

Case C-287/22

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:

3 May 2022

Referring court:

Sąd Okręgowy w Warszawie (Poland)

Date of the decision to refer:

24 March 2022

Applicant:

YQ

RJ

Defendant:

Getin Noble Bank S.A.

Subject matter of the case in the main proceedings

Obtaining a finding declaring a loan agreement invalid on account of the inclusion of unfair contractual terms and an order for payment of a sum of money

Subject matter and legal basis of the question referred

Interpretation of Article 6(1) and Article 7(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ EU L 1993.95.29); Article 267 TFEU

Question referred

In the light of the principles of effectiveness and proportionality, do Article 6(1) and Article 7(1) of Directive 93/13 preclude an interpretation of national legislation or of national case-law according to which a national court may, in

particular because of a consumer's obligations to settle payments with a seller or supplier or the sound financial situation of the seller or supplier, dismiss a consumer's application for an interim measure (securing of the action) to suspend, during the course of the proceedings, the performance of a contract which is likely to be declared invalid as a result of the removal of the unfair terms from it?

Provisions of Community law relied on

Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: Article 6(1), Article 7(1)

Order of the Court of 26 October 2016, *Ismael Fernandez Oliva* (C-568/14 to C-570/14, EU:C:2016:828)

Provisions of national law relied on

Article 385¹ of the Ustawa z 23 kwietnia 1964 roku Kodeks cywilny (Law of 23 April 1964, Civil Code) (Official Journal of the Republic of Poland of 2020, item 1740), 'the KC':

1. The terms of a contract concluded with a consumer which have not been individually negotiated shall not be binding on the consumer if his or her rights and obligations are set forth in a way that is contrary to good practice and grossly infringes his or her interests (abusive clauses). This provision shall not apply to terms setting out the principal matters to be performed by the parties, including price or remuneration, so long as they are worded clearly.
2. If a contractual term is not binding on the consumer pursuant to paragraph 1, the contract shall otherwise continue to be binding on the parties.
3. The terms of a contract which have not been individually negotiated are those over the content of which the consumer had no actual influence. This relates in particular to contractual terms taken from a standard contract proposed to a consumer by a contracting party.
4. The burden of proving that a term has been agreed individually rests with the person relying thereon.

Article 405 of the KC

A person who has obtained a material benefit at the expense of another person with no legal basis shall be obliged to release the benefit in kind and, if that is not possible, to reimburse its value.

Article 410 of the KC

1. The provisions of the preceding articles shall apply in particular to undue performance.
2. An obligation shall be undue where the person who performed it was in no way obliged or was not obliged to the person for whom he performed it, or where the basis of the obligation ceased to exist or the intended objective of the obligation was not attained, or where the juridical act requiring performance of the obligation was invalid and did not become valid after the obligation was performed.

Article 189 of the Ustawa z 17 listopada 1964 roku Kodeks postępowania cywilnego (Law of 17 November 1964, Code of Civil Procedure) (Official Journal of the Republic of Poland of 2021, item 1805), 'the KPC':

Applicants may bring an action before a court for a declaration that a legal relationship or a right exists or does not exist, provided that they have a legitimate interest in bringing proceedings.

Article 730¹ of the CC:

1. The granting of security may be requested by any party or participant in the proceedings if it substantiates its claim and legal interest in the granting of such.
2. There is a legal interest in the granting of security if it will be impossible or very difficult to implement the judgment handed down in the case or it will otherwise be impossible or very difficult to achieve the aim of the proceedings if the security is not granted.

2(1). A legal interest in the granting of security is deemed to be substantiated if the party seeking security is pursuing a claim for payment in connection with a commercial transaction within the meaning of the Ustawa z dnia 8 marca 2013 r. o przeciwdziałaniu nadmiernym opóźnieniom w transakcjach handlowych (Law of 8 March 2013 on counteracting excessive delays in commercial transactions) and where the value of the transaction does not exceed seventy-five thousand Polish zlotys, the claim has not been settled and at least three months have elapsed since the date on which the sum fell due.
3. When selecting the form in which security is to be granted, the court shall take into account the interests of the parties or participants to the proceedings, so as to ensure proper legal protection for the entitled party and not to burden the obligated party excessively.

Article 731 of the KPC

The securing of a claim shall not be directed at satisfying the claim unless otherwise provided by law.

Article 755 of the KPC

1. If the security does not relate to a pecuniary claim, the court shall grant security in such manner as it deems appropriate under the circumstances, not excluding measures designed to secure pecuniary claims. In particular, the court may:
 - 1) regulate the rights and obligations of the parties or parties to the proceedings for the duration of the proceedings;
 - 2) prohibit the disposal of the subject matter or rights concerned;
 - 3) stay enforcement or other proceedings aimed at enforcing a judgment;
 - 4) regulate the custody of minors and contacts with a child;
 - 5) order that an appropriate warning be entered in the land and mortgage register or in another relevant register.
2. In cases involving the protection of personal rights, a measure to secure a claim in the form of a publication ban may only be granted if there is no important public interest that would militate against doing so. When granting such, the court shall determine the duration of the ban, which may not exceed one year. Where proceedings are pending, the entitled party may, before the expiry of the period for which the publication ban was ordered, apply for a further measure to secure the claim; the provisions of the first and second sentences shall apply. If the entitled party has requested further measure, the publication ban shall remain in force until a final decision has been reached on the application.
 - 2(1). The provision contained in Article 731 does not apply if the security is necessary to avert an impending threat of harm or other unfavourable consequences for the entitled party.
3. The court shall serve an order issued in chambers on the obligated party by which it will order it to perform or refrain from performing certain acts or not to hinder the performance of acts on the part of the entitled party. This does not apply to orders requiring delivery of items in the possession of the obligated party.

Succinct presentation of the facts of the case and procedure in the main proceedings

- 1 In 2008, YQ and RJ entered into a CHF-indexed mortgage loan agreement with defendant Getin Noble Bank S.A. for a sum of 643,395.63 Polish zlotys and under which the principal amount of the loan was converted into CHF at a buy rate set by the bank, while the instalments, calculated in CHF, were repaid at a sell rate also set by the bank. The applicants were provided with information on the impact of interest rate and exchange rate changes in the form of a table comparing loan

instalments assuming a 20% increase in the amount of the loan and in the case of a 15.6% increase in the exchange rate (corresponding to the difference between the highest and lowest exchange rate during the past year).

- 2 In the statement of claim, the applicants requested that the agreement in question be declared invalid and that the amount of PLN 375,042.34 be awarded, together with statutory interest for late payment and legal costs. The applicants also raised an alternative claim, based on the assumption that the conversion clauses are abusive and that the agreement may continue after the abusive clauses are removed. They also applied to have their claim with regard to the agreement being declared invalid secured by regulating the rights and obligations of the parties to the proceedings for the duration of the proceedings in the form of suspending the obligation to pay instalments under the loan agreement until the final and binding conclusion of the proceedings (a), prohibiting the defendant from issuing notice terminating the agreement (b), and prohibiting the defendant from disclosing information in the Biuro Informacji Gospodarczej about the applicants' failure to make loan payments until the proceedings have been concluded.
- 3 The defendant, in its reply to the statement of claim, demanded that the claim be dismissed and raised formal objections as well as denied that the contractual provisions were of an unlawful nature. It submitted documents intended to prove the legality of the terms and disputed the status of the applicants as consumers. It also asserted that the bank was entitled to repayment of the entire capital paid out and to remuneration for the use of that capital. With regard to the motion for the granting of security, the defendant asserted that the applicants' claim had not been substantiated and was time-barred.
- 4 The applicants filed an appeal against the decision of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) (court of first instance) dismissing their motion, demanding that it be granted in its entirety.

Essential arguments of the parties in the main proceedings

- 5 At first instance, the applicants stated that the loan agreement contained unlawful terms relating to indexing the amount of the loan in the foreign currency and that the amount claimed represented the sum of the payments made by the applicants as an undue performance received by the defendant. In their appeal against the order of the court of first instance, they claimed that they have a legal interest in the granting of security as each repayment increases the amount to be returned to them by the defendant bank. With regard to the motion for the granting of security, the defendant asserted that the applicants' claim had not been substantiated and was time-barred. It also submitted documents intended to confirm its sound financial position.

Succinct presentation of the reasons for the reference

- 6 In order to answer the question referred for a preliminary ruling, the Court takes the view, in the light of national law, that the effect of the inclusion in a contract of unlawful terms imposing on the consumer, inter alia, a foreign exchange risk, is that the contract as a whole cannot be continued and is therefore invalid (Article 385¹ of the KC) and that each of the parties to an invalid contract is entitled to claims in restitution in respect of performances rendered (Article 410 of the KC).
- 7 The main proceedings involve proceedings for the granting of security in which a court decides on protective measures on the basis of prima facie grounds. The referring court found it substantiated that certain provisions of the agreement concluded by the claimants as consumers are unfair because they impose an exchange rate risk on consumers and allow the bank to shape the exchange rate spread as it sees fit (they are similar to the provisions of the agreements considered in Case C-260/18), that the applicants, in performing the agreement, paid the defendant bank approximately 59% of the amount of the loan disbursed and that the addenda to the agreement concluded by the parties did not restore the effectiveness of the unfair provisions.
- 8 Article 385¹ of the KC, inasmuch as it transposes Directive 93/13 into Polish law, must be interpreted in such a way as to ensure that the objectives of that directive are achieved as effectively as possible. As the Court has already stated, Article 6(1) of Directive 93/13 must be interpreted as meaning that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. Therefore, the determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he would have been in if that term had not existed. The obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts (see judgment of 21 December 2016, *Francisco Gutiérrez Naranjo*, C-154/15, C-307/15 and C-308/15, ECLI:EU:C:2016:980, paragraphs 61, 62). The requirement that an interpretation be followed which is consistent with EU law also applies to national procedural rules (see judgment of 14 June 2012, *Banco Español de Crédito SA*, C-618/10, EU:C:2012:349, paragraphs 53 to 57).
- 9 The Court has, on several occasions, developed general considerations relating to the need to ensure that national courts are able to grant interim relief in order to ensure the full effectiveness of judicial decisions concerning the protection of the rights relied on under EU law (see judgment of 19 June 1990 in Case C-213/89 *Factortame*, EU:C:1990:257, paragraph 21; judgment of 11 January 2001, *Siples*, C-226/99, EU:C:2001:14, paragraph 19; judgment of 13 March 2007, *Unibet*, C-432/05, paragraph 67). The Court has, on several occasions, developed general considerations relating to the need to ensure that national courts are able to grant interim relief in order to ensure the full effectiveness of judicial decisions

concerning the protection of the rights relied on under EU law (see judgment of 19 June 1990 in Case C-213/89 Factortame, EU:C:1990:257, paragraph 21; judgment of 11 January 2001, Siples, C-226/99, EU:C:2001:14, paragraph 19; judgment of 13 March 2007, Unibet, C-432/05, paragraph 67). In the context of Directive 93/13, the Court has already ruled on the need to apply an interim measure, in particular where enforcement of the immovable property in which the consumer resides is pending (judgments of 10 September 2014, *Kusionova*, C-34/13, EU:C:2014:2189, paragraph 66; Judgment of 14 March 2013, *Aziz* (415/11, EU:C:2013:164, paragraph 59).

- 10 Nevertheless, interim measures are essential not only for the suspension of enforcement against consumers, but also in cases where consumers take legal action to have certain contractual terms declared invalid (see order of 26 October 2016, *Ismael Fernandez Oliva*, Joined Cases C-568/14 to C-570/14, EU:C:2016:828). The Court has also held that national legislation which prevents a court from suspending enforcement proceedings pending an examination of the objections raised by a consumer regarding the unfair nature of a contract is incompatible with the provisions of that directive (see judgment of 26 June 2019, *Kuhar*, C-407/18, EU:C:1990:257).
- 11 Article 7(1) of Directive 93/13 thus requires the national court to adopt an appropriate interim measure, including of its own motion, where it is necessary to order such a measure in order to ensure the full effectiveness of the future decision on unfair terms.
- 12 However, national case-law only rarely takes account of claims by consumers seeking the adoption of such a protective measure. Some of the national courts consider that an action for a declaratory judgment (Article 189 of the KPC) is not enforceable and seeks only to confirm formally that the terms of the contract are unfair or invalid. Such an interpretation seems to disregard the question of the restitutory effect arising from an unfair term. The contrary view is based on Article 731 of the KPC, according to which a measure to secure a claim may not be used to satisfy that claim. The third view refers to the consumer having a legal interest in the granting of security (Article 730¹(2) of the KPC) and the excessive burden on the obligated party (defendant) (Article 730¹(3) of the KPC). While recognising that both parties to an invalid loan agreement are entitled to restitution in respect of sums paid but not due, part of the case-law observes that the consumer is also required, in principle, to repay the capital used.
- 13 For the event that a loan agreement is found to be invalid, appropriate interim measures (such as the suspension of the obligation to pay the capital and interest instalments arising from that agreement for the duration of the proceedings) are already necessary at the preliminary stage of the proceedings to ensure the full effectiveness of a future judgment. Otherwise, the restitutory effect would be jeopardised and, consequently, the effectiveness of Directive 93/13 would be jeopardised. In fact, most often, consumers who bring a civil action against a bank to obtain a finding declaring a loan agreement invalid and for an order for

appropriate amounts to be paid in settlement of such invalid agreement continue to pay instalments in the amount claimed by the bank. In view of this, it is necessary to already consolidate (freeze) the legal and factual situation of the parties at the beginning of such court proceedings, as the continued payment of instalments by consumers will render the judgment to be made at the end of the proceedings ineffective. Otherwise, claimants (consumers) would have to extend their claim every month (after each instalment), which would be very cumbersome and prolong the proceedings.

- 14 Such situation would penalise the consumer rather than the seller or supplier, which, according to the referring court, would undermine the effectiveness of Article 6(1) and Article 7(1) of Directive 93/13. Nor would it fully restore the true balance between the rights and obligations of the parties, since it would be the consumer (and not the seller or supplier) who, in order to enforce his rights, would have to invest further financial and time resources by initiating further legal proceedings.
- 15 According to the referring court, Article 6(1) and Article 7(1) of Directive 93/13 require that, in the light of the principle of effectiveness and that a fair balance be struck between the rights and obligations of the parties, if a consumer initiates proceedings against a seller or supplier (the bank) the purpose of which is to establish that the terms of the loan agreement are unfair and, consequently, that the agreement is invalid and that the sums paid by the consumer under the invalid agreement are to be recovered (restitution), the national court must take all necessary measures (including interim measures) to ensure that those proceedings finally resolve the legal situation between the consumer and the seller or supplier. The purpose of such proceedings should be to draw all legal consequences which Directive 93/13 attaches to a finding that a contractual term is unfair, including full and final restitutory consequences, without the consumer having to initiate further proceedings.
- 16 According to the referring court, such interim measure should consist in consolidating the legal and factual situation of the parties as it existed at the time the proceedings were brought, in particular by suspending, for the duration of the proceedings, the obligation to make capital and interest payments under a loan agreement containing unfair contractual terms.
- 17 In the light of the foregoing considerations, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) proposes that the answer to the question referred should be that the interpretation of the provisions of national law and of national case-law should not allow a national court to deny an application submitted by a consumer requesting a court to order an interim measure suspending the performance of an agreement in cases such as that in the main proceedings.