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Advocate General's Opinion in Case C-520/21 | Bank M. (Consequences of the annulment of the contract)

Advocate General Collins: after the annulment of a mortgage loan agreement due to unfair terms, consumers may assert claims against banks that go beyond reimbursement of monetary consideration; banks may not

It is a matter for national courts to determine, by reference to national law, whether consumers have the right to assert such claims and, if so, to rule on their merits

In 2008 A.S. and his spouse, E.S., concluded a mortgage loan agreement with Bank M. for the purpose of building a house. The loan amount was denominated and disbursed in Polish zlotys (PLN) but – similarly to thousands of other mortgage loans granted to the consumers in Poland from the early 2000s – was indexed to the Swiss franc (CHF). Monthly loan instalments were to be paid in PLN after conversion according to the CHF selling rate published in Bank M.'s table of exchange rates in force on the date each loan instalment fell due.

Considering that the loan agreement at issue contains unfair terms such as to render it void in its entirety under Polish law, A.S. brought an action against Bank M. before the District Court of Warsaw-Śródmieście (Poland; “the referring court”). He argued that Bank M. had received the monthly loan instalments without any legal or contractual basis and had benefited from them. He requested Bank M. to pay compensation for having used his money without a contractual basis, for the loss of opportunity to earn profit through his temporary inability to use his money and for the decrease in the purchasing power of the money he had transferred to the bank.

The referring court asks the Court whether the Directive on unfair terms in consumer contracts¹ (“the Directive”), as well as the principles of effectiveness, legal certainty and proportionality, must be interpreted so as to preclude an interpretation of national legislation to the effect that, where a loan agreement concluded between a consumer and a bank is declared void in its entirety, the parties are entitled to assert claims against each other that go beyond reimbursement of the monetary consideration they paid under that agreement and the payment of default interest at the statutory rate from the date of the request for reimbursement.

In his Opinion, delivered today, Advocate General Anthony Michael Collins recalls that the Directive does not provide for the consequences of a finding that a consumer contract does not legally exist upon the excision of unfair terms contained therein. **Those consequences are determined by the Member States under their domestic laws in a manner consistent with EU law.**

As regards the consumer's claims against the bank, Advocate General Collins finds that **the Directive is no obstacle to national legislative provisions, or national case-law interpreting those provisions, that facilitate the consumer in pursuing claims going beyond reimbursement of the instalments paid under the invalid**

¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29–34).

mortgage loan agreement and default interest at the statutory rate from the date of the request for reimbursement. It is, however, a matter for the national court to determine, by reference to national law, whether consumers have the right to assert such claims and, if so, to rule on their merits.

That solution is justified by the Directive's objective to provide consumers with a high level of protection. The contractual term held to be unfair does not produce binding effects on the consumer and, consequently, he or she ought to be restored to the factual and legal position he or she would have been in had that term not been included in the contract in the first place. In the Advocate General's view, the possibility of pursuing more far-reaching claims may encourage consumers to exercise the rights they derive from the Directive, while deterring banks from introducing unfair terms in their contracts.

As for the possibility of the bank asserting claims of a similar nature against consumers, Advocate General Collins takes the opposite view. He advises the Court that a **bank is not entitled to assert against a consumer claims that go beyond reimbursement of the loan capital transferred and payment of default interest at the statutory rate from the date of the request for reimbursement.**

By way of justification, Advocate General Collins observes that the annulment of a mortgage loan agreement arises as a consequence of the bank having introduced an unfair term into that agreement. A supplier ought not to derive any economic advantage from a situation it has created by its own unlawful conduct. **Nor would the bank be deterred from including unfair terms in loan agreements with consumers if, despite the annulment of the contract, it could charge consumers remuneration at the market rate for the use of the loan capital. Such a situation might even make it profitable for banks to impose unfair terms on consumers.**

Advocate General Collins further observes that borrowers are generally not in a position to assess the amount a bank could claim from them before deciding whether it is in their interests to challenge the presence of unfair terms in their loan agreements. Given the complex and discretionary nature of the criteria upon which banks calculate remuneration for the use of the loan capital and that the requested sums are usually payable on demand, consumers might be all the more discouraged from exercising their rights under the Directive. Such a situation would deprive the Directive of its effectiveness and lead to an outcome inconsistent with the objectives that it pursues.

Advocate General Collins finally observes that the argument as to the stability of financial markets in Poland has no weight in the context of the interpretation of the Directive, which aims, above all, at protecting consumers' interests. **Banks, as creatures of the law, are under a duty to arrange their affairs in such a manner to respect all of its provisions.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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