

Case law

Case Details

National ID: Т. д. № 616/2015 г., II т. о., ТК

Member State: Bulgaria

Common Name: link

Decision type: Supreme court decision

Decision date: 17/08/2015

Court: Supreme Court of Cassations

Subject:

Plaintiff: EVN Bulgaria Elektrorazpredelenie EAD

Defendant: Bulgarian Consumer Protection Commission

Keywords: nullity, supply of gas, water and electricity, terms and conditions, unfair terms

Directive Articles

Unfair Contract Terms Directive, [Article 3, 1.](#) Unfair Contract Terms Directive, [Article 3, 2.](#) Unfair Contract Terms Directive, [ANNEX I, 1., \(f\)](#)

Headnote

1. The opportunity of consumers to influence the general terms and conditions of the electric power distribution companies through public consultations does not exclude per se the unfairness of the same general terms and conditions if they fall within the scope of Article 3, paragraph 1 of Directive 93/13/EEC (implemented into Bulgarian law by Article 143 and Article 146, Alinea 1 of the Consumer Protection Act).

2. The approval of the general terms and conditions of the electric power distribution companies by the competent state regulatory body does not guarantee their fairness and validity.

Facts

The defendant filed a class action with the Plovdiv District Court against the plaintiff asking the court to: (i) proclaim null and void the clauses of article 54, par. 2 and article 43, par. 4 of the General Terms and Conditions (GTC) of the plaintiff for the contracts for electricity transmission, approved by the Energy and Water Commission on 10 May 2008; (ii) order the plaintiff to cease the application of the same clauses; and (iii) disseminate the court's decision through the plaintiff's website and one national daily newspaper.

The clause of article 54, par. 2 of the plaintiff's GTC provides for the right of the plaintiff, in the cases of established undue impact on the the watt-hour meters, to adjust the electricity bills for past period, without taking into account the actual quantity of supplied electricity and even without proving the fault of the consumer.

Article 43, par. 4 of the plaintiff's GTC provides for the right of the plaintiff to claim from the consumer payment of invoices which are contested by the consumer as incorrect.

Defendant claims that article 54, par. 2 and article 43, par. 4 of the GTC are unfair contract terms pursuant to ANNEX I, paragraph 1, subparagraph (f) of Directive 93/13/EEC (implemented into Bulgarian law by Article 143, paragraph 6 of the Consumer Protection Act).

The plaintiff objects that article 54, par. 2 and article 43, par. 4 of the GTC have been subject to public consultations and are approved by the competent regulator state body and hence do not fall within the scope of Article 3, paragraph 1 of Directive 93/13/EEC.

The Plovdiv District Court awarded the class action. The plaintiff appealed the first instance court decision to the Plovdiv Court of Appeals but the latter rejected the appeal and confirmed the decision of the Plovdiv District Court. Therefore, the plaintiff submitted an appeal to the Supreme Court Cassations as the last resort court instance.

Legal issue

The arguments of the plaintiff for illegality of the appellate decision because of the freedom of negotiations pursuant to under Article 9 of the Obligations and Contracts Act are unfounded. The fact that there is no legal prohibition the parties negotiate and agree among themselves how to settle their relationships in case of unjustified exchange of assets and the freedom of negotiations provided for in Article 9 of the Obligations and Contracts Act does not justify the conclusion that the specific contractual terms of art. 54, para. 2 and art. 43, para. 4 of the GTC are individually negotiated.

The procedure, provided by the law, for disclosure, consultation and adoption of the GTC entitling consumers to express disagreement with certain clauses of the GTC does not automatically mean that those terms are individually negotiated. The court drawn that conclusion from Article 3, paragraph 2 of Directive 93/13/EEC (implemented into Bulgarian law by Article 146, Alinea 2 of the Consumer Protection Act): the contractual clauses which were prepared in advance and therefore the consumer is not able to influence their content are individually negotiated, particularly in the case of a contract under GTC.

Therefore, the consumers who entered into contracts with the plaintiff after the adoption and approval of the GTC had not the opportunity to participate in the public consultations and hence to influence their content.

The competent regulatory state body, which approved the plaintiff's GTC, based its decision mainly on economic rather than on legal reasons. The statutory acts in the field of electricity power distribution provide for the necessary content of the GTC of the electricity distribution companies but by the time of adoption and approval of the plaintiff's GTC did not provide for procedure on correction of the bills.

Decision

1. Does the opportunity of consumers to influence the general terms and conditions of the electric power distribution companies through public consultations exclude per se the unfairness of the same general terms and conditions if they fall within the scope of Article 3, paragraph 1 of Directive 93/13/EEC (implemented into Bulgarian law by Article 143 and Article 146, Alinea 1 of the Consumer Protection Act)?

2. Does the approval of the general terms and conditions of the electric power distribution companies by the competent state regulatory body guarantee their fairness and validity?

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Result

The court rejected the plaintiff's appeal and upheld the second instance court's judgment.