Case C-81/21

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:

9 February 2021

Referring court:

Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie (Poland)

Date of the decision to refer:

27 October 2020

Applicants:

B.S.

W.S.

Defendant:

M.

Subject matter of the main proceedings

The applicants claim that the defendant should be ordered to pay them an amount of money, plus statutory default interest, in connection with amounts charged unjustifiably by way of principal and interest payments relating to reimbursement of a loan on account of the use of unfair contractual terms contained in a mortgage agreement denominated in Swiss francs (CHF).

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

Interpretation of EU law, in particular Articles 6(1) and 7(1) of Council Directive 93/13/EEC; Article 267 TFEU.

Questions referred

1. Must Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as precluding a judicial interpretation of provisions of national legislation under which a court, where it finds that a contractual term is unfair, without that rendering the agreement invalid, may supplement the content of the agreement with a supplementary provision of national law?

2. Must Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as precluding a judicial interpretation of national legislation under which a court, where it finds that a contractual term is unfair, with the result that the agreement is invalid, may supplement the content of the agreement with a supplementary provision of national law, in order to prevent the agreement from being invalid, even though the consumer consents to its being invalid?

Provisions of EU law invoked

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: twenty-first and twenty-fourth recitals, Articles 6(1) and 7(1) and (2)

Provisions of national law invoked

Ustawa of 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code) (Dz. U. No 16, item 93, as amended); 'the CC'

A 'consumer' is a natural person who performs with a seller or supplier a legal transaction which is not directly connected to his trade or profession (Article 22^1).

1. Subject to the exceptions laid down in this Law, pecuniary obligations in the territory of the Republic of Poland may be denominated only in Polish currency (Article 358 in the version in force until 23 January 2009).

1. Where the subject matter of a pecuniary obligation is a sum denominated in a foreign currency, the debtor may render performance in Polish currency, unless legislation, a court ruling constituting the basis of the obligation or a juridical act reserves the performance of the obligation exclusively in a foreign currency. 2. The value of the foreign currency is to be calculated in accordance with the average exchange rate announced by the National Bank of Poland on the day of the obligation's maturity, unless legislation, a court ruling or a juridical act provides otherwise. In the case where the debtor is in default, the creditor may demand performance in Polish currency in accordance with the average exchange rate announced by the National Bank of Poland on the day on which the payment is made (Article 358 in the version in force as from 24 January 2009).

1. Terms of a contract concluded with a consumer which have not been agreed individually shall not be binding on the consumer if they define his rights and obligations in a way that is contrary to good practice, grossly infringing his interests (prohibited contractual terms). This shall not apply to terms setting out the principal obligations of the parties, including price or remuneration, if they have been worded unambiguously. 2. If a contractual term is not binding on the consumer pursuant to paragraph 1, the contract shall otherwise continue to be binding on the parties. 3. Provisions of a contract which are not agreed individually are those over the content of which the consumer had no genuine influence. This refers in particular to contractual terms taken from a standard contract proposed to a consumer by a contracting party. 4. The burden of proving that a provision has been agreed individually rests with the person relying thereon (Article 385^1).

The compliance of contractual terms with good practice shall be assessed according to the state of affairs at the time of conclusion of the contract, taking into account its content, the circumstances in which it was concluded and also other contracts connected with the contract which contains the provisions being assessed (Article 385^2).

Any person who, without legal grounds, obtains an economic advantage at the expense of another person shall be required to restore that advantage in kind and, where that is not possible, to return the value thereof (Article 405).

1. The provisions of the preceding articles shall apply in particular to an undue obligation. 2. An obligation shall be undue where the person who performed it was in no way obliged or was not obliged to the person for whom he performed it, or where the basis of the obligation ceased to exist or the intended objective of the obligation was not attained, or where the juridical act requiring performance of the obligation was invalid and did not become valid after the obligation was performed (Article 410).

Succinct presentation of the facts of the case

1 In 2009 the parties concluded a CHF-indexed mortgage agreement for a period of 360 months, which was reimbursed in equal principal and interest payments at a variable rate set as the LIBOR 3M rate, plus a fixed bank margin of 7.20% (Paragraph 9(1) and (2)). The borrower undertook to reimburse the capital plus interest monthly in instalments on the dates and in the amounts set out in the repayment schedule. The principal and interest payments were reimbursed in złoty after having been converted at the selling rate set out in the bank's exchange rate table in force on the date of reimbursement (Paragraph 10(5)). On 18 February 2012, the parties concluded an annex to the loan agreement which allowed the applicants to make loan payments directly in CHF. By 12 January 2020 the applicants had paid to the defendant by way of loan reimbursement payments an amount equivalent to PLN 219 169.44. If it were assumed that the parties were not

bound by Paragraphs 10(5) and 12(5) of the loan agreement, whilst the other provisions of the agreement remained in force, the sum of the loan payments in that period would have been PLN 43 749.97 less. On the other hand, if it were assumed that the loan capital and the loan payments were converted at the average rate of exchange of the National Bank of Poland, the sum of the loan payments in that period would be PLN 2 813.45 and CHF 2 369.79 less than the amount actually paid by the applicants.

2 In the application, the applicants sought an order requiring the defendant to pay them the amounts of PLN 37 866.11 and CHF 5 358.10, plus statutory default interest, by way of repayment of the principal and interest payments charged by the defendant over the period from 14 June 2010 to 12 December 2012, pursuant to the loan agreement of 3 February 2009, which contains unfair contractual terms rendering that agreement invalid, and, on the other hand, if it were to be found that the unfair terms contained in the loan agreement did not render it invalid, the applicants sought an order requiring that they be paid an amount of PLN 44 976.66 by way of repayment of the equivalent of the overpaid portion of the principal and interest payments. The defendant contended that the action should be dismissed. At the hearing, after being informed of the consequences if the loan agreement were invalid, the applicants personally declared that they understood the legal and financial consequences of the invalidity of that agreement and agreed to them.

Essential arguments of the parties in the main proceedings

3 As consumers, the applicants contest the contractual terms of the loan agreement, which were not agreed with them individually, as regards the conversion of the amount of the loan and the loan payments on the basis of foreign exchange rates set by the defendant bank. In their view, those clauses were taken from a standard agreement used by the defendant bank.

Succinct statement of the reasons for the reference

4 In analysing the effects of the unfair nature of the clauses at issue, the referring court refers at the outset to the judgment of the Court of Justice of 3 October 2009 (C-260/18, *Dziubak*) which ruled that Article 6(1) of Directive 93/13 must be interpreted as precluding gaps in a contract caused by the removal of the unfair terms contained in that contract from being filled solely on the basis of national provisions of a general nature which provide that the effects expressed in a legal transaction are to be supplemented by, inter alia, the effects arising from the principle of equity or from established customs, which are neither supplementary provisions nor provisions applicable where the parties to the contract so agree.

5 In the context of the ‘conversion clauses’, the referring court refers to the position expressed, on the basis of the amended version of Article 358 of the CC, by the Sąd Okręgowy w Warszawie (Regional Court, Warsaw), that the unfair nature of

the indexation clauses could render the entire agreement or some of its clauses invalid, provided that in the absence of the unfair indexation clauses the agreement can be maintained in the original form established by the parties to the loan. Clauses which are declared unfair are to be deleted to the extent that their content is impermissible. A finding that some of the indexation clauses are unfair does not necessarily mean that the entire indexation mechanism described is open to challenge. A loan-indexing mechanism is essentially a contractual indexation clause, as provided for in Article 358[1](2) of the CC, fixing the amount of the obligation in accordance with a measure of value other than Polish currency. [1] Since the loan agreement under consideration in this case was concluded whilst the new version of Article 358 of the CC was in force, it is necessary to consider whether, as a result of the terms contained in Paragraphs 10(5) and 12(5) of the loan agreement being declared unfair, it is possible to 'fill the gap' in that agreement in the manner set out above in the judgment of the Sąd Okręgowy w Warszawie. This ruling gives rise to doubts in the light of Article 6(1) of Directive 93/13 in the context of the Court of Justice's position that that provision precludes national legislation which allows a national court, in the case where it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to modify that contract by revising the content of that term. Therefore, it follows from the wording thereof that the national courts are required only to exclude the application of an unfair contractual term, without being empowered to revise its content. *'The contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible. (...) If it were open to the national court to modify the content of the unfair clauses included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non- application of those unfair terms with regard to consumers (see, to that effect, the order in Pohotovost', paragraph 41, and the case-law there cited), in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.*' [2]

6 Furthermore, in the judgment cited (paragraph 69) the Court of Justice referred explicitly to points 86 to 88 of the Opinion of Advocate General Verica Trstenjak of 14 February 2012 in which the above issue was explained in an even more direct and resolute manner. The Advocate General pointed to the reduction in the risks to the seller or supplier resulting from the use of unfair terms, since the modification consisting in amendment of the terms in accordance with the law is

[1] See judgment of the Sąd Okręgowy w Warszawie of 6 February 2020, XXVII Ca 1196/18, LEX nr 3032540.

[2] See judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10.

acceptable to the seller or supplier. The prospect of curing the grounds for invalidity of an agreement and clarity over risks for the seller or supplier could have the reverse effect to that desired by the legislature and creating the possibility of a subsequent modification of the agreement by the court would not only neutralise the deterrent effect of Article 6 of the directive, but would also have the opposite effect. The above position has also been reflected in many other judgments of the Court of Justice. [3]

7 However, the Court of Justice has permitted one exception to the rule providing that unfair contractual terms are to be invalid, pointing out that, in a situation in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, Article 6(1) of Directive 93/13 does not preclude a rule of national law enabling the national court to substitute for it a supplementary provision of national law. [4] That position was then supplemented by the finding that the possibility of substituting a supplementary provision of domestic law for an unfair contractual term is limited to situations in which the invalidation of that contractual term would require the court to annul the agreement in its entirety, thereby exposing the consumer to such consequences that he would be penalised as a result. [5] Furthermore, in its judgment of 14 June 2012 the Court of Justice held explicitly that Article 6(1) of Directive 2004/18 cannot be understood as allowing the national court to revise the content of an unfair term instead of merely setting aside its application to the consumer, but that provision must be interpreted as precluding legislation of a Member State which allows a national court to modify that contract by revising the content of that term. [6] Finally, explaining the meaning of Articles 6 and 7 of Directive 93/13, the Court of Justice held that they had to be interpreted ‘as

[3] See order of 16 November 2010, C-76/10, *Pohotovost’*, paragraph 41; judgments of 30 April 2014, C-26/13, *Kásler*, paragraphs 77 and 79; of 21 January 2015, C-482/13, C-484/13, C-485/13, C-487/13, *Unicaja Banco and Caixabank*, paragraphs 28, 31 and 32; of 30 May 2013, C-488/11, *Asbeek Brusse and de Man Garabito*, paragraph 57; order of 11 June 2015, C-602/13, *Banco Bilbao Vizcaya Argentaria*, paragraphs 33 to 37; judgment of 21 April 2016, C-377/14, *Radlinger*, paragraphs 97 to 100; order of 6 June 2016, C-613/15, *Ibercaja Banco*, paragraphs 36 to 38; judgments of 21 December 2016, C-154/15 and C-307/15, *Naranjo and Martinez*, paragraphs 57 and 60; of 26 January 2017, C-421/14, *Banco Primus*, paragraphs 71 and 73; of 31 May 2018, C-483/16, *Sziber*, paragraph 32; of 7 August 2018, C-96/16 and C-94/17, *Banco Santander and Cortés*, paragraphs 73 and 75; of 13 September 2018, C-176/17, *Profi Credit Polska*, paragraph 41; of 14 March 2019, C-118/17, *Dunai*, paragraph 51; of 26 March 2019, C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, paragraphs 53, 54, and 63; of 7 November 2019, C-349/18, C-350/18, and C-351/18, *NMBS*, paragraphs 66 to 69.

[4] See judgment of 30 April 2014, C-26/13, *Kásler*, paragraph 85.

[5] See order of 11 June 2015, C-602/13, *Banco Bilbao Vizcaya Argentaria*, paragraph 38; judgments of 21 January 2015, C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco and Caixabank*, paragraph 33; of 7 August 2018, C-96/16 and C-94/17, *Banco Santander and Cortés*, paragraph 74; judgment of 14 March 2019, C-118/17, *Dunai*, paragraph 54; of 26 March 2019, C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, paragraphs 37 and 59.

[6] See judgment of 14 June 2012, C-618/10, *Banco Español de Crédito*, paragraphs 71 and 73.

precluding an accelerated repayment clause of a mortgage loan contract that has been found to be unfair from being maintained in part, with the elements which make it unfair removed, where the removal of those elements would be tantamount to revising the content of that clause by altering its substance'. [7]

8 In this situation, the referring court thus infers an obligation on a court to find that the term declared unfair does not bind the consumer from the outset and in its entirety and to consider whether the agreement can function without the unfair term. If this is possible, the agreement should continue in existence with the exception of the unfair terms and therefore the problem of applying the supplementary provision does not arise at all. If that were not the case, on the other hand, the agreement would consequently have to be declared invalid and the court would have to consider whether that invalidity is to the consumer's disadvantage. If the court finds that the invalidity of the agreement is not to the consumer's disadvantage, or if the consumer consents to the agreement being invalid, that court is obliged to declare the agreement invalid in its entirety and cannot supplement its content with a supplementary provision.

9 In the light of the case-law of the Court of Justice set out above and the applicants' claim for repayment of the overpaid part of the loan payments in connection with the use of unfair terms or repayment of all the payments which they made under the invalid agreement, it is reasonable to conclude that, given the position taken by the applicants, the referring court is, where it finds that a contractual term is unfair, essentially limited to adopting one of two approaches. The court can either declare the continued existence of the agreement without the conversion clauses and thus order that the applicants be repaid the overpaid part of the loan payments or declare that the agreement cannot exist without the conversion clauses and thus all the loan payments must be paid back to the applicants. Thus, in neither of these cases is it possible to have recourse to a supplementary provision of national law and such a move would be contrary to Article 6(1) of Directive 93/13. Supplementing the loan agreement through Article 358(2) of the CC would therefore appear to be impermissible.

10 The referring court proposes that the answer given should be that Articles 6(1) and 7(1) of Directive 93/13/EEC must be interpreted as precluding a judicial interpretation of national legislation allowing a court, where it finds that a contractual term is unfair, without that rendering the agreement invalid, to supplement the content of the agreement with a supplementary provision of national law (first question). If the court finds that the contractual term rendering the agreement invalid is unfair, with the result that the agreement is invalid, those provisions must be interpreted as precluding a judicial interpretation of national legislation allowing a court to supplement the content of the agreement with a supplementary provision of national law in order to prevent the agreement from

[7] See judgment of 26 March 2019, C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, paragraph 64.

being invalid, even though the consumer consents to its being invalid (second question).