

European Union, CJEU, Kusionova, judgement of 10 September 2014

Deciding bodies and decisions

District court of Humenné

Regional court of Prešov

Court of Justice of European Union

Area of law

Consumer protection

Subject matter

invalidity of unfair contractual clauses

ex officio power of judge

effective remedy - interim relief

Summary Facts Of The Case

The consumer credit agreement between Monika Kušionová and SMART Capital was secured by a charge on the family house of the former. Mrs Kušionová claimed in front of the District court of Humenné that the credit contract as well as the charge agreement were invalid (and therefore to be declared void) as the credit agreement contained an unfair clause.

The District court of Humenné, declared that the credit agreement was partially void, whereas the charge agreement was totally annulled. Both parties lodged an appeal before the Regional court of Prešov. The appeals concerned the terms of the charge agreement that allowed the extrajudicial enforcement of the charge on the immovable property provided by the consumer as security.

SMART Capital affirmed that the clause was based on a statutory provision (art 151j of the Slovak Civil Code), so as to allow the creditor to enforce the charge without any review of the underlying agreement to be reviewed by a court.

The Regional Court of Prešov deemed the national provision to be potentially in conflict with Directive 93/13, as it may allow the inclusion of an unfair clause within a consumer contract. Thus, on 20 December 2012, the Slovak court decided to stay the proceedings and posed the following questions to the CJEU by way of preliminary reference:

“Are [Directive 93/13] and [Directive 2005/29], in the light of Article 38 of [the Charter], to be interpreted as precluding legislation of a Member State, such as Paragraph 151j(1) of the Civil Code, in conjunction with other provisions of the legislation applicable in the present case, which enables a creditor to recover sums on the basis of unfair contract terms by enforcing a charge against a consumer’s immovable property without any assessment of the contract terms by a court and despite there being a dispute as to whether the contract term at issue is unfair?

Does the European Union legislation referred to [in question 1] preclude the application of a

national rule, such as Paragraph 151j(1) of the Civil Code, in conjunction with other provisions of the legislation applicable in the present case, which enables a creditor to recover sums on the basis of unfair contract terms by enforcing a charge against a consumer's immovable property without any assessment of the contract terms by a court and despite there being a dispute as to whether the contract term at issue is unfair?

Must the judgment of the Court of Justice [in *Simmenthal*, EU:C:1978:49] be interpreted as precluding, in the interests of meeting the objectives of the directives [referred to in question 1] and in the light of Article 38 of the [Charter], the national court from applying domestic provisions, such as Paragraph 151j(1) of the Civil Code, in conjunction with other provisions of the legislation applicable in the present case, which enable a creditor to recover sums on the basis of unfair contract terms by enforcing a charge against a consumer's immovable property without any assessment of the contract terms by a court and also, despite there being a dispute, to circumvent review by a court of its own motion of the contract terms?

Is Article 4 of [Directive 93/13] to be interpreted as meaning that a term in a contract concluded by a consumer without representation by a lawyer which enables a creditor to enforce a charge by extra-judicial means and without any review by a court, is a circumvention of the important principle of EU law that contract terms are to be reviewed by courts of their own motion and, for that reason, is unfair, even where the wording of such a contract term is based on a national provision?"

Before the CJEU decided the case, the Slovak legislator adopted a reform on April 2014 (Law n 106/2014 Z.z.), which modified the procedural rules applicable to the enforcement of charges, so that para. 21.2 of the Law on Voluntary Sale by Auction provided that

"Where the validity of the charge agreement is challenged or the provisions of the present law are infringed, any person who claims that his rights have been adversely affected as a result of that infringement may request the court to declare the sale void".

On 10 September 2014, the CJEU decided the case. The analysis of this case sheet will only focus on the first three questions.

A first interpretative step was to extend the evaluation of national legislation on the basis not only of art. 38 CFREU, as requested in the preliminary ruling, but also to art. 47 CFREU. The Court – after having affirmed the lack of provisions regarding the enforcement proceedings within the Directive 93/13, thus leaving the regulation of such elements to the procedural autonomy of Member states– addressed the compliance of national mechanisms vis-à-vis the principles of equivalence and effectiveness.

As the equivalence test was deemed to be met, the Court analysed the whole procedural system in order to verify if it also met the requirements of the effectiveness test. The Court acknowledged that the Slovak procedural system (as amended in 2014) provides for the possibility for the consumer to contest the enforcement proceedings within three months from the day the auction took place. This time limit, as well as the fact that the consumer should not be completely passive in the procedure, was deemed by the court as compliant with its previous jurisprudence. Moreover, the fact that amended legislation provided that the sale may be declared void by national courts, does not affect the situation of the consumer as it allows him/her to return to a situation almost identical to the original one.

The Court went on to evaluate the proportionality of the remedy (using the terminology of penalty in the decision). It noted that the fact that the security given by consumers may frequently be his/her family home is a peculiar, as also stated in ECHR jurisprudence, thus such a case required that any balancing exercise take into account also art. 7 CFREU providing for the right to accommodation. The possibility for interim relief granted by the national court to avoid the eviction of the consumer from the family home then was considered as sufficient to prevent the continued use of an unfair term.

The final decision of the CJEU on this point was then the following:

“Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows the recovery of a debt that is based on potentially unfair contractual terms by the extrajudicial enforcement of a charge on immovable property provided as security by the consumer, in so far as that legislation does not make it excessively difficult or impossible in practice to protect the rights conferred on consumers by that directive, which is a matter for the national court to determine.”

The Regional court of Presov then quashed the first-instance judgment and remanded the case for further consideration.

Relation to the scope of the Charter

The national court correctly linked the Charter to the secondary law provisions included in the Directive 93/13/EC. The national court used as reference also the principle stated in art. 38 CFREU, although the main issue addressed by the Directive provisions mentioned in the preliminary ruling deals with the issue of remedies.

This fact was acknowledged by the CJEU, which affirmed that, although the preliminary ruling included an explicit reference only to art. 38 CFREU, its assessment will also take into account art. 47 CFREU. However, the CJEU in its later analysis does mentions neither art. 38 nor art. 47 CFREU. As a matter of fact, the CJEU examined whether the possibility of an order for interim relief could ensure the protection of art. 7 CFREU, on the fundamental right to accommodation. Although the reference to such a fundamental right expressly acknowledged a relationship between the former and consumer protection, it did not clarify whether this relationship should include also the right to housing assistance (Art. 34(3) CFREU).

An important additional element is the fact that the proportionality of the measures should also be included in the art. 7 CFREU analysis.

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Notes on the remedies dimension

The CJEU based its analysis on the principle of sincere cooperation (art 4(3) TEU) and on its

previous case law relating to the assessment of effectiveness, proportionality and dissuasiveness of remedies. The requirements of effectiveness and dissuasiveness are analysed together, and focus on the one hand, on the availability of an interim relief to prevent the enforcement proceedings, and on the other, on the reform of the Slovak procedural law that allows the judges to declare the auction sale void. The analysis of the requirement of proportionality then also brings the protection of the right to accommodation as provided by art 7 CFREU into the balancing exercise. The availability for national courts to adopt interim measures to avoid the immediate risk of the consumer (and his/her family) being evicted from their home is seen as an adequate and effective remedy. One could question whether the protection of the consumer as an individual may conflict with the need to protect other rights (i.e. creditor and bona fide purchaser). Could this consideration change the balance brought about by the application of the proportionality test?

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Sources - EU and national law

Directive 93/13

Sources - CJEU Case Law

C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2014:2099
