Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 19 November 2015 [1]

Case C-377/14

Ernst Georg Radlinger
Helena Radlingerová
v
FINWAY a.s.
(Request for a preliminary ruling from the

Krajský soud v Praze (Prague Regional Court, Czech Republic))

(Directive 93/13/EC — Directive 2008/48/EC — National procedural rules governing insolvency proceedings — Obligation of national court to examine of its own motion issues relating to EU consumer protection legislation in insolvency proceedings — Meaning of 'total amount of credit' — Calculation of the annual percentage rate — Unfair terms in consumer credit agreements — Assessment of unfairness of penalty clauses — Consequences of a finding of cumulative unfairness)

1. The main proceedings concern an incidental application made by debtors in the context of insolvency proceedings. [2] The debts that gave rise to those proceedings originate from the debtors' inability to meet their commitments under a consumer credit agreement. In this request for a preliminary ruling the Krajský soud v Praze (Prague Regional Court) asks for guidance as to whether national procedural rules governing such proceedings, which prevent it from considering whether the debtors benefit from the consumer protection rules in Directive 93/13 [3] and Directive 2008/48, [4] are consistent with EU law. Essentially it wishes to know to what extent it is obliged to examine those provisions *ex officio*, whether the obligation on creditors to provide information pursuant to Directive 2008/48 should be taken into account in its assessment, how penalties under the credit agreement are to be assessed in the context of Directive 93/13 and what effects should flow from a finding that such penalties are, cumulatively, unfair.

1 — Original language: English.

2 — I understand the expression 'incidental application' in Czech law to mean an application made during the course of insolvency proceedings which is to be determined by a court in the context of those proceedings.

3 — Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 25).

4 — 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).

European Union legislation

Directive 93/13

2. Directive 93/13 applies to unfair terms in contracts concluded between a seller or supplier and a consumer.[5] The aims of Directive 93/13 include ensuring that consumer contracts do not contain unfair terms and protecting consumers against the abuse of power by sellers or suppliers, in particular through one-sided standard contracts and the unfair exclusion of essential rights in contracts.[6] Where a contractual term has not been individually negotiated it is to be regarded as unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.[7] Terms drafted in advance which the consumer has not been able to influence must always be regarded as not being 'individually negotiated' for the purposes of Article 3(1).[8] The Annex to Directive 93/13 contains an indicative and non-exhaustive list of terms which may be regarded as unfair,[9] including those which have the object or effect of requiring a consumer who fails to fulfil his obligations to pay a disproportionately high sum in compensation.[10]

3. The unfairness of a contractual term must be assessed, 'taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent'.[11]

4. Member States must provide in their measures transposing Directive 93/13 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'.[12]

5. Member States are also obliged to 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'.[13]

Directive 2008/48

6. Directive 2008/48[14] harmonises certain aspects of the Member States' rules concerning agreements covering credit for consumers.[15] Recital 10 explains that although the scope of Directive 2008/48 is expressly defined therein, Member States may nevertheless, in accordance with EU law, apply its provisions to matters outside the directive's scope. The following stated aims of Directive 2008/48 are relevant here: developing a more transparent and efficient consumer credit market within the internal market;[16] achieving full harmonisation while ensuring a high and equivalent level of protection for

5 — Article 1(1).

6 — The fourth and ninth recitals in the preamble to Directive 93/13.

7 — Article 3(1).

8 — Article 3(2).

9 — Article 3(3).

10 — Annex, point 1(e).

11 — Article 4(1).

12 — Article 6(1).

13 — Article 7(1).

14 — Directive 2008/48 was subsequently amended by Commission Directive 2011/90/EU of 14 November 2011 amending Part II of Annex I to Directive 2008/48/EC of the European Parliament and of the Council providing additional assumptions for the calculation of the annual percentage rate of charge (OJ 2011 L 296, p. 35). However, Directive 2011/90 entered into force after the date that the consumer credit agreement at issue was concluded.

15 — Article 1.

16 — Recitals 6 and 7.

consumers throughout the European Union;[17] ensuring that credit agreements contain all necessary information in a clear and concise manner, so as to enable consumers to make their decisions in full knowledge of the facts and to allow them to be aware of the rights and obligations under a credit agreement and guaranteeing that consumers have information relating to the annual percentage rates of charge ('APR') throughout the European Union, allowing them to compare those rates.[18]

7. Directive 2008/48 covers credit agreements for consumers.[19] However, agreements 'which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property' are expressly excluded from its scope.[20]

8. The following definitions in Article 3 are relevant:

'…

(c) "credit agreement" means an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation …

…

(g) "total cost of the credit to the consumer" means all the costs, including interest, commissions, taxes and any other kind of fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor …

(h) "total amount payable by the consumer" means the sum of the total amount of the credit and the total cost of the credit to the consumer;

(i) "annual percentage rate of charge" ["APR"] means the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit, where applicable including the costs referred to in Article 19(2); [21]

…

(l) "total amount of credit" means the ceiling or the total sums made available under a credit agreement;

…'

9. Article 5 imposes an obligation to provide consumers with information prior to conclusion of a credit agreement. Although that provision is not as such at issue in the present matter, the information set out therein is reflected in the compulsory list of information to be included in credit agreements in Article 10. The latter provision requires credit agreements to be drawn up on paper or

17 — Recital 9.

18 — Recitals 19 and 31.

19 — Article 2(1).

20 — Article 2(2)(a).

21 — Article 19(1) provides that the APR is to be calculated in accordance with the formula set out in Part I of Annex I. Article 19(2) states that for the purpose of calculating the APR when determining the total cost of the credit certain charges payable by the consumer are to be excluded whilst certain costs must be included. The details of those charges and costs are not relevant to the present matter and I have not therefore set them out here.

on another durable medium. All the contracting parties must receive a copy of the credit agreement.[22] Article 10(2) lists 22 items of information that must be specified in a clear and concise manner in any credit agreement. That list includes: 'the total amount of credit and the conditions governing the drawdown'.[23]

10. In so far as Directive 2008/48 harmonises credit agreements for consumers, Member States are prohibited from introducing diverging provisions and from allowing consumers to waive rights conferred on them by national laws implementing or corresponding to that directive.[24]

11. Member States must provide for effective, proportionate and dissuasive penalties in order to implement Directive 2008/48.[25]

National law

Insolvency proceedings

12. The referring court explains that national rules governing insolvency proceedings apply in the following way.

13. An individual is bankrupt where he is unable to honour his financial commitments more than 30 days after payment falls due. A debtor who is not a trader may apply to the insolvency court for the status of bankruptcy to be reviewed and to be resolved by way of discharge. In such proceedings the insolvency court may not examine the validity, amount or the ranking in which registered claims are settled, even where issues regulated by Directive 93/13 or 2008/48 arise, unless those claims are challenged by the administrator in bankruptcy, another creditor or, exceptionally, the debtor himself. An incidental application to that effect must be made to the insolvency court by the relevant party.

14. Where the insolvency court has approved the resolution of bankruptcy by means of discharge, a debtor may lodge an incidental application. If that application concerns an enforceable unsecured claim, the insolvency court may examine it. However, in so doing the insolvency court's assessment is restricted to whether the claim has lapsed or is time-barred.[26] According to national procedural rules, the insolvency court is not allowed to investigate the substance of an incidental application in so far as it concerns secured claims.[27]

Consumer law and consumer credit

15. The referring court states that any legal act which by its content or purpose contravenes or circumvents a law or which is contrary to accepted principles of morality is invalid.

22 — Article 10(1).

23 — Article 10(2)(d). The term 'drawdown' is not defined in Directive 2008/48. The definition in the *Shorter Oxford English Dictionary* includes: 'An act of raising money through loans; borrowing'. It is also sometimes understood as referring to a situation where a loan is made available and the borrower accesses funds in a series of tranches.

24 — Article 22(1) and (2).

25 — Article 23.

26 — Such a claim is treated in the same way as if the claim were contested by the administrator in bankruptcy (Paragraph 410(2) and (3) of Law No 182/2006 on bankruptcy and the modes of its resolution, as amended by Law No 185/2013 ('the Law on Insolvency').

27 — Paragraph 160(4) of the Law on Insolvency.

16. Consumer credit agreements must be in writing and the creditor must include, inter alia, information regarding the total amount of credit and the APR charged. Failure to meet those requirements does not render the credit agreement invalid in its entirety. [28] However, where the consumer relies on that fact against the creditor, interest is deemed to have been due on the credit agreement from the date it was concluded at the discount rate applicable at the time published by the Czech National Bank; and any other arrangements as to payments in the credit agreement are considered to be invalid. [29]

17. Arrangements in consumer contracts which, in breach of the requirement of good faith, entail a marked imbalance in the rights and obligations of the parties to the consumer's detriment are invalid. [30]

Facts, procedure and questions referred

18. On 29 August 2011 Mr Ernst Radlinger and Mrs Helena Radlingerová ('the Radlingers' or 'the consumers' or 'the debtors') concluded a consumer credit agreement with Smart Hypo ('the lender'). Pursuant to that agreement Smart Hypo granted a loan of CZK 1 170 000 (EUR 43 205). [31] In return the Radlingers agreed to repay the sum of CZK 2 958 000 (EUR 109 231) in 120 monthly instalments of CZK 24 375 (EUR 900) payable on the 20th of each month (apart from the first instalment which was to be paid on 31 August 2011 and costs of CZK 33 000: those amounts were deducted from the principal sum borrowed). The sum of CZK 2 958 000 comprised the following: (i) the principal of CZK 1 170 000; (ii) interest charged at a rate of 10% per annum on the principal for the duration of the credit agreement (also amounting to CZK 1 170 000); (iii) fees payable to the lender amounting to CZK 585 000 (EUR 21 602); and (iv) the costs indicated above). [32] It followed from the payment plan under the agreement that the Radlingers' repayments would in effect, go towards paying the lender's costs, interest and fees between 31 August 2011 and 20 July 2017. Only from the 73rd monthly repayment would they begin to repay the principal sum. The APR was quantified as 28.9%. [33]

19. At the same time the Radlingers agreed to secure the loan as follows: (i) by means of a mortgage against the family home and their land; (ii) by arranging for insurance covering that property, under which, if the insurable event arose, any benefits would be paid directly to the lender; and (iii) by executing a notarial act which included a clause concerning the immediate enforceability of the debt.

20. Over and above the default interest provided by statute, in the credit agreement the Radlingers undertook to pay the lender a contractual penalty of 0.2% of the principal sum for every day or part of a day of default in the payment of that sum, the lender's fees or interest. In the event of a default exceeding one month, they also agreed to pay a single contractual fine of CZK 117 000 (EUR 4 320) and a lump sum of CZK 50 000 (EUR 1 846) towards the lender's costs in recovering amounts owed, which did not include arbitration costs or the costs of court proceedings or legal representation. [34]

28 — Paragraph 6(1) of Law No 145/2010 on consumer credit and Annex 3 to that law.

29 — Paragraph 8 of the Law on Consumer Credit.

30 — Paragraphs 55(2) and 56 of the Civil Code.

31 — I have indicated the approximate euro equivalents at the current exchange rate. On my arithmetic, there is a slight difficulty with the calculation. If the agreement was to pay back 120 x CZK 24 375, then the total repayments amounted to CZK 2 925 000, and therefore did not include the CZK 33 000 (EUR 1 219).

32 — I refer to items (ii), (iii) and (iv) as the 'associated costs' of the loan.

33 — It is for the referring court, as sole judge of fact, to verify the calculation of the APR. Given the amounts indicated in the order for reference and the definitions in Article 3(g), (h), (i) and (l) of Directive 2008/48, I do not understand how one arrives at an APR of 28.9%.

34 — I refer to those amounts together as 'the contractual penalties'.

21. If the Radlingers defaulted in repayment or the lender discovered that they had provided false or grossly misleading information or withheld material information in the application for credit, the lender could demand immediate repayment of the principal sum and the associated costs set out in the credit agreement. In addition, the contractual penalties and the statutory interest became payable.

22. On 27 September 2011, the lender notified the Radlingers that it had become aware that they had withheld information indicating that their property had previously been made the subject of an enforcement order. That order had been for an amount of CZK 4 285 (EUR 158). Nevertheless, on that basis the lender demanded immediate repayment of the debt in full. By letter of 19 November 2012 the lender repeated its demand stating that the Radlingers' payments under the credit agreement had been irregular and late. However, according to the referring court the Radlingers did not default until December 2012.

23. FINWAY a.s. ('FINWAY' or 'the creditor'), the defendant in the main proceedings, subsequently took over those claims from Smart Hypo.

24. On 26 April 2013 the referring court declared the Radlingers bankrupt, appointed an administrator in bankruptcy and called on creditors to register their claims. On 23 May 2013, in the context of the insolvency proceedings, FINWAY registered two enforceable claims. The first was a secured claim for CZK 3 045 991 (EUR 112 480). The second was an unsecured claim in the amount of CZK 1 359 540 (EUR 50 204), representing the contractual penalty for default on the payments at 0.2% per day from 23 September 2011 to 25 April 2013.

25. On 3 July 2013, in the course of review proceedings, the Radlingers accepted that the claims were enforceable, but contested the amounts of both the secured and the unsecured claims on the grounds that the terms of the original credit agreement had been contrary to accepted principles of morality. They argue that the amount that they should be liable to pay (CZK 1 496 801 (EUR 55272.70), is substantially lower than FINWAY's registered claims. The administrator in bankruptcy did not contest FINWAY's claim.

26. By order of 23 July 2013, the referring court approved the Radlingers' joint discharge from bankruptcy on the basis of a schedule of repayments. On the following day the Radlingers lodged an incidental application by which they seek a declaration that FINWAY's registered claims are not legitimate on the grounds that they are contrary to accepted principles of morality.

27. The referring court states that the national rules governing insolvency proceedings prevent it from examining the substance of the Radlingers' incidental application. Under those rules such applications may be brought solely in cases where the resolution of the debtor's bankruptcy in the form of a discharge is approved by the insolvency court. Here, the national rules do not allow the Radlingers to bring an incidental application against the secured claim at all. Therefore that part of the application should be dismissed. However, the national rules make provision for a debtor to lodge an incidental application in relation to the unsecured claim.

28. In order to determine the Radlingers' incidental application the Krajský soud v Praze (Prague Regional Court) seeks a preliminary ruling on the questions summarised below:

(1) Do Article 7(1) of Directive 93/13 and Article 22(2) of Directive 2008/48, or any other provisions of EU law on consumer protection, preclude national rules which, in insolvency proceedings:

— allow the court to examine the authenticity, amount or ranking of claims against a debtor who is a consumer only on the basis of an incidental application lodged by the administrator in bankruptcy, by a creditor or by the debtor?

— allow such a debtor to request review by the court of the creditors' registered claims (i) only where the resolution of his bankruptcy in the form of a discharge is approved, (ii) only in relation to unsecured claims and (iii), in the case of claims declared enforceable by a decision of the competent authority, only in order to assert that the claim has lapsed or is time-barred?

(2) In insolvency proceedings concerning claims under a consumer credit agreement, must the court have regard *ex officio* (even in the absence of any objection by the consumer) to the lender's failure to provide the information required under Article 10(2) of Directive 2008/48, and declare the contractual arrangements invalid in accordance with national law?'

If Question 1 or 2 is answered in the affirmative:

(3) Do those provisions of those directives have direct effect and can they be applied directly, given that an *ex officio* review by the court encroaches on the horizontal relationship between the consumer and the supplier of goods or services?

(4) What is the "total amount of credit" in Article 10(2)(d) of Directive 2008/48 and what are "the amounts of drawdown" in the formula for calculating the APR in Annex I to that directive, if (i) the credit agreement formally specifies an amount of credit to be paid out but (ii) it is agreed that the lender's claims for a fee and for the first repayment instalment(s) will be offset against that amount, so that the offset sums are never in reality paid to the consumer but remain at the lender's disposal throughout? Does inclusion of those sums affect the calculation?

(5) In assessing whether penalty clauses are unfair for the purposes of point 1(e) of the Annex to Directive 93/13, is it necessary to consider the cumulative effect of all such clauses in the agreement, regardless of whether the creditor insists that they be satisfied in full or whether some of them may be considered invalid under national law, or only that of the penalties which are or can be actually demanded?

(6) If contractual penalties are found to be unfair, is it necessary to disapply all of the individual penalties which (but only when considered together) led the court to conclude that the amount of compensation was disproportionately high within the meaning of point 1(e) of the Annex to Directive 93/13, or only some of them (and, in the latter case, on what criteria)?

29. Written observations were submitted by the Radlingers, FINWAY, the Governments of the Czech Republic and Poland and by the European Commission. At the hearing on 15 July 2015 Germany and the Commission presented oral observations.

Assessment

Question 1

30. By Question 1 the referring court asks whether national rules governing insolvency proceedings relating to a debt originating in a consumer credit agreement, which: (i) require the debtor to lodge an incidental application to the main insolvency proceedings in order to examine the validity, amount or ranking of claims; and (ii) restrict his right to request a review of those claims, are compatible with EU law, in particular Directive 93/13 and Directive 2008/48. By implication, that also raises the

question whether such rules are compatible with the principles of equivalence and effectiveness. [35]

31. I shall start by considering the position in relation to Directive 93/13, which establishes a system that protects and prevents consumers from being bound by unfair contract terms and requires Member States to ensure that adequate and effective means exist to prevent the continued use of such terms in consumer contracts. [36] It is not in dispute that the Radlingers are consumers and that the lender is a supplier for the purposes of that directive.

32. As regards the principle of equivalence, the referring court states in its order for reference that the court seised of insolvency proceedings may not examine the validity, the amount or the ranking of claims on any grounds, unless the person concerned — the administrator in bankruptcy, the creditor or (as here) the debtor — lodges an incidental application. That position is no different where the insolvency proceedings concern debts arising from a consumer contract. Thus, there is no information before the Court suggesting that national procedural rules requiring a debtor to lodge an incidental application — in order, for example, to challenge the validity of a creditor's claim on the grounds that the contract from which that claim stems is incompatible with EU consumer protection rules — are less favourable than those governing other similar domestic actions.

33. In relation to the principle of effectiveness, it is settled law that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. [37] For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure. [38]

34. In the light of the national procedural rules at issue, is it impossible or excessively difficult for the insolvency court to examine the validity, amount or ranking of claims arising from a consumer credit agreement and do those rules make it excessively difficult for a debtor who is a consumer to challenge a registered claim?

35. The referring court states that under those rules it is prevented in the incidental proceedings from examining the legitimacy of the first claim (in the sum of CZK 3 045 991), because that claim is secured. It is entitled to assess the incidental application concerning the second claim (in the sum of CZK 1 359 540), since that claim is both enforceable and unsecured. However, that examination is subject to significant restrictions. Such unsecured claims can be assessed solely on grounds of their validity, the amount or the rank in which they are settled and debtors are restricted to challenging them on the grounds that the claim has lapsed or is time-barred. [39]

36. As a result of those special features it is impossible for debtors in the position of the Radlingers to contest secured claims. In particular, where secured claims concern debts derived from consumer credit agreements, neither the validity of the claim nor the calculation of the sum owing can be challenged. The question of whether the contract giving rise to the debt is compatible with EU

35 — It is for the Member States to determine the procedural rules or the conditions governing legal actions intended to ensure the protection conferred by EU law (the principle of national procedural autonomy). That principle is subject to the condition that such rules are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness); see, for example, judgments in *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 46, and *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 51.

36 — See Article 6(1) and Article 7 of Directive 93/13. See further order in *Pohotovosť*, C-76/10, EU:C:2010:685, paragraph 41.

37 — See more recently judgment in *Faber*, C-497/13, EU:C:2015:357, paragraph 43 and the case-law cited. In my Opinion in that case, I suggested formulating this slightly differently: '… it is necessary to take account of the role of a particular provision in a procedure and the course and special features of that procedure, viewed as a whole, before the national bodies …'. Opinion of Advocate General Sharpston in *Faber*, C-497/13, EU:C:2014:2403, point 59.

38 — See judgment in *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 39 and the case-law cited.

39 — See points 12 to 14 above.

consumer protection rules is fundamental to establishing precisely those two points. Where the consumer protection rules have not been respected, the consequence under Article 6(1) of Directive 93/13 is meant to be that the clauses in the contract establishing the debt are deemed to be unfair and do not bind the consumer. Yet national rules such as those at issue in the main proceedings prevent the court seised from carrying out the necessary examination and they do not allow the debtor himself to bring an action.

37. That seems to me to be incompatible with the principle of effectiveness.

38. In relation to enforceable unsecured claims, it seems if not impossible then certainly excessively difficult for debtors to challenge the legitimacy of such claims on the grounds that the provenance of the insolvency debt (the consumer contract) is incompatible with EU consumer protection rules. Whilst it is true that debtors may bring incidental applications challenging the validity, the amount or the ranking of such claims (the latter does not seem to be relevant here), the grounds on which they may do so are restricted. The relevant national rules do not provide for the court itself to examine the validity, or the amount of claims arising from a consumer credit agreement and debtors are limited to submitting that enforceable unsecured claims have lapsed or are time-barred. It seems to me that such rules in effect prevent consumers who are debtors from challenging the validity or the amount of such unsecured claims where those claims are based on clauses that are expressly prohibited by Directive 93/13. [40]

39. I therefore conclude that Directive 93/13 should be interpreted as precluding national procedural rules such as those at issue in the main proceedings which: (i) do not allow an insolvency court of its own motion when determining an incidental application to examine the validity, amount, or ranking of enforceable unsecured claims arising from a consumer credit agreement; (ii) do not allow such a court of its own motion to examine the legitimacy of a secured claim; and (iii) render it impossible and/or excessively difficult for a consumer who is a debtor to challenge an enforceable unsecured claim, where such claims are derived from a consumer credit agreement, even though the insolvency court has the legal and factual elements necessary for that task available to it.

40. The referring court also seeks guidance as to whether the national procedural rules at issue are precluded by Article 22(2) of Directive 2008/48. In my view it is unnecessary to reply to that aspect of Question 1. Article 22(2) requires Member States to ensure that consumers may not waive the rights conferred on them by provisions of national law implementing or corresponding to Directive 2008/48. Nothing in the national rules described in the order for reference governing a consumer's waiver of his rights within the meaning of Article 22(2) appears to be relevant here. Furthermore, there is no indication in the referring court's narration of the facts that the Radlingers waived the rights conferred on them by the national provisions implementing that directive. It follows that Article 22(2) of Directive 2008/48 has no apparent bearing on the question whether the national rules at issue are precluded by the principles of equivalence and effectiveness.

Question 2

41. In Question 2 the referring court raises two issues. First, must national courts examine *ex officio* whether a creditor has failed to provide the information listed in Article 10(2) of Directive 2008/48, even where the debtor himself does not rely on that ground? Second, if the creditor did fail to provide that information, is the credit agreement then invalid as provided under national law?

40 — See Article 3(1) read together with point 1(e) in Annex I to Directive 93/13.

42. Before examining those questions I recall that under the credit agreement in the main proceedings the Radlingers agreed to take out a secured loan and that the subsequent insolvency proceedings concern *two claims* relating to that debt. The first claim (CZK 3 045 991) is guaranteed by three means including a security in the form of a mortgage. The second claim (CZK 1 359 540) consists of contractual penalties imposed under the credit agreement as a result of the Radlingers' default.

43. It is the credit agreement itself that falls within the scope of Directive 2008/48 rather than the resulting debts or the creditor's claims. However, credit agreements secured by a mortgage are expressly excluded from the scope of Directive 2008/48 (Article 2(2)(a)). The Commission states in its submissions that the national transposition provisions are broader in scope than Article 2 of Directive 2008/48, as they also cover credit agreements secured by a mortgage. That position is not inconsistent with the aims of Directive 2008/48. Member States are entitled to maintain or introduce, in accordance with EU law, national legislation corresponding to some or all of the provisions of Directive 2008/48, that covers credit agreements outside its scope. [41]

44. Furthermore, it is settled case-law that in the preliminary ruling procedure under Article 267 TFEU it is for the referring court to determine the need for a reference and the pertinence of the questions referred. [42] The Court refuses to rule on a question referred for preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [43] That is not the position here. Thus, it is, at the very least, not obvious that the interpretation of Article 10(2) of Directive 2008/48 cannot be relevant for resolving the dispute in the main proceedings regarding the first claim. [44]

45. The national legislation at issue must therefore be applied in accordance with Directive 2008/48 as interpreted by the Court.

46. In the present case, whether the credit agreement from which the secured debt originates would have fallen outside the scope of Directive 2008/48 in the absence of the Czech Republic's implementing rules and whether the unsecured debts would be governed by that directive makes no difference to the analysis. Those questions are therefore better left open to be dealt with in a future case where they are pertinent.

47. Next, I observe that Article 10(2)(d) of Directive 2008/48 contains a list of 22 items of information that must be specified in a credit agreement. Is it necessary to consider whether national courts should conduct an *ex officio* examination in relation to each of those items?

48. The legislative scheme of Directive 2008/48 provides for consumers to be furnished with information both prior to the conclusion of the credit agreement and in the agreement itself. [45] The information listed in Article 10 ('Information to be included in credit agreements') reflects the 19 items specified in Article 5 ('Pre-contractual information') and the aims of both provisions are to ensure that the consumer is fully informed. [46]

41 — See recital 10 in the preamble to Directive 2008/48, cited at point 6 above, and the judgment in *SC Volksbank România*, C-602/10, EU:C:2012:443, paragraphs 40 to 43.

42 — Judgment in *SC Volksbank România*, C-602/10, EU:C:2012:443, paragraph 48.

43 — Judgment in *SC Volksbank România*, C-602/10, EU:C:2012:443, paragraph 49.

44 — Judgment in *SC Volksbank România*, C-602/10, EU:C:2012:443, paragraph 50, and the order in *Pohotovosť*, C-76/10, EU:C:2010:685, paragraphs 33 to 35.

45 — See point 9 above.

46 — See recitals 19 and 31 in the preamble to Directive 2008/48.

49. The referring court here seeks guidance as to whether national courts should examine *ex officio* whether the obligation in Article 10(2)(d) to inform the consumer of 'the total amount of credit and the conditions governing the drawdown' has been met. Should the national court take account of the lender's failure to provide what the referring court describes as 'the correct' information regarding the total amount of credit? In the factual situation under consideration, the credit agreement stipulates an amount of credit that is to be paid to a consumer, but under the agreement the lender's costs (for example, administration fees and the first repayment instalments of interest) are to be offset against the amount of the loan and the sums representing those costs are in reality never made available to the consumer. Where the total amount of credit includes such costs the APR is lower than it is where those costs are excluded from the amount that is in reality paid. [47] The referring court therefore asks whether national courts must examine *ex officio* a creditor's failure to supply information as to the total amount of credit as required by Article 10(2)(d).

50. That question is of particular relevance to determine the main proceedings: if the referring court finds that the consumer was not informed of the total amount of credit, a different rate of interest will apply and other arrangements will be considered invalid. [48]

51. The Court has held on a number of occasions that national courts must apply certain provisions of EU consumer protection legislation *ex officio*. That requirement 'has been justified by the consideration that the system of protection introduced under that legislation is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge and that there is a real risk that the consumer, particularly because of a lack of awareness, will not rely on the legal rule that is intended to protect him'. [49] The Court has applied those principles (for example) when considering a consumer's right to pursue remedies against the grantor of credit under Article 11(2) of Directive 87/102/EEC [50] and in relation to a consumer's right to withdraw from a contract negotiated away from business premises. [51] In *Faber*, [52] where the question of whether a guarantee or warranty owed by a seller to a purchaser under a contract of sale relating to a motor car arose, the national court sought guidance as to whether it was required to examine of its own motion the purchaser's status as a consumer within the meaning of Article 1(2) of Directive 1999/44/EC, [53] even though Mrs Faber had not relied on that status in the national proceedings.

52. In my view the same principles can usefully be applied to assessing whether national procedural rules such as those at issue in the main proceedings render the application of EU law impossible or excessively difficult. In other words: are those national rules compatible with the principle of effectiveness? [54]

53. It is apparent from the referring court's description of the procedural rules governing domestic insolvency proceedings that national courts are unable to assess whether the requirement that creditors must provide consumers who are debtors with the information required under Article 10(2)(d) has been met. It also appears that the Radlingers themselves were unable to raise the issue.

47 — See point 59 et seq. below where I consider Question 4.

48 — See point 16 above.

49 — See judgment in *Faber*, C-497/13, EU:C:2015:357 paragraph 42 and the case-law cited.

50 — Council Directive of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48). See further judgment in *Rampion and Godard*, C-429/05, EU:C:2007:575, paragraphs 60 to 65.

51 — See judgment in *Martín Martín*, C-227/08, EU:C:2009:792.

52 — See judgments in *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraphs 45 to 57, and *Faber*, C-497/13, EU:C:2015:357, paragraph 46.

53 — Of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12).

54 — See footnote 35 above.

54. Consumers need the information specified in Article 10(2)(d): (i) to enable them to assess the amount they are paying for credit; (ii) to establish whether they can obtain a better deal elsewhere; and (iii) to organise their personal finances with a view to avoiding the disabilities and the inconveniences which the status of bankruptcy entails. Those elements accord with Directive 2008/48's objectives of providing a high level of consumer protection and creating a genuine internal market.[55] Information relating to the total amount of credit is relevant to calculating the APR under a consumer credit agreement.[56] What may be of even more immediate importance to the consumer are the conditions governing the drawdown: how much money is going to be made available to him under the credit agreement?

55. If national procedural rules prevent a consumer who has become a debtor from raising a creditor's failure to provide information in accordance with Article 10(2)(d), the consumer is denied the protection afforded by Directive 2008/48.

56. Whether or not that information in the present proceedings was provided could affect the validity of the creditor's claim as well as the amount of the debtor's liability. If the court seised cannot examine that issue, it is unable to determine whether the claims derived from the consumer credit agreement are within the (wider) national rules implementing Directive 2008/48. Nor can it apply national rules which impose penalties where a creditor fails to provide information on the total amount of credit and the conditions governing the drawdown of a loan. Those national rules may lead to a reduction, or even to the extinction, of the consumer's liability.

57. It follows that procedural rules which prevent a national court from examining whether the requirement laid down in Article 10(2)(d) of Directive 2008/48 has been met undermine the effectiveness of the protection conferred by that directive. A national court must be able to conduct that examination *ex officio* and, where appropriate, impose penalties under national law for non-compliance.[57]

58. I therefore conclude that Article 10(2)(d) of Directive 2008/48 should be interpreted as meaning that a national court seised of insolvency proceedings relating to a consumer credit agreement must examine *ex officio* whether the information laid down in that provision has been provided by the creditor to the debtor and to impose the relevant penalties under national law where that obligation has not been met.[58]

Question 4

59. In circumstances where a credit agreement stipulates an amount of credit to be paid out, but it is agreed that the lender's claims for a fee and for the first repayment instalment(s) will be offset against that amount, so that those sums are never in reality paid to the consumer but remain at the lender's disposal throughout: (i) what is 'the total amount of credit' for the purposes of Article 10(2)(d) of Directive 2008/48; (ii) what are 'the amounts of drawdown' in the formula for calculating the APR in Annex I to that directive; and (iii) does inclusion of those sums affect that calculation?

55 — See recitals 6, 7, 8 and 9 in the preamble to Directive 2008/48.

56 — The APR is defined as the total cost of credit expressed as an annual percentage of that amount; see further Article 3(i) of Directive 2008/48.

57 — It is for the referring court to verify whether the penalties are effective, proportionate and dissuasive for the purposes of Article 23 Directive 2008/48. It seems from the information in point 16 above that that is the case.

58 — See judgment in *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 59 and the case-law cited.

60. The 'total amount of credit' is defined in Article 3(l) as meaning '… the ceiling or the total sums made available under a credit agreement'. However, the text of Directive 2008/48 does not state whether that sum includes, in addition to the amount of the loan that the consumer actually receives, costs such as administrative fees and any initial interest payments which are retained by the lender and never paid to the consumer; or whether it means the sum received by the consumer exclusive of such costs. [59]

61. It is common ground between the Commission, the Czech Republic, Germany and Poland that the total amount of credit means the latter. Those parties also agree that if the total amount of credit is instead defined so as to add such costs to the amount actually paid to the consumer, the effect is to generate an APR which appears lower than it would be if calculated on the basis only of the sum paid to the consumer exclusive of costs. Neither the Radlingers nor FINWAY offered comments on this point.

62. It seems to me that the natural meaning of the expression '… the total sums *made available* under a credit agreement' [60] is 'the amount of the loan exclusive of the lender's costs'. That is that amount which is actually paid to the consumer and thus placed at the consumer's disposal for him to use. That sum also corresponds to the amount of the drawdown in the formula for calculating the APR in Annex I to Directive 2008/48.

63. Such a reading is also consistent with the scheme of Directive 2008/48 in so far as Article 3(h) states that 'the total amount payable by the consumer means the sum of the total amount of the credit and the total cost of the credit to the consumer'. If the 'total amount of credit' is deemed to include costs such as interest payments and administrative fees, those items would be counted twice in establishing the total amount payable by the consumer — once when establishing the 'total amount of credit' and again when establishing the total cost of the credit to the consumer as defined in Article 3(g). That would render the scheme of the directive incoherent.

64. The costs that a consumer may be required to pay under a credit agreement can differ in nature and they may be calculated by creditors using different methods and variables. [61] If such elements were taken into account when calculating the APR, that could undermine the aims of Directive 2008/48 of ensuring transparency and comparability with regard to offers of credit. Where costs are not calculated by reference to uniform rules, the inclusion of costs within 'the total amount of credit' will render a realistic comparison difficult if not impossible. Such costs should therefore be excluded from the calculation of the APR so as, precisely, to ensure transparency and comparability.

65. Finally, I emphasise that Directive 2008/48 is a full harmonisation measure. [62] It is thus essential that 'the total amount of credit' and the sums included in the drawdown for the purposes of applying the formula in Annex I are interpreted in the same way throughout the Member States.

59 — The Commission provides an illustration at page 11, footnote 12, of Commission Staff Working Document 'Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge' SWD(2012) 128 final ('the Commission's Guidelines on the application of Directive 2008/48/EC'). A creditor provides EUR 5 000, but agrees with the consumer that costs amounting to EUR 100 are to be paid from that total and not from the consumer's other resources. The consumer thus freely avails himself of EUR 5 000 minus EUR 100 = EUR 4 900. The Commission considers the latter sum to be the total amount of credit defined in Article 3(l) of Directive 2008/48.

60 — Emphasis added.

61 — See the Commission's Guidelines on the application of Directive 2008/48/EC, p. 5.

62 — See recital 9.

66. I therefore consider that 'the total amount of credit' in Article 10(2)(d) of Directive 2008/48 refers to the sums made available to the consumer under a credit agreement within the meaning of Article 3(l), that is the sums that are actually paid by the lender to the consumer and thus placed at the consumer's disposal for him to use, exclusive of any costs due to the creditor. The drawdown in the formula for the purposes of calculating the APR in Annex I to that directive is the same as the total amount of credit.

Question 3

67. In Question 3 the referring court asks whether the provisions of Directive 93/13 and Directive 2008/48 have direct effect, regard being had in particular to the fact that the main proceedings concern a 'horizontal' dispute between individuals.

68. It seems to me that strictly speaking that question is irrelevant.

69. The provisions of both directives have been transposed into national law. Neither party to the main proceedings therefore needs to rely on them directly.

70. Since the dispute in the main proceedings is between a consumer and a supplier, neither of the parties may rely on the direct effect of Directive 93/13 or Directive 2008/48. It is nevertheless settled case-law that a national court hearing a dispute between individuals is required, when applying the provisions of domestic law, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the applicable directive in order to achieve an outcome consistent with the objective pursued by that directive.[63]

Questions 5 and 6

71. By Question 5 the referring court seeks guidance on the meaning of point 1(e) in the Annex to Directive 93/13. In Question 6 it seeks to ascertain whether contractual penalties such as those at issue here are unfair for the purposes of that directive and, if so, whether national courts must exclude the application of all such clauses or only some of them. I shall deal with both questions together.

72. In accordance with point 1(e) in the Annex to Directive 93/13, terms which have the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation are unfair for the purposes of the directive and are thus, pursuant to Article 6(1), not to be binding.

73. The Court has held that Article 3(1) and Article 4(1) of Directive 93/13 define the general criteria as to whether contractual terms within the directive's scope are unfair. Against that legislative background it is for national courts to determine whether a particular term is unfair for the purposes of Article 3(1).[64] Criteria relevant to that assessment here will include the relative strengths of the finance company compared to the bargaining position of the consumer and whether the penalty clauses were pre-formulated standard terms that were not negotiated with the Radlingers, so that they had no influence on them.[65]

63 — See, for example, the Opinion of Advocate General Mengozzi in *Rampion and Godard*, C-429/05, EU:C:2007:199, points 31 to 33, and judgment in *Faber*, C-497/13, EU:C:2015:357, paragraph 33.

64 — See judgment in *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 55 and the case-law cited.

65 — Article 3(1) of Directive 93/13, see further the order in *Pohotovosť*, C-76/10, EU:C:2010:685, paragraphs 57 to 59.

74. It is necessary to assess the cumulative effect of all such clauses in the credit agreement, since they apply unless they are subject to a successful legal challenge. (However, the consumer may be unaware that he can challenge such clauses or be unable to do so for reasons of cost or because he is precluded by national procedural rules.)

75. The second part of Article 6(1) of Directive 93/13 expressly provides that contracts concluded between a seller or supplier and a consumer continue to bind the parties 'upon those terms' if that contract is capable of continuing in existence 'without the unfair terms'. Therefore, 'national courts are required 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 the content of such terms'.[66] It follows that where penalty clauses are unfair within the meaning of Article 3(1) of Directive 93/13, national courts should exclude *all* such clauses rather than merely some of them.

76. Given the nature and significance of the public interest which constitutes the basis of the protection guaranteed to consumers under Directive 93/13, Member States must provide for adequate and effective means 'to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers' (Article 7(1)). If national courts were able to revise the content of unfair terms included in such contracts, that might (paradoxically) compromise attainment of the long-term objective of Article 7, 'since it would weaken the dissuasive effect on sellers or suppliers of the straightforward non-application of those unfair terms with regard to the consumer'.[67]

77. If a national court has found that penalty clauses are unfair for the purposes of point 1(e) of the Annex to Directive 93/13, is it necessary to consider the cumulative effect of all such clauses in an agreement rather than restricting the assessment to those which the lender insists should be satisfied or disregarding those considered invalid under national law?

78. In my view it is necessary to consider the cumulative effect of the penalty clauses.

79. First, that position is consistent with the aims of Directive 93/13 which include eradicating the practice of including unfair terms in consumer contracts and ensuring that consumers are protected from abuse by sellers or suppliers who enjoy a stronger bargaining position as compared to the consumer.[68] Second, it is consistent with Article 7(1) of Directive 93/13 that such terms should be disapplied in their entirety in order to discourage sellers or suppliers and in particular creditors in the political and economically sensitive domain of consumer credit from including terms of that nature in credit agreements. That is particularly the case where such clauses are contained in standard terms that have not been negotiated.

80. I therefore conclude that, for the purposes of Articles 3 and 4 of Directive 93/13 and point 1(e) of the Annex thereto, it is necessary for the referring court to consider whether the cumulative effect of all penalty clauses in a consumer credit agreement require a consumer to pay a disproportionately high sum in compensation, even where the lender does not insist that all such clauses should be satisfied in full, or where certain penalty clauses are considered to be invalid under national law. Where such clauses are found to be unfair, the application of all such clauses to the consumer must be excluded in their entirety.

66 — See judgment in *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraphs 56 and 57 and the case-law cited.

67 — See judgment in *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 58.

68 — See Article 3(1) and Article 6(1); see also the fourth and ninth recitals in the preamble to Directive 93/13.

Conclusion

81. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by Krajský soud v Praze (Prague Regional Court) to the following effect:

— Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts should be interpreted as precluding national procedural rules such as those at issue in the main proceedings, which: (i) do not allow an insolvency court of its own motion when determining an incidental application to examine the validity, amount, or ranking of enforceable unsecured claims arising from a consumer credit agreement; (ii) do not allow such a court of its own motion to examine the legitimacy of a secured claim; and (iii) render it impossible and/or excessively difficult for a consumer who is a debtor to challenge an enforceable unsecured claim, where such claims are derived from a consumer credit agreement, even though the insolvency court has the legal and factual elements necessary for that task available to it.

— Article 10(2)(d) of 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 should be interpreted as meaning that a national court seised of insolvency proceedings relating to a consumer credit agreement must examine *ex officio* whether the information laid down in that provision has been provided by the creditor to the debtor and impose the relevant penalties under national law where that obligation has not been met.

— 'The total amount of credit' in Article 10(2)(d) of Directive 2008/48 should be understood as referring to the sums made available to the consumer under a credit agreement within the meaning of Article 3(l), that is the sums that are actually paid by the lender to the consumer and thus placed at the consumer's disposal for him to use, exclusive of any costs due to the creditor. The drawdown in the formula for the purposes of calculating the annual percentage rate of charge in Annex I to that directive is the same as the total amount of credit.

— The referring court must determine whether the cumulative effect of the penalty clauses in a credit agreement require a consumer to pay a disproportionately high sum in compensation for the purposes of Articles 3 and 4 of Directive 93/13 and point 1(e) of the Annex thereto, even where the lender does not insist that all such clauses should be satisfied in full, or where certain penalty clauses are considered to be invalid under national law. Where such clauses are found to be unfair, the application of all such clauses to the consumer must be excluded in their entirety.