

European Union, CJEU, Banif Plus Bank, Judgement of 21 February 2013

Deciding bodies and decisions

Appeal Court (Budapest Municipal Court)

Court of Justice of European Union

Area of law

Consumer protection

Subject matter

invalidity of unfair contractual terms

ex officio power of judge

Summary Facts Of The Case

The credit agreement between Mr Csaba Csipai and Banif Plus Bank was concluded through a standard form contract. The latter included a clause that allowed the Banif Bank Plus to claim for the full amount of the loan as well as default interest and costs in case of breach of contract by the borrower. As Mr Csipai paid only part of the instalments defined by the contract, the bank terminated the agreement and presented a claim in front of the Pest Central District court in order to recover the debt. As Pest Central District Court evaluated ex officio the clause as unfair, it allowed the parties to comment, then decided the case on 6 July 2010 addressing the contract excluding the unfair clause.

Banif Plus Bank appealed against that decision before the Budapest Municipal Court, which decided to stay the proceedings and to refer the following questions:

‘Are the procedures of a national court consistent with Article 7(1) of [the Directive] if, where a contract term is held to be unfair, and the parties did not submit a claim to that effect, the court informs them that it holds sentence 4 of clause 29 of the standard contract terms of the loan agreement between the parties to the proceedings to be invalid? That invalidity arises from breach of the legislation, namely Paragraphs 1(1)(c) and 2(j) of Government Decree No 18/1999 ...

In the circumstances of the first question, is it permissible for the court to direct the parties to the proceedings to make a statement in relation to the contract term in question, so that the legal implications of any unfairness may be established and so that the aims expressed in Article 6(1) of [the Directive] may be achieved?

In the circumstances described above, is it permissible for the court, when examining an unfair contract term, to examine all the terms of the contract, or may it examine only the terms on which the party concluding the contract with the consumer bases his claim?’

The CJEU decided the case on 21 February 2013. The Court addressed only the principle of

effectiveness, disregarding the principle of equivalence, starting from the assertion that the judge has the duty to ascertain on its own motion the unfairness of contract clause, and should be able to establish all the consequences of such a qualification under national law. However, the CJEU balances effectiveness with the principle of effective judicial protection (art 47 CFREU) and in particular with the principle of audi alteram partem, which is part of the rights of defence. Under this principle, the CJEU acknowledged that the both parties should not only be aware of the documents and observations made by the court but also be able to discuss them. Moreover, the court affirmed that in order to guarantee the right to a fair hearing, the parties should be able to debate and be heard on the matters of fact and law that are determinative. The CJEU then affirmed on this point that: “Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that the national court which has found of its own motion that a contractual term is unfair is not obliged, in order to be able to draw the consequences arising from that finding, to wait for the consumer, who has been informed of his rights, to submit a statement requesting that that term be declared invalid. However, the principle of audi alteram partem, as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure.”

Relation to the scope of the Charter

Although not included in as a reference within the preliminary reference, the CJEU evaluated the national provision taking into account art. 47 CFREU. The Charter article is found to contain the principle of audi alteram partem as well as the principle of a fair hearing. Art. 47 CFREU is then used to balance the evaluation of compliance provided by the effectiveness test. The CJEU tempered the duty to exercise the ex officio power by the national court with the obligation to safeguard the possibility for the parties to present their observations regarding the evaluation of unfairness.

Notes on the remedies dimension

The CJEU added a specific consideration to the exercise of ex officio power of the judge: the court clarified that national courts have the duty to evaluate the unfairness on their own motion, but their evaluation should not overcome the preference of the consumer. First, the evaluation of the national court should be presented to the parties, leaving sufficient time for both to present their views; secondly, the court should take into account the possibility that the consumer would prefer to apply the unfair clause. However, the court is not obliged to wait for the consumer to make a statement requesting the term be declared invalid before making such a declaration.

Notes on the remedies dimension

The CJEU added a specific consideration to the exercise of ex officio power of the judge: the court clarified that national courts have the duty to evaluate the unfairness on their own motion, but their evaluation should not overcome the preference of the consumer. First, the evaluation of the national court should be presented to the parties, leaving sufficient time for both to present their views; secondly, the court should take into account the possibility that the consumer would prefer

to apply the unfair clause. However, the court is not obliged to wait for the consumer to make a statement requesting the term be declared invalid before making such a declaration.

Impact on Jurisprudence

Preliminary ruling presented by the Budapest Municipal Court in C-32/14 *ERSTE Bank Hungary Zrt. v Attila Sugár*

Sources - EU and national law

Directive 93/13

Sources - CJEU Case Law

C-243/08, *Pannon GSM Zrt. V Erzsébet Sustikné Gy?rfi*, ECLI:EU:C:2009:350

C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, ECLI:EU:C:2010:659

C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*, ECLI:EU:C:2012:349.
