

Case C-472/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

30 September 2020

Referring court:

Fővárosi Törvényszék (Budapest High Court, Hungary)

Date of the decision to refer:

28 August 2020

Applicant and appellant:

Lombard Lízing Zrt.

Defendant and respondent:

PN

Subject matter of the main proceedings

Appeal against the judgment at first instance in proceedings concerning a loan contract denominated in a foreign currency

Purpose and legal basis of the request for a preliminary ruling

Legal consequences of the invalidity of the main subject matter of the contract on grounds of the unfairness of a contractual term which places the foreign exchange risk on the consumer – Determination of such legal consequences in a position statement adopted by the highest court of a Member State which is, however, not binding on lower courts – National legislation establishing special procedural requirements concerning the invalidity of contracts – Ex post regulation of the legal consequences through legislation – Effectiveness of Directive 93/13

Legal basis: Article 267 TFEU

Questions referred

1. If the unfair contract term concerns the main subject matter of the contract (the information on the exchange rate was not compliant), with the result that the contract cannot continue in existence, and there is no agreement between the parties, does the fact that, in the absence of any default rule under national law, guidance on a declaration of the validity or effectiveness of the contract is provided by a position statement adopted by the highest court which is, however, not binding on lower courts, ensure the full effectiveness of Directive 93/13?
2. If the answer to the first question referred is in the negative, is it possible to restore the original position in a situation where the contract cannot continue in existence due to the unfairness of a term concerning its main subject matter, there is no agreement between the parties, and the position statement referred to above cannot be applied?
3. If the answer to the second question referred is in the affirmative, can the law impose a requirement in respect of [this] type of contract stipulating that, when making an application for a declaration of invalidity in respect of the main subject matter of the contract, the consumer must also make an application for a declaration of the validity or effectiveness of the contract?
 - If the answer to the second question referred is in the negative, where it is not possible to restore the original position, is it possible for contracts to be declared valid or effective by means of ex post legislation, in the interests of ensuring a balance between the parties?

Provisions of EU law cited

- Articles 1, 6 and 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29)
- Judgment of the Court of Justice of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282)
- Judgment of the Court of Justice of 14 March 2019, *Dunai* (C-118/17, EU:C:2019:207)
- Judgment of the Court of Justice of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819)

Provisions of national law cited

- A Polgári Törvénykönyvről szóló 1959. évi IV. törvény (Law IV of 1959 establishing the Civil Code), in force when the loan contract at issue was concluded: Articles 200, 209, 209/A, 237 and 239/A.

- A hitelintézetekről és a pénzügyi vállalkozásokról szóló 1996. évi CXII. törvény (Law CXII of 1996 on Credit Institutions and Financial Enterprises), in force when the loan contract at issue was concluded: Article 203.
- A Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvény (Law XXXVIII of 2014 regulating specific matters relating to the decision of the Kúria (Supreme Court) to safeguard the uniformity of the law concerning loan contracts concluded by financial enterprises with consumers ('Law DH 1'): Articles 1, 3 and 4.
- A [DH1 törvényben] rögzített elszámolás szabályairól és egyes egyéb rendelkezésekről szóló 2014. évi XL. törvény (Law XL of 2014 on the rules relating to the settlement of accounts referred to by [Law DH 1], and other provisions) ('Law DH 2'): Articles 1 and 37.

Article 37 of Law DH2 establishes special procedural requirements concerning the invalidity of contracts. According to this provision, an applicant may apply for a declaration of invalidity only if he also requests a determination of the legal consequences of invalidity, namely, a declaration of validity or effectiveness of the contract up to the time of adoption of the judgment. Otherwise, the substance of the application cannot be examined.

- A bíróságok szervezetéről és igazgatásáról szóló 1997. évi LXVI. törvény (Law LXVI of 1997 on the organisation and administration of the courts), in force when the contract at issue was concluded: Article 33.
- A bíróságok szervezetéről és igazgatásáról szóló 2011. évi CLXI. törvény (Law CLXI of 2011 on the organisation and administration of the courts), currently in force: Article 25.
- Az érvénytelenség jogkövetkezményeiről szóló 1/2010. (VI. 28) PK vélemény (Opinion 1/2010 of 28 June 2010 of the Civil Chamber of the Supreme Court, sitting in plenary session, on the legal consequences of invalidity).

According to point 5 of the opinion, where the grounds for the invalidity can be eliminated or subsequently disappear, the court may declare the invalid contract valid with retroactive effect from the time it was concluded. The possibility of declaring the contract valid is an alternative that is equivalent to restoring the original position. If both legal consequences are possible, it will be for the court to exercise its discretion in order to decide which to apply.

- Position statement adopted on 19 June 2019 by the majority of the Advisory Council of the Supreme Court examining the case-law on the invalidity of loan contracts denominated in a foreign currency.

This position statement, which is not binding on lower courts, offers lower courts two solutions, equally well founded in case-law, regarding the invalidity of contract terms that place the foreign exchange risk on the consumer. The court may declare the loan contract denominated in a foreign currency valid by changing the denomination to Hungarian forint, with ordinary interest at the rate applicable to the Hungarian forint on the date of signature of the contract, plus the differential. Alternatively, the court may also declare the contract valid by establishing a maximum exchange rate between the foreign currency and the Hungarian forint and leaving the interest rate fixed in the loan contract intact up to the date of the conversion into Hungarian forint.

Brief summary of the facts and the main proceedings

- 1 The defendant in the main proceedings ('the defendant') wanted to buy a Rover car. His own funds amounted to HUF 362 500,¹ which he needed to supplement with a loan of HUF 1 417 500. On 3 December 2009 he therefore made an application for credit to Lombard Finaszírozási Zrt., the predecessor in law to the applicant in the main proceedings ('the applicant') In the application the defendant undertook to contribute his own funds on 3 December 2009 and thereafter, from 5 January 2010 to 5 May 2016, to make monthly payments of HUF 34 900, amounting to HUF 2 689 225 in total.
- 2 On 4 December 2009 Lombard Finaszírozási Zrt., as the lender, and the defendant, as the borrower, concluded an individual consumer loan contract denominated in Swiss francs at a variable interest rate. The contracting parties established the loan repayment terms and agreed that, where the contract made no provision, the general terms and conditions of lending issued by Lombard Finaszírozási Zrt. would apply, and the said terms and conditions form an integral part of the contract.
- 3 On 4 December 2009 the defendant also signed a declaration of notification of risk. The declaration informed the borrower of the interest rate risk and of possible interest rate fluctuations. The information also advised of the need to take account of exchange rate risk. The monthly payments were determined in the foreign currency and then converted into Hungarian forint, which produces a different exchange rate; it was not possible to predict future fluctuations in the exchange rate. The general information on exchange rate variations was included in the

¹ According to the reference exchange rate published by the European Central Bank, one euro was equal to HUF 269.14 at the time the contract at issue was concluded, that is, on 4 December 2009; to HUF 313.33 when the contract was terminated on 14 September 2015; to HUF 325.83 when the court of first instance gave judgment on 11 July 2019; and to HUF 365.53 on the date of the request for a preliminary ruling, that is, on 30 September 2020. See https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-huf.en.html

general terms and conditions of lending under the definitions 'Change in exchange rate I' and 'Change in exchange rate II'.

- 4 Lombard Finanszírozási Zrt. was dissolved as the result of a takeover on 31 August 2010 and its universal successor in law became the applicant.
- 5 The settlement of accounts established by Law DH2, passed by the Hungarian legislature in 2014, also applied to the loan contract between the parties to the main proceedings. In accordance with those provisions, the applicant settled the amount which, according to Law DH1, had been calculated unfairly and was due to the defendant. The breakdown of the payment calculation also gave the annual ordinary interest rate as 22.32%, both before and after the amendment to the contract. The defendant did not challenge the settlement of accounts, which is therefore final.
- 6 The defendant defaulted on the monthly payments. The applicant therefore terminated the loan contract on 14 September 2015 and lodged an action against the defendant with the Pesti Központi Kerületi Bíróság (Central District Court of Pest, 'the court of first instance'). In that action it asked the court to declare that the loan contract concluded by the parties to the main proceedings on 4 December 2009 was valid, with retroactive effect from the date of conclusion, thus fixing the initial interest rate at 23.07% per annum. It also asked the court, in enforcing the contract, to order the defendant to make a principal repayment of HUF 490 102 plus default interest, and to pay the applicant's costs.
- 7 In his defence, the defendant submitted that the terms in the loan contract which placed the foreign exchange risk solely on the defendant were unfair, and he denied that the information provided in relation to the risk was plain and intelligible. He also argued that the contract was invalid because it did not clearly define the ordinary interest rate, in contravention of the relevant provisions of Hungarian law. The defendant complained that the applicant had not appended a detailed calculation of changes in the debt over time to the contract, which would have enabled detailed monitoring. The defendant also lodged a counterclaim in which he stated that since concluding the contract he had paid the applicant a total of HUF 3 151 644, whereas the initial amount of the loan was only HUF 1 417 500; he therefore considered all payments made from October 2012 to be overpayments. In his counterclaim he therefore asked the court to order the applicant to pay HUF 1 734 144 on grounds of the invalidity of the contract and unjust enrichment. He also asked the court to order the applicant to transfer title to the Rover car to him and to cancel the applicant's right of option.
- 8 While the applicant did not challenge the amount of the loan repayments made by the defendant up to that point, it did dispute the counterclaim based on unjust enrichment and it did not accept the quantitative deduction claimed on that ground. It also stated that it had provided information on the exchange rate risk in plain, intelligible language. Moreover, it argued that the fact that the contract did not state the ordinary interest rate could, at most, be grounds for partial invalidity,

which would be curable. Finally, the applicant underlined that the defendant had not challenged the interest rate stated in the settlement of accounts performed in accordance with the provisions of Law DH2, and therefore the court could supply the ordinary interest rate, thereby curing the invalidity of the contract.

- 9 In its judgment of 11 July 2019 the court of first instance classified the contract at issue as a loan contract denominated in Hungarian forint and declared it valid with retroactive effect from the date of conclusion, fixing the ordinary interest rate in Hungarian forint at 23.07% per annum. It dismissed the remaining claims in the application. With regard to the counterclaim brought by the defendant, it ordered the applicant to pay the defendant HUF 462 419 and to transfer title to the Rover car to him, and ordered the cancellation of the applicant's right of option. It dismissed the counterclaim as to the remainder.
- 10 With regard to the ordinary interest rate in foreign currency, in the grounds for the decision the court of first instance declared that the interest rate stated by the applicant could not be properly inferred from either the loan contract or the general terms and conditions of lending, and that the interest rate had not been proved. The court of first instance agreed with the defendant that the ordinary interest stated by the applicant is contrary to the very nature of a foreign currency-based system. In practice, at the time the parties concluded the loan contract the interest rate for loans denominated in Hungarian forint was around 20%, whereas the interest rate for loans denominated in foreign currency concluded at that time was 10% or even less. According to the court of first instance, the onus was on the applicant to support its claim by proving the essential content of the contract and the ordinary interest rate in foreign currency; it had, however, failed to do so.
- 11 With regard to information on the exchange rate risk, the court of first instance ruled that the contractual term which placed the foreign exchange risk on the consumer was unfair, having regard to Directive 93/13, the judgment of the Court of Justice of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750), and Decision No 6/2013 PJE of the Supreme Court adopted with a view to ensuring consistent interpretation of the provisions of civil law. The court also ruled that all the legal consequences – that is, the consequences of the unfairness of the contractual term which placed the foreign exchange risk on the consumer and the consequences of the partial invalidity on grounds of failure to determine the interest – should be applied jointly.
- 12 With regard to the application of the legal consequences of invalidity, the court of first instance based its reasoning on the position statement issued by the Advisory Council of the Supreme Court on 19 June 2019. It ruled that the loan contract between the parties was valid, deeming it to be denominated in Hungarian forint due to the unfairness of the exchange rate risk. Based on the settlement of accounts produced by the applicant to take account of the difference between the total monthly payments (HUF 2 689 225) and the amount of the loan (HUF 1 417 500), the court fixed the initial ordinary interest rate at 23.07% per annum. However, in view of the difference between the HUF 3 151 644 actually

paid by the defendant up to that point and the original total of all the monthly payments, which amounted to HUF 2 689 225, the court ordered the applicant to pay the defendant HUF 462 419 HUF on grounds of unjust enrichment.

- 13 The applicant lodged an appeal against the judgment at first instance with the referring court, which has made a request to the Court of Justice for a preliminary ruling.

Main arguments of the parties to the main proceedings

- 14 The applicant asks the referring court to amend the judgment at first instance so as to omit the classification of the contract at issue as a loan contract denominated in Hungarian forint and to order the defendant to pay HUF 490 102 by way of principal – a sum it also claimed at first instance – plus default interest and the applicant’s costs. It also asks the court to dismiss the counterclaim in its entirety and to omit the operative provisions of the judgment concerning the transfer of title to the car and the cancellation of the right of option.
- 15 The applicant argues that the declaration of notification of risk clearly stated that the defendant should take the exchange rate risk into account. The applicant also drew the defendant’s attention to the uncertainty over future exchange rate fluctuations. According to the applicant, the fact that the borrower bears the exchange rate risk in return for a more favourable interest rate does not in itself mean that a loan contract denominated in foreign currency is unlawful or contrary to honest practices, that it is usurious, that performance is impossible, or that the contract is a sham.
- 16 The applicant cites point 1 of Decision No 2/2014 PJE of the Supreme Court adopted with a view to ensuring consistent interpretation of the provisions of civil law, which establishes that the consumer bears the exchange rate risk without limitation. A contractual term concerning exchange rate risk can be examined only if, at the time of the conclusion of the agreement, its content was neither plain nor intelligible for an average consumer who is reasonably well informed and reasonably observant and circumspect. If, based on the contractual terms and the information provided by the financial institution, such a consumer was able clearly to understand that he bore the entire and unlimited exchange rate risk and that there was no upper limit on potentially adverse exchange rate fluctuations, the term under examination could not be regarded as unfair. According to the applicant, the information it had provided is compliant with the judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282), and of 20 September 2017, *Andriiciuc and Others* (C-186/16, EU:C:2017:703). It stressed that, based on the general terms and conditions of lending, it was possible to establish unequivocally that the borrower has to pay for fluctuations in exchange rates, and that the exchange rate may be subject to extreme fluctuations with no upper limit.

- 17 The applicant disputes the finding by the court of first instance that it had failed to prove the interest rate of 23.07%, which had been determined by the court itself. During the proceedings at first instance it gave a detailed account of the amount of ordinary interest. When the court of first instance declared the contract to be valid, it should also have been required to amend the ordinary interest, using the interest rate for the relevant foreign currency plus the differential. A declaration that a contract is valid cannot entail a change in the contractual balance between the parties which has the effect of creating a major disparity between the value of obligation and consideration in the legal relationship.
- 18 In his response to the appeal, the defendant asks the court to uphold the judgment given at first instance. He points out that, according to the Supreme Court, the information to be provided on exchange rate risk must be deemed part of the main contractual obligation, and that if the information is not provided or is unfair, the contract becomes invalid in its entirety. His response is accompanied by various individual judgments in support of his argument.

Brief summary of the reasons for the request for a preliminary ruling

- 19 In the light of the previous case-law of the Court of Justice, the referring court seeks clarification of the possibilities available in law for declaring a contract to be valid and effective where its main subject matter is invalid.