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Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

10 June 2021 (*)

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Scope – Article 1(2) – Mandatory national legislative provisions – Early termination of the loan agreement – Accumulation of loan interest and default interest)

In Case C-192/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajský súd v Prešove (Regional Court, Prešov, Slovakia), made by decision of 9 March 2020, received at the Court on 5 May 2020, in the proceedings

Prima banka Slovensko a.s.

v

HD,

THE COURT (Seventh Chamber),

composed of A. Kumin, President of the Chamber, T. von Danwitz and I. Ziemele (Rapporteur),
Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Slovak Government, by B. Ricziová, acting as Agent,
- the European Commission, by R. Lindenthal and N. Ruiz García, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(2) and Article 169(1) TFEU, of Article 38 of the Charter of Fundamental Rights of the European Union and of Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), as interpreted by the Court in the judgment of 7 August 2018, *Banco Santander and Escobedo Cortés* (C-96/16 and C-94/17, ‘the judgment in *Banco Santander and Escobedo Cortés*’, EU:C:2018:643).

2 The request has been made in proceedings between Prima banka Slovensko a.s. and HD concerning the payment of sums due following the early termination of the term of a consumer credit agreement concluded between those parties.

Legal context

EU law

3 The 13th recital of Directive 93/13 is worded as follows:

‘Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject [to the present directive] the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording “mandatory statutory or regulatory provisions” in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established’.

4 Article 1 of that directive provides:

‘1. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

2. The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.’

5 Article 6(1) of that directive provides:

‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and

that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.’

6 Article 7(1) of Directive 93/13 provides:

‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’

Slovak law

The Civil Code

7 Paragraph 54(1) of the Občiansky zákonník (Civil Code) provides:

‘Contractual terms in a consumer contract may not derogate from the provisions of this law to the detriment of the consumer. In particular, the consumer cannot waive in advance his or her rights granted by this law or by specific provisions which confer protection on consumers, and cannot otherwise worsen his or her contractual position.’

8 Paragraph 517(2) of the Civil Code provides:

‘In the event of a delay in debt repayment, the creditor shall have the right to demand from the debtor default interest in addition to meeting his or her obligation where the debtor is not required by this law to pay a default charge; the amount of default interest and of the default charge shall be fixed in an implementing provision.’

9 Paragraph 519 of the Civil Code reads as follows:

‘The creditor’s right to obtain compensation for the damage caused by the debtor’s delay remains unaffected; however, in the case of a delay in debt repayment, the creditor may claim compensation for damage only to the extent to which such damage is not covered by default interest or the default charge.’

Government Regulation No 87/1995

10 Paragraph 3a of Government Regulation No 87/1995 provides:

‘(1) Where the purpose of the contract concluded with the consumer is to make funds available to the consumer, penalties for late repayment by the consumer may not exceed in total the average annual percentage rate published most recently under a specific provision ... before the default occurred by more than 10 percentage points per annum and, at the same time, may not exceed three times the default interest provided for in this Government Regulation; the annual percentage rate for a similar type of consumer credit shall be regarded as conclusive.

(2) The penalties under subparagraph 1 shall be deemed to include default interest, contractual penalties and any other consideration for late repayment of funds by the consumer.

(3) If the penalties under subparagraph 1 reach the amount of the funds made available, subsequent penalties for late repayment of funds by the consumer shall not exceed the default interest provided for in this Government Regulation.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 On 17 June 2016, HD concluded a consumer loan agreement with Prima banka Slovensko for the amount of EUR 5 700 at an interest rate of 7.90%. That loan was repayable in 96 monthly instalments.

12 As from September 2017, HD no longer made the monthly repayments. As a result, on 28 December 2017, Prima banka Slovensko declared the early termination of the term of the loan and demanded the immediate repayment of EUR 5 083.79 in respect of the outstanding capital. In addition, Prima banka Slovensko claimed, on the basis of the provisions of the loan agreement, *inter alia*, default interest of 5% on the outstanding loan amount and on the interest due, for the period from the time at which the loan was declared immediately due and payable until the actual repayment of the entire amount of the capital borrowed, as well as ordinary interest of 7.90% for the same period.

13 By judgment of 20 September 2019, the Okresný súd Kežmarok (District Court, Kežmarok, Slovakia), before which Prima banka Slovensko had brought an action, first, upheld that action in so far as it sought an order requiring HD to pay default interest until full repayment of the capital borrowed and, second, dismissed that action in so far as it sought an order requiring HD to pay ordinary interest for that period, on the ground that Slovak law did not allow such an accumulation of interest. In addition, that court stated that a term in a loan agreement which provides for the accumulation of default interest and ordinary interest had already been classified as ‘unfair’ by the Slovak courts.

14 Prima banka Slovensko appealed against that judgment, claiming that it follows from the judgment in *Banco Santander and Escobedo Cortés* that a borrower who has failed to fulfil his or her contractual obligations is bound, in the event of early termination of the term of the loan which he or she has taken out, not only to pay default interest but also to pay ordinary interest until the borrowed capital has been repaid.

15 The referring court, before which that appeal has been brought, states that, under national law, late payment of a debt which has become due entails a right in favour of the creditor to payment of default interest, compensation for the harm actually suffered and the possible payment of contractual penalties. Those claims are, however, governed, in the case of consumer contracts, by Paragraph 54(1), Paragraph 517(2) and Paragraph 519 of the Civil Code, which set a ceiling for the combined amount of all applicable penalties and preclude the terms of the contract from imposing on the consumer obligations that go beyond compensation for the harm actually suffered by the creditor.

16 The referring court finds that the application of ordinary interest together with default interest from the time at which the loan was declared immediately due and payable until actual repayment of the borrowed capital would, first, result in the ceiling fixed by law being exceeded and, second, necessarily lead to a worsening of the consumer’s situation.

17 While it is true that ordinary interest corresponds to the consideration for making available the borrowed capital, and that that capital remains available to the borrower until he or she has repaid it in its entirety, the referring court states that that interest combined with default interest allows the bank to obtain more than the compensation for the harm actually suffered which it is guaranteed by the national provisions. Given such an advantage, the bank might be encouraged to declare early termination of the term of a loan in the event of the slightest delay in payment. According to the referring court, such a situation appears to be all the more worrying since banks

generally do not comply with the obligation to assess the creditworthiness of consumers before the conclusion of a loan agreement, as provided for in Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66, and corrigenda OJ 2009 L 207, p. 14; OJ 2010 L 199, p. 40 and OJ 2011 L 234, p. 46). According to the referring court, if Prima banka Slovensko had carried out that assessment in the present case, it could have found that HD was not creditworthy.

18 In those circumstances, the Krajský súd v Prešove (Regional Court, Prešov, Slovakia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Directive 93/13 ... and in particular Articles 6(1) and 7(1) thereof, in conjunction with the interpretation contained in the judgment in [*Banco Santander and Escobedo Cortés*], be interpreted as precluding legislation such as the protective framework provision contained in Paragraph 54(1) of the Civil Code, which does not allow the consumer’s position to be worsened by contractual terms, in comparison with the statutory provision which provides for the following rights of the creditor in the event of a consumer defaulting on loan repayment:

- the creditor’s right to default interest at a rate limited by a government regulation;
- the creditor’s right to other penalties which the creditor may impose on the consumer and which, together with default interest, are limited to the amount of the loan principal outstanding;
- the creditor’s right to compensation where the damage suffered by the creditor is higher than the default interest, that is, the creditor’s right to unlimited compensation up to the amount of the actual damage.

(2) If the answer to the first question is in the affirmative: does the high level of protection of consumer rights under Article 38 of the Charter of Fundamental Rights ... and under Articles 4(2) and 169(1) TFEU preclude a consumer from paying, for his or her delay in the performance of contractual obligations, the flat rate costs of the creditor rather than the equivalent of the actual loss suffered by the creditor, even if the actual loss is lower than the flat rate costs?’

Consideration of the questions referred

The first question

Admissibility

19 The Slovak Government contends that the first question is inadmissible, stating, first, that the order for reference neither sets out the reasons which led the referring court to refer that question nor explains the link between the provisions of Directive 93/13 the interpretation of which is required and the applicable national legislation and, second, that that question is hypothetical in so far as it does not need to be answered in order for a decision to be taken on the dispute in the main proceedings, since that dispute may be resolved on the basis of provisions of national law.

20 In that regard, the referring court states that its doubts as to the compatibility of the Slovak legislation – in particular, Paragraph 54(1) of the Civil Code – with the provisions of Directive 93/13 arise from the judgment in *Banco Santander and Escobedo Cortés*, which has been the subject of divergent interpretations by the Slovak courts.

21 Thus, the referring court notes that it might be inferred from that judgment, as Prima banka Slovensko argues, that Article 6(1) and Article 7(1) of Directive 93/13 preclude Paragraph 54(1) of the Civil Code, which, read in conjunction with Paragraph 517(2) and Paragraph 519 thereof and with the provisions of Government Regulation No 87/1995, prohibits a consumer loan agreement from allowing the creditor, in the event of early termination of the term of the loan, to claim ordinary interest, in addition to default interest, until the capital borrowed is actually repaid.

22 However, the referring court also takes the view that the contractual terms allowing the combination of ordinary interest with default interest create a significant imbalance in the rights and obligations of the parties to the contract, to the detriment of the consumer.

23 Since the referring court has before it an action seeking an order requiring a consumer to pay ordinary interest, in addition to the payment of default interest, until the capital borrowed is actually repaid, the outcome of the dispute in the main proceedings necessarily depends on the Court's answer to the first question.

24 As a result, the order for reference sets out to the requisite legal standard both (i) the reasons which led the referring court to refer a question to the Court of Justice and (ii) the link between the provisions of Directive 93/13 which that court seeks to have interpreted, the applicable national legislation and the dispute before that court.

25 The first question is therefore admissible.

Substance

26 By its first question, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13, as interpreted by the Court in the judgment in *Banco Santander and Escobedo Cortés*, must be interpreted as precluding national legislation under which a consumer who has concluded a loan agreement with a seller or supplier cannot be required, on the basis of the terms of that agreement, in the event of early termination of the term of the loan, to pay to the seller or supplier ordinary interest for the period from the time at which the loan was declared immediately due and payable until the capital borrowed has actually been repaid, when the payment of default interest and of the other contractual penalties due under the terms of that agreement provides compensation for the actual harm suffered by the seller or supplier.

27 From the outset, it should be noted that it is apparent from the order for reference, first, that, under Paragraph 519 of the Civil Code, the creditor is entitled, in the event of late payment of a pecuniary debt, to claim compensation for the harm resulting therefrom, in so far as that harm is not covered by default interest, the amount of which is limited, in the case of consumer loan contracts, by Paragraph 3a of Government Regulation No 87/1995.

28 Second, in accordance with Paragraph 54(1) of the Civil Code, the consumer may neither waive in advance the rights which that code or specific provisions confer on him or her nor otherwise aggravate his or her contractual position.

29 According to the referring court, those national provisions are intended to ensure consumer protection, in that the consumer cannot be required, in the event of early termination of the term of a loan agreement which he or she has concluded with a seller or supplier, to pay ordinary interest, since the payment of default interest and any penalties provided for in that agreement and, where appropriate, the payment of compensation, cover the harm actually suffered by that seller or supplier.

30 In so far as, by its first question, the referring court seeks to ascertain whether Article 6(1) and Article 7(1) of Directive 93/13 preclude those national provisions, it should be noted that, according to Article 1(1) of that directive, its purpose is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

31 In addition, in accordance with Article 1(2) of that directive, contractual terms which reflect mandatory statutory or regulatory provisions are not to be subject to the provisions of that directive.

32 In that regard, the Court has stated on several occasions, as is apparent from the 13th recital of Directive 93/13, that the exclusion from the scope of that directive in Article 1(2) thereof extends to provisions of national law that apply between the parties to the contract independently of their choice and to provisions that apply by default, that is to say, in the absence of other arrangements established by the parties in that regard. That exclusion is justified by the fact that it is legitimate to presume that the national legislature has struck a balance between all of the rights and obligations of the parties to certain contracts, a balance which the EU legislature has expressly intended to preserve (judgment in *Banco Santander and Escobedo Cortés*, paragraph 43 and the case-law cited).

33 It is clear, in essence, from the Court's settled case-law that that exclusion covers mandatory statutory or regulatory provisions other than those relating to the control of unfair terms, particularly those concerning the scope of the national court's powers to assess the unfairness of a contractual term (judgment in *Banco Santander and Escobedo Cortés*, paragraph 44 and the case-law cited).

34 In the present case, in the first place, it is apparent from the order for reference that the national provisions which are the subject of the reference for a preliminary ruling are legislative or regulatory in nature and are not set out in the contract at issue in the main proceedings.

35 In the second place, first, the referring court states, as mentioned in paragraph 28 above, that, under Paragraph 54(1) of the Civil Code, the consumer cannot waive in advance the rights which that code or specific provisions confer on him or her, with the result that they are binding on the contracting parties, irrespective of what those parties have agreed in the contract at issue. Second, it is apparent from the documents before the Court that the national provisions referred to in the present reference for a preliminary ruling do not concern the extent of the national court's powers to assess whether a contractual term is unfair and, more generally, do not appear to relate to the review of unfair terms. As a result, subject to the verifications to be made by the referring court, those national provisions are excluded from the scope of Directive 93/13.

36 That said, it is also apparent from the order for reference that the loan agreement at issue in the main proceedings contains a term which requires the consumer concerned, in the event of the early termination of the term of that agreement, to pay to the seller or supplier, inter alia, both default interest and ordinary interest for the period from the time at which the loan was declared immediately due and payable until the capital borrowed has actually been repaid. According to Prima banka Slovensko, such an accumulation of interest was authorised by the Court in the judgment in *Banco Santander and Escobedo Cortés*. According to that party to the main proceedings, in that judgment the Court defined the purpose of ordinary interest as being consideration for the use of the funds until they were repaid. The consumer uses those funds, with the result that he or she should, on that basis, also have to pay ordinary interest. In those circumstances, the referring court has doubts as to whether the national legislation at issue in the

main proceedings, which does not permit the accumulation of default interest and ordinary interest, is compatible with that judgment.

37 In that regard, it must be borne in mind that, in the case which gave rise to that judgment, the referring court wished, inter alia, to ascertain whether the provisions of Directive 93/13 precluded national case-law according to which the consequence of the unfair nature of a non-negotiated term fixing the default interest rate in a consumer loan agreement is the complete elimination of that interest, while the ordinary interest provided for in that agreement continues to run.

38 The Court noted, in particular, in paragraph 75 of the judgment in *Banco Santander and Escobedo Cortés*, that Directive 93/13 does not require the national court to set aside, in addition to the term declared unfair, those terms which have not been classed as such.

39 In addition, the Court stated, in paragraph 76 of that judgment, that it does not follow from that directive that the setting-aside or annulment of the term in a loan agreement fixing the default rate of interest, on the ground of the unfairness of that term, should also bring about that of the term in that agreement fixing the ordinary rate of interest, particularly as those different terms must be clearly distinguished. The Court noted in that paragraph that, in that regard, default interest is intended to penalise the debtor's failure to fulfil his or her obligation to make the loan repayments on the dates contractually agreed, to deter the debtor from falling behind in the performance of his or her obligations and, where appropriate, to compensate the lender for the loss suffered as a result of late payment. The Court noted, in that paragraph, that, by contrast, the function of ordinary interest is one of remuneration for the lender making a sum of money available until that sum has been repaid.

40 The Court based that solution on the objective pursued by Directive 93/13, which consists in protecting the consumer and restoring the balance between the parties by not applying those contractual terms held to be unfair, while maintaining, in principle, the validity of the other terms of the contract at issue (judgment in *Banco Santander and Escobedo Cortés*, paragraph 75).

41 As a result, contrary to what Prima banka Slovensko appears to suggest, it does not follow from the judgment in *Banco Santander and Escobedo Cortés* that the provisions of Directive 93/13 must be interpreted as precluding national legislation which does not allow a seller or supplier who has concluded a loan agreement with a consumer to demand, in the event of early termination of the term of that loan and on the basis of the provisions of that agreement, the payment of ordinary interest, in addition to default interest, for the period from the time at which the loan was declared immediately due and payable until the capital borrowed has actually been repaid in full.

42 In the light of all the foregoing considerations, the answer to the first question is that, subject to the verifications to be made by the referring court, Directive 93/13 must be interpreted as not being applicable to national provisions under which a consumer who has concluded a loan agreement with a seller or supplier cannot be required, on the basis of the terms of that agreement, in the event of early termination of the term of the loan, to pay to the seller or supplier ordinary interest for the period from the time at which that loan was declared immediately due and payable until the capital borrowed has actually been repaid, since the payment of default interest and of the other contractual penalties due under the terms of that agreement provides compensation for the actual harm suffered by the seller or supplier.

The second question

43 Given the answer to the first question, there is no need to answer the second question.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Subject to the verifications to be made by the referring court, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not being applicable to national provisions under which a consumer who has concluded a loan agreement with a seller or supplier cannot be required, on the basis of the terms of that agreement, in the event of early termination of the term of the loan, to pay to the seller or supplier ordinary interest for the period from the time at which that loan was declared immediately due and payable until the capital borrowed has actually been repaid, since the payment of default interest and of the other contractual penalties due under the terms of that agreement provides compensation for the actual harm suffered by the seller or supplier.

[Signatures]

* Language of the case: Slovak.
