

Case C-229/20**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:**

29 May 2020

Referring court:

Sofiyski rayonen sad (Bulgaria)

Date of the decision to refer:

29 May 2020

Applicant:

P

Defendant:

'K' EOOD

Subject matter of the main proceedings

Consumer credit agreement in which the total cost of the credit is not clearly indicated — Proportionality of the penalty provided for by national law in such cases (nullity of the contract) in the light of the provisions of Directive 2008/48/EC — Conclusion of a separate agreement on the provision of ancillary services directly linked to consumer credit agreements and the possibility of modifying and deferring the contractual instalments — Possible unfairness pursuant to Directive 93/13/EEC of a clause regarding payment for that package of services — Question as to what the nature of those ancillary services must be in order to be regarded as part of the main subject matter of the agreement — Question as to whether the cost of such ancillary services is to be regarded as part of the 'total cost of the credit' used to determine the annual percentage rate of charge in accordance with Directive 2008/48/EC.

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

Interpretation on the basis of Article 267 TFEU, Directive 2008/48/EC of the European Parliament and of the Council, and Council Directive 93/13/EEC regarding the alleged nullity of a consumer credit agreement owing to unfair or void terms in a separate agreement on the provision of ancillary services linked to the credit granted.

Questions referred

1. Is Article 3(g) of Directive 2008/48/EC to be interpreted as meaning that the fees for ancillary services agreed in connection with a consumer credit agreement, such as fees for the possibility of deferring and reducing instalments, constitute part of the annual percentage rate of charge for the credit?
2. Is Article 10(2)(g) of Directive 2008/48/EC to be interpreted as meaning that an incorrect indication of the annual percentage rate of charge in a credit agreement between a trader and a consumer borrower must be regarded as a failure to indicate the annual percentage rate of charge in the credit agreement and that the national court must apply the legal consequences provided for under national law for failure to indicate the annual percentage rate of charge in a consumer credit agreement?
3. Is Article 22(4) of Directive 2008/48/EC to be interpreted as meaning that a penalty provided for under national law, in the form of nullity of the consumer credit agreement, whereby only the principal amount granted is to be repaid, is proportionate if the annual percentage rate of charge is not accurately indicated in the consumer credit agreement?
4. Is Article 4(1) and (2) of Directive 93/13/EEC to be interpreted as meaning that the fees for a package of ancillary services provided for in a separate supplementary agreement to a consumer credit agreement as the main agreement must be regarded as part of the main subject matter of the latter agreement and cannot therefore be the subject of the assessment of unfairness?
5. Irrespective of the answer to the third question, is Article 3(1) of Directive 93/13/EEC in conjunction with point 1(o) of the annex to that directive to be interpreted as meaning that a term in an agreement for ancillary services relating to consumer credit is unfair if it grants the consumer the abstract possibility of deferring and rescheduling his payments and he owes fees for that possibility even if he does not make use of it?

Provisions of EU law and the case-law cited

Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive

87/102/EEC, in particular Article 3(g), Article 4(1) and (2), Article 10(2)(g) and Article 23.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in particular Article 3(1), Article 4(1), Article 5, point 1(o) of the annex to the directive.

Judgment of 20 September 2018, *EOS KSI Slovensko*, C-448/17 (EU:C:2018:745).

Judgment of 9 November 2016, *Home Credit Slovakia*, C-42/15 (EU:C:2016:842).

Provisions of national law cited

Zakon za zadalzheniata i dogovorite (Law on obligations and contracts), in particular Articles 26, 34 and 55.

Zakon za potrebitelskia kredit (Law on consumer credit), in particular Articles 10a, 11, 19, 21 to 24 and 33, and Paragraph 1 of the Dopolnitelni razporedbi (Additional provisions) for that law.

Zakon za zashtita na potrebitelite (Law on consumer protection), in particular Articles 146 to 148.

Brief summary of the facts and procedure

- 1 On 13 April 2017, P, who resides in Sofia (Bulgaria), and the non-bank financial institution 'K' EOOD, also located there, entered into a consumer credit agreement. Based on that agreement, the applicant was granted a sum of 3 000 Leva (BGN) (approximately EUR 1 500) for a period of 24 months. The agreement provided for an interest rate of 41.17% per annum and an annual percentage rate of charge of 49.89% for the loan. It was agreed that the loan would be repaid in 24 equal monthly instalments. The daily interest rate provided for was 0.11%. Thus, the total liability for the loan was BGN 4 451.04 (approximately EUR 2 225). By concluding the credit agreement, the applicant agreed to the general terms and conditions of the defendant.
- 2 A separate agreement for ancillary services was concluded alongside the credit agreement. It provides that the applicant can make use of a package of five ancillary services: '1. Priority check and disbursement of the consumer credit; 2. Possibility of deferring a certain number of repayment instalments; 3. Possibility of reducing a certain number of repayment instalments; 4. Possibility of changing the due date; 5. Facilitated procedure for the granting of additional funds.'
- 3 The price of this package of ancillary services was BGN 3 601.44 (approximately EUR 1 800), divided into instalments with the same due dates as the loan instalments. As a result, the total amount to be repaid under the main loan

agreement and the package of ancillary services was BGN 8 052.48 (approximately EUR 4 026).

- 4 According to the defendant's general terms and conditions, the selected services can be made use of only under certain conditions. For example, the possibility of deferring the payment of a certain number of instalments is linked to a specific reason, such as loss of employment or illness, and only up to four instalments can be deferred; the reduction of the instalments is also permitted only for up to four contractual instalments. A written supplementary agreement is to be signed for each individual use of the aforementioned services.
- 5 Under the ancillary services agreement, this is not a condition for the conclusion of the consumer credit agreement or for the granting of the credit under the conditions offered. It is expressly stated that the customer enters into that agreement voluntarily, understands its content and, by signing the agreement, consents to all its clauses.
- 6 It is provided that the defendant provides the ancillary services only as an option, while the borrower is liable to pay for them irrespective of whether he makes use of them or not. Although the remuneration for the services falls due immediately, it is deferred in line with the monthly instalments if the loan is repaid properly.
- 7 The applicant made use of an ancillary service from the package on two occasions. On the first occasion, he requested that two monthly contractual instalments be deferred. In that connection, an annex to the loan agreement was signed, which postponed the payment of the instalments due in August and September 2017. By way of a second annex, the payment of the seventh loan instalment according to the repayment schedule was also postponed.
- 8 The applicant brought an action before the referring court, asserting that several terms of the consumer credit agreement are contrary to mandatory legal provisions or are unfair, meaning that that agreement is null and void.

Principal arguments of the parties to the main proceedings

- 9 The main argument put forward by the applicant is that the agreement as a whole is null and void, since several contractual clauses are contrary to mandatory legal provisions or are unfair. The defendant is therefore not entitled to receive any remuneration under the agreement from the applicant. The applicant requests that the amount received by the defendant be returned to him (in accordance with the principle laid down in Article 34 of the Law on obligations and contracts, according to which the amount received on the basis of a contract which is null and void must be returned, and with the principle laid down in Article 23 of the Law on consumer credit, according to which, in the event of the nullity of a consumer credit agreement, the consumer is obliged only to repay the amount received, without any fees or interest). The applicant seeks reimbursement from

the defendant of the amount unduly overpaid on account of the nullity of the agreement.

- 10 The applicant emphasises that, under the general terms and conditions of the creditor, the credit agreement is automatically terminated in the event that payment is delayed by more than 30 days. Contrary to that clause, it is also provided that, in the event of such a 'termination', the borrower is obliged to pay all the contractual instalments in full. The applicant therefore asserts that, according to the clauses of the agreement, he cannot be released from the particularly onerous obligation to pay for the package of ancillary services in the event of financial difficulties, and this constitutes one of the grounds for the assumption that the credit agreement is null and void.
- 11 The applicant also claims that the clauses concerning payment for the package of ancillary services are unfair, since he is obliged to pay for a 'service' that he might not actually make use of. He points out that, even when a package of ancillary services is purchased, the possibility of deferring and reducing loan instalments does not actually arise automatically but requires the consent of the creditor for each use of such a service. The applicant therefore submits that he is paying for services that he is not receiving, which constitutes a typical unfair term within the meaning of point 1(o) of the Annex to Directive 93/13/EEC.
- 12 The expert accounting report obtained in the present proceedings concludes that the annual percentage rate of charge is 49.89% if calculated solely on the basis of the obligations under the main credit agreement. However, if the price of the package of ancillary services is included in the formula for calculating the annual percentage rate of charge, that figure rises to 216.05%.
- 13 In that regard, the applicant emphasises that, at the time the credit agreement was concluded, the law prohibited the annual percentage rate of charge under the credit agreement from being more than five times the statutory interest rate of 10% per annum for the period during which the credit was repaid, meaning that the maximum annual percentage rate of charge could be 50%. Under Article 19(5) of the Law on consumer credit, contractual clauses which result in that threshold being exceeded are null and void. Furthermore, under Article 21(1) of that law, any clause in a consumer credit agreement which has the object or effect of circumventing the requirements of that law is null and void. Moreover, pursuant to the Law on consumer credit (Article 22 in conjunction with point 10 of Article 11(1)), a consumer credit agreement which does not indicate the annual percentage rate of charge is null and void and, in such a case, the consumer is obliged to repay only the amount actually received by him, without interest or costs.

Brief summary of the basis for the reference

- 14 First, the question that arises for the referring court is whether an inaccurate indication of the amount of the annual percentage rate of charge in a consumer

credit agreement should be equated with a failure to indicate that rate. The court is inclined to come to that conclusion in view of the requirement that terms in consumer contracts must be formulated clearly and given that any inaccuracies must be interpreted to the detriment of the trader (Article 147 of the Law on consumer protection in conjunction with Article 24 of the Law on consumer credit). Those provisions transpose Article 5 of Directive 93/13/EEC into national law.

- 15 In the *EOS KSI Slovensko* judgment (C-448/17), the Court of Justice held that an unclearly worded clause concerning the amount of the annual percentage rate of charge does not satisfy the requirement of Article 4(2) of the Directive on unfair terms in consumer contracts and that the court seised is therefore empowered to disapply such clauses. In the present case, the question arises as to whether that principle also applies where the trader deliberately indicates the amount of the annual percentage rate of charge in an imprecise manner in order to circumvent the prohibition under national law on excessive increases in the amount of the annual percentage rate of charge.
- 16 Second, the referring court asks whether costs such as those incurred for the package of ancillary services in the present proceedings should be included in the formula for calculating the annual percentage rate of charge in a consumer credit agreement. The determination of the annual percentage rate of charge is fully harmonised by Article 3(g) of Directive 2008/48/EC and the Court of Justice must therefore clarify whether the calculation of the annual percentage rate of charge must include fees for ancillary services such as those agreed between the parties in the present case.
- 17 In that regard, the referring court takes the view that the formula for determining the annual percentage rate of charge for a loan must be as predictable as possible. Consequently, certain payments connected with the loan, including payments relating to the repayment of that loan, must always be regarded as costs under the credit agreement. The fact that a loan can be taken out under more flexible or more 'rigid' conditions must not leave the consumer uncertain as to the price of the additional flexibility granted to him. Consumers would be better placed to choose between credit products if the fees that are charged for deferring or modifying payments and are payable even if those rights are not exercised were to be included in the annual percentage rate of charge. Otherwise, the consumer would have to perform complicated mathematical calculations to weigh up the risk resulting from the need to defer his payments against the risk resulting from the decision to increase them. The court seised therefore takes the view that the costs relating to the deferral of payments and to the manner in which the credit is repaid should be included in the method of calculating the annual percentage rate of charge.
- 18 Third, the chamber called upon to rule on the present case attaches importance to the question of whether the aforementioned ancillary services are a 'mandatory precondition for the credit being granted in the first place' and whether the

'granting of the credit results from the use' of those ancillary services. In answering that question, the Court of Justice should take account of the fact that in the present proceedings it is not disputed that the ancillary services in question were requested voluntarily by the consumer when the credit agreement was concluded — the objection that the applicant had been misled as to the nature of the agreement concluded by him has not been raised in the proceedings. Nor has it been claimed that the defendant would not have agreed to grant the credit payment for those ancillary services. However, it should be noted that those ancillary services must be paid for at the time of conclusion of the contract, but will possibly not be made use of. It should also be noted that those services are related entirely to the manner in which the credit is repaid and not to the receipt by the applicant of any other products or goods not corresponding to the amount of money already granted to him. The referring court takes the view that the fact that those services are provided after the conclusion of written supplementary agreements and that there are numerous conditions for the use of those services is also relevant.

- 19 Moreover, it is necessary to assess whether national law provides for an appropriate penalty for failure to indicate the annual percentage rate of charge clearly in a consumer credit agreement. According to the *Home Credit Slovakia* judgment (C-42/15, operative part 4), national legislation providing for the nullity of a consumer credit agreement on account of minor inaccuracies in its content may constitute a disproportionate penalty within the meaning of Article 23 of Directive 2008/48/EC. In the present case, it is necessary to clarify, by way of interpretation, whether the connection with an inaccurate indication of the interest rate in a credit agreement must have the effect of vitiating the legal effect of the agreement and releasing the consumer from his obligation to pay interest and fees.
- 20 The adjudicating Chamber takes the view that if there is a clear formula for determining the annual percentage rate of charge, the creditor can easily avoid the risk of a penalty in the form of a loss of interest or of all of his contractual revenue. At the same time, an inaccurate indication of the costs can mislead the consumer and create a competitive advantage over the products of other market participants. The court seised therefore considers that the law could penalise an incorrect indication of the annual percentage rate of charge by creditors more severely.
- 21 Finally, the question arises as to whether the clauses relating to payment for a package of ancillary services by the applicant are capable of having a binding effect on him in the present proceedings. On the one hand, this is a matter of national law, which limits the maximum amount of the cost of credit in Article 19 of the Law on consumer credit, cited above. On the other hand, it is also a matter of EU law, as the payment for ancillary services may be based on the use of unfair terms in consumer contracts.
- 22 As regards the requirement in Article 4(1) of Directive 93/13/EEC that unfair terms must not relate to the main subject matter of the contract, the court seised

has doubts, in view of the fact that the package of ancillary services was agreed separately, as to whether it can be regarded as the ‘main subject matter’ of an agreement linked to the credit agreement or as an additional condition of the credit agreement. The view that it is the latter is supported by the connection between the two agreements and the fact that the fees for the ancillary services are not provided for in the agreement on the provision of those services but in the consumer credit agreement itself.

- 23 The court seised is inclined to assume that where provisions of EU law govern contracts for the provision of services connected with credit agreements, those services should not relate to the way in which the credit is granted or repaid. The referring court takes the view that those provisions apply instead to other services which supplement the granting of a sum of money, such as electronic payment services, access to information society services and other such services. The applicant’s view that they are not ancillary services therefore appears to be well founded. Furthermore, it must not be overlooked that creditors provide funds with the aim of securing a foreseeable amount of profit at regular intervals and that the deferral and rescheduling of payments entail risks for creditors. Providing the possibility of such financial relief can therefore be the subject of remuneration.
- 24 The referring court is therefore of the opinion that the question of whether such costs for ancillary services should always be regarded as being based on unfair terms should be answered in the negative. However, this should mean that when consumers pay the additional fees for such services, they should be entitled to make use of them almost automatically.