THE EUROPEAN COURT OF JUSTICE JURISPRUDENCE IN ÁRPÁD KÁSLER VS. OTP CASE AND ITS INTERPRETATION IN THE JURISPRUDENCE OF NATIONAL COURTS

Mircea GROZAVU

DOI: https://doi.org/10.18662/eljpa/2016.0301.07

Covered in:
CEEOL, Ideas RePeC, EconPapers, SocioNet

Published by:
Lumen Publishing House

On behalf of:
Stefan cel Mare University from Suceava, Faculty of Economics and Public Administration, Department of Law and Public Administration

THE EUROPEAN COURT OF JUSTICE JURISPRUDENCE IN ÁRPÁD KÁSLER VS. OTP CASE AND ITS INTERPRETATION IN THE JURISPRUDENCE OF NATIONAL COURTS

Mircea GROZAVU

Abstract

The issue of abusive clauses referring to the repayment in the currency of the long term bank loan, on the grounds of the obligation of the parties to fulfil exactly the undertaken obligations, created a case-law that is rich in contradictions.

This state of affairs brings up the selected subject as one with a significant potential for scientific research. The present article replies with a summarized study on the main court rulings that created the existing contradictions at the Romanian and European Union level of case-law concerning the protection of the consumer’s rights.

The analysis of the mentioned rulings will be realized from the standpoint of the existing normative regulations and also form the standpoints of the law and economics doctrine, with the main purpose to bring clarity in a field that is mainly speculative in the present time.

Keywords:

abusive clause; bank loan; currency of credit; contractual negotiations; judicial control.

JEL Classification: K12, K22, K29

1 MA Graduate of European Law, Ștefan cel Mare University, Suceava.
I. INTRODUCTION

During the period of 2006-2009, after a period of general economic growth, a phenomenon of massive indebtedness with bank loans for consumer purpose of individuals was recorded.

A significant part of bank loans was taken in national currency and another more significant part of bank loans was taken in foreign currency, like euro, dollar or Swiss franc.

Statistically, according to the data provided by the National Bank of Romania’s Risk Central of the Credit, a total of more than 75,000 individuals have loans in Swiss francs, and 360,000 people were bank loans in euro².

The total approximate number of individuals that took bank loans in foreign currency during the stated period reached 435,000.

Because the individuals that took bank loans have mainly the quality of consumers and the bank institutions that have provided the bank loans acted from the position of professionals, the legal binding loan contract signed by these two parties is being ruled by Directive 93/13/EEC and Law no. 193/2000 regarding the protection of consumer’s rights.

Because some of the foreign currencies in which the loan were granted by the banks have appreciated constantly, the repayment of the bank loans got more onerous for the consumers because their wages were mainly paid in national currency, which became weaker than the currency in which the loan was taken and the consumer was facing the negative consequences of currency risk.

II. ANALYSIS OF THE TOPIC

As a result the amount of overdue and doubtful loans granted to consumers switched from low levels - less than 1% in 2007 to an alarming 22.3% in 2014³.

---

This is why the macroeconomic imbalance turned the parties of the bank loans in front of national courts, where were held a large number of disputes related to judicial censorship of unfair terms in contracts signed between consumers and credit banks. The trials aimed to obtain a cut of bank loan repayment costs.

A new element in the substance of the cases regarding prohibited contractual mistreatments between banks and consumers that faced judicial control are the contractual clauses concerning the currency in which the return of bank credit was effectuated that brought a new aim for the consumers that filed the law suits, which consisted in the "stabilization" of the value of foreign currency in which bank credit was requested at the exchange rate of the date of credit.

Compared to the time of the conclusion of credit agreements, respectively for 2006-2009, the legal relations have emerged in the Civil Code of 1864, which represents the law applicable to these cases.

The precise execution of the obligations consented on the grounds of a legally valid contract is a main principle of Romanian Civil Code (art. 969 Civil Code 1864) known as mandatory binding force of the contract and it means that the binding effects of the contract implies first of all compliance with time, quality and quantity agreed by the parties of the contract.

The particular problems noticed in judicial practice regarding how the principle of the mandatory binding force of the contract and exact execution of the contractual commitments will continue to subsist after a judicial control for unfair terms of the contractual clauses that state the currency in which the repayment of the bank loan will be effectuated.

The starting point of the reasoning on which is based the filed request of judicial stabilization of the exchange rate of the credit currency at the historical value of that currency from the day of consumer loan contract conclusion is considered the ruling in Case C-26/13 Árpád Kásler, Hajnalka Káslerné Rabaul c. OTP Jelzálogbank Zrt, where the Court of Justice of the European Union had the task of answering three questions formulated by a Hungarian court.

---

One of the questions was if the national law contains a provision governing the legal issue of contractual execution with a facultative character, could it be introduced in the credit loan contract by the national court instead of an abolished unfair term is compatible with art. 6 (1) of Directive 93/13 / EEC in conjunction with paragraph 73 of the judgment in Banco Español de Crédito Case (C/2012/349), which prohibits courts to remedy the benefit of consumers cancelling a provision insider a contractual term of a contract consumer credit by amending or supplementing those contractual clause?

In examining the prejudicial matter C.J.E.U. held that Jelzálogbank, as defendant before the Hungarian court has given borrowers a loan of 14.4 million Hungarian forints (HUF), equivalent of 94 240,84 Swiss francs (CHF). Article III/2 of the bank loan contract was stating that the determination of the amount of the loan in the currency of the loan will be realized according to the purchase exchange rate applied by the creditor bank reported in the day when the bank loan was granted. Also besides the amount of loan, the interest earned by the bank and administration expenses and penalties on overdue payments and other expenses were determined in national currency by reference to the exchange rate for the purchase of Swiss francs (CHF) applied Jelzálogbank at the due date of these sums.

Therefore, the findings Court of Justice of the European Union considered are the provisions of Article 6 parag. (1) of Directive 93/13 / EEC: "Member States shall provide that unfair terms used in a contract concluded with a consumer by a seller or supplier in accordance with domestic legislation, will not be binding on the consumer, and the contract will continue to bind the parties upon those terms that are not unfair, if it can continue to exist without the unfair terms " allow the national court, under principles of contract law to eliminate the unfair term by replacing it with a provision of national law with facultative character.

This solution, however, was interpreted in contradictory ways by national courts, and now there are two irreconcilable views.

On the one hand, most courts take the view that banks can’t be compelled by a third party to guarantee consumers against currency risk, even more such a requirement is not mentioned in the contract and repayment of the loan is made in the currency of the loan or, the
equivalent in lei of settlement, rejecting as unfounded the complaints by which it was sought to stabilize the exchange rate of the currency.\(^5\)

2. A solution diametrically opposite in a similar case was ruled in Decision No. 230/R/ 2014 Galati Court. The court retained that in 2008 and prior to the time of signing the contract, the exchange rate of the Swiss franc was stable for a long period of time, this causing otherwise the lender to enter into a loan agreement in that currency. Exchange rate stability was reflected in the relatively small amount of interest for this type of loan, which made the loan more attractive to customers.

On the background of contractual terms agreed between the parties, the bank had the right but not the obligation to convert the loan balance in Swiss francs into Romanian lei, where there will be a decrease or an appreciation of the exchange rate of the Swiss franc with more 10 percentage points. Such an increase in the Swiss franc exchange rate held on 02.10.2008.

I consider questionable the legal interpretations of contract terms, performed Galati Court because the national court's interpretation of Court of Justice of the European Union decision in Case C-26/13 and Hajnalka Kaslerne Raba Árpád Kasler v. Jelzalogbank OTP Rt. is one contrary to its logic.

I believe that the vision of European Court has no bearing on the case rule by Galați Court because the facts adopted by the European judges is radically different from the present case, as opposed to the conduct of the Hungarian credit institution, the Romanian defendant bank had provided to the borrowers Swiss franc loans and loan repayment were made accordingly in Swiss francs. Related to the facts, the decision of the Court of Justice of the European Union gave priority to the principle of mandatory binding force of the contract\(^6\).

\(^5\) Judecătoria Rădăuți Sentința 3653/2014  
Judecătoria Bălăști Sentința 2948/2014  
Tribunalul Suceava, Secția a II-a Civilă, Decizia nr. 247/25.11.2015  

\(^6\) Pascariu Liana Teodora, The implication of transposing of European directives regarding the improvement of the effectiveness of review procedures concerning the
On the other hand, the solution of the national court mentioned contravenes the provisions of art. 1578, par. (1) C. Civ. 1864 that states that if of a loan obligation that money is always the same numerical amount shown in the contract.

And if before the due date of the obligation repayment an increase or a decrease in the price of currency benefit occurs, the borrower will repay the amount in the currency numerical benefit, according to art. 1578 parag. (2) C. Civ. 1864.

From a similar point of view that is based on art. 1578, par. (1) and (2) C. Civ. 1864, Professor Corneliu Bîrsan argues that the reimbursement was to be determined by reference to the amount actually borrowed in the currency the bank loan was granted. 7

In other words, the amount to be repaid regards the exact number and quality of units, because, in fact, it recalls the recalled rule that can be easily deduced by the civil legislation following the logic of matters of any other obligations, and moreover, the second paragraph of art. 1578 Civ. Code from 1864 refers to the nominal value of the debt, regardless of the occurrence of changes in currency value.

III. CONCLUSION

However, the existing views of national courts, contrary to the research conclusions of this work are found non-unitary in matters of credit made available in Swiss francs. Given the non-unitary practice existing in the field, participants in the meeting of the representatives of Superior Council of Magistracy of Romania with the presidents of sections specialized in commercial disputes with professionals and insolvency the courts of appeal passed a motion of proposal to General Prosecutor's Office to promote a request for a point of view on this subject from the Supreme Court of Romania, and on related matters concerning the interpretation and application of article 4 of law no.

7 Corneliu Bîrsan, „Principiul nominalismului monetar şi imprevizuirea în contractul de împrumut de consumaţie având ca obiect o sumă de bani: o asociere ireconciliabilă?” http://www.universuljuridic.ro/

8 R. Libchaber, Recherches sur la Monnaie en droit privé , apud C. Bîrsan, op cit.
193/2000 on prohibition of unfair clauses on the conversion to be performed, interpretation and application of art. 1271 Civ. code.

We appreciate that in event of filing the request of a point of view on these legal issues mentioned in the previous paragraph the solution of the Supreme Court of Romania will be predictable considering the legal provision of the Civil Code of 1864 and Civil Code of 2009, concerning the applicability in time of civil law and the fact that the vast majority of bank loans in foreign currency were contracted during the period of the Civil Code of 1864, which removes the applicability of legal provisions on contractual unpredictability, as defined by art. 1271 Civil Code 2009 and the prohibition of any judicial intervention by means of editing the content of credit agreements controlled for unfair clauses.

REFERENCES

European Commission - Country Report Romania 2015 including an in-depth review on the prevention and correction of macroeconomic imbalances, ec.europa.eu/europe2020/pdf
Corneliu Bîrsan, Principiul nominalismului monetar și împreviziunea în contractul de împrumut de consumație având ca obiect o sumă de bani: o asociere ireconciliabilă?, accesat pe http://www.juridice.ro/362877
Liana-Teodora Pascariu, An analysis of the effects the directive produce to internal jurisprudence, in European Journal of Law and Public Administration, 2015
Tribunalul Botoșani, Secția a II-a Civilă, de Contencios Administrativ și Fiscal, Decizia nr. 621/12.04.2016