Article

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Foreign Currency Loans and the Foundations of European Contract Law – A Case for Financial and Contractual Crisis?

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Abstract: Loans with variable interest rates indexed to foreign currencies carry a double risk for borrowers: a rise of interest rates and an adverse development in the exchange rate. While they therefore could have been forbidden for consumer credit, they are allowed both at EU and (most) national levels. Consumer credit arrangements indexed to foreign currencies that were legal in principle have raised enormous problems when they occurred in large numbers in Eastern and Central European countries and reference was not directly written into the terms (like in Romania), but could change with additional discretionary decisions (such as in Poland and Croatia). While Croatia has introduced special legislation to cure the overall problem, Polish cases are potentially not only causing a systemic risk for the

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Professor of German and European Private and Business Law at Humboldt-Universität, Berlin, Professor of Transnational Law and Theory, European University Institute (EUI) (*alumnus*). Both authors have written an expert opinion in the CJEU case C-520/21, the first author also a second one based on the first in the joined CJEU cases C-139/22 and C-140/22. The present article represents their scientific conviction. In two articles, they have moreover dealt with specific aspects of this article in more detail – which hence overlap with this article: see N. Badenhoop, 'Restitution Claims – EU Consumer Law Principles and the Mortgage Credit Directive as an Overarching Value Model', in Sirena, n 1 (forthcoming) (mainly for below Sections 3.2, 3.3 and 4) and S. Grundmann, 'Against consumer freeriding: Market expectations as the overarching benchmark for fairness in European (consumer) contract law', in Sirena, n 1 (forthcoming) (mainly for below Sections 2.3 and 5).

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whole banking system, but abundantly are the subject of CJEU case law. This triggers the core interest in contract law, namely an unheard-of relevance in EU law of general and more specific questions of the law of restitution – on the basis of unjust enrichment and/or of damages. This article presents the following five main theses. Firstly, while the Unfair Contract Terms Directive (UCTD) contains too vague a scheme of remedies/sanctions for detailed answers, the overarching benchmark is clear, namely a fair balance of interests and the meeting of justified expectations, which the parties, especially on the consumer side, could have had at the moment when the loan was issued. Secondly, general (EU) principles of unjust enrichment, as well as of damages, are recognised by the CJEU in EU law. They order the restitution of what was gained above the status quo ante, but could not have been acquired on markets even by informed and proper contracting at that time and/or the restitution of losses incurred as compared to the status quo ante. Thirdly, Articles 23 and 24 of the Mortgage Credit Directive (MCD) constitute a suitable model around which a set of claims in unjust enrichment can be shaped and can be applied also to old cases. Fourthly, any windfall profit of borrowers (gain beyond what could have been achieved at the moment of formation of the contract) has to be avoided in the name of fairness and justified expectations – which are recognised in CJEU case law as the two main benchmarks of the regime of sanctions of the UCTD. Finally, a fair restitution regime is reached if the borrower, who had not been properly informed (with the nullified clause), can now make an informed choice between the different offers that were offered on markets when the loan was issued. Thus, he/she could now opt for a loan in either the national currency plus applicable interbank interest rate (in the Polish case Zloty tied to WIBOR) or their foreign currency counterparts (i.e. a loan in CHF tied to LIBOR). Expropriation (of banks) of the loan capital, as well as the possibility to use that capital to generate interest have to be avoided, for penalisation is neither an aim of European contract law nor of the UCTD.

Keywords: foreign currency loans, restitution, fairness, unjust enrichment, fundamental rights, expropriation, mortgage credit directive, penalisation and redistribution, unfair contract terms directive

Résumé: Les prêts à taux variable indexés sur des devises étrangères comportent un double risque pour les emprunteurs : une hausse des taux d'intérêt et une évolution défavorable du taux de change. Alors qu'ils auraient pu être interdits pour le crédit à la consommation, ils sont autorisés tant au niveau de l'UE qu'au niveau national (la plupart du temps). Les contrats de crédit à la consommation indexés sur des devises étrangères qui étaient par principe légaux ont soulevé d'énormes problèmes lorsqu'ils se sont multipliés dans les pays d'Europe centrale et orientale et que la référence n'était pas directement inscrite dans les conditions (comme en Roumanie),

mais pouvait changer avec des décisions discrétionnaires supplémentaires (comme en Pologne et en Croatie). Alors que la Croatie a introduit une législation spéciale pour remédier au problème général, les cas polonais sont potentiellement non seulement à l'origine d'un risque systémique pour l'ensemble du système bancaire, mais font abondamment l'objet de la jurisprudence de la CJUE. Cela implique la pertinence en droit européen du droit des contrats à travers les questions générales et plus spécifiques du droit de la restitution – sur la base de l'enrichissement sans cause et/ou des dommages et intérêts. Cet article présente les cinq thèses principales suivantes. Premièrement, bien que la directive sur les clauses contractuelles abusives (UCDT) contienne un schéma trop vague de remèdes/sanctions pour permettre des réponses détaillées, le critère principal est clair, à savoir un juste équilibre des intérêts et la satisfaction des attentes justifiées que les parties, en particulier du côté des consommateurs, auraient pu avoir au moment où le prêt a été accordé. Deuxièmement, les principes généraux (européens) de l'enrichissement sans cause, ainsi que des dommages et intérêts, sont reconnus par la CJUE dans le droit européen. Ils ordonnent la restitution de ce qui a été acquis au-dessus du statu quo ante, mais qui n'aurait pas pu être acquis sur les marchés même en contractant en connaissance de cause à ce moment-là et/ou la restitution des pertes subies par rapport au statu quo ante. Troisièmement, les articles 23 et 24 de la directive sur le crédit hypothécaire (MCD) constituent un modèle approprié autour duquel un ensemble d'actions en enrichissement sans cause peut être façonné et peut être appliqué également à des affaires anciennes. Quatrièmement, tout profit exceptionnel des emprunteurs (gain dépassant ce qui aurait pu être obtenu au moment de la formation du contrat) doit être évité au nom de l'équité et des attentes justifiées – qui sont reconnues dans la jurisprudence de la CJUE comme les deux principaux critères du régime de sanctions de la UCTD. Enfin, un régime de restitution équitable est atteint si l'emprunteur, qui n'avait pas été correctement informé (avec la clause annulée), peut maintenant faire un choix éclairé entre les différentes offres qui étaient proposées sur les marchés au moment de l'émission du prêt. Ainsi, il peut maintenant opter pour un prêt soit dans la monnaie nationale plus le taux d'intérêt interbancaire applicable (dans le cas de la Pologne, le zloty est lié au WIBOR), soit dans la monnaie étrangère correspondante (c'est-à-dire un prêt en CHF lié au LIBOR). L'expropriation (des banques) du capital emprunté, ainsi que la possibilité d'utiliser ce capital pour générer des intérêts doivent être évitées, car la pénalisation n'est pas un objectif du droit européen des contrats ni de la UCDT.

Zusammenfassung: Fremdwährungskreditverträge mit Vario-Zins bergen zwei Hauptrisiken für Darlehensnehmer: negative Zinsentwicklung (idR Anstieg) und ungünstige Entwicklung des Wechselkurses der Referenzwährung. Es wäre daher denkbar, sie gegenüber Verbrauchern zu verbieten, was freilich weder auf EU- noch auf nationaler Ebene geschah (jedenfalls in Polen). Die Arrangements, die demnach

grundsätzlich legitim und wirksam waren, warfen erhebliche Probleme auf, wenn sie massenhaft gewählt wurden (in Zentral-und Osteuropa) und nicht schlicht auf die Referenzwährung (mit Referenzzinssatz) verwiesen wurde (so idR in Rumänien), sondern Umrechnungsmechanismen in AGBs ausgestaltet wurden (wie in Polen und Kroatien). Während Kroatien das Problem durch Spezialgesetz weitgehend löste, könnten die polnischen Fälle nicht nur das Potential haben, eine Bankenkrise auszulösen, sondern sind auch im großen Umfang Gegenstand des Fallrechts des EuGHs. Dies ist auch der Grund dafür, dass sie auch im Kernbereich des Europäischen Vertragsrechts absolut zentral sind, namentlich, dass sie mehr als je zuvor eine breite Diskussion und Beschäftigung mit dem Rückabwicklungsregime auslösen – namentlich mit den Instrumenten der ungerechtfertigten Bereicherung, aber auch des Schadensersatzrechts. Dieser Beitrag formuliert hierzu fünf Thesen. Erstens, während die AGB-Richtlinie nur ein zu allgemeines Sanktions-Regime formuliert, um darauf konkrete und detaillierte Antworten in Einzelfragen zu stützen, ist doch die Generalzielsetzung klar, namentlich, dass ein fairer Interessenausgleich zu suchen ist und die gerechtfertigten Markterwartungen, wie sie bei Vertragsschluss denkbar erschienen, abgebildet werden sollen, für beide Seiten (auch den Verbraucher). Zweitens, allgemeine Grundsätze des Unionsrechts zur ungerechtfertigten Bereicherung, aber auch zum Schadensersatzrecht werden im Fallrecht des EuGHs als solche anerkannt. Sie gehen dahin, dass Gewinne über den status quo ante, die damals auch bei angemessener Information und ordnungsgemäßem Vertragsschluss gar nicht hätten erzielt werden können, als Bereicherung auszukehren sind, aber auch, dass Schadensersatzansprüche einen Schaden gegenüber dem Zustand voraussetzen, der damals überhaupt erzielbar war. Drittens bildet Artikel 23 der Wohnimmobilien-Richtlinie ein sinnvolles – ungleich besser ausdifferenziertes – Modell der Rückabwicklung, das grundsätzlich auch für Altfälle (vor 2014) zugrunde zu legen ist. Viertens sind Gewinne des Kreditnehmers über den Zustand hinaus zu vermeiden, den er bestmöglich bei Vertragsschluss hätte realisieren können, dies aufgrund der Grundsätze von Treu und Glauben ('fairness') und gerechtfertigter Markt-und Parteienerwartungen – der beiden Hauptzielrichtungen einer Auslegung der AGB-Richtlinie (auch) in der EuGH-Rechtsprechung. Fünftens ist ein faires Restitutionsregime jedenfalls dann realisiert, wenn der Kreditnehmer heute (mit voller Information) die Wahl zwischen Alternativen nachholen kann, die damals auf dem Markt zur Verfügung standen – mehr gebietet der Verbraucherschutz nicht. Dies bedeutet etwa eine Wahlmöglichkeit zwischen Vertragswährung in nationaler Währung mit nationalem Interbank-Zinsindex (zB in Polen Zloty verbunden mit dem Zinsindex WIBOR) oder Vertragswährung in ausländischer Währung mit entsprechendem Zinsindex (zB CHF verbunden mit dem Zinsindex LIBOR). Im Ergebnis ist eine Enteignung der Kreditgeber nicht zu rechtfertigen und zu vermeiden und zwar hinsichtlich der Darlehensvaluta selbst (Rückzahlung), aber auch der Dispositionsfreiheit, sie nur gegen angemessene Verzinsung zur Verfügung

zu stellen. Pönalisierung der Kreditgeber bildet kein Ziel des Europäischen Vertragsrechts und auch nicht der AGB-Richtlinie.

1 Introduction

Loans with variable interest rates indexed to foreign currencies, i.e. coupled with the full exchange rate risk, are currently hotly debated, in the light of a series of CJEU cases and decisions, which are truly ground-breaking.[1] In some Central and Eastern European Member States of the European Union, such loans had been widely issued to households (in Poland, which is key according to our discussion, mostly after adhesion). In part, they have been the preponderant type of loan (including household loans) with variable interest rates, which in Croatia are even almost the sole type of loan. In other countries, such as Spain, Austria and Greece, they played a considerable role in this segment of the market, though at a considerably lower percentage and rather in circles with rather high financial literacy. When analysing the most involved jurisdictions, one can see why Polish loans and banks are still much more affected and hotly debated than is the case in any other country or jurisdiction (see below Section 2.2).[2] In Poland, it would even seem possible – or at least not excluded in the perception of the Polish Banking Supervisory Authority –

1 See only P. Sirena (ed), *Unfair Contract Terms and Restitution in European Private Law – the National and ECJ Litigation on House Loans Indexed in a Foreign Currency* (Cambridge: Cambridge University Press, 2023) (forthcoming); some five years ago: E. Paparseniou, 'Der Schutz des Fremdwährungsdarlehensnehmers nach der Rechtsprechung des EuGH', *WM – Wertpapiermitteilungen* 2018, 1730–1738; see now Advocate General's Opinion in Case C-520/21 (Anthony Collins), Press Release 36/2023 of 16th of February 2023 – favouring claims on both sides on restitution/payment of loan principal and interests (in the case of bank claims, however, limited to statutory interests).

2 For a survey (graph), see already here: European Central Bank, https://sdw.ecb.europa.eu/reports.do?node=1000003803, graph sub b by Sector. (EU, percentages, last observation: September 2022): the three countries where household loans indexed to foreign currencies reached almost 10% or up to 30% of all the loans' volume are Croatia, Rumania and Poland. Considerable still in this segment (approx 2–3 %) Bulgaria, Greece, Austria. For Spain see below. There is a substantial amount of literature, specifically aimed at the situation in the countries named. See vol 66(1) (2020) *Osteuropa-Recht* (a number of contributions on consumer credits in foreign currency in Croatia and Poland); E. Mišcenic, 'Currency Clauses in CHF Credit Agreements: A 'Small Wheel' in the Swiss Loans' Mechanism' 9 (2020) *Journal of European Consumer and Market Law* 226–235; A. Wiewiórowska-Domagalska, 'Unfair Contract Terms in CHF Mortage Loans' 9 (2020) *Journal of European Consumer and Market Law* 206–212; A. Wiewiórowska-Domagalska, 'Potential and Hurdles for the CJEU's Jurisprudence in Domestic Legal Orders: A Polish Case Study', in S. Grundmann/M. Grochowski (eds), *European Contract Law and the Creation of Norms* (Cambridge: Intersentia, 2021) 269–303; R. Vassileva, 'Monetary Appreciation and Foreign Currency Mortgages: Lessons from the 2015 Swiss Franc Surge' 28 (2020) *European Review of Private Law* 173–195; and others in the course of discussion.

that a bank crisis with a number of bank insolvencies could ensue from unfavourable outcomes of the decisions of the CJEU that are expected in the first half of 2023.[3] Within the context of this journal, it is, however, not only important that the phenomenon may have huge practical and macro-economic implications, even disastrous ones. The phenomenon would still seem to be of rather specific kind, with narrow and detailed financial law problems. Mišcenic, in her contribution, calls it a 'small wheel' – and therefore not in the prime focus of the readership.

It is, however, at this point that the interest for European contract law very broadly speaking kicks in. The importance of the discussion revolving around foreign currency indexed (household) loans for European contract law is primarily due to the fact that it triggers general principles and questions of restitution to an extent so far virtually unknown in European contract law. A whole range of problems of this one huge branch of the law of obligations – restitution in the form of damages or in the form of unjust enrichment – would seem to be addressed by these cases in a truly ground-breaking way. This includes, firstly, the regime of sanctions and restitution in the Unfair Contract Terms Directive (UCTD)[4] – one of the few general EU Directives on contract law (see below Section 3.2). This includes, secondly, the whole regime of general principles of EU (and of national) law(s) on restitution (see below Section 3.3). Thirdly, this may even have constitutional dimensions, including the horizontal effect of fundamental rights for all this area (see below Section 3.4). Finally, this also addresses one of the mega-questions of the last decade, namely how regulation and macro-economic structures impact on private law remedies (see below Section 3.3 and, on market expectations, below Section 3.5). In this article, however, we do not only discuss these more general (and vague) instruments and principles. We also propose that these cases may be best resolved by recourse to a rather specific regime, tailor-shaped for them, the Mortgage Credit Directive (MCD) of 2014,[5] attributing retro-active effect to it, because we see in it (as did the CJEU already in the case *Schyns*)[6] the embodiment of a general principle pre-dating the directive (see below Section 4). Moreover, we discuss more generally how fairness, expectations and sanctions/penalisation relate to each other in European contract law (see below Section 5).

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3 Opinion of the Office of the Polish Financial Supervisory Authority – on directions of resolution of legal questions presented by the First President of the Supreme Court concerning housing mortgage loans denominated in or indexed with a foreign currency, 2021 (on the request of the Full Civil Chamber of the Polish Supreme Court).

4 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *EU OJ* 1993 L 95/29.

5 Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, *EU OJ* 2014 L 60/34.

6 Case C-58/18 *Michel Schyns* v *Belfius Banque SA* [2019] ECLI:EU:C:2019:467.

2 Phenomenon and Importance of Macro-Economic Market Considerations

2.1 Phenomenon and Core CJEU Decisions

Loans with variable interest rates indexed to foreign currencies are doubly risky, but in a very different and largely unforeseeable way for each single foreign currency separately. In the cases named, the main (foreign) currencies involved – with respect to Polish loans (Polish Zloty being the domestic currency) – were Euros (EUR), Swiss Francs (CHF), much less Japanese Yen (YEN). They indeed developed in dramatically different directions after 2000 – when household mortgage booms kicked in. Indeed, loans indexed in Euros turned out to be mostly neutral after 20 years, those indexed in Swiss Francs were disastrous, those in Yen even a good bargain.[7] In Poland, unfortunately, Swiss Francs seem to have been the currency chosen most. Typically, loans in foreign currencies are entered into because of lower interest rates – indeed, practice would seem to show that often they were offered (and chosen) when a loan in the domestic currency, because of the higher interest rate, would not have passed the hurdle of 'responsible lending' (check of creditworthiness).[8] In other words, the customer would not have received a loan in Zloty or other domestic (Croatian, Romanian, etc.) currencies. The variable interest rate loans indexed to foreign currencies are, however, doubly risky, because not only is the interest rate

7 See graphs for 2000 through 2022 for the major currencies involved/mentioned – EUR, CHF, YEN and Polish Zloty – at https://exchangerate-euro.com/currency/. The single graphs show a development with an exchange rate Zloty-Euro mostly stable, with a depreciation of Zloty *and* Euro against CHF of approx 40% and with an appreciation of Zloty *and* Euro against YEN of approx 10–15%.

8 See T. Josipovic, 'Limits to restitutionary effects of unfair contract terms in foreign currency loans', in Sirena, n 1 above, forthcoming. Summarising, a duty to 'responsible lending' requires of banks a scrutiny that the debtor is likely to be able – out of his/her fortune and of his/her income – to pay back the principal of the loan and the interests owed. While there was no explicit duty of 'responsible lending' at the EU level before 2014 (as of then, art 18 and 20 para 1 of the Mortgage Credit Directive, below n 10, in the future as well for all consumer credits, see COM(2021) 347 final in its art 18.), national law could contain one such duty. Moreover, there was as well a dispute whether the same duty could not be inferred from EU Banking Supervision Law also at the European level: see discussion in Y. Atamer, 'Duty of Responsible Lending: Should the European Union take action?', in S. Grundmann/Y. Atamer (eds), *Financial Services, Financial Crisis and General European Contract Law – Failure and Challenges of Contracting* (Alphen: Kluwer, 2009) 179–202; also V. *Mak, 'What is Responsible Lending? The EU Consumer Mortgage Credit Directive in the UK and the Netherlands'* 38 *Journal of Consumer Policy* 411–430 (2015). In any case, banks in those countries would seem to often have made recourse to loans indexed in foreign currencies as well because they could thus (formally) satisfy the prerequisites of the duty of 'responsible lending' – paradoxically with a potentially more risky form of loan.

variable, which carries a fairly high risk of rising interest repayments, but the exchange rate risk is added as a second risk. When foreign currency indexed loans are issued at lower interest rates – especially when the domestic currency is still perceived as being weaker, like the Zloty at the beginning of the Millennium –, this is so because of the index of reference used. All are typically calculated by reference to an interbank offered rate. In the case of CHF, this was often LIBOR, in the case of the Euro typically EURIBOR. Their rates were variable, but almost consistently lower than WIBOR (Warsaw Interbank Offered Rate). Hence, the main bargain was lower interest rates (LIBOR/EURIBOR v WIBOR) v the risk of adverse exchange rate development for the loan principal that has to be repayed at the termination of the loan (EUR or CHF rising as against Zloty).

Given how unforeseeable both developments are, it could, of course, also be argued that disallowing foreign currency indexed loans completely for households would be the soundest consumer law policy.[9] This, however, was decidedly *not* the policy of the European Union, not even after the Global Financial Crisis,[10] nor of the legislature most heavily involved, the Polish Supervisory Authority from whom the association of Polish banks had even asked *in vain* to introduce such a ban.[11] Therefore, the issue of such loans can*not* in itself be seen as a 'wrong' imputable to banks involved – and the CJEU has rather clearly opted for this view, as well in the cases relating to the Romanian practice (see below 2). Thus, all highly affected Eastern European legislatures and the CJEU are unanimous in not imputing any fault to banks issuing such household loans. Exceptions, where such bans have been introduced, like in Austria, just show that this option was open to the legislature, but too seldom taken. For the banks in these countries, it is only a failure in the drafting of the terms of the loans that is at stake, which is associated with improper information.

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9 More generally on individual protection goals in EU banking regulation and their impact on contract law (including contract nullity), N. Badenhoop, 'The Individual Protection Goal in EU Banking Regulation – A Process Towards Private Law Enforcement', in S. Grundmann/P. Sirena (eds), *European Contract Law in the Banking and Financial Union* (Cambridge: Intersentia, 2023 – forthcoming); N. Badenhoop, *Europäische Bankenregulierung und private Haftung* (Tübingen: Mohr Siebeck, 2020) 274 et seq. There are two opposing views on foreign currency loans: either they are – from the side of consumers – totally rational strategies for consumers (putting burdens off to the end of the loan), or blatant examples of (consumers') bounded rationality and vulnerability.

10 Art 23 Mortgage Credit Directive.

11 For the Polish Banking Association's report of 2005, see https://www.zbp.pl/getmedia/583d24ee-450e-4a97-a9bc-4c71b85f7749/06-Biala-ksiega-kredytow-frankowych-w-Polsce_marzec_2015. See namely n 4: Polish banks applied to the Association in November 2005 to restrict such loans; n 5 the latter applied to the Polish Supervisory with the same aim; n 7 the latter rejects with decree of 8th of February 2006; n 12 PiS was in favour of broadening access to loans for households.

If then loans with variable interest rates indexed to foreign currencies are not banned as such, the core question debated today – and also in this article – is how to deal with cases where the mechanism of indexing is further specified via standard contract terms. What is not at stake is 'naked' direct referencing just to the foreign currency as such (on this issue see below Section 2 with respect to Romanian cases mainly). With respect to the case law on such loans with variable interest rates indexed to foreign currencies, where the mechanism of indexing is indeed further specified via standard contract terms, the following cases decided by the CJEU so far stand out.

In the case *Árpád Kásler*,[12] the CJEU dealt with a Hungarian loan denominated in CHF that contained a standardised clause referencing the monthly instalments in Hungarian Florint to the bank's own selling rate of exchange. Unsure about the clause's fairness, the referring court asked the CJEU three core questions: whether the clause was outside the realm of judicial control ('definition of the main subject-matter of the contract' or 'remuneration'), whether the requirement of clear and intelligible drafting also included the economic reasons for using the contractual term under Article 4 para 2 UCTD, and whether it was allowed to cure the contract by replacing the invalid clause with supplementary national law under Article 6 para 1 UCTD. Firstly, the CJEU left it to the referring national court to assess whether the selling rate of exchange of the foreign currency could define the main subject matter, but clarified that the difference between selling and buying rates of exchange cannot be considered as 'remuneration'.[13] Secondly, the functioning mechanism had to be transparent so that the consumer could understand the economic consequences for him or her.[14] Thirdly, where the deletion of an unfair clause would render the continuation of the contract impossible, the CJEU allowed supplementary provisions of national law to fill the gap.[15]

In *Zsuzsanna Dunai*,[16] the CJEU further clarified the consequences of an unfair exchange rate clause of a foreign currency loan. It held that Article 6 para 1 UCTD permits the cancellation of a loan contract on the basis that the exchange difference is unfair when this restores the legal and factual situation in which the consumer would have been without the unfair clause.[17] This builds on the case *Gutiérrez Naranjo and Others,* where the CJEU ruled that the restoration of the legal and factual *status quo ante* required the creation of a right to restitution of advantages wrongly

12 Case C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai* v *OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282.

13 *Ibid*, para 51, 58.

14 *Ibid*, para 74.

15 *Ibid*, para 85.

16 Case C-118/17 *Zsuzsanna Dunai* v *ERSTE Bank Hungary* [2019] ECLI:EU:C:2019:207.

17 *Ibid*, para 45.

obtained.[18] On a second point in *Zsuzsanna Dunai*, the CJEU did not allow the cancellation of a loan contract for an unfair term relating to exchange rate risk where the contract cannot continue to exist without that term because such a term defines the main subject-matter of the contract under Article 4 para 2 UCTD.[19]

In *Kamil Dziubak*,[20] the CJEU had to interpret Article 6 para 1 UCTD on several questions deciding the fate of Polish mortgage loans indexed to CHF whose foreign currency exchange clause the referring court deemed unfair. The CJEU ruled that the annulment of certain unfair terms could lead to the annulment of the entire contract if their removal would effectively alter the nature of the main subject matter of the contract.[21] In addition, the court must assess the consequences of annulling the entire contract in light of the existing or foreseeable circumstances at the time when the dispute arose, with a special consideration of the wishes expressed by the consumer.[22] When upholding a contract, the national court was not allowed to fill the gaps left by the invalid clauses with national provisions of a general nature, such as equity or established customs.[23] Where clauses cannot be replaced, they are not to be upheld unless the consumer expressly consents thereto.[24]

2.2 Survey on Relevance for Main Affected Jurisdictions

Besides the core decisions reported above that deal with the extent of nullity and raise a question of restitution, both about its foundations and its extent for both contractual parties, there are other important decisions by the CJEU on household loans with variable interests indexed to foreign currencies. The characteristic of these decisions is, however, that the extent of nullity and restitution were not at stake here, because they had already been blocked or avoided at an 'earlier' stage. Alternatively, there are jurisdictions that solved core problems ensuing from nullity of such loans via specific national legislation. These developments influence the macroeconomic importance of the issue considerably. Among the three most affected jurisdictions – Croatia, Romania and Poland – each has its particular setting.

18 Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo and Others* [2016] ECLI:EU:C:2016:980, para 66.

19 Case C-118/17 *Zsuzsanna Dunai* v *ERSTE Bank Hungary* [2019] ECLI:EU:C:2019:207, para 52.

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

21 *Ibid*, para 45.

22 *Ibid*, para 56.

23 *Ibid*, para 62.

24 *Ibid*, para 68.

Romania, indeed, is the core jurisdiction where the household loan indexed to foreign currencies in large majority were arranged in such a way that the CJEU did not see a case for nullity.[25] The loans referred directly to the foreign currency and the interest rate index related to it. The court judged that such 'naked' direct referencing just to the foreign currency as such fell under Article 4 para 2 UCTD and therefore the substantive scrutiny under the Directive did not apply when the clause was expressed in 'plain intelligible language' – all to be assessed at the moment of contract formation.[26] The same legal outcome – now under Article 1 para 2 UCTD – was given to cases where the arrangement of the conversion mechanism just followed a norm contained in the national background legal regime, the bank just copying the wording, not giving any information and the bank potentially even being conscious of a lack of knowledge of the client.[27] In case both provisions apply, the court gives preference to Article 1 para 2 UCTD, thereby totally excluding the clause from the ambit of application of the directive and its scrutiny.[28]

Conversely, in Croatia the adaptation of annulled loan agreements to the changed circumstances was taken care of by the legislature. While this legislation was based on macro-economic reasoning, the consequence was that the weakness of Article 6 UCTD – of being too vague about legal consequences of annulment under the Directive and specifying them too little – was basically cured. The large majority of the loan agreements were based on a new and valid basis balancing the interests of both parties. Moreover, long-term agreements (especially of financial type where only money has to be refunded) raise questions considerably different from those in simple exchange contracts for which the UCTD would seem to be conceived primarily. The main legislative move was to establish a regime of national currency indexed variable (reasonable) interest loans into which consumers could opt and which the banks had to offer them under Consumer Credit Act 2015.[29] As this constituted a default rule for the consumers (having an option), standard contract terms including such conversion into the new regime were upheld under Article 1 para 2 UCTD by the CJEU.[30]

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25 See more in detail C. Toader, in Sirena, n 1 above, forthcoming.

26 Case C-186/16 *Andriciuc* [2017] ECLI:EU:C:2017:703 (moreover, national court must check whether terms were so intelligible for the consumer as to understand duty and risk undertaken); similar for other countries: Cases C-776/19 to C-782/19 *BNP Paribas Personal Finance SA* [2021] ECLI:EU:C:2021:470 (with the further specification that the burden of proof for the term being intelligible enough is on the provider/bank and that if the risk is unlimited for the borrower, a particularly high threshold of clarity is required).

27 Case C-87/21 *NSV and NM* [2021] ECLI:EU:C:2021:860 ('mauvaise foi'); and similar already for a refinancing agreement: Case C-81/19 *Banca Transilvania* [2020] ECLI:EU:C:2020:532.

28 Case C-364/19 *Credit Europe Bank NV* [2021] ECLI:EU:C:2021:306.

29 See Josipovic, n 8 above, forthcoming.

30 Case C-567/20 *A H.* v *Zagrebačka banka* [2022] ECLI: EU:C:2022:352, esp para 48–64.

Thus, among the three most affected countries, only in Poland were loans were annulled in large numbers (different from Romania) and there was no legislative solution to the changed circumstances that mandated a compromise solution (different from Croatia). This article hence focuses on the problems raised by such loans issued by Polish banks, a number of which also were referred to the CJEU for preliminary ruling. The solutions proposed here are, of course, of a general kind and would apply also to other jurisdictions – Polish cases just form the main body of case law.

2.3 Macro-Economic Market Considerations and their Relevance for Contract Law[31]

In its opinion, the Polish Supreme Court requested from the Polish Financial Supervisory Authority on potential systemic risk for the Polish banking sector. The Authority distinguished different scenarios. These relate to the impact of a complete annulment – also of the duty to refund the principal of the loan (in Zloty) – and to the economic consequences a decision would have to bar any payment of interest by the borrower – even interest at low or the lowest available level. According to whether the interest is already paid or remains due, the result may play out in restitution claims of the client or claims of banks to still pay interest. The Authority gives detailed answers for several scenarios (no restitution of loan principal at all, no duty to pay interest at all, or a duty to refund the principal [in Zloty] and pay interest, either according to the [lower] index of LIBOR [related in real markets to CHF loans] or according to that of WIBOR [related in real markets to Zloty loans]).[32] Depending on the decisions in these contract law questions, and given the volume outstanding, the Authority sees a more or less serious risk not only of losses, but of insolvencies and need for recovery proceedings, potentially also of a bank crisis more generally.

This view raises the question whether courts should take such a risk into account. The traditional view would rather see these questions as being unrelated to the individual justice considerations regarding the contract and its unravelling.[33] The CJEU already adhered to this traditional view as well.[34] It does not need to be

31 On this section, see more in detail: Grundmann, see above initial note about author, forthcoming.

32 See reference above n 3.

33 See in this sense, namely for unfair contract terms law, I. Barral-Viñals, 'Aziz case and unfair contract terms in mortgage loan agreements – Lessons to be learnt in Spain' 4 *Penn State Journal of Law & International Affairs* 2015, 69–95, 90 *et seq* ('serious difficulties in the economic public order … not a legal argument') (with Spanish case law of this content).

34 Namely Case C-92/11 *RWE* [2013] ECLI: EU:C:2013:180, para 56–62 (however, already this decision with the exception that the contrary can apply if there 'is a risk of serious difficulties').

discussed whether there is not a more recent trend to see regulation of the public good and private law considerations as being more closely related to each other -[35] vigorously supported by the introduction of a private claims regime for antitrust competition law as one of the most paradigmatic areas of public good regulation.[36]

The establishment of the European Banking Union and its stability regime for the banking sector – probably the dominant legal development in financial law in the last decade, and with respect to the overarching goal of interest here, applicable to EU Member States outside the Eurozone as well – is of core importance here. The reason is that it completely contradicts the traditional approach at least for scenarios where bank insolvencies are potentially at stake. For the banking sector, this stability regime has introduced one overarching principle and benchmark – with superiority over all others. The aim is to avoid bank crises (with their socialisation of costs, namely to taxpayers) by all available means, at least in scenarios where these crises are triggered by private gains or even windfall profits, which is why private burden-sharing via a bail-in mechanism (as opposed to a tax-funded bail-out) was introduced.[37] No private investors (such as foreign indexed loan borrowers) may make

35 There is a host of literature, namely in Germany, on the mutual dependence of private law and regulatory instruments (with discussion of the functional links mutually reinforcing each other), see, more generally A. Hellgart, *Regulierung und Privatrecht – Staatliche Verhaltenssteuerung mittels Privatrecht und ihre Bedeutung für Rechtswissenschaft, Gesetzgebung und Rechtsanwendung* (Tübingen: Mohr-Siebeck, 2016); S. Grundmann, 'Regulierung und Privatrecht', *Festschrift Claus-Wilhelm Canaris* 2017, 907–948; and for specific areas of the law J.-H. Binder, *Regulierungsinstrumente und Regulierungsstrategien im Kapitalgesellschaftsrecht* (Tübingen: Mohr-Siebeck, 2012) (capital markets), J.-U. Franck, *Marktordnung durch Haftung: Legitimation, Reichweite und Steuerung der Haftung auf Schadensersatz zur Durchsetzung marktordnenden Rechts* (Tübingen: Mohr-Siebeck, 2016) (tort law); Badenhoop, n 9 above, banking regulation. Path-breaking, two decades ago: H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999).

36 See Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, *OJ EU* 2014 L 349/1; and on the discussion on and the arguments for the introduction of such private law (damages) regime, for instance, J. Basedow, 'Entwicklungslinien des europäischen Rechts der Wettbewerbsbeschränkungen – von der Dezentralisierung über die Ökonomisierung zur privaten Durchsetzung', in S. Augenhofer (ed), *Europäisierung des Kartell- und Lauterkeitsrechts* (Tübingen: Mohr-Siebeck, 2009) 1–14; today see P. Kirst, *The Impact of the Damages Directive on the Enforcement of EU Competition Law – A Law and Economics Analysis* (Cheltenham: Edward Elgar, 2021).

37 On this aim, its primacy and the rationale behind it, see, for instance, J.-H. Binder/C. Gortsos, *The European Banking Union – A Compendium*, 2016 *passim*; J.-H. Binder/C. Gortsos/K. Lackhoff/C. Ohler (eds), *European Banking Union – Brussels Commentary* (Munich: Beck, 2022) *passim*; S. Grundmann, *Bankvertragsrecht vol 1 – Grundlagen und Commercial Banking* (Berlin et al: de Gruyter, 2020) part 1 para 34–41; Badenhoop, n 9 above, 59–74. On the effect of private burden-sharing to avoid public bail-outs N. Badenhoop, 'Banking Communication Non-binding and Burden-sharing Approved: Kotnik' (2017) 13(3) *European Review of Contract Law* 299–309. For the corpus of legislative acts that constitute

their gains at the expense of the public at large (and privatise them). If this is the case already in case of risky investment (speculation), as before the global financial crisis, this has to hold true *a maiore* for gains that could not have been made anywhere on markets (windfall profits). This rationale of the core legal act and regime in banking law is to be taken seriously in the whole arena (at least) of banking law via systematic interpretation.[38] It is indeed a prominent (if not the most prominent) method consistently used by the CJEU and also between different legal instruments ('inter-instrumentally'), with a view to make EU policy considerations consistent.[39] Therefore, borrowers not properly informed and subjected to (annulled) standard contract terms still have to refund both the loan principal and pay some interest. They profit 'only' from a most favourable treatment regime: They may *now* choose which one of the schemes available on markets at the time of the issue of the loan they prefer, e.g. principal of loan in Zloty tied to WIBOR *or* principal of loan in CHF tied to LIBOR. Conversely, they have no right to better deals than those that were available on the markets.

The argument that even redistribution is needed in financial markets into the direction of borrowers[40] – going still further than 'only' re-establishing fair distribution – is problematic in three respects. These borrowers already have profited

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the EU Banking Union package, see survey by all three authors, for instance Grundmann, part 1 para 31–71. See as well on how this rationale also binds private law subjects, in this case bank managers (who must put stability concerns above interests in revenues): ground-breaking and very largely followed, J.-H. Binder, 'Vorstandshandeln zwischen öffentlichem und Verbandsinteresse – Pflichten- und Kompetenzkollisionen im Spannungsfeld von Bankaufsichts-und Gesellschaftsrecht' *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2013, 760–801. The bail-in mechanism is regulated for all EU countries (including non-Eurozone) in arts 43 to 58 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (BRRD), *EU OJ* 2014, L 173/190.

38 For the overarching importance of such systematic interpretation – also between different legal instruments of the EU legal order – see broader survey in S. Grundmann, '"Inter-Instrumental-Interpretation" – Systembildung durch Auslegung im Europäischen Unionsrecht' 75 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2011, 882–932; K. Riesenhuber, in K. Riesenhuber (ed), *European Legal Methdology* (2nd edn, Cambridge: Intersentia, 2021) 260 et seq; K. Lenaerts/J. Gutiérrez-Fons, *To say what the law of the EU is – Methods of interpretation and the European Court of Justice*, EUI Working Papers AEL 2013/9, 13 *et seq*; C. Herresthal, 'Die teleologische Auslegung der Verbrauchsgüterkaufrichtlinie – Der EuGH auf dem Weg zu einer eigenständigen Methode der Rechtsgewinnung' *Zeitschrift für Europäisches Privatrecht* 2009, 600–612, 605 et seq; more critically C. Höpfner/B. Rüthers, 'Grundlagen einer europäischen Methodenlehre' 209 *Archiv für die civilistische Praxis* 2009, 1–36, 11–13.

39 See references last footnote; for instance Case 283/81 *CILFIT* [1982] ECR 1982, 3415 para 20.

40 In this sense, C. Mak, in Sirena, n 1 above, forthcoming (redistribution at the expense of banks mandated by constitutional principles).

from (legitimate) gains on markets (massive increase of their investment in value).[41] They would make any further gains ('use of loan for free') potentially at the expense of the public at large, also those that could not invest at all. Finally, why should value be redistributed from one group of investors (in shares, for instance needed for retirement schemes) to another group of investors (in houses), disregarding the constitutional guarantees of the former and the second potentially (and probably) even being the richer group? Why should such redistribution not primarily be a public task – supporting investment in housing, i.e. via schemes that do exist in many EU Member States?

3 General Principles of Restitution

3.1 Background Considerations: Partial and Total Nullity and Default Rules

This contribution focuses on a discussion and normative evaluation of the legal consequences of partial or total nullity of standard contract terms – and not of the grounds of nullity and of its extent. However, the main lines found in the case law of the CJEU should at least shortly be mentioned (as has been done already for the [mostly] Romanian banks issued loans that [in principle] escaped nullity because of their pure referral mechanism). This (older) case law (already more extensively discussed in the literature) serves as background to the discussion of the legal consequences and remedies. It is because of the *Dziubak* case[42] and its interpretation that the question of restitution is so broadly relevant and hotly debated. The CJEU decision mandated national courts to consider as void standard contract terms that introduced any element of discretion into the reference to a foreign currency or to an index according to which interest was to be calculated (like LIBOR, WIBOR etc.). Moreover, the decision at least allowed national courts to consider also the whole contract as void – and only this would trigger all the questions concerning restitution, constitutional issues and questions relating to how market expectations and systemic risk of bank insolvencies impact. It is, however, disputed whether the court

41 Indeed, house price increases in Poland and Hungary surpassed inflation rates in Poland and Hungary by 7% per year: See for the years between 2016 and 2020: Eurostat, 'Housing price statistics – house price index 2021', https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Housing_price_statistics_-_house_price_index#Long_term_trends_in_House_prices_and_rents.

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

also mandated full nullity of the contract,[43] or left this decision to national courts to decide.[44] Some authors hold as well that integration of the contract would well have been possible[45] thus triggering the regular legal consequence of Article 6 para 1 UCTD, namely default rules filling the lacuna created by the nullity of the single clause. In this respect, one further delineation which the court made is that the complementing and filling of such lacunae is possible only via national legal acts, not via rulings by national courts.[46]

An important consequence of the development triggered namely by the *Dziubak* case and its understanding in legal academia and practice is an unexpected and impressive new focus on the (EU) law of restitution. The condition was always that the whole contract was seen as void. What ensued was a strange landscape, consisting of two parts, the first one strongly discussed, but with very vague principles. Indeed, it became clear how weak the denominators for legal remedies and consequences are in the Unfair Contract Terms Directive – as the act that triggers the nullity. Also the alternative, common principles derived from national laws on restitution claims for unjust enrichment or resulting from damages and recognised in EU law, remains loaded with considerable uncertainty – because of the need to distil them from Member State law as general principles (for both regimes, see below Sections 2 and 3). These two vague regimes can be complemented by yet another regime that is based mainly on a balancing of open-textured rights, namely the

43 This would seem to be the understanding of Polish courts when referring a number of questions relating to legal consequences to the CJEU, see cases pending quoted in Fn. * (case C-520/21 and joined cases C-139/22 and C-140/22); related to this question as well the holding in case C-511/17 *Lintner* [2020] ECLI:EU:C:2020:188 that a national court does not have to scrutinize, on its own motion and without demand by one of the parties, all other clauses in the set of standard contract terms, especially not those unrelated to the issue of dispute.

44 This is the reading of the case, for instance, by A. Wiewiórowska-Domagalska, in Sirena, n 1 above, forthcoming. Indeed in this sense, case C-118/17 *Zsuzsanna Dunai* v *ERSTE Bank Hungary* [2019] ECLI:EU:C:2019:207, para 48 and 52; partly referring to case C-51/17 *OTP Bank and OTP Faktoring* [2018] ECLI:EU:C:2018:750, para 68; the latter judgment referring to case C-186/16 *Andriciuc and Others* [2017] ECLI:EU:C:2017:703, para 43. In *Zsuzsanna Dunai*, the Court held that a 'term relating to the exchange rate risk defines the main subject-matter of the contract' and that 'in such a case, the continuation of the contract does not appear to be legally possible, which is however to be determined by the referring court.'

45 In this sense, for instance, F. Esposito, 'Dziubak Is a Fundamentally Wrong Decision: Superficial Reasoning, Disrespectful of National Courts, Lowers the Level of Consumer Protection' 16 *European Review of Contract Law* 2020, 538–551, 548; also critically M. Storme, 'On the Usefulness of Default Rules and Disproportionate Sanctions in Consumer Law' 29 *European Review of Private Law* 2021, 399–402, 400.

46 See references below n 99; moreover no reduction of a clause to a still acceptable level is allowed with a view to maintain validity: see Case C-618/10 *Banco Español de Crédito* [2012] ECLI:EU:C:2012:349, para 80–89.

constitutional dimension which only lately started to come to the fore (see below Section 4). All these regimes as a larger corpus strongly depend on benchmarks and their interpretation, namely justified expectations, fairness or as well balancing of gains, windfall profits and losses, potentially even losses, which are systematically relevant (see below Sections 3.5 and 5 and also above Section 2.3). The second part of the landscape consists of a rather specific regime, contained in Article 23 of the Mortgage Credit Directive of 2014, so far virtually not discussed for the scenario at hand, for which precision of the rules is not the main concern, but rather its applicability (see below Section 4). Thus, the overall picture of the EU law of restitution is one composed of a set of rules that certainly apply, but whose content is vague, and of a regime that is precise, but whose application remains uncertain and which has been discussed very little so far.

3.2 The Restitution Regime of the Unfair Contract Terms Directive

The Unfair Contract Terms Directive itself does not specify the restitution claims arising from the annulment of a contract. Unfair terms shall 'not be binding' on consumers under Article 6 para 1 UCTD and Member States have to ensure 'adequate and effective means (…) to prevent the continued use of unfair terms' under Article 7 para 1 UCTD, but the consequences for restitution are not legislated and, in principle, left to national law. In the absence of a European restitution regime, it is the legislative purpose – as expressed in the recitals and the system of the norms – and CJEU jurisprudence that gives important guidance on the relevant principles and criteria for restitution under national law. In case law, these principles can be found both in general CJEU rulings on the Unfair Contract Terms Directive and in specific judgments on foreign currency loans.

The first principle is private autonomy. Like EU consumer law in general, the Unfair Contract Terms Directive builds on the free will of the consumer as a knowledgeable contractual party. As a result, Article 4 para 2 UCTD excludes judicial fairness control of the main contractual obligations where fully autonomous decisions can be assumed even in standardised contracts, i.e. the 'main subject-matter of the contract' and the 'adequacy of the price and remuneration'. In *Árpád Kásler*, the CJEU confirmed this legislative decision (just as in the cases on Romanian practice) and specified the exact content for foreign currency loans. It left it to national courts to decide whether the selling rate of exchange could define the main subject-matter and clarified that the difference between selling and buying rates of exchange are not 'remuneration', especially where the lender does not provide

foreign exchange services.[47] It can be further assumed that the amount of the loan principal and its denomination in or indexation to a foreign currency plus the interest rate, e.g. if indexed to LIBOR, EURIBOR or WIBOR are outside judicial fairness control. The parties' autonomous will ought to be respected also when it comes to unwinding the null contractual relation in form of mutual restitution claims. Restitution shall place the parties in the position where they would have been without the contract, by restituting to each other their respective contributions. It should be clarified already at this point – subject to further explanations later on – that also the (service to provide the) use of the loan principal constitutes such a contribution.[48]

The second principle is consumer equality, not superiority. Well aware of informational and bargaining asymmetries between business and consumers, the Unfair Contract Terms Directive aims to re-establish the equality between them. In other words, market failure is to be cured. There is no indication either in recitals or in the norms that giving windfall profits to the client/consumer constitutes an aim of the directive as well. *Ex ante*, this means that consumers have to be informed in a clear and intelligible way on the economic consequences of a foreign currency loan, including the difference between the selling and buying rates of exchange and their different impact on the calculation of the total sum due, as the CJEU ruled in *Kásler*.[49] *Ex post*, equality means 'not to cancel all contracts containing unfair terms but to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance re-establishing equality between them' – according to the CJEU in *Dziubak*.[50] In terms of restitution, the overall idea is not to overprotect consumers, but simply to re-establish the balance through the restitutionary obligations.

The third principle is good faith and fairness, the core aim of the Unfair Contract Terms Directive. This is the principle among the three that is most directly expressed in the directive, namely in Article 3 para 1 UCTD, which constitutes the key norm for the criteria of scrutiny, i.e. the key norm for distinguishing between nullity of terms and validity of terms. In *Dunai*, the CJEU held that Article 6 para 1 UCTD meant that

47 Case C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai* v *OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282, para 51, 58.

48 See more in detail already: P. Sirena, 'Unfairness of contract terms and restitution of the performance unduly received', in Sirena, n 1 above, forthcoming; M. Gutowski, 'Is the remuneration for use of capital a part of a restitution claim in case of annulment of the bank loan contract?', in Sirena, n 1 above, forthcoming.

49 Case C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai* v *OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282, para 72–75.

50 Case C-260/18 *Kamil Dziubak, Justyna Dziubak* v *Raiffeisen Bank International AG* [2019] ECLI:EU:C:2019:819, para 39.

'a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer, and that it has the consequence of restoring the consumer to the legal and factual situation that he would have been in the absence of that term'.[51] For restitution, this means that the parties – both parties, both with respect to loan principal and interest payments – are to be put in the legal and factual situation they would have been in if they had not agreed the contract. In foreign currency loans, the difficulty arises from the difference of the sum due at the original exchange rate when the loan was disbursed and the sum due at the current exchange rate when restitution is claimed. This applies to both the loan principal and the exchange rate. The principle of good faith and fairness requires that all restitution claims from both sides – i.e. the bank claiming back the loan principal and interest and the consumer claiming back all instalments and interest payments – are subjected to the same logic and exchange rate.

The fourth principle is no penalisation. Article 6 para 1 UCTD does not intend to penalise either contractual side. The consumer ought not to be penalised by any solution found, as the CJEU stressed in *Dziubak* that the nullity of entire contracts could not result in 'unfavourable consequences' for consumers and hence, did not 'penalise' consumers.[52] Neither is the business counterpart to be penalised. Of course, the Unfair Contract Terms Directive aims to deter unfair practices in the drafting of contract terms. However, there is no indication either in recitals or in the norms that penalisation of the user of standard contract terms is an aim of the UCTD. In addition, penalising the consumer's business counterpart is not an objective because – more generally – penalisation is foreign to EU law (see below V 2).

The last principle is procedural autonomy within the boundaries of equivalence and effectiveness. This mainly regards procedural rules, such as prescription or limitation periods for the actions resulting from unfair clauses. Regarding consumer credit agreements, the CJEU ruled in *Raiffeisen Bank and BRD Groupe Société Générale* that while Articles 6 para 1 and 7 para 1 UCTD allow for time limits of the action seeking restitution on condition that the period is not less favourable than in similar domestic actions (principle of equivalence) and that it does not render practically impossible or excessively difficult the exercise of rights conferred by EU law

51 Case C-118/17 *Zsuzsanna Dunai* v *ERSTE Bank Hungary* [2019] ECLI:EU:C:2019:207, para 41; referring to Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo and Others* [2016] EU:C:2016:980, para 61.

52 Case C-260/18 *Kamil Dziubak, Justyna Dziubak* v *Raiffeisen Bank International AG* [2019] ECLI:EU:C:2019:819, para 48; referring to Case C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai* v *OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282, para 80–84; further referring to Joined Cases C-70/17 and C-179/17 *Abanca Corporación Bancaria SA* v *Alberto García Salamanca Santos* and *Bankia SA* v *Alfonso Antonio Lau Mendoza and Verónica Yuliana Rodríguez Ramírez* [2019] ECLI:EU:C:2019:250, para 64.

(principle of effectiveness).[53] The CJEU found a three-year limitation period running from the full contractual performance to infringe these principles, if the consumer's knowledge was presumed and not proven in the concrete case.[54] Similarly, it ruled in *Profi Credit Slovakia* that a limitation period hinders effective enforcement if it starts from a moment in which the consumer is not yet in a position to assess for himself or herself that a contractual term is unfair.[55]

3.3 The Restitution Regime of General Principles (of EU and National Laws)

There is no clear or common general restitution regime in EU law itself or derived from national laws. However, both sources provide three general principles governing restitution: private autonomy, good faith and fairness, and unjust enrichment.

The general principle of party autonomy can be derived from the Fundamental Freedoms in EU primary law, party autonomy forming their underlying rationale.[56] Similarly, Members States' private laws are all based on this principle; thus party autonomy forms a general principle common to the Members States' private laws. Finally, also for most EU secondary law acts and the bulk of their rules, party autonomy serves as the underlying rationale.[57] In substance, it is strongly linked to information rules. The reason is that they give a denser basis (namely to consumers) to exercise their party autonomy in a meaningful (and truly autonomous) way (*denser form of party autonomy*) – a consideration that is paramount also in UCTD law, as has already been explained and the *Dziubak* case has stressed (*material, not only formal equality*). Withdrawal rights function in much the same way. Indeed most contract law in the EU is targeted on private autonomy (with enhancing the information basis) or, where autonomous choice seems illusory, alternatively to

53 Joined cases C-698/18 and C-699/18, *Raiffeisen Bank and BRD Groupe Société Générale* [2020] ECLI:EU:C:2020:537, para 57–58.

54 *Ibid*, para 78–83.

55 Case C-485/19 *Profi Credit Slovakia* [2021] ECLI:EU:C:2021:313, para 61–64. On the constitutional law underpinnings of both judgments, namely art 47 of the EU Charter, and on their effect to protect both sides similarly, see below Section 4.

56 G. Comparato/H.-W. Micklitz, 'Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU', in U. Bernitz/X. Groussot/F. Schulyok (eds), *General Principles of EU Law and European Private Law* (Alphen aan den Rijn: Wolters Kluwer, 2013) 121–153, 121–122.

57 S. Grundmann, 'The Structure of European Contract Law' 4 (2001) *European Review of Private Law* 505–528.

paternalistic protection.[58] The general thrust of this principle for the law of restitution is that – as already under the UCTD – also as a general principle of EU law, the content of restitution has to come as close to what the affected parties would have had as their expectations when the cause for nullifying the underlying legal relationship occurred.

The general principle of good faith and/or fairness constitutes a principle common to the Member States.[59] This explains its particular role already in Article 3 para 1 UCTD. It is rooted in common concepts of ancient Roman Law, starting with its importance as key principle under German Law since codification and even more in the course of the 20th century, upgraded to an overarching principle for all aspects of contract law also in the Romance legal orders, namely France in the grand reform of 2016.[60] It gradually changed from a principle of limited ambit to a truly overarching and omnipresent principle of contract. At least in unfair contract terms law, also UK law makes no exception.[61] The good faith and fairness principles are omnipresent, however, also throughout harmonisation acts in contract law, be it commercial contracts or consumer contracts, and increasingly have been accepted as one of the most important and indeed overarching principles of EU contract law as well by the Court.[62] The common thrust is always to foster solutions where the interests and justified expectations of *both* parties are safeguarded as far as possible, i.e. in a duly balanced way and without giving priority to one party in a one-sided way. For restitution law, this implies that windfall profits (that would not have been available in any market scenario) are to be judged unjustified and hence have to be returned.

Finally, the general principle of unjust enrichment – and duties of restitution deriving from it – is a principle of all Member States' private laws.[63] It constitutes, however, a principle less omnipresent in the Court's case law and EU legal acts than the other two. The Court recognises the concept of unjust enrichment namely as a

58 S. Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 *Common Market Law Review* 269–293.

59 For a general overview S. Whittaker/R. Zimmermann, 'Good faith in European contract law: surveying the legal landscape', in R. Zimmermann/S. Whittaker (eds), *Good Faith in European Contract Law* (Cambridge: University Press, 2000) 7–62.

60 Ordonnance n° 2016–131 of 10 February 2016. See discussion in English in the special issue of (2017) 13(4) *European Review of Contract Law*.

61 C. Twigg-Flesner, *The Europeanisation of Contract Law – Current Controversies in Law* (2nd ed, London: Routledge, 2013) 133.

62 D. Caruso, 'Fairness at a Time of Perplexity – The Civil Law Principle of Fairness in the Court of Justice of the European Union', in S. Vogenauer/S. Weatherill (eds), *General Principles of Law – European and Comparative Perspectives* (Oxford: Hart, 2017) 329–354.

63 C. von Bar and S. Swann, *Unjustified Enrichment (EL Unj Enr)*, Principles of European Law – Study Group on a European Civil Code (Munich: Beck, 2010) 93–118 (para B8-B40).

remedy against the EU,[64] but sees it as well as a remedy of a broader ambit of application in case of nullified contracts when transfers have to be returned.[65] In this respect, it is flanked by a principle of efficient cure and remedy.[66] As EU legal acts at least recognise the principle (and do so rather frequently), the lack of a clear structuring of the principle of unjust enrichment in EU legal acts would seem to be mainly due to the fact that EU law turned to regulating remedies for violation only in relatively recent times. In most cases, EU law still is limited to setting the standard as such and leaves the remedies for nullity or breach to the Member States, though within a framework (mandated already by EU law as outer boundaries), in which fairness and efficient honouring of justified expectations is warranted.

3.4 A Constitutional Dimension to the Restitution Regime?

The restitution regime can and should be assessed as well in a constitutional perspective – even if there is only space to do so in broad lines in this contribution.[67] The Articles in the EU Charter on Fundamental Rights that are most prominently quoted on the side of the borrower are Articles 7, 38 and 47[68] – respect for private and family life; high level of consumer protection, and fair procedure. A number of contributions contend that these articles create a self-standing right to the private home. While Article 7 EU Charter is sometimes quoted indeed as an additional source in CJEU case law, when the right to fair trial (Article 47 EU Charter) is at stake, the risk involved has to be carefully considered. This fundamental right might potentially be touched by eviction (if there is indeed the risk in the particular case), but not if just a duty to pay interest on a loan is at stake (pure monetary interests). Such cases of eviction were indeed the scenario whenever the CJEU made reference to Article 7. Article 38 EU Charter refers to the high level of consumer protection, which,

64 Case C-259/87 *Greece* v *Commission* [1990] ECR I-2845, para 2.

65 Case C-47/07 *P Masdar (UK) Ltd* v *Commission of the European Communities* [2008] ECR I-9761, para 55.

66 A. Hartkamp, *European Law and National Private Law* (Cambridge *et al*: Intersentia, 2018) 81–82, 109.

67 On this dimension and also on this section, see more in detail the more focused recent contributions in: M. Denga, 'Restitution claims between private autonomy and constitutional order', in Sirena, n 1 above, forthcoming; and for the side of borrowers: Mak, n 40 above, forthcoming.

68 See P. Kenna/H. Simón-Moreno, 'Towards a common standard of protection of the right to housing in Europe through the charter of fundamental rights' 25 *European Law Journal* 608–622 (2019); I. Domurath/C. Mak, 'Private Law and Housing Justice in Europe' 83 *Modern Law Review* 1188–1220 (2020); also *A. van* Duin, 'Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC' 6 *Journal of European Consumer & Market Law* 190–198 (2017); and C. Mak (last footnote).

however, is substantiated more in detail in the directives, which refer to the same formula. In any case, the core question remains whether this level of protection should only guarantee that consumers get the full benefit of what markets can offer to duly informed and circumspect consumers or whether it should guarantee consumers windfall profits beyond what markets offer – for instance loans for decades without interest payments. Article 47 EU Charter is on the fairness of the trial and indeed constitutes the provision most quoted – implicitly and explicitly – in CJEU case law on housing and loans, most centrally in any case.[69] Still, these cases are primarily about procedural fairness – namely the right to be heard and to have sufficient time to react before the final decision is taken – and not about fairness in substantive outcome. The latter is meant to be furthered by having one's arguments heard. This implies that borrowers (and also lenders, as Article 47 EU Charter protects all private parties) must have had a fair chance to make their case heard – which is paramount for the calculation of the period of limitation in the context of the scenario discussed here.[70]

One fundamental right rather astonishingly has hardly been discussed until lately. This is the right to property, putting limits to effects of expropriation. This is a right that potentially can be invoked by both parties – by the borrower against eviction, by the lender against expropriation of the loan principal (no refund), but as well against expropriation of the use of the loan principal without remuneration (no interest payments).[71] More generally, what is often neglected in the discussion about fundamental rights as well is that, in cases of horizontal effect, a balancing of the fundamental rights of both parties is of the essence – namely the right to property on the one hand, and the right to appropriate housing, at least not to be arbitrarily evicted from it, on the other hand (last paragraph, with the seminal decision in the *Aziz* line of cases).

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69 Early Case C-415/11 *Aziz* [2013] ECLI:EU:C:2013:164; then, very prominent, Case C-34/13 *Kušionová* [2014] ECLI:EU:C:2014:2189 (quoting as well art 7 and 38); Case C-169/14 *Sánchez Morcillo* [2014] ECLI:EU:C:2014:2099; on these decisions and on the primarily procedural fairness (and not substantial fairness) dimension, see I. Domurath, 'Mortgage Debt and the Social Function of Contract' (2016) 22 *European Law Journal* 758–771 (766 *et seq*).

70 In this sense, indeed, also within the scenario discussed here (although on the basis of UCTD aims and a principle of *effectiveness*): Case C-485/19 *Profi Credit Slovakia* [2021] ECLI:EU:C:2021:313.

71 See, in particular, ECtHR, Nos 7151/75 and 7152/75, Judgment of 23 September 1982, *EuGRZ* 1983, 523, para 63 (*Sporrong and Lönnroth*) (for the parallel provision in the European Convention on Human Rights); and also C. Calliess, in C. Callies/M. Ruffert, *EUV/AEUV* (6th ed, Munich: Beck, 2022), Art 17 Grundrechtecharta, para 20; more in detail Denga (above n 67); this is one of the main issues – if not the main issue – of cases quoted in n * (still pending), namely CJEU case C-520/21 and joined CJEU cases C-139/22 and C-140/22.

3.5 In Particular: The Role of Justified Expectations[72]

In the cases that are most disputed (and referred to the CJEU), Polish banks offered their clients the alternative of either CHF as the currency of reference and LIBOR as the (variable) interest rate of reference *or* Zloty as the currency of reference and WIBOR as the (variable) interest rate of reference.[73] For each of the two variants, periodic adaptation to the chosen interest rate of reference was foreseen. For the latter (periodic adaptation), a scheme was foreseen in standard contract terms including a discretionary decision by the bank on the when and how exactly. In this respect, the UCTD regulation came into play. For one-sidedness, this awarding of a discretionary position to the bank/lender was nullified (and thereby often as well the whole contract).

This raises the foundational question of what scope the regulation is aiming at. Regulation – as it is seen by mainstream economic analysis of law – is about reinstalling market mechanisms where they do not properly function, namely to allow for a properly informed and undistorted equilibrium between demand side and offers available,[74] not about substituting markets, creating offers that are not available on markets,[75] even less constructing offers that cannot realistically be made.[76] Therefore, when information was not properly given or one side had an

72 On this section, see more in detail: Grundmann, see above initial note about author, forthcoming.

73 Opinion of the Office of the Polish Financial Supervisory Authority (above n 3).

74 With reference to the underlying public interest theory see R. Baldwin/M. Cave, *Understanding Regulation – Theory, Strategy, and Practice* (Oxford: University Press, 1999) 9; B. Mitnick, *The Political Economy of Regulation – creating, designing, and removing regulatory forms* (New York: Columbia University Press, 1980) 291–296; A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Clarendon Press, 2004) 29 *et seq*; cf also A. Shleifer, 'Understanding Regulation' 11 *European Financial Management* (2005) 439–451, 440; very detailed also S. Breyer/R. Stewart/C. Sunstein/A. Vermeule/M. Herz, *Administrative Law and Regulatory Policy – Problems, Text and Cases* (New York: Aspen, 2017) 4 *et seq*.

75 On this issue in particular cf, for instance, Breyer/Stewart/Sunstein/Vermeule/Herz (last n) 10 ('On the economic model, regulation is justified only by a market failure'); see also J. Masing, 'Die US-amerikanische Tradition der Regulated Industries und die Herausbildung eines europäischen Regulierungsverwaltungsrechts – Constructed Markets on Networks vor verschiedenen Rechtstraditionen' 128 *Archiv für öffentliches Recht* (2003) 558–602, 562 *et seq*.

76 In the cases at hand, banks could not even have offered loans in Zloty indexed to LIBOR because they would not have found refinancing opportunities. The very essence of credit creation by banks is refinancing the loans issued, typically long-term loans with short term refinancing (maturity transformation). Therefore, in variable interest loans, when LIBOR rises, banks' refinancing costs rise in the same way as they charge the risen interest rate of reference to the clients – they typically do not gain from changes in such interest rates of reference. See recently, for instance, D. Wiggs, 'City of standards – London and the rise of LIBOR in global finance' 51 *Economy and Society* (2022) 398–421, 403 ('A floating interest rate forces the borrower of a loan to pay *what it costs the lender to borrow*,

improper unilateral right to discretionary decision-making, this flaw has to be cured and a solution be found that mimics the situation that would have existed without these flaws. What is best is to give the party affected by such flaw the same opportunity (again) as it would have existed without such flaw. If a weaker party needs to be protected against such flaws, it is properly protected (potentially even more than properly protected) if it is empowered to take the decision free of such flaws at a later moment in time – more protected as he/she can now act by hindsight. This 'advantage' for the weaker party, if it represents the only feasible way of mimicking a decision made without flaws at the outset, is a necessary precondition for curing the flaw and at the same time still imputable to the other party's responsibility for the flaw – hence acceptable. Conversely, all solutions reaching beyond this level – to the benefit of the weaker party – would constitute windfall profits for this party, substituting and no longer curing markets. Hence, justified expectations are those expectations that could have been realised at the formation of the loan contract, offers available at that time, with a choice now made with the benefit of hindsight – an option right given to the borrower. Anything reaching beyond this level constitutes over-regulation (or redistribution that requires additional grounds for justification, that cannot be found in the constitutional framework, see above Section 4).

4 Specific Principles of Restitution[77]

4.1 The Mortgage Credit Directive as Fully Fledged Restitution Regime

As opposed to the vague restitution principles discussed so far, the Mortgage Credit Directive (MCD) provides a tailored restitution regime based on two pillars: firstly, specific provisions on foreign currency loans in Articles 23 and 24 MCD and, secondly,

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which, for the lender, then guarantees that the loan will stay at or above their own costs, never below' – emphasis added). Specifically, with reference to variable-rate loans on a LIBOR basis, see D. Hou/D. Skeie, 'LIBOR: Origins, Economics, Crisis, Scandal, and Reform' *FRB of New York Staff Report No 667* (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423387, 3: 'The rationale for the wide usage of LIBOR in contracts stems from its construction. […] In this sense, banks extending variable rate loans can guarantee a positive net interest margin by ensuring that the interest rates they charge are *tied to their cost of funds*, with a positive premium built in' (emphasis added). On the (three-part) transformation task of banks in terms of maturities, lot sizes and risks, see, for instance, X. Freixas/J.-C. Rochet, *Microeconomics of Banking* (2nd ed, Boston: MIT Press, 2008) 4 *et seq*; Grundmann, n 37 above, part 1 para 9.

77 On this section, see more in detail: Badenhoop, see above initial note about author, forthcoming.

restitution lessons from the consumer creditworthiness assessment under Article 18 MCD in its national transposition. Both give very clear indications of how to deal with restitution claims after foreign currency loans have been annulled.

In the Mortgage Credit Directive, EU legislators clarified their intention to allow foreign currency loans in principle. Article 23 MCD explicitly allows loans denominated in a foreign currency, which Article 4 para 28 MCD defines as a currency other than that of the consumer's country of residence, income or asset to repay the loan. Loans indexed to a foreign currency are not explicitly regulated, but either covered by the same provision by analogy or at least by Article 24 MCD on variable rate credits as the foreign currency is used as a reference rate. The Mortgage Credit Directive establishes a mechanism to protect consumers from the exchange rate risk in foreign currency loans, a protection grounded in disclosure and party autonomy. In foreign currency denominated loans, Member States have to either grant consumers the right to convert the credit agreement into an alternative currency, especially their home currency, under specified conditions or establish other arrangements to limit the exchange rate risk for the consumer (Article 23 para 1, 2 MCD). In the case of conversion, the market exchange rate applicable on the day of application for conversion has to be used by default (Article 23 para 3 MCD). The lender has to inform the consumer on a regular basis if the exchange rate deteriorates by more than 20% (Article 23 para 4 MCD). Consumers have to be informed about the applicable protection mechanisms in the standardised information sheet ESIS and in the loan contract itself, including an illustrative example of a 20% exchange rate fluctuation (Article 23 para 6 MCD). It makes sense to apply all these provisions by analogy also to loans indexed to a foreign currency as they carry the same exchange rate risk as foreign currency denominated loans. Even if this analogy were denied, Article 24 MCD would still address foreign currency indexed loans and mandate two requirements. Firstly, the applicable exchange rate has to be clear, accessible, objective and verifiable by the parties (Article 24 lit a MCD). Secondly, lenders have to maintain historical records of the exchange rates for calculating the borrowing rates (Article 24 lit b MCD). The same requirements also apply to foreign currency denominated loans with variable interest rates. The rules of Articles 23 and 24 MCD provide clear guidance for how EU legislators conceive a fair agreement between professional lenders and consumer borrowers on a foreign currency loan. While this is about a set of requirements for proper information and performance, the regime also is pertinent to flawed processes.

Specifically on the restitution of a void contract, the consumer creditworthiness assessment under the Mortgage Credit Directive and its national transposition provide further helpful guidance. This duty has evolved from the duty of responsible

lending to a forceful instrument of public and private law.[78] Pursuant to Article 18 para 1 MCD, creditors have to thoroughly assess the consumer's creditworthiness before concluding a loan agreement. In doing so, they have to take into account all relevant factors, not just the value of the residential immovable property (Article 18 para 1, 3 MCD). Errors in the creditworthiness assessment may not lead to the loan's cancellation or alteration apart from cases of fraudulent consumer behaviour (Article 18 para 4 MCD). The consequences of wrong assessment are mainly spelled out by national law. The EU's two biggest jurisdictions Germany and France show that the loan is upheld with a mere reduction in interest rates. In France, the interest rate can be reduced by up to 30% if the lender fails to properly inform the consumer about the financial risks or if it does not properly assess the creditworthiness.[79] Only if no creditworthiness assessment takes place at all can the interest rate be reduced to zero.[80] In Germany, interest rates are reduced to a market minimum. Fixed interest rates are reduced to the prevailing market rate on capital markets for mortgage bonds and public bonds whose duration corresponds to that of the fixed interest rate.[81] Variable interest rates are reduced to EURIBOR 3M.[82] Both national transpositions show that, even where lenders infringe their duty to assess the borrower's creditworthiness, in principle, there is no credit without interest, but rather interest rates are reduced in proportion (France) or to a market minimum (Germany). This rationale can be transposed to the case of foreign currency loans being partially or totally annulled.

4.2 The Mortgage Credit Model as Paradigm of General Principles

While the Mortgage Credit Directive of 2014 does not directly apply to most of the foreign currency mortgages in Central and Eastern Europe whose restitution claims are of systemic relevance, the CJEU applied the Mortgage Credit Directive already in a case predating its enactment – the case *Michel Schyns*.[83] When asked if the consumer creditworthiness assessment under the Consumer Credit Directive obliged creditors to refrain from concluding loan agreements where the assessment is negative, the

78 See references above n 8; moreover N. Badenhoop, 'Private Law Duties Deriving From EU Banking Regulation and its Individual Protection Goals' 16 *European Review of Contract Law* 2020, 233–266, 239–242.

79 Article L341-27 du *Code de la consommation*.

80 Article L341-28 du *Code de la consommation*.

81 § 505d (1) sentence 1 number 1 German Civil Code (*Bürgerliches Gesetzbuch/BGB*).

82 § 505d (1) sentence 1 number 2 German Civil Code.

83 Case C-58/18 *Michel Schyns* v *Belfius Banque SA* [2019] ECLI:EU:C:2019:467.

CJEU referred to the creditworthiness assessment under the Mortgage Credit Directive, although neither applicable in time nor in substance, and answered affirmatively.[84] In line with this ruling, the tailored restitution regime for foreign currency loans under the Mortgage Credit Directive (see above Section 1) can be applied to cases before its national transposition. In the case of a variable interest rate mortgage loan denominated in or indexed to a foreign currency, the contract model is regulated in the Mortgage Credit Directive, which sees these contracts as valid in principle under Articles 23 and 24 MCD. At least the validity of foreign currency as such is unquestioned; under European law, they constitute legitimate transactions.

Moreover, in the parts most relevant, the Mortgage Credit Directive reflects homogeneous practice over decades in the Member States. In substance, two main features of the regime stand out. It provides a blueprint of a fair foreign currency loan whose currency exchange clause cannot be deemed unfair. Moreover, because of that homogeneous practice, the alternative of now a foreign variable interest mortgage loan also constitutes – again – the amount that any borrower would have had to pay and hence is enriched with, in case he did not have to pay it. In content, Article 23 MCD, even though not applicable retroactively, indicates two things. Foreign exchange variable interest mortgage loans can be advantageous for *both* parties, hence are not void *per se*. The risks remaining should, however, be contained by conversion rights to the borrower's own currency and by warning duties, namely when the exchange rate alters to the detriment of the borrower by more than 20%.[85] Under the model of the Mortgage Credit Directive, the borrower then decides and has to decide whether to choose conversion or to carry on. There is no paternalistic protection for him, but only an informed choice made possible. Article 24 MCD makes clear that a combination with variable interest rates is possible (and indeed even the norm for foreign currency loans), as long as the indices used are clear, neutral and traceable (as LIBOR, EURIBOR and WIBOR are). This reflects the underlying principle of private autonomy in EU consumer law. It also balances the interests of the contracting parties by (re-)establishing informational and decisional equality to the benefit of consumer borrowers, while not overly protecting them or rendering them superior to business lenders. In this sense, it also constitutes an obvious and stringent expression of the overall principle of good faith and fairness.

While the Mortgage Credit Directive is not applicable in most of the restitution cases, it nevertheless gives valuable insight. In the *Schyns* case, the Court has used similar insight as well already before the Mortgage Credit Directive formally applied.

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84 *Ibid*, para 46–47.

85 See more in detail Recital 23 Mortgage Credit Directive.

The insight is this: even if a loan contract is totally void – in the *Schyns* case not for violation of standard contract terms law, but because of the (equally important and perhaps even more directly related in substance) duty of responsible lending –, restitution claims for the loan principal are given. Moreover, according to legislative decision at the Member State level (as the Mortgage Credit Directive is largely mute on this), interest rates are not to be fixed at zero, but at the lowest ('most favourable') market rate that borrowers could have got. In the two largest jurisdictions, this spells out as follows. France allows a reduction of the agreed interest rate to up to 30% for virtually all violations (typically, however, intentional), while Germany just reduces the agreed upon interest rate – fixed or variable – to a (low) benchmark rate of the market, e.g. EURIBOR 3M. Increase of interests in case of violation is explicitly excluded under Article 18 para 4 MCD. Comparing violations of the duty to transparently fix exchange rate mechanisms and of the duty to properly assess creditworthiness, the latter would seem even worse given that the borrower is still weaker. Therefore, an *a-maiore*-argument from the Mortgage Credit Directive context seems appropriate in treating restitution cases of foreign currency mortgages.

5 The Overarching Issue of Fairness, Justified Expectations and Penalisation[86]

5.1 Fairness, Justified Expectations and Consumer Equality as Benchmarks of UCTD and European Law of Restitution

When we introduced the offers *de facto* available on loan markets in Poland back in the 2000s, we explained the concept of justified expectations. We elaborated on that the aim of regulation is seen in mainstream regulatory theory in reaching these expectations as far as possible by re-installing or mimicking functioning market conditions – not going beyond that level, i.e. not taking the role of a redistributor of assets (above Section 3.5). This should now be tied back to contract law concepts, more concretely the key concepts used in the UCTD discussion. Indeed, we want to specify the relationship between justified expectations, fairness/good faith and consumer/parties' equality as the three key concepts used with three core aspects in UCTD that can thoroughly be anchored as well in legislation and CJEU case law. The first question is for which shortcomings, according to CJEU case law, the *UCTD* regulation has been enacted and to which end. The second question is about how the nullity of standard contract terms as the prime legal consequence of the control

86 On this section, see more in detail: Grundmann, see above initial note about author, forthcoming.

relates to default rules as the prime alternative normative material envisaged in the UCTD. Default rules are so core in the UCTD because they form a prime benchmark for fairness and as well the prime supplementing regime for filling lacunae opened because a standard contract term is annulled. Finally, the third question is about the relationship of the three concepts more generally – justified expectations, consumer/parties' equality, and good faith/fairness. The last one of the three concepts it the most straightforward to define. In Article 3 para 1 UCTD, when defining the criterion, which decides which standard terms have to be annulled or not, *good faith* and *fairness* are singled out as the two core criteria.[87] They form the guidelines by which proper clauses (binding) are distinguished from abusive clauses (voidable).

The first question is about the purposes of UCTD regulation (grounds and aims of regulation). The answer to the first part of the question was described in the *Oceano Grupo* case in a seminal way. The Court sees two grounds: 'the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his *bargaining power* and his *level of knowledge*.'[88] Hence, if bargaining power of the whole demand side and of the whole side of offers is taken as benchmark and information is fully given and explained to the consumer again, and the consumer can make his choice on this basis now, the two reasons for regulation are satisfied. This is the core idea of letting consumers/borrowers *now* choose among the offers that were on the Polish loan markets at the moment when their loan was negotiated – with full information, as a result of hindsight, on full market options. For further supporting this idea, one can as well turn to the aim of regulation. In the *Mostaza Claro* case, the CJEU established that the prime aim must be to find a mechanism to re-establish the equilibrium that would exist without the two grounds named for regulation and describes the result as 'equality' (of parties). The regime (and namely the core legal consequence in Article 6 para 1) 'aims to replace the formal balance … between the rights and obligations of the parties with an effective *balance* which re-establishes *equality* between them.'[89] Thus, regulation should

87 Indeed, both French law and German law, which are seen as most influential for the formulation of the regime, see good faith as the key source of standard contract term control: For France, see H. Beale, B. Fauvarque-Cosson, J. Rutgers, D. Tallon and S. Vogenauer, *Cases, Materials and Text on Contract Law* (2nd ed, Oxford and Portland: Hart, 2010) 789–792. For Germany, see 782–784. Fairness/unfairness is used as the summary of the value judgment on the clause taken on the basis of all relevant criteria.

88 See Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA* v *Roció Murciano Quintero* (C-240/98) and *Salvat Editores SA* v *José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) and *Emilio Viñas Feliú* (C-244/98) [2000] *ECR* I-4941, para 25.

89 See case C-168/05 *Mostaza Claro* [2006] ECR I-10421, para 36; then consistently take up, see case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, para 30; case C-453/10 *Pereničová and Perenič* [2012] ECLI:EU:C:2012:144, para 28; case C-618/10 *Banco Español de Crédito* [2012] ECLI:EU:C:2012:349, para 40.

further consumer expectations by also putting them *de facto* at the same level (equality), not by giving consumer more than he/she could have got with proper information and equal bargaining power (on overall markets). Otherwise, consumer contract law would as well be in fundamental disagreement with overall contract law that is about balancing the affected interests equally, not systematically giving preference to those of one side.

The same result can be reached from another perspective, now looking at the role of default rules in UCTD. When the CJEU in the *Kásler* case seminally explains why default rules are taken to supplement a standard clause struck-down, the role of the legislature is paramount. The (national) legislatures – not even courts – are seen as the body that (in general) is most clearly constituted in such a way that all interests are fairly balanced, not one is preferred systematically.[90] It would *a maiore* be absurd, if a court should then be allowed to fill the whole contract when the whole contract is struck down in a way that systematically preferred consumer interests.

The third question is about fairness, justified expectations and consumer equality, thereby also what 'a high level of consumer protection' may imply, and how this is related to the overall scope of contract law (and as well of information rules) to establish an equilibrium, i.e. to strike a good balance between the interests of all parties involved. A bit more concretely, would it not be contradictory if contract law indeed was about fair balancing of all affected interests and if nevertheless consumer law was about preferring the interests of consumers beyond a fair balance, even if unfair to their counterparts? In one of the most discussed and most hailed judgments on UCTD of last decade, the CJEU in *Aziz*, defined the two main criteria of 'unfairness'. It defined that 'gross imbalance' meant gross deviation from the *default rule regime* (seen as a regime of balanced interests, see above) and that 'circumstances' of the formation of contracts referred to justified expectations in that moment.[91] In literature, this was described as a

90 See case C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai* v *OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282, para 81: Conversely, courts are not seen in a euqivalent position, not even when judging on the basis of 'equity' or good faith: case C-260/18 *Kamil Dziubak, Justyna Dziubak* v *Raiffeisen Bank International AG* [2019] ECLI:EU:C:2019:819, para 59/60.

91 Case C-415/11 *Mohamed Aziz* v *Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECLI:EU:C:2013:164, para 68–69: 'in order to ascertain whether a term causes a 'significant imbalance' …, it must in particular be considered what rules of national law would apply in the absence of an agreement [and for] … the circumstances in which such an imbalance arises, … the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations. [i.e. assess his expectations at the moment of formation].'

'possible agreement test'.[92] Thus, solutions that could be reached now and to which any properly informed consumer acting in good faith would then have agreed, fully complied with the aim of the regulation. The 'high level of consumer protection' then consists in that not only formal equality of information must be reached, but material equality, i.e. the fair possibility for the consumer really to understand the main substance, also of the risk incurred.[93] 'High level of consumer protection' does not imply distribution beyond 'fairness', i.e. redistribution. This solution is also in line with the main provision on legal consequences. Article 6 para 1 UCTD is indeed about bringing the adopted (supplementing/alternative) solution as close as possible to what the contract would have brought the consumer if not vitiated by the problem of inequality in information/bargaining power.[94]

5.2 Penalisation and Redistribution as Aims of European Contract and Restitution Law?

In a last section, the 'consumer' equality issue should still be deepened a bit, namely in that it is further explained that neither 'penalisation' of lender/banks is an aim of European Contract Law and UCTD nor is redistribution – pointing mostly into the same direction in our scenario. Both approaches propose to bar any duty to refund the loan principal and/or bar any duty to pay interests for the long-term use of the loan principal, i.e. to leave that use to the consumer 'for free'. Our discussion of this proposal and the approaches behind it is not based on a single theory postulated in literature, but on the legislature's expressions, on the core rationale of CJEU case law and on general traits to be found in (enacted) European contract law (with constitutional bases) – as only these are seen as the 'hard bases' of (democratically posited) law.

We start with European competition law, which forms the first (and the sole primary EU Law) area that was enacted with the aim of consumer protection.[95] It

92 G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (London: Routledge, 2017) 148.

93 Case C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai* v *OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282, para 73; referring also to ECJ case C-92/11 *RWE Vertrieb AG* v *Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECLI:EU:C:2013:180, para 49.

94 Case C-118/17 *Zsuzsanna Dunai* v *ERSTE Bank Hungary* [2019] ECLI:EU:C:2019:207, para 41; referring to Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo and Others* [2016] EU:C:2016:980, para 61: The aim is that of 'restoring the consumer to the legal and factual situation that he would have been in the absence of that term.'

95 In respect of the explicit wording of the legal text, this already follows from the fact that an (individual) exemption pursuant to Article 101 (3) TFEU presupposes an appropriate participation of consumers in the profits. In the 'Hoechst' case, the ECJ has expressly recognised consumer protection is a core objective of European Competition law. The court states, that 'the function of these rules is

contains as well the most explicit statements on the issue of penalisation, both in CJEU case law and by the European legislature. Compensation is the sole philosophy at EU level, any philosophy of penalisation is explicitly excluded – in the lead decision in *Manfredi*,[96] in Recital 13 of the Cartel Damages Directive and in its Article 3 para 3,[97] which reads as follows: 'Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.'

The same is true, albeit a bit less explicitly, but certainly with enough clarity for the UCTD. When the CJEU makes clear that only default rules may fill lacunae opened up, when a contract term is struck down, not courts, this is because default rules are presumed to balance all interests evenly, not give preference to one side (see above 1) – for instance because economic theory stresses the importance of incentives and penalisation and makes this the sole and completely dominant aspect. If only the legislature is called upon filling gaps, all the more it is only the legislature that can add such an important overall philosophy as penalisation as a main aim of the UCTD (where no indications are given in the directive). Even for the UCTD, the EU legislature has spoken to the opposite (albeit less powerfully and less explicitly than in the Cartel Damages Directive). The UCTD legislature has not imposed fines, and also effective sanctions only for 'continued' violation', not for a first violation and one that was done involuntarily. At least non-fraudulent behaviour, namely when even not yet challenged and struck down in court, would seem to be seen by European mainstream as a flaw that leads (only) to modified amounts of interests. It does not lead at all to cancellation of all duties to pay interest and thereby to a sub-market windfall profit for the consumer/borrower (see discussion of Articles 18, 23 and 24 MCD above Section 4.1). All CJEU judgments quoted above in Section 1 are based on a principle of equality of interests affected – that should be furthered not only formally, but materially. Thus, the aspiration of the UCTD to have deterrent or dissuasive effects,[98] implies all the instruments developed by the CJEU and/or the

[…] to prevent competition from being distorted to the detriment of the public interest, individual undertakings, and consumers' (Joined Cases 46/87 and 227/88, *Hoechst AG* v *Commission*, [1989] ECR 2859, para 25). See also J. Stuyck, 'EC Competition Law After Modernisation: More Than Ever in the Interest of Consumers' 28 *Journal of Consumer Policy* (2005) 1–30, 27 ('competition law as cornerstone of consumer law'); and Badenhoop, n 78 above, 242–244.

96 Case C-295/04 *Manfredi* [2006] ECR I-6619, mainly para 83, 93, 95–96.

97 See reference above n 36.

98 See, primarily, Case C-260/18 *Kamil Dziubak, Justyna Dziubak* v *Raiffeisen Bank International AG* [2019] ECLI:EU:C:2019:819; and (however mainly for the Unfair Trade Practices Directive) Case C-618/10 *Banco Español de Crédito* [2012] ECLI:EU:C:2012:349, para 102–106.

directive – ex officio statement of unfairness, legal standing for consumer protection associations, no validity conserving reduction of the clause etc. It does, however, not include fines and imposing other sanctions that take away property from the user of standard contract terms that he/she would not have been deprived of had the information and the standard contract term been appropriate – hence no penalisation in the proper sense.

Penalisation would even raise further hurdles. How about *nulla poena sine lege* and the pertinent case law – for instance on Article 7 of the European Convention on Human Rights – concretising this principle? Would dissolution (a bank's insolvency) not constitute such penalisation? Would there not need to be 'continued' use of the standard contract term incriminated (this is the *lex* and wording on which the sanction is based according to Article 7 para 1 UCTD), and can penalisation be seen as based in the act when the UCTD does not even foresee fines?[99] All considerations on penalisation can properly be summarised in three ways. First, all the more recent CJEU case law explicitly runs counter allowing penalisation trends in European contract law, regulation and more specifically within the UCTD. Second, also the most pertinent position-taking by the EU legislature in the last decade in European market regulation explicitly excludes penalisation. Thirdly, not even the constitutional boundaries for penalisation would be respected in this case (see also next paragraph).

The argument that redistribution is needed in financial markets in the direction of borrowers[100] – going still further than 'only' re-establishing fair distribution – is problematic already for the same reasons (because, by necessity, the substance of the proposal implies as well penalisation of the lenders/banks). There are four additional aspects though (see already end of above Section 2.3). Redistribution for their benefit would create windfall-profits to clients that already have made huge gains from speculation by the same transaction anyhow (gained 7% above inflation rate). This additional gain would potentially have to be financed by the public at large ('taxpayers'), which was not involved with these transactions (a consequence the whole compound of EU Banking Union wanted to combat). Thirdly, one (probably richer) group of investors (in land) would in any case benefit at the cost of another (probably less wealthy) group of investors (in stock) by such windfall profits. Finally, constitutional boundaries are *not* taken into consideration in an equilibrated, but a one-sided way. What would need to be considered is a balancing of all fundamental rights (all affected parties, obvious in horizontal application), namely also the right to

99 On all these issues, see more in detail: Grundmann, n * above (forthcoming).

100 In this sense Mak, n 40 above, forthcoming (redistribution at the expense of banks mandated by constitutional principles).

property of borrowers which would seem to be infringed if there is no mandatory justification by other fundamental rights (already vested).[101]

6 Conclusions

Foreign currency loans issued to households, a current phenomenon mainly in Central and Eastern European Member States, are not forbidden as such, as EU legislation and CJEU case law uniformly hold. In one part of the case law, even standard term contracts and referrals to the foreign currency and the variable interest rate index were upheld by the CJEU under Article 4 para 2 (and partly Article 1 para 2) of the Unfair Contract Terms Directive (UCTD), because the referral was clear, intelligible and not modulated by any discretionary act or scheme. The main cases refer to Romanian practice. Only in those countries where the referral was subject to such scheme containing elements of discretion (and where no national legislation was imposing a substitute regime afterwards, as in Croatia), did a double large-scale set of problems ensue – particularly in the case of Poland. This is, firstly, the potential of a serious bank crisis. This is, secondly, a putting into question of all European Law with respect to a fair and equitable regime of restitution – and this in a way and to an extent unheard-of so far. For the first question, the article argues that the creation of the European Banking Union has one overarching rationale that applies here as well, and even to EU countries outside the Eurozone. This is to forbid any private law scheme and decision that would result in a socialising of costs (for instance, a potential triggering of a banking crisis), while privatising gains, for instance by obliging borrowers now to less than what was available as the lowest burden offer on markets at the moment of issuance of the loan. The second question is discussed with respect to the Unfair Contract Terms regime, which remains vague on the concrete restitution claims, with respect to (EU) general principles of restitution derived from the common core in Member States' laws, still rather vague, and with respect to the Mortgage Credit Directive, with a concrete regime in Articles 23, 24 (which we hold to contain general principles and therefore being applicable *ex post* as well). The article concludes that all three main sources of European law of restitution are aimed at fairness and the upholding of justified expectations, only curing market failure, and neither at penalisation nor at redistribution to consumers/borrowers (who, typically even have made considerable profit from the transactions owed to significant land value increase). The same result applies at the constitutional level, where the fundamental right of property has to be honoured appropriately in a balancing of interests. As an overall result, the article argues that a

101 See on this issue Denga, n 67 above, forthcoming; and above Section 3.4.

consumer who has not been properly informed at the moment of contract formation (*ex ante*), now has an *ex post* option and choice. This is between those offers he or she could have found on the loan market at the moment of contract formation – not less, not more. In the Polish cases, this choice is typically between either an offer made in CHF for the loan principal tied to LIBOR *or* an offer made in Zloty for the loan principal tied to WIBOR. In summary, European consumer contract (and restitution) law does not aim to render consumers superior nor to penalise their business counterparts, but rather to achieve a fair and balanced contractual relationship by (re-)establishing informational equality and by strengthening the consumers' party autonomy.