Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 25 June 2015 [1]

Case C-32/14

ERSTE Bank Hungary Zrt
v
Attila Sugár

(Request for a preliminary ruling from the Fővárosi Törvényszék (Hungary))

(Consumer protection — Unfair terms in contracts concluded between sellers or suppliers and consumers — Directive 93/13/EEC — Articles 6 and 7 — Assessment of unfair contract terms — Adequate and effective means of preventing the continued use of unfair terms — Enforcement of authentic instruments containing a contract — Affixing of an enforcement clause by a notary — The notary's obligations — Examination of the court's own motion of unfair terms — Judicial review — Principles of equivalence and effectiveness)

1. Where notaries play a central role in the enforcement of contracts concluded between sellers or suppliers and consumers, does Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [2] impose on those notaries specific obligations regarding review of unfair contract terms, similar to those which, by virtue of the now extensive case-law of the Court, are incumbent upon the national courts?

2. That is, in essence, the principal and novel issue raised by the two questions referred to the Court for a preliminary ruling in this case. On that point, this case differs from the various cases which have been brought before it in recent years, for example by Hungarian [3] or Spanish [4] courts called upon to assess the compatibility of national legislation with the requirements arising from Articles 6 and 7 of Directive 93/13, inter alia.

1 — Original language: French.

2 — OJ 1997 L 95, p. 2.

3 — See, in particular, the judgments in *Pannon GSM* (C-243/08, EU:C:2009:350); *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659); *Invitel* (C-472/10, EU:C:2012:242); *Banif Plus Bank* (C-472/11, EU:C:2013:88); *Jőrös* (C-397/11, EU:C:2013:340); *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282) and *Baczó and Viznyiczai* (C-567/13, EU:C:2015:88) and the Order in *Sebestyén* (C-342/13, EU:C:2014:1857).

4 — See, in particular, the judgments in *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346); *Mostaza Claro* (C-168/05, EU:C:2006:675); *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615); *Banco Español de Crédito* (C-618/10, EU:C:2012:349); *Aziz* (C-451/11, EU:C:2013:164); *Barclays Bank* (C-280/13, EU:C:2014:279); *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099); *Unicaja Banco and Caixabank* (C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21) and the Order in *Banco Popular Español and Banco de Valencia* (C-537/12 and C-116/13, EU:C:2013:759).

I – **Legal framework**

A – *EU law*

3. 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.’

4. Article 7(1) of Directive 93/13 provides:

‘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.’

B – *National law*

5. The various provisions of national law that are relevant to the dispute in the main proceedings appear in Law No IV of 1959 on the Civil Code,[5] Law No LIII of 1952 establishing the Hungarian Code of Civil Procedure,[6] Law No III of 1994 on Judicial Enforcement[7] and, lastly, Law No XLI of 1991 on Notaries.[8]

1. The Civil Code

6. Paragraph 209 of the 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.

2) In assessing the unfairness of a contract term, all of the circumstances attending the conclusion of the contract which led the parties to conclude it must be considered, as well as the nature of the service agreed and the relationship of the term at issue with other terms of the contract or of other contracts.

3) Special rules may determine which terms in consumer contracts are to be considered unfair or which are to be considered unfair unless proved otherwise.’

7. Paragraph 209/A of the Civil Code provides:

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

5 — ‘The Civil Code’.

6 — ‘The Code of Civil Procedure’.

7 — ‘The Law on Judicial Enforcement’.

8 — ‘The Law on Notaries’.

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

2. The Code of Civil Procedure

8. Paragraph 366 of the Code of Civil Procedure provides:

'Where the termination or limitation of enforcement is not permitted according to Paragraph 41 or 56 of Law … [on] Judicial Enforcement …, within the framework of judicial enforcement procedures, a debtor who objects to the enforcement may bring an action for the termination or limitation of enforcement against the party seeking enforcement.'

9. Paragraph 369 of the Code of Civil Procedure provides:

'An action may be brought for the termination or limitation of enforcement initiated by an authentic instrument containing an enforcement clause or by an enforceable instrument treated as such if:

a) the claim to be enforced did not arise validly,

b) the claim has been extinguished fully or in part,

c) the party seeking enforcement granted an additional period for performance and that period has not yet expired,

d) the debtor wishes to offset a claim against his debt.'

10. Paragraph 370 of the Code of Civil Procedure provides that:

'The court hearing the action for termination or limitation of enforcement may grant a stay of enforcement.'

3. The Law on Judicial Enforcement

11. The Law on Judicial Enforcement provides that enforcement of a claim may be ordered by a court or by a notary. Paragraph 224/A thereof provides:

'Where it is for a notary to order enforcement, these provisions shall apply subject to the following adaptions:

a) 'court ordering enforcement' means the notary; 'resolution adopted by the court ordering enforcement' means a notarial resolution; …'

12. Under Paragraph 13 of the Law on Judicial Enforcement:

'1) The enforcement order may be issued if the decision to be enforced:

a) contains an claim (sum of money),

b) is definitive or enforceable provisionally, and

c) the time limit for compliance has expired. …'

13. Paragraph 23/C of the Law on Judicial Enforcement provides:

‘1) The notary drawing up the instrument shall affix the enforcement clause to the notarial instrument, if the latter contains:

a) an undertaking concerning the provision of a service and the consideration therefor or a unilateral undertaking,

b) the names of the creditor and the debtor,

c) the subject-matter, quantity (amount) and legal basis for the obligation,

d) the manner of and time limit for compliance.

2) If an obligation is subject to the occurrence of a condition or a time limit, enforceability of the obligation shall also require that the instrument attest that the event has occurred or that the time limit has passed. …

5) Enforcement may be effected if the claim referred to in a notarial instrument is subject to judicial enforcement and the time limit for compliance has expired. …’

14. According to Paragraph 31/E(2) of the Law on Judicial Enforcement:

‘2) Notarial procedures, as non-contentious civil procedures, shall have effects similar to those of judicial proceedings. Decisions adopted by notaries shall have effects similar to those of local court decisions.’

15. Paragraph 211(2) and Paragraph 212(1) of the Law on Judicial Enforcement provide:

‘Paragraph 211

…

2) If the court affixes the enforcement clause to the instrument in breach of the law, the enforcement clause must be cancelled. …’

‘Paragraph 212

1) The court ordering enforcement may at any time revoke the enforceable copy or cancel the enforcement clause on application by either party, on the basis of a report by the bailiff or of its own motion. …’

II – **The facts giving rise to the dispute in the main proceedings**

16. On 18 December 2007, the applicant for enforcement in the main proceedings, ERSTE Bank Hungary Zrt,[9] and the defendant in the main proceedings, Mr Attila Sugár,[10] concluded a loan contract and mortgage agreement contained in an authentic instrument under which ERSTE Bank granted the debtor a loan of CHF 30 687 for the purchase of an apartment.

9 — ‘ERSTE Bank’

10 — ‘The debtor’

17. On 19 December 2007, in accordance with that contract, the debtor made a declaration acknowledging the obligation set out in a notarial instrument granting ERSTE Bank the right, first, to terminate the loan contract if the debtor failed to meet his contractual obligations and, secondly, to recover the debt arising from the contract on the basis of a certificate stating the amount owed drawn up by ERSTE Bank, by requesting the notary to affix an enforcement clause to the various instruments.

18. Since the debtor did not meet his payment obligations, ERSTE Bank, first, terminated the contract and, secondly, applied for the enforcement clause to be affixed with respect to the debtor. As the relevant legal requirements were fulfilled, on 13 December 2011 the notary granted that application.

19. On 5 June 2013, the debtor applied to the notary to have the enforcement clause affixed to the authentic instrument containing the loan contract cancelled, on the ground that it contained unfair contract terms and did not take account of statutory provisions relating to loan contracts concluded with consumers.

20. On 13 June 2013, the notary rejected that application. He stated that the instrument contained a unilateral obligation, the names of the creditor and the debtor, the amount of and legal basis for the obligation and the method of and time limit for compliance, that it attested that the relevant condition had been fulfilled and the date thereof and that the instrument was endorsed with the enforcement clause on 13 December 2011. The notary also stated that notarial procedure is non-contentious and that it is not permissible in disputes between parties concerning contract clauses or the legality of terminating the contract for the notary to disclose his opinion, as they are matters falling exclusively within the jurisdiction of the courts. He also pointed out that he had only to certify the fact that the creditor had terminated the contract and that the parties could, moreover, contest the contract terms before the court and that they have available, by way of additional remedies, the possibility of bringing proceedings for limitation or cancellation of enforcement.

21. The debtor then brought an action before the referring court seeking annulment of the notary's decision and cancellation of the enforcement clause. He challenges the description of himself as a debtor and argued that, in the notarised acknowledgment of the obligation, the notary had endorsed unfair contract terms and erroneous data. He takes the view that, when drawing up the authentic instrument acknowledging the obligation, the existence of invalid terms in the contract should have been identified. He also challenges the fact that the authentication procedure allows the affixing of an enforcement clause, since that procedure is initiated by the creditor based solely on accounting data which the creditor supplies. In his opinion, the affixing of the enforcement clause was therefore an abuse of law, since the party seeking enforcement makes, by way of a unilateral declaration, a finding of fact which can be made only in *inter partes* proceedings.

III – **The questions referred for a preliminary ruling and the procedure before the Court**

22. In those circumstances, the Fővárosi Törvényszék (Regional Court of Appeal) decided to refer the following two questions to the Court for a preliminary ruling:

'(1) Does a procedure of a Member State comply with Article 7(1) of Directive 93/13/EEC if, under that procedure, in the event of a breach by the consumer of an obligation contained in a document in due form drawn up by a notary, the other party to the contract avoids *inter partes* proceedings before a court and asserts its claim to the amount it indicates by issuing what is known as an enforcement clause, without any examination being possible of the unfairness of a term of the underlying contract?

(2) In such a procedure may the consumer request the annulment of the enforcement clause already issued on the basis that there was no examination of the unfairness of a term of the underlying contract, whereas, according to the judgment in Case C-472/11 [*Banif Plus Bank*, EU:C:2013:88], in court proceedings the court must inform the consumer if it finds that a term is unfair?'

23. The Hungarian Government and the European Commission submitted written observations. ERSTE Bank, the German Government, the Hungarian Government and the Commission also presented oral argument at the public hearing held on 5 February 2015. The German Government stated that it wished to intervene at the hearing because German law has a procedure similar to that under Hungarian law.

IV – **The questions referred for a preliminary ruling**

A – *Observations submitted to the Court*

24. The Hungarian Government and the German Government agree that Directive 93/13 does not preclude a procedure for affixing an enforcement clause of the kind at issue in the main proceedings. By contrast, the Commission took the contrary view.

25. After recalling the relevant case-law of the Court and presenting the main characteristics of the simplified notarial enforcement procedure at issue in the main proceedings, the Hungarian Government essentially argued that it does not preclude any review of unfair terms, either by the notaries themselves or by the national courts.

26. First of all, it argued that the Law on Notaries requires notaries, when drawing up an authentic instrument, to determine whether it complies with the law and whether any of the terms of the underlying legal transaction are unfair.

27. Moreover, although the procedure for cancellation of the enforcement clause, the purpose of which is simply to verify the legality of the procedure whereby that clause was affixed, precludes any review of the validity of the contractual terms, the consumer nevertheless has the option, first, to bring legal proceedings to have the contract declared void, whether or not enforcement has been requested, and, secondly, to invoke the nullity of the contract in proceedings for the termination or limitation of enforcement (Paragraph 369 of the Code of Civil Procedure).

28. In the course of such proceedings, the national courts could and should review the fairness of contract terms or standard contract conditions and, in compliance with Paragraph 163 of the Code of Civil Procedure and in accordance with the case-law of the Kúria (Supreme Court, Hungary),[11] identify of their own motion instances where it is possible to establish on the evidence available that a term is manifestly invalid.

29. According to the Hungarian Government, the Hungarian system therefore strikes a fair balance between, first, ensuring that the aims of Directive 93/13 are effectively pursued and, secondly, protecting the aims and the specific status of the notarial procedure, without making it impossible or excessively difficult for individuals to exercise their rights.

11 — The Hungarian Government refers, in that regard, to Opinion No 2/2010 of 28 July 2010 and Opinion No 2/2012 of December 2012.

30. The German Government, which stated that the notarial enforcement clause exists in German law, argued at the hearing that Article 7 of Directive 93/13 requires that there must be adequate means of voiding unfair contract terms, which would not necessarily involve automatic review. Since national enforcement procedures fall within the scope of national procedural autonomy, provided that the principles of equivalence and effectiveness are respected, it is for the referring court to examine whether the national provisions at issue, analysed within the relevant context, having regard for all the remedies available, are likely to make it impossible or excessively difficult for consumers to exercise the rights conferred on them by Directive 93/13.

31. In that context, consideration should be given to the general duties of notaries as defined by national law and also the verification obligations incumbent upon them, the specific procedures whereby an enforcement clause is affixed to an authentic instrument and the procedures for judicial review of enforcement procedures.

32. In that regard, the German Government pointed out that the Court has held that, although Directive 93/13 requires that the national court hearing disputes between consumers and sellers or suppliers take positive action unconnected with the parties to the contract, the need to comply with the principle of effectiveness cannot be stretched so far as to make up fully for the total inertia on the part of the consumer concerned. [12]

33. By contrast, the Commission, which proposes an answer to both questions, considers that Directive 93/13, as interpreted by the Court, precludes the Hungarian legislation.

34. In reply to the first question and referring principally to the judgment in *Banco Español de Crédito*, [13] it argues that Articles 6 and 7 of Directive 93/13 must be interpreted as precluding a Member State's legislation which provides that a notary may issue an enforceable instrument on the basis of a loan contract contained in an authentic instrument without having examined whether certain contract terms may be unfair.

35. At the stage when the enforcement clause is affixed to the authentic instrument containing the contract, the notary should first of all be able to examine, if necessary of his own motion, whether any of the contract terms are unfair, provided that he has available to him all the legal and factual elements necessary for that task, which is usually the case, and inform the parties that he has done so.

36. In that regard, it notes that whereas, under Paragraph 31/E(2) of the Law on Judicial Enforcement, a notarial instrument bearing an enforcement clause has the same effect as a local court decision, the notary can during the enforcement procedure do no more than verify compliance with the requirements contained in Paragraph 23/C(1) of the Law on Judicial Enforcement. The consumer cannot therefore invoke the protection of the legislative provisions concerning contract terms unless he brings an action for the termination or limitation of enforcement under Paragraph 369 of the Code of Civil Procedure, following which the court hearing the case may stay the enforcement.

37. At the hearing, the Commission also stated that the obligation for the consumer to bring a legal action in order to challenge an unfair contract term is not compatible with the principle of effectiveness. Moreover, it added that, if a notary were informed by a national court that a consumer had brought proceedings, he ought to be able to stay the procedure for the affixing of an enforcement clause.

12 — Judgment in *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 56).

13 — C-618/10, EU:C:2012:349.

38. When drawing up the authentic instrument containing the contract, the notary should, having regard to his advisory duties under the Law on Notaries, also be able to examine of his own motion whether certain contract terms are unfair and thus contribute towards achieving the aims of Article 7 of Directive 93/13.

39. In reply to the second question and referring in that regard to the judgment in *Banif Plus Bank*,[14] the Commission argues that if, at the enforcement stage, the notary should of his own motion examine whether certain terms of the contract underlying the notarised instrument are unfair, the consumer should a fortiori be able to take the initiative of challenging the enforceable notarial instrument and request the cancellation of the enforcement clause on the ground that the notary has not examined whether certain contract terms are unfair.

B – *My analysis*

40. By its first question, the referring court is essentially asking whether Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits a notary, who has drawn up in due form an authentic instrument relating to a contract between a seller or supplier and a consumer, to affix an enforcement clause to that instrument and thus initiate enforcement of that contract against a consumer who has failed to fulfil his obligations, without any *inter partes* proceedings before a court and without any prior review of whether certain contract terms are unfair.

41. By its second question, it is also asking whether, in the light of the judgment in *Banif Plus Bank*,[15] Directive 93/13 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which does not permit a consumer to request the cancellation of an enforcement clause affixed to an authentic instrument relating to a contract with a seller or supplier, by claiming that no prior review was carried out to determine whether certain contract clauses are unfair.

42. In order properly to understand those two questions, it is necessary to start with a precise description of the two stages at which the notary intervenes in the procedure for affixing an enforcement clause at issue in the main proceedings, whether this be at the stage when the clause is actually affixed, at the request of the creditor, or at the stage where it may be cancelled, at the request of the consumer. In both cases, the review is confined strictly to formal requirements.

1. The two stages where the notary intervenes in the procedure for affixing an enforcement clause

43. Hungarian law very specifically establishes a simplified or streamlined system for the enforcement of contractual obligations, which is based on intervention by notaries at two stages, which at the same time establishes an order of precedence for the exercise by the parties to the contract of their respective prerogatives. It thus permits a bank which, as in the main proceedings, has concluded a mortgage loan contract with an individual and has called upon the services of a notary to draw up an authentic instrument containing an acknowledgment of obligations on the part of the debtor, to request that that notary[16] affix an enforcement clause to the authentic instrument, if the debtor fails to fulfil the contract. In other words, on the basis of evidence supplied to him by the bank and provided that certain formal requirements are fulfilled, it permits the bank to request the notary to initiate enforcement of the contract, without the need to take legal action for that purpose. It is only at the second stage that the debtor may apply to the notary for the cancellation of the enforcement clause which has been affixed.

14 — C-472/11, EU:C:2013:88.

15 — C-472/11, EU:C:2013:88.

16 — It was explained at the hearing that, when the circumstances so require, Hungarian law allows two different notaries to intervene, the first to draw up the authentic instrument and the second to affix the enforcement clause.

44. The obligations incumbent upon the notary at the stage when the enforcement clause is affixed to the authentic instrument which he has drawn up are listed in Paragraph 23/C of the Law on Judicial Enforcement, which reproduces the substance of Article 112 of the Law on Notaries. Those provisions state that the notary may affix an enforcement clause provided that the four criteria defined therein are satisfied: the instrument must set out the undertaking concerning the provision of the service and the consideration therefor, the names of the creditor and the debtor, the subject-matter of the obligation, the quantity and legal basis for the obligation and, lastly, the manner of and time limit for compliance.

45. As confirmed by the Hungarian Government, the review thus carried out by the notary, solely on the basis of the documents produced by the party requesting the affixing of the enforcement clause, is purely formal in nature. In particular, he is not required to assess of his own motion whether certain clauses of the contract to be enforced pursuant to the authentic instrument are unfair, even though he might have available to him all the factual and legal elements necessary for that task.

46. Hungarian law provides that the notary may subsequently cancel [17] the enforcement clause affixed to an authentic instrument at the request of the debtor, the cancellation being automatic where that clause has been affixed in breach of the law. Notaries ordering enforcement may also at any time revoke the enforceable copy or cancel the enforcement clause on application by either party, on the basis of a report by the bailiff or of their own motion.

47. In that regard, the Hungarian Government stated that the sole purpose of that procedure is to enable a review of the legality of the procedure for the affixing of an enforcement clause, that is to say whether the formal requirements referred to in point 13 of this Opinion have been complied with. Thus, in the same way as it is not possible for the notary to review the various terms of the contract at the time when the enforcement clause is affixed, nor is it possible for him to carry out such a review as part of the procedure for the cancellation of that clause.

48. In the light of the facts presented above, it is clear that the two questions referred by the national court for a preliminary ruling raise a single issue, essentially stemming from the fact that notaries are empowered to declare that a contractual obligation, in this case a mortgage debt, is enforceable, and so they need to be examined together.

49. In order to be able to propose a useful answer to those two questions, apart from the judgment in *Banif Plus Bank* expressly cited by the referring court in its second question, [18] it is necessary to start by recalling the principal conclusions in the relevant case-law of the Court concerning Directive 93/13, in particular Article 6(1) and Article 7(1) thereof.

2. The Court's definition of the principle requirements arising from Directive 93/13

50. Article 38 of the Charter of Fundamental Rights of the European Union ('the Charter') provides that European Union policies must ensure a high level of consumer protection. That requirement also applies to the implementation of Directive 93/13. [19] The Court has also held that, in implementing EU law, the national court must also respect the requirements of effective judicial protection of the rights

17 — Paragraphs 211 and 224/A of the Law on Judicial Enforcement.

18 — C-472/11, EU:C:2013:88, paragraph 17.

19 — See, in particular, the judgments in *Pohotovosť* (C-470/12, EU:C:2014:101, paragraph 52) and in *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 47).

that individuals derive from EU law, as guaranteed by Article 47 of the Charter.[20] That protection must apply both as regards the designation of the courts and tribunals having jurisdiction to hear and determine actions based on EU law and as regards the definition of detailed procedural rules relating to such actions.[21]

51. In accordance with the settled case-law of the Court, 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 the terms.[22]

52. Article 6(1) of Directive 93/13 therefore provides that unfair terms are not binding on consumers.

53. The Court has repeatedly held that this is a mandatory provision that 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.[23]

54. In particular, the Court has on several occasions concluded from this that the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task,[24] in so far as there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair.[25]

55. The Court has held inter alia that a national court must investigate of its own motion whether a term falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair.[26] It has also held that a national court which has established that a contract term is unfair is required, first, without waiting for the consumer to make an application in that regard, to draw all the consequences which, under national law, result from that finding, whilst respecting the principle of *audi alteram partem*,[27] in order to satisfy itself that that consumer is not bound by that term and, secondly, to assess, in principle on the basis of objective criteria, whether the contract concerned can continue in existence without that term.[28]

20 — See the judgments in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 29); *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 35) and *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 47).

21 — See the judgments in *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 49) and *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 35).

22 — See, in particular, the judgments in *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 25); *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 25); *Aziz* (C-415/11, EU:C:2013:164, paragraph 44); *Barclays Bank* (C-280/13, EU:C:2014:279, paragraph 32); *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 22) and *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 48).

23 — See, in particular, the judgments in *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 40) and *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 23).

24 — See, in particular, the judgments in *Aziz* (C-415/11, EU:C:2013:164, paragraph 46); *Barclays Bank* (C-280/13, EU:C:2014:279, paragraph 34) and *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 24) and also the Order in *Banco Popular Español and Banco de Valencia* (C-537/12 and C-116/13, EU:C:2013:759, paragraph 41).

25 — See the judgment in *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 26).

26 — See the judgment in *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659, paragraphs 49 to 56) regarding a term conferring exclusive territorial jurisdiction contained in the disputed contract; see also the judgments in *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 44) and *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 24).

27 — See the judgment in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraphs 17 to 36).

28 — See the judgment in *Jőrös* (C-397/11, EU:C:2013:340, paragraph 48).

56. In this context, it should be made clear that, in *Banif Plus Bank*,[29] which was expressly cited by the referring court in its second question, the Court had been asked inter alia whether Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding or, on the contrary, allowing the national court which has held, of its own motion, that a contractual term is unfair, to inform the parties that there are grounds for invalidity and to invite them to submit a statement in that regard.

57. In that case, the Court held that Articles 6(1) and 7(1) of Directive 93/13 must be interpreted as meaning that the national court which has found of its own motion that a contractual term is unfair is not obliged, in order to be able to draw the consequences arising from that finding, to wait for the consumer, who has been informed of his rights, to submit a statement requesting that that term be declared invalid. However, it added that the principle of *audi alteram partem*, as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure.[30]

58. Lastly, the Court held that Directive 93/13 had to be interpreted as meaning that it precludes the legislation of a Member State which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not permit the court before which declaratory proceedings have been brought, which does have jurisdiction to assess the unfairness of such a term, to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee the full effectiveness of its final decision.[31]

59. That directive also precludes national legislation which does not allow the court responsible for enforcement, in mortgage enforcement proceedings, to grant interim relief, including, in particular, staying the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of the final decision of the court hearing the declaratory proceedings before which the consumer argues that that term is unfair.[32]

60. Moreover, it follows from equally consistent case-law of the Court that, in the absence of harmonisation within EU law of the national mechanisms for enforcement, it is for the national legal order of each Member State to establish such rules, in accordance with the principle of procedural autonomy, on condition, however, that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness).[33] The Court has also held that national enforcement proceedings are subject to the requirements arising out of its case-law requiring the national court to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair.[34]

29 — C-472/11, EU:C:2013:88, paragraph 17).

30 — See paragraphs 17 to 36.

31 — See the judgments in *Aziz* (C-415/11, EU:C:2013:164, paragraphs 49 to 64) and *Barclays Bank* (C-280/13, EU:C:2014:279, paragraph 36).

32 — See the Order in *Banco Popular Español and Banco de Valencia* (C-537/12 and C-116/13, EU:C:2013:759, paragraph 60) and the judgment in *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 28).

33 — See the judgments in *Aziz* (C-415/11, EU :C :2013 :164, paragraph 50), *Pohotovost'* (C-470/12, EU:C:2014:101, paragraph 46), *Barclays Bank* (C-280/13, EU:C:2014:279, paragraph 37), *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 31), and *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 50) and also the Order in *Banco Popular Español and Banco de Valencia* (C-537/12 and C-116/13, EU:C:2013:759, paragraph 45).

34 — See the judgments in *Pohotovost'* (C-470/12, EU:C:2014:101, paragraph 51) and *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 24).

61. The Court has held, in this context, that, in order to assess whether a national procedural provision makes the application of EU law impossible or excessively difficult, it must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies,[35] although it pointed out that the specific characteristics of proceedings which take place under national law between sellers or suppliers and consumers cannot constitute a factor which is liable to affect the legal protection from which consumers must benefit under the provisions of Directive 93/13.[36]

62. It is in the light of those principles that it is necessary to examine, in the relevant legal context, the procedure for affixing an enforcement clause at issue in the main proceedings.

3. The answers to the questions referred for a preliminary ruling

63. Having examined the legal background to this case, it should be noted that the issue at the heart of the two questions that the national court has referred for a preliminary ruling stems from the fact that Hungarian law provides that application for enforcement of an obligation contained in a contract between a seller or supplier and a consumer, such as the mortgage debt at issue in the main proceedings, may be made to a notary, without any prior examination, if necessary of the notary's own motion and in compliance with the principle of *audi alteram partem*, to determine whether certain contractual terms may be unfair, regardless of the remedies available which, moreover, enable the contract or its enforcement to be challenged. The same rules apply to any subsequent application for cancellation of the enforcement clause.

64. The central argument put forward both by the debtor and by the Commission is that this possibility of initiating the enforcement of a contract is likely to be incompatible with the case-law of the Court cited above concerning Directive 93/13, including the judgment in *Banif Plus Bank*.[37] Since, as it has been argued, the affixing by a notary of an enforcement clause to an authentic instrument containing a contract has the same effect as a court decision, it necessarily follows that that case-law must be applicable in full to that intervention by the notary. The notary would therefore be subject, inter alia, to the obligation to indicate of his own motion that certain contractual terms may be unfair and to invite the parties to set out their views on the matter, with the opportunity to challenge the views of the other party.

65. However, that reading of the case-law of the Court omits a fundamental element, namely that that case-law is concerned specifically with the role of the national court called upon to perform its duties, which therefore fall strictly within the scope of the exercise of jurisdiction. That case-law is therefore based on the premise that it is a court which is hearing an action and which may, before declaring a contractual obligation to be enforceable, examine, if necessary of its own motion and provided that it has available to it the legal and factual elements necessary for that task, whether the contract contains any unfair terms, initiate a discussion between the parties in this connection and draw the appropriate conclusions, either ruling that the unfair terms are void or dismissing the action for enforcement 'as provided under their national law'.[38]

35 — See the judgments in *Asociación de Consumidores Independientes de Castilla y León* (C-413/12, EU:C:2013:800, paragraph 34) and also *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 52).

36 — See the judgments in *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 55); *Aziz* (C-415/11, EU:C:2013:164, paragraph 62) and *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 53).

37 — C-472/11, EU:C:2013:88.

38 — See, in particular, the judgments in *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 58) and *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraphs 25 and 27).

66. In circumstances where the national legislation empowers notaries to affix an enforcement clause to an authentic instrument containing a contract and subsequently to cancel it when it has expired, any attempt to extend to them the right to exercise powers which are a direct prerogative of the judicial function would encounter virtually insurmountable difficulties stemming from the principle that the judicial function has a monopoly of such powers.

67. Directive 93/13, as interpreted by the Court, cannot have the effect of requiring Member States to alter the duties of a notary to such an extent that he would have to conduct *inter partes* proceedings between the parties to a contract, following which he would have to decide whether a contractual term was unfair and possibly order its annulment.

68. From that point of view, I consider that, subject to a few clarifications, the two questions referred for a preliminary ruling by the national court, as reformulated in points 40 and 41 of this Opinion, can only be answered in the negative.

69. First of all, Directive 93/13 must be interpreted as not precluding, in principle, a Member State's legislation which, as is indisputably its right, permits a notary to affix an enforcement clause to an authentic instrument containing a contract without any prior review, if necessary of his own motion, of whether certain contractual terms are unfair.

70. It is true, as the Commission pointed out at the hearing, that the simplified enforcement procedure at issue in the main proceedings enables a seller or supplier, where appropriate, first of all to obtain from a notary a declaration that a contractual obligation is enforceable, without first having to engage in *inter partes* proceedings. A consumer wishing to challenge that declaration is therefore obliged either to bring an action contesting the validity of the contract or to bring an action for the termination or limitation of enforcement under Paragraph 369 of the Code of Civil Procedure.

71. However, the mere fact that the national legislation does not include an obligation for the notary to review of his own motion, at the stage when the enforcement clause is affixed to the authentic instrument relating to a contract between a seller or supplier and a consumer, whether certain terms of that contract are unfair and, again in compliance with the principle of *audi alteram partem*, to draw the appropriate conclusions cannot of itself lead to the conclusion that Hungarian law is not compatible with Directive 93/13, provided, however, that that consumer is afforded effective judicial protection.

72. First, Directive 93/13 does not provide a sufficient basis to preclude the fundamental competence of the Member States to empower notaries to affix an enforcement clause to an authentic instrument relating to a contract. Secondly, it is not possible to extend to notaries the powers conferred upon the courts by Directive 93/13, as interpreted by the Court of Justice.

73. Furthermore, as I have already mentioned, all the relevant case-law of the Court concerning the specific responsibilities of the national courts in implementing Directive 93/13 and, in particular, the need to allow them to assess of their own motion whether contractual terms are unfair is based on the premise that one of the parties to the contract has first brought an action before those courts.

74. As the German Government essentially argued, neither Directive 93/13 nor the relevant case-law of the Court can be interpreted as meaning that it is mandatory for Member States either to include in their legislation an obligation for notaries to act in the place of the national courts in order to review, in compliance with the principle of *audi alteram partem*, whether contractual terms contained in the authentic instruments notaries draw up are unfair, or, more broadly, to amend their rules of civil procedure to empower notaries to compensate for the total inertia on the part of consumers who have not exercised their right to bring legal proceedings.

75. Next, to remain consistent with the arguments set out above regarding the second question, Directive 93/13 must also be interpreted as not precluding national legislation which does not permit a consumer to request the cancellation of an enforcement clause affixed to an authentic instrument relating to a contract with a seller or supplier, on the ground that no prior assessment was made as to whether any of the contractual terms are unfair.

76. It is as difficult to impose on notaries, solely on the basis of Directive 93/13, an obligation to give a decision, following *inter partes* proceedings, at the stage when an enforcement clause is affixed to an authentic instrument relating to a contract, as to whether the contract contains unfair terms as it is to impose such an obligation on them in the context of a procedure for the cancellation of that clause. In that regard, it is therefore sufficient to refer to the arguments set out in points 69 to 74 of this Opinion.

77. That said, a satisfactory answer to the referring court's questions, which will be of use to it and which is consistent with the spirit of Directive 93/13, as interpreted by the Court, cannot be confined simply to declaring that the legislation at issue in the main proceedings is in principle compatible with that directive. On the contrary, it is essential to state a few 'caveats', deriving to a large extent from the case-law of the Court. In clarifying those caveats, it is necessary to focus on the obligations incumbent both upon notaries and upon the national courts in the light of the specific objective pursued by Directive 93/13, namely the protection of consumers and, more broadly, the requirements arising from the right to effective judicial protection as provided for in Article 47 of the Charter.

78. As regards notaries, first, it follows from the explanations given by the referring court and the written observations and oral argument presented to the Court that the Law on Notaries, which enshrines the importance of their role in preventing disputes and reducing the workload of the courts, defines in Article 1 their obligations in very general terms. In procedures falling within their competence, they are required, in particular, to assist the parties by giving advice and ensuring that they are afforded equal treatment when exercising their rights and fulfilling their obligations.

79. Article 3(1) of the Law on Notaries also provides that 'a notary must refuse his assistance where it is incompatible with his obligations, in particular where his assistance is requested for the purposes of a legal transaction which is contrary to the law or which is intended to circumvent the law or again where its purpose is prohibited or unlawful'. Article 3(2) of the Law on Notaries adds that '[w]here, during the procedure, the notary finds an element giving rise to doubts, where there are no grounds for him to refuse his assistance, he must draw the parties' attention to that element and make a written record thereof. If a party objects to that element, the notary must refuse his assistance'.

80. In the light of the obligations incumbent upon the Member States under Article 7(1) of Directive 93/13, which requires them to ensure that there are adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers, when drawing up authentic instruments relating to contracts, notaries thus have a particular responsibility to inform and advise the consumer.

81. In circumstances such as those in the case in the main proceedings, when drawing up an authentic instrument relating to a contract concluded between a seller or supplier and a consumer, the notary must take great care not only to advise the consumer of any potentially unfair contractual terms which he may have identified, but also to inform the consumer, first, of the power that the law confers on him as a notary to affix an enforcement clause to that authentic instrument on expiry of a time limit and, potentially, to cancel that clause, solely on the basis of a formal assessment, and, secondly, of the consequences of affixing such a clause, in particular from the procedural point of view.

82. In the present case, it follows from the above considerations that, under Hungarian law, at the stage when he is drawing up an authentic instrument relating to a contract concluded between a seller or supplier and a consumer, a notary is empowered to play a role in preventing the inclusion of unfair terms in that contract and that he may, at the very least and in particular if there is any doubt as to whether a certain term is unfair, bring this to the attention of the parties, and especially the consumer, who may then, if appropriate, exercise his right to bring an action before the national court having jurisdiction.

83. The general provisions of the Law on Notaries are therefore, in principle, likely to contribute towards compliance with the requirements laid down by Article 7(1) of Directive 93/13, which requires Member States to ensure that there are adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. However, it is for the national court, which has sole jurisdiction to interpret national law, to assess the circumstances of the case at issue in the main proceedings and to draw the appropriate conclusions.

84. Next, regarding the courts, it is important to remember that it is incumbent upon the Member States to ensure that consumers are afforded effective judicial protection, by making it possible for them to bring legal action against the contract itself and/or its enforcement, which is not subject to conditions, in particular time limits, which make it excessively difficult or impossible in practice to exercise the rights guaranteed by Directive 93/13,[39] in the context of which the court must be able to examine, if necessary of its own motion provided that it has available to it all the legal and factual elements necessary for that task, whether certain contractual terms are unfair and, in compliance with the principle of *audi alteram partem*, draw the appropriate conclusions under the conditions laid down by national law, in accordance with the case-law of the Court.

85. In the present case, it is apparent from the explanations provided both by the referring court and by the Hungarian Government that Hungarian law provides that consumers may, first, bring an action challenging the validity of a contract and, secondly, bring proceedings for the termination or limitation of enforcement pursuant to Paragraph 369 of the Code of Civil Procedure. In the latter proceedings, as the Commission pointed out, the consumer may also request the court to stay the enforcement of the contract which was initiated when the notary affixed the enforcement clause.

86. Thus, first of all, the consumer could at any time, both before and after the enforcement clause is affixed, bring an action before the national courts challenging the validity of the contract on the basis of which the authentic instrument bearing the enforcement clause was drawn up.

87. Then, once the enforcement clause has been affixed and without prejudice to the aforementioned option of seeking its cancellation, he could bring proceedings for the termination or limitation of enforcement pursuant to Paragraph 369 of the Code of Civil Procedure, in which he would have the option of claiming that the contract is invalid and requesting that enforcement be stayed pursuant to Paragraph 370 of the Code of Civil Procedure.

88. It is within the context of those procedures that the entire body of relevant case-law of the Court cited in points 51 to 62 of this Opinion should be applied in full. The need to comply with the requirements laid down by that case-law is particularly imperative in relation to a procedure such as that provided for in Paragraphs 369 to 370 of the Code of Civil Procedure, in so far as the first of those provisions gives an exhaustive list of the grounds on which it is possible to seek the termination or limitation of the enforcement initiated when a notary affixes an enforcement clause to an authentic instrument relating to a contract, which do not include the possibility that the contract may contain unfair terms.

39 — For the question of limitation periods, see the Opinion of Advocate General Szpunar in *BBVA* (C-8/14, EU:C:2015:321).

89. Consequently, in the light of the foregoing considerations, I propose that the Court's answer to the two questions referred for a preliminary ruling by the national court should be that Articles 6 and 7 of Directive 93/13 must be interpreted as not precluding in principle national legislation, such as that at issue in the main proceedings, which permits a notary who has drawn up in due form an authentic instrument relating to a contract between a seller or supplier and a consumer to initiate enforcement of that contract against a consumer who has failed to fulfil his obligations, either by affixing an enforcement clause to that instrument or by refusing to cancel such clause, without any assessment having been made at either of those stages as to whether that contract contains unfair terms.

90. However, when drawing up such an authentic instrument, it is incumbent upon the notary to inform the consumer of any unfair contract terms identified by the notary, of the power conferred on him by law to initiate enforcement of the contract solely on the basis of a review of the formal requirements, and of the consequences arising therefrom, in particular from the procedural point of view.

91. By contrast, that directive precludes national legislation which prevents a national court, whatever the nature of the proceedings in which an action has been brought before it, from examining of its own motion, in compliance with the principle of *audi alteram partem*, whether the contract contains unfair terms, provided that it has available to it all the legal and factual elements necessary for that task, and from drawing the appropriate conclusions.

V – **Conclusion**

92. In the light of all the foregoing considerations, I propose that the Court should answer the two questions referred for a preliminary ruling by the Fővárosi Törvényszék as follows:

Articles 6 and 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding in principle national legislation, such as that at issue in the main proceedings, which permits a notary who has drawn up in due form an authentic instrument relating to a contract concluded between a seller or supplier and a consumer to initiate enforcement of that contract against a consumer who has failed to fulfil his obligations, either by affixing an enforcement clause to that instrument or by refusing to cancel such clause, without any assessment having been made at either of those stages as to whether that contract contains unfair terms.

However, when drawing up such an authentic instrument, it is incumbent upon the notary to inform the consumer of any unfair contract terms identified by the notary, of the power conferred on him by law to initiate enforcement of the contract solely on the basis of a review of the formal requirements, and of the consequences arising therefrom, in particular from the procedural point of view.

By contrast, that directive precludes national legislation which prevents a national court, whatever the nature of the proceedings in which an action has been brought before it, from examining of its own motion, in compliance with the principle of *audi alteram partem*, whether the contract contains unfair terms, provided that it has available to it all the legal and factual elements necessary for that task, and from drawing the appropriate conclusions.