

**Communication concerning the decision of the Curia of Hungary
in civil case n° Gfv.VII.30.160/2014**

On 29 May 2008, the plaintiffs concluded a foreign exchange loan contract with the second defendant. The loan, secured by a real estate mortgage, amounted to 14 000 000,- forints. According to the terms of the loan contract, the amount of the loan was denominated in a foreign currency on the basis of the buying rate applied by the financial institution on the day of advancement, while the amount of the monthly repayment instalments were to be determined in forints based on the selling rate applied by the same financial institution on the day preceding the due date for reimbursement (spread between the buying and selling rates of the foreign currency).

In their claim, the plaintiffs requested the court, *inter alia*, to qualify the application of the rate spread as an unfair contractual term and to invalidate its use. The second defendant motioned for the dismissal of the plaintiffs' claim.

In its judgement, the first instance court declared the contractual terms that determine the amount of repayment instalments in forints on the basis of the foreign currency's selling rate as invalid. The court upheld the validity of the loan contract with retroactive effect from the day of its conclusion by applying the buying rate instead of the selling rate in the contract.

The second instance court upheld the first instance judgement within the above scope.

The second defendant submitted a petition for judicial review in which it requested the Curia of Hungary to quash the final court decision, modify the first instance judgement and dismiss the plaintiffs' claim. The second defendant argued that the unfairness of the contractual terms in question should not have been examined by the courts with regard to the provisions of Article 209, paragraph (4) of Act n° IV of 1959 on the Civil Code that were in effect on the day of the conclusion of the loan contract. Should the unfairness of these terms nevertheless be assessed by the courts, the second defendant took the view that the terms in question were not unfair.

The Curia decided to stay its proceedings and made a reference for a preliminary ruling to the European Court of Justice that rendered its judgement under case number C-26/13. Based on the interpretation given by the European Court of Justice, the Curia established the unlawfulness of the final court decision only in respect of the method applied for rendering the loan contract valid. The Curia resolved the following three questions of substance:

1) The Curia found that the contractual terms that stipulate the application of different rates cannot be regarded as terms that determine the contract's main subject matter or the ratio between the services supplied and the consideration given in return, therefore the unfairness of these terms can be examined by the courts.

2) Having agreed with the decisions of the lower instance courts, the Curia established the unfairness of the impugned contractual terms in line with point 1) of uniformity decision n° 6/2013 PJE of the Civil Department of the Curia which stated that in foreign exchange loan contracts there is no currency exchange but instead a mere determination of the currency conversion rate in respect of the loans and the repayment instalments, hence, in the absence of any foreign exchange service, the financial institutions are not entitled to charge a fee for currency exchange. By applying such a spread between the buying and selling rates, the

financial institutions make revenues without any service in return and impose additional costs on their customers in an unfair manner. Furthermore, the application of such a spread is unfair also because it does not comply with the requirement of clear and comprehensible regulation as interpreted by the aforementioned judgement of the European Court of Justice.

3) Based on the decision of the European Court of Justice, the lower instance courts erred when they terminated the invalidity of the impugned contractual terms via the amendment of the loan contract. The European Court of Justice held that, in such and similar cases, the unfair terms should not be amended, but be replaced by a supplementary provision of national law. Article 231, paragraph (2) of the Civil Code, the relevant supplementary provision of Hungarian law regulates that debts determined in another currency shall be converted on the basis of the rate of exchange applied at the place and on the date of the payment. The rate of exchange shall be deemed to be the official exchange rate set by the Hungarian National Bank. Consequently, the contractual terms that stipulate the application of buying and selling rates are invalid and are to be replaced by the above provision of the Civil Code.

Budapest, the 23rd of June 2014

Civil Department of the Curia of Hungary

The operative part of uniformity decision no. 2/2014 PJE

1. The clause of a foreign exchange loan contract which stipulates that the risk of foreign exchange shall be taken without restrictions by the consumer – in exchange for a favourable interest rate – forms part of the main subject matter of the contract, therefore, as a main rule, its unfairness is exempt from assessment. The unfairness of such clause can be assessed and established only if its content, i.e. the text of the contract and the information provided by the financial institution, is not clear and intelligible for the average consumer, who is reasonably well-informed and reasonably observant and circumspect (hereinafter: consumer) when the contract is concluded. If due to insufficient information or lack of information by the financial institution there is reason for the consumer to believe that the risk of exchange is not real or that it burdens him/her only to a limited degree, the contractual clause related to the risk of exchange is unfair, which leads to the invalidity of the contract in part or in full.
2. Contractual clauses enabling unilateral amendment of a contract are unfair if they do not comply with the principles laid down in point 6 of Opinion no. 2/2012 (XII. 10.) of the Civil Department of the Curia on the unfairness of the right to unilateral contract amendment in the general terms and conditions applied by financial institutions in consumer loan contracts (the principle of clear and intelligible drafting, the principle of taxonomic definition, the principle of objectivity, the principle of factuality and proportionality, the principle of transparency, the principle of terminability, and the principle of symmetry). Based on these principles, contractual clauses defining the criteria of unilateral contract amendment are fair if they clearly and intelligibly define how and to what extent changes in the circumstances of causes listed in the above Opinion affect the consumer's payment obligations and if they make it possible to verify the unilateral amendments' compliance with the principles of proportionality, factuality and symmetry as well as with the other contractual terms.
3. The application of a different exchange for the purposes of repayment of the loan (selling rate) to that used for the advancement of the loan (buying rate) is unfair because the financial institution does not provide any service directly for the consumer, therefore it is an unjustified cost for the consumer. These clauses are furthermore unfair because the economic reasons for their application are not clear, not intelligible and not transparent for the consumer. In view of the derogatory provisions of Article 231, paragraph (2) of the Civil Code, the buying and selling rates applied in foreign exchange loan contracts as rates of conversion shall be replaced by the official foreign exchange rate of the Hungarian National Bank until mandatory provisions of law enter into force.

The Curia does not uphold decision no. EBH.2013.G.10 in its quality as a decision on principle.