

Case C-689/20**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:**

18 December 2020

Referring court:

Sofiyski rayonen sad (Bulgaria)

Date of the decision to refer:

18 December 2020

Applicant:

Banka DSK EAD

Defendant:

RP

Subject matter of the main proceedings

Action brought by a banking institution for payment of the balance of the principal – the term of which had been accelerated – and the accrued interest under a consumer credit agreement. The applicant claims monthly instalments, of varying amounts, not paid in the period from 24 October 2016 to 24 October 2017 and the principal amount – the term of which had been accelerated – remaining until the last repayment date (9 March 2019) in the total amount of 4 105.27 leva (BGN) (approximately EUR 2 100), remunerative interest under the contract for the period from 24 September 2016 to 9 November 2017 in the amount of 668.93 leva (BGN) (approximately EUR 340), and default interest at the statutory rate in the amount of 84.06 leva (BGN).

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

The amount of the borrowing rate set by the lending bank under the consumer credit agreement depends on whether the consumer has entered into a contract for tied payment services [‘ancillary services’] with that same bank. The referring

court takes the view that this gives rise to uncertainty in the application of a number of national rules on unfair competition to that contract. This raises several groups of questions, namely whether certain consumer lending practices relating to interest discounts provided when using other services of the bank which are tied to the granting of the consumer credit can be considered ‘unfair’ within the meaning of Directive 2005/29 concerning unfair commercial practices, to what extent those practices can be assessed as being unfair terms within the meaning of Directive 93/13 on unfair terms in consumer contracts, and whether the information requirements under Directive 2008/48 on credit agreements for consumers are fulfilled.

Questions referred for a preliminary ruling

The referring court hereby refers the following questions for a preliminary ruling:

‘1. Are Article 3(1) of Directive 93/13/EEC, read in conjunction with subparagraphs (e) and (f) of paragraph 1 of the annex to that directive, and Article 15(2) and (3) of the Charter of Fundamental Rights [of the European Union] to be interpreted as meaning that terms are contrary to the requirement of good faith and are to the disadvantage of the consumer if they substantially increase the consumer’s costs under a credit agreement in the event that the consumer does not transfer his or her salary to [an account with] the lending bank each month, taking into account that, under the terms of the agreement, that consumer is obliged to create a pledge on his or her claim to salary, irrespective of how and in which country he or she receives that salary?

2. If the first question is answered in the negative, is Article 3(1) of Directive 93/13/EEC, read in conjunction with subparagraphs (e) and (f) of paragraph 1 of the annex to that directive, to be interpreted as meaning that terms are contrary to the requirement of good faith and are to the disadvantage of the consumer if they oblige the consumer, in addition to transferring his or her salary to [an account with] the trader granting the credit, to effectively use other services of that trader?

3. If the second question is answered in the affirmative as a matter of principle, on what criteria should the national court base its assessment of unfairness? In particular, should it take account of the degree of the connection between the subject matter of the credit agreement and the ancillary services which the consumer is obliged to use, the number of services and the national rules on the restriction of tied sales?

4. Does the principle of interpreting national law in conformity with EU law, as established in paragraph 26 of the judgment in Case 14/83, *von Colson*, also apply to the interpretation of national legal provisions governing areas of law (in casu, rules on unfair competition) which have a legal subject matter that is different from but related to that of the act of EU law applied by the national court in the proceedings before it (in casu, Directive 93/13/EEC on unfair terms in consumer contracts)?

5. Are Article 7(2) of Directive 2005/29/EC, read in conjunction with Article 6(1)(d) thereof, and Article 10(2)(f) of Directive 2008/48/EC to be interpreted as prohibiting the indication of a lower borrowing rate in the main consumer credit agreement if the granting of the credit at that borrowing rate is made subject to conditions laid down in an annex to the agreement? Should such an assessment entail an examination of the wording of the conditions for the reduction of the borrowing rate, the loss of such a reduction and the means by which that reduction can be recovered?

6. Is Article 5(2)(b) of Directive 2005/29/EC to be interpreted as meaning that, when assessing the possibility that the economic behaviour of consumers might be materially altered, the market share of a bank granting consumer loans must be taken into account, having regard to the needs of the consumers who use such products?

7. Is Article 3(g) of Directive 2008/48/EC to be interpreted as meaning that the costs specified in contracts which relate to a consumer credit agreement and the performance of which results in the granting of a discount on the interest under the consumer credit agreement form part of the annual percentage rate of charge of the loan and must be included in the calculation thereof?

8. Is Article 3(g) of Directive 2008/48/EC, read in conjunction with Article 5 of Directive 93/13/EEC, to be interpreted as meaning that, in the event of non-performance of obligations under contracts relating to the credit agreement, which is tied to an increase in the borrowing rate of the loan, the annual percentage rate of charge of the loan must be calculated also on the basis of the increased borrowing rate in the event of non-performance?

9. Is Article 10(2)(g) of Directive 2008/48/EC to be interpreted as meaning that an incorrect indication of the annual percentage rate of charge in a credit agreement between a trader and a consumer borrower must be regarded as a failure to indicate the annual percentage rate of charge in the credit agreement and that the national court must apply the legal consequences provided for under domestic law for failure to indicate the annual percentage rate of charge in a consumer credit agreement?

10. Is Article 22(4) of Directive 2008/48/EC to be interpreted as meaning that a penalty provided for by the national legislature, in the form of nullity of the consumer credit agreement, whereby only the principal amount granted is to be repaid, is proportionate in situations where a consumer credit agreement does not contain an accurate indication of the annual percentage rate of charge?

EU legislation and case-law relied on

Article 15(2) and (3) of the Charter of Fundamental Rights of the European Union (OJ 2016 C 202, p. 389).

Article 3(1) and Article 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) and subparagraphs (e) and (f) of paragraph 1 of the annex thereto.

Article 7(2), Article 5(2)(b) and Article 6(1)(d) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

Article 3(g), Article 10(2)(f) and (g) and Article 22(4) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66).

Judgment of 10 April 1984, *von Colson*, 14/83, EU:C:1984:153, paragraph 26.

Judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraphs 43 and 44.

Judgment of 9 November 2016, *Home Credit Slovakia*, C-42/15, EU:C:2016:842, paragraph 78.

Judgment of 19 September 2018, *Bankia*, C-109/17, EU:C:2018:735, paragraphs 48 to 50.

Judgment of 20 September 2018, *EOS KSI Slovensko*, C-448/17, EU:C:2018:745.

Judgment of 10 September 2020, *A*, C-738/19, EU:C:2020:687, paragraph 37.

Provisions of national law relied on

The referring court cites a number of national provisions applicable to the case. The relevant parts of the most important provisions are worded as follows:

Zakon za zadalzheniata i dogovorite (Law on obligations and contracts)

Article 149. A pledge on a [...] claim [...] may be created to secure a claim.

Zakon za zashtita na potrebitelite (Law on consumer protection)

Article 68c. Unfair commercial practices shall be prohibited.

Article 68d. (1) [...]

(4) Misleading and aggressive commercial practices shall also be unfair [...].

Article 68e. (1) A commercial practice shall be misleading if [...] it is likely to deceive the average consumer, even if the information provided is factually correct [...].

(2) The circumstances under paragraph 1 shall include information on:

[...]

4. the price or the manner in which the price is calculated, or the existence of a specific price advantage;

[...]

Article 68f. (1) A commercial practice shall also be misleading if [...] it fails to provide material information [...].

(2) Any commercial practice in which a trader hides material information [...] by withholding it, or provides it [...] in an unclear manner, shall also be misleading.

Article 68h. A commercial practice shall be regarded as aggressive if [...] by harassment, coercion, including [...] undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct [...].

Article 68m. (1) The consumer shall be entitled to cancel a contract with a trader concluded as a result of an unfair commercial practice, and to claim compensation under the general provisions [...].

Article 143. An unfair term in a contract concluded with a consumer is any agreement harming the consumer which is contrary to the requirement of good faith and leads to a significant imbalance in the rights and obligations of the trader or supplier and the consumer, by:

[...]

9. binding the consumer to terms with which he or she had no opportunity of becoming acquainted before the conclusion of the contract;

12. [...] entitling the trader or supplier to increase the price without in that case giving the consumer the right to withdraw from the contract if the final price is considerably higher in relation to the price agreed when the contract was concluded;

[...]

18. laying down other similar conditions.'

Zakon za potrebitelskia kredit (Law on consumer credit)

Article 5. (1) In good time before the consumer is bound by [...] any consumer credit agreement, the creditor [...] shall provide the consumer [...] with the information needed to compare the different offers and to take an informed decision on whether to conclude a credit agreement.

(2) The information pursuant to paragraph 1 shall be provided by means of a Standard European Information form pursuant to Annex No 2.

[...]

(4) The information pursuant to paragraphs 1 and 2 [...] as well as the general terms and conditions shall be provided to the consumer free of charge, on paper or on another durable medium, in a clear and comprehensible manner [...].

[...]

(7) In the case of a credit agreement with a variable borrowing rate for which a reference rate is used, the creditor [...] shall provide the consumer with information regarding the name of the reference rate and its administrator, and regarding the implications of the reference rate for the consumer, in a separate document to be annexed to the Standard European Information [...] form. Any additional information which the creditor [...] provides to the consumer shall be given in a separate document which shall be annexed to the form pursuant to paragraph 2.

[...]

Article 10a. [...]

(4) The nature and amount of charges and/or commissions and the activity for which they are charged must be clearly and precisely specified in the consumer credit agreement.

Article 11. (1) The consumer credit agreement shall be drawn up in plain language and shall contain:

[...]

9. the borrowing rate for the credit, the conditions governing the application of that rate and any index or reference interest rate linked to the initial borrowing rate, as well as the periods, conditions and procedures for changing the borrowing rate; if different borrowing rates apply in different circumstances, the abovementioned information shall be provided in respect of all the applicable borrowing rates;

9a. the method for calculating the reference interest rate pursuant to Article 33a;

10. the annual percentage rate of charge of the loan and the total sum owed by the consumer [...];

11. the conditions for the repayment of the credit by the consumer, including an amortisation table containing information on [...] the different outstanding amounts owed at different borrowing rates for the purposes of repayment;

12. information about the consumer's right, where capital amortisation of a credit agreement with a fixed duration is involved, to receive [...] an amortisation table containing the payments made and to be made; [...]

14. all costs for opening and maintaining one or more bank accounts for servicing (drawdowns and payment transactions) the credit, unless the opening of a bank account is voluntary [...];

15. the interest rate applicable in the case of late payments as calculated at the time of conclusion of the credit agreement and the arrangements for its adjustment and any costs payable in the event of non-performance of the contract;

16. a warning regarding the consequences for the consumer in the case of late payments;

[...]

18. where applicable, the sureties which the consumer is obliged to provide;

[...]

Article 19. (1) The annual percentage rate of charge of the loan shall represent the current and future total cost of the credit to the consumer (interest, other direct or indirect costs, commissions, fees [...]), expressed as an annual percentage of the total amount of the loan granted.

(2) The annual percentage rate of charge of the loan shall be calculated using the formula set out in Annex No 1, taking into account the general provisions and additional assumptions set out therein.

(3) For the purpose of calculating the annual percentage rate of charge of the loan, the following costs shall not be taken into account:

1. costs payable by the consumer for non-performance of his or her obligations under the credit agreement;

[...]

3. costs of maintaining an account in connection with the consumer credit agreement, [...], other costs relating to payment transactions, where the opening of the account is not compulsory and the costs associated with the account are clearly and separately set out in the credit agreement or in any other agreement concluded with the consumer.

[...]

Article 21. (1) Any term in a consumer credit agreement which has the object or effect of circumventing the requirements of this Law shall be void.

[...]

Article 22. If the requirements of [...] Article 11(1)(7) to (12) and (20) and Article 11(2) [...] are not fulfilled, the consumer credit agreement shall be null and void.

Article 23. If a consumer credit agreement has been declared null and void, the consumer shall repay only the net amount of the credit and shall not owe any interest or other costs for the credit.

Article 24. Articles 143 to 148 of the Zakon za zashtita na potrebitelite (Law on consumer protection) shall also apply to consumer credit agreements.

Article 33. (1) In the event of default by the consumer, the creditor shall be entitled to charge interest only on the amount not paid in due time and only for the duration of the default.

(2) If the consumer defaults on payments owed by him or her for the credit, the compensation for the default may not exceed the statutory rate of interest.

[...]

Paragraph 1 For the purposes of this Law:

‘total cost of the credit to the consumer’ means all the costs, including interest, commissions, taxes, remuneration for credit intermediaries and any other kind of fees which are directly related to the credit agreement, are known to the creditor and which the consumer is required to pay [...].

Zakon za zashtita na konkurentsata (Law on the protection of competition)

Article 15. (1) All [...] concerted practices between two or more undertakings which have as their object or effect the prevention, restriction or distortion of competition within the relevant market shall be prohibited, such as:

[...]

5. making the conclusion of contracts subject to acceptance by the other party of supplementary obligations or the conclusion of supplementary contracts which, by their nature or according to commercial usage, have no connection with the subject of the main contract or the performance thereof.

(2) Any agreements and decisions referred to in paragraph 1 shall be automatically void.

[...]

(5) The existence of unfair terms in a contract concluded with a consumer shall not render that contract null and void if it is capable of continuing in existence without the unfair terms.

Article 16. (1) The prohibition under Article 15(1) shall not apply to agreements, decisions and concerted practices that have a negligible effect on competition.

(2) The effect shall be negligible if the combined market share of the undertakings participating in the market for the goods or services which are the subject of the agreement, decision or concerted practice does not exceed the following thresholds:

1. 10% of the relevant market, if the undertakings concerned are in competition with each other;

[...].

Article 36. [...]

(2) It shall be prohibited to offer or give, in addition to the goods or services sold, a gift free of charge or ostensibly at the price of other goods or services; this shall not apply to: promotional gifts of negligible value [...].

[...].

Article 37a. (1) Any act or omission by an undertaking in a stronger bargaining position which is contrary to the requirement of good faith in commercial practice and harms or is likely to harm the interests of the party in the weaker bargaining position and of consumers shall be prohibited. Acts or omissions [...] such as the imposition of unreasonably onerous [...] conditions [...] shall be contrary to the requirement of good faith.

(2) The existence of a stronger bargaining position shall be assessed taking into account the structural characteristics of the relevant market and the specific legal relationship between the undertakings concerned, taking into consideration their mutual dependence [...].

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 9 March 2016, the parties to the main proceedings concluded a consumer credit agreement. Based on that agreement, the defendant was granted a sum of 5 000 leva (BGN) (approximately EUR 2 550) for a period of 36 months. The loan had a variable borrowing rate equal to the sum of the six-month EURIBOR and a fixed margin of 7.606%.
- 2 The effective borrowing rate was 8.2% on the date on which the contract was concluded. The loan was to be repaid in 36 monthly instalments of 159.24 leva (BGN) (approximately EUR 82).

- 3 Article 8 of the credit agreement provides that the initial borrowing rate specified in the agreement is promotional and applies if the defendant fulfils the conditions set out in Annex No 2 to the agreement. If those conditions are not met, the fixed margin, which forms part of the borrowing rate for the credit, increases from the initial 7.606% to 14.356% (that is to say, by 6.75%, thus almost doubling the effective borrowing rate).
- 4 In addition to the credit agreement, an agreement on the pledge of the defendant's claim to his salary was also concluded, in which the defendant declared that he was employed by a Bulgarian trading company on the basis of a fixed-term employment contract.
- 5 Annex No 2 to the contract of 1 March 2016, signed also by the defendant, specifies various types of benefits attached to consumer loans.
- 6 Pursuant to point 1.1.1. of that annex, the conditions under which the borrower can avail himself or herself of the promotional borrowing rate of 8.20% per annum under a consumer credit agreement apply if the borrower:
 - (a) transfers his or her salary to an account opened with Banka DSK EAD;
 - (b) creates a pledge in favour of Banka DSK EAD on his or her claim to salary;
 - (c) creates a pledge in favour of Banka DSK EAD on all his or her receivables in accounts with the bank;
 - (d) submits a request for the issuance of a debit card by Banka DSK EAD;
 - (e) participates in the online banking system 'DSK Direkt' of Banka DSK EAD;
 - (f) receives at least two types of short text message (SMS) notifications; and
 - (g) pays at least one utility bill (for electricity, telephone, water supply, etc.) cashless by direct debit from Banka DSK EAD each month or pays a minimum instalment of 10 leva (BGN) into the supplementary voluntary pension fund 'DSK Rodina' each month.
- 7 Pursuant to point 1.2.1. of Annex No 2, the borrowing rate will be 8.70% per annum if the borrower fulfils only the conditions set out in points (a) to (c) above. Pursuant to point 9.1.2. of Annex No 2, if the services under points (d) to (g) ('ancillary services') are not used for two consecutive months, but the borrower does fulfil the conditions under points (a) to (c), the borrowing rate of the loan will be increased by 0.5% with effect from the next monthly instalment, effectively becoming 8.70% per annum again.
- 8 Point 9.1.1. of Annex No 2 provides that if, for two consecutive months, the borrower's salary is not paid into his or her account with Banka DSK EAD (that is to say, the conditions under points (a) and (b) above are not met), but the loan

repayment instalment is paid into the account, the loan will bear interest at the rate of 11.95% with effect from the next instalment. In the event of late payment of two or more instalments, the interest benefits set out in Annex No 2 will be lost in their entirety pursuant to point 9.1.3.

- 9 Point 9.1.2 provides that if the loan is repaid regularly, the benefits can 'be restored' if the borrower once again fulfils the conditions for their use and issues a statement to that effect to Banka DSK EAD. It is not specified whether and under what conditions such restoration is mandatory.
- 10 According to an accountant's expert opinion obtained in the proceedings, the defendant stopped paying the loan instalments on 24 October 2016. The expert states that, from that date, the applicant in the main proceedings charged interest on the unpaid balance of the principal at the rate of 14.687% per annum until 24 December 2016, 14.682% per annum until 24 June 2017 and 14.624% per annum until 9 November 2017. After that date, the term of the loan was accelerated and no remunerative interest was charged. Based on the information provided by the bank, the outstanding debt from the loan consists of the principal amount of 4 105.27 leva (BGN), remunerative interest of 668.93 leva (BGN) and default interest of 84.07 leva (BGN).
- 11 It is common knowledge that many credit institutions in Bulgaria offer lower borrowing rates to consumers who transfer their salary into an account held with the lending bank. There are also loans which are advertised as being more attractive compared with market conditions, which do not require a 'salary transfer' to the lending bank. It can be concluded from this that the practice of obliging borrowers to have their salary paid into an account with the lending bank is widespread in the banking market in Bulgaria.
- 12 The applicant, Banka DSK EAD, is one of the largest credit institutions operating on the market and, according to the media, its market share of approximately 10% alternates between first and second place. In the present case, the referring court states that it did not collect information on the applicant's market share because it is not clear whether that fact is relevant to the dispute.

Brief summary of the grounds for the request

- 13 The referring court takes the view that the terms in Annex No 2 to the consumer credit agreement at issue pose a problem for the application of the law in the main proceedings.

Unfairness of the contractual terms

- 14 In the first place, the referring court questions whether the terms regarding the compulsory use of ancillary services are compatible with the requirement of good faith under Article 3 of Directive 93/13, given the fact that the credit agreement

imposes on the consumer an onerous obligation, which at the same time confers a competitive advantage on the creditor.

- 15 In particular, the referring court seeks an interpretation of the term ‘to the detriment of the consumer’ used in Article 3 of Directive 93/13. It is uncertain whether the consumer’s obligation to pay his or her salary into an account with the bank with which he or she has taken out a loan is in itself harmful to the consumer, and whether it is in all cases or only in certain cases that the condition of using certain ancillary services (some of which are not free of charge) in order to obtain a reduction in the applicable borrowing rate is harmful to the consumer.
- 16 Moreover, the referring court is uncertain whether the obligation to transfer salary into an account with the bank constitutes a condition that is prohibited under EU law. The debtor in the dispute is a third-country national who works for a Bulgarian employer but could change his place of habitual residence. In that connection, the obligation to transfer his salary into a Bulgarian account could constitute an obstacle to the exercise of his right under Article 15(3) of the Charter of Fundamental Rights, read in conjunction with Article 15(1) thereof, namely the right to take up employment in another Member State of the European Union. In that regard, the referring court takes the view that it should be noted that national law also provides for another means of securing the bank’s claim, namely the creation of a pledge on the salary, as contractually provided for in the agreement in the main proceedings.
- 17 Next, if the provisions of Directive 93/13 do in principle allow the bank to require the consumer to transfer his or her salary to an account held with it, the question arises whether such an obligation is unfair in view of the requirement to use ancillary services.
- 18 In order to answer that question, the referring court needs guidance as to what criteria should be applied when assessing the unfairness of the contractual terms on ancillary services. It notes that EU law does not contain any provisions specifically prohibiting or restricting the ability of a trader to impose tied sales on a consumer (Renda, A. [coord.], *Tying and Other Potentially Unfair Commercial Practices in the Retail Financial Service Sector*. Final Report. 2009, Centre for European Policy Studies, p. 147-149, retrievable at https://ec.europa.eu/finance/consultations/2010/tying/docs/report_en.pdf). Such provisions exist only for transactions between traders – see Article 101(1)(e) TFEU.
- 19 However, tied sales are prohibited under Bulgarian law, specifically under Article 36 of the *Zakon za zashtita na konkurentsia* (Law on the protection of competition; ‘the ZZK’), and generally under Article 29 of the ZZK. In the light of the guidance given by the Court of Justice of the European Union, in accordance with which national provisions on consumer protection must also be taken into account in the application of Directive 93/13 (judgment in Case C-738/19, A, paragraph 37 and the case-law cited), the Court of Justice should

clarify whether national rules prohibiting unfair competition must also be taken into account when assessing the unfairness of a term in a contract with a consumer. The referring court takes the view that national competition standards should be taken into account when assessing the unfairness of a term.

Interpretation in conformity with EU law

- 20 The referring court also raises the question as to how national standards concerning the prohibition of unfair competition must be interpreted in connection with the rules of Directive 93/13.
- 21 The rules on the prohibition of tied sales under the Bulgarian ZZK are of a general nature, but there is no rule providing for any specific conditions under which such a prohibition is applicable. The Bulgarian legislature has regulated the prohibition of attracting customers unfairly, including by coercing them to conclude tied transactions, in Article 36(1) of the ZZK. Pursuant to Article 29 of the ZZK, the attracting of customers through actions that are unfair in relation to other undertakings is also prohibited. The main purpose of those prohibitions is to protect the other traders who are in direct competition with the infringing trader. However, in so far as unfair competition practices are prohibited, and in the light of the case-law cited above, the referring court nevertheless considers that it should also take that prohibition into account when assessing the unfairness of a contract with a consumer.
- 22 In particular, in view of the broad possibilities of interpreting Article 29 and Article 36(1) of the ZZK, the referring court also raises the question of whether, when applying the prohibition of unfair competition existing under national law, that prohibition must be interpreted not only in the context of the unfairness rules relating to consumer contracts under Directive 93/13, but also in the context of the requirements under Article 38 of the Charter of Fundamental Rights. Were the national court to be bound by such an interpretation, it would have to interpret the prohibitions existing under its domestic competition law and take into account not only the interests of competitors, but also those of consumers.
- 23 Furthermore, the referring court notes that, in accordance with paragraph 26 of the judgment in Case 14/83, *von Colson*, the obligation to interpret national law in conformity with EU law exists only in relation to legislation which the national court applies to the case directly and that it does not apply to legislation having a different subject matter. In the present case, the referring court must assess whether the terms of a contract concluded with a consumer are unfair under Article 143 of the *Zakon za zashtita na potrebitelite* (Law on consumer protection), which transposes the requirements of Directive 93/13 into national law. At the same time, those requirements must be examined in the light of general standards of national law which were not adopted directly in implementation of that act of EU law, namely in the light of the rules on unfair competition. However, in so far as those rules serve as a criterion for the

implementation of consumer protection, the referring court is of the view that, in the light of the fundamental need for consumer protection under Article [38] of the Charter of Fundamental Rights, national competition standards must be interpreted in connection with consumer interests. Last but not least, it points out that the objective of protecting competition is to create better conditions precisely for the end consumer.

Unfair commercial practices

- 24 In accordance with the case-law of the Court of Justice of the European Union (paragraphs 43 and 44 of the judgment in Case C-453/10, *Pereničová and Perenič*, and paragraphs 48 to 50 of the judgment in Case C-109/17, *Bankia*), the inclusion of a contractual term as a result of the application of an unfair commercial practice within the meaning of Directive 2005/29 constitutes one element in the assessment of unfairness under Article 4 of Directive 93/13.
- 25 The referring court must therefore determine whether the wording of the contractual terms in the credit agreement at issue constitutes a misleading commercial practice under Article 7(2) of Directive 2005/29. In particular, it is necessary to answer the question as to whether it always constitutes an unfair commercial practice if a consumer credit agreement indicates an annual borrowing rate calculated after the deduction of all interest rate discounts that apply if the required ancillary services are used, and does not indicate the borrowing rate which applies in principle, without any interest rate discounts, and only then specify in greater detail the borrowing rate that applies if those interest rate discounts apply. It is also necessary to clarify whether, when assessing whether a commercial practice is unfair, the court must also take into account the wording of the conditions for the use and the loss of the interest rate discounts as well as the consumer's ability to navigate the system of terms structured in such a way.
- 26 That question must be answered also in the light of whether such an indication of the borrowing rate is permissible under the provisions of Directive 2008/48, in particular Article 10 thereof.
- 27 Next, the referring court raises the question as to whether, when assessing whether a commercial practice is likely to alter the consumer's behaviour when choosing a supplier of goods or services for the purposes of Article 5(2)(b) of Directive 2005/29, the national court must take into account also the market share of the trader applying the commercial practice in question. The reason for this is that in the present case a consumer credit agreement has been concluded, which in principle binds a person for a long period of time and is capable of materially distorting his market behaviour. A borrower is drawn to (better known) credit institutions that are closer to his or her workplace or home. This means that he or she would be more exposed to offers from market participants with a large market share. The referring court must therefore determine whether, when assessing whether a commercial practice is of such a nature as to be misleading or put

pressure on the consumer, it should also take into account the trader's position on the relevant market for goods and services.

- 28 Last but not least, the referring court states that the present case concerns a widespread market practice used by banks, that is to say, by [legal] persons which acquire money by means of deposits from the public. Larger banks would therefore be able to secure more borrowers and bind them to less favourable terms. The question arises as to whether, in the absence of a dominant position on the market (in the present case, such a position has been neither established nor argued with respect to the applicant), market share could be relevant in assessing whether a commercial practice is unfair.

Method of calculating the annual percentage rate of charge and consequences in the event of an incorrect calculation

- 29 The questions referred in Case C-229/20, *K*, concerning the way in which the annual percentage rate of charge is calculated and indicated in a consumer credit agreement, also arise in the present case, since, pursuant to Article 22 of the *Zakon za potrobitelskia kredit* (Law on consumer credit), read in conjunction with Article 11(1)(10) thereof, a consumer credit agreement which does not indicate the annual percentage rate of charge is null and void and, in such a case, the consumer is obliged to repay only the amount actually received by him or her, without interest or costs.
- 30 In that connection, clarification is required as to whether an inaccurate indication of the amount of the annual percentage rate of charge in a consumer credit agreement should be equated with a failure to indicate that rate. This appears to follow from the requirement that terms in consumer contracts must be formulated clearly and any inaccuracies must be interpreted to the detriment of the trader – Article 147 of the *Zakon za zashtita na potrobitelite* (Law on consumer protection), read in conjunction with Article 24 of the *Zakon za potrobitelskia kredit* (Law on consumer credit). Those provisions transpose into national law Article 5 of Directive 93/13 and Article 23 of Directive 2008/48, respectively.
- 31 In its judgment in Case C-448/17, *EOS KSI Slovensko*, the Court of Justice held that an unclearly worded term concerning the amount of the annual percentage rate of charge does not satisfy the requirement of Article 4(2) of Directive 93/13 and that the national court must therefore disapply such terms. In the present case, the question arises as to whether that principle also applies where the trader indicates the amount of the annual percentage rate of charge in an imprecise manner (if it is indeed indicated in such a manner) in order to mislead consumers and influence their freedom of choice.
- 32 In order to be able to answer the question as to whether an inaccurate indication of the amount of the annual percentage rate of charge should be equated with a failure to indicate that rate, it is necessary, in view of the facts of the dispute, to answer a further question, namely: should costs such as those incurred for the

package of ancillary services agreed in the present proceedings be included in the formula for calculating the annual percentage rate of charge under a consumer credit agreement? The determination of the annual percentage rate of charge is fully harmonised by Article 3(g) of Directive 2008/48 and the Court of Justice must therefore clarify whether the calculation of the annual percentage rate of charge must include fees for ancillary services such as those agreed in the contract between the parties.

- 33 An important factor in that connection is, in particular, the question of whether the abovementioned ancillary services are ‘compulsory in order to obtain the credit’ or whether the ‘granting of the credit results from the application’ of those ancillary services. In answering that question, the Court of Justice should consider that, although in the present case there has been no objection that the defendant had been deceived in connection with the obtaining of his consent to the provision of ancillary services, the wording of the terms relating to interest rate discounts requires familiarisation with numerous different terms in Annex No 2 to the contract. It should also be noted that the contract can be concluded without the ancillary services but on substantially different interest rate terms, and that some of those services (for example, the payment of bills for municipal utility services using an online banking application) are not directly related to the subject matter of the credit agreement.
- 34 This way of calculating the borrowing rate raises several more questions. First of all, the question arises as to whether the price for the ancillary services that are not part of the credit agreement must be assessed when determining the annual percentage rate of charge of the loan. If this is not the case, the question arises as to whether the increased interest amount that would be due if the ancillary services were not used would not have to be considered as part of the cost of the loan (and, accordingly, as part of the formula for determining the annual percentage rate of charge).
- 35 In connection with the above two questions, namely whether the price of the ancillary services forms part of the formula for calculating the annual percentage rate of charge of the loan and whether any inaccurate calculation of that rate must be equated with a complete failure to indicate it in the contract, it is also necessary to assess whether, in the present case, national law provides for an appropriate penalty for the incorrect indication of that rate. In paragraph [72] of the judgment in Case C-42/15, *Home Credit Slovakia*, the Court of Justice held that national legislation providing for the nullity of a consumer credit agreement on account of minor inaccuracies in its content may constitute a disproportionate penalty for the purposes of Article [23] of Directive 2008/48. In the present case, the referring court questions whether an inaccurate indication of the borrowing rate in the credit agreement must result in the consumer being released from his or her contractual obligation to pay interest and fees.