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Advocate General's Opinion in Case C-26/13
Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt

According to Advocate General Wahl, contractual terms which provide, in respect of the advancement of a loan in foreign currency, for the use of an exchange rate which differs from that used for the repayment of the loan are not necessarily exempt from an assessment as to whether they are unfair

While such terms may, in principle, be considered to be included within the main subject-matter of a loan contract denominated in foreign currency, it is nevertheless for the national court to determine whether the consumers were in a position to understand that they would be subject to additional expense by reason of the difference between the two rates of exchange

The Unfair Terms in Consumer Contracts Directive¹ provides that consumers are not bound by unfair terms in a contract concluded with a seller or supplier. However, with regard to terms which define the main subject-matter of the contract and the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, the directive provides that it is not possible to assess the unfair nature of those terms when they are in plain intelligible language.

On 29 May 2008, Mr Kásler and Mrs Káslerné Rábai concluded a contract for a mortgage loan denominated in foreign currency with a Hungarian bank. The bank granted the borrowers a loan of 14 400 000 Hungarian forints (HUF) (approximately €46 469), the equivalent value of which in Swiss francs (CHF) was fixed at CHF 94 240.84. According to the terms of the contract, Mr and Mrs Kásler took formal note of the fact that, in addition to the loan, the related interest, the administration fees and default interest and other charges would also be determined in CHF.

The contract further stipulated that the amount of the loan in CHF would be determined at **the buying rate** for that currency, applied by the bank on the date of advancement of the funds. However, under the contract the amount in HUF of each monthly instalment due was to be determined, on the day preceding the due date, on the basis of **the rate of exchange applied by the bank for the sale of CHF**.

Mr and Mrs Kásler challenged the term which allowed the bank to calculate the monthly instalments due on the basis of the selling rate for CHF before the Hungarian courts. They claim that this clause is unfair in so far as it provides, for the purposes of repayment of the loan, for the application of a different exchange rate to that used for the advancement of the loan.

The Kúria (Hungarian Supreme Court), before which the case was brought on appeal, asks the Court of Justice whether the term determining the rates of exchange applicable to a loan contract denominated in foreign currency relates to the main subject-matter of the contract or to the value for money of the services supplied under it. If that is so, it seeks to ascertain in what case such a term must be considered to have been drafted in plain intelligible language, with the effect that its unfair nature cannot be examined on the basis of the Directive. The Hungarian court also wishes to determine whether, in the case where the contract cannot remain in existence following the deletion of an unfair term, the national court is authorised to amend or supplement the contract.

¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

In his Opinion delivered today, Advocate General Nils Wahl states, first, that, in order to establish what constitutes the main subject-matter of a contract, it is necessary to determine, in each specific case, which obligation(s) can objectively be regarded as essential within the general scheme of the contract. It is thus necessary to examine whether the terms in question intrinsically form part of the obligations that define the contract, with the result that, in the absence of such terms, the contract would lose one of its fundamental characteristics, or even could not be performed on the basis of the remaining contractual stipulations.

In that context, Advocate General Wahl takes the view that, in the case of a contract specifically denominated in foreign currency (such as that at issue in the present case), **the terms determining the applicable rates of exchange**, like those relating to the provision of the capital and the payment of interest, **form part of the main subject-matter of the contract**. They constitute one of the essential components of the mechanism of a loan in foreign currency since, in the absence of those terms, performance of the contract would be impossible.

Second, as regards the issue of whether those terms were drafted in plain intelligible language, the Advocate General is of the opinion that the examination of that criterion should not be limited purely to the words in which those terms are drafted. The plain and intelligible character of a contractual term must ensure that the consumer has information on the basis of which he will be able to assess the advantages and disadvantages of concluding the contract and the risks involved in the transaction. Consequently **the consumer must understand not only the content of a term, but also the related obligations and rights**.

So far as concerns the loan contract in question here, Advocate General Wahl takes the view that the contractual stipulations relating to the rate of exchange applicable to the advancement and to the repayment of the loan respectively appear to have been set out in plain language. He nevertheless considers that **there may be doubts as to whether the consumer was in a position to understand that he would be subject to additional expense stemming from the difference between the selling price for the foreign currency and the buying price for that currency**. In that regard, it is, in Mr Wahl's view, for the Hungarian Kúria to answer that question in the light of the objective information available when the contract was concluded.

Lastly, the Advocate General takes the view that, where the deletion of an unfair term would make performance of the contract impossible, as in the present case, **the Directive does not preclude the national court from replacing the term at issue with a supplementary provision of national law**, where such a replacement is possible under national law. Such an approach makes it possible to attain the Directive's objective, which consists, inter alia, in restoring a balance between the parties while preserving, as far as possible, the validity of the contract as a whole.

If such a replacement were not permitted and the court were required to annul the contract, the deterrent effect of the penalty of invalidity and the objective of consumer protection could be jeopardised. In the present case, the effect of such an annulment would be to render due the full amount of the balance of the loan. That, however, is liable to be beyond the consumer's financial capacities and, therefore, to penalise the consumer rather than the lender, who, in the light of that consequence, might not be encouraged to avoid including such terms in its contracts.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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