

Case C-395/21

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:

28 June 2021

Referring court:

Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania)

Date of the decision to refer:

23 June 2021

Applicant:

D. V.

Defendant:

M. A.

Subject matter of the main proceedings

The award of (i) a sum owed in respect of remuneration, calculated on the basis of an hourly rate, for legal services provided by the applicant D. V. (a lawyer) to the defendant M. A., and (ii) interest.

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

Consideration, in an appeal in cassation, of the case between the applicant D. V. and the defendant M. A. has given rise to doubts as to the assessment, on the basis of Article 169 TFEU, Article 38 of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 4, 6 and 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Directive 93/13'), of the fairness of the terms of the contracts concluded by the parties.

Questions referred for a preliminary ruling

1. Must Article 4(2) of Directive 93/13 be interpreted as meaning that the words ‘the main subject matter of the contract’ cover a term – which has not been individually negotiated and is in a contract for legal services concluded by a businessman (lawyer) and a consumer – concerning the cost and the way in which it is calculated?

2. Must the reference in Article 4(2) of Directive 93/13 to the plainness and intelligibility of a contractual term be interpreted as meaning that it is sufficient to specify in the term in the contract regarding cost (which establishes the cost for services actually provided on the basis of an hourly rate) the amount of the hourly fee payable to the lawyer?

3. If the answer to the second question is in the negative: must the requirement of transparency be interpreted as encompassing an obligation of the lawyer to indicate in the contract the cost of services the specific rates of which can be clearly defined and specified in advance, or must an indicative cost of the services (a preliminary budget for the legal services provided) also be specified, if it is impossible to predict the number (or duration) of specific actions, and the fee for them, when concluding the contract, and the possible risks leading to an increase or decrease in the cost be indicated? When assessing whether the contractual term regarding cost complies with the requirement of transparency, is it relevant whether information relating to the cost of legal services and the way in which it is calculated is provided to the consumer by any appropriate means or is laid down in the contract for legal services itself? Can a lack of information in pre-contractual relations be compensated for by providing information during the performance of the contract? Is the assessment of whether the contractual term complies with the requirement of transparency affected by the fact that the final cost of the legal services provided becomes clear only after their provision has come to an end? When assessing whether the contractual term regarding cost complies with the requirement of transparency, is it relevant that the contract does not stipulate the periodic provision of reports of the lawyer in respect of the services provided or the periodic presentation of bills to the consumer, which would allow the consumer to decide in good time on the refusal of legal services or a change of the contract price?

4. If the national court decides that the contractual term establishing the cost for services actually provided on the basis of an hourly rate is not in plain intelligible language as required under Article 4(2) of Directive 93/13, must it examine whether that term is unfair within the meaning of Article 3(1) of that directive (that is to say, when examining whether the contractual term may be unfair, it must be established whether that term causes a ‘significant imbalance’ in the rights and obligations of the parties to the contract, to the detriment of the consumer) or, nevertheless taking into account the fact that that term covers essential information under the contract, is the mere fact that the term regarding cost is not transparent sufficient for it to be found unfair?

5. Does the fact that, when the contractual term regarding cost has been found to be unfair, the contract for legal services is not binding, as indicated in Article 6(1) of Directive 93/13, mean that it is necessary to restore the situation in which the consumer would have been in the absence of the term which has been found to be unfair? Would the restoration of such a situation mean that the consumer does not have the obligation to pay for the services already provided?

6. If the nature of a contract for services provided for consideration means that it is impossible to restore the situation in which the consumer would have been in the absence of the term which has been found to be unfair (the services have already been provided), would the establishment of remuneration for the services provided by the lawyer be contrary to the objective of Article 7(1) of Directive 93/13? If the answer to this question is in the negative, would the real balance by which the equality of the parties to the contract is restored be achieved: (i) if the lawyer were paid for the services provided at the hourly rate specified in the contract; (ii) if the lawyer were paid the minimum cost of legal services (for example, that specified in a national legal measure, namely recommendations on the maximum amount of the fee for assistance provided by a lawyer); (iii) if the lawyer were paid a reasonable amount for the services that was determined by the court, regard being had to the complexity of the case, the lawyer's qualifications and experience, the client's financial situation and other relevant circumstances?

Provisions of EU law and case-law of the Court of Justice cited

Article 169 TFEU, Article 38 of the Charter, Articles 3 to 7 of Directive 93/13.

Judgment of 21 March 2013, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV.*, C-92/11, paragraph 44; judgment of 30 April 2014, *Kásler and Káslerné Rábai v OTP Jelzálogbank Zrt*, C-26/13, paragraphs 37, 38 and 61; judgment 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, paragraphs 51 and 62; judgment of 20 September 2017, *Ruxandra Paula Andriciuc and Others v Banca Românească SA*, C-186/16, paragraphs 40, 44, 45 and 47; judgment of 20 September 2018, *OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt. v Teréz Ilyés and Emil Kiss*, C-51/17, paragraph 68; judgment of 14 March 2019, *Zsuzsanna Dunai v ERSTE Bank Hungary Zrt*, C-118/17, paragraphs 41 and 48; judgment of 9 July 2020, *XZ v Ibercaja Banco, SA*, C-452/18, paragraphs 22 and 23.

Provisions of national law cited

Article 6.228⁴ of the Lietuvos Respublikos civilinis kodeksas (Civil Code of the Republic of Lithuania; 'the CC').

Article 50 of the Lietuvos Respublikos advokatūros įstatymas (Law of the Republic of Lithuania on the profession of lawyer (advokatas) of 18 March 2004

Recommendations on the maximum amount of the fee for assistance provided by a lawyer (advokatas) or trainee lawyer to be awarded in civil cases, approved by Order No 1R-85 of the Minister of Justice of the Republic of Lithuania of 2 April 2004 and by the resolution of the Council of the Lithuanian Bar of 26 March 2004 (in the version in force from 20 March 2015).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The defendant M. A., as a consumer, concluded five contracts for the provision of legal services with the applicant, the lawyer D. V. Paragraphs 1 to 4 of Article 1 of all the contracts provided that the lawyer undertook to provide consultations orally and/or in writing, to prepare drafts of legal documents and to sign them, to perform legal review of documents, and to represent the client before various bodies when carrying out related actions. The relevant provisions of all the contracts laid down that the amount of the lawyer's fee was EUR 100 for each hour of consultation provided to the client or of provision of legal services. Part of that fee was payable immediately upon presentation by the lawyer of a bill for legal services, taking into account the hours of the consultations provided or of provision of legal services.
- 2 The court of first instance and the appellate court found that D. V. provided services in April to December 2018 and January to March 2019. D. V. presented bills for all the services provided almost a year after the contracts for the provision of legal services were entered into.
- 3 On 10 April 2019, the applicant brought an action before the court of first instance seeking an order requiring that the defendant M. A. pay a debt of EUR 9 900 for the legal services provided, EUR 194.30 in respect of expenses incurred in carrying out the defendant's instructions, interest of 5% per annum on the amount awarded, from the day the case was brought before the court until the judgment was fully enforced, and the costs of the proceedings.
- 4 According to the assessment of the court of first instance, legal services in an amount of EUR 12 900 were provided under all the contracts concluded by the applicant with the defendant. The court ruled that the terms concerning payment for the legal services provided in all five representation contracts were unfair and reduced the specified cost of the services provided by 50% (EUR 6 450).
- 5 On 30 April 2020, the applicant filed an appeal but the appellate court dismissed it by order of 15 June 2020 and upheld the judgment of the court of first instance. On 10 September 2020, the applicant brought an appeal in cassation.

Arguments of the court of cassation and its position in the preliminary ruling proceedings

- 6 In the present case, the court of cassation ('the Court') states its position and refers questions to the Court of Justice regarding: (1) compliance of the terms forming the main subject matter of contracts for legal services with the requirement of transparency; (2) the legal consequences when the terms determining the cost of a contract for legal services are found to be unfair.

Compliance of the terms forming the main subject matter of contracts for legal service with the requirement of transparency

- 7 The Court points out first of all that in the present case there is no dispute that the defendant is a natural person who acted for personal purposes, not pursuing any purposes relating to his trade, business or profession, and the applicant is a lawyer, who carried out her professional activities for remuneration by providing legal services to a natural person; therefore, the contracts concluded between the parties are to be classified as consumer contracts.
- 8 According to the Court, two terms of the contracts for legal services concluded by the applicant and the defendant are of fundamental importance in resolving the dispute between the parties: (i) the term of the contract regarding cost (establishing the cost for services actually provided on the basis of an hourly rate); (ii) the term of the contract concerning the arrangements for payment for legal services. Both of those terms are relevant to the present dispute because, in a situation where the applicant indicated the hourly fee rate but did not discuss in more detail the extent and duration of specific legal services and the expected amount of the final fees, and also did not regularly provide information about the cost of the legal services already provided and did not periodically draw up bills, the defendant may have been unable to assess the extent of the services that he needed and their final cost, either at the time of the conclusion of the contract or at the time of its performance. The defendant also did not have the possibility of withdrawing from the contract(s) for legal services if the cost of the services seemed to him to be too high during the performance of the contract(s).
- 9 The Court raises the question whether Article 4(2) of Directive 93/13 must be interpreted as meaning that the words 'the main subject matter of the contract' cover a term – which has not been individually negotiated and is in a contract for legal services concluded by a businessman (lawyer) and a consumer – concerning the cost and the way in which it is calculated. According to the Court, in view of the fact that that term constitutes an essential obligation of the person liable to make payment under a contract for the supply of services for consideration, of the nature, general scheme and provisions of contracts for legal services, and of legal and factual circumstances, it should be classified in the category of terms specified in Article 4(2) of Directive 93/13 (terms forming 'the main subject matter of the contract').

- 10 The Court notes that, on the one hand, it is sufficiently evident that the term of the disputed contracts regarding cost is clear grammatically. However, there is reasonable doubt as to whether that term is intelligible, that is to say, whether the average consumer can understand the economic consequences of the term. Consequently, in the present case, the question of interpretation of the content of the principle of transparency arises. In view of the fact that one of the essential elements of the transparency of a term is the assessment of the provision of information to the consumer, in the present case it is relevant to clarify the scope of the information that must be provided and its degree of detail.
- 11 The Court observes that detailed and/or periodically provided information on the cost – given the nature of legal services and the client’s possibly poor grasp of the nature, extent and particular features of those services – is considered essential. Also, bearing in mind the fact that the duration of judicial proceedings and/or the scope of legal services are quite often difficult to predict, the Court has reasonable doubts whether, where only the amount (rate) of the hourly fee for legal services and the principle that the lawyer is to be paid for services actually provided on the basis of the hourly rate have been specified, such a contractual term can be understood by the average consumer not only formally and grammatically, but also allows him to appraise the final cost of the legal services and the economic consequences of such a term. Such unclarity of the term regarding cost is not removed by assessment of that term in conjunction with the other provisions of the disputed contracts because the second term, concerning payment, did not specify the frequency of the furnishing of reports by the provider of legal services and of payment for the services provided.
- 12 Although the specific nature of the provision of legal services can quite often make it difficult to predict how many hours will actually be worked in providing legal services, a professional (a lawyer) should be able to provide at least a preliminary estimate of certain amounts, taking into account the information provided by the consumer and the circumstances that are known to him as a service provider when the process of concluding the contract begins. The Court raises the question whether, when assessing the plainness and intelligibility of a term regarding cost in a contract for legal services, the national court should take into account whether, for example, the contract establishes specific rates for the services (where such rates can be clearly defined and specified in advance). If it were found to be impossible to determine the number (or duration) of specific actions, and the fee for them, when concluding a contract for legal services, must the contract specify indicative service costs (a preliminary budget for the services), or would such a requirement still exceed what can be reasonably expected of a professional and place an excessive and unreasonable burden on the service provider (lawyer)?
- 13 In addition, the Court raises the question whether, in order to ensure compliance with the requirement of transparency, information relating to the cost of legal services and the way in which it is calculated can be provided to the consumer by any means or must be laid down in the contract for legal services itself, and

whether a lack of information in pre-contractual relations may be compensated for by providing information during the performance of the contract. Finally, the Court wishes to ascertain whether the assessment of the requirement of transparency is affected by the fact that the final cost of the legal services provided becomes clear only after the end of representation by the lawyer in a particular case.

The resulting action to be taken by the national court if it finds that the term regarding cost is unfair

- 14 If it is found that the terms of the disputed contracts regarding cost are not in plain intelligible language (they fail to comply with the requirement of transparency), such terms must be assessed from the point of view of fairness. Article 6.228⁴(6) of the CC, which transposes Article 5 of Directive 93/13 into national law, lays down that terms failing to comply with the requirement of plainness and intelligibility are regarded as unfair. Therefore, national law ensures a higher level of consumer protection than that guaranteed by Directive 93/13 – the mere fact that the term regarding cost is not transparent is sufficient for it to be found unfair.
- 15 The Court raises the question whether, if it were found that a term regarding cost is not expressed in plain intelligible language and, therefore, would fall within the scope of Article 4(2) of Directive 93/13, the Court would have to verify whether the disputed term causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, or whether nevertheless the mere fact that the term regarding cost is not transparent is sufficient for it to be found unfair, in particular in the light of the higher level of consumer protection provided for in national law in this regard.
- 16 In addition, the Court has doubts regarding the resulting action to be taken by the national court if it finds that the term regarding the cost of the legal services is unfair. In view of the fact that price is a term of a contract for legal services that defines an essential obligation, the Court considers that the further performance of the disputed contracts without the aforementioned term is legally impossible under the rules of domestic law; thus, the non-application of the unfair term leads to the annulment of the disputed contracts. Therefore, the national court must restore the situation in which the defendant (the consumer) would have been in the absence of the term regarding cost which has been found to be unfair. However, since the nature of a contract for services provided for consideration means that it is impossible to restore that situation (the services have already been provided), if the consumer were not subject to the terms establishing the cost in the present case, the court would be able not to order the consumer to pay the lawyer the cost of the services provided. The Court has doubts as to whether such application of restitution in the present case does not negate the principle of the supply of services for consideration.
- 17 According to the Court, the action to be taken resulting from finding a contractual term to be unfair constitutes an appropriate sanction for a businessman; however,

it may be doubted whether such a sanction, if the lawyer is not paid for the services provided at all, would not lead to the consumer's unjustified enrichment and the creation of an excessively unfair result (deny the lawyer's right to receive remuneration for the services provided).

- 18 On the other hand, the Court has doubts as to whether the case-law of national courts (under which the finding of an unfair term regarding the contract price enables the court to reduce the cost of the services provided, or to award the cost price of those services or the lowest possible market price) would not be contrary to the long-term objective of Article 7(1) of Directive 93/13, that is to say, whether that case-law would not eliminate the deterrent effect which is created for traders by such unfair terms not being applied to the consumer at all, because they would still be inclined to exploit those services, in the knowledge that, even if those terms were found to be unfair, they would still receive the minimum remuneration for the services provided, thus safeguarding the interests of those traders.

Brief summary of the reasons for the request for a preliminary ruling

- 19 The answer to the questions referred for a preliminary ruling is crucial for the present case because it would make it possible to determine the scope of the information to be provided by a lawyer when concluding contracts for legal services with a consumer, to assess the adequacy of performance of the obligation to provide information and to resolve the issue of ordering payment of the debt in respect of legal services provided.