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Consumer Compensation via the Unfair Contract Terms Directive? AG Collins' Opinion in *Bank M* (C-520/21, 16 February 2023)

By Niels Kirst

In a recent [Opinion](#) by Advocate General Anthony Collins, the Court of Justice of the European Union (the Court) was asked to interpret the [Unfair Contract Terms Directive \(Directive 93/13\)](#) (the UCT Directive) in light of a preliminary reference from Poland. In the referral, the Court was asked whether the UCT Directive allows for follow-up compensation claims of EU consumers deceived by unfair contract terms in a foreign denominated mortgage loan agreement. This case could potentially open the door for compensation claims under the UCT Directive and thereby [cause the Polish banking sector financial turbulence and distress](#). How could it come that far?

Background

In the early 2000s, many Polish consumers borrowed thousands of mortgage loans denominated or indexed to the Swiss franc (CHF). The CHF was more stable than the Polish zloty and offered more security for the bank and the lender. Additionally, those loans were offered with interest rates far lower than those applicable to loans denominated in Polish zlotys (PLN). Similar developments took place across Europe and also [in other Member States](#). With the onset of the Global Financial Crisis (GFC) in 2007, the exchange rate of the

PLN deteriorated against the CHF. This led to financial distress for borrowers and lawsuits against their banks. The applicant in the proceedings at issue was one of them, claiming that the mortgage loan agreement contained unfair terms such as to render it void in its entirety. Consequently, Bank M. had received monthly loan instalments without any legal basis (paras 14-17). The applicant relied on Article 6 (1) the UCT Directive, to achieve the dissolution of the contract and was now suing for follow-up compensation claims against Bank M.

The UCT Directive which is an essential piece of EU consumer protection legislation to prevent companies from using unfair contract terms in their dealings with consumers. The main goal of the UCT Directive, which was adopted in 1993, is to protect consumers from contract terms that are excessively one-sided and place them at a significant disadvantage in their dealings with businesses. The UCT Directive requires Member States to ensure that contract terms used in consumer contracts are fair and reasonable and that any unfair terms are unenforceable (Article 6 of the UCT Directive). Under the UCT Directive, contract terms may be considered unfair if they contravene the requirements of good faith and balance between the parties and create a significant imbalance in the rights and obligations of the parties to the detriment of the consumer (Article 3 of the UCT Directive). If a court or national authority finds a contract term unfair under the UCT Directive, it can be declared null and void (Article 6 of the UCT Directive).

The UCT Directive is thus an essential piece of EU legislation seeking to protect consumers from unfair contract terms in business dealings. However, it does not provide for sanctions nor follow-up compensation claims. It is upon national law to specify and decide whether there is the possibility for follow-up compensation claims. However, both parties argued that they shall be entitled to sue the other party for follow-up compensation claims. The question before the Court of Justice is thus whether the UCT Directive allows for such follow-up compensation claims in national law.

Both parties to the proceedings, the consumer and Bank M, had opposing views on how the Court of Justice should decide the case. Bank M argued that if at all, it was for the bank to sue the consumer for using the money received (para. 18). In contrast, the consumer

argued that he is entitled to sue the bank for unjust enrichment. The question for the Court of Justice to answer now is whether the UCT Directive precludes or allows additional follow-up claims after an unfair contract is declared void.

The AG's Opinion

Admissibility

The defendant, Bank M, challenged the admissibility of the case. According to Bank M, the effects of the nullification of the loan contract are a matter of national law and do not fall within the scope of the UCT Directive. However, the AG dismissed those claims and found that protection provided by the UCT Directive requires that national law does not impair or alter the scope and the substance of the protection (para. 35). Therefore, the Court is due to answer the questions of the referring court.

Substance

On the substance, the AG had to answer whether the UCT Directive and the general principles of effectiveness, legal certainty, and proportionality in EU law must be interpreted to preclude an interpretation of national law that allows parties to an annulled loan agreement to advance additional non-contractual follow-up claims for compensation.¹

The consumer contract was already declared void by the referring Polish court in its entirety in line with the Court's earlier preliminary ruling in [Dziubiak \(C-260/18\)](#), in which the Court declared [that conversion clauses unilaterally set by the lender are unfair and unlawful](#). However, the question in the main proceeding ensued from this point: Is the deceived consumer entitled to claim additional compensation from the bank under the UCT Directive?

¹ The legal bases for such claims in Polish law are either Article 405 of the Polish Civil Code (unjust enrichment) or that provision read in conjunction with Article 410(1) of the Polish Civil Code (undue performance). The concept of 'undue performance' and, *a fortiori*, that of 'unjust enrichment' are relatively broad concepts in Polish law which cover a wide range of matters, including, potentially, claims in relation to the use of money without a contractual basis.

From the outset, there were essentially four ways the AG could answer the question of the referring Polish court. First, he could argue that the UCT Directive precludes any follow-up claim in national law after the contract is declared void. Second, he could maintain that the UCT Directive allows for follow-up claims by either of the parties. Third, he could hold that the UCT Directive allows for follow-up claims only by the lender, and fourth, that it allows for follow-up compensation claims only by the borrower (the consumer). In the spirit of the far-reaching EU consumer protection law, the AG decided to go for the latter view.

Regarding claims for follow-up compensation by the consumer (paras 46–55), the AG found that it is a question of national law whether a consumer is entitled to assert additional claims. The AG brushed away the argumentation by Bank M that this would undermine the objective of the UCT Directive (para. 53), and instead emphasized that such rules in national law could even enhance consumer protection on the national level. However, as the UCT Directive does not stipulate anything in this regard, it is for the national court to decide on follow-up compensation claims by the consumer.

Regarding claims for follow-up compensation by Bank M (paras 56–64), the AG opined that it would go against the purpose of the UCT Directive if banks were allowed to advance substantial follow-up compensation claims after a contract is declared void: “[...] a bank is entitled to assert [claims against a consumer] that go beyond reimbursement of the loan capital transferred and payment of default interest at the statutory rate. [...], I am of the opinion that Bank M. is not entitled to pursue such claims” (para. 57). According to the AG, it would be against the spirit of EU consumer law and the UCT Directive if Bank M were entitled to advance such claims.

Therefore, the AG rejected the claims by Bank M on the grounds of the legal principle of *nemo auditor propriam turpitudinem allegans* – a party shall not derive an economic advantage from a situation it has created with its unlawful conduct (para. 58). Henceforth, allowing banks to advance claims against deceived consumer would disincentivize them to use the UCT Directive at all, specifically given that some of the bank claims currently pending before Polish courts are higher than the initial mortgage loan agreement.

Comment

In his Opinion, the AG adopted a consumer-friendly approach to the questions presented, based upon the principle that the national legislator may go beyond the level of protection offered by the Union and offer more stringent rules to protect consumers in line with Recital 12 of the UCT Directive. From a practical point of view, the argumentation of the AG is reasonable, as any other outcome of the case could render it undesirable for EU consumers to use the UCT Directive, as they might fear retaliation and follow-up compensation claims by the lender.

The outcome of the case will be crucial for Polish banks, as it will determine whether they must prepare for a potential flood of new lawsuits by consumers seeking compensation for unfair treatment in their foreign-denominated mortgage loan agreements. Notably, the Polish banking stocks plunged in reaction to the Opinion, with the Warsaw WIG-Bank index [dropping as much as 3.2% on the day of the AG's Opinion](#). If the Court follows the view of the AG, then the referring Polish court would have to decide upon the basis of Polish law whether the consumer could sue compensation from Bank M. Furthermore, it would send shockwaves throughout the Polish banking sector as an unfavourable verdict by the Court (from the perspective of the banking sector) could [cost the banking sector up to PLN 100 billion and is a critical tail risk for the zloty and Polish government bonds](#).

Finally, there are a few possibilities where the Court could take a turn different to the AG's Opinion in its analysis. The Court could come to a different conclusion on either the issue of admissibility of the case, or on the AG's proposed interpretation that EU law allows for one-sided compensation claims only for the consumer and not for the lender. Notably, the Portuguese Government argued in the oral proceeding before the Court that both sides should be entitled to seek follow-up compensation claims (see footnote 31 of the AG's Opinion). However, only future will tell whether the Court sides with the AG or takes a more restrained approach to solving the case. The Fourth Chamber of the Court will decide the case under the presiding Cypriote Judge C. Lycourgos in the coming months.