Case C-714/22

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:

22 November 2022

Referring court:

Sofiyski rayonen sad (Bulgaria)

Date of the decision to refer:

21 November 2022

Applicant:

S.R.G.

Defendant:

Profi Credit Bulgaria EOOD

Subject matter of the main proceedings

The proceedings are governed by the first paragraph of Article 267 TFEU

Subject matter and legal basis of the request

Dispute concerning the validity of a consumer credit agreement under which payment for a package of non-compulsory ancillary services was agreed. The following questions arise. Are those services activities involving the drawdown and servicing of credit, given that they are not included in the annual percentage rate of charge on the credit? Are those additional services therefore such as to constitute unfair terms within the meaning of Directive 93/13 and are they to be regarded as part of the ‘total cost of the credit’ used to determine the annual percentage rate of charge in accordance with Directive 2008/48? In the light of the previous case-law of the Court of Justice (judgment in Joined Cases C-24/19 and C-259/19), how are the costs of the proceedings to be apportioned where unfair terms are found to be present in a consumer agreement?

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Questions referred for a preliminary ruling

1. Is Article 3(g) of Directive 2008/48/EC to be interpreted as meaning that costs in respect of ancillary services agreed in connection with a consumer credit agreement, such as fees for the possibility of deferring and reducing instalments, constitute part of the annual percentage rate of charge for the credit?

2. 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 the national court must apply the consequences provided for in national law for failure to indicate the annual percentage rate of charge in a consumer agreement?

3. Is Article [23] of Directive 2008/48/EC to be interpreted as meaning that a penalty provided for in national law, in the form of the nullity of the consumer credit agreement, whereby only the principal amount granted is to be repaid, is proportionate where the annual percentage rate of charge is not accurately indicated in the consumer credit agreement?

4. Is Article 4(1) and (2) of Directive 93/13/EEC to be interpreted as meaning that a fee for a package of ancillary services provided for in a supplementary agreement to a consumer credit agreement, which has been concluded separately and in addition to the main agreement, must be regarded as part of the main subject matter of the agreement and cannot therefore be the subject matter of the assessment of unfairness?

5. Is Article 3(1) of Directive 93/13/EEC read in conjunction with point 1(o) of the annex to that directive to be interpreted as meaning that a term in an agreement on ancillary services relating to consumer credit is unfair if it grants the consumer the abstract possibility of deferring and rescheduling payments, in respect of which that consumer owes fees even if he or she does not make use of it?

6. Are Articles 6(1) and 7(1) of Directive 93/13 and the principle of effectiveness to be interpreted as meaning that they preclude a legal provision whereby the consumer may be made to bear part of the costs of the proceedings in the following cases: (1) where a claim for a declaration that sums are not owed by reason of the established unfairness of a term is upheld in part […]; (2) where it is practically impossible or excessively difficult for the consumer, in the exercise of his or her rights, to specify the amount of the claim; (3) in all cases where an unfair term is present, including in cases where the presence of the unfair term does not directly affect, either in whole or in part, the amount of the creditor's claim, or where the term has no direct connection with the subject matter of the proceedings?

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Provisions of European Union law and case-law relied on

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in particular Articles 3(1), 4(2), 6(1) and 7(1) thereof

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, in particular Article 3(g), Article 10(2)(g) and Article 23 thereof

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

Judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (Joined Cases C-224/19 and C-259/19, EU:C:2020:578, in particular point 5 of the operative part)

Provisions of national law relied on

Zakon za zadalzheniata i dogovorite (Law on Obligations and Contracts), in particular Article 26 thereof

Zakon za potrebitelskia kredit (Law on Consumer Credit; 'the ZPK'), in particular Articles 10a, 11, 19, 21 to 24 and 33 thereof, as well as Paragraph 1 of the Dopalnitelni razporedbi (Additional Provisions) to that Law

Grazhdanski protsesualen kodeks (Code of Civil Procedure), in particular Article 7(3) and Article 78 thereof

Succinct presentation of the facts and procedure in the main proceedings

1 On 10 October 2019, the applicant and the defendant concluded a consumer credit agreement with the following features: principal amount of 5 000 Leva (BGN), term of 36 months, annual interest rate of 41.00%, annual percentage rate of charge of 49.02%, giving a total amount for the credit of BGN 8 765.02. In addition to the total amount owed under the credit, the consumer credit agreement comprises remuneration for the following non-compulsory ancillary services: (a) grant of the right to priority consideration and disbursement of the consumer credit ('Fast' service), in the amount of BGN 1 250; and (b) grant of the right to reschedule the repayment of the consumer credit ('Flexi' service), in the amount of BGN 2 500. Those fees are included in the repayment schedule as part of the agreement, bringing the total liability for the credit to an amount of BGN 12 515.02, repayable over 36 monthly instalments of BGN 347.64 each. It is common ground between the parties that the defendant has in fact provided BGN 5 000 to the applicant.

2 The credit agreement states that the customer expressly made known at the outset that it was her wish to acquire the ancillary services, the conditions for using such services being described in detail in the defendant's general terms and conditions.

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According to those, the ‘Fast’ ancillary service gives customers who have purchased it the right to priority consideration of their credit application. Following a decision to approve the credit, the amount granted is transferred to the customer within 24 hours of signature of the required documents. In accordance with the general terms and conditions, the ‘Flexi’ ancillary service gives customers who have purchased it the right to reschedule their repayments, subject to the relevant specific conditions. Customers may ask to defer or reduce a certain number of repayment instalments if detailed reasons for doing so (incapacity to work, loss of employment, loss of or damage to property as a result of a disaster, etc.) are provided.

3 As regards the substance of the case, it is common ground between the parties that the consumer voluntarily chose to purchase the abovementioned non-compulsory ancillary services at the time when the credit agreement was concluded. No objection has been raised to the effect that the applicant was misled with respect to the nature of the agreement concluded by her. It has not been alleged in the proceedings that the defendant would have refused to grant credit if those ancillary services had not been paid for.

4 In accordance with the provisions of the Bulgarian ZPK that are applicable to this case, the creditor may not require the payment of fees or commissions for activities in connection with the drawdown and servicing of a credit (Article 10a(2)). The annual percentage rate of charge for a credit is defined as the current or future total cost of the credit to the consumer and must not exceed a certain upper limit (Article 19(1) and (4)). In that connection, the amount of the annual percentage rate of charge and the total amount payable by the consumer, calculated at the time when the agreement is concluded, are both mandatory features of a consumer credit agreement (Article 11(1)(10)). At the same time, any term in a consumer credit agreement which has the aim or effect of circumventing the requirements of the ZPK is null and void (Article 21); if the requirements governing the specification of the annual percentage rate of charge are not fulfilled or the upper limit applicable to that rate is exceeded, the consumer credit agreement is invalid (Article 22). If the consumer credit agreement is declared invalid, the consumer is to repay only the net amount of the credit and owes no interest or other costs connected with the credit (Article 23).

5 Before the referring court, the applicant brought an action for a negative declaration. She seeks a declaration that she does not owe the defendant an amount totalling BGN 7 515.02, comprising: (1) BGN 3 765.02 by way of contractual interest, made up of the annual interest rate and the annual percentage rate of charge for the entire term of the consumer credit agreement; (2) BGN 1 250 by way of remuneration for the ‘Fast’ ancillary service; and (3) BGN 2 500 by way of remuneration for the ‘Flexi’ ancillary service.

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The essential arguments of the parties in the main proceedings

6 S.R.G. submits that the terms in the consumer credit agreement which lay down an obligation to pay the annual interest rate, the annual percentage rate of charge and remuneration for the ancillary services are null and void on account of being contrary to accepted principles of morality. She further disputes the obligation to pay remuneration for the ancillary services because, in her opinion, they constitute routine credit servicing activities (involving the examination of applications for the grant and disbursement of consumer credit). S.R.G. states that the reason she does not owe the abovementioned remuneration on the ground of breach of accepted principles of morality is that the remuneration for the two ancillary services amounts in total to BGN 3 750, which is more than half of the amount loaned. The remuneration at issue does not relate to services which lie outside the creditor's principal claim, but constitute fees for drawing down the credit or for activities in connection with servicing of the credit. That, therefore, is an infringement of the express prohibition precluding creditors from demanding fees and remuneration for activities connected with the drawdown and servicing of credit. The applicant further argues that the ancillary services form part of the contractual remuneration and must as such be included in the annual percentage rate of charge. Since the remuneration for those ancillary services represents a cost to the consumer and is therefore a hidden cost of the credit, it must be included in the determination of the annual percentage rate of charge. If, however, the costs in question were added to the annual percentage rate of charge, the latter would exceed the restrictions laid down by the ZKP with respect to the upper limit applicable to that rate, thus rendering the consumer credit agreement invalid.

7 The defendant contends that, in her credit application, the applicant decided herself to purchase the ancillary services connected with the agreement. She had the necessary additional pre-contractual information concerning the services available under the agreement. The defendant submits that the annual interest rate is fixed, and that its general terms and conditions, which form part of the consumer credit agreement, specify what the contractual remuneration consists of, what conditions apply for the application of the interest rate and how the annual percentage rate of charge is calculated. What is more, details of the repayment instalments due over the full term of the agreement are set out in the repayment schedule. The general terms and conditions provide for a right of withdrawal for the consumer. The defendant takes issue with the assertion that the terms for purchasing the ancillary services are contrary to the accepted principles of morality, since those additional options are chosen by the applicant and are not a mandatory condition for the conclusion of the credit agreement. It therefore considers the applicant's assertion that the agreement contains unfair terms to be unfounded. The defendant submits that the applicant has availed herself of the services under the ancillary agreement, namely, priority consideration and disbursement of consumer credit and deferral of contractually agreed repayment instalments.

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

8 In the view of the referring court, the subject matter of the proceedings relates primarily to the question of the validity of the credit agreement as a whole and the validity of the terms for purchasing the ancillary services in particular. Under Bulgarian law, the court called upon to adjudicate on the matter has an obligation to take into account of its own motion unfair terms in a consumer credit agreement such as that at issue here.

9 In that context, the first question with which the referring court is faced is how the annual percentage rate of charge is determined in the case of a consumer credit agreement. Under national law, a consumer credit agreement in respect of which the legal requirements governing the specification of an annual percentage rate of charge are not fulfilled must be declared invalid. Under such an agreement, the consumer is liable only for repayment of the amount received, without interest or costs. The referring court draws a similar inference from the judgment [of the Court of Justice] in *EOS KSI Slovensko* (C-448/17), according to which the requirement laid down in Article 4(2) of Directive 93/13/EEC is not fulfilled where the term concerning the amount of the annual percentage rate of interest is not worded clearly. Consequently, the national court does not need to apply such terms. In the view of the referring court, it must nonetheless be examined whether the penalty provided for in national law, namely a declaration as to the invalidity of a consumer credit agreement which does not meet the mandatory requirements relating to the specification of the annual percentage rate of interest, is adequate or proportionate for the purposes of Article 23 of Directive 2008/48/EC. That question must be examined in the light of the applicant's submission that the creditor deliberately did not include in the agreement the remuneration for the ancillary services, which, from the point of view of their content, are not ancillary services at all but relate to the drawdown and servicing of the credit, in the calculation of the annual percentage rate of charge. In the opinion of the referring court, the question that is to be answered is whether the incorrect specification of the amount of the annual percentage rate of charge in respect of a consumer credit agreement is to be treated in the same way as the failure to specify that rate. That calls for an answer to the further question as to whether the agreed remuneration for 'ancillary services' (which, at the time when the agreement was concluded, were contained in the original repayment schedule, and relate entirely to the manner of repayment of the credit and not to the receipt of other goods or interests) constitutes a cost which must be included in the annual percentage rate of charge, in accordance with Article 3(g) of Directive 2008/48. That necessitates an interpretation of whether, in the present case, the payment of such remuneration constitutes the 'main subject matter' of an agreement connected with the credit agreement or an additional condition of, and, accordingly, an additional cost connected with, the credit agreement.

10 Lastly, the referring court would like to recall point 5 of the operative part of the judgment [of the Court of Justice] of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (Joined Cases C-224/19 and C-259/19), which reads:

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‘Articles 6(1) and 7(1) of Directive 93/13 and the principle of effectiveness must be interpreted as meaning that they preclude a system whereby the consumer may be made to bear part of the costs of proceedings depending on the level of the unduly paid sums which are refunded to him following a finding that a contractual term is void for being unfair, given that such a system creates a substantial obstacle that is likely to discourage consumers from exercising the right to an effective judicial review of the potential unfairness of contractual terms such as that conferred by Directive 93/13’. In the light of the foregoing, the question with which the court called upon to adjudicate on this matter is faced is whether that interpretation is applicable only in cases where it is practically impossible or excessively difficult for the consumer to exercise his or her rights, where the amount of the claim for refund of the payments made on the basis of the unfair term must be specified, or in all cases, including that involving the presence of an unfair term which does not affect, either in whole or in part, the amount of the claim, which is not directly related to the subject matter of the proceedings or, accordingly, the liability towards the creditor. This question is linked to the subject matter of the main proceedings inasmuch as, if the remuneration for ‘ancillary services’ forms the ‘main subject matter’ of an agreement connected with the credit agreement and would accordingly have to be excluded from the calculation of the annual percentage rate of charge, the court, when giving judgment on the dispute, would also have to adjudicate on the apportionment of the costs of the proceedings. Under national law, the share of those costs payable depends on the extent to which the application is granted or dismissed, irrespective of the status of the party to the proceedings concerned.

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