Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

26 April 2012*

((Directive 93/13/EEC — Article 3(1) and (3) — Articles 6 and 7 — Consumer contracts — Unfair terms — Unilateral amendment of the terms of a contract by a seller or supplier — Action for an injunction brought in the public interest and on behalf of consumers by a body appointed by national legislation — Declaration of the unfair nature of a term — Legal effects))

In Case C-472/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Pest Megyei Bíróság (Hungary), made by decision of 25 August 2010, received at the Court on 29 September 2010, in the proceedings

Nemzeti Fogyasztóvédelmi Hatóság

v

Invitel Távközlési Zrt,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan (Rapporteur), A. Borg Barthet, J.-J. Kasel and M. Berger, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

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

— the Spanish Government, by F. Díez Moreno, acting as Agent,

— the European Commission, by G. Rozet and K. Talabér-Ritz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 December 2011,

gives the following

* Language of the case: Hungarian.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3(1) and (3) and Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) (the 'Directive') and points 1(j) and 2(d) of the annex to that directive.

2 The reference has been made in public-interest proceedings brought by Nemzeti Fogyasztóvédelmi Hatóság (the Hungarian national consumer protection authority; the 'NFH') against the company Invitel Távközlési Zrt ('Invitel'), concerning the latter's use of allegedly unfair terms in its contracts concluded with consumers.

Legal context

European Union law

3 According to the 20th recital in the preamble to the Directive:

'… contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms …'

4 Article 1 of the Directive provides:

'...

2. The contractual terms which reflect mandatory statutory or regulatory provisions ... shall not be subject to the provisions of this Directive.'

5 Article 3 of the Directive provides:

'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.

...

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.'

6 Article 4 of the Directive states:

'1. Without prejudice to Article 7, 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.

2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject-matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods [supplied] in exchange, on the other, in so far as these terms are in plain intelligible language.'

7 Article 5 of the Directive provides:

‘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. ...’

8 Article 6 of the Directive provides:

‘1. 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.

…’

9 Article 7 of Directive 93/13 is worded as follows:

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

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.’

10 Article 8 of the Directive states:

‘Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum level of consumer protection.’

11 The annex to the Directive lists the terms referred to in Article 3(3):

‘1. Terms which have the object or effect of:

...

(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

...

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

...

2. Scope of subparagraphs (g), (j) and (l)

...

(b) ...

Subparagraph (j) is … without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

...

(d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.'

National law

12 Article 209 of the Hungarian Civil Code provides:

'1. A standard contract term, or a non-individually negotiated term of a consumer contract, shall be regarded as unfair if, in breach of the obligation to act in good faith and fairly, it unilaterally and unjustifiably establishes the contractual rights and obligations of the parties to the detriment of the party other than that imposing the contract term in question.

...'

13 Article 209/A of the Civil Code states:

'1. The party adversely affected may contest unfair terms which appear in the contract as standard contract terms.

2. Unfair terms which appear in consumer contracts as standard contract terms, or which the seller or supplier has drafted unilaterally and without individual negotiation, shall be void. Invalidity may be invoked only in favour of the consumer.'

14 Article 209/B of the Civil Code provides as follows:

'1. Bodies designated in separate legislation may also apply to the courts for the declaration of invalidity of an unfair term which appears in a consumer contract as a standard contract term, pursuant to Article 209/A(2) of this Code. The declaration of invalidity of the unfair term shall have effects as regards all those who have concluded contracts with a seller or supplier who applies such a term.

2. Bodies designated in separate legislation may also apply for a declaration of unfairness of a standard contract term that has been defined for consumer contracts and published, regardless of whether or not the term in question has in fact been applied.

3. If the court, in proceedings under paragraph 2, finds that a standard contract term is unfair, it shall declare it invalid in the event of its (future) use in favour of all parties who conclude contracts with any seller or supplier who has published the term in question. Following such judgment the user of the unfair contract term is to satisfy any claim that consumers may have against him. The judicial decision must also contain a clause prohibiting the party which published the term in question from further use thereof.

...'

15 Article 39 of the Law CLV of 1997 on consumer protection provides:

‘1. The consumer protection authority, the non-governmental organisation for the protection of consumers’ interests or the public prosecutor may bring proceedings against any party whose illegal activities affect a wide range of consumers or cause substantial disadvantage, in order to defend a wide range of consumers or eliminate substantial disadvantage. Such an action may also be brought even if the identity of the consumers adversely affected cannot be established.

...’

16 Article 132 of Law C of 2003 on electronic communications states:

‘1. The rules relating to the conclusion of subscriber contracts shall apply to the amendment of each subscriber contract. The standard contract terms may allow the amendment of each subscriber contract in accordance with paragraph 2.

2. A supplier of services may unilaterally amend a subscriber contract only in the following cases:

(a) if the conditions set out in each subscriber contract or in the standard contract terms are met, subject to the condition that the amendment does not involve any substantial amendment of the terms of the contract, in so far as the legislation or the rules relating to electronic communications do not provide otherwise;

(b) if it is justified by a legislative amendment or by an administrative decision.

or

(c) if it is justified by substantial changes in circumstances.

3. A substantial amendment shall mean a change relating to the conditions necessary to receive the service or to the indicators corresponding to a quality objective.

4. If the supplier of a service is permitted unilaterally to amend the standard contract terms in the circumstances set out by those terms, that supplier shall be required to inform subscribers, in accordance with the requirements laid down by the present Law, and to respect a notice period of at least thirty days before the date on which the aforementioned amendment is to take effect; it shall also be required to inform subscribers of the conditions applicable to their resulting right to terminate the contract. In such a case, a subscriber may terminate the contract with immediate effect within eight days of the amendment notification having been sent.

5. Where the amendment includes provisions which are unfavourable to the subscriber, the latter may terminate the subscriber contract, without any other legal consequences, within 15 days of the aforementioned notification. However, subscribers are not entitled to avoid the contract if they have undertaken to use the service for a specific period of time and if they have concluded the subscriber contract in light of the benefits stemming from such an undertaking, and the amendment does not affect the benefits received. Where the amendment has an effect on the benefits received and the subscriber terminates the contract, the supplier of the service cannot claim from the subscriber the amount of the benefits received for the period subsequent to the termination of the contract.

...’

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

17 In the context of public-interest proceedings, the NFH challenges Invitel’s practice of requiring, in fixed-term, so-called ‘loyalty contracts’, and subsequent to the conclusion of those contracts, that the consumer pay fees which had not initially been agreed between the parties.

18 As is apparent from the case-file, Invitel, as a fixed-line telephone network operator, introduced, into its general business conditions ('GBC') in force from 1 January 2008, a term providing for 'money order fees', that is to say, the fees applied in the event of payment of invoices by money order. According to that term, 'if the subscriber pays the amount of the invoice by means of a money order, the supplier of services shall have the right to invoice the additional fees which result (such as postal fees)'. Furthermore, the GBC did not contain any provision specifying the method of calculation of those money order fees.

19 The NFH received a large number of complaints from consumers, on the basis of which it formed the view that the term included in the GBC referred to in the previous paragraph was unfair within the meaning of Article 209 of the Civil Code. As Invitel refused to amend that term, the NFH brought an action before the Pest Megyei Bíróság (Pest County Court) with a view to obtaining a declaration that the contested term was void as being unfair, and the automatic and retroactive reimbursement to subscribers of the amounts wrongly invoiced and received as 'money order fees'. However, that court took the view that the outcome of the dispute depended on the interpretation of provisions of European Union law.

20 In those circumstances, the Pest Megyei Bíróság decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) May Article 6(1) of [the Directive] … be interpreted as meaning that an unfair contract term is not binding on any consumer where a body appointed by law and competent for that purpose seeks a declaration of the invalidity of that unfair term which has become part of a consumer contract on behalf of consumers in an action in the public interest (*actio popularis*)?

May Article 6(1) of that directive be interpreted, where an order which benefits consumers who are not party to the proceedings is made, or the application of an unfair standard contract term is prohibited, in an action in the public interest, as meaning that an unfair term which has become part of a consumer contract is not binding on all consumers also as regards the future, so that the court has to apply the consequences in law thereof of its own motion?

(2) May Article 3(1) of [the Directive], in conjunction with points 1(j) and 2(d) of the annex applicable by virtue of Article 3(3) of that directive, be interpreted as meaning that, where a seller or supplier provides for a unilateral amendment of a contract term without explicitly describing the method by which prices vary or giving valid reasons in the contract, that contract term is unfair *ipso jure*?'

Consideration of the questions referred

The second question

21 By its second question, with which it is appropriate to deal first, the referring court asks, in essence, whether, in light of points 1(j) and 2(d) of the annex to the Directive, Article 3(1) and (3) of the latter should be interpreted as meaning that, where a seller or supplier provides, in a term appearing in the GBC of a consumer contract, for a unilateral amendment of the fees connected with the service to be provided, without setting out clearly the method of fixing those fees or specifying a valid reason for this amendment, that term is unfair.

22 It should be noted, in this regard, that the jurisdiction of the Court of Justice extends to the interpretation of the concept of 'unfair term' used in Article 3(1) of the Directive and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of the Directive, bearing in mind that it is for that court to determine, in the light of those

criteria, whether a particular contractual term is actually unfair in the circumstances of the case (Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-10847, paragraph 44). It is thus clear that the Court of Justice must limit itself, in its response, to providing the referring court with the indications which the latter must take into account in order to assess whether the term at issue is unfair.

23 In accordance with Article 4(2) of the Directive, the assessment of the unfair nature of terms is to relate neither to the definition of the main subject-matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as those terms are in plain and intelligible language. However, this exclusion cannot apply to a term relating to a mechanism for amending the prices of the services provided to the consumer.

24 With regard to a contract term providing for an amendment of the total price of the service provided to the consumer, it should be pointed out that, in light of points 1(j) and (l) and 2(b) and (d) of the annex to the Directive, the reason for and the method of the variation of the aforementioned price must, in particular, be set out, the consumer having the right to terminate the contract.

25 That annex, to which Article 3(3) of the Directive refers, contains only an indicative and non-exhaustive list of terms which may be regarded as unfair (see Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraphs 37 and 38; *VB Pénzügyi Lízing*, paragraph 42; and order in Case C-76/10 *Pohotovosť* [2010] ECR I-11557, paragraphs 56 and 58).

26 If the content of the annex does not suffice in itself to establish automatically the unfair nature of a contested term, it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term. In the present case, it is clear from a reading of the provisions of the annex to the Directive, referred to in paragraph 24 of the present judgement, that, in assessing the unfair nature of a term such as that at issue in the main proceedings, the question whether the reasons for, or the method of, the variation of the fees connected with the service provided were specified and whether the consumer had the right to terminate the contract is particularly relevant.

27 Moreover, as is clear from the 20th recital in the preamble to the Directive, the consumer should actually be given an opportunity to examine all the terms appearing in the GBC and the consequences of those terms. Further, the obligation to draft terms in clear, intelligible language is laid down in Article 5 of the Directive.

28 Consequently, in the assessment of the 'unfair' nature of a term, within the meaning of Article 3 of the Directive, the possibility for the consumer to foresee, on the basis of clear, intelligible criteria, the amendments, by a seller or supplier, of the GBC with regard to the fees connected to the service to be provided is of fundamental importance.

29 Where certain aspects of the method of amendment of the fees connected with the service to be provided are specified by mandatory statutory or regulatory provisions within the meaning of Article 1(2) of the Directive, or where those provisions provide, for the consumer, the right to terminate the contract, it is essential that the consumer be informed of those provisions by the seller or supplier.

30 It is for the national court, ruling on an action for an injunction, brought in the public interest and on behalf of consumers, by a body appointed by national law, to assess, in the light of Article 3(1) and (3) of the Directive, the unfair nature of a term such as that at issue in the main proceedings. In that assessment, the national court must determine, inter alia, whether, in light of all the terms appearing in the GBC of the consumer contracts which include the contested term, and the national legislation setting out the rights and obligations which could supplement those provided by the GBC at issue, the reasons for, or the method of, the amendment of fees connected with the service to be provided are set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract.

31 In light of the foregoing considerations, the answer to the second question is that it is for the national court, ruling on an action for an injunction, brought in the public interest, and on behalf of consumers by a body appointed by national law, to assess, with regard to Article 3(1) and (3) of the Directive, the unfair nature of a term included in the GBC of consumer contracts by which a seller or supplier provides for a unilateral amendment of fees connected with the service to be provided, without setting out clearly the method of fixing those fees or specifying a valid reason for that amendment. As part of this assessment, the national court must determine, inter alia, whether, in light of all the terms appearing in the GBC of consumer contracts which include the contested term, and in the light of the national legislation setting out rights and obligations which could supplement those provided by the GBC at issue, the reasons for, or the method of, the amendment of the fees connected with the service to be provided are set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract.

The first question

32 By its first question, the referring court asks, in essence, whether Article 6(1) of the Directive, read in conjunction with Article 7(1) and (2) thereof, should be interpreted as meaning that it does not preclude a declaration of invalidity of an unfair term which is part of the GBC of a consumer contract in an action for an injunction, referred to in Article 7 of that Directive, brought against a seller or supplier in the public interest and on behalf of consumers, by a body appointed by national law from producing effects with regard to all consumers who have concluded a contract to which the same GBC apply, including those who were not party to proceedings for an injunction, and whether the national courts are required to apply all the legal consequences under national law, also with regard to the future.

33 In order to answer the first part of this question, it is first necessary to bear in mind that the system of protection established by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the trader as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the trader without being able to influence the content of those terms (Case C-453/10 *Pereničová and Perenič*, paragraph 27 and the case-law cited).

34 In the context of actions involving an individual consumer, the Court has held that, in view of that weak position, Article 6(1) of the Directive requires Member States to specify that unfair terms 'shall, as provided for under their national law, not be binding on the consumer' As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (*Pereničová and Perenič*, paragraph 28 and the case-law cited).

35 With regard to actions for an injunction brought in the public interest, such as that here at issue in the main proceedings, it should be noted that, while the Directive does not seek to harmonise the penalties applicable in the event of a term being found to be unfair in the context of those actions, Article 7(1) of the Directive nevertheless requires the Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers.

36 As is apparent from Article 7(2) of the Directive, the aforementioned means are to include the possibility for persons or organisations having a legitimate interest under national law in protecting consumers to take action in order to obtain a judicial decision as to whether contract terms drawn up for general use are unfair and, where appropriate, to have them prohibited (see Case C-372/99 *Commission* v *Italy* [2002] ECR I-819, paragraph 14).

37 In this respect, it should be added that the deterrent nature and dissuasive purpose of the measures to be adopted, together with their independence of any particular dispute, mean that such actions may be brought even though the terms which it is sought to have prohibited have not been used in specific contracts (see *Commission* v *Italy*, paragraph 15).

38 The effective implementation of that objective requires, as the Advocate General essentially noted in point 51 of her Opinion, that terms of the GBC of consumer contracts which are declared to be unfair in an action for an injunction brought against the seller or supplier concerned, such as the term here at issue in the main proceedings, are not binding on either the consumers who are parties to the actions for an injunction or on those who have concluded with that seller or supplier a contract to which the same GBC apply.

39 In the main proceedings, the national legislation provides that the declaration, by a court, of the invalidity of a term appearing in the GBC of consumer contracts is to apply to any consumer who has concluded a contract with a seller or supplier which includes that term. As is apparent from the case-file in the main proceedings, the subject-matter of the dispute concerns the use by the supplier of standard terms featuring the disputed term in contracts concluded with numerous consumers. It should be noted that, as the Advocate General pointed out in points 57 to 61 of her Opinion, national legislation such as that referred to in the present paragraph satisfies the requirements of Article 6(1), read in conjunction with Article 7(1) and (2), of the Directive.

40 The application of a penalty of invalidity of an unfair term with regard to all consumers who have concluded a consumer contract to which the same GBC apply ensures that those consumers will not be bound by that term, but does not exclude the application of other types of adequate and effective penalties provided for by national legislation.

41 As regards the second part of the first question, concerning the consequences that national courts must draw from a finding, in an action for an injunction, as to the unfair nature of a term included in the GBC of consumer contracts, it must be noted at the outset that the national court's power to determine of its own motion whether a term is unfair constitutes in itself a means of achieving the result sought by Article 7 (see Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 27 and the case-law cited). The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair (see *Mostaza Claro*, paragraph 38).

42 National courts which find that a term included in GBC is unfair are required under Article 6(1) of the Directive to draw all the consequences that follow under national law, so that the consumer is not bound by that term (see *Pereničová and Perenič*, paragraph 30 and case-law cited).

43 It follows that, where the unfair nature of a term included in the GBC of consumer contracts has been recognised in an action for an injunction, such as that here at issue in the main proceedings, the national courts are required, of their own motion, and also as regards the future, to draw all the consequences provided for by national law in order to ensure that consumers who have concluded a contract to which those GBC apply will not be bound by that term.

44 In the light of those considerations, the answer to the first question is that Article 6(1) of the Directive, read in conjunction with Article 7(1) and (2) thereof, must be interpreted as meaning that:

— it does not preclude the declaration of invalidity of an unfair term included in the GBC of consumer contracts in an action for an injunction, provided for in Article 7 of that directive, brought against a seller or supplier in the public interest, and on behalf of consumers, by a body appointed by national legislation from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same GBC apply, including with regard to those consumers who were not party to the injunction proceedings;

— where the unfair nature of a term in the GBC has been acknowledged in such proceedings, national courts are required, of their own motion, and also with regard to the future, to take such action thereon as is provided for by national law in order to ensure that consumers who have concluded a contract with the seller or supplier to which those GBC apply will not be bound by that term.

Costs

45 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. **It is for the national court, ruling on an action for an injunction, brought in the public interest and on behalf of consumers by a body appointed by national law, to assess, with regard to Article 3(1) and (3) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, the unfair nature of a term included in the general business conditions of consumer contracts by which a seller or supplier provides for a unilateral amendment of fees connected with the service to be provided, without setting out clearly the method of fixing those fees or specifying a valid reason for that amendment. As part of this assessment, the national court must determine, inter alia, whether, in light of all the terms appearing in the general business conditions of consumer contracts which include the contested term, and in the light of the national legislation setting out rights and obligations which could supplement those provided by the general business conditions at issue, the reasons for, or the method of, the amendment of the fees connected with the service to be provided are set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract.**

2. **Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) and (2) thereof, must be interpreted as meaning that:**

   — **it does not preclude the declaration of invalidity of an unfair term included in the standard terms of consumer contracts in an action for an injunction, provided for in Article 7 of that directive, brought against a seller or supplier in the public interest, and on behalf of consumers, by a body appointed by national legislation from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same general business conditions apply, including with regard to those consumers who were not party to the injunction proceedings;**

   — **where the unfair nature of a term in the general business conditions has been acknowledged in such proceedings, national courts are required, of their own motion, and also with regard to the future, to take such action thereon as is provided for by national law in order to ensure that consumers who have concluded a contract with the seller or supplier to which those general business conditions apply will not be bound by that term.**

[Signatures]