Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

3 April 2019*

(Reference for a preliminary ruling — Consumer protection — Directive 93/13/EEC — Unfair terms in consumer contracts — Article 1(2) — Scope of the directive — Contractual term conferring territorial jurisdiction on the court determined pursuant to the general rules — Article 6(1) — Review of unfairness of the court's own motion — Article 7(1) — Obligations and powers of the national court)

In Case C-266/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Poznaniu (Regional Court, Poznań, Poland), made by decision of 11 April 2018, received at the Court on 17 April 2018, in the proceedings

Aqua Med sp. z o.o.

v

Irena Skóra,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, C. Toader (Rapporteur), A. Rosas, L. Bay Larsen and M. Safjan, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Aqua Med sp. z o.o., by T. Babecki, radca prawny,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by N. Ruiz García, M. Wilderspin and S.L. Kalėda, acting as Agents,

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

gives the following

* Language of the case: Polish.

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), and the judgment of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350).

2 The request has been made in the course of proceedings between Aqua Med sp. z o.o. and Irena Skóra concerning the territorial jurisdiction of national courts to hear an action for payment of the sale price, brought by the seller or supplier against the consumer.

Legal context

European Union law

Directive 93/13

3 The 13th and 24th recitals of Directive 93/13 state:

'Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording "mandatory statutory or regulatory provisions" in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established;

…

Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts'.

4 Article 1 of that directive provides:

'1. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

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

5 Article 6(1) of Directive 93/13 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.'

6 Article 7(1) of that directive is worded as follows:

‘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.’

Regulation (EU) No 1215/2012

7 Article 18(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1) provides:

‘Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.’

Polish law

8 Article 27 of the Kodeks postępowania cywilnego (Civil Procedure Code), set out in Section 1, entitled ‘General Jurisdiction’, of Chapter 2 of that code, provides:

‘1. An action shall be brought before the court of first instance within whose area of jurisdiction the defendant is domiciled.

2. The place of domicile shall be determined in accordance with the provisions of the Kodeks cywilny (Civil Code)’.

9 Article 31 of the Civil Procedure Code, which is part of Section 2, entitled ‘Alternative Jurisdiction’, of Chapter 2 of that code, provides:

‘Actions in matters covered by the provisions in this section may be brought either pursuant to provisions on general jurisdiction or before the court designated in accordance with the following provisions.’

10 Also in Section 2, Article 34 of that code is worded as follows:

‘An action relating to the conclusion of a contract, its content, modification or its very existence, to its performance, termination or cancellation, and also to damages for the non-performance or inadequate performance of the contract, may be brought before the court for the place where the contract is performed. In the case of doubt, written confirmation shall be provided in relation to the place where the contract is performed.’

11 Article 200 of the Civil Procedure Code provides that a court which declares that it does not have jurisdiction is to refer the case to a court which does have jurisdiction.

12 Under Article 202 of that code:

‘Where a court does not have jurisdiction and this can be remedied by means of an agreement between the parties, the court shall not consider this until the plea of the defendant has been submitted and sufficiently reasoned prior to his entering an appearance in relation to the substance of the case. Nor shall a court examine of its own motion whether or not it has jurisdiction before the document instituting the proceedings is served. Unless a special provision provides otherwise, a court shall consider, of its own motion and at all stages of the proceedings, any circumstances giving grounds for

declaring an action inadmissible, as well as for declaring that the type of procedure is inappropriate, that an agent does not have due authorisation, that there is lack of capacity on the part of the defendant to bring legal proceedings, that the defendant is not properly constituted or that a statutory representative has failed to act.'

13 Directive 93/13 was transposed into Polish law in the Civil Code. Article 385^3(23) of that code provides that contractual terms which exclude the jurisdiction of the Polish courts or which give jurisdiction to an arbitration tribunal situated in Poland or another State or to another authority, as well as clauses which require a matter to be brought before a court which has no territorial jurisdiction under Polish law, are to be considered unfair terms.

14 Article 454 of the Civil Code states:

'1. If the place of performance is not given or it does not follow from a characteristic of the obligation, the place of performance must be where the debtor had his place of domicile or principal place of business at the time when the obligation arose. However, monetary payments must be made where the creditor has his place of domicile or principal place of business when the payment is made; where the creditor has transferred his place of domicile or principal place of business after the obligation has arisen, he shall bear the additional costs incurred by reason of that transfer.

2. In the case where the obligation is connected with the business of the debtor or creditor, the place of performance shall be the place where the business is registered.'

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

15 Aqua Med is a seller or supplier which has its registered office in Opalenica (Poland). On 29 October 2016, it concluded an off-premises sales contract with Ms Irena Skóra, the consumer, domiciled in Legnica (Poland), in respect of a mattress, mattress cover and pillow for the price of 1 992 Polish zloty (PLN) (approximately EUR 465).

16 According to the clause set out in paragraph 4 of Section 9 of the general terms and conditions, which form an integral part of that sales contract, '[t]he court which has jurisdiction to hear disputes between the parties shall be the court which has jurisdiction under the relevant provisions'.

17 Since it had not received the sale price within the agreed time period, Aqua Med brought an action before the Sąd Rejonowy w Nowym Tomyślu (District Court, Nowy Tomyśl, Poland), within whose territorial jurisdiction Aqua Med's registered office is situated. Aqua Med takes the view that the dispute in question comes within the territorial jurisdiction of that court by virtue of Article 34 of the Civil Procedure Code, according to which actions seeking the performance of a contract are to be brought before the court for the place of performance thereof. Aqua Med maintains that the payment in question was, pursuant to Article 454 of the Civil Code, to be made by transfer to its bank account, at its registered office.

18 By order of 18 October 2017, the Sąd Rejonowy w Nowym Tomyślu (District Court, Nowy Tomyśl) declared of its own motion that it did not have jurisdiction and referred the case to the district court within whose territorial jurisdiction the defendant is resident. The former court found that, since the case concerned a contract between a seller or supplier and a consumer, not only was national law to be applied, but also EU law on consumer protection, inter alia, Article 6(1) of Directive 93/13, as well as the case-law of the Court of Justice, specifically the judgment of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350), which states that a national court has an obligation to examine of its own motion unfair terms used in contracts concluded between sellers or suppliers and consumers, particularly in relation to jurisdiction.

19 Consequently, the abovementioned court found that Article 202 of the Civil Procedure Code, which does not allow the court seised to examine of its own motion whether it has jurisdiction, in practice makes it impossible or excessively difficult to give effect to the judicial protection granted to consumers by EU law.

20 Pursuant to that own-motion review, the Sąd Rejonowy w Nowym Tomyślu (District Court, Nowy Tomyśl) examined its own territorial jurisdiction and considered that a contractual term which allows the application of a national rule under which a seller or supplier can bring an action against a consumer before the court within whose territorial jurisdiction that seller or supplier has its principal place of business is unfair.

21 Accordingly, the Sąd Rejonowy w Nowym Tomyślu (District Court, Nowy Tomyśl) set aside the contractual term in question and applied a statutory provision, namely Article 27(1) of the Civil Procedure Code, which governs general jurisdiction, to the effect that the court within whose jurisdiction the defendant is domiciled is the court which has territorial jurisdiction.

22 Aqua Med appealed against the order of the court at first instance before the Sąd Okręgowy w Poznaniu (Regional Court, Poznań, Poland), relying on an infringement of national legislation and an erroneous application of Article 6(1) of Directive 93/13.

23 That court entertains doubts as to the application of Directive 93/13, on the ground that the contractual term at issue refers to national provisions that are applicable irrespective of the existence of that term. It considers that a review of its own motion, by the court seised, of its territorial jurisdiction would be tantamount, in the present case, to a critical examination of national legislation so far as concerns the determination of that jurisdiction in disputes concerning consumer contracts. In that context, the referring court is uncertain whether EU law confers such a power on national courts and whether that power derives from the provisions of Directive 93/13. In the event of an answer in the affirmative, it would be for the referring court to refrain from applying national law held to be contrary to the provisions of EU law according to the case-law arising from the judgment of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49) and to apply the rule that is most favourable to the consumer, being in the present case the general rule giving jurisdiction to the court within whose territorial jurisdiction the defendant is domiciled.

24 In support of those considerations, the referring court makes reference to Article 18(2) of Regulation No 1215/2012, according to which proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

25 Lastly, the referring court considers that the inclusion of a jurisdiction clause such as that at issue in a contract concluded with a seller or supplier by a consumer may be misleading for the latter, inasmuch as it may wrongly suggest to the consumer that it is favourable to him.

26 In those circumstances, the Sąd Okręgowy w Poznaniu (Regional Court, Poznań) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must a review, by a national court of its own motion, of the terms of a contract concluded with a consumer determining which court has jurisdiction to hear a dispute, and which is based on Article 6(1) of … Directive 93/13 … and on the case-law of the Court … (judgment of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350), also cover those terms of the contract which, although governing the matter of jurisdiction for settling disputes between the parties, confine themselves to referring to rules of national law?

(2) If the answer to the first question is in the affirmative, must the review by that court lead to rules of jurisdiction being applied in such a way as to guarantee consumers protection under Directive 93/13, that is to say, that the case can be dealt with by the court which is closest to the consumer's place of domicile or habitual residence?'

Consideration of the questions referred

The first question

27 As a preliminary point, it should be recalled that, in paragraphs 22 and 23 of the judgment of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350), the Court held that the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. The Court has also held that, in view of that position of weakness, Directive 93/13 requires Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair (judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 50). In that context, the objective pursued by Article 6 of that directive would not be achieved if the consumer were himself obliged to raise the unfairness of a term of the contract, and effective consumer protection may be attained only if the national court acknowledges that it has the power to evaluate terms of this kind of its own motion (see, to that effect, judgment of 27 June 2000, *Océano Grupo Editorial and Salvat Editores*, C-240/98 to C-244/98, EU:C:2000:346, paragraph 26).

28 However, an own-motion review by the national court may be required only in the case of a contractual term which comes within the scope of Directive 93/13, as that scope is defined in Article 1 of that directive. According to Article 1(2) of the directive, contractual terms which reflect mandatory statutory or regulatory provisions are not to be subject to the provisions of that directive.

29 In accordance with the 13th recital of Directive 93/13, the wording 'mandatory statutory or regulatory provisions' in Article 1(2) of Directive 93/13 also covers rules which, according to the law, are to apply between the contracting parties provided that no other arrangements have been established.

30 Accordingly, it must be held that, by its first question, the referring court is asking, in essence, whether Article 1(2) of Directive 93/13 must be interpreted as meaning that a contractual term, such as that as issue in the main proceedings, which refers to the national law applicable so far as concerns the determination of jurisdiction to hear disputes between the parties to the contract, falls outside the scope of that directive.

31 In that connection, it should be recalled that Article 1(2) of Directive 93/13, which refers to contractual terms which reflect mandatory statutory or regulatory provisions, introduces an exclusion from the scope thereof, which is subject, according to the Court's case-law, to two conditions. First, the contractual term must reflect a statutory or regulatory provision and, secondly, that provision must be mandatory (judgment of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 52 and the case-law cited).

32 Although determining whether those conditions have been met in each individual case is a matter for the national court, it is for the Court of Justice to identify the criteria which may allow the national court to give judgment (see, by analogy, judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.*, C-182/17, EU:C:2018:91, paragraph 34 and the case-law cited).

33 Thus, according to settled case-law of the Court, the exclusion from the scope of Directive 93/13 provided for in Article 1(2) thereof extends to provisions of national law that apply between the parties to the contract independently of their choice and to provisions that apply by default, that is to say, in the absence of other arrangements established by the parties in that regard. That exclusion is justified by the fact that it is legitimate to presume that the national legislature has struck a balance between all the rights and obligations of the parties to certain contracts, a balance which the EU legislature has expressly intended to preserve (judgment of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, EU:C:2018:643, paragraph 43).

34 Moreover, the Court has also held that a national court must take account of the fact that, having regard to the purpose of that directive, namely the protection of consumers against unfair terms included in contracts concluded with consumers by sellers or suppliers, the exception provided for in Article 1(2) of the directive is to be strictly construed (judgment of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 54 and the case-law cited).

35 In the present case, it follows from the findings of the referring court that the contractual term at issue in the main proceedings is worded in very general terms so that, first, doubts arise as to whether it serves a useful purpose, given that it refers to national provisions which, as that court points out, apply irrespective of the existence of that contractual term. Second, that term does not, strictly speaking, reflect a specific national provision, since the national provisions to which it refers provide for a set of rules governing the arrangements for determining jurisdiction, and the seller or supplier can choose whichever is the most favourable to him.

36 Although the contractual term at issue in the main proceedings refers to national legislation, the presumption that the national legislature has struck a balance between all the rights and obligations of the parties to certain contracts cannot justify that contractual term being excluded from the scope of Directive 93/13. It is a matter, in such a case, of assessing the wording of that contractual term and its effects on the consumer's expectations.

37 Given that the exception laid down in Article 1(2) of Directive 93/13 is strictly construed, it follows from the foregoing that a contractual term, such as that at issue in the main proceedings, cannot be understood as reiterating a national provision.

38 It follows from the foregoing that Article 1(2) of Directive 93/13 must be interpreted as meaning that a contractual term, such as that at issue in the main proceedings, which refers to the national law applicable so far as concerns the determination of jurisdiction to hear disputes between the parties to the contract, does not fall outside the scope of that directive.

The second question

39 Although the second question does not relate specifically to the interpretation of a particular provision of EU law, it is settled case-law that the Court must extract from all the factors provided by the referring court, and in particular from the statement of grounds contained in the order for reference, the provisions of EU law requiring an interpretation, having regard to the subject matter of the dispute (see, to that effect, judgment of 12 February 2015, *Surgicare*, C-662/13, EU:C:2015:89, paragraph 17 and the case-law cited).

40 In the present case, since the questions raised by the Sąd Okręgowy w Poznaniu (Regional Court, Poznań) seek to determine the level of protection afforded to consumers and the judicial remedies available to the latter, it is appropriate to include Article 7(1) of Directive 93/13 amongst the EU legal instruments which the referring court seeks to have interpreted by the Court (see, to that effect, judgment of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 45).

41 Accordingly, it must be held that, by its second question, the referring court is asking, in essence, whether Article 7(1) of Directive 93/13 must be interpreted as precluding procedural rules, to which a contractual term refers, which allow the seller or supplier to choose, in the event of an action for alleged non-performance of a contract by the consumer, between the court which has jurisdiction in the place where the defendant is domiciled and that which has jurisdiction in the place where the contract was to be performed.

42 Article 7(1) of Directive 93/13, read in conjunction with the 24th recital thereof, provides that Member States must 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.

43 In its settled case-law, as recalled in paragraph 27 of the present judgment, the Court has placed emphasis on the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness vis-à-vis sellers or suppliers (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 40 and the case-law cited).

44 So far as concerns territorial jurisdiction to hear disputes between a seller or supplier and a consumer, it is clear that Directive 93/13 does not contain any express provision determining which court has jurisdiction.

45 Although Article 18(2) of Regulation No 1215/2012, to which the referring court makes reference in that context, provides that the court which, at international level, has jurisdiction to hear the action brought against the consumer by the other party to the contract is that of the Member State in which the consumer is domiciled, that provision is not intended to apply in a case such as that in the main proceedings, which is characterised by the absence of any indication that a cross-border situation exists (see, to that effect, judgment of 5 December 2013, *Asociación de Consumidores Independientes de Castilla y León*, C-413/12, EU:C:2013:800, paragraphs 46 and 47).

46 Nevertheless, as has been observed by the European Commission in its written observations, an effective protection of the rights which the consumer derives from Directive 93/13 must be ensured.

47 Whilst the Court has already defined, in a number of respects and taking account of the requirements of Articles 6(1) and 7(1) of Directive 93/13, the way in which national courts must ensure that the rights which consumers derive from that directive are protected, the fact remains that, in principle, EU law does not harmonise the procedures applicable to examining whether a contractual term is unfair and that those procedures accordingly fall within the domestic legal system of the Member States, on condition, however, that they are not less favourable than those governing similar situations subject to domestic law (principle of equivalence) and that they provide for a right to an effective remedy, as required by Article 47 of the Charter of Fundamental Rights of the European Union (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 57 and the case-law cited).

48 As regards the principle of equivalence, it must be observed that the Court does not have before it any information which might raise doubts as to the compliance with that principle of the legislation at issue in the main proceedings.

49 So far as concerns the right to an effective remedy, it must be recalled that that right must apply both as regards the designation of courts having jurisdiction to hear and determine actions based on EU law and as regards the detailed procedural rules relating to such actions (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 59 and the case-law cited).

50 In that context, the national court must assess whether the national procedural provision guarantees the right to an effective remedy and conduct that assessment by reference to the role of that provision in the procedure as a whole before the various national bodies, and to the conduct of the procedure and its special features.

51 It is therefore necessary to determine, in situations such as that at issue in the main proceedings, the extent to which the provisions of national law relating to jurisdiction restrict excessively the right of consumers to an effective remedy or the exercise of the rights conferred on them by Directive 93/13.

52 In principle, a national provision which provides, as an alternative, that the court for the place where a consumer contract is to be performed has jurisdiction is not, in itself, liable to give rise to an excessive restriction of the consumer's right to an effective remedy. Such jurisdiction does not, in fact, preclude the possibility of the consumer participating in the proceedings brought against him and asserting the rights that he derives from Directive 93/13. Furthermore, any court is required to examine, of its own motion, the unfair nature of the terms of a contract between a seller or supplier and a consumer and to take the necessary measures in order to guarantee the protection of the consumer against unfair terms.

53 However, the adequate and effective means that are to guarantee the consumer a right to an effective remedy must include the possibility of taking part in an action brought against him by a seller or supplier, under reasonable procedural conditions, so that the exercise of his rights is not subject to conditions, in particular time limits, costs or distance, which undermine the exercise of the rights guaranteed by Directive 93/13 (see, to that effect, judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 63 and the case-law cited).

54 Procedural arrangements which give rise to overly high costs for the consumer could have the effect of deterring him from properly defending his rights before the court before which proceedings have been brought by the seller or supplier. That would be the case where proceedings brought before a court which is very far away from the consumer's place of residence give rise to overly high travel costs for the latter, such as to deter him from entering an appearance in the proceedings brought against him (see, to that effect, judgment of 12 February 2015, *Baczó and Vizsnyiczai*, C-567/13, EU:C:2015:88, paragraphs 49 to 59).

55 It is for the national court to ascertain whether that is so in the case in the main proceedings.

56 Accordingly, the answer to the second question is that Article 7(1) of Directive 93/13 must be interpreted as not precluding procedural rules, to which a contractual term refers, which allow the seller or supplier to choose, in the event of an action for alleged non-performance of a contract by the consumer, between the court which has jurisdiction in the place where the defendant is domiciled and that which has jurisdiction in the place of performance of the contract, unless the choice of place of performance of the contract gives rise, for the consumer, to procedural conditions which are such as to restrict excessively the right to an effective remedy conferred on him by the European Union legal order, which is a matter for the national court to determine.

Costs

57 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 1(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a contractual term, such as that at issue in the main proceedings, which refers to the national law applicable so far as concerns the determination of jurisdiction to hear disputes between the parties to the contract, does not fall outside the scope of that directive.**

2. **Article 7(1) of Directive 93/13 must be interpreted as not precluding procedural rules, to which a contractual term refers, which allow the seller or supplier to choose, in the event of an action for alleged non-performance of a contract by the consumer, between the court which has jurisdiction in the place where the defendant is domiciled and that which has jurisdiction in the place of performance of the contract, unless the choice of place of performance of the contract gives rise, for the consumer, to procedural conditions which are such as to restrict excessively the right to an effective remedy conferred on him by the European Union legal order, which is a matter for the national court to determine.**

[Signatures]