Supreme Court rules one-off loan processing fees are lawful

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Banking, Austria

Introduction

In a recent decision**(1)** the Supreme Court held that one-off loan processing fees charged by banks are lawful. The Supreme Court reversed the decisions of both lower courts, which followed German Supreme Court decisions**(2)** rendered in 2014. Based on a detailed assessment, and while outlining the material differences between Austrian and German law, the Supreme Court held that one-off loan processing fees qualify as contractually agreed principal performance obligations that are not subject to the control of unfair terms under Section 879(3) of the Civil Code.

Facts

Following the abovementioned German Supreme Court decisions, the Austrian Association for Consumer Information – a consumer organisation constituted under Austrian law which has the right to file for injunctions to protect consumer interests – brought an action against an Austrian bank which claimed that it did not use contractual provisions charging one-off loan processing fees of up to 3% of the loan when concluding consumer loan agreements.

The first and second-instance courts held that loan processing fees do not qualify as contractually agreed principal performance obligations and are therefore subject to the control of unfair contractual terms in accordance with Section 879(3) of the Civil Code. The courts further held that one-off loan processing fees are disadvantageous for clients as they are calculated on the basis of the loan amount and do not reflect the actual processing expenditures. The appeal court further held that – in accordance with the German Supreme Court – passing expenditures onto customers based on statutory provisions is *per se* subject to the control of unfair terms terms under Section 879(3) of the Civil Code.

Decision

In its decision, the Supreme Court outlined that Austrian and German laws differ materially as regards the scope of the term 'interest' in relation to a loan agreement. While under German law the term 'interest' is limited to the interest amount payable over the length of the contract as compensation for the right to use the loan principal,**(3)** the Austrian understanding of the compensation payable for a loan is far broader. According to the Supreme Court, the parties are free to agree on the compensation to be given by the borrower. In accordance with prevalent legal scholars, the Supreme Court summarised that the term 'compensation' includes everything that must be provided by the borrower in addition to returning the loan principal and may include one-off payments, services and in-kind contributions as well as processing fees and commissions. In addition, the Supreme Court held that pursuant to the explanatory notes of the Banking Act (Section 33(7) of the unamended Banking Act), one-off processing fees must be included in the effective annual percentage rate, which must be previously disclosed so that consumers can make their decisions in full knowledge of the facts (Recital 19 and 20 of the Consumer Credit Directive**(4)** – annual percentage rate of charge). In accordance with prevalent legal scholars,**(5)** the Supreme Court held that customers perceive processing fees as a deciding factor and regularly negotiate the relevant rate and, from the banks' standpoint, such fees are a *conditio sine qua non* for granting a loan. In short, the Supreme Court held that there is no risk that processing fees will alter the principal contractual obligations.

In addition, the request for an injunction based on the control of general terms and conditions was unjustified because the fee was not disadvantageous to customers. In this respect, the Supreme Court pointed out that, unlike German law, Austrian law requires a more severe disadvantage, and referred to a precedence approving, for example, fees related to the transfer of securities accounts**(6)** and account fees related to loan agreements.**(7)** As regards its recent decision banning fees for confirmations on outstanding debt regarding the closure of accounts, the Supreme Court referred to the fact that the relevant clauses failed to comply with statutory consumer protection provisions (Section 16 of the Consumer Credit Act) and were not tested against Section 879(3) of the Civil Code.

Thus, the Supreme Court reconfirmed its opinion on the lawfulness of passing on costs related to services **(8)** by holding that, in particular, the credit assessment is a service rendered to the advantage of the customer. The court further upheld – contrary to the German Supreme Court – the 'costs by cause' principle. Pursuant to this principle, the Supreme Court deemed fee arrangements to be lawful if they impose the costs on the party causing such costs.

The Supreme Court also dismissed the Association for Consumer Information's argument that the value-dependent pricing structure of the one-off loan processing fees is disadvantageous by referring to the fact that Austrian laws regularly recognise such structures (eg, court fees, lawyer tariffs and commissions for real estate agents) and holding that there is no need for the one-off fee to mirror exactly the actual processing expenditures; otherwise, any lump-sum agreements would be impossible. Further, by referring to the fact that processing fees have been common practice for decades and to the special emphasis applied by the bank when addressing the fee provisions in its general terms and conditions and the relevant loan agreement, the Supreme Court held that a customer cannot assume in good faith that the bank would grant the loan with the same terms and conditions if no processing fee was paid. Based on these findings, the Supreme Court held that retroactively voiding processing fees would lead to a windfall gain due to the customer having to pay a lower annual percentage rate of charge as agreed by contract.

Comment

This well-argued decision turning down both lower courts caught the Association for Consumer Information – as well as the Austrian media – on the wrong foot. While prevalent legal scholars had already paved the way for this decision by addressing the material differences between applicable German and Austrian law, public perception of the costly effects of the German Supreme Court decisions also triggered expectations about material repayment obligations to be imposed on Austrian banks (similar to German banks). In public statements, the Association for Consumer Information and the media have characterised this decision as being against consumer interests and solely aimed to protect Austrian banks against repayment obligations. There is one other notable aspect: this decision is based on Section 879(3) of the Civil Code – as such, its effects apply to loan agreements entered into by consumers and entrepreneurs. While one may agree with the Supreme Court's opinion that one-off processing fees are perceived as a deciding factor and customers regularly attempt to negotiate relevant rates, it remains to be seen whether the rates will in fact be negotiated by banks and whether there is sufficient competition ensuring responsible practices.

For further information on this topic please contact Stephan Schmalzl at Graf & Pitkowitz by telephone (+43 1 401 17 0) or email (schmalzl@gpp.at). The Graf & Pitkowitz website can be accessed at www.gpp.at.

Endnotes

(1) OGH 6 Ob 13/16d.

(2) In its May 13 2014 decisions (XI ZR 405/12, XI RZ 170/13) the German Supreme Court banned the charging of processing fees for consumer loan contracts and also ordered the banks to repay fees previously charged. The financial burden arising from this decision is estimated with an amount of approximately €13 billion.

(3) BGH XI ZR 404/12.

(4) EU Directive 2008/48/EC of the European Parliament and of the Council of April 23 2008 on credit agreements for consumers.

(5) Graf, *Zur Zulässigkeit der Vereinbarung einer Bearbeitungsgebühr beim Kreditvertrag* (ÖJZ 2015/43); Bollenberger, *Zulässigkeit von einmaligen Bearbeitungsentgelten beim Kreditvertrag* (ÖBA 2015, 396).

(6) In this decision (OGH 6 Ob 253/07k), the Supreme Court confirmed the lawfulness of passing on of entire costs related to the transfer of the securities account even though the bank, in its capacity as custodian, was under the contractual obligation to hand over securities held on the account.

(7) OGH 8 Ob 31/12k.

(8) Graf, *Zur Zulässigkeit der Vereinbarung einer Bearbeitungsgebühr beim Kreditvertrag* (ÖJZ 2015/43); Bollenberger, *Zulässigkeit von einmaligen Bearbeitungsentgelten beim Kreditvertrag* (ÖBA 2015, 396).

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