The German Federal Court of Justice declares modification clause in German banking T&Cs unenforceable

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On April 27, 2021, the German Federal Court of Justice (*Bundesgerichtshof* – **BGH**) ruled that the modification clause (which provides that the bank may change the terms of the contract by giving two months' notice) of the general business conditions of German banks (*AGB Banken* – **Banking T&C**s) to be "unfair" and thus unenforceable. The decision has far-reaching consequences because the vast majority of German banks rely on the Banking T&Cs. With the detailed reasoning being published on 7 June 2021, banks should begin to set up an action plan on how to deal with the consequences of this groundbreaking decision. This Client Alert explores the BGH's decision and sets out to explore initial repercussions and possible fixes.

The decision of the BGH

In the appeal case brought before the BGH, the claimant, a consumer protection organization, had originally filed for a cease and desist order against the defendant, a German-based bank, for the use of allegedly unfair modification clauses in their Banking T&Cs. Pursuant to these modification clauses, the bank had the right to modify the terms of all contracts with their clients, including, but not limited to, contracts for the provision of payment and investment services, without the explicit consent of the customer. The modification would become effective if the bank had notified the customer two months in advance. The bank had to tell the customers that they could reject the proposed modifications, but that in case of a rejection, the bank could terminate the entire contract. Banks often used this procedure to increase the fees for their services.

The modification clause in the Banking T&Cs is effectively an implementation of Articles 52(6a)[1] and 54(1) PSD2.[2] The Court of Appeals in Cologne (*Oberlandesgericht Köln*) therefore held in a 2019 decision that since the modification clause was simply a copy of the black letter of the law, the modification clause in the Banking T&Cs were enforceable.[3] Nevertheless, the BGH concluded that the modification clause would not satisfy the test of fairness and reasonableness under the German implementation of the Unfair Terms in Consumer Contracts Directive 93/13/EEC (the **UTCCD**). The BGH applied the ruling of the European Court of Justice (**ECJ**) in the case of DenizBank[4], in which the ECJ held that the relevant provisions of the EU's Second Payment Services Directive (**PSD2**) would not limit a national court's review of such modification clauses.

More precisely, the court held that the wording of the modification clause was so broad that it would not only cover changes to minor details of the business relationship but that it would allow the bank to redesign the entire business relationship without the consent or involvement of the consumer.

The court argued that given that the customer was deemed to consent to the modifications proposed by the bank, the "deemed consent" is in fact not so much a "consent" but rather a unilateral power of the bank to modify contract terms, including modifications that were not limited to minor amendments. According to the BGH, such disadvantages for customers can be remedied neither by a judicial review of the modified contract terms nor by the consumers option

to terminate the contract.

It is worth noticing that the BGH did not provide specific guidance on how to separate minor changes from major ones. While the court held that modifications of the fees for banking services would qualify as major change requiring the consent of the consumer, a considerable “grey” area remains. This will make it a challenge for banks to redraft the modification clause in the Banking T&Cs in a way that will be upheld by courts.

Consequences

As a consequence of the BGH judgment, all existing modification clauses that have the same wording as the modification clause in the Banking T&Cs might be unenforceable. In the German market, such modification clauses are not only used in the banking industry, but also in other industries. Therefore, the challenge is two-fold: Firstly, market-participants need to develop new modification clauses that take into account the new requirements set out by the BGH and which can be used for future contracts with customers. Secondly, given the modification clauses in existing contract are unenforceable, such new modification clauses need to be introduced in accordance with general principles of contract amendments (i.e. by asking customers for their explicit consent).

The immediate reactions by market participants differed considerably. While some banks have deleted the modification clause, others have restricted the clause to cover contracts with business customers only and still others have left the modification clause untouched. Making such short-term adjustments to the modification clause for new business seems appropriate in order to avoid the potential risk of cease-and-desist letters form consumer protection associations. However, this will only be a partial and temporary fix. Indeed, we would expect the Association of German Banks (*Bundesverband deutscher Banken*, **BdB**) to update the template Banking T&Cs and thus put in place new standard modification clauses for the German market to be used in the future. In terms of scope, such clause would need to carefully separate minor changes – which still would not require an explicit consent – from major changes – which now require an explicit consent by the consumer. Such major changes would include at least all changes of essential contractual obligations (i.e. services and payments).

Even more important, banks may wish to consider devising a plan on how to remedy the unenforceability of the modification clause in existing contracts, which may have led to the unenforceability of modifications implemented under this clause. When introducing a valid modification clause to existing customers, the same considerations apply as outlined above, i.e. particular attention will have to be paid to the question to what extent an explicit consent of the customers will be required for future modifications.

The lawyers of our financial institutions regulatory team are assisting a number of bank and other regulated firms on regulatory matters. If you would like to discuss any of the items mentioned, or how they may affect your business more generally, please contact any of our key contacts or the wider team of our financial institutions regulatory team.

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1. Article 52(6a) PSD2 reads: Member States shall ensure that the following information and conditions are provided to the payment service user:
   (…)
   6. on changes to, and termination of, the framework contract: (a) if agreed, information that the payment service user will be deemed to have accepted changes in the conditions in accordance with Article 54, unless the payment service user notifies the payment service provider before the date of their proposed date of entry into force that they are not accepted; (…)↩
2. Article 54(1) PSD2 reads: Any changes in the framework contract or in the information and conditions specified in Article 52 shall be proposed by the payment service provider in the same way as provided for in Article 51(1) and no later than 2 months before their proposed date of application. The payment service user can either accept or

reject the changes before the date of their proposed date of entry into force. “Where applicable in accordance with point (6)(a) of Article 52, the payment service provider shall inform the payment service user that it is to be deemed to have accepted those changes if it does not notify the payment service provider before the proposed date of their entry into force that they are not accepted. The payment service provider shall also inform the payment service user that, in the event that the payment service user rejects those changes, the payment service user has the right to terminate the framework contract free of charge and with effect at any time until the date when the changes would have applied.“ ↩

3. Decision dated 19 December 2019 – 12 U 87/18.↩
4. Ruling of the ECJ dated 11 November 2020 – C-287/19).↩

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