Ius Comparatum – Global Studies in Comparative Law

Yeşim M. Atamer
Pascal Pichonnaz *Editors*

Control of Price Related Terms in Standard Form Contracts

Ius Comparatum – Global Studies in Comparative Law

Volume 36

Series Editors
Katharina Boele-Woelki, Bucerius Law School, Hamburg, Germany
Diego P. Fernández Arroyo, Institut d'Études Politiques de Paris (Sciences Po), Paris, France

Founding Series Editors
Jürgen Basedow, Max Planck Institute for Comparative and International Private Law, Hamburg, Germany
George A. Bermann, Columbia University, New York, USA

Editorial Board
Joost Blom, University of British Columbia, Vancouver, Canada
Vivian Curran, University of Pittsburgh, USA
Giuseppe Franco Ferrari, Università Bocconi, Milan, Italy
Makane Moïse Mbengue, Université de Genève, Switzerland
Marilda Rosado de Sá Ribeiro, Universidade do Estado do Rio de Janeiro, Brazil
Ulrich Sieber, Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany
Dan Wei, University of Macau, China

As globalization proceeds, the significance of the comparative approach in legal scholarship increases. The IACL / AIDC with almost 800 members is the major universal organization promoting comparative research in law and organizing congresses with hundreds of participants in all parts of the world. The results of those congresses should be disseminated and be available for legal scholars in a single book series which would make both the Academy and its contribution to comparative law more visible. The series aims to publish the scholarship emerging from the congresses of IACL / AIDC, including: 1. of the General Congresses of Comparative Law, which take place every 4 years (Brisbane 2002; Utrecht 2006, Washington 2010, Vienna 2014, Fukuoka 2018 etc.) and which generate (a) one volume of General Reports edited by the local organizers of the Congress; (b) up to 30 volumes of selected thematic reports dealing with the topics of the single sections of the congress and containing the General Report as well as the National Reports of that section; these volumes would be edited by the General Reporters of the respective sections; 2. the volumes containing selected contributions to the smaller (2-3 days) thematic congresses which take place between the International Congresses (Mexico 2008; Taipei 2012; Montevideo 2016 etc.); these congresses have a general theme such as “Codification” or “The Enforcement of Law” and will be edited by the local organizers of the respective Congress. All publications may contain contributions in English and French, the official languages of the Academy.

More information about this series at http://www.springer.com/series/11943

Académie Internationale de Droit Comparé
International Academy of Comparative Law

Yeşim M. Atamer • Pascal Pichonnaz
Editors

Control of Price Related Terms in Standard Form Contracts

Editors
Yeşim M. Atamer
Faculty of Law
University of Bern
Bern, Switzerland

Faculty of Law
Istanbul Bilgi University
Istanbul, Turkey

Pascal Pichonnaz
Faculty of Law
University of Fribourg
Fribourg, Switzerland

ISSN 2214-6881 ISSN 2214-689X (electronic)
Ius Comparatum – Global Studies in Comparative Law
ISBN 978-3-030-23056-2 ISBN 978-3-030-23057-9 (eBook)
https://doi.org/10.1007/978-3-030-23057-9

© Springer Nature Switzerland AG 2020
This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.
The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.
The publisher, the authors, and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Springer imprint is published by the registered company Springer Nature Switzerland AG.
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Preface

Competitive market economies work with the basic assumption that the supply side cannot charge more than their cost of supply given that rational and perfectly well-informed customers know their preferences and are responsive to any price change in the market. However, markets are never fully transparent, and findings of behavioural sciences show that especially consumers act based on imperfect rationality due to systematic biases. Pricing structures that serve to hide rather than reveal the real cost of the goods and services pose one of the main challenges to markets as they abuse biases on the demand side to the greatest extent possible. "Hiding" price-related terms in standard form contracts is a prominent way of creating non-salient prices and is therefore a debated issue in many countries around the world.

This book explores various approaches regarding control of price terms and particularly discusses the effectiveness of two major paths: *ex ante* regulatory and *ex post* judicial intervention. For the past several years, courts in many jurisdictions are confronted with the issue of whether, and to what extent, they should intervene in price-related terms in standard form contracts—especially so in the area of consumer contracts. Open price clauses, flat remunerations, price adjustment clauses, clauses giving the seller/supplier the right to ask for additional payments, bundling or partitioning practices—a variety of price-related terms are used to manipulate customers' choices, often also by exploiting their behavioural biases. The result is an unfavourable contract that is later challenged in court. However, invalidating a given price term in standard forms e.g. of a banking or utilities contract only has an *inter partes* effect, which means that in thousands if not millions of similar contracts, the same clauses may continue to be used. Effective procedural rules are often lacking. Therefore, pricing patterns that serve to hide rather than to reveal the real cost of goods and services require special attention on the part of regulators.

Thanks to its broad comparative analysis, this book offers a thorough overview of the methods employed in several countries. It also gives references to numerous decisions dealing with abusive price terms in various jurisdictions. As such, it may serve as a source of ideas and suggestions to identify and tackle abusive terms in standard contract terms.

The structure of each chapter is broadly determined by the questionnaire prepared by the editors. Each country report includes general information on the scope of freedom of contract and control of standard contract terms, followed by a specific chapter on judicial control of price terms used in standard contract terms. In their country reports, the authors dwell further into details of specific regulatory provisions related to control of price terms, as well as to disclosure regulations promoting price transparency and competition. The detailed questionnaire is available as an appendix to the general report included in this volume.

The book gathers twenty-seven contributions from national rapporteurs and one supranational report for the European Union. All chapters were prepared for the General Congress of the International Academy of Comparative Law held in July 2018 in Fukuoka; they have been updated as of July 2019. These reports are supplemented by a general report presented at the same IACL Congress, which includes a comparative analysis of the national and supranational reports. The national contributors hail from around the globe, including Africa, Asia, Europe and the Americas. We are very pleased and honoured to have such a group of distinguished scholars contributing to this volume and are grateful to all of them for engaging in this project and for the productive cooperation.

We would like to express our special thanks to Prof. Dr. Dr. h.c. (mult.) Katharina Boele-Woelki and Prof. Dr. Diego P. Fernández Arroyo, respectively, President and Secretary General of the International Academy of Comparative Law, for including this volume in the *Ius Comparatum* series. This volume could not have been published without the superb assistance of Ms Margaux Schroeter, BLaw at the University of Fribourg, in editing the contributions. We are both indebted to her. The editors would also like to thank sincerely Ms Anja Trautmann, Mrs Kay Stoll, Ms Anitha Chellamuthu, Ms Sayani Dey and Mr Sabarigirinathan Thanikachalam at Springer for their constant support and patience in completing this volume.

Bern, Switzerland	Yeşim M. Atamer
Fribourg, Switzerland	Pascal Pichonnaz
September 2019	

Contents

Part I General Report

Control of Price Related Terms in Standard Form Contracts: General Report . . . 3
Yeşim M. Atamer and Pascal Pichonnaz

Part II Supranational Report: European Union

Control of Price Related Terms in Standard Form Contracts in the European Union: The Innovative Role of the CJEU's Case-Law . . . 67
Sergio Cámara Lapuente

Part III National Reports

Control of Price Related Terms in Standard Form Contract in Argentina . . . 105
Osvaldo Jorge Marzorati

Control of Price Related Terms in Standard Form Contracts in Austria: Judicial Control and Other Means of Price Control . . . 133
Florian Heindler

Control of Price Related Terms in Standard Form Contracts in Belgium . . . 157
Reinhard Steennot

Control of Price Related Terms in Standard Form Contracts in Brazil . . . 185
Ana Frazão

Control of Price Related Terms in Common Law Canada: Piecemeal Solutions to Demonstrated Problems of Unfairness 209
Joshua Karton

Control of Price Related Terms in Standard Form Contracts in Canada (Civil Law): Le prix dans les contrats de consommation, les contrats d'adhésion et les contrats réglementés – pouvoir d'intervention des tribunaux et autres modes de contrôle des prix en droit québécois 231
Marie-Claude Desjardins and Nathalie Vézina

Control of Price Related Terms in Standard Form Contracts in Chile: Price Control and the External Intervention of Contracts in Chilean Law 269
Jaime Alcalde Silva and Juan Luis Goldenberg Serrano

Control of Price Related Terms in Standard Form Contracts in China 293
Shiyuan Han and Teng Wu

Control of Price Related Terms in Standard Form Contracts in Croatia 315
Marko Baretić and Siniša Petrović

Control of Price Related Terms in Standard Form Contracts in Denmark: Pragmatism and General Clauses 339
Kasper Steensgaard

Control of Price Related Terms in Standard Form Contracts in Estonia: Judicial Control and Other Means of Price Control 359
Karin Sein

Control of Price Related Terms in Standard Form Contracts in France 379
Gaël Chantepie

Control of Price Related Terms in Standard Form Contracts in Germany 405
Matthias Fervers and Beate Gsell

Three Modes of Regulating Price Terms in Standard-Form Contracts—The Israeli Experience 429
Eyal Zamir and Tal Mendelson

Control of Price Related Terms in Standard Form Contracts in Italy 451
Michele Graziadei

Control of Price Related Terms in Standard Form Contracts in Japan . . . 473
Hiroo Sono

Control of Price Related Terms in Standard Form Contracts in the Netherlands: Exclusion of Clauses Pertaining to the Core of the Contract . . . 497
Ewoud Hondius

Control of Price Related Terms in Standard Form Contracts in Romania . . . 507
Adriana Almăşan and Lucian Bercea

Freedom of Contract in Respect of Price Terms in Russian Law: With a Special Focus on Price Terms in Standard Form Contracts . . . 531
Artyom G. Karapetov and Andrey M. Shirvindt

Control of Price Related Terms in Standard Form Contracts in Singapore . . . 561
Wee Ling Loo

Control of Price Related Terms in Standard Form Contracts in Slovenia . . . 593
Damjan Možina

Control of Price Related Terms in Standard Form Contracts in South Africa . . . 605
Jacques du Plessis and Wiaan Visser

Control of Price Related Terms in Standard Form Contracts in Spain . . . 631
Francisco de Elizalde

Control of Price Related Terms in Standard Form Contracts in Switzerland—The Control of Standard Contracts Terms: The Swiss Approach . . . 653
Thomas Probst

Control of Price Related Terms in Standard Form Contracts in Taiwan: Control of Price Related Terms Through the Legislator, the Judiciary and the Administration . . . 673
Ming-En Hsiang and Ting-Su Chen

Control of Price Related Terms in Standard Form Contracts in Turkey: Judicial and Other Means of Price Control . . . 687
Kerem Cem Sanlı

Control of Price Related Terms in Standard Form Contracts in the UK: Regulating Prices and Charges in the UK: Information Versus Substance, General Clauses Versus Rules Developed by Regulators 723
Christopher Willett

Contributors

Jaime Alcalde Silva Associate Professor, Pontifical Catholic University of Chile, Faculty of Law, Santiago, Chile

Adriana Almăşan Associate Professor, University of Bucharest, Faculty of Law, Bucharest, Romania

Yeşim M. Atamer Professor, University of Bern, Faculty of Law, Bern, Switzerland
Istanbul Bilgi University, Faculty of Law, Istanbul, Turkey

Marko Baretić Professor, University of Zagreb, Faculty of Law, Zagreb, Croatia

Lucian Bercea Professor, West University of Timişoara, Faculty of Law, Timișoara, Romania

Sergio Cámara Lapuente Professor, University of La Rioja, Faculty of Law, Logroño, Spain

Gaël Chantepie Professor, University of Lille, Faculty of Legal, Political and Social Sciences, Lille, France

Ting-Su Chen Dr. iur., National Taipei University, Department of Law, Taipei, Taiwan

Marie-Claude Desjardins Associate Professor, University of Sherbrooke, Faculty of Law, Sherbrooke, QC, Canada

Francisco de Elizalde Associate Professor, IE University, IE Law School, Madrid, Spain

Matthias Fervers Dr. iur., Ludwig-Maximilians-University, Faculty of Law, Munich, Germany

Ana Frazão Professor, University of Brasília, Faculty of Law, Brasília, Brazil

Juan Luis Goldenberg Serrano Associate Professor, Pontifical Catholic University of Chile, Faculty of Law, Santiago, Chile

Michele Graziadei Professor, University of Turin, Department of Law, and Collegio Carlo Alberto Fellow, Turin, Italy

Beate Gsell Professor, Ludwig-Maximilians-University, Faculty of Law, Munich, Germany

Shiyuan Han Professor, Tsinghua University, School of Law, Beijing, China

Florian Heindler Assistant Professor, Sigmund Freud University, Faculty of Law, Vienna, Austria

Ewoud Hondius Professor em., Utrecht University, Faculty of Law, Utrecht, Netherlands

Ming-En Hsiang Associate Professor, National Taipei University, Department of Law, Taipei, Taiwan

Artyom G. Karapetov Professor, M-LOGOS Law Institute/Higher School of Economics, Moscow, Russia

Joshua Karton Associate Professor, Queen's University, Faculty of Law, Kingston, ON, Canada

Wee Ling Loo Associate Professor, Singapore Management University, School of Law, Singapore, Singapore

Osvaldo Jorge Marzorati Dr. iur., Buenos Aires, Argentina

Tal Mendelson Law Clerk of the Supreme Court, The Hebrew University of Jerusalem, Faculty of Law, Jerusalem, Israel

Damjan Možina Professor, University of Ljubljana, Faculty of Law, Ljubljana, Slovenia

Siniša Petrović Professor, University of Zagreb, Faculty of Law, Zagreb, Croatia

Pascal Pichonnaz Professor, University of Fribourg, Faculty of Law, Fribourg, Switzerland

Jacques du Plessis Professor, Stellenbosch University, Faculty of Law, Stellenbosch, South Africa

Thomas Probst Professor, University of Fribourg, Faculty of Law, Fribourg, Switzerland

Kerem Cem Sanlı Associate Professor, Istanbul Bilgi University, Faculty of Law, Istanbul, Turkey

Karin Sein Professor, University of Tartu, School of Law, Tallinn, Estonia

Andrey M. Shirvindt Associate Professor, Lomonosov Moscow State University, Faculty of Law, Moscow, Russia
Head of Department, Private Law Research Centre under the President of the Russian Federation named after S.S. Alexeev, Moscow, Russia

Hiroo Sono Professor, Hokkaido University, School of Law, Sapporo, Japan

Reinhard Steennot Professor, Ghent University, Financial Law Institute, Gent, Belgium

Kasper Steensgaard Professor, Aarhus University, School of Business and Social Sciences, Department of Law, Aarhus, Denmark

Nathalie Vézina Professor, University of Sherbrooke, Faculty of Law, Sherbrooke, QC, Canada

Wiaan Visser Former Research Fellow, Max Planck Institute for Comparative and International Private Law, Hamburg, Germany

Christopher Willett Professor, University of Essex, School of Law, Colchester, UK

Teng Wu Associate Professor, Central University of Finance and Economics, School of Law, Beijing, China

Eyal Zamir Professor, The Hebrew University of Jerusalem, Faculty of Law, Jerusalem, Israel

Abbreviations

A	South African Appellate Division
ABCA	Alberta Court of Appeal (Canada)
ABGB	Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch)
ABQB	Alberta Court of Queen's Bench (Superior trial court) (Canada)
ABS	Association of Banks in Singapore
AC	Appeal Cases (United Kingdom)
ACM	Consumer and Market Authority (Autoriteit Consument en Markt) (Netherlands)
AcP	Archiv für civilistische Praxis (journal) (Austria)
AELA	Application of English Law Act (Singapore)
AEUMC	United States–Mexico–Canada Agreement (Accord Etats-Unis-Mexique-Canada)
AFTA	Alberta Fair Trading Act (Canada)
AG	Advocate General
AG	Attorney General
AGB	Allgemeine Geschäftsbedingungen (Germany)
AGBG	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Germany)
AGBGB	Ausführungsgesetz zum Bürgerliches Gesetzbuch (Germany)
AGCM	Autorità Garante della Concorrenza e del Mercato (Italy)
al.	Alinéa (Canada)
ALA	Agricultural Land Act (Japan)
ALENA	North American Free Trade Agreement (Accord de libre-échange nord-américain)
ALI	American Law Institute
AMA	Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Japan)
ANAC	National Civil Aviation Agency (Brazil)
ANATEL	National Telecommunication Agency (Brazil)

ANCOM	National Authority for the Administration and Regulation of Communications (Autoritatea Națională pentru Administrare şi Reglementare în Comunicații) (Romania)
ANEEL	National Electrical Power Agency (Brazil)
ANPC	National Authority for Consumer Protection (Autoritatea Națională pentru Protecția Consumatorilor) (Romania)
ANPC	Romanian National Authority for Consumer Protection (Autoritatea Națională pentru Protecția Consumatorilor) (Romania)
ANRE	National Energy Regulatory Authority (Autoritatea Națională de Reglementare în Domeniul Energiei) (Romania)
ANS	National Supplementary Health Agency (Brazil)
ANTT	National Terrestrial Transportation Agency (Brazil)
AOER	Average Overall Effective Rate
APR	Annual Percentage Rate
APRC	Annual Percentage Rate of Charge
ARERA	Autorità di Regolazione per Reti Energia e Ambiente (Autorità di regolazione per reti energia e ambiente) (Italy)
ARPT	Agency in Real Property Transactions Act (Zakon o posredovanju u prometu nekretninama) (Croatia)
Art.	Article
ASAS	Standards Authority of Singapore
ASCT	Act for Specified Commercial Transactions (Japan)
ASF	Financial Supervision Authority (Autoritatea de Supraveghere Financiară) (Romania)
Ass. plén.	Assemblée plénière de la Cour de Cassation (France)
ATM	Automated Teller Machine
AUPMR	Act against Unfair Premiums and Misleading Representations (Japan)
B2B	Business to Business contract
B2C	Business to Consumer contract
B2SME	Business to Small and Medium Size Enterprise
BBVA	Banco Bilbao Vizcaya Argentaria (Argentina)
BC	British Columbia (Canada)
BC Reg	British Columbia Regulations (Canada)
BCCA	British Columbia Court of Appeal (Canada)
BCLR	British Columbia Law Reports (Canada)
BCSC	British Columbia Supreme Court (Superior trial court) (Canada)
BeckOGK	Beck'scher Online-GrossKommentar (Germany)
BeckRS	Beck-Rechtssachen (Online-Zeitschrift) (Germany)
BGB	German Civil Code (Bürgerliches Gesetzbuch)
BGBl	Bundesgesetzblatt (Germany)

BGE	Entscheidungen des Schweizerischen Bundesgerichtes (Switzerland)
BGH	German Federal Court of Justice (Bundesgerichtshof)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany)
BIT	Behavioural Insights Team
BKR	Zeitschrift für Bank- und Kapitalmarktrech (Germany)
BOE	*Boletín Oficial del Estado (Spain)*
BPCPA	Business Practices and Consumer Protection Act (BC and Alberta) (Canada)
BRL	Brazilian Real (Brazilian currency)
BT-Drs	Deutscher Bundestag Drucksache (Germany)
BVerfGE	Senatsentscheidungen des Bundesverfassungsgerichts (Germany)
BvR	Sicherungseinrichtung des Bundesverbandes der Deutschen Volksbanken und Raiffeisenbanken (Germany)
c.	Considérant (Canada)
c.	Contre (Canada)
C. cr.	Code criminal (Canada)
C.c.Q.	Quebec Civil Code (code civil du Québec)
C.p.c	Code de Procédure civile (Canada)
C.Q.	Chevalier (ordre national du Québec) (Canada)
C2C	Consumer to Consumer contract
CA	Court of Appeal
CACA	Credit Agreements for Consumers Act (Zakon o potrošačkom kreditiranju) (Croatia)
CACRIPA	Credit Agreements for Consumers Relating to Residential Immovable Property Act (Zakon o stambenom potrošačkom kreditiranju) (Croatia)
CADE	Brazilian Competition Authority
Cass.	Italian Supreme Court of Cassation (Corte Suprema di Cassazione)
CBLJ	Canadian Business Law Journal
CBRC	China Banking Regulatory Commission
CC	Civil Code
CC	South African Constitutional Court
CC.	Commercial Code (Turkey)
CCA	Consumer Contract Act (Japan)
CCA	Consumer Credit Act (Switzerland)
CCL	Chinese Contract Law
CConsom	French Consumption Code
CCP	Code of Consumer Protection (Turkey)
CCPL	Consumer Protection Law

CCR	Romanian Constitutional Court (Curtea Constituțională a României)
CCRC	Constitutional Court of the Republic of Croatia
CDC	Consumer Protection Code (Brazil)
CEL	Code of Economic Law (Belgium)
CESL	Common European Sales Law
CETIP	Chamber of Custody and Liquidation (Brazil)
Cf.	Confer
CFRA	Comparability of Fees Related to Payment Accounts, Payment Account Switching and Access to Payment Accounts with Basic Features Act (Zakon o usporedivosti naknada, prebacivanju računa za plaćanje i pristupu osnovnom računu) (Croatia)
Chap, cap	Chapter
CIA	Credit Institutions Act (Zakon o kreditnim institucijama) (Croatia)
Cir.	Circuit
Circ.	Circulaire (France)
Civ.	Civil Chamber of the French Cassation Court (Chambre civile I de la Cour de Cassation)
CJEU	Court of Justice of the European Union
CJF	Brazilian Council of Federal Justice
CMA	Competition and Markets Authority (United Kingdom)
CMN	National Monetary Council (Brazil)
CNSP	National Private Insurance Council (Brazil)
CNY	Chinese Yuan (Chinese currency)
CO	Code of Obligations
COD	(Procedure of) Codecision
COM	Commission
Com.	Commercial Chamber of the French Cassation Court (Chambre commerciale de la Cour de Cassation)
CONC	Consumer Credit Sourcebook (United Kingdom)
cons.	Considérant (Switzerland)
Cons. Code	Consumer Code
Cons. const.	Conseil constitutionnel (France)
COPREC	Consumer Relationships Prior Conciliation Service (Argentina)
Corp.	Corporation
Corte Cost	Italian Constitutional Court (Corte costituzionale)
CPA	Consumer Protection Act (Austria)
CPA	Consumer Protection Act (Zakon o zaštiti potrošača) (Croatia)
CPA	Consumer Protection Act (Tarbijakaitseseadus) (Estonia)
CPA	Consumer Protection and Fair Trade Authority (Israel)
CPA	Consumer Protection Act 68 of 2008 (South Africa)

CPC	Communist Party of China
CPC	Civil Procedure Code (Codul de procedură civilă român) (Romania)
CPD	Criminal Practice Directions (United Kingdom)
CPFTA	Consumer Protection Fair Trading Amendment Act (Singapore)
CPrA	Civil Procedure Act (Croatia)
CRA	Consumer Rights Act (United Kingdom)
Credit CARD Act	Credit Card Accountability Responsibility and Disclosure Act
CRTC	Canada Radio-Television and Telecommunications Commission
CSALB	Centre for Alternative Dispute Resolution in Banking (Centrul de Soluționare Alternativă a Litigiilor în Domeniul Bancar) (Romania)
CSC	Canadian Supreme Court (Cour Suprême du Canada)
D.	Digeste
D.lgs	Decreto legislativo (Italy)
DAE	Annual Percentage Rate (Dobânda anuală efectivă) (Romania)
DAOJA	Danish Administration of Justice Act (Lov om Rettens Pleje)
DC	Décision de contrôle de constitutionnalité des lois ordinaires, lois organiques, des traités, des règlements des Assemblées (France)
DCA	Danish Contract Act (Lov om aftaler og andre retshandler på formuerettens område)
DCAA	Danish Credit Agreement Act (Lov om kreditaftaler)
DCFR	Draft Common Frame of Reference
DCFR	Draft Common Frame of Reference
DHCA	Danish Housing Cooperative Act (Lov om andelsboligforeninger og andre boligfællesskaber)
DIA	Danish Interest Act (Lov om renter og andre forhold ved forsinket betaling)
DIRINCO	Directorate of Industry and Commerce (Dirección de Industria y Comercio) (Chile)
DL	Decreto Legge (Italy)
DMPA	Danish Marketing Practices Act (Lov om markedsføring)
DPI	Direct Purchase Initiative (Singapore)
DSFT	Decision of the Swiss Federal Tribunal (Switzerland)
DStv	Digital Satellite Television (South Africa)
E.	Case
e.g.	For example
EA	Energy Act (Zakon o energiji) (Croatia)
EBA	European Banking Authority
EC	European Community / European Commission
ECA	Electronic Communications Act (Zakon o elektroničkim telekomunikacijama) (Croatia)

ECB	European Central Bank
ECHR	European Convention of Human Rights
ECHR	European Court of Human Rights
ECLI	European Case-Law Identifier
ecolex	Ecolex Fachzeitschrift für Wirtschaftsrecht (journal) (Austria)
ECtHR	European Court of Human Rights
ed(s)	Editor(s)
edn	Edition
EEA	European Economic Area
EEC	European Economic Community
EEMA	Electrical Energy Market Act (Zakon o tržištu električne energije) (Croatia)
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche (Germany)
EGO	Emergency Government Order
EHA	Asociación Hipotecaria Española (Spain)
EIR	Effective Interest Rate
eMBeD	Mind, Behavior, and Development Unit
ERA	Electricity Regulation Act 4 of 2006 (South Africa)
et al.	And others
EU	European Union
EuGH	Europäischer Gerichtshof (Germany)
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (Germany)
EvBl	Evidenzblätter (collection) (Austria)
EvBl-LS	Evidenzblätter-Leitsätze (collection) (Austria)
EWCA	Court of Appeal of England & Wales (United Kingdom)
EWHC	High Court of Justice of England and Wales (United Kingdom)
EYB	Éditions Yvon Blais (Canada)
FAPL	Fonds d'Amélioration de la Programmation locale (Canada)
FAPPA	Financial Activities and Pre-Bankruptcy Procedures Act (Zakon o financijskom poslovanju i predstečajnoj nagodb) (Croatia)
FAQ	Frequently Asked Questions
FCA	Financial Conduct Authority (United Kingdom)
FCAC	Financial Consumer Agency of Canada
ff.	And the following
FID	Fee Information Document
fn	Footnote
FSC	Financial Supervisory Commission (Taiwan)
FSCA	Financial Sector Conduct Authority (South Africa)
FSMA	Financial Services Market Authority (Belgium)
FTC	Fair Trade Commission (Japan)
FTR	Fixed Termination Rates
G2B	Government to Business contract
GC	General clause

GDP	Gross Domestic Product
GG	Government Gazette (South Africa)
GMA	Gas Market Act (Zakon o tržištu plina) (Croatia)
GN	Government Notice (South Africa)
GOÄ	Gebührenordnung für Ärzte (Germany)
Gov.	Government
GOZ	Gebührenordnung für Zahnärzte (Germany)
GPCCA	General part of Civil Code Act (Tsiviilseadustiku üldosa seadus) (Estonia)
GPCCC	General Provisions of Chinese Civil Code
HAKOM Bylaw	Bylaw on the Manner and Conditions for Conducting of Electronic Communication Networks and Services Activities, issued by the Croatian Regulatory Authority for Network Industries (Pravilnik o načinu i uvjetima obavljanja djelatnosti elektroničkih komunikacijskih mreža i usluga) (Croatia)
HANFA	Croatian Financial Services Regulatory Agency
HCSTL	High Cost Short Term Lending (United Kingdom)
HD	Law Chamber of the Supreme Court
HERA	Croatian Energy Regulatory Authority
Hfl.	Dutch guilder (Dutch currency)
HG	Austrian Commercial Court (Handelsgericht)
HH	Official Israeli Publication of Bills of Legislation (Hatza'ot Hok)
HNB	Croatian National Bank
HOAI	Honorarordnung für Architekten und Ingenieure (Germany)
HPA	Hire-Purchase Act (Singapore)
HSBC	Hong Kong & Shanghai Banking Corporation
i.e.	In other words
ICASA	South African Independent Communications Authority
ICCJ	Romanian High Court of Cassation and Justice (Înalta Curte de Casație și Justiție)
ICLQ	International Comparative Law Quarterly
ICT	Information and Communications Technology (Japan)
IMDA	Info-communications Media Development Authority Act (Singapore)
immolex-LS	Immolex-Leitsätze (collection) (Austria)
Inc.	Incorporation
IPRP	Injunctions Proposal Review Panel (Singapore)
IRRA	Interest Rate Restriction Act (Japan)
J.E	Jurisprudence Express (Canada)
JBl	Juristische Blätter (journal) (Austria)
JO	Journal Official de la République française (France)
K.	Decision

KB	Court of King's Bench (United Kingdom)
KID	Key Information Document for package retail and insurance based investment products
L	Legislation
L.p.c.	Loi sur la Protection du Consommateur (Canada)
L.R.C	Lois Révisées du Canada (Canada)
LCD	Loi sur la Concurrence Déloyale (Switzerland)
let.	Letter
LG	Landgericht (Germany)
LJN	Landelijk Jurisprudentie Nummer (Netherlands)
LOA	Law of Obligations Act (Võlaõigusseadus) (Estonia)
Ltd	Limited Liability
MAS	Monetary Authority of Singapore
MBCA	Manitoba Court of Appeal (Canada)
MDR	Monatsschrift für Deutsches Recht (Germany)
Mr.	Mister
NCA	National Credit Act 34 of 2005 (South Africa)
NCC	National Communications Commission (Taiwan)
NCR	National Credit Regulator (South Africa)
NDPC	National Development and Planning Committee (China)
NERSA	National Energy Regulator (South Africa)
NHS	National Health Service (United Kingdom)
NJW	Neue Juristische Wochenschrift (Germany)
NJW-RR	Neue Juristische Wochenschrift – Rechtsprechungsreport (Germany)
NLCA	Newfoundland and Labrador Court of Appeal (Canada)
NN	National Gazette of the Republic of Croatia
Nr. / no / n^{o} / n	Number
NTBR	Publicatielogo Nederlands Tijdschrift voor Burgerlijk Recht (Netherlands)
O Reg	Ontario Regulations (Canada)
OA	Obligation Act (Croatia)
OAC	Ontario Appeal Cases (Canada)
ÖBA	Österreichisches Bankarchiv (journal) (Austria)
OCPA	Ontario Consumer Protection Act (Canada)
OEB	Ontario Energy Board (Canada)
OECD	Organisation for Economic Co-operation and Development
OFGEM	Office of Gas and Electricity Markets (United Kingdom)
OFT	Office of Fair trading (United Kingdom)
OGH	Austrian Supreme Court of Justice (Oberster Gerichtshof)
OJ	Official Journal of the CJEU
ÖJZ	Österreichische Juristenzeitung (journal) (Austria)
OLG	Austrian Higher Regional Court (Oberlandesgericht)
OLG	German Higher State Court (Oberlandesgericht)

Ont CA	Ontario Court of Appeal (Canada)
OODMA	Oil and Oil Derivatives Market Act (Zakon o tržištu nafte i naftnih derivate) (Croatia)
ORCC	Office de Révision du Code Civil (Canada)
ÖZW	Österreichische Zeitschrift für Wirtschaftsrecht (journal) (Austria)
P & CR	Planning property and Compensation Reports (United Kingdom)
p., pp.	Page(s)
PADEC	Prevención, Asesoramiento y Defensa del Consumidor (Argentina)
Par ex.	Par exemple (Canada)
Para(s), par.	Paragraph(s)
PC	Penal Code
PD	Official Israeli Law Report (Piskei Din)
PECL	Principles of European Contract Law
PEN	Argentinian Executive Power
PFAP	Prohibition on Fraudulent Act related to Price (Jinzhi Jiage Qizha Xingwei Guiding) (China)
PJA/AJP	Pratique Juridique Actuelle/Aktuelle Juristische Praxis (Switzerland)
PNTL system	Pay Now, Terms Later
PPI	Payment protection insurance
PRC	People's Republic of China
PSA	Payment System Act (Zakon o platnom prometu) (Croatia)
PSA	Postal Services Act (Zakon o poštanskim uslugama) (Croatia)
pt.	Point
Pty	Proprietary
QB	Court of Queen's Bench (United Kingdom)
QCCA / C.A.	Quebec Court of Appeal (Cour d'appel du Québec)
QCCQ / C.Q	Quebec Court (Cour du Québec)
QCCS / C.S.	Quebec Superior Court (Cour supérieure du Québec)
QPC	Question Prioritaire de Constitutionnalité (France)
R.C.S.	Recueil des arrêts de la Cour suprême du Canada (Canada)
R.J.Q	Recueil de jurisprudence du Québec (Canada)
RACJ	Régie des Alcools des Courses et des Jeux (Canada)
RCCS	Measures for Regulating Credit Card Services (China)
RCPS	Measures for Regulating the Charge of Property Services, provided by the National Development and Reform Commission and the former Ministry of Construction (China)
RDRB	Rules developed by regulatory bodies (United Kingdom)
RdW	Recht der Wirtschaft (journal) (Austria)
REJB	Répertoire Electronique de Jurisprudence du Barreau (Canada)
REsp	Recurso Especial (Brazil)

Rev Ed	Revised editions (Singapore)
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen (Germany)
RIO	Reference Interconnection Offer
RJC	Responsible Jewelry Council (Argentina)
RLRQ	Recueil des Lois et des Règlements du Québec (Canada)
RMAAQ	Régie des marchés agricoles et alimentaires du Québec (Canada)
RMB	Renminbi (Chinese currency)
ROT	Restraint of trade (Singapore)
RPSCB	Measures for Regulating the Prices for Service, provided by Commercial Banks (Shangye Yinhang Fuwu Jiage Guanli Banfa) (China)
RR	Repo Rate
RT	State Gazette (Riigi Teataja) (Estonia)
S, ss	Schedule(s)
s.	Suivante(s) (Canada)
SAP	Uperintendence of Supply and Prices (Superintendencia de Abastecimiento y Precio) (Chile)
SAP	Sentencia de la Audiencia Provincial (Spain)
SC	Supreme Court
SCA	South African Supreme Court of Appeal
SCAP	Singaporean Code of Advertising Practice
SCC	Canadian Supreme Court
SCL	Standard Contracts Law (Israel)
SCRC	Supreme Court of the Republic of Croatia
SCT	Standard Contract Terms
SCTA	Small Claims Tribunal Act (Singapore)
SERNAC	National Consumer Service (Servicio Nacional del Consumidor) (Chile)
SFFA	Singaporean Freight Forwarders' Association Standard Trading Conditions
SFT	Swiss Federal Tribunal
SGD	Singaporean Dollar (Singaporean currency)
SGHC	Singaporean High Court
SIDE	Secretary of Intelligence of the Government
SKCA	Saskatchewan Court of Appeal (Canada)
SLR	Singaporean Law Report
SLR(R)	Singaporean Law Reports (Reissue)
SoF	Statement of Fees
SOGA	Sale of Goods Act (Singapore)
SPC	Chinese Supreme People's Court
SR	Systematische Sammlung des Bundesrechts (Switzerland)
St.	Satz (Germany)
STF	Brazilian Supreme Federal Court (Supremo Tribunal Federal)

STJ	Brazilian Superior Tribunal of Justice (Superior Tribunal de Justiça)
STS	Supreme Court Judgment
STS	Spanish Supreme Court (Tribunales Superiores de Justicia)
SUGA	Supply of Goods Act (Singapore)
SUNAB	Superintendência Nacional de Abastecimento (Brazil)
SUSEP	Superintendence for Private Insurances (Brazil)
SZ	Sammlung Zivilrecht (official collection) (Austria)
t.	Tome (Canada)
TCC	Technology and Construction Court of England (United Kingdom)
TFEU	Treaty on the Functioning of the European Union
Trib.	Tribunale (Italy)
UCA	Unfair Competition Act (Switzerland)
UCTA	Unfair Contract Terms Act (Singapore)
UfR	Weekly Journal for the Jurisprudence (Ugeskrift for Retsvæsen)
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
US	United States
USA	United States of America
USD	United States Dollar (United States currency)
UTCCR	Unfair Terms in Consumer Contracts Regulation (United Kingdom)
VAT	Value Added Tax
VfGH	Austrian Constitutional Court (Verfassungsgerichtshof)
VfSlg	Amtliche Sammlung des VfGH (official collection) (Austria)
vol.	Volume
vs. / V	Versus
VSL	Ljubljanan Higher Court (Višje sodišče v Ljubljani) (Slovenia)
WASPA	Wireless Application Provider's Association (South Africa)
WLR	Weekly Law Reports (United Kingdom)
WM	Wertpapier-Mitteilungen, Zeitschrift für Wirtschafts- und Bankrecht (Germany)
Yargıtay HGK	General Assembly of the Civil Chambers of the Turkish Supreme Court (Yargıtay hukuk genel kurulu) (Turkey)
Zak	Zivilrecht aktuell (journal) (Austria)
ZFR	Zeitschrift für Finanzrecht (journal) (Austria)
ZfV	Zeitschrift für Verwaltung (journal) (Austria)
ZIP	Zeitschrift für Wirtschaftsrecht
ZR	Zivilrecht (Germany)
ZVR	Zeitschrift für Verkehrsrecht (journal) (Austria)

Decisions of the Court of Justice of the European Union[1]

CJEU Judgment of 30 Mai 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341	Austria 27 Belgium 23 EU 22, 88, 152 Italy 28 General Report 116, 212
CJEU Judgment of 15 January 2015, *Air Berlin*, C-573/13, EU:C:2015:11	EU 33, 65, 166 FR 99 General Report 336
CJEU Judgment of 6 July 2017, *Air Berlin*, C-290/16, EU:C:2017:523	Austria 97, 99
CJEU Judgment of 18 July 2013, *Alemo-Herron and Others*, C-426/11:EU:C:2013:521	Italy 5
CJEU Judgment of 20 September 2017, *Andriciuc and others*, C-186/16, EU:C:2017:703	Austria 48, 90, 106 EU 10, 24, 62, 68, 83, 93, 101, 102, 103, 110, 130 France 55 Romania 67 Slovenia 45, 46 Spain 29, 37, 40, 64 Switzerland 53, 54 General Report 170, 181, 182, 241, 354
CJEU Judgment of 14 March 2013, *Aziz,* C-415/11, EU:C:2013:164	Belgium 19, 22 EU 18, 22, 88 Spain 80 UK 109, 125, 132 General Report 19, 50, 66, 102, 108
CJEU Judgment of 27 April 2017, *Bachman*, C-535/16, EU:C:2017:321	EU 29
CJEU Judgment of 11 June 2015, *Banco Bilbao Vizcaya Argentaria (BBVA)*, C-602/13, EU:C:2015:397	EU 127, 152, 155, 157 Spain 83

(continued)

[1] The numbers refer to the footnotes in the respective reports.

CJEU Judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349	Denmark 59 EU 20, 22, 152, 153 Spain 28, 67 General Report 115, 116, 118, 123
CJEU Judgment of 5 July 2016, *Banco Popular Español and PL Salvador*, C-7/16, EU:C:2016:523.	EU 130
CJEU Judgment of 23 January 2017, *Banco Popular Español*, C-349/15, EU:C:2017:68	Spain 49
CJEU Judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60	EU 9, 24, 38, 67, 85, 99, 109, 121, 142, 152 General Report 108, 109, 129, 244
CJEU Judgment of 7 August 2018, *Banco Santander*, C-96/16 and C-94/17, EU:C:2018:643	EU 40, 122, 130, 154 Spain 88, 89, 90
CJEU Judgment of 3 December 2015, *Banif Plus Bank*, C-312/14, EU:C:2015:794	EU 77, 83
CJEU Judgment of 30 April 2014, *Barclays Bank*, C-280/13, EU:C:2014:279	EU 122 General Report 50
CJEU Judgment of 25 January 2017, *BAWAG*, C-375/15, EU:C:2017:38.	Belgium 72
CJEU Judgment of 21 December 2016, *Biuro podróży Partner*, C-119/15, EU:C:2016:987	Belgium 33 General Report 106, 107, 153
CJEU Judgment of 9 July 2015, *Bucura*, C-348-14, EU:C:2015:447	EU 62, 86, 102, 114, 140 Romania 66 Spain 40, 54 General Report 181
CJEU Judgment of 18 December 2014, *CA Consumer Finance SA*, C-449/13, EU:C:2014:2464	EU 58, 166 Croatia 87
CJEU Judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid,* C-484/08, EU:C:2010:309	EU 4, 35 Spain 29, 31 General Report 14, 21, 170, 241
CJEU Judgment of 22 November 2011, *Cape and Idealservice MN RE,* C-541/99, EU:C:2001:625.	Belgium 13 France 20
CJEU Judgment of 3 September 2015, *Coastea*, C-110/14, EU:C:2015:538	EU 161
CJEU Judgment of 21 November 2002, *Codifis*, C-473/00, EU:C:2002:705.	EU 3
CJEU Judgment of 10 July 2014, *Comission/Belgium*, C-421/12, EU:C:2014:2064.	Belgium 82
CJEU Judgment of 10 May 2001, *Commission/Netherlands*, C-144/99, EU:C:2001:257	EU 4, 34
CJEU Judgment of 7 May 2002, *Commission/Sweden*, C-478/99, EU:C:2002:281.	Denmark 48 General Report 105
CJEU Judgment of 21 April 2016, *Conseil/Commission*, C-73/14, EU:C:2016:283.	Belgium 54
CJEU Judgment of 16 January 2014, *Constructora Pincipado*, C-226/12, EU:C:2014:10	France 23 General Report 18
CJEU Judgment of 5 July 2012, *Content Services*, C-49/11, EU:C:2012:419;	Belgium 72
CJEU Judgment of 3 September 2015, *Costea,* C-110/14, EU:C:2015:538	Belgium 14

(continued)

CJEU Judgment of 3 October 2013, *Duarte Hueros*, C-32/12, EU:C:2013:637	EU 161
CJEU Judgment of 19 July 2012, *ebookers.com Deutschland*, C-112/11, EU:C:2012:487	Austria 101
CJEU Judgment of 22 February 2018, *ERSTE Bank Hungary*, C-126/17, EU:C:2018:107.	EU 12, 62, 83, 102, 159, 160, 167
CJEU Judgment of 4 June 2015, *Faber*, C-497/13, EU:C:2015:357	EU 161
CJEU Judgment of 18 February 2016, *Finanmadrid EFS*, C-49/14, EU:C:2016:98	Estonia 22
CJEU Judgment of 1 April 2004, *Freiburger Kommunalbauten*, C-237/02, EU:C:2004:209	EU 23
CJEU Judgment of 20 January 2005, *Gruber*, C-464/01, EU:C: 2005:32	EU 29
CJEU Judgment of 21 December 2017, *Gutiérrez Naranjo*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980	Belgium 26 EU 16, 39, 141, 149, 150, 152 Spain 49, 56, 80 General Report 115, 116, 117, 129, 245
CJEU Judgment of 17 March 2016, *Ibercaja Banco,* C-613/15, EU:C:2016:195	EU 152, 155, 157
CJEU Judgment of 26 April 2010, *Invitel,* C-472/10, EU:C:2012:242	Belgium 30, 31, 43 Estonia 20 EU 24, 33, 45, 48, 55, 56, 96, 115, 133 Spain 33 Switzerland 50 General Report 150
CJEU Judgment of 30 May 2013, *Jőrös*, C-397/11, EU:C:2013:340	EU 47, 156 General Report 125
CJEU Judgment of 4 October 2018, *Kamenova*, C-105/17, EU:C:2018:808	EU 29
CJEU Judgment of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen,* C-147/16, EU:C:2018:320	Belgium 17 EU 29
CJEU Judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282	Austria 50, 90 EU 6, 41, 51, 54, 61, 62, 67, 70, 75, 76, 79, 80, 81, 83, 94, 102, 157, 158 Belgium 25 Italy 36 Romania 69 Spain 29, 34, 39, 40, 42, 64 Switzerland 48, 50 UK 58 General Report 14, 15, 116, 170, 181, 182
CJEU Judgment of 18 January 2016, *Kolcunová*, C-610/14, EU:C:2016:80	EU 87
CJEU Judgment of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189	EU 124, 127, 129
CJEU Judgment of 22 February 2018, *Lupean and Lupean*, C-119/17, EU:C:2018:193	EU 12, 83, 93, 110 Romania 68

(continued)

CJEU Judgment of 1 December 2009, *Martín Martín*, C-227/08, EU:C:2009:792	EU 161
CJEU Judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127	Belgium 43 Estonia 39 EU 7, 41, 44, 47, 54, 61, 62, 68, 82, 87, 89, 90, 95, 96, 102, 108, 118, 140 Romania 65 Spain 35, 39, 40, 53 Switzerland 51
CJEU Judgment of 27 June 2000, *Océano Grupo Editorial and Salvat Editores*, C-240/98 and C-244/98, EU:C:2000:346	EU 23 Netherlands 17 General Report 134
CJEU Judgment of 20 September 2018, *OTP Bank and OTP Faktoring,* C-51/17, EU:C:2018:750.	EU 11, 83, 93, 102, 108, 109, 111, 124, 126, 158, 162 General Report 242
CJEU Judgment of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350	France 15 General Report 125
CJEU Judgment of 15 March 2012, *Pereničová and Perenič,* C-453/10, EU:C:2012:144.	Belgium 18 EU 114, 119, 140, 156 Spain 52
CJEU Judgment of 16 November 2010, *Pohotovosť*, C-76/10, EU:C:2010:685	EU 24, 113, 140 Romania 70 Spain 52
CJEU Judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283	EU 88, 161
CJEU Judgment of 4 July 2007, *Rampion and Godard*, C-429/05, EU:C:2007:575	EU 161
CJEU Judgment of 23 January 2017, *Rodríguez Sánchez*, C-381/15, EU:C:2017:69	Spain 49
CJEU Judgment of 21 March 2013, *RWE Vertrieb,* C-92/11, EU:C:2013:180.	Belgium 43 EU 5, 33, 46, 48, 57, 107, 117, 122, 126, 132 Spain 40, 41, 46 General Report 16, 355
CJEU Judgment of 29 November 2016, *Sales Sinués*, C-381/14 and C-385/14, EU:C:2016:252	Spain 19, 20
CJEU Judgment of 5 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099	EU 127 Spain 80
CJEU Judgment of 25 January 2018, *Schrems*, C-498/16, EU:C:2018:37	Austria 40 EU 29
CJEU Judgment of 23 October 2014, *Schulz and Egbringhoff*, C-359/11 and C-400/11, EU:C:2014:2317.	EU 46, 50, 59, 60, 107, 125, 166 Croatia 87 General Report 17
CJEU Judgment of 3 April 2014, *Sebestyén*, C-342/13, EU:C:2014:1857	EU 42, 88, 112
CJEU Judgment of 15 January 2015, *Šiba*, C-537/13, EU:C:2015:14	EU 167
CJEU Judgment of 7 September 2016, *Sony Europe Limited*, C-310/15, EU:C:2016:633	France 96

(continued)

CJEU Judgment of 19 November 2015, *Tarcău*, C-74/15, EU:C:2015:772	EU 29
CJEU Judgment of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21	Austria 29 Belgium 25, 57 EU 127, 152, 155, 158 Spain 80, 83 General Report 115, 116, 125, 213
CJEU Judgment of 23 April 2015, *Van Hove*, C-96/14, EU:C:2015:262.	EU 8, 61, 62, 68, 81, 84, 91, 102, 106, 108, 164 Deutschland 101 Spain 36 Switzerland 52 General Report 14, 170, 182, 241
CJEU Judgment of 9 November 2010, *VB Pénzügyi* Lízing, C-137/08, EU:C:2010:659	EU 24
CJEU Judgment of 26 November 2015, *Verein für Konsumenteninformation*, C-326/14, EU:C:2015:782	Austria 67
CJEU Judgment of 28 July 2016, *Verein für Konsumenteninformation*, C-191/15, EU:C:2016:612	EU 24, 116, 144 General Report 131
CJEU Judgment of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299.	Belgium 79
CJEU Judgment of 12 July 2012, *Volksbank România*, C-602/10, EU:C:2012:443	Romania 64 General Report 363
CJEU Judgment of 18 September 2014, *Vueling Airlines,* C-487/12, EU:C:2014:2232	Austria 100, 101
CJEU Judgment of 9 November 2016, *Wathelet*, C-149/15, EU:C:2016:840	EU 29
CJEU Judgment of 7 December 2017, *Woonhaven Antwerpen*, C-446/17, EU:C:2017:954	EU 125
CJEU Judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerb,* C-59/12, EU:C:2013:634.	Belgium 17
CJEU Judgment of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675	General Report 134

Part I
General Report

Control of Price Related Terms in Standard Form Contracts: General Report

Judicial Control and Other Means of Price Control

Yeşim M. Atamer and Pascal Pichonnaz

Abstract Competitive market economies work with the basic assumption that the supply side cannot charge more than their cost of supply given that rational and perfectly well-informed customers know their preferences and are responsive to any price change in the market. However, markets are never fully transparent, and findings of behavioural sciences show that especially consumers act based on imperfect rationality due to systematic biases. Pricing structures that serve to hide rather than reveal the real cost of the goods and services pose one of the main challenges to markets as they abuse biases on the demand side to the greatest extent possible. "Hiding" price related terms in standard form contracts is a prominent way of creating non-salient prices and is therefore a debated issue in many recent high court decisions of different countries. This paper conducts a comparative study on developments in 28 jurisdictions and discusses the efficiency of ex ante regulatory as well as ex post judicial intervention. The results show that controlling prices and price related terms is a multifaceted and complicated issue which entails a holistic approach, involving more transparency, smarter information to be provided to customers, but sometimes also hard paternalistic interventions such as price caps. Besides, more effective ways of collective proceedings and redress mechanisms need to be implemented.

Y. M. Atamer (✉)
University of Bern, Faculty of Law, Bern, Switzerland

İstanbul Bilgi University, Faculty of Law, Istanbul, Turkey
e-mail: yesim.atamer@ziv.unibe.ch

P. Pichonnaz (✉)
University of Fribourg, Faculty of Law, Fribourg, Switzerland
e-mail: pascal.pichonnaz@unifr.ch

© Springer Nature Switzerland AG 2020

Y. M. Atamer, P. Pichonnaz (eds.), *Control of Price Related Terms in Standard Form Contracts*, Ius Comparatum – Global Studies in Comparative Law 36,
https://doi.org/10.1007/978-3-030-23057-9_1

1 Presentation of the Research Question

Control of standard contract terms (SCT) in business to consumer (B2C) as well as in business to business (B2B) contracts has long been a highly debated topic in many jurisdictions. However, control of price related terms in standard contract terms is an issue of more recent concern. In competitive market economies, prices, in principle, need not to be controlled. It is conventional knowledge that in such markets the supply side cannot charge more than their cost of supply. Rational and perfectly well-informed consumers know their preferences and are responsive to any price change in the market. These utility-maximizing consumers on the demand side and profit-maximizing producers on the supply side meet on a perfectly competitive and transparent market, which results in the best possible equilibrium price. Whenever such market conditions are existent an intervention in the price equilibrium is likely to reduce social welfare and will hurt consumers.

This basic market rationale is reflected in most of the Civil Codes enacted in the nineteenth and beginning of the twentieth century, which seldom gave courts the right to intervene in a contractual equilibrium and only under very strict conditions. This very liberal policy approach has been dogmatically justified by the paramount principle of autonomy of will, as well as a restricted understanding of the *laesio enormis* since the natural lawyers of the seventeenth century. Natural law codifications, such as the French and the Austrian Civil codes reflect largely this approach, which allow the disadvantaged party to avoid only certain types of contracts and only if a fixed threshold of imbalance between reciprocal obligations is met. Under the influence of the German historical school and the centrality of will, the newer civil codes have substituted the fix limit by a more flexible system where an objective requirement (gross disparity) and subjective one (circumstances imperilling the free and rational will of one party) have to be met for the disadvantaged party to avoid the contract or ask the judge to adopt it (e.g. Dutch, German, Portuguese and Swiss civil codes). If no such exceptional circumstances are given the parties are free to set the price as they wish.[1]

Leaving the price formation to market forces was also the choice for example of Article 4(2) Directive 93/13/EEC on unfair contract terms[2]: "[a]*ssessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies [sic] in exchange, on the other, in so far as these terms are in plain intelligible language*". Even if the price is ascertained in pre-formulated standard contract terms no judicial review is allowed for as long as the term is drafted in a plain and intelligible manner. The so-called 'transparency' requirement reflects the trust in market mechanisms: if the price term can be

[1]See for a comparative overview Grebieniow (2019), pp. 3–26.

[2]Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993, L 95/29.

understood by an average consumer it is subject to competition and there is no need for a judicial control.

However, this assumption of EU law is obviously far too optimistic. Especially findings of behavioural sciences show, first, that consumers act based on imperfect rationality due to systematic biases, second, that markets are never fully transparent and, finally, that even rational apathy may lead consumers not to choose the best price in the market.[3] This is a widespread phenomenon and is not caused by some exceptional situation, such as undue influence or exploitation of dependence.

According to the results of behavioural sciences the main biases impeding welfare enhancing decisions of consumers are as follows: First of all, consumers deal with complexity mostly by disregarding it. They simplify decisions by ignoring insignificant looking price dimensions and taking mental shortcuts. Evidence shows that when prices are complex, and in particular when they are two-dimensional rather than one-dimensional, consumers have problems choosing the right price.[4] The more complex the price gets, the more consumers end up with contracts that, in hindsight, prove not to serve their interests well. Furthermore, the so called 'optimism bias', as pointed out by cognitive studies and social psychology, entails that individuals tend to be over-optimistic about their future.[5] Accordingly, consumers incline to be also optimistic about their future income. They often misjudge the probability of losing a job, encountering an accident, illness or divorce, which might bring about financial hardship. People systematically predict future choices wrongly and hence misjudge elements of the price vector due to overconfidence.[6] Consumers tend to be myopic. They overvalue the short-term benefits of a transaction at the expense of the future. This type of bias leads for example to the choice of mortgage loan contracts with escalating payments, given the fact that myopic borrowers place excessive weight on initial low payments and insufficient weight on future high payments.[7] The low introductory interest rate (the teaser rate) is a model of product design that targets exactly consumers' imperfect rationality in this regard. The credit

[3]See in detail Bar-Gill (2012); Bar-Gill (2014), pp. 465–490; Zamir and Teichman (2018), pp. 281–324.

[4]See e.g. Grubb (2015), p. 310. The author uses the example of an electricity tariff including a fixed fee, an initial marginal rate, and sometimes also a threshold and subsequent marginal rate. Zamir and Teichman (2018), pp. 297–298; Atamer (2017), pp. 634–635.

[5]Shepperd et al. (2015), pp. 232–237; Bar-Gill (2009), p. 1120; Faure and Luth (2011), p. 344; Mathis and Steffen (2015), p. 40; Zamir and Teichman (2018), pp. 61–64.

[6]Bubb and Pildes (2014), pp. 1595 and 1649 ff.; Zamir and Teichman (2018), pp. 64–66. A good example is the credit-card market in Turkey. Recurring studies have revealed that Turkish consumers choose credit cards not according to the default interest rate, but by comparing different reward programs, or the option to pay the balance back in instalments. Turkish credit card users' optimism manifests itself in the expectation of maintaining a zero-credit balance. This underestimation bias results in distorted competition and credit card interest rates well above marginal cost. Miscalculation of future borrowing shifts competition in the credit card market from the long-term price elements such as interest rates to short-term price elements such as annual fees, or other card related features. See Atamer (2017), p. 633 and Turkey Report.

[7]Bar-Gill (2009), p. 1120.

card scheme is another such model. Due to this myopia, consumers are also naïvely underestimating their future tendency to borrow and exercise no self-control today.[8]

It comes as no surprise that these types of biases are misused by sellers to exploit consumers to the greatest extent possible.[9] The two most common contract designs, as put forward prominently by Bar-Gill, are *increasing complexity* and *deferring costs*.[10] Using standard form contracts which include terms affecting the price is a classic way of creating such complexity. But, this is surely not the only way. Bundling prices,[11] price partitioning,[12] or offering credits with 'zero introductory interest rates' and disproportionally high rates kicking-in in the second year are all common means of obfuscating. These pricing schemes are not necessarily linked to the usage of standard terms but in most of the cases they do come along with them.

In the last couple of years, a growing concern regarding such pricing schemes has become visible. Given that in most countries special provisions countervailing these practices do not exist, courts had to intervene, and they mostly did so by way of extending standard terms control also to price related contract terms. This was especially so in the European Union, which can serve as a good example to demonstrate the problem[13]:

Even though the aforementioned Article 4(2) Directive 93/13/EEC did not give courts the right to control price terms in standard form contracts, the way to limit this exception—and therefore to open the way for judicial control—was shown by the CJEU in *Van Hove* as follows: "[c]*ontractual terms falling within the concept of 'the main subject-matter of the contract', within the meaning of Article 4(2) of Directive 93/13, must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it. By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within the concept of 'the main subject-matter of the contract', within the meaning of that provision*".[14] For example, terms relating to the exchange rate to be applied to consumer credit

[8]Bubb and Pildes (2014), p. 1642.

[9]See in detail on such exploitation examples the book of two Nobel laureates: Akerlof and Shiller (2015).

[10]Bar-Gill (2012), pp. 17–23; Bar-Gill (2014), pp. 471–474.

[11]For example, bundling the credit agreement with a payment protection insurance; or broadband internet, subscription-based television services and landline telephones; or cell phone handsets with an internet and calling plan are common practices.

[12]Examples from the credit card market are e.g. charging an annual fee but in addition also a cash-advance fee, balance-transfer fee, foreign currency-conversion fees, expedited payment fee, late payment fee, over-limit fee, returned check fee, credit limit increase fee, and even a no activity fee. In a study of 2013, the Banking Authority of Turkey has found 65 different items for which banks charged fees. See on price partitioning as a means of influencing consumer decision making: Van Boom (2011), pp. 364 ff.

[13]For further explanations see the EU Report.

[14]CJEU Judgment of 23 April 2015, *Van Hove*, C-96/14, EU:C:2015:262, para 33. Parallel also CJEU Judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid,* C-484/08, EU:C:2010:309, para 34; CJEU Judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:28, para 49.

contracts denominated in foreign currency (*Kásler*[15]); terms giving the right to unilaterally alter the price of the service in a natural gas supply contract (*RWE Vertrieb*,[16] parallel *Schulz and Egbringhoff*[17]); terms where the duty of the seller to pay the municipal tax on the increase in value of urban land is transferred to the buyer (*Constructora Principado*[18]); provisions giving the bank the right to unilaterally set the default interest rate in a mortgage credit contract (*Aziz*[19]) were all found to be 'ancillary' and therefore open to judicial control.[20] These decisions seem to be in line with the approach of the CJEU taken in *Caja de Ahorros*,[21] where it decided that Art. 4(2) does not preclude national legislation authorizing judicial review of the adequacy of price and remuneration.

In fact, this discussion got more and more heated in regard to price related terms in banking contracts.[22] Many countries face the problem that in long-term contracts the switching costs combined with consumer inertia places banks in a very advantageous position.[23] For instance, Germany has been very active in terms of judicial control of price terms in banking standard form contracts. The German Federal Court of Justice (BGH) differentiates between main and ancillary terms affecting the price, just like the CJEU does.[24] All those terms, which have an indirect effect on price calculation, are subject to standard terms control. Especially terms that burden the consumer with operational costs that normally should have been carried by the bank are considered as abusive and therefore ineffective according to the national law regime.[25] One of the notable examples was the May 2014 decision of the BGH in which it found terms in consumer credit contracts that allowed banks to charge 'management fees' for the opening of a credit to be invalid.[26] German banks were obliged to pay these fees back retrospectively for 10 years.[27] *Stiftung Warentest*, a German consumer organisation, reports that the amount to be repaid could be as high as 13 billion Euros.[28]

[15]CJEU *Kásler and Káslerné Rábai* (n 14).

[16]CJEU Judgment of 21 March 2013, *RWE Vertrieb,* C-92/11, EU:C:2013:180.

[17]CJEU Judgment of 23 October 2014, *Schulz and Egbringhoff*, C-359/11 and C-400/11, EU:C:2014:2317.

[18]CJEU Judgment of 16 January 2014, *Constructora Pincipado*, C-226/12, EU:C:2014:10.

[19]CJEU Judgment of 14 March 2013, *Aziz,* C-415/11, EU:C:2013:164.

[20]See also EU report and below 5.2.

[21]CJEU *Caja de Ahorros y Monte de Piedad de Madrid* (n 14).

[22]See Atamer (2017), pp. 648–657.

[23]See on the status quo bias and the endowment effect causing switching inertia in long-term contracts Zamir and Teichman (2018), pp. 48 ff.; Luth (2010), p. 52. The problem is also prominent in e.g. energy, internet, cell-phone or pay TV contracts.

[24]See Germany Report.

[25]See also below p. 34.

[26]BGH, 13.05.2014 – XI ZR 405/12, NJW 2014, p. 2420.

[27]BGH, 28.10.2014 – XI ZR 348/13, NJW 2014, p. 3713.

[28]http://t1p.de/test-bearbeitungsgeb.

A different approach was taken by the Supreme Court of the United Kingdom in the 2009 *Office of Fair Trading v Abbey National* decision.[29] The issue was whether overdraft charges on current accounts contracted on a 'free-if-in-credit' basis were price terms and would therefore be exempt from control. The England and Wales Court of Appeal had found that the terms could be controlled, given that they were not part of the essential bargain between the parties.[30] By contrast, the UK Supreme Court decided that overdraft charges were exempt. It rejected the idea that price terms could be divided into those which formed the essential bargain and those which were ancillary. According to the Court, 12 million UK citizens were regularly incurring such charges.

Other countries, like Israel (2008), Romania (2010), China (2014) and Turkey (2014) have preferred to give their national supervision authorities for banks the right to issue a list of services for which they can charge fees. No other payments can be requested, and all fees have to be disclosed on the webpage of the banks. In some jurisdictions like the USA,[31] Switzerland, Turkey or the EU legislators introduced caps on some type of prices like credit card late payment fees, interest rates or roaming fees.[32] In the EU[33] and the UK[34] special measures were taken to stimulate competition between the banks, and thereby to reduce prices by enhancing transparency and switching.

All these examples show that the issue of control of price terms, especially in long-term contracts is problematic. However, whether the preferable way of control is through intervention of the legislature *ex ante* or the judiciary *ex post*, or by enhancing competition has to be ascertained carefully. Some major problems related to judicial control are caused by the sheer volume of the contracts involved, since the *inter partes* effect of court decisions is still a major obstacle in many countries.[35] In

[29] [2009] UKSC 6. For a critical appraisal of the decision see UK Report and for example Chen-Wishart (2010) and Whittaker (2011).

[30] [2009] EWCA Civ 116.

[31] See e.g. Agarwal et al. (2015); Bar-Gill and Bubb (2012).

[32] Compare e.g. for the detailed EU regulations: https://europa.eu/newsroom/highlights/special-coverage/end-roaming-charges_en.

[33] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, OJ 2014, L 257/214.

[34] The Competition and Markets Authority has declared its "Retail Banking Market Investigation – Final Report" on 9 August 2016 https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market-investigation-full-final-report.pdf.

[35] See regarding enforcement of consumer protection rules under EU law Micklitz (2015), pp. 491 ff.; See for the developments in the EU Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, COM (2018) 185 final; Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee A New Deal for Consumers, COM (2018) 183 final. See for a comparative overview Micklitz and Saumier (2018). Cf. also below p. 24.

addition, given that price terms are at stake, any decision of the courts has a potential to trigger restitution claims from millions of consumers. Besides, judgements often do not add to legal certainty given that each variation of a price term, which was already found abusive by a court, might be subject to a new legal procedure.[36]

Therefore, also means of *ex ante* regulatory intervention have to be sought.[37] Especially findings of behavioural economics show that controlling deceptive pricing patterns, by either trying to subject them to the competitive forces of the market, or sometimes by limiting their application can be more effective.[38] In fact, using the insights of behavioural economics seems to be a general trend today in national, international and supranational settings.[39]

The aim of this comparative research is *to determine different approaches in the world regarding price control and particularly to discuss the efficiency of both paths, judicial and regulatory intervention*. Price control and its limits are certainly some of the major questions arising in all liberal market economies, as well as in more regulated markets. It is important to set an adequate limit, which maintains the fundamental elements of a free market economy but rises also the level of protection against abusive practices regarding price related terms. The appropriate level of intervention may however vary from one legal system to the other, given the various legal and non-legal players involved.

2 Presentation of the Results of the Questionnaire

The **27** national and **1** supranational reports on which this general report is based present a scattered picture regarding how, and how far, a control of SCT in general, and of price related terms in particular is implemented. As a first impression, it can be stated that freedom of contract, and especially freedom of the parties to determine goods and services in exchange for a certain remuneration is fully granted. Whether under a socialist market economy or a fully market-oriented economy; whether in a common law, civil law or mixed jurisdiction freedom of contract, and especially

[36] Atamer (2017), pp. 639–642.

[37] For a detailed report in the UK see ‘Helping people get a better deal: Learning lessons about consumer facing remedies’, prepared by the Financial Conduct Authority and the Competition and Markets Authority, October 2018 (https://www.gov.uk/government/publications/ukcn-consumer-remedies-project-lessons-learned-report).

[38] See in detail Bar-Gill (2012); Atamer (2017), pp. 642 ff.

[39] **UK**: In 2010 the Behavioural Insights Team (BIT) started life inside 10 Downing Street as the world’s first government institution dedicated to the application of behavioral sciences (https://www.bi.team/); **EU**: Behavioural Insight Unit at the Joint Research Centre of the European Commission (https://ec.europa.eu/jrc/en/research/crosscutting-activities/behavioural-insights) **OECD**: http://www.oecd.org/gov/regulatory-policy/behavioural-insights-and-public-policy-9789264270480-en.htm. **The World Bank**: Mind, Behavior, and Development Unit (http://www.worldbank.org/en/programs/embed#1).

freedom of the parties to decide on the goods and services in exchange for a certain remuneration is acknowledged. The main principle regarding the price remains its formation on the market.

However, many of the participating countries have introduced a special legal regime for the control of SCT, mostly in B2C relations, but sometimes also in B2B contracts. Even though a SCT control excludes price control, the tendency of courts to control price related terms either by qualifying them as auxiliary terms or as intransparent price terms is existent. Besides, all of the national reports indicate that, in some way or the other, regulators are interfering in the price formation process. Price control is obviously a multifaceted and very complicated issue involving many policy decisions. It happens especially in sectors where there are problems in stimulating competition, or in regard to special goods or services where public interest requires such interference, or where social concerns outweigh efficiency-based arguments. This report does not aim at discussing all these different motives of price control. Our main focus lies on price related market failures based on information asymmetries or pricing structures that serve to hide rather than reveal the real cost of goods and services and thereby abuse limitations in the cognitive competences of consumers.

Our general report will follow the questionnaire that we had prepared for the national reporters.[40] We will therefore begin by looking at the scope of freedom of contract and its legal foundations (3). After a presentation of the functioning of the judicial control of standard contract terms in general (4), we will present in more detail how the judiciary reacts when these standard terms incorporate price related terms (5). Next to judicial control, there are also legislative and more importantly administrative controls either for all types of contract or for specific ones regarding price terms. Chapter (6) is dedicated to give an overview regarding these control methods. As competition is based on correct information regarding the price, and SCT cause an additional information problem we have asked the national reporters to present also various measures taken to ensure a higher level of information which will be discussed in chapter (7). We will end with some proposals and conclusions (8).

3 Freedom of Contract and Justifications of Its Limitation

3.1 The Justification of Freedom of Contract

Freedom of contract is recognized as a fundamental principle of contract law in all the legal systems that have been reported to us. Even legal systems based on a socialist market economy, such as China, recognize this fundamental principle.[41]

---

[40] See below p. 58 et seq.

[41] China Report.

Some reporters indicate that freedom of contract is a constitutional right,[42] some consider that it is indirectly recognized by the constitution.[43] Other systems may have not integrated freedom of contract on the constitutional level, or may not have a constitution at all, but do recognize it as a fundamental and even ideological principle of contract law,[44] and sometimes as an on-going constitutionalization process of private law.[45]

The reasons underlying the recognition of such constitutional right or fundamental principle of contract law may have different but complementary reasons:

- *Existence of a market economy.* For some legal systems, market economy may only exist if there is freedom of enterprise. Entrepreneurs may then only fully benefit from such freedom if there is a chance for them to decide freely to conclude or not to conclude a contract with given parties; to decide on the content of their contract and to choose the form in which they wish to contract. Freedom of contract is fundamental to free-market libertarianism and thus perceived more as an economic right.
- *Freedom to develop one's personality.* Freedom of contract is also about choices made by parties. Therefore, some legal regimes put more emphasis on the role of freedom of contract for individuals to live a dignified life,[46] to further individual fulfilment and self-realization.[47] Freedom of contract is thus perceived also as a personality right than purely an economic right.

These different justifications may trigger different answers when fundamental rights such as the freedom of contract versus the right to equality are conflicting and when the lawmaker needs to balance those rights.

3.2 Limits to Freedom of Contract

Even understood as a fundamental right, freedom of contract is never conceived as being absolute. It needs to be weighed against other fundamental rights, it can be restricted by bills, as long as the restriction is welfare enhancing, proportionate and does not impair the core of freedom of contract.[48]

The reasons for such limitations, also in the context of standard contract terms, can be summarized as below. These reasons are obviously not mutually exclusive but supplementary:

[42] Brazil Report; Turkey Report.

[43] Germany Report; Israel Report.

[44] Canada Common Law Report; Croatia Report; Singapore Report; UK Report.

[45] Argentina Report. See on the issue in general Micklitz (2014).

[46] South Africa Report.

[47] Germany Report; Taiwan Report.

[48] Brazil Report.

- *To ensure a proper or better functioning of the market*. This is true especially when freedom of contract is taken in its economic dimension. Antitrust regulations, rules against unfair competition or consumer law are areas where interference with freedom of contract aims at correcting market failures.
- *To ensure procedural fairness*. Rules on capacity, mistake, fraud, threat and the like can be found in all jurisdictions to ensure a so-called procedural fairness. Procedural fairness is not an aim as such, but it guarantees a higher probability of *substantive fairness*. Especially regarding SCT the special requirements for inclusion of such terms is a matter of procedural fairness. The customer must at least be given the chance to acknowledge the use of SCT, to read them, and bargain if he so wishes.
- *To ensure substantive fairness*. A structural imbalance between parties due to a market failure may also cause an unfair imbalance between the parties' rights and obligations. That usage of SCT can cause such imbalance especially in B2C contracts but also in Business to Small and Medium Size Enterprise (B2SME) contracts is a widely acknowledged fact. The justification for a legal intervention can be seen in the substantial welfare costs these imbalanced contracts impose.[49] But fairness and the protection of the weaker party are also often used justifications for such intervention.[50] Brazil is an interesting example in this context as Section 421 of the new Civil Code expressly regulates that every contract has a social function itself.[51]

A restriction on a constitutional or fundamental right needs to be **proportionate to the objectives** it aims at. This involves traditionally two aspects:

- *The measure shall be apt to achieve the objective it aims at.* The regulation that restricts freedom of contract should be suitable to ensure a better functioning of the market via procedural and/or substantial fairness requirements. If it restricts the freedom of contract without being able to achieve these goals, it might be (rightly) challenged.
- *The measure shall not go too far vis à vis what is needed.* If there is a less intrusive mechanism to restrict freedom of contract and to accomplish the same result, then that lesser measure shall be chosen. Prices for example are typically salient. If there are reasons to assume that there is an information problem regarding the price this can mostly be cured by special requirements regarding labelling, common calculation methods, like the annual percentage rate (APR), or by facilitating a better comparison shopping through specialised websites and the like. However, as the national reports show, this is not always enough to spur competition. Even in regard to very simple prices, such as the credit card interest

---

[49]Bar-Gill (2012), pp. 23 ff.

[50]CJEU Judgment of 30 April 2014, *Barclays Bank*, C-280/13, EU:C:2014:279, para 32; see also CJEU *Aziz* (n 19), para 44. See also Rösler (2010).

[51]See Brazil Report.

rate[52] or the default interest rate, there might be need for a judicial control or for regulatory caps if consumers are unresponsive to any information provided. Obviously, price relevant factors in SCT need to be scrutinized also from this perspective.

4 Standard Contract Terms and Their Control

4.1 Rationale of Controlling Standard Contract Terms

The rationale of controlling SCT is, although not explicitly underlined by lawmakers, that a market failure impedes competition among SCTs.[53] Comparison shopping is not possible because of an information deficit on the customer side. While using SCT decreases transaction costs of the supplier to a great extent due to standardisation, efficient risk calculation and centralized handling of thousands if not millions of contracts, the transaction cost for the customer rises drastically as he is burdened with the cost of searching for the best SCT on the market. A rational customer is well advised not to do so since in most of the cases the probability of the SCT being employed is too low to justify the costs involved in searching for the best SCT.[54] Due to these search costs suppliers have also no chance to make up for the information asymmetry via disclosure measures ("signalling").[55] Any information provided by a supplier at contract conclusion phase will be disregarded by a rational consumer ("rational apathy").[56] Hence no supplier has an incentive in drafting its SCT in favour of the customer or even to try to make its terms more salient. If the consumer is not going to place its limited attention on the SCT whatever the supplier does a race to the bottom situation inevitably occurs and all suppliers end up using the worst SCT. This market failure ("lemon problem"[57]) arises despite competitive markets and calls for the lawmakers to intervene.[58] In most of the reporting countries we see such special control mechanism.[59]

Given this rationale of controlling SCT it comes as no surprise that price terms even if stated in the SCT are not subject to control. Price is assumed to be subject to

[52]See n 4.

[53]Korobkin (2003), pp. 1203–1295; Schäfer and Leyens (2010), pp. 97–119; Atamer (2018), pp. 35–57; Schäfer and Ott (2012), pp. 423 ff. and 449 ff.

[54]Eisenberg (1995), pp. 211, 243–244; Bakos et al. (2014), pp. 1–35.

[55]Schäfer and Leyens (2010), p. 104; Luth (2010), pp. 147–148; Zamir and Teichman (2018), p. 303.

[56]Faure and Luth (2011), p. 342. See also UK Report.

[57]Akerlof (1970).

[58]Zamir and Teichman (2018), p. 320.

[59]It is also worth noting that in the USA, the American Law Institute (ALI) is in the process of preparing a Restatement of the Law for Consumer Contracts that focuses on standard-form contracting (http://www.thealiadviser.org/consumer-contracts).

competition as long as it is transparently formulated, and no additional information problem exists. If for example the credit card SCT include also the yearly fee payable for the card this does not by itself make the price term intransparent. If it is ensured that prices are salient and subject to competition a disguised judicial control by way of a SCT control would disrupt the market equilibrium. However, the problem lies exactly in this presupposition: As stated above, prices are not always salient and SCT often include terms that have an indirect but significant effect on the formation of the price.[60] In such cases, the same market failure argument is also valid for price clauses and justifies an intervention.

In this section we briefly address the issue of definition, incorporation and interpretation of SCT (Sect. 4.2), before analysing in more details the ambit of any substantive control by the judiciary, the various techniques used for and the various consequences of such substantive control (Sect. 4.3) and finally the important issue of collective action and its efficiency (Sect. 4.4).

4.2 Definition, Incorporation and Interpretation of Standard Contract Terms

For the sake of clarity, we understand **standard contract terms** as being contractual terms that fulfil three requirements:

- *Advance formulation.* SCT are formulated in advance by one party. The party using these SCT has usually drafted them, but it may also have used SCT prepared by third parties, such as professional associations. Therefore, the party supplying the SCT to the counter party will be named "the supplier of SCT", which is more precise than the "drafter". The party to whom they are imposed will be named as "the counter party or the customer".
- *Intention to use multiple times.* SCT are standardized because they are intended to be used in multiple contracts. This is also why they are generally drafted as a separate document and annexed to the main contractual document. However, the fact that these SCT have not yet been used, for instance because an administrative authority has the power to control them,[61] or that they have been used only in a very limited number of contracts, or even just once, does not change their nature.[62] What matters more is the *intent* to use them for many contracts as a standardization mechanism of contracts.[63]
- *Absence of negotiation.* SCT keep their nature of being "standard" contract terms only if they have not been subject to negotiation. The absence of negotiation,

[60] See also UK Report.

[61] As is the case for some sectoral SCT in e.g. Croatia.

[62] See China Report.

[63] See for a Swiss perspective, Pichonnaz (2017), Art. 8 LCD para 4.

either because the customer did not ask for, or its request to discuss one term or the other was rejected, or because it was not possible during the contracting process (e.g. distance contracting), is the key-factor to identify SCT.[64] Obviously, there is some divergence among legal systems with regard to what amounts to negotiation.[65] Neither the mere reading of the SCT, nor the mere fact to ask questions as to specific terms shall be considered as acts of negotiation. Indeed, the way the SCT are drafted, i.e. in a separate document that looks as unchangeable, and the fact that the customer is often told that one cannot change the SCT, add to the idea that the threshold to accept that specific SCT have been negotiated should be pretty high.[66] The expectations will certainly differ according to the value of the transaction and whether or not the counter-party is a business itself. As explained above, the reason why there is a race to the bottom with SCT is the fact that the transactions costs related to searching for better terms or negotiating such terms are too high. However, the higher the transaction value the lesser the cost of such negotiation will be in relation. Therefore, in B2C contracts negotiation can seldom be presumed as the contract value is mostly low.[67] Whereas in B2B contracts this possibility is rather high.

To be binding for the parties, SCT need to be **incorporated into the contract** at stake. The incorporation formalities vary significantly from one system to the other, but also from one type of contract to the other. It is not the place to examine these incorporation requirements in all details, but we may stress two issues:

- *Acknowledgment of the existence of the SCT.* In principle the customer has to give his consent to the inclusion of standard terms at the time of conclusion of the contract.[68] This acknowledgment may be done without any form, may have specific requirements, such as a signature, or even a handwritten acknowledgment that the SCT have been read and understood. This acknowledgement process is

[64] China Report; South Africa Report.

[65] See on these elements Austria Report.

[66] See furthermore the CJEU which considers that the good faith requirement implies to determine whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations: CJEU *Aziz* (n 19), para 69; see Belgium Report.

[67] Art. 3 Directive 93/13/EEC therefore provides that a term shall always be regarded as not individually negotiated where it has been drafted in advance, particularly in the context of a pre-formulated standard contract. Even if a specific term has been negotiated the Directive applied to the rest of the contract as long as the supplier does not prove that the rest has been negotiated too. See also French Report and Art. L. 212-1 al. 6 French CConsom.

[68] But see also some US Decisions, which mention the *Pay Now Terms Later* system (or "shrinkwrap"), in which the parties agree on the main terms of the transaction immediately, but the SCT arrive later, when the purchase item is delivered and opened. Some courts have accepted the inclusion of the SCT, some have rejected it. See among others *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Specht v. Nescape Communications Corporation*, 306 F.3d 17 (2nd Cir. 2002).

based on the requirement of some sort of *consent* to these terms by the other party, even if these are not effectively read, but could have been.

- *Reasonable availability test.* Most systems do only accept a valid incorporation when the acknowledgment of the existence of the SCT is combined with the fact that those terms are reasonably available.[69] Again, this test may vary significantly from one regime to the other, but also from the mode of conclusion of the contract: a contract concluded electronically may have a regime of "*clickwrap*" where one has to scroll-down a text and then consent to the text or "*browsewrap*" where a link will lead to the website including the SCT. Continuing to use the webpage is interpreted as an assent.[70] Sometimes even a system of *pay now, terms later* is applied where the terms arrive later with the purchased items.[71] In B2C contracts these methods are often not deemed as sufficient to include SCT. SCT printed on the back of the ticket,[72] SCT written in too small prints for instance may also be considered as being not incorporated. One concern might be that the ability to negotiate them does not exist at all and the risk of abusive terms might therefore be very high.

Some legal systems, which do not have special provisions authorizing the judge to control unfair terms, have tried to strike out such unfair clauses through a strict application of the incorporation requirements. Thus, even though the SCT had been handed over to the customer before concluding a contract, a *surprising term*, to which a party has not specifically drawn the attention of the other party to, is deemed not to have been incorporated into the contract.[73] One may speak about a disguised substantive control.[74]

Most of the legal systems have also adopted the **interpretation *contra proferentem*** rule[75] which goes back to the Roman law rule of interpretation for unilateral oral contracts (*stipulatio*).[76] Today, it aims at improving the quality and also the transparency of SCT. According to this rule, in case of doubt over the proper meaning of a term, the judge has to choose the most favourable interpretation for the customer (*in dubio*

[69]For some cases see Belgium Report which mentions a Decision of the Belgian Cassation Court requiring that a hyperlink to SCT actually works and Italian Report.

[70]This is typical for the US Court practice, see among others *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171 (9th Cir. 2014); *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2nd Cir. 2002).

[71]See n 64.

[72]See Italian Report, which cites at least two Supreme Court cases, Cass. 26 February 2004, n. 3863, Foro it., 2004, 1, 2132, annotated by Bitetto; Cass., 20 December 2005, n. 28232; Foro it., 2006, I 2065.

[73]See Switzerland Report; UK Report (red-hand rule).

[74]See below p. 18.

[75]See Canada Common Law Report; China Report; South Africa Report.

[76]D. 45,1,38, 18 (Ulpianus libro 49 ad Sabinum): "*In stipulationibus cum quaeritur, quid actum sit, verba contra stipulatorem interpretanda sunt.*"

contra stipulatorem). The rule sets an incentive to suppliers of SCT to avoid equivocal terms as much as possible. This term might also be central for price related terms, which often are more complex and bear the risk of doubts or absence of clarity.

As shown by the Canada-Common Law report, the question whether contractual interpretation is a question of fact or of law, or a mixed one,[77] may also play a role regarding control of SCT.

Once SCT have been validly incorporated into a contract, and their meaning determined by means of interpretation, possibly by reference to the *contra proferentem rule*, the judge has to move on to the substantive control of SCT. Such control may depend on the ambit of review, but also on the tools at disposal.

4.3 Substantive Control of Standard Contract Terms

4.3.1 Ambit of Substantive Control

The substantive control of SCT may vary according to two factors, which we will only briefly mention here:

- *Control of SCT v. any non-negotiated contract term*. As already mentioned, the substantive control may be restricted to formal "standard contract terms" which have become part of the contract and are then often called "adhesion contracts". However, it is not always clear why this restriction applies; especially, one could wonder whether the control should work equally for any non-negotiated term, whether it is formally part of SCT or not. Given that the existence of the formal requirements of SCT can sometimes be subject to discussion the Directive 93/13/EEC, for example, has chosen to extend control to all non-negotiated terms, independent of the fact whether there is only one contract term or more, whether they were drafted in advance or not, or will be used more than once. If the argument for limiting contractual freedom is based on a structural imbalance of negotiation powers, as affirmed for instance by the Directive,[78] or in some national systems,[79] then a restriction to SCT does not really make sense; the aim being a more social private law and a kind of *post-contractual* rebalancing of powers to produce a (potential) preventive effect on further contract and SCT drafting. This argumentation can also be brought in harmony with the market failure reasoning as it does not make a difference whether the exclusion of liability clause is a stand-alone clause as seen at the entrance of e.g. a car-park, or one among a bunch of other terms favouring the supplier as e.g. in a sales contract. The customer will carry the costs of searching for better clauses on the market or rather rationally opt for concluding this contract and hope for no dispute to arise.

[77] See Canada Common Law Report; *Sattva Capital v Creston Moly*, 2014 SCC 53, para 50.

[78] See EU Report.

[79] See among others Belgium Report; France Report.

- *B2B v. B2C control.* The question whether a protection against SCT should be given only in B2C relations or should also include B2B relations is raised in every report. There are only a few countries which fully exclude a SCT control for B2B contracts.[80] If the argument for the control of SCT is seen in the market failure due to high transaction costs burdened by the SCT, there is little grounds to justify an *a priori* exclusion of B2B contracts without checking in each concrete case whether the negotiating powers were sufficiently balanced. This will often be a problem if the counter party is an SME as their financial and legal capacities are limited and they may face the same type of structural imbalanced negotiating powers as consumers.[81] However, as put forward above, the higher the value of the contract the higher the expectations are on the customer to get some legal advice and/or to seek for better contract terms.

4.3.2 Various Techniques of Substantive Control

4.3.2.1 Indirect Substantive Control

We have already mentioned above techniques of indirect or disguised substantive control linked with the incorporation requirement.[82] These mechanisms are based on the idea that standard terms that are **not reasonably available** at contract conclusion have an enhanced risk of including unfair terms.[83] SCT that are not **reasonably legible** shall be struck down for similar reasons.[84]

Furthermore, some systems have dealt with **surprising terms**,[85] which means with terms that the other party did not expect to find in the SCT and, if the party had known about them would probably not have agreed to them. In a way, these SCT are surprising also because they are unfair. However, instead of striking them down at the level of a substantive control, these terms are deemed not to have been incorporated into the contract because of lack of consent. This is why some authors have called that approach a "disguised substantive control".[86] The Canadian common law report mentions such technique, as one in which the Court does not assert its control power.[87]

To some extent, the **interpretation of SCT** may also be a technique of substantive control, especially when the interpretation deals with SCT for which the factual

[80] E.g. Belgium Report; Canada Common Law Report; Israel Report (where also for B2C contracts no special SCT control is practiced).

[81] See e.g. Austria Report; Croatia Report; Denmark Report; France Report; South Africa Report.

[82] See p. 14 et seq.

[83] See p. 16.

[84] See for instance Canada Civil Law Report. See also below p. 24.

[85] See Romania Report; Switzerland Report.

[86] Koller (2008), pp. 943–953; Pichonnaz (2017), para 94.

[87] Canada Common Law Report.

matrix is far less important. Some interpretations, with or without reference to the *contra proferentem* rule, may be more a question of law than of facts,[88] and therefore have a significant precedential value.

4.3.2.2 Direct Substantive Control

National reports have shown **mainly two types** of judicial substantive control of SCT (as well as for invasive administrative controls, when they exist):

- **Control by means of general (mandatory) provisions of contract law.** Mandatory provisions, which the parties cannot contract out, apply in any contractual situation. However, the chance that they are applied when SCT are used is certainly higher, given either the *field of application* of these norms (consumer contracts, supply of common goods, transportation, energy, telecommunication), the *specific contracting process*, which may trigger issues of mistake,[89] duress or formal unconscionability, or the *typical content* of SCT, such as exclusion or limitation of liability,[90] which may be expressions of violations of good morals,[91] sometimes concretized by institutions such as *laesio enormis*[92] or *unconscionability*, in many variations. Sometimes sector-specific mandatory rules, such as rules protecting tenants against some issues dealt in SCT, might provide a remedy.[93] Many reports have also rightfully underlined the importance of *anti-trust* rules or *unfair competition* regulations as both are mandatory.[94]

  However, as mentioned above, SCT create a special market failure which neither can be cured by the market itself nor by employing the classical restrictions of contract law. If the system cannot assure that SCT are read, commented or negotiated because of the transaction costs involved, a structural imbalance in negotiation powers is manifest. Therefore, one needs to seek for special restricting regulations.

- **SCT-specific control of unfair terms.** A SCT-specific content control has been implemented in almost all legal regimes.[95] It has two main features.

  - *Administrative control.* An administrative control may take place either *before* a supplier of SCT can use them in its contracts[96] or at the request of the other

[88] See the Canada Common Law Report and *Ledcor v Northbridge*, 2017 SCC 7, para 24.

[89] See for instance South Africa Report.

[90] See for instance South Africa Report.

[91] See Estonia Report.

[92] See Brazil Report; Chile Report; Croatia Report; Romania Report; Switzerland Report.

[93] See e.g. Switzerland Report.

[94] Brazil Report.

[95] Exception: Canada Common Law Report.

[96] See China Report; Croatia Report; Taiwan Report.

party,[97] who complains about them and intends to have a decision that may influence a later lawsuit against their supplier.

- *Judicial control.* In most of the reporting countries this has been the preferred choice, even if there is sometimes also an administrative control available.[98] We will present briefly such judicial control below.

Given that 14 of the contributing countries are EU Member States it makes sense to start by briefly describing the system introduced by the Directive 93/13/EEC. However, this Directive sets only minimum standards in harmonization (art. 8[99]); therefore, the EU Member States are free to introduce further reaching measures to protect customers from unfair contractual terms. Some of these divergences we will discuss below, when dealing with price related unfair terms.[100] There is also a specific report presenting EU law, the Directive 93/13/EEC and the relevant case law of the CJEU.[101]

The EU system is based on a *general provision* (art. 3 Directive 93/13/EEC), which regards a not individually negotiated term as *unfair* if "**(a)** contrary to the requirement of good faith, it causes **(b)** a significant imbalance in the parties' rights and obligations arising under the contract, **(c)** to the detriment of the consumer" (letters added). Despite the CJEU *Aziz* case[102], the requirement of good faith is not always understood as a separate requirement,[103] but it certainly underlines that the imbalance needs to be justified by objective reasons, looking at the whole contract, or even external factors. The imbalance shall be significant, which is also difficult to assess in abstract. This is the reason why the Directive 93/13/EEC has provided for a list of clauses that are presumed to be unfair, reversing the burden of proof (so-called *grey list*) (art. 3 para 3: "*The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair*").

However, since EU Member State are allowed to implement more stringent measures, some have transposed this list in dividing it into terms that are regarded as being always unfair (so-called *black-list*)[104] and some that are only presumed to be unfair (*grey-list*), and sometimes have also supplemented the list to some

[97] See for instance Israel Report; Italy Report; Netherlands Report.

[98] Croatia Report; Israel Report; Italy Report; South Africa Report.

[99] "Member States *may* adopt or retain *the most stringent provisions* compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer" (emphasis added).

[100] See below p. 33 et seq.

[101] See EU Report.

[102] CJEU *Aziz* (n 19), para 69.

[103] See Belgium Report (Belgian legislator did not incorporate the requirement of good faith in the Belgian general provision on unfair terms).

[104] E.g. Belgium Report; Italy Report.

extent.[105] Moreover, the CJEU has recently considered that EU Member States were allowed to keep a public register listing the clauses that had been considered as unfair by authorities or judicial decisions, as long as it is "*structured in a clear manner*" and kept up to date so that "*in keeping with the principle of legal certainty, terms that are no longer needed are removed promptly*".[106] Authorities can rely on these lists, but professionals who would be sanctioned for using those terms shall have the possibility of challenging both, the assessment of the conduct considered to be unlawful and the amount of the fine fixed by the competent national body.[107] Because of the need to assess a clause in light of all circumstances and in the ambit of a specific contract,[108] one can consider these registers as a *kind of administrative/judicial grey-list*, since those clauses are presumed to be unfair, but a professional can still challenge their unfairness in a given case. As underlined by the CJEU, unfairness can best be measured by comparing it to the specific term which in the absence of an agreement by the parties would apply, that is the otherwise applicable default rule.[109]

In addition to the general and special rules defining unfairness, the Directive 93/13/EEC also underlines the need for *transparency* in relation to substantive control. The abovementioned art. 5 and also art. 4, para 2 of this Directive provide that terms have to be drafted in a plain and intelligible language. This is, as will be seen below, especially important in regard to price terms, as not being transparent is the only justification for control of a price term under the Directive 93/13/EEC.

Most of the non-EU States have followed similar paths, having either only one or several *general provisions* controlling unfair terms in consumer contracts[110] or in any type of contract.[111] Some others use in addition the device of a *black list*[112] or a *grey list*.[113] In all these instances, what matters really are (a) the *consequences* attached to the recognition of an "unfair" term (see below Sect. 4.3.3) and (b) the *precedential value* of any judicial decision on other SCT (see below Sect. 4.4).

[105]See for instance Estonia Report; France Report. However, Denmark is an outlier as it did not transpose the Directive 93/13/EEC Annex into Danish law and supported the Swedish position in front of the CJEU by stressing that the general clause applicable would protect consumers in a parallel way. The CJEU favoured this argumentation, CJEU Judgment of 7 May 2002, *Commission/ Sweden*, C-478/99, EU:C:2002:281.

[106]CJEU Judgment of 21 December 2016, *Biuro podróży Partner*, C-119/15, EU:C:2016:987, paras 38 ff.

[107]CJUE *Biuro podróży Partner* (n 106), para 40.

[108]CJEU Judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paras 59–61 with references; CJEU *Aziz* (n 19), paras 66–71.

[109]CJEU *Banco Primus* (n 108), para 59; see also Germany Report; Turkey Report.

[110]See among others Switzerland Report; Turkey Report.

[111]E.g. Turkey Report.

[112]See Brazil Report; South Africa Report.

[113]See South Africa Report; Turkey Report.

4.3.3 Legal Consequences

Depending on the type of substantive control the legal consequences might differ. Especially in countries where there are no specific rules for the control of SCT, the invalidation of the unfair term might not always be the result of a substantive control. The national reports have shown mainly three issues:

- *Consequences of infringing mandatory rules.* A mandatory rule does not always specify the consequence of its infringement. In absence of any specification, legal regimes usually consider that an interpretation of the legal norm has to consider the aim of such provision and the proportionality test to determine the specific consequence. Often, the answer will be *invalidity* of the specific SCT since the applicable mandatory rules aim at enforcing public policy issues (e.g. consumer protection, proper functioning of the market).[114]

- *Invalidity of the unfair term vs. adaptation.* A very important point with regard to judicial review of unfair clauses, and especially price clauses, is to determine whether the court could only invalidate an unfair clause as a whole, or whether it may adapt the clause/contract so as to keep it valid. In many countries the SCT control norm provides for the invalidity of the unfair term. At the same time, Art. 6 Directive 93/13/EEC burdens the EU Member States to lay down that unfair terms used in a contract concluded with a consumer shall not be binding on the consumer, and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

  In principle, *no adaptation of the unfair term* is allowed.[115] The rationale is that if courts could adapt the contract by supplementing the invalid SCT with a default provision or one made-up by the Court, there would be quite a strong incentive for suppliers of SCT to provide unfair terms, knowing that in any case they would get the well-balanced option of the legislator (default rule) or of the court.[116] The CJEU has expressed this very clearly: "*To this end, it is for the national court purely and simply to exclude the application of an unfair contractual term in order for it not to produce binding effects with regard to the consumer, without being authorised to revise its content*".[117] According to

[114] See also the EU Report for a broader discussion.

[115] Austria Report; EU Report. See especially CJEU Judgment of 21 December 2017, *Gutiérrez Naranjo*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, para 57; CJEU Judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, para 65; CJEU Judgment of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, para 31. See however Belgium Report.

[116] See especially CJEU *Gutiérrez Naranjo* (n 115), para 60 ("the national court may not revise the content of unfair terms, lest it contribute to eliminating the dissuasive effect for sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms"); see also CJEU *Unicaja Banco and Caixabank* (n 115), para 31; CJEU *Kásler and Káslerné Rábai* (n 14), para 78; CJEU *Banco Español de Crédito* (n 115), para 69. CJEU Judgment of 30 Mai 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paras 57 ff. (no reduction of a penalty clause).

[117] CJEU *Gutiérrez Naranjo* (n 115), para 57.

Banco espanol de credito, this means "*the contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible*".[118]

Some EU Member States have still operated until now on a slightly different basis. For instance, based on general principles of civil law, Belgian Courts have restricted unfair terms to what was acceptable, implementing thus an adaptation of unfair terms.[119] Similarly, Estonian courts have the power to reduce the interest for late payment according to a specific provision (§ 113(8) LOA), but it has to be requested by one party.[120] This is true also for contractual penalties.[121]

For non-EU States, the picture varies. Some provisions do not specifically address the issue, such as in Swiss law, for which the dominant opinion rejects any possible adaptation of unfair terms.[122] Some States have however accepted the possibility for courts to adapt the contract by revising the unfair clause as to avoid any unfair result.[123] One rational for allowing revision of unfair terms is to limit the deterrence effect or punitive sanction of unfair terms to situations in which parties have acted in bad faith.[124] EU Law tends to recognize a larger benefit to consumers in rejecting any adaptation of unfair clauses. It aims at deterring professionals from trying to insert unfair clauses in their standard terms, knowing that in doing so they might lose more than what they would get in being reasonable from the beginning.

An exceptional adaptation at the customer's choice. If the invalid SCT is an essential part of the contract, where the contract cannot be maintained without the invalid part, then there are two options: either, the contract is void in total as a consequence of the partial invalidity of SCT; or, one can envisage that the other party might have agreed to have the default provision applied if it had known that the SCT in question would have been void. The CJEU has specifically addressed

[118]CJEU *Banco Español de Crédito* (n 115), para 65.

[119]Belgium Report.

[120]Estonia Report.

[121]Estonia Report; but also many other systems, see e.g. Switzerland Report.

[122]Switzerland Report; Pichonnaz (2017), Art. 8 LCD para 172; regarding the approach to control surprising terms see SFT (Swiss Federal Tribunal), Decision of 18 December 2008, 4A_404/2008, reason 5.6.3.2.1.

[123]See Spain Report, which mentions that an adaptation of contract is allowed for B2B contracts, this not being possible for B2C contracts according to *CJEU Banco Español de Crédito* (n 115), para 73.

[124]For such rationale of no intervention in case of bad faith, see among other decisions, *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 37 (Tenn. 1984), in which the court noted: "*We recognize the force of the objection that judicial modification could permit an employer to insert oppressive and unnecessary restrictions into a contract knowing that the courts can modify and enforce the covenant on reasonable terms. [. . .] [T]he employer may have nothing to lose by going to court, thereby provoking needless litigation. If there is credible evidence to sustain a finding that a contract is deliberately unreasonable and oppressive, then the covenant is invalid.*"; see also *Jenkins v. Jenkins Irrigation, Inc.*, 259 S.E.2d 47, 51 (Ga. 14 1979).

this question,[125] letting the choice to the customer (potentially with a duty for the court to ask the party for its choice).

- *Consequences of lack of transparency.* As already mentioned above, Art. 5 Directive 93/13/EEC does not state the consequences of lack of transparency. The first sentence only provides for the duty, in the case of contracts offered in writing, to draft the SCT in plain, intelligible language. One can envisage three options: (a) To consider the non-transparent term not to have been incorporated into the contract, as it is practice—at least to some extent—with legal regimes using the device of *surprising terms*[126]; (b) To consider these non-transparent terms as *unfair*,[127] which had been suggested by the DCFR (art. II.-9:402[1]); (c) to weigh-in this non-transparency aspect in the overall assessment of the unfairness of SCT,[128] which was suggested by the CESL draft (art. 83[2]). The latter seems to be the actual position of the CJEU,[129] though, as rightly mentioned by the EU Report,[130] some decisions seem to have taken the second option.[131]

4.4 *Litigating Against Standard Contract Terms: Collective and Individual Actions Made Easy*

When confronted with unfair SCT it is not easy for an individual (typically a consumer) to get these SCT ignored, invalidated or just to get his rights respected. Sometimes it is due to rational apathy, especially when the loss incurred is modest and the fees to litigate high; this is often the case in consumer related issues.[132] Therefore, countries have developed several strategies[133]:

---

[125] CJEU Judgment of 30 May 2013, *Jőrös*, C-397/11, EU:C:2013:340, para. 41 ("In this connection, the Court has stated that, where the national court considers a contractual term to be unfair, it must not apply it, except if the consumer opposes that non-application, after having been informed of it by that court. See, to that effect, CJEU Judgment of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350, para. 35"); CJEU *Unicaja Banco et Caixabank* (n 115), para 33.

[126] See p. 91; as well as some suggestions in France on the "inopposabilité" of those terms: Peglion-Zika (2013), pp. 199–225.

[127] See EU Report; Spain Report.

[128] See EU Report; German Report.

[129] See CJEU *Gutierrez Naranjo* (n 115), paras 49 and 51; CJEU *Banco Primus* (n 108), para 62.

[130] EU Report.

[131] CJEU Judgment of 28 July 2016, *Verein für Konsumenteninformation*, C-191/15, EU:C:2016:612, para 71; EU Report.

[132] See for EU, the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184/3; presented in relation with the so-called "New Deal", April 11, 2018: http://europa.eu/rapid/press-release_MEMO-18-2821_en.htm; as well as for the collective redress mechanism see The New Deal for Consumers: How will the new Collective Redress Mechanism Work?: https://ec.europa.eu/info/sites/info/files/ndc_factsheet4_redress_mechanism.pdf.

[133] See for a detailed overview of 28 jurisdictions and a general report Micklitz and Saumier (2018).

a) *Arbitration mechanisms for consumer contracts*. When speaking of arbitration, it needs to be differed between arbitration terms dictated by the supplier of SCT and arbitration boards established by the state for a speedy dispute resolution. Arbitration clauses in SCT are on the grey list of the Directive 93/13/EEC and therefore mostly seen as unfair in the EU Member States if the consumer loses its right to apply to state courts.[134] In the USA however, most disputes with consumers are subject to arbitration,[135] which renders access to case law difficult and raises the question of how far these arbitral boards are independent. Recently, the US Supreme Court has confirmed that (exclusive) arbitration clauses are valid in consumer and employment contracts.[136]
b) *Collective actions.* Many national reports have stressed the importance of collective redress mechanism or class actions.[137] EU Member States had to implement the Directive 2009/22/EC on injunctions for the protection of consumers' interests,[138] which aimed at the protection of the collective interests of consumers. That Directive provided for 'qualified entities'[139] to file claims to get orders requiring the cessation or prohibition of any infringement (art. 2 let. a), and to some extent order for payments into the public purse or to any beneficiary designated in or under national legislation (art. 2 let. c). As shown by national reports, these means have not been very satisfactory, though it may play a crucial role as to price related terms.[140] The new draft directive of 2018[141] shall enhance the possibility to obtain damages and penalties, but also provide for a mediation mechanism that facilitates multi-sided agreements.

[134]See also CJEU Judgment of 27 June 2000, *Océano Grupo Editorial and Salvat Editores*, C-240/98, EU:C:2000:346; CJEU Judgment of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675; parallel Turkey Report.

[135]Council Draft No. 3, ALI Restatement of the Law Consumer Contracts (December 20, 2016), Reporters' Introduction, p. 4.

[136]US Supreme Court, 21 May 2018, *Epic Systems Corp. v. Lewis*, 584 US_2018 and already US Supreme Court, 20 June 2013, *American Express Co. v. Italian Colors Restaurant*, 570 US_2013.

[137]Accepted in e.g. Austria; Belgium; Brazil; Croatia; Italy; Germany; Greece; Romania; Russia; Turkey.

[138]Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ 2009, L 110/30.

[139]Art. 3 Directive 2009/22/EC defines "qualified entities" as "*any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with, in particular: (a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist; and/or (b) organisations whose purpose is to protect the interests referred to in Article 1, in accordance with the criteria laid down by the national law*".

[140]See for some CJEU cases brought by "qualified entities", EU Report.

[141]Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184/3.

In many non-EU States, consumer associations are authorized to file claims on behalf of consumers. They have adopted a system more or less based on the idea of *representative actions*.[142] Variations regarding these judicial proceedings exist in several aspects:

- *Type of 'entity' deciding on the case*. In most of the countries it is the normal civil law court which decides on the validity of the questioned terms. However, some countries have also special courts/tribunals vested with the power to strike out unfair terms on the application of e.g. the Attorney General.[143]
- *Type of 'qualified entity' initiating the proceedings.* Some countries allow consumer organisations and associations to file claims and seek for the annulment of unfair terms[144]; some others couple it with official authorities which can sue in courts,[145] or even leave it totally to such administrative authorities.[146]
- *Type of possible orders sought for.* Collective actions are aimed at orders recognizing the abusiveness of standard terms; injunctions preventing the further use of such unfair terms; but rarely any damage claim based on these abusive terms or restitution. Some systems have an abstract review only.[147]
- *Fees to be paid.* Efficiency of the collective claims depends also on the fees that organisations/individuals have to pay to litigate.[148]

Some countries have introduced either in addition to representative actions or instead of them the class action system.[149] Especially in regard to possible damages and restitution claims of consumers the class action model is more promising as the customers themselves are part of the litigation and can enforce any favourable judgement immediately. The Danish report gives the example of a class action being prepared to claim payment of wrongfully charged VAT on the media license from the Danish Broadcasting Corporation. In fact, the new collective redress mechanism being discussed in the EU aims also at facilitating such damages/restitutions claims being filed by the representative institutions.

[142] Argentina Report; Estonia Report; Israel Report; Turkey Report.

[143] Israel Report.

[144] Brazil Report; Israel Report.

[145] Belgium Report; Croatia Report; Israel Report (Commissioner of Consumer Protection); Switzerland Report; Turkey Report.

[146] Russia Report: special governmental agency ("Federal Agency for Control in the Sphere of Consumer's Rights Protection and Human's Welfare").

[147] Austria Report.

[148] In Turkey e.g. consumers are exempt from paying any fees when suing in specialized consumer courts.

[149] Belgium Report; Denmark Report.

c) *Extending the res judicata effect of court decisions to third parties*. One of the major problems related to SCT control is certainly the effect of a decision, which invalidates several terms as unfair, on other contracts where the same supplier has used the same SCT against third parties. One step further, the question would arise how contracts of other suppliers using similar terms in their contracts are affected by this decision. The procedural principle in most of the countries is that the decision only binds the parties of the legal dispute, no *erga omnes* effect is granted. This is obviously a very invidious result especially in case of unfair terms or unfair commercial practices, where sometimes millions are faced with the same clause. The whole concept of representative actions would be undermined if the decision fought out by the consumer organisation would only have an *ex ante* effect with no influence on the contracts in which the same SCT were used by the same supplier. In fact, the CJEU decided in *Invitel*[150] that the declaration of invalidity in an action for injunction will extend its effect to all consumers who have a contractual relation with the same supplier and the same SCT even though they were not party to the injunction proceeding.[151] In the abovementioned *Biuro* case the CJEU goes further, extending the effect of an unfairness declaration by the court even to other suppliers using a similar term.[152] This triggers a kind of presumption of unfairness for all suppliers, but allows them to challenge the assessment of unfairness in case it is based on a former decision which they think does not reflect the specificities of their contractual relation.[153] As mentioned earlier, one can consider that the *Biuro* case sets a kind of grey-list value for clauses that have been recognized as abusive by administrative bodies or judicial entities.[154]

Below we will discuss another aspect of this issue in relation to price terms: Even if the effect of the decision can be extended to third parties, this will only be regarding the invalidity of the term. However, any restitution claims regarding unnecessarily paid amounts of money will mostly have to be initiated by the individual consumer again. This is certainly one of the major obstacles to a cost and time-effective solution regarding e.g. fees paid without any legal grounds. In fact, one of the aims of the proposed new Directive on protecting collective interests of consumers[155] is to remedy this situation by giving qualified entities a right to bring representative actions seeking a redress order.

[150] CJEU Judgment of 26 April 2010, *Invitel,* C-472/10, EU:C:2012:242.

[151] See for a parallel solution Croatia Report.

[152] See Werro and Pichonnaz (2015), pp. 268 ff.; see also Belgium Report; EU Report.

[153] CJEU *Biuro podróży Partner* (n 106), para 42.

[154] See p. 21 and Austria Report, which considers that the decision is *de facto* often observed.

[155] (n 141).

5 Judicial Control of Price Related Standard Contract Terms

5.1 *Principal Rule: Prices Are Determined Freely on the Market*

The overall picture of national reports on the judicial control of price related standard terms is certainly dominated by one main feature: in all market driven economies the price is determined freely on the market relying on the interaction of supply and demand reaching an equilibrium.[156] Even though the extent of regulatory intervention may vary, this fundamental principle is acknowledged by all national reports. Therefore, many legal systems are reluctant to have a direct judicial control over price related terms, since it would hamper the efficient functioning of the market. South Africa is probably the only exception among the studied jurisdictions as it explicitly prohibits in its Consumer Protection Act section 48(1)(a) '*a supplier from entering into an agreement '(i) at a price that is unfair, unreasonable or unjust*'. However, the courts seem to have refrained from making use of this discretion so far.[157]

It is common knowledge that in competitive market economies the supply side cannot charge more than their cost of supply.[158] Rational and perfectly well-informed consumers know their preferences and are responsive to any price change in the market. Utility-maximizing consumers on the demand side and profit-maximizing producers on the supply side meet on a perfectly competitive market that results in the best possible equilibrium price.[159] That is also the main reason why price terms even if stipulated in SCT are excluded from a SCT control. Other than SCT in general, price is a salient feature of the contract and there is, in principle, no need for a judicial intervention as long as the prerequisites for a functioning market that is competition on the supply side and information on the demand side are guaranteed.

Many of the reports underline rightfully the role of antitrust and unfair competition laws to ensure a correct functioning of the market on the supply side. As we will see below, there are also widespread provisions in order to inform the demand side about the price.[160] These provisions are forming the baseline of a functioning market. It is the governments' duty to secure these prerequisites.

Besides, general provisions of contract law may find application whenever a specific situation occurs in which the customer has consented an imbalanced contract

[156]See Belgium Report; Canada Common Law Report; Chile Report; China Report; Croatia Report; Israel Report; Japan Report; Singapore Report; Taiwan Report; Turkey Report; UK Report.

[157]South Africa Consumer Protection Act 68 of 2008, section 48(1)(a).

[158]DeMuth (1986), p. 216.

[159]See e.g., Cooter and Ulen (2012), pp. 18–29; Kirchgässner (2008), pp. 59–61.

[160]See below p. 48 et seq.

due to incapacity, misrepresentation, error, or a gross disparity situation.[161] Also, the concepts of *laesio enormis*,[162] unconscionable contracts,[163] usurious interests[164] or usury contracts[165] aim at judicial correction of singular situations where the contractual equilibrium has been disturbed and an unreasonably high price has been stipulated.

5.2 Special Protection Needed if Price Terms in SCT Are Not Subject to Competition

However, a competitive market and even detailed information requirements might not suffice to spur competition as the case is with SCT, and also with some type of price terms. There are for example hundreds of banks supplying credit on the EU market and they serve the consumer in a timely fashion with the SCT, but still, no market for SCT is developing. The customers are choosing their credit institution not according to the content of SCT, and this is even a rational choice due to the high transaction costs involved in searching for better terms. As long as the lawmakers do not intervene in the substance of the SCT the risk of bad deals for customers are high.

The *ratio legis* of the exclusion in art. 4(2) Directive 93/13/EEC is based on this distinction. SCT in general are not subject to competition; therefore, they need to be controlled. However, price formation is highly competitive; here we need no intervention. But, the inevitable result of this reasoning is that terms which are price related but *not subject to competition* might need to be submitted to judicial control as they inherently are carrying the same risk as other SCT: the risk that a race to the bottom is leading to the worst clause possible.[166] In fact, the overview in the national reports of the case law shows several recurring situations which we tried to systematize below.

The Directive 93/13/EEC is probably the first piece of legislation which tried to differ between the terms subject to competition and therefore exempt from judicial control and those not subject to competition and therefore not exempt from judicial competition. According to Art. 4(2)[167] of this Directive:

[161] Russia Report; Switzerland Report; Turkey Report.

[162] Canada Civil Law Report; Chile Report.

[163] Canada Common Law Report; China Report.

[164] Canada Civil Law Report.

[165] Russia Report.

[166] Underlined also in the Austria Report; Germany Report; Turkey Report; UK Report. See for details, Schillig (2011), pp. 933–963.

[167] Some EU Member States did not transpose such restriction and make therefore no difference between main subject matter and ancillary price-related terms. See EU Report for a general overview. See also Croatia Report; after the Croatian *Franak* case, in which credits linked to Swiss franc were unsuccessfully challenged, the Croatian High Commercial Court reversed its position on 14 June 2018 and found that a contract clause denominating credits in Swiss francs was

> Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies (sic) in exchange, on the other, in so far as these terms are in plain intelligible language.

This definition has two components: any term which is not defining the main subject matter of the contract or the ratio between price and goods or services can be assessed in regard to its unfairness (1) and any term, even if defining the subject matter of the contract, can be assessed in regard to its unfairness if it is formulated in a non-transparent manner (2). The first group consists of those terms that are not salient as they are not directly linked to the contract price and are therefore not perceived by customers. The second group of terms is perceived as price terms, but their content is misperceived as they are not transparent.

1° *"Main" and "ancillary" obligations of the contract.* The interpretation of the first part of Art. 4(2) by the CJEU and also in the EU Member States has not been harmonious at all. The EU report reflects the developments in detail. In brief, the CJEU was often guided by the decisions of the BGH.[168] The approach of the BGH is to differentiate between the "main" and the "ancillary" obligation of the contract.[169] The CJEU adopts this approach and explains it in *Van Hove* as follows: "*[c] ontractual terms falling within the concept of 'the main subject-matter of the contract', within the meaning of Article 4(2) of Directive 93/13, must be understood as being those that lay down the essential obligations of the contract and, as such, characterize it. By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within the concept of 'the main subject-matter of the contract', within the meaning of that provision*".[170]

Price terms which can be controlled are those which have an indirect effect on the price and can be substituted by courts as in every incomplete contract. The CJEU argues: "[. . .] *it follows from the wording of Article 4(2) of Directive 93/13 that the second category of terms which cannot be examined as regards unfairness is limited in scope, for that exclusion concerns only the adequacy of the price or remuneration as against the services or goods supplied in exchange, that exclusion being explained by the fact that no legal scale or criterion exists that can provide a*

unfair for lack of transparency of the price-related contract term; see also Danish Report; Estonia Report and the Slovenian Report, which underlines that there is no transposition of art. 4(2) Directive 93/13/EEC, but that the Supreme Court does control some price related terms. Italian law seems not to have explicitly relied upon that distinction, see Italian Report. Though influenced by EU law, Swiss law does not make a difference between main subject matter and ancillary contracts (Switzerland Report).

[168]See for details the EU Report.

[169]E.g. BGH, 13. 11. 2012 – XI ZR 500/11, (2013) NJW, 995; BGH, 7.6.2011 – XI ZR 388/10, (2011) BKR, 418; BGH, 7.5.1991 – XI ZR 244/90, (1991) *Zeitschrift für Wirtschaftsrecht* (ZIP), 857. For details see Germany Report.

[170]CJEU *Van Hove* (n 14), para 33. Parallel also CJEU *Caja de Ahorros y Monte de Piedad de Madrid* (n 14), para 34; CJEU *Kásler et Káslerné Rábai* (n 14), para 49; CJEU Judgment of 20 September 2017, *Andriciuc and others*, C-186/16, EU:C:2017:703, para 35.

framework for, and guide, such a review". The CJEU as well as the BGH are both basing their argument on the idea that prices cannot be defined in default rules. Therefore, any contractual issue where a default rule is existent or can be derived from the law by analogy cannot be a price term. In case the customer has been burdened with some additional charges e.g. the court has to inquire whether default rules regarding that specific contract type allow for such additional charge.[171] If such default rule is missing, a fair distribution of rights and obligations can be derived from the very nature of the contractual relationship, or from general principles of law.

However, in the *OFT v Abbey National* decision of 2009 the majority[172] of the UK Supreme Court tended to interpret the Article 4(2) exemption more in line with a market rationale. According to the court, where the goods consist of a multiplicity of items or the services were composite, there is no "*principled basis on which the court could decide that some services are more essential to the contract than others*".[173] Given that the services offered by banks to their current account customers were comparable packages of services, it would be equally difficult to decide which prices are essential and which are ancillary. According to Lord Mance, the consumer's protection under the Directive and the national regulation is the requirement of transparency. That being present, the consumer is to be assumed to be capable of reading the relevant terms and identifying whatever is objectively the price and remuneration under the contract into which he or she enters.

It is interesting to see that the Austrian Supreme Court of Justice (OGH) has based its distinction between main and ancillary matters on whether the relevant standard contract term is still sufficiently *exposed to competition*.[174]

Some **non-EU States** are also differentiating between main and ancillary price terms. Thus, section 23(1) of the Israeli Standard Contracts Law (SCL) in its 2014 version sets an exclusion from the Statute and its scrutiny for *"a condition determining the monetary consideration to be paid by the customer or the supplier for the object of the transaction, provided that it is formulated in a simple and clear language.*" The prevailing opinion of Israeli judges and scholars[175] is that the expression shall be interpreted narrowly; thus, ancillary clauses are defined on

[171]BGH, 13.05.2014 – XI ZR 405/12, (2014) *Neue Juristische Wochenschrift* (NJW), 2420; BGH, 28.10.2014 – XI ZR 348/13, (2014) NJW, 371.

[172]*OFT v Abbey National plc and others* [2009] UKSC 6. The views expressed by Lord Walker and Lord Mance were endorsed by Lady Hale (para 92) and Lord Neuberger (para 119). Lord Phillips' argumentation and final decision are essentially the same (paras 78–91), however, underlining that the discussion must be more about whether the method of pricing is fair, and not the question of whether the relevant charges form part of the price or remuneration for the package of services provided (para 80). See for details UK Report.

[173]*OFT v Abbey National*, para 40 (Lord Walker).

[174]OGH 30 March 2016 (6 Ob 13/16d) EvBl-LS 2016/119; Austria Report.

[175]Israel Report.

more psychological and practical basis. When clauses are complex and less salient, as well as more open to the supplier's manipulation, they should be defined as ancillary and made subject to an abusiveness control.[176] Parallel provisions can also be found in the Argentinian[177] and Turkish laws.[178]

Québec law is interesting since it provides for a control under objective and subjective unconscionability ("lesion objective", "lesion subjective") also for consumer contracts, meaning that **the price itself** may be subject to scrutiny. As the Report shows, some of the issues are related to ancillary terms, some others however to main terms, such as the **price for representing consumers** in front of administrative bodies which has been considered as unconscionable, though it is not clear from the report whether this was foreseen in standard terms.[179] However, the same mechanism applies to standard terms.[180]

2° *Transparency requirement.* Even if a price related term is considered as being covered by the definition of the "main subject matter of the contract", it is still possible to control whether this term is unfair if the term does not comply with the requirement of substantive transparency. Being transparent and therefore comparable is the most important requirement for a competitive price formation. Non-transparent prices hamper competition and have to be controlled. As underlined by the CJEU in *Andriciuc*, "*the requirement of transparency of contractual terms [. . .] cannot be reduced merely to their being formally and grammatically intelligible, but that [it] must be understood in a broad sense*".[181] This means that the transparency requirement has to be as "*requiring also that the contract should set out transparently the specific functioning of the mechanism to which the relevant term relates and the relationship between that mechanism and that provided for by other contractual terms, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it*".[182] The transparency requirement is therefore a substantive one, which implies that the other party is able to understand the *legal* and *economic consequences* of those terms. The same approach is adopted in Israel ("simple and clear language")[183] and Turkey[184] for example.

---

[176]Israel Report.

[177]Argentina Report.

[178]Turkey Report.

[179]Canada Civil Law Report.

[180]Canada Civil Law Report.

[181]CJEU *Andriciuc and* others (n 170), para 44; CJEU *Kásler and Káslerné Rábai* (n 14), paras 71 and 72; CJEU Judgment of 9 July 2015, *Bucura*, C-348-14, EU:C:2015:447, para 52; see also EU Report.

[182]CJEU *Andriciuc and others* (n 170), para 45; CJEU, *Kásler and Káslerné Rábai* (n 14), para 75; CJEU *Van Hove* (n 14), para 50; also EU Report.

[183]Israel Report.

[184]Turkey Report.

5.3 *Examples of Debated Terms*

It is not an easy task to systematize the huge number of clauses which have been discussed in the national reports. We tried to create a structure by first subsuming the multiple SCT under the subheadings "ancillary price terms"[185] and "non-transparent price terms". Under each of these sections there are several recurring categories. However, the reader will see that some terms are combining both features—being ancillary and non-transparent. But for the sake of simplicity we preferred not to introduce another subsection for this type of "hybrid" terms.

5.3.1 Ancillary Price Term or Not?

5.3.1.1 Additional Fees

- In lease contracts a SCT stating that the tenant bears the *costs for minor repair* is an ancillary term[186];
- *Renewal fee* in case of renewal of a residential lease contract is considered as valid, as long as they are not too high[187];
- A clause burdening high consumption electricity users with an *additional fee* is an ancillary term, and unfair in the specific case[188];
- Clause burdening electricity users with so called *leakage fees* is an ancillary term[189];
- *Admission fees* paid in addition to tuition fees for an application to a university, were considered valid, even if not refunded in case of a rejection, unless the amount exceeds what is reasonable or would exceed an average cost[190];
- In *mobile phone contracts*, the term that an *additional fee has to be paid for a paper invoice* was considered by German courts as an ancillary term subject to the fairness test[191]; it has been decided in the same way in Estonia.[192] However, a SCT in a mobile phone contract including mobile-internet access stating that after the complete consumption of the data volume agreed, the supplier is entitled to make available additional data volume to the customer against an additional fee is a principal term.[193] A lower German court considered on the other hand that a

[185] See also the EU Report for the discussion on ancillary price terms and the case law analysis.

[186] Germany Report.

[187] Japan Report.

[188] Slovenia Report.

[189] Turkey Report. However, due to a regulatory intervention after the High Court decision banning the electricity distribution companies from levying such fees, they were allowed to do so again.

[190] Japan Report.

[191] Germany Report.

[192] Estonia Report.

[193] Germany Report.

term that would lower the speed of the data stream if a customer would object to an *automatic additional data volume* against an additional fee was an ancillary term subject to control.[194]

- *Banking charges*:
  - An issue debated in many countries is the *management/administration fee* banks are charging when extending a credit. The argument of the banks is that this fee is charged to offset the time spent while drafting the contract, checking the credibility of the consumer, and administering the collaterals. According to the BGH loan agreements are contracts which are regulated by law, and § 488 German Civil Code defines interest as the only consideration for lending money. Therefore, a loan agreement can only have a run-time dependent pricing scheme, and all possible costs incurred at contract conclusion have to be priced in the interest rate.[195] Whereas in Austria, those fees have been considered as linked to the main object of the Contract. The Court argued, also taking into account the decision of the BGH, that a price partitioning makes even sense given that this will serve transparency and customers will be able to compare with other offers.[196] The Turkish High Court judged the same way as the German one. However, the Banking Regulator who was later assigned with the task to limit the different types of bank charges decided that a management fee can be claimed.[197]
  - Other banking charges which were debated were *fees for deposit and withdrawal* at cash machine in a giro account[198]; *fines* applied by a bank in case the money transfer request could not be executed because of insufficient funds[199]; *additional fee* to use a *credit card* abroad[200]; *blocking fees* for a credit card[201]; *express fees* if the customer does not comply with certain order deadlines.[202]
  - *Maintenance charges* for a savings account which were increased regularly over the years, to end up at a higher level than the interest that the bank remunerated on those saving accounts were considered void.[203] Mainly because the amount would not only absorb the interest served, but also the capital; this was against the very purpose of saving accounts.
  - Allocating the *fees incurred when notarising and registering a mortgage* for a credit agreement to the consumer creates a significant imbalance in the parties'

[194] Germany Report.

[195] Germany Report.

[196] Austria Report.

[197] Turkey Report.

[198] Germany Report; Slovenia Report: in Slovenia, the Agency found that the banks had formed an illegal cartel which allowed them to raise the fees for the use of cash machines.

[199] Germany Report.

[200] Germany Report.

[201] Austria Report.

[202] Austria Report.

[203] Argentina Report.

rights and obligations arising under the contract as both expenses benefit primarily the bank, which is interested in securing its right in rem (to which end the public deed and its registration are required).[204]

- *Service fees* for e-ticketing, printing at home or sending to a mobile phone, in addition to the main price for online ticket purchase was considered as unfair, because these elements should be covered by the main price, as tickets necessarily had to be collected as part of the main obligation.[205]

5.3.1.2 Terms Regarding Consequences of a Breach of Contract

- Terms which have the object or effect of "*permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract*" can be unfair (Directive 93/13/EEC Annex pt 1 let. d).
- Terms which have the object or effect of "*requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation*" can be unfair (Directive 93/13/EEC, Annex pt 1 let. e).
- Terms which have the object or effect of "[. . .] *permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;*" can be unfair (Directive 93/13/EEC, Annex pt 1 let. f).
- Clauses providing for a *flat fee* in case of loss of a highway card, despite the fact that the actual mileage could have been proven are unfair.[206]
- A *"non-buying" fee*, which is due when the party to a car leasing contract refuses to buy the car at the end of the contractual period, is unfair and imbalanced, especially because it exceeded the actual costs.[207]
- *Penalty clauses and interest for late payment* are mostly judged to be ancillary terms that can be controlled by the courts. For example the Estonian Supreme Court has considered some very high "fees", contractual penalties or interest on late payment sometimes as unfair.[208] The Estonian Supreme Court declared as presumably unfair and thereby void standard terms providing for an interest rate for late payment exceeding three times the interest rate for late payment in the statute.[209] The Spanish Supreme Court considered that default interest clauses

[204] Spain Report.
[205] Austria Report.
[206] China Report.
[207] Austria Report.
[208] Estonia Report.
[209] Estonia Report.

were of ancillary nature and therefore subject to an unfairness test and decided that a contractual late payment interest of more than two percent over the statutory default interest rate for late payment was unfair.[210] However, on the ground of "lesion objective", Québec courts did not strike down any of the late payment interest rates that were subject to their scrutiny.[211] On penalty clauses, the CJEU has decided that a national court can find such clauses to be unfair, however if it does so it cannot merely reduce the amount to an acceptable level (as it might be authorised by its national law) but it has to strike out the clause in its entirety with regard to the consumer.[212] A parallel decision was taken regarding default interest rates which were exceeding the legal limit. The CJEU underlined the right and duty of the national courts to evaluate the unfairness of the clause and if so judged to nullify it in its entirety.[213] Belgium law has stated that penalty clauses can only be valid in a B2C contract if they are reciprocal and equivalent.[214]
- SCT which burden the customer with all *costs involved with payment requests, or collection costs* were found unfair in Austria as they were not quantified and left to the discretion of the bank.[215] Danish law requires costs in relation with collection of outstanding debts to be "reasonable and relevant", but the legislator has also set a statutory cap on claimable fees.[216] The situation in Estonia is parallel. Estonian courts consider such fees as unfair if "unreasonably high" and a cap on such fees serves for legal certainty.[217]
- Belgian law provides also for a certain *caps limiting the amount of compensation* in certain contracts, but the courts keeps the discretion to further reduce the amount.[218]

5.3.1.3 Loss of Price Advantages in Case of an Early Termination

- Terms that retroactively cancel the reductions of the annual premium to the customer for an insurance contract in case of a dispute, or in absence of renewal of the contract by the customer is not subject to the fairness test, being a term related to the subject matter of the contract.[219]
- Terms that retroactively cancel a rent reduction if the landlord has to sue for the unpaid rent are not ancillary terms.[220]

[210] Spain Report; see also the EU Report on this.

[211] Canada Civil Law Report.

[212] CJEU *Asbeek Brusse and de Man Garabito* (n 116), paras 57 ff.; see also EU Report.

[213] CJEU *Unicaja Banco and Caixabank* (n 115), paras 28 ff.

[214] Belgium Report.

[215] § 879 (3) Austrian CC; Austria Report.

[216] Denmark Report.

[217] Estonia Report.

[218] Belgium Report.

[219] Germany Report.

[220] Germany Report.

- In case of an early termination the service provider has to return the fee for services not provided. However, the service provider has to calculate the amount it can charge and the amount it needs to return according to the discounted rate and not the regular rate.[221] The Japanese Supreme Court found that the terms on restitution were similar to liquidated damages clauses that could be assessed on their fairness.
- An 18 months non-termination period in exchange for a reduction of the price of a cell phone subscription was found price related and accepted by the Austrian Supreme Court of Justice; however, a 24–36 months non-termination period for a subscription to a fitness centre at a reduced price was outlawed.[222]

5.3.2 Transparent Main Subject Matter or Not?

5.3.2.1 Open Price Clauses

- Terms which have the object or effect of "*providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded*" can be unfair (Directive 93/13/EEC, Annexe pt 1 let. l).
- When the price shall be fixed by one party, French law states that this is valid, as long as there is a justified reason for the amount of the price (new art. 1164 French CC)[223]; this enables some control by the judge over the price determination.
- A *cost-plus formula* for the calculation of remuneration for maintenance services of a commercial condominium was assessed and considered as unfair when there was no constraint on the service provider, but acceptable when limited to reasonable and customary costs.[224]
- In Austria, *passing-on cost clauses* are usually considered as unfair,[225] unless the clauses refer to costs actually incurred or to a lump sum, which by and large reflects the cost incurred.

5.3.2.2 Flat Remuneration

- In a waste disposal contract, the "*bring-or-pay-clause*" which imposes the payment of the entire remuneration irrespective of whether the party delivered or not

[221] Japan Report.
[222] Austria Report.
[223] France Report.
[224] Israel Report.
[225] Austria Report.

the agreed amount of waste, is an ancillary term; the basic remuneration however is a main term.[226]

- A flat remuneration for an estate agent irrespective of the conclusion of the transaction with the third party is unfair.[227] The court did not address the issue whether the term was related to the main subject matter, but it considered that the clause was "rather ambiguous" so that it could be void already based on the substantive transparency requirement.

5.3.2.3 Price Adjustment Clauses

Almost all reports discuss how price adjustment clauses are treated under their respective national law. The issue is delicate as there are valid interests on both sides which have to be balanced. The first differentiation one has to make is between long-term contracts with recurring performances, and contracts which are performed at once even though the maturity date might be in the future.

- If the contract involves only a *one-time performance* such as in a sales contract, a change of the price until delivery date will mostly be qualified as unfair. Given that the rule is *pacta sunt servanda* both parties carry in principle the risk of negative price developments. But how should clauses in SCT be qualified if they change this rule? The Directive 93/13/EEC defines in its Annex, Art. 1, let. j that terms "*providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price*" are in principle allowed, however, to pass the unfairness test they must be *"giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded*". Even though the Directive does not underline the additional requirement that the SCT must define expressly and transparently the objective reasons for a change in price before delivery (e.g. a car which has to be imported and where the taxes are yet unknown) such requirement can be deduced from Annex, Art. 1, lit. j which requests for such terms to be acceptable that they name a valid reason for the price increase. In addition, the term can pass the test only if the customer is also given the right to terminate the contract.
- The need to adjust prices, and contract terms affecting the price of the goods/ services is certainly more acute *in long-term contracts* as unexpected contingencies are frequent. In principle, it would be acceptable that the seller/service provider includes clauses to vary the contract, and especially the price term. However, just as above, the valid/objective reason for the change needs to be stated already at contract conclusion so that the customer can control the adjustments made at a given time. Besides, the customer must be granted a reasonable

[226] Germany Report.

[227] Italy Report.

time to terminate the contract if such price adjustment was done according to the contract terms but the price has become too high for the customer.[228] The objective criteria requirement is especially important in cases where the customer technically has a right to terminate the contract but in practice would not be able to use it. The *Milgrom Estate* case decided in Israel is a good example for that. "*The Supreme Court invalidated a clause that required a retirement community resident who had moved into a nursing home to pay according to the nursing home's tariff for such services at the time of moving. The court reasoned that, in the absence of objective criteria for setting and updating the tariff, the clause was unduly disadvantageous*."[229]

- The requirement that the price variation has to be based on objective criteria is underlined by several reports[230] and e.g. accepted if an indexation clause was stipulated.[231] It is also emphasised that an objective adjustment clause must work both ways in order to be qualified as fair, i.e. price increase in favour of the business but also price reduction in favour of the customer must be possible.
- Some examples from case-law are as follows:
  - The Austrian Supreme Court of Justice decided that an interest rate that would increase or decrease parallel to the variations of the European Central Bank (ECB) key interest rate is unfair and void if that leads to a zero interest on a saving account, since this contradicts the mere core of a saving account.[232]
  - The Argentinian Supreme Court considered as ineffective a clause allowing a unilateral modification of the monthly payment and benefits due under a contract between a Medical Company and its affiliates.[233]
  - According to the Swiss reporter, price adjustment clauses in standard form contracts that have not been negotiated infringe the principle of good faith and are therefore presumed to be unfair, unless the provider proves that this has been counterbalanced by concrete and substantive advantages by other favourable terms.[234] Courts have sometimes required also a meaningful right to terminate the contract.[235]
  - Belgian courts have authorized *indexation clauses* based on objective criteria.[236]

[228]See e.g. Belgium Report; Israel Report.

[229]See Israel Report for a decision of the special SCT Tribunal in Israel, which found a contractual term allowing the retirement home to raise the monthly payment up to 5% annually over and above the rise in the Consumer Price Index, as conferring too much discretion.

[230]Brazil Report.

[231]Belgium Report.

[232]Austria Report.

[233]Argentina Report.

[234]Switzerland Report.

[235]DSFT 135/*2008* III 1, especially p. 10, para 2.5; Switzerland Report.

[236]Belgium Report.

- The same is true for Brazil albeit the indexes the parties can choose from are ascertained by some supervisory agencies.[237] This solution was also preferred in Turkey regarding mortgage credit agreements. The parties can only choose between several specific indexes defined by the regulator.[238]
- A case of unilateral introduction of indexation that was not provided for in the contract might also be judged invalid.[239]

5.3.2.4 Foreign Currency Clauses

Many national courts and the CJEU had to struggle with credit agreements in foreign currencies with interest to be converted or reconverted into domestic currencies.[240] The CJEU has decided that these terms were related to the main subject matter of the contract,[241] and that exchange rates can only be assessed under the transparency requirement.[242] However, it is interesting to see that some countries have preferred to restrict the taking of consumer loans in another currency than the national one.[243]

5.3.2.5 Calculation of Interest Rates

- Method of calculating interests has been discussed in the CJEU case *Banco Primus*, in which the CJEU has given concrete guidelines for checking whether a term governing the method of calculating ordinary interest on mortgage

[237]Brazil Report.

[238]Turkey Report.

[239]Chile Report.

[240]Croatia Report; EU Report; Greece Report; Romania Report; Slovenia Report; Spain Report.

[241]CJEU *Andriciuc and others* (n 170), para 35; CJEU *Caja de Ahorros y Monte de Piedad de Madrid* (n 14), para 34; CJEU *Van Hove* (n 14), para 33; for an analysis, see the EU Report.

[242]But the expectations regarding transparency are high: “Article 4(2) Directive 93/13/EEC must be interpreted as meaning that the requirement for a contractual term to be drafted in plain intelligible language requires financial institutions to provide borrowers with adequate information to enable them to take well-informed and prudent decisions. In that regard, that requirement means that a term relating to the foreign exchange risk must be understood by the consumer both at the formal and grammatical level and also in terms of its actual effects, so that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the possibility of a depreciation of the national currency in relation to the foreign currency in which the loan was denominated, but would also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations.” CJEU Judgment of 20 September 2018, *OTP Bank and OTP Faktoring,* C-51/17, EU:C:2018:750.

[243]E.g. France Report; Turkey Report.

can be declared intransparent by way of comparing with the statutory interest.[244]

- Floor clauses (minimum percentage to be charged by a bank for a credit even if the average interest rate is lower) were considered as unlawful in B2C contracts under Spanish law as they were not transparent for the average consumer.[245]
- Estonian courts have considered that, unless one can invoke the rules on usurious credit contracts,[246] interest clauses are exempt from fairness control[247]; however, the methods for determining the rate, such as a *formula* is subject to control.[248]
- Under Danish Law, interest rates are subject to the fairness test ("reasonableness standard"[249]); they can be reduced,[250] or even set aside when they are exorbitant, which indicates that the other party was exploited.[251]
- Even if an act may limit the interest rate, such as in Japan, courts may be struggling with the question whether voluntary payment in excess of the limitation is valid or not.[252] The Japanese Supreme Court decided that in such a case, the payment would be valid, but then tried to restrict the ambit of a "voluntary payment".[253]
- Provision in the SCT stating that the bank charges a certain interest rate per annum on debit balances, however settling the interest at the end of each quarter is non-transparent.[254] The court held that customers, as a result, will not regularly be

[244]"[W]here the national court considers that a contractual term relating to the calculation of ordinary interest, such as that at issue in the main proceedings, is not in plain intelligible language, within the meaning of Article 4(2) of that directive, it is required to examine whether that term is unfair within the meaning of Article 3(1) of the directive. In the context of that examination, it is the duty of the referring court, inter alia, to compare the method of calculation of the rate of ordinary interest laid down in that term and the actual sum resulting from that rate with the methods of calculation generally used, the statutory interest rate and the interest rates applied on the market at the date of conclusion of the agreement at issue in the main proceedings for a loan of a comparable sum and term to those of the loan agreement under consideration." CJEU *Banco Primus* (n 108), para 67. See also the EU Report.

[245]Spain Report. The Spanish Court decided however, against clear rules of national law, to restrict the ex tunc consequences derived from nullifying floor clauses. The reason was that banking institutions had acted in good faith and that there was a risk of serious economic difficulties if the judgment were to be applied retroactively—given the estimated cost of restitution of €4 billion. The issue was decided by the CJEU which interpreted the Directive 93/13/EEC as precluding national case-law that temporally limits the restitutory effects connected with a finding of unfairness by a court, CJEU *Gutiérrez Naranjo* (n 115).

[246]Estonia Report.

[247]Estonia Report.

[248]Estonia Report.

[249]Denmark Report.

[250]Denmark Report, which indicates a case of a student loan, for which the interest rate had been reduced.

[251]Denmark Report.

[252]Japan Report.

[253]Japan Report.

[254]Austria Report.

aware of the compound interest effect leading to higher debit balances resulting from a quarter-end settlement in comparison to the interest rate that would have been calculated in case of a year-end settlement.

5.3.2.6 Missing Price Breakdown

- Standard contract terms of an online ticket platform were found non-transparent as the platform had indicated only the total price of the ticket without breaking down the price and indicating several fees such as the agency service fee.[255]
- Bundled price indication of nursing agencies for a range of various services were outlawed for the same reason. The agency offered to (a) arrange a contact with and (b) select suitable nursing staff, (c) support, (d) educate, and (e) prepare the nursing staff and (f) arrange transport, as well as to (g) act as paying agent for the fees payable to the nursing staff, and (h) support the customers to apply for subsidies, etc. In its standard contract terms, the agency charged a fixed fee including the price of its own services as well as the price of the nursing staff, which it invoiced in its function as a paying agent.[256]

6 Special Regulatory Provisions Controlling Price Terms

All legal regimes that were covered by a national report have some degree of regulation intervening into price formations in specific markets and/or contractual situations. Reasons may be found in the specificity of some fields, such as the supply of public goods, energy or others that have been or still are in the hands of state-owned businesses or businesses with specific legal ties to the state. Another parallel argument is monopolistic or oligopolistic markets.[257] We had underlined in our questionnaire,[258] that we were more in search of examples of contracts where SCT are used widely, like long-term service contracts, insurance contracts and the like. Our focus was more on situations which arise due to special information asymmetries, or transaction cost problems, including switching costs. However, given that most of the national reports have been more comprehensive, we prefer to include also some of the recurring examples from other problem areas, which are not directly connected to the use of SCT.

[255] Austria Report.

[256] Austria Report.

[257] In general, all reports rightly underline the importance of anti-trust regulations in the fight against unfair prices and collusion between actors to fix unfair price related terms. However, this report is focusing on other types of interventions, especially needed if there is a persisting market failure despite anti-trust regulation. As discussed above, standard contract terms cause such a transaction cost problem which cannot be overcome by spurring competition among the market actors.

[258] See Annex-Questionnaire IV.

It is interesting to see that also in this section market economies as well as socialist market economies mostly intervene in the same areas. There are two types of intervention: (a) direct intervention in the price formation, such as caps, or *ex ante* administrative control of prices or the like[259] and (b) intervention into price related contract terms, either by limiting their application or by banning them in total.

We have been able to define the following recurring examples in the reports presented to us regarding direct interventions in the price formation:

- *Utilities (energy, gas)*[260]: price cap[261]; permission needed for setting new price[262]; cap on several fees charged[263]; parts of the price are set by the regulator, parts freely by the service provider[264]; special calculation method defined by the regulator.[265]
- *Railway* services.[266]
- Some sort of intervention in the calculation formula for *fuel prices*; limit to the daily/weekly change in fuel prices.
- *Telecommunications*: control of price escalations through state authorities[267]; Prohibition or cap of certain types of fees[268]; cap or ban on roaming charges[269]; right of special authority to control the price[270]; regulation for termination fees.[271]
- Cap on prices for *postal services*.

[259]Sometimes the regulator has also a general right to intervene in the prices like in Israel, where the government can regulate the prices of goods and services in monopolistic and low-competition markets, for state-subsidized goods and services, for essential goods and services, and when goods or services are scarce due to exceptional circumstances. In Argentina, a country plagued with high inflation, the relevant authority can determine a special margin of profit for certain goods. See Argentina Report; Israel Report.

[260]Here a possible distinction which should be born in mind is that not all countries have liberalised their energy markets.

[261]Israel Report; Japan Report; Romania Report; Russia Report.

[262]Canada Common Law Report; South Africa Report.

[263]Romania Report.

[264]Croatia Report.

[265]Brazil Report.

[266]Austria Report; Canada Common Law Report; Croatia Report; Israel Report; Japan Report.

[267]Brazil Report.

[268]Canada Common Law Report.

[269]Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017, amending Regulation (EU) No 531/2012 as regards rules for wholesale roaming markets, OJ 2017, L 147/1; see also Austria Report; Belgium Report; Canada Common Law Report; China Report; Denmark Report; Italy Report; Japan Report; South Africa Report.

[270]Croatia Report.

[271]Japan Report; South Africa Report.

- *Interest rates*:
  - Annual maximum contractual interest rate.[272]
  - Special interest rate limits for consumer credits[273]; for credit card interest rate[274]; for overdraft account interest rate.[275]
  - Ban on short-term teaser interest rates.[276]
  - Limit to default interest rates[277]; special limit for default interest for credit agreements.[278]

- Cap on fees for some *special services*: fees of real estate agents[279] or estate management costs[280]; taxi fares[281]; notaries[282]; legal services provided by lawyers.[283]
- *Banking/financial services charges*: Basic banking service charge limited[284] or even for free[285]; Payment account service charge limited/free[286]; Fee for switching payment accounts limited/free[287]; Limit to prepayment charge[288]; Special regulation for payday loans[289]; Most of the basic banking services listed and either caps or fixed by the administrator[290]; Some banking charges forbidden, some with cap[291];

---

[272]Brazil Report; Chile Report; Romania Report; Turkey Report.

[273]Belgium Report; Canada Common Law Report; China Report; Estonia Report; Greece Report; Israel Report; Italy Report; Japan Report; Russia Report; Taiwan Report; Turkey Report.

[274]Chile Report; Turkey Report.

[275]Chile Report; Turkey Report.

[276]Israel Report.

[277]Canada Common Law Report; Croatia Report; Denmark Report; Israel Report; Romania Report; South Africa Report; Spain Report; Turkey Report.

[278]Estonia Report; Greece Report; Russia Report.

[279]Austria Report.

[280]For PRC see China Report; for caps see Russia Report.

[281]Austria Report; Belgium Report; Canada Civil Law Report; Turkey Report. However, it should be underlined that through the new chances opened by the so-called sharing economies the classical protective measures in e.g. taxi markets by introducing caps are challenged. The competition through Uber shows that the regulator possibly needs to intervene in a different way by opening up this market, making sure that the market remains open and that Uber does not become dominant in the market. But this problem will certainly occupy the agenda of regulators everywhere for some time more.

[282]Turkey Report.

[283]Turkey Report.

[284]Belgium Report.

[285]Brazil Report.

[286]Austria Report.

[287]Austria Report; EU Report.

[288]Canada Common Law Report; EU Report; Greece Report; Turkey Report.

[289]Canada Common Law Report.

[290]China Report.

[291]Romania Report; Taiwan Report; Turkey Report.

Caps/bans on credit processing fees/management fees[292]; Cap on charges for overdraft accounts.[293]
- Cap on debt recovery costs/fees.[294]

There are also several examples of *bans on clauses that have an effect on the price*. Often this type of specific mandatory rule was introduced after the problem had been subject to court decision that qualified such clause as unfair. However, some countries provide for a much more general provision regarding price terms in SCT or in consumer contracts. Several of those general provisions deserve to be mentioned separately in advance.

- In France the Consumer Code provides for an express rule that prior to the conclusion of a sales or services contract, the professional has to *"ensure the express consent of the consumer for any additional payment in addition to the price of the principal object of the contract.*"[295] The express consent requirement is important as the provision further underlines that if contrary to the law the consent is assumed in the contract the consumer may claim restitution of all payments he made without express consent.
- The Turkish Consumer Code is another example where a general provision regulates additional charges that businesses can ask for. According to Art. 4, para 3 of the Code, suppliers cannot demand additional charges from consumers in three specific instances: If the obligation in question is a *legal obligation* of the seller/supplier he cannot burden the consumer with the related expenses; if the consumer was *rightfully expecting* that the goods/services in question would be provided *within the usual scope of the primary obligation* the supplier cannot ask for an additional payment. In these two instances, the consumer is the beneficiary of the service; yet the supplier has a legal obligation to serve at no charge. In the third instance, the recipient of the service is the supplier and the law, rightfully, allocates the costs of these services to the supplier. Whenever the *expenses were encountered for the benefit of the supplier* he may not demand any remuneration.[296]
- Taiwan is also an interesting example where the legislator has defined 81 specific situations related to price formation in SCT and has banned them.[297] In contracts for educational services e.g. the SCT may not contain any agreement that the business could charge extra fees besides the fee agreed upon. Or for recreation

[292]Belgium Report (capped to a 500 Euro maximum. In case of early repayment only 250 Euro); Germany Report (banned if in SCT); Greece Report (banned); Turkey Report (capped to 0.5% of the capital amount).

[293]Italy Report.

[294]Brazil Report; Canada Common Law Report; Denmark Report; Estonia Report; South Africa Report.

[295]France Report.

[296]Turkey Report. When drafting this provision, the Turkish law maker was guided by the case law of the BGH. See Atamer (2015), pp. 7–41.

[297]Taiwan Report.

and travel related contracts served in relation to a membership contract there is a ban regarding terms that the business can unilaterally raise its membership fees, or any fee agreed in the contract.

In other jurisdictions there are several specific prohibitions regarding price related terms. Some of them are as follows:

- A prominent example is the choice of Israel, China, Romania and Turkey of limiting the *types of charges financial institutions* can demand. This list is prepared by the relevant authority, and banks can only ask for a payment if one of the services on the list was provided to the customer. Thus, customers can compare the different prices much easier, especially because special websites are designed for this.
- Limitation of *penalty clauses* as a percentage rate of the debt[298]; limit of the penalty clause to the actual loss of the party if the amount set by the parties appears unreasonable[299]; ban on penalty in case of residential lease contracts[300]; ban on penalty in case of consumer credit[301]; limit of penalty to a proportioned sum (control by the court).[302]
- Ban of a weekly *billing* system.[303]
- Limitation of *cancellation fees*.[304]
- Prohibition of *round-up clauses* (e.g. parking and telecommunications sectors)[305]; mandatory rule to bill in car-parks on 15 minutes intervals and not hourly.[306]
- No *additional fees* for pre-paid cards.[307]
- *Unilateral price adjustment clauses* prohibited for some type of contracts,[308] or limited.[309]
- *Bundling* of different goods and/or services: This is certainly a problematic case regarding price formation as the customer cannot freely choose what and which quantity to purchase, and also to which price to purchase it, as he is not given the chance to compare the prices on the market and to make an informed choice. Price bundling might conflict with transparency requirements. This type of practice is often

[298] Brazil Report (10% of the debt).

[299] Denmark Report.

[300] Estonia Report; Turkey Report.

[301] Estonia Report.

[302] EU Report and Member States; Italy Report; Japan Report; Turkey Report.

[303] Italy Report.

[304] Canada Civil Law Report; Japan Report.

[305] Spain Report.

[306] France Report.

[307] Canada Civil Law Report.

[308] Russia Report; Turkey Report.

[309] Canada Civil Law Report.

forbidden or at least subject to scrutiny under national antitrust law. However, there are also consumer codes like the Turkish and South African[310] ones, which expressly forbid such sales practice in relation to consumer contracts. Estonia has a general restriction applicable for SCT in consumer contracts.[311] If a term prescribes that the consumer has to enter into another contract with the party supplying the SCT or a third party this is considered unfair, unless entry into such other contract is reasonable, taking into account the relationship between such contract and the contract with SCT.

One of the often-cited examples is the *payment protection insurance* (PPI) bundled with the credit agreement.[312] The problem is two-fold: on the one hand, such bundling of services violates competition rules as the consumers are not free to choose another insurance company which offers better terms on the market. On the other hand, even if the consumer is free to choose a PPI from another insurance company, the question remains how the offer of the credit institute could be best framed. Should the additional charge for the PPI be stated separately, or included in the APR calculation? The best choice is probably to do both. Given that the consumer should be free to choose on the market there is a need for a clear statement regarding the cost of the PPI. This way the customer can choose the cheapest PPI with the maximum coverage. However, in order to compare the effective cost of the credit with credit offers of other institutions the consumer will also need the APR including the PPI costs. The approach adopted in Belgium seems to convince in this regard, as it differentiates between tying practices and bundling practices in consumer and mortgage credit contracts.[313] As long as the consumer has the option to conclude the credit agreement also without the additional services, a lighter protection is applied: the information regarding prices has to be made available in a transparent and not misleading fashion. Tying practices however, that means that the consumer is forced to obtain the services in a bundle, are forbidden.[314]

For *lease contracts*, there are some provisions against bundling in some jurisdictions (*tying agreement*).[315] In an Austrian case however, the lease agreement for an apartment and the furniture were deemed valid.[316]

Bundling of the *sale of a smartphone* combined with an obligation to conclude also a mobile network services contract for a certain period is another common example given.[317] The problem here is that the customer often cannot judge what

[310] South Africa Report; Turkey Report.

[311] Estonia Report.

[312] E.g. Austria Report; South Africa Report; Turkey Report.

[313] Belgium Report.

[314] See also Croatia Report; Turkey Report.

[315] See Switzerland Report; Swiss CO Art. 254.

[316] Austria Report.

[317] Estonia Report; Japan Report. In Belgium once a period of 6 months has elapsed consumers are by law entitled to cancel their subscription without any cost, at least with regard to the subscription as such; however, if at the time of subscription, a device was given for free or at a reduced price, the consumer will have to pay a compensation for the device; the amount of this compensation, equalling the residual value of the device, has to be determined beforehand in the contract. The

the real cost of the offer is. Carriers can offer the phones for free or for a lower price as they trust in the long-term revenue stream that is guaranteed by the lock-in contract.[318]

7 Special Disclosure Regulations Promoting Price Transparency and Competition

In this section we aim at finding out about the different regulatory means applied in the participating countries in order to ensure price transparency and comparability (either in addition or as an alternative to price control). A prominent example can be given from EU law: Since 1987 creditors in a consumer credit contract are under the duty to declare the "*annual percentage rate of charge (APR)*" (meaning the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit) in consumer credit agreements. This should enable and give an incentive to consumers to compare the different APR's of different creditors and choose the cheapest one.[319] Given that the APR calculation formula is standardized by the EU, consumers can simply resort to this figure to get an overview of the market. The Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers is another example of such legislation aiming at unifying price indications and thereby facilitating "*informed choices on the basis of simple comparisons*".[320]

Recently price information has also been refined in some countries by "*product-use information*". Consumers can, for example, choose the right plan for a cell-phone contract much easier if they are not only informed about the amount they have to pay in a month but also about the average usage of a consumer, and even better, about their own past usage patterns. Serving this type of information during the life span of a contract is especially important as it could motivate consumers to get additional quotes from other providers on the market and thereby make switching more attractive. The reporters were asked for any type of comparable provision aiming at simplifying and fostering comparison-shopping and thereby stimulating competition.

---

same solution is offered in Turkey after 1 year. The consumer has a free cancellation right, however, must compensate for any reduced price it profited from due to a long-term contractual promise.

[318] See in detail Bar-Gill (2012), pp. 185 ff.

[319] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ 1987, L 42/48. Same also Art. 3(i) Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ 2008, L 133.

[320] Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ 1998, L 80/27.

- The requirement to illustrate the prices in a *clear and transparent* manner is provided in almost all the countries.[321] It is especially underlined that the total price including all costs has to be named.
- Most of the countries have introduced special regulations prohibiting *misleading and fraudulent acts related to prices*.[322] The Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market includes also several provisions relating to prices.[323] Bait and switch selling,[324] low-ball technics,[325] or sale above the advertisement price[326] for example, are banned as unfair commercial practices. Often special requirements are existent for advertisements including prices.[327] Any time a credit is praised as "cheap" special information has to be provided to the consumer.[328] Besides, the unfair competition rules of a country burden the competitors to abstain from misleading information regarding pricing[329];
- *Standardizing the way information regarding prices is served* gives customers a chance to compare. As long as apples and pears have to be compared no healthy competition is possible.
  - Art. 1 Directive 98/6/EC provides that the selling price and the *price per unit of measurement* of products offered by traders to consumers shall be indicated to improve consumer information and to facilitate comparison of prices. Besides, both prices must be unambiguous, easily identifiable and clearly legible (Art. 3).
  - As already mentioned, the requirement to inform the consumer on the *APR* is the most prominent and widespread example of standardization.[330] The requirement in Canada[331] of stating the interest rate per annum and not on a 360-year day basis is serving the same purpose, i.e. to have a comparable interest rate. This interest rate and other relevant information regarding the

---

[321] See e.g. Directive 98/6/EC (n 320); Canada Common Law Report; Chile Report; China Report; Japan Report; Turkey Report.

[322] China Report; Denmark Report; EU Report; South Africa Report; Turkey Report.

[323] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ 2005, L 149/22.

[324] Canada Common Law Report; Croatia Report.

[325] Croatia Report.

[326] Canada Common Law Report.

[327] Japan Report; Singapore Report.

[328] South Africa Report.

[329] Canada Common Law Report.

[330] Besides the EU Member States compare e.g. Singapore Report, Turkey Report.

[331] Canada Civil Law Report and Canada Common Law Report. See also South Africa Report.

credit have to be conveyed to the consumer on a standardized information sheet.[332]

– The same is true in regard to the limitation of *claimable banking charges*: if all these charges are named the same and are comparable the consumer might choose the cheapest offer. Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features was issued to tackle the problem of "comparability of fees related to payment accounts and payment account switching" as the name illustrates.[333] Some of the policy solutions offered by the Directive are attempts to foster competition in the market. Regarding the comparability of fees connected to payment accounts Article 3 of the Directive ordered the Member States to notify the Commission and the European Banking Authority (EBA) until 18 September 2015 of a provisional list of 10 to 20 of the most representative services linked to a payment account and subject to a fee. On the basis of these lists the EBA developed the Union's "standardized terminology" for banking services that are common to at least a majority of Member States and issued its Final Draft Technical Standards setting out the standardised terminology for services linked to a payment account, and the standardised formats and common symbol of the fee information document (FID) and the Statement of Fees (SoF) in May 2017.[334] Member States will have to adjust their national terminology according to the final list, which will ensure that the most important services related to a payment account use the same nomenclature all over the EU. The Directive also asks Member States to ensure that consumers are served with a standardized "fee information document" in good time before entering into a contract.
– Another area which can serve as an example is *air transport*. According to Art. 23 Regulation (EC) N 1008/2008 on common rules for the operation of air services[335] "[t]*he final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition to the indication of the final price, at least the following shall be specified: (a) air fare or air rate; (b) taxes; (c) airport charges; and (d) other charges, surcharges or fees, such as those related to security or fuel; where the items listed under (b), (c) and (d) have been added to the air fare or air rate. Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking*

[332] Art. 5 Directive 2008/48/EC.

[333] Directive 2014/92/EU (n 33), para 4.

[334] https://www.eba.europa.eu/documents/10180/1837359/Final+draft+RTS+and+ITSs+under+PAD+%28EBA-RTS-2017-04%2C%20EBA-ITS-2017-03%2C%20EBA-ITS-2017-04%29.pdf.

[335] Regulation (EC) N 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast), OJ 2008, L 293/3.

process and their acceptance by the customer shall be on an 'opt-in' basis." The Directive especially underlines in Art. 22 that air carriers shall freely set air fares, however, according to Recital 16 "[c]*ustomers should be able to compare effectively the prices for air services of different airlines. Therefore, the final price to be paid by the customer for air services originating in the Community should at all times be indicated, inclusive of all taxes, charges and fees*." Besides, air carriers are also encouraged to indicate the final price for their air services from third countries to the Community.[336]

- *Special warnings* at contract conclusion or during the contract period regarding price relevant factors
  - In Denmark mortgage credit agreements must include a warning regarding the fact that possible fluctuations of the exchange rate could affect the amount payable for loans marketed in Denmark and in currencies other than Danish Kroner.[337]
  - In Estonia the creditor or the credit intermediary is obliged to provide the consumer explanations regarding the ancillary agreement proposed in relation with a consumer credit contract relating to residential immovable property.[338]
  - In South Africa, for electronic communications, licensees and their agents must inform the end-user (the consumer) at the point of sale and prior to the conclusion of the contract of various terms and conditions. These include: "(a) deposit; (b) the connection fee; (c) administrative fees; (d) insurance costs; (e) in and out-of-bundle rates; (f) hardware costs; (g) the possibility of tariff changes during the contract term; (h) rules for early termination of a contract prior to expiry of the contract term; (i) rules for the carryover of voice minutes and data; and (j) fair usage policies".
  - In Russia the creditor is obliged by law to warn the consumer that expenses in Rubles may turn out to be higher than expected, since the applicable variable interest rate or the exchange rate in cases of foreign currency credits may rise, and that the past development of the rates may not be taken as a guarantee for future developments[339];
  - In the UK the Competition and Markets Authority has proposed requiring banks to warn consumers of imminent unauthorized overdrafts and allowing a subsequent grace period giving consumers the chance to reduce or avoid overdrafts by adding funds.[340]
  - If a consumer is not entitled to an overdraft in Belgium, but nevertheless an overdraft facility of at least 1.250 euro is created (and this overdraft is not

[336]See also CJEU Judgment of 15 January 2015, *Air Berlin*, C-573/13, EU:C:2015:11.

[337]Denmark Report.

[338]Estonia Report.

[339]Russia Report.

[340]UK Report.

reimbursed within a period of one month), the consumer must be informed on the penalties that will apply.[341]

- Article 11(1) of the Directive 2008/48/EC on credit agreements for consumers provides for the following: "*the consumer shall be informed of any change in the borrowing rate, on paper or another durable medium, before the change enters into force. The information shall state the amount of the payments to be made after the entry into force of the new borrowing rate and, if the number or frequency of the payments changes, particulars thereof.*"

• *Price comparison mechanisms/facilitation of comparison-shopping*

- Electricity and gas market.[342]
- Fuel prices.[343]
- Banking fees.[344]
- Products of insurance companies.[345]
- Air travel.[346]
- Car rental.[347]
- Telecommunication.[348]

• *Price breakdown in special situations*

- Telecommunication.[349]
- Banking charges.[350]
- Electricity and gas contracts where the seller arranges also settlement of accounts for the network services provided by the network operator.[351]

• *Cooling-off period to ensure information is understood.* Taiwan has introduced an interesting measure in Art. 11(1) of the Taiwanese Consumer Protection Act. It provides for a cooling-off period for customers to review the terms of the contract. As reflected in the Report: "*Traders shall provide a reasonable period, not longer than 30 days, for consumers to review all contract clauses, before entering into a standard contract. The terms and conditions adopted by traders in standard contracts which make consumers waive the right provided for in the*

[341] Belgium Report.
[342] E.g. Austria Report; Belgium Report; France Report; Italy Report; UK Report.
[343] Austria Report.
[344] Belgium Report; Croatia Report; Estonia Report; Greece Report; Israel Report; Turkey Report.
[345] Singapore Report.
[346] EU Report; South Africa Report.
[347] South Africa Report.
[348] Greece Report.
[349] South Africa Report.
[350] Chile Report; Spanish Report.
[351] Estonia Report.

previous paragraph shall be invalid [. . .]".[352] This rather long cooling-off period is foreseen to enable a thorough analysis of all information relating to the concluded contract, and a comparison of similar contracts in order to enhance competition.

8 Efficiency and the Way Forward

The comparison of the 27 country reports plus the supranational EU report allows for some conclusions and recommendations. We are not aiming at a full-blown set of advices to the regulators, but to raise awareness for the problem of contractual pricing structures that serve to hide rather than reveal the real cost of goods and services and thereby abuse limitations in the cognitive competences of consumers. This problem seems to be universal and calls for a multi-layered approach of regulators:

- All country reports underline that freedom of contract, and especially freedom of the parties to determine goods and services in exchange for a certain remuneration is fully granted. Whether under a socialist market economy or a fully market-oriented economy, whether in a common law, civil law or mixed jurisdiction, freedom of contract, and especially freedom of the parties to decide on the goods and services in exchange for a certain remuneration is acknowledged. The main principle regarding the price remains its formation on the market.
- However, we see also that the issue of price related contract terms is in some way or the other causing problems in all the reported countries. There are repeating pricing patterns which call for a deeper analysis. These can be categorized as follows:
  - **Some types of contract** are prone to cause disputes: long-term service contracts such as electricity, gas, internet, telecommunication contracts; banking contracts; insurance contracts (however reported less prominently).
  - **Some types of pricing schemes** are prone to cause disputes: price adjustment clauses; bundling and price partitioning; deferred payments; clauses linking the consequences of a breach of contract to the price paid (e.g. losing price reductions in case of breach); determination of interest rates (e.g. foreign currency credits/floor clauses).
- Reactions in the reporting countries to these problematic cases have been diverse. One difference can be observed in **common law countries**. Without wanting to overgeneralise, it might be stated that these countries are more reluctant in giving courts the right to control SCT and especially any sort of price related terms. The

[352] See Taiwan Report.

tendency is more in seeking regulatory responses to unfair price structures.[353] In civil law countries and mixed jurisdictions however, courts as well as the regulators seem more prone to intervene to fix problems. The trend being more that, at first, courts intervene and declare some price related SCT void, and then the regulator reacts to introduce a legal response.

- A common regulatory reaction in all countries is promoting **transparent pricing**. This includes standardizing pricing (e.g. APR), banning misleading pricing, facilitating efficient price comparisons and the like. These are protection measures applicable independent of the use of SCT. The idea is that prices must be transparent and salient in order to be subject to competition.

  Transparency is often also a requirement for any price related term in SCT to pass the validity test. In recent years, the CJEU has underlined several times that the *meaning of the transparency requirement* is not purely formal but also substantive. The customer shall be able to understand the terms in their economic and legal consequences. In a specific case dealing with mortgage credit in foreign currency, this involved also understanding which risk was assumed. The CJEU stated that[354]:

  > [. . .] first, the borrower must be clearly informed of the fact that, in entering into a loan agreement denominated in a foreign currency, he is exposing himself to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a fall in the value of the currency in which he receives his income. Second, the seller or supplier, in this case the bank, 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. Therefore, it is for the national court to check that the seller or supplier has communicated to the consumers concerned all the relevant information enabling them to assess the economic consequences of a term, such as that at issue in the main proceedings, on their financial obligations.

  This approach of the CJEU reflects all the hope in a formula once introduced by the Directive 93/13/EEC in 1993: as long as price related terms are made salient and therefore subject to competition the consumer will have the chance to pick the best possible deal. Given e.g. the risks involved in a foreign currency transaction, he would more likely choose one with the local currency.

  The same approach was also taken in *price adjustment clauses*. The CJEU imposed high demands for adjustment clauses to survive a transparency control.[355] According to the court, the main question is

[353]A very good example is certainly the UK where the Financial Conduct Authority and the Competition and Markets Authority take a very active role in seeking for new remedies to address problems in consumer markets. See e.g. Helping people get a better deal: Learning lessons about consumer facing remedies, prepared by the Financial Conduct Authority and the Competition and Markets Authority, on behalf of the UK Competition Network, 2018; Digital Comparison Tools: Consumer Research Final report, prepared by Kantar Public as part of the Competition and Markets Authority's (CMA) market study in relation to digital comparison tools, 2017.

[354]CJEU *Andriciuc and* others (n 170), para 50.

[355]CJEU *RWE Vertrieb* (n 16), para 49.

> [. . .] whether the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges. The lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation.

However, it is very doubtful if this approach is leading to a meaningful solution of the problem. As explained above, the results of *behavioural sciences* show that consumer deal with complexity mostly by disregarding it. They simplify decisions by ignoring insignificant looking price dimensions and taking mental shortcuts. Evidence shows that when prices are complex, and in particular are two-dimensional rather than one-dimensional, consumers have problems choosing the right price. A price adjustment clause for example cannot be written in such a simple and transparent form that a consumer could possibly look for the *best* alternative clause offered on the market. Furthermore, the so called optimism bias, as pointed out by cognitive studies and social psychology, entails that individuals tend to be over-optimistic about the future. People systematically predict future choices wrongly and hence misjudge elements of the price vector due to overconfidence. Any sort of foreign currency credit inherently builds on this overconfidence. Even if the consumer is informed about the possible risks of taking a foreign currency credit, he will not be in a position to judge the future correctly. In such case, the transparency requirement, which is praised so much by the CJEU, will be of little help to consumers.

- In many countries, courts intervene in unfair price terms also based on the argument that these are only **"ancillary" terms**, that is price terms which are not directly determining the price and therefore subject to a judicial control. Independent of the fact that these terms are transparent, they are put to scrutiny in order to ascertain if they cause a significant imbalance in the parties' rights and obligations contrary to the requirement of good faith. The problem with this approach is, as with the case of transparency, that it is subject to the courts' discretion and that the judgments may often vary. A prominent example is the *credit management fee* charged in many countries. The German High Court qualified these fees as ancillary terms controllable by the courts and decided that they were causing a significant imbalance. The Austrian High Court however was of the exact opposite view qualifying the management fee as part of the main subject matter of the contract. In Turkey on the other hand, the High Court has joined the German one and annulled such terms. But the Turkish legislator later intervened and gave financial institutions the right to charge management fees by statute. The whole debate in Turkey lasted for more than 5 years during which banks had to pay back fees which they then were allowed to charge again from 2015 onwards. It is certainly a common phenomenon that courts decisions may vary whenever certain discretion is involved. This is nothing new. However, the problem with price related terms in SCT is that they can involve thousands if

not millions of contracts where according to the decision amounts in millions have to be restituted.

Controlling this type of price terms ***ex post*** **via court intervention** means that for every type of price adjustment clause, for any credit agreement in foreign currency, or for any management fee charged the courts will have to intervene if the customer challenges the term. However, it is an established fact that consumers often do not sue. If by any chance there is an active consumer who gets the SCT annulled, the *inter partes* effect of the court decision will constitute another major problem. Most of the countries report that persons or organizations having a legitimate interest under national law in protecting consumers have a right to sue against the continued use of unfair terms in consumer contracts. But, consumer organizations have seldom the financial means to follow this type of suits. Besides, *the effect* (individual vs. *erga omnes/*with the same provider vs. for any provider) of any judgment declaring a contractual term to be unfair in a case lead by an individual or by a collective entity remains controversial. Even the requirement for national courts to consider *ex officio* any judgment annulling a certain unfair term is not beyond doubt. And, if by a special national provision, the *inter partes* effect of a decision can be surmounted, the *restitution claim* for any sums paid based on an invalid price-term has still to be filed by every individual consumer. Unless the sum involved is high, or in exceptional cases attracts much publicity, like fees in the energy or banking sector, one can imagine that consumers will be unwilling to undertake the burden of suing the companies. Finally, for those consumers prepared to claim what they paid in excess, *limitation periods* regarding this type of restitution claim will be a final obstacle. Before consumers are able to inform themselves about the invalidity of the relevant term, a restitution claim may already have become time-barred. Obviously, businesses will not be willing to change their terms and pricing policies as long as no effective remedy is enforced.

- Another related argument against an ***ex post*** **judicial intervention** is the *lack of legal certainty*. The number of judgments for example regarding price adjustment clauses or banking fees in many countries proves that the businesses are persistent in creating new clauses allowing for some sort of price modification. But the cost of adjudicating each dispute seems by far to outweigh the effect of the judgments in solving the problem. The Israeli case of *Bank Leumi* lasting for 25 years is a unique but good example regarding the inefficiency of court proceedings.[356] With every decision a new variant of the respective price term is used by the banking or energy sector. This incurs enormous enforcement costs with often no perspective of putting an end to the legal problem. Legal certainty which is needed for a functioning market is not granted. Furthermore, when arbitration in consumer and especially SCT disputes is allowed, accessibility of such awards will not always be granted, which again causes lack of foreseeability.

[356] *Attorney General v. Bank Leumi*, PM 5763(1) 481 (2004), see Israel Report.

- All in all, the option of a **regulatory intervention** regarding some price terms used in millions of contracts needs further consideration. This is also in line with the principle of the separation of powers. As underlined by Lady Hale in the UK Supreme Court decision *Abbey National*: "[. . .] *it is not clear to me whether the proper solution is to find some way of forcing the suppliers to compete with one another in the terms they offer or whether the solution is to condemn one particular model of charging for those services. Fortunately, however, that is for Parliament and not for this Court*."[357] Indeed, some national regulators have chosen to intervene and to ban e.g. the taking of a consumer credit in foreign currency, or to limit the type of banking charges to certain items and to ban any other type of charges. The benefits of certainty to a legal system are obvious: increased predictability, reduced information costs, increased speed of dispute resolution, and the consequential reduction in litigation expenditures.

  But more important than that, effective consumer protection cannot be achieved solely by allowing or forbidding some pricing structures. Even if a court finds, for example, a price adjustment clause or an overdraft charge to be perfectly transparent and therefore fair, the need to **protect consumers against behavioural market failure** remains.[358] Regulatory interventions could in fact be designed in a tailor-made fashion taking into account the findings of cognitive sciences. Given that the major problem with price terms in SCT is that they are not subject to market forces the aim of any regulation should be to change this. If consumer awareness can be raised regarding some pricing schemes the need for judicial control would also diminish. *Soft paternalistic remedies* are already applied in some of the countries. Simplifying the choice environment by standardizing price information; facilitating comparison-shopping by specialized websites and intermediaries[359]; informing consumers of their usage data and making switching in long-term contracts easier are some prominent examples.[360]

  A perfectly transparent price adjustment clause would probably help consumer less than a monthly prominent information about the fare applied to them and the alternative (better) prices on the market plus a right to freely change the contract. Even though consumers are sometimes aware of the unfavourable conditions of their contract, they hesitate to look for new options given its costs and unpredictable outcome. Changing the status quo entails the cost of gathering

[357][2009] UKSC 6, Lady Hale, para 93.

[358]Policymakers certainly have to be aware of the cultural differences affecting human judgment and decision making and adjust their regulatory interventions accordingly, see Zamir and Teichman (2018), pp. 124–127.

[359]See the detailed report prepared for the UK market: Digital Comparison Tools: Consumer Research Final report, prepared by Kantar Public as part of the Competition and Markets Authority's (CMA) market study in relation to digital comparison tools, 2017.

[360]See on behaviourally informed lawmaking Zamir and Teichman (2018), pp. 162 ff. and 313 ff.; see on different regulatory means to spur competition on the market for long-term services and banking contracts Atamer (2017), pp. 644–657; or on the market for credit-card, mortgage and cell-phone contracts Bar-Gill (2012), pp. 51 ff.

information, comparing it and finding the best offer on the market. This can be costlier than the additional benefits of the change itself. Under such circumstances the apathy of the consumer might even be rational. If this information has to be given to the consumer correctly each month by the service provider this would have a nudging effect to switch. Obviously, the inhibition threshold for suing your service provider is much higher than the one for just terminating your contract. The lawmakers would be well advised to intervene at this stage.

- However, it is questionable whether enhancing comparison shopping or nudging to change the service provider is really enough to tackle the bounded self-control problem of present biased consumers. As Bubb and Pildes put it "[n]*aïveté and overconfidence persist despite consumers' accumulated experience of their own weakness of will. Printed words on a page are unlikely to cure what painful experience has not*".[361] Whereas making prices salient and comparable, and thereby spurring competition, might work in some cases, hard paternalistic interventions will be needed in others, like the case with over-limit fees or default interests. Smart disclosure might lead consumers to the service provider with the lowest charge. Monthly or yearly statements might also show consumers that they have a self-control problem given that they are ending up paying these fees, but it might not necessarily help them to overcome the self-control problem. If there is a bias which is hard to overcome by nudging and which can be exploited very easily by suppliers, hard paternalistic interventions, especially limiting the amount of this type of charges have to be thought of.
- **Controlling prices and price related terms** is a multifaceted and complicated issue. This report tries to seek for some alternative methods to the trend of judicial *ex post* control which is developing in the last decades. It is undeniable that courts often play a pioneer role in ascertaining problem areas. But it might be the time for regulators to think of more effective *ex ante* regulations to unburden the courts. Besides, more effective ways of collective proceedings and redress mechanisms need to be found as, obviously, businesses can also violate an *ex ante* regulation. The role of courts in controlling less prominent as well as less widely applicable price related terms will certainly remain.

Annex: Questionnaire for the National Reporters

General Information on the Scope of Freedom of Contract

In this introductory part, brief information should be provided on the acceptance of freedom of contract as a rule, and if this is the case, the provisions/court decisions guaranteeing this freedom. It is important to see whether the parties, in principle, are free to set the contractual price, whether the rules of liberal market economy are

[361] Bubb and Pildes (2014), p. 1650.

applied, and whether there is a mechanism (autonomous body or state department) to protect competition in the market.

General Information on Control of SCT

This part should give an overview on judicial (and if the case might be administrative) control of standard contract terms. Especially whether control is applied only in B2C contracts or also in B2B contracts; the general norm allowing for a judicial review of standard terms; whether there is a "black" (forbidden without discretion of the judge) and/or "grey" list of unfair terms (presumed to be unfair); the effect of an "annulment" of an unfair term by courts/or an administrative body; the *inter partes* effect of a court decision and its exceptions; possible registers in which unfair terms are listed and their effect; whether there are means of collective action against usage of unfair terms in standard contract terms.

Judicial Control of Price Terms in SCT

Are there special provisions that give the courts the right to control price terms in SCT, or forbid such control? Do courts control price terms in SCT even though there is a limitation or no express authorization? If yes based on which arguments? If there is a parallel provision to Article 4(2) Directive 93/13/EEC do courts distinguish between main and ancillary price terms? Please also advise if an administrative body is vested with this function instead of courts.

Representative examples from case law are very important in this section. The authors are free to give all kind of additional information, which they judge to be relevant.

Special Regulatory Provisions Controlling Price Terms

This section should give information on different regulatory responses directly intervening into price terms. Obviously, these interventions can occur in very different sectors. However, given the scope of the topic the major contracts we look for are those were standard contract terms are widely used and therefore also a judicial control of price terms could occur. Insurance contracts, contracts with energy, internet, cell-phone, pay-TV providers, banking contracts, contracts with health clubs would be typical examples. However, price caps introduced by the regulatory regarding e.g. pharmaceuticals are not relevant. Examples of regulatory intervention could be:

- Limiting the number of services banks can charge: examples from Israel,[362] Romania[363] and Turkey.
- Setting price caps:
  - General caps regarding contractual and default interest rates[364] or special caps applicable just for e.g. interest rates in credit card contracts or overdraft accounts;
  - Special caps regarding some charges, e.g. roaming charges[365];
  - Caps regarding contractual penalty fees, specifically in the banking sector,[366] or generally for consumer contracts;
- Forbidding certain types of fees or penalties;
- Limiting or forbidding price bundling or price partitioning;
- Any comparable regulatory provision.

It would also be very important to explain the interrelation of administrative provisions and judicial price control. That is, if courts can still practice price control, or do so *de facto*, even though a regulatory provision regarding price control is existent.

[362] http://www.boi.org.il/en/ConsumerInformation/ConsumerIssues/Pages/AmalotReform.aspx.

[363] According to the information provided in the CJEU Judgment of 12 July 2012, *Volksbank România*, C-602/10, EU:C:2012:443, para 14 the Romanian legislator has limited fees which can be charged in relation to credit agreements: "*Article 36 EGO No 50/2010 provides: 'For the credit granted, the creditor may levy only a charge for the processing of the application, a credit administration charge or current account administration charge, compensation in the event of early repayment, insurance costs, penalties if appropriate, and a single charge for services provided upon request by consumers*."

[364] See e.g. for a comparative study Reifner et al. (2010).

[365] https://ec.europa.eu/digital-single-market/en/roaming-tariffs.

[366] For example, in the USA, Section 149(a) of the Truth in Lending was changed with the Credit Card Accountability, Responsibility And Disclosure Act of 2009 as follows: "*The amount of any penalty fee or charge that a card issuer may impose with respect to a credit card account under an open end consumer credit plan in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee, over-the-limit fee, or any other penalty fee or charge, shall be reasonable and proportional to such omission or violation." On 15 June 2010 the Federal Reserve Board of the US has announced that it "[p]rohibits credit card issuers from charging a penalty fee of more than $25 for paying late or otherwise violating the account's terms unless the consumer has engaged in repeated violations or the issuer can show that a higher fee represents a reasonable proportion of the costs it incurs as a result of violations. Prohibits credit card issuers from charging penalty fees that exceed the dollar amount associated with the consumer's violation. For example, card issuers will no longer be permitted to charge a $39 fee when a consumer is late making a $20 minimum payment. Instead, the fee cannot exceed $20. Bans "inactivity" fees, such as fees based on the consumer's failure to use the account to make new purchases. Prevents issuers from charging multiple penalty fees based on a single late payment or other violation of the account terms. Requires issuers that have increased rates since January 1, 2009 to evaluate whether the reasons for the increase have changed and, if appropriate, to reduce the rate.*"

Special Disclosure Regulations Promoting Price Transparency and Competition

In this section it is aimed to find out about the different regulatory means applied in the participating countries in order to ensure price transparency and comparability (either in addition or as an alternative to price control).

A prominent example can be given again from EU law: Since 1987 creditors in a consumer credit contract are under the duty to declare the "*annual percentage rate of charge APR*" (meaning the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit) in consumer credit agreements at the latest at time of conclusion of the contract. This should enable and give an incentive to consumers to compare the different APR's of different creditors and choose the cheapest one.[367] Given that the APR calculation formula is standardized by the EU, consumers can simply resort to this figure to get an overview of the market. The Directive 98/6/EC is another example of such legislation aiming at unifying price indications and thereby facilitating "informed choices on the basis of simple comparisons".[368]

Recently price information has been refined in some countries by "product-use information". Consumers can, for example, choose the right plan for a cell-phone contract much easier if they are not only informed about the amount they have to pay in a month but also about the average usage of a consumer, and even better, about their own past usage patterns. Especially serving this type of information during the life span of a contract is important as it could motivate consumers to get additional quotes from other providers on the market and thereby make switching more attractive.

Any type of comparable provisions which aim at simplifying and fostering comparison-shopping and thereby stimulating competition is of interest in this section:

- Special labelling requirements for prices,
- Comparative listing of prices by independent institutions on websites,[369]
- Transparency requirements which balance the effect of price-partitioning[370] or price bundling.[371]

---

[367]Council Directive 87/102/EEC (n 319).

[368](n 320).

[369]Directive 2014/92/EU (n 33) for example obliges EU Member States in Article 7 to "[. . .] ensure that consumers have access, free of charge, to at least one website comparing fees charged by payment service providers for at least the services included in the final list referred to in Article 3 (5) at national level. Comparison websites may be operated either by a private operator or by a public authority".

[370]See n 5. Parallel to the APR regulation in consumer credits, Article 23 Regulation (EC) N 1008/2008 for example includes a special provision to countervail intransparent price information via price-partitioning: "The **final price** to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication."

[371]See n 4.

- Product-use information at contract conclusion and regularly during the contract performance.[372]
- Special information whenever a fee or penalty is going to be applied. E.g. alert systems for overdraft accounts.[373]

Just like under section IV, this section too should include comment on the relation of transparency/disclosure regulations to judicial price control. Whether these exclude each other or applied together is of crucial importance.

References

Agarwal S, Chomsisengphet S, Mahoney N, Stroebel J (2015) Regulating consumer financial products: evidence from credit cards. Q J Econ 130:111–164

Akerlof GA (1970) The market for "lemons": quality uncertainty and the market mechanism. Q J Econ 84:488–500

Akerlof GA, Shiller RJ (2015) Phishing for phools. The economics of manipulation and deception. Princeton University Press

Atamer YM (2015) 6502 Sayılı Tüketicinin Korunması Hakkında Kanun Çerçevesinde Fiyat Denetimi [Price control under the new Consumer Protection Code No 6502]. In: Inceoglu M (ed) Yeni Tüketici Hukuku Konferansı [Conference on the new Consumer Code]. XII Levha Publishers, Istanbul, pp 7–41

Atamer YM (2017) Why judicial control of price terms in consumer contracts might not always be the right answer. Insights from behavioural law and economics. Mod Law Rev 80:624–660

Atamer YM (2018) Unlauterer Wettbewerb durch Nutzung von ungültigen AGB? In: Emmenegger S et al (eds) Brücken bauen. Festschrift für Thomas Koller. Stämpfli, Bern, pp 35–57

Bakos Y, Marotta Wurgler F, Trossen DR (2014) Does anyone read the fine print? Consumer attention to standard-form contracts. J Leg Stud 43:1–35

Bar-Gill O (2009) The law, economics and psychology of subprime mortgage contracts. Cornell Law Rev 94:1073–1152

Bar-Gill O (2012) Seduction by contract. Law, economics, and psychology in consumer markets. Oxford University Press, Oxford

Bar-Gill O (2014) Consumer transactions. In: Zamir E, Teichman D (eds) The Oxford handbook of behavioral economics and the law. Oxford University Press, Oxford

Bar-Gill O, Bubb R (2012) Credit card pricing. The card act and beyond. Cornell Law Rev 97:967–1018

Bubb R, Pildes RH (2014) How behavioral economics trims its sails and why. Harv Law Rev 127:1593 ff

Chen-Wishart M (2010) Transparency and fairness in bank charges. Law Q Rev 126:157–162

Cooter R, Ulen T (2012) Law & economics, 6th edn. Pearson, Boston

DeMuth CC (1986) The case against credit card interest rate regulation. Yale J Regul 3:201 ff

Eisenberg MA (1995) The limits of cognition and the limits of contract. Stanford Law Rev 47

[372] According to Article 5 Directive 2014/92/EU (n 33), payment service providers have to inform consumers at least annually and free of charge with a statement of all fees incurred in that year.

[373] See for such a suggestion: Provisional Decision on Remedies regarding the Retail Banking Market Investigation announced by the UK Competition & Markets Authority on 17 May 2016, pp. 175 ff.

Faure MG, Luth HA (2011) Behavioural economics in unfair contract terms. Cautions and considerations. J Consum Policy 34:337–358
FCA, CMA (2018) Helping people get a better deal: learning lessons about consumer facing remedies. Available at https://www.gov.uk/government/publications/ukcn-consumer-remedies-project-lessons-learned-report
Grebieniow A (2019) Remedies for inequality in exchange. Comparative perspectives for the evolution of the law in the 21st century. Eur Rev Priv Law 27:3–26
Grubb M (2015) Failing to choose the best price. Theory, evidence, and policy. Rev Ind Organ 47:303–340
Kirchgässner G (2008) Homo oeconomicus. The economic model of behaviour and its applications in economics and other social sciences. Springer, New York
Koller T (2008) Einmal mehr: das Bundesgericht und seine verdeckte AGB-Inhaltskontrolle. PJA/AJP 2008, pp 943–953
Korobkin R (2003) Bounded rationality, standard form contracts, and unconscionability. Chic Law Rev 70:1203–1295
Luth H (2010) Behavioral economics in consumer policy. The economic analysis of standard terms in consumer contracts revisited. Intersentia, Antwerp
Mathis K, Steffen AD (2015) From rational choice to behavioural economics. Theoretical foundations, empirical findings and legal implications. In: Mathis K (ed) European perspectives on behavioural law and economics. Springer, p 31 ff
Micklitz HW (ed) (2014) Constitutionalization of European private law. Oxford University Press, Oxford
Micklitz HW (2015) The transformation of enforcement in European private law: preliminary considerations. Eur Rev Priv Law 23:491–524
Micklitz HW, Saumier G (eds) (2018) Enforcement and effectiveness of consumer law. Ius Comparatum, Global studies in comparative law. Springer
Peglion-Zika CM (2013) La notion de clause abusive au sens de l'article L. 132-1 du Code de la Consommation, thesis. Librairie générale de droit et de jurisprudence, Paris
Pichonnaz P (2017) Art. 8 LCD. In: Martenet V, Pichonnaz P (eds) Commentaire romand, Loi contre la concurrence déloyale. Helbing Lichtenhahn, Basel
Reifner U, Clerc-Renaud S, Knobloch M (2010) Study on interest rate restrictions in the EU. Final Report for the EU Commission DG Internal Market and Services, Project No. ETD/2009/IM/H3/87. Institut für Finanzdienstleistungen, Brussels, Hamburg, Mannheimt
Rösler H (2010) Protection of the weaker party in European contract law: standardized and individual inferiority in multi-level private law. Eur Rev Priv Law 18:729–756
Schäfer HB, Leyens P (2010) Judicial control of standard terms and European private law. A law & economics perspective on the Draft Common Frame of Reference for a European private law. In: Chirico F, Larouche P (eds) Economic analysis of the DCFR. The work of the Economic Impact Group within CoPECL. Sellier European Law Publishers, Munich, pp 97–119
Schäfer HB, Ott C (2012) Lehrbuch der ökonomischen Analyse des Zivilrechts, 5th edn. Springer, Berlin, Heidelberg
Schillig M (2011) Directive 93/13 and the "price term exemption": a comparative analysis in the light of the "market for lemons" rationale. Int Comp Law Q 60:933–963
Shepperd JA, Waters E, Weinstein ND, Klein WMP (2015) A primer on unrealistic optimism. Curr Dir Psychol Sci 24:232–237
Van Boom WH (2011) Price intransparency, consumer decision making and European consumer law. J Consum Policy 34:359–376
Werro F, Pichonnaz P (2015) Un reflet de la jurisprudence récente en droit privé européen. Annuaire Suisse de Droit Européen 2018, p 268 ff
Whittaker S (2011) Unfair contract terms. Unfair prices and bank charges. Mod Law Rev 74:106–122
Zamir E, Teichman D (2018) Behavioral law and economics. Oxford University Press, Oxford