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| **Constitutional complaint:** | **U-III - 2521 / 2015** |
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| https://sljeme.usud.hr/icons/ecblank.gif | decision, 13/12/2016 |
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| https://sljeme.usud.hr/icons/ecblank.gif | constitutional complaint accepted; rejection on the merits |
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| **Headnote:**The statements of reasons of court decisions are highly important because a lack of relevant and sufficient reasons for the findings provided in the decision is the first and most important sign of arbitrary decision-making by the court. The extent of the obligation of the court to state in written form the reasons that guided it towards a decision (the criterion of sufficiency) will always depend on the particular circumstances in each individual case.Unless a court decision impugned by a constitutional complaint states sufficient and relevant reasons used by the court as guidance in rendering its decision, and which may lead to the conclusion that the said court actually examined the case and responded to all the significant allegations of the parties, it cannot be considered that the decision satisfies the general requirements arising from the constitutionally guaranteed right to a fair trial. |
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| **Publication data: Official Gazette no. 123/16** |

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| **Conclusion (U-III-2521/2015):**Violation - fair trialCivil proceedings - protection of the collective interests and rights of consumers ("Swiss franc") |
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Summary

Constitutional complaints were filed by Potrošač – the Croatian Union of Consumer Protection Organisations (hereinafter: Potrošač) and seven banks, following the Supreme Court judgment and ruling of 9 April 2015, by which their requests for reviews filed against the judgment and ruling of the High Commercial Court of 13 June 2014 (hereinafter: second-instance decision) were rejected as unfounded.

In proceedings prior to the Constitutional Court proceedings, Potrošač, on the basis of the Consumer Protection Act (hereinafter: ConsPA), filed a claim with the competent commercial court against eight of the largest banks, for the protection of the collective interests of consumers, for contracting unfair contractual provisions in the consumer loan contracts concerning a foreign currency clause (tying the principal to the Swiss franc) and concerning a variable interest rate. The first-instance court admitted the claim of Potrošač. The second-instance court and the Supreme Court rejected the claim in the part concerning the nullity of the contractual provision that ties the principal to the Swiss franc, and in its entirety in relation to the 8th respondent bank, Sberbank d.d.

The second-instance court upheld the first-instance decision in the part concerning the nullity of the contractual provision on the variable interest rate in relation to seven banks (in relation to Sberbank d.d., it overturned the first-instance decision and rejected the claim in its entirety). It confirmed the position of the first-instance court that this constituted an unfair contractual provision which had been imposed on consumers by a unilateral decision of the banks, and which had not been negotiated individually.

Concerning the contractual provision on the foreign currency liability, the second-instance court established that this provision met the requirement of intelligibility and that it was thus not unfair, and, consequently, not null and void. In this part, it overturned the first-instance decision and rejected the claim.

The objections of Potrošač alleged in the constitutional complaint consisted in the main part of statements concerning the violation of the right to a fair trial (for instance, claims about the violation of the right to a reasoned decision, about a formalistic interpretation and application of substantive law, about the incorrect application of the principle of good faiths and fair dealing, and about the failure of ordinary courts to apply the case-law of the Court of Justice of the European Union), and the objections of the banks were related to procedural omissions of the ordinary courts and to the application of domestic and European substantive law in a manner that led to arbitrary decision-making.

The Constitutional Court partially admitted the constitutional complaint of Potrošač and repealed the decision of the Supreme Court in the part concerning the foreign currency clause (Swiss franc) for all the banks, and for the 8th respondent bank, Sberbank d.d., in the part related to the variable interest rate.

Firstly, the Constitutional Court decided on the admissibility of the constitutional complaint of Potrošač.

Potrošač was, through Article 2 point 6 of the Decree on the designation of persons authorised to institute proceedings for the protection of the collective interests of consumers, in conjunction with Article 132.2 of the Consumer Protection Act, explicitly prescribed as a person authorised to instigate proceedings before the competent commercial court in order to protect the collective interests of consumers.

The procedure of controlling the trader according to the ConsPA is abstract because it protects a collective interest and is initiated in order to generally combat a particular, current unlawful practice of the trader, and the current use of unfair provisions in standard contracts, with the aim of preventing such current and future conduct. This means that authorisation to initiate proceedings does not depend on whether the rights of individual consumers have been violated by a particular commercial practice or contractual provisions in a particular case, but rather on whether a collective interest of consumers has been violated.

Since the decisions of ordinary courts rendered in these proceedings were impugned in the present Constitutional Court proceedings, the Constitutional Court found that Potrošač is authorised to lodge a constitutional complaint.

The Constitutional Court considered the objections of Potrošač and the banks from the aspect of a violation of the right to a fair trial, in particular from the aspect of the right to a reasoned court decision.

*Well-foundedness of the constitutional complaint of Potrošač*

The Constitutional Court established that the Supreme Court had applied double standards when assessing the (un)intelligibility of the contractual provisions on the foreign currency clause and on the variable interest rate.

With regard to the intelligibility of the contractual provisions concerning the variable interest rate, it established (just as the second-instance court had done) that during negotiations and the conclusion of the loan contract, the bank staff had not explained to the consumers (the loan beneficiaries) all the elements that affected the formation of the interest rate, which was the only way they could have understood and become informed about the economic effects of contracting such an interest rate. Therefore this provision was unintelligible, hence unfair, and therefore null and void. Thus, the Constitutional Court also accepted the position of the secondinstance court on the relevance and applicability to the case in hand of the case law of the CJEU – judgment no. C-26/13 of 30 April 2014 concerning the interpretation and application of Article 4.2 of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

The Constitutional Court noted that in its judgment the CJEU emphasised that the relevant provision of Directive 93/13/EEC must not be interpreted in terms of its grammatical intelligibility, but in such a way as to provide the consumer with an explanation of the reasons for and the particularities of the mechanism of the variable interest rate and the relationship between that mechanism and the mechanism laid down by other terms of the contract, or the general conditions of doing business, so that he could foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it. The CJEU based this assessment on its standard position that the consumer is in a weaker position vis-a-vis the entrepreneur (in this particular case, the bank) as regards both his bargaining power and his level of knowledge, a situation that leads to his agreeing to terms drawn up in advance by the entrepreneur (the bank) without being able to influence the content of those terms.

With regard to the intelligibility (fairness) of the contractual provisions concerning the foreign currency clause, however, the Supreme Court, using as a starting point the fact that a foreign currency clause is included in contracts as a generally accepted long-term contracting model, which is, therefore, »very well known« to consumers, including the legal consequences of such a way of contracting, found that this clause was intelligible to consumers, and that it is thus not subject to the fairness test in the meaning of the above-mentioned Directive and the case law of the CJEU. In other words, the failure of the banks to inform the consumers about the economic consequences of concluding a loan contract was the decisive circumstance for the Supreme Court’s finding that the contractual provisions on the variable interest rate were unfair. However, the Supreme Court did not take into account the same circumstance with regard to the contractual provision about the foreign currency clause, nor did it provide a statement of reasons for a different approach in interpreting this legal standard.

The double standards and unclear and insufficiently reasoned criteria which the Supreme Court followed in applying a different approach when assessing the intelligibility (fairness) of the contractual provision related to the variable interest rate and the contractual provision related to the foreign currency clause are particularly important if we take into account that, in the case in hand, the loan contracts were burdened by two significant variable elements – the foreign currency clause and the variable interest rate. Moreover, it should have been considered and assessed whether the consumers had been aware of the economic consequences of such a simultaneous and by nature (even) more risky means of contracting.

Consequently, the Constitutional Court established that the Supreme Court had failed to state the reasons for the different interpretation of the same legal standard.

Furthermore, the Constitutional Court established that the Supreme Court had failed to state the reasons why it considered that CJEU judgment no. C-26/13 was relevant to review the fairness of contracting a variable interest rate, but not also the foreign currency clause (it limited itself to establishing that the factual substance of the »Hungarian case« related to that case and that of the case in hand were different, but it did not provide reasons to explain what this difference consisted of, nor did it give reasons why it considered that a possible difference of the factual substratum prevented it from applying the general legal position of the CJEU).

Finally, the Supreme Court failed to state the reasons why it considered that in the case in hand it was not obliged to initiate preliminary proceedings, that is, to file a request with the CJEU to issue a preliminary ruling concerning EU law, in the meaning of Article 267.3 of the Treaty on the Functioning of the European Union, which had been requested by both Potrošač and the banks.

Concerning Sberbank d.d, the Constitutional Court established that the stated reasons on the basis of which the Supreme Court had found that the contractual provision on the variable interest rate in the manner formulated by Sberbank d.d., albeit different in content from such a contractual provision of the other banks, was intelligible for consumers, especially in terms of the economic consequences for consumers arising from such a contractual provision.

Based on the above findings, the Constitutional Court established that the right to a fair trial of Potrošač was violated, in the aspect of the right to a reasoned court decision. The remaining part of the constitutional complaint of the applicant Potrošač was rejected.

*Ill-foundedness of the constitutional complaints of the banks*

The constitutional complaints of the banks were rejected because the Constitutional Court established that the right to a fair trial of the banks had not been violated. Namely, the Court found that the ordinary courts, in the statements of reason of their decisions, in the part relating to the objections of the constitutional complaints of the banks, provided sufficient and relevant reasons for their findings. It was made possible for the banks to participate in the proceedings, lodge legal remedies, and undertake other legally permitted procedural actions.