Case C-280/24 [Malicník] [i]

Request for a preliminary ruling

Date lodged:

23 April 2024

Referring court:

Krajský súd v Prešove (Slovakia)

Date of the decision to refer:

25 March 2024

Appellant and applicant at first instance:

A.B.

Other party to the proceedings, defendant at first instance:

Slovenská sporiteľňa, a.s.

[…]

ORDER

The Krajský súd v Prešove (Regional Court, Prešov, Slovakia) […], in the case brought by A.B. […], the applicant at first instance, against Slovenská sporiteľňa, a.s. […], the defendant at first instance, for the determination of a loan as non-interest-bearing and fee-free, for restitution based on unjust enrichment and for a finding that the terms of an agreement are inadmissible, as regards [A.B]'s appeal against the judgment handed down by the Okresný súd Prešov (District Court, Prešov, Slovakia) […] on 27 October 2023,

hereby orders:

According to Paragraph 162(1)(c) of the Civilný sporový poriadok (Code of Civil Procedure), the proceedings are stayed, and the following questions are referred to the Court of Justice of the European Union ('the Court of Justice') for a preliminary ruling:

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

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1. Is there a conflict between EU law and case-law such as the judgment handed down by the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic, Slovakia) on 28 February 2022, ref. 7Cdo 294/2019, according to which the requirement that the subject matter of the service for which the consumer must pay an arrangement fee be clear and intelligible is met if *'it follows from the definition of the disputed fee that it is an arrangement fee, i.e. a fee for activities by the lender that are essential for the conclusion of the agreement and that form part of the lender's internal management and the costs incurred by that lender, i.e. activities by the lender associated with arranging the loan, such as the drafting or conclusion of the agreement, etc.'*, and also the amount of the fee was clearly set out?

2. Does the extent of the expenses incurred by the lender in connection with the service associated with such a fee, and thus the question of whether the agreement should indicate the subject matter of that service, or the question of whether the fee is merely remunerative in nature and the lender is not obliged, when determining it, to take into account the expenses it has incurred in connection with providing the service associated with that fee, have any bearing on the assessment of whether the arrangement fee is inadmissible?

3. If the arrangement fee is intended to reflect the expenses incurred by the lender in connection with the service associated with such a fee, is this relevant to the objectives set out in Article 6(1) of [Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts] in situations where the lender transfers to the consumer, in the form of such a fee, all of the expenses borne by the lender in connection with providing the service associated with that fee, and where the subject matter of the service is in the interest of both parties to the agreement?

Reasoning:

Legal context

European Union law

Article 3(1) of Directive 93/13 states:

'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.'

Under Article 4 of that directive:

'1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract,

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to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplie[d] in exchange, on the other, in so far as these terms are in plain intelligible language.'

Article 5 of Directive 93/13 states:

'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).'

Law of the Slovak Republic

According to Article 2(2) of the Code of Civil Procedure, legal certainty means a situation in which a person can reasonably expect his or her dispute to be settled according to the established decision-making practice of the supreme judicial bodies; in the absence of any such established practice, it also means a situation in which a person can reasonably expect his or her dispute to be settled fairly.

According to Paragraph 53(1) of the Občiansky zakonnik (Civil Code), consumer contracts must not contain provisions that cause a significant imbalance in the rights and obligations of the contracting parties, to the detriment of the consumer ('inadmissible terms'). This does not apply in the case of contractual terms relating to the main subject matter of the service and the adequacy of prices, provided that those contractual terms are expressed unambiguously, clearly and comprehensibly, or if the inadmissible terms have been negotiated individually.

The dispute in the main proceedings and the questions referred for a preliminary ruling

On 23 May 2012, a consumer instalment credit agreement was concluded between the applicant at first instance, as the consumer, and the defendant at first instance (the bank), as the lender; under that agreement, the bank granted the applicant at first instance a non-earmarked consumer loan of EUR 9 999 on the following terms: an annual interest rate of 16.90%; monthly instalments of EUR 189.14; a first instalment payment date of [20 July 2012] and 120 instalments in total; a final credit repayment date of 20 June 2022, an [annual percentage rate of change (APRC)] of 19.55%; an average APRC of 13.80%; and a total repayment amount of EUR 21 926.19. The loan was granted immediately and in full. The agreement also defined the arrangement fee as follows:

Fees

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1 The Borrower shall be obliged to pay Fees to the Bank

Name of the Fee	*Amount of the Fee in EUR*	*Frequency*
Arrangement fee	*169.00*	*One-off*
Administrative fee	*2.99*	*Monthly*
Fee for credit insurance	*6.40*	*Monthly*

– The reminder fee shall be EUR 25 for each reminder issued.

– The Borrower shall pay the Fees referred to in the table in regular instalments in accordance with the frequency and payment dates of instalments for the Loan.

The Fees referred to in this section shall be payable from the date on which the Credit Agreement is signed, and any changes to these Fees shall be governed by the Credit Agreement, the Terms of Credit and the General Conditions of Sale.

The applicant at first instance brought an action before the Okresný súd Prešov (District Court, Prešov; 'the District Court'), in which he claimed an infringement of his consumer rights. He claimed, inter alia, that the arrangement fee lacked transparency and was inadmissible, because the agreement did not specify which service was to be provided in exchange for that fee.

In its first judgment of 30 November 2022, the District Court stated that it *'does not share the view that the definition of the "arrangement fee" does not make it clear for which service the defendant is charging that fee. A logical and grammatical interpretation leads to the conclusion that the fee is being charged for the activities by the lender that are essential for the conclusion of the agreement, such as, in particular, the actual drafting of the agreement and other documents associated with arranging the loan.'* It therefore dismissed the action for a finding that the arrangement fee was inadmissible.

In response to an appeal, on 22 August 2023 the Krajský súd v Prešove (Regional Court, Prešov; 'the Regional Court') set aside the judgment of the District Court in so far as it concerned the arrangement fee, referring, inter alia, to the judgment of the Court of Justice in Case C-224/19, in which the Court of Justice found that: *'In the light of the foregoing considerations, the answer to the eleventh question in Case C-224/19 is that Article 3(1) of Directive 93/13 must be interpreted as meaning that a term in a loan agreement concluded between a consumer and a financial institution which requires the consumer to pay an arrangement fee is capable of creating, to the detriment of the consumer, a significant imbalance in the rights and obligations of the parties as arising from that agreement, contrary to the requirement of good faith, where the financial institution does not demonstrate that that fee corresponds to services actually provided and to costs it has incurred, which is a matter for the referring court to verify.'*

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In a second judgment handed down on 27 October 2023, the District Court again dismissed the action for a finding that the arrangement fee was inadmissible. The District Court justified its decision to disregard the legal position of the court hearing the appeal on the grounds that a similar legal question had already been settled by the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic, Slovakia; 'the Supreme Court'), and that the ruling by the Supreme Court formed part of the established case-law that was binding on all courts. The ruling in question was a judgment handed down by the Supreme Court under ref. 7Cdo/294/2019 […]. The District Court also cited the judgment of the Court of Justice in Case C-621/[17], from which it follows that it is not necessary to stipulate the specific services which are covered by those fees, but that it is vital that those terms of the agreement have been drafted in a clear and understandable manner.

In response to an appeal by the applicant at first instance (now the appellant), the court hearing the appeal is assessing the arrangement fee in question. The court hearing the appeal contests the conclusions drawn by the District Court regarding the transparency of the arrangement fee, because the District Court essentially based those conclusions only on the name of the fee, and failed to familiarise itself with the mechanism by which it was calculated and the subject matter of the associated service. The District Court however gave its ruling on the basis of the ruling of the Supreme Court which has been published in the Zbierka súdnych rozhodnutí (Collection of Court Judgments) and which is binding on all courts (Article 2 of the Code of Civil Procedure).

The Supreme Court, in Judgment 7Cdo/294/2019, found that:

13. According to the judgment of the Court of Justice of 3 October 2019 in Case C-621/17, 'Article 4(2) and Article 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that the requirement that a contractual term be drafted in plain, intelligible language does not require that non-individually negotiated contractual terms in a loan contract concluded with a consumer, such as those at issue in the main proceedings, which specify the exact amount of management charges and of a disbursement commission to be borne by the consumer, their method of calculation and the time when they have to be paid, also have to indicate all of the services provided in return for the amounts concerned;'

14. The appeal court points out that it follows from the definition of the fee in question that it is an arrangement fee, and is therefore charged for activities by the lender that are essential for the conclusion of the agreement and that form part of the lender's internal management and the costs incurred by that lender, i.e. activities by the lender associated with arranging the loan, such as the drafting or the conclusion of the agreement, etc. The arrangement fee is therefore the price for the provision of the service by the lender, whereby an option for charging such a fee is provided by [Zákon č. 129/2010 Z. z. o spotrebiteľských úveroch a o iných úveroch a pôžičkách pre spotrebiteľov a o zmene a doplnení

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niektorých zákonov (Law No 129/2010 on consumer credit and other credits and loans for consumers and amending and supplementing certain laws)], and this option also results from the case-law of the Court of Justice. It cannot therefore be concluded, with regard to the negotiation of the arrangement fee, that an unfair contractual term is present.

15. It is significant that it was for the appellant, who was in a position to assess the economic consequences arising from the Agreement, to decide on its conclusion, and that there was nothing to prevent him from approaching another entity if he believed that the arrangement fee, which was expressed in specific, plain and intelligible terms in the Agreement, was too high. In the appeal court's view, it would be intolerable for an appellant who knew in advance that he or she would have to pay an arrangement fee and at the same time knew the amount of that fee nevertheless to conclude the agreement, i.e. consent to the fee and its amount, and subsequently take the view that that fee was an inadmissible contractual term.

The court hearing the appeal considers that the position of the Supreme Court, and thus of the District Court, may be at odds with the case-law of the Court of Justice, in particular the judgments in Cases C-224/19 and C-565/21. Changes in interpretation may also be expected on the basis of the ruling in Case C-300/23.

In particular, the court hearing the appeal calls into question the position of the Supreme Court that the subject matter of the service associated with the arrangement fee should relate to the bank's internal management. In the view of the referring court, this is the very opposite of transparent, since the term '*internal*' suggests that these are matters concerning only the bank, which obviously hinders transparency.

The Regional Court also has doubts as to whether it should be for the court, and not the lender, to identify the subject matter of the service associated with the arrangement fee on the basis of an illustrative list ('…etc.'). Because a term of an agreement should, according to the case-law of the Court of Justice, be assessed according to the circumstances prevailing at the time that the agreement is concluded, it is crucial that the consumer be able to decide, at the time that the agreement is concluded, whether he or she wishes to pay for the service, and he or she thus needs to be familiar with that service.

The court hearing the appeal considers that the very name of the fee is also potentially very suggestive in terms of the subject matter of the service given the overall context of the agreement, but believes that the name of the fee is only one of a number of features indicating the subject matter of the service.

The Court of Justice has already ruled that it is important, when assessing inadmissibility, to ensure that the fee does not correspond to another term of the agreement. The Regional Court is particularly concerned by the District Court's argument to the effect that if the arrangement fee were invalid, the bank would be

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obliged to increase the interest rate *('It should be noted that the bank, when concluding the credit agreement, predicted that its profit would consist of the interest and the fees; if it had expected only the profit from the interest, this would undoubtedly have been reflected in the interest rate.'* – paragraph 59 of Judgment 11Csp/72/2022–463 of 27 October 2023).

The Regional Court has doubts as to whether the Supreme Court lent any weight whatsoever to the actual subject matter of the service associated with the arrangement fee. It therefore believes that the question to be referred for a preliminary ruling concerning the significance of the costs of the service associated with the bank fee and the burden of bearing those costs is of crucial significance. It is generally accepted that it would be much cheaper for consumers to draft a credit agreement and formulate the terms of the bank independently, or with the help of their own lawyers. Drafting agreements independently would however undermine the entire doctrine of protection resulting from Directive 93/13, which is based on protection against unfair terms that have not been individually negotiated.

It thus seems essential to clarify the case-law as regards familiarity with the actual service and the real subject matter of the service to be reimbursed by the consumer in connection with the fee. Having regard to the above, a further crucial question relates to whether the consumer should bear the burden of all the costs associated with the service, which is furthermore in the interest of the bank itself. The consumer has an interest in obtaining a loan, but the bank has an interest in the interest paid on the loan, and the Court of Justice could thus settle the issue of who should participate in the costs of the service associated with the arrangement fee.

[…] [repetition of questions referred for a preliminary ruling] […] [Information about appeals]

[…]

[Signatures]

[…]

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