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Court of Justice of the European Union

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Judgment in Case C-26/13

Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt

Consumers who contract a loan in foreign currency must be able to assess the economic consequences of the application of a rate of exchange (the selling rate) to the repayment of the loan which is different from that applicable to the calculation of the amount of the loan when it is made available (the buying rate)

The national court may substitute a provision of national law for an unfair term in order to re-establish a balance between the parties to the contract and to preserve its validity

The directive on unfair contract terms¹ provides that unfair terms in a contract concluded with a seller or supplier are not binding on consumers. However, as regards terms which define the main subject matter of the contract and adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, the directive authorises the Member States to provide in the national implementing legislation that those terms are not subject to an assessment of their unfairness provided they are in plain, intelligible language. The Hungarian legislation implementing the directive provides for such exclusion.

On 29 May 2008, Mr Kásler and Ms Káslerné Rábai concluded a contract for a mortgage denominated in a foreign currency with a Hungarian bank. The bank granted the borrowers a loan of 14 400 000 Hungarian Forints (HUF) (approximately €46 867).

The contract stipulated that the fixing in Swiss francs of the amount of the loan was to be made on the basis of **the buying rate of exchange** of that currency applied by the bank on the day the funds were advanced. In accordance with that term, the amount of the loan was fixed at CHF 94 240.84. However, under the contract, the amount in Hungarian forints of each monthly instalment to be paid was to be determined, on the day before the due-date, on the basis of **the rate of exchange applied by the bank to the sale of Swiss francs**.

Mr and Mrs Kásler brought an action before the Hungarian court challenging the term, which authorises the bank to calculate the monthly instalments due on the basis of the selling rate of exchange of the Swiss franc. They rely on the unfairness of that term, in so far as it provides, for the purpose of repayment of the loan, for the application of a rate different from that used when the loan was made available.

The Kúria (Hungarian Supreme Court) hearing the case on appeal, asks the Court of Justice whether the term concerning the exchange rate applicable to a loan contract denominated in foreign currency concerns the main subject matter of the contract or the quality/price ratio of the goods or services supplied. It also wishes to know whether the contested term may be regarded as being in plain, intelligible language, so that it is not subject to an assessment of its fairness pursuant to the directive. Finally, the Hungarian court wishes to know whether, if the contract cannot continue in existence if the unfair term is deleted, the national court is authorised to amend or supplement the contract.

The Court recalls, first of all, that the prohibition on determining the unfairness of terms relating to the main subject-matter of the contract must be interpreted strictly and may be applied only to terms laying down the essential obligations of the contract. It is for the Kúria to determine whether

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

the contested term constitutes an essential obligation of the contract concluded by Mr and Ms Kásler.

Furthermore, the Court notes that the examination of the unfairness of the term at issue cannot be avoided on the ground that that term relates to adequacy of the price and the remuneration on one hand as against the services or goods supplied on the other. That term merely determines the conversion rate between Hungarian florints and Swiss francs for the purpose of calculating the repayments, without the lender providing any foreign exchange service. In the absence of such a service, the financial costs resulting from the difference between the buying and selling rates of exchange, which must be borne by the borrower, cannot be regarded as remuneration due as consideration for a service.

Second, the Court states that a term defining the main subject matter of the contract is exempt from an assessment of its unfairness only if it is in plain, intelligible language. In that connection, the Court states that that requirement is not limited to clarity and intelligibility from a purely structural and grammatical point of view. To the contrary, the loan contract must set out in a transparent fashion the reason for and the particularities of the mechanism for converting the foreign currency. Thus, it is for the Kúria to determine whether **the average consumer, who is reasonably well informed and reasonably observant and circumspect**, on the basis of the promotional material and information provided by the lender in the course of negotiating the loan contract, would not only be aware of the existence of the difference between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to **assess the consequences arising from the application of the selling rate of exchange for the calculation of the repayments and for the total cost of the sum borrowed**.

Finally, the Court observes that, if the deletion of an unfair term renders the contract unenforceable, as in the present case, **the directive does not preclude the national court from substituting the contested term with a supplementary provision of national law**. Such an approach enables attainment of the aim of the directive, which consists in re-establishing a balance between the parties while preserving, as far as possible, the validity of the contract as a whole.

If such a substitution were not allowed and if the court were obliged to annul the contract, the dissuasive nature of the penalty of nullity and the objective seeking to protect consumers might be jeopardised. In the present case, such an annulment would have the consequence that the whole of the outstanding sum would become due. That is likely to be in excess of the consumer's financial capacities and, as a result, to penalise him rather than the lender who, in the light of that consequence, might not be dissuaded from inserting such terms in its contracts.

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 judgment is published on the CURIA website on the day of delivery.

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