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Regulating the fairness of (loan) contracts. A case-note on C-51/17 OTP Bank and OTP Faktoring Követeléskezelő Zrt v Ilyes and Kiss and C-118/17 Dunai v ERSTE Bank Hungary

Introduction

Cases involving the interpretation of Directive 1993/13/EC on Unfair Contract terms (UCTD) virtually flooded the Court of Justice of the European Union (hereinafter: CJEU) in recent years.[1] Many involved aspects of fairness of foreign currency denominated mortgage and other consumer loans (also called forex or FX loans).[2] These loans worked in a way that the amount of the loan and the instalments were set out in the relevant foreign currency but the loan itself was advanced and the repayments were due in the national currency. They were extremely dangerous for consumers as they effectively transferred the risk of currency depreciation onto consumers. In addition to the risk element they also enabled banks to earn extra profits on the exchange rate difference or spread by manipulating with the exchange rate. Due to being denominated in foreign currency these loans contained foreign currency exchange terms to determine the relevant exchange rate for issuing and repaying the loans. Banks would normally use their own exchange rates and stipulate the use of the cheaper selling rate for issuing the loan and the more expensive buying rate for the repayment of the loan.

Forex loans were particularly wide-spread in some Member States[3] including Hungary, where the denomination of loans Swiss Francs was part of the established banking practice in years preceding the global financial crisis.[4] When the true nature of these clauses unfolded, it

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[1] Hans-W. Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 *Common Market Law Review* 771 .

[2] See for instance C-397/11 *Erika Jőrös v Aegon Magyarország Hitel Zrt*., ECLI: EU:C:2013:340; C-26/*13Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank*, ECLI:EU:C:2014:282; C-483/16 *Zsolt Sziber v ERSTE Bank Hungary Zrt*., ECLI:EU:C:2018:367; C-186/16 *Ruxandra Paula Andriciuc and Others V Banca Românească SA*, ECLI:EU:C:2017:703.

[3] For further information on lending in foreign currencies in the EU see the Annex to Recommendation of the European System Risk Board (ESRB/2011/1) of 21 September 2011 on lending in foreign currencies (OJ C 342, 22.11.2011, p.1 also available at <https://www.esrb.europa.eu/pub/pdf/recommendations/2011/ESRB_2011_1.en.pdf> accessed 20 July 2019.

[4] See Andrea Fejős, 'Mortgage Credit in Hungary' (2017) 6 *Journal of European Consumer and Market Law* 139 with further references.

transpired that many of these loans were mis-sold to consumers,[5] and led to grave socio-economic consequences including severe debt issues and the risk of homelessness.[6] In fighting for their existence and often their home, consumers frequently sought salvation from the UCTD, alleging the unfairness of one or more terms[7] and requesting the court to remove them from their contracts. The surge of the cases also pushed the CJEU to become more interventionist in its interpretative role[8] at the same time providing it with novel opportunities to clarify the meaning and the scope of the UCTD.[9]

This case-note concerns two recent decisions of the CJEU about preliminary reference requests from Hungarian courts: *C-51/17 OTP Bank Nyrt, OTP Faktoring Követeléskezelő Zrt v Teréz Ilyés and Emil Kiss of 20 Septembre 2018*[10] and *C-118/17 Zsuzsanna Dunai v ERSTE Bank Hungary Zrt of 14 March 2019*.[11] Both cases raised aspects of fairness of foreign currency exchange terms in loans denominated in Swiss Francs that provided the use of the bank's own selling rate for issuing the loan and the more expensive buying rate at the time when repayments were calculated (hereinafter: CHF exchange term). They both involved legal issues building on the CJEU's landmark judgment in *C-26/13 Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* and the effect of the subsequent reforms that followed in Hungary. One of the legal issues in *Kásler* involved the interpretation of CHF exchange terms in the light of Art. 4(2) of the UCTD, according to which, the main subject matter of the contract and the

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[5] BEUC, 'The map of major mis-selling scandals' <https://www.thepriceofbadadvice.eu/static-map/> accessed 13 November 2018; Olha O. Cherednychenko and Jesse-M. Meindertsma, *Consumer Credit: Mis-selling of Financial Products*; Fernando Zunzunegui, *Mortgage Credit: Mis-selling of Financial Products* (EU Parliament 2018) <http://www.europarl.europa.eu/thinktank/en/search.html?word=mis-selling> accessed 20 July 2019.

[6] Mónika Józon, 'Hungary' in The Over-indebtedness of European Consumers – a View from Six Countries Irina Domurath et al eds EUI Working Paper LAW 2014/10 < https://cadmus.eui.eu/bitstream/handle/1814/32451/LAW%20WP%202014_DOM.pdf?sequence=1&isAllowed=y> accessed 20 July 2019.

[7] For an alternative approach see C-312/14 *Banif Plus Bank Zrt. V Márton Lantos, Mártonné Lantos*, ECLI:EU:C:2015:794 arguing that foreign currency exchange transactions connected to foreign currency denominated loans are forward currency transactions, investment services within the meaning of, and in breach of, Directive 2004/39/EC on Markets in Financial Instruments. For a detailed comment see Andrea Fejős, ' Foreign currency exchange transactions connected to foreign currency denominated loans are not investments' (Recent Developments in European Consumer Law, 14 December 2015) <https://recent-ecl.blogspot.com/2015/12/foreign-currency-exchange-transactions.html >accessed 20 July 2019.

[8] Andrea Fejős, 'Behind the frosty glass. The EU's Unfair Contract Terms Directive as a tool for justice in the modern financial sector' The BEUC blog, <https://www.beuc.eu/blog/behind-the-frosty-glass-the-eus-unfair-contract-terms-directive-as-a-tool-for-justice-in-the-modern-financial-sector/> accessed 20 July 2019.

[9] To summarize the extensive case-law and to achieve the uniform interpretation and application of the UCTD in the light of these, the EU Commission publish the *Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts*, C(2019) 5325 final, Brussels, 22 July 2019 < https://ec.europa.eu/info/sites/info/files/uctd_guidance_2019_en_0.pdf> accessed 22 July 2019.

[10] ECLI:EU:C:2018:750.

[11] ECLI:EU:C:2019:207.

adequacy of the price and remuneration in exchange for it cannot be assessed for fairness as long as they are in plain and intelligible language. The CJEU provided a protective interpretation narrowing down the main subject matter to those terms for which there is an actual service provided in exchange,[12] and providing, that the transparency requirement should be understood as requiring consumers to be able to understand the economic consequences of the term.[13] Following the *Kásler* judgment, [14] the Supreme Court of Hungary (hereinafter: *Kúria*) instructed lower courts to consider CHF exchange terms unfair (because there is no service provided in exchange and because these clauses are not transparent for consumers), temporarily replacing CHF exchange terms with the official exchange rate of the Hungarian National Bank.[15] In order to ease the enforcement of this decision, and arguably assuming that not every affected consumer had a pending court case, the Parliament intervened by introducing new statutory rules. *Act XXXVIII of 2014*[16] declared CHF exchange terms null and void replacing them with the official exchange rate set by the Hungarian National Bank. *Act XL of 2014*[17] declared ordered financial institutions to compensate consumers, upon their request, for the moneys paid in excess of the unfavourable exchange rate. Finally, *Act LXXVII of 2014*[18] imposed an obligation on banks to convert the outstanding amounts of mortgage loans indexed in foreign currency into Hungarian forints using the exchange rate of the Hungarian National Bank.[19] Although these interventions helped many consumers, they can also be objected as being partial and not fully addressing consumer vulnerabilities.[20] One aspect of leaving consumers vulnerable to these loans is the fact that Law *XXXVIII of 2014* left the burden of

[12] C-26/13 *Kásler*, para 59.
[13] C-26/13 *Kásler*, para 75.
[14] See for more on the impact of *Kásler* in Hungary: Judit Fazekas, 'The consumer credit crisis and unfair contract terms – Before and after Kásler, (2017) 6 *Journal of European Consumer and Market Law* 99.
[15] 2/2014 Civil Law Unification Decision [Polgári jogegységi határozat], point 3 <https://kuria-birosag.hu/hu/joghat/22014-szamu-pje-hatarozat> accessed 20 July 2019.
[16] 2014. évi XXX8VIII. törvény a Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló [Act XXXVIII of 2014 regulating specific matters relating to the decision of the Kúria to safeguard the uniformity of the law concerning loan contracts concluded between financial institutions with consumers]
[17] 2014. évi XL. törvény a Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvényben rögzített elszámolás szabályairól és egyes egyéb rendelkezésekről [Act XL of 2014 on the rules relating to the settlement of accounts and other rules referred to by Act XXXVIII of 2014 regulating specific matters relating to the decision of the Kúria to safeguard the uniformity of the law concerning loan contracts concluded by financial institutions with consumers].
[18] 2014. évi LXXVII. törvény az egyes fogyasztói kölcsönszerződések devizanemének módosulásával és a kamatszabályokkal kapcsolatos kérdések rendezéséről [Act LXXVII of 2014 regulating various aspects of the modification of the currency of consumer loans and to the rules governing interest].
[19] For rescue measures prior to the above statutory interventions see: Mónika Józon 'Country Report Hungary' 92-95 in Hans-W Micklitz, Irina Domurath (eds), *Consumer Debt and Social Exclusion in Europe* (Ashgate, 2015) .
[20] See for instance: Fejős, note 4, 139.

bearing the exchange rate risk with consumers. This issue is tackled in the two cases subject of this commentary.

Against this background the paper will now proceed with discussing the new cases, focusing on those aspects that advanced the interpretation and application of the UCTD.

Statutory interventions and the UCTD

The question of the impact of the above statutory interventions on the application of the UCTD arose in the both cases discussed in this note. The CJEU in *OTP Bank* discussed the impact of statutory interventions on Art. 3(1), Art. 1(2) and Art. 4(1) of the UCTD, whereas in *Dunai* it tackled the impact of interventions on Art. 6(1) UCTD. These questions in essence raise the matter of a relationship between private law of contracts and national public intervention for the protection of consumers.

The CJEU in OTP Bank

The OTP Bank case involved a typical scenario where the consumers concluded a mortgage loan contract in 2008 containing a CHF exchange term, and several years later in 2013 they brought an action for the annulment of the contract on the grounds that they were not fully informed to be able to evaluate the true extent of the foreign exchange risk, despite a clause in their contract on the 'Declaration of notification of risk' where the bank set out in detail the various modalities in which the consumers are aware of the risk.[21] However, since starting the legal action, Parliament intervened into these contracts with the above discussed provisions, the referring national court sought instructions from the CJEU on the effect of these interventions on the fairness of terms, in particular, on the applicability of Art. 3(1), Art. 1(2) and Art. 4(1) UCTD.[22]

Art. 3(1) UCTD contains the main test of fairness according to which a contract term which has not been individually negotiated is unfair if contrary to good faith causes a significant imbalance in the parties' rights and obligations under the contract. Since the provision only

[21] C-51/17 *OTP Bank,* para 19.
[22] Although this case also included Art. 4(2) and Art. 6(1) of the UCTD these confirmed the earlier interpretations of the UCTD and thus will not be discussed in this note.

catches non-negotiated contract terms, the referring national court asked whether the statutory intervention with *ex tunc* effect i.e. Art. 3(1) of *Act XXXVIII of 2014* that declared CHF exchange terms null and void replacing them in Art. 3(2) with the applicable exchanger rate of the Hungarian National Bank read in conjunction with Art.10 of *Act LXXVII of 2014* on the conversion of outstanding amounts of mortgage loans indexed in foreign currency renders these terms non-negotiated within the meaning of Art. 3(1) UCTD.[23] The answer to this question is straight forward. Given that the term was inserted by the relevant statute it could not have been negotiated between the parties.[24]

The second implication of statutory intervention was the question whether this subsequently inserted term into the contract was exempted from the test of fairness by virtue of ***Art. 1(2) UCTD,*** under which mandatory regulatory or statutory provisions are left outside the scope of the UCTD.[25] The CJEU acknowledged that terms must satisfy two cumulative conditions. They must be statutory or regulatory provisions, and must be mandatory.[26] Given that the there is no dispute the term originates from the above statutory provisions, the CJEU discussed the mandatory nature of the term, and concluded, that the term must be such given it 'intended to establish certain conditions relating to the obligations contained in that type of loan contract.'[27] The CJEU concluded that contractual terms such as those inserted into the contract by the above relevant statutes that reflect mandatory statutory provisions cannot be assessed for fairness.[28] However, the CJEU also emphasized that the exemption must be strictly construed.[29] In cases involving CHF exchange terms this means that the exemption would only include terms that are expressly covered by the statue, such as those in Art. 3(1) and (2) of *Law XXXVIII of 2014* and Art. 10 of *Law LXXVII of 2014*. Other, closely related, contractual terms such as the one under scrutiny on the 'Declaration of notification of risk'[30] fall outside the scope of the Art. 1(2) exemption and can be assessed for fairness under the general rules of the UCTD, including being transparent under Art. 4(2) UCTD.[31]

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[23] C-51/17 *OTP Bank,* para. 46.
[24] C-51/17 *OTP Bank,* para. 49.
[25] Referring here to C-186/16 *Andriciuc*, paras 27-28.
[26] Ibid.
[27] C-51/17 *OTP Bank,* para. 62.
[28] C-51/17 *OTP Bank,* para. 64.
[29] Referring here to C-186/16 *Andriciuc*, paras 31.
[30] C-51/17 *OTP Bank,* para. 70.
[31] C-51/17 *OTP Bank,* para. 68.

Finally, about the requirement of transparency, the referring national court requested guidance on the impact of subsequent statutory interventions on ***Art. 4(1) UCTD***. This provision provides that the fairness of the terms, and thus their transparency, should be assessed at the time when the contract is concluded taking into account all the circumstances surrounding the conclusion of the contract and all other terms of the contract. They key here is to emphasize that the circumstances and terms should be taken into account at the time when the contract is concluded. The CJEU concluded that regardless of the intervention being made retroactive and applicable *ex tunc*, the transparency of terms must be assessed in the light of the circumstances and contractual terms when the contract was made, therefore, not taking into account subsequent changes.[32]

The CJEU in Dunai

Shortly after the *OTP Bank* judgment, the CJEU delivered its interpretation in another similar case. The legal issues in *Dunai* arose in a typical situation of a Swiss Franc denominated loan contract, in which, following the default of the consumer the bank started enforcement proceedings. The consumer filed an objection alleging that the contract was null and void. Contrary to the applicable statute that declared contracts null and void unless they were fully transparent on all the cost of the loan,[33] the present contract did not specify the exchange rate difference or spread i.e. the difference between the exchange rate when the funds were released and when the loan was being paid off.[34] However, given the above discussed statutory interventions in CHF exchange terms coming about subsequently to the conclusion of the contract the national court doubted its powers to declare the contract null and void. The court recognized that in spite of the statutory intervention that replaced the bank's own buying and selling rates with the lower official exchange rate of the Hungarian National Bank, the intervention did not take away the burden of bearing the exchange rate risk from the consumer.[35] Thus it might serve the interest of the consumer to take advantage of the powers

[32] C-118/17 *Dunai*, para. 83.
[33] Art. 213 (1)(c) of the former 1996. évi CXII. törvény a hitelintézetekről és a pénzügyi vállalkozásokról [Act CXII of 1996 on credit institutions and financial enterprises]
[34] It must be noted that unlike the *OTP Bank* case, here the judgment does not refer to the full wording of the terms under scrutiny. Sometimes it is unclear what the exact content of the term is and how many terms are actually involved in the discussion. The analysis in the paper is made based on the understanding derived from the information available in the judgment.
[35] C-118/17 *Dunai*, para. 24.

granted to national courts by virtue of Art. 6(1) of the UCTD.[36] Art. 6(1) of the UCTD provides that unfair terms are not binding on consumers but that the contracts continue to exist without the unfair terms if the contract is capable to do so. Consequently, although the preliminary reference referred to the term concerning the exchange rate difference the CJEU considered the impact of the term on transferring the exchanger rate risk on the consumer, as it was apparent for it from the request for preliminary ruling that the very reason for invoking the unfair nature of the exchange rate difference was to avoid the consumer bearing the exchange rate risk.[37] The court proceeded with separate analysis of the two terms.

The term setting out the ***exchange rate difference***, although arguably not sufficiently clear and precise in setting out the difference between the exchange rates applicable when the funds were released and when the loan was paid off, is covered by the above statutory interventions.[38] As such, following the CJEU in *OTP Bank*, they cannot be assessed for fairness as long as they fall under the mandatory terms exemption under Art. 1(2) UCTD.[39] However, according to the CJEU, this case can be distinguished from *OTP Bank* on the grounds that it is not about the fairness of contractual terms added by the legislation, but it is about the impact of that legislation on the protection provided by ***Art. 6(1) UCTD***.[40] The aim of statutory intervention must be in line with the objective pursued by Art. 6(1), that is, to restore the contractual balance between the parties by removing the unfair term from the contract while safeguarding the validity of the contract as a whole.[41] In other words, the 'fact that certain contractual terms were, by means of legislation, declared unfair and void and replaced by new terms, in order to allow the continued existence of the contract at issue, cannot have the result of weakening the protection guaranteed to consumers'.[42] Importantly however, the CJEU has recently clarified the scope of Art. 6(1) CJEU-that the unfair term must be regarded as never having existed. This means that it should not had any effect on the consumer or if it did exercise some influence, the consequence of annulling the term is that the consumers must be restored to the legal and

[36] Surprisingly, the national court did not engage with the complex relationship of the general UCTD and the specific provisions of the above act that required nullity of the contract (with the effect of Art. 8 UCTD in particular), perhaps assuming that breaching the *lex specialis* provision would also make the term unfair under the UCTD.
[37] C-118/17 *Dunai*, para. 35.
[38] C-118/17 *Dunai*, para. 36.
[39] C-118/17 *Dunai*, para. 37.
[40] C-118/17 *Dunai*, para. 38.
[41] C-118/17 *Dunai*, para. 40.
[42] C-118/17 *Dunai*, para. 43.

factual situation as he/she would have been without the unfair term.[43] The CJEU concluded that it is for the national court to determine whether the legislative interventions produced the effect of Art. 6(1) UCTD, allowing reversion to the legal and factual situation in which the consumer would have been in the absence of the unfair term, including the restitution of the advantages wrongly obtained by the bank.[44] If the relevant statute does not provide for this effect, the referring national court could rely on its powers granted by Art. 6(1) and rule on the fairness of the term, removing it from the contract and possibly terminating the entire contract if it cannot continue to exist without the exchange rate difference term.[45] The CJEU therefore concluded that the statutory interventions are only compatible with Art. 6(1) of the UCTD as long as they restore the legal and factual situation in which the consumer would have been in the absence of the unfair term.

About the terms relating to the **exchange rate risk**, the CJEU reaffirmed its findings in *OTP Bank* that the legislative interventions did not cover every aspect of exchange rate difference[46] and in spite of the statutory provisions some terms closely connected to the term might still be assessed for their fairness. This is true, as long as they are not considered core terms of the contract such as the main subject matter of the contract under Art. 4(2) UCTD that would exempt them from the test of fairness subject to the rules on transparency.[47] However, in this case the CJEU did consider the terms on exchange rate risk to be the main subject matter of the contract.[48] If such terms are presented in a non-transparent way and subsequently found to be unfair by the referring national court, the contract will not be capable of continuation, and should be set aside.[49]

Here however the Art. 37(1) of *Act XL of 2014* seems to be in conflict with the UCTD as the statute essentially asks the courts to declare these contracts valid. Albeit this would happen only until the date of their decision, according to the CJEU, such declaration would consumers from not being bound by an unfair term concerned and where necessary bound by the entire

[43] C-118/17 *Dunai*, para. 41 referring to C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo and Others*, EU:C:2016:980, para. 61.
[44] C-118/17 *Dunai*, para. 44.
[45] C-118/17 *Dunai*, para. 45.
[46] C-118/17 *Dunai*, para. 46.
[47] C-118/17 *Dunai*, para. 48.
[48] C-118/17 *Dunai*, para. 52. This bold statement of the CJEU is surprising given the absence of a comprehensive analysis of the compatibility of this term with the test established in C-26/13 *Kásler* para. 59.
[49] Ibid.

contract in line with Art. 6(1) of the UCTD.[50] Although exceptionally, and following *Kásler* it would be possible to replace the core term with default provisions of domestic law,[51] this option should only be used when the cancellation of the contract would lead to significantly unfavourable consequences for the consumer.[52] This exemption does not apply in the present case, as indeed, it would be contrary to the interest of the consumer to keep the contract alive.[53] In the light of these considerations, the CJEU concluded that Art. 6(1) UCTD should be interpreted as precluding national legislation which prevents courts from annulling the contract when they found that the term is unfair and the contract cannot be kept alive without the unfair term in question.[54] National law may thus not prevent consumers to rely on the nullity of the contract if keeping the contract alive would be against their interest.

Binding interpretations of the law and the UCTD

The referring national court raised another interesting question in *Dunai*. The court was concerned with the compatibility of the organization of the Hungarian judicial system with EU law, according to which, lower courts are bound by the *Kúria's* law unification decisions aiming to ensure uniform interpretation of the law.

In line with Continental-European legal traditions, while the *Kúria* cannot deliver binding judgments, it can provide binding interpretations of the law aiming to unify the law (so called 'law unification' decisions) that lower courts must follow. Given the interpolation of EU law into national laws, this power may *de facto* lead to interpretation of EU law (as it was in the case at hand), the competence of which should belong to the CJEU.[55] These are delivered in a closed process of a college of Supreme Court judges, experts in the broad area of law, without following the adversarial process that would guarantee effective judicial protection and fair process for consumers.

[50] C-118/17 *Dunai*, para. 53.
[51] C-118/17 *Dunai*, para. 54.
[52] Ibid. C-26/13 *Kásler,* paras. 83-84.
[53] C-118/17 *Dunai*, para. 54.
[54] C-118/17 *Dunai*, para. 56.
[55] Joasia Luzak, 'National supreme courts and their binding (but not really) decisions – CJEU in Dunai (C-118/17) Recent Developments in European Consumer Law, 17 March 2019) <https://recent-ecl.blogspot.com/2019/03/national-supreme-courts-and-their.html> accessed 20 July 2019.

In the dispute at hand, the claimant questioned the constitutionality of *PJE 6/2013 of Kúria* that declared contracts indexed in foreign currencies valid[56] denying the consumer a chance to ask the court to consider the fairness of the CHF exchange term and potentially remove it from the contract by virtue of *Art. 6(1)* UCTD.[57] The question that the CJEU considered therefore was whether Art. 6(1) read in the light of Art. 47 of the European Charter of Fundamental Rights on the right to effective remedy and fair trial precludes the supreme courts of Member States from adopting binding decisions on the uniform interpretation and effective implementation of the UCTD.[58]

Although the CJEU provided a negative answer to the question, enabling supreme courts to deliver binding interpretations of the law, it tied it to various conditions. The decisions of supreme courts should not deprive the competent lower court from ensuring the full effect of the UCTD and from providing consumers with an effective remedy or from referring a question for preliminary ruling to the CJEU.[59]

Concluding thoughts

This case note has discussed two recent judgments of the CJEU on the interpretation of the UCTD, the *OTP Bank* and the *Dunai* case. The two cases are especially significant in that they discuss the relationship between the UCTD and Hungarian statutes and instructions from the highest Hungarian court.[60] We can clearly see the CJEU's intention to give space to the application of the UCTD as much as possible, narrowing down the reach of the statutory interventions, this especially coming across in the approach to interpreting Art. 1(2) and Art. 6(1) of the UCTD. This confirms the role of the UCTD as an instrument containing general principles that are useful safety nets to fall back onto to protect consumers. As the facts in *Dunai* show, the role of the UCTD is especially significant when statutory interventions might

[56] 6/2013 Civil Law Unification Decision [Polgári jogegységi határozat], point 2 <https://kuria-birosag.hu/hu/joghat/62013-szamu-pje-hatarozat> accessed 20 July 2019.
[57] C-118/17 *Dunai*, para. 26.
[58] C-118/17 *Dunai*, para. 60.
[59] C-118/17 *Dunai*, para. 64
[60] The CJEU have seldom similar direct opportunities. One such reference resulted in the landmark C-154/15, C-307/15 and C-308/15, *Naranjo and Others* that considered the Supreme Court's temporal limitation of declaring the contract term unfair incompatible with Art. 6(1) UCTD. See for more: Anna van Duin, 'Spanish 'floor clauses' (cláusulas suelo) - EU Court of Justice steps in: nullity is nullity' Recent Developments in European Consumer Law, 22 December 2016) < https://recent-ecl.blogspot.com/search?q=Naranjo> accessed 20 July 2019.

not serve the interests of consumers. A similar approach is noticeable with giving effect to binding interpretations of national supreme courts. Given the number of limitations imposed on the validity of these interpretations, one might say that these decisions operate in practice more like guidelines for lower courts to follow but from which they must depart insofar as this is necessary to achieve the goals of the UCTD or to protect consumers' fundamental rights.[61]

While in the *OTP Bank* case the CJEU delivered useful guidance for national courts on the relationship of statutory interventions to specific provisions of the UCTD; *Dunai* has the potential to become a landmark decision capable of producing social justice effects and directly improving the lives of large numbers of consumers[62]. By effectively declaring the primacy of the UCTD over the relevant statutory provisions, the CJEU in *Dunai* has raised the potential for contractual terms (and perhaps contracts as a whole) to be annulled where these do not sufficiently serve the interests of consumers, notwithstanding that they are based on the national statutory provisions. Consumer bodies have high hopes about the effects of this judgment;[63] however, its true effect may depend on Hungary fulfilling its obligation to comply with the general principles of EU law, i.e. to amend the relevant statute.[64] If the statute is not amended, the effect of this judgment becomes more uncertain in terms of the extent of which consumers will be able to rely on it in practice.

[61] Luzak, note 50. Compare with C-118/17 *Dunai*, para. 63.
[62] Fejős, note 8.
[63] FXLoans: European Group for Consumer Rights, Hungary: Curia's Judgment in Case C-118/17 https://www.fxloans.org/hungary-curias-judgement-in-case-c-118-17/ accessed 20 July 2019.
[64] Under Art. 4(3) Treaty on the European Union.