17 From Kásler to Dunai

A Brief Overview of Recent Decisions of the CJEU in Hungarian Cases Concerning Unfair Terms in Consumer Contracts

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Abstract
The CJEU was recently called upon to interpret Council Directive 93/13/EEC on unfair terms in consumer contracts in relation to consumer loan contracts denominated in a foreign currency and in relation to the legislation adopted by the Hungarian Parliament in 2014 concerning such contracts in several Hungarian preliminary ruling procedures. The decisions of the CJEU, starting with the judgment rendered in case *C-26/13, Kásler and Káslerné Rábai,* have not only contributed to the ever-evolving case-law relating to Directive 93/13/EEC but also provided national jurisdictions with useful guidance on the interpretation and application of the Directive in the specific area of consumer loan contracts concluded in a foreign currency, an area of prolific litigation before Hungarian courts in recent years. The CJEU also evaluated the Hungarian legislation adopted in 2014 to deal with certain issues relating to such contracts and seemed to approve of its conformity with Directive 93/13/EEC in a series of decisions up until the judgment made in case *C-117/18, Dunai.* In that judgment, however, the findings of the CJEU may have been based on a misinterpretation of the content of national legislation, leading to a perhaps erroneous conclusion and most certainly prompting a re-emergence of controversies before national courts.

17.1 Introduction

Hungarian judges have been very active in requesting preliminary rulings from the CJEU since the accession of Hungary to the EU in 2004. This is also illustrated by the fact that

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the first request for a preliminary ruling to arrive from one of the new Member States in 2004 was from the Szombathely District Court *(Szombathelyi Városi Bíróság)* in *Ynos*,[1] relating to the interpretation of Directive 93/13/EEC on unfair terms in consumer contracts.[2] As of 1 May 2019, 195 preliminary ruling procedures have been initiated by Hungarian courts in the most diverse subjects including taxation, consumer protection, the four freedoms, competition policy, public procurement, private international law *etc.* This impressing number, which places Hungary in the front-ranks regarding the number of preliminary ruling references relative to the size of the country, demonstrates an awareness on behalf of the Hungarian judicature in relation to EU law as well as a genuine trust in the CJEU to resolve questions regarding the interpretation of EU law that are crucial to national judicial proceedings.

It is not surprising therefore that in recent years Hungarian courts have repeatedly sought the interpretation of Directive 93/13/EEC on unfair terms in consumer contracts in relation to loan contracts denominated in a foreign currency that have become a source of bitter litigation before these courts. Most of the 22 Hungarian preliminary ruling procedures relating to Directive 93/13/EEC[3] had been initiated in connection with such (mortgage) loan contracts and several of them directly referred to a new series of laws adopted by the Hungarian Parliament in 2014 to address certain issues surrounding such loan contracts and the unfair terms they contained.

The origins of the problem may be traced back to the 2000s when a considerable part of mortgage and other loans in Hungary had been taken out in euro, Swiss franc or Japanese yen, given the difference in the interest rates of these currencies and the Hungarian forint. The economic crisis of 2008 has had a negative impact on the exchange rate of the Hun-

1 Judgment of 10 January 2016, *Case C-302/04, Ynos kft v. János Varga*, ECLI:EU:C:2006:9.

2 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

3 The Hungarian cases relating to Directive 93/13/EEC are: *Case C-302/04, Ynos kft v. János Varga;* Judgment of 9 November 2010, *Case C-137/08, VB Pénzügyi Lízing*, ECLI:EU:C:2010:659; Judgment of 4 June 2009, *Case C-243/08, Pannon GSM*, ECLI:EU:C:2009:350; Judgment of 26 April 2012, *Case C-472/10, Invitel*, ECLI:EU:C:2012:242; Judgment of 30 May 2013, *Case C-397/11, Jőrös*, ECLI:EU:C:2013:340; Judgment of 21 February 2013, *Case C-472/11, Banif Plus Bank*, ECLI:EU:C:2013:88; Judgment of 30 April 2014, *Case C-26/13, Kásler and Káslerné Rábai*, ECLI:EU:C:2014:282; Order of 3 April 2014, *Case C-342/13, Sebestyén*, ECLI:EU:C:2014:1857; Judgment of 12 February 2015, *Case C-567/13, Baczó and Vizsnyiczai*, ECLI:EU:C:2015:88; Judgment of 1 October 2015, *Case C-32/14, ERSTE Bank Hungary*, ECLI:EU:C:2015:637; Judgment of 3 December 2015, *Case C-312/14, Banif Plus Bank*, ECLI:EU:C:2015:794; Judgment of 31 May 2018, *Case C-483/16, Sziber*, ECLI:EU:C:2018:367; Judgment of 20 September 2018, *Case C-51/17, OTP Bank and OTP Faktoring*, ECLI:EU:C:2018:750; Judgment of 14 March 2019, *Case C-118/17, Dunai*, ECLI:EU:C:2019:207; Order of 22 February 2018, *Case C-126/17, ERSTE Bank Hungary*, ECLI:EU:C:2018:107; Order of 21 November 2017, *Case C-232/17, VE*, ECLI:EU:C:2017:907; Order of 21 November 2017, *Case C-259/17, Rózsavölgyi*, ECLI:EU:C:2017:905; Order of 8 November 2018, *Case C-227/18, VE*, ECLI:EU:C:2018:891. Still pending before the CJEU at the time of the submission of the manuscript were *Case C-38/17, GT; Case C-621/17, Kiss and CIB Bank; Case C-511/17, Lintner;* and *Case C-34/18, Lovasné Tóth.*

garian forint in relation to these currencies, which in turn resulted in a considerable rise in the amount of the monthly instalments for many debtors, given the fact that the instalments were determined in the foreign currency of the contract. Thousands of consumers challenged the loan contracts claiming that the contracts were void, referring *inter alia* to unfair terms they allegedly contained. The Hungarian courts were thus called upon to interpret and apply the Hungarian legal provisions transposing Directive 93/13/EEC.[4]

17.2 The Kásler Judgment[5]

In 2013 the Curia of Hungary *(Kúria)* requested a preliminary ruling from the CJEU seeking the interpretation of Directive 93/13/EEC. In particular, it requested the interpretation of one of the controversial terms that most of the consumer loan contracts denominated in foreign currency contained: the contractual term that allowed the lender to calculate the amount of the monthly repayment instalments owed by the consumer in accordance with the selling rate of exchange of the foreign currency it applied. Before this contractual term could be assessed, however, it had to be clarified whether the term in question defined 'the main subject matter of the contract' which, pursuant to Article 4(2) of Directive 93/13/EEC, may not be subject to an assessment of unfairness in so far as it was drawn up in plain intelligible language.

On request of the Curia of Hungary, the CJEU found that the national court may find such a term to constitute the 'main subject-matter of a contract' only in so far as it was found, having regard to the nature, general scheme and stipulations of the contract and its legal and factual context, that that term laid down an essential obligation of that agreement which, as such characterized it. The CJEU has excluded that the contractual term in question constituted 'remuneration' the adequacy of which could not be the subject of an examination as regards unfairness under Article 4(2) of Directive 93/13/EEC.

The CJEU went on to interpret the requirement of transparency of contractual terms laid down by Directive 93/13/EEC as requiring not only that the relevant term be grammatically intelligible to the consumer, but also that the contract set out transparently the specific functioning of the mechanism of conversion for the foreign currency and the

4 For a more detailed background of the issue of loan contracts concluded in a foreign currency in Hungary, *see* Judit Fazekas, 'The Consumer Credit Crisis and Unfair Contract Terms Regulation – Before and After Kásler', *Journal of European Consumer and Market Law*, Vol. 6, Issue 3, 2017, pp. 99-106. More generally on the subject of EU consumer law *see* Christian Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law*, Edward Elgar Publishing, 2016.

5 *See Case C-26/13, Kásler and Káslerné Rábai*. For a detailed analysis of the judgment, *see* Rita Sik-Simon, 'Missbräuchliche Klauseln in Fremdwährungskreditverträgen – Klauselersatz durch dispositive nationale Vorschriften, EuGH Rs C-26/13 (Kásler) und Kúria 2/2014. PJE határozata', *Journal of European Consumer and Market Law*, Vol. 3, Issue 4, 2014, pp. 256-261.

relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it. This formula established by the CJEU relating to the requirement of transparency of contractual terms and that they should be intelligible to the consumer has appeared in several judgments since *Kásler and Káslerné Rábai*.[6]

Finally, the CJEU answered the question of the Curia of Hungary relating to the possible substitution of an unfair term with a national legal provision in the affirmative by stating that Article 6(1) of Directive 93/13/EEC does not preclude a rule of national law enabling the national court to remedy the invalidity of an unfair term by substituting it with a supplementary provision of national law.

17.3 Follow-up of the Kásler Judgment

Following the CJEU's judgment in *Kásler and Káslerné Rábai*, the Curia of Hungary adopted a so-called uniformity decision. Decision No. 2/2014 PJE[7] sought to give guidance to lower courts and ensure a uniform application of the law in cases relating to consumer loan contracts denominated in foreign currency. In the decision the Curia of Hungary concluded that the contractual term considered in *Kásler and Káslerné Rábai* was unfair because the financial institution did not provide any direct service to the consumer, and therefore it constituted an unjustified cost for the consumer. According to the Curia of Hungary, these terms were also unfair because the economic reasons for their application were not clear, not intelligible and not transparent to the consumer. The Curia of Hungary decided that the buying and selling rates applied in foreign exchange loan contracts as rates of conversion were to be replaced by the official foreign exchange rate of the Hungarian National Bank (the central bank of Hungary) until mandatory provisions of law enter into force.

In Decision No. 2/2014 PJE the Curia of Hungary also considered another term frequently applied in loan contracts, namely contractual clauses allowing for the unilateral amendment of a contract. These terms were, according to the Curia of Hungary, only fair if they complied with the principles previously determined by the Curia of Hungary. That is the principle of clear and intelligible drafting, the principle of specific definition, the principle of objectivity, the principle of effectivity and proportionality, the principle of transparency, the principle of terminability, and the principle of symmetry.

6 *See* in particular in relation to loan contracts concluded in a foreign currency, Judgment of 20 September 2017, *Case C-186/16, Andriciuc and Others*, ECLI:EU:C:2017:703.

7 Hungarian Official Gazette *(Magyar Közlöny)*, 2014/91, p. 10975.

Perhaps the most controversial part of the decision of the Curia of Hungary at the time concerned the contractual term that allocated the risk of the exchange rate of the currency in which the contract was concluded entirely to the consumer. To the disappointment of many consumers who have concluded such contracts, and who anticipated that these contractual terms would be found to be unfair and, as a consequence, void, the Curia of Hungary found that such terms form part of the main subject-matter of the contract, and are, therefore, as the main rule, exempt from assessment from the perspective of unfairness. The unfairness of such a clause may be assessed and established only if its content, *i.e.* the text of the contract and the information provided by the financial institution, was not clear and intelligible to the average consumer, who was reasonably well-informed, reasonably observant and circumspect when the contract was concluded. If there was a reason for the consumer to believe that the risk of exchange was not real or that it only entailed a limited burden, the contractual clause regarding the risk of exchange was unfair, resulting in the invalidity of the contract in part or in full.

In 2014 the Hungarian government proposed a series of legislation to Parliament with a view to implement the CJEU's judgment in *Kásler and Káslerné Rábai* and Decision No. 2/2014 PJE of the Curia of Hungary. The three laws subsequently adopted[8] have, *inter alia*, declared the contractual terms relating to the application of different exchange rates for the advancement and the repayment of the loan, considered in *Kásler and Káslerné Rábai* earlier, to be unfair. Another term previously dealt with by the Curia of Hungary, the contractual clauses allowing for a unilateral amendment of the contract were presumed to be unfair, with the possibility for the financial institutions applying such terms to demonstrate in court proceedings that they satisfied the conditions reiterated by the Curia of Hungary in Decision No. 2/2014 PJE. The new legislation provided for the settlement of accounts to be conducted by the lenders having regard to the consequences of the unfair nature of the two terms in question. It also set out a series of procedural rules relating to ongoing court procedures, including those where consumers decided to proceed with their case after the unfair terms in questions were removed from their contract and after the settlement of accounts had taken place. The Hungarian legislator also prescribed a mandatory transformation of contracts. These were to be denominated in Hungarian forints, to exclude any future escalation of consumer burdens in relation to the change in the exchange rate of the foreign currency in which the contract was originally concluded.

8 Act XXXVIII of 2014 regulating specific matters relating to the decision of the Curia of Hungary to safeguard the uniformity of the law concerning loan contracts concluded by financial institutions with consumers; Act XL of 2014 on the rules relating to the settlement of accounts referred to by Act XXXVIII of 2014, regulating specific matters relating to the decision of the Curia of Hungary to safeguard the uniformity of the law concerning loan contracts concluded by financial institutions with consumers, and other provisions and Act LXXVII of 2014 regulating various matters relating to the amendment of the currency of denomination of consumer loan contracts and to the rules governing interest.

17.4 The Sziber Judgment[9]

The conformity with Directive 93/13/EEC of some of the procedural provisions set out by the new legislation was raised by the Budapest Regional Court *(Fővárosi Törvényszék)* in *Sziber*. The national court wanted to ascertain in particular whether Directive 93/13/EEC precluded the provisions of the new legislation that required the applicant to regularize his application by stating the legal consequences sought in the event of a finding that the loan agreement or part of it was invalid and to complete the settlement of accounts by specifying the amounts considered to have been paid on the basis of unfair terms other than those already taken into account in that settlement. The referring court also inquired on the conformity with Directive 93/13/EEC of Hungarian legislative provisions that excluded the consumer from requesting the application of *restitutio in integrum* as the legal consequence of the contract's invalidity.

The provisions in question were intended by the Hungarian legislator to ensure a more effective resolution of court proceedings in cases where consumers relied on the unfairness of contractual terms other than the ones already deemed unfair by the legislation on the basis of Decision No. 2/2014 PJE. In particular, the applicants were required to state the legal consequence they sought in order to avoid an incomplete ruling, *i.e.* a ruling declaring the contract or the contractual term void without determining the legal consequence applied, otherwise permitted by generally applicable rules of the Hungarian Civil Code. Experience had shown that this possibility was frequently employed by debtors, resulting merely in the prolongation of litigation, as the final resolution of the dispute usually required further court proceedings. The legal consequences that the consumers were required by the legislation to choose from were those established by earlier case-law relating to such contracts as the only possible legal consequences among those provided for by the general rules of the Hungarian Civil Code. By excluding the possibility of *restitutio in integrum,* the legislation had taken note of the particular nature of loan contracts, where provisions already rendered by the parties under the contract cannot be made undone and therefore the original situation of the parties may not be fully restored as if the contract had never existed.[10]

In its judgment the CJEU found that Article 7 of Directive 93/13/EEC did not preclude, in principle, national legislation which lays down specific procedural requirements, such as those referred to by the national court, provided that a finding that terms in such an agreement were unfair would restore the legal and factual situation that the consumer would have been in had those unfair terms not existed. In particular, the CJEU reiterated that the imposition of additional procedural requirements on consumers deriving rights

9 *Case C-483/16, Sziber*.

10 *See* more on the question of irreversibility of loan contract below.

from EU law does not, in itself, mean that those procedural requirements are less favorable and thus violate the principle of equivalence.

The CJEU acknowledged that the aim of the legislation in question was to shorten and simplify the procedures before the national courts, with due consideration to the large number of consumer loan contracts denominated in foreign currency that included the two contractual terms in question. It added that, in similar cases which did not involve rights derived from EU law, a finding of invalidity of one or more unfair terms may not be sufficient to resolve the dispute definitively, a second procedure being necessary to determine the legal consequences of the total or partial invalidity of the contract. As regards the obligation of the consumer to specify the amount considered to be unduly paid, the CJEU found that it did not appear to be less favorable than the rules applicable to similar actions based on national law. This is because this obligation only applied where the consumer relied on the invalidity of allegedly unfair terms other than the two terms covered by the legislation and it may be considered to be merely a specific expression of the general rule applicable to civil procedural law, in accordance with which an application must be specific and quantified.

The CJEU went on to consider the provisions in question from the perspective of the principle of effective judicial protection. The CJEU recalled that the fact that a particular procedure sets out certain procedural requirements that the consumer must respect in order to assert his rights did not mean that he did not enjoy effective judicial protection. According to the CJEU, although it was true that the procedural rules in question required an additional effort from the consumer, they were aimed at addressing an exceptional situation and pursued a general interest in the proper administration of justice, and were therefore likely to prevail over private interests, provided that they did not go beyond what was necessary to achieve their objective. As regards the provision that precluded the consumer from requesting the court to order the restoration of the situation prior to the conclusion of the loan contract, or *in integrum restitutio*, the CJEU held that it was for the referring court to ascertain whether it may be considered that a finding that terms of the contract were unfair would restore the legal and factual situation that the consumer would have been in had those unfair terms not existed, including a right to restitution of advantages wrongfully obtained by the lenders on the basis of those unfair terms.

17.5 The OTP Bank and OTP Faktoring Judgment[11]

The next series of questions to be raised in a preliminary ruling procedure related to whether the legislation of 2014 excluded the examination under Directive 93/13/EEC of

11 *Case C-51/17, OTP Bank and OTP Faktoring.*

the terms that were replaced as a result of the legislation, since these terms were, according to the referring court, the Budapest Regional Court of Appeal *(Fővárosi Ítélőtábla)*, no longer 'contractual terms which have not been individually negotiated' within the meaning of the Directive. Even if those terms would be classified as 'contractual terms', according to the referring court, the term relating to the exchange rate risk that the consumer ran in relation to the currency of the contract could fall within the exclusion laid down by Article 1(2) of Directive 93/13/EEC. This is because it may constitute a contractual term which 'reflects mandatory statutory or regulatory provisions' within the meaning of that provision and would therefore not be subject to the provisions of the Directive. Subsequent questions addressed the assessment of the terms under the Directive and whether it would be permissible to take account of any other unfair terms, as they appeared in the contract at the time of its conclusion, even though they were annulled and, where necessary, replaced pursuant to provisions of national law. The referring court also sought clarification on the CJEU's case-law relating to the identification of unfair terms by the national court of its own motion.

The CJEU found, first, that the concept of 'term which has not been individually negotiated' in Article 3(1) of Directive 93/13/EEC covered contractual terms amended by a national statutory provision adopted after the conclusion of a contract with a consumer, for the purpose of removing a term from that contract which was null and void. On the other hand, Article 1(2) excluded from the scope of Directive 93/13/EEC terms which reflected mandatory provisions of national law that were inserted after the conclusion of a loan contract, with the intention of removing a term from the contract which was void, by imposing an exchange rate set by the National Bank.

The CJEU, however, found that a term relating to the foreign exchange risk was not excluded from the scope of the Directive. The CJEU recalled that Article 1(2) of Directive 93/13/EEC must be construed narrowly and therefore the fact that some terms which reflect statutory provisions fall outside the scope of the Directive does not mean that the validity of other terms, which were included in the same contract and were not covered by statutory provisions, may not be assessed by the national court in light of the Directive. The CJEU acknowledged that the Hungarian legislation in question was not intended to address in full the issue of foreign exchange risk in respect of the period between the time when the loan contract was concluded and its conversion into Hungarian forints. Thus, the contractual terms which addressed the issue of foreign exchange risk and which were not covered by statutory amendments fell within the scope of Article 4(2) of Directive 93/13/EEC and could be assessed in light of the requirement of being drafted in plain intelligible language.

As far as the requirement for a contractual term to be drafted in plain intelligible language is concerned, the CJEU reiterated the formula established in *Kásler and Káslerné Rábai* and in *Andriciuc and Others*, requiring financial institutions to provide borrowers

with adequate information to enable them to make well-informed and prudent decisions. The term relating to foreign exchange risk must be understood by the consumer both at the formal and grammatical level and also in terms of its actual effects, so that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the possibility of a depreciation of the national currency in relation to the foreign currency in which the loan was denominated, but would also be able to assess the potentially significant economic consequences of such a term in respect of his financial obligations.

As far as the questions concerning the scope of assessment by the national court are concerned, the CJEU found that the plainness and intelligibility of contractual terms must be assessed by referring, at the time of conclusion of the contract, to all circumstances surrounding the conclusion of the contract and to all the other terms of the contract, notwithstanding that some of those terms have been declared or were presumed to be unfair and, accordingly, annulled at a later point in time by the national legislature. Based on earlier case-law, the CJEU reaffirmed that Articles 6(1) and 7(1) of Directive 93/13/EEC must be interpreted as meaning that it is for the national court to identify of its own motion, in the place of the consumer in his capacity as an applicant, any unfairness of a contractual term, provided that it has available to it the legal and factual elements necessary for that task.

17.6 The Dunai Judgment[12]

Already addressed some extent in *Sziber*, the question whether the Hungarian legislation of 2014 ensured that when a court finds a contractual term to be unfair the consumer should be placed in a legal and factual situation in which the consumer would have been in had the unfair term never existed, was brought before the CJEU once again in *Dunai.* The referring court, the Buda Central District Court *(Budai Központi Kerületi Bíróság)* has, in its reference for a preliminary ruling, interpreted the Hungarian legislation as precluding the national court from finding that the loan contract denominated in a foreign currency is invalid since legislation voided the term concerning the difference between the buying rate and the selling rate of the currency concerned. This meant that the contract remained valid and, consequently, the consumer was obliged to bear the financial cost resulting from the exchange risk of the foreign currency. The national court had asked for the interpretation of the judgment in *Kásler and Káslerné Rábai* as regards the possibility of national courts to remedy the invalidity of the contract where the continuation of the contract was contrary to the economic interests of the consumer. The referring court also

12 *Case C-118/17, Dunai.*

challenged the possibility of Member State legislators to adopt legislation modifying consumer contracts, such as the Hungarian legislation of 2014. It also challenged the possibility of the highest court of a Member State to adopt decisions to orient lower courts and ensure the uniform application of the law, as the Curia of Hungary had done in Decision No. 2/2014 PJE.

The CJEU understood the questions relating to the substance of the legislation as referring to the possibility of the consumer to rely on the unfair nature of the term regulating the exchange rate risk. The CJEU first reiterated its judgment in *OTP Bank and OTP Faktoring*, in which it had held that the terms included in consumer contracts as a result of such legislation reflected statutory provisions, and as such were excluded from the scope of Directive 93/13/EEC in accordance with Article 1(2) of the Directive. The CJEU went on to find that the questions referred did not relate to terms included by legislation in the loan contracts, but to the impact of that legislation on protection guarantees resulting from Article 6(1) of Directive 93/13/EEC.

The CJEU noted that by addressing the problems of contractual terms governing the exchange difference, by amending those terms through legislation and by upholding, at the same time, the validity of loan contracts, the Hungarian legislation fulfilled the objective pursued by Directive 93/13/EEC to restore the balance between the parties, whilst maintaining, as far as possible, the validity of the entirety of the contract. The Hungarian legislation was found to be in compliance with Directive 93/13/EEC as far as the term relating to the exchange difference was concerned, in the case of which the legislation allowed the restoration of the legal and factual situation that consumers would have been in if those unfair terms had not existed. However, the CJEU found that legislation governing the term relating to the exchange rate risk seemed to preclude that outcome and was therefore in violation of the requirements of the Directive. This was because, in the opinion of the CJEU and based on the information submitted to it by the referring national court, Hungarian legislation seemed to imply that when consumers invoked the unfair nature of the term relating to the exchange rate risk, they also had to request that the court declare the contract to be valid until the date of the decision. Therefore, according to the CJEU, this legislation was capable of preventing consumers from being unbound by the unfair terms and the contract from being cancelled in its entirety if it could not continue to exist without that contractual term.

The CJEU also noted that, whereas in *Kásler and Káslerné Rábai* it had ruled that a national court may substitute an unfair contractual term with supplementary provision of domestic law in order to ensure the continued existence of the contract, that possibility was limited to cases in which the cancellation of the contract in its entirety would expose the consumer to particularly unfavorable consequences. The CJEU found that in the main proceedings, based on the information provided by the national court, the continuation of the contract would be contrary to the interests of the consumer and, therefore, the

substitution pursuant to *Kásler and Káslerné Rábai* did not appear to be applicable in the present case.

As regards the uniformity decisions adopted by the Curia of Hungary, the CJEU found that Directive 93/13/EEC, read in the light of Article 47 of the EU Charter of Fundamental Rights, did not preclude the adoption of such decisions, in so far as they did not prevent lower courts from ensuring the full effect of the provisions of Directive 93/13/EEC and from offering consumers an effective remedy for the protection of the rights that they can derive therefrom, or from referring a question for a preliminary ruling to the CJEU in that regard.

17.7 A Brief Comment on the Dunai Judgment

The judgment in *Dunai* was the first judgment in relation to the Hungarian legislation of 2014 on consumer loan contracts concluded in foreign currency more or less explicitly declaring that the legislation had failed to comply with Directive 93/13/EEC. Although the CJEU has been careful to emphasize at every step of the way that it based its assumptions on the information provided by the national court in the reference for a preliminary ruling and that the national court had to verify whether, in fact, the legislation had the effects attributed to it by the CJEU, the judgment has been quickly interpreted in Hungary as a categorical declaration of the incompatibility of the relevant legislative provisions with Directive 93/13/EEC.[13]

Within a few days of the delivery of the judgment in *Dunai*, on 18 March 2019, the Curia of Hungary issued a statement dealing with the judgment.[14] The Curia of Hungary stated that it was of the view that the Hungarian legislation in question did not have the effect of excluding the cancellation of the loan contract based on the unfair nature of the term relating to the exchange rate risk, which would result in the consumer being relieved of the burden of the exchange rate risk. In the opinion of the Curia of Hungary, while it was true that the legislation had prescribed that the consequences of the invalidity of the contract were the 'declaration of validity or effectiveness of the contract up to the time of adoption of the [court's] decision', these legal consequences resulted in relieving the consumer from the exchange rate risk with retroactive effect as of the conclusion of the contract, if it was to be found that the term relating to the exchange rate risk was unfair due to the

13 This may probably also be due in part to the press release of the CJEU relating to the judgment, the 'headline' of which read: "The Hungarian legislation excluding the retroactive cancellation of a loan contract denominated in a foreign currency which includes an unfair term relating to the exchange-rate risk is contrary to EU law", at https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-03/cp190028en.pdf.

14 *See* https://kuria-birosag.hu/hu/sajto/kuria-kozlemenye-az-europai-unio-birosaganak-dunai-ugyben-hozott-hatarozatarol.

breach of the obligation of providing the consumer with adequate information in accordance with Decision No. 2/2014 PJE and the CJEU's judgment in *OTP Bank and OTP Faktoring*. The Curia of Hungary also stated that the legal consequences of the invalidity of unfair terms relating to the exchange rate risk would be further discussed in future meetings of the consultative body previously set up by the president of the Curia of Hungary for the purpose of analyzing the case-law relating to the loan contracts concluded in a foreign currency.

Although the Curia of Hungary has omitted to expressly address the possible reasons for the obvious contradiction between its position and the CJEU's judgment in *Dunai*, it may be concluded that the latter may have been based on a misinterpretation of the precise content of the national legislation, leading to an erroneous conclusion.[15] In fact, the legal consequence of invalidity of a contract known in Hungarian civil law as 'declaration of effectiveness of the contract up to the time of adoption of the [court's] decision', prescribed in the legislation of 2014 as one of the legal consequences that the consumer had to request, can easily be misread as precluding the national court from drawing the consequences of invalidity of the whole contract with *ex tunc* effect. Meanwhile in reality it is merely a legal instrument to address situations where *restitutio in integrum* is not possible, as for example, one could argue, in the case of loan contracts.[16]

While the finding of the invalidity of the whole contract entails that it is null and void from the time of its conclusion by the parties, certain types of contracts cannot be fully reversed, as the services already rendered by the parties under the contract cannot be made undone. Therefore, in such cases, when the contract is declared invalid by a court, the latter has to rule on these services already rendered by the parties. The 'declaration of effectiveness of the contract up to the time of adoption of the [court's] decision' is the legal concept in Hungarian law that enables the court to rule on such services by filling the void that the declaration of invalidity has left. This does not, however, mean that the consequences of invalidity are in any way restricted or that the term found to be unfair by the court continues to exert an effect between the time of the conclusion of the contract and the judgment declaring its invalidity. On the contrary, should a court declare a consumer

15 It must be emphasised once again that the CJEU has presumably based its reading of national law on the information it received from the referring court and on the case file, including a translation of the legal provisions in question, which may have contributed to a misunderstanding of its content. It may also be pointed out, however, that the CJEU decided to proceed without holding a hearing in the case, which might have proved useful in clarifying the precise meaning of the national legislation, particularly because the reference for a preliminary ruling did not address the issue with sufficient clarity.

16 The question of the legal consequences of the invalidity of loan contracts has been addressed by an expert group analyzing the case-law set up by the Curia of Hungary in March 2014, where the majority opinion opted for the impossibility of *restitutio in integrum* in case of the invalidity of loan contracts, while a strong minority supported the contrary opinion, at https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_i.pdf.

loan contract null and void *ab initio* as a consequence of the unfair nature of a term that constituted the main subject-matter of the contract and without which the contract may not continue to exist, it must settle the accounts between the parties and rule on the services rendered without offset, having full regard to the fact that the unfair term was not binding upon the consumer. Therefore, in such cases the court first finds that the contract is invalid, resulting in the consumer being unbound by the unfair term and then proceeds to settle the outstanding claims between the parties based on the factual circumstance that the contract had nevertheless deployed certain effects until the declaration of its invalidity. It seems, therefore, that if the above interpretation of the national legal concept is correct, the premise of the judgment in *Dunai* as to the effects of the legislation is mistaken, and the legal provisions may pass the test of conformity with Directive 93/13/EEC after all.

It should also be noted that the CJEU has made an important point in the judgment as to the relevance of the consumer's economic interests in deciding on the eventual cancellation or continuation of the contract. Unfortunately, the question was addressed only in a brief two paragraphs of the judgment,[17] which is in stark contrast with the opinion of Advocate General Wahl,[18] who devoted 24 paragraphs to this question, coming to an entirely different conclusion. Considering that the consequences to be attached to the economic interest of the consumer was one of the questions explicitly raised by the referring court, it is all the more surprising that the CJEU merely declared that the possibility of the national court to substitute a supplementary provision of domestic law for an unfair contractual term in order to ensure the continued existence of the contract is limited to cases where the cancellation of the contract would be unfavorable to the consumer. This seems to be an important distinction as compared to earlier judgments, where the CJEU seemed to confirm that the continued existence, if legally possible, of the contract was the solution preferred by Directive 93/13/EEC,[19] and that the national court cannot base its decision to annul the contract solely on a possible advantage for one of the parties.[20] Apart from the novelty of the approach it is also noteworthy that here again, the CJEU has fully relied on the information provided by the referring court to find that in the main proceedings the continuing existence of the contract seemed to be contrary to the interest of the consumer and therefore, the substitution of a supplementary provision of domestic law 'did not seem to be applicable'.

17 *Case C-118/17, Dunai*, paras. 54-55.
18 Opinion of Advocate General Nils Wahl delivered on 15 November 2018, ECLI:EU:C:2018:921.
19 *See e.g. Case C-51/17, OTP Bank and OTP Faktoring*, para. 60.
20 Judgment of 15 March 2012, *Case C-453/10, Pereničová and Perenič*, ECLI:EU:C:2012:144, paras. 31-33.

17.8 Conclusions

Several conclusions may be drawn from this brief overview of recent decisions rendered in Hungarian preliminary ruling procedures relating to consumer loan contracts concluded in foreign currencies. First, it seems clear that several national courts were not satisfied with the solutions adopted by the Curia of Hungary and later on by the national legislator to the problems relating to these contracts. They have therefore challenged certain elements of the case-law of the Curia of Hungary and the Hungarian legislation adopted in 2014 with regard to Directive 93/13/EEC. It follows that the CJEU had to verify the conformity of a juxtaposition of contractual terms, national case-law and several layers of national legal provisions with the Directive. These national provisions were, and continue to be, disputed before the courts and also by the courts themselves. It may also be concluded that the untangling of the meaning of national legal provisions and in particular those of national civil law concepts in light of Directive 93/13/EEC remains a difficult task where the CJEU shall not neglect to take into account the complexity of issues raised and should preferably rely on multiple sources of information relating to the exact content of national legislation brought before it by the national courts. As for the national courts, it should be reiterated that in the context of the judicial dialogue under the Article 234 TFEU procedure they have the responsibility to provide the CJEU with reliable and clear information relating to the national legal provisions that they intend to apply or, as the case may be, set aside in the light of the interpretation of EU law sought by a reference for a preliminary ruling.