Case C-80/21

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:

8 February 2021

Referring court:

Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie (Poland)

Date of the decision to refer:

27 October 2020

Applicants:

E.K.

S.K.

Defendant:

D.B.P.

Subject matter of the main proceedings

The applicants claim that the defendant should be ordered to pay them an amount of money, plus statutory default interest, in connection with amounts charged unjustifiably by way of interest payments relating to reimbursement of a loan on account of the use of unfair contractual terms contained in a mortgage agreement denominated in Swiss francs (CHF). As consumers, the applicants contest the contractual terms of the loan agreement, which were not negotiated with them individually, as regards the conversion of the amount of the loan and the loan instalments on the basis of foreign exchange rates set by the defendant bank.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law, in particular Articles 6(1) and 7(1) of Council Directive 93/13/EEC; Article 267 TFEU

Questions referred

1. Must Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as precluding a judicial interpretation of national legislation under which a court finds that a contractual term is unfair not in its entirety, but only in the part thereof which renders the term unfair, as a result of which that term remains partially effective?

2. Must Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as precluding a judicial interpretation of national legislation under which a court, having found that a contractual term is unfair, without which the contract could not continue in existence, may modify the remainder of the contract by interpreting the parties' declarations of intent, in order to prevent the contract, which is beneficial to the consumer, from being invalid?

Provisions of EU law invoked

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: twenty-first and twenty-fourth recitals; Articles 6(1) and 7(1) and (2)

Provisions of national law invoked

Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code) (*Dz. U.* No 16, item 93, as amended); 'the CC'.

A 'consumer' is a natural person who performs with a seller or supplier a legal transaction which is not directly connected to his trade or profession (Article 22^1).

1. A legal transaction which is contrary to the law or intended to circumvent the law shall be invalid, unless the relevant provision provides otherwise, in particular that the invalid terms of the legal transaction are to be substituted by relevant provisions of law. 2. A legal transaction which is *contra bonos mores* shall be invalid. 3. Where only part of the legal transaction is affected by the invalidity, the transaction shall remain in force as regards the remainder, except where circumstances show that without the terms affected by the invalidity the transaction would not be performed (Article 58).

1. A declaration of intent should be interpreted in accordance with the principles of social conduct and with established customs, taking into account the circumstances in which the intent was expressed. 2. Regard should be had to the contracts to determine the common intent of the parties and the specified objective of those contracts rather than focussing on the literal meaning of the terms used (Article 65).

1. Terms of a contract concluded with a consumer which have not been individually negotiated shall not be binding on the consumer if his rights and obligations are set forth in a way that is contrary to good practice and grossly infringes his interests (unlawful terms). This shall not apply to terms setting out the principal obligations 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 shall refer 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 negotiated individually shall lie with the person relying thereon (Article 385^1).

The compliance of contractual terms with good practice shall be assessed according to the state of affairs at the time when the contract was concluded, taking into account its content, the circumstances in which it was concluded and also other contracts connected with the contract which contains the provisions being assessed (Article 385^2).

Any person who, without legal grounds, obtains an economic advantage at the expense of another person shall be required to restore that advantage in kind and, where that is not possible, to return the value thereof (Article 405).

1. The provisions of the preceding articles shall apply in particular to an undue obligation. 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 legal transaction requiring performance of the obligation was invalid and did not become valid after the obligation was performed (Article 410).

Ustawa z dnia 29 sierpnia 1997 r. Prawo bankowe (Banking Law of 29 August 1997) (*Dz. U.* No 140, item 939, as amended): 'the Banking Law'.

Under a loan agreement, a bank shall undertake to make available to the borrower, for the period stipulated in the agreement, an amount of money intended for a specified purpose, and the borrower shall undertake to use that money on the terms laid down in the agreement, to repay the amount of the loan used, plus interest, on specific reimbursement dates and to pay a commission on the loan granted (Article 69(1) in the version in force on 8 July 2008).

The loan agreement must be drawn up in writing and specify, inter alia: (1) the parties to the agreement, (2) the amount and currency of the loan, (3) the purpose for which the loan was granted, (4) the terms and date of reimbursement of the loan, (5) the rate of interest payable on the loan and the conditions for changing it, (6) the security for reimbursement of the loan, (7) the scope of the bank's powers

as regards monitoring the use and reimbursement of the loan, (8) the dates on which and the manner in which the money is made available to the borrower, (9) the amount of the commission, if provided for in the agreement, (10) the conditions under which the agreement may be amended and terminated (Article 69(2) in the version in force on 8 July 2008).

Succinct presentation of the facts of the case

On 8 July 2008, the applicants concluded with the defendant, for a period of 360 months, a loan agreement denominated in Swiss francs (CHF) for the amount of CHF 103 260, which was disbursed in a single tranche no later than 8 October 2008. The interest rate on the loan was variable and the loan was reimbursed in equal instalments.

Under the 'Terms of the loan' accepted by the applicants, the amount of the loan was to be disbursed to the borrower either in złoty or in CHF or another currency. The bank was to apply the buying rate for CHF published in the 'Table of exchange rates for housing and consolidated loans in foreign currencies of Deutsche Bank PBC S.A.', in force on the date of disbursement of the loan or tranche thereof, in order to convert the amount of the loan into złoty. The loan was to be reimbursed by debiting the borrower's bank account by an amount in złoty equivalent to the current instalment in CHF of the debt and other amounts due to the bank in CHF, calculated by applying the selling rate for CHF published in the 'Table of exchange rates […] of Deutsche Bank PBC S.A.' in force at the bank.

By application lodged on 6 July 2018, the applicants sought an order requiring the defendant to pay them the amount of PLN 26 274.90, plus statutory default interest. In the grounds for the claim, they pointed out in particular that over the period from 17 July 2008 to 3 April 2012 the defendant bank had wrongly charged the applicants an amount of PLN 24 705.30 as a result of the use of the unfair contractual terms contained in the loan agreement. The defendant contended that the action should be dismissed, pointing out that the loan agreement is not invalid and contains no unfair contractual terms.

It is clear from the hearing of the applicants and witnesses that when they concluded the loan agreement the applicants were not engaged in any commercial activity and that in 2006 and 2008 they concluded four loan agreements with the defendant bank. During the loan procedure, the applicants communicated with the bank remotely and paid only one visit to a branch of the bank. Most of the loan documents (including the loan application and the loan agreement) were signed by the applicants' agents. The applicants did not negotiate any of the terms of the loan agreement with the bank. The applicants asked the bank to send them the draft agreement by email before signing it, but their requests went unanswered. During the proceedings, the applicants were informed of the consequences of a possible court declaration that the agreement was invalid. The applicants stated that they understood the legal and financial consequences of the loan agreement

being invalid, that they accepted these and consented to the agreement being judicially declared invalid.

Succinct statement of the reasons for the request

According to the prevailing position in Polish case-law, the contractual terms used by the defendant bank contain unfair terms, but they concern only some of the clauses relating to conversion and the fact that they are void does not render performance of the agreement impossible.

The proposed approaches set out in previous national case-law appear to raise doubts in the light of Article 6(1) of Directive 93/13. As the Court of Justice has explained, [1] *'Article 6(1) of [Council] Directive 93/13[/EC] preclud[es] legislation of a Member State … which allows a national court, in the case where it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to modify that contract by revising the content of that term. (…) It thus follows from the wording of Article 6(1) that the national courts are required only to exclude the application of an unfair contractual term in order that it does not produce binding effects with regard to the consumer, without being authorised to revise its content. The contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible. (…) If it were open to the national court to modify the content of the unfair clauses included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application of those unfair terms with regard to consumers (see, to that effect, the order in Pohotovosť, paragraph 41, and the case-law there cited), in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.'* Furthermore, in the judgment cited (paragraph 69) the Court of Justice referred explicitly to points 86 to 88 of the Opinion of Advocate General Verica Trstenjak of 14 February 2012, in which the above issue was explained in an even more direct and resolute manner. The Advocate General pointed to the reduction in the risks to the seller or supplier resulting from the use of unfair terms, since a modification consisting in amendment of the terms in accordance with the law is acceptable to the seller or supplier. The prospect of curing the grounds for invalidity of an agreement and clarity over risks for the seller or supplier could have the reverse effect to that desired by the legislature and creating the possibility of a subsequent modification of the agreement by the court would not only neutralise the deterrent effect of Article 6 of the directive,

[1] See judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10.

but would even also have the opposite effect. The above position has also been reflected in many other decisions of the Court of Justice. [2]

However, the Court of Justice has permitted one exception to the rule providing that unfair contractual terms are to be invalid, pointing out [3] that, in a situation in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been removed from it, Article 6(1) of Directive 93/13 does not preclude a rule of national law enabling the national court to substitute for it a supplementary provision of national law. That position was then supplemented by the statement that the possibility of substituting a supplementary provision of domestic law for an unfair contractual term is limited to situations in which the invalidation of that contractual term would require the court to annul the agreement in its entirety, thereby exposing the consumer to such consequences that he would be penalised as a result. [4] Furthermore, in its judgment of 14 June 2012 the Court of Justice held explicitly that Article 6(1) of Directive 2004/18 cannot be understood as allowing the national court to revise the content of an unfair term instead of merely setting aside its application to the consumer, but that provision must be interpreted as precluding legislation of a Member State which allows a national court to modify that contract by revising the content of that term. [5] Finally, explaining the meaning of Articles 6 and 7 of Directive 93/13, the Court of Justice held that they must be interpreted *'as precluding an accelerated repayment clause of a mortgage loan contract that has been found to be unfair from being maintained in part, with the elements which*

2 See orders of the Court of Justice of 16 November 2010, *Pohotovost'*, C-76/10, paragraph 41; of 11 June 2015, *Banco Bilbao Vizcaya Argentaria*, C-602/13, paragraphs 33 to 37; of 6 June 2016, *Ibercaja Banco*, C-613/15, paragraphs 36 to 38, and judgments of 30 April 2014, *Kásler*, C-26/13, paragraphs 77 and 79; of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13, C-487/13, paragraphs 28, 31 and 32; of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, paragraph 57; of 21 April 2016, *Radlinger*, C-377/14, paragraphs 97 to 100; of 21 December 2016, *Naranjo and Martinez*, C-154/15 and C-307/15, paragraphs 57 and 60; of 26 January 2017, *Banco Primus*, C-421/14, paragraphs 71 and 73; of 31 May 2018, *Sziber*, C-483/16, paragraph 32; of 7 August 2018, *Banco Santander and Cortés*, C-96/16 and C-94/17, paragraphs 73 and 75; of 13 September 2018, *Profi Credit Polska*, C-176/17, paragraph 41; of 14 March 2019, *Dunai*, C-118/17, paragraph 51; of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, paragraphs 53, 54, and 63, and of 7 November 2019, *NMBS*, C-349/18, C-350/18, C-351/18, paragraphs 66 to 69.

3 See judgment of 30 April 2014, *Kásler*, C-26/13, paragraph 85.

4 See order of the Court of Justice of 11 June 2015, *Banco Bilbao Vizcaya Argentaria*, C-602/13, paragraph 38, and judgments of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, paragraph 33; of 7 August 2018, *Banco Santander and Cortés*, C-96/16 and C-94/17, paragraph 74; of 14 March 2019, *Dunai*, C-118/17, paragraph 54, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, paragraphs 37 and 59.

5 See judgment of the Court of Justice of 14 June 2012, *Banco Español de Crédito*, C-618/10, paragraphs 71 and 73.

make it unfair removed, where the removal of those elements would be tantamount to revising the content of that clause by altering its substance.' [6]

Considerable reservations on the part of the referring court are also caused by the position that the provisions relating to disbursement and reimbursement of the loan are only partially unfair and that removal of the defective part thereof enables the remainder of the loan agreement to be performed unimpeded. The greatest doubt is caused by the position that an unfair term requiring the bank's consent, under which the disbursement and reimbursement of the loan may be effected in CHF with the bank's consent, must be deleted, as a result of which the disbursement and reimbursement of the loan may be made unconditionally in CHF. In that view, clauses concerning disbursement and reimbursement of loan, worded as follows in the contract: *'The amount of the loan will be disbursed to the borrower in złoty. […] With the consent of the bank the loan may be disbursed in CHF or another currency.' (Paragraph 2(2)). 'The loan will be reimbursed by debiting the borrower's bank account by an amount in złoty equivalent to the current instalment in CHF of the debt and other amounts due to the bank in CHF, calculated by applying the selling rate for CHF published in the 'Table of exchange rates […]' in force at the bank two working days before the date of each reimbursement of the amount of the loan. With the consent of the bank, the borrower may effect reimbursements of the loan also in CHF or other currency' (Paragraph 6(1)),* would, following deletion of the unfair terms, assume the following form: *'The loan may be disbursed in CHF'* (Paragraph 2(2)). *'The borrower may effect reimbursements of the loan in CHF'* (Paragraph 6(1)). It is difficult to avoid the conclusion that such a measure is anything other than precisely deletion of the unfair elements from an unfair contractual term, tantamount to a revision of the content of the term, which is contrary to Articles 6 and 7 of Directive 93/13. [7]

In addition, a consequence of such a measure is a reduction in what is known as the 'deterrent effect' in that it provides a seller or supplier who incorporates unfair terms into the contract with a guarantee that, in the worst-case scenario for him, the court will modify them, thus enabling further unimpeded performance of the contract, with no negative consequences for the seller or supplier. Consumer protection thus turns out to be fictitious in practice since in a typical situation a consumer will, on the basis of the wording of the agreement, be quite convinced that he is obliged to reimburse the loan only in PLN as he has not obtained consent to reimburse it in CHF, but it is only after the judgment of the court that he will discover that the opposite was true, thus exposing the consumer to an accusation of improper performance of the agreement and giving rise to the threat

6 See judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, paragraph 64.

7 See judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, paragraph 64.

that the bank will terminate the loan agreement and declare accelerated repayment of the entire amount of the loan.

Doubts are also raised by another position, according to which a declaration that certain contractual terms are unfair, and consequently not binding on the consumer, does not preclude modification of other clauses of the agreement in such a way that the agreement can finally be performed. By classifying the conversion clauses as unfair, the Sąd Najwyższy (Supreme Court) gave a negative assessment of the fact that the amount of the loan was expressed in CHF and not in PLN and found that the loan agreement had to be regarded as a złoty loan agreement. However, it is not known whether this specific conversion of a foreign currency loan into a złoty loan is the result of an interpretation of the declarations of intent by the parties to the agreement (Article 65(2) of the CC) or a declaration of the clause setting the amount of the loan as another unfair term (Article 385^1(1) of the CC). It would appear that the intention of the Sąd Najwyższy was not to find that the clause of the loan agreement setting the amount of the loan is unfair (Article 385^1(1) of the CC) since in that case modification or supplementation of the agreement in order to fill in the 'gap' in the remainder of the agreement would be directly contrary to Article 6(1) of Directive 93/13. Consequently, it would seem that, in the view of the Sąd Najwyższy, it should be concluded that the amount of the loan is set in PLN and not in CHF on the basis of an interpretation of the parties' declarations of intent (Article 65(2) of the CC). However, in this regard the question arises as to whether such an understanding of Article 65(2) of the CC is consistent with Articles 6 and 7 of Directive 93/13 and whether this kind of interpretation is intended to protect the interests of the consumer or can seek to protect the interests of a seller or supplier using unfair contractual terms. It is not possible to rule out a situation in which the court, after finding that certain contractual terms are unfair, finds that without those terms continued performance of the contract is impossible but, in order to prevent that contract being invalid, interprets other contractual terms in such a way as to allow the terms to be maintained. In a situation in which the consumer accepted the invalidity of the contract, the described action of the court would be contrary to Articles 6 and 7 of Directive 93/13 and the following principles arising therefrom: the principle that a court is prohibited from modifying a contract beyond declaring that the unfair terms are void, the principle of effective protection of consumer rights, and the obligation to take account of the deterrent effect of the application of Directive 93/13 with regard to sellers or suppliers.

Under an alternative approach, the court could find that the clauses concerning disbursement and reimbursement of the loan contained in Paragraphs 2(2) and 6(1) of the contractual terms constitute unfair contractual terms in their entirety, which are not binding on the parties (Article 385^1(1) of the CC), without which it is not possible for the agreement to continue in existence (Article 6(1) of Directive 93/13), and, in addition, since that agreement does not contain the necessary clauses concerning the disbursement and reimbursement of the loan and the manner in which the money is made available to the borrower (Article 69(2)(4) and (8) of the Banking Law), it is contrary to the law and consequently invalid

(Article 58(1) of the CC), with the result that all obligations performed pursuant to it – that is to say, disbursement of the loan and payment of the instalments – constitute undue performances (Article 410(2) of the CC), subject to repayment (Article 405 of the CC in conjunction with Article 410(1) thereof). Such an approach would appear possible in the present case, particularly having regard to the fact that the applicants agreed to the agreement being declared invalid. Nevertheless, since such an approach would be contrary to the methods for judicial interpretation of the national legislation set out above, it is necessary to refer this matter for a preliminary ruling. Consequently, the referring court considers that the Court of Justice should answer the question as to whether the application submitted should be regarded as correct.

The referring court proposes that the answers to the above questions should be as follows:

1. Articles 6(1) and 7(1) of Council Directive 93/13/EEC must be interpreted as precluding a judicial interpretation of national legislation under which a court does not find that a contractual term is unfair not in its entirety, but only in the part thereof which renders the term unfair, as a result of which that term remains partially effective.

2. Articles 6(1) and 7(1) of Council Directive 93/13/EEC must be interpreted as precluding a judicial interpretation of national legislation under which a court, having found that a contractual term is unfair, without which the contract could not be valid, may modify the remainder of the contract by interpreting the parties' declarations of intent, in order to prevent the contract, which is beneficial to the consumer, from being invalid.