



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-51/17
OTP Bank Nyrt and OTP Faktoring Követeléskezelő Zrt v Teréz Ilyés and
Emil Kiss

According to Advocate General Tanchev, a Member State legislative response to a ruling of the Court of Justice concerning the unfairness of contractual terms for lack of clarity is judicially reviewable

In February 2008, Ms Ilyés and Mr Kiss concluded with a Hungarian bank a credit contract for the provision of a loan denominated in Swiss francs (CHF). According to the contract, although the monthly repayment instalments were to be paid in Hungarian forints (HUF), the sum of these instalments was calculated on the basis of the current exchange rate between the HUF and the CHF. In addition, the borrowers accepted to bear the risk related to possible fluctuations in the exchange rate between these two currencies.

The exchange rate subsequently changed considerably to the detriment of the borrowers, which resulted in a significant increase in the amount of their monthly instalments. In May 2013, Ms Ilyés and Mr Kiss instituted legal proceedings before the Hungarian courts against OTP Bank and OTP Factoring, to which the creditor claims arising from the loan contract at issue had been transferred. In the course of these proceedings, the question arose as to whether the term of the contract placing the exchange rate risk on the borrowers could be considered unfair within the meaning of the directive on unfair terms in consumer contracts¹ and, as such, not binding on the borrowers on account of this term not having been drafted by the bank concerned in a plain and intelligible manner.

In the meantime, Hungary adopted, in 2014, laws by which it removed from the foreign currency loan contracts certain unfair terms, converted virtually all outstanding consumer debts under these contracts into HUF, and made other amendments to the content of legal relationships between the parties to the contracts at issue. These laws also sought to implement a decision of the Kúria (Supreme Court, Hungary) on the non-compliance with the directive of certain terms incorporated into foreign currency loan contracts² (this decision was issued in the light of the Court of Justice's judgment in the Kásler case³). However, the new laws continued to place the exchange rate risk on the borrower.

Given that contractual terms which reflect mandatory statutory or regulatory provisions do not fall within the scope of application of the directive, the Court of Justice is asked by the Fővárosi Ítéltábla (Budapest Regional Court of Appeal, Hungary), which is dealing with the case of Ms Ilyés and Mr Kiss, if the latter court can assess the unfairness of an unclear term placing the exchange rate risk on the borrower despite the validity of this term having been confirmed by the Hungarian legislator.

In today's opinion, Advocate General Evgeni Tanchev recalls that the purpose of the exclusion of terms reflecting mandatory statutory or regulatory provisions from the scope of application of the directive is justified by the fact that it may legitimately be supposed that the national legislature has struck a balance between all the rights and obligations of the parties to the contracts concerned.

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

² Decision No 2/2014.

³ Case: [C-26/13 Kásler](#) see Press Release No. [66/14](#).

However, **that assumption cannot hold with respect to statutory measures, such as the aforementioned laws in Hungary, which were passed after the date on which the relevant contract was agreed and with a view to implementing a judicial finding of non-compliance with the directive.** In this regard, the Advocate General is of the view that the exemption at issue was designed to ensure that Member States were permitted to maintain or introduce rules going beyond the protective provisions of the directive with these States being however precluded from diminishing the level of protection provided for by those provisions.

In addition, the Advocate General stresses that **the legislative response of a Member State to a finding of the Court that a national law or practice is incompatible with the directive cannot be excluded from judicial review** since such an exclusion would be at odds with the provisions of the Charter of Fundamental Rights of the EU which guarantee a high level of consumer protection and a right to effective judicial protection.

In these circumstances, the Advocate General proposes that **a term which has become part of a foreign currency loan contract by legislative intervention and which leaves an initial term of the contract placing the exchange rate risk on the borrower, does not reflect mandatory statutory or regulatory provisions** within the meaning of the directive. As a consequence, in cases where that term was not formulated in the contract in a plain and intelligible manner, **the national court can examine whether it constitutes an unfair term not binding on the consumer.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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 Opinion is published on the CURIA website on the day of delivery.

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