Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

25 November 2020*

[Text rectified by order of 20 January 2021]

(Reference for a preliminary ruling – Consumer protection – Unfair terms in consumer contracts – Directive 93/13/EEC – Consequences of a term being found to be unfair – Replacement of the unfair term – Method for calculating the variable interest rate – Whether permissible – Referral of the parties to negotiations)

In Case C-269/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania), made by decision of 27 February 2019, received at the Court on 29 March 2019, in the proceedings

Banca B. SA

v

A.A.A.,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan and N. Jääskinen (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure and further to the invitation made to the parties to the main proceedings and to the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union to give written replies to the Court's questions,

after considering the observations submitted on behalf of:

– Banca B. SA, by R. Trăilescu, I.-C. Şerban, D. Cristea and E. Tudose, avocaţi,

– A.A.A., by C. Neamţ, avocată,

[As rectified by order of 20 January 2021]

* Language of the case: Romanian.

– the Romanian Government, initially by C.-R. Canţăr, E. Gane, O.-C. Ichim and L. Liţu, and subsequently by E. Gane, O.-C. Ichim and L. Liţu, acting as Agents,

– the United Kingdom Government, by Z. Lavery and S. Brandon, acting as Agents, and by A. Howard, Barrister,

[As rectified by order of 20 January 2021]

– the European Commission, by C. Gheorghiu and N. Ruiz García, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in proceedings between Banca B. SA, a banking institution, and A.A.A., concerning several allegedly unfair and void terms in a credit agreement between A.A.A. and that institution relating to the grant of a personal loan.

Legal context

EU law

3 It is apparent from the 24th recital of Directive 93/13 that the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts.

4 Article 3(1) of that directive provides:

‘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.’

5 Under Article 6(1) of that directive:

‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.’

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

‘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.’

Romanian law

7 Legea nr. 193/2000 privind clauzele abuzive din contractele încheiate între profesioniști și consumatori (Law No 193/2000 on unfair terms in contracts between sellers or suppliers and consumers; 'Law No 193/2000'), transposes Directive 93/13 into Romanian law.

8 In accordance with the provisions of Article 6 of Law No 193/2000, unfair terms contained in a contract that have been verified personally or by legally authorised bodies are to have no effect on the consumer, and the contract is to continue to produce effects, with the consumer's consent, only if that remains possible after the unfair terms have been removed.

9 According to Article 7 of that law, if the contract is incapable of producing effects after the terms considered to be unfair have been removed, the consumer is entitled to request that the contract be terminated and, where appropriate, claim damages.

10 Article 9quater of the Ordonanța Guvernului nr. 21/1992 privind protecția consumatorilor (Government Order No 21/1992 on consumer protection), incorporated by Article II(9) of the Ordonanța de urgență a Guvernului nr. 174/2008 (Government Emergency Order No 174/2008), provides that, as regards contracts concluded with consumers, financial services providers are required to respect the following rules, set out in point (g) as follows:

'The following rules apply to variable-rate credit agreements:

1. the variation in the interest rate shall be independent of the will of the financial services provider and shall be linked to fluctuations of the verifiable benchmark rates specified in the agreement, or to legislative amendments which impose such a variation;

2. the interest rate may vary in accordance with the financial services provider's benchmark rate, provided that the latter is unique for all financial products intended for individuals proposed by the economic operator in question and that it is not increased above a certain level established by the contract.'

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

11 On 5 June 2007, A.A.A. entered into a credit agreement relating to the grant of a personal loan with Banca B. That agreement was secured by a first-ranking mortgage, in the amount of EUR 182 222, of which EUR 179 000 corresponded to the personal loan known as 'Maxicredit' at a fixed rate for a year and EUR 3 222 corresponded to the award fee for that loan, for a period of 300 months.

12 It is apparent from the order for reference that the following contractual terms were applicable to that agreement:

– Article 5 of the loan agreement at issue provided for an annual interest rate of 7.4% for the first year of the loan, then a current interest rate corresponding to the variable benchmark rate displayed at the bank's premises, plus 1.50 percentage points;

– under Article 2.6 of the general terms and conditions of the loan, annexed to that agreement, during the loan period the current interest rate could vary depending on changes in the 'servicing of the customer's debt' to the bank;

– under Article 2.10(a) of those general terms and conditions, during the period of the loan the bank could change the interest without the borrower's consent, depending on the cost of providing the loan, the new interest rate being applicable to the balance of the loan from the date of the change. A change to the variable interest rate meant recalculating the interest due;

– in accordance with Article 2.10(b) of those general terms and conditions, with regard to loans with a variable interest rate calculated on the basis of a LIBOR or Euribor reference rate, the interest rate could be varied depending on changes in that rate;

– under Article 2.11 of the general terms and conditions, the new interest rate, which could be adjusted every six months, was to be displayed at the premises of the bank from the date on which the change applied and the resulting interest rate was to be applied to the balance of the loan as at the date of the change;

– in cases of credit lines, the borrower became aware of the change in the annual interest rate and of the updated repayment schedule by means of a registered letter with acknowledgement of receipt or a statement of account provided to the borrower free of charge at the bank;

– if, following a change in the annual interest rate made by that institution, the borrower did not repay the balance of the loan and the corresponding interest within 10 days from the date of becoming aware of the change, it was deemed to have accepted the new interest rate.

13 On 9 June 2017, A.A.A. brought an action against Banca B. before the Tribunalul Specializat Cluj (Specialist Court, Cluj, Romania) requesting that court to declare that the terms of the loan agreement at issue concerning the variable interest rate were unfair and therefore void and, in consequence, to annul the schedule established under those terms. It also asked that court to order the defendant to amend those terms and to repay the amounts overpaid as a result of those terms being declared unfair. Before that court, A.A.A. claimed, inter alia, that the terms at issue allowed Banca B. to arbitrarily change the level of that rate, thus undermining A.A.A.'s legitimate interests as a consumer.

14 By judgment of 23 January 2018, the Tribunalul Specializat Cluj (Specialist Court, Cluj) upheld A.A. A.'s action in part. In particular, it declared void in part the term set out in Article 5 of the credit agreement, as regards the mechanism for determining the variable interest rate, which provided that the current interest rate was to correspond to the variable benchmark rate displayed at the bank's premises, as well as Articles 2.6, 2.10a and 2.11, referred to in paragraph 12 above. It found the term contained in Article 2.10b of the credit agreement to be void in so far as the bank had only an option, and not an obligation, to revise the variable interest rate in accordance with the benchmark rates stipulated in the agreement, that is to say, the LIBOR or Euribor.

15 In addition, it ordered Banca B. to clarify the contents of the term relating to interest in the loan agreement at issue, by defining, in accordance with that court's instructions, the constituent elements and the amount of that interest. First, the margin laid down in Article 5 of the agreement had to be set at 1.50 percentage points plus the six-month Euribor rate. Second, the method of changing the interest rate was to depend solely on the six-month Euribor benchmark rate with a margin fixed by the bank that could be changed only with the written agreement of the parties, with the result that the modification of the interest rate depended on changes to the six-month Euribor rate.

16 According to the Tribunalul Specializat Cluj (Specialist Court, Cluj), removing the term giving the bank the exclusive right to control the variable interest rate adjustment mechanism, without specifying the consequences, would lead, in practice, to the agreement being modified, in so far as the interest would be fixed at the level applicable during the first year of the loan. That situation would be particularly attractive for the bank and would render any negotiations between the parties on that point futile. Furthermore, that court noted that establishing a fixed interest rate would constitute a

modification of the agreement at odds with what was agreed by the parties, namely a variable interest rate, and with Article 969 of the Civil Code, which enshrines respect for contractual commitments (*pacta sunt servanda*).

17 Moreover, in the absence, at the time the agreement at issue was concluded, of any provision of national law governing the method for calculating interest rates in agreements guaranteed by mortgage, the Tribunalul Specializat Cluj (Specialist Court, Cluj) applied, by analogy, the legislative provisions referred to in paragraph 10 above regarding methods for determining interest rates, which were not applicable *ratione temporis* in the present case.

18 On 15 October 2018, Banca B. brought an appeal against that judgment before the referring court, the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania).

19 Banca B. submits before that court, in essence, that the court of first instance changed the method of calculating the interest rate at issue for the entire duration of the loan, disregarding the intention of the parties at the time the loan agreement at issue was concluded. In making that ruling, it exceeded its jurisdiction and disregarded the recent case-law of the Court of Justice. Banca B. also argues that the court of first instance wrongly based its decision on provisions which were not in force at the time that agreement was concluded.

20 The referring court states that Article 6 of Law No 193/2000, which transposes Article 6 of Directive 93/13 into Romanian law, has been interpreted and applied in a divergent manner by the Romanian courts, as regards, inter alia, the determination of the consequences that should follow from a finding that terms which define the mechanism for setting the variable interest rate by reference to non-transparent criteria are unfair.

21 Since a loan agreement concluded by a consumer with a seller or supplier cannot legally continue to exist when the seller or supplier loses its right to charge interest, some courts consider that it is for the parties to the contract to negotiate, in good faith and in an effective and efficient manner, the term relating to the method of setting the interest rate, so that the contract they entered into may continue to exist. Other courts have ordered the application, on expiry of the period during which a fixed interest rate was to apply, of a an interest rate composed of the fixed margin stipulated in the loan agreement for the second year of the loan, plus an objective, transparent and verifiable benchmark rate, such as Euribor. There is also a line of case-law in accordance with which, from the second year, the interest is to consist exclusively of the fixed margin stipulated in the contract, which is maintained. Lastly, some courts take the view that the term relating to the method of calculating the interest rate applicable for the first year should continue to apply.

22 According to the referring court, it is necessary, in order to resolve the dispute before it, to determine the consequences that should follow from the finding that a term defining the mechanism for setting the variable interest rate is unfair. First, it is necessary to make such a determination in order to establish the interest rate that will apply in the legal relationship between the parties to the contract in the future. Second, that determination is necessary in order for the court to be able to rule on A.A. A.'s claim that Banca B. should be ordered to reimburse the overpaid interest. More specifically, it considers that it must be established whether the overpayment corresponds to (i) the difference between the interest actually paid by that consumer and the interest calculated on the basis of a margin set at 1.50 percentage points plus the six-month Euribor rate after the first year of the loan, (ii) the difference between the interest actually paid by the consumer and the interest calculated on the basis of the fixed percentage established for the first year of the loan, or (iii) the difference between the interest actually paid and the interest rate set by the court in the light of the facts contained in the loan agreement.

23 In those circumstances, the Curtea de Apel Cluj (Court of Appeal, Cluj) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Must Article 6(1) of Directive [93/13] be interpreted as meaning that, after a term establishing the mechanism for determining the variable rate of interest by the formula ‘fixed margin plus the benchmark interest applied by a bank on the basis of non-transparent criteria’ has been found to be unfair in connection with a credit agreement applying a fixed interest rate limited to the first year and a variable rate for the subsequent years, in accordance with the above formula, the national court may vary the agreement by imposing a method for calculating the variable rate of interest on the basis of transparent benchmarks (LIBOR or Euribor) and the bank’s fixed margin, in the light of the facts contained in the credit agreement, for the purposes of ensuring better consumer protection?

2. If the answer to that question is in the negative, must Article 6(1) of Directive [93/13] be interpreted as meaning that, after a term such as that mentioned above has been found to be unfair, the national court may apply, by judicial process, a fixed rate of interest by reference to the fixed margin agreed for the second year of the agreement or to the fixed rate of interest for the first year?

3. If the answer to that question is in the negative, must Article 6(1) of Directive [93/13] and the principle of effectiveness be interpreted as precluding the national court, after a term such as that mentioned above has been found to be unfair, from instructing the parties to conduct negotiations with a view to fixing a new interest rate, without setting any benchmarks?

4. If the answer to that question is in the negative, what possible remedies are there to ensure that consumers are protected in line with Article 6(1) of Directive [93/13]?’

Consideration of the questions referred

24 It should be noted as a preliminary point that, according to settled case-law, 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 decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it (judgments of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 34, and of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 27).

25 In that regard, it is important to clarify that, in the present case, the questions referred to the Court do not concern the criteria for assessing the unfairness of terms governing the mechanism for determining the method of calculating the variable interest rate in the loan agreement at issue. Rather, the questions referred in the present case concern only the consequences of such contractual terms being found to be unfair.

26 Thus, in order to provide a useful answer to the referring court, it is necessary to consider that, by those questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 6(1) of Directive 93/13 must be interpreted as meaning that, after terms establishing the mechanism for determining the variable interest rate in a loan agreement such as that at issue in the main proceedings have been found to be unfair, and where that contract cannot continue to exist following the removal of the unfair terms in question and there are no supplementary provisions under national law that may replace those unfair terms, that provision precludes the national court from establishing a new method for calculating the interest rate or from inviting the parties to negotiate in order to establish a new method for calculating that rate, without setting benchmarks for those negotiations.

27 In order to answer that question, it is necessary, first of all, to recall the principles of consumer protection in relation to unfair contract terms stemming from Directive 93/13, as interpreted by the Court.

28 The system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both bargaining power and level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. As regards such a position of weakness, that directive requires Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair (judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 37 and the case-law cited).

29 In that context, under Article 6(1) of Directive 93/13, it is for the national court to exclude the application of the unfair terms so that they do not produce binding effects with regard to the consumer, unless the consumer objects (see, to that effect, judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 58 and the case-law cited). However, the contract must continue in existence, in principle, without any amendment other than that resulting from the removal of the unfair terms, in so far as, in accordance with the rules of national law, such continuity of the contract is legally possible (see, inter alia, judgment of 5 June 2019, *GT*, C-38/17, EU:C:2019:461, paragraph 42 and the case-law cited).

30 As a result, when the national court finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, that court cannot modify the contract by revising the content of that term (see, to that effect, judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 59 and the case-law cited).

31 The Court has held that if it were open to the national court to revise the content of unfair terms included in such a contract, 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 on 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 modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers (judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 69; of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 79; of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 54, and of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 60).

32 However, where a contract concluded between a seller or supplier and a consumer is not capable of continuing in existence following the removal of an unfair term, the Court has acknowledged that Article 6(1) of Directive 93/13 does not preclude the national court from removing, in accordance with the principles of contract law, the unfair term and replacing it with a supplementary provision of national law in cases where 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, inter alia, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 80 and 83; of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 56; of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 48, and of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 61).

33 Such a substitution is fully justified in the light of the purpose of Directive 93/13. Indeed, it is consistent with the objective of Article 6(1) of Directive 93/13, since that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the

parties a real balance re-establishing equality between them, not to annul all contracts containing unfair terms (see, inter alia, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 81 and 82; of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 57, and of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 62).

34 If, in a situation such as that described in paragraph 32 above, the national court was unable to replace an unfair term with a supplementary provision of national law and was obliged to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, so that the dissuasive effect resulting from the annulment of the contract could well be jeopardised. In general, the consequence of such an annulment with regard to a loan agreement would be that the outstanding balance of the loan would become due forthwith, which would be likely to be in excess of the consumer's financial capacities and, as a result, would tend to penalise the consumer rather than the lender who, as a consequence, would not be dissuaded from inserting such terms in its contracts (see, inter alia, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 83 and 84; of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 58, and of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 63).

35 The Court has also ruled that Article 6(1) of Directive 93/13 precludes gaps in a contract caused by the removal of the unfair terms contained in that contract from being filled solely on the basis of national provisions of a general nature which have not been subject to a specific assessment by the legislature with a view to establishing a balance between all the rights and obligations of the parties to a contract and as a result are not covered by the presumption that they are not unfair, which provide that the effects expressed in a legal transaction are to be supplemented, inter alia, by the effects arising from the principle of equity or from established customs, which are neither supplementary provisions nor provisions applicable where the parties to the contract so agree (judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraphs 61 and 62).

36 In the present case, the referring court asks the Court what powers Article 6(1) of Directive 93/13 confers on the national court in a situation in which the contract cannot continue to exist without the unfair terms, but in which the national court cannot replace those terms with a supplementary provision of national law.

37 Although the wording of Article 6(1) of Directive 93/13 provides no indication in that regard, it must be noted that the purpose of Directive 93/13 is to provide consumers with a high level of protection. The EU legislature expressly indicated, in particular, in Article 7 of Directive 93/13, read in the light of the 24th recital thereof, that authorities, including judicial authorities, should have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts.

38 With that in mind, as is apparent from the case-law cited in paragraphs 31 to 34 above, the consequences that should follow from the finding that a term in a contract concluded between a seller or supplier and a consumer is unfair must allow two objectives to be achieved. First, the court must ensure that the equality between the parties, which would have been undermined if a term of the contract that was unfair as regards the consumer was applied, is restored. Second, it is necessary to ensure that the seller or supplier is deterred from including such terms in contracts with consumers.

39 Directive 93/13 does not seek to prescribe uniform solutions as regards the consequences that should follow from a finding that a contractual term is unfair. Thus, since, under Article 6(1) of Directive 93/13, unfair terms cannot bind consumers, those objectives can be achieved, depending on the case

and the national legal framework, by simply disapplying the unfair term in question with regard to the consumer or, where the contract cannot continue to exist without that term, by replacing that term with supplementary provisions of national law.

40 However, those are not the only possible consequences of a finding that a contractual term is unfair.

41 Thus, where the national court takes the view that the loan agreement at issue cannot, in accordance with contract law, legally continue to exist after the unfair terms in question have been removed, and where there are no supplementary provisions of national law or provisions applicable where the parties to the contract at issue so agree which may replace those terms, it must be held that, in so far as the consumer has not expressed his or her wish to retain the unfair clauses, and/or annulling the contract would expose the consumer to particularly unfavourable consequences, the high level of consumer protection which must be ensured under Directive 93/13 demands that, in order to restore the effective balance between the reciprocal rights and obligations of the parties, the national court must, while taking into account all of its national law, take all the measures necessary to protect the consumer from the particularly unfavourable consequences which could result from the annulment of the loan agreement in question, notably the fact that the seller or supplier could immediately claim the debt from the consumer.

42 In that regard, it must be clarified that, in circumstances such as those in question in the main proceedings, nothing precludes the national court from, inter alia, inviting the parties to negotiate with the aim of establishing the method for calculating the interest rate, provided that it sets out the framework for those negotiations and that those negotiations seek to establish an effective balance between the rights and obligations of the parties to the contract taking into account in particular the objective of consumer protection underlying Directive 93/13.

43 As the Court has already noted, the national court must, so far as possible, apply its national law in such a way as to draw all the consequences which, under national law, result from a finding that the term at issue is unfair, in order to achieve the result laid down in Article 6(1) of the directive, namely that the consumer is not bound by an unfair term (see, to that effect, judgment of 30 May 2013, *Jőrös*, C-397/11, EU:C:2013:340, paragraphs 52 and 53). The same applies when determining, following a finding that a term is unfair, the consequences that should follow from that finding in order to ensure, in accordance with the purpose of that directive, a high level of protection for the consumer.

44 However, it is important to note that the court's powers cannot extend beyond what is strictly necessary to restore the contractual balance between the parties and thus to protect the consumer from the particularly unfavourable consequences which could result from annulment of the loan agreement in question. If the court were permitted to change or restrict freely the content of the unfair terms, that power could undermine the achievement of all the objectives referred to in paragraph 38 above.

45 In the light of all the foregoing considerations, the answer to the questions referred is that Article 6(1) of Directive 93/13 must be interpreted as meaning that, after terms establishing the mechanism for determining the variable interest rate in a loan agreement such as that at issue in the main proceedings have been found to be unfair, and when that contract cannot continue to exist following the removal of the unfair terms in question, annulment of the contract would have particularly unfavourable consequences for the consumer and there are no supplementary provisions under national law, the national court must, while taking into account all of its national law, take all the measures necessary to protect the consumer from the particularly unfavourable consequences which could result from annulment of the loan agreement in question. In circumstances such as those in question in the main proceedings, nothing precludes the national court from, inter alia, inviting the parties to negotiate with the aim of establishing the method for calculating the interest rate, provided

that that court sets out the framework for those negotiations and that those negotiations seek to establish an effective balance between the rights and obligations of the parties taking into account in particular the objective of consumer protection underlying Directive 93/13.

Costs

46 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 (First Chamber) hereby rules:

Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that, after terms establishing the mechanism for determining the variable interest rate in a loan agreement such as that at issue in the main proceedings have been found to be unfair, and when that contract cannot continue to exist following the removal of the unfair terms in question, annulment of the contract would have particularly unfavourable consequences for the consumer and there are no supplementary provisions under national law, the national court must, while taking into account all of its national law, take all the measures necessary to protect the consumer from the particularly unfavourable consequences which could result from annulment of the loan agreement in question. In circumstances such as those in question in the main proceedings, nothing precludes the national court from, inter alia, inviting the parties to negotiate with the aim of establishing the method for calculating the interest rate, provided that that court sets out the framework for those negotiations and that those negotiations seek to establish an effective balance between the rights and obligations of the parties taking into account in particular the objective of consumer protection underlying Directive 93/13.

[Signatures]