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Procedural autonomy and effectiveness - a delicate balance

Opinion of AG Wahl in C-483/16 Sziber

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Publication date

2018

Document Version

Final published version

License

Unspecified

[Link to publication](#)

Citation for published version (APA):

van Duin, A. (Author). (2018). Procedural autonomy and effectiveness - a delicate balance: Opinion of AG Wahl in C-483/16 Sziber. Web publication or website, Recent developments in European Consumer Law. <http://recent-ecl.blogspot.co.uk/2018/01/procedural-autonomy-and-effectiveness.html>

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WEDNESDAY, 24 JANUARY 2018

Procedural autonomy and effectiveness - a delicate balance; Opinion of AG Wahl in C-483/16 Sziber

For those who are interested in [consumer credit agreements in a foreign currency](#), the legal consequences of unfair terms and the 'proceduralization' of [Directive 93/13](#), we will discuss the [Opinion of Advocate General Wahl in Sziber \(Case C-483/16\)](#) that came out last week. This case is a successor to the much-discussed [Kásler judgment \(C-26/13\)](#). In short, the questions asked to the EU Court of Justice by the referring court from Hungary pertain to national legislation adopted after [Kásler](#) and follow-up case law of the Kúria, the Hungarian Supreme Court.[*]



Source: ERSTE Bank Hungary

Mr. Zsolt Sziber - a consumer - had brought an action against ERSTE Bank Hungary, claiming that the agreement he concluded with the bank was invalid in its entirety, inter alia because the bank had not carried out a credit assessment, because the contract contained a foreign currency conversion

without clearly stipulating the exchange rate, and because he could not evaluate the extent of the risk on the basis of unintelligible information. Alternatively, he sought a declaration that some of the contractual terms were unfair and thus invalid. During the proceedings, the applicable national laws were amended and additional requirements were introduced. The new legislation applies to consumer credit agreements concluded between 2004 and 2014. It declares standard terms void that set, for the purpose of repayment of the debt, a different exchange rate from the one set when the loan was paid out. Those terms are replaced by the official exchange rate for the foreign currency concerned. Standard terms that permit the unilateral increase of the interest rate, costs and commissions are also deemed to be unfair (and void). The sums paid in excess have to be refunded, and the credit institution must carry out a 'settlement of accounts' with the customer.

In addition, to harmonise the case law, transitional procedural rules provide that the contracting parties may make an application to the court for a declaration of (partial) invalidity, but **only** if they also request determination of the legal

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- ▶ [2019](#) (72)
- ▼ [2018](#) (107)
 - ▶ [December](#) (8)
 - ▶ [November](#) (10)
 - ▶ [October](#) (7)
 - ▶ [September](#) (12)
 - ▶ [August](#) (6)
 - ▶ [July](#) (11)
 - ▶ [June](#) (12)
 - ▶ [May](#) (6)
 - ▶ [April](#) (13)
 - ▶ [March](#) (6)
 - ▶ [February](#) (4)
 - ▼ [January](#) (12)

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consequences of invalidity, including the settlement of accounts between them. Otherwise, the application is inadmissible and the court may not examine the case on the merits.

The referring court found that Mr. Sziber was entitled to a refund and invited him to amend his application in line with the new legislation, but he failed to do so. Therefore, the referring court considered itself unable to rule on the merits of the case, which meant that Mr. Sziber would be left empty-handed. Subsequently, the referring court raised doubts as to whether the national laws involved were compatible with EU law, in particular Articles 38 and 47 of the EU Charter of Fundamental Rights, Directive 93/13 and Directive 2008/48 (which, according to AG Wahl, does not apply to the present case; see para 29). In the referring court's view, *the additional requirements were prejudicial to consumers*, whether applicant or defendant. Moreover, these additional requirements did not apply to consumers who had not entered into a credit agreement between 2004 and 2014 or who entered into a different kind of agreement. Then, it suffices to merely seek a declaration of invalidity, without having to specify the legal consequences.

AG Wahl's Opinion is divided in two parts: (i) admissibility, and (ii) substance, i.e. the 'equivalence and effectiveness' test.

First, AG Wahl remarks that the national legislation at issue already seems to have the effect of rendering the contractual terms that Mr. Sziber regarded as unfair null and void (para 32). In *Kásler*, the CJEU held that Directive 93/13 does not preclude provisions of national law "enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law". So far, so good: new legislation has indeed been adopted in Hungary. The problem in this case, however, is that the referring court was *prevented from 'curing the invalidity'*, due to the applicable procedural rules. In this respect, the case appears to be a classic example of national procedural law that could make the exercise of consumer rights under e.g. Directive 93/13 "impossible or excessively difficult". Although the Member States have **procedural autonomy**, they must still observe the principles of **equivalence and effectiveness**. Furthermore, according to established case law of the CJEU, the **full effectiveness (effet utile)** of Directive 93/13 requires that national courts offer consumers *ex officio* protection against unfair contract terms.

Yet AG Wahl's Opinion shows how delicate the balance is between procedural autonomy and effectiveness. He even concludes that the case is inadmissible, because Mr. Sziber's claims regarding unfair terms have already been addressed by the national legislation at issue. The remaining claims are unrelated to EU law, says Wahl (para 32). At the same time, Wahl acknowledges that, as a consequence of Mr. Sziber's inaction, the referring court had to dismiss the claims before it could substitute the terms and/or order a refund (cf. para 64 of the Opinion). Why, then, the case would be inadmissible is a bit of a mystery.

[AG Sharpston states in a recent Opinion](#) - referring to *Asturcom* (C-40/08) -

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- ▶ [2017](#) (78)
- ▶ [2016](#) (79)
- ▶ [2015](#) (84)
- ▶ [2014](#) (136)
- ▶ [2013](#) (220)
- ▶ [2012](#) (276)
- ▶ [2011](#) (155)
- ▶ [2010](#) (92)

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that, while the national court does not have to make up fully for 'total inertia' on the part of a consumer, the Directive must be applied *irrespective of the parties' procedural actions or submissions*, except (of course) if none of them has brought proceedings. Indeed, the CJEU has held in *Asturcom* that the national court must assess the potential unfairness of contractual terms of its own motion, "in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature. If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause". This appears to seamlessly apply to the present case.

In light of the CJEU's case law, AG Wahl's Opinion is all the more curious. Not only does he seem to defend a rather 'passive' role for national courts (cf. para 54), he also argues that placing a heavier burden on the consumer is justified. In his view, the new procedural rules are "more favourable" than the ordinary rules: they would make the enforcement of consumer rights more simple, quicker and cheaper (paras 51-52). It may be true that specific, possibly more effective procedures have been introduced for consumers, but in Mr. Sziber's case they are not of any help. For Mr. Sziber, the new requirements do have "unfavourable consequences" (para 64). Thus, the question should not be whether the new system "taken as a whole" (para 50) is compatible with EU law, but whether Mr. Sziber and other consumers in a similar position are afforded sufficient protection of the rights they derive from Directive 93/13. Wahl does not substantiate why it would be legitimate and necessary to request that claimants like Mr. Sziber make an extra effort by submitting an 'express' and 'quantitatively defined' claim (cf. paras 54-55 and 59-62). He does not explain either why the adoption of such additional steps would not prejudice the effective judicial protection of Mr. Sziber's rights, in particular his right of access to court, guaranteed by Article 47 of the Charter (cf. para 65). Unfortunately, the referring court does not seem to have provided much more information. For instance, why could the desired outcome - a settlement of accounts - not be achieved by requiring *the bank* to provide the necessary documents? We hope that the CJEU's judgment will clarify which test is to be applied here, as well as how procedural autonomy, effectiveness and, finally, effective judicial protection are (inter)related.

[*] For more details, see: Judith Fazekas, 'The consumer credit crisis and unfair contract terms regulation - Before and after Kásler', *Journal of European Consumer and Market Law* 3/2017, pp. 99-106.

Posted by Anna van Duin at 19:56



Labels: [access to justice](#), [charter](#), [civil procedure](#), [cjeu](#), [consumer protection](#), [directive 93/13](#), [effective judicial protection](#), [effectiveness](#), [unfair contract terms](#), [unfair terms](#)

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[Action Pan](#) (1)

[Action Plan](#) (2)

[ADR](#) (16)

[advertising](#) (38)

[aggressive practices](#) (5)

[air](#) (1)

[air fare](#) (1)

[air passengers](#) (15)

[air travel](#) (73)

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[article](#) (3)

[Article 29 WP](#) (1)

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[automated financial advice](#) (2)

[average consumer](#) (14)

[Aziz](#) (10)

[B2B](#) (1)

[bank recovery and resolution](#) (1)

[bank transfer](#) (1)

[banking services](#) (31)

[banking union](#) (3)

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[blacklist](#) (9)

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[book](#) (15)

[breach of consumer law](#) (1)

[brexit](#) (6)