Case C-932/19

Request for a preliminary ruling

Date lodged:

20 December 2019

Referring court:

Győri Ítélőtábla (Regional Court of Appeal, Győr, Hungary)

Date of the decision to refer:

10 December 2019

Applicant:

J.Z.

Defendants:

OTP Jelzálogbank Zrt.

OTP Bank Nyrt.

OTP Faktoring Követeléskezelő Zrt.

…

In the proceedings brought by way of the appeal … lodged by J.Z. against the judgment … delivered by the Veszprémi Törvényszék (High Court, Veszprém, Hungary) on 3 July 2019 in the proceedings instituted by **J.Z.** (… Tapolca, …), **applicant**, against **OTP Jelzálogbank Zártkörűen Működő Részvénytársaság** (… Budapest, …), first defendant, **OTP Bank Nyilvánosan Működő Részvénytársaság** (… Budapest, …), second defendant, and **OTP Faktoring Követeléskezelő Zártkörűen Működő Részvénytársaság** (… Budapest, …), third defendant, in connection with a claim of contractual invalidity, the Győri Ítélőtábla (Regional Court of Appeal, Győr, Hungary) has made the following

Order

1 The Győri Ítélőtábla (Regional Court of Appeal, Győr, Hungary) hereby makes a reference to the Court of Justice of the European Union for a preliminary ruling on the following question:

Does Article 6(1) [of Council Directive 93/13/EEC on unfair terms in consumer contracts] preclude a rule of national law which, in loan agreements concluded with consumers, states that terms — with the exception of contractual terms which have been individually negotiated — pursuant to which the financial institution stipulates that, for the purpose of paying out the amount of finance granted for the purchase of the subject of the loan or financial leasing, the buying rate is to apply, and that, for the purpose of repayment of the debt, the selling rate, or a different exchange rate from that set when the loan was paid out, is to apply, are to be void, and replaces the void terms with a provision which, in the case of both disbursement and repayment, applies the official exchange rate set by the National Bank of Hungary for the currency in question, without considering whether — in the light of all of the terms in the contract — that provision actually protects the consumer against particularly unfavourable consequences, and also without giving the consumer the opportunity to express a view as to whether he wishes to avail himself of the protection afforded by that legislative provision?

2 …

3 … [matters of national procedural law]

Grounds

Background to the reference for a preliminary ruling

4 The applicant and the second defendant concluded a personal loan agreement on 16 May 2007. On 4 June 2007, the applicant and the first and second defendants concluded a mortgage loan agreement for the purchase of a residential property and, on 4 September 2008, the applicant and the second defendant concluded a loan agreement for the refinancing of the debt. In each of those three agreements, the lenders undertook to grant the applicant, as a consumer, a foreign-currency-based loan. All of those agreements are consumer contracts.

Subsequently, the lenders terminated the loan agreements concluded on 16 May 2007 and 4 June 2007 and assigned their claims to the third applicant. The agreement of 4 September 2008 was terminated when the applicant discharged his obligations thereunder.

5 In his application, the applicant claimed that the three loan agreements were invalid. As regards the home purchase loan, he requested that the agreement be declared effective up until the date of delivery of the judgment and that the amount of his debt be fixed at HUF 3 310 525, plus agreed interest at 5.99% per annum from 13 March 2015 to the date of the judgment and default interest at the statutory rate from that date until full payment of the debt. He requested that the second defendant be ordered to pay HUF 619 460 in connection with the personal loan and HUF 605 159 in connection with the debt-refinancing loan, plus interest on both amounts.

The defendants contended that the application should be dismissed.

6 The court of first instance dismissed the action as unfounded. The applicant lodged an appeal against that judgment.

7 In the appeal, the applicant also claims that the court of second instance should find [the terms of the agreements] to be unfair by virtue of the application of different exchange rates, in accordance with the judgment of the Court of Justice in Case C-260/18. He also submits that the information provided by the bank on the exchange rate risk was inadequate.

Relevant legal provisions

8 Directive 93/13/EEC ('the Directive'). In accordance with Article 1(2) of the Directive, the contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, are not to be subject to the provisions of that directive.

9 Article 3(1) of the Directive provides that a contractual term which has not been individually negotiated is to be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer.

10 According to Article 6(1) of that directive, Member States are to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier must, as provided for under their national law, not be binding on the consumer, and that the contract must continue to bind the parties upon those terms if it is capable of continuing in existence without those terms.

11 In accordance with Paragraph 209(1) of the Polgári Törvénykönyvről szóló 1959. évi IV. törvény (Law No IV of 1959 establishing the Civil Code; 'the former Civil Code'), any standard contract term or any term of a consumer contract which has not been individually negotiated is to be regarded as unfair if, in breach of the obligation to act in good faith and fairly, it unilaterally and unjustifiably establishes the contractual rights and obligations of the parties to the detriment of the party other than the one imposing the contractual term in question.

12 In accordance with Paragraph 209(5) of the former Civil Code, a contract term may not be regarded as unfair if it was established by a statutory provision or framed in accordance with the requirements of a statutory provision.

13 Paragraph 209/A(2) of the former Civil Code provides that, in consumer contracts, unfair terms which are included as standard contract terms, or which the party concluding the contract with the consumer has pre-formulated unilaterally and without individual negotiation, are to be invalid. Invalidity may be invoked only in favour of the consumer.

14 Paragraph 3(1) of the Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvény (Law No XXXVIII of 2014 on the resolution of certain issues relating to the decision adopted by the Kúria (Supreme Court, Hungary) with a view to ensuring the consistent interpretation of the provisions of civil law concerning loan agreements concluded by financial institutions with consumers, 'Law DH 1') provides that, in loan agreements concluded with consumers, terms — with the exception of contractual terms which have been individually negotiated — pursuant to which the financial institution stipulates that, for the purpose of paying out the amount of finance granted for the purchase of the subject of the loan or financial leasing, the buying rate is to apply, and that, for the purpose of repayment of the debt, the selling rate, or a different exchange rate from that set when the loan was paid out, is to apply, are to be void.

15 Subparagraph 2 of that paragraph provides that, without prejudice to the provision contained in subparagraph 3, instead of the void term referred to in subparagraph 1, the official exchange rate set by the National Bank of Hungary for the foreign currency concerned is to apply in relation to the disbursement and repayment of the loan (including payment of the instalments and all the costs, fees and commissions expressed in foreign currency).

Relevant judgments of the Court of Justice

16 In the judgment given in Case C-618/10, *Banco Español de Crédito*, the Court of Justice stated that the expression 'shall … not be binding on the consumer', contained in Article 6(1) of the Directive, aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (paragraph 63). It also held that modifying the contract would not be such as to ensure such efficient protection of the consumer's rights as that resulting from non-application of the unfair terms (paragraph 70).

17 In accordance with the judgment in Case C-26/13, *Kásler and Káslerné Rábai*, in a situation such as that at issue in the main proceedings, in which a contract concluded between a seller or supplier and a consumer may not continue in existence after the deletion of an unfair term, that provision does not preclude national legislation which allows the national court to cure the invalidity of the unfair term by substituting a supplementary provision of national law. The reason for this is that the consumer must not be exposed to particularly unfavourable consequences, so as to ensure that the dissuasive effect resulting from the annulment of the contract cannot be jeopardised (paragraph 83). The fact that the outstanding balance of the loan becomes due forthwith [as a result of annulment] carries with it the risk that that balance will be in excess of the consumer's financial capacities and, for that reason, may penalise the consumer rather than the

lender, who, as a consequence, would not be dissuaded from inserting such terms in its contracts (paragraph 84).

It is clear from the foregoing that that judgment did not address the issue of the assumption of the exchange rate risk.

18 In the judgment in Case C-483/16, *Sziber*, the Court of Justice did not consider to be contrary, in principle, to Article 7 of the Directive national legislation such as that contained in Paragraphs 37(1) to (3) and 37/A(1) of the Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvényben rögzített elszámolás szabályairól és egyes egyéb rendelkezésekről szóló 2014. évi XL. törvény (Law No XL of 2014 on the provisions governing the settlement of accounts referred to in Law No XXXVIII of 2014 governing specific matters relating to the decision of the Kúria (Supreme Court) to harmonise the case-law on loan agreements concluded between credit institutions and consumers, and concerning a number of other provisions; 'the DH2 Law'), but only if a finding that the terms contained in such an agreement are unfair will restore the legal and factual situation that the consumer would have been in had those unfair terms not existed.

19 In Case C-51/17, *Ilyés*, the Court held that Article 1(2) of Directive 93/13 must be interpreted as meaning that the scope of that directive does not cover terms which reflect mandatory provisions of national law, inserted after the conclusion of a loan contract concluded with a consumer and intended to remove a term which is null and void from that contract, by imposing an exchange rate set by the National Bank. However, a term relating to the foreign exchange risk, such as that at issue in the main proceedings, is not excluded from that scope under that provision.

That judgment stated that the exclusion from the application of the rules of Directive 93/13 is justified by the fact that, in principle, it may legitimately be supposed that the national legislation struck a balance between all the rights and obligations of the parties to certain contracts (paragraph 53). As regards Paragraph 3 of Law DH 1, the Court went on to say that such a law was adopted in a specific context, in that it is based on Decision No 2/2014 PJE of the Kúria (Supreme Court), delivered to safeguard the uniformity of the law, by which that court ruled on the unfairness or the presumption of unfairness of terms on the difference in exchange rates and the power to make unilateral amendments contained in credit or loan contracts denominated in a foreign currency and concluded with consumers. Both the decision of the Kúria (Supreme Court) and Law DH 1 are based on the judgment in Case C-26/13 (paragraphs 58 and 59).

20 In the judgment in Case C-118/17, *Dunai*, the Court starts from the premiss that provisions of national law which modify terms relating to exchange rate difference by legislative means and at the same time safeguard the validity of loan contracts are consistent with the objective pursued by the Directive (paragraph 40). However, such provisions must respect the requirements of

Article 6(1) of the Directive (paragraph 42). The fact that certain contractual terms were declared to be unfair and void and replaced by new terms, in order to allow the continued existence of the contract at issue, cannot have the result of weakening the protection guaranteed to consumers (paragraph 43). In that case, the term relating to the exchange rate risk defines the main subject matter of the contract and the continuation of the contract does not appear to be legally possible, although this is a matter to be determined by the referring court (paragraph 52). The Court emphasised that the substitution of a supplementary provision of national law for an unfair term is possible only in cases in which the cancellation of the contract in its entirety would expose the consumer to particularly unfavourable consequences, and, in the case in question, it was apparent that the continuation of the contract would be contrary to the interests of the consumer (paragraphs 54 and 55).

21 In the judgment in Case C-260/18, *Dziubak*, the Court held that, so far as concerns the determination of the legal consequences, the consumer's interests must be assessed in relation to the consequences existing or foreseeable at the time when the dispute arose (paragraphs 50 and 51), although the consumer, after having been duly informed by the national court, may give his free and informed consent to the terms in question, in which case the system of protection mentioned above would not be applicable (paragraph 54). The Court supplemented the judgment given in Case C-26/13 by adding that the consequences referred to in that judgment must be assessed in the light of the existing or foreseeable circumstances at the time when the dispute arose, and that, for the purposes of that assessment, the wishes expressed by the consumer in that regard are the decisive factor. In its opinion, Article 6(1) of the Directive precludes unfair terms contained in a contract from being upheld where their removal would lead to the annulment of that contract and the court takes the view that that annulment would give rise to unfavourable effects for the consumer, if the latter has not consented to their being upheld.

Reasons for the request for a preliminary ruling

22 As a result of the judgments given by the Court of Justice in Cases C-118/17 and C-260/18, the Hungarian courts currently have pending before them a large number of cases in which, because of the unfairness of the exchange rate difference, it is increasingly common for consumers to ask for the contract to be declared invalid in its entirety, and, owing to the consequences arising from the significant exchange rate risk that is systematically borne by them, consumers do not want the unfair term to be replaced with a supplementary provision of national law which, in their opinion, does not protect them from the particularly unfavourable consequences of invalidity. It should be noted, however, that, according to the case-law established by the Hungarian courts in the period since those judgments were delivered, if terms relating to the exchange rate risk cannot be declared unfair, it is not possible for the Hungarian courts to extinguish the legal relationship in its entirety solely on the basis of the invalidity arising from

the exchange rate difference and to apply the legal consequences of that invalidity to the entire contract, thus refraining from applying the provisions of Paragraphs 3(1) and (2) of Law DH 1.

23 The Kúria (Supreme Court), the highest-ranking body in the Hungarian judicial system, stated, for example, in a press release of 11 October 2019, that, in Polish law, there is no provision similar to the supplementary provision of Hungarian law that is contained in Paragraph 231(2) of the former Civil Code, relating to the determination of the rate of exchange between currencies, in accordance with which debts expressed in another currency are to be converted using the exchange rate in force at the place and on the date of payment. Consequently, the approach taken by the Court of Justice in Case C-26/13 cannot be applied in Polish law. It follows further from this that the findings contained in the judgment [in Case C-260/18] with respect to the exchange rate difference and the remedying of the unfairness of the exchange rate risk are not applicable to Hungarian cases. The Court of Justice has not overruled the approach it took in Case C-26/13. According to the aforementioned press release, that judgment does not create new means of redress or new legal remedies for Hungarian consumers; the issue of exchange rate difference was definitively resolved by the settlement of accounts established in point 3 of Decision No 2/2014 PJE of the Kúria (Supreme Court) and in Law DH 2.

24 The court of second instance hearing the present dispute is uncertain whether, given that the provision of national law contained in Paragraph 3(1) and (2) of Law DH 1 must be applied even in the case where the consumer has expressed wishes to the contrary, those provisions are to be regarded as being contrary to Article 6(1) of the Directive, and, if so, whether the courts must refrain from applying them.

25 In the light of all the foregoing considerations, the Győri Ítélőtábla (Regional Court of Appeal, Győr) makes a reference to the Court of Justice under Article 267 TFEU for a preliminary ruling on the question set out in the operative part of this order.

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27 … [matters of national procedural law]

Győr, 10 December 2019.

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[signatures]