

Anonymised version

Translation

C-625/21 – 1

Case C-625/21

Request for a preliminary ruling

Date lodged:

8 October 2021

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

22 September 2021

Appellant on a point of law (original defendant at first instance):

VB

Respondent in the appeal on a point of law (original applicant at first instance):

GUPFINGER Einrichtungsstudio GmbH

[...]

The Oberster Gerichtshof (Supreme Court, Austria), [...], in the case of the action brought by the original applicant, GUPFINGER Einrichtungsstudio GmbH, Schärding, [...] against the original defendant, VB, [...] [...] concerning a final claim of EUR 5 271.33 [...], following the appeal on a point of law lodged by the defendant against the judgment of the Landesgericht Ried im Innkreis (Regional Court, Ried im Innkreis), sitting as the court ruling on appeals on the merits ('the appellate court'), of 12 February 2021, GZ 18 R 1/2lh-65, by which the judgment of the Bezirksgericht Braunau am Inn (District Court, Braunau am Inn) of 27 November 2020, GZ 2 C 128/18t-57, was partly amended and partly confirmed, has made, [...], the following

order:

A. The following questions are submitted to the Court of Justice of the European Union ('the Court of Justice') for a preliminary ruling:

1. Are Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('the Unfair Contract Terms Directive') to be interpreted as meaning that, in the examination of a trader's contractual claim for compensation brought against a consumer based on the consumer's unjustified withdrawal from the contract, the application of supplementary national law is precluded if the trader's general terms and conditions ('the GTCs') contain an unfair term which, in addition to the provisions of supplementary national law, grants the trader an optional right to flat-rate compensation against a consumer who has acted in breach of contract?

If Question 1 is answered in the affirmative:

2. Is such an application of supplementary national law also precluded in the cases where the trader does not base its claim for compensation against the consumer on that term?

If Questions 1 and 2 are answered in the affirmative:

3. Is it contrary to the abovementioned provisions of EU law that, in the case of a term containing several provisions (for example, alternative sanctions in the event of unjustified withdrawal from the contract), those parts of the term which, in any event, are consistent with the supplementary national law and are not to be regarded as unfair continue to exist as part of the contract?

[...] [stay of proceedings]

Grounds:

1 I. The facts

2 The applicant company operates an interior design studio in Schärding (Austria) and also offers fitted kitchens for sale.

3 The defendant is a pensioner and, on 12 November 2017, during a construction fair in Ried im Innkreis (Austria), he purchased a fitted kitchen from the applicant at the applicant's stand for the price of EUR 10 924.70. The contract was based on the applicant's general terms and conditions ('the GTCs'), clause V of which is worded as follows (emphasis as in the original):

V. Withdrawal from contract

In the event of delay in acceptance (point VII) or other important reasons, such as in particular bankruptcy of the customer or dismissal of bankruptcy for lack of assets, as well as in the case of default of payment by the customer, we are entitled to

withdraw from the contract, in so far as it has not yet been performed in full by both parties. In the event of withdrawal, we have the choice, if the customer is at fault, of claiming **flat-rate compensation of 25% of the gross invoice amount or compensation for the loss actually suffered.**

In the event of default on payment by the customer, we shall be released from all further obligations to perform and deliver and shall be entitled to withhold any outstanding deliveries or services and to demand **advance payments or securities** or to withdraw from the contract after setting a reasonable grace period.

If the customer withdraws from the contract – without being entitled to do so – or requests its cancellation, we have the choice of insisting on the performance of the contract or agreeing to the cancellation of the contract; in the latter case, the customer is obliged to pay, at our discretion, **flat-rate compensation amounting to 20% of the gross invoice amount or the loss actually suffered.** In so far as design work is not compensated separately, we assert our rights of copyright to all corresponding design documents in the event of the seller's withdrawal from the contract.

- 4 On 28 November 2017, the defendant withdrew from the purchase contract because he was unable to purchase the house for which the kitchen had been intended.
- 5 If the purchase contract had been performed, the applicant would have obtained a profit of EUR 5 270.60 in total.
- 6 **II. Procedure to date**
- 7 By its action brought on 14 May 2018, the applicant claimed contractual compensation from the defendant in the amount of the purchase price minus what it had saved as a result of the non-performance of the work. The applicant argued that the claim, the amount of which it finally estimated at EUR 5 270.60, was due as a result of the withdrawal from the purchase contract. During the proceedings, the applicant company based its claim not on its GTCs, but on supplementary provisions of (Austrian) civil law.
- 8 At the beginning of the proceedings, the defendant still took the view that he was not liable to pay compensation since the withdrawal had been justified. In the proceedings at third instance, however, it is no longer in dispute that the defendant had been wrong to withdraw from the purchase contract.
- 9 The defendant argued, finally, that the GTCs had been part of the purchase contract. Clause V (third paragraph) grants the trader, in the event of unjustified

withdrawal by the consumer, the right to choose to claim from the consumer either flat-rate compensation amounting to 20% of the gross invoice amount or the loss actually suffered. Since that term was unfair and was to the detriment of the defendant as a consumer, the applicant was, it is submitted, entitled to no more than 20% of the actual purchase price.

- 10 The court of first instance awarded the applicant 20% of the gross sale price (EUR 2 184.94) and dismissed the request as to the remainder. Referring to the Supreme Court's decision 3 Ob 237/16y, the court of first instance held that the third paragraph of clause V was grossly prejudicial to the consumer due to the unreasonably high cancellation fee. If this provision were completely omitted from the purchase contract, the applicant would be entitled to compensation for non-performance in the amount of EUR 5 270.60 (due to the supplementary law). In this case, the removal of the unfair term would have a 'punitive' effect on the consumer. After all, the term suggested to him that, in the event of withdrawal from the contract, the maximum amount of compensation to be paid would be 20% of the gross sale price. Under no circumstances would a consumer expect that 'the loss actually suffered' in the event of withdrawal from the contract, without any consideration on the part of the seller, would amount to almost half the agreed price. For those reasons, the compensation for non-performance to be paid to the applicant should be limited to a maximum of 20% of the gross sale price.
- 11 The appellate court varied that judgment by upholding the action [...]. The invalidity of a term in the GTCs that did not concern one of the main obligations of both parties could not, it held, lead to invalidity of the contract. According to the case-law of the Court of Justice, it can be inferred from Article 6(1) of the Unfair Contract Terms Directive that the national courts are required only to exclude the application of an unfair contractual term in order to ensure that it does not produce binding effects with regard to the consumer, without being authorised to revise its content. That 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. Article 6(1) of the Unfair Contract Terms Directive does not preclude a national court, in accordance with the principles of the law of contract, from deleting an unfair term and substituting for it a supplementary provision of national law. On the contrary, replacing an unfair term with such a provision is fully justified in the light of the objective of the Unfair Contract Terms Directive, since it would have the consequence that the contract can continue in existence and remains binding on the parties despite the deletion of the invalid term. According to the case-law of the Court of Justice, Article 6(1) of the Unfair Contract Terms Directive does not seek to invalidate all contracts containing unfair terms. A withdrawal clause that provides for compensation for the actual loss suffered thereby, thus reflecting the supplementary legal situation, was not contrary to accepted principles of morality. A 'limitation of the compensation for non-performance' to an amount of 20% of the gross sale price cannot be reconciled with the case-law of the Court of Justice, according to which

it is apparent from the wording of Article 6(1) of the Unfair Contract Terms Directive that the national courts are required only to exclude the application of an unfair contractual term, without being authorised to revise its content. Recourse to supplementary law is not precluded in the present case. As a result of the defendant's unjustified withdrawal from the contract, the applicant had an interest in the performance of the contract.

- 12 The appellate court subsequently granted leave for the ordinary appeal on a point of law regarding the question as to whether a trader could prevent the exclusion of supplementary law within the meaning of the recent case-law of the Court of Justice (judgment of 27 January 2021, C-229/19 and C-289/19) by refraining from invoking the invalid term vis-à-vis the consumer.
- 13 The Supreme Court is called upon to rule on the defendant's appeal on a point of law brought against the decision on the appeal on the merits.
- 14 In that context, in accordance with the lower courts, reference should be made (as is also not disputed by the parties) to the previous case-law of the Supreme Court (3 Ob 237/16y; RIS-Justiz RS0016914 [T63]), according to which stipulating a flat-rate cancellation fee of 20% must be regarded as grossly prejudicial within the meaning of Paragraph 879(3) of the Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code, 'the ABGB') (and thus unfair within the meaning of Article 6(1) of the Unfair Contract Terms Directive) due to the unreasonably high cancellation fee.
- 15 In the appeal on a point of law brought against the decision on the appeal on the merits, the defendant argues that, according to the case-law of the Court of Justice, in the case where an unfair term is deleted, a supplementary provision cannot be applied to the detriment of the consumer. National courts are bound to assess, of their own motion, whether a term is invalid. Supplementary law was not applicable even if the trader did not expressly rely on the term in the GTCs.
- 16 In its response in the appeal on a point of law, the applicant refers to the statutory right to compensation provided for under Paragraph 921 of the ABGB. To that extent, a term giving the trader the opportunity to assert that right to compensation provided for by law does not constitute an abuse of rights. Furthermore, it would be remarkable to rule out the supplementary law under the guise of consumer protection.
- 17 The provision cited reads:

Paragraph 921 of the ABGB

Withdrawal from the contract shall not affect the claim for compensation for damage caused by culpable non-performance. The remuneration already received must be refunded or reimbursed in such a way that neither party profits from the other's loss.

18 That rule confers on the creditor, after withdrawal, a right to compensation based on the interest in performance of the contract from the party who has been at fault. The debtor is required to pay compensation for all harm suffered by the creditor as a result of the culpable non-performance.

19 If one ignores the existence of the unfair term, the contested decision awarding the applicant compensation for non-performance would in any event have to be upheld in application of that provision (and in conjunction with further rules of Austrian law on compensation).

20 **III. The questions referred for a preliminary ruling**

21 First question:

22 The power to substitute a term by supplementary law has been held by the Court of Justice not to create a problem where a contract cannot continue in existence after an unfair term has been deleted (C-26/13, *Kásler*, paragraph 85).

23 It has also been clarified, for example, in the decision in C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco SA and Caixabank SA*, that it is permissible to plug the gap left in the contract by the removal of an unfair term through recourse to the supplementary provisions of consumer law if the deletion of the unfair term without replacement would have a detrimental effect on the consumer's legal situation.

24 In its judgment of 27 January 2021 in C-229/19 and C-289/19, *Dexia*, the Court of Justice most recently interpreted the provisions of the Unfair Contract Terms Directive as meaning that a seller or supplier which has imposed on a consumer a term declared unfair and, consequently, void by the national court cannot claim the statutory compensation provided for by a supplementary provision of national law which would have been applicable in the absence of that term where the contract is capable of continuing in existence without that term (paragraph 67). In support of its legal view, the Court of Justice held that if it were open to the national court to revise the content of unfair terms included in such a contract, such a power would be liable to compromise attainment of the long-term objective of Article 7 of the Unfair Contract Terms Directive. That power would contribute to eliminating the 'dissuasive effect' (see CJEU C-26/13, *Kásler*, paragraph 79, above) for sellers or suppliers of the 'straightforward non-application' with regard to the consumer of those unfair terms, in so far as those traders would still be 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 (*Dexia*, paragraph 64).

25 For the present case, it could also be deduced from the case-law cited that recourse cannot be had to the provisions of supplementary law merely because of the existence of an unfair and therefore inapplicable term. However, such a result, which exempts a consumer in breach of contract from paying compensation for

the loss culpably caused by him or her, is diametrically opposed to the general scheme and principles of civil law, which is characterised by equitably balancing the different interests of contracting parties. The Court of Justice also recognises that, by the provisions of supplementary law, the national legislature intends to establish a balance between the interests of the contracting parties (CJEU, C-260/18, *Dziubak*, paragraph 60). The Court of Justice is therefore asked to provide clarification in this case.

26 Second question:

27 The present case, unlike the situation which gave rise to the *Dexia* decision (see paragraph 64: ‘sellers or suppliers would still be tempted to use those terms’) is characterised by the fact that the term has no relevance for the assessment of the claim at issue, since the right to compensation relied on can be based solely on provisions of supplementary law. The applicant also based its claim on the supplementary law and not on the unfair term. In the proceedings against the defendant, the applicant therefore did not ‘use’ the term, within the meaning of paragraph 64 of the *Dexia* decision, in support of its claim. Thus, the present Chamber does not consider the application of national supplementary law to be precluded in the present case, notwithstanding the fact that the stipulation of flat-rate compensation of 20% must be regarded as unfair.

28 Nor is that contrary to the requirement for a national court to assess, of its own motion, whether terms are invalid when it has available to it the legal and factual elements necessary to that end (CJEU, C-154/15, [C-307/15 and C-308/15], *Gutiérrez Naranjo and Others*, paragraphs 58 and 59). According to the present Chamber, that requirement relates only to the terms relevant to the assessment of the right which is the subject of the proceedings. Accordingly, an assessment of invalidity by the court, of its own motion, should be contemplated only if the term is of direct relevance for the purposes of assessing the right which is the subject of the action [...]. Clarification by the Court of Justice also seems necessary in that regard.

29 Third question:

30 According to the case-law of the Court of Justice, where a national court finds that a term in a contract concluded between a seller or supplier and a consumer is void, the national court cannot modify that contract by revising the content of that term (CJEU, C-618/10, *Banco Español*, paragraph 69 et seq.; C-125/18, *Gómez del Moral Guasch*, paragraph 59 and the case-law cited; C-229/19 and C-289/19, *Dexia*, paragraph 63). The Supreme Court has also (including in individual proceedings) upheld this ‘prohibition of a reduction that preserves the validity of the contract’ (RS0128735; RS0122168; RS0038205 [T20]).

31 However, it is necessary to clarify whether the statements made above also apply to severable clauses. The sanctions provided for in the present case in the third paragraph of clause V are available to the trader on an optional basis. Apart from

the right to a high level of flat-rate compensation, which must be regarded as unfair, the present Chamber considers that possible recourse, by way of alternative, to the loss actually suffered is unobjectionable, particularly as that is consistent with the supplementary law. Clarification by the Court of Justice is required as to whether it is contrary to the Unfair Contract Terms Directive not to assume the overall invalidity of the term in such a case.

32 [...]

33 [...] [procedural considerations, stay of proceedings]

[...]

22 September 2021

[...]

WORKING DOCUMENT