THE CONSEQUENCES OF UNFAIR TERMS IN CONSUMER CONTRACTS

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Abstract: *Provided that a term in a consumer contract is unfair within the meaning of Article 3 (1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts we have to decide what consequences it means for the obligation. The directive only requires that such a term cannot have any effect for the consumer. The article tries to ascertain when the unfairness of a term may lead to the nullity of the entire contract. If the entire contract survives without the unfair term, the national law will offer some tools of how to fill in the gap in the contract, for example supplementary provisions, supplementary interpretations, severability clauses. There is an option too, that the gap does not have to be filled at all. It seems that the CJEU adopts a rather restrictive interpretation, and enables the gap to be filled in if it is necessary to save the contract where the non-existence (invalidity) of the entire contract would expose the consumer to particularly unfavourable consequences. The article shows that such a restrictive approach is not always in place. Courts should have a broader scope of tools how to establish the balance between the parties, even with ex nunc effects.*

Keywords: *consumer, unfair contract term, gap in contract, supplementary provisions, supplementary interpretation, severability clause*

1. INTRODUCTION

The starting point of this article is a situation where a term in a consumer contract is unfair within the meaning of Article 3 (1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter "unfair contract terms directive" or "UCTD"). Under Article 6 (1) UCTD, a contract shall continue to bind the parties under the same terms if it is capable of continuing in existence without the unfair terms. National courts are required, on the basis of a finding that certain terms are unfair, to exclude all such terms and to ensure that the consumers are not bound by them regardless of whether the entrepreneur applies them or not.[1]

We may assume to have an unfair term limiting the consumer rights arising from defects, or depriving the consumer of the possibility to terminate the obligation early. We therefore need to analyse whether the contract as a whole remains effective, whether a supplementary rule or another provision may be used instead of the unfair term.[2] In the context of these examples, we shall find out whether the consumer has some rights from the defects, or whether he may terminate the obligation early.[3]

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[1] Case C-377/14 *Ernst Georg Radlinger and Helena Radlingerová v FINWAY a.s.*, ECLI:EU:C:2016:283, para. 100 and 101.

[2] Provided that the Member States have not adopted more stringent provisions to ensure a maximum degree of protection for the consumer (Article 8 UCTD).

[3] Only consumer contracts are discussed here, but it is obvious, that it is also a general problem, see LANDINI, S. The Worthiness of Claims Made Clauses in Liability Insurance Contracts. *The Italian Law Journal*. 2016, Vol. 2, No 2, p. 509.

Within this consideration, we shall first deal with the position of the unfair term in the consumer contract within the system of defects of legal acts under national law (II.). Then we will analyse whether the unfair nature of the term may affect the entire contract (III.). If we conclude that it is not the case, it is necessary to decide whether the contract should be used without the unfair term, the term should be reduced to a level which is fair, or whether another term should be applied, such as a supplementary provision or as a result of a severability clause (IV.). The result should be a certain algorithm, a guidance on how to proceed in cases when a certain term is found to be unfair.

In the analysis EU law is taken as the unified ground. Its interpretation made by the CJEU is compared with traditional approaches in Central Europe that is in Austrian, Czech, and Polish law. These states have the same legal culture with common historical origins, but not all issues are covered by case law or jurisprudence within these states. Nowadays, this law is significantly influenced by German law, which will be compared with the above mentioned states. In the end there might be apparent differences in this algorithm and guidance to ones formerly used in these states.

2. NON-BINDING UNFAIR TERMS IN NATIONAL LAW

The unfair terms shall, not be binding on the consumer (Article 6 (1) UCTD). The legislator has to find an appropriate measure within national law to achieve such a goal. In Germany, an unfair term is ineffective (*unwirksam*) under Section 307 BGB, similarly in Poland under Article 385[1] KC (*bezskutecne*).[4] In Austria, with regard to Section 879 (3) ABGB, a conclusion on voidability (*relative nichtigkeit*) was acknowledged; now, under the influence of the case law of the CJEU, the conclusions tend to nullity (*absolute nichtigkeit*) according to Section 879 (3) ABGB.[5]

In the Czech Republic the unfair terms are disregarded unless invoked by the consumer according to Section 1815 of Act 89/2012 Coll., Civil Code (hereinafter "CCC"). With regard to the wording of the provision and the original intention when adopting the law, many authors infer the term being non-existent.[6] However, the consumer is given the opportunity to invoke such a term anyway.[7] Within the academic literature, it is also possible to find a conclusion regarding nullity or voidability upside down.[8] The Supreme Court seems

[4] MIKŁASZEWICZ, P. In: K. Osajda et al. *Prawo konsumenckie. Komentarz. Tom VII.* Warszawa: C. H. Beck, 2019, p. 36; POPIOŁEK, W. In: K. Pietrzykowski et al. *Kodeks Cywilny. Tom I. Komentarz.* 9th edition. Warszawa: C. H. Beck, 2018, p. 1300.

[5] GRAF, G. In: A. Kletečka – M. Schauer. *ABGB-ON1.05*. Wien: Manz, 2019, § 879, Rn. 297; KREJCI, H. In: P. Rummel – M. Lukas. *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. Teilband §§ 859-916 ABGB. Vertragsrecht.* 4th edition. Wien: Manz, 2015, § 879, pp. 511 and 521.

[6] HULMÁK, M. In: M. Hulmák et al. *Občanský zákoník V. Závazkové právo. Obecná část (§ 1721–2054). (Civil Code V. Law of obligations. General part (Sections 1721-2054). 1st. edition.* Praha: C. H. Beck, 2014, p. 475; MELZER, F. In: F. Melzer et al., *Občanský zákoník: velký komentář. Svazek III. § 419- 654 (Civil Code: Large Commentary. Volume III. Sections 419- 654).* Praha: Leges, 2015, p. 572; BERAN, V. In: J. Petrov et al. *Občanský zákoník. Komentář. (Civil Code. Commentary).* 2nd edition. Praha: C. H. Beck, 2019, p. 614.

[7] Case C-243/08 *Pannon GSM Zrt.v. Erzsébet Sustikné Győrfi*, ECLI:EU:C:2009:350, para. 32.

[8] PELIKÁN, R., PELIKÁNOVÁ, I. In: J. Švestka et al. *Občanský zákoník. Komentář. V. sv. (Civil Code. Commentary. V. volume).* Praha: Wolters Kluwer, 2014, p. 198; ONDREJOVÁ, D. *Porušení závazkového práva jako nekalá*

to incline towards nullity too, although it is still an isolated decision.[9] The differences in these views are of limited practical significance in terms of the content of this article. It is clear that the term has no effect.

3. IMPACT ON THE ENTIRE CONTRACT

In accordance with the above-mentioned Article 6 (1) UCTD, the severability of the unfair term from the rest of the contract applies as a principal rule. The purpose is to maintain the benefits of the contract for the weaker party, here the consumer. The nullity of the entire contract would not generally be in favour of the consumer.[10]

In Germany, Article 6 (1) UCTD is implemented in Section 306 (1) BGB, according to which the unfairness of a term shall not, in principle, affect the effectiveness of the contract as a whole. Pursuant to Article 385[1] (2) KC, the contract is binding on the parties even without an unfair term in Poland. In Austria, it is inferred from Section 878 (sentence 2) ABGB that the invalidity of a term shall not, as a general rule, affect the rest of the contract.[11] In the Czech legislation, Section 1815 CCC establishes that only the unfair term is not taken into account. As a rule, the unfair term shall not apply, without prejudice to the binding nature of the rest of the contract.

However, this does not provide an answer to the question in which specific cases the unfairness of a term results in the nullity of the entire contract. In Germany, in connection with Section 306 (1) BGB, it is inferred from Article 6 (1) UCTD that it concerns the cases where it will not be possible to fill the gap in the contract. In particular, it concerns a situation where more terms, are unfair and it is not a contractual type regulated in the law by supplementary provisions.[12] Moreover, under Section 306 (2) and (3) BGB, the unfair nature of one term may lead to the ineffectiveness of the entire contract if such a change in the content of the obligation, even when determined by statutory provisions, would lead to disproportionate toughness for the party.[13]

A similar problem has been addressed to some extent in Poland, and it was the relationship of Article 58 (3) KC to Article 385[1] (2) KC. Some authors previously inferred an

obchodní praktika nebo nekalá soutěž (Breach of the obligations law as unfair business or unfair competition). Praha: C. H. Beck, 2016, p. 128; VONDRÁČEK, O. In: J. Petrov et al. *Občanský zákoník. Komentář. (Civil Code. Commentary)*. pp. 1912 and 1920.

[9] Nejvyšší soud (hereinafter "NS"), 25 July 2018, file no. 26 Cdo 2666/2017. In the previous judgement of the NS of 10 April 2018, file no. 33 Cdo 2317/2017, the NS concluded that the term has no legal relevance (the court did not mention invalidity).

[10] Case C-482/13, C-484/13, C-485/13 and C 487/13 *Unicaja Banco and Caixabank*, ECLI:EU:C:2015:21, para. 33; Case C-26/13 *Kásler Árpád, Káslerné Rábai Hajnalka v. OTP Jelzálogbank Zrt.*, ECLI:EU:C:2014:282, para. 82 et seq.

[11] GRAF, G. In: A. Kletečka – M. Schauer. *ABGB-ON[1.05]*. Wien: Manz, 2019, § 879, Rn. 297.

[12] BASEDOW, J. In: W. Krüger (eds.) *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2*. 8th edition. München: C. H. Beck, 2019, § 306, Rn. 12.

[13] However, this provision is considered in the literature to be in breach of Article 6 (1) UCTD when the provision preserves the contract in a broader scope and not necessarily to protect the consumer SCHMIDT, H. In: P. Ulmer. *AGB-Recht. Kommentar zu den §§ 305-310 BGB und zum UKlaG*. 12th edition. Köln: Otto Schmidt, 2016, § 306, Rn. 4d.

analogous application of Article 58 (3) KC[14] and assessed whether the parties would have concluded a contract at all without the term in question. It was sufficient for the invalidity of the entire contract that the parties would not have concluded the contract without the given term. Nevertheless, for example, the unfairness of a term regarding the method of calculating an instalment (currency clause) did not invalidate the entire contract.[15] An approach conforming to Article 6 (1) UCTD now appears to prevail, both in the literature and in the case-law, with Article 385[1] (2) KC being seen as a special provision to Article 58 (3) KC. Thus, the hypothetical will of the parties is not examined.[16] Nevertheless, there are cases in case law where, for example, the courts apply other contractual terms by analogy, provided that it corresponds to the will of the parties.[17]

In the Czech Republic it follows from the explanatory memorandum that the provisions on partial invalidity (Section 576 CCC) should not apply.[18] However, if the contract cannot be performed without such a term, for example due to the uncertainty of performance, the entire contract shall be non-existent (Section 553 CCC).

A: Reasons for the impact on the entire contract

The article 6 (1) UCTD does not itself lay down the criteria governing the possibility of a contract continuing in existence without the unfair terms, but rather leaves it to the national legal order to determine those criteria in a manner consistent with EU law.[19] However the CJEU gradually set certain limits. The criteria for assessing whether a contract may continue to exist without the given term, the severability of such a term, is in principle objective.[20] It is clear from the case law of the CJEU that the criteria for preserving the contract cannot be the mere advantage or disadvantage of preserving the contract as a whole for the consumer, the attitude of the consumer. The termination of the obligation may even be detrimental to consumers. Nevertheless, the consumer is given the opportunity to agree to the unfair term remaining valid.[21]

The objective approach corresponding to the requirement of preserving the legal certainty of economic activity is emphasized.[22] However, given the nature of minimum har-

[14] Under Article 58 (3) KC, if the invalidity affects only part of the legal act, the remainder of the act shall remain valid, unless the circumstances of the case show that the act would not have taken place without such an invalid part.

[15] Sąd Apelacyjny w Warszawie, 18 September 2013, file no. VI ACa 1600/12.

[16] MIKŁASZEWICZ, P. In: K. Osajda et al. *Prawo konsumenckie. Komentarz. Tom VII.* p. 38; Sąd Najwyższy (hereinafter „SN"), 9 May 2019, file no. I CSK 242/18.

[17] SN, 14 July 2017, file no. II CSK 803/16. The decision is criticised from a number of aspects in OSAJDA, K. et al. *Prawo konsumenckie. Komentarz. Tom VII.* C. H. Beck, 2019, p. 38 and 39.

[18] Parliamentary Press 362/0 (6th term, 2010-2013), pp. 685 and 686. In: *psp.cz* [online]. [2020-08-01]. Available at: <www.psp.cz>.

[19] Case C-19/20 *I. W., R. W. v. Bank BPH S. A.*, ECLI:EU:C:2021:341, para. 84.

[20] Case C-397/11 *Erika Jőrös v Aegon Magyarország Hitel Zrt.*, ECLI:EU:C:2013:340, para. 48; Case C-70/17, C-179/17 *Abanca Corporación Bancaria SA and Bankia SA v Alberto García Salamanca Santos and Others*, para. 60.

[21] Case C-260/18 *Kamil Dziubak and Justyna Dziubak v. Raiffeisen Bank International AG*, ECLI:EU:C:2019:819, para. 68.

[22] Case C-453/10 *Jana Pereničová and Vladislav Perenič in SOS financ spol. s r. o.*, ECLI:EU:C:2012:144, para. 31 et seq.

monization, it is acknowledged that regulation in a Member State may do more to protect consumers.[23] In addition, the CJEU itself mentions in its case law the criterion of consumer benefit as an aspect for preserving a contract in connection with the application of supplementary regulation.[24]

Legal certainty of economic activity means the trust in preserving the contractual relations. The regulation of unfair terms is not intended to help the consumer to enjoy a more favourable legal position than the position normally accorded to two equivalent contractors in the course of trade. It is not to remove the consumer's responsibility for assessing the advantages or disadvantages of the contract. The nullity of the entire contract may therefore be considered if, without the given term, the contract would lose its meaning for both of the parties. Thus, for example, in cases where it did not take place without the term in question, because the purpose or legal nature of the contract would no longer be the same.[25] The impact on the entire contract is not a question of whether, without such a term, one of the parties would not have concluded the contract ex post.[26]

The CJEU admitted that the nature of the main subject-matter of the contract may be such an objective criterion.[27] This may occur, for example, as a result of the unfairness of indexation terms to a foreign currency, while the interest rate is directly linked to the interbank rate of this currency. Annulling such terms would lead not only to the removal of the indexing mechanism and the exchange difference but also, indirectly, to the disappearance of the exchange rate risk. Terms relating to the exchange rate risk may define the main subject matter of a loan contract.[28] Thus it is not contrary to Article 6 (1) UCTD for a court to conclude, in accordance with national law, that a contract cannot continue to exist without such an unfair indexation term to foreign currency.[29] However, the clause setting out the buying and selling rates of a foreign currency in a loan agreement indexed to a foreign currency as such does not define the main subject matter of the contract.[30]

We may conclude, that respect for the nature and purpose of the legal act precludes from making the legal act gratuitous as regards to the main subject-matter of the contract. The unfairness of the price term should not lead to the purchase contract being a contract of donation, a credit contract, loan for consumption, or an innominate contract. The fact that one party would welcome such a performance shall not change this.

However, such an assessment under the national law is affected by the CJEU in another way too. In fact, there is only a limited space for the application of traditional national law. National law relies very often on the application of supplementary rules or a supplemen-

[23] Case C-453/10 *Jana Pereničová and Vladislav Perenič in SOS financ spol. s r. o.,* para. 34.
[24] Case C-70/17, C-179/17 *Abanca Corporación Bancaria SA and Bankia SA v Alberto García Salamanca Santos and Others, ECLI*:EU:C:2019:250, para. 64.
[25] Opinion of the Attorney-General Trstenjak in Case C-453/10 *Jana Pereničová and Vladislav Perenič in SOS financ spol. s r. o.*, ECLI:EU:C:2011:788, para. 52 et seq.
[26] Opinion of the Attorney-General Tizzano in Case C-302/04 *Ynos kft proti Jánosi Vargovi,* ECLI:EU:C:2005:576 (judgement of 10 January 2006), para. 79.
[27] Case C-38/17 *GT v HS,* ECLI:EU:C:2019:461, para. 43.
[28] Case C-118/17 *Zsuzsanna Dunai v. ERSTE Bank Hungary Zrt.*, ECLI:EU:C:2019:207, para 48 and 52.
[29] Case C-260/18 *Kamil Dziubak and Justyna Dziubak v. Raiffeisen Bank International AG,* para. 44 and 45. Similarly Case C-19/20 *I. W., R. W. v. Bank BPH S. A.*, para. 85.
[30] Case C-212/20 *M.P., B.P. v. 'A.' prowadzący działalność za pośrednictwem 'A.' S.A.* ECLI:EU:C:2021:934, para. 37.

tary interpretation. The entire contract cannot be affected by the unfair term when the rest of the contract can continue in existence (objective criterium). This may be the case when the gap can easily be filled, for example by supplementary rules.[31] However, since the CJEU allows a gap in the contract to be filled only when the contract cannot be performed without the unfair term,[32] it is clear that the existence of a supplementary provision cannot be the only criterion when examining the impact of the unfair term on the entire contract. This logic of the CJEU decisions seems to be different to the traditional understanding of partial invalidity and use of supplementary rules in the compared national laws. Provided that the contractual term on place of performance is unfair, it cannot be derived due to supplementary regulation, that the contract as whole is not affected (e.g. it can be performed at the place set by supplementary rules). On the contrary, it should be concluded that the contract as a whole is affected, and only then to settle whether preconditions for rescuing the contract are met.

The difference to national law is in subjective criterium too. Deciding on the partial invalidity the hypothetic will of parties ex ante to have the contract without the invalid term is taken in account under national laws.[33] However, the protective purpose of a given provision prevents taking the will of the entrepreneur into account, whether or not he would have concluded a contract without the given term, for exactly the same reasons as prohibiting a reduction preserving the validity of the term.[34] The CJEU points out the objective character of decisive criteria. There is no room for the hypothetic will of the parties.

B. Relation to other grounds for invalidity

The unfairness of the term in the consumer contract may overlap with other grounds for invalidity or non-existence, such as the breach of good morals or uncertainty. If there are some specific consequences of the unfair term due to consumer protection, it is necessary to ask to what extent this protection can be denied by applying some other grounds for invalidity or non-existence of the term.

This is an issue often addressed in Germany in connection with the interpretation of Section 306 (1) BGB.[35] Even when determining the invalidity of the term for another reason (in particular for a conflict with good morals under Section 138 BGB), the protective purpose of Section 306 (1) BGB shall be upheld. The protective purpose would be completely denied when, due to the ineffectiveness of a particular term (or several terms), the entire contract was found to be invalid for the conflict with good morals. An entrepreneur who incorporates a number of unfair terms into a contract would be relieved of their obliga-

[31] BASEDOW, J. In: W. Krüger (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2*. § 306, Rn. 12.
[32] Case C-26/13 *Kásler Árpád, Káslerné Rábai Hajnalka v. OTP Jelzálogbank Zrt.*, para. 82 and 83; Case C-118/17 *Zsuzsanna Dunai v. ERSTE Bank Hungary* para 55.
[33] BASEDOW, J. In: W. Krüger (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2*. § 306, Rn. 11.
[34] GRAF, G. In: A. Kletečka – M. Schauer. *ABGB-ON[1.05]*. § 878, Rn. 14; MELZER, F. In: F. Melzer et al. *Občanský zákoník: velký komentář. Svazek III. § 419- 654 (Civil Code: Large Commentary. Volume III. Sections 419- 654)*, pp. 705–706; MIKŁASZEWICZ, P. In: K. Osajda et al. *Prawo konsumenckie. Komentarz. Tom VII.* p. 38.
[35] BASEDOW, J. In: W. Krüger (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2*. § 306, Rn. 11 and 12.

tions with regard to breaches of good morals, while an entrepreneur who has used a single unfair term would not.[36]

A similar conclusion can be reached within Czech legal regulations. There is nothing to prevent the application of general grounds for invalidity or non-existence. However, it is necessary to respect the protective purpose of Section 1815 CCC as regards to the grounds for invalidity, which would at the same time establish the unfair nature of the term. When considering partial or complete invalidity (Section 576), with regard to the purpose of invalidity, it is necessary to limit the examination of the entrepreneur's will to preserve the legal act due to the deterrent effect of the regulations of unfair terms.

C. Stipulated impact on the entire contract

Consumer contracts often regulate the impact of the unfair nature of a certain term on the entire contract. They may contain a term whereby the unfairness of a particular term fails to affect the rest of the contract or, conversely, affects the contract automatically. At this point, it is therefore necessary to consider what place the will of the parties has in examining the impact of the unfairness.

The clause that the non-existence of the term shall not affect the entire contract (*Erhaltungsklauseln)*, is accepted as admissible, since it only confirms the general rule.[37]

On the contrary, the clause excluding severability of a non-existent term constitutes a bigger problem. With regard to the mandatory provision in Section 306 (1) and (3) BGB, there is a consensus in the academic literature in Germany that this protection may not be waived in advance by an agreement that an ineffective term leads to the ineffectiveness of the entire contract.[38] This does not preclude an individual agreement on the ineffectiveness of the entire contract.[39]

In EU law the requirement of severability of an unfair term in Article 6 (1) UCTD may be perceived as a provision for the protection of the consumer. By depriving the benefit of a contractual obligation in advance in the event of any unfair term, such a clause deviates from the legislation to protect the consumer to their detriment, and thus is invalid regardless whether or not it is an individual term.[40]

On the contrary, the CJEU admitted gradually, that a consumer may waive the right to rely on the unfairness of a contractual term in the context of a novation agreement. The UCTD does not go as far as making the system of protection against the use of unfair terms by suppliers or sellers, a system which it introduced for the benefit of consumers, manda-

[36] SCHMIDT, H. In: P. Ulmer. *AGB-Recht. Kommentar zu den §§ 305-310 BGB und zum UKlaG.* § 306, Rn. 22.

[37] MÄSCH, G. In: M. Stoffels. *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 2. Recht der Schuldverhältnisse. Sections 305-310.* Köln: Otto Schmidt – de Gruyter, 2019, Section 306, Rn. 53.

[38] FUCHS, A. In: P. Ulmer. *AGB-Recht. Kommentar zu den §§ 305-310 BGB und zum UKlaG.* Köln: Otto Schmidt, 2016, p. 529.

[39] FUCHS, A. In: P. Ulmer. *AGB-Recht. Kommentar zu den §§ 305-310 BGB und zum UKlaG.* p. 530.; BASEDOW, J. In: W. Krüger (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2.* § 306, Rn. 13.

[40] Commission notice – Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (2019/C 323/04), p. 38.

tory.[41] Provided the waiver is the result of free and informed consent, the consumer may waive the effects that would result from that term being declared to be unfair too. The free and informed consent requires that the consumer was aware of the non-binding nature of that term and of the consequences resulting from it.[42]

In general, the consumer has the possibility to agree at any time on the termination of the obligation without any reason. The parties have the possibility to regulate other reasons for the termination of the obligation in advance. In such cases, it will be necessary to assess the unfairness of the term, such as with regard to transparency, whether it is an individual term under art. 3 (2) UCTD or not.[43]

4. RULES USED INSTEAD OF UNFAIR TERMS

Under the compared national law, only if the entire contract is not affected by the unfairness of the term, it is necessary to examine which rule, and whether any at all, shall apply instead of the unfair term. The use of moderation, the application of supplementary provisions, the rule stipulated in the agreement of the parties or the supplementary interpretation of the court may be used. It has been mentioned above, that the approach concerning unfair terms in consumer contracts and Art. 6 (1) of the UCTD is different.

A. Amendment of the term to a fair level

Private law seeks to respect the will of the parties in the event of defects in the legal act. The concept of voidability is preferred. Legal acts are interpreted in favour of preserving their validity. There may be possibilities how to moderate invalid terms, e. g. a contractual penalty.

If the term is unfair within the meaning of Article 3 (1) UCTD, the court cannot supplement the will of the parties and amend the term of the contract.[44] If a term on a contractual penalty, interest on a late payment or the amount of performance is found to be unfair, the court cannot only moderate the amount of the contractual penalty, interest on the late payment, or the scope of the performance. The prohibition of reduction preserving validity shall prevail in both individual and abstract control. It is clear that the prohibition of a specific term in abstract control, due to its unfair nature, may subsequently in further use be removed in other cases by limiting the scope to a fair level.

Article 7 (1) UCTD obliges the Member States to ensure fair and effective means in the interests of consumers and competitors that prevent the continued use of unfair terms in the contracts concluded by sellers or providers with the consumers. Allowing such moderation would make it more difficult to fulfil this obligation. Moderation of the unfair term to a fair level is prohibited. Reductions preserving the validity of the term lead to the fact

[41] Case C-260/18 *Kamil Dziubak and Justyna Dziubak v. Raiffeisen Bank International AG*, para. 55 and 56.
[42] Case C-452/18 *XZ v Ibercaja Banco,* ECLI:EU:C:2020:61, para. 28.
[43] Case C-452/18 *XZ v Ibercaja Banco,* para 38.
[44] Case C-618/10 *Banco Español de Crédito SA v. Joaquín Calderón Camino,* ECLI:EU:C:2012:349. Similarly, also Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v. Jahani BV*, ECLI:EC:C:2013:341.

that the entrepreneur does not bear any risk in the case that their defective behaviour is detected. The entrepreneur is therefore in no way motivated to refrain from breaching the law, because at worst, the term will be moderated to a fair level. Breaching the law, which is the unfair term here, could only bring benefits thereto.

In spite of the fact there is no statutory explicit expression in the compared states, the idea that the reduction preserving the validity is prohibited in this case is followed.[45] However, older decisions based on reduction preserving the validity of the clause and trying to escape from the effects to the entire contract can be found. Actually, the reduction was achieved by the application of the general principles of social life, customs and the nature of the obligation, or the hypothetical will of the parties.[46] In fact, it shows what *Basedow* points out, one is to look for the differences between a validity-preserving reduction and a validity-preserving interpretation with a magnifying glass.[47]

The conclusion on the prohibition of validity-preserving reduction is relatively clear, nevertheless in practice this may not be a simple issue. It is necessary to distinguish when it is already a prohibited reduction preserving validity and when it is only a strict implementation of the unfairness test on a particular term. In essence, it is also necessary to examine the severability of a certain unfair part of the term from the rest of the terms. For example, it is clear that if the term contains several ways of terminating an obligation, the unfair nature of one of these options shall not affect the other possibility of terminating the obligation.

The judgement of the CJEU *Abanca Corporación Bancaria* emphasizes that the UCTD prevents a specific unfair clause (on accelerated repayment) from being maintained to become fair, where the removal of unfair elements would be tantamount to revising the content of that clause by altering its substance.[48] The bank margin as the element of the indexation term in the mortgage loan would be also severable from the rest of such term only if it is a contractual obligation distinct from the other contractual terms, capable of being the subject of an individual examination of its unfairness.[49] On the other hand, the CJEU indirectly admitted the severability of the minimum interest rate clause from the rest of the terms regarding interest.[50] The clause on default interests is also considered separately from the clause on ordinary interests, even if it has a form of the increase in these interests.[51]

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[45] BASEDOW, J. In: W. Krüger (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2.* § 306, Rn. 17; GRAF, G. In: A. Kletečka – M. Schauer. *ABGB-ON1.05*. § 879, Rn. 300; MIKŁASZEWICZ, P. In: K. Osajda et al. *Prawo konsumenckie. Komentarz. Tom VII.* p. 37; HULMÁK, M. In: M. Hulmák et al. *Občanský zákoník V. Závazkové právo. Obecná část (§ 1721–2054). (Civil Code V. Law of obligations. General part (Sections 1721-2054)*, p. 475.

[46] GREBIENIOW, A., OSAJDA, K. *Kredyty walutowe. Zagadnienia węzłowe* (*FX Loans. Key Issues*). Biuro Studiów i Analiz Sądu Najwyższego, Warszawa: Dom Wydawniczy ELIPSA, 2019, p. 36.

[47] BASEDOW, J. In: W. Krüger (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2.* § 306, Rn. 21.

[48] Case C-70/17, C-179/17 *Abanca Corporación Bancaria SA and Bankia SA v Alberto García Salamanca Santos and Others*, ECLI:EC:C:2018:724, para. 64.

[49] Case C-19/20 *I. W., R. W. v. Bank BPH S. A.*, para. 71.

[50] Case C-154/15, C-307/15 and C-308/15 *Francisco Gutiérrez Naranjo and Ana María Palacios Martínez v. Cajasur Banco and Banco Bilbao Vizcaya Argentaria SA (BBVA)*, ECLI:EU:C:2016:980 (CJEU did not address the issue directly but Spanish court proceeded in this respect prior to referring the preliminary question).

[51] Case C-96/16 and C-94/17 *Banco Santander SA contre Mahamadou Demba et Mercedes Godoy Bonet and Rafael Ramón Escobedo Cortés v. Banco de Sabadell SA*. ECLI:EU:C:2018:643, para. 76 and 77.

National courts found severable the unfair clause on interest changes from the clause on interest rates,[52] the unfair term governing the further possibility of assignment by the debt collector for the purpose of its refinancing from the consent to the assignment of a dentist's claim against the patient to the debt collector.[53] On the other hand, the term on the obligation to secure the rights arising from defects to a certain extent was not severable from the ineffective term on the obligation to do so in the form of a guarantee associated with the waiver of certain rights.[54]

In essence, it is only a matter of shifting the consideration of the effect of an unfair term from the level of the contract to the level of the contractual term, the conclusions should be similar. Where a contract term contains more stipulations that can be separated from each other in such a way that one of them can be deleted, while the remaining stipulations are still clear and comprehensible and can be assessed on their own merits.[55] Finding the unfair term severable from the other contractual terms does not contravene the prohibition of validity-preserving reduction.[56]

From a legal-political point of view, one may have some reservations concerning the general prohibition of validity preserving reduction. We can dispute the extent to which private law is supposed to have a dissuasive and, to a large extent, punitive effect. Its purpose should be rather to restore the balance, while the dissuasive and punitive effects pertain more to public law regulations. This is also reflected in the fact that the regulation of unfair terms in a particular case fails to take into account the fairness of the consequence, such as the extent to which the term is unfair, the intention of the entrepreneur. The prohibition of a validity preserving reduction is certainly appropriate in cases where the unfair nature of the term is obvious. In many cases, however, this is not the case and the finding of unfairness is based on a complicated test with a number of variables.[57]

It should also be borne in mind that a number of terms may be applicable both regarding the consumer and the entrepreneur, such as contractual penalty arrangements, price modification arrangements. The prohibition of validity preserving reduction is manifested as consumer protection, in the opposite direction it can occur according to general rules. Therefore, there may be a situation where the consumer will not be obliged to pay any contractual penalty, while the entrepreneur will pay a reduced penalty or the original one.

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[52] SN, 14 May 2015, file no. II CSK 768/14.

[53] BGH, 10 October 2013, file no. III ZR 325/12.

[54] BGH, 28 July 2011, file no. VII ZR 207/09. Critically to this decision MÄSCH, G. In: M. Stoffels. *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 2. Recht der Schuldverhältnisse. Sections 305-310.* Section 306, Rn. 22.

[55] Commission notice — Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (2019/C 323/04), p. 40. See similar conclusions in F. de Elizade. *Partial Invalidity for Unfair Terms? CJEU in Abanca – C-70 & 179/17.* 4th edition. EuCML, 2019, p. 147.

[56] The problem is rather that validity preserving reduction is interpreted sometimes too broadly as covering also severability of the unfair term or the application of supplementary rules – see GREBIENIOW, A., OSAJDA, K. *Kredyty walutowe. Zagadnienia węzłowe* (*FX Loans. Key Issues*), p. 38ff.

[57] Similarly, BASEDOW, J. In: W. Krüger (eds.) *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2.* § 306, Rn. 18 and 19.

B. Application of supplementary provisions

The supplementary regulation is the principal means for filling the gap in the contract as a result of unfairness of a term. This option is respected also by the case-law of the CJEU. If the contract concluded between the entrepreneur and the consumer cannot continue to exist after the removal of the unfair term, the invalidity of such a term may be remedied in accordance with national law by replacing it with supplementary legislation.[58]

1. What is a supplementary provision

The CJEU understands supplementary legislation broadly. The national court has the option to substitute the unfair term by a provision of national law which is supplementary in its nature (*dispositive Vorschrift*) or one which is applicable where the parties so agree.[59] The concept was expanded in the judgement *Abanca Corporación Bancaria*, where the CJEU admitted replacing the unfair term of accelerated repayment with the new wording of legislation which the parties would have to negotiate and which would not be applicable without such negotiation.[60]

On the other hand the CJEU rejects filling gaps by applying the mere principles of law. It was a provision of a general nature which provided that the legal act has, in addition to the effects expressed therein, also effects that result, inter alia, from the principle of fairness or usages. Such provisions shall not be the supplementary provisions nor the provisions that are to be applied in the case of agreement between the parties.[61]

The CJEU thus rejected the creative adaptation of the content of the contract.[62] Therefore, the filling of a gap in the contract by an analogous application of the legal regulations does not seem to succeed either.[63] However, statutory analogy (*analogia legis*) is an usual way how to get supplementary provisions. Legislators often rely on analogy as the technique allowing them not to repeat the same for essentially similar situations. Indeed, they even prescribe it. We have to distinguish between creative adaption and mere identification of otherwise applicable rules due to the statutory analogy.[64] Once the statutory provision would have been applicable in the absence of the contractual term, it is a supplementary provision regardless of the used legislative technique. If the CJEU stresses the need to protect the consumer from the particularly unfavourable consequences which the annulment of the contract concerned could cause,[65] this must be

[58] Case C-26/13 *Kásler Árpád, Káslerné Rábai Hajnalka v. OTP Jelzálogbank Zrt.*, para. 82 and 83. In the Case C-118/17 *Zsuzsanna Dunai v. ERSTE Bank Hungary Zrt.*, para 55.

[59] Case C-260/18 *Kamil Dziubak and Justyna Dziubak v. Raiffeisen Bank International AG*, para. 48.

[60] Case C-70/17, C-179/17 *Abanca Corporación Bancaria SA and Bankia SA v Alberto García Salamanca Santos and Others*, para. 64.

[61] Case C-260/18 *Kamil Dziubak and Justyna Dziubak v. Raiffeisen Bank International AG*, para. 62.

[62] Commission notice — Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (2019/C 323/04), p. 42.

[63] Decision of the SN of 14 July 2017, file no. II CSK 803/16. The decision is criticised in number of aspects in OSAJDA, K. et al. *Prawo konsumenckie. Komentarz. Tom VII.*, p. 38 and 39.

[64] MACAGNO, H. In: H. J. Ribeiro (ed.). *Systematic Approaches to Argument by Analogy.* Cham: Springer International Publishing, 2014, pp. 82 and 85.

[65] Case C-269/19 *Banca B. SA v. A.A.A*, ECLI:EU:C:2020:954, para. 43 and 44.

a case here as well. A high level of protection for the consumer must be ensured in compliance with national law.

It is clear that here the supplementary legislation means the explicit regulation which allows the filling of a gap in the contract. It makes no sense to address the supplementary regulation in the form of an absence of the rules.

In spite of the established case law of the CJEU the notion of the supplementary provision is still a little blurred. In *Kanyeba* the CJEU reiterates rules for the application of supplementary rules.[66] On the other hand the CJEU leaves only to the national law the question whether rules of tort law should be applied instead of the unfair penalty clause, because non-contractual liability falls outside the scope of the UCTD.[67] It seems that tort law is not considered as a supplementary rule.[68] At some other place *Leone* speaks even about general law on damages.[69] Therefore this law may be applied instead of the unfair term without other conditions. Nevertheless, still there is no apparent grounds for such an exclusion. It is clear that under Art. 1 (1) UCTD we shall search for unfair terms in consumer contracts, but it says nothing about the scope of supplementary rules. Even a consumer contract may concern tort law or the general law on damages.

2. Preconditions for use of a supplementary provision

The use of the supplementary provision requires two conditions to be met: (a) a contract without the unfair term concerned cannot continue to exist, and (b) annulment of the contract may expose the consumer to the particularly unfavourable consequences, which means that the dissuasive character arising from the annulment of the contract may be jeopardised.[70]

The issue of when a contract cannot continue to exist without the unfair term has been already addressed. Here, the precondition that the consumer would be exposed to particularly unfavourable consequences in the case of invalidity of the entire contract shall also be cumulatively fulfilled. Particularly unfavourable consequences shall be assessed in the light of the circumstances existing or foreseeable at the time the dispute arose. For the purposes of their assessment, the intention of the consumer expressed in that regard is a decisive factor.[71]

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[66] Case C-349/18 to C-351/18 *Nationale Maatschappij der Belgische Spoorwegen (NMBS) v Mbutuku Kanyeba and Others*, ECLI:EU:C:2019:936, para. 74.

[67] Case C-349/18 to C-351/18 *Nationale Maatschappij der Belgische Spoorwegen (NMBS) v Mbutuku Kanyeba and Others*, ECLI:EU:C:2019:936, para. 72 and 73.

[68] LEONE, C. CJEU in Kanyeba: "contract of transport" and the scope of Directive 93/13. In: *Recent developments in European Consumer Law* [online]. November 2019 [2022-01-19]. Available at: <http://recent-ecl.blogspot.com/2019/11/cjeu-in-kanyeba-contract-of-transport.html>.

[69] LEONE, C. Unfair terms and supplementary rules after Dexia (Joined Cases C-229/19 and C-289/19): rolling a dice? In: *Recent developments in European Consumer Law* [online]. February 2021 [2022-01-19]. Available at: <https://recent-ecl.blogspot.com/2021/02/unfair-terms-and-supplementary-rules.html>.

[70] Case C-26/13 *Kásler Árpád, Káslerné Rábai Hajnalka v. OTP Jelzálogbank Zrt.*, para. 82 and 83. In the Case C-118/17 *Zsuzsanna Dunai v. ERSTE Bank Hungary Zrt.*, para 55.

[71] Case C-260/18 *Kamil Dziubak and Justyna Dziubak v. Raiffeisen Bank International AG*, para. 50 and 56.

Replacing the unfair clause with a supplementary provision of national law is consistent with the objective of Article 6 (1) UCTD, as according to the settled case-law this provision seeks to replace the formal balance established by the contract between the rights and obligations of the parties, the real balance re-establishing equality between them.[72]

However, the CJEU defines the scope for the application of the supplementary regulation narrowly and prefers the preventive and dissuasive effects of the unfair nature of the terms. Suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those suppliers.[73] Provided that the entrepreneur has abused their position and despised the supplementary regulation, they have no possibility to invoke it later except in the above-mentioned exceptional cases. The opposite procedure, in its essence, leads to a reduction that preserves validity.

3. Traditional understanding in the compared states

The traditional understanding of supplementary rules apparently support wider use. Not only as an exception when the unfair term has an impact on the entire contract and when it has particularly unfavourable consequences for the consumers. Supplementary rules are defined as statutory rules that parties may deviate from.[74] Therefore, if the precondition for the application of the supplementary rule is the fact that there is no other arrangement of the parties, then the absence of such a term due to the unfairness or its invalidity regularly leads to the application of the rule.[75]

Filling the gaps in the contract as a result of the unfair term by application of the supplementary legal regulation is also expressly allowed by the German legislation in Section 306 (2) BGB. It is also inferred in the Austrian practice[76] and literature.[77] Polish literature[78] and case law[79] follow the same procedure, as does the Czech law.[80]

The stricter requirements of the CJEU on the application of supplementary provisions are not always taken into account. While in Poland or in the Czech Republic, the restrictive

[72] Case C-26/13 *Kásler Árpád, Káslerné Rábai Hajnalka v. OTP Jelzálogbank Zrt.*, para. 82; Case C-453/10 *Jana Pereničová and Vladislav Perenič in SOS financ spol. s r. o.*, para. 31; as well as Case C-618/10 *Banco Español de Crédito SA v. Joaquín Calderón Camino*, para. 40.

[73] Case C-229/19, C-289/19 *Dexia Nederland BV v XXX and Z.*, ECLI:EU:C:2021:68, para. 64.

[74] BYDLINSKY, P. *Bürgerliches Recht. Allgemeiner Teil. Band 1.* 7th edition. Wien: Verlag Österreich GmbH, 2016, p. 19; MELZER, F., TÉGL, P. In: F. Melzer et al., *Občanský zákoník: velký komentář. Svazek I.* § *1-117 (Civil Code: Large Commentary. Volume I. Sections 1-117)*. Praha: Leges, 2013, p. 46.

[75] COESTER, M. In: R. M. Beckmann et al. *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Eckpfeiler des Zivilrechts.* Berlin: De Gruyter, 2008, p. 160 (the same SCHIEMANN, G., p. 63).

[76] OGH. 28 November 2012, file no. 7Ob93/12w.

[77] KREJCI, H. In: P. Rummel – M. Lukas. *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. Teilband §§ 859-916 ABGB. Vertragsrecht.* Wien: Manz, 2014, § 879, Rn 528.

[78] MIKŁASZEWICZ, P. In: K. Osajda et al. *Prawo konsumenckie. Komentarz. Tom VII.* p. 37; POPIOŁEK, W. In: K. Pietrzykowski et al. *Kodeks Cywilny. Tom I. Komentarz.* p. 1300.

[79] SN of 14 July 2017, file no. II CSK 803/16.

[80] NS, 25 July 2018, file no. 26 Cdo 2666/2017.

approach in the case law of the CJEU is partially respected,[81] in Germany, with regard to the traditional interpretation of Section 306 (2) BGB, different views may be encountered. According to *Basedow*, the application of the supplementary provisions under Section 306 (2) BGB is fully in compliance with the UCTD.[82] *Schmidt* came to the same conclusion, referring to the nature of minimum harmonization, when, in his view, Section 306 (2) BGB does not harm consumers.[83] *Mäsch* also defends the current approach, objecting the individual peculiarities of the cases discussed by the CJEU with regard to the Spanish legislation and the premature nature of the categorical conclusions in view of the request for a preliminary ruling made at that time.[84]

However, even in the German academic literature, there is already a call for the revision of the traditional approach and the taking into account of the case law of the CJEU, either in the form of an amendment to Section 306 (2) BGB[85] or a teleological reduction.[86] In the update *Mäsch* considers the most recent approach of the CJEU as extremely questionable. Eventually, he accepts teleological reduction of Section 306 (2) BGB too. A gap filling can be permissible if the statutory law provides objectively more favorable provisions for the consumer.[87]

4. Critical remarks on the CJEU approach

The above-mentioned approach of the CJEU is objected to as being too stringent, as the purpose of the regulation of the unfair terms shall be the material balance between both of the parties and not a unilateral advantage for the consumer.[88]

At the same time, it is clear that the above-mentioned restriction on the use of the supplementary rules in some cases of unfair terms lacks the purpose. If there is an unfair term by which the consumer has been deprived of the right arising from the supplementary regulation, then this supplementary rule should apply, although the contract as a whole is not affected. Otherwise, the unfair term has effect, for example the consumer would not be able to terminate the obligation early.[89]

The judge would also regularly conclude without further considerations that the unfair limitation of the entrepreneur's contractual liability does not have effect on the entire contract, but the statutory level of such a liability is applied. On the other hand, provided the term on consumer's contractual liability is unfair, the judge must

[81] MIKŁASZEWICZ, P. In: K. Osajda et al. *Prawo konsumenckie. Komentarz. Tom VII*. p. 37.;VONDRÁČEK, O. In: J. Petrov et al. *Občanský zákoník. Komentář (Civil Code. Commentary)*. p. 1922.

[82] BASEDOW, J. In: W. Krüger (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2*. § 306, Rn. 5.

[83] SCHMIDT, H. In: P. Ulmer. *AGB-Recht. Kommentar zu den §§ 305-310 BGB und zum UKlaG*. § 306, Rn. 4c and 4d.

[84] MÄSCH, G. In: M. Stoffels. *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 2. Recht der Schuldverhältnisse. Sections 305-310*. Section 306, Rn. 10.

[85] GRAF, F. AGB-Recht im zweiten Halbjahr 2018. *Neue Juristische Wochenschrift*. 2019, Vol. 72, No. 1, p. 275.

[86] GSELL, B. Grenzen des Rückgriffs auf dispositives Gesetzesrecht zur Ersetzung unwirksamer Klauseln in Verbrauchervertägen. *JuristenZeitung*. 2019, Vol. 71, No. 15-16, p. 757.

[87] MÄSCH, G. In: M. Stoffels. *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 2. Recht der Schuldverhältnisse. Sections 305-310*. Section 306, Rn. 10a 4.

[88] GSELL, B., Ibid., p. 756.

[89] GSELL, B., Ibid., p. 751, 753.

wonder why the consumer should be exempted to pay intentionally caused contractual damages.

The used legislative technique for regulation of unfairness may make some regulation even for one side mandatory, e. g. by a black list of unfair terms in consumer contracts. There is no apparent justification to different consequences of unfairness - to always allow application of mandatory rules without further conditions, and limited use of otherwise applicable supplementary rules in case of overreaching deviations, e. g. difference between deviation from mandatory or supplementary default interests. The consequences should be the same.

Moreover, we may find some cases where the CJEU was more benevolent to applications of supplementary provisions. The court admitted without further preconditions the application of rules on allocation of costs incurred by mortgage contracting instead of the unfair term dealing with the same issue.[90] It could be however interpreted also in the way that these rules are not supplementary.[91]

Nevertheless recently the CJEU confirmed the above mentioned stricter approach to supplementary provisions. The unfair term dealt with the compensation scheme after the early termination of the share leasing agreement. On one hand Dutch law requires to pay damages as a result of the contract being terminated rather than continued by both parties (art. 6:277 BW), on the other hand it allows some deductions on each advance repayments (art. 7A:1576e BW). If the contract is capable of continuing existence without the unfair term on compensation, the national court cannot claim the statutory compensation provided for by a supplementary provision of national law.[92]

To some extent, these last decisions reveal the weaknesses of a strict approach to the supplementary rules. There is no clear borderline what shall be supplementary provision with a limited scope of applicability and where there are not such strict preconditions for their use. The existence of supplementary rules traditionally excludes the potential effects of the unfair term on the entire contract. Stricter conditions and consequently the non-application of the supplementary rule lacks purpose when the supplementary rule lays down consumer rights. While the above mentioned restrictions are fully understandable with regard to the validity preserving reduction, the application of statutory supplementary rules was in the compared national laws something different.[93] That may be the reason why national courts still struggle with the application of supplementary rules in compliance with the case law of the CJEU. Thus we can expect some other decisions on this issue bringing more coherent clarifications.[94]

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[90] Case C-224/19, C-259/19 *CY v Caixabank SA* (C-224/19), *LG, PK v Banco Bilbao Vizcaya Argentaria SA* (C-259/19), ECLI:EU:C:2020:578, para. 54 and 55.

[91] LEONE, C. Unfair terms and supplementary rules after Dexia (Joined Cases C-229/19 and C-289/19): rolling a dice? In: *Recent developments in European Consumer Law* [online]. 11. 2. 2021 [2022-01-19]. Available at: <https://recent-ecl.blogspot.com/2021/02/unfair-terms-and-supplementary-rules.html>.

[92] Case C-229/19, C-289/19 *Dexia Nederland BV v XXX and Z.,* para. 67.

[93] MÄSCH, G. In: M. Stoffels. *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 2. Recht der Schuldverhältnisse. Sections 305-310.* Section 306, Rn. 10.

[94] LEONE, C. Unfair terms and supplementary rules after Dexia (Joined Cases C-229/19 and C-289/19): rolling a dice? In: *Recent developments in European Consumer Law* [online]. 11. 2. 2021 [2022-01-19]. Available at: <https://recent-ecl.blogspot.com/2021/02/unfair-terms-and-supplementary-rules.html>.

C. Supplementary interpretation

In addition to the supplementary regulation, the Austrian[95] and German[96] literature offers to fill of solving the gap in the contract also by supplementary interpretation (*ergänzende Vertragsauslegung*). This corresponds to the case law, according to which the ineffectiveness of the term leads to the adjustment of the contract with regard to the supplementary provisions of the law and the hypothetical will of the parties in accordance with the principles of fairness.[97] Supplementary interpretation is possible if there was a gap in the contract which cannot be resolved by reference to the supplementary rules and the absence of a rule did not lead to a reasonable solution taking into account the typical interests of the entrepreneur and the consumer.[98] It is therefore an alternative solution to the gap in the contract (*sekundäre Ersatzordnung*).

In the Czech Republic the legislator expressly refused to adopt the rules on supplementary interpretation.[99] Notwithstanding that the idea of supplementary interpretation is acknowledged in the academic literature.[100] Also inspired by Germany, one of the tools to fill the gap in the contract is a supplementary interpretation in Poland too.[101]

The supplementary interpretation may be perceived as contrary to the prohibition of reduction that preserves the validity in the case of unfair terms, as described above. However, the supplementary interpretation should not lead to the preservation of an ineffective rule in so far as it is not unfair. There is not any prohibition of validity preserving reduction if the very part of a certain rule is assessed, linguistically and in terms of content, separately and passes the unfairness test. The unfairness of a certain rule may also be determined on the basis of objective criteria only for certain cases, such as certain types of transactions or cases of use.[102] The supplementary interpretation is intended to fill a gap in the contract due to the unfair nature of the term, thus maintaining the contract in accordance with the original will of the parties, thus replacing formal equality with material equality in accordance with the directive, taking into account the interests of both parties.[103] In Germany it is therefore inferred, whether in the case law[104] or in the literature,[105] that, although the CJEU prohibits the modification or amendment of a contract, supple-

[95] RIEDLER, A. In: M. Schwimann – G. Kodek. *ABGB, Praxiskommentar. Verbraucherrecht. Band 4*. New York: LexisNexis, 2015, p. 422; GRAF, G. In: A. Kletečka – M. Schauer. *ABGB-ON*[1.05]. § 879, Rn. 297.

[96] BASEDOW, J. In: W. Krüger (eds.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2*. § 306, Rn. 31.

[97] OGH, 14 November 2012, file no. 7Ob84/12x.

[98] MÄSCH, G. In: M. Stoffels. *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 2. Recht der Schuldverhältnisse. Sections 305-310*. Section 306, Rn. 37.

[99] Parliamentary Press 362/0 (6th term, 2010-2013), pp. 686. [cit. 1. 4. 2021]. Available at: <www.psp.cz>.

[100] MELZER, F. In: F. Melzer et al. *Občanský zákoník: velký komentář. Svazek III.* § *419 – 654 (Civil Code: Large Commentary. Volume III. Sections 419- 654).* p. 490 et seq.; SLANINA, J. et al. *Zákon o spotřebitelském úvěru. Komentář. (Act on Consumer Credit. Commentary)*. Praha: C. H. Beck, 2017, p. 401; KOTÁSEK, J. *Doplňující výklad smlouvy. (Supplementary Interpretation of the Contract)*. Brno: MUNI, 2018.

[101] GREBIENIOW, A., OSAJDA, K. *Kredyty walutowe. Zagadnienia węzłowe* (*FX Loans. Key Issues*), p. 41.

[102] FUCHS, A. In: P. Ulmer. *AGB-Recht. Kommentar zu den §§ 305-310 BGB und zum UKlaG*. p. 528.

[103] Case C-453/10 *Jana Pereničová and Vladislav Perenič in SOS financ spol. s r. o.*, para. 31.

[104] BGH, 23 January 2013, file no. VIII ZR 80/12; BGH, 6 April 2016, file no. VIII ZR 79/15.

[105] SCHMIDT, H. In: P. Ulmer. *AGB-Recht. Kommentar zu den §§ 305-310 BGB und zum UKlaG*. § 306, Rn. 4d; BASEDOW, J. In: W. Krüger (eds.) *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2*. § 306, Rn. 5.

mentary interpretation is not affected by such a prohibition. Nevertheless, there are still some doubts.[106] The clarification of the CJEU is expected on whether preconditions for supplementary rules should be applied to supplementary interpretation too.[107]

The application of supplementary interpretation is possible within the above mentioned states if the validity of the entire contract is preserved, and only some terms become ineffective. In practice, supplementary interpretation has been used in cases of unfair terms relating to price changes. In the case of continuing obligations, such as with the supply of heat, gas, energy, the unfair terms relating to the price changes may have far-reaching economic consequences for the entrepreneurs, in particular when it occurs from the very beginning. The unfair term relating to the price changes should, in principle, lead to the payment of the originally contractually agreed price. The BGH settled this problem by supplementary interpretation. The gap in the contract (absence of a suitable supplementary rule) was filled in such a way that the consumer cannot contest the price increase if they did not do that within three years of the receipt of the bill indicating the price increase. Such an increased price replaces the originally agreed price in the future, even the entrepreneur was able to terminate the obligation after the price being challenged by the consumer.[108] Within Austrian practice, it is possible to give an example of an unfair term relating to the change of interest rate. Using the supplementary interpretation, the court concluded that the parties would hypothetically link changes in the interest rate to changes in the EURIBOR rate in such a case.[109]

Unlike the German authors, we are concerned that the general use of supplementary interpretation is not in line with the current practice of the CJEU. The contract may be preserved in the event of the term being unfair only if, in accordance with national law, it can continue to exist legally without any other change.[110] If the CJEU rejects the validity of preserving reduction,[111] if it restricts the possibility of applying supplementary rules to a situation where the entire contract would otherwise be affected,[112] if it refuses to fill a gap in the contract by a general regulation referring to legal principles,[113] the preconditions for supplementary interpretation can hardly be met.

Advocate General *Kokott* expressly tried to acknowledge the possibility of supplementary interpretation in his opinion provided the gap is not possible to fill with supplementary rules or other provision opted for by the parties.[114] Nevertheless Kokott's conclusions on supplementary interpretation were not confirmed by the CJEU in its final decision.[115]

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[106] BASEDOW, J., Ibid., § 306, Rn. 5.

[107] MÄSCH, G. In: M. Stoffels. *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 2. Recht der Schuldverhältnisse. Sections 305-310*. Section 306, Rn. 10a 3.

[108] BGH, 15 April 2015, file no. VfIII ZR 59/14 (it lists all the previous decisions as well as subsequent doubts).

[109] OGH, 24 June 2003, file no. 4Ob73 / 03v.

[110] Case C-618/10 *Banco Español de Crédito SA v. Joaquín Calderón Camino*. Similarly, also Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v. Jahani BV*.

[111] E.g. Case C-118/17 *Zsuzsanna Dunai v. ERSTE Bank Hungary Zrt.*, para. 54 and 55; Case C-70/17, C-179/17 *Abanca Corporación Bancaria SA and Bankia SA v Alberto García Salamanca Santos and Others.*

[112] Case C-260/18 *Kamil Dziubak and Justyna Dziubak v. Raiffeisen Bank International AG*, para. 62.

[113] Case C-260/18 *Kamil Dziubak and Justyna Dziubak v. Raiffeisen Bank International AG.*

[114] Opinion in Case C-81/19 *NG OH v SC Banca Transilvania SA,* ECLI:EU:C:2020:217, para. 87.

[115] Case C-81/19 *NG OH v SC Banca Transilvania SA,* ECLI:EU:C:2020:532.

Moreover the CJEU refused explicitly in recent cases, that the national court could interpret the term in order to remedy its unfairness, even if that interpretation would correspond to the common intention of the parties to that contract.[116] Such strict conclusion without further distinction means, that general dissuasive effects may prevail over the will of the parties in the particular case.

On the other hand in other cases the CJEU still emphasizes that the powers of the court cannot go beyond what is necessary to restore the contractual balance between the parties and thus to protect the consumer from the particularly unfavourable consequences that the annulment of a contract could cause. Provided the conditions are met the court must adopt all the necessary measures to protect the consumer from the particularly unfavourable consequences which the annulment of the contract concerned could cause. The court has even the option of requesting the parties negotiate the replacement of the unfair term.[117] Thus, it is not still apparent why not to use supplementary interpretation, if it is not possible in such case to fill the gap with supplementary rules.

D. Severability clause

The consumer contract may provide for the severability of an unfair, invalid or otherwise ineffective term from the rest of the contract (simple severability clause). At the same time, a method of replacement may be agreed. The term may commit to further negotiations to replace the original term or to another form of co-operation in removing the consequences of the unfair nature of the term. The term may include an alternative provision. The agreed alternative provision may be a supplementary provision in fact.

In general, the autonomy of the will of the parties have to be respected. If the parties have the possibility to deviate from the supplementary legal regulation, they also have the possibility to negotiate a severability clause. But probably everyone feels that the entrepreneur restricts the consumer in this way in the event of an unfair term in the contract.

Severability clauses are subject to the unfairness assessment in the same way as other terms. A common reason for their unfairness is the ambiguity and incomprehensibility when establishing rules for the case of unfairness. The ambiguity and incomprehensibility of the terms in question may be seen in the consumer's inability to anticipate under which circumstances, to which change of the contract or any possible rules they commit. It is also argued by the prohibition of validity preserving reductions in the event of unfair terms.[118]

In Austria, a severability clause according to which the parties undertook to replace the ineffective term with a lawful term that best suited the meaning and purpose of the replaced term was found to be unfair. Where the alternative term is to correspond to the meaning and purpose of an ineffective term it must also be an unfair term. The content

[116] Case C-212/20 *M.P., B.P. v. 'A.' prowadzący działalność za pośrednictwem 'A.' S.A.*, para. 69 and 79.

[117] Case C-269/19 *Banca B. SA v. A.A.A,* ECLI:EU:C:2020:954, para. 44 and 45.

[118] PECYNA, M., ZOLL, F. Krótkie uzasadnienie zbiorcze projektu o kontroli postanowień. In: *Transformacje Prawa Prywatnego.* p. 83. In: *biedronne.home.pl* [online]. April 2010 [2022-01-19]. Available at: <http://biedronne.home.pl/transformacje/wp-content/uploads/2011/05/tpp_4-2010_niedozwolone-postanowienia-i-wzorce.pdf>.

of such a future agreement is not even predictable for parties in good faith.[119] Similarly, in the case of various rules laid down provided that something else fails to follow from the mandatory provisions of the Consumer Protection Act, for example the obligation of the lessee to pay rent even for the period during which the vehicle cannot be used.[120] Conversely, in the case of a term where the ineffective term has been replaced by a rule laid down in accordance with the law. In such a case, it is only a question of describing the consequence of the unfair nature of the term.[121]

In Germany it is generally admissible to fill a gap in the contract in the form of a specific severability clause, provided that it is not in conflict with the requirement of transparency.[122] These are cases where the content of the contract is a certain and clear rule to be applied instead of an ineffective term. It may be argued that the entrepreneur reduces the risk of the ineffectiveness of the contractual term in this way by setting a different rule for that case. However, it does not follow from the legal regulations that the entrepreneur should bear such a risk. The purpose is to exclude the unlawful content of the contract. The content is fully preserved. Admissibility is based primarily on the wide possibility of supplementing the contract by a supplementary provision under Section 306 (2) BGB. If it is possible to fill the gap with a supplementary provision, from which it is possible to deviate, there is no reason to preclude the filling by a contractual arrangement. The entrepreneur is entitled to use the legal possibility of deviation.[123] A stricter view prevails in relation to terms which only entitle the parties, or even only one party, to replace an ineffective term with a term which most closely fulfils the objective of an ineffective term and is still admissible. The stricter approach applies also to clauses directly replacing the unfair term with a term which most closely fulfils the objective of an ineffective term and is still legally admissible without further conditions. Such terms will be ineffective under Section 307 BGB since they do not clearly and comprehensibly confer specific rights and obligations on the consumer. It is not clear to what extent there has been a deviation from the supplementary rule.[124]

If the CJEU interprets the existing regulation strictly even as significantly limiting the possibility of replacing an unfair term and materially balancing the content of the contract with supplementary regulation, the question is whether this option should be given to the pre-agreed content of the consumer contract. Logically, such a possibility should be given only in the event that the supplementary legal regulation would otherwise apply in the case of ineffectiveness. However, if we have doubts about the correctness of the strict interpretation chosen by the CJEU as mentioned above, it must necessarily be reflected here as well. In general, in our opinion, there is nothing to object to about the severability clause. This does not preclude the unfairness of the clause concerned in the specific case.

[119] OGH, 11 October 2006, file no. 7Ob78/06f.
[120] OGH, 11 May 2011, file no. 7Ob173/10g.
[121] OGH, 27 January 2017, file no. 8Ob132/15.
[122] BASEDOW, J. In: W. Krüger (eds.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2.* § 306, Rn. 43.
[123] MÄSCH, G. In: M. Stoffels. *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 2. Recht der Schuldverhältnisse. Sections 305-310.* Section 306, Rn. 55.
[124] BGB, 4 February 2015, file no. VIII ZR 26/14; BGH, 3 December 2015, file no. VII ZR 100/2015; MÄSCH, G., Ibid., Section 306, Rn. 56.

The clause may be unfair due to lack of transparency, when it is not clear and comprehensible, when the subsidiary rule is to be applied and what its content should be.

Moreover, the Commission acknowledges that the right of the parties within the contractual freedom to amend or replace the unfair contractual term by a new contractual arrangement is not affected. Its fairness may be assessed under the condition of the UCTD. The amendment or replacement of the unfair contractual term cannot, at the same time, in principle revoke the consumer's rights arising from the non-binding nature of the amended / replaced term (for details see below).[125] If examining the unfair nature of such a contractual arrangement, the court needs to take into account the will of the consumer, provided he is aware that the unfair term is not binding and they do not wish its application to be excluded, thereby giving their free and informed consent to such a term,[126] there is no reason to prevent a term of a different content also.

It is necessary to distinguish changes with *ex tunc* effects, when the removal of an unfair term, or already arisen consequences respectively, happens with retroactive effects. Here, the rules that allow the consumer to invoke the unfair term (and thus waive the protection) shall fully apply. On the other hand, there are changes with *ex nunc* effects, where nothing changes in its essence regarding the unfair nature of the original term at a given time. From this point of view, agreements that only reflect the legal regulation, such as on the settlement of the already established claims, shall not pose any problem.

In connection with the issue of novation and settlement, the CJEU finally opted for the possibility of a settlement agreement (novation).[127] In its view, it is possible to conclude a settlement agreement (novation) if the consumer's consent (waiver of protection) is based on their free and informed consent. The baseline is the previously admitted possibility of waiving the protection. Two situations may be distinguished. The court excludes the possibility to waive the protection in advance for the future, whereby its view on inadmissibility of the severability clauses is clear. There cannot be an informed consent of the consumer. Otherwise, however, if the problem occurs subsequently. In the case of such a settlement agreement (novation), the waiver of protection (right to file an action) will only be fair if it is clearly and comprehensibly defined by the main subject-matter of the agreement under Article 4 (2) UCTD. This does not affect the possibility of individual arrangements.

E. Without application of additional rules

An unfair term has no effect on the consumer. Given the limitation of cases where a gap in the contract may be filled by a supplementary legal regulation, it will be very common for the parties to continue to be bound by the original contract without any other rules being applied. For example, this can be the case for late payment interest.[128] The Polish

[125] Commission notice – Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (2019/C 323/04), p. 4.

[126] E.g. Case C-231/14 *Banif Plus Bank Zrt. v. Márton Lantos and Mártonné Lantos*, ECLI:EU:C:2015:451, para. 35.

[127] Case C-452/18 *XZ v Ibercaja Banco, SA*, ECLI:EU:C:2020:61, para 25; Case C-19/20 *I. W., R. W. v. Bank BPH S. A.*, para. 46.

[128] Case C-96/16 and C-94/17 *Banco Santander SA contre Mahamadou Demba et Mercedes Godoy Bonet and Rafael Ramón Escobedo Cortés v. Banco de Sabadell SA.*

courts concluded that the contract without an indexation to foreign currency clause was maintained while maintaining the interest rate for the foreign currency.[129]

One may include here clauses limiting the trader's liability for improper performance, or choice-of-law, jurisdiction or arbitration clauses too. In fact, it is obvious that some supplementary rules have to be used, e. g. on jurisdiction, on trader's liability, on the conflict of laws. It reveals, that it is not always easy to say no additional rules shall apply. The law regularly has some settlement for cases when a contractual term is missing. On the other hand, the application of supplementary rules is limited by strict preconditions. We have discussed this problem already above.

As far as consideration is concerned, at first sight, it would seem logical that, in the event such a term is unfair, the particular performance shall be gratuitous if the effects of the contract are preserved. This will only be the case if the contract can continue to be performed without the unfair term, namely there is no change in the nature of the main subject-matter of the contract.[130] Otherwise, it is necessary to examine the benefit for the consumer and possibly apply the supplementary provision, if the nullity of the entire contract would be likely to have particularly unfavourable consequences for the consumer. Thus, the decisive factor can also be the question of whose consideration is at stake. Unfair ancillary trader performance should not lead to the conclusion that the consumer gets nothing for the paid price. What is unfair is that the performance of the consumer is too high.

The supplementary regulation often addresses the amount of the consideration, not the fact of consideration itself. If the fact of consideration is unfair, the supplementary rules regarding the amount of consideration shall not apply. For example, in the case where the consumer is obliged to provide the consideration on the basis of a non-transparent term, when the legislation does not envisage the consideration and the consumer does not receive any special performance.

Exceptionally, private law provides for consideration without need to be negotiated. These are the cases where the law, in connection with a certain contract, automatically envisages[131] or establishes a presumption of consideration within certain facts at issue.[132] The unfairness cannot pertain in the mere requirement of consideration, when such a requirement arises from the legal regulations. The unfairness of a specific term in the contract, for example due to non-transparency, may be manifested in the application of such a regulation. However, supplementary provisions are not applied automatically. It is necessary to assess the significance of the consideration for the obligation, inter alia, whether the main subject-matter of the contract would not change (such as in the case of payment for services related to the use of an apartment) and whether in such a case the absence of the obligation is likely to be disadvantageous for the consumer.

[129] SN, 9 May 2019, file no. I CSK 242/18.

[130] Case C-260/18 *Kamil Dziubak and Justyna Dziubak v. Raiffeisen Bank International AG*.

[131] E. g., in the Czech Republic reimbursement of costs associated with the use of the apartment – the contract does not have to contain any rule on these costs and services, both are provided by the law as a supplementary provision in the absence of an agreement (Section 2247 CCC and Act no. 67/2013 Coll.).

[132] E. g. in the Czech Republic the commission to the agent – a usual price shall be paid when it is typical for the profession of the agent (Section 2438 CCC).

The same principle applies in the case where the unfairness concerns not the term regarding the price itself, but, for example, the term regarding the method of price change. It is often not necessary to use any arrangement here. The contract applies without this provision. However, such a term can also be the main subject-matter of the contract (currency clause, interest rate). A flat-rate and strict interpretation carried out earlier seems to have been overcome.[133]

5. CONCLUSION

The problems with the unfair nature of a term in a consumer contract do not end with the conclusion that a certain term is unfair. The traditional consequences under the compared national laws are to a great extent affected by EU law nowadays. The CJEU came in respect to unfair terms with different approaches focusing more on the advantages to the consumer and the deterrent effect of the regulations of unfair terms.

National legislations determine such a term as ineffective, invalid, voidable or non-existent. From the perspective of EU law it is essential that the term should have no effect on the consumer from the beginning. The entire legal act should not be affected. Preservation of the validity of the legal act as a whole does not depend on the hypothetical will of the entrepreneur. The advantage or disadvantage for consumers is not significant either.

The unfairness of a term may have an impact on the entire contract, for example, if it is an essential element, or the term without which the contract cannot be performed. As follows from the case law of the CJEU, the preservation of the contract as a whole should only take place if the certainty of economic activity is maintained. The invalidity of the entire contract may therefore be considered if, without the given term, the contract would lose its meaning for both of the parties. Thus, in cases where it would not have taken place without the term in question, because the legal nature of the contract would no longer be the same as the main subject-matter of the contract would have changed. A contract for consideration cannot become gratuitous.

The rules on partial invalidity, which are generally part of the legal systems of the Member States, have limited applicability in this respect. When examining the severability of the unfair term, they often take into account the existence of a supplementary regulation. If the CJEU significantly limits the applicability of the supplementary regulation, their existence cannot be an argument for preserving the contract as a whole. There would be a logical contradiction here. The existence of supplementary regulation would indicate that the contract as a whole would be preserved, but they could not be applied.

In any case, the court is not entitled to change the unfair term, moderate it to a reasonable level. With regard to the protective purpose, the prohibition of the validity preserving reduction is upheld. This does not preclude the possibility of examining how far the unfair term is severable, and, where appropriate, maintaining the remainder of the arrangement.

[133] E. g. in Poland analysis when currency clause or indexation clause is the main subject of the contract in GREBIENIOW, A., OSAJDA, K. *Kredyty walutowe. Zagadnienia węzłowe.* p. 79ff.

For example, the unfairness of a term regarding the minimum interest rate does not necessarily affect the interest rate as such.

The usual consequence of the invalidity or non-existence of a term in Member States is the application of a supplementary regulation. That is the regulation that was excluded from use by the unfair term. As regards to its use in the event of an unfair term in a consumer contract, the CJEU lays down strict conditions. The only purpose is to preserve the rest of the contract where the non-existence (invalidity) of the entire contract would expose the consumer to particularly unfavourable consequences.

The Member States mentioned in this article were traditionally more benevolent to the application of the supplementary regulation and did not require any such restrictive preconditions. There should be no difference between unlawful mere deviation from mandatory law and the unlawful over reaching deviation from supplementary rules. In both cases excluded rules shall be applied, for example the regulation concerning the rights arising from defects which was excluded by the unfair term. Not only obligations but also consumer rights may arise from the supplementary regulation. Thus, the protective purpose of such supplementary regulation shall be observed too.

One may also assume, the more limited the scope is for the direct applicability of supplementary rules under the CJEU approach, the stronger tendency will be to conclude the impact of the unfairness of a term on the entire contract and to allow their application in this way. This, at the end, limits effects of art. 6 (1) UCTD and leads to the invalidity of the entire contract in cases when under the traditional approach in national law the contract would remain untouched. Such consequences may be even stricter than the breach of mandatory rules.

The other options – supplementary interpretation and severability clauses – have limited scope of use. Indeed the supplementary interpretation is too close to the prohibited validity preserving reduction. The CJEU seems to reject its use, but one may see a certain tendency to allow it at least to protect the consumer from the particularly unfavourable consequences that the annulment of the contract concerned could cause, if there is no such supplementary regulation. The severability clauses are themselves subject to the unfairness test as they often suffer from ambiguity and incomprehensibility (when; to what extent they should apply; did the consumer have the opportunity to consider the consequences).

Although the position of the CJEU might seem to be well established, in fact some clarification and clearer justification is still needed. The concept of supplementary rules in national law is blurred due to the different decisions of the CJEU. The importance of a balance in the rights and obligations of the parties to consumer contracts could be emphasized. This purpose should be achieved even with the application of supplementary provisions or a supplementary interpretation, in certain circumstances even with the reduction preserving validity, and even if the whole contract would be unaffected by the absence of the unfair term. The purpose of consumer protection rules in private law should not be to sanction the entrepreneur (gratuitous performance), reinterpretation of the contracts in favour of the consumer (such as the absence of the interest on late payment, absence of a price increase), *ex post* destabilization of entire business sectors (gas, electricity, insurance or loans), but the balanced settlement of relationships. The absence of the above-mentioned options for courts is one of the reasons why *ad hoc* legislative

solutions are being adopted in many countries, or there is an attempt to have consequences only with *ex nunc* effects. This does not preclude the unjust enrichment, damages or public sanctions in the particular case, but often taking into account fault, the foreseeability of the infringement and the proportionality of sanctions.