

CONTROL OF PRICE RELATED TERMS IN STANDARD FORM CONTRACTS: SPAIN

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Abstract: The control of standard terms implies a significant inroad into classic contract theory as the fairness assessment moves from formation (procedural justice) to the content of contracts (substantial justice). When it comes to price terms, the challenge faces freedom of contracts and competition – two sources of undoubted interest for academics and practitioners. The chapter aims to present the status of the control of price related terms in Spanish law. It includes an introduction to the validity of standard form contracts in general and an analysis of content control in B2C contracts as the more far-reaching one. The assessment is not limited to statutory controls. Judicial activism has been significant in this field, as case law has defined unfairness criteria for specific types of contracts and ancillary terms. Additionally, courts have increasingly resorted to the requirement of transparency to control main price terms. The contours of the assessment of non-transparent terms and its consequences are not entirely defined nor homogenous, which brings about a relevant issue of legal certainty.

Keywords: main terms, transparency, unfair terms, standard form contracts, price

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1. The scope of freedom of contract

Freedom of contract is a cornerstone in Spanish law. Art 1255 Spanish Cc enshrines the general principle according to which the contracting parties may establish any terms deemed convenient provided that they are not contrary to (mandatory) law, morals or public policy.¹ The limitation includes prohibitions arising from the principle of good faith.² Within these margins, the obligations created by contracts ‘have the binding force of law’ between the parties.³ Furthermore, even the classic limitations to freedom of contract have a much more restricted application in Spain, compared to those of other similar legal systems (such as the French one, for example). This is the case with *laesio enormis*, which is rejected as a rule (Art 1293 Spanish Cc), and only admitted under certain circumstances that affect minors and absent persons.⁴

Freedom of contract was further enhanced in the 1978 Spanish Constitution, which recognized freedom of enterprise as a right within the framework of a market economy (Art 38). Moreover, as a Member State of the European Union, the four freedoms of the Internal Market (goods, capital, persons and services) are binding, with the added effect of limiting price restrictions. An autonomous administrative body, the National Commission on Markets and Competition (*Comisión Nacional de los Mercados y la Competencia*), is responsible for promoting the proper functioning of markets and applying Spanish and EU competition law. Courts follow this free market approach and, in principle, show respect and uphold contractual agreements on price.⁵ In general, except for certain regulated sectors, prices are left to party autonomy and competition.

The respect for freedom of contract rests on the philosophical basis of subjective fairness, according to which the parties alone determine the adequacy of the price given in exchange for a product or service as well as the ancillary contractual terms, with the limitations arising from mandatory law. For that to occur, the agreement should be intentional and free – invalidity for defects of consent (mistake, misrepresentation, duress, etc.) aiming to secure that contract formation is fair. The control of standard terms implies a significant inroad into classic contract theory as the fairness assessment moves from formation (procedural justice) to the content of contracts (substantial justice). When it comes to price terms, control challenges market competition, in addition to freedom of contract.

The chapter aims to present the status of the control of price related terms in Spanish law. It includes an introduction to the validity of standard form contracts in general and an analysis of content control in B2C contracts as the more far-reaching one. The assessment is not limited to statutory controls. Judicial activism has been significant in this field, as case law has defined unfairness criteria for specific types of contracts and ancillary terms. Additionally, courts have increasingly resorted to a general requirement of transparency to

¹ See Díez-Picazo (1991), pp. 430-432.

² Art 7 Spanish Cc.

³ Art 1091 Spanish Cc.

⁴ Art 1291 Spanish Cc. Although some regional systems of private law in Spain, such as that of Catalonia or Navarre have a broader recognition of *laesio* (Arts 499-507 of the *Fuero Nuevo* in Navarre; Arts 321-325 of the old *Compilación catalana* and Arts 621-45 to 621-48 of the Catalan Civil Code, the validity of which has been challenged in court, and is currently under the review of the Spanish Constitutional Court, *Recurso de inconstitucionalidad* 2557-2017).

⁵ Among many others, STS 10 May 2001 (ES:TS:2001:3809).

control main price terms, on the margins of specific legal obligations. The chapter addresses both of them.

2. Legal framework for the control of standard terms

The Standard Contract Terms Act,⁶ which applies to both B2B and B2C contracts (Art 2), provides the general framework for the incorporation of terms into standard form contracts. The law establishes that, for a term to be incorporated, the adherent to the contract should be aware of its existence. Additionally, the term should be transparent, clear, concrete and plain (Art 5). The Supreme Court has interpreted these requirements to mean grammatical (not substantive) transparency of standard terms.⁷

A general content control is absent from the Standard Contract Terms Act.⁸ This is restricted to B2C contracts⁹ and its origin was the transposition of the Unfair Contract Terms Directive (UCTD)¹⁰ into Spanish law. Therefore, the substantive review of standard terms is currently found in the Consumer Protection Act (Arts 82-91).¹¹ This means that Spanish law has adopted the theory of abuse of power in the control of standard terms according to which the unfairness assessment is justified by the weakness of consumers vis-à-vis businesses or professionals.¹² The ordinary consequence for an unfair term is the invalidity of the clause if the contract can continue to exist without it.¹³

Art 82.1 Consumer Protection Act, which is drafted in a very similar way to Art 3(1) UCTD, contains the rule that considers as unfair those terms not individually negotiated which, against good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer. Apart from this rule, Articles 85-90 Consumer Protection Act establish a detailed list of terms, which 'in any case' would be unfair.¹⁴ A literal reading of this commandment could lead to the conclusion that the Consumer Protection Act has only created 'black lists' of terms, which are necessarily deemed unfair. However, this understanding is heavily contested. A great number of the listed terms require a judicial assessment of their factual and legal background, as a result of which, certain clauses could be declared valid even though listed.¹⁵ Therefore, it seems more accurate to say that the Consumer Protection Act has both grey and black lists.¹⁶

Following individual or collective actions, courts determine the unfairness of terms.¹⁷ Through collective redress it is possible to obtain an injunction to cease the use of unfair terms as well as a compensation for the damage caused. However, the exact effect of

⁶ Ley 7/1998, de 13 de abril, sobre Condiciones Generales de la Contratación, BOE nr 89 of 14 April 1998 (Standard Contract Terms Act).

⁷ STS 3 June 2016 (ES:TS:2016:2550).

⁸ Miquel (2002), p. 433.

⁹ Art 8 Standard Contract Terms Act.

¹⁰ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L 95/29.

¹¹ Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, BOE nr 287 of 30 November 2007 (Consumer Protection Act).

¹² In respect of this policy approach, see Micklitz (2008), pp. 33-34.

¹³ Art 83 Consumer Protection Act.

¹⁴ Arts 82.4 et seq. Consumer Protection Act.

¹⁵ For example, Art 86.3 Consumer Protection Act lists as unfair the assignment of the contract to a third party, by the business, only if it is capable of diminishing the rights of the consumer.

¹⁶ Cámara Lapuente (2011), pp. 832-834.

¹⁷ In the context of unfair terms, Art 12 Standard Contract Terms Act. In general, Art 11 Civil Procedure Act.

collective actions is difficult to determine, especially in respect of third parties. The Spanish collective redress system is extremely complex and its contours are still being heavily shaped by case law. As a rule, the Civil Procedure Act allows courts to extend to third parties (on a case by case basis) the effects of decisions rendered in collective proceedings.¹⁸

However, in *Sales Sinués*¹⁹ the CJEU limited this possibility by deciding that a collective action could not impede consumers from bringing an individual complaint (not even the same claim, although individually, against the same party is restricted) as this would affect the right to an effective and adequate protection in the sense of the UCTD. The CJEU was dealing with pendency, the logical procedural stage prior to *res judicata*, and the defence was brought by banks that had been sued in both collective and individual proceedings. *Sales Sinués* proved to be a great challenge to the third party effect of collective actions, the fate of which seems to have been decided by the lack of possibility to ‘opt out’ in the Spanish collective redress system (which was declared contrary to Art 7 UCTD).²⁰ Following *Sales Sinués*, the Spanish Supreme Court has been seriously qualifying the third party effect of collective proceedings, at least in the context of B2C contracts. Although it is early to draw a conclusion, for the time being the Supreme Court has not extended the effects of decisions rendered in collective proceedings to third parties if the judgment was not favourable to the consumer.²¹

Finally, the Consumer Protection Act also empowers notaries and public registries (land and company) to control those terms, which have been declared unfair and the judgment has been recorded in the public Registry for Standard Contract Terms (*Registro de Condiciones Generales de la Contratación*).²² However, as both notaries and public registries are obliged to control the legality of every document under their intervention, and an unfair term is null and void, it has been argued that this control should also reach the assessment of every unfair term, even those not registered or against which no judicial ruling has been rendered.²³

3. General aspects concerning the judicial review of terms

3.1. On the possibility of judicial review in contract law

As a rule, Spanish law does not allow courts to review the price established in a contract. Revision is only admitted if mandatory law fixes the price (a restricted exception in the context of a market economy) or if a certain provision, also of mandatory law, empowers courts to control the price. The latter is also a rarity and only an old statute (albeit still in

¹⁸ Art 221.1.2^a Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, BOE nr 7 of 8 January 2000 (Civil Procedure Act). See Tapia Fernández (2011), pp. 1090-1094. Armenta Deu (2013), pp. 90-93.

¹⁹ CJEU C-381 & 385/14 *Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA (Catalunya Banc S.A.)* EU:C:2016:252.

²⁰ CJEU C-381 & 385/14 *Sales Sinués* [37], [39] and [43].

²¹ SSTS 24 February 2017 (ES:TS:2017:477), 25 May 2017 (ES:TS:2017:2016) and 6 June 2017 (ES:TS:2017:2249) do not extend the effects that were not entirely favourable to consumers. STS 8 June 2017 (ES:TS:2017:2244), instead, considers that the favourable effects should be extended to individual proceedings.

²² Art 84 Consumer Protection Act. This Registry is voluntary for businesses who may register their standard form contracts (Art 11 Standard Contracts Act). Additionally, it keeps record of judicial decisions against standard terms. Its use has been heavily debated and has, in practice, no influence on judicial rulings.

²³ Miquel (2011), pp. 774-781.

force) that forbids abusive interest rates in the context of exploitation allows for this.²⁴

However, judicial review can occur indirectly by the application of general tools from contract law such as the general principle of good faith or the vices of consent.²⁵ These are not aimed to control any gross disparity among performances but, rather, to protect the adherent's reasonable reliance on the price offered and his capacity to compare it with others in the market. The control of incorporation, a test particular to standard form contracts,²⁶ is also a way to prevent the application of clauses that have not been (grammatically) understood by the adherent. In the application of the tools abovementioned, and mostly depending on the term being a main one or not,²⁷ the court would be entitled to adapt the contract (although limitations apply in B2C contracts following the CJEU case *Banco Español*).²⁸ Hence, the price could be indirectly revised.

These are the ways in which a court can control price terms in all standard form contracts. With the exception of the incorporation test, they do not differ from the general controls applicable to negotiated contracts. However, a special regime applies to B2C standard form contracts, by virtue of the UCTD, which, as mentioned, is largely found in the Consumer Protection Act (Arts 80-91).

3.2. The control of standard form B2C contracts

The judicial review of standard-form B2C contracts is particular and far reaching as it controls the substantive transparency and the fairness of terms. Art 82 Consumer Protection Act follows Art 3 UCTD in declaring that a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer.

The law makes no distinction between main and ancillary price terms. Art 4(2) UCTD, which impedes the assessment of transparent terms that relate to the definition of the main subject matter of the contract or to the adequacy of the price of the goods or services given in exchange, has not been transposed into Spanish law. This has given place to misinterpretations as to whether main price terms may be reviewed in Spain. Taking into consideration that the UCTD is a Directive that seeks minimum harmonization (Art 8 UCTD), Member States could decide to raise the level of consumer protection by allowing control of the so-called²⁹ 'essential obligations under the contract'.

The first draft of the statute that was meant to incorporate the UCTD into Spanish Law exempted the essential obligations of the parties from judicial review, following Art 4(2) UCTD, insofar they were drafted in plain intelligible language –the requirement of transparency. However, during the legislative process, the draft was amended and the final

²⁴ Ley de 23 de julio de 1908, de la usura, Gaceta Oficial 24 July 1908 (Usury Act).

²⁵ In respect of incidental fraud and non-transparent standard terms see Pantaleón Prieto (2017).

²⁶ Arts 5 and 7 Standard Contract Terms Act.

²⁷ Art 10.2 Standard Contract Terms Act.

²⁸ CJEU C-618/10 *Banco Español de Crédito SA v Joaquín Calderón Camino* [2012] EU:C:2012:349 [73]. *Banco Español* made clear that a national court cannot fill in the gap that is left by an unfair term that is declared 'non-binding' (Art 6 UCTD).

²⁹ This is a controversial historical term that the CJEU has adopted in respect of the UCTD. See CJEU C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] EU:C:2010:309 [34]; CJEU C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt* [2014] EU:C:2014:282 [46]; CJEU C-186/16 *Ruxandra Paula Andriiciuc and Others v Banca Românească SA* [2017] EU:C:2017:703 [35].

version did not have an equivalent to Art 4(2) UCTD.³⁰

Thus, in the case *Caja de Ahorros*, the CJEU affirmed that: ‘in the Spanish legal system, as the Tribunal Supremo states, a national court may, in all circumstances, assess, in a dispute concerning a contract concluded between a seller or supplier and a consumer, the unfairness of a term which was not individually negotiated and which relates to, inter alia, the main subject-matter of the contract, even in the case where that term was drawn up in advance by the seller or supplier in plain, intelligible language’.³¹ This was not the most extended understanding at the time in Spanish contract law. In the judgment of 9 May 2013,³² the Spanish Supreme Court clarified that the assessment of the terms, which contained the essential obligations of the parties, was impeded if they were transparent.

Therefore, it is currently not controverted that the exemption from judicial review of main price terms, as enshrined in Art 4(2) UCTD, is the rule in Spain. They can only be controlled if the terms are not transparent (not drafted in plain intelligible language). If they are, the substantive economic fairness of contracts is left to party autonomy and competition. In contrast, ancillary terms (including ancillary price terms) are subject to the unfairness assessment, which aims to control the legal balance of standard form contracts. The Supreme Court has not established clear parameters that allow distinguishing main from ancillary price terms. However, the criteria set out by the CJEU in *Invitel*,³³ *Kásler*,³⁴ *Matei*,³⁵ *Van Hove*,³⁶ and *Andriciuc*³⁷ are impliedly assumed in Spanish case law.

The next section will focus on how main price terms have been reviewed by courts, by making use of the exception laid down in Art 4(2) UCTD (transparency). In respect of ancillary price clauses, the analysis will be restricted to the most relevant cases that directly refer to the core of the topic, leaving aside those in which the issue at stake was only procedural in nature. Because the Consumer Protection Act has incorporated the UCTD, reference to EU law is on occasion inevitable, with the added fact that a significant number of requests for a preliminary ruling to the CJEU on the UCTD were submitted by Spanish courts. However, a more in-depth assessment of EU law is to be found elsewhere in this volume.³⁸

4. Judicial control of main price terms

Art 4(2) UCTD, which is applicable in Spain although not expressly transposed, prohibits judicial review of terms that define the main subject matter of the contract as well as the assessment of the adequacy of the price in respect of the goods or services provided in exchange. Price clauses themselves are not included in this rule as it refers to ‘the adequacy of the price’ in respect of the counter-performance. However, it is evident that if a court were to assess a price clause it would be directly affecting its relationship with the good or

³⁰ Alfaro (2002), pp. 129-130.

³¹ CJEU C-484/08 *Caja de Ahorros* [42].

³² STS 9 May 2013, ES:TS:2013:1916.

³³ CJEU C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt* [2012] EU:C:2012:242 [23].

³⁴ CJEU C-26/13 *Kásler* [57]-[58].

³⁵ CJEU C-143/13 *Bogdan Matei and Ioana Ofelia Matei v. SC Volksbank România SA* [2015] EU:C:2015:127 [57] & [64].

³⁶ CJEU C-96/14 *Jean-Claude Van Hove v CNP Assurances SA* [2015] EU:C:2015:262 [33].

³⁷ CJEU C-186/16 *Andriciuc* [38].

³⁸ see Cámara Lapuente S, in this volume.

service received in exchange.

The impossibility to review terms, which determine the essential obligations of the parties under the contract is subject to the condition that they are drafted in plain intelligible language (Art 4(2) UCTD) –the requirement of transparency. The CJEU decided that transparency has the same meaning throughout the UCTD (Arts 4(2) and 5).³⁹ It refers to the capacity of an average consumer to understand the legal and economic consequences of a term. Therefore, transparency requires that a term is not only grammatically or formally clear but, also, that it may be comprehended by consumers (substantive approach).⁴⁰ This can involve an obligation on the business to provide the information that is necessary for a consumer to evaluate the consequences of a term.⁴¹

4.1. Transparency and main price terms. The doctrine of the Supreme Court that led to the CJEU case *Gutiérrez Naranjo*

According to Art 4(2) UCTD, lack of transparency allows for judicial review of the essential obligations of the parties. Even before the actual meaning of transparency had been given a more definite shape by the CJEU (*Kásler* was a main contributor to this end),⁴² the Spanish Supreme Court applied it in the most relevant group of cases to date for Art 4(2) UCTD in Spain.

All those cases shared similar facts. The Supreme Court had to deal with floor clauses, an extended practice in the Spanish mortgage loan market, which changed after the Supreme Court ruled against their validity. Floor clauses set a minimum fixed annual interest rate for variable interest rate loans (a floor), which normally ranged from 2 to 5 per cent. When the referral indexes (among which the EURIBOR was the most used) plummeted below those margins, consumers could not profit from the decline due to the existence of floor clauses. This had the effect of flooding Spanish courts with lawsuits that, based on a variety of arguments, challenged the validity of such terms.

In the first judgment on this topic, on 9 May 2013,⁴³ the Spanish Supreme Court (plenary session), in the context of a collective action brought by a consumer association against three banking institutions, decided that floor clauses defined the subject matter of the contract and should be treated as main price terms. Additionally, the Supreme Court found that they fulfilled the requirements for incorporation as standard terms (Art 7 Standard Contract Terms Act) as they were grammatically clear and borrowers had the opportunity to become acquainted with them. Hence, floor clauses were *per se* lawful. However, in the context of B2C contracts, the Supreme Court further considered that the terms lacked substantive transparency because consumers were not provided with sufficient information in respect of their legal and economic consequences. Based on this, floor clauses were declared unfair (Art 83 Consumer Protection Act).

Nevertheless, the Supreme Court decided, against clear rules of national law,⁴⁴ to restrict

³⁹ CJEU C-26/13 *Kásler* [69]; CJEU C-143/13 *Matei* [73].

⁴⁰ CJEU C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] EU:C:2013:180 [44]; CJEU C-26/13 *Kásler* [71]-[75]; CJEU C-143/13 *Matei* [73]; CJEU C-348/14 *Maria Bucura v. SC Bancpost SA* [2015] EU:C:2015:447 [54]; CJEU C-186/16 *Andriiciuc* [45].

⁴¹ CJEU C-92/11 *RWE Vertrieb* [50].

⁴² CJEU C-26/13 *Kásler* [71]-[75].

⁴³ ES:TS:2013:1916.

⁴⁴ Art 83 Consumer Protection Act and Art 1303 Spanish Civil code.

the consequences derived from nullifying floor clauses – namely, restitution that follows the *ex tunc* effects of a term that is null and void. The reason provided for this was that the users of floor clauses (the banking institutions) had acted in good faith and that there was a risk of serious economic difficulties if the judgment were to be applied retroactively – given the estimated cost of restitution of €4 billion.⁴⁵ The Supreme Court based the limitation on arguments of economic public policy and cited the CJEU case *RWE*.⁴⁶

This caused turmoil among consumers and judges from first instance and appeal courts who on the one hand kept claiming restitution (the former) and on the other kept granting it (the latter), despite the doctrine established by the Supreme Court, which was further extended to individual cases following its judgment of 25 March 2015.⁴⁷ In this ruling, the Supreme Court upheld its doctrine in the sense that no restitution was conceded prior to 9 May 2013 – the date of its first decision on floor clauses. However, it found that, as from that judgment, banking institutions could no longer be considered to be acting in good faith if they continued to use floor clauses.⁴⁸ Therefore, the limitation to retroactivity would not apply and so the Supreme Court allowed for restitution of the amounts overpaid but only after the delivery of its decision of 9 May 2013. The doctrine of the Supreme Court raised issues of its compatibility with EU law and several requests for a preliminary ruling were submitted to the CJEU. The European court joined three of them and decided on this in what is now known as the case *Gutiérrez Naranjo*.⁴⁹

4.2. The consequence of a lack of transparency as regards the essential obligations of the parties. Compatibility of Spanish law with EU law

Art 4(2) UCTD establishes that the assessment of the unfair nature cannot be made for those terms that determine the essential obligations of the parties under the contract if they are drafted in plain intelligible language. However, this provision does not indicate the consequence of a lack of transparency in those main terms and a simplistic *a contrario* reading of the article ('if the term is not drafted in plain intelligible language it is subject to the unfairness assessment') is controversial.

In fact, the only consequence that the UCTD provides for in the case of non-transparent terms is enshrined in Art 5 UCTD – the *contra proferentem* rule. This rule is evidently applicable in cases of formal (grammatical) lack of transparency, which may result in more than one meaning of a term. However, it may be of little help when dealing with substantive lack of transparency, in which the term could be grammatically clear (leading to only one possible meaning) but, nonetheless, it prevents the consumer from understanding its legal and economic consequences, as was the case with floor clauses.

⁴⁵ <www.elmundo.es/economia/2016/12/21/585a81d3268e3ef0328b45a2.html> (last visited 25 July 2017).

⁴⁶ CJEU C-92/11 *RWE Vertrieb* [50]-[64].

⁴⁷ ES:TS:2015:1280.

⁴⁸ For a criticism of this understanding of good faith, in the context of floor clauses, see de Elizalde (2015), p. 186.

⁴⁹ CJEU C-154, 307 & 308/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU; Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA) and Banco Popular Español SA v Emilio Irlés López and Teresa Torres Andreu* [2016] EU:2016:980. See the case note by Leskinen and de Elizalde (2018). Other two requests for a preliminary ruling had been submitted to the CJEU on floor clauses but were withdrawn after the decision on *Gutiérrez Naranjo*. These were CJEU C-381/15 *Javier Ángel Rodríguez Sánchez v Caja España de Inversiones, Salamanca y Soria SAU (Banco CEISS)* [2017] EU:C:2017:69; and CJEU C-349/15 *Banco Popular Español SA v Elena Lucaciu and Cristian Laurentiu Lucaciu* [2017] EU:C:2017:68.

In the first years of the UCTD, a certain consensus existed that the Directive (apart from the *contra proferentem* rule) did not regulate the consequences of non-transparent terms, thus leaving the decision to the Member States.⁵⁰ In fact, in the Report from the Commission on the Implementation of the UCTD, which appraised the five years after the deadline for its implementation, it was recognized that the UCTD did not harmonize the sanctions derived from the infringement of transparency.⁵¹

If this interpretation had prevailed, the decision of the Spanish Supreme Court as to the consequences of floor clauses, which lacked transparency, should have remained as an issue of pure national law. However, at least since 2010 the CJEU has been treating non-transparent terms as unfair. The grounds for doing so, despite the drafting of UCTD, have not been expressed. It may be argued that since ‘unfairness’ is an autonomous Union concept, which requires a uniform interpretation by the CJEU, it is in the exercise of this interpretation that the consequences of the lack of transparency may fall within the jurisdiction of the CJEU.

Without discussing any possible constitutional constraints, the CJEU in *Pohotovost* and *Pereničová*, expressed that national courts *could* assess whether deficiencies in the information relating to the APR (annual percentage rate of charge) of credit agreements were likely to confer on that term an unfair nature.⁵² The wording in the subsequent *Matei* case was clearer in that sense.⁵³ However, in *Bucura*, the CJEU made some headway by stating that if a term is not transparent, a judge *must* assess its unfairness.⁵⁴

With this background, it was not surprising that the CJEU accepted the requests for a preliminary ruling that led to *Gutiérrez Naranjo* as, in its interpretation, the consequences of a non-transparent term fall within its jurisdiction. In *Gutiérrez Naranjo*, the CJEU appeared to build on *Bucura* (despite this case not being cited)⁵⁵ but with the peculiarity that it applied its doctrine (that courts must assess the unfairness of non-transparent terms) to a clause relating to the definition of the subject matter of the contract (Art 4(2) UCTD), which did not seem to be the context of *Bucura*.

Moreover, in *Gutiérrez Naranjo* the CJEU related the lack of transparency with Art 6(1) UCTD, according to which the unfair term should not be binding on the consumer. The CJEU thus ruled that national case law (the Spanish one), which limited the restitution effects of a term that was declared unfair to amounts overpaid after the delivery of the decision in which the unfairness was found (*ex nunc* effect, as decided by the Spanish

⁵⁰ Ebers (2008), pp. 201-202. Durovic (2016), p. 179.

⁵¹ COM (2000) 248 final, “Report from the Commission on the implementation of Council Directive 93/13/EEC, of 5 April 1993, on Unfair Terms in Consumer Contracts”, pp. 18-19.

⁵² CJEU C-76/10 *Pohotovost’ s.r.o. v. Iveta Korčková* [2010] EU:C:2010:685 [73]; CJEU C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o* [2012] EU:C:2012:144 [44]-[47].

⁵³ CJEU C-143/13 *Matei* [72]. The CJEU gave clear indications in the sense that the controverted terms did not fall within Art. 4(2) UCTD (para 71). However, as it is for the referring court to verify this, the CJEU reasoned upon Art. 4(2) UCTD, in case the national court were to decide that the terms defined the subject matter of the contract or were related to the adequacy of the price and the service given in exchange. It was in this context where transparency was linked with unfairness.

⁵⁴ CJEU C-348/14 *Bucura* [50] and [62]. Although there is no official translation into English of the case, we find ‘should’ to be an adequate translation from the French ‘*est tenue de*’. The Romanian version of the judgment (the other one available) reinforces this interpretation.

⁵⁵ There is no reference to Case C-348/14, *Bucura*, in the entire decision. However, the Advocate General Mengozzi made reference to it in his Opinion (paras 48-49). Additionally, a footnote in the Opinion (n 45) stated that essential obligations of the contract, if not transparent, are subject to an unfairness assessment.

Supreme Court on 25 March 2015), was incompatible with Art 6(1) UCTD.⁵⁶

4.3. Spanish case law in the aftermath of *Gutiérrez Naranjo*

In its decision of 24 February 2017, the Spanish Supreme Court rectified its doctrine to bring it in line with *Gutiérrez Naranjo* and, hence, granted full *ex tunc* restitution after a floor clause was found to be non-transparent and, thus, unfair.⁵⁷ More decisions followed this trend.⁵⁸

Additionally, in a relevant shift, it could be argued that since *Gutiérrez Naranjo* the Supreme Court has begun to depart from its previous understanding of how transparency should be assessed.⁵⁹ In fact, in its seminal decision of 9 May 2013, the Supreme Court expressed that transparency used an abstract criterion to assess the validity of a term inserted in standard form contracts. According to this criterion, a term would lack transparency if an average consumer could not be able to foresee its legal and economic consequences.⁶⁰

However, in the more recent decisions of 9 March 2017⁶¹ and 8 June 2017⁶² the Supreme Court (plenary session in both cases) seemed to depart from the criterion of the average consumer, which is intrinsically related to the abstract approach. Instead, the Supreme Court increasingly looks to the actual consent of each particular consumer. Therefore, transparency seems to be assessed more subjectively, on a case-by-case basis.⁶³ This could raise further conflicts with EU law as the CJEU has consistently opted for the understanding of an ‘average consumer’ as the benchmark to assess the transparency of a term.⁶⁴

5. Judicial review of ancillary price terms

Unlike the assessment of the essential obligations of the parties, whose regulation was omitted, the unfairness control of ancillary terms is expressly established in Art 82.1 Consumer Protection Act, which incorporates the rule of Art 3(1) UCTD. Accordingly, standard terms that, against the requirement of good faith, cause a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, are subject to an unfairness control. Following the Supreme Court’s interpretation of this provision, mentioned above, it is now clear that this rule does not apply to the essential obligations of the parties.

The next sections will focus on the most relevant cases from the Spanish Supreme Court concerning the assessment of ancillary price terms, including the general control of default interest clauses and other costs related to mortgage loans. In all cases the unfairness control

⁵⁶ CJEU C-154, 307 & 308/15 *Gutiérrez Naranjo* [75].

⁵⁷ ES:TS:2017:477.

⁵⁸ Three SSTs of 20 April 2017 (ES:TS:2017:1498, ES:TS:2017:1499, and ES:TS:2017:1501).

⁵⁹ Cámara Lapuente (2017), pp. 1784-1786.

⁶⁰ STS 9 May 2013, ES:TS:2013:1916 [210] & [253].

⁶¹ ES:TS:2017:788.

⁶² ES:TS:2017:2244.

⁶³ The Supreme Court still distinguishes the transparency control from the assessment of a vice of consent. However, it decides that the circumstances of a particular consumer should be taken into consideration to determine if it has understood the legal and economic consequences of the contract. Therefore, it is not the criterion of an average consumer the lenses to analyse those circumstances but those of the consumer-party to the contract.

⁶⁴ CJEU C-26/13 *Kásler* [74]; CJEU C-186/16 *Andriiciuc* [47].

is restricted to B2C standard form contracts.

5.1. General control of default interest clauses in B2C contracts

There is no general statutory limitation on default interest in Spain, despite some specific rules for special types of contracts. Until recently, freedom of contract seemed to prevail in this field.

However, the status quo changed radically after the seminal decision of the Spanish Supreme Court of 22 April 2015 (plenary session).⁶⁵ The background of the case was a personal loan entered into by a consumer with a bank using standard terms that contained an ordinary interest rate of 11.80 per cent and a default interest rate of 21.80 per cent, the latter of which was challenged. The Appeal Court had declared it unfair and void and decided that no interest rate for default should be charged at all.⁶⁶ The Appeal Court did so based on the CJEU case *Banco Español*, according to which following the invalidity of an unfair term the court cannot modify the contract by revising the content of that term.⁶⁷

The Supreme Court considered that default interest clauses were subject to an unfairness assessment, as they constituted ancillary price terms. In particular, it reasoned that default interest clauses fall under Art 85.6 Consumer Protection Act, which reproduces Annex 1.e UCTD, according to which a term is unfair if it requires ‘any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation’.

The Supreme Court further ruled that a default interest rate on personal loans that adds more than 2 percentage points to the ordinary (contractual) interest rate is unfair. Thus, the challenged clause was nullified. However, unlike the Appeal Court, the Supreme Court considered that the ordinary (contractual) interest rate should continue to apply to the period of default. This doctrine was confirmed by the Supreme Court decisions of 7 and 8 September 2015.⁶⁸

Requests for a preliminary ruling to contest this doctrine were submitted to the CJEU, especially as regards its compatibility with the CJEU case *Banco Español*. The outcome is explained further below as it also affects default interest rates in mortgage loans.⁶⁹

5.2. Clauses that attribute fees, expenses and taxes to the consumer

Standard terms incorporated into loan contracts have been challenged from almost every possible angle. On one further occasion the Supreme Court had to assess the validity of fees, expenses and taxes associated with the formation of a mortgage loan contract, which are normally attributed to the consumer. This was the factual background of its decision of 23 December 2015 (plenary session).⁷⁰

The Supreme Court’s ruling was grounded both in the general unfairness assessment rule (that a term is unfair if, contrary to good faith, it causes a significant imbalance in the parties’ rights and obligations) and in particular unfair clauses listed in the Consumer Protection

⁶⁵ ES:TS:2015:1723.

⁶⁶ Besides a statutory interest as from the judgment, not from default.

⁶⁷ CJEU C-618/10 *Banco Español* [73].

⁶⁸ ES:TS:2015:3828 and ES:TS:2015:3829, respectively.

⁶⁹ See Section 6.2.3.

⁷⁰ ES:TS:2015:5618.

Act.

With regard to the fees incurred in notarising and registering the loan and its associated property right (the mortgage), the Supreme Court considered that as both expenses benefited the bank, which is interested in securing its right ‘in rem’ (to which end the public deed and its registration are required), allocating their full cost to the consumer created a significant imbalance in the parties’ rights and obligations arising under the contract.

The challenged clause also attributed to the consumer any possible attorney and court representative (*Procurador*) fees that may be incurred in the event of breach in the repayment of the loan. The Supreme Court considered the term invalid in this respect based on the general unfairness assessment control (the imbalance in the rights and obligations of the parties) and a possible infringement of mandatory procedural rules (basically, the ‘loser pays’ rule). In fact, it may occur that for various reasons (the Court mentions partial victory, successful opposition by the consumer or formal defects in the complaint), the bank might not be granted a favourable order over the fees. Therefore, the Supreme Court established that a clause, as the contested one, which necessarily imposes those fees on the consumer, would create a significant imbalance in the parties’ rights and obligations.

Lastly, the Supreme Court dealt with a tax due as a result of the loan contract (*Actos Jurídicos Documentados*), which is also ordinarily allocated to the consumer. The Court considered that the bank was, at least to a certain extent, a taxable person and, thus, established that the term was unfair as it was framed in the black listed clause of Art 89.3.c Consumer Protection Act –it is unfair to attribute to the consumer the payment of taxes when the taxable person is the business. This interpretation was controversial, as another section of the Spanish Supreme Court (Section 3, Contentious-Administrative Law) ruled that the taxable person for that tax is the borrower (the consumer, in this case).⁷¹ In its subsequent decision of 15 March 2018, the Civil Chamber of the Supreme Court aligned itself with the Contentious-Administrative Chamber as regards the taxable person. However, it confirmed the unfairness of standard terms that allocate all concepts under this tax to consumers as in respect of some acts (e.g. asking for copies of documents) the taxable person could vary.⁷²

In another turn to the screw, the Contentious-Administrative Chamber changed its previous interpretation on the taxable person. In its ruling of 16 October 2018 it decided that the tax should be paid by the banks.⁷³ Nevertheless, in what seems to be a never-ending story, three days later, the President of the Chamber called for a plenary session to decide whether to confirm or rectify this latest approach (pending).⁷⁴

6. Regulatory provisions controlling price terms

The statutory control of main and ancillary price terms is only sectorial and mostly restricted to B2C contracts. This section intends to identify the most relevant ones.

⁷¹ SSTS (3^o) 20 January 2004 (ES:TS:2004:159), 20 June 2004 (ES:TS:2004:4976) and 31 October 2006 (ES:TS:2006:7141). See Zumaquero Gil (2018), pp. 150-155.

⁷² ES:TS:2018:848.

⁷³ ES:TS:2018:1505.

⁷⁴ The plenary session has been convened for 5 November 2018.

6.1. Provisions controlling main price terms

An old statute that still controls main price terms is the Usury Act of 1908.⁷⁵ According to its Art 1, loan contracts in which the interest rate is considerably higher than the ‘normal’ price of money and manifestly disproportionate in the circumstances are void.⁷⁶ The control is also applicable to contracts that are similar to loans (Art 9). In determining the ‘normal’ price of money, the Supreme Court has relied on the information that financial entities send to the Central Bank of Spain as regards the interest rates used in the market.⁷⁷

The Usury Act applies not only to B2C but also to B2B and C2C contracts. However, courts have been very cautious in resorting to this Act and case law is not abundant.

6.2. Provisions controlling ancillary price terms

6.2.1. Prohibition of round-up clauses

Art 87.5 Consumer Protection Act lists as unfair those standard terms which round up the time-consumed, or round up the price of a product or service. It is a good example of how judicial activism may, on occasion, trigger legislative reforms. In fact, this provision is the result of case law that had ruled against practices in the parking and telephone sectors that rounded up the time consumed (in parking contracts, rounding up to the next half hour or even hour; in mobile phone contracts, full minutes or stretches of 30 seconds instead of the real time spoken). It was also motivated by case law that had declared unfair those terms which granted financial institutions the right to round up the variable interest rate laid down in loan contracts, with effect from the first revision, to the following quarter of a percentage point.⁷⁸

6.2.2. Prohibition to charge unused products and services

Art 87.5 Consumer Protection Act also lists as unfair those clauses that ‘charge for products or services not effectively used’. This prohibition may be too broad and should be read in light of its background (the challenge of round-up clauses).⁷⁹ Services that are charged by time clearly fall within this prohibition. Also, it encompasses those services that are charged but not provided, a well-established prohibition in banking contracts.⁸⁰ However, the rule laid down in this article would not cover those services in which the main costs are fixed, with time treated as a marginal cost. Examples of this could be gym subscriptions or the lease of movables or immovables, which may be lawfully charged for periods of months or

⁷⁵ Ley de 23 de julio de 1908, de la Usura, Gaceta Oficial 24 July 1908 (Usury act).

⁷⁶ Art 1 adds more requirements but these have been considered sufficient for the rule to apply. See STS 25 November 2015 (ES:TS:2015:4810).

⁷⁷ See STS 25 November 2015 (ES:TS:2015:4810). The decision ruled that an interest rate of 24.6 per cent, which exceeded the double of the medium interest rate used in the market, was considerably higher than the normal price of money.

⁷⁸ In respect of the latter, see SSTS 4 November 2010 (ES:TS:2010:6062), 29 December 2010 (ES:TS:2010:7551), 2 March 2011 (ES:TS:2011:1244) and 11 February 2015 (ES:TS:2015:278). Further details may be found in Cámara Lapuente (n 16), pp. 881-889

⁷⁹ Cámara Lapuente (n 16), p. 896.

⁸⁰ Currently enshrined in Orden EHA/2899/2011, de 28 de octubre, de transparencia y protección del cliente de servicios bancarios, BOE nr 261 of 29 October 2011. It replaced older provisions.

days even though they are not used all the time.⁸¹

6.2.3. Statutory provisions limiting default interest

6.2.3.1. Default interest in mortgage credits and loans

The Spanish crisis, which began in 2008, brought with it a stricter legislative and judicial control (with an important intervention by the CJEU)⁸² over credits and loans applied for the acquisition of residential property. Among these measures, Law 1/2013⁸³ reformed the Mortgage Act (Art 114)⁸⁴ in order to introduce a limitation on default interest in mortgage-secured credits and loans intended to acquire dwellings. The cap on default interest was set at three times the legal interest rate.

After this cap was introduced, it was uncertain whether default interest clauses, which did not exceed the limitation, would necessarily be deemed fair. This was first clarified by the CJEU cases *Banco Bilbao* and *Unicaja*, in which it was decided that even if those terms fall within the threshold of Art 114.3 Mortgage Act, they are not exempted from the general unfairness assessment (Art 3(1) UCTD).⁸⁵ The Spanish Supreme Court followed this reasoning in its decisions of 23 December 2015 and 18 February 2016.⁸⁶

Moreover, in the subsequent ruling of 3 June 2016,⁸⁷ the Supreme Court (plenary session) extended the doctrine established in its decision of 22 April 2015,⁸⁸ in respect of default interest in personal loans, to those of mortgage loans and credits for the acquisition of dwellings. According to this doctrine, any default interest which exceeds the ordinary (contractual) interest rate by 2 percentage points, is deemed unfair and void. However, the amounts in default bear the ordinary (contractual) interest.

Requests for a preliminary ruling to contest this doctrine were submitted to the CJEU, especially as regards its compatibility with the CJEU case *Banco Español*. The Supreme Court itself sent a request as well.⁸⁹ The CJEU joined the requests and in the case *Escobedo Cortés*⁹⁰ it decided that the Supreme Court's case law was compatible with EU law, in particular, with the UCTD. The CJEU considered that treating a default interest rate as unfair when it exceeded 2 percentage points the ordinary rate was wholly consistent with

⁸¹ Cámara Lapuente (n 16), pp. 898-899.

⁸² See, among others, CJEU C-415/11 *Mohamed Aziz*; CJEU C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* [2014] EU:C:2014:2099; CJEU Joined Cases C-482, 484, 485 & 487/13 *Unicaja Banco, SA v José Hidalgo Rueda and Others and Caixabank SA v Manuel María Rueda Ledesma and Others* [2015] EU:C:2015:21; CJEU Joined Cases C-154, 307 & 308/15 *Gutiérrez Naranjo*.

⁸³ Ley 1/2013, de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social, BOE nr 116 of 15 May 2013 (Law 1/2013).

⁸⁴ Decreto de 8 de febrero de 1946, por el que se aprueba la nueva redacción oficial de la Ley Hipotecaria, BOE nr 58 of 27 February 1946 (Mortgage Act).

⁸⁵ Respectively, CJEU C-602/13 *Banco Bilbao Vizcaya Argentaria, S.A. v Fernando Quintano Ujeta and María Isabel Sánchez García* [2015] EU:C:2015:397 [45]; Joined Cases CJEU C-482, 484, 485 & 487/13 *Unicaja* [39].

⁸⁶ ES:TS:2015:5618 and ES:TS:2016:626.

⁸⁷ ES:TS:2016:2401.

⁸⁸ See Section 5.1.

⁸⁹ ES:TS:2017:785A.

⁹⁰ CJEU C-96/16 & 94/17 *Banco Santander SA v Mahamadou Demba and Mercedes Godoy Bonet; Rafael Ramón Escobedo Cortés v Banco de Sabadell SA* [2018] EU:2018:643.

the objective of consumer protection of the UCTD.⁹¹ As regards the consequence of declaring a default interest rate unfair, the CJEU ruled that annulment of the default interest rate did not bring about that of the term fixing the ordinary interest rate.⁹² Therefore, case law from the Supreme Court was deemed compatible with EU law in both issues.

6.2.3.2. Default interest cap for overdrafts

The Consumer Credit Directive allows for tacit overdrafts (overrunning) if certain conditions are fulfilled.⁹³ In transposing the Directive, the Spanish Consumer Credit Act (Art 20.4) maintained a cap on default interest for overrunning that existed in the previous law. According to it, the default interest cannot result in an APR of more than 2.5 times the legal interest rate.⁹⁴ For a long time, this cap stood alone in the Spanish legal landscape and some questioned whether this provision could be extended to other analogous situations – with some courts declaring in the affirmative.⁹⁵ The commented decision of the Supreme Court of 22 April 2015⁹⁶ should bring this approach to an end. The current doctrine of the Supreme Court (that a default interest rate is unfair if it exceeds the ordinary one by 2 percentage points) should be considered the applicable one.⁹⁷ Lastly, it is also likely that default interest due to overrunning in consumer credit contracts (the subject matter of the statute under analysis) could also be challenged even if they did not exceed the cap of Art 20.4, by an analogous reasoning to what has occurred in respect of Art 114.3 Mortgage Act (a cap in default interest of mortgage loans and credits).

6.2.4. Other provisions

This section has tried to present the most relevant provisions controlling price terms in Spanish law and their interaction with the judiciary. Other legislative provisions do exist, such as a cap in the charge for the withdrawal of money from ATMs,⁹⁸ but their application has so far been straightforward. In addition to this, the Consumer Protection Act has several far-reaching articles that could produce interesting case law in the future but it is impossible to tackle these here. Moreover, legislation from the European Union influences Spanish law. It has also affected price terms, for example, by establishing caps to interchange fees for consumer debit and credit card transactions⁹⁹ or abolishing retail roaming charges.¹⁰⁰

⁹¹ CJEU C-96/16 & 94/17 *Escobedo Cortés* [69-71].

⁹² CJEU C-96/16 & 94/17 *Escobedo Cortés* [74-76].

⁹³ Art 18 of 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 [2008] OJ L133/66.

⁹⁴ Art 20.4 of Ley 16/2011, de 24 de junio, de contratos de crédito al consumo, BOE nr 151 of 25 June 2011 (Consumer Credit Act), and Art 89.7 Consumer Protection Act.

⁹⁵ See Pertíñez Vílchez (2011), pp. 815-818.

⁹⁶ See Section 5.1.

⁹⁷ See, for instance, SAP Málaga 7 February 2017, ES:AMPA:2017:174.

⁹⁸ Real Decreto-ley 11/2015, de 2 de octubre, para regular las comisiones por la retirada de efectivo en los cajeros automáticos, BOE nr 237 of 3 October 2015.

⁹⁹ Arts 3 and 4 of Regulation (EU) 2015/75 on interchange fees for card-based payment transactions [2015] OJ L123/1.

¹⁰⁰ Art 6a of Regulation (EU) 2015/2120 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union [2015] OJ L310/1.

7. Special disclosure regulations promoting price transparency and competition

As a Member State of the European Union, Spain has incorporated the transparency requirements that stem from EU law, which include price transparency. It has also added more of its own.

One of the most established provisions from EU law is the duty to inform about the APR in consumer credit contracts.¹⁰¹ In Spain, this requirement has been extended to all B2C banking contracts.¹⁰² Additionally, financial institutions are obliged to break down and inform about charges for other services.¹⁰³ The duty to provide pre-contractual information affects related services, with a specific provision preventing price bundling.¹⁰⁴ Consumers should also regularly receive information about interest, taxes and charges paid during the lifetime of banking contracts.¹⁰⁵

The Consumer Protection Act has extended price transparency to all B2C contracts. According to Art 60.2.b, a business has a duty to provide pre-contractual information (including advertising) on the full price, with a breakdown of the total, which contains any increases or discounts that may be applicable, taxes, expenses that may be passed on to the consumer and additional expenses for incidental services, financing or other similar payment terms. Art. 60.2 should be complemented by other provisions of the Consumer Protection Act (especially by Art 20.1.c)¹⁰⁶ and other legislative rules seeking price transparency, such as the European Regulation 1008/2008, which prevents price partitioning in the air transport sector.¹⁰⁷

The abovementioned provisions that promote price transparency, even if accomplished, have not prevented courts from applying the unfairness assessment enshrined in the Consumer Protection Act to both main and ancillary price terms.¹⁰⁸

¹⁰¹ 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 [2008] OJ L133/66.

¹⁰² Art 4 of Orden EHA/2899/2011 (n 80); Art 14 of Ley 2/2009, de 31 de marzo, por la que se regula la contratación con los consumidores de préstamos o créditos hipotecarios y de servicios de intermediación para la celebración de contratos de préstamo o crédito, BOE nr 79 of 1 April 2009.

¹⁰³ Arts 3 and 7 of Orden EHA/2899/2011 (n 80); Art 14 of Ley 2/2009 (n 102).

¹⁰⁴ Art 12 of Orden EHA/2899/2011 (n 80).

¹⁰⁵ Art 8.3 of Orden EHA/2899/2011 (n 80).

¹⁰⁶ Art 20.1.c. transposed Art. 7.4.c of 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 [2005] OJ L149/22.

¹⁰⁷ Art 23 of Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community [2008] OJ L293/3. Other important pieces of EU law have not yet been transposed into Spanish law. Among them, the Payment Accounts Directive (Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features OJ L257/214), and the Mortgage Credit Directive (Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 OJ L60/34).

¹⁰⁸ See, in respect of ancillary terms STS 2 March 2011 (ES:TS:2011:1244) and, as regards main price terms, STS 9 May 2013 (ES:TS:2013:1916).

8. Conclusion

The control of price related terms in Spanish law follows a two-fold approach. B2B contracts, even standard form, are largely governed by classic rules on contract formation, with some additional requirements that stem from standardization. The evolution in respect of them is marked by the parallel development of consent. In contrast, B2C standard terms are framed in a special legal regime from which judicial activism has derived far-reaching consequences, sometimes leading to legislative reform. The interaction with EU law, including the possibility of any court to request a preliminary ruling from the CJEU even against an established doctrine of the Supreme Court, affects the hierarchical structure of the judiciary. Activism of stakeholders has been fostered by the CJEU, in the way that it has recurrently decided against the compatibility of Spanish law with Union law. All this has resulted in a more creative approach towards B2C standard form contracts with probable gains for justice yet also a potential hindrance to legal certainty. In any case, Fouillée's maxim '*qui dit contractuel dit juste*'¹⁰⁹ has lost much of its antique splendour.

¹⁰⁹ Fouillée (1885), p. 410.

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