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THE DUAL/MULTIPLE NATURE OF “PLAIN AND INTELLIGIBLE LANGUAGE” OF UNFAIR TERMS IN CONSUMER CONTRACTS UNDER EUROPEAN LAW AND ITS POLISH TRANSPOSITION

Abstract:

The “plain and intelligible language” requirement performs a dual function within the framework of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. First, it is listed as a requirement for application of the exemption included in Art. 4(2) as regards policing terms relating to the main subject matter of the contract or to the adequacy of the price and remuneration. Second, the “plain and intelligible language” requirement is a general requirement addressed at all consumer contracts executed in writing (Art. 5). This paper examines the boundaries of the precept, and places particular emphasis on the recent developments in both EU and Polish law, where the requirement has been used to imply a host of information duties aimed at enhancing consumers’ capacity to foresee the consequences of the terms that they are assenting to. This apparently novel approach, which has been developing in piecemeal fashion in the CJEU’s ever-expanding case law, may trigger significant consequences in the field of consumer contract law. In some ways, expansion of the substantive scope of the requirement may be said to be motivated by the fact that courts, under Art. 4(2) of Directive 93/13, are unable to subject the adequacy of the price and remuneration against the services or supply of goods received in exchange to the substantive fairness test under Art. 3(1) (examination of terms through the prism of the notions of good faith and significant imbalance in the parties’ rights and obligations to the detriment of the consumer).

Keywords: plain and intelligible language, consumer contracts, unfair terms, substantive unfairness, Directive 93/13/EEC

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1. NATURE AND EMANATIONS OF THE PLAIN AND INTELLIGIBLE LANGUAGE REQUIREMENT

The “plain and intelligible language” requirement performs a dual function within the framework of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.¹ First, it is listed as a requirement for application of the exemption included in Art. 4(2), which prohibits subjecting terms relating to the main subject matter of the contract or to the adequacy of the price and remuneration to the substantive fairness test. Second, it features as a general requirement addressed at all consumer contracts executed in writing (Art. 5).² Despite being featured in two distinct provisions, these requirements have the same scope.³ The transparency standard is a novelty under Directive 93/13, and it has been argued in the academic literature that it was spurred by developments within German consumer contract law (*Transparenzgebot*).⁴

It has been emphasized – which also finds confirmation in recital 20 in the preamble to Directive 93/13 – that the “plain and intelligible language” requirement encompasses the duty of the trader or seller to enable the consumer to actually familiarize himself⁵ with all the terms appearing in any pre-drafted contract put before him.⁶ Crucially, the consumer must also have an opportunity to discover the consequences of those terms, and those consequences shall include also those going beyond the available legal remedies or, more generally, changes in the sphere of rights and obligations.⁷ The

¹ [1993] OJ L 95.

² Case C-26/13 *Kásler v OTP Jelzalogbank Zrt* [2014] ECLI:EU:C:2014:282, para. 68; H. Collins, *The Directive on Unfair Contract Terms: Implementation, Effectiveness and Harmonization*, in: H. Collins (ed.), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law*, Kluwer Law International, Alphen aan den Rijn: 2009, pp. 12-13; P. Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, Hart Publishing, London: 2007, pp. 135-136; E. Macdonald, R. Atkins, *Koffman & Macdonald's Law of Contract* (8th ed.), Oxford University Press, Oxford: 2014, pp. 245-247; M.B.M. Loos, *Transparency of standard terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law*, 23(2) *European Review of Private Law* 179 (2015), pp. 179, 182, 185.

³ C-26/13 *Kásler v OTP Jelzalogbank Zrt*, para. 69.

⁴ E. Hondius, *The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States*, 3 *European Review of Private Law* 241 (1995), pp. 248-249.

⁵ The masculine pronoun and its derivatives is used throughout this text, in part because it is used in the CJEU's decisions. Obviously the gender of consumers should encompass both the masculine and feminine forms of pronouns, but for the sake of readability only the masculine form is used.

⁶ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECLI:EU:C:2012:242, para. 27. S. Whittaker has written that the recital “suggests that while in general words which are plain and intelligible may nevertheless be ambiguous (that is, they may clearly and comprehensibly have more than one meaning), Article 5 of the Directive should be interpreted as requiring that contract terms should *not* be ambiguous, for otherwise consumers would not know to what they were agreeing.” S. Whittaker, *The Language or Languages of Consumer Contracts*, in: J. Bell, C. Kilpatrick (eds.), 8 *Cambridge Yearbook of European Legal Studies, 2005-2006*, Hart Publishing, London: 2006, p. 247.

⁷ C-26/13 *Kásler v OTP Jelzalogbank Zrt*, para. 67; M. Chen-Wishart, *Regulating Unfair Terms*, in: L. Gullifer, S. Vogenauer (eds.), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale*, Hart Publishing, London: 2014, p. 112.

consumer must also be able to foresee, based upon the meaning and forward-looking wording of the terms he assents to, any amendments to the contract as regards the fundamental elements of performance, such as in particular the amount of fees payable.⁸ Furthermore, where a consumer concludes more than one contract with the same seller or supplier as part of a package, more protection will be afforded, as a consumer in such a situation cannot be held to the same standard of vigilance regarding the extent of the risks covered by either contract as he would if he had concluded each contract separately.⁹

The “plain and intelligible language” requirement has laid the groundwork for the creation of certain information duties with respect to unfair terms.¹⁰ The European court has confirmed that informing the consumer prior to the conclusion of a contract of its terms and potential consequences thereto is, per the CJEU’s judgment in *RWE Vertrieb*,¹¹ “of fundamental importance for a consumer.”¹² In the context of a term providing for the possibility of altering the charge for a service, the Court has explained that the reason for and method of such an alteration shall be laid out in clear and comprehensible terms, thus allowing the consumer to foresee these alterations.¹³ It is insufficient to merely refer to a national provision which determines the rights and obligations of the parties – the content of those provisions must be laid out to the consumer.¹⁴ It is also insufficient to attempt to remedy the absence of such information prior to the

⁸ C-472/10 *Invitel*, para. 28. Loos, *supra* note 2, p. 185; B. Keirsbilck, *The Erga Omnes Effect of the Finding of an Unfair Contract Term: Nemzeti*, 50(5) *Common Market Law Review* 1467 (2013), p. 1472; Micklitz and Reich have generalized: “[t]he Court takes the information rhetoric seriously in that only clear and transparent information allows the consumer to make use of his rights. The Court, however, seems to put great confidence in the individual capacity of the consumer to check the legitimacy of the price increase and to shop for better offers” (see H.-W. Micklitz, N. Reich, *The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)*, 51(3) *Common Market Law Review* 771 (2014), p. 787).

⁹ Case C-96/14 *Van Hove v CNP Assurances SA* [2015] ECLI:EU:C:2015:262, para. 48.

¹⁰ M. Durovic, *European Law on Unfair Commercial Practices and Contract Law*, Hart Publishing, London: 2016, p. 178; A. Metzger, *Data as Counter-Performance: What Rights and Duties for Parties Have*, 8(1) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 2 (2017), p. 5. For more on the relationship between these two aspects in the context of the proposal for a Common European Sales Law, see C. Azcárraga Monzonís, *The Mandatory Nature of the Right of Withdrawal*, in: J. Plaza Penades, L.M. Martínez Velencoso (eds.), *European Perspectives on the Common European Sales Law*, Springer, Berlin: 2014, pp. 62-64.

¹¹ Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECLI:EU:C:2013:180.

¹² *Ibidem*, para. 44.

¹³ *Ibidem*, para. 49. It is unclear, however, whether the consumer shall be only aware of the possibility of introducing amendments or whether he should have a sense as to the type and gravity of potential amendments. M. E. Mendez-Pinedo, *Iceland, the EFTA Court and the Indexation of Credit to Inflation: Operating in Nature Ex-Post but Need to Calculate the Disclose ex-ante. A Law of Contradiction*, 6 *Juridical Tribune* 7 (2016), pp. 24-25, 28.

¹⁴ C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, para. 50. See further C. Leone, *Transparency revisited – on the role of information in the recent case-law of the CJEU*, 10 *European Review of Contract Law* 312 (2014), pp. 316-323.

conclusion of the contract by informing the consumer in advance of any variation to the contract, even where a termination right is ensured.¹⁵ The “principal conditions” of the right of unilateral variation a trader reserves for itself must also be specified.¹⁶ In *Andriuciuc*,¹⁷ the CJEU made a series of sweeping assertions linking information duties and the so-called substantive prong of transparency. For consumers to be able to estimate the consequences for them of a contract they happen to be entering into (such as the cost of a loan they are taking out), the seller must inform such consumers – for example in the context of a loan denominated in a foreign currency – that they are “exposing [themselves] to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a fall in the value of the currency in which he receives his income. Second, the seller or supplier, in this case the bank, must be required to set out the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, particularly where the consumer borrower does not receive his income in that currency.”¹⁸

¹⁵ C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, para. 51.

¹⁶ *Ibidem*, para. 52. Loos and Luzak have attempted to extrapolate the findings onto other types of exercises of a unilateral right to vary a contract: “[a]lthough all cases so far decided by the CJEU with regard to modification terms pertain to changes of the price or costs charged to the consumer, there does not seem to be a good reason not to apply the same reasoning to other unilateral changes of the contract, in particular, if they would substantially alter the parties’ other rights and obligations. In other words, and even though paragraph 1 under (l) of the Annex to the Directive refers only to the change of contractual terms defining the price as potentially unfair, in our opinion, the national courts could apply this provision analogically to a substantial change of other terms and conditions. We expect they will declare the terms allowing for such changes to be unfair if the conditions under which the terms and conditions may be changed are not valid or not specified in the contract or if consumers are not given an opportunity to terminate the contract” (M. Loos, J. Luzak, *Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers*, 39 *Journal of Consumer Policy* 63 (2016), p. 69).

¹⁷ Case C-186/16 *Andriuciuc v Banca Romaneasca SA* [2018] ECLI:EU:C:2017:703.

¹⁸ *Ibidem*, para. 50. See wyrok Sądu Najwyższego [judgment of the Supreme Court], 22 January 2016, I CSK 1049/14, 2 *Monitor Prawa Bankowego* 16 (2017), which offers a fitting illustration of how information duties may be imported into national law as part and parcel of the plain and intelligible language requirement. The judicial panel in that case considered that providing a consumer with an opportunity to familiarize themselves with average exchange rates on the website of the Polish National Bank was compliant with the applicable threshold. Further, the consumer in that case was informed of the meanings of a host of specialist economic terms as well as of the indexation mechanism. Still however the Court, having noted that the bank is in possession of all information relevant to ascertaining the installment amounts payable with respect to outstanding loans, observed that the exchange rates, although made available to consumers at large, fluctuate daily. Therefore, knowledge of a bank consumer of the average applicable rate is of a merely historical character. He is allowed to realize the amount of installments already paid only post factum, in practice – after a certain sum is withdrawn from the bank account dedicated to servicing the consumer’s mortgage loan. This, coupled with the fact that the manner of determining exchange rates typically constitutes a bank’s proprietary information, was held sufficient to warrant an inference of “information inequality” between the parties, thus falling short of the plain and intelligible language standard. Consumers, the Court surmised, should be made aware of the basic mechanisms governing the indexation of their mortgage loan installment amounts with a view to facilitating them in undertaking precautionary steps aimed at protecting their economic interests in advance and anticipating potential currency rate fluctuations.

2. FACTORS IMPACTING THE JUDICIAL TREATMENT OF PLAIN AND INTELLIGIBLE LANGUAGE

The scope of the obligation to be imposed on the stronger contracting party is predicated upon such factors as the time between the notification of an upcoming amendment and its entry into force; the information provided at the time of that communication; and the cost to be borne and the time necessary to change supplier.¹⁹ The level of plainness and intelligibility may also vary according to the type of goods or services concerned.²⁰ In *Van Hove*, which concerned a term defining “total incapacity for work” in an insurance contract, the CJEU required that the information which had to be taken into account must include “the specific features of the arrangements for covering the loan repayments payable to the lender in the event of the borrower’s total incapacity for work and the relationship between those arrangements and the arrangements laid down in respect of other contractual terms.”²¹ A common thread appears to be the ability to foresee the economic consequences of a term – although it remains unclear whether the individual circumstances of a given consumer are to be taken into account.²² I submit that they should be, and, more importantly that this could be accommodated within the paradigm of a “reasonably well informed and reasonably observant and circumspect” consumer. In *Van Hove*, where the claimant was physically handicapped, regard could be had to his economic situation, his prospects, and how this affected his ability to perceive economic reality. In other words, a consumer potentially deprived of, as it was the case in *Van Hove*, insurance coverage in the event of severe injury, may be inclined to accord more weight to economic advantage and subjectively consider financial remuneration as particularly beneficial.²³ Indeed, in that

¹⁹ C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, para. 54.

²⁰ *Ibidem*, para. 51.

²¹ *Ibidem*, para. 41.

²² Note that recital 34 of the Consumer Rights Directive (2011/83/EU) obliges traders to take account of consumer’s characteristics in providing certain information under the conditions of a distance or off-premises contract: “The trader should give the consumer clear and comprehensible information before the consumer is bound by a distance or off-premises contract, a contract other than a distance or an off-premises contract, or any corresponding offer. In providing that information, the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.” (A. Borselli, *Cognoscat emptor: on the insurer’s duty to inform the prospective policyholder in Europe*, 2 Insurance Law Review 55 (2012), pp. 63-64; S. Weatherill, *Consumer Rights Directive: How and Why a Quest for Coherence Has (Largely) Failed*, 49(4) Common Market Law Review 1279 (2012), pp. 1293-1295; G. Straetmans, *Misleading practices, the consumer information model and consumer protection*, 5(5) Journal of European Consumer and Market Law 199 (2016), pp. 205-208).

²³ This outlook is merely a reflection of the notion of “vulnerable consumer”, which has been gaining ground in EU consumer protection law. A stellar piece of research on the subject is the Vulnerable Consumer Working Group Guidance Document on Vulnerable Consumers, published in November 2013, available at: https://ec.europa.eu/energy/sites/ener/files/documents/20140106_vulnerable_consumer_report_1.pdf (accessed 30 May 2019). See also B. Duivenvoorde, *The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive*, 2(2) Journal of European Consumer and Market Law 69

case, the Court impliedly defined economic wellbeing for the consumers at hand as an ability to meet monthly payments on their loans.²⁴

The corollaries from *RWE Vertrieb* have been mostly reiterated in later cases. It is true, however, that the most ground-breaking case in this regard was *Kásler*, closely followed by *Matei*.²⁵ In the former case, the CJEU made some far-reaching observations concerning the remit of the “plain and intelligible language” requirement, inserting into it a number of information duties aimed at equipping the consumer with the knowledge and data necessary to make informed decisions and ensure adequate consumer choice.²⁶ Specifically, the contract must transparently set out the specific functioning of the mechanism to which the relevant term relates and the relationship between that mechanism and that provided for by other contractual terms, so that that consumer is in a position to evaluate, on the basis of clear and intelligible criteria, the economic consequences for him which derive from it.²⁷

(2013); J. Luzak, *Vulnerable Travellers in the Digital Age*, 5(3) *Journal of European Consumer and Market Law* 130 (2016). For an American perspective, see M.N. Browne, K.B. Clapp, N.K. Kubasek, L. Biksacky, *Protecting Consumers from Themselves: Consumer Law and the Vulnerable Consumer*, 63(1) *Drake Law Review* 157 (2015), pp. 176-190.

²⁴ C-96/14 *Van Hove v CNP Assurances SA*, para. 42.

²⁵ C-143/13 *Matei v SC Volksbank Romania SA* [2015] ECLI:EU:C:2015:127.

²⁶ *Ibidem*, para. 70, stating that “information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier.”

²⁷ C-26/13 *Kásler v OTP Jelzálogbank Zrt*, para. 75. C. Willett has expressed skepticism with regard to this approach: “[h]owever, the need-based viewpoint is that none of this will have much effect: Consumers are unlikely to read standard terms, so ‘prominent’ and ‘transparent’ standard terms will do little to inform them. Even if ‘prominence’ means that charges must be specially highlighted in some way (and (...) this is not clear), consumers are assumed generally to focus on the essential charges, certainly at least on those that are routinely payable, rather than on contingent charges. If they do read about contingent charges, they may find it difficult to assess whether the events triggering these charges are likely to occur – possibly assuming they will not occur. Consumers are therefore unlikely to feel the need to bargain for lower charges (if they did, they are unlikely to have the bargaining power/skill to be successful), or to make comparisons between different businesses’ charges – so the charges will often be subject to very limited competitive discipline” (footnotes omitted). C. Willett, *Re-Theorising Consumer Law*, 77(1) *Cambridge Law Journal* 179 (2018), pp. 204-205. In the Polish literature, see M. Romanowski, *Zasada przejrzystości materialnej umowy konsumenckiej* [The principle of substantive transparency of a consumer agreement], in: M. Romanowski (ed.), *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe na tle orzecznictwa TSUE* [Sustainability of a consumer agreement following the striking out of unfair terms under the CJEU’s jurisprudence], C.H. Beck, Warszawa: 2017, pp. 233-237; M. Sieradzka, *Glosa do wyroku TS z dnia 30 kwietnia 2014 r., C-26/13* [Case comment on the judgment of the CJEU of 30 April 2014, C-26/13], LEX 2014; W. Gontarski, *Przedkontraktowe obowiązki informacyjne banku w przypadku kredytów udzielanych w walucie obcej - glosa do wyroku TS z dnia 3 grudnia 2015 r., C-312/14* [Pre-contractual information duties in the case of loans taken out in a foreign currency - comment on the CJEU’s judgment of 3 December 2015, C-312/14], LEX 2016 (contending that the “economic consequences” encompass, within the context of a loan, the entire cost of a loan, taking into account differences in exchange rates); R. Stefanicki, *Wdrażanie dyrektywy 93/13/EWG w świetle ostatniego orzecznictwa Trybunału Sprawiedliwości, cz. II* [Implementation of Directive 93/13/EEC in light of the latest case law of the Court of Justice], 6 *Przegląd Prawa Handlowego* 5 (2015), pp. 7-9.

In *Kásler*, the requirement that terms be drafted in plain, intelligible language was singled out as a condition for the full and proper transposition of Directive 93/13 into national legal systems.²⁸ It is insufficient for a scrutinized term to be merely formally and grammatically intelligible (semantically clear). Due to the fact that the protection afforded by Directive 93/13 at large is based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, in particular as regards his or her level of knowledge, the requirement of transparency must be understood in a broad sense.²⁹ This is specifically the case with regard to terms which allow sellers to calculate the level of monthly repayment instalments in accordance with the selling exchange rate carried by the seller, which ultimately results in increasing the cost of the financial service tendered at the consumer's expense. Thus the CJEU held that "it is of fundamental importance for the purpose of complying with the requirement of transparency, to determine whether the contract sets out transparently the reason for and the particularities of the mechanism for converting the foreign currency and the relationship between that mechanism and the mechanism laid down by other terms relating to the advance of the loan, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it."³⁰ As for the conversion mechanism, it is of paramount importance that the average consumer, defined as reasonably well informed and reasonably observant and circumspect, is (1) aware of the existence of a difference between a selling rate and a buying rate with respect to currency exchange; and (2) able to assess the potentially significant economic consequences caused to his detriment as a result of such a discrepancy.³¹

²⁸ C-26/13 *Kásler v OTP Jelzálogbank Zrt*, para. 62.

²⁹ C-26/13 *Kásler v OTP Jelzálogbank Zrt*, paras. 71-72; Case C-96/14 *Van Hove v CNP Assurances SA*, para. 40; Case C-191/15 *Verein für Konsumenteninformation v Amazon EU Sarl* [2017] ECLI:EU:C:2016:612, para. 68. S. Weatherill, *Empowerment is not the Only Fruit*, in: D. Leczykiewicz, S. Weatherill (eds.), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, Hart Publishing, London: 2016, pp. 212-213. It has been questioned whether this sentiment is consistent with the founding principle of Directive 93/13 – minimum harmonization. See e.g. N. Reich, *Balancing in Private Law: Experiences and Opportunities*, in: R. Brownsword, H.-W. Micklitz, L. Niglia, S. Weatherill (eds.), *The Foundations of European Private Law*, Hart Publishing, London: 2011, pp. 239-240.

³⁰ C-26/13 *Kásler v OTP Jelzálogbank Zrt*, para. 73. The passage was affirmed in Case C-143/13 *Matei v SC Volksbank Romania SA*, para. 74. Recently, the CJEU has begun to refer to a "substantive" prong of transparency (Joined Cases C-154/15 and C-307/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU et al.* [2017] ECLI:EU:C:2016:980, para. 49), using it to denote those pre-contractual information duties that fall within the ambit of the "intelligibility" requirement. See also Case C-348/14 *Maria Bucura v SC Bancpost SA* (unpublished), para. 61: "Failure to mention information relating to the loan repayment terms in question and modification of those terms during the period of the loan are decisive elements in the analysis by a national court of whether a term in a loan agreement which relates to its cost and which does not contain such information is drafted in plain intelligible language within the meaning of Article 4 of Directive [93/13]." For an overview of the relevant case law, see paras. 46-50 of Advocate General Mengozzi's Opinion in Joined Cases C-154/15 and C-307/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU et al.* [2017] ECLI:EU:C:2016:552.

³¹ C-26/13 *Kásler v OTP Jelzálogbank Zrt*, para. 74.

2.1. Foreseeability of economic consequences and the precedence of inquiry

As noted above, an important facet of the plain and intelligible language requirement is that a term in dispute shall be capable of letting a consumer foresee the economic consequences of him agreeing to such a term. This factor has been deemed particularly important in analysing the plainness and intelligibility of terms allowing for variations of interest rates in credit contracts, and the term “significant changes in the money market” was held to be *prima facie* an insufficient indication despite being grammatically intelligible and clear.³² This approach could potentially be effective in hampering the spread of economically detrimental terms should the CJEU put more emphasis on the overarching requirement of plainness and intelligibility from Art. 5.³³ The requirement is typically invoked in the context of analysing whether a term falls within any of the exemptions under Art. 4(2), with the courts seemingly overlooking the fact that Art. 5 applies to all contract terms. Since “plain and intelligible language” has the same meaning under both provisions,³⁴ it is difficult to see why it would be unwarranted for the CJEU to use it more expansively to stop the influx of terms whose economic ramifications for consumers, especially in the long term, are hardly foreseeable.³⁵

Some evidence, albeit rather limited and tentative, may be offered that the CJEU is ready to strike down terms even before it moves to a substantive enquiry applying the requirements enshrined in Art. 3(1). In *Amazon SARL*, the analysis zeroed in on a clause which mandated that the contract was to be subject to the law of the seller or supplier (on the facts of the case, an operator in an electronic commerce contract based in another Member State). The CJEU concluded that the operator failed to inform the consumer of their rights under the Rome I Regulation, Art. 6(2) of which provides that the choice of applicable law must not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which would have been applicable in the absence of choice. The insertion of a term in defiance of this rule, without informing the consumer of their true rights (the letter of the Regulation superseding the contract) was considered sufficient grounds to find unfairness.³⁶

³² C-143/13 *Matei v SC Volksbank Romania SA*, para. 76.

³³ Some signs of a bolder approach could be found in a handful of cases where the Court went so far as to list lack of transparency as a chief indicator – next to good faith and imbalance? – of substantive unfairness; see Case C-96/14 *Van Hove v CNP Assurances SA*, para. 27.

³⁴ As confirmed in C-26/13 *Kásler v OTP Jelzálogbank Zrt*, para. 69. See also Loos, *supra* note 2, pp. 187-188.

³⁵ This proposition has been endorsed by R. Sik-Simon, see R. Sik-Simon, *Missbräuchliche Klauseln in Fremdwährungskreditverträgen – Klauselersatz durch dispositive nationale Vorschriften*, *EuGH Rs C-26/13 (Kásler) und Kúria 2/2014. PJE határozata*, 3(4) *Journal of European Consumer and Market Law* 256 (2014), pp. 259-261.

³⁶ C-191/15 *Verein für Konsumenteninformation v Amazon EU Sarl*, para. 71. In the practical sense, in the absence of a reference to the mandatory rules of the consumer's law, the CJEU's decision will result in the following examination: First, it must be assessed which legal system governs the fairness of a term under Rome I. If it is established that a term is unfair according to the applicable law, it must be established whether the use of unfair terms in general conditions will result in unfair competition pursuant to

An interesting example in this connection is *Sebestyén*,³⁷ where a term was at issue under which, should a dispute arise over the contract or the agreement, exclusive jurisdiction over the dispute would be vested in a panel of three arbitrators. It was introduced into evidence that prior to the execution and signing of the disputed mortgage loan contract, the defendant bank brought to the attention of the claimant certain key differences in procedures before arbitration and in courts.³⁸ In addition, it was specifically highlighted at the moment of conclusion of the agreement that the arbitration procedure entailed only one “trial procedure” and that a verdict rendered by a panel was not appealable. The claimant was also informed about the attendant costs, which were higher compared to court proceedings. Whilst pre-contractual information relating to the contractual terms and the consequences of concluding the contract is of fundamental importance to the consumer,³⁹ it cannot be automatically assumed that the provision of information, even in a relatively comprehensive and clear manner, rules out the unfairness of a particular term, including an arbitration clause.⁴⁰ Regrettably, the CJEU did not analyse any further whether the volume and depth of information furnished for the benefit of the consumer was sufficient to at least clear the threshold of plain and intelligible language under Art. 5, although this appears to be the case since the Court did proceed to consider the substantive requirements of unfairness under Art. 3(1).⁴¹ I submit that this only goes to show that more could be done to sharpen, as it were,

the applicable legal system after having applied Art. 6(1) Rome II. J. Rutgers, *Judicial Decisions on Private International Law: Court of Justice of the European Union 28 July 2016, Case C-191/15 Verein für Konsumenteninformation v. Amazon EU Sàrl* ECLI:EU:C:2016:612, 64 *Netherlands International Law Review* 163 (2017), p. 174.

³⁷ Case C-342/13 *Katalin Sebestyén v Zsolt Csaba Kövéri and Others* [2014] ECLI:EU:C:2014:1857.

³⁸ *Ibidem*, para. 17. The consumer was also informed of the single procedure character of arbitration (no appeals could be brought), and that the costs incurred in commencing and conducting an arbitration procedure tended to be higher than those of ordinary court proceedings.

³⁹ Case C-226/12, *Constructora Principado SA v José Ignacio Menéndez Álvarez* [2014] ECLI:EU:C:2014:10, para. 25. This becomes all the more important in the context of complex contracts, such as those concerning digital content: “[t]he need for pre-contractual information about digital content is further re-enforced by two of their essential features: the complexity of the technology and the fact that most pieces of digital content are subject to specific licensing conditions that determine the functionality and usability of the digital content. Accordingly, purchasers of digital content have specific information needs. In addition to the more commonly acknowledged facts that consumers must be informed about (such as price, terms of delivery, etc.), they require information on matters such as access and interoperability, the functionality of digital content, the existence of usage restrictions, the licensing conditions, and the privacy-related implications of, e.g., the use of tracing and monitoring technologies, as well as information about the quality of the digital content in question, including the applicability of professional codes of conduct and guidelines (e.g. journalistic codes). N. Helberger, M.B.M. Loos, L. Guibault, C. Mak, L. Pessers, *Digital Content Contracts for Consumers*, 36(1) *Journal of Consumer Policy* 37 (2013), pp. 47-48.

⁴⁰ C-342/13 *Katalin Sebestyén v Zsolt Csaba Kövéri and Others*, para. 34.

⁴¹ *Ibidem*, paras. 26-29, 36. On the relationship between transparency and substantive unfairness within the context of Australian law, see J. Patterson, *The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts*, 33(3) *Melbourne University Law Review* 934 (2009), pp. 951-956.

the general plainness and intelligibility requirement with a view to applying it to all scrutinized terms, thus treating it as an initial threshold to be cleared before a substantive unfairness exercise is carried out. In fact, the CJEU appeared to tie together the plain and intelligible language requirement and the substantive fairness inquiry by requiring that national courts consider that a pre-contractual disclosure of information to the consumer concerning the nature of arbitration does not, in and of itself, absolve a clause of unfairness.⁴² It may be a reasonable expectation on the part of a consumer that a term, within the context of a particular genus of contract (such as an insurance contract or a loan), will have a very similar (or effectively the same) meaning as a corresponding term utilized in national legislation.⁴³

The plain and intelligible language requirement could be used in tandem with a purposeful interpretation of exemptions under Art. 4(2) to further strengthen the protection against unfair terms. In asserting that terms which impose burdens on consumers shall, in order to be plain and intelligible, transparently justify the reasons for doing so, the CJEU has demanded that such terms actually do more than that – i.e. that they specify a distinct, additional service that the seller must provide, in addition to the service constituting the main subject matter of the contract at hand, in exchange for such an onerous clause. Where no such service can be pointed out, a plausible inference is that no transparent reasons were furnished, and thus such a term could be struck down as unfair, especially if the seller attempts to skirt applicable legal limitations by manipulating the name or nature of charges imposed in a contract.⁴⁴

2.2. *Andriciu* – an unwarranted invasion of information duties or a breath of fresh air?

The most recent case where a reappraisal of the plain and intelligible language requirement has been offered is *Andriciu*. There, the Court had to scrutinize the plainness and intelligibility of a clause in a mortgage loan agreement denominated in Swiss francs (CHF) that effectively placed the exchange risk on the borrowers (Romanian citizens receiving their remuneration in Romanian leu) by mandating loan repayment

⁴² C-342/13 *Katalin Sebestyén v Zsolt Csaba Kövéri and Others*, para. 36. This is, I submit, a moot and somewhat self-evident point considering the clear wording and meaning of Art. 3(1), although the literature pre-*Kásler* knows of assertions of clear, hard and fast lines between transparency and substantive control. See e.g. M. Träger, *Party Autonomy and Social Justice in Member States and EC Regulation: A Survey of Theory and Practice*, in: Collins (ed.), *supra* note 2, p. 73.

⁴³ C-96/14 *Van Hove v CNP Assurances SA*, para. 46.

⁴⁴ See C-143/13 *Matei v SC Volksbank Romania SA*, para. 77. At para. 29 of that judgment it is noted that the defendant bank, in response to new national regulations purportedly banning the use of “risk charges” in credit contracts, attempted to change the name of the charge to a “credit management fee”. Interestingly, the technique was employed by American telecommunications giant AT&T which in 2017 imposed “credit management fees” in the amount of 449 dollars on all customers it deemed high-risk (typically having bad credit or being behind in payments). See P. Dampier, *AT&T’s Service Deposit Becomes Controversial Non-Refundable “Credit Management Fee”*, available at: <http://stopthecap.com/2017/10/31/atts-service-deposit-becomes-controversial-non-refundable-credit-management-fee/>, 31 October 2017 (accessed 30 May 2019).

in CHF. The CJEU reiterated its pronouncements of the “plain and intelligible” principle from *Kásler*, specifically that the requirement stretches well beyond formal and grammatical intelligibility and legibility, and a broad interpretation must be applied.⁴⁵ In the specific context of loans denominated in a foreign currency, the Court held that the borrower must be informed of the attendant risk connected with currency rate fluctuations, and that it may be difficult to bear the exchange risk in the event of a drastic fall in the value of the currency in which the consumer receives his income. The bank must provide details as to the conceivable range of fluctuations with a view to conveying to the consumer the potential risk his financial standing and obligations are exposed to.⁴⁶ Banks can satisfy this requirement by including suitable information in their promotional materials.⁴⁷ Importantly, the obligation also entails providing the consumer with information concerning the nature of goods or services which comprise the subject matter of the contract.⁴⁸

As noted above, it is generally required, within the so-called substantive prong of transparency, that a term enables the consumer to foresee the consequences, including economic consequences, for him which flow from the term in issue. The “foreseeability” element was not accorded as much weight in the recent judgment of *Andriiciuc*, where the CJEU insisted instead on the presentation by a seller or supplier of the specific functioning of the mechanism to which the relevant term relates and the relationship between that mechanism and that provided for by other contractual terms, and the Court found that the seller’s measures must accord to the consumer a level of predictive ability which would allow him to “evaluate” the risks.⁴⁹ It is perhaps too fine of a distinction to attempt to differentiate between “foresee” and “evaluate”, and it certainly remains to be seen whether the CJEU or national courts pick up on this particular aspect with a view to emulating it. I would tentatively suggest that “evaluate” implies a higher standard of knowledge and cognitive ability. If this is true, the swerve would be welcome as it would raise the required level of substantive transparency. The Court in *Andriiciuc* itself doubled down and also used the word “estimate”, requiring that the consumer is able to *estimate*, on the basis of pre-contractual information, the total cost of their loan.⁵⁰ The

⁴⁵ C-186/16 *Andriiciuc v Banca Romaneasca SA*, para. 44.

⁴⁶ *Ibidem*, para. 50.

⁴⁷ *Ibidem*, para. 46; Case C-143/13 *Matei v SC Volksbank Romania SA*, para. 75. There is psychological evidence to the effect that this may be insufficient, as a sizable portion of consumers feel, when confronted with promotional material, that they either have too many choices or that there is a dearth of options. Many consumers who signed loans denominated in the Swiss franc were drawn thereto by competitive exchange rates which, coupled with well-documented bullish behavior of banking advisors, could again outweigh and/or overshadow any information concerning the feasibility of their choices. P. Rodik, *The Impact of the Swiss Franc Loans Crisis on Croatian Households*, in: S.M. Değirmencioglu, C. Walker (eds.), *Social and Psychological Dimensions of Personal Debt and the Debt Industry*, Springer, Berlin: 2015, pp. 71-78.

⁴⁸ Case C-186/16 *Andriiciuc v Banca Romaneasca SA*, para. 47; C-348/14 *Maria Bucura v SC Bancpost SA*, para. 66.

⁴⁹ Case C-186/16 *Andriiciuc v Banca Romaneasca SA*, para. 45.

⁵⁰ *Ibidem*, para. 47.

variety in terms utilized by the Court is liable to give rise to inconsistencies and confusion, and a degree of consequentiality would be recommended.

3. RELATIONSHIP BETWEEN PLAIN AND INTELLIGIBLE LANGUAGE AND THE SUBSTANTIVE CRITERIA OF FAIRNESS

The requirement that terms shall be expressed in plain and intelligible language corresponds with the substantive requirement of finding a balance between the contractual parties, prescribed in Art. 3(1) of the Directive. For it is in the trader's or supplier's legitimate interest to, for example, prevent against a material change of circumstances following the conclusion of the contract, so that it may tender the goods or services contracted for in accordance with the attendant terms and conditions. On the other hand, the flipside of this coin is that the consumer has a legitimate interest in preparing for and being able to foresee the potential consequences in the event such a change occurs.⁵¹ In particular, the task of preserving a proper balance of rights and obligations may consist in insuring, as it were, the consumer against the potential risk of the contract being altered or even vitiated. This is to be done by means of equipping the consumer with information and data so that he can react most appropriately to any reasonable change of circumstances. *Andrić* confirmed the controversial assertion in *Kásler* that this requirement is directly linked to and motivated by the fact that the consumer is in a weaker position as against the trader or supplier. The exact scope of overlap between the plainness and intelligibility of the language (which has come to also encompass, via purposeful judicial interpretation, certain information duties on the part of the trader) and the substantive requirement to level the significant imbalance between the parties' rights and obligations remains uncertain.⁵²

As noted above, the requirement does not refer merely to the clarity of information provided, but also to its completeness, which is assessed against the nature and practical application of the contract in issue. Specifically with regard to insurance agreements,

⁵¹ Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, para. 53.

⁵² It is evident that informing the consumer of the overall economic ramifications of him signing a given consumer contract elevates his position as against the trader, if only at the pre-conclusion stage. See D.D. Barnhizer, *Propertization Metaphors for Bargaining Power and Control of the Self in the Information Age*, 54 *Cleveland State Law Review* 69 (2006), pp. 79-100; A. Choi, G. Triantis, *The Effect of Bargaining Power on Contract Design*, 98(8) *Virginia Law Review* 1665 (2012). Cabrales et al. have conducted and reported on an experiment whereby competition amongst agents vying for principals to hire them was shown to, first, elevate the latter's bargaining power and, at the same time, diminish the informational monopoly power agents would have wielded had there been a shortage of agents on the market. However, in a scenario where the principals were searching for agents (or were matched upfront with one), not only did the agents feel more confident as regards negotiating the terms of the relationship, but they were able to extract more information regarding their agency contract's financial consequences (i.e. remuneration). These findings could be applied by analogy to consumers. See A. Cabrales, G. Charness, M.C. Villeval, *Hidden Information, Bargaining Power, And Efficiency: An Experiment*, 14(2) *Experimental Economics* 133 (2011).

it has been held by a Polish court that where an insurer attempts to exclude its liability under a policy (i.e. the duty to make a disbursement for the benefit of the insured when a specific contractually stipulated event has occurred), it should clearly specify under what circumstances the payment may be subject to additional conditions.⁵³ It is insufficient for an insurer to employ wording such as “performance may be rendered in part...” or “costs may be returned under the condition that...”. A typical consequence of a failure to use plain and intelligible language is to give the drafter of a disputed term the right to unilaterally interpret or amend the terms of the contract in a binding fashion, and as a consequence, alter the rights and obligations thereunder.⁵⁴ One may see here a clear link between typified unfair terms (included in the “grey list” appended to Directive 93/13) and transparency. However, it is difficult to determine the exact nature of this overlap. Its practical result is the wide casting of the substantive fairness net – on one hand a term expressed in plain and intelligible language may nevertheless imply a right of unilateral interpretation, whilst another term could clear the threshold posed by Art. 1(i) or 1(j) of the Annex, yet still fail to be expressed plainly and intelligibly, thus coming under the scrutiny of the substantive requirements of Art. 3(1).

On 3 May 2018, Advocate General Tanchev issued an Opinion in the case of *OTP Bank and OTP Faktoring v Ilyés and Kiss*.⁵⁵ On the facts, similarly to the *Kásler* case, the creditor converted the loan from Hungarian forints to Swiss francs, using its own buying rate for the conversion, whilst monthly repayment instalments were fixed according to the bank’s selling rate. Another contract term gave the creditor the power to unilaterally change the ordinary interest and management costs. It should be noted that *Kásler* triggered a sea change in Hungarian law and measures were subsequently introduced to declare invalid such clauses in consumer loan contracts which use the buying rate of a foreign currency to determine the loan payment but the selling rate for the purpose of loan repayment. The consequence of such invalidity is the replacement of a given term with a provision providing the official exchange rate for the currency set by the National

⁵³ Wyrok Sądu Apelacyjnego w Warszawie [Judgment of the Appellate Court for Warsaw], 9 February 2012, LEX no. 1213380.

⁵⁴ K. Kohutek, *Klauzula modyfikacyjna: faktyczna ochrona konsumenta czy bezpodstawny formalizm?* [Modification clause: actual protection of the consumer or baseless formalism?], 12 Przegląd Prawa Handlowego 13 (2017), pp. 17-19; P. Gorzko, *Zagadnienia dopuszczalności stosowania oraz abuzywności bankowych klauzul o zmiennym oprocentowaniu* [Questions pertaining to the permissibility as well as possibilities of abuse of variable interest rates], 3 Transformacje Prawa Prywatnego 5 (2012), pp. 20-23; N. Reich, H.-W. Micklitz, *Unfair Terms in the Draft Common Frame of Reference (Comments on the Occasion of the Tartu Conference on Recent Developments in European Private Law)*, 14 *Juridica International* 58 (2008), pp. 61-62; I. Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts*, Hart Publishing, London: 2017, p. 93. Micklitz has noted that transparency control often serves as a substitute for the otherwise prohibited control of the main price, the core term. See H.-W. Micklitz, *The Proposal on Consumer Rights and the Opportunity for a Reform of European Unfair Terms Legislation in Consumer Contracts*, EUI Working Papers Law 2010/12, European University Institute 2010, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698703 (accessed 30 May 2019).

⁵⁵ Opinion of Advocate General Tanchev in Case C-51/17 *OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt v Teréz Ilyés and Emil Kiss* [2018] ECLI:EU:C:2018:303.

Bank of Hungary to be used for both loan payments and repayments.⁵⁶ The Opinion missed an opportunity to engage with the issue of transparency post-*Andriciu*, with the Advocate General merely expressing satisfaction that explanatory notes to the new legislation issued by the Hungarian legislature are sufficient.⁵⁷ One commentator has observed that the issue “whether the fact that the Hungarian legislator imposed the official exchange rate of the Hungarian National Bank could be perceived as invalid, due to lack of transparency of such an exchange rate to consumers or the lack of foreseeability of such a rate determining consumers’ obligations at the moment of conclusion of the contract. It is interesting to consider whether the Hungarian legislator should not have at least offered consumers a choice – to have their contractually agreed-upon exchange rate changed into the official exchange rate of the Hungarian National Bank or to remain the contractual one. Whilst the official exchange rate might be more transparent, it won’t necessarily be more beneficial to consumers.”⁵⁸

The Court in its *OTP Bank* judgment reiterated the crucial passages from *Andriciu*, particularly that financial lending institutions have an obligation to create conditions sufficient for consumers to become familiarized with the risks inherent in taking out a loan denominated in or indexed to a foreign currency; by providing an adequate level of information “and [this information] should at least encompass the impact on instalments of a severe depreciation of the legal tender of the Member State in which a borrower is domiciled and of an increase of the foreign interest rate.”⁵⁹ Furthermore, it appears that consumers must be aware that the risk they may choose to incur may be difficult to bear where the currency in which they receive their income depreciates markedly, and “the seller or supplier, in this case the bank, must be required to set out the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency.”⁶⁰

4. THE POSITION OF POLISH LAW

The Polish regulation reflects the dual role of the plain and intelligible language standard. Art. 385¹ § 1 stipulates plain and intelligible language as a condition for the application of the exemption from a substantive unfairness inquiry (transposition of

⁵⁶ See Art. 3 of the Law XXXVIII of 2014 governing specific matters relating to the decision of the Kúria to harmonise the case-law on loan agreements concluded between credit institutions and consumers. The process is described in: M. Józson, *The Methodology of Judicial Cooperation in Unfair Contract Terms Law*, in: F. Cafaggi, S. Law (eds.), *Judicial Cooperation in European Private Law*, Edward Elgar Publishing, Cheltenham: 2017, pp. 137-143.

⁵⁷ Decision No 2/2014 of the Kúria, Magyar Közlöny 2014/91, p. 10975 (para. 69 of Advocate General Tanchev’s Opinion, C-51/17 *OTP Bank*).

⁵⁸ J. Luzak, *Kasler repercussions - AG Tanchev in OTP Bank and OTP Faktoring (C-51/17)*, available at: <http://recent-ecl.blogspot.com/2018/05/kasler-repercussions-ag-tanchev-in-otp.html> (accessed 30 May 2019).

⁵⁹ C-51/17 *OTP Bank*, para. 74.

⁶⁰ *Ibidem*, para. 75.

Art. 4(2) of Directive 93/13). On the other hand, Art. 385 § 2 enshrines the overarching requirement that all standard contractual clauses be expressed in plain and intelligible language.⁶¹

4.1. Transposition of the general requirement under Art. 5 of Directive 93/13

As noted above in relation to the EU jurisprudence, Polish courts have also opined that the plain and intelligible language requirement concerns not only the grammatical intelligibility of a document, but also its meaning and the level of familiarity therewith that can be expected on the part of an average consumer.⁶² Attempts have been made to distinguish between form and content, with the Supreme Court holding that transparency consists of “understandability”, which applies to both content and form, with “unambiguity” attaching to content only.⁶³ The transparency requirement is not concerned however with whether the consumer approved of or accepted the content of the clause.⁶⁴ The question whether a consumer realized the gravity and meaning of

⁶¹ As a side note, the requirement of plain and intelligible language applies here to all boilerplate clauses, including those not offered to consumers, whilst a *contra proferentem* interpretation is reserved exclusively for consumers.

⁶² Wyrok Sądu Apelacyjnego we Wrocławiu [Judgment of the Appellate Court for Wrocław], 16 February 2017, I ACa 1585/16, LEX no. 2340273. The ambit of the principle has been explained by reference to the fact that transparency is perceived as the primary bulwark of protection for consumers, particularly in the context of abstract control proceedings where no reference may be made to the individual facts of the case at hand. See: Wyrok Sądu Apelacyjnego w Warszawie [Judgment of the Appellate Court for Warsaw], 4 July 2017, VI ACa 345/16, LEX no. 2486476.

⁶³ Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 15 February 2013, I CSK 313/12, 12 Monitor Prawa Bankowego 28 (2013). The Court also posited that “ambiguity” should be interpreted strictly, demanding that contractual clauses shall be drafted so that they have only one plausible interpretation for an average consumer. This has since been confirmed in a resolution by the Supreme Court of 22 April 2015, ref. number I CSK 720/14. W. Popiołek, *Art. 385*, in: K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz* [Civil Code. Commentary], C.H. Beck, Warszawa: 2013, pp. 1067-1068; K. Pacuła, *Art. 23a*, in: K. Osajda (ed.), *Ustawa o ochronie konkurencji i konsumentów (art. 23a–23d i 99a–99f). Komentarz* [Act on Competition and Consumer Protection (arts. 23a–23d and 99a–99f). Commentary], Legalis 2018; M. Więcko-Tułowicka, *Ochrona konsumentów w umowach ubezpieczenia* [Protection of consumers under insurance contracts], LexisNexis, Warszawa: 2014, pp. 89-92; P. Mikłaszewicz, *Obowiązki informacyjne w umowach z udziałem konsumentów na tle prawa Unii Europejskiej* [Information duties in consumer contracts in the context of European Union law], Wolters Kluwer Polska, Warszawa: 2008, pp. 176-178; E. Łętowska, *Ustawa o ochronie niektórych praw konsumentów: komentarz* [Act on Protection of Certain Consumer Rights. Commentary], C.H. Beck, Warszawa: 2001, p. 49; E. Wiczorek, in: Z. Brodecki (ed.), *Prawo ubezpieczeń gospodarczych. Komentarz. TOM II. Prawo o kontraktach w ubezpieczeniach. Komentarz do przepisów i wybranych wzorców umów* [Law of business insurance. Commentary. Volume II. Law of insurance contracts. Commentary on statutory provisions and selected model contracts], Wolters Kluwer Polska, Warszawa: 2010, p. 116; F. Zoll, *Potrzeba i kierunek nowelizacji kodeksowego ujęcia problematyki wzorców umownych* [The need for and direction of amendments to the regulation of model contracts under the Civil Code], 1 Przegląd Legislacyjny 59 (1997), p. 91; K. Zagrobelny, in: E. Gniewek (ed.), *Kodeks cywilny. Komentarz* [Civil Code. Commentary], C.H. Beck, Warszawa: 2011, p. 631.

⁶⁴ Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 10 July 2014, I CSK 531/13, LEX no. 1537260.

a disputed clause is not decisive. For example, even where a consumer understood the amount of a termination fee or amount of interest to be paid, that is insufficient to save such a clause if the amounts are exorbitant.⁶⁵ The requirement of transparency has been tied to a consumer's economic interest in making an informed choice and entering into a transaction with specific content aligned with such interest.⁶⁶ Aside from such subjective considerations, consumer terms operating on the market that are transparent and unambiguous strengthen social trust in the law as a whole and is conducive to legal stability and security.⁶⁷

It is established law that it is insufficient for a trader to merely present to a consumer a list of standard contractual terms prior to the conclusion of a contract, e.g. General Insurance Terms and Conditions. A trader must ensure that such terms and the other related documents necessary to conclude an insurance contract are expressed in plain and intelligible language (i.e. so that they are understandable to a person without specialist preparation or education), and it is the trader that bears any and all consequences of failing to do so.⁶⁸ It is not completely clear whether it is permissible for a trader to make available to a consumer additional explanations or definitions of terms or formulations used in a consumer contract, or whether the duty requires traders to second-guess, as it were, the level of sophistication of consumers and attempt to furnish plain clauses upfront.⁶⁹ Generally, insurance contracts have recently been elevated to the standard of "agreements of special trust", with respect to which the plain and intelligible language requirement has a stronger bite. As such, insurance contracts must be interpreted through the prism of not only their nature, but also their purpose, i.e. the provision of insurance coverage to a consumer. At a bare minimum insurance contracts must clearly specify the risks insured.⁷⁰ Standard clauses are interpreted pursuant to general principles

⁶⁵ Wyrok Sądu Apelacyjnego we Wrocławiu [Judgment of the Appellate Court for Wrocław], 16 February 2017, I ACa 1585/16, LEX no. 2340273.

⁶⁶ E. Łętowska, *Europejskie prawo umów konsumenckich*, C.H. Beck, Warszawa: 2004, p. 263; R. Stefanicki, *Ochrona konsumenta w świetle ustawy o szczególnych warunkach sprzedaży konsumenckiej* [Protection of the consumer under the Act on Special Conditions Applicable to Consumer Sales], Kantor Wydawniczy Zakamycze, Kraków: 2006, pp. 105-108.

⁶⁷ R. Stefanicki, *Konstytucjonalizacja ochrony konsumenta na tle standardów prawa wspólnotowego* [Constitutionalization of consumer protection against the backdrop of Community law], 3 Państwo i Prawo 5 (2008), p. 13.

⁶⁸ Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 12 January 2007, IV CSK 307/06, LEX no. 238967.

⁶⁹ There is some authority implying that definitions could be appended in the form of an annex as long as all provisions are within one document and consumers are not referred to outside documentation. See: wyrok Sądu Apelacyjnego w Łodzi [Judgment of the Appellate Court for Łódź], 30 November 2017, I ACa 903/17, LEX no. 2461426; wyrok Sądu Okręgowego w Rzeszowie [Judgment of the Rzeszów Regional Court], 19 October 2015, VI GC 271/15, LEX no. 1952094.

⁷⁰ Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 14 March 2018, II CSK 445/17, LEX no. 2486131. See: Report of the Ombudsman for the Insured, *Nieprawidłowości w ogólnych warunkach ubezpieczenia* [Irregularities in standard insurance terms], available at: <https://bit.ly/2XBQj0K> (accessed 30 November 2018); Office of Competition and Consumer Protection, *Raport z Kontroli Wzorców Umownych Stosowanych przez Zakłady Ubezpieczeń* [Report following an inspection of model contracts

of civil law, particularly Art. 65 § 2 which obliges interpreters of a contract to be guided more by the mutual intention of the parties and the contract's purpose rather than its literal wording. A clause cannot be worded so unclearly that a plausible interpretation deprives a consumer of insurance coverage. This principle has been extended to prohibit cases of an insurer's refusal to provide coverage where the insured realized a given risk was not covered by the relevant policy after an accident has occurred, provided however that the wording of the clause was so unclear that to think it covered a particular type of risk constituted a reasonable interpretation.⁷¹

Exclusions of liability should, as a general rule, be grouped together and not scattered all throughout a contract; they should be easily discoverable for a non-sophisticated contract reader.⁷² It is insufficient for a trader to include within general terms and conditions a reference to a statute or regulation, e.g. to the Criminal Code when defining an act that absolves the insurer of liability. Drafters should avoid formulations such as "all forms of crime" or "any and all instances of set-off", and instead attempt to formulate exhaustive, enumerative lists.⁷³ Factual findings of the court are also pertinent

used by insurance firms], September 2006, available at: <https://www.uokik.gov.pl/download.php?id=584> (accessed 28 November 2018); M. Orlicki, *Kilka uwag o technice tworzenia ogólnych warunków ubezpieczenia* [Remarks on the technique of drafting of model insurance contracts], 1 *Wiadomości Ubezpieczeniowe* 75 (2011), pp. 80-83.

⁷¹ Wyrok Sądu Najwyższego [Judgment of the Supreme Court] 15 January 2016, I CSK 122/15, LEX no. 1977822; wyrok Sądu Najwyższego [judgment of the Supreme Court], 16 September 2016, IV CSK 711/15, LEX no. 2151436 (endorsing *obiter* comments made in the 15 January judgment); R. Trzaskowski, *Art. 385*, in: J. Gudowski (ed.), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna* [Civil Code. Commentary. Volume III. Obligations. General part], ed. II, LEX 2018, side no. 20; M. Bączyk, *Przegląd orzecznictwa Sądu Najwyższego w sprawach bankowych za okres od lipca do grudnia 2016 r. (cz. I)* [Overview of the Supreme Court's case law in banking matters in the period between July and December 2016 (part I)], 10 *Monitor Prawa Bankowego* 44 (2017), p. 44; E. Wójtowicz, *Instrumenty kontroli wzorców umownych w obrocie profesjonalnym* [Instruments of control of model contracts in professional trading], 308 *Acta Universitatis Wratislaviensis* 549 (2009), pp. 550, 565.

⁷² Judgment of the Supreme Court of 23 January 2015, ref. number V CSK 217/14; wyrok Sądu Apelacyjnego w Łodzi [judgment of the Appellate Court for Łódź], 16 September 2015, I ACa 524/15, LEX no. 1808670; wyrok Sądu Apelacyjnego w Warszawie [judgment of the Appellate Court for Warsaw], 25 May 2017, VI ACa 145/16, LEX no. 2330650. J. Ostałowski, *Zaniechanie informacyjne banku jako podstawa roszczeń konsumenta dotyczących umowy kredytu denominowanego we franku szwajcarskim* [Information negligence of a bank as a basis of consumer claims under a loan denominated in Swiss francs], 4 *Przegląd Prawa Handlowego* 27 (2018), p. 35. Also note that exclusion of liability with respect to non-performance or undue performance of a contract and for bodily harm is impermissible under Article 385³ points 1 and 2 of the Civil Code.

⁷³ See e.g. wyrok Sądu Okręgowego w Łodzi [judgment of the District Court for Łódź], 20 August 2015, III Ca 720/15, LEX no. 2131849; M. Wałachowska, *Wzorce umowne po wejściu w życie nowej ustawy o działalności ubezpieczeniowej i reasekuracyjnej (zagadnienia wybrane)* [Model contracts following the entry into force of the new Act on Insurance and Reinsurance Activity], 3 *Wiadomości Ubezpieczeniowe* 3 (2016), pp. 6-9. This requirement of exhaustiveness is not, however, unbounded, and it has been held that a failure on the part of a trader to specify all instances of bad weather within a contractual definition of *force majeure* did not fall foul of the transparency principle. See: wyrok Sądu Apelacyjnego w Warszawie [judgment of the Appellate Court for Warsaw], 26 April 2013, VI ACa 1509/12, LEX no. 1322087.

as the judges considered whether the consumer in question was aware of the trader's motives in not formulating a contract clause in a transparent fashion, or contemplated a hypothetical where a consumer would ultimately profit by virtue of opting for a given contractual mechanism which, at least ostensibly and on the surface, appears unfair.⁷⁴ When analysing the permissibility of an indexation clause in the context of its transparency, the Supreme Court has put emphasis on whether the consumer was actually aware of the situation on the market and the likelihood of the currency rate of the Swiss franc (in which the loan was indexed) radically appreciating.⁷⁵

It is defensible for a supplementary hospital insurance policy to prescribe a maximum duration of a hospital stay for which a payments under the policy will be disbursed. Such a limit is within the bounds of good faith provided that it clearly delineates the range of circumstances in which the patient is granted coverage.⁷⁶ More generally, a reasonable degree of proficiency in literal legal interpretation may be demanded from an average consumer. It has been held that a quote of the relevant statutory provision concerning the civil right of retention⁷⁷ is sufficient to satisfy the transparency requirement so long as the provision is featured prominently and without redundant additions aimed at obscuring its reading by the consumer.⁷⁸

4.2. Consequences of a failure to observe the transparency requirement

It has been acknowledged at the highest judicial level that there is no agreement as to the legal consequences of a trader's or seller's failure to formulate a contract clause plainly and intelligibly.⁷⁹ There are several schools of thought in this regard – first, that where a clause is ambiguous, an attempt to apply a *contra proferentem* interpreta-

⁷⁴ Wyrok Sądu Apelacyjnego w Szczecinie [Judgment of the Appellate Court for Szczecin], 13 June 2016, I ACa 23/15, LEX no. 2121872.

⁷⁵ Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 1 March 2017, IV CSK 285/16, LEX no. 2308321. I would submit that it is difficult to reconcile this approach with the prevalent “average consumer” standard. I would suggest that courts should continue to endorse the objective measure instead of delving into the subjectively perceived cognitive skills of a given complainant.

⁷⁶ Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 30 September 2015, I CSK 800/14, 9 Orzecznictwo Sądu Najwyższego. Izba Cywilna 105 (2016).

⁷⁷ Under Article 461 § 1 of the Polish Civil Code, “A person obliged to release somebody else's thing may retain it until his claims for the reimbursement of expenditures on the thing or claims for the redress of the damage inflicted by the thing are satisfied or secured.”

⁷⁸ Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 4 March 2016, I CSK 72/15, LEX no. 2036717. The standard is rather high, as the Court insisted that the particular provision in question was drafted in plain and everyday language and that, importantly, there was only one possible interpretation thereof for an average, typical consumer. The Court also remarked that it is too refined of an interpretation to argue that an average consumer knows the definition of retention under the Civil Code, and that the use of the term in the contract clause under dispute was largely consistent with the general common meaning of the notion.

⁷⁹ Postanowienie Sądu Najwyższego [Resolution by the Supreme Court], 22 April 2015, I CSK 720/14, LEX no. 1710341. The judgment endorsed the view that a non-transparent clause may be rendered ineffective, noting however a wealth of differing opinions in this regard. See also Trzaskowski, *supra* note 71, side no. 29.

tion should be made.⁸⁰ It appears that the dominant tendency is to empower judges to render a clause unfair on the sole basis of a failure to proffer a transparent clause to consumers. This approach, just as the previous one, has been endorsed by the Supreme Court⁸¹ which in addition has remarked on one occasion that it is the “most convincing view.”⁸² This account is shared by a majority of academic writers, some of whom have underscored that it reflects the intention of the Court of Justice of the European Union to a greater extent than any of the other approaches proposed.⁸³

In abstract control proceedings, the *contra proferentem* rule does not apply, pursuant to the letter of Art. 385 § 2 of the Civil Code. This could mean that in such cases, where a clause does not have one plausible interpretation, it should by default be struck down as falling afoul of the overarching transparency requirement.⁸⁴ This need not be the case however. It is conceivable that judges could select a plausible interpretation that is conducive to the security of trading. As regards cases brought in individual cases, I submit that a combined approach is most fitting in terms of protecting the weaker bargaining party. Therefore, a court should first attempt a *contra proferentem* interpretation, striving to purposively construe a clause so that it increases the rights or decreases the burdens of the consumer. Where this proves futile or excessively difficult, the court should acknowledge that the clause in dispute is so one-sided that its consequences cannot be remedied by reference to the ordinary rules of contractual interpretation prescribed in Art. 65 § 2 of the Civil Code (particularly where there is no conclusive indication of mutual intention), and strike it down as unfair. Importantly, judges should be circumspect about allowing ambiguous clauses when at least one plausible interpretation is inconsistent with the substantive requirements of fairness. Judicial discretion must be retained, and judges will have to make decisions as to whether they pick the more consumer-friendly construction or whether they render the entire clause ineffective. While it might be safer to err on the side of caution, nonetheless the ultimate decision will depend on the circumstances of the particular case at hand. Still, it is worth underscoring that the test should be two-pronged in respect of individual claims – an inquiry as to whether a consumer-friendly interpretation is possible; followed – only where no such alternative exists – by a declaration of unfairness.

⁸⁰ Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 4 March 2016, I CSK 72/15, LEX no. 2036717. M. Bednarek, in: E. Łętowska (ed.), *Prawo zobowiązań - część ogólna. System Prawa Prywatnego. Tom 5* [Law of obligations - general part. System of Private Law. Volume 5], C.H. Beck, Warszawa: 2013, p. 706.

⁸¹ Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 15 February 2013, I CSK 313/12, 12 Monitor Prawa Bankowego 28 (2013).

⁸² Postanowienie Sądu Najwyższego [Resolution by the Supreme Court], 22 April 2015, I CSK 720/14, LEX no. 1710341.

⁸³ P. Mikłaszewicz, *Art. 385*, in: K. Osajda (ed.), *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna. Tom IIIA* [Civil Code. Commentary. Obligations. General part. Volume IIIA], C.H. Beck, Warszawa: 2017, pp. 260-261; Łętowska, *supra* note 66, p. 322; Popiołek, *supra* note 67, p. 1067.

⁸⁴ Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 4 March 2016, I CSK 72/15, LEX no. 2036717.

CONCLUSIONS

The foregoing discussion serves to demonstrate that the requirement that terms in consumer contracts be drafted in plain and intelligible language has been used by the CJEU and national courts to incorporate information duties into the consumer-trader relationship. This relatively recent development should be, on the whole, assessed positively, although it could also be viewed as an attempt to circumvent the limits imposed by the prohibition of assessment of the adequacy of price or remuneration under Art. 4(2) of Directive 93/13. In this sense it appears that the CJEU is seeking to ameliorate the effects of this preclusion by increasing the level of information consumers must be furnished with prior to entering into a consumer contract. Importantly, the most recent pronouncements of the European court suggest that consumers (i.e. average consumers who are reasonably observant and circumspect with respect to their personal finances) must be facilitated in making prudent decisions. The CJEU has been adamant in its restatements of recital 20 to the Directive, under which the consumer should actually be given an opportunity to examine all the terms of the contract.

Although it appears clear that consumers must be able, with reference to an adhesion contract term, to foresee the economic consequences of the term for their financial situation (albeit this has been worded more in terms of the risk posed by such a term), nonetheless a handful of issues pertaining to the practical consequences of the requirement are yet to be resolved. Specifically, scant evidence is available as to whether a court may use the plain and intelligible language threshold to strike down consumer contract terms before moving to a substantive inquiry under Art. 3(1) of Directive 93/13 (Polish courts have shown some inclination to do so). The judiciary overall appears to be moving in this direction, albeit couching its decisions in terms of pre-contractual information, thus proving resistant to potential new breakthroughs in the field of consumer contract law and sticking rather to already established axioms. Furthermore, doubts persist as regards the consequences of a term not being worded in plain and intelligible language within the meaning of Art. 5 of the Directive. As the provision has an open-ended wording and presents itself as a general, overarching requirement of clarity, there may be a temptation to consider it a mere instruction which has no significant ramifications where it is not obeyed. The *contra proferentem* rule is particularly troublesome in this context, and its position within the protective scheme of the Directive is in this regard highly ambiguous.