



National legislation may provide for a contract between a consumer and a trader which contains an unfair term to be void if that ensures better protection of the consumer

While EU law in principle aims only to eliminate unfair terms, it none the less allows the Member States to give consumers a higher level of protection that it provides for

The Unfair Terms in Consumer Contracts Directive¹ provides that unfair terms in a contract between a consumer and a trader which are imposed by the trader are not binding on the consumer. A term must 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. However, a contract containing such a term remains binding on the parties if it is capable of continuing in existence without the unfair term.

Mr and Mrs Perenič obtained a loan of SKK 150 000 (€4 979) from SOS, a non-bank institution which grants consumer loans on the basis of standard contracts. According to the credit agreement, the loan was to be repaid in 32 monthly instalments of SKK 6 000 (€199) and a 33rd instalment in the same amount as the loan granted. The borrowers were thus obliged to repay an amount of SKK 342 000 (€11 352).

The annual percentage rate of charge (APR) of the loan – that is to say, the consumer's total costs in connection with the loan – was fixed at 48.63% in the agreement, but, according to the calculation of the Slovak court which is making the reference to the Court of Justice, it is in fact 58.76%.

Mr and Mrs Perenič brought an action before the Okresný súd Prešov (District Court, Prešov, Slovakia) seeking a declaration that their credit agreement contains several unfair terms, such as the incorrect statement of the APR, and also asking that court to declare the agreement void as a whole.

The Slovak court asks the Court of Justice whether the directive allows it to declare void a consumer contract containing unfair terms if that is more advantageous to the consumer. As the Slovak court points out, if the agreement were declared void, the consumers in question would be obliged to pay only interest for late payment, at the rate of 9%, rather than all the charges relating to the loan granted, which would be much higher than that interest.

In its judgment the Court of Justice starts by recalling that the aim of the directive is to eliminate unfair terms in consumer contracts while preserving, if possible, the validity of the contract as a whole, not to abolish all contracts containing unfair terms.

Next, as regards the criteria for assessing whether a contract can indeed continue to exist without the unfair terms, the Court observes that an objective approach must be applied, under which the situation of one of the parties to the contract, in this case the consumer, cannot be regarded as the decisive criterion determining the fate of the contract. Consequently, when an assessment is made of whether a contract containing one or more unfair terms can continue to exist without those

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

terms, the directive precludes the taking into consideration solely of the advantage to the consumer of the annulment of the contract as a whole.

The Court finds, however, that the directive carried out only a partial and minimum harmonisation of national legislation concerning unfair terms, while allowing Member States the option of giving consumers a higher level of protection than that for which the directive provides. Consequently, **the directive does not preclude a Member State from laying down, in compliance with EU law, national legislation under which a contract between a trader and a consumer which contains one or more unfair terms may be declared void as a whole where that will ensure better protection of the consumer.**

Finally, the Court states that a commercial practice which consists in indicating in a credit agreement an APR lower than the real rate constitutes false information as to the total cost of the credit which must be classified as a misleading commercial practice within the meaning of the directive on unfair commercial practices², in so far as it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. While that circumstance may be taken into account among other factors for the purpose of finding that contractual terms are unfair under the directive on unfair terms, it is not, however, such as to establish, automatically and on its own, that those terms are unfair. All the circumstances of the particular case must be considered before taking a decision on the fairness of the terms in question. Similarly, a finding that a commercial practice is unfair has no direct effect on whether the contract as a whole is valid.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ 2005 L 149, p. 22).