



23.2.2024

NOTICE TO MEMBERS

Subject: Petition No 0724/2022 by Sándor Csaba Dr. Gyulai (Hungarian) on alleged non-compliance with Directive 93/13 EEC (Unfair Terms in Consumer Contracts Directive)

1. Summary of petition

The petitioner alleges that the Hungarian judicial bodies do not comply with Directive 93/13 EEC (Unfair Terms in Consumer Contracts Directive) and the mandatory interpretation given in the decisions of the European Union court interpreting the directive. He considers that Hungarian judicial bodies ignore and even make decisions that expressly contradict the interpretation of the directive and the binding content of the EUJ judgments interpreting it, thus explicitly violating the rights of Hungarian citizens guaranteed by the directive and their rights to a fair trial and the protection of property guaranteed by the Charter of Fundamental Rights of the European Union. The petitioner singles out the provisions of the European Union court regarding the prohibition of retroactive effect as one such contradiction, as the judicial bodies amend already terminated contracts with retroactive effect, which undermines the foundations of trust in the rule of law.

2. Admissibility

Declared admissible on 18 November 2022. Information requested from Commission under Rule 227(6).

3. Commission reply, received on 23 February 2024

The Commission's observations

The petition concerns mainly the Hungarian court cases regarding foreign exchange loan contracts.

The Commission would like to refer, therefore, to its responses to petitions 0928/2018 (16 May 2019 and 23 July 2021) and 1187/2020 regarding a possible infringement by Hungary of Directive 93/13/EEC on unfair terms in consumer contracts¹ (UCTD), as well as its observations to petition 493/2021 transmitted to the European Parliament on 10 January 2022.

As mentioned in these earlier observations, the Court of Justice of the European Union (hereafter ‘the Court’) has handed down a number of judgments² as regards the interpretation of Directive 93/13/EEC in relation to the Hungarian foreign exchange loan related legislation adopted in 2014. In particular, the Court raised concerns³ regarding compatibility of a specific provision of one of these laws (paragraph 37(1) of the Law XL of 2014 on the rules relating to the settlement of accounts referred to by Law XXXVIII of 2014, also called ‘Law DH2’) with the UCTD. That provision seems to prevent consumers from benefitting from the fact that unfair terms setting out the exchange rate risks are non-binding and from the invalidity of the contract in its entirety if it cannot continue to exist without that term and thus seems incompatible with the UCTD.

In its three recent judgments in cases C-932/19 *JZ v OTP Jelzálogbank and others* C-472/20 *Lombard Lízing Zrt v PN* and C-705/21 *AxFina Hungary*, the Court further developed its case-law related to the subject matter of the petition, in particular, to the consequences of finding specific terms unfair in a loan contract denominated in foreign currency.

In Case C-932/19 *JZ v OTP Jelzálogbank and others*, the referring court submitted questions concerning the prevailing case-law in Hungary which applies the Law No XXXVIII of 2014 regulating specific matters relating to the decision of the Kúria (Supreme Court, Hungary) to safeguard the uniformity of the law concerning loan agreements concluded by financial institutions with consumer (“Law DH 1”) strictly, merely replacing with retroactive effect any term relating to the exchange difference that is void, pursuant to Section 3(1) of that law, with a provision of national law, namely that in Article 3(2) of that law, without invalidating the agreement at issue in its entirety. The Court concluded that Article 6(1) of the UCTD does not preclude “*national legislation which, in relation to loan agreements concluded with a consumer, renders void a term relating to the exchange difference that is regarded as unfair and requires the national court with jurisdiction to replace that term with a provision of national law imposing the use of an official exchange rate, without providing for the possibility, for that court, to grant the application of the consumer concerned for the annulment of the loan agreement in its entirety, even if that court considers that the continuation of that agreement would be contrary to the interests of the consumer, in particular with regard to the exchange risk which the latter would continue to bear by virtue of another term in that agreement, in so far as the court is, however, in a position to make a finding – in the exercise of its sovereign discretion, over which the consumer’s expressed wishes cannot prevail – that the implementation of the measures thus provided for by that national legislation makes it possible to re-establish the legal and factual situation which would have existed for the consumer in the absence of that unfair term.*”

¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ L 95*, 21.4.1993, p. 29–34.

² In particular, cases C-483/16 *Sziber v Erste Bank Hungary*, C-126/17 (Order) *Erste Bank Hungary v Czakó*, C-51/17 *OTP Bank Nyrt et al. v Ilyés, Kiss*, C-227/18 (Order) *VE v WD*, C-118/17 *Dunai v Erste Bank Hungary*, C-38/17 *GT v HS*, C-511/17 *Lintner v UniCredit Bank Hungary Zrt*.

³ Judgment in case C-118/17 *Dunai*.

In Case C-472/20 *Lombard Lizing Zrt v PN*, the Court further clarified however that “*the effectiveness of the provisions of [the UCTD] cannot be ensured, in the absence of a supplementary rule of national law governing such a situation, solely by a non-binding opinion issued by the highest court of the Member State concerned indicating to the lower courts the approach to be taken in order to declare a contract to be valid or effective between parties, where that contract cannot continue in existence because a term relating to its main subject matter is unfair.*”

The Court also ruled that the UCTD does not prevent “*the national court with jurisdiction from deciding to restore the parties to a loan agreement to the situation they would have been in if that agreement had not been concluded on the ground that a term of that agreement relating to its main subject matter must be declared unfair under that directive, provided that, if it is not possible to restore the parties to that position, it must ensure that the consumer is ultimately in the position he or she would have been in if the term held to be unfair had never existed.*”

The Court recalled this line in its judgment in Case C-705/21 *AxFina Hungary* and also reminded that although “*the national court may substitute a supplementary provision of national law for an unfair term in a loan agreement, that possibility is, however, limited to exceptional cases, namely those cases in which the invalidity of that unfair term would require the court to annul that contract in its entirety, thereby exposing the consumer concerned to particularly unfavourable consequences, so that the consumer would thus be penalised*”. Moreover, such a possibility of substitution “*is limited to supplementary provisions of national law or those which are applicable where the parties so agree and is based, in particular, on the ground that such provisions are presumed not to contain unfair terms*”.

The Commission is analysing the Court’s rulings in detail to make sure that the UCTD, as interpreted by the Court, is effectively implemented in Hungary.

The Commission also recalls the EU Pilot procedure it opened in relation to the Hungarian legislation concerning foreign currency loans (EU-Pilot 8572/16/JUST). This EU-Pilot procedure is ongoing as the Commission is currently working on the assessment of this case in light of the most recent preliminary rulings and the most recent complaints.

Regarding the retroactivity concerns that the petitioner raises referring to the Court’s case law, the petition is also too general. However, the following can be said regarding the Court’s case law in this regard.

The case law on retroactivity is based on the principle of protection of legitimate expectations and the principle of legal certainty, which form part of the EU legal order. They must accordingly be observed by the EU institutions, but indeed also by the Member States when exercising the powers conferred on them by EU directives⁴.

However the Court has also consistently held that an EU measure may exceptionally have retroactive effects if the objective so demands and the legitimate expectations of those concerned are respected.⁵ It further clarified “*as regards the national rules adopted by the*

⁴ Judgment in joined Cases C-487/01 *Gemeente Leusden* and C-7/02 *Holin Groep* and Opinion of A.G. Kokott in Case C-181/20. See case law cited there.

⁵ Judgment in joined Cases C-487/01 *Gemeente Leusden* and C-7/02 *Holin Groep*, paragraph 59: “*The Court has consistently held that, although in general the principle of legal certainty precludes a Community measure from*

*Member States in the area of VAT, the Court has held inter alia that the status of taxable person, once recognised, cannot, save in situations of fraud or abuse, be withdrawn from the taxpayer with retrospective effect, without infringing the principles of the protection of legitimate expectations and legal certainty,”*⁶

The Court ruled repeatedly, including recently in a judgment related to the application of the UCTD to loan contracts in Case C-265/22 *Banco Santander*, paragraph 37 “*that a new rule of law applies from the entry into force of the act introducing it, and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application.*”

Furthermore, another judgment in the Joined Cases C-154/15, C-307/15 and C-308/15, *Francisco Gutiérrez Naranjo etc.* seems also relevant in this regard. It is related to a decision of the Spanish Supreme Court that declares specific category of terms in loan contracts as unfair, however only in future contracts, as of the date of the decision.

The Court stressed that the determination by a court that a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he would have been in if that term had not existed. It therefore found, while acknowledging the importance of legal certainty, that the effect of that temporal limitation is an incomplete and insufficient protection that cannot constitute an adequate or effective means of preventing the use of unfair terms, as required by the directive.

Therefore, the Court concluded that EU law precludes national case law in accordance with which the restitutory effects connected with the invalidity of an unfair term are restricted to the amounts overpaid after the delivery of the decision holding that the term is unfair.

More specifically, in relation to the Hungarian legislation of 2014, referred to above, in the *Dunai* judgment mentioned before, the Court found that those provisions of the 2014 Hungarian laws related to foreign currency loans that exclude the retroactive cancellation of a loan contract denominated in a foreign currency which includes an unfair term relating to the exchange-rate risk are contrary to the UCTD. According to the Court, the cancellation of the contract must be possible where it cannot continue to exist without the unfair term.

In that same judgment the Court reminded in paragraph 37: “*As regards those terms, which, in accordance with those laws, were retroactively included in the loan contracts concerned, the Court held, in paragraphs 62 to 64 of its judgment of 20 September 2018, OTP Bank and OTP Faktoring (C 51/17, EU:C:2018:750), that such terms, which reflect mandatory statutory provisions, cannot fall within the scope of Directive 93/13, since that directive does not apply, in accordance with Article 1(2) thereof, to conditions contained in contracts between a seller or supplier and a consumer which are determined by national legislation.*”

The Commission’s concerns regarding the rule of law in Hungary are clearly stated in the

taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. That case-law also applies where the retroactivity is not expressly laid down by the measure itself but is the result of its content.”
6 Judgment in joined Cases C-487/01 *Gemeente Leusden* and C-7/02 *Holin Groep*, paragraphs 60.

Commission's annual Rule of Law Reports⁷. The Commission does not share the petitioner's analysis in that respect.

Conclusions

The Commission services are currently analysing all the available information (from complaints and petitions including the present one, the Court's case law, reply by the Hungarian authorities) and reviewing if specific information may be missing to be able to conclude the assessment of the Hungarian legislation on foreign exchange consumer credits as regards its compliance with the Unfair Contract Terms Directive and to consider the follow-up to be given to the structured dialogue with the Hungarian authorities in the framework of EU-Pilot 8572/16/JUST. In particular, the most recent preliminary rulings such as that of 27 April 2023 in Case C-705/21 *AxFina Hungary* will be essential in this regard.⁸

⁷ https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en

⁸ In addition, a new request for a preliminary ruling, with questions highly relevant for some crucial issues raised within the EU Pilot case, was submitted to the Court by the Hungarian Supreme Court on 17 October 2023 in Case C-630/23.