

ASSESSMENT OF UNFAIR TERMS IN TIMESHARE CONTRACT^a

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Abstract

In this article, through the presentation of case law, which is primarily related to timeshare contract, author performed a legal analysis of the absolute and relative criteria that court takes into account in the overall fairness assessment of a contract term. A contract term shall be considered unfair as a result of violation of absolute criteria, i.e., if it causes: breach of the principle of good faith and significant imbalance in contractual obligations of the parties to the detriment of the consumer. The unfairness of a term shall be assessed taking into account relative criteria, such as: the nature of the goods or services to which the contract relates; the circumstances under which the contract has been concluded; other terms of the same consumer contract or of another related contract; the manner in which the contract was drafted and communicated to the consumer by the trader.

Another important question that is raised in this article deals with the impact of the Directive 2005/29/EC on the evaluation of the fairness of contract clauses, when it comes to the duty to provide information, and when it comes to its impact on the courts in the interpretation and evaluation of the fairness of the contract clauses.

Key words: unfair contract terms, fairness assessment, assessment criteria, time-sharing, unfair commercial practice.

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ПРОЦЕНА ПРАВИЧНОСТИ ОДРЕДАБА ТАЈМ-ШЕРИНГА

Апстракт

У овом раду, кроз приказ судске праксе која се пре свега односи на тајм-шеринг, извршена је правна анализа апсолутних и релативних критеријума које суд узима у обзир приликом процене правичности уговорних одредаба. Према одредбама Закона о заштити потрошача, сматраће се да је уговорна одредба неправична уколико је дошло до повреде апсолутних критеријума која за последицу има: повреду начела савесности и поштења и значајну несразмеру узајамних престајања на штету потрошача. Релативни критеријуми на основу којих се утврђује да ли је одређена одредба уговора неправична су: природа робе или услуга на које се уговор односи; околности под којима је уговор закључен; остале одредбе истог потрошачког уговора или другог уговора са којим је потрошачки уговор повезан; начин на који је постигнута сагласност о садржини уговора и начин на који је потрошач обавештен о садржини уговора.

Поред тога, посебна пажња у оквиру рада је посвећена питању утицаја Директиве ЕУ 2005/29 на уговорно право и процену правичности уговорних одредаба, што се најбоље може видети на примеру дужности информисања и судске праксе.

Кључне речи: неправичне уговорне одредбе, процена правичности, критеријуми правичности, тајм-шеринг, непоштена пословна пракса

INTRODUCTION

Before the adoption of the Directive 93/13/EEC (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJL 095, 21.4.1993, pp. 29-34), the European Commission launched a series of studies in order to analyze certain types of standard-form contracts including travel and tourism contracts (package travel, timeshare contract¹, long-term holiday products). Studies have not only shown a lack of transparency, but also identified difficulties consumers are facing in acquiring relevant information before contract conclusion, as well as the presence of unfair contract terms in these contracts. A significant portion of unfair contract terms is identified in timeshare contracts, as a result of their complexity and specific nature.

Therefore, rules contained in Directive 93/13/EEC and Consumer Protection Act (Official Gazette of Republic of Serbia, No. 62/14; hereinafter CPA) have high importance for assessing fairness of timeshare contract terms. These regulations stipulate two basic systems of contract term

¹ Pursuant to Article 5, paragraph 1, item 26 of Serbian Consumer Protection Act, a timeshare contract is defined as a contract under which the trader is obliged, in the span of at least a year or with a tacit extension, to provide consumer with one or more immovable properties in which he can spend a night and which he can use on at least two occasions, for which the consumer is obliged to pay an adequate fee.

fairness assessment (fairness tests): general fairness test (fairness assessment based on a general clause) and fairness assessment based on a list of unfair terms² (unfair terms list test). These two systems are usually combined, while unfair terms list represents an additional instrument (fairness criteria) courts use for concretization of the general clause.

The general fairness test is used to assess whether a particular contract term can fall under the general clause (which is wide enough to cover many different situations) and therefore considered to be unfair. In the function of the general fairness test, different fairness assessment criteria can be used. In this regard, CPA makes a clear distinction between absolute (important, relevant) and relative (facultative, conditional) fairness assessment criteria (Karanikić Mirić, 2012, p. 223).

In this paper, the authors conducted a legal analysis of absolute and relative criteria, through the presentation of case law of certain EU member states, with regard to the significance and effect they have on the assessment of unfair terms in timeshare contracts. Special attention will be given to the impact of the Directive 2005/29/EC (Directive 2005/29/EC of the European Parliament and of the Council of 11.5.2005 concerning unfair business-to-consumer commercial practices in the internal market, OJL 149, pp. 22-39) on the assessment of unfair terms, not only regarding its duty to inform, but also regarding its impact on the courts in interpreting and assessing the fairness of the contract terms. Even though timeshare contract is not frequently concluded and used in the Serbian legal system at the moment, which is expected to change, a comparative review of the case law directly or indirectly related to the assessment of unfair terms in timeshare contract could serve as a guideline for domestic courts in the future.

ABSOLUTE FAIRNESS ASSESSMENT CRITERIA

CPA, according to the provisions of the Directive 93/13/EEC (Article 3, paragraph 1), provides a couple of absolute criteria for assessing fairness of terms in consumer contracts. These are: (A) transparency requirement as formal control criterion (compliance with certain general, formal requirements for validity and enforceability of contract terms), as

² It is possible to distinguish the so-called “blacklists” of absolutely unfair contract clauses, “graylists” of clauses that are presumed to be unfair, and “indicative lists” of clauses that may be regarded as unfair. While Serbian Consumer Protection Act has provided a combination of “black” and “gray” list of unfair contract terms, the legal nature of the Annex to Directive 93/13/EEC has long aroused doubts in the European doctrine, but the attitude that it was an “indicative list” eventually prevailed. This was also confirmed by the European Court of Justice in the case *Commission of the European Communities v Kingdom of Sweden*, according to which the list in Annex of the Directive 93/13/EEC has only an “illustrative, guiding value”. See: Rott & Terryn, 2010, pp. 291-292.

well as requirement of good faith (B) and significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (C), as substantive control criteria. Based on the provisions of the CPA and Directive 93/13/EEC, the aforementioned criteria need to be cumulatively met in order for contract terms to be qualified as unfair.³

A) Formal control criteria (transparency principle) can be seen as an integral part of traders' duty to provide consumers with relevant information. Pursuant to provisions of Directive 93/13/EEC, this principle is limited solely to situations when the contract is made in writing (Article 5). CPA provides a higher degree of protection for consumers, given that the application of this principle is not conditioned by the form of the contract.

³ Unlike the approach taken in the current CPA and Directive 93/13/EEC, previous CPA (Official Gazette, No. 73/10), contained three additional substantive control criteria: transparency requirement and criteria aimed toward assessing whether execution of the contract is disadvantageous to the consumer without a justifiable explanation and whether execution of the contract is substantially different from what the consumer legitimately expected. The transparency requirement in the previous CPA was, therefore, at the same time set as a criterion of formal control (Article 44), as well as a criterion of substantive control of contract terms (Article 46, paragraph 2, item 4). It was obviously a failure of the legislator, because one and the same criterion cannot have two different purposes. In order for a consumer to be bound by the contract term, the contract must comply with the transparency requirement first, which is followed by fairness assessment of contract term in the substantive sense.

It seems that, in terms of the aforementioned substantive control criteria, the solution that was adopted in German law served as a model for Serbian legislator (Vuković, 2012, p. 96). According to paragraph 307 (1) of the German Civil Code (Bürgerliches Gesetzbuch), invalid provisions are those provisions of the general conditions which, contrary to the principle of good faith, place undue burden to one party to a contract. In case of doubt, it is considered that undue burden exists: a) when a provision deviates from the basic principles of legal regulation; b) when the essential rights or duties resulting from the nature of the contract are restricted in such a manner that there is a risk that the purpose of the contract will not be achieved. In assessing whether the execution of contractual obligations places undue burden on the consumer without justifiable explanation, the Court takes into account the circumstances of the case as well as the entire content of the contract. Doctrine points out that it is difficult to determine the precise parameters for materialization of this criterion in practice and that it is almost impossible to distinguish it from other fairness assessment criteria (Nebbia, 2007, p. 26). Therefore, German law sets this criterion as an additional criterion for determining whether a contract term is contrary to the principle of good faith.

The criterion concerning legitimate consumer expectations was developed from the German legal principle of "protection of faith in the legal system", which originally applied to public-law relations between private individuals and the government. Therefore, this criterion was originally understood as a legitimate expectation of legal entities that content of legal regulations will not differ from what can reasonably be expected.

Formal control of fairness of contract terms in consumer contracts implies assessment of clarity, accuracy,⁴ comprehensibility, and transparency of contract terms, combined with the rule *in dubio contra stipulatorem* (Vuković, 2012, p. 86). Contract terms shall be binding on the consumer insofar as they are expressed in plain, intelligible language, and understandable to a reasonable person as educated and informed as the particular consumer (Article 41, paragraph 1, CPA).⁵ The trader shall make contract terms available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract, with due regard to the means of communication used (Article 41, paragraph 1, CPA). In case a contract term does not meet the requirements of the transparency principle, such a term would be considered unfair in the formal sense.

Regarding timeshare contract, the trader shall provide the consumer with information listed in the standard information forms within a reasonable time before the contract is concluded (Article 110, paragraph 1, CPA). The notice must be accurate, complete, clear, intelligible, and provided by the trader free of charge, on paper or another easily accessible durable medium, in a clear and comprehensible manner (Article 110, paragraph 1 and 2, CPA).⁶ The standard information forms for timeshare contracts, long-term holiday product contracts, resale contracts, and exchange contracts shall be regulated by the Government, following the

⁴ Under the imprecise terms, as regards the obligations of a trader, the following terms shall be understood: time of delivery will be respected “to the extent possible”, repair of goods will be made “as soon as practicable” and “thoroughly”. As regards the provisions governing the liability of consumers, the following terms can be identified in contractual practice: “regardless of the reason”, “no matter the damage”, “in all circumstances”. See: Djurdjevic, 1998, p. 829.

⁵ Requirement of “simple, clear and plain intelligible language” does not refer only to the prohibition of complex sentences and unusual words, but also ensures that the consumer clearly understands legal and economic significance of the contract as a whole. See: Armbrüster, 2008, p. 167.

⁶ In Article 31 of the Proposal for a Directive on Consumer Rights (Proposal for a Directive of the European Parliament and of the Council on consumer rights, 8.10.2008, COM (2008) 614/3), the transparency principle was complemented with a requirement that a contract term needs to be legible; however, in the final text of the Directive 2011/83/EU (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJL 304, 22.11.2011, pp. 64-88), this provision was not included. Moreover, Directive 2011/83/EU contains only one article related to unfair contract terms, which complements Article 8 of Directive 93/13/EEC. Namely, Article 32 of Directive 2011/83/EU provides that each Member State shall inform the Commission if it decides to impose in its legislation a broader scope than the one stipulated in Directive 93/13/EEC, in particular if a Member State: a) extends the unfairness assessment to individually negotiated contract terms; b) imposes a “blacklist” of unfair contract terms.

joint proposal of the ministry and the ministry in charge of tourism (Article 110, paragraph 3, CPA).

Transitional and final provisions of the CPA stipulate that within six months after this law enters into force the respective bylaws will be passed, including the rules on the content of standard information forms. The act currently in force is the Decree of the Government of the Republic of Serbia on the content of the standard information form for timeshare contract, long-term holiday product contracts, resale contracts, and exchange contracts (Official Gazette of Republic of Serbia, No. 55/2011), which was adopted by the authorisation of the previous CPA. According to the Decree, a standard information form contains: 1) name and residence of the trader; 2) description of the immovable property/product; 3) rights consumer acquires under the contract; 4) exact period during which the rights can be exercised; 5) date on which the consumer may start to exercise the contractual rights; 6) if the contract concerns a specific property under construction, date when the accommodation and services/facilities will be completed/available; 7) price to be paid by the consumer for acquiring the right(s); 8) outline of additional obligatory costs imposed under the contract, type of costs, and indication of amounts (e.g. annual fees, other recurrent fees, taxes); 9) key services that are available to the consumer (e.g. electricity, water, maintenance, refuse collection) and an indication of the amount to be paid by the consumer for such services; 10) summary of the facilities available to the consumer (e.g. swimming pool, sauna, sport facilities, the Internet) and an indication of the amount to be paid by the consumer to use these facilities; 11) possibility of joining the exchange system, name of that system, and an indication of costs for membership in that system; 12) information on codes of conduct signed by the trader and the place where these codes can be found; 13) a notice on the right of consumers to withdraw from the contract and time limits for exercising that right; 14) a notice on prohibition of advance payments before expiry of the withdrawal period.

As regards timeshare contract, the standard information form contains information about entitlements, immovable properties, costs, and information regarding accommodation under construction. If necessary, the trader is obliged to provide the consumer with the following information: 1) the manner in which maintenance and repairs of the property and its administration and management are arranged, including whether and how consumers may influence and participate in the decisions regarding these issues; 2) possibility to join a system for the resale of the contractual rights, information about the relevant system, and an indication of costs related to resale through that system; 3) indication of the languages available for after-sales communication with the trader pertaining to the contract (e.g. pertaining to management decisions, increase of costs, and the handling of queries and complaints); 4) the possibility of out-of-court dispute resolution.

One shortcoming of this Decree lies in the fact that it stipulates only one form for timeshare contract, long-term holiday product contract, and ancillary contracts. Therefore, it is necessary to replace the current Decree with a new one, which will regulate the content of the standard information sheets separately for each and every contract that is stipulated under CPA (timeshare contract, long-term holiday product contracts, resale contracts, and exchange contracts).⁷

The transparency principle is linked to the consumer's right to "own language", i.e., the right to receive information in one's native language. Since timeshare contract is a typical example of the cross-border contract, there is often a problem of the language of the contract (Bukovac Puvača, 2003, p. 325). That is why Directive 2008/122/EC (Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJL 33, 3.2.2009, pp. 10-30) regulates this question in detail.⁸ It is determined that Member States are obliged to ensure that the information contained in standard information forms and the contract is drawn up in the language or one of the languages of the Member State in which the consumer is a resident or a national, at the choice of the consumer, provided it is an official language of the Community (Article 4, paragraph 3 and Article 5 of Directive 2008/122/EC). Under the same condition, the Member State in which the consumer is a resident may also require that: a) in every instance, the contract be provided to the consumer in the language or one of the languages of that Member State, provided it is an official language of the Community; b) in the case of a timeshare contract concerning one specific immovable property, the trader provide the consumer with a certified translation of the contract in the language or one of the languages of the Member State in which the property is situated, provided it is an official language of the Community (Article 5 of the Directive 2008/122/EC). In addition, the Member State on whose territory the trader carries out sale activities may require that, in every instance, the contract be provided to the consumer in the language or one of the languages of that Member State, provided it is an official language of the Community (Article 5 of the Directive 2008/122/EC).

B) The principle of good faith is nowadays the most frequently used general clause in the entire civil law (Commentary on the Law of Obligations, 1980, p. 107). Participants of the contractual obligations are

⁷ Annex I-IV Directive 2008/122 provides separate forms for each of these contracts and specifies their contents.

⁸ Unlike the previous legislative text, the current CPA contains a mandatory provision stipulating that information specified in standard information forms needs to be drawn up in the Serbian language, or another language, if contract parties agree so.

obliged to adhere to the principle of good faith, but in addition to that, many specific rules of the Law of Obligations are concretized with this principle.⁹ However, the Law of Obligations does not specify what is meant by that principle. Thus, the principle of good faith represents a general clause, i.e. a blanket norm by which generally applicable principles of the legal system and ethical maxims can be applied to particular facts of the case (Stojanović, 1973, p. 7).

It is the principle of good faith that was the main criterion the Polish Supreme Court used in assessing the fairness of contract terms in the case *Sąd Najwyższy (PL) 23 Mar. 2005 ICK 586/04*.¹⁰ In this case, two parties concluded a timeshare contract which contained a clause requiring the buyers to pay an amount of £630 if they withdraw from the contract within the statutory 10 days. This sum represented 28% of the total price. The right of consumer to withdraw from the contract, as well as the right of the trader to request reimbursement of costs related to conclusion of the contract, was envisaged by the Law on the Protection of the Purchaser of the Right To Use a Building or a Flat in a Specified Period Each Year (Ustawa z dnia 13 lipca 2000 o ochronie nabywców prawa korzystania z budynku lub pomieszczenia mieszkalnego w oznaczonym czasie w każdym roku, Dz.U.2000.74.855). The consumers exercised the right of withdrawal within the time limit, but refused to pay £630, claiming that the amount was too high and did not reflect the true costs of concluding the contract. The Court for the Protection of Competition and Consumers held that the clause demanding £630 was an unfair contractual clause expressly contravening Article 385.3, paragraph 17 of the Civil Code. That article provides that a clause which requires a consumer who withdraws from a contract to pay a strikingly high financial contractual penalty or to lose a deposit which was very high is unfair. The Court of Appeal confirmed this decision. The Supreme Court also agreed that the requirement was an unfair contractual clause, but did not follow the line of reasoning of the two other Courts, i.e. it did not conclude that Article 385.3, paragraph 17 was breached. The amount was not, according to the Court, a contractual penalty: such penalties follow a breach of contract and not withdrawal from it. Irrespective of the fact that Article 385.3, paragraph 17 could not be applied in this case, the Court concluded that the request to pay £630 was an unfair clause.

⁹ The principle of good faith is particularly prominent in the specific rules of the Law of Obligations concerning: the legal consequences of nullity (Article 104); termination or modification of the contract due to changed circumstances (Article 135); disclaiming in advance the right to claim changed circumstances (Article 136); reimbursement of expenses with regard to acquisition without ground (Article 215); extension of liability by contract (Article 264).

¹⁰ Available at: http://www.eu-consumer-law.org/caseabstracts_en.cfm?JudgmentID=514 (31/10/2014).

The Court applied the general fairness test, according to which any contractual clause is unfair if it contravenes good faith. It concluded that a clause which limited the consumer's statutory cancellation rights by imposing a requirement to pay a very high amount of money was unfair.

C) The effect of the principle of equal value of mutual considerations (equivalency principle) is twofold. Not only does it protect the individual interests of the contract parties in a mutually binding agreement, but the legal system as a whole is also interested to ensure that all market acts are undertaken in accordance with this principle, which means that, in addition to individual, it also protects the public interest (Perović, 2007, pp. 11-12). According to the CPA, the provision in the consumer contract is considered unfair if it causes a significant imbalance between the rights and obligations of the parties to the detriment of the consumer (Article 43, paragraph 2, CPA). Therefore, disproportion needs to be significant, which is something that court determines in each case. Legal consequences in these cases are diverse and their goal is either to establish an equivalent exchange, or, if possible, to cancel the contract and allow *restitution in integrum* (Morait, 1997, p. 57).

The significant disparity in the rights and obligations of the parties under the timeshare contract may be caused, inter alia, by conversion of timeshare rights based on the "week" system into the "points" system. Consumers are usually persuaded to convert their timeshare rights for greater flexibility in exercising rights from the contract (possibility to choose the period of use and accommodation, possibility of shorter and longer stays in combination with supporting services). However, in this case, traders often reserve the right to change the value of points, which results in the reduction of the total period of use during the year. Thus, in one particular case, after timeshare purchasers converted their original right to use accommodation for a period of three weeks during the year into points, the trader reduced the value of points, which automatically decreased consumers' right to use accommodation to one week.¹¹ In Serbian law, these and similar contract terms (e.g. when traders unilaterally alter the contract terms by increasing annual fees: for maintenance services, for timeshare resale or exchange services)¹² are presumed to be unfair unless proven otherwise (Article 45, paragraph 1, item 11, CPA).

¹¹ See: <https://www.google.rs/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCMQFjAA&url=https%3A%2F%2Fwww.citizensadvice.org.uk%2Fparadiselost.pdf&ei=Up9TVMCgNsit7AbA4GICw&usg=AFQjCNGq3GTx0nZ809ekJtBPkBYdLyiIng&bvm=bv.78677474,d.ZGU&cad=rja>, p. 13 (31.10.2014)

¹² See: <http://www.twolegalservices.com/uploads/oft859timeshare%20act.pdf>, p. 24 (31.10.2014)

RELATIVE FAIRNESS ASSESSMENT CRITERIA

During the assessment of the fairness of contract terms in consumer contracts, court also takes into account the relative fairness assessment criteria: A) the nature of the goods or services to which the contract pertains; B) the circumstances under which the contract has been concluded; C) other terms of the same consumer contract or of another related contract; D) the manner in which the contract was drafted and communicated to the consumer by the trader (Article 43, paragraph 3, items 1-4, CPA).¹³ The content of these criteria (circumstances) depends on the manner or context in which certain term of the consumer contract is negotiated. Thus, the legal significance of the fulfillment of these criteria is evaluated according to the circumstances of each case (Karanikić Mirić, 2012, p. 224).

A) The nature of the goods or services which are the subject of contractual obligations may directly affect the scope of the parties' rights and obligations. For instance, content of the pre-contractual duty to inform consumers may differ depending on the subject of the contract – whether it is the sale of clothing or sale of a complex technical device (Vuković, 2012, p. 131). Bearing in mind that timeshare purchasers are in an informatively subordinate position because of the specific nature of the transaction and the complexity of the contract, the imperative legal rules serve to ensure the fulfillment of the trader's information duties in order to achieve a balance of the contracting parties (Wilhelmsson & Twigg-Flesner, 2006, pp. 461-462; Twigg-Flesner, 2008, p. 111).

B) When assessing whether a contractual provision is fair or not, one must take into account all the circumstances that existed before and during the conclusion of the contract. Before the conclusion of the contract, the main problem that timeshare purchasers face is a way of offering, advertising,¹⁴ and selling timeshare. In this respect, it will be assessed whether the trader: indicated the possibility and the procedure of obtaining information contained in standard information forms during

¹³ Directive 93/13/EEC makes no mention of the manner in which the contract was drafted and communicated to the consumer by the trader as one of the relevant circumstances for the fairness assessment of the contract terms. Serbian legislator was probably inspired by the solution contained in Articles 31 and 32 of the Proposal for a Directive on Consumer Rights.

¹⁴ Spanish Timeshare Law (No. 42/1998) prohibits the use of the word property (*propiedad*) or shared property (*multipliedad*) for advertising or promotion of timeshare rights. This is confirmed in the case of *Audiencia Provincial Alicante (ES) 19. Sep. 2002 545/2002 "Sain 333 S. L." V Francisco Javier G. B. And Amparo M. G.*, in which the Court took into account Article 8.1 of the Spanish Timeshare Law and applied Article 6, paragraph 3 of the Civil Code (*Código Civil*) which provides for nullity of any contract or other legal act which is contrary to imperative legal provisions.

advertising of the timeshare contract; clearly indicated the commercial purpose and the nature of the event in case the timeshare contract (long-term holiday product, resale, or exchange contract) is offered for sale to the consumer in person; made available to the consumer the information contained in standard information forms at any time during the promotional or sales event; markets or sells the timeshare contract as an investment, even though it is prohibited by law (Article 111, paragraphs 1-4, CPA). During conclusion of timeshare contracts it is often the case that the contract either does not contain certain information at all or contains obscure provisions with regard to: the trader as the counterparty, the subject of the contract, the period during which consumers acquire the right to use certain accommodation; consumer's rights and the deadline for exercising the right to withdraw from the contract; the prohibition of advance payments; and maintenance fees. The court must take into account all these circumstances for the fairness assessment of contract terms.

For example, the lack of stipulation of the periods of time for the enjoyment of timeshare rights does not necessarily entail the conclusion that it is abuse, which should be sanctioned either by nullity of a particular contract term or by nullity of the contract as a whole, but this depends on the circumstances of the case. Thus, in the case *Günter Johann and Gabriele Gertrude P. v "Turventa S. L. U." and "Nove Ferien Plus Est."*,¹⁵ the Court held that this omission may have a positive effect on the consumer, giving him the freedom to choose the times of enjoyment under the assumption that the reservation (booking) is made well in advance. In contrast, in the case *Fernando R. M. and Jacinta F. P. v "Mundivac, S. A." and "Aqualandia S. A."*,¹⁶ the Court, taking into account all the facts of the case, concluded that the subject of the contract was not clearly determined (neither the apartment nor the times of enjoyment) and that the trader did not comply with the transparency requirement, which prevented consumers from properly understanding the content of contract terms; therefore, the contract was declared null and void.

C) In assessing the fairness of specific contract terms, other terms of the same consumer contract must also be taken into account, because the fairness of one particular term often depends on the meaning of other provisions. Other terms of the same contract can differently affect the term whose fairness is weighed. On the one hand, those terms may intensify the inequity of specific contract terms, and on the other hand they may have a compensatory effect (Baretić, 2004, p. 243). In other words, the contract term which itself seems valid, may undermine the equivalence of mutual

¹⁵ Available at: http://www.eu-consumer-law.org/caseabstracts_en.cfm?JudgmentID=195 (31/10/2014).

¹⁶ Available at: http://www.eu-consumer-law.org/caseabstracts_en.cfm?JudgmentID=190 (31/10/2014).

obligations of the parties, if one takes into account the contract as a whole. However, the other terms of the contract can also have the effect of neutralizing the unfairness of specific contract terms (Vuković, 2012, pp. 132-133).

In addition, the Court will also consider the provisions of the other related contract in order to assess the unfairness of a specific contract term. In terms of timeshare contract, it means that the court will take into account the resale and exchange contracts if the consumer joined the system of exchange or resale. Likewise, if the timeshare contract is concluded on the basis of an already approved credit, fairness assessment of timeshare contract terms should also take into account the provisions of the credit agreement.

D) The Court also takes into account the manner in which the contract was drafted and communicated to the consumer by the trader. The aforementioned manner, as it pertains to timeshare contract, is in correlation with unfair business practices¹⁷ or sales techniques used by traders for the purpose of promoting and selling timeshare. These techniques are very aggressive and misleading, aiming to persuade the consumer to take an economic decision that he would not take otherwise. Examination of the manner in which the contract was drafted and communicated to the consumer serves to verify whether the trader has fulfilled the duties with regard to the transparency principle, which has already been discussed above.

IMPACT OF DIRECTIVE 2005/29/EC ON FAIRNESS ASSESSMENT OF CONTRACT TERMS

Although Article 3, paragraph 2 of Directive 2005/29/EC provides that the Directive is without prejudice to contract law, it can be noted, however, that there is an indirect link between the rules governing unfair

¹⁷ Serbian legislator stipulated various forms of unfair commercial practices (Articles 19-23, CPA). Depending on the manner in which the trader caused the consumer to take a transactional decision that he would not have taken otherwise (fraudulent action, harassment, coercion), the following categories are introduced: misleading commercial practices, misleading omissions, and aggressive commercial practices. Misleading commercial practices and misleading omissions are two types of fraud, active and passive. In the first case, the consumer is usually misled by receiving false information, while in the second case the consumer is kept misinformed through omission, concealment, or untimely provision of relevant information. Aggressive commercial practices involve the use of psychological (*vis compulsiva*) or physical coercion (*vis absoluta*), which impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product, as a result of harassment and coercion, including physical coercion or undue influence. Therefore, the modalities are different, but the goal is the same – to cause consumers to take a transactional decision that they would not have taken otherwise.

contract terms and the rules governing unfair business practices. This view is backed up not only by the provisions of relevant regulations related to the duty of notification (A), but also by the case law (B).

A) Impact of unfair business practices to contract law can best be seen in the case of information duties. Namely, Article 7, paragraph 2 of Directive 2005/29/EC,¹⁸ and the European Court of Justice suggest that the prohibition of unfair practices is in correlation with the obligation of notification.¹⁹ This was confirmed in Article 20 of the CPA, which explicitly states that any breach of duty of informing the consumer prior to the conclusion of the contract, as well as the breach of duty to inform the consumer on their rights in accordance with this law, shall be regarded as an unfair commercial practice, in respect of: distance contracts; contracts on package tours and time sharing; indication of prices; and e-commerce contracts. Regarding timeshare contract, within a reasonable time and prior to formation of the contract, the trader shall expressly inform the consumer on their right of withdrawal, the period within which the consumer can withdraw from the contract, and the prohibition of advance payment prior to expiry of the period within which the consumer can withdraw from the contract (Article 112, paragraph 7, CPA), but shall also provide the consumer in a timely manner with accurate and complete information contained in the standard information forms. Bearing in mind that after the formation of timeshare, the aforementioned information, which obliges the trader and which cannot be altered,²⁰ forms an integral part of the contract, it could be concluded that misleading omission committed by the trader in terms of untimely provision of information to consumers pursuant to Article 20, paragraph 1, item 2 of CPA also results in the breach of the transparency principle pursuant to Article 41, paragraph 2 of CPA, according to which contract terms shall be made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract, with due regard to the means of communication used.²¹

¹⁸ Article 7, paragraph 2 of Directive 2005/29/EC, *inter alia*, provides that a misleading omission is any omission of the trader which consists in hiding or providing information in an unclear, unintelligible, ambiguous, or untimely manner, which causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

¹⁹ Likewise, the various sector-specific consumer protection directives combine (misleading) advertising provisions with pre-contractual information requirements. See: Keirbilck, 2011, p. 93.

²⁰ The aforementioned information can be subject to change only exceptionally, i.e. if the parties expressly agree so, or if the changes are due to force majeure (Article 112, paragraph 3 of CPA).

²¹ Article 31 of the Proposal for a Directive on Consumer Rights probably served as a model for Serbian legislator regarding transparency requirement. Unlike the CPA, the

B) The provisions of Directive 2005/29/EC can be used by the court to interpret the provisions of Directive 93/13/EC. For example, the clarity and intelligibility of contract terms (Article 5 of Directive 93/13/EC) is estimated depending on the subject of legal protection (Whittaker, 2007, p. 151). In this regard, Article 5, paragraphs 2 and 3 of Directive 2005/29/EC draws a clear distinction between: a) the average consumer; b) the average member of a group where a commercial practice is directed to a particular group of consumers; c) the average member of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age, or credulity in a way which the trader could reasonably be expected to foresee.²²

In addition, the EU Directive 2005/29 may have an indirect effect on contract law, because if it is determined that a commercial practice is unfair, this may impact the assessment of the fairness of particular contract terms under Directive 93/13/EC (Twigg-Flesner, 2013, pp. 55, 96). This approach was confirmed in the case *Jana Pereničová and Vladislav Perenič v SOS financspol. sr. O. (C-453/10)*, where the question arose whether misleading business practice regarding annual percentage rate for a credit agreement could be relevant in applying the unfairness test. The European Court of Justice decided positively, by applying Article 4 of Directive 93/13/EC, which states that in assessing the fairness of contract

main text of Directive 93/13/EEC makes no mention of the transparency requirement, but item i) of the Annex to Directive stipulates that a term may be regarded unfair if it has the object or effect of irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract. It could be concluded that unfair commercial practice indirectly affected the transparency requirement to become one of the criteria for the fairness assessment of contract terms.

²² This approach was confirmed in the case *Audiencia Provincial Málaga (ES) 09. Jul. 1999 509/1999 Frank H. and Anke Christine H. v "Rockwell International Ltd."*, where consumers acquired a week's holiday in a two bed apartment during high season within the complex "*Miraflores de Mijas Costa*", on the basis of club membership (Club trustee). Sometime after the contract was concluded, consumers filed a claim for annulment of the contract, due to a mistake in their consent at the time of conclusion of the contract, as a result of alleged deceit regarding the price. The Court rejected the claim on the grounds that the consumers' request for the annulment of the contract due to an error in the consent is possible only in exceptional cases, i.e. if certain conditions, formulated by the Supreme Court, are fulfilled: a) that the error is essential and inexcusable; b) that it is substantial and derives from legal actions that are unknown to the party which is bound by the contract; c) that it had not been possible to avoid deficiencies by regular diligence, and d) that it is sufficiently proved. In the present case, the Court found that such requirements were not met due to the fact that consumers concluded a contract in their native language and that they had already enjoyed other timeshare rights on the basis of club membership (Club la Costa), so the contract was valid. It could be concluded that the Court assessed the clarity and intelligibility of contract terms in relation to the average member of a particular group of consumers.

terms, among other things, all the circumstances attending the conclusion of the contract should be taken into account. However, the Court held that the mere fact that business practice is unfair has no direct effect on the validity of particular contract terms, or on the validity of the contract as a whole.²³

With regard to timeshare contract, the impact of unfair business practices on the assessment of the fairness of contract terms can be noted in the case of *Juan Bautista R. R. And Teresa G. M. v "Mundivac, S. A." and "Acualandia, S. A."*. In this case, consumers concluded a timeshare contract, which contained a footnote in print much smaller than the rest of the contract text and which recognised their right to withdraw from the contract within seven days following the date of signature but with the obligation to pay 25% of the price to the seller as a penalty clause.²⁴ However, during the sale, consumers were convinced to purchase the property with the option of withdrawing freely from the contract, with no mention of any penalties, so the consumers sent a letter to a manager of the company, wishing to exercise their rights as they were originally told to. As the trader insisted on payment of the amount stipulated in the contract, the consumers filed a lawsuit requesting the cancellation of contract. The court of first instance rejected the claim, because at the time of conclusion of the contract Directive 94/47/EC (Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, GPL 280, 29.10.1994, pp. 83-87), which stipulated prohibition of advance payments, had not been transposed into Spanish law. However, the Court of Appeal revoked the first instance judgement, taking into account the provisions of Directive 94/47/EC in coordination with national regulations, and declared the nullity of the contract due to defects in the expressed will and because of the unfairness of contract terms.

Namely, the Court took into account that the trader used misleading and aggressive sales techniques and concealed information on contractual penalties; hence the contracting parties had committed a defect in consent rendering the contract voidable as provided by the general provisions of the Civil Code (Article 1265, 1269, 1300 Spanish Civil Code). In making its judgment, the Court also considered that the clause establishing the withdrawal right with a penalty of 25% of the price was unfair, in accordance with the General Consumer Protection Law (Article 10 of Law 26/1984). Moreover, the consumer's right to withdraw from the contract may be

²³ Available at: <http://curia.europa.eu/juris/liste.jsf?num=C-453/10>, paragraphs 42-45, 46 (10/31/2014).

²⁴ Available at: http://www.eu-consumer-law.org/caseabstracts_en.cfm?JudgmentID=153 (31.10.2014).

exercised in three ways: a) by declaring the entire clause null and void and, if the other valid clauses give rise to a situation that is deemed to be unfair, declaring the entire contract null and void; b) by declaring only the withdrawal penalty null and void so that the consumer may withdraw from the contract without incurring any expense; c) by declaring nullity of the contract taking into account the misleading omission by the trader, which consists in concealing important information from consumers, which in turn led them to take a decision to conclude the contract which would not be taken otherwise.

CONCLUSION

In assessing the fairness of contract terms, the court shall take into account all the relative criteria in order to determine whether cumulatively set absolute criteria have been met (breach of the principle of good faith and significant imbalance in contractual obligations of the parties to the detriment of the consumer).

With regard to timeshare contract, practice has shown that stipulated contract terms often violate the transparency principle (irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract; stipulating unclear, unintelligible terms). In addition, there are also provisions which, contrary to the principle of good faith, lead to a breach of the equivalency principle (permitting the trader to retain sums paid by the consumer when the latter decides not to conclude or perform the contract, or enabling the trader to alter the terms of the contract unilaterally – especially those with regard to maintenance services and other related services).

For example, the consumer's right to withdraw from the contract is often conditioned on payment of contract penalty, i.e. by keeping a part of the amount which the consumer paid. In addition, information which traders give during the promotion or sale of timeshare rights often differs from what is written in the contract. That is where relative fairness assessment criteria (all the circumstances that preceded contract conclusion) come to the fore.

Consequently, if it is determined that a commercial practice is unfair, this could have an impact on the fairness assessment of timeshare contract terms. Namely, unfair B2C commercial practice could lead to declaring a contract term null and void in whole or in part, and if other contract terms and circumstances of the case increase the unfairness effect of a specific contract term, the entire contract may be declared null and void. In the case of timeshare contract, this has already been confirmed in Spanish case law (Juan Bautista R. R. and Teresa G. M. v "Mundivac, S. A." and "Acualandia, S. A.").

Thus, case law substantially contributed to the improvement of legal framework regarding time-sharing. Directive 2008/122/EC adopted

new solutions aiming to prevent stipulation of unfair contract terms. Some of these solutions, such as consumers' right to receive information in their native language, are incorporated in current CPA. Protection of timeshare purchasers from unfair contract terms in Serbian law needs to be improved by adequate by-laws that would define the content of the standard information forms as it is provided at the EU level. In this respect, separate forms should be stipulated for timeshare contract, long-term holiday product contract, and resale and exchange contract.

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ПРОЦЕНА ПРАВИЧНОСТИ ОДРЕДАБА ТАЈМ-ШЕРИНГА

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Резиме

Имајући у виду да се уговор о ТШ најчешће закључује на основу унапред припремљених формулара, да су одредбе уговора често нетранспарентне, да се потрошачи суочавају са тешкоћама поводом могућности упознавања са њиховим садржајем пре закључења уговора, као и да су у њима присутне неправичне клаузуле, улога суда приликом процене правичности одредаба тајм-шеринга је од изузетног значаја.

Полазећи од законом предвиђених критеријума за процену правичности уговорних одредаба, суд је дужан да узме у обзир све релативне критеријуме који су у функцији проверавања да ли је дошло до повреде апсолутних критеријума који би конкретну одредбу чинили неправичном (повреде начела савесности и поштења и значајне несразмере уговорних обавеза на штету потрошача). Под релативним критеријумима за процену правичности, подразумевају се све околности које су постојале пре и приликом закључења уговора, природа робе или услуге које представљају предмет уговорне обавезе, остале одредбе истог уговора и другог уговора са којим је потрошачки уговор повезан, као и начин на који је постигнута сагласност о садржини уговора.

С тим у вези, на процену правичности уговорних одредаба посредан утицај могу имати и правила којима се уређује непоштена пословна пракса. Утицај непоштене пословне праксе на уговорно право најбоље се може видети на примеру дужности информисања. Наиме, с обзиром да закључењем ТШ-а подаци садржани у стандардним информативним обрасцима постају његов саставни

део, обавезују трговца и не могу се мењати, могло би се закључити да обмањујуће пропуштање трговца које се састоји у неблаговременом пружању информација потрошачу сходно чл. 20. ст. 1. тач. 2. ЗЗП-а, уједно има за последицу повреду начела транспарентности сходно чл. 41. ст. 2. ЗЗП-а, према којем је трговац дужан да обавести потрошача о садржини уговорне одредбе пре закључења уговора, на начин који с обзиром на употребљено средство комуникације потрошачу пружа стварну могућност да се упозна са њеном садржином.

Уколико се утврди да је уговор закључен као последица непоштене пословне праксе, то може утицати да се уговорна одредба у целини или делимично прогласи ништавом, а ако при том остале одредбе уговора и околности конкретног случаја појачавају дејство неправичности конкретне уговорне одредбе, цео уговор се може прогласити ништавним. То је, између осталог, потврдила и шпанска судска пракса кад је реч о ТШ-у, у случају *Juan Bautista R. R. and Teresa G. M. v "Mundivac, S. A." and "Acualandia, S. A."*

Захваљујући судској пракси у значајној мери је побољшана правна регулатива која се тиче ТШ. У важећи текст Директиве ЕУ 2008/122 су уграђена нова решења којима се ограничава простор за уговарање неправичних уговорних одредби. Нека од тих решења, као што је право потрошача на „сопствени језик“, преузета су и инкорпорисана у важећи ЗЗП. Заштиту стицалаца ТШ од неправичних уговорних одредби је потребно заокружити доношењем одговарајућих подзаконских прописа којима би се дефинисала садржина стандардних информативних образаца онако како је то предвиђено на нивоу ЕУ. То подразумева прописивање засебних образаца за уговор о ТШ, уговор о дугорочном производу за одмор, уговор о препродаји и размени.