Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

30 May 2013 *

(Directive 93/13/EEC — Unfair terms in consumer contracts — Examination by the national court, of its own motion, as to whether a contractual term is unfair — Consequences to be drawn by the national court from a finding that the term is unfair)

In Case C-397/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Bíróság (Hungary), made by decision of 12 July 2011, received at the Court on 27 July 2011, in the proceedings

Erika Jőrös

v

Aegon Magyarország Hitel Zrt.,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Ilešič, E. Levits, M. Safjan and M. Berger (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Hungarian Government, by K. Szíjjártó and Z. Fehér, acting as Agents,

— the Spanish Government, by A. Rubio González, acting as Agent,

— the European Commission, by M. Owsiany-Hornung, M. van Beek and V. Kreuschitz, acting as Agents,

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

gives the following

* Language of the case: Hungarian.

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), in particular Article 6(1) thereof.

2 The request has been made in proceedings between Ms Jőrös and Aegon Magyarország Hitel Zrt. ('Aegon') concerning sums due under a credit contract concluded between those parties.

Legal context

European Union law

3 Article 3(1) of Directive 93/13 defines an unfair term as follows:

'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.'

4 Article 4(1) of that directive states:

'… the unfairness of a contractual term shall 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.'

5 Under Article 5 of that directive:

'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. …'

6 So far as concerns the effects linked to the finding that a term is unfair, 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.'

National law

Substantive law

7 Under Paragraph 209(1) of Law IV of 1959 on the Civil Code (a Polgári Törvénykönyvről szóló 1959. évi IV. Törvény; 'the Civil Code'), in force at the date on which the credit contract at issue in the main proceedings was entered into, 'a standard contractual term or a contractual term not negotiated individually in a consumer contract shall be unfair if it establishes the rights and obligations of the parties arising from the contract unilaterally and unjustifiably, in breach of the requirements of good faith and fairness and to the detriment of the party to the contract who did not draw up that term'.

8 Paragraph 209/A(2) of the Civil Code provided that such terms are void.

9 Pursuant to Paragraph 2(d) of Government Decree 18/1999 (II. 5.) on terms to be considered unfair in consumer contracts (a fogyasztóval kötött szerződésben tisztességtelennek minősülő feltételekről szóló 18/1999 (II. 5.) kormányrendelet), of 5 February 1999 (*Magyar Közlöny* 1999/8), the terms of a consumer agreement must in particular be regarded as unfair, unless evidence is provided to the contrary, if they enable the party entering into the contract with the consumer to amend the contract unilaterally and without having to provide justification, particularly where that party increases the level of financial recompense defined in the contract, or if such terms enable the party entering into the contract with the consumer to amend the contract unilaterally on justified grounds as defined in the contract where the consumer is not entitled to terminate or cancel the contract with immediate effect.

Procedural law

10 Under Paragraph 3(2) of Law III of 1952 on the Code of Civil Procedure (a polgári perrendtartásról szóló 1952. évi III. törveny; 'the Code of Civil Procedure'), the court, in the absence of any statutory provision to the contrary, is bound by the submissions and legal statements made by the parties.

11 In accordance with Paragraph 23(1)(k) of the Code of Civil Procedure, actions seeking to establish that unfair contract terms are invalid under, inter alia, Paragraph 209/A(2) of the Civil Code come within the jurisdiction of the local courts.

12 Opinion 2/2010/VI.28./PK of the Mixed Civil Chamber of the Legfelsőbb Bíróság (Supreme Court of Hungary), of 28 June 2010, on certain matters of procedural law arising in invalidity proceedings, adds the following details:

'4. (a) A court may declare of its own motion that there is obvious invalidity only if such invalidity can be established clearly as fact on the basis of the evidence available to it. …

(b) The court must make a finding of invalidity of its own motion in appeal proceedings if the grounds for invalidity can be established clearly from the circumstances of the proceedings at first instance. …

5. (a) … In a civil case, the court is generally bound by the statement of the factual circumstances in the application, by the object of that application and therefore by the right which the party seeks to exercise. In accordance with Paragraph 121(1)(c) of the Code of Civil Procedure, the application must refer to the law relied upon but need not mention a specific legal basis. The fact of being bound by the application does not therefore imply that the court is bound by the legal basis incorrectly relied on by a party. If the facts set out by the party provide a different basis for the application or the counterclaim, the court may properly redefine the legal relationship.

…'

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

13 On 4 July 2007, Ms Jőrös entered into a credit contract with Aegon, a Hungarian financial establishment, for a sum of approximately 160 000 Swiss francs (CHF), paid in Hungarian forints (HUF), the expiry date of which was fixed at 15 August 2024.

14 That contract, concluded on the basis of a form drawn up in advance by the financial establishment, provided for the payment of interest, the rate of which was 4.5% per annum when the contract was signed, and management costs, the rate of which was 2.2% per annum at the same date. Commission

equivalent to 1.5% of the total amount of the loan, with a minimum of CHF 250 and a maximum of CHF 1 759, was due on liquidation. The annual percentage rate of charge for the credit was thus 7.658%.

15 Clause 3.2 of General Section II of the credit contract concluded between Ms Jőrös and Aegon provided that the lender had the right, at the end of each financial year and in relation to the following financial year, to amend the amount of the management costs in line with a scale and pursuant to the detailed rules defined by a permanent regulation of that financial establishment.

16 Clause 8.2 of that contract stipulated that the lender was entitled unilaterally to amend the interest rate or the level of the other costs provided for by that contract, and to introduce new categories of fees and costs, should there be a change to the costs linked to the financing of the transaction.

17 Clause 12.2 of that contract provided that if, as a result of an amendment to any statutory or administrative provision or following a change in the interpretation of those provisions, Aegon found itself exposed to new costs which it could not have foreseen when the contract was signed, the borrower would be required, upon demand by that financial establishment, to pay an amount covering those costs or, alternatively, that establishment would be entitled unilaterally to amend the interest rate or the amount of commission.

18 The credit contract did not guarantee the borrower the right of termination with immediate effect in the event that the financial institution were to amend the contract unilaterally.

19 Ms Jőrös brought proceedings against Aegon, the lending establishment, before the Pesti Központi kerületi bíróság (Pest Central District Court) (Hungary). She submitted, in those proceedings, that the credit contract was partially invalid, claiming that its provisions were usurious, unethical and fictitious in nature. However, she did not request the court to declare that that contract was partially invalid on the ground that its provisions were unfair.

20 The Pesti Központi kerületi bíróság dismissed Ms Jőrös' action by a ruling of 2 December 2010. It is apparent from the grounds of that ruling that Ms Jőrös had been unable to show that the disputed provisions of the credit contract were usurious, unethical and fictitious in nature.

21 Ms Jőrös appealed against that ruling to the Fővárosi Bíróság (now the Fővárosi Törvényszék) (Budapest Municipal Court) (Hungary). She claims that clauses 3.2, 8.1, 8.2 and 12.2 of the credit contract are invalid on the ground that they are manifestly contrary to ethical practice in so far as they allow the creditor unilaterally to amend the contract terms and that they oblige the debtor to bear the burden of the consequences of subsequent amendments made by the creditor, but over which the debtor has no influence. She submits that, following amendments made pursuant to those clauses, the amount of the loan and the burden of its repayment have increased in such proportions that she can no longer meet her obligations under the contract.

22 In those circumstances, the Fővárosi Bíróság decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the procedures of the national court consistent with Article 7(1) of Directive [93/13] if, having found that one of the contract's general terms relevant to the claim is unfair, the court examines its invalidity without the parties making a specific application in that regard?

(2) Must the national court also proceed in accordance with Question 1 in a case brought by a consumer where the determination of the invalidity of a general contract term on the ground of unfairness would ordinarily fall under the jurisdiction not of the local court but of a higher court, if the injured party were to bring a claim on that basis?

(3) In the event that Question 2 is answered in the affirmative, may the national court also examine the unfairness of a general contract term in proceedings at second instance if the proceedings at first instance did not examine this and new facts and evidence cannot generally be taken into consideration in appeal proceedings under national law?'

The questions referred

The third question

23 By this question, which it is appropriate to examine first, the referring court asks, in essence, whether Directive 93/13 must be interpreted as meaning that a national court, before which appeal proceedings have been brought concerning the validity of terms in a contract concluded between a seller or supplier and a consumer on the basis of a form prepared in advance by the seller or supplier, is entitled to examine the unfair nature of the terms at issue if that ground for invalidity was not raised in the proceedings at first instance and new facts or evidence cannot generally be taken into consideration in appeal proceedings under national law.

24 As a preliminary point, it must be observed, as the European Commission has noted, that the order for reference does not contain any information as regards the production by the parties to the dispute in the main proceedings, at the appeal stage, of new facts or evidence. In so far as the third question is to be interpreted as concerning, in part, the issue of whether an appeal court, before which proceedings have been brought concerning the validity of terms in a contract concluded between a seller or supplier and a consumer, is required to accept the production of new facts or evidence, that part of the question is thus hypothetical and, to that extent, inadmissible (see, inter alia, by analogy, Case C-396/11 *Radu* [2013] ECR, paragraph 24).

25 With a view to answering the admissible part of the question, it must be observed that Article 6(1) of Directive 93/13, according to which unfair terms are not binding on the consumer, constitutes a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and the obligations of the parties with an effective balance which re-establishes equality between them (see, inter alia, Case C-618/10 *Banco Español de Crédito* [2012] ECR, paragraph 40, and Case C-472/11 *Banif Plus Bank* [2013] ECR, paragraph 20).

26 In order to guarantee the protection intended by Directive 93/13, the Court has already stated on several occasions that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract (see, inter alia, *Banco Español de Crédito*, paragraph 41, and *Banif Plus Bank*, paragraph 21 and the case-law cited).

27 It is in the light of that consideration that the Court has held that the national court is required, as soon as it has available to it the legal or factual elements necessary for that task, to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier (see, inter alia, *Banco Español de Crédito*, paragraphs 42 to 44, and *Banif Plus Bank*, paragraphs 22 to 24).

28 Consequently, the role attributed to the national court by European Union law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task (see, inter alia, *Banco Español de Crédito*, paragraph 43, and *Banif Plus Bank*, paragraph 23).

29 In respect of the implementation of those obligations by a national court ruling in appeal proceedings, it must be noted that, in the absence of European Union legislation, the procedural rules governing appeal proceedings for safeguarding the rights that individuals derive from European Union law fall within the internal legal order of the Member States by virtue of the principle of procedural autonomy of those Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and may not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law (principle of effectiveness) (see, to that effect, *Banco Español de Crédito*, paragraph 46, and *Banif Plus Bank*, paragraph 26).

30 So far as the principle of equivalence is concerned, it stems from that principle that, where the national court ruling in appeal proceedings has a discretion or the obligation to examine of its own motion the validity of a legal measure in the light of national rules of public policy, even though no conflict in that area was raised at first instance, it must also exercise such a power for the purposes of assessing, of its own motion, in the light of the criteria in Directive 93/13, whether a contractual term falling within the scope of application of that directive is unfair. Should the referring court establish that, in domestic-law situations, it has that power, it would be required to exercise it in a situation such as that in the main proceedings, which calls into question the protection of the rights which the consumer derives from European Union law (see, to that effect, Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraphs 53 and 54, and Case C-488/11 *Asbeek Brusse and de Man Garabito* [2013] ECR, paragraphs 45 and 46).

31 In any event, on the basis of the file submitted to it, the Court does not have before it any evidence which is capable of giving rise to doubts as to the compliance of the legislation at issue in the main proceedings with that principle.

32 With regard to the principle of effectiveness, it should be noted that the Court has consistently held that every case in which the question arises as to whether a national procedural provision makes the application of European Union 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 (see *Banco Español de Crédito*, paragraph 49 and the case-law cited). The national court is required to interpret and apply all of the national provisions at issue in order to ensure, as far as possible, that the rights guaranteed by the provisions of European Union law are implemented effectively.

33 In the present case, it is apparent from the file submitted to the Court that, pursuant to point 4(b) of Opinion 2/2010/VI.28./PK of the Mixed Civil Chamber of the Legfelsőbb Bíróság (Hungarian Supreme Court) of 28 June 2010, the appeal court must make a finding of invalidity of its own motion if grounds for invalidity can be established clearly from the circumstances of the proceedings at first instance.

34 That opinion also stipulates, in point 5(a) thereof, that if the facts set out by the applicant give the application a different legal basis to that relied upon by that party, the court seised can redefine appropriately, in law, the basis of the request submitted to it.

35 As the Hungarian Government stated in the observations which it submitted to the Court, it may be inferred from that opinion that, in the Hungarian court system, a court ruling in appeal proceedings has jurisdiction, as soon as it has available to it the legal or factual elements necessary for that task, to assess, of its own motion or by redefining the legal basis of the application, whether those elements point to grounds for invalidity of a contractual term, even where the party to the proceedings which could have argued that the term was invalid on the basis of those elements did not do so.

36 As has been noted in paragraph 30 of the present judgment, where the national court ruling in appeal proceedings has that power in domestic-law situations, it must exercise it in a situation such as that at issue in the dispute in the main proceedings, which concern the protection of the rights which the consumer derives from Directive 93/13.

37 In those circumstances, it must be held that the national procedural rules applicable in the dispute in the main proceedings do not appear, in themselves, to be such as to make impossible or excessively difficult the protection of the rights which Directive 93/13 confers on the consumer.

38 In the light of the foregoing, the answer to the third question is that Directive 93/13 must be interpreted as meaning that where a national court, dealing with an appeal concerning the validity of terms in a contract concluded between a seller or supplier and a consumer on the basis of a form prepared in advance by that seller or supplier, has the power, under its internal procedural rules, to examine any grounds for invalidity clearly apparent from the elements submitted at first instance and, if necessary, to redefine, depending on the facts determined, the legal basis relied upon to establish that those terms are invalid, it must assess, of its own motion or by redefining the legal basis of the application, whether those terms are unfair in the light of the criteria in that directive.

The first question

39 By its first question, the referring court is seeking, in essence, to ascertain whether Article 7 of Directive 93/13 must be interpreted as meaning that a national court which has established that a contractual term is unfair can examine of its own motion whether the contract should be annulled on that ground, even though the parties have not made an application in that regard.

40 So far as concerns proceedings involving an individual consumer, the first part of Article 6(1) of Directive 93/13 requires the Member States to lay down that unfair terms 'shall, as provided for under their national law, not be binding on the consumer'.

41 The Court has interpreted that provision as meaning that it is for the national court to establish all the consequences, arising under national law, of a finding that the term in question is unfair in order to ensure that the consumer is not bound by that term (see, inter alia, *Banco Español de Crédito*, paragraph 63, and *Banif Plus Bank*, paragraph 27). In this connection, the Court has stated that, where the national court considers a contractual term to be unfair, it must not apply it, except if the consumer opposes that non-application, after having been informed of it by that court (see, to that effect, Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 35).

42 It follows from that case-law that the full effectiveness of the protection provided for by Directive 93/13 requires that the national court which has found of its own motion that a term is unfair should be able to establish all the consequences of that finding, without waiting for the consumer, who has been fully informed of his rights, to submit a statement requesting that that term be declared invalid (see, to that effect, *Banif Plus Bank*, paragraph 28, and *Asbeek Brusse and de Man Garabito*, paragraph 50).

43 As the Court has already held, national legislation such as that at issue in the main proceedings, providing that terms declared unfair are invalid, satisfies the requirements of Article 6(1) of Directive 93/13 (see, to that effect, Case C-472/10 *Invitel* [2012] ECR, paragraphs 39 and 40).

44 The national court must also assess the effect of the finding that the term at issue is unfair on the validity of the contract concerned and determine whether that contract can continue in existence without that term (see, to that effect, order in Case C-76/10 *Pohotovost'* [2010] ECR I-11557, paragraph 61).

45 In this connection, Article 6(1) *in fine* of Directive 93/13 states that 'the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms' (Case C-453/10 *Pereničová and Perenič* [2012] ECR, paragraph 29).

46 As the Court has observed, the objective pursued by the European Union legislature in connection with Directive 93/13 consists, not in annulling all contracts containing unfair terms, but in restoring the balance between the parties while in principle preserving the validity of the contract as a whole (see, to that effect, *Pereničová and Perenič*, paragraph 31).

47 As regards the criteria for assessing whether a contract can indeed continue to exist without the unfair terms, the Court has held that both the wording of Article 6(1) of Directive 93/13 and the requirements concerning the legal certainty of economic activities plead in favour of an objective approach in interpreting that provision (*Pereničová and Perenič*, paragraph 32). However, since that directive effected only a partial and minimum harmonisation of the national legislation concerning unfair terms, it does not preclude the possibility, in compliance with European Union law, that a contract concluded between a trader and a consumer which contains one or more unfair terms may be declared invalid as a whole where that will ensure better protection of the consumer (see, to that effect, *Pereničová and Perenič*, paragraph 35).

48 The answer to the first question is therefore that Article 6(1) of Directive 93/13 must be interpreted as meaning that a national court which has established that a contractual term is unfair is required, first, without waiting for the consumer to make an application in that regard, to draw all the consequences which, under national law, result from that finding in order to satisfy itself that that consumer is not bound by that term and, secondly, to assess, in principle on the basis of objective criteria, whether the contract concerned can continue in existence without that term.

The second question

49 By its second question, the referring court is seeking, in essence, to ascertain whether Directive 93/13 must be interpreted as meaning that a national court which has, of its own motion, established that a contractual term is unfair can examine whether the contract should be annulled on that ground, even though, under the internal procedural rules, actions seeking to establish the invalidity of unfair contract terms come within the jurisdiction of a separate judicial body.

50 In this connection, it must be recalled that it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from European Union law. However, it is the Member States' responsibility to ensure that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court to involve itself in the resolution of questions of jurisdiction to which the classification of certain legal situations based on European Union law may give rise in the national judicial system (see, inter alia, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 40, and Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 35).

51 However, as has been pointed out in paragraphs 43 and 44 above, the Court has interpreted Article 6(1) of Directive 93/13 as meaning that the national court must draw all the consequences, arising under national law, from a finding that the term at issue is unfair, in order to satisfy itself that the consumer is not bound by that term.

52 In those circumstances, it follows from the requirements that national law be interpreted in accordance with Directive 93/13 and that the rights of consumers should be effectively protected that it is for the national court to apply, as far as possible, its internal procedural rules in such a way as to achieve the result laid down by Article 6(1) of that directive.

53 The answer to the second question is therefore that Directive 93/13 must be interpreted as meaning that a national court which has, of its own motion, established that a contractual term is unfair must, as far as possible, apply its internal procedural rules in such a way as to draw all the consequences which, under national law, result from a finding that the term at issue is unfair, in order to satisfy itself that the consumer is not bound by that term.

Costs

54 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:

1. **Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that where a national court, dealing with an appeal concerning the validity of terms in a contract concluded between a seller or supplier and a consumer on the basis of a form prepared in advance by that seller or supplier, has the power, under its internal procedural rules, to examine any grounds for invalidity clearly apparent from the elements submitted at first instance and, if necessary, to redefine, depending on the facts determined, the legal basis relied upon to establish that those terms are invalid, it must assess, of its own motion or by redefining the legal basis of the application, whether those terms are unfair in the light of the criteria in that directive.**

2. **Article 6(1) of Directive 93/13 must be interpreted as meaning that a national court which has established that a contractual term is unfair is required, first, without waiting for the consumer to make an application in that regard, to draw all the consequences which, under national law, result from that finding in order to satisfy itself that that consumer is not bound by that term and, secondly, to assess, in principle on the basis of objective criteria, whether the contract concerned can continue in existence without that term.**

3. **Directive 93/13 must be interpreted as meaning that a national court which has, of its own motion, established that a contractual term is unfair must, as far as possible, apply its internal procedural rules in such a way as to draw all the consequences which, under national law, result from a finding that the term at issue is unfair, in order to satisfy itself that the consumer is not bound by that term.**

[Signatures]