

## Directives and *Ex Officio* Application of EU Law

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The book devotes a complete chapter to directives (Chapter 6) and another one to the question of *ex officio* application of EU law (Chapter 7). The two chapters overlap to the extent that there are directives which Courts of Member States have to apply on their own initiative. The most important of these is Directive no. 93/13/EEC on unfair terms in consumer contracts (hereinafter the ‘Unfair Contract Terms Directive’), which may easily be one of the most frequently applied pieces of EU legislation in Hungary, at least as far as private law disputes are concerned. What follows are a few remarks related to these two chapters from the point of view of a Hungarian lawyer.

One of the topics discussed in Chapter 6, which any Hungarian may find interesting and useful, is the so-called ‘*spillover effect*’ of directives. According to the definition given by the book, ‘spillover effects of directives [occur] where directive provisions are applied outside the directive’s scope, in other (non-harmonised) areas of national law. Most common is the situation where a national legislature adjusts its national law beyond what is required by the directive.’<sup>1</sup> While the expression ‘*spillover effect*’ may not sound familiar to all Hungarian lawyers (in fact there is not even a generally understood Hungarian translation for it), the phenomenon itself is immediately recognisable. There are many instances where the Hungarian legislator opted to implement directives in a broader manner than was strictly necessary. The reason is almost always that the legislator’s aim was to create a coherent system of general norms, rather than a fragmented collection of specific ones.

To mention only a few examples, the Consumer Sales Directive (1999/44/EC) applies to the sale of consumer goods and contains provisions protecting the consumer. Nevertheless, when the Hungarian legislator transposed the rules of the directive, it made a double generalisation. First, the transposing rules apply not only with regard to consumer contracts but also in B2B relations. Second, they apply to all kinds of contracts, not only to sale and purchase agreements. In this way, the Consumer Sales Directive in effect created general Hungarian contract law rules.<sup>2</sup> Another example would be the Unfair Contract Terms

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\* Miklós Boronkay is attorney at law at Szecskay Attorneys at Law (Budapest) and lecturer at Pázmány Péter Catholic University, Faculty of Law and Political Sciences, Department of Civil Law (e-mail: miklos.boronkay@szecskay.com).

<sup>1</sup> Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon) 403.

<sup>2</sup> E.g. Section 206 of the Civil Code of 1959 (Act IV of 1959 on the Civil Code), Section 6:159 of the currently effective (new) Civil Code of 2013 (Act V of 2013 on the Civil Code).

Directive, certain provisions of which (e.g. the definition of unfairness) are also applicable to B2B contracts.<sup>3</sup> Finally and most interestingly, when the Hungarian legislator adopted the new Civil Code in 2013, it introduced direct producers' liability.<sup>4</sup> The important rules of this new legal institution (e.g. the grounds of exemption for the producer) were simply copied from the Product Liability Directive (85/374/EEC).<sup>5</sup>

While creating a concept to describe a certain phenomenon may be satisfying for theoretical thinking and reading the relevant chapter of the book may result in a 'eureka moment' for the reader, the practical implications are equally significant. The spillover effect raises the following difficult question: how should the national rule transposing the directive be interpreted outside the scope of the directive? Should the national judge follow the interpretation given by the Court of Justice of the European Union ('CJEU') for cases falling within the directive's scope or may it (or even should it) adopt a different interpretation? EU law does not provide any answer, as the Member States are free to determine their legal norms in cases not covered by a given directive. Consequently, this question must be answered by the national courts. It is therefore a great virtue of the book that it reports national case-law and demonstrates what kind of different approaches national courts adopted to handle this problem. Without going into the details of this complicated question, it is enlightening to read that the German Federal Supreme Court (BGH) took the liberty of departing from a CJEU ruling by basically saying that it disagrees with it (the doctrine of '*gespaltene Auslegung*').<sup>6</sup> My personal takeaway from the two German cases reported in the book is that the more unlikely or surprising the CJEU's interpretation is, the less likely it is that courts will also apply it in cases not covered by the given directive. It is doubtful whether such an interpretation ought to be applied in the case of B2B contracts, especially if the CJ mainly bases its interpretation on the need to protect consumers.

The other topic which I would like to briefly touch upon is the *ex officio* application of the Unfair Contract Terms Directive. This issue is highly relevant for Hungarian lawyers, as consumers often invoke the provisions of this directive (and/or the transposing national rules) to challenge the contracts they concluded. Such references are extremely frequent in lawsuits between consumers and banks, which constitute a considerable portion of the lawsuits involving EU law. It is perhaps more than a coincidence that two of the CJEU judgements referred to in the book were given in Hungarian cases,<sup>7</sup> and that a preliminary reference procedure is currently before the CJEU which also concerns the *ex officio* application of the Unfair Contract Terms Directive.<sup>8</sup>

<sup>3</sup> E.g. Section 209(1) of the Civil Code of 1959, Section 6:102(1) of the Civil Code of 2013.

<sup>4</sup> Sections 6:168 – 6:170 of the Civil Code of 2013.

<sup>5</sup> Section 6:168(3) of the Civil Code of 2013.

<sup>6</sup> Hartkamp, Sieburgh, Devroe (n 1) 405–411.

<sup>7</sup> Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Györfi* [2009] ECRI-4713; Case C-137/08 *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* [2010] ECR I-10847.

<sup>8</sup> Case C-51/17 – Request for a preliminary ruling from the Fővárosi Ítéletábla (Hungary) lodged on 1 February 2017 – *Teréz Ilyés, Emil Kiss v OTP Bank Nyrt., OTP Faktoring Követeléskezelő Zrt.* (pending). The Hungarian Court referred the following question to the CJ in connection with the *ex officio* application of the Unfair Contract

Under Hungarian law, one of the main problems associated with this topic is that the provisions of Hungarian law originally transposing the Unfair Contract Terms Directive did not allow for an *ex officio* application. Hungarian private law differentiates between two types of invalidity: nullity (*semmisség*) and contestability (*megtámadhatóság*; similar to the German *Anfechtbarkeit*). Nullity means that anybody may invoke the invalidity without time limit, and Courts may also raise the invalidity *ex officio*.<sup>9</sup> On the other hand, contestability means that the contract becomes invalid only if the aggrieved party challenges it. This may be done within a one year time limit, which generally starts from the conclusion of the contract. Courts may not raise such invalidity *ex officio* because it is only the aggrieved party who is entitled to challenge the contract.<sup>10</sup>

The original implementation of the Unfair Contract Terms Directive took place by way of Act CXLIX of 1997, which modified Section 209(1) of the Old Civil Code as follows: 'If a general term is unfair, the aggrieved party may challenge such a provision.' Hence, courts were not allowed to investigate *ex officio* whether a particular general term was unfair, if the aggrieved party did not raise this point in court. However, the Old Civil Code was amended as of March 1 2006 by way of Act III of 2006. The amendment introduced the following new Section 209/A(2): 'In the case of consumer contracts, unfair general terms which become part of the contract, as well as unfair terms that the other party determines unilaterally before concluding the contract, and which have not been individually negotiated with the consumer, are null and void. This nullity may only be invoked for the consumer's benefit.' As of this date, the nullity sanction applies with regard to unfair general terms. The new Civil Code (Act V of 2013), which entered into force on March 15, 2014, did not change these rules.<sup>11</sup>

It is clear that, for consumer contracts concluded after March 1, 2006, courts may find *ex officio* that a certain general contract term is unfair. However, the question arises as to the situation of contracts concluded between May 1, 2004 (when Hungary became a member of the EU) and March 1, 2006 (the date of the amendment to the Old Civil Code). Theoretically,

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Terms Directive: 'If the national court declares that the contractual term which places the exchange rate risk on the consumer is unfair, is it required, when determining the legal effects in accordance with the rules of national law, also to take into account of its own motion, while respecting the right of the parties to present argument in *inter partes* proceedings, the unfairness of other contractual terms which have not been relied on by the applicants in their action? Does the principle that the court should act of its own motion in accordance with the case-law of the Court of Justice also apply if the applicant is a consumer or, having regard to the position occupied by the principle of the autonomy of the parties in the whole proceedings and to the particular features of the proceedings, does the principle that the parties have the right to delimit the subject matter of an action, in that case, preclude examination by the court of its own motion?'

<sup>9</sup> Section 234 of the Civil Code of 1959, Sections 6:88 and 6:108 of the Civil Code of 2013.

<sup>10</sup> Sections 235-236 of Civil Code of 1959, Section 6:89 of the Civil Code of 2013.

<sup>11</sup> Section 6:103(3) of the Civil Code of 2013 provides as follows: '*Unfair contractual terms in contracts between a consumer and an undertaking are null and void. This nullity may only be invoked for the consumer's benefit.*' The definition of unfair contractual terms is also included in the same provision. The concept of nullity and contestability have not changed.

the original wording of Section 209(1) of the Old Civil Code applies to these matters, which does not allow courts to raise the unfairness of a general term *ex officio*.

However the Hungarian court practice came to a different conclusion, as demonstrated by the recent judgement of the Court of Appeal of Pécs (*Pécsi Ítéletábla*) no. Pf.VI.20.147/2016/4., published under no. BDT 2017. 3680. This judgement concerns a mortgage contract concluded in 2005, i.e. during the period where Hungary was already an EU Member State, thus Directive 93/13/EEC had to be applied. However, the relevant provision of domestic law (the Old Civil Code) had not yet been amended to allow *ex officio* application of the rules of that directive. It was also a fact of the particular case that the consumer challenged certain general terms of the mortgage contract after the one year deadline. As such, the relevant question for the court was whether to apply the Old Civil Code and reject the claim, since the one year deadline for challenging the contract had expired, or to interpret the Old Civil Code in line with the directive and allow the claim.

The court chose the latter option. It summarised the CJEU's case-law on the *ex officio* application of the Unfair Contract Terms Directive and harmonious interpretation, and concluded as follows: 'In Case Y-000/98 O,<sup>12</sup> the Court of Justice of the European Union expressly stated that national courts shall interpret national law provisions "in conformity with the directive". Accordingly, the provisions of the Civil Code of 1959 applicable in a particular case must be interpreted in light of the purpose and wording of Directive 93/13/EEC in a way to meet the requirements of the effective enforcement of consumer interests. It follows from all the above that unfair general terms, or contractual terms which have not been individually negotiated shall be regarded as null and void in the case of contracts concluded not only after March 1 2006 but also between May 1 2004 and February 28 2006.<sup>13</sup> The court's decision followed the general guidance given by the Hungarian Supreme Court on this particular issue.<sup>14</sup>

While this approach ensures the effectiveness of the Unfair Contract Terms Directive's provisions (*i.e.* it enables their *ex officio* application), it is doubtful whether the court's approach remained within the legitimate limits of interpretation. In effect, the court held that the unfairness of a general term is a ground for nullity, even though the legal provision applicable in the case expressly qualified unfairness as a ground for challenge. When dealing with the requirement of harmonious interpretation, the book emphasises that this requirement cannot go so far so to contradict a clear provision of domestic law.<sup>15</sup> Re-characterising a ground for invalidity seems to be a *contra legem* interpretation of Hungarian law.

<sup>12</sup> While the exact case number has been redacted from the published version of the judgement, it clearly refers to Case C-240/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941.

<sup>13</sup> Judgement in case no. BDT 2017. 3680. para 15.

<sup>14</sup> Supreme Court Opinion no. 3/2011 PK. Supreme Court Opinions are non-binding legal instruments by way of which the Supreme Court exercises its constitutional right and obligation to unify the court practice in Hungary.

<sup>15</sup> Hartkamp, Sieburgh, Devroe (n 1) 362.