] If Article 16e is interpreted as addressing information disclosure, it may not be applicable to consumer credit providers as the CCD 2023 regulates information provision specifically for these types of financial services providers. Therefore, it is yet to be determined how Member States will interpret and transpose this article. Unfortunately, despite the simultaneous adoption process of the DMFSD 2023, the CCD 2023 does not include a similar article.[2232] Therefore, it would be advantageous to extend the application of this article to short-term credit providers, such as BNPL providers, in order to ensure consumer protection. This is particularly important considering the known practices of these providers, which can have an impact on the consumer's decision-making process.[2233]

The national legal systems that I examined also do not place much importance on the transparent design of the online environment, based on the directives I analysed. Among the three national legal systems, German law appears to provide the most extensive considerations of the compatibility of certain factors with transparency requirements. These factors include combining the use of pictures with mandatory information, as well as the font size and colour of information. For instance, in German law implementing the CRD, the requirements of clarity and comprehensibility necessitate that traders ensure mandatory information is sufficiently comprehensible when combined with a picture, considering factors such as font size, style, and colour.[2234] Prominence requires that mandatory information is sufficiently distinguishable from other information and pictures on the website,

2229. For instance, see the research commissioned by the Swedish BNPL provider Klarna and conducted by the University of Reading, School of Psychology and Clinical Language Sciences – Lynne Bell, Julia Vogt, Rachel McCloy and Laurie Butler, 'Emotional eCommerce Research Report: Ups and downs in the online experience' (2017) 8-12. See also Dutch Authority for the Financial Markets, 'Buy Now, Pay Later: A study of a new market trend' (2022) [12-16]; David Laibson, Sumit Agarwal, Xavier Gabaix, and John C. Driscoll, 'The Age of Reason: Financial Decisions over the Life Cycle and Implications for Regulation' (2009) *Brookings Papers on Economic Activity* 51-117; Xavier Gabaix and David Laibson, 'Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets' (2006) 121(2) *Quarterly Journal of Economics* 505-540; Stefano DellaVigna and Ulrike Malmendier, 'Paying Not to Go to the Gym' (2006) 96 *American Economic Review* 694-719; Stefano DellaVigna and Ulrike Malmendier, 'Contract Design and Self-Control: Theory and Evidence' (2004) 119 *The Quarterly Journal of Economics* 353-402.

2230. Recital 10 DMFSD 2023.

2231. Recitals 16-22 DMFSD 2023.

2232. While the CCD 2023 was adopted on 18 October 2023, the DMFSD 2023 was adopted on 22 November 2023.

2233. Dutch Authority for the Financial Markets, 'Buy Now, Pay Later: A study of a new market trend' (2022) [12-16].

2234. OLG Hamm, 14 March 2017, 4 W 34/16, 4 W35/16, GRUR-RR 2017, 359.

taking into account factors such as font size, style, and colour.[2235] Despite the fact that the use of pictures, font size, style, and colour is relevant for clarity, comprehensibility, and prominence of consumer information, German law suggests that clarity and comprehensibility safeguard the understandability of information and prominence ensures its noticeability.

To the best of my knowledge Croatian law implementing the three directives I have analysed does not offer instructions regarding the transparent design of the online environment.[2236] English law provides an example of a case that is adjudicated based on multiple legal acts, including the provisions implementing the CRD. In this case, the High Court of Justice took into account various factors such as font, size, colour, and position, in order to assess the prominence of information.[2237] While English law, which implements the CRD, provides limited insights into the transparent design of the online environment, it should be recalled that the FCA's Consumer Duty offers guidance on how financial firms should disclose information in the online sphere.[2238] This guidance covers considerations relating to the transparent design of the online environment. For example, the FCA advises financial firms to utilise a variety of visual cues, such as headings, layout, bullet points, fonts, tables, graphs, diagrams, graphics, audio-visuals, and interactive media. These visual cues should be used to present information in a manner that encourages consumer engagement and facilitates the identification of crucial information. However, the FCA abstains from providing specific examples of good or bad practices in transparent design, allowing financial firms the flexibility to experiment and determine the most effective approaches themselves.

In conclusion, my analysis indicates that the four legal systems I examined do not adequately address the transparent design of the online environment based on the three directives included in my study. While rules governing the online ordering process and the prohibition of opt-outs exist, along with some guidance on the impact of factors like hyperlinks, colour, font size, position, and images on information transparency, there is insufficient emphasis on transparent design of online interfaces. The DMFSD 2023 appears to signal a positive shift by requiring Member States to establish rules governing the design of online interfaces for financial service providers. However, it is worth noting that these rules may have limited effectiveness, as they do not appear to extend to online traders outside the financial services sector and may not cover consumer credit providers.

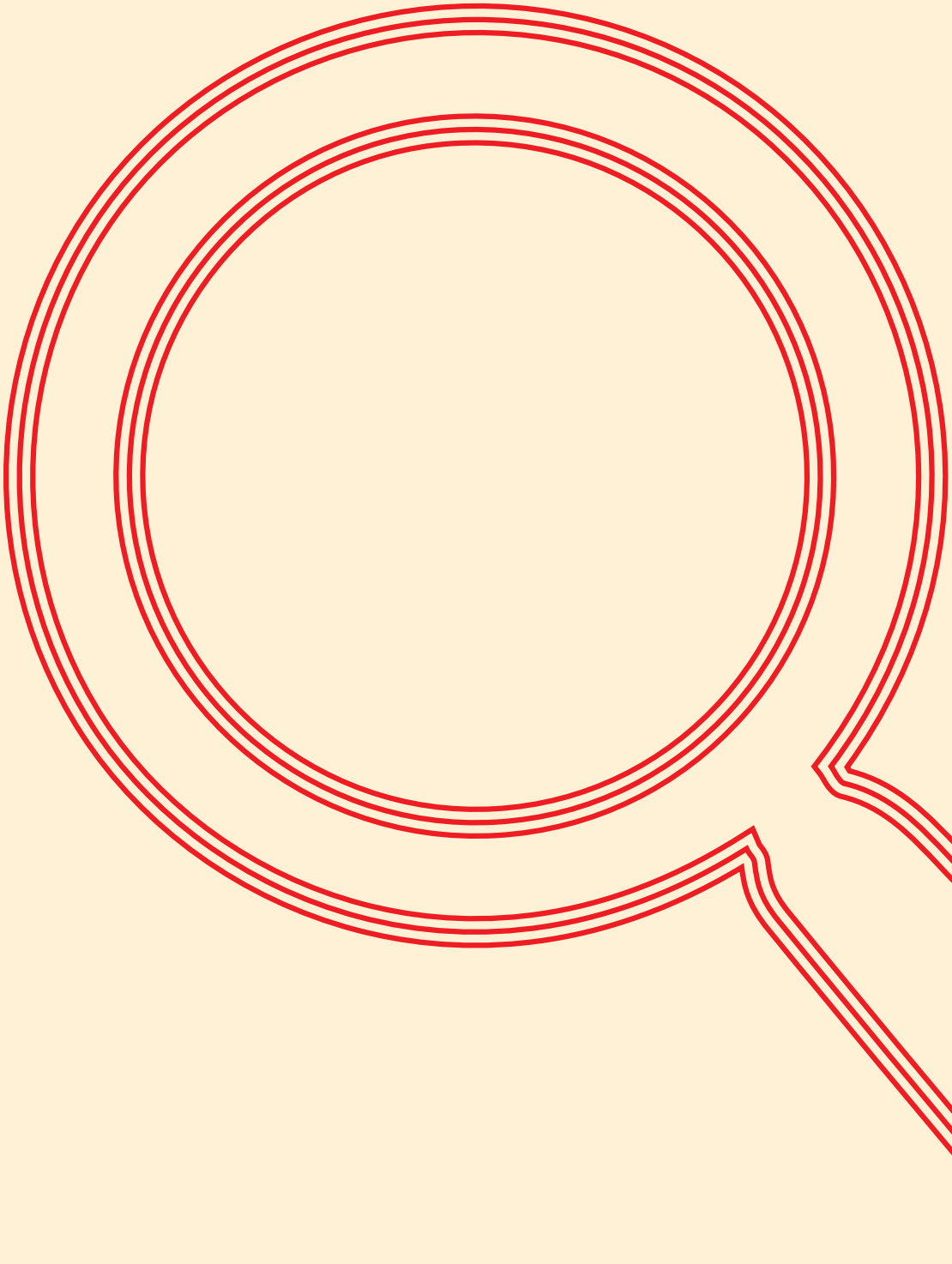
2235. OLG Köln 7 October 2016, 6 U 48/16, GRUR-RR 2017, 108.

2236. *Competition and Markets Authority v Viagogo AG* (*CMA v Viagogo*) (2018) FS-2018-000011 22 and 27. See Chapter 4.

2237. *Competition and Markets Authority v Viagogo AG* (*CMA v Viagogo*) (2018) FS-2018-000011 22 and 27. Also, see my analysis in Chapter 5, Section 5.4.3.3.

2238. Financial Conduct Authority, 'FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty' (2022) [74-75]. Also, see my analysis in Chapter 5, Section 5.3.3.5.

6



EPILOGUE

Concluding remarks and recommendations

As discussed in Chapter 1, the concept of transparency is deeply ingrained in EU consumer law, manifested through various directives imposing diverse transparency and design requirements on consumer information. However, the absence of clear guidance on interpreting and evaluating transparency at the EU level creates uncertainty regarding whether transparency holds the same meaning in EU consumer law or if its meaning can differ under different directives, even when the requirements expressing this concept are formulated in the same way.

This thesis aims to provide a more concrete understanding of the concept of transparency in EU consumer law. It focuses on the UCTD, CCD, and CRD, and offers a detailed account of how transparency of consumer information is interpreted and assessed in EU, German, Croatian, and English law. This research also contributes to the academic discourse by examining the legal perspective on what constitutes transparent information, considering insights from scholarly contributions that explore the effectiveness of consumer information through behavioural research or analyse transparency under the UCTD. It seeks to determine whether the legal understanding of transparency aligns with its objectives and, to a lesser extent, with insights from behavioural studies. Moreover, it investigates whether and to what extent there is convergence in the meaning, objectives, scope, and consequences of breaching transparency across the directives and jurisdictions under scrutiny.

In Chapter 1, I have identified the following research questions that have served as the guiding framework for this study:

What is the meaning and scope of the concept of transparency under the UCTD, the CCD and the CRD, and to what extent can transparency meet the objective(s) that these directives assign to it?

1) What are the objectives of transparency and what are the contractual consequences of the lack of transparency?
2) How do EU and national legislatures, courts and enforcement authorities interpret and assess transparency under the UCTD, the CCD and the CRD?
3) Does digitalisation affect the interpretation and assessment of transparency?
4) To what extent do the interpretation and assessment of transparency in EU, German, Croatian and English law converge or diverge?
5) Considering the objectives of transparency as a benchmark, what are the best practices currently applied in the assessment of transparency of consumer information and how can this assessment be improved?

In Chapter 6, I have synthesised the findings from the preceding chapters in light of the aforementioned research questions and identified key issues regarding the interpretation and assessment of transparency under the UCTD, CCD, and CRD. These issues include the misalignment between objectives attributed to transparency and its interpretation and assessment in practice, the absence of a consistent

transparency taxonomy, and a lack of consideration for the impact of digitalisation on the concept of transparency. In this epilogue, I provide concluding remarks and recommendations based on my research.

A noteworthy part of my study revolved around examining the understanding and application of the transparency concept in the online context. My research, which commenced in 2016, predates the increased regulatory focus on online transparency that emerged in 2019, leading to subsequent legislative advancements such as the DCD, the DMA, and the DSA. As clarified in Chapter 1, the aforementioned legislative acts are excluded from my study since they were not incorporated into the national legal systems of the Member States during the study period, which makes them unsuitable for this type of comparative research.

Additionally, in October and November 2023, directives reviewing the CCD and the CRD, namely the CCD 2023 and the DMFSD 2023, were adopted. In my thesis, I have examined whether these directives effectively address the transparency issues identified in relation to the CCD and CRD. However, further research is needed to evaluate their impact on the concept of transparency and their interaction with other EU acts regarding information transparency in the online sector.

Based on my research, I have formulated the following conclusions and recommendations:

1. **To ensure alignment between the objectives of transparency and its interpretation and assessment in practice, it is imperative to consistently conduct a dual transparency assessment and establish clear contractual consequences for breaches of transparency.**

As summarised in Chapter 6, the concept of transparency in the UCTD, the CCD, and the CRD aims to empower consumers to make well-informed decisions in the market. These directives envision consumers using information about goods and services available in the market to compare, conclude, and withdraw from contracts. They mandate various transparency requirements to ensure the quality of information essential for consumers to make these choices. Furthermore, in line with the shared main objective of facilitating informed consumer choice, the standardisation requirements in the CCD and the CRD also strive to enhance legal certainty.

To achieve these objectives, it is necessary to implement a dual transparency assessment. This approach ensures that the interpretation and evaluation of transparency in consumer information encompass both its formal and substantive elements. Currently, within the examined directives and legal systems, there is often a lack of this dual perspective in the interpretation and assessment of transparency. There is a tendency to prioritise formal transparency elements and overlook substantive transparency. Even when there is recognition of the need for a dual transparency assessment, various authorities face challenges in its practical

application. Furthermore, examples of the interpretation and evaluation of transparency are not always available, posing challenges in determining the extent to which a dual assessment of transparency is safeguarded. In my opinion, to provide a coherent and comprehensive interpretation of the transparency concept and achieve its objectives, it is essential to clarify that this concept serves a dual function, protecting both the formal and substantive aspects of information transparency.[139]

Furthermore, it is essential to establish precise and effective consequences for transparency violations, supporting the achievement of its objectives. My analysis highlights flaws in how the UCTD, the CCD, and the CRD address contractual repercussions for breaches of consumer information transparency. In instances where transparency breaches are expected to have contractual consequences, the scope and application of those consequences are not always clearly specified. Moreover, sector-specific directives like the CCD and the CRD mainly link consequences to violations of information obligations, leading to uncertainty about the applicability of such consequences to cases involving transparency violations. To address these issues, it is necessary to clarify the scope and application of consequences specifically related to transparency and explicitly state that consequences applicable to breaches of information obligations also apply to breaches of transparency obligations.

The clarification of the dual function of transparency and the contractual consequences for breaches of transparency should be undertaken at the EU level to prevent the emergence of different national approaches. Consequently, it falls upon the European legislator to define the meaning and consequences of the transparency concept.

2. To prevent diverging interpretations of transparency that could obscure its intended meaning, it is crucial to establish a uniform taxonomy of transparency.

As stated in Chapter 1, the concept of transparency is embedded in multiple directives of EU consumer law and encompasses various transparency and design requirements. However, most analysis regarding the interpretation and evaluation of consumer information transparency primarily concentrates on one directive, namely the UCTD. To fill this gap, my research thoroughly examines and compares transparency and design requirements in three directives across four jurisdictions, with the aim of determining the degree of convergence or divergence in the interpretation and assessment of transparency within these contexts.

My analysis reveals a lack of a uniform taxonomy of transparency both across and within the jurisdictions examined. Despite some degree of convergence, particularly in the area of unfair contract terms law, the legal systems under study exhibit significant divergence in interpreting and evaluating various transparency

139. Together with Dr. Joasia Luzak, I also advocated for the explicit implementation of a dual transparency evaluation in EU consumer law in Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 99-100, 105-106.

requirements. Moreover, even when similar factors are recognised as important for assessing transparency, different legal systems often associate these factors with different transparency requirements. Furthermore, although both EU and national laws prescribe transparency requirements that may appear linguistically synonymous, various authorities often interpret them differently within distinct legal contexts or neglect to specify if they are intended to convey the same meaning. In my opinion, this opacity concerning the meaning and scope of transparency requirements undermines the potential effectiveness of the transparency concept as a tool for consumer protection.

Based on my research, I have concluded that two actions need to be taken to address this issue. Firstly, it is necessary to determine the content of the transparency concept. This can be accomplished by pinpointing which of the numerous transparency requirements outlined in the UCTD, the CCD, and the CRD encapsulate the essence of this concept. Subsequently, a clear interpretation of these requirements should be provided.

A good example in this regard can be found in English law governing unfair contract terms, which stipulates that the transparency concept encompasses requirements of legibility, plainness, and intelligibility. These requirements aim to ensure that the wording and consequences of contract terms are readable and understandable. Such a transparency concept can be generally applied to consumer information.

However, specific design requirements, such as prominence or conciseness, which apply only to some consumer information, may warrant separate consideration from the transparency concept. For instance, English unfair contract terms law distinguishes between the assessment of prominence of contract terms and transparency of contract terms. The prominence test ensures that contract terms are presented in a manner allowing an average, reasonably well-informed, observant, and circumspect consumer to notice them. While English unfair contract terms law applies the transparency concept (including legibility, plainness, and intelligibility) to all standard contract terms and notices, it imposes the prominence requirement solely on core contract terms, which are generally exempt from unfairness control. The EU legislature could consider adopting a similar approach to develop a more uniform transparency taxonomy.

Secondly, the European legislator should avoid constantly adding more transparency requirements that dictate how information should be designed but may need further interpretation. Instead, the European legislature should empower relevant European authorities, like the Commission or the EBA, to create legally binding guidelines on the design of mandatory information. These guidelines should be based on insights from behavioural sciences. In doing so, European authorities can take inspiration from the FCA's Consumer Duty, which provides comprehensive guidance for traders on effectively presenting information to consumers to improve their decision-making process, complete with illustrative examples of both good and poor practices.

3. **To enhance consumers' decision-making in the online environment, it is important to recognise the impact of digitalisation on transparency. This entails adjusting transparency tools for the online realm and implementing measures that ensure transparent design within this environment.**

As explained in Chapter 6, behavioural research shows that traders can use specific disclosure techniques to capture consumers' attention online. However, my analysis indicates that the European legislature has not adequately adjusted transparency tools, such as standardised information forms and the obligation to provide adequate explanations of consumer credit information, to be suitable for the digital realm. Recent revisions to both the CCD and the CRD missed an opportunity to update these tools for the digital age. For instance, while the CCD 2023 requires the customisation of standardised credit information forms for different media, it does not sufficiently address issues such as the table format and length of these forms, which hinders their effective adaptation to the online environment.

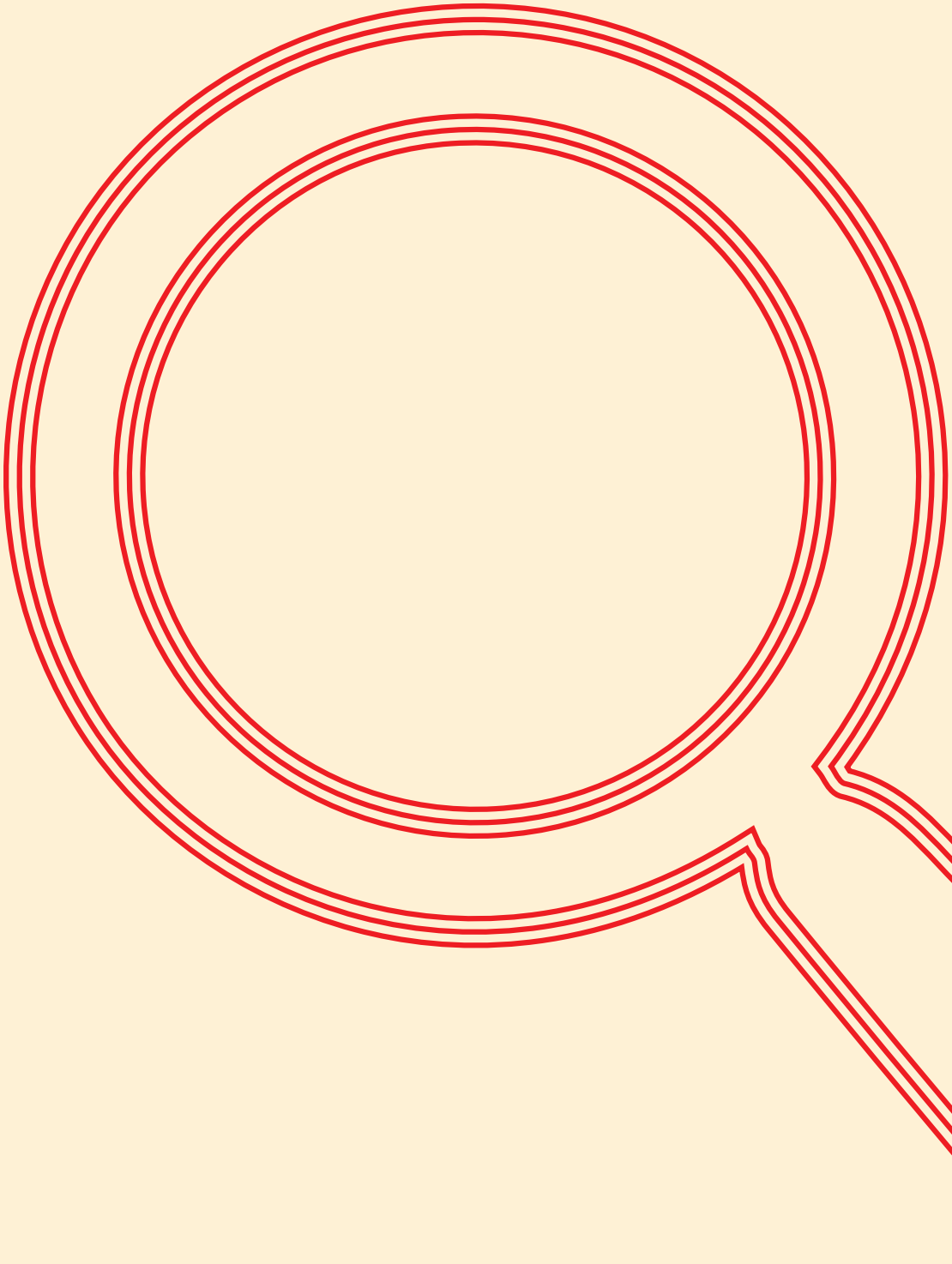
Furthermore, apart from taking into consideration the influence of the online ordering process's arrangement, opt-outs, and factors like hyperlinks, colour, or font size on the transparency of consumer information, my research indicates that the legal systems being examined lack sufficient consideration for the transparent design of the online environment. This is worrisome, as studies have shown that online traders leverage behavioural insights to manipulate consumer emotions or behaviour, leading them towards specific choices that may not always be responsible or necessary.

The DMFSD 2023 signals a positive change by requiring Member States to establish rules for the transparent design of online interfaces by financial service providers. These rules should address practices in the market that make it difficult for consumers to make informed decisions, such as emphasising certain choices and making it complex to terminate a financial service. However, these rules might have limited impact, as they do not seem to apply to online traders from sectors other than financial services, and potentially even consumer credit providers.

Under the DMFSD 2023, Member States have gained the authority to adopt stringent measures for regulating the design of the online environment for financial service providers. This presents an opportunity for Member States to adopt various solutions aimed at promoting transparent design of the online environment. To inspire Member States and facilitate harmonisation, the relevant European authorities could develop guidelines on transparent online interface design based on behavioural research. This should be done bearing in mind the DSA, which includes a similar article but grants the Commission the power to develop guidelines on the transparency of online interface design rather than Member States, as outlined in Chapter 1.

In conclusion, this thesis demonstrates that there is significant potential to enhance the transparency concept under the UCTD, the CCD, and the CRD in order to align it with the ambitious goals of facilitating informed consumer choice

and providing legal certainty. Based on my research findings, I propose several improvements to the transparency concept. These include re-conceptualising the concept itself to explicitly incorporate a dual transparency assessment and clearly defined transparency and design requirements. Moreover, I advocate for the establishment of well-defined contractual consequences for breaching transparency obligations, as well as the implementation of specific guidelines for transparent information design in the online environment, underpinned by behavioural research. I believe that these recommendations contribute to a forward-thinking approach towards transparency in consumer information, which is well-suited to meet the demands of the digital age.



Bibliography
Case law index
Summary
Samenvatting
Acknowledgements

Bibliography

Ady J, 'Die Umsetzung der Verbraucherkreditrichtlinie in deutsches Recht und besondere verbraucherpolitische Aspekte' (2009) 23 *Zeitschrift für Wirtschafts- und Bankrecht* 1061-1070

Alexander C, 'Neuregelungen zum Schutz vor Kostenfallen im Internet' (2012) 28 *Neue Juristische Wochenschrift* 1985-1990

——, 'Die Umsetzung der Verbraucherrechte-Richtlinie und die Auswirkungen auf das Lauterkeitsrecht' (2014) *Wettbewerb in Recht und Praxis* 501-509

Altmann S, 'Aussage "Der Artikel ist bald verfügbar" ist wettbewerbswidrig' (2018) 23 *Gewerblicher Rechtsschutz und Urheberrecht, Praxis im Immaterialgüter und Wettbewerbsrecht* 562

Armbrüster C and Wiese V, 'Die Folgen der Schuldrechtsreform für vor dem 1. 1. 2002 begründete Dauerschuldverhältnisse' (2003) 9 *Deutsches Steuerrecht* 334-342

Armbrüster C, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen nach der Schuldrechtsmodernisierung' (2004) 6 *Deutsche Notar-Zeitschrift* 437-447

Atamer Y, 'Duty of Responsible Lending: Should the European Union Take Action?' in Grundmann S and Atamer YM (eds), *Financial Services, Financial Crisis and General European Contract Law: Failure and Challenges of Contracting* (Kluwer Law International 2011) 179-202

——, 'Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer – Insights from Behavioural Law and Economics' (2017) 80(4) *Modern law review* 624-660

Atiyah PS, 'Common Law and Statute Law' (1985) 48(1) *The Modern Law Review* 1-120

Ayres I and Schwartz A, 'The no-reading problem in consumer contract law' (2014) 66(3) *Stanford Law Review*

Baaij CJW, *Legal Integration and Language Diversity: Rethinking Translation in EU Lawmaking* (Oxford University Press 2018)

Babić M, 'Zaštita prava potrošača i izvori trgovačkog prava' (2015) 9(1) *Poslovna izvrsnost* 71-89

Bakos Y, Marotta-Wurgler F, and Trossen DR, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43(1) *The Journal of Legal Studies* 1-35

Bamberger, Roth, Hau, Poseck, *Beck'scher Online-Kommentar 53. Auflage* (Verlag C.H. Beck 2020)

Baretić M and Petrović S, 'Enforcement and Effectiveness of Consumer Law in Croatia' in Micklitz HW and Saumier G (eds) *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 203-226

——, 'Control of Price Related Terms in Standard Form Contracts in Croatia' in Atamer YM and Pichonnaz P (eds), *Control of Price Related Terms in Standard Form Contracts* (Springer 2020) 315-338

Baretić M, 'Nepoštene odredbe u potrošačkim ugovorima s posebnim osvrtom na ugovore banaka i osiguravajućih društava' in Baretić M and others *Obveze trgovaca u sustavu zaštite potrošača* (Narodne Novine 2003)

——, 'Zaštita potrošača u Republici Hrvatskoj nakon ulaska u Europsku Uniju – jesmo li implementacijom europskog prava izgradili sustav zaštite potrošača?' in Bourgoignie T and Jovanić T (eds) *Strengthening consumer protection in Serbia/Jačanje zaštite potrošača u Srbiji* (Liber Amicorum Svetislav Taboroši 2013)

——, 'Je li europsko uređenje ugovornog prava zaštite potrošača optimalni regulacijski okvir' in Barbić J (ed) *Zaštita potrošača u Republici Hrvatskoj* (Modernizacija prava, knjiga 29 2016) 73-103

Bar-Gill O and Ben-Shahar O, 'Regulatory techniques in consumer protection: A critique of European consumer contract law' (2013) 50 *Common Market Law Review* 109-125

Bartlitz D, 'Die Sanktionierung von Verstößen gegen die Erläuterungs- und Bonitätsprüfungspflicht im Verbraucherkreditrecht' (2016) 8 *Zeitschrift für Wirtschafts- und Bankrecht* 344-352

Basedow J, 'Transparenz als Prinzip des (Versicherungs-) Vertragsrechts' (1999) *Versicherungsrecht* 1045-1055

Beale H, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in Beatson J and Friedman D (eds) *Good Faith and Fault in Contract Law* (Oxford University Press 1997) 231-262

——, 'Unfair Terms in Contracts: Proposals for Reform in the UK' (2004) 27(3) *Journal of Consumer Policy* 289-316

——, *Chitty on Contracts 35th edition* (Sweet & Maxwell 2023)

Beale H, Fauvarque-Cosson B, Rutgers J, and Vogenauer S (eds), *Cases, Materials and Text on Contract Law, 3rd edition* (Hart Publishing 2018)

Bell L, Vogt J, McCloy R, and Butler L, 'Emotional eCommerce Research Report: Ups and downs in the online experience' (2017) https://www.klarna.com/assets/sites/3/2020/01/07094907/emotionaleCommerce_Reading_Klarna.pdf (accessed 8 May 2024)

Benöhr I, *EU Consumer Law and Human Rights* (Oxford University Press 2013)

Ben-Shahar O and Chilton A, 'Simplification of Privacy Disclosures: An Experimental Test' (2016) 45 (S2) *The Journal of legal studies* 41-67

Ben-Shahar O and Schneider CE, 'The failure of mandated disclosure' (2011) 159(3) *University of Pennsylvania Law Review* 647-749

——, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014)

Bergt M, 'Praktische Probleme bei der Umsetzung neuer gesetzlicher Vorgaben im Webshop' (2012) 49 *Neue Juristische Wochenschrift* 3541-3545

Bierekoven C and Crone A, 'Umsetzung der Verbraucherrechterichtlinie. Neuerungen im deutschen Schuldrecht – Ein erster Überblick' (2013) 11 *Multimedia und Recht* 687-690

Birchall C, 'Introduction to 'Secrecy and Transparency': The Politics of Opacity and Openness' (2011) 28(7-8) *Theory, Culture and Society* 7-25

van Boom WH, 'The Draft Directive on Consumer Rights: Choices Made and Arguments Used' (2009) 5(3) *Journal of Contemporary European Research* 452-464

Brandner HE, 'Transparenz als Maßstab der Inhaltskontrolle? Eine Problemskizze' in Löffelmann P und Korbion H (eds) *Festschrift für Horst Locher zum 65. Geburtstag* (Werner-Verlag 1990) 317-324

Bray O and Perkins S, 'The new Consumer Contracts Regulations: key changes and implications' (2014) *Computer and Telecommunications Law Review* 98-99

Bresci C, 'Transparency Claims, Intellectual Services and Consumer Contracts: A Case of Consumer Over-Protection and Under-Protection?' (2023) 19(4) *European Review of Contract Law* 394-421

Bright S, 'Winning the battle against unfair contract terms' (2000) 20(3) *Legal Studies* 331-352

——, 'Unfairness and the Consumer Contract Regulations' in Burrows A and Peel E (eds) *Contract Terms* (Oxford University Press 2007) 173-190

Brown S, 'EU and UK Consumer Credit Regulation: Principles, Conduct, and Consumer Protection: Divergence or Convergence of Approach?' (2015) 26(4) *European Business Law Review* 555–580

——, 'Consumer credit relationships – protection, self-interest/reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law' (2016) 36(2) *Legal Studies* 230-257

Brunetta d'Usseaux F, 'Formal and substantive aspects of the transparency principle in European Private Law' (1998) *Consumer Law Journal* 320-338

Buck-Heeb P, 'Aufklärungs- und Beratungspflichten bei Kreditverträgen -- Verschärfungen durch die EuGH-Rechtsprechung und die Wohnimmobilienkredit-Richtlinie' (2015) 5 *Zeitschrift für Bank- und Kapitalmarktrecht* 177-186

Buijze AWGJ, *The principle of transparency in EU law* (Utrecht University Repository 2013)

Bülow P and Artz M, *Verbraucherkreditrecht* (Verlag C.H.Beck oHG 2019)

Burrows A, *English Private Law* (Oxford University Press 2013)

Busch C, 'Implementation of the Consumer Rights Directive in Germany' (2014) 2 *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 119-122

——, 'Does the Amazon Dash Button Violate EU Consumer Law? Balancing Consumer Protection and Technological Innovation in the Internet of Things' (2018) 2 *Journal of European Consumer and Market Law* 78-80

Čadjenović Z, Miscenic E, Dabović-Anastasovska J, Dollani N, Gavrilović N, Mirić MK, Meškić Z and Zdraveva N, 'EU Consumer Contract Law' (2010) 3 *Civil Law Forum for South East Europe-Collection of studies and analyses* 407-741

Caratelli M, 'Transparency of Price Conditions in Consumer Credit: The Usage of the APR' in Fiordelisi F, Molyneux P, and Previati D (eds) *New Issues in Financial and Credit Markets* (Palgrave Macmillan 2010) 144–156

Cartwright J, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2013)

Cherednychenko OO, 'The proposal for a new EU Consumer Credit Directive: towards responsible lending in the digital age?' (2022) *Law and Financial Markets Review* 183-206

Christensen LT and Cornelissen J, 'Organizational transparency as myth and metaphor' (2015) 18(2) *European Journal of Social Theory* 132-149

Cian G, 'Auslegung und Transparenzgebot in der Regelung der AGB und der Verbraucherverträge nach italienischem und deutschem Recht' (1998) 3 *Zeitschrift für Europäisches Privatrecht* 586

Čikara E, 'Prijevremena otplata kredita prema novom Zakonu o potrošačkom kreditiranju' (2010) 31(1) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 151-173

Collins DM, 'Misleading APRs in consumer credit agreements: a new influence?' (2012) 7 *Journal of Business Law* 629-639

Comparato G and Domurath I, 'Financialisation and its implications for private autonomy in consumer credit law' (2018) *Centre for the Study of European Contract Law Working Paper Series No. 2018-01* 237 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3194428 (accessed 8 May 2024)

Conklin K, Hyde R, and Parente F, 'Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores?' (2019) 39 *Legal Studies* 378-397

Conway L, (Business & Transport Section, House of Commons Library), 'The Unfair Terms in Consumer Contracts Regulations' (1996) Research Paper 96/93 https://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP96-93 (accessed 8 May 2024)

——, (House of Commons Library), 'Brexit: UK consumer protection law' (2021) Briefing Paper 9126 https://commonslibrary.parliament.uk/research-briefings/cbp-9126/ (accessed 8 May 2024)

Crnić I, 'Zaštita prava potrošača i novi Zakon o obveznim odnosima' (2006) 45(6) *Pravo u gospodarstvu* 167-223

Curtin D, "Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency' (2017) 23 (1-2) *European Law Journal* 28-44

Curtin DM and Leino P, 'In search of transparency for EU law-making: Trilogues on the cusp of dawn' (2017) 54(6) *Common Market Law Review* 1673–1712

Dainow J, 'The Civil Law and the Common Law: Some Points of Comparison' (1966) 15 (3) *The American Journal of Comparative Law* 419-435

van Dam JCA, 'Guidance documents of the European Commission: a typology to trace the effects in the national legal order' (2017) 10(2) *Review Of European Administrative Law* 75-91

Danco A, 'Die Novellierung der Verbraucherkreditrichtlinie' (2003) 18 *Zeitschrift für Wirtschafts- und Bankrecht* 853

Davies PS, 'Bank Charges in the Supreme Court' (2010) 69(1) *Cambridge Law Journal* 21-24

Davis J, 'Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts' (1977) 63(6) *Virginia Law Review* 841-920

De Cristofaro G, '"Invalidity" of Contracts and Contract Terms in the Feasibility Study on a Future Instrument for European Contract Law' in Schulze R and Stuyck J (eds) *Towards a European Contract Law* (Sellier 2011) 97-120

De Franceschi A, 'The EU Digital Single Market Strategy in Light of the Consumer Rights Directive: The 'Button Solution' for Internet Cost Traps and the Need for a More Systematic Approach' (2015) *Journal of European Consumer and Market Law* 144-148

Dean M, 'Defining Unfair Terms in Consumer Contracts. Crystal Ball Gazing? Director General of Fair Trading v First National Bank plc' (2002) 65(5) *The Modern Law Review* 773-781

DellaVigna S and Malmendier U, 'Contract Design and Self-Control: Theory and Evidence' (2004) 119 *The Quarterly Journal of Economics* 353-402

——, 'Paying Not to Go to the Gym' (2006) 96 *American Economic Review* 694-719

Deveci HA, 'Consent in online contracts: old wine in new bottles' (2007) *Computer and Telecommunications Law Review* 223-231

Devenney J and Pfeiffer T, 'Control of Standard Terms and Collective Proceedings' in Dannemann G and Vogenauer S (eds) *The Common European Sales Law in Context: Interaction with English and German Law* (Oxford University Press 2013) 687-707

Domurath I, 'The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law' (2018) 2 *Journal of European Consumer and Market Law* 124-137

Donegan T et al, 'The effect of contractual unfairness under the Consumer Rights Act 2015 on the transferability of bonds following the High Court's decision in R. (Donegan) v Financial Services Compensation Scheme' (2023) 38(8) *Journal of International Banking Law and Regulation* 265-271

Donnelly M and White F, 'The distance selling directives - A time for review' (2005) 56 *Northern Ireland Legal Quarterly* 1-36

Duivenvoorde BB, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015)

Ebers M, 'Unfair Contract Terms Directive (93/13)', in Schulte-Nölke H, Twigg-Flesner C, and Ebers M (eds), *EU Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier 2008)

Elshout M et al, 'Study on consumers' attitudes towards Terms and Conditions (T&Cs)' (2016) https://commission.europa.eu/system/files/2018-03/terms_and_conditions_final_report_en.pdf (accessed 8 May 2024)

Esposito F and de Almeida L, 'European Union Litigation' (2022) 18(3) *European review of contract law* 265-279

Esposito F and Grochowski M, 'The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration' (2022) 18(1) *European Review of Contract Law* 1-31

Faure M and Luth H, 'Behavioural Economics in Unfair Contract Terms' (2011) 34(3) *Journal of Consumer Policy* 337-358

Fejős A, 'Achieving Safety and Affordability in the UK Payday Loans Market' (2015) 38(2) *Journal of Consumer Policy* 181-202

Feldhusen C, 'Angabepflichten des Darlehensgebers: Europäisches Verbraucherleitbild als Maßstab?' (2020) *Verbraucher und Recht* 87-95

Fenster M, 'The Opacity of Transparency' (2006) 91 *Iowa Law Review Market* 885-949

Fleming C and Speechlys CR, 'The impact and content of the new UK Consumer Contracts Regulations' (2015) *Compliance & Risk* 2-5

Föhlisch C and Dyakova T, 'Fernabsatzrecht und Informationspflichten im Onlinehandel Anwendungsbereich nach dem Referentenentwurf zur Umsetzung der Verbraucherrechterichtlinie' (2013) 1 *Multimedia und Recht* 3-9

Fritz D, 'Click & Collect und Call & Collect – Vertragsschluss und AGB' (2021) 24 *Neue Juristische Wochenschrift* 1697-1776

Fung A, Graham M, and Weil D, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press 2007)

Gabaix X and Laibson D, 'Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets' (2006) 121(2) *Quarterly Journal of Economics* 505-540

Garcia C and van Boom WH, 'Information Disclosure in the EU Consumer Credit Directive: Opportunities and Limitations' in Devenney J and Kenny M (eds) *Consumer Credit, Debt and Investment in Europe* (Cambridge University Press 2012) 21-55

Gardiner C, *Unfair contract terms in the digital age: the challenge of protecting European consumers in the online marketplace* (Edward Elgar Publishing Limited 2022)

Gercke C, *Schadensersatz wegen vorvertraglicher Informationspflichtverletzung beim Verbraucherkredit* (Springer 2014)

Giliker P, 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive' (2015) 23(1) *European Review of Private Law* 5-28

——, 'The Consumer Rights Act 2015 – a bastion of European consumer rights?' (2017) 37(1) *Legal Studies* 78-102

Gillespie A and Weare S, *The English legal system* (Oxford University Press 2017)

Gómez Pomar F, 'Core versus Non-Core Terms and Legal Controls Over Consumer Contract Terms: (Bad) Lessons from Europe?' (2019) 15(2) *European Review of Contract Law* 1-31

Goode RM, 'The Consumer Credit Act 1974' (1975) 34 (1) *Cambridge Law Journal* 79 -130

Gorenc V, *Zakon o obveznim odnosima s komentarom* (Računovodstvo, revizija i financije Plus 1998)

Gottschalk E, 'Das Transparenzgebot und allgemeine Geschäftsbedingungen' (2006) 206(4) *Archiv für die civilistische Praxis* 555-597

Griffiths M, 'Consumer credit advertising - transparent at last?' (2006) 11(3) *Communications Law* 75-84

Grigoleit HC, 'Besondere Vertriebsformen im BGB' (2002) 16 *Neue Juristische Wochenschrift* 1151-1158

Grundmann S and Hofmann C, 'EC Financial Services and Contract Law – Developments 2007–2010' (2010) 6(4) *European Review of Contract Law* 467-484

——, 'The EU Consumer Rights Directive: Optimizing, Creating Alternatives, or a Dead End?' (2013) 18(1) *Uniform Law Review* 98-127

——, 'A Modern Standard Contract Terms Law from Reasonable Assent to Enhanced Fairness Control: A view on Digital Environments and Post-Transaction Assent' (2019) 15(2) *European Review of Contract Law* 148-176

Gupta A, 'Transparency Under Scrutiny: Information Disclosure in Global Environmental Governance' (2008) 8(2) *Global Environmental Politics* 1-7

Gutkin L, *Die Europäisierung der AGB-Kontrolle von Preisänderungsklauseln* (Duncker & Humbolt 2018)

Hall E, Howells G, and Watson J, 'The Consumer Rights Directive – An Assessment of Its Contribution to the Development of European Consumer Contract Law' (2012) 8(2) *European Review of Contract Law* 139-166

Heinrichs H, 'Das Transparenzgebot und die EG-Richtlinie über missbräuchliche Klauseln in Verbrauchtverträgen' in von Westphalen GF und Sandrock O, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995) 157–177

——, 'Die Entwicklung des Rechts der Allgemeinen Geschäftsbedingungen im Jahre 1996' (1997) 21 *Neue Juristische Wochenschrift* 1407-1420

——, 'Das neue AGB-Recht und seine Bedeutung für das Mietverhältnis' (2003) 1 *Neue Zeitschrift für Miet- und Wohnungsrecht* 6-13

Heirman G, 'Core terms: interpretation and possibilities of assessment' (2017) 6(1) *Journal of European Consumer and Market Law* 30-34

Helberger N et al, 'EU Consumer Protection 2.0: Structural asymmetries in digital consumer markets' (2021) https://www.beuc.eu/brochure/eu-consumer-protection-20-structural-asymmetries-digital-consumer-markets-0 (accessed 8 May 2024)

Helleringer G and Sibony A-L, 'European consumer protection through the behavioral lens' (2017) 23 (3) *Columbia Journal of European Law* 607-646

Hergenröder C, 'Die Vereinbarkeit sogenannter „Dash Buttons" mit den zivilrechtlichen Regelungen zum E-Commerce' (2017) 5 *Verbraucher und Recht* 174-178

Herington M and Brothers S, 'Unfair terms and consumer contracts regulations' (1995) 3(8) *International Insurance Law Review* 262-266

Herresthal C, 'Die Verpflichtung zur Bewertung der Kreditwürdigkeit und zur angemessenen Erläuterung nach der neuen Verbraucherkreditrichtlinie 2008/48/EG' (2009) 25 *Zeitschrift für Wirtschafts- und Bankrecht* 1174-1180

Hesselink M, 'A European Legal Method? On European Private Law and Scientific Method' (2009) 15(1) *European Law Journal* 20-45

Hoeren T and Föhlisch C, 'Ausgewählte Praxisprobleme des Gesetzes zur Umsetzung der Verbraucherrechterichtlinie' (2014) *Computer und Recht* 242-248

Hoffmann J and Bartlitz D, 'Erläuterungs- und Bonitätsprüfungspflicht im Verbraucherkreditrecht' (2014) 49 *Zeitschrift für Wirtschafts- und Bankrecht* 2297-2304

Hondius E, 'The Proposal for a Directive on Consumer Rights: The Emperor's New Clothes?' (2011) 19 (2) *European Review of Private Law* 163-166

——, 'Unfair Contract Terms and the Consumer: ECJ Case Law, Foreign Literature, and Their Impact on Dutch Law' (2016) 24(3/4) *European Review of Private Law* 457-472

Horton D, 'Flipping the Script: Contra Proferentem and Standard Form Contracts' (2009) 80(2) *University of Colourado Law Review* 431

Howells G and Weatherill S, *Consumer* Protection Law (Ashgate 2005)

Howells G, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) *Journal of Law and Society* 349-370

——, 'The consumer credit litigation explosion' (2010) 126 *Law Quarterly Review* 617-644

Howells G, Twigg-Flesner C, and Wilhelmsson T, *Rethinking EU consumer law* (Routledge 2017)

von Hoyningen-Huene G, 'Unwirksamkeit von AGB bei bloßer Intransparenz?' in von Westphalen GF und Sandrock O, *Lebendiges Recht- von den Sumerern bis zum Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft 1995)

Iamiceli P, 'Online Platforms and the Digital Turn in EU Contract Law: Unfair Practices, Transparency and the (pierced) Veil of Digital Immunity' (2019) 15(4) *European review of contract law* 394-420

Incardona R and Poncibò, C, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) 30(1) *Journal of Consumer Policy* 21-38

Jabłonowska A and Tagiuri G, 'Rescuing transparency in the digital economy: in search of a common notion in EU consumer and data protection law' (2023) *Yearbook of European Law* 347–387

Janal R, 'Alles neu macht der Mai: Erneute Änderungen im Recht der besonderen Vertriebsformen' (2012) 49 *Zeitschrift für Wirtschafts- und Bankrecht* 2314-2322

——, 'Der Beginn der Widerrufsfrist im neuen Fernabsatzrecht' (2015) 2 *Verbraucher und Recht* 43-37

——, 'Die AGB-Einbeziehung im „M-Commerce"' (2016) 44 *Neue Juristische Wochenschrift* 3201-3205

——, 'Spezialregelungen für Verträge über digitale Inhalte in Theorie und Praxis' (2017) 9 *Verbraucher und Recht* 332-340

Johnson H, Consumer credit and deregulation (1993) 12(6) *International Banking and Financial Law* 63-64

Johnson P, 'All wrapped up? A review of the enforceability of "shrink-wrap" and "click-wrap" licences in the United Kingdom and the United States' (2003) *European Intellectual Property Review* 98-102

Jones S, 'Forming electronic contracts in the United Kingdom' (2000) *International Company and Commercial Law Review* 301-308

Joppich TG, *Die Kodifikation des Transparenzgebots in § 307 BGB* (Peter Lang 2009)

Josipović T and Ernst H, 'Recent crisis-motivated reforms in Croatian private law' 2015 13(1) *Evropski Pravnik* 73-98

Josten R, *Kreditvertragsrecht* (Verlag C.H.Beck oHG 2017)

Józon M, 'Unfair contract terms law in Europe in times of crisis: Substantive justice lost in the paradise of proceduralisation of contract fairness' (2017) *Journal of European Consumer and Market Law* 157-166

Junuzović M, 'Transparency of (Pre-)Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?' (2018) 14 *Croatian Yearbook of European Law and Policy* 69-98

Kim NS, *Wrap Contracts: Foundations and Ramifications* (Oxford Academic 2014)

Klarić P and Vedriš M, *Građansko pravo: Opći dio, stvarno pravo, obvezno i nasljedno pravo* (Narodne Novine 2014)

Köch R, 'Auswirkungen der Schuldrechtsreform auf die Gestaltung Allgemeiner Geschäftsbedingungen – Teil I' (2002) 44 *Zeitschrift für Wirtschafts- und Bankrecht* 2173-2183

Koivisto I, 'The Anatomy of Transparency: The Concept and its Multifarious Implications' (2016) 2016/09 *EUI Working Paper MWP* https://cadmus.eui.eu/bitstream/handle/1814/41166/MWP_2016_09.pdf (accessed 8 May 2024)

——, 'Thinking Inside the Box: The Promise and Boundaries of Transparency in Automated Decision-Making' (2020) 2020/01 *EUI Working Paper AEL* https://cadmus.eui.eu/bitstream/handle/1814/67272/AEL_2020_01.pdf?sequence=1 (accessed 8 May 2024)

Koller I, 'Das Transparenzgebot als Kontrollmaßstab AGBs' in in Baur JF, Hopt KJ und Mailänder KP, *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März* (De Gruyter 1990) 667

Köndgen J, 'Grund und Grenzen des Transparenzgebots im AGB-Recht. Bemerkungen zum "Hypothekenzins-" und zum "Wertstellungs-Urteil" des BGH' (1989) 15 *Neue Juristische Wochenschrift* 943-952

Kösters W, Paul S, and Stein S, 'An Economic Analysis of the EU Commission's Proposal for a New Consumer Credit Directive' (2004) 39(2) *Intereconomics* 84-96

Kramme M, 'Die Einbeziehung von Pflichtinformationen in Fernabsatz- und Außergeschäftsraumverträge' (2015) 5 *Neue Juristische Wochenschrift* 279-284

Kulke U, 'Das Gesetz zur Umsetzung der Verbraucherkreditrichtlinie, des zivilrechtlichen Teils der Zahlungsdiensterichtlinie sowie zur Neuordnung der Vorschriften über das Widerrufs- und Rückgaberecht – Teil 2' (2009) 10 *Verbraucher und Recht* 373-380

Kundid Novokmet A, 'Troubles with the Chf Loans in Croatia: The Story of a Case Still Waiting to Be Closed' (2021) 14(2) *Journal of Risk and Financial Management* 1-21

Laibson D, Agarwal S, Gabaix X, and Driscoll JC, 'The Age of Reason: Financial Decisions over the Life Cycle and Implications for Regulation' (2009) *Brookings Papers on Economic Activity* 51-117

Lee J and Hogarth JM, 'The Price of Money: Consumers' Understanding of APRs and Contract Interest Rates' (1999) 18(1) *Journal of Public Policy and Marketing* 66-76

Leenheer J et al, 'Study on the effects of online displays of sustainability' (2014) https://op.europa.eu/en/publication-detail/-/publication/87c863a3-88af-4c8a-ab47-beab72de492e (accessed 8 May 2024)

Leff AA, 'Unconscionability and the Code. The Emperor's New Clause' (1967) 115(4) *University of Pennsylvania Law Review* 485-559

Lobban M, 'Contractual Terms and their Performance' in Cornish W et al (eds) *The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law* (Oxford University Press 2010) 473-521

Lomnicka E, 'The reform of consumer credit in the UK' (2004) *Journal of Business Law* 129-143

——, 'Unfair credit relationships: five years on' (2012) 8 *Journal of Business Law* 713-730

——, 'The future of consumer credit regulation: a chance to rationalise sanctions for breaches of financial services regulatory regimes?' (2013) 34(1) *Company Lawyer* 13-21

London Economics, 'Consumer vulnerability across key markets in the European Union' (2016) https://op.europa.eu/en/publication-detail/-/publication/79b42553-de14-11e6-ad7c-01aa75ed71a1 (accessed 8 May 2024)

Loos MBM and Luzak, J, 'Update the Unfair Contract Terms Directive for Digital Services' (2021) https://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL_STU(2021)676006_EN.pdf (accessed 8 May 2024)

Loos MBM, 'Transparency of standard terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law' (2015) 23(2) *European Review of Private Law* 179-193

——, 'Double Dutch – On the role of the transparency requirement with regard to the language in which standard contract terms for B2C-contracts must be drafted' (2017) 6(2) *Journal of European Consumer and Market Law* 54-59

——, 'Transparency Under the UCTD: Could You Please Explain what these Terms are Supposed to Mean?' (2020) 9(1) *Journal of European Consumer and Market Law* 25-26

——, 'Crystal Clear? The Transparency Requirement in Unfair Terms Legislation' (2023) 19(4) *European Review of Contract law* 281-299

Luzak J and Junuzović M, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8(3) *Journal of European Consumer and Market Law* 97-107

Luzak J, 'Information duties in the new proposal for the Directive on consumer rights' in Hesselink MW and Loos MBM (eds) *Het Voorstel voor een Europese richtlijn consumentenrechten: een Nederlands perspectief* (Boom Juridische uitgevers 2009)

——, 'To Withdraw or Not To Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking Into Account Its Behavioural Effects on Consumers' (2014) 37(1) *Journal of Consumer Policy* 91-111

——, 'Online Disclosure Rules of the Consumer Rights Directive: Protecting the Passive or the Active Consumers?' (2015) 4(3) *Journal of European Consumer and Market Law* 79-87

——, 'Will the imaginary active consumers please stand up? Case note to Walbusch Walter Busch: Case C-430/17 Walbusch Walter Busch GmbH & Co. KG v. Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV, EU:C:2019:47' (2019) 26(5) *Maastricht journal of European and comparative law* 713-719

——, 'The Steady Creep of an Average Consumer as a Reference Consumer in the Assessment of the Transparent Provision of Mandatory Information' (2020) 5 *Tijdschrift voor Consumentenrecht & handelspraktijken* 265-274

Luzak J, Wulf AJ, Seizov O, Loos MBM, and Junuzović M, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) 46 *Journal of Consumer Policy* 307-333

Macdonald E, 'Mapping the Unfair Contract Terms Act 1977 and the Directive on unfair terms in consumer contracts' (1994) *Journal of Business Law* 441-462

——, 'Unfair Contract Terms Act – Thirty Years On' in Burrows A and Peel E (eds) *Contract Terms* (Oxford University Press 2007) 153–172

——, Macdonald E, 'Bank Charges and the Core Exemption: Office of Fair Trading v Abbey National Plc' (2008) 71(6) *Modern Law Review* 987-998

Mak V and Braspenning J, 'Errare humanum est: Financial Literacy in European Consumer Credit Law' (2012) 35(3) *Journal of Consumer Policy* 307-332

Mak V, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2013) 1(4) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 254-263

Marečić D, 'Nepoštene ugovorne odredbe u potrošačkim ugovorima' (2012) 11 *Pravo i porezi*

Marotta-Wurgler F and Chen DL, 'Does Contract Disclosure Matter?' (2012) 168(1) *Journal of institutional and theoretical economics* 94-123

Marthinussen HF, 'Unfair Contract Terms' in Penadés JP and Martínez Velencoso LM (eds) *European Perspectives on the Common European Sales Law* (Springer 2015) 93–110

McKendrick E, *Contract Law: Text, Cases, and Materials* (Oxford University Press 2018)

McMurtry L, 'Consumer Credit Act mortgages: unfair terms, time orders and judicial discretion' (2010) 2 *Journal of Business Law* 107-125

Meads P, 'E-consumer protection - distance selling' (2002) *International Company and Commercial Law Review* 13(4) 179-182

Meder S, 'Die Zulässigkeit einer isolierten Bepreisung des Auslandseinsatzes von Kreditkarten' (1996) 29 *Neue Juristische Wochenschrift* 1849-1854

Metz R, 'Erläuterungspflichten bei Verbraucherkrediten' (2012) 28 *Neue Juristische Wochenschrift* 1360-1363

Micklitz H-W and Reich N, 'Crónica de Una Muerte anunciada: The Commission Proposal for a "Directive on Consumer Rights"' (2009) 46(2) *Common Market Law Review* 471-519

——, 'The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) *Common Market Law Review* 771-808

Micklitz H-W, 'Some reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts' in Consumer Contracts' in Collins C (ed) *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008) 387-410

——, 'Reforming European Unfair Terms Legislation in Consumer Contracts' (2010) 6(4) *European Review of Contract Law* 347-383

Mišćenić E and Petrić S, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima* (Narodne Novine 2020)

Mišćenić E, 'Unfair Contract Terms in the Contract Law of the Republic of Croatia' (2012) 1 *Civil Law Forum for South East Europe, Collection of Studies and Analyses - Second Regional Conference* https://repository.pravri.uniri.hr/islandora/object/pravri%3A2342 (accessed 8 May 2024)

——, 'Nepoštene odredbe u ugovorima o kreditu' in Tomljenović V, Petrić S, and Miščenić E (eds) *Nepoštene ugovorne odredbe: Europski standardi i hrvatska provedba* (Pravni fakultet u Rijeci 2013) 113-164

——, 'Usklađivanje prava zaštite potrošača u Republici Hrvatskoj' (2013) 4(1) *Godišnjak Akademije pravnih znanosti Hrvatske* 145-176

——, 'Croatian case Franak: Effective or "Defective" Protection of Consumer Rights?' (2016)5 *Harmonius Journal of Legal and Social Studies in South East Europe* 184-209

——, 'Croatian Consumer Protection Law: From Legal Approximation to Legal Fragmentation (Part I)' (2019) 23 *Studia Iuridica Toruniensia*

Morgan P, 'Bank charges and the Unfair Terms in Consumer Contracts Regulations 1999: the end of the road for consumers?' (2010) 2 *Lloyd's Maritime and Commercial Law Quarterly* 208-215

Moringiello JM, 'Signals, Assent and Internet Contracting' (2005) 57(4) *Rutgers Law Review* 1307-1349

Müller K, 'Verstoß gegen Fernabsatzrecht bei Bestellungen über Dash Buttons' (2018) 6 *Verbraucher und Recht* 650-658

——, 'OLG München: Verbraucherrechtsverstoß auf Knopfdruck – Dash Button die Zweite' (2019) 11 *Verbraucher und Recht* 429-433

Niebling J, 'AGB-Recht: Aktuelle Entwicklungen zum Transparenzgebot' (2020) 11 *Monatsschrift für Deutsches Recht* 650

Nobbe G, 'Neuregelungen im Verbraucherkreditrecht – Ein kritischer Überblick' (2011) 14 *Zeitschrift für Wirtschafts- und Bankrecht* 625

Obar JA and Oeldorf-Hirsch A, 'The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services' (2020) 23(1) *Information, Communication and Society* 128-147

Oderkerk M, 'The Need for a Methodological Framework for Comparative Legal Research: Sense and Nonsense of "Methodological Pluralism" in Comparative Law' (2015) 79(3) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 589-623

Padfield A, 'The impact on English contract law of the EC Directive on unfair terms in consumer contracts' (1995) 10(5) *Journal of International Banking Laws* 175-182

Partington M, *Introduction to the English Legal System* (Oxford University Press 2013)

Patient J, 'The Consumer Credit Act 2006' (2006) 21(6) *Journal of International Banking Law and Regulation* 309-314

Pazos R, 'Loans concluded in a foreign currency – their main subject matter and the transparency requirement' (2018) 15(3) *Zeitschrift für das Privatrecht der Europäischen Union* 106-115

Peel E, 'Contra proferentem revisited' (2017) 133 *Law Quarterly Review* 6-11

Pejović Č, 'Civil law and common law: Two different paths leading to the same goal' (2001) 40(155) *Poredbeno pomorsko pravo* 7-32

Peters A, 'Towards Transparency as a Global Norm' in Peters A and Bianchi A (eds) *Transparency in International Law* (Cambridge University Press 2013)

Pfeiffer T and Schinkels, B, 'Schuldrechtsmodernisierung und AGB-Gesetz' in Micklitz H-W, Pfeiffer T, Tonner K, und Wilingmann A, *Schuldrechtsreform und Verbraucherschutz* (Nomos Verlagsgesellschaft, Baden-Baden 2001)

Pfeiffer T, Was kann ein Verbraucher? Zur Relevanz von Informationsverarbeitungskapazitäten im AGB-Recht und darüber hinaus (2011) ½ *Neue Juristische Wochenschrift* 1-7

Poščić A, 'Zaštita potrošača u hrvatskom pravu – dobar ili loš primjer zakonodavstva' (2004) 9 *Pravo i porezi* 81-85

——, 'Nepoštena klauzula u potrošačkim ugovorima' (2006) 43(2) *Zbornik radova Pravnog fakulteta u Splitu* 165-190

Präve P, 'Versicherungsbedingungen und Transparenzgebot' (2000) 51 *Versicherungsrecht*

Price O, Fleming C, and Russell C, 'The impact and content of the new UK Consumer Contracts Regulations' (2015) *Compliance & Risk* 2-5

Ramsay I, 'Consumer credit regulation after the fall: International dimensions' (2012) 1(1) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 24-34

——, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Hart Publishing 2012)

Raue B, '"Kostenpflichtig bestellen" – ohne Kostenfalle? Die neuen Informations- und Formpflichten im Internethandel' (2012) 7 *Multimedia und Recht* 438-443

Reifner U and Herwig I, 'Consumer education and information rights in financial services' (2003) 12(2) *Information & Communications Technology Law* 125-421

Reifner U, 'Responsible Credit in European Law' (2018) 4(2) *Italian Law Journal* 421-448

Römer W, 'Gerichtliche Kontrolle Allgemeiner Versicherungsbedingungen nach den §§ 8, 9 AGBG' (1999) 3 *Neue Zeitschrift für Versicherung und Recht* 97-104

Rona-Tas A and Guseva A, 'Information and Consumer Credit in Central and Eastern Europe' (2013) 41(2) *Journal of Comparative Economics* 420-435

Rosenow J und Schaffelhuber K, 'Neues zur Transparenzkontrolle im AGB-Recht' (2001) *Zeitschrift für Wirtschaftsrecht* 2211-2223

Rosenthal D, *Consumer Credit Law and Practice – A Guide* (Bloomsbury Professional 2018)

Rossi A, Ducato R, Haapio H, and Passera S, 'When Design Met Law: Design Patterns for Information Transparency' (2019) 122-123(5) *Doctrine Rechtsleer* 79-121

Roth H-P, '"Button-Lösung" – Gesetz zum Schutz der Verbraucher vor Abo- und Kostenfallen im Internet' (2012) 12 *Verbraucher und Recht* 477-482

Rott P, 'The average consumer is not a lawyer! Case C-66/19 JC v Kreissparkasse Saarlouis' (2020) 27(3) *Maastricht journal of European and comparative law* 379-386

Rudkowski L and Werner D, 'Neue Pflichten fr Anbieter jenseits der „Button-Lösung". Paid Content-Verträge nach der Verbraucherrechte-Richtlinie' (2012) 11 *Multimedia und Recht* 711–715

Säcker, Rixecker, Oetker, Limperg, *Münchener Kommentar zum Bürgerlichen Gesetzbuch 8. Auflage 2019*

——, *Münchener Kommentar zum Bürgerlichen Gesetzbuch 9. Auflage 2022*

——, *Münchener Kommentar zum Bürgerlichen Gesetzbuch 9. Auflage 2023*

Samuels A, 'The Consumer Rights Act 2015' (2016) *Journal of Business Law* 159-185

Sandrock O and Galston NM, 'The Standard Terms Act 1976 of West Germany' (1978) 26(4) *The American Journal of Comparative Law* 551–572

Šarić D, 'Dodatne obveze trgovaca kod sklapanja ugovora na daljinu' (2016) 6 *Računovodstvo i financije*

Schaub M, 'How to Make the Best of Mandatory Information Requirements in Consumer Law' (2017) 25(1) *European Review of Private Law* 25-44

Schillig M, 'Directive 93/13 and the 'Price Term Exemption': A Comparative Analysis in the Light of the 'Market for Lemons' Rationale' (2011) 60(4) *International and Comparative Law Quarterly* 933-963

Schmidt-Kessel M and Schäfer, S, 'Wie flexibel ist die Musterwiderrufsbelehrung?' (2013) 48 *Zeitschrift für Wirtschafts- und Bankrecht* 2241-2249

Schmitz B and Pavillon C, 'Measuring Transparency in Consumer Contracts: The Usefulness of Readability Formulas Empirically Assessed' (2020) 9(5) *Journal of European Consumer and Market Law* 191-200

Schulze, *Bürgerliches Gesetzbuch Handkommentar 11. Auflage* (Nomos 2022)

Schumacher U, 'Die Aufwertung des Transparenzgebots und die Konsequenzen für das Mietrecht – Neun Thesen' (2003) 1 *Neue Zeitschrift für Miet- und Wohnungsrecht* 13-17

Schwintowski H-P, 'Transparenz und Verständlichkeit von Allgemeinen Versicherungsbedingungen und Prämien' (1998) 3 *Neue Zeitschrift für Versicherung und Recht* 97-102

——, Schwintowski H-P, 'Die Bedeutung interdisziplinären Arbeitens von Rechts- und Sprachwissenschaft' (2003) 632 *Neue Juristische Wochenschrift* 1-14

Seizov O and Wulf AJ, 'Communicating Legal Information to Online Customers Transparently: A Multidisciplinary Multistakeholderist Perspective' (2021) 33(2) *Journal of international consumer marketing* 159-177

Seizov O, Wulf AJ, and Luzak, J, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2018) 42(1) *Journal of consumer policy* 149-173

Simon HA, 'A Behavioral Model of Rational Choice' (1955) 69(1) *The Quarterly Journal of Economics* 99-118

Sluijs JP, Schuett F, and Henze B, 'Transparency regulation in broadband markets: Lessons from experimental research' (2011) 35(7) *Telecommunications Policy* 592-602

Smits J, 'Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights' (2010) 18 (1) *European Review of Private Law* 5-14

Spindler G, Thorun C, and Blom AG, 'Die Evaluation der Button-Lösung. Ergebnisse einer empirischen Studie' (2015) 1 *Multimedia und Recht* 3-7

Suter et al., 'Behavioural study on the digitalisation of the marketing and distance selling of retail financial services: final report' (2019) https://op.europa.eu/en/publication-detail/-/publication/a3cb68db-a676-11ea-bb7a-01aa75ed71a1/language-en(accessed 8 May 2024)

Tamm M, *Verbraucherschutzrecht: Europäisierung und Materialisierung des deutschen Zivilrechts und die Herausbildung eines Verbraucherschutzprinzips* (Mohr Siebeck 2011)

——, 'Kostenfallen im Internet nach neuer Rechtslage' (2012) 6 *Verbraucher und Recht* 9-17

——, 'Informationspflichten nach dem Umsetzungsgesetz zur Verbraucherrechterichtlinie' (2014) 1 *Verbraucher und Recht* 9

Thode R, 'Die wichtigsten Änderungen im BGB-Werkvertragsrecht: Schuldrechtsmodernisierungsgesetz und erste Probleme - Teil 2' (2002) 7 *Neue Zeitschrift für Baurecht und Vergaberecht* 360-366

Tigelaar L, 'How to Sanction a Breach of Information Duties of the Consumer Rights Directive?' (2019) 27(1) *European Review of Private Law* 27-57

Tonner K and Fangerow K, 'Directive 2011/83/EU on Consumer Rights: A New Approach to European Consumer Law?' (2012) 1(2) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 67-80

Turrow J, Hennessy M, and Bleakley A, 'Consumers' Understanding of Privacy Rules in the Marketplace' (2008) 42(3) *The Journal of Consumer Affairs* 411-424

Tversky A and Kahneman D, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1124-1131

——, 'Rational Choice and the Framing of Decisions' (1986) 59(4) *Journal of Business* S251-S278

Twigg-Flesner C and Metcalfe D, 'The Proposed Consumer Rights Directive – Less Haste, More Thought?' (2009) 5(3) *European Review of Contract Law* 368-391

Twigg-Flesner C, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform' in DiMatteo L and Hogg M (eds) *English Law in Comparative Contract Law: British and American Perspectives* (Oxford University Press 2015) 427–438

Ulmer, Brandner, Hensen, *AGB-Recht Kommentar 11. Auflage* (Verlag C.H. Beck 2011)

Valant J (European Parliamentary Research Service), 'Consumer protection in the EU: Policy Overview' (2015) https://epthinktank.eu/2015/09/03/consumer-protection-in-the-eu-policy-overview/ (accessed 8 May 2024)

Vander S, 'Reform des Fernabsatzrechts. Probleme und Fallstricke der neuen Widerrufsbelehrung' (2015) 2 *Multimedia und Recht* 75-79

Vandone D, *Consumer Credit in Europe Risks and Opportunities of a Dynamic Industry* (Heidelberg: Physica 2009)

Vučković RM, 'Predugovorno obavješćivanje jamaca u potrošačkom kreditiranju' (2017) 67 *Zbornik Pravnog fakulteta u Zagrebu* 497-529

Waelkens J, 'Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts', in Samoy I and Loos M (eds), *Information and Notification Duties* (Intersentia 2015) 47-73

Wagner W and Walker W, *Incomprehensible! A Study of How Our Legal System Encourages Incomprehensibility, Why It Matters, and What We Can Do About It* (Cambridge University Press 2019)

Wang F, 'The incorporation of terms into commercial contracts: a reassessment in the digital age' (2015) *Journal of Business Law* 87-119

Weatherill S, 'The Consumer Rights Directive: How and why a quest for "coherence" has (largely) failed" (2012) 49(4) *Common Market Law Review* 1279-1317

Weber RH, 'From disclosure to transparency in consumer law' in Mathis K and Tor A (eds) *Consumer Law and Economics* (Springer 2021) 73-87

——, 'The Disclosure Dream – Towards a New Transparency Concept in EU Consumer Law' (2023) 67 *Journal of European Consumer and Market Law* 45-48

Weiss A, 'Die Untiefen der "Button"-Lösung' (2013) 7 *Juristische Schulung* 590-594

Wendehorst C, 'Das neue Gesetz zur Umsetzung der Verbraucherrechterichtlinie' (2014) 9 *Neue Juristische Wochenschrift* 577-584

von Westphalen GF, 'AGB-Recht ins BGB - Eine erste "Bestandsaufnahme"' (2002) 1 *Neue Juristische Wochenschrift* 12-25

——, 'AGB im ersten Halbjahr 2018' (2018) 31 *Neue Juristische Wochenschrift* 2238-2242

Whittaker S, 'Unfair Contract Terms and Consumer Guarantees: The Proposal for a Directive on Consumer Rights and the Significance of "Full Harmonisation"' (2009) 5 (3) *European Review of Contract Law* 223-247

Whittaker S, 'Unfair Contract Terms, Unfair Prices and Bank Charges' (2011) 74(1) *Modern Law Review* 106-134

——, Whittaker S, 'Distinctive features of the new consumer contract law' (2017) *Law Quarterly Review* 47-72

Wilhelmsson T and Willett C, 'Unfair terms and standard form contracts' in Howells G, Ramsay I, Wilhelmsson T, and Kraft D (eds) *Handbook of Research on International Consumer Law* (Edward Elgar Publishing Limited 2010) 139-171

Wilhelmsson T, 'The abuse of the "confident consumer" as a justification for EC consumer law' (2004) 27(3) *Journal of Consumer Policy* 317-337

——, 'Cooperation and competition regarding standard contract terms in consumer contracts' (2006) 17(1) *European Business Law Review* 49-72

Willett C, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Aldershot 2007)

——, 'General Clauses and Competing Ethics of European Consumer Law in the UK' (2012) 71(2) *The Cambridge Law Journal* 412-440

——, 'Transparency and Fairness in Australian and UK Regulation of Standard Terms' (2013) 37(1) *University of Western Australia Law Review* 72-85

——, 'Re-theorising consumer law' (2018) 77(1) *Cambridge Law Journal* 179-210

Wolf, Lindacher, Horn, *AGB-Gesetz: Gesetz zur Regelung des Rechts der Allgemeinen Geschaftsbedingungen* (Verlag C.H. Beck 1999)

Wolf, Lindacher, Pfeiffer, *AGB-Recht Kommentar 6. Auflage* (Verlag C.H. Beck 2013)

Wulf AJ and Seizov O, 'The Principle of Transparency in Practice: How Different Groups of Stakeholders View EU Online Information Obligations' (2020) 28(5) *European Review of Private Law* 1065 – 1092

——, 'How to Improve Consumers' Understanding of Online Legal Information. Insights from a Behavioral Experiment' (2023) 56 *European Journal of Law and Economics* 559–584

——, '"Please understand we cannot provide further information": evaluating content and transparency of GDPR-mandated AI disclosures' (2024) 39 *AI & Society* 235–256

Ződi Z, 'The limits of plain legal language: understanding the comprehensible style in law' (2019) 15 *International Journal of Law in Context* 246-262

Blogposts

Jabłonowska A, 'Pre-contractual information in multi-party settings: mobilizing legitimate interests to restrict consumer protection?' (C-179/21 absoluts-bikes) (Recent developments in European Consumer Law, 15 December 2022) https://recent-ecl.blogspot.com/search?q=C%E2%80%91179%2F21 (accessed 8 May 2024)

——, 'CJEU rules on the right of withdrawal in the subscription economy' (C-565/22, Sofatutor) (Recent developments in European Consumer Law, 8 October 2023) https://recent-ecl.blogspot.com/search?q=C%E2%80%91565%2F22 (accessed 8 May 2024)

Luzak J, 'Foreign currency loans? Inform consumers of risks! - CJEU in Andriciuc' (C-186/16) (Recent developments in European Consumer Law, 21 September 2017) http://recent-ecl.blogspot.com/2017/09/foreign-currency-loans-inform-consumers.html (accessed 8 May 2024)

——, 'Services performed, no right to payment - CJEU in DC' (C-97/22) (Recent developments in European Consumer Law, 26 May 2023) https://recent-ecl.blogspot.com/search?q=C%E2%80%9197%2F22 (accessed 8 May 2024)

Guidance documents

Bundestag – Drucksache 14/6040, 'Entwurf eines Gesetzes zur Modernisierung des Schuldrechts' (2021) <https://dserver.bundestag.de/btd/14/060/1406040.pdf> (accessed 8 May 2024)

Bundestag – Drucksache 16/11643, 'Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Umsetzung der Verbraucherkreditrichtlinie, des zivilrechtlichen Teils der Zahlungsdiensterichtlinie sowie zur Neuordnung der Vorschriften über das Widerrufs- und Rückgaberecht' (2009) <https://dserver.bundestag.de/btd/16/116/1611643.pdf> (accessed 8 May 2024)

Bundestag – Drucksache 17/12637, 'Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Umsetzung der Verbraucherrechterichtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung' (2013) <https://dserver.bundestag.de/btd/17/126/1712637.pdf> (accessed 8 May 2024)

Bundestag – Drucksache 17/1394, 'Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Einführung einer Musterwiderrufsinformation für Verbraucherdarlehensverträge, zur Änderung der Vorschriften über das Widerrufsrecht bei Verbraucherdarlehensverträgen und zur Änderung des Darlehensvermittlungsrechts' (2010) <https://dserver.bundestag.de/btd/17/013/1701394.pdf> (accessed 8 May 2024)

Bundestag – Drucksache 17/7745, 'Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Änderung des Bürgerlichen Gesetzbuchs zum besseren Schutz der Verbraucherinnen und Verbraucher vor Kostenfallen im elektronischen Geschäftsverkehr' (2011) <https://dserver.bundestag.de/btd/17/077/1707745.pdf> (accessed 8 May 2024)

Bundestag – Drucksache 19/27655, 'Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Änderung des Bürgerlichen Gesetzbuchs und des Einführungsgesetzes zum Bürgerlichen Gesetzbuche in Umsetzung der EU-Richtlinie zur besseren Durchsetzung und Modernisierung der Verbraucherschutzvorschriften der Union und zur Aufhebung der Verordnung zur Übertragung der Zuständigkeit für die Durchführung der Verordnung (EG) Nr. 2006/2004 auf das Bundesministerium der Justiz und für Verbraucherschutz' (2021) <https://dserver.bundestag.de/btd/19/276/1927655.pdf> (accessed 8 May 2024)

Bundestag – Drucksache 7/3919, 'Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz)' (1975) <https://dserver.bundestag.de/btd/07/039/0703919.pdf> (accessed 8 May 2024)

Competition & Markets Authority, 'Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (2015) CMA 37 <https://www.gov.uk/government/publications/unfair-contract-terms-cma37> (accessed 8 May 2024)

Competition & Markets Authority, 'Online car rental intermediaries: Consumer law compliance summary' (2017) <https://www.gov.uk/cma-cases/car-rental-intermediaries-consumer-compliance-review> (accessed 8 May 2024)

Competition & Markets Authority, 'What's new? An overview of changes to unfair contract terms law in the Consumer Rights Bill' (2015) CMA37(c)con <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/398211/CMA37_c_con_Unfair_terms_what_s_new.pdf> (accessed 8 May 2024)

Competition and Markets Authority and Financial Conduct Authority, 'Memorandum of Understanding between the Competition and Markets Authority and the Financial Conduct Authority on the use of concurrent powers under consumer protection legislation' (2016) <https://www.gov.uk/government/publications/cma-and-fca-memorandum-of-understanding> (accessed 8 May 2024)

Department for Business, Energy & Industrial Strategy, 'Consumer Contracts Regulations Review: Call for evidence' (2019) <https://www.gov.uk/government/calls-for-evidence/consumer-contract-regulations-2014-review-call-for-evidence> (accessed 8 May 2024)

Department for Business, Energy & Industrial Strategy, 'Transposition guidance: how to implement EU Directives into UK law effectively' (2018) <https://www.gov.uk/government/publications/implementing-eu-directives-into-uk-law> (accessed 8 May 2024)

Department for Business, Innovation & Skills, 'Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013: Implementing Guidance' (2013) BIS/13/1368 <https://www.gov.uk/government/consultations/consultation-on-the-implementation-of-the-consumer-rights-directive-2011-83-eu> (accessed 8 May 2024)

Department for Business, Innovation & Skills, 'Guidance on the regulations implementing the Consumer Credit Directive updated for EU Commission Directive 2011/90/EU' (2010) BIS/10/1053 <https://www.gov.uk/government/publications/consumer-credit-regulation-guidance-on-the-regulations-implementing-the-consumer-credit-directive-updated-for-eu-commission-directive-2011-90-eu-effective-1-january-2013> (accessed 8 May 2024)

Department of Trade and Industry and Office of Fair Trading, 'A guide for businesses on distance selling' (2006) OFT698 <https://webarchive.nationalarchives.gov.uk/20140402222255/http://www.oft.gov.uk/shared_oft/business_leaflets/general/oft698.pdf> (accessed 8 May 2024)

Department of Trade and Industry, 'Fair, clear and competitive: a consumer credit market for the 21st century' (White paper 2003) <https://www.gov.uk/government/publications/fair-clear-and-competitive-a-consumer-credit-market-for-the-21st-century> (accessed 8 May 2024)

Dutch Authority for the Financial Markets, 'Buy Now, Pay Later: A study of a new market trend' (2022) <https://www.afm.nl/en/consumenten/actueel/2022/november/buy-now-pay-later> (accessed 8 May 2024)

European Commission, 'C(2019) 5325 final: Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts' (2019) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927(01)> (accessed 8 May 2024)

European Commission, 'COM (2012) 0225 final: A European Consumer Agenda - Boosting confidence and growth' (2012) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2012%3A0225%3AFIN> (accessed 8 May 2024)

European Commission, 'COM (2020) 696 final: New Consumer Agenda – Strengthening consumer resilience for sustainable recovery' (2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0696> (accessed 8 May 2024)

European Commission, 'COM (90) 98 final: Three-year action plan of consumer policy in the EEC (1990-1992)' (1990) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51990DC0098> (accessed 8 May 2024)

European Commission, 'COM(2002) 443 final: Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the

Member States concerning credit for consumers' (2002) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0443:FIN:EN:PDF> (accessed 8 May 2024)

European Commission, 'COM/2008/0614 final: Proposal for a Directive of the European Parliament and of the Council on consumer rights' (2008) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2008%3A0614%3AFIN> (accessed 8 May 2024)

European Commission, 'COM/2018/0185 final: Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83/EU as regards better enforcement and modernisation of EU consumer protection rules' (2018) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:185:FIN> (accessed 8 May 2024)

European Commission, 'COM/2021/347 final: Proposal for a Directive of the European Parliament and of the Council on consumer credits' (2021) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:347:FIN> (accessed 8 May 2024)

European Commission, 'Commission Staff Working Document, 'Evaluation of Directive 2008/48/EC on credit agreements for consumers' SWD(2020) 255 final (2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0254> (accessed 8 May 2024)

European Commission, 'Commission Staff Working Document, 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD (2012) 128 final' (2012) <https://commission.europa.eu/document/download/9d3ac401-443a-474b-84cb-7dd9b66200a5_en?filename=guidelines_final.pdf> (accessed 8 May 2024)

European Commission, 'SWD (2017) 209 final: Report of the Fitness Check on Directive 2005/29/EC, Council Directive 93/13/EEC, Directive 98/6/EC, Directive 1999/44/EC, Directive 2009/22/EC and Directive 2006/114/EC' (2017) <file:///C:/Users/Junuzovic/Downloads/fitness_check_report_44639%20(2).pdf> (accessed 8 May 2024)

European Commission, 'SWD(2017) 169 final: Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU' (2017) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2017:0169:FIN:EN:PDF> (accessed 8 May 2024)

European Commission, DG JUSTICE, 'Guidance document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council' (June 2014) <https://commission.europa.eu/system/files/2019-07/crd_guidance_en_0_updated_0.pdf> (accessed 8 May 2024)

European Commission, Directorate-General for Education, Youth, Sport and Culture, 'Guidelines for Teachers and Educators on Tackling Disinformation and Promoting Digital Literacy through Education and Training' (Publications Office of the European Union 2022) <https://op.europa.eu/en/publication-detail/-/publication/a224c235-4843-11ed-92ed-01aa75ed71a1/language-en> (accessed 8 May 2024)

European Economic and Social Committee, 'COM(2002) 443 final – 2002/0222 (COD): Opinion of the European Economic and Social Committee on the "Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers"'(2002) < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2003.234.01.0001.01.ENG&toc=OJ%3AC%3A2003%3A234%3ATOC> (accessed 8 May 2024)

European Parliament and Council, '2021/C 525/01: Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' (2021) <https://op.europa.eu/en/publication-detail/-/publication/a5f87ef3-6849-11ec-9136-01aa75ed71a1/language-en/format-PDFA2A> (accessed 8 May 2024)

European Parliament and Council, '2021/C 526/01: Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' (2021) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2021.526.01.0001.01.ENG&toc=OJ%3AC%3A2021%3A526%3ATOC> (accessed 8 May 2024)

Financial Conduct Authority, 'Consumer Credit Sourcebook' (Release 37, 2019) <https://www.handbook.fca.org.uk/handbook/CONC/1/?view=chapter> (accessed 8 May 2024)

Financial Conduct Authority, 'FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty' (2022) <https://www.fca.org.uk/publication/finalised-guidance/fg22-5.pdf> (accessed 8 May 2024)

Financial Conduct Authority, 'Reader's Guide: An introduction to the Handbook' (2019) <https://www.handbook.fca.org.uk/handbook-readers-guide> (accessed 8 May 2024)

Flash Eurobarometer 525 – Ipsos European Public Affairs, 'Monitoring the level of financial literacy in the EU' (2023) <https://europa.eu/eurobarometer/surveys/detail/2953> (accessed 8 May 2024)

HM Treasury, 'Reforming the Consumer Credit Act 1974: Consultation Response (2022)' <https://assets.publishing.service.gov.uk/media/63907e6b8fa8f569fcaefd6c/CCA_CP_211122_Final_Review.pd> (accessed 8 May 2024)

HM Treasury, Department for Business, Innovation & Skills, 'A new approach to financial regulation: transferring consumer credit regulation to the Financial Conduct Authority' (2013) <https://www.gov.uk/government/consultations/a-new-approach-to-financial-regulation-transferring-consumer-credit-regulation-to-the-financial-conduct-authority> (accessed 8 May 2024)

Hrvatska narodna banka i Hrvatska agencija za nadzor financijskih usluga, 'Mjerenje financijske pismenosti i financijske ukljucenosti u Hrvatskoj – 2023.' (2023) <https://www.hnb.hr/-/predstavljanje-rezultata-istrazivanja-financijske-i-digitalne-pismenosti-stanovnistva-2023> (accessed 8 May 2024)

Office of Fair Trading, 'IT consumer contracts made at a distance: Guidance on compliance with the Distance Selling and Unfair Terms in Contracts Regulations' (2005) OFT 672

Office of Fair Trading, 'Unfair contract terms guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999' (2008) OFT 311 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284426/oft311.pdf> (accessed 8 May 2024)

Opinion of the European Central Bank of 18 September 2015 on the conversion of Swiss franc loans (CON/2015/32) <https://www.ecb.europa.eu/ecb/legal/pdf/en_con_2015_32_f_sign.pdf> (accessed 8 May 2024)

Self-regulatory initiative for a better presentation of information to consumers from 19 July 2019 <https://commission.europa.eu/document/94f2c3a0-6be1-41c6-ba21-3a67ef7d3bee_en> (accessed 8 May 2024)

The Law Commission and The Scottish Law Commission, 'Unfair terms in contracts: Report on a reference under section 3(1)(e) of the Law Commissions Act 1965' (2005) SE/2005/13 <https://www.lawcom.gov.uk/project/unfair-terms-in-contracts/> (accessed 8 May 2024)

The Law Commission and The Scottish Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) <https://www.lawcom.gov.uk/project/unfair-terms-in-consumer-contracts/> (accessed 8 May 2024)

Case law index

European law

Court of Justice of the European Union

CJEU 18 October 1990, Case C-297/88 *Dzodzi v Belgian State* ECLI:EU:C:1990:360
CJEU 16 July 1998, Case C-210/96 Gut Springenheide ECLI:EU:C:1998:369
CJEU 10 May 2001, Case C-144/99 *Commission v The Netherlands* ECLI:EU:C:2001:257
CJEU 9 September 2004, Case C-70/03 *Commission v Spain* ECLI:EU:C:2004:505
CJEU 10 April 2008, Case C-412/06 *Hamilton* ECLI:EU:C:2008:215
CJEU 3 June 2010, Case C-484/08 *Caja de Ahorros* ECLI:EU:C:2010:309
CJEU 16 November 2010, Case C-76/10 *Pohotovosť* ECLI:EU:C:2010:685
CJEU 15 March 2012, Case C-453/10 *Pereničová and Perenič* ECLI:EU:C:2012:144
CJEU 26 April 2012, Case C-472/10 *Invitel* ECLI:EU:C:2012:242
CJEU 14 June 2012, Case C-618/10 *Banco Español de Crédito* ECLI:EU:C:2012:349
CJEU 5 July 2012, Case C-49/11 *Content Services* ECLI:EU:C:2012:419
CJEU 19 July 2012, Case C-112/11 *ebookers.com* ECLI:EU:C:2012:487
CJEU 21 March 2013, Case C-92/11 *RWE Vertrieb* ECLI:EU:C:2013:180
CJEU 16 January 2014, Case C-226/12 *Constructora Principado* ECLI:EU:C:2014:10
CJEU 27 March 2014, Case C-565/12 *LCL Le Crédit Lyonnais* ECLI:EU:C:2014:190
CJEU 30 April 2014, Case C-26/13 *Kásler* ECLI:EU:C:2014:282
CJEU 18 December 2014, Case C-449/13 *CA Consumer Finance SA* ECLI:EU:C:2014:2464
CJEU 21 January 2015, Joined cases C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco en Caixabank* ECLI:EU:C:2015:21
CJEU 26 February 2015, Case C-143/13 *Matei* ECLI:EU:C:2015:127
CJEU 23 April 2015, Case C-96/14 *Van Hove* ECLI:EU:C:2015:262
CJEU 11 June 2015, Case C-58/14 *Amazon EU* ECLI:EU:C:2015:385
CJEU 9 July 2015, Case C-348/14 *Bucura* ECLI:EU:C:2015:447
CJEU 21 April 2016, Case C-377/14 *Radlinger and Radlingerová* ECLI:EU:C:2016:283
CJEU 28 July 2016, Case C-191/15 *Verein für Konsumenteninformation/Amazon* EU:C:2016:612
CJEU 9 November 2016, Case C-42/15 *Home Credit Slovakia* ECLI:EU:C:2016:842
CJEU 21 December 2016, Case C-154/15 *Gutiérrez Naranjo* ECLI:EU:C:2016:980
CJEU 26 January 2017, Case C-421/14 *Banco Primus* ECLI:EU:C:2017:60
CJEU 20 September 2017, Case C-186/16 *Andriciuc* ECLI:EU:C:2017:703
CJEU 22 February 2018, Case C-126/17 *ERSTE Bank Hungary/Orsolya Czakó* ECLI:EU:C:2018:107
CJEU 7 August 2018, Joined Cases C-96/16 and C-94/17 *Banco Santander* ECLI:EU:C:2018:643
CJEU 20 September 2018, Case C-448/17 *EOS KSI Slovensko* ECLI:EU:C:2018:745
CJEU 20 September 2018, Case C-51/17 *OTP Bank and OTP Faktoring* ECLI:EU:C:2018:750
CJEU 8 November 2018, Case C-227/18 *VE* ECLI:EU:C:2018:891
CJEU 23 January 2019, Case C-430/17 *Walbusch Walter Busch* ECLI:EU:C:2019:47
CJEU 26 March 2019, Joined Cases C-70/17 and C-179/17 *Abanca Corporación Bancaria* ECLI:EU:C:2019:250
CJEU 5 June 2019, Case C-38/17 *GT* ECLI:EU:C:2019:461
CJEU 6 June 2019, Case C-58/18 *Schyns* ECLI:EU:C:2019:467
CJEU 10 July 2019, Case C-649/17 *Amazon EU* ECLI:EU:C:2019:576
CJEU 19 September 2019, Case C-34/18 *Lovasné Tóth* ECLI:EU:C:2019:764
CJEU 3 October 2019, Case C-621/17 *Kiss and CIB Bank* ECLI:EU:C:2019:820
CJEU 3 October 2019, Case C-260/18 *Dziubak* ECLI:EU:C:2019:819
CJEU 19 December 2019, Joined Cases C-355/18, C-356/18 and C-479/18 *Rust-Hackner* ECLI:EU:C:2019:1123

CJEU 3 March 2020, Case C-125/18 *Gómez del Moral Guasch* ECLI:EU:C:2020:138
CJEU 26 March 2020, Case C-66/19 *Kreissparkasse Saarlouis* ECLI:EU:C:2020:242
CJEU 14 May 2020, Case C-266/19 *EIS* ECLI:EU:C:2020:384
CJEU 25 June 2020, Case C-380/19 *Bundesverband der Verbraucherzentralen und Verbraucherverbände* ECLI:EU:C:2020:498
CJEU 9 July 2020, Case C-452/18 *Ibercaja Banco* ECLI:EU:C:2020
CJEU 16 July 2020, Joined Cases C-224/19 and C-259/19 *Caixabank and Banco Bilbao Vizcaya Argentaria* ECLI:EU:C:2020:578
CJEU 3 September 2020, Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska* ECLI:EU:C:2020:631
CJEU 20 January 2021, Case C-269/19 Banca B. ECLI:EU:C:2020:954
CJEU 10 June 2021, Case C-609/19 *BNP Paribas Personal Finance* ECLI:EU:C:2021:469
CJEU 10 June 2021, Case C-776/19 *BNP Paribas Personal Finance* ECLI:EU:C:2021:470
CJEU 9 September 2021, Joined Cases C-33/20, C-155/20 and C-187/20 *Volkswagen Bank* ECLI:EU:C:2021:736
CJEU 17 November 2021, Case C-655/20 *Gómez del Moral Guasch II* ECLI:EU:C:2021:943
CJEU 18 November 2021, Case C-212/20 *A. S.A.* ECLI:EU:C:2021:934
CJEU 6 December 2021, Case C-670/20 *ERSTE Bank Hungary* ECLI:EU:C:2021:1002
CJEU 24 February 2022, Case C-536/20 *Tiketa* ECLI:EU:C:2022:112
CJEU 31 March 2022, Case C-472/20 *Lombard Lízing* ECLI:EU:C:2022:242
CJEU 7 April 2022, Case C-249/21 *Fuhrmann-2* ECLI:EU:C:2022:269
CJEU 5 May 2022, Case C-179/21 *Victorinox* ECLI:EU:C:2022:353
CJEU 5 May 2022, Case C-567/20 *Zagrebačka banka* ECLI:EU:C:2022:76
CJEU 12 January 2023, Case C-395/21 *D.V. (Honoraires d'avocat - Principe du tarif horaire)* ECLI:EU:C:2023
CJEU 16 March 2023, Case C-565/21 *Caixabank* ECLI:EU:C:2023:212
CJEU 16 March 2023, Case C-6/22 *M.B. and Others* ECLI:EU:C:2023:216
CJEU 20 April 2023, Case C-263/22 *Ocidental - Companhia Portuguesa de Seguros de Vida* ECLI:EU:C:2023:311
CJEU 17 May 2023, Case C-97/22 *DC* ECLI:EU:C:2023:413
CJEU 13 July 2023, Case C-265/22 *Banco Santander* ECLI:EU:C:2023:578
CJEU 21 September 2023, Case C-139/22 *mBank* ECLI:EU:C:2023:692
CJEU 5 October 2023, Case C-565/22 *Sofatutor* ECLI:EU:C:2023:735
CJEU 7 December 2023, Case C-140/22 *mBank* ECLI:EU:C:2023:965

Opinions of Advocates General

Opinion of AG Hogan of 21 March 2019, Case C-34/18 *Lovasné Tóth* ECLI:EU:C:2019:245
Opinion of AG Hogan of 15 May 2019, Case C-621/17 *Kiss and CIB Bank* ECLI:EU:C:2019:411
Opinion of AG Trstenjak of 13 September 2012, Case C-92/11 *RWE Vertrieb* ECLI:EU:C:2012:566

German law

Federal Court of Justice

Bundesgerichtshof, judgement of 11 June 1980, VIII ZR 174/79, NJW 1980, 2518
Bundesgerichtshof, judgement of 24 September 1980, VIII ZR 273/79, NJW 1981, 117
Bundesgerichtshof, judgement of 29 September 1983, VII ZR 225/82, NJW 1984, 171
Bundesgerichtshof, judgement of 3 February 1986, II ZR 201/85, NJW-RR 1986, 1311
Bundesgerichtshof, judgement of 14 January 1987, IVa ZR 130/85, NJW 1987, 2431
Bundesgerichtshof, judgement of 23 March 1988, VIII ZR 58/87, NJW 1988, 1726
Bundesgerichtshof, judgement of 24 November 1988, III ZR 188/87, NJW 1989, 222
Bundesgerichtshof, judgement of 17 January 1989, XI ZR 54/88, NJW 1989, 582
Bundesgerichtshof, judgement of 11 February 1992, XI ZR 151/91, NJW 1992, 1097
Bundesgerichtshof, judgement of 9 May 2001, IV ZR 138/99, NJW 2001, 2012

Bundesgerichtshof, judgement of 21 June 2001, IX ZR 69/00, NJW-RR 2002, 485
Bundesgerichtshof, judgement of 4 July 2002, I ZR 55/00, BKR 2002, 872
Bundesgerichtshof, judgement of 4 July 2002, I ZR 81/00, BeckRS 2002, 7277
Bundesgerichtshof, judgement of 23 June 2004, IV ZR 130/03, NJW 2004, 2589
Bundesgerichtshof, judgement of 20 July 2005, VIII ZR 121/04, NJW-RR 2005, 1496
Bundesgerichtshof, judgement of 12 October 2005, IV ZR 162/03, NJW 2001, 292
Bundesgerichtshof, judgement of 26 October 2005, VIII ZR 48/05, NJW 2006, 996
Bundesgerichtshof, judgement of 20 July 2006, I ZR 228/03, MMR 2007, 40
Bundesgerichtshof, judgement of 13 December 2006, VIII ZR 25/06, NJW 2007, 1054
Bundesgerichtshof, judgement of 13 June 2007, VIII ZR 36/06, NJW 2007, 2540
Bundesgerichtshof, judgement of 11 October 2007, III ZR 63/07, NJW-RR 2008, 134
Bundesgerichtshof, judgement of 12 October 2007, V ZR 283/06, NJW-RR 2008, 251
Bundesgerichtshof, judgement of 29 April 2008, KZR 2/07 NJW 2008, 2172
Bundesgerichtshof, judgement of 13 January 2009, XI ZR 118/08, NJW-RR 2009, 709
Bundesgerichtshof, judgement of 10 March 2009, XI ZR 33/08, NJW 2009, 3572
Bundesgerichtshof, judgement of 23 June 2009, XI ZR 156/08, NJW 2009, 3020, 785
Bundesgerichtshof, judgement of 9 December 2009, VIII ZR 219/08, NJW 2010, 989
Bundesgerichtshof, judgement of 1 December 2010, VIII ZR 82/10, NJW 2011, 1061
Bundesgerichtshof, judgement of 2 February 2011, VIII ZR 103/10, NJW-RR 2011
Bundesgerichtshof, judgement of 8 May 2013, IV ZR 84/12, NJW 2013, 2739
Bundesgerichtshof, judgement of 14 January 2014, XI ZR 355/12, NJW 2014, 924
Bundesgerichtshof, judgement of 12 March 2014, IV ZR 295/13, NJW 2014, 1658
Bundesgerichtshof, judgement of 28 May 2014, VIII ZR 179/13, NJW 2014, 802
Bundesgerichtshof, judgement of 16 July 2014, IV ZR 73/13, NJW 2014, 2723
Bundesgerichtshof, judgement of 10 September 2014, XII ZR 56/11, NJW 2014, 830
Bundesgerichtshof, judgement of 9 October 2014, III ZR 33/14, NJW 2015, 152
Bundesgerichtshof, judgement of 18 March 2015, VIII ZR 185/14, NJW 2015, 1594
Bundesgerichtshof, judgement of 29 April 2015, VIII ZR 104/14, NJW 2015, 2244
Bundesgerichtshof, judgement of 25 November 2015, VIII ZR 360/14, NJW 2016, 936
Bundesgerichtshof, judgement of 9 December 2015, VIII ZR 349/14, NJW 2016, 2101
Bundesgerichtshof, judgement of 31 December 2015, VII ZR 100/15, NJW 2016, 401
Bundesgerichtshof, judgement of 13 January 2016, IV ZR 38/14, NJW 2016, 1646
Bundesgerichtshof, judgement of 10 February 2016, VIII ZR 137/15, NJW 2016, 1308
Bundesgerichtshof, judgement of 23 February 2016, XI ZR 101/15, NJW 2016, 1881
Bundesgerichtshof, judgement of 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440
Bundesgerichtshof, judgement of 25 February 2016, VII ZR 156/13, NJW 2016, 1575
Bundesgerichtshof, judgement of 13 April 2016, XII ZR 146/14, NJW 2016, 2489
Bundesgerichtshof, judgement of 6 July 2016, IV ZR 44/15, NJW 2017, 388
Bundesgerichtshof, judgement of 12 July 2016, XI ZR 564/15, BKR 2016, 463
Bundesgerichtshof, judgement of 21 September 2016, VIII ZR 27/16, NJW 2017, 325
Bundesgerichtshof, judgement of 22 November 2016, XI ZR 434/15, BeckRS 2016, 115038
Bundesgerichtshof, judgement of 12 January 2017, I ZR 253/14, GRUR 2017, 402
Bundesgerichtshof, judgement of 15 February 2017, IV ZR 91/16, NJW 2017, 2346
Bundesgerichtshof, judgement of 13 September 2017, IV ZR 302/16, NJW 2017, 3711
Bundesgerichtshof, judgement of 5 October 2017, I ZR 163/16, GRUR 2018, 100
Bundesgerichtshof, judgement of 5 December 2017, XI ZR 253/15, BeckRS 2017, 140388
Bundesgerichtshof, judgement of 14 March 2018, XII ZR 31/17, NJW 2018, 1811
Bundesgerichtshof, judgement of 22 March 2018, IX ZR 99/17, NJW 2018, 2193
Bundesgerichtshof, judgement of 4 April 2018, IV ZR 104/17, NJW 2018, 1544
Bundesgerichtshof, judgement of 7 February 2019, III ZR 38/18, NJW-RR 2019, 942

Bundesgerichtshof, judgement of 26 June 2019, VIII ZR 95/18, NJOZ 2020, 300.
Bundesgerichtshof, judgement of 11 July 2019, VII ZR 266/17, NJW 2019, 2997
Bundesgerichtshof, judgement of 14 August 2019, IV ZR 279/17, NJW 2019, 3582
Bundesgerichtshof, judgement of 17 September 2019, XI ZR 662/18, BKR 2020, 33
Bundesgerichtshof, judgement of 5 November 2019, XI ZR 650/18, NJW 2020, 461
Bundesgerichtshof, judgement of 20 November 2019, IV ZR 159/18, NJW-RR 2020, 92
Bundesgerichtshof, judgement of 10 June 2020, VIII ZR 289/19, NJOZ 2021, 375
Bundesgerichtshof, judgement of 29 July 2021 III ZR 179/20, NJW 2021, 3179
Bundesgerichtshof, judgement of 8 September 2021, VIII ZR 97/19, BeckRS 2021, 30598

Higher Regional Courts

Oberlandesgericht Brandenburg, judgement of 30 October 2019, 7 U 25/18, NJW-RR 2020, 16
Oberlandesgericht Bremen, judgement of 18 March 1991, 6 U 4/91 NJW 1991, 1837
Oberlandesgericht Celle, judgement of 2 December 2015, 3 U 108/15 BeckRS 2016, 2741
Oberlandesgericht Frankfurt, judgement of 24 May 2019, 10 U 5/18, BeckRS 2019, 12877
Oberlandesgericht Hamburg, judgement of 13 June 2002, 3 U 168/00, MMR 2002, 677
Oberlandesgericht Hamm, judgement of 14 April 2005, 4 U 2/05, NJW 2005, 2319
Oberlandesgericht Hamm, judgement of 15 May 2014, 22 U 60/13, NJW 2014, 3659
Oberlandesgericht Hamm, judgement of 14 March 2017, 4 W 34/16, 4 W35/16, GRUR-RR 2017, 359
Oberlandesgericht Karlsruhe, judgement of 27 March 2002, 6 U 200/01, MMR 2002, 618
Oberlandesgericht Karlsruhe, judgement of 11 March 2016, 8 U 138/14, NJW 2016, 2670
Oberlandesgericht Karlsruhe, judgement of 28 February 2019, 6 W 81/18, MMR 2020, 52
Oberlandesgericht Köln, judgement of 14 February 2014, 6 U 120/13, MMR 2015, 393
Oberlandesgericht Köln, judgement of 3 February 2016, 6 U 39/15, MMR 2016, 602
Oberlandesgericht Köln, judgement of 7 October 2016, 6 U 48/16, GRUR-RR 2017, 108
Oberlandesgericht Köln, judgement of 3 July 2017, 12 U 86/16, BeckRS 2017, 127239
Oberlandesgericht Köln, judgement of 19 February 2020, 6 U 184/19, MMR 2020, 710
Oberlandesgericht München, judgement of 30 November 2016, 15 U 1298/16, NJW 2017, 2127
Oberlandesgericht München, judgement of 17 May 2018, 6 U 3815/17, GRUR-RR 2019, 31
Oberlandesgericht München, judgement of 10 January 2019, 29 U 1091/18, MMR 2019, 532
Oberlandesgericht Nürnberg, judgement of 3 March 2021, 13 U 2366/20, BeckRS 2021, 11218
Oberlandesgericht Rostock, judgement of 29 May 2006, 3 U 167/05, NJW 2006, 3217
Oberlandesgericht Saarbrücken, judgement of 6 August 2015, 4 U 156/14, NJW-RR 2016, 630
Oberlandesgericht Schleswig, judgement of 27 March 1995, 4 RE-Miet 1/93, NJW 1995, 2858
Oberlandesgericht Stuttgart, judgement of 24 April 2014, 2 U 98/13, BeckRS 2014, 10515
Oberlandesgericht Stuttgart, judgement of 5 February 2015, 2 U 81/14, BeckRS 2016, 3090
Oberlandesgericht Stuttgart, judgement of 24 May 2016, 6 U 222/15, BeckRS 2016, 105816
Oberlandesgericht Stuttgart, judgement of 27 March 2019, 4 U 184/18, BeckRS 2019, 4577

Regional Courts

Landgericht Berlin, judgement of 17 July 2013, 97 O 5/13, MMR 2013, 780
Landgericht Berlin, judgement of 30 June 2016, 52 O 340/15, MMR 2017, 50
Landgericht Berlin, judgement of 31 January 2019, 16 O 284/17, BeckRS 2019, 60030
Landgericht Leipzig, judgement of 26 July 2013, 08 O 3495/12, BeckRS 2013, 13273
Landgericht München, judgement of 1 March 2018, 12 O 730/17, BeckRS 2018, 2468
Landgericht Ravensburg, judgement of 5 March 2020, 2 O 328/19, 2 O 280/19, 2 O 334/19, BeckRS 2020, 3265
Landgericht Ravensburg, judgement of 31 March 2020, 2 O 294/19, 2 O 249/19, VuR 2020, 277
Landgericht Ravensburg, judgement of 7 January 2020, 2 O 315/19, BKR 2020, 151
Landgericht Saarbrücken, judgement of 17 January 2019, 1 O 164/18, BKR 2019, 190
Landgericht Stuttgart, judgement of 26 May 2014, 44 O 7/14 KfH, BeckRS 2016, 6486

District Court

Amtsgericht Bottrop, judgement of 24 March 2021, 12 C 158/19, BeckRS 2021, 51045

Croatian law

Constitutional Court of the Republic of Croatia

Constitutional Court of the Republic of Croatia, decision of 4 April 2017, U-I-3685/2015
Constitutional Court of the Republic of Croatia, judgement of 11 October 2018, U-III/5124/2017
Constitutional Court of the Republic of Croatia, judgement of 11 October 2018, U-III/5087/2017
Constitutional Court of the Republic of Croatia, judgement of 13 December 2016, U-III-2521/2015
*Supreme Court of the Republic of Croatia*Supreme Court of the Republic of Croatia, judgement of 9 April 2015, Revt-249/14
Supreme Court of the Republic of Croatia, decision of 3 October 2017, Revt-575/16
*Commercial Courts*Commercial Court of Zagreb, judgement of 4 July 2013, P-1401/2012
High Commercial Court of the Republic of Croatia, judgement of 14 June 2018, Pž-6632/17
High Commercial Court of the Republic of Croatia, judgement of 13 June 2014, Pž-7129/13

Regional Courts

Regional Court of Osijek, judgement of 9 November 2018, Gž-1832/2017
Regional Court of Slavonski Brod, judgement of 26 February 2018, Gž-59/2018
Regional Court of Varaždin, judgement of 9 February 2017, Gž-874/16
Regional Court of Varaždin, judgement of 19 January 2018, Gž-794/2018
Regional Court of Varaždin, judgement of 6 March 2018, Gž-71/2017
Regional Court of Zadar, judgement of 23 March 2016, Gž-152/16
Regional Court of Zagreb, judgement of 23 August 2016, Gž-5480/16
Regional Court of Zagreb, judgement of 6 September 2016, Gž-4854/16
Regional Court of Zagreb, judgement of 21 February 2017, Gž-6858/2015

Municipal Courts

Municipal Civil Court in Zagreb, judgement of 3 March 2017, Povrv-14598/15
Municipal Civil Court of Zagreb, judgement of 28 June 2017, P-5009/15
Municipal Civil Court of Zagreb, judgement of 13 September 2017, Povrv-16916/15
Municipal Civil Court of Zagreb, judgement of 27 September 2017, P-7372/15
Municipal Court of Rijeka, judgement of 28 September 2017, P-123/2015
Municipal Court of Sisak, judgement of 3 March 2017, P-371/15
Municipal Court of Sisak, judgement of 11 August 2017, P-357/15
Municipal Court of Varaždin, judgement of 12 July 2016, P-543/15
Municipal Court of Velika Gorica, judgement of 22 April 2016, Povrv-1675/15
Municipal Court of Virovitica, judgement of 2 December 2016, P-261/16
Municipal Court of Virovitica, judgement of 30 June 2017, Povrv-133/17
Municipal Court of Zadar, judgement of 3 December 2015, P-233/15
Municipal Court of Zagreb, judgement of 21 October 2016, P-4459/15
Municipal Court of Zagreb, judgement of 25 August 2017, P-4741/16
Municipal Court of Zagreb, judgement of 29 September 2017, P-7372/15
Municipal Court of Zagreb, judgement of 21 November 2017, P-7241/15

Administrative Court

Administrative Court of Split, judgement of 31 August 2018, Usl-377/17

English law

Chancery Division District Registry (Birmingham), judgment of 27 May 2011, *The Office of Fair Trading v Ashbourne Management Services Ltd and Others* [2011] C.T.L.C. 237

Court of Appeal (Civil Division), judgment of 18 December 1970, *Thornton v Shoe Lane Parking Ltd* [1971] R.T.R. 79

Court of Appeal (Civil Division), judgement of 12 November 1987, *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433

Court of Appeal (Civil Division), judgment of 20 May 1999, *Overseas Medical Supplies Ltd v Orient Transport Services Ltd*. [1999] C.L.C. 1243

Court of Appeal (Civil Division), judgement of 26 February 2009, *Office of Fair Trading v Abbey National plc and others* [2009] 2 W.L.R. 1286

Court of Appeal (Civil Division), judgement of 2 April 2009, *Office of Fair Trading v Foxtons Ltd* [2010] 1 W.L.R. 663

Court of Appeal (Civil Division), judgement of 12 October 2011, *Harrison v Black Horse Ltd* [2011] C.T.L.C. 105

Court of Appeal, judgement of 25 April 1877, *Parker v South Eastern Railway Co* (1877) 2 C.P.D. 416

Court of Appeal, judgement of 9 March 1927, *Gordon Alison & Co Ltd v Wallsend Slipway Co Ltd* (1927) 27 Ll. L. Rep. 285

Court of Appeal, judgement of 20 March 1956, *J Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461

High Court of Justice (Chancery Division), judgement of 10 July 2009, *The Office of Fair Trading v Foxtons Limited* [2009] C.T.L.C. 188

House of Lords (Scotland), judgment of 4 June 1875, *Robert Henderson and Others v Charles Henry Stevenson* (1875) 2 R. (H.L.) 71

House of Lords, judgement of 5 November 1923, *Ernest Beck & Co v K Szymanowski & Co* [1924] A.C. 43

House of Lords, judgement of 25 January 1962, *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600

House of Lords, judgement of 30 June 1983, *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803

House of Lords, judgement of 2 May 1985, *Street v Mountford* [1985] A.C. 809

House of Lords, judgement of 25 October 2001, *Director General of Fair Trading v First National Bank Plc* [2002] 1 A.C. 481

King's Bench Division (Commercial Court), judgement of 29 July 2023, *Eternity Sky Investments Ltd v Zhang* [2023] EWHC 1964 (Comm)

King's Bench Division, judgement of 20 February 1934, *L'Estrange v F Graucob Ltd* [1934] 2 K.B. 394

Privy Council (Canada), judgement of 21 January 1952, *Canada Steamship Lines Ltd v King, The* [1952] A.C. 192

Queen's Bench Division (Administrative Court), judgement of 29 March 2021, *R. (on the application of Donegan) v Financial Services Compensation Scheme Ltd* [2021] EWHC 760 (Admin)

Queen's Bench Division (Commercial Court), judgement of 18 May 2012, *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm)

Queen's Bench Division (Commercial Court), judgement of 24 April 2008, *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] C.T.L.C. 1

Queen's Bench Division (Technology & Construction Court), judgement of 15 September 2021, *CC Construction Ltd v Mincione* [2021] EWHC 2502 (TCC)

Queen's Bench Division District Registry (Manchester), judgement of 2 March 2012, *Overy v Paypal (Europe) Ltd* [2012] EWHC2659 (QB)

Queen's Bench Division, judgement of 29 April 2022, *Longley v PPB Entertainment Ltd* [2022] EWHC 977 (QB)

Supreme Court, judgement of 25 November 2009, *Office of Fair Trading v Abbey National plc and others* [2009] 3 W.L.R. 1215

Supreme Court, judgment of 12 November 2014, *Plevin v Paragon Personal Finance Ltd and another* [2014] 1 W.L.R. 4222

Supreme Court, judgement of 4 November 2015, *El Makdessi v Cavendish Square Holdings BV* [2016] A.C. 1172

Summary

"Through a Magnifying Glass: A Study of the Concept of Transparency in European Consumer Contract Law"

Transparency has emerged as a fundamental concept guiding the functioning of society across diverse sectors such as law, governance, policy, and business. Nevertheless, it remains a concept that is often under-analysed and lacks a clear definition. In the realm of EU consumer law, transparency is typically not defined independently of the trader's obligation to furnish consumers with information. In contractual relationships, consumers are usually perceived as the weaker party, lacking the resources to independently gather necessary information. Thus, EU consumer law mandates that traders provide consumers with detailed information about their products and services. However, despite traders' comprehensive disclosure obligations, behavioural studies indicate that consumers frequently fail to read or understand contract terms. This problem is exacerbated in the online realm, where consumers must navigate numerous disclosures and assess the quality of their intended purchases without direct interaction with traders.

Despite criticism from behavioural science, which challenges the assumption that consumers are rational market actors driven by information, the primary objective of transparency within EU consumer law is to empower consumers to select appropriate, if not optimal, goods and services available in the EU market. EU consumer law not only mandates traders to provide consumers with information but also requires that this information meets specific quality standards. This includes various transparency requirements such as plainness, intelligibility, legibility, clarity, comprehensibility, conciseness, and prominence. Additionally, EU consumer law sometimes standardises the format of mandatory consumer information or imposes specific design requirements, all aimed at enhancing the clarity and comparability of the provided information. However, despite these efforts, EU consumer law often lacks sufficient guidance on how to interpret and apply these requirements.

This study explores the concept of transparency in EU consumer law by analysing transparency, standardisation, and design requirements. This approach facilitates a clear differentiation between the mere provision of mandatory information and its transparent presentation to consumers. Unlike information requirements, which specify *what* traders need to offer consumers, these requirements dictate *how* this information should be presented. Many existing studies on transparency in EU consumer law do not (sufficiently) distinguish between the content of mandatory consumer information and its presentation. Exceptions in this regard are studies that discuss the concept of transparency under the UCTD, as well as more recent research exploring ways to enhance the transparency of information mandated by EU consumer law.

My thesis aims to bridge the gap in literature by offering a more concrete and comprehensive account of the concept of transparency in EU consumer law. The analysis encompasses transparency within the UCTD and extends to other directives, specifically the CCD and the CRD. In addition to exploring the European perspective on information transparency, this research investigates transparency provisions in national laws implementing these directives within German, Croatian and English law. By examining transparency across multiple directives and legal systems, this thesis seeks to provide an in-depth understanding of the concept within EU consumer law.

My research identifies three main problems in the interpretation and assessment of transparency of consumer information under the UCTD, the CCD and the CRD. In response to these problems, I have formulated three recommendations on how to address them.

Problem 1: There is a discrepancy between the objectives attributed to transparency and its interpretation and assessment in practice.

My analysis underscores the ambitious goals set by the UCTD, CCD, and CRD regarding transparency of consumer information. Specifically, transparency is seen as instrumental in empowering consumers to make well-informed decisions. These directives envision consumers utilising available information about goods and services to compare, conclude, and withdraw from contracts. This objective of fostering informed consumer choice is shared across German, English, and Croatian legal systems.

Furthermore, in addition to facilitating consumer choice, the CCD and CRD introduce standardisation requirements aimed at enhancing legal certainty. With the aim of promoting cross-border trade within the EU, particularly in the online domain, these directives seek to standardise consumer information disclosure across Member States. Standardising the presentation of information not only helps traders reduce costs but also enhances the comparability of their offers for consumers. Outside of EU law, only German law explicitly recognises legal certainty as an objective of transparency.

To achieve these ambitious objectives, a dual assessment of transparency is necessary. This entails considering both the formal aspect, such as the accessibility and readability of mandatory consumer information, as well as the substantive aspect, which involves the actual comprehensibility of the information provided. However, my analysis indicates that across these four legal systems, the interpretation and evaluation of transparency often lack this dual assessment. Even when courts and enforcement authorities acknowledge transparency as comprising both formal and substantive elements, they encounter difficulties in implementing this dual assessment in practice.

In addition, to prevent these objectives from becoming a dead letter, it is crucial to establish clear and effective consequences for breaches of transparency

obligations. My analysis reveals shortcomings in how the UCTD, CCD, and CRD, as well as national laws implementing them, address contractual consequences for breaches of consumer information transparency. In cases where such consequences are assigned to transparency breaches, their scope and application are not always clearly defined. Moreover, sector-specific directives like the CCD and CRD do not provide specific contractual consequences for transparency violations but rather outline consequences for breaches of information obligations. This creates uncertainty regarding the applicability of such consequences to cases involving transparency violations.

Recommendation: To ensure alignment between the objectives of transparency and its interpretation and assessment in practice, it is imperative to consistently conduct a dual transparency assessment and establish clear contractual consequences for breaches of transparency.

In my opinion, achieving a coherent and comprehensive interpretation of the transparency concept and realising its objectives require clarifying that transparency serves a dual function, protecting both the formal and substantive aspects of information transparency. Furthermore, it is essential to establish precise and effective consequences for transparency violations, thereby supporting the achievement of its objectives. To this end, it is necessary to clarify the scope and application of consequences specifically related to transparency and explicitly state that consequences applicable to breaches of information obligations also extend to breaches of transparency obligations. This should be done by the European legislator in order to prevent diverging national approaches.

Problem 2: There is a lack of a uniform transparency taxonomy across all examined jurisdictions

The UCTD, the CCD and the CRD impose various transparency, standardisation, and design requirements on consumer information. However, my analysis of transparency across these directives and the relevant national provisions implementing them, reveals the absence of a uniform approach to interpreting the meaning and scope of transparency requirements in practice, as well as assessing the transparency of consumer information. In essence, my research uncovers a lack of a uniform taxonomy of transparency. This lack of uniformity is evident not only when comparing the concept of transparency in selected national laws with EU law but also when examining its interpretation and evaluation within each jurisdiction under review.

My analysis indicates that despite some degree of convergence, particularly in the realm of unfair contract terms law, the legal systems I have studied demonstrate a significant level of divergence in interpreting and evaluating transparency. Even when similar factors are acknowledged as significant for assessing transparency,

different legal systems often attribute them to distinct transparency requirements. Additionally, although both EU and national laws include transparency requirements that could be considered linguistically synonymous, different authorities often interpret them differently across legal fields or fail to specify whether they are intended to have the same meaning. This lack of clarity and certainty regarding the content and application of transparency undermines its potential effectiveness as a tool for consumer protection.

Recommendation: To prevent diverging interpretations of transparency that could obscure its intended meaning, it is crucial to establish a uniform taxonomy of transparency.

Based on my research, I have concluded that two actions need to be taken to address the absence of a uniform transparency taxonomy in EU consumer law. Firstly, it is necessary to determine the content of the transparency concept. This can be accomplished by identifying which of the numerous transparency requirements outlined in the UCTD, the CCD, and the CRD encapsulate the essence of this concept. Secondly, the European legislature should refrain from adding new transparency requirements that prescribe how information should be designed but may require further interpretation. Instead, it should empower relevant European authorities to establish legally binding guidelines on the design of mandatory information, informed by insights from behavioural sciences.

Problem 3: Insufficient consideration is given to the influence of digitalisation on the concept of transparency.

The European legislature acknowledges that online consumers face additional disadvantages, such as an information deficit and the inability to physically inspect their orders. However, EU law fails to sufficiently address how digitalisation impacts the transparency of information provided to consumers, despite behavioural research identifying specific disclosure techniques that traders can employ to capture consumers' attention online. Additionally, the need for clear guidance on transparent disclosures may be even more pronounced online than offline. Behavioural studies suggest that consumers tend to read online information sparingly. Furthermore, online consumers must navigate multiple disclosures to complete a single transaction. In such scenarios, consumers typically prioritise primary transaction aspects, such as price and delivery terms, while overlooking others, such as data and privacy protection.

My analysis underscores the failure to adapt transparency tools, such as standardised consumer information forms, and the obligation to provide adequate explanations of consumer credit information to the online context, across all four jurisdictions under review. The European legislature also missed the opportunity to modernise these tools for the digital age during recent revisions to both the CCD and the CRD. Moreover, my research suggests that the four legal systems I examined

fail to adequately address the transparent design of the online environment, despite considering the impact of factors such as the arrangement of the ordering process, opt-outs, hyperlinks, font size, and colour on consumer information transparency. This is concerning, as studies indicate that online traders utilise behavioural insights to influence consumer emotions or behaviour, guiding them toward specific choices that may not always be responsible or necessary.

Recommendation: To enhance consumers' decision-making in the online environment, it is important to recognise the impact of digitalisation on transparency. This entails adjusting transparency tools for the online realm and implementing measures that ensure transparent design within this environment.

Legislation such as the DMFSD 2023 signals a positive shift in the approach to the design of online choice architecture. It mandates Member States to enact rules requiring financial service providers to transparently design their online interfaces. These rules should target market practices that hinder consumers from making informed decisions, such as highlighting specific choices and complicating the process of terminating a service. The DMFSD 2023 also empowers Member States to enforce stricter measures for regulating the design of the online environment for financial service providers. This creates an opportunity for Member States to implement diverse solutions aimed at promoting transparency in the online environment. To inspire Member States and promote harmonisation, relevant European authorities could draft guidelines regarding the transparent design of online interfaces based on behavioural research.

***

To conclude, this thesis underscores the potential for enhancing transparency of consumer information within the UCTD, the CCD, and the CRD to better achieve the goals of informed consumer choice and legal certainty. It proposes several improvements in this regard. These include re-conceptualising transparency to incorporate a dual transparency assessment and clarify the meaning of transparency and design requirements. Additionally, it advocates for implementing measures for transparent information design online, informed by behavioural research, to meet the needs of the digital era.

Samenvatting

"Door een vergrootglas: Een studie van het begrip transparantie in het Europese consumentencontractenrecht"

Transparantie is uitgegroeid tot een fundamenteel concept dat het functioneren van de samenleving in diverse sectoren zoals recht, bestuur, beleid en bedrijfsleven stuurt. Desondanks blijft het concept vaak onderbelicht en ontbreekt er een heldere definitie. In het EU-consumentenrecht wordt transparantie meestal niet los gezien van de verplichting van de handelaar om consumenten informatie te verstrekken. In contractuele relaties worden consumenten gezien als de zwakkere partij, die niet over de middelen beschikt om zelfstandig de nodige informatie te verzamelen. Daarom verplicht de EU-consumentenwetgeving handelaren om consumenten gedetailleerde informatie te geven over hun producten en diensten. Ondanks de uitgebreide informatieplicht van handelaren, blijkt uit gedragsstudies dat consumenten vaak contractvoorwaarden niet lezen of begrijpen. Dit probleem wordt nog verergerd in de onlinewereld, waar consumenten talrijke informatie moeten bestuderen en de kwaliteit van hun voorgenomen aankopen moeten beoordelen zonder directe interactie met handelaren.

Het primaire doel van transparantie binnen de EU-consumentenwetgeving is om consumenten in staat te stellen om geschikte, zo niet optimale, goederen en diensten te kiezen die beschikbaar zijn op de EU-markt. Dit ondanks kritiek vanuit de gedragswetenschap, die de veronderstelling aanvecht dat consumenten rationele marktdeelnemers zijn die zich laten leiden door informatie. De EU-consumentenwetgeving verplicht handelaren niet alleen om consumenten informatie te verstrekken, maar eist ook dat deze informatie aan specifieke kwaliteitsnormen voldoet. Dit omvat verschillende transparantievereisten zoals duidelijkheid, begrijpelijkheid, leesbaarheid, beknoptheid, en opmerkelijkheid. Daarnaast standaardiseert de EU-consumentenwetgeving soms de manier waarop consumenteninformatie moet worden weergegeven of legt specifieke ontwerpeisen op, met als doel om de duidelijkheid en vergelijkbaarheid van de informatie te verbeteren. Ondanks deze inspanningen ontbreekt het in de EU-consumentenwetgeving vaak aan voldoende richtsnoeren over hoe deze vereisten moeten worden geïnterpreteerd en toegepast.

Deze studie onderzoekt het begrip transparantie in het EU-consumentenrecht door transparantie-, standaardisatie- en ontwerpeisen te analyseren. Deze benadering maakt een duidelijk onderscheid mogelijk tussen het louter verstrekken van verplichte informatie en de transparante presentatie daarvan aan consumenten. In tegenstelling tot informatie-eisen, die specificeren welke informatie handelaren aan consumenten moeten geven, schrijven deze eisen voor hoe deze informatie moet worden gepresenteerd. Veel bestaande onderzoeken naar transparantie in het EU-consumentenrecht maken niet (voldoende) onderscheid tussen de inhoud van verplichte consumenteninformatie en de presentatie daarvan. Uitzonderingen

hierop zijn studies die het begrip transparantie onder de UCTD bespreken, evenals recenter onderzoek naar manieren om de transparantie van informatie die verplicht is onder de EU-consumentenwetgeving te verbeteren.

Mijn proefschrift wil deze leemte in de literatuur opvullen door een concretere en uitgebreidere weergave te geven van het begrip transparantie in het consumentenrecht van de EU. De analyse omvat transparantie binnen de UCTD en strekt zich uit tot andere richtlijnen, met name de CCD en de CRD. Naast de analyse van het Europese perspectief op informatietransparantie, bestudeert dit onderzoek transparantiebepalingen in nationale wetten die deze richtlijnen implementeren binnen de Duitse, Kroatische en Engelse wetgeving. Door transparantie in meerdere richtlijnen en rechtsstelsels onder de loep te nemen probeert dit proefschrift een diepgaand inzicht te geven in het concept binnen het consumentenrecht van de EU.

Mijn onderzoek identificeert drie belangrijke problemen bij de interpretatie en beoordeling van transparantie van consumenteninformatie onder de UCTD, de CCD en de CRD. In antwoord op deze problemen heb ik drie aanbevelingen geformuleerd over hoe ze kunnen worden aangepakt.

Probleem 1: Er is een discrepantie tussen de beoogde doelstellingen van transparantie en de interpretatie en beoordeling ervan in de praktijk.

Mijn analyse toont de ambitieuze doelen die de UCTD, CCD en CRD hebben gesteld met betrekking tot transparantie van consumenteninformatie. Transparantie wordt met name gezien als een middel om consumenten in staat te stellen weloverwogen beslissingen te nemen. Deze richtlijnen beogen dat consumenten de beschikbare informatie over goederen en diensten gebruiken om contracten te vergelijken, af te sluiten en te herroepen. Deze doelstelling om geïnformeerde consumentenkeuzes te bevorderen wordt gedeeld door de Duitse, Engelse en Kroatische rechtssystemen.

Bovendien introduceren de CCD en de CRD, naast het vergemakkelijken van de keuze van de consument, standaardisatievereisten die gericht zijn op het vergroten van de rechtszekerheid. Om grensoverschrijdende handel binnen de EU te bevorderen, met name in het online domein, proberen deze richtlijnen de opmaak van consumenteninformatie in alle lidstaten te standaardiseren. Het standaardiseren van de presentatie van informatie helpt handelaren niet alleen om kosten te besparen, maar vergroot ook de vergelijkbaarheid van hun aanbod voor consumenten. Buiten de EU-wetgeving erkent alleen de Duitse wet expliciet rechtszekerheid als een doel van transparantie.

Om deze ambitieuze doelstellingen te bereiken, is een tweeledige beoordeling van transparantie nodig. Dit houdt in dat zowel naar het formele aspect wordt gekeken, zoals de toegankelijkheid en leesbaarheid van verplichte consumenteninformatie, als naar het inhoudelijke aspect, waarbij het gaat om de begrijpelijkheid van de verstrekte informatie. Uit mijn analyse blijkt echter dat in de vier onderzochte rechtssystemen deze tweeledige beoordeling vaak ontbreekt bij de interpretatie en evaluatie van

transparantie. Zelfs als rechtbanken en toezichthouders erkennen dat transparantie zowel formele als inhoudelijke elementen bevat, ondervinden ze problemen om de tweeledige beoordeling in de praktijk te brengen.

Om te voorkomen dat deze doelstellingen een dode letter worden, is het belangrijk om duidelijke en effectieve consequenties vast te stellen voor overtredingen van transparantieverplichtingen. Mijn analyse onthult tekortkomingen in hoe de UCTD, CCD en CRD, en de nationale wetten die deze richtlijnen omzetten, contractuele consequenties verbinden aan overtredingen van de transparantieverplichtingen met betrekking tot consumenteninformatie. In de gevallen waarin dergelijke consequenties worden verbonden aan schendingen van de transparantie is de reikwijdte en toepassing ervan niet altijd duidelijk gedefinieerd. Bovendien voorzien sectorspecifieke richtlijnen zoals de CCD en de CRD niet in specifieke contractuele consequenties voor schendingen van de transparantie, maar schetsen ze eerder consequenties voor overtredingen van informatieverplichtingen. Dit schept onduidelijkheid over de toepasbaarheid van dergelijke consequenties op gevallen waarin sprake is van overtredingen van transparantieverplichtingen.

Aanbeveling: Om de doelstellingen van transparantie en de interpretatie en beoordeling ervan in de praktijk op elkaar af te stemmen, is het noodzakelijk om consequent een tweeledige beoordeling van transparantie uit te voeren en duidelijke contractuele consequenties vast te stellen voor schendingen van transparantie.

Om tot een coherente en alomvattende interpretatie van het begrip transparantie te komen en de doelstellingen ervan te verwezenlijken, moet worden verduidelijkt dat transparantie een tweeledige functie heeft. Dit betekent dat zowel de formele als de inhoudelijke aspecten van informatietransparantie moeten worden beschermd. Verder is het essentieel om precieze en effectieve consequenties vast te stellen voor schendingen van transparantie, om zo de naleving van de doelstellingen ervan te ondersteunen. Daartoe moeten de reikwijdte en de toepassing van de consequenties die specifiek verband houden met inbreuken op de transparantieverplichtingen worden verduidelijkt. Ook moet expliciet worden vastgesteld dat de consequenties die gelden voor overtredingen van informatieverplichtingen ook van toepassing zijn op overtredingen van transparantieverplichtingen. De Europese wetgever dient deze stappen te zetten om uiteenlopende nationale benaderingen te voorkomen.

Probleem 2: Er is een gebrek aan een uniform transparantieraamwerk in alle onderzochte rechtsgebieden.

De UCTD, de CCD en de CRD leggen verschillende transparantie-, standaardisatie- en ontwerpeisen op voor consumenteninformatie. Mijn analyse van het begrip transparantie aan de hand van deze richtlijnen en de nationale bepalingen die deze richtlijnen omzetten, laat echter zien dat er in de praktijk geen uniforme benadering

is voor het interpreteren van transparantievereisten en voor het beoordelen van de transparantie van consumenteninformatie. In wezen legt mijn onderzoek een gebrek aan een uniform raamwerk van transparantie bloot. Dit gebrek aan uniformiteit blijkt niet alleen uit een vergelijking van het begrip transparantie in de geselecteerde nationale wetten met de EU-wetgeving, maar ook uit een onderzoek naar de interpretatie en evaluatie ervan binnen elk onderzocht rechtssysteem.

Mijn analyse geeft aan dat ondanks een zekere mate van convergentie, met name op het gebied van oneerlijke bedingen in overeenkomsten, de rechtsstelsels die ik heb bestudeerd een aanzienlijke mate van divergentie vertonen bij het interpreteren en evalueren van transparantie. Zelfs als vergelijkbare factoren worden erkend als belangrijk voor het beoordelen van transparantie, worden ze in verschillende rechtsstelsels vaak toegekend aan andere transparantie-eisen. Zowel EU- als nationale wetten bevatten transparantievereisten die taalkundig als synoniem kunnen worden beschouwd. Diverse instanties interpreteren deze eisen echter vaak op een andere manier binnen verschillende rechtsgebieden of specificeren niet of ze bedoeld zijn om dezelfde betekenis te hebben. Dit gebrek aan duidelijkheid en zekerheid over de inhoud en toepassing van transparantie ondermijnt de potentiële effectiviteit ervan als instrument voor consumentenbescherming.

Aanbeveling: Om uiteenlopende interpretaties van transparantie te voorkomen die de bedoelde betekenis ervan zouden kunnen verhullen, is het belangrijk om een uniform raamwerk van transparantie op te stellen.

Op basis van mijn onderzoek heb ik geconcludeerd dat er twee acties moeten worden ondernomen om het ontbreken van een uniform raamwerk voor transparantie in het consumentenrecht van de EU aan te pakken. Ten eerste moet de inhoud van het begrip transparantie worden vastgesteld. Dit kan worden bereikt door vast te stellen welke van de vele transparantievereisten in de UCTD, de CCD en de CRD de kern van dit concept samenvatten. Ten tweede moet de Europese wetgever afzien van het toevoegen van nieuwe transparantie-eisen die nadere interpretatie behoeven. In plaats daarvan moet de wetgever de relevante Europese autoriteiten het mandaat geven om juridisch bindende richtsnoeren op te stellen voor het ontwerp van verplichte informatie. Deze richtsnoeren moeten gebaseerd zijn op inzichten uit de gedragswetenschap.

Probleem 3: Er wordt onvoldoende rekening gehouden met de invloed van digitalisering op het begrip transparantie.

De Europese wetgever erkent dat online consumenten extra nadelen ondervinden, zoals een gebrek aan informatie en de onmogelijkheid om hun bestellingen fysiek te controleren. De EU-wetgeving schiet echter tekort in het adequaat aanpakken van de invloed van digitalisering op de transparantie van informatie

die aan consumenten wordt verstrekt. Dit ondanks gedragsonderzoek dat wijst op specifieke manieren van informatie weergave die handelaren kunnen gebruiken om de aandacht van consumenten online te trekken. Bovendien is de behoefte aan duidelijke richtsnoeren voor transparante informatie online mogelijk nog wel groter dan offline. Uit gedragsonderzoek blijkt dat consumenten geneigd zijn om online informatie spaarzaam te lezen. Daarnaast moeten online consumenten veel informatie bestuderen om een enkele transactie te voltooien. In dergelijke scenario's geven consumenten meestal voorrang aan primaire transactieaspecten, zoals prijs en leveringsvoorwaarden, terwijl ze andere aspecten over het hoofd zien, zoals gegevens- en privacybescherming.

Mijn analyse geeft aan dat in alle vier de onderzochte rechtsgebieden transparantie-instrumenten, zoals de standaardisatie van de opmaak van consumenteninformatie en de verplichting om passende toelichting te geven op kredietinformatie, niet zijn aangepast aan de online context. De Europese wetgever heeft ook nagelaten deze instrumenten aan te passen aan het digitale tijdperk tijdens recente herzieningen van zowel de CCD als de CRD. Bovendien stelt mijn onderzoek dat de vier rechtssystemen die ik heb onderzocht onvoldoende aandacht besteden aan de transparante inrichting van de online omgeving. Dit ondanks het feit dat er soms aandacht wordt besteed aan hoe bepaalde factoren, zoals het ontwerp van het bestelproces, opt-outs, hyperlinks, lettergrootte en kleur, de transparantie van consumenteninformatie beïnvloeden. Dit is verontrustend, omdat onderzoeken laten zien dat online handelaren gedragsinzichten toepassen om de emoties of het gedrag van consumenten te sturen in de richting van keuzes die niet altijd verantwoord of noodzakelijk zijn.

Aanbeveling: Om de besluitvorming van consumenten in de online omgeving te ondersteunen, is het noodzakelijk om de impact van digitalisering op transparantie te erkennen. Dit betekent dat transparantie-instrumenten moeten worden aangepast voor de onlineomgeving en dat er maatregelen moeten worden aangenomen met betrekking tot de transparante inrichting van deze omgeving.

Wetgeving zoals de DMFSD 2023 signaleert een positieve verandering in de benadering van het ontwerp van online keuzeomgeving. Lidstaten krijgen het mandaat om regels op te stellen die financiële dienstverleners verplichten om hun online-interfaces op een transparante manier te ontwerpen. Deze regels moeten gericht zijn op marktpraktijken die consumenten verhinderen om geïnformeerde beslissingen te nemen, zoals het benadrukken van specifieke keuzes en het bemoeilijken van het proces om een dienst te beëindigen. De DMFSD 2023 geeft lidstaten ook de bevoegdheid om strengere maatregelen af te dwingen om de inrichting van de online omgeving voor financiële dienstverleners te reguleren. Hierdoor kunnen lidstaten verschillende oplossingen implementeren die gericht zijn op het vergroten van transparantie in de online omgeving. Om lidstaten te inspireren en harmonisatie te bevorderen bij het ontwerp van transparante online-interfaces,

kunnen relevante Europese autoriteiten hiervoor richtsnoeren opstellen op basis van gedragsonderzoek.

***

Dit proefschrift wijst op het potentieel om de transparantie van consumenteninformatie binnen de UCTD, CCD en CRD te verbeteren, waardoor het bevorderen van geïnformeerde consumentenkeuzes en het vergroten van rechtszekerheid gemakkelijker worden bereikt. In dit verband worden verschillende aanbevelingen voorgesteld. Deze omvatten het herdefiniëren van het begrip transparantie op een manier die een tweeledige beoordeling van transparantie waarborgt en de betekenis van transparantie- en ontwerpeisen verduidelijkt. Daarnaast wordt gepleit voor het implementeren van maatregelen voor de transparante inrichting van de online omgeving, gebaseerd op gedragsonderzoek, om tegemoet te komen aan de behoeften van het digitale tijdperk.

Acknowledgements

This thesis represents the result of a challenging yet rewarding journey, characterised by moments of excitement, learning, and personal growth, as well as periods of doubt and perseverance. Although the process of writing it often felt solitary, its completion would not have been possible without the guidance and support of many wonderful individuals.

First and foremost, I would like to express my deepest appreciation to my supervisors, Marco Loos and Joasia Luzak. Your unwavering support, insightful feedback, and constant encouragement have been invaluable throughout my PhD journey. During moments of uncertainty about completing this thesis, your confidence in me kept me motivated and focused, enabling me to successfully navigate this project to its conclusion. I am particularly grateful for the enriching experience of conducting my doctoral research within Joasia's international, interdisciplinary project, "*The ABC of Online Disclosure Duties: Towards a More Uniform Assessment of the Transparency of Consumer Information in Europe*." This opportunity enabled me to collaborate closely not only with my supervisors but also with Alexander Wulf and Ognyan Seizov, researchers from the Berlin University of Applied Sciences. Alex and Ognyan, your insights from economics and communication sciences significantly enhanced my research, and I thoroughly enjoyed our productive research meetings in Berlin. Thank you for your warm hospitality.

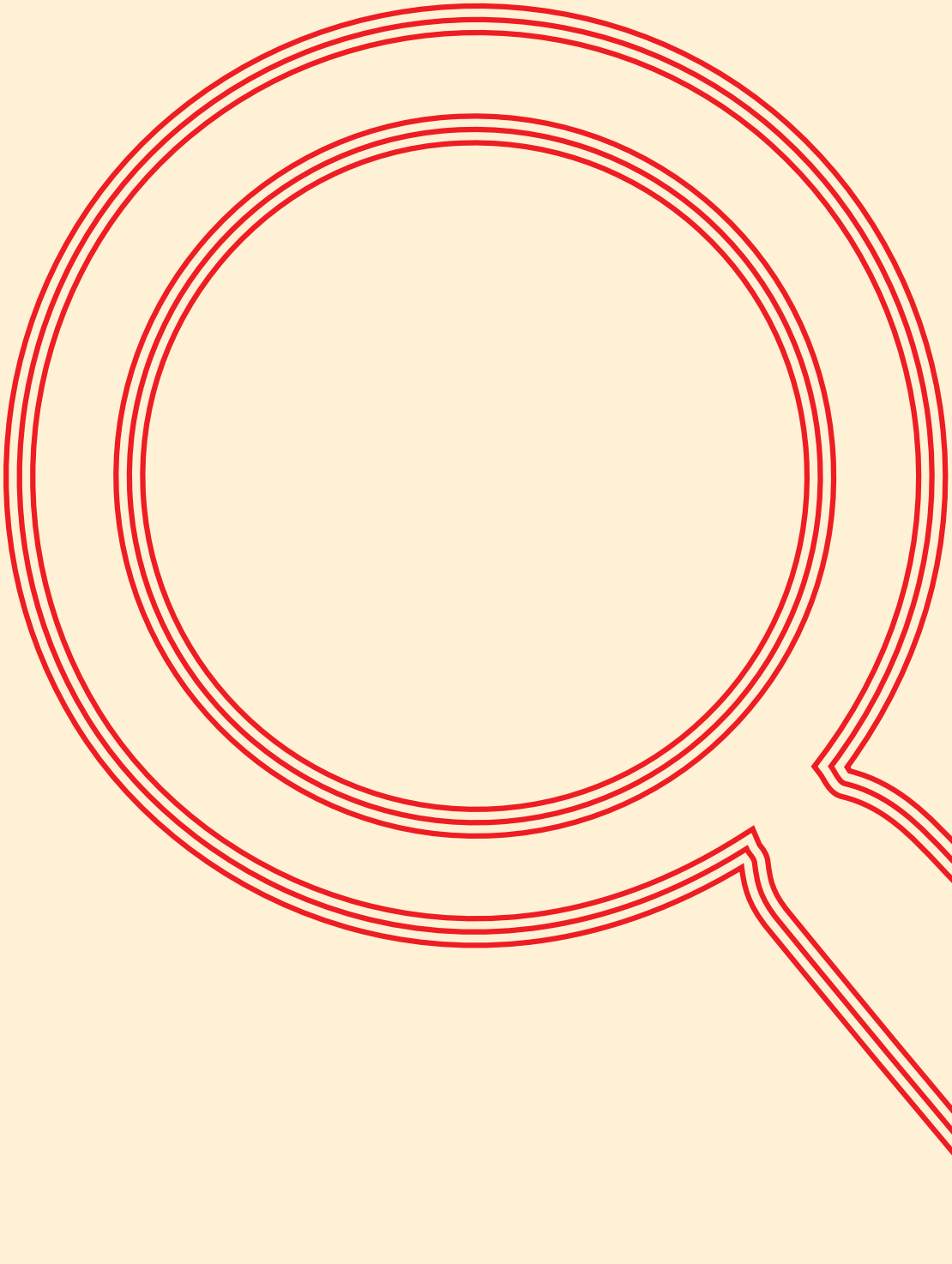
Furthermore, I am indebted to the members of my dissertation committee, Chantal Mak, Kati Cseres, Marieke Oderkerk, Peter Rott and Emilia Mišćenić, for generously devoting their time to reading and reviewing my dissertation. Given its length, it was certainly no light summer read. Besides your role as committee members, each of you was a source of support and inspiration during my academic journey, either as lecturers or as fellow academics with whom I could exchange views on various topics. Additionally, I am very thankful to Kati for facilitating my introduction to Joasia, which helped launch my academic career.

Special thanks go to my colleagues at the University of Amsterdam (UvA) and the Amsterdam Centre for Transformative Private Law (ACT). Many colleagues contributed to making my time at the UvA and ACT intellectually stimulating, but I would like to especially acknowledge Laura Burgers, Anna van Duin, Sacha Tamboer, Candida Leone, Karoline Rakneberg Haug, Betül Kas, Mirthe Jiwa, Irina Domurath, Aart Jonkers, Beatrijs van Schilfgaarde, and Marija Bartl, with whom I spent the most time and worked most closely. In addition to providing me with a safe, supportive, and collaborative research space, you have made my time in academia incredibly enjoyable. I will always cherish our borrels, teambuildings, dinners, and parties. I am also immensely grateful for my amazing *paranimf*, Eva Vermeulen. You have become a true friend and the best listening ear one could ever wish for.

During my time at the UvA, I had the privilege of participating in numerous inspiring conferences and events across the Netherlands, Germany, Switzerland, Brazil, and Croatia. Additionally, I spent a rewarding two-month research stay at the Department of European Public Law at the University of Zagreb. I am grateful to Tamara Ćapeta, Iris Goldner Lang, Antonija Ivančan, Davor Petrić, and Nika Bačić Selanec for welcoming me into their warm and friendly research community and for introducing me to the delightful dining experiences at Bistro Vještica. I also extend my gratitude to Marko Baretić, who generously discussed the Croatian context of my research and provided valuable input for the Croatian chapter of this dissertation. Your insightful comments broadened my understanding of key issues in Croatian law.

After four years at the UvA, I embarked on a new career path and joined the Dutch Authority for the Financial Markets (AFM), where I continue to work today. This transition required me to balance completing my dissertation with a full-time role at the AFM. This experience has deepened my understanding of topics central to my PhD research, such as consumer credit law and regulation, while also putting my time-management and organisational skills to the test. Balancing a demanding job with writing a PhD thesis proved more challenging than I initially anticipated. Therefore, I am immensely grateful to my former and current managers, Eva-Lotte Bakker and Teun van der Velden, for their support and flexibility in granting me the time I needed to focus on my PhD, even during periods when our team was understaffed. Your understanding and encouragement were crucial in completing this project. Additionally, I am thankful to my teammates for their support and willingness to take on extra responsibilities in my absence.

A heartfelt thank you goes to all my friends in Poreč, Zagreb and Amsterdam, who kept inquiring about the progress of my PhD even at times when I was hesitant to talk about it. Several of them deserve special recognition for their important role in this journey. Zoe, thank you for generously sharing your home with me for two months during my research stay in Zagreb. Despite Mišo's reluctance to give up his cushion for me, I felt extremely welcome and well taken care of. Mery and Tea, thank you for always remembering to ask how I was doing; your kind care for my wellbeing has not gone unnoticed. Petra, your suggestion that I take a sabbatical to complete my PhD and your critical questioning of my reasons why I could not do it, gave me the push I needed. Joško and Bojana, thank you for opening your home to me and hosting me for an entire month during my PhD sabbatical. You patiently listened to my frustrations and ensured I was well-fed. Annika, thank you for your enduring interest in my work and for taking me to Finland for an unforgettable workcation. Our paths crossed during a Dutch language course I took as part of my PhD, and our friendship is the best by-product of my PhD journey.

Finally, the deepest gratitude goes to my family. To my in-laws, Sonja, Arie, Marijn, and Daniël, thank you for being curious about my work and for listening to my stories about my PhD during every family reunion, holiday, and birthday. Your genuine appreciation of my work fuelled my determination to continue. To my

parents, Milena and Hari, thank you for your unconditional love and support, and for instilling in me from an early age the value of education and hard work. Dad, thank you for constantly reminding me that I can do this, even when I felt I could not. Mum, even though you are no longer here, thank you for teaching me all the skills I needed to be successful in life. You are and will always be my biggest inspiration. To my life partner, best friend and *paranimf*, Bart, thank you for your patience, love, and faith in me. You sacrificed holidays and dedicated countless hours to support me when I needed it most. You have truly been my anchor in the most challenging times.