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Case note to CJEU, C-51/17 OTP Bank and OTP Faktoring

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I. Introduction

Some Eastern and Central European countries do not use the euro, but still have their own currency. The currency of these countries is sometimes less stable than the euro. As a result, the value of claims in the national currency may fluctuate (sometimes abruptly). Banks in these EU Member States have therefore started to draft consumer loans in euros (initially in German marks) and in Swiss francs. Such loans could cover both consumer credit contracts[1] and consumer mortgage contracts.[2] Although the contract was drawn up in the foreign currency, the amount made available to the consumer was paid out in the national currency of both the consumer and the bank at the exchange rate of the day. The consumer's repayments were made again in the consumer's own national currency and were then converted into the foreign currency at the exchange rate applicable at that time.

For the banks, the advantage of granting foreign currency loans was that the value of the claim on the consumer remained the same even when the national currency unit depreciated. Conversely, however, this meant that in the event of such a fall in value, the amount of the loan, expressed in the consumer's and the bank's national currency, suddenly increased. As a result, the consumer had to repay an amount higher than that which he had expected at the time of the conclusion of the contract. Particularly after the start of the financial crisis at the end of the first decade of this century, this led to financial problems for consumers in many of these countries. In Hungary, for example, this has led to legislation aimed at limiting the greatest risks for consumers of this type of contract. For example, a Hungarian law of 2014 (cited in the judgment as the Law DH1)[3] declared that in loan contracts concluded as of 1 May 2004, not individually negotiated terms according to which there was a difference between the two exchange rates were null and void. Instead, the official exchange rate of the National Bank of Hungary – both for the payment to the consumer and for the repayment by the consumer – applied. In addition, standard terms incorporated into such contracts allowing the bank to unilaterally increase the interest, charges or fees were, in principle, annulled. A second law (Law DH2)[4] of the same year required Hungarian banks to compensate consumers for the amounts wrongly paid by consumers to the banks based on the prohibited terms. A third law of 2014 (Law DH3)[5] subsequently provided that the loan agreements were amended automatically in accordance with the provisions of Law DH3. Under that law, banks were required to convert the debt payable by consumers in foreign currency into a debt in Hungarian forint. When converting the debt, they had to either use the average exchange rate of the Hungarian National Bank for the period for which the loan was in force or the exchange rate officially fixed by the National Bank of Hungary on 7 November 2014, whichever was more favourable for the consumer.

II. Facts

The case discussed here concerned a consumer credit agreement concluded on 15 February 2008 whereby the amount of the loan was set in Swiss francs. Different exchange rates were used for the payment of the money to the consumer and the consumer's repayment to the bank. By signing the credit agreement, the consumers, Ilyés and Kiss, had stated that they were aware of the fact that they were exposed to an exchange rate risk, that the economic effects of this exchange rate risk were entirely incumbent on them, and that the realisation of that risk could also lead to a significant increase in the amount of the instalments they had to pay in Hungarian forints. After being affected by the consequences of the credit crisis, they brought an action for annulment of the consumer credit contract on 16 May 2013. They argued that they were unable to assess the extent of the exchange rate risk, since the clause in the consumer credit contract was not formulated in a plain and intelligible manner. Shortly thereafter, on 22 July 2013, the OTP Bank terminated the consumer credit contract due to the consumers' failure to repay the instalments.

In a judgment of 11 March 2016, i. e. after the entry into force of the three aforementioned laws, the court of first instance found, first of all, that (the legal predecessor of) the OTP Bank had not sufficiently warned the consumers about the exchange rate risk. Secondly, the court held that the exchange rate clause in the standard terms was not formulated in a plain and intelligible manner. Thirdly, in accordance with Law DH3, the debt from the consumer credit contract had to be converted into Hungarian forint. On appeal, the court found that Laws DH1 and DH3 had put an end to the use of different exchange rates for the payment of the money to the consumers and their repayment to the bank, and that the amount of the loan and the repayments should be determined using the exchange rate set by the Hungarian National Bank. The laws, while alleviating the burden on consumers by making the fixed exchange rates more favourable than those provided for in the contract, did not eliminate the risk of fluctuations in the exchange rate itself: that risk

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1 In addition to the case discussed here one could, for instance, think of the case that led to Case C-312/14 *Banif Plus Bank v Lantos* EU:C:2015:794.

2 As was, for instance, the case that led to Case C-26/13 *Kásler* EU:C:2014:282.

3 Case C-51/17 *OTP Bank and OTP Faktoring* EU:C:2018:750, para 11.

4 CJEU *OTP Bank and OTP Faktoring* (n 3), para 14.

5 CJEU *OTP Bank and OTP Faktoring* (n 3), para 15.

was still borne by the consumers. However, the fact that these laws had transposed the terms automatically raised the question as to whether they were still covered by the Unfair Contract Terms Directive:[6] according to Article 1(2) of the Directive, the Directive is not applicable to terms corresponding to mandatory legal or administrative provisions.

III. Judgment

The Court of Justice ruled (paras 62-64) that terms automatically replaced by mandatory provisions were excluded from the scope of the Directive. However, according to the Court, the exception must be interpreted in a limited way and concerns only those parts of the clause which have been amended by the mandatory legal provisions (paras 54 and 66). The Court went on to state that the amendments resulting from Laws DH1 and DH3 were not intended to regulate the exchange rate risk in its entirety. In so far as the terms in question had not been replaced by the legislative provisions in question, they do fall within the scope of the Directive (paras 65 and 67). This applies in particular to the fact that the loan is denominated in foreign currency, since that fact gives rise to the exchange risk and that risk, as had been established by the Court of Appeal, had not been eliminated by Laws DH1 and DH3.

However, the Court of Justice expressly referred to the exchange rate risk term as a core term (para 68). According to Article 4 (2) of the Directive, core terms are subject to the review of their content only if they are not worded in plain and intelligible language. This so-called transparency requirement is not limited to core terms: according to Article 5 of the Directive, this requirement applies to all terms drawn up in advance and not individually negotiated. In earlier case law, the Court of Justice had already made it clear that the transparency requirement in both articles has the same scope.[7]

A (core) term is only then formulated in a 'plain and intelligible' manner if the consumer can foresee on the basis of plain and intelligible criteria which economic consequences for the consumer result from the term. In this respect it is not enough that the term is comprehensible from a linguistic and grammatical point of view, as the Court explicitly repeated in para 73 of this judgment. Instead, the Court of Justice stated that the requirement of transparency is not met if the consumer does not have, before or at the time of the conclusion of the contract, all the information necessary to make an informed decision on the desirability of concluding the contract under the conditions offered by the trader.[8]

In the present judgment, the Court of Justice held that when assessing whether a term is written in plain and intelligible language, account must be taken of the other terms contained in the contract. The reason for this is that the consumer must assess whether he wishes to conclude the contract on the basis of *all* the terms made available to him (paras 80 and 81). According to the Court, the fact that one of these other terms is subsequently annulled by the legislature and replaced by another provision does not diminish the fact that the consumer, at the time of the conclusion of the contract, may have taken account of that subsequently replaced term. In this context, it seems particularly relevant that the consumer will have understood the various terms in their mutual relationship (in case the consumer has read the terms, as the standard of the average consumer assumes).

The Court further held (paras 74 and 75) that the requirement of transparency means that, in the case of an exchange rate risk term, the consumer must at least be aware of two facts before the conclusion of the contract. First, the consumer should be aware of the effect of an abrupt fall in the value of the currency in which he receives his income in relation to the currency in which the periodic instalments for repayment and interest are to be made. Secondly, he should also be aware that, as a result of that exchange rate risk, the loan could potentially become a heavy economic burden for him. The Court noted (para 77) that this requirement may have been fulfilled if the consumers had received, at the time of the conclusion of the contract, a form containing additional information on the exchange rate risk, containing concrete examples of the calculation of the risk in the event of a depreciation of the Hungarian forint against the Swiss franc.

IV. Comment

When assessing whether or not the (not-individually negotiated) terms of a contract have been drafted in plain and intelligible language, the criterion of a reasonably well-informed and reasonably observant and circumspect 'average' consumer is to be applied.[9] Decisive is then whether such an 'average' consumer, having considered all relevant information, including advertising and information provided by the trader, should have understood the economic consequences which would result from the term.[10] This is both a normative and objective concept. Normative, because the consumer is deemed to be aware of the relevant factual data, such as the information provided by the user, even if it was clear to the trader at the time of the conclusion of the contract that the consumer had not actually read the information. Objective, because it is based on the *average consumer* against whom the term is invoked.[11] However, in the present judgment the Court also held (para 82) that the examining court 'must take into account *all* the circumstances of the main proceedings as they existed at the time when the contract was concluded' (my italics, MBML). This seems to indicate that circumstances concerning the particular consumer concluding the contract, such as a certain level of education or the possible presence of expert assistance, can also be considered when assessing the clarity and comprehensibility of a term. In my opinion, however, it is obvious that such personal circumstances can only play a role if the user was aware of them prior to the conclusion of the contract, or could reasonably have been expected to have been aware of these circumstances. For this to occur, the trader would have had to have gathered that information at the time of the conclusion of the contract or – e.g. on the basis of the information he had gathered at that time – could reasonably have been expected to make inquiries as to these personal circumstances. For instance, under Article 8 Consumer Credit Directive,[12] a bank is required to assess the consumer's creditworthiness before concluding a consumer credit contract. In order to comply with this obligation, the bank will need to first obtain relevant information from the consumer. The information that is or should have been gathered by the bank will then also be of relevance when applying the transparency require-

6 Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L 95/29.
7 Cf CJEU *Kásler* (n 2), paras 67-70.
8 Cf Case C-186/16 *Andriciuc* EU:C:2017:703, paras 47 and 48.
9 CJEU *Andriciuc* (n 8), para 47.
10 CJEU *Kásler* (n 2), para 74; Case C-143/13 *Matei* EU:C:2015:127, paras 73-74; Case C-96/14 *Van Hove* EU:C:2015:262, para 41.
11 Cf CJEU *Andriciuc* (n 8), para 47.
12 Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers [2008] OJ L 133/66.

ment. With this consideration, however, the CJEU does seem to partially abandon an overly objective criterion and leave room for a judgement that is more tailored to the person of the consumer (or to the group of persons to which the consumer belongs). At the same time, this reduces the difference between the standard to be used in the context of the transparency requirement and the standard for assessing whether the term is unfair within the meaning of Article 3 (1) of the Unfair Contract Terms Directive).

Above we have discussed the transparency requirement in a *substantive* sense: the requirement that standard terms must be drafted in plain and intelligible language is made in the light of the possibility of the consumer giving informed consent with regard to the content of the contract.[13] In its case law, the Court consistently stresses also the relevance of transparency in a *formal* sense by requiring that the consumer must have an effective opportunity before the conclusion of the contract to become acquainted with all the terms of the contract.[14] I would argue that substantive transparency presupposes formal transparency – when the latter is absent, the former by definition cannot be achieved. In this respect, the Court observed that it is essential for the consumer to receive, in good time before the conclusion of the contract, information on the terms of the contract and on the effects of the conclusion of the contract, in order to decide whether he wishes to be contractually bound to a seller or supplier by accepting the terms and conditions laid down in advance by the latter. In this more formal sense, transparency is not so much about the content of the terms but rather about actually giving the consumer the opportunity to know that content in order to take a decision on the basis of it.[15] For example, it may be argued that the provision of terms that effectively cannot be read should be equated with the failure to provide these terms altogether. This may be the case if the standard terms are printed in Gothic letters or in such a small font that they can no longer be read without a magnifying glass by the average consumer (or, if the trader targets a specific target group of consumers, e. g. pensioners: the average member of that group), if the paper copy of the standard terms is damaged or otherwise illegible, or if the stored electronic file contains bugs or errors that prevent the consumer from opening it. In my view, in all these cases the transparency requirement as provided by Article 5 of the Directive has been breached. Under national law this may have the consequence that the standard terms have not been incorporated into the contract in the first place, that a national court will hold them to be unfair within the meaning of Article 3 of the Directive, or that the law otherwise ensures that these terms may not be invoked against the consumer. Which of these legal consequences is attached to the breach of the transparency requirement under national law is rather immaterial. The Court's case-law, however, clearly shows that there have to be consequences to such a breach, at least by having that fact play a role in the unfairness test.

V. Conclusion

The OTP-case is an important next step in the development of the transparency requirement in the Unfair Contract Terms Directive. The Directive does not provide a clear sanction for breaches of the transparency requirement. The Court's case-law, however, slowly but clearly shows that there are indeed consequences attached to such a breach, as the Court continuously sees the transparency requirement in light of the unfairness control under Article 3 of the Directive. This suggests that also the Court's case-law on the *ex officio* testing of unfair terms could be applicable, i. e. that national courts may be required to test of their own motion whether the trader had complied with the transparency requirement – both in a substantive and in a formal sense. We will see whether the Court of Justice indeed develops its case law in this direction. ■

13 Cf JA Luzak and M Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8 Journal of EU Consumer and Market Law 97, 99.

14 See para 76 of this judgment; see also Case C-92/11 *RWE Vertrieb* EU:C:2013:180, paras 43 and 44, referring to recital 20 in the preamble to the Directive; Case C-226/12 *Constructora Principado* EU:C:2014:10, para 25; Case C-377/14 *Radlinger* EU:C:2016:283, para 64; Joint cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo* EU:C:2016:980, para 50.

15 Cf Luzak and Junuzović (n 13) 99.