Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

31 March 2022 *

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms – Credit agreements – Loan denominated in a foreign currency repayable in national currency – Contractual term placing the exchange rate risk on the consumer – Unfairness of a term relating to the main subject matter of the agreement – Effects – Invalidity of the agreement – Serious harm to the consumer – Effectiveness of Directive 93/13 – Non-binding opinion of the highest court – Possibility of restoring the parties to the situation they would have been in if that agreement had not been concluded)

In Case C-472/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decision of 28 August 2020, received at the Court on 30 September 2020, in the proceedings

Lombard Pénzügyi és Lízing Zrt.

v

PN,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, Vice-President of the Court, acting as President of the Sixth Chamber, N. Jääskinen (Rapporteur) and M. Safjan, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Lombard Pénzügyi és Lízing Zrt., by Zs. Bohács, ügyvéd,

– PN, by L. Gönczi, ügyvéd,

– the Hungarian Government, by M.Z. Fehér and K. Szíjjártó, acting as Agents,

* Language of the case: Hungarian.

– the European Commission, by I. Rubene, Zs. Teleki, N. Ruiz García and L. Havas, 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 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 Lombard Pénzügyi és Lízing Zrt. ('Lombard') and PN concerning the legal effects of a contractual term relating to the exchange rate risk borne by the consumer in the case of a credit agreement denominated in foreign currency but repayable in national currency.

Legal context

European Union law

3 Article 4 of Directive 93/13 is worded as follows:

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

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

4 The first sentence of Article 5 of that directive provides that 'in the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.'

5 Article 6(1) of the directive states:

'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 Under Article 7(1) of Directive 93/13:

‘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.’

7 Article 8 of that directive provides:

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

Hungarian law

8 Paragraph 209 of the Polgári Törvénykönyvről szóló 1959. évi IV. törvény (Law No IV of 1959 establishing the Civil Code), in the version applicable to the main proceedings (‘the previous Civil Code’), stated:

‘1. Any standard contract term or any term of a consumer contract which has not been individually negotiated shall be regarded as unfair if, in breach of the obligation to act in good faith and fairly, it unilaterally and unjustifiably establishes the contractual rights and obligations of the parties to the detriment of the party other than the one imposing the contractual term in question.

2. In order to determine whether a contractual term is unfair, regard shall be had to all the circumstances attending the conclusion of the contract, the nature of the service for which the contract was concluded, and the relationship between the term in question and the other terms of the contract or other contracts.

3. Consumer contract terms which are unfair, or which are to be considered unfair failing any proof to the contrary, may be determined by special rules.

4. A standard contractual term, or a term not individually negotiated in a consumer contract, shall also be regarded as unfair on the sole ground that it is not in plain intelligible language.

5. The provisions relating to unfair contractual terms shall not be applicable to contractual stipulations that define the main supply or determine whether the supply and the consideration are proportionate to each other, provided that those stipulations are in plain intelligible language.’

9 Under Paragraph 209/A of the previous Civil Code:

‘1. The party adversely affected may contest unfair terms which appear in the contract as standard contract terms.

2. In consumer contracts, unfair terms which are included as standard contract terms, or which the seller or supplier has pre-formulated unilaterally and without individual negotiation, shall be invalid. Invalidity may be invoked only in favour of the consumer.’

10 Paragraph 237 of that code was worded as follows:

‘1. If the contract is invalid, the situation prevailing prior to the conclusion of that contract shall be restored.

2. If it is impossible to restore the situation prevailing prior to the conclusion of the contract, the court may declare the contract applicable until it has given a ruling. An invalid contract may be declared valid if the cause of invalidity can be eliminated, in particular by eliminating the disproportionate advantage where there is a lack of proportionality between the performance required of each of the parties in usurious contracts. In such cases, the restitution of any performance outstanding shall be ordered, if need be without consideration.’

11 Paragraph 203(4) and (5) of the hitelintézetekről és a pénzügyi vállalkozásokról szóló 1996. évi CXII. törvény (Law No CXII of 1996 on credit institutions and financial undertakings), in the version applicable to the main proceedings, provided:

‘4. In the case of contracts concluded with customers who are consumers the subject matter of which is the grant of a foreign currency loan or which contain an option to purchase immovable property, the credit institution shall explain to the customer the risk to which he or she will be exposed on account of the contractual operation and shall confirm that the customer is aware of that risk by having him or her sign a declaration to that effect.

5. The declaration referred to in subparagraph 4 shall include:

(a) in the case of a contract for the grant of a loan denominated in a foreign currency, an explanation of the exchange rate risk and its effect on the amount of the repayment instalments,

…’

12 Paragraph 1 of the Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvényben rögzített elszámolás szabályairól és egyes egyéb rendelkezésekről szóló 2014. évi XL. törvény (Law No XL of 2014 on the rules governing the settlement of accounts provided for in Law No XXXVIII of 2014 on specific matters relating to the decision of the Kúria (Supreme Court, Hungary) to ensure consistency in the interpretation of civil law provisions concerning loan agreements concluded by financial institutions with consumers and other miscellaneous provisions) (‘the DH2 Law’) provides:

‘The effects of this Law shall cover loan agreements concluded with consumers falling within the scope of the [Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvény (Law No XXXVIII of 2014 on specific matters relating to the decision of the Kúria (Supreme Court) to ensure consistency in the interpretation of civil law provisions concerning loan agreements concluded by financial institutions with consumers)].’

13 Article 37 of the DH2 Law is worded as follows:

‘1. In relation to contracts falling within the scope of this Law, the parties may apply to the court for a declaration of invalidity of the contract or of certain contractual terms (“partial invalidity”) – irrespective of the grounds for such invalidity – only if they also apply for a determination of the

legal consequences of invalidity (namely, a declaration of validity or effectiveness of the contract up to the time of adoption of the decision). If they do not – and if the parties fail to act on a request to remedy the defects – the court may not examine the substance of the case. If the parties apply to the court for a determination of the legal consequences of total or partial invalidity, they shall also state what legal consequences the court should apply. As regards the application of the legal consequences, the parties shall submit a specific, quantified claim which also includes the settlement of the accounts between them.

2. In the light of the provisions of paragraph 1, as regards contracts falling within the scope of this Law and on the basis of Paragraph 239/A(1) of [the previous Civil Code] or Paragraph 6:108(2) of the [Polgári törvénykönyvről szóló 2013. évi V. törvény (Law No V of 2013 establishing the Civil Code)], the action shall be dismissed without the parties being ordered to appear in the proceedings in progress seeking a declaration of total or partial invalidity of the contract or those proceedings shall be discontinued, provided that the conditions laid down in this Law are met. The action shall not be dismissed without the parties being ordered to appear nor shall the proceedings be discontinued if the party concerned, in addition to seeking a declaration of total or partial invalidity of the contract, has also sought another form of order. In that case, that party shall be deemed not to maintain the form of order seeking a declaration of invalidity. The same course of action shall also be followed in proceedings resumed after a stay has ended.'

14 Under Paragraph 33(1) of the bíróságok szervezetéről és igazgatásáról szóló 1997. évi LXVI. törvény (Law No LXVI of 1997 on the organisation and administration of the judiciary), the mixed chamber of the Kúria (Supreme Court) is to analyse the case-law and give an opinion on disputed issues concerning the application of the law in order to ensure the uniformity of the case-law.

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

15 On 4 December 2009, PN concluded with Lombard Finanszírozási Zrt. an individual loan agreement with a variable rate for the purchase of a vehicle ('the loan agreement at issue'). That agreement was denominated in Swiss francs (CHF) and the monthly repayments were converted into Hungarian forint (HUF).

16 When that agreement was concluded, PN signed a declaration confirming that he was aware of the risk involved. That declaration stated that the exchange rate risk lay with the consumer and that future fluctuations in currency rates could not be predicted. Thus, the monthly repayments were fixed in Swiss francs then converted into Hungarian forint, with the borrower having to make up the exchange rate difference, calculated at the time of that conversion. It was also apparent from that document that if the currency rate for Hungarian forint on the due date differed from the reference exchange rate established when the contract was concluded, the difference between the selling and buying rates was also to be chargeable to the borrower.

17 On 31 August 2010, Lombard Finanszírozási Zrt. was dissolved by absorption and Lombard became its universal successor. In consequence, all rights and obligations of Lombard Finanszírozási Zrt. were transferred to Lombard.

18 In April 2015, the loan agreement at issue was subject to adjustment, by means of a settlement of accounts, under the DH2 Law. Following that settlement, the sum of HUF 284 502 (approximately EUR 800), considered to have been wrongly received by the lender, was deducted from the amount

owed by PN. However, the annual interest rate, which stood at 22.32% before adjustment of the loan agreement at issue, remained the same. That settlement of accounts was sent to PN, who did not object to it.

19 PN fell behind in payment of the monthly instalments under the loan agreement at issue, whereupon Lombard informed him, on 12 August 2015, that he was in arrears in the amount of HUF 121 722 (approximately EUR 342), stating that, in the event of non-payment, that agreement would be terminated with immediate effect. PN did not comply with that request, as a result of which Lombard unilaterally terminated the agreement on 14 September 2015 and ordered PN to pay the outstanding balance of HUF 472 399 (approximately EUR 1 320). PN received that demand on 15 October 2015.

20 Lombard then brought an action before the court of first instance, asking it to declare the loan agreement at issue to be valid, retroactively, and to order PN to pay HUF 490 102 (approximately EUR 1 370) in respect of the capital of the contractual debt plus default interest.

21 PN argued that the terms of the loan agreement at issue, which imposed the full extent of the exchange rate risk on him, were unfair. He denied that the information leaflet on the exchange rate risk was plain and intelligible. By way of a counterclaim, he sought, inter alia, that Lombard be ordered to repay him HUF 1 734 144 (approximately EUR 4 870) on the ground of unjust enrichment resulting from the invalidity of that agreement.

22 The court of first instance examined in particular the conditions under which an agreement such as the loan agreement at issue may be declared valid in the light of the opinion delivered in June 2019 by the advisory body of the Kúria (Supreme Court) ('the opinion of the Kúria'). According to that opinion, where an invalid loan agreement is declared to be valid, there are two approaches open to the courts. They may declare the agreement to be valid, so that it is deemed to have been denominated in Hungarian forint, at an interest rate corresponding to the applicable interest rate for transactions in Hungarian forint on the date of conclusion of that agreement, plus the margin applied. Alternatively, they may declare the agreement to be valid by maximising the exchange rate between the foreign currency and the Hungarian forint, whereby the interest rate fixed in the agreement remains unchanged until the date of conversion into Hungarian forint.

23 The court of first instance held that, although the fact that the term contained in the loan agreement at issue providing that the exchange rate risk had to be borne by PN was unfair, that agreement had to be regarded as valid with retroactive effect to the date of its conclusion, but as having been denominated in Hungarian forint from that date. It also decided that the annual interest rate should be fixed at 23.07%, relying on Lombard's calculation based on the difference between the initial amount of the loan and the total amount of the monthly instalments repaid by PN. In the present case, the initial amount of the loan was HUF 1 417 500 (approximately EUR 4 000) and it was provided that the total monthly repayments would be HUF 2 689 225 (approximately EUR 7 600). Since PN had actually paid HUF 3 151 644 (approximately EUR 8 900), the court of first instance ordered Lombard, on the ground of unjust enrichment, to reimburse the difference between those two amounts, namely HUF 462 419 (approximately EUR 1 300).

24 Lombard brought an appeal against that judgment before the referring court, the Fővárosi Törvényszék (Budapest High Court, Hungary), challenging the decision that the loan agreement at issue had to be regarded as having been denominated in Hungarian forint from the date of its conclusion. It submitted in particular that the declaration of validity in respect of that agreement

cannot have the effect of upsetting the contractual balance between the parties to such an extent and in such a way that an imbalance arises, in the legal relationship, between the respective amounts of the supply and the consideration. Furthermore, according to Lombard, such agreements – denominated in foreign currency and imposing the exchange rate risk on consumers – cannot be declared unlawful per se.

25 The referring court had doubts as to the legal options available where a contract, the invalidity of which relates to its main subject matter, is declared valid or effective between the parties.

26 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. If the unfair contract term concerns the main subject matter of the contract (the information on the exchange rate was not compliant), with the result that the contract cannot continue in existence, and there is no agreement between the parties, does the fact that, in the absence of any default rule under national law, guidance on a declaration of the validity or effectiveness of the contract is provided by a position statement adopted by the highest court which is, however, not binding on lower courts, ensure the full effectiveness of Directive 93/13?

2. If the answer to the first question referred is in the negative, is it possible to restore the original position in a situation where the contract cannot continue in existence due to the unfairness of a term concerning its main subject matter, there is no agreement between the parties, and the position statement referred to above cannot be applied?

3. If the answer to the second question referred is in the affirmative, can the law impose a requirement in respect of [this] type of contract stipulating that, when making an application for a declaration of invalidity in respect of the main subject matter of the contract, the consumer must also make an application for a declaration of the validity or effectiveness of the contract?

4. If the answer to the second question referred is in the negative, where it is not possible to restore the original position, is it possible for contracts to be declared valid or effective by means of *ex post* legislation, in the interests of ensuring a balance between the parties?'

Consideration of the questions referred

The first question

Admissibility

27 It should be noted that, in order to allow the Court to provide an interpretation of EU law that will be of assistance to the national court, Article 94(c) of the Rules of Procedure of the Court of Justice requires that the request for a preliminary ruling contain a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings (judgment of 17 September 2020, *Burgo Group*, C-92/19, EU:C:2020:733, paragraph 38).

28 According to settled case-law of the Court, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court, which enjoy a presumption of relevance. Therefore, since the question referred concerns the interpretation or validity of a rule of EU law, the Court is, in principle, required to give a ruling, unless it is quite obvious that the interpretation sought bears no relation to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the question submitted to it (judgment of 21 December 2021, *Trapeza Peiraios*, C-243/20, EU:C:2021:1045, paragraph 25 and the case-law cited).

29 It is also common ground that, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court, the national court alone has jurisdiction to interpret and apply national law, while the Court is empowered only to give rulings on the interpretation or the validity of an EU provision on the basis of the facts which the national court puts before it (judgment of 21 December 2021, *Trapeza Peiraios*, C-243/20, EU:C:2021:1045, paragraph 26 and the case-law cited).

30 In the present case, as the Hungarian Government points out in its written observations, the information provided by the referring court as to why it is necessary to interpret EU law and as to the relevance of the first question in order to resolve the dispute in the main proceedings is, admittedly, very sparse.

31 Nonetheless, it is apparent from the order for reference that Lombard brought an appeal against the judgment at first instance before the referring court in which it challenged, in particular, the reclassification of the loan agreement at issue as an agreement denominated in Hungarian forint. It also follows from the order for reference that that reclassification was carried out in accordance with the first approach set out in the opinion of the Kúria.

32 In the light of those considerations, it is not obvious that the first question – concerning the possibility, in the light of Directive 93/13, of having recourse to such an opinion in order to determine the approach to be taken in order to declare a contract to be valid or effective where that contract cannot continue in existence because a term relating to its main subject matter is unfair – is irrelevant for the purposes of resolving the dispute in the main proceedings.

33 It follows that the first question is admissible.

Substance

34 By its first question, the referring court asks, in essence, whether Directive 93/13 must be interpreted as meaning that the effectiveness of the provisions of that directive can be ensured, in the absence of a supplementary rule of national law governing such a situation, by a non-binding opinion issued by the highest court of the Member State concerned indicating to the lower courts the approach to be taken in order to declare a contract to be valid or effective between the parties, where that contract cannot continue in existence because a term relating to its main subject matter is unfair.

35 It should be noted at the outset that, although it follows from the third paragraph of Article 288 TFEU that, when transposing a directive, the Member States enjoy a broad discretion as to the choice of ways and means of ensuring that it is implemented, that freedom does not affect the obligation imposed on each of those States to adopt all the measures necessary to ensure that the directive concerned is fully effective, in accordance with the objective which it pursues (see, to that effect, judgment of 29 July 2019, *Fashion ID*, C-40/17, EU:C:2019:629, paragraph 49 and the case-law cited).

36 Directive 93/13 requires Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers (see, to that effect, judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 68).

37 Furthermore, it follows from the Court's case-law that it cannot be excluded that, in their role of ensuring consistency in the interpretation of the law, and in the interests of legal certainty, the highest courts of a Member State may, in compliance with Directive 93/13, elaborate certain criteria in the light of which the lower courts must examine the unfairness of contractual terms (see, to that effect, judgment of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, EU:C:2018:643, paragraph 68).

38 It also follows that guidance issued by those highest courts containing such criteria cannot, however, have the effect of preventing the national court with jurisdiction, first, from giving full effect to Directive 93/13 by setting aside, where necessary of its own motion, any conflicting provision of national legislation, even one adopted subsequently, including any conflicting judicial practice, without it being necessary for that court to request or await the prior setting aside of such a provision by legislative, judicial or other constitutional means, and, secondly, from submitting a request for a preliminary ruling to the Court (see, to that effect, judgment of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraph 61).

39 The Court has thus held that Directive 93/13, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, does not preclude the highest court of a Member State from adopting, in the interest of ensuring uniform interpretation of the law, binding decisions concerning the modalities for implementing that directive, in so far as those decisions do not prevent the competent court from ensuring the full effect of the norms laid down in that directive and from offering consumers an effective remedy for the protection of the rights that they can derive therefrom, or from referring a question for a preliminary ruling to the Court in that regard (judgment of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraph 64).

40 Nonetheless, the existence of a non-binding opinion of the highest court of a Member State, which thus allows the lower courts, called upon to follow that opinion, to depart from it as they see fit, cannot be regarded as capable of ensuring the effectiveness of Directive 93/13, by guaranteeing full protection for persons harmed by the unfair term.

41 The Court has, it is true, ruled that if a contract concluded between a seller or supplier and a consumer must in principle be annulled in its entirety following the national court's decision to remove an unfair contractual term, 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 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 (judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 61 and the case-law cited).

42 However, it must be held that a non-binding opinion of the highest court of a Member State, such as the opinion of the Kúria, cannot be treated in the same way as such a supplementary provision of national law intended to replace a loan agreement term held to be unfair.

43 In the light of all the foregoing considerations, the following answer should be given to the first question referred: Directive 93/13 must be interpreted as meaning that the effectiveness of the provisions of that directive cannot be ensured, in the absence of a supplementary rule of national law governing such a situation, solely by a non-binding opinion issued by the highest court of the Member State concerned indicating to the lower courts the approach to be taken in order to declare a contract to be valid or effective between parties, where that contract cannot continue in existence because a term relating to its main subject matter is unfair.

The second question

Admissibility

44 In the light of the Court's case-law referred to in paragraphs 27 to 29 above and the considerations set out in paragraph 31 above, it is not obvious that the second question – concerning the possibility of restoring the parties to a loan agreement to the situation they would have been in if that agreement had not been concluded where the agreement, on account of the unfair term relating to its main subject matter, cannot continue in existence, where there is no agreement between the parties and where the non-binding opinion referred to in the first question cannot be applied authoritatively – is irrelevant for the purposes of resolving the dispute in the main proceedings.

45 It follows that the second question is admissible.

Substance

46 By its second question, the referring court asks, in essence, whether Directive 93/13 must be interpreted as precluding the national court with jurisdiction from deciding to restore the parties to a loan agreement to the situation they would have been in if that agreement had not been concluded on the ground that a term of that agreement relating to its main subject matter must be declared unfair under that directive.

47 It should be recalled at the outset that, under Article 4(2) of Directive 93/13, assessment of the unfair nature of the terms is not to relate to the definition of the main subject matter of the contract, in so far as those terms are in plain intelligible language.

48 However, Article 8 of that directive lays down the option for Member States to adopt or retain more stringent provisions compatible with the Treaty in the area covered by the directive, in order to ensure a greater degree of protection for the consumer.

49 Thus, in paragraphs 30 to 35, 40 and 43 of the judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid* (C-484/08, EU:C:2010:309), the Court, after finding that the terms referred to in Article 4(2) of Directive 93/13 fell within the area covered by that directive and that, therefore, Article 8 thereof also applied to Article 4(2), held that those two provisions do not preclude national legislation allowing for a judicial review of the unfairness of such terms which ensures a higher level of protection for the consumer than that established by that directive.

50 Against that background, it should be noted that, according to the Court's case-law, Article 6(1) of Directive 93/13 is to be interpreted as meaning that a contractual term held to be unfair must be regarded, in principle, as never having existed, with the result that it cannot have any effect on the consumer. Therefore, the determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he or she would have been in if that term had not existed (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 61).

51 The Court has also held that Article 6(1) of Directive 93/13 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 (see, to that effect, judgments of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 28, and of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 62 and the case-law cited).

52 As regards the effects of a finding that terms of a contract are unfair on the validity of the contract in question, it must be pointed out that, under Article 6(1) *in fine* of Directive 93/13, 'the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms' (judgments of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 29, and of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 53).

53 In that context, national courts which find that terms of a contract are unfair are required under Article 6(1) of Directive 93/13, first, to draw all the consequences that follow under national law, so that the consumer is not bound by those terms, and, secondly, to assess whether the contract in question can continue in existence without those unfair terms (order of 22 February 2018, *ERSTE Bank Hungary*, C-126/17, not published, EU:C:2018:107, paragraph 38 and the case-law cited).

54 The objective pursued by the EU legislature in connection with Directive 93/13 consists in restoring the balance between the parties while, in principle, preserving the validity of the contract as a whole, not in annulling all contracts containing unfair terms (see, to that effect, judgments of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraph 40 and the case-law cited, and of 2 September 2021, *OTP Jelzálogbank and Others*, C-932/19, EU:C:2021:673, paragraph 40).

55 The Court has repeatedly held that, while it is for the Member States, by means of their national legislation, to define the detailed rules under which the unfairness of a contractual clause is established and the actual legal effects of that finding are produced, the fact remains that such a finding must allow the restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed, by, inter alia, creating a right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier on the basis of that unfair term (judgment of 31 May 2018, *Sziber*, C-483/16, EU:C:2018:367, paragraph 34 and the case-law cited).

56 Thus, where the national court takes the view that the loan agreement at issue in the case before it 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 (judgment of 25 November 2020, *Banca B.*, C-269/19, EU:C:2020:954, paragraph 41).

57 It follows from the foregoing considerations that if, in a situation such as that at issue in the main proceedings, having regard to the nature of the loan agreement, the national court takes the view that it is not possible to restore the parties to the situation they would have been in if that agreement had not been concluded, the onus is on that court to ensure that the consumer is ultimately in the position he or she would have been in if the term held to be unfair had never existed.

58 In a situation such as that at issue in the main proceedings, the interests of the consumer could thus be safeguarded by, inter alia, repaying to him the sums wrongly received by the lender on the basis of the term held to be unfair, such repayment being effected on the ground of unjust enrichment. In the present case, as is apparent from the order for reference, the court of first instance reclassified the loan agreement at issue as a loan agreement denominated in Hungarian forint, then determined the applicable interest rate and ordered Lombard to repay the amount corresponding to such unjust enrichment.

59 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 at issue (judgment of 25 November 2020, *Banca B.*, C-269/19, EU:C:2020:954, paragraph 44).

60 In the light of all the foregoing considerations, the following answer should be given to the second question referred: Directive 93/13 must be interpreted as not precluding the national court with jurisdiction from deciding to restore the parties to a loan agreement to the situation they would have been in if that agreement had not been concluded on the ground that a term of that agreement relating to its main subject matter must be declared unfair under that directive, provided that, if it is not possible to restore the parties to that position, it must ensure that the consumer is ultimately in the position he or she would have been in if the term held to be unfair had never existed.

The third question

61 By its third question, the referring court asks, in essence, whether Directive 93/13 must be interpreted as precluding legislation of a Member State which requires a consumer bringing an action for a declaration of invalidity relating to the main subject matter of the contract to include in his or her action an application for a declaration that the loan agreement is valid or effective.

62 In that regard, it should be noted that it is apparent from the order for reference that, in the dispute in the main proceedings, the consumer is, as Lombard pointed out in its written observations, not the applicant but the defendant.

63 Furthermore, there is nothing in the file before the Court to suggest that such a procedural requirement would apply or would have been applied to his counterclaim before the court of first instance, and the referring court has not explained why an answer to the third question is necessary in order to resolve the dispute before it.

64 Consequently, it must be held that, since the referring court has not set out with sufficient clarity and precision the reasons which prompted it to refer its third question, it has failed to comply with the requirement laid down in Article 94(c) of the Rules of Procedure of the Court, referred to in paragraph 27 above.

65 Accordingly, that question is inadmissible.

The fourth question

66 By its fourth question, the referring court enquires, in essence, whether, if it were not possible to restore the parties to the situation they would have been in if the agreement had not been concluded, referred to in the second question, the loan agreement at issue could, by the adoption of ex post legislation, be declared valid or effective in the interests of ensuring a balance between the parties.

67 As the Hungarian Government pointed out in its written observations, it must be stated that the referring court has not explained how the phrase 'by means of ex post legislation', to which it refers in that question, should be interpreted.

68 The referring court has also not explained why an answer to that question is necessary in order to enable it to resolve the dispute before it.

69 Consequently, for the same reason as that set out in paragraph 64 above, that question is inadmissible.

Costs

70 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 (Sixth Chamber) hereby rules:

1. **Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that the effectiveness of the provisions of that directive cannot be ensured, in the absence of a supplementary rule of national law governing such a situation, solely by a non-binding opinion issued by the highest court of the Member State concerned indicating to the lower courts the approach to be taken in order to declare a contract to be valid or effective between parties, where that contract cannot continue in existence because a term relating to its main subject matter is unfair.**

2. Directive 93/13 must be interpreted as not precluding the national court with jurisdiction from deciding to restore the parties to a loan agreement to the situation they would have been in if that agreement had not been concluded on the ground that a term of that agreement relating to its main subject matter must be declared unfair under that directive, provided that, if it is not possible to restore the parties to that position, it must ensure that the consumer is ultimately in the position he or she would have been in if the term held to be unfair had never existed.

[Signatures]