Article

Apostolos D. Tassikas*

The Court and the Sleeping Beauty 2.0: Filling the Contractual Gap, or Making Valid Consumer Contracts to the Detriment of the Non-consumer?

https://doi.org/10.1515/ercl-2023-2024

Abstract: This paper is a critical presentation of the CJEU case-law on UCTD, with particular reference to the non-filling of the contractual gap resulting from the unfairness test by applying 'dispositive' law or supplementary interpretation. The result contradicts the principles and methods of national civil law: not only does the balance in the contract suffer under the position the CJEU has chosen, as it creates alternated forms of balance of interests rather than the identical ones sought by the parties, but moreover, the increasing number of different cases imposes an ambiguous approach on the CJEU, since European judges have to ask on a case-by-case basis what the best interest of the consumer is. By adopting such a functional approach in favour of the substantive justice of the contract, the ECJ decided with questionable results with regard to national civil law, while methodological legal questions as to whether the contract should stand as it is, following the unfairness test, or whether a supplementation of the contract should take place are still open. It is therefore of critical importance to achieve an optimal combination between a fair balance of the contract and effective consumer protection.

To the memory of Prof Dr. h.c. mult. Jürgen Basedow for his contribution to the Law of Standard Contract Terms.

The title refers to the paper of the two pioneers of the European and national law of consumer protection, H.-W. Micklitz and N. Reich, 'The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 *Common Market Law Review* 771–808, indicating a new revival of the Directive's impact on Member States' contract law thanks to the recent CJEU case-law.

***Corresponding author: Apostolos D. Tassikas**, Faculty of Law, Aristotle University of Thessaloniki, Thessaloniki, Greece, E-mail: atassikas@law.auth.gr

Keywords: unfair contract terms; CJEU case-law; validity-preserving reduction; filling gap in contract; supplementation of the contract; supplementary provisions; supplementary interpretation; (re)negotiations

Résumé: Cet article est une présentation critique de la jurisprudence de la CJUE sur la directive sur les clauses abusives, avec une attention particulière au fait que le vide résultant de la mise en oeuvre du test d'iniquité n'est pas comblé par l'application d'une disposition supplétive. Le résultat est en contradiction avec les principes et méthodes du droit civil national: non seulement l'équilibre du contrat souffre de la position choisie par la CJUE, qui crée des formes alternées d'équilibre des intérêts au lieu des formes identiques recherchées par les parties, mais en outre, le nombre croissant de cas différents impose une approche ambiguë à la CJUE, puisque les juges européens doivent se demander au cas par cas quel est le meilleur intérêt du consommateur. En adoptant une telle approche fonctionnelle en faveur de la justice contractuelle, la CJCE a obtenu des résultats discutables au regard du droit civil national, alors que des questions méthodologiques sur le point de savoir si le contrat doit rester en l'état, en suivant le test d'iniquité, ou s'il doit être complété, restent ouvertes. Il est donc essentiel de parvenir à une combinaison optimale entre un juste équilibre du contrat et une protection efficace des consommateurs.

Zusammenfassung: Der Beitrag analysiert kritisch das EuGH-Fallrecht zur AGB-Richtlinie, vor allem zu der Frage, dass oder ob die durch Nichtigkeit von Einzelklauseln gerissene Lücke nicht durch dispositives Recht und ergänzende Vertragsauslegung gefüllt werden darf. Das vom EuGH gefundene (restriktive) Ergebnis steht im Widerspruch zu Prinzipien und Methoden im nationalen Recht. Nicht nur leidet das Vertragsgleichgewicht, wenn man der EuGH-Linie (eines Verbots ergänzender Vertragsauslegung) folgt, weil so andere Formen von Vertragsgleichgewicht geschaffen werden als die von den Parteien intendierten. Vielmehr führt die wachsende Zahl an Fällen auch zu einer fragwürdigen Situation für den EuGH: Europäische Richter müssen zunehmend von Einzelfall zu Einzelfall fragen, welches das beste Verbraucherinteresse sein mag. Durch Wahl solch eines "funktionalen" Ansatzes – anstatt dessen einer inhaltlichen Vertragsbalance – kam der EuGH zu Resultaten, die nach nationalem Rechtsverständnis fragwürdig erscheinen, während umgekehrt die zentralen methodischen Fragen offenblieben, namentlich dahingehend, ob der Vertrag, so wie er (nach Nichtigkeit der Einzelklausel) steht, schlicht erhalten bleiben soll oder ob er im Sinne eines Vertragsgleichgewichts im fraglichen Punkt wieder ergänzt werden soll. Daher ist es von maßgeblicher Bedeutung, die rechte Balance zwischen Vertragsgleichgewicht und hinreichendem Verbraucherschutz zu finden.

1 Introduction

As a result of finding a contractual term unfair, the Unfair Contract Terms Directive 93/13/EEC (UCTD)[1] requires that such a term remains unenforceable[2] without actually explaining what consequences it has for the obligations of the parties (nullity/invalidity).[3] In this case, national laws offer supplementary methods for filling in the gap in the contract. The Court of Justice of the European Union (CJEU) adopts here a rather narrow interpretation and an eclectic approach: according to its recent decisions, the contractual gap is to be filled only if it is necessary to 'save' the contract where the unenforceability of the contract in its entirety would expose the consumer to particularly unfavourable consequences.[4] Were this not the case, the gap-filling would be contrary to the so-called deterrent-effect of Article 7(1) UCTD.[5] In the face of any methodological or other objection on the part of Member States' legal doctrine and court decisions, filling the gaps by applying the supplementary rules or the supplementary interpretation method ensures the contractual balance.[6]

Therefore, CJEU case-law requires a multiple analysis, whether, for example, the unfair term may affect the entire contract or whether the contract remains effective should a statutory rule or another term resulting from supplementary interpretation or even a general principle be used instead of the unfair term.[7] More specifically, if under CJEU case-law, the contract should continue without the unfair term, then from the point of view of national laws the next question is whether the term should

1 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] *OJEU* L95/29 (UCTD).

2 C-287/22 *YQ, RJ* v *Getin Noble Bank SA* [2023] EU:C:2023:491, para 37; C-80/21 to C-82/21 *EK and Others* v *DBP and Others* [2022] EU:C:2022:646, para 58; C-70/17 and C-179/17 *Abanca Corporación Bancaria SA* v *Alberto García Salamanca Santos and Bankia SA* v *Alfonso Antonio Lau Mendoza and Verónica Yuliana Rodríguez Ramírez* [2019] EU:C:2019:250, para 52.

3 C-287/22, *ibid*, 37; C-80/21 to C-82/21, *ibid*, 59; C-705/21 *MJ* v *AxFina Hungary Zrt* [2023] EU:C:2023:352, para 53; C-19/20 *IW and RW* v *Bank BPH SA* [2021] EU:C:2021:341, paras 83 *et seq*; C-269/19 *Banca B SA* v *AAA* [2020] EU:C:2020:954, paras 33, 41–42, 43–44, 45.

4 C-6/22 *MB and Others* v *X SA* [2023] EU:C:2023:216, paras 64–65; C-395/21 *DV* v *MA* [2023] EU:C:2023:14, para 68; C-705/21, *ibid*, 45; C-269/19, n 3, 34–35, 41–45; C-125/18 *Marc Gómez del Moral Guasch* v *Bankia SA* [2020] EU:C:2020:138, para 63.

5 C-80/21 to C-82/21, n 2, 60; C-229/19, C-289/19 *Dexia Nederland BV* v *XXX and Z* [2021] EU:C:2021:68, para 64; C-349/18 to C-351/18 *NMBS* v *M Kanyeba et others* [2019] EU:C:2019:936, para 69; C-70/17, C-179/17, n 2, 54; C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito* v *Jahani BV* [2013] EU:C:2013:341, para 58.

6 C-19/20, n 3, 83; C-260/18 *Kamil Dziubak and Justyna Dziubak* v *Raiffeisen Bank International AG* [2019] EU:C:2019:819, para 39.

7 C-453/10 *Jana Pereničová and Vladislav Perenič in SOS financ spol s r o* [2012] EU:C:2012:144, para 34.

be reduced to a minimum of fair content, or whether a supplementary provision or, in the absence of the latter, the supplementary interpretation should be applied or if this is not the case, a conversion has possibly taken place, which would have a result similar to that of a severability clause.[8]

2 The Unfair Term's Impact on the Contract – The Non-binding Effect

In accordance with Article 6(1) UCTD, unfair terms shall not be binding on the consumer.[9] This non-binding effect of the unfair term results in a principal rule of maintaining the rest of the contract.[10] The clear purpose is not to restrict in any way the benefits of the contract for the consumer, since the nullity of the contract in its entirety due to the abusive and invalid unfair term would be detrimental to the consumer.[11] However, the gap resulting from the invalid unfair term, may lead unavoidably to the ineffectiveness of the entire contract, irrespective of whether this is detrimental to the consumer or not.[12]

It may also be that avoiding gap-filling through statutory provisions and causing a change in the content of the contractual obligation leads to a disproportionate effect and not necessarily in favour of the weaker party.[13] Nevertheless, there could be cases where, for example, the courts apply other stipulations should they meet the

8 Sections 4, 5, and 6.

9 References notes 2, 3. However it is questionable whether this complies with the right of the consumer, after being informed by the judge, to consent to the application of the unfair term, C-19/20, n 3, 46–47, 95; C-932/19 *JZ* v *OTP Jelzálogbank Zrt, OTP Bank Nyrt, OTP Faktoring Követeléskezelő Zrt* [2021] EU:C:2021:673, para 47; C-260/18, n 6, 53–54, 66. References notes 9, 59, 75, 124.

10 In principle see § 306(1) German Civil Code (BGB), § 878(2) Austrian Civil Code (ABGB), Article 2(8) of Greek Consumer Protection Law 2251/1994. Indicatively G. Graf, in A. Kletečka and M. Schauer (eds), *Online-Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch, ABGB-ON*[1.05] (Vienna: Manz, 2019) § 879 no 297.

11 C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco SA* v *José Hidalgo Rueda and Others and Caixabank SA* v *Manuel María Rueda Ledesma and Others* [2015] EU:C:2015:21, para 33; C-26/13 *Kásler Árpád, Káslerné Rábai Hajnalka* v *OTP Jelzálogbank Zrt* [2014] EU:C:2014:282, para 82 *et seq*.

12 Compare under German law, cases in which is not possible to fill the contract gap, specifically cases in which more terms are unfair and also cases with lacking supplementary rules, J. Basedow, in W. Krüger and others (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 2* (8th ed, Munich: C H Beck, 2019) § 306 no 12; updated M. Fornasier (9th ed, 2022) § 306 no 14, 17, 33, 38.

13 The preservation of the contract only in order to protect the consumer is not in line with the provision of art 6(1) UCTD, H. Schmidt, in P. Ulmer and others (eds), *AGB-Recht. Kommentar zu den §§ 305–310 BGB und zum UklaG* (13th ed, Cologne: Otto Schmidt, 2022) § 306 no 4d, 23, reasoning that art 3(1) UCTD preserves the broader scope of the contract, as defined by both parties.

legitimate expectations of the consumer or the legal nature and economic scope of the contract.[14] Therefore, according to CJEU case-law, the hypothetical will of the parties should not be critical, since a partial validity of the contract could result from this contrary to the legal interest of the consumer.[15] There always remains of course the question of what happens if the contract cannot be executed without such a term.[16]

3 Criteria for the Impact on the Contract

Article 6(1) of the UCTD does not lay down any criteria for the effectiveness of the contract without the unfair term.[17] However, certain criteria arose out of the CJEU case-law: the main scope is the continuity of the enforcement of a valid contract without the unfair term, even by exceptional gap-filling with supplementary rules, so that there is no disadvantage for the consumer.[18] Although the criteria regarding the continuity of the contract without the unfair term should be in principle objective,[19] in order to support legal certainty of economic activity,[20] it would appear from the CJEU's case-law that the criteria for maintaining the validity of the contract without the unfair term had been considered ex post.[21] This in other words means merely depending on the results, that is to say, from the advantages or disadvantages of the legal position of the consumer should the contract remain valid.[22] In its case-law,

14 Sections 4.4, 5.2, 5.4.2, and 6. Compare S. Osmola, 'Fixing Reasonable Expectations in European Contract Law' (2023) *European Review of Contract Law* 136.

15 According to the prevailing opinion in Greek doctrine, the provision on partial invalidity of art 181 Greek Civil Code (GCC) ['The nullity of a part entails the nullity of the transaction as a whole if it can be deduced that the transaction would not have been concluded without the void part'], comparable with § 139 BGB, should finally not apply in consumer contracts, as the effects, i.e. the termination of the contractual obligation between the parties, may even be detrimental to consumers, A. Georgiades, *General Principles of Civil Law* (5th ed, Athens: P.N. Sakkoulas, 2019) 491 *et seq*, 494 *et seq*, 549 *et seq*.

16 Sections 3.5, 4.1.2, and 6. Compare S. Grundmann and N. Badenhoop, 'Foreign Currency Loans and the Foundations of European Contract Law-A Case for Financial and Contractual Crisis?' (2023) *European Review of Contract Law* 1, 15–16.

17 C-19/20, n 3, 84.

18 C-269/19, n 3, 32; C-125/18, n 4, 61; C-260/18, n 6, 48; C-26/13, n 11, 80, 83.

19 C-70/17, C-179/17, n 2, 56, 60; C-397/11 *Erika Jőrös* v *Aegon Magyarország Hitel Zrt* [2013] EU:C:2013:340, para 48.

20 C-6/22, n 4, 35; C-19/20, n 3, 56; C-453/10, n 7, 31 *et seq*.

21 Compare for the ex post or the ex ante approach in the supplementary interpretation K. Larenz and C.W. Canaris, *Methodenlehre der Rechtswissenschaft* (3rd edition, Berlin: Springer, 1995) 121.

22 For the consumer's opportunity to give their consent, see C-229/19, C-289/19, n 5, 62; C-269/19 n 3, 29; C-125/18, n 4, 58; C-260/18, n 6, 68; references n 9.

the CJEU insists on the criterion of the consumer's benefit, especially when preserving a contract even (exceptionally) via supplementary methods.[23]

3.1 Invalidity

The purpose of consumer protection as expressed in the combination of Articles 6(1), 7(1) UCTD would be denied under EU-Law[24] should the entire contract be invalid on other legal grounds.[25] In any case, when considering partial or complete nullity, it is necessary to restrict the point of view the entrepreneur would have in order to preserve the contract, albeit partially, and to favour the deterrent effect of the unfairness test.

3.2 The Agreed Impact on the Contract

The parties may conclude a particular term under which the annulment of an unfair term does not affect the rest of the contract (or, conversely, affects the contract in its entirety). The clause stipulating that the unfair term shall not affect the whole contract is accepted without objections in the legal order of the Member States, since it only confirms the general rule.[26] Conversely, the clause stipulating in advance[27] that the unfair term shall affect the whole contract might be very problematic when it comes to the will of the weaker party (the consumer)[28] and their ability to dilute the impact of the unfairness of the contract.[29] However, the CJEU accepts in its case-law

23 C-70/17, C-179/17, n 2, 64.

24 Schmidt, n 13 above, 22; Fornasier, n 12 above, 14; Basedow, n 12 above, 11–12.

25 Eg for a violation of morality rules, § 138 BGB, Article 178 GCC; or prohibition under the law, e.g. liability exemption or liability limitation via standard term clauses, even in cases of gross negligence or for willful conduct, § 134 BGB, Articles 174, 332, 334 GCC, M. Stathopoulos/A.G. Karampatzos, *Contract Law in Hellas* (4th edition, Alphen aan den Rijn: Kluwer Law International, 2017) no 160–165; or abuse of right, art 2(2) Swiss Civil Code (ZGB), art 281 GCC.

26 G. Mäsch, in M. Stoffels (ed), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 2. Recht der Schuldverhältnisse. §§ 305–310* (Cologne: Otto Schmidt/De Gruyter, Neubearbeitung 2022) § 306 No 53–56. See, however, references n 15.

27 Consumer protection cannot, in principle be waived prior to the settlement of any dispute on specific claims related to the unfair terms, Commission notice – Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (*OJEU* C 323, 27 September 2019) 38.

28 For the individual agreements, according to which an ineffectiveness of the entire contract is foreseen, Basedow, n 12 above, 13.

29 Schmidt, n 13 above, 54 *et seq*, 55.

that a consumer may waive the right to apply the unfairness of a term,[30] provided the waiver is the result of free and informed consent.[31]

3.3 National Laws and Legal Methodology in Opposition to CJEU Case-Law Approach

As a result of the restrictive approach of the CJEU, national laws and their legal methodology are sidestepped, as there remains little scope to apply the methods of national law to fill the gap with supplementary rules as the legislator's optimal solution through its effort to approach the contract justice ideal (objective criterion);[32] or, secondly, by a supplementary interpretation, which represents the search for the regulation that certain contractual parties would have stipulated if they dealt with the matter, in accordance with good faith and the common usages (semi-objective criterion).[33] Conversely, and according to recent CJEU case-law, filling the gap shall only be allowed when the contract cannot be executed without the unfair term, thus avoiding the nullity (invalidity) of the contract which would be to the detriment of the consumer.[34]

This restrictive and one-sided criterion (only to the consumer's benefit) of the CJEU case-law diverges strongly from the traditional understanding in national law, both with regard to partial invalidity and to the use of supplementary techniques (rules or interpretation, etc.) in order to fill the gaps.[35] Therefore, it seems that the existence of supplementary provisions or supplementary interpretation is not

30 C-260/18, n 6, 53–56; C-472/11 *Banif Plus Bank Zrt* v *Csaba Csipai and Viktória Csipai* [2013] EU:C:2013:88, paras 23, 27, 35.

31 C-19/20, n 3, 44, 46–48; C-269/19, n 3, 29; C-452/18 *XZ* v *Ibercaja Banco SA* [2020] EU:C:2020:536, para 24–26, 28.

32 Basedow, n 12 above, 12; Fornasier, n 12 above, 11, 32 *et seq*; C-705/21, n 3, 54; C-260/18, n 6, 59. Compare on § 306(2) BGB, M. Wendland, 'Allgemeine Geschäftsbedingungen', in C. Herresthal and others (eds), *Eckpfeiler des Zivilrechts* (7th edition, Cologne: Otto Schmidt/De Gruyter, 2020) 255.

33 Stathopoulos/Karampatzos, n 25 above, 173 *et seq*, 179 *et seq*. Compare G. Schiemann, 'Das Rechtsgeschäft', in Herresthal and others (eds), n 32 above, 171; Austrian Supreme Court (OGH), 28 November 2012 – 7Ob93/12w.

34 C-118/17 *Zsuzsanna Dunai* v *ERSTE Bank Hungary Zrt* [2019] EU:C:2019:207, para 55; C-26/13, n 11, 82–83; references notes 84, 160.

35 According to the CJEU case-law, finding that a term is unfair must allow for 'the restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed', C-520/21 *AS* v *Bank M SA* [2023] EU:C:2023:478, paras 59–61; C-705/21, n 3, 47; C-395/21, n 4; C-932/19, n 9, 50; C-483/16 *Sziber* v *ERSTE Bank Hungary Zrt* [2018] EU:C:2018:367, para 34; C-154/15 C-307/15 and C-308/15 *Francisco Gutiérrez Naranjo* v *Cajasur Banco SAU, Ana María Palacios Martínez* v *Banco Bilbao Vizcaya Argentaria SA (BBVA), Banco Popular Español SA* v *Emilio Irles López και Teresa Torres Andreu* [2016] EU:C:2016:980, para 66. References notes 55, 79.

relevant for negating the impact of the unfair term on the contract in its entirety.[36] Should, however, the unfair and invalid term stipulate in a quantitative or qualitative way the performance, i.e. a term defining the place, the time of the fulfilment or the method to calculate the financial obligation (i.e. the foreign currency exchange rate, the increasing interest rate or the insurance policy premiums rate etc.), then, it cannot always be legally certain due to any supplementation process (supplementary rule or interpretation), that the contract as whole is not affected.[37]

3.4 The Impact on the Contract According to the National Courts

For national courts to rule not on the nullity of the contract in its entirety but rather on its partial nullity and in accordance with a deduced ex ante 'hypothetical will' of the contract parties to have concluded the contract even without the unfair term, seems to create a great discrepancy when compared with the CJEU case-law.[38] It is therefore important to understand that the CJEU case-law favours objective criteria in establishing contract nullity and rejects the subjective criterion of the 'hypothetic will' of the parties.[39] However, the nullity of the whole contract is considered should a contract without the unfair term lose its economic scope for both contracting parties.[40] Moreover, the impact on the entire contract does not depend on an ex post assessment as to whether one of the parties would not have made the contract without it.[41]

---

36 The opposite for the national laws, Schmidt, n 13 above, 34; Fornasier, n 12 above, 32; German Federal Court of Justice (BGH), 26 January 2022 – VIII ZR 175/19; 10 May 2023 – VIII ZR 197/21 and VIII ZR 204/21.

37 References n 16.

38 Consequently, the CJEU seems not to take in account the national laws, Basedow, n 12 above, 11; Fornasier, n 12 above, 10–11.

39 However, even in national laws, in the case of consumer contracts, the purpose of consumer protection as a given EU-Law principle prevents the national judge from attempting to reconstruct the contract as the parties would have concluded it even without the unfair term. References n 15. For the same reasons as prohibiting a 'preserving reduction' of the invalid unfair term, Graf, n 10 above, § 878 no 14. References notes 65, 155, 162, 173.

40 This applies especially in cases where the contract cannot be concluded or cannot be performed without the unfair term, because of the economic purpose or the legal nature of the contract or because of the non-determined performance. Opinion of Advocate General V. Trstenjak, C-453/10 *Jana Pereničová and Vladislav Perenič* v *SOS finance spol s r o* [2011] EU:C:2011:788, para 52 *et seq.*

41 Opinion of Advocate General A. Tizzano, C-302/04 *Ynos kft* v *János Varga* [2005] EU:C:2005:576, para 79.

3.5 The Impact on the Contract in Cases Where the Unfair Term is One of the Main Subject-Matters of the Contract

In all these cases, CJEU case-law recognises that the nature of this matter legitimates the gap-filling according to objective criteria.[42] One representative example comprises legal cases in which the unfair term stipulated the index to a foreign currency (e.g. Swiss franc) and linked the interest rate directly to the interbank rate (or another rate) of this currency.[43] The annulment of these unfair terms, especially on the ground of non-transparency,[44] led to a gap which referred to the conversion mechanism and to the exchange with heavy effects on the agreed contractual balance of the exchange rate risk;[45] so that only by filling the gap with statutory terms (supplementary law) on the exchange rate risk is it possible to define the 'core' of a loan contract.[46] Therefore, according to CJEU case-law it is not contrary to Article 6(1) UCTD for a national court to conclude that a contract cannot continue to exist without a term presenting an index for the foreign currency.[47]

Consequently, the potential existence of a supplementary (statutory) rule would indicate that the contract can be effective. But in the absence of any such supplementary provisions, in so far as annulment of a loan agreement would expose the consumer to the claims by the seller or supplier, the national court would take all necessary measures to protect the consumer from 'unfavourable consequences' to restore the 'effective balance' between the reciprocal rights and obligations of the parties.[48] However,[49] it is contradictory to attempt on the one hand to appeal for contractual balance and on the other to give advantages to the consumer to the detriment of the contractual balance.[50]

---

42 C-19/20, n 3, 83; C-229/19, C-289/19, n 5, 62; C-269/19, n 3, 29; C-260/18, n 6, 39; C-70/17, C-179/17, n 2, 57; C-118/17, n 34, 40, 51; C-38/17 *GT* v *HS* [2019] EU:C:2019:461, para 42–43.

43 C-776/19, C-782/19 *VB and Others* v *BNP Paribas Personal Finance SA and AV and Others* v *BNP Paribas Personal Finance SA and Procureur de la République* [2021] EU:C:2021:470, para 56; C-118/17, n 34, 48; C-51/17 *OTP Bank Nyrt and OTP Faktoring Követeléskezelő Zrt* v *Teréz Ilyés and Emil Kiss* [2018] EU:C:2018:750, para 68.

44 C-776/19, C-782/19, n 43, 43, 50; C-38/17, n 42, 31; C-118/17, n 34, 41, 48.

45 References n 50–56; Section 6.

46 C-260/18, n 6, 44; C-38/17, n 42, 39, 42; C-118/17, n 34, 48–52. Compare C-212/20 *MP, BP* v *'A.' prowadzący działalność za pośrednictwem 'A' SA* [2021] EU:C:2021:934, para 37.

47 C-19/20, n 3, 85; C-609/19 *BNP Paribas Personal Finance* [2021] EU:C:2021:469, para 33; C-776/19, C-782/19, n 43, 56; C-260/18, n 6, 44–45; C-51/17, n 43, 68; C-118/17, n 34, 48.

48 C-705/21, n 3, 45; C-472/20 *Lombard Pénzügyi és Lízing Zrt* v *PN* [2022] EU:C:2022:242, para 56. See F. Esposito, 'Loans and the Unfair Contract Terms Directive after C-472/20 Lombard' (2022) *Journal of European Consumer and Market Law* 223.

49 References n 46.

50 C-776/19, C-782/19, n 43, 54, 77–78; C-118/17, n 34, 41–43; C-932/19, n 9, 39, 41; C-19/20, n 3, 77–79.

3.6 Housing Loan Contracts

Thus, deriving from a number of CJEU rulings,[51] it is stressed that the payment of regular amortization loan instalments calculated on the basis of a 'fixed' euro-Swiss franc exchange rate, that is to say at the time of disbursement of the loan, as a solution should be condemned.[52] This choice confirms the rule of Article 291 GCC;[53] the clauses which repeat the contents of the provision are the so-called declaratory clauses which diverge from the unfairness test.[54]

The annulment of an unfair price term should not lead to the housing-loan, which is a reciprocal contract, being a unilaterally obliging contract. That would be the result in the case where a contractual term held to be unfair must be regarded as never having existed and as having no effect at all on the consumer, so that the latter is to be restored to the legal and factual situation that he or she would have been in if that unfair term had not existed.[55] The fact that one party at least – the consumer – asks for that and would welcome such a change is representative of the imbalance and the synallagmatic deficit.[56]

---

51 C-26/13, n 11; C-312/14 *Banif Plus Bank Zrt* v *Márton Lantos and Mártonné Lantos* [2015] EU:C:2015:794; C-186/16 *Ruxandra Paula Andriciuc and Others* v *Banca Românească SA* [2017] EU:C:2017:703; C-51/17, n 43; C-118/17, n 34. Compare E. Paparseniou, 'Der Schutz des Fremdwährungsdarlehensnehmers nach der Rechtsprechung des EuGH' (2018) *Wertpapiermitteilungen* 1730.

52 As a large section of case-law in the Greek courts of First Instance or of Appeal was incorrectly accepted, adopting the search for a nominal agreement based on the hypothetical will of the parties. On the contrary, the correct choice is to convert the debt of the foreign currency into the local currency something which will take place at the exchange rate of time of payment or according to the so-called payment day rule. See Greek Civil Law Supreme Court (Areopag) 4/2019 (Plenary session), NOMOS Legal Database Nr 745275.

53 'Performance in foreign currency. In the matter of a monetary debt expressed in foreign currency payable in Greece the debtor shall subject to any agreement on the contrary have the right to pay in local currency on the basis of the current value of the foreign currency at the time and place where payment is effected'.

54 Otherwise in the place of such an invalid clause, a legal provision of similar content should be implemented, A. Fuchs, in Ulmer and others (eds), n 13 above, § 307 no 17; BGH, 16 March 2004 – XI ZR 13/03; 8 May 2012 – XI ZR 437/11 and XI ZR 61/11; 13 January 2016 – IV ZR 38/14; 1 February 2018 – III ZR 196/17.

55 C-6/22, n 4, 25; C-118/17, n 34, 41. References notes 35, 79.

56 Consumers are requesting national courts to annul their loan agreement, rather than replacing the unfair term, because they consider that the application of the relevant provisions of national law would not protect them sufficiently, C-932/19, n 9, 16; C-260/18, n 6; C-118/17, n 34.

4 Filling the Gap – Rules, Interpretation or Principles Instead of Unfair Terms

Under the legal methodology and as a consequence of the system of national laws, it is always necessary when the contract in its entirety is not affected by the unfair term, to examine which statute rule (supplementary law) shall apply in filling the gap created by the unfair term.[57] Of course, before using the supplementary rules or interpretation by the court,[58] there is space for the use of moderation, or of other methods.[59]

4.1 Prolegomena

4.1.1 Severability of the Unfair Terms

It is necessary to consider the eventual sustainability of only a part of the unfair term:[60] Thus, it should be noted that a term contains more stipulations that can be differentiated in such a way that if one is deleted, the rest of the stipulations remain transparent and comprehensible as discrete elements.[61] Furthermore, in its case-law, the CJEU indirectly accepts the severability of the minimum interest rate clause.[62] The clause on deferred payment of interest is also considered separately from the clause on contractual or other types of interest rates, even if it has a form of increase in these kinds of interest.[63] According to CJEU case-law, the UCTD prevents a specific unfair clause (e.g. on accelerated repayment of a mortgage loan) from being

57 From a CJEU case-law point of view it is necessary only to prevent the contract being affected by the gap of the unfair term.

58 Supplementation could be achieved even by the application of general principles, business customs and the scope or the nature of the contract apart from the hypothetical will of the parties. BGH, 25 April 2023 – XI ZR 225/21; 24 January 2023 – XI ZR 257/21; 1 June 2022 – VIII ZR 287/20; 6. October 2021 – XI ZR 234/20; references notes 33, 92, 96.

59 In a certain case CJEU used a broad wording ' … in order to restore the effective balance between the reciprocal rights and obligations of the parties, the national court must, while taking into account all of its national law, take all the measures necessary to protect the consumer from the particularly unfavourable consequences … ', C-472/20, n 48, 56 *et seq*; C-6/22, n 4, 60, 64–65. References notes 75, 123.

60 In case, the parties cite other reasons for the termination of the obligation in advance, the unfairness of the term, especially its transparency, should be assessed, C-452/18, n 31, 38, 51; C-38/17, n 42, 33; C-19/20, n 3, 44, 46–48; C-229/19, C-289/19, n 5, 53.

61 Commission notice, n 27 above, 40; F. de Elizalde, 'Partial Invalidity for Unfair Terms?' (2019) *Journal of European Consumer and Market Law* 147.

62 C-520/21, n 35, 59–61; C-154/15, C-307/15, C-308/15, n 35.

retained to become fair, where its content is restricted to a minimum fair core.[64] Judging each one of the unfair terms as being severable does not contravene the prohibition of validity-preserving reduction.[65]

4.1.2 The Prohibited Validity-Preserving Reduction

An interpretative reduction of the unfairness and the preservation of the unfair term by its moderation to a valid level (the limits of fairness) is prohibited[66] because it means that the trader does not bear any risk should the term be declared unfair.[67] Despite the fact there is no explicit statutory rule in national laws and, taking into consideration the special character of the consumer protection law,[68] the prohibition of a validity-preserving reduction of an unfair term is in general accepted.[69] However, a number of objections are set out:

In fact, there are slight differences between the validity-preserving reduction and the supplementary interpretation:[70] Conceptually the supplementary interpretation emerges from the examination of the term as unfair and invalid and its full setting aside from the contract. Consequently, a part of the term is not applied and thus it must be separated from its restricted valid core.[71] Functionally, the supplementary interpretation in any case does not end up in a restricted valid content of the unfair term, since it has neither the invalid term as its starting point nor the intention to preserve it. Thus, it has a tendency towards a balanced result,[72] which

63 C-96/16 and C-94/17 *Banco Santander SA* v *Mahamadou Demba, Mercedes Godoy Bonet and Rafael Ramón Escobedo Cortés* v *Banco de Sabadell SA* [2018] EU:C:2018:643, paras 72–73, 76–77.

64 C-70/17, C-179/17, n 2, 64. Compare C-600/21 *QE* v *Caisse régionale de Crédit mutuel de Loire-Atlantique et du Centre Ouest* [2022] EU:C:2022:970.

65 Sections 4.1.2, 5.4.2, 5.4.4, and 5.4.5; references note 155, 162, 173.

66 C-80/21 to C-82/21, n 2, 79 *et seq*; C-212/20, n 49; C-19/20, n 3, 66 *et seq*; C-269/19, n 3; C-229/19, C-289/19, n 5, 63 *et seq*; C-125/18, n 4, 59–60; C-618/10 *Banco Español de Crédito S* v *Joaquín Calderón Camino* [2012] EU:C:2012:349, para 73; BGH, 6 October 2021 – XI ZR 234/20; 27 April 2021 – XI ZR 26/20; 4 July 2017 – XI ZR 562/15; Basedow, n 12 above, 16–17; Fornasier, n 12 above, 9, 18 *et seq*.

67 See art 7(1)(2)(3) UCTD.

68 With respect to the will of the parties the concept of voidability of the contracts is preferred, so contracts are interpreted in favour of preserving their validity.

69 Graf, n 10 above, 300; T. Pfeiffer, in M. Wolf and others (eds), *AGB-Recht* (7th ed, Munich: C H Beck, 2020) art 6 no 9–11; J. Busche, in C. Schubert (red), *Münchener Kommentar zum BGB*, Band 1 (9th ed, Munich: C H Beck, 2021) § 157 no 30 *et seq*, 35 *et seq*.

70 Basedow, n 12 above, 21; Fornasier, n 12 above, 11, 18 *et seq*, 32 *et seq*.

71 BGH, 5 October 2016 – VIII ZR 241/15; 6 April 2016 – VIII ZR 79/15; 15 April 2015 – VIII ZR 59/14; 31 July 2013 – VIII ZR 162/09.

72 K. Uffmann, 'Der BGH und die ergänzende Vertragsauslegung' (2012) *Neue Juristische Wochenschrift* 2225, 2228; A. Dedual, *Geltungserhaltende Reduktion* (Tübingen: Mohr Siebeck, 2017) 18–19, 21 *et seq*, 28 *et seq*, 221 *et seq*, 229 *et seq*, 237 *et seq*, 252 *et seq*, 261 *et seq*.

therefore could lie even nearer to the protection of the consumer's interests than the preservation of the term.[73]

Finally, the unfairness test is based on a number of complex variables, the prohibition of preserving reduction being only one.[74]

4.1.3 The Public Interest-Character of the Unfairness Test and the Gap-Filling Legal Reasoning

Private law, due to the consumer protection scope and EU-consumer policy, adopted a punitive effect with similarities to public law regulations, although to a large extent its purpose should be rather to restore the contractual balance.[75] According to traditional legal reasoning and the judicature in national laws, a supplementary interpretation is needed to fill the gap left by the invalid term when there is no related supplementary provision and the invalidity of the term without such a supplement does not result in a suitable solution, that is to say, in a solution which would take into account the formal interests of the supplier and the consumer, but shift the balance of the contract unilaterally against the former.[76] This public interest-character is also evident in the way CJEU case-law approaches the unfair terms particularly taking into account the fact that in their decisions, European judges do not take into consideration the fairness or unfairness of a term in its bilateral extent, that is to say, to the extent that even in filling the gap of an unfair term, the intention and the will of the entrepreneur should be also an element of the contractual balance.[77]

Consequently, contract terms (e.g. price modification or interest rate or indexation arrangements etc.), despite being applicable to both the consumer and the trader, are ultimately there to unilaterally serve the consumers, as they may be exempted from paying any interest or any increased insurance policy premiums,

73 Basedow, n 12 above, 38; Fornasier, n 12 above, 39.

74 Basedow, n 12 above, 18–19; Fornasier, n 12 above, 19–21.

75 Critically, M. Storme, 'On the Usefulness of Default Rules and Disproportionate Sanctions in Consumer Law' (2021) *European Review of Private Law* 399, 400. The provision of Article 6(1) UCTD is intended to substitute the formal balance established by the contract between the rights and obligations of the parties for a real balance re-establishing equality between them, not to annul all contracts containing unfair terms, C-125/18, n 4, 62–63; C-260/18, n 6, 39; C-70/17, C-179/17, n 2, 57; C-26/13, n 11, 81–82. References note 59, 123.

76 Basedow, n 12 above, 33–35; Fornasier, n 12 above, 35, 39; BGH, 14 March 2012 – VIII ZR 113/11.

77 In the CJEU case-law is confirmed this contradiction between the search for contractual justice (material character) and the contractual balance (procedural character) as always the care is for the interest of the consumer, C-19/20, n 3, 83 *et seq*; C-269/19, n 3, 33, 41–45; C-260/18, n 6, 39.

while their counterparties will bear all the interest risk or the increased prices etc.[78] Thus, CJEU case-law insists on the restoration of the consumer to the legal and factual situation that he or she would have been in if the unfair term had not existed, resulting in not being able to restrict the clause to its valid core, i.e. to its most favourable possible content for its user, which, at the same time, would not exceed the level of unfairness and thus remain valid.[79]

However, contrary considerations on public interest can be expressed, that is to say, towards supporting the regular and smooth operation of the suppliers or service providers regularly overseen by the State, as in such cases as the energy market.[80] Similar views could also be expressed regarding the smooth operation of the insurance market, also under supervision.[81] However, the CJEU is not moving on thoughts in relation to the interests of the consumer's counter-party or on recitals regarding the public interest, which could have significance here, since maintaining the contractual equilibrium might well serve the legal position and the financial credibility of the supplier[82] and links the non-filling of the gap in the contract only in the consumer's interest, and particularly, their interest in preventing the invalidity of the entire contract.[83]

---

78 The generally negative position held by the Court against filling the gap after finding the term invalid occurs in cases where the position of the supplier would improve compared with the operation of the contract without the invalid term and without any supplement, e.g. compared with the function of insurance without any readjustment in interest or the premium, etc. Relevant rulings of Greek courts, Court of Appeal Athens 74/2022 and 4108/2012, NOMOS Legal Database Nr 821982 and 599749.

79 Basedow, n 12 above, 16; Fornasier, n 12 above, 18, 39; C-154/15, C-307/15, C-308/15, n 35, 66; compare C-224/19, C-259/19 *CY* v *Caixabank SA and LG, PK* v *Banco Bilbao Vizcaya Argentaria SA* [2020] EU:C:2020:578, para 52. References notes 35, 55.

80 In German case-law, ideas are formulated occasioned by price readjustment clauses in energy supply contracts whereby in the context of the supplementary interpretation following the invalidation of the clause, the public interest is also taken into account for the smooth operation of the energy market, BGH, 28 October 2015 – VIII ZR 158/11; 14 March 2012 – VIII ZR 113/11; 21 December 2022 – VIII ZR 199/20 and VIII ZR 200/20.

81 With regard to Greek case-law, instances of invalid clauses for the readjustment of health insurance premiums, Athens Multimember Court of First Instance 1227/2016 and 3537/2015, NOMOS Legal Database Nr 767987 and 737183.

82 Especially if we are talking about financial or insurance institutions, for which the smooth operation of the relevant market is in part an issue of public interest. For the German case-law on energy market, see references n 80.

83 References n 15; G. Mentis, *General Standard Terms* (2nd ed, Athens: P.N. Sakkoulas, 2020) no 8.3; G. Dellios, *General Standard Terms* (3rd ed, Athens-Thessaloniki: Sakkoulas, 2013) no 473–474.

4.2 Filling the Gap by Application of Supplementary Rules and the CJEU's Understanding of It

According to CJEU case-law, only when the consumer contract cannot continue to exist validly (in favour of the consumer) may the unfair term be remedied (again in favour of the consumer) by replacing it with supplementary statutory rules.[84] Over time and through delivering more judgments, the CJEU grasped the meaning of supplementary provisions broadly. The concept was concretely expanded through several judgments, where the CJEU accepted replacing the unfair term not only with supplementary (statute) rules (also an index provided by law statute) but also with provisions agreed by the parties.[85] Further, the concept is now included in (after judgments issued in cases of accelerated repayment) supplementary statutes, which would not be applicable without a negotiation between the parties.[86]

4.3 Filling the Gap by Supplementary Interpretation

The supplementary interpretation of a contract is generally accepted in the legal orders of the Member States.[87] The conceptual relationship between gap-filling according to supplementary rules and gap-filling according to supplementary interpretation becomes clear in provision of the Article 2(2) of the Swiss Law of Obligations.[88] In order not to refer only to the controversial concept of the 'hypothetical will' of the parties, in the case of using the supplementing interpretation of a contract in order to fill the gap, national courts make an objective and reasonable assessment of the interests of the parties under the specific circumstances in the concrete context.[89] However, in their attempt to approach objectively the problem of

84 C-625/21 *VB* v *GUPFINGER Einrichtungsstudio GmbH* [2022] EU:C:2022:971, para 30; C-80/21 to C-82/21, n 2, 67 *et seq*, 78 *et seq*, 84; C-212/20, n 49, 72; C-269/19, n 3, 32 *et seq*; C-229/19, C-289/19, n 5, 66; C-125/18, n 4, 61 *et seq*; C-260/18, n 6, 39, 43, 48; C-51/17, n 43, 61; C-118/17, n 34, 54–55; C-96/16, C-94/17, n 63, 74; C-26/13, n 11, 82–84; C-482/13, C-484/13, C-485/13, C-487/13, n 11, 33; C-618/10 n 66, 65, 71 *et seq*.

85 C-80/21 to C-82/21, n 2, 72; C-125/18, n 4, 64; C-260/18, n 6, 48, 59.

86 C-269/19 n 3, 41–45; C-70/17, C-179/17, n 2, 64. Compare C-600/21, n 64; Sections 5.4.4, and 5.4.5).

87 W. Grobecker, *Implied Terms und Treu und Glauben: Vertragsergänzung im englischen Recht in rechtsvergleichender Perspektive* (Berlin: Duncker-Humblot, 1999) 38 *et seq*, 49 *et seq*, 52 *et seq*, 59 *et seq*; C.-W. Canaris and H.C. Grigoleit, 'Interpretation of contract', in A.S. Hartkamp and others (eds), *Towards a European Civil Code* (4th ed, Alphen aan den Rijn: Kluwer Law International, 2011) 587.

88 'In the event of failure to reach agreement on such secondary terms, the court must determine them with due regard to the nature of the transaction'; compare § 157 BGB, Article 200 GCC.

89 The so called 'mixed-approach' is to be preferred: the complicated method consists in determining – as a first step – how a specific issue would have been solved by the parties if they had had it in mind when concluding the contract ('subjective approach'), and – in the second step – how the

what the parties would have agreed on if they knew the gap, courts may land in the field of what the judge believes is fair and just to be chosen as the intention of the parties in the very concrete context.[90] This is the case even when the court composes a contractual term in the place of the unfair one by using an objective approach.[91]

4.4 Filling the Gap with the Reasonable Expectations of the Partners (in Complying with the Purpose and the Nature of the Contract) or According to General Principles

Of course, filling the gaps according to supplementary interpretation should also include parameters like good faith and good usages etc.[92] So, in order to restore the contractual will of the partners, the mixed approach should be followed (both subjective and objective criteria) in compliance with the freedom of contract.[93] Thus, contracts should be interpreted with respect to the parties' reasonable expectations and the economic and legal purposes of the legal act.[94] It must also be assumed that the parties are equal and honest traders, fair and reasonable persons and that they are aiming to perform their contractual duties to achieve their common financial scope.[95] Also reading into a contract a duty of good faith and fair dealing and examining the reasoning of the contract as a self-regulation made by the parties (*lex privata*) but always in the context of the provisions of law, touches the very ground of the contract law theory in both families of law, Civil Law and Common Law.[96] As a

same issue would have been solved by reasonable and fair parties not autonomous but in the very concrete context and circumstances of the parties; E.G. Voglis, 'Vertragsergänzung durch Rechtsfortbildung' (2020) *Rechtstheorie* 379.

90 Canaris and Grigoleit, n 87 above (no 1.2.2).

91 C-6/22, n 4, 35; C-19/20, n 3, 56.

92 Canaris and Grigoleit, n 87 above (no 3.1, 3.2, 3.3). In art II.-9:102(2)(a) DCFR, similar to art 6:102(b) PECL 'the nature and purpose of the contract' is treated as consideration independent and separate from the principle of good faith and fair dealing.

93 P. Hellwege, 'Objectivity and Subjectivity in Contract Interpretation', in A. Burrows and others (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford: Academic, 2013; online 26 September 2013), at https://doi.org/10.1093/acprof:oso/9780199677344.003.0036, last visited 11 August 2023.

94 Canaris and Grigoleit, n 87 above (no 1.3.2, 2.2).

95 Art 5:101(3) PECL, corresponding rule of art II.-8:101(3)(a) DCFR and modelled after art 8(2) CISG, refers to the perspectives of the parties by stating that 'the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances'.

96 Canaris and Grigoleit, n 87 above (no 1.3.2). See art 1:102(1) PECL, which was the model for art II.-1:102(1) DCFR.

result, any supplementary methods may be seen as being natural consequences of, or an extension of, the contracting parties' intent.[97]

In any case the CJEU in its case-law rejects the possibility of filling gaps by applying principles of law such as the principle of fairness.[98] In this way the CJEU case-law rejected any creative adjustment of the contract.[99]

4.5 Interim Conclusions and Some Critical Remarks

As the CJEU insists on the need to protect the consumer from 'unfavourable consequences' of the annulment of the entire contract[100] whose rigidity causes a non-consequent, non-practicable and non-useful and a disadvantageous ground to serve this protective scope: it makes little sense to address the supplementary provision in the form of an absence of rules and, despite this absence, to remain restricted without using those methods and techniques familiar in national laws which allow the filling of a gap in the contract. After all, a high level of protection for the consumer must be ensured but always in compliance with national laws.[101] Thus, once gap-filling is obligatory only to favour the consumer and a statute is applicable – even from the CJEU's perspective – it is the supplementary technique which is at use irrespective of it being a supplementary rule or another methodologically accepted way. Under Article 1(1) UCTD we shall search for unfair terms in consumer contracts, and under Articles 6(1), 7(1) UCTD we shall keep valid the contract and serve the deterrent scope of the provisions;[102] but these provisions say nothing about the scope of filling gaps with supplementary methods (statute rules or supplementary interpretation).[103]

---

97 References notes 21, 87, 89–90, 92–94, 96, 146, 150, 152.

98 C-260/18, n 6, 62. Critically, F. Esposito, 'Dziubak Is a Fundamentally Wrong Decision: Superficial Reasoning, Disrespectful of National Courts, Lowers the Level of Consumer Protection' (2020) *European Review of Contract Law* 538, 548.

99 Commission notice, n 27 above, 42. See n 89.

100 C-269/19, n 3, 43–44; references notes 4, 48, 59, 62, 106, 168, 185–188.

101 For example, in other cases, C-6/22, n 4, 30–33; C-349/18 to C-351/18, n 5, 72–73. Compare C-520/21, n 35.

102 C-269/19, n 3, 31–34, 38 'The court must ensure that the equality between the parties, which would have been undermined if a term of the contract that was unfair as regards the consumer was applied, is restored. Second, it is necessary to ensure that the seller or supplier is deterred from including such terms in contracts with consumers.'

103 'When interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it forms part', C-570/21 *IS, KS* v *YYY SA* [2023] EU:C:2023:456, para 28; C-349/18 to C-351/18, n 5, 35.

5 The CJEU Case-Law on Gap-Filling according to Supplementary Methods

5.1 The CJEU's Preconditions and the Impact on National Laws

According to CJEU case-law,[104] using supplementary (statute) provisions for filling contractual gaps after the unfairness test requires that two or three conditions are met: firstly that a contract cannot continue to exist as a valid one without the unfair term;[105] secondly, annulment of the contract may expose the consumer to particularly unfavourable consequences;[106] and thirdly the application of supplementary (statute) provisions is not to the eventual detriment of the legal status of the consumer (rights and obligations). All the above means that the annulment of the entire contract should not be jeopardized either by not filling the gap at all or by filling the gap with supplementary statute rules which are more or equally disadvantageous for the consumer in comparison with the invalid term itself; e.g., so that the entrepreneur is not entitled to any compensation against the consumer, not even for the statutory amounts,[107] or in the case whereby the entrepreneur is not entitled to claim either the abusive indemnity flat rate or the statutory positive non-performance damages (positive interest).[108]

Of course, the question of whether a contract can or cannot continue to exist without the unfair term is a familiar problem to national legal orders.[109] However, in our case what is critical is the precondition that the consumer would be exposed to particularly adverse consequences should the entire contract become invalid. In order to assess these 'unfavourable consequences' it is not only the intention of the

104 References n 84.

105 Regarding for the critics, W. Faber, 'Kein Schließen von Vertragslücken durch dispositives Recht nach Wegfall missbräuchlicher AGB-Klauseln in Verbraucherverträgen?' (2018) *Österreichische JuristenZeitung* 989, 991, referring to C-482/13, C-484/13, C-485/13 and C-487/13, n 11; S. Perner and M. Spitzer, 'Vertragsflickschusterei von Kásler bis Gupfinger-der EuGH und die Lücken' (2022) *Österreichische JuristenZeitung* 1053, 1054.

106 C-26/13, n 11, 82–83; C-118/17, n 34, 55.

107 C-229/19, C-289/19, n 5.

108 C-625/21 n 84; G. Graf, 'EuGH lässt OGH abblitzen: Keine Anwendung dispositiven Rechts bei Klauselnichtigkeit!' (2023) *ecolex* 109; M. Kellner, F. Liebel and M. Legath, 'Vorabentscheidungsantrag zur Zulässigkeit der Lückenfüllung durch Anwendung dispositiven Rechts in B2C-Verträgen' (2022) *Österreichisches Bankarchiv* 128, 130, 132.

109 Compare M. Farina, 'Unfair Terms and Supplementation of the Contract' (2021) *European Review of Private Law* 441, whose suggestion for supplementation of the contract concentrated on the cases where the unfair term is one of the debtor's main obligations, otherwise the contract is not able to continue to exist without the unfair term.

consumer expressed that is decisive,[110] but also the concrete circumstances existing or foreseeable at the time the dispute arose.[111]

However, the CJEU insists on stressing the preventive and dissuasive reasoning of the unfairness test.[112] In the CJEU wording, suppliers would still be tempted to use their standard terms in the belief that, even if they were declared unfair and invalid, the contract would be modified by the national court, in filling the gap, and to the extent and in such a way as to be valid again.[113] Were the opposite rationale employed, this would lead to a reduction of the unfair content of the term which would preserve the validity of the contract, reminiscent of the prohibited validity reduction at the level of the results.[114]

These CJEU positions, however, diametrically contradict the systematics and the valuations of Civil Law and by doing so they call for brave or hard decisions on the side of national laws (doctrine and courts) regarding the compliance of national law and national judges with the CJEU case-law objective approach and stricter requirements.[115] For example in Germany, regarding the traditional interpretation of § 306 (2) BGB, different views have already been expressed in the literature: the application of supplementary provisions is (still) fully in compliance with the UCTD,[116] while, in reaching the same conclusion by referring to the nature of minimum harmonization, the application of § 306 (2) BGB does not harm consumers.[117] Further, initially views were set out so as to prevent the general application of the rulings of the CJEU with regard to the non-application – under conditions – of supplementary provisions in the place of the invalid unfair clauses.[118] At a later date,

110 C-260/18, n 6, 50, 56; references notes 9, 22, 31.

111 For the ex ante approach or the ex post approach by filling the gap via supplementary interpretation, see references n 21.

112 Compare for this discrepancy in the case of the effectiveness-principle, as the CJEU case-law on consumer protection confirms that the principle of effectiveness is gaining more attention than the principle of equivalence, C-618/10, n 66, 49; C-34/13 *Monika Kušionová* v *SMART Capital a s* [2014] EU:C:2014:2189, para 52; C-449/13 *CA Consumer Finance SA* v *Ingrid Bakkaus* etc. [2014] EU:C:2014:2464, paras 23, 25.

113 C-229/19, C-289/19, n 5, 64. In the same line C-269/19, n 3, 32; C-125/18, n 4, 61 *et seq*, 66; C-80 to C-82/21, n 2, 67 *et seq*; C-70/17 and C-179/17, n 2, 54; C-260/18, n 6, 61–62.

114 Given that the trader has already once, by formatting and concluding the contract, abused their position by deviating from supplementary statutory law, and therefore they do not have a second chance to manipulate the law again.

115 See judgments or preliminary requests by OGH, 25 April 2018 – 9Ob85/17s; 25 April 2023 – 4Ob236/22t; compare S. Laimer, § 879, in A. Fenyves and others (eds), *Großkommentar zum ABGB-Klang Kommentar, §§ 859–887 ABGB, Allgemeines Vertragsrecht* (3rd ed, Vienna: Österreich Verlag, 2022).

116 So Basedow, n 12 above, 5; Fornasier, n 12 above, 7, 10, 20, 29, 35.

117 So Schmidt, n 13 above, 4b-4e.

118 B. Gsell und F. Graf von Westphalen, 'Missbräuchliche Zinsanpassungsklauseln in Prämiensparverträgen-Auswirkungen der neuen EuGH-Rechtsprechung zur Klausel-RL 93/13/EWG auf die

opinions were expressed in which, complying with the case-law of the CJEU, the application of supplementary provisions depends on specific requirements, i.e. firstly only when the inclusion of the unfair term in the contract cannot continue to be valid or function without the invalid term and therefore it is harmed by the invalidation of the controversial term and secondly the invalidity of the contract will also have adverse consequences for the consumer.[119] So, even in the German academic literature, there is already a call for the taking into account of the case-law of the CJEU, either in the form of an amendment of § 306 (2) BGB or in the form of a teleological reduction of the provision.[120]

Of course one has to bear in mind the fact the CJEU case-law is characteristic of the individual peculiarities of the cases discussed regarding the different Member States' legislation or case-law on consumer protection, such as the Spanish one (during the period 2000–2014) or those of Central European countries (Hungary, Slovakia, Poland) or of Balkan countries (Romania, Croatia, Slovenia) in the last decade. And all this of course in combination with the unavoidable premature nature of the CJEU's conclusions vis-à-vis the request of preliminary ruling made at that time[121] and the lack of dogmatically elaborated decisions as well as the wording style of the Court with regard to the need to solve practical problems with a great deal of social and economic impact in all these countries.[122]

In any case, replacing the unfair term with a supplementary rule of national statute law complies with the stipulation of Article 6(1) UCTD, as according to the

---

Lückenfüllung gesetzlicher Zinssatz nach § 246 BGB' (2021) *Zeitschrift für Wirtschaftsrecht* 1729, 1734–1735; A. Wilfinger, 'Unwirksame AGB-Klauseln, dispositives Recht und EuGH' (2021) *Verbraucher und Recht* 18, 19–20.

119 Schmidt, n 13 above, 4d; Fornasier, n 12 above, 10.

120 Contra B. Gsell, 'Grenzen des Rückgriffs auf dispositives Gesetzesrecht zur Ersetzung unwirksamer Klauseln in Verbraucherverträgen' (2019) *JuristenZeitung* 751, 757; Mäsch, n 26 above, 10 *et seq*, 11 *et seq*.

121 It is also of critical importance that very often national courts do not submit a relevant request for a preliminary ruling to the CJEU or the wording of the question submitted often does not help; F. Graf von Westphalen, 'Irritierende Verweigerungshaltung des BGH' (2022) *Zeitschrift für Wirtschaftsrecht* 1465, 1469, according to whom the BGH in its judgment of 6 October 2021 – XI ZR 234/20 had to request the CJEU for a preliminary rule; compare J. Basedow, 'Der Europäische Gerichtshof und die Klauselrichtlinie 93/13: Der verweigerte Dialog', in G. Müller and others (eds), *Festschrift für Günter Hirsch* (Munich: C H Beck, 2008) 51.

122 Eg C-324/20 *Finanzamt B* v *X-Beteiligungsgesellschaft mbH* [2021] EU:C:2021:880, para 31 'the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. The Court must take account, under the division of jurisdiction between the Court and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set'; C-229/19, C-289/19, n 5, 44; Mäsch, n 26 above, 10 *et seq*, 11 *et seq*.

CJEU case-law this provision seeks to replace the formal balance established by the contract between the rights and obligations of the parties, by re-establishing equality between them.[123] The purpose of that provision, and in particular its second part, is not to cancel all contracts containing unfair terms but to substitute the formal balance established by the contract between the rights and obligations of the parties with a real balance, re-establishing equality between them, it being specified that the contract at issue must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms.[124] However, the problem is that gap-filling can be permissible only if the statutory law provides objectively more favourable provisions for the consumer.[125] Once again, it is contradictory on the one hand to appeal for contractual balance and on the other hand to give advantages to the consumer to the detriment of the balance.[126]

5.2 Assessment and Critical Remarks

By being too stringent, the above-mentioned restrictions defeat the purpose of regulating the unfair terms which shall also be (beyond the unfairness test and the invalidation of the unfair term) the material balance between both the parties and not a unilateral advantage for the consumer to the detriment of the economic scope of the contract.[127] It would be a very restricted legal opinion to accept that only under threat of invalidity of the entire contract, without the unfair term, would the national judge be allowed to apply the supplementary rule which had been altered or had deviated from the unfair term, since no modification or substitution would be possible and that only under the condition that the gap-filling with the statutory rules is not to the detriment of the consumer.[128] However, if there is an unfair term through which the consumer has been deprived of their rights arising from the supplementary regulation, then this very concrete supplementary (statutory) rule should simply apply without the contract as an entire valid structure being affected.

123 C-6/22, n 4, 35; C-19/20, n 3, 56; C-26/13, n 11, 82; C-453/10, n 7, 31; C-618/10, n 66, 40; references notes 59, 75.

124 C-19/20, n 3, 83; C-260/18, n 6, 39. It is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them, C-570/21, n 105; C-600/19 *MA* v *Ibercaja Banco SA* [2022] EU:C:2022:394, para 36; references notes 9, 59, 75, 123.

125 Mäsch, n 26 above, 10 *et seq*, 11 *et seq*, who considers the approach of the Court as extremely questionable.

126 References n 50. Compare Opinion of Advocate General V. Trstenjak, n 40, 63, 65.

127 Gsell, n 120 above, 756; references notes 50, 126. For the CJEU case-law, references notes 84, 160.

128 C-260/18, n 6, 39; C-118/17, n 34, 40, 51; C-70/17, C-179/17, n 2, 57. In any case, the CJEU insists on its ruling. References notes 75, 84, 123, 160.

If this does not pertain, then the unfair term, albeit invalid or absent, manages to have its effect: the deviation from the supplementary (statutory) rule which should apply.[129]

Further, and leaving aside for a moment the CJEU's narrow approach, the national judge regularly concludes without further consideration, that the limitation of the trader's liability via the unfair term does not have any effect on the entire contract, after the unfairness test, but that the legislative level of such a liability pertains by application of the supplementary rule.[130] However, provided the term regarding the consumer's liability is unfair, it is far beyond the national judges' understanding that the consumer should be exempted from paying contractual damages[131] or that the consumer should be exempted from paying for unjustified enrichment in any case in which the unfair term forces the consumer to pay amounts that prove not to be due (and thus a corresponding restitutionary effect in respect of those same amounts)[132] or even that the consumer should be exempted from paying the lawyer's fee stipulated on an unfair term.[133]

Moreover, as far as the differentiation between supplementary statutory rules and mandatory rules is concerned, there is no apparent nor a legally grounded justification to different consequences of unfairness:[134] according to CJEU case-law, the application of mandatory rules is always allowed without further conditions but only limited space is provided for the application of supplementary rules in case of unfair terms stipulating interests rates when overreaching deviations, e.g. in case of difference between deviation from mandatory or supplementary default (delayed payments) interests.[135]

---

129 For example, the consumer would not be able to terminate the obligation early, Gsell, n 120 above, 753; C-229/19, C-289/19, n 5, 67. References notes 60, 141; Sections 4.1.1, and 5.3.

130 C. Pavillon, 'Case note on: Hof van Justitie Europese Unie, 08/12/2022, C-625/21, EU:C:2022:971' (2023) *Tijdschrift voor Consumentenrecht & Handelspraktijken* 39; F. Rieländer, 'Zum Reformbedarf des deutschen AGB-Rechts unter dem Eindruck der neueren EuGH-Judikatur zur Klausel-Richtlinie '(2023) *Europäische Zeitschrift für Wirtschaftsrecht* 317; S. Perner, 'Gupfinger: Ein Möbelhaus schreibt Rechtsgeschichte(?)' (2022) *Zeitschrift für Finanzmarktrecht* 573.

131 C-625/21, n 84; C-80/21 to C-82/21, n 2, 66.

132 C-776/19, C-782/19, n 43, 37, 57; C-154/15, C-307/15, C-308/15, n 35, 61–62; C-698/18 and C-699/18 *Raiffeisen Bank and BRD Groupe Société Générale* [2020] EU:C:2020:537, para 54; C-520/21, n 35.

133 C-395/21, n 4, 56, 60, 63, 65–68; Opinion of Advocate General M. Szpunar, C-395/21 *DV* v *MA* [2022] EU:C:2022:715, paras 57–58, 63, 73, according to whom the lawyer's claim seemed not to appear a non-applicable supplementary (statutory) law, but an applicable one, the application of which serves the purpose of avoiding the consequences of the total nullity of the contract which may lead to in exceptional unfavorable consequences for the consumer.

134 Art 1(2) UCTD and recital 13 of the Preamble; C-932/19, n 9, 28–29; C-593/22 *FS and WU* v *First Bank SA* [2023] EU:C:2023:555, on the exclusion of the scope of art 1(2) in the case of contractual terms reflecting mandatory statutory or regulatory provisions.

135 C-96/16, C-94/17, n 63, 72–73, 76–77.

It is of note that in some CJEU' cases European judges appeared to look on applications of supplementary provisions more favourably.[136] However, these recitals could be understood also in the light of the fact that these rules were not supplementary.[137] Instead of this, they were rules that govern the allocation of costs connected with the creation and cancellation of a mortgage in the absence of any agreement between the parties in this regard, unless any provisions of national law which applies in the absence of that term, requires that the consumer pay all or part of those costs.[138]

5.3 The CJEU Upholding the Same Approach

The CJEU continues to confirm this stricter approach to supplementary provisions and to their role by gap-filling legal methods.[139] In one case,[140] the unfair content of the term in question stipulated the compensation scheme after the early termination of the contract.[141] If the contract may continue to exist without the unfair term, the national court cannot apply the statutory compensation provided for by a supplementary provision of national law.[142] This tendency, somewhat similar to *stare decisis*, in recent CJEU case-law regarding gap-filling in unfair terms of consumer contracts and the function of supplementary provisions and rules, reveals in each new case a new facet of the theoretical scheme which the CJEU introduces, and also indications of shortcomings in the strict approach taken by the CJEU towards gap-filling and the supplementary rules.[143]

136 Case C-224/19, C-259/19, n 79, 54–55.

137 C. Leone, 'Unfair terms and supplementary rules after Dexia (Joined Cases C-229/19 and C-289/19): rolling a dice?' (2021) *Recent developments in European Consumer Law* [online], at https://recent-ecl.blogspot.com/2021/02/unfair-terms-and-supplementary-rules.html (last visited 11 August 2023).

138 C-224/19, C-259/19, n 79, 54–55.

139 C-625/21, n 84; C-125/18, n 4, 60; C-19/20, n 3, 67–68; references notes 84, 160.

140 C-229/19, C-289/19, n 5, 67; C-19/20, n 3, 67–68. Also compare C-405/21 *FV* v *NOVA KREDITNA BANKA MARIBOR d d* [2022] EU:C:2022:793, para 21–22.

141 See from the Dutch Civil Code (BW) on the one hand art 6:277, on the other hand art 7A:1576e. Compare G. Graf, 'EuGH: Keine Ersetzung nichtiger AGB-Klauseln durch dispositives Recht! Was bedeutet das für die Praxis?' (2021) *ecolex* 198; C. Wittebolm and Y. Choi, 'Vertragslückenfüllung ade?: der EuGH zum Rückgriff auf dispositives Recht bei unwirksamen AGB' (2021) *Wertpapier-Mitteilungen* 1734; A. Wilfinger, 'Ende der Klauselersetzung durch dispositives Recht?' (2021) *Europäische Zeitschrift für Wirtschaftsrecht* 637.

142 C-229/19, C-289/19, n 5, 67.

143 To the detriment of the legal certainty and of the methodological consequence, the CJEU does not draw a clear distinction on questions as to what legal method is to be applied in gap-filling, which supplementary technique is of limited applicability, under which preconditions and when are the latter to be applied.

The CJEU's strict approach and the restricted conditions for applying supplementary rules for gap-filling are understandable only with regard to the validity of preserving reduction, in cases where the application of statutory supplementary rules was rather different depending on the national laws.[144] Otherwise, this approach lacks general normative orientation, as demonstrated in unique cases where the supplementary rules do not lay down consumer rights and the unfair terms themselves do not compete against supplementary rules. As the supplementary (statutory) rules generally exclude the disadvantageous effects of the critical unfair term on the entire contract, the 'dispositive' law is more disadvantageous than the invalid unfair term would only apply in some complex contractual formulations whose advantageousness or disadvantageousness depends, for example, on future developments in the financial markets.[145] This dependence on various occasions on the unique case and on the circumstances of the contract conclusion or the judicial dispute correspondingly may be the reason why national courts when applying supplementary rules still work on reaching compliance with the case-law of the CJEU.

5.4 National Laws on Legal Acts

5.4.1 Supplementary Methods and Purposes

A legal method of national laws for gap-filling is also the search for the 'hypothetical will' of the parties, i.e. their 'actual' contractual will which the parties would have expressed at the point of the contractual gap had they been aware of it.[146] Allowing the court to 'participate' (even partially) in the concluding of the parties' contract seems to be a fair and reasonable technique to moderate the consequences of unenforceability of contract due to the nullity of its terms: on the one hand, it seems to be fair as the court reconstructs the contractual balance in combination with

144 Mäsch, n 26 above, 10 *et seq*, 11 *et seq*.

145 This will depend on the circumstances of each contested case, such as C-229/19, C-289/19, n 5, where the fact that the circumstances of the applicable rule of supplementary law in the specific case concluded in a legal consequence more adverse for the consumer's interest than the consequence that caused the invalid term, if it was to be deemed valid. Compare OGH, 19 October 2021 – 10Ob24/21h (more favorable §1098 ABGB).

146 Supplementary interpretation serves as a method of providing the contract with 'terms' which must be perceived as implied to achieve the actual purpose and at the same time with respect to the contractual balance, see references notes 21, 87 89–90, 92–94, 96, 146, 150, 152. The usefulness of such a process of supplementary interpretation of a contract is obvious in determining the contractual obligations and supporting the express intent of parties, see § 157 BGB, art 200 GCC. Sections 3.4, 4.3, and 5.4.2); references notes 15, 52, 58, 89, 149, 153.

objective criteria such as good faith and good usages,[147] while on the other, it seems to be reasonable as the courts interfering with the parties' intentions substitute the legal act that was actually concluded by them, despite its invalidity, with another legal act, a functionally similar one, that can be enforced.[148]

The CJEU case-law could profit from these national law methods and processes,[149] ie from supplementary interpretation of a contract in order to enforce the contract despite its invalid unfair terms which would lead to the contract's invalidity. However, at the same time, from the point of view of protecting the consumer the CJEU cannot permit the national courts to perform this role as, by supplementing the contract in gap-filling, they actually act as though they were 'making the contract for the parties'.[150] The fine difference on which the CJEU cannot (or does not want to) entrust to the national courts[151] is the fact that by rewriting the parties' will, the national judge uses a mixed-approach (ie objective criteria and the expressed will of the parties) and reconstructs the contractual balance or at least that is the initial purpose and the meaning of the concept.[152]

Nevertheless, European judges should not overlook that national courts seek the hypothetical intent of the parties by asking how the gap would be filled by

147 The provision of art II.-9:101(2) DCFR, similar to the provision of art 6:102 PECL, states that a court may imply an additional term 'where it is necessary to provide for a matter which the parties have not foreseen or provided for' on the basis of (among other factors, as the circumstances at the time of conclusion) the principle of good faith and fair dealing. Sections 3.3, 4.3, and 4.4; references notes 33, 92, 96.

148 Thanks to the legal reasoning of *conversio* courts substitute the (invalid) contract made by the parties with a (valid) contract which is different but functionally similar (at least partially). See § 140 BGB, art 3:42 BW, art 182 GCC; J. Hijma, 'The concept of nullity', in C.G. Breedveld-de Voogd and others (eds), *Core Concepts in the Dutch Civil Code Continuously in Motion* (Deventer: Wolters Kluwer, 2016) 17, 29–31.

149 Supplementary interpretation, or equivalent methods and processes, according to the 'hypothetical' will of the parties are useful in the case of filling gaps in the contract and in the case of invalidity to 'rescue' the contract. Section 3.3; references n 32–33.

150 See although the 'mixed-approach', Sections 4.3, and 5.4.2; references notes 89, 93, 152, 168.

151 Although it should, since under its case-law it is for the Member States or for the national courts to not only determine the consequences of finding an unfair term but also to take the appropriate protective measures for the consumer in each case, considering also the several grounds in the national law, C-395/21, n 4, 68; C-472/20, n 48, 57; C-6/22, n 4, 21–22; C-705/21 n 3, 47; C-287/22 n 2, 30.

152 On the conceptual level, a lot of methods can be generally classified as methods of the supplementation of contracts. Not all those techniques have the goal of establishing the legally binding meaning of the contract, but only of interpreting expressed terms, R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (reprint, Cape Town: Juta, 1992) 684. See references notes 21, 87, 89–90, 92, 96.

reasonable and fair contracting parties,[153] having in mind the economic purpose of the contract and the other contractual provisions, of which the legal nature of the contract consists. So, the purpose of both the European and the national judge is the same, that is to strike a balance between the interests of the parties while determining the binding content of their contract should there be gaps which might threaten the validity of it.

5.4.2 Supplementary Interpretation, Specifically

Should a term be ineffective, the supplementary interpretation method leads to the adjustment of the contract, considering the typical interests of the entrepreneur and the consumer, with regard to the general context of supplementary statutory rules (which actually do not stipulate precisely the rule for very concrete issue) and to the hypothetical will of the parties in accordance with the principles of fairness, securing a fair and reasonable solution.[154] However, it should also be accepted that even the supplementary interpretation should not lead to the effect of preserving an ineffective, unfair term.[155] Moreover, this process can be executed more easily based on objective criteria, which are available only in certain cases, such as specific contractual types for which exists a framework of supplementary rules stipulating transactions; otherwise, the legitimate expectations and the economic purpose of the contract or general clauses, such as good faith, are to be used in such cases:[156] at this point, CJEU seems to see the danger in replacing a material (in)equality (in favour of the seller or supplier), with a formal equality between the contract parties, protecting the interests of both parties and not especially the interest of the consumer.[157]

So, in opposition to the case-law and doctrine on a Member States level[158] the CJEU continues to approach strictly the gap-filling legal reasoning by prohibiting supplementary interpretation with the very prerequisites which the CJEU sets for supplementary rules.[159] Thus, continuing to apply a supplementary interpretation is

153 The approach of an average third-party bystander ('objective approach') is not unfamiliar to the CJEU legal thinking, C-6/22, n 4, 35; C-19/20, n 3, 56.

154 Fornasier, n 12 above, 32; Mäsch, n 26 above, 37; Basedow, n 12 above, 31; Graf, n 10 above, 297; OGH, 14 November 2012 – 7Ob84/12x; references notes 33, 180.

155 W.F. Lindacher and W. Hau, in Wolf and others (ed), n 69 above, § 306 no 26–39, 40–43, 70–71; Sections 4.1.1, and 4.1.2; references n 65.

156 Schmidt, n 13 above, 53–54, 55.

157 C-472/20, n 48, 51–52; C-483/16, n 35, 32; C-453/10, n 7, 31.

158 BGH, 23 January 2013 – VIII ZR 80/12; 6 April 2016 – VIII ZR 79/15; Schmidt, n 13 above, 4d; Basedow, n 12 above, 5; references n 84.

159 Schmidt, n 13 above, 4a-4d; BGH, 6 October 2021 – XI ZR 234/20; references notes 115, 160.

not in line with recent case-law of the CJEU.[160] The contract may be preserved after the term has been found unfair only if it can continue to exist legally without any other change.[161] Since the validity-preserving reduction[162] is prohibited and given that the CJEU limits the scope of applying supplementary rules where the entire contract would otherwise be affected to the detriment of the consumer solely, while at the same time also declining to fill a gap in the contract with general regulations pointing to such legal principles as good faith etc.,[163] it is hardly likely that all these preconditions for supplementation of the contract (especially via supplementary interpretation) can be met.[164]

Moreover, in recent cases the CJEU explicitly refused to permit the national court to interpret the term in order to remedy its unfairness, even if that interpretation would correspond to the common intention of the parties in that contract.[165] So, general dissuasive effects and the deterrent scope prevail over the hypothetical will of the parties or over the judge-making contract will even on a mixed-approach and even on the grounds of objective criteria in the particular case.[166] The CJEU has even rejected the option of requesting that the parties negotiate the replacement of the unfair term.[167] Therefore, the ultimate rule is, of course provided that the conditions are met, the national court must adopt all necessary measures to protect the consumer from the particularly unfavourable consequences that the annulment of the contract concerned could cause.[168]

5.4.3 Distinction Between Gap-Filling and *Conversio*

The method of supplementary interpretation might be confused with the conception of *conversio*:[169] in the typical gap-filling, the parties concluded the contract, only they

160 Mäsch, n 26 above, 10 *et seq*, 11 *et seq*; C-80/21 to C-82/21 n 2; C-212/20 n 49, 73; C-269/19, n 3, 29 *et seq*, 35, 40–42; C-260/18, n 6, 57 *et seq*; C-70/17, C-179/17, n 2, 53 *et seq*; C-482/13, C-484/13, C-485/13, C-487/13, n 11, 32 *et seq*; C-618/10, n 66, 65, 69, 71, 73.

161 C-618/10 n 66; C-488/11, n 5.

162 C-118/17, n 34, 54–55; C-70/17, C-179/17 n 2; Sections 4.1.1, and 4.1.2; references notes 65, 155.

163 C-260/18, n 6, 62; Sections 3.3, 4.3, and 4.4; references notes 33, 92, 96.

164 The possibility of supplementary interpretation seems to have been already indicated where the gap cannot be filled by supplementary rules or other provisions opted for by the parties, Opinion of Advocate General J. Kokott, C-81/19 *NG OH* v *SC Banca Transilvania SA* [2020] EU:C:2020:217, para 87. However, this was not confirmed by the Court in its decision C-81/19 [2020] EU:C:2020:532.

165 Case C-212/20, n 49, 69, 79; C-19/20, n 3, 68.

166 C-395/21, n 4, 67.

167 C-269/19, n 3, 41–45; C-705/21, n 3, 46.

168 C-6/22, n 4, 64–65; C-80/21 to C-82/21 n 2, 77; C-260/18, n 6, 62.

169 The ratio of the institution of *conversio* refers to the Roman law principle of *utile per inutile non vitiator*, Zimmermann, n 152 above, 683; compare T. Gema, 'Utile per inutile non vitiatur: can favor

did not regulate or address a particular issue, which later turned out to be critical (because of the gap the unfair term 'left' behind). The legal reasoning of the institution of *conversio* goes much further, as the court must consider what the parties would have done and if they would have concluded another (substitute) legal act should they have been aware of the invalidity of the contract between them.[170] In *conversio* the risk of the national court while reconstructing a new similar contract (another one, as a substitute) on the basis of an unspoken contractual will of the parties is greater than in the case of typical gap-filling.

5.4.4 Severability Clauses

The consumer contract may provide a special term for the severability of an unfair term[171] or this term may bind to further (re)negotiations or to another form of co-operation for replacing the unfair term.[172] At that point, especially in consumer contracts, one has to raise the question of the unfairness of those severability clauses.[173] Thus, there is no doubt that even severability clauses are subject to unfairness and transparency control according the UCTD in just the same way as other terms.[174] Undoubtedly, the content of the contract has to consist of certain and clear rules to be applied, rather than ineffective terms.[175] As far as the unfairness test is concerned, should the alternative (subsidiarily applied) term correspond to the purpose of an unfair term, it must also be seen as an unfair term too.[176]

On the contrary, a severability clause pointing out the replacement of the unfair term by a 'reserve' rule laid down in accordance with the law should pass the unfairness test.[177] This would go against the strict prerequisites of the CJEU case-law in using supplementary methods, as the deterrent effect, but, however, at the same time it provides evidence to suggest that the strict CJEU case-law had more of those cases of severability clauses in mind (to avoid) and less the supplementary methods.

---

contractus be considered a European regula iuris?' (2016) *European Review of Contract Law* 259, according to whom a reasonable assessment of invalidity in situation on unfairness, should be based on an objective understanding of the contract. See references n 148, Section 5.4.1).

170 J. Hager, *Gesetzes- und sittenkonforme Auslegung und Aufrechterhaltung von Rechtsgeschäften* (Munich: C H Beck, 1983) 195.

171 Section 4.1.1.

172 Section 4.2, n 86.

173 Moreover, that would probably also be a violation of the prohibition of validity-preserving reduction; Sections 4.1.1, 4.1.2, 5.4.4, and 5.4.5; references notes 65, 155, 162.

174 Fornasier, n 12 above, 44; Basedow, n 12 above, 43.

175 Mäsch, n 26 above, 53–56; Fornasier, n 12 above, 44.

176 OGH, 11 October 2006 – 7Ob78/06f.

177 OGH, 27 January 2017 – 8Ob132/15t.

Consequently, there is no reason to preclude the filling by a contractual arrangement as it is possible for the entrepreneur to deviate from the supplementary (statute) rule in order to draw up the contract with their own standard terms and then to write in a severability clause to fill the gap with a supplementary provision, from which it is possible to deviate.[178] In all those cases above, severability clauses are going to be found unfair since they do not clearly and specifically grant rights and impose obligations on the consumer, in other words in the case it is not clear to what extent there has been a deviation from the supplementary rule.[179] The severability clause, according to which the unfair term is to be amended or replaced, is not allowed to revoke the consumer's rights arising from the non-binding nature of the amended or replaced term.[180]

5.4.5 Contractual Terms or (Re)Negotiations

The Court was called on to shed light on these questions in connection to the so-called *novatio* agreements.[181] In its view, a *novatio* may be concluded as long as the consumer's consent is based on freedom of contract and transparent information.[182] In any case, different timeline parameters are here to be distinguished: the possibility to waive the protection in advance for the future and for claims or rights which are not yet legally grounded should always be found impermissible. Further, in the case of a *novatio* it is crucial that the waiver of protection is fair, i.e. is clearly and comprehensibly defined by the main contractual subject of the agreement.

However the Court has recently stated[183] when contract parties amended the original contractual relationship on the basis of a voluntary agreement and not directly on the basis of legislative intervention, even when the consumer had the option to decline the conversion provided for by that law, the fact remains that where the consumer consented to it, the parties amended their original agreement, replacing the unfair terms contained therein, not freely but with the obligation to apply the conversion rules imposed by the national legislature, as was the case. The mere requirement of the consumer's consent for the purpose of a *novatio* in a renegotiations framework, does not mean that the new terms in question are not to

178 In any case the trader can always use the legal possibility of deviation, by planning all that already at the time of concluding the contract. See Mäsch, n 26 above, 53–56.

179 BGH, 4 February 2015 – VIII ZR 26/14; 3 December 2015 – VII ZR 100/2015; Mäsch, n 26 above, 53–56.

180 Commission notice, n 27 above, 4, 41.

181 C-452/18, n 31, 25; compare C-19/20, n 3, 46.

182 C-932/19, n 9, 47; C-260/18, n 6, 53–54; C-19/20, n 3, 46–47; C-268/19 *UP* v *Banco Santander SA* [2021] EU:C:2021:423, paras 30–31.

183 C-567/20 *A H* v *Zagrebačka banka d d* [2022] EU:C:2022:352, para 61; C-118/17, n 34.

be regarded as reflecting a mandatory statutory or regulatory provision, since the content of these is entirely determined by that law.[184]

6 The Consumer Contract with Unfair Terms and Without Application of any Supplementary Methods of Gap-Gilling

One cannot overlook that national law regularly provides for solutions in order to fill the gap when a contractual term is missing. Contrarily, according to the CJEU, it is necessary even in these cases to examine the potential benefit for the consumer and then apply the supplementary provision, if the nullity/invalidity and non-enforceability of the entire contract would be likely to have 'particularly unfavourable consequences' for the consumer.[185] In fact, it is clear that some supplementary rules have to be used, e.g. on parties' bilateral duties and rights as on parties' performance or liability, especially when the issue is an element of the contractual performance of one or both parties. This has been the case in decisions for delayed payment interest[186] or in the decision[187] in which the CJEU interpreted the UCTD as not precluding a national court from replacing that term, with a view to preventing that contract from becoming invalid, with a supplementary index provided for under national law, in so far as the annulment of the contract would expose the consumer to particularly unfavourable consequences.[188]

Of course, if the contract can continue to be performed without the unfair term, then so be it, but always mindful of the benefit for the consumer and avoiding particularly unfavourable consequences for them.[189] Consequently, the contract shall turn out to lose its synallagmatic (reciprocal) character if the effects of the

184 Opinion of Advocate General J. Kokott C-567/20 *AH* v *Zagrebačka banka* [2022] EU:C:2022:76, para 50.

185 Art 6(1) UCTD is not precluding the national court, where an unfair contractual term setting a reference index for calculating the variable interest of a loan is null and void, from replacing that index with a statutory index applicable in the absence of an agreement to the contrary between the parties to the contract, in so far as the mortgage loan agreement in question is not capable of continuing in existence if the unfair term is removed and annulment of that agreement in its entirety would expose the consumer to particularly unfavourable consequences. C-125/18, n 4, 57, 67.

186 C-452/18, n 31, 25; C-19/20, n 3, 46.

187 C-125/18, n 4, 64.

188 A mortgage loan was not capable of continuing in existence following the removal of an unfair term referring to a statutory index for calculating the variable interest rate applicable, compare C-70/17, C-179/17, n 2, 59.

189 C-125/18, *ibid*, 61, 63, 66–67.

contract are further preserved without the unfair term and without gap-filling.[190] Therefore, a new decisive factor emerges in this peculiar group of cases, i.e. the question of the synallagmatic (or reciprocal) character of the contract.[191] So, the supplementary rules may offer to the parties or the judge the amount of the performance on the synallagmatic (reciprocal) ground of the contract, e.g. the calculation method, the flat-rate possibility, the foreign currency exchange rate or the interest rate, but shall not affect the synallagmatic (reciprocal) character of the contract itself:

On the one hand, in every case the synallagmatic (reciprocal) character of the contract may be unfair in toto.[192] Thus, the fact that the supplementary rules regarding the modes of the performance shall not apply if as result that would also expose the consumer to 'particularly unfavourable consequences' (under the CJEU approach) seems to be irrelevant. But on the other hand, there are cases where according to supplementary (statutory) rules and on the ground of certain contracts, automatically (by default) a certain synallagmatic relationship is depicted or with other words a presumption of synallagmatic relationship is established. In these cases, the requirement for the synallagmatic relationship to be maintained, when such a requirement arises from the legal rules (supplementary regulations) cannot be concerned as an element of unfairness.

The 'third way' would be the acceptance that supplementary rules are not applied always and are not applying automatically. It may be necessary to assess the synallagmatic relationship for the obligations of the contract parties, and specifically whether the price of the contract would not change by applying supplementary rules and whether in such a case the absence of the unfair term which stipulated these obligations would turn out to be disadvantageous for the consumer. But the very same thought could apply (with one or the other result, i.e. using or not using supplementary rules) in cases where the unfairness concerns not the term regarding the price itself, but, for example, the term regarding the mode of price change, i.e. the increasing of interest rates or energy supply contracts costs or of insurance policy premiums.[193] Further forms of supplementing the contract, e.g. arrangements after negotiations or *novatio* is not always necessary to be used, if the

190 C-260/18, n 6; C-565/21 *CaixaBank SA* v *X* [2023] EU:C:2023:212, paras 16 *et seq*, 25 *et seq*.

191 Stathopoulos/Karampatzos, n 25 above, 31–32.

192 Art 3(1) UCTD: ' … significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

193 References notes 78, 80–82. Compare C. Spierings, 'Testing the Unfairness of Interest Rate Amendment Clauses in Revolving Consumer Loans' (2022) *European Review of Private Law* 521, according to whom it is debatable whether the German BGH practice of applying supplementary interpretation of the contract is compatible with the CJEU case-law; F. Heidler, 'Control of Price Related Terms in Standard Form Contracts in Austria: Judicial Control and Other Means of Price

contract applies without this provision. However, we cannot overlook the fact that such a term often can also belong to the 'core' of the contract (foreign currency clause, interest rate, premium increasing rate etc.).[194]

7 Conclusions

The considerations presented in this paper are not arguing (at least not for all cases) regarding the CJEU case-law with respect to the UCTD, that supplementary rules or methods for gap-filling of the contract could be under certain conditions the same as preserving or converting unfair terms, which from the CJEU' point of view could negate the preventive function of the unfairness test. Thus, according to the CJEU case-law, the national judge should firstly conclude that the contract is affected by the absence of the unfair term, which would result in the ineffectiveness of the contract to the detriment of the consumer, and then should attempt to preserve the contract in favour of the consumer by filling the gap.

However, it does not legally or methodologically follow to accept that almost always no additional supplementation (possibly via statutory rules or supplementary interpretation and legitimated expectations or via general principles and good faith) shall apply. One may not forget that all the above concern legal reasoning and methodological processes aimed at excluding the unlawful content of the contract while also keeping it enforceable without the unfair terms, which is in line with Articles 6(1) and 7(1) UCTD and the CJEU case-law. Consequently, a basic criterion should be that a supplementary interpretation of the contract can be limited within the scope of applying the UCTD only in exceptional cases where the contractual balance would be completely shifted without the supplementation of the contract.

However, it is problematic that, in contrast to supplementary rules which incorporate a legislative optimal balance between contractual rights and duties and also in contrast to supplementary interpretation, which balances the interests of both typical contracting parties, in application of the UCTD, the CJEU focuses on ensuring consumer protection. So, it would seem that national protection mechanisms ('principle of equivalence') are limited insofar as the effet utile of the UCTD orders that a high level of consumer protection is ensured ('principle of effectiveness'). As a result, only those claims (statutory or according to any other kind of

Control', in Y.M. Atamer and others (ed), *Control of Price Related Terms in Standard Form Contracts* (Cham: Springer, 2020) 133, 136.

194 The unfairness of a term regarding the minimum interest rate does not necessarily affect the interest rate as such, C-452/18, n 31, 40 *et seq*, 50, 52, 54, 66–67, 69 *et seq*, 71 *et seq*; references notes 43, 62–63, 78.

supplementary method) should be excluded which are functionally congruent with those arising from the unfair term. At that point, and also in contrast to supplementary rules or interpretation, which would lead to a certain result through a court decision, the CJEU case-law provides for a (not entirely satisfactory) negotiated solution, as the parameters of the terms of reference for a possible party settlement seem to be fixed. That is unfortunate since in principle the consumer is thus obliged to cooperate with the counterparty in order to 'rescue' or to convert the unfair term, since otherwise there would be the risk of the loss of the contract, not to mention the potential of that the parties failing to reach a negotiated solution.

After all that, it would appear that the complications with the unfair contract terms in consumer contracts rather start than come to an end with the unfairness test and the discovery that a term is unfair.