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CJEU Decision on Unfair Terms

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A recent decision of the Court of Justice of the European Union (CJEU) has set limits on the ability of national courts to intervene to save a contract which contains unfair terms. Article 6(1) of the Unfair Contract Terms Directive (93/13/EEC) (implemented in Ireland by EC (Unfair Terms in Consumer Contracts Regulations) 1995), regulates contracts between consumers and businesses. Unfair terms in consumer contracts must not be binding on consumers but the contract will stand, if possible, without the unfair term. Generally, a court may not rewrite a contract by implying more reasonable terms into it. In *Kásler and Káslerné Rábai* (Case C-26/13), the ECJ had ruled that, where a consumer contract cannot continue in existence after an unfair term has been deleted, the national court could cure the invalidity of that term by substituting for it a “supplementary provision of national law” if to annul the contract would have unfavourable consequences for the consumer. The recent decision of *Dziubak and another v Raiffeisen Bank International AG* (Case C-260/18), established the limits of the *Kásler* exemption. The court ruled that gaps resulting from the removal of unfair terms cannot be filled by national law provisions of a general nature; only “supplementary provisions of national law” or terms agreed by the parties may be relied on to preserve a contract. The ECJ confirmed that courts can only save a contract in these circumstances if the consumer agrees to it. Even if the court considered that annulling the contract would have unfavourable consequences for the consumer, the wishes of that consumer prevail.

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