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Limitation periods in consumer disputes

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Abstract

This contribution analyzes the court's *ex officio* obligations in consumer disputes regarding the statute of limitations within the Council Directive 93/13/EEC framework on unfair terms in consumer contracts and current legislation. It also considers recent case law developments. The statute of limitations aims to allow debtors to contest or confirm debts that they may not recall or that are disputed. However, the legislation infringes upon debtor autonomy by mandating protection, creating an asymmetry between suppliers and consumers. The concept of procedural protection for the weaker party in consumer disputes aligns with the EU's internal market's sustainable development. The court's *ex officio* consideration of limitations is crucial in achieving this goal. Slovakia's entry into the EU led to adopting procedural protection measures, exceeding minimum harmonization standards, and fulfilling international obligations. Slovak civil legislation reflects the inequality between consumers and suppliers, resulting in specific substantive law derogations to address this disparity. Including a protective *ex officio* statute of limitations in consumer disputes represent a baseline for consumer protection in civil court proceedings, offsetting debtor information deficits. This analysis reveals the coexistence of two fundamental principles in civil litigation: equality of parties and protection of the weaker party in consumer disputes. The court's *ex officio* approach upholds the principle of safeguarding the weaker party and enhances equality in dispute resolution. In conclusion, introducing an *ex officio* court obligation to apply the statute of limitations in consumer litigation guarantees consumer protection and is necessary to ensure weaker litigants' fundamental human right to a fair trial.

Keywords: consumer, supplier, consumer credit, limitation, unjust enrichment

1. Introduction

Consumer protection legislation in the context of consumer credit is continuously evolving and expanding, and the individual instruments are often refined. The current legislation, together with the case law, constitutes a fairly coherent and sufficient set of instruments that should compensate for the unequal position of the consumer and the supplier and ensure adequate protection for the consumer. Determining the degree of liability or co-liability of the various parties to the contractual relationship is a very sensitive legal issue. The principle of the protection of the weaker party has been frequently mentioned in recent decisions of the Constitutional Court and the Court of Justice of the European Union, as consumers often have problems repaying these types of loans and can easily obtain a new loan to refinance the previous one.

The statute of limitations is one of the most important legal facts under which legal consequences, i.e., rights and obligations, arise. The primary purpose of the limitation is the protection of the debtor, and the secondary purpose is the public interest in protecting legal certainty.

Applying the principle of protection of the weaker party to the dispute leads to the fulfillment of the principle of equality of the parties in a set of civil disputes in which the court should implement the procedural deviations determined by the legislator. Each of the statutory procedural derogations is a manifestation of the legislator's will to remove obstacles of an objective nature, which result in an unequal position of the parties to a consumer dispute concerning the effective exercise of their procedural rights and obligations. A party to a dispute may not, in exercising the fundamental human right to obtain judicial protection for his or her rights that have been threatened or infringed, suffer from a factual inequality consisting in the objective impossibility of obtaining relevant evidence or from an information deficit which is characteristic of the ordinary consumer. The economically more powerful subject of the legal relationship has virtually unlimited possibilities already in the choice of the procedural representative through whom he acts in his dealings with the court. Compared with the defendant, the plaintiff is at a significant disadvantage. Given the complicated nature of court proceedings involving claims arising from consumer contracts, it seems almost unrealistic that the consumer should deal directly with the court.

2. Statute of limitations

The basis of consumer policy is based on primary European Union law but is mostly regulated in secondary law. Directive 93/13/EEC regulating unfair terms in consumer contracts can be regarded as the basis for general consumer protection legislation at the European level, and other consumer protection directives have followed it. The Directive aimed to unify the Member States' legislation on unfair contract terms and, at the same time, to set a uniform minimum standard of consumer protection and, to some extent, harmonize consumer protection policy across all Member States of the European Communities [1].

The court is obliged by its official duty to examine in every proceeding whether a consumer relationship is involved to ensure the legal protection of the consumer; the protection of the consumer *ex officio* also follows from Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. It follows from the case law of the Court of Justice of the European Union that factual inequalities must be balanced. A real balance must replace the formal balance. The Court of Justice has repeatedly emphasised that an unequal relationship between consumer and supplier can only be compensated for by positive external intervention *ex officio*. We consider the Charter of Fundamental Rights of the European Union to be one of the sources of law, where Article 38 states: "The Union's policies shall ensure a high level of consumer protection". The Charter of Fundamental Rights of the European Union is considered part of primary law and a reference for our legislation. Since the accession of the Slovak Republic to the European Union, the principle of effective consumer protection has also been reflected in the Slovak legal order through European law, in which the provisions of the Treaty on the Functioning of the European Union and Article 38 of the Charter of Fundamental Rights and Freedoms, accompanied by several directives, are its legal basis. Directive 93/13/EEC was one of the first regulatory measures in consumer protection adopted on European territory [2].

Based on the principle of effectiveness, the Court of Justice has required the national court to apply *ex officio* certain provisions of the Union directives in consumer protection, notwithstanding the contrary rules of national law. That requirement was justified by the consideration that the system of protection introduced by those directives is based on the idea that the consumer is at a disadvantage compared with the seller or supplier in terms of bargaining power and level of information and that there is a not inconsiderable risk that, in particular, because of his ignorance, the consumer will not point to the legislation which is intended to protect him [see, to that effect, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [3].

The institution of limitation has been given great weight in Roman law, with the emphasis placed on ensuring legal certainty, and it has retained that character to the present day. Before the adoption of the Civil Code (Act No 64/1964 Coll.), Slovak private law distinguished between limitation causing the

extinction of a right (*praescriptio extinctiva*) and limitation under which a right was acquired (*praescriptio acquisitiva*). At present, prescription is a substantive legal institute governed by the provisions of Article 100 et seq. of the Civil Code [4].

It can be stated that the substantive purpose, the very essence of limitation, is not to avoid debt but on the contrary, to open the possibility of not paying a debt that the debtor does not remember with certainty or which is disputed between the parties in this sense. In this respect, the current legislation interferes with the autonomy of the will, since it essentially imposes on debtors protection which should be (exclusively) theirs to use [5].

Limitation (in Latin "*inveteratio*") is one of the legal consequences of the futile expiration of the time provided by law without the rightful subject exercising or enforcing its right in court. By limitation, we mean the qualified expiry of the time provided by law to exercise a right, which has elapsed without the right having been exercised. As a consequence of limitation, the obliged entity may counter a judicial exercise of the right with a plea of limitation, which results in the extinction of the claim belonging to the content of the subjective right, i.e. the extinction of judicial enforceability. As a result of the plea of limitation and the extinction of the claim, the right cannot be judicially recognized by the entitled party. As a consequence of limitation, although the original subjective right of the entitled subject is not extinguished, it is weakened in the component that constitutes the claim. The entitled party may seek recognition of his right and the time-barred right in a court of law and may even be successful unless the obliged party raises a limitation objection before the court. However, if the obliged party pleads limitation before the court and raises a limitation objection, the claim is extinguished, and the court will not uphold such an action [6].

The Constitutional Court of the Czech Republic stated in the proceedings under Case No. I. ÚS 2063/2017 that the legislator embodied the protection of the weaker party in the legal order. The basis for the protection under consumer law is the de facto unequal position of the consumer against the entrepreneur, who may benefit from greater professional experience, better knowledge of the law, or easier access to legal services. The stronger position of the entrepreneur is also based on the professional background that he generally possesses and which corresponds to his legal obligation to record, report, and tax certain income from his customers. The supplier should also be expected to behave generally fairly towards the consumer. If he fails to do so, he betrays the other party's confidence in the contractual relationship in the honesty of his conduct, and there is no legal protection for such conduct. In interpreting and applying the statutory provisions governing consumer relations, the general courts must respect the constitutional principle of the protection of the weaker party arising from the principle of equality expressed in Article 1 of the Charter of Fundamental Rights and Freedoms and including the principle of consumer protection, and reflect that principle in their reasoning and judgments. In relationships involving parties whose starting positions are significantly unequal, such as those between a businessman and a consumer, it cannot be satisfied that both parties will be afforded the same legal remedies, i.e. a kind of formal equality because in reality the inequality of starting points also causes inequality in the result itself. The solution to this situation lies in the imbalance of the subjective rights and obligations of the parties to a private law relationship, by giving the weaker party more rights and the stronger party more obligations. The purpose of the legislation in question is to seek to achieve a true balance by legally balancing the underlying economic, informational, professional, and other differences that exist between the parties. In other words, to achieve equality as an objective, the inequality of starting positions needs to be categorised by an equally unequal regulation of rights and obligations [7].

Procedural conditions which, as may be the case in a trial on the merits, prohibit both the trial court and the appellate court adjudicating an action on a warranty based on a contract of sale from qualifying based on facts and law which they have or could have on a simple request for further explanation, the legal relationship in question as a sale to the consumer, unless the latter expressly invokes that status, would lead to the consumer being subject to the obligation to qualify his situation fully in law himself, under the threat of losing the rights which the European Union legislature intended to confer on him by Directive 1999/44. In an area where, in many Member States, the procedural rules allow individuals to

represent themselves before the courts, there would be a considerable risk that, mainly due to ignorance, the consumer would be unable to comply with that level of requirements [8].

The Court of Justice (First Chamber) has also held in *Mostaza Claro* C-168/05 that Council Directive 93/13/EEC of 5. April 1993 on unfair terms in consumer contracts must be interpreted as requiring the national court seised of an action for annulment of an arbitration award to assess the nullity of the arbitration agreement and to annul that award on the ground that that agreement contains an unfair term, even though the consumer invoked that nullity not in the context of the arbitration proceedings but exclusively in the context of the action for annulment [9].

3. Obligations of the *ex officio* approach of the court to the statute of limitations in consumer disputes

In civil law relations, the court takes into account the limitation of a right only upon an objection raised by the debtor during the court proceedings. In such proceedings, the court cannot then recognize the limitation of the right, but in relations based on a consumer contract according to Section 54a, first sentence, of the Civil Code, the limitation of the right cannot be enforced at all, i.e., asserted in court. The court takes into account such unenforceability of the right even without the debtor's objection [10].

The provision of § 54a of the Civil Code is the legislator's reaction to the declaration of § 5b of Act No. 50/2007 Coll. on Consumer Protection as incompatible with the Constitution of the Slovak Republic. This provision was declared incompatible with Article 46(1) in conjunction with Article 1(1) of the Constitution of the Slovak Republic by the finding file no. ÚS 11/2016 of 7 February 2018. A time-barred right under a consumer contract cannot be enforced or validly secured; the provision of §151j(2) is unaffected. The content of a time-barred right under a consumer contract may be changed, replaced by a new right, or restored to enforceability only by an act of the debtor who knew of the limitation [11]. The Constitutional Court of the Slovak Republic in the case PL. ÚS 5/2021 of 12 May 2021 in point 19 of the resolution stated that in the circumstances of the case under consideration, it is a substantive regulation which, with the moment of limitation of the right from the consumer contract, also links the change of the legal nature of the claim, namely from a claim that is judicially and subsequently enforceable to a claim that is (primarily) unenforceable (i.e., not "only" time-barred, similarly as in the case of § 845(1) of the Act on the enforcement of claims against consumers) or § 455(2) of the Civil Code) [12].

In civil law disputes, if the claim secured by a pledge is not duly and timely satisfied, the pledgee may satisfy or seek satisfaction from the pledge even if the secured claim is time-barred [13]. A time-barred right under a consumer contract cannot be enforced or validly secured. In this construction of the legal rule, it is possible to speak of a so-called 'spurious preemption' of rights under consumer contracts. It is a hybrid between classical limitation and preemption in that, although it does not extinguish the supplier's time-barred claim against the consumer, it becomes objectively unenforceable, even without the need for a plea of limitation by the consumer. The impairment of the right is linked to an objective legal fact - the qualified lapse of time within the scope of the limitation provisions. The general limitation period is three years. *Ipso facto* in consumer legal relations, the claim is not weakened after the expiry of the limitation period (as is the case with classical limitation) but is directly extinguished. After the expiry of the limitation period, the right under the consumer contract cannot be secured by any security device [14].

In the present context, it is necessary to conclude that, concerning the needs of application practice, the obligation of *ex officio* procedure of supervisory authorities and bodies assessing claims under consumer contracts to examine and evaluate obstacles to the exercise of the seller's right against the consumer is clearly established.

The court's obligation to examine the statute of limitations *ex officio* follows from the decision of the Court of Justice of the European Union C-485/19 of 22.4.2021 *LH v. Profi Credit Slovakia s.r.o.* in the first paragraph of the operative part of the judgment, the Court of Justice held that the principle of effectiveness precludes national legislation which provides that an action brought by a consumer for the recovery of sums unduly paid based on unfair terms within the meaning of Council Directive 93/13/EEC on unfair terms in consumer contracts or the basis of terms contrary to the requirements of Directive

2008/48/EC on credit agreements is subject to a limitation period of three years from the date on which the unjustified enrichment was obtained. It follows from the reasoning that by requiring the consumer to bring an action within three years of the date on which the unjust enrichment occurred, where that enrichment may have occurred during the performance of a long-term contract, procedural conditions such as those at issue in the main proceedings are of such a nature as to make it excessively difficult for the consumer to exercise the rights conferred on him by Directive 93/13 or Directive 2008/48. They are, therefore, contrary to the principle of effectiveness. There is a not inconsiderable risk that the consumer concerned will not invoke the rights conferred on him by European Union law during the period prescribed (the three years laid down in Article 107(2) of the Civil Code begins to run from the date on which the unjust enrichment occurred. The limitation period also applies where the consumer cannot judge whether a contractual term is unfair). The possibility of extending the limitation period on the condition that the consumer proves the seller's or supplier's intention, as provided for in Article 107(2) of the Civil Code, cannot rebut the above statement [15].

As stated by the Constitutional Court of the Slovak Republic in its ruling of 7 February 2018 in the case PL. ÚS 11/2016, the statute of limitations, like preclusion, is unique in that it stands in the middle of the intersection of substantive and procedural law to the extent that it belongs to both substantive and procedural law or neither of them. The question of judicial enforceability is part of substantive law, a rule of conduct between two equal private individuals. In limitation, the subjective right and the claim stand in contrast. The former is not extinguished. The latter is. The court is barred from discovering it in a traditional statute of limitations case. As mentioned earlier, the uniqueness stems from the complexity of deciding temporality and the equality of subjects. By its very nature, limitation reflects personal initiative, responsibility for managing one's affairs, and the debtor's honor in always being able to pay his debt. Limitation expresses society's concern that debts should be recovered in court, with the participation of the State, only within a reasonable time because the need for proof and knowledge of the debt in general increases with time. The point is not to pay an old, uncertain obligation. Still, the statute of limitations, by specifying the exact time of the claim, suppresses the causation of the debt and is applicable even if the debt is undisputed. The statute of limitations, therefore, also essentially consumes the plea of good faith. From this perspective, the limitation is also a 'contest' between the parties, in which, on the one hand, the creditor must sue within a reasonable time and, on the other hand, the debtor must know his position and the court is a 'discreet' arbiter. However, good morals remain present in that the debtor can pay the debt without the risk of unjust enrichment on the creditor's part. The substantive purpose, the very essence of limitation, however idealistic it may sound, is not to avoid the debt but to open up the possibility of not paying a debt of which the debtor has no certain recollection or which is disputed between the parties. From that point of view, the legislation in force interferes with the autonomy of the will since it essentially imposes protection on debtors, which should be theirs to use [16].

Therefore, The court is obliged to consider the limitation period *ex officio*. The legislation aims to introduce legal certainty in consumer relations. The objective of the legislation is to strengthen consumer protection by taking account of defects in claims often based on unfair contractual terms at a time when the amount receivable is disproportionately increased as a result of deliberately late enforcement of a right against the consumer, at a time when the consumer cannot reasonably expect litigation given the passage of sufficient time, that is to say, when he may no longer have any contractual documentation and when he may no longer remember anything about the contractual relationship in question, since he cannot reasonably be expected, after more than three years, to retain the documentation and all the facts in his memory which he could subsequently use in his defense. This is mainly a case of a subject who is ignorant of the law and cannot raise substantive objections competently because of weakness and ignorance, including the objection of limitation.

Concerning the enforceability of rights under consumer contracts, under Section 54a of the Civil Code, the court examines whether the plaintiff's claim is time-barred, even with a statute of limitations objection being raised. We refer to the legal opinion expressed in the decision of the District Court of Vranov nad Topľou file no. 8Csp/18/2020 dated 14.9.2021, where the plaintiff filed a claim against the defendant for payment of EUR 9,861 with default interest at 5% per annum from 21.4.2020 until

payment. The grounds for bringing the action are that on 24.8.2015, the plaintiff concluded with the defendant a contract for the issue and use of a credit payment card, based on which the plaintiff undertook to provide the defendant with a credit card for which he maintained an account. The defendant failed to fulfill its obligations under the contract despite several requests from the plaintiff. The defendant drew down the approved loan but did not fulfill his obligations under the contract properly and on time and did not make the loan repayments. Therefore, the plaintiff canceled the loan, of which he informed the defendant by letter dated 2 June 2017. This was preceded by a notice from the claimant to the defendant inviting him to pay his debt and informing him that if the installment due in March 2017 were not paid by 25.5.2017, the lender would be entitled to cancel the loan. The defendant did not comment on the application, did not attend the hearing, and did not justify his absence. The court, after taking evidence, concluded that the claim brought in the action was time-barred, regarding Section 54a of the Civil Code in conjunction with Section 879v of the Civil Code, according to which a time-barred right under a consumer contract cannot be enforced or validly secured. The claim was delivered to the district court on 28 May 2020, i.e., when the provision mentioned above of Section 54a of the Civil Code was in force, and the court, therefore, examined whether the plaintiff's claim was already time-barred, even without the statute of limitations objection being raised. The court held that in the present case, the limitation period began to run from the due date of the installment for which the plaintiff prematurely repaid the loan. That is to say, the one that triggered the consumer credit repayment. It is clear from the pre-action notice that the plaintiff's repayment of the loan was due to non-payment of the installment due in March 2017. Based on the above, the Court concludes that the repayment was due to default on the installment due in March 2017 and that the limitation period for the repayment of the entire balance of the defendant's debt under the second sentence of Article 103 of the Civil Code began to run on that date at the latest. The limitation period, therefore, expired in March 2020 [17].

4. Conclusion

The substantive purpose of the statute of limitations is not to avoid the debt in the first place but to open up the possibility of not paying a debt that the debtor does not remember with certainty or that is disputed between the parties in that sense. From that point of view, the legislation in force interferes with the autonomy of the debtor's will since it essentially imposes protection on debtors, which should be up to them to use. In the opinion of the Constitutional Court, the contested legislation, by its simplistic and straightforward nature, is asymmetrical since it places all suppliers (creditors), as it were, on the side of the 'bad' ones and consumers on the side of the 'wronged' ones. However, according to judicial practice, the way the legislation is set up often results in the most reactive consumers being assisted, while the more responsible ones often appear at the hearing and acknowledge the debt, which under procedural law automatically leads to an action being brought by way of an acknowledgment judgment.

The concept of procedural protection of the weaker party in consumer disputes results from a transnational interest in the sustainable development of the internal market of the European Union, and the *ex officio* obligation of the court to take account of limitation constitutes a key factor in achieving that objective. The accession of the Slovak Republic to the European Union was an important milestone in developing civil procedure in our territory from the point of view of procedural protection of weaker parties in civil disputes. The legislator reacted to this state of affairs by adopting the concept of procedural protection of weaker parties to disputes, which occurred in the framework of the recodification of the Civil Code of the provisions of Section 54a of the Civil Code. By adopting the concept of procedural protection of weaker parties to disputes in the provisions of the recodified Civil Disputes Code, the Slovak legislator not only went beyond the framework of minimum harmonization standards but also expressed a particular interest in the fulfillment of international obligations and the fulfillment of the fundamental values of the Union, in particular concerning the decision of the Court of Justice of the European Union C-485/19 of 22 April 2021 in the case of LH v. Profi Credit Slovakia s.r.o.

The civil legislation of the Slovak Republic directly reflects the unequal position of the consumer and the supplier through the Civil Code. The adoption of individual substantive law derogations is the legislator's response to factual inequality between the parties in a consumer dispute, manifested primarily

in the context of the effective realization of the procedural rights and obligations of the parties to a consumer dispute. The transposition of the protective *ex officio* statute of limitations in consumer disputes constitutes a minimum level of consumer protection in civil court proceedings. Therefore, the information deficit of the debtor is compensated by an increased level of court intervention in the ongoing court proceedings. We can say with certainty that the consumer is in a procedurally disadvantageous position since we are basing this on the nature of the subjects. The unequal position of the parties to these disputes is based on the nature of the subjects of the sets of legal relations that enjoy the legal protection of consumer legislation. We are talking, in particular, about relations between the supplier and the consumer. The Slovak legislator has adopted specific procedural derogations to eliminate the de facto inequality between the parties to a consumer dispute. A concrete manifestation of the legislator's intention is conditional adherence to the investigative principle. The court is an *ex officio* investigator but respects the principle of formal truth. Because of the specific nature of consumer litigation, it may side with the consumer even without a plea of limitation, as this is necessary for a fair decision on the merits.

The analysis has led us to a rational conclusion on the coexistence of two fundamental principles of civil litigation: the principle of equality of the parties and protection of the weaker party in a consumer dispute.

Modern civil procedure is called upon to give litigants an equal opportunity to exercise their procedural rights and obligations. In conclusion, we can thus reasonably conclude that the court's *ex officio* approach to the statute of limitations in consumer disputes not only contributes to fulfilling the principle of protecting the weaker party to the dispute but also contributes to deepening the principle of equality of the parties to the dispute and thus to the overall concept of the right to a fair trial. Given the complexity and peculiarities of court proceedings involving claims under consumer contracts, introducing an *ex officio* obligation on the court to apply the statute of limitations in consumer litigation constitutes a consumer protection guarantee. For that reason, the legislative definition of procedural derogations is a necessary step by which the legislator seeks to protect the fundamental human rights of weaker litigants to a fair trial.

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