Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

15 March 2012*

(Consumer protection — Consumer credit agreement — Incorrect statement of annual percentage rate of charge — Effect of unfair commercial practices and unfair terms on the validity of the contract as a whole)

In Case C-453/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Okresný súd Prešov (Slovakia), made by decision of 31 August 2010, received at the Court on 16 September 2010, in the proceedings

Jana Pereničová,

Vladislav Perenič

v

SOS financ spol. s r. o.,

THE COURT (First Chamber),

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

Advocate General: V. Trstenjak,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 15 September 2011,

after considering the observations submitted on behalf of:

— Mr and Mrs Perenič, by I. Šafranko and I. Motyka, advokáti,

— the Slovak Government, by B. Ricziová, acting as Agent,

— the German Government, by T. Henze and J. Kemper, acting as Agents,

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

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the European Commission, by G. Rozet, A. Tokár and M. Owsiany-Hornung, acting as Agents,

* Language of the case: Slovak.

after hearing the Opinion of the Advocate General at the sitting on 29 November 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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), provisions of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22), and the possible effect of the application of Directive 2005/29 on Directive 93/13.

2 The reference has been made in the course of proceedings between Mr and Mrs Perenič and SOS financ spol. s r. o. ('SOS'), a non-bank institution which offers loans to consumers, concerning a credit agreement concluded between them and that company.

Legal context

European Union legislation

Directive 93/13

3 According to the 7th, 16th, 20th and 21st recitals in the preamble to Directive 93/13:

'Whereas sellers of goods and suppliers of services will thereby be helped in their task of selling goods and supplying services, both at home and throughout the internal market; whereas competition will thus be stimulated, so contributing to increased choice for Community citizens as consumers;

…

Whereas … in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account;

…

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

Whereas Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions'.

4 Under Article 3 of Directive 93/13:

‘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.’

5 Article 4 of that directive provides:

‘1. … 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.’

6 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. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. …’

7 Under Article 6 of the directive:

‘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.

…’

8 Article 8 of the directive provides:

‘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 degree of protection for the consumer.’

9 The annex to Directive 93/13 lists the terms referred to in Article 3(3) of the directive:

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

…

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

…’

Directive 2005/29

10 Article 2 of Directive 2005/29 reads as follows:

‘For the purposes of this Directive:

…

(c) “product” means any goods or service including immovable property, rights and obligations;

(d) “business-to-consumer commercial practices” (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

(e) “to materially distort the economic behaviour of consumers” means using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;

…

(k) “transactional decision” means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;

…’

11 Article 3 of that directive provides:

‘1. This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.

2. This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.

…

4. In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.

5. For a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective. …

…’

12 Article 5 of the directive provides:

‘1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence,

and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

3. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. …

4. In particular, commercial practices shall be unfair which:

(a) are misleading as set out in Articles 6 and 7,

or

(b) are aggressive as set out in Articles 8 and 9.

…'

13 Under Article 6 of the directive:

'1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

…

(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;

…'

14 Article 7 of the directive states:

'1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of

the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

…'

15 Article 11 of the directive provides:

'1. Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.

…'

16 In accordance with Article 13 of the directive:

'Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.'

National legislation

17 Paragraph 52 of the Slovak Civil Code (Občiansky zákonník) provides:

'1. "Consumer contract" means any contract, regardless of its legal form, made between a supplier and a consumer.

2. Provisions on consumer contracts and all other provisions governing the legal relations into which a consumer has entered shall always be applied to the advantage of the party to the contract who is a consumer. Different contractual agreements or agreements whose content or purpose is to circumvent these provisions shall be invalid.

…

4. A "consumer" is a natural person who, when concluding and performing a consumer contract, does not act in the course of his trade or of another commercial activity.'

18 Paragraph 53 of that code provides:

'1. A consumer contract must not contain provisions which cause a significant imbalance in the rights and obligations of the parties to the contract to the detriment of the consumer ("unfair terms"). That does not apply in the case of contractual terms which relate to the main object of the contract or the appropriateness of the price, where those terms are expressed precisely, clearly and intelligibly, or if the unfair term has been individually negotiated.

…

4. Provisions shall be regarded as unfair terms in a consumer contract in particular if they:

…

(k) require a consumer who has failed to fulfil his obligations to pay a disproportionately high sum as a penalty for not fulfilling the obligations,

…

5. Unfair terms in consumer contracts shall be invalid.'

19 Paragraph 4 of Law No 258/2001 on consumer loans (Zákon č. 258/2001 Z.z. o spotrebiteľských úveroch) provides:

'1. A consumer credit agreement must be in written form, otherwise it is invalid, and the consumer shall receive one copy of the agreement.

2. A consumer credit agreement, in addition to the general elements, must contain:

…

(j) the annual percentage rate of charge [(APR)] and the consumer's total costs in connection with the consumer credit, calculated on the basis of the data valid at the time of the conclusion of the agreement,

…

If, however, a consumer credit agreement does not contain the elements listed in subparagraph 2, point … (j), … the credit granted shall be regarded as free of interest and charges.'

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

20 By their action, the applicants in the main proceedings ask the referring court to declare void the credit agreement they concluded with SOS, a non-bank establishment which grants consumer loans on the basis of standard contracts. According to the order for reference, the loan at issue in the main proceedings was granted to them on 12 March 2008.

21 Under that agreement, SOS granted the applicants in the main proceedings a loan of SKK 150 000 (EUR 4 969), repayable in 32 monthly instalments of SKK 6 000 (EUR 199) and a 33rd instalment in the same amount as the loan granted. They are thus obliged to repay an amount of SKK 342 000 (EUR 11 352).

22 The APR was fixed at 48.63% in the agreement, but, according to the calculation of the referring court, it is in fact 58.76%, since SOS did not include in its calculation some charges relating to the loan granted.

23 The order for reference further states that the agreement at issue in the main proceedings contains several terms to the disadvantage of the applicants in the main proceedings.

24 The referring court observes that a declaration that this short-term loan agreement is invalid as a whole, because of the unfair nature of some of its terms, would be more advantageous for the applicants in the main proceedings than maintaining the validity of the non-unfair terms in the agreement. In the former case, the consumers in question would be obliged to pay only interest for late payment, at the rate of 9%, rather than all the charges relating to the loan granted, which would be much higher than that interest.

25 Since it considered that the outcome of the case depended on an interpretation of the relevant provisions of European Union law, the Okresný súd Prešov (District Court, Prešov) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the scope of consumer protection under Article 6(1) of … Directive 93/13 … such as to make it possible, where unfair contractual clauses are found in a consumer contract, to conclude that the contract as a whole is not binding on the consumer, if that is more advantageous to the consumer?

2. Are the criteria determining what is an unfair commercial practice in accordance with … Directive 2005/29 … such as to permit the conclusion that, if a supplier quotes in the contract a lower … APR … than is in fact the case, it is possible to regard that step by the supplier towards the consumer as an unfair commercial practice? If there is a finding of an unfair commercial practice, does Directive 2005/29 … permit there to be any impact on the validity of a credit agreement and on the achievement of the objective in Articles 4(1) and 6(1) of Directive 93/13, if invalidity of the contract is more advantageous for the consumer?'

Consideration of the questions referred

Question 1

26 By its first question, the referring court asks essentially whether Article 6(1) of Directive 93/13 must be interpreted as allowing national courts to decide, if they find that there are unfair terms in a contract concluded between a trader and a consumer, that the contract as a whole shall not be binding on the consumer, on the ground that that is more advantageous for the consumer.

27 In order to answer this question, it must first be recalled that the system of protection established by Directive 93/13 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-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25; Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 22; and Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 29).

28 In view of that weak position, Article 6(1) of Directive 93/13 requires Member States to lay down 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 (see *Mostaza Claro*, paragraph 36; *Asturcom Telecomunicaciones*, paragraph 30; and Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-10847, paragraph 47).

29 As regards the effects of a finding that terms of a contract are unfair on the validity of the contract in question, it must be pointed out that, under Article 6(1) in fine of Directive 93/13, 'the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms'.

30 In this context, national courts which find that terms of a contract are unfair are required under Article 6(1) of Directive 93/13, first, to draw all the consequences that follow under national law, so that the consumer is not bound by those terms (see *Asturcom Telecomunicaciones*, paragraphs 58 and 59, and order in Case C-76/10 *Pohotovosť* [2010] ECR I-11557, paragraph 62), and, secondly, to assess whether the contract in question can continue to exist without those unfair terms (see order in *Pohotovosť*, paragraph 61).

31 As follows from the case-law cited in paragraph 28 above, and as the Advocate General observes in point 63 of her Opinion, the objective pursued by the European Union legislature in connection with Directive 93/13 consists in restoring the balance between the parties while in principle preserving the validity of the contract as a whole, not in abolishing all contracts containing unfair terms.

32 As regards the criteria for assessing whether a contract can indeed continue to exist without the unfair terms, it must be noted 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, so that, as the Advocate General observes in points 66 to 68 of her Opinion, the situation of one of the parties to the contract, in this case the consumer, cannot be regarded as the decisive criterion determining the fate of the contract.

33 Consequently, Article 6(1) of Directive 93/13 cannot be interpreted as meaning that, when assessing whether a contract containing one or more unfair terms can continue to exist without those terms, the court hearing the case can base its decision solely on a possible advantage for the consumer of the annulment of the contract as a whole.

34 That being so, it must none the less be observed that Directive 93/13 carried out only a partial and minimum harmonisation of national legislation concerning unfair terms, while allowing Member States the option of giving consumers a higher level of protection than that for which the directive provides. Thus Article 8 of the directive expressly provides that Member States may 'adopt or retain the most stringent provisions compatible with the Treaty in the area covered by [the directive], to ensure a maximum degree of protection for the consumer' (see Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* [2010] ECR I-4785, paragraphs 28 and 29).

35 Directive 93/13 does not therefore preclude a Member State from laying down, in compliance with European Union law, national legislation under which a contract concluded between a trader and a consumer which contains one or more unfair terms may be declared void as a whole where that will ensure better protection of the consumer.

36 In the light of those considerations, the answer to Question 1 is that Article 6(1) of Directive 93/13 must be interpreted as meaning that, when assessing whether a contract concluded with a consumer by a trader which contains one or more unfair terms can continue to exist without those terms, the court hearing the case cannot base its decision solely on a possible advantage for one of the parties, in this case the consumer, of the annulment of the contract in question as a whole. That directive does not, however, preclude a Member State from providing, in compliance with European Union law, that a contract concluded with a consumer by a trader which contains one or more unfair terms is to be void as a whole where that will ensure better protection of the consumer.

Question 2

37 By its second question, the referring court asks essentially whether the indication in a consumer credit agreement of an APR lower than the real rate may be regarded as an unfair commercial practice within the meaning of Directive 2005/29. If the answer to that question is in the affirmative, the Court is asked what consequences should be drawn from such a finding for the purpose of assessing the unfairness of the terms of that contract from the point of view of Article 4(1) of Directive 93/13 and the validity of the contract as a whole from the point of view of Article 6(1) of that directive.

38 In order to answer that question, it must first be recalled that Article 2(d) of Directive 2005/29, using a particularly wide formulation, defines the term 'commercial practice' as 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a

trader, directly connected with the promotion, sale or supply of a product to consumers' (Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-217, paragraph 36, and Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-10909, paragraph 17).

39 Next, in accordance with Article 3(1) of Directive 2005/29 read in conjunction with Article 2(c) of that directive, the directive applies to unfair business-to-consumer commercial practices before, during or after a commercial transaction relating to any goods or service. Under Article 5(4) of the directive, misleading practices in particular are unfair.

40 Finally, as stated in Article 6(1) of Directive 2005/29, a commercial practice is regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer in relation to one or more of the elements listed in Article 6(1), and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. The elements referred to in that provision include the price or the manner in which the price is calculated.

41 A commercial practice such as that at issue in the main proceedings which consists in indicating in a credit agreement an APR lower than the real rate constitutes false information as to the total cost of the credit and hence the price referred to in Article 6(1)(d) of Directive 2005/29. In so far as the indication of such an APR causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, which is for the national court to ascertain, that false information must be regarded as a 'misleading' commercial practice under Article 6(1) of the directive.

42 As regards the effect of that finding on the assessment of the unfairness of the terms of that contract from the point of view of Article 4(1) of Directive 93/13, it must be observed that that provision gives a particularly wide definition of the criteria for making such an assessment, by expressly including 'all the circumstances' attending the conclusion of the contract in question.

43 In those circumstances, as the Advocate General says in substance in point 125 of her Opinion, a finding that a commercial practice is unfair is one element among others on which the competent court may base its assessment of the unfairness of contractual terms under Article 4(1) of Directive 93/13.

44 That element, however, is not such as to establish, automatically and on its own, that the contested terms are unfair. It is for the referring court to decide on the application of the general criteria set out in Articles 3 and 4 of Directive 93/13 to a specific term, which must be considered in relation to all the circumstances of the particular case (see, to that effect, Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraphs 19 to 22; *Pannon GSM*, paragraphs 37 to 43; *VB Pénzügyi Lízing*, paragraphs 42 and 43; and order in *Pohotovosť*, paragraphs 56 to 60).

45 As regards the consequences to be drawn from a finding that the incorrect statement of the APR constitutes an unfair commercial practice for the purposes of assessing, from the point of view of Article 6(1) of Directive 93/13, the validity of the contract in question as a whole, it suffices to observe that Directive 2005/29 applies, as Article 3(2) states, without prejudice to contract law and in particular to the rules on the validity, formation or effect of a contract.

46 Consequently, a finding that a commercial practice is unfair has no direct effect on whether the contract is valid from the point of view of Article 6(1) of Directive 93/13.

47 In the light of the above considerations, the answer to Question 2 is that a commercial practice such as that at issue in the main proceedings which consists in indicating in a credit agreement an APR lower than the real rate must be regarded as 'misleading' within the meaning of Article 6(1) of Directive 2005/29 in so far as it causes or is likely to cause the average consumer to take a transactional

decision that he would not have taken otherwise. It is for the national court to ascertain whether that is the case in the main proceedings. A finding that such a commercial practice is unfair is one element among others on which the competent court may, pursuant to Article 4(1) of Directive 93/13, base its assessment of the unfairness of the contractual terms relating to the cost of the loan granted to the consumer. Such a finding, however, has no direct effect on the assessment, from the point of view of Article 6(1) of Directive 93/13, of the validity of the credit agreement concluded.

Costs

48 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. **Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that, when assessing whether a contract concluded with a consumer by a trader which contains one or more unfair terms can continue to exist without those terms, the court hearing the case cannot base its decision solely on a possible advantage for one of the parties, in this case the consumer, of the annulment of the contract in question as a whole. That directive does not, however, preclude a Member State from providing, in compliance with European Union law, that a contract concluded with a consumer by a trader which contains one or more unfair terms is to be void as a whole where that will ensure better protection of the consumer.**

2. **A commercial practice such as that at issue in the main proceedings which consists in indicating in a credit agreement an annual percentage rate of charge lower than the real rate must be regarded as 'misleading' within the meaning of Article 6(1) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') in so far as it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. It is for the national court to ascertain whether that is the case in the main proceedings. A finding that such a commercial practice is unfair is one element among others on which the competent court may, pursuant to Article 4(1) of Directive 93/13, base its assessment of the unfairness of the contractual terms relating to the cost of the loan granted to the consumer. Such a finding, however, has no direct effect on the assessment, from the point of view of Article 6(1) of Directive 93/13, of the validity of the credit agreement concluded.**

[Signatures]