Péter Pázmány Catholic University
Faculty of Law and Political Sciences

Some theoretic issues of foreign exchange-fixed loan agreements

doctoral theses

by

Dr. POMEISL András József

Supervisors:

Prof. Dr. CSEHI Zoltán

Prof. Dr. OSZTOVITS András

Manuscript closing date:
31st January 2020.

Budapest
2020.

I. The actuality of the topic

In the last decade, there have been few private law issues that have stirred as much social outrage as the issue of foreign currency debts disbursed between 2002 and 2009. This social outrage was mainly triggered by an increase in instalments due to a significant increase in the exchange rate of registration currencies against HUF, by a dramatic increase in the amount of debt denominated in HUF, which in practice meant that debtors were forced to repay much more of their income than expected, and in many cases the size of the instalment exceeded their real capacity, which ultimately led to enforcement and the loss of the properties offered as collateral.

From the very beginning, many have sought to remedy this social problem by means of law. In a specific way, however, it was not the institution of the clausula *rebus sic stantibus,* often used during economic crises, was called upon to help, but the validity of foreign exchange-fixed loan (and lease) agreements began to be disputed. In addition to the theoretically arguable argumentations, approaches creating completely unfounded expectations in the masses of debtors also appeared in the public discourse. It is largely due to the latter that the legal solution to this problem developed by the Curia is still surrounded by public debate.

It should also be emphasized that, unlike the false narratives of some actors, there was no ready-made answer to the assessment of foreign exchange-fixed contracts in either Hungarian or EU law. The Curia has in fact played a pioneering role in this field: it has applied the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ("the Consumer Directive") to such issues, with which the Court of Justice of the European Union previously did not address in relation with the interpretation of the Consumer Directive. The value of the legal solution developed by the Curia is shown by the fact that the Court of Justice of the European Union has subsequently accepted many elements of it as correct.

The author of the present dissertation is in the fortunate position of being able to follow the development of the Curia's legal practice and to take part of the internal debates leading to the development of the legal solutions as a secretary and then as a chief advisor working at the

Curia's Civil Department from the very beginning, so he has direct information on the elements of the legal argumentations which support the legal position of the Curia of Hungary.

II. The aim, object and method of the research

The aim of this dissertation is to explore the theoretical system of arguments that underlies the Curia's doctrinal guidelines and governing case law, and to build the statements of theoretical significance in the individual doctrinal guidelines and case-decisions into a unified, consistent system. Of course, in building this system, the author prefers the approach he has taken during the debates, and where some of the Curia's guidelines or case decisions reflect a different approach from this consistently represented principled position, he attempts to clash his own approach with different approaches. .

The author's working hypothesis during the preparation of this dissertation was that the Curia's approach to foreign currency-fixed financing cannot be considered new in the sense that it is based on those doctrines, in particular GROSSCHMID Béni's theory of monetary obligations, which was generally accepted in Hungarian private law even before the emergence of the "foreign currency credit" problem, and thus fits organically into the framework of Hungarian private law doctrines. The novelty of the case law of the Curia therefore stems not so much from the approach as from the novelty of the issues addressed and the reception of aspects of EU law.

Of course, the so-called foreign currency lending cases have brought to the surface several issues that are not closely tied to this construct. The author must therefore necessarily delineate what he wishes to examine. Given that most of the controversy to date is triggered by an assessment of the construction of foreign exchange-fixed lending, it seemed appropriate to put this issue at the centre of the study. As the Uniformity Decisions of the Curia, the research mainly covers consumer loan agreements[1] in respect of which the debtor's debt is denominated in a foreign currency (typically: Swiss franc, Euro or Japanese yen), but the actual disbursement and repayment happened in HUF under the loan agreement.

[1] The uniformity decisions of the Curia cover not only loan agreements but also financial lease agreements, but this dissertation basically deals with the issues raised by loan agreements; we will refer to the specific issues of financial leases only for the sake of context.

The dissertation basically examines two issues:
(A) the validity of the characteristic content of the contracts under review; and
(B) the applicability of additional legal consequences in the event of possible invalidity.

In connection with question (A), it should be noted that during the discussions it arose that the construction of a foreign currency loan agreement does not comply with the legal definition of a loan agreement because the object of the latter is a specific amount of money, as opposed to the indefinite amount of the principal amount expressed in HUF as the object of the foreign currency-based loan agreement. In view of this argument, the issue of the determination of the loan amount, the issue of conversion between the denomination and the pay-out currency, the issue of bearing the exchange rate risk, as well as the nature of the consideration included in the loan agreement had to be addressed.

Regarding issue (B), it was necessary to briefly summarize the ongoing debate on the deduction of the legal consequences of invalidity, referring to the various solutions proposed. The sub-areas of this issue are: the restorability of the original condition in case of invalidity of the loan agreement, the content of the amendment to render the contract valid, if the loan agreement is invalid due to the unfairness of the provisions placing the exchange rate risk on the consumer; the nature of the partial invalidity and, in this connection, the possibility for the court to intervene in the content of the contract; and, finally, the question of the limitation period for recovery claims arising from an invalid loan agreement.

Since the aim of the research was basically to explicate the theoretical approach underlying the doctrinal guidelines and case-law of the Curia of Hungary, it required a theoretical processing of the case law and a clash of different dogmatic approaches. To this end, we tried to process the Curia's doctrinal guidelines, the relevant case-by-case decisions on the one hand, and the position of the consultative bodies on the other hand. During this examination – striving for completeness – we reviewed almost 1000 substantive decisions of the Curia, of which the dissertation also names the decisions containing substantive findings within the scope of our topic among the sources used. On the part of the legal literature, it contributes to this the processing of general and topic-specific monographs and articles, so the Curia's approach can be placed in the broader context of Hungarian private law. In view of the international connections of the topic, we also refer in the appropriate places to the publicised decisions of

the Court of Justice of the European Union and of the Federal Court of Justice of Germany and of the Supreme Court of Austria, which are relevant to Hungarian case law in this field. Finally, it should be noted that in preparing the dissertation, we also used the experience of internal debates in the Curia and in the various court advisory bodies in which the author participated.

The method of his research is thus basically a dogmatic-analytical method, which is supplemented by the method of case study. The author did not consider the exploration of the economic background of this complex issue and the examination of social causes and effects within the framework of the present dissertation. We refer to them only to the extent that it is absolutely necessary to understand the different approaches or to delimit aspects that can be taken into account under private law (for example, to what extent a financial institution can expect the consumer to take into account aspects arising from its own operations).

III. ***The main findings of the dissertation***

In our dissertation, we attempted to examine the extent to which the Curia's doctrinal guidelines and case law on foreign currency-fixed loan agreements fit harmoniously into the general interpretation framework of private law by reviewing the relevant Hungarian legal literature and case law.

To this end, we first reviewed Béni GROSSCHMID's theory of money obligations, its main theorems, and its further life in the Hungarian legal literature and case law. It should be pointed out that GROSSCHMID distinguishes between real money debts, that is, debts for monetary value, and debts for genres of currency and for individual coins. The peculiarity of real money debts is the distinction between imposition and payment: while the former determines the size of the monetary value, the latter determines the method of performance. The structural feature of a debt in cash is that the amount of the debt is determined by the amount specified in the currency of imposition, which, however, must be settled in the currency of payment; the relationship between the two amounts is created by the conversion. Another feature resulting from the structure of a money-in-money obligation is that the currency of imposition is a constant component of the debt, while the currency of payment and the actual amount of payment vary depending on the place and time of the payment.

Due to the structure of the money-in-money obligation, the value of the cash debt is only constant in relation to the value of the currency of imposition. Value constancy is an essential issue of money indebtedness, arising from the nature of money, because the value in use of money is determined not by its material attributes but by its exchange value, which is not constant in different places and times. This variability is particularly pronounced in times of crisis; during the crises of the 1920s and 1930s, Hungarian jurisprudence sought to find practical answers to this phenomenon, breaking through the framework of GROSSCHMID's theory. However, these necessity solutions rather confirmed the correctness of GROSSCHMID's theory, since concessions made in the name of fairness were rightly criticized for changing the content of the legal relationship to the detriment of the other party and were therefore acceptable only in exceptional cases.

The doctrines of real money debts cannot be established without examining the specific nature of money. Reviewing the historical manifestations of money, it can be concluded that the quality of money is based on the performance of monetary functions, above all the function of the general exchange instrument. In terms of the legal nature of money, it is an asset of a nature that represents a generally recognized exchange value in trade; in that capacity it is not a thing, but a special asset which exhibits certain peculiarities of things determined by kind and quantity, and has a legal nature most similar to that of securities. As a result, a coin and a banknote are considered money, but so-called account money is not considered money, because although it has an exchange value, is in fact only a claim on money. The value in use of money does not, in fact, derive from the material attributes of its material carrier, but from its exchange value, so the use of money can be grasped in the possession and disposition of this exchange value, that is, in accumulation and payment.

This theoretical background helps to interpret and to assess the nature and essential features of foreign currency-fixed loan agreements. Due to the shortcomings of the legal regulations of the time, the 1. point of the Civil Law Uniformity Decision Nr. 6/2013. of the Curia clarified the concept of a foreign currency-fixed loan agreement: it is a loan agreement in which the currency of imposition according to the concepts of GROSSCHMID's theory is a foreign currency, while the currency of actual payment is the domestic currency. The difference between the currency of imposition and the currency of actual payment does not deprive the loan agreement of its essential character, it does not make the contract an investment transaction: the foreign currency only plays a role in determining the amount and thus the value of the debt, without any

obligation or right to provide actually foreign currency. The amount of the loan is fixed and constant in the currency of imposition, the amount of the actual payment can be determined on this basis by conversion.

According to the relevant legal provisions, the essential content of the loan agreement is the determination of the loan amount (including the indication of the currency of imposition), of the creditor's disbursement and the debtor's repayment obligations, of the term of the loan and, in the case of an onerous loan, of the consideration payable for loan, that is, of the interest rate. In connection with the latter, however, we are of the opinion that since the issue of interest is settled by a dispositive rule, the parties do not necessarily have to agree on the amount and charge of interest for the conclusion of the contract, under the § 205 (2) of the old Civil Code ("OCC") or under § 6:63 (4) of the Civil Code in force ("NCC").

The determination of the loan amount means the determination of the loan amount in the currency of imposition also in the case of a foreign currency-fixed loan agreement, so for the validity of the loan agreement – neither under § 210 (1), nor under § 213 (1) (a) of Act Nr. CXII of 1996 on Credit Institutions and Financial Undertakings ("OACIFU") – it is not necessary for the parties to specify it in the currency of actual payment as well. Under the Civil Uniformity Decisions Nr. 6/2013. and Nr. 1/2016., the determination of the amount of the loan is also appropriate if the contract quantifies only the amount of actual payment, but by defining the currency of imposition and referring to the conversion, it makes the loan amount in the currency of imposition clearly predictable at disbursement, if it is necessary, by application of dispositive rule [§ 231 (1)-(2) of OCC; § 6:45. of NCC].

A characteristic feature of a foreign currency-based loan agreement is the difference between the currency of imposition and the currency of actual payment, which, within the scope of performance, requires the conversion of the amount denominated in currency of imposition into the amount denominated in currency of actual payment. However, this conversion, as it is clear from the Point 1. of Civil Uniformity Decision Nr. 6/2013. and from Point 3. of Civil Uniformity Decision Nr. 2/2014., a mere mathematical operation (conversion), not a real currency exchange, as the role of the amount denominated in currency of imposition is only to determine the value (or quantity) of the money debt, therefore the financial institution might not devolve to the consumer the additional burden arising from the application of different kind of exchange rates used in disbursement and repayment. The clauses of the contract stipulating

to apply different kind of conversion rates depending on the person performing the contract, according to Point 3 of Civil Uniformity Decision Nr. 2/2014, as they create an additional payment at the expense of the consumer, which is not based on a real service, are unfair and therefore void, replaced by the dispositive legal provisions on conversion [§ 231 (2) OCC; § 6:45 (2) NCC]. This solution is based on the considerations set out in the judgment of the Court of Justice of the European Union in the case Nr. C-26/13, in the so-called Kásler case, and became law by § 3 of the Act Nr. XXXVIII in 2014 ("Dh1.").

The imposition of the loan amount in a foreign currency has the economic effect that the risk of a deterioration of the domestic currency against the currency of imposition is borne by the debtor. In view of this risk settlement, the validity of imposition of the loan amount in foreign currency was examined by the Curia from several point of view in Point 2 of Civil Uniformity Decision Nr. 6/2013. and in Point 2. of Civil Uniformity Decision Nr. 2/2014, based on a scheme in which the exchange rate risk arising from the disbursement of the loan amount in a foreign currency is offset by the stipulation of a more favourable interest rate than interest rate for domestic currency debts. The Curia found that this solution did not constitute a prohibited contract (i.e., it did not violate the law or good morals obviously), was not a usury, was not an impossible service, and was not a sham contract. These findings are in line with the Supreme Court's and the Curia's previous case law on prohibited, usurious contracts, impossible service or sham contracts.

In Point 1 of the Civil Uniformity Decision Nr. 2/2014, relying on the considerations set out in the Kásler case, Curia also stated that the construction in question was not in itself unfair in itself, but where the consumer, under standards for an average consumer, could not have been aware of economic consequences of imposition in a foreign currency, that is to say, the nature of the exchange rate risk and its effect on its obligation to pay, in the absence of adequate information then, as a condition which is not clear and comprehensible to the average consumer, the foreign currency loan is unfair and therefore null and void. This interpretation of the law has been confirmed and clarified on the one hand by the National Conference of Heads of Civil Departments and the Consultative Body established by the President of the Curia of Hungary and on the other hand by the Court of Justice of the European Union [C-186/16; C-51/17.].

This improved interpretation clarified that, in addition to the grammatically clear and unambiguous clauses of the contract concerning the currency of imposition, the consumer must

be informed separately of the nature of the exchange rate risk and the effect of the devaluation of the domestic currency against the currency of imposition. According to Hungarian practice, it is not considered appropriate information if the nature and effect of the exchange rate change can only be inferred from the joint interpretation of several contractual provisions, but it cannot be objected to if the information is recorded in the contract document as a separate, well-recognizable structural unit.

As regards the content of the information, domestic practice requires that the consumer's attention be drawn to the fact that there is no upper limit to exchange rate fluctuations, that the effects are borne solely and directly by him, and that his payment obligations may increase significantly. The information need not cover the expected direction and extent of exchange rate changes; if this happens, the financial institution is liable of its correctness. It should also be clear from the information that the possibility of an unfavourable exchange rate change is real, i.e. it can occur during the term of the loan. Not only the documents signed by the consumer are relevant to the adequacy of the information, but also the information provided orally to the consumer and the advertisements published by the financial institution must be considered.

The provision and content of the information must, in principle, be proved by the financial institution, but the consumer could rebuttal. Among the adequacy of the information, the civil law principles of expectability and of good faith and fairness are also relevant: the consumer could not claim that he has not read the information provided to him in writing, but that he has received information which would have not been clear and understandable for an average consumer. The consumer is also expected to ask questions and ask for further information if he does not understand something, but in assessing whether the consumer has acted with due care when not requesting further information from the financial institution, the wording of the contract, which could be incidentally ambiguous, vague, complicated wording for an average consumer, must be also taken into account.

It follows from the principles of good faith and fairness, the principle of declaration and the nature of unfairness, which in principle gives rise to partial invalidity, that if, on the basis of the information, the average consumer may have a misconception that there is a specific, identifiable upper limit for exchange rate risk, however, the contract is invalid in its entirety due to the invalidity of the imposition, but in the context of the amendment to render the contract valid, the ground for invalidity is eliminated by relieving the consumer only of exchange rate

risk in excess of this specific amount. However, if the nature or significance of the exchange rate risk is not apparent from the information as measured by an average consumer, the consumer shall not be obliged to bear the exchange rate risk at all.

In a loan agreement, the typical consideration for making the loan amount available is interest. In order to conclude the contract, the parties, under § 205 (2) OCC or § 6:63. § (4) NCC, they not necessarily have to agree, as the dispositive rule contained in § 232 OCC or § 6:47 NCC settle this issue. However, under § 210 (2) OACIFU, the contract is invalid if the written contract does not specify the transaction interest; under § 213 (1) (c) OACIFU, the consumer or retail loan agreement, which does not include the percentage of interest, is also null and void. In the latter cases, however, the contract could be amended to render it valid by the court fixing the rate of interest in the contract. However, the case-law is not entirely uniform as to whether, in the case of a formally invalid interest rate clause, the interest rate to be determined on the basis of the circumstances and the statements of the parties, or the statutory interest rate should be applied; in any case, the Curia takes the former position.

Regarding the interest rate agreed by the parties, the question of whether the interest rate is excessive may arise. In assessing this issue, the theoretical reasons for the obligation to pay interest, the functions of the interest as well as the term and amount of the money debt, the circumstances of concluding the contract and the purpose of the contract must be taken into account. Both theoretical considerations, historical background and case law support that the basic point of alignment is the statutory interest rate, and an interest rate of more than twice this can generally be considered excessive. Of course, the short maturity of a debt and other special circumstances may justify a higher interest rate, and for longer maturities, a weighted average of the statutory interest rates may be considered if the interest rate is constant over the term. It should be noted that German practice also considers twice the reference rate as presuming the immorality of the clause, although it should be pointed out that the rate in question there is not in fact the transaction rate in the narrower sense, but the so-called effective interest rate, identical to the APR according to Hungarian terminology. In both Hungarian and Austrian practice, in the case of interest rate linked to a reference value, the issue of so-called negative interest has arisen, which is excluded by law [Ptké. 52 / A. §] in Hungary, and by the case law of the Supreme Court in Austrian law.

In practice, the question of the admissibility of over-interest payment obligations has arisen. According to the practice of the Curia, it is not forbidden to stipulate a payment obligation other than interest in the loan agreement (it does not contradict the law or good morals obviously, cf. EBH 2012.G.4), however, the prohibition or unfairness of the stipulation of certain payment obligations can be examined on the merits. From the resolutions of the Consultative Board and the judgment of the Court of Justice of the European Union in Case C-621/17, the general principles governing the finding of unfairness of certain items of expenditure could be outlined.

A cost may be considered unfair if it is not clear from the contract or legislation what kind of service it is for, or if it is not possible to determine whether there is an overlap between the consideration reimbursed for each cost item. It is also unfair if the consideration charged to the consumer is not the actual consideration for a service provided to the consumer or the consumer is charged multiple payments for the same service, unless it can be established that the consumer has not suffered a real disadvantage as a result of this special payment obligation, as another consideration has been reduced proportionately to offset the disadvantage to the consumer. It is also unfair if the loan agreement stipulates the mandatory use of a service that involves unreasonable or disproportionate costs for the performance of the loan agreement.

The practice of the Curia clearly distinguishes between the costs connected to the loan (and therefore to be included in the APR and to be included in the loan agreement) and only the costs "related" to the loan agreement. In its view, the cost of the loan is not a payment obligation entered into by the consumer with a third party (1) under a contract which is not mandatory for the disbursement of the credit; (2) an obligation to pay under a contract prescribed as a precondition for the disbursement of the credit if (a) it is prescribed by law, or (b) the third party is freely chosen by the consumer; or (c) the contract is not limited to the purposes of the loan agreement.

The Curia examined the formal and substantive conditions for determining each cost item. The Curia stated that the individual cost items can be specified not only in the document signed by the consumer, the so-called individual loan agreement, but also in the general terms and conditions included in the separate document and in the Announcement. The requirement of "unambiguousness" in § 210 (2) OACIFU is not the same as defining the concept of the given service and including this concept into the contract, therefore the requirement of unambiguity is also met if the contract includes the indication of the cost, fee, commission and its amount or

extent. Determining the percentage of one-off costs is neither justified nor a condition for the validity of the contract. If a financial institution does not wish to charge a cost item, it may indicate this in the contract at zero value, however, in the case of a zero value, it is not mandatory to indicate the cost item in the contract, because the non-existent cost item does not qualify as a cost.

With regard to the legal consequences of incorrect definition of individual cost items or unjustified disregard for the calculation of the APR, the Curia's position is that if a cost had not been taken into account in the determination of the APR and, consequently, the APR had been incorrectly indicated, the circumstance does not result in the nullity of the contract in the same way as if the costs, fees or part of them are not clearly specified in the contract; the latter has the only consequence that the financial institution may not charge unspecified costs and fees.

A review of the German and Austrian practice on cost items shows that German and Austrian practice treat many issues in the same way as Hungarian case law, but there are differences in many respects, partly due to differences in applicable legislation and partly in approach. In general, it can be stated that the Austrian Supreme Court practice is significantly more permissive in judging costs above interest than the Hungarian case law, which in many respects is closer to the stricter German practice. A good example of this is the position taken in connection with the one-time management fee (*Bearbeitungsgebühr*), which can be identified with the Hungarian disbursement commission, which the OGH found acceptable, while BGH described it as unfair.

The Hungarian and German approaches agree in that it interprets the scope of clauses that are not subject to content control narrowly and understands only the typical services and consideration on it. The German case-law, similarly to the Hungarian practice, unlike the Austrian practice, attaches importance to dispositive rules not only in terms of assessing disadvantage but also in terms of their investigability, suggesting that not only the unfairness of the clauses deviating from the dispositive rule, but also the unfairness of the clauses supplementing can be examined on the merits. The German case-law is also closer to the Hungarian one in that, in contrast to the Austrian case-law, it does not attach importance to whose act the given cost item was incurred, but to whose interest it serves and judges this issue strictly. Finally, the German case-law, in contrast to the Austrian case-law, requires that the fees be proportionate to the service provided, and regarding the transferred costs, it requires the

actual occurrence as well as the Hungarian case law. An important difference, however, is that that under Hungarian law the absence of mandatory elements of a consumer loan contract results in partial or total invalidity, under German law the disbursement of the loan remedies this invalidity (but the consideration is limited to statutory interest), while Austrian case law orders the application of the legal consequences of error or damage.

Regarding the legal consequences of the invalidity of a foreign currency-fixed loan agreement, we pointed out that the dogmatic background of further legal consequences is still disputed. Lajos VÉKÁS – in the wake of Endre NIZSALOVSZKY – sees the dogmatic basis of the restoration of the original state in *rei vindicatio*, the basis of other legal consequences in unjust enrichment, while Attila HARMATHY – also in the wake of NIZSALOVSZKY – distinguishes unjust enrichment from the legal consequences of undue payment.

For our part, we see that the "restoration of the former state" used in the old law cannot be identified with the restoring the original condition (in kind) regulated in § 237 (1) OCC or § 6:112 NCC, but encompasses a broader scope, which means reversing in kind or in value the changes that occur during the performance of an invalid contract according to the rules on reimbursement of unclaimed service, which are not actually codified in the Civil Code. For this reason, a claim for the application of additional legal consequences is a single obligational claim, of which restoration the original condition or compensation for unjust enrichment are only one of its manifestations.

After reviewing the discussion on the restorability of the original condition in the Case Law Analysis Group and then its legal literature, we took the position that the restoration of the original condition was applicable even in the event of the invalidity of the loan agreement, given that the changes given from the increase in the value of assets due to the performance of the contract can be reversed in all cases. In this connection, GROSSCHMID's teachings on the nature of real money debt are relevant, according to which the essence of money debt is to provide the amount of value represented by the amount of money disbursed; if this is true, then the consequence of the fulfilment of the monetary obligation is the appearance of this amount of value in the property of the beneficiary even in the case of a loan contract. We also pointed out that the issues arising from the timeliness of the loan debt can be resolved among the additional claims arising from the lapse of time as an additional factual element, by setting an equivalent interest rate proportional to the cost of providing an alternative source.

We have also briefly reviewed the issues of partial invalidity, given that the unfairness of individual clauses typically causes partial invalidity. It can be stated that the positions in the legal literature also do not agree on whether partial invalidity is a *sui generis* legal consequence of invalidity or a special situation of invalidity. For our part, we see that there are cases of partial invalidity where partial invalidity is a *sui generis* legal consequence which results in the invalid part falling out from the contract without the possibility of active judicial intervention, whereas in other cases it constitutes a special factual situation in which the part of the contract which may be interpreted as a separate contract becomes void, in respect of which active judicial formation is also permitted.

We also referred to that that the rule of partial invalidity of consumer contracts in § 239 (2) OCC and § 6:114 NCC is in fact a result of a misinterpretation or misunderstanding of Article 6 (1) of Directive 93/13/EEC. It is clear from the relevant case law of the Court of Justice of the European Union [C-453/10; C-38/17; C-126/17; C-260/18.], that it is a question of national law whether a contract concluded with a consumer may be maintained in the event of it contains an unfair term, and it is not decisive in that regard whether that is detrimental to the consumer, however application of a dispositive rule as a contractual term to save the contract can be justified by the fact that the total invalidity of the contract would be particularly detrimental to the consumer.

Finally, in connection with partial invalidity, we described the solution to be applied in the case of partial unfairness of imposition in foreign currency, developed by the National Conference of Heads of Civil Departments and confirmed by the Consultative Board, according to which in such cases the contract should be amended to render the contract valid in such a way, that the original currency of imposition and interest rate remain unchanged, but the conversion rate shall not exceed an maximum value that is clearly appeared from the credible information.

We also pointed out that in addition to the amendment to render the contract valid with the described content, a special partial invalidity legal sanction could be applied in cases where the foreign currency-fixed lease payment/instalment was determined in HUF under the contract and the exchange rate difference was charged to the consumer retrospectively and periodically; provided that, in such cases, only the clause relating to the charging of the exchange rate

difference was declared invalid, thereby nevertheless relieving the consumer entirely of the exchange rate risk for lack of adequate information.

Among the other legal consequences of invalidity, we also addressed the issues of amendment to render the contract valid validity or of declaration of contract in force, in particular the issues arises regarding amendment to render the contract valid validity or of declaration of contract in force of foreign currency-fixed loan agreements, namely the determination of the currency of imposition and the issue of changing interest rate. In this context, our position is that there is neither a need nor a way to currency of imposition in these cases, provided that the imposition clause is not invalid for reasons of its content or errors of will. However, if the method of imposition changes, the interest rate, which is also adjusted to the currency of the imposition also in the case of statutory interest rates, should be changed accordingly, preferably to reflect the consensus of the parties and the material circumstances of the transaction, and can be defined by leaving the interest premium unchanged.

In view of the differences between the two solutions raised at the meeting of the Consultative Board on 19 June 2019, we briefly outlined the EU legal argument and the practical circumstances under which the two solutions are considered equivalent in terms of EU-law adequacy and actual numerical outcome, namely that that the disadvantage suffered by the consumer as a result of the unfair imposition of debt and from which the consumer must be exempted pursuant to Article 6 (1) of Directive 93/13/EEC is the excess over the HUF-denominated loan of the same principal amount and it is only a technical matter that the reimbursement of this surplus will be made possible by the fact that the contract has been amended to render contract valid with the same content as this HUF denominated loan, or that the exchange rate risk is limited to the extent that this additional payment obligation does not burden the consumer.

Lastly, we examined the issue of the obsolescence of overpayment due to the partial invalidity of the loan agreement. In our opinion, although the limitation period starts at the time of repayments, but as the debt due is to be accounted for primarily in good faith and fairness, these claims become extinct when the next instalment is due and the cumulative claims can only lapse after the debtor has fulfilled all its payment obligations because after that there is no more debt to which they can be accounted for. In comparison, we consider that the Dh2.tv. its detailed

settlement rules do not introduce a special regime but specify the general rules of the Civil Code for the given case.

Based on the comparison of Hungarian legal practice and legal literature, it can be stated that within the framework of the Curia's case law on foreign currency-fixed loan agreements, on the basis of the doctrines of private law, taking into account the principles of private law, and based on the previous case law of the Supreme Court and the Curia, the Curia of Hungary established a framework of interpretation in which individual legal issues can be appropriately separated and adjudicated. It should also be clear that the Curia has played a pioneering role in this field at EU level as well: It was not the case that the solutions already ready in EU law had to be applied to cases covered by Hungarian private law, but rather that the Curia was the first to apply the rules of Directive 93/13/EEC to certain special cases in this area of law, and solutions it has developed have been declared compatible with EU law by the Court of Justice of the European Union so far.

Based on the Hungarian experience of lawsuits related to foreign currency-based loan agreements, it would be expedient to set out the most important principles in special rules for the future. Thus, in order to increase transparency, it would be appropriate to enshrine in law, at least for consumer contracts, the "one service, one consideration" principle, i.e. to prohibit the unjustified breakdown of the consideration for a service. It would be appropriate to stipulate that an additional payment obligation in addition to interest in a consumer credit agreement may be imposed only if it compensates for an independent ancillary service provided by the creditor or a third party to the consumer in order to conclude or complete the transaction, or in the case of an ancillary service normally or necessarily accompanying the loan agreement, provided that the typical principal service (interest) is reduced proportionately in that regard.

In any case, it would be appropriate to define in law the concept of each type of cost item (interest, fee, cost, commission) and to require its consistent use in contracts, sanctioning infringements of this rule to the extent necessary, either by giving rise to a presumption of unfairness as a result of the use of a misleading name, or by having the unfairness examined by a court in accordance with the rules applicable to that type of cost. In the case of costs, the justification of the cost and the actual occurrence should be examined, in the case of a commission, it should be examined whether it is a fee for the intermediation of a service

provided by a third party for the benefit of the consumer and, in the case of a fee, whether the remunerated service is actually provided to the consumer by the lending financial institution.

It would also be worth considering the legal consequences: if possible, contracts should not be overturned. Accordingly, in the absence of mandatory content, it would be appropriate to adopt the German solution, according to which the invalidity of the loan amount is remedied by the disbursement of the loan amount (possibly as if the foreign currency-based imposition is not clear, the loan should be considered to have been imposed in HUF), but for interest and other payment obligations have the effect that only the statutory interest rate can be charged after the loan amount.

If the EU's expectations regarding legal consequences are clarified, it would be appropriate to lay down in law the legal consequences applicable in the event of invalidity of the imposition. At that time, I had already indicated this to the Ministry of Justice in connection with the codification of the Act Nr. LXXVII. of 2014, but then it was left out, because the ministry was of the opinion that legislation cannot remedy the invalidity of contracts by eliminating the cause of invalidity. However, I think this is an unfounded concern and would greatly increase legal certainty if these contracts were to be amended to render valid by law, with the content it defines.

In the light of the experience of settlement, it would be appropriate for consumer loan agreements to require the bank, during the settlement of the monthly repayments, shall indicate its receivables and the amounts received separately for each payment entitlement, specifying the amount of payment obligations and the data taken into account in their calculation, and keep this accounts for five years after the termination of the contract. In many cases, the consumer was unable to indicate his claim precisely because he had no idea what data the bank was counting on, and in many cases the banks also did not know the parameters that existed at an earlier date, even for current loans.

IV. The author's publications related to the topic of the dissertation

We must point out that several resolutions published by the various consultative bodies of the Curia have been drawn up based on the author's submission, with their essentially unchanged adoption. In addition, the following studies related to the topic of the dissertation were published specifically under the author's name:

1. POMEISL András József: Néhány gondolat a semmisségről. *Gazdaság és Jog*, XII. évf. (2004.) 11. sz., 3-9.
2. POMEISL András József: A kezes és a gazdasági társaság tagja felelősségének (mögöttes felelősség) elévülése. *Iustum, Aequum, Salutare*, III. évf. (2007) 3. sz., 191-200.
3. POMEISL András: XXVI fejezet: A szerződés megszűnésének egyes esetei Az elévülés. In: OSZTOVITS András (szerk.): *A Polgári Törvénykönyvről szóló 1959. évi IV. törvény magyarázata*, Budapest, OPTEN, 2011, 1117-1185
4. POMEISL András József: Két Ptk. között. A 2009. évi CXX. törvény érvénytelenséggel kapcsolatos általános szabályai. *Ügyvédek Lapja*, L. évf. (2011.) 1. sz., 6-10.
5. POMEISL András: Egyéb kötelemkeletkeztető tényállások. In: WELLMANN György (szerk.) *Polgári jog. Kötelmi jog. – Az új Ptk. magyarázata VI/VI.* Harmadik, Negyedik, Ötödik és Hatodik rész. Budapest: HVG-ORAC, 2013, 534-566.
6. POMEISL András József: Mikor uzsora az usura? In: CSEHI Zoltán et ali. (szerk): *(L)ex cathedra et praxis – Ünnepi kötet Lábady Tamás 70. születésnapja alkalmából*. Budapest, Pázmány Press, 2014., 205-219.
7. POMEISL András: Külföldi kirovó pénznem magyar törvényben? *Ügyvédek Lapja*, LIV. évf. (2015), 12-18.
8. POMEISL András József – WELLMANN György: Emlékeztető a DH. törvények hatálya alá tartozó szerződések érvénytelenségével kapcsolatos perekkel foglalkozó konzultációs testület 2016. szeptember 28. napján tartott üléséről. *Kúriai Döntések – Bírósági Határozatok*, LXIV. évf. (2016) 12. sz., 1500-1508.
9. POMEISL András József – WELLMANN György: Emlékeztető a DH. törvények hatálya alá tartozó szerződések érvénytelenségével kapcsolatos perekkel foglalkozó konzultációs testület 2016. szeptember 28. napján tartott üléséről. *Kúriai Döntések – Bírósági Határozatok*, LXI. évf. (2017) 1. sz., 130-134.
10. POMEISL András József: A devizaalapú kölcsön fogalmi elemei és konstrukció jogi megítélése a Kúria gyakorlatában. *Acta Humana*, 2017/4. 71–88.
11. POMEISL András: Hatodik rész: Egyéb kötelemkeletkeztető tények. In: WELLMANN György (szerk.): *Az új Ptk. magyarázata VI/VI. – Kötelmi jog Harmadik, Negyedik, Ötödik és Hatodik Rész*, Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2018, 703-736.
12. POMEISL András József: Az árfolyamkockázatot a fogyasztóra telepítő szerződési kikötés tisztességtelensége esetén alkalmazandó jogkövetkezmény. In: BODZÁSI Balázs (szerk.): *Gazdasági jogi és adójogi tanulmányok*, 2020, Budapest, Corvinus, 2020, 258-260.