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CJEU loan in Swiss francs unfair terms in consumer contracts

On 09.07.2020, the CJEU delivered its judgement in Case C-81/19 NG and OH v SC Banca Transilvania SA concerning the unfairness of a term of a refinancing agreement denominated in a foreign currency, namely in Swiss francs.

This preliminary ruling concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), of which the article 1 paragraph 2 provides that the contractual terms which reflect mandatory statutory or regulatory provisions shall not fall into the scope of this directive. Further, pursuant to article 3 paragraph 1 of this directive a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Firstly, the CJEU has noted that the article 1 paragraph 2 of Directive 93/13 introduces the possibility of exclusion from the scope of the directive and that exclusion is to be interpreted strictly. As a result, it is for the national court to determine whether the contractual term in question reflects mandatory provisions of national law that apply between contracting parties independently of their choice or provisions that are supplementary in nature and therefore apply by default, that is to say, in the absence of other arrangements established by the parties in that respect (points 23-28).

To this extent, the CJEU has held that *"the wording 'mandatory statutory or regulatory provisions' within the meaning of Article 1(2) of Directive 93/13 also covers, in the light of the 13th recital of the directive, supplementary rules, that is to say, rules which apply between contracting parties provided that no other arrangements have been established. From that perspective, that provision makes no distinction between provisions which apply between contracting parties irrespective of their choice and supplementary provisions"*. Thus, the supplementary rules of national law are always exempt from a fairness assessment under the Unfair Contract Terms Directive (93/13/EEC) (point 34-36).

On the contrary, according to the Opinion of Advocate General Kokott, the assessment of whether a term reflects a mandatory statutory provision shall exempt from the fairness requirement in the Unfair Contract Terms Directive. Therefore, the court must consider whether the statutory provision was intended to protect consumers. As a result, a court may plug the gap in a contract to re-establish an equal position between the parties.

Nevertheless, the CJEU rejected the Advocate General's suggestion that the court should assess whether the legislature had intended that the supplementary rules should establish a reasonable balance between the parties to the relevant contract.

To this end and in the context of this legal issue, Greece's Supreme Court (*Areios Pagos* in Greek) in its judgement 4/2019 has also concluded that the wording "mandatory statutory or regulatory provisions" within the meaning of Article 1 paragraph 2 of Directive 93/13 covers not only *ius cogens* but also *ius dispositivum* provisions. In that context, the provision of Greek Consumer Protection Law (Law 2251/1994) on "General Unfair Terms" (GOS in Greek) shall not fall into the scope of this Directive. For this reason, the contractual term of a loan agreement providing that the repayment of the loan will be effected in euro or swiss francs at the current rate has a denotative meaning and thus it shall not be subject to assessment of unfairness.

For further information:

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-07/cp200089en.pdf>

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