

Anonymised version

Translation

C-749/23 – 1

Case C-749/23

Request for a preliminary ruling

Date lodged:

20 November 2023

Referring court:

Okresní soud v Teplicích (Czech Republic)

Date of decision to refer:

14 September 2023

Applicant:

innogy Energie, s.r.o.

Defendant:

QS

ORDER

The Okresní soud v Teplicích (the Teplice District Court), sole judge [...] has ruled in the case of

the applicant: **innogy Energie, s.r.o.**, [...]

v

the defendant: **QS**, [...]

with respect to the payment of CZK 6,609.66

as follows:

[...] The court hereby submits the following question to the Court of Justice of the European Union for a **preliminary ruling**, pursuant to Article 267 of the Treaty on the Functioning of the European Union:

- a. Does the spirit and purpose of Directive 93/13/EEC prevent Article 3 thereof in conjunction with the Annex thereto, point 1(e), concerning unfair contractual terms in consumer contracts, in conjunction with Article 5 thereof concerning written terms drafted in plain and intelligible language, and the principle of effectiveness under Article 7 thereof, from being interpreted to the effect that a contractual penalty set out in an adhesion contract in the part ‘Other Stipulations’, on page 1/2 (first page of the contract) is deemed even though (contrary to common practice in consumer contracts), this ‘first’ page does not feature any identification data of the parties, nothing is to be physically filled in, and the contractual penalty is included in the section ‘Other Stipulations’, which appears to be an unimportant provision to constitute a regular part of a written contract between the consumer and the supplier, inasmuch as the consumer may be required to become duly acquainted with this page of the contract, when the second page of the contract (2/2), which is actually filled in and signed, features adequate indication that this is page two of the contract by being marked 2/2?
- b. Does the spirit and purpose of Directive 93/13/EEC prevent Article 3 thereof in conjunction with the Annex thereto, point 1(e), and/or Article 12(3) of Directive (EU) 2019/944 of the European Parliament and of the Council from being interpreted such that, in the event of the termination of a fixed-price energy contract for a fixed term by the supplier due to a breach of obligation by the consumer, the amount of the actual direct economic loss sustained by the supplier due to the premature termination of the contract with the consumer is **not decisive**?

[...]

Grounds:

(A) Subject of the proceedings

In its action, the applicant seeks the payment of CZK 6,609.66 on the grounds that the defendant, on the basis of a bundled electricity supply contract, consumed electricity at the [...] metering point, for use in his household, and undertook to pay the agreed price for the electricity supplied. The contract had been concluded for a fixed term, and a product had been agreed upon that guarantees a specific price of electricity for the duration of the contract (during the basic term of the contract, and for the subsequent period /prolongation/, it sets out a method of determining the price), featuring a lower unit price of electricity than unlimited

term contracts. The applicant offsets this benefit with a contractual penalty, requiring that the customer's obligation, consisting of due performance of the contract for the agreed term, will be fulfilled. The contractual penalty represents at the same time a flat-rate compensation for damage that the applicant may incur in the event of a failure to purchase the electricity contracted for the customer, given that, for fixed-term contracts, the applicant purchases the electricity for the customer in advance for the entire term of the contract on volatile wholesale markets, on the basis of reasonably expected consumption. Due to the fact that the defendant breached its obligation to duly pay the price of electricity, the applicant discontinued the supply of electricity on 11 September 2020, in line with the energetický zákon (the Energy Law), and by letter of 23 September 2020, it withdrew from the contract. In the context of the withdrawal, the applicant billed the defendant, in accordance with the fixed-term contract, for a contractual penalty of CZK 8,800, by means of a bill for a contractual penalty issued on 13 September 2020, which was due on 23 September 2020. The contractual penalty sought amounts to CZK 400 for each month, starting on 11 September 2020 through to 24 July 2022, that is, for 22 months, amounting in total to CZK 8,800. The defendant made a partial payment of CZK 2,190.34, and the defendant's outstanding debt equals the amount sought in litigation.

The defendant did not provide a statement with respect to the action.

The defendant failed to appear at the hearing ordered without an excuse, and the court conducted the proceeding in his absence, in line with the občanský soudní řád (Code of Civil Procedure), taking documentary evidence from the file and informing the applicant (its legal counsel) that, in view of the defendant's position as a consumer, the court has doubts about the compatibility of the contractual penalty with EU consumer protection legislation. The applicant did not comment on that procedure.

From the evidence taken, the Court made the following partial findings of facts:

The Court finds, from the bundled electricity supply contract of 24 January 2020 concluded by the applicant and the defendant as a consumer, that this is a standard form contract printed in advance by the applicant which is physically filled in and signed exclusively on page 2/2. Effective from 24 January 2020, the applicant undertook in that contract to permit electricity consumption at the [...] metering point and the defendant undertook to pay the purchase price for the consumption of electricity in line with the applicable price list. Monthly advances of CZK 1,2000 were agreed, with the product being the distribution set 'STANDARD DO2d' and planned consumption being 1.8 MWh/year. The page of the contract designated as 1/2, in the section '**Contract Conclusion and Term**', states that the contract has been concluded for a fixed term of 30 months ('Basic Period') and, during that time, it cannot be prematurely terminated.

The disputed provision is in the section '**Ostatní ujednání**' ('**Other Stipulations**'), which states that the customer shall provide to innogy without

undue delay the cooperation required for the commencement of supply on the basis of the contract, in particular not to take any legal or other act preventing it from fulfilling its obligation (including the implementation of a switch of suppliers) except for those acts that it is entitled to take by law. In the event of a breach of that obligation, the customer is obliged to pay a penalty to innogy, amounting to CZK 3,000 in the Households category and CZK 10,000 in the Entrepreneur category. The customer is obliged to pay the same penalty if it misleads innogy by terminating the contract by agreement and, in breach of the declared grounds for its conclusion, carries on consumption by purchasing from a different supplier at the same metering point. If the customer makes any legally relevant expression of its will without innogy's consent (regardless of whether it was or was not made in regard to and/or delivered to innogy, whether that took place out of time, or whether it suffered from defects, and regardless of who subsequently completes the contract/supply or how it was completed) aimed at a premature termination of a fixed-term contract and/or supply from innogy (in its role as a balance responsible party with respect to the market operator) taking place on the basis of such a contract (such expression of will includes a power of attorney for switching suppliers or the late delivery of a notice of termination of a fixed-term contract during the contractually-agreed term; on the other hand, such expressions of will shall not include a mere proposal of a premature termination of the contract by agreement) and/or the customer repeatedly (that is, twice or more times) breaches any payment obligation arising from the contract (regardless of whether it is the same obligation or different obligations and whether the contract is subsequently unilaterally terminated by innogy and/or whether the customer, by its actions, renders impossible the supply, innogy shall be entitled to bill a penalty to the customer that also includes compensation for any damage incurred by innogy by its failure to purchase the electricity contracted for the customer, amounting to CZK 400 in the Households category and CZK 2,000 in the Entrepreneur category for each calendar month or a part thereof that follows after the date of termination or interruption of supply by innogy due to the customer's actions described above, until the end of the agreed contract term (including any prolongation). In the case of customers with the distribution rate D01d or C01d as per the price list, the penalty amounts set out in the previous sentence shall be reduced by half. The customer shall pay to innogy a penalty of CZK 100 for each individual case of default on any payment pursuant to this contract in excess of 10 days. The customer shall pay the penalty billed by the bill due date in line with the business terms and conditions. In the event of a penalty for the premature termination of a contract/supply in breach of the contractual terms, the customer can effectively release himself from the obligation to pay it if he recalls or withdraws such an expression of will, aimed at terminating the contract prematurely, and remedies any adverse effects thereof towards innogy. Unless otherwise stipulated above, innogy shall have, in addition to the right to a penalty arising from a breach of the customer's obligation, also a right to damages and default interest arising from the breach of the same obligation. Withdrawal from the contract shall not extinguish innogy's right to a penalty arising from a breach

of the customer's obligation prior to such withdrawal. The provisions of 'Other Stipulations' shall take effect on the effective date of the contract.

In this case, the contract is completed by the applicant's staff directly in an electronic environment (by computer) and a consumer has the option to preview the document on a monitor, while the text of the contract is moved around by the applicant's staff member using a mouse. The document is subsequently signed using a tablet and the final signed contract is sent to the consumer by e-mail. At the customer's request, the contract can be printed out at any point during the negotiation process.

By letter of 21 July 2020, the defendant was asked to pay advances of CZK 1,200 due for the months of June and July 2020. Subsequently, by letter of 23 September 2020, the applicant withdrew from the contract on the grounds that the defendant failed to pay its receivables despite repeated notices. By invoice [...], the applicant generated a final bill and billed an overpayment on electricity supply between 4 February 2020 and 11 September 2020 amounting to CZK 316.36. By its letter of 13 September 2020, the applicant billed the defendant for a contractual penalty of CZK 8,800 for 22 months of non-consumption at CZK 400 per month, due on 23 September 2020.

(B) National legislation

Zákon č. 89/2012 Sb., občanský zákoník, v platném znění (Law 89/2012, the Civil Code, as amended).

Paragraph 2048(1)

Where the parties have agreed on a contractual penalty in a certain amount or on a method whereby a contractual penalty amount will be determined in the event of a breach of an agreed obligation, the creditor may demand the contractual penalty regardless of whether the breach of the confirmed obligation caused it damage. A contractual penalty may be agreed upon in consideration other than financial.

Paragraph 580(1)

Legal action that is contrary to good morals is void, as is a legal action that runs contrary to the law, so long as the spirit and purpose of the law so require.

Paragraph 1811(1)

An entrepreneur shall make all communication towards a consumer clearly and understandably in the language of the contract.

Zákon č. 458/2000 Sb., energetický zákon – Law 458/2000, the Energy Act

[Provisions of national law of no temporal relevance]**Note:** Harmonisation with Directive (EU) 2019/944 of the European Parliament and of the Council was

implemented by the above-mentioned provisions effective from 1 January 2022 – until then (until 31 December 2021), the regulation in the Czech legal order was in Paragraph 11a, with the heading ‘Certain provisions on customer protection’ and its text does not apply to this case.

Paragraph 28(1)

A customer is entitled to

(e) choose and switch electricity suppliers free of charge;

Paragraph 28(2)

A customer is obliged

(l) in exercising his right to choose a supplier pursuant to subparagraph 1(e), to adhere to the agreed duration of the termination period in the event of a contract for an indefinite period.

(C) European Union legislation

European Union legislation concerned:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Article 3

1. 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.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Article 5

In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).

Article 7

1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

Annex:

Terms referred to in Article 3(3)

1. Terms which have the object or effect of:

...

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU

Article 12

Right to switch and rules on switching-related fees

1. Switching supplier or market participant engaged in aggregation shall be carried out within the shortest possible time. Member States shall ensure that a customer wishing to switch suppliers or market participants engaged in aggregation, while respecting contractual conditions, is entitled to such a switch within a maximum of three weeks from the date of the request. By no later than [1 January] 2026, the technical process of switching supplier shall take no longer than 24 hours and shall be possible on any working day.

2. Member States shall ensure that at least household customers and small enterprises are not charged any switching-related fees.

3. By way of derogation from paragraph 2, Member States may permit suppliers or market participants engaged in aggregation to charge customers contract termination fees where those customers *voluntarily* terminate fixed-term, fixed-price electricity supply contracts before their maturity, provided that such fees are part of a contract that the customer has voluntarily entered into and that

such fees are **clearly communicated** to the customer before the contract is entered into. Such fees shall be **proportionate** and shall not exceed the direct economic loss to the supplier or the market participant engaged in aggregation resulting from the customer's termination of the contract, including the costs of any bundled investments or services that have already been provided to the customer as part of the contract. The burden of proving the direct economic loss shall be on the supplier or market participant engaged in aggregation, and the permissibility of contract termination fees shall be monitored by the regulatory authority, or by another competent national authority.

(D) Relevant case-law

Judgement of the Nejvyšší soud (Supreme Court) of 30 August 2022, ref. no. 33 Cdo 2151/2021-106, annulled the decision of the Krajský soud v Ústí nad Labem – pobočky v Liberci (Liberec branch of the Ústí nad Labem Regional Court) of 11 February 2021, ref. no. 29 Co 165/2020-40, returning the case for further proceedings.

The Court notes in this regard that decisions pertaining to similar (identical) claims can be found in the database of anonymised court decisions kept by the Ministerstvo spravedlnosti ČR (Ministry of Justice of the Czech Republic) at www.justice.cz.

Final decisions confirming the invalidity (or nullity) of the said provisions include final judgments in [...] [reference to judgments of national courts of first and second instance].

To a similar extent however, there are also final decisions which did not find a breach of law and assessed the agreed contractual penalty as being valid, granting the claim.

The position of defendants is passive in the vast majority of the cases (they do not attend hearings, do not give their statements on the action).

(E) Grounds for the first question

The issue of unfair stipulations had already been [addressed] by legal regulation that was in force before 1 January 2014, and the Ústavní soud České republiky (Constitutional Court of the Czech Republic) had already ruled on it in the context of the legal regulation effective until 30 December 2013, in its decision of 11 November 2013, ref. no. I ÚS 35112/11, not limiting itself to noting that 'penalty clauses', in order not to be deemed unfair, must be part of the contract and a reference to general business terms and conditions does not suffice to validly agree to them; it also addressed the fact that the text of a consumer contract, especially in the case of a pre-formulated contract, must be sufficiently legible for the average consumer, clear, and logically structured, the contractual stipulations must be of a sufficient font size and must not be placed in a section in which they give the impression of being irrelevant.

Large corporations responded to this conclusion by adapting their contracts and including penalties in the text of the relevant contract. The applicant did the same; nevertheless, it integrated them into the contract in a manner that gives rise to doubts as to whether it was indeed done in line with the principle on which Council Directive 93/13/EEC is based. That is, whether the placement of a term that has not been negotiated individually in a part of the contract designated as page 1/2, in which individually agreed stipulations are not written, in an ‘residual section’ titled as ‘Other Stipulations’, when all individual contractual stipulations are set out exclusively on page 2/2, complies with the conditions set out in Article 5 of the Directive.

As for the conclusion of contracts in electronic form versus ‘paper’ form, the court does not find any difference in this case, as the consequence of the placement of the text of penalty provisions in an adhesion contract on a page that is not physically filled in, that does not follow that part of the contract, and on the contrary, is only its introduction, which can be overlooked in the course of the conclusion of the contract in any manner, or may not be given as much relevance as the information under which a signature is directly placed, is comparable in both cases.

(F) Grounds for the second question

The abovementioned contractual penalty affects the consumer, (among other cases) in the event of the termination of the contract due to the consumer’s failure to fulfil his payment obligations. As for the termination of the contract by the supplier’s withdrawal, the most frequent ground is the consumer’s failure to perform its financial obligations. The applicant is claiming a contractual penalty for the months during which there was no consumption under a fixed-term contract, amounting, in the case of consumers, to CZK 400 per month, without having to document the amount of its actual direct financial loss, as would be the case if the penalties were to be applied against a consumer if he terminated the contract due to switching suppliers during the contractual term. Both cases involve contract termination before the duly agreed term, but if the contract is terminated by the supplier, it is not burdened with the obligation to document actual direct financial losses when claiming a contractual penalty, unlike when the relationship is terminated by the consumer who does this voluntarily, and there is a clear limit on the penalty in the amount of the direct financial loss.

The court notes that, in the case at hand, there was not an underpayment on the price of energy, but, on the contrary, there was an overpayment, even though the defendant clearly failed to pay at least two monthly advances on the energy, of CZK 1,2000, and the subject of the agreement did not include any commitment of the defendant – consumer to purchase a minimum volume of energy. No obligations of the supplier itself are secured with a contractual penalty, not even the basic one – the due supply of energy.

(G) Closing notes

This case constitutes a low-value dispute concerning performance not exceeding CZK 10,000, in which the ruling cannot be challenged by an appeal pursuant to national law [...]. Hence, the court was obliged to approach the Court of Justice of the European Union in line with Article 267 of the Treaty on the Functioning of the European Union.

Furthermore, it should be pointed out that this is not an isolated case: the same question is being addressed in a large number of court disputes and the answer of the Court of Justice of the European Union to the above questions will be of relevance to a large number of court disputes.

[...]

WORKING DOCUMENT