Case C-364/19

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:

7 May 2019

Referring court:

Tribunalul Galați (Romania)

Date of the decision to refer:

27 February 2019

Appellants:

XU

YV

ZW

AU

BZ

CA

DB

EC

Respondents and cross-appellants:

S.C. Credit Europe Ipotecar IFN S.A.

Credit Europe Bank NV

Subject-matter of the main proceedings

Appeals brought by the appellants (and applicants) XU, YV, ZW, AU, BZ, CA, DB and EC and the cross-appellants (and defendants) S.C. Credit Europe Ipotecar IFN S.A. and Credit Europe Bank NV against the judgment of the Judecătoria Galați (Court of First Instance, Galați, Romania) partly upholding the applicants'

application for a declaration that certain terms of the loan agreement concluded with the defendant S.C. Credit Europe Ipotecar IFN S.A. are unfair.

Subject-matter of the request for a preliminary ruling

The request for a preliminary ruling concerns the interpretation of Article 1(2) and Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

Questions referred

1. Are Article 1(2) and Article 4(2) of Directive 93/13/EEC, as interpreted in Case C-186/16, *Andriciuc and Others*, to be interpreted as meaning that, where the contract contains a term relating to exchange rate risk that reflects a provision of national law, national courts are required to examine as a first priority the relevance of the exclusion laid down in Article 1(2) of the directive, or instead the trader's compliance with the obligation to provide information governed by Article 4(2) of the directive, without first assessing the relevance of the provisions of Article 1(2) of the directive?

2. Are Article 1(2) and Article 4(2) of Directive 93/13/EEC to be interpreted as meaning that, in the event of a failure to comply with the obligation to inform the consumer prior to the conclusion of the loan agreement, the trader may rely on the provisions of Article 1(2) of the directive, so that a contractual term relating to exchange rate risk that reflects a provision of national law is excluded from any assessment of whether the contractual terms are unfair?

Provisions of EU law and case-law of the Court of Justice cited

Article 1(2) and Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

The judgments of the Court of Justice of the European Union in Cases C-92/11, *RWE Vertrieb*, paragraph 25, C-34/13, *Kušionová*, paragraphs 76 and 78, and C-280/13, *Barclays Bank SA*, the order in C-119/17, *Lupean and Lupean*, and the judgments in C-51/17, *OTP Bank and OTP Faktoring*, and C-186/16, *Andriciuc and Others*, paragraphs 27 to 31

Provisions of national law cited

Article 1578 of the Codul civil (1864) (Civil Code of 1864), in the version in force on the date on which the loan agreement was concluded, that is to say, 8 November 2007, which provided that ' … the obligation arising from a money loan is always limited to the same numerical sum shown in the contract. Whenever the value of a currency increases or decreases, before the due date for

payment, the debtor must return the sum lent and is obliged to return that sum only in the currency used at the time of payment.'

Outline of the facts and the main proceedings

1 By a loan facility and guarantee agreement dated 8 November 2007, the defendant Credit Europe Ipotecar IFN SA Bucarest granted to the applicants (and appellants) XU, YV, ZW and AU, and to NL, a mortgage loan in the sum of 124 600 Swiss francs (CHF) repayable over a period of 30 years, for the purpose of purchasing a dwelling. On 6 April 2014, NL deceased, leaving as heirs the applicants ZW (the surviving spouse) and BZ, CA, DB and EC (the children).

2 In accordance with the repayment schedule for the loan, the monthly instalments during the period 3 December 2007 to 2 May 2008 were CHF 0. In the period 2 June 2008 to 1 November 2011, the instalments varied between CHF 436.45 and 498.80, and for the period 2 November 2011 to 2 November 2037 they are set at between CHF 680.63 and CHF 683.5.

3 On 31 March 2009, the defendant Credit Europe Ipotecar IFN SA assigned the debt under the loan agreement to the defendant Credit Europe Bank NV Amsterdam.

4 Both the initial agreement and subsequent addendum of 3 October 2011 concerning the renegotiation of the loan provide that any exchange rate variations are to be borne by the borrowers.

5 The amount of the loan on the date of conclusion of the contract was CHF 124 700, which, at that time, was the equivalent of RON 256 221.09. On 16 March 2015, when proceedings were issued before the Judecătoria Galați (Court of First Instance, Galați), the amount of the loan stood at RON 522 991.80, the Swiss franc exchange rate having since risen by 204.12%.

6 By application lodged on 16 March 2015 at the Judecătoria Galați (Court of First Instance, Galați) and amended on 8 October 2015, the applicants XU, YV, ZW, AU, BZ, CA, DB and EC sought a judgment against the defendant Credit Europe Ipotecar IFN SA, inter alia, declaring the term relating to the applicants' assumption of the exchange rate risk unfair and consequently null and void and setting the CHF-RON exchange rate at the rate prevailing on the date of the conclusion of the contract, with the sums paid in excess to be refunded.

7 The applicants maintained that they were not informed by the defendant about the risk that the Swiss franc might increase in value, which, given its financial expertise, the bank could have foreseen. They submitted that that omission constituted a breach of the bank's obligation to advise and that they had entered into a contractual bond with a distorted and unrealistic conception of the extent of the rights and obligations assumed. They submitted that the lending officer (an employee of the defendant) had induced them to take out a loan in Swiss francs,

arguing that it was the most advantageous on the banking market and presented no risk, since the Swiss franc was the most stable currency on the foreign exchange market. They also asserted that they had asked the loan officer to calculate the sum loaned in the national currency (RON) and in euros, but he had informed them that they were taking the loan purely in Swiss francs. The applicants claimed that, since they did not work in the banking sector and did not have the requisite knowledge of the foreign exchange market, they had been persuaded to enter into this type of contract, and that the lending officer had explained to them that this was his field and that they should trust him and the bank.

8 The applicants also asked the court to declare that the terms relating to exchange rates and to the interest calculation method were unfair.

9 The defendants Credit Europe Ipotecar IFN SA and Credit Europe Bank NV raised an objection of inadmissibility with regard to the head of claim seeking a declaration that the term relating to the burden of the exchange-rate risk was unfair and should be annulled and requesting the court to set the CHF-RON exchange rate at the rate prevailing on the date of the conclusion of the contract, on the ground that Romanian legislation did not provide for such an option whereby a contract would be supplemented by a term inserted by the court, and on the ground that Directive 93/13/EEC was not applicable. In this connection, they submitted that the question of a possible contractual imbalance did not arise, since the principle of monetary nominalism had been established by the national legislature (in Article 1578 of the Civil Code) and not by the bank. In addition, information on currency exchange risks in general is something that any average consumer can obtain. The defendants also explained that there was no contractual or legal obligation on the trader to provide information about the existence of a currency exchange risk or about the degree of appreciation or depreciation of a currency and that the bank could not, therefore, be deemed to have acted in bad faith, since it had no way of knowing how the value of the Swiss franc might change. The alleged conduct on the part of the banks with which the applicants had taken issue was not penalised by any legislative act in force either at the time when the loan was granted or subsequently.

10 By judgment of 30 January 2018, the Judecătoria Galați (Court of First Instance, Galați) partly upheld the action but dismissed as unfounded, inter alia, the application for a declaration that the term requiring the applicants to bear the exchange rate risk was unfair and should be annulled.

11 First of all, the court examined currency risk, which is defined in the Norma Băncii Naționale a României n. 17/2003 (Regulation No 17/2003 of the National Bank of Romania) as the risk of incurring losses or failing to earn anticipated gains arising from fluctuations in exchange rates. Given that the contract stipulated that the exchange rate risk was to be borne by the applicants, the court found that it was apparent from the application that they had concluded the contract in Swiss francs because it was more advantageous for them, even though they had been at liberty to choose on the financial market a loan in Romanian lei

or in another currency other than Swiss francs. While the applicants had asserted that the foreign exchange risk clause had been imposed on them without any possibility of their altering it, the Judecătoria Galați (Court of First Instance, Galați) found that the fact that they had entered into a 30-year loan in a foreign currency constituted their assumption of the risk of fluctuations in that currency. The court also held that the provisions of the contract which imposed an obligation on the borrower to make the repayment instalments in Swiss francs did not create any significant imbalance between the rights and obligations of the parties, inasmuch as those provisions were not solely for the benefit of the bank. Nor could it be said that the bank had acted in bad faith, since it was clear that it had not imposed on the applicants the financial product for which they had entered into a contract.

12 In the second place, in so far as concerns the obligation on the economic operator to provide complete, correct and precise information, which also entails an obligation to draft the terms of the contract in clear and unequivocal terms, such that no specialist knowledge is required in order to understand them, the court of first instance found that it was clear from the drafting of the contractual provisions relating to exchange rate risk that the defendants had explained, at the time when the contract was concluded, that the loan would have to be repaid in Swiss francs. Although the lender was a professional, it could not be assumed that it knew or could predict how the Swiss franc exchange rate would change. The court also cited the judgment of the Court of Justice of 4 March 2004, *Cofinoga* (C-264/02), with reference to the limits on the conditions for the proper functioning of the market. Thus, the bank was not required to provide financial advice to natural persons, but merely to submit its offer of a loan. In conclusion, the court of first instance found that the applicants had been informed about the offer, which they themselves had considered to be advantageous.

13 On 7 March 2018 the applicants appealed against the judgment of the court of first instance. On 15 March 2018, the defendants also appealed against it.

14 The applicants, now appellants, ask that the judgment at first instance be varied so that the court declares the contractual terms relating to exchange rate risk unfair and consequently null and void, sets the exchange rate at the rate prevailing at the time of the conclusion of the contract, and orders the reimbursement of the differences between the exchange rate at the time of the conclusion of the contract and the exchange rate at the time when each of the instalments was paid.

15 The defendants, now cross-appellants, reiterate the arguments they submitted at first instance and assert that the exchange rate risk is implicitly borne by the consumer, especially since it could not, as professional, predict that risk, which is dependent on external factors beyond its sphere of control. In addition, information had been given correctly and there is no significant imbalance. The cross-appellants again invoke the principle of monetary nominalism and reiterate that the contractual term at issue is excluded from the court's analysis in so far as concerns its fairness or otherwise.

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

16 The request for a preliminary ruling has been made by the Tribunalul Galați (Regional Court, Galați, Romania) of its own initiative.

17 The referring court cites paragraph 25 of the judgment of the Court of Justice in *RWE Vertrieb* (C-92/11), paragraphs 76 and 78 of the judgment in *Kušionová* (C-34/13) and paragraphs 27 to 31 of the judgment in *Andriciuc and Others* (C-186/16), which discuss the exclusion from the scope of Directive 93/31/EEC, laid down in Article 1(2) of that directive, of terms which reflect mandatory statutory or regulatory provisions.

18 In so far as concerns the first question referred for a preliminary ruling, the Tribunalul Galați (Regional Court, Galați) seeks to establish what is to be examined first by the court: the professional's compliance with its obligation to provide the consumer with prior information, or the question whether the loan agreement contains a contractual term the fairness or otherwise of which is excluded from review.

19 In this connection, the referring court observes that, following the Court of Justice's ruling in Case C-186/16, *Andriciuc and Others*, it has mostly been held in national case-law that, where an argument is raised concerning the unfairness of contractual terms relating to exchange rate risk, the court must assess, as a first priority, whether the contractual terms at issue merely reflect a provision of national law (the principle of monetary nominalism established in the Civil Code) and whether the exclusion, under Article 1(2) of Directive 93/31/EEC, of the term from the assessment of unfairness applies. In practice, the courts have not given priority to the assessment of the professional's pre-contractual conduct, in terms of its compliance with the obligation to provide the consumer with information prior to the conclusion of the contract, instead giving priority to the relevance of the abovementioned exclusion.

20 As regards the second question referred for a preliminary ruling, the Tribunalul Galați (Regional Court, Galați) seeks the Court's interpretation in the case where the court does assess, as a first priority, the professional's compliance with its obligation to provide prior information and finds that it has failed to meet its legal obligations and has not explained to the consumer the content of the contractual terms clearly and intelligibly and in such a way that, prior to concluding the contract, the consumer has sufficient information to take a prudent and informed decision. In that case, the question arises of whether the professional whose contractual conduct was not in good faith may still rely on the provisions of Article 1(2) of Directive 93/13/EEC, with the result that a contractual term relating to exchange rate risk that reflects a provision of national law will be excluded from the court's assessment of unfairness.