

**Case C-410/23 [Pielatak] <sup>1</sup>****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:**

3 July 2023

**Referring court:**

Sąd Okręgowy w Warszawie (Poland)

**Date of the decision to refer:**

26 May 2023

**Applicant:**

I. SA

**Defendant:**

S.J.

**Subject matter of the main proceedings**

Appeal against the judgment of the court of first instance concerning the claim for payment of a contractual penalty for early termination, by an electricity customer who is a farmer, of a fixed-term contract for the provision of electricity.

**Subject matter and legal basis of the request**

The first question referred for a preliminary ruling concerns whether, in the light of Article 2(b) and (c) of Directive 93/13/EEC, the status of consumer is enjoyed by a farmer who concludes a contract for the purchase of electricity for both an agricultural holding and a household. The second question referred for a preliminary ruling considers whether, in the light of Directive 2009/72/EC, it is permissible to charge that farmer a contractual penalty for withdrawing from such a contract.

<sup>1</sup> This case has been given a fictitious name which does not correspond to the real name of any of the parties to the proceedings.

## Questions referred for a preliminary ruling

**1. Do Article 2(b) and (c) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and the definition of consumer contained therein, and recital 17 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, also cover a farmer who concludes a contract for the purchase of electricity both for an agricultural holding and for private purposes for a household?**

**2. Must Article 3(5) and (7) of and recital 51 and Annex I(1)(a) and (e) to Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, which requires that no charge be levied on consumers in the event of withdrawal from a contract for the provision of electricity services, be interpreted as precluding the possibility of imposing a contractual penalty on an energy consumer customer for the termination of a fixed-term contract for the provision of electricity (Article 4j(3a) of the Polish Law on energy of 10 April 1997)?**

### Provisions of European Union law relied on

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts – Article 2.

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council – recital 17.

Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC – recital 51, Article 3(5) and (7), and also point 1(a) and (e) in Annex I.

### Provisions of national law relied on

Ustawa z dnia 10 kwietnia 1997 r. – Prawo energetyczne (Law of 10 April 1997 on energy – Article 4j(3a):

‘3a. A final customer may terminate a fixed-term contract, pursuant to which an energy company provides that customer with gaseous fuel or energy, without

paying costs and compensation other than those resulting from the content of the contract, by submitting a written declaration to the energy company.’

Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code) – Articles 22<sup>1</sup> (definition of consumer), 43<sup>1</sup> (definition of company), 385<sup>1</sup> (unlawful clauses in contracts with consumers), 483(1) (contractual penalty), and 484 (amount of contractual penalty).

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 On 18 March 2017, the company I. S.A., which is an electricity provider, concluded a comprehensive contract for the sale of electricity with S.J., who runs a farm. The agricultural holding belonging to S.J. was stated as the point of electricity consumption. Under the contract, the sale was to start on 1 January 2018. The contract was concluded for a fixed term until 31 December 2021. In the event that it was terminated before that date or that the contract could not be performed for reasons attributable to the customer, the customer was obliged to pay a contractual penalty under the general terms and conditions of the contract.
- 2 By letter of 5 May 2017., S.J. stated that he was withdrawing from the contract by exercising the statutory right of withdrawal laid down in respect of consumer contracts. In addition, S.J. submitted a declaration of rescission of the contract concluded in error and pleaded that the contract was invalid. He claims that when the contract was concluded he was misled by representatives of I. S.A., who caught him off guard at work and failed to explain all the circumstances of the contract.
- 3 By letter of 22 May 2020, I. S.A. stated that the declarations submitted were not effective. It issued a debit note according to which, S.J. was to pay, by 7 July 2020, the contractual penalty imposed for early termination of a contract, and issued an invoice for the consumption of electricity provided between 1 January 2018 and 10 January 2018.
- 4 S. J. refused to pay the amounts stated. I. S.A. did not provide S.J. with any amount of electricity. The provision of electricity to S.J. during the period stated in the invoice was effected by another company.
- 5 By an application of 14 April 2021, I. S.A. requested the court of first instance to order S.J. to pay the price for the electricity provided, plus interest, and the contractual penalty imposed for early termination of the contract.
- 6 In his defence, S.J. contended that the action should be dismissed in its entirety, arguing that the contract was invalid, that the applicant had failed to perform the contract, and that he had withdrawn from the contract.
- 7 The court of first instance dismissed the action. I. S.A. lodged an appeal against the judgment of the court of first instance with the referring court.

**The essential arguments of the parties in the main proceedings and reasoning of the court of first instance**

- 8 S.J takes the position that he has the status of consumer because the distribution of electricity and the sale of electricity do not relate only to the agricultural holding but also, and primarily, his household.
- 9 The court of first instance dismissed the action for payment, despite the fact that it found that S.J. does not enjoy the status of consumer, because, under Article 221 of the Civil Code, a consumer is any natural person who concludes, with a seller or supplier, a legal transaction which has no direct link to that person’s business or professional activity. On the other hand, the contract states ‘agricultural holding’ as the customer and stipulates that the contract is intended for persons who are not consumers. Although S.J. stated that the electricity purchased was also to be used in his household, in the view of the court of first instance, that is not sufficient to regard S.J. as a consumer. He was therefore unable to exercise the right to withdraw from the contract under the provisions of the law on consumer rights and his declaration was ineffective.
- 10 Instead, the court of first instance applied Article 4j(3a) of the Law on energy, under which a final customer may terminate a fixed-term contract pursuant to which an energy company provides gaseous fuel or energy to that customer, without paying costs and compensation other than those arising from the content of the contract.
- 11 In the view of the court of first instance, the demand for payment of the contractual penalty has no merit since, under Article 483(1) of the Civil Code, a contractual penalty consists of compensation for damage resulting from non-performance or improper performance of a non-pecuniary obligation. In the case of the sale of energy, the subject matter of the buyer’s consideration is payment of the price, that is to say a consideration of a pecuniary nature. In the view of the court of first instance, the contractual provision could not impose an obligation on S.J. to pay a contractual penalty in the event of termination of the contract on his initiative since his obligation was pecuniary in nature.
- 12 Furthermore, the court of first instance considered that the claim for payment of the price of the energy consumed was unfounded as it had been established that I. S.A. had not provided S.J. with any amount of energy.
- 13 In its appeal, I. S.A. pleads an incorrect assessment of the evidence, and also infringement of Article 4j(3a) of the Law on energy, consisting in an incorrect interpretation and an assumption that I. S.A. does not have the right to impose a contractual penalty for early termination of a contract, whereas it follows unequivocally from that provision that a consumer may incur additional costs if the obligation to pay them arises from the contract, as is the case here.
- 14 I. S.A. also pleads infringement of Article 483(1) of the Civil Code (concerning the possibility of requiring payment of a specific amount – contractual penalty –

as compensation for damage arising from non-performance or improper performance of a non-pecuniary obligation) by the non-application thereof and the erroneous assumption that the penalty was imposed for non-performance of a pecuniary obligation, whereas the penalty was reserved for a situation where a contract was terminated early, and thus for specific conduct of a customer, and not for non-performance of a pecuniary obligation.

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

- 15 **The first question referred for a preliminary ruling** seeks to ascertain whether a farmer who purchases energy for the purposes of both an agricultural holding and a household has the status of consumer.
- 16 It is by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, that Council Directive 93/13 defines the contracts to which it applies (judgment of 21 March 2019, *Pouvin and Dijoux*, C-590/17, paragraph 23). According to the settled case-law of the Court of Justice, the concept of ‘consumer’, within the meaning of Article 2(b) of Directive 93/13, must be assessed by reference to a functional criterion, consisting in an assessment of whether the contractual relation at issue has arisen in the course of activities outside a trade, business or profession (order of 14 September 2016, *Dumitras*, C-534/15, paragraph 32). In the present case, a functional distinction is not entirely possible as the contract was concluded for both farming and domestic purposes.
- 17 Council Directive 93/13 EEC contains no rules on dual purpose contracts. Only in recital 17 of Directive 2011/83/EU of 25 October 2011 on consumer rights did the EU legislature stated clearly that ‘in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer’.
- 18 However, in its judgment of 20 January 2005, *Gruber*, C-464/01, the Court of Justice held that a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the rules on consumer protection, ‘unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, ***the fact that the private element is predominant being irrelevant in that respect***’.
- 19 By contrast, in its judgment of 27 October 2022, *S.V.*, C-485/21 the Court of Justice held, in paragraph 27, that consumer protection is enjoyed by a natural person who is party to a contract concerning the management of a property ‘in so far as she does not use that apartment for purposes which fall ***exclusively*** within her trade, business or profession’. The Court of Justice thus points in that case to the criterion of exclusive trade, business or professional purpose.

- 20 Against that background, the question therefore arises as to how, in the light of Article 2(b) of Council Directive 93/13 EEC, the concept of consumer is to be interpreted in a situation where the contract is of a mixed, partly consumer, partly trade, business or professional nature. Is it necessary to establish the predominant purpose of the contract in such a situation, or is it sufficient to merely establish that the trade, business or professional nature of the contract is not exclusive? The Court of Justice’s answer will therefore make it possible to assess contracts that are dual in nature and serve both farming and household purposes equally. Given the tendency to extend the scope of instruments of consumer protection, it is appropriate to establish which criteria should be adopted to protect consumers.
- 21 **The second question referred for a preliminary ruling** seeks to ascertain whether a provision of national law, which provides for the possibility of imposing a contractual penalty on an electricity customer for early termination of a fixed-term contract for the provision of electricity, is compatible with EU law.
- 22 The referring court’s uncertainties relate to Article 4j(3a) of the Law on energy, which confers on a final consumer the right to terminate a contract for the provision of energy, without paying costs and compensation other than those arising from the content of the contract. That provision therefore refers to the contract, in which the parties may specify the duration of the contract and the conditions governing termination.
- 23 Those uncertainties arose in the context of Directive 2009/72/EC. In the view of the referring court, the overriding principle expressed in that directive is the possibility of freely changing electricity providers and specific consumer protection. Member States are to take appropriate measures to protect final customers, and are, in particular, to ensure that there are adequate safeguards to protect vulnerable customers. As regards at least household customers, those measures are to include those set out in Annex I. The possibility of withdrawing from the contract is also closely linked to the change of supplier.
- 24 The aim of the legislation is, on the one hand, to protect energy customers, in particular consumers, and to guarantee their rights and, on the other hand, to grant electricity companies equal access to customers. In that context, the referring court cites the case-law of the Court of Justice contained in particular in the judgments of 7 September 2016, *ANODE*, C-121/15, paragraph 36; 30 April 2020, *Overgas Mrezhi and Balgarska gazova asotsiatsia*, C-5/19, paragraph 56; and 14 October 2021, *Viesgo Infraestructuras Energéticas*, C-683/19, paragraph 44). That case-law sets out the conditions for State intervention in electricity pricing under Directive 2009/72, despite the fact that such intervention constitutes an obstacle to the formation of a competitive electricity market.
- 25 The main problem with the guaranteed freedom to change energy provider relates to the possibility of charging an energy consumer customer a fee in the event that he or she terminates a fixed-term contract. It follows from Article 3(7) of Directive 2009/72/EC, in conjunction with Annex I(1)(a) and (e) thereof, that, in

the case of a consumer customer, no charge should be levied when changing provider and withdrawing from the contract.

- 26 However, the Law on energy does not provide for such an exemption. At national level, under Article 4j(3a) of the Law on energy the final customer may terminate a fixed-term contract for the provision of energy without paying costs and compensation other than those arising from the content of the contract. That provision therefore allows such a contract to stipulate that the customer may be charged the 'costs and compensation' provided for in the contract. The Law on energy does not specify any other criteria for those costs and compensation and does not refer to any exemption for consumers.
- 27 In the case of consumers, national academic writings only permit an excessively high termination penalty to be declared invalid when dealing with consumers. It is therefore possible to verify the amount of the contractual penalty as part of a review of unfairness. This is particularly true where such contractual penalties would in practice result in termination of fixed-term contracts being blocked, which would be contrary to Article 4j(3a) of the Law on energy, which provides that a fixed-term contract may be terminated.
- 28 The referring court considers that the permissibility of such contractual penalties imposed on consumers might nullify the protective functions of Article 3(5) and (7) of Directive 2009/72/EC.

WORKING DOCUMENT