

## Anonymised version

Translation

C-405/21 – 1

Case C-405/21

### Request for a preliminary ruling

**Date lodged:**

30 June 2021

**Referring court:**

Višje sodišče v Mariboru (Slovenia)

**Date of the decision to refer:**

8 June 2021

**Appellant:**

FV

**Respondent:**

Nova Kreditna Banka Maribor d.d.

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REPUBLIC OF SLOVENIA  
VIŠJE SODIŠČE V MARIBORU (COURT OF APPEAL, MARIBOR)

### Order

The Višje sodišče v Mariboru (Court of Appeal, Maribor) [...],

in the civil action brought by the appellant: **FV**, [...], Koper, [...], against the respondent: **NOVA KREDITNA BANKA MARIBOR d.d.**, [...], Maribor, [...],

seeking a declaration of invalidity of the loan agreement, of the related notarial act and of the payment of EUR 9 361.44, a declaration of invalidity of the mortgage registration, with the consequent cancellation of the invalid registration and the reinstatement of the previous entries in the Land Register (value of the claim EUR 89 567.83),

ruling in the **appeal brought by the appellant** against the judgment of the Okrožno sodišče v Mariboru (Regional Court, Maribor) [...] of 4 August 2020,

at the hearing held on **8 June 2021**

HAS DECIDED

as follows:

**I. The following question is referred to the Court of Justice of the European Union for a preliminary ruling:**

**‘Is Article 3(1), read in conjunction with Articles 8 and 8a, of Council Directive 93/13/EEC to be interpreted as not precluding national provisions which characterise the two conditions of ‘good faith’ and ‘a significant imbalance’ as alternatives (as separate, autonomous and independent conditions), such that, for the purposes of deciding whether a contractual term is unfair, it is sufficient if facts exist which establish that just one of those two conditions is fulfilled?’**

**II. The present proceedings are stayed pending the decision of the Court of Justice of the European Union.**

#### GROUND

- 1 The referring court is seised of an appeal brought by the appellant against the judgment of the court of first instance dismissing all of the appellant’s claims for a declaration of invalidity of the notarial act [...] of 19 September 2007 and of the loan agreement [...] of 19 September 2007, a declaration of invalidity of the mortgage registration securing the debt arising under the said loan agreement for immovable property [...], a declaration that the payment of EUR 9 361.44 was not due, and costs. The appellant, having been unsuccessful in the proceedings, has been ordered to pay costs of EUR 11 039.06 to the respondent.
- 2 On 19 September 2007 a loan agreement was concluded between the original applicant and the respondent (after concluding the agreement, the original applicant died, on 31 July 2013, whereupon the present appellant, her daughter, undertook to repay the loan pursuant to a debt transfer agreement dated 21 July 2014.) Under the loan agreement it was agreed that the borrower would receive CHF 149 220.00, with a repayment term of 240 months, ending on 31 September 2027. The monthly repayment instalments are CHF 1 001.76 and normal repayment of the loan [is] ensured by means of a standing order on the borrower’s current account, in which the borrower had received the funds, paid in EUR. The loan agreement contains no specific agreement regarding exchange rates. On 9 April 2018 the appellant issued proceedings before the court of first instance on the basis that the rate of exchange between the Euro and the Swiss franc had changed to such a degree that the borrower’s debt on 10 February 2018 still stood

at EUR 72 597.53, notwithstanding the fact that, on the due date of the first monthly repayment, the total amount of the loan had been EUR 89 567.83.

- 3 The appellant lodged an appeal on several grounds against the decision of the court of first instance, to which the respondent replied. The part of the appeal which is relevant to the grounds of the present request for a preliminary ruling is headed '*Content of the general assessment under Article 3(1) of the directive; the condition relating to good faith and a significant imbalance*'. In that part, the appellant raises questions, or rather makes assertions regarding the interpretation of Council Directive 93/13/EEC ('the Directive') and the relationship between the conditions, as defined in Article 3(1), under which a contractual term will be unfair and the provisions of national law.
- 4 Hearing the appeal, the Višje sodišče v Mariboru, in its capacity as the court of second instance, has taken the view that the essential question for the resolution of the dispute is whether the interpretation of national law is consistent with the wording and purpose of the Directive (and with EU law). Consequently, in accordance with Article 113.a(1) and (3) of the Zakon o sodiščih (Law on Judicial Bodies) and Article 267 of the Treaty on the Functioning of the European Union, it has decided to stay the proceedings and to refer the question to the Court of Justice of the European Union ('the Court of Justice').

#### **EU law**

- 5 The twelfth recital of the Directive reads as follows: '*Whereas, however, as they now stand, national laws allow only partial harmonisation to be envisaged; whereas, in particular, only contractual terms which have not been individually negotiated are covered by this directive; whereas Member States should have the option, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this directive*'.

The seventeenth recital of the Directive reads as follows: '*Whereas, for the purposes of this directive, the annexed list of terms can be of indicative value only and, because of the cause of the minimal character of the directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws*'.

Article 8 of the Directive provides as follows: '*Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer*'.

Article 8a of the Directive provides as follows: '*1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions:*

- *extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration; or*
- *contain lists of contractual terms which shall be considered as unfair.*

2. *The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website.*

3. *The Commission shall forward the information referred to in paragraph 1 to the other Member States and the European Parliament. The Commission shall consult stakeholders on that information.'*

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

#### **National law**

6 In the present case, the essential legal basis consists in the provisions of the *Zakon o varstvu potrošnikov*<sup>1</sup> (Law on consumer protection) ('the ZVPot') and, more specifically, the first paragraph of Article 24 thereof:

*'Contractual terms shall be regarded as unfair if:*

- *they cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, or*
- *if they render the performance of the contract unduly prejudicial to the consumer, or*
- *if they render the performance of the contract significantly different from what the consumer could legitimately expect, or*
- *if they breach the principle of good faith and fairness.'*

That provision has remained unchanged since the ZVPot entered into force. Admittedly, when the amendment of the law by the ZVPot-A<sup>2</sup> entered into force, the legislature expressly stated that one reason for the amendment was to transpose the Directive, but it emphasised that the amendment was primarily '*nomotechnical*'. The legislature did not therefore alter the first paragraph of

<sup>1</sup> *Official Journal of the Republic of Slovenia* No 20/1998 of 13 March 1998, as amended, in force as from 28 March 1998.

<sup>2</sup> *Official Journal of the Republic of Slovenia* No 110/2002 of 18 December 2002, in force as from 17 January 2003.

Article 24 and so that provision has remained unchanged since the ZVPot entered into force. However, the preparatory text which accompanied and explained the reasons for the legislation stated, with reference to Article 24, that *‘the first paragraph of the abovementioned article of the law lists exhaustively the primary conditions to be satisfied (as alternatives!) in order to be able to commence an assessment of unfairness, whereas the third paragraph of that article provides an illustrative list of the most typical forms of unfair contractual terms.’*<sup>3</sup> That statement, while producing no direct legal effects that are binding on the courts, may be used for the purposes of one possible method of interpretation (a teleological interpretation).

### The interpretation of the Court of Justice

- 7 The court of second instance has been unable to identify any express ruling of the Court of Justice that establishes that the relationship between the two abovementioned conditions is exclusive (or alternative) in nature. A purely literal interpretation of the wording does not reveal any such meaning. In its judgment of 26 January 2017, in Case C-421/14, the Court of Justice stated the following: *‘That being so, it should be noted that, in referring to **concepts of “good faith” and “significant imbalance”** in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, Article 3(1) of Directive 93/13 merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (judgment of 14 March 2013, Aziz, C-415/11, EU:C:2013:164, paragraph 67 and the case-law cited).’*

A further allusion to the link between the two conditions is to be found in the following passage (which is nevertheless *obiter dictum*) in the judgment of 20 [September] 2017, in Case C-186/16: *‘In order to ascertain whether a term, such as that at issue in the main proceedings, causes a **“significant imbalance” in the parties’ rights and obligations arising under the contract to the detriment of the consumer, contrary to the requirement of good faith**, the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations (see, to that effect, judgment of 14 March 2013, Aziz, C-415/11, EU:C:2013:164, paragraphs 68 and 69).’*

### The interpretation of national law

- 8 In the Republic of Slovenia, the highest court is the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia). It has created a legal standard of *‘consolidated case-law’*, meaning that its decisions have the *‘effect of a precedent’*, which makes them very similar to the formal sources of law.

<sup>3</sup> Report No 81/02 of 3 September 2002.

- 9 With regard to cases which, in so far as the interpretation of substantive law is concerned, are substantially similar to the present case, the Vrhovno sodišče has held that the substantive legal conditions for determining whether a contractual term is unfair are as follows:

*‘Only if it transpires that the bank has failed to provide the consumer with adequate explanations (that is to say, if it has not properly fulfilled its duty to provide clarity), such that the contractual term cannot be regarded as clear and comprehensible, is it possible also to assess whether the main subject matter of the contract is unfair. In the context of that assessment, it is necessary to ascertain, first and foremost, whether the bank acted in good faith and whether there is a significant imbalance in the parties’ rights and obligations.’*<sup>4</sup>

*‘Since the respondent, in its capacity as seller or supplier in the banking sector, acted in accordance with the requirement of good faith when concluding the agreements at issue, the contractual term in question, which relates to the assumption of foreign exchange risk, cannot be unfair within the meaning of Article 3 of Directive 93/13, read in conjunction with Article 24 of the ZVPoT.’*<sup>5</sup>

#### **The question referred for a preliminary ruling**

- 10 In the circumstances of the present case, the question as to whether the Directive permits the provision in Article 3(1) to be transposed into national law in the manner in which it was transposed by the first paragraph of Article 24 of the ZVPoT is essential to the decision. Indeed, it is apparent from the factual circumstances that the borrower assumed the entire foreign exchange risk, in accordance with Article 12 of the loan agreement, which reads as follows:

*‘The borrower acknowledges and confirms to the bank that **he or she accepts full and sole liability for the foreign exchange risk resulting from fluctuations in exchange rates and/or in the interest rate of reference.** The borrower also acknowledges that he or she is exposed to the currency risk resulting from changes in the interest rate and to other risks arising from market developments caused by monetary and currency market conditions, by fluctuations in interest rates, by capital market conditions and by other factors.’*

It is also apparent from other undisputed facts that those risks materialised and that, as a consequence, on 29 January 2018, the borrower still had to pay a total of EUR 72 049.58 in order to repay the loan in Swiss francs, which, at the time when the loan agreement was concluded, was the equivalent of EUR 89 567.83, and that the borrower is still under an obligation to pay monthly instalments until 31 September 2027 and that, during the relevant period, the euro was a stable currency in terms of inflation.

<sup>4</sup> Order of the Vrhovno sodišče II Ips 137/2018 of 25 October 2018, paragraph 20.

<sup>5</sup> Judgment of the Vrhovno sodišče II Ips 32/2019 of 23 January 2020, paragraph 31.

Therefore, it is permissible to transpose the Directive into national law in such a way that the two conditions of ‘*good faith*’ and ‘*a significant imbalance*’ are separate and independent conditions, this means that, in order to establish that a contractual term is unfair, it is sufficient if facts exist which establish that just one of those conditions is fulfilled. In the circumstances of the present case, this would therefore mean that the courts are not required to consider whether the respondent acted in good faith, since the set of factual circumstances set out above would be sufficient.

- 11 The two recitals mentioned above and Articles 8 and 8a of the Directive permit the adoption of national legislation which affords a higher level of consumer protection, although the Member States are required to give notice of any provisions of national law which set more stringent standards or extend the scope of the national provisions transposing the Directive. However, from the available information relating to Slovenia, it does not appear that that Member State has given notice in relation to the conditions laid down in Article 3(1) of the Directive.<sup>6</sup>
- 12 However, according to the interpretation of the court of second instance, any possible failure to give such notice does not affect the validity of the national legislation. Rather, it is essential to establish whether the Directive permits, and whether it is consistent with the principle of minimum harmonisation and with the Directive’s objectives,<sup>7</sup> for a provision of national law to establish a relationship between the conditions which determine that a contractual term is unfair that is exclusive (or alternative) in nature.
- 13 The court of second instance has not found in the decisions of the Court of Justice any clear interpretation on the basis of which it is able to decide whether the application (interpretation) of the provision of the ZVPot cited above is consistent with the objectives and purpose of the Directive. A further obstacle is posed by the decisions of the Vrhovno sodišče Republike Slovenije cited above, which apply as a legal basis or interpret the two conditions referred to in Article 3(1) of the Directive in conjunction (as cumulative conditions), which – if the view of the court of second instance is correct – is to the detriment of consumers, inasmuch as the latter are thus afforded a lower level of protection than that contemplated by national law. According to the court of second instance, the situation thus arises in which, because of the interpretation given by the highest court of general

<sup>6</sup> Slovenia: ‘*National law extends the unfairness assessment to contract terms relating to the main subject matter of the contract and to the adequacy of the price or remuneration, regardless of whether such terms are in plain, intelligible language*’; accessible at [https://ec.europa.eu/info/notifications-under-article-8a-directive-93-13-eeec\\_sl](https://ec.europa.eu/info/notifications-under-article-8a-directive-93-13-eeec_sl).

<sup>7</sup> Those objectives being to afford effective protection to consumers, who are usually the weaker parties to an agreement, against unfair contract terms used by sellers and suppliers that are not individually negotiated, to contribute to the creation of the internal market by means of the minimum harmonisation of national regulations aimed at providing such protection, to re-establish de facto equilibrium between the contracting parties and to discourage the use of unfair terms in the future.

jurisdiction, consumers involved in disputes such as the present dispute will find it difficult or impossible to protect their rights under the more favourable national legislation. That manner of proceeding is not consistent with the interpretation given by the Court of Justice, which permits national supreme courts to give additional details of the criteria defined by the Court of Justice with regard to the matter, but does not permit them to prevent lower courts from ensuring that consumers benefit from the full effect of the Directive and have an effective remedy for the protection of their rights.<sup>8</sup>

- 14 For the aforementioned reasons, the court of second instance has decided to stay the present proceedings and to refer to the Court of Justice of the European Union a question for a preliminary ruling. The proceedings are stayed pending the decision of the Court of Justice.

**Maribor, 8 June 2021**

[...]

<sup>8</sup> Judgment of 14 March 2019 in Case C-118/17, paragraph 64: *‘Having regard to the above considerations, the answer to the fourth and fifth questions is that Directive 93/13, read in the light of Article 47 of the Charter, does not preclude a supreme court of a Member State from adopting, in the interest of ensuring uniform interpretation of the law, binding decisions concerning the modalities for implementing that directive, in so far as those decisions do not prevent the competent court from ensuring the full effect of the norms laid down in that directive and from offering consumers an effective remedy for the protection of the rights that they can derive therefrom, or from referring a question for a preliminary ruling to the Court in that regard, which it is however for the referring court to determine.’*