

PRACTICAL PROBLEMS IN THE FIELD OF CONSUMER CONTRACT

EVA TOROK

PhD, University of Debrecen, Faculty of Law, Department of Civil Law
Email: torok.eva@law.unideb.hu

Abstract— Consumers are concluding numerous types of contracts for the supply of goods or services in their everyday lives. In several cases these contracts are containing terms which are more favorable to merchant but are unfair with the consumers. Since, consumers became a vulnerable group against the terms and conditions of contracts. In this article the practical problems in the field of consumer contracts will be presented through legal cases. The relevance of this topic is that some of the Hungarian requests for preliminary ruling are in connection with unfair terms. The main question is whether the requirement of plain intelligible language can be extended to such a degree as to include the specific clauses which banks use for example when signing a loan agreement? Firstly, the main findings of the behavioral economics will be examined. Then an outlook will be introduced on the practice of the Court of Justice of the European Union. Moreover, case studies will be analyzed, too. Finally, a question will be answered regarding the protection of the regulation for the consumer.

Index Terms— contract law, consumer protection, regulation

I. INTRODUCTION

In this article the topic of the contract law will be outlined focusing especially on the consumer contracts. Consumers are concluding numerous types of contracts for the supply of goods or services in their everyday lives. In several cases these contracts are containing terms which are more favorable to merchant but are unfair with the consumers. Every time if somebody buys a product or service from a trader, he/she will be entering into a contract.

Under EU law, standard contract terms used by traders have to be fair. "This doesn't change if they're called "terms and conditions" or are part of a detailed contract that you actually have to sign. The contract is not allowed to create an imbalance between your rights and obligations as a consumer and the rights and obligations of sellers and suppliers. Contract terms must be drafted in plain, understandable language. Potentially the unfair terms are in addition to the general requirement of "good faith" and "balance", EU rules contain a list of specific terms that may be judged unfair." [1] If specific terms in a contract are unfair, they are not binding on you and the trader may not rely on them. A regular form contract planned by the traders is the common contract where unfair terms can be expected to be found. Upon this the following questions should be answered: 1) How broadly can the requirement of clear wording be expanded? 2) What can we expect from an average consumer? The relevance of this topic is that some of the Hungarian requests for preliminary ruling are in connection with unfair terms. The main question is whether the requirement of plain intelligible language can be extended to such a degree as to include the specific clauses which banks use for example when signing a loan agreement? During the article the following questions will be answered. [2-4]

II. THE COUNCIL DIRECTIVE ON UNFAIR TERMS IN CONSUMER CONTRACTS

The Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts introduces the notion of "good faith" to prevent imbalances in the rights and obligations of consumers on the one hand and sellers and suppliers on the other hand. A list of examples of terms that may be regarded as unfair further illustrates this general requirement. Unfair contract terms are not binding for consumers. The directive also requires contract terms to be drafted in plain and intelligible language and states that ambiguities will be interpreted in favour of consumers. EU countries must make sure that effective means exist under national law to enforce these rights and that such terms are no longer used by businesses. [5] Standard contract terms facilitate commercial transactions and can also work to the advantage of consumers. Contract terms define the rights and obligations of the parties. In consumer contracts, sellers and suppliers possess a considerable advantage by defining the terms in advance that are not individually negotiated. [5]

III. IMPORTANCE OF THE TOPIC

The relevance of this topic is that some of the Hungarian requests for preliminary ruling are in connection with unfair terms. The main question is whether the requirement of a clear wording can be extended to such a degree as to include the specific clauses which banks use for example when signing a loan agreement? First of all it is essential to examine the main findings of Behavioral Economics:

- the consumer group is not homogeneous;
- factors affecting the average consumer and regulatory / protection level;

The degree of protection afforded by national

consumer protection rules depends largely on the economic environment. During the foreign currency credit crisis, for example, the level of protection increased. [6] A question arises in the topic: is the consumer with sufficient information acting rationally? Here has to be emphasized that a consumer with enough information may not be rationally acting.

Then I would like to focus on the consumer image of the Court of Justice of the European Union:

- well-informed, attentive, circumspect; meaningful, rational consumer [7];
- the criteria must always be examined by the national courts in the specific case [8];
- when using general contract terms, expectations are less pronounced [6].

The average consumer is reasonably well informed and reasonably observant and circumspect. While information and information processing is a consumer's responsibility, the Court's expectations of consumers in applying the general contract terms are less pronounced: the Judicial Forum does not seem to expect the consumer to turn himself into multi-faceted, small-scale contract terms. [8]

As for the Hungarian practice I have to mention that the markers are similar to the above mentioned ones:

- the consumer should be well-informed, recognizes the fundamental purpose of advertising and [7],
- the consumer should be informed according to the degree of risk before the transaction [9].

IV. THE REQUIREMENT OF PLAIN INTELLIGIBLE LANGUAGE IN THE PRACTICE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The Court of Justice of the European Union has dealt with the requirement of plain intelligible language in several decisions. The requirements are:

- simple and comprehensible language,
- information in a clear and comprehensible manner,
- the consumer can anticipate the economic consequences of the conclusion of the contract,
- transparency,
- an extended interpretation of the equilibrium situation.

The requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers. The consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it. [10]

It is not enough if the condition is simple, clear and comprehensible in both formal and grammatical terms, and it must also reveal the reason and

mechanism of applying the condition.

In 2016, a request was submitted for preliminary ruling under Article 267 TFEU from the Court of Appeal, Oradea, Romania to the EU Court. The request contained the case of Ruxandra Paula Andriciuc and Others contra Bank of Romania about the unfair contracts. [12] The terms referred to in Article 4(2) of Directive 93/13, escape the assessment as to whether they are unfair only in so far as the national court having jurisdiction should form the view, following a case-by-case examination, that they were drafted by the seller or supplier in plain, intelligible language. [13] From article 4(2) of Directive 93/13 the court has ruled the requirement for the case of transparency of contractual terms. Since they stated that, it cannot be reduced merely to their being formally and grammatically intelligible, but that, to the contrary, since the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a position of weakness and vulnerability. While the seller or supplier, in particular as regards his level of knowledge; that the main requirements are:

- plain and intelligible drafting of contractual terms.
- the transparency laid down by the directive must be understood in a broad sense. [14]

From the case of Kásler and Káslerné Rábai it can be concluded that how one can understand the requirement of the contractual term being drafted in plain intelligible language. It means that the contract should be written transparently the specific functioning of the mechanism to which the relevant term relates and the relationship between that mechanism and that provided for by other contractual terms.

It was declared that the consumer should be in a position to evaluate, on the basis of clear, intelligible criteria, and he/she should know the economic consequences, too. It was further written that the national court should consider all the circumstances regarding the contract during the decision. The national court should investigate whether the estimation of the total cost of the loan was known by the consumer, moreover the terms were drafted in plain intelligible language to be understandable for an average consumer. In this preliminary ruling was further presented that providing information, before concluding a contract, on the terms of the contract and the consequences of concluding it, is of a fundamental importance for a consumer and it is a settled case-law. As well the risk awareness is also very important. The financial institutions must provide borrowers with adequate and correct information to enable them to take well-informed and prudent decisions. They should at least encompass the impact on installments of a severe depreciation of the legal tender of the Member State in which a borrower is domiciled and of an increase of the foreign interest rate. Finally, by the Advocate General further concluded that: it is for the

national court to check that the seller or supplier has communicated to the consumers concerned all the relevant information enabling them to assess the economic consequences of a term, such as that at issue in the main proceedings, on their financial obligations. [11, 13]

V. THE HUNGARIAN PRACTICE

A. Hungarian case study

In May 2018 the Advocate General of EU court has delivered an opinion regarding the Case C 51/17 between the OTP Bank Nyrt. (National savings bank of Hungary) contra Teréz Ilyés and Emil Kiss. The Budapest Regional Court of Appeal, Hungary made a request for a preliminary ruling to the EU Court in the topic of the unfair consumer contracts. This reference for a preliminary concerns another dispute following up from the ruling of the Court of Kásler and Káslerné Rábai, [13] which addressed the compatibility with EU law of clauses of consumer credit agreements in Hungary which were denominated in foreign currency, and notably Swiss Francs. in the opinion of the advocate General a very interesting paragraph is written, whether as the part of the of the contract entitled 'Declaration of notification of risk' was attached It stated that 'in relation to the loan risks, the debtor declares that he is aware of and understands the detailed information relating to this matter provided to him by the creditor, and is aware of the risk of taking out a foreign-currency loan, a risk which he alone bears. With regard to the exchange rate risk, he is aware, in particular, that, if during the term of the contract there were variations in the exchange rate between the forint and the Swiss franc which were unfavorable. In other words: is to say, in the event of depreciation of the exchange rate of the forint as opposed to the exchange rate at the time of disbursement), it might even happen that the exchange value of the repayment installments, which are fixed in foreign currency and payable in forint, would increase significantly. It is notable from the side of the bank from the risk awareness point of view. But it has to be mentioned that the documents should be written in plain and intelligible language. As a result, in the opinion was written, similarly as presented in the case of Andriuc that the national referring court to determine, taking account of all of the circumstances surrounding the contract, and the case-law of the Court, whether, under Article 4(2) of Directive 93/13 and its requirement for contractual terms to be in 'plain intelligible language'. Moreover, lenders are obliged to convey to consumers pertinent financial information in its possession at the time the contract was concluded, including relevant macroeconomic material, and explain its effects on exchange rate mechanisms. [14]

B. The practice

Herewith I would present the requirement of plain intelligible language in Hungarian practice:

- transparency of structure, trackable conditions,
- understandable style, adequate use of terms, readable format,
- clear and comprehensible content,
- the consumer can assess the economic consequences,
- in a durable relationship, both parties must be aware that the circumstances may change which poses a risk; the consumer has an interest in this circle that the contract includes how risks are shared between the parties,
- the consumer can know and control the extent of his obligations, the causes, the extent and the mechanism of his future change. [15]

The main question is: what kind of protection should the regulation provide for the consumer?

Considering the complexity and significance of the transactions under consideration, the financial consumer is expected to make a more rational and rational decision than usual.

CONCLUSION

In this article the importance and analysis of the unfair contract terms were presented. During the analysis both national and EU cases were investigated. As a conclusion it has to be emphasized that the text of the terms should be written in intelligible and plain structure.

The regulation cannot go away from the specificity of the transactions being investigated and overcomes the consumer's financial ignorance, for example by unreasonably widening the requirement of clear wording. The consumer also has to bear some risk, as it is impossible to cope with all the risks of economic and financial processes.

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