

Case C-170/21

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:

15 March 2021

Referring court:

Sofiyski rayonen sad (Bulgaria)

Date of the decision to refer:

15 March 2021

Applicant:

Profi Credit Bulgaria EOOD

Debtor in the main proceedings:

T.I.T.

Subject matter of the main proceedings

Application by the applicant for an order for payment pursuant to Article 410 of the Grazhdanski protsesualen kodeks (Code of Civil Procedure; ‘the GPK’) in respect of a claim against the debtor for sums of money consisting of a principal claim, remunerative interest owed under the contract, remuneration for the purchase of a package of ancillary services and default interest under a consumer credit agreement concluded between the parties.

Subject matter and legal basis of the request

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

Article 267 TFEU

Questions referred for a preliminary ruling

1. Must Article 6(1) of Directive 93/13/EEC be interpreted as requiring the court, in proceedings to which the debtor is not party until the issuance of a court order for payment, to assess of its own motion the unfairness of a contractual term and, if there is a suspicion that the term is unfair, to disapply it?
2. If the first question is answered in the affirmative, is the national court required to refuse to issue a court decision ordering payment altogether where part of the claim was based on an unfair contractual term, which gives rise to the amount of the claim asserted?
3. If the first question is answered in the affirmative and the second in the negative, is the national court required partially to refuse to issue a court decision ordering payment in respect of the part of the claim that was based on the unfair term?
4. If the third question is answered in the affirmative, is the court required, and, if so, under what conditions, to take into account of its own motion the consequences of the unfairness of a term in the case where it has available to it information about a payment based on that term, inter alia by offsetting that payment against other outstanding debts under the contract?
5. If the fourth question is answered in the affirmative, is the national court bound by the instructions of a higher court which, under national law, are binding on the instance under review, in the case where those instructions do not take the consequences of the unfairness of a term into account?

EU legislation and case-law relied on

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

Case C-243/08 of the Court of Justice of the European Union [see operative part]

Provisions of national law and national case-law relied on

1. *Grazhdanski protsesualen kodeks* (Code of Civil Procedure; ‘the GPK’)

Article 278. [This provision concerns appeals. They are heard in closed session. The appeal decision adopted therein is binding on the lower court.]

Article 410. (1) *An applicant may apply for an order for payment:*

1. *on the grounds of monetary claims or claims to fungible goods, provided the Rayonen sad [district court] has jurisdiction to hear the application;* [2. on the grounds of the delivery of movable property]

(2) *The application must request an enforcement order and must fulfil the requirements of Article 127(1) and (3) and Article 128, Sections 1 and 2. [...]*

(3) *(New – Darzhaven vestnik (State Gazette; ‘DV’) No 100 of 2019) If the claim arises from a consumer contract, the contract, if in writing, together with any annexes and amendments thereto, as well as any general terms and conditions applicable thereto, shall be attached to the application.*

Article 411. *The application shall be lodged with the district court within the district of which the debtor has his permanent address or domicile [time limit for verifying territorial jurisdiction]. An application against a consumer shall be filed with the court in the district of which the consumer has his current address or, in the absence of a current address, [with the court] in the district of which he has his permanent address. [procedure to be followed if it is filed with a court without jurisdiction].*

(2) *The court shall examine the application at a preparatory hearing and shall grant a payment order within the period stipulated in paragraph (1) except where:*

1. *the application does not fulfil the requirements of Article 410 and the applicant fails to remedy the errors within three days of notification;*

2. *the application is unlawful or immoral;*

3. *(new – DV No 100 of 2019) the claim is based on an unfair term in a consumer contract or there are reasonable grounds to suspect that that is the case;*

4. and 5. [These provisions concern the case where the debtor has no permanent address in Bulgaria or does not exercise his or her occupation in Bulgaria.]

(3) *If the application is admitted, the court shall issue an order, a copy of which shall be served on the debtor.*

Article 413. (1) *A payment order cannot be contested except for the decision on costs.*

(2) *The applicant can file a complaint contesting a ruling dismissing an application for a payment order in full or in part; a copy for service need not be enclosed.*

Article 414. (1) *The debtor may lodge a written objection against the order for payment or parts of the order. [grounds for objection]*

(2) *Objections must be lodged within one month of service of the order. That period cannot be extended.*

Article 415. (1) *The court shall notify the applicant that he or she may initiate proceedings to pursue his or her claim in the following cases:*

1. *the objection was lodged in time;*
2. *[service if the debtor cannot be located];*
3. *the court dismissed the application for an order for payment.*

(2) *If the court advised of the facility to initiate proceedings in the case referred to in point 2 of paragraph (1), it shall order provisional suspension of enforcement, inasmuch as an enforcement order was granted under Article 418.*

(3) *Proceedings initiated in accordance with point 1 or 2 of paragraph (1) are proceedings for a declaratory judgment. Proceedings initiated in accordance with point 3 of paragraph (1) are injunction proceedings.*

(4) *Proceedings shall be initiated within one month of notification; [details regarding the court fee]*

(5) *If the applicant fails to adduce proof that he or she initiated proceedings within the period prescribed, the court shall declare that the order for payment is null and void in part or in full, together with the enforcement order issued in accordance with Article 418.*

Article 416. *If the objection is not lodged in time [or is withdrawn, or the claim is judicially acknowledged], the order for payment shall become enforceable. [An enforcement order shall be issued]*

Article 422. (1) *An application for declaratory judgment acknowledging the claim shall be deemed to have been lodged at the time when the application for an order for payment was lodged, provided that the period prescribed in Article 415(4) has been observed.*

(2) *The lodging of an application in accordance with paragraph 1 shall not have the effect of discontinuing provisional enforcement*

(3) *If the application is dismissed by final judgment, enforcement shall be discontinued*

(4) *No order reversing enforcement shall be issued if the application is dismissed on the ground that the claim is unenforceable.*

2. Zakon za zadalzheniata i dogovorite (Law on obligations and contracts; ‘the ZZD’):

Article 76. (1) *A person who owes the performance of several obligations of the same kind to the same person may, in so far as enforcement is not sufficient to extinguish all the claims, specify which of them he or she will extinguish. If he or*

she does not specify this, the most onerous claim shall be extinguished. In the case of several claims that are equally onerous, the oldest shall be extinguished, and if they all arose at the same time, each claim shall be extinguished proportionately.

(2) Where enforcement is not sufficient to cover the interest, the charges and the principal claim, the charges shall be repaid first, then the interest and finally the principal claim.

3. Zakon za potrebitelskia kredit (Law on consumer credit; 'the ZPK')

Article 9. *(1) A consumer credit agreement is an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, a loan or other similar financial accommodation. [exceptions]*

(2) The contracting parties to the consumer credit agreement are the consumer and the creditor.

(3) A consumer is a natural person who, when concluding a consumer credit agreement, acts outside his or her trade or profession.

(4) A creditor is a natural or legal person who grants or promises to grant credit in the course of his or her trade or profession.

Article 10a. *(1) The creditor may charge the consumer fees and commissions for additional services related to the consumer credit agreement.*

(2) The creditor may not charge fees or commissions for activities related to the disbursement and administration of the credit.

(3) The creditor may charge fees and/or commissions for the same activity only once.

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

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 of any nature, including those owed to a broker in respect of the conclusion of the contract), expressed as an annual percentage of the total amount of the loan granted.*

(2) [calculation of the annual percentage rate of charge]

(3) [The following costs shall not be taken into account in the calculation of the annual percentage rate of charge]: 1. Costs to be borne by the consumer in the event of non-performance of his obligations under the consumer credit agreement; 2. costs other than the purchase price of the product or service owed by the consumer; 3. costs of maintaining an account in connection with the consumer

credit agreement, costs of using a means of payment enabling payments to be made in connection with the disbursement or repayment of the credit and the like.]

(4) *The annual percentage rate of charge shall not be more than five times the statutory rate of default interest in leva or in a foreign currency determined by decision of the Council of Ministers of the Republic of Bulgaria.*

(5) *Contractual terms that go beyond those specified in paragraph 4 shall be deemed to be null and void.*

(6) *In the case of payments under contracts containing terms declared null and void under paragraph 5, amounts paid in excess of the threshold under paragraph (4) shall be offset against subsequent redemption payments under the loan.*

Article 20. (1) *The rights to which consumers are entitled under this Law must not be restricted. Any agreement which excludes or restricts the rights of consumers in advance shall be invalid.*

(2) *Any waiver of rights to which consumers are entitled under this Law shall be ineffective.*

(3) [Impermissibility of the exclusion of the legal protection granted to the consumer under this Law or under the law system of another Member State of the EU where the contract is directly related to the territory of the Republic of Bulgaria or to that of another Member State or other Member States].

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.*

(2) *Any term in a consumer credit agreement with a fixed interest rate which provides for compensation for the creditor greater than that provided for in Article 32(4) shall be void.*

Article 22. [Other cases of nullity]

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. *The provisions of Articles 143 to 148 of the Law on consumer protection shall also apply to consumer credit agreements.*

4. Zakon za zashtita na potrebitelite (Law on consumer protection; ‘the ZZP’):

Article 143. (in force until 23 December 2019) *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 causes a significant imbalance in the rights and obligations of the seller or supplier and the consumer arising under the contract by:*

1. [limiting the liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier]
2. *excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or any other person in the event of total or partial non-performance or inadequate performance of any of the contractual obligations, including the exclusion of the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him or her;*
3. *making the provision of services by the seller or supplier subject to a condition whose realisation depends on his or her own will alone;*
4. [permitting only the seller or supplier, but not the consumer, to retain sums in the event that the contract is not concluded or performed];
5. *requiring any consumer who fails to fulfil his or her obligation to pay a disproportionately high sum in compensation or contractual penalty;*
6. *authorising the seller or supplier to exempt himself or herself from his or her obligations on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him or her where it is the seller or supplier himself or herself who dissolves the contract;*
7. *enabling the seller or supplier to terminate a contract of indeterminate duration without notice – except where there are serious grounds for doing so;*
8. *providing for a disproportionately short period for the consumer's tacit consent to the renewal of the contract where he or she does not object;*
 - 8a. *providing that a contract of fixed duration is automatically extended where the consumer does not express his or her desire to terminate it, and fixing an unreasonably early deadline for the consumer to express this desire not to extend the contract;*
9. *binding the consumer to terms with which he or she had no opportunity of becoming acquainted before the conclusion of the contract;*
10. [enabling the seller or supplier to alter the terms of the contract unilaterally without a reason which is specified in the contract];
11. [enabling the seller or supplier to alter unilaterally without reason any characteristics of the product];
12. [providing for the price to be determined at the time of delivery of the product or provision of the service or allowing a seller or supplier to increase the price without giving the consumer the right to cancel the contract in such a case];

13. [giving the seller or supplier the exclusive right to interpret contractual terms];

14. *obliging the consumer to fulfil all his or her obligations where the seller or supplier does not perform his or hers;*

15. *providing that the seller or supplier may transfer his or her rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;*

16. [excluding or hindering the consumer's right to take legal action or other dispute resolution remedies, unduly restricting the evidence available to him or her or imposing the burden of proof on him or her];

17. [limiting the seller's or supplier's liability for commitments undertaken by his or her agents];

18. *not giving the consumer the possibility of assessing the economic consequences of the conclusion of the contract;*

19. *laying down other similar conditions.*

Article 143. *(as amended by No 100 of 2019) (1) An unfair term in a contract concluded with a consumer is an agreement harming the consumer which is contrary to the requirement of good faith and causes a significant imbalance in the rights and obligations of the seller or supplier and the consumer arising under the contract by:*

(2) *A term is unfair if it:*

1. [... wording identical to point 1 of Article 143 prior to the amendment, see above];

2. [... wording identical to point 2 of Article 143 prior to the amendment, see above];

3. [... wording identical to point 3 of Article 143 prior to the amendment, see above];

4. [... wording identical to point 4 of Article 143 prior to the amendment, see above];

5. [... wording identical to point 5 of Article 143 prior to the amendment, see above];

6. [... wording identical to point 6 of Article 143 prior to the amendment, see above];

7. [... wording identical to point 7 of Article 143 prior to the amendment, see above];
8. [... wording identical to point 8 of Article 143 prior to the amendment, see above];
9. [providing that a contract of fixed duration is automatically extended where the consumer does not express his or her desire to terminate it];
10. [previously point 9, see above];
11. [previously point 10, see above];
12. [previously point 11, see above];
13. [previously point 12, see above];
14. [previously point 13, see above];
15. [previously point 14, see above];
16. [previously point 15, see above];
17. [previously point 16, see above];
18. [previously point 17, see above];
19. [previously point 18, see above];
20. [previously point 19, see above].

Article 144. (1) [Point 7 of Article 143(2) shall not apply if a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason.]

(2) [Point 11 of Article 143(2) shall not apply to terms by which: 1. a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason; 2. a supplier of financial services reserves the right to alter unilaterally the conditions of a contract of indeterminate duration]

(3) [Points 7, 11 and 13 of Article 143(2) shall not apply in relation to: 1. Transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or an interest rate on a financial market; 2. Contracts for the purchase or sale of foreign currency]

(4) [Point 13 of Article 143(2) shall not apply to price-indexation clauses]

Article 145. (1) *The unfairness of a contractual term in a contract concluded with a consumer shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.*

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

Article 146. (1) *Unfair terms in contracts shall be null and void unless individually negotiated.*

(2) to (4) [The provisions specify when clauses have not been individually negotiated and how that fact is to be proven.]

(5) *The existence of unfair terms in a consumer contract does not render that contract null and void if the contract can also continue to exist without those terms.*

Article 147. (1) *The terms in contracts offered to consumers must be drafted in clear and unequivocal language.*

(2) *Where there is doubt about the meaning of a particular term, the interpretation most favourable to the consumer shall prevail.*

...

Article 147a. (1) *When a contract is concluded with a consumer, general terms and conditions included therein shall be binding on the consumer only if they have been made available to him or her and he or she has agreed to them.*

(2) *The consumer's agreement to the general terms and conditions shall be certified by signature.*

(3) to (5) [The provisions govern the proof of the transmission of a signed copy of the seller's or supplier's general terms and conditions to the consumer and the consumer's agreement thereto].

Article 147b. (1) *The seller or supplier is obliged to inform the consumer of any change to the general terms and conditions included in the contract within seven days of the change via the telephone number, email address or correspondence address provided by the consumer.*

(2) to (5) [further action to be taken by the parties in the event of a change to the general terms and conditions]

Article 148. (1) *The Commission for Consumer Protection:*

1. to 4. [Powers of the Commission for Consumer Protection in respect of unfair terms in pre-formulated standard contracts]

(2) to (4) [Powers of the Commission for Consumer Protection in respect of unfair terms in pre-formulated standard contracts]

5. Interpretative judgment No 4 of the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria), OSGTK [Joint Committee of the Civil and Commercial Sections], of 18 June 2014, paragraph 2.b. *The court found as follows: ‘According to the express provision of Article 410(1) of the GPK, the application must meet the requirements of Article 127(1) of the GPK, that is to say, it must contain details of the circumstances on which the claim is based. In that sense, a precise explanation of the claim in terms of justification and amount is the prerequisite for a proper application as a basis for the issuance of an order for payment. In the event that the application does not sufficiently specify the legal ground on which it is founded, it must be rejected; the court ruling on the order for payment is not permitted to infer the legal ground from the documents attached to the application. As justification for this, it is stated that the court does not take evidence in the order for payment procedure under Article 410 of the GPK (the purpose of the procedure is not to establish the claim as such, but merely to verify whether it is disputable) and, consequently, no conclusions as to the existence of the claim or the legal basis on which it is founded can be drawn from the documents attached to the application. However, in the case of Article 417 of the GPK, in which the court decides on the basis of the document submitted by the applicant, it is permissible for the legal basis and the subject matter of the claim to be determined from that document, since, for the purposes of the statutory legislation, it is mandatory for that document to be attached to the application on the basis of which the enforcement order is issued, whereby the prerequisite for the issuance thereof is the existence of an enforceable claim, which is proven by precisely that document.’*

6. Non-appealable decisions of the Sofiyski gradski sad (Sofia City Court; ‘the SGS’) in comparable cases: order [of] 30 June 2020, order of 27 November 2020 and further orders. In the appeal proceedings brought by Profi Kredit Bulgaria EOOD against the rejection of its application for an order for payment under Article 410 of the GPK in respect of claims arising from a consumer credit agreement containing a clause on ‘remuneration for the purchase of a package of ancillary services’, the court held that the clause was null and void pursuant to Article 10a(2) and Article 19(4) of the ZPK. The SGS then held that the provision of Article 76(2) of the ZZD applies to the amounts paid by the debtor, inter alia, to satisfy the claims that were null and void owing to the unfairness of the terms.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The proceedings are based on an application of 21 October 2020 lodged by Profi Kredit Bulgaria EOOD, a company incorporated under Bulgarian law ('Profi Kredit'), seeking the issuance of an order for payment in respect of a monetary claim against the debtor, T.I.T., a Bulgarian national, in accordance with Article 410 GPK for the total amount of 5 218.69 leva (BGN) (approximately EUR 2 609), consisting of a principal claim in the amount of BGN 2 035.34, remunerative interest owed under the contract for the period from 11 July to 11 August 2020 in the amount of BGN 1 160.46, remuneration for the purchase of a package of ancillary services in the amount of BGN 1 765.61, default interest for the period from 12 April 2018 to 11 August 2020 in the amount of BGN 212.17, and default interest for the period from 11 August 2020 to 19 October 2020 in the amount of BGN 45.11.
- 2 In its application, Profi Kredit stated that the claims asserted arose from the consumer credit agreement concluded between the parties on 29 December 2017, which was attached to the application. It submitted that the debtor had paid eleven repayment instalments and had fallen into arrears. As a result, it was declared on 11 August 2020 that the term of the loan was being accelerated; the consumer was informed of this.
- 3 By order of 9 November 2020, the court – taking into account its duty arising from Article 411(2)(3) of the GPK and the requirement introduced by the case-law of the Court of Justice to assess, of its own motion, the unfairness of a term where it has available to it the factual elements necessary for that task (C-147/16; C-243/08) – found that, according to the documents submitted in the case, the terms relating to the package of ancillary services were likely to be unfair. It found that the contractual relationship between the parties in the specific case constitutes a consumer credit agreement pursuant to Article 9(1) of the ZPK, for which reason the provisions of the ZPK or the ZZP apply. As to the substance, the court found that the package of ancillary services agreed under point V. of the contract, on which a separate agreement was concluded, ... included the payment of remuneration of BGN 2 292.48, whereby the services to be provided for that price were not exhaustively listed, as prescribed by the mandatory provisions of the ZPK. Moreover, contrary to Article 10a(4) of the ZPK, the prices for the services are not listed individually, including in the agreement. Furthermore, payment of the remuneration is made on a precautionary basis, that is to say, it is owed solely for the 'possible provision' of the services, irrespective of whether one of the services is used during the term of the contract. That court stated that this is because, in the preamble of the agreement, it is stated that the claim to remuneration for the provision of the specified ancillary services arises upon signature, whereby it exists in full even if none of the services are used. According to the attached payment plan, the debtor had to pay, for 36 months, for something that he did not use. The referring court cites the judgment of the Court of Justice of 16 July 2020 in Case C-686/19, concerning the concept of the 'total cost of the credit to the consumer', contained in Article 3(g) of Directive 2008/48/EC. The

court takes the view that the agreement at issue is likely to be unfair to the detriment of the consumer within the meaning of Article 143 of the ZZP, which is applicable in the specific case, causing a significant imbalance in the rights and obligations of the seller or supplier and the consumer arising under the contract, for which reason the application must be rejected in part, in relation to the remuneration for the purchase of a package for ancillary services in the amount of BGN 1 765.61.

- 4 Next, taking into account the applicant's statement that the debtor had made eleven payments, and taking into account the amount of the sums claimed, the court found that the debtor had paid a total of BGN 1 988.69, by means of which the remunerative interest and then the principal claim were to be repaid, in that order, as provided for in Article 76(2) of the ZZD. The court stated that, on the basis of the amounts asserted in the application, it is established that the amounts had also been set off against the asserted claims arising from the package of ancillary services, although they should have been set off against subsequent instalments. Accordingly, by way of those payments, 16 full instalments and part of the 17th instalment (due on 11 June 2019) had been made in respect of the principal claim and 17 full instalments in respect of the interest, in accordance with Article 76(2) of the ZZD. Thus, the debtor had repaid BGN 1 206.06 of the interest and BGN 782.63 of the principal claim, as a result of which the remaining amount of the principal claim is BGN 1 617.37 and the remaining amount of interest is BGN 609.90. With regard to the default interest claimed for the period from 12 April 2018 to 19 October 2020 (in a total amount of BGN 257.28), the court ruled that it is justified for the period from 11 June 2019 (in view of the offsetting of payments against the subsequent instalments pursuant to Article 76(2) of the ZZD) to 19 October 2020; the court set the amount at BGN 204.53 pursuant to Article 162 of the GPK; the court held that the application is to be dismissed with regard to the difference between that amount and the claimed BGN 257.28 (that is to say, BGN 52.75). On those grounds, the court dismissed in part the application for an order for payment lodged by Profi Kredit on 21 October 2020 pursuant to point 3 of Article 411(2) of the GPK.
- 5 By order for payment of 9 November 2020, the Sofiyski rayonen sad (District Court, Sofia), in a preparatory hearing held in closed session on that day, held that the conditions for granting the application were met, including on the basis of Article 411(3) of the GPK, and ruled as follows: The debtor must pay the creditor, Profi Kredit, the sum of BGN 1 617.37, which is composed of the following: principal claim under the consumer credit agreement of 29 December 2017, plus statutory interest from 21 October 2020 until the point at which the claim is settled, remunerative interest in the amount of BGN 609.90 for the period from 11 July 2019 to 11 August 2020, compensation for delay in the amount of statutory interest of BGN 204.53 for the period from 11 June 2019 to 19 October 2020, and procedural costs for court fees in the amount of BGN 48.63 and for legal advice in the amount of BGN 23.30.

- 6 The applicant, Profi Kredit, brought an appeal against the order of the SRS of 9 November 2020 before the SGS. By order of 16 February 2021, the latter held that the court must reject an application for an order for payment pursuant to point 3 of Article 411(2) of the GPK if the application is based on an unfair term in a contract concluded with a consumer or if there are reasonable grounds to suspect that that is the case. The appellate court held that the appellant's argument that the court of first instance was not empowered to examine the validity of contractual clauses was unfounded, since the court could determine the unlawfulness or immorality of contractual clauses of its own motion and without the debtor being able to object thereto; that obligation was imposed on it by point 2 of Article 411(2) of the GPK. According to the appellate court, a further argument is provided by the case-law of the Court of Justice of the European Union, in accordance with which the national court is required to assess, of its own motion, whether the contractual terms falling within the scope of Directive 93/13 are unfair, compensating in this way for the unfairness. As to the substance, the appellate court proceeded on the assumption that the consumer credit agreement does contain an unfair term, which obliges the consumer to pay remuneration to the creditor for the provision of ancillary services.
- 7 Next, the appellate court found that the remainder of the appeal was well-founded because the court is obliged to issue the order for payment pursuant to Article 410 of the GPK if the conditions provided for in the GPK [conditions listed] are met. It stated that the exceptions are provided for in points 1 to 5 of Article 411(2) of the GPK. The purpose of the procedure is not to establish the claim itself, but merely to assess whether it is disputable. Therefore, the powers conferred on the court do not extend to an assessment of the existence of the claim asserted. That question must be clarified by way of legal proceedings instigated by the creditor in accordance with Article 422 of the GPK, in the case where the debtor exercises his or her right of objection pursuant to Article 414 of the GPK. The appellate court held that the decision of the court of first instance rejecting part of the principal claim asserted under the consumer credit agreement, the remunerative interest and the default interest owing to the invalidity of the term on the package of ancillary services and the payments made by the debtor and offset pursuant to Article 76(2) of the ZZD was wrong as the decision went beyond the court's powers of review [in respect of the] issuance of an order for payment. The appellate court stated that the claims for payment of the principal claim and interest had been sufficiently specified in the application in terms of justification and amount, and if none of the requirements of points 1 to 3 of Article 411(2) of the GPK were met, the requirements for issuing the order for payment pursuant to Article 410 of the GPK are met. The question of whether the payment obligation exists in its entirety is the subject of the examination to be carried out in the context of a possible subsequent action for a declaratory judgment pursuant to Article 422 of the GPK. [*Amounts repeated*]
- 8 For these reasons, the SGS upheld the SRS's order of 9 November 2020 in the part rejecting Profi Kredit's application in respect of the amount of BGN 1 765.61, consisting of the remuneration for a package of ancillary services.

It annulled the order as to the remainder and ruled as follows: ‘It is necessary to issue an order for payment pursuant to Article 410 of the GPK in favour of Profi Kredit Bulgaria against the debtor in respect of an amount of BGN 417.97 (the difference between the full principal amount claimed, in the amount of BGN 2 035.34, under the consumer credit agreement of 29 December 2020 and the amount already awarded, in the amount of BGN 1 617.37), an amount of BGN 550.56 (the difference between the total remunerative interest claimed for the period from 11 July 2019 to 11 August 2020 in the amount of BGN 1 160.46 and the amount already awarded, in the amount of BGN 609.90), and an amount of BGN 52.75 (the difference between the total amount of default interest claimed for the period from 12 April 2018 to 19 October 2020, in the amount of BGN 257.28, and the amount already awarded, in the amount of BGN 204.53, for the period from 11 June 2019 to 19 October 2020), plus statutory interest on the principal claim from 21 October 2020 until the point at which payment is made in full, and additional costs of BGN 96.38 for the court fee paid and the remuneration for a legal advisor’. By that non-appealable order, the appellate court referred the case back to the SRS with the stipulation that it issue an order for payment corresponding to the order.

Essential arguments of the parties in the main proceedings

- 9 The applicant seeks the issuance of an order for payment in respect of a monetary claim arising from a consumer credit agreement. Since the order for payment procedure is pursued unilaterally until the order for payment is issued, the debtor, who is a consumer, has not taken a position on the matter. The reasoning of the courts hearing the case differs to a certain extent, first with regard to the scope of consumer protection and more specifically with regard to how the court must discharge its duty not to allow the consequences of unfair terms to materialise.

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

- 10 The following is clear from the facts of the present case: An application for an order for payment was lodged pursuant to Article 410 of the GPK. Under national law, that procedure is pursued unilaterally until the order is issued. The application lodged is for the issuance of an order for payment (court order by which the court orders the debtor to pay the applicant the claims acknowledged by the court) in respect of claims arising from a consumer credit agreement. All courts with jurisdiction in the case have expressed they have reasonable grounds to suspect that some of the claims are based on unfair terms that increase the value of the claims arising from the loan. According to the applicant, the debtor (a consumer) made payments which were used, inter alia, to meet the claims arising from the unfair terms.
- 11 If – as assumed by the SGS in other decisions – the payments from the unfair terms were to be set off against the unpaid components of the credit agreement (principal and interest) in accordance with Article 19(6) of the ZPK, that is to say,

if set-off had to take place *ex officio* where the contractual term on the basis of which the consumer had made a payment was found to be unfair, it would not be necessary, when a court order for payment is issued, for the consumer to raise an objection under Article 414 of the GPK or for legal proceedings to be conducted in which he or she could exercise his or her right of set-off. In that regard, the referring court cites operative parts 1 and 2 of the judgment of the Court of Justice of the European Union in Case C-243/08.

- 12 The referring court considers that it is important to establish whether, in proceedings to which the consumer is not party, the national court – where it has grounds for suspicion, verifies the unfair nature of a contractual term, and has available to it the legal and factual elements necessary for that task – **must refuse** to issue an order for payment pursuant to Article 410 of the GPK **altogether** or **must refuse it in part**, in relation to the specific contractual term, taking into account **of its own motion the consequences** of the unfairness of the term, in the case where that national court has available to it information about payments based on that term, and whether that court is bound by the instructions of a higher court which, despite having assessed a contractual term as being unfair, orders the issuance of an order for payment pursuant to Article 410 of the GPK, thereby disregarding, in essence, some of the consequences of the unfairness of the term. The latter is related to ensuring effective remedies for consumers, as national law allows offsetting of claims only in the event that a subjective right is exercised and only exceptionally under Article 19(6) of the ZPK. For that reason, if Article 6(1) of Directive 93/13/EEC requires the court, in proceedings to which the debtor is not party, to disapply of its own motion a contractual term on the ground of suspected unfairness *vis-à-vis* a consumer, but does not require it to refuse to issue a judicial decision ordering payment altogether, and instead requires it to refuse to do so only in part, must the court then take into account of its own motion the consequences of the unfairness of the term, in the case where it has available to it information about a payment made by the consumer on the basis of the unfair term, whereby, under national law, the corresponding application of Article 19(6) of the ZPK in conjunction with Article 76(2) of the ZZD is permissible and has also been applied in similar cases cited above?
- 13 There is an interest in the request for interpretation, as the existing case-law of the Court of Justice of the European Union does not provide answers to the specific questions raised. It is not clearly apparent from the existing case-law of the Court of Justice cited above whether that interpretation covers the questions. For these reasons, it is necessary for the referring court to request a ruling from the Court of Justice on the questions set out in this order for reference and to stay the main proceedings on the basis of Article 267(2) TFEU.