Adriana Alves Henriques

THE (UNCLEAR) RELATIONSHIP BETWEEN A PERSONALISED PRICE TERM AND THE UNFAIR CONTRACTUAL TERMS DIRECTIVE

Dissertation to obtain a Master's Degree in Law, in the specialty of Business Law and Technology ("Law & Tech")

Supervisor:

Dr. Fabrizio Esposito, Professor of the NOVA School of Law

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ANTI-PLAGIARISM STATEMENT

I hereby declare that the work I present is my own work and that all my citations are correctly acknowledged. I am aware that the use of unacknowledged extraneous materials and sources constitutes a serious ethical and disciplinary offence.

Lisbon, September 2022.

(Adriana Alves Henriques)

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My first acknowledgement goes to my supervisor, Professor Fabrizio Esposito, for accepting my invitation and for always being so accessible and supportive to me throughout this journey.

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ABSTRACT

Given the persistent advance of technology and data science, it is predictable that the practice of price personalisation will become more common and sophisticated. It is therefore up to the Law to intervene and regulate this new commercial practice in order to ensure consumer protection. In this context, transparency requirements can play a key role.

In this sense, the European legislator implemented a new pre-contractual information duty, which will be included in the Consumer Rights Directive - new Article 6(ea). Under this new paragraph, the consumer has to be informed if the price was personalised on the basis of automated decision-making. Even though this requirement is very welcome, it raises several questions. Thus, part of this work will be dedicated to its detailed analysis, namely its scope, form, content and level of detail, as well as its importance for the consumer's life. In addition, we will also offer the interpretation that we consider the most adequate.

Since this new transparency requirement is not applied in an isolated manner, it is important to take into consideration its relationship with the remaining legal instruments, namely the Directive on unfair terms in consumer contracts (UCTD). Although it contains already a transparency requirement, we believe that both can be interpreted in a cohesive way.

Under the UCTD, it is clear that if a personalised price term is not transparent, it will be subject to the unfairness test of Article 3, requiring, to that end, some effort and adaptation by national courts. On the contrary, if the term is transparent, we argue that, based on a teleological interpretation, it is still possible to submit the personalised price term to this assessment.

In the final part of our work, we decided to address the consequences of the declaration of the unfair nature of a personalised price term. In the light of the UCTD, this term will have to be eliminated which, in turn, will lead, in our view, to the nullity of the entire contract. Exceptionally, if such an annulment gives rise to some particularly unfavourable consequences for the consumer, the performance of the contract should continue, with the replacement of the personalised price term - either by a new price negotiated by the parties or by a supplementary rule of national law (at the limit, in the absence of such a rule, by the non-personalised price).

Keywords: price personalisation; personalised price term; transparency; pre-contractual information duties; European consumer law

RESUMO

Atendendo ao avanço persistente da tecnologia e da ciência dos dados é previsível que a personalização de preços se torne mais comum e sofisticada. Com efeito, incumbe ao Direito acompanhar e regular esta nova prática comercial, a fim de garantir a proteção do consumidor. Neste contexto, as exigências de transparência podem desempenhar um papel essencial.

Neste sentido, o legislador europeu aprovou um novo dever de informação pré-contratual, que será incluído na Diretiva relativa aos Direitos dos Consumidores – novo Artigo 6(ea). Nos termos do mesmo, a circunstância do preço ter sido personalizado com recurso a automatização terá de ser informada ao consumidor. Pese embora este requisito seja muito bem-vindo, a verdade é que o mesmo levanta diversas questões. Desta forma, parte do presente trabalho será dedicada à sua análise detalhada, designadamente ao seu escopo, forma, conteúdo e nível de detalhe, bem como a sua relevância para a vida do consumidor. Adicionalmente, iremos oferecer a interpretação que consideramos mais adequada.

Uma vez que este novo requisito de transparência não se aplica de forma isolada, importa ter presente a sua relação com os restantes instrumentos jurídicos, nomeadamente com a Diretiva relativa às cláusulas abusivas nos contratos celebrados com os consumidores (UCTD). Embora a mesma também preveja um requisito de transparência, cremos que ambos podem ser interpretados de forma coesa.

No âmbito da UCTD, é evidente que se a uma cláusula de preço personalizado não é transparente, a mesma estará sujeita ao teste de carácter abusivo do Artigo 3º, sendo necessário, para o efeito, algum esforço e adaptação por parte dos tribunais nacionais. Na eventualidade da cláusula ser transparente, consideramos que, com base numa interpretação teleológica, será possível os tribunais nacionais submeterem a cláusula de preço personalizado a este teste.

O nosso trabalho termina, assim, com a análise das consequências da declaração de caracter abusivo. No nosso entender, a cláusula de preço personalizado deverá ser excluída e o contrato deverá ser considerado nulo. Excecionalmente, se da nulidade do contrato surgirem consequências particularmente desfavoráveis para o consumidor, a execução do mesmo deverá continuar, com a substituição da cláusula de preço personalizado - quer por um novo preço negociado pelas partes, quer por uma regra supletiva de direito nacional (no limite, na ausência de tal regra, pelo preço não personalizado).

Palavras-chaves: personalização de preços; cláusula de preço personalizado; transparência; deveres de informação pré-contratuais; direito do consumo europeu

QUOTING AND OTHER CONVENTIONS

I. In the context of this work, the citation of other academic works will be made according to the Portuguese Norms no. 405-1 and 405-4 of the Portuguese Quality Institute ("*Instituto Português da Qualidade*"):

> The monographs mentioned in this work are cited with reference to author, title, volume (when applicable), edition, publisher, year and page(s). From the second citation on, only reference is made to the author, title (abbreviated) and respective page(s).
>
> Periodical articles or parts of books are cited with reference to the author, title of the article or part of the book, name of the journal or book in italic, volume, number, year and page(s). From the second citation on, only the author's name, title of the article or part of the book (abbreviated) and respective page are referred to.
>
> The citation of several works in the same footnote follows a tendency order according to the order in the work. In the final list, the works are ordered by author.

II. For reasons of fluidity, all legislative sources are briefly identified in the text. The full reference can be found in the footnote where it is first mentioned.

III. The method of citing case law adopted is based on European Case Law Identifier (ECLI) and refers to the type of decision (with full date), usual case name, case number with the register and paragraph cited. From the second citation on, only reference is made to the usual case name, case number and paragraph(s).

IV. The body of this dissertation has 198.134 characters, including spaces and footnotes.

V. Extensive quotes (more than 60 words) are highlighted from the body of the text for emphasis.

LIST OF ABBREVIATIONS AND ACRONYMS

A29WP	Article 29 Working Party
ADM	Automated Decision Making
AI	Artificial Intelligence
CJEU	Court of Justice of the European Union
CRD	Consumer Rights Directive
DL	Decree-Law
EC	European Commission
ECLI	European Case Law Identifier
EU	European Union
GDPR	General Data Protection Regulation
ML	Machine Learning
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
OPP	Online Price Personalisation
PID	Price Indication Directive
UCTD	Unfair Contract Terms Directive
UCPD	Unfair Commercial Practices Directive

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1. INTRODUCTION

"In the age of the Internet, fixed prices are a thing of the past"[1]

- Julia Angwin and Dana Mattioli

The possibility for traders to obtain and analyse ever-increasing amounts of data about their customers and, in particular, potential customers, has allowed the phenomenon of online price personalisation (OPP) to develop further and better.

In this regard and bearing in mind the importance of protecting consumers who are used to being charged a uniform price, the European Union (EU) legislator introduced a new information requirement in the Consumer Rights Directive (CRD)[2], according to which traders will have to inform consumers whether the price has been personalised, on the basis of automated decision making (ADM) – new Article 6(ea). This provision follows some concerns regarding the transparency of these practices. However, this new requirement also raises new concerns, in particular concerning its interplay with other European legislation, namely the Unfair Contract Terms Directive (UCTD).

A price personalisation term could arguably be considered an unfair term under Article 3 of the UCTD[3]. However, according to the same legislative instrument, the fairness of the price can only be assessed if the term is not transparent, as stated in Article 4(2) UCTD. At first sight it might appear that if the trader fulfils his duty to inform, the term is necessarily fair, so there will be no fairness assessment. However, that would be extremely detrimental to consumers[4], and therefore certainly not desired by the legislator. On the other hand, if the trader does not inform, other issues arise, notably regarding the difficulties of the fairness' verification of the price, under the circumstances of a personalised price.

Keeping these issues in mind, it is important first of all to contextualise the phenomenon of OPP. We will start by delimiting its concept, by comparing it to other online

[1] ANGWIN, Julia, and MATTIOLI, Dana - Coming Soon: Toilet Paper Priced Like Airline Tickets. *The Wall Street Journal* (September 2012).

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

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

[4] See below, Section 2.4.

practices that involve price setting. Once the object is defined, we will then analyse this practice from an economic perspective in order to demystify the impact of it on consumers.

We will then move on to a more practical analysis, that of the OPP process itself, where we will address the protection of consumers' personal data. This topic is not only unavoidable to address when talking about online price personalisation because of its relevance, but it is also important as it allows us to make the link with the transparency requirement.

Chapter two ends with a brief analysis of the harm that OPP can bring for consumers. Although the overall effect of this practice on consumers is ambiguous, as it depends on several factors, it is possible to identify a number of situations where the implementation of personalised prices can be detrimental to consumers. As we will see further, these situations essentially relate to the exploitative and discriminatory potential of the practice.

The third chapter analyses the transparency requirement introduced in the CRD. There we will present our considerations on it, notably as regards its scope, form, content and level of detail, as well as its importance for consumers' protection. As part of this analysis, we will position ourselves on the issue of *what it will take for a trader to comply with the new transparency requirement*, in particular why we argue that consumers should be informed about the main factors determining willingness to pay, as well as the non-personalised price.

Following in-depth study of this new requirement, the conditions are in place for the analysis of the relationship object of this work: the relationship between the transparency requirement and the UCTD, in particular the unfairness test. This will be the topic of fourth chapter, which will be analysed in the light of two possible scenarios: Scenario 1, where there is no compliance with the transparency requirement; and Scenario 2, where there is compliance.

In this regard, we consider, first of all, that a harmonious interpretation will have to be carried out between the concept of transparency under the UCTD and the one implemented by the new Article 6(ea) of the CRD. Only in this way will it be possible to avoid a duality of transparency requirements. In any case, if there is no compliance with the transparency requirement (Scenario 1), the OPP term will have to be subjected to the unfairness test. In this context, we identified some difficulties in carrying out this assessment from a substantive point

of view, yet we believe that, with some adaptation and effort by the national court, it is possible to review the fairness of the personalised price term.

On the contrary, if the term complies with the transparency requirement (Scenario 2), it is important to stress out that this circumstance does not imply the fairness of the term. As initially stated, the practice of OPP has an exploitative and discriminatory potential that cannot be underestimated. For this reason, we argue that it would be desirable for consumer protection that Member States extend the unfairness test to price adequacy, in order to cover OPP. As the Portuguese legal system has extended the scope of the assessment of unfairness to contractual terms related to the adequacy of the price or remuneration, we will briefly analyse it in Section 4.5.

Before our conclusive remarks, we will further address the consequences of an OPP found to be unfair, as a number of practical issues arise in this regard (Section 4.6).

Finally, Chapter 5 summarizes the findings about the relationship between a personalised price term and the UCTD.

2. ONLINE PRICE PERSONALISATION

The practice of price personalisation is not a novelty, having taken place in the offline world for a long time. Taking the example of a salesperson at the fair, or even a car dealer[5], it is common that, depending on the customer in front of them, these traders adjust the price of the good according to what they think is the highest price the customer would pay for it. In other words, they adjust the price to the customer's maximum willingness to pay.

In recent years, somewhat as a consequence of the digital age, price personalisation has shifted from the offline world to the online environment and has become a pricing strategy extremely attractive.

As technology has not only enabled the development of OPP, but also other similar practices involving price setting, it is important to delimit the concept and make some conceptual distinctions. Before going deeper into the debate from the perspective of transparency in the EU consumer market, we will address price personalisation from an economic perspective and also how this strategy works in practice. A brief analysis of the impact that OPP may have on consumers is reserved for the end of the chapter.

2.1. Online price personalisation: definition and conceptual distinctions

Based on Recital 45 of the Omnibus Directive, OPP can be defined as the practice whereby a trader, for the same or identical good or service, charges different prices based on the individuals' maximum willingness to pay, as assessed through ADM and profiling of consumer behaviour[6]. From this definition, it is therefore possible to identify the three elements considered to be characteristic of this practice.

The first one is the existence of different prices for the same or identical products: not all the customers have the same willingness to pay, as a result, for the same T-shirt different prices will be charged. The second one is the fact that this price differentiation is based solely on the customer's maximum willingness to pay, instead of considering other relevant and traditional factors for pricing strategy, such as costs, stock levels or competition[7]. And the third one is the circumstance that the customer's maximum willingness to pay is assessed on

[5] OECD - *Personalised Pricing in the Digital Era – Note by the European Union*. OECD: (2018), 2.
[6] Recital 45 of the Omnibus Directive.
[7] DE ARRUDA, Elisa Schenfel - Personalised Prices: Striving for Transparency from Data Protection and European Consumer Law Perspective. Lisbon, 2020, Master Thesis, 4.

the basis of ADM and profiling of consumer behaviour. Once these elements are verified, we can say that we are dealing with OPP.

Although many authors claim that, in practice, OPP is highly unlikely or improbable[8], as sellers are not yet able to know and trace the exact willingness to pay of each buyer for the product or service, the truth is that with the advance of technology the possibility of predicting the consumer's willingness to pay becomes more and more real[9]. Powered by data-driven personalisation technologies, traders have been able to obtain and analyse ever-increasing amounts of data about consumer choices and preferences of their customers and potential ones. In turn, the information collected, which includes both public and private information, is what allows traders to implement OPP strategies[10].

However, OPP is not the only practice emerging in this environment, so before going into detail about how it works, it is important to clarify how OPP relates to online price discrimination and dynamic pricing.

Starting with the relationship between OPP and online price discrimination[11], as these two terms are often used interchangeably despite having different meanings, the former is considered to be a particular manifestation of the latter[12]. Online price discrimination is a wider phenomenon that encompasses any and all price differentiation for the same or identical products or services, which is not based on cost differences[13]. In this sense, it includes forms of discrimination that do not fall within the term OPP, such as quantity discounts or loyalty cards[14].

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[8] In this respect: POORT, Joost, and BORGESIUS, Frederik Zuiderveen - Personalised Pricing: The Demise of the Fixed Price?" In *Data-Driven Personalisation in Markets, Politics and Law*, 176; SEARS, Alan M - The Limits of Online Price Discrimination in Europe. *The Columbia Science& Technology Law Review,* Vol. 21 (2019): 5.

[9] In this sense, a 2015 White House Report concluded that "*A review of the current practices suggests that sellers are now using big data and digital technology (…) to set personalized prices"* - WHITE HOUSE - *Big Data and Differential Pricing*. Washington: White House, 2015, 20.

[10] VICTOR, Vijay, FEKETE-FARKAS, Maria, and LANER, Zoltan - Consumer Attitude and Reaction towards Personalised Pricing in the E-Commerce Sector. *Journal of Management and Marketing Review*, Vol. 4, no. 2 (2019), 140.

[11] In order to avoid the negative connotation of the word "discrimination", there are authors who use the term "price differentiation". Nevertheless, the meaning is the same. PHILLIPS, R. L - *Pricing and Revenue Optimization*, Stanford: Stanford University Press, 2005, 74. Alan M. "The Limits of Online Price Discrimination in Europe",6.

[12] DE ARRUDA - Personalised Prices, 4.

[13] JOOST, and BORGESIUS - Personalised Pricing: The Demise of the Fixed Price?,174-189; DE STREEL, Alexandre, and JACQUES, Florian - Personalised pricing and EU law. In *30th European Conference of the International Telecommunications Society (ITS): "Towards a Connected and Automated Society"*. Helsinki: International Telecommunications Society (ITS), 2019, 2.

[14] SEARS - The Limits of Online Price Discrimination in Europe, 6.

Another pricing strategy widely used online and that can cause some confusion is dynamic pricing. Through this practice, companies can change "*the [displayed] price of a product in a quick and highly flexible manner in response to market demand*"[15]. In contrast to price personalisation, what makes prices vary is not a personal characteristic - the customer's maximum willingness to pay - but rather the features of the market, the purchase and the product, including the evolution of supply and demand in relation to perishable, time-sensitive or scarce products[16].

Having clarified the relevant concepts, we will now focus on OPP as defined at the beginning of this section. Because of the complementarity between the economic and the legal fields, it is useful, for the purposes of the present analysis, to be familiar with the economic context of the practice[17].

2.2. Online price personalisation from an economic perspective

The practice of OPP has been object of study also in the field of economics, being commonly identified by this literature as *first-degree of price discrimination* or *third-degree of price discrimination,* depending on whether the price personalisation is made for specific consumers or for specific categories of consumers, respectively[18].

From an economic perspective, for an OPP strategy to work effectively and be successful, some conditions must be satisfied[19]. Firstly, and perhaps the most important one, the trader must be able to individualise consumers based on the price elasticity of demand for

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15 EC - *Commission Notice: Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market*, Official Journal of the European Union, 2021: 102.

16 BIAC - *Personalised Pricing in the Digital Era - Discussion Points*. Paris: Business and Industry Advisory Committee to the OECD BIAC (2018), 1.

17 With a similar understanding AKON, Melvin Tjon - Personalized Pricing Using Payment Data: Legality and Limits under European Union and Luxembourg Law. *European Business Law Review*. Wolters Kluwer. Vol. 31, no. 5 (2020), 951; ESPOSITO, Fabrizio - Making personalised prices pro-competitive and pro-consumers. *CeDIE Working Papers*, Vol. 2 (2020), 7.

18 According to the economic literature, there is also a second degree of discrimination where prices vary according to the quantity bought by the consumer. However, that degree is no longer covered by the concept of OPP, as traders do not offer the same product (or quantity) in order to price discriminate. JOOST, and BORGESIUS- Personalised Pricing: The Demise of the Fixed Price?,176; DE STREEL and JACQUES - Personalised pricing and EU law, 1.

19CARROLL, Kathleen, and COATES, Dennis - Teaching Price Discrimination: Some Clarification. *Southern Economic Journal*, Vol. 66, no. 2 (October 1999), 470-471; POORT and BORGESIUS - Personalised Pricing: The Demise of the Fixed Price, 177; MILLER, Akiva - What Do We Worry About When We Worry About Price Discrimination? The Law and Ethics of Using Personal Information for Pricing. *Journal of Technology Lawand Policy*, Vol. 19 (2014), 54.

the goods or services it supplies[20]. If the trader cannot do so in practice, it cannot set the price that corresponds to the buyer's maximum willingness to pay. Secondly, it is required for the trader to have a "*sufficiently strong market position*"[21], meaning that it cannot be a price taker: it must be capable of setting prices above marginal costs, even temporarily[22]. And thirdly, the trader must have control over the sale of its goods or services, which requires being in a position to prevent arbitrage between consumers, either through prohibition or legal constraints or simply because resale is impractical or would be too costly. If the trader has no control and resale is possible and admissible, the person who buys at a lower price - because his maximum willingness to pay was lower - may sell to a third party more expensive than the price he bought at, but cheaper than the third party would buy from the trader. Therefore, the OPP strategy would not succeed.

Once these conditions are met, the implemented OPP initiative will produce its effects. It is therefore relevant to take a general and brief overview of its main and potential economic effects. As a first effect, we have the potential increase in trader's output. When a trader sets a personalised price, consumers who have a low willingness-to-pay will be able to purchase the good or service that they otherwise could not (as they would not be able to afford it at the old uniform price), which turns out to be rather positive for consumers. Since the trader's product ends up being available to more people, the number of transactions in the market will increase, which in turn generate a *market expansion effect*[23], more commonly referred as the *output expansion effect* [24/25].

However, if an OPP practice can leave some consumers better off, on the other hand, consumers with high willingness to pay may be left worse off. This is so by virtue of the *appropriation effect,* which is more common and significant in monopolistic markets[26]. This effect means that the trader may appropriate consumers' surplus - *i.e.,* the difference between the

[20]MILLER, "What Do We Worry About When We Worry About Price Discrimination?", 54.
[21] POORT and BORGESIUS - Personalised Pricing: The Demise of the Fixed Price?, 177.
[22] CARROLL and COATES - Teaching Price Discrimination: Some Clarification, 470.
[23] BOURREAU, Marc, and DE STREEL, Alexandre - *The regulation of personalised pricing in the digital era*. DAF/COMP/WD 150. OECD (2018), 5.
[24] SCHOFIELD, Alex - Personalized pricing in the digital era. *Competition Law Journal*, Vol. 18, no. 1 (2019), 37; AKON - Personalized Pricing Using Payment Data, 953.
[25] However, this increase must be balanced with the opposite effect produced by consumers who have a high willingness to pay, as these consumers will buy less, or nothing, compared to what they would buy at the previously uniform price, thus reducing the trader's output.
[26] OFT - *The economics of online personalised pricing*. London, OFT: (2013), 22.

market price and the consumer's willingness to pay[27]. Therefore, differently from in competitive markets with uniform prices, here the gains will be transferred from the consumer to the trader, who will make a greater profit.

By extracting each consumer's maximum willingness to pay to personalised prices, traders may be triggering increased competition - *the intensified competition effect.* Accordingly, high-margin traders will - even aggressively - compete for price-sensitive consumers who easily choose to buy from a lower-priced rival. From a consumer perspective, this may be a positive effect. However, as recognised by economic theory, it will lead to price sensitive consumers receiving better offers compared to non-price sensitive consumers[28].

One last effect worth mentioning is *the commitment effect*, also explored by most of the literature. In this regard, OPP can prevent traders from committing not to decrease their prices in the future[29]. As explained by the Office of Fair Trading (OFT), if a trader decides to deploy an OPP practice, it will, in a first moment, charge a uniform price to collect some signals from consumers (*e.g.*, if the consumer did not buy, it means that his or hers willingness to pay is lower than the price offered)[30]. On the second moment, the trader will charge a lower price to non-returning customers and a higher price to returning customers. Thus, a sophisticated consumer, even he or she has a high willingness to pay when compared to the uniform price, could pretend to have a lower willingness to pay (by not buying), in order to get a lower price later on. From the moment the consumer knows that, if he or she does not buy today, the trader will lower the price tomorrow, he or she will stop buying at the first moment[31]. As a result, from the trader's perspective, it cannot help but offer declining prices over time[32].

From the analysis of these effects, it is already possible to draw some consequences for consumers. Some of them quite positive, namely the increased access to the market by vulnerable or low-income consumers and the enhancement of competition. However, the practice of OPP can also be harmful to consumers. Before we go into that matter in more

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[27] GRAEF, Inge - Algorithms and Fairness: What Role for Competition Law in Targeting Price Discrimination Towards End Consumers? *The Columbia Journal of European Law*, Vol. 24, no. 3 (2018), 545.
[28] AKON - Personalized Pricing Using Payment Data, 953.
[29] SCHOFIELD - Personalized pricing in the digital era, 37. OFT- *The economics of online personalised pricing,* 7.
[30] OFT- *The economics of online personalised pricing*, 28-30.
[31] OFT- *The economics of online personalised pricing*, 28-30.
[32] ARMSTRONG, Mark - Price discrimination. *MPRA Paper*. No. 4693 (2006), 5.

detail, it is important to know how OPP works, since only after that context, will we be able to better understand to what extent consumers may be harmed.

2.3. The process of online price personalisation

There is little evidence of how capillar OPP currently is. In this regard, Akiva A. Miller explains that it is due to the fact that there is a "*prevailing secrecy in the consumer data industry*"[33]. According to the author, "*it is a matter of conjecture how companies actually translate the detailed profiles (...) of consumers into individual price offers, and how widespread these practices are*"[34]. However, as stated by the European Commission (EC) in its latest study:

> "[from] *the lack of evidence of systematic personalised pricing (…) cannot be deduced that online retailers do not use such a practice to charge different shoppers different prices for the same product. There are a number of factors that may explain the lack of evidence of online personalised pricing. For example, it is difficult to detect this practice, as online firms may employ any of the latest sophisticated algorithms or personalisation tools (…) which research tools or methodologies cannot easily detect."* [35](our emphasis).

As can be seen, transparency issues emerge from the outset. Even though there is currently a low prevalence of identified personalised pricing[36], certainly, with the development and widespread use of data-driven technologies, companies will increasingly turn to OPP. For its implementation, there are 3 steps that can be identified. First and foremost, a data collection process is required. In the past, the traders' ability to collect all the information needed to estimate how much a consumer would be willing to pay for a product was limited, posing a major obstacle to the implementation of OPP[37]. Traders only had access to data volunteered by the consumers (*e.g.*, name, address for delivery, responses to surveys, professional occupation, level of education) and even then, such data collection process was too time-consuming and costly.

Nowadays, data collection is still a paticularly resource-intensive process. However with the use of internet and the development of sensor-equipped smart devices and advanced data analytics, it is possible for traders to rely on different types of data and from a wide variety

[33] AKIVA - What Do We Worry About When We Worry About Price Discrimination?, 52.
[34] AKIVA - What Do We Worry About When We Worry About Price Discrimination?, 52.
[35] IPSOS, LONDON ECONOMICS, and DELOITTE - *Consumer market study on online market segmentation through personalised pricing/ offers in the European Union*. Report for DG JUST. Brussels: European Commission, 2018, 261.
[36] IPSOS, LONDON ECONOMICS, and DELOITTE - *Consumer market study on online market segmentation through personalised pricing/ offers in the European Union*, 261.
[37] OFT - *Personalised Pricing: Increasing Transparency to Improve Trust in the Market*. OFT: (2013), 7.

of sources. Not only do they have the opportunity to collect data volunteered by consumers, but also data that is involuntarily and unconsciously provided, namely data that is directly observed. For instance, an IP address can reveal information about the consumer's country or region and the type of computer or browser that he or she uses[38]. Past purchases, website vists, search history and *likes* in social networks are also examples of data that is directly observed from a consumer's online behavior and that allows profiling. Additionally, traders can also rely on data inferred from online consumer behavior, but which has been obtained by third parties, notably consumer data brokers. These entities use several tracking technologies, such as cookies, IP address tracking, web beacons, and browser/device fingerprinting, to follow the digital trail of users[39] in order to create their consumer profiles and subsequently sell them to companies.

All these data combined give traders an information level they never had before, which is particularly important since the data collection process is the most crucial step for the successful implementation of OPP: the more information about customers (current and potential), the better the estimation of the customers' maximum willingness to pay.

Once the data is available, the second step is the process of consumer's willingness to pay estimation. This is probably the most challenging stage of the process, since this information does not result from an observed variable[40]. Therefore, traders will have to deploy sophisticated algorithms to identify correlations between the different data collected in order to profile the consumer and find out what is the maximum he or she would be willing to pay. To this end, the analysis of consumer's purchase history and browsing history on e-commerce sites is crucial, as these types of data are an adequate source to extract the consumer's willingness to pay[41].

Finally, after reaching an estimate, the trader will have to decide which price will be set. Usually, the price setting is not a direct and individual decision of the trader, but rather an automated decision made by the pricing algorithm that the trader has chosen for this purpose. Although the generic definition of these values may be done by the trader, it is important to

[38] BORGESIUS, Frederik Zuiderveen, and POORT, Joost - Online Price Discrimination and EU Data Privacy Law. *Journal of Consumer Policy*, Vol. 40 (2017): 350; OECD - *Personalised Pricing in the Digital Era – Background Note by the Secretariat*. OECD: (2018), 10-11.

[39] VALE, Sebastião Barros - The Omnibus directive and online price personalization: a mere duty to inform? *European Journal of Privacy Law & Technologies* (June 2021), 2.

[40] OECD - *Personalised Pricing in the Digital Era*, 11.

[41] BAR-GILL, Oren - Algorithmic Price Discrimination: When Demand Is a Function of Both preferences and (Mis)Perceptions. *University of Chicago Law Review*, Vol. 86, no. 5, 6.

underline that, as it is with any algorithm, its user does not always have control over it. In particular, in algorithms incorporating Artificial Intelligence (AI), namely Machine Learning (ML), the trader will hardly have information about the type of data that fed the algorithm or the logic behid it, due to its complexity. For that reason, transparency issues are also discussed in this regard[42].

Nevertheless, when the decision to set the final price is in the hands of the trader, it is important to note that opting for a price equal to the estimate may not be the most convenient solution. The trader should bear in mind that estimates are imperfect by nature, so choosing to follow an estimate that in turn overestimates the customer's willingness to pay can create the risk of losing customers[43]. In addition, the trader should also consider, among other factors, the level of competition[44]. In the next section we will look further into the ADM process and the use of consumer's data that is inherent to it.

2.3.1. Use of consumer's personal data and ADM

As it was explained, OPP involves collecting data in different forms and processing several types of data. Thus, from the perspective of data protection law, scholars have considered that OPP initiatives are quite likely to fall within the scope of the General Data Protection Regulation (GDPR)[45]. Indeed, Article 2(1) - under the heading of *Material Scope* - provides that the "*regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system*". Therefore, this criterion is likely to be satisfied in the context of OPP: as on the one hand we have the processing of consumers' personal data, although it depends on the pricing strategy and the model of the pricing algorithm[46], the fact is that these processes usually include personal data[47]- *e.g.* name, age, revenue brackets,

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[42] VALE - The Omnibus directive and online price personalization, 5 et seq.
[43] OECD - *Personalised Pricing in the Digital Era*, 11.
[44] OECD - *Personalised Pricing in the Digital Era*, 12.
[45] In this sense: WONG, Benjamim - Online personalised pricing as prohibited automated decision-making under Article 22 GDPR: a sceptical view. *Information & Communications Technology Law*, Vol. 30 (2021), 193-207; STEPPE, Richard - Online Price Discrimination and Personal Data: A General Data Protection Regulation Perspective'. *Computer Law & Security Review*, Vol. 33, no. 6 (2017), 768-785. 768-785; BORGESIUS, Frederik Zuiderveen - Online Price Discrimination and Data Protection Law. *Amsterdam Privacy Conference*. Amsterdam: Institute for Information Law, University of Amsterdam (2015), 13.
[46] VALE - The Omnibus directive and online price personalization, 5.
[47] Following the definition presented in Article 4 GDPR "personal data" means "*any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".*

geolocation, personal phone number and email address, interests and preferences; on the other hand, this data is often processed by automated means (*i.e.* without human intervention), through the use of pricing algorithms, as we have seen.

Therefore, OPP may be subject to the data protection requirements of the GDPR, which implies that traders must comply with its principles and rules in collecting and processing each type of data, using appropriate, fair and lawful mechanisms. Even if these processes are conducted by service providers on behalf of the trader, the latter continues to have obligations as a data controller, as it defines in any case the purpose of the processing of such data[48].

In order to lawfully process data for the purpose of OPP, one of the grounds set forth in Article 6 GDPR must be applicable. From the exhaustive list, paragraph (a) – *consent*, paragraph (b) – *pre-contractual and contractual measures*, and paragraph (f) – *legitimate interests*, are the most adequate grounds. Without prejudice, scholars have argued that consent is the main (if not the only) ground to consider in this context[49] - an understanding that we hereby endorse.

Both the pre-contractual and contractual measures and the legitimate interest grounds are unsatisfactory since they are subject to the *necessity test*[50] and hardly pass its sieve. In this sense, starting from paragraph (b), it is not easy to see to what extent many of the personal data and profiling practices are necessary for the performance of the contract. If we are talking about an address or bank details, of course it becomes necessary. However, with the exception of these pieces of personal data, all the others turn out to be rather dubious. As rightly underlined by Joost Poort and Frederik Zuiderveen Borgesius "*The fact that a company sees personal data processing as useful or profitable does not make the processing «necessary»"* [51]. In the same sense, with respect to the last part of paragraph (b) - the processing for pre-contractual measures- although pricing decisions would fit into this ground (as it is an essential aspect of entering into a contract), the fact is that for the sale of products and services, the price personalisation decision is not essential. Therefore, the processing of data for that purpose is, once again, not necessary, but only convenient to maximise the trader's profit. On the other

[48] VALE - The Omnibus directive and online price personalization, 5.
[49] ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 21-24; STEPPE - Online Price Discrimination and Personal Data, 776-781; VALE - The Omnibus directive and online price personalization, 5-6; BORGESIUS - Online Price Discrimination and EU Data Privacy Law, 360.
[50] Which requires a "*close and substantial connection and a direct and objective link between the data subject's interests and the purposes*" referred to in the paragraphs under analysis. STEPPE - Online Price Discrimination and Personal Data, 779.
[51] BORGESIUS - Online Price Discrimination and EU Data Privacy Law, 360.

hand, there is not always a *de facto* contractual relationship merely based on the use of online services[52]. Furthermore, it is important to note that this ground is limited to contacts initiated by the data subject, thereby excluding marketing approaches by the data controller[53] which, in essence, are those mostly used for OPP purposes. Consequently, this circumstance also makes the use of this legal basis inadequate[54].

Moving on to paragraph (f), the processing of personal data is lawful if it is necessary for the purposes of *the legitimate interests pursued by the controller or a third party*. Once again, we have a ground that requires the verification of the necessity test, which raises the aforementioned question as to whether the processing of data for price personalisation is actually necessary. Besides, it is important to note that the pursuit of legitimate interests is not absolute or unlimited. According to the final part of paragraph (f), they should be balanced with the interests or fundamental rights and freedoms of the data subject. Therefore, apart from the necessity test, it is also required that the processing passes a balancing test between the trader's interest and the consumer's interest. This is where we see a major weakness in the use of this legal basis. Although there is the legitimate interest of the traders in getting to know their customers and potential customers to personalise prices and to maximise their profits, which is part of their right to the freedom to conduct business[55], we may not forget that, on the opposite side, we have the consumer's right to the protection of their personal data[56]. So, at the first glance, although it requires a casuistic analysis, when comparing both interests and rights, we would say that the protection of data of the consumers should prevail. This result is even more clear when traders establish far-reaching profiles of customers and potential customers without their knowledge[57]. In those cases, there is a significant intrusion into their interests and rights that could never be balanced with commercial interest of the trader[58].

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[52] On the contrary, as clarified by the A29WP, the processing of data under this ground is limited to authenticated users. A29WP - *Opinion 1/2008 on data protection issues related to search engines*, WP 148, 2008, 17. STEPPE - Online Price Discrimination and Personal Data, 778.

[53] A29WP - *Working Document: Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive*, WP 12, 1998, 24.

[54] In the same sense, Fabrizio Esposito argues that it is "*unlikely to conclude that the processing is at the request of the data subject*" and for that reason, among others, "*Article 6(1)(b) is unlikely to offer a valid basis to processing for the purpose of personalising prices*" in ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 22.

[55] DE ARRUDA - Personalised Prices, 36. The right is foreseen in Article 16 of the Charter of Fundamental Rights of the European Union.

[56] Foreseen in Article 8 of the Charter of Fundamental Rights of the European Union.

[57] STEPPE - Online Price Discrimination and Personal Data, 780.

[58] In this sense, A29WP states that in cases of "*extensive profiling (…), consent under Article 7(a) should be considered*", instead of the legal ground of legitimate interests. A29WP - *Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC*, WP 217, 2014, 18.

In conclusion, the most viable and appropriate legal ground for processing data for OPP is consent, as provided for in paragraph (a), which encompasses "*any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her*"[59].

However, the analysis of the use of personal data does not end here. OPP practices generally involve ADM, as already explained. Therefore, given that these are the ones we are particularly interested in, in light of the new transparency requirement of Article 6 (ea), Article 22 GDPR regime should be looked at, not least because it can be put forward as an extra argument to justify the need for consent for OPP[60].

Under Article 22(1) GDPR, individuals are granted with the right to not be subject to "*decisions based solely on automated processing, which produces legal effects concerning him or her or similarly significantly affects him or her*". In turn, it is commonly recognised that this right implies an in-principle prohibition of such decisions[61]. Rephrasing Richard Steppe, this prohibition is applicable when: (i) there is a decision (ii) based solely on automated processing of personal data (iii) that results in legal or similarly significant effects on the individual[62]. In the context of OPP, scholars tend to agree that the first two conditions are met[63], since there is an algorithm that decides, in an automated manner and based on personal data, the price for certain consumer. The question is whether or not OPP produces *legal effects* or *significantly affects* the data subject.

In our opinion, OPP is within the scope of the Article 22(1) either way. Starting with the legal effects path, it can be pointed out that a price offer is as an invitation to enter into a legally binding agreement, therefore it produces legal effects right from the outset, inter alia, the power of the data subject to execute the agreement and information duties[64]. Contrary to

[59] Article 4 (11) GDPR.
[60] In this sense BORGESIUS-Online Price Discrimination and EU Data Privacy Law, 361.
[61] ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 23; BORGESIUS-Online Price Discrimination and Data Protection Law, 15. WONG - Online personalised pricing as prohibited automated decision-making under Article 22 GDPR, 198; BORGESIUS-Online Price Discrimination and EU Data Privacy Law, 361.
[62] STEPPE - Online Price Discrimination and Personal Data, 783.
[63] Namely, Borgesius in BORGESIUS - Online Price Discrimination and Data Protection Law,16 and in BORGESIUS - Online Price Discrimination and EU Data Privacy Law, 361; Richard Steppe in STEPPE - Online Price Discrimination and Personal Data, 783; and Benjamin Wong in WONG - Online personalised pricing as prohibited automated decision-making under Article 22 GDPR, 198.
[64] In this sense, Fabrizio Esposito concretises: "(…) *price personalisation based on profiling triggers an information duty, profiling has a legal effect.*" In ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 23.

what Benjamin Wong[65] argues, we do not believe that the direct or indirect nature of the effects is relevant. Such a distinction does not result from the law, nor is it given in the guidelines for the application of the provision[66]. What is relevant for the purposes of Article 22 is that the effects are of serious impactful[67]. It is a question of "intensity" rather than form (whether direct or indirect). On the other hand, admitting all effects does not make insignificant the "similarly significantly affects" limb, as it will continue to apply in cases where ADM has no effect on people's legal rights.

In any case, the path of an automated decision that significantly affects the data subject, would be verified. Even though there are scholars who only consider that there is significant affectation to the data subject when OPP leads to a price increase, we disagree. As explained by Gianclaudio Malgieri and Giovanni Comandé, in privacy we can distinguish[68]:

> "(…) *subjective harms ('perception of unwanted observation') from objective harms ('unanticipated or coerced use of information concerning a person against that person'). While subjective harms refer to the psychological dimension of the 'observed' person, objective harms refer to the actual use of personal information against individuals (e.g. discrimination, unfair use, manipulation, denial of contracts, etc.). Thus, objective harms can include, inter alia, impairing treatment based on personal data analytics, distortion of individuals' freedom of choice or conduct, manipulation of individual decisions."*

Therefore, it can be argued that OPP, even if it presents a lower price, can distort consumers' freedom of choice and/or manipulate their decision, and in this sense, we can consider that it can significantly affect the data subject.

In sum, Article 22(1) is applicable to OPP, which implies, in turn, that we look at the exceptions foreseen in Article 22(2). Given our context, only exceptions (a) and (c) would apply in abstracto. Regarding the first one, we have already made our considerations when analysing the corresponding legal basis provided by Article 6(b) GDPR, where we argued that it would not have an appropriate application to the case. All that remains is consent. We therefore conclude that for the processing of consumers' personal data for the purposes of the

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[65] In WONG - Online personalised pricing as prohibited automated decision-making under Article 22 GDPR, 198.

[66] Namely, A29WP - *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, WP251rev.01, 2017.

[67] A29WP - *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, 21.

[68] MALGIERI, Gianclaudio, and COMANDÉ, Giovanni - Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation. *International Data Privacy Law*, Vol. 7, no. 3 (2017), 18.

OPP, it is necessary the prior consent of the consumers. As stated by Mireille Hildbrandt "*price discrimination may be a good thing in a free market economy, but the fairness again depends on consumers' awareness of the way they are categorised*"[69].

However, nowadays, some OPP practices may be taking place without any consent[70], plus without consumers being aware of the fact that companies are using their data to maintain detailed profiles of them[71]. Which is quite concerning. In these situations, consumers can be harmed. However, these are not the only situations where this might happen. Thus, the following section discusses way the main harms that OPP can cause to consumers.

2.4. Brief overview of potential consumer harm

In general, scholars recognise that the overall effect of OPP on consumers is ambiguous[72]. Indeed, it not only depends on the relation of its key effects and their balancing, but also on other factors such as the type of market and its level of competition[73], the complexity of the OPP strategy and the trader's costs[74]. Its practical impact will depend therefore on a case-by-case analysis. Without prejudice, it is possible to identify a number of situations where the implementation of OPP can be harmful to consumers.

We will start with the situations mentioned at the end of the previous Section and which directly result from the way price personalisation is carried out. More specifically, the non-transparent way in which it can be done. In this regard, if consumers do not even know that personalisation is taking place and under what terms, and/or it is not clear to them how to control of their data, their autonomy as consumers and data subjects is undermined. In practical terms, they are also deprived of exercising their rights, as they are unlikely to know whether they have been violated[75].

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[69] HILDEBRANDT, Mireille - Profiling into the future: An assessment of profiling technologies in the context of Ambient Intelligence. *Fidis Journal*, Vol. 1 (2007): 10.
[70] STEPPE - Online Price Discrimination and Personal Data, 785.
[71] OECD - *Personalised Pricing in the Digital Era*, 10-11.
[72] GRAEF - Algorithms and Fairness, 545; AKON - Personalized Pricing Using Payment Data, 954; BOURREAU and DE STREEL - *The regulation of personalised pricing in the digital era*, 5.
[73] In particular, the level of competition in a market is a key indicator of whether personalised pricing risks harming consumers. As observed by Schofield, in markets where there is no effective competition (*i.e.*, monopolised markets), there is a risk that the monopolist trader will use anti-competitive personalised pricing with the ultimate aim of excluding competitors or raising barriers to entry (*e.g.*, by engaging in predatory behaviour through selective discounts). SCHOFIELD - Personalized pricing in the digital era, 37.
[74] SCHOFIELD - Personalized pricing in the digital era, 37.
[75]CONSUMERS INTERNATIONAL and MOZILLA FOUNDATION - *A consumer investigation into personalised pricing.* Study (2022), 12.

Even more worrying is the set of situations where OPP is used to exploit consumers. Admittedly, this might happen in several different ways. Taking the example of markets characterised by consumer inertia to change ("laziness" in shopping around), traders can use personalisation to identify and exploit (through higher prices) their inactive or "lazy" customer base[76]. Going further, the trader, with some market power, may exploit consumers who are less knowledgeable about the market mechanism, either because they are older, have limitations, or simply lack digital literacy, thus taking advantage of their alienation and ignorance of reality to charge a higher price. In short, the information asymmetry that results from price personalisation gives traders a bargaining power that can be use by them to exploit consumers[77].

On the other hand, consumer data collected by the trader, can also be used to target behavioral biases and thus to inhibit the ability of consumers to make economically rational transaction decisions. These biases can include the fact that, for instance, consumers can easily become overwhelmed by information (making decision-making more difficult and dissuading them from shopping around)[78]. Moreover, if consumers cannot easily avoid personalisation if they so wish (*e.g.*, because the good or service in question is "essential"), consumer choice may be thus undermined[79].

Besides this potential for OPP to be exploitative, there is also a potential for OPP to be discriminatory[80]. As it was mentioned above, an OPP strategy works, in practice, by means of algorithms. Thus, it is not a novelty that this technology may unintentionally produce results that are considered discriminatory under the relevant applicable law, since it sometimes differentiates based on data that it legally cannot. In this sense, it is clear that consumers may be harmed when personalised prices are calculated on the basis of, for instance, postcode (social class), ethnicity, race, gender or other.

OPP may also be detrimental to consumers to the extent that it diminishes their trust in the digital market. In this regard, there is evidence that personalised prices are often

[76]SCHOFIELD - Personalized pricing in the digital era, 38.
[77] ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 14.
[78] SCHOFIELD - Personalized pricing in the digital era, 38.
[79] CONSUMERS INTERNATIONAL and MOZILLA FOUNDATION - *A consumer investigation into personalised pricing,* 12.
[80] CONSUMERS INTERNATIONAL and MOZILLA FOUNDATION - *A consumer investigation into personalised pricing,* 11.

perceived by consumers as unfair or even manipulative[81]. This negative perception of personalised prices will make consumers hesitate to buy online and to use new services, affecting engagement in e-commerce and trust in the online market as a whole[82]. Thus, if consumers do not trust a market, that market will not grow[83]. Innovation is stifled and there will be no digital economy development, to the detriment of consumers, naturally[84].

To finish, we would just like to note that OPP may also lead to consumer harm when the trader incurs in significant costs to implement the OPP strategy, as corroborated by some studies[85]. In such cases, traders are very likely to pass on these high costs to consumers in the form of higher prices[86].

Notwithstanding all of the above, what is important to retain at this point is that OPP is not necessarily harmful to consumers. What may be harmful to consumers are complex and totally opaque OPP strategies designed to exploit them, particularly those who are price-sensitive and unsophisticated. If implemented in a fair, responsible and transparent manner, with appropriate supervision, it is possible to benefit from the positive economic effects of OPP – *e.g.*, the fostering of competition and increased market access - without harming consumers[87]. In this regard, measures should be adopted to ensure that personalised pricing works in the best interests of all consumers.

Some of these measures will naturally involve implementing greater transparency, which has already been put into practice with the new Article 6(ea). However, as will be seen further below, this requirement does not solve all problems and raises other issues. With a fair environment for consumers in mind, our concern in this context is the assessment of the unfairness of an OPP term under the UCTD. According to Article 4(2) UCTD, the unfairness of the price can only be assessed if the term is not transparent. Thus, *if the new requirement introduces transparency, does that mean that the unfair nature of a personalised price personalisation term*

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[81] CONSUMERS INTERNATIONAL and MOZILLA FOUNDATION - *A consumer investigation into personalised pricing,* 11; JOOST, and BORGESIUS - Personalised Pricing: The Demise of the Fixed Price?,7; JOOST and BORGESIUS - Does everyone have a price?, 1-20.
[82] EC - *Executive Summary of the Impact Assessment*, Commission Staff Working Paper, SEC/2012/0073 final, 2012 (draft that accompanied the GDPR).
[83] ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 11.
[84] As stated by the OFT: "*consumer trust is essential for the digital economy to develop optimally"* in OFT - *Personalised Pricing: Increasing Transparency to Improve Trust in the Market*. OFT: (2013), 4.
[85] OFT - *The economics of online personalised pricing.* London, OFT: (2013), 78.
[86] SCHOFIELD - Personalized pricing in the digital era, 38.
[87] CONSUMERS INTERNATIONAL and MOZILLA FOUNDATION - *A consumer investigation into personalised pricing*, 11.

cannot be assessed? Additionally, *if conversely the term does not meet the transparency requirement, how can the unfairness test be applied?* In the next section we will analyse in detail the new requirement and see how far it reaches, so that we can then relate it to the Directive.

3. THE NEW TRANSPARENCY REQUIREMENT

Aware of several new problems and challenges in the online consumer environment, the EU presented in 2018 the "New Deal for Consumers" a bundle of directives that aims to strengthen the enforcement of EU consumer law and modernise the rules of this branch of law, taking into consideration market developments[88]. This initiative encompassed a general communication and two legislative proposals[89], which are now in force: the Omnibus Directive [Directive (EU) 2019/2161][90] and the Directive (EU) 2020/1828 on Representative Actions[91].

The Omnibus Directive introduced a set of important rules to deal with the increasing use of online platforms, handling general improvements to the substance of EU consumer law and rules on sanctions for infringements of it as well. It amends four important European directives in the field of consumer law: UTCD, Unfair Commercial Practices Directive (UCPD), Price Indication Directive (PID), and CRD. Even though there are important changes in all, for the purpose of this analysis, we are mostly interested in those that are (or can be) connected to the transparency of the practice of OPP, namely the ones in PID and CRD.

As regards the PID, a new Article 6a has been inserted. According to it, "*Any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction*"[92]. For such a purpose, the "prior price" should be understood as "*the lowest price applied by the trader during a period of time not shorter than 30 days prior*

[88] EC – *Communication: A New Deal for Consumers',* Brussels: EC, COM (2018)183 final, 3-4.
[89] All the proposals emerged from the well-known REFIT (Fitness Check) exercise: EC – *Report of the Fitness Check on Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')*, Brussels: European Commission, SWD(2017) 209 final.
[90] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, PE/83/2019/REV/1, OJ L 328, 18.12.2019, 7–28.
[91] Council Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] *OJ L 409.*
[92] Article 6(a), paragraph 1 of the PID.

to the application of the price reduction"[93/94]. In practical terms, this new article imposes a new information duty on traders when they decide to make price reductions (discounts). In addition to reducing the asymmetry of information between traders and consumers, this obligation allows consumers to compare prices, which has a twofold effect. On the one hand, it prevents the consumer from being manipulated with the unfair practice of raising prices before the discount (*i.e.*, making it appear that the price reduction is more considerable than it actually is)[95]. On the other hand, it empowers consumers to better understand the economic consequences and ultimately make a more informed decision[96]. By being presented with the *prior price* and the reduced price, the consumer is able not only to know what he or she will pay, but also acknowledge how much the price has changed in relation to the "normal" one[97]. This aspect of the economic consequences is particularly important in the context of EU consumer law, as we will see in more detail when analysing the UCTD.

At this point, the relevant question that emerges is whether a trader giving a personalised discount is bound by this new obligation. This would require considering that the personalised discount would be, for the purposes of the PID, an "announcement of a price reduction"[98]. Although such a possibility does not seem unreasonable to us, based on the literal element of the provision, we tend to agree with some authors who argue that Article 6a should not be applicable to personalised discounts, as such an interpretation would not be in line with the teleology of the provision[99]. Although there is no recital clarifying its rationale, the EC has recently released a guidance in which it explicitly states that "*Article 6a aims at preventing traders from artificially inflating the reference price and/or misleading consumers about the amount of the discount. It increases transparency and ensures that consumers actually pay less for the goods when a price reduction is announced."* [100]. Therefore, having this rationale in mind, there is no need for the personalised discount to be covered. Indeed, the EC itself clarifies that "*Article 6a (…) does not cover long-term*

[93] Article 6(a), paragraph 2 of the PID.
[94]Notwithstanding, Article 6(a), paragraphs 3 to 5 of the PID, provides for some exceptional situations which are left to the discretion of member states.
[95] DE ARRUDA - Personalised Prices, 64; ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 35.
[96] DE ARRUDA - Personalised Prices, 64.
[97] ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 34.
[98] 1st part of Article 6(a), paragraph 1 of the PID.
[99] ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 34-35. DE ARRUDA - Personalised Prices, 65-69.
[100] EC – *Commission Notice: Guidance on the interpretation and application of Article 6a of Directive 98/6/EC of the European Parliament and of the Council on consumer protection in the indication of the prices of products offered to consumers.* Official Journal of the European Union, C 526, 2021: 131.

arrangements that allow the consumers to benefit systematically from reduced prices and specific individual price reductions"[101] (our emphasis). We therefore believe that this issue has become less dubious.

Although not covered by the new price reduction rules of PID, the practice of OPP has not been forgotten by the Omnibus Directive. A new provision has also been introduced in the CRD – Article 6(ea) – which obliges, in distance and off-premises contracts, traders to inform consumers *"where applicable, that the price was personalised on the basis of automated decision-making"* [102]. Remarkably, the matter of OPP was not in the original Omnibus Directive proposal[103]. It was subsequently included by amendment of the European Parliament in its report, as a new subparagraph (da) to the new Article 6(a)[104]. According to the European Parliament's suggestion, traders should be required to inform "*whether and how algorithms or automated decision making were used, to present offers or determine prices, including personalised pricing techniques*".

As can be seen from the final version of the Directive, this information requirement has not only undergone a rewording, but has systematically been placed in a different part (in Article 6 instead of Article 6(a). Furthermore, the Council also added a recital to the text - Recital 45 - which gives some guidance for the interpretation of the new requirement and further develops it:

> *"Traders may personalise the price of their offers for specific consumers or specific categories of consumer based on ADM and profiling of consumer behaviour allowing traders to assess the consumer's purchasing power. Consumers should therefore be clearly informed when the price presented to them is personalised on the basis of ADM, so that they can take into account the potential risks in their purchasing decision. Consequently, a specific information requirement should be added to*

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[101] In contrast, the EC states that "*Article 6a of the PID will be applicable to those price reductions, which, even though presented as personalised, are in reality offered/announced to consumers in general.*" – EC - *Guidance on the interpretation and application of Article 6a of Directive 98/6/EC of the European Parliament and of the Council on consumer protection in the indication of the prices of products offered to consumers,* 132 and 136-137.

[102] Article 4 (4)(a)(ii) of the Omnibus Directive.

[103] As we can see in EC - *Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules*, Brussels: EC, COM/2018/0185 final - 2018/090 (COD), 33-37.

[104] Amendment 65 in European Parliament - *REPORT on the proposal for a directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules,* Committee on the Internal Market and Consumer Protection Rapporteur, A/2019/0029, 40-41.

> *Directive 2011/83/EU to inform the consumer when the price is personalised, on the basis of ADM. This information requirement should not apply to techniques such as 'dynamic' or 'real-time' pricing that involve changing the price in a highly flexible and quick manner in response to market demands when those techniques do not involve personalisation based on ADM. This information requirement is without prejudice to Regulation (EU) 2016/679, which provides, inter alia, for the right of the individual not to be subjected to automated individual decision-making, including profiling"* [105].

The combined reading of this recital and paragraph (ea) leads immediately to the conclusion that OPP practices are admissible under consumer law, as it is explicitly stated that *"Traders may personalise the price of their offers for specific consumers (…) based on ADM and profiling of consumer behaviour allowing traders to assess the consumer's purchasing power"* [106]. If there were any doubts in this respect, they should no longer exist. However, its admission depends on whether the consumer has been informed that the prices shown have been personalised on the basis of ADM. And here several questions arise in relation to the requirement, namely its scope of application, the way the information must be provided, its content and level of detail. All these aspects will be analysed in the following sections.

3.1. Scope of the requirement

As already mentioned above, the new paragraph (ea) of Article 6 establishes a new pre-contractual obligation for distance and off-premises contracts, applicable to all traders, to inform consumers in case of price personalisation based on ADM. Although the scope of application of this requirement seems quite broad, it is actually subject to several limitations.

In the first place, it must be stressed that this pre-contractual obligation only applies to contracts between traders and consumers, which are concluded at a distance and off-premises and fall within the scope of the CRD[107]. In this respect, we draw attention to the existence of several contracts for which it would make sense to oblige the trader to inform the consumer that the price has been personalised on the basis of automated decisions, but which, because they are excluded from the scope of the CRD, they are not subject to this new

[105] Recital 45 Omnibus Directive.
[106] GRAAF, de Tycho - Consequences of Nullifying an Agreement on Account of Personalised Pricing. *Journal of European Consumer and Market Law*, Vol. 8, no. 5 (2019), 185.
[107] Article 3 (1) and Article 6 CRD.

information obligation. Some of these are contracts for social services, healthcare, gambling and financial contracts[108].

In the second place, this requirement does not apply to all practices involving automated price setting. As is made clear from the outset in Recital 45 "*(…) This information requirement should not apply to techniques such as 'dynamic' or 'real-time' pricing*[109] *that involve changing the price in a highly flexible and quick manner in response to market demands when those techniques do not involve personalisation based on automated decision-making"* (our emphasis). It is obvious that the European legislator wanted to differentiate between situations in which the price setting was made on the basis of personal characteristics of the consumer and those in which the price strategy was based on other non-personal factors, notably the changes in supply and demand. This option does not seem unreasonable to us since, as we will see below, the implementation of information duties as a strategy to promote transparency has to be considered taking into account the opposing interests and the impact it will have on the market.

Following this limitation, it is important to highlight that paragraph (ea) of Article 6 also does not cover all kinds of personalised offers, only the ones based on ADM. Although some consider this to be an aspect of little practical relevance[110], from an academic point of view and for the purposes of the present analysis, it is worth addressing it.

Even though the notion of ADM is not presented in the CRD, under the influence of data protection law, it can be defined as a "*decision made solely by automated means without any human involvement*"[111]. As mentioned in Section 2.3, in OPP the data is processed by automated means and the final decision is often not a decision of the trader, but rather of the pricing algorithm. Therefore, the implementation of this type of practice usually does not involve human intervention. Nevertheless, as is sometimes the case with credit scores[112], it may be possible that the trader, or other person responsible, is involved in setting the price after it has been determined by the algorithm. In such situations it would need to be ascertained whether the decision of the trader or other person was entirely and blindly based on the result provided by

[108] Article 3(3) CRD.
[109] For a definition of these concepts and distinction with the concept of OPP, please see Section 2.1 supra.
[110] LYNSKEY, Orla, MICKLITZ, Hans-W, and ROTT, Peter - Personalised Pricing and Personalised Commercial Practices. In *EU CONSUMER PROTECTION 2.0 - Structural asymmetries in digital consumer markets*. Brussels: BEUC, 2021, 120-121.
[111] As it results from Article 22 of the GDPR.
[112] In credit scores, traders often use external scores (calculated by a credit rating agency or some other provider) and rely on the credit score that the same agency has calculated based on the information it has. In such cases there is therefore an intervention by the trader at the final "validation/acceptance" stage.

the algorithm or whether there was some weighting or amendment of the individual. In the latter case, having added thoughts/ideas on the price setting, we can no longer considered it an automatic decision-making as there was human intervention. As a consequence, the trader would not be under the obligation to inform the consumer that the price was personalised. On the other hand, if there is only a mere formal validation by the individual, this intervention does not justify no longer considering that decision making as automatic. Therefore, as stated by the BEUC in one of its reports "*Only a new decision that takes other factors into account constitutes a relevant human intervention",* hence we must conclude that only those OPP practices that involve such decisions are excluded from the scope of the Article 6 (ea).

Despite these scope limitations, it should be noted that the European legislator could have restricted the information requirement only to "pure" price personalisation practices, *i.e.*, to the *first-degree of price discrimination* discussed in Section 2.2. However, as clarified in Recital 45, the information duty was extended also to *third-degree of price discrimination* practices - "*Traders may personalise the price of their offers for specific consumers or specific categories of consumers…"* (our emphasis)[113]. This means that, regardless of whether the personalisation is individual or group-based, the trader will be obliged to inform the consumer that the price has been personalised.

3.2. Content and level of detail

There is no doubt that in situations which fall within the scope of the requirement, and which were delineated in the previous section, the trader has the duty to inform consumers about OPP based on ADM. However, it is not clear what information the trader must concretely communicate to consumers and at what level of detail. The only guidance that is given is that "*Consumers should therefore be clearly informed when the price presented to them is personalised on the basis of automated decision-making, so that they can take into account the potential risks in their purchasing decision"*[114], which, however, shed no light on the potential risks that consumers should be aware of and how knowing that the price has been personalised would help them[115]. The recital is too vague in this respect.

Contrary to what happens in case of ranking of offers[116], the Omnibus Directive does not impose on the trader to inform the consumer about the criteria used to personalise the

[113] Recital 45 Omnibus Directive.
[114] Recital 45 Ominibus Directive.
[115] ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 6.
[116] In case of rankings, the Omnibus Directive gives clear guidance on what information should be made available: "*traders should inform consumers about the default main parameters determining the ranking of offers presented to the consumer as*

price in question, how it weights those criteria or other details that could be relevant. In this regard, most scholars regret that the requirement does not include an obligation to provide the main parameters and their relative importance, as the European Parliament had initially suggested[117], considering this as one of the major limitations of the new Article 6 (ea)[118]. Even if the consumer could use its rights under the GDPR[119] to find out what personal data the trader holds and has used to personalise the price, or to obtain meaningful information about the logic involved, such a possibility would be wholly inadequate for the context of online shopping. Moreover, the consumer would remain uncertain whether the price personalisation was beneficial or detrimental to him or her[120].

Thus, in line with the authors Alexander De Streel and Florian Jacques, in the absence of specific indications and given the expressed option in rankings, one could think that the legislator wanted traders to provide only the most basic level of information[121]. Meaning that it would be sufficient to present the statement that "the price shown has been personalised" as a kind of warning label, without any details about how the price was concretely set[122]. Although it is a valid possibility, we do not believe that was the legislator's intention. Not only would it be in contradiction with the trader's transparency duties under the GDPR[123], but it would also not allow consumers *to take into account the potential risks in their purchasing decision,* which is ultimately the rationale of the requirement, as clarified by Recital 45. Therefore, in our view, the interpretation of the requirement as an obligation to provide only the most basic information may not be the most correct interpretation.

Given that what is intended is that the consumer be aware of the potential purchase risks, scholars have come forward with different understandings as to what information should be provided for that purpose. Besides the information on the main parameters and their relative importance, already mentioned, some argue that it would be useful for consumers to be informed about the prices that are being offered to other consumers. Thus, by having access

a result of the search query and their relative importance as opposed to other parameters. (…) Parameters determining the ranking mean any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking."– Recital 22 of the Omnibus Directive.

[117] Please see above in the beginning of Chapter 3.

[118] DE STREEL and JACQUES - Personalised pricing and EU law, 9; LYNSKEY, MICKLITZ, and ROTT - Personalised Pricing and Personalised Commercial Practices, 119-122.

[119] Such as the ones of Article 13 (1) (c), 13 (2) (f) and Article 22 (2) and 22(4) of the GDPR.

[120] LYNSKEY, MICKLITZ, and ROTT - Personalised Pricing and Personalised Commercial Practices, 119-122.

[121] DE STREEL and JACQUES - Personalised pricing and EU law, 9. In the same sense, ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 5.

[122] VALE - The Omnibus directive and online price personalization, 4.

[123] VALE - The Omnibus directive and online price personalization, 4.

to this range of prices, consumers would be able to situate themselves (as if they had an *anchor price*[124]) and thereby make their own considerations regarding the fairness or unfairness of the personalisation. Furthermore, they will more easily understand the extent to which the price has been personalised and in turn predict the economic consequences that it will have on them[125]. Otherwise, they may have an unrealistic perception of the implications and repercussions of the practice of OPP. In this respect there is evidence of a consumers' tendency to consider in this context, that they are charged less or at least they are still better off than a subjective reference price[126], which is not always true and must be demystified.

Moreover, it has been argued that consumers are also entitled by the requirement of Article 6 (ea) to know the non-personalised price, which in turn implies consumers should be granted the right to be offered such price. This is an understanding that has been held by some scholars[127]. In particular, the author Fabrizio Esposito bases such an interpretation on the principles of transparency and effectiveness under EU consumer law, as well as on Article 22 of the GDPR[128]. Traditionally, the principle of transparency requires consumers to understand the economic consequences of the term in question. In turn, such a substantive understanding implies that, in the context of OPP, the consumer knows not only that the price has been personalised, but also *how much* personalised it was[129]. Otherwise, the consumer will certainly not be able to understand the economic consequences. In the same sense, the principle of effectiveness, in view of the possibility of exploitation by traders through opaque personalised surcharges, demands an additional suitable safeguard - which may well be the provision of the

124 DE STREEL and JACQUES - Personalised pricing and EU law, 9.
125 DE ARRUDA, Personalised Prices, 73.
126 A study for the periodical Social Justice Research found that when consumers are told that the price being offered is an "appropriate price", they usually do not believe they are being overcharged, they think exactly the opposite. Even when they are offered with the "same" price as others, they consider that it is not for "everyone else", or that they are still better off than a subjective, internally driven reference price – in VAN BOOM, Willem H., VAN DER REST, Jean-Pierre, VAN DEN BOS, Kees, and DECHESNE, Mark - Consumers Beware: Online Personalized Pricing in Action! How the Framing of a Mandated Discriminatory Pricing Disclosure Infuences Intention to Purchase. *Social Justice Research*, Vol. 33 (2020), 346.
127 ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 20-43; ESPOSITO, Fabrizio - The GDPR enshrines the right to the impersonal price. *Computer Law and Security Review*, Vol. 45 (2022), 1-13; WAGNER, Gerhard, and EIDENMÜLLER, Horst - Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating the Dark Side of Personalized Trasactions. *The University of Chicago Law Review*, (2019), 590-591, 605-606; CHAPDELAINE, Pascale - Algorithmic Personalized Pricing. *Journal of Law & Business*, Vol. 17, no. 1 (2020), 43; DE ARRUDA - Personalised Prices, 72.
128 ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 20-43.
129 ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 34-37.

non-personalised price[130]. The same can be said under Article 22(3) GDPR, whose minimum safeguards may not be sufficient and thereby require another, more appropriate, measure[131].

Furthermore, if consumers have the power, as data subjects, to refuse consent to the processing of their data for OPP purposes and therefore be offered an impersonal price (without knowing what the personalised would be), it makes no sense that, after giving consent to the processing, they would no longer be empowered to know the non-personalised price and, eventually, to opt out of personalised pricing[132]. In any case, it should be underlined that from the trader's perspective, the possibility to opt out of personalised pricing would not be entirely disadvantageous, as consumer choice would always be valuable feedback for the OPP strategy itself[133].

In addition, under a full disclosure approach[134], one could argue that the requirement imposes disclosure of all aspects related to OPP. This would include, for instance, revealing the pricing algorithm, or the ML model[135], and provide a technical explanation of how the parameters were calculated to reach the final personalised price. Since such obligation does not follow from the wording of the article, nor would it be beneficial to the consumer, we consider that the requirement does not - and should not - impose it. A full disclosure obligation would contribute to consumer information overload[136]. It is becoming increasingly evident that consumers are not capable of processing all the available information and evaluating the

130 ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 37-41.
131 ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 41-43.
132 For a more detailed analysis on the topic, please see: ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 20-43. ESPOSITO - The GDPR enshrines the right to the impersonal price, 2. In a different sense, Pascal Chapdelaine argues that the *"the choice of allowing personalized pricing to take place should arguably not be given to consumers..."* – CHAPDELAINE - Algorithmic Personalized Pricing, 36.
133 WAGNER and EIDENMÜLLER - Down by Algorithms?, 591.
134 The concept of full disclosure is explored in BEN-SHAHAR, Omri, and SCHNEIDER, Carl E. - *More than you wanted to know - The failure of mandated disclosure*. New Jersey: Princeton University Press (2014). The authors use this term to refer to the idea that consumers should receive all type of information that could potentially be useful to them, in order to equip them to make unfamiliar and complex decisions. For instance, under this approach, consumers in choosing mortgage loans would be provided with full information on rates, margins, discounts, rate and payment caps, negative amortisation, repayment options, and monthly mortgage payments in relation to their future ability to pay.
135 GROCHOWSKI, Mateusz, JABLONOWSKA, Agnieska, LAGIOIA, Francesca, and SARTOR, Giovanni - Algorithmic Transparency and Explainability for EU Consumer Protection: Unwrapping the Regulatory Premises. *Critical Analysis of Law (CAL),* Vol. 8, no. 1 (2021), 55.
136 Information overload means the inability of human beings to consciously process all the information on a given subject, which, given the natural limitations of time, can lead them to block or make bad decisions. Ramos, M. V. (2019). Psicologia e Direito do Consumo: a Proteção do Consumidor face aos Efeitos das Modernas. Anuário do Nova Consumer Lab, 343.

wide range of choices at their disposal[137]. In this regard, several studies have been conducted and the current findings indicate that when the amount of information exceeds the information processing capacity of consumers, the quality of decision making, and the consumer experience is impaired[138]. Thus, in the case of OPP, providing as much information as possible about how was the price set or providing it in a high level of detail will certainly not be helpful to the consumer, most likely it will just leave him or her confused.

In particular, providing technical explanations on the functioning of the pricing algorithm or ML model would not only be dispensable for consumer decision making, but also it would raise some practical difficulties. The first concerns opacity, since to access information related to the relevant aspects of the design and functioning of algorithms, it would be necessary to pierce the veil of the "black box", which proves to be quite complex and not always possible. The second one relates to the well-known problem of low-literacy consumers, which would result in most consumers not understanding the information provided.

In view of the above, to achieve the objectives of the Article 6 (ea) requirement, we argue that the consumer should be provided with only the information that is important to make an informed purchasing decision and to understand the potential risks of the purchase. Having this in mind, it would be relevant for the consumer to be informed about how their willingness to pay is assessed. In other words, about the main factors that determine their willingness to pay and which, consequently, set the price they are presented with.

Although this information does not result from the letter of the requirement and its literal content, we believe that an extensive interpretation may be carried out. First and foremost, because it is in line with the rationale of the provision, namely the one that arises from Recital 45. And secondly, on the basis of the similarities that exist between ranking offers and the practice of OPP. Since both require complex and extensive processing of personal data and are somehow intended to persuade the individual to a certain economic action - the

[137]GROCHOWSKI, JABLONOWSKA, LAGIOIA and SARTOR - Algorithmic Transparency and Explainability for EU Consumer Protection, 45.

[138] PENG, Minjing, XU, Zhicheng, and HUANG, Haiyang - How Does Information Overload Affect Consumers' Online Decision Process? An Event-Related Potentials Study. *Frontiers in Neuroscience*, Section Decision Neuroscience, Vol. 15 (October 2021), 1-11; CHEN CHEN, Yu, AN SHANG, Rong, and YU JAO, Chen- The effects of information overload on consumers' subjective state towards buying decision in the internet shopping environment. *Electronic Commerce Research and Applications*, Vol. 8, no. 1 (2009), 48-58.

purchase - a similar understanding as in Recital 23 may be defended for OPP[139]. Nevertheless, we would like to emphasise that disclosure of the main factors does not imply a detailed clarification of the specific extent to which they were considered or an explanation of how those factors led to the personalised price, as that is of little relevance to the consumer. It should imply only a simple information on the most important factors that were taken into account for OPP purposes.

On the other hand, for the consumer to take into consideration the potential risks in his or hers purchase, a comparative price information is necessary. In this context, the comparison that seems most appropriate is not the first one mentioned, with the prices charged to other consumers, but rather the one with the non-personalised price. Indeed, for the consumer to be able to understand whether price personalisation is beneficial or detrimental to him or her, it will be necessary to be informed about the price that would be offered without personalisation. Only then will the consumer know whether he or she will be surcharged. Otherwise, the purchase decision would be a decision under high uncertainty. Thus, in line with some scholars, for the purposes of complying with the duty of transparency in Article 6(ea), we consider that the non-personalised price should be disclosed.

3.3. Salience and form of information disclosure

As mentioned in the previous section, the consumer is often exposed to a huge amount of information. In distance and off-premises contracts, in addition to the information that is provided and is not legally required or is based on other regulatory instruments, Article 6(1) sets out 20 items (21 with the new requirement) of different pieces of information (with a considerable detail) that must be disclosed to the consumer. As is ironically acknowledged by author Philipp Hacker, Article 6(1) is itself the "epitome" of information overload[140].

To reduce the risk of information overload when executing those contracts, information should not only be reduced to what is essential but also simplified and disclosed in a prominently way[141]. Since price is one of the most relevant elements for consumers in deciding whether or not to purchase the product or service, OPP information based on ADM should be presented in a way that stands out from the rest of the "information mass", in order

[139] DE ARRUDA - Personalised Prices, 72.
[140] HACKER, Philipp - Personalizing EU Private Law: From Disclosures to Nudges and Mandates. *European Review of Private Law,* Vol. 25, no. 3 (2017), 667. In the same sense, G., Twigg-Flesner, C., & Wilhelmsson, T. (2018). Rethinking EU Consumer Law. London and New York: Routledge, 103.
[141] ESPOSITO, Fabrizio - A Dismal Reality: Behavioural Analysisand Consumer Policy. *Journal of Consumer Policy*, (2017), 206.

to capture the limited attention of the consumer and not be just another unnoticed piece of information.

Unfortunately, the Omnibus Directive does not clearly address this issue. In line with the other information requirements of CRD, it is certain that, by virtue of Article 6(1) and Article 8(1) of CRD, information on OPP must be disclosed in a *"clear and comprehensible"* [142] manner and in a one "*appropriate to the means of distance communication used in clear and intelligible language*"[143]. Furthermore, it seems to be safe to assume that under paragraph 2 of the latter article, when the contract is concluded by electronic means and it places the consumer under an obligation to pay - whether for a product or a service - traders are under the obligation of making "*the consumer aware in a clear and prominent manner, and directly before the consumer places his order…"* [144] of the information on OPP. Although paragraph 2 of Article 8 of the CRD does not expressly state the new point (ea), it can easily be extended to it. Firstly, because the information related to OPP is still information related to price. Therefore, if the information on price must be prominently and clearly presented, because it is included in the list of Article 8(2) [paragraph (e)], information on OPP should also be presented in the same way. Moreover, one could always argue that the legislator has inserted the new information under paragraph (ea) [and not, for example, at the end, under paragraph (u)], because the new information derives from paragraph (e). In this sense, it would not make sense to make such a formal distinction and treat differently what is, in reality, similar[145]. In any case, Recital 45 states "(...) *Consumers should therefore be clearly informed when the price presented to them is personalised on the basis of automated decisions...*" (our emphasis).

In all these provisions, the European Legislator has chosen to use vague and open sentences, which is not a novelty in EU consumer law[146]. However, it is important to note that, while these expressions may shed some light on the issue, on the other hand they can lead to different and dispersed interpretations and to traders using this wide leeway in the way that best suits their commercial interests[147]. Given that disclosure messages can influence the

142 Article 6(1) CRD
143 Article 8(1) CRD
144 Our emphasis. Article 8(2) CRD.
145 VALE - The Omnibus directive and online price personalization, 3.
146 The use of such expressions in European law is however quite common, as duties to disclose information always tend to be formulated in open sentences, *vide* for example Articles 5 of CRD ("clear and comprehensible manner") or Article 7 of the UCPD ([cannot be given] "in an unclear, unintelligible, ambiguous or untimely manner").
147 BOOM, VAN DER REST, VAN DEN BOS and DECHESNE - Consumers Beware: Online Personalized Pricing in Action!, 336.

consumer's intention to purchase[148], and there are no specific rules on how it should be formulated, traders may purposely obfuscate the information on OPP in order to get consumers to purchase their product or service[149]. It is in these situations that it becomes clear that the form of disclosure plays a key role in consumer protection.

As transparency in itself is of no use for consumers if the information is misleading or unnoticed, it is important to ensure the quality of disclosure[150], which in our view, and in light of guidance of Recital 45, Article 6(1) and Article 8 (1) and (2), implies salience and disclosure at the right time, as often as necessary. Indeed, we must not forget that if disclosure, even if during the transaction process, is made too late, it will not fulfil the purpose of the provision. In this regard, the EC has already made clear that "*The information about personalisation should be provided every time a personalised price is offered*"[151].

Directly linked with the issue of the quality of disclosure is the actual form - or support - in which the information is made available. According to the joint application of Articles 6(1) and 8(1) of the CRD, information has to be provided in a *durable medium*. In a digital environment, such as online platforms, it could be difficult to satisfy such a requirement since information stored on a website can be changed at any time. However, in this regard, the Court of Justice of the European Union (CJEU) has previously decided to allow certain websites to be considered durable mediums, provided that the consumer is able to store the information addressed to him or her personally, in order to be sure that its content will not be altered, and that it can be accessed and reproduced by him or her during an adequate period[152]. In addition to the foregoing, it is important to emphasise, within the context of the provision of OPP information, that such information cannot be made available by means of hyperlinks. In this regard, the CJEU has made it clear that "(…) *making the information referred to in that provision accessible to the consumer only via a hyperlink on a website of the undertaking concerned does not meet the requirements of that provision, since that information is neither 'given' by that undertaking nor 'received' by the*

[148] According to a recent study, it is the phrasing and framing of the disclosure message that affects the degree of perception about the use of the information for self-interest, which in turn affects purchase intention. BOOM, VAN DER REST, VAN DEN BOS and DECHESNE - Consumers Beware: Online Personalized Pricing in Action!, 346.

[149] In addition, it could be the case that traders obfuscate the information accidentally. BOOM, VAN DER REST, VAN DEN BOS and DECHESNE - Consumers Beware: Online Personalized Pricing in Action!, 346.

[150] SCHOFIELD - Personalized pricing in the digital era, 37.

[151] EC - *Recommendations for a better presentation of information to consumers,* Brussels, July 2019.

[152] Judgments of 25 January 2017, *BAWAG PSK Bank*, Case C-375/15. ECLI:EU:C:2017:38; and of 5 July 2012, *Content Services*, C-49/11, EU:C:2012:419, paragraphs 42-51.

consumer…" [153]. Therefore, in order to make the information on OPP available and comply with new obligation, the trader cannot force the consumer to take an active step[154].

Considering the above and taking into account the purpose of the requirement, there is a solution that has been discussed and seems to us to have potential. Instead of the information being included in the terms and conditions or somewhere else that would not be immediately noticeable and would require an active step of the consumer, an OPP tag/label would be created and displayed right next to the price. Of course, the tag/label information would not just state "*the price has been personalised based on ADM*", as that would be totally insufficient. It would have to include the elements mentioned in the previous sub-chapter. This would be an interesting solution as it would be a clear, salient and timely way of presenting the information and that, in turn, would help consumers making more informed and conscious decisions about whether or not to engage with traders who deploy OPP strategies[155].

Such a solution, while positive from a consumer perspective, may be received with reluctance by traders. This is so because, even though there is not much evidence of OPP practices, there are already some studies proving that modern consumers are sensitive to personalised pricing strategies[156]. Many of them find such practices unacceptable and unfair[157], not only because they fear having to pay more than others and being subject to secret price adjustments, but also because they feel resentful about their personal data being used for this purpose[158/159]. Hence, it will not be in the interest of traders to make the information that they are using an OPP strategy based on ADM, as visible and prominent as possible, as they are afraid (and do not want to) suffer potential reprisals from their customers, such as displays of

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153 *Content Services*, C-49/11, paragraphs 50-51.

154 This option has been criticised by some as being too restrictive, as emails are considered a durable medium and, in practical terms, there is not much difference between opening an email or clicking on a hyperlink. In this sense: HOWELLS, Geraint, TWIGG-FLESNER, Christian, and WILHELMSSON, Thomas - *Rethinking EU Consumer Law*. London and New York: Routledge, 2018, 107.

155 VALE - The Omnibus directive and online price personalization, 4.

156 For instance, VICTOR, FEKETE-FARKAS and LANER - Consumer Attitude and Reaction towards Personalised Pricing in the E-Commerce Sector, 146.

157 In this sense a recent study by Joost Poort and Frederik J. Zuiderveen Borgesius concluded that *"[when] Asked whether online price discrimination is acceptable and fair, more than 80% indicate that they find it unacceptable and unfair (…)"*- POORT and BORGESIUS - Personalised Pricing: The Demise of the Fixed Price?, 180, 186.

158 VICTOR, FEKETE-FARKAS and LANER - Consumer Attitude and Reaction towards Personalised Pricing in the E-Commerce Sector, 146.

159 Further on this topic, the authors Joost Poort and Frederik J. Zuiderveen Borgesius also provide some interesting findings: acceptance of OPP practices, in general, increases with income and education level; it decreases with age; and, on average, men are more willing to accept it than women. POORT, Joost, and BORGESIUS, Frederik J. - Does everyone have a price? Understanding people's attitude towards online and offline price discrimination. *Internet Policy Review - Journal on internet regulation*, Vol. 8, no.1, (2019), 17.

dissatisfaction in the media or by word of mouth[160]. Eventually, because of the fear of reprisals, traders may even stop deploying pricing algorithms to prevent customers and other consumers from dispersing[161].

In any case, at this point, the effects of OPP labels on consumer purchasing behaviour are not yet known. Given this uncertainty as to their impact, it may be possible that the information provided by traders would not be as clear as desirable. However, as mentioned initially, the way in which the information is presented is at the discretion of traders who, ultimately, will have to clearly inform the consumer and present that information every time the price is personalised. Due to the traders' large margin of leeway, it is expected that the form of information disclosure be the one that is most convenient for their interests, rather than those of consumers.

3.4. Importance of the requirement for consumer protection

Despite all the limitations explored in the previous sections, the introduction of this new information requirement in EU Consumer Law is very welcome. As is well known, one of the aims of this branch of law is not only to achieve a high level of consumer protection vis-à-vis other market participants, but also to empower them to make independent and well-informed decisions[162]. This is so because there is a widespread assumption that traders will always be better informed than consumers[163]. Therefore, the latter should be protected as the weaker party[164] and, at the same time, empowered as much as possible, as active societal agents, so that they can manage this information imbalance themselves[165].

Naturally, with OPP the information asymmetry between traders and consumers becomes even more pronounced. Traders not only know their products and services better

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160 VICTOR, FEKETE-FARKAS and LANER - Consumer Attitude and Reaction towards Personalised Pricing in the E-Commerce Sector, 146.

161 VALE - The Omnibus directive and online price personalization, 4.

162 DE STREEL and JACQUES - Personalised pricing and EU law, 3. GROCHOWSKI, JABLONOWSKA, LAGIOIA, and SARTOR -Algorithmic Transparency and Explainability for EU Consumer Protection, 49.

163WILHELMSSON, Thomas, and TWIGG-FLESNER, Christian - Pre-contractual information duties in the acquis Communautaire, *European review of contract law,* Vol. 2, no. 4, (2006), 452. Yet the authors warn that this premise does not always prove to be true and that therefore there must be limits to the regulation of information duties.

164 Under the CJEU's settled case law, the consumer is always considered as the weaker party regarding 'both his bargaining power and his level of knowledge' – *e.g.*, Judgment of the Court (Sixth Chamber), 30 April 2014, *Barclays Bank*, Case 280/13, ECLI:EU:C:2014:279; Judgment of the Court (First Chamber), 14 March 2013, *Aziz*, Case C-415/11, ECLI:EU:C:2013:164.

165 As recognised by scholars, "*EU consumer policy is built on two pillars, empowerment and protection*…" – ESPOSITO- A Dismal Reality, 194. GROCHOWSKI, JABLONOWSKA, LAGIOIA, and SARTOR -Algorithmic Transparency and Explainability for EU Consumer Protection, 49.

than consumers, but also have mechanisms that allow them to know more about the latter than they know about themselves. As the author Iain Ramsay once stated, *"imperfect consumer information is a fundamental rationale for consumer protection measures*[166]*"*. As a result, many scholars have proposed, as a first step, the development of disclosure requirements[167], since transparency can empower consumers. It is therefore in this context that the duty of information in Article 6(ea) of the CRD has emerged: as a motto for consumer empowerment towards OPP practices. The importance of this requirement is consequently evident in several aspects.

In the first place, by being informed about the fact that the price displayed is personalised on the basis of the ADM, consumers can decide whether they feel comfortable with such a practice and shop elsewhere if they do not. As a matter of fact, once fully informed, consumers can truly consent to the conclusion of any contract they wish. In this sense, it is clear that this new requirement promotes and preserves consumer autonomy[168] and the exercise of their contractual freedom[169].

In the second place, since the requirement is not limited to informing the consumer about the deployment of ADM mechanisms in OPP, but also includes other pieces of information related to, as seen above in Section 3.2, one could always argue that the requirement contributes to a better understanding of the consumer of the exact reasons behind the individual price, of the suppliers' market power and eventual attempts to profit from their vulnerabilities and biases. Thus, the information that is provided by traders under Article 6(ea), may empower consumers to proactively protect their own economic and non-economic (such as privacy-related) interests[170]. Indeed, it should be highlighted that the reasons behind the state of affairs between traders and consumers is due, at least in part, to the issue of opacity. In this sense, this transparency requirement, by addressing opacity, can mitigate some negative

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[166]RAMSAY, Ian - Framework for regulation of the consumer marketplace. *Journal of Consumer Policy,* Vol. 8 (1985), 359.

[167] Without prejudice to other methods that exist to reduce information asymmetries (*e.g.* the establishment of rules of a different nature; regulation of the type of activity; ensuring a certain quality of the services offered - licences, authorisations; standardisation of contract terms, etc.), in distance and off-premises contracts, the mechanism preferred by the EU legislator has been the classic measure of imposing pre-contractual information obligations on the trader. POLUDNIAK-GIERZ, Katarzyna - Sanctions for Lack of Fulfilment of Information Duties: Searching for an Adequate Regulatory Model for Personalized Agreements. *European Review of Private Law*, Vol. 28, no. 4 (2020), 820.

[168] CHAPDELAINE - Algorithmic Personalized Pricing, 36.

[169] In this sense HOWELLS, TWIGG-FLESNER and WILHELMSSON - *Rethinking EU Consumer Law*, 94. WAGNER and EIDENMÜLLER - Down by Algorithms?, 589.

[170] GROCHOWSKI, JABLONOWSKA, LAGIOIA, and SARTOR -Algorithmic Transparency and Explainability for EU Consumer Protection, 58.

consequences, preventing consumers from being misled and led into making choices they may regret, and empowering them so they can challenge traders' behaviour, exposing unfairness and illegality and access legal redress or other remedies[171].

In the third place, along with the importance of the requirement for consumers individually, one cannot fail to recognise that it will also play a key role from a collective perspective. Since increasing consumer confidence and trust in the market is also an aim of EU Consumer Law, balancing the position of the consumer and the trader, and hence ensuring fairness in individual contracts will contribute to some collective-political goals, such as the strengthening of the internal market and the increasing of the overall welfare[172].

Last but not least, this requirement is extremely valuable from the perspective of policy makers, consumer associations and regulatory and judicial bodies. By making information on the implementation of OPP practices public and visible, it will be possible for these players to find out how widespread these practices are and to identify certain outcomes at scale, such as patterns of manipulation or discrimination. In turn, this information, and other related to which may be gathered thereafter, will be extremely useful for the drafting of legislation governing the matter, as well as for the development of case law, advocacy or enforcement strategies[173].

Without prejudice to all these reasons that corroborate the importance of this new requirement, the fact is that most scholars consider that effective transparency is needed but are skeptical that it is sufficient to address the risks created by OPP practices for consumers[174]. Transparency does not necessarily allow consumers to exercise their autonomy when they are left with limited or unattractive alternatives, or when they do not understand or agree with the consequences of what is being disclosed[175]. In this sense, some argue that higher levels of intervention are required, suggesting that a standard of substantive fairness should be pursued.

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171 GROCHOWSKI, JABLONOWSKA, LAGIOIA, and SARTOR -Algorithmic Transparency and Explainability for EU Consumer Protection, 48-49.
172 GROCHOWSKI, JABLONOWSKA, LAGIOIA, and SARTOR -Algorithmic Transparency and Explainability for EU Consumer Protection, 49.
173 In this sense, VALE - The Omnibus directive and online price personalization, 4. GROCHOWSKI, JABLONOWSKA, LAGIOIA, and SARTOR -Algorithmic Transparency and Explainability for EU Consumer Protection, 55.
174 LYNSKEY, MICKLITZ, and ROTT - Personalised Pricing and Personalised Commercial Practices, 119-122; SCHOFIELD - Personalized pricing in the digital era, 37; UNCTAD - *Competition and Consumer Protection Policies for Inclusive Development in the Digital Era*. Geneva: UNCTAD, 2021, 33.
175 CHAPDELAINE - Algorithmic Personalized Pricing, 36.

However, the aim of the present dissertation is not to pronounce on whether the requirement is sufficient or not, but rather to focus on assessing the fairness of an OPP term in light of this new requirement and the UCTD. That said, we will thus move on to the next chapter where we will address the relationship between Article 6(ea) and the UCTD.

4. RELATIONSHIP OF THE NEW REQUIREMENT AND THE UNFAIR CONTRACT TERMS DIRECTIVE

4.1. Introduction to the UCTD and the unfairness test

In EU Consumer Law, there are several directives potentially applicable to OPP. Most scholars are dedicated to the analysis of this practice in the light of UCPD, in particular taking into consideration the amendments made by the Omnibus Directive to it and to the CRD[176]. Although OPP is usually thought about as being better addressed by the UCPD framework, the fact is that UCTD may also have a key role to play here[177].

The UCTD offers consumers protection against a contractual term that has been drafted in advance by the other party to a contract and which, contrary to the requirement of good faith, causes a significant imbalance between the parties, to the detriment of the consumer[178]. At its genesis is the assumption, mentioned above in Section 3.4, that consumers are in a weaker position compared to traders, both in terms of bargaining power and level of knowledge. Because this imbalance often leads to some consumer rights being unfairly excluded from contracts, or to consumers being forced to accept terms without being able to influence their substance, the UCTD provides that a contract term, which is not individually negotiated, can be reviewed by the court in order to ascertain whether or not it is of an unfair nature.

[176] About the topic, see inter alia: GRAAF - Consequences of Nullifying an Agreement on Account of Personalised Pricing, 186; DE STREEL and JACQUES - Personalised pricing and EU law, 4-5; DE ARRUDA - Personalised Prices, 61. VALE - The Omnibus directive and online price personalization, 6-7.
[177] In the same sense: LOOS, Marco, and LUZAK, Joasia - *Update the Unfair Contract Terms directive for digital services - STUDY*. Policy Department for Citizens' Rights and Constitutional Affairs, European Union, Brussels: European Parliament, 2021, 29.
[178] Article 3 UCTD.

The criterion for this court assessment, better known as the "unfairness test", is provided for in Article 3(1) of the UCTD, according to which: "*A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".* In addition to the requirements (which we will address further below), the assessment of the unfair nature of the term shall be determined taking into consideration the object of the contract, the circumstances of the case at the time of its conclusion and the remaining terms of the contract and/or of another contract on which it is dependent[179]. Any doubts of interpretation that may arise will be solved under Article 5 UCTD, which states that the interpretation most favourable to the consumer will prevail - *principle of interpretation in dubio contra proferentem or contra stipulatorem*[180].

As results from the reading of the mentioned Article 3(1) of the UCTD, it is possible to identify 3 requirements that need to be verified in order to consider a term as unfair. Firstly, it is required that the term has not been individually negotiated. In this regard, Article 3(2) of the UCTD clarifies that a term is considered not individually negotiated when it was drafted in advance and the consumer has therefore not been able to influence the substance of the term, in particular, in the context of a pre-formulated standard contract/one-sided contracts[181]. In this regard, terms - whether part of the terms and conditions or not - to the extent that they have been subject to negotiations or formulated specifically for the consumer, are irrelevant.

Secondly, it is necessary for the term to create a significant imbalance between the parties' obligations and rights, to the detriment of the consumer. Unlike the previous requirement, the UCTD does not specify what is meant by a term that is significantly detrimental to the consumer or the factors that should be taken into account. Without prejudice, the CJEU has already ruled on this issue, concluding that in order to carry out such a verification, national courts should consider the rules of national law applicable to the matter in question, in the absence of an agreement between the parties- *i.e.*, the supplementary rules

[179] Article 4(1) UCTD.
[180] HOWELLS, TWIGG-FLESNER and WILHELMSSON - *Rethinking EU Consumer Law*, 139.
[181] Concerning this requirement, Article 3(2) further develops that the fact that certain aspects of a term, or a specific term, have been individually negotiated does not exclude the application of Article 3(1) in relation to the rest of the contract if an overall assessment of the contract indicates that it is a pre-formulated standard contract. If the trader claims that a term has been individually negotiated, the burden of proof shall lie with him – Article 3(2), paragraphs 2 and 3.

- and therefore the extent to which the term derogates from those rules[182]. According to the case-law, only a comparative analysis will enable the national court to assess whether and, where appropriate, to what extent the contract places the consumer in a less favourable legal situation[183]. In this sense, a term which causes a significant imbalance may take the form of a restriction of rights, a limitation on the exercise of rights or perhaps an additional obligation imposed on the consumer which is not provided for by national rules[184].

Yet, for the purpose of considering an unfair term, not every derogation from national law is sufficient. It is also necessary that such a derogation would be *contrary to the requirement of good faith*. As with the previous requirement, given the lack of detail in the UCTD, the CJEU provided an interpretation. According to its case law, the court will have to, on a case-by-case basis, assess whether the trader, "*dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term if he or she had entered into individual contract negotiations*"[185]. Thus, although the trader has the freedom and legitimate interest in organising his contractual relations in a manner which derogates from national rules, he may not, in any case, simply pursue his own commercial interests of contractual efficiency against the legitimate expectations of the consumer[186].

In addition to the general clause of Article 3(1), the UCTD offers an annex with a list of several terms that may be considered unfair. As follows from Article 3(3) of the UCTD, the content of such list is merely illustrative, which means that it is not exhaustive, providing only

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182 In this sense, Judgment of the Court (First Chamber), 14 March 2013, *Aziz,* Case C-415/11, ECLI:EU:C:2013:164, paragraph 68;

183 *Aziz*, Case C-415/11, paragraph 68, which in turn refers to Advocate General Kokott's Opinion, in particular to paragraph 71, where it is stated that "*It is not possible to assess whether a term causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, without a comparison with the legal situation under national law in the event that the parties themselves have not made any contractual provision. Only where the contractual term treats the consumer less favourably than the statutory provisions might the term actually cause an unfair shift in the rights and obligations arising under the contract, to the detriment of the consumer."* - AG Opinion of the cited case, paragraph 71. In this regard, it should be highlighted that the significant imbalance does not necessarily require an economic impact on the value of the transaction. EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*. Brussels: EC, 2019, 31.

184 As a number of judgments have stated, *e.g.*, Judgment of the Court (First Chamber) of 16 January 2014, *Constructora Principado*, Case C-226/12, EU:C:2014:10, paragraph 23; Judgment of the Court (First Chamber) of 26 January 2017, *Banco Primus SA v Jesús Gutiérrez García*, Case C-421/14, ECLI:EU:C:2017:60, paragraph 23.

185 *Aziz*, Case C-415/11, paragraph 69.

186 PATTI, Francesco Paolo - Personalized Unfair Terms Control: EU Law Meets Innovative US Doctrines. *European Review of Private Law*, Vol. 28, no. 6 (2020), 1258; and MICKLITZ, Hans-W., and REICH, Norbert - The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD). *Common Market Law Review,* Vol. 51, no. 3 (2014), 790.

some guidance in the application of the unfairness test, with the ultimate goal of standardising the behaviour of market participants[187].

Once the three requirements of Article 3(1) are met, the term is declared unfair and, under Article 6(1) of the UCTD, it will not bind the consumer, meaning that it will be excluded. The rest of the contract will only be binding if it is capable of continuing to exist without the unfair term[188]. In short, and using Fabrizio Esposito's words, by applying the unfairness test mechanism "*the normatively unjustified formal equality created by the contract is replaced by a substantive equality created by the law*"[189]. By doing so, the UCTD is protecting the economic interests of consumers[190], ensuring that consumer contracts become freer from unfair terms.

Notwithstanding the above, there are situations where the assessment of unfairness is not applicable. In this sense, it is clear that if at issue is an individually negotiated term, the assessment will not apply. On the other hand, contractual terms that reflect mandatory, statutory or regulatory provisions, and the provisions or principles of international conventions are also excluded, as a consequence of falling outside the scope of the UCTD, in accordance with Article 1(2). Finally, the assessment of unfairness shall not relate to terms that concern the definition of the main subject matter of the contract and/or the adequacy of the price and remuneration, in so far as these terms are in plain intelligible language. This last exception stems directly from Article 4(2) of UCTD[191] and it is for us the most relevant one, which is why it will be analysed, with more detail, in the next section.

4.2. Contract terms relating to the price and remuneration under Article 4(2) UCTD: The transparency requirement

In principle, terms relating to the price and remuneration (*i.e.*, consumers' financial obligations) are subject to Article 3(1) of the UCTD[192]. However, the particularity of such contract terms is that, according to Article 4(2) of the UCTD, when it concerns the adequacy

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187 PATTI - Personalized Unfair Terms Control, 1259.

188 Article 6(1) UCTD *in fine*. For more information on the consequences see Section 4.5 below.

189 ESPOSITO, Fabrizio - Dziubak Is a Fundamentally Wrong Decision: Superficial Reasoning, Disrespectful of National Courts, Lowers the Level of Consumer Protection. *European Review of Contract Law*, Vol. 16, no. 4 (2020), 546.

190 As set out in Recital 9 of the UCTD.

191 According to Article 4(2) of the UCTD, "*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*".

192 EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 21.

of the price and remuneration, or, as expressed in Recital 20 of UCTD, the "*quality/price ratio of the goods or services provided* ", the unfairness assessment is excluded if the term is presented in plain intelligible language, in other words, if it complies with the transparency requirement.

The rationale behind this limitation is the UCTD's commitment to strike a balance between the protection of consumer rights, on the one hand, and the respect and observance of the principles of a free market economy, on the other hand[193]. At the time of the enactment of the UCTD, the problems of controlling the relationship between the agreed price and the goods or services to be supplied were much discussed. The doctrine held that since the price is determined by the market's mechanisms, allowing a court to control the reasonableness between the price and the respective good or service provided would be manifestly contrary to the fundamental principles of a free market economy[194]. As pointed out by the authors Hans Erich Brandner and Peter Ulmer, such control "*(…) would partially abrogate the laws of the market and hence prevent the offerers of goods or services from acting in accordance with those laws; the consumer would no longer need to shop around for the most favourable offer, but rather could pay any price in view of the possibility of a subsequent control of its reasonableness*."[195]. Moreover, it was held that the average consumer (contextualised below) was able to search for the best essential terms on their own, putting, in turn, pressure on traders and ensuring therefore better terms for consumers than those that could be ensured through court action[196]. In any case, in order to avoid potential adverse effects, the legislator considered that the best option, bearing in mind the aim of protecting consumers against unfair contract terms while balancing the rights and obligations of the parties, would not be to use means of controlling contract terms[197], but instead to improve transparency in such context[198].

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193 PATTI - Personalized Unfair Terms Control, 1255-1256.

194 In this sense, ATAMER, Yesim M. - Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer – Insights from Behavioural Law and Economics. *The Modern Law Review* (2017): 624-660; BRANDNER, Hans Erich, and ULMER, Peter - The community directive on unfair terms in consumer contracts: some critical remarks on the proposal submitted by de EC Commission. *Common Market Law Review*, (1991), 647-662.

195 BRANDNER and ULMER - The community directive on unfair terms in consumer contracts, 656.

196 ESPOSITO, Fabrizio, MACHADO, Leonor, and GROCHOWSKI, Mateusz - Consumidores vulneráveis e cláusulas abusivas: uma análise jurídica e económica. *Católica Law Review,* Vol. VI, no. 2 (2022), 92-93.

197 In this regard, the CJEU has held that since the price is not determined according to a legal formula, "*no legal scale or criterion exists that can provide a framework for, and guide, such a review*", which is why the assessment of the adequacy of prices is excluded from the court's powers - Judgment of the Court (Ninth Chamber) of 26 February 2015, *Matei*, Case C-143/13, ECLI:EU:C:2015:127, paragraph 55, which in turn refers to Judgment of the Court (Ninth Chamber) of 30 April 2014, *Kásler and Káslerné Rábai*, Case C-26/13, ECLI:EU:C:2014:282, paragraphs 54–55.

198 BRANDNER and ULMER - The community directive on unfair terms in consumer contracts, 656.

Thus Article 4(2) is intended to encourage traders to adopt transparent (price) terms, failing which they will be subject to a fairness assessment by the court. As is clear from its wording, a term is considered transparent when drafted in plain intelligible language - Article 4(2) *in fine*[199]. While it is up to the national courts to verify whether the drafting of the term comprises those features, the EC has developed a list of factors that may be relevant for such purpose[200]. These include, *inter alia,* whether the consumer had access and/or the opportunity to read the contract term prior to the conclusion of the contract, the comprehensibility of the individual term in light of the clarity of its drafting and the specificity of the terminology used and/or the form in which the contract terms are presented. Notwithstanding, the CJEU interpretation of this requirement has been broader, going far beyond the aspects suggested by the EC. As is clearly stated in Case *Andriciuc* [201]:

> "*As regards the requirement of transparency of contractual terms, as is clear from Article 4(2) of Directive 93/13, the Court has ruled that that requirement, also repeated in Article 5 thereof, cannot be reduced merely to their being formally and grammatically intelligible, but that, to the contrary, since 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 level of knowledge, that requirement of plain and intelligible drafting of contractual terms and, therefore, the requirement of transparency laid down by the directive must be understood in a broad sense (…) Therefore, the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring also that the contract should set out transparently 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, intelligible criteria, the economic consequences for him which derive from it (…)"* (our emphasis)[202].

[199] The same follows from the transparency requirement imposed by Article 5 of the UCTD.
[200] EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 23 and 25-26.
[201] Judgment of the Court (Second Chamber) of 20 September 2017, *Andriciuc*, Case C-186/16, ECLI:EU:C:2017:703, paragraphs 44 and 45.
[202] In the same sense, see for instance: Cases C-26/13, *Kásler*, paragraphs 71 and 72; Judgment of the Court (Third Chamber) of 28 July 2016, *Verein für Konsumentenforschung v Amazon,* C-191/15, ECLI:EU:C:2016:612, paragraph 68; and Judgment of the Court (Third Chamber) of 23 April 2015, *Van Hove,* Case C-96/14, ECLI:EU:C:2015:262, paragraph 40.

In the CJEU's view, transparency requires consumers to be able to assess the potential economic consequences of the term before the conclusion of the contract, *i.e.*, to be aware what will happen under the contract[203], as such information is extremely important for consumers to understand the extent of their rights and obligations under the contract before they are bound by it[204]. This question should be examined by the referring court in light of the standard of the average consumer, meaning a reasonably well-informed, observant and circumspect consumer[205].

While the CJEU'S interpretation of the transparency requirement is rather broad (requiring more than what seems to result from the letter of the provision), conversely, its interpretation of Article 4(2) has been rather narrow. Given its nature as an exception to the application of the unfairness test of Article 3(1) of the UCTD, the Court has consistently held that Article 4(2) of the UCTD, should be interpreted and applied in narrow terms[206]. Thus, as regards the first part of the provision, concerning the object of the unfairness assessment, the analysis of whether the term relates to the definition of the main subject-matter of the contract and/or the adequacy of the price and remuneration, will always be carried out from a restricted perspective.

In sum and given all the above, in the light of the UCTD, if the price of the good and/or service is presented clearly, explicitly, using the right terminology, at the right time and allows the consumer to assess the economic consequences for him or her arising from it, then there will be no room for a review of the substantive fairness of the quality/price ratio.

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[203] ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 36.

[204] EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 26.

[205] As can be read in *Kásler,* Case C-26/13, paragraph 74: "*it is for the referring court to determine whether, having regard to all the relevant information, including the promotional material and information provided by the lender in the negotiation of the loan agreement, the average consumer, who is reasonably well informed and reasonably observant and circumspect*…" (our emphasis). In the same sense, *Andriciuc*, Case C-186/16, paragraph 47: "*whether the terms are drafted in plain intelligible language enabling an average consumer, that is to say a reasonably well-informed and reasonably observant and circumspect consumer (…)be able to assess the potentially significant economic consequences*…". For a critical analysis of this standard, please see: ESPOSITO, GAMBÔA MACHADO, and GROCHOWSKI - Consumidores vulneráveis e cláusulas abusivas, 83-111.

[206] In this sense, *vide* for instance: *Van Hove,* Case C-96/14, paragraph 31; *Kásler,* Case C-26/13, paragraph 42; and *Matei,* Case C-143/13 Matei, paragraphs 49-50.

4.2.1. The specific case of OPP: the interplay between the transparency requirement of Article 4(2) of the UCTD and the new information duty of the CRD

At this point, we cannot avoid relating the specific transparency requirement of Article 6(ea) to the one required under the UCTD, in order to make it clear what is ultimately required for an OPP term to fall under the exception of Article 4(2) of the UCTD. Indeed, as the OPP term concerns price/remuneration, it is important to ascertain whether compliance with the former necessarily implies compliance with the latter.

The answer to this question depends on how one interprets Article 6(ea). If, contrary to what we have argued in the present analysis (Section 2.2), it is held that Article 6(ea) only requires that the consumer be informed - only and literally - that "the price displayed has been personalised through the use of ADM", it would not be reasonable to consider the term transparent, for the purposes of Article 4(2) of the UCTD. This is so because such a scenario would leave consumers in a more unprotected position. As Fabrizio Esposito rightly points out "*If merely informing that the price was personalised without any additional specification were sufficient to make the term transparent, Article 4(2) would effectively shield personalised surcharges from being reviewed. Consequently, consumers would be at the mercy of unscrupulous traders*"[207].

In such a case, compliance with Article 6(ea) would not necessarily imply compliance with the transparency requirement of Article 4(2) of the UCTD. As result, there would be a duality of transparency requirements whereby in one framework a term is considered transparent and, for the purposes of another, it is no longer considered transparent. We do not believe that would make sense. In our view, an effort to ensure a coherent articulation of the two requirements should be made.

Accordingly, it should be noted that the combination of the two requirements is simple when interpreting Article 6(ea) as proposed in Section 2.2. The broadened scope of the transparency requirement, introduced by the case law and mentioned in the previous section, is perfectly in line with the content of Recital 45 of the Omnibus Directive. Both reveal a concern for consumer awareness at the moment of purchase, seeking to ensure that the consumer is able to assess the impact and potential economic consequences for him - or her -

[207] Our emphasis. ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 7.

of a contract concluded under such conditions. Therefore, a trader who informs consumers about whether the price has been personalised on the basis of ADM, about the main factors for determining consumers' willingness to pay and the non-personalised price, will not only be complying with Article 6(ea), but will certainly also ensure that the practice falls under the shield of Article 4(2) of the UCTD. There would therefore be no significant divergence between compliance with the aforementioned requirements[208].

Notwithstanding the above, even if the two requirements are harmonised, this does not mean that the relationship between OPP (and its associated transparency requirement) and Articles 4(2) and 3(1) of the UCTD is straightforward[209]. In this sense, and because the UCTD may be an important framework in regulating the practice of OPP, we believe that it is relevant to study their interplay. In the following sections, we propose to analyse the personalised price term and its transparency requirement under UCTD, in light of the two possible scenarios: when the term does not meet the transparency requirement under the UCTD and when it does.

4.3. Scenario 1: The term does not meet the UCTD transparency requirement - how can we check the fairness of the personalised price from a substantive point of view?

Bearing in mind what has been developed so far, it is clear that an OPP term, as a contractual term that concerns the price/remuneration of the good or service, will in principle be covered by Article 4(2) exception of the UCTD. Thus, it will not be possible to assess the adequacy of the personalised price with respect to the good or service supplied in exchange, except if the term is not in compliance with the transparency requirement.

In this sense, if the information regarding the use of ADM is not disclosed to the consumer, the personalised price term lacks transparency. However, that should not mean that the term is automatically unfair[210]. Although some propose to create a rebuttable presumption

[208] For this reason, our point of view in section 2.2. is also strengthened. A more restrictive or literal interpretation of Article 6(ea) than the proposal would perpetuate the existence of two transparency requirements that, although different in purpose, are similar in ratio.

[209] In fact, this relationship has been a little explored issue, both by scholars and case law. GROCHOWSKI, Mateusz, JABLONOWSKA, Agnieska, LAGIOIA, Francesca, and SARTOR, Giovanni -Algorithmic Price Discrimination and Consumer Protection: A Digital Arms Race? *Technology and Regulation*, (2022), 43.

[210] EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 34.

of unfairness for non-transparent personalised prices[211], the fact is that according to the joint application of Articles 3 and 4 of the UCTD, its unfairness must still be assessed according to the criteria of Article 3(1) of the UCTD[212].

Without prejudice, from a substantive point of view, some difficulties may arise in carrying out such an assessment. Thus, assuming that the OPP term was not individually negotiated[213] - *i.e.*, that it was drafted in advance and that the consumer could therefore not influence the substance of the term -, we will analyse below the conditions of the unfairness test in order to understand how it can be conducted by the court in the context of OPP.

As discussed in more detail in Section 4.1, the second requirement of the unfairness test concerns whether the term creates a significant imbalance between the rights and obligations of the contractual parties to the detriment of the consumer. As explained, for the purposes of carrying out that examination, the CJEU held that a comparison should be made between the relevant contract term and any rules of national law which would apply in the absence of such a term. The Court has thus introduced a comparative test which enables the national courts to assess, on a case-by-case basis, the imbalance created between the parties and the less favourable position in which the consumer has been placed, by virtue of the contract. The question that naturally arises in this context is "what is the comparative element in the context of OPP"?

As regards price and remuneration, to the extent that the relevant national legislation does not contain supplementary rules, the EC suggests comparing the consideration to be paid by the consumer and the value of a given good or service, taking into account the market practices prevailing at the time that the contract was concluded[214]. In the same sense, the CJEU, regarding a term relating to the calculation of the normal interest rate under a loan agreement (which in essence corresponds to the price), sheds some light by holding that:

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[211] LOOS and LUZAK - *Update the Unfair Contract Terms directive for digital services - STUDY*, 31. In the view f the author, "*a rebuttable presumption could be introduced that personalised prices and terms are discriminatory, and, therefore, unfair*".
[212] LOOS and LUZAK - *Update the Unfair Contract Terms directive for digital services - STUDY*, 31; DE ARRUDA - Personalised Prices, 59.
[213] In this sense, Mateusz Grochowski Et al. argue that "*pricing conditions proposed to consumers could be deemed non-individually negotiated terms and could accordingly fall within the purview of Directive 93/13/EEC on unfair contract terms (UCTD)*" - GROCHOWSKI, JABLONOWSKA, LAGIOIA and SARTOR -Algorithmic Price Discrimination and Consumer Protection, 43.
[214] EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 33.

> "*it is the duty of the referring court* [national court], *inter alia, to compare the method of calculation of the rate of ordinary interest laid down in that term and the actual sum resulting from that rate with the methods of calculation generally used, the statutory interest rate and the interest rates applied on the market at the date of conclusion of the agreement at issue in the main proceedings for a loan of a comparable sum and term to those of the loan agreement under consideration*"[215].

In the light of these developments, it is important to analyse the options under the particular case of personalised prices, taking into consideration their specificities. Starting with the option of comparison with a statutory term, this would only be possible if, in fact, there was some legal standard for price personalisation. In this regard, a regulatory solution has been presented among scholars that involves establishing personalised pricing caps[216]. As in the case of uniform pricing, where an exploitative price is approached with a price ceiling[217], what is suggested is that the regulator, through its own data, would determine the maximum legal price to be charged to each individual. Even though neither of the authors has elaborated much on how regulators would collect the information and set the ceilings, in particular the factors that would be taken into consideration for this purpose, one could always argue that in the world of big data such eventual difficulties are not insurmountable[218].

In the view of the author of the original idea (Ben-Shahar), the definition of this maximum price could be made taking into consideration the main concerns and intentions of the legislator – *e.g.*, to set maximum ceilings that protect the poor, that protect against *price gouging*[219] or even against the *anti-welfarist distribution of resources*[220]. In the case of protection against high personalised prices, Ben-Shahar proposes as benchmark the *average total cost*[221]. Using an example of a drug, the author argues that the average total cost (which he considers

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215 Our emphasis. *Banco Primus,* Case C-421/14, paragraph 67, second indent.

216 BAR-GILL-Algorithmic Price Discrimination, 21; BEN-SHAHAR, Omri - The Ethics and Regulation of Personalized Pricing. Macalester College, 2017, unpublished master thesis, 28-35. Alternatively, some suggest that traders using personalising pricing should only charge a fixed percentage of consumer's willingness to pay (VULKAN, Nir, and SHEM-TOV, Yotam - A note on fairness and personalised pricing. *Economics Letters*, (2015), 179-183). Therefore, one could consider the regulator setting the standard percentage and that would serve as a benchmark.

217 For example, setting ceilings on the amount of interest that can be charged for a loan. BEN-SHAHAR - The Ethics and Regulation of Personalized Pricing, 29.

218 In fact, there is increasing work on personalised rules – *e.g.*, HACKER - Personalizing EU Private Law, 651 – 677; PATTI - Personalized Unfair Terms Control, 1263-1266.

219 Price gouging can be defined as the practice whereby traders take advantage of spikes in demand by charging exorbitant prices for necessities (often after a disaster).

220 BEN-SHAHAR-The Ethics and Regulation of Personalized Pricing, 29.

221 BEN-SHAHAR-The Ethics and Regulation of Personalized Pricing, 29-33.

should be understood in a broad sense, including costs of production and risk and opportunity costs) should be equal to the average price. Thus, in simplified terms, if the average total cost of a specific product is 10 euros and, for a consumer with low willingness to pay, the trader charged 7 euros, for a consumer with high willingness to pay, he or she should only, theoretically, charge up to 13 euros. In the words of Ben-Shahar "*(…) raising the price on someone with high willingness to pay is only justified if it is done to lower the price for someone with low willingness to pay*"[222].

It is true that with the creation of statutory ceilings it would be possible for the courts to perform the comparison exercise with the personalised price. Moreover, there is evidence that price caps can be beneficial[223]. In this regard, the author Oren Bar-Gill argues that "*The personalised cap could track the misperception and thus undo its effects*"[224]. Without prejudice, given the current state of the art and the reality in many European countries, we do not believe that it is a feasible option, as regulators are unlikely to have the quality and quantity of information required. On the other hand, we cannot fail to recall what was said above on the circumstance that the *significant imbalance* does not mean economic disadvantage. Indeed, the analysis of the *significant imbalance* is not limited to an economic comparison of the total value of the contract. To that extent, the comparison with personalised pricing caps may not be adequate for the purposes of Article 3(1) of the UCTD, as it does not make it possible to assess whether the consumer is left in a less favourable position as part of that contract (only whether it is below the cap provided for).

Another option that could be on the table would be comparison with market practices at the time when the contract was concluded[225], namely the market practice of OPP. This comparison would in turn involve personalised prices from different traders, set for a particular consumer and relating to identical or similar goods and/or services, to those in the contract under review. Perhaps by knowing the different outputs of pricing algorithms, the

[222] The author further states that "*In order to keep the average price equal to average total cost, every dollar that is reduced for those with low willingness to pay must instead be paid by someone with high willingness to pay*" in BEN-SHAHAR-The Ethics and Regulation of Personalized Pricing, 33.
[223] BAR-GILL, Oren - Price Caps in Multiprice Markets. *The Journal of Legal Studies,* Vol. 44, no. 2 (2015): 453-476.
[224] BAR-GILL, Algorithmic Price Discrimination, 4 and 21.
[225] By force of the next requirement - the good faith requirement - the EC considers that only fair and equitable market practices can be considered for this assessment. EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 33.

judge will be able to understand the justification for the price and make the analysis of its reasonableness.

However, even though the comparison to market practice may be effective with many other price and remuneration related terms, in the OPP context it would most likely not work in practice. In our view, it would also fail to meet its intended purpose. Firstly, as mentioned at the very beginning of this work, there is not much evidence of OPP practices. Although the new transparency requirement came to change that reality, the truth is that currently and in the near future it may prove to be a complex task to identify other traders with the same practice and supplying the same good or service. On the other hand, even if they are identified, it will always be difficult to make such a comparison. Even if it is the same person, traders collect and have access to different information from the consumer, plus the algorithms deployed will naturally work in different ways, which in turn could generate completely distinct and incomparable prices. Furthermore, and more important than these practical issues, is that this comparison, in our opinion, does not really make it possible to ascertain whether the term creates an imbalance between the parties to the detriment of the consumer. The comparison with the market practice of OPP, or similar ones, only allows a conclusion on whether the consumer, by virtue of that contract, is left in a less favourable position than if he or she had concluded the contract with another trader. In that sense, even if the consumer is in a more favourable position than he or she would be with other traders, that does not mean that he or she is objectively in a good position and is not being exploited by the trader through the use of ADM in OPP.

Finally, and still on the basis of what CJEU has already ruled in the context of interest rate calculations, the comparison could also take place between the method of calculation under the OPP practice and the *method of calculation generally used*[226]. The latter refers to the traditional price setting, *i.e.*, the one that takes into consideration production and distribution costs, stock levels, market supply and demand, and even a brief and superficial assessment of

[226] About this possibility see: ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 14-17.

how much potential consumers are willing to pay for the product or service[227]. In other words, the one that leads to the non-personalised price[228].

In this sense, the non-personalised price is not only relevant in triggering the unfairness test but may also play a key role in its application. However, it is important to clarify two issues that are often raised in this context. The first one concerns access to the non-personalised price. Even if one considers that the latter is covered by the new information duty, as argued in Section 3.2, the truth is that if there is no transparency (and information has not been provided), it may be difficult to access the non-personalised price. Yet, this issue can be easily overcome based on recent doctrine that demonstrates that the right to non-personalised pricing is granted by the GDPR[229]. To that extent, it will not be necessary for the national court, by its own means, to identify the non-personalised price with the trader, as the consumer will be entitled to it as a consumer-data subject. As a result, with the use of non-personalised price, made available under the GDPR obligations, the unfairness assessment process would become much faster and more efficient.

The second concerns the question one could raise about to what point price differences would be considered permissible under the unfairness test. In other words, to what extent can the personalised price be higher than the non-personalised price, without being considered of unfair nature. In this regard, some argue that it is unlikely that small variations in prices allow the term to be considered unfair[230]. However, in a different sense, we point out that when using the non-personalised price as a term of comparison, for the purposes of verifying the condition of *significant imbalance*, the core of the analysis should not be the *quantum* of the difference between the prices, since it is not decisive according to case law and the doctrine[231]. Once again, it should be stressed that the *significant imbalance* is not limited to the economic value of the contract. On the contrary, it can result solely of a sufficiently serious

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227 DE ARRUDA - Personalised Prices, 4.

228 As pointed out by the author Fabrizio Esposito, the non-personalised price "(…) *as of today clearly counts as the method of calculation generally used*." in ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 15.

229 ESPOSITO - The GDPR enshrines the right to the impersonal price, 1-13. The author develops 4 hypothetical scenarios based on the commitments and decisions of data controllers and consequently the attitude of consumers towards them. He analyses the scenarios under 2 different legal bases -consent and legitimate interest-, concluding that Article 7(4) GDPR, read together with Recitals 42 and 43 thereof, and/or Article 21(1) GDPR, as applicable, grant to consumers-data subjects the right to the impersonal price when they need it.

230 SEARS - The Limits of Online Price Discrimination in Europe, 23.

231 *Constructora Principado*, Case C-226/12, paragraph 22 – *"…the question whether that significant imbalance exists cannot be limited to a quantitative economic evaluation…"*.

impairment of the situation in which the consumer, as a party to the contract in question, is placed.

Therefore, if the personalised price is lower than the non-personalised price, this circumstance indicates that the consumer will be better off and therefore, even if there may be an imbalance, it will not be to the detriment of the consumer. Conversely, if the personalised price is higher than the non-personalised price, although it is potentially exploitative, does not necessarily imply that it is outrageous. In some cases, it could still be considered acceptable. Taking the example given by author Fabrizio Esposito of a charitable organisation, if the monthly donation from its donors is personalised, it may well be fine if properly explained to those involved[232]. In such a context, it could be seen as unreasonable to consider a term as unfair only on the grounds that the personalised price is higher than the non-personalised price. On the other hand, even if the non-personalised price is only a few cents higher, there may still be an imbalance between the parties to the detriment of the consumer. An example of it is the situation where, by virtue of having to pay one cent more than the non-personalised price, the consumer is consequently obliged to pay a delivery charge (which under the non-personalised price he did not have). In this case it could be argued that the term creates an imbalance between the parties to the detriment of the consumer, since it subjected the consumer to a new obligation. In any case, what is relevant is for the national court analyse whether the OPP term leaves the consumer in a less favourable position or not.

Moving on to the requirement of good faith, as has already been mentioned, it follows from case-law that what is at stake is a fair and equitable performance by the trader towards the consumer. The key point of the analysis is therefore whether it can reasonably be assumed that the consumer would have agreed to the personalised price if he or she had entered into individual contract negotiations. In this context, where the trader does not inform the consumer that the price has been personalised on the basis of the ADM, it seems unlikely that he can be considered to have dealt fairly and equitably with the consumer and to have taken account of his legitimate interests[233]. Although the lack of transparency does not automatically

[232] ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 17.
[233] Some consider however that traders, insofar as they try to succeed by offering consumers the best deal available, are acting in good faith. In this sense, SICILIANI, Paolo, RIEFA, Chrisitine, and GAMPER, Harriet - Fairness by Design: The Introduction of a Positive Duty to Trade Fairly. In *Consumer Theories of Harm - An economic approach to consumer law enforcement and policy making*. Hart Publishing, 2019, 179-209.

make the term unfair, as noted at the beginning of the Section, it is recognised by the EC that it can have a significant influence. As follows from the EC guidance on UCTD[234]:

> *"One may thus conclude that, depending on the content of the contract term at issue and in light of the impact of the lack of transparency, the possible unfairness of a contract term can be closely related to its lack of transparency or the lack of transparency of a contract term may even indicate its unfairness. This may be the case, for instance, where consumers cannot understand the consequences of a term or are misled. Indeed, where consumers are put in a disadvantageous position based on contract terms which are unclear, hidden or misleading, or where explanations necessary to understand their implications are not provided, it is unlikely that the seller or supplier was dealing fairly and equitably with the consumer and took their legitimate interests into account"* (our emphasis).

If the trader did not inform the consumer that he personalised the price on the basis of ADM, it was most probably out of fear of possible reprisals from the consumer[235]. Thus, in such circumstances, the trader can never be considered to have taken the consumer's legitimate interests into account. On the other hand, this lack of transparency naturally makes it impossible for the consumer to understand the implications of the term, for instance, that it was calculated according to his willingness to pay and that the amount he paid was not the same as the one charged to other consumers.

Furthermore, the required circumstance that the consumer would have agreed to the personalised price if he had entered into individual contract negotiations may also be difficult to verify. When the personalised price is lower (than the non-personalised price would be), it is more or less clear that the consumer would accept the same if he had entered into individual negotiations[236]. However, when it is higher, the issue is more dubious. Even though, at first glance it would seem that the consumer would never agree to pay more for a good or service on the basis of having a higher willingness to pay, this may not be always the case. In this

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234 EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 34.

235 A fear that has been mentioned before and gathers some evidence. *Vide*, for instance, VICTOR, FEKETE-FARKAS and LANER - Consumer Attitude and Reaction towards Personalised Pricing in the E-Commerce Sector, 146. Another possibility would be for the trader not to have informed the consumer because he was unaware of the existence of such an obligation, which, however, seems unlikely.

236 This aspect has only been mentioned for academic reasons since, in practice, if the analysis of the unfairness test is carried out in the same order as in this paper, a term with a lower personalised price than the non-personalised one would probably not reach the stage of the good faith requirement (as there would be no detriment to the consumer under the previous requirement).

respect, a well-known judgment of a national court (the UK Supreme Court) provides an interesting and relevant contribution[237]. The matter of the judgment was a payment due for overstaying in a parking space[238]. In it, the court held that a consumer who was interested in parking free of charge for two hours in a shopping centre would have reasonably agreed to the term providing for a payment for overstaying, as he or she would run that risk for the advantage of being able to benefit from the parking. It thus follows from the case that some consumers may accept onerous conditions in their contracts, provided they are compensated for them[239]. Applied to the OPP context, although we cannot exclude such a possibility, we would say that there are few cases in which the consumer would have any economic or other benefit[240]. Hence, if there is no gain to the consumer, in individual negotiations it would be unlikely that he or she would agree with the higher (personalised) price.

It follows from this analysis that, failing the transparency requirement, the OPP term will have to be subjected to the unfairness test and that, accordingly, with some adaptation and effort by the national court, it is possible to check the fairness of the personalised price, from a substantive point of view.

4.4. Scenario 2: The term fulfils the UCTD transparency requirement - Is it necessarily fair under the directive?

In contrast to the previous scenario, it may be the case that the trader has fulfilled his information duty and thereby provided the consumer with all the information he or she is obliged to. In such an event, the main question that arises is whether this circumstance implies that, automatically, the OPP term is considered fair under the UCTD.

In this regard, the EC has stated that a term that is perfectly transparent under the UCTD may still be considered unfair under Article 3(1) in light of its unbalanced content[241]. Even though transparency is connected to fairness, in principle, it does not automatically make a practice fair at a substantive level[242]. However, while this may apply to the generality of the terms, it is doubtful whether it applies to terms covered by Article 4(2) of the UCTD. It

[237] UK Supreme Court, judgment of 4th November 2015, *Beavis v. ParkingEye*, Case UKSC 2015/0116.
[238] In cause was a sign stating that "*Failure to comply with the following will result in a Parking Charge of £85: Parking limited to 2 hours (no return within 1 hour)*" – Cited Case: *Beavis v. ParkingEye*, Case UKSC 2015/0116, paragraph 91.
[239] PATTI - Personalized Unfair Terms Control, 1259.
[240] In this regard we refer to the charity organisation example previously mentioned (reference in footnote 233).
[241] EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 34.
[242] CHAPDELAINE - Algorithmic Personalized Pricing, 36.

appears from both the EC Guidance and the case law that such a possibility is only permissible under the context of the transparency requirement of Article 5 of the UCTD. Indeed, in view of the rationale of Article 4(2) of the UCTD, it seems inconsistent to admit the unfairness test when the purpose of the exception enshrined therein is precisely to rule out such assessment.

However, accepting that an OPP term is automatically fair, and therefore excluding the possibility of carrying out a price adequacy check, simply on the grounds that transparency duties have been met, seems to us to leave consumers in a fragile and unprotected situation, particularly when high surcharges are involved. Indeed, where the trader, using OPP, charges less to a consumer, no significant fairness issue seems to arise, as the term would not be considered unfair in light of the requirements of the unfairness test. Although the term has not been individually negotiated and therefore the first requirement is verified, there is no significant imbalance between the parties to the detriment of the consumer, and it would hardly be contrary to the principle of good faith.

In a different sense, as outlined in Section 4.3, a surcharge will have the potential to be considered abusive in nature under Article 3(1) of the UCTD[243]. Not only can it create a significant imbalance between the rights and obligations of the contractual parties, to the detriment of the consumer, but also such a term will in all likelihood be considered contrary to the principle of good faith. Thus, if an OPP term that surcharges the consumer passes the unfairness test (meaning that has an unfair nature), it is clear that excluding such an assessment, on the grounds that the term is transparent, would be harmful to consumers, who could be exploited by accepting unfair terms without being able to rely on the UCTD remedies.

Considering only the wording of Article 4(2) of the UCTD, it seems to follow that once the transparency requirement is met, a personalised price falls within the exception and no substantive control can be carried out. The term is, in principle, considered fair. As this situation can be detrimental to consumers, one could argue that this issue should have been addressed when the UCTD was amended[244]. As one of the aims of the Omnibus Directive was to bring EU consumer protection legislation up to date with market developments, alongside the inclusion of the new information duty in the CRD, the exception of Article 4(2)

[243] In this sense, ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 7.
[244] In this regard some point out that OPP was merely an incidental detail of the reform carried out by the Omnibus Directive. GROCHOWSKI, Mateusz - European Consumer Law after the New Deal: A Tryptich. *Yearbook of European Law*, Oxford University Press, (2020), 402.

of the UCTD could have been reworded to exclude the price adequacy when the price is not traditionally calculated. Notwithstanding, this is of little concern since, if the transparency requirement is interpreted in accordance with what was argued in this work, and given what will be developed below in respect of Article 4(2) of the UCTD, the problem will not arise and consumers will still be protected.

We must not forget that the UCTD is a minimum harmonisation directive, *i.e.*, it only sets minimum standards, leaving it to the Member States to set standards higher than those laid down in the directive[245]. In this sense, even though the European legislator could make such an amendment, it would not be necessary when Member States can, in their own right, implement the substantive control of OPP. In other words, the fact that the unfairness assessment of the UCTD cannot be applied to contract terms relating to the adequacy of the price and remuneration does not preclude, because of the minimum nature of the UCTD, national fairness rules that cover the price[246]. This possibility has even been expressly confirmed by the CJEU[247].

Therefore, to ensure a higher level of consumer protection, Member States may subject an OPP term to substantive control, even in cases where the term is drafted in clear and intelligible language. In our view, they not only can, but, in fact, should[248]. Despite the literal content of the exception of Article 4(2) UCTD, we set out below some arguments that demonstrate that such provision can be interpreted and applied to personalised surcharges, without any prejudice to the UCTD.

First of all, the rationale of the exception of Article 4(2) of the UCTD has no application to the case of OPP[249]. Article 4(2) of the UCTD was intended to respect and observe the principles of a free market economy and contractual freedom of the parties, letting the market discipline the price/quality relationship, notably through supply and demand

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[245] Article 8 of the UCTD.
[246] HOWELLS, TWIGG-FLESNER and WILHELMSSON - *Rethinking EU Consumer Law*, 140.
[247] Judgment of the Court (First Chamber) of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, Case C-484/08, ECLI:EU:C:2010:309. According to which *"(…) Articles 4(2) and 8 of the Directive must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language".*
[248] In the same sense, Francesco Paolo Patti argues that "*Price discrimination based on data shows that the exclusion of the substantive control of price terms should be repealed, as a control on the price determination mechanism is needed*" in PATTI - Personalized Unfair Terms Control, 1271.
[249] ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 40.

forces[250]. However, nowadays in the face of OPP and similar practices, such a rationale seems unsuitable to the context[251]. As it was made clear, in OPP, prices are not determined by market rules, but instead according to consumer's willingness to pay. Accordingly, the intervention of the court will not directly interfere with the normal functioning of the market, nor will it interfere with the contractual freedom of the parties[252]. The trader will remain free to use the OPP practice and to shape the main obligations (subject only to a limit of reasonableness)[253], and the consumer will not stop looking for the most favourable offer on the market[254]. Therefore, it would not make sense to exclude the OPP term from the unfairness test on the basis of the principles of a free market economy and contractual freedom of the parties, when the price does not result from the intersection of the law of supply and demand, and the aforementioned principles are not put at risk. The concerns present in the rationale of Article 4(2) are, thus, irrelevant for OPP.

On the other hand, as prices are not set in the traditional way, the reason for exclusion by the CJEU does not hold in this case either. Recalling what was stated by the court, the exclusion pursuant to Article 4(2) of the UCTD is "*explained by the fact that no legal scale or criterion exists that can provide a framework for, and guide, such a review*"[255]. Although there is no legal framework, in the case of OPP there is a "contractual framework" that could provide a term of comparison –the alternative "contractual framework" composed of the non-personalised price. The national court here will have to examine whether the personalised price, as compared to the non-personalised price, left the consumer in a less favourable position and whether or not the trader acted in good faith. Thus, there would be a criterion that could guide such a review by the national court.

Secondly, the suggested amendment would be in line with the CJEU's restrictive interpretation of the exception[256]. As can be read explicitly in several judgments "*Article 4(2) of Directive 93/13 laying down an exception to the mechanism for reviewing the substance of unfair terms, such as that provided for in the system of consumer protection put in place by that directive, that provision must be*

[250] As developed in the Section 4.2, to which reference is made.
[251] PATTI - Personalized Unfair Terms Control, 1257-1258.
[252] BRANDNER and ULMER - The community directive on unfair terms in consumer contracts, 656.
[253] As stated by Francesco Patti, "*Apart from the ethical concerns, personalized pricing is not necessarily an evil to combat, but some limitations of contractual freedom are needed*". PATTI - Personalized Unfair Terms Control, 1268.
[254] BRANDNER and ULMER - The community directive on unfair terms in consumer contracts, 656. He or she will not simply pay any price, considering the possibility of a subsequent control of its reasonableness, when there is some trader offering a lower price (personalised or not).
[255] Cf. Footnote 200.
[256] ESPOSITO - Making personalised prices pro-competitive and pro-consumers, 40.

strictly interpreted" (our emphasis)[257]. Although it is not certain that the CJEU would, on the basis of the restrictive interpretation, refrain from applying Article 4(2) to an OPP term, the fact is that from its own position it seems to follow that, if the grounds of the exception are not met, the provision should not be applied. Thus, a national court, on the basis of case law, could make this restrictive interpretation and exclude the term OPP from the scope of the exception.

In sum, it follows from the analysis conducted in this section that an OPP term, just because it is drafted in clear and intelligible language, should not imply that it is automatically considered to be fair. As explained, even if transparent, an OPP term, in particular when there is a personalised surcharge, can be potentially exploitative. In this sense, although it appears from the letter of Article 4(2) that the exception applies to OPP, given that the UCTD is only a minimum harmonisation directive, Member States, on the basis of the arguments set out, may extend the unfairness test to the adequacy of the price, in order to encompass OPP. In the following section we will briefly analyse this issue in the light of the Portuguese legal framework, since the latter has broadened the scope of the unfairness assessment to contract terms relating to the adequacy of the price or remuneration.

4.5. The Portuguese law approach

For the context of OPP, the relevant Portuguese legal framework comprises Decree Law (DL) 446/85 of 25 October[258], known as Regime of Standard Contractual Clauses ("*Regime das Cláusulas Contratuais Gerais*") that governs the unfair terms, Law 24/96 of 31 July which concerns the Consumer Protection Act ("Lei da Defesa do Consumidor")[259] and DL 24/2014 of 14 February that transposed the CRD[260].

It is also relevant to include, for the purposes of the present analysis, the DL 109-G/2021 of 10 December[261], that partially transposed the Omnibus Directive and amended DL 24/2014 of 14 February , adding a new information item to the list of Article 4(l) – the information about the use of ADM in OPP. Although this transposition was express and the legislator did not go beyond what is provided for in the UCTD, in the Portuguese case, an

[257] *Matei,* Case C-143/13, paragraph 49.
[258]DL 446/85 of 25 October, *Diário da República* no. 246/1985, Serie I of 1985-10-25, last amended by DL 109-G/2021, of 10 December.
[259] Law 24/96 of 31 July, *Diário da República* no. 176/1996, Serie I-A of 1996-07-31, last amended by DL 109-G/2021, of 10 December.
[260] DL 446/85 of 25 October, *Diário da República* no. 32/1985, Serie I of 2014-02-14, last amended by DL 109-G/2021, of 10 December.
[261] DL 109-G/2021 of 10 December, *Diário da República* no. 238/2021, Serie I of 2021-121-10, 1st supl.

OPP term becomes less worrisome from the consumer's point of view, due to the national regime of unfair terms – *i.e.*, the Regime of Standard Contractual Clauses.

Primarily, due to its scope of application. Contrary to the UCTD, the Regime of Standard Contractual Clauses does not make any limitation in terms of content. The exclusion of terms relating to the main obligations of the contract, foreseen in Article 4(2) of the UCTD, was not transposed into the Portuguese legal framework. Thus, under Portuguese law, an OPP term may be subject to the unfairness test. Accordingly, in light of the Regime of Standard Contractual Clauses, a term will be considered abusive when it is contrary to good faith, taking into account, for that purpose, the principles of trust protection and primacy of materiality[262]. Although the unfairness test of Article 3 of the UCTD has not been expressly transposed (with no reference to the significant imbalance in determining the consumer), according to national doctrine, it should be used in the interpretation of the Portuguese law[263].

Secondly, the framework regarding the unfair terms is generally recognised as being more protective than that provided by the UCTD with regard to transparency[264]. Accordingly, under Article 5 of the Regime of Standard Contractual Clauses, the terms must be communicated in full to the adhering parties[265]. Yet, simple communication is not enough[266]. The insertion of a term in a contract depends on full and effective knowledge of the terms being made possible by those using common diligence ("*comum diligência*")[267]. Contrary to the UCTD, where to assess transparency, it was defined (by jurisprudence and *a posteriori*) the standard of the average consumer[268], under Portuguese law, the relevant standard is the one of common diligence, assessed taking into account the habits and level of culture of the Portuguese people[269]. The advantage of this standard is that it is variable, depending not only on the capacity and contractual level of the consumer, but also on the extent and complexity of the term in question[270]. Moreover, this variable standard ends up making the duty of

[262] Articles 15 and 16 of the Regime of Standard Contractual Clauses.
[263] For more information on the topic, please see: CARVALHO, Jorge Morais - *Manual de Direito do Consumo*. 7th. Almedina, 2020, 169.
[264] ESPOSITO, GAMBÔA MACHADO, and GROCHOWSKI - Consumidores vulneráveis e cláusulas abusivas, 83-111.
[265] Article 5(1) of the Regime of Standard Contractual Clauses.
[266] CARVALHO - *Manual de Direito do Consumo*, 130.
[267] Article 5(2) of the Regime of Standard Contractual Clauses.
[268] See Section 4.2.
[269] CARVALHO - *Manual de Direito do Consumo*, 133.
[270] ESPOSITO, GAMBÔA MACHADO, and GROCHOWSKI - Consumidores vulneráveis e cláusulas abusivas, 95.

communication equally variable. The latter will differ in terms of extent and level of depth, depending on the content of the contract and the specific person with whom it is concluded[271].

In addition to the duty to communicate, the Regime of Standard Contractual Clauses also imposes a duty to inform and to provide clarification – Article 6 (1) and (2). The former requires the trader to clarify all terms that may be unclear. The analysis of the need for explanation should be made according to the circumstances, namely the nature and condition of the person (including his or her cultural level revealed during the negotiation)[272]. Once again, the extent and intensity of the duty of information varies, and in this case, according to the condition of the party.

Thus, as recognised by the doctrine, the Regime of Standard Contractual Clauses ensures a consumer protection, as well as an imperative of transparency, more expansive than the UCTD, since it imposes on the trader communication and information duties that, in the face of vulnerable consumers, are proportionally intense[273]. This framework and the fact that an OPP term is not excluded, *ab initio*, from the unfairness test, allows us to conclude that the Portuguese legal system may offer a more adequate protection in the context of OPP.

4.6. Consequences of the term's unfairness

As briefly noted in Section 4.1, once the three requirements of Article 3(1) of the UCTD are met, the term is declared unfair and shall "*not be binding on the consumer*" – Article 6(1) of the UCTD. The rest of the contract will only be binding if it is capable of continuing to exist without the unfair term[274]. This is a mandatory provision that, according to the CJEU, "*aims 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*" [275/276].

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271 ESPOSITO, GAMBÔA MACHADO, and GROCHOWSKI - Consumidores vulneráveis e cláusulas abusivas, 95.

272 CARVALHO - *Manual de Direito do Consumo*, 138.

273 ESPOSITO, GAMBÔA MACHADO, and GROCHOWSKI - Consumidores vulneráveis e cláusulas abusivas, 96.

274 Article 6(1) *in fine*.

275 In this sense, Judgment of the Court (First Chamber), 30 May 2013, *Asbeek Brusse*, Case C-488/11, ECLI:EU:C:2013:341, paragraph 38 with references to Judgment of the Court (First Chamber), 14 June 2012, *Banco Español de Crédito,* Case C-618/10, ECLI:EU:C:2012:349, paragraph 40, and Judgment of the Court (First Chamber), 21 February 2013, *Banif Plus Bank*, Case C-472/11, ECLI:EU:C:2013:88, paragraph 20.

276 This imperative nature implies that this provision is binding on all parties and authorities and that, in principle, it cannot be circumvented or deviated from. Additionally, it does not seem to be possible for consumers to waive this protection. EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 38.

The notion of "*not be binding on the consumer*" should be interpreted as implying the invalidity (nullity) of unfair contractual terms, since this appears to be the solution which best and most effectively achieves the protection sought[277]. As the CJEU has already pointed out *"(…) Article 6(1) of Directive 93/13 must be interpreted as meaning that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer"*[278]. Therefore, the declaration by a court that such a term is unfair should, in principle, have the effect of restoring the consumer to the situation he would have been in if that term had never existed[279].

In this sense, the UCTD enshrines a principle that unfair contractual terms must be set aside. Thus, under Article 6(1) it does not seem to be admissible for a national court to replace or modify a term found to be unfair by a fairer one. Allowing a national court to review the content of an unfair contract term would mean that the term in question would remain partially binding and that traders would benefit to some extent from the use of such term[280]. Consequently, the aim of dissuading traders from using unfair terms – one of the main aims of the UCTD - would be frustrated[281]. For these reasons, case law has reinforced the prohibition of revision of terms. As is clear from the Case *Banco Primus* [282]:

> "(…) *it follows from the wording of Article 6(1) of Directive 93/13 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."* (our emphasis).

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[277] EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 38.

[278] Our emphasis. Judgment of the Court (Grand Chamber) of 21 December 2016, *Gutiérrez Naranjo*, Joined Cases C-154/15, C-307/15 and C-308/15, ECLI:EU:C:2016:980, paragraph 61.

[279] *Gutiérrez Naranjo*, Joined Cases C-154/15, C-307/15 and C-308/15, paragraph 61.

[280] Traders could then use unfair terms without any risk of them being excluded, as the court would always choose to modify them. PATTI - Personalized Unfair Terms Control, 1260.

[281] PATTI - Personalized Unfair Terms Control, 1260. In addition, the EC argues that to admit such a hypothesis would not only undermine the effectiveness of Article 6(1) UCTD, but also, inconsistently, frustrate the objective of combating the continued use of unfair contract terms reflected in Article 7(1) UCTD (in EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 39).

[282] *Banco Primus,* Case C-421/14 paragraph 71. In the same sense: *Banco Español de Crédito*, C-618/10, paragraph 65; *Asbeek Brusse*, C-488/11, paragraph 57.

In view of the above, although the principle that unfair contract terms simply have to be excluded from the contract (while the rest of the contract continues to bind the parties), does not raise difficulties in most cases, the same cannot be said in the case of an OPP term, since it is doubtful that the contract would be able to subsist without such a term. Indeed, in our view, that would be very unlikely.

The continuity of the contract without the unfair contract term is assessed under the applicable national law and involves a case-by-case analysis of whether the contract can legally be performed without the unfair contract term[283]. Thus, such an assessment cannot be based on purely economic considerations, meaning that it does not matter whether the trader would not have concluded the contract without the unfair term or whether the removal of the term makes the contract less attractive from an economic point of view[284]. What is relevant is that continuation is *legally possible* under national law. Nevertheless, we recognise that this assessment may not always be easy due to its complexity and may generate some disagreement/confusion.

In the case of OPP, we are dealing with the remuneration of the contract, one of the essential contractual obligations, which constitutes a key part of its object. Therefore, it seems to us that it would be difficult, under national law, to maintain a contract in legal terms without one of its main obligations. Although it can be argued on the basis of some case law, where it is stated that the reduction to zero of the interest rate in case of loans (in violation of the Consumer Credit Directive[285]) is possible under EU law, that it would also be possible to maintain a contract with an OPP equal to zero, we are somewhat sceptical about such a possibility. In fact, this does not seem to us to follow from the majority of case law[286], nor from policy makers. In this regard, the EC as clarified that "*A contract cannot be performed, i.e. 'cannot continue in existence', if a term defining its main subject matter or a term that is essential for the*

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283 EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 41.

284 EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 41.

285 Directive 2008/48/EC Of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, 66–92.

286 There is case law that consider that contracts cannot be performed without terms of designation of the currency (in which payments have to be made) or determining the exchange rate (in order to calculate the repayment instalments of a loan denominated in a foreign currency). *A fortiori,* in the case of the OPP, the contract cannot be performed either without such a term. About these cases *vide*: *Andriucic,* Case C-186/16, paragraphs 35-37 and *Kásler,* Case C-26/13, paragraphs 80-81.

calculation of the remuneration to be paid by the consumer is removed"[287]. This means that if the unfairness of a term which is essential for calculating the remuneration leads to the non-performance of the contract, *a fortiori,* the unfairness of the remuneration/price term itself also leads to.

At this point, it seems reasonable to conclude that, the OPP term having been declared unfair, it should be excluded and, consequently, since the contract has no way of existing, the latter would also, as a whole, be considered null and void. Notwithstanding the above, the CJEU has consistently recognised that, in certain and exceptional circumstances, the national courts may replace the unfair contract term. Such a possibility has been grounded, firstly, on the ratio of Article 6(1) UCTD. In this respect, the EC highlights that "*Article 6(1) is intended to restore the balance between the parties by removing unfair terms from the contract, in principle preserving the validity of the contract as a whole, and not to render all contracts containing unfair terms null and void*"[288]. And secondly, on the negative consequences for the consumer resulting from the nullity of the contract[289].

Although this solution does not follow from the wording of the Article 6(1) UCTD and may sound slightly contradictory to what was initially said (about the prohibition of revision), it is not out of place and may in fact safeguard some situations in which the consumer would be truly harmed by the nullity of the contract. On the other hand, it should be noted that this possibility of replacing is not carried out by any means. In principle, the replacement allowed by the CJEU is limited to a supplementary provision of national law. Such a provision, in turn, must be understood as the rule "*which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established",* as follows from Recital 13, which is often referred to by case-law in this specific context. The reason for this limitation is that these provisions are presumed not to contain unfair terms[290]. Whether or not this notion can be interpreted extensively, thus encompassing general provisions of contract law, is a question

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[287] EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 41. Judgment of the Court (Third Chamber) 14 March 2019, *Dunai,* Case C-118/17, ECLI:EU:C:2019:207, paragraph 52.

[288] Our emphasis. EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 41.

[289] Using the example given by the EC: if the consumer had an obligation to repay the entire loan immediately and not in the agreed instalments. EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 41.

[290]Judgment of the Court (Third Chamber) of 3 October 2019, *Dziubak,* Case C-260/18, ECLI:EU:C:2019:819, paragraph 59. *Kásler*, C-26/13, EU:C:2014:282, paragraph 81, and Judgment of the Court (Grand Chamber) of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, joined cases C-70/17 and C-179/17, EU:C:2019:250, paragraph 59.

that has been controversial. The case law, notably in the Case *Dziubak*, held that general provisions cannot be used to fill the gap caused by the exclusion of a term which has been found to be unfair, on the grounds that:

> "(…) *even assuming that provisions such as those to which the national court refers* [general ones], *given their general nature and the need to make them effective, can in practice replace the unfair terms concerned by the mere act of substitution by the national court, they do not appear, in any event, to have been subject to a specific assessment by the legislature with a view to establishing that balance, such that those provisions are not covered by the presumption* [if not containing unfair terms]…*"* [291].

In a different sense, some scholars[292] and even the EC seem to admit that this filling of gaps can be done with general rules, instead of the national courts being limited only to specific provisions that regulate the rights and obligations under that contract[293]. This does not seem to us to be unreasonable to the extent that, firstly, there are general provisions which are covered by the presumption. From the joint application of Recital 13 with Article 1(2) UCTD, it results that implicitly they have a fair nature. Otherwise, the terms reflecting it could not be excluded from the scope of the Directive under Article 1(2) UCTD. Secondly, because it would not be a creative adaptation of the contract, so that the principle of prohibition of revision of terms would be respected[294].

Returning to the specific case of OPP, the elimination of this term, on the grounds of its unfair nature, would lead to the nullity of the contract as a whole. It is therefore appropriate to analyse it in the light of the exception introduced by the case law. In this context, two major questions arise. The first is whether the elimination of the contract has negative consequences for the consumer, taking into account all the relevant provisions of national law. A positive answer leads us to the second question, namely how the term is replaced by the supplementary rules of national law.

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[291] *Dziubak*, Case C-260/18, paragraph 61.
[292] For a more detailed analysis, please see: ESPOSITO - Dziubak Is a Fundamentally Wrong Decision, 538-551.
[293] Alternatively, the EC also mentions the possibility of using statutory provisions to replace the term unfair – *in* EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts,* 42. Additionally, there are those who present a more technological solution of personalised gap-filling, namely PATTI - Personalized Unfair Terms Control, 1262.
[294] Additional arguments are put forward by the author Fabrizio Esposito in ESPOSITO - Dziubak Is a Fundamentally Wrong Decision, 538-551.

As regards the first question, it follows from a large body of case-law that the negative consequences of the termination of the contract may be assessed, on the one hand, by considering whether the consumer is "penalised" by the termination and, on the other, whether the continuation of the contract is contrary to the consumer's interests[295]. This will therefore require a case-by-case analysis. Moreover, case law (*e.g.*, *Kásler)* adds that the consequences have to be *particularly unfavourable* for the consumer. An illustrative example of this is the situation of the *Kasler's* main proceedings where the termination of a consumer credit agreement denominated in foreign currency, would lead to the outstanding balance of the loan becoming immediately due (which, in turn, would be very likely to exceed the consumer's financial capacities)[296]. As a result, the consumer would be severely penalised, unlike the trader, who would ultimately not be dissuaded from inserting such terms in its contracts.

In the case of an agreement with an OPP term, what the national court will have to ascertain is whether the termination of the contract will give rise to some *particularly unfavourable consequences*. That assessment will, of course, depend on the circumstances of the individual case. If by hypothesis, it does not give rise to the mentioned consequences, the contract terminates without major issues. On the contrary, if it does, we are confronted with a second question which concerns the replacement of the unfair term of the contract by the supplementary rule of national law. In this context, the problem of what should apply in the context of OPP arises.

A first solution would be for the national court to invite the parties to negotiate a new price. This possibility is expressly recognised in case-law, in particular in *Banca B.*:

> "[if the] *annulment of the contract would have particularly unfavourable consequences for the consumer and there are no supplementary provisions under national law, the national court must (…) take all the measures necessary to protect the consumer from the particularly unfavourable consequences which could result (…). In circumstances such as those in question in the main proceedings, nothing precludes the national court from, inter alia, inviting the parties to negotiate with the aim of establishing the method for calculating the interest rate, provided that that court sets out the framework for those negotiations and that*

[295] *Dunai*, Case C-118/17, paragraphs 54-55; Judgment of the Court (Fifth Chamber) of 7 August 2018, *Banco Santander*, joined cases C-96/16 and C-94/17, ECLI:EU:C:2018:643, paragraph 74; Judgment of the Court (First Chamber) of 21 January 2015, U*nicaja Banco and Caixabank*, joined cases C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraphs 33-34.
[296] *Kásler*, Case C-26/13, paragraph 84.

> *those negotiations seek to establish an effective balance between the rights and obligations of the parties taking into account in particular the objective of consumer protection underlying Directive 93/13"*[297].

Indeed, as recognised by the EC the prohibition of revision does not affect the parties to amend or replace an unfair contract term with a new one, within their contractual freedom[298]. Thus, in the absence of a supplementary provision, the court could try to get the parties to reach an agreement.

Alternatively, following on from what has been developed in the previous chapters, a potential solution would be the replacement with a non-personalised price. In such a case, at least, the obstacles raised in *Dziubak* would not arise. As noted, the CJEU limited substitution to supplementary provisions of national law on the basis that such provisions are presumed not to contain unfair terms (as they were subject to a specific assessment by the legislature with a view to establishing a balance between the parties), however, in the case of the non-personalised price, such a balance is also achieved but through the functioning of the market. Moreover, this replacement would not require creativity on the part of the judge. The price would not result from the judge's will or from what he understands to be the fairest, but from the intersection of the law of supply and demand.

Without prejudice to the above, regarding to this last alternative, although it is intended to restore the balance between the parties, ensuring the protection of the consumer, one cannot fail to bear in mind the rationale of the exception introduced by case law – *e.g. Kásler*. Even though the exception came to rescue some contracts from overall invalidity, it was justified essentially by the need to ensure the dissuasive effect of the prohibition to use unfair terms[299]. It is therefore not certain that if all contracts with unfair OPP terms could be replaced by the non-personalised price, such an effect would be produced among traders. They would most likely risk setting an unfair personalised price, since the worst that would happen to them would be that the price would be reduced to the non-personalised one.

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[297] Judgment of the Court (First Chamber) of 25 November 2020, *Banca B. SA*, Case 269/19, ECLI:EU:C:2020:954, paragraph 45.
[298] EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 41.
[299] PATTI - Personalized Unfair Terms Control, 1261. ESPOSITO - Dziubak Is a Fundamentally Wrong Decision, 542.

In addition to the above and bearing in mind the referred aim of restoring the consumer to the situation he or she would have been in if that term had never existed, the CJEU has recognised that if consumers make payments on unfair terms, they should be entitled to the reimbursement of such payments[300/301]. Therefore, if the entire contract is terminated, the consumer will be entitled to a full refund, facing other remaining contractual consequences which the termination of the contract will entail. If, on the contrary, the contract is maintained but the term is removed, and the gap resulting from the removal of the OPP term is filled at the price agreed between the parties, and/or with the non-personalised price (in the event of such a hypothesis being admitted), the consumer will be entitled to reimbursement of the difference.

[300] *Gutierrez Naranjo*, joined cases C-154/15, C-307/15 and C-308/15, paragraphs 62-63: "*It follows that the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts*.".

[301] EC - *Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts*, 43.

5. CONCLUSIVE REMARKS

The aim of the present work was to deepen the study of the practice of online price personalisation, from the perspective of EU consumer law, namely in light of the UCTD. It focused essentially on the issue of transparency, due to the implementation, by the Modernisation Directive, of a new pre-contractual information duty – Article 6(ea).

As we have seen, price personalisation can, to a certain extent, be detrimental to consumers. In this respect we have identified a number of situations where their autonomy, their trust in the market and their rights (as consumers, but also as data subjects), may be jeopardised. Notwithstanding, this does not mean that the practice is necessarily harmful to consumers. As noted, from an economic point of view, online price personalisation may have very positive effects in consumer markets. Having said that, we argue that if online price personalisation is implemented in a fair, responsible and transparent manner, it is possible to benefit from those effects – *e.g.*, the fostering of competition and increased market access -, without harming consumers.

In this context, we believe that the new Article 6(ea) will play a very important role, as it empowers consumers to make more informed and independent decisions. It is, however, necessary to interpret it more than literally. From our point of view, in order to a trader comply with Article 6(ea), it is not enough to state something like "*The price was personalised based on automated decision-making*". The trader will have to inform consumers about the main factors used to estimate willingness to pay, as well as the non-personalised price. Additionally, that information should be made available in a clear and prominent way, at the right time and close to where the consumer places its order.

The following issue addressed in this work was related to how this new information duty relates to the transparency requirement of the UCTD. This is particularly relevant in light of Article 4(2) UCTD, according to which only contractual terms relating to price that are unclear (*i.e.*, that do not comply with the transparency requirement) may be subject to the unfairness test of Article 3 UCTD provided therein. In this regard, we thus argue that a concise articulation should be made between the two requirements to avoid double standards. In fact, if Article 6(ea) is interpreted in the same sense as we have argued in this work, there will not be much divergence between the fulfilment of both requirements.

At this point, the analysis considered two essential scenarios: one where the term is not transparent and one where it is. As regards the former, it is clear that in the light of the UCTD, the online personalised term will have to be subjected to the unfairness test, by virtue of Article 4(2). Yet, there are some obstacles, from a substantive point of view, on the assessment of the unfair nature of the term, with which national courts will, naturally, be confronted. In this sense, we argue that, with some adaptation and effort by the national court, all of them are surmountable.

In what concerns the second requirement of the unfairness test – the creation of a *significant imbalance between the rights and obligations of the contractual parties to the detriment of the consumer* -, which requires, according to the CJEU, a comparative element, we suggest that national courts, in the absence of supplementary rules, turn to the non-personalised price and see if the personalised one has left the consumer in a less favourable position. Such a solution is very in line with case law, as it results from the *method of calculation generally used*[302], and it is, in practical terms, more feasible than other potential solutions. With regard to the third requirement – *good faith* -, although some difficulties may also arise, it should be borne in mind that (i) if the trader does not inform the consumer that the price has been personalised on the basis of the ADM, it is unlikely that he or she has dealt fairly and equitably with the consumer and taken into consideration its legitimate interests; and (ii) if there is no gain to the consumer, in individual negotiations, it is unlikely that he or she would agree with a higher (personalised) price.

Moving on to the second scenario, from our analysis we conclude that the term, albeit transparent, should not automatically be considered fair, as there is a high likelihood of personalised surcharges being of an abusive nature under Article 3 of the UCTD. Accordingly, for consumer protection purposes, the personalised price term should therefore not be covered by the exception of Article 4(2) UCTD. We base this understanding, on the one hand, on the rationale of Article 4(2) itself, since in online price personalisation prices are not determined by market rules, but instead according to consumer's willingness to pay. And, on the other hand, on the CJEU's restrictive interpretation of the exception.

At the end, since the UCTD is a minimum harmonisation directive, it will be within the discretion of Member States to extend (or not) the unfairness test to the adequacy of the price, in order to encompass price personalisation terms. Even though the practice of online price personalisation does not yet appear to be fully widespread, it undoubtedly has a

[302] *Banco Primus*, Case C-421/14, paragraph 67, second indent.

significant potential for growth, given the advances in technology that we have witnessed[303]. It would therefore be desirable for Member States to extend this assessment in order to protect their consumers. In this regard, Portugal is one of the European countries that has already done so. As a result, we can say that, in the context of online price personalisation, its legal framework will be one of those offering the most adequate protection for consumers.

Finally, regarding the practical consequences of a price personalisation term being considered unfair, in our view, the elimination of this term should lead to the nullity of the contract as a whole. However, if the annulment of the contract gives rise to some *particularly unfavourable consequences* for the consumer, the execution of the contract should continue, with the term being replaced. For that replacement, two possible solutions may arise. The first one is for the national court to invite the parties to negotiate a new price. The second one, is to replace by a supplementary rule of national law. In the absence of this rule, the national court will have to rely on alternatives, such as the non-personalised price, being certain that such a solution may not be ideal, since it will most likely not produce the desired dissuasive effect on the trader.

[303] DE ARRUDA - Personalised Prices, 71.

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