Case C-474/20

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:

Vrhovni sud Republike Hrvatske (Croatia)

Date of the decision to refer:

27 May 2020

Applicant:

I. D.

Defendant:

Z. b. d. d., Z.

Subject matter of the case in the main proceedings

Appeal on a point of law against a final judgment rejecting the applicant's request seeking a declaration of nullity in respect of a loan agreement provision which was not individually negotiated and concerned unilateral changes in the agreed interest rate, and seeking payment of HRK 41 735.48 as the difference between the amount which would have been paid at the originally agreed interest rate and the amount actually paid, calculated on the basis of the interest rates as changed by the lender's unilateral decisions, increased by statutory default interest.

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

Request for an interpretation of EU law pursuant to Article 267 of the Treaty on the Functioning of the European Union.

Questions referred

1. Must Directive 93/13 on unfair terms in consumer contracts be interpreted as meaning that its provisions are applicable to a loan agreement concluded prior to the accession of the Republic of Croatia to the European Union, which loan was converted following accession on the basis of legislation adopted by the Republic of Croatia after its accession to the European Union, and does the Court of Justice therefore have jurisdiction to answer the second question?

If the answer to the first question is in the affirmative, the following question arises:

2. Must Article 6(1) of Directive 93/13 on unfair terms in consumer contracts be interpreted as precluding national legislation such as the special law at issue in the main proceedings – ZID ZPK 2015 – Zakon o konverziji (Law on Conversion), which, on the one hand, obliges the supplier of services under a mandatory provision to offer the consumer the conclusion of an annex to the loan agreement in the manner set out in that law, which annex replaces individual terms and conditions of the agreement which have been declared null and void by a court ruling already at the time of entry into force of that law (terms and conditions concerning unilateral changes to the interest rate) or subsequently (terms and conditions concerning a currency clause linked to the Swiss franc (CHF)) with valid contractual terms and conditions in such a manner as if the terms and conditions stipulated in the annex had been in force between the parties from the outset, thereby ensuring the validity of the agreement, and, on the other hand, providing that payments made pursuant to unfair terms and conditions by a consumer who has voluntarily agreed to conclude the annex are to be counted towards his obligations arising from the terms and conditions of the valid annex, by way of disposing of any overpayment or reimbursing the consumer if the overpayment exceeds the sum of equal instalments under the new loan repayment schedule, which disposal or reimbursement is to be effected in the manner provided for by that law?

Applicable provisions of EU law

Article 1(2), Article 6(1) and second subparagraph of Article 10(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) (‘Directive 93/13’)

Applicable provisions of national law

Articles 81 and 87 of the Zakon o zaštiti potrošača (Law on Consumer Protection, *Official Gazette* [*Narodne novine*] No 96/03);

Articles 4, 49 and 55 of the Zakon o zaštiti potrošača (Law on Consumer Protection, *Official Gazette* [*Narodne novine*] Nos 41/14, 110/15 and 14/19; 'the ZZP');

Articles 145, 147, 148, 322, 323, 324, 1111 and 1115 of the Zakon o obveznim odnosima (Law on Obligations, *Official Gazette* [*Narodne novine*] Nos 35/05, 41/08, 125/11, 78/15 and 29/18);

Articles 1, 19a, 19b, 19c, 19d and 19e of the Zakon o izmjeni i dopunama Zakona o potrošačkom kreditiranju (Law amending and supplementing the Law on Consumer Credit, *Official Gazette* [*Narodne novine*] No 102/2015; 'the Law on Conversion');

Articles 502j, 502k and 502n of the Zakon o parničnom postupku (Law on Civil Procedure, *Official Gazette* [*Narodne novine*] Nos 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 123/08, 57/11, 148/11 (consolidated text), 25/13, 89/14 (judgment of the Ustavni sud Republike Hrvatske (Constitutional Court of the Republic of Croatia)) and 70/19).

Succinct presentation of the facts and procedure

1 On 30 June 2006, the applicant, acting as a consumer and borrower, concluded with Bank Z. b. d.d., Z., acting as lender, a loan agreement denominated in Swiss francs (CHF) and to be repaid in Croatian kuna (HRK) at the average exchange rate published by the Hrvatska Narodna Banka (Croatian National Bank) as on each payment date. The applicant undertook to repay the loan, the amount of which was fixed at CHF 78 200.00, with a currency clause linked to the Swiss franc, within 20 years together with contractual interest, which under the agreement was to be variable and determined in line with changes in market conditions on the basis of interest-rate decisions made by the lender; the equivalent amount in Croatian kuna was to be calculated in accordance with the average exchange rate published by the Croatian National Bank as on each payment date ('the loan agreement'). As he took the view that the contractual terms concerning the currency clause and unilateral changes in the interest rate, which had not been individually negotiated, were null and void, on 14 November 2014 the applicant brought an action before the Općinski sud u Osijeku (Municipal Court, Osijek), requesting that the loan agreement be declared null and void or, alternatively, that the loan agreement be declared partially null and void (specifically, the terms concerning the currency clause and unilateral changes in the interest rate); in both cases, the applicant also filed a claim in restitution for unjust enrichment. With respect to the alternative claim, the applicant sought payment of HRK 41 735.48 as being the difference between the amount that would have been paid at the originally fixed interest rate and the amount actually paid, determined on the basis of the interest rates changed as a result of the lender's unilateral decisions between 23 October 2007 and 31 December 2013, calculated in Croatian kuna on each interest payment date according to the CHF-

HRK exchange rate on each payment date; the applicant also sought statutory default interest.

2 The interest rate originally agreed, which was 4.90% per annum, was changed several times during the life of the agreement by the lender's unilateral decisions, such that it amounted to 5.55%, 6.30%, 6.80% or 6.55% during certain periods – until 1 January 2014, when it was set at 3.23% as a result of a statutory intervention.

3 On 18 January 2016, the applicant concluded an annex to the loan agreement with the lender, pursuant to which certain terms and conditions of the agreement were changed in accordance with the Law on Conversion, namely, those relating to the currency in which the loan was denominated, the interest rate and the amount of the outstanding part of the loan, and an agreement concerning the disposal of the overpayment was concluded. Taking the view that the lender had *de facto* satisfied part of his claim by concluding the annex to the loan agreement, the applicant partially withdrew his claim, continuing to seek only that the terms and conditions related to unilateral changes in the interest rate be declared null and void and maintaining the corresponding claim in restitution.

4 The applicant's claim was dismissed by judgment of the Općinski sud u Osijeku (Municipal Court, Osijek) of 18 May 2016, and his appeal against that judgment was dismissed by judgment of the Županijski sud u Osijeku (Regional Court, Osijek) of 2 February 2017. The lower-instance courts took the view that, since the applicant had concluded the annex in question with the lender pursuant to the Law on Conversion, he could not validly claim that the provision of the agreement concerning unilateral changes in the interest rate, which had ceased to apply, was null and void, or seek the repayment of unjust enrichment on those grounds as if the annex to the agreement had never been concluded. The applicant has brought an appeal on a point of law against that final judgment, which is being reviewed by the Vrhovni sud Republike Hrvatske (Supreme Court of the Republic of Croatia) in the main proceedings.

Principal arguments of the parties to the main proceedings

5 In support of his action, the applicant submits, firstly, that the contractual term relating to unilateral changes in the interest rate had, as a result of a class action, been declared null and void by judgment of the Trgovački sud u Zagreb (Commercial Court, Zagreb) of 4 July 2013, which, following the judgment of the Visoki trgovački sud Republike Hrvatske (Commercial Court of Appeal of the Republic of Croatia), became final in that part on 13 June 2014. Secondly, the applicant stresses that the overpayments made pursuant to that unfair contractual term, as well as the statutory interest on those amounts, were not recognised at the time when the loan was converted into euros, but, on the contrary, an even higher interest rate was charged on the euro loan.

6 In his appeal on a point of law, the applicant disputes, inter alia, the correctness of the legal assessments made by the lower courts in their judgments, taking the view that the conclusion of an annex to the loan agreement does not constitute compensation for an unfair term concerning unilateral changes in the interest rate, and stresses that the annex does not contain any provisions relating to compensation in that sense. Therefore, he claims that he is entitled to compensation under the general provisions of contract law as if no annex to the agreement had been concluded.

Brief reasons for the questions referred

7 The Vrhovni sud (Supreme Court) proceeds on the assumption that the terms and conditions of the original loan agreement concerning the currency clause and unilateral changes in the interest rate, which were not individually negotiated, are null and void. The aforementioned judgment of the Trgovački sud u Zagrebu (Commercial Court, Zagreb) of 4 July 2013, which was reviewed by the Vrhovni sud (Supreme Court) and by the Ustavni sud Republike Hrvatske (Constitutional Court of the Republic of Croatia), was also delivered against Bank Z. b. d.d., Z. and relates to the loan agreement at issue.

8 However, the Vrhovni sud (Supreme Court) has doubts as to the legal consequences of the nullity of those terms and conditions due to the entry into force of the Law on Conversion. In this context, it considers Article 6(1) of Directive 93/13 to be the central provision of the system for protecting consumers against unfair contractual terms in the European Union, and regards its interpretation in practice by the Court of Justice as being of crucial importance. It therefore refers to the case-law of the Court of Justice, [1] according to which Member States must ensure that unfair terms are not binding on the consumer and that the contract remains in force without the unfair terms, if possible under national law, as well as ensuring restitution for the consumer. The Vrhovni sud (Supreme Court) explains that the Croatian legislature has ensured the non-binding nature of the unfair terms by declaring them null and void and, since that nullity has an *ex tunc* effect, the declaration that unfair terms are null and void ensures that consumers receive the standard of protection required by that directive, provided that, at the same time, the legal effects of the nullity of those terms and, above all, restitution are recognised and protected.

9 The ZZP does not contain any provisions on consumer restitution in regard to unjust enrichment, that is to say , it creates a legal and factual situation in which unfair contractual terms are non-existent, while restitution is effected on the basis of general provisions of contract law or specific provisions, if any, pertaining to individual consumer contracts. As regards the consumer contract at issue in the main proceedings, it is pointed out that the Law on Conversion entered into force

[1] Judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 55 and 56).

on 30 September 2015; it was adopted in order to mitigate the adverse consequences for many consumers who had concluded loan agreements with a currency clause linked to the Swiss franc between 2004 and 2008, resulting from the significant appreciation of that currency and the increases in interest rates introduced by the decisions of lenders. The Law on Conversion was submitted for review to the Ustavni sud Republike Hrvatske (Constitutional Court of the Republic of Croatia), which, by order of 4 April 2017, rejected the motion to examine the compatibility of that law with the Ustav (Constitution), finding that it had the legitimate objective of increasing social protection, preventing the continuation of unfair commercial practices by credit institutions and preventing an aggravation of the debt crisis, and also that the loan conversion measure was proportionate to that legitimate objective and that no other less onerous or restrictive measure was available.

10 The applicant voluntarily concluded the annex to the loan agreement pursuant to the Law on Conversion, which resulted in his loan being converted. Such an annex is valid where the provision in the original loan agreement concerning unilateral changes in the interest rate is null and void, a fact which the applicant does not dispute. At the time of the entry into force of that law, contractual terms and conditions stipulating unilateral changes in the interest rate were already considered null and void in the case-law, whereas, according to the case-law of the Vrhovni sud (Supreme Court), the currency clause linked to the Swiss franc was valid. The Vrhovni sud (Supreme Court) states that in the present proceedings it is deciding for the first time on possible restitution following the conclusion of such an annex to a loan agreement, whereas the appellate courts have taken different legal positions on this issue.

11 As regards the unfair contractual term concerning unilateral changes in the interest rate set forth in the original loan agreement, it is considered null and void *ab initio* and has been replaced by the conclusion of an annex to the loan agreement as if the loan had been denominated in euro from the outset, with a term stipulating a variable rate of interest for euro loans, the fairness of which is not disputed by the parties to the main proceedings. Moreover, a settlement was effected with the applicant concerning all of the payments made to date and the overpayment determined. The provision in the annex to the agreement stipulating that the term of the original loan agreement concerning unilateral changes in the interest rate is retroactively replaced by a variable contractual interest rate for loans with a currency clause linked to the euro is likewise not a provision that has been individually negotiated. However, in the opinion of the Vrhovni sud (Supreme Court), that provision, which refers to Article 1(2) and the thirteenth recital of Directive 93/13, is excluded from the scope of that directive because it was not drawn up in advance by the lender, but is determined by national law. The level of the interest rate itself, as stated in the annex, and the manner of its application are not stipulated in that law, but the fairness and validity of this term of the annex have not been challenged in the main proceedings.

12 The Law on Conversion obliges the lender to offer the consumer the conclusion of an annex to the loan agreement; the content of that annex as regards the conversion calculation method is determined by the law in question, and the consumer has the choice of whether or not to conclude it.

13 Referring to the case-law of the Court of Justice, [2] the Vrhovni sud (Supreme Court) found that the objective of making unfair contractual terms no longer binding may also be attained by a Member State through enacting legislation which will apply retroactively to consumer contracts already concluded which contain unfair terms in order to remove those terms while at the same time maintaining the validity of the contract, subject to restitution for the consumer. In this connection, the Vrhovni sud (Supreme Court) – in proceedings in which the Općinski sud u Pazinu (Municipal Court, Pazin) requested from it a legal position on a question which that court considered important for the uniform application of the law (so-called model proceedings) – ruled that amendments to a loan agreement concluded on the basis of the Law on Conversion are valid. This is a special provision which derogates from provisions on nullity in general contract law. However, this derogation also results in a situation in which the amounts already paid pursuant to unfair terms and conditions are not returned to the consumer, but are instead used to meet his obligations under the annex to the loan agreement in the manner provided for in that law, and the manner of disposing of any overpayment which may have occurred is also determined in that annex. The Law does not expressly declare null and void any provision of a loan agreement such as the agreement in question, and therefore does not provide for any restitution to the consumer. However, it must be taken into account that the Law in question was enacted at a time when the provision concerning unilateral changes in the interest rate had already been finally declared null and void.

14 The Vrhovni sud (Supreme Court) has come to the conclusion that it is clear from the entire case that the intention of the legislature was to replace the unfair contractual term by way of an annex to the agreement and to provide restitution to the consumer by crediting the payments made pursuant to unfair terms against the payments to be made pursuant to valid terms as well as by concluding an agreement on any overpayment so as to remove all doubts as to the validity of the agreement and restitution to the consumer without the need for further legal proceedings. It therefore appears to the Vrhovni sud (Supreme Court) that the provisions of that special Law permit the interpretation that, owing to the conclusion of a valid annex in the interests of the parties to the agreement and of legal certainty, the loan agreement remains in force and the consumer is not reimbursed for the payments made under the unfair contractual term (except where the overpayment exceeds the sum of equal instalments). However, these payments are credited against the valid contractual obligations laid down in the annex (the content of which is set out in the Law), and these valid obligations are not necessarily economically advantageous for the consumer at all times during

2 Judgment of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraph 55.

the term of the agreement, since the consumer himself covers the difference between the higher interest rate applicable to loans with a currency clause linked to the euro and that in the case of the Swiss franc, without the right to interest from the date of payment and to exchange rate differences related to the overpayment determined.

15 The Vrhovni sud (Supreme Court) goes on to state that, in its view, the interpretation of the Court of Justice presented in its judgment of 9 July 2020, *Ibercaja Banco*, C-452/18, does not apply in the present case because, on the one hand, in that case the annex was concluded on the basis of the principle of freedom of contract and the contents of that annex were either drawn up in advance by the seller or supplier or individual negotiations between the parties took place. On the other hand, the annexes to the agreement at issue in the main proceedings do not contain any terms or conditions pertaining to the consumer's withdrawal from the annexes, nor are such terms or conditions contained in the Law in question, with the result that the lender cannot be accused of not having presented to the consumer all the possible legal effects of concluding the annex which it was obliged to conclude under the law. Obviously, at the time when the agreement was concluded, there was no case-law relating to the legal effects of the Law on Conversion concerning restitution to the consumer for unfair contractual terms; even today, there is no uniform case-law relating to this subject matter. In this regard, the Vrhovni sud (Supreme Court) referred to the judgment of the Court of Justice of 19 September 2019, *Lovasné Tóth*, C-34/18, according to which the transparency requirement does not require the seller or supplier to provide the consumer with additional information concerning the scope of a contractual term the legal effects of which may be determined only by interpreting provisions of national law in respect of which there is no consistent case-law. In the view of the Vrhovni sud (Supreme Court), this also applies to the present case where, at the time when the annex was concluded, there was no case-law concerning the Law on Conversion, and especially in circumstances where the contents of the annex and the lender's obligation to offer it to the consumer are determined entirely by mandatory legal provisions.

16 In the light of the foregoing, the Vrhovni sud (Supreme Court) has doubts as to whether it can be concluded that a consumer who made payments under unfair terms included in a loan agreement with a currency clause linked to the Swiss franc was compensated by the fact that he was ultimately placed in a factual and legal situation equivalent to having concluded at the outset a loan agreement with a currency clause linked to the euro which did not contain unfair terms. In other words: is a rule which, in principle, guarantees to the consumer the performance of obligations in real terms, a sufficient guarantee of compensation even if absolute mathematical equality in the value of the obligations performed is not achieved?

17 Finally, the Vrhovni sud (Supreme Court) also has to consider the question of the applicability of EU law to the subject matter of the main proceedings. The original loan agreement was concluded prior to the accession of the Republic of Croatia to

the European Union on 1 July 2013. The Vrhovni sud (Supreme Court) refers to the case-law of the Court of Justice, [3] according to which the latter has jurisdiction to interpret EU law as regards its application in a Member State only from the date of its accession to the European Union. It follows from the order of the Court of Justice in *Tudoran* that the second subparagraph of Article 10(1) of Directive 93/13 determines the period to which it is applicable (in Croatia, it applies to consumer contracts concluded after 1 July 2013), and therefore, in order to determine whether that directive applies to the agreement here at issue in the main proceedings, the date of its conclusion must be taken into account, with the period during which it produces legal effects being irrelevant.

18 Nevertheless, the Vrhovni sud (Supreme Court) submits that the situation at issue does not concern a request for an interpretation of EU law concerning the validity of a loan agreement on the basis of elements which were present as at the date of its conclusion, but rather the compatibility of the legal effects of the Law on Conversion enacted after the accession of the Republic of Croatia to the European Union, as regards restitution for consumers covered by that law, with Article 6 of Directive 93/13. Owing to its retroactive effect, that legislation applies to the subject matter of the main proceedings and impacts on the interests of consumers, which must be assessed at the time of the dispute rather than on the date on which the agreement was concluded. Therefore, the Vrhovni sud (Supreme Court) hereby requests an interpretation concerning the compatibility with EU law of rules of national law which the Republic of Croatia adopted after the date of its accession to the European Union and which, with respect to the agreement at issue, which was concluded prior to accession, produces legal effects after accession to the European Union.

[3] Judgment of 10 January 2006, *Ynos*, C-302/04, EU:C:2006:9, paragraphs 35 to 38; order of 3 July 2014, *Tudoran*, C-92/14, EU:C:2014:2051, paragraphs 26 to 29; judgment of 9 July 2020, *BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraphs 41 to 48.