Financial Inclusion Law and Over-Indebtedness

Edited by Duygu Damar-Blanken and Michelle Kelly-Louw

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Jagna Mucha

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Jagna Mucha

1. Introduction

Protection against unfair contract terms has constituted a core element of EU consumer law[1] for 30 years already. Drafting legislative framework in this area was as a huge challenge due to the very diverse approaches of the Member States towards the concept of unfairness.[2] As a matter of consensus reached at the EU level, the Unfair Contract Terms Directive[3] (UCTD) was adopted. Heated discussions and controversies related to the scope of this piece of legislation resulted in its narrow shape. Thus, UCTD is focused on consumer contracts based on standard forms only, and it does not cover individual terms which have been individually negotiated, however, with the reservation that these terms are expressed in a plain intelligible language.[4] The EU legal framework for consumer protection is based on the assumption that the consumer is the weaker party to the contract. At the same time, however, superior knowledge and experience of a specific consumer does not disqualify such person from being a 'consumer' for the purposes of the UCTD.[5] The Directive follows a minimum harmonization standard, which means that Member States may provide a higher standard of protection than the one regulated at the EU level.[6] Thirty years after its introduction, the UCTD is still considered as one of the most effective tools of the EU law.[7] Due to its significant practical value, the UCTD was widely applied by national courts referring many preliminary questions to the Court of Justice of the European Union (CJEU), which, in turn, gave a rise to the complex case law in this respect.

The consumer-friendly approach of the CJEU allowed it to find solutions for many problems faced by consumers over the years, with the prominent example of its case law which addressed the foreign currency loan crisis in Europe. The crisis started in the early 2000s when banks encouraged people to take loans in foreign currency, mostly denominated or indexed in Swiss francs in order to benefit from lower interest rates in Switzerland, which, in a short term, was beneficial. Due to the fact that the source of their income was mostly in the domestic currency, consumers were exposed to the risk connected to an unfavourable change in interest rate. As a result of the financial crisis in 2008 and after the Swiss franc was unpegged from the euro in 2015, the instalments increased dramatically. The situation of borrowers was only worsened by the COVID-19 pandemic when many

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consumers affected by the crisis suffered financial difficulties, including those with the timely payment of their commitments. Since the majority of loans was secured by mortgages, consumers started to lose their homes, which heated the debate on how the law can contribute to the protection of the right to housing.[8]

The aforementioned problem was addressed differently in particular Member States.[9] Some of them implemented a broad range of support measures with the aim of easing the challenges faced by borrowers.[10] These measures included, among others, so-called payment holidays providing for a payment relief for obligors affected by the COVID-19 pandemic by allowing suspension or postponement of payments within the specific period of time. At the EU level, the European Banking Authority (EBA) published guidelines on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis.[11]

Unfortunately, unlike most EU Member States, in Poland no legislative measures have been taken in order to sufficiently assist consumers affected by the foreign currency loan crisis.[12] At the same time, the scale of the problem was massive – it was estimated that approx. 550.000 borrowers in Poland were affected.[13] As a result, consumers started court actions against the banks. According to data presented by the financial ombudsman, in 2021, there were approximately 70.000 lawsuits in Swiss franc cases pending before the court of first instance and about 4.000 cases on appeal.[14] The debate on the borrowers' rights was particularly heated due to a very strong banking lobby, supported by the Polish Financial Supervision Authority. The main argument voiced in the public discussion was that foreign currency loans were not, as such, forbidden in consumer contracts in Poland and that the borrowers must have been aware of the risk associated with the change of the foreign currency and variable interest rate. On the other hand, consumers invoked that the loan contract terms are unfair due to the fact that the indexing mechanism allowed the bank to arrange the exchange rate at its discretion. The national courts were supposed to evaluate whether the terms included in consumer loans shall be assessed in line with requirements specified in the UCTD and, consequently, in case of the breach of the fairness requirement, to adjudicate on relevant remedies.

2. The EU concept of unfairness

The concept of unfairness provided in Article 3(1) of UCTD relates to the contractual term that has not been individually negotiated with consumers.[15] Such a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' contractual rights and obligations, to the detriment of the consumer. Assessment of fairness does not apply to the terms relating to the definition of the main subject matter of the contract and to the adequacy of the price and remuneration. At the same time, however, these terms must comply with the principle of transparency, namely be drafted in plain, intelligible language. In case of doubt about the meaning of a term, the interpretation most favourable to the consumer should prevail. As a consequence of the breach of the fairness requirement, the unfair terms are not binding for the consumer. Since the provisions of the UCTD are general and rather imprecise, national courts were struggling in the process

of interpretation of the national law consistently with EU law.[16] It was, therefore, the significant role of the CJEU to specify the rules on application of this UCTD in practice.[17] In relation to the foreign currency loan contracts, the key questions referred by the national courts related to the issues whether the indexing mechanism constitutes the essence of the contract, what the consequences of unfairness are, and how to understand the principle of transparency.

The first vital issue to be addressed is whether the indexing mechanism used for the purpose of loan repayment should be considered as the essence of the contractual relationship. Such qualification is important in view of the possibility of continuing the contract after finding the term unfair. The CJEU did not provide a clear answer to the question at first but gave some guidelines to the national courts who should examine this issue in relation to the specific case. In *Kásler*, the CJUE stated that it is the role of the national court to

> *determine, having regard to the nature, general scheme and the stipulations of the loan agreement and its legal and factual context, whether the term setting the exchange rate for the monthly repayment instalments constitutes an essential element of the debtor's obligations, consisting in the repayment of the amount made available by the lender*.[18]

The position of the CJEU evolved over the years. In its recent judgment in the case of *Dziubak*,[19] the Court held expressly that terms relating to the exchange risk define the subject matter of a loan contract. This obviously weakened the level of consumer protection since it implied that in principle, the indexation clause is excluded from assessment of fairness provided in the UCTD. Nevertheless, the requirement of transparency still applies. It follows from Article 4(2) of the UCTD that all terms of consumer contract must comply with the principle of transparency. If the term is not plain and intelligible, the court may review the unfairness even if the term refers to the main subject matter of the contract.

Secondly, if the national court recognizes that the contract term is unfair, such term is not binding for the consumer, whereby the contract should continue to be binding for the parties only if it is capable of continuing in existence without the unfair term. In view of this, it is of utmost importance for the national court to decide on the consequences of unfairness. If the court decides that the contract should be annulled, the parties are obliged to reimburse the payments and therefore the consumer may be exposed to particularly unfavourable consequences.[20] In *Dziubak*, the Polish court was wondering how to uphold the contract. It was not sure whether it was possible to replace provisions considered unfair solely on the basis of the national provisions of general nature. The CJUE answered this question negatively.[21] The justification given was based on the assumption that the possibility of substitution derogates from the general rule that the contract at issue can remain binding on the parties only if it can continue in existence without the unfair terms it contains. By way of exception, the gap could be filled only by the supplementary provisions of the national law or those which are applicable where parties so agree.[22] However, the national courts are not entitled to fill the gap of the

contract solely on the national provisions of general nature.[23] It must be noted at this point that the wish of the consumer is decisive when it comes to the annulment of the contract due to the unfair term. If, as a consequence of the removal of the unfair term, the contract would not continue to exist, the consumer may decide that the unfair contract term remains binding.[24] This is justified in view of the fact that in case of the annulment of the contract, the consumer would be obliged for immediate repayment of the loan (minus installments), which can be particularly unfavourable.

Thirdly, the EU concept of fairness implies that all contractual terms included in consumer contracts must be written in plain, intelligible language. The UCTD provides that in case of doubts, the interpretation most favourable to consumers should prevail. If the unfair term is not plain and intelligible, the court may review the unfairness even if the term refers to the main subject matter of the contract. The CJEU referred to the principle of transparency many times in its case law[25] underlying its importance in view of the weaker position of the consumer vis-à-vis seller or supplier as regards both bargaining power and level of knowledge. As a starting point, the requirement of transparency should be understood as requiring that the contractual term must be formally and grammatically intelligible to the consumer. Further, it means that an average consumer, who is reasonably well informed and reasonably observant and circumspect, must be in a position to understand the specific functioning of the term and thus evaluate, on the basis of clear intelligible criteria, the potentially significant economic consequences of such term for his or her financial obligations.[26] In the context of foreign currency loan agreements, the principle of transparency plays a vital role. It requires the bank to draft a contract in a way which enables an average consumer to estimate, in particular, the total cost of the loan,[27] which as will be demonstrated in what follows, has significant consequences in practice.

3. Application of the principle of transparency in practice

The EU concept of unfairness is being tested in judicial practice very frequently. One of the recent judgments which comprehensively addresses all of the key problems discussed before is the Polish case of *M.P. i B.P* against *Bank 'A'*.[28] This decision provides some important guidelines for the national courts adjudicating the claims related to foreign currency loan contracts. The CJEU explains steps which national courts should take while applying national law in line with the UCTD. The decision also shows the reluctant attitude of some national courts, including the Polish Supreme Court, towards the Swiss loan crisis in Poland.[29] In spite of the fact that the CJUE clearly stated that an unfair clause of the contract cannot be replaced by the provision of the general nature,[30] in the case at hand the Polish referring court was still searching for national provisions that could substitute the unfair term.[31]

The case concerned consumers who concluded in 2008 with a Polish bank 'A' a mortgage loan agreement indexed to Swiss franc in an amount of approximately 100.000 euros. The consumers signed a statement to the effect that they were aware of the exchange rate risk and that they were informed about loan instalments being

expressed in foreign currency, however, the repayment being required in Polish zloty. According to the general conditions, the funds were to be released in Polish zloty at a rate not lower than the buying rate, under the table in force at the time of their release. In 2013, the consumers signed a rider saying that they will repay the loan in Swiss francs without having recourse to exchange transactions carried by the bank. The effect of fluctuations in the exchange rate between Polish zloty and the Swiss franc between 2008–2014 resulted in that consumers were obliged to repay approximately 6.700 euros more than the sum that they would have repaid if the loan had been denominated in Polish zloty. The consumers took the view that the clause indexing the loan was unfair on the ground that it did not specify the method implied by the bank when determining the exchange rate. They brought an action against the bank claiming approximately 11.000 euros.

The key problem here was that the parties to the contract understood the indexation clause differently. For the bank, that clause provided that the exchange rate for the currency of the loan was to be determined in relation to the market rate, as set out daily in the bank exchange rate table. On the other hand, the borrowers interpreted the clause as providing that the currency's exchange rate is to be set on the basis of an objective rate, such as that set by the National Bank of Poland. The referring court found it questionable whether the bank fulfilled its transparency obligations specified in the UCTD due to the fact that the indexation was included in general terms. It was also particularly doubtful in view of the fact that neither the indexation clause nor the general condition of the contract specified all the factors taken into account by the bank when setting the exchange rate. Therefore, the referring court characterized the indexation clause less by ambiguous wording than by a failure to indicate the method for determining the exchange rate that was applied by the bank to calculate the repayment instalments.[32] On the other hand, it was uncertain whether the UCTD required the bank to draft the indexation clause in such way as to enable consumers to determine the rate independently at a given time due to the fact that the loan was concluded for 40 years and the exchange rate changes constantly over time. Having this in mind, the referring court asked whether, in such circumstances, it is possible to formulate a more general wording of the contact term that refers to the market value of the foreign currency.

The first issue examined by the CJUE in the case of *M.P. i B.P* against *Bank 'A'* was the application of the principle of transparency. Following its *Dziubak* judgment, the Court stated that the indexation clause in question included in general terms does not constitute the main subject matter of the contract nor refers it to the adequacy of price and remuneration.[33] Having said so, the Court referred solely to the principle of transparency, which is applicable to the whole consumer contract. In the context of foreign currency consumer loans, it is of utmost importance to determine whether the contract sets out transparently the reason for and the specific features of the mechanism for converting the foreign currency. It is on the basis of that information that the consumer decides whether he or she wants to become contractually bound to the bank.

In order to fulfill the requirement of transparency, the contractual term should satisfy two conditions: linguistic and grammatical intelligibility and economic

transparency.[34] It follows from the Court's case law that the consumer must be put in the position to understand, on the basis of clear, intelligible criteria, the economic consequences for him or her which derive from it.[35] The CJUE obliged the national court to verify in light of all the relevant facts whether

> *an average consumer, who is reasonably well informed and reasonably observant and circumspect, may not only be aware of the existence of the variations in exchange rates generally observed on the foreign exchange market, but also assess the potentially significant economic consequences for him or her resulting from the application of the selling rate of exchange for the calculation of the repayments for which he or she will ultimately be liable and, therefore, estimate the total cost of the loan.*[36]

Having this in mind, it became clear that in line with Article 5 of UCTD, an indexation clause must enable a consumer to understand, on the basis of clear and intelligible criteria, the way in which the rate used to calculate the amount of repayment instalments is set.[37] The failure to mention the relevant criteria set by the bank cannot be justified by the fact that foreign currency exchange rate changes in the long term. Unlike the referring court, the CJEU had no doubts that the consumer must be able to determine himself the exchange rate at any time.

4. Consequences of unfairness of the contract term

Consequences of the breach of transparency requirement in consumer contracts are tremendous. Lack of transparency must be taken into account by the national court in assessment of whether the term is unfair.[38] The unfair term is not binding for the consumer, whereby the contract should continue to be binding for the parties only if it is capable of continuing in existence without the unfair term. In view of this, another problem addressed by the national courts dealing with the foreign currency loan crisis related to the possibility of a supplement of the agreement in order to remedy the unfair contract clause. This issue was not new, and in view of the clear interpretation given by the CJEU in the *Dziubak* case,[39] it was quite surprising that the national court referred this question again to the CJEU. In the *Bank A* case, the referring court was looking for the possibility to substitute the unfair contract term. For this aim, the Polish court presented an idea to recourse to the general concept of the market value of the foreign currency and argued that such interpretation would correspond to the common intention of the parties to the agreement. According to Article 65 of the Polish Civil Code,[40] it would be possible to remedy the lack of transparency by giving the interpretation of the unfair term corresponding to the common intention of the parties.

In order to clarify the concerns of the Polish court, in the *Bank A* case, the CJEU comprehensively explained how the EU concept of unfairness provided in UCTD should be applied in practice.[41] These guidelines referred to (i) requirements for assessment whether the contractual term is unfair and (ii) consequences of assessment of unfairness: annulment of the contract being uncapable of continuing in

existence without unfair terms (as a general rule) or upholding the contract under certain conditions only (as an exception).

Firstly, the national court should assess whether the contractual term is unfair. For this aim, it is necessary to determine whether the bank failed to observe the requirement of good faith and examine the possible existence of the significant imbalance to the detriment of consumer. In the case at hand, the referring court stated that the bank cannot be regarded as having acted in bad faith; therefore, this issue was not further explored by the Court. The focus was put on the examination of the second requirement, namely verification whether there is a significant imbalance in the parties' rights and obligations arising under the agreement, to the detriment of the consumer. The CJEU provided some guidance in this respect and specified that

> *such an examination cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract, on the one hand, and the costs charged to the consumer under that clause, on the other. A significant imbalance may result from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed under the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he or she enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him or her of an additional obligation not envisaged by the national rules*.[42]

It is up to the national court to decide whether the legal situation of borrowers was impaired or their rights were restricted.

The second step to be taken by the national court is to adjudicate the legal consequences for the parties to the loan agreement in case the contract term is unfair. As a general rule, an unfair term should not be binding for consumers, and the contract should continue to bind the parties only if it is capable of continuing in existence without the unfair term. What are the options to remedy the problem of unfairness? The first solution would be recourse to the national legislation allowing to provide the contract term substituting the unfair clause. According to the CJEU, this legislation must respect the requirements specified in the UCTD,[43] which means that a new contract term cannot have the result of weakening the protection guaranteed to consumers. It was already mentioned that in Poland, however, no legislative measures were undertaken in order to solve the problem of Swiss francs crisis.[44] As a consequence, the national courts were forced to handle the problem without having an appropriate legal instrument in hand. Therefore, unsurprisingly, the courts were looking for solutions in existing law. In the *Bank A* case, in view of the lack of any supplementary provisions, the referring court was searching for the possibility to supplement the contract by the provisions of the general nature. At this point, the Court was very clear that this is not an option and that the national court cannot modify the contract by revising the content of that term. The possibility of such modification will make the sellers or suppliers tempted to use unfair contract terms

in knowledge that, even if they were declared invalid, the contract could nevertheless be modified by the national court.[45]

Having said so, is it possible at all to supplement an agreement with unfair contract terms? The CJEU stated that only if the invalidity of the unfair contract term were to require the national court to declare the contract invalid in its entirety, thereby exposing consumers to particularly unfavourable consequences, then the national court might replace that term with the supplementary provision of the national law.[46] However, the Court reminded that the UCTD precludes the national court to fill the gap in the contract solely on the provisions of the general nature. In view of this, it became clear that the national court is precluded from interpretation of the unfair contract term even if that interpretation would correspond to the common intention of the parties.

5. Consequences of invalidity of the contract

The practice shows that consumers wish to exercise their rights for protection against unfair contract terms granted by the UCTD. As a result of the consumer-friendly interpretation of the CJEU case law, the national courts in the majority of individual cases tend to declare the loan contracts invalid on the ground of unfairness of the contract terms.[47] This tendency is very painful for the banking sector, suffering severe financial losses as a result. In order to recover from losses, the banks started claims against consumers on the ground of unjust enrichment and undue performance. National courts adjudicating these cases were confused – should consumers pay for the use of the capital to the banks if the latter violated consumer law by use of unfair contract terms? An argument presented in this discussion referred to the so-called 'free loans' problem. Once the court confirmed the invalidity of the loan contract, consumers used the borrowed capital free of charge often for more than several years. This was obviously not welcomed by the banks, surprisingly supported by the president of the Financial Supervision Authority in Poland saying that the stability of the financial markets will be threatened if the banks were not allowed to seek compensation from consumers. It also provoked heated discussion amongst other borrowers having loan contracts in national currency. In the public opinion in Poland, the ridiculous argument was voiced that consumers having their loans in Polish zloty are discriminated against by the ones having loans in foreign currency.

Does the EU law provide a solution for this problem? The UCTD does not govern the consequences of the invalidity of the contract after the excision of unfair contact terms; therefore, it is up to the Member States to determine such consequences. However, national rules in this respect must be compatible with EU law, including the UCTD which, amongst others, aims at deterrence. One of the most urgently awaited CJEU judgments clarifying this issue was rendered as a result of a claim brought against a bank by one of the Polish activists.[48] He had concluded a mortgage loan agreement in foreign currency including an unfair contact term which thus was deemed invalid. According to Polish law, in such a case, where the parties have performed certain services, they may claim reimbursement for undue performance. It was clear for the national court that in this situation, the borrower

should repay the equivalent of the principal loan granted by the bank and that the bank should repay the equivalent of monthly instalments and expenses paid by the consumer. However, the national court was not sure whether in addition to those payments, parties may claim the payment of other amounts on account of the use of funds over a certain period without any legal basis. The national court was of the opinion that neither the bank nor the consumer should have any additional claims. On the one hand, the bank should not have any profits from the invalidity of the loan agreement since the invalidity results from the conduct of the bank which used the unfair contract term(s). On the other hand, however, allowing consumers to claim payment in respect of the use without a legal basis of the amount of the instalments would impose a disproportionate penalty to the bank.[49]

The CJEU took a different view. It stated that the possibility by the consumer to assert claims that go beyond the reimbursement of monthly instalments and paid expenses does not undermine the objectives of the UCTD, quite to the contrary, it supports its deterrent effect. As opposed to the assumptions of the national court, the Court stated that payment of such restitution is not contrary to the principle of legal certainty since it constitutes a practical implementation of the prohibition of unfair contract terms provided by UCTD.[50] Moreover, such payment would also be proportionate as long as it is necessary to restore the situation in which the consumer would have been if the contract had not existed.[51] On the other hand, the Court clearly confirmed that the bank cannot seek from consumer compensation going beyond the capital paid. For the Court, it was clear that the bank cannot derive economic advantages from its unlawful conduct or be compensated for the disadvantage caused by such conduct.[52] It was not persuaded by the argument relating to the stability of financial market since it is not relevant in the context of UCTD, which aims to protect consumers.[53] Indeed, the effectiveness of consumer protection would be undermined if consumers were exposed to the risk of paying compensation since it would be more advantageous for the consumers to continue to perform the contract with unfair contract term rather than to exercise the rights under the UCTD.[54]

The judgment in the *Bank A* case was widely discussed in Poland. The banking lobby was threatened that consumers will massively go to court and start proceedings against financial institutions. However, although in theory such a scenario is possible, it seems to be very unlikely in practice. The goal of the consumers is to confirm the invalidity of the loan agreements, to return the borrowed capital and simply to get out of any obligations towards banks. Apart from the group of activists, consumers in general are not very litigious and they are not willing to pursue their claims. The situation of credit Swiss loan contracts was exceptional because the value of the claim was significant. But, if the goal is achieved and the loan contract is invalid, there is a very little possibility that consumers will start other proceedings just to recover some minor compensation.

6. Conclusions

The interpretation of the UCTD by the CJEU is clearly consumer friendly. There is no doubt that principles relating to the mechanism of indexation of the loan to the

foreign currency must be clear, transparent and understandable for the consumer, who, at any time, should be able by him- or herself to assess the costs of the loan. In order to satisfy the requirement of transparency, it is not enough to refer to the market value or to other general clauses. The CJEU upholds its position regarding the consequences of the unfair clauses and states that the main sanction for the banks which use the unfair clause is that such term is not binding for the consumer. It is possible to substitute the unfair clause only if: (i) due to the unfair clause, the contract cannot continue to bind the parties, (ii) invalidity of the contract exposes the consumer to particularly unfavourable consequences and (iii) there exist specific national supplementary provisions tailored to remedy the problem of unfairness which can be used in order to replace the unfair clause. These requirements must be satisfied jointly. If the national court could revise the content of the unfair term included in a contract, such power would contribute to the elimination of the dissuasive effect of the UCTD. Banks would still be tempted to use those unfair terms with the knowledge that even if the term will be declared invalid, the contract can nevertheless be modified by the court.

Further, the CJEU recognizes the significance of the wishes of the consumers. The national courts are not entitled to remove unfair contract terms, and such terms may be still applicable if the consumer, after having been informed by the courts, does not intend to assert its unfair or non-binding status. If, as a consequence of unfairness, the contract is to be declared invalid, the consumers would be obliged for immediate repayment of all the remaining amount of the loan, which can be particularly unfavourable. Therefore, after being advised, consumers should have the possibility to decide whether they want the contract to be invalid or not. Although it is nice to have such a choice, practice shows that consumers wish to exercise their right to be protected against unfair contract terms and claim that the loan contracts are invalid. In this sense, the UCTD is used as a tool to release consumers from the obligation towards banks to pay high interest rates.

Importantly, in cases where the loan contract is invalid since it cannot continue in existence after removal of the unfair contract terms, the financial institutions are entitled to claim the reimbursement of the capital and interests at the statutory rate from the date on which notice for payment is served. There is no doubt that banks are not entitled to claim any compensation beyond such reimbursement. This is a very important safeguard for consumers which should encourage them to pursue their claims and enforce their rights granted under the UCTD. As a consequence of the invalidity of the loan agreement, the situation should be restored in which the consumer would have been if the contract had not existed. For this aim, consumers may seek from the bank compensation beyond reimbursement of the monthly instalments and expenses paid in respect of the performance of that agreement. In such a case, it is up to the national court to decide whether such a claim is proportionate. However, it is unlikely that consumers will massively start such proceedings having in mind that they are reluctant towards litigation, courts are very cautious as regards payment of compensation and proceedings are very lengthy. The main goal of consumer claims is to be released from the obligations towards the bank regarding payment of high interests and simply to repay the capital borrowed.

Notes

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1 Dean, "Unfair Contract Terms," 581.
2 Howells, "Unfair Contract Terms," 133.
3 Council Directive 93/13/EEC of 5.04.1993 on unfair terms in consumer contracts, OJEC L 95, p. 29 ("UCTD").
4 Article 5 UCTD.
5 European Commission, Guidance on interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, 2019/C 323/04, OJEU C 323, p. 10.
6 Klamert, "Harmonisation," 367.
7 At the same time however, it is argued that since UCTD was not modernised over the years, it does not meet challenges of the digital age, see Durovic and Poon, "Consumer Vulnerability," 420; Loos and Luzak, *Update the Unfair Contract Terms Directive*.
8 Domurath and Mak, "Private Law and Housing," 1189.
9 Regulatory responses to the challenges of loan contracts indexed to foreign currency in particular Member States are discussed in several contributions in Tereszkiewicz and Golecki, *Protecting Financial Consumers in Europe*.
10 Regulatory responses to the challenges of loan contracts indexed to foreign currency in particular Member States are discussed in several contributions in Tereszkiewicz and Golecki, *Protecting Financial Consumers in Europe*.
11 European Banking Authority, *Guidelines on Legislative and Non-Legislative Moratoria on Loan Repayments Applied in the Light of the COVID-19 Crisis*, consolidated version as of 2.12.2020. Accessed March 10, 2024. https://www.eba.europa.eu/guidelines-legislative-and-non-legislative-moratoria-loan-repayments-applied-light-covid-19-crisis.
12 In 2011 the so called "Anti-Spread Act" was adopted enabling consumers to pay installments in foreign currency (Act of 29 July 2011 amending the Act of 29 August 1997-Banking Act and other acts, Journal of Laws 2011, No. 165, item 984). However, this act did not address the problem of unfair terms included in loan contracts.
13 Golecki and Tereszkiewicz, "Complex Mortgage Loans," 19.
14 Rzecznik Finansowy, "Analiza aktualnych zagadnień dotyczących kredytów frankowych 2021."
15 Busch and Lehmann, *Unfair Terms in Banking and Financial Contracts*, 26.
16 Mišćenić, Tereszkiewicz, and Infantino, "The Interplay Between the CJEU and National Courts," 353.
17 Tereszkiewicz, "Foreign Currency Loans," 248; Lapuente, "Control of Price Related Terms," 67.
18 Judgment of the CJEU of 30.04.2014, C-26/13 Kásler and Káslerne Rásbai, EU:C:2014:282, para 51; on the exclusion of so called core-terms from unfairness test see: Rott, "Unfair Contract Terms," 293; Fazekas, "The Consumer Credit Crisis," 104; Feher, "From Kásler to Dunai," 291.
19 Judgment of the CJEU of 3.10.2019, C-260/18, *Dziubak and others* against *Raiffeisen Bank International*, ECLI:EU:C:2019:819, para 44.
20 Judgment of the CJEU, C-26/13 Kásler, para 83.
21 Critical on the reasoning of the CJUE see Esposito, "Dziubak," 542.
22 Judgment of the CJEU, C-26/13 *Kásler*, para 81.
23 Judgment of the CJEU, C-260/18, *Dziubak*, para 62.
24 Judgment of the CJEU, C-260/18, *Dziubak*, para 56; see also Ziemblicki and Lewandowski, "Legal Consequences of Unfair Contract Terms," 360.

25 Judgment of the CJEU of 3.03.2020, C-125/18 *Gómez del Moral Guasch*, EU:C:2020:138, para 52.
26 Judgment of the CJEU of 10.06.2021, C-776/19 do C-782/19 *BNP Paribas Personal Finance*, EU:C:2021:470, para 64.
27 Judgment of the CJEU of 10.06.2021, C-776/19 do C-782/19 *BNP Paribas Personal Finance*, EU:C:2021:470, para 67.
28 Judgment of the CJEU of 18.11.2021, C-212/20, M.P., B.P. against bank 'A', ECLI:EU:2021:934.
29 Wiewiórowska-Domagalska, "Unfair Contract Terms," 210.
30 Judgment of the CJEU, C-260/18, *Dziubak*, para 62.
31 For the critical remarks see Węgrzynowski, "Przejrzystość i wykładnia."
32 Judgment of the CJEU, C-212/20, para 48.
33 Judgment of the CJEU, C-212/20, para 37.
34 Loos, "Crystal Clear?" 285.
35 Judgment of the CJEU, C-212/20, para 49; in relation to other CJEU case law in this respect see Loos, "Transparency of Standard Terms," 187; Junuzovic, "Transparency of (pre-) contractual Information," 77.
36 Judgment of the CJEU, C-212/20, para 50.
37 Judgment of the CJEU, C-212/20, para 55.
38 Judgment of the CJEU, C-212/20, para 58: see Loos, "Crystal Clear?," 293.
39 Wiewiórowska-Domagalska, "Unfair Contract Terms," 211.
40 Act of 23.04.1964 – Civil Code, Journal of Law 1964 no. 16 item 93 with amendments.
41 Mucha, "Wymóg zrozumiałości i przejrzystości," 50–58.
42 Mucha, "Wymóg zrozumiałości i przejrzystości," para 66.
43 Mucha, "Wymóg zrozumiałości i przejrzystości," para 61.
44 See Wiewiórowska-Domagalska, "Prawo z tektury"; Mroczkowski, "Legal Effects of Unenforceability," 1.
45 Judgment of the CJEU, C-212/20, para 69.
46 See Serafin, "The Court of Justice on Unfair Terms," 154.
47 According to statistics, in Poland in 96% of cases won by consumers, the latter claimed the invalidity of the contract due to the unfair contract term; see Parkiet, "Lawina wyroków w sprawach umów kredytów frankowych"; for Hungary see Király, "The Invalidity of Foreign Currency Loans," 60.
48 Judgment of the CJEU of 15.06.2023, C-520/21, *Arkadiusz Szcześniak* against *Bank Millenium*, ECLI:EU:C:2023:478.
49 Judgment of the CJEU of 15.06.2023, C-520/21, *Arkadiusz Szcześniak* against *Bank Millenium*, ECLI:EU:C:2023:478, para 28.
50 Judgment of the CJEU of 15.06.2023, C-520/21, *Arkadiusz Szcześniak* against *Bank Millenium*, ECLI:EU:C:2023:478, para 72.
51 Judgment of the CJEU of 15.06.2023, C-520/21, *Arkadiusz Szcześniak* against *Bank Millenium*, ECLI:EU:C:2023:478, para 73.
52 For critical remarks see: Bresci, "Transparency Claims," 406; Grundmann and Badenhoop, "Foreign Currency Loans," 18.
53 Judgment of the CJEU, C-520/21, para 80.
54 Judgment of the CJEU, C-520/21, para 79.

References

Bresci, Catherina. "Transparency Claims, Intellectual Services and Consumer Contracts: A Case of Consumer Over-Protection and Under-Protection?" *European Review of Contract Law* 19, no. 4 (2023): 394–421. https://doi.org/10.1515/ercl-2023-2023.

Busch, Danny, and Matthias Lehmann. *Unfair Terms in Banking and Financial Contracts*. Oxford University Press, 2023.

Cámara Lapuente, Sergio. "Control of Price Related Terms in Standard Form Contracts in the European Union: The Innovative Role of the CJEU's Case-Law." In *Control of*

Price Related Terms in Standard Form Contracts, edited by Yesim M. Atamer and Pascal Pichonnaz. Springer, 2020.

Cardone-Riportella, Clara, and Myriam García-Olalla. "Changes to the Regulation and the Declaration of Unfair Terms in Mortgage Agreements: An Event Study Approach to the Spanish Banking Industry." *European Journal of Law and Economics* 51 (2021): 157–81. https://doi.org/10.1007/s10657-020-09678-y.

Dean, Meryll. "Unfair Contract Terms: The European Approach." *The Modern Law Review* 56, no. 4 (1993): 581–90. https://doi.org/10.1111/j.1468-2230.1993.tb01890.x.

Domurath, Irina, and Chantal Mak. "Private Law and Housing Justice in Europe." *The Modern Law Review*, 83, no. 6 (2020): 1188–220. https://doi.org/10.1111/1468-2230.12557.

Durovic, Mateja, and Joseph Poon. "Consumer Vulnerability, Digital Fairness, and the European Rules on Unfair Contract Terms: What Can Be Learnt from the Case Law Against TikTok and Meta?." *Journal of Consumer Policy* 46 (2023): 419–43. https://doi.org/10.1007/s10603-023-09546-7.

Esposito, Fabrizio. "*Dziubak* Is a Fundamentally Wrong Decision: Superficial Reasoning, Disrespectful of National Courts, Lowers the Level of Consumer Protection: Judgment of the Court of Justice (Third Chamber) of 3 October 2019, *Kamil Dziubak, Justyna Dziubak* v *Raiffeisen Bank International AG* (Case 260/18)." *European Review of Contract Law* 16, no. 4 (2020): 538–51. https://doi.org/10.1515/ercl-2020-0030.

Fazekas, Judith. "The Consumer Credit Crisis and Unfair Contract Terms Regulation-Before and After Kásler." *Journal of European Consumer and Market Law* 6, no. 3 (2017): 99–106.

Feher, Miklos Zoltan. "From Kásler to Dunai. A Brief Overview of Recent Decisions of the CJEU in Hungarian Cases Concerning Unfair Contract Terms in Consumer Contracts." *Hungarian Yearbook of International and Law and European Law* 7, no. 1 (2019): 289–302. https://doi.org/10.5553/HYIEL/266627012019007001017.

Golecki, Mariusz, and Piotr Tereszkiewicz. "Complex Mortgage Loans as a Case Study for Consumer Law and Economics." In *Consumer Law and Economics*, edited by Klaus Mathis and Avishalom Tor. Springer, 2021.

Grundmann, Stefan, and Nikolai Badenhoop. "Foreign Currency Loans and the Foundations of European Contract Law – A Case for Financial and Contractual Crisis?" *European Review of Contract Law* 19, no. 1 (2023): 1–36. https://doi.org/10.1515/ercl-2023-2002.

Howells, Geraint. "Unfair Contract Terms." In *Rethinking EU Consumer Law*, edited by Geraint Howells, Christian Twigg-Flesner, and Thomas Wilhelmsson. Routledge, 2017.

Junuzović, Mia. "Transparency of (Pre-)Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?" *Croatian Yearbook of European Law & Policy* 14, br. 1 (2018): 69–98. https://doi.org/10.3935/cyelp.14.2018.310.

Király, Péter Bálint. "The Invalidity of Foreign Currency Loans in the Hungarian Judicial Practice." *Public Governance, Administration and Finances Law Review* 2 (2017): 60–66. https://doi.org/10.53116/pgaflr.2017.2.4.

Klamert, Marcus. "What We Talk About When We Talk About Harmonization." *Cambridge Yearbook of European Legal Studies* 17 (2015): 360–79. https://doi.org/10.1017/cel.2015.12.

Lapuente, Cámara. "Control of Price Related Terms in Standard Form Contracts in the European Union: The Innovative Role of the CJEU's Case-Law." In *Control of Price Related Terms in Standard Form Contracts*, edited by Y.M. Atamer and P. Pichonnaz. Springer, 2020.

Loos, Marco B.M. "Crystal Clear? The Transparency Requirement in Unfair Terms Legislation." *European Review of Contract Law* 19, no. 4 (2023): 281–99. https://doi.org/10.1515/ercl-2023-18.

Loos, Marco B.M. "Transparency of Standard Terms Under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law." *European Review of Private Law* 23, no. 2 (2015): 179–93.

Loos, Marco B.M., and Joasia Luzak. *Update the Unfair Contract Terms Directive for Digital Services. Study Requested by European Parliament*. European Union, 2021.

https://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL_STU(2021)676006_EN.pdf.

Mišćenić, Emilia, Piotr Tereszkiewicz, and Marta Infantino. "The Interplay Between the CJEU and National Courts in the Case Law on Unfair Contract Terms in Foreign Currency Loans: A Comparative Overview." *European Review of Contract Law* 19, no. 4 (2023): 346–74. https://doi.org/10.1515/ercl-2023-2021.

Mroczkowski, Rafal. "Legal Effects of Unenforceability or Invalidity of an Agreement for a Denominated in or Indexed to a Foreign Currency Mortgage Loan in The Light of Judicial Decisions." *Financial Law Review* 24, no. 4 (2021): 1–23. https://doi.org/10.4467/22996834FLR.21.029.14654.

Mucha, Jagna. "Wymóg zrozumiałości i przejrzystości w umowie kredytu hipotecznego oraz brak możliwości zmiany treści nieuczciwego warunku umownego przez sąd krajowy – wprowadzenie i wyrok Trybunału Sprawiedliwości z 18.11.2021 r., C-212/20, M.P. i B.P. przeciwko 'A.', prowadzącemu działalność za pośrednictwem 'A.' S.A." *Europejski Przegląd Sądowy* 6 (2022): 50–58.

Parkiet. "Lawina wyroków w sprawach umów kredytów frankowych." Accessed March 1, 2024. https://www.parkiet.com/banki/art39453151-lawina-wyrokow-w-sprawach-umow-kredytow-frankowych.

Rzecznik Finansowy. *Analiza aktualnych zagadnień dotyczących kredytów frankowych 2021*. Warszawa, 2022. https://rf.gov.pl/baza-wiedzy/analizy-i-raporty.

Rott, Peter. "Unfair Contract Terms." In *Research Handbook on EU Consumer and Contract Law*, edited by Christian Twigg-Flesner. Edward Elgar, 2016.

Serafin, Riccardo. "The Court of Justice on Unfair Terms and Supplementation of the Contract: How Far Is Too Far?" *Journal of European Consumer and Market Law* 12, no. 4 (2023): 150–58.

Tereszkiewicz, Piotr. "Foreign Currency Loans and Directive 93/13: The CJUE as a Legal Architect." In *Protecting Financial Consumers in Europe. Comparative Perspectives and Policy Choices*, edited by Piotr Tereszkiewicz and Mariusz Golecki. Brill, 2022.

Vandenberghe, Ann-Sophie. "The Law on Unfair Terms in Standard Form Contracts in Europe." In *Consumer Law and Economics*, edited by Klaus Mathis and Avishalom Tor. Springer, 2020.

Węgrzynowski, Łukasz. "Przejrzystość i wykładnia umowy kredytu frankowego z perspektywy dyrektywy 93/13. Glosa do wyroku TS z dnia 18 listopada 2021 r., C-212/20." LEX/el., 2021. https://sip.lex.pl/komentarze-i-publikacje/glosy/przejrzystosc-i-wykladnia-umowy-kredytu-frankowego-z-perspektywy−386286371.

Wiewiórowska-Domagalska, Aneta. "Prawo z tektury. Państwo mogło zapobiec problemom frankowiczów." *Gazeta Prawna*, August 6, 2019. https://serwisy.gazetaprawna.pl/finanse-osobiste/artykuly/1424985,rola-panstwa-w-kryzysie-frankowym.html.

Wiewiórowska-Domagalska, Aneta. "Unfair Contract Terms in CHF Mortgage Loans. Case C-260/28 Dziubak – Where Do We Go from Here?" *Journal of European Consumer and Market Law* 9 (2020): 206–12.

Ziemblicki, Bartosz, and Mateusz Lewandowski. "The Legal Consequences of Unfair Contract Terms in Consumer Loan Agreements Valorized with Foreign Currency: Considerations with Respect to the Judgment of the CJEU in the Dziubak Case (C-260/18)." *Review of Central and East European Law* 46 (2021): 346–73. https://doi.org/10.1163/15730352-bja10055.