

Case C-289/19**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:**

9 April 2019

Referring court:

Gerechtshof Den Haag (Netherlands)

Date of the decision to refer:

2 April 2019

Appellant:

Dexia Nederland BV

Respondent:

Z

Subject of the action in the main proceedings

The dispute in the main proceedings concerns two so-called ‘securities lease agreements’ concluded by Z, a consumer, and a legal predecessor of Dexia Nederland BV (‘Dexia’), a bank. What is in dispute here is the amount to which Dexia may be entitled after the premature termination of the lease agreements. More specifically, the question is what law applies to the settlement of the securities lease agreement after the relevant term of the agreement has been declared unfair.

Subject and legal basis of the request for a preliminary ruling

The present request under Article 267 TFEU concerns the question whether the user of a term declared unfair (by a national court) within the meaning of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts can rely on the statutory provisions of supplementary law if the term declared unfair appears to be more advantageous to the consumer than the national statutory provision applicable by way of supplementary law.

Questions referred

1. Can the user of an unfair term relating to the payment of compensation in the event of a consumer's non-compliance with his obligations, which has been declared void, claim the legal compensation provided for by way of supplementary law?
2. For the purpose of answering that question, does it matter whether the compensation that can be claimed by the application of the statutory compensation scheme is equal to or lower or higher than the compensation under the term which has been declared void?

Provisions of European Union law cited

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Provisions of national law cited

Burgerlijk wetboek (Civil Code; 'BW'): Articles 6:101, 6:233 and 6:277

Oud burgerlijk wetboek (Old Civil Code): Article 7A:1576e(2)

Brief summary of the facts and the procedure in the main proceedings

- 1 The present case concerns securities lease agreements which were offered on a large scale to consumers by banks in the late 1990s and early 2000s, with the investments taking place with borrowed money. In essence, that product entailed the lessee (always a consumer) borrowing money from the bank for a specific period ('the principal sum'), with the bank then using that money to purchase securities on behalf of that consumer and for his account. The ownership of the securities remained with the bank until the loan was fully repaid, but any dividend was payable to the lessee. During the term of the agreement, the lessee paid a monthly amount in interest on the loan and in some cases also an amount in repayment of the principal sum ('the monthly instalment'). At the end of the term, the shares were sold and the lessee received the proceeds of the sale of the shares, after the deduction of the balance of the principal sum and any monthly instalments still outstanding. Because the investments were made with borrowed money, a relatively large share portfolio was acquired with a relatively small 'investment' (the interest and possible loan repayment). Furthermore, in many cases, only interest was paid and the principal sum was only repayable at the end of the term of the securities lease agreement. The limited investment could result in the achievement of a relatively large positive return but also of a large negative return, the so-called leverage effect [...]. That share lease arrangement was attractive in the Netherlands, not only because of the rising stock market, but also

because of tax benefits: the monthly interest could be entered as a deductible item in the income tax return, while the capital growth of the shares was not taxed. When the economy faltered at the beginning of this century, the interest deduction was abolished and the stock market collapsed, the securities lease agreements proved to be very risky. In many cases they resulted in a residual debt because the selling price of the shares was insufficient to repay the loan.

- 2 In the present case, Z concluded two such securities lease agreements on 17 March 2000, each with a term of 120 months. The other party was Dexia's legal predecessor. The total agreed lease sum of each of the agreements was EUR 49 507.66 [the purchase price (principal sum) of EUR 22 102.06 and the total interest payable of EUR 27 405.60]. The 'Bijzondere Voorwaarden Effecten Lease van Legio-Lease' ('Special Terms and Conditions of Lease Securities of Legio-Lease'; 'Bijzondere Voorwaarden') were declared applicable to the agreements.
- 3 Under the securities lease agreements, Z was required to pay interest of NLG 503.28 (EUR 228.38) per month per contract for the first 36 months and 12.4% per year on the purchase price for the subsequent 84 months, with a possible discount based on the average increase in value of the share package. The principal sum had to be repaid at the end of the agreed term of the securities lease agreements (120 months). Z paid a total of EUR 33 911.69 in monthly instalments for the two contracts together. After deduction of the dividend received on the shares, this amounts to a 'net investment' of EUR 25 725.37 for the two contracts together.
- 4 In 2006, the securities lease agreements with Z were terminated prematurely by Dexia because Z was in arrears with its payments. For the purpose of the questions referred for a preliminary ruling, under national law that termination may be treated in the same way as the dissolution of the agreement. Dexia prepared final accounts for the securities lease agreements.

Articles 6 and 15 of the Bijzondere voorwaarden were applied in the calculation thereof. These read as follows:

'6. If (a) the lessee, after written notice of default, still fails to pay one or more monthly instalments or to fulfil any other obligation under the agreement or any other lease agreement similar to the present agreement, or (b) the lessee applies for the suspension of payment or is declared bankrupt, the Bank is entitled to immediately terminate the agreement and all other similar lease agreements and to claim the unpaid balance of the total agreed lease sum(s) under all current lease agreements similar to the present agreement, in its entirety and to sell the securities on the stock exchange or otherwise at a time to be determined by the Bank. The Bank will deduct the proceeds of such sale from the amount owed to it by the lessee. Any credit balance will then be paid by the Bank to the lessee.'

‘15. [...] In the event of the dissolution of the agreement, the claim of the lessee shall consist of an amount equal to the sale value of the securities on the date of the dissolution less an amount equal to the present value of the unpaid balance of the total agreed lease sum. The present value shall be calculated in accordance with the provisions of Article 7A:1576e(2) BW.’

5 Article 7A:1576e(1) and (2) of the (old) BW read as follows:

‘1. The buyer is always entitled to make early payment of one or more subsequent instalments of the purchase price.

2. In the event of the early lump-sum repayment of the entire amount still due, he shall be entitled to a deduction, calculated at five per cent per year for each instalment covered by such early payment.’

6 According to those final statements, the lessee owed the present value (calculated in accordance with Article 7A:1576e(2) BW by means of a deduction of 5% per year) of the balance of the agreed principal sum after the deduction of the sale value of the shares (Article 15 of the Bijzondere voorwaarden) and, in addition, the present value of the remaining monthly instalments on the basis of Article 6 of the Bijzondere voorwaarden. According to Dexia’s calculation of 3 October 2006, Z owed Dexia an amount of EUR 8 607.22 per contract for the remaining monthly instalments. The final account drawn up by Dexia determined the amount to be paid by Z (‘the residual debt’) at EUR 7 682.36 and EUR 8 107.17. The amounts were essentially made up of the balance of the principal sum and the remaining 41 monthly instalments, after deduction of the sale value of the shares.

7 The Hoge Raad (Supreme Court) ruled that Dexia, as a highly qualified financial service provider, was under an obligation to take due account of the interests of the lessee with regard to this risky and complex product by strongly warning of the risk associated with a residual debt that could result from the premature termination of the agreement (warning obligation). In addition, the Hoge Raad ruled that Dexia should have investigated the income and capital position of the lessee in order to ascertain whether he had sufficient funds at his disposal to reasonably meet his payment obligations under the agreement (obligation to investigate). If Dexia has failed to fulfil its warning and investigation obligations, it is settled case-law that it is obliged to pay compensation, but under Article 6:101 BW (own fault), such compensation is limited to two thirds of the residual debt. After offsetting the compensation against the residual debt, a third of the residual debt therefore remains owing by the lessee. However, if the financial position of the lessee was such that the financial obligations arising from the securities lease agreement constitute an unacceptably heavy financial burden for him, it is incumbent upon Dexia, if it has failed in both duties of care, to also pay two thirds of the interest paid and of any capital repayments (the monthly instalments already paid), in addition to two thirds of the residual debt, as compensation.

- 8 In the present proceedings, Dexia initially demanded payment of one third of the residual debt as calculated in the final statements (according to Dexia, EUR 1 948.43 and EUR 2 702.12), plus extrajudicial costs of EUR 700.
- 9 In the course of the proceedings, Dexia acknowledged that Z's financial position was such that there was an unacceptably heavy financial burden on him and that it therefore owed Z compensation. According to Dexia, the compensation it owed consisted of two thirds of the monthly instalments already paid after offsetting the dividend and two thirds of the residual debt, consisting, inter alia, of the present value of the 41 remaining instalments under Article 6 of the Bijzondere voorwaarden. However, it believed that it was still entitled to one third of the as yet unpaid instalments. It deducted those amounts from its debt to Z. According to Dexia, it owed Z a balance of EUR 6 844.95 for the first contract and EUR 5 731.82 for the second contract.
- 10 By judgment of 21 May 2013, the Kantonrechter (District Court (Cantonal Sector)) ordered Dexia to pay Z an amount of EUR 18 804.60. The Kantonrechter was of the view that the remaining instalments claimed by Dexia (converted to their present value) should not be taken into account and could therefore not be deducted from the amount payable to Z.
- 11 Dexia appealed against that judgment. Z argued that Article 6 of the Bijzondere voorwaarden, on which Dexia bases the claim for the repayment of the remaining instalments (converted to their present value), provides for penalty interest and should be considered to be an unfair term within the meaning of Directive 93/13/EEC on unfair terms in consumer contracts.
- 12 On 29 November 2016, the Gerechtshof (Court of Appeal) stayed the proceedings pending a judgment of the Hoge Raad in national preliminary ruling proceedings concerning, inter alia, the question whether Articles 6 and 15 of the Bijzondere voorwaarden should be regarded as unfair terms within the meaning of Directive 93/13/EEC.
- 13 In its preliminary ruling of 21 April 2017, the Hoge Raad found that Article 6 of the Bijzondere voorwaarden should indeed be regarded as an unfair term within the meaning of Directive 93/13/EEC. According to the Hoge Raad, the court is obliged, under Article 6:233 BW, to declare that term void in a dispute between a buyer and Dexia in so far as it relates to interest payments that were still in the future at the time of the termination of the lease agreement. The Hoge Raad is of the view that Dexia is therefore not entitled to those interest payments. According to the Hoge Raad, the consequences of that term being declared void are governed by supplementary national law.

Main submissions of the parties to the main proceedings

- 14 According to Dexia, the preliminary ruling of the Supreme Court means that the term on the basis of which it was able to demand payment of the remaining

monthly instalments in the event of premature termination is indeed voidable but that Dexia is entitled to compensation in accordance with the law, namely, Article 6:277(1) BW, which reads:

‘If an agreement is wholly or partially dissolved, the party whose failure has given rise to a ground for dissolution is obliged to compensate the other party for the damage that it suffers, since there is no reciprocal compliance but rather, dissolution of the agreement.’

- 15 According to Dexia, the damage consists of the future instalments from which must be deducted the advantage that Dexia enjoyed as a result of the dissolution. According to Dexia, its dissolution damage amounts to EUR 6 653.33. That amount (as a result of the difference between the contractually fixed interest rate and the considerably lower market interest rate at the time of the dissolution) is higher than that which Dexia charged Z under Article 6 of the securities lease agreement.
- 16 Dexia argues that, since it can no longer rely on the contractual term laid down in Article 6 of the *Bijzondere voorwaarden*, which entitles it to the remaining instalments after termination of the agreement, it is in any event entitled to the compensation to which the law entitles it after dissolution by way of supplementary legislation.

Brief summary of the reasons for the referral

- 17 The amount that Dexia can claim under the supplementary legislation (Article 6:277 BW) may be higher than that which Dexia might have been able to claim under Article 6 of the *Bijzondere voorwaarden* of the securities lease agreement. That is due to the difference between the interest rate fixed contractually (in 2000) and the considerably lower market interest rate at the time of the dissolution of the agreement (in 2006). As a result of the passage of time and the falling interest rate, Z could therefore be at a greater disadvantage in that specific situation if the supplementary legislation were to be applied (Article 6:277 BW) than if the (void) Article 6 of the *Bijzondere voorwaarden* of the securities lease agreement were to be applied. The question is whether, in a case such as this, Dexia can invoke a statutory provision under supplementary legislation.
- 18 A similar question was raised in Joined Cases C-96/16 and C-94/17, *Banco Santander* and *Escobedo Cortés*, namely, whether a declaration that a term setting a default rate of interest is void, because unfair, must have other effects, such as, for example, the total elimination of both ordinary and default interest, or the charging of statutory interest, when the borrower fails to fulfil his obligations under the agreement. However, that question was left unanswered by the Court of Justice. Against that background and in view of the fact that those questions will or may play a role in a large number of similar cases, the questions are asked here.