Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

9 July 2020 *

(Reference for a preliminary ruling — Consumer protection — Directive 93/13/EEC — Unfair terms in consumer contracts — Scope — Article 1(2) — Definition of 'mandatory statutory or regulatory provisions' — Supplementary provisions — Loan agreement denominated in a foreign currency — Term relating to the foreign exchange risk)

In Case C-81/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania), made by decision of 27 December 2018, received at the Court on 1 February 2019, in the proceedings

NG,

OH

v

SC Banca Transilvania SA,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, acting as Judge of the First Chamber, L. Bay Larsen, C. Toader and N. Jääskinen (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 6 February 2020,

after considering the observations submitted on behalf of:

– NG and OH, by V. Lupu and G. Perju, avocați,

– SC Banca Transilvania SA, by S. Tîrnoveanu, L. Retegan and A. Iorgulescu, avocați,

– the Romanian Government, initially by E. Gane, L. Lițu, O.-C. Ichim and C.-R. Canțăr, and subsequently by E. Gane, L. Lițu, and O.-C. Ichim, acting as Agents,

– the German Government, by J. Möller, M. Hellmann and E. Lankenau, acting as Agents,

* Language of the case: Romanian.

– the European Commission, by C. Gheorghiu and N. Ruiz García, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 March 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in proceedings between NG and OH, on the one hand, and SC Banca Transilvania SA ('Banca Transilvania'), on the other hand, concerning the alleged unfairness of a term of a refinancing agreement denominated in a foreign currency that was concluded between the parties.

Legal context

EU law

3 According to the 13th recital of Directive 93/13:

'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 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(2) of that directive provides:

'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 3 of the directive is worded as follows:

'1. A contractual term which has not been individually negotiated shall 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.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of that term, particularly in the context of a pre-formulated standard contract.

…'

Romanian law

6 Article 1578 of the Cod Civil (civil code), in the version in force at the material time in the main proceedings ('the Civil Code'), provides:

'The debt arising under a money loan shall always be limited to the amount set out in the agreement.

Where there is an increase or a decrease in the value of the currency before the due date for payment, the debtor must repay the sum received by way of loan and shall be obliged to repay that sum only in currency that is legal tender at the time of payment.'

The main proceedings and the questions referred for a preliminary ruling

7 On 31 March 2006, NG and OH concluded a consumer credit agreement with SC Volksbank România SA, now Banca Transilvania, under which the bank loaned NG and OH the sum of 90 000 Romanian lei (RON) (approximately EUR 18 930) ('the first agreement').

8 On 15 October 2008, the parties concluded a loan agreement denominated in Swiss francs (CHF) in order to refinance the first agreement ('the refinancing agreement'). The refinancing agreement was for the sum of CHF 65 000 (approximately EUR 42 139), being approximately RON 159 126 at the exchange rate applicable on the date that agreement was signed.

9 Under Banca Transilvania's internal regulations, the maximum level of indebtedness permitted was 55% of the borrower's financial capacity. For NG and OH, that threshold was calculated taking into account the exchange rate of the Swiss franc against the Romanian lei ('the CHF/RON exchange rate') as it applied before the refinancing agreement was signed, which accounted for 35.04% of their income on the date the loan was concluded.

10 Clause 4.1 of the general terms and conditions of the refinancing agreement provided that all payments made pursuant to the agreement were to be made in the currency of the loan. It was also specified that the borrower could, in certain circumstances, ask the bank for the loan to be denominated in a different currency, without the bank being obliged to grant such request. It was further provided that the bank was authorised to carry out the exchange, for and on behalf of the borrower, in order to discharge the payment obligations due, by using its own exchange rate.

11 Fluctuations in the CHF/RON exchange rate between October 2008 and April 2017 resulted in an increase of RON 117 760 (approximately EUR 24 772) in the sum borrowed by NG and OH.

12 On 23 March 2017, NG and OH brought an action before the Tribunalul Specializat Cluj (Cluj Specialist Tribunal, Romania) for a declaration that, inter alia, Clause 4.1 of the general terms and conditions of the refinancing agreement was unfair. NG and OH also claimed that Banca Transilvania failed to comply with its obligation to provide information by not warning them, when the agreement was negotiated and signed, of the risk inherent in converting the first agreement into an agreement denominated in a foreign currency. In particular, since the borrowers received income only in Romanian lei, Banca Transilvania should have drawn their attention to the implications of a decrease in value of that currency against the foreign currency in which the loan was to be repaid. In addition, the term requiring repayment in a foreign currency created an imbalance to the detriment of the borrowers, who alone bore the exchange risk. Accordingly, NG and OH asked the Tribunalul Specializat Cluj (Cluj Specialist Tribunal) to freeze the CHF/RON exchange rate at the rate applicable on the date when the agreement was concluded and to order reimbursement of the sums which had been paid on the basis of a less favourable exchange rate.

13 That court granted in part the action brought by NG and OH. However, it rejected the request that the CHF/RON exchange rate be set at the rate prevailing on the date when the refinancing agreement was signed. In doing so, that court held that while the term in Clause 4.1 of the general terms and conditions of the refinancing agreement reflects what is referred to as the 'monetary nominalism' principle laid down in Article 1578 of the Civil Code, it falls within the scope of Directive 93/13 since such a provision is not mandatory, but supplementary in nature. That court therefore held that it was able to analyse whether that term was unfair. Following that analysis, it found that the term was drafted in clear, intelligible language and that Banca Transilvania had fulfilled its obligation to provide information since it could not have foreseen the significant variations in the CHF/RON exchange rate.

14 Both Banca Transilvania and NG and OH have brought an appeal against that judgment before the referring court, the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania). Contesting the appeal brought by NG and OH, Banca Transilvania maintains that Clause 4.1 of the general terms and conditions of the refinancing agreement, under which all payments made pursuant to the agreement are to be made in the currency of the loan, forms part of the main subject matter of the agreement. In addition, that contractual term reflects a mandatory statutory provision, as referred to in Article 1(2) of Directive 93/13, which cannot be reviewed for the purpose of determining whether it is unfair.

15 According to the referring court, it is apparent from the judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703), that where a contractual term reflects a mandatory provision of national law that applies between contracting parties irrespective of their choice or a provision that is supplementary in nature and therefore applicable by operation of law, that is to say, where there is no other arrangement between the parties in that respect, it falls outside the scope of Directive 93/13.

16 The referring court states that Article 1578 of the Civil Code is supplementary in nature but that the approach adopted in the judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703), has been applied differently by the Romanian courts.

17 The vast majority of Romanian courts consider that contractual terms which reflect that statutory provision, as supplementary provisions that apply by default if there is no other arrangement between the parties, cannot be examined for the purpose of determining whether they are unfair. A certain number of Romanian courts, however, take the view that such a term is imposed on the consumer by the seller or supplier. Since it is not open to the consumer to disapply the term by inserting a different term into the agreement, it can be reviewed for the purpose of determining whether it may be unfair.

18 The referring court states that the majority view of the Romanian courts reduces to the point of elimination the distinction between statutory provisions which are mandatory and those which are supplementary in nature, which results in them being subject to the same legal treatment as regards the analysis of whether they are unfair.

19 That majority interpretation is based on a terminological difference between the Romanian language version and the French language version of Article 1(2) of Directive 93/13. In that regard, the referring court explains that whereas the French version uses the term 'impératif' (mandatory), the Romanian version refers to 'obligatory statutory or regulatory provisions'. The referring court points out that, unlike the term 'mandatory', which, in its view, excludes supplementary provisions, the term 'obligatory' includes them. While mandatory provisions are obligatory, supplementary provisions also become obligatory when contracting parties decide not to derogate from them.

20 In addition, the referring court is uncertain as to the extent of the obligation on the bank to provide information as regards future fluctuations in a currency's exchange rate and the measures which the bank is required to adopt in order to guarantee the effectiveness of the rights granted to the consumer by Directive 93/13 where there is no supplementary provision to replace a contractual term which is found to be unfair.

21 In those circumstances, the Curtea de Apel Cluj (Court of Appeal, Cluj) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 1 [paragraph 2] of Directive 93/13 be interpreted as not precluding any analysis, with regard to unfairness, of a contractual term that reproduces a supplementary rule from which the parties could have derogated, but did not in fact do so as there was no negotiation in that regard, as in the present case analysed here with regard to the term requiring repayment of the loan in the same foreign currency as that in which it was granted?

(2) In a context where, when being granted a loan in a foreign currency, the consumer was not given calculations/estimates relating to the economic impact that any exchange rate fluctuation would have as regards the overall payment obligations arising under the agreement, can it reasonably be maintained that such a term, under which the exchange risk is borne entirely by the consumer (in accordance with the nominalist principle), is clear and intelligible and that the seller or supplier/bank has complied in good faith with the obligation to provide information to the other party to the agreement, in circumstances in which the maximum degree of indebtedness of consumers established by the National Bank of Romania has been calculated by reference to the exchange rate prevailing on the date when the loan was granted?

(3) Do Directive 93/13 and the case-law based on it and the principle of effectiveness preclude a contract from continuing unchanged after a term relating to the party that bears the exchange rate risk has been declared unfair? What change could be incorporated into the contract in order to disapply the unfair term and comply with the principle of effectiveness?’

Consideration of the questions referred

The first question

22 By its first question, the referring court asks, in essence, whether Article 1(2) of Directive 93/13 is to be interpreted as meaning that a contractual term which has not been individually negotiated but which reflects a rule that, under national law, applies between contracting parties provided that no other arrangements have been established in that respect falls within the scope of that directive.

23 It should be noted that Article 1(2) of Directive 93/13, which covers terms that reflect mandatory statutory or regulatory provisions, introduces the possibility of exclusion from the scope of the directive (judgment of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 52).

24 That exclusion is to be interpreted strictly and its application requires that two conditions be met, namely that, first, the contractual term must reflect a statutory or regulatory provision and, secondly, that provision must be mandatory (see, to that effect, judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraphs 30 and 31 and the case-law cited).

25 As stated in the 13th recital of Directive 93/13, the wording ‘mandatory statutory or regulatory provisions’ in Article 1(2) of that directive also covers rules which, under national law, are to apply between contracting parties provided that no other arrangements have been established (see, to that effect, judgments of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 26, and of 3 April 2019, *Aqua Med*, C-266/18, EU:C:2019:282, paragraph 29).

26 The Court has repeatedly held that that exclusion from the application of the rules of Directive 93/13 is justified by the fact that, in principle, it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts (see judgments of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 28, and of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 53).

27 Accordingly, the fact that the national legislature has struck a balance between all the rights and obligations of the parties to certain contracts does not constitute a condition for the application of the exclusion in Article 1(2) of Directive 93/13, but the justification for such an exclusion.

28 It follows that, in order to establish whether the conditions for applying the exclusion laid down in Article 1(2) of Directive 93/13 are met, the Court has held that it is for the national court to determine whether the contractual term in question reflects mandatory provisions of national law that apply between contracting parties independently of their choice or provisions that are supplementary in nature and therefore apply by default, that is to say, in the absence of other arrangements established by the parties in that respect (see, to that effect, judgments of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 26; of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 79; of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraphs 29 and 30; and of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 32).

29 In the present case, as set out in the order for reference, the term contained in Clause 4.1 of the general terms and conditions of the refinancing agreement, which is alleged by the applicants in the main proceedings to be unfair, provides that 'all payments made pursuant to the agreement shall be made in the currency of the loan …'.

30 The referring court has also pointed out that such a term reflects the 'monetary nominalism' principle, as laid down in Article 1578 of the Civil Code. Pursuant to that provision, 'the debtor must repay the sum received by way of loan and shall be obliged to repay that sum only in currency that is legal tender at the time of payment'. Furthermore, the referring court has classified Article 1578 of the Civil Code as a supplementary provision, that is to say, as a provision which applies to loan agreements provided that the parties have made no other arrangements.

31 Therefore, according to the referring court, since the term contained in the general terms and conditions, which is alleged to be unfair by the applicants in the main proceedings, reflects a provision of national law which is supplementary in nature, it comes within the exclusion laid down in Article 1(2) of Directive 93/13.

32 The referring court points out, however, that in the Romanian language version, the wording of Article 1(2) of Directive 93/13 refers to 'normă obligatorie' (obligatory rule), where the French language version refers to 'disposition impérative' (mandatory provision). Unlike the term 'mandatory', which, according to the referring court, excludes provisions of a supplementary nature, the term 'obligatory' includes them. It is therefore necessary to determine which language version is correct, on the basis of the purpose and objectives of the directive.

33 In that regard, it should be noted that, according to the Court's settled case-law, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all languages of the European Union. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the general scheme and purpose of the rules of which it forms part (judgments of 15 November 2012, *Kurcums Metal*, C-558/11, EU:C:2012:721, paragraph 48, and of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraph 42).

34 As pointed out in paragraph 25 above, the wording 'mandatory statutory or regulatory provisions' within the meaning of Article 1(2) of Directive 93/13 also covers, in the light of the 13th recital of the directive, supplementary rules, that is to say, rules which apply between contracting parties provided that no other arrangements have been established. From that perspective, that provision makes no distinction between provisions which apply between contracting parties irrespective of their choice and supplementary provisions.

35 In that regard, first, the fact that it is possible to derogate from a supplementary provision of national law is irrelevant to the determination of whether a contractual term which reflects such a provision is excluded from the scope of Directive 93/13 pursuant to Article 1(2) thereof.

36 Secondly, the fact that a contractual term reflecting one of the provisions referred to in Article 1(2) of Directive 93/13 has not been individually negotiated has no bearing on whether it is excluded from the scope of the directive. In accordance with Article 3(1) of Directive 93/13, the fact that a term has not been individually negotiated is a condition for reviewing whether the term is unfair, and that review cannot be carried out if the contractual term falls outside the scope of the directive.

37 In the light of the foregoing, the answer to the first question is that Article 1(2) of Directive 93/13 must be interpreted as meaning that a contractual term which has not been individually negotiated but which reflects a rule that, under national law, applies between contracting parties provided that no other arrangements have been established in that respect falls outside the scope of that directive.

The second and third questions

38 Since the referring court considers that the contractual term at issue in the main proceedings reflects a national provision which may be classified as supplementary, it follows from the foregoing that it falls outside the scope of Directive 93/13, pursuant to Article 1(2) thereof. Consequently, there is no need to answer the second and third questions.

Costs

39 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 (First Chamber) hereby rules:

Article 1(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a contractual term which has not been individually negotiated but which reflects a rule that, under national law, applies between contracting parties provided that no other arrangements have been established in that respect falls outside the scope of that directive.

[Signatures]