ORDER OF THE COURT (Eighth Chamber)

16 November 2010 *

In Case C-76/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Krajský súd v Prešove (Slovakia), made by decision of 19 January 2010, received at the Court on 9 February 2010, in the proceedings

Pohotovosť s. r. o.

v

Iveta Korčkovská,

* Language of the case: Slovakian.

THE COURT (Eighth Chamber),

composed of L. Bay Larsen, Acting for the President of the Eighth Chamber, C. Toader (Rapporteur) and A. Prechal, Judges,

Advocate General: N. Jääskinen,
Registrar: A. Calot Escobar,

the Court proposing to give its decision by reasoned order pursuant to the first subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling relates to the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), read in conjunction with the European Union rules applicable to consumer credit contracts.

2 The reference has been made in the course of proceedings between Pohotovosť s. r. o. ('Pohotovos') and Ms Korčkovská concerning the enforcement of an arbitration award ordering her, under the provisions of a credit agreement for the sum of SKK 20 000 (EUR 663.88) concluded between those parties, to pay the company the sum of SKK 48 820 (EUR 1 620.53) plus default interest and costs.

Legal context

European Union legislation

Directive 87/102/EEC

3 The twenty-fifth recital in the preamble to Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48), as amended by Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 17, 'Directive 87/102') reads as follows:

'Whereas, since this Directive provides for a certain degree of approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit and for a certain level of consumer protection, Member States should

not be prevented from retaining or adopting more stringent measures to protect the consumer, with due regard for their obligations under the Treaty.'

4 Article 1 of Directive 87/102 provides:

'1. This Directive applies to credit agreements.

2. For the purpose of this Directive:

(a) "consumer" means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession;

(b) "creditor" means a natural or legal person who grants credit in the course of his trade, business or profession, or a group of such persons;

(c) "credit agreement" means an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation.

…

(d) "total cost of the credit to the consumer" means all the costs, including interest and other charges, which the consumer has to pay for the credit;

(e) "annual percentage rate of charge" means the total cost of the credit to the consumer expressed as an annual percentage of the amount of the credit granted and calculated in accordance with Article 1a.'

5 Article 1a of that directive provides:

'1. (a) The annual percentage rate of charge, which shall be that equivalent, on an annual basis, to the present value of all commitments (loans, repayments and charges), future or existing, agreed by the creditor and the borrower, shall be calculated in accordance with the mathematical formula set out in Annex II.

(b) Four examples of the method of calculation are given in Annex III, by way of illustration.

2. For the purpose of calculating the annual percentage rate of charge, the "total cost of the credit to the consumer" as defined in Article 1(2)(d) shall be determined, with the exception of the following charges:

(i) charges payable by the borrower for non-compliance with any of his commitments laid down in the credit agreement;

...

(iii) charges for the transfer of funds and charges for keeping an account intended to receive payments towards the reimbursement of the credit, the payment of interest and other charges except where the consumer does not have reasonable freedom of choice in the matter and where such charges are abnormally high; this provision shall not, however, apply to charges for collection of such reimbursements or payments, whether made in cash or otherwise;

…

4. (a) The annual percentage rate of charge shall be calculated at the time the credit contract is concluded, without prejudice to the provisions of Article 3 concerning advertisements and special offers.

(b) The calculation shall be made on the assumption that the credit contract is valid for the period agreed and that the creditor and the consumer fulfil their obligations under the terms and by the dates agreed.

6. In the case of credit contracts containing clauses allowing variations in the rate of interest and the amount or level of other charges contained in the annual percentage rate of charge but unquantifiable at the time when it is calculated, the annual percentage rate of charge shall be calculated on the assumption that interest and other charges remain fixed and will apply until the end of the credit contract.

…'

6 Article 4 of Directive 87/102 provides:

‘1. Credit agreements shall be made in writing. The consumer shall receive a copy of the written agreement.

2. The written agreement shall include:

(a) a statement of the annual percentage rate of charge;

(b) a statement of the conditions under which the annual percentage rate of charge may be amended;

(c) a statement of the amount, number and frequency or dates of the payments which the consumer must make to repay the credit, as well as of the payments for interest and other charges; the total amount of these payments should also be indicated where possible;

(d) a statement of the cost items referred to in Article 1a(2) with the exception of expenditure related to the breach of contractual obligations which were not included in the calculation of the annual percentage rate of charge but which have to be paid by the consumer in given circumstances, together with a statement identifying such circumstances. Where the exact amount of those items is known, that sum is to be indicated; if that is not the case, either a method of calculation or as accurate an estimate as possible is to be provided where possible.

In cases where it is not possible to state the annual percentage rate of charge, the consumer shall be provided with adequate information in the written agreement. This information shall at least include the information provided for in the second indent of Article 6(1).

…'

7 Article 6(1) and (2) of Directive 87/102 provides:

'1. Notwithstanding the exclusion provided for in Article 2(1)(e), where there is an agreement between a credit institution or financial institution and a consumer for the granting of credit in the form of an advance on a current account, other than on credit card accounts, the consumer shall be informed at the time or before the agreement is concluded:

— of the credit limit, if any,

— of the annual rate of interest and the charges applicable from the time the agreement is concluded and the conditions under which these may be amended,

— of the procedure for terminating the agreement.

This information shall be confirmed in writing.

2. Furthermore, during the period of the agreement, the consumer shall be informed of any change in the annual rate of interest or in the relevant charges at the time it occurs. Such information may be given in a statement of account or in any other manner acceptable to Member States.'

8 Article 14 of that directive provides:

'1. Member States shall ensure that credit agreements shall not derogate, to the detriment of the consumer, from the provisions of national law implementing or corresponding to this Directive.

2. Member States shall further ensure that the provisions which they adopt in implementation of this Directive are not circumvented as a result of the way in which agreements are formulated, in particular by the device of distributing the amount of credit over several agreements.'

9 Article 15 of that directive states:

'This Directive shall not preclude Member States from retaining or adopting more stringent provisions to protect consumers consistent with their obligations under the Treaty.'

Directive 2008/48/EC

10 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66) imposes a general obligation on the lender to provide the consumer, at the pre-contractual stage and in the credit agreement, with certain information including the annual percentage rate of charge ('the APR'). Annex I to that directive sets out a harmonised method of calculating the APR.

11 In accordance with Articles 27 and 29 of Directive 2008/48, the transposition period for that directive expired on 12 May 2010, the date on which Directive 87/102 was repealed.

Directive 93/13

12 Article 3 of Directive 93/13 provides:

'1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

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

13 Article 4 of that directive provides:

'1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

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

14 Article 5 of that directive reads as follows:

'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. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).'

15 Under Article 6(1) of that 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.'

16 Article 7 of Directive 93/13 provides:

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

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual

terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

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

17 Under Article 8 of Directive 93/13 '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.'

18 Point 1(e) of the annex to that directive, concerning the terms referred to in Article 3(3) thereof, mentions '[T]erms which have the object or effect of... (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.'

The Slovakian rules

19 Article 52 of the Slovakian Civil Code provides:

'(1) "Contract concluded with a consumer" means any contract, in whatever legal form, concluded between a supplier and a consumer.

(2) The terms of a contract concluded with a consumer and any other provision governing a legal relationship involving a consumer shall always apply in favour of the consumer who is party to the contract. Separate treaties or contractual agreements the substance or object of which aims to circumvent those provisions shall be invalid.

...

(4) "Consumer" means a natural person who, in the conclusion and enforcement of a consumer contract, is acting for purposes outside his trade or profession.'

20 Article 53 of that code provides:

'(1) A contract concluded with a consumer must not contain provisions causing a significant imbalance in the rights and obligations of the parties to the detriment of the consumer (unfair term). A contractual term relating to the principal subject of the transaction or the appropriateness of the price shall not be deemed to be unfair if that term is precisely formulated in plain and intelligible language or if the unfair term has been individually negotiated.

...

(4) Unfair terms used in a contract concluded with a consumer include in particular provisions which:

…

(k) impose a penalty on any consumer who fails to fulfil his obligations requiring him to pay a disproportionately high sum in compensation,

…

(5) Unfair terms used in a contract concluded with a consumer shall be invalid.'

21 Article 4 of Act No 258/2001 on consumer credit, as it applied on the date of the facts in the main proceedings, provides:

'Consumer credit contract

(1) The consumer credit contract must be drawn up in writing, otherwise it shall be invalid; the consumer shall receive a copy.

(2) The consumer credit contract must contain, in addition to the general items,

…

(j) the annual percentage rate of charge and the total costs associated with the credit to be borne by the consumer, calculated on the basis of data valid on the date on which the contract is concluded,

...

If the consumer credit contract does not contain the items indicated in paragraph 2... (j), the credit granted shall be deemed to be interest-free and free of charge.'

22 Article 45 of Act No 244/2002 on the arbitration procedure, as it applied on the date of the facts in the main proceedings, provides:

'(1) A court competent in enforcement proceedings under specific legislation shall, upon an application from the party against whom enforcement of an arbitration award is ordered, discontinue the enforcement proceedings.

...

(c) if the arbitration award binds a party to arbitration proceedings to provide performance which is objectively impossible, unlawful or contrary to basic morality.

(2) A court competent in enforcement proceedings shall discontinue the enforcement of an arbitration award or enforcement proceedings of its own motion if it finds irregularities in the arbitration proceedings pursuant to paragraph (1)(b) or (c).'

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

23 On 26 February 2008, Ms Korčkovská, who is disabled and receives an invalidity pension amounting to approximately EUR 370 per month, entered into a credit agreement with Pohotovosť, the general terms and conditions of which were as follows. The sum borrowed was SKK 20 000 (EUR 663.88) and the fees relating to the credit were SKK 19 120 (EUR 634.67). Ms Korčkovská was required to repay the principal and the costs over one year in monthly instalments of SKK 3 260 (EUR 108.21). According to the national court, the APR on the credit was thus 95.6 %, but it was not mentioned as such in the general terms and conditions of credits granted by Pohotovosť or in the credit agreement concluded.

24 Under Article 4 of those general terms and conditions, the whole debt becomes immediately payable if the debtor defaults, in part or in full, on two consecutive instalments. Moreover, in such a case, Article 6 of those general terms and conditions provides for the payment of daily default interest amounting to 0.25 % of the sum due, starting from the date on which the debt becomes payable until the date it is finally paid off. The penalty thus corresponds to an annual rate of 91.25 %. In that regard, the national court points out that, under Slovakian law, the penalties laid down in the form of default interest in civil cases must not exceed the base rate of the European Central Bank, which is currently fixed at 1 %, plus eight percentage points, that is, a total of 9 %.

25 Article 17 of the same general terms and conditions provides that disputes arising from a credit agreement are to be settled either in Bratislava by the Stály rozhodcovský súd (Permanent Court of Arbitration) or by a national court with jurisdiction chosen by the contracting party bringing an action. Moreover, under Article 19 of those general terms and conditions, all relations between the lender and the borrower are governed by the provisions of the Commercial Code and not by those of the Civil Code. The national court adds that the agreement at issue in the main proceedings contained a power of attorney for a lawyer to represent Ms Korčkovská.

26 As Ms Korčkovská failed to pay two consecutive monthly instalments, on 9 October 2008 Pohotovosť filed an action before the Stály rozhodcovský súd, which, on 3 November 2008, delivered an arbitration award, in which it ordered the party concerned to pay the company in particular the sum of SKK 48 820 (EUR 1 620.53) plus default interest amounting to SKK 39 120 (EUR 1 298.55) and costs of SKK 9 928 (EUR 329.55). The award became final on 15 December 2008 and became enforceable on 18 December 2008.

27 On the basis of that award, on 9 March 2009 a bailiff applied to the Okresný súd Stará Ľubovňa (Stará Ľubovňa District Court) for an enforcement order to recover the sum of EUR 3 467. By order of 31 July 2009, that court discontinued the enforcement proceedings on the grounds that they contravened basic morality as regards the costs of the applicant's legal representative in the enforcement proceedings, which exceeded the sum of EUR 94.61, and as regards the recovery of default interest amounting to 0.25 % per day on a sum of EUR 1 298.52, from 21 July 2008 until full payment of the debt.

28 On 26 August 2009 Pohotovosť appealed against that order before the Krajský súd v Prešove (Regional Court in Prešov). In support of Ms Korčkovská, the Asociácia spotrebiteľských subjektov Slovenska (Association of Consumer Organisations of Slovakia, 'the Asociácia') was granted leave to lodge a statement in which in particular

it informed that court of the large number of enforcement proceedings brought in Slovakia by Pohotovosť. The Asociácia considers that the general terms and conditions of the credit granted by that company contain unfair terms and amount to unfair business practices, and it proposed to the national court that it should make a reference to the Court of Justice pursuant to Article 267 TFEU.

29 Moreover, taking the view that the complaint submitted by the Asociácia contains facts which it must examine of its own motion, the Krajský súd v Prešove decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. (a) Is information about the total cost to the consumer in percentage points (the annual percentage rate — APR) of such importance that failure to mention it in the contract could render the cost of consumer credit non-transparent and insufficiently clear and comprehensible?

(b) Is it possible, under the consumer protection framework provided by Council Directive 93/13 …, to regard the price as an unfair condition in a credit contract on the grounds of insufficient transparency and clarity if the contract fails to set out information on the total cost of consumer credit in percentage points and the price is expressed solely as a financial sum consisting of various fees specified both in the contract and in the General Terms and Conditions?

2. (a) Must Council Directive 93/13 … be interpreted as meaning that a national court, hearing an application for enforcement of a final arbitral award issued without the participation of the consumer, is required of its own motion, where the necessary information on the legal and factual state of affairs is

available to it for this purpose, to consider the fairness of a penalty contained in the credit agreement concluded by a creditor with a consumer if, according to national procedural rules, such an assessment may be conducted in similar proceedings under national law?

(b) If the penalty for a violation of the consumer's obligations is disproportionate, is it for this court to draw the necessary conclusions arising therefrom under national law to ensure that the consumer will not be bound by that penalty?

(c) Can a penalty of 0.25 % per day on outstanding credit, i.e. 91.25 % p.a., be regarded as an unfair condition on the grounds that it is disproportionate?

3. In the application of EU legislation (Council Directive 93/13 …, Directive 2008/48 … repealing Directive 87/102 …) is the consumer protection framework of such a nature in relation to consumer credit agreements that, if a contract circumvents regulations designed to protect consumers in the field of consumer credit and if, under such a contract, an application is submitted for the enforcement of a ruling under an arbitral award, the court may discontinue enforcement proceedings or permit enforcement proceedings at the creditor's expense only up to the outstanding amount of the credit granted, if, under national rules, such an assessment of an arbitral award is admissible and the court has the necessary information about the factual or legal state of affairs at its disposal?'

The questions referred

30 Pursuant to the first subparagraph of Article 104(3) of the Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order.

31 The Court considers that that applies in the present case.

Admissibility

32 Pohotovosť argues in its written observations, first, that the replies to some of the questions referred may be provided by means of an order adopted on the basis of Article 104(3) of the Rules of Procedure. Secondly, it submits in particular that the first and third questions do not relate to the interpretation of European Union law and that, in general, the national court did not fulfil the obligation incumbent on it to settle the questions of national law prior to making the reference to the Court under the mechanism provided by Article 267 TFEU.

33 In that regard, it suffices to observe that, first, while it may be convenient, in certain circumstances, for questions of purely national law to be settled at the time the reference is made to the Court, national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity,

necessitating a decision on their part (Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 41 and the case-law cited).

34 As regards the questions referred by the national court, it must be said that they relate to the interpretation of European Union law.

35 Consequently, the Court must reply to those questions raised by the Krajský súd v Prešove.

The second question, part (a)

36 By part (a) of its second question, which should be examined first of all, the national court asks whether, pursuant to Directive 93/13, a national court, hearing an application for enforcement of a final arbitration award issued by default and without the participation of the consumer, is required of its own motion, where the necessary information on the legal and factual state of affairs is available to it for this purpose, to consider the fairness of a penalty contained in a credit agreement concluded by a creditor with a consumer, that penalty having been applied in that award, if, according to national procedural rules, such an assessment may be conducted in similar proceedings under national law.

37 According to settled case-law, the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier

without being able to influence the content of those terms (Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25, and Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25).

38 As regards such a weaker position, Article 6(1) of Directive 93/13 provides that unfair terms are not to be binding on the consumer. As follows from the case-law, it is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (*Mostaza Claro*, cited above, paragraph 36, and Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 25).

39 In order to guarantee the protection intended by Directive 93/13, the Court has also stated on a number of occasions that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract (*Océano Grupo Editorial and Salvat Editores*, cited above, paragraph 27; *Mostaza Claro*, cited above, paragraph 26; and Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 31).

40 It is in the light of those principles that the Court has therefore held that the national court is required to assess of its own motion whether a contractual term is unfair (*Asturcom Telecomunicaciones*, cited above, paragraph 32).

41 A court's power to determine of its own motion whether a term is unfair must be regarded as constituting a proper means both of achieving the result sought by Article 6 of Directive 93/13, namely, preventing an individual consumer from being bound by an unfair term, and of contributing to the attainment of the objective of Article 7, since, if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms being used by traders in contracts concluded

with consumers (Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraph 32, and *Mostaza Claro*, cited above, paragraph 27).

42 That power of the national court has been regarded as necessary for ensuring that the consumer enjoys effective protection, in view in particular of the real risk that he is unaware of his rights or encounters difficulties in enforcing them (*Cofidis*, cited above, paragraph 33, and *Mostaza Claro*, cited above, paragraph 28).

43 The protection which the directive confers on consumers thus extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfair nature of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve (*Cofidis*, cited above, paragraph 34).

44 Such protection is all the more justified where, as the national court appears to consider in its reference for a preliminary ruling, the credit contract at issue in the main proceedings contains a power of attorney for a lawyer chosen by the creditor who is to represent the consumer or debtor, who may not choose to be represented by another lawyer unless he pays a contractual penalty equal to 15 % of the amount of the credit.

45 It is true that, according to the case-law of the Court, European Union law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, such as an arbitration award, even if to do so would make it possible to remedy an infringement of a provision of European Union law, regardless of

its nature, on the part of the decision at issue (*Asturcom Telecomunicaciones*, cited above, paragraph 37).

46 Indeed, the Court has already had occasion to observe that, in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided to exercise those rights can no longer be called into question (*Asturcom Telecomunicaciones*, cited above, paragraph 36, and the case-law cited).

47 Thus, in the absence of European Union legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law (principle of effectiveness) (*Asturcom Telecomunicaciones*, cited above, paragraph 38).

48 In accordance with the principle of equivalence, the conditions imposed by domestic law under which the courts and tribunals may apply a rule of European Union law of their own motion must not be less favourable than those governing the application by those bodies of their own motion of rules of domestic law of the same ranking (*Asturcom Telecomunicaciones*, cited above, paragraph 49, and the case-law cited).

49 In that regard, it must be pointed out that Article 6(1) of Directive 93/13 is a mandatory provision. It should also be noted that, according to the Court's case-law, that directive as a whole constitutes a measure which is essential to the accomplishment of the tasks entrusted to the European Union and, in particular, to raising the standard

of living and the quality of life throughout the Union (*Mostaza Claro*, cited above, paragraph 37, and *Asturcom Telecomunicaciones*, cited above, paragraph 51).

50 Accordingly, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy (*Asturcom Telecomunicaciones*, paragraph 52).

51 It follows from this in particular that, inasmuch as the national court or tribunal seised of an action for enforcement of a final arbitration award is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair in the light of Article 6 of that directive, where it has available to it the legal and factual elements necessary for that task (*Pannon GSM*, cited above, paragraph 32, and *Asturcom Telecomunicaciones*, cited above, paragraph 53).

52 In the main proceedings, it appears that, according to the information provided by the national court, the national rules on arbitration proceedings require the court to discontinue the enforcement of a payment laid down by an arbitration award where that payment is prohibited by law or where it contravenes basic morality. Moreover, that court considers that any unfair term appearing in a contract concluded with a consumer would, in terms of national law, contravene basic morality since, contrary to the requirement of good faith, it would cause a significant imbalance in the rights and obligations of the supplier and of the consumer to the detriment of the consumer.

53 Thus, as in the context of the *Asturcom Telecomunicaciones* judgment, in a situation such as that in the main proceedings, where the court seised with a view to the enforcement of an arbitration award may, of its own motion, discontinue the application of that arbitration award where that award imposes on the party concerned an objectively impossible payment, prohibited by law or contrary to basic morality, that court must, where it has available to it the legal and factual elements necessary for that task, examine, of its own motion, within the context of the enforcement proceedings, whether the penalty laid down by a credit contract concluded between a creditor and a consumer is unfair.

54 The answer to part (a) of the second question is therefore that Directive 93/13 requires a national court, hearing an application for enforcement of a final arbitration award issued by default and without the participation of the consumer, of its own motion, where the necessary information on the legal and factual state of affairs is available to it for this purpose, to consider the fairness of a penalty contained in the credit agreement concluded by a creditor with a consumer, that penalty having been applied in that award, where, according to national procedural rules, such an assessment may be conducted in similar proceedings under national law.

The second question, parts (b) and (c)

55 By its second question, parts (b) and (c), the national court asks, first, whether a term contained in a credit agreement providing, in the event of non-payment by the consumer, for a daily penalty of 0.25 % of the amount of the credit, that is to say 91.25 % of that amount per year, may be regarded as unfair within the meaning of Articles 3 and 4 of Directive 93/13 on the grounds that it is disproportionate, and, secondly, if

that is the case, whether it is for a national court which finds that it is disproportionate to ensure that the consumer will not be bound by that term.

56 It should be noted in that regard that, in referring to concepts of good faith and significant imbalance between the rights and obligations of the parties, Article 3 of Directive 93/13 merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (see, to that effect, Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 17, and Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 19).

57 Article 3(2) of that directive provides, however, that a term is always to be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract, which appears to be the case in the main proceedings.

58 The annex to which Article 3(3) of Directive 93/13 refers contains an indicative and non-exhaustive list of the terms which may be regarded as unfair, including, under point (1)(e) of that annex, those 'which have the object or effect of... requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation'.

59 As to the question whether a particular term in a contract is, or is not, unfair, Article 4 of Directive 93/13 provides that the answer should be reached taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract. It should be pointed out in that respect that the consequences

of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law (*Freiburger Kommunalbauten*, cited above, paragraph 21).

60 It follows that, in the context of its jurisdiction under Article 267 TFEU to interpret European Union law, the Court may interpret general criteria used by the European Union legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question, and so it is for the national court to decide whether a contractual term such as that at issue in the main proceedings providing, according to the findings of the national court, for a disproportionately high sum in compensation, is to be regarded as unfair in the light of all the circumstances attending the conclusion of the contract (see, in that regard, *Freiburger Kommunalbauten*, cited above, paragraphs 22 and 25).

61 Consequently, if that court reaches the conclusion that the term at issue in the main proceedings is unfair within the meaning of Directive 93/13, it should be pointed out that, in accordance with Article 6(1) of that directive, and as provided for under national law, such a term is not to be binding on the consumer and that, moreover, under the same provision, that court will have to examine whether the contract can continue in existence without that unfair term.

62 In such a situation, it is therefore for that court to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that term (see *Asturcom Telecomunicaciones*, paragraph 59).

63 In the light of the foregoing, the answer to parts (b) and (c) of the second question is that it is for the national court to determine whether a term in a credit agreement such as that at issue in the main proceedings providing, according to the findings of that court, for the consumer to pay a disproportionately high sum in compensation, must, in the light of all the circumstances attending the conclusion of the contract, be regarded as unfair within the meaning of Articles 3 and 4 of Directive 93/13. If that is the case, it is for that court to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that term.

The first question

64 By its first question, the national court asks, in essence, whether the mention of the APR in a consumer credit contract, as laid down in Article 4(2)(a) of Directive 87/102, constitutes essential information in that type of contract and consequently whether the failure to mention that information means that, within the meaning of Article 4(2) of Directive 93/13, the terms of that contract are not drafted in plain, intelligible language, so that the term concerning the cost of that credit may then be assessed by that court as to whether it may be unfair within the meaning of Article 3 of the latter directive.

65 First of all, it should be noted that, bearing in mind the date on which the credit agreement at issue in the main proceedings was concluded and the details set out in paragraph 11 of this order, this question must be answered in the light of Directive 87/102 and not Directive 2008/48.

66 In that regard, the Court has previously ruled that the objective pursued by Directive 87/102 consists in ensuring that a minimum standard of consumer protection in matters of consumer credit is complied with (Case C-429/05 *Rampion and Godard* [2007] ECR I-8017, paragraph 47, and Case C-509/07 *Scarpelli* [2009] ECR I-3311, paragraph 25). That directive, as is clear from Article 15 thereof and from the 25th recital in the preamble thereto, according to which the directive does not prevent Member States from maintaining or adopting stricter provisions for the protection of consumers, provides for only minimum harmonisation of the provisions of national law relating to consumer credit (*Rampion and Godard*, cited above, paragraph 18).

67 The Court has also repeatedly found that, as is clear from the recitals in the preamble thereto, Directive 87/102 was adopted with the dual aim of ensuring both the creation of a common consumer credit market (3rd to 5th recitals) and the protection of consumers who avail themselves of such credit (6th, 7th and 9th recitals) (Case C-208/98 *Berliner Kindl Brauerei* [2000] ECR I-1741, paragraph 20, and Case C-264/02 *Cofinoga* [2004] ECR I-2157, paragraph 25).

68 It is with a view to protecting the consumer against unfair credit terms and to enabling him to have full knowledge of the terms of the future performance of the agreement entered into that Article 4 of Directive 87/102 provides that, at the time of concluding such an agreement, the borrower must have to hand all information which could have a bearing on the implications of his undertaking (*Berliner Kindl Brauerei*, cited above, paragraph 21).

69 Article 4(1) and (2) of Directive 87/102 provides that the credit agreement must be made in writing and that the written agreement must include a statement of the APR and the conditions under which it may be amended. Article 1a of that directive lays down the methods of calculation of the APR and stipulates, in paragraph 4(a), that it is to be calculated 'at the time the credit contract is concluded' (see, to that effect, *Cofinoga*, cited above, paragraph 23).

70 Informing the consumer of the total cost of credit, in the form of an interest rate calculated according to a single mathematical formula, is of critical importance in this regard. First, this information, which, under Article 3 of Directive 87/102, must be stated in any advertising, contributes to the transparency of the market, as it enables the consumer to compare offers of credit. Secondly, it enables the consumer to assess the extent of his liability (*Cofinoga*, cited above, paragraph 26).

71 Consequently, in a situation such as that in the main proceedings, the failure to mention the APR in the credit agreement at issue, the mention of the APR being essential information in the context of Directive 87/102, may be a decisive factor in the assessment by a national court of whether a term of a credit agreement concerning the cost of that credit in which no such mention is made is written in plain, intelligible language within the meaning of Article 4 of Directive 93/13.

72 If that is not the case, a national court is empowered to assess the unfair nature of such a term within the meaning of Article 3 of Directive 93/13. Even if such a term may be assessed as falling within the scope of the exclusion referred to in that article, it should be observed that the terms referred to in Article 4(2) of that directive, while they come within the area covered by Directive 93/13, escape the assessment as to whether they are unfair only in so far as the national court having jurisdiction should form the view, following a case-by-case examination, that they were drafted by the seller or supplier in plain, intelligible language (see Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* [2010] ECR I-4785, paragraph 32).

73 In the main proceedings, an examination of the unfair nature of the term of the credit agreement which fails to mention the APR could also be considered in the light of Directive 93/13 and, in that regard, as was found in paragraph 53 of this order, the national court has the power to examine such a term of its own motion. In such a situation, as was observed in paragraph 60 of this order, it is for the national court to

assess whether, in the light of all the circumstances attending the conclusion of the contract at issue in the main proceedings, the failure to mention the APR in a term of a consumer credit contract concerning the cost of that credit is likely to confer on that term an unfair nature within the meaning of Articles 3 and 4 of Directive 93/13.

74 However, it follows from the information supplied by the national court that, in accordance with Article 4 of Act No 258/2001, which transposes Directive 87/102, a consumer credit contract must mention the APR and, in the absence of such mention, the consumer credit granted is deemed to be interest-free and free of charge.

75 Article 14 of that directive requires Member States to ensure that credit agreements do not derogate, to the detriment of the consumer, from the provisions of national law implementing or corresponding to that directive.

76 Consequently, in circumstances such as those in the main proceedings, without its being necessary to examine the unfair nature of the term which fails to mention the APR in the light of Directive 93/13, Directive 87/102 is to be interpreted as allowing national courts to apply of their own motion the provisions transposing Article 4 of that directive into national law and as providing that the failure to mention the APR in a consumer credit contract means that the credit granted is deemed to be interest-free and free of charge (see, by analogy, as regards Article 11(2) of Directive 87/102, *Rampion and Godard*, cited above, paragraph 69).

77 Accordingly, the answer to the first question is that, in circumstances such as those in the main proceedings, the failure to mention the APR in a consumer credit contract, the mention of the APR being essential information in the context of Directive 87/102, may be a decisive factor in the assessment by a national court of whether a

term of a consumer credit agreement concerning the cost of that credit in which no such mention is made is written in plain, intelligible language within the meaning of Article 4 of Directive 93/13. If that is not the case, that court has the power to assess, of its own motion, whether, in the light of all the circumstances attending the conclusion of that contract, the failure to mention the APR in the term of that contract concerning the cost of that credit is likely to confer on that term an unfair nature within the meaning of Articles 3 and 4 of Directive 93/13. However, notwithstanding the power which is given to assess that contract in the light of Directive 93/13, Directive 87/102 is to be interpreted as allowing national courts to apply of their own motion the provisions transposing Article 4 of the latter directive into national law and as providing that the failure to mention the APR in a consumer credit contract means that the credit granted is deemed to be interest-free and free of charge.

The third question

78 By this question, the national court asks whether, in circumstances such as those in the main proceedings, and in so far as it reaches the conclusion that the provisions of Directives 87/102 and 93/13 have not been complied with, it has the power, under the European Union's consumer protection rules, to discontinue or limit the enforcement of a definitive arbitration award adopted under an arbitration clause set out in the credit agreement.

79 In that regard, it must be observed that, under Article 267 TFEU, the Court has no power to apply rules of European Union law to a particular case, but only to rule on

the interpretation of the Treaty and of acts adopted by European Union institutions (Case C-291/03 *MyTravel* [2005] ECR I-8477, paragraph 43 and the case-law cited).

80 By the present question, the national court is asking the Court of Justice to indicate to it whether, in circumstances such as those at issue in the main proceedings, taking account of the replies given by the Court to the first and second questions, it may, under European Union law and national law, limit the enforcement of the definitive arbitration award at issue in the main proceedings solely to the outstanding amount payable under the consumer credit agreement.

81 In so far as the reply to that question would involve the Court ruling on the actual application to the facts of the case at issue of the rules of law interpreted in the context of the first two questions and, in any event, on the basis of the replies given to those questions, the national court has available to it the means of interpretation necessary to resolving the dispute before it, there is no need to reply to this question.

Costs

82 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court of Justice, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts requires a national court, hearing an application for enforcement of a final arbitral award issued by default and without the participation of the consumer, of its own motion, where the necessary information on the legal and factual state of affairs is available to it for this purpose, to consider the fairness of the penalty contained in a credit agreement concluded by a creditor with a consumer, that penalty having been applied in that award, where, according to national procedural rules, such an assessment may be conducted in similar proceedings under national law.**

2. **It is for the national court concerned to determine whether a term in a credit agreement such as that at issue in the main proceedings providing, according to the findings of that court, for the consumer to pay a disproportionately high sum in compensation, must, in the light of all the circumstances attending the conclusion of the contract, be regarded as unfair within the meaning of Articles 3 and 4 of Directive 93/13. If that is the case, it is for that court to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that term.**

3. **In circumstances such as those in the main proceedings, the failure to mention the annual percentage rate in a consumer credit contract, the mention of the annual percentage rate being essential information in the context of Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as amended by Directive 98/7/EC of the European**

Parliament and of the Council of 16 February 1998, may be a decisive factor in the assessment by a national court of whether a term of a consumer credit agreement concerning the cost of that credit in which no such mention is made is written in plain, intelligible language within the meaning of Article 4 of Directive 93/13. If that is not the case, that court has the power to assess, of its own motion, whether, in the light of all the circumstances attending the conclusion of that contract, the failure to mention the annual percentage rate in the term of that contract concerning the cost of that credit is likely to confer on that term an unfair nature within the meaning of Articles 3 and 4 of Directive 93/13. However, notwithstanding the power which is given to assess that contract in the light of Directive 93/13, Directive 87/102 is to be interpreted as allowing national courts to apply of their own motion the provisions transposing Article 4 of the latter directive into national law and as providing that the failure to mention the annual percentage rate in a consumer credit contract means that the credit granted is deemed to be interest-free and free of charge.

[Signatures]