

**Case C-630/23**

**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:**

17 October 2023

**Referring court:**

Kúria (Hungary)

**Date of the decision to refer:**

26 September 2023

**Appellants:**

ZH

KN

**Respondent:**

AxFina Hungary Zrt.

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**Subject matter of the main proceedings**

Determination of the scope and application of the legal consequences in the event that a term of a contract concluded with consumers and denominated in foreign currency, under which the consumer assumes, on an unlimited basis, the exchange rate risk, is unfair and that fact gives rise to the invalidity of the entire contract.

**Subject matter and legal basis of the request**

Interpretation of Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Article 267 TFEU.

**Question referred for a preliminary ruling**

1. Is it correct to interpret the phrase ‘[the contract] is capable of continuing in existence without the unfair terms’, which appears in Article 6(1) of Council

Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Directive 93/13'), as meaning that a contract concluded with consumers and denominated in foreign currency is capable of continuing in existence without a contractual term which pertains to the main obligation to be performed under the contract and which places the exchange rate risk, on an unlimited basis, on the consumer, taking into account that the law of the Member State regulates the currency conversion mechanism by means of mandatory legal provisions?

Is a legal practice of a Member State compatible with Article 1(2), Article 6(1) and Article 7(1) of Directive 93/13, where, according to that practice (which is based on an interpretation of the law of the Member State given in the light of that directive and in compliance with the principles of interpretation established by the Court of Justice of the European Union), in view of the principle of unjust enrichment,

- a) the creditor is ordered to reimburse the consumer (or pay the consumer as part of a settlement) the amounts charged by the creditor under the term declared unfair, but that order is not made in the context of a *restitutio in integrum*, because a special provision of national law excludes that possible legal consequence of invalidity, and nor are the rules relating to unjust enrichment applied independently, because the national law does not provided for such a legal consequence of the invalidity of the contract, but rather the consumer is freed from the consequences that are particularly detrimental to him or her and, at the same time, the balance of the contract between the contracting parties is restored by applying the main legal consequence which the law of the Member State provides for in the case of invalidity, namely, a declaration of validity in respect of the contract, such that the unfair terms do not impose any obligation on the consumer, but the remaining (fair) elements of the contract (including the contractual interest and other costs) continue to bind the parties on the same terms?
  - b) in the event that a declaration of validity is not possible, in order to effect a settlement of accounts, the legal consequences of invalidity are determined by declaring the contract applicable until judgment is given and the settlement of accounts between the parties is carried out by applying the principle of unjust enrichment?
2. When it comes to determining the legal consequences of a contract that is invalid for the reason stated, may a legislative provision of the Member State, which entered into force subsequently and which introduced, from then on, mandatory conversion into forints, be disapplied, because that provision, as a result of the fixing of the exchange rate, places a certain part of the exchange rate risk on the consumer, who – on account of the unfair contractual term – should be freed entirely from that risk?

3. In the event that, in accordance with EU law, it is not possible to determine the legal consequences of invalidity, either by means of a declaration of validity or by means of a declaration of applicability, what are the legal consequences, along with the relevant basis in case-law, which should therefore be determined *contra legem*, irrespective of the legislation of the Member State relating to the legal consequences and based exclusively on EU law, taking into account that Directive 93/13 does not regulate the legal consequences of invalidity?

### **Provisions of European Union law relied on**

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: Article 1(2), Article 6(1) and Article 7(1)

Judgment of the Court of Justice of the European Union ('Court of Justice') of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819)

Judgment of the Court of Justice of 31 March 2022, *Lombard Lízing* (C-472/20, EU:C:2022:242)

Judgment of the Court of Justice of 27 April 2023, *AxFina Hungary* (C-705/21, EU:C:2023:352)

Judgment of the Court of Justice of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)* (C-520/21, EU:C:2023:478)

### **Provisions of national law relied on**

A Polgári Törvénykönyvről szóló 1959. évi IV. törvény (Law No IV of 1959 establishing the Civil Code; 'the former Civil Code'): Paragraph 209(1) and (4); Paragraph 209/A(2); Paragraph 237(1) and (2); Paragraph 361(1); and Paragraph 363(1)

A Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvény (Law No XXXVIII of 2014 regulating specific matters relating to the decision of the Kúria (Supreme Court, Hungary) to safeguard the uniformity of the law concerning loan agreements concluded by financial institutions with consumers; 'Law DH1'): Paragraphs 3 and 4

A Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvényben rögzített elszámolás szabályairól és egyes egyéb rendelkezésekről szóló 2014. évi XL. törvény (Law XL of 2014 on the rules applicable to the settlement of accounts referred to by Law XXXVIII of 2014, regulating specific matters relating to the decision of the Supreme Court to

safeguard the uniformity of the law concerning loan agreements concluded by financial institutions with consumers, and various other provisions; ‘Law DH2’): Paragraphs 3, 4 and 37

Egyes fogyasztói kölcsönszerződésekből eredő követelések forintra átváltásával kapcsolatos kérdések rendezéséről szóló 2015. évi CXLV. törvény (Law CXLV of 2015 regulating matters relating to the conversion into forints of the debts resulting from certain loan agreements concluded with consumers; ‘Law DH7’): Paragraphs 3, 9, 12, 13 and 15

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 On 21 June 2007, the commercial company AxFina Hungary Zrt. (‘AxFina’), in its capacity as a finance leasing company, and ZH, in the capacity of lessee, concluded – with a joint and several guarantee provided by KN – a finance lease denominated in foreign currency [Swiss francs] (CHF), the purpose of which was the purchase of a private car. The lessee chose a method of settlement relating to the fluctuations in the exchange rate whereby she had to make 120 fixed monthly payments and settlement relating to the fluctuations in the exchange rate took place at the end of the term of the agreement. AxFina paid the supplier the purchase price of the asset forming the subject matter of the finance lease and ZH took possession of the car. On 7 May 2013, AxFina terminated the finance lease with immediate effect due to ZH and KN being in arrears, as a result of which the whole of the debt resulting from the contract became due and payable in a single payment.
- 2 AxFina brought a claim against ZH and KN in which, in view of the fact that the contract was invalid due to the unfair nature of the term relating to fluctuations in the exchange rate, it asked the court to declare the contract valid with retroactive effect and order the defendants to pay the principal plus interest. The principal claimed also included the amount owed in respect of fluctuations in the exchange rate.
- 3 In its judgment, the court of first instance held that the finance lease was invalid due to the unfair nature of the exchange rate risk. It observed that, as a legal consequence of that invalidity, ZH and KN were obliged to bear that risk up to a certain limit. The court of first instance reduced the amount owed to AxFina by the amount in excess of that which ZH would have had to pay, if the contract had been denominated in Hungarian forints [(HUF) (‘forints’)].
- 4 ZH and KN brought an appeal against that decision, as a result of which the court of second instance upheld the judgment given at first instance, holding that the method of settlement of accounts employed by the court of first instance was contrary neither to Hungarian law nor to EU law. In its opinion, the irreversibility of the service provided under the finance lease excluded the restoration of the original situation.

- 5 In their further appeal against the final appealable judgment, ZH and KN asked the court to set aside the judgment and reject the original claim, and also, secondarily, to order the court of first instance to initiate new proceedings in which the validity of the finance lease would be declared and a new settlement of accounts between the parties effected.

**The essential arguments of the parties in the main proceedings**

- 6 According to ZH and KN, the contract is invalid, inter alia, because it does not contain information regarding the exchange rate risk.
- 7 ZH and KN argue that, unless the consumer expressly requests it, the Hungarian provisions which, with the aim of rectifying the unfair situation brought about by the fluctuations in the exchange rate, impose the application of the official foreign exchange rate of the Hungarian Central Bank instead of the unfair exchange rate differential and stipulate that the settlement of accounts should be based on that official exchange rate, as well as excluding the restoration of the original situation and requiring the conversion into forints of the debts resulting from loan agreements, should not be applied to the legal relationship between the parties to the proceedings.
- 8 ZH and KN maintain that the court cannot modify the content of an unfair term. Should the parties desire and request it, the contract may be declared valid, removing the invalid parts. Consequently, the terms which have given rise to the invalidity of the contract cannot be taken into account, but the consumer is obliged to make the monthly payments provided for in the finance lease until the 120 instalments have been satisfied.
- 9 AxFina has not submitted a response to that appeal.

**Succinct presentation of the reasoning in the request for a preliminary ruling**

- 10 In accordance with Hungarian case-law, the main consequences – being equal in status – to be applied in the event of invalidity are the restoration of the original situation (*restitutio in integrum*) and, if the cause of the invalidity can be removed, a declaration of validity with effect *ex tunc* in respect of the contract. In the event that the restoration of the situation prior to the conclusion of the contract is not possible or appropriate – due to the irreversibility [of the performance], either *ab initio* or a posteriori – and nor is it possible to make a declaration of validity in respect of the contract, the court will declare the contract applicable until a decision has been given and, where appropriate, it will order monetary compensation to be paid for the value of any performance for which no consideration has been received.
- 11 In the opinion of the Supreme Court, among the legal consequences of invalidity provided for in Hungarian law, the declaration of validity is that which

appropriately satisfies the interests of the consumer and is also consistent with the principles enshrined in EU law. In the event that it is not possible to declare the contract valid, it may be declared applicable, alongside a settlement of accounts between the parties that complies with the principle of unjust enrichment, which also satisfies the requirements stated. By applying the declaration of applicability, the court does not compel the performance of the invalid contract, but rather it confines itself to effecting a settlement of accounts between the parties.

- 12 When adopting the Hungarian legislation on the protection of consumers – which establishes the unfair nature of both the exchange rate differential applied by financial institutions and the contractual terms which form the basis of the right of such institutions to modify the contract unilaterally – the legislature consciously opted to exclude restoration of the original situation from the legal consequences of invalidity. Thus, in accordance with the relevant provision of Hungarian legislation, the legal consequence of the invalidity of the finance lease forming the subject matter of the main proceedings can only be either a declaration of validity in respect of the contract, or a declaration of its applicability during the period of time that elapses until a decision is given.
- 13 So, the Supreme Court considers the fact that the court endeavours to apply, in the first instance, the main legal consequence established in Hungarian law – namely, a declaration of validity in respect of the contract – to be consistent with the objective set out in Article 6(1) of Directive 93/13, according to which the balance between the parties must be restored, while, at the same time, as a general rule, maintaining the validity of the contract as a whole.
- 14 In its judgment of 27 April 2023, *AxFina Hungary* (C-705/21, EU:C:2023:352), the Court of Justice has already given guidance regarding the legal consequences which should not be applied when a declaration of validity is made in respect of the contract. However, it did not deal with all of the relevant questions of legal interpretation, in particular as regards the applicable legal consequences. Indeed, the Court of Justice did not rule on all of the relevant elements of the legal consequences that may be deduced and, therefore, it is legitimate that it should also respond to the additional questions of legal interpretation arising in this dispute.
- 15 Furthermore, in its judgment of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)* (C-520/21, EU:C:2023:478), given following an order for reference made by a Polish court, the Court of Justice held that a mortgage loan agreement cannot continue to exist after the removal of the unfair terms appearing in it and that Article 6(1) and Article 7(1) of Directive 93/13 preclude an interpretation of national law according to which the credit institution is entitled to seek compensation going beyond reimbursement of the capital and payment of default interest at the statutory rate from the date on which notice is served.

- 16 However, under Hungarian law, the invalidity of the contract has legal consequences that differ from the provisions of Polish law referred to in the above-mentioned judgment C-520/21. The answers given by the Court of Justice in its judgments given in response to Polish orders for reference (or such orders made by other Member States) cannot always be adapted to the Hungarian legal context, due to the divergences between the national legislation of different countries and between the [different] instruments of legal protection applied in relation to invalidity. The legal situation is also substantially different because the Hungarian legislature has adopted numerous rules intended to protect consumers and, in particular, in the case of loan agreements concluded with consumers and denominated in foreign currency, regarding the conversion mechanism pertaining to the main subject matter of the contract.
- 17 The Supreme Court emphasises that those elements stated in the case-law of the Court of Justice which only refer to the legal situation existing in the law of a Member State should not be taken into consideration with *erga omnes* effects. Indeed, a contrary interpretation would, in view of the Hungarian legislative context, make an application of the law *contra legem* necessary, which the Court of Justice also considers it preferable to avoid.
- 18 In the opinion of the Supreme Court, the interpretation of the law of the Member States in the light of EU law is demarcated by the principle of procedural autonomy of the Member States, the scope of which is modified by the principles of equivalence and effectiveness. In view of that fact, the onus is on the national court to ensure that the consumer is ultimately in the position he or she would have been in if the term held to be unfair had never existed (judgment C-705/21, paragraph 47, and judgment C-472/20, paragraph 57).
- 19 The fact that the court endeavours to apply, in the first instance, the legal consequence established in the former Civil Code, namely, a declaration of validity in respect of the contract, is consistent with the objective set out in Article 6(1) of Directive 93/13, according to which the aim of that directive is to restore the balance between the parties, while, at the same time, as a general rule, maintaining the validity of the contract as a whole, and not to declare every contract containing unfair terms null and void.
- 20 Given that the cause of the invalidity is the lack of transparency regarding the effects which assuming the exchange rate risk has on the consumer, that cause can be removed in its entirety in the context of a declaration of validity, freeing the consumer entirely from that risk, such that it is not the consumer who assumes it.
- 21 The removal of the unfair contractual term does not constitute a prohibited modification of the contract, as the contract is able to continue in existence without that term. Nor does it alter the nature of the main subject matter of the contract. It does not amount to performing a different type of contract (judgment C-260/18, paragraphs 35 and 45), given that the settlement of accounts based on the foreign currency is retained; it is just that the exchange rate risk is not assumed

by the consumer, but rather by the bank. However, it allows the interests of the consumer to be protected. This solution ensures that the penalty imposed is effective and proportionate and, moreover, it ensures that a real balance between the parties is restored.

- 22 The Supreme Court has also observed in previous decisions that the consumer, having been duly informed, is entitled not to avail himself or herself of the system of protection, not to claim that a term is unfair and not to request that the relevant legal consequences be applied. However, in the event that the consumer does not make such a declaration, his or her wishes are not a determining factor when it comes to establishing the way in which the legal consequences of invalidity are to be applied, nor when it comes to specifying their content.
- 23 The Supreme Court wishes to develop its own case-law regarding the legal consequences, with the aim of adapting the application of the rules establishing the conversion into forints of the debts resulting from loan agreements to the principles of EU law. It considers the practice of the body applying the law to be consistent with the objective stated in Article 6(1) of Directive 93/13, where, according to that practice, in the event that the contract is invalid on account of imposing the exchange rate risk on the consumer, the national court disapplies the law requiring the debts resulting from loan agreements to be converted into forints applying an exchange rate higher than the current rate at the time when the contract was concluded (and which also provides that the interest is calculated on the national currency).
- 24 In addition to the legal consequences referred to above, the disapplication of the provisions of Hungarian legislation relating to the conversion into forints of the debts resulting from loan agreements allows the consumer to be freed entirely from any payment obligation arising from the unfair contractual terms.
- 25 Consequently, the Supreme Court considers an interpretation of EU law to be necessary regarding whether an interpretation and application of Hungarian legislation is consistent with the objectives stated in Article 6(1) and Article 7(1) of Directive 93/13, where, according to that interpretation and application, in the event of the invalidity of the entire contract, the national court, as a legal consequence of the invalidity, declares the contract valid with retroactive effect from the date of its conclusion, removing the unfair contractual terms which provide non-transparent information regarding the exchange rate risk and which impose that risk on the consumer. Those terms thus no longer imply any obligation on the part of the consumer (who does not have to bear the exchange rate risk, which is assumed by the financial institution instead), while the remaining, fair, terms of the contract (the obligation to pay interest and other costs, etc.) bind the parties on unaltered terms.
- 26 Another question that arises in this regard is whether the reasoning of the Court of Justice set out in judgment C-705/21 must be interpreted as meaning that only an application of national law which gives rise to the parties being in the situation

they would have been in if the contract containing the unfair terms had not been concluded is compatible with EU law. Is the legal consequence of invalidity provided for in Hungarian law, namely, the application of the declaration of validity, therefore, totally excluded, even though (contrary to what happened in the case that gave rise to judgment C-705/21) such a declaration implies the removal of the unfair contractual terms and not a modification of the content of those terms?

- 27 In the event that the legal interpretation proposed – namely, a retroactive declaration of validity in respect of the contract, removing the unfair terms – is not compatible with EU law, the Supreme Court asks the Court of Justice to provide it with additional interpretive guidance, along with the relevant basis in case-law, as to the legal consequences which, being based on EU law directly, should be applied in the case of a contract that is invalid as a result of having provided non-transparent information regarding the exchange rate risk.
- 28 In view of the seriousness of the legal questions raised in this request for a preliminary ruling, the Supreme Court asks the Court of Justice to consider the possibility of ruling on this case in the Grand Chamber.

WORKING DOCUMENT