Article

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The Unfairness of Personalised Price Terms in Consumer Credit Products

https://doi.org/10.1515/ercl-2024-2003

Abstract: This article examines whether, and if so to what extent, a lender can engage in the algorithmic personalised pricing of consumer credit products (PP) under the Unfair Contract Terms Directive (UCTD) and the Consumer Credit Directive (CCD). To this end, the author first analyses the economic literature to discuss the mechanics of PP and the economic impacts on different consumer groups. This overview is followed by an examination of the UCTD and the CCD, in the broader context of EU regulatory law, as these Directives apply to the practice and the contractual terms. Subsequently, the author applies the considerations of the European Court of Justice (CJEU) in the jurisprudence regarding price terms in credit and mortgage agreements to personalised price terms. Finally, the author concludes that the Directives indeed limit the extent to which a lender can engage in PP, but that the frameworks in the broader EU regulatory context would be better suited than the Directives to address the negative economic impacts of the practice.

Keywords: pricing; consumer credit; unfair contract terms; personalisation; price discrimination

Résumé: Cet article examine si, et si oui dans quelle mesure, un prêteur peut s'engager dans la tarification personnalisée algorithmique des produits de crédit à la consommation en vertu de la directive sur les clauses abusives dans les contrats et de la directive sur le crédit à la consommation. À cette fin, l'auteur analyse tout d'abord la littérature économique afin d'examiner les mécanismes de la tarification personnalisée algorithmique et les effets économiques pour les différents groupes de consommateurs. Cet aperçu est suivi d'un examen des deux directives précitées, dans le contexte plus large du droit réglementaire de l'UE, étant donné qu'elles s'appliquent

This article was finalised on 23 October 2023 and developments after this date have not been taken into account.

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à la pratique et aux clauses. L'auteur reprend ensuite les considérations de la Cour de justice des Communautés européennes (CJCE) dans la jurisprudence relative aux conditions tarfaires dans les contrats de crédit et d'hypothèque, pour les appliquer aux conditions tarifaires personnalisées. Enfin, l'auteur conclut que les directives limitent effectivement la mesure dans laquelle un prêteur peut s'engager dans la tarification personnalisée algorithmique, mais le cadre réglementaire plus large de l'UE serait mieux adapté pour traiter les effets économiques négatifs de cette pratique.

Zusammenfassung: Dieser Beitrag analysiert die Frage, ob und in welchem Umfang ein Kreditgeber unter Einsatz von Algorithmen personalisierte Preisspreizung betreiben darf in Verbraucherkreditprodukten, namentlich im Rahmen der AGB-Richtlinie und der Verbraucherkredit-Richtlinie. Hierfür analysiert der Beitrag zunächst die ökonomische Literatur zur Funktionsweise dieser Art von Verbraucherkreditprodukten und deren unterschiedliche Wirkweise bei verschiedenen Verbrauchergruppen. Auf diesen Überblick folgt eine breitere Analyse beider genannten Richtlinien, im Rahmen des allgemeinen regulatorischen Rahmens der EU, da beide Richtlinien die genannten Praktiken und Klauseln erfassen. In einem dritten Schritt untersucht der Verf. die Überlegungen, die der EuGH in seiner Rechtsprechung zu Preisklauseln in Kredit- und Immobiliarkreditverträgen entwickelt, namentlich für personalisierte Preisabreden. Schließlich kommt Verf. zum Schluss, dass und in welchem Umfang der Kreditgeber tatsächlich bei solchermaßen personalisierter Preisspreizung für Verbraucherkreditprodukte auf rechtliche Grenzen trifft, zugleich jedoch, dass eine Regulierung im breiteren Rahmen die negativen ökonomischen Effekte besser adressieren könnte.

1 Introduction

The ability of lenders to personalise prices of consumer credit products by using machine learning algorithms on consumers' personal data collected from social media networks, browsing histories and other parts of their digital footprints (**big data**), has received much interest in academic, advocacy and regulatory circles.[1] Such personalised pricing (**PP**) involves using those data to estimate price sensitivities, shopping propensities, preferences and other personal characteristics unrelated to credit risk, in order to vary the profit margins incorporated in the prices offered to different groups of consumers (**price segments**).[2] This practice can improve overall consumer welfare, but also raises concerns that some consumers may pay

1 Section 2.4.

2 R. Phillips, *Pricing Credit Products* (Stanford: Stanford University Press, 2018) 136–137.

(significantly) higher prices compared to uniform pricing.[3] As PP is a modern-day version of 'price discrimination' or 'differential pricing'[4] that (partially) replaces human judgement with data-driven algorithmic estimation, it has reinvigorated old debates regarding market efficiency, distributive justice and consumer privacy.[5]

PP is not only technologically possible, but also allowed under EU consumer law. The revised Consumer Credit Directive (**CCD**) expressly acknowledges the possibility of lenders to personalise prices, provided they inform consumers of such personalisation in the offer and pre-contractual information.[6] While the permissive stance of the CCD is clear, it does not clearly address any potential legal limits to the practice, beyond mentioning that other legal frameworks apply 'without prejudice', in particular the General Data Protection Regulation (**GDPR**) and the Unfair Contract Terms Directive (**UCTD**).[7] More specifically, the Directive is silent on the profit-maximisation aspect of PP, i.e. when a lender sets the price above the costs to serve the product to an individual consumer by including a personalised price markup in order to maximise profit. This article intends to address that issue. It analyses the question of whether, and if so to what extent, the lender's discretion to engage in PP and set prices using personal data is limited by EU consumer contract law, in particular the UCTD and the CCD. There is a sizeable literature on credit scoring and PP generally, which focuses on the application of data protection and anti-discrimination frameworks to the practice, but it does not discuss the profit-maximisation aspect in detail.[8] Some scholars have discussed the limits imposed by the UCTD on PP in a general sense, but an extensive analysis of its application has not yet been performed.[9] Similarly, a discussion of how the CCD limits PP and interacts with the UCTD is still wanting. This article aims to fill these voids.

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3 Section 2.4.

4 Differentiation is the more neutral term, see R. Phillips, *Pricing and Revenue Optimization* (2nd ed, Stanford: Stanford University Press, 2021) 120–121; European Commission, Proposal for a Regulation on a framework for Financial Data Access, COM(2023) 360 final, 28 June 2023, recital 18.

5 Section 2.4.

6 Recital 46 and articles 10.5.m, 11.4.h and 13 Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC.

7 Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and Directive 93/13/EEC on unfair terms in consumer contracts.

8 Section 2.4.

9 P. Rott, J. Strycharz, F. Alleweldt, 'Personalised Pricing', Study for IMCO Committee of European Parliament, November 2022; M. Grochowski, A. Jabłonowska, F. Lagioia and G. Sartor, 'Algorithmic Price Discrimination and Consumer Protection – A Digital Arms Race?' *Technology and Regulation* 2022, 36–47; F. Esposito, 'Loans and the Unfair Contract Terms Directive after C-472/20 Lombard' *Journal of European Consumer and Market Law* 11 (2022) 223–228.

The analysis is structured as follows. Section 2 provides an introduction to PP, its economic benefits and risks. Section 3 discusses the framework of the UCTD and the CCD, in the context of the wider EU legal context that regulates PP. Section 4 applies the relevant jurisprudence of the Court of Justice of the European Union (**CJEU**) in respect of the UCTD to PP. Section 5 concludes the analysis and presents an avenue for further research.

2 Personalised Pricing

For the present purposes, a **credit product** is defined as a (1) mass-marketed contractual arrangement for the provision of credit, entered into between (2) a regulated private financial entity that extends loans on a professional and commercial basis (**lender**), and a (3) member of the general public acting in a non-professional capacity who applied for such credit (**borrower**), with (4) pre-drafted general price terms and price terms subject to variation, proposed by the lender on a take-it-or-leave it basis.[10] The 'provision of credit' or 'granting a loan' is a service which involves making available a sum of money to the borrower (**principal**) which must be repaid in accordance with the terms of the arrangement, in return for compensation as stipulated in the price terms of that arrangement.[11] Instalment loans, credit cards and overdrafts are examples of credit products.

2.1 Price Structure

The compensation or **price** of the credit product is the sum of interest, fees and other charges payable under its terms.[12] Each interest rate, fee or charge is a component of the **price structure** and serves a specific economic purpose.[13] In general, a credit product stipulates two interest rates. The *ordinary interest rate* is the basic, non-contingent compensation for making the funds available to the consumer.[14] The

10 Ipsos and London Economics, 'Study on the functioning of the consumer credit market in Europe', EAHC/FWC/2011 86 03 (July 2013). See also the references to 'credit products' in the CCD. Hereafter, 'borrower' will include a prospective borrower (i.e. a consumer).

11 Compare art 3.3 CCD. The CCD does not define 'loan'.

12 Phillips, n 4 above, 23. Compare art 3.5 CCD.

13 The concept of price structure is common in the industry, see e.g. Deutsche Bank, 'Pricing in retail banking – Scope for boosting customer satisfaction & profitability', 3 May 2013, www.dbresearch.com (accessed 14 November 2023). Fee and charge will be used interchangeably.

14 St. Finlay, *Consumer Credit Fundamentals* (2nd ed, Basingstoke/New York: Palgrave MacMillan, 2009) para 2.2; art 3.8 CCD ('borrowing rate'); case 565/21 *Caixabank* 16 March 2023 (CJEU) para 20 ('compensatory interest').

default interest rate is a contingent rate, the application of which is triggered by the non-compliance with a payment obligation (an event of default) and serves to deter non-compliance or compensate for the related costs.[15] Credit products also tend to stipulate various non-interest components, depending on their characteristics. For some products, such as instalment loans, a one-off, non-contingent fee for the disbursement of the credit product is common.[16] Also common are recurring, non-contingent fees for services provided, such as annual credit card fees.[17] Finally, the product may specify contingent charges, triggered by non-compliance with payment obligations (e.g. late fees),[18] use of additional services (e.g. currency exchange fee) or other aspects of the credit arrangement.[19]

2.2 Personalisation

To understand price personalisation, it is important to understand the general approaches to product pricing (or 'underwriting'): cost-plus, competition-based and value-based pricing.[20] In practice, lenders combine these approaches to set their prices as they balance several objectives, including cost recovery, market consistency and overall strategy.[21] In each approach, the lender can decide to opt for price personalisation or uniform pricing.

A. *Cost-based pricing*, i.e. setting prices on the basis of the lender's costs to serve the borrower, is the most common approach.[22] For example, the *cost-plus* approach

15 Compare art 10.3 g CCD ('the interest rate applicable in the case of late payments').

16 The charge may be termed an arrangement fee, administration charge, disbursement commission, to give some examples. See R. Beck and K. Farrell, *Consumer Lending* (American Bankers Association, 2013) chapter 10; Section 4 *infra*.

17 See for a discussion, K.C. Sanl, 'Control of Price Related Terms in Standard Form Contracts in Turkey: Judicial and Other Means of Price Control', in Y. Atamer and P. Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Cham: Springer Nature Switzerland AG, 2020) 687–721, 704.

18 Art 10.3 g CCD ('any charges payable for default').

19 Beck and Farrell, n 16 above.

20 S. Caufield, 'Consumer credit pricing', in R. Phillips and O. Ozer, *Oxford Handbook of Pricing Management* (Oxford: Oxford University Press, 2012) chapter 8; Phillips, n 2 above, 24–29; see D. Bolder, *Modelling Economic Capital – Practical Credit-Risk Methodologies, Applications, and Implementation Details* (Cham: Springer, 2022) Section 6.2; European Banking Authority (EBA), *Final Report – Guidelines on loan origination and monitoring*, EBA/GL/2020/06, 29 May 2020 (EBA Guidelines) para 202.

21 EBA, *Summary of the responses received to the consultation and the EBA's analysis*, Annex to EBA Guidelines, question 10 ('It should also be reflected that […] such as market competition'.); Beck and Farrell, n 16 above, chapter 10.

22 P. Rose and S. Hudgins, *Bank management and financial services* (8th ed, Boston: McGraw-Hill, 2010) 573; Phillips, n 4 above, para 2.2.1.

to setting the interest rate involves aggregating all the costs to serve the loan and adding a profit mark-up.[23] The *base rate* includes the cost of capital (equity, debt and regulatory allocations), the cost of funding the loan (e.g. LIBOR), operating and administrative (non-funding) costs, and any other real costs (e.g. tax).[24] In addition to the base rate comes a markup or 'risk premium' that compensates the lender for the counterparty credit risk of the borrower and any associated loss in case of default, and a fixed profit margin.[25] Loans can also be priced using the (desired) risk-adjusted return on capital (RAROC). The RAROC connects the pricing of a loan portfolio to the expected profit and the economic capital allocated to that portfolio.[26] For example, the interest rate can be determined using the lowest RAROC (also called the 'hurdle rate') necessary to meet the profitability target of the lender's shareholders.[27]

B. *Competition-based pricing* involves setting prices by considering the prices offered by competitors for similar products and the lender's competitive strategy.[28] The competitive environment is arguably the single most important factor in setting interest rates: if interest rates are too high compared to the market average, the lender will be unable to attract many creditworthy consumers but if they are too low, the lender risks losing profit.[29] Pricing strategies by competitors also impact other price components, which may explain the proliferation of specific pricing approaches such as 'teaser rates' or the common practice of dividing remuneration into interest rates and non-interest price components (e.g. annual card fees).[30]

C. *Value-based pricing* means setting prices on the basis of the economic value of the product to the consumer, operationalised with willingness-to-pay (WTP) and price sensitivity.[31] The WTP is the maximum price the lender believes the

23 Rose and Hudgins, n 22 above.

24 *Ibid.* Also, Bank of England, *Understanding the price of new lending to households*, Quarterly Bulletin Q3 2010, 20 September 2010; EBA Guidelines, n 20 above, para 202.

25 EBA Guidelines, n 20 above, para 202.

26 The economic capital is the bank's best estimate of the capital required to absorb losses up to a chosen probability of failure, including shareholders. See Boulder, n 20 above; EBA Guidelines, n 20 above, para 203.

27 Boulder, n 20 above; T. Baer, A. Mehta, H. Samandari, 'The use of economic capital in performance management for banks: A perspective', McKinsey & Company Working Papers on Risk nr 24, January 2011; R. Kimball, 'Economic Profit and Performance Measurement in Banking' *New England Economic Review* July/August 1998.

28 Phillips, n 4 above, para 2.2.2; Rose and Hudgins, n 22 above, 574 ('price leadership model').

29 Beck and Farrell, n 16 above.

30 ICF SA, *Evaluation of Directive 2008/48/EC on credit agreements for consumers*, Final Report, February 2020, 115.

31 Phillips, n 2 above, 136–147 and n 4 above, para 2.2.3; H. Sargeant, 'Algorithmic decision-making in financial services: economic and normative outcomes in consumer credit' *AI and Ethics* November 2022.

borrower is willing to pay, which is dynamic and dependent on socioeconomic and behavioural characteristics (e.g. income, shopping behaviour), as well as product alternatives.[32] Price sensitivity is the observed response in borrower demand to a change in the price of the product.[33] When engaging in uniform pricing, the price is set using the average WTP across the entire target market of potential borrowers.[34] By contrast, PP involves charging *different* prices to *different* borrowers for the *same* product using each borrower's individual WTP, and differentiating between borrowers on the basis of collected or inferred personal data.[35] For instance, if borrower A's WTP is higher than borrower B's WTP, borrower A could be charged a higher price such that the contribution to net profit is higher in the latter case, at equal costs to serve.[36] Thus, price personalisation is essentially 'first degree' price discrimination leveraging big data and machine learning.[37] It is different from *credit scoring*, *i.e.* using personal data to rank borrowers in terms of idiosyncratic credit risk in order to determine eligibility or to personalise the costs to serve, namely the aforementioned risk premium (*risk-based pricing*).[38] While often combined with risk-based pricing, PP focuses on differentiating *profit* margins.[39] In practice, banks may use price segments of multiple borrowers rather than single-person segments, which is essentially group pricing.[40]

32 Phillips, n 2 above, 136–147; O. Bar-Gill, C. Sunstein and I. Talgam-Cohen, 'Algorithmic Harm in Consumer Markets', Harvard Public Law Working Paper 23–05, January 2023.

33 Phillips, n 2 above, 136–147. A recent study from the EBA suggests that 10 % of financial institutions set fees (excluding interest) based on sensitivities. See EBA, *Thematic Review on the Transparency and Level of Fees and Charges for Retail Banking Product*, EBA/REP/2022/31, December 2022, 32.

34 This assertion follows from the general approach to value-based uniform pricing.

35 This definition is broader than the definition used in e.g. OECD, *Personalised Pricing in the Digital Era*, AF/COMP(2018)13, 28 November 2018 (which focuses on WTP) and resembles F. Zuiderveen Borgesius and J. Poort, 'Online Price Discrimination and EU Data Privacy Law' *Journal of Consumer Policy* 40, 347–366.

36 Whether the lender will offer the product, depends on the lender's corporate strategy (Section 2.4).

37 Sargeant, n 31 above.

38 Phillips, n 2 above, 31; Bar-Gill et al., n 32 above ('cost-based price discrimination').

39 Beyond value-based pricing, PP can also use other approaches, such as *price optimization* (holistic behavior-based pricing) and *relationship pricing* (focuses on the value of the customer relationship to the lender), see Caufield, n 20 above and for a practical example in the mortgage space, B. Eisen and R. L. Ensign, 'Banks Don't Love Rich Mortgage Borrowers as Much as They Used To' *Wall Street Journal* 21 August 2023.

40 Phillips, n 4 above, para 6.3.1.

Intuitively, the personalisation of the price structure of a credit product can be categorised in three types.[41]

1. **Type I:** A lender can personalise the price *level* (the amount or percentage). For example, a default interest rate term may be personalised for two borrowers A and B as follows: *'Upon a Default, the interest rate is X'*, replacing X with (base rate *1.2) for A and (base rate*1.8) for B. The term can fix the level (e.g. *fixed* interest rate) or set the markup over some benchmark (e.g. a *variable* interest rate, such as SONIA + X bps).[42]
2. **Type II:** Alternatively, a lender can personalise the price *calculation method* (the price-setting formula). For example, an ordinary interest rate term could be personalised as follows: *'The Interest Rate (IR) is calculated on the basis of N days: IR = days/N'*, replacing N with 360 for borrower A and 365 for borrower B.[43]
3. **Type III:** In theory, a lender could also incorporate the personalisation in the term. A term could read *'The Default Interest Rate is 1.25 times the Ordinary Interest Rate if the Consumer's Financial Behaviour (CFB) is classified as Class A and 1.75 otherwise'*, where the CFBs are defined in another term, annex or document.

In this article, a personalised term refers to any of these types in relation to any component of the price structure, unless stated otherwise.

2.3 Process

Given that consumer lending is a high-volume and highly standardised business, a lender using PP defines its pricing policies and processes for an entire portfolio of loans, rather than individual loans.[44] Pricing, funding, profit target and all other main loan decisions are made on this aggregate basis. The lender generally uses one pricing model with sufficient parameters to accommodate a predetermined variety of eligible borrower segments and loan characteristics, while allowing loan officers to deviate from the model ('override') in some instances.[45] Due to PP, the loans in each segment of the portfolio differ in their expected contribution to profit, net of costs to serve.[46] Below is a stylised description of the lender's pricing process for an individual application.[47]

41 For brevity reasons, the discussion focuses on common examples.

42 See for a similar term, case 265/22 *Banco Santander* 13 July 2023 (CJEU) para 15 *et seq*.

43 See for a similar term, case 421/14 *Banco Primus* 26 January 2017 (CJEU).

44 EBA Guidelines, n 20 above, para 200; Court of Appeals Amsterdam, 24 May 2022, ECLI:NL:GHAMS:2022:1563, para 4.14.

45 EBA Guidelines, n 20 above, Section 4.3.

46 L. Thomas, *Consumer Credit Models: Pricing, Profit and Portfolios* (Oxford: Oxford University Press, 2009) 56–62; Phillips, n 2 above, 63–79.

47 Phillips, n 2 above, 26–32.

1. The prospective borrower files an application for a credit product specifying the desired amount.
2. The lender analyses the data provided by the applicant, as well as collected from internal sources (for existing customers) and external sources (e.g. credit bureaus, big data brokers) to score the applicant on the aforementioned dimensions and determine the applicable price segment.
3. If the applicant is eligible for a product, the lender determines the price structure with the price model and presents the applicant with a price offer.[48]
4. Once the offer is accepted by the applicant, the parties proceed to execute the agreement(s).[49]

Note how the price is customised by design, as it is tailored to the credit product and the characteristics of the applicant.[50] Moreover, given the standardisation, it is the lender's only choice variable to determine the expected profitability of the loan. It is also important to highlight that the lender does not know if the applicant has received competing price offers, unless the applicant shares this information, making the consumer an important actor in the competitive dynamics of the market.

2.4 Outcomes

In the literature, many authors have discussed the market outcomes (i.e. economic consequences) of personalised pricing for consumers, as compared to uniform pricing. Given the absence of conclusive empirical evidence, those observations (discussed below) are predominantly based on economic theory and anecdotal evidence.

PP may benefit the economic interests of some or all borrowers.[51] First, just as using big data for risk-based pricing increases allocative efficiency by providing a more accurate and individualised assessment of the borrower's credit risk (due to less risk mutualisation), PP *increases allocative efficiency* by setting pricing based on a more accurate and individualised assessment of the borrower's WTP.[52] Second, PP

48 This depends on whether the lender can classify the consumer for pricing purposes. See in the mortgage context, Bank of England, *Price discrimination and mortgage choice*, Staff Working Paper 926, 2021.

49 The lender uses the data on the acceptance of offers and take rates to improve the model's performance.

50 Phillips, n 2 above, 28.

51 F.P. Patti, 'Personalized Unfair Terms Control: EU Law Meets Innovative US Doctrines' (2020) *European Review of Private Law* 1249–1272.

52 N. Aggarwal, 'The norms of algorithmic credit scoring' *Cambridge Law Journal* 80 (1) 42–73, 53–56.

enables subsidies between price segments, such as from borrowers with high purchasing power to borrowers with low purchasing power (or vice versa).[53] Uniform pricing involves 'inherent' subsidisation: non-defaulting borrowers subsidise defaulting borrowers and loans with larger loan amounts subsidise loans with smaller loan amounts, to give some examples.[54] However, PP also allows for 'intentional' subsidisation: the lender may set prices for certain segments at or below cost (e.g. low-income or high-value consumers) while simultaneously charging higher prices in other segments to meet the portfolio's target profit margin.[55] Third, by offering products at different prices, more borrowers can be served (*market expansion* effect), i.e. PP can increase access to credit and facilitate financial inclusion.[56] Finally, PP could lead to overall *lower average prices* compared to uniform pricing, if banks engage in price competition and offer lower prices to poach switching customers (*competition* effect).[57]

However, PP also entails risks to the economic interests of borrowers, depending on the degree of competition and the lender's strategy. Note that instead of intentional subsidisation, the lender's strategy may be to retain the profits or distribute them to shareholders. If the lender is a *monopolist* in the market, the lender has sufficient pricing power to only sell profitable loans, charge *each* borrower his WTP *and* pocket the profits (which will be higher than with uniform pricing), making all consumers worse off (*surplus appropriation* effect).[58] By contrast, in a (quasi-) competitive market where lenders compete on price to attract the most profitable borrowers, it is more likely that the lender's PP strategy causes some borrowers to pay lower prices and other borrowers to pay higher prices compared to uniform pricing, due to subsidisation. The size and direction of these subsidies depends on various factors,[59] but it may be that:

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53 Bar-Gill et al., n 32 above; Sargeant, n 31 above; A. Fuster, M. Plosser, Ph. Schnabl, J. Vickery, 'The Role of Technology in Mortgage Lending' (2019) *The Review of Financial Studies* 1854–1899.

54 G. Trumbull, *Consumer lending in France and America: Credit and Welfare* (Cambridge: Cambridge University Press, 2014) 146 and 160; G. Howells, Ch. Twigg-Flesner, T. Wilhelmsson, *Rethinking EU Consumer Law* (London: Routledge, 2018) 213.

55 Financial Conduct Authority, *Price discrimination and cross-subsidy in financial services*, Occasional Paper 22.

56 OECD, n 35 above; Ch. Townley, E. Morrison, K. Yeung, 'Big Data and Personalized Price Discrimination in EU Competition Law' (2017) *Yearbook of European Law* 683–748.

57 J. Thiel, *Competition, dynamic pricing and advice in frictional markets: Theory and evidence from the Dutch market for mortgages* (PhD thesis 2020), para 1.1.

58 The lender then absorbs all the 'consumer surplus', i.e. the difference between the consumers' WTP and the prices, see OECD, n 35 above.

59 They are ultimately dependent on factors such as brand loyalty, available alternatives, income and consumer sophistication, which impact WTP. See also Bar-Gill et al., n 32 above; N. Sarin, 'Making Consumer Finance Work' (2019) *Columbia Law Review* 1519–1596; Phillips, n 2 above, 136–147.

1. Those borrowers who are predicted to read the contracts, shop around or are price-sensitive, are offered lower prices;[60]
2. Those borrowers who are estimated as presenting low credit risk or high lifetime value, are offered lower prices;[61] and
3. Other borrowers pay higher prices or are excluded from the market altogether.[62]

The fact that some borrowers are worse off, is cause for substantive fairness (distributive justice) concerns.[63] As a group, vulnerable consumers risk either paying more or being excluded.[64] The use of data also aggravates those concerns where (1) the data are collected in contexts unrelated to the credit transaction (e.g. social media, browsing) and are considered irrelevant,[65] (2) the data represent past transactions that incorporate historic prejudice and invidious discrimination, especially when profiling with proxies or behavioural group affiliations,[66] (3) lenders pursue similar segmentation and pricing strategies (e.g. due to technology vendor choice),[67] or (4) borrowers are penalised for not disclosing certain data through higher prices.[68] They also give rise to potential procedural fairness concerns where consumers (1) are unaware of the scope and use of personal data or do not

60 Bar-Gill et al., n 32 above, who consider that sufficiently informed and rational (i.e. sophisticated consumers will be offered good deals and are thus better off, whereas non-sophisticated consumers are offered bad deals and are worse off); Sargeant, n 31 above, 21; H. Ru and A. Schoar, 'Do credit card companies screen for behavioural biases?' BIS Working Papers 842, February 2020; Sarin, n 59 above, 1520–1596, 1568.

61 Aggarwal, n 52 above; T. Gillis, 'The Input Fallacy' (2022) *Minnesota Law Review* 1175–1263, 1188–1196.

62 European Commission, 'Commission Staff Working Document – Evaluation of Directive 2008/48/EC on credit agreement for consumers', SWD(2020) 254 final, 63–64 (note 288); Joint Statement by Didier Reynders, Commissioner for Justice and Consumer Protection of the European Commission and Rohit Chopra, Director of the United States Consumer Financial Protection Bureau, 17 July 2023.

63 A. Miller, 'What Do We Worry About When We Worry About Price Discrimination? The Law and Ethics of Using Personal Information for Pricing' (2014) *Journal of Technology Law & Policy* 41–104, 90–98.

64 Aggarwal, n 52 above, 42–73; European Commission, Proposal for a Regulation on a framework for Financial Data Access, COM(2023) 360 final, 28 June 2023, recital 18.

65 J. Wu, 'Algorithmic Fairness in Consumer Credit Underwriting: Towards a 'Harm-Based' Framework for AI Fair Lending' (2023) *Berkeley Business Law Journal*, para 2.2.

66 Wu, n 65 above, para 2.3; Miller, n 63 above, 93–96; Gillis, n 61 above; S. Wachter, 'Affinity profiling and discrimination by association in online behavioural advertising' (2020) *Berkeley Journal of Law and Technology* 367–430.

67 FCA, 'Feedback Statement, 'The potential competition impacts of Big Tech entry and expansion in retail financial services', FS23/4, paras 2.19–2.25.

68 EBA, *Discussion Paper on innovative uses of consumer data by financial institutions*, EBA/DP/2016/01, 4 May 2016, 24.

understand such processing,[69] (2) have limited alternatives to choose from,[70] or (3) the seller has more bargaining power and informational advantage (not only with respect to the product,[71] but especially over how the borrower values the product, what he is likely to do, and how much he knows of the market).[72] In those circumstances the consumer's transactional autonomy, which is both an assumption and a justification of the primacy of pricing freedom, may be limited.[73] Consequently, these risks have prompted opponents to propose various regulatory interventions, from limits on data use to banning PP.[74]

Vulnerable consumers are generally at the centre of those concerns. While there is no consensus on its meaning, vulnerability is often described as the inability of consumers to protect their interests in the market. It is a multidimensional construct, incorporating cognitive and physical abilities, economic status, digital and financial literacy, among other factors.[75] It is also commonly considered a dynamic characteristic, in the sense that every consumer can be temporarily or permanently vulnerable to a greater or a lesser degree (some consumers are even deemed to be 'hyper-vulnerable').[76] If unchecked, PP could make vulnerable consumers worse off, warranting regulatory intervention.[77]

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69 Wu, n 65 above, para 2.2 ('encroachments of privacy and autonomy'); EBA, n 68 above, 23; Aggarwal, n 52 above, 58–60.

70 P. Chapdelaine, 'Algorithmic Personalized Pricing' *New York University Journal of Law & Business* 17(1), 1–47, 36–37; I. Domurath, 'The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law' (2013) *Journal of European Consumer and Market Law* 124–137, 133–134.

71 Bar-Gill et al., n 32 above.

72 Domurath, n 70 above.

73 Chapdelaine, n 70 above, 22–23; Miller, n 63 above, 68.

74 Rott et al., n 9 above, para 4.3; BEUC, *Each consumer a separate market? Position paper on personalised pricing*, BEUC-X-2023-097, July 2023, para 4. See also the rejected amendments to the Draft Report (IMCO_PR(2022)696560), recital 40 and Article 13 (for example amendments 163 (price optimization), 500 (financially related data) and 505 (price sensitivity)).

75 See for example, London Economics, VVA Consulting and Ipsos Mori consortium, *Consumer vulnerability across key markets in the European Union*, Final report for the European Commission, chapter 3; European Parliamentary Research Service, *Vulnerable consumers*, PE 690.619, May 2021; S. Brown, 'Regulating the consumer credit market – protecting vulnerable consumers', in Ch. Riefa and S. Saintier (eds), *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice* (London: Routledge, Taylor and Francis Group, 2020) chapter 5; N. Helberger, O. Lynskey, H.-W. Micklitz, P. Rott, M. Sax and J. Strycharz, *EU Consumer Protection 2.0: Structural asymmetries in digital consumer markets*, BEUC Report, March 2021 ('digital vulnerability').

76 T. Naude, 'Fragmentation Versus Convergence of Consumer Law Within One Legal System and Across Legal Systems: An African Perspective' (2020) *Journal of Consumer* Policy 43:11–33.

77 This point is further discussed in Section 3.5 below.

At the heart of the discussion on the impact and desirability of PP lies a clash in normative judgements over the expected outcomes and trade-offs, where the desirability is often conditioned on the impact on wealth equalities among consumer groups or the division of economic surplus between consumers and lenders.[78] For some, subsidies with 'progressive' economic effects on wealth inequality are desirable, whereas subsidies with regressive economic effects are undesirable.[79] For others, the potential reduction in consumer surplus is undesirable. Another group considers the role of personal data in these outcomes problematic. Ultimately, the fairness norms in the UCTD, CCD and the GDPR are intended to settle conflicts between the countervailing values of allocative efficiency, distributive justice, consumer privacy, consumer protection and consumer choice, while understanding the empirical reality of offsetting economic effects.[80]

3 EU Consumer Law

This section starts with an application of the UCTD to PP, followed by a discussion of the CCD and the broader EU regulatory context, composed primarily of the GDPR, the Race and Gender Equality Directives and the proposed Artificial Intelligence Act. It shows how these provisions limit the lender's pricing freedom, which is anchored in the EU Charter and acknowledged by the European Banking Authority.[81]

3.1 UCTD

The UCTD was introduced to promote an integrated European single market and to protect consumers against 'one-sided standard contracts and the unfair exclusion of essential rights in contracts' due to the abuse of power by the seller; the text is a

78 See e.g. J. Coker and J.-M. Izaret, 'Progressive Pricing: The Ethical Case for Price Personalization' (2021) *Journal of Business Ethics* 387–398 and M. Edwards, 'Price and Prejudice: The Case Against Consumer Equality in the Information Age' (2006) *Lewis and Clark Law Review* 559, for views.

79 For example, Sarin, n 59 above, 1568–1574 and 1589–1596.

80 Similarly, EIOPA Consultative Expert Group on Digital Ethics in Insurance, *Artificial Intelligence Governance Principles: Towards Ethical and Trustworthy Artificial Intelligence in the European Insurance Sector*, 2021, 12. For example, where the market expansion effect exceeds the surplus absorption effect, the majority of served consumers is better off than in the uniform pricing case, see OECD, n 35 above.

81 Article 16 Charter of Fundamental Rights of the European Union. See for the acknowledgment, EBA Guidelines, n 20 above para 6.c ('without … responsibilities').

compromise between those aims.[82] Price terms in credit agreements fall within the scope of the UCTD. The present discussion focuses on the general assessment *ex* Article 3.1 UCTD as it applies to personalised terms.[83]

Pursuant to that clause, a contract term which has not been individually negotiated is unfair, if (1) contrary to the requirement of good faith, it causes a (2) significant imbalance in the parties' rights and obligations arising under the contract, (3) to the detriment of the consumer.[84] The protection is designed to address contractual inequality arising from asymmetries in information or bargaining power (where the consumer is considered the weaker party), creating an effective balance achieved by removing the unfair term.[85] The UCTD thus aims to safeguard both procedural and substantive fairness.[86] As clarified in *Aziz*, a national court must assess both prongs separately, taking into consideration other contract terms, all the circumstances which were known or could have been known to the lender at the time of conclusion of the contract, and the consequences of the term in the national system.[87] The assessment is thus a form of *ex post* contextualised judicial control over the contractual bargain.[88]

It should be clear that most personalised terms will not be subject to the assessment.[89] First, personalised terms that are core terms (the 'essential obligations of the contract'), are exempted from the assessment.[90] While the variety in credit products complicates a satisfactory generalisation,[91] in the CJEU's view the main obligations relate to a sum of money made available and to be repaid, and in particular the debtor's obligations in connection with the repayment of that sum (i.e. the ordinary interest rate).[92] Fees for services which do not form part of those

82 Recital 13 UCTD; C. Gardiner, *Unfair Contract Terms in the Digital Age. The Challenge of Protecting European Consumers in the Online Marketplace* (Cheltenham: Edward Elgar Publishing, 2022) 38 and 41.

83 Art 2 subs b and c UCTD; case 472/10 *Nemzeti Fogyasztóvédelmi Hatósá* 26 April 2012 (CJEU), para 23.

84 Art 3.1 UCTD.

85 European Commission, *Commission Notice – Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts*, C(2019) 5325 final, para 1.1; case 421/14 *Banco Primus* 26 January 2017 (CJEU).

86 Gardiner, n 82 above, 50.

87 Case 415/11 *Mohamed Aziz* 14 March 2013 (CJEU) paras 69–71.

88 Y. Atamer and P. Pichonnaz, 'Control of Price Related Terms in Standard Form Contracts: General Report', in Atamer and Pichonnaz (eds), n 17 above, 3–66, 20.

89 Rott et al., n 9 above, para 3.5.2.

90 Art 4.2 UCTD; case 621/17 *Gyula Kiss* 3 October 2019 (CJEU), paras 32–33.

91 E. Miscenic, 'Uniform Interpretation of Article 4.2 of UCT Directive in the Context of Consumer Credit Agreements: Is it possible?' *Revue du droit de l'Union europeenne* 3/2018, 127–159.

92 Case 565/21 *Caixabank* 16 March 2023 (CJEU) paras 17–24.

main obligations but are merely associated with those services (thus ancillary), are not considered core terms.[93] Second, the assessment does not consider the 'price/value ratio' or 'price adequacy', since the *iustum pretium* doctrine has been abandoned.[94] While the UCTD provides the option to extend the assessment to cover core terms and price adequacy, most Member States (**MS**) have not exercised this option.[95] However, if the term is not grammatically and substantively transparent to the average consumer, the personalised term (including the price-value relationship) will be subject to the assessment.[96]

3.2 CCD

Just like the UCTD, the CCD pursues two objectives: setting high standards of consumer protection and fostering the development of a single market for credit by removing fragmentation caused by national differences.[97] The CCD was adopted to improve the 2008 Directive, *inter alia* to keep up with the digitalisation of the market, price personalisation, as well as the growing variety of credit products in the market.[98]

The CCD refers to prices of credit products in several concepts: the notion of 'total cost of the credit to the consumer', which aggregates all components of the price structure, and notions covering individual components (e.g. 'borrowing rate').[99] It uses those notions to regulate pricing using a number of *ex ante* techniques: disclosure obligations, calculation methods, price restrictions and conduct rules. First, the CCD requires disclosure of individual components and the APR in advertisements, pre-contractual information and contract terms.[100] Pursuant to those obligations, the lender is required to inform the borrower in pre-contractual

93 Case 565/21 *Caixabank* 16 March 2023 (CJEU) para 23.

94 Art 4.2 UCTD; Atamer and Pichonnaz, n 89 above, 29–32; case 26/13 *Kásler and Káslerné Rábai* 30 April 2014 (CJEU), para 55; joined cases 84/19, 222/19 and 252/19 *Profi Credit Polska* 3 September 2020 (CJEU) para 80 (Terms 'relating to the consideration payable by the consumer to the lender or having an effect on the actual price to be paid to the lender by the consumer').

95 Art 8a UCTD. See EC, 'Notifications under Article 8a of Directive 93/13/EEC', accessed via commission.europa.eu.

96 Art. 4.2 UCTD. Case 26/13 *Kásler and Káslerné Rábai* 30 April 2014 (CJEU), para 75; J. Luzak and M. Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' *Journal of European Market and Consumer Law* 8(3) 97–107.

97 Recitals 3 to 13 CCD.

98 Recital 3 CCD. The definition of 'credit agreement' (Article 3.3 CCD) has been modified to capture more products.

99 Art 3, subs 5 and 8 CCD.

100 Art 8, 10.3 (see especially subs j and m) and 21.1 (especially subs f, k, l and r) CCD.

disclosures and in the offer that the price terms have been personalised.[101] The obligations in respect of the pre-contractual disclosures are 'without prejudice to the UCTD', meaning that they do not affect the unfairness assessment.[102] In respect of the offer, the CCD clarifies that the consumers must be informed in a 'clear and comprehensible manner' (including on the data sources used[103]) and that the lender must observe data protection rules.[104] The disclosure is meant to enable the consumer to incorporate the potential risks in his decision-making.[105] Thus, the CCD is facilitative in the sense that it allows parties to enter into agreements with personalised prices (prioritising consumer choice), while making consumers responsible for evaluating the utility of the bargain, and expressly refers to other regulatory frameworks that contain rules protecting consumers.

Second, the CCD provides bans, caps or calculation methods for fees charged in specific cases, such as withdrawal,[106] termination of open-ended credit[107] and early repayment.[108] Third, the Directive also obliges MS to introduce measures to effectively prevent abuse and to ensure that consumers cannot be charged with excessively high borrowing rates, annual percentage rates of charge or total costs of credit (they may prohibit or cap specific charges to do so).[109] The rationale of this rule is to harmonise the landscape, as a significant number of MS have introduced interest rate caps for credit products,[110] even if 'excessively high' is not defined in the text *per se*. Fourth, lenders have the obligation to 'act honestly, fairly, transparently and professionally and take account of the rights and interests of the consumers' when manufacturing products and granting credit.[111] This provision could be used to limit PP on the grounds that the practice yields unfair outcomes.[112] However, given the absence of clear definitions and context, it is uncertain whether this provision (1) codifies a distinct duty that addresses substantive fairness concerns arising from

101 Art 10.5 m and 11.4 h.

102 Recital 30 CCD.

103 Recital 40, art 13 CCD and art 14(2) (f) GDPR.

104 The CCD's rules are 'without prejudice' to the GDPR, see recitals 30 and 46, as well as art 13 and 18.3.

105 Recital 40 CCD.

106 Art 26.5 CCD.

107 Art 28.1 CCD.

108 Art 29.2 CCD.

109 Art 31 CCD.

110 European Commission, *Evaluation of Directive 2008/48/EC on credit agreement for consumers*, SWD(2020) 254 final, 127.

111 Art 32.1 subs a and c CCD.

112 See for a precedent of this interpretation in the insurance sector, EIOPA, *Supervisory statement on differential pricing practices in non-life insurance lines of business*, EIOPA-BoS-23/076, 22 February 2023.

price-value divergences of the nature discussed here, (2) is limited to procedural fairness, or (3) merely refers to fairness to the extent used in national systems.[113] A detailed analysis of this issue is unfortunately beyond the scope of this article.

It should be noted that the CCD contains two scoring-related provisions. The CCD contains a non-discrimination provision that details *conditions to be fulfilled for being granted a credit* which, based on a literal reading in conjunction with the recitals and provisions on personalised pricing, pertains to the credit *granting* decision and not the credit *pricing* decision.[114] The CCD also contains a provision that governs the use of personal data for the creditworthiness assessment (CWA), which is performed to ascertain whether the borrower is able to honour the proposed terms of the credit offer (*including* its price terms).[115] Therefore again, the conditions imposed on the use of data apply at best to *credit* scoring for the purposes of the CWA, but not to *profit* scoring for the purposes of the pricing decision.[116] Thus, the CCD does not harmonise rules governing personal data use for (personalised) pricing. In fact, pricing-specific rules did not make it through the legislative process.[117]

3.3 Regulatory Context

The UCTD and CCD are part of a larger multi-layered normative framework that also includes public law provisions that limit PP, which should be outlined to properly understand their specific functions in regulating the practice.[118] Under EU competition law, a lender that occupies a dominant position in the market is prohibited from engaging in excessive pricing of credit products.[119] Under EU data protection

113 The provision appears in other financial services frameworks, in particular dir 2014/65/EU and dir (EU) 2016/97 and has been interpreted similarly. See e.g. L. Enriques and M. Gargantini, 'The overarching duty to act in the best interest of the client in MiFID II', in D. Busch and G. Ferrarini, *Regulation of the EU Financial Markets: MiFID II and MiFIR* (1st ed, Oxford: Oxford University Press, 2016) chapter 4, paras 4.16 and 4.31; P. Marano, 'The Contribution of Product Oversight and Governance (POG) to the Single Market: A Set of Organisational Rules for Business Conduct', in P. Marano and K. Noussia (eds), *Insurance Distribution Directive: A Legal Analysis* (Cham: Springer Nature Switzerland AG, 2021) 55–74, 69–72.

114 Art 6 CCD.

115 Art. 18.1 CCD.

116 European Data Protection Supervisor, *Opinion on the Proposal for a Directive on consumer credits*, Opinion 11/2021, 26 August 2021.

117 See the amendments in n 64.

118 See W.H. van Boom, *Privaatrecht en Markt. Hoe het Vermogensrecht onze Marktsamenleving faciliteert en geleidt* (Den Haag: Boom Juridisch, 2020) 16–18.

119 Art 102 TFEU. See M. Botta and K. Wiedeman, 'To discriminate or not to discriminate? Personalised pricing in online markets as exploitative abuse of dominance' (2020) *European Journal of Law and Economics* 381–404.

law, in particular the GDPR, processing personal data for pricing purposes is subject to conditions and restrictions.[120] Key among those conditions are the information obligations *ex* Articles 13 and 14 GDPR and the consent requirement for automated processing *ex* Article 22.1 GDPR. Relevant restrictions include compliance with data minimisation, storage limitation, accuracy and fairness principles that limit the lender's ability to use data for pricing purposes.[121] For example, the fairness principle may limit processing, such as where the profiling focuses on financial vulnerability.[122] Special categories of personal data cannot be used, unless consent is given.[123] Under EU anti-discrimination law, in particular the Race and Equality Directives and the EU Charter,[124] personalisation (1) on the basis of data on protected characteristics (direct discrimination), or (2) that puts persons with protected characteristics at a particular disadvantage compared with other persons, without the right justification and means (indirect discrimination), is prohibited, thus limiting lender discretion.[125] However, other forms of personalisation that do not involve (proxies for) those data, such as affinities, are not barred under those rules.[126] Finally, under the proposed EU Artificial Intelligence Act, machine learning algorithms used for credit scoring or creditworthiness assessments are high-risk AI systems and subject to detailed requirements that impact their design.[127]

3.4 Discussion

The UCTD and CCD impact the lender's ability to engage in PP at various stages. Actions at the pre-contractual stage (profiling, price setting and communication of the offer) are subject to the CCD. The contractual and post-contractual stages (signing and performance) are subject to the UCTD and the CCD.[128] The CCD and the UCTD are

120 EDPS (n 117 above); F. Esposito, 'The GDPR enshrines the right to the impersonal price' (2022) *Computer Law & Security Review*.

121 Art 5 and 6 GDPR, recital 25a CCD; Aggarwal, n 52 above.

122 Art 29 Data Protection Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, WP251rev 01, para III.A.1.

123 Unlike creditworthiness assessments, for which the use of these data is strictly prohibited (art 18. 3 CCD), pricing processes are not covered by a specific prohibition.

124 Dir 2000/43/EC and 2006/54/EC. See also case 414/16 *Vera Egenberger* 17 April 2018 (CJEU), para 76; M.L. Montagnani and C. Paulesu, 'Towards an Ecosystem for Consumer Protection in the Context of AI-based Credit Scoring' (2022) *European Business Law Review* 557–580.

125 Montagnani and Paulesu, n 124 above.

126 Wachter, n 66 above; K. Langenbucher, 'Consumer Credit in The Age of AI – Beyond Anti-Discrimination Law' *European Corporate Governance Institute – Law Working Paper* No 663/2022.

127 Art 6 and annex III 5.b.

128 Recital 30 CCD.

complementary in the sense that the CCD provides *ex ante* rules of general application, whereas the UCTD provides *ex post* judicial control of individual bargains. The UCTD does not prohibit price personalisation *per se*,[129] only contextually unfair price terms resulting from such personalisation. This state of affairs is not problematic, because the broader regulatory context in which the Directive is embedded provides complementary safeguards and limits that address the aforementioned risks.

As discussed in Section 2.4, some scholars and regulators have called for the special protection of vulnerable consumer groups against PP, as well as for recognising that all consumers to some extent may be vulnerable in today's digitalised credit markets. While the CCD and UCTD focus on weaknesses due to information and bargaining power asymmetries, they are based on the 'average consumer' image and do not account for actual idiosyncratic vulnerabilities. Moreover, the 'vulnerable consumer' is not even codified in these texts and appears only sparsely in EU consumer law.[130] It is submitted that the UCTD is not the proper place to address those concerns. Not only is the court ill-equipped and poorly placed to provide such special protection,[131] but the Directive also seems to merely ensure that contracts are balanced as if resulting from party equality, without structurally favoring (certain) consumers over lenders or engaging in redistribution.[132] Moreover, there is no political consensus on how EU law should accommodate specific vulnerabilities.[133]

4 Unfairness Assessment

This section discusses the application of the UCTD's general assessment to personalised price terms. While the CJEU has yet to consider personalised price terms, it has considered price terms in credit and mortgage agreements and formulated guidance for national courts to aid them in the assessment of those terms.[134]

129 Similarly, Rott et al., n 9 above, para 3.5.2; Patti, n 51 above, para 3.3.

130 See in particular art 5 dir 2005/29/EC.

131 Generally, I. Ramsay, *Consumer Law and Policy* (London: Bloomsbury Publishing, 2011) para 3.5; similarly, L. Willis, 'Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price' (2006) *Maryland Law Review* 806–817.

132 Similarly, St. Grundmann and N. Badenhoop, 'Foreign Currency Loans and the Foundations of European Contract Law – A Case for Financial and Contractual Crisis?' (2023) *European Review of Contract Law* 1–36.

133 See amendments mentioned in n 74 above.

134 The role of the CJEU is by construction limited to the interpretation of EU law and formulating general criteria, which may be useful to national courts in assessing the effects of its provisions in a particular case. Case 226/12 *Constructora Principado* 16 January 2014 (CJEU), para 20; Gardiner, n 82 above, 53.

4.1 Significant Imbalance

The CJEU has resorted to the formulation of three general reference points to assess the balance: (1) suppletive law, (2) market practices and (3) the loan amount.

4.1.1 Suppletive Law

Suppletive law, i.e. the statutory rule applicable in the absence of a contractually agreed term, is the primary reference point.[135] In *Aziz*, the CJEU considered a non-transparent default interest rate term.[136] It held that to assess the imbalance, 'it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties' (suppletive law), and to evaluate if and how much 'the contract places the consumer in a legal situation less favourable' than such national law (suppletive law test).[137] Thus, for a default interest rate, the national court should (1) assess the suppletive law and (2) compare the rate with the statutory interest rate, 'in order to determine whether it is appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them.[138] A-G Kokott, whose reasoning was followed by the CJEU, essentially stated that while assessing the difference between the rates, the court must consider what purposes may be lawfully pursued by default interest under national law and whether the difference is disproportionate to that purpose (a proportionality test).[139] In *Constructora Principado*, the CJEU elaborated on the suppletive law test,[140] explaining that since its overall aim is a balance assessment, a 'quantitative economic evaluation' comparing transaction value and the price term is too reductive. Instead, a 'sufficiently serious impairment' of the consumer's legal situation under suppletive law due to the term (c.q. passing on a tax liability to the

135 EC, n 85 above, para 3.4.2.

136 Case 415/11 *Mohamed Aziz* 14 March 2013 (CJEU) paras 69–71.

137 Case 415/11 *Mohamed Aziz* 14 March 2013 (CJEU) para 68.

138 Case 415/11 *Mohamed Aziz* 14 March 2013 (CJEU) para 74.

139 Advocate General Kokott, Opinion in case 415/11 *Mohamed Aziz* 14 March 2013 (CJEU), 8 November 2012, paras 86–88. O. Gerstenberg, 'Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts' *European Law Journal* 21 (5) 599–621; S. Whittaker, *Chitty on contracts* (34th ed, vol II, London: Sweet & Maxwell, 2021) chapter 40, Section 1, nr 40–287; C. Leone, *The Missing Stone in the Cathedral. Of unfair terms in employment contracts and coexisting rationalities in European Contract law* (PhD Thesis, 2020) 59.

140 Case 226/12 *Constructora Principado* 16 January 2014 (CJEU).

consumer), already meets the test.[141] Several national courts have adopted this reference point.[142] This case law applies to personalised terms in the same manner as non-personalised terms.

4.1.2 Market Practices

In addition to the suppletive law test, national courts should also consider market practices. In *Banco Primus*, the CJEU considered a non-transparent calculation method for ordinary interest.[143] The Court held that when applying the test to the term, the court should *inter alia* compare the method and the resulting 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 […] for a loan of a comparable sum and term […]'.[144] In *Banco Santander*, the CJEU held that the comparison with those rates applies more generally to 'a term relating to the calculation of interest' (c.q. a variable interest term fixing a markup over a reference rate published by the Bank of Spain).[145] In other words, a personalised interest rate term will not only be compared against the statutory rate, but also against comparable market rates and general market practices – it should apply to non-interest terms as well.[146] In view of the customised nature of pricing, the comparison should also consider borrower risk and market segment.[147] The CJEU does not explicitly establish a hierarchy between statutory and market rates and it is unclear which of the two should prevail, but that choice is ultimately up to the national court.[148]

The use of market practices risks including exploitative market practices, with the risk that the assessment 'greenlights' such practices. The EC's guidance that only 'fair and equitable market practices' should be considered, seems designed to address that risk,[149] but that criterion lacks objectivity and is highly impractical.[150] Using professional standards on acceptable practices or considering market averages could function as more effective ways to mitigate such risk. Yet, even if they are

141 Case 226/12 *Constructora Principado* 16 January 2014 (CJEU) paras 21–23 and 30.

142 Dutch Supreme Court, 22 November 2019 ECLI:NL:HR:2019:1830, para 3.2.3 (considering *Aziz* and *Constructora Principado*); UK Supreme Court, *ParkingEye Ltd* v *Beavis* [2015] UKSC 67, following the CJEU and A-G Kokott in *Aziz*, see Whittaker, n 139 above, nrs 40–287 to 40–289.

143 Case 421/14 *Banco Primus* 26 January 2017 (CJEU).

144 Case 421/14 *Banco Primus* 26 January 2017 (CJEU) paras 59, 65 and 67.

145 Case 265/22 *Banco Santander* 13 July 2023 (CJEU) para 65.

146 See Kokott, n 139 above, whose reference to loans 'normally agreed', in Aziz, para 85, leans in the same direction.

147 EBA Guidelines, n 20 above, para 199.

148 EC, n 85 above, para 3.4.1.

149 EC, n 85 above, para 3.4.4.

150 See Section 4.2 regarding good faith.

useful, it is always up to the national court to determine whether or not to rely on market practices. Note that the fact that a pricing practice deviates from prevailing market practices, does not by itself make it unfair. Party autonomy carries weight. Ultimately, the assessment should focus on the economics of the clause in a holistic manner, i.e. considering not only the price but also other elements, such as related contractual rights and the conditions in which they are exercised.[151]

4.1.3 Loan Amount

In cases involving non-interest price terms, the CJEU has introduced the loan amount as another secondary reference point as part of the suppletive law test. In *Gyula Kiss*, the litigated terms stipulated general management charges and a disbursement commission. Applying the test by reference to *Constructora Principado*, it held that '[u]nless the services provided in return do not reasonably come within the scope of the services provided in connection with the management or disbursement of the loan, or the amounts of those charges and that commission to be borne by the consumer are disproportionate in relation to the amount of the loan, it does not appear, subject to verification by the referring court, that those terms adversely affect the consumer's legal position as provided for under national law'.[152] In *Profi Credit Polska*, the CJEU considered a term stipulating general non-interest credit costs set below a price cap in national law that allows for the inclusion of general economic activity expenses.[153] Referring to *Gyula Kiss*, the CJEU applied the suppletive law test.[154] It held that the term could cause a significant imbalance even if set below the cap, 'if the services provided in return were not reasonably covered by the services provided in connection with the conclusion or management of the credit agreement, or if the amounts charged to the consumer in respect of the costs of granting and managing the loan are clearly disproportionate in relation to the amount of the loan'.[155] More specifically, this is the case where such term transfers costs of the lender's economic activity to the consumer, to the extent that it is disproportionate to the services provided and to the amount of the loan received.[156]

151 See for example Court of Appeals of Amsterdam, 24 May 2022, ECLI:NL:GHAMS:2022:1563, paras 4.14 *et seq*.

152 Case 621/17 *Gyula Kiss* 3 October 2019 (CJEU) para 55. The disbursement commission was EUR 125 and the management charges 2.4 % per annum, the principal amount EUR 16.451. It is not evident why these amounts are non-controversial.

153 Joined cases 84/19, 222/19 and 252/19 *Profi Credit Polska* 3 September 2020 (CJEU).

154 Joined cases 84/19, 222/19 and 252/19 *Profi Credit Polska* 3 September 2020 (CJEU) para 92.

155 Joined cases 84/19, 222/19 and 252/19 *Profi Credit Polska* 3 September 2020 (CJEU) para 95.

156 Joined cases 84/19, 222/19 and 252/19 *Profi Credit Polska* 3 September 2020 (CJEU) paras 95 and 97.

Thus, in the case of non-interest costs, the CJEU applies a proportionality test between those costs and the principal as a second reference point, taking into account other terms. It is submitted that those other terms should include price terms. As discussed in Section 2.3, lenders may seek to recover certain costs through separate fees instead of through a single interest rate, necessitating the evaluation of the entire price structure as part of the assessment of a non-interest price term. Also, rather than focusing on the loan amount, the assessment should use market practices as a key reference point. Finally, the CJEU's consideration in *Profi Credit Polska* makes it clear that national statutory price restrictions transposing the CCD have no bearing on the assessment.

4.2 Good Faith

A significant imbalance caused by a personalised price term can only lead to a finding of unfairness if the lender has acted in violation of good faith. The CJEU decided in *Aziz* that assessing good faith requires determining whether the lender 'dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations'.[157] This 'possible agreement' test is objective and requires hypothetical reasoning, which is problematic because (1) it disregards the actual interests of the parties,[158] (2) it is unclear whether the test involves assuming what consumers would generally agree to in practice (thus less protective)[159] or what would sufficiently serve their interests (thus more protective).[160] A clear consumer image is lacking and the test is unhelpful as a normative standard for price setting behaviour as it provides no proper guidance towards an 'agreeable price'.

At the same time, Recital 16 UCTD and the case law indicate that good faith has subjective elements. In *Andriciuc*, the CJEU held that the national court should consider the expertise and knowledge of the bank regarding the risks of the litigated price term, instead of the assumed knowledge of a hypothetical bank.[161] In *BNP Paribas Personal Finance,* the CJEU reiterated its holding in *Andriciuc*,[162] and stressed

157 Case 415/11 *Mohamed Aziz* 14 March 2013 (CJEU) para 76.

158 Whittaker, n 139 above, nr 40–289.

159 Civic Consulting, 'Study for the Fitness Check of EU consumer and marketing law – Final report Part 1 – Main Report', May 2017, 73, referring to UK Supreme Court *Parking Eye* v *Beavis* (n 142 above); Leone, n 139 above, 61–62.

160 Civic Consulting, n 159 above, 72; EC, n 85 above, 23; Gardiner, n 82 above, ('overall balancing approach to the interests of the parties') 56–58.

161 Case 186/16 *Andriciuc* 20 September 2017 (CJEU) paras 52–58.

162 Case 82/20 *BNP Paribas Personal Finance* 24 March 2022 (CJEU) para 41 and cases cited therein.

that the strength of the parties' bargaining positions and whether the consumer had an inducement to agree to the term must be considered (per Recital 16),[163] in particular the bank's expertise.[164] The CJEU then concluded that the good faith requirement is not met if the term in fact creates a risk that is disproportionate in relation to the services provided and to the amount of the loan received, while the lender fails to comply with the transparency requirement.[165] In *Profi Credit Polska*, a similar conclusion is reached regarding costs resulting from non-interest price terms that are considered disproportionate.[166]

Recital 16 has been understood in the literature as requiring the consideration of particular (subjective) vulnerabilities of the individual consumer, such as poverty and other difficulties to get access to services.[167] Inducements to agree to a term has been connected a seller exercising (explicit) pressure on the consumer.[168] Bargaining power has been connected to poverty in the assessment of residential tenancy agreements, due to the nature of lodging as an essential need and the fact that poverty complicates access to housing.[169] While these cases consider vulnerabilities, they do so in an *objective* sense (affecting the consumer image), not in a *subjective* sense. Factoring in subjective vulnerabilities would be tantamount to personalising the *assessment*, such that the same price may result in different outcomes for different consumers, as the good faith standard is adjusted in each case. Such personalisation is not advisable, since it could introduce more uncertainty in the assessment, increasing transaction costs and inviting arbitrage by consumers.[170]

In general, Type I and II terms will be evaluated similarly to non-personalised price terms (as they are also just amounts and percentages), affected by the same uncertainties of the 'possible agreement' test. As they incorporate personalisation wording, Type III terms have a higher non-compliance risk than the other types due to the impact of transparency on the assessment of the good faith requirement (see next section). Note that while on the borrower's side the 'average consumer' image does not consider subjectivity, the good faith test injects some subjectivity for

163 Case 82/20 *BNP Paribas Personal Finance* 24 March 2022 (CJEU), para 42.

164 Case 82/20 *BNP Paribas Personal Finance* 24 March 2022 (CJEU), paras 44–45.

165 Case 82/20 *BNP Paribas Personal Finance* 24 March 2022 (CJEU), paras 47–49.

166 Joined cases 84/19, 222/19 and 252/19 *Profi Credit Polska* 3 September 2020 (CJEU), para 96.

167 P. Rott, 'Unfair contract terms', in Ch. Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Cheltenham: Edward Elgar Publishing, 2016) 287–313, 301.

168 Case 263/22 *Ocidental – Companhia Portuguesa de Seguros de Vida* 20 April 2023 (CJEU), paras 43–44.

169 Rott, n 167 above; case 488/11 *Asbeek* 30 May 2013 (CJEU), para 32–33.

170 C. Goanta, 'The Ancient Alien: Good Faith as the Facilitator of Personalized Law', https://lawreviewblog.uchicago.edu/2022/03/09/bp-goanta/; O. Ben-Shahar and A. Porat, 'Personalizing Mandatory Rules in Contract Law' *University of Chicago Law Review* 86 (2). Differently, Patti, n 51 above, para 5.

lenders, as their actual expertise and knowledge of the term is considered.[171] This aspect has little differential impact on the assessment of Type I and II terms, but a lender's lack of actual understanding of a Type III term (e.g. where a complex machine learning algorithm performs the classification of Financial Behaviour) will impact the assessment. In addition, it is worth highlighting the creeping restriction of the appreciation of the circumstances by national courts, as the CJEU focalises certain circumstances or conclusions to be reached.[172] For example, the CJEU's test in *BNP Paribas Personal Finance* does not leave national courts the option to conclude that the good faith requirement is met in case of the disproportionate risk and failure to meet the transparency requirement.

4.3 Transparency

The transparency of a personalised price term impacts the evaluation of good faith, but most importantly determines the application of the price adequacy exemption of Article 4.2 UCTD.[173] The CJEU has handed down a number of judgments that further clarify the level of transparency required by Articles 3.1, 4.1 and 5 UCTD as precondition for the application of the exemption.

According to the CJEU, transparency requires that a term must be both formally and grammatically intelligible as well as substantially intelligible, in the sense that an average consumer who is reasonably well informed and reasonably observant and circumspect, can understand the specific functioning of the term and evaluate the economic consequences of the term for his financial obligations.[174] The average consumer, referring to 'consumer' in Article 2.b UCTD, is a normative standard that sets an objective criterion that abstracts from the concrete knowledge the consumer in question has or may have, or may lack due to vulnerability (in the sense discussed in Section 2.4 above).[175] Therefore, the objective standard cannot be tweaked to refer to a consumer who is better or less informed than this standard, since ultimately the broad definition in Article 2.b UCTD (which does not consider knowledge) serves to

171 NB: it does not consider the seller's actual knowledge or expertise regarding the pricing algorithm behind Term III.

172 In that sense, these cases could be considered as a Europeanisation of the doctrine of fairness. See Howells, Twigg-Flesner, Wilhelmsson, n 54 above, 163; Rott, n 167 above, 287–313, 299; Civic Consulting, n 172 above, 74 ('developing new substantive fairness norms').

173 NB: a lack of transparency is itself insufficient to render a term unfair, see case 655/20 *Gómez del Moral Guasch* 17 November 2021 (CJEU), para 37.

174 Case 139/22 *mBank S A* 20 September 2023 (CJEU), para 60; case 565/21 *Caixabank* 16 March 2023 (CJEU), para 31.

175 Case 139/22 *mBank S A* 20 September 2023 (CJEU), para 61; case 593/22 *FS and WU* v *First Bank* 6 July 2023 (CJEU), paras 31 and 33.

provide a certain level of protection to all natural persons who are exposed to information and bargaining power asymmetries in situations in which they act as consumers.[176]

The plainness and intelligibility of a term must be assessed in light of the relevant facts,[177] which include promotional material and the level of attention the average consumer is expected to pay to that term.[178] Thus, the transparency requirement does not require complete specification, but a specification that is sufficient such that the average consumer can assess the economic consequences of the specific term, understand or infer the nature of the services (by considering the contract as a whole, if necessary), and ascertain that there is no overlap between the costs or services.[179] Thus, a term covering non-interest credit costs that lacks specification of the services or contains a formulation that confuses the average consumer, does not fall within the exemption.[180] By contrast, a currency term in which the lender provides sufficient and exact information such that the average consumer can understand the concrete functioning of the financial mechanism and can evaluate the consequences for the duration of the contract, falls within the exemption.[181] The 'incorporation by reference' of an index applicable to a payment term may also satisfy the transparency requirement if the information provided is sufficient to enable the average consumer to become aware of the calculation method of the index referred to in the term, without having to perform legal research.[182]

Again, Type I and II terms will be assessed in the same manner as non-personalised terms. Generally speaking, interest terms will require less additional information than non-interest terms. A Type III term will require more additional information, especially if the incorporated categorisation can change during the contract. In fact, for the average consumer to understand the economic consequences of the term, the contract must contain a description of how (1) personal data determines the applicable financial behaviour category, and (2) the financial behaviour category determines the final price,[183] sufficient for such understanding.[184] It remains unclear, however, how much technical knowledge (e.g. statistics, machine learning,

176 Case 139/22 *mBank S A* 20 September 2023 (CJEU), paras 66–68.

177 Case 565/21 *Caixabank* 16 March 2023 (CJEU), para 33.

178 Case 565/21 *Caixabank* 16 March 2023 (CJEU), para 33.

179 Case 565/21 *Caixabank* 16 March 2023 (CJEU) paras 31–33 and 39. General knowledge of a term is not sufficient, para 41.

180 Joined cases 84/19, 222/19 and 252/19 *Profi Credit Polska* 3 September 2020 (CJEU) paras 74 and 86. Similarly, case 82/20 *BNP Paribas Personal Finance* 24 March 2022 (CJEU), para 34.

181 Case 82/20 *BNP Paribas Personal Finance* 24 March 2022 (CJEU), para 34.

182 Case 265/22 *Banco Santander* 13 July 2023 (CJEU), para 60.

183 See also critically, BEUC, n 74 above, 21, on the understanding of the data processing.

184 Note that the disclosures required to provide such understanding may be the same disclosures used to comply with the required disclosures under the GDPR, but that they are subject to different transparency standards.

scoring) the average consumer will be expected to possess, if the clause refers to technical terms or jargon. On the other hand, it is clear that due to the objective criterion of the average consumer, the consumer's actual technical knowledge does not impact the lender's disclosure obligations. Nevertheless, given the overall ambiguity it is not unforeseeable that national courts will set diverging standards.

4.4 Discussion

The problem identified in Section 2 is that PP has the potential to harm specific consumer segments.[185] The discussion in Section 3 demonstrates that the UCTD has a limited role to play in mitigating this risk.[186] The discussion in this section indicates that the CJEU has given the assessment a relatively open texture, by emphasising context-specific circumstances. The assessment of the personalised term's impact on the contractual balance involves comparing the consumer's contractual position against his position under national suppletive law, and specific secondary reference points and related tests have been provided for specific types of terms, namely market practices and the loan amount. These reference points are objective in nature: there is no indication that the imbalance test would rely on an inherently subjective reference point such as the WTP. Second, by using those reference points, the ultimate economic interests of the lender are only approximated: the lender's actual costs to serve or expect profit margin on that individual transaction, are disregarded. In this respect, the assessment differs from other tests in the broader regulatory context, such as the assessment regarding an 'unfair price' in EU competition law as interpreted by the CJEU, in which it does consider costs.[187] The contextualisation of the assessment impacts the good faith requirement, as the objective 'possible agreement' also considers the lender's subjective knowledge, as well as the transparency requirement, because the average consumer is required to collect and evaluate information in certain circumstances. The latter requirement may be harder to meet in case of Type III terms. Otherwise, the assessment of personalised terms is similar to non-personalised terms.

5 Final Remarks

PP is often equated with consumer harm. That position is unjustified: depending on the competitive dynamics and consumer behaviour, PP may be beneficial to some

185 Section 2.4.

186 Section 3.5.

187 Cases 27/76 *United Brands* 14 February 1978 (CJEU), para 250 and 177/16 *AKKA/LAA* 14 September 2017 (CJEU), para 35.

consumers or overall consumer welfare through more accurate pricing and subsidies that promote credit access and financial inclusion. The UCTD and the CCD allow a lender to personalise prices but limit its discretion through *ex ante* rules and *ex post* control. In addition, the Directives set upper bounds to prices through fairness provisions, i.e. open norms that are designed to apply across different credit products and different circumstances. As a result, they generate legal uncertainty which, in the case of the UCTD, has been exacerbated by the CJEU through its case-law on the general assessment.[188] Price terms are frequently litigated and studies suggest that while some terms have been struck down, the uncertainty has translated into higher prices for all consumers.[189] This uncertainty is not entirely unavoidable. Personalised pricing involves processes that are governed by various regulatory frameworks before they are embedded in contract terms. Those frameworks, which cover competition, data protection and anti-discrimination, are better suited to *structurally* address specific undesirable economic effects of such personalisation than fairness norms in consumer contract law. Further research should understand how these frameworks can be applied to address those effects.

Research funding: The author declares that he has no financial or non-financial interests that are directly or indirectly related to the manuscript.

188 Gardiner, n 82 above, 56–58.

189 F. Gómez and M. Artigot, 'Ex-Post Fairness Controls and Contract Design: the Spanish Experience', in K. Mathis and A. Tor, *Consumer Law and Economics* (Cham: Springer, 2020) 133–150, 148.