Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

21 April 2016*

(Reference for a preliminary ruling — Directive 93/13/EEC — Article 7 — National rules governing insolvency proceedings — Debts arising from a consumer credit agreement — Effective judicial remedy — Point 1(e) of the annex — Disproportionate amount of compensation — Directive 2008/48/EC — Article 3(l) — Total amount of credit — Point I of Annex I — Amount of drawdown — Calculation of the annual percentage rate — Article 10(2) — Obligation to provide information — Ex officio examination — Penalty)

In Case C-377/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajský soud v Praze (Regional Court, Prague, Czech Republic), made by decision of 24 June 2014, received at the Court on 7 August 2014, in the proceedings

Ernst Georg Radlinger

Helena Radlingerová

v

Finway a.s.,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Second Chamber, acting as President of the Third Chamber, C. Toader (Rapporteur), F. Biltgen, E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 15 July 2015,

after considering the observations submitted on behalf of:

— Mr Radlinger and Ms Radlingerová, by I. Ulč,

— Finway a.s., by L. Macek,

— the Czech Government, by M. Smolek, J. Vláčil and S. Šindelková, acting as Agents,

— the German Government, by T. Henze and D. Kuon, acting as Agents,

* Language of the case: Czech.

— the Polish Government, by B. Majczyna, acting as Agent,

— the European Commission, by M. van Beek, G. Goddin and K. Walkerová, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 November 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation, firstly, of Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) and of point 1(3) of the annex to that directive and, secondly, of Articles 10(2) and 22(2) of 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 1987 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) and point I of Annex I to that directive.

2 The request has been made in proceedings between Mr Radlinger and Ms Radlingerová ('the Radlingers') and Finway a.s. ('Finway') concerning debts arising from a consumer credit agreement which were declared in insolvency proceedings.

Legal context

EU law

Directive 93/13

3 Under Article 1(1), the purpose of Directive 93/13 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.

4 In accordance with Article 3(1) of that directive, a contractual term which has not been individually negotiated is to 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. Article 3(3) of the directive states that 'the annex [thereto] contains an indicative and non-exhaustive list of the terms which may be regarded as unfair'. In accordance with point 1(e) of the annex to that directive, terms which have the object or effect of 'requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation'.

5 Under Article 4(1) of Directive 93/13:

'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.'

6 Article 6(1) of that directive is worded as follows:

‘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.’

7 According to Article 7 of the directive:

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

2. The means referred to in paragraph 1 are to 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 effective means to prevent the continued use of such terms.

…’

Directive 2008/48

8 As stated in Article 1 thereof, Directive 2008/48 harmonises certain aspects of the Member States’ rules concerning agreements covering credit for consumers.

9 In accordance with Article 2(2)(a) of that directive, it does not apply, in particular, to ‘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’. Recital 10 to that directive states that although the scope of the directive is expressly defined therein, Member States may nevertheless apply its provisions to matters outside the directive’s scope.

10 In accordance with recitals 6, 7, 9, 19 and 31 to Directive 2008/48, the aims of that directive are, inter alia, to develop a more transparent and efficient consumer credit market within the internal market; to achieve full harmonisation while ensuring a high and equivalent level of protection for consumers throughout the European Union; to ensure that credit agreements contain all necessary information in a clear and concise manner, so as to enable consumers to make their decisions in full knowledge of the facts and to allow them to be aware of the rights and obligations under a credit agreement and that consumers have information relating to the annual percentage rates of charge (‘APR’) throughout the European Union, allowing them to compare those rates.

11 Furthermore, recital 43 to Directive 2008/48 states, inter alia, that, despite the uniform mathematical formula for its calculation, the APR is not yet fully comparable throughout the European Union. That directive therefore seeks clearly and comprehensively to define the total cost of a credit to the consumer.

12 Article 3 of Directive 2008/48, entitled ‘Definitions’, states as follows:

‘For the purposes of this directive, the following definitions apply:

…

(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;

(h) "total amount payable by the consumer" means the sum of the total amount of the credit and the total cost of the credit to the consumer;

(i) "[APR]" means the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit, where applicable including the costs referred to in Article 19(2);

...

(l) "total amount of credit" means the ceiling or the total sums made available under a credit agreement;

…'

13 Article 10 of Directive 2008/48, concerning the information to be included in credit agreements, requires, in the first subparagraph of paragraph 1, that credit agreements are to be drawn up on paper or on another durable medium. Article 10(2) lists the items of information that must be specified in a clear and concise manner in any credit agreement. That list includes, inter alia:

'…

(d) the total amount of the credit and the conditions governing the drawdown;

...

(f) the borrowing rate, the conditions governing the application of that rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedures for changing the borrowing rate and, if different borrowing rates apply in different circumstances, the abovementioned information in respect of all the applicable rates;

(g) the [APR] and the total amount payable by the consumer, calculated at the time the credit agreement is concluded; all the assumptions used in order to calculate that rate shall be mentioned;

(h) the amount, number and frequency of payments to be made by the consumer and, where appropriate, the order in which payments will be allocated to different outstanding balances charged at different borrowing rates for the purposes of reimbursement;

…'

14 Article 19 of Directive 2008/48, entitled 'Calculation of the [APR]' provides, in paragraphs 1 and 2:

'1. The [APR], equating, on an annual basis, to the present value of all commitments (drawdowns, repayments and charges), future or existing, agreed by the creditor and the consumer, shall be calculated in accordance with the mathematical formula set out in Part I of Annex I.

2. For the purpose of calculating the [APR], the total cost of the credit to the consumer shall be determined, with the exception of charges payable by the consumer for non-compliance with any of his commitments laid down in the consumer credit agreement and charges other than the purchase price which, for purchases of goods or services, he is obliged to pay whether the transaction is effected in cash or on credit.

The costs of maintaining an account recording both payment transactions and drawdowns, the costs of using a means of payment for both payment transactions and drawdowns, and other costs relating to payment transactions shall be included in the total cost of credit to the consumer unless the opening of the account is optional and the costs of the account have been clearly and separately shown in the credit agreement or in any other agreement concluded with the consumer.'

15 Article 22 of Directive 2008/48, entitled 'Harmonisation and imperative nature of this Directive', states in paragraph 2:

'Member States shall ensure that consumers may not waive the rights conferred on them by the provisions of national law implementing or corresponding to this Directive.'

16 Article 23 of the directive, entitled 'Penalties', provides as follows:

'Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this directive and shall take all measures necessary to ensure that they are implemented. The sanctions must be effective, commensurate with the infringement, and must constitute a sufficient deterrent.'

17 Part I of Annex I to Directive 2008/48 specifies, inter alia, as follows:

'…

The basic equation, which establishes the [APR], equates, on an annual basis, the total present value of drawdowns on the one hand and the total present value of repayments and payments of charges on the other. ...'

Czech law

Insolvency proceedings

18 It is apparent from the file before the Court that insolvency proceedings are governed by Law No 182/2006 on bankruptcy and the modes of its resolution (the Law on insolvency) (zákon č. 182/2006 Sb., o úpadku a způsobech jeho řešení, as amended by Law No 185/2013 ('the Law on insolvency').

19 Under that law, a debtor is regarded as insolvent, in particular, for the purposes of that law, when he is unable to honour his financial commitments for more than 30 days after the final date for payment. A debtor who is not a trader may apply to the insolvency court for the status of bankruptcy to be resolved by way of discharge. The authorisation of the discharge is subject, firstly, to a finding by the court that, by that application, the debtor is not acting in bad faith and, secondly, to the reasonable presumption that the registered unsecured creditors will recover, in the discharge, at least 30% of the established debts. In the context of insolvency proceedings, under Article 410 of that law, the court may not, either of its own motion or at the request of the debtor, examine the validity, amount or the ranking of claims, even where issues regulated by Directive 93/13 or 2008/48 arise, before adoption of its decision on the application for discharge.

20 It is not until the insolvency court has approved the resolution of the bankruptcy by way of discharge that the debtor may lodge an incidental application to contest the registered debts, that application being, however, limited only to enforceable, unsecured claims. Furthermore, in that case, the debtor may assert, in order to justify his opposition to the existence or amount of that debt, only that the claim has lapsed or is time-barred.

Consumer protection legislation

21 Articles 51a et seq. of Law No 40/1964 establishing the Civil Code (Zákon č. 40/1964 Sb., občanský zákoník), in the version in force until 31 December 2013 ('the Civil Code'), transposed Directive 93/13 into Czech law.

22 In accordance with Article 56(1) of that code, consumer contracts must not contain terms which, 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. By virtue of Article 55(2) of that code, terms of that sort in consumer contracts are to be void. Article 56(3) of that code contains an indicative list of unfair terms which is based on the annex to Directive 93/13 but which does not include the term, set out in point 1(e) of that annex, which has the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.

23 Directive 2008/48 was transposed into Czech law by Law 145/2010 concerning consumer credit and amending certain laws in their original version (Zákon č. 145/2010 Sb., o spotřebitelském úvěru a o změně některých zákonů) ('the Law on consumer credit').

24 Article 6(1) of that Law, which concerns the creditor's obligation to provide information to the consumer, provides:

'Consumer credit agreements shall be in writing and include the information listed in Annex 3 to this Law, set out in a clear, concise and visible manner. Failure to comply with that obligation to provide information or to set out the agreement in writing shall not affect the validity of the contract. ...'

25 By virtue of Article 8 of the Law on consumer credit, if the credit agreement does not include the information set out in Article 6(1) of that law and if the consumer relies on that fact against the creditor, interest under that consumer credit is, from the outset, deemed to have been calculated at the discount rate applicable at the date of conclusion of that agreement, as published by the Czech National Bank; and any other arrangements as to payments in the credit agreement are invalid.

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

26 On 29 August 2011, the Radlingers concluded a consumer credit agreement with Smart Hypo s.r.o., under which they were granted a loan of CZK 1 170 000 (1 170 000 Czech crowns) (approximately EUR 43 300).

27 As consideration for the grant of that loan, the Radlingers undertook firstly to reimburse to the creditor the sum of CZK 2 958 000 (approximately EUR 109 500) in 120 monthly instalments. That sum is made up of the capital, interest at the rate of 10% per annum on the capital borrowed for the duration of the credit, the remuneration due to the creditor in the sum of CZK 585 000 (approximately EUR 21 600), and fees of CZK 33 000 (approximately EUR 1 200). The APR of the consumer credit at issue in the main proceedings was 28.9%.

28 Over and above the default interest provided by statute, the Radlingers undertook to pay the lender a contractual penalty of 0.2% of the principal sum for every day or part of a day of default, a single contractual fine of CZK 117 000 (approximately EUR 4 320) in the event of a default exceeding one month, and a lump sum of CZK 50 000 (approximately EUR 1 846) towards the lender's costs in recovering amounts owed.

29 Finally, the creditor reserves the right to demand, with immediate effect, reimbursement in full of the amounts due, if one of the monthly instalments was not paid in full or on time, or if his agreement proved to have been vitiated by a fraudulent lack of disclosure by the Radlingers.

30 As is apparent from the order for reference, no money has actually been paid to the Radlingers. The credit at issue in the main proceedings was used to settle earlier debts owed to a bailiff, notarial fees, and, in favour of the lender, the costs connected with that credit, the first monthly instalment thereof and part of the following monthly instalments.

31 On 27 September 2011, Finway, to which Smart Hypo s. r. o. had transferred the debts which it held over the Radlingers, informed them that the full amount of the debt, which at that time amounted to CZK 2 873 751 (approximately EUR 106 300), was payable immediately, on the ground that essential information had been withheld when the agreement at issue in the main proceedings was concluded. According to Finway, the Radlingers had hidden the fact that a seizure had been ordered of their property in the amount of CZK 4 285 (approximately EUR 160).

32 By letter of formal notice of 19 November 2012, that company again requested the Radlingers to reimburse the debt, which it then calculated at CZK 3 794 786 (approximately EUR 140 500), stating that its debt had become immediately payable because they had not regularly reimbursed the credit on time.

33 On 5 February 2013, the Radlingers applied to the Krajský soud v Plzni (Regional Court, Pilsen, Czech Republic) for a declaration that they were bankrupt and an order that their debt be discharged by way of scheduled payments, since they were not in a position to honour their commitments and had a delay of more than three months in making payment. That application was transferred to the Krajský soud v Praze (Regional Court, Prague, Czech Republic), the court having territorial jurisdiction to hear that application, and that court, by order of 26 April 2013, declared the Radlingers bankrupt, designated an insolvency administrator and requested the creditors to declare their claims within 30 days.

34 On 23 May 2013, in the context of the insolvency proceedings, Finway registered two enforceable claims, the first was a claim for CZK 3 045 991 (approximately EUR 112 700) secured by a mortgage, and the second was an unsecured claim in the amount of CZK 1 359 540 (approximately EUR 50 300), representing the contractual penalty, provided for in the agreement at issue in the main proceedings, for default on the payments at 0.2% of the principal sum per day from 23 September 2011 to 25 April 2013.

35 On 3 July 2013, the Radlingers accepted that the claims were enforceable, but contested the amounts on the grounds that the terms of the credit agreement at issue in the main proceedings had been contrary to accepted principles of morality.

36 By order of 23 July 2013, the referring court approved the Radlingers' joint discharge from bankruptcy on the basis of a schedule of repayments.

37 On 24 July 2013, the Radlingers made an incidental application to that court by which they requested, as debtors, a declaration of the unlawfulness in part or in full of the claims declared by Finway.

38 With regard to that claim, that court notes that, by virtue of the Law on insolvency, the debtor has the right to dispute only unsecured debts, only in an incidental application and on the sole grounds that the debt is time-barred or has been repaid.

39 Given that the agreement at issue in the main proceedings, from which the claim is declared by Finway originate, constitutes both a consumer credit agreement, within the meaning of Directive 2008/48, and a contract concluded between a consumer and a seller or supplier, within the meaning of Directive 93/13, the referring court asks whether the obligations which flow from the provisions of the latter directive are placed also on the insolvency court ruling on disputed claims which originate from a credit agreement.

40 That court is also doubtful as to the regularity of the APR as set out in the agreement at issue in the main proceedings. In that regard, it is unsure as to which sums were included by the lender in the amount of credit drawdown, within the meaning of point I of Annex I to Directive 2008/48, for the purposes of calculating the APR, having regard to the fact that the costs relating to that credit and the two first monthly instalments were immediately deducted from the amount of that credit.

41 Finally, it is unsure as to the appropriate way in which to examine, in the light of the requirements of Directive 93/13, the terms of an agreement concluded between a consumer and a seller or supplier, such as that at issue in the main proceedings, which provides that, in the event of late payment, the creditor may claim from the debtor immediate repayment of the entire credit concerned, including the interest and the future creditors fees, payment of a contractual penalty of 0.2% of the principal sum for every day or part of a day of default and a single contractual fine of CZK 117 000 (approximately EUR 4 300) in the event of a default exceeding one month.

42 Since it considered that the outcome of the case depended on an interpretation of the relevant provisions of EU law, the Krajský soud v Praze (Regional Court, Prague) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Do Article 7(1) of Directive 93/13 and Article 22(2) of Directive 2008/48, or any other provisions of EU law on consumer protection, preclude national rules which, in insolvency proceedings:
   (a) the concept of the Law on insolvency, which enables the court to examine the authenticity, amount or ranking of claims stemming from consumer relations only on the basis of an incidental application lodged by the administrator in bankruptcy, a creditor or (under the abovementioned restrictions) the debtor (consumer)?
   (b) provisions which, in the context of the national legislation governing insolvency proceedings, restrict the right of the debtor (consumer) to request review by the court of the registered claims of creditors (suppliers of goods or services) solely to cases in which the resolution of the consumer’s bankruptcy in the form of a discharge is approved, and in this context only in relation to creditors’ unsecured claims, with the objections of the debtor being further limited, in the case of enforceable claims acknowledged by a decision of the competent authority, solely to the possibility of asserting that the claim has lapsed or is time-barred, as laid down in the provisions of Paragraph 192(3) and Paragraph 410(2) and (3) of the Law on insolvency?

2. If Question 1 is answered in the affirmative:
   (a) is the court in proceedings concerning the examination of claims under a consumer credit agreement required to have regard ex officio, even in the absence of an objection on the part of the consumer, to the credit supplier’s failure to fulfil the information requirements under Article 10(2) of Directive 2008/48 and
   (b) to infer the consequences provided for in national law in the form of the invalidity of the contractual arrangements?

If Question 1 or 2 is answered in the affirmative:

3. Do the provisions of the directives applied above have direct effect and is their direct application precluded by the fact that the initiation of an incidental action by the court ex officio (or, from the point of view of national law, the inadmissible review of a claim on the basis of an ineffective contestation by the debtor-consumer) encroaches on the horizontal relationship between the consumer and the supplier of goods or services?

4. What amount is represented by 'the total amount of credit' in accordance with Article 10(2)(d) of Directive 2008/48 and what amounts are included as 'the amounts of drawdown' in the calculation of the APR according to the formula set out in Annex I to Directive 2008/48, if the credit agreement formally promises the payment of a specific financial amount but at the same time it is agreed that, as soon as the credit is paid out, the claims of the credit supplier in terms of a fee for the provision of the credit and in terms of the first credit repayment instalment (or subsequent instalments) will to a certain extent be offset against that amount, so that the amounts thus offset are never in reality paid out to the consumer, or to his account, and remain at the creditor's disposal throughout? Does the inclusion of those amounts which are in reality not paid out affect the amount of the APR calculated?

Regardless of the answer to the preceding questions:

5. In the assessment of whether the above agreed compensation is disproportionately high within the meaning of point 1(e) of the Annex to Directive 93/13, is it necessary to evaluate the cumulative effect of all the penalty clauses, as concluded, regardless of whether the creditor actually insists that they be satisfied in full and regardless of whether some of them may from the point of view of the rules of national law be considered to have been concluded invalidly, or is it necessary to take into consideration only the total amount of the penalties actually demanded and capable of being demanded?

6. In the event that the contractual penalties are found to be abusive, is it necessary to disapply all of those partial penalties which, only when considered together, led the court to conclude that the amount of compensation was disproportionately high within the meaning of point 1(e) of the Annex to Directive 93/13, or merely some of them (and in that case by what criteria is this to be judged)?'

Consideration of the questions referred

The first question

43 By its first question, the referring court asks, in essence, whether Articles 7(1) of Directive 93/13 and 22(2) of Directive 2008/48 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in insolvency proceedings does not permit, firstly, the court hearing the action to examine of its own motion any unfairness of contractual terms on which the claims declared in such proceedings are based and which, secondly, permits that court to examine only unsecured claims, solely in respect of a restricted number of complaints related to whether they are time-barred or have been paid.

44 Article 22(2) of Directive 2008/48 requires Member States to ensure that consumers may not waive the rights conferred on them by provisions of national law implementing or corresponding to that directive. It is not apparent from the order for reference that the Radlingers waived the rights

conferred on them by the provisions of Czech law implementing that directive. It follows therefrom, as the Advocate General noted in point 40 of her Opinion, that that provision has no bearing on the first question.

45 Article 7(1) of Directive 93/13 provides that Member States are to ensure that, in the interests of consumers, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

46 Those means must include provisions enabling consumers to be guaranteed effective judicial protection by making it possible for them to bring legal proceedings against the disputed contract including in the insolvency proceedings and under reasonable procedural conditions so that the exercise of their rights is not subject to conditions, in particular time limits or costs which make it excessively difficult or impossible to exercise the rights guaranteed by Directive 93/13 (see, to that effect, judgment of 1 October 2015 in *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 59).

47 In the present case, the first question referred concerns the organisation of insolvency proceedings, in the context of a dispute where the debtor-consumer raises an objection to the merits of claims declared.

48 According to the settled case-law of the Court, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State, in accordance with the principle of procedural autonomy, to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. On that basis, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 12 February 2015 in *Baczó and Vizsnyiczai*, C-567/13, EU:C:2015:88, paragraphs 41 and 42 and the case-law cited).

49 As regards the principle of equivalence, as the Advocate General noted in point 32 of her Opinion, it must be observed that the Court does not have before it any evidence which might raise doubts as to the compliance of the rules at issue in the main proceedings with that principle.

50 As regards application of the principle of effectiveness, every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. Moreover, the specific characteristics of court proceedings cannot constitute a factor which is liable to affect the legal protection from which consumers must benefit under the provisions of Directive 93/13 (see, to that effect, judgment of 10 September 2014 in *Kušionová*, C-34/13, EU:C:2014:2189, paragraphs 52 and 53 and case-law cited).

51 In the present case, question 1(a) concerns the compatibility with Article 7(1) of Directive 93/13 of a national procedural system, such as that set out in paragraphs 19 and 20 of this judgment, which does not permit the court hearing insolvency proceedings to examine of its own motion any unfairness of contractual terms on which the claims declared in those proceedings are based.

52 In that context, it must be borne in mind that, in accordance with the settled case-law of the Court, the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary to that end (judgment of 1 October 2015 in *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 41 and the case-law cited).

53 In fact, the Court has held that, in order to guarantee the protection intended by Directive 93/13, the imbalance which exists between the consumer and the seller or supplier may be corrected by the court hearing such disputes only by positive action unconnected with the actual parties to the contract (see, to that effect, judgment of 27 February 2014 in *Pohotovosť*, C-470/12, EU:C:2014:101, paragraph 40 and the case-law cited).

54 Accordingly, Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in insolvency proceedings does not permit, firstly, the court hearing the action to examine of its own motion any unfairness of contractual terms on which the claims declared in those proceedings are based, where that court has available to it the legal and factual elements necessary to that end.

55 As regards question 1(b), it is apparent from the findings of the referring court that the national legislation at issue in the main proceedings does not allow all claims arising from a credit agreement which are likely to contain unfair terms to be disputed, but only those which are unsecured, and then solely in respect of a ground concerning whether they are time-barred or have been paid.

56 In that regard, as is clear from the case-law cited in paragraph 46 of the present judgment, the right to an effective judicial remedy means that the consumer is permitted to contest, before the national court, the merits of the claims arising from a credit agreement which contains terms likely to be unfair, whether or not those claims are secured.

57 Furthermore, although it is apparent from the order for reference that the national legislation at issue in the main proceedings permits a debtor seeking to contest an unsecured claim to rely only on the fact that the claim is either time-barred or has been paid, it must be recalled that a restriction on the power of the national court of its own motion to set aside unfair terms is liable to affect the effectiveness of the protection intended by Articles 6 and 7 of Directive 93/13 (see, by analogy, judgment of 21 November 2002 in *Cofidis*, C-473/00, EU:C:2002:705, paragraph 35).

58 Accordingly, by permitting only certain claims arising from a consumer contract of which some terms are likely to be declared unfair to be contested and in respect of complaints only as to whether the claims are time-barred or have been paid, national legislation such as that at issue in the main proceedings does not meet the requirements which flow from Article 7(1) of Directive 93/13.

59 Having regard to the foregoing considerations, the answer to the first question is that Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in insolvency proceedings does not permit, firstly, the court hearing the action to examine of its own motion any unfairness of contractual terms on which the claims declared in those proceedings are based, even when it has available to it the matters of law and fact necessary to that end, and which, secondly, permits that court to examine only unsecured claims, solely in respect of a restricted number of complaints related to whether they are time-barred or have been paid.

The second question

60 By its second question, the referring court asks, in essence, whether Article 10(2) of Directive 2008/48 must be interpreted as meaning that it requires a national court hearing a dispute concerning claims based on a credit agreement within the meaning of that directive to examine of its own motion whether the obligation to provide information laid down in that provision has been complied with and to establish all the consequences under national law of an infringement of that obligation.

61 It should be noted at the outset that the obligation to provide information, set out in Article 10(2) of Directive 2008/48, contributes to attaining the objective pursued by that directive, which, as can be seen from recitals 7 and 9 to that directive, consists in providing, as regards consumer credit, full and

mandatory harmonisation in a number of key areas, which is regarded as necessary in order to ensure that all consumers in the European Union enjoy a high and equivalent level of protection of their interests and to facilitate the emergence of a well-functioning internal market in consumer credit (see, by analogy, judgment of 18 December 2014 in *CA Consumer Finance*, C-449/13, EU:C:2014:2464, paragraph 21 and the case-law cited).

62 As regards question 2(a), it is appropriate to note that the Court has recalled on a number of occasions the obligation of national courts to examine of their own motion infringements of EU consumer protection legislation (see, to that effect, with regard to Directive 93/13, judgment of 4 June 2009 in *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 32; with regard to Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31), judgment of 17 December 2009 in *Martín Martín*, C-227/08, EU:C:2009:792, paragraph 29; and, with regard to Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12), judgment of 3 October 2013 in *Duarte Hueros*, C-32/12, EU:C:2013:637, paragraph 39).

63 As the Advocate General has noted in points 51 et seq. of her Opinion, such a requirement is justified by the consideration that the system of protection, in accordance with the settled case-law of the Court, 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, which 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 (see judgment of 1 October 2005 in *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 39 and the case-law cited).

64 In that regard, information, before and at the time of concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is, in particular, on the basis of that information that the consumer decides whether he wishes to be bound by the conditions drafted in advance by the seller or supplier (see, to that effect, judgment of 16 January 2014 in *Constructora Principado*, C-226/12, EU:C:2014:10, paragraph 25 and the case-law cited).

65 Furthermore, there is a real risk that the consumer, particularly because of a lack of awareness, will not rely on the legal rule that is intended to protect him (judgment of 4 June 2015 in *Faber*, C-497/13, EU:C:2015:357, paragraph 42 and the case-law cited).

66 It follows therefrom that effective consumer protection could be achieved only if the national court were required, of its own motion, to examine compliance with the requirements which flow from EU law on consumer law (see, by analogy, judgment of 4 October 2007 in *Rampion and Godard*, C-429/05, EU:C:2007:575, paragraph 61 and 65).

67 In fact, as has been recalled in paragraph 53 of this judgment, in order to guarantee the protection intended by that directive, the imbalance which exists between the consumer and the seller or supplier may be corrected by the court hearing such disputes only by positive action unconnected with the actual parties to the contract.

68 Examination by a national court, of its own motion, of compliance with the requirements which flow from Directive 2008/48 constitutes, moreover, a means both of achieving the result sought by Article 10(2) of that directive and of contributing to achieving the aims set out in recitals 31 and 43 thereto (see, by analogy, order of 16 November 2010 in *Pohotovosť*, C-76/10, EU:C:2010:685, paragraph 41 and the case-law cited).

69 In particular, in accordance with Article 23 of Directive 2008/48 the penalties laid down in respect of infringement of the national provisions adopted under that directive must be dissuasive. There can be no doubt that examination by the national courts of compliance with the requirements flowing from that directive is dissuasive.

70 Since the national courts are required to ensure the effectiveness of consumer protection intended to be given by the provisions of Directive 2008/48, the role attributed to the national court by EU law in this area is not limited to a mere power to rule on the compliance with those requirements, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task (see, by analogy, judgment of 4 June 2009 in *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 32).

71 In addition, where the national court has, of its own motion, found an infringement of Article 10(2) of Directive 2008/48 it is not obliged, in order to be able to draw the consequences arising under national law from that infringement, to wait for the consumer to make an application to that effect, provided always that the principle of audi alteram partem has been complied with (see, by analogy, judgments of 21 February 2013 in *Banif Plus Bank*, C-472/11, EU:C:2013:88, paragraph 36, and of 1 October 2015 in *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 42).

72 In that context, it is also appropriate to bear in mind that it follows from Article 23 of Directive 2008/48 that Member States are to lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to that directive and take all measures necessary to ensure that they are implemented. In addition to their dissuasive nature, those penalties must be effective and proportionate.

73 In that regard, where a national court has found an infringement of the obligation to provide information, it must draw all the consequences provided for under national law, provided that the penalties laid down therein satisfy the requirements of Article 23 of Directive 2008/48, as interpreted by the Court, in particular in the judgment of 27 March 2014 in *LCL Le Crédit Lyonnais* (C-565/12, EU:C:2014:190).

74 Having regard to all the foregoing considerations, the answer to the second question is that Article 10(2) of Directive 2008/48 must be interpreted as meaning that it requires a national court hearing a dispute concerning claims based on a credit agreement within the meaning of that directive to examine of its own motion whether the obligation to provide information laid down in that provision has been complied with and to establish the consequences which follow under national law of any infringement of that obligation, provided that the penalties satisfy the requirements of Article 23 of that directive.

The third question

75 By its third question, the national court, after having noted that the dispute in the main proceedings concerns two individuals, asks, in essence, whether the relevant provisions of Directives 93/13 and 2008/48 have direct effect.

76 In that connection, it must be recalled that, under the third paragraph of Article 288 TFEU, the directive, while binding, as to the result to be achieved, upon each Member State to which it is addressed, leaves to the national authorities the choice of form and methods. Thus, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (judgment of 24 January 2012 in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 37 and the case-law cited). Nonetheless the obligation on a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 288 TFEU and by the directive itself. That duty to take all appropriate measures, whether

general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (judgment of 24 June 2008 in *Commune de Mesquer*, C-188/07, EU:C:2008:359, point 83 and the case-law cited).

77 In the present case, firstly, the obligation to examine ex officio the unfairness of certain terms and the presence of mandatory information in a credit agreement constitutes a procedural rule placed not on an individual but on the courts (see, by analogy, judgments of 10 September 2014 in *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 67, and 18 February 2016 in *Finanmadrid EFC*, C-49/14, EU:C:2016:98, point 35 and the case-law cited).

78 Secondly, as is apparent from the wording of Article 23 of Directive 2008/48, the Member States' authorities must ensure, when transposing and implementing the directive, that effective, proportionate and dissuasive penalties are implemented.

79 Moreover, it must be borne in mind, as the Court has consistently held, that when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of Directive 2008/48 in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with EU law is inherent in the system of the FEU Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them (see, by analogy, judgment of 24 January 2012 in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 24 and the case-law cited).

80 It is therefore unnecessary to answer the third question.

The fourth question

81 By its fourth question, the national court asks, in essence, in what way the concepts of 'total amount of credit' and 'amount of drawdown', the first in Articles 3(1) and 10(2) of Directive 2008/48 and the second in point I of Annex I thereto, must be interpreted.

82 That court notes that the contract at issue in the main proceedings, by which the lender undertook to grant credit to the Radlingers, stipulated that, once the credit facility was available, the fees for opening that line of credit and the first monthly instalment and, if appropriate, the subsequent instalments, would be deducted from the total amount of that credit. Thus the question arises whether, in particular, that part of that credit which was not made available to the persons concerned could be included in the amount of drawdown within the meaning of point I of Annex I to Directive 2008/48 for the purpose of calculating the APR.

83 In that regard, it is appropriate to recall that the total amount of credit, within the meaning of Directive 2008/48, is defined in Article 3(l) thereof as meaning the ceiling or the total sums made available under a credit agreement.

84 Furthermore, in accordance with Article 3(g) of that directive, the total cost of the credit to the consumer covers all the costs which he is required to pay in connection with the credit agreement and which are known to the creditor. Finally, by virtue of Article 3(i) of that directive, the APR means the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit, where applicable including the costs referred to in Article 19(2) of that directive.

85 Since the concept of the 'total amount payable by the consumer' is defined in Article 3(h) of Directive 2008/48 as being 'the sum of the total amount of the credit and the total cost of the credit to the consumer', it follows that the concepts of 'total amount of the credit' and of 'total cost of the credit to the consumer' are mutually exclusive and that, accordingly, the total amount of the credit cannot include any of the sums included in the total cost of the credit to the consumer.

86 Thus, within the meaning of Articles 3(1) and 10(2) of Directive 2008/48, none of the sums intended to meet the commitments agreed under the credit concerned, such as the administrative costs, interest, commissions and any other type of cost which the consumer is required to pay, can be included in the total amount of the credit.

87 It is appropriate to point out that the improper inclusion in the total amount of the credit of sums which form part of the total cost of credit to the consumer of necessity has the effect of undervaluing the APR, since its calculation depends on the total amount of the credit.

88 Article 19(1) of Directive 2008/48 states that the APR, equating, on an annual basis, to the present value of all commitments agreed by the creditor and the consumer, is to be calculated in accordance with the mathematical formula set out in Part I of Annex I to that directive. That directive states that the basic equation, which establishes the APR equates, on an annual basis, the total present value of drawdowns on the one hand and the total present value of repayments and payments of charges on the other. Thus, the amount of drawdown, within the meaning of Part I of Annex I to Directive 2008/48, corresponds to the total of the credit, within the meaning of Article 3(1) of that directive.

89 In the present case, it is for the referring court to ascertain whether one or more of the sums mentioned in paragraphs 27 and 28 of this judgment have improperly been included in the total amount of the credit, within the meaning of Article 3(1) of Directive 2008/48, since that fact is likely to affect the calculation of the APR and, in consequence, affect the accuracy of the information which the lender must set out, by virtue of Article 10(2) of that directive, in the credit agreement at issue in the main proceedings.

90 As stated, in essence, in recitals 31 and 43 to Directive 2008/48, 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. Firstly, that information contributes to the openness of the market in that it enables the consumer to compare offers of credit. Secondly, it enables the consumer to assess the extent of his commitment (see, to that effect, judgment of 4 March 2004 in *Cofinoga*, C-264/02, EU:C:2004:127, paragraph 26, and order of 16 November 2010 in *Pohotovosť*, C-76/10, EU:C:2010:685, paragraph 70).

91 Having regard to the foregoing considerations, the answer to the fourth question is that Articles 3(1) and 10(2) of Directive 2008/48 and point I of Annex I to that directive must be interpreted as meaning that the total amount of the credit and the amount of the drawdown together designate the sums made available to the consumer, which excludes those used by the lender to pay the costs connected with the credit concerned and which are not actually paid to that consumer.

The fifth and sixth questions:

92 By its fifth and sixth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the provisions of Directive 93/13 must be interpreted as meaning that, in order to assess whether the amount of compensation required of a consumer who does not fulfil his obligations is disproportionately high, within the meaning of point 1(e) of the annex to that directive, it is necessary to evaluate the cumulative effect of all the penalty clauses in the contract in question,

regardless of whether the creditor actually insists that that they all be satisfied in full and whether, as regards those terms the unfairness of which has been recognised, the national courts must set aside application of all those terms or merely some of them.

93 To answer those questions, it must be borne in mind, firstly, that 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'.

94 In the assessment of any unfairness of a contractual term, Article 4(1) of Directive 93/13 states 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 (see, to that effect, order of 16 November 2010 in *Pohotovosť*, C-76/10, EU:C:2010:685, paragraph 59, and judgment of 9 July 2015 in *Bucura*, C-348/14, EU:C:2015:447, paragraph 48).

95 Thus, and as the Advocate General noted in point 74 of her Opinion, it is necessary to assess the cumulative effect of all such terms of an agreement concluded between a consumer and a seller or supplier. Such an assessment is justified, since all those terms are applicable, regardless of whether the creditor actually insists that that they all be fully performed (see, by analogy, judgment of 10 September 2014 in *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 42).

96 Secondly, it must be recalled that the first part of Article 6(1) of Directive 93/13 requires Member States to lay down that unfair terms in an agreement concluded with a consumer are, as provided for under their national law, not to be binding on the consumer. However, the second part of Article 6(1) of that directive states that such a contract 'shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms'.

97 The Court has recalled that the national courts are required only to exclude the application of an unfair contractual term in order that it does not produce binding effects with regard to the consumer, without being authorised to revise its content. The contract must 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 (judgment of 21 January 2015 in *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraph 28 and the case-law cited).

98 That interpretation is, moreover, borne out by the objective and overall scheme of Directive 93/13. In this connection, given the nature and significance of the public interest which constitutes the basis of the protection guaranteed to consumers, the directive requires Member States, as is apparent from Article 7(1) thereof, to provide for adequate and effective means 'to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers'. If it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of the directive, since it would weaken the dissuasive effect on sellers or suppliers of the straightforward non-application of those unfair terms with regard to the consumer (judgment of 30 May 2013 in *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 58 and the case-law cited).

99 Thus, where the national court reaches the conclusion that a term is unfair within the meaning of Directive 93/13, 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, to that effect, order of 16 November 2010 in *Pohotovosť*, C-76/10, EU:C:2010:685, paragraph 62 and the case-law cited).

100 It follows therefrom, as the Advocate General noted, in essence, in point 75 of her Opinion, that a national court which has held that a number of terms in an agreement concluded between a consumer and a seller or supplier or unfair, within the meaning of Directive 93/13, must exclude all unfair terms and not merely some of them.

101 Having regard to the foregoing, the answer to the fifth and sixth questions is that the provisions of Directive 93/13 must be interpreted as meaning that, in order to assess whether the amount of compensation required to be paid a consumer who does not fulfil his obligations is disproportionately high, within the meaning of point 1(e) of the annex to that directive, it is necessary to evaluate the cumulative effect of all the penalty clauses in the contract in question, regardless of whether the creditor actually insists that that they all be satisfied in full and that, if necessary, the national courts must, by virtue of Article 6(1) of that directive, establish all the consequences of the finding that certain terms are unfair, exclude all terms found to be unfair in order to ensure that the consumer is not bound by them.

Costs

102 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 (Third Chamber) hereby rules:

1. **Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in insolvency proceedings does not permit, firstly, the court hearing the action to examine of its own motion any unfairness of contractual terms on which the claims declared in those proceedings are based, even when that court has available to it the matters of law and fact necessary to that end, and which, secondly, permits that court to examine only unsecured claims, solely in respect of a restricted number of complaints related to whether they are time-barred or have been paid.**

2. **Article 10(2) of 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 must be interpreted as meaning that it requires a national court hearing a dispute concerning claims based on a credit agreement within the meaning of that directive to examine of its own motion whether the obligation to provide information laid down in that provision has been complied with and to establish the consequences under national law of an infringement of that obligation, provided that the penalties satisfy the requirements of Article 23 of that directive.**

3. **Articles 3(1) and 10(2) of Directive 2008/48 and point I of Annex I to that directive must be interpreted as meaning that the total amount of the credit and the amount of the drawdown together designate the sums made available to the consumer, which excludes those used by the lender to pay the costs connected with the credit concerned and which are not actually paid to that consumer.**

4. **The provisions of Directive 93/13 must be interpreted as meaning that, in order to assess whether the amount of compensation required to be paid by a consumer who does not fulfil his obligations is disproportionately high, within the meaning of point 1(e) of the annex to that directive, it is necessary to evaluate the cumulative effect of all the penalty clauses in the contract in question, regardless of whether the creditor actually insists that they all be satisfied in full and that, if necessary, the national courts must, by virtue of Article 6(1) of**

that directive, establish all the consequences of the finding that certain terms are unfair, exclude all terms found to be unfair in order to ensure that the consumer is not bound by them.

[Signatures]