

European Union, CJEU, Pannon, judgement of 4 June 2009

Deciding bodies and decisions

Budaörs District Court

Court of Justice of European Union

Area of law

Consumer protection

Subject matter

Limits of ex officio power of judge

invalidity of unfair contractual practices

territorial jurisdiction

Summary Facts Of The Case

The contract for mobile telephone service provision between Mrs Sustikné Györfi and Pannon GSM Zrt. was a standard contract agreement, which included among the terms and conditions a jurisdiction clause setting the forum for any dispute arising from the contract in the place where the service provider has its seat.

After an alleged breach of contractual obligation, the service provider applied to the Budaörs District Court for an order of payment. The court was in fact located in the district where Pannon has its principal place of business. As a consumer opposed the order of payment, the court acknowledged that under the applicable rules of procedure the territorial jurisdiction for the claim should be in the place of residence of the consumer. This issue of territorial jurisdiction, under the code of civil procedure, must be raised on its own motion by the court; however, under Hungarian law, the issue of jurisdiction cannot be raised anymore after the first filing by the defendant of her defence to the substance of the dispute, as in the case at stake the consumer opposed to the order.

The Budaörs District Court then decided to stay proceedings and referred the following questions: Can Article 6(1) of ... Directive [93/13] – pursuant to which Member States are to provide that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer – be construed as meaning that the non-binding nature vis-à-vis the consumer of an unfair term introduced by the seller or supplier does not have effect ipso jure but only where the consumer successfully contests the unfair term by lodging the relevant application?

Does the consumer protection provided by Directive [93/13] require the national court of its own motion – irrespective of the type of proceedings in question and of whether or not they are contentious – to determine that the contract before it contains unfair terms, even where no application has been lodged, thereby carrying out, of its own motion, a review of the terms introduced by the seller or supplier in the context of exercising control over its own jurisdiction?

In the event that the second question is answered in the affirmative, what are the factors which the

national court must take into account and evaluate in the context of exercising this control?’ The CJEU decided the case on 4 June 2008. The present analysis will be focused on the first two questions. The CJEU moved from the previous case law on the ex officio power of court and clearly affirmed that EU law confers on the national court both a power and a duty to examine the fairness of terms in consumer contracts. The national procedural rules applicable to the case (such as the one regarding the territorial jurisdiction) do not limit any such duty to examine ex officio the fairness of a term.

However, the CJEU did not provide an open solution for the national court. Rather, it provided guidance for national courts as regards the test of fairness which should be carried out “where [the court] has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction”; the court is not required to disapply the term “if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status”.

Hence, the CJEU affirmed on this point that:

“Article 6(1) of Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand.

The national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application. That duty is also incumbent on the national court when it is ascertaining its own territorial jurisdiction.”

Notes on the remedies dimension

The CJEU allocated a relevant role for national courts as regards protection of consumers. The CJEU affirmed, on the one hand, that an unfair contract term is not binding on the consumer even if the consumer has not contested the validity of the term *in limine litis*. On the other hand, it went further to state that national courts are not only capable of determining on their own motion whether a term of a contract before it is unfair, but also have the obligation to examine the unfairness where legal and factual elements are available.

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Sources - EU and national law

Directive 93/13

Sources - CJEU Case Law

Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, ECLI:EU:C:2000:346
C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, ECLI:EU:C:2006:675
C-473/00, C-473/00 *Cofidis SA contro Jean-Louis Fredout*, ECLI:EU:C:2002:705.
