Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

26 February 2015 *

(Directive 93/13/EEC — Unfair terms in contracts concluded between a seller or supplier and a consumer — Article 4(2) — Assessment of the unfairness of contractual terms — Exclusion of terms relating to the main subject-matter of the contract or the adequacy of the price and remuneration as long as they are in plain intelligible language — Terms including a 'risk charge' charged by the lender and authorising it, under certain conditions, unilaterally to alter the interest rate)

In Case C-143/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Specializat Cluj (Romania), made by decision of 26 November 2012, received at the Court on 20 March 2013, in the proceedings

Bogdan Matei,

Ioana Ofelia Matei

v

SC Volksbank România SA,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, M. Safjan and A. Prechal (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 19 November 2014,

after considering the observations submitted on behalf of:

— SC Volksbank România SA, by D. Ciubotariu, G. Murgulescu, G. Vintilă, M. Clough, QC, and B. Papandopol, avocat,

— the Romanian Government, by R. H. Radu and I.-R. Hațieganu, acting as Agents,

— the European Commission, by C. Gheorghiu, M. Owsiany-Hornung, and M. van Beek, acting as Agents,

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

* Language of the case: Romanian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in proceedings between Mr and Mrs Matei ('the borrowers') and SC Volksbank România SA ('Volksbank') concerning allegedly unfair terms in consumer credit contracts providing, first, for a 'risk charge' applied by Volksbank and, second, authorising the latter to alter the rate of interest unilaterally under certain conditions.

Legal context

EU law

Directive 93/13

3 Recitals 12, 19 and 20 in the preamble to Directive 93/13 state:

'Whereas … as they now stand, national laws allow only partial harmonisation to be envisaged; whereas, in particular, only contractual terms which have not been individually negotiated are covered by this Directive; whereas Member States should have the option, with due regard for the [EEC] Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive;

...

Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject-matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject-matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; …

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

4 Article 1(1) of that directive provides:

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

5 According to Article 3 of that 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.'

6 Article 4 of Directive 93/13 is worded 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 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.'

7 Article 5 of that 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. …'

8 Article 8 of that directive provides:

'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.'

9 The annex to that directive, relating to the terms referred to in Article 3(3) thereof, contains, in paragraph 1, a non-exhaustive list of terms which may be regarded as unfair. Paragraph 1(j) concerns terms which have the object or effect of 'enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract'. Paragraph 1(l) contains terms which have the object or effect of 'allowing a seller of goods or supplier of services to increase their price without … giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded'.

10 Paragraph 2 of that annex concerns the scope of paragraph 1(g), (j) and (l) thereof. Paragraph 2(b) states in particular that paragraph 1(j) 'is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately'. Paragraph 2(d) of the annex states that paragraph 1(l) thereof 'is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described'.

Directive 2008/48/EC

11 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 and corrigenda OJ 2009 L 207, p. 14, OJ 2010 L 199, p. 40, and OJ 2011 L 234, p. 46) 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.

12 Article 2(2) of Directive 2008/48 reads as follows:

‘This Directive shall not apply to:

(a) credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property;

…’

13 Article 3 of that directive provides:

‘For the purpose of this Directive:

…

(g) “total cost of the credit to the consumer” means all the costs, including interest, commissions, taxes and any other kind of fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor, except for notarial costs; costs in respect of ancillary services relating to the credit agreement, in particular insurance premiums, are also included if, in addition, the conclusion of a service contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed;

…

(i) “APR” means the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit …

…’

Romanian law

Law No 193/2000

14 Law No 193/2000 on unfair terms in contracts concluded between traders and consumers, in the republished version (*Monitorul Oficial al României*, Part I, No 305 of 18 April 2008, ‘Law No 193/2000’), is intended to transpose Directive 93/13 into national law.

15 Article 1(3) of Law No 193/2000 provides:

‘Traders are prohibited from inserting unfair terms into contracts concluded with consumers.’

16 Article 4 of that law provides:

‘1. A contract term which has not been directly negotiated with the consumer is regarded as being unfair if, considered in isolation or together with other provisions of the contract, it causes, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance in the parties’ rights and obligations.

2. A contract term shall be regarded as not having been directly negotiated with the consumer if it has been drafted without the consumer having had the opportunity to influence the nature of that term, as in the case of standard contracts or general terms and conditions of sale used by traders operating on the market for the goods or service concerned.

3. The fact that certain components of contractual terms or only one of those terms has been directly negotiated with the consumer does not exclude the application of the provisions of this Law to the remainder of the contract if an overall assessment of the contract shows that it was unilaterally prepared by the trader. If the trader claims that a standard term has been directly negotiated with the consumer he must submit evidence to that effect.

4. The annex, which is an integral part of this Law, contains, by way of example, a list of terms regarded as unfair.

5. Without prejudice to the provisions of this Law, the unfairness of a contractual term shall be assessed according to:

(a) the nature of the goods or services which are the subject-matter of the contract at the time it is concluded;

(b) all the factors which have led to the conclusion of the contract;

(c) other contractual terms or other contracts on which it is based.

6. Assessment of the unfairness of the terms shall not cover the definition of the main subject-matter of the contract or 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.'

17 Paragraph 1(a) of the annex referred to in Article 4(4) of Law No 193/2000 exactly replicates the wording in Paragraphs 1(j) and 2(b) of the annex to Directive 93/13.

The EGO No 50/2010

18 The Emergency Government Order No 50/2010 on credit agreements for consumers (*Monitorul Oficial al României*, Part I, No 389 of 11 June 2010, 'EGO No 50/2010') is intended to transpose Directive 2008/48 into national law.

19 Article 2(1) of Law No 50/2010 provides:

'This emergency order shall apply to credit agreements, including credit agreements secured by a mortgage or by another right in immovable property, and credit agreements the purpose of which is to finance the acquisition or retention of property rights in an existing or projected building or the renovation, rebuilding, reinforcement, improvement, extension or increase in value of immovable property, irrespective of the total amount of the credit.'

20 Article 36 of EGO No 50/2010 provides:

'For the credit granted, the creditor may levy only a charge for the processing of the application, a credit administration charge or current account administration charge, compensation in the event of early repayment, insurance costs, penalties if appropriate, and a single charge for services provided upon request by consumers.'

21 Article 95 of EGO No 50/2010 is worded as follows:

'1. For agreements in the process of being performed, creditors shall be required to take measures to bring the agreement into line with its provisions within 90 days of the date of entry into force of this emergency order.

2. Agreements in the process of being performed shall be amended by supplementary agreements within 90 days of the date of entry into force of this emergency order.

...'

Law No 288/2010

22 Under Article 1, first paragraph, point 39 of Law No 288/2010 approving Emergency Government Order No 50/2010 on consumer credit agreements (*Monitorul Oficial al României*, Part I, No 888 of 30 December 2010):

'Article 95 [of the EGO] shall be amended as follows:

Article 95 — The provisions of this Emergency Order shall not apply to contracts existing on the date when this Emergency Order entered into force, with the exception of the provisions of Article 37a, Articles 66 to 69 … Articles 50 to 55, 56(2), 57(1) and (2) and 66 to 71.'

23 Article II of Law No 288/2010 provides:

'1. The supplementary agreements concluded and signed up to the date of entry into force of this Law in order to guarantee compliance of contracts with the provisions of the [EGO No 50/2010] shall produce their effects in accordance with the contract laid down by the parties.

2. Supplementary agreements not signed by consumers, regarded as tacitly accepted up to the date of entry into force of this Law, shall produce their effects in accordance with the terms in which they have been dared, except in the case of notification to the contrary by the consumer or lender within 60 days from the date of entry into force of this Law.'

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

24 The borrowers concluded two credit agreements with Volksbank. The first agreement, concluded on 4 March 2008, was to cover ongoing personal expenditure of EUR 8 000. That loan, to be repaid over a five-year period, was granted at a fixed annual rate of interest of 9% and an APR of 20.49%.

25 The second agreement, concluded on 7 March 2008, concerns a loan of CHF 103 709 intended to finance the purchase of immoveable property which is secured by a mortgage on it. Since that loan is to be repaid over 25 years, its current annual rate of interest is 3.99% and its APR is 19.55%.

26 Pursuant to Clause 3(d) of the Special Terms of those two agreements, relating to the variable nature of the rate of interest, 'the bank reserves the right to alter the current rate of interest in the event of significant changes on the financial markets, the new rate of interest being notified to the borrower; the rate of interest thereby altered shall apply from the date of notification'.

27 Clause 3.5 of the general conditions of the credit agreements at issue in the main proceedings, which is headed 'Risk Charge', provides that, for making available the credit, the borrower may be required to pay the bank a risk charge, calculated on the basis of the balance of the loan and payable monthly throughout its duration.

28 Clause 5 of the Special Terms of those agreements, also headed 'Risk Charge', states that that charge is to be equal to 0.74% of the credit balance in euros, 0.22% of the credit balance in Swiss Francs. The total amount of that charge amounts to EUR 1 397.17 for the credit balance in euros, and CHF 39 955,98 for the credit balance in Swiss Francs.

29 After 22 June 2010, the date of entry into force of the EGO No 50/2010, Volksbank took steps to ensure that the credit agreements at issue in the main proceedings complied with the provisions of that order. Thus, in the draft supplementary agreements to those credit agreements, Volksbank proposed to replace the heading of the terms relating to the 'risk charge' to 'Credit Management Charge', since charging that commission was expressly authorised by Article 36 of that order, without at the same time modifying the content of those terms. The borrowers refused to accept that proposal and, therefore, to sign the supplementary agreements.

30 Taking the view that a set of terms in the credit agreements at issue in the main proceedings, which included the terms relating to the variable rate of interest and the 'risk charge', were unfair within the meaning of Article 4 of Law No 193/2000, the borrowers, after contacting the National Consumer Protection Authority which failed to respond to their communication, brought an action before the Judecãtoria Cluj-Napoca (court of first instance, Cluj-Napoca), seeking a declaration that the terms at issue are unfair and, therefore, invalid.

31 By judgment of 12 December 2011, that court upheld the borrowers' action in part.

32 The Judecãtoria Cluj-Napoca held that certain terms were unfair and must therefore be regarded as invalid. It held that that is the case with respect to the term relating to variable rate of interest because the notion 'significant changes in the money market' was so vague that it enables the bank to alter the rate of interest in a discretionary manner.

33 However, that court held that the terms concerning the 'risk charge' and the draft term relating to 'credit management charge' cannot be classified as unfair since, in particular, it was not for the court to determine the specific risk the bank was exposed to or the effectiveness of the contractual guarantees.

34 Both the borrowers and Volksbank appealed against that judgment to the Tribunalul Specializat Cluj, which observes that, while the Court has not already decided the issue whether contractual terms, such as those relating to the 'risk charge' at issue in the main proceedings, are part of the main subject-matter' and/or the 'price' within the meaning of Article 4(2) of Directive 93/13, certain Romanian courts have already held that such terms do not fall within those concepts, as they are set out in Article 4(6) of Law No 193/2000, which replicates in full the wording of Article 4(2) of Directive 93/13. Those terms are accordingly not excluded from an assessment of their unfairness.

35 Those courts have taken the view that that exclusion does not apply to the terms in question since, in particular, the lender does not provide any service constituting consideration which would justify the risk charge and, additionally, the drafting of those terms is unclear.

36 In those circumstances, the Tribunalul Specializat Cluj decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Having regard to the fact that, in accordance with Article 4(2) of Directive 93/13, the assessment of the unfairness of contractual terms must not concern either the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language, and given that, under Article 2(2)(a) of Directive 2008/48, the definition provided in Article 3(g) thereof of "the total cost of the credit to the consumer", which includes all the fees which the consumer is required to pay in connection with the credit agreement, does not apply for the purposes of determining the subject-matter of a credit agreement secured by a mortgage, can the concepts of "subject-matter" and/or of "price" referred to in Article 4(2) of Directive 93/13 be interpreted as meaning that such terms — namely the "subject-matter" and/or the "price" of a credit agreement secured by a mortgage — also cover, among the elements which make up the

consideration owed to the credit institution, the [APR] of such a credit agreement secured by a mortgage, which is in particular made up of: the interest rate, whether fixed or variable; bank charges; and other costs included and defined in the credit agreement?'

Consideration of the question referred for a preliminary ruling

Admissibility

37 Volksbank claims that by reason of the settlement reached with the borrowers the dispute between the parties in the main proceedings has been resolved. Therefore, since there is no longer any dispute pending before the referring court, an answer to the question referred is no longer necessary and the Court should declare that the conditions for its jurisdiction are no longer fulfilled, pursuant to Article 100(2) of its Rules of Procedure.

38 In that connection, it is clear from the case-law of the Court that if it finds that there is in fact no dispute pending before the referring court, so that an answer to the question would be of no use to that court for the resolution of a dispute, the Court must rule that there is no need to give a ruling on the request for preliminary ruling (see to that effect, in particular, judgments in *Djabali*, C-314/96, EU:C:1998:104, paragraphs 16, 21 and 22; *García Blanco*, C-225/02, EU:C:2005:34, paragraphs 23 and 29 to 31, and order in *Mohammad Imran*, C-155/11 PPU, EU:C:2011:387, paragraphs 14 and 19 to 21).

39 In the present case, it should be noted that, by letter of 14 February 2014, the referring court informed the Court of Justice that a settlement had been reached between Volksbank and the borrowers.

40 However, in the same letter the referring court indicated that it had not taken note of that settlement as regards the issue of the alleged unfairness of the contractual terms relating to the 'risk charge' applied by Volksbank, since that issue had to be regarded as a question of public policy on which the parties cannot compromise and that, therefore, an answer from the Court to the question referred would continue to be of prime importance to it for the purpose of resolving the dispute in the main proceedings.

41 In those circumstances, it cannot be held, in accordance with the principle enshrined in the case-law cited in paragraph 38 of the present judgment, that no dispute is actually pending before the referring court. On the contrary, it is expressly stated in the information provided by the latter that an answer from the Court to the question referred is not only useful, but also decisive for the resolution of the dispute in the main proceedings.

42 Therefore, the objection of inadmissibility raised by Volksbank must be dismissed and the Court will give a ruling on the request for a preliminary ruling.

Substance

43 First of all, the scope of the dispute must be ascertained.

44 According to the question, it seeks to determine whether the notions of 'main subject-matter' and/or 'price' within the meaning of Article 4(2) of Directive 93/13 may be interpreted as meaning that they include, among the elements which make up the consideration due for the establishment of credit, the APR of the credit agreement, consisting in particular in the fixed or variable rate of interest, banking commission and other costs included and defined in that agreement.

45 The wording of that question also mentions that the latter concerns the inclusion in the notions of 'main subject-matter' and/or 'price' of all the terms of a consumer credit agreement guaranteed by a mortgage, which cover consideration due by the consumer to the lender and which are part of the notion of 'total cost of the credit to the consumer', as defined in Article 3(g) of Directive 2008/48, and therefore, the APR.

46 It must be held, first, that it is clear from all the grounds for the decision to refer that the dispute in the main proceedings, as it is pending at the appeal stage brought before the referring court, concerns at most two types of terms relating to consideration due by the consumer to the lender and included in the credit agreements at issue in the main proceedings, that is to say, terms providing for the 'risk charge' applied by the lender and other terms authorising it, under certain conditions, to change the rate of interest. In the context of that dispute, the question arises whether such terms fall within the scope of Article 4(6) of Law No 193/2000 which is intended to transpose Article 4(2) of Directive 93/13 into Romanian law.

47 Second, the exact scope of 'main subject-matter' and 'price' within the meaning of Article 4(2) of Directive 93/13 cannot be determined by the concept of 'the total cost of the credit to the consumer' within the meaning of Article 3(g) of Directive 2008/48.

48 The latter notion is in fact defined particularly broadly so that the total amount of all the costs or expenses to the consumer and relating to payments made by the latter both to the lender and to third parties must be clearly stated in consumer credit agreements, such a procedural obligation contributing to the main objective of transparency pursued by that directive.

49 However, Article 4(2) of Directive 93/13 laying down an exception to the mechanism for reviewing the substance of unfair terms, such as that provided for in the system of consumer protection put in place by that directive, that provision must be strictly interpreted (judgment in *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 42).

50 Furthermore, the expressions 'main subject-matter of the contract' and 'the adequacy of the price and remuneration on the one hand, as against the services or goods supplied, on the other' must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question (*Kásler and Káslerné Rábai*, EU:C:2014:282, paragraphs 37 and 38).

51 In its case-law, the Court has also set out criteria for the interpretation of those concepts, which specifically take account of the specific objective of Directive 93/13, that is to say, to require Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair for the purposes the protection granted to a consumer on account of the fact that he is in a position of weakness vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (see, to that effect, judgment in *Kásler and Káslerné Rábai*, EU:C:2014:282, paragraphs 39 and 40).

52 Therefore, it must be held that, by its question, the referring court asks essentially whether Article 4(2) of Directive 93/13 must be interpreted as meaning that the expressions 'main subject-matter of the contract' and 'the adequacy of the price and remuneration on the one hand, as against the services or goods supplied, on the other' cover terms in credit agreements concluded between a seller or supplier and consumers, such as those at issue in the main proceedings which both allow the lender, under certain conditions, unilaterally to alter the interest rate and provide for a 'risk charge' applied by it.

53 In that regard, although it is for the national court alone to rule on the classification of those terms in accordance with the particular circumstances of the case, the fact remains that the Court has jurisdiction to elicit from the provisions of Directive 93/13, in this case the provisions of Article 4(2), the criteria that the national court may or must apply when examining a contractual term (*Kásler and Káslerné Rábai*, EU:C:2014:282, paragraph 45).

54 The Court has held that contractual terms falling within the notion of the 'main subject-matter of the contract', within the meaning of Article 4(2) of Directive 93/13, must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it. By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within the notion of the 'main subject-matter of the contract'. It is for the referring court to determine, having regard to the nature, general scheme and the stipulations of the loan agreement, and its legal and factual context, whether the term concerned constitutes an essential element of the debtor's obligations, consisting in the repayment of the amount made available by the lender (*Kásler and Káslerné Rábai*, EU:C:2014:282, paragraph 49 to 51).

55 The Court has also stated that it follows from the wording of Article 4(2) of Directive 93/13 that the second category of terms which cannot be examined as regards unfairness is limited in scope, for that exclusion concerns only the adequacy of the price or remuneration as against the services or goods supplied in exchange, that exclusion being explained by the fact that no legal scale or criterion exists that can provide a framework for, and guide, such a review (see, to that effect, *Kásler and Káslerné Rábai*, EU:C:2014:282, paragraphs 54 and 55).

56 Terms relating to the consideration due by the consumer to the lender or having an impact on the actual price to be paid to the latter by the consumer thus do not, in principle, fall within the second category of terms, except as regards the question whether the amount of consideration or the price as stipulated in the contract are adequate as compared with the service provided in exchange by the lender.

57 In particular, as regards the classification of the contractual terms at issue in the main proceedings, in the light of the criteria set out in paragraphs 54 to 56 of the present judgment, for the purposes of applying Article 4(2) of Directive 93/13 and, in the first place, terms enabling the lender, under certain conditions, unilaterally to alter the rate of interest, a number of elements tend to show that they do not fall within the scope of the exclusion laid down under that provision.

58 It should be noted, first of all, that the Court has already held that a similar term relating to a mechanism for amending the prices of the services provided to the consumer does not fall within Article 4(2) of Directive 93/13 (judgment in *Invitel*, C-472/10, EU:C:2012:242, paragraph 23).

59 Next, it must be held that terms authorising the lender unilaterally to alter the rate of interest are expressly mentioned in Paragraph 1(j) of the annex to Directive 93/13 which, in accordance with Article 3(3) thereof, includes an indicative and non-exhaustive list of the terms which may be declared unfair. Paragraph 2(b) of that annex sets out the conditions in which Paragraph 1(j) does not preclude such terms.

60 Taking account of the objective pursued by the annex to Directive 93/13, that is to say to serve as a 'grey list' of terms which may be regarded as unfair, the inclusion in that list of terms such as those enabling the lender unilaterally to alter the interest rate would to a large extent be deprived of effectiveness if they were excluded from the outset from an assessment of their unfairness pursuant to Article 4(2) of Directive 93/13.

61 Consequently, the same will be true of the applicable Romanian law and, in particular, Article 4(4) of Law No 193/2000 which is intended to transpose Article 3(3) of Directive 93/13 and the annex referred to by that directive, by means of a mechanism consisting in drawing up a 'black list' of terms

to be regarded as being unfair. Moreover, such a mechanism is one of the more stringent measures that Member States may adopt or retain in the area covered by Directive 93/13 to ensure a maximum degree of protection for the consumer which is compatible with the EU law.

62 Furthermore, an indication of the ancillary nature of such terms may also be the fact that, since they essentially contain an adjustment mechanism enabling the lender to alter the term setting the interest rate, they do not appear to be separable from the term fixing the interest rate which is likely to be part of the main subject-matter of the contract.

63 Finally, those terms also appear to fall outside the scope of Article 4(2) of Directive 93/13 because, subject to verification by the referring court, it would seem to be the case from the documents submitted to the Court that their unfairness is raised not on account of the alleged inadequacy of the level of the altered interest rate as against any consideration that may have been supplied in exchange for the alteration, but the conditions and criteria enabling the lender to make that alteration, in particular on the ground alleging 'significant changes in the money market'.

64 In the second place, as regards terms providing for a 'risk charge' to be applied by the lender, such as those at issue in the main proceedings, several elements suggest that they do not fall within one of the two categories of exclusions laid down by Article 4(2) of Directive 93/13.

65 First of all, the question arises whether such terms may fall within the exclusion laid down in Article 4(2), if it is found, which, as already stated in paragraph 54 of the present judgment, is for the referring court to ascertain, that they form part of the contractual terms which define the main subject-matter of the contract.

66 Thus, it is for the referring court to determine whether, taking account of the findings set out in paragraph 54 above, those terms lay down one of the essential services provided for by the agreements at issue in the main proceedings or whether they are ancillary as compared with the terms which defined the very essence of the contractual relationship.

67 In the context of that assessment, that court will have to take account in particular of the essential aim pursued by the 'risk charge' which consists in ensuring repayment of the loan. That clearly constitutes an essential obligation on the part of the consumer in exchange for making available the amount of the loan.

68 Furthermore, taking account of the objective of protecting consumers which must guide the interpretation of the provisions of Directive 93/13, as set out in paragraph 51 of the present judgment, the mere fact that the 'risk charge' may be regarded as representing a relatively important part of the APR and, therefore, the income received by the lender from the credit agreements concerned is in principle irrelevant for the purposes of determining whether the terms providing for that charge define the 'main subject-matter' of the contract.

69 It is also for the referring court to examine whether the terms providing for the 'risk charge' applied by the lender, such as those at issue in the main proceedings, may fall within the second category of exclusions referred to in Article 4(2) of Directive 93/13. Certain information in the documents submitted to the Court seems rather to indicate that that is not the case.

70 Whilst the matter is once again subject to verification by the referring court, some of that information suggests that the subject-matter of the dispute in the main proceedings does not concern the adequacy of amount of that commission as compared with a service provided by the lender (of whatever kind) since it is submitted that the lender does not provide any actual service which could constitute consideration for that charge, so that the question of the adequacy of that charge does not arise (see, by analogy, *Kásler and Káslerné Rábai*, EU:C:2014:282, paragraph 58).

71 However, the information in the documents submitted to the Court appear to indicate that the dispute in the main proceedings essentially covers the grounds justifying the terms in question, and in particular, whether, in so far as they require the consumer to pay commission of a substantial amount which aims to ensure the repayment of the loan, even though it is argued that that risk is already guaranteed by a mortgage and that, in exchange for that charge, the bank does not provide a real service to the consumer solely in the consumer's interests, those terms must be regarded as unfair, within the meaning of Article 3 of Directive 93/13.

72 Finally, it must be held that, if the referring court were to consider that, in the light of the information provided by the Court in answer to the question referred, that the relevant terms none the less fall within the 'main subject-matter of the contract' or that they are in fact challenged with regard to the adequacy of the price or the remuneration, the fact remains that those terms must, in any event, be subject to an assessment of their unfairness if it was found, which is also for the referring court to verify, that they are not drafted in clear and intelligible language (see, to that effect, *Kásler and Káslerné Rábai*, EU:C:2014:282, paragraph 61).

73 In that connection, it should be recalled that the requirement of transparency of contractual terms laid down by Articles 4(2) and 5 of Directive 93/13, which, moreover, have identical scope, cannot be reduced merely to their being formally and grammatically intelligible (see, to that effect, *Kásler and Káslerné Rábai*, EU:C:2014:282, paragraphs 69 and 71).

74 It follows, in particular from Articles 3 and 5 of Directive 93/13 and Paragraph 1(j) and (l) and Paragraph 2(b) and (d) of the annex to that directive that it is of fundamental importance, for the purpose of complying with the requirement of transparency, to determine whether the loan agreement sets out transparently the reasons for and the particularities of the mechanism for altering the interest rate and the relationship between that mechanism and the other terms relating to the lender's remuneration, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it (see, to that effect, *Kásler and Káslerné Rábai*, EU:C:2014:282, paragraph 73).

75 That question must be examined by the referring court, in the light of all the relevant facts, including the promotional material and information provided by the lender in the negotiation of the loan agreement and the level of attention to be expected of the average consumer, who is reasonably well informed and reasonably observant and circumspect (see, to that effect, *Kásler and Káslerné Rábai*, EU:C:2014:282, paragraph 74).

76 As regards the contractual terms at issue in the main proceedings and, first, those allowing the lender unilaterally to alter the interest rate, the question arises as to the foreseeability for the consumer of increases in that rate which may be made by the lender according to the criterion, which is prima facie not transparent, relating to 'significant changes in the money market', even if that formulation is in itself grammatically plain and intelligible.

77 Second, as regards the terms providing for the 'risk charge', the question arises whether the loan agreement concerned sets out transparently the reasons justifying the remuneration corresponding to that charge, since it is disputed that the lender is required to provide real consideration in order to obtain payment of that charge, apart from the fact of assuming the risk of non-repayment, which it is argued is already guaranteed by a mortgage. The lack of transparency, in the agreements at issue in the main proceedings, of the statement of the grounds justifying those terms also appears to be confirmed by the fact, noted in paragraph 29 of this judgment, that, in the present case, the lender proposed to the borrowers to replace the heading of those terms with 'credit management charge', without at the same time changing their content.

78 Having regard to all of the foregoing considerations, the answer to the question referred is that Article 4(2) of Directive 93/13 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the expressions 'main subject-matter of the contract' and 'adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other' do not, in principle, cover the types of terms in the credit agreements concluded between a professional and consumers such as those at issue in the main proceedings, which, on one hand, allow, under certain conditions, the lender unilaterally to alter the interest rate and, on the other hand, provide for a 'risk charge' applied by the lender. However, it is for the referring court to verify that classification of those contractual terms having regard to the nature, general scheme and stipulations of the agreements concerned and the legal and factual context of which they form part.

Costs

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

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

Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that 'main subject-matter of the contract' and 'adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other' do not, in principle, cover the types of terms in the credit agreements concluded between a professional and consumers such as those at issue in the main proceedings, which, on one hand, allow, under certain conditions, the lender unilaterally to alter the interest rate and, on the other hand, provide for a 'risk charge' applied by the lender. However, it is for the referring court to verify that classification of those contractual terms having regard to the nature, general scheme and stipulations of the agreements concerned and the legal and factual context of which they form part.

[Signatures]