

EUROPEAN COMMISSION GUIDANCE: A 2019 SNAPSHOT OF CJEU CASE LAW ON UNFAIR TERMS IN CONSUMER CONTRACTS

On 22 July 2019, the European Commission adopted a Guidance Notice on the interpretation of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (“the UCTD”) which, for consumer contracts entered into on or after 1 October 2015, is implemented in the UK by Part 2 of the Consumer Rights Act 2015.

The Guidance Notice provides a snapshot of the substantial body of case law from the Court of Justice of the European Union (“CJEU”) on the meaning of the UCTD.

THE UCTD

1. The UCTD recognised the inequality of bargaining power that typically existed between consumers on the one hand, and traders contracting on their standard (i.e. non-negotiated) terms on the other. It provided for a mechanism by which courts could assess those standard terms for fairness and, if found to be unfair, declare them unenforceable against the consumer. Under art.4(2) of the UCTD, this scheme was subject to an exemption for terms relating to “the main subject matter of the contract” and “the adequacy of the price... in so far as these terms are in plain intelligible language”, i.e. transparent.
2. The UCTD is a “minimum harmonisation” Directive (see art. 8). Such a Directive does not require complete consistency amongst Member States. Member States are permitted to implement the UCTD in such a way that provides greater (but not lesser) protection to the consumer than that provided for in the Directive. Many Member States have done so by doing one or more of the following:

- 2.1. Creating a list of terms that will be considered to be unfair in all circumstances i.e. a “black list” (the indicative list in the Annex to the UCTD is only a “grey list”, i.e. a list of terms which are presumed to be unfair unless, following an assessment for fairness, they are proven not to be).
- 2.2. Extending the scope of the scheme to cover individually negotiated terms.
- 2.3. Extending the scope of the scheme to cover terms relating to the main subject matter of the contract and/or the adequacy of the price regardless of whether they are transparent.
3. The UK has implemented the UCTD in such a way that provides greater protection to the consumer in the following respects.
 - 3.1. Under the Consumer Rights Act 2015, there is no “black list”; there is only a “grey list”, (see Part I of Schedule 2). However, that “grey list” is slightly longer than that which is set out in the Annex to the UCTD.
 - 3.2. The Consumer Rights Act 2015 has been extended to cover individually negotiated terms (see ss. 61(1) and 62(1)).
 - 3.3. The Consumer Rights Act 2015 has not been extended to cover terms relating to the main subject matter of the contract and/or the adequacy of the price regardless of whether they are transparent (see s.64(2)). However, the Act does impose the additional requirement that these terms must be “prominent” in order to avoid assessment for fairness.

THE GUIDANCE NOTICE

4. European Directives, such as the UCTD, continue to influence the interpretation of the domestic legislation that implements them, such as the Consumer Rights Act 2015, in the following ways:
 - 4.1. Domestic legislation must “as far as possible” be interpreted so as to give effect to the terms and the purpose of any underlying Directives (*Schulte v Deutsche Bausparkasse Badenia AG* (C-350/03) EU C 2005 637, [2005] ECR I 9215 at [71] and *Robertson v Swift* [2014] UKSC 50, [2014]

I WLR 3438 at [20]–[23]) except where it would be contrary to the clear words of the domestic legislation (*Kásler v OTP Jelzálogbank Zrt* (C-26/13) EU C 2014 282, April 30, 2014 at [65]).

- 4.2. Where the CJEU has ruled on the meaning of a Directive that has been implemented through domestic legislation the UK Courts must follow that ruling when interpreting that domestic legislation (European Communities Act 1972 s.3(1)).
5. The UCTD has been the subject of considerable judicial interpretation in the CJEU. This has served to develop many of the principles laid down in it. These developments have affected the substantive assessment of contractual terms, the consequences to be drawn from any findings of unfairness, and they have had implications for relevant national rules of procedure. The Guidance Notice aims to summarise these developments to ensure consistent application across Member States.
6. The Guidance Notice is not binding and it does not create any new principles. Nevertheless, it is a helpful compendium of the key CJEU decisions on the meaning of the UCTD. It refers to around 100 decisions dating from 1976 to 2019. A full list of the decisions is helpfully set out in a table at Annex 1 to the Guidance Notice, in chronological order and in each case the issue under consideration is identified and cross-referenced to the relevant section in the Guidance Notice. The rest of the Guidance Notice is laid out over the following sections:
 - 6.1. Section 1: the objectives and scope of the UCTD including key definitions and its relationship with other provisions of European Union law, (pages 4 to 15).
 - 6.2. Section 2: the relationship with national law including minimum harmonisation, (pages 16 to 19).
 - 6.3. Section 3: the general unfairness test including the meaning of “main subject matter of the contract”, “adequacy of the price” and “plain and intelligible language”, (pages 20 to 40).

- 6.4. Section 4: the non-binding character of unfair contract terms including the issues of severability of such terms and nullity of the contracts of which they form part, (pages 41 to 50).
- 6.5. Section 5: remedies and procedural guarantees including the scope of the obligation on national courts to assess the unfairness of contract terms of their own motion, (pages 51 to 74).
- 6.6. Section 6: applications for injunctions brought by consumer protection organisations in the collective interest of consumers, (pages 75 to 80).

UK WITHDRAWAL FROM THE EUROPEAN UNION

- 7. There is little certainty about when, whether and on what terms the UK will withdraw from the European Union. Therefore, it is difficult to speculate on the likely long-term application of the UCTD (or the case law of the CJEU on the meaning of the UCTD) following withdrawal. However, the current state of the law is such that, immediately following withdrawal, the position will be governed by the European Union (Withdrawal) Act 2018 which, broadly, will repeal the European Communities Act 1972 and retain in effect almost all aspects of the law in force in the UK as a result of the UK's membership of the European Union as at the date of withdrawal. Under the European Union (Withdrawal) Act 2018:
 - 7.1. The UCTD (like other Directives) will not be retained. However, Part 2 of the Consumer Rights Act 2015 (i.e. the legislation that implements it) will be retained under s.2 as "EU-derived domestic legislation" and any directly effective rights under it will be retained under s.4(1) (as long as they have been recognised as such by the CJEU or the UK courts as at the date of withdrawal (s.4(2)(b)).
 - 7.2. Following withdrawal, UK courts will no longer be bound to follow the case law of the CJEU (see s.6(1)(a)) but "may have regard" to it (see s.6(2)). However, under ss.6(3) and (4) in all courts except the Supreme Court "Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it: (a) in accordance with any retained case law and any retained general principles of EU law...". The

term “retained case law” is defined under s.6(7) in such a way that the effect of ss.6(3) and (4) is that the body of CJEU decisions that exists as at the date of withdrawal will continue to be binding on all courts except the Supreme Court; subsequent decisions of the CJEU will not.

8. Therefore, if the UK does withdraw from the EU, the current state of the law is such that this Guidance Notice will continue to be relevant after withdrawal. Under ss.6(3) and (4) of the European Union (Withdrawal) Act 2018, a snapshot of CJEU case law as at the date of withdrawal will continue to bind the County Courts, High Court and Court of Appeal; this Guidance Notice is arguably just that.

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