Court of Justice ruling on transparency of terms in consumer insurance contracts

European consumers are protected against unfair terms in consumer contracts, including insurance contracts. However, this protection does not extend to terms setting out the essential elements of a contract, such as the extent of the risk covered and the amount of the insurance premium. Nevertheless, if the term under scrutiny is not drafted in 'plain, intelligible language', a court may proceed to evaluate its fairness. The Court of Justice of the EU clarified the concept of 'plain, intelligible language' in a recent decision, stating that a term in a contract can be qualified as such only if it allows an average consumer actually to understand the economic consequences of the term.

Unfair Terms Directive
The Unfair Terms Directive was enacted in 1993 and has not been significantly amended since. It is based on the assumption that traders not only have stronger bargaining power than consumers, but also have a higher level of knowledge. Therefore, consumers cannot influence the content of terms contained in standard contracts drafted in advance by traders, and often agree to terms which are unfair towards them but favourable to the trader. In order to prevent this, the Directive obliges EU Member States to enact legislation which will allow consumers to have the unfair terms set aside by a court.

However, terms determining the main subject matter of a contract (its 'essentials') are not covered by this possibility. The Directive assumes that the balance between the service or good and its price should be determined by the market, rather than evaluated by judges. In other words, the judicial scrutiny of unfair terms should cover the 'small print', but not the 'price tag'. The Directive requires that the evaluation of the fairness of a term take into account the context, that is both the circumstances of the conclusion of the contract, and the other terms of the contract in question or a related contract.

With regard to insurance contracts, the Directive's preamble states that the essentials of such contracts include those terms which 'clearly define or circumscribe the insured risk and the insurer’s liability', because their extent is reflected in the calculation of the premium payable by the consumer.

Court of Justice ruling in the Van Hove case

Facts of the case
On 23 April 2015, the Court of Justice of the EU (CJEU) issued its ruling in Van Hove v CNP Assurances (Case C-96/14) in which it interpreted the rules of the Unfair Terms Directive with regard to insurance contracts in a preliminary ruling procedure brought by a French court. The case before the referring court was brought by Mr Van Hove, a consumer, against CNP Assurances, an insurance company. In 1998, Mr Van Hove concluded two loan contracts. Additionally, he took out insurance with CNP to cover the risk of repayment of the loans in case of his death or incapacity for work.

The insurance contract provided that CNP Assurances would cover Mr Van Hove’s loan instalments in the event that he finds himself in a state of total incapacity for work. The contract provided for a definition of ‘total incapacity’, stating that this occurs ‘if, after 90 consecutive days’ interruption of activity following an accident or illness (...) he finds himself unable to take up any activity, paid or otherwise’. (emphasis added)

In 2000, Mr Van Hove suffered a work-related accident. As a result, in 2005 he underwent surgery and his partial incapacity was assessed at 67%. He suffered from outbreaks of dizziness, and from 2010 on, his state of health deteriorated. In 2011 the social security authorities declared that his 'permanent partial incapacity' rate amounted to 72% and he was allocated a monthly allowance. However, a doctor appointed by CNP...
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Assurances found that he could in fact take up part-time employment. As a result, CNP Assurances refused to cover Mr Van Hove’s repayment instalments. Mr Van Hove took the insurance company to court.

Arguments of the parties
Mr Van Hove claimed that the definition of ‘total incapacity’ in the insurance contract is an unfair term. This is because it is worded in such a way that a lay consumer cannot understand its full significance. CNP Assurances contested Mr Van Hove’s claim. It argued that that the definition is clear and precise and it covers the very subject matter of the contract.

View of the referring court
According to the referring court, the contractual term in question is clear and precise. However, it could be regarded as unfair. This is because it stipulates that the insurance company can refuse to cover the loan instalments if, following an accident, the insured consumer is able to take up ‘any activity’, even if this is unpaid. This ‘small print’ provision allows, according to the French court, CNP Assurances to frustrate the purpose of the whole contract, which is to cover the risk of the consumer not being able to pay the instalments himself. If he takes up an unpaid activity, following the accident, he would not have the resources to repay the loan, the court pointed out.

Reasoning of the Court of Justice
The legal reasoning of the CJEU focused on two fundamental concepts – the ‘main subject-matter of the contract’ on the one hand, and ‘plain, intelligible language’ on the other hand. The CJEU pointed out that in insurance contracts, the essentials (main subject matter) are that the insurance company agrees to provide a service to the insured person in case a risk covered by the contract materialises, whilst the insured person undertakes to pay a premium. With regard to the term under scrutiny, the CJEU indicated that the final word as to whether it belongs to the ‘main subject matter’ of the contract or not, belongs to the national court, which must take into account not only the term’s wording, but also the entire context. However, even if the term belongs to the essentials of the contract, its fairness can still be evaluated if it is not drafted in ‘plain, intelligible language’, i.e. if it violates the requirement of transparency.

The CJEU pointed out that the requirement of transparency covers not only formal and grammatical intelligibility, but must be interpreted broadly, in line with the Directive’s overarching purpose. Therefore, in an insurance contract, an average consumer should be able to evaluate the economic consequences of a contractual term.

Applying these requirements to the case at hand, the Court observed that although the term in question was grammatically intelligible, the consumer did not understand its actual scope. The judges noted that the term is drafted in an ‘extremely broad and vague’ manner, and the words ‘activity, paid or otherwise’ can cover any form of human operation. Another issue which caught the Court’s attention was the discrepancy between the concept of ‘total incapacity for work’ in the contract and the concept of ‘permanent partial incapacity’ used by French social security law. This discrepancy could be misleading to the consumer.

The Court’s ruling
In its reply to the referring court, the CJEU instructed the national judges that they may consider the term as falling within the exception for terms determining the essentials of a contract in ‘plain, intelligible language’ (and therefore refrain from analysing its fairness) only if they find that it is not only grammatically intelligible, but also sets out the functioning of the contractual scheme in such a way as to allow the consumer to assess the economic consequences of the term. The case now returns to the referring court, which must apply the CJEU’s guidance to the facts of the case and make the final decision as to whether the term in question meets the requirements of transparency and, if not, whether it is fair.

Conclusions
The CJEU’s decision is certainly good news for consumers concluding insurance contracts. Although, in principle, one of the most important terms of such a contract – those describing the insured risk – are not caught by the Directive because they define the contract’s main subject matter, they may still undergo judicial scrutiny if they do not conform with the transparency requirement. The Court’s ruling in Van Hove fleshed out this requirement by giving it a purpose-oriented understanding. On the one hand, the Court took into account the purpose of the Directive (improving the position of the weaker party), and on the other hand, it looked into the purpose of a loan insurance contract’s terms. They must not only regulate the rights and duties of parties, but also communicate – in a manner understandable to an average consumer – the extent of the insurance company’s liability so that consumers can make an informed decision.