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Court of Justice of the European Union
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Judgment in Case C-81/19
NG and OH v SC Banca Transilvania SA

A contractual term which has not been negotiated but which reflects a rule that, under national law, applies between parties provided that no other arrangements have been established in that respect, falls outside the scope of EU law on unfair terms in consumer contracts

In 2006, NG and OH concluded a loan agreement with Banca Transilvania under which the bank loaned them the sum of RON 90 000 (Romanian lei) (approximately €18,930). In 2008, they concluded a second loan agreement, denominated in Swiss francs, in order to refinance the first agreement.

As a result of the sharp fall in the value of the Romanian lei, the amount to be repaid almost doubled in the years that followed.

On 23 March 2017, NG and OH brought an action before the Tribunalul Specializat Cluj (Specialist Tribunal, Cluj, Romania) for a declaration that part of the refinancing agreement was unfair. That part provided that payments were to be made in the currency of the loan, but specified that the borrowers could ask the bank for the loan to be denominated in a different currency, without the bank being obliged to grant such a request. It was also provided that the bank was authorised by the borrower to discharge the payment obligations due by using its own exchange rate.

NG and OH also claimed that Banca Transilvania failed to comply with its obligation to provide information by not warning them, when the agreement was negotiated and signed, of the risk inherent in converting into a foreign currency the currency in which the first agreement was denominated. In addition, according to NG and OH, the term requiring repayment in a foreign currency created an imbalance to their detriment since they alone bore the exchange risk.

It is against that background that the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania) has asked the Court of Justice, first, whether the directive on unfair terms in consumer contracts¹ applies to a contractual term which has not been individually negotiated but which reflects a rule that, under national law, applies between contracting parties provided that no other arrangements have been established in that respect. Second, that court has asked the Court of Justice what conclusions, if any, a national court is to draw from a finding that a term relating to the foreign exchange risk is unfair.

By today's judgment, the Court notes, first of all, that that directive does not apply if two conditions are met: first, the contractual term must reflect a statutory or regulatory provision and, secondly, that provision must be mandatory. That exclusion is justified by the fact that, in principle, it may legitimately be presumed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts.

In order to establish whether the conditions for applying the exclusion are met, the Court states that it is for the national court to determine whether the contractual term in question reflects mandatory provisions of national law that apply between contracting parties independently of their

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

choice or provisions that are supplementary in nature and therefore apply by default, that is to say, in the absence of other arrangements established by the parties in that respect.

As regards the first condition, since, according to the referring court, the term contained in the general terms and conditions which is alleged to be unfair by the applicants in the main proceedings reflects a provision of national law which is supplementary in nature, it comes within the exclusion laid down by the directive.

As regards the second condition, the Court observes that the wording 'mandatory statutory or regulatory provisions' also covers rules which, under national law, apply between contracting parties provided that no other arrangements have been established. From that perspective, that provision makes no distinction between provisions which apply between contracting parties irrespective of their choice and supplementary provisions.

In that regard, first, the fact that it is possible to derogate from a supplementary provision of national law is irrelevant to the determination of whether a contractual term which reflects such a provision is excluded. Secondly, the fact that a contractual term reflecting one of the provisions referred to in the directive at issue has not been individually negotiated has no bearing on whether it is excluded from the scope of the directive.

The Court concludes that **the directive on unfair terms in consumer contracts does not apply to a contractual term which has not been individually negotiated but which reflects a rule that, under national law, applies between contracting parties provided that no other arrangements have been established in that respect.**

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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