

National courts can assess the fairness of core terms in banking contracts rules the European Court of Justice

Caja de Ahorros y Monte de Piedad de Madrid v. AUSBANC
(Asociación de Usuarios de Servicios Bancarios)
[2010] EUECJ C-484/08¹

Banking contracts – variable rate credit – unfair contract terms – core terms – factors to be applied by court – assessment by court

Unfair Terms in Consumer Contracts Directive 93/13/EEC²

Océano Grupo Editorial and Salvat Editores [2000] ECR I-4941³

Commission v Sweden [2002] ECR I-4147⁴

Commission v Netherlands [2001] ECR I-3541⁵

The European Court of Justice gave its ruling this month on the application of the Unfair Contract Terms Directive to variable rate secured loan agreements. It has answered the questions raised by the Spanish court and referred the matter back to them. The judgment was handed down on **Thursday 3rd June 2010** by the First Chamber (Judges Tizzano, Levits, Toader, Ilešič and Kasel).

The bank in its standard variable rate loan agreements for the purchase of residential property had a clause which allowed it to round up the interest rate to the nearest quarter of a percentage point. A banking services users' association challenged the term in the court as being unfair under the Spanish national laws which implemented the Unfair Terms in Consumer Contracts Directive.

The 1st instance court ruled for the consumers holding that the term was unfair and invalid. This ruling was upheld on appeal. On further appeal to the Spanish Supreme Court, the bank sought to argue that this term was a core term and that the courts were precluded from assessing its unfairness under the Directive. Spanish law went further than that required by the Directive.

The Supreme Court stayed the proceedings and referred to the European Court of Justice the question of whether member states could go further than the Directive and permit their courts to examine these core terms. The Luxembourg Court held that member states could go beyond the Directive and national laws could allow courts to assess whether core terms were unfair or not. The matter has now been remitted to the Spanish Supreme Court which will now have to decide if it agrees with the lower courts' decisions that this interest rate rounding clause was unfair or not.

Article 3.1 of the Directive says that a “contractual term which has not been individually negotiated shall be regarded as unfair, if contrary to the requirements of good faith it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer”. However Article 4.2 of the Directive specifies that “Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject-matter of the contract nor to the adequacy of the price and remuneration” (the core terms exemption).

Article 8 of the Directive allows member states to “retain the most stringent provisions” which will “ensure a maximum degree of protection for the consumer.” Recital 12 to the Directive specifically

¹ www.bailii.org/eu/cases/EUECJ/2010/C48408.html

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML>

³ www.bailii.org/eu/cases/EUECJ/2000/C24098.html

⁴ www.bailii.org/eu/cases/EUECJ/2002/C47899.html

⁵ www.bailii.org/eu/cases/EUECJ/2001/C14499.html

states that EU member states should have the option “to afford consumers a higher level of protection”.

The Court referred to its rulings in 3 other cases:

- *Océano Grupo Editorial and Salvat Editores*⁶ - where it said a consumer is in a weak position with respect to the seller as regards his bargaining power and level of knowledge which leads consumers to agree to terms drawn up in advance without being able to influence their content.
- *Commission v Sweden*⁷ – where it said Articles 3 and 4 taken as a whole define the general criteria permitting an assessment of unfairness.
- *Commission v Netherlands*⁸ - where it said Article 4(2) is mandatory and binding on member states and the Netherlands had not transposed the Directive in full.

Practical guidance:

- In the UK, this Directive was implemented by the Unfair Terms in Consumer Contracts Regulations 1999⁹. Regulation 6(2) of the 1999 Regulations states that where a term is expressed in “plain intelligible language” then the assessment of fairness of a term shall not relate to either the “definition of the main subject of the contract” or the “adequacy of the price or remuneration.”
- The Supreme Court¹⁰ decided the narrow issue on 25 November last year that the Unfair Terms in Consumer Contracts Directive did not apply to banks’ charges for unauthorized overdrafts on their current accounts. It decided against referring the issue to the Luxembourg court for a ruling.
- This case is a good example of how issues arising under EU Directives or Regulations which have been transposed into law in the UK, can then be subject to a ruling by the European Court where issues are referred to it from courts in other EU member states. It should be noted that none of the 5 judges in the UK Supreme Court referred to this case even though the Advocate-General had give her ruling¹¹ on 29th October 2009.
- The OFT, which brought the UK bank charges case, stated¹² on 22nd December 2009 that it still has significant cause for concern about the operation of the UK current account market but has decided against pursuing further its investigation. Whether it will change its position after seeing this decision remains to be seen.
- Many have complained about bank charges and the UK Supreme Court decision was a welcome decision for banks. This decision by the Luxembourg Court could provide some further fuel for dissatisfied bank customers who pursue a complaint to the Financial Ombudsman Service. FOS will have to be clear that Spanish law went further that it needed to under EU rules and this was permitted by the Directive. Nevertheless, for an internal market measure which is meant to lay down the same rules for all EU countries, it is not satisfactory that Spanish banking customers get more protection than their UK counterparts – especially when some UK banks are now Spanish owned.

⁶ www.bailii.org/eu/cases/EUECJ/2000/C24098.html

⁷ www.bailii.org/eu/cases/EUECJ/2002/C47899.html

⁸ www.bailii.org/eu/cases/EUECJ/2001/C14499.html

⁹ SI 1999/2083 www.opsi.gov.uk/si/si1999/19992083.htm which repealed and replaced the earlier Unfair Terms in Consumer Contracts Regulations 1994 SI 1994/3159 www.opsi.gov.uk/si/si1994/Uksi_19943159_en_1.htm

¹⁰ www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0070_Judgment.pdf

¹¹ <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-484/08>

¹² www.ofc.gov.uk/shared_ofc/personal-current-accounts/ofc1154