Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 21 March 2019[1]

Case C-34/18

Ottília Lovasné Tóth
v
ERSTE Bank Hungary Zrt.

(Request for a preliminary ruling from the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary))

(Reference for a preliminary ruling — Consumer protection — Unfair terms — Directive 93/13/EEC — Scope — Clause reflecting the law — Annex — Legal weight — Article 3(1) — Assessment of the unfairness of a term — Impression conveyed by a clause to the average consumer — Intelligibility of terms — Existence of conflicting national judgments)

1. The present case concerns proceedings between ERSTE Bank Hungary Zrt. ('the Bank') and Ms Lovasné Tóth regarding the fairness of a particular clause contained in a loan agreement in respect of a domestic dwelling. The disputed clause is contained in a mortgage document and it provides, first, that each party declares itself obliged to accept as conclusive a notarial document which has been drafted in accordance with the debtor's accounts and with the Bank's books and records, and second, that they agree to accept the said document as providing a ground for direct enforcement in the event of default.

2. As it happens, the Kúria (Supreme Court, Hungary) has previously delivered several judgments in respect of a clause similar to the one at issue in the main proceedings. In these judgments it has held that such a clause merely referred to an existing national notarial enforcement procedure and, therefore, from a legal point of view, did not affect either party's right to take legal action nor did it affect the burden of proof.

3. Within this context, the referring court wonders in particular if that clause may nevertheless be declared unfair under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) ('the 1993 Directive') essentially by reason of the erroneous impression which such a clause may convey to the average consumer.

4. Before considering this question, it is first necessary to set out the relevant provisions of the 1993 Directive.

1 Original language: English.

I. Legal context

A. EU law

1. Directive 93/13

5. The 16th, 17th and 20th recitals of the 1993 Directive stipulate:

'Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; 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, for the purposes of this Directive, the annexed list of terms can be of indicative value only and, because of the cause of the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws;

…

Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail'.

6. Article 1(2) of the 1993 Directive states:

'The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.'

7. According to Article 3 of the 1993 Directive:

'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.'

8. Article 4(1) and (2) of the 1993 Directive reads as follows:

'1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of the 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 supplies in exchange, on the other, in so far as these terms are in plain intelligible language.'

9. Article 5 of the 1993 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…'

10. According to Article 6(1) the 1993 Directive:

'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.'

11. Under Article 7(1) and (2) of the 1993 Directive:

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

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

12. In the words of Article 8 of the 1993 Directive:

'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.'

13. Point 1 of the Annex to the 1993 Directive refers to:

'Terms which have the object or effect of:

…

(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

…

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.'

2. Directive 2005/29

14. Article 6(1) of the 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. 229, headed 'Misleading actions', provides:

'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:

...

(g) the consumer's rights …'

15. According to Article 7(2) of Directive 2005/29, headed 'Misleading omissions':

'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..., and where... this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.'

II. The main proceedings and the questions referred for a preliminary ruling

16. On 27 October 2008, the Bank and Ms Tóth, who, within the context of the agreement, was acting for purposes which are outside her trade, business or profession, entered into a loan agreement for the purchase of a residential property. There is, accordingly, no dispute regarding Ms Tóth's status as a consumer for the purposes of Article 2(b) of the 1993 Directive.

17. On the same day, Ms Tóth appeared before a notary and declared that she was aware of each and every clause of the loan agreement. This declaration was incorporated into an authentic instrument entitled 'unilateral declaration of acknowledgement of debt'.

18. Clause I.4 of the loan agreement, which also appears as part of the authentic instrument prepared by the notary, is worded as follows:

'For the purposes of settling any dispute concerning the settlement of accounts or satisfying a claim by the Bank, in order to determine the amount of the loan or of any other debt outstanding at a given moment under this document, to determine the effective disbursement date and the date when a payment obligation falls due, or to determine any other fact or information required for the purposes of direct judicial enforcement, the Parties declare themselves bound to accept a probative document recorded in a notarial act and drawn up in accordance with the Debtor's accounts at the Bank and with the Bank's records and books of account as irrefutable and reliable proof.

Accordingly, in the event of default in payment of the principal or of interest and costs, or in the event of the payment not reflecting the terms of the agreement, in addition to this document, the probative document recorded in a notarial act and drawn up in accordance with the Debtor's accounts at the Bank and with the Bank's records and books of account shall serve as proof of the loan and of the interest and costs outstanding at a given moment that provide the grounds for enforcement, and of the facts mentioned above, and, by signing this agreement the Parties agree to be bound to accept the said probative document.

If enforcement proceedings are commenced by the Bank, the Parties or the Debtor shall ask the notary who certified this document, or any other competent notary, to issue a notarial act drawn up in accordance with the Debtor's accounts at the Bank and with the Bank's records and books of account, having first examined the records, stating the amount of the loan and of the outstanding interest and costs or any other related debt arising from the abovementioned loan and the abovementioned facts and information, and they shall authorise banking confidentiality to be lifted in respect of the information in question.'

19. In addition, under the loan agreement and the unilateral declaration of acknowledgement of debt, in the event of a serious breach of the contract by the debtor, such as a failure to fulfil his/her payment obligations, the Bank is entitled to terminate the agreement with immediate effect and to declare the remaining balance of the loan to be due, together with the interests and costs.

20. On 5 January 2016, Ms Tóth filed an application for a declaration that both clause I.4 of the loan agreement and the corresponding provision in the notarial act were unfair. In support of her application, she alleged that this clause reverses the burden of proof to her detriment.

21. In its defence, the Bank claims that the clause was not unfair as it does not entitle the Bank unilaterally to determine whether Ms Tóth has performed her obligation, nor to quantify the amount she owed, nor restrict Ms Tóth's opportunities to assert her rights, nor reverses the burden of proof, as it cannot be seen as an acknowledgement of debt.

22. The court of first instance gave judgment dismissing the application. It held that the clause did not establish a binding provision on the parties as regards the debtor's performance of obligations, nor contained an acknowledgement of debt, and nor did it entitle the Bank unilaterally to determine the amount still owed by Ms Tóth or whether she has performed her obligations under the agreement. The fact, moreover, that Ms Tóth has accepted that a notarial act can be executed, did not mean that she was deprived of the possibility of challenging the amount of the debt as she could still file, for example, an application for a stay (or limitation) of enforcement.

23. Ms. Tóth then appealed to the referring court. In support of her appeal, she argued that the clause could lead to an imbalance between her and the respondent because it makes it easier for the latter to exercise its rights while at the same time making it difficult for her to challenge the amount of the debt recorded in the Bank's books.

24. In this context, the referring court indicates, first, that it is unclear regarding the scope of the Annex to the 1993 Directive. Indeed, point 1 of that annex in the Hungarian version refers to the 'object or effect' of the terms whereas other language versions, for example, the German, Polish, Czech or Slovak versions, use the expression 'purpose or effect'. Given that difference in wording, the referring court seeks to ascertain whether, in order for a term to fall within point 1(q) of the Annex to the Directive, it is sufficient that its objective is to reverse the burden of proof.

25. In addition, when a clause satisfies the requirements laid down in point 1(q) of the Annex to the 1993 Directive, the question arises if it is still necessary to examine to what extent the term has given rise to an imbalance to the detriment of the consumer. Indeed, despite claiming to be fully aware that, according to settled case-law of the Court of Justice, the annex to which Article 3(3) of the 1993

Directive refers contains only an indicative and non-exhaustive list of terms which may be regarded as unfair, the referring court notes that in the judgment of 26 April 2012, *Invitel* (C-472/10, EU:C:2012:242), this Court has also declared that 'if the content of the annex does not suffice in itself to establish automatically the unfair nature of a contested term, it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term'.

26. Second, the referring court states that the Kúria (Supreme Court) has held that a clause, similar to the ones at issue in the main proceedings, cannot be considered as an acknowledgement of debt and does not affect the consumer's legal situation as regards the means of enforcing the claim, as the legislation grants him or her the right to launch proceedings for a stay of enforcement or to seek a declaration that the termination has no legal effect. The Kúria (Supreme Court) also stated that a similar clause does not per se put the consumer at any disadvantage with regard to the burden of proof. Indeed, as a lender can take the decision to end the contract on the basis of its own records, it is inherent in such a situation that the burden of proof lies with the consumer. Similarly, the national legislation entitles any lender to ask for a notarial statement, even if the contract with the debtor contains no explicit provision on this point. So, for the Kúria (Supreme Court), it is neither the clause nor the notarial act that changes the burden of proof, making it more onerous for the consumer to defend himself, but rather the rules governing notarial acts with probative force and enforcement clauses.

27. The referring court nonetheless indicates that it still has a doubt whether clause I.4 should nevertheless be treated as falling under point 1(q) of the Annex to the 1993 Directive.

28. It observes, on the one hand, that while that clause is grammatically intelligible, its consequences are not clear for a consumer as it gives the impression that, once the contract has been signed, the execution of the notarial act will serve as irrefutable and reliable proof of any debt that may arise under the agreement in the future. It maintains that all of this has a direct effect on the consumer's decision to exercise his/her rights against the lender.

29. On the other hand, clause I.4 could have negative consequences for the consumer even if, according to the interpretation given by the Kúria (Supreme Court), it is not at the root of the lender's right to commence a direct enforcement action. Indeed, the Bank would be entitled, by invoking Clause I.4, to avoid engaging in fair and equitable negotiations with the debtor since the latter could exercise her/his rights only through costly and lengthy legal proceedings and, while those proceedings are still running, the debtor would be obliged to make the excess payment arising from the unfair terms in order to avoid the consequences of the termination of the contract.

30. Third, the referring court wonders whether clause I.4 should not be declared unfair on the ground of Article 5 of the 1993 Directive. As a matter of fact, according to the judgments of the Kúria (Supreme Court), such a clause does not reverse the burden of proof. However, several national courts) have ruled otherwise in similar cases. As a result of this body of case-law, consumers are not in a position to realise that this apparently clear provision has, in fact, no effect on the burden of proof.

31. Fourth, the referring court notes that, according to the wording of clause I.4, the statement in the notarial act must be drafted on the sole basis of the information recorded by the lender regarding the debtor's performance up to that point. Therefore, that clause could be regarded as entitling the lender to decide unilaterally whether the consumer's obligations have been performed in accordance with the terms of the contract and, consequently, could fall within point 1(m) of the Annex to the 1993 Directive.

32. In those circumstances, the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) has decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must point 1(q) of the Annex to Directive 93/13, as an EU law having the status of a rule of public policy, be interpreted as a general prohibition, making any further analyses unnecessary, that prevents a lender from imposing on a debtor classed as a consumer a contract term in the form of a standard term or a term that has not been individually negotiated, when the purpose or effect of that term is to reverse the burden of proof?

(2) If, pursuant to point 1(q) of the Annex to Directive 93/13, the purpose or effect of the contract term has to be assessed, can the following types of contract term be held to prevent consumers from exercising their rights:

– A term that gives a debtor with the status of a consumer good reason to believe that he/she must perform the contract in its entirety, including all its terms, in the manner and to the extent required by the lender, even when the debtor is convinced that the performance demanded by the lender is not due, either in full or in part;

– A term that has the effect of limiting or excluding the consumer's access to a dispute resolution mechanism based on an equitable negotiation, given that it is sufficient for the lender to invoke this contract term in order for the dispute to be deemed to have been resolved?

(3) If a decision is required as to whether the contract terms listed in the Annex to Directive 93/13 are unfair in light of the criteria established in Article 3(1) of the Directive, is the requirement in Article 5 of the Directive for terms to be drafted in plain, intelligible language satisfied in the case of a contract term which affects decisions by the consumer about performance of the contract, resolution of disputes with the lender through judicial or non-judicial channels, or the exercise of rights, when (although the wording is clear grammatically) the legal effects of the term can be determined only by interpreting national laws on which the courts had not formulated a consistent position at the time the contract was concluded, and on which no consistent position has emerged in subsequent years?

(4) Must point 1(m) of the Annex to Directive 93/13 be interpreted as meaning that a contract term that has not been individually negotiated can also be unfair where it authorises the party contracting with the consumer to determine unilaterally whether the consumer's performance of the contract satisfies the terms of the contract, and when the consumer acknowledges himself to be bound by the term even before the contracting parties have performed any obligations?'

III. Analysis

A. Jurisdiction of the Court and the admissibility of the preliminary reference

33. The Bank argues that the referred questions are hypothetical and, consequently, that the Court has no jurisdiction to answer them. Indeed, contrary to the referring court's assumption in its first, second and fourth questions, it submits that the clause at issue in the main proceedings would not have the effect of reversing the burden of proof, nor would it exclude or restrict the possibility for the consumer to take legal action, nor would it allow the Bank to assess unilaterally whether the consumer has fulfilled his/her contractual obligations. Similarly, contrary to the hypothesis presented in the third question, it contends that national case-law is not in fact divergent as the Kúria (Supreme Court) has since then ruled on the scope of a clause similar to the one at issue in the main proceedings in several recent judgments.

34. In this respect, it should be noted, first, that if the Bank formally challenges the Court's jurisdiction its argument must be understood as questioning the admissibility of the questions asked. [2]

35. Second, the procedure established in Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate. [3] It is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. [4]

36. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling. The Court may, of course, refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted. [5] Yet the fact that one of the parties in the main proceedings disputes the relevance of the question referred for a preliminary ruling for the resolution of the dispute in the main proceedings cannot in itself justify the conclusion that these questions should be declared inadmissible.

37. In the present case, it is not obvious from the presentation of the case made by the referring court that the hypotheses envisaged in its questions do not correspond to the situation at issue in the main proceedings. In these circumstances, I consider that the Court should not rule that these questions are inadmissible. [6]

B. On the substance

1. Preliminary observations

38. As several questions concern the interpretation of point 1(q) of Annex to the 1993 Directive, I consider it necessary first to address the doubts expressed by the national court in its request concerning the wording of the first sentence of that annex.

39. In the present case, it is clear from the 17th recital, as well as from Article 3(3), that its annex is intended to contain a non-exhaustive list of examples of terms that *may* be declared to be unfair under Article 3(1) of the 1993 Directive by reason of their object or effect.

40. Moreover, Article 3(1) defines the notion of an unfair term as referring to any term which has not been individually negotiated and which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Accordingly, in assessing the unfair nature of the term subject to their review, national courts are expected to take into consideration the object or effect of such terms.

2 The Court has jurisdiction to answer a preliminary question referred by a national court, except when the subject matter of the question falls outside its substantive scope of jurisdiction as defined by the first paragraph of Article 267 TFEU, namely the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

3 Judgment of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 16.

4 Judgment of 1 July 2010, *Sbarigia*, C-393/08, EU:C:2010:388, paragraphs 19 to 20. In addition, the Court does not have jurisdiction, pursuant to Article 267 TFEU, to assess the facts and to apply EU law to a particular case. See, for example, judgments of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 104, and of 26 April 2012, *Invitel*, C-472/10, EU:C:2012:242, paragraph 22.

5 Judgment of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 37.

6 The judgments delivered by the Kúria (Supreme Court) which are mentioned by the Bank were all delivered prior to the events in the present proceedings.

41. Finally, the Court has already held that this directive requires Member States 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.[7] This implies that the determining factor is the effects produced by the term in question and not the objective pursued by its author.

42. In these circumstances, I consider that point 1 of the Annex to the 1993 Directive should be read, in any language version, as referring to the 'object or effect' and not to the 'objective or effect' of contractual terms.

43. Second, it should be recalled that, according to the Court's settled case-law, the relevant jurisdiction of the Court extends to the interpretation of the concept of unfair term used in Article 3(1) of the 1993 Directive and in the Annex thereto, together with the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that directive. However, it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case.[8]

2. The first question

44. By its first question, the referring court asks, in essence, whether point 1(q) of the Annex to the 1993 Directive should be interpreted as amounting to a general prohibition in respect of any term which has not been individually negotiated and the purpose or effect of which is to reverse the burden of proof where that burden should, according to the applicable law, naturally rest with the other party.

45. In this regards, it should first be recalled that point 1(q) of the Annex to the 1993 Directive concerns terms which have the object or effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy…, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract'. Any term, therefore, which has the object or effect of unfairly reversing the burden of proof on a consumer falls to be considered under point 1(q) of the Annex to the 1993 Directive.

46. It is, however, clear from the very terms of Article 3(3) of the 1993 Directive that the Annex to that directive contains a list of terms which *may* — and not must — be declared to be unfair.[9] Consequently, as the Court has already held, 'a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may nonetheless be regarded as unfair'.[10] In order to declare a term unfair, the latter must be submitted to the test laid down in Article 3(1) even if, as I will later explain, some features of this test can be presumed to be satisfied if the contractual provision at issue falls within the scope of the Annex.

47. Accordingly, point 1(q) of the Annex cannot, as a matter of EU law, be regarded as prescribing a general prohibition of clauses falling under one of the categories set out therein. It is merely an example of a term which *may* be declared to be unfair.

48. It should be noted, however, that Article 8 of the 1993 Directive grants Member States the right to adopt or retain more stringent provisions to ensure a higher degree of protection for the consumer.

7 Judgment of 26 April 2012, *Invitel*, C-472/10, EU:C:2012:242, paragraph 34 and case-law cited.

8 Order of 14 November 2013, *Banco Popular Español and Banco de Valencia*, C-537/12 and C-116/13, EU:C:2013:759, paragraph 63.

9 The use of the verb 'may' seems more decisive in this regard than the reference made in the 17th recital or in Article 3(3) of the 1993 Directive to the 'indicative' nature of that annex. Indeed, and as the Commission has underlined in its Explanatory memorandum of the Re-examined proposal for a Council directive on unfair terms in consumer contracts (COM(93) 11 final) this adjective is ambiguous. Indeed, it could indicate either that the list contained in the Annex to this directive is either incomplete or that it has no particular probative force.

10 Judgment of 7 May 2002, C*ommission* v *Sweden*, C-478/99, EU:C:2002:281, paragraph 20.

49. Therefore, as the Commission pointed out in its written observations — which its representative also confirmed at the oral hearing — the tasks assigned to national courts depend on whether the Member State concerned has decided by appropriate legislative measures to make the list of terms contained in point 1(q) of the Annex to the 1993 Directive legally binding, rather than merely purely indicative.

50. In the situation where the Member State has not taken this step so that national legislation does not deem the terms falling within the category referred to in point 1(q) of the Annex to the 1993 Directive to be unfair, national courts must examine, in the light of the definition of the concept of unfair term given in Article 3(1) and the clarifications made in Article 4(1) of that directive as regards the elements to be taken into account in this assessment, whether the terms subject to their review are to be regarded as unfair. [11]

51. By contrast, in the situation where the Member State concerned has in fact decided that terms falling within the category referred to in point 1(q) of the Annex to the 1993 Directive are deemed to be unfair, national courts are accordingly required to declare any term to be unfair which has the object or effect of reversing the burden of proof on consumers without having to apply the test laid down in Article 3(1). It must be stressed, however, that, when a Member State has taken such steps, it is not point 1(q) of the Annex to the 1993 Directive which makes any further analysis pursuant to Article 3(1) unnecessary, but rather the national legislation in question.

52. Regarding the main proceedings, as all parties confirmed at the oral hearing and as, indeed, the referring court has also stated, Hungary has revised its Civil Code so as to avail of the option contained in Article 8 of the 1993 Directive to provide for higher standards of consumer protection than that required by the terms of the directive itself. However, since Hungary was not required to take such step, it must be found that the obligation imposed on its national courts to declare contractual clauses covered by point 1(q) of the Annex automatically void, is *a* matter of *national law* and not of EU law.

53. Therefore, I believe that, as matter of EU law, the answer to the first question should be in the negative. Simply put, the answer must be that point 1(q) of the Annex to the 1993 Directive cannot be interpreted as amounting to a general prohibition on any contractual clause falling within its scope.

54. Despite the fact that the referring court has perfectly well summarised the Court's case-law on this issue, that court has nonetheless expressed the need to ask the Court about the effect of the Annex to Directive 93/13. In these circumstances I consider, therefore, that the Court may find it useful to take this occasion to clarify certain aspects of the test to be applied to determine under which conditions a clause reversing the burden of proof should be considered unfair pursuant to Article 3(1) of the 1993 Directive.

55. As a matter of fact, the Court has previously ruled that Article 3(1) of the 1993 Directive lays down two criteria to define the notion of unfair terms, namely, on the one hand, the 'absence of good faith' and, on the other hand, the 'existence of a significant imbalance, to the detriment of the consumer, between the rights and obligations of the parties under the contract'. According to case-law, the first condition would involve examining whether a seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations, while the second would require examining whether the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. [12]

11 Judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309, paragraph 33.

12 See judgments of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraphs 68 and 69; of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 58 to 60; and of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 56.

56. For my part, however, I do not think that these two criteria should be assessed separately.

57. First, from the point of view of the wording of Article 3(1) of the 1993 Directive, it should be noted that the words 'good faith' and those of 'significant imbalance' are grammatically linked by the preposition 'contrary to'. The use of this preposition does not imply that the situation described constitutes a separate condition, but rather serves to highlight the fact that the creation of a significant imbalance between parties' rights and obligations by the contract is the opposite of the good faith normally expected. It is, accordingly, clear that a term contained in a consumer contract which has not been individually negotiated can only be regarded as unfair for the purposes of Article 3(1) of the 1993 Directive if:

– it creates a significant imbalance in the parties' rights and obligations arising under the contract, and

– this imbalance is to the detriment of the consumer.

58. Accordingly, since in the legal systems which use this precept, good faith is always presumed, the expression 'contrary to the requirement of good faith' should be understood as referring simply to the situation that would have prevailed in the absence of a significant imbalance and *not* as constituting a separate condition *in its own right*. Put another way, the words 'contrary to the requirements of good faith' are essentially descriptive of the state of affairs which is brought about where there is, in fact, a significant imbalance in the parties' rights and obligations such as to give rise to detriment of the consumer.

59. Second, as regards the objectives pursued by the 1993 Directive, the 16th recital explains that the requirement of good faith implies an overall evaluation of the different interests in the light, in particular, of the strength of the bargaining positions of the parties. This demonstrates again that it was not the intention of the EU legislature to draw a clear line between these two concepts, still less to establish a principle of good faith as an overarching and independent test which is divorced from the other specific provisions of the 1993 Directive.

60. Third, from a systemic perspective, as some authors have pointed out, a term causing a significant imbalance in the parties' rights and obligations is in itself contrary to the principle of good faith.[13]

61. Within this context, one may also assume that the reference made in Article 3(1) of the 1993 Directive of the existence of 'significant imbalance' in relation to the notion of 'good faith' may be explained by the absence of a general principle of good faith in the common law traditions as reflected by English and Irish law.[14] In addition, by making the requirement of good faith dependent on the existence of a significant imbalance, Article 3(1) of the 1993 Directive serves to give an objective definition to what might otherwise amount to divergent understandings of the principle of good faith even in those Member States which follow the civil law tradition. The 1993 Directive may thus be said to reconcile in this respect the various existing approaches among Member States to contractual relationships.

13 See, for example, Tenreiro, M., 'The Community Directive on Unfair Terms and National Legal Systems — The Principle of Good Faith and Remedies for Unfair Terms' (1995) 3 *European Review of Private Law*, Issue 2, 273 at 279.

14 For English law, see, for example, *Globe Motors Inc v TRW Lucas Variety Electric Steering Ltd* [2016] EWCA Civ 396, and for Irish law, *Flynn &. Benray* v *Breccia* & *McAteer* [2017] IECA 7, [2017] 1 ILRM 369, *Morrissey* v *Irish Bank Resolution Corporation* [2017] IECA 162.

62. In view of the foregoing, I consider therefore, despite the reference made in Article 3(1) of the 1993 Directive to good faith, that the unfairness of a term can be inferred from the single circumstance that such a term produces a significant imbalance between the contractual rights of the parties, thereby causing detriment to the consumer. This is in essence the sole test of Article 3(1) of the 1993 Directive and it is not necessary to establish, in addition, that this clause was inserted as a result of the absence of good faith.

63. The second clarification which could usefully be made concerns the legal nature of the Annex. Although the fact that a particular term is contained in the Annex does not *in itself* suffice to establish automatically the unfair nature of a contested term, the Court has held that 'it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term'. [15]

64. The reference here to an 'essential element' is, perhaps, a matter which might usefully be clarified because I do not think that these words were intended or event are to be understood absolutely literally.

65. First, it may be observed that, while the Court has made clear that the content of the Annex is not sufficient 'in itself' and does not 'automatically' establish for the purposes of EU law the unfair nature of a contested contractual term, the Court has also never expressly excluded the possibility that the Annex may at least be partially or even presumptively indicative of the unfairness of a particular term.

66. Second, each category of terms mentioned in the Annex refers to situations in which the existence of a significant imbalance between parties' rights and obligations is so obvious that it is difficult to see how it might be otherwise.

67. Consequently, I consider that the statement by the Court to the effect that the Annex to the 1993 Directive is 'an essential element on which the competent court may base its assessment as to the unfair nature of that term' must be understood in the sense that, when a term meets the criteria for falling under one of the categories mentioned in the Annex, national courts may presume that this term creates an imbalance. [16] Given, however, that Article 3(1) of the 1993 Directive refers to situations of imbalances which, first, are significant, second, are detrimental to consumers and, third, concern parties' rights and obligations arising under the contract, national courts are nonetheless required to see to it that these three other criteria are also met before any conclusion can be reached as to the unfairness of the term in question. [17]

68. In summary, therefore, so far as Question 1 is concerned, I am of the view that point 1(q) of the Annex to the 1993 Directive does not amount to a general prohibition in respect of any contractual term which has not been individually negotiated and the purpose or effect of which is to reverse the burden of proof where that burden should, according to the applicable law, naturally rest with the other party. On the other hand, Article 3(1) of the 1993 Directive precludes as unfair a contractual term which has the effect of limiting or excluding the consumer's access to a dispute resolution mechanism in circumstances where, should the national court so find, the lender has merely to invoke this term in order for the dispute to be deemed to have been resolved.

15 Judgments of 26 April 2012, *Invitel*, C-472/10, EU:C:2012:242, paragraph 26, and of 30 May 2013, *Asbeek Brusse and de Man Garabito* C-488/11, EU:C:2013:341, paragraph 55.

16 This is also consistent with the word 'object' used in the first sentence of the Annex which implies that in some instances certain inferences as to the unbalanced character of a particular term may be drawn simply from its content.

17 This conclusion is neither contradicted by the wording of Article 3(3) of the 1993 Directive, nor by that of the 17th recital. On the one hand, Article 3(3) does not specify why the categories of terms mentioned in the Annex should not automatically be considered unfair. On the other hand, while it follows from the 17th recital of the 1993 Directive that the annexed list of terms is of indicative value because the directive provides for only a minimum level of harmonisation, such a circumstance does not exclude that the EU legislature has nevertheless considered that the minimum nature of this harmonisation should entail the obligation for Member States to consider that the categories of clauses referred to in the Annex are presumed to create an imbalance between parties' rights and obligations.

3. The second question

69. By its second question, the referring court asks whether in a case in which, pursuant to point 1(q) of the Annex to the 1993 Directive, the purpose or effect of a contract term falls to be assessed, the following types of term must be regarded as ones which prevent consumers from exercising their rights:

– a term that gives a debtor with consumer status a good reason to believe that he/she must perform the contract in its entirety, including all its terms, in the manner and to the extent required by the lender, even when the debtor is convinced that the performance demanded by the lender is not due;

– a term that has the effect of limiting or excluding the consumer's access to a dispute resolution mechanism based on equitable negotiation, given that it is sufficient for the lender to invoke this contract term in order for the dispute to be deemed to have been resolved.

70. In the light of the answer to the first question, I believe that this second question should be understood as relating to the interpretation of Article 3(1) of the 1993 Directive and as seeking to ascertain whether a term falling within one of the two hypotheses mentioned by the referring court must be regarded as unfair. I propose, for reasons of convenience, to commence my analysis by first examining the second hypothesis.

(a) The second hypothesis: consumers are restricted in their access to the court system

71. Article 3(1) of the 1993 Directive provides that a 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'.

72. As mentioned above, in order to ascertain whether, under this article, a term causes a 'significant imbalance', national courts must compare parties' rights and obligations arising under the term at issue with those which would prevail without it.[18]

73. Regarding parties' rights and obligations arising under national law, I note that, as laid down in Article 7(1) of the 1993 Directive, Member States must provide procedural rules that ensure the observance of the individual rights deriving from the 1993 Directive to prevent the continued use of unfair terms. This implies the requirement to grant consumers a right to an effective remedy, a requirement which is also enshrined in Article 47 of the Charter of Fundamental Rights.[19]

74. If the contractual term at issue in these proceedings has the effect of permitting lenders to end any litigation by deeming the dispute to have been resolved, this would in substance preclude debtors from commencing proceedings of their own. This in turn would deprive debtors of their right to an effective remedy. Such a clause would manifestly create a profound imbalance in the ordinary contractual relationship between the parties to the clear detriment of the consumer. It would, accordingly, have to be regarded as unfair within the meaning of Article 3(1) of the 1993 Directive.

18 Judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 68.

19 Judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 59.

75. In the present case, however, the information contained in the case file before the Court indicates that the Kúria (Supreme Court) has held in a series of judicial decisions that similar clauses merely refer to the existence of a national notarial enforcement procedure and that, therefore, such clauses do not in any way seek to foreclose the right of the borrower to commence the appropriate legal proceedings.

76. In this context, before examining whether a term of this nature can be declared unfair, one must first ascertain whether or not Article 1(2) of the 1993 Directive, according to which any contractual terms reflecting mandatory statutory provision shall not be subject to the provisions of this directive, applies.

77. In this respect, I consider that, since the Bank is not obliged to employ the national notarial enforcement procedure, such a clause cannot be regarded as mandatory for the purposes of the exclusionary provisions of Article 1(2) of the 1993 Directive.

78. However, as I have already observed, the fairness of a contractual term must be assessed by comparing rights and obligations established by the contract with those which would have prevailed in its absence. Accordingly, a clause which merely draws the attention of the customer to the existence of a legislative provision does not alter his/her situation to his/her detriment. Even in the absence of such a contractual provision, the other party would have been entitled in any event to use the legislative provision in question, assuming, of course, that it was, in fact, applicable.

79. In the present case, the disputed contractual provision seems to refer simply to the existence of a national notarial enforcement procedure, albeit that this is ultimately a matter for the national court to ascertain. If, however, this is in fact that case, therefore, for all the reasons I have just given, such a clause cannot be considered to be unfair.

(b) The first hypothesis: consumers are led to believe that the contract must be performed as required by the lender

80. The first hypothesis mentioned by the referring court in the second question refers in essence to a contractual term which, viewed objectively, conveys the impression to a consumer that he must perform the contract in the manner and to the extent required by the lender, even if, in essence, the performance demanded is not due, either in full or in part.

81. As the referring court explains in its request, the hypothesis considered here refers to a contractual term which, in itself, is perfectly clear but which nonetheless gives the impression to a consumer that, once the contract has been formalised in a notarial instrument, the latter will serve as irrefutable and conclusive proof of any debt that may arise under the agreement in the future. In other words, the issue really is whether a contractual provision may be considered to be unfair *merely* because of the *impression* which an otherwise grammatically intelligible clause is liable to create in the minds of the average consumer.

82. It would, perhaps, be naive not to suppose that contract drafters may endeavour to take advantage of information asymmetries between them and consumers in a number of ways. One obvious and well known stratagem is to seek to conceal from the consumer the precise legal effects of a particular term. The second one, which seems to be implied by the referring court, arises when the drafter seeks to induce consumers to behave in a certain way when, from a legal point of view, such behaviour is not in fact required. In other words, while the information contained in the clause is legally accurate, it is

nevertheless presented in a way that is apt to lead the consumer to act differently.[20]

83. Obviously, in the case of the first stratagem (i.e., that of concealment) which I have already mentioned, the clause at issue falls to be examined by reference to Article 3(1) of the 1993 Directive, as national courts must assess the real legal effect produced by the clause and determine whether such a clause creates a significant imbalance between parties' rights and obligations to the detriment of the consumer.

84. Regarding the second stratagem, it should be recalled that the Annex to the 1993 Directive is to be interpreted as not referring to the possible objectives which may have been in the mind of the drafters of such a contractual term.[21] However, since the assessment of the fairness of a term is based, under Article 3(1) of that directive, on the balance of parties' rights and obligations, what matters only is the legal effect produced by such a term. If such a clause only has the effect of inducing consumers to believe that they must act in a way which is not legally required, then the possible unfairness of this term is not covered by the 1993 Directive at all.

85. Besides, it must be stressed that the wording of Article 5 does not expressly state that the fact that a term is not drafted in plain, intelligible language constitutes a separate ground to declare that term unfair. This provision simply provides that in the event that a contractual term is not drafted in 'plain, intelligible language', then 'where there is doubt about the meaning of a term', the interpretation which is the most favourable to the consumer shall prevail.

86. In addition, it flows from the 16th recital and from Article 3(1) of the 1993 Directive that there is only one test of an unfair contract term, namely, the one provided for in Article 3(1) itself. Accordingly, Article 5 does not constitute an alternative test of unfairness: it rather simply provides an interpretative rule in order to determine the legal effect produced by such terms. It follows in turn that where a particular term is not drafted in plain or intelligible language, then recourse to the interpretative rule in Article 5 may serve to mitigate any potentially harsh or unfair interpretations of that provision. It is only when, even as interpreted by reference to Article 5, the contractual term still creates a contractual imbalance to the detriment of the consumer that it might be considered as unfair. In that situation, however, the unfairness will be measured by reference to the test of unfairness contained in Article 3(1) and not by reference to the interpretative rule in Article 5.

87. It is true that the judgment of 28 July 2016, *Verein für Konsumenteninformation* (C-191/15, EU:C:2016:612, paragraph 68), has, perhaps cast doubt, however, on the question of whether a term may be declared unfair simply because it has not been drafted in plain and intelligible language. Indeed, the Court held that the unfairness of such a term may result from a formulation that does not comply with the requirement of being drafted in plain and intelligible language set out in Article 5 of the 1993 Directive. The Court accordingly deduced from it that a pre-formulated term on the choice of the applicable law designating the law of the Member State in which the seller or supplier is established was unfair. It did so not by reference to the legal effects of this clause, but because that term was misleading for the consumers, as they were not informed of the existence of certain mandatory statutory provisions.[22]

20 For example, the repetition of some expressions or the use of some sophisticated formulation, although grammatically correct and legally accurate, can sometimes give consumers the impression that they cannot contest the validity of a clause, even if they are in fact legally entitled to do so. Requiring, moreover, that consumers must declare before a notary that they were aware of each and every clause of the loan, incorporating this statement into an authentic instrument and then making several references to the existence of a notarial enforcement procedure in the mortgage documentation might perhaps, when combined with some other elements, have the effect of dissuading consumers from exercising their rights. This might especially be so if we take into consideration the common perceptions in some Member States (such as Hungary) where notarial enforcement procedure is commonly used and where a notarial instrument is perceived as an irrevocable commitment.

21 See the preliminary observations.

22 Paragraph 71.

88. It may be noted, however, that, before reaching this conclusion, the Court recalled, in paragraph 67 of that judgment, that, in order to declare a term unfair, the latter needs to create a significant imbalance in the rights and obligations of the parties, which tends to show that the Court's intention was not to create a second test of unfairness.

89. In any case, I consider that this judgment has perhaps somewhat overstated the scope of the 'transparency requirement' identified by the Court[23] in its previous case-law.[24] In these circumstances, I consider, with respect, that the Court should revert to its previous approach, according to which Article 5 of the 1993 Directive does not establish an autonomous test of unfairness which is distinct from that contained in Article 3(1). I therefore believe that the Court should rather state that Article 5 instead simply articulates an interpretative rule providing that where the relevant provisions of the contract are not drafted in 'plain, intelligible language', then where there is doubt about the meaning of the term in question, 'the interpretation most favourable to the consumer shall prevail'. It is only when even after the application of the interpretative rule contained in Article 5 that the clause still produces a significant imbalance between the parties' that the test of unfairness contained in Article 3(1) comes into play.[25]

90. The referring court may, however, wish to give some consideration to the EU legislation on unfair business-to-consumer commercial practices which contains provisions dealing specifically with misleading information and in particular, Article 6(1)(g) and Article 7(2) of Directive 2005/29. Since this directive was not mentioned by the referring court and as its relevance has not been discussed by the parties, I do not propose to elaborate further on this issue.

91. It follows, therefore, that a term cannot be declared unfair by virtue of the 1993 Directive *simply* because the impression may be conveyed to the consumer that the performance of a certain contractual obligation is required when, measured by reference to the actual language of the contractual term, that performance is not in fact required. In view of the test of unfairness contained in Article 3(1), it is necessary to show that the term creates a significant imbalance between parties' rights and obligations, which, in the case at issue, operated to the detriment of the consumer.

4. The third question

92. By its third question, the referring court asks whether Article 5 of the 1993 Directive must be interpreted in the sense that a term must be considered to have been written in plain and intelligible language when its legal effects can be determined only by interpreting national laws on which the courts had not formulated a consistent position at the time the contract was concluded and in respect of which no consistent position has emerged in the subsequent years, even if the wording used is otherwise intelligible and clear.

23 I believe that this transparency requirement only concerns Article 4(2) according to which the assessment of the unfair nature of the terms does not relate to the definition of the main subject matter of the contract in so far as those terms are in plain, intelligible language. Indeed, the rationale for the requirement of intelligibility laid down in Article 4(2) is that, in so far as such terms concern the main subject matter of the contract, consumers are expected to consent to the contract in consideration of its object. Thus, unlike the other clauses of an adhesion contract which consumers do not read, terms related to the main subject matter of the contract are not likely to catch the consumer off guard. Therefore, if the requirement of intelligibility in Article 4(2) has the same scope as that referred to in Article 5 of that directive, the consequences of its breach are not the same, as the objective pursued by these two provisions is not identical. In the first case, this objective is to check that the presumption just recalled is correct (and thus that the consumer was indeed in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from the main subject matter of the contract) whereas, for Article 5, as I believe, the objective is to determine, in view of the test enshrined in Article 3(2), how a term must be interpreted.

24 See judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 73, and of 20 September 2018, *Danko and Danková*, C-448/17, EU:C:2018:745, paragraph 61.

25 See, for example, judgment of 9 July 2015, *Bucura*, C-348/14, not published, EU:C:2015:447, paragraph 64.

93. As I have already noted, Article 5 of the 1993 Directive provides that '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'. This implies that the wording of a clause should clearly articulate the legal effects brought about by such a clause. Any assessment, therefore, of whether or not a term is intelligible should be based, in the first instance at least, on the wording in question.

94. In the present case, however, the referring court refers to the situation of a term where the wording is clear, but whose legal meaning has instead been obscured by the existence of conflicting case-law concerning the interpretation of the clause in question.

95. Therefore, the question must be understood as relating to the existence of a possible obligation to inform the consumer in respect of this subject of the conflicting case-law, over and above the Article 5 obligation to draft terms in plain and intelligible language. In its judgment of 28 July 2016, *Verein für Konsumenteninformation* (C-191/15, EU:C:2016:612, paragraph 69), the Court held, in relation to a clause stipulating that the contract is governed by the law of the Member State in which the seller or supplier is established, that 'where the effects of a term are specified by mandatory statutory provisions, it is essential that the seller or supplier informs the consumer of those provisions'.

96. It may, however, be observed that the 1993 Directive contains no reference to any such duty. On the contrary, the existence of such a duty is contradicted by the wording of Article 5, which implies that the essential information about the contract must be contained in the contract itself.

97. Moreover, and irrespective of any position which the Court may adopt in respect of the question of whether an autonomous test of the unfairness is enshrined in Article 5, for my part I doubt if Article 5 could properly be interpreted as imposing any wider obligation on the contract drafter to alert consumers regarding the actual or potential impact of court rulings in respect of the interpretation of these mandatory statutory provisions. In this context one might first observe that the fifth and sixth recitals of the directive expressly refer to the fact that, 'generally speaking, consumers do not know the rules of law which, in Member States *other than their own*, govern contracts for the sale of goods or services'.[26] This in itself suggests that the Directive proceeds at least tacitly on the basis that whereas consumers are generally not familiar with *foreign* law, they must be taken to have sufficient knowledge of their own legal system so far as the application of consumer contracts is concerned.

98. Second, if Article 5 of the 1993 Directive had this meaning, it would potentially place a considerable, and, indeed, an uncertain burden on the supplier of the goods or services in question. How, one might ask, could the contract drafter be expected to summarise or explain the legal consequences of a term which has been the subject of a series of potentially conflicting or inconsistent judicial decisions? Such an obligation might be especially onerous in common law systems where much (admittedly not all) of contract law rests not on the provisions of a general code (as is the case in the vast majority of the Member States) or even statute law, but rather by reference to an understanding of a series of judicial decisions. Yet even in the case of civil law systems where judicial decisions are perhaps not quite as central to an understanding of contract law as in the case of the common law systems, such an obligation might well nonetheless prove to be a quite difficult to fulfil.

99. Third, any such interpretation of Article 5 of the 1993 Directive would in practice be unworkable. After all, the 20th recital of the directive envisages that 'the consumer should actually be given an opportunity to examine all the terms …'. One might ask: is it to be seriously suggested as a result of the decision in *Verein für Konsumenteninformation* that consumers be given a summary of judicial decisions by potential vendors prior to the conclusion of a consumer contract? Even if this obligation

26 Emphasis supplied.

were to be confined to major consumer purchases [27] — such as, as in the present case, the execution of a mortgage in respect of the purchase of a house — the impatience (not to speak of bemusement) which the average consumer might be expected to exhibit in the face of what might well amount to a seminar in basic contract law given by unqualified personnel can only be imagined. In any event, if such a far reaching obligation were to be imposed by the directive, one would have expected that this would have been stated in very clear words.

100. I cannot help thinking, therefore, that it may be necessary for Court to re-visit and, indeed, revise some of the language contained in paragraph 69 of *Verein für Konsumenteninformation*.

101. It is, admittedly, necessary to draw attention to the facts of this decision. The case concerned an action brought by a consumer group challenging the validity of certain terms contained in standard form electronic sales contracts which the large multinational online retail company, Amazon, had concluded with Austrian consumers. Amazon had no registered office or other establishment in Austria. One of those contractual provisions had simply stated that the contract was governed by Luxembourg law. There was, for example, no reference at all to the relevant provisions of the Rome I Regulation [28] which are designed to protect the consumer in respect of choice of law clauses. Nor did the clause even indicate that the statutory rights afforded to consumers by Austrian law remained unaffected by the choice of Luxembourg law.

102. The conclusion that such a clause was unfair is therefore scarcely surprising. After all, if there is one fundamental *leitmotif* of the scheme of protection provided for by the Brussels and Rome Regulations, it is that consumers should be protected against the operation of contractual clauses designed to remove them either from the jurisdictions or systems of law with which they are familiar. Viewed thus, a contractual clause providing for the application of Luxembourg law to Austrian consumers without reference to the protection contained in the Rome I Regulation in respect of such a choice of law represents almost a textbook example of an unfair term contained in a consumer contract.

103. I think, therefore, that the comments of the Court made at paragraph 69 of its decision in *Verein für Konsumenteninformation* must be viewed in the light of those particular circumstances and against the general background of the choice of law provisions — and the protection for consumers which is thereby entailed — which are contained in Articles 4, 6 and 9 of the Rome I Regulation.

104. If, however, the comments of the Court are to be understood as implying a general duty on the part of a seller or supplier to inform a consumer of the existence of mandatory statutory provisions, then I fear that such a statement cannot, with respect, be supported. While this Court does not formally adhere to a system of precedent, nevertheless, given the importance of the decision in *Verein für Konsumententinformation*, it would, I suggest, be desirable that these comments should at the very least be clarified or perhaps even revised.

105. In accordance with this view, it must be recalled that the contract law of all the Member States contains mandatory statutory provisions, many of which are expressly designed to protect consumers. This is certainly true of the civil law systems to which the vast majority of the Member States adhere, as their domestic codes are replete with provisions of this nature. Yet this is also true of the common law systems. While, as I have already noted, large parts of contract law are derived in common law systems from judicial decisions, there are nonetheless many important examples of where mandatory provisions of this kind have been imposed by statute.

27 A distinction which, in any event, is not drawn by the directive itself.

28 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

106. Accordingly, the contract laws of the Member States all contain a wide range of mandatory provisions, ranging, for example, from implied terms as to the fitness for purpose of the goods and services supplied on the one hand to special rules concerning the transfer of immovable property on the other. It could not therefore be realistically suggested that consumers need to be informed by the seller or the supplier of each and every such mandatory statutory provision prior to the conclusion of a contract. Since, the decision in *Verein für Konsumententinformation* is, admittedly, based on the idea that consumers should actually be given an opportunity to examine all the contractual terms in order to be able to influence their substance,[29] it must be assumed that the Court did not require that all applicable mandatory statutory provisions need to be brought to the attention of the consumer, but rather only those which have direct influence on his/her consent.

107. In these circumstances, I suggest that, first, the duty of information set out by the Court in the judgment in *Verein für Konsumenteninformation* should be understood as limited to the particular hypothesis referred to in that case, namely, that of a term governing the applicable law, the apparently broad language contained in paragraph 69 of the judgment notwithstanding. Such an understanding of the judgment would also be consistent with the fifth and sixth recitals of the 1993 Directive which speak of the need to safeguard consumers who are not generally aware of the law in respect of jurisdictions other than their own.

108. Second, I believe that, one way or another, it would be helpful if the Court were to clarify or even revise the language of paragraph 69 of the judgment in *Verein für Konsumenteninformation*. In that regard I suggest that the Court should hold that, absent the special circumstances of a foreign choice of law clause such as was at issue in that case, there is no general duty imposed upon vendors or suppliers of goods or services to draw the attention of customers to the existence of mandatory statutory provisions of this nature prior to the execution of the contract.

109. Regarding the question referred, I consider that the existence of any duty to provide information should result from Directive 2005/29 rather than the 1993 Directive and that such a duty should only relate to key information.[30] However, that duty should not go so far as to include an outline of the existing case-law. It follows in turn that, in any case, the existence of conflicting case-law is not in itself sufficient to establish that a contractual term which does not refer to that case-law is unintelligible for the purposes of Article 5 of the 1993 Directive.

5. The fourth question

110. By its fourth question, the referring court asks in essence whether point 1(m) of the Annex to the 1993 Directive should be interpreted as applying to a contractual term that has not been individually negotiated where it authorises the party entering into a contract with the consumer to determine unilaterally whether the consumer's performance of the contract satisfies the terms of the contract, even before the contracting parties have performed any obligations.

111. In this respect, it should be recalled that point 1(m) of the Annex to the 1993 Directive refers to terms which have the object or effect of giving the seller or supplier the right to determine, inter alia, whether 'the goods or services' supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract. It is, however, clear from the use of the words 'goods or services' supplied that point 1(m) of the Annex does not refer to *all* the contractual obligations arising under the contract, but rather only to those which relate to the question of

29 See paragraphs 63 and 68.

30 See, by analogy, judgment of 7 September 2016, *Deroo-Blanquart*, C-310/15, EU:C:2016:633, paragraph 48.

whether the goods or services concerned have been supplied in conformity with the contract. Indeed, if it had been intended that point 1(m) should apply to all and any obligations arising under the contract, words other than those of 'goods and service' would presumably have been used by the EU legislature.

112. Accordingly, therefore, a term which 'authorises the party contracting with the consumer to determine unilaterally whether the consumer's performance of the contract satisfies the terms of the contract' does not, as such, fall under point 1(m) of the Annex to the 1993 Directive, although it might in certain circumstances amount to an unfair contract term by virtue of the provisions of Article 3(1) of that directive by reason of the fact that almost by definition it creates a significant imbalance in the parties' rights and obligations arising under the contract

113. To repeat, therefore, point 1(m) applies only to clauses which give the seller or supplier the exclusive right to determine whether the *goods or services* supplied are in conformity with the contract: it does not cover the performance of the contract generally.

IV. Conclusion

114. In the light of the foregoing consideration, I propose that the Court answer the questions asked by the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary) as follows:

(1) Point 1(q) of the Annex to the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts is to be interpreted as meaning that it does not amount to a general prohibition in respect of any contractual term which has not been individually negotiated and the purpose or effect of which is to reverse the burden of proof where that burden should, according to the applicable law, naturally rest with the other party.

(2) Article 3(1) of Directive 93/13 is to be interpreted as precluding as unfair a contractual term which has the effect of limiting or excluding the consumer's access to a dispute resolution mechanism. On the contrary, a term which, however, gives the consumer good reason to believe that he/she must perform the contract in its entirety in the manner and to the extent required by the lender even if this is disputed by the consumer is not an unfair contract term for the purposes of Article 3(1) of Directive 93/13.

(3) Article 5 of Directive 93/13 is to be interpreted as meaning that the absence of a consistent position among national courts concerning the interpretation of a specific standard term is not sufficient, by itself, to enable the conclusion to be drawn that this term has not been drafted in plain and intelligible language within the meaning of that provision.

(4) Point 1(m) of the Annex to Directive 93/13 is to be interpreted as not being applicable to a contract term which has not been individually negotiated and which authorises the party contracting with the consumer to determine unilaterally whether the consumer's performance of the contract satisfies the terms of the contract. In certain circumstances, however, a clause of this kind might be held to be in breach of the provisions of Article 3(1) of the directive.