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**EUROPEAN, HUNGARIAN AND SERBIAN MODELS OF
FAIRNESS IN CONSUMER CONTRACTS AND THEIR
APPLICATION TO CONSUMER CREDIT**

PhD Thesis

Summary

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I. The objective of the research

The objective of the thesis is to analyze the issue of unfair terms in consumer credit contracts in European Union (hereinafter: EU) in general, and in the two selected jurisdictions, in Hungary and in Serbia in particular.

Although consumer credits are nominated contracts and there is an increasing body of consumer credit specific regulation, the question of unfair terms remains under the general regime of the unfair contract terms regulation. Therefore, the foundation of the thesis is the *Directive 1993/13/EC on Unfair Terms in Consumer Contracts* (hereinafter: UCTD)¹ and its implementing acts. In Hungary this is *Act IV of 1959 on the Civil Code of the Republic of Hungary* (hereinafter: HuCC), and in Serbia, the *Consumer Protection Act of 2010* (hereinafter: SrbCPA).² Because the unfair contract terms regulation cannot be analyzed in a “vacuum”, the thesis explores the relation between these “new” consumer protection rules and the “old” or “traditional” contract law institutions; and the relation between the general regime of unfair contract terms and the specific regime of consumer credit.

Regarding the “new/old” issue, the thesis especially analyzes the traditional contract law institutions of *laesio enormis*, *usury*, *clausula rebus sic stantibus* and *force majeure*, and the “traditional” regulation of standard terms; and the limits of these tools, i.e. the need for the new rules. Regarding the “general/specific” issue, the thesis primarily relies on the *Directive 2008/48/EC on Consumer Credit*³ in EU, on *Act CLXII of 2009 on Credit Agreements for Consumers* and the *Act CXII of 1996 on Credit*

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

² Official Gazette of the Republic of Serbia No. 73/2010.

³ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008.

Institutions and Financial Enterprises in Hungary, and the *Financial Services Users Protection Act of 2011*⁴ in Serbia. The key is to understand how these specific rules operate together with the general unfair terms rules to provide protection.

As the UCTD contains a combination of rules that set standards of fairness and rules on enforcement of these standards the European, Hungarian and Serbian “models of fairness” referred to in the thesis reflect these two components. Therefore, on the one hand, the thesis tackles the question of when contract terms are unfair. This analysis evolves around the notions of substantive and procedural fairness. “*Substantive fairness*” relates to fairness of the substance of the terms, fairness in the distribution of contractual rights and obligations between the parties. “*Procedural fairness*” means fairness in the process leading up to contract conclusion, primarily the consumers’ real opportunity to understand the terms of the contract.⁵ On the other hand, the thesis tackles the available enforcement mechanisms searching for those that provide for genuinely effective preventive enforcement.

The key research question the thesis aims to answer is if a high level of protection is achieved. More particularly, to what extent the UCTD sets a high level of protection; how this has been received and improved in Hungary and in Serbia; what impact the UCTD and its implementation has on the particular problems of unfairness of the terms of credit contracts; what tools of preventive enforcement are available against unfair terms; and if there is the potential in the future for a higher level of protection.

A “high level of protection” means fairness or fair contract terms. Fairness depends on the presence of, and relation between, substantive and procedural fairness. A high level of protection also depends on which contract terms can be assessed for their fairness, if some terms are exempted from this scrutiny. Also, relevant is the question as to when contract terms can be evaluated for their fairness, if changed circumstances after the conclusion of the contract can be taken into account. Finally, a high level of protection depends on the effectiveness of preventive enforcement mechanisms and availability of ultra-preventive mechanisms for eliminating unfair terms.⁶

⁴ Official Gazette of the Republic of Serbia No. 36/2011.

⁵ Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms*, Ashgate, Aldershot, 2007, p. 2.

⁶ Preventive control is a type of a control that eliminates unfair contract terms that are already incorporated into contracts, and prevents their future use. “Ultra-preventive” enforcement takes place before a term would ever be used, before it would come into circulation on the market.

II. Scope and limits of the research

Consumer credit is chosen as a specific context for analysing the concept of fairness because it raises important consumer protection issues. Consumer credits are usually long term contracts, involve substantial funds of consumers and potentially have very significant social and economic consequence for consumers and their families. Consumer credit contracts are particularly likely to cause unfairness as they are complex contracts containing highly specific legal and economic language, and are drafted unilaterally by the creditor. Contracts are long and comprehensive (standard form contracts with addition of standard terms and conditions) and most of potential situations that might arise in conclusion and performance of the contract are covered by the contract. Therefore, when there is a problem the source of it is often not a default rule or a legal gap, but the fairness of a term that is in the contract.

There is a great variety in types of consumer credit. Taking the terminology of the CCD, the most general division of consumer credits is on trade credits and loan credits. Loan credits are based on the loan of money, while trade credits are deferred payment based transactions. The thesis deals only with loan credits. However, the analysis of the thesis is not applicable to some loan credits that trigger a different fairness regime like free of charge or zero interest rate credits, credits given at discount by employers to their employees, or state subsidized credits. Loan credits are provided by financial institutions, primarily by banks. Finally, although financial lease is not a credit *stricto sensu* credit and finance lease are often used as alternatives by consumers when searching for financing options. Therefore, the thesis primarily analyzes consumer credit provided by banks, and where applicable, considers finance lease as consumer credit. When referring here to consumer credit the summary means loan credit.

Consumer credit is an interaction between law and economy, and raises important social, behavioural and policy questions. The thesis focuses on the legal side of consumer credit. However, consumer credit raises various legal questions to tackle various forms of unfairness. Before the contract is concluded, credit can be subject to unfair marketing (or selling practices), and involve an unfair process of granting the credit. The contract itself can contain unfair terms. Credit can be secured with unfair securities. After default, the fairness of debt collection practices and fair debt enforcement arises. Finally, the fairness of credit reporting can also be questioned. The

thesis focuses on the contract of credit, and one aspect of fairness, on fairness of the terms of the contract.

The thesis analyzes consumer credit from the point of view of consumer protection. It sees consumer credit as part of consumer (protection) law. Consumer law is characterised by its rules belonging to more areas of law, stretching through public and private law, including the traditional branches of civil law, commercial law, administrative law, and criminal law, containing both substantive and procedural norms;⁷ and “modern” areas of law like competition law. Consumer law is a special area of law that does not fit into “classical” branches of law and should be regarded as a new, special field of law “intersectorial” in its nature that rests on existing branches.⁸

Consumer law and policy is part of the “regulatory state”. The regulatory state broadly means the state’s involvement in the regulation, creation, monitoring and enforcement of market transactions. For example, rather than leaving it to contracting parties to determine the terms of their relationship (traditional freedom of contract) and to enforce these terms *ex post*, the state steps in, setting standards for contracting behaviour, enforcing these standards, helping individuals to seek redress, and protecting citizens from poverty. Consumer law is characterised by increasing regulatory intervention, especially in consumer credit. Consumer credit has multiple economic benefits for one national economy, but it also carries a great deal of danger for consumers and their families, for the safety and soundness of financial institutions, and for stability of national economy. Therefore, the state is interested to intervene. To a certain extent the thesis tackles the questions of why and how to regulate unfair terms in general, and in consumer credit in particular, and points to shifts in aims and tools of regulatory intervention. However, the focus of the thesis is on the contract of credit. Regulation comes into play in two significant aspects. One is to the extent of which regulation is in place to limit the parties’ contractual freedom to ensure contractual fairness. The other is the role of the regulatory authorities in preventive enforcement of unfair contract terms.

The question of unfair terms in consumer credit was very topical at the time of writing the thesis, and it still is, at the moment of finalization of the research, in both Hungary and in Serbia. These dynamics posed the greatest challenged to the thesis, the

⁷ Judit Fazekas, The development of consumer protection law 113-150 In: The history of development of civilistics, Péter Miskolczi Bodnár (ed.), Miskolc, 2006, p. 114.

⁸ István Sándor, The regulation of consumer protection in Hungary, 1 *Studia Iuridica Caroliensia* 193-208, 2006, p. 201; *Cf* Fazekas 2006, p. 114.

challenge of how to deal with changed circumstances and changed regulation. The Swiss franc denominated loan scandal triggered significant legal and institutional changes. These changes were constant during the research and are still ongoing. For example in Hungary courts at the moment tackle Swiss franc denominated consumer loan cases,⁹ and in Serbia there is no court practice yet on the test of fairness. For this reason it is important to say that the research is completed in June 2013, with later changes added concluding with 23 November 2013. It is also crucial to point out that thesis addresses the problem of Swiss franc denominated loans, and tries to find solutions; however, the thesis is not a case study of these loans. It aims to give a more general and lasting contribution to legal science and practice in how the general regime of unfair contract terms applies to consumer credit contracts. It explores a wider range of issues than those specific to foreign currency denominated loans.

Independently and parallel to changes in consumer credit general civil law reform efforts took place in selected jurisdictions. The most significant is the adoption of the *Act V of 2013 on Civil Code* (hereinafter: nHuCC) in Hungary. Since it was adopted towards the end of the research, and thinking of the faith of the *Act CXX of 2009 on the Civil Code*, that failed to enter into force in the very last moment, the decision was made, to primarily rely on the law in force, that is, on the HuCC. However, the thesis indicates the solutions of the nHuCC focusing on what has changed in the nHuCC when issues are discussed and devote a special and independent analysis of the regime of unfair terms in the nHuCC. Overall, the nHuCC adopted the regime of the HuCC without significant changes. Therefore, the analysis of the HuCC is almost entirely applicable to the nHuCC.

III. Contributions of the research

Although the UCTD was subject to considerable academic attention in the international arena, in Hungary and in Serbia the regulation of unfair contract terms and the implementation of the UCTD was not studied in great detail or in a comprehensive and critical way. Therefore, remedying this gap, the thesis provides a comprehensive analysis of this issue, and thereby contributes to legal science in Hungary and in Serbia. Given the fact that the thesis is written in the English language, it potentially has a wider

⁹ See All hell breaks loose on foreign currency loan disputes- The stake is enormous. Portfolio: http://www.portfolio.hu/users/elofizetes_info.php?t=cikk&i=190424 (13 November 2013).

impact on EU legal science in general as the research principally relies on materials written in Hungarian and Serbian languages thereby making their achievements available in English.

Moreover, even though the UCTD represents one of the first steps in the creation of *consumer acquis*, and therefore was explored by leading academics from different angles and taking into account different aspects, the issue of unfair contract terms in relation to contracts of consumer credit has so far not been subject to any comprehensive and publicly available research. This is the main contribution of the present research to the legal science in EU in general and in Hungary and Serbia in particular.

Hungary and Serbia has been chosen as specific jurisdictions for a number of reasons. First, the issue of unfair consumer credit contract terms was not subject to comprehensive academic analysis. This is especially true for Serbia, where the concept of unfair terms was just recently introduced by the SrbCPA. Second, the comparison is unique, and it has not been done before. Third, a comparative analysis is possible, because the two legal systems show plenty of similarities and a sufficient degree of differences. Both Hungary and Serbia belongs to civil law families; their contract laws show similar influences. Both countries were socialist states that underwent significant changes after the change of regime, the most important being the influence of EU law and policy. Fourth, the selected jurisdictions can learn from each other. Hungary can learn from Serbia, Serbia has a very modern approach to the regulation of unfair terms, while Hungary opted for taking over the test in the UCTD that was created in different times. Due to its slower social and economic development, Serbia can learn from Hungary in enforcement of consumer credit. Serbia and Hungary can learn from each other in regulation of consumer credit. Fifth, the application of considerably different unfair terms regimes together with somewhat different consumer credit regimes allow give a comparative perspective of what solutions provide for a higher level of protection. Finally, in both jurisdictions, consumer credit is a large problem, especially the Swiss franc denominated loans.

IV. Research methods used

The research methods used in the thesis are the methods of legal analysis and comparative methods.

The thesis relies on the writings of legal scholars, research reports, (projects), legislation and the case law. Since the UCTD is one of the first EU legislative acts in the area of consumer protection, it was subject to considerable academic attention. The thesis summarizes the arguments, and selects the most important writings, without an attempt to cover everything written. This would be impossible given the quantity. However, in contrast to the large volume of academic writing on the UCTD in general, the opposite is true for in relation to unfair terms in consumer credit, and in relation to both the general and the credit rules in Hungary and (especially) Serbia. Therefore, in the rest of the analysis the thesis principally relies on research reports, the legislation and the available case law.

The thesis is primarily comparative in its nature. Comparative research and comparative law is very important. From its many benefits, Zweigert and Kötz identify the following as the most vital: it is an aid of the legislator, a tool of construction, a contributor to the systemic unification of the law, and an essential tool in developing the common private law of Europe.¹⁰ The thesis compares the models of fairness in consumer credit in the EU, Hungary and Serbia. In its analysis the thesis is primarily a *micro-comparison* of specific legal provisions (the provisions of the UCTD, the HuCC and the SrbCPA) and specific legal institutions in Hungary and in Serbia (the traditional contract law institutions). However, the final aim of the thesis, the comparison of models of fairness, is achieved by *macro-comparison*, comparing the effects of the tests of fairness and their enforcement.

V. Structure of the thesis

The analysis of the thesis is divided into eight chapters.

Chapter I contains the introduction to the research. It sets the problem of unfair contract terms in consumer credit, identifies the objectives, methods, scope and limits of the research and the areas of scientific contribution.

Chapter II analyzes the regime of unfair contract terms in Europe. It is a general chapter and does not focus on any specific contract. It analyzes the regime of unfair contract terms under the UCTD. To a certain extent the thesis deals with all the provisions therein, but the focus is on the basic concept of unfairness, the role of transparency, and the limits of the test of fairness. It relies on the most important

¹⁰ Konrad Zweigert, Hein Kötz, Introduction to comparative law, Clarendon Press, Oxford, 1998, p. 16.

writings of legal scholars and research studies. Besides analyzing the provisions of the UCTD this Chapter tackles broader theoretical questions on the regulation of unfair terms. The key question it aims to answer is whether the UCTD sets a high level of protection for consumers.

The test of fairness in Art. 3(1) UCTD reads the following:

“A contractual term which have not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

The basic concept of unfairness consists of two general clauses, the “good faith” and “significant imbalance.” The thesis tackles the meaning of these clauses in the light of the general concepts of substantive and procedural fairness. It concludes that it is not certain if the preferred reading of the test of fairness, the principle aim towards substantive fairness, is provided by the language of the UCTD.

In terms of transparency, the thesis asserts the meaning of procedural fairness is not clear. Procedural fairness is not an independent basis of unfairness. Therefore, under the EU rules a term cannot be removed from the contract for solely being procedurally unfair. Under the UCTD, the relationship between procedural and substantive fairness is not clear, and an interpretation that allows procedural fairness to justify substantive unfairness is possible. This means businesses can easily communicate substantively unfair terms in a transparent manner, and thereby escape the review of the test of fairness. The reach of transparency becomes even less clear as understanding is measured in relation to the “benchmark” consumer¹¹ that is a reasonably well informed average consumer, without guidance on how to determine the average.

The test of fairness has a number of exemptions. Individually negotiated terms, mandatory rules of law are exempted at all times. Core terms of the contract, i.e. the “main subject matter” and the “price” are exempted if they are transparent. The exemptions in general, but the core terms exemption in special, lowers the level of protection the UCTD provides.

The test of fairness is not flexible. It is to be applied at the moment of contract conclusion and changed circumstances (e.g. illness, unemployment) cannot be taken into

¹¹ The “benchmark” consumer is a standard of a consumer towards which the comprehensibility of the presentation of contract terms is measured.

account. Hence, the concept of *social force majeure* cannot be included into the scope of the UCTD.¹² This lack significantly lowers the level of protection the UCTD provides.

This Chapter concludes, that although within the objective of achieving a high level of protection, the UCTD probably intended towards providing full fairness (substantive and procedural fairness) this aim is not followed up. At many instances it leaves room for the businesses' freedom of contract and provides for limited fairness (substantive or procedural fairness) for consumers.

Chapter III analyzes the regime of unfair contract terms in Hungary. It is a general Chapter and does not focus on any specific contract. In the analysis it particularly focuses on the basic concept of unfairness, on the role of transparency, and on the limits of the test of fairness. It aims to see how the UCTD was implemented into the national legal system of Hungary, i.e. how the UCTD fits into the existing system of contract law and how some particularly disputed issues of the UCTD are addressed in Hungary. In its analysis this Chapter uses the writings of legal scholars, the legislation and the case law. It answers the key question if the Hungarian implementation achieves the protection intended by the UCTD, and where the level of protection provided by the UCTD is not so high, provides its own, higher level of protection.

The test of fairness is laid down in Art. 209(1) HuCC that reads:

„A standard contract term, or an individually non-negotiated contract term in consumer contracts, shall be regarded unfair if, contrary to the requirement of good faith, unilaterally and without justification causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the contracting party that did not draft the term.”

In Hungary, the test of fairness is understood as aiming to provide for substantive fairness, as the “significant imbalance” and “good faith” are one, integral criterion within Art. 209(1) HuCC. Procedural fairness is ensured by an independent application of the principle of good faith as a general contract law principle (Art. 4(1) HuCC) and by the principle of transparency (Art. 209(4) HuCC).

In regard to transparency, the HuCC provides a higher level of protection than the UCTD. The HuCC clarifies that transparency means a consumers' real opportunity to get familiar with the content of standard terms. Second, transparency is an independent basis of unfairness, procedural unfairness alone is able to make the contract

¹² “Social force majeure” means social obstacles to performance due to e.g. unemployment or illness. See for more on the concept: Thomas Wilhelmsson, 'Social Force Majeure': A New Concept in Nordic Consumer Law, 13 Journal of Consumer Policy 1-14, 1990, p. 3-8.

term unfair. Third, procedural fairness is not capable of legitimizing substantive unfairness because procedural fairness (Art. 209(4) HuCC) and substantive fairness (Art. 209(1) HuCC) are set on separate basis.

The HuCC adopted the exemptions from the UCTD, and hence, adopted its level of protection. The test of fairness is not flexible; it is to be applied at the moment of contract conclusion. However, the traditional institutions of *force majeure* and *clausula rebus sic stantibus* allow the reassessment of fairness of contract terms at a later point, and seem to be able to accommodate the concept of *social force majeure*. Thus the traditional institutions generally remedy the inflexibility of the test of fairness and raise the level of protection relative to the UCTD.

Therefore, the implementation of the UCTD achieves the protection intended by the UCTD, and at many instances where the level of protection provided by the UCTD is not so high, the HuCC provides its own, higher level of protection. It has solid grounds for achieving complete fairness (procedural and substantive fairness). However, the core terms exemption has potential to undermine the complete fairness approach, give way to the businesses' freedom of contract and leave consumers unprotected.

Chapter IV analyzes the regime of unfair contract terms in Serbia. It is a general Chapter and does not focus on any specific contract. In the analysis the Chapter particularly focuses on the basic concept of unfairness, on the role of transparency, and on the limits of the test of fairness. It aims to see how the UCTD was implemented into the national legal system of Serbia. As it was implemented recently, there is no case-law and very little academic writing on the issue. Therefore, only assumptions can be made on the perception of procedural and substantive fairness and their relationship, based on the previous analysis. This Chapter aims to see if the Serbian implementation achieves the protection intended by the UCTD, and where the level of protection provided by the UCTD is not so high, provides its own, higher level of protection.

The basic concept of unfairness is laid down in Art. 46(2) SrbCPA that reads:

“ A contract term is unfair if it:

- 1) results in a significant imbalance in contractual obligations of the parties to the detriment of the consumer;
- 2) causes the execution of a contract to be burdensome to the consumer without a justifiable reason;
- 3) causes the execution of a contract to be substantially different from what the consumer legitimately expected;
- 4) violates the transparency requirements of the business;
- 5) violates the principle of good faith.”

The test of fairness in Art. 46(2) SrbCPA is complex. It has five basis of unfairness, some of which aim towards achieving substantive fairness, some towards both substantive and procedural fairness, and one aims towards procedural fairness. Hence, the test of fairness in Serbia is to be understood as aiming towards both substantive and procedural fairness. Overall, the test of fairness provides for a very high level of protection, much higher than the UCTD and the HuCC.

Regarding the role of transparency, the SrbCPA also sets a higher level of protection than the UCTD and the HuCC. First, it clarifies transparency means a consumer's real chance to understand the terms of the contract. Second, transparency is an independent basis of unfairness, and procedural fairness alone is capable of making the contract term unfair. Third, procedural fairness is generally not capable of legitimising substantive unfairness because procedural fairness and substantive fairness are set on separate basis under the test of fairness. Additionally, Art. 44(1) SrbCPA directly links the principle of transparency to the "benchmark" consumer that it defines as a reasonable man of the consumers' knowledge and experience.

The test of fairness has no limits. It is applicable to all contract terms.

The test of fairness is flexible. Art. 46(2)(2) SrbCPA and Art. 46(2)(3) SrbCPA expressly allow the re-assessment of contract terms for their fairness during performance. Art. 46(2)(2) SrbCPA also has potentials to incorporate the principle of *social force majeure*. Additionally, the traditional contract law institutions of *force majeure* and *clausula rebus sic stantibus* generally allow the reassessment of the terms of the contract while the duration of the contract, due to changed circumstances, and seem to accommodate the concept of *social force majeure*.

Therefore, the test of fairness in SrbCPA is an almost perfect legislative solution. The SrbCPA achieves the protection intended by the UCTD and at many instances where the level of protection provided by the UCTD is not so high provides its own, higher level of protection. It is very much fairness oriented, providing both for substantive fairness and procedural fairness leaving very limited room for the businesses freedom of contract. The protection envisaged by the SrbCPA may only be compromised by not applying the test at all. So far courts seem to be reluctant to apply the test of fairness.

Chapter V deals with the regime of unfair contract terms in credit contracts. It builds on the research results of previous Chapters, and relies on analyzing academic writings, research projects, legislation, and case law. In this Chapter the general concepts

are analyzed together with the sector specific regulation. The focus is on how the substantive fairness of core and ancillary terms is determined in consumer credit, what the role of transparency or procedural fairness is, and what are the consequences of the limits in the application of the test of fairness, in EU in general, and in Hungary and in Serbia in particular. This Chapter also tackles broader theoretical questions on the regulation of consumer credit. The key question it aims to answer is if a high level of protection is achieved in consumer credit contracts. To what extent it is achieved in EU, and where the level of protection is not so high, a higher level is provided in Hungary and in Serbia.

Regarding substantive fairness, because Art. 3(1) UCTD and Art. 209(1) HuCC exempts core terms i.e. the “main subject matter” and the “price” from their scope; the thesis divides its analysis onto core and ancillary terms.

Regarding core terms, the thesis shows, it is difficult to determine what falls under the exemption in consumer credit, if the price of credit is the interest or the annual percentage rate of charge (hereinafter: APR). In Hungary, in the absence of applicability of test of fairness, in earlier concluded contracts, the price can be controlled by the traditional institutions of *laesio enormis* and *usury*. However, the thesis argues these institutions are not suitable safeguards against substantively unfair price terms. In newer contracts, the price is controlled by a price cap. In Serbia, the situation is different. Because the test of fairness has no exemptions, the price can be subject to the test. Nevertheless, it is difficult to say which instrument, the test of fairness (Serbia) or the price cap (Hungary) provides for a higher level of protection.

Regarding ancillary terms, the thesis analyzes the fairness of variation clauses and default interest clauses in consumer credit contract. These clauses are subject to considerable product regulation in the selected jurisdictions. The applicability of the test of fairness is limited with the boundaries of regulation. The thesis concludes that these boundaries are often difficult to determine, and hence it is not easy to apply the test of fairness to determine the substantive fairness of these terms.

Regarding ancillary terms, the thesis also analyzed the general applicability of the doctrine of *social force majeure*. It showed, the concept seems to be explicitly acknowledged by both Hungarian and Serbian regulators, but these acknowledgements are limited by their non-binding character. As additional tools, consumers can rely on the traditional institutions of *clausula rebus sic stantibus* and *force majeure* to accommodate the principle. In Serbia, consumers can also rely on the test of fairness

itself. Therefore, both Hungary and Serbia provide for a higher level of protection than the UCTD envisaged, and allow the reassessment of the fairness of ancillary contract terms while performance of the contract. The level of protection seems to be the highest in Serbia, where this reassessment is allowed by the test of fairness itself.

Regarding procedural fairness, in the EU, credit is in the first place regulated as a service. Consequently, there are numerous rules aiming to ensure procedural fairness. These rules provide for “layered” information obligation of the creditor. Hence, the vague provision of the UCTD becomes clear in the context of consumer credit, and ensures transparency means a real chance of a consumer to understand the terms of the contract. This is achieved by giving standard information but also by drawing the attention of a particular consumer to a particular term and providing additional explanations. In regard to the selected jurisdictions, the level of protection seems to be higher in Hungary than in Serbia. In Hungary, the creditor is obliged to explain the content of contract terms while in Serbia the creditor’s obligation extends only to explaining the role of standard terms and conditions but not their content.

Chapter VI analyzes the regime of preventive enforcement of unfair contract terms. As enforcement mechanisms and tools in financial services are somewhat different from generally available mechanisms, it deals with enforcement of credit contracts in EU in general, and in Hungary and Serbia in particular. The key question it seeks to answer is if there are enforcement mechanisms in place as to make for genuinely effective preventive control and set a high level of protection.

In this Chapter the thesis analyses the available enforcement models and mechanisms. It concludes, there are no specifically designed preventive enforcement mechanisms in the EU that Member States could transpose. In Hungary, although preventive enforcement with ultra-preventive elements is present, there are no ultra-preventive enforcement mechanisms. In Serbia, preventive enforcement is less present than in Hungary. Preventive enforcement has no ultra-preventive elements, and likewise, there are no ultra-preventive enforcement mechanisms in place. Hence, the intended objective of a high level of protection is not achieved in Hungary and in Serbia.

Chapter VII briefly considers the future of unfair contract terms regimes in EU, Hungary and Serbia. It is a general Chapter without a focus on any specific contract. It briefly outlines the contract law reform initiatives in EU, Hungary and Serbia and analyzes the proposed tests of fairness, in particular the basic concept of unfairness, the role of transparency and the limits of the test of fairness. The key question this Chapter

aims to answer is if the new solutions would provide for a higher level of protection than the present level is in EU, Hungary and Serbia.

Within reform initiatives at the level of EU, the thesis analyses the test of fairness in the *Draft Common Frame of Reference* (hereinafter: DCFR)¹³ and in the *Proposal for a Regulation on a Common European Sales Law* (hereinafter: pCESL).¹⁴ In Hungary, the thesis devotes attention to the test of fairness in the nHuCC. In Serbia, there are no alternatives proposed to the present solution. This Chapter concludes that the DCFR and the pCESL are somewhat better alternatives for the regulation of unfair contract terms than the UCTD is. However, they do not provide better alternatives to the current regulation of unfair terms in Serbia and to the current and future regulation in Hungary. Regarding Hungary, the regime of the nHuCC maintains the present level of protection. Hence, the new solutions would overall not provide a higher level of protection.

Chapter VIII contains conclusions of the research. It presents the models of fairness in EU, Hungary, and Serbia, compares their level of protection and provides suggestions for improvements of these models in the future. It concludes, the standards of fairness are set much higher in Serbia than in Hungary. However, these standards are undermined by the lacks in enforcement. Therefore, overall, the Serbian model provides for a lower level of protection than the Hungarian model, but for a higher level than the European model.

VI. Main findings of the research

In terms of “new/old” issue, the thesis showed the protection gaps in the coverage of the “new” concepts of the UCTD can be “filled in” by “old” contract law institutions. However, these traditional tools are not the most suitable instruments (*clausula rebus sic stantibus* and *force majeure*), or are completely unsuitable (*laesio enormis* and *usury*) to provide for high level of protection.

Regarding the “general/specific” issue the thesis showed how the sector specific rule on consumer credit operate together with the general unfair terms rules to provide protection. These sector specific rules in the EU focus on ensuring procedural fairness, while in the selected jurisdictions substantive fairness is increasingly ensured by product regulation. The level of regulatory intervention is much higher in Hungary than in

¹³ Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, at DG JUSTICE: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf (2 November 2011).

¹⁴ Regulation on a Common European Sales Law, COM (2011)0635 final, 11.10.2011.

Serbia. The relation between general rules and sector specific rules raises the question of what regulatory tools to use for a high level of protection.

Turning to protective concepts of procedural and substantive fairness, the present research showed the effectiveness of procedural fairness is limited, stemming from the limits of information as a regulatory tool, and limits of competition. Therefore, regulation should ensure substantive fairness. The general test of fairness is one regulatory tool that can provide substantive fairness. However, as the general test is often difficult to apply in consumer credit, a high level of protection requires more specific forms of product regulation. Nevertheless, the test of fairness should always be applicable as a “safety net” as it provides flexible standards that can cover new contract drafting techniques and circumstances that the regulation could not anticipate.

In terms of enforcement, it is very important that genuinely preventive enforcement mechanisms, ultra-preventive mechanisms, are in place that are able to eliminate unfair terms from a large number of contracts before these terms would produce harmful effects for consumers.

VII. Recommendations for the future

The European model could be improved by settling some of the disputed issues of the general test of fairness. The relationship between procedural and substantive fairness should be settled in a way that the primacy of substantive fairness is ensured at all times. Procedural fairness should not be capable of justifying substantive fairness. Nevertheless, procedural unfairness alone should be sufficient to make the contract term unfair. The meaning of procedural fairness should be clarified and the benchmark consumer regulated in a way to show sensitivity towards vulnerable consumers. The test of fairness should not have exemptions. Alternatively, if the exemptions are maintained, they should be clarified in a way to include as little as possible. The test of fairness should be flexible, and also applicable at a later point, during performance in order to accommodate changed circumstances. In terms of enforcement, the European Commission should specially encourage ultra-preventive enforcement and show examples of good practices.

The Hungarian model could be improved by eliminating the exemptions from the test of fairness or at least clarifying their scope. Importantly, Hungary should eliminate the core terms exemption and make the test of fairness applicable to the price. In terms

of variation clauses, regulation should spell out, as much as possible, the valid reasons for variation and specify the contractual price cap applies even after the increase in interest, fees and charges. Regarding default interest, regulation should set a cap on default interest. Defining the benchmark consumer and making the test of fairness flexible, especially extending its application to *social force majeure* situations would also raise the level of protection. As for enforcement, the Hungarian National Bank should use the powers and tools it has to provide for genuinely effective preventive enforcement of unfair terms. It should take a leading role in ultra-preventive enforcement.

The Serbian model could be improved by deleting certain references to transparency (i.e. eliminating transparency from the circumstances taken into account in the interpretation of the test of fairness) so as to be clear that transparency cannot legitimise substantive unfairness. Serbia should also introduce price caps. In this task it is important to take a right benchmark as the price, i.e. the APR, and to carefully set the numerical limit. In terms of variation clauses, regulation should specify, as much as possible, the objective and valid reasons for variation and extend the applicability of price caps onto price variations. Regulation should also set a cap on default interest. Additionally, in terms of procedural fairness, Serbia should extend the financial institutions duty to give additional explanations on the substance of contract terms. Finally, there is a need to raise awareness on the role and importance of the test of fairness. Regarding enforcement, the number of enforcement agents empowered to pursue collective actions should be extended, and the Serbian National Bank should take a leading role in ultra-preventive enforcement.

VIII. List of publications

1. Fairness of Contract Terms in European and Serbian Law In: *Strengthening Consumer Protection in Serbia-Liber Amicorum Svetislav Taboroši*, Thierry Bourgoignie, Tatjana Jovanić (eds.), Faculty of Law, Belgrade, 2013, 186-201;
2. The Impact of EU Norms and Policies on Consumer Protection Enforcement in Serbia, 34 *Journal of Consumer Policy* 247-268, 2013;
3. The Reform of Consumer Legislation in Serbia [Reforma potrošačkog zakonodavstva], 128-147 In: *Social Challenges of European Integrations: Serbia and Comparative Experiences*, Novi Sad, 2010;

4. The Features of the New Directive on Consumer Credit, *Collected Papers of the International Biannual Conference of the West University of Timisoara*, Bucharest 618-633, 2010;
5. Out-of-Court Consumer Dispute Resolution in Serbia: Current State and Recommendations for the Future [Vansudsko rešavanje sprova potrošača u Srbiji: sadašnje stanje i preporuke za novu zakonsku regulativu], In: *New Legal Solutions in Consumer Protection* [Nova zakonska rešenja u oblasti zaštite potrošača], 43-58, Kragujevac, 2009;
6. The Consumer in the Conditions of Socio-Economic Crisis: the Problem of Debtor Over-indebtedness with Special Emphasis on the Prevention of Over-indebtedness [Potrošač u uslovima društveno-ekonomske krize: problem prezaduženosti korisnika kredita sa posebnim osvrtom na prevenciju prezaduženosti], 219-239 In: *Individual, Family and Company in Conditions of Socio-Economic Crisis*, Novi Sad, 2009;
7. The Impact of Information on Responsible Lending and Responsible Borrowing in the European Union, 4(12) *Pravni život* 751-764, 2009;
8. Consumer Protection in Sales Transactions in Hungary, 49(4) *Acta Juridica Hungarica* 441-468, 2008;
9. Consumer Arbitration Boards in Hungary – a Model for Out-of-Court Consumer Dispute Settlement in Serbia? [Potrošačka mirovna tela u Mađarskoj – Model vansudskog rešavanja sporova potrošača u Srbiji?-], 57(13) *Pravni život* 483-500, 2008;
10. The Role of Stabilization and Association Agreement in Consumer Protection [Uloga Sporazuma o stabilizaciji i pridruživanju u zaštiti potrošača], co-author with Goran Papović, 1 *Izazovi evropskih integracija* 54-60, 2008;
11. Ombudsman in Vojvodina [Az ombudsman Vajdaságban], *Társadalom és Tudomány, Válogatás a II. Vajdasági Magyar Tudományos Diákköri Konferencia humán tárgyú dolgozataiból*, Novi Sad, 188-202, 2005.