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# Uniform Interpretation of Article 4(2) of UCT Directive in the Context of Consumer Credit Agreements: Is it possible?

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## Abstract

So much has been said about the exclusion of contractual terms from the *unfairness test* embedded in Article 4(2) of the UCT Directive by both the CJEU as well as the legal doctrine. Nonetheless, numerous national courts of different MS struggle with the interpretation and consequently proper

application of their domestic laws implementing this provision. This particularly concerns the correct interpretation of this rule within the complex surrounding of consumer credit agreements, where an understanding of the notions deriving from the exclusion is conditioned by the proper knowledge of terms of financial and mathematical nature, such as variable interest rate, annual percentage rate of charge, currency clause, various methods of calculation etc. National courts all over the Union are repeatedly occupied by questions regarding which of these contractual terms are encompassed by the notions of the ‘definition of the main subject matter of the contract’ or ‘adequacy of the price and remuneration’, and particularly whether these contractual terms are transparent to an average consumer. This article investigates the approach the CJEU has taken regarding these questions and examines whether its answers are ‘transparent’ enough for MS’ courts.

## 1. Introduction

This paper provides a general overview of the difficulties that occur in connection with the interpretation and consequently the application of national law provisions transposing Article 4(2) of the UCT Directive<sup>1</sup> to consumer credit agreements. In this respect, numerous questions have been raised by MS’ national courts and addressed to the CJEU within the preliminary ruling procedure under Article 269 TFEU<sup>2</sup>.<sup>3</sup> The answers given by the CJEU are crucial not only for the purpose of uniformity of interpretation and consistency of application of the EU law across the MS,<sup>4</sup> but also with regards to the destiny of billions of consumer credit contracts concluded every year in Europe.<sup>5</sup> According to this rule, essential elements of the consumer credit contract shall not be evaluated upon their (un)fairness in so far as they are written in plain, intelligible language.<sup>6</sup> Such contract terms never get to meet the famous (un)fairness test under Article 3(1) of the UCT Directive pursuant to which “a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”.

In this respect, MS’ national courts deciding upon the (un)fairness of contract terms in consumer credit contracts are faced with a serious preliminary question, which has two sides. The first one concerns the matter of which of these complex contract terms contained in uniform, standard, and pre-formulated credit contracts and within them incorporated trader’s general terms and conditions is to be qualified as an essential element of the contract? Much more than expected the answer

1. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, pp. 29–34.

2. Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7 June 2016, p. 47.

3. See Fazekas, J., *The consumer credit crisis and unfair contract terms regulation – Before and after Kásler*, *Journal of European Consumer and Market Law*, Issue 3, 2017, pp. 99–106. See also Mišćenić, E., *Croatian Case “Franak”: Effective or “Defective” Protection of Consumer Rights? Harmonius Journal of Legal and Social Studies in South East Europe*, Vol. V, 2016, pp. 184–209.

4. The ECJ established a long time ago in judgement of 1 December 1965, C-16/65, *Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1965:117, p. 886, and in judgement of 5 March 1986, C-69/85, *Wünsche v Germany*, EU:C:1986:104, para. 12, that the aim of judicial cooperation between national courts and the Court of Justice under Article 177 TEEC, that is today’s Article 269 TFEU, “is to ensure that Community law is applied in a unified manner throughout the Member States”.

5. See Volume and Structure of Consumer Credit Market in Europe in *European Commission Study on the functioning of the consumer credit market in Europe – Final Report*, July 2013, available at [http://ec.europa.eu/consumers/archive/rights/docs/consumer\\_credit\\_market\\_study\\_en.pdf](http://ec.europa.eu/consumers/archive/rights/docs/consumer_credit_market_study_en.pdf). See also Eurofinas Report for 2016-17 in *Consumer Credit Bulletin Europe*, 2017, p. 15, available at [http://www.eurofinas.org/uploads/documents/CCBE/Consumer%20Credit%20Bulletin17\\_WEB.pdf](http://www.eurofinas.org/uploads/documents/CCBE/Consumer%20Credit%20Bulletin17_WEB.pdf).

6. See *infra*, p. 5.

shall depend on the proper understanding of the notions and definitions deriving from another EU Directive, namely Directive 2008/48/EC and her ancestor *ex* Directive 87/102/EEC on consumer credit agreements, i. e. Directive 2014/17/EU in case of mortgage consumer credit agreements.<sup>7</sup> The eventual positive qualification of contractual terms as essential elements of consumer credit contracts leads to another side of the preliminary question to be answered by a national judge regarding whether these terms are written in plain, intelligible language. Only if both sides of the preliminary question are answered positively, the national court is not obliged to investigate the unfairness of these contractual terms.

Although, at first sight there is nothing problematic in this evaluation process, a ‘second thought’ brings us into a world of contractual terms dealing with mathematical formulas for the calculation of the annual percentage rate of charge, variable interest rates, acceleration clauses, floor clauses, execution clauses, total costs of credit, reference rates, etc. Since, *iura novit curia*, national courts should also know the answer to the question which of these contractual terms represents an essential element of the consumer credit contract. Or maybe not? The abundance of requests for a preliminary ruling referred to the CJEU in this regard demonstrates clearly the level of difficulties that national courts are facing when searching for the right answer to this important question.<sup>8</sup> Such a decision-making process involves an interaction of a whole range of civil law institutes and requires from the national judge the application of legal definitions and notions deriving both from the so-called ‘original’ and ‘harmonized’ national law provisions, which must be interpreted “as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view”<sup>9</sup>.

According to CJEU’s settled case law, such duty of interpreting domestic law consistent to the EU law, finds its roots in the definition of a directive (Article 288(3) TFEU) on the one hand, and in the principle of loyalty (Article 4(3) TEU<sup>10</sup>), on the other.<sup>11</sup> However, its primary goal of contributing to the uniformity of interpretation and application of EU law across the Union can be seriously undermined by various and diverging national courts’ practices.<sup>12</sup> Consequently, the CJEU and the MS’ courts find themselves in a very close relationship in which they must cooperate with each other in order to achieve practical results contributing to the uniformity of application of the EU law.<sup>13</sup> On

7. 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 L 133, 22.5.2008, pp. 66–92; *ex* 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 L 042, 12.02.1987, pp. 48–53; Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, Text with EEA relevance, OJ L 60, 28.2.2014, pp. 34–85.

8. See *infra*, p. 4.

9. Judgment of 14 July 1994, C-91/92, *Faccini Dori v Recreb*, EU:C:1994:292, para. 26.

10. Consolidated version of the Treaty on European Union, OJ C 202, 7 June 2016, p. 13.

11. According to the judgment of 13 November 1990, C-106/89, *Marleasing v Comercial Internacional de Alimentación*, EU:C:1990:395, para. 8: “(...) the Member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts”.

12. On possible tensions between CJEU and constitutional courts of the MS’ see Piqani, D., *Legal Risks in the Relation Between National Constitutional Law and EU Law*, in: Mišćenić, E., Raccah A., (eds), *Legal Risks in EU Law: Interdisciplinary Studies on Legal Risk Management and Better Regulation in Europe*, Springer, 2016, p. 23.

13. For this point see Mišćenić, E., *Legal Risks in Development of EU Consumer Protection Law*, in: Mišćenić, E., Raccah, A., *op. cit.*, p. 158: “Apart from the uniform application and interpretation of EU law by the CJEU, effective legal protection of consumer rights is guaranteed at the forefront by the national judiciaries of the MS”.

the one hand, the CJEU is accomplishing this task primarily through guidelines and criteria given to national courts within a preliminary ruling procedure. On the other, national courts are doing so, not only by sending their requests, but also by observing the settled case law of the CJEU as part of EU law consistent to which they must interpret domestic law provisions. Bearing this in mind and recognizing the crucial role of the CJEU in guaranteeing the uniform application of EU law across the Union,<sup>14</sup> this article analyses to what extent national courts are following and understanding the guidelines and criteria given by CJEU case law when deciding which credit contract terms are *essential* and whether they are *transparent*.

## 2. General Remarks on Exclusion from Unfairness Test under Article 4(2) UCT Directive

To begin with, one should demonstrate the exact wording of the exclusion from the (un)fairness test under Article 4(2) of the UCT Directive pursuant to which: “Assessment of the unfair nature of the terms shall relate neither to the *definition of the main subject matter of the contract* nor to the *adequacy of the price and remuneration*, on the one hand, as against the services or goods supplies in exchange, on the other, *in so far as these terms are in plain intelligible language.*”

As *Riesenhuber* explained it almost fifteen years ago, this exclusion entered the UCT Directive for obvious reasons.<sup>15</sup> If in plain, intelligible language, a contractual term on the main subject matter is a reflection of the true will of the consumer, and the idea that a national judge should tell him what he ‘really’ wants, would go against the principle of private autonomy of the parties.<sup>16</sup> On the other hand, according to *Riesenhuber*, price and remuneration are elements formed on the market and the judge should not play the role of the ‘price commissioner’.<sup>17</sup> Never mind, he said, if the consumer does not negotiate the price, as it is usually the case; normally there is no incentive to check on its unfairness. The background of the exclusion lies in fundamental values of private autonomy and competition, explains *Riesenhuber*.<sup>18</sup>

Besides presented wording of Article 4(2), the main text of the UCT Directive contains no further definitions or proposals on the exact meaning of the terms ‘definition of the main subject matter of the contract’ and ‘adequacy of the price and remuneration’, as well as no interpretation of the phrase ‘plain intelligible language’. Useful guidelines to their meaning can be found in the preamble of the UCT Directive, the CJEU case law and different Commission reports on the UCT Directive and its implementation into MS’ laws<sup>19</sup>. For example, in the case *Caja de Ahorros y Monte de Piedad*

14. See judgment of 17 April 2008, C-404/06, *Quelle*, EU:C:2008:231, para. 22, and prior to it judgment of 6 December 2005, C-461/03, *Gaston Schul Douane-expediteur*, EU:C:2005:742, para. 21, and judgment of 10 January 2006, C-344/04, *IATA and ELFAA*, EU:C:2006:10, para. 27, according to which “(...) the very aim of the powers given to the Court by Article 234 EC, (which) are intended, in essence, to ensure the uniform application of Community law by the national courts”.

15. See *Riesenhuber*, K., *Europäisches Vertragsrecht*, De Gruyter Recht, Berlin, 2003, p. 237.

16. *Ibidem*.

17. *Ibidem*.

18. *Ibidem*.

19. For example, in *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, COM(2000) 248 final, Brussels, 27 April 2000 (*Report on the implementation of Directive 93/13*). See also the recent *European Commission Report on the Fitness check of consumer and marketing law*, SWD(2017) 209 final of 23 May 2017.

*de Madrid* concerning the use of unfair contract terms in mortgage loans concluded with consumers by the creditor *Caja de Madrid* in Spain,<sup>20</sup> the CJEU clarified the nature of Article 4(2) as not being a provision setting a scope of application (Lat. *ratione materiae*) of the UCT Directive.<sup>21</sup> It is due to a minimum standard of protection that the UCT Directive is based on,<sup>22</sup> that MS' legislators can decide to widen the scope of the (un)fairness test even to the excluded categories of terms in B2C (business-to-consumer) contracts, if in plain, intelligible language.<sup>23</sup> The CJEU's conclusion was subsequently confirmed by EU legislation in Article 32 of Directive 2011/83/EU on consumer rights,<sup>24</sup> which introduced an amendment to the UCT Directive regulating the MS' possibility to widen the scope of (un)fairness control to the quality/price ratio.<sup>25</sup>

### 3. Application of Exclusion under Article 4(2) UCT Directive to Consumer Credit Agreements

#### 3.1. What is 'Essential' in Exclusion of 'Essential' Contract Terms under Article 4(2) UCT Directive?

The first barrier that MS' courts have to cope with when deciding whether a contractual term is embraced by the exclusion taken over into national law provisions from Article 4(2) of the UCT Directive, is its submission under the first ('definition of the main subject matter of the contract') or the second ('adequacy of the price and remuneration') category of terms. At first sight, this does not seem to be a very difficult task since the legal terms used, 'subject matter of the contract' and 'price', correspond to those of the essential elements of contracts (Lat. *essentialia negotii*) of their domestic

20. Judgment of 3 June 2010, C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid*, EU:C:2010:309, para. 10, where a dispute concerning the use of unfair contract terms in pre-formulated standard loan agreements intended for the purchase of residential property "pursuant to which the nominal interest rate laid down in the contract, variable from time to time in accordance with the agreed reference index, is to be rounded up, with effect from the first revision, to the next quarter of a percentage point ('the rounding-up term')".

21. *Ibidem*, para. 32.: "It thus follows from the actual wording of Article 4(2) of the Directive that that provision (...) cannot be regarded as laying down the scope *ratione materiae* of the Directive. On the contrary, the terms referred to in Article 4(2), while they come within the area covered by the Directive, escape the assessment as to whether they are unfair only in so far as the national court having jurisdiction should form the view, following a case-by-case examination, that they were drafted by the seller or supplier in plain, intelligible language."

22. According to Article 8 of the UCT Directive: "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."

23. *Caja de Ahorros y Monte de Piedad de Madrid*, para. 50: "Art. 4(2) and 8 of Directive 93/13/EEC (...) must be interpreted as not precluding national legislation, (...) which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language."

24. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Text with EEA relevance, OJ L 304, 22.11.2011, pp. 64–88.

25. *Ibidem*, Article 32: "In Directive 93/13/EEC, the following Article is inserted: 'Article 8a 1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions: - extend the unfairness assessment (...) to the adequacy of the price or remuneration;'"

civil laws.<sup>26</sup> According to this, the exclusion would go from a presumption of the true will of the parties regarding the essential elements of contracts that is rebuttable under the condition that these are not in plain, intelligible language. In such a case, the consent of contractual parties on essential elements of the contract was not ‘really’ reached, a consequence of what under the civil law regimes of most MS would be invalidity of the contract, in principle in the form of absolute nullity with *ex tunc*<sup>27</sup> effects.<sup>28</sup> And, as rightly emphasized by Advocate General *Trstenjak* in her Opinion to the case *Pereničová and Perenič*,<sup>29</sup> the goal of the UCT Directive is to limit the invalidity of contracts as a whole only to a few exceptional cases.<sup>30</sup> This goal is even more accentuated in consumer credit agreements, where the annulment of the whole contract would lead to the immediate maturity of the outstanding sum of the credit and therefore bring a consumer in a very difficult financial position.<sup>31</sup> Such interpretation can be supported, for example, by the conclusion in the case *Caja de Ahorros y Monte de Piedad de Madrid*, where the CJEU stated that Article 4(2) is concerned “solely with establishing the detailed rules and the scope of the substantive assessment of contract terms which have not been individually negotiated and which describe the *essential obligations of contracts* concluded between a seller or supplier and a consumer”.<sup>32</sup> The same was confirmed in the Hungarian case *Kásler and Káslerné Rábai*, that dealt with unfair contract terms denominating a capital of the credit in a foreign currency, in this case in Swiss Francs (CHF) (so-called ‘currency clauses’).<sup>33</sup>

However, this view is only partially correct and unfortunately for MS’ courts the legal terms and notions arising from EU Directives ‘are not always as they sound’. Although they correspond terminologically with MS’ civil law standards, the expressions ‘subject matter of the contract’ and ‘price’ from Article 4(2) of the UCT Directive are not to be given the same meaning as their national siblings. Exactly this presents a serious trap that MS’ courts might fall into when interpreting and

26. According to civil law regimes of most of the MS, a contract is entered into when the contracting parties have reached an agreement on the essential elements of the contract. In the sense of the UCT Directive *Willet* speaks about “‘core’ obligations, i.e. the main subject matter of the trader and the price obligation of the consumer”. See *Willet, C., Fairness in Consumer Contracts: The Case of Unfair Terms*, Routledge, 2016, chapter five.

27. In the judgment of 21 December 2016, *Gutiérrez Naranjo*, joined cases C-154/15, C-307/15 and C-308/15, EU:C:2016:980, differently than Advocate General *Mengozi* in his Opinion of 13 July 2016, EU:C:2016:552, para. 82, the CJEU found the Spanish court practice enabling *ex nunc* effects of the restitution to be paid by the creditors to consumers as a legal consequence of unfairness of so-called ‘floor clauses’ (establishing a minimum rate below which the variable rate of interest could not fall) to be in contradiction with the UCT Directive. According to the CJEU, para. 77: “Article 6(1) of Council Directive 93/13/EEC (...) must be interpreted as precluding national case-law that temporally limits the restitutory effects connected with a finding of unfairness by a court, in accordance with Article 3(1) of that directive, in respect of a clause contained in a contract concluded between a consumer and a seller or supplier, to amounts overpaid under such a clause after the delivery of the decision in which the finding of unfairness is made.”

28. Lat. *Quod nullum est nullum producit effectum*. There are exceptions under civil law regimes of some MS, where the content of essential element of the contract can be replaced with provision of domestic civil law in case of its imprecise determination and consequently maintained as valid. For example, Article 237(2) of the Hungarian Civil Code: “An ineffective contract may be declared valid if it is possible to eliminate the cause of ineffectiveness, particularly in the case of disproportion between the performances required of each party in a usurious contract, by eliminating the disproportionate advantage”, as quoted in the judgment of 13 April 2014, C-26/13, *Kásler and Káslerné Rábai*, EU:C:2014:282, para. 16.

29. Judgment of 15 March 2012, C-453/10, *Pereničová and Perenič*, EU:C:2012:144.

30. Opinion of Advocate General *Trstenjak* delivered on 29 November 2011, EU:C:2011:788 in case C-453/10, *Pereničová and Perenič*, para. 59.

31. *Kásler and Káslerné Rábai*, paras 83–84.

32. *Caja de Ahorros y Monte de Piedad de Madrid*, para. 34.

33. *Kásler and Káslerné Rábai*, para. 46.

applying their national law provisions consistently with the UCT Directive.<sup>34</sup> Namely, as EU legal standards, both of the categories from Article 4(2) of the UCT Directive, i. e. ‘definition of the main subject matter of the contract’ and ‘adequacy of the price and remuneration’ are to be interpreted autonomously and uniformly across the Union.<sup>35</sup> Due to a lack of further explanation under the UCT Directive, such interpretation is to be searched for primarily in the CJEU case law revealing the true meaning behind the two categories of terms. And, it is precisely the CJEU case law in the context of consumer credit agreements that opens up more questions than offers answers to MS’ courts when applying the transposed exclusion from Article 4(2) to consumer credit contracts.<sup>36</sup> Apart from the main issue, i. e. under which category to submit a disputable credit contract term, the key question remains which contractual terms present ‘essential obligations of contracts’. Furthermore, both above-mentioned CJEU judgments as well as the UCT Directive preamble refer to the exclusion of assessment of the unfair character of contractual terms “‘which describe’ the main subject matter of the contract (n) or the quality/price ratio of the goods or services supplied”<sup>37</sup>. Here is where the riddle becomes even more complicated for MS’ courts. Should national judges deciding in concrete disputes on consumer credit contracts exclude from the assessment just the contractual terms on the main subject matter (e. g. credit capital) and on the quality/price ratio, or should they go beyond that by excluding all contractual terms ‘describing’ these terms? What does it mean ‘which describe’ and how far should they go in interpretation of these two words?

All these doubts have been raised on several occasions by MS’ courts, which sent their requests for preliminary rulings to the CJEU both regarding the notion ‘definition of the main subject matter’ and ‘adequacy of the price and remuneration’. In the above-mentioned case *Kásler and Káslerné Rábai*, the Hungarian *Kúria* was not certain under which of these two notions a currency clause is to be submitted. In case that the contractual term does not fall within the ‘definition of the main subject matter of the contract’, the *Kúria* asked whether a difference between the buying rate of exchange (under which a loan was approved) and the selling rate of exchange (under which a loan is to be repaid) of a foreign currency constitutes a remuneration.<sup>38</sup> Similarly, the Romanian *Tribunalul Specializat Cluj* asked the CJEU in the *Matei* case whether these concepts can be interpreted as meaning that they *inter alia* cover the annual percentage rate (APR) of a credit agreement secured by a mortgage, which is made up of the interest rate (fixed or variable), bank charges, and other costs included and defined in the contract?<sup>39</sup> Not so long ago, another Romanian court *Judecătoria Câmpulung* asked the CJEU, if a contractual term in a credit agreement denominated in a foreign

34. As properly emphasized by šarčević, S., *Legal Translation and Legal Certainty / Uncertainty: From the DCFR to the CESL Proposal*, in: Pasa, B., Morra, L. (ed.), *Translating the DCFR and Drafting the CESL, A Pragmatic Perspective*, selp, 2014, Monaco, p. 54: “Since the corresponding national concepts are only partial equivalent with the European concept, the *danger exists that using a national term will encourage judges to interpret the term in accordance with its national meaning, thus frustrating courts to achieve uniform interpretation and application of European concepts.*”

35. Judgment of 26 February 2015, C-143/13, *Matei*, EU:C:2015:127, para. 50: “(...) the expressions ‘main subject-matter of the contract’ and ‘the adequacy of the price and remuneration on the one hand, as against the services or goods supplied, on the other’ must normally be given an *autonomous and uniform interpretation throughout the European Union*, which must take into account the context of that provision and the purpose of the legislation in question (*Kásler and Káslerné Rábai*, EU:C:2014:282, paragraphs 37 and 38)”.

36. See *infra*, pp. 7 *et seq.*

37. Preamble of the UCT Directive, recital 20.

38. *Kásler and Káslerné Rábai*, para. 35.

39. *Matei*, para. 36.



currency, which leaves the ‘currency risk’ with the debtor alone, is to be encompassed by one of the two disputable notions.<sup>40</sup>

While we are still awaiting the CJEU judgment in the last mentioned *Gavrilescu* case, findings in two previous cases did not offer a precise answer to the question, which contractual terms in the context of consumer credit agreements are to be considered *essential* in the light of Article 4(2) of the UCT Directive. Because such a decision lies solely in the competence of a MS’ court deciding in a concrete dispute between the parties, the CJEU left the answering of this key question to MS’ courts.<sup>41</sup> However, it gave them guidelines to be observed when deciding on the matter in each individual case. Consequently, in *Kásler and Káslerné Rábai*, the CJEU concluded that Article 4(2) “represents a derogation and the ensuing *necessity of its being interpreted strictly*, contractual terms falling within the notion of the ‘*main subject-matter of the contract*’, within the meaning of that provision, must be understood as being *those that lay down the essential obligations of the contract and, as such, characterise it*’.<sup>42</sup> The same was repeated in the cases *Matei* and *Van Hove*, where the CJEU went a step further by adding that “By contrast, terms ancillary to those that define the *very essence of the contractual relationship* cannot fall within the notion of the ‘*main subject-matter of the contract*’.”<sup>43</sup> It is therefore obvious that the CJEU limited contractual terms on ‘essential obligations of the contract’ only to the first category of terms under Article 4(2). What is not so obvious is the meaning behind other criteria given by the CJEU and intended for the interpretation of the notion ‘*main subject-matter of the contract*’. Although the request to strictly interpret the exemptions does not present a novelty as such, could we conclude that its explicit mentioning narrows the above-mentioned phrase from the preamble of the UCT Directive ‘which describe’? Moreover, referring to the essential obligations characterising a contract, could it also be understood as referring to ‘characteristic performance’, which according to private international law scholars presents the creditors’ lending of capital?<sup>44</sup> The requirement of a *strict interpretation* and referring to characteristic essential obligations could therefore lead to the conclusion that the ‘*main subject-matter of the contract*’ only concerns the contractual term of putting a certain amount of money at the debtor’s disposal, i. e. the contractual term on the capital of the credit.<sup>45</sup> It is the equalization of the contractual terms on the subject matter of the contract with those on essential obligations of the contract that seems to indicate that the CJEU’s interpretation is not as ‘strict’ after all. The final answer to this question is, however, left to national courts, which have to decide in a concrete dispute “whether the term (...) *constitutes an essential element of the debtor’s obligations*”, by “having regard to the nature, general scheme and the stipulations of the loan agreement, and its legal and factual con-

40. Request for a preliminary ruling from the *Judecătoria Câmpulung* (Romania) lodged on 23 November 2015, C-627/15, *Gavrilescu*.

41. See *Kásler and Káslerné Rábai*, para. 45, as well as *Matei*, para. 53, where the CJEU stated: “although it is for the national court alone to rule on the classification of those terms in accordance with the particular circumstances of the case, the fact remains that the Court has jurisdiction to elicit from the provisions of Directive 93/13, in this case the provisions of Article 4(2), the criteria that the national court may or must apply when examining a contractual term”.

42. *Kásler and Káslerné Rábai*, para. 49.

43. *Matei*, para. 54, and judgment of 23 April 2015, C-96/14, *Van Hove*, EU:C:2015:262, para. 33.

44. For this point see Klauer, S., *Das europäische Kollisionsrecht der Verbraucherverträge zwischen Römer EVÜ und EG-Richtlinien*, Mohr Siebeck, Tübingen, 2002, p. 43.

45. Also Čikara, E., *Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien*, LIT Verlag, Berlin et al., 2010, p. 447: “Bei (ungebundenen) Verbraucherkreditverträgen wird in den meisten Fällen das Recht des Geschäftssitzes des Kreditgebers anwendbar sein, da er nach hM die charakteristische Leistung erbringt.”

text”.<sup>46</sup> In the above-mentioned *Kásler and Káslerné Rábai* case, the CJEU departed from the real possibility of a national court qualifying a contractual term setting the exchange rate for the monthly repayment instalments as an essential element of the contract. Although such a qualification of a currency clause is very disputable to the author,<sup>47</sup> the CJEU went from a possible annulment of the whole contract by the Hungarian *Kúria*. Such a finding derives from the ruling in *Kásler and Káslerné Rábai*, where the CJEU reached an opposite conclusion regarding the legal consequences of unfairness of a contractual term than in the case *Banco Español de Crédito*,<sup>48</sup> where a disputed contractual term on late payment interests was obviously not an essential contract term. While in the *Banco Español de Crédito* case, the CJEU ruled on the impossibility of curing the invalidity of an unfair contract term through the intervention of a national court,<sup>49</sup> in *Kásler and Káslerné Rábai* it did exactly the opposite by accentuating the idea of the UCT Directive on preserving the validity of contracts whenever possible.<sup>50</sup>

A more precise interpretation was given in respect of “adequacy of the price and remuneration as against the services or goods supplied in exchange”, where already a Commission Report from 2000 clarified that this notion does not concern “the terms laying down the *manner of calculation* and the *procedures for altering the price*”, which remain entirely subject to the UCT Directive.<sup>51</sup> This approach was also confirmed by the CJEU in the later cases *Invitel*, *Kásler and Káslerné Rábai* and *Matei*.<sup>52</sup> Moreover, in *Kásler and Káslerné Rábai* the CJEU also accentuated the limited scope of the second category of terms under Article 4(2) and confirmed the reasoning of Advocate General *Wahl* on the background of its exclusion pursuant to which “exclusion of a review of contractual terms as to the quality/price ratio of a supply of goods or services is explained by the fact that no legal scale

46. *Kásler and Káslerné Rábai*, para. 51. The CJEU reached the same conclusion in *Matei*, para. 54, and in the judgment of 23 April 2015, C-96/14, *Van Hove*, EU:C:2015:262, para. 37.

47. Under the civil law regimes of some MS, a credit contract could survive without such a clause, leading to the legal consequence of the conversion of the credit agreement denominated in a foreign currency into a credit agreement in the official domestic currency of the MS. A similar solution is enshrined in Article 23 of Directive 2017/14/EU according to which MS *inter alia* ensure that the consumer has the right to convert the foreign into an alternative currency, whereby the definition of an alternative currency also covers the domestic one. Critically on “vague solutions of such an important problem”, Mišćenić, E., *Mortgage Credit Directive (MCD): Are Consumers Finally Getting the Protection They Deserve?* in: Slakoper, Z. (ed.), *Liber Amicorum in Honorem Vilim Gorenc*, Rijeka, 2014, p. 247.

48. Judgment of 14 June 2012, C-618/10, *Banco Español de Crédito*, EU:C:2012:349.

49. *Ibidem*, para. 89: “Article 6(1) of Directive 93/13 must be interpreted as precluding legislation of a Member State (...) which allows a national court, in the case where it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to modify that contract by revising the content of that term.”

50. *Kásler and Káslerné Rábai*, para. 86: “Article 6(1) of Directive 93/13 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, that provision does not preclude a rule of national law enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law.”

51. *Report on the implementation of Directive 93/13*, *op. cit.*, p. 15.

52. Judgment of 26 April 2012, C-472/10, *Invitel*, EU:C:2012:242, para. 23; *Kásler and Káslerné Rábai* and *Matei*.

or criterion exists that can provide a framework for, and guide, such a review”<sup>53, 54</sup> Nonetheless, the “exclusion does not apply to a term concerning a mechanism for amending the prices of the services provided to the consumer”.<sup>55</sup> The analogue application of this finding to the first category of terms, ‘definition of main subject-matter of the contract’, would lead to the conclusion that these do not cover contractual terms’ setting mechanisms or procedures for altering the subject matter of the contract. Regarding consumer credit contracts, this would mean that contractual terms such as the above-mentioned currency clause, incorporating a mechanism affecting the amount of the credit capital in a way that the latter depends on the fluctuation of the exchange rate of a foreign currency in which the credit capital is expressed, i. e. denominated, are subject to the unfairness test. Nonetheless, as stated above, the final decision on the key question of whether a contractual term affecting a subject matter belongs to the ‘essential obligations of the contract’ is in the hands of the MS court, which decides in the concrete matter.<sup>56</sup> Even so, the proposed interpretation could be supported by views pursuant to which examples of possible unfair contract terms in the so-called ‘grey list’ in the Annex of the UCT Directive<sup>57</sup> present contractual terms additional to those on the subject matter and the price that are to be submitted to the (un)fairness review.<sup>58</sup> Although the list, in principle, deals with contractual terms giving unilateral rights to traders without justified reasons or contractual terms that overburden consumers with obligations of which they are not even aware of, it also contains an example of a contractual term “enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided”.<sup>59</sup> Accordingly, contractual terms regulating ‘any characteristics’ of the product or service would fall under the unfairness review, while, *argumentum a contrario*, contractual terms on the product or service presenting a subject matter of the contract would not.

Unfortunately for consumers, there are no CJEU judgments, which ‘explicitly’ confirm such an interpretation. The presented viewpoint would also give a precise answer to the question referred to the CJEU in the case *Gavrilescu*.<sup>60</sup> Despite the CJEU’s request of *autonomous and uniform interpretation of Article 4(2) of the UCT Directive across the Union*,<sup>61</sup> the CJEU’s conclusions are not offering

53. *Kásler and Káslerné Rábai*, para. 55. See also Opinion of Advocate General Wahl delivered on 12 February 2014, EU:C:2014:85 in case C-26/13, *Kásler and Káslerné Rábai*, para. 69.

54. In this respect authors Willet and Morgan-Taylor give an interesting interpretation according to which the exclusion of the ‘adequacy’ could be interpreted as not being about ‘equality’ of performances (Lat. *prestatio*). By applying this argument to various bank charges that consumers are paying, the authors conclude that consumers paying high charges are cross-subsiding other customers and saving them from “relatively modest routine standing charges for bank services”. Their interpretation concerns a famous case *Office of Fair Trading v Abbey National plc & Others* (2009) UKSC 6 (2010) 1 AC 696 decided by the UK Supreme Court in 2009 dealing with bank charges debited by UK banks to consumers ‘not in credit’. See Willet, C., Morgan-Taylor, M., *Recognising the limits of transparency in EU consumer law* in: Devenney, J., Kenny, M. (eds), *European Consumer Protection: Theory and Practice*, Cambridge University Press, 2012, p. 158, fn 63.

55. *Kásler and Káslerné Rábai*, para. 56, as well as *Invitel*, para. 23.

56. See *supra*, p. 8.

57. Judgment of 7 May 2002, C-478/99, *Commission v. Sweden*, EU:C:2002:281, para. 20: “(…) the annex in question is, according to the terms of Article 3(3), to contain an indicative and non-exhaustive list of terms which may be regarded as unfair. It is not disputed that a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair”.

58. Such a conclusion was reached by the CJEU in the *Matei* case, para. 62.

59. See Annex of the UCT Directive, Terms Referred to in Article 3(3), point 1(k).

60. See *supra*, p. 8.

61. *Matei*, para. 50, and *Kásler and Káslerné Rábai*, paras. 37 and 38.

guidance enough to MS' courts. In the case *Matei*, where the answer to the question on whether the contractual term on APR is encompassed by one of the two categories of terms from Article 4(2) was expected, the CJEU decided that both of them do not, in principle, cover contractual terms, which "on one hand, allow, under certain conditions, the lender unilaterally to alter the interest rate and, on the other hand, provide for a 'risk charge' applied by the lender".<sup>62</sup> The CJEU, therefore, excluded the contractual term on the APR from the scope of Article 4(2) of the UCT Directive, but without answering, if such a term is to be considered as an essential element of the consumer credit contract. As in previous cases, this decision was left to the MS court ruling in the concrete case. Moreover, the CJEU introduced another criterion to the assessment of whether the contractual term is encompassed by the subject matter of the contract or quality/price ratio from Article 4(2), namely the one on the trader's 'unilateral' right to amend contractual terms. Since the disputed contractual terms on the traders' unilateral right to amend the variable interest rate and on unilaterally imposed risk charges do correspond to those indicated on the grey list, the CJEU exempted them from Article 4(2) due to this reason.<sup>63</sup> In doing so, the CJEU actually confirmed the above presented standing point that contractual terms corresponding to those from the indicative list of unfair contract terms are rather additional i.e. ancillary than essential contractual terms. The CJEU concluded in the *Matei* case that the *ancillary nature* of such terms may be indicated by the fact that "since they essentially contain an adjustment mechanism enabling the lender to alter the term setting the interest rate, they do not appear to be separable from the term fixing the interest rate *which is likely to be part of the main subject-matter of the contract*".<sup>64</sup> This conclusion is not only important for the matter of the 'ancillary nature' of the contractual terms in question, but also for the legal qualification of the disputed and unilaterally imposed variable interest rate as belonging to the first category of terms under Article 4(2) of the UCT Directive, namely the 'definition of main subject-matter of the contract'. By using the argumentation presented in the above-mentioned *Kásler and Káslerné Rábai* case on the exclusion of the assessment of the quality/price ratio,<sup>65</sup> the CJEU concluded that: "*Terms relating to the consideration due by the consumer to the lender or having an impact on the actual price to be paid to the latter by the consumer thus do not, in principle, fall within the second category of terms, except as regards the question whether the amount of consideration or the price as stipulated in the contract are adequate as compared with the service provided in exchange by the lender.*"<sup>66</sup> This approach was also confirmed also in the following judgments, for example in the case *Bucura*, concerning the issue of American Express Gold credit cards, where the contractual terms on the costs of the credit were also linked with the 'main subject-matter of the contract'.<sup>67</sup>

### 3.1.1. 'Main Subject Matter of the Contract' v. 'Adequacy of the Price'

There are several questions arising from the above presented CJEU findings. If, according to what

62. *Ibidem*, para. 79.

63. *Ibidem*, para. 60: "Taking account of the objective pursued by the annex to Directive 93/13, that is to say to serve as a 'grey list' of terms which may be regarded as unfair, the inclusion in that list of terms such as those enabling the lender unilaterally to alter the interest rate would to a large extent be deprived of effectiveness if they were excluded from the outset from an assessment of their unfairness pursuant to Article 4(2) of Directive 93/13."

64. *Ibidem*, para. 62.

65. *Ibidem*, para. 55.

66. *Ibidem*, para. 56.

67. Judgment of 9 September 2015, C-348/14, *Bucura*, EU:C:2015:447, para. 67.

is now already settled CJEU case law, all contractual terms related to interests, interest rates, costs of the credit etc. are to be linked with the subject matter of the credit contract, then which credit contract terms fall under the second category of terms from Article 4(2) of the UCT Directive? The limited scope of the second category of terms concerns the ‘adequacy’ of the price/remuneration against the services or goods supplied in exchange, i. e. quality/price ratio. However, the question remains the adequacy of ‘what’ is not to be assessed under the condition of transparency, when no contractual term relates to ‘price and remuneration’?<sup>68</sup> One cannot ignore that the second category of terms includes the notions ‘price and remuneration’, which the CJEU is linking to the first category of terms on the main subject matter of the contract except when they relate to the adequacy in relation to the services/goods provided.<sup>69</sup> This leads to a quite perplexing result according to which, for example, contractual terms on interests fall under the main subject matter of the contract, except when their adequacy is in question, when these are to be linked with the notions on price/remuneration.<sup>70</sup> One could go even beyond this debate and question the ‘adequacy’ of the reasoning behind the exclusion of the ‘adequacy of the price and remuneration against the services or goods supplied in exchange’.<sup>71</sup> It is a generally accepted view that the prices of goods and services are formed on the market and that there are no legal criteria for the assessment of this process.<sup>72</sup> Nonetheless, the “exclusion does not apply to a *term concerning a mechanism for amending the prices* of the services provided to the consumer”,<sup>73</sup> which is *inter alia* a factor affecting the price. The latter conclusion derives from the presumption that there is a ‘legal scale or criterion’ that can provide a framework for and guide the review of such a mechanism<sup>74</sup>. In terms of credit agreements, the height of interest that a consumer is paying for the capital borrowed is affected by the interest rate being one of the factors influencing the ‘adequacy of the price and remuneration’ against the service supplied in exchange.<sup>75</sup> And the *adequacy* of the interest rate as a mechanism affecting interests can actually

68. An important contribution to the price/quality ratio together with an in-depth analysis of difficulties experienced by UK and German courts was given by Schillig M., *op.cit.*, pp. 933, 947. *Schillig's* valuable paper was written before here analyzed CJEU case law and seems to indicate that the CJEU followed the German law approach, according to which both seller's and consumer's main obligation, i.e. the payment of the price fall under the first category of terms under Article 4(2).

69. As in *Kásler and Káslerné Rábai*, para. 57, where the CJEU stated that “(...) the exclusion of the assessment of the unfairness of a term being limited to the adequacy of the price and the remuneration on one hand as against the services or goods supplied on the other, it cannot apply where there is a challenge to the variation between the selling rate of exchange of a foreign currency (...) and the buying rate of exchange of that currency (...)”.

70. *Matei*, para. 56.

71. Author agree with Spanish scholars, who consider that “the control assessment of fairness is not about the adequacy of the price, (...) but about the way some clauses help to determine the total price that consumers have to pay for the loan”, as emphasized by Barral-Viñals, I., *Aziz Case and Unfair Contract Terms in Mortgage Loan Agreements: Lessons to Be Learned in Spain*, 4 Penn. St. J.L. & Int'l Aff. 69, 2015, p. 76.

72. See Willet, C., Morgan-Taylor, M., *op. cit.*, p. 158, fn 63.

73. *Kásler and Káslerné Rábai*, para. 56.

74. *Ibidem*, para. 55.

75. Such interpretation is in line with standing of the UK Supreme Court taken in the case *Office of Fair Trading v Abbey National plc & Others* (2009) UKSC 6 (2010) 1 AC 696, para 435, where *Lord Walker* stated: ‘Contracts are unlikely to contain terms that directly deal with “the adequacy of the price or remuneration as against the goods or service supplied in exchange”, as quoted by Schillig M., *op. cit.*, p. 946, fn. 81. It is the case law of the German Bundesgerichtshof (BGH) that also differs between “price terms that directly regulate the price or remuneration as ‘the consumer’s essential obligation’ and ‘ancillary (price) term”, as stated by Schillig M., *op. cit.*, p. 951.

be verified, with the help of various mathematical formulas and manners of interest rates' calculations.<sup>76,77</sup> If there are no criteria or guidelines for the assessment of the adequacy of the price/remuneration, why is it that Article 8a of the UCT Directive and the CJEU prior to that in the case *Caja de Ahorros y Monte de Piedad de Madrid* enable such a review?<sup>78</sup>

When it comes to consumer credit agreements, the author believes that the answers to many of the expressed doubts lie in the proper interpretation of the terms and definitions arising from another set of EU Directives, namely those regulating consumer credit agreements, i. e. Directive 2008/48/EC and *ex* Directive 87/102/EEC, as well as Directive 2014/17/EU on consumer mortgage credit agreements (CCA Directives). Here, a key precondition for a definition of the 'credit agreement' itself is the existence of remuneration in the form of interests or other charges,<sup>79</sup> while interest-free credits are excluded from the scope of application of CCA Directives.<sup>80</sup> The most exact factor expressing the 'costs of the credit' for the consumer is the APR<sup>81</sup> defined under Article 3(i) of Directive 2008/48/EC as "the *total cost of the credit to the consumer*, expressed as an annual percentage of the total amount of credit, where applicable including the costs referred to in Article 19(2)"<sup>82</sup>. The 'total cost of the credit to the consumer' under Article 3(g) of Directive 2008/48/EC means "*all the costs, including interest, commissions, taxes and any other kind of fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor, except for notarial costs; costs in respect of ancillary services relating to the credit agreement, in particular insurance premiums, are also included if, in addition, the conclusion of a service contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed*".<sup>83</sup> Therefore, a (variable or fixed) interest rate is a mechanism affecting 'interests' that are encompassed by the notion expressing the 'total costs of the credit' for the consumer, i. e. by the APR.<sup>84</sup> In other words, the APR is 'expressing' the gross 'price' the consumer is paying for the capital of the credit borrowed.<sup>85</sup>

76. Regarding consumer credit agreements, various methods of interests' rates calculations have been over the years replaced by the introduction of a uniform method of calculation of the APR. See *European Commission Study on the Calculation of the Annual Percentage Rate of Charge for Consumer Credit Agreements*, 2009, 2013, available at [http://ec.europa.eu/consumers/documents/study\\_apr\\_2013\\_final.pdf](http://ec.europa.eu/consumers/documents/study_apr_2013_final.pdf).

77. *Barral-Viñals* comes to the similar conclusion in respect of the Spanish law, however by using a traditional civil law institute of usury contracts and by reasoning that the adequacy of the price in credit agreements is to be controlled by application of provisions prohibiting "interest notoriously higher than the normal price of money", which make the loan void in its entirety. See *Barral-Viñals, I., op. cit.*, p. 77.

78. See *supra*, pp. 6–7.

79. See Reich, N., in Reich N., Micklitz, H.-W., *Europäisches Verbraucherrecht*, Nomos Verlag, Baden-Baden, 2003, p. 739.

80. See Article 2(2)(f) of Directive 2008/48/EC and Article 2(1)(c), (d) and (g) of *ex*-Directive 87/102/EEC, as well as Article 3(2)(c) of Directive 2014/17/EU.

81. It is precisely because of this reason that the CJEU prohibits the inclusion of costs payable by the consumer that are already encompassed by the "total costs of the credit" within the "total amount of the credit", since it leads to a fictitious lowering of the APR. See judgment of 21 April 2016, C-377/14, *Radlinger and Radlingerová*, EU:C:2016:283, paras 86 and 87.

82. These could eventually include costs of maintaining an account or of using a means of payment for payment transactions and drawdowns or other costs relating to payment transactions.

83. See also *European Commission Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of Charge*, SWD(2012) 128 final, Brussels, 8 May 2012, p. 7, where the APR is related to Article 7(4) of the Unfair Commercial Practices Directive regarding the indication of "the price of the product or service offered".

84. Preamble of Directive 2008/48/EC, recital 43.

85. See Čikara, E., *Gegenwart...*, *op. cit.*, p. 340: "Die wichtigste Information, aufgrund welcher der Verbraucher die Kreditangebote am Markt vergleichen bzw die Information über den Preis des Kredites bekommen kann, ist die zum effektiven Jahreszins."

If applied to the exclusions under Article 4(2) of the UCT Directive, these ‘words’ would indicate that the contractual terms on interests, commissions and other charges are to be linked with the notions on ‘price and remuneration’ mentioned under the second category of terms.<sup>86</sup> However, the CJEU is binding them to the first category, except when doubts to their adequacy arise, in which case they fall under the second one.<sup>87</sup> Since, according to the settled CJEU case law, the first category of terms under Article 4(2) is about the ‘essential obligations of the contract’,<sup>88</sup> the question remains whether contractual terms falling under this category are to be considered as ‘essential elements of the contract’. The CJEU left this key decision to MS’ courts, but without giving them ‘essential’ guidelines or criteria necessary for the interpretation of the ‘European’ notion on ‘essential obligations of the contract’.

### 3.1.2. *Essential Information v. Essential Obligations*

As outlined above, only a true understanding of another set of EU legal standards, namely those regulating basic terms and definitions regarding consumer credit agreements, can help in determining of which contractual terms represent ‘essential obligations of consumer credit contracts’. Since the legal concepts deriving from both the mentioned CCA Directives and the UCT Directive constitute autonomous EU legal standards, national judges deciding in cases on unfair terms in consumer credit contracts could find themselves torn between the two sets of rules. That these concerns are justified is confirmed by frequent requests for preliminary rulings of MS’ courts, in which they are asking both for the interpretation of the provisions of the UCT Directive and of the CCA Directives with respect to the same credit agreement. For example, there are references for a preliminary ruling concerning the question whether contractual terms related to the notions deriving from Directive 2008/48/EC can be encompassed by the exclusion of Article 4(2) or by other provisions of the UCT Directive.<sup>89</sup> Here again CJEU’s interpretation plays a key role by offering the necessary guidance to MS’ courts when they are interpreting and consequently applying domestic law provisions consistent with EU law. A potential issue that could arise for MS’ courts from the interaction of the UCT and CCA Directives is connected with the attempts of submitting contractual terms containing ‘essential information’ according to the CCA Directives under ‘essential obligations’ from Article

86. According to *Schillig*: “It is not clear, however, where within that structure price terms reside. Are they part of the ‘main subject matter of the contract’ or do they find their homestead under the ‘price or remuneration’ prong of the provision.” See *Schillig M.*, *op. cit.*, p. 936. On the serious discussion and difficulties in the practice of the Czech courts see *Hulmák, M.*, *Přezkum cenových ujednání ve spotřebitelských smlouvách*, u: *Prenos poznatkov do justičnej praxe: zásahy súdov do súkromoprávných úkonov*, Pezinok, JA SR, 2015, p. 6.

87. *Matei*, para. 56. Differently than the CJEU in *Matei* case, the Spanish case law relates ‘remunerative’ interest rates to the price, while ‘default’ interest are linked to the main subject matter of the contract. In its judgement of 9 May 2013, a Spanish *Tribunal Supremo* held that the rate of default interest constitutes part of the main subject matter of the contract. See judgement of the *Tribunal Supremo* of 9 May 2013, R.J., No. 1916/2013 as quoted by *Barral-Viñals, I.*, *op. cit.*, p. 77.

88. *Kásler and Káslerné Rábai*, para. 49.

89. Apart from the above-mentioned case *Matei*, see also a request for a preliminary ruling lodged on 6 December 2012, C-564/12, *BNP Paribas Personal Finance SA and Facet SA v Guillaume* (erased from the registry of the CJEU by the order of 25 September 2013, EU:C:2013:642), where the French *Tribunal d’instance d’Orléans* asked whether Article 22 of Directive 2008/48/EC interpreted in the light of Council Directive 93/13/EEC prohibits the existence and application of standard terms in credit agreements, whereby the consumer acknowledges that the creditor’s obligations have been fulfilled? Another example is the *Bucura* case, where the Romanian *Judecătoria Câmpulung* referred numerous questions on the interpretation of both the UCT Directive and ex Directive 87/102/EEC regarding credit agreements on issuing credit cards. See judgment of 9 September 2015, C-348/14, *Bucura*, EU:C:2015:447.

4(2) of the UCT Directive. An example thereof is Article 10(2) of Directive 2008/48/EC on the content of the consumer credit agreement regulating that “the *credit agreement shall specify* in a clear and concise manner” information from point (a) to (v) of that paragraph.<sup>90</sup> By relying on the linguistic stipulation of Article 10(2) of Directive 2008/48/EC, some legal scholars have concluded that all of the information enlisted therein represents essential elements of a credit contract (Lat. *essentialia negotii*).<sup>91</sup> It is the author’s opinion that this conclusion is not to be accepted. It is most likely that such conclusions are made by the interpretation of the wording in the light of domestic civil laws instead of the Directive 2008/48/EC itself. This leads to the obvious risk that MS’ courts could repeat the same mistake when interpreting harmonized national law provisions. Primarily, the wording of EU directives in general, is often characterised by so-called ‘quasi-legal’ terms that do not correspond to ‘traditional’ civil or other law provisions of the MS’.<sup>92</sup> This is why these concepts are ‘autonomous’ and should not be substantially equated with national legal concepts.<sup>93</sup> An example are the very consumer credit agreements, whose definition given in Article 3(c) of the Directive 2008/48/EC<sup>94</sup> does not correspond in its content with the definition of a credit contract from the civil laws of continental law systems. Instead, the definition of a ‘credit agreement’ in Directive 2008/48/EC is to be understood to have a much broader meaning, and encompass not only (let us call them) ‘MS’ credit contracts’, but also financial leasing, certain loan contracts etc., i. e. as being a provision, which in combination with the exclusion of certain credit agreements under Article 2(2) of Directive 2008/48/EC sets a material scope of application of the Directive.<sup>95</sup> Nonetheless, what could be understood as enhancing the above presented idea is the recent CJEU case law demanding from MS’ courts to watch *ex officio* upon the duty of creditors to include all prescribed information into credit agreements.<sup>96</sup> In the author’s opinion, the *ex officio* duty to watch upon the content of credit agreements should not be mixed up with the legal qualification of all information listed in Article 10(2) of Directive 2008/48/EC as being essential elements of the contract.<sup>97</sup> This view is supported not only by the provision itself, which requests the insertion of certain information “where applicable”,<sup>98</sup> but also by the Standard European Consumer Credit Information (SECCI) form in Annex II of Directive 2008/48/EC, which is to be given to a consumer in a pre-contractual

90. Article 10 of Directive 2008/48/EC, ‘Information to be included in credit agreements’, prescribes in its para. 2 information on the type of credit, duration of the credit agreement, total amount of credit and the conditions governing the drawdown etc.

91. Dukic Mijatovic, M., Gongeta S., *Consumer Credit in European Union*, European Scientific Journal, vol. 1, 2014, p. 416.

92. See judgment of 6 October 1982, C-283/81, *CILFIT v Ministero della Sanità*, EU:C:1982:335, para. 19: “(...) Community law uses terminology which is peculiar to it (...)” and “(...) legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States (...)”.

93. As Bajčić explains it: “Since EU law is an autonomous legal order, both legal concepts and terms have sometimes been borrowed from national legal orders of EU Member States. However, concepts borrowed from national laws were given new ‘European’ meanings.” See Bajčić, M., *Towards a Terminological Approach to Translating European Contract Law* in: Pasa, B., Morra, L. (ed.), *Translating..., op. cit.*, p. 131.

94. Article 3(c) of the Directive 2008/48/EC defines ‘credit agreement’ as “an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments”.

95. For more detail see Mišćenić, *Mortgage..., op. cit.*, p. 225.

96. *Radlinger and Radlingerová*, para. 102.

97. Although it is important information to a consumer, the existence and validity of the contract does not depend on the information in point (t) of Article 10(2) on the out-of-court complaint and redress mechanism, and this is the reason why this point begins with the condition “whether or not there is an (...)”.

98. For example, in Article 10(2)(k), (n), (u) and (v).



stage, but which contains information that mostly corresponds to those from Article 10(2)<sup>99</sup>. This form divides mentioned information into different categories, e. g. into those concerning the ‘main’ features of the credit product, costs of the credit, other important legal aspects (which include information on the right of withdrawal, on early repayment etc.), and so on. Consequently, it is clear from the information enlisted in Article 10(2) as well as from those categorized in the SECCI form, that they represent ‘information’ to be given to the consumers by the creditors, upon fulfilment of which duty MS’ courts must watch *ex officio*, thereby contributing to the overall realization of the trader’s *duty to inform* a consumer as a consumer protection instrument of the outmost importance.<sup>100</sup> The prescribed information to be included in the credit agreement, on the one hand, and the courts’ *ex officio* duty to control the fulfilment of the creditors’ duty, on the other, are actually improving and contributing to the successful realization of another condition arising from Article 4(2) of the UCT Directive, namely the *transparency requirement*.

Broadening the scope of the ‘essential obligations of contracts’<sup>101</sup> to all the ‘information to be included in credit agreements’<sup>102</sup> would in case of unfairness of certain contractual terms containing the latter information lead to unfavourable legal consequences for consumers by widening the number of possible situations in which a credit contract could be pronounced as null and void by MS’ courts.<sup>103</sup> This result would be in direct conflict with the goal of the UCT Directive on limiting the invalidity of a contract as a whole only to a few exceptional cases.<sup>104</sup> It, therefore, follows that not all information to be included in consumer credit agreements pursuant to Article 10(2) of Directive 2008/48/EC is to be considered as ‘essential obligations of contracts’ in the light of the Article 4(2) of the UCT Directive. Although some of it is ‘essential information’, this characteristic does not necessarily qualify this information as being an essential obligation of the contract. On the other hand, the information on the essential obligations of a contract is certainly ‘essential’. For example, in the case *Pohotovost*’ the CJEU concluded that the APR represents essential information in the context of Directive 87/102/EEC.<sup>105</sup> However, the CJEU left the decision on the matter of whether contractual term on the APR constitutes an essential obligation of the contract to the competent MS court.<sup>106</sup> Although the final legal qualification is in the hands of the MS court, the CJEU established that “the failure to mention the APR in a consumer credit contract (...), may be a *decisive factor in the assessment by a national court of whether a term of a consumer credit agreement* concerning the

99. With the exception of those preserved for the pre-contractual stage, e. g. information “on the result of a database consultation carried out for the purposes of assessing his creditworthiness”.

100. As rightly emphasized by Durovic, M., *European Law on Unfair Commercial Practices and Contract Law*, Hart Publishing, Oxford and Portland Oregon, 2016, p. 192: “(...) the duty of information has become the main regulatory tool in all directives on consumer contract law since the very beginning of EU consumer law development”.

101. *Caja de Ahorros y Monte de Piedad de Madrid*, para. 34.

102. Article 10 of Directive 2008/48/EC.

103. *Kásler and Káslerné Rábai*, para. 83: “(...) requiring the court to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, so that the dissuasive effect resulting from the annulment of the contract could well be jeopardised”.

104. According to the settled case law, the objective of Article 6(1) of the UCT Directive is “to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance re-establishing equality between them, (and) not to annul all contracts containing unfair terms”. See *Kásler and Káslerné Rábai*, para. 82; *Pereničová and Perenič*, para. 31; *Banco Español de Crédito*, para. 40.

105. Order of 16 November 2010, C-76/10, *Pohotovost*’, EU:C:2010:685, para. 71: “(...) the mention of the APR being essential information in the context of Directive 87/102 (...)”.

106. *Ibidem*, para. 72.

cost of that credit in which no such mention is made *is written in plain, intelligible language* within the meaning of Art 4 of Directive 93/13”.<sup>107</sup> It is a ruling, which confirms the author’s view that ‘information to be included in credit agreements’ under the CCA Directives, when observed in the light of Article 4(2) of the UCT Directive, primarily contributes to its transparency requirement. Nonetheless, this view was brought into question by an ambiguous ruling in the case *Bucura*.<sup>108</sup> In this case, the CJEU undoubtedly invoked the transparency requirement by requesting the competent MS court to check whether “(...) *all information* which may affect the scale of the *consumer’s obligations* has been communicated to him (...)”,<sup>109</sup> and by taking into account the decisive factor of whether relevant contractual terms were drafted in plain, intelligible language. However, the second category of decisive factors to be taken into account when assessing these facts include “the circumstance linked to the lack of mention in the consumer credit contract of *information* which, in view of the nature of the goods or services which constitute the *subject-matter of that contract*, is regarded as being essential, in particular that referred to in Article 4 of Directive 87/102, as amended”.<sup>110</sup> Since Article 4 of Directive 87/102/EEC prescribes the information to be included in credit agreements and therefore corresponds to Article 10(2) of Directive 2008/48/EC,<sup>111</sup> one could interpret this finding as equalizing the essential obligations under the contract with information to be included in credit agreements under the CCA Directives. Bearing in mind the serious legal consequences that such an interpretation would lead to, the author believes that the CJEU’s intention was to accentuate that the information relating to the essential obligations of the contract (such as the one on the subject matter) is an essential one, and this essential information belongs to the information to be included in credit agreements under Article 4 of Directive 87/102/EEC the fulfilment of which the MS’ court watches *ex officio*.<sup>112</sup>

### 3.2. How Transparent is the Requirement of Transparency under the UCT Directive?

Once a MS’ court deciding in a dispute on unfair terms in a contract finds that a disputable contractual term falls under the ‘definition of the main subject matter of the contract’ or ‘adequacy of the price and remuneration’, it remains to be evaluated if these terms are *in plain, intelligible language*. This requirement, which primarily contributes to the transparency of contractual terms, is also regulated by Article 5 of the UCT Directive pursuant to which “in the case of contracts where all or certain terms offered to the consumer are *in writing, these terms must always be drafted in plain, intelligible language*”.<sup>113</sup> Regulation is of a particular relevance for consumer credit agreements,

107. *Ibidem*, para. 71.

108. *Bucura*, para. 67.

109. *Ibidem*.

110. *Ibidem*.

111. See *Radlinger and Radlingerová*, para. 56: “Article 10(2) of Directive 2008/48 provides for such harmonisation as regards the *information which must imperatively be included in a credit agreement*.”

112. *Arg. ex Radlinger and Radlingerová*, para. 102.

113. The CJEU confirmed in *Kásler and Káslerné Rábai*, para. 69 “that requirement as it appears in Article 4(2) of Directive 93/13 has the same scope as that referred to in Article 5 of that directive”.

which must be in writing<sup>114</sup> and where due to the nature and complexity of the specific institutes and instruments the achievement of transparency is a special challenge. What remains to be answered is the question when a contractual term in a credit agreement is considered to be written in plain, intelligible language? Which criteria do the national judges need to decide on if a contractual term relating to the calculation of the APR or to a variable interest rate, currency clause etc. is stipulated in plain, intelligible language?

As in the case of the first two categories of terms under Article 4(2) of the UCT Directive, the answers to these questions derive from the Directive itself and the settled CJEU case law interpreting its provisions. Firstly, it has to be noted that the transparency requirement under the UCT Directive goes beyond a pure request on drafting contractual terms in plain, intelligible language. Such a conclusion is confirmed by a recital of the UCT Directive related to the transparency requirement, which *inter alia* requires that a consumer should “*actually be given an opportunity to examine all the terms*”<sup>115</sup> and, if in doubt, the interpretation most favourable to the consumer should prevail (Lat. *in dubio contra proferentem*).<sup>116</sup> Therefore, the transparency requirement is to be understood to have a much broader meaning as demanding not only plain and intelligible language, i. e. the ‘comprehensibility’ of contractual terms,<sup>117</sup> but also their ‘availability’ in the first place.<sup>118</sup>

It is precisely the availability of conditions set in certain contractual terms of pre-formulated standard contracts that presents an important issue in the practice of various traders, including creditors. A problem is also reflected in the grey letter rule of the UCT Directive presuming the unfairness of a contractual term “irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract”.<sup>119</sup> The transparency of contractual terms is seriously undermined in pre-formulated standard contracts or adhesion contracts, which often refer to the application of trader’s general terms and conditions or even to the application of some other internal regulatory acts. For example, it is not rare for credit contracts to refer to the payment of fees or other bank charges as regulated in the general terms and conditions of a bank or in a Decision of a bank on fees and charges.<sup>120</sup> Another example are contractual terms that prescribe the

114. According to Article 10(1) of Directive 2008/48/EC “Credit agreements shall be drawn up on paper or on another durable medium”, which implies that they also must be ‘in writing’ according to the Opinion of Advocate General *Sharpston* delivered on 9 June 2016, EU:C:2016:431 in case C-42/15, *Home Credit Slovakia*, para. 29.

115. Preamble of the UCT Directive, recital 21.

116. Under the system established by the UCT Directive, the *contra proferentem* interpretation is not allowed in collective redress proceedings. See Opinion of Advocate General *Geelhoed* delivered on 9 September 2004, EU:C:2004:279 in case C-70/03, *Commission v Spain*, paras 13, 15 and 18.

117. According to the authors of the *EC Consumer Law Compendium*, “The criteria “plain” and “intelligible” complement each other and are difficult to distinguish.” They interpret contractual terms to be ‘plainly’ drafted, “when no ambiguities, misunderstandings or doubts exist in relation to the content of the terms”. On the other hand, a contractual term is ‘intelligible’, “when the consumer can understand the essential substance of the rules”. See Schulte-Nölke, H., Twigg-Flesner, Ch., Ebers, M., *EC Consumer Law Compendium, The Consumer Acquis and its Transposition in the Member States*, Sellier, München, 2008, p. 412.

118. The same conclusion can be drawn from the wording of Article 31(2) of the *Proposal for a Directive of the European Parliament and of the Council on consumer rights*, COM(2008) 614 final: “Contract terms shall be made *available* to the consumer in a manner which gives him a *real opportunity of becoming acquainted with them* before the conclusion of the contract, with due regard to the means of communication used.”

119. See Annex of the UCT Directive, Terms Referred to in Article 3(3), point 1(i).

120. For example, in the judgment of 12 July 2012, C-602/10, SC *Volksbank România*, EU:C:2012:443, that concerned the disputable general conditions of the credit agreements requiring the borrower to pay the bank a ‘risk charge’. The general conditions of credit agreements in the case *Matei* also included such a clause, see *Matei*, para. 27.

change of a variable interest rate according to a Decision of a bank and the changes of the market conditions.<sup>121</sup> The matter of a ‘real’ availability of general terms and conditions (or of other trader’s internal acts) incorporated into the contract through a reference to their publication at the trader’s business premises or official website, or through small letters written on the back of the contract,<sup>122</sup> becomes a precondition to the comprehensives of contractual terms. The described practice brings into the light another aspect of transparency concerning the ‘visibility’ or ‘noticeability’ of contractual terms. For example, in the *Cofidis* case, a French court considered the use of small letters for important contractual terms on the back of the offer of consumer credit agreements to be non-transparent and therefore constituting unfair contract terms.<sup>123</sup> In this respect, many MS went beyond the level of protection offered by the UCT Directive and besides plain, intelligible language of contractual terms introduced additional requests for contractual terms to be ‘visible’ or ‘noticeable’.<sup>124</sup>

Once it is established that the requirement of transparency under the UCT Directive is to be understood to have a broader meaning, as not only demanding for contractual terms to be written in plain intelligible language, but also to be ‘actually’ available to consumers,<sup>125</sup> it is necessary to observe the CJEU case law interpreting these conditions. As it will be demonstrated below, the settled case law provides MS courts not only with criteria necessary for the interpretation of presented provisions, but also with the tools necessary to pursue this complex task. Besides establishing the exact criteria on ‘what’ is to be understood under the transparency requirement of the UCT Directive, the CJEU gives guidelines on ‘how’ the transparency requirement is to be evaluated by defining circumstances and further elements to be taken into account by MS’ courts when ruling on the transparency of contractual terms.

### 3.2.1. Tools and Rules for Assessment of Transparency of Consumer Credit Contract Terms

The assessment of the transparency of contractual terms in credit agreements involves once again a strong interaction between the national law provisions implementing the UCT Directive and those transposing the CCA Directives. Namely, the so-called ‘duty to inform’ or information duty of creditors and credit intermediaries entrenched in the provisions of Directive 2008/48/EC or *ex* Directive

121. As in the *Matei* case, where pursuant to Clause 3(d) of the Special Terms of credit agreements, relating to the variable nature of the rate of interest, “the bank reserves the right to alter the current rate of interest in the event of significant changes on the financial markets, the new rate of interest being notified to the borrower; the rate of interest thereby altered shall apply from the date of notification”. See also judgment of 21 December 2016, *Gutiérrez Naranjo*, C-154/15, joined cases C-307/15 and C-308/15, EU:C:2016:980, dealing with “the clauses establishing a minimum rate below which the variable rate of interest could not fall (‘floor clauses’) contained in the general conditions of mortgage loan agreements concluded with consumers”. The same clauses were disputed in the judgment of 14 April 2016, joined cases C-381/14 and C-385/14, *Sales Sinués*, EU:C:2016:252.

122. More on the incorporation of contractual terms in D’Agostino, E., *Contracts of Adhesion Between Law and Economics: Rethinking the Unconscionability Doctrine*, Springer, 2015.

123. Judgment of 21 November 2002, *Cofidis*, C-473/00, EU:C:2002:705.

124. As pointed out by *Lord Denning* in the case *Spurling (J)Ltd v. Bradshaw -/1956/ 2 All ER 121*: “some clauses would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient”. As an example, see the Croatian legal system setting a higher level of protection and requiring for contractual terms to be “written in plain, intelligible language and easily noticeable” in Article 53 of the Consumer Protection Act (OG Nos. 41/14 and 110/15).

125. For example, in its judgements of 8 September 2014, R.J., No. 3903/2014 and of 9 May 2013., R.J., No. 1916/2013, the Spanish *Tribunal Supremo* checked the ‘accessibility’ of creditors general contract conditions as a first step in assessment of their transparency. See Barral-Viñals, I., *op. cit.*, p. 87.

87/102/EEC or Directive 2014/17/EU contributes significantly to the transparency of contractual terms.<sup>126</sup> Extensive informing of the consumer as a borrower is, pursuant to the CCA Directives, required at all stages of the contract conclusion process - from the pre-contractual stage of advertising and providing pre-contractual information until the conclusion of the contract - through the regulation of a wide list of information to be included in credit agreements.<sup>127</sup> The CJEU points out to MS' courts that the question of transparency “*must be examined (...) in the light of all the relevant facts, including the promotional material and information provided by the lender in the negotiation of the loan agreement (...)*”.<sup>128</sup> The legal background for the inclusion of advertising, pre-contractual informing and other stages of the conclusion of a credit contract into the assessment of the transparency of contractual terms lies most likely in Article 4(1) of the UCT Directive. Although the provision prescribes additional criteria (i. e. the nature of the goods or services; circumstances prior to the contract conclusion; the relation to other contract terms or other contracts) to be taken into account when evaluating the *unfairness* of a contractual term, the CJEU uses them also in the context of exclusion from the unfairness test under Article 4(2).<sup>129</sup> Since the prescribed criteria and the legal and factual context of the credit agreement are to be taken into account by MS' courts when deciding on essential obligations of a contract, these should also be observed when assessing the transparency of contractual terms.<sup>130</sup>

In addition, according to the settled CJEU case law, MS' courts are requested to rule on the transparency of contractual terms also by applying another criterion. This one concerns the level of attention of an ‘average consumer’, “*who is reasonably well informed and reasonably observant and circumspect*”.<sup>131</sup> When put in the context of consumer credit agreements, this definition certainly gains a new meaning. While the consumer should be reasonably observant and circumspect by himself when concluding a credit agreement, the question remains on how should the consumer be reasonably well informed. A consumer can be reasonably well informed about a currency clause mechanism or on an APR calculation method only by the creditor, who has special knowledge and to whose duties this belongs. It would be unreasonable to expect from a consumer, for whom this is not a daily and ordinary activity, to arrive at the bank with special prior knowledge on credits and their conditions of a legal, economical and mathematical nature.<sup>132</sup> Therefore, the level of attention of the debtor as an average consumer will be *inter alia* affected by the observance of the creditor's duty to inform a consumer, that belongs to the legal and factual circumstances a MS' court is evaluating in each

126. See *Radlinger and Radlingerová*, para. 64.

127. Critically about the extensiveness of information (so-called ‘information overload’) see Mišćenić, who considers that “the consumer often ends up being more confused than enlightened”. See Mišćenić, E., *Legal...*, *op. cit.*, p. 151.

128. *Matei*, para. 75. As well as in *Kásler and Káslerné Rábai*, para. 74 and in *Bucura*, para. 67.

129. By requiring from MS' courts, when deciding in a concrete case whether a contractual term constitutes an essential element of the debtor's obligations to take into account “the nature, general scheme and the stipulations of the loan agreement, and its legal and factual context”. See *Van Hove*, para. 51 or *Kásler and Káslerné Rábai*, para. 51, and *Matei*, para. 54.

130. Differently, Article 83(2) of the revoked CESL Proposal pursuant to which when assessing the unfairness of a contract term in B2C contracts a ‘duty of transparency’ is to be taken into account together with the above-mentioned criteria. See Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, Brussels, 11 October 2011, revoked in 2014.

131. Extensively on various images of the consumer in EU law in Leczykiewicz D., Weatherill S. (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, Hart Publishing, 2016.

132. See Decision of the Italian Supreme Court (*Corte di Cassazione*), Cass., 19 febbraio 2014, n. 3968.: “(...) *implicanti una diligenza non comune o l'applicazione di regole specialistiche, ma comunque corrispondenti ad una univoca elaborazione da parte di una determinata scienza (nella specie, la matematica finanziaria)*”.

individual case. An excellent example merging all these relevant criteria when assessing the transparency of contractual terms in credit agreements is to be found in the above-mentioned *Bucura* case. Here, the CJEU established decisive factors for the transparency assessment: “first, the issue as to whether the terms are drafted in plain, intelligible language in such a way as to allow an *average consumer*, that is to say, a consumer who is reasonably well informed and reasonably observant and circumspect, to assess such a cost (total cost of his loan) and, second, *the circumstance linked to the lack of mention in the consumer credit contract of information (...)*”.<sup>133</sup> Not only does it bring into relation criteria presenting ‘tools’ necessary for the assessment of transparency of consumer credit contract terms, the CJEU clearly indicates a strong interaction between the UCT and CCA Directives.

### 3.2.2. Availability and Comprehensibility of Consumer Credit Contract Terms

As previously explained, a precondition to the comprehensibility of contractual terms is their availability to the consumer, where both of these elements form two sides of the same coin. Therefore, when assessing the transparency of a pre-formulated term of a standard credit agreement pursuant to which ‘an interest rate is variable according to conditions from a Decision of a bank and dependent upon circumstances on credit market’,<sup>134</sup> a national judge is checking both the availability and comprehensibility of the content of the contract condition for the consumer. Here is where the UCT Directive and CCA Directives are strongly intertwined again. Both above-mentioned elements of the transparency requirement will be fulfilled if the creditor respected the national provisions implementing the CCA Directives during the contract conclusion. In the case *Radlinger and Radlingerová*, when dealing with the availability of credit contract conditions to consumers as borrowers, the CJEU established the *ex officio* duty of MS’ courts to watch upon creditor’s duty to inform a consumer on the information to be included in the credit agreement arising from Article 10(2) of Directive 2008/48/EC.<sup>135</sup> The fusion of the creditor’s duty to inform and of the transparency requirement is particularly noticeable in the following words: “(...) information, before and at the time of concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer, (since) it is, in particular, *on the basis of that information that the consumer decides whether he wishes to be bound by the conditions drafted in advance by the seller or supplier*”.<sup>136</sup> Unfortunately, this idea of an informed consumer in the field of consumer credits very often stumbles over unfair contract terms. In the context of the ‘availability’ of contract conditions, the CJEU case law on credit agreements demonstrates examples of creditor’s standard terms by the acceptance of which a debtor confirms being properly informed or

133. *Bucura*, para. 67.

134. The example was taken from the credit agreements disputed in the Croatian case *Franak*. See Mišćenić, E., *Croatian...*, *op. cit.*, p. 184.

135. *Radlinger and Radlingerová*, para. 102.

136. *Ibidem*, para. 64. To that effect see also the judgment of 16 January 2014, C-226/12, *Constructora Principado*, EU:C:2014:10, para. 25 and the judgment of 21 March 2013, C-92/11, *RWE Vertrieb*, EU:C:2013:180, para. 44.

being checked on his creditworthiness.<sup>137</sup> Since the question of a ‘real’ fulfilment of these duties is a factual one and subject to an evidence procedure in a court proceeding, the CJEU does not find such clauses disputable. In the case *CA Consumer Finance SA*, the CJEU established that such a standard clause does not undermine the effectiveness of rights recognized under the Directive 2008/48/EC since it is only an indication that the lender has to prove during a court proceeding.<sup>138</sup> On the other hand, when observed from the angle of the transparency requirement of the UCT Directive, such clauses undermine the ‘availability’ of credit contract conditions, which according to the mandatory provisions of Directive 2008/48/EC must be given to the consumer when concluding a credit agreement.<sup>139</sup> Contrary to the CJEU, in this case the author is of the opinion that the examples of such contractual terms directly collide with Article 22(3) of Directive 2008/48/EC that requires MS to ensure that national harmonized provisions “cannot be circumvented as a result of the way in which agreements are formulated”.<sup>140</sup> Although this is a matter of facts to be proven by evidence, as seen in the case at hand, the goal of the above-mentioned standard terms was exactly to circumvent the creditor’s duties resulting in the non-transparency of contractual terms for consumers.<sup>141</sup> In another case, *Home Credit Slovakia*, Advocate General *Sharpston* established that it is not against Article 10(2) of Directive 2008/48/EC to refer to other sources of contractual information, such as the lender’s general terms of business, as long as all prescribed contractual information is in there. *Sharpston*, however, calls for minimal conditions, which will ‘in fact’ place a consumer in a position “where he can make a full, informed and timely assessment of the deal that is being proposed to him”.<sup>142</sup> A ‘real availability of contract conditions’ is to be accomplished by: “(i) the separate documents containing the compulsory information (to) be given to the consumer at the same time and prior to conclusion of the agreement; (ii) the credit agreement (...) containing clear and precise cross references to the compulsory information and indicat(ing) where it can be found in the lender’s general terms of business; and (iii) the lenders (...) (ability) to prove that he has given the compulsory information to the consumer prior to the conclusion of the agreement”.<sup>143</sup> The CJEU followed this Opinion by requiring “clear and precise cross-reference to other paper, or other durable, media

137. For example, in the case *CA Consumer Finance SA*, the CJEU dealt with the circumvention of the creditors’ duty to give pre-contractual information to the consumer by introducing a standard contract term by the acceptance of which a debtor confirms being properly informed with the SECCI. In the same case, the creditor omitted to assess the creditworthiness of the debtors and signed with them a pre-formulated credit contract containing a standard term confirming that the creditor’s obligations have been fulfilled in this respect. See judgment of 18 December 2014, *CA Consumer Finance SA*, C-449/13, EU:C:2014:2464, para. 7: “(...) the contract signed by Ms Bakkaus contains a standard term which is worded as follows: ‘I, the undersigned, Bakkaus Ingrid, acknowledge that I have received and taken note of the Standard European Information form’”.  
138. *Ibidem*, para. 29.

139. In that sense, *Loos* speaks about the ‘presentation’ of the information to the consumer “in such a way that the consumer could not have missed it before (or when) concluding the contract”. See *Loos*, M. B. M., *Double Dutch: On the role of the transparency requirement with regard to the language in which standard contract terms for B2C-contracts must be drafted*, EuCML, 2/2017, p. 54.

140. *Ibidem*, para. 29: “(...) it is clear from Article 22(3) of Directive 2008/48 that such a term cannot allow the creditor to circumvent its obligations”.

141. *Mišćenić* already previously questioned the effectiveness of consumer protection instruments deriving from EU consumer protection directives, “if in reality the consumer has to resort to procedural enforcement mechanisms as a last line of defense to actually enjoy a guaranteed legal certainty”. *Mišćenić*, E., *Legal...*, *op. cit.*, p. 152.

142. Opinion of Advocate General *Sharpston* delivered on 9 June 2016, EU:C:2016:431 in case C-42/15, *Home Credit Slovakia*, para. 71.

143. *Ibidem*.

containing the information that was actually given to the consumer (...) so as to give him the opportunity to be genuinely apprised of all his rights and obligations”.<sup>144</sup>

Although both above-mentioned cases deal with the interpretation of the provisions of Directive 2008/48/EC, as previously demonstrated, the observance of the creditor’s information duties during a contract conclusion plays a key role in the assessment of the transparency of credit contract terms. As accentuated by the CJEU in *Pohotovost*,<sup>145</sup> *Bucura*<sup>146</sup>, and many others, these circumstances represent a ‘decisive factor’ in the assessment by a national court of whether a term of a consumer credit agreement is written in plain, intelligible language. This leads us to another side of the transparency requirement dealing with the ‘comprehensiveness’ of contractual terms in credit agreements. Apart from being ‘available’ to the consumer, contract conditions contained either in the contract itself or referred to in the contract (e. g. creditor’s general terms and conditions or other internal acts) must be written in ‘plain, intelligible language’ according to Article 5 of the UCT Directive. And while the legal doctrine and the CJEU case law agree about the same scope of the transparency requirement in Articles 4(2) and 5 of the UCT Directive,<sup>147</sup> the ratio and legal consequences of these two provisions differ. It is pursuant to Article 5 that all or certain contractual terms in writing ‘must always be drafted in plain, intelligible language’, whereas the exclusion from Article 4(2) is limited to the essential obligations of contracts and the adequacy of the price and remuneration. While the former is sanctioning the non-transparency of contractual terms by the application of the *contra proferentem* rule,<sup>148</sup> the latter is doing the same by submitting contractual terms on essential obligations and quality/price ratio to the unfairness test. In the context of consumer credit agreements, the judgment playing a key role in interpreting the meaning behind the words ‘plain, intelligible language’ is certainly *Kásler and Káslerné Rábai*. Here, the CJEU for the first time explicitly accentuated that “the requirement of transparency of contractual terms laid down by Directive 93/13 cannot (therefore) be reduced merely to their being formally and grammatically intelligible”.<sup>149</sup> By relying on the interpretation given in the previous cases *Invitel*<sup>150</sup> and *RWE Vertrieb*,<sup>151</sup> the CJEU further explained that “(...) it is of fundamental importance for the purpose of complying with the requirement of transparency, to determine whether the contract sets out transparently the reason for and the particularities of the mechanism for converting the foreign currency and the relationship between that mechanism and the mechanism laid down by other terms relating to the advance of the loan, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it (...)”.<sup>152</sup> These words lead to the conclusion that in order to achieve substantial understanding, i. e. ‘comprehensiveness’ of the contractual terms, it is necessary that these fulfil three basic criteria by setting out transparently (1) reasons for and particularities of the agreed mechanism; (2) its relationship with the mechanisms entailed in other contractual terms; and

144. Judgment of 9 November 2016, C-42/15, *Home Credit Slovakia*, EU:C:2016:842, para. 34.

145. *Pohotovost*, para. 71.

146. *Bucura*, para. 67.

147. *Kásler and Káslerné Rábai*, para. 69.

148. According to Article 5, in case of doubt about the meaning of a term, “the interpretation most favourable to the consumer shall prevail”, except in collective redress proceedings.

149. *Kásler and Káslerné Rábai*, para. 71.

150. *Invitel*, paras 24, 26 and 28.

151. *RWE Vertrieb*, para. 49.

152. *Kásler and Káslerné Rábai*, para. 73.



finally that contractual terms (3) enable a consumer based on clear, intelligible criteria an evaluation of economic consequences which derive from that agreement. With minor deviations over the years these criteria were established by the CJEU case law as a yardstick upon the fulfilment of which, a transparency requirement is to be measured by the MS' courts.<sup>153</sup> Consequently, the final decision on the matter of whether a certain contractual term is transparent enough as to give the consumer clear and intelligible criteria from which he can foresee the economic consequences deriving from it, is in the hands of the MS' court, which decides about this question by taking into account the circumstances of the concrete case and applying the level of attention of an 'average' consumer.<sup>154</sup>

### 3.3. The MS' Courts Lost in Interpretation: Example of the Croatian Case Franak

This duty of MS' courts to observe the criteria and guidelines set by the autonomous and uniform interpretation of the CJEU forms an integral part of the courts' duty to interpret and consequently apply national law provisions in the light of the aim of the relevant EU Directive, i. e. consistently with EU law.<sup>155</sup> Although the MS' courts possess the general knowledge on the meaning of the principle of EU consistent interpretation,<sup>156</sup> they are faced with serious difficulties when applying this principle in practice.<sup>157</sup> To the questions bothering national judges, belong, for example, the matter *as to what extent they should observe the CJEU case law when interpreting harmonized national law provisions*. It is often the case that national judges ignore the relevant CJEU case law, when interpreting national law provisions consistently with the relevant EU Directive.<sup>158</sup> To use an example, one should mention the Croatian case *Franak* dealing with the (un)fairness of contractual terms regarding the foreign currency exchange, i. e. currency clauses in Swiss Franc (CHF) and unilaterally imposed variable interest rates.<sup>159</sup> In this collective redress proceeding, all court instances failed

153. See, analogously, *RWE Vertrieb*, para. 49. See also *Van Hove*, para. 51, where the CJEU interpreted Article 4(2) of the UCT Directive regarding the term of an insurance contract intended to ensure the repayment of a loan, and requested: "that that term is drafted in plain, intelligible language, that is to say that it is not only grammatically intelligible to the consumer, but also that the contract sets out transparently the specific functioning of the arrangements to which the relevant term refers and the relationship between those arrangements and the arrangements laid down in respect of other contractual terms, so that that consumer is in a position to evaluate, on the basis of precise, intelligible criteria, the economic consequences for him which derive from it".

154. See *supra*, p. 19.

155. As stated in the judgment of 9 November 2010, C-137/08, *VB Pénzügyi Lizing*, EU:C:2010:659, para. 44, in *Invitel*, para. 22, and in *RWE Vertrieb*, para. 49 regarding the unfairness of contractual terms: "the jurisdiction of the Court extends to the interpretation of the provisions of those directives and to the *criteria which the national court may or must apply when examining a contractual term in the light of those provisions*, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case".

156. Namely, the general concept is known to all national courts: to use the whole body of national law, even if adopted prior to a certain EU directive, and interpret national law provisions so far as possible in a manner that allows the achievement of the EU directives' result, i. e. goal. See *supra*, p. 4.

157. See Brennecke, M., *A Hybrid Methodology for the EU Principle of Consistent Interpretation*, Statute Law Review (2017, forthcoming). For examples of MS case law, see the *Database of the Centre for Judicial Cooperation of the European University Institute*, available at <http://judcoop.eui.eu/data/?p=data&fold=1&subfold=1.1.1>.

158. As an example of resistance to the UCT Directive see Mańko, R., *Resistance Towards the Unfair Terms Directive in Poland: The Interaction Between the Consumer Acquis and a Post-Socialist Legal Culture*, in: Devenney, J., Kenny M. (eds), *European Consumer Protection: Theory and Practice*, Cambridge University Press, Cambridge, 2012, p. 412.

159. Extensively on the case Mišćenić, E., *Croatian...*, *op. cit.*, p. 184.

to adequately observe the relevant CJEU case law, particularly regarding the interpretation consistent with Article 4(2) of the UCT Directive.<sup>160</sup> Although the judgment in the case *Matei* seems to be relevant for the case at hand, the judgment and conclusions of the CJEU were not observed in the last instance judgment of the Supreme Court.<sup>161</sup> On the contrary, the Croatian courts qualified the contractual terms on the creditor's right to 'unilaterally' alter the interest rates as falling under the national provisions implementing Article 4(2).<sup>162</sup> The contractual terms in question were submitted, nonetheless, to the unfairness test since the courts found them to be unintelligible and consequently non-transparent.<sup>163</sup> On the other hand, the Supreme Court found the invoked case *Kásler and Káslerné Rábai* to be inapplicable when it comes to the assessment of the transparency of currency clauses in CHF. Similarly to the contractual terms on variable interest rate, currency clauses were also submitted to domestic provisions transposing Article 4(2).<sup>164</sup> Once the clauses were evaluated as being transparent,<sup>165</sup> they were excluded from the unfairness test by the Croatian courts.<sup>166</sup> Without going into an analysis of the question whether the currency clause falls under the first category of terms from Article 4(2) of the UCT Directive, what seems to be very disputable in the case at hand is the matter of the clause's transparency. During the revision of the second instance judgment, the Supreme Court took a very questionable approach by applying the above-analysed criteria of the

160. During the first instance procedure only the judgment of 8 May 1993, *Schutzverband gegen Unwesen i.d. Wirtschaft v Rocher*, C-126/91, EU:C:1993:191 was invoked. See the judgment and order of the Commercial Court in Zagreb of 4 July 2013, P-1401/12. The Croatian High Commercial Court as the second instance invoked the cases *Caja de Ahorros y Monte de Piedad de Madrid* and *Kásler and Káslerné Rábai*. During the revision, the Supreme Court also mentioned the case *Invitel*. See the judgment and order of the High Commercial Court of the Republic of Croatia of 13 June 2014, Pž-7129/13-4, and the judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2.

161. The judgment in the case *Matei* was published two months before the final ruling of the Supreme Court. See *Matei*, para. 79, where the CJEU found that the two categories of terms from Article 4(2) of the UCT Directive "(...) do not, in principle, cover the types of terms in the credit agreements concluded between a professional and consumers such as those at issue in the main proceedings, which, on one hand, allow, under certain conditions, the lender unilaterally to alter the interest rate and, on the other hand, provide for a 'risk charge' applied by the lender".

162. Without a differentiation between the notions of "interest rates" and "interest", the High Commercial Court states: "Essential elements of the credit contract are certainly subject matter and the price, and interests are price." See judgment and order of the High Commercial Court of the Republic of Croatia of 13 June 2014, Pž-7129/13-4, p. 58.

163. *Ibidem*, pp. 56 and 57: "Pursuant to assessment of this court contractual term making the variable interest rate dependent upon decision of a bank is plain and noticeable, (...) but not intelligible."

164. All three instances used the same legal qualification as a basis. See the judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2, p. 17: "Term linking a capital of the credit to the Swiss Franc is the term on the subject matter of the contract."

165. *Ibidem*. To the many reasons justifying the transparency of currency clauses in CHF, the Supreme Court includes for example: general acceptance of the currency clause 'institute' by all participants of the Croatian society and its daily use (p. 18); high degree of familiarity of these contractual terms to consumers including their legal consequences (p. 18); understanding of every full age, adult and averagely careful person that during a longer period of time on which such credit contracts have been concluded, one cannot expect for circumstances in the society to stay unchanged, in particular the economical ones, which unquestionably affect the value and therefore exchange rates both of the national kuna as well as of other world currencies such as euro, Swiss franc, Japanese yen, US dollar etc. (p. 19); low level of interest rates in credit agreements denominated in CHF in comparison to credit agreements in EUR or kunas (p. 21).

166. See the judgment and order of the High Commercial Court of the Republic of Croatia of 13 June 2014, Pž-7129/13-4, p. 53: "(...) since in contracts concluded by all plaintiffs it is clear, easily intelligible and noticeable, on the ground of Article 84 of the CPA of 2003 and Article 99 of the CPA of 2009, it is exempted from fairness assessment (...)". The conclusion was confirmed by the Supreme Court in the judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2, p. 24.

transparency requirement to disputable contractual terms on the variable interest rate,<sup>167</sup> but by denying their application to currency clauses due to ‘different factual circumstances of two cases’.<sup>168</sup> As a reminder, the *Kásler and Káslerné Rábai* case was dealing with unfair currency clauses in CHF and not with the lender’s unilateral right to amend the interest rate, which was a matter of dispute in the ignored *Matei* case. When speaking of different ‘factual circumstances’, it is noteworthy to mention that despite the request deriving from settled CJEU case law to take into account all circumstances of the case,<sup>169</sup> the Supreme Court confirmed the standing of the High Commercial Court according to which, when assessing the transparency of currency clauses, the “plaintiff’s behaviour that preceded and affected the conclusion of contract related to currency clauses in CHF” is not to be observed.<sup>170</sup> All these and many other disputable arguments of the Supreme Court, and in particular those dealing with the transparency of contractual terms, were recently questioned by the Croatian Constitutional Court, which found them as not being reasoned and therefore violating the claimant’s right to a fair trial as the right guaranteed by the Croatian Constitution and the ECHR.<sup>171</sup> A result was returning of the final judgement of the Supreme Court to a renewed trial with respect to the part of the decision dealing with currency clauses in CHF.<sup>172</sup> The latter ruling is in tune with the CJEU’s finding on the limits of the principle of EU consistent interpretation according to which “the obligation for a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem*”.<sup>173</sup> To the many criticisms of the Constitutional Court belong also those concerning the non-observance of the CJEU case law’s conclusions, guidelines and criteria.<sup>174</sup> However, the Constitutional Court refers only to the *Kásler and Káslerné Rábai* case and does not mention other relevant cases interpreting the requirement of transparency from the UCT Directive, such as *Matei*, *Van Hove* or *Bucura*.

What leads to another question concerning EU consistent interpretation: when to observe the interpretation given by certain CJEU judgments? The author believes that the answer to this question is twofold. Notwithstanding the factual circumstances of the concrete case, there are numerous judgements in which the CJEU has confirmed the application of its conclusions to all B2C contracts. These concern, for example, the *ex officio* duty of courts to watch upon unfairness of contractual terms<sup>175</sup> or the contrariety of national law provisions setting the limitation period for the unfairness con-

167. Whereby, when applying the criteria on the transparency requirement from the settled CJEU case law, the Supreme Court did so without referring to any of the CJEU cases. See the judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2, pp. 33 and 34.

168. *Ibidem*, p. 22: “From what is said it is clear that factual substance of described Hungarian case and of this case is not the same and cannot be compared to or be brought into the relation.” However, when ruling on the exclusion of the currency clause from the (un)fairness test, the Supreme Court concluded that its interpretation is in accordance with Article 4(2) of the UCT Directive and the interpretation of the latter provision in the case *Kásler and Káslerné Rábai*. *Ibid.*, p. 24.

169. See *supra*, p. 19.

170. *Ibidem*, p. 24. See also the judgment and order of the High Commercial Court of the Republic of Croatia of 13 June 2014, Pž-7129/13-4, p. 53.

171. Decision of the Constitutional Court of the Republic of Croatia of 13 December 2016, U-III – 2521 / 2015 and others, point 22.

172. *Ibidem*, point I. Until now, a new court decision in the case *Franak* has not been rendered.

173. *Kásler and Káslerné Rábai*, para. 65.

174. Decision of the Constitutional Court of the Republic of Croatia of 13 December 2016, U-III – 2521 / 2015 and others, points 8.1. and 8.2.

175. Beginning with judgment of 27 June 2000 in joined cases C–240/98 to C–244/98, *Océano Grupo and Salvat Editores*, EU:C:2000:346 that dealt with the prorogation clauses in sales contracts of encyclopaedias.

trol with the UCT Directive<sup>176</sup>. On the other hand, the interpretation of one and the same provision of the UCT Directive often does vary due to the different circumstances of the concrete case. As an example, one can mention the interpretation of Article 6(1) of the UCT Directive in *Kásler and Káslerné Rábai*, where the CJEU limited its interpretation to “a situation such as that at issue in the main proceedings”.<sup>177</sup> Another example is the interpretation of the key element of the unfairness test on the ‘significant imbalance in parties’ rights and obligations arising under the contract, to the detriment of consumer’. Here, the circumstances creating a significant imbalance differ in the case of unfair prorogation clauses<sup>178</sup> from those in case of unfair currency clauses. Nevertheless, as stated, this does not necessarily mean that the criteria contained in the CJEU’s final conclusions are inapplicable to other kinds of unfair contract terms. Unfortunately, the CJEU judgments relevant for the interpretation of this important condition, such as *Aziz*<sup>179</sup> or *Constructora Principado*,<sup>180</sup> were also not observed in the Croatian case *Franak* due to the exclusion of currency clauses in CHF from the unfairness test. It is in cases of doubt, whether to follow the criteria given by the CJEU in a certain judgment and to apply them to a case at hand, that the competent MS court should refer a request for a preliminary ruling to the CJEU.<sup>181</sup> What sometimes stands in the way of MS’ courts such as the Croatian one, when they have doubts regarding the proper interpretation of national law provisions, is EU law itself. It was clarified on several occasions by the CJEU case law<sup>182</sup> that the CJEU is not competent to answer questions on the interpretation of EU Directives dealing with factual situations created prior to the entrance of the MS into the EU. Since the Croatian case *Franak* deals with unfair contract terms in credit agreements signed between 2003 and 2008, i. e. before 1 July

176. *Cofidis*, para. 39.

177. *Kásler and Káslerné Rábai*, para. 86.

178. Regarding unfair prorogation clauses, see *Océano Grupo and Salvat Editores*, para. 22: “(...) the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance”.

179. See judgment of 14 March 2013, C-415/11, *Aziz*, EU:C:2013:164, para. 76: “(...) the concept of ‘significant imbalance’, to the detriment of the consumer, must be assessed in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force. - in order to assess whether the imbalance arises ‘contrary to the requirement of good faith’, it must be determined 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”. See also judgment of 26 January 2017, C-421/14, *Banco Primus*, EU:C:2017:60, para. 76.

180. See *Constructora Principado*, para. 31.: “(...) the existence of a ‘significant imbalance’ does not necessarily require that the costs charged to the consumer by a contractual term have, as regards that consumer, a significant economic impact having regard to the value of the transaction in question, but can result solely from a sufficiently serious impairment of the legal situation in which that consumer, as a party to the contract, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under that contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules”.  
181. In the judgment of 16 January 1974, C-166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1974:3, para. 2, the CJEU accentuated that “Article 177 (now: 267 TFEU) is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community. Whilst it thus aims to avoid divergences in the interpretation of Community law which the national courts have to apply, it likewise tends to ensure this application by making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States.”

182. Regarding the ‘acte clair’/‘acte éclairé’ doctrine consult judgment of 27 March 1963 in joined cases C-28/62 to 30/62, *Da Costa en Schaake NV and Others v Administratie der Belastingen*, EU:C:1963:6, p. 38, and the judgment of 5 March 1986, C-69/85, *Wünsche v Germany*, EU:C:1986:104, para. 15. See also *Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings*, OJ C 439, 25.11.2016, p. 1–8.

2013,<sup>183</sup> as in the cases *Tudoran* or *Ynos*,<sup>184</sup> the Croatian courts would have received a ‘red card’ if they had requested a preliminary ruling from the CJEU. The irony here lies in the fact that as ‘the MS to be’ Croatia respected and observed EU law even prior to its full EU membership due to the duties arising from the international Stabilisation and Association Agreement signed with the EU in 2001.<sup>185</sup> In the context of EU consistent interpretation, this leads to a perplexing result, where MS’ courts solving ‘current’ disputes regarding factual situations created prior to their entrance to the EU are applying the principle of EU consistent interpretation and therefore observing EU law, while the EU does not observe them.

It is in line with the EU principle of loyalty and sincere cooperation,<sup>186</sup> as well as the principle of effective protection,<sup>187</sup> that MS’ courts should do their best to achieve the so-called ‘*effet utile*’ of EU Directives, which includes the observance of relevant CJEU conclusions when interpreting national law consistently with EU law. In this regard, a *crucial question on how to apply the criteria developed by CJEU’s interpretation of EU legal standards* arises. Despite the CJEU’s request for *autonomous and uniform interpretation* of the first two categories of terms from Article 4(2) of the UCT Directive, Croatian courts resort to their interpretation in the light of domestic civil law. The civil law definition, common to most of the MS, of the ‘subject matter’ and the ‘price’ as essential elements (Lat. *essentialia negotii*) of the contract, does not correspond to the allocation of these two categories under Article 4(2). According to the CJEU settled case law both of these civil law terms are to be linked with the ‘definition of the main subject matter of the contract’ that encompasses contractual terms “*that lay down the essential obligations of the contract and, as such, characterise it*”.<sup>188</sup> It is here that the line between an interpretation consistent with EU law and an interpretation consistent with domestic civil law becomes very thin. Since the final decision on the matter, which contractual terms in the concrete case describe essential obligations of the contract, is in the hands of MS’ courts, the decision is regularly made based on their domestic civil laws. This often leads to a result where MS’ courts, despite the CJEU’s request on strict interpretation of exemptions, by relying on their civil laws also include contractual terms affecting the subject matter and the price

183. Treaty between Member States of the European Union and the Republic of Croatia concerning the Accession of the Republic of Croatia to the European Union, OJ L 112, 24.4.2012; Act on Confirmation of Treaty between Member States of the European Union and the Republic of Croatia concerning the Accession of the Republic of Croatia to the European Union, OG IA Nos. 2/12 and 9/13.

184. In the *Tudoran* case dealing with a credit agreement signed in Romania prior to its entrance to the EU, the CJEU found the UCT Directive to be inapplicable. See Order of 3 July 2014, C-92/14, *Tudoran*, EU:C:2014:2051, paras 28 and 29, further invoking *Pohotovost*’ and other cases. See also the judgment of 10 January 2006, C-302/04, *Ynos*, EU:C:2006:9, where the CJEU clarified that it has no jurisdiction to answer questions concerning the interpretation of the UCT Directive regarding national law adopted based on the Association Agreement prior to Hungary’s entrance to the EU, dealing with “facts which occurred prior to the accession of a State to the European Union”.

185. Act on Confirmation of the Stabilisation and Association Agreement between the Republic of Croatia and the European Communities and their Member States, OG IA Nos. 14/01, 15/01, 14/02, 1/05, 7/05, 9/05 and 11/06.

186. Article 4(3) TEU.

187. The principle of effective protection as developed by the settled CJEU case law (principles of equivalence and effectiveness) is nowadays also entrenched in Article 19(1) TEU, as well as guaranteed by Article 47 of the EU Charter of Fundamental Rights (right to an effective remedy and to a fair trial).

188. *Kásler and Káslerné Rábai*, para. 49.

as essential elements of contracts.<sup>189</sup> In doing so, they run the risk of lowering the level of consumer protection by widening the scope of contractual terms that under the fulfilment of the transparency requirement are excluded from the (un)fairness review. When speaking about the transparency requirement in the case *Franak*, the Croatian courts applied this requirement in their own way by either not following the criteria set by the CJEU or applying them indirectly and again combining them with civil law provisions.<sup>190</sup> This two-sided approach was also taken in relation to the above-described CJEU's guidelines on how to assess the transparency of contractual terms. While the assessment of the transparency of contractual terms on variable interest rates included the observance of all the factual circumstances during the contract conclusion,<sup>191</sup> the latter were considered irrelevant for the assessment of the transparency of currency clauses in CHF.<sup>192</sup> The image of an 'average consumer' in the case *Franak* varied also significantly from the one of the above-mentioned 'European' consumer. Consequently, it was expected from Croatian consumers to arrive at the bank with special prior knowledge on the currency, acceleration, execution and other sorts of clauses and to be acquainted with their manner of functioning without the necessity of being informed about it by the banks themselves, since such knowledge is widespread in the Croatian society.<sup>193</sup>

#### 4. Concluding Remarks

In line with the principle of effective legal protection, the MS' courts are obliged to guarantee the protection of rights of all individuals by complying with applicable EU law provisions and national legislation intended to give effect to the rights arising from the UCT Directive.<sup>194</sup> The latter is to be accomplished in the first line by interpreting and applying national law provisions consistently with the provisions of the UCT Directive and by achieving its full effect.<sup>195</sup> The duty of MS' courts to use the 'whole body of national law' in order to achieve the results intended by the UCT Directive includes also the understanding of the Directive's provisions in the meaning given by CJEU's interpretation. It is through the request for uniform application of EU law across the Union that the CJEU guarantees legal certainty to individuals. Consequently, numerous duties of MS' courts were established by CJEU case law, such as the key duty to evaluate the unfairness of contractual terms on its own motion, where the court has available legal and factual elements necessary for completing this task.<sup>196</sup> The failure of the national judge to assess the unfairness of contractual terms, where the

189. Such an interpretation is accepted by the Croatian case law on consumer credit agreements. See judgment of the Municipal Court in Osijek of 1 April 2015, P-788/2014-48, p. 18: "It is a term binding the capital of the credit with the CHF, i.e. a term on the subject matter of the contract, that makes the height of the capital dependent upon the relation between CHF and Kuna, and this is why the contractual term in question is (...) essential element of the credit contract."

190. Judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2, p. 34: "(...) it is obvious that insertion in credit contracts of completely undetermined formulation on variable interest rate, in a manner done by sued banks during disputed time period, was contrary to enumerated principles of civil law".

191. *Ibidem*.

192. See the judgment and order of the High Commercial Court of the Republic of Croatia of 13 June 2014, Pž-7129/13-4, p. 53.

193. See *supra*, fn 149.

194. Judgment of 15 May 1986, C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, para. 19.

195. *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, para. 2.

196. Regarding consumer credit agreements see for example: order of 16 July 2015, C-539/14, *Sánchez Morcillo and Abril García*, EU:C:2015:508, para. 27.; judgment of 17 July 2014, C-169/14, *Sánchez Morcillo and Abril García*, EU:C:2014:2099, para. 24; judgment of 9 July 2015, C-348/14, *Bucura*, EU:C:2015:447, para. 67; judgment of 30 May 2013, C-397/11, *Jórös*, EU:C:2013:340.

judge has the legal and factual elements at his disposal, can result in the state's liability for damage caused to individuals by the infringement of EU law. This was precisely the matter of dispute in the *Tomášová* case,<sup>197</sup> where the Advocate General *Wahl* found that the failure of the last instance court to assess the unfairness of a contractual term is to be classified as a sufficiently serious infringement such as to give rise to state liability, when "(...) in spite of the information brought to its attention, either by the consumer himself or by other means, the court called upon to adjudicate at last instance has failed to raise of its own motion the unfairness of a contractual term contained in such a contract".<sup>198</sup> Whether and which implications this finding could have on the Croatian case *Franak* is to be seen once the renewed trial finishes. However, Croatian courts are by no means the only ones to be lost in EU consistent interpretation, in particular regarding unfair terms in credit agreements. The practice of MS' courts all over Europe demonstrates serious difficulties in understanding the content, manner of application and limits of the principle. Although MS' courts acknowledge the relevance of CJEU case law for the interpretation of domestic law consistent with EU Directives, in practice they often ignore the relevant CJEU guidelines and criteria or misapply them.<sup>199</sup> The consequences of such a behaviour can be serious both for the uniform application of EU law as well as for the rights of individuals arising from the relevant EU Directives, thereby bringing the legal certainty in question. The matter of legal certainty can also be observed from another angle, the EU law one. It is a precondition of legal certainty to have clear and precise legal measures in place that make EU legislation certain and its application foreseeable for individuals.<sup>200</sup><sup>201</sup> However, the analysis of Article 4(2) of the UCT Directive and the abundance of questions for preliminary ruling requesting its interpretation demonstrate the level of uncertainty that MS' courts are experiencing when applying the analysed exclusion to consumer credit agreements. A lot of this uncertainty can be attributed to a linguistic stipulation of this autonomous EU legal standard, which contains the notions corresponding to those from MS' civil laws, but gives them a different substantive meaning. Consequently, the 'definition of the main subject matter of the contract' in Article 4(2) of the UCT Directive is to be understood in a much broader sense than under MS' civil laws as to also include contractual terms on price/remuneration, except in the case of their adequacy.<sup>202</sup> The use of linguistically corresponding legal terms and the ignorance of CJEU case law revealing the true meaning behind them leads to an obvious risk for MS' courts to interpret and apply national law provisions based on their civil laws instead of consistently with their EU origin. This results in cases such as the Croatian case *Franak*, where all contractual terms 'linked to' the 'subject matter' and the 'price' are essential<sup>203</sup> and where the transparency of a contractual term depends on the image of a

197. Judgment of 28 July 2016, C-168/15, *Tomášová*, EU:C:2016:602.

198. Opinion of Advocate General *Wahl* delivered on 14 April 2016, EU:C:2016:260 in case C-168/15, *Tomášová*, para. 87.

199. More on the serious legal consequences of such behaviour under EU law: Leczykiewicz D., *Effectiveness of EU Law Before National Courts: Direct Effect, Effective Judicial Protection, And State Liability*, in: Arnulf, A., Chalmers D. (eds), *Oxford Handbook of European Union Law*, Oxford University Press, 2015, pp. 212 *et seq.*

200. Judgment of 22 January 1997, T-115/94, *Opel Austria v Council*, EU:T:1997:3, para. 124.

201. As rightly emphasized by šarčević, in order "To create uniform concepts with an autonomous meaning at EU level, definitions must be written in clear, precise and simple language, which is easily translatable and will be interpreted and applied uniformly by the national courts of the Member States." See šarčević, S., *op. cit.*, p. 58.

202. *Matei*, para. 56.

203. Such broad interpretation was also accepted by Spanish courts, whose *Tribunal Supremo* concluded in the Resolution of 18 June 2012, R.J., No. 5966/2012, that Spanish legislation implementing the UCT Directive excludes from the (un)fairness test contract terms 'related to price', i.e. also remunerative interest rates presenting a tool for calculation of the price in credit agreements. See Barral-Viñals, I., *op. cit.*, p. 75.

‘Croatian average consumer’. What contributes to such rulings is also the fact that the final decision on the ‘essential obligations of the contract’ is in the hands of MS’ courts, which in absence of CJEU guidelines rule by following the civil law meaning of the concept.<sup>204</sup> In this magic circle, the MS’ courts cannot interpret the first two categories of terms imported from Article 4(2) of the UCT Directive as corresponding to the essential elements of contracts of their civil laws, but end up using their civil laws for the purpose of determining the contractual terms on essential obligations of the contract in each individual case. While the discretion to do so was given to them by the CJEU itself, what was obviously not given to MS’ courts are sufficient and “essential” criteria on how to interpret the autonomous EU legal standard on the “essential obligations of the contract”.<sup>205</sup> This whole debate leads to a final result to which Professor *Basedow* remarkably pointed at almost ten years ago, by emphasising that “(...) *the key question of unfairness remains furthermore the subject matter of divergent national practices without any possibility of European correction*“.<sup>206</sup>

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204. According to *Schillig*, German courts apply interpretation according to which the CJEU notion ‘essential obligation of the contract’ concerns *essentialia negotii*, therefore restricting the ambit of Article 4(2) of the UCT Directive. On the other hand, UK courts introduced a term ‘essential bargain’ into the construction of Article 4(2). See *Schillig M.*, *op. cit.*, p. 950, 954. Similar approach is taken by Spanish courts. In the judgement of the Tribunal Supremo of 9 May 2013, R.J., No. 1916/2013 presented by *Barral-Viñals*, the *Tribunal Supremo* concluded that the floor clause in credit agreement refers to an essential contract element. See *Barral-Viñals, I.*, *op. cit.*, p. 88.

205. Many of author’s findings were confirmed in the recent CJEU case *Andriuciu and Others* published almost two months after the paper was complete. In this case dealing with credit agreements denominated in CHF, the CJEU followed a civil law oriented reasoning of Advocate General *Wahl*, according to which “the fact that a loan must be repaid in a certain currency relates, in principle, not to an ancillary repayment arrangement, but to very nature of the debtor’s obligation, thereby constituting an essential element of a loan agreement”. In respect of transparency requirement, the CJEU established that it means “that a term under which the loan must be repaid in the same foreign currency as that in which it was contracted 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 be aware both of the possibility of a rise or fall in the value of the foreign currency in which the loan was taken out, and would also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations”. By requiring from financial institutions “to provide borrowers with sufficient information to enable them to take prudent and well-informed decisions” when concluding credit agreements, it confirmed author’s finding of interaction of creditors information duty arising under CCA Directives and of UCT Directive transparency requirement. See judgment of 20 September 2017, C186/16, *Andriuciu and Others*, EU:C:2017:703, paras. 38 and 51.

206. *Basedow, J.*, *Der Europäische Gerichtshof und die Klauselrichtlinie 93/13: Der verweigerte Dialog*, in: Müller, G., Osterloh, E., Stein, T. (eds.), *Festschrift für Günter Hirsch zum 65. Geburtstag*, C.H. Beck, München, 2008, p. 58.



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