The Transparency Requirement of the Unfair Terms Directive: An EEA Legal Blind Spot?

Published 27 november, 2025

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This Art. examines the Unfair Terms Directive's transparency requirement for standard terms in consumer contracts. Despite extensive guidance from the Court of Justice of the European Union, the requirement has largely been overlooked in Norwegian legal practice. Through an analysis of the Court of Justice of the European Union's case law, this Art. clarifies the substantive elements of the transparency requirement and examines the enforcement mechanisms as developed by the Court. Norwegian loan agreements with variable interest rates serve as a case study, illustrating the practical implications when transparency requirements in consumer contracts are violated.

This Art. is based on the author's master's thesis submitted to the Faculty of Law at the University of Oslo in autumn 2023.[1]

1. Introduction

The Unfair Terms Directive (93/13/EEC) Art. 5 first sentence and Art. 4 (2) sets out a requirement that standard terms in consumer contracts must be drafted in "plain, intelligible language". The transparency requirement, a cornerstone principle under EU consumer protection law, has been extensively interpreted through numerous Court of Justice of the European Union (CJEU) rulings in recent years. When a contractual term fails to meet this standard, it may be deemed unfair under the Unfair Contract Terms Directive. Such a determination can have significant consequences for the contracting parties.

Norway is bound by the Unfair Terms Directive through the EEA Agreement.[2] There is no reason why the Directive should be interpreted differently in the context of EEA law than in the context of EU law.[3] The Directive is intended to be implemented in Sec. 36 and 37 of the Norwegian Contracts Act, which must consequently be interpreted and applied in accordance with the requirements of the Directive.[4]

Despite Norway's EEA obligations, the transparency requirement has barely been touched upon in Norwegian case law. In May 2023, however, the EFTA Court delivered two significant advisory opinions that should serve as a wake-up call for Norwegian businesses and legal authorities regarding their dormant EEA responsibilities.[5] In Joined Cases E-13/22 and E-1/23, the EFTA Court examined whether variable interest rate clauses in two Icelandic loan agreements contravened the Mortgage Credit Directive and the Unfair Terms Directive. The EFTA Court was clear that the Icelandic terms, which allow the bank to modify the interest rate at its discretion, violates the transparency requirements of the Unfair Terms Directive. The EFTA Court's interpretation calls into question the variable rate mechanisms widely used in Norwegian loan agreements, potentially creating considerable challenges for the country's banking industry.

The primary objective of this Art. is to explain the substantive content of the transparency requirement, as established through the case law of the CJEU (Part 2). The Art. will also briefly explain the legal consequences of contractual terms that do not fulfil the transparency requirement (Part 3). Finally, the Art. demonstrates how the transparency requirement has evolved into a significant blind spot in Norwegian law with respect to EEA obligations (Part 4). Contractual terms on variable interest rates in Norwegian loan agreements will be used to illustrate the potential consequences violations of the transparency requirement may have for traders who employ such terms.

2. The Transparency Requirement of the Unfair Terms Directive

2.1 Introductory Remarks

The purpose of the Unfair Terms Directive is to enhance consumer protection in contractual relationships with traders while ensuring consistent market conditions across the European Economic Area.[6] The Directive's dual objectives fundamentally inform how the CJEU interprets its provisions. To ensure that the Directive achieves its purpose throughout the EEA, the Court centers its assessments on general consumer interests rather than individual party interests.

1 I am grateful to Professor Marte Eidsand Kjørven for her invaluable guidance and encouragement throughout the research process. I also want to thank you Professor Johan Giertsen and Vebjørn Wold for their encouraging discussions and insights that contributed to this Art..

2 The Unfair Terms Directive is included in point 7a of Annex XIX to the EEA Agreement on consumer protection (Art. 72 EEA). It follows from Art. 7 of the EEA Agreement that acts referred to or included in Annexes to the Agreement shall be binding on the Contracting Parties and be, or be made, part of their legal order.

3 See Finn Arnesen, "Valget mellom endring og ugyldighet i forbrukerkontrakter" [The choice between modification and invalidity in consumer contracts], in Erling J. Hjelmeng (ed.), *Ugyldighet i privatretten: Minnebok for Viggo Hagstrøm,* Fagbokforlaget 2016, pp. 49-62 (p. 57).

4 Ot.prp. nr. 89 (1993-1994) Om lov om endring av avtaleloven [Amendments to the Contracts Act], p. 3-4 and p. 6.

5 On 23 May 2024, the EFTA Court delivered its opinions in case E-4/23*, Neytendastofa*, and joined cases E-13/22, *Landsbankinn,* and E-1/23, *Íslandsbanki.* In both cases, the question was what requirements EEA law imposes on variable rate terms in loan agreements. Case E-4/23, *Neytendastofa,* concerned a consumer credit agreement, and the assessment was based on Art. 5 and 10 of the Consumer Credit Directive. Joined Cases E-13/22, *Landsbankinn*, and E-1/23, *Íslandsbanki*, on the other hand, concerned two mortgage loan agreements, and the EFTA Court decided the question in accordance with the Mortgage Credit Directive and the Unfair Terms Directive.

6 Sec. 6 of the preamble to the Unfair Terms Directive.

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This approach necessitates that the CJEU standardise the Directive's requirements, thereby establishing a minimum level of consumer protection to which member states can align their legislation and application of the law.[7]

The CJEU has stated that a fundamental premise for the Directive's consumer protection is the asymmetry inherent in consumer contracts, as the consumer is in a "weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge".[8] This is particularly the case in standardised contracts for consumers "agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms".[9] The purpose of the Directive's consumer protection is to equalise the assumed imbalance in the contractual relationship.[10]

To this end, the Directive regulates when non-individually negotiated terms are to be considered unfair and requires Member States to ensure that such terms do not bind the consumer.[11]

2.2 The Transparency requirement - Legal basis

The legal basis for the transparency requirement is found in Art. 5, first sentence, and Art. 4(2) of the Unfair Terms Directive.

The first sentence of Art. 5 states that "[i]n the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language". The provision establishes a general norm that written terms in consumer contracts must be formulated clearly and comprehensibly.

According to Art. 4(2), "the assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language."[12] The final condition demonstrates that the transparency requirement also applies to the main subject matter of the contract and the relationship between price and performance.

The CJEU interprets both Art. 5 and Art. 4(2) as expressing a general requirement for clear and transparent contract terms under the Directive.[13] Moreover, the CJEU's jurisprudence establishes that the clarity requirements in these two Art. are substantively identical.[14] Consequently, this analysis of the transparency requirement will draw upon the standards established in both provisions.

In the following, the Art. will examine the substantive content of *the transparency requirement as a primary standard*.[15] I will not address the significance of the transparency requirement for *contract interpretation*.

2.3 Fundamental aspects of the transparency requirement

The wording "plain, intelligible language", used in both Art. 5 and 4 (2), in its ordinary meaning indicates that contract terms should be drafted in a way that makes them clear and easy to understand, without confusing elements or complex technical terms and formulations. Paragraph 20 of the preamble reiterates that "[c]ontracts should be drafted in plain, intelligible language" and, in addition, that "[t]he consumer should actually be given an opportunity to examine all the terms [...]".

Extensive CJEU jurisprudence clarifies how the transparency requirement should be interpreted across various contractual terms. The Court typically structures its opinions by first articulating general principles of the transparency requirement, before providing specific guidance on their application to the particular contractual terms under examination.[16]

In the *Ocidental* case, the CJEU summarises the overall assessment topic as follows: "The Court has stated that the requirement of *transparency* of contractual terms, as resulting from those provisions, must be construed broadly and that *it cannot be reduced merely to those terms being formally and grammatically intelligible*. That requirement requires that *an average consumer, who is reasonably well informed and reasonably observant and circumspect*, is in a position to understand the specific functioning of that term and thus *evaluate*, on the basis of clear, intelligible criteria, *the potentially significant economic consequences of such a term for his or her financial obligations*."[17] [my italics]

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7 See Johan Giertsen, "Forbrukerretten europeiseres" [Consumer law becomes Europeanised], in Henrik Udsen, Jan Schans Christensen, Jesper Lau Hansen, Torsten Iversen and Linda Nielsen (eds.) *Festskrift til Mads Bryne Andersen*, Djøf Forlag 2018, p. 433-446, p. 436.

8 See e.g. case C-240/98-C-244/98, *Océano*, Par. 25.

9 l.c.

10 In e.g. case C-488/11, *Asbeek Brusse*, par. 38, the CJEU states that the purpose of the directive is to "replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them". The "effective" balance probably points to the agreement as it would have looked had the asymmetry not influenced its formation, see Giertsen, *Avtaler*, 4th ed., Universitetsforlaget 2021, p. 265.

11 The content of the unfairness assessment is regulated in Art.s 3, 4 and 5 of the Unfair Terms Directive, while Art. 6 stipulates that Member States shall ensure that unfair terms do not bind the consumer.

12 See case C-76/10, *Photovost,* Par. 72

13 The CJEU uses both Art. 5 and Art. 4(2) as the legal basis for the transparency requirement in most cases. See, for example, Case C-265/22, *Banco Santander,* Par. 52.

14 Cases C-224/19 and C-259/19, *Caixabank*, Par. 66-71 and C-125/18, *Gómez del Moral Guasch,* Par. 46.

15 *The transparency requirement as a primary standard* refers to the substantive transparency requirement, as opposed to the interpretation rule in Art. 5(2) of the Unfair Terms Directive, which states that "[w]here there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail".

16 See e.g. Case C-186/16, *Andricius*, Par. 44 to 48 and Par. 49 and 50 respectively.

17 Case C-263/22, *Ocidental*, ECLI:EU:C:2023:311, paragraph 26. See also, among others, C-609/19 BNP, *Paribas PersonalFinance*, Par. 42 and 43.

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The Court's statements demonstrate that the essence of the transparency requirement is whether the contract terms genuinely enable the consumer to understand *what financial consequences the agreement may have for him or her*.[18]

In *Banco Santander*, the Court emphasised that as "the system of protection introduced by Directive 93/13 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, that requirement must be understood in a broad sense".[19] Furthermore, in *RWE Vertrieb,* the court states that "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*."[20] [my italics].

The CJEU, notably in the *BNP Paribas* joined cases, has articulated that the trader, to fulfil the transparency requirement, must provide the consumer with "*sufficient and accurate* information to enable the consumer to evaluate the risk of potentially significant adverse economic consequences of contractual terms on his or her financial obligations." [my italics].[21]

These statements demonstrate that the transparency requirement is interpreted offensively. The imbalance in the contractual relationship is counterbalanced by providing consumers with sufficient and tailored information that enables them to make informed choices when entering contracts. This interpretation finds support in point 20 of the preamble, which, as previously noted, states that "[t]he consumer should actually be given an opportunity to examine all the terms [...]".

The transparency requirement is thus not only aimed at the information that is presented to the consumer through the contract. The contract terms may lack information necessary for the consumer to *understand* the rights and obligations arising from the agreement. In this manner, the CJEU derives information obligations from the transparency requirement,[22] alongside requirements for linguistic clarity and accessibility.

The assessment of whether the transparency requirement is fulfilled must be assessed from the perspective of "*an average consumer, who is reasonably well informed and reasonably observant and circumspect*".[23] When the benchmark is an ordinary consumer, it is not sufficient that the terms and conditions are clear and comprehensible to individuals with specialised expertise—for example, the judge determining the question of transparency.

The CJEU has been clear that the reference to an average consumer means that an objective standard must be applied to the assessment.[24] In the *mBank* case, a consumer had entered into a foreign currency loan agreement with a bank where he was employed.[25] The consumer also had business experience and knowledge of the characteristics and risks of foreign currency loan agreements. Despite the consumer's knowledge, the CJEU assessed the transparency requirement on the basis of the objective standard and did not allow individual assumptions to influence the assessment.[26]

In the *Kiss* case, the CJEU stated that the transparency assessment must "take into account *all of the circumstances* of the case in the main proceedings as they existed at the time when the contract was concluded [my italics]".[27] Although *Kiss* predates *mBank* it introduces some ambiguity regarding the precise application of the objective standard. This raises the question of whether the standard might be adapted to different contract types, as consumers entering complex investment contract are not necessarily the same consumer who enters into a modest credit agreement. However, the fundamental need to standardise the directive's requirements argues against such differentiation. Furthermore, the CJEU has not provided any clear signal that the objective standard can be relaxed under any circumstances.

The objective standard is related to the fact that the purpose of the Unfair Terms Directive is not only to protect the interests of the specific party; the directive is also intended to strengthen the position of consumers and ensure a level playing field *throughout the EEA*. The Unfair Terms Directive therefore aims to discipline traders outside the specific party relationship,[28] in order to achieve a European standard for consumer contracts.

The Unfair Terms Directive is a minimum directive. Member states may have legislation that ensures better consumer protection than the directive, as long as the directive's minimum requirements are met. The Member States may thus, in their internal legislation emphasise the consumer's individual circumstances *if this tightens the transparency requirement*.

18 The consumer must be enabled to understand the financial consequences of the contract, not just the "*potentially significant*" economic consequences. In several judgements, the CJEU has ruled that the consumer must be informed of the terms of the contract and their consequences, without limiting this to significant economic consequences, see e.g. Case C-265/22, *Banco Santander,* Par. 52 and Case C-92/11, *RWE Vertrieb*, Par. 44, referred to below.

19 See Case C-265/22, *Banco Santander,* Par. 52. See also e.g. case C-186/16, *Andricius.*

20 Case C-92/11, *RWE Vertrieb*, Par. 44.

21 Joined Cases C-776/19 to C-782/19, *BNP Paribas*, Par. 83.

22 See also *Loos*, 2023, pp. 281-299 (p. 282). Loos makes a distinction between grammatical intelligibility, economic transparency and formal transparency

23 See e.g. the case C-263/22, *Ocidental*, Par. 26.

24 Case C-139/22, *mBank*, Par. 61.

25 Ibid. Par. 65.

26 Ibid., Par. 66. The CJEU emphasises that the average consumer "*cannot be deemed to correspond, inter alia, either to a consumer who is less well informed than that average consumer, or to a consumer who is better informed than the latter.*"

27 Case C-51/17, *Kiss*, Par. 82.

28 See also Giertsen 2018, pp. 435-436, with reference to Arnesen 2016, pp. 54-55.

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2.4 Application of the Transparency Requirement to Variable Interest Rate Loans

In Norway, most consumer credit and mortgage agreements have variable interest rate terms.[29] Unlike variable rate terms in most other European countries, typical Norwegian terms allow the bank to modify loan rates based on internal discretionary assessments. However, the practice of the EU and EFTA courts suggest that these Norwegian terms may breach the transparency requirement.

This issue necessitates a separate analysis of how contractual terms on variable interest rates must be designed to comply with the transparency requirements of the Unfair Terms Directive.

As a preliminary consideration, it is relevant to address the relationship between the Unfair Terms Directive and overlapping sectoral directives. Standard terms in consumer contracts falling within the scope of the Unfair Terms Directive are frequently governed simultaneously by sectoral-specific directives applicable to particular contract types. These sectoral directives typically establish distinct information obligations tailored to the specific type of contract. For instance, mortgage agreements are subject to both the Unfair Terms Directive and the Mortgage Credit Directive (2014/17/EU), whilst most other consumer credit arrangements are subject to both the Unfair Terms Directive and the Consumer Credit Directive (2008/48/EC).[30]

When contract terms fall are subject to both the Unfair Terms Directive and a sectoral directive, the general rule is that both directives apply.[31] CJEU case law indicates that even if *the consumer only invokes the Unfair Terms Directive*, specific information requirements under the relevant sectoral directive may be decisive for the interpretation of the Unfair Terms Directive's transparency requirements.[32] If the consumer instead *only invokes the Sectoral Directive*, the transparency requirements of the Unfair Terms Directive may be decisive for the interpretation of the sector-specific information obligations.[33]

When assessing whether a specific contractual term meets the information requirements under EEA law, it may be necessary to consider whether a sectoral directive also regulates the term. This Art. examines the information obligations the CJEU has derived from *the general transparency requirement under the Unfair Terms Directive*, specifically in relation to terms on variable interest rates in loan agreements.

Norwegian interest rate adjustment terms typically allow banks to unilaterally change interest rates during the loan term. Creditors can usually adjust loan interest rates based on discretionary factors such as "the creditor's earning capacity in the long term", "individual circumstances of the credit", or "the money market rate".[34] Such terms and conditions are not linked to an external index but allow Norwegian banks to adjust the interest rates based on internal assessments.

By way of comparison, in other European countries it is common to link the interest rate to an index that is determined in advance and linked to the internal banking market.[35] Whilst such contractual terms also result in a floating interest rate, the creditor itself cannot influence the interest rate after the agreement has been entered into.

29 In 2021, 94% of Norwegian mortgages were variable rate loans, see Knudsen, Kyrre Martinius. "Fastrente bør bli en snakkis" [Fixed interest rates should be a talking point]. *Stavanger aftenblad*, 18 August, 2022. https://www.aftenbladet.no/meninger/debatt/i/pWJGl1/fastrente-boer-bli-en-snakkis.

30 The revised Consumer Credit Directive, (EU) 2023/2225, was adopted on 18 October 2023. As of today (29 March 2025), the new directive has not yet been implemented in Norway.

31 Art. 1(2) of the Unfair Terms Directive provides that "contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive". See also European Commission, *Commission notice - Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (Text with EEA relevance),* Official Journal of the European Union, 2019, https://op.europa.eu/da/publication-detail/-/publication/16437269-e0fc-11e9-9c4e-01aa75ed71a1, point 1.2.4 third paragraph. At the same time, it follows from the case law of the CJEU that if the sectoral directive was adopted after the Unfair Terms Directive, it must be expressly provided for, or follow from the purpose, if the Unfair Terms Directive is not to apply outside the sectoral directives, see Case C-290/16, *Air Berlin*, Par. 45 and 46. See also the European Commission's guidance, point 1.2.4, fourth paragraph.

32 In case C-448/17, *Slovensko*, the question was whether terms in a consumer credit agreement concerning credit costs fulfilled the transparency requirement in the Unfair Terms Directive. The Court stated in paragraph 62 that the transparency assessment must take into account "*all the provisions of EU law laying down obligations relating to information for consumers which may be applicable to the agreement concerned.*" Information requirements for the credit agreement were regulated in Art. 4 of the current Consumer Credit Directive. The Court found that failure to disclose the APR, as required by the Sectoral Directive, could be a "decisive element" in the assessment of whether the transparency requirement in the Consumer Credit Directive was met.

33 In Joined Cases C-33/20, C-155/20 and C-187/20, *Volkswagen Bank and others*, the question was how terms on interest on arrears had to be designed to fulfil the disclosure requirements of the Consumer Credit Directive. Although the assessment was based on the Consumer Credit Directive, the CJEU applied the assessment theme for the transparency requirement under the Unfair Terms Directive "by analogy", see Par. 94.

34 The example is taken from Danske Bank's general credit terms and conditions for consumer credit agreements – consumer. However, most major Norwegian banks use similar loan terms in their mortgage agreements with variable interest rates.

35 See e.g. Santander, "How does a higher Euribor affect a variable rate mortgage?", 21 March 2022, https://www.santander.com/en/stories/how-does-a-higher-euribor-affect-a-variable-rate-mortgage#:~:text=In%20Europe%2C%20the%20Euribor%2C%20the,instalment%20amount%20that%20borrowers%20pay. The interest rate is typically defined as "EURIBOR (Euro Interbank Offered Rate) plus X percentage points", where X is a fixed premium set by the bank, but which does not change during the loan period. Such loans are also offered in Norway, but are not widespread, see e.g. Handelsbanken, "Lån med NIBOR-tilknytning" [Loans linked to NIBOR], https://www.handelsbanken.no/no/privat/lane/boliglan/nibor?gad_source=1&gclid=Cj0KCQjwu8uyBhC6ARIsAKwBGpTH_Nv83QrBmDZEfwrz-QC6lojL49WTm-pqDqlwauxYseGNuezFUNTkaAjjMEALw_wcB.

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When the bank raises the interest rate during the contractual relationship, the consumer can check that the interest rate change is legal according to the contractual terms by comparing the increase with the predetermined index.

In *RWE Vetrieb*, the question was whether contractual terms that allowed a utility company to unilaterally change the costs associated with the supply of gas were unfair.[36] The CJEU stated as regards the assessment of "a term that allows the supplier to alter unilaterally the charges for the service to be supplied", it is it is of "fundamental importance […] whether the contract sets out in transparent fashion the reason for and method of the variation of the charges for the service to be provided, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges [...]".[37]

In *RWE Vertrieb*, the court further emphasised that "the lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation".[38] In other words, subsequent notification of changes alongside cancellation rights cannot compensate for insufficient information provided at the time of the contract's formation.

The terms employed in Norwegian loan agreements with variable interest rates can be criticised for not being objective when the bank can change the loan terms based on internal assessments. When the bank is not required to reference objective criteria when increasing the interest rate, it is not possible for the consumer to verify the legitimacy of such adjustments. This makes it difficult for the consumer to make an informed choice and meaningfully compare loan offers – after all, the bank retains considerable leeway to increase the interest rate shortly after the agreement is signed.

The CJEU has also ruled on the transparency requirement specifically in relation to variable rate terms in loan agreements.

The *Ibercaja Banco* case concerned a mortgage agreement with a variable interest rate linked to a reference rate, but where the interest rate was limited downwards by a minimum interest rate.[39] The Court stated that since "precise information regarding the financial consequences" depends on "unforeseeable future events that are outwith the seller or supplier's control", the trader cannot be expected to provide exact calculations of the minimum interest rate's effect on repayments over the full contractual period.[40] Such a disclosure requirement would be practically impossible for the trader to fulfil.

However, in the case of *Gómez del Moral Guasch*, the CJEU stated that a variable interest rate must enable the average consumer "*understand the specific functioning of the method used for calculating that rate* and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations"[41] [my italics]. The case concerned a variable-rate mortgage agreement where the interest rate varied depending on a benchmark index for Spanish mortgages.

When read in context, these statements indicate that where traders maintain control over the factors affecting interest rate changes, they must inform the consumer of the specific methodology by which such rates are calculated. For consumers to verify interest rate changes, the terms must be objective and not discretionary. Although the Court does not explicitly specify which calculation elements must be explained, the logical interpretation of this ruling is that all conditions and factors potentially triggering interest rate adjustments must be specifically described in the contract terms.

In his opinion in *Gómez del Moral Guasch*, the Advocate General stated that the transparency requirements for variable rate agreements cannot be as strict as those for foreign currency loans.[42] According to the Advocate General, a key element in the case law of the CJEU is that the consumer must be able to understand "potentially significant economic consequences".[43] However, the CJEU chose not to adopt the Advocate General's opinion on this point, instead ruling that variable rate terms, too, must enable the consumer to understand how the interest rate is actually calculated,[44] even though such terms do not necessarily entail the same risk.

In summary, CJEU case law establishes that variable interest rate terms must enable consumers to verify the interest rate adjustments implemented by the bank throughout the contractual relationship. This necessarily requires that the term be formulated objectively and that all conditions or factors potentially triggering changes in the loan interest rate be specifically articulated in the contractual term. Moreover, the term must be comprehensible to ordinary consumers without special knowledge in the field.

In May 2024, the EFTA Court delivered a judgment on whether variable interest rate terms in two Icelandic mortgage agreements complied with the Mortgage Credit Directive and the Unfair Terms Directive.[45] These terms resemble typical Norwegian terms by enabling banks to modify interest rates based on their discretionary

36 Case C-92/11, *RWE Vertrieb*.

37 Ibid. Par. 49.

38 Ibid. Par 51.

39 Case C-452/18, *Ibercaja Banco*. A "minimum interest rate" is a provision in a loan agreement that sets a minimum interest rate, below which the interest rate of the loan can never fall, see Par. 15 of the judgement. Such clauses ensure that the lender always receives a certain minimum return on the loan, even if market interest rates fall below that level.

40 Ibid. Sec. 50.

41 Case C-125/18, *Gómez del Moral Guasch*, Par. 51.

42 Opinion in Case C-125/18 *Gómez del Moral Guasch* delivered on 10 September 2019 by Advocate General M. Szpunar.

43 See Opinion of the Advocate General, Par. 118. The Advocate General refers to case C-186/16, *Andriciuc*, Par. 51.

44 See case C-125/18, *Gómez del Moral Guasch*, Par. 53

45 Joined cases E-13/22, "*Landsbankinn",*and E-1/23 "*Íslandsbanki"*.

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assessment. The EFTA Court unambiguously determined that the terms *did not fulfill the transparency requirement of the Unfair Terms Directive*.[46]

Mortgage agreements between consumers and businesses are specifically regulated in the Mortgage Credit Directive. Art. 24 sets out specific information requirements for "variable rate credit", including that "indexes or reference rates used to calculate the borrowing rate are clear, accessible, objective and verifiable by the parties to the credit agreement and the competent authorities [...]".[47]

In the request for an advisory opinion from the EFTA Court, the Icelandic court only requested an interpretation of the Mortgage Credit Directive and, if relevant, the Consumer Credit Directive. However, the Court stated that these sectoral directives must be interpreted in the light of the Unfair Terms Directive.[48] *The Court then first made a separate assessment of whether the terms complied with the Unfair Terms Directive, and concluded that the terms did not fulfil the requirements of Art. 3(1) and 5 of the Directive.*[49] *The Court then made a separate assessment of Art. 24 of the Mortgage Credit Directive, and concluded that the terms were contrary to this provision as well.*[50]

The Icelandic terms at issue in cases E-13/22 and E-1/23, which closely parallel typical Norwegian terms, permit the bank to modify loan interest rates at its discretion, based on a number of different factors. The EFTA Court concluded that both the individual elements, and the contractual term considered as a whole, contravened to the transparency requirement of the Unfair Terms Directive. The Court left minimal discretionary margin to the national court by stating that the national court should only "verify" whether the terms constitute a breach of the Directive's requirements.[51]

The disputed contractual terms referred, among other things, to "the interest rate of the Central Bank of Iceland". The EFTA Court pointed out that the loan rate does not directly mirror changes in the key interest rate, but rather is determined by the bank, with the key interest rate representing merely only one of numerous factors.[52] *In such circumstances, the Court concluded that reference to the key interest rate does not enable the consumer to understand how the interest rate is calculated.*[53] *Similarly, in typical Norwegian loan terms governing variable interest rates, "actions by the Central Bank of Norway that affect the interest rate on the loan" constitutes merely one of several factors that may permit the bank to adjust the interest rate.*

The EFTA Court also held that elements such as "operating costs", "public levies" and "other unforseen costs" must be regarded as vague references that are not verifiable.[54] *By comparison, typical Norwegian terms and conditions permit banks to justify interest rate adjustments on grounds such as "consideration the creditor's earnings capacity in the long term" and "special circumstances on the part of the creditor". According to the EFTA Court, the wording "among other things" reinforced the ambiguity of the interest rate adjustment term, as this allows banks to base adjustments on factors unknown to consumers when entering agreements.*[55] *While typical Norwegian interest rate terms do not include the wording "among other things", the EFTA judgment suggest that the crucial issue was that terms lacked objectivity, making verification impossible for consumers. Similar to the Icelandic terms, typical Norwegian terms permit banks to modify borrowing rates using discretionary criteria that consumers cannot realistically verify.*

As mentioned, the clarity requirement is not only intended to protect the consumer – it is also intended to help ensure a level playing field in the internal market. It is not obvious whether the ability to adjust the interest rate on a discretionary basis gives Norwegian banks a competitive advantage. The banking industry argues that the consumer's right of cancellation and ability to negotiate a lower interest rate contributes to healthy market competition.[56] However, it can be argued that relatively few Norwegians switch banks and negotiate lower interest rates.[57]

Further, it remains uncertain whether interest rate terms allowing changes regardless of reference rates or other objective factors actually increase consumer borrowing cost. Nevertheless, the record

46 On the EFTA cases E-13/22, *Landsbankinn,* and E-1/23, *Íslandsbanki,* and the problems surrounding Norwegian terms on variable interest rates, see also Kjørven, Marte Eidsand and Wold, Vebjørn, "EFTA-domstolen sitter på en boliglånsbombe" [The EFTA Court is sitting on a mortgage time bomb], *Rett24*, 2 May 2023, https://rett24.no/Art.s/efta-domstolen-sitter-pa-en-boliglansbombe, and Wold, Vebjørn, "EFTA-domstolens rentebombe fra Island" [The EFTA Court's interest rate bomb from Iceland], *Rett24*, 27 May 2024, https://rett24.no/Art.s/efta-domstolens-rentebombe-fra-island.

47 Art. 24(a) of the Mortgage Credit Directive.

48 See Joined Cases E-13/22, *Landsbankinn*, and E-1/23, *Íslandsbanki,* Par. 68. The Court referred to Case C-290/16, *Air Berlin,* Par. 44, cited above.

49 Ibid. Par. 69-99.

50 Ibid. Par. 100-129.

51 Ibid. Par. 99.

52 Ibid. Par. 95.

53 Ibid. Par. 95.

54 Ibid. Par. 96.

55 Ibid. Par. 98.

56 See e.g. Nilsen, Asgeir Aga and Meisingset, Synnøve. *"*Rentefesten I DNB: Tjener historisk mye på kundene*"* [Interest rate bonanza at DNB: Makin record profits from customers]. *E24*, 27 April 2023. https://e24.no/norsk-oekonomi/i/KneX6G/rentefesten-i-dnb-tjener-historisk-mye-paa-kundene?fbclid=IwAR1KWovYu7JigAYky29Q00PLcQrfblUZUs7uxwqoTePeKJVsGPBGzsVZXwo.

57 See Høyland et al. "Flertallet dropper å byte bank: - Jeg orker det bare ikke" [The majority choose not to switch banks: - I just can't be bothered]. *NRK*, 22 September, 2023. https://www.nrk.no/rogaland/forbrukerradet-mener-du-kan-spare-2000-kroner-i-maneden-pa-a-bytte-bank-1.16539918.

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profits banks have achieved following recent key interest rate increases raise questions.[58] These profits are possible because the banks increase lending rates faster than deposit rates. However, determining whether discretionary interest rate terms lead to higher borrowing costs is best left to the economists.

Another question is whether floating rate terms must link specifically to an index or reference rate to meet transparency requirements. The CJEU's statement in *Gómez del Moral Guasch* that a variable interest rate term must enable the consumer to understand the specific "method of calculation" of the interest rate could suggest this interpretation.[59] However, the CJEU has not yet directly addressed this issue, as all cases requiring specific calculation methods involved terms already linked to external reference rates.[60] In the EFTA court's judgment on Icelandic terms, the EFTA Court did not specify how variable rate terms must be formulated, as long as the terms are objective and verifiable.

3. Legal consequences of lack of transparency

3.1 Introductory remarks

The Unfair Terms Directive does not explicitly state the legal consequences of breaching the transparency requirement. However, when the CJEU issues rulings on the transparency requirement, it typically does so while assessing whether contract terms should be considered unfair.[61] The CJEU's case law shows that breaches of the transparency requirement can be decisive in unfairness assessments. Unfairness under the Directive can have far-reaching consequences for the contracting parties.

The question of what legal effects unfairness should have in member states raises several related issues, particularly due to the principle of effectiveness.[62] For instance, the Court has ruled in multiple recent cases that national limitation periods make it unreasonably difficult for consumers to assert their rights under the Unfair Terms Directive.[63] Here, however, I will focus on the substantive question of legal consequences.

3.2 The significance of lack of transparency for the unfairness assessment in Art. 3

According to Art. 3(1) of the Unfair Terms Directive, contractual terms shall be considered unfair if, "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".[64]

The Unfair Terms Directive contains no provision directly establishing what significance lack of transparency has for the unfairness assessment.[65] However, lack of transparency may be considered a "circumstances attending the conclusion of the contract", which under Art. 4(1) may influence the unfairness assessment. Additionally, the grey list indicates that the where the consumer "had no real opportunity of becoming acquainted before the conclusion of the contract", this signals unfairness.[66]

The CJEU Justice often refers to lack of transparency as "*one of the elements* to be taken into account in the assessment of whether that term is unfair" [my italics].[67] In the guidance to the Directive, the European Commission confirms that although lack of transparency does not automatically lead to the unfairness of a given contract term, lack of transparency may *indicate* unfairness.[68]

When it comes to terms permitting unilateral changes by the trader, the CJEU case law clearly indicates that breaching the transparency requirement results in unfairness. In the aforementioned *RWE Vetrieb*, the Court stated that when terms give the trader the unilateral right to change the price, it is of "fundamental

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58 Biehl, Karl. "Rekordhøy rentefest for bankene" [Record-high interest rate bonanza for the banks]. *E24*, 8 November 2023. https://e24.no/boers-og-finans/i/VP7dxp/rekordhoey-rentefest-for-bankene. Interest surplus (also called interest margin) is the difference between the interest rate on loans and deposits.

59 Case C-125/18, *Gómez del Moral Guasch*, Par. 51.

60 It is conceivable that such a requirement could instead be derived from the Mortgage Credit Directive or the Consumer Credit Directive. However, these directives do not provide clear guidance on how variable rate terms must be formulated that does not already follow from the clarity requirement, see in particular Art. 24 of the Mortgage Credit Directive and Art. 10(2)(f) of the Consumer Credit Directive.

61 Art. 5 can be interpreted in such a way that a breach of the transparency requirement first and foremost triggers the rule of interpretation in the second sentence of the provision that "[w]here there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail". However, the interpretation rule presupposes that the term allows for an alternative interpretation that is not unreasonable for the consumer. For more information on the relationship between the interpretation rule in Art. 5 and the Directive's unfairness test, see *Loos*, 2023, pp. 291-294.

62 The principle of effectiveness is expressly set out in Art. 7(1) of the Unfair Terms Directive.

63 For example, the CJEU has ruled that a national limitation period of 10 years violated the principle of effectiveness because the starting point of the period entailed a risk that the consumer would not be able to invoke rights under the Directive within the period, see Joined Cases C-80/21-C-82/21, *D.B.P.,* Par. 96-100. In principle, national courts cannot limit the consumer's repayment claim backwards in time either, see e.g. Joined Cases C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo*, Par. 74.

64 The wording "good faith" can be understood as a requirement of loyal creation in the light of the preamble, point 16, which states that the trader can fulfil the good faith requirement by "deals fairly and equitably with the other party whose legitimate interests he has to take into account". "Imbalance", on the other hand, must be understood as a requirement that contractual terms must be balanced, see Giertsen, *Avtaler*, p. 274.

65 See also Marco B.M. Loos, "Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law", *European Review of Private Law* 2017, pp. 179-194 (p. 183).

66 See Annex to the Unfair Terms Directive (grey list), point 1(i). The grey list contains an "indicative and non-exhaustive list of the terms which may be regarded as unfair", cf. Art. 3(3).

67 Joined Cases C-776/19 and C-782/19, *BNP Paribas Personal Finance*, Par. 62.

68 See European Commission 2019, Sec. 3.4.6.

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importance" the contract sets out in transparent fashion the reason for and method of the variation of the charges.[69] The Court further stated that the transparency requirement had to be fulfilled *alongside* the loyalty and balance requirement in Art. 3(1) in order for contractual terms not to be considered unfair, by imposing a requirement of "good faith, balance *and transparency*" [my italics].[70]

The Commission confirms that if contract terms are on the Directive's grey list, "with particular regard to unilateral changes to contract terms", lack of transparency may be decisive for the unfairness assessment.[71] Indeed, he CJEU's statements in *RWE Vetrieb* suggest that as long as terms permit unilateral changes, a breach of the transparency requirement will *in all cases indicate unfairness.*

In the case concerning the Icelandic variable rate terms, the EFTA Court concluded that none of the disputed contractual terms fulfilled the requirement of "good faith, balance and transparency (...)".[72] *The EFTA Court came to this conclusion after establishing that the terms did not fulfil the transparency requirement. The Court stated that the terms must be considered unfair under Art. 3(1) "where they cause a significant imbalance in the parties' rights and obligations under a contract to the detriment of the consumer (...)".*[73] *While the final determination was left to the national court, when assessing whether the terms med the transparency requirement, the Court stated that "subject to verifications to be carried out by the referring courts, such contractual terms seem liable to cause a significant imbalance in the parties' rights and obligations".*[74]

In summary, the best arguments support that when contractual terms cause an imbalance in the contractual relationship to the detriment of the consumer, lack of transparency must, as a clear general rule, lead to unfairness under Art. 3(1). As the Commission notes in the guidance, it is unlikely that the trader was dealing "fairly and equitably" when the consumer is put in a "disadvantageous position" due to the lack of transparency.[75]

3.3 Legal consequences of unfairness

Art. 6(1) of the Unfair Terms Directive requires Member States to ensure that unfair terms used in consumer contracts shall "not be binding on the consumer and the contract shall continue to be bind the parties upon those terms if it is capable of continuing in existence without the unfair terms". Put simply, the main rule is that only the unfair term is set aside,[76] while the rest of the contract remains in force where possible.

At the same time, CJEU case law establishes that, in principle, unfair terms cannot be *modified*.[77] The CJEU's view is that if it were open to national courts to revise unfair terms, "such a power would be liable to compromise attainment of the [the directive]" as it would "weaken the dissuasive effect on sellers or suppliers of the straightforward non-application of those unfair terms with regard to the consumer".[78] While some may claim that modifying an unfair term could restore contractual balance, the Court has emphasised that this is not possible because it would compromise the Directive's preventive purpose.

The EFTA Court has also held that, in principle, unfair contract terms cannot be modified.[79] In *Engilbertsson*, the Court points out that although the EEA states are granted a certain degree of autonomy in defining the legal consequences of unfairness, they must nevertheless ensure that the unfair term is not binding on the consumer and that the contract continue to bind the parties if it is capable of continuing in existence without the unfair terms.[80]

The CJEU case law makes it clear that the main rule that only the unfair contract term should be set aside is usually followed.[81] When assessing whether the agreement can be maintained without the unfair term, the Court places minimal weight on any negative consequences for the trader.

In the *Bank M* case, which concerned a foreign currency loan agreement, setting aside only the unfair term would result in the complete cancellation of the loan interest, leaving the consumer

69 Case C-92/11 *RWE Vertrieb*, Par. 49.

70 The CJEU stated this for the first time in case C-92/11, *RWE Vertrieb*, Par. 47. From recent case law, see e.g. C-139/22, *Mbank*, Par. 49

71 European Commission 2019 point 3.4.6. For example, terms that allow unilateral changes to the borrowing rate are covered by the grey list with certain exceptions, see grey list point 1(j).

72 Joined Cases E-13/22*, Landsbankinn*, and E-1/23, *Íslandsbanki,* Par. 99

73 Joined Cases E-13/22, *Landsbankinn,* and E-1/23, *Íslandsbanki,* Par. 99

74 Joined Cases E-13/22, *Landsbankinn,* and E-1/23, *Íslandsbanki,* Par. 97.

75 European Commission 2019, pt. 3.4.6.

76 According to the CJEU, national courts are generally required to set aside unfair contract terms, unless the consumer objects. See e.g. Case C-125/18, *Gómez del Moral Guasch*, Par. 58.

77 For example, in case C-421/14, *Banco Primus,* the CJEU states in Par. 71 that "*national courts are merely required to exclude the application of an unfair contractual term in order that it may not produce binding effects with regard to the consumer, without being empowered to revise the content of that term. That contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible*".

78 See e.g. Case C-488/11, *Asbeek Brusse*, Par. 58, with further references to Case C-618/10, *Banco Español*, Par. 66 to 69.

79 See case E-25/13, *Engilbertsson,* Par. 164 and case E-27/13, *Gunnarsson,* Par. 107.

80 See case E-25/13, *Engilbertsson,* Par. 161. This creates a tension between the Unfair Terms Directive and Sec. 36 of the Contracts Act, with flexibility on the effect side. When implementing the Directive, the Ministry assumed that Sec. 36 provides a *"flexible and favourable solution, which cannot affect the consumer in any unreasonable way"* [English translation], and that the consumer must also be able to use the access to contract revision offered by the provision within the scope of the Directive, see Ot.prp. nr. 89 (1993-1994) p. 11. However, on the basis of the CJEU's statements, it can be argued that a general right to change unreasonable contract terms within the scope of the Directive is contrary to EEA law.

81 It is primarily where the unfair term defines the main subject matter of the contract (see Joined Cases C-70/17 and C-179/17, *Abanca Corporación Bancaria*, Par. 55), or a breach of only the unfair term leads to a contract contrary to national law (see Case C-421/14, *Banco Primus*, Par. 71), that the CJEU allows the entire contract to be set aside, and not only the unfair term.

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only required to repay the loan capital.[82] The CJEU stated that it is irrelevant to the assessment of the parties' entitlements that the consumer effectively received a "free" loan.[83] In this regard, the Court referred to the principle that "a party cannot be allowed to derive economic advantages from his, her or its unlawful conduct or to be compensated for the disadvantages caused by such conduct".[84] The Court further stated that "the argument relating to the stability of the financial markets" is not relevant to the interpretation of the Unfair Terms Directive and that traders cannot "circumvent the objectives of [the directive]" on such grounds.[85] Breaches of the transparency requirement can thus have potentially far-reaching consequences for traders operating with such contract terms.

If, exceptionally, the agreement cannot be maintained without the unreasonable contractual term, the entire agreement must be set aside.[86] *Likewise in such cases, the amount paid due to the unfair terms must be fully refunded.*[87] *For loan agreements, this means that the loan falls due for payment, so that the consumer must repay the principle. However, if the loan amount exceeds the consumer's financial capacity, and refinancing is not arranged, immediate repayment would be unfavourable for the consumer. CJEU case law clarifies that if cancellation is "contrary to the interests of [the consumer]", other legal consequences must be considered.*[88]

In Kásler, the immediate due date of the loan would have forced the consumer to sell the home securing the loan.[89] *The CJEU stated that even though modifying contractual terms is generally prohibited the Directive does not prevent the national court from replacing the unfair term with a "supplementary provision of national law" in such cases.*[90] *The Court emphasised that if the consumer were penalized while the bank faced no deterrent, the preventive effect of the Directive would be undermined.*[91]

In Norwegian contract law, there are no provisions designed to supplement unfair contract terms. Instead, Sec. 36 of the Norwegian (and Nordic) Contracts Act allows for amendment of unfair contractual terms. In Dziubak, the court emphasised that unfair terms cannot be replaced by "mere act of substitution (...) [as] they do not appear in any event, to have been subject to a specific assessment by legislature with a view to establishing that balance (...)".[92] *This suggests that only provisions with specific content, designed to supplement agreements, may replace unfair terms. On the other hand, general statutory provisions permitting revision of unfair contracts – such as Sec. 36 of the Nordic Contracts Acts – cannot replace unfair contract terms.*

In Banca B, national law contained no declaratory provisions to replace unfair terms regarding the calculation of the interest rate.[93] *The CJEU held that to restore the contractual balance, the national court must take "all the measures necessary to protect the consumer from the particularly unfavourable consequences which could result from the annulment of the loan agreement in question".*[94] *In such instances, courts may "invit[e] the parties to negotiate with the aim of establishing the method for calculating the interest rate".*[95] *This requires that the national court "sets out the framework for those negotiations" and that "negotiations seek to establish an effective balance between the rights and obligations."*[96]

This approach raises questions about its effectiveness in fulfilling the directive's purpose of restoring contractual balance and deterring traders from using unfair terms. Nor does the CJEU specify how the restitution should proceed if the parties must in negotiate new terms.[97]

82 Case C-520/21, *Bank M*.
83 Ibid. Par. 80.
84 Ibid. Par. 81.
85 Ibid. Par. 83.
86 Art. 6(1) of the Unfair Terms Directive.
87 Case C-520/21, *Bank M,* Par. 66
88 Case C-118/17, *Dunai*, Par. 55. See also Case C-645/22, *Luminor bank*, Par. 41, where the CJEU emphasises that the consumer does not have a freedom of choice on this point, so that the national court must first examine whether cancellation of the contract actually has harmful effects on the consumer.
89 Case C-26/13, *Kásler*.
90 Ibid. Par. 80.
91 Ibid. Par. 83 to 84.
92 Case C-260/18, *Dziubak*, Par. 61 and 62. See also Case C-269/19, *Banca B*, Par. 35.
93 Case C-269/19, *Banca B*, Par. 34.
94 Ibid. Par. 41.
95 Ibid. Par. 42.
96 Ibid. Par. 45.
97 In E-13/22, *Landsbankinn*, and E-1/23, *Íslandsbanki*, the EFTA Court states that if it is not possible to maintain the agreement without the floating rate clause, and cancellation of the agreement has unfortunate consequences for the consumer, the clause may exceptionally be replaced by the background legal provision. However, the EFTA Court says nothing about what the legal effect will be when there is no background legal provision that can replace the term, see Par. 140 to 143.

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4. Transparency overlooked: The consequences of inadequate implementation in Norwegian contract law

The Unfair Terms Directive's transparency requirement is not established as a general requirement in Norwegian law.[98] However, the Directive's unfairness assessment is implemented though Sec. 36 of the Contracts Act.[99] Since lack of transparency constitutes a factor in the Directive's unfairness assessment, the transparency requirement must be interpreted within Sec. 36 of the Contracts Act when contract terms fall within the Directive's scope.[100] Norwegian legal practitioners (as well as Nordic legal practitioners) must therefore apply the transparency criteria established by the CJEU and the EFTA Court.

Despite Norway's obligations, the transparency requirement has received minimal attention in Norwegian case law.[101] This blind spot in EEA law implementation may, first and foremost, be due to Norway's implementation approach.

At implementation, the Ministry claimed that Sec. 36 of the Contracts Act likely imposed stricter unfairness standards than the Directive.[102] The Ministry aimed for the legal status under Sec. 36 "to be continued as far as possible" [English translation].[103] Several have noted these ministerial statements may have been incorrect even at implementation.[104] As *Wabakken* observes, the Ministry overlooked that both Sec. 36 and the Directive's unfairness assessment are evolving legal standards, developing in different contexts for different purposes, in different contexts and for different purposes.[105]

When properly applied, the transparency requirement may create difficulties for Norwegian traders. As noted, Norwegian variable rate terms potentially breach this requirement and could be considered unfair.[106]

The specific consequences of unfairness under Art. 6(1) raise complex questions due to the function of variable interest rate terms and varying sanctions across Member States.[107] Notably, the CJEU has given little weight to financial market stability when assessing the transparency requirement breaches.[108]

If Norwegian variable-rate terms breach the transparency requirement, banks will likely need to revise their practices. At the same time, it is not obvious that the new requirements will lead to lower costs for consumers. In its memorandum to the Ministry of Justice, Finance Norway argues that a requiring variable interest rate terms to link to indices or reference rates could negatively impact both the banking industry and consumers.[109]

Nevertheless, Norwegian banks have achieved record profit over the past years through increased net interest income. By comprehensively specifying the objective grounds for interest rate adjustments, it becomes possible to verify the circumstances justifying

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98 Sec. 22 of the Marketing Control Act authorises the consumer authorities to prohibit unfair consumer terms if public interest considerations so dictate, and in the assessment, emphasis must be placed on "balance between the parties and the need for *clarity in the contractual relationship*" [my italics]. However, the provision has no significance for the legal position of the individual consumer, see Ot.prp. nr. 55 (2007-2008) Om lov om kontroll med markedsføring og avtalevilkår mv. (markedsføringsloven) p. 122. The fact that the clarity requirement was not legislated for may be due to the fact that the legislator exclusively understood the clarity requirement as a premise for the rule of interpretation in the second sentence of Art. 5 that unclear contract terms shall be interpreted in the consumer's favour, see Ot.prp. no. 89 (1993-1994) p. 15. See also See Marie Natland Wabakken, "Om standardiseringen av en rettslig standard" [On the Standardization of Legal Standards], MarIus, 2018, p. 33.

99 Ot.prp. nr. 89 (1993-1994) p. 3-4 and p. 6.

100 In contrast to the Unfair Terms Directive, Sec. 36(2) of the Contracts Act allows the "position of the parties" to be emphasised in the unfairness assessment. However, as a result of the directive's objective benchmark, the position of the parties will also be of limited importance in Norwegian cases when the directive applies.

101 Wabakken 2018. As Giertsen points out, the transparency requirement could probably have been invoked in Rt. 2012 p. 1926 (Fokus Bank), see Giertsen, *Avtaler*, p. 103.

102 Ot.prp. no. 89 (1993-1994) p. 8.

103 Ot.prp. no. 89 (1993-1994) p. 13.

104 See Kåre Lilleholt, "Revitalisering av generalklausulen? Litt om opplysningssvikt og avtalelova § 36" [The revival of the general clause? Some words on the information deficiency and Sec. 36 of the Contract Act], *Tidsskrift for rettsvitenskap*, 2013 p. 550-566 (p. 565) and Wabakken 2018, p. 21.

105 See Wabakken 2018, p. 65. While the purpose of the Unfair Terms Directive is to ensure both consumer protection and a level playing field throughout the EEA, the main purpose of Sec. 36 of the Contracts Act is to achieve reasonableness in the specific contractual relationship, see Giertsen 2018, p. 435, with further reference to Arnesen 2016, pp. 54-55

106 See Sec.0. The Norwegian requirement for the wording of contractual terms on variable interest rates must be understood in the light of Sec. 3-13 to 3-15 of the Financial Contracts Act. The provisions implement, among other things, the Consumer Credit Directive and the Mortgage Credit Directive. The provisions regulate when the creditor can change the interest rate on the loan, and when the consumer can refuse to consent to the proposed change without the creditor being able to terminate the loan agreement. The creditor's right of cancellation is regulated in Sec. 5-14 (1) in conjunction with (2) of the Financial Contracts Act. The provisions do not say anything about whether the creditor is authorised to terminate a fixed-term agreement with a variable interest rate. Since most loan agreements with variable interest rates are fixed-term, the provision leaves uncertainty as to whether the creditor can change such agreements during the contractual relationship.

107 See Sec. 3.3. As mentioned, Sec. 36 of the Contracts Act, with its flexibility in terms of the period of effect, complicates the assessment of what legal effects unfairness under the Unfair Terms Directive may have under Norwegian law. However, in light of the presumption principle, it is obvious that Norwegian courts must also follow the legal effects Art. 6 of the Unfair Terms Directive

108 See the reference in Sec.0 to case C-520/21, *Bank M,* Par. 80 - 83.

109 Finance Norway. New Financial Contracts Act - amendment of contract terms for fixed-term credit etc. [Memorandum to the Ministry of Justice], 18 May 2021, p. 11-14.

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such adjustments. Transparent contract terms can thus make it easier to discuss the need for the banks' record profits.

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