

Communication concerning the decision of the Curia of Hungary in
civil case number Gfv.VII.30.356/2019

The charging of a disbursement commission in a foreign currency-based loan contract is unfair, if the bank requires the payment of such commission as a prerequisite for the provision of the loan.

The case's background

Based on the foreign currency-based loan contract at issue, the predecessor of the first defendant granted a loan of 16 516 euros to the debtors at an annual interest rate of 5.4 percent and with management charges of 2.4 percent (with an annual percentage rate of charge of 8.47 percent) over a period of 240 months. The contract required the payment of 40 000 Hungarian forints as a disbursement commission. In his legal action, the plaintiff requested the court – in particular – to declare the invalidity of the contractual terms providing for the payment of management charges and disbursement commission based on their unfairness as defined by section 209, subsection (1) of Act number IV of 1959 on the Civil Code (hereinafter referred to as the former Civil Code) and to determine the legal consequences of such invalidity.

The first defendant motioned for the dismissal of the plaintiff's action.

In its judgement, the court of first instance declared the contractual term providing for the payment of disbursement commission unfair and ordered that the amount of 40 000 Hungarian forints paid by the plaintiff as a disbursement commission be set off as an early repayment to reduce the debt owed by the plaintiff to the first defendant, while it dismissed the remainder of the legal action.

Proceeding upon the appeals of the plaintiff and the first defendant, the court of second instance upheld the first instance judgement.

Having regard to the alleged breaches of law referred to by the plaintiff and the first defendant in their petitions for judicial review, the Curia of Hungary made a reference for a preliminary ruling. In its judgement delivered on 3 October 2019 in case C-621/17, the European Court of Justice (hereinafter referred to as the Court of Justice) interpreted Articles 3, 4 and 5 of Council Directive number 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter referred to as the Directive).

The Curia's decision and a summary of the reasons thereof

The Curia followed and interpreted the set of criteria laid down by the Court of Justice's above decision, and subsequently it rendered a partial judgement: it quashed the part of the final judgement as well as that of the first instance judgement relating to the establishment of the unfairness of the contractual term on the payment of management charges and ordered the court of first instance to reopen its proceedings in that regard, on the other hand, it upheld the

remainder of the final judgement.

Having regard to the Court of Justice's judgement, the Curia assumed that the contractual terms at issue (which had expressly determined the amount and due date of payment of the management charges and the disbursement commission) had typically complied with the requirement of transparency. It also clearly followed from the judgement that the loan contract had not been required to detail all the services provided for consideration therein.

The Curia held both in respect of the disbursement commission and the management charges that they had not constituted a consideration which the financial institution had received for the supply of its main service, therefore the potential unfairness of the contractual terms concerned had to be assessed on the basis of Article 5 of the Directive, which meant that the fulfilment of the principle of good faith and the requirement of balance (proportionality) between the service rendered and the consideration received in return had to be examined in accordance with the guidelines provided by the Court of Justice.

Regarding the unfairness of the payment of disbursement commission as a non-individually negotiated contractual term applied in a consumer contract, the Curia indicated that the contract at issue had required the payment of such commission as a prerequisite for the provision of the loan. By virtue of section 523, subsection (1) of the former Civil Code, the creditor's main obligation in a loan contract is to grant an amount of money to the debtor, and the provision of the loan may entail additional costs to be paid by the latter, however, such costs have to be identifiable based either on the loan contract or on any other legal instrument. In the absence of their identification in the case at hand, there had been no evidence to show that any kind of service had been supplied by the bank to the plaintiff in exchange for the payment of the disbursement commission. As a result of a lack of the relevant contractual term and any other evidence, the obligation to pay a disbursement commission without the provision of any identifiable service in return is not transparent (in the sense that it cannot be known why such commission has to be paid and whether the consideration in return for which such commission is to be paid is covered by the management charges or not), infringes the requirement of good faith (consumers cannot be expected to pay for a service that is not specified and cannot be identified by them) and creates a significant imbalance between the parties (which is justified by the mere fact that no service is provided in return for the payment of such commission), consequently it is unfair.

Concerning the unfairness of the payment of management charges as a non-individually negotiated contractual term applied in a consumer contract, it was not disputed in the case at hand that the first defendant had indeed provided a service in return. The Advocate General's Opinion regarded the management charges as a means for compensating for the financial institution's operating costs. However, due to their diverging legal viewpoints, the lower instance courts – the court of second instance qualified the management charges as a consideration for the provision of the main service – failed to carry out an on-the-merits examination as to whether the contractual term providing for the payment of management

charges had been in compliance with the requirements of good faith and balance (proportionality), as required by the Court of Justice's judgement. Since the data and pieces of information necessary for assessing the fulfilment of the aforementioned requirements were not available to the Curia, the latter was not in a position to deliver a well-founded decision in that regard within the framework of its judicial review proceedings.

As a result of the foregoing, the Curia ordered the court of first instance to reopen its proceedings and – having regard to the Court of Justice's guidelines which have a binding effect on the national courts ruling in the main proceedings – examine, in particular, the cumulative fulfilment of the requirements of good faith and balance (proportionality) as set out in paragraphs 50, 51 and 55 of the Court of Justice's judgement. As regards the requirement of balance, the first defendant will be primarily required to prove in the reopened proceedings that the imposition of management charges (with regard to the interest rate and the amount of management charges) has not resulted in a significant imbalance to the plaintiff's detriment. The existence of such imbalance can be assessed essentially by taking the market interest rates applied at the time of the conclusion of the loan contract into account. The above market rates may be determined on the basis of the average interest rate stipulated by loan contracts with similar conditions (for instance similar as to their currency, maturity and risk classification) but with no management charges imposed, the combined average amount of the interest and the management charges as well as the level of the annual percentage rate of charge.

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Press Secretariat of the Curia of Hungary