Case C-208/21

Summary of a request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

23 March 2021

Referring court:

Sąd Rejonowy dla Warszawy-Woli w Warszawie (District Court for Warszawa-Wola, Warsaw, Poland)

Date of the decision to refer:

1 June 2020

Applicant:

K.D.

Defendant:

Towarzystwo Ubezpieczeń Ż S.A.

Subject matter of the main proceedings

Action for payment in connection with a plea alleging that a declaration of accession to a group assurance contract is invalid in the context of the use of an unfair commercial practice.

Subject matter and legal basis of the question referred

The scope of the term 'unfair commercial practice' contained in [Directive] 2005/29/EC; scope *ratione personae* of responsibility; right to apply for the annulment of a contract under national law; unclear standard contract in the context of Directive 93/13

Questions referred

'Question 1: Must Article 3(1) of Directive 2005/29/EC, in conjunction with Article 2(d) thereof, be interpreted as concentrating the meaning of the term 'unfair commercial practice' only around the circumstances relating to the conclusion of a contract and the presentation of the product to the consumer, or must the formulation, by the trader who is creator of the product, of the misleading standard contract which underlies the functioning of the sales offering prepared by another trader, and is therefore not directly related to the marketing of the product, also be understood as falling with the scope of the directive and thus the term 'unfair commercial practice'?

Question 2: If the first question is answered in the affirmative, must it be concluded that the trader responsible under Directive 2005/29/EC for the use of an unfair commercial practice is the trader responsible for formulating the misleading standard contract or the trader who, on the basis of that standard contract, presents the product to the consumer and is directly responsible for marketing the product, or must it be concluded that both traders bear responsibility under Directive 2005/29/EC?

Question 3: Does Article 3(2) of Directive 2005/29/EC preclude a rule of national law (interpretation of national law), which confers on the consumer the right to apply for annulment by a national court of a contract concluded with a trader, with mutual refund of payments, where the consumer's declaration of intent to conclude the contract was made under the influence of the trader's unfair commercial practice?

Question 4: If the third question is answered in the affirmative, must it be held that the appropriate legal basis for assessing the action of a trader, consisting in the use of unintelligible and unclear standard contract in relation to a consumer, will be Directive 93/13, and consequently must the requirement that contractual terms be drafted in plain, intelligible language, laid down in Article 5 of Directive 93/13, be interpreted as meaning that in unit-linked assurance contracts concluded with consumers this requirement is met by a non-individually negotiated contractual term which does expressly define the scale of the investment risk during the term of the assurance contract and merely provides information about the possibility of

the loss of part of the first premium paid and on-going premiums in the event of withdrawal from the assurance before the end of the liability period?

Provisions of Community law relied on

Articles 2, 3, 5, 11 and 11a 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') ('Directive 2005/29/EC')

Articles 3 and 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Directive 93/13')

Provisions of national law relied on

Articles 2, 4, 12 of the Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym z dnia 23 sierpnia 2007 r. (Law of 23 August 2007 on combating unfair commercial practices) ('the LCUCP')

Articles 6, 58, 84, 88, 361, 415, 805, and 808 of the Civil Code of 23 April 1964 ('the CC')

Succinct presentation of the facts of the case and proceedings

1 By an application of 10 January 2018, the applicant, K. D., sought an order requiring the defendant, Towarzystwo Ubezpieczeń Ż, a public limited liability company established in W. (hereinafter also referred to as 'TUŻ'), to pay an amount of PLN 40 225.43, plus statutory default interest from 7 May 2017 to the date of payment, and the costs of the proceedings.

2 The applicant founded its claim on several bases, inter alia a plea alleging that the declaration of accession to the group endowment and life assurance contract with the unit-linked fund 'L.' (hereinafter also referred to as 'the ULF L.'), concluded between TUŻ, a public limited company established in W. and the Bank Y., a public limited company established in W. (hereinafter also referred to as 'Bank Y'), and also a plea alleging the defendant used an unfair and misleading commercial practice, both pleas being based on identical facts and the product description contained in the Terms and Conditions of Assurance L. and the Instrument of Incorporation of the Unit-Linked Fund 'L.' ('the Fund's Instrument of Incorporation').

3 The dispute in question arose in connection with the applicant's accession, as a consumer, to the group endowment and life assurance contract with the unit-linked fund 'L.', concluded between TUŻ, a public limited company established in W., and the Bank Y., a public limited company established in W.

4 TUŻ, a public limited company established in W., acted as the assurer in the contract. Bank Y., a public limited company established in W, acted as the policyholder therein. The applicant acted therein in its capacity as the assured person. The applicant had assurance cover from 10 January 2012. The agreed assurance period was 15 years. In connection with its accession to the contract, the applicant was required to pay an initial premium of PLN 20 250 and on-going monthly premiums of PLN 612. The applicant paid a total of PLN 58 806 into the assurer's account by way of such premiums. Standard terms in the form of assurance terms and conditions, a table of fees and premium limits, and the fund's instrument of incorporation apply to the contract.

5 According to the Assurance Terms and Conditions, the table of fees and premium limits and the Fund's Instrument of Incorporation, the objective of the assurance was to accumulate and invest the assured person's monies using a dedicated unit-linked fund. According to the instrument of incorporation, the unit-linked fund was created from the payment of premiums – initial and on-going – less administrative fees. The initial premium paid at the beginning of the contract amounted to 20% of the invested premium, that is to say the sum of all the premiums minus the fees which the applicant had to pay throughout the term of the contract. The premium invested under the contract amounted to PLN 101 250 – it was the product of the on-going premium less the administration fee and the number of months of duration of the assurance, plus the initial premium (that is to say PLN 612 minus the administration fee x 15 years x 12 months + 20%). The objective of the fund was to: increase the value of the assets through growth in the value of the investment thereof in certificates issued by BV and the 100% protection of the amount corresponding to the premium invested, without the assurer guaranteeing that those objectives would be attained.

6 At the end of the 15-year duration of the contract the applicant was to receive a life assurance benefit in the amount of the value of the account on the date of redemption, which was to be determined on the basis of the instrument of incorporation. Under Paragraph 4(5) of the Instrument of Incorporation, the value of the account on the date of redemption was to be calculated on the basis of the value of the certificates referred to in subparagraph 3. On the date on which the liability period ended, the payment from the certificate was to protect the nominal value corresponding to the invested premium (i.e. PLN 101 250) and achievement of the objective referred to in Paragraph 3(2) of the Instrument of Incorporation (i.e. the increase in the value of the ULF's assets), with the proviso that the assurer did not guarantee achievement of the investment objective referred to in Paragraph 3(2) of the Fund's Instrument of Incorporation. In addition, payment was to be made unless one of the following risks materialised: a credit risk of the issuer (understood as the possibility of permanent or temporary inability of the

issuer to service the debt, including surrender of issued certificates); the risk of not making profits because the performance of the ULF is dependent on change in the value of the certificates and is not determined in advance; and the risk of losing part of the initial premium paid and on-going premiums less the management free in the event of withdrawal from the assurance before the end of the liability period.

7 How the abovementioned index operates was not specified anywhere in the contract. Furthermore, that index could be replaced by a replacement index if the original index were terminated. The contract did not set out how the replacement index was to be calculated or specify the situation in which the original index could be terminated, or who was to take the decision in that regard.

8 The applicant had the right to terminate the contract before the 15-year term expired. In that case, the assurer undertook to effect what is known as 'total surrender'. The assurer then paid the assured person an amount equal to the value of the account, less a termination fee amounting 80% of the monies concerned, where the contract was terminated in the first, second or third year of its term. If the contract were terminated in subsequent years of its term, the termination fee was subject to a corresponding reduction, so that it amounted to 50% in the sixth year and 20% in the tenth.

9 The termination fee was to be calculated and charged as a percentage, in accordance with the table of fees and premium limits, of the value of the redeemed units. The value of the account indicated the current number of units acquired to the unit account multiplied by the value of such a unit on a given date. The value of a unit was calculated by dividing the net asset value of the overall fund by the total number of units. How the net asset value of the unit-linked fund was to be calculated was set out in the instrument of incorporation, under which it was to be effected in accordance with a market value permitting a reliable reflection of their value whilst complying with the principle of prudence in valuation. However, the contract did not explain the rules under which units in the assurance fund were to be valued or the rules under which the net assets of the overall fund were to be valued. Nor were rules on the valuation of bonds/certificates in which the monies were to be invested set out.

10 The first premium was converted into fund units in accordance with a conversion rate, strictly defined by the contract, for the value of the initial unit in the amount of PLN 200. In the subsequent operations on the account, that is to say after payment of the monthly on-going premiums had commenced, the conversion of the money into fund units and the conversion of the value of the total units entered in the assured person's account (including the applicant's) was effected in a manner unknown to the applicant. The Terms and Conditions of the Assurance and the Instrument of Incorporation of the Fund did not state why the value of the unit following the first acquisition dropped from PLN 200 to PLN 147.38 and in subsequent periods down to PLN 31.93.

11 The applicant acceded to the abovementioned assurance contract through Bank Y, a public limited company.

12 The monies of the unit-linked assurance fund were invested in structured bonds issued by the investment bank BV. The value of the unit share, and thus the value of the assured person's investment, determined the value of those assets (i.e. the structured bonds), and not the value of the underlying indexes. The structured bonds consisted of an option component and a debt component (bond or deposit). The market value of a structured bond is a component of the value of those two parts. The above information was not included in the Assurance Terms and Conditions or the Fund's Instrument of Incorporation – the Terms and Conditions merely stated that the ULF monies would be invested in BV certificates.

13 The Terms and Conditions and the Fund's Instrument of Incorporation likewise do not state in detail what the financial leverage mechanism used in the product in question consists of and what the consequences thereof are for the value of the share account, in particular that the fact that both the profit and the loss are calculated on the basis the total invested premium. The value of the unit share and a significant decrease in its value during the initial period of investment was affected by the fact the assets in question (structured bonds), in which the monies of the fund were invested, were partially paid financial instruments – as a result of the financial leverage mechanism.

14 When offering the product, Bank Y employee R.N. informed clients that it was an investment product with a capital guarantee at the end of the contract. In the event of early withdrawal from the contract there was no capital guarantee and the client had to pay a termination fee. The capital guarantee covered the amount paid by the client throughout the term of the contract.

15 The financial leverage mechanism – leverage in such a way that it had to pay 20% of declared investment of PLN 101 250 and the bank was to add the rest – was explained to the applicant. The entire declared amount – PLN 101 250 – was to produce profit. At the meeting with the adviser, R.N., the applicant was not informed of the risks associated with the product or that the loss would also be calculated on the basis of the declared amount.

16 The creator of the entire product 'L.' was TUŻ, a limited liability company established in W. In the process of providing the applicant with coverage, Bank Y, a public limited company established at W., acted solely as the policyholder and had no influence on the parameters of the product. Bank Y was not involved in the creation of that product. On the other hand, Bank Y did draw up training materials to train Bank Y employees in how to offer TUŻ products. Those training materials were accepted by TUŻ.

17 R.N. received product and sales training. The training relating to product 'L.' lasted about two weeks and concerned inter alia the product offering, the construction of the product, the principles of the product and the sales processes.

The Bank Y employees offering investment products were also trained as regards the construction of investment products, and their economic aspects and principles.

18 When it learnt of its share account balance – which was considerably less than the sum of the premiums paid – the applicant decided to discontinue the contract. By letter of 4 April 2017, the applicant withdrew from the assurance contract and requested that the defendant refund all the monies paid. By letter of 25 April 2017, TUŻ refused to comply with the applicant's request.

19 The value of the monies in the account on the date on which the assurance contract ended was PLN 37 161.15. TUŻ deducted a termination fee of PLN 18 580.58 (50% of the value of the share account). The sum of the premiums paid by the applicant during the term of the contract amounted to PLN 58 806.

Essential arguments of the parties to the main proceedings

20 In the view of the applicant, the Terms and Conditions of Assurance L. contained vague, unclear and imprecise provisions which thus mislead the applicant, the customer, who was not in a position to determine itself, on the basis thereof, the nature and make-up of the product purchased.

21 In so far as it may be concluded that the assured person was able to obtain from the assurer information on the 'units' assigned to it, the value of the share remained dependent on the value of unit-link fund as a whole. However, the Terms and Conditions of the Assurance 'L.' did not specify how that final value (the value of the ULF as a whole) was to be determined, referring in that regard to the Fund's Instrument of Incorporation. However, the provisions of the Fund's Instrument of Incorporation provided that the value of the units was to be the net asset value of the fund or the total number of units. The net asset value was defined as the value of the assets less liabilities. How the value of the fund's net asset value was determined in the Fund's Instrument of Incorporation drawn up by the defendant assurance fund was defined in very vague terms by the statement that that value was to be determined 'according to a market value allowing for a fair reflection of their value, subject to the principle of making valuations on a prudent basis'. However, the Fund's Instrument of Incorporation did not state who was to carry out that valuation and how.

22 According to the Fund's Instrument of Incorporation, the monies of the unit-linked fund are to be invested in certificates issued by BV, that is to say a foreign company not operating in Poland, with the payment of those certificates based on an index referred to in the Instrument of Incorporation as the BV INDEX. The Instrument of Incorporation states that the index was created by the BV – Bank, whilst the applicant claimed that the provisions of the Instrument of Incorporation do not specify which objectivised criteria are used to establish the values of that index.

23 Neither the Terms and Conditions of Assurance ‘L.’ nor the Fund’s Instrument of Incorporation state the rules and mechanisms for valuing the units in the fund during the term thereof or on its termination.

24 An analysis of the Fund’s Instrument of Incorporation led the applicant to conclude that the value of benefits due to the assured person under the assurance contract will be established not on the basis of objectively verifiable and generally available market data but in a manner resulting from methods, criteria and data not shown in the Terms and Conditions and the Fund’s Instrument of Incorporation.

25 The applicant pointed out that, when offering the product, the adviser failed to inform it not only that the profit is burdened with risk but that the applicant might not recover the paid-up capital. He did not warn the applicant that it could suffer a loss even if the index on which the fund is based increased.

26 The applicant claimed that the practice of selling products which are essentially investment products not adapted to the needs of the client, and the failure reliably to inform clients (including emphasising the possibility of gaining above-average profits combined with the marginalisation of information about the risk) is unfair.

27 In response to the application, the defendant TUŻ contended that the action should be dismissed in its entirety and that the applicant should be ordered to pay its costs. The defendant raised inter alia an objection that the TUŻ lacked capacity to be sued in connection with the plea alleging unfair commercial practices since the pleas raised by the applicant concern the process of selling assurance products by an employee of the policyholder – the Bank Y – and not actions and omissions of the defendant – the public limited company TUŻ. An objection that the action is time-barred in this regard was raised at the same time.

28 With reference to the plea alleging unfair commercial practices, the defendant argued that the applicant had failed to prove use of unfair commercial practices in the offering of the product and the applicant’s accession to the group assurance contract. The defendant denied having engaged in an unfair commercial practice. The applicant had failed to prove that the defendant had offered the product unfairly by presenting its qualities in a misleading manner.

29 It was also argued that Bank Y, as a separate entity, offered its clients accession to the assurance contract as insured persons as part of the economic activity in which it was engaged. Thus, the actions performed by Bank Y were actions performed by that entity on its own behalf and in its own name.

30 The defendant company had complied with its obligations to provide information and all the information about the assurance was contained in the documents which the applicant received. Consequently, the applicant was perfectly aware of the nature of the product to which it was acceding. Since the applicant was aware of the nature of the product and had an opportunity to learn about the associated risks before acceding to it, the applicant cannot be regarded as having had its interest infringed.

Succinct reasons for the reference

31 The definition of 'commercial practices' contained in Article 2(d) of Directive 2005/29/EC is very general. It is clear from the case-law of the Court of Justice of the European Union that this term is to cover any form of actions or omissions by a trader which could potentially or actually influence consumer choices and decisions directly connected with the sale or promotion of a product. Consequently, under national law it is assumed that unfair commercial practice covers any form of conduct by a trader, provided that there is a direct connection between the action or omission and the promotion or purchase of a product by a consumer. It is stated that actions of a trader which fall within the definition of practice include: advertising, commercial information, marketing, and promotion.

32 It would appear that in its previous case-law the Court of Justice has not ruled expressly on the meaning of the term 'causal link' for the purposes of Directive 2005/29/EC. In national case-law the issue of direct link was raised by the Sąd Najwyższy (Supreme Court) when it ruled that the Law on combating unfair commercial practices applies to actions or omissions directly connected with the promotion or purchase of a product by a consumer, with not only the trader's marketing conduct but also other means of distinguishing its products among the product offered on the market being relevant.

33 In this context, the referring court was uncertain whether an unfair commercial practice within the meaning of Directive 2005/29/EC is also engaged in by the trader who is the author of a standard contract – the Terms and Conditions and the Fund's Instrument of Incorporation, which underlie the functioning of the sales offering drawn up by another trader. The author of the standard contract (the assurer) does not market the product directly and is not directly responsible for marketing the product. That is done by a party with which it has a contract (the policyholder). Against this background, uncertainty arose as to whether, in such a mix of relationships, it is possible to find that the author of the standard contract also engages in an unfair commercial practice within the meaning of Directive 2005/29/EC.

34 In the present case, the applicant was offered an opportunity to accede to the group endowment and life assurance contract with the unit-linked fund L. The group assurance contract was concluded between TUŻ, a public limited company established in W., and Bank Y, a public limited company established in W. In this trilateral legal relationship, TUŻ acts as assurer, creator of the product and author of the standard contract used in the relationship with the consumer – the Terms and Conditions of Assurance L., the table of fees and limits and the Fund's Instrument of Incorporation. Bank Y, on the other hand, acts as the policyholder, which was simultaneously the actual assurance distributor. It is Bank Y which was responsible for attracting the clients who acceded to the group assurance 'L.', including being responsible for presenting the sales offering and the product to the applicant. The evidence gathered in the present case – the information provided by Bank Y – shows that the training materials used to give Bank Y employees

training in product L., were accepted by the assurer, the defendant TUŻ. On the other hand, as the policyholder Bank Y had no influence over the parameters of the product and took no part in the creation of that product.

35 In this situation, the question arises as to which entity is responsible for engaging in an unfair practice towards the applicant consisting in the presentation of a product on the basis of a misleading standard contract. It would appear to follow from Article 3(1) of Directive 2005/29/EC that it will be the trader with whose activity the marketing of the product is connected – in the present case, the policyholder. The substance of the above provision appears to concentrate the meaning of the term 'unfair commercial practice' only around the circumstances related to the conclusion of the contract and the presentation of the product to the consumer and not the earlier stage related to the actual construction of the product and determination of the content of the standard contract. Recital 7 of Directive 2005/29/EC also addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products.

36 On the other hand, however, having regard to the multiplicity and diversity of contractual relations involving consumers, such an interpretation does not appear appropriate, in particular in the context of recital 13 of Directive 2005/29/EC and also the obligation, highlighted in the preamble to the directive, on traders to provide information (in particular as regards financial services, by reason of their complexity) and the objective of maintaining consumer confidence. This is of particular relevance in the context of the facts of this case. The applicant claims that the defendant assurer (which is responsible for the construction of the product and the standard contract) uses an unfair market practice consisting in misleading it as to the qualities of the product offered to it by another trader. The assurer, on the other hand, raises the objection that it cannot be responsible for an unfair commercial practice as it was not responsible for marketing the product. At the same time, it is clear from the findings of the court that the product was offered to the applicant on the basis of the Terms and Conditions of Assurance L. and the Fund's Instrument of Incorporation drawn up by the defendant TUŻ, documents which at the same time constituted the standard contract delivered to the applicant following the signing of the declaration of accession to the contract.

37 The court's uncertainty does not encompass the actual responsibility of the policyholder, Bank Y, for the misleading presentation of the product. However, uncertainty is raised by a situation in which the consumer was not provided, during the presentation, with complete and clear information about the product purchased – in this case assurance with UFK 'L.' – and at the same time this information was not contained expressly in the standard agreement – the Terms and Conditions of the Assurance 'L' and the Fund's Instrument of Incorporation. Therefore, in the view of the court, the question arises as to whether, where a trader uses a standard contract, which does not comply with the principle of transparency, which is incomprehensible and unclear to the average consumer and on the basis of the which consumer is unable to reconstitute the essential qualities of the product, it can, in a situation where the trader is not involved at the stage

where the product is offered and presented to the consumer, be classified as an unfair commercial practice.

38 In this case, there is a stage at which the product is offered to the consumer, before the transaction is concluded. The product is presented by one trader (the policyholder) on the basis of a standard contract supplied by another trader (the assurer). At the same time, the court considers that the standard contract constructed by the assurer was formulated in a manner which could be misleading. In particular, the standard contract (in particular the Instrument of Incorporation) refers, as regards the methods for valuing the product, to complicated rules on accounting and the valuation of financial instruments contained in other detailed legal acts, without at the same time indicating those acts and without explaining clearly and unequivocally to the consumer what the valuation consists of and how it 'works'.

39 In the situation set out above, the question arises as to whether the term 'commercial practice' contained in Directive 2005/29/EC also covers a trader's conduct consisting in the construction of a misleading standard contract which then underlay the functioning of the sales offering of another trader and at the same time defined the substance of the obligation between the consumer and the assurer. If the term 'commercial practice' does also cover a trader's conduct consisting in the construction of a misleading standard contract, is the trader responsible for engaging in a unfair commercial practice towards a consumer under Directive 2005/29/EC the trader responsible for formulating the misleading standard contract, or the trader which, on the basis of that standard contract, presents the product to the consumer and is directly responsible for marketing that product, or must it be concluded that both traders bear responsibility under Directive 2005/29/EC?

40 Furthermore, according to the case-law of the Court of Justice, in the light of Article 3(2) of Directive 2005.29/EC a finding that a commercial practice is unfair has no direct effect on the validity of the contract but it may be one element among others on which the competent court may base its assessment of the unfairness of contractual terms under Article 4(1) of Directive 93/13.

41 In this context, the referring court is uncertain in the present case whether an interpretation of Article 12(1)(4) of the LCUCP which leads to the consumer being granted, under national measures, the right to apply for a declaration of invalidity of a contract, where it is shown that the contract was concluded as a result of the trader using an unfair commercial practice, is compatible with Articles 11, 11a, 13 and 3(2) of Directive 2005/29/EC.

42 As stated in the opinion of the Advocate General delivered on 29 November 2011 in the case of *Pereničová and Perenič* v *SOS financ spol.* (paragraphs 83 to 86), Directive 2005/29/EC contains no provisions which provide for contractual term being declared invalid. Instead, Article 3(2) of Directive 2005/29 states that the

'directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract'.

43 If it is concluded that, under national measures, granting a consumer the right to have declared invalid a contract concluded under the influence of an unfair commercial practice, as part of a self-contained penalty, is not compatible with Article 3(2) of Directive 2005/29/EC, uncertainty also arises about the possible concurrence of Directive 2005/29/EC with Directive 93/13 and the possibility of assessing the fact that the trader uses an incomprehensible and unclear standard contract on the basis of which consumer is unable to reconstitute the essential qualities of the product and the investment risk borne by him, under Article 3(1) of Directive 93/13.

44 The trader's failure to provide the consumer with detailed information can be classified as an unfair commercial practice. However, having regard to the rule arising from Article 3(2) of Directive 2005/29/EC that that directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract, the question arises as to whether appropriate basis for judicial intervention in a particular contractual obligation, such as that applied for by the consumer in the dispute with the trader, will be the provisions of Directive 93/13. Consequently, the question arises as to whether it is through the prism of Article 5 of Directive 93/13 that it is necessary to assess the contractual terms contained in the Fund's Instrument of Incorporation and which, as a whole, make up the distribution and scale of the investment risk arising from the contract, which is borne by the consumer during the term of the contract.