Chapter IX

Unfair Terms

1. General considerations

In the middle of the 20th century, principles such as autonomy of will and freedom of contract became mere illusions in the conditions of mass production and consumer society. The need for consumption, limited competition, and economic inequality did not allow a wide range of actors to impose their will in shaping the content of their obligations. This asymmetry between mass producers (as well as marketers) on the one hand and the mass of consumers on the other was manifested in the standardized terms of contracts.

Standardized terms for multiple contracts (standard terms in a broader sense) allow entrepreneurs to consolidate the content of their obligations and to some extent simplify the formation of contracts. Sales and services and their distribution become easier to administer, and thereby cheaper. It is after all easy to fill out a form. The settlement of problems of interpretation, for example, results in the resolution of thousands of other cases based on the same arrangement. The contract itself becomes a unified, mass-produced product.[1]

On the other hand, the consumer's ability to negotiate any divergent arrangement is limited. He or she cannot protect his or her interests, either because the entrepreneur benefits from a monopoly or dominant position, or because all entrepreneurs offer the same or very similar terms. The will of the consumer is in this way made

1 Llewellyn, 1931, p. 731.

Hulmák, M., Menyhárd, A., Tomczak, T., Veress, E., Dudás, A., Hlušák, M. (2022) 'Unfair Terms' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 289–320. https://doi.org/10.54171/2022.ev.cliece_chapter9

more or less subject to the terms set by the stronger party and to conditions whose consequences are often not even comprehensible to the consumer.[2] Most issues are resolved in advance by the contract, and usually in favor of the stronger party. Given the importance of the contract for a particular individual, it becomes a private law instrument of management and control.[3] The use of standard terms leads to the creation of a new form of servitude.[4] The consumer has only the right to choose who will govern him. Studying the terms and seeking to negotiate are ineffective when no change can be achieved in their contents. Any time devoted to such activity seems wasted.

As early as the 1930s, it was pointed out that the increasing possibility of control and management also calls for greater protection of the weaker party.[5] Interference with the autonomy of the contracting parties and no respect for freedom of contract occur historically when there is abuse.[6] For example, clauses limiting the entrepreneur's liability hidden in his standard terms have long been reviewed by courts. The criteria considered were incompatibility with good morals or good faith.[7]

The issue was never only the existence of a consensus, or any surprising terms, but also the adequacy of the performances. Emphasis was placed on procedural justice, while controlling material adequacy was an issue placed rather at the end of the queue. Rakoff has already pointed out that the control of some terms by the court and their subsequent non-application without adjusting the price may result in excessively onerous obligations for the weaker party when the price has been set precisely with respect to these terms, e.g., transferring risks to the weaker party. He spoke about retroactive unfairness. However, the mere fact that the term under examination was taken into account when setting the price (i.e., the price is adequate when considering the agreed content) does not mean that the term subject to control is fair.[8]

Gradually, the perception of standard terms as a manifestation of monopolistic behaviors hindering the free market was abandoned.[9] Standard terms were used to a much greater extent as a manifestation of the mass production and distribution typical of contemporary society.[10] Their use is connected with the increase in the number of entrepreneurs and growth of management, pressure toward the effectiveness of the contracting process, and the involvement of lawyers in the preparation of contractual documentation.[11] The modern economy is not a marketplace in which the

2 Kessler, 1943, p. 632.
3 Llewellyn, 1931, p. 732.
4 Kessler, 1943, p. 640.
5 Llewellyn, 1931, p. 733.
6 Niglia, 2003, p. 26.
7 E.g., in Germany § 138 and § 242 of the BGB in case law prior to 1976 (see decision of the German Supreme Court of February 24, 1971, Ref. No. VIII ZR 22/70, according to Raiser, 1958, p. 7).
8 Rakoff, 1983, p. 1243.
9 Kessler, 1943, p. 640.
10 Rakoff, 1983, pp. 1220 et seq.
11 Niglia, 2003, pp. 34 et seq.

price and contractual terms are negotiated; instead, it relies on firm and standardized terms that are not in principle negotiable.[12]

These changes in contractual terms are necessarily reflected in the need for specific rules in legislation. This legislation may impose an obligation to negotiate or to determine the price.[13] A partial solution is regulation preventing restrictions on free competition.[14] Nevertheless, eventually the need for legal certainty, comprehensibility, and predictability of standard terms and their growing importance led to the adoption of special rules. Invalidity of the term was connected with its surprising or unfair nature[15] or the absence of special written consent for certain arrangements.[16] Oversight was no longer a matter of procedural justice alone (formal contractual freedom), but was aimed at ensuring substantive justice (substantive contractual freedom—*materiale Vetragsfreiheit*).[17] However, judicial or administrative control of the content of the contract has been only slowly enforced despite the existence of such legislation, for example in Italy or France.[18]

At the same time, a consumer protection program in the European Economic Community was formulated.[19] Generally, the program started a fight for the protection of consumers against abuse of power by businesses, unilateral terms, the exclusion of fundamental rights, and unfair commercial practices.[20] Attention was focused on standard terms, not price arrangements, which differed from contract to contract and which, together with the definition of consideration, could be negotiated even if standard terms were applied.[21] At the level of the European Economic Community, these tendencies resulted in the adoption of Directive 93/13/EEC on Unfair Terms in Consumer Contracts (hereinafter 'UCTD').[22] Consumer protection against unfair contractual terms was motivated primarily by the need to respond to market failures. The aim was to eliminate the imbalance between the consumer and

12 Canaris, 2000, p. 323.
13 Raiser, 1958, p. 3 (enforced as a requirement of the social state and of social justice).
14 Raiser, 1958, p. 5.
15 Loi Scrivener (loi n°78-22 du 10 janvier 1978), Das Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (December 9, 1976, BGB I 1976, 3317), Unfair Contract Terms Act 1977, Restatement (second) of Contracts, § 211 (1979).
16 According to the *Codice Civile*, Article 1341. The bill on unfair terms in businesses' standard terms was eventually not adopted in Italy in the 70s (see details on this reform in Niglia, 2003, p. 62).
17 Canaris, 2000, pp. 321 et seq.
18 Niglia, 2003, pp. 63 and 67.
19 Preliminary programme of the European Economic Community for a consumer protection and information policy, April 25, 1975, OJ C 92, pp. 2 et seq.
20 This program was followed by the first directives on consumer protection. In 1984 the Commission adopted the Unfair Terms in Contracts Concluded with Consumers (Communication from the Commission), COM/1984/055 final. Regulation in particular Member States at that time is described in point 20 et seq.
21 Unfair terms in contracts concluded with consumers (Communication from the Commission), points 6 and 10.
22 Details on adoption of this directive in Niglia, 2003, pp. 93 et seq.

the entrepreneur.[23] However, it was also about harmonizing legislation in order to facilitate cross-border trade.[24]

Summarizing its basic principles, protection is provided to the consumer in the case of terms that have not been individually negotiated. Such a contractual term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.[25] The unfairness of a contractual term shall be assessed taking into account the specific circumstances of the case.[26] Some terms are presumed to be unfair.[27]

Subsequently, in other Member States, specific rules emerged for reviewing the unfairness of contractual terms. It was no longer necessary to rely on general institutions such as good morals, good faith, or usury. However, the UCTD was based on the principles of minimum harmonization,[28] and moreover only in view of business-to-consumer relations. Member States could also adopt stricter consumer protection regulations. Therefore, different legal regulations addressing the unfairness of standard terms can be found in Europe now.[29]

The (judicial) oversight of possibly unfair terms may be limited to consumer contracts only or it may be broader, and subject terms included in other contracts to control as well (e.g., adhesion contracts). Unequal bargaining power can also affect business-to-business relations. In this respect, Directive (EU) 2019/633 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain is well known.

There may be one general regulation of unfair terms,[30] possibly with special provisions concerning consumers,[31] or two or more separate ones.[32] The special assessment of unfairness may concern standard terms in the broader sense.[33] It may be limited to terms that have not been negotiated individually.[34] We may find regulations where the entire content of the contract is assessed.[35] The law may exclude certain terms from under oversight, e.g., terms defining the main subject of the contract,[36]

23 E.g., CJEU, C-169/14 of July 17, 2014, Juan Carlos Sánchez Morcillo, María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria SA, para. 24.
24 UCTD, Preamble.
25 UCTD, Article 3.
26 UCTD, Article 4.
27 UCTD, Annex I.
28 UCTD, Article 8.
29 According to Schulte-Nolke, Twigg-Flesner and Ebers, 2007.
30 BGB, § 307; ABGB, § 879 (3); Dutch Civil Code, Article 6:231.
31 BGB, § 310; KSchG, § 6; Dutch Civil Code, Articles 6:236 and 6:237.
32 Code Civile, Article 1171; Code de la Consommation, Article L.132-I.
33 E.g., ABGB, § 879 (3); BGB, § 307.
34 PECL, Article 4: 110 (1); UCTD, Article 3.
35 Code de la Consommation, Article L.132-I.
36 PECL Article 4: 110 (2) l. a); DCFR, Article II.–9:406 (2); ABGB, § 879 (3); Dutch Civil Code, Article 6:231. l. a).

contracts from other fields of private law,[37] and terms merely taking over otherwise applicable provisions.[38] On the other hand, sometimes the regulation positively limits its applicability to terms deviating from the legal regulation.[39]

The way in which assessment of unfairness takes place differs not only in what is being reviewed, but also in the content of the test applied, typically depending on the nature of the relationship.[40] A review of the adequacy of mutual performances may be excluded from such supervision.[41] Particular attention is paid to the possibility of taking price into account during the assessment as a way to compensate the unfairness (price-based considerations). In some jurisdictions, an unclear and incomprehensible term is immediately declared unfair.[42] Surprising terms in standard terms are very often ineffective, regardless of the nature of the parties.[43]

The UCTD contains a list of terms that are presumed to be unfair (the 'gray list').[44] However, in Member States today, the legal system often contains a list of unfair terms prohibited without further ado (the 'blacklist').[45] It is interesting to compare the differences in these catalogues, such as the prohibited restriction on damages a consumer may claim, or arbitration clauses in consumer contracts. The law may also allow for the subsequent completion of these lists in the form of follow-up acts.[46]

Depending on the national legal system, unfair terms may be unenforceable, invalid (null and void, or voidable), or non-existent. Such consequences occur in some cases *ex lege* or may be invoked *ex officio*, while in others (such as voidability) only the aggrieved party may be entitled to raise them.[47] In most cases, the legislation seeks to maintain the validity of the rest of the contract. However, there may be different approaches and different means of filling the gap that is left in the contract after the unfair term is rendered invalid or non-existent. The law may also extend the unenforceability, invalidity, or non-existence of such a term, e.g., toward retailers in the middle of a distribution chain.[48]

37 E.g., contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law, and contracts relating to the incorporation and organization of companies or partnership agreements (preamble of the UCTD).
38 DCFR, Article II.–9:406 (1).
39 E.g., BGB, § 307 (3).
40 DCFR, Articles II.–9:403, II.–9:404, II.–9:405.
41 PECL, Article 4: 110 (2) l. b); UCTD, Article 4 (2); Code de la Consommation, Article L.132-I; DCFR, Article II.–9:406 (2).
42 BGB, § 307 (1); KSchG, § 6 (3).
43 BGB § 305c; Dutch Civil Code , Article 6:233. l. b).
44 Dutch Civil Code, Article 6:237; BGB, § 309; KSchG, § 6. (2).
45 Dutch Civil Code, Article 6:236; BGB, § 308; KSchG, § 6. (1).
46 Dutch Civil Code, Article 6:239; Code de la Consommation, Article L.132-I.
47 Dutch Civil Code, Article 6:231.
48 Dutch Civil Code, Article 6:244.

2. The Czech Republic

2.1. Overview

The regulation of unfair contractual terms in the CzeCC stems from the general obligations of fair dealing,[49] the prohibition of breach of good morals,[50] and the prohibition of abuse of economic power.[51] A person who acts as a professional (entrepreneur) in relation to others in an economic relationship must not abuse his or her professional quality or his or her economic position to create or take advantage of a state of dependence of the weaker party or to achieve an obvious and unjustified imbalance in their mutual rights and duties.

The regulation of unfair contractual terms can be divided into two basic sets of norms—the regulation of contracts of adhesion[52] and the regulation of consumer contracts.[53] This regulation is supplemented, for example, by the general prohibition of surprising clauses in standard terms inspired by § 305c of the BGB.[54] A clause included in the standard terms that the other party could not reasonably have expected is ineffective if it was not expressly accepted by the other party. Any provision to the contrary is disregarded. Whether such a clause is or is not surprising must be determined not only by reference to its contents, but also by reference to the manner in which it is expressed.

2.2. Adhesion contracts

The regulation of contracts of adhesion (*smlouvy sjednávané adhezním způsobem*) in the CzeCC was inspired by the Civil Code of Québec, Canada (specifically Articles 1379, 1432, and 1435–1437).

The provisions on contracts of adhesion apply to any contract the essential terms of which have been determined by or under the direction of one of the parties without the weaker party having had a real opportunity to influence the content of such essential terms. The burden of proof that a contract is a contract of adhesion is qualified by two rebuttable legal presumptions. The first is a presumption that the weaker party is the party who contracted with the entrepreneur in economic relations that lay outside the business of such a party.[55] It is also presumed that the contract of adhesion is a contract concluded with the weaker party by means of a standard form used in the course of trade or other similar means.[56]

49 CzeCC, § 6.
50 CzeCC, § 588.
51 CzeCC. § 433.
52 CzeCC, § 1800.
53 CzeCC, § 1813.
54 As implemented in the CzeCC, § 1753.
55 CzeCC, § 433 (2).
56 CzeCC, § 1798 (2).

A clause that can only be read with special difficulty or is incomprehensible to a person of average intelligence is voidable unless there is no prejudice to the weaker party, or the meaning of the clause has been sufficiently explained to the weaker party.

A clause that is particularly disadvantageous to the weaker party without reasonable cause is voidable as well, in particular if the contract deviates seriously and without special reason from the usual terms and conditions agreed to in similar cases. If the equitable arrangement of the rights and obligations of the parties so requires, the court shall decide *mutatis mutandis* in accordance with § 577 of the CzeCC (i.e., reduction for preserving validity). The court may set the amount of performance in accordance with the breached statutory limit.

Rules[57] known from consumer law may be to some extent used as a benchmark for the assessment of a particularly disadvantageous clause. The intensity of the disadvantage must not be higher than in the case of juridical acts involving consumers; the latter are considered by the legislator particularly worthy of protection.[58]

This provision is mandatory. However, entrepreneurs may exclude it in their relations with each other unless a party proves that a clause outside the actual text of the contract that was proposed by the other party is grossly contrary to commercial usages and the principle of fair dealing.

2.3. Consumer contracts

The regulation of unfair terms in consumer contracts[59] is an implementation of the UCTD. Unfair terms are those that, contrary to the requirement of good faith, create a significant imbalance of rights or obligations between the parties to the detriment of the consumer.

Basically, all clauses in consumer contracts fall under a review of unfairness. The scope of application is not limited to standards terms or to terms not individually negotiated. The only exception is a clause on the main subject of the obligation or the assessment of the adequacy of the mutual consideration, provided that it is laid down in a clear and comprehensible manner. This exception is interpreted in accordance with Article 4 (2) of the UCTD.[60] Obviously a clause corresponding to the otherwise applicable law should be a fair one.[61]

The CzeCC has a list of unfair and thus prohibited clauses. The list is to some extent inspired by the list in the Annex to the UCTD. Nevertheless, the Czech legislator adopted a stricter approach. The clauses prohibited as unfair without further consideration constitute mainly a veritable blacklist, not only a set of presumptions, as is the case with the gray list under the UCTD. Moreover, some clauses are prohibited although the UCTD does not mention such cases in the list. For example, the CzeCC

57 CzeCC, §§ 1813, 1814.
58 Janoušek in Petrov et al., 2019, p. 1886; Petrov in Hulmák et al., 2014, p. 352.
59 CzeCC, § 1813.
60 Hulmák, 2020, p. 118; Vondráček in Petrov et al., 2019, p. 1794.
61 Hulmák, 2020, p. 15.

prohibits[62] clauses that limit any consumer's rights arising from defects or the right to damages. Some clauses, e.g., setting jurisdiction or arbitration clauses, are prohibited in special acts.[63]

On the other hand, the presumption of abusive character (grey list) is laid down only in three cases, i. e., clauses (1) conferring on the entrepreneur the right to terminate the obligation without good cause without reasonable notice, (2) postponing the determination of the price until the time of performance; or (3) excluding or limiting the consumer's rights against the trader in the event of default by the trader, including the possibility of off-setting of the consumer's claim against the trader's claim.

The legislator adopted a list of criteria to be taken into account when examining unfairness.[64] The practice stems from the judgment of the CJEU in case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*.[65] The requirement of clarity and comprehensibility of the clause is explicitly emphasized.[66] However, the legislator did not strictly state that absence of clarity always means that the term is unfair. The uncertain term may be non-existent,[67] interpretation in favor of the consumer may be at stake,[68] or it may be a surprising term included in the standard terms.[69] Provided the term is a part of the contract, clarity and comprehensibility are taken into account during the test of unfairness also.[70] The approach set out by the CJEU is followed in this respect.[71]

The unfair term is non-existent, but the consumer may invoke such a clause as being fair.[72] Some authors[73] and the Supreme Court consider the unfair term null and void.[74] This difference has no significant consequence.

Not only a consumer may plead the unfairness of the term. An organization for the protection of consumers may initiate proceedings against the entrepreneur to force it to refrain from the use of an unfair term.[75] This constitutes the implementation of Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests and Article 7 of the UCTD.

62 CzeCC, § 1814 (a) and (b).
63 Act No. 261/1994 Sb., on arbitration (§ 2), Act No. 99/1963 Sb. Code of Civil Procedure (§ 89a).
64 UCTD, Article 4 (1).
65 Supreme Court, Ref. No. Cpjn 200/2013.
66 CzeCC, § 1811.
67 CzeCC, § 553.
68 CzeCC, § 1812.
69 CzeCC, § 1753
70 CzeCC, § 1813; Hulmák, 2020, p. 116; Vondráček in Petrov et al., 2019, p. 1911.
71 CJEU, C-472/10, Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt., par. 27 a 29; CJEU, C-453/10, Jana Pereničová and Vladislav Perenič v. SOS financ spol. s r.o.; CJEU, C-621/17, Gyula Kiss v. CIB Bank Zrt., Emilu Kissovi, Gyuláné Kiss, par. 49.
72 CzeCC, § 1815; Hulmák in Hulmák et al., 2014, p. 475; Melzer in Melzer and Tégl, 2014, p. 572; Beran in Petrov et al., 2019, p. 614.
73 Pelikán and Pelikánová in Švestka et al., 2014, p. 198; Vondráček in Petrov et al., 2019, p. 1912.
74 Supreme Court, Ref. No. 26 Cdo 2666/2017.
75 Act No. 634/1992 Sb., on consumer protection (§ 25).

In case law, the most attention has so far been paid to the unfairness of loan administration fees. In the light of German case law,[76] there has been an attempt to declare such terms unfair and to recover such fees. The Supreme Court[77] and the Constitutional Court[78] have both rejected such an approach. They reasoned on the basis of the clarity and comprehensibility of the terms and eventually excluded them from the review of unfairness as a price arrangement.

2.4. Other examples

Problems in supply chains for food and agricultural products distribution led the legislator to adopt Act No. 395/2009 Coll., on Significant Market Power in the Sale of Agricultural and Food Products and its Abuse. Under § 4 of this Act the abuse of significant market power is prohibited in general. Aside from this, the same provision lays down prohibitions on specific contractual arrangements. Abuse is constituted for example by:

- the negotiation or application of contractual terms that create a significant imbalance in the rights and obligations of the parties, or
- the negotiation or obtaining of any payment or other consideration for which no service or other counter-performance has been provided, or if the counter-performance is disproportionate to the value of the consideration actually provided.

Such clauses are voidable.[79] An amendment to this Act is being prepared to implement Directive (EU) 2019/633 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain.

In addition, it is necessary to mention the unfairness of the clauses on debt maturity or on default interests.[80] Such grossly unfair clauses are voidable. This rule constitutes the implementation of Directive 2011/7/EU on Combating Late Payment in Commercial Transactions.

3. Hungary

3.1. Overview

The HunCC, in line with European developments in the 1970s, provided rules for the invalidity of unfair contractual terms. These rules have been repealed by the implementation of the regime provided by the European legislator.

Hungarian private law provides a two-tier protection against unfair contractual terms. The first level of protection is provided for contracts concluded on the basis of standard contractual terms, whereas the second level is provided for consumer

76 BGH, Ref. No. XI ZR 388/10.
77 Supreme Court, Ref. No. Cpjn 203/2013.
78 Constitutional Court, Ref. No. III. ÚS 3725/13.
79 Zapletal in Petrov, 2019, p. 466; Kindl and Koudelka, 2017, p. 90.
80 CzeCC, § 1964.

contracts. The basis of this two-level protection is the distinction between standard contractual terms and contractual terms that are not individually negotiated.

3.2. Standard terms

As a general rule, a standard contractual term is unfair if it unilaterally, unreasonably, and by interfering with the requirement of good faith and fair dealing sets forth the rights and obligations arising from a contract to the detriment of the party contracting with the person applying that contractual term. The aggrieved party may claim the unfair standard contractual term invalid.

3.3. Consumer contracts

In contracts between consumers and undertakings, the provisions on unfair standard contractual terms shall also apply to contractual terms that are drafted in advance by the undertaking and not negotiated individually. The burden of proof is imposed on the undertaking that the contractual terms were individually negotiated by the parties. An unfair contractual term included in a contract between a consumer and an undertaking shall be null and void, where invalidity may be relied upon only in the interest of the consumer. Hungarian contract law has thus been harmonized with the UCTD.

3.4. Unfairness

The unfair nature of a term, stipulated either in a consumer or in a non-consumer contract, shall be assessed by examining all circumstances of concluding the contract, including the pre-contractual stage and the designated purpose of the stipulated performance, as well as the relationship of the term concerned with other terms of the contract or with other contracts. The provisions on unfair contractual terms shall not apply to terms defining the main performance or the proportionality between the performance and the counter-performance if those terms are clear and intelligible. A contractual term—established in accordance with legal requirements or as set forth by law—shall not qualify as unfair. In contracts between consumers and undertakings, the unclear nature of standard contractual terms and contractual terms determined by the undertaking in advance and not negotiated individually shall in itself suffice for the term to be deemed unfair. The black and gray lists provided by the UCTD are implemented by the HunCC.[81]

3.5. Loans denominated in Swiss Francs

A great bulk of the relevant case law covers consumer loans denominated in Swiss Francs (CHF). In Hungary, as in other Middle and Eastern European countries, a large number of citizens had become indebted with loans denominated in CHF. These consumer loans became a huge social problem because of drastic changes in the exchange rate and threats of mass insolvency among households. Thousands of claims were

81 HunCC, § 6:104.

submitted to the courts that led to diverging judicial practice, considering more than 30 different arguments submitted by the parties in such cases. They mostly argued that shifting the risk of changes in currency exchange rates to the debtor (a consumer) was unfair and thus that such provisions were invalid. In order to avoid the flood of claims, the legislator enacted a law that declared such clauses explicitly invalid. The Hungarian legislator then passed an act that declared the provision included in such consumer loan contracts that shifted the risk of changes in currency rates to the consumer as unfair.[82] In this way the Hungarian legislator provided a statutory interpretation of the concept of unfair contractual terms in this respect. The statutory intervention, however, was quick and clear, capable of closing the floodgates and providing legal certainty, especially for this group of cases. Development of the case law in Hungary also followed the judgements of the CJEU. The Supreme Court, along with the CJEU, assessed the problem with application of the UCTD as the unilateral right of the creditor to increase interest rates and to shift the risk of changes in currency exchange rates to the debtor.[83] In these cases, an element of the test of validity was constituted by whether the bank complied with the duty of disclosure, thus revealing the risks involved in such transactions. Court practice assessed this problem as an enforceability issue on the grounds of fairness of the terms. The problem was actually much less an issue of fairness than of the allocation of risk: that of placing the burden resulting from changed circumstances on the debtor, in effect a *clausula rebus sic stantibus* issue.[84]

3.6. Action in the public interest

An action in the public interest to establish the invalidity of an unfair contractual term that became part of a contract between a consumer and an undertaking may be brought by the public prosecutor; the minister of justice and the heads of autonomous state administration organs, main government agencies, and central agencies; the heads of the capital and county government offices; economic and professional chambers or organizations for the representation of their members' interests; and with regard to consumer interests protected by it, the associations that are engaged in the protection of consumer interests and the associations established to protect consumer interests under the law of any Member State of the European Economic Area.

On the basis of an action in the public interest, the court may establish the invalidity of an unfair standard contractual term effective against all parties contracting with the entity that applies the term and may then order the entity applying the

82 A Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. tv. [Act XXXVIII of 2014 on the Resolution of Questions Relating to the Uniformity Decision of the Curia Regarding Consumer Loan Agreements of Financial Institutions].

83 Supreme Court, Unificatory Resolutions Nos 6/2013, 2/2014, and 1/2016.

84 As assessed, e.g., by the Hungarian Supreme Court in the case of Kúria Gfv.VII.30.030/2018., BH 2019 No. 54.

contractual term to arrange, at its own cost, the publication of an announcement of the establishment of the contractual term's unfair nature. The court decides even on the text and manner of publishing the announcement. The announcement must contain the precise identification of the contractual term concerned, the establishment of its unfair nature, and the arguments on which its unfair nature is based. The establishment of invalidity cannot affect contracts that have been performed up to the time of contesting the unfair contractual term.

Organizations representing the economic interests of undertakings may also submit actions pursuant to the provisions of the Rules of Civil Procedure on actions brought in the public interest, claiming as unfair a clause that becomes, as a standard contractual term, a part of the contract between undertaking, and sets forth unilaterally, unreasonably, and to the detriment of the obligee the time for performance of a pecuniary debt or the rate and due date of the default interest by violating the principle of good faith and fair dealing.

3.7. Examples

According to the case law, the standard contractual term according to which the agent is entitled to a commission even if the property is not purchased by a buyer introduced by the agent is unfair.[85] A standard contractual term derogating from the non-mandatory rule of the HunCC, under which the principal—in the event of lawful termination—is obliged to pay to the real estate agent a percentage of the success fee (fixed as a commission set according to the purchase price of the property), as compensation for costs, shall be deemed unfair.[86]

The amount of the general compensation for termination meets the requirements of good faith and fair dealing if the parties took into account the period of time after termination, the activities carried out by the party before termination, and the costs incurred. Imposing compensation without differentiation is unfair.[87] The exclusive jurisdiction clause is also a disadvantage for the consumer in terms of access to justice, where the fact that it does not apply to the same court as the place of establishment of the business is to be deemed unfair.[88]

The invalidity of unfair contractual terms is just one element in the system of the control of standard contractual terms. Although under formal control surprising terms (like jurisdictional clauses) do not become part of the contract, Hungarian court practice seems to prefer the fairness test instead of cases of formal control.

85 Supreme Court, EBH 2005 No. 1333.
86 Supreme Court, BH 2020 No. 181.
87 Supreme Court, PJD 2018 No. 29.
88 Supreme Court, PJD 2017 No. 7.

4. Poland

4.1. Overview

Celsus argued that *'Law is the art of the good and the equitable'* (Dig. 1, 1, 1). The aim of Polish civil law is to ensure the fairness of contracts. Therefore, numerous provisions may be found in the PolCC whose goal, at least to some extent, is to eliminate unfair terms.[89] The most general one is Article 58 of the PolCC, under which the contract can be entirely or partially declared null and void due to the breach of a statute, its circumvention, or due to inconsistency with the principles of social coexistence. Thanks to this provision it is possible to find a part of a juridical act (e.g., a contract) null and void.[90] The cited article does not provide any limitation regarding its personal scope. One other general provision whose application may in essence lead to similar consequences is Article 388 of the PolCC, which regulates the institution of exploitation of the other party.[91]

However, in this sub-chapter a narrow scope of the notion of 'unfair contractual term' will be adopted. It will focus on the regulations of Polish law that constitute the implementation of the UCTD. Such an approach is justified by the subject matter of this work and the fact that the provisions elaborated upon below constitute the most essential regulation on the basis of which parties may contest an unfair contractual term.

4.2. Legislative basis

In Poland the UCTD was mainly implemented by Articles 385^1–385^3 of the PolCC. The mentioned provisions entered into force on July 1, 2000, even before Poland became an EU Member State. On January 1, 2021, Article 385^5 was added to the PolCC, which extended the personal scope of the institution under examination (see below).

4.2.1. The definition of unfair contractual terms

Article 385^1 § 1 of the PolCC states that: 'Terms of an agreement concluded with a consumer not individually negotiated shall not bind the consumer if they frame his/her rights and obligations in a manner contrary to good manners, grossly violating his/her interests (unfair contractual terms). (...)'

89 E.g., PolCC Article 58 § 2 and 3.

90 Radwański and Olejniczak, 2010, p. 162.

91 PolCC, Article 388 § 1 states: 'If one of the parties, taking advantage of the other party's state of necessity, infirmity, or inexperience, in exchange for his/her performance accepts or reserves for himself/herself or for a third party a performance whose value at the moment of the conclusion of the contract blatantly exceeds the value of his own performance, the other party may demand a reduction in his/her performance or an increase in the performance due to him/her, and where both proved to be excessively difficult, he/she may demand that the contract be declared void.'

4.2.2. The personal scope of the applicability of norms on unfair contractual terms

According to Article 385[1] § 1 of the PolCC the institution of unfair contractual terms refers only to consumers. Under Polish law a consumer is defined as a natural person who enters into a juridical act with an entrepreneur, if that act is not related directly to his or her business or professional activity.[92]

However, on January 1, 2021, due to the entry into force of the new Article 385[5] of the PolCC, this personal scope was extended. Presently, a natural person concluding a contract directly related to his or her business activity may also rely on the institution in question when the content of such a contract shows that it does not have the character of his or her professional activity. In other words, in Poland the discussed institution applies not only to business-to-consumer relations, but to some extent may also be used in business-to-business relations. Below, the term 'consumer' will be used, but it shall refer also to the indicated business-to-business situations.

4.2.3. The conditions of unfair contractual terms

According to 385[1] § 1 of the PolCC, to find a certain term unfair, the following conditions have to be fulfilled cumulatively:

— the term has to be included in an agreement,
— the term must not be individually negotiated,
— the term must frame the rights and obligations of a consumer in a way contrary to good manners,
— the term must grossly (i.e., egregiously) violate the interests of the consumer.

If the above conditions are met, the term still cannot be found 'unfair' when it determines the main performance of the parties, including the price or the remuneration, if it was formulated in an unambiguous way.[93] The mentioned preconditions can be elaborated separately.

Article 385[1] § 1 of the PolCC speaks only about the terms of 'an agreement.' However, in the Polish legal literature and case law, it is unanimously stated that a term of a contract form (template) may be found to be unfair.[94] The issue is important since Polish law does not treat agreements and forms use for concluding contracts in the same way.[95]

According to the wording of Article 385[1] § 3 of the PolCC, a term shall be regarded as not having been individually negotiated where a consumer had no actual influence on its content. The indicated provision further explicitly states that this rule concerns, in particular, contractual terms taken over from a contract concluded on

92 PolCC, Article 221.
93 PolCC, Article 385[1] § 1.
94 Like the general terms of contracts, the contract form, the rules, and regulations. See the judgment of the Polish Supreme Court, 29.08.2013, I CSK 660/12, LEX No. 1408133.
95 See PolCC, Article 384 and Radwański and Olejniczak, 2010, p. 162.

a form. The burden of proof in this respect shall be incumbent on the person who claims this to be the case.[96]

The condition that a term has to frame rights and obligations of a consumer in a manner contrary to good manners is not uniformly interpreted in the case law.[97] However, quite generally, it may be stated that this condition is fulfilled if the terms of the agreement have been framed in such a manner by the entrepreneur that it violates the contractual balance of the parties.[98]

According to the wording of Article 385^1 § 1 of the PolCC, a term has to 'grossly' violate an interest of the consumer to be found unfair. However, in the literature and case law it is indicated that such terminology constitutes an incorrect implementation of the UCTD,[99] since the UCTD speaks only of a 'significant' imbalance. Therefore, on the basis of the obligation to interpret national law in accordance with European Union law, only a significant violation shall be required.[100]

In the opinion of the Polish Supreme Court this condition is fulfilled when in a specific legal relationship there is unjustified imbalance of rights and obligations to the detriment of the consumer.[101]

Very often in court proceedings a court analyzes a certain term of the contract and afterwards adjudicates that it is contrary to good manners and grossly violates interests of a consumer without making a clear distinction between these two premises.[102]

A certain term cannot be found unfair if it determines the main performances of the parties and was formulated in an unambiguous way. First, an assessment whether a certain term refers to the 'main performance' shall be done on the basis of a certain agreement. Swiss-Franc-denominated loan agreements showed that determining this issue can be very difficult.[103] Second, the requirement of unambiguity is fulfilled when the content of the given term was determined precisely, clearly, and obviously and was understandable to a typical consumer.[104]

96 PolCC, Article 385^1 § 4. For more about this premise, see, for example, the judgment of the Polish Supreme Court, 1.03.2017, IV CSK 285/16, LEX No. 2308321.

97 See Tomczak, 2020, pp. 1069–1070.

98 Of course, in favor of the entrepreneur. See the judgment of the Polish Supreme Court, 13.07.2005, I CK 832/04, LEX No. 159111.

99 See: Tomczak, 2020, pp. 1069–1070, and the resolution of the Polish Supreme Court (7), 20.6.2018, III CZP 29/17, LEX No. 2504739 and the judgment of the Polish Supreme Court, 4.04.2019, III CSK 159/17, LEX No. 2642144.

100 See: Tomczak, 2020, p. 1072.

101 See the judgment of the Polish Supreme Court, 13.07.2005, I CK 832/04, LEX No. 159111.

102 See for example the judgment of the Polish Supreme Court, 27.2.2019, II CSK 19/18, LEX No. 2626330.

103 For a contradiction in this respect in judgments of the Polish Supreme Court, see the judgment of the Polish Supreme Court, 29.10.2019, IV CSK 309/18 and the judgment of the Polish Supreme Court, 11.12.2019, V CSK 382/18, LEX No: 2771344.

104 The judgment of the Polish Supreme Court, 1.03.2017, IV CSK 285/16, LEX No. 2308321.

4.2.4. Consequences of finding a term unfair

According to Article 385[1] § 1 of the PolCC in connection with § 2 of the PolCC the unfair contractual term shall not be binding on the consumer, while the parties remain bound by the rest of the agreement. Any payment based on the unfair term is undue.[105]

Despite the clear wording of these provisions, the Polish Supreme Court found that unfair contractual terms, in certain circumstances, may lead to the whole agreement being null and void.[106] Such a conclusion was made in the context of Swiss-Franc-denominated loan agreements; however, it seems that invalidity of the whole contract will be especially likely in cases in which unfair terms determine the main performance of the parties ambiguously.

4.3. Unfair terms: The gray list

Article 385[3] of the PolCC provides a list of terms that are presumed to be unfair (the 'gray list').[107] In the PolCC there is no provision that provides for a so-called 'blacklist.'

Currently in Poland there are two legal paths by which a certain term can be found unfair. First, a court, when adjudicating in reference to a certain legal relationship, may determine the term to be unfair in the meaning of Article 385[1] § 1 of the PolCC. In such cases we are dealing with so-called 'incidental control.' Such a verdict does not produce effects toward third parties.

However, it is also possible for the President of the Office of Competition and Consumer Protection (hereinafter: POCCP) to commence an administrative proceeding against certain entrepreneurs. The aim of such a proceeding is to determine whether an entrepreneur had included unfair terms in its contract templates (forms). The procedure will end with an administrative decision of the POCCP that benefits from extended effectiveness. All the consumers who concluded the agreement with the entrepreneur on the basis of such a contract template can rely on this decision. This so-called abstract control is regulated in Articles 23a–23d and 99a–99f of the Polish Protection of Competition and Consumer Act.[108]

The amount in dispute in consumer cases was usually not high. That was probably why the institution of the rules pertaining to unfair terms has received relatively modest comment in the literature and case law. However, the practical problems of Swiss-Franc-denominated loan agreements breathed life into the debate regarding this institution. Currently it is very widely discussed both in case law and the literature.

105 The judgment of the Polish Supreme Court, 11.12.2019, V CSK 382/18.
106 The judgment of the Polish Supreme Court, 11.12.2019, V CSK 382/18.
107 The article states that: 'In the case of doubt it shall be presumed that unfair contractual terms are these which in particular (...).'
108 Polish Journals of Laws from 2021, item 275.

5. Romania

5.1. Unfair terms in consumer contracts

Romania implemented the institution of unfair contractual terms through the transposition of Directive 93/13/EEC through the provisions of Law No. 193/2000 on unfair terms in contracts concluded between professionals and consumers.[109]

The law prohibits professionals from stipulating unfair terms in consumer contracts. 'Consumer' in this context means any natural person or group of natural persons formed into associations who acts (act) for purposes outside his or her (their) commercial, industrial or production, craft, or liberal activities. The Romanian High Court of Cassation and Justice established that in accordance with the provisions of Article 14 of Law No. 193/2000, the provisions of this law may be invoked only by those subjects who are consumers within the meaning of the law. In this context, it follows from the accessory nature of the surety that in the case of a leasing contract concluded between two professionals for which a natural person has guaranteed as a surety, the natural person cannot claim to be a consumer and cannot apply the legal provisions on consumer protection contained in Law No. 193/2000. The surety has the legal status of a personal guarantor, substituting for the user in the performance of his obligation to pay his debts to the lessor, which does not confer on him the status of a consumer within the meaning of Law No. 193/2000. [110]

A contractual term that has not been directly negotiated with the consumer will be regarded as unfair if, by itself or together with other provisions of the contract, it creates, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties. A contractual term will be regarded as not having been directly negotiated with the consumer if it has been agreed without giving the possibility for the consumer to influence its nature, such as pre-formulated standard contracts or general sales conditions applied by traders in the market for the product or service in question. The list contained in the Annex of the Law No. 193/2000 gives, by way of example, the terms considered unfair.

The effects of an unfair term are not clearly regulated. Article 6 of Law No. 193/2000 states that 'unfair terms contained in the contract and ascertained either personally or through the bodies empowered by law will not produce effects on the consumer, and the contract will continue, with the consent of the consumer, only if it can continue after their removal.' According to Article 7, 'insofar as the contract can no longer produce its effects after the removal of the terms considered unfair, the consumer is entitled to demand the resolution of the contract, and may also claim damages, if necessary.'

109 Monitorul Oficial, No. 543 of August 3, 2012.
110 High Court of Cassation and Justice, II Civil Section, Decision No. 1777 of June 25, 2015.

Resolution (termination) is an institution that presupposes a valid contract. On the contrary, the prevailing interpretation is that two distinct situations can be identified:

— If the contract cannot be performed without the unfair clause, the contract as a whole is invalid. In such circumstances, termination is more likely to take the form of an action for nullity (annulment) and may serve to enforce a claim for damages.
— If the contract contains an unfair clause, this is null and void, but the contract is preserved valid in itself. The unfair clause cannot have any legal effect in this case either. In this case, the consumer can choose to maintain the contract or to ask for resolution, which in this case appears as a specific sanction that entitles the consumer to decide on the fate of contract, even if the performance of the contract would be possible legally and materially after the elimination of the unfair terms. In both cases (maintaining or terminating the contract), the consumer is entitled to damages.

These interpretations are correct in our point of view, having in mind also Article 12 (4) of Law No. 193/2000, which states that 'a consumer who is asked to perform a contract of adhesion[111] containing unfair terms may invoke the nullity of the term by way of action or by way of exception, in accordance with the law.'

Compliance with the provisions of the law is monitored by authorized representatives of the National Authority for Consumer Protection and by authorized specialists from other public administration bodies in accordance with their powers. The inspection bodies carry out checks at the request of the aggrieved parties or *ex officio*. If they find that unfair terms are used in contracts of adhesion, the inspection bodies shall refer the matter to the tribunal having jurisdiction according to the entrepreneur's domicile or headquarters, requesting that the entrepreneur be ordered to amend all contracts currently in force by removing the unfair terms. The court, if it finds unfair terms in the contract, shall order the entrepreneur to amend all contracts of adhesion in the course of performance and to remove unfair terms from pre-formulated contracts intended for use in the course of business.

5.2. Standard unusual contractual clauses

While Law No. 193/2000 has a defined scope, an interesting regulation can be found in the RouCC on standard unusual contractual terms.[112]

Standard terms are stipulations that are agreed in advance by one party for general and repeated use and included in the contract without having been negotiated with the other party. It does not matter whether the standard terms are included in the body of the contract itself or whether the inclusion takes place through a

111 A contract of adhesion is a contract that is not negotiated by the parties and is usually embodied in a standardized form prepared by the dominant party.
112 Veress, 2020, pp. 44–46; Popa, 2016, pp. 135–154.

contractual provision referring to general contractual terms. Certain standard terms are considered unusual. Only standard terms can be considered unusual; negotiated terms cannot be categorized as such.

The law considers unusual terms to be those clauses that provide for the benefit of the party proposing them:

— a limitation of liability,
— the right to unilaterally terminate the contract,
— the right to suspend the performance of obligations.

Also included in this category of unusual terms are those that provide for the detriment of the other party:

— a waiver of rights,
— a waiver of the benefit of the due date (permit premature enforcement),
— a limitation of the right to invoke defenses,
— a restriction of the freedom to contract with other persons,
— tacit renewal of the contract,
— setting applicable substantive law,
— arbitration clauses,
— clauses derogating from the general rules establishing the jurisdiction of courts.

Considering the source of inspiration of this text, Italian law, the qualification given in Italy is that of a limitative enumeration. Moreover, in our opinion, the list in the RouCC cannot be qualified as illustrative.[113]

If a standard clause is determined to be unusual, a question of validity arises. The law makes the validity of such clauses contingent on their express, written acceptance by the other party. The question arises as to what sanction follows from this legal text. In our view, the rule does not institute the requirement of recording such clauses in a written instrument *ad validitatem*, the breach of which would render the contractual provision null and void. The written form (of a written instrument under private signature) is only required in order to provide easy proof of acceptance of these clauses. Accordingly, the sanction that arises in the absence of express written acceptance is voidability (in the Romanian context called relative nullity) of the unusual clause, with the legal regime that follows from this qualification. The resulting invalidity will as a rule be partial, i.e., it will render ineffective only the unusual clause, and the contract will produce its natural effects and will be supplemented by applicable legal provisions. Under these circumstances, the text of the law would have been much more in line with the orientation of the RouCC if the law had considered these clauses unwritten.

De lege ferenda, the legislator should distinguish between professional contracts on the one hand and other contracts (general, consumer-to-consumer, and

113 The same opinion is expressed by Almășan, 2014, p. 142.

business-to-consumer contracts) on the other. Professional (business-to-business) contracts should be exempted from the application of the rules on unusual contractual terms.[114]

5.3. Late payment in commercial transactions

Another regulation related to unfair terms was created in Romanian legislation in the context of the transposition of Directive 2011/7/EU on Combating Late Payment in Commercial Transactions through Law No. 72/2013 on Measures to Combat Late Payment Obligations Arising from Contracts Concluded Between Professionals and Between Professionals and Contracting Authorities.[115] According to Article 12, a contractual practice or clause that clearly sets the payment deadline, the level of interest for late payment, or additional damages unfairly in relation to the creditor is considered unfair. Such unfair terms are null and void pursuant to Article 15. Some clauses are considered in all cases unfair (a blacklist), covering the following contractual terms:

- those that exclude the possibility of penalty interest or set penalty interest lower than the statutory interest for late payment,
- that lay down an obligation to pay interest conditioned to a previous formal notification,
- that provide for a longer period for which interest shall be payable on the debt claim than that provided for in the law,[116]
- that eliminate the possibility of payment of additional damages,
- that set a time limit for the issue/receipt of the invoice.

In other cases, if a clause is deemed to be unfair, the court takes into account all the circumstances of the case, in particular:

- serious departures from established practices between the parties or from usages that are in accordance with public policy or morality,
- failure to observe the principle of good faith and due diligence in the performance of obligations,
- the nature of the goods or services,
- failure to provide objective reasons for waiving payment deadlines or interest rates in accordance with this law,

114 Veress, 2020, p. 46.

115 Monitorul Oficial No. 182 of April 2, 2013. For details, see Veress, 2020, pp. 249–252.

116 If the payment deadline has not been stipulated in the contract, penalty interest shall accrue from the following deadlines: 1. after 30 calendar days from the date of receipt by the debtor of the invoice or any equivalent request for payment, 2. if the date of receipt of the invoice or equivalent request for payment is uncertain or prior to the receipt of the goods or the provision of the services, 30 calendar days after the receipt of the goods or the provision of the services, and 3. if the law or the contract provides for a procedure of acceptance or verification allowing for certification of the conformity of the goods or services, and the debtor has received the invoice or equivalent request for payment on or before the date of acceptance or verification, after 30 calendar days from that date.

— the dominant position of the contractor in relation to a small or medium-sized enterprises.

Therefore, the institution of unfair terms is extended over consumer contracts, and in the case of the late payments even to contracts between professionals.

6. Serbia, Croatia, Slovenia

6.1. Serbia

The former federal law on obligations was adopted in 1978, a time preceding the golden era of the emergence of consumer law in the European Communities. Lacking a special law on the protection of consumers, it did however specifically regulate some issues pertaining to consumer protection. One is the issue of the validity of standard contractual terms, regularly but not necessarily applicable to business-to-consumer transactions. The SrbLO retained these rules but for one,[117] being heavily burdened with notions and categories that existed in the era of the socialist self-management system of the former Yugoslavia, which was repealed in 1993.

The SrbLO prescribes that standard contractual terms, either included in the text of the contract prepared in advance or contained in a separate document referred to by the contract, supplement the special terms and conditions agreed upon by the parties and oblige the parties just the same as the agreed terms.[118] The major feature of standard contractual terms, as defined by the law, is that they were not subject to individual negotiations between the parties.[119] The law further specifies that standard terms must be published in a customary manner.[120] They oblige the other contracting party, if he or she knew or should have been aware of them at the time of the formation of contract.[121] If specific terms agreed upon by the parties contravene the standard contractual terms, the former shall apply.[122] The law specifies that some or all of the standard contractual terms are considered null and void if they are contrary to the purpose of the contract or to good trade usages, even in the case where the standard contractual terms have been approved by the competent authority.[123] In addition, the court is entitled to refuse the enforcement of specific standard terms depriving the other party of his or her right to raise an exception or limiting other rights stemming from the contract, lead to loss of deadline, or are in any other way unfair or disproportionately severe to the other party.[124]

117 SrbLO, Article 144.
118 SrbLO, Article 142 (1).
119 Đurđević, 2012b, p. 386.
120 SrbLO, Article 142 (2).
121 SrbLO, Article 142 (3).
122 SrbLO, Article 142 (4).
123 SrbLO, Article 143 (1).
124 SrbLO, Article 143 (2).

The first Consumer Protection Act from 2005, enacted in the legislative competencies of the Republic of Serbia, did not regulate the subject matter of unfair contractual terms. The second Act from 2010, however, contained such rules, which profoundly relied on the UCTD.[125] Though the Directive mandates only the control of terms that have not been individually negotiated, the Act from 2010 extended the scope of the application of the rules on unfair contractual terms to all terms regardless of whether they have been individually negotiated or contained only in standard contractual terms.[126] The next Consumer Protection Act from 2014 retained for the most part the rules from the previous Act from 2010 regarding unfair contractual terms, as does the new Act from 2021, which specifies the requirement of transparency of the terms of a consumer contract. A contractual clause obliges the consumer if it has been expressed in plain and intelligible language, provided that a reasonable person possessing the consumer's knowledge and experience would understand it.[127] Ambiguous terms of the contract shall always be construed in favor of the consumer.[128] A term shall be considered unfair if, contrary to the principle of good faith and fair dealing, it causes a substantial imbalance of rights and obligations of the parties to the detriment of the consumer.[129] The unfairness of a contractual term is to be determined taking into account the nature of the goods or services that are the object of the contract, circumstances of the conclusion of the contract, other terms of the same or other contract to which the contract is related, and the means by which the parties' consent on the content of the contract has been reached and by which the consumer has been notified thereof.[130] Unfair terms in a consumer contract are considered null and void.[131] In addition, the law specifies a set of typical terms that are always considered unfair, and another set for which it shall be presumed to be unfair unless rebutted.[132] The former are traditionally denoted a 'blacklist,' the latter a 'gray list' of unfair contractual terms.[133]

Taking into account that two statutes regulate unfair contractual terms, the SrbLO and the Consumer Protection Act, the issue of their scope of application inevitably surfaces. The rules of the SrbLO on standard terms are not limited only to consumer contracts, but apply in all cases when either of the parties use standard contractual terms, regardless of whether the parties are legal entities or natural persons.[134] However, they are applicable only to standard contractual terms and to terms that have not been individually negotiated,[135] while the rules of the Consumer Protection

125 Karanikić Mirić, 2012, p. 219.
126 Karanikić Mirić, 2012, p. 222.
127 SrbCPA, Article 40 (1).
128 SrbCPA, Article 40 (2).
129 SrbCPA, Article 42 (2).
130 SrbCPA, Article 42 (3).
131 SrbCPA, Article 42 (1).
132 SrbCPA, Articles 43 and 44.
133 Karanikić Mirić, 2009, p. 139.
134 Karanikić Mirić, 2009, p. 133.
135 Đurđević, 2012b, p. 386.

Act apply to all terms of a consumer contract.[136] It seems that the only proper conclusion may be that the Consumer Protection Act narrowed the scope of application of the rules of the SrbLO concerning standard contractual terms: Since 2010 these rules of the SrbLO are not applicable to consumer contracts.[137]

6.2. Croatia

The HrvLO has only partially retained the rules of the former federal law on standard contractual terms.[138] The rules on the notion of general contractual terms, conditions of their application, relation to individually agreed terms, and publication of the general terms remained the same as in the former federal law.[139] Some novelties have been introduced in relation to the rules on the nullity of standard contractual terms.[140] They were imposed by the fact that the transposition of Directive 93/13/EEC into the then effective Consumer Protection Act from 2003[141] led to a parallel legal framework for the validity of standard contractual terms in consumer law relations and in general contract law, with different standards and dimensions of protection.[142] The novelties introduced by the HrvLO from 2005 had the purpose of synchronizing the two systems of rules applicable to standard contractual terms.[143] The new rules are considered to provide a lower level of protection of the other party than the former federal law.[144] First, in contrast to the former federal law that considered standard contractual terms as being always invalid if they frustrate the purpose of the contract or they are contrary to good usages, the HrvLO makes the invalidity of such terms dependent on whether they, in a way that is contrary to the principle of good faith and fair dealing, create an obvious imbalance between the rights and obligations of the parties or frustrate the purpose of the contract.[145] In both cases, the condition of the invalidity of standards terms is the infringement of the principle of good faith and fair dealing, a requirement that did not exist in the former federal law.[146] The SrbLO specifies further that when determining whether a given standard term is invalid, the court must take into account all the circumstances that existed prior and at the time of the formation of contract, its legal nature, the nature of the goods or services that are the object of the performance, the terms of the contract, and the terms of other contracts to which the given standard term is related.[147] Finally, the application of these rules is excluded in relation to standard terms the content of which is a result

136 Đurđević, 2012b, p. 390.
137 Đurđević, 2012b, p. 391.
138 Josipović in Možina, 2019, p. 142.
139 HrvLO, Article 295.
140 HrvLO, Article 296.
141 Mišćenić, 2012, p. 184.
142 Josipović in Možina, 2019, p. 141.
143 Josipović in Možina, 2019, p. 139.
144 Josipović in Možina, 2019, p. 145.
145 HrvLO, Article 296 (1).
146 Josipović in Možina, 2019, p. 145.
147 HrvLO, Article 296 (2).

of compliance with mandatory rules, and terms that were subject of individual negotiation between the parties, whereby the other party had the possibility to influence their content. The application of statutory rules is also excluded regarding the terms of the contract pertaining to its object or the price to be paid, insofar as these terms are clear, intelligible, and easily discernible.[148]

The rules of the Croatian Consumer Protection Act in effect from 2022, just like those of the former Act from 2014 on unfair contractual terms, convey the impression of a literal transposition of Directive 93/13/EEC, which was the legislative technique adopted in the transposition of major parts of the consumer *acquis*.[149] The notion of an unfair term is restricted to terms not individually negotiated, for instance, those that contrary to the principle of good faith and fair dealing create a substantial imbalance between the rights and duties of the parties to the detriment of the consumer.[150] In addition, the law contains only a 'gray list' of unfair contractual terms[151] that fully corresponds to the unfair terms listed in the Annex of Directive 93/13/EEC.[152] Unfair terms in a consumer contract shall be deemed null and void.[153] The law, however, specifies further that only partial invalidity shall apply if the contract can exist without the clauses declared null and void.[154] This is a clear discrepancy in comparison to the Serbian Consumer Protection Act, which does not explicitly regulate partial invalidity in relation to unfair terms of consumer contracts. Still, the application of the general rules of contract law on partial invalidity could yield a very similar outcome. Such conclusion could be implied from the HrvLO as well.

6.3. Slovenia

The SvnCO prescribes verbatim the same rules on standard contractual terms as the SrbLO.[155] The Slovenian legislature has thus transposed the UCTD into the Law on the Protection of Consumers[156] without amending the general legal frame of the SvnCO.[157]

The Consumer Protection Act specifies that the professional is forbidden from imposing contractual terms that are unfair to the consumer.[158] The unfair contractual term is considered null and void.[159] A contractual term is considered

148 HrvLO, Article 296 (3).
149 See Mišćenić, 2014, p. 280; Mišćenić, 2018, pp. 127–159; Mišćenić and Petrić, 2020, pp. 95–160.
150 HrvCPA, Article 53 (1).
151 HrvCPA, Article 54.
152 Mišćenić, 2014, p. 283. This conclusion has been inferred in relation to the CPA from 2014. However, there is no major difference in the wordings of the respective rules of CPA from 2022 in comparison to CPA from 2014.
153 HrvCPA, Article 59 (1).
154 HrvCPA, Article 59 (2).
155 SvkCO, Articles 22–24.
156 SvkCPA, Articles 22–24.
157 Možina and Vlahek, 2019, p. 95.
158 SvkCPA, Article 23 (1).
159 SvkCPA, Article 23 (2).

unfair if it—to the detriment of the consumer—causes a significant imbalance in the contractual rights and obligations of the parties, makes the performance of the contract unjust to the detriment of the consumer, causes performance of the contract to be significantly different from what the consumer reasonably expected, or is otherwise contrary to the principle of good faith and fair dealing.[160] This definition of unfairness of a term in a consumer contract is considered broader than the respective rule in the UCTD.[161] In addition the Slovenian Consumer Protection Act did not transpose the rule from the UCTD, according to which terms relating to the main subject matter and to the adequacy of consideration are not subject to fairness assessment. However, the literature points out that both issues are interpreted in the case law in the light of the UCTD.[162] In addition, the act prescribes that the terms of the contract must be interpreted in conjunction with other terms in the same contract or in another contract between the same parties and taking into account the nature of the goods or services and any other circumstances relating to the conclusion of the contract.[163] The law specifies a non-exhaustive 'gray list' of unfair contractual terms.[164]

7. Slovakia

7.1. Overview

Neither the SvkCC nor the SvkCommC contain a universal rule that would explicitly consider a dishonest, unfair contractual term (*nepoctivé zmluvné podmienky*) automatically invalid. Such an explicit rule is laid down only for consumer relations and, to a very limited extent, also for commercial relations. At the same time, it is debatable whether the invalidity of an unfair term could be inferred from § 39 of the SvkCC, according to which a juridical act that in its purpose or content contradicts good morals is invalid, although in the legal literature for the area of commercial relations there is an opinion that if a juridical act contradicts the principles of fair trade, then it is also contrary to good morals.[165]

7.2. Consumer relations

Slovakian regulations on consumer relations are a mixture of norms based on EU law with some national specificities. Pursuant to § 52 (1) of SvkCC, a consumer contract is any contract, irrespective of the legal form, concluded by a supplier with a consumer. At the same time, § 52 (2) of the SvkCC states that if a consumer contract contains a provision that is less favorable to the consumer than the regulation of consumer

160 SvkCPA, Article 24 (1).
161 Možina and Vlahek, 2019, pp. 96–97.
162 Možina and Vlahek, 2019, p. 97.
163 SvkCPA, Article 24 (2).
164 SvkCPA, Article 24 (3). See Možina and Vlahek, 2019, p. 97.
165 Ovečková, 2017.

contracts or the dispositive regulation of the legal relationship that is considered a consumer relationship in that particular case, then these provisions are invalid.[166] This means that the contractual terms and conditions regulated by a consumer contract may not deviate from the SvkCC to the detriment of the consumer. At the same time, the consumer may not waive the rights granted to him or her by the SvkCC or other consumer protection regulations in advance, or otherwise worsen his or her contractual position.[167]

In accordance with Directive 93/13/EEC, consumer contracts must not contain provisions that cause a significant imbalance in the rights and obligations of the contracting parties to the detriment of the consumer [so-called 'unacceptable terms' (*neprijateľné zmluvné podmienky*)]. However, this does not apply if the terms relate to the main object of the performance and the reasonableness of the price (if such terms have been expressed in a definite, clear, and comprehensible manner) or if they are individually agreed terms.

In § 53 (4) of the SvkCC there is a list by way of example of the terms that are considered unacceptable. This wording suggests that it is a so-called 'blacklist'[168] (although this issue is disputed in the literature[169]). This means that the terms and conditions listed therein are considered unacceptable *per se* and it is not necessary to examine whether, in the context of the contract in question, they actually cause a significant imbalance in the rights and obligations of the contracting parties to the detriment of the consumer. The list of unfair terms includes not only the terms defined as unfair in Directive 93/13/EEC, but also a set of unfair (unacceptable) terms that are specific to Slovak legislation. Among these, for example, is a term that requires the consumer to pay for a service the provision of which by the supplier is not predominantly in the interests of the consumer, or a term that requires the consumer to be bound by the contract for an unreasonably long period of time, even though it was obvious at the time of conclusion of the contract that the subject matter of the contract could be achieved in a considerably shorter period of time.

In addition, Slovak legislation contains other specificities. For example, according to § 53 (7) of the SvkCC, the consumer's obligation cannot be secured by a security transfer of the right; similarly, according to § 53c of the SvkCC, if a consumer contract is made in writing, the subject matter and the price may not be stated in smaller type than any other part of such contract except for the title of the contract and the titles of its parts, and the contract, including the general terms and conditions or other parts of the contract, may not be written in type smaller than 1.9 mm. A contract concluded in contravention of this provision shall be invalid.

At the same time, under § 53a of the SvkCC, if a court has found a contractual term to be unfair (unacceptable), the professional must refrain from using it (or using a

166 Budjač, 2018.
167 SvkCC, § 54.
168 Csach, 2009d; Budjač, 2018.
169 Jurčová and Novotná, 2016.

similar term with the same meaning) not only in relation to the consumer who was a party to the court proceedings, but in relation to all other consumers.

Another peculiarity of the Slovak legislation is that, according to § 54a of the SvkCC, a time-barred right under a consumer contract cannot be enforced or validly secured. In other words, the court is obliged to take into account the statute of limitations *ex officio*, even without the debtor's objection. It is irrelevant whether the debtor is the consumer or the professional. Under this provision it is possible to alter the content of a time-barred right under a consumer contract, to replace it by a new right, or to reinstate it only if the debtor was aware of the limitation.

7.3. Commercial relations

Pursuant to § 265 of the SvkCommC, the exercise of a right that is contrary to the principles of fair commercial dealing (*zásady poctivého obchodného styku*) does not enjoy legal protection. However, this provision *per se* concerns only the exercise of a right; it does not concern whether a contractual term may be void if it is contrary to the principles of fair dealing. The only express provision on such invalidity for commercial relations is contained in § 365d of the SvkCommC, which is based on Directive 2011/7/EU (the Late Payment Directive).

According to this provision, a contractual term relating to the maturity of a pecuniary obligation, the rate of interest on late payment, or the lump-sum reimbursement of the costs associated with the claim, that is grossly disproportionate to the rights and obligations arising from the contractual relationship for the creditor, without there being a just (fair) reason for it, is unfair (*nekalá zmluvná podmienka*) and therefore invalid. A contractual arrangement that excludes the right to interest, which results in the creditor waiving the right to default interest before the contractual obligation has been breached, or that excludes the right to a lump-sum reimbursement of the costs of the claim, is *per se* unfair and therefore invalid.

All the circumstances of the case, in particular compliance with the principle of fair dealing, the nature of the subject matter of the obligation, and the existence of a just (fair) reason for the debtor's deviation from the law, are decisive for the assessment of whether a contractual term is unfair.

In a way similar to that applied in consumer relations, if a court has declared a contractual term to be unfair, the contracting party must refrain from using it not only in relation to the entrepreneur who was the other contracting party, but in relation to all other entrepreneurs. Procedurally, the commencement of proceedings to refrain from further use of an unfair contractual term or a final judgment on the merits in favor of the other party to the contract constitutes an obstacle to the commencement of other proceedings concerning the same term by other undertakings (other undertakings may, however, intervene in the first proceedings already commenced).

8. Concluding remarks

A comparison of the various legal systems shows that there is no uniform understanding of the concept of unfair terms and no clear distinction from other defects of juridical acts. Tests of unfairness are not always limited to standard terms. They are often accompanied by explicit prohibitions and injunctions. Some jurisdictions even include within this concept prohibitions under Directive 2011/7/EU (Romania, Slovakia, the Czech Republic), while others would include the implementation of Directive (EU) 2019/633 (the Czech Republic) as well.

The historical basis for combatting unfair contractual terms seems to be the regulation of good morals. It is still applied as a general corrective. In some jurisdictions, it is even today the basis for the examination of unfairness (Poland); however, it is also often applied beside rules specifically tailored to unfair contractual terms (the Czech Republic, Slovakia). In Croatia, Serbia, and Slovenia, the specific protection against unfair terms has older foundations that can already be found in the Federal Law of Obligations of 1978.

The fundamental regulation of unfair terms is the implementation of the UCTD in the compared countries, even in non-EU jurisdictions (Serbia). Obviously, exceptions to the scope of application of a given directive are not always explicitly reflected in the legislation in question. For example, only the Croatian report explicitly mentions that the review of standard terms, the content of which is a result of compliance with mandatory rules, is excluded. We may assume that this constitutes an implementation of Article 1 (2) of the UCTD.

The distinction between states where the regulation applies to consumer contractual terms (the Czech Republic, Serbia, Slovenia) and states where the applicability is limited only to cases of consumer contractual terms that have not been individually negotiated (Hungary, Poland, Romania, Slovakia, Croatia) seems to be crucial. However, it may be interesting to examine how the fact that the arrangement has not been individually negotiated, i.e., the ability of the other party to influence the content of the arrangement, is interpreted in each state. It seems that in Hungary it is additionally emphasized that the arrangement must be drafted in advance by an entrepreneur. The Slovak regulation lays down a rebuttable presumption that the clause was not individually negotiated, and the Polish and Hungarian regulations function in the same way.

There appears to be no uniform approach to the exception in Article 4 (2) of the UCTD in the compared states. This exception appears in various forms in Poland, the Czech Republic, Hungary, and Croatia. It is worth mentioning the formulation in Croatia, where, although the subject matter of the contract and the price are excluded from coming under review generally, case law and the literature interpret the exception in line with the wording of the directive. The exception, while not contained in Slovenian legislation, is enforced by the influence of case law. In Romania and Serbia, the exception is not mentioned.

The unfairness test is essentially an attempt to translate Article 3 (1) of the UCTD. Therefore, in most states the key point is good faith (Serbia, Croatia, Slovenia, Hungary, the Czech Republic), in others good morals (Poland). Slovenian regulation elaborates on this test and also mentions the criterion of justice or reasonable expectation. Elsewhere, no similar criterion appears; a mere significant imbalance or a deviation from statutory provisions to the detriment of the consumer is sufficient (Slovakia). Thus, both Slovak and Slovenian acts are stricter toward entrepreneurs in this respect. Only in some states does the statute contain circumstances that must be taken into account in a decision on unfairness (Poland, Hungary, the Czech Republic).

When it comes to specific prohibited arrangements, legislators have chosen all solutions: a blacklist (Slovakia), a gray list (Croatia, Poland, Romania, Slovenia), or their combination (Serbia, Hungary, the Czech Republic). Naturally, this matter depends on the content of the prohibited arrangements. Inspiration was sought in the Annex to the UCTD. Special attention must be given to the strict prohibitions in Slovakia. The parties must not deviate from the legal regulation to the detriment of the consumer. Apparently inspired by German case law, there is a ban of clauses requiring the consumer to pay for a service the provision of which by the supplier is not predominantly in the interests of the consumer. The size of the font, the prohibition of security by assignment of a right, or the *ex officio* consideration of limitation periods are laid down there as well. We can also mention the prohibition of any limitation of the right to compensation or rights from defects (the Czech Republic). The mere unclear nature of a provision shall in itself suffice for the term to be deemed as unfair in Hungary.

National reports show the importance of regulations applicable to unfair contractual terms for dealing with loans denominated in a foreign currency (Hungary) or bank fees (the Czech Republic). The case law of the CJEU reveals that this was also a problem in Romania and Poland. The same legal question was also addressed in Croatia.

The comparison disclosed no significant difference in the consequences of unfair terms. Unfair or surprising contractual terms are usually rendered null and void or considered non-existent. Legislators have tried to varying degrees to regulate certain peculiar situations—the emphasis being on preserving the rest of the contract (Croatia, Romania, Poland), the possibility of invoking the unfair clause by the consumer (Czech Republic), or the fact that invalidity may be relied upon only in the interest of the consumer (Hungary). Consumers in Romania have a stronger position in this respect, as they can decide to terminate the entire contract for just one unfair term. Other peculiarities inferred by the case law of the CJEU, e.g., application of supplementary rules, however, are not codified.

Although we are in the area of private law, the protection of the consumer and the enforcement of the prohibition of unfair terms is not left to him or her alone. In most of the jurisdictions compared, public law enforcement of the prohibition of unfair terms is also offered, in some cases even with effects against third parties. This can take place in an administrative procedure (the Czech Republic, Poland) or court

proceedings initiated by public authorities (Hungary, Romania). An important role is played by associations established to protect consumer interests under the law of any Member State of the European Economic Area. A special regulation can be found in Slovakia, where the legislator has explicitly extended the effects of incidental control toward third parties. The term found to be unfair in a particular case should also not be used in relation to all other consumers.

It is evident from the comparison that protection against unfair terms is not limited only to consumer contracts. Historically, the basis of the regulation was not the need to protect the consumer, but to protect against the use of standard terms. Regulation in this other area varies, and the inspirational patterns are also different.

The simplest way is to extend the application of unfair terms in consumer contracts to other cases. This can be done covertly by extending the concept of consumer (as in Poland). Another way is the separate regulation of standard terms, i.e., contractual terms prepared in advance and employed by one of the parties for repeated use (Hungary, Romania). In other cases, the bargaining position of the contracting parties also needs to be taken into account, as in contracts of adhesion (the Czech Republic).

We may identify some sources of such regulation in the compared countries. German regulation of surprising terms in § 305c of the BGB (in the Czech Republic), the regulation of contracts of adhesion in the Civil Code of Québec (the Czech Republic), and Italian regulation of standard terms in Article 1350 of the Italian Civil Code and the requirement of written form in certain cases (Romania). Apparently, in view of the historical development, we have not observed the German model, § 305 and 310 of the BGB, i.e., a mere extension of the regulation of standard terms with certain additions to consumers.

Other examples originate in EU regulation. In the first place, Directive 2011/7/EU should be emphasized. This directive appears in a number of national reports (the Czech Republic, Slovakia, Romania). Romanian legislation is worth mentioning here since, with regard to this directive, it prohibits a number of arrangements in commercial relations, not only in the standard terms, e.g., elimination of additional damages. As to Directive (EU) 2019/633 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply, it is mostly not mentioned in the individual reports. This may be due to the fact that its scope of regulation is limited to a specific sector of trade.

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