Case C-269/19

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 March 2019

Referring court:

Curtea de Apel Cluj (Romania)

Date of decision to refer:

27 February 2019

Appellant:

Banca B. SA

Respondent:

A. A. A.

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Subject-matter of the main proceedings

Appeal lodged by Banca B. SA, the defendant at first instance, against the judgment of the Tribunalul Specializat Cluj (Specialist Court, Cluj, Romania) which allowed A. A. A.'s application in part, declaring unfair certain terms of the credit agreement concluded by the parties concerning, inter alia, the method for calculating the variable rate of interest.

Factual and legal background to the reference for a preliminary ruling

An interpretation is requested, pursuant to Article 267 TFEU, of Article 6(1) of Directive 93/13/EEC

Questions referred

1 Must Article 6(1) of Directive 93/13/EEC be interpreted as meaning that, after a term establishing the mechanism for determining the variable rate of interest by the formula 'fixed margin and the benchmark interest applied by a

bank on the basis of non-transparent criteria' has been found to be unfair in connection with a credit agreement applying a fixed interest rate limited to the first year and a variable rate for the subsequent years, in accordance with the above formula, the national court may vary the agreement by imposing a method for calculating the variable rate of interest on the basis of transparent benchmarks (LIBOR/EURIBOR) and the bank's fixed margin, in the light of the facts contained in the credit agreement, for the purposes of ensuring better consumer protection?

2 If the answer to that question is in the negative, must Article 6(1) of Directive 93/13/EEC be interpreted as meaning that, after a term such as that mentioned above has been found to be unfair, the national court may apply, by judicial process, a fixed rate of interest by reference to the fixed margin agreed for the second year of the agreement or to the fixed rate of interest for the first year?

3 If the answer to that question is in the negative, must Article 6(1) of Directive 93/13/EEC and the principle of effectiveness be interpreted as precluding the national court, after a term such as that mentioned above has been found to be unfair, from instructing the parties to conduct negotiations with a view to fixing a new interest rate, without setting any benchmarks?

4 If the answer to that question is in the negative, what possible remedies are there to ensure that consumers are protected in line with Article 6(1) of Directive 93/13/EEC?

Provisions of European Union law and case-law relied on

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Articles 6(1) and 7(1)

Judgment of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349), paragraphs 63 to 65 and operative part

Judgment of 30 May 2013, *Jőrös* (C-397/11, EU:C:2013:340), paragraphs 40 to 47 and operative part

Judgment of 30 April 2014, *Kásler and Káserné Rábai* (C-26/13, EU:C:2014:282)

Judgment of 21 January 2015, *Unicaja Banco and Caixabank* (C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21)

Judgment of 21 December 2016, *Gutiérrez Naranjo* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980).

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Provisions of national law relied on

Legea nr. 193/2000 privind clauzele abuzive din contractele încheiate între profesioniști și consumatori (Law No 193/2000 concerning unfair terms in contracts between sellers or suppliers and consumers; 'Law No 193/2000'), which transposes the provisions of Directive 93/13 and essentially provides, in Article 6, that unfair terms contained in a contract are to have no effect on the consumer and that the contract is to continue to have effect, with the consent of the consumer, only if, after those terms have been removed, it can continue to exist and, in Article 7, that, where the contract is incapable of having effect after the deletion of the terms considered to be unfair, the consumer is to have the right to request that the contract be terminated and, where appropriate, claim damages.

Ordonanța de urgență a Guvernului nr. 50/2010 privind contractele de credit pentru consumatori (Government Emergency Order No 50/2010 on credit agreements with consumers) ('OUG No 50/2010'), which, in Article 37(a), provides that in credit agreements with a variable rate of interest, that rate is to be linked to the fluctuations in the EURIBOR/ROBOR/LIBOR reference rates/benchmark interest rate of the Banca Naţională a României (National Bank of Romania), depending on the currency of the loan, to which the lender may add a certain margin fixed for the entire duration of the agreement.

Ordonanța Guvernului nr. 21/1992 privind protecția consumatorului (Government Order No 21/1992 on consumer protection) ('OG No 21/1992'), which provides, in Article 9(3)(g)(1), incorporated by Ordonanța de urgență a Guvernului nr. 174/2008 (Government Emergency Order No 174/2008), that financial services providers are required, in variable-rate credit agreements concluded with consumers, to ensure that the variation in the interest rates is independent of the will of the financial services provider in that it is linked to fluctuations of certain verifiable benchmark rates specified in the agreement.

Succinct presentation of the facts and procedure in the main proceedings

1 On 5 June 2007, the appellant, SC BANCA B. SA, and the respondent, A. A. A., as borrower, concluded a personal loan agreement guaranteed by a first mortgage in the amount of EUR 182 222, for a period of 300 months.

2 The agreement provided for an annual interest rate of 7.4% for the first year of the loan, but for the subsequent years the applicable rate of interest was to be the variable benchmark rate displayed at the lending bank's premises, plus 1.50 percentage points (Article 5).

3 The general lending conditions provided that, during the loan period, the current rate of interest could vary depending on changes in the servicing of the customer's debt to the bank (Article 2.6) and that the bank could change the rate of interest without the borrower's consent, depending on the cost of providing the loan (Article 2.10a). Under those general conditions, with regard to loans with a

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variable rate of interest set in accordance with a LIBOR/EURIBOR reference rate, the interest rate may vary depending on changes in that rate (Article 2.10b). The new rate of interest, which may be reviewed every six months, is to be displayed at the headquarters of the bank from the date on which is applied and is to apply to the balance of the loan on the date on which it is changed (Article 2.11).

4 On 9 June 2017, A. A. A. brought an action before the Tribunalul Specializat Cluj (Specialist Court, Cluj) ('the Tribunalul'), requesting a finding that the contractual terms relating to the variable rate of interest are unfair and must therefore be declared invalid. A. A. A. also claimed that the bank should be ordered to modify the contractual terms in accordance with the finding of invalidity and the parties' intentions on the date on which they signed the agreement, and to repay the amounts overpaid pursuant to the unfair terms, and requested that the rate of interested be recalculated, for the past and the future, in accordance with the following formula: the value of the EURIBOR benchmark rate at six months, plus 1.5 percentage points, or, in the alternative, the fixed rate of interest laid down when the loan agreement was concluded, that is to say, 7.4%.

5 By civil judgment of 23 January 2018, the Tribunalul allowed the application in part, declaring invalid the term set out in Article 5 of the credit agreement only as regards the mechanism for setting the variable rate, that is to say, the expression 'the current rate of interest shall consist of the variable rate of interest which is displayed at the premises of [B.]', and Articles 2.6, 2.10a and 2.11. It was also found that the term contained in Article 2.10b of the credit agreement was invalid in so far as it provides that the lender has only an option, and not an obligation, to review the variable rate of interest in accordance with the benchmark rates stipulated in the agreement, that is to say, the LIBOR/EURIBOR.

6 The Tribunalul further ordered the bank to clarify the term relating to interest in the loan agreement, defining the constituent elements and the amount of that interest: 1.50 percentage points (the margin laid down in Article 5 of the agreement) + EURIBOR at six months. It also stated that the interest rate could be changed solely on the basis of the EURIBOR benchmark rate at six months, specifying that the bank's margin is fixed and may be changed only with the written agreement of the parties.

7 The defendant bank was ordered to repay all the amounts received pursuant to the unfair terms above the amount calculated by applying the formula adopted by the Tribunalul.

8 After finding that the term entitling the bank unilaterally to change the current rate of interest in the absence of any transparent criteria is unfair, the Tribunalul noted that the removal of that term without establishing the consequences arising from that finding, leads, in practice, to a modification of the agreement in that it fixes the interest at the level of that applicable in the first year of the loan, thus rendering the agreement particularly attractive for the seller or supplier, a prospect that would make any negotiations doomed to predictable failure. Furthermore, the

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setting of a fixed rate of interest would constitute a modification of the agreement at odds with what was agreed by the parties, who agreed a variable rate of interest.

9 Citing the Court of Justice's judgments in *Banco Español de Crédito* (C-618/10), *Unicaja Banco and Caixabank* (C-482/13) and *Jőrös* (C-397/11), the Tribunalul noted that the mere finding that a term is invalid deprives the agreement of any valid means of varying the rate of interest, which calls into question the very continuation of the agreement, and that the commencement of new negotiations between the parties does not guarantee an efficient and effective settlement of the dispute as their failure would bring the parties back to court.

10 Since, on the basis of all those considerations, it considered that the 'action' taken by the court to correct/remove the unfair elements must prevail, and is necessary to restore the contractual balance, the Tribunalul, in the absence of any provision of national law in force at the time the agreement was concluded governing the method for setting the interest rates in agreements guaranteed by mortgage, decided to apply, by analogy, the provisions of Article 9(3)(g)(1) of OG No 21/1992 and the provisions referred to in Article 37(a) of OUG No 50/2010.

The essential arguments of the parties in the main proceedings

11 A. A. A. considers that the terms relating to the method for setting the rates of interest — the part regarding the *variable rate of interest* — are unfair in that this component of the interest rates allows the bank to modify arbitrarily the amount thereof, thereby adversely affecting the legitimate interests of the consumer.

12 The appellant bank essentially argues that the Tribunalul modified the calculation formula for the entire duration of the loan, completely disregarding the intention of the parties at the time the agreement was concluded, exceeding its jurisdiction and disregarding the recent case-law of the Court of Justice, in particular the judgment given in Case C-618/10, *Banco Español de Crédito*. It considers that the principle of the symmetry of acts means that a binding contractual relationship can be modified only by contract and not by judicial process. Furthermore, it considers that the court of first instance erroneously based its decision on the provisions of Article 9(3)(g)(1) of OG No 21/1992 and OUG No 50/2010, which were not in force on the date on which that the credit agreement was concluded.

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

13 The referring court considers that, in the light of the case-law of the Court of Justice cited above, the national courts have interpreted and applied differently the provisions of Article 6 of Law No 193/2000, which transposes Article 6(1) of Directive 93/13, thus making it necessary to ask the Court of Justice to interpret the latter article in order to establish the consequences arising from the finding that the term defining the method for calculating the variable rate of interest as

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from the second year of the loan is unfair in the context of a credit agreement with a fixed rate for the first year and a variable rate for the subsequent years.

14 Under national law, the penalty following from a finding that a term is unfair is always invalidity. However, in national case-law there are differences of opinion as to the legal consequences of that penalty for the legal relationship between the contracting parties, in particular as regards determining, for the future, the methods for calculating the interest.

15 **According to one opinion**, decisions finding that the term governing the method for calculating the variable interest rate is unfair mean that the parties are obliged to conduct negotiations to determine the new method for calculating interest. The parties are therefore considered to be under an obligation to negotiate that term in good faith and in an effective and efficient manner so that the contract concluded between the parties can continue to be performed.

16 The courts in favour of that solution have held that neither national legislation nor Directive 93/13 permits a court to intervene in relation to an agreement concluded on the basis of the intention of the parties and to modify the content of a term. Those courts therefore consider that the case-law of the Court of Justice, and in particular its judgment in *Banco Español de Crédito*, expressly preclude intervention, by the court, in the parties' agreement since the parties alone have the power to determine all the contractual terms.

17 The referring court goes on to set out some of the shortcomings of that view. Firstly, those judgments are open to criticism in that they do not make it clear whether it is possible to continue with the credit agreement, which would be contrary to what the Court of Justice ruled in paragraph 48 of its judgment in *Jőrös*. Sending the parties away to negotiate would delay clarification as to whether or not it is possible to continue with the agreement.

18 Secondly, the dispute would not be concluded definitively, even though the objective pursued by initiating proceedings is precisely to resolve the dispute between the parties. It cannot be ruled out that blocking negotiations will lead to the court being seized again to establish a method for calculating the interest. Such situations have occurred and the courts thus seized have dismissed the application on the ground that a contract must be the result of the parties' agreement and may not be imposed by the court. In such a situation the very continuation of the credit agreement can be called into question since, in the absence of interest, the obligations of the seller or supplier have no basis in law.

19 Thirdly, in the absence of a valid method for calculating interest at the time the judgment is given, a further criticism levelled at that line of case-law concerns the difficulty the court has in quantifying the interest which has been overpaid pursuant to the unfair term and which must be repaid. Some courts have dismissed claims for repayment as premature, taking the view that they would need a calculation formula which has a contractual basis, whilst other courts have

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requested that the parties sign an addendum to the agreement which defines a valid method for calculation that also applies to the earlier period, from the time when the contract was concluded.

20 On the other hand, the case-law of the Court of Justice establishes the right to a refund of payments made pursuant to an unfair term (judgment in *Gutiérrez Naranjo*) and, on the other, national law requires, as a consequence of a finding that a term is invalid, restoration of the situation which existed between the parties before the contract was signed, by means of the refund of the amounts paid pursuant to the unfair term.

21 Fourthly, in practice the judgments according to which the parties are under an obligation to conduct negotiations have omitted to incorporate that obligation into the operative part — it being found only in the grounds — and to provide clear benchmarks which define the scope of the negotiations (planned duration, timetable, factors to be taken into consideration, penalties).

22 **According to a second opinion**, the court is to declare the term relating to interest unfair and order that the contract be varied, stipulating that, from the second year of the loan, that is to say, after the expiry of the period in which the interest was to be of a fixed rate, a formula for calculating the interest is to apply, made up of the fixed margin applicable in the second year of the loan, plus a valid benchmark for the currency stipulated in the loan — LIBOR/EURIBOR.

23 The courts that have followed this approach have taken the view that only the part of the term which provided for a non-transparent, variable benchmark was unfair and not that which provided for a fixed margin, set as a percentage and agreed by both parties. Since they considered that the mere finding that the provisions of the parties' agreement relating to interest are invalid means that, although the parties agreed a variable rate of interest, the agreement no longer provides any valid method for varying it, thus jeopardising the very possibility of continuing with the agreement, and that a return to negotiations between the parties would not ensure an efficient and effective settlement of the dispute, those courts have taken as a basis the fixed margin, to which they have added an objective, transparent and verifiable benchmark (EURIBOR/LIBOR), thereby maintaining the variable nature of the interest.

24 In order to justify identifying a particular variable element to be added to the fixed margin, those courts relied on provisions which entered into force after the agreement was concluded, that is to say, Article 9(3)(g)(1) of OG No 21/1992 and Article 37(a) of OUG No. 50/2010, which they applied by analogy. The referring court notes that these provisions are not relevant to the dispute and that, on the date on which the agreement was concluded, there were no provisions in national law which governed the ability of a court to vary the contract concluded by the parties.

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25 Other courts have used an ‘interpretation’ of the parties’ intentions based on the original act, considering that, depending on the currency in which the loan was granted, the variable element which has to form part of the interest is the EURIBOR/LIBOR, since it is reasonable to conclude that by ‘the variable benchmark rate displayed at the headquarters of the bank’, the parties intended to refer to the Euribor/month rate.

26 That opinion too is open to criticism in that, firstly, at the time the credit agreement in question was concluded there was no provision in Romanian law which permitted the court to vary the agreement by reframing the term relating to the methods for calculating interest. Secondly, at that time there were no supplementary rules on how to determine the variable interest rate which the courts could use in accordance the case-law of the Court of Justice (judgment in *Kásler and Káslerné Rábai*). Thirdly, the courts would encounter practical difficulties since they would have to choose between the various benchmarks (EURIBOR/LIBOR at one month, at three months, at six months and at twelve months) and find it difficult to justify choosing one in preference to the other.

27 **According to a third opinion**, following the declaration that the term relating to the mechanism for setting the interest rate applicable from the second year after the loan was granted is partially invalid (as regards the non-transparent variable element), the interest will be composed exclusively of the fixed margin, which is maintained.

28 The argument underlying that line of case-law is that the part of the term governing the fixed margin in establishing the method for calculating the interest has not been invalidated and therefore cannot be modified or removed from the contract. What must be removed is only the contractual mechanism whereby a margin of interest set solely as a result of an internal and unilateral decision-making process on the part of the bank is added to the fixed margin. Therefore, the agreement can continue to be performed without prejudicing the consumer in any way, by applying the contractually agreed fixed margin.

29 According to that view, therefore, even if the agreement is de facto transformed into a contract with a fixed rate of interest, it can continue in that form in so far it respects the intention of the parties, is in no way unfair and complies with the case-law of the Court of Justice, which requires the removal of the unfair terms and the maintenance of the other terms intact where the agreement is capable of continuing, without the court intervening with regard to the mechanism for calculating the rate of interest.

30 **According to a fourth opinion**, following the finding that the term relating to the mechanism for establishing the interest rate applicable from the second year after the loan was granted is unfair, the term relating to the mechanism for fixing the interest rate applicable in the first year remains applicable.

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31 The justification for that opinion, which is isolated, is that the only clear reference to interest in the credit agreement concluded between the parties is that regarding the interest applicable in the first year, specified as a fixed percentage, and therefore that interest alone can be charged to the consumer since he was aware of it at the time the credit agreement was concluded and approved it at the time the contractual relationship was established.

32 However, that solution is open to criticism, because on the one hand, it perpetuates the interest laid down solely for the first year of the agreement and, on the other, presupposes third-party intervention in relation to the contract and that a variable rate of interest can no longer be applied.

33 The referring court notes that, at national level, the conclusion drawn in the professional meetings of judges aimed at analysing situations of non-uniform practice has been that a court cannot intervene in respect of the agreement.

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