



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

7 November 2019*

(References for a preliminary ruling — Rail transport — Passengers' rights and obligations — Regulation (EC) No 1371/2007 — Article 3(8) — Transport contract — Concept — Passenger without a ticket at the time of boarding a train — Unfair terms in consumer contracts — Directive 93/13/EEC — Article 1(2) and Article 6(1) — General conditions of carriage of a railway undertaking — Mandatory statutory or regulatory provisions — Penalty clause — Powers of the national court)

In Joined Cases C-349/18 to C-351/18,

REQUESTS for a preliminary ruling under Article 267 TFEU from the *vredegerecht te Antwerpen* (Magistrates' Court, Antwerp, Belgium), made by decisions of 25 May 2018, received at the Court on 30 May 2018, in the proceedings

Nationale Maatschappij der Belgische Spoorwegen (NMBS)

v

Mbutuku Kanyeba (C-349/18),

Larissa Nijs (C-350/18),

Jean-Louis Anita Dedroog (C-351/18),

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis (Rapporteur), E. Juhász, M. Ilešič and C. Lycourgos, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Belgian Government, by C. Van Lul and C. Pochet and by J.-C. Halleux, acting as Agents,
- the European Commission, by N. Ruiz García and P. Vanden Heede, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 June 2019,

* Language of the case: Dutch.

gives the following

Judgment

- 1 These requests for a preliminary ruling concern the interpretation of Article 9(4) of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ 2007 L 315, p. 14) and of Article 2(a) and Articles 3 and 6 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).
- 2 The requests have been made in proceedings between the Nationale Maatschappij der Belgische Spoorwegen (NMBS) (Belgian national railway company (SNCB)), on the one hand, and Mr Mbutuku Kanyeba (Case C-349/18), Mrs Larissa Nijs (Case C-350/18) and Mr Jean-Louis Anita Dedroog (Case C-351/18), on the other hand, concerning additional surcharges claimed from the latter for having travelled by train without a transport ticket.

European Union law

Directive 93/13

- 3 The 13th recital of Directive 93/13 states:

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

- 4 Article 1 of that directive provides:

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

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

- 5 Article 2(a) of that directive states:

'For the purposes of this Directive:

(a) "unfair terms" means the contractual terms defined in Article 3'.

- 6 Article 3 of that directive 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.

...

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

7 According to Article 6(1) of Directive 93/13:

'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.'

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

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

Regulation No 1371/2007

9 Recitals 1 to 3 of Regulation No 1371/2007 state:

'(1) In the framework of the common transport policy, it is important to safeguard users' rights for rail passengers and to improve the quality and effectiveness of rail passenger services in order to help increase the share of rail transport in relation to other modes of transport.

(2) The Commission's communication "Consumer Policy Strategy 2002-2006" [OJ 2002 C 137, p. 2] sets the aim of achieving a high level of consumer protection in the field of transport in accordance with Article 153(2) of the Treaty.

(3) Since the rail passenger is the weaker party to the transport contract, passengers' rights in this respect should be safeguarded.'

10 Article 1(a) of that regulation provides:

'This Regulation establishes rules as regards the following:

(a) the information to be provided by railway undertakings, the conclusion of transport contracts, the issuing of tickets and the implementation of a Computerised Information and Reservation System for Rail Transport,'.

11 Article 3 of that regulation contains the following definitions:

'For the purposes of this Regulation the following definitions shall apply:

...

(2) “carrier” means the contractual railway undertaking with whom the passenger has concluded the transport contract or a series of successive railway undertakings which are liable on the basis of this contract;

...

(8) “transport contract” means a contract of carriage for reward or free of charge between a railway undertaking or a ticket vendor and the passenger for the provision of one or more transport services;

...

(10) “through ticket” means a ticket or tickets representing a transport contract for successive railway services operated by one or several railway undertakings;

...

(16) “General Conditions of Carriage” means the conditions of the carrier in the form of general conditions or tariffs legally in force in each Member State and which have become, by the conclusion of the contract of carriage, an integral part of it;

...’

12 Chapter II of Regulation No 1371/2007, entitled ‘Transport contract, information and tickets’, includes Articles 4 to 10 thereof. Article 4 of that regulation, entitled ‘Transport contract’, provides:

‘Subject to the provisions of this Chapter, the conclusion and performance of a transport contract and the provision of information and tickets shall be governed by the provisions of Title II and Title III of Annex I.’

13 Article 9 of that regulation, which concerns the availability of tickets, through tickets and reservations, provides, in paragraphs 2 to 4 thereof:

‘2. Without prejudice to paragraph 4, railway undertakings shall distribute tickets to passengers via at least one of the following points of sale:

- (a) ticket offices or selling machines;
- (b) telephone, the Internet or any other widely available information technology;
- (c) on board trains.

3. Without prejudice to paragraphs 4 and 5, railway undertakings shall distribute tickets for services provided under public service contracts via at least one of the following points of sale:

- (a) ticket offices or selling machines;
- (b) on board trains.

4. Railway undertakings shall offer the possibility to obtain tickets for the respective service on board the train, unless this is limited or denied on grounds relating to security or antifraud policy or compulsory train reservation or reasonable commercial grounds.’

14 Annex I to Regulation No 1371/2007, entitled ‘Extract from Uniform Rules concerning the contract for international carriage of passengers and luggage by rail (CIV)’, consists of Titles II to VII of Appendix A to the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention Concerning International Carriage by Rail of 3 June 1999 (‘the COTIF’). Annex I therefore includes Title II of that appendix, entitled ‘Conclusion and performance of the contract of carriage’, which contains Articles 6 to 11 of that appendix.

15 Article 6, entitled ‘Contract of carriage’, of Appendix A to the COTIF provides:

‘1. By the contract of carriage the carrier shall undertake to carry the passenger as well as, where appropriate, luggage and vehicles to the place of destination and to deliver the luggage and vehicles at the place of destination.

2. The contract of carriage must be confirmed by one or more tickets issued to the passenger. However, subject to Article 9 the absence, irregularity or loss of the ticket shall not affect the existence or validity of the contract which shall remain subject to these Uniform Rules.

3. The ticket shall be prima facie evidence of the conclusion and the contents of the contract of carriage.’

16 Article 7, which concerns the ‘Ticket’, of Appendix A, provides, in paragraphs 1 and 2 thereof:

‘1. The General Conditions of Carriage shall determine the form and content of tickets as well as the language and characters in which they are to be printed and made out.

2. The following, at least, must be entered on the ticket:

...

(c) any other statement necessary to prove the conclusion and contents of the contract of carriage and enabling the passenger to assert the rights resulting from this contract.’

17 Article 8(1) of Appendix A states that, ‘subject to a contrary agreement between the passenger and the carrier, the carriage charge shall be payable in advance’.

18 Article 9 of Appendix A is entitled ‘Right to be carried. Exclusion from carriage’. Paragraph 1 thereof provides:

‘The passenger must, from the start of his journey, be in possession of a valid ticket and produce it on the inspection of tickets. The General Conditions of Carriage may provide:

(a) that a passenger who does not produce a valid ticket must pay, in addition to the carriage charge, a surcharge;

(b) that a passenger who refuses to pay the carriage charge or the surcharge upon demand may be required to discontinue his journey;

(c) if and under what conditions a refund of the surcharge shall be made.’

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

- 19 In 2015, Mr Kanyeba was the subject of four findings in which it appeared that he had travelled by train without a ticket (Case C-349/18), in breach of Articles 156 to 160 of the SNCB's general conditions of carriage then in force. In 2013 and 2015, five similar findings were made against Mrs Nijs (Case C-350/18). Likewise, in 2014 and 2015, Mr Dedroog was the subject of 11 similar findings (Case C-351/18).
- 20 The SNCB offered those persons the opportunity to regularise their situations by paying either immediately the price of the journey, plus an 'on board' surcharge, or, within 14 days after the establishment of the infringement, a surcharge of EUR 75 or, with respect to infringements prior to 2015, the transport price plus EUR 60. After that 14-day deadline, the defendants in the main proceedings again had the opportunity to pay a surcharge of EUR 225 or, with respect to infringements prior to 2015, the transport price plus EUR 200.
- 21 Since none of the defendants in the main proceedings made use of those opportunities, the SNCB sued them before the referring court, namely the *vredegerecht te Antwerpen* (Magistrates' Court, Antwerp, Belgium), seeking an order that they pay it respectively, in Cases C-349/18 to C-351/18, the amounts of EUR 880.20, EUR 1 103.90 and EUR 2 394, in addition to the costs of the proceedings in each case. In the context of those requests, the SNCB claims that the legal relationships between it and the defendants in the main proceedings are not contractual, but regulatory, since the latter did not by a ticket. The latter did not appear before the referring court.
- 22 That court considers that, in the light of the Court's case-law, it is required to examine of its own motion the application of the regime on unfair terms where the service is provided to a consumer. It notes that the cases before it concern, firstly, 'consumers', for the purposes of the doctrine of unfair terms, since that concept covers according to it 'any natural person who is acting for purposes which are outside his or her trade, business, craft or profession' and, secondly, an 'undertaking' for the purposes of that doctrine, by referring in that regard to a judgment of the *Hof van Cassatie* (Court of Cassation, Belgium). It notes that it is, as a result, bound to carry out the examination of the application of that doctrine and, in that regard, questions the nature of the legal relationship between the SNCB and the defendants in the main proceedings as well as, consequently, whether a transport contract was concluded.
- 23 In that regard, it notes that the legal basis for the SNCB's general conditions of carriage, which determine the respective rights and obligations of that company and of passengers, is not clear. According to one argument, they are purely contractual terms. According to a second argument, they are regulations, for the purposes of administrative law. There is also a controversy, in Belgian law, regarding the nature of the legal relationship between the SNCB and passengers. According to one theory, that relationship is always contractual, even where the passenger does not have a valid ticket. The mere fact of entering an area in which it is necessary to have a ticket gives rise to a transport contract, which is thus a pure adhesion contract. According to a second theory, the relationship is contractual where the passenger obtained a ticket, but regulatory in the absence of such a ticket. In that case, there would not be an agreement, since the passenger has no intention of paying for the carriage and the transport company has no intention of carrying out the carriage without consideration. The referring court notes that that discussion no longer appears to be relevant in Belgian law, since the *Grondwettelijk Hof* (Constitutional Court, Belgium) and the *Hof van Cassatie* (Court of Cassation) held that the doctrine of unfair terms applies also to regulatory legal relationships.

- 24 The referring court notes however that the doctrine of unfair terms presupposes the existence of a contract and considers that the concept of ‘contract’ is an EU law concept. In that regard, it refers to Article 9(4) of Regulation No 1371/2007 and raises the question of the time of the conclusion of the contract of carriage, and more particularly of whether it takes place on entering the area where it is in principle necessary to be in possession of a ticket or when the ticket is purchased.
- 25 It considers, moreover, that the question of the start of the contract of carriage should be tied in with Article 2(a) and Article 3 of Directive 93/13. In the cases before it, the SNCB’s general conditions of carriage, whether they be contractual or regulatory, should be regarded as conditions which have not been individually negotiated for the purposes of the latter provision.
- 26 In the light of those considerations, it raises the question whether a legal contractual relationship is always created between a transport company and a passenger, even where that passenger uses the services of that transport operator without obtaining a ticket. If such is not the case, it questions whether the doctrine of unfair terms applies to passengers who use public transport without having obtained a ticket.
- 27 In the event that the Court finds that the SNCB’s general conditions of carriage must be examined in the light of the doctrine of unfair terms, the referring court notes that, in Belgian law, an unfair term is invalid and that, according to the Court’s case-law, EU law precludes, in essence, a national court which finds a term in a contract concluded between a seller or supplier and a consumer to be unfair, from modifying that contract by revising the content of that term. Belgian legal literature however has criticised that prohibition of common law modification for being too sweeping. That court thus questions whether there are circumstances in which a seller or supplier has an interest in a term being maintained, but in which consumers have an interest in its scope being limited by the court and, in such a case, whether those circumstances can be abstractly defined.
- 28 In those circumstances, the *vredegerecht te Antwerpen* (Magistrates’ Court, Antwerp) decided to stay the proceedings and to refer the following questions, which are worded identically in each of the joined cases, to the Court for a preliminary ruling:
- ‘(1) Must Article 9(4) of [Regulation No 1371/2007], read in conjunction with Article 2(a) and Article 3 of Directive 93/13, be interpreted as meaning that a contractual legal relationship is always created between the transport company and the passenger, even when the latter makes use of the services provided by the transport company without purchasing a ticket?
- (2) If the answer to the previous question is in the negative, does the protection offered by the doctrine of unfair terms also extend to a passenger who makes use of public transport without having acquired a ticket and who, by that action, under the general terms and conditions of the transport company, which are considered to be generally binding on the basis of their regulatory nature or, alternatively, by virtue of their publication in an official State publication, is obliged to pay a surcharge in addition to the fare?
- (3) Does Article 6 of Directive 93/13 on unfair terms in consumer contracts, which provides that “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”, preclude a court in all cases from moderating the term deemed to be unfair or from applying ordinary law instead?
- (4) If the answer to the previous question is in the negative, what then are the circumstances in which a national court may proceed to moderate the term found to be unfair or to replace it by the ordinary law?

- (5) If the aforementioned questions cannot be answered *in abstracto*, the question then arises as to whether, if the national railway company, having apprehended a fare-dodger, imposes a civil penalty in the form of a surcharge, whether or not in addition to the fare, and the court were to find that the surcharge imposed is unfair within the meaning of Article 2(a), read in conjunction with Article 3, of Directive 93/13, Article 6 of that directive precludes the court from declaring the term void and applying ordinary liability law to compensate the national railway company for the damage suffered.⁷

Procedure before the Court

- ²⁹ By decision of the President of the Court of 11 July 2018, Cases C-349/18 to C-351/18 were joined for the purposes of the written procedure and the judgment.

Consideration of the questions referred

The first question

- ³⁰ At the outset, it should be noted, first, that, by its first question, the referring court seeks to obtain an interpretation of Article 9(4) of Regulation No 1371/2007 in the light of Directive 93/13. That regulation does not however contain any references to Directive 93/13. Moreover, it follows from a comparison of Article 1 of each that that regulation and that directive have different subject matters. Therefore, the provisions of Directive 93/13 cannot be relevant to the interpretation of Regulation No 1371/2007 (see, by analogy, judgments of 9 September 2004, *Meiland Azewijn*, C-292/02, EU:C:2004:499, paragraph 40; of 15 December 2011, *Møller*, C-585/10, EU:C:2011:847, paragraphs 37 and 38; and of 11 September 2014, *Commission v Germany*, C-525/12, EU:C:2014:2202, paragraph 40).
- ³¹ Secondly, if, by that question, the referring court raises the issue of the interpretation of Article 9(4) of Regulation No 1371/2007, it should be noted that that provision concerns the opportunity which must in principle be offered by rail undertakings to obtain tickets for the service at issue on board the train. However, it follows from the orders for reference that it is not so much that opportunity that is at issue in the main proceedings, but whether a passenger travelling by train without having purchased a ticket must be considered, by boarding the train, to have entered into a contractual relationship with the rail undertaking, for the purposes of that regulation. It is therefore not Article 9(4) of that regulation, as such, which must be interpreted for the purposes of the main proceedings.
- ³² It follows however from the Court's settled case-law that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not prevent the Court from providing the national court with all the points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 36 and the case-law cited).

- 33 In the light of those considerations and the grounds for the requests for a preliminary ruling, it must be understood that, by its first question, the referring court asks, in essence, whether Article 3(8) of Regulation No 1371/2007 must be interpreted as meaning that a situation in which a passenger boards a freely accessible train for the purposes of travel without acquiring a ticket comes within the concept of a ‘transport contract’ for the purposes of that provision.
- 34 Under Article 3(8) of Regulation No 1371/2007, the concept of ‘transport contract’, for the purposes of that regulation, covers ‘a contract of carriage for reward or free of charge between a railway undertaking or a ticket vendor and the passenger for the provision of one or more transport services’.
- 35 It should be noted that, when interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules (see judgments of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 41 and the case-law cited, and of 22 November 2012, *Westbahn Management*, C-136/11, EU:C:2012:740, paragraph 33 and the case-law cited).
- 36 As regards the wording of Article 3(8) of Regulation No 1371/2007, it should be noted, firstly, that the word ‘contract’ is generally understood to designate an agreement by consensus intended to produce legal effects. Secondly, in the context of the field covered by that regulation and in the light of the wording of that provision, that effect consists principally in the obligation imposed on the rail undertaking to provide to the passenger one or more transport services and the obligation imposed on the passenger to pay the price of that transport, unless the service is provided free of charge.
- 37 It follows therefore from the findings in the previous paragraph that, on the one hand, by allowing free access to its train and, on the other hand, by boarding that train with an intention to travel, both the rail undertaking and the passenger demonstrate their agreement to enter into a contractual relationship, so that the conditions necessary for establishing the existence of a transport contract are, in principle, satisfied. The wording of Article 3(8) of Regulation No 1371/2007 however does not allow it to be determined whether the possession, by the passenger, of a ticket is essential for the purposes of considering that there exists a ‘transport contract’ within the meaning of that provision.
- 38 As regards the context of Article 3(8) of Regulation No 1371/2007, it should be noted, in the first place, that the term ‘transport contract’ occurs in several other provisions of that regulation.
- 39 Therefore, Article 3(10) of that regulation defines the concept of ‘through ticket’ as referring to ‘a ticket or tickets representing a transport contract for successive railway services operated by one or several railway undertakings’.
- 40 Article 4 of that regulation, which specifically concerns the ‘transport contract’, provides that, ‘subject to the provisions of [Chapter II of Regulation No 1371/2007], the conclusion and performance of a transport contract and the provision of information and tickets shall be governed by the provisions of Title II and Title III of Annex I’ to that regulation.
- 41 In that regard, Title II of Appendix A of the COTIF relating to the conclusion and performance of the contract of carriage is, inter alia, reproduced in Annex I to Regulation No 1371/2007. According to Article 6(1) of that appendix, ‘by the contract of carriage the carrier shall undertake to carry the passenger as well as, where appropriate, luggage and vehicles to the place of destination and to deliver the luggage and vehicles at the place of destination’, Article 6(2) stating that the contract of carriage must be confirmed by one or more tickets issued to the passenger and that, subject to Article 9 of that appendix, the absence, irregularity or loss of the ticket does not affect the existence or validity of the contract which remains subject to the uniform rules established by the COTIF. Article 6(3) of that appendix adds that the ticket is *prima facie* evidence of the conclusion and the contents of the contract of carriage.

- 42 Moreover, Article 7 of Appendix A of the COTIF provides, in paragraph 1 thereof, that the general conditions of carriage are to determine, in particular, the form and content of tickets and, in paragraph 2(c) thereof, that all necessary information to prove the conclusion and contents of the contract of carriage and enabling the passenger to assert the rights resulting from that contract must in particular be included on the ticket.
- 43 In that regard, it should be noted that it follows from Article 9(2) and (3) of Regulation No 1371/2007 that, without prejudice to paragraph 4 of that article, railway undertakings are required to distribute tickets to passengers via at least one of three — or one of two in relation to tickets for services provided under public service contracts — points of sale listed in those provisions, including distribution on board trains.
- 44 In the second place, it should be noted that it follows from Article 8(1) of Appendix A of the COTIF, included in Annex I to that regulation, that it is only in the absence of a contrary agreement between the passenger and the carrier that the carriage charge is payable in advance.
- 45 Moreover, admittedly, Article 9 of Appendix A, subject to which Article 6 thereof applies, provides, in the first sentence of paragraph 1 thereof, that the passenger must, from the start of his journey, be in possession of a valid ticket and produce it for inspection. However, Article 9 states, in the second sentence, respectively paragraphs (a) and (b) thereof, that the general conditions of carriage may provide that a passenger who does not produce a valid ticket must pay, in addition to the carriage charge, a surcharge, and that a passenger who refuses to pay the carriage charge or the surcharge upon demand may be required to discontinue his journey.
- 46 According to Article 3(16) of Regulation No 1371/2007, the concept of ‘General Conditions of Carriage’, for the purposes of that regulation, covers ‘the conditions of the carrier in the form of general conditions or tariffs legally in force in each Member State and which have become, by the conclusion of the contract of carriage, an integral part of it’, the ‘carrier’ being defined by Article 3(2) of that regulation as ‘the contractual railway undertaking with whom the passenger has concluded the transport contract or a series of successive railway undertakings which are liable on the basis of this contract’.
- 47 In so far as a passenger who does not produce a valid ticket or refuses to immediately pay for a ticket, in accordance with Article 9 of Appendix A of the COTIF, included in Annex I to Regulation No 1371/2007, the general conditions of carriage may be relied upon against that passenger, and in so far as those conditions, according to Article 3(16) of that regulation, read in conjunction with Article 3(2) thereof, form, for the purposes of that regulation, an integral part of the transport contract between the rail undertaking and the passenger by the conclusion of the latter, it follows that such an undertaking which allows free access to its trains and a passenger who boards such a train for the purposes of travel must be considered to be parties to a ‘transport contract’, as soon as that passenger is thus on board the train. Otherwise, those general conditions of carriage could not be relied upon against that passenger on the basis of Regulation No 1371/2007.
- 48 It thus follows clearly from those elements that the ticket, referred to in Appendix A as a ‘ticket’, is only the instrument which embodies the transport contract, for the purposes of Regulation No 1371/2007.
- 49 The wording of Article 3(8) of Regulation No 1371/2007 and the context of that provision, consequently, allow it to be considered that the concept of ‘transport contract’, within the meaning of that provision must, for the purposes of that regulation, be understood as being independent from the possession, by the passenger, of a ticket and in the sense that it covers a situation in which a passenger boards a freely accessible train for the purposes of travel without having obtained a ticket.

- 50 That interpretation is supported by the objectives pursued by Regulation No 1371/2007. Firstly, in accordance with Article 1(a) thereof, the purpose of that regulation is, in particular, to establish rules concerning the conclusion of transport contracts. Secondly, recital 1 of that regulation points out in particular that, in the context of the common transport policy, it is necessary to safeguard the rights of rail passengers. Moreover, it follows from recital 2 of that regulation that a high level of consumer protection in the field of transport must be achieved and, according to recital 3 thereof, since the rail passenger is the weaker party to the transport contract, his rights in this respect should be safeguarded.
- 51 It would be contrary to those objectives to consider that the concept of ‘transport contract’, for the purposes of Regulation No 1371/2007, must be interpreted as not covering a situation in which a passenger boards a freely accessible train for the purpose of travel without having obtained a ticket. If it were permissible to consider that such a passenger can, on the sole ground that he does not have a ticket when he boards a train, be regarded as not being a party to a contractual relationship with the rail undertaking which grants free access to its trains, that passenger could, in circumstances beyond his control, be deprived of the rights that that regulation attaches to the conclusion of a transport contract, which would undermine the objective pursued by that regulation of protecting rail passengers and which is noted in recitals 1 to 3 thereof.
- 52 Moreover, in the absence of provisions in that regard in Regulation No 1371/2007, such an interpretation is without prejudice to the validity of that contract or the consequences which could result from the non-performance, by one of the parties, of its contractual obligations, which, in the absence of provisions in that regard, remain governed by the applicable national law.
- 53 In the light of all of the foregoing considerations, the answer to the first question is that Article 3(8) of Regulation No 1371/2007 must be interpreted as meaning that a situation in which a passenger boards a freely accessible train for the purposes of travel without acquiring a ticket comes within the concept of ‘transport contract’ for the purposes of that provision.

The second question

- 54 Having regard to the reply given to the first question, there is no need to reply to the second question.

The third and fifth questions

- 55 By its third and fifth questions, which should be examined together, the referring court asks, in essence, whether Article 6(1) of Directive 93/13 must be interpreted as precluding that a national court which establishes that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair moderate the amount of the penalty imposed on that consumer or replace that term with a supplementary provision of national law. In that context, that court also asks whether Directive 93/13 must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, that the national court apply, in addition, provisions of its national law relating to non-contractual liability.
- 56 In that regard, it should be noted, first of all, that, in the present case, according to the information contained in the requests for a preliminary ruling, the penalty clause that the referring court could, where appropriate, declare to be unfair is part of the SNCB’s general conditions of carriage, in respect of which that court states that they are ‘considered to be generally binding on the basis of their regulatory nature’ and that they are part of a ‘publication in an official State publication’.

- 57 In the light of those explanations, it must be noted that, in accordance with Article 1(2) of Directive 93/13, contractual terms which reflect, in particular, mandatory statutory or regulatory provisions are not to be subject to the provisions of that directive.
- 58 According to the Court's settled case-law, as is apparent from the 13th recital of Directive 93/13, the exclusion provided for in Article 1(2) thereof extends to provisions of national law that apply between the parties to the contract independently of their choice and to provisions that apply by default, that is to say, in the absence of other arrangements established by the parties in that regard, and to contractual terms reflecting those provisions (see, to that effect, judgments of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 26; of 30 April 2014, *Barclays Bank*, C-280/13, EU:C:2014:279, paragraphs 30, 31 and 42; and order of 7 December 2017, *Woonhaven Antwerpen*, C-446/17, not published, EU:C:2017:954, paragraph 25).
- 59 That exclusion is justified by the fact that, in principle, it may legitimately be supposed that the national legislature has struck a balance between all the rights and obligations of the parties to certain contracts, a balance which the EU legislature has expressly intended to preserve (see, to that effect, judgment of 30 April 2014, *Barclays Bank*, C-280/13, EU:C:2014:279, paragraph 41 and the case-law cited, and order of 7 December 2017, *Woonhaven Antwerpen*, C-446/17, not published, EU:C:2017:954, paragraph 26).
- 60 That exclusion from the scope of application of Directive 93/13 requires therefore, according to the Court's case-law, two conditions to be met. Firstly, the contractual term must reflect a statutory or regulatory provision and, secondly, that provision must be mandatory (judgments of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 78, and of 20 September 2017, *Andrić and Others*, C-186/16, EU:C:2017:703, paragraph 28).
- 61 Moreover, it results, in essence, from the Court's case-law that that exclusion covers mandatory statutory or regulatory provisions other than those relating to the scope of the national court's powers to assess the unfairness of a contractual term (see, to that effect, judgments of 30 April 2014, *Barclays Bank*, C-280/13, EU:C:2014:279, paragraphs 39 and 40 and the case-law cited, and of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, EU:C:2018:643, paragraph 44).
- 62 Determining whether those conditions have been met in each individual case is a matter for the national court (see, to that effect, judgments of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 33, and of 20 September 2017, *Andrić and Others*, C-186/16, EU:C:2017:703, paragraph 29 and the case-law cited).
- 63 In carrying out that determination, that court must take into account the fact that, having regard to the purpose of Directive 93/13, namely the protection of consumers against unfair terms included in contracts concluded with consumers by sellers or suppliers, the exception provided for in Article 1(2) of the directive is to be strictly construed (see, to that effect, judgments of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 77, and of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 54 and the case-law cited).
- 64 Having said that, it is for the Court to analyse the third and fifth questions on the basis of the premiss, whose accuracy will be for the referring court to verify, that the term which that court intends to declare unlawful does not fall outside the scope of Directive 93/13 in accordance with Article 1(2) thereof.
- 65 According to Article 6(1) of Directive 93/13, Member States are to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier are, as provided for under their national law, not to be binding on the consumer and that the contract is to continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

- 66 The Court has interpreted that provision as meaning that it is for the national court to establish all the consequences, arising under national law, of a finding that the term in question is unfair in order to ensure that the consumer is not bound by that term. In that regard, the Court has stated that, where the national court considers a contractual term to be unfair, it is required to disapply it in order that it may not produce binding effects with regard to the consumer, except if the consumer opposes that non-application (see, to that effect, judgments of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 49 and the case-law cited, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 52).
- 67 The Court has also held that, where a national court finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, Article 6(1) of Directive 93/13 must be interpreted as precluding a rule of national law which allows the national court to modify that contract by revising the content of that term (judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 77 and the case-law cited, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 53). In particular, the Court has held that that provision cannot be interpreted as allowing the national court, where it establishes that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair, to moderate the amount of the penalty imposed on the consumer instead of excluding the application of that clause in its entirety with regard to that consumer (judgments of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 59, and of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraph 29).
- 68 The contract must therefore continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible (judgments of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 57 and the case-law cited, and of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraph 28).
- 69 If it were open to the national court to revise the content of unfair terms, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect for sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be adjusted, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers (judgments of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 58, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 54 and the case-law cited).
- 70 Moreover, it is true that the Court acknowledged an exception to that principle by holding that Article 6(1) of Directive 93/13 does not preclude a national court from removing, in accordance with the principles of contract law, an unfair term and replacing it with a supplementary provision of national law, provided that that substitution is consistent with the objective of Article 6(1) of Directive 93/13 and enables real balance between the rights and obligations of the parties to be restored which re-establishes equality between them. However, the Court has limited that possibility to cases in which the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to particularly unfavourable consequences, so that the consumer would thus be penalised (see, to that effect, judgments of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21 paragraph 33 and the case-law cited, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraphs 56 and 57).

- 71 However, in the main proceedings, and subject to verifications to be carried out, in that regard, by the referring court, it does not appear that the possible invalidation of the penalty clause at issue is capable of entailing the cancellation of the contracts in their entirety and thus of exposing consumers to particularly unfavourable consequences.
- 72 As regards the question whether, in circumstances such as those at issue in the main proceedings, it is possible, for the referring court, in addition, to apply the rules of its national law governing non-contractual liability, it suffices to note that the purpose of Directive 93/13, in accordance with Article 1(1) thereof, 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 and that it does not contain any provisions relating to non-contractual liability.
- 73 Therefore, the question whether circumstances such as those at issue in the main proceedings are, moreover, capable of falling within the ambit of the law governing non-contractual liability does not come within the scope of Directive 93/13, but of national law. Consequently, it is not necessary to examine it in the context of the present requests for a preliminary ruling.
- 74 In the light of all of the foregoing considerations, the answer to the third and fifth questions is that Article 6(1) of Directive 93/13 must be interpreted as precluding, firstly, that a national court which establishes that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair moderate the amount of the penalty imposed on the consumer and, secondly, that a national court replace that term, in accordance with the principles of its contract law, with a supplementary provision of national law, except where the contract at issue cannot continue in existence in the event that the unfair term is deleted and where the cancellation of the contract in its entirety exposes consumers to particularly unfavourable consequences.

The fourth question

- 75 In view of the answer to the third and fifth questions, it is unnecessary to reply to the fourth question.

Costs

- 76 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 (Fifth Chamber) hereby rules:

- 1. Article 3(8) of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations must be interpreted as meaning that a situation in which a passenger boards a freely accessible train for the purposes of travel without acquiring a ticket comes within the concept of a 'transport contract' for the purposes of that provision.**
- 2. Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding, firstly, that a national court which establishes that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair moderate the amount of the penalty imposed on the consumer and, secondly, that a national court replace that term, in accordance with the principles of its contract law, with a supplementary provision of national law, except where the contract at issue cannot continue in existence in the event that the unfair term is deleted and where the cancellation of the contract in its entirety exposes consumers to particularly unfavourable consequences.**

[Signatures]