

# Unfair Contract Terms in the Contract Law of the Republic of Croatia

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Source / Izvornik: **Civil Law Forum for South East Europe-Collection of Studies and Analyses, 2012, 2nd Regional Conference, vol. I, 2012., 2012, 184 - 200**

Conference paper / Rad u zborniku

Publication status / Verzija rada: **Published version / Objavljena verzija rada (izdavačev PDF)**

Permanent link / Trajna poveznica: <https://urn.nsk.hr/urn:nbn:hr:118:686259>

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Download date / Datum preuzimanja: **2025-03-04**

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## C. Unfair Contract Terms in the Contract Law of the Republic of Croatia

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### 1. Legal debate in Croatia whether to include the unfair contract terms in the general contract law within the Law on Obligations.

In the Croatian legal system there are currently two sets of positive legal rules regulating unfair contract terms which complement each other. One concerns the control of the standard pre-formulated contract terms regulated in the Civil Obligation Act<sup>194</sup> (COA), which existed even before the process of approximation of the Croatian existing legislation to the European consumer protection *acquis* and is applicable to all kinds of contractual relationships, involving either natural or legal persons or both as contracting parties (B2C, B2B, B2P and P2P contracts). Thus before the transposition of the **Council Directive 93/13 on unfair terms in consumer contracts**<sup>195</sup> (Directive 93/13) into the Croatian legal system, provisions on unfair contract terms concerned only the control of general contract conditions in standard pre-formulated contracts regulated within the COA of 1978 in ex Arts. 142 to 144.<sup>196</sup> The new COA of 2005 has taken over the content of ex-Arts. 142 to 144 into new Arts. 295 to 296 under the Title "VII. General Contract Conditions" in Part Two, Title VIII. on Contractual Obligations, Chapter 1. General Provisions of the COA. Provisions of the COA have subsidiary significance for consumer contracts and are to be applied except as otherwise provided for B2C contracts by the Consumer Protection Act (CPA)<sup>197</sup> (Art. 2 (2) CPA). A second set of legal rules concerning unfair terms in consumer contracts is prescribed in Arts. 96 to 106, Chapter XI. of the CPA, which transposes the Directive 93/13 into the Croatian legal system,<sup>198</sup> and following the concept of Directive 93/13 restricts the content review to B2C contracts.<sup>199</sup> The transposition of the Directive 93/13 and of most other EU consumer protection directives into the CPA<sup>200</sup> was a direct consequence of complying

<sup>194</sup> Civil Obligation Act, *Official Gazette of the Republic of Croatia* (OG), No. 35/05, 41/08, 125/11.

<sup>195</sup> Council Directive 93/13/EEC of 5. April 1993 on unfair terms in consumer contracts, *Official Journal* (OJ) L 095, 21/04/1993, p. 0029 – 0034 (Directive 93/13).

<sup>196</sup> See the Civil Obligation Act, OG 53/91, 73/91, 111/93, 3/94, 107/95, 7/96, 91/96, 112/99, 88/01 which transposed Yugoslav COA, OJ SFRJ 29/78, 39/85, 46/85, 45/89, 57/89, through Law on Transposition of Civil Obligation Act, OG 53/91. The COA of 1978 was repealed by Civil Obligation Act enacted in 2005, OG No. 35/05, 41/08, 125/11.

<sup>197</sup> Consumer Protection Act, OG No. 79/07, 125/07, 79/09, 89/09, 133/09 and 78/12.

<sup>198</sup> Directive 93/13 was for the first time transposed in CPA of 2003 (OG No. 96/03), which was in 2007 repealed and replaced by the new CPA (OG No. 79/07, 125/07, 79/09, 89/09, 133/09 and 78/12).

<sup>199</sup> Croatian CPA is applicable to contracts concluded between a trader and a consumer (B2C transactions). Under Art. 3 9<sup>th</sup> indent CPA the consumer is natural person who concludes the legal affair or acts on the market outside of its commercial, business, craft or professional activity. Under Art. 3 15<sup>th</sup> indent CPA trader means any natural or legal person who concludes the legal affair or acts on the market within its commercial, business, craft or professional activity, as well as person acting in the name or on the behalf of the trader. The concept of trader includes companies and single traders, but also all the other natural and legal persons, who act on the market within their business or professional activity (farmers, craftsmen, public services, local and regional self-government, self-employed like free artists, architects, lawyers etc.).

<sup>200</sup> While the CPA transposes Directives 98/6, 87/102, 93/13, 97/7, 85/577, 94/47, 98/27, 2002/65 and 2005/29, the Directives 90/314 and 1999/44 are transposed in the COA. For transposition of Directive 2008/48, the legislator adopted a separate Consumer Credit Act, OG No. 75/09 and 112/12.

with the obligation to align the Croatian existing legislation with the *acquis communautaire*, which is stipulated in Arts. 69 and 74 of the Stabilisation and Association Agreement signed between the Republic of Croatia, on the one part, and the European Communities and their Member States, on the other<sup>201</sup> (SAA) on 29. October 2001.

The decision of the Croatian legislator to regulate consumer protection law within the special piece of legislation was at first motivated by the thought of shielding the COA from new and different concepts of EU law and from frequent amendments, which could endanger or at least relativize its fundamental legal institutes and systematic. Another reason for this approach was also the fear of concealing the European origin of national provisions, when EU directives are implemented excessively, what could make the directive's consistent interpretation more difficult.<sup>202</sup> However, despite all mentioned arguments the COA took over certain consumer contracts directives, e.g. Directive 90/314 and Directive 1999/44, and used them for the modernization of already existing provisions. The argumentation of the Croatian legislator was based on the fact that the personal scope of application of these directives enables extension to persons other than consumers. For example, since the rules on seller's responsibility for material defects were already regulated in the COA, the Croatian legislator transposed some of the provisions of Directive 1999/44 excessively, by widening their field of application *ratione materiae* to all onerous contracts concluded not only in B2C but also in B2B and in P2P relationships (Arts. 400 et seq. COA).<sup>203</sup> Such transposition of the Directive 1999/44 resulted in the creation of certain separate rules which are only applicable to consumer transactions within the COA.<sup>204</sup> Thus, although there is currently no ongoing legal debate in Croatia whether to include the specific consumer protection legislation on unfair contract terms into the general contract law within the COA, a similar argumentation could be applied here too.<sup>205</sup> Such reasoning is even more persuasive because of the fact that, during the process of harmonization with the Directive 93/13, the Arts. 295 to 296 COA were also amended in order to comply with its requirements, which led to similar and complementing legal solutions on unfair contract terms in the CPA and the COA.

When comparing the legal framework of the mentioned two sets of provisions on unfair contract terms, there are numerous common features. Art. 295 (1) COA defines general contract conditions as contractual terms that have been formulated "for a larger number of contracts" that one party (drafter) proposes to the other contracting party before or at the time of entering into the contract, regardless of whether they are included in a form contract (standard contract) or referred to in the contract. General contract conditions complement individually negotiated clauses

<sup>201</sup> Stabilisation and Association Agreement between the Republic of Croatia, of the one part, and the European Communities and their Member States, of the other part, OG - *International Agreements of the Republic of Croatia*, No. 14/01.

<sup>202</sup> See Josipović T., „Anpassung des kroatischen Zivilrechts an europäische Standards“, in Welser R. (ed.), *Privatrechtsentwicklung in Zentral- und Osteuropa*, 2008, p. 141; Čikara E., „Die Angleichung des Verbraucherschutzrechts in den Europäischen Gemeinschaften: Unter besonderer Berücksichtigung des Verbraucherschutzrechtes in der Republik Kroatien“, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 28, 2/2007, p. 1083.

<sup>203</sup> The COA provisions on sale contracts are applicable to all contracts of sale, i.e. also applicable to all non-gratuitous contracts. Art. 5 of the CPA prescribes that the trader shall fulfill a consumer contract in accordance with the CPA and COA provisions and that in the case of material defects of the product or with regard to the service provided, the relations between consumers and traders shall be regulated by the provisions of the COA relating to responsibility for material defects of the product.

<sup>204</sup> Art. 402 (3) COA defines consumer contracts; Art. 403 (4) COA contains a special rule for consumers with regard to the duty to notify lack of conformity etc. For more details see Čadjenović Z./Čikara E./Dabović Anastasovska J./Dollani N./Gavrilović N./Karanikić Mirić M./Meškić Z./Zdraveva N., Consumer Sales Directive (99/44) in: Jessel-Holst Ch./Galev G. (ed.), *EU Consumer Contract Law/Potrošačko ugovorno pravo Evropske unije*, Civil Law Forum for South East Europe-Collection of studies and analyses, Beograd, Zagreb, Jugoslovenski pregled, Denona d.o.o., Volume III, Beograd, 2010, p. 518 et seq.

<sup>205</sup> This idea was rejected with regard to Arts. 142-144 COA of 1978, see Baretić M., „Nepoštene odredbe u potrošačkim ugovorima“ (Unfair Contract Terms in Consumer Contracts), in Dika M./Pogarčić Z. (ed.), *Obveze trgovca u sustavu zaštite potrošača* (Trader Obligation in the System of Consumer Protection), Narodne novine, Zagreb, 2003, p. 60; Slakoper Z., „Nevaljanost pojedinih odredaba općih uvjeta ugovora s posebnim osvrtom na potrošačke ugovore“ (Invalidity of Certain General Contract Terms Provisions with Special Emphasis on Consumer Contracts), *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 2001, Vol. 1, p. 204.

laid down between the contracting parties of the same contract, and, as a rule, they are equally binding (Art. 295 (2) COA). According to Art. 295 (5) COA general contract conditions are binding for a contracting party if that party was acquainted or ought to have been acquainted with them at the time of the conclusion of the contract. Subsequently, Art. 296 (1) COA prescribes that “any provision of the general contract conditions shall be void if it, contrary to the principle of good faith and fair dealing, causes evident inequality in rights and obligations of the parties to the detriment of the contracting party of the drafter or if it compromises the achievement of the purpose of the contract concluded, even if the general contract conditions including such provisions are approved by an authority”. Art. 102 (1) CPA prescribes that “an unfair contractual term is null and void”, and Art. 96 (1) CPA stipulates that a contractual term which has not been individually negotiated shall be regarded as “unfair” if, contrary to the requirement of good faith,<sup>206</sup> it causes a significant imbalance in the contractual parties’ rights and obligations, to the detriment of the consumer. However, unlike the COA, the CPA does not restrict the control of unfairness to standard terms formulated “for a larger number of contracts” only, but in accordance with the transposed Directive 93/13 its provisions are also applicable to pre-formulated individual contracts for single use. However, it puts special emphasis on pre-formulated standard terms of the trader, by regulating in Art. 96 (2) CPA that a certain contractual term shall be deemed not individually negotiated if it has been drafted in advance by the trader and the consumer has therefore not been able to influence its content, “particularly when it is a term of the pre-formulated standard contract of the trader”. In case of a unique regulation of unfair contract terms within the COA these differences could easily be overridden by an appropriate approximation of the COA provisions. By encompassing also individual contracts for single use, the true goal of Arts. 295-296 COA would be accomplished, i.e. the protection of the party who couldn’t influence the content of the contract, irrespective of whether the terms were pre-formulated for a larger number of contracts or just for the individual contract.

There are numerous other CPA and COA provisions on unfair contract terms that share similarities, like provisions on criteria to be taken into account when assessing the contract (Art. 98 CPA, Art. 296 (2) COA), or regarding the exclusion of specific contractual terms from unfairness test, like contractual terms based on mandatory provisions (Art. 96 (5) CPA, Art. 296 (3) COA), or regarding the *contra proferentem* rule (Art. 101 (1) CPA, Art. 320 (1) COA). Apart from slight amendments in order to approximate these COA provisions to the requirements of the Directive 93/13, no major interventions would be necessary. Finally, since the CPA as *lex specialis* contains no detailed special provisions on nullity (e.g. invoking nullity, time period for invoking nullity etc.) or provisions on compensation for damage etc., the general rules of the COA apply.

This is another good reason *pro* regulation of unfair contract terms within the COA. Although the main differences concern the field of application, especially the personal scope, special higher standards for the protection of consumers could be limited to B2C contracts by means of introduction of certain special provisions for consumers, what already happened with the COA rules on seller’s responsibility for material defects.<sup>207</sup> The remaining provisions on unfair contract terms,

<sup>206</sup> The requirement for the contracting parties to act in good faith as a fundamental principle of Croatian contract law is laid down in Art. 4 COA under the national term *načelo savjesnosti i poštenja* (principle of conscientiousness and honesty) and is acceptable as an equivalent for “good faith” in the CPA (Arts. 3 and 96) and for “good faith and fair dealing” in the COA (Art. 296 (1)), which are both used in official translations of the CPA and the COA. See Šarčević S./Čikara E., “European vs. National Terminology in Croatian Legislation Transposing EU Directives”, in Šarčević S. (ed.), *Legal Language in Action: Translation, Terminology, Drafting and Procedural Issues*, Zagreb, 2009, p. 211.

<sup>207</sup> Such approach is also to be found in the new 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, by differentiating between provisions for B2C and B2B contracts. E.g. it regulates in Art. 80 that the unfairness test does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in contracts between a trader and a consumer in so far as the trader has complied with the duty of transparency set out in Art. 82, while it prescribes the same rule for contracts between traders without requiring the fulfillment of the transparency condition.

as demonstrated above, could then excessively transpose the Directive 93/13 and be applicable not only to B2C but also to B2B relationships. Such transposition would also be in accordance with the prerequisites of the Directive 93/13, which after amendments through the Directive 2011/83/EU of the European Parliament and of the Council on consumer rights<sup>208</sup> is still based on minimum harmonisation principle. Beside necessary amendments regarding the personal scope of application concerning definitions of “consumer” and “trader”, it would also be necessary to introduce a provision which would in accordance with the recital 10 of the Directives 93/13 preamble exclude the application of consumer protection rules on contracts relating to employment, succession rights, family law rights and contracts relating to incorporation and organization of companies or to partnership agreements.<sup>209</sup>

The inclusion of the unfair contract terms in the general contract law by uniting the two currently existing sets of positive legal rules within the COA would also contribute to richer court practice. Currently there is a significant lack of court practice based on the CPA provisions.<sup>210</sup> Croatian courts are rather applying the COA provisions and protecting consumers as every other person, ignoring at the same time the existence of special consumer protection provisions. On the other hand, there are numerous courts decisions on unfair terms in standard pre-formulated contracts according to the COA provisions.<sup>211</sup> This is understandable, having in mind the real possibility of contracts concluded even in B2B relationships, where one of the contractual parties in monopolistic

<sup>208</sup> See Art. 32 of the 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 /64, 22. November 2011.

<sup>209</sup> One could follow the current solution in the CPA, which does not expressly exclude these contracts from the application of its provision on unfair contract terms, since their exclusion already results from the scope of application *ratione personae*, namely because a subject of these contracts cannot fall under the CPA definitions of consumer and trader. The transposition beyond the scope of the Directive 93/13 would also mean widening of unfairness control from contracts on sale of goods and supply of services within the meaning of Art. 1 (1) of the Directive 93/13 to all contracts, with the exception of certain enumerated contracts.

<sup>210</sup> To our knowledge, there are just a few court judgments concerning the CPA provisions. See County Court in Zagreb, Gž. 5173/10–2 of 23. November 2010 (public services); County Court in Zagreb, Gž. 7188/08–2 of 21. April 2009 (public services); County Court in Varaždin, Gž. 1074/08–2 of 4. August 2008 (sale of goods); County Court in Varaždin, Gž. 1052/08–2 of 12. June 2008 (consumer credit); High Commercial Court of the Republic of Croatia (VTSRH), Pž 3114/05–3 of 26. October 2007. Beside the possibility of consumer protection in procedures initiated by individual actions (in the Civil Procedure Act of 1976, with subsequent amendments OG 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91 as incorporated by Act of 1991 with its amendments in OG No. 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11), the CPA regulates in Part V. alternative consumers' dispute resolution (Chapter I) and protection of collective interests of consumers (Chapter II). Consumer access to justice includes beside court procedures and ADR (ad hoc arbitration committees, Croatian Chamber of Economy, Croatian Chamber of Trades and Crafts etc.), also administrative procedure. The first case of protecting consumer rights based on the CPA was the case “Ponikve” regarding the provision of public services, where the Croatian Competition Agency adopted the Decision UP/I 030-02/2004-01/66, OG No. 135/05. See also Administrative Court of the Republic of Croatia, Decision Us-4052/2004-7 of 21. February 2008; Misdemeanor Court in Zagreb, Decision XVII-G-12636-04 of 25. July 2006; Misdemeanor Court in Zagreb, Decision XVII-G-12636-04 of 25. July 2006. Before the last CPA amendments (OG No. 79/09) which have abolished this possibility, the protection against unfair contract terms was also granted through misdemeanor responsibility. Competent inspectors of the ministries and of the State Inspectorate were entitled to impose a fine in the amount of HRK 10000 to 100000 (cca. EUR 1370 to 13700) on a legal person which used unfair contractual terms.

<sup>211</sup> However, all following rulings concern ex-Arts. 142 to 144 COA of 1978: Supreme Court of the Republic of Croatia (VSRH), Rev 2486/90 of 14. February 1991; High Commercial Court of the Republic of Croatia (VTSRH), Pž 1844/91 of 10. March 1992; VSRH, Rev 2371/90 of 14. May 1992; VSRH, Rev 585/1992 of 23. September 1992; VSRH, Rev 1202/1992-2 of 24. September 1992; VTSRH, Pž 2222/92 of 27. April 1993; VSRH, Rev 1173/1997-2 of 21. January 1998; VSRH, Rev 409/1996-2 of 10. February 2000; VSRH, Rev 819/1996 of 7. March 2000; VSRH, Rev 1748/1996-2 of 12. April 2000; VSRH, Rev 3658/1999-2 of 01. June 2000; VSRH, Rev 23023/99 of 14. September 2000; VSRH, Rev 2354/1997-2 of 01. February 2001; County Court in Koprivnica, Gž. 1087/02 of 14. November 2002; VSRH, Rev 382/02 of 25. March 2003; County Court in Bjelovar, Gž 1158/2004-2 of 23. September 2004; County Court in Zagreb, Gž. 3662/02 of 23. November 2004; VSRH, Rev 1034/04-2 of 20. September 2005; VTSRH, Pž 3580/05-3 of 13. December 2005; VTSRH, Pž 3670/04-3 of 24. October 2006; VTSRH, Pž 4205/04 of 19. December 2006; VTSRH, Pž 1480/04-3 of 26. February 2007; VSRH, Rev 636/2006-2 of 11. July 2007; VSRH, Rev 1000/06-2 of 11. July 2007; VTSRH, Pž 7102/2003 of 19. September 2007; VTSRH, Pž 5191/04-4 of 4. October 2007; VSRH, Gzz 19/2004-2 of 25. February 2008; VSRH, Rev 96/2008-2 of 14. October 2008; VSRH, Rev 499/2008-2 of 18. February 2009.

position imposes unfair contractual terms on the other party, especially on small or medium-sized enterprises (SME). This is another important argument which could contribute to possible future legal debate on incorporation of the consumer contracts provisions on unfair contract terms into the COA.

A possible argument against the unique regulation of unfair contract terms within the COA could be the fact that the COA cannot fulfil the requirements of Art. 7 of the Directive 93/13 regarding procedure for protection of collective interests of consumers. However, these rules on procedure against a person, who acts contrary to provisions on unfair contract terms, could continue to be regulated in Arts. 131-141b CPA.<sup>212</sup> Since Art. 131 CPA prescribes the same procedure also for protection of consumer interests regarding seller's responsibility for material defects that is regulated in the COA, the same solution could be introduced also with regard to unfair contract terms.<sup>213</sup> As Prof. *Josipović* emphasized correctly, the separate regulation of consumer and general contract law hinders the creation of a consistent contract law system appropriate to market relationships.<sup>214</sup> Unified regulation of unfair contract terms within the COA would bring more transparency and systematic to Croatian contract law and consequently enable more effective protection and enforcement of granted rights in practice.

## 2. Unfair contract terms in B2B contracts

As already mentioned, the Croatian legal system knows one set of legal rules concerning unfair terms in consumer contracts prescribed in Arts. 96 to 106 CPA, and another set of legal rules regulating the control of the standard pre-formulated contract terms in Arts. 295 to 296 COA. While the CPA provisions restrict the content review to B2C contracts, the COA provisions on control of fairness of general contract conditions are applicable to all kind of contractual relationships, namely to B2C, B2B, B2P and P2P contracts. As to the question of applicability of the unfair contract terms provisions to B2B contracts, the answer would be confirmative. The use of pre-formulated standard terms within the B2B contracts is the ordinary way of dealing between traders, and Art. 295 (1) COA defines general contract conditions as contractual terms that have been formulated for a larger number of contracts and which one party (drafter) proposes to the other contracting party before or at the time of entering the contract, regardless of whether they are included in a form contract (standard contract) or "referred to" in the contract.

<sup>212</sup> In September 2011 association "Franak" initiated before the Commercial Court in Zagreb the proceeding for the protection of the collective interests of clients of nine Croatian banks, claiming that the terms in their credit contracts (usually pre-formulated with general contract conditions) are unfair and thus null and void. Since the relevant association has no standing to apply for injunction in court according to Regulation on determining of persons authorized to initiate the proceeding for the protection of the collective interests of consumers (OG No. 124/09), the action was dismissed. However, association "Franak" signed the agreement on collaboration with Croatian Union of the Consumer Protection Associations "Consumer", which is an entity qualified to initiate such a proceeding. See <http://udrugafanak.hr/index.php/component/k2/item/download/16>, last visited on 15. February 2012.

<sup>213</sup> For more details see Čadjenić Z./Čikara E./Dabović Anastasovska J./Dollani N./Gavrilović N./Karanikić Mirić M./Meškić Z./Zdraveva N., Unfair Terms Directive (93/13) in: Jessel-Holst Ch./Galev G. (ed.), op.cit., p. 484. See also Art. 131 (1) CPA: "Any qualified entity is entitled to initiate the proceedings for the protection of the collective interests of consumers against a person who acts contrary to provisions of Articles 30 to 115 of this Act, provisions of Articles 400 to 429, Articles 881 to 903 of the Civil Obligations Act, provisions of Article 8, 9 and 14 of the Electronic Commerce Act, provisions of Article 15, 17 to 18a and 34 of the Electronic Media Act and provisions of Article 5 to 15 of the Ordinance on advertising and providing information on medicinal, homeopathic and medical products."

<sup>214</sup> The incorporation of rules on consumer contracts into the general act on obligations by applying them to all consumer contracts or eventually to all the other contracts could according to Prof. *Josipović* positively affect further modernization of contract law. See Josipović T., "Das Konsumentenschutzgesetz – Beginn der Europäisierung des kroatischen Vertragsrechts", in: Grundmann S./Schauer M. (ed.), *The Architecture of European Codes and Contract Law*, 2006, p. 129.

General contract conditions can be incorporated in B2B contracts also implicitly when the general contract terms of traders with monopolistic position are raised to the level of trade usages.<sup>215</sup> Pursuant to Art. 12 (2) COA, in B2B obligation relationships the trade usages which are ordinarily applied by traders in such relations apply, unless the parties excluded their application explicitly or implicitly. The rule is however only applicable under the limits set out in Art. 295 (5) COA, requiring that the contracting party knew or should have known the content of the general contract conditions at the time of the contract conclusion. This emphasizes the importance of control of unfair terms in general contract conditions in B2B contracts even more. A similar reasoning can also be found in Art. 86 of new Proposal for a Regulation on a Common European Sales Law, according to which in B2B contracts a contract term is unfair only if it forms part of not individually negotiated terms and is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing. When defining B2B relationships the Proposal stipulates that the Common European Sales Law may be used only in B2B relationships where all contracting parties are traders and at least one of those parties is SME. Similar *ratio* can be found in Arts. 295 to 296 COA with regard to fairness control of general contract conditions in B2B contracts.

This leads us to answering the second question concerning provisions on the declaration of invalidity of an unfair contract term applicable to both B2C and B2B contracts. As explained, the CPA provisions on this subject matter are restricted to B2C contracts. The CPA prescribes in its Art. 102 (1) that “an unfair contractual term is null and void” and in its Art. 102 (2) regulates the partial nullity. The COA on the other hand contains a provision applicable both to B2C and B2B contracts which declares a general contract term “void if it, contrary to the principle of good faith and fair dealing, causes evident inequality in rights and obligations of the parties to the detriment of the contracting party of the drafter or if it compromises the achievement of the purpose of the contract concluded, even if the general contract conditions including such provisions are approved by an authority” (Art. 296 (1) COA). Without explicit proclamation of such a general contract term as “unfair”, the COA declares the term that fulfills the conditions set out in Art. 296 (1), either in B2C or B2B contracts, invalid. These conditions correspond to the requirements of Art. 3 (1) of the Directive 93/13 and even go beyond its level of protection by declaring the general contract term void, if it compromises the achievement of the purpose of the contract concluded. Since the purpose of the contract must be determined by court interpretation on a case by case basis, this ground for nullity of general contract terms was criticized in practice and literature.<sup>216</sup> In connection with Art. 296 COA, Art. 324 (1) COA also regulates partial nullity for all types of contracts by prescribing that if “one clause of a contract is void, this shall not result in rendering the contract void, provided that the contract may survive without such void clause and that the clause was neither a condition nor a decisive motive for entering into the contract”, and even if it was, the contract shall remain valid, “where nullity is established in order to eliminate a void clause from a contract” (Art. 324 (2) COA).

Moreover, the posed question could also be observed from another angle and it could be argued, that there are other sporadic provisions in the COA and other special acts applicable both to B2C and B2B contracts, which concern different subject matters and sanction with invalidity such contract clauses, that at the same time also fulfil prescribed legal conditions for an unfair contract

<sup>215</sup> According to Art. 12 (1) COA any agreed trade usages and mutually developed practices shall apply to obligations between traders. This provision shows the influence of Art. 1:105 (1) as general provision of Principles of European Contract Law (PECL), which regulates, that the parties are bound by any usage to which they have agreed and by any practice they have established between themselves.

<sup>216</sup> See Slakoper Z., *Nevaljanost pojedinih...* (Invalidity of certain...), op.cit., p. 197.

term.<sup>217</sup> It should also be mentioned that both the CPA and the COA contain further provisions on legal consequences of unfairness of contract terms which will be elaborated in more detail later on (see below 6. ). Beside declaration of unfair term of general contract conditions null and void under Art. 296 (1) COA, the judicial control of general terms could have also other implications on B2B contracts. If the court establishes that the contracting party was not or should not have been acquainted with the general contract conditions at the time of conclusion of the contract, they will be not legally binding on that party (Art. 295 (5) COA). Furthermore, if the court finds that there is a conflict between the general contract conditions and individually negotiated provisions, according to the mandatory provision of Art. 295 (3) COA the latter shall be valid. However, it needs to be recognized that the determination of such a conflict will not be an easy task for the court, since the individually negotiated provision and the provision of general contract conditions will rarely be in obvious direct conflict. The courts also play a special role when interpreting general contract conditions by applying the *contra proferentem* principle in disputes concerning B2B transactions. Pursuant to this principle, where a contract is concluded according to a previously printed content, or it was prepared and proposed by one contracting party, the court shall interpret any unclear clause in favour of the other contracting party (Art. 320 (1) COA).

### 3. Definition of unfair contract terms and its concretization in the black or grey list; role of courts in interpreting unfair contract terms

Following the normative approach of the Directive 93/13, the Croatian legislator approximated provisions on general contract conditions in the COA and introduced in the CPA the so called general invalidity clause which defines criteria the court will use on a case by case basis when deciding on (in)validity of a certain contract term. As a consequence of literal transposition of Art. 3 (1) of Directive 93/13 into Art. 96 (1) CPA, 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 contractual parties' rights and obligations, to the detriment of the consumer.<sup>218</sup> This legal definition of unfair contract term, which concerns only B2C contracts, is unlike COA provisions on general contract conditions also applicable to pre-formulated individual contracts for single use. Art. 296 COA, which is applicable to both B2C and B2B contracts, restricts its fairness control only to standard terms formulated "for a larger number of contracts" (Art. 295 (1) COA) and without explicit proclamation of unfairness declares a term of general contract conditions which fulfills the conditions set out in its paragraph 1, null and void. Pursuant to Art. 296 (1) COA any provision of the general contract conditions shall be void if it, contrary to the principle of good faith and fair dealing, causes evident inequality in rights and obligations of the parties to the detriment of the contracting party of the drafter or if it compromises the achievement of the purpose of the contract concluded,

<sup>217</sup> E.g. Art. 345 COA regulates one possible situation by prescribing that at the request of an interested contracting party a court may annul the contract clause on exclusion or restriction of liability for ordinary negligence, if such agreement arises from a monopolistic position of the debtor or else from inequality in relations between the contracting parties in general. Furthermore, Art. 408 (2) COA regulates that a provision of the contract limiting or excluding liability for defects of things shall be void if the seller was aware of the defect and failed to notify the buyer thereof, and also where the seller imposed such a provision by making use of his monopolistic position, or with regard to a consumer contract. The COA contains similar provisions in Art. 528 (2) regarding lease contract and in Art. 558 (2) regarding rental contract. Also, under Art. 435 (2) COA if at the time of entering into the contract the seller was aware or could not have been unaware of a defect to his right, the provision of the contract on limitation or exclusion of liability for legal defects shall be void. Finally, there are also general COA provisions required under Art. 322 (1) COA on the nullity of each contract (contrariety to the Constitution of the Republic of Croatia, to the mandatory provisions or the society moral), COA provisions on defects of intention (Arts. 279 et seq. COA) and COA provision on excessive loss (Art. 375 COA) that allow the consumer to apply for annulment of the contract.

<sup>218</sup> Art. 83 (1) of the new Proposal for a Regulation on a Common European Sales Law retained basically the same definition.



even if the general contract conditions including such provisions are approved by an authority.<sup>219</sup> Thus, Art. 296 (1) COA transposes the requirements out of Art. 3 (1) of the Directive 93/13 in the first part of the sentence and adds the already mentioned, criticized ground for nullity regarding the achievement of the purpose of the contract. The interpretation of the concrete purpose of the contract represents a difficult and complicated task for the national court, which has to determine both the legal objective purpose of the contract and those goals which the parties are trying to achieve. Such an interpretation must be pursued according to general COA provisions on interpretation and by taking into account the common intention of the contracting parties (Art. 319 (2) COA).<sup>220</sup>

Both of these legal definitions from Art. 96 (1) CPA and Art. 296 (1) COA are not applicable to individually negotiated contract terms.<sup>221</sup> According to Art. 96 (2) CPA a certain contractual term shall be deemed not individually negotiated if it has been drafted in advance by the trader and the consumer has therefore not been able to influence its content, particularly when it is a term of the pre-formulated standard contract of the trader. An equivalent provision is contained in Art. 296 (3) COA according to which the provision on nullity of unfair standard terms in Art. 296 (1) COA shall not apply to those provisions of general contract conditions, which were subject to individual negotiations before the conclusion of the contract in the course of which the other party could have affected the content of such provision. However, the fact that certain aspects of a term or specific contractual term have been individually negotiated, whereas an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract of the trader, shall not exclude a possibility that the rest of the contract terms be assessed as unfair under Art. 96 (3) CPA. Pursuant to Art. 96 (4) CPA if the trader claims that a certain contractual term in a pre-formulated standard contract has been individually negotiated, the burden of proof in this respect shall lie with it.

Another exclusion from unfairness test concerns contractual terms on the subject matter and the price of the contract, if these are clear, understandable and highly visible (see Art. 99 CPA and Art. 296 (3) COA). Both provisions can be criticized, since the Croatian legislator transposed literally Art. 4 (2) Directive 93/13 without taking into account certain explanations from the preamble of the Directive, which could have been helpful for the courts when applying these provisions. By taking over the explanation out of recital 19 of the Directive 93/13 which specifies that the unfairness test does not apply to “the quality/price ratio of the goods or services”, a better understanding of the provision could have been achieved, in the sense that the fairness of other contract terms concerning price calculation or way of payment etc. can be examined.<sup>222</sup> By introducing the second explanation from the same recital according to which “the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms”, it could have been clarified to courts that these provisions, although not separately but in combination with

<sup>219</sup> See for example judgment of the Supreme Court of the Republic of Croatia, VSRH, Rev 1000/2006-2 of 11. July 2007: “Regulation (on criteria for compensation of investments made by lessee), which is not a delegated act, can have the significance of general contract conditions. (...) The term of general contract conditions (Regulation) according to which a lessee has a right to receive compensation for invested means only if the agreed rent is ten times higher than the initial one” was evaluated as unfair and too harsh to lessee.

<sup>220</sup> Art. 319 (2) COA: “When interpreting a controversial clause of a contract, the mutually agreed intention of the parties must be considered rather than the literal meaning of the expressions used, and the controversial clause must be understood in accordance with the principles of the law of obligations established by this Act.”

<sup>221</sup> Regarding this exclusion see 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, 27.04.2000, p. 14 (Report on the implementation of Directive 93/13).

<sup>222</sup> This is confirmed in the Report on the implementation of Directive 93/13, p. 15: “The terms laying down the manner of calculation and the procedures for altering the price remain entirely subject to the Directive.” In its earlier practice, before obligation of harmonization under SAA, the Supreme Court of the Republic of Croatia in its judgment VSRH, Rev 409/1996-2 of 10. February 2000, applied the corresponding provision of ex-Art. 143 COA of 1978, that, “the court is not authorized to examine the adequacy of price calculation, which the parties determine according to their free will”.

certain other contract terms can lead to unfairness to the detriment of the consumer.<sup>223</sup> The recent practice of the European Court of Justice (ECJ) (now: Court of Justice of the European Union)<sup>224</sup> and legal developments confirmed that excessive transposition of both Art. 3 (1) and Art. 4 (2) of the Directive on exclusion of specific contractual terms, would be in accordance with the Directive 93/13. Art. 32 of the Directive 2011/83/EU on consumer rights imposes on a Member State that adopts provisions in accordance with the minimum harmonisation principle (Art. 8 of the Directive 93/13) the obligation to inform the Commission thereof, as well as of any subsequent changes, in particular where „those provisions extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration“. Also in its judgment *Caja de Ahorros*, the ECJ stated: “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”.<sup>225</sup> The new Proposal for a Regulation on a Common European Sales Law makes the (un)fairness control of the main subject matter of the contract or of appropriateness of the price to be paid in B2C contracts conditional upon the trader’s fulfillment of the transparency requirement (Art. 80), while excluding such a test for B2B contracts.<sup>226</sup> A further exclusion from unfairness test concerns contractual terms by which mandatory statutory provisions or provisions and principles from conventions which are binding upon the Republic of Croatia are included in the contract (Art. 96 (5) CPA) and provisions of the general contract conditions, the content of which was taken over from applicable regulations (Art. 296 (3) COA). Beside mandatory provisions the COA also encompasses dispositive provisions of applicable legislature, which cannot be examined by the court when they are included in general contract conditions.<sup>227</sup>

Beside legal definition of an unfair contract term, Art. 97 CPA contains an indicative and non-exhaustive list of contractual terms which may be declared unfair by the court in each individual case on the basis of conditions regulated in Art. 96 CPA. Because of the limits of the EU competence in the field of consumer protection set up by the subsidiarity and proportionality principles

<sup>223</sup> See Petrić S., „Opći uvjeti ugovora prema novom ZOO“ (General contract conditions under the new COA), in Slakoper Z. (ed.), *Bankovni i finacijski ugovori* (Banking and Financial Contracts), Pravni fakultet Rijeka, Rijeka 2007, p. 56. Nevertheless, the necessity of restrictive interpretation of this provision can be deduced from the grey list of unfair contract terms in Art. 97 CPA, which enumerates certain contract terms on additional rights and obligations of contracting parties concerning subject matter and price of the contract.

<sup>224</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17. December 2007 amended the name and the structure of the ECJ, introduced changes concerning appointment of judges and Advocate-Generals, concerning competences etc.

<sup>225</sup> ECJ judgment of 3. June 2010, C-484/08 – *Caja de Ahorros y Monte de Piedad de Madrid v Asociacion de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR-00000.

<sup>226</sup> See Proposal for a Regulation on a Common European Sales Law, Art. 80 (2): Section 2 (Unfair contract terms in contracts between a trader and a consumer) does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the trader has complied with the duty of transparency set out in Article 82.

<sup>See</sup> also Art. 80 (3): Section 3 (Unfair contract terms in contracts between traders) does not apply to the definition of the main subject matter of the contract or to the appropriateness of the price to be paid.

<sup>227</sup> This is in accordance with recital 13 of the preamble of Directive 93/13: “(...) whereas in that respect the wording ‘mandatory statutory or regulatory provisions’ in Article 1 (2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established“. See also reference for a preliminary ruling from the Oberlandesgericht Oldenburg (Germany) lodged on 6 January 2011 in case C-8/11, *Johann Bilker and Others v EWE AG*, where the referring court asked whether Art. 1(2) Directive 93/13 to be interpreted as meaning that statutory or regulatory provisions are not subject to the provisions of that directive even in the case where a seller or supplier refers in his contractual terms and conditions to statutory or regulatory provisions which were adopted in respect of a different consumer group and a different type of contract.

(Art. 5 (3) and (4) TEU (ex Art. 5 (2) and (3) TEC))<sup>228</sup> the European legislator regulated in Annex of the Directive 93/13 the so called “grey list” of unfair contract terms.<sup>229</sup> The minimum harmonisation principle contained in Art. 8 of the Directive 93/13 allowed national legislators the transposition of the list either as grey (contract terms which are presumed to be unfair) or as black (contract terms which are always unfair), or even as a combination of both. On the contrary, the optional Proposal for a Regulation on a Common European Sales Law regulates for B2C contracts both a grey (Art. 85) and a black list of unfair contract terms (Art. 84).<sup>230</sup> The CPA transposed in Art. 97, by a grey letter rule, nineteen terms from Annex No. 1 lit. a–q of the Directive 93/13,<sup>231</sup> which need not necessarily be considered unfair and conversely, if they don’t appear in the list may nevertheless be regarded as unfair.<sup>232</sup> Thereby, the wording of the CPA grey list slightly differs from the wording of the Annex

<sup>228</sup> See consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), OJ C 83/01 of 30. March 2010.

<sup>229</sup> The Commissions Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final, contained both „black list“ in Annex II (Art. 34) and the „grey list“ in Annex III (Art. 35). However, these provisions have not entered into the Directive 2011/83/EU of the European Parliament and of the Council of 25. October 2011 on consumer rights.

<sup>230</sup> The problem of competence limitation will most probably not arise with regard to the proposed legal basis of Art. 114 TFEU, because of the “optional” nature of the Proposal for a Regulation on a Common European Sales Law. Pursuant to its Art. 3 the parties may agree that the Common European Sales Law governs their “cross-border contracts” for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7.

<sup>231</sup> According to Art. 97 CPA contractual terms which, subject to conditions referred to in Art. 96 CPA “may be regarded as unfair are, for instance:– term limiting or excluding the liability of a trader for the damage caused by the death or personal injury of a consumer, if the damage resulted from the trader’s harmful act, – term limiting or excluding the rights of the consumer vis-à-vis the trader or other third person in the event of total or partial non-performance of the contract, including the provision excluding the offset of consumer’s debt against the debt which the trader has against the consumer, – term by which the consumer undertakes to fulfil the contract, whereas the fulfilment of the trader’s obligation is subject to a condition whose fulfilment depends exclusively on trader’s will, – term providing that the trader retains sums paid by the consumer where the latter decides not to conclude the contract, or when he or she does not fulfil the contract, without providing for the consumer the same right in the event that the trader decides not to conclude the contract or does not fulfil the contract, – term by which the consumer undertakes to pay compensation for failure to fulfil which is substantially higher than actual damage, – term enabling the trader to rescind the contract on a discretionary basis, where the same right is not provided for the consumer, – term enabling the trader to retain the sums paid for services not yet performed by him, where it is the trader himself who rescinds the contract, – term enabling the trader to cancel a contract of indeterminate duration without giving reasonable cancellation period, except where there are justifiable grounds for cancellation, – term providing that a contract of fixed duration will be extended for an indeterminate or determinate period of time unless the consumer declares, before the termination of the contract, that he or she does not want an extension of the contract, if the deadline fixed for the consumer to declare so is unreasonably short, – term imposing upon the consumer certain obligations, when the consumer had no opportunity of becoming acquainted with that provision prior to the conclusion of the contract, – term allowing the trader to unilaterally alter contractual terms without a valid reason which is specified in the contract, – term allowing the trader to unilaterally alter characteristics of the product or service, without a valid reason, – term providing that the price of goods or service is to be determined at the time of the supply of the goods or at the time of the rendering of the service, or term allowing the trader to increase the price, without in both cases giving the consumer the right to rescind the contract if the actual price is substantially higher than the price agreed upon at the time of the conclusion of the contract, – term giving the trader the right to assess whether the product sold or service rendered is in conformity with the contract, – term giving the trader the exclusive right to interpret all or some terms of the contract, – term excluding or limiting liability of the trader for obligations undertaken for it by its agent or term by which a duty to honour these obligations is subject to compliance with certain formalities, – term obliging the consumer to fulfil his or her contractual obligations, even in situations where the trader did not fulfil its contractual obligations, – term allowing the trader to transfer, without the prior agreement of the consumer, rights and obligations under the contract on the third person, if the consumer is thus placed in the less favourable position, – term excluding, limiting or encumbering the consumer’s right to realise his or her contractual rights before the court or other competent body, particularly the term obliging the consumer to submit dispute to arbitration not envisaged by the applicable law, term preventing presentation of the evidence favourable to the consumer or term shifting burden of proof on the consumer when, according to the applicable law, burden of proof should lie with the trader.”

<sup>232</sup> This is in accordance with ECJ judgment of 7. May 2002, C-478/99 - *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-04147: “As regards the annex referred to in Article 3(3) of the Directive, the annex in question is (...) to contain an indicative and non-exhaustive list of terms which may be regarded as unfair. (...) In any event, in order to achieve the twofold objective pursued and to satisfy the requirements of legal certainty, it is essential for this list to be published as an integral part of the provisions of the Directive.”

to the Directive 93/13.<sup>233</sup> The CPA does not regulate exceptions prescribed in Annex No. 2 of the Directive 93/13 that allow to states to make certain exceptions from listed terms used by suppliers of financial services and thus the CPA provides a higher level of consumer protection.<sup>234</sup> The COA on the other hand introduces neither a black nor a grey list of unfair contract terms, restricting itself only to a general invalidity clause. Since the courts are obliged to observe nullity *ex officio* (Art. 327 (1) COA), meaning also nullity of an unfair contract term, the introduction of such an indicative list could have been helpful to Croatian courts when interpreting the meaning of criteria from the general invalidity clause in Art. 296 (1) COA. Using the existing legislative framework courts can use the so called grey list of Art. 97 CPA only when deciding on unfair contract terms in B2C contracts, what will rarely be the case, because the courts are ignoring special consumer protection legislation. To our knowledge, there are no court judgments concerning the CPA provisions on unfair contract terms.<sup>235</sup> However, ex-Art. 143 COA of 1978 contained in its paragraph 1 a general invalidity clause and in its paragraph 2 the indicative list of unfair terms in general contract conditions. Because of strict obedience of the *pacta sunt servanda* principle the courts are not fond of declaring nullity of terms in general contract conditions, which has led to quite moderate court practice concerning ex-Arts. 142 to 144 COA of 1978.<sup>236</sup> Nevertheless, respective judgments led to a conclusion that beside the general invalidity clause the indicative list of unfair contract clauses was of great use to them. Since neither the COA nor the CPA definitions of unfair contract term specify what is to be understood under evident or significant imbalance in the contractual parties' rights and obligations, this task is also left to the courts to decide it in each individual case.<sup>237</sup> According to Prof. *Petrić* this problem will especially arise with regard to innominate contracts, since there are no legal provisions about them that reflect the legislator's opinion on what is to be considered a balanced position in the contracting parties'

<sup>233</sup> E.g. transposition of Annex No. 1 lit. b misses the word "inappropriately", with regard to excluding or limiting the legal rights of the consumer, while transposition of Annex No. 1 lit. i misses the word "irrevocably" and doesn't qualify consumer's opportunity to become acquainted with a contract term as "real". When transposing of Annex No. 1 lit. p, instead of saying "where this may serve to reduce the guarantees for the consumer", Art. 97 18<sup>th</sup> indent CPA speak about a term which may "bring the consumer to a less favorable position".

<sup>234</sup> See the list in Čadjenović Z./Čikara E./Dabović Anastasovska J./Dollani N./Gavrilović N./Karanikić Mirić M./Meškić Z./Zdraveva N., op.cit., p. 473.

<sup>235</sup> However within the framework of alternative consumers' dispute resolution there are numerous judgments of e.g. Court of Honour of Croatian Chamber of Economy or of Court of Honour of Croatian Chamber of Trades and Crafts etc. In the latest judgment of Court of Honour of Croatian Chamber of Economy No. P-I-50/10 of 25. March 2011, confirmed after appeal with the judgment No. PŽ-II-13/11 of 7. October 2011, Court of Honour decided that the bank P.B.Z. d.d. is responsible for concluding an unclear and incomplete credit contract with the consumer A.D. because parties were prevented to individually negotiate at the time of contract conclusion and because the contract didn't contain exact parameters and method of calculation of these parameters which influenced the banks Decision on alteration of contractual interest rates. As a consequence an imbalance between parties' rights and obligations occurred, based on unilateral augmentation of contractual interest rates. The Court of Honour decided that the provisions of the pre-formulated contract on alteration of interest rate and on currency risks fulfill prerequisites of ex-Art. 81 CPA (now: Art. 96) on unfair contract terms.

<sup>236</sup> See *supra* footnote No. 18.

<sup>237</sup> See judgment of County Court in Zagreb, Gž. 3662/02 of 23. November 2004: "When the court examines whether a term of general contract conditions is too harsh on the other party, it needs to determine objectively if it reflects that what is presumed to be common in a certain branch, e.g. it needs to evaluate the common interests of whole circle of users in relation to the interests of drafter of the conditions, in order to evaluate to what extent a certain term of general contract conditions damages the concrete party in the dispute." See Order of the High Commercial Court of the Republic of Croatia (VTSRH), Pž 3670/04-3 of 24. October 2006: "It is considered that the author of general contract conditions respected the principle of conscientiousness and honesty, if he proceeded honestly and fair to the other party and took its interest always into account. Thus, the court shall be obliged to take into account all different interests that arise in connection with the contract, to estimate negotiation positions and strength of parties, to determine if one of the parties was forced to conclude a certain contract."

rights and obligations.<sup>238</sup> Herewith, we come to the last rhetorical question, if the courts should be bound by the black or grey list of the unfair contract terms. The experience of some EU Member States demonstrates that the introduction of a black or grey list can also have some negative consequences, since the courts were apt to hold only on terms listed therein. There were cases where the courts uncritically declared contractual terms from the list null and void in any case, or denied nullification of any other clause that wasn't listed therein, which caused a lower level of protection for the other contracting party.<sup>239</sup>

#### 4. Circumstances of relevance for the fairness test

Beside general circumstances required in Art. 322 (1) COA for the nullity of each contract (contrariety to the Constitution of the Republic of Croatia, to mandatory provisions or to society moral),<sup>240</sup> the CPA by way of transposition of Art. 4 (1) of the Directive 93/13, into its Art. 98 introduced a provision stipulating additional circumstances that should be taken into consideration by the courts while evaluating the unfairness of a contract term. When assessing whether a specific contractual term is fair, the nature of the good or service for which the contract was concluded, all circumstances before and during the conclusion of the contract, other terms of the contract as well as of some other contract which represents the main contract in relation to the contract being assessed shall be taken into account. Also, the grey list from Art. 97 CPA has a certain indicative effect in the assessment of fairness of a clause in B2C contracts.<sup>241</sup> Similarly the COA regulates in Art. 296 (2) that "in evaluating whether a provision in general contract conditions is void, it is necessary to take into account all circumstances before and at the time of conclusion of the contract, the legal nature of a contract, the type of goods or services that constitute the performance, other provisions of the contract and the provisions of another contract with which such provision of the general contract conditions is linked". All these additional circumstances should be taken into consideration by the courts when deciding whether a certain contract term is contrary to the principle of good faith. Beside this requirement the condition of significant imbalance in the contractual parties' rights and obligations must cumulatively be fulfilled in order to declare a contract term null and void. Although there are no special guidelines in the CPA or the COA for the interpretation of this question, when a contract term is contrary to the principle of good faith, the general principle stipulated in Art. 4 COA requires from both parties always to take into account each other's interests when drafting and concluding a contract and when performing contractual duties and fulfilling contractual

<sup>238</sup> Petrić S., *Opći uvjeti... (General standard...)*, op.cit., p. 50. According to Prof. Petrić the fulfillment of this task will be easy when the imbalance between parties rights and obligations is intensive, e.g. clauses in general contract conditions which deprive the other party from rights regulated for a certain type of contracts, clauses which exempt the drafter of general contract conditions from liability or restrict its liability unilaterally, clauses which ascertain to one contractual party rights not granted to it by mandatory provisions, clauses on right to unilaterally or even unlawfully cancel the contract etc.

<sup>239</sup> See EC Consumer Law Compendium, Case Law, [http://www.eu-consumer-law.org/caseofprovision\\_en.cfm?ArgumentID=60](http://www.eu-consumer-law.org/caseofprovision_en.cfm?ArgumentID=60), last visited on 3. November 2011. Further criticisms concern vague and broad formulation of terms listed in Annex No. 1 of the Directive 93/13. The Report on the implementation of Directive 93/13 demonstrated that the black list plays an important role, since out of a total of 1849 cases, 1689 concerned black lists while only 160 concerned grey lists.

<sup>240</sup> According to Art. 322 (1) COA a contract that is contrary to the Constitution of the Republic of Croatia, to mandatory laws or to society moral is null and void unless the objective of the infringed rule refers to some other legal consequence or the law provides differently in such case. The Constitutional Court of the Republic of Croatia decided in its Decision U-III 380/2001 of 5. May 2004 (OG No. 65/04) that an agreement of unproportionally high interest rates in a credit contract is against basic principles of civil law, i.e. principle of conscientiousness and honesty, principle of equality of parties to obligations, principle of equal value of performances and that contracted obligations are against society moral.

<sup>241</sup> Furthermore, the ECJ held in its judgment of 1. April 2004, C-237/02 – *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ulrike Hofstetter und Ludger Hofstetter* [2004] ECR I-3403, para. 21 that "the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law."

rights.<sup>242</sup> Thus, the enumerated circumstances will be helpful to courts when deciding whether the mentioned requirements are met. Their task will be even more facilitated if they adopt the Commissions interpretation of Art. 3 (1) of the Directive 93/13, according to which, the contract clause that created significant imbalance to the detriment of the other party cannot be consistent with the principle of good faith.<sup>243</sup>

However, some of the additional circumstances were already criticized in Croatian legal theory and practice. According to the first requirement when assessing whether a specific contractual term is fair, the court must take into account “the nature of the good or service”, which is the object of performance.<sup>244</sup> Due to transposition of Art. 4 (1) of the Directive 93/13, Art. 98 CPA uses the more appropriate term “nature”, while Art. 296 (2) COA uses a more narrow term speaking about the “type” of goods or services. When evaluating the fairness of a term in general standard conditions the court should not restrict itself only to the type of the contracts object but also evaluate all its other characteristics.<sup>245</sup> The requirement for the court to take into account “all circumstances before and during the conclusion of the contract” was found as too narrow, since the circumstances can aggravate for the contractual party also after conclusion of the contract.<sup>246</sup> There are also criticisms pursuant to which this requirement is of no relevance, because most of these contracts are concluded as pre-formulated standard contracts without possibility of negotiation on the content of the clause. Opposite to the Art. 98 CPA, Art. 296 (2) COA further mentions explicitly “the legal nature of a contract”, which is a basic requirement for the court when deciding on a certain contract. The last additional circumstance concerns the most complicated task for courts, namely taking into account other terms of the contract as well as some other contract which represents the main contract (CPA), i.e. the provisions of another contract with which the provision of the general contract conditions is linked (COA). Applying systematic interpretation the court must observe the concrete contractual term not as an isolated clause but as an integral part of the contract or of linked contracts as a whole. The court can only then decide whether the contractual term is unfair, i.e. whether its disadvantages can be compensated by advantages of other contract terms. In this way a certain contractual term which seems to be unfair, can be evaluated as fair in connection with other terms of the same contract or *vice versa*. This complicated task requires from the court to compare and interpret rights and obligations of contractual parties which are often, like by linked agreements, different with regard to their content,<sup>247</sup> especially since these can be concluded between different contracting parties. Finally it is interesting to notice that the new Proposal for a Regulation on a Common European Sales Law retained basically the same additional circumstances in Art. 83 (2) for B2C contracts and in Art.

<sup>242</sup> The preamble of the Directive 93/13 contains explanations in recital 16: “(...) whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account”.

<sup>243</sup> Beside this one, there are two other possible interpretations, one of which includes the mentioned possibility of cumulating these two requirements and another allows the alternative fulfillment of requirements. See Čadjenović Z./Čikara E./Dabović Anastasovska J./Dollani N./Gavrilović N./Karanikić Mirić M./Meškić Z./Zdraveva N., *op.cit.*, p. 467.

<sup>244</sup> The concept is to be interpreted as encompassing performance that may consist in giving, acting, omitting or toleration (Art. 269 (1) COA) and all objects of a contractual obligation, meaning all services and all things (movables, immovables and rights) (Art. 2 of the Act on Ownership and Other Real Rights, OG No. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09).

<sup>245</sup> See Petrić S., *Opći uvjeti... (General standard...)*, *op.cit.*, p. 54.

<sup>246</sup> The other contractual party could use *clausula rebus sic stantibus* regulated in Arts. 369 COA et seq. Possible improvement of circumstances should not affect the once established nullity of a contractual term, if a cause of nullity disappears after conclusion of the contract. See Art. 326 (1) COA pursuant to which a void contract shall not become valid, if a cause of nullity disappears in the future.

<sup>247</sup> See Petrić S., *Opći uvjeti... (General standard...)*, *op.cit.*, p. 54.

86 (2) for B2B contracts, with one additional circumstance regarding B2C contracts in Art. 83 (2) (a) concerning traders' compliance with the transparency duty.

## 5. Time limits for invalidation

In accordance with the requirements of the Directive 93/13 and the ECJ practice, the relevant provisions of the CPA and the COA do not prescribe a time limit for remedies on invalidating an unfair term or a contract which contains an unfair term. Pursuant to the mandatory provision of Art. 6 (1)<sup>248</sup> of the Directive 93/13, the state shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding for the consumer, and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. In its judgment *Cofidis*, the ECJ came to the conclusion that the Directive 93/13 precludes a national provision which prohibits the national court, on expiry of a limitation period, from finding that a term of the contract is unfair.<sup>249</sup> Compared to the ECJ judgment *Cofidis*, neither the COA nor the CPA contain in their general provisions or in their provisions on special types of contracts, a rule prescribing a limitation period for invalidating an unfair contract term. Namely, both the CPA and the COA contain provisions on legal consequences of unfairness of a contractual term (Art. 102 CPA, Arts. 322 et seq. COA). However, the CPA as *lex specialis* contains no special detailed provisions with regard to nullity, like provisions on invoking nullity, time period for invoking nullity etc. According to Art. 2 (2) CPA, unless otherwise provided in the CPA, B2C contracts shall be subject to provisions of the COA as *lex generalis*. General provisions of the COA on the nullity of contracts (Arts. 322 et seq. COA) contain the rule on time period for invoking nullity in Art. 328. Pursuant to this provision, the right to invoke nullity does not lapse, i.e. the time period for invoking nullity is unlimited.

## 6. The “ineffectiveness” or the “non-binding nature” of an unfair term

In accordance with requirements of Art. 6 (1) of the Directive 93/13, the Croatian legislator regulated in Art. 102 (1) CPA that “an unfair contractual term is null and void”. The COA contains a corresponding provision in Art. 296 (1) (in connection with Art. 322)<sup>250</sup> regulating nullity of unfair contract terms in general contract conditions.<sup>251</sup> Although Art. 6 (1) of the Directive 93/13 raised the question of the concept of nullity of an unfair term, the ECJ practice rejected the concept of relative nullity and confirmed the concept of absolute nullity in its judgments *Océano*, *Cofidis* and *Mostaza Claro*.<sup>252</sup> The latter concept was also followed by the Croatian legislator who prescribes absolute nullity as a consequence of unfair contract terms. Furthermore, according to the principle *utile per inutile non vitiatur* contained in Art. 6 (1) of Directive 93/13, Art. 102 (2) CPA regulates that the nullity of a certain contractual term does not entail the nullity of the contract itself, if the contract can survive

<sup>248</sup> See ECJ judgment of 26. October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421, confirmed in ECJ judgment of 6. October 2009, C-40/08 – *Asturcom Telecomunicaciones S.L. v. Rodríguez Nogueira* [2009] ECR I-09579.

<sup>249</sup> ECJ judgment of 21. November 2002, C-473/00 – *Cofidis v. Fredout*, [2002] ECR I-10875.

<sup>250</sup> See *supra* footnote No. 47.

<sup>251</sup> Old Art. 143 COA regulated two consequences of unfair terms in general contract conditions: absolute nullity and a possibility for the court to deny the use of e.g. set aside a particular term that is not null and void but is unfair or too harsh (relative nullity). See judgment of High Commercial Court of the Republic of Croatia (VTSRH), Pž 7102/2003 of 19. September 2007: “The court can deny the application of certain terms of general contract conditions which are unfair to one of the contracting parties, in other word which are contrary to the principle of equal value of performances”. See also judgments of Supreme Court of the Republic of Croatia: VSRH, Rev 819/1996 of 7. March 2000, VSRH, Gzz 19/2004-2 of 25. February 2008.

<sup>252</sup> ECJ judgment of 27. June 2000, Joined Cases C-240/98 to C-244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941; ECJ judgment of 21. November 2002, C-473/00 – *Cofidis v. Fredout*, [2002] ECR I-10875; ECJ judgment of 26. October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421.

without the null and void term. Same consequences are prescribed in Art. 296 (1) COA in connection with Art. 324 COA (partial nullity) within the COA general provisions on the nullity of contracts (Arts. 322 et seq. COA). Art. 324 (1) COA regulates partial nullity for all types of contracts by stipulating that if “one clause of a contract is void, this shall not result in rendering the contract void, provided that the contract may survive without such void clause and that the clause was neither a condition nor a decisive motive for entering into the contract”. In case the nullity is established in order to eliminate a void clause from a contract and to maintain the validity of the contract, the contract shall remain valid even if this void clause was a condition or a decisive motive for the contract (Art. 324 (2) COA). A corresponding provision can be found in the new Proposal for a Regulation on a Common European Sales Law, according to whose Art. 79, a contract term which is supplied by one party and which is unfair (...) is not binding on the other party (para. 1) and where the contract can be maintained without the unfair contract term, the other contract terms remain binding (para. 2). Thus special CPA and general COA provisions on the nullity reflect the idea of the Directive 93/13 regarding maintenance of the contract in the best interest of the weaker contracting party, when it is possible for the contract to survive without the unfair contract term (partial nullity).

Like the Directive 93/13 itself neither the provision of the CPA nor of the COA contain rules on partial retention, i.e. preservation of the unfair clause with a content which is still permissible, e.g. on alteration, amendment and adjustments of unfair terms in contracts. However, Art. 329 COA contains a rule on usury contracts, under which the damaged party may request from the court the reduction of the contractual obligation to a just amount within five years from the conclusion of the contract.<sup>253</sup> The court shall meet this request if possible, and the contract shall be valid with the corresponding alteration. Also, Art. 354 COA regulates the possibility for the court to reduce the sum of the contractual penalty at the request of the debtor, if it finds that the sum is disproportionately high with regard to the value and the significance of the subject of the obligation.

Finally, just like the provisions of the Directive 93/13, neither the CPA nor the COA contains a rule on unfairness e.g. nullity of written contract terms which are contrary to the requirements of Art. 5 of the Directive 93/13,<sup>254</sup> namely not drafted in plain, intelligible language.<sup>255</sup> Art. 100 CPA regulates that „when the law or an agreement of the parties provides that the contract must be in a written form, the contractual terms must be written clearly and understandably and must be easily noticeable”. By prescribing that the contractual terms must be “easily noticeable”, the Croatian legislator introduced a higher level of consumer protection, covering different trader techniques like clauses in small print etc. Although the same provision cannot be found in the COA with regard to general standard terms, it might be argued that Art 295 (4) COA follows the equivalent reasoning by prescribing that „general contract conditions must be published in a usual manner”. The problematic

<sup>253</sup> Upon revision in case VSRH, Rev 749/2006-2 of 10. October 2006, the Supreme Court of the Republic of Croatia abolished judgments of Municipal and County Court in Zagreb and referred the case back to lower court instance. Although the courts of lower instance dismissed the action because of expired five years time period, the Supreme Court found that the plaintiff rightly argues that the agreed interest rate of 30% (lowered to 15%) is null and void in the amount which goes beyond 9% and that the right to invoke nullity does not lapse.

<sup>254</sup> Similarly to the original text of this provision from the Directive, Art. 31 (2) of the Commission’s Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final, introduced new transparency requirement, pursuant to which contract terms must *inter alia* 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”. This provision has not entered into the Directive 2011/83/EU of the European Parliament and of the Council of 25. October 2011 on consumer rights.

<sup>255</sup> There are views in legal theory that the recital 20 of the preamble of Directive 93/13 restricts the interpretation rule to clauses that have not been drafted in plain language, which further implies that for plain, but unintelligible clauses there are no legal consequences. Such an interpretation of the Directive would, however lead to very unusual consequences. For instance, Art. 101 (1) speaks about “dubious or unintelligible contractual terms”, while Art. 320 (1) COA mentions “unclear clauses”.



issue here certainly is the meaning of “in a usual manner”.<sup>256</sup> This provision is followed by Art. 295 (5) COA that stipulates, that general contract conditions are binding for a contracting party if that party was acquainted or should have been acquainted with them at the time of the conclusion of the contract.<sup>257</sup> This provision serves *inter alia* for the fulfillment of the purpose of Art. 295 (4) COA, i.e. of the transparency requirement. Since the lack of transparency cannot lead to unfairness i.e. invalidity of a certain term, the only consequence for the breach of the transparency requirement is to be found in the interpretation rule of Art. 5, 2<sup>nd</sup> sentence of the Directive 93/13. This rule was transposed in Art. 101 (1) CPA, which prescribes that “dubious or unintelligible contractual terms are interpreted in a manner that is more favourable to the consumer”. This rule is however not applicable in proceedings for the protection of collective interests of consumers initiated according to Art. 131 CPA, which restricts its use to procedures initiated by individual actions only (Art. 101 (2) CPA). An equivalent *contra proferentem* rule can be found in Art. 320 (1) COA, which regulates that “where a contract is concluded according to a previously printed content, or where a contract was prepared and proposed by one contracting party, any unclear clause shall be interpreted in favour of the other contracting party”.<sup>258</sup>

## 7. Ex-officio declaration of the contract term as unfair

As described above, Art. 102 CPA contains only one rule on the nullity as a consequence of unfairness of the contractual term in B2C contracts. However, it contains no special detailed provisions concerning nullity, like provisions on consequences of nullity, on subsequent disappearance of the cause of nullity, on invoking nullity, on time period for invoking nullity etc. These are regulated in the general provisions of the COA on the nullity of contracts (Arts. 322 et seq. COA) which are thus applicable to all contracts. With regard to these matters, unless otherwise provided in the CPA, the COA provisions apply as *lex generalis* (Art. 2 (2) CPA). According to Art. 327 (1) COA on invoking nullity the court examines the matter of nullity *ex officio* and any interested party may invoke nullity. According to Art. 327 (2) COA even a state attorney is entitled to request the establishment of nullity. Although the latter provision is applicable to all contracts, the primarily purpose of this provision on state attorney control were most probably B2B contracts. However, there is no doubt about its relevance for the private consumer contract law, especially regarding the large number of contracts which public sector undertakings acting as traders conclude through pre-formulated contracts with

<sup>256</sup> Prof. Petrić points out that there are more possible interpretations of the wording of the provisions, which could include publication in official journals or publication in business premises of the drafter of general contract conditions. The question has also been raised whether general contract conditions should be made available only to the concrete contracting party or to the wider public. The validity of general contract conditions is not made conditional upon their publication. Their validity depends on the fulfillment of requirements from Art. 295 (5) COA. See Petrić S., *Opći uvjeti... (General standard...)*, op.cit., p. 38.

<sup>257</sup> Recital No. 20 of the Directive 93/13 provides that „the consumer should actually be given an opportunity to examine all the terms”. Also, Annex No. 1 lit. i stipulates that a term that „irrevocably bind[s] the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract” may be deemed unfair.

<sup>258</sup> The new Proposal for a Regulation on a Common European Sales Law regulates with regard to B2C contracts a duty of transparency for contract terms not individually negotiated. Art. 82 stipulates that where a trader supplies contract terms which have not been individually negotiated with the consumer (...) it has a duty to ensure that they are drafted and communicated in plain, intelligible language. Beside consequences in form of the mandatory interpretation rule of Art. 64, Article 81 of the Proposal prescribes the mandatory nature of the whole Chapter 8. on unfair contract terms. Art. 64 regulates that where there is a doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer shall prevail unless the term was supplied by the consumer.

consumers.<sup>259</sup> As mentioned above the right to claim nullity of a void contract does not expire pursuant to Art. 328 COA and the nullity can be invoked in proceedings initiated by individual action and in proceedings for protection of collective interests of consumers initiated by an action for injunction by a qualified entity according to Art. 131 CPA.<sup>260</sup> The court shall declare unfair contract term null and void *ex tunc*.

The nullity of a contract term does not render the consumer contract void in its entirety, if the contract can survive without such void clause (Art. 102 (2) CPA; Art. 324 (1) COA). Except for provisions on usury contracts (Art. 329 COA) and on contractual penalty (Art. 354 COA), there are no rules on the matters of alteration, amendment or adjustments of unfair contract terms. The provisions of the Croatian law on unfair contract terms are thus in accordance with the developed ECJ jurisprudence, according to which the national courts must have the power to review the fairness of a contract term on their own initiative. As stated in *Oceano* the aim of the mandatory provision of Art. 6 (1) of the Directive 93/13, which requires states to lay down that unfair terms are not binding on the consumer, could not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. As further acknowledged in *Oceano*, the effective protection of the consumer may be achieved only if the national court has the power to evaluate unfair contract terms of its own motion.<sup>261</sup> Although in its judgments *Claro* and *Cofidis*, the ECJ went a step further by arguing that the national court has an obligation to evaluate unfair contract terms *ex officio*,<sup>262</sup> the ECJ cases *Pannon*, *Rodriguez* and *Pohotovost* made this obligation conditional upon the actual possibility of the national court to examine the unfairness of a contract term with regard to the availability of necessary legal and factual elements.<sup>263</sup> The concretization of this obligation came in the recent ECJ judgment *Pénzügyi Lízing*, where firstly, the obligation for the national court to investigate of its own motion whether a contract term falls within the scope of Directive 93/13 was established, and secondly, the obligation for the national court to assess of its own motion whether a contract term is unfair was

<sup>259</sup> This concerns primarily public sector undertakings which provide public services because of their enterprise (company) status. According to Art. 24 (1) CPA public services shall mean: electricity distribution and supply, natural gas distribution and supply, thermal energy distribution and supply, fresh water supply, waste water drainage and purification, public passenger transport, postal services, maintenance of cleanness, municipal waste disposal, maintenance of cemeteries and crematories, including transport of the deceased, chimney-sweeping craft, and public telecommunications services. There were several opportunities for the Constitutional Court of the Republic of Croatia to decide on constitutionality and legality of general contract conditions of public services providers prescribed in their ordinances, like for instance in Decision U-II/2188/2011 of 9. July 2003. The Constitutional Court established that Art. 50 (1) of Ordinance on General Contract Conditions for Providing Telecommunication Services is *inter alia* contrary to the principle of equal value of performances (ex Art. 15 COA (now Art. 7 COA)) and abolished this provision. The provision stipulated that the telephone subscription fee is remuneration for readiness of telecommunications system.

<sup>260</sup> The procedure can be initiated against an individual trader, a group of traders from the same economic sector, traders' chambers, against traders' interest associations or against the drafter of the traders' code of conduct. The court decision shall determine, define and order cessation of infringement, order removal of detrimental consequences and prohibit similar behavior in the future with respect to all consumers. The damaged consumer can initiate an individual procedure for compensation or procedure for contract nullification etc. See Tomljenović V./Čulinović Herc E./Butorac Malnar V. (eds.), *Republika Hrvatska na putu prema Europskom pravosudnom području, Rješavanje trgovačkih i potrošačkih sporova* (The Republic of Croatia on its Way to the European Judicial Area, Settlement of Commercial and Consumer Disputes), Rijeka, Pravni fakultet Sveučilište u Rijeci, 2009.

<sup>261</sup> ECJ judgment of 27. June 2000, Joined Cases C-240/98 to C-244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941, para. 26.

<sup>262</sup> ECJ judgment of 26. October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421, para. 38; ECJ judgment of 21. November 2002, C-473/00 – *Cofidis v. Fredout* [2002] ECR I-10875.

<sup>263</sup> ECJ judgment of 4. June 2009, C-243/08 – *Pannon GSM v. Erzébet Sustikné Györfi* [2009] ECR I-4713; ECJ judgment of 6. October 2009, C-40/08 – *Asturcom Telecomunicaciones S.L. v. Rodríguez Nogueira* [2009] ECR I-09579, para. 32; ECJ judgment of 16. November 2010, C-76/10 – *Pohotovost' s.r.o. v. Iveta Korčkovská*, OJ C 030, 29. January 2011, p. 0012.

confirmed.<sup>264</sup> Although a rich practice of the Court of Justice of the European Union on unfair contract terms gives detailed guidelines to our national courts regarding application and interpretation of transposed provisions, this could in the near future represent a difficult task for them.<sup>265</sup>

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<sup>264</sup> See the ECJ judgment of 9. November 2010, C-137/08 – *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, OJ C 013, 15.01.2011., p. 0002. The Court has not adopted the Opinion of Advocate General *Verica Trstenjak* regarding the third additional question referred, where Advocate General stated that beside the general obligation for the courts to examine the fairness of terms on their own motion, there is no obligation to determine legal and factual circumstances needed for this examination, where national procedural law permits such an examination only on application by the parties and the parties have not made any application to that effect.

<sup>265</sup> See Opinion of Advocate General *Trstenjak* delivered on 14 February 2012 in Case C618/10, *Banco Español de Crédito, SA v Joaquín Calderón Camino* where AG pointed out that Directive 93/13 is to be interpreted to the effect that it does not require a national court, in the context of a national order for payment procedure, to give a ruling of its own motion and *in limine litis* on whether a term concerning interest on late payments in a consumer credit agreement is not binding, provided the assessment of whether that term is unfair can be transferred, in accordance with the national procedural rules, to an *inter partes* procedure to be initiated through an appeal brought by the debtor, in which the national court is given the opportunity to obtain the legal and factual elements necessary to conduct such an assessment. AG also confirmed that Art. 6(1) of Directive 93/13 precludes a national provision which authorises the national court to modify a consumer agreement so as to replace an unfair contractual term by another term which is not to be regarded as unfair. In another case C453/10 Advocate General *Trstenjak* in Opinion delivered on 29.11.2011, *Jana Pereničová, Vladislav Perenič v S.O.S. financ, spol. sro* AG held that Art. 6 (1) Directive 93/13 does not concern the question whether the invalidity e.g. nullity of whole credit contract containing numerous unfair terms is a more advantageous legal consequence to the consumer, but nothing precludes states to prescribe such a consequence in their national legislation. AG also found that quoting in the credit contract a lower annual percentage rate (APR) than is in fact the case represents an unfair commercial practice, which national judge can take into consideration as an additional circumstance while evaluating the unfairness of a contract term.