Anonymised version

Case C-279/24

Request for a preliminary ruling

Date lodged:

22 April 2024

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

8 April 2024

Applicant:

AY

Defendant:

Liechtensteinische Landesbank (Österreich) AG

The Oberster Gerichtshof (Supreme Court, Austria), sitting as the court of appeal on points of law [...], in the case brought by the appellant AY [...], against the respondent, Liechtensteinische Landesbank (Österreich) AG, […] Vienna 1, […], regarding EUR 140 271.10 […], in proceedings concerning the extraordinary appeal on a point of law brought by the appellant against the judgment of the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), sitting as the court of appeal of 16 June 2023, GZ 3 R 10/20g-70, which upheld the judgment of the Handelsgericht Wien (Commercial Court, Vienna, Austria) of 18 November 2022, GZ 12 Cg 12/20i-62, has made the following

Order:

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Must the legal consequences of orders for the acquisition of financial products placed by a consumer domiciled in State A (here Italy) on the basis of an

ongoing business relationship with a bank domiciled in State B (here Austria) be assessed in accordance with the law resulting from Article 6 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation) if the conditions for the application of Article 6 of the Rome I Regulation were met when the individual orders were placed but not when the business relationship was entered into and the parties had at that time chosen the law of State B for the entire business relationship in accordance with Article 3 of the Rome I Regulation?

2. If question 1 is answered in the affirmative:

Is the exception in Article 6(4)(a) of the Rome I Regulation applicable where a bank opens accounts for a consumer domiciled in another Member State on the basis of a contract and subsequently acquires financial products for the consumer on the basis of the consumer's orders that are attributed to the accounts, where the consumer may (also) place the orders by means of remote communication?

3. If question 1 is answered in the affirmative and question 2 is answered in the negative: Must a choice of law made before the conditions for the application of Article 6 of the Rome I Regulation were met be regarded as unfair within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [...] after those conditions were met if the contract does not refer to the legal consequences of Article 6(2) of the Rome I Regulation?

II. [...] [Stay of proceedings]

Grounds:

I. Facts:

1 Due to his professional experience, the applicant, who lives in Italy, has a good understanding of financial transactions and the capital and financial markets. In the present context, however, he did not act for a purpose attributable to his professional or commercial activities. In 2013, he opened a securities deposit and current account with the defendant bank, whose registered office is in Austria. To do so, he attended a branch of the defendant in Austria. The contact had been arranged by a person from his professional environment. He went on to submit the account application and 'customer profiles' requested by the bank from Italy.

2 As a private customer, the applicant chose the form of transaction known as 'execution only' (without receiving any advice). The 'account application' signed by him contained the following provision:

> *'I (We) hereby acknowledge and agree to the "General Terms and Conditions for Banking Transactions" as well as the "Special Terms and Conditions for On-Exchange and Off-Exchange Options and Futures Transactions" and the "Overview of Interest and Conditions", all as*

amended from time to time, as the basis of our present and future business relationship.'

3 The 'General Terms and Conditions for Banking Transactions', which were issued to him beforehand, contained the following provision:

'All legal relationships between the customer and the credit institution shall be governed by Austrian law.'

4 In the course of the business relationship, the applicant's customer profile was updated several times. Throughout the relationship, he specifically opted for 'execution only' transactions in order to be able to carry out his investments freely according to his own intentions without receiving prior advice from the defendant.

5 In September 2015 and June 2016, the applicant acquired unsecured exchange traded notes (ETNs) via the defendant, which he sold at a profit in July 2016. Again he did not seek advice on those acquisitions but decided to make the acquisition solely on the basis of information contained in a newspaper article.

6 In October 2016, an event organised by an Italian company took place in Padua, attended by institutional and private investors, including the applicant. The managing director of the company introduced one fund, among others, whose portfolio included the above-mentioned ETNs. An employee of the defendant bank was also present at that event. He did not present the above-mentioned fund or any other financial products, but merely introduced the defendant.

7 Between October 2017 and February 2018, the applicant acquired further shares in the ETN on his own initiative via the defendant. The applicant placed orders with the defendant either by telephone or by email. The event of October 2016 had no bearing on his acquisition decisions. Furthermore, in October 2017, the applicant placed a written order to acquire shares in the fund that had been introduced at the event via the defendant. The customer information document regarding that fund was available on the defendant's website.

8 The defendant bank did not provide any advice after 2017 (either); the transactions in question were still 'execution only' – as expressly requested by the applicant. There is no dispute between the parties about the fact that the acquisition was implemented by way of a 'commission-based transaction'. The referring court understands that to mean that the bank purchased the financial products for the account of the applicant and credited his securities account held with the bank.

II. Forms of order sought and arguments of the parties:

9 The **applicant** claims to have suffered a financial loss as a result of the purchase of ETNs and fund units from 2017 onwards and seeks damages of EUR 140 271.10 [...] from the defendant due to errors in the provision of advice

and information. The applicant argues that the defendant had directed its activities to Italy. The choice of Austrian law was inadmissible, 'especially since the Italian provisions of the Codice Civile and the CDC (Article 67[18] of the Italian Law on Consumer Protection) are much more favourable than the Austrian provisions in force for that purpose'. The defendant had breached obligations to inform 'within the meaning of the TUF decree-law 58/98 (Italian Consolidated Financial Law) Paragraphs 21 and 23'. In the event of a breach of pre-contractual obligations and obligations to inform under those provisions, the contract was null and void.

In summary, the **defendant** argued that Austrian law was applicable due to the valid choice of law. The applicant had not availed himself of any investment advice, but had chosen for the transaction to be implemented as an 'execution only' transaction. It had only carried out the individual transactions as instructed. The investment had been 'appropriate' for the applicant. As a consequence, the defendant was not liable under Austrian law.

III. Previous proceedings:

10 The **lower courts** dismissed the forms of order sought. They assumed that Austrian law was applicable based on the agreement on the choice of law. The applicant's securities account and clearing account with the defendant were held in Austria. As an 'execution only' client in Italy he did not receive any investment advice or other services from the defendant. The choice of law made was 'also admissible against the background of Article 6(4)(a) of the Rome I Regulation'. With regard to an 'execution only' client, under Austrian law the defendant was only obliged to carry out an 'appropriateness test' pursuant to Paragraph 45 of the Wertpapieraufsichtsgesetz 2007 (Austrian Securities Supervision Act 2007, 'the WAG 2007'; now Paragraph 57 of the Wertpapieraufsichtsgesetz 2018 [WAG 2018]) – and not a suitability test pursuant to Paragraph 44 of the WAG 2007 (now Paragraph 56 of the WAG 2018) – with regard to the applicant's knowledge and experience of the products and to gather the necessary information. The defendant had not breached any obligations in that regard and was therefore not liable for the applicant's losses.

11 The **Oberster Gerichtshof** (Supreme Court, Austria) is called upon to decide the appeal on a point of law brought by the applicant. In it, he argues in summary that, based on the defendant's introduction at the event in Padua in October 2016, the defendant actively marketed itself in Italy and thus directed its activities to the Italian market in accordance with Article 6(1)(b) of the Rome I Regulation. After that event, he had ordered further shares in the ETN and in the fund; the applicant only asserted claims for compensation from the acquisitions made after the event. The choice-of-law clause contained in the General Terms and Conditions was unfair in the case of consumer transactions due to a lack of transparency and therefore not applicable if – as in the present case – the consumer has not been informed that he could invoke the protection of the mandatory provisions of the law applicable in the State of his habitual residence in accordance with

Article 6(2) of the Rome I Regulation. The Austrian legal provisions were significantly less favourable to him than those under Italian law. The exception under Article 6(4)(a) of the Rome I Regulation was not applicable because the defendant operated an English-language website which allowed him, as an Italian consumer, to view all account transactions, print out account statements and obtain information, opinions and analyses. That investment service was provided online in Italy – his State of residence – without requiring him to be physically present in Austria. Thus, according to Article 6(1) of the Rome I Regulation, Italian law was applicable to the financial services contracts concluded with him as a consumer.

IV. Legal bases:

12 Recitals 7 and 25 of the Rome I Regulation read as follows:

> *'(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I") and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II").*
>
> *[...]*
>
> *(25) Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. [...]'*

13 The relevant provisions of the Rome I Regulation read as follows:

> *'Article 3*
>
> *Freedom of choice*
>
> *(1) A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract. [...]*
>
> *Article 6*
>
> *Consumer contracts*
>
> *(1) Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession ("the consumer") with another person acting in the*

exercise of his trade or profession (“the professional”) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.

(2) Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

[...]

(4) Paragraphs 1 and 2 shall not apply to:

(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;

[...]’

14 Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [...] provides:

‘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.’

15 Paragraph 879(3) of the Allgemeines Bürgerliches Gesetzbuch (the Austrian Civil Code, ‘the ABGB’) states:

‘A term in the general terms and conditions of a contract or in standard form contracts which does not govern a fundamental obligation of one of the parties shall be regarded as void if, in the light of all of the circumstances, it is seriously detrimental to one of the parties.’

V. Questions referred for a preliminary ruling:

16 The applicant acted as a consumer both when establishing the business relationship and when placing the disputed orders for the acquisition of financial products. However, as will be explained below, the requirements of Article 6 of the Rome I Regulation had not yet been met when the business relationship was established because the defendant had not yet carried out any activities in Italy or directed them there at the time in question. In the opinion of the Supreme Court, that gives rise to three questions regarding the interpretation of EU law, the answers to which may lead to different results regarding the applicable law.

1. Question 1:

17 1.1. First of all, it must be clarified whether the fulfilment of the conditions of Article 6(1) of the Rome I Regulation in the course of a previously established permanent business relationship means that the legal consequences of that provision apply to subsequent transactions. If the answer is no, Austrian law would be applicable in the case at hand due to the choice of law made at the beginning of the business relationship.

18 1.2. At the beginning of the business relationship, the parties had validly chosen Austrian law.

19 The effectiveness of the choice of law was to be assessed under Austrian law pursuant to Article 3(5) in conjunction with Article 10(1) of the Rome I Regulation and thus, inter alia, pursuant to Paragraph 879(3) ABGB. That provision implements Article 3(1) of Directive 93/13/EEC and must therefore be interpreted in conformity with the Directive. However, Article 3(1) of Directive 93/13/EEC and thus Paragraph 879(3) of the ABGB did not preclude the validity of the choice of law for the following reasons:

20 While it is true that a term in a professional's general terms and conditions which has not been individually negotiated, under which the contract in question is to be governed by the law of the Member State in which the professional is established, is unfair, within the meaning of Article 3(1) of Directive 93/13/EEC, in so far as it leads the consumer concerned into error by giving him or her the impression that only the law of that Member State applies to the contract, without informing him that, under Article 6(2) of the Rome I Regulation, he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term (CJEU C-191/15, *Verein für Konsumenteninformation*, ECLI:EU:C:2016:612, paragraph 71), namely those of the law of the country in which he or she has his or her habitual residence (CJEU C-821/21, *Club La Costa et. al.*, ECLI:EU:C:2023:672, paragraph 72).

21 That does, however, require that Article 6 of the Rome I Regulation is applicable. Yet that was not the case at the time the choice-of-law clause was agreed. The applicant attended a branch of the defendant in Austria to initiate the business

relationship after the contact was arranged by a person from his professional environment. While, subsequently, at his Italian place of residence, he signed a customer profile sent by the defendant and the 'account application' for the current account and securities deposit account, there is no indication that, apart from the transmission of those documents, the defendant had carried out a professional or commercial activity in Italy or in any way directed it to Italy. Such an activity leading to the application of Article 6 of the Rome I Regulation would only exist if it is clear from the circumstances that the defendant intended to conclude contracts with consumers from the applicant's State beyond that individual case (that is to say, in general) (CJEU C-585/08 and C-144/09, *Pammer and Hotel Alpenhof*, ECLI:EU:C:2010:740, paragraph 92 [on Article 15 of the Brussels I Regulation]; see also OGH 1 Ob 158/09f, point 5, on the irrelevance of merely sending catalogues once). The facts of the case contain no backing for that at the time the business relationship was established.

22 Accordingly, in the opinion of the Oberster Gerichtshof (Supreme Court, Austria), the requirements for the application of Article 6(1) of the Rome I Regulation had not been met when the business relationship was established. There was therefore neither a reason nor an obligation for the defendant to refer to that provision in the choice-of-law clause. There are also no other reasons discernible that the clause is unfair, especially as Austrian law would have been applicable to the business relationship (provision of banking services) even without the choice of law pursuant to Article 4(1)(b) of the Rome I Regulation.

23 1.3. According to its clear wording, the choice-of-law clause also covers future transactions within the scope of the business relationship. Having said that, after entering into the business relationship, the bank engaged in conduct that did meet the constituent elements of Article 6(1) of the Rome I Regulation. By participating in the event in Italy, it has directed its activity to the consumer's country (below [a]), and the applicant's further orders fall within the scope of that activity (below [b]).

24 (a) The applicant has (at least) directed its activities to Italy.

25 The term 'directing' is used in Article 6(1)(b) of the Rome I Regulation in a similar way to Article 15(1)(c) of Brussels I and now Article 17(1)(c) of Brussels I recast. According to recital 7 of the Rome I Regulation, the interpretation of the provisions of that Regulation should be consistent with that of the aforementioned regulations, which means that the case-law of the CJEU on that jurisdiction provision can also be applied in the present case.

26 According to that case-law (CJEU C-585/08 and C-144/09, *Pammer and Hotel Alpenhof*, ECLI:EU:C:2010:740, paragraph 75 et seq.), 'directing' requires the trader to have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile. Therefore, before a possible contract is concluded with that consumer, there must be evidence that the trader intended to do business with

consumers domiciled in other Member States, including the Member State in whose territory the consumer in question is domiciled, in the sense that the trader was prepared to conclude a contract with those consumers.

27 Against that background, there is no doubt in the present case that the defendant bank 'directed' its activity to the consumer's country by having an employee introduce it at an event in Italy. That is because, when viewed realistically, such introduction could only serve the purpose of concluding new or additional transactions with the customers present at the event. Since the event was also attended by private investors and there is no indication that the defendant was not aware of that fact, the 'directing' also related to the conclusion of contracts with consumers.

28 (b) The applicant's further orders also fell within the scope of that activity.

29 A causal link between the activity directed at the consumer's country and the specific conclusion of the contract is not required in that context; it is sufficient that the activity was generally aimed at the conclusion of such contracts (see CJEU C-218/12, *Emrek*, ECLI:EU:C:2013:666, paragraph 32 [on Article 15(1)(c) of the Brussels I Regulation]). That was the case because the acquisition of financial products constitutes a typical banking transaction, the conclusion of which was the bank's intention. Since a causal link between the activity and the contract subsequently concluded is not required, it is irrelevant under conflict of laws provisions that a business relationship with the applicant already existed and that the bank did not promote certain financial products at the event in Italy.

30 1.4. The defendant has therefore engaged in conduct that should in itself lead to the application of Article 6 of the Rome I Regulation. The question remains, however, whether that also applies if orders are placed as part of a permanent business relationship for which the parties – as in the present case – had made a valid choice of law when entering into that business relationship.

31 The defendant bank's reliance on the validity of the choice of law leading to the application of Austrian law is an argument against such assumption. There could be doubts as to whether that trust deserves protection if the bank enters the market of the consumer's country after concluding that agreement – as in the present case – and must therefore expect the law of that State to apply, at least in relation to new contracts. Yet, in the present case, it might be relevant that the bank was under an obligation to fulfil the orders. While it is true that, according to the terms and conditions, the bank only had to fulfil the orders (provided the other requirements were met) if the customer had agreed that with the bank (General Part of the Terms and Conditions I. B. 1. No 2 paragraph 2), the applicant did conclude such an agreement with the defendant on 26 September 2013 regarding the placement of orders by means of telecommunication. Rather, that obligation militates in favour of protecting the bank's trust in the (unlimited) effectiveness of the choice of law.

32 A similar conclusion could be drawn from the judgment in C-135/15, *Nikiforidis*, ECLI:EU:C:2016:774, on Article 28 of the Rome I Regulation. In that case, the CJEU held that the Rome I Regulation applies to a contract concluded previously only if there has been a variation of such magnitude that a new contract must be regarded as having been concluded. That assessment could apply to the case that – as in the present case – the conditions for the application of Article 6 of the Rome I Regulation are met after the conclusion of the contract. However, it should be noted that the present case does not concern a contract of indefinite duration in the narrower sense (such as an employment contract as in *Nikiforidis*) but a contractually-governed business relationship in the context of which individual independent orders are placed and executed.

33 1.5. The CJEU is therefore asked to answer the question of whether the legal consequences of an order to purchase a financial product, which a consumer places with a bank on the basis of an ongoing business relationship and which the bank executes, must be assessed according to the law set out in Article 6 of the Rome I Regulation if the conditions for the application of that provision had not yet been met when the business relationship was established and if the parties had agreed a (comprehensive) choice of law in accordance with Article 3 of the Rome I Regulation at that time.

2. Question 2:

34 2.1. If Article 6 of the Rome I Regulation is applicable in principle, the question arises as to whether the conditions for the exception pursuant to Article 6(4)(a) of the Rome I Regulation have been met. According to that provision, Article 6(1) and (2) of that Regulation shall not apply to ‘a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence’. A contract for the purchase of securities for the account of the customer constitutes a contract for the provision of services within the meaning of Article 6(4)(a) of the Rome I Regulation.

35 2.2. The Court of Justice of the European Union commented on that provision in its judgment in C-272/18, *Verein für Konsumenteninformation*, ECLI:EU:C:2019:827.

36 That case involved a dispute about the acquisition of shares in a limited partnership domiciled abroad. Consumers paid the amounts to be invested into a trust account in the consumer’s country, the company fulfilled information obligations under the trust agreement by sending reports to the consumer’s country, and dividend payments were transferred to accounts in the consumer’s country. Furthermore, the company maintained a website for Austrian consumers, which allowed them to access information and exercise their voting rights.

37 In the opinion of the CJEU, it was necessary to ascertain whether it follows from the very nature of the contracted services that they can be supplied, as a whole,

only outside the State in which the consumer has his habitual residence (paragraph 51). Where the services were actually supplied in a country other than the one in which the consumer 'receives' those services, it must be considered that the services are supplied 'exclusively' outside of the consumer's Member State only where the consumer has no possibility of receiving them in his State of residence and must travel abroad in order to do so (paragraph 52). That was not the case in the case in question (paragraph 53).

38 2.3. In the present case, the fact that the applicant was able to place his purchase orders by means of distance communication (telephone, email) from Italy is an argument against the 'exclusive' provision of the service in Austria. Furthermore, the applicant also had access to the defendant's website in English and, according to his undisputed submissions in that regard, he was able to view his accounts on the website; moreover, it can be assumed that the bank also provided the applicant with information on the execution of his orders.

39 Nevertheless, it is not necessarily the case that the judgment in C-272/18 can be applied to the present case. The case at issue in that decision concerned the assessment of a trust agreement under which the defendant trustee undoubtedly had to provide services that benefited the consumer in the country of his habitual residence (receipt of the amounts to be invested in an account in that country, enabling participation in the decision-making of the companies via a website designed for that country, transfer of investment income to that country). The present case, by contrast, essentially (only) involved the opening of a securities account in the country of the bank, and the crediting of the financial products acquired by the bank on behalf of the customer in that country. It could therefore be questionable whether the applicant actually 'received' those services in his country – namely in Italy (C-272/18, paragraph 52). The possibility of placing orders from a distance and the transmission of information could therefore be regarded as mere secondary elements that do not preclude the application of Article 6(4)(a) of the Rome I Regulation.

40 2.4. While, in the opinion of the Oberster Gerichtshof (Supreme Court, Austria), it does suggest itself to treat the present case in the same way as the case that the European Court of Justice had to judge on in Case C-272/18, the opposite view could also be taken. For that reason the Court of Justice of the European Union is again asked to interpret Article 6(4)(a) of the Rome I Regulation. Should that interpretation reveal that the provision is applicable, the case would have to be judged exclusively according to Austrian law.

3. Question 3:

41 3.1. If, on the other hand, question 1 is answered in the affirmative and question 2 in the negative, Article 6 of the Rome I Regulation is applicable. According to paragraph 1 of that provision, that would result in the application of the law of the country where the consumer has his habitual residence, in the present case in the

application of Italian law. That said, a choice of law is possible. According to Article 6(2) of the Rome I Regulation, such choice may not, however, result in depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of mandatory law of his country of residence.

42 3.2. In that specific case, the question arises as to whether the choice of law made by the parties must still be adhered to, even though it did not – in accordance with the judgment in C-191/15, *Verein für Konsumenteninformation*, ECLI:EU:C:2016:612 – refer to the legal consequences of Article 6(2) of the Rome I Regulation (V.1.2. above). It could be argued that although the choice of law originally did not give rise to any concerns, it must now be regarded as unfair pursuant to Article 3(1) of Directive 93/13/EEC. In that case, Italian law would be comprehensively applicable in accordance with Article 6(1) of the Rome I Regulation. If, on the other hand, it was found that the choice of law was not unfair, Austrian law would be applicable due to the choice of law pursuant to Article 6(2) of the Rome I Regulation, with the proviso that any more favourable provisions of Italian law would take precedence.

43 3.3. For that reason, the European Court of Justice is also requested to answer the question of whether a choice of law made before the conditions for the application of Article 6 of the Rome I Regulation are met must be regarded as unfair within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts […] if it does not refer to the legal consequences of Article 6(2) of the Rome I Regulation.

VI. Procedure:

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Oberster Gerichtshof (Supreme Court, Austria)

Vienna, on 8 April 2024

[...]