Case C-243/20

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:

5 June 2020

Referring court:

Polymeles Protodikeio Athinon (Greece)

Date of the decision to refer:

5 May 2020

Applicants:

DP

SG

Defendant:

Trapeza Peiraios AE

Subject matter of the main proceedings

Action for a declaration that terms of a contract between a bank and a consumer are unfair.

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

Article 267 TFEU, interpretation of Directive 93/13/EEC

Questions referred for a preliminary ruling

(1) Is Article 8 of Directive 93/13/EEC, which provides that the Member States may adopt more stringent provisions to ensure a greater degree of protection for the consumer, to be interpreted as meaning that a Member State need not transpose Article 1(2) of Directive 93/13/EEC into national law and may allow

judicial review also of terms which reflect statutory or regulatory provisions of mandatory or non-mandatory law?

(2) Can the first and second subparagraphs [1] of Article 1(2) of Directive 93/13/EEC, even though not expressly transposed into Greek law, be regarded as having been transposed indirectly together with the content of Article 3(1) and Article 4(1) of that directive, as transposed in Article [2(6)] of Law 225[1]/1994?

(3) Is the exclusion in the first and second subparagraphs of Article 1(2) of Directive 93/13/EEC contained in the concept and the scope of unfair terms as defined in Article 3(1) and Article 4(1) of Directive 93/13/EEC?

(4) Does review of the unfairness of a general term of business in accordance with the provisions of Directive 93/13/EEC extend to a term – contained in a credit agreement entered into by a consumer with a credit institution – which reflects the content of a rule of non-mandatory law of the Member State, where the term was not individually negotiated?

Relevant provisions of EU law

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), in particular Article 1(2) and Article 8.

Relevant provisions of national law

Article 291 of the Civil Code: 'Where a monetary debt owed in a foreign currency is payable in Greece, the debtor shall be entitled, unless agreed otherwise, to repay the debt in local currency on the basis of the current value of the foreign currency at the time and place of payment'.

Law 2251/1994 on consumer protection (FEK A 191), as amended, in particular Article 2(6).

Brief summary of the facts and procedure

1 On 3 September 2004, the defendant, acting as lender, granted the applicants (borrowers) a repayment mortgage for a residential property. Under the mortgage agreement with the defendant, the applicants were granted a residential property loan of EUR 100 000 over a period of 30 years. It was stated in the agreement that

[1] Translator's note: the second subparagraph is not included in the English version of Article 1(2) of the directive. In the Greek version of the directive, the second subparagraph of Article 1(2) repeats the 13th recital of the directive in so far as that recital states that 'the wording "mandatory statutory or regulatory provisions" in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established'.

this was a variable-rate mortgage and it was agreed that the interest rate would be based on the 360-day Euro Inter-Bank Offered Rate (EURIBOR).

2 In early 2007, the defendant, acting through its staff, suggested to the applicants that they vary their mortgage agreement in order to switch the loan currency from the euro to the Swiss franc (CHF). It informed them that, as the London Inter-bank Offered Rate (LIBOR) was significantly lower than the EURIBOR, this would reduce their monthly mortgage repayments.

3 On 26 March 2007, a rider was signed between the parties varying the initial mortgage agreement in order to switch the loan currency from the euro to the Swiss franc. By that rider, it was agreed that the balance of the loan on 26 March 2007, which was EUR 95 726.36, would be converted into Swiss francs on 17 April 2007. It was further agreed that the interest rate on the mortgage would be fixed at 3.65% per annum for the first three years, on expiry of which it would switch to a variable rate based on the 360-day Swiss franc LIBOR.

4 On 25 June 2007, a rider was signed varying the mortgage agreement once again, by which it was agreed that the outstanding balance on the loan, which was EUR 95 362.84 on 16 June 2007, would be converted into Swiss francs on 17 July 2007 in accordance with the terms and conditions set out in detail in the aforesaid rider. Under that new rider varying the agreement, the interest rate on the loan was fixed at 3.9% per annum for the first three years, on expiry of which it would switch to a variable rate based on the 360-day Swiss franc LIBOR.

5 Clause 4.5 of the aforesaid rider varying the agreement reads as follows:

‘The debtor shall repay the loan either in the same currency or with a sum in euros equivalent to the sum in Swiss francs, calculated on the payment date of the instalment on the basis of the exchange rate for the currency concerned quoted on the interbank currency market. That price shall be higher than the current price at which the Bank sells Swiss francs, as quoted in the Bank’s Daily Currency Price Bulletin’.

6 Clause 8.1(3) of that rider varying the agreement states, inter alia, that ‘if notice of termination of the mortgage agreement is given, and aside from any other consequences noted herein, the Bank shall also be entitled (but not obliged) to convert the full outstanding balance into euros on the basis of the Bank’s current selling price for the Swiss franc, as quoted in the Bank’s Daily Currency Price Bulletin, on the date on which the full debt is converted into euros, and to charge on it a default rate calculated at the Bank’s current base rate for mortgages, plus a margin and the contribution payable under Law 128/1975, enhanced by 2.5 percentage points. If a higher default rate is in force, that rate shall apply’.

7 Up to 2015, the monthly instalments on the loan were duly paid and the applicants contend that they were under the impression that the outstanding capital of the loan was declining gradually as the monthly instalments were paid.

8 According to the applicants, the effect of the above clauses and of the obligation to repay the loan on the basis of the exchange rate applicable at the time of payment of the instalments was that, whereas they had made repayments towards the loan totalling EUR 98 298.62, the defendant informed them that, on 17 April 2018, the debt solely for the outstanding capital on the loan was EUR 87 858.78.

9 On the basis of the above facts, the applicants brought an action on 17 September 2018 before the Polymeles Protodikeio Athinon (Court of First Instance, Athens) seeking, inter alia, a declaration that the contested riders varying the mortgage agreement are invalid, as they are unfair for the purposes of Article 2(6) and (7) of Law 2251/1994 and Article 281 of the Civil Code prohibiting the abusive exercise of rights.

Principal arguments of the parties to the main proceedings

10 The applicants contend that they were never apprised of the currency risk, in either the precontractual or the contractual information provided by the defendant, and that they did not have the expertise required to understand the risk. They argue that they decided to take out the mortgage in question in Swiss francs at the instigation of one of the defendant's employees, who presented it as the most economical option due to the low interest rate, without ever highlighting the risk inherent in that contract of a reversal in the exchange rates, even though he knew that they had no personal income in Swiss francs. Since the exchange rate of the Swiss franc against the euro changed, a large part of their monthly payments was swallowed up whereas, had the defendant's employees advised them that the currency risk would be passed on to them and informed them of the consequences thereof, they would not have entered into the contested contract.

11 The applicants argue that the contested clauses (4.5 and 8.1(3)) of the mortgage agreement, providing for their debt to the bank to be repaid either in the currency in which it was granted or in euros on the basis of the current selling price of the currency of grant on the payment date of each instalment, are unfair and, therefore, automatically invalid under Article 2 of Law 2251/1994. First, the financial reason behind the above term is not plain and intelligible, and nor are the financial consequences that follow from it in terms of the total amount ultimately repayable, meaning that that term infringes the principle of transparency. Second, the term is vague as to the criteria by which the instalments and the outstanding capital fluctuate, thereby enabling the bank to determine them unilaterally, at any time, without knowing in advance the specific and reasonable criteria on which the respective exchange rate is based.

Brief summary of the grounds for the reference

12 The applicants request, inter alia, that the riders amending the agreement be annulled on the ground of unfairness, in particular the unfairness of clause 4.5 and clause 8.1(3). Those clauses essentially repeat the rule (of non-mandatory law)

established in Article 291 of the Civil Code. Consequently, it is necessary to establish in this case if the referring court is able to review the unfairness of the aforesaid clauses. The legislative framework that applies primarily for the purpose of that assessment is formed, first, by Directive 93/13 and, second, by Law 2251/1994 transposing the directive into Greek law. It should be noted that, when the directive was transposed into Greek law, Article 1(2), which excludes clauses that reflect statutory or regulatory provisions of mandatory (or non-mandatory) law from review to establish their unfairness, was not expressly transposed.

13 There has been a division of opinion in Greek case-law regarding the question of whether the aforesaid exclusion in Article 1(2) of Directive 93/13, even though it was not expressly transposed into Greek law, can be regarded as having been transposed by way of interpretation, so that it is not possible to review the unfairness of a term in a loan agreement which repeats a statutory provision, in this case Article 291 of the Civil Code.

14 The Grand Chamber of the Areios Pagos (Court of Cassation, Greece) found by a majority in its judgment 4/2019 that, although that exclusion had not been transposed into national law by a specific and express provision, it should nonetheless be regarded as being inherent in the legislation by way of interpretation consistent with EU law. That is because, according to Article 2(6) of Law 2251/1994, 'general terms of business that cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer shall prohibited and shall be invalid. The unfairness of a general term incorporated in a contract shall be assessed taking into account the nature of the goods or services to which the contract relates, the purpose of the contract, all the specific circumstances attending the conclusion of the contract and all the other terms of the contract or of another contract on which it is dependent'. Consequently, in order for a general term of business to be unfair under Law 2251/1994, it must cause 'a significant imbalance in the parties' rights and obligations to the detriment of the consumer'. However, if the contested term reflects a provision of mandatory or non-mandatory national law, it cannot, by definition, cause an imbalance between the parties or be unfair. Therefore, any such term is, by definition, excluded from the scope of Law 2251/1994. Consequently, although a debt exists in a foreign currency in this case, the debtor has the option of paying a different consideration in lieu of that owed originally, namely in local currency on the basis of the current value of the foreign currency at the time and place of payment. However, any such term in a loan agreement between a bank and a borrower reflects the content of Article 291 of the Civil Code and, therefore, it cannot cause an imbalance between the parties or be unfair.

15 However, the referring court concurs, by a majority, with the dissenting opinion in the aforesaid judgment of the Grand Chamber of the Court of Cassation. According to that opinion, the exclusion in Article 1(2) of Directive 93/13, which was not expressly transposed into national law by Law 2251/1994, cannot be regarded even by way of interpretation as being inherent in the rule enacted in Article 2(6) of Law 2251/1994. Had the national legislature wished to transpose it,

it would have done so in an express and specific manner. In any event, exceptions to the rule (that all general terms of business must be reviewed for unfairness) must be interpreted narrowly and strictly in order not to undermine that rule. That is justified by the fact that Directive 93/13 established only partial and minimum harmonisation of national legislation on unfair terms, as is apparent from the 12th recital, and authorised the Member States in Article 8 to adopt or retain more stringent provisions compatible with the Treaty in the area covered by the directive, to ensure a greater degree of protection for the consumer. This is achieved by not transposing provisions of the directive that restrict the scope of consumer protection, as happened with Article 1(2), which was not transposed into national law, notwithstanding the successive amendments made to Law 2251/1994. Thus, as the exclusion in Article 1(2) of the Directive was deliberately not transposed into national law, the provision of the directive that was not transposed does not produce any direct horizontal effect between private individuals, nor can national law be interpreted in keeping with the spirit and purpose of the directive, as that would reduce the greater degree of protection for the consumer which the legislature intended to achieve in Law 2251/1994 (by not transposing the exclusion in Article 1(2) of the directive) and would consequently be an impermissible interpretation *contra legem* of national law.

16 The referring court finds that there is doubt in this case as to the interpretation of provisions of Directive 93/13, in particular as to whether or not Article 1(2) of the directive applies where that provision has not been expressly transposed into national (in this case Greek) law. Consequently, it considers that a question needs to be referred to the Court for a preliminary ruling, given that the above finding is a preliminary issue to be resolved before considering the argument that clauses 4.5 and 8.1(3) of the contested mortgage agreement are unfair and thus invalid. In particular, if it is held that the above exclusion has not been transposed into Greek law, then the referring court can declare the aforesaid terms to be invalid on the ground of unfairness. That option does not exist if it is held that the aforesaid exclusion can in fact be regarded, by way of interpretation, as having been transposed into Greek law.

17 It should be noted that, in the majority opinion of the referring court, Article 1(2) of Directive 93/13 does not apply, as it was not expressly transposed into Greek law, meaning that the Greek courts can also review the unfairness of terms which reflect statutory or regulatory provisions of mandatory (and non-mandatory) law. However, as mentioned previously, it has been argued that that exclusion must be regarded as being inherent in Article 2(6) of Law 2251/1994 by way of interpretation consistent with EU law. It should be noted that that provision is a straight transposition of Article 3(1) and Article 4(1) of Directive 93/13. Therefore, according to that opinion, the exclusion of terms reflecting statutory or regulatory provisions of mandatory (and non-mandatory) law from review of unfairness may be regarded as being inherent in the rule laid down in Article 3(1) and Article 4(1) of the directive. That interpretative approach is one of the questions referred to the Court for a preliminary ruling.

18 One member of the referring court takes the view that the contested legal issue has already been ruled on by the Grand Chamber of the Court of Cassation and that the case under consideration should be heard by the referring court and decided in light of its legal and substantive merits without the need to refer a question to the Court for a preliminary ruling.