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**IN SEARCH FOR THE SCOPE OF MAIN SUBJECT
MATTER WITHIN ARTICLE 4(2) OF DIRECTIVE
93/13 AFTER ANDRICIUC. PRACTICAL
CONSEQUENCES OF THE GENERAL CJEU
PRONOUNCEMENTS**

Abstract: The paper delves into the intricacies surrounding the ‘main subject matter’ requirement with a view to delineating its scope by reference to CJEU jurisprudence. Specifically, regard is had to the recent case of *Andriciuc*, its dictum and potential ramifications it may have for the judicial purview in the field of unfair terms control. Practice in recent years has brought to the fore the issue of indexation clauses as the focal point for doctrinal disputes. Comprehensive analyses of the main subject matter have also been carried out by Polish courts at all instances, including that in the Supreme Court, within the context of claims brought by consumers who entered into loans denominated in the Swiss Franc following the events of the so-called ‘Black Thursday’. The paper strives to decode the practical ramifications of the CJEU’s general doctrinal interpretations, offering succinct corollaries pertaining to the compatibility with the EU standard, of the judicial interpretations of Poland’s courts with regard to the concept.

Keywords: main subject matter, consumer contracts, unfair terms, professional traders, consumer exchange, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

1. Introduction

Article 4(2) of Directive 93/13¹ carves out a number of important exemptions from the net of substantive unfairness cast in Article 3(1). Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language. Article 4(2) should be given an autonomous and uniform interpretation throughout the European Union.² In addition, the exemptions should be interpreted strictly³ as exceptions to the overarching mechanism of control of unfairness in consumer contracts that enhances the EU-wide consumer protection regime.⁴

¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, pp. 29–34.

² Case *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálog bank Zrt*, C-26/13, Judgment of 30.4.2014, ECLI:EU:C:2014:282, para. 37; Case *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA*, C-143/13, Judgment of 26.2.2015, ECLI:EU:C:2015:127, para. 50; Case *Ruxandra Paula Andriciuc and Others v Banca Românească SA*, C-186/16, Judgment of 20.9.2017, ECLI:EU:C:2017:703, para. 34. *Matei* appears to have referred not only to the notion of ‘plain and intelligible language’ within the exemption in Article 4(2) but also to the general overarching principle in Article 5.

³ Case C-26/13 *Kásler*, *supra* note 2, para. 42; Case C-143/13 *Matei*, *supra* note 2, para. 49; Case C-186/16 *Andriciuc*, *supra* note 2, para. 34.

⁴ Case *Jean-Claude Van Hove v CNP Assurances SA*, C-96/14, Judgment of 23.4.2015, ECLI:EU:C:2015:262, para. 31; P. Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, Hart Publishing, Oxford-Portland 2007, pp. 83-85; 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*, ‘Journal of European Consumer and Market Law’ 2017, vol. 6, no. 5, pp. 192-197; K. Nemeth, *How Much Can a Credit Cost – Recent Developments in Unfair Terms and Consumer Credit Law in Austria and Germany*, ‘Journal of European Consumer and Market Law’ 2016, vol. 5, no. 6, pp. 263-265.

The paper delves into the intricacies into the ‘main subject matter’ requirement with a view to delineating its scope by reference to CJEU jurisprudence. Specifically, regard is had to the recent case of *Andriciuc*,⁵ its dictum and potential ramifications it may have for the judicial purview in the field of unfair terms control. Practice in recent years has brought to the fore the issue of indexation clauses as the focal point for doctrinal disputes. As the classification of such contract terms may potentially have profound social consequences, given the gravity of the crisis which ensued following the unexpected appreciation of the currency rate of the Swiss franc in January 2015, Polish courts will have to resolve resultant tensions, facing the dilemma of compromising intellectual integrity and cohesiveness of the requirement on the one hand with, on the other, pressing social needs and considerations of fairness and equity. In this respect, the paper will specifically address the issue of indexation clauses to tentatively assess whether the approach of Polish courts may be reconciled with the CJEU’s instructions.

2. Main subject matter under Directive 93/13

In an important pronouncement, the CJEU has held that provisions pertaining to the main subject matter of any consumer contract are those that lay down the essential obligations of the contract (*essentialia*

⁵ For a full reference, see *supra* note 2.

*negotii*⁶) and, as such, characterise it,⁷ to the exclusion of terms ancillary to the purpose of defining the ‘very essence of a contractual relationship’.⁸ In deciding whether a provision relates to the main subject matter of a contract, construction should take account of the nature, general scheme and the stipulations (other related provisions) of the agreement in issue, as well as its legal and factual context.⁹ These questions are to be considered

⁶ This continental concept has been argued to be similar to the common law precepts of certainty and completeness. See: G. Dannemann, S. Vogenauer, *The Common European Sales Law in Context: Interactions with English and German Law*, Oxford University Press, Oxford 2013, pp. 259-260. See also: R. Sik-Simon, *Missbräuchliche Klauseln in Fremdwährungskreditverträgen – Klauselersatz durch dispositive nationale Vorschriften*, EuGH Rs C-26/13 (*Kásler*) und Kúria 2/2014. *PJE határozata*, ‘Journal of European Consumer and Market Law’ 2014, vol. 3, no. 4, pp. 256–261 (contending that since there are discrepancies in the doctrinal understanding of *essentialia negotii* among Member States, the case law may diverge markedly with time); T. Pfeiffer, *Formation of Contracts and Offer and Acceptance in European Private Law*, [in:] P.P. Viscasillas and R. Schulze (eds.), ‘The Formation of Contract. New Features and Developments in Contracting’, Nomos, Baden-Baden 2016, pp. 135-146 (focusing on offer and acceptance as the core *essentialia negotii* and setting them against Directive 93/13). For an economic analysis of the *essentialia negotii* in the context of standard contract terms, see: F. Chirico, P. Larouche, *Economic Analysis of the DCFR: The work of the Economic Impact Group within CoPECL*, Walter de Gruyter, Berlin 2010, pp. 109 *et seq.*; M. Bednarek [in:], E. Łętowska (ed.), ‘Prawo zobowiązań – część ogólna. System Prawa Prywatnego. Tom 5’ [Law of obligations – general part. System of Private Law. Volume 5], C.H. Beck, Warszawa 2013, p. 757.

⁷ Case C-26/13 *Kásler*, *supra* note 2, para. 49; Case *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, C-484/08, Judgment of 3.6.2010, ECLI:EU:C:2010:309, para. 34; Case C-96/14 *Van Hove*, *supra* note 4, para. 33; Case C-186/16 *Andriuc*, *supra* note 2, para. 35.

⁸ Case C-26/13 *Kásler*, *supra* note 2, para. 50. The CJEU noted in Case C-143/13 *Matei*, *supra* note 2, at para. 62 that the ancillary character of a term which modifies the applicable interest rate may manifest itself in the fact that they are not separable from the interest rate term.

⁹ Case C-26/13 *Kásler*, *supra* note 2, para. 51; Case C-96/14 *Van Hove*, *supra* note 4, para. 37. E. Macdonald, *Inequality of Bargaining Power and ‘Cure’ by Information Requirement*, [in:] L. DiMatteo and M. Hogg (eds.), ‘Comparative Contract Law: British and American Perspectives’, Oxford University Press, Oxford 2015, pp. 163 *et seq.*; G. Howells, C. Twigg-Flesner, T. Wilhelmsson, *Rethinking EU Consumer Law*, Routledge, London 2017, pp. 137-142. In the Polish literature, see: K. Michalak, P. Staszczyk, *Możliwość uznania abuzywności klauzuli wartości wykupu w umowach polisokolat w ramach kontroli konkretnej* [The possibility of recognizing the repurchase performances as abusive clauses in investment policies contracts], ‘Zeszyty Naukowe Towarzystwa Doktorantów UJ. Nauki Społeczne’ 2016, vol. 15, no. 4, pp. 201, 203-204; P. Gorzko, *Obowiązki formułowania klauzul jednostronne narzuconych prostym i zrozumiałym językiem oraz określenie głównego przedmiotu umowy*

by a national court,¹⁰ however, the CJEU does have the right to enunciate general principles for national judges to be guided by when adjudicating. Regard may be had to accompanying terms, for example, within the General Insurance Terms and Conditions, and where the significance of a disputed term remains unclear, the courts may engage in an exercise in literal construction unconstrained by the location of the term within the scheme of a contract.¹¹ The CJEU has refused to rely upon other instruments of EU law to define the ‘main subject matter of the contract’.¹²

The problem of defining main subject matter has arisen frequently in the context of insurance agreements. By entering into an insurance agreement, the insurer undertakes, within the scope of its business, to perform (confer a benefit on the insured) upon the occurrence of an accident specified in the underlying agreement, whilst the insuring party undertakes to incur a premium.¹³ More specifically, the insurer is

*w świetle przesłanek kontroli treści nieuczciwych warunków – glosa do wyroku TS z dnia 23 kwietnia 2015 r., C-96/14 [Responsibilities to formulate unilaterally imposed clauses in simple and plain language and designation of the main subject of an agreement in light of scrutiny conditions of unfair terms – a comment to the CJEU’s judgment of 23.4.2015, C-96-14], LEX 2016; W. Gontarski, *Przedkontraktowe obowiązki informacyjne banku w przypadku kredytów udzielanych w walucie obcej – glosa do wyroku TS z dnia 3 grudnia 2015 r., C-312/14 [Pre-contractual informative responsibilities of banks in case of foreign currency credits – a comment to the CJEU’s judgment of 3 December 2015, C-312/14], LEX 2016.**

¹⁰ Case C-26/13 *Kásler*, *supra* note 2, para. 51. P. Rott, *Unfair Contract Terms*, [in:] C. Twigg-Flesner (ed.), ‘Research Handbook on EU Consumer and Contract Law’, Edward Elgar Publishing, Cheltenham 2016, pp. 294-296; I. Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts*, Hart Publishing, Oxford-Portland 2017, pp. 112-114 (noting the approach of Hungarian courts on the issue).

¹¹ Judgment of the Appellate Court for Warsaw of 19.6.2013, ref. number VI ACA 1545/12, LEX No. 1402977.

¹² Case C-143/13 *Matei*, *supra* note 2, para. 47.

¹³ This corresponds to the Polish codified definition of an insurance relationship in Article 805(1) of the Polish Civil Code; see Case *Försäkringsaktiebolaget Skandia*, C-240/99, Judgment of 8.3.2001, para. 37: ‘the essentials of an insurance transaction are that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded’. See also the nineteenth recital to the Directive which lays down that terms which clearly define or circumscribe the insured risk and the insurer’s liability shall not be subject to an assessment of unfair character since those restrictions are taken into account in calculating the premium paid by the consumer. G. Heirman, *Core Terms: Interpretation and Possibilities of Assessment*, ‘Journal of European Consumer and Market Law’ 2017, vol. 6, no. 1, pp. 30-34; J.P. Devenney, *Gordian Knots*

obliged to make a payment in a contractually agreed amount in exchange, as it were, for regular payment of premiums by the insured.¹⁴ Provision of ‘insurance protection’ (maintenance of an insurance policy and acceptance risk of potential disbursement by the insurer) does not amount to the main subject matter of an insurance contract.¹⁵ In the context of a loan, the main subject matter has been held to consist in, on the one hand, an obligation to make available a bargained for sum of money and, on the other, an obligation of the counterparty to make a full repayment.¹⁶ Interest rates will normally be treated as forming part of the main subject matter of a contract.¹⁷ Indexation clauses fall, in principle and at least following the recent CJEU case of *Andriciuc*, within the definition of main subject matter.¹⁸ In *Andriciuc*, the CJEU made a distinction between its

in *Europeanised Private Law: Unfair Terms, Bank Charges and Political Compromises*, ‘Northern Ireland Legal Quarterly’ 2011, vol. 62, no. 1, pp. 47-50 (situating the recital within the context of the landmark UK Supreme Court case of *Office of Fair Trading v Abbey National plc*); G. Rohl, *Common Law, Civil Law, and the Single European Market for Insurances*, ‘International and Comparative Law Quarterly’ 2006, vol. 55, no. 4, pp. 901-909 (contending, at p. 903, that two rules of general construction and application can be employed to mitigate the consequences of an overly broad interpretation of the main subject matter requirement: ‘The first rule provides that contractual terms must receive a reasonable interpretation and, if necessary, be read with such limitations and qualifications as will render them reasonable. The second rule mandates that contractual terms must be construed against the party that has drafted them (*contra proferentem* rule)’). See, however, the judgment of the Supreme Court of 30.9.2015, ref. number I CSK 800/14, LEX No. 1797957, where the court appeared to describe the insurer’s obligation as bearing the risk of incurring payment for the benefit of the insured, with payment being the manner in which the obligation is fulfilled following the occurrence of an insured event.

¹⁴ Judgment of the Appellate Court for Wrocław of 16.2.2017, ref. number I ACa 1585/16, LEX No. 2340273.

¹⁵ Nor does assuming the risk of non-repayment by a lender: Case C-143/13 *Matei*, *supra* note 2, para. 77. A. Tarasiuk-Flodrowska, *Abusive Clauses in Consumer and Insurance Contracts – Recent Developments in Europe*, ‘European Insurance Law Review’ 2014, no. 1, pp. 31-40; position of the President of the Office for Competition and Consumer Protection of 30.3.2017, ref. number RLU-644-3/17/IM.

¹⁶ Case C-143/13 *Matei*, *supra* note 2, para. 54; Case C-186/16 *Andriciuc*, *supra* note 2, para. 38. See also: R. Simon, *Transposition of the Mortgage Credit Directive into Hungarian and Czech Law – The Problem of Credit Intermediaries*, ‘Journal of European Consumer and Market Law’ 2017, vol. 6, no. 3, pp. 108-109.

¹⁷ Case C-143/13 *Matei*, *supra* note 2, para. 62.

¹⁸ Case C-186/16 *Andriciuc*, *supra* note 2, para. 38. The Court specifically remarked, without mentioning ‘indexation clauses’ by name that ‘the fact that a loan must be repaid

own facts and those of *Kásler*.¹⁹ In the latter case, the loans that contained the disputed terms had to be repaid in the national currency according to the selling rate of exchange applied by the bank.²⁰ In the former case, however, loans were repaid in the same currency in which they were granted, except a foreign currency rate was used to calculate the instalment amount to be ultimately repaid in the same currency.²¹ Clauses of the former type can be classified as constituting the ‘main subject matter of the contract’ where it is established, on a case-by-case basis, that such a term lays down an essential obligation of that agreement which, as such, characterises it.²²

Another practical area of contention within the jurisprudence of the CJEU is consumer credit agreements. In *Matei*, the Court analysed the nature of a ‘risk’ charge applied by the lender (calculated as a percentage of the outstanding loan and payable every month) and a term allowing the lender to change the otherwise fixed interest rate in case of ‘significant changes in the money market’. In *Kásler*, the court was tasked with determining whether the notion of ‘main subject matter of the contract’ encompassed every element of consideration to be paid in cash by the borrower as part of a loan contract, including sums resulting from the difference between the exchange rate applicable to the advance of the funds and the repayment of the loan, or whether only the payment of the nominal rate of interest, in addition to the grant of the loan, is covered by that notion.²³

in a certain currency relates, in principle, not to an ancillary repayment arrangement, but to the very nature of the debtor’s obligation, thereby constituting an essential element of a loan agreement’.

¹⁹ For a full reference see *supra* note 2.

²⁰ Case C-186/16 *Andriciuc*, *supra* note 2, para. 40.

²¹ *Ibid.* On the facts, it was envisaged that the loan was to be granted and repaid in Swiss francs, with the risk of currency fluctuations in the event of a slump of the Romanian leu as against the Swiss franc resting upon the claimants. The risk was particularly high considering the claimants’ sole source of income was in the Romanian leu, a circumstance which merely exacerbated the economic strain potential currency changes could have had on their finances. See para. 9 of the judgment.

²² Case C-26/13 *Kásler*, *supra* note 2, para. 39. In Polish case law, as a general rule, indexation clauses will not form the main subject matter of the contract. See notably the judgment of the Supreme Court of 22.1.2016, ref. number I CSK 1049/14, LEX No. 2008735.

²³ Case C-26/13 *Kásler*, *supra* note 2, para. 29.

The ‘essential aim’ of a term is important in ascertaining whether a term defines the main subject matter of a contract.²⁴ To revert back to ‘risk charges’, the essential aim of those has been held to be the securing of loan repayment.²⁵ As noted above, repayment constitutes the essence of a loan contract. The essential aim of a term shall be weighed together with the objective of consumer protection.²⁶

The practical significance of the ‘main subject matter’ exemption might be on the wane. In the recent case of *Gutiérrez Naranjo*, the CJEU was ready to consider the unfairness of a contract term by subjecting it to the test in Article 3(1) of the Directive even where that term referred to the main subject matter of the contract, provided that sufficient evidence was adduced to the effect that the consumer did not have, before the conclusion of that contract, the necessary information on the contractual conditions and the consequences of entering into that contract.²⁷ By stating that such situations fell under the scope of the Directive in general, ‘and Article 6(1) in particular’, the CJEU appears to have intimated that the onus of providing a justification for striking down a particular term attaching to the main subject matter of the contract will be transferred to national courts. This is because the aforesaid provision enshrines the principle that Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer. It is unknown how this passage from a very recent case will be elaborated upon and possibly emulated

²⁴ Due to such considerations, H.-W. Micklitz has argued that transparency represents the minimum level of regulation that the European Union provides for core terms. See: H.-W. Micklitz, *Reforming European Unfair Terms Legislation in Consumer Contracts*, ‘European Review of Contract Law’ 2010, vol. 6, no. 4, p. 366; G.G. Howells, *The European Union’s Influence on English Consumer Contract Law*, ‘George Washington Law Review’ 2017, vol. 85, no. 6, p. 1937.

²⁵ Case C-143/13 *Matei*, *supra* note 2, para. 67.

²⁶ *Ibid*, para. 68.

²⁷ Joined Cases *Francisco Gutiérrez Naranjo v Cajasur Banco SAU, Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA), Banco Popular Español SA v Emilio Irlés López and Teresa Torres Andreu*, C-154/15 and C-307/15, Judgment of 21.12.2016, ECLI:EU:C:2016:980, para. 51. This only serves to further bolster and elevate the idea that at least one of the tenets of the transparency requirement consists in informing the consumer about the particular of a contract they are about to enter into. M.B.M. Loos, *Transparency of standard terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law*, ‘European Review of Private Law’ 2015, vol. 23, no. 2, pp. 181-189.

in the future. I would submit that, in procedural terms, the CJEU may, having concluded no sufficient information concerning the contractual consequences was provided to the consumer, declare that either the Member state concerned failed to perform its duties under the Directive and EU law at large or proceed straight to an evaluative exercise under Article 3(1). Crucially, it is unknown whether lack of pre-contractual information automatically supersedes the main subject matter exemption, or whether there must be an additional element entailing the failure to comply with Article 6(1).²⁸ Further, it is unclear whether this new principle would apply only to contractual provisions that reflect mandatory statutory provisions or important provisions of public policy (which would be understandable given the CJEU's reference to Article 6(1)).²⁹ If so, its ambit is relatively moderate.

3. Position under Polish law

It was not long after the transposition of Directive 93/13 into Polish law that the Polish Supreme Court surmised that the main subject matter exemption should be interpreted narrowly and within the context of the *essentialia negotii* of an agreement.³⁰ At least initially, judges of this court justified

²⁸ M. Grochowski has argued pertinently that in practice, the main subject matter exemption is detached from the negotiation stage and is aimed exclusively at reinforcing the consumer's autonomy as regards making a decision to enter into an agreement. Cf. M. Grochowski, *Postanowienia określające główne świadczenia stron* (art 385(1) § 1 k.c.): źródła w prawie UE ['Clauses relating to main subject matter' (Article 385 (1) § 1 of the Polish Civil Code), 'Palestra' 2017, no. 6, pp. 91-92.

²⁹ See especially paragraph 62 of the *Gutierrez Naranjo* judgment where the CJEU underscores the duty to exclude contract terms imposing obligations to incur payments that shall not be due and an accompanying duty of all Member States concerning restitution of any such amounts actually paid.

³⁰ Judgment of the Supreme Court of 8.6.2004, ref. number I CK 635/03, LEX No. 846537; judgment of the Supreme Court of 10.7.2014, ref. number I CSK 531/13, LEX No. 1537260. P. Miłkaszewicz, *Art. 385¹*, [in:] K. Osajda (ed.), 'Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna' [Civil Code. Commentary. Obligations. General part], C.H. Beck, Warszawa 2017, p. 267; M. Bednarek, [in:] 'Prawo zobowiązań – część ogólna. System...', op. cit., p. 757; W. Popiołek, *Art. 385¹*, [in:] K. Pietrzykowski (ed.), 'Kodeks cywilny. Komentarz' [Civil Code. Commentary], C.H. Beck, Warszawa 2013, p. 1075. See also the judgment of the Appellate Court for Wrocław of 16.2.2017, ref. number I ACa 1585/16, LEX No. 2340273, where the 'main performances under a contract' were defined as such that characterise, typify and define the agreement, and, importantly

this position by a literal reading of the transposed provision. In this case, the legislator availed itself of the phrasing ‘provisions determining the main performances under the contract’ (a Polish phrasing for the ‘main subject matter – the Polish legislator focused more on the respective benefits parties confer on each other as part of performance of a contract) and not ‘provisions pertaining to’ such performances; the latter wording is taken to have a wider meaning.³¹ Specifically, it has been held that *prima facie* rules governing liability of contractual parties and the scope of the duty to remedy a loss will generally fall outside of the main subject matter exemption.³² Thus, a clause within a fire insurance policy which limited the insurer’s liability by setting it in proportion to the actual value of the insured object (its restoration value) was held not be caught within the exemption.³³

In respect of life insurance contracts, it has been held that their main subject matter comprises, on the part of the insurer, a payment under the policy in the event of the insured’s death. Where additional options are envisaged under a contract (e.g. a value-add capability under which a payout is to be exacted in the event of the insured’s serious sickness in exchange for an additional premium), such options will form part of the main subject

ones without which the agreement would not have been concluded in the first place. The final requirement could be problematic if it were to be interpreted as denoting consideration or contractual conditions which, albeit not required explicitly by law to sustain the legality and validity of a bargain, constituted, subjectively speaking, an essential element of the agreement in the eyes of the relevant party. Such a reading should be rejected as leading to excessive interpretative uncertainty.

³¹ A. Olejniczak, *Art. 385¹*, [in:] A. Kidyba (ed.), ‘Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część ogólna’ [Civil Code. Commentary. Volume III. Obligations – general part], Wolters Kluwer, Warszawa 2011, pp. 258-259; M. Grochowski, ‘*Postanowienia określające ...*’, op. cit., p. 90. The courts have also remarked that for a clause to be exempted it shall be of fundamental significance within the context of a given legal relationship. See judgment of the Supreme Court of 30.9.2015, ref. number I CSK 800/14, LEX No. 1797957.

³² Judgment of the Supreme Court of 30.9.2015, ref. number I CSK 800/14, LEX No. 1797957 (where the Court was adamant that the issue is fact-specific); judgment of the Supreme Court of 2.2.2015, ref. number I CSK 257/14, LEX No. 1710338; judgment of the District Court for Lublin of 31.3.2017, ref. number II Ca 886/16, LEX No. 2285192; judgment of the Appellate Court for Warsaw of 14.11.2012, ref. number VI ACa 803/12, LEX No. 1289816.

³³ Judgment of the Supreme Court of 16.10.2014, ref. number III CSK 302/13, LEX No. 1545100.

matter and are subject to a substantive unfairness test.³⁴ Likewise, in the context of a unit-linked life insurance policy, a clause that stipulated a termination fee was held to fall beyond the scope of the exception.³⁵

3.1. Indexation clauses – limits of the ‘main subject matter’

Comprehensive analyses of the main subject matter have been carried out by Polish courts at all instances, including in the Supreme Court, within the context of claims brought by consumers who entered into loans denominated in the Swiss Franc following the events of the so-called ‘Black Thursday’.³⁶ At the European level, the culminating point was *Kásler*, in which the CJEU offered a comprehensive overview of the main subject matter concept, and refined in later cases such as that of *Andriuc*. Following the later judgment, it appears an indexation clause could be classified as describing the main subject matter of a contract where it is established, on a case-by-case basis, that such a term lays down an essential obligation of that agreement which, as such, characterises it.³⁷ The CJEU appears to have advanced a more general pronouncement in that clauses addressing the foreign exchange risk inherent in virtually all consumer credit contracts

³⁴ Judgment of the Supreme Court of 13.10. 2010, ref. number I CSK 694/09, LEX No. 786553.

³⁵ Judgment of the Appellate Court for Wrocław of 16.2.2017, ref. number I ACa 1585/16, LEX No. 786553; judgment of the Appellate Court for Katowice of 21.12.2018, ref. number I ACa 369/18, LEX no. 2669685.

³⁶ On 15.1.2015, the Swiss National Bank decided to discontinue its policy of maintaining a minimal exchange rate of euros into francs, which caused a steep appreciation of the franc as against other currencies. For Polish investors and consumers who repaid their loans in francs this meant that the franc, which cost 3.54 PLN at the beginning of the day, skyrocketed to 5.19 PLN at the day’s peak. The most thorough and comprehensive analysis of the phenomenon has been offered, in monographic form, by K. Koźmiński and M. Jabłoński. See M. Jabłoński, K. Koźmiński, *Bankowe kredyty waloryzowane do kursu walut obcych w orzecznictwie sądowym* [Bank loans denominated in foreign currencies in case law], Wolters Kluwer, Warszawa 2018.

³⁷ The effects of the judgment may be viewed as negative, as the Oradea court, to which *Andriuc* was reverted, denied protection to the claimants, asserting that the clause in question was drafted in plain and intelligible language and was, therefore, excluded from a substantive fairness inquiry. M. Calu, C. Stanciu, *Rulings of the National Courts Following the Curia Decision in Case C-186/16, Andriuc and Others v Banca Romaneasca, ‘Challenges of the Knowledge Society’* 2018, no. 12, pp. 211-212.

denominated in or indexed to a foreign currency shall escape the national court's assessment as to substantive unfairness provided that the plain and intelligible language requirement is fulfilled, and this is to be ascertained by a national judge on a case-by-case examination.³⁸

The watershed case culminated in the judgment of the Supreme Court of 2.4.2015,³⁹ which was a cassation appeal from the judgment of the Appellate Court for Warsaw of 12.6.2013.⁴⁰ The challenged clause entitled a construction company to increase price rates on account of their indexation by the value of construction and assembly production indices published annually by the Central Statistical Office. This had the effect of a slight price mark-up on each instalment paid by home buyers, and a termination right was envisaged by the contract only where, as a result of a correction of the relevant index, the overall price surged by more than 10% of the original gross amount.⁴¹ The court at first instance (Warsaw District Court) inferred that the clause did not dictate an element of the main subject matter of the contract in dispute, that is the price for a newly erected home, but only pertained to it, and as such was liable to scrutiny under Article 3 of Directive 93/13. This was refined by the Appellate Court, which decided that the clause did not dictate the price directly, but only envisaged a contractual regime for its increases. It was emphasized that consumers, in the event of a variation of contractual provisions, shall have the right to terminate because they may no longer be interested in

³⁸ Case C-186/16 *Andriuc*, *supra* note 2, para. 43. This was subsequently confirmed in Case *OTP Bank Nyrt. and OTP Faktoring Követelés kezelőZrt v TerézIlyés and Emil Kiss*, C-51/17, Judgment of 20.9.2018, ECLI:EU:C:2018:750, para. 68, and Case *Zsuzsanna Dunai v ERSTE Bank Hungary Zrt*, C-118/17, Judgment of 14.3.2019, ECLI:EU:C:2019:207, para. 48.

³⁹ Ref. number I CSK 257/14, LEX No. 1710338.

⁴⁰ Ref. number VI ACa 1691/12, LEX No. 1448925.

⁴¹ A similar clause was scrutinized by the Appellate Court for Warsaw in its judgment of 3.9.2015, ref. number VI ACa 830/15, LEX No. 1814844. There, the Court emphasized that indexation of a benefit to be conferred under a contract (in the case a home purchase agreement), albeit legal and permissible *per se*, cannot be left to a developer's full discretion. Further, a consumer must be granted the right to rescind or terminate the agreement in the event of a change, and it is a gross violation of consumer interests to reserve the right to rescission only where indexation exceeds an arbitrarily high threshold, e.g. 10%. This is because, the Court asserted, the consumer may be unable to lift such a burden economically, and this is true particularly where the indexation clause is imposed upfront, especially as a condition precedent for the trader to even undertake any meaningful negotiations with a view to concluding a consumer contract.

purchasing a good on services under the revised conditions.⁴² The Appellate Court referred to the judgment of the Supreme Court of 13.5.2005⁴³ that hinted that an indexation clause could be examined through the lens of ‘contractual decency’, understood as a conceptually rough equivalent of the good faith test under Article 385³ of the Civil Code.⁴⁴ The Supreme Court started on a doctrinal note, observing that in abstract control proceedings, regard shall be had to the character or type of the contract (or, to be more precise, of the obligations both parties incur) in question, for without it, identification of the ‘main subject matter’ is impossible. For instance, insertion by a trader of a ‘preliminary contract’ header in an agreement is not final – whether a contract is truly preliminary is for a court to decide after a thorough examination of the nature, character, gravity and duration of the obligations given rise to by the contract.⁴⁵

⁴² See a recent judgment of the Appellate Court for Poznań in which it is insisted that this should ‘always and invariably’ be the case. Judgment of the Appellate Court for Poznań of 12.12.2017, ref. number I ACa 632/17, LEX No. 2442753. For a comprehensive account of the entitlement of a right to terminate in the event of a variation of contractual conditions, including the price of a service, see: M. Loos, J. Luzak, *Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers*, ‘Journal of Consumer Policy’ 2016, vol. 39, no. 1, pp. 67-72.

⁴³ Ref. number I CK 690/04, LEX No. 407119.

⁴⁴ Act of 23 April 1964 – Civil Code (uniform text: Official Journal of Laws of 2018, item 1025). This case, however, could be distinguished on a host of grounds. First, it pertained to an insurance policy for provision for infant children, and the reasoning relies heavily on a pro-family stance, particularly considering the negative ethical assessment the court took of the defendant insurance provider. Second, the judicial panel based its conclusions predominantly upon a construction of the term ‘financial consideration’ in Article 358¹ p 3, pursuant to which, in the case of a substantial change of money’s purchasing power after the creation of an obligation, a court of law may, having weighed the parties’ interests, according to the principles of community coexistence, change the amount or the manner of rendering the financial consideration, even if they have already been determined in a ruling or in a contract. It is, however, true, that the Court mentioned in passing the nature of an indexation clause consists in setting out a contractual regime for the increases of ‘principal consideration under a contract’. It appears that it was the first time the principle was applied to a contract other than an insurance policy (in fact, the Appellate Court for Warsaw in its judgment of 12.6.2013 explicitly singled out insurance contracts as a genus of contract within the umbrella of the precept).

⁴⁵ B. Gliniecki, *Glosa do uchwały SN z dnia 9 grudnia 2010 r., III CZP 104/10* [Comment on resolution of the Supreme Court of 9 December 2010, III CZP 104/10], ‘Monitor Prawniczy’ 2011, no. 17, pp. 953-955; M. Warciński, *Glosa do uchwały SN z dnia 9 grudnia 2010 r., III CZP 104/10* [Comment on resolution of the Supreme Court of 9 December 2010, III CZP 104/10], ‘Przegląd Sądowy’ 2011, nos. 11-12, p. 178 *et seq.* (offering a critique of the judgment and

The Supreme Court in its resolution of 9.12.2010⁴⁶ appears to have opened the door for aggrieved home purchasers to sue construction developers by virtue of non-performance or under performance of their contracts (Article 471 of the Civil Code). It was underscored that it is the nature of the obligations undertaken by the parties (consisting in the construction of a luxury good that is a home in line with the agreed standard and subsequent transfer of legal title thereto onto a customer, on the one hand, and conferment of significant financial consideration on the other) that determines the availability of contractual damages.

4. Final remarks – compatibility of the Polish position with EU orthodoxy

The inference drawn in the 2015 Supreme Court case has been confirmed in a string of cases that have followed, with a varying degree of similarity in terms of arguments put forward in favour of a particular judicial panel's

arguing that it should be possible, at the moment of concluding a preliminary contract, to envisage the letter and meaning of the promised contract, and that in practice it is impracticable); D. Opalska, *Glosa do wyroku SN z dnia 9 grudnia 2010 r., III CZP 104/10* [Comment on resolution of the Supreme Court of 9 December 2010, III CZP 104/10], 'Glosa' 2012, no. 1, p. 49 *et seq.* (arguing in consonance with the judgment, stressing the importance of eliminating preliminary contracts in consumer practice); M. Kućka, *Glosa do uchwały SN z dnia 9 grudnia 2010 r., III CZP 104/10* [Comment on resolution of the Supreme Court of 9 December 2010, III CZP 104/10], 'Przegląd Sądowy' 2011, no. 7, pp. 146-154 (offering a middle ground by refusing to accept the non-preliminary nature of contracts preliminary on their face, accepting, however, in accordance with Article 390 of the Civil Code, that loss sustained by a consumer by virtue of subsequent non-conclusion of a final contract shall be remedied under the general principles of tort law).

⁴⁶ Ref. number III CZP 104/10, LEX No. 622227.

position.⁴⁷ In one subsequent judgment,⁴⁸ the final instance court added that a strained construction of the main subject matter exception is supported by the purpose of abstract control proceedings.⁴⁹ This position has since been confirmed without exception at the appellate level.⁵⁰

It is difficult to discern whether the approach of Polish courts remains consistent with the CJEU jurisprudence following *Andriuciu*. For, on the one hand, that case included without exception within the ambit of ‘main subject matter’ clauses that mandated that a loan be paid back in the same foreign currency in which it was initially drawn. This, as the European court specifically reserved itself, distinguishes such contract terms from indexation clauses, such as that in *Kásler*. That differentiation though, dilutes the principal, I submit, inference from *Kásler*, i.e. that indexation clauses are generally beyond the ambit of the main subject matter exception, whereas this is accepted by Polish courts as nothing short of an axiom, at least in recent jurisprudence.⁵¹ A similar situation can be discerned among academic commentators, for whilst the weight of the argument appears

⁴⁷ See, however, the judgment of the District Court for Łódź of 17.10.2016, ref. number III Ca 1427/15, LEX No. 2151803, where the judges were careful to underscore that indexation of the amount of loan repayment instalments is inextricably connected to the repayment of a loan, and could be classified as characterising a chief obligation of a lender. K. Kurosz has argued that indexation could be caught within the definition of *essentialia negotii*, deducing so based on the essential character of interest itself within the scheme of a bank loan, pursuant to Article 69 of the Banking Law. K. Kurosz, *Nieważność umowy kredytu nas kutek wadliwego określenia warunków zmiany oprocentowania* [Invalidity of a loan as a result of a defective determination of conditions of interest changes], *Przegląd Prawa Handlowego* 2017, no. 1, pp. 17-22.

⁴⁸ Judgment of the Supreme Court of 22.1.2016, ref. number I CSK 1049/14, LEX No. 2008735.

⁴⁹ For more, see: T. Czech, *Abuzywność klauzuli umowy kredytowej dotyczącej przeliczenia walutowego – glosa do wyroku SN z 22 stycznia 2016 r. (I CSK 1049/14)* [Unfairness of a clause in a loan pertaining to currency conversions – comment on the judgment of the Supreme Court of 22 January 2016 (I CSK 1049/14)], *Monitor Prawa Bankowego* 2017, no. 2, pp. 32-36.

⁵⁰ Judgment of the Appellate Court for Warsaw of 16.1.2019, ref. number V ACA 814/17, LEX No. 2668855.

⁵¹ Judgment of the Supreme Court of 2.2.2015, ref. number I CSK 257/14, LEX No. 1710338; judgment of the Supreme Court of 22.1.2016, ref. number I CSK 1049/14, LEX No. 2008735; judgment of the Supreme Court of 1.3.2017, ref. number IV CSK 285/16, LEX No. 2308321. A helpful discussion is provided by M. Matusiak-Frącczak, *Glosa do wyroku TS z dnia 20 września 2017 r.* [Case comment on the judgment of the CJEU of 20 September 2017], *C-186/16*, *Europejski Przegląd Sądowy* 2018, no. 4, pp. 41-43.

to be tilted towards classification of indexation clauses as outside the scope of the main subject matter concept, thus in disregard to the *Andriciuc* differentiation based on the currency in which a loan is repaid,⁵² prominent voices to the contrary have also been raised.⁵³ Hence, focus remains to be placed on procedural rules employed in the service of safeguarding rights derived by consumers by virtue of the unfair terms legislation, i.e. Articles 6(1) and 7(1) of the Directive. Therefore, the CJEU has relied on the significance of the public interest in elevating the weak bargaining position of consumers to espouse the need to ensure that judicial and administrative bodies have adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.⁵⁴ The recent cases have also accentuated the plain and intelligible language requirement as the gateway to the application of the main subject matter exemption, pushing, at the same time, the responsibility for ascertaining the fulfilment of the requirement down to national courts.⁵⁵

⁵² M. Bednarek, [in:] *Prawo zobowiązań – część ogólna. System...* [Law of obligations – General part], op. cit., p. 757; M. Bednarek, *Skutki prawne wadliwego sformułowania klauzuli zmiennego oprocentowania w umowie kredytowej (przyczynek do dyskusji)* [Legal consequences of a defective formulation of a floating interest clause in a loan contract (starting point for discussion)], 'Studia Prawa Prywatnego' 2017, no. 2, pp. 67-69 (differentiating between the economic and legal approaches to considering indexation clauses and other notions such as interest); T. Czech, *Abuzywność klauzuli umowy...*, op. cit., pp. 37-40. Further on the potential social implications of applying the *Andriciuc* dictum: B. Gadek, *Dopuszczalność stosowania klauzul indeksacyjnych w umowach kredytowych* [Permissibility of indexation clauses in loan contracts], 'Monitor Prawniczy' 2018, no. 12, p. 659 *et seq.*

⁵³ Most notably: K. Zagrobelny, [in:] E. Gniewek, P. Machnikowski (eds.), 'Kodeks cywilny. Komentarz' [Civil Code. Commentary], C.H. Beck, Warszawa 2017, ed. 8, p. 743. A review of viewpoints on the topic together with an analysis of the economic mechanisms involved in formulating indexation clauses is provided by B. Lackoroński, *Waluta zobowiązania i waluta świadczenia po zmianie art. 358 k.c. z 23 października 2008 r.* [Currency of the obligation and currency of the performance following amendments to Article 358 of the Civil Code of 23 October 2008], 'Przegląd Sądowy' 2011, no. 6, pp. 23-36.

⁵⁴ A recent iteration of this general judicial trend is found in Case *Zsolt Sziber v ERSTE Bank Hungary Zrt*, C-483/16, Judgment of 31.5.2018, ECLI:EU:C:2018:367, paras. 32-34.

⁵⁵ This is highlighted against the backdrop of Greek jurisprudence in I. Venieris, *Plain and Intelligible Language of Consumer Insurance Contracts under the Light of the Greek Jurisprudence*, 'European Insurance Law Review' 2015, no. 1, pp. 17-28. The trend is particularly prominent in the recent Case *GT v HS*, C-38/17, Judgment of 5.6.2019, ECLI:EU:C:2019:461, paras. 33-35, where the CJEU reiterated the dictum in *Andriciuc*,

Aid is to be sought in national legislatures that may be inclined to adopt legislation aimed at easing the burden on consumers. In a recent series of cases,⁵⁶ the CJEU has had to examine a Hungarian law, logic of which has been to assist consumers in repaying their loans, despite the fact that Article 4(2) of Directive 93/13 does not authorise the examination of the unfairness of a provision relating to the exchange rate risk as a determining factor in defining the main subject matter of the contract.⁵⁷ The law effectively rendered void clauses in consumer credit contracts that stipulated that, for the purpose of paying out the amount of finance granted for purchase of the subject of the loan or financial leasing, the buying rate is to apply, and that, for the purpose of repayment of the debt, the selling rate, or a different exchange rate from that set when the loan was to hold. Instead, the exchange rates stated within these clauses were to be replaced by the official exchange rate set by the National Bank of Hungary for the foreign currency concerned. This appears to be an instrument that is legally available to national legislatures and one which is liable to shield them from the scrutiny of the Court on account of Article 1(2) of the Directive which excludes from the purview of courts adjudicating on the basis of the Directive's provisions, 'contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party'.

emphasizing that regard must be had all the relevant facts, including the promotional material and information provided by the lender in the negotiation of the loan agreement, and that the loan contract in question shall transparently indicate the mechanism for calculating the amount lent, expressed in foreign currency, and the exchange rate applicable, as well as lay out criteria which enable a forecast of the economic consequences which may arise for the consumer by virtue of the agreement.

⁵⁶ Case C-51/17 *OTP Bank*, *supra* note 38, Case C-118/17 *Dunai*, *supra* note 38, Case C-38/17 *GT v HS*, *supra* note 54.

⁵⁷ Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatá val kapcsolato segyes kérdések rendez éséről szóló 2014. évi XXXVIII. törvény [Law No XXXVIII of 2014 regulating specific matters relating to the decision of the Kúria (Supreme Court, Hungary) to safeguard the uniformity of the law concerning loan agreements concluded by financial institutions with consumers.

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