



In loan contracts concluded in Poland and indexed to a foreign currency, unfair terms relating to the difference in exchange rates cannot be replaced by general provisions of Polish civil law

If, after the removal of the unfair terms, the nature of the main subject matter of those contracts is likely to alter, in that they would no longer be indexed to a foreign currency while remaining subject to an interest rate based on that currency rate, EU law does not preclude the annulment of those contracts

In 2008, Kamil Dziubak and Justyna Dziubak ('the borrowers') concluded, with the Raiffeisen Bank, a contract for a mortgage loan specified in Polish zlotys (PLN) but indexed to the Swiss franc (CHF). Thus, whereas the funds were made available in PLN, the outstanding sum due and the monthly repayments were expressed in CHF in such a way however that the repayments were required to be debited in PLN from the borrowers' bank account. At the time the loan was disbursed, the debt remaining due and expressed in CHF was determined on the basis of the PLN-CHF buying rate applied by Raiffeisen on the day of the disbursement, whereas the monthly repayments were calculated in accordance with the PLN-CHF selling rate applied by that bank at the time they fell due. Having concluded a loan contract indexed to CHF, the borrowers benefitted from an interest rate based on the rate of that currency, which was lower than the rate applicable to PLN, but they were exposed to an exchange risk resulting from the fluctuation in the PLN-CHF exchange rate.

The borrowers brought an action before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) seeking a declaration of the invalidity of the loan contract in question on the ground that the terms in that contract providing for the application of a difference in exchange rate, consisting in recourse to the buying rate for the disbursement of funds and the selling rate for their repayments, were unlawful unfair terms that were not binding on them in accordance with the directive on unfair contract terms in consumer contracts,¹ and the removal of which would lead to the annulment of the contract.

According to the borrowers, once the terms at issue are removed, it would be impossible to determine the correct exchange rate, with the result that the contract could not continue in existence. In addition, they submit that, even if it appeared that the loan contract could be executed without those terms as a loan contract expressed in PLN but no longer indexed to CHF, the loan would continue to be subject to the more advantageous interest linked to CHF.

Referring to the judgment in *Kásler*² in which the Court of Justice held that, in certain circumstances, the national court may substitute an unfair term with a provision of national law in order to restore a balance between the parties to the contract and maintain the validity of the contract, the Polish court asks the Court whether, after their removal, the unfair terms may be replaced by general provisions of Polish law which provide that the effects expressed in a contract are to be completed by the effects arising from the principles of equity or established customs.

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

² Case: [C-26/13](#) *Kásler and Káslerné Rábai*, see also Press Release No. [66/14](#).

The Polish court also asks whether the directive permits it to annul the contract where the maintenance of the contract without the unfair terms would result in altering the nature of its main subject matter since, even though the loan at issue would no longer be indexed to CHF, the interest would continue to be calculated on the basis of the rate applicable for that currency.

By today's judgment, the Court finds, first of all, that the possibility of substitution established by the Kásler judgment is restricted to supplementary provisions of national law or those applicable in the event of agreement by the parties and is based, inter alia, on the ground that those provisions are presumed not to contain unfair terms.

Those provisions are presumed to reflect the balance that the national legislature wished to establish between the rights and obligations as a whole of parties to certain contracts in cases where the parties did not depart from a standard rule laid down by the national legislature for the contracts concerned or expressly selected the applicability of a rule established by the national legislature for that purpose. However, those general provisions of Polish law referred to do not appear to have been specifically assessed by the legislature in order to establish that balance, such that they do not benefit from the presumption that they are not unfair.

Consequently, the Court finds that **those provisions cannot remedy the gaps in a contract caused by the removal of unfair terms that appeared in it.**

In that context, the Court considers that, since the possibility of substitution seeks to ensure the attainment of consumer protection by safeguarding consumers' real and actual interests against the possible detrimental consequences that could result from the annulment of the contract at issue as a whole, those consequences must be assessed in relation to the current or foreseeable circumstances at the time of the proceedings relating to the removal of the unfair terms concerned and not those existing at the time when the contract was concluded.

The Court recalls, next, that under the directive a contract from which the unfair terms have been removed remains binding on the parties as regards the other terms that it contains, provided that it can continue in existence after the unfair terms are removed and that such continuity of the contract is legally possible under the rules of domestic law. In that regard, the Court notes that, according to the national court, after the removal of the terms on the difference in exchange rate, the nature of the main subject matter of the contract appears to be altered by the cumulative effect of abandoning the indexation to the CHF and the continued application of an interest rate based on the CHF rate. Since such an alteration appears to be legally impossible under Polish law, **the directive does not preclude the annulment of contract in question by the Polish court.**

On that point, the Court emphasises that the deletion of the terms at issue would lead not only to the removal of the indexing mechanism and the exchange difference but also, indirectly, the loss of the exchange risk, which is directly connected to the indexation of the loan to a currency. The Court recalls that the terms relating to the exchange risk define the main subject matter of a contract for a loan indexed to a foreign currency such that the objective possibility of maintaining the loan contract at issue appears, in any event, to be uncertain.

Finally, the Court recalls that, where the consumer prefers not to rely on the system of protection established by the directive against unfair terms, it does not apply. In that regard the Court clarifies that **the consumer must also be able, in accordance with that system, to refuse to be protected against the detrimental consequences caused by the annulment of the contract as a whole where the consumer does not wish to benefit from that protection.**

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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