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## EU Case Note

Candida Leone

# Transparency revisited – on the role of information in the recent case-law of the CJEU

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*The European Court of Justice has recently had the chance to bring the understanding of transparency requirements in the Unfair Terms Directive a few steps ahead. Through the Invitel and RWE cases, indeed, substantive improvements have been made in the understanding of what transparency entails, at least with regard to clauses allowing for changes in the price(s) to be paid by consumers in the context of long-term contracts. Even more interesting progress can be observed as to giving transparency a proper function in consumer relations. These developments, suggesting a potential shift towards an ‘ex post’ perspective on contractual information, seem to provide some good reasons to take transparency (more) seriously – even for those who are more critical of information requirements as a means of ‘helping’ consumers.*

## I Introduction

Over the last couple of years, the European Court of Justice has had the chance to bring the understanding of transparency requirements in the Unfair Terms Directive a few steps forward.<sup>1</sup> Already in the *Pereničová*<sup>2</sup> case, the Court has been

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<sup>1</sup> This can, of course, be seen as part of a more general enterprise, which will not be addressed in the present paper. Readers seeking a more comprehensive outlook will find a very recent one in N. Gavrilovic, ‘The Unfair Contract Terms Directive through the Practice of the Court of Justice of the European Union: Interpretation or Something More’ *European Review of Contract Law* 2013, 163.

<sup>2</sup> *Jana Pereničová and Vladislav Perenič v SOS financ spol s r o*, case 453/10, n y r.

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confronted with an intransparent term, without, however, giving interpreters too useful directions.<sup>3</sup> Shortly afterwards, the CJEU seems to have undertaken a more resolute effort.

Interesting new developments can be identified by taking a careful look at two cases decided in 2012 and 2013 respectively, *Invitel* and *RWE v Verbraucherzentrale*. The two cases have been commented upon by several authors, especially in national journals. In particular, great attention has been devoted to the relevance of *Invitel*<sup>4</sup> as to the potential *ultra partes* effects of a declaration of unfairness. Comments regarding *RWE*, on the other hand, have tended to concentrate on its significance for the gas sector.<sup>5</sup> The relevance of the two cases with reference to transparency has been noticed, but only to a certain extent, by Micklitz and Reich,<sup>6</sup> who however only considered this among other aspects in annotating the two decisions.

The present article attempts to show that the two cases deserve new attention when read in connection with each other. Through the two decisions, indeed, substantive improvements have been made in the understanding of what transparency concretely entails under Directive 93/13, at least with regard to clauses allowing for changes in the price(s) to be paid by consumers in the context of long-term contracts. Moreover, the Court's reasoning, when carefully read, also helps to clarify – or better, enrich – the *function* of transparency. The latter

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3 The decision does indicate that if a contract's term is found to be misleading under Unfair Commercial Practices legislation, this can be taken into account in assessing its potential unfairness, but doesn't seem to recognise transparency itself a determinant role in the assessment. See on the issue H.-W. Micklitz and N. Reich, "Und es bewegt sich doch?" – Neues zum Unionsrecht der missbräuchlichen Klauseln in Verbraucherverträgen' *Europäische Zeitschrift für Wirtschaftsrecht* 2012, 126 *et seq* (commenting AG Trstenjak's opinion in the case). The question then might be raised whether the present decisions to a certain extent also 'correct' *Pereničová* or whether they should be seen as exclusively limited to the specific domain in which they intervene.

4 See for instance G. Paisant, 'Effets à l'égard des tiers d'une action en cessation d'une clause abusive intentée au nom des consommateurs par un organisme désigné par la législation hongroise' *La Semaine Juridique – édition générale* [2012] n 19, 960 *et seq*; R. Mathiak, 'Verbraucherschutz: Rechtswirkung der Feststellung der Missbräuchlichkeit einer AGB-Klausel' *Europäische Zeitschrift für Wirtschaftsrecht* 2012, 788 *et seq*; but also B. Keirsblick, 'The erga omnes effect of the finding of an unfair contract term: Nezmeti' *Common Market Law Review* 2013, 1467 *et seq*; M.R. Mok, *Nederlandse Jurisprudentie* 2012/404.

5 See Lindacher, 'Missbrauchskontrolle von Preisanpassungsklauseln in Gaslieferungsverträgen ('RWE'-Vertrieb)' *Entscheidungen zum Wirtschaftsrecht* 2012, 233 *et seq*; T. Scannicchio, 'Clausole dei contratti standard di fornitura di gas e sindacato di abusività' *Giurisprudenza Italiana* 2013, 1008 *et seq*.

6 See for *Invitel* Micklitz and Reich, n 3 above, 126 *et seq*; on *RWE*, H.-W. Micklitz and N. Reich, 'Von der Klausel- zur Marktkontrolle' *Europäische Zeitschrift für Wirtschaftsrecht* 2013, 457 *et seq*.

appears to be geared not only towards the pre-contractual phase, but also to have something to contribute at a later stage, during the contract's execution. This development may provide some good reasons to take transparency (more) seriously – even for those who are more critical of information requirements as a means of 'helping' consumers.

## II The cases

Both *Invitel*<sup>7</sup> and *RWE*<sup>8</sup> concern long-term consumer contracts. Interestingly enough, they both arose out of collective enforcement proceedings; however, given the nature of the question posed, it seems that the collective nature of the proceedings did not affect the Court's reasoning (neither, likely, those of the involved national courts).<sup>9</sup>

In the *Invitel* case, a consumer protection body challenged a term imposed by a telecom company, allowing the company to charge extra costs to consumers who wanted to pay their bill through a money order. The term did not, however, specify how much would be charged, nor how the charges would be calculated. A collective action was brought to have the term declared unfair. In the course of the action, questions arose both as to the effects of the court's decision concerning the term's unfairness on the contracts which contained that term and as to the possibility of declaring the term unfair<sup>10</sup> under Directive 93/13.<sup>11</sup> The first question, which is only remotely connected to the vantage point taken here, will be left aside.<sup>12</sup>

<sup>7</sup> Case 472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, n y r.

<sup>8</sup> Case 92/11, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, n y r.

<sup>9</sup> Actually, in *RWE* the Court did consider that the final judgement, to be rendered by the national court, might have a sizeable impact on the economic situation of the supplier, but also considered that as a matter exceeding the scope of its assessment. See para 56 *et seq* of the judgement.

<sup>10</sup> From the case file (request for preliminary ruling): '2. May Article 3(1) of Directive 93/13, in conjunction with points 1(j) and 2(d) of the annex applicable by virtue of Article 3(3) of that Directive, be interpreted as meaning that where a seller or supplier provides for a unilateral amendment of a contract term without explicitly describing the method by which prices vary or giving valid reasons in the contract, that contract term is unfair *ipso jure*?', <http://curia.europa.eu/juris/document/document.jsf?text=&docid=82480&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=114950>.

<sup>11</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>12</sup> The court ruled that the Directive does not preclude national legislation from establishing that a decision declaring a term unfair has effect 'with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same general business conditions apply, including with regard to those consumers who were not party to the injunction proceedings'. See

In *RWE*, the dispute concerned a term used by the defendant in the main proceedings, an energy provider, in its ‘special’<sup>13</sup> contracts. The provision allowed the company to adjust the price at which it sold gas to its customers without specifying under which circumstances and to what extent adjustments could take place. The legal context in this case was complicated by the interaction of rules on unfair terms (as implemented in Germany) with the later Directive 2003/55 on the internal market for natural gas,<sup>14</sup> but also by the fact that the term literally reproduced national legal provisions regulating a different class of contracts, namely ‘standard tariff’ contracts, also used by the same provider in its relationships with other consumers. Under the Unfair Terms Directive, provisions reproducing national or international legislation are exempted from control. The first question referred, thus, was whether the exemption also applied to contracts different than the ones for which a certain rule had been conceived.<sup>15</sup> The court answers this question in the negative, arguing that the reason to exclude legal rules from control is that the regulator is deemed to have struck a fair balance with reference to the situations it was addressing; the same assumption cannot be maintained outside of the scope explicitly envisaged. It is the second question, however, which is more relevant here and will be addressed in these pages; this question concerned the term’s unfairness, to be assessed against the complex background mentioned above.

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for a comment F. Cafaggi and S. Law, ‘Unfair Contract Terms – Effect of Collective Proceedings’, in E. Terry, G. Straetmans and V. Colaert (eds), *Landmark Cases of EU Consumer Law: In Honour of Jules Stuyck* (Cambridge: Intersentia, 2013) 653 *et seq.*

**13** As opposed to ‘standard tariff’ contracts. ‘Standard tariff’ contracts are concluded, usually, by so-called ‘suppliers of last resort’ on the basis of their obligation to accept consumers that other providers might find unappealing to deal with. They are usually more expensive in return for the higher expected costs to be borne by the provider and they are regulated in Germany by the *Gasgrundversorgungsverordnung*. Contracts concluded under a ‘freedom of contract’ regime, on the other hand, are only subject to the general rules in the Civil Code. See for an extensive account P. Rott, ‘The Adjustment of Long-Term Supply Contracts: Experience from German Gas Price Case Law’ *European Review of Private Law* 2013, 717 *et seq.*, 722–723 on this point. As this last author points out, it should be mentioned that a case is also pending at the Court of Justice asking whether art 5 of the *Gasgrundversorgungsverordnung*, according to which ‘[t]he supplier has the right to adjust the supply price by giving the customer notice of the new price’, is not itself in breach of the transparency requirement set by dir 2003/55; the case is registered as case 359/11, *Alexandra Schulz v Technische Werke Schussental GmbH & Co KG*.

**14** Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

**15** More in depth on this issue, E. Terry, ‘Unfair Contract Terms – Statutory Provisions, Price Increase Terms and the Role of the CJEU’, in Terry, Straetmans and Colaert (eds), n 13 above, 677 *et seq.*

In both cases, the CJEU does not explicitly declare the term at hand unfair, faithful to its non-interventionist doctrine held since *Freiburger Kommunalbauten*.<sup>16</sup> However, the cases are relevant in that they show how the Court understands the notion of ‘unfairness’ contained in the Directive and the function of unfair terms legislation, in particular with reference to transparency requirements.

## 1 Invitel

Although it is likely that the structure actually put in place by Invitel’s standard terms was made of two terms, the first allowing for the introduction of new conditions and the second (introduced later in accordance with the former) concretely imposing the contested fee, only the latter is dealt with in the decision. The question mainly required the Court to consider different elements in the Unfair Terms Directive’s Annex and their relation to the general clause spelled out by Article 3 of the same Directive.

While in general the Annex casts a doubt on the validity of clauses allowing the provider to alter the terms of a contract,<sup>17</sup> this suspicion is attenuated for long-term contracts. In this case, indeed, variations are allowed provided that the supplier affords the consumer certain guarantees. In particular, for price-indexation clauses ‘the method by which prices vary’ has to be explicitly described,<sup>18</sup> while the ‘right to alter unilaterally the conditions’ of the contract is subject to the fact that the consumer is timely informed and that he is entitled to dissolve the contract.<sup>19</sup>

Before proceeding with an analysis of what the Directive, read in conjunction with its Annex, implies for the evaluation of the term at hand, the Court excludes that the term might be ‘sheltered’ by the rule of Article 4(2) of the Directive, excluding so-called ‘core terms’. The exclusion, according to the CJEU, ‘cannot

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**16** Case 237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Ulrike Hofstetter*, ECR 2004 I-03403, with note by M. Hesselink, *European Review of Contract Law* 2006, 366 *et seq.*

**17** Paragraph 1, subparagraphs (j) and (l), ‘grey-listing’ terms which enable the seller or supplier to unilaterally modify the contract without a valid reason ‘specified in the contract’ and terms which allow the provider to determine/adjust the price against which the good or service is to be delivered, without granting the consumer a right to cancel the contract if the price becomes too high.

**18** Annex, para 2(d).

**19** Annex, para 2(b).

apply to a term relating to the mechanism for amending the prices of the services provided to the consumer'.<sup>20</sup>

Getting to the substance of the question, the annex seems to indicate that a term allowing the provider to modify the price he charges for his services should set out the 'reason for and the method of' the variation; furthermore, the consumer should be able to terminate the contract. While the annex does not contain binding rules, the assumption that such requirements should be respected is consistent with the idea, stated in the 20<sup>th</sup> recital to the directive, that the consumer should be able to examine the terms included in a standard contract and to appreciate the *consequences* of those terms. The transparency requirement laid out by Article 5 of the directive also has to be taken into account.

The ECJ concludes that, when scrutinizing a term which allows the provider to change the fees connected with the service to be provided national courts should, 'determine, inter alia'<sup>21</sup> whether, all the relevant elements considered, 'the reasons for or the method of the amendment [...] are set out in plain, intelligible language'.<sup>22</sup> Furthermore, consumers must be free to terminate the contract if they disagree with the new term. When additional rights provided by legislation might support the consumer, 'supplementing' the standard terms, for instance by guaranteeing the right to terminate the contract or by constraining

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**20** *Invitel*, n 8 above, para 23.

**21** Here the test resembles that which would apply if the proposed Common European Sales Law regulation (Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM[2011] 635 final) were adopted: like in the proposed art 83, (non-) compliance with the transparency requirement seems to be one of several elements to be considered in evaluating a term's fairness. Contrary to what was authoritatively inferred (see R. Schulze [ed], *Common European Sales Law (CESL) – Commentary* [Baden-Baden *et al*: Beck-Hart-Nomos, 2013] 3181) from the Court's decision in *Cofidis* (case 144/99), lack of transparency does not seem to entail unfairness *ipso iure*. It should rather, as the CESL also provides, be considered among other factors, namely the nature of what is to be provided, the circumstances prevailing during the conclusion of the contract, the other contract terms and the terms of any other contract on which the concerned contract depends. To the extent that such 'guidance' had not been articulated before, this seems to be another issue on which the judgements provide relevant insight.

**22** *Invitel*, n 8 above, conclusions. Earlier in the text the Court was even more explicit: paragraph 28 states that (as a consequence of the 20<sup>th</sup> recital read in conjunction with art 5 of the Directive) 'in the assessment of the "unfair" nature of a term, within the meaning of Article 3 of the Directive, the possibility for the consumer to foresee, on the basis of clear, intelligible criteria, the amendments, by a seller or supplier, of the GBC with regard to the fees connected to the service to be provided is of *fundamental importance* (emphasis added).'

the supplier's freedom to change its prices, the consumer *should be informed* of this circumstance.<sup>23</sup>

## 2 RWE

As mentioned above, the legal framework in *RWE* was somewhat complex, due partially to the interaction between different European instruments and partially to the way the Unfair Terms Directive is implemented in the German system.

The second question, on which this contribution concentrates, concerned the legal consequences of a term contained in a contract for the provision of natural gas being found non-transparent. The specific contract is relevant here due to the mentioned interaction of unfair terms rule with rules organising the liberalisation of gas supply services. In the case under review, the term allowing RWE to put in place a price increase without specifying any condition allowing such an increase could easily be declared unfair on the basis of the general clause only, since in its German version the latter incorporates a transparency requirement.<sup>24</sup> Indeed, the term had been declared invalid on grounds of its non-transparent formulation by the previous national instances. Given the peculiarities of markets such as that for natural gas, however, the *Bundesgerichtshof* had decided to ask the Court of Justice whether different considerations should prevail. In particular, the question concerned the relationship between the transparency rule and the specific requirements imposed with reference to price increase terms. Both the Annex to Directive 93/13 and Annex A to Directive 2003/55 refer to two different obligations, namely the timely notification of a price increase and the possibility for the consumer to terminate the contract,<sup>25</sup> without, however, clarifying their relation-

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**23** *Invitel*, n 8 above, paragraphs 29–31. The last requirement is spelled out at paragraph 29 and implied in the conclusions, where the Court says ‘the national court must determine, inter alia, whether, in light of all the terms appearing in the GBC of the consumer contracts which include the contested term, and the national legislation setting out the rights and obligations which could supplement those provided by the GBC at issue, the reasons for, or the method of, the amendment of feed connected with the service to be provided are set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract.’

**24** § 307 BGB ‘Provisions in general terms and conditions are of no effect if they unreasonably disadvantage the contracting partner of the party using them, contrary to the requirements of good faith. Unreasonable disadvantage may also arise from the provision not being clear and intelligible.’

**25** As concerns Annex A to dir 2003/55, the relevant provisions state that ‘*Conditions shall be fair and well known in advance. In any case, this information should be provided prior to the conclusion*

ship to the terms' validity. By its second question, the referring court wanted to ascertain whether fulfilment of these requirements could be considered to 'validate' a non-transparent – and thus otherwise unfair – term.

The CJEU answered this last question stating that a term's lack of transparency can in general not be compensated by the correct implementation of other mechanisms of consumer protection. The fairness of a term allowing a price increase in a contract for the long-term provision of natural gas should then be assessed taking into account both whether the term was sufficiently clear and intelligible and whether the consumer was given a reasonable chance to switch providers.

### III The court's reasoning

In both cases, the Court was called to examine the role of transparency in a context, such as that of long-term contracts, in which the legislator thought it appropriate to recognise providers a certain degree of flexibility in determining the price(s) charged for their services.<sup>26</sup> Terms providing for such adjustments are therefore allowed, but not exempted from meeting 'requirements of good faith, balance and transparency'.<sup>27</sup> In particular, so far as transparency is concerned, the Court derives its importance from Article 5 of the Unfair Terms Directive,<sup>28</sup> in conjunction with the 20<sup>th</sup> recital thereto, according to which 'the consumer should actually be given an opportunity to examine all the terms' of the contract.<sup>29</sup> In *Invitel*, this examination is also related to the *consequences* of said terms.<sup>30</sup> In the

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or confirmation of the contract. Where contracts are concluded through intermediaries, the above information shall also be provided prior to the conclusion of the contract:

(b) are given adequate notice of any intention to modify contractual conditions and are informed about their right of withdrawal when the notice is given. Service providers shall notify their subscribers directly of any increase in charges, at an appropriate time no later than one normal billing period after the increase comes into effect. Member States shall ensure that customers are free to withdraw from contracts if they do not accept the new conditions, notified to them by their gas service provider;

(c) receive transparent information on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of gas services;'.<sup>26</sup>

<sup>26</sup> See *RWE*, n 9 above, para 46.

<sup>27</sup> *RWE*, n 9 above, para 47.

<sup>28</sup> At least it does so in *RWE*, n 9 above.

<sup>29</sup> *Invitel*, n 8 above, para 27, *RWE*, n 9 above, para 43.

<sup>30</sup> *Invitel*, n 8 above, para 27.

Court's words, the consumer must be given the possibility to 'foresee, on the basis of clear, intelligible criteria, the amendments'<sup>31</sup> that can take place.

Thus the reasons for, or method of a price variation must be spelled out clearly so that the consumer can decide 'whether he wishes to be bound by the terms'<sup>32</sup> or look for a different provider – but not only to this end. Should a price increase eventually take place, says the court, the consumer has an interest 'in having the data available [...] to allow him to react most appropriately to his new situation.'<sup>33</sup> The CJEU does not specify what reactions could be foreseen, but it is easy to imagine that, if the consumer has a clear image of what is permissible for the provider under the term, he can also more easily figure out what is *not* permissible and accordingly challenge a modification which he believes not to be legitimate.<sup>34</sup>

The consumer's interest in receiving a contract which spells out in clear terms how his obligations might change is therefore appreciated both with reference to his ability to make a conscious contractual decision and having regard to his possibility to defend his interests in the relationship. This double function justifies the imposition of a high level of transparency, which, according to the Court, goes so far as to require the provider to offer the consumer some information even as to the legal framework surrounding the possibility to unilaterally amend the contract and the consequences of such an amendment.

As we have seen, that the consumer should be informed of the legislative provisions 'supplementing' the rights and duties established by the contract was spelled out by the Court in *Invitel*. The statement is reiterated and reinforced in *RWE*: '*With respect, in the first place, to the information to be given to the consumer, it is clear that that obligation to make the consumer aware of the reason for and method of the variation of those charges and his right to terminate the contract is not satisfied by the mere reference, in the general terms and conditions, to a legislative or regulatory act determining the rights and obligations of the parties. It is essential that the consumer is informed by the seller or supplier of the content of the provisions concerned.*' The Court, regrettably, does not specify how this information should be provided, and more specifically whether it has to be incorpo-

<sup>31</sup> *Invitel*, n 8 above, para 28; the wording is recalled almost literally by *RWE*, n 9 above, para 49.

<sup>32</sup> *RWE*, n 9 above, para 44.

<sup>33</sup> *RWE*, n 9 above, para 53.

<sup>34</sup> This is also, with a different vantage point, observed by Micklitz and Reich, n 7 above, 460: in the *RWE* case, the association *Verbraucherzentrale Nordrhein-Westfalen* had decided to bring a claim representing individual consumers to challenge the price increases. In order to decide whether a support action is 'worth the effort', however, also associations need to have a clear picture of the contractual relationship(s) at hand.

rated in the contract or communicated orally during the pre-contractual phase. In any case, the requirement seems go one step beyond the usual (though optimistic) assumption that parties should know the rules to which their transactions are subject and, in doing this, probably also beyond what is normally intended to fall within the scope of information duties. This argument, however, while recalled in the reasoning, does by no means appear in the conclusions of the Court in *RWE*.

## [The Court's reasoning] continued: Transparency 2.0?

The faith in information as a privileged instrument of consumer protection which the EU allegedly cultivated throughout its directives<sup>35</sup> has been the object of much criticism from different strands of legal scholarship.<sup>36</sup> Disclosure requirements in the field of consumer contracts are the object of similar criticism, mainly on the basis of the fact that of all the information that is given to them, consumers can only factor a small amount – the rest being irrelevant at best and possibly even noxious. In the two decisions analysed here, however, the information to be given concerns a term which allows the provider to change the contract's core term in one case (*RWE*) and the way the charge for choosing a certain means of payment is set in the other (*Invitel*). These issues – price of the core service and of one basic additional service – are arguably 'salient' issues, which the consumer should be able to consider in making his decision as long as they are properly presented to him.

When deciding the convenience of a long term contract, it is important for a consumer to be able to assess whether the conditions which he is accepting are likely to change substantially or frequently during the contract's life-span. Obviously, for the consumer the ideal situation would be that the terms should not be changed at all, or should only be changed to his advantage. The provider of a long-term service, on the other hand, has an interest in being able to change the terms to react to market adjustments and external events, which – as said above – is acknowledged by the legislator. Ideally, he should be able to immediately and

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<sup>35</sup> See S. Grundmann, W. Kerber and S. Weatherill, *Party Autonomy and the Role of Information in the Internal Market* (Berlin: de Gruyter, 2001).

<sup>36</sup> H.-W. Micklitz, also lately 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: "A bittersweet polemic"' *Journal of Consumer Policy* 2012, 283 *et seq.*, but also works emphasising the risks of information overload. Not only on this side of the Atlantic, see eg notes 38 and 40.

constantly adjust its prices. The indication in the contract of certain reasons and methods concerning price amendments serve as a means of allowing a certain degree of flexibility, while preventing the provider from acting on pure capricious grounds and allowing the consumer to foresee, by and large, how his costs will change.

On the other hand, once a price increase takes place, consumers should be able to check whether the circumstances allowing for it were met and whether the price increase was in a non-exorbitant proportion to the events justifying it: also in support of this aim, a term establishing only a very general right to unilaterally amend the contract is of very little help to the consumer, especially when terminating the contract is not a viable option. So far, most of the rich literature on information duties has concentrated on the pre-contractual phase, with the idea of helping the consumer to make a rational market decision. Relatively unexplored, to this point, is the idea that the written contract performs an important function later on in a contractual relationship, and most specifically when an undesired event takes place.<sup>37</sup> Considering, however, how commonplace the assumption seems to have become, according to which consumers (especially, but not only, in a digital environment) do not read standard terms at all before entering a contract,<sup>38</sup> a more 'reactive' function of clear drafting, focussing on the possibility for the consumer to go back to the terms when he needs to, seems worth considering.<sup>39</sup> Such understanding of transparency requirements can be all the more valuable with regard to less 'salient' terms, which the consumer has not really considered when making his original decision:<sup>40</sup> the term

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**37** Although a tendency to express a much large inclination to read the contract after an 'accident' takes place has been traced by S.I. Becher and E. Unger-Aviram, 'The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction' *DePaul Business and Commercial Law Journal* 2010, 199. In their work, the authors asked the participants in their survey to predict their behaviour in *ex ante* (pre-contractual) and *ex post* (after an 'accident' occurred) situations, finding that in most situations the answers reported a much increased likelihood to read the contract carefully in the latter scenarios.

**38** See for a well-argued critique of information-oriented rules O. Ben Shahar, 'The Myth of the Opportunity to read in Contract Law' *European Review of Contract Law* 2009, 1 *et seq*; also, taking the issue for granted, I. Ayres and A. Schwartz, 'The No Reading Problem in Consumer Contract Law' *Stanford Law Review*, forthcoming.

**39** This possibility is also reinforced by the Court's strict understanding of the 'durable medium' notion in distance contracts – see case 49/11, *Content Services Ltd v Bundesarbeitskammer*.

**40** See *inter alia* R.B. Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' *University of Chicago Law Review* 2003, 1203 *et seq*; O. Bar-Gill, *Seduction by Contract* (Oxford: OUP, 2012).

will become salient once it brings about unfavourable consequences, and the consumer will turn to it in order to find out what his legal situation is.<sup>41</sup>

This additional function also helps to understand the significance of the potentially debatable inclusion, in the Court's reasoning, of a requirement to inform the consumer of his legal rights.<sup>42</sup> These rights, again, are likely to appear of little interest to the consumer when he enters the contract, but if something goes wrong it becomes important to know what actions can be taken against potential harm arising from it. In some cases, in particular, by not informing the consumer of the obligations which are legally imposed on the provider, the contract might give him a misleading impression of his legal position. To this end, it might not suffice to inform the consumer orally before the contract is signed; including the information among the data that the consumer will have available later on might help him to react appropriately to supervening events. As mentioned earlier, the Court gave no indication as to how such information is to be provided; if this requirement is to be taken seriously, future decisions should take the chance to establish clearly that the consumer should receive a written statement. To this regard, the reasoning developed with regard to the need to provide information concerning the right of withdrawal on a 'durable medium' could play a role.<sup>43</sup>

## IV Conclusion

The previous pages have attempted to show how, in two recent decisions, the European Court of Justice has articulated the transparency requirement and its relationship to the general clause on unfairness in Directive 93/13 EEC, in its application to clauses allowing contractual amendments in long-term contracts. Although, as has been highlighted, the legal framework in the *Invitel* and *RWE* decisions was largely determined by the specific nature of the contracts at hand, these cases were also the first ones in which the Court of Justice explicitly articulated adjudication 'guidelines' in relation to transparency. Against the

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**41** To give an example, few of us will take a look at the seller's general terms of business when buying a small appliance, but we would likely want to consult them once our purchase has turned out not to work as we expected.

**42** This understanding seems also compatible with Micklitz and Reich's conclusion that the recent case law has brought about a 'revaluation' ('*Aufwertung*') of the transparency requirement into 'a positive and effective information requirement'. See Micklitz and Reich, n 7 above, 460.

**43** See n 39 above.

Directive's silence<sup>44</sup> on the consequences of non-transparency,<sup>45</sup> so far the Court had either avoided the question<sup>46</sup> or only acknowledged that violations might play a role in the unfairness assessment in extreme cases.<sup>47</sup>

In particular, in the case of terms allowing the variation of conditions, the Court has established that, for such a term to be valid, besides the fact that the consumer has to have a chance to terminate the contract in reaction to the amendment, the term has to indicate in clear intelligible language the reasons allowing an amendment and the methods which will be employed to determine the new conditions. The Court has justified this with one main argument related to the need for consumers to be put in a condition to know what terms they are accepting – which also seems to entail understanding the *consequences* for them of those terms<sup>48</sup> – but also by making reference to a further function, namely that of empowering the consumer to appropriately react to an amendment which is unfavourable to him.

This additional, *ex post* function<sup>49</sup> is reinforced if the provider is required to include in the contract some information regarding the rights and duties which the law imposes to the parties 'supplementing' the contract. Some passages in the ECJ's reasoning seem to pursue this direction. Such a function of contractual transparency and information could be even more valuable with reference to non-price terms, which the consumers are less likely to have an interest in at the moment of entering the contract, but to which they might want to turn to seek

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**44** With the exception of art 5, first sentence, requiring the establishment of a *contra proferentem* rule in case of unclear drafting. The implementation of this provision has been strictly policed by the CJEU in a series of cases: *Commission v Kingdom of the Netherlands*, 144/99 [2001] ECR I-03541; *Commission v Kingdom of Sweden*, 478/99 [2002] ECR I-04147; *Commission v Kingdom of Spain*, 70/03 [2004] ECR I-0799.

**45** Which, perhaps unsurprisingly, has generated divided views about what such consequences should be – ranging from the idea that member states were free to choose to (not) introduce explicit sanctions, to the suggestion that lack of transparency could be an element in the unfairness assessment. See H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, *Consumer Law Compendium*, online edition 2008, 415, available at [http://ec.europa.eu/consumers/rights/docs/consumer\\_law\\_compendium\\_comparative\\_analysis\\_en\\_final.pdf](http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf).

**46** As in *Cofidis SA v Jean-Louis Fredout*, case 473/00, [2002] ECR I-10875, where it had merely stated that it could 'not be excluded' that the terms that the remitting court deemed intransparent could also cause a significant imbalance to the ends of dir 93/13.

**47** *Pereničová*, n 2 above.

**48** See *supra*, para III first part; this also seems consistent with recital 20 to the directive, also recalled above.

**49** Which, similar to the first function (and contrary to the specific drafting requirements set by the Court in the two cases), seems to articulate the purposes of transparency in consumer contracts in general rather than only in the context of long-term utilities provision.

guidance when something goes wrong. If properly put forward, thus, the Court's reasoning might help to make sense of information duties even without the (unrealistic) assumption that consumers actually are eager to 'examine' a contract's terms whenever they are given a chance to do so. Such a development should be welcome.<sup>50</sup>

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**50** Since the note has been last revised, the CJEU has issued a new decision whose reasoning is largely based on *RWE*: see Case C 26/13, *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, ny.r. In his even more recent (8 May) opinion in Joined Cases C 359/11 and C 400/11, *Alexandra Schulz v Technische Werke Schussental GmbH und Co. KG Josef Egbringhoff v Stadtwerke Ahaus GmbH*, AG Wah, while denying that the *RWE*-standards should be directly transposed to "standard tariff" contracts, seems nevertheless to be furthering a very similar test.