

Case C-738/19**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 October 2019

Referring court:

Rechtbank Amsterdam (Netherlands)

Date of the decision to refer:

19 September 2019

Applicant:

A

Defendants:

B

C

Subject of the action in the main proceedings

The main proceedings involve a dispute between A, a foundation which leases out social housing in Amsterdam, and B and C. A considers B to have breached a lease she concluded with it by not using the dwelling in question as her main residence but subletting it (for higher than the rent price) to her daughter, C. For that reason, A claims that B and C must vacate the dwelling and that B must pay the rent arrears, the profits made from the subletting as well as a fine for breach of the lease.

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

This request, based on Article 267 TFEU, concerns unfair terms in consumer contracts. More specifically, the question is whether, in assessing whether a penalty clause is unfair, account must be taken of (all) other penalty clauses in the contract, irrespective of whether those other clauses are actually relevant and/or are relied on in the case at hand.

Question referred for a preliminary ruling

How should Directive 93/13 and, more specifically, the principle of cumulative effect contained therein, be interpreted when assessing whether the sum which a consumer who fails to fulfil his obligations is required to pay in compensation ('penalty clause') is disproportionately high within the meaning of point 1(e) of the annex to that directive, in a case in which penalty clauses are associated with shortcomings of various kinds which, by their very nature, do not have to occur together, and indeed do not do so in the present case? Is it also relevant in that regard that, with regard to the shortcoming on the basis of which payment of the fine is sought, compensation in the form of the remittance of unfairly made profits is also sought?

Provisions of EU law cited

Article 3(1) and (3) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Directive 93/13') and point 1(e) of the annex to that directive

Relevant provisions of national law

Article 6:104 of the Burgerlijk Wetboek (Netherlands Civil Code; 'BW')

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

- 1 It has been established in the main proceedings that A leased out to B a social dwelling – which are very scarce in Amsterdam – and that, contrary to the lease agreement, she did not have her main residence there and moreover subleased the dwelling to her daughter, C. For that reason, A has requested the voorzieningenrechter (judge hearing applications for interim measures) of the Rechtbank Amsterdam (District Court, Amsterdam; 'the referring court') to order B and C to vacate the dwelling and B to pay the rent still outstanding. The referring court considers it plausible that the court ruling on the merits will grant those requests and that A, in view of the scarcity of and the public interest in social housing, has an urgent interest. For that reason, it granted the abovementioned requests for interim measures.
- 2 Moreover, in the Algemene Voorwaarden sociale woonruimte (general conditions of social housing; 'AVSW') of 1 November 2016, which are applicable to the lease agreement between A and B, there is a large number of penalty clauses set out in regard to several specific acts. A invokes one of those clauses in order to claim that B should be ordered to pay a fine of EUR 5 000 for subletting the dwelling in breach of the lease agreement. A also claims that, pursuant to Article 6:104 BW, B should repay the profit made on the subletting.

- 3 The referring court is in doubt as to how it must assess whether the penalty clause invoked by A is unfair and whether the claim under Article 6:104 BW and the other penalty clauses set out in the AVSW – not invoked in this case – play a role. For that reason, it reserved its decision on those claims and referred the preceding question to the Court of Justice for a preliminary ruling.

Brief summary of the reasons for the referral

- 4 According to Article 3(1) of Directive 93/13, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The penalty clause is one of the terms in the indicative list set out in the annex to that directive, in accordance with Article 3(3) thereof. Terms from that list do not necessarily have to be considered unfair.
- 5 The referring court takes the view that the term at issue is not in itself unfair, despite the amount of the fine, given the social interest served by its deterrent effect.
- 6 However, in paragraph 101 of the judgment of the Court of Justice of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283 ('the *Radlinger* judgment'), it was held that 'Directive 93/13 must be interpreted as meaning that, in order to assess whether the amount of compensation required to be paid a consumer who does not fulfil his obligations is disproportionately high, within the meaning of point 1(e) of the annex to that directive, it is necessary to evaluate the cumulative effect of all the penalty clauses in the contract in question, regardless of whether the creditor actually insists that that they all be satisfied in full'.
- 7 The question arises as to how that assessment should be interpreted with respect to the phrase 'all the penalty clauses'. Unlike the *Radlinger* judgment, the present case does not concern a situation in which more than one penalty is contractually associated with one and the same shortcoming, but rather, a situation in which penalties are associated with a series of shortcomings of various kinds, such as using common areas or the garden as a storage area, leasing out the rented dwelling as holiday accommodation, using the dwelling for the cultivation of drugs, not using the dwelling as the main residence and subletting the dwelling. In the case at hand, only the latter two – closely related – shortcomings have occurred, with A having sought the payment of a fine only in respect of the subletting (and also filed a legal claim for transfer of profits).
- 8 The question therefore arises as to whether penalties that have been imposed on other acts or omissions, unrelated to nature or content, must be included in the assessment of the fairness of a penalty clause imposed on contractually prohibited conduct that has indeed occurred. The *Radlinger* judgment sheds no light on this question of practical importance.

- 9 According to the referring court, the following can be argued in support of an affirmative answer to that question. The *Radlinger* judgment held without reservation that the cumulative effect of *all* contractual terms must be considered, and that all the circumstances attending the conclusion of the contract, *as well as all the other terms of the contract or of a related contract*, must be taken into account. Moreover, this is a protection system for the benefit of the consumer, so that in principle it seems obvious that the above rule should be interpreted broadly.
- 10 In support of a negative answer to that question, it can first be argued that the *Radlinger* judgment concerned a situation in which more than one penalty was contractually associated with one and the same shortcoming. What should apply in such a case does not also automatically apply in a case where penalty clauses are associated with shortcomings of various kinds which, by their very nature, do not have to occur together, and indeed do not do so in the present case.
- 11 Second, the rationale of the rule in the *Radlinger* judgment is evidently that the consumer, when deciding whether to adhere to a contractual prohibition, may and must be able to involve all the circumstances of the case, thus also all the contractual penalties associated with the acts or omissions concerned. Viewed in that light, it is in principle irrelevant whether the opposing party actually invokes all those penalties afterwards in proceedings. In making that assessment, however, the consumer will not take into account that penalties were also imposed in relation to very different activities or omissions that he need not consider. Thus, a tenant who is contemplating subletting in breach of a contractual prohibition has no reason to consider that, as in the present case, a contractual penalty also applies to improper delivery of the leased property and to drug-related activities. He will therefore also not be deterred from subletting by those other penalty clauses. It is therefore reasonable to assume that the rule in the *Radlinger* judgment, in view of its rationale, does not relate to the cases as referred to here.
- 12 Third, an affirmative answer to that question would have undesirable legal consequences. After all, in that case, the mere fact that the contract in question contains an unfair penalty in respect of an act or omission which does not occur does not make it possible to demand compliance with terms which are not in themselves unfair. Focused on the case of prohibited subletting, it would not only harm the landlord's reasonable interest, in that he would not want his property to be misused by third parties, but also the general interest involved in careful tenancy. After all, allowing a property to be misused by third parties is often accompanied by nuisance to local residents.
- 13 Last, a fourth reason for answering the above question in the negative is the fundamental principle of proportionality. It would be disproportionate to consider penalties for acts that have not actually occurred.
- 14 In the light of the foregoing arguments, the referring court favours the following interpretation of Directive 93/13 and the *Radlinger* judgment. When assessing

whether the sum which a consumer who fails to fulfil his obligations is required to pay in compensation is disproportionately high within the meaning of point 1(e) of the annex to that directive, it is necessary to ascertain the cumulative effect of all terms involving a sanction which in the contract are associated with the shortcoming in question, even if those terms are not in themselves unfair. In that regard, no special significance should be attached to terms involving a sanction which in the contract are linked to shortcomings of a different nature, if those other shortcomings have not occurred in the case in question.

- 15 However, since there may be reasonable doubt as regards this interpretation and since clarity is important for a large number of cases brought in practice, the referring court has referred the abovementioned questions to the Court of Justice for a preliminary ruling.

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