

Case C-698/18

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:

7 November 2018

Referring court:

Tribunalul Specializat Mureș (Romania)

Date of the decision to refer:

12 June 2018

Appellant:

SC Raiffeisen Bank SA

Respondent:

JB

Subject matter of the main proceedings

Appeal against the judgment of the Judecătoria Târgu-Mureș (Court of First Instance, Târgu-Mureș, Romania) upholding, at first instance, the action brought by JB seeking to establish the unfairness of certain terms of the personal loan agreement into which he had entered, as borrower, with the appellant bank, SC Raiffeisen Bank SA, and to obtain the reimbursement of the sums paid pursuant to those terms.

Subject matter and legal basis of the request for a preliminary ruling

Pursuant to Article 267 TFEU, the referring court seeks an interpretation of the 12th, 21st and 23rd recitals and of Articles 2(b), 6(1), 7(2) and 8 of Directive 93/13/EEC, with a view to establishing the temporal duration of the status as ‘consumer’ of borrowers under loan agreements that have been performed in their entirety.

Questions referred

1. Do the provisions of Council Directive 93/13/EEC on unfair terms in consumer contracts, in particular the 12th, 21st and 23rd recitals and Articles 2(b), 6(1), 7(2) and 8 thereof, permit, in accordance with the principle of procedural autonomy and the principle of equivalence and effectiveness, a set of means of legal recourse that consists in an ordinary legal action, not subject to any limitation period, to establish the unfairness of certain terms in a consumer contract and an ordinary legal action of a personal and pecuniary nature that is subject to a limitation period, which is used in pursuit of the directive's aim of eliminating the effects of all obligations arising and performed under clauses which are found to be unfair to consumers?
2. In the event that the first question is answered in the affirmative, do those same provisions preclude an interpretation, derived from application of the principle of the certainty of civil-law legal relationships, according to which the objective point in time by which the consumer must have known or should have known of the existence of the unfair terms is the time at which the loan agreement with that consumer came to an end?

Provisions of EU law and case-law referred to

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in particular the 12th, 21st and 23rd recitals and Articles 2(b), 6(1), 7(2) and 8 thereof.

Judgment of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 44; judgment of 21 December 2016, *Gutiérrez Naranjo*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 54, 69 and 70; judgment of 6 October 2009, *Asturcom telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 41.

Provisions of national law, case-law and legal theory referred to

Legea nr. 193/2000 privind clauzele abuzive din contractele încheiate între profesioniști și consumatori (Law No 193/2000 on unfair terms in contracts between professionals and consumers), republished in the *Monitorul Oficial al României*, Part I, no 543 of 3 August 2012, as amended in 2014, in particular, Articles 1 and 2, which are relevant to the definition of 'consumer', Article 6, in accordance with which unfair terms do not produce effects as regards the consumer, and Articles 12 and 14, which provide for the right of consumers who have sustained damage as a result of an agreement entered into in breach of this law to bring legal proceedings.

Codul civil 1864 (the Civil Code of 1864), Articles 993, 994 and 1092, and Decretul nr. 167/1958 (Decree No 167/1958), Articles 1, 2, 7 and 8, which, taken

together, provide the basis for the assimilation, in legal theory and in case-law, of the unenforceability of unfair terms with the regime of absolute invalidity.

Ordonanța Guvernului nr. 9/2000 privind nivelul dobânzii legale pentru obligații bănești (Legislative Decree No 9/2000 on the statutory rate of interest for pecuniary obligations), in particular Article 2, which provides that, where the obligation is productive of interest but the rate of interest is not stated, interest at the statutory rate will be payable.

Ordonanța Guvernului nr. 13/2011 privind dobânda legală remuneratorie și penalizatoare pentru obligații bănești, precum și pentru reglementarea unor măsuri financiar-fiscale în domeniul bancar (Legislative Decree No 13/2011 on the rates of statutory interest and default interest for pecuniary obligations and on the regulation of certain financial and fiscal measures in the banking sector), which repealed and replaced Ordonanța Guvernului nr. 9/2000 (Legislative Decree No 9/2000).

The referring court also puts forward an analysis of invalidity as a civil-law sanction, its classification as absolute or relative, on the one hand, and, on the other, as complete or partial invalidity, as well as the way in which it is governed and its effects, outlining a series of principles, of which the principle of the retroactivity of effects and the principle of *restitutio* are relevant to the case at hand.

Succinct presentation of the facts and the main proceedings

- 1 On 26 June 2008, the credit institution Raiffeisen Bank SA and JB entered into an agreement for a personal loan of EUR 4 148.41 to be made to the borrower, a natural person.
- 2 Pursuant to the terms of that agreement, the borrower was required to pay (i) a processing fee of EUR 121.41 (3% of the amount of the loan), fully payable on the date on which the loan was taken out, (ii) variable interest calculated in accordance with a formula set out in the ‘general conditions of banking operations’, the rate of which could be changed by the bank in line with developments in the financial market (the rate being 11% initially and varying between 10.25% and 12.00% over the duration of the agreement), and (iii) a monthly administration fee of 0.39% of the initial amount of the loan, which was for the bank’s monitoring of the use and repayment of the loan and for its fulfilment of any other obligations assumed by the bank under the loan agreement.
- 3 According to the reimbursement schedule issued on 26 June 2008, the borrower was required to pay 84 monthly instalments, giving rise to a final amount of EUR 7 360.93. The agreement terminated in 2015, with the loan having been repaid in full.

- 4 On 20 December 2016, JB brought an action against the bank with a view to establishing the unfairness of the terms of the loan agreement that provided for (i) the bank's entitlement to change the interest rate, (ii) the monthly administration fee and (iii) the processing fee, and also seeking the annulment of those terms following the establishment of their unfairness. JB also sought the reimbursement of the sums paid under those clauses together with the payment of statutory interest on the sums to be reimbursed, from the date of their receipt to the date of their actual reimbursement.
- 5 The defendant bank raised the objection that the applicant did not have standing to bring the proceedings because he had lodged his application over a year after the termination of the contractual relationship between the parties and therefore, in its view, no longer had the status of consumer.
- 6 The Judecătoria Târgu-Mureş (Court of First Instance, Târgu-Mureş) upheld the applicant's action in its entirety, finding that he was indeed a consumer. The court of first instance stated that neither Law No 193/2000 nor Directive 93/13 expressly stipulated what sanctions were applicable in the event of a finding that contractual terms were unfair, but both referred to the unenforceability of such terms. The court then went on to assimilate the characteristics of such unenforceability with the legal regime of absolute invalidity and applied the principle of *restitutio in integrum* to the sums paid under the terms considered unfair.
- 7 The defendant brought an appeal against the judgment of the Judecătoria Târgu-Mureş, reiterating its objection that JB did not have standing to bring the proceedings.

The essential arguments of the parties to the main proceedings

- 8 The defendant/appellant also submits that the interpretation given to date of the concept of consumer does not indicate the temporal duration of the status of consumer in a situation such as that in the main proceedings, in which the loan agreement has already been performed and terminated. Determining that duration is, it contends, decisive for the purpose of adjudicating the claims ancillary to an action to establish the unfairness of contractual terms, by which the consumer seeks reimbursement, given that, under domestic law, such claims are subject to a limitation period.
- 9 JB considers that a person acquires the status of consumer on entering into a loan agreement and retains that status as long as the unfair terms continue to have an effect on his financial situation. He regards as correct the national case-law which assimilates the unenforceability of unfair terms with absolute invalidity, the procedural regime for which is not subject to any limitation period.

Succinct presentation of the reasons for the request for a preliminary ruling

- 10 In the view of the referring court, it is important, in order to resolve the case, to determine the temporal duration of the status of consumer after the termination of the agreement and, in this connection, whether the manner in which the agreement is terminated is relevant (early repayment or performance over the full term).
- 11 Although the directive speaks of the fact that unfair terms do *not give rise to obligations for the consumer*, in the sense that the consumer cannot be bound by such clauses and may therefore ignore them, which leads to the notion of *unenforceability*, having regard to the characteristics of invalidity and of unenforceability, as governed by national law, the sanction of invalidity appears to be more faithful to the scheme established by the directive.
- 12 With reference to the procedural autonomy conferred on Member States by Article 7(2) of the directive, the referring court observes that, although Law No 193/200 does not expressly provide for application of the sanction of invalidity, Article 12(4) of that law does provide that the existence of the administrative procedures governed by Article 12(1) to (3) does not alter the consumer's right to argue the invalidity of an unfair term, either by bringing an action or by raising an objection.
- 13 With reference to the fact that the entire system for the protection of consumer rights is, in law, a matter of public policy, as is confirmed by provisions of law and case-law in accordance with which national courts are not only able, but are also required, to review, on their own motion, potentially unfair contract terms, it is clear that that case-law is oriented toward the legal regime of absolute invalidity, as a matter of public policy.
- 14 The referring court points out that the Court of Justice itself held, in its judgments in *Asbeek Brusse and de Man Garabito* and *Gutiérrez Naranjo*, cited above, that Article 6(1) of the directive must be regarded as a provision of equal standing to national rules which, within the domestic legal system, are in the nature of rules of public policy.
- 15 Therefore, by virtue of that assimilation of the mechanism for establishing the unfairness of contractual terms with the legal regime of absolute invalidity, a person who claims to be a consumer in the conclusion of a loan agreement with a bank may bring proceedings before a court at any time, without any limitation period being applied, given that the aim pursued is to eliminate the effects of unfair contractual terms.
- 16 In the present case, however, the consumer has argued the unfairness of certain terms contained in an agreement concluded with a professional which had ceased to exist more than a year earlier, having reached its term. Therefore, on that date also, the terms in question ceased to produce any effects, which means that the aim pursued by the EU legislature and by the national legislature is no longer present.

- 17 However, once the unfairness of a contractual clause has been established, the absolute invalidity of the contractual provision contained in it entails the application of the corresponding principles of national law, including the principle of *restitutio in integrum*.
- 18 The referring court adds that, since the right to seek the reimbursement of moneys paid pursuant to contractual terms that have been invalidated is closely linked with the finding of invalidity, in the sense that that right arises only after the declaration of invalidity, then, in so far as procedure is concerned, personal pecuniary claims will no longer be subject to a time-bar and it will be possible to rule on an ancillary head of claim (seeking reimbursement) – in itself subject to a time-bar – that is made in the pleadings in the main action to establish the unfairness of the contractual terms, which is essentially not subject to a time-bar.
- 19 Consequently, since no reasonable period of time is stipulated for determining whether a borrower remains a ‘consumer’ after the termination of a loan agreement, reliance could be placed on the fact that absolute invalidity is not subject to any time-bar in order to obtain a pecuniary benefit from the declaration of invalidity, albeit in the absence of the public-policy objective pursued by the EU legislature and the national legislature and also at the risk of undermining other principles, such as the principle of legal certainty.
- 20 Clarification is also necessary because, once the loan agreement has come to an end, so too does the legal relationship between the parties and, along with that, the consumer’s position as the weaker of the parties, by comparison with the professional, in terms of economic strength, which is what affects the consumer’s bargaining power and leads to contractual imbalances.
- 21 In the interests of achieving a balance between the principle of ensuring a high level of consumer protection and the principle of legal certainty, the referring court observes, by way of illustration, that pecuniary claims resulting from the application of the regime of invalidity to an unfair term of a contract that has already terminated could be subject to a limitation period that commences at a given time, determined objectively, which could be the date of termination of the agreement. Under national law, that limitation period is three years.
- 22 While, in the present case, JB brought his action approximately one year after the termination of the contract, thus within the national limitation period of three years laid down for pecuniary claims, and will consequently be entitled to obtain reimbursement of the moneys paid under the contested clauses, the referring court observes that, in parallel proceedings pending before it, which raise identical legal issues and in which the borrower also applied for a request to be made for a preliminary ruling, in similar terms (Case C-699/18), the borrower’s action to establish the unfairness of certain terms and to obtain the reimbursement of sums paid under those terms was brought approximately 11 years after the date of termination of the loan agreement by way of the early payment of the balance in

accordance with the terms of the contract. That is well beyond the three-year limitation period.

- 23 In the referring court's view, when an action is brought so late, the public-policy objective pursued by the EU legislature and the national legislature and the private interest of consumers in obtaining pecuniary benefits from application of the regime of invalidity could jeopardise the security of legal relationships and would therefore be in conflict with the principle of legal certainty.

WORKING DOCUMENT