

**Case C-745/19**

**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:**

10 October 2019

**Referring court:**

Sofiyski rayonen sad (Bulgaria)

**Date of the decision to refer:**

25 September 2019

**Applicants:**

PH

OI

**Defendant:**

“Eurobank Bulgaria” AD

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**Subject matter of the action in the main proceedings**

Action to recover the variable interest on a loan agreement, paid by two consumers who submit that it was set by the bank using unfair methodology and, in the alternative, to recover a part of that interest.

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

Interpretation of Article 6(1) of Directive 93/13 in the light of the consequences of excluding the application of potentially unfair contractual terms in a consumer agreement to that part of the agreement that is not directly affected by the alleged unfairness.

## Questions referred

1. If it is shown that a term allowing the creditor to unilaterally change the interest rate on a loan agreement concluded between a seller or supplier and a consumer is unfair, can the national court assume that the interest rate payable under the agreement is fixed (despite any provision to the contrary in the initial agreement) in the amount set as at the date the loan was granted?
2. If the answer to the first question is in the negative, is the national court allowed to award any interest at all where there is an unfair term that fails to set the variable interest rate on the agreement in a fair manner?
3. What effect does the fact that, in the course of repayment of the loan, the consumer has agreed to the application of a methodology for setting the interest rate that does not contain any unfair terms, have on the answer to the first two questions?

## Legal provisions and case-law of the European Union

Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29);

Judgment of the Court of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 65);

Judgment of the Court of 30 May 2013, *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341).

## Provisions of national law cited

Zakon za zadalzhniyata i dogovorite (Law on obligations and contracts; ‘the ZZD’)

Article 26(4) of the ZZD provides that the nullity of individual parts does not entail nullity of the contract where those parts are replaced by operation of law by mandatory legal rules or when it can be presumed that the transaction would have been concluded without the void parts.

Under Article 365 of the ZZD, the parties may put an end to an existing dispute or avoid a potential dispute by means of a settlement, by making mutual concessions; under Article 366 of the ZZD, any agreement concerning a prohibited contract will be null and void even if the parties have reached an agreement with respect to its nullity.

Zakon za zashtita na potrebitelite (Law on consumer protection; [‘the ZZP’]) (in force since 10 May 2006)

Article 146. (1) Unfair terms in contracts shall be null and void unless individually negotiated.

(3) The fact that some terms have been individually negotiated shall not exclude the application of the present section to the rest of the contract.

(5) The existence of unfair terms in a consumer contract does not render that contract null and void if the contract can also continue to exist without those terms.

Article 147. (1) The terms in contracts offered to consumers must be drafted in clear and unequivocal language.

(2) Where there is doubt as to the meaning of a particular term, the interpretation most favourable to the consumer shall prevail.

Zakon za potrebitelskiya kredit (Law on consumer credit; [‘the ZPK’]) (in force since 1 May 2010)

That law contains certain requirements for a consumer loan agreement to be valid, including, from July 2014, requirements as regards the methodology used by the creditor to determine the reference rate; however, according to Paragraph 5 of the Transitional and Final Provisions of that law, its provisions do not apply to consumer loan agreements concluded before the date of its entry into force.

Grazhdanski protsesualen kodeks (Code of Civil Procedure; ‘the GPK’)

Pursuant to Article 280 of the GPK, judgments on appeal, in which the court has misconstrued interpretative decisions, the case-law of the Varhoven kasatsionen sad (Supreme Court of Cassation; ‘the VKS’) and judgments of the Court of Justice of the European Union, are subject to an appeal on a point of law to the VKS. Generally, VKS itself rules on the matter, referring it back only if certain procedural actions are needed. In the event of such a referral, the proceedings commence with the unlawful act having led to the decision being set aside; the instructions of the VKS as regards the application and interpretation of the law are binding on the court to which the case has been referred back.

By Decision No 92 of 9 September 2019, the VKS held that the nullity, resulting from Article 146(1) of the ZZP, of a provision of a bank loan agreement allowing the creditor bank to unilaterally alter the interest rate on the loan when its internal base rate changes, does not entail the nullity of a provision in the same term to the effect that the loan recipient is to pay interest determined as the sum of the bank’s internal base rate in a precisely defined amount (as a percentage) as at the date the agreement is signed, and a contractual surcharge.

In Decision No 198 of 18 January 2019, in a case involving similar circumstances, namely, a term in a loan agreement setting variable interest rate consisting of two components — one fixed and one variable, but with the variable component set on

the basis of the bank's internal rules, and with the concrete interest rate as at the date of conclusion of the agreement being provided as a fixed number, the VKS again held that changing the interest rate unilaterally, at the request of the bank, is not permissible. Nevertheless, the VKS referred the case back to the appellate court (second instance), instructing that court to investigate, upon a fresh examination of the case, the amount of the instalments due under the contract when the fixed interest rate, expressed as a figure in the term in question, is applied.

### **Brief summary of the facts and procedure**

- 1 On 16 October 2007, the applicants and the defendant concluded a loan agreement in the amount of EUR 45 000 for the purpose of building a house, to be drawn down in two stages and repaid in 252 equal monthly instalments.
- 2 Pursuant to the loan agreement, the applicants owed annual interest in the amount of the base rate, set by the defendant for that type of loans, reduced by 0.15%. At the time of conclusion of the agreement, the base rate was 6.35%. The contract expressly stated that the bank's base rate was non-negotiable and that any changes to the base rate would become binding on the parties with immediate effect.
- 3 The internal rules of the bank state that the base rate is set by a special department — Asset and liability management committee (Komitet za upravljenie na aktivite i pasivite; 'the KUAP'). The internal rules do not provide for any specific calculation formula but merely indicate factors, without any specification as to how they are weighted.
- 4 By decisions of the KUAP of 24 May 2008, 24 July 2008, 16 October 2008, 24 June 2011, and 24 October 2012, the interest rate on the applicants' loan was changed, to 6.55%, 7.05%, 7.8%, 8.05% and 7.8%, respectively. After 2012, the applicants failed to repay some instalments on time.
- 5 On 1 December 2014, the parties concluded an addendum amending the loan agreement. The addendum stated the amount due according to the bank's calculations and provided that from that point in time, interest was to be determined as the sum of a reference rate — the six month EURIBOR rate, and a fixed surcharge. The same approach was adopted in another two addenda, dated 26 May 2015 and 24 February 2017.

### **Main arguments of the parties to the main proceedings**

- 6 The applicants seek to recover interest paid from 2 May 2012 to 2 December 2014, which they consider to be unduly paid on the ground that it was set pursuant to unfair terms.

- 7 They assert that all interest payments under the loan agreement for the aforementioned period should be reimbursed to them. Their claim relies on the alleged unfairness of the methodology used by the bank to determine the interest rate. According to them, it follows that the entire term pertaining to interest does not produce any effects, and there is no interest due under the agreement.
- 8 In the alternative, they seek to recover an amount determined by applying the initial interest rate on the loan, as indicated in the agreement. In that regard, they are relying on the prevailing view in Bulgarian case-law, according to which, where the method of determining the variable interest rate on an agreement is unfair but the same agreement expressly provides that interest as at the date the loan was granted, expressed as a figure, the interest rate provided in the agreement as a figure is to be applied as a fixed rate for the entire duration of the agreement.
- 9 The defendant maintains that the terms are individually negotiated (a matter on which the national court will decide in its ruling on the case). In the alternative, the defendant asserts that those terms are not unfair.

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

- 10 In the present case, the term pertaining to the change of the interest rate may be unfair as regards the conditions for its alteration, but there is no reason to consider that it is unfair as regards the determination of that rate as at the date the agreement was concluded. If the referring court were to adopt the prevailing view expressed in the national case-law and set a fixed interest rate for the loan agreement, it would change the intentions of the parties who expressly agreed on a variable interest, and replacing those intentions with anything else could be seen as detrimental to the consumer.
- 11 There is a conflict between two established principles of EU law. On the one hand, under Article 6(1) of Directive 93/13, the court must preserve that part of the contract which is not affected by the unfair terms. That rule safeguards the freedom of contract of the parties. On the other hand, the case-law of the Court of Justice of the European Union, as reflected in the judgments in *Banco Español de Crédito* (C-618/10) and *Asbeek Brusse and Others* (C-488/11), requires the national court to substitute the formal balance of the parties' rights with an effective balance, by releasing the consumer from the terms that are to his or her detriment.
- 12 The case-law of the Court of Justice of the European Union needs clarification as regards loan agreements with variable interest rates. The problem arises when the interest rate consists of two components, one fixed and one variable, and when the variable component is not a commonly used stock exchange index, but is set by the creditor on the basis of a number of factors. In such cases, if the variable component is not based on a concrete formula or a set of objective factors with clear weighting, the interest rate on the agreement does not satisfy the requirements of fairness.

- 13 The question amounts to a query on what the acceptable limits to modifying the intentions of the parties in accordance with the two aforementioned principles are.
- 14 It is also necessary to determine whether a consumer may agree to the effects of a potentially unfair term when a contract with a seller or supplier is subsequently lawfully amended, by answering the question whether such an individual negotiation leads to a removal of the obligation on the part of the court to release the consumer from his or her obligation under the potentially unfair term that he or she had initially agreed to, provided that the consumer has agreed to accept the effects of that term following individual negotiations with the seller or supplier resulting in the conclusion of a valid contract without any unfair terms.
- 15 Where such amendments are made to the agreement, the parties usually agree with respect to two elements — the cumulative amount of debt already owed (affected by a potentially unfair term) and a new method of determining the obligations under the loan agreement (for which no unfair terms are alleged in the present case). The question is whether the nullity of one element (determining the amount of the debt) affects the validity of the second element (determining the new method of calculating interest), and in what way.
- 16 There are four possible solutions as regards the method of determining interest where the interest rate was initially set in an unfair manner.
- 17 First, the court may transform the interest into a fixed one; that, however, goes against the consumer's express intention. The only possibility for the consumer to benefit from a more favourable interest rate on the market would be to obtain financing from a different seller or supplier, following early repayment of the loan. That solution also harbours the risk that the seller or supplier providing the credit would prefer to employ unfair terms to change the interest, as consumers that do not seek to claim their rights would pay higher interest rates; on the other hand, consumers invoking the unfair terms would be bound to at least the initial interest rate, as provided in the agreement. That would guarantee the profit of the seller or supplier.
- 18 Secondly, it may be accepted that, where the terms as regards the determination of the methodology of changing the variable interest rate are unfair, the consumer is under an obligation to pay only the fixed component of the interest. That option takes into consideration the parties' intentions and sticks as closely as possible to the rule referred to in the judgments in *Banco Español de Crédito* (C-618/10) and *Assbeek Brusse and de Man Garabito* (C-488/11); the court does not replace the parties' intentions but merely 'discards' that part thereof that is affected by the potential unfairness. That decision is acceptable in so far as it actually penalises a creditor who acts unfairly. However, it cannot be implemented where the fixed component of the interest rate is negative, as it is in the present case, -0.15%.
- 19 Thirdly, it may be accepted that, where the variable interest rate is set on the basis of unfair terms, the consumer does not owe any interest at all. That is the most

deterrent solution for sellers or suppliers acting in bad faith. However, on the other hand, it transforms the loan agreement into a way of obtaining free financing. A problem of that approach is that it would enable the court to 'release' certain persons from their debt, if it were to adopt too liberal an approach in declaring the nullity of such terms.

- 20 Fourthly, the national court may replace the unfair term as regards the determination of the variable interest rate with some index, for instance the statutory interest, or the average market rate for a loan in the same amount and with the same security and repayment term. However, such an approach does not respect the parties' intentions at all and ends up with those intentions being replaced with the court's intention.
- 21 As regards the effects of a subsequent amendment to a consumer agreement containing unfair terms, the referring court also considers that there is more than one possible solution.
- 22 First, it may be considered that substituting for the future, by agreement of the parties, a fair term for the unfair one, does not affect the agreement's ineffectiveness as to the part vitiated by the unfairness. If that approach were adopted, the consumer would not be bound to the agreement amended in his or her favour, where that amendment would put him in a less favourable position as compared with the scenario where the unfair term would not have any effect at all during any period of the duration of the contract. That solution strengthens the punitive function of the concept of an 'unfair term'. However, adopting such a rule would dissuade a seller or supplier from willingly improving the situation of consumers and could give scope for further legal disputes.
- 23 Secondly, it may be accepted that an amendment to an agreement affected by unfair terms, by which the consumer agrees to accept some of its consequences in exchange for the agreement being brought into line with the law, entirely remedies the effects that are unfavourable to the consumer. Such a solution would be consistent with the rule that individually negotiated contractual terms are never unfair, as well as with the principle of freedom of contract. However, it would put a less informed party in a position where it can irreversibly go against its own interests. Nevertheless, it may be accepted that, where there is an express statement on the part of the consumer that he or she is aware of the existence of the unfair term, it is possible to remedy the contract in that manner.
- 24 Thirdly, the effects of amendments to the agreement that change the unfair terms could be preserved, but only in part. In that case, the national court would have to establish how the agreement would operate without its unfair terms up until the time of its amendment. However, after the conclusion of the lawful amendment to the agreement, the parties' intentions that are not vitiated should be applied. That approach is balanced and safeguards both the parties' intentions and the interest of the consumer. However, it would not be possible to implement it if it is accepted that, where initially a loan agreement with unfair terms as regards the

determination of the methodology of calculating interest was concluded, the consumer does not owe any interest at all.

WORKING DOCUMENT