



Press and Information

Court of Justice of the European Union

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Judgment in Case C-51/17

OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt. v Teréz Ilyés and  
Emil Kiss

## **The unfairness of an unclear contractual term which places the exchange rate risk on the borrower and does not reflect statutory provisions may be subject to judicial review**

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 amount of those instalments was to be calculated on the basis of the current exchange rate between the HUF and the CHF. In addition, the contract refers to the foreign exchange risk in the event of possible fluctuations in the exchange rate between these two currencies.

The exchange rate subsequently changed considerably to the detriment of the borrowers, resulting in a significant increase in the amount of their monthly instalments. In May 2013 Ms Ilyés and Mr Kiss brought legal proceedings before the Hungarian courts against OTP Bank and OTP Faktoring, two companies 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 relating to the foreign exchange risk had not been drafted by the bank in plain intelligible language and could therefore be considered unfair within the meaning of the directive on unfair terms in consumer contracts.<sup>1</sup>

In the meantime, Hungary adopted, in 2014, laws by which it removed from foreign currency loan contracts certain unfair terms, converted virtually all outstanding debts under these contracts into HUF and applied the exchange rate set by the National Bank of Hungary. Those 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 contracts<sup>2</sup> (this decision was issued in the light of the Court of Justice's judgment in the Kásler and Káslerné Rábai case).<sup>3</sup> However, the new laws did not alter the fact that the foreign exchange risk is placed on the borrower in the event of a depreciation of the Hungarian forint in relation to the Swiss franc.

Given that, under the directive, contractual terms which reflect mandatory statutory or regulatory provisions do not fall within its scope, the Court of Justice is asked by the Fővárosi Ítéltábla (Budapest Regional Court of Appeal, Hungary), which is hearing the case of Ms Ilyés and Mr Kiss, whether the latter court can assess the unfairness of a term, where it is not drafted in plain intelligible language, even though the Hungarian legislature, by not intervening in that respect, has accepted that the foreign exchange risk continues to be placed on the consumer in the event of a depreciation of the Hungarian forint in relation to the foreign currency concerned.

In today's judgment, the Court recalls that **the rule excluding terms which reflect mandatory statutory or regulatory provisions from the scope of the directive** is justified by the fact that it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to the contract. **However, this does not mean that another**

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

<sup>2</sup> Decision No 2/2014 PJE (*Magyar Közlöny* 2014/91, p. 10975).

<sup>3</sup> Case [C-26/13](#) Kásler and Káslerné Rábai, see also Press Release No [66/14](#)).

**contractual term which is not covered by statutory provisions**, such as that relating to the foreign exchange risk in the present case, **is**, in its entirety, **also excluded from the scope of the directive**. The unfairness of that term may therefore be assessed by the national court in so far as it forms the view, following a case-by-case examination, that it is not drafted in plain intelligible language.<sup>4</sup>

In that regard, the Court takes the view that **financial institutions are required to provide borrowers with adequate information to enable them to take well-informed and prudent decisions. This means that a term relating to the foreign exchange risk must be understood** by the consumer both at the formal and grammatical level and also in terms of its actual effects. It follows that **an average consumer**, who is reasonably well informed and reasonably observant and circumspect, **must not only be aware of the possibility of a depreciation of the national currency in relation to the foreign currency in which the loan was denominated, but also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations.**

Furthermore, the Court states that the plainness and intelligibility of the contractual terms must be assessed by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract, notwithstanding that some of those terms have been declared or presumed to be unfair and, accordingly, annulled at a later time by the national legislature.

Finally, the Court confirms that it is for the national court to identify of its own motion, in the place of the consumer in his capacity as an applicant, any unfairness of contractual terms other than that relating to the foreign exchange risk, provided that it has available to it the legal and factual elements necessary for that task.

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**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 EU 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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<sup>4</sup> Case [C-186/16](#) Andriuc and Others, see also Press Release No [103/17](#)).