



Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

13 October 2022*

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Article 3(1) and Article 8 – Criteria for assessing the unfairness of a contractual term – Significant imbalance between the parties' rights and obligations under the contract – Requirement of good faith on the part of the seller or supplier – Possibility of ensuring a higher level of protection than that provided for in the directive)

In Case C-405/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Višje sodišče v Mariboru (Court of Appeal, Maribor, Slovenia), made by decision of 8 June 2021, received at the Court on 30 June 2021, in the proceedings

FV

v

NOVA KREDITNA BANKA MARIBOR d.d.,

THE COURT (Tenth Chamber),

composed of M. Ilešič, acting as President of the Chamber, I. Jarukaitis and Z. Csehi (Rapporteur),
Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- FV, by R. Preininger, odvetnik,
- the Slovene Government, by B. Jovin Hrastnik, acting as Agent,
- the European Commission, by B. Rous Demiri and N. Ruiz García, acting as Agents,

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

* Language of the case: Slovenian.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 3(1) and Articles 8 and 8a of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), as amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 (OJ 2011 L 304, p. 64) ('Directive 93/13').
- 2 The request has been made in proceedings between FV, a consumer, and NOVA KREDITNA BANKA MARIBOR d.d., a bank established under Slovenian law, concerning a credit agreement and legal acts relating to that agreement.

Legal context

European Union law

- 3 The 12th and 16th recitals of Directive 93/13 are worded as follows:

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

...

Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account'.

- 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 Article 5 of that directive states:

‘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. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. ...’

6 Article 8 of that directive states:

‘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.’

7 Article 8a(1) and (2) of Directive 93/13 states:

‘1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions:

- extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration; or
- contain lists of contractual terms which shall be considered as unfair[.]

2. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website.’

Slovenian law

8 Paragraph 24(1) of the Zakon o varstvu potrošnikov (Law on consumer protection) (Uradni list RS, No 98/04, consolidated version; ‘the ZVPot’) provides:

‘1. Contractual terms shall be regarded as unfair if:

- they cause a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, or
- if they render the performance of the contract unduly prejudicial to the consumer, or
- if they render the performance of the contract significantly different from what the consumer could legitimately expect, or
- if they breach the principle of good faith and fairness.’

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

9 On 19 September 2007, NOVA KREDITNA BANKA MARIBOR and FV’s mother concluded a credit agreement. The latter having died, FV undertook, on 21 July 2014, under a standard debt agreement, to repay the remaining balance of the credit agreement to the defendant in the main proceedings. By the latter agreement, the loan taker borrowed an amount of 149 220 Swiss francs (CHF) (approximately EUR 89 568 at the time of conclusion of the credit agreement), to be repaid within 240 months.

- 10 That credit agreement does not contain any terms as to the applicable exchange rate. By contrast, under Article 12 of that agreement, the foreign exchange risk is assumed entirely by the loan taker.
- 11 The referring court states that, in the present case, the foreign exchange risk materialised, since the loan taker still had to repay to the defendant in the main proceedings, on 29 January 2018, an amount of EUR 72 049.58.
- 12 On 9 April 2018, FV brought an action before the Okrožno sodišče v Mariboru (District Court, Maribor, Slovenia) seeking a declaration, inter alia, that the credit agreement at issue in the main proceedings was void, relying on changes in the exchange rate between the euro and the Swiss franc. Following the dismissal of that action by that court, FV brought an appeal before the Višje sodišče v Mariboru (Court of Appeal, Maribor, Slovenia), the referring court.
- 13 According to the referring court, the resolution of the dispute before it depends, in essence, on whether Paragraph 24(1) of the ZVPot complies with the terms and objectives of Directive 93/13. More specifically, that court seeks to ascertain whether Article 3(1) of that directive can be transposed into national law in such a way that the conditions of ‘good faith’ and ‘significant imbalance’ are distinct and independent of each other, so that, in the circumstances of the case before it, it would not need to consider whether the defendant in the main proceedings had acted in good faith.
- 14 The referring court considers that it is clear from the 12th and 16th recitals of Directive 93/13, read in conjunction with Articles 8 and 8a thereof, that Member States may adopt provisions ensuring a higher level of consumer protection than that guaranteed by that directive and that, in that case, such provisions must be communicated to the Commission. According to the referring court, the provisions relating to the conditions referred to in Article 3(1) of Directive 93/13 were not communicated by the Republic of Slovenia to the Commission.
- 15 In addition, the referring court states that no clear interpretation of Article 3(1) of Directive 93/13, on the basis of which it could decide whether the interpretation and application of the relevant provision of national law is consistent with the objectives of that directive, is apparent from the case-law of the Court. The referring court states, moreover, that it follows from several decisions of the Vrhovno sodišče (Supreme Court, Slovenia) that the two conditions referred to in Article 3(1) of Directive 93/13 must be read as being cumulative, which would be contrary to the interests of the consumer and would offer a lower level of consumer protection than that guaranteed by national law. The referring court considers that such a position is not consistent with the Court’s case-law, which, while allowing national supreme courts to define more precisely the criteria which the Court has itself defined, does not allow them to prevent lower courts from guaranteeing consumers the full effectiveness of Directive 93/13 and an effective remedy in order to defend their rights.
- 16 In those circumstances, the Višje sodišče v Mariboru (Court of Appeal, Maribor) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:
- ‘Is Article 3(1), read in conjunction with Articles 8 and 8a, of Directive [93/13] to be interpreted as not precluding national provisions which characterise the two conditions of “good faith” and “a significant imbalance” as alternatives (as separate, autonomous and independent conditions), such that, for the purposes of deciding whether a contractual term is unfair, it is sufficient if facts exist which establish that just one of those two conditions is fulfilled?’

Consideration of the question referred

- 17 By its question, the referring court asks, in essence, whether Article 3(1) and Article 8 of Directive 93/13 must be interpreted as precluding national legislation which permits a finding that a contractual term is unfair where it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, without, however, carrying out an examination, in such a case, of the requirement of 'good faith' within the meaning of Article 3(1).
- 18 It should be noted at the outset that Directive 93/13 obliges 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. In that context, it is for the national court to determine, taking account of the criteria laid down in Article 3(1) and Article 5 of Directive 93/13, whether, having regard to the particular circumstances of the case, such a term meets the requirements of good faith, balance and transparency laid down by that directive (judgment of 7 November 2019, *Profi Credit Polska*, C-419/18 and C-483/18, EU:C:2019:930, paragraph 53 and the case-law cited).
- 19 Under Article 3(1) of Directive 93/13, a term in a contract concluded between a consumer and a seller or supplier 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 that contract, to the detriment of the consumer.
- 20 In referring to concepts of 'good faith' and 'significant imbalance' in the parties' rights and obligations arising under the contract, to the detriment of the consumer, Article 3(1) of Directive 93/13 merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (judgment of 27 January 2021, *Dexia Nederland*, C-229/19 and C-289/19, EU:C:2021:68, paragraph 47 and the case-law cited).
- 21 The Court has thus held that, in order to determine whether a term causes a 'significant imbalance' in the parties' rights and obligations under a contract to the detriment of the consumer, particular account must be taken of which rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. Similarly, it is appropriate, to that end, to carry out an assessment of the legal situation of that consumer having regard to the means at his or her disposal, under national legislation, to prevent continued use of unfair terms (judgment of 27 January 2021, *Dexia Nederland*, C-229/19 and C-289/19, EU:C:2021:68, paragraph 48 and the case-law cited).
- 22 Moreover, the assessment of whether any 'significant imbalance' exists cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract and the costs charged to the consumer under that clause. A significant imbalance can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he or she enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him or her of an additional obligation not envisaged by the national rules (judgment of 27 January 2021, *Dexia Nederland*, C-229/19 and C-289/19, EU:C:2021:68, paragraph 49 and the case-law cited).

- 23 Regarding the question as to whether the requirement of ‘good faith’ within the meaning of Article 3(1) of Directive 93/13 is observed, it is apparent from the case-law that, in the light of the 16th recital of that directive, the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 50 and the case-law cited).
- 24 Thus, as is apparent from the 16th recital of that directive, the requirement of ‘good faith’, within the meaning of Article 3(1) of Directive 93/13, is a factor which makes it possible to ascertain whether the seller or supplier has dealt fairly and equitably with the consumer, whose legitimate interests he or she has to take into account. It is also apparent from that recital that, in making an assessment of good faith, particular regard is to be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer.
- 25 Furthermore, the Court has already stated that the concept of ‘good faith’ is inherent in the examination of the unfairness of a contractual term (order of 17 November 2021, *Unión de Créditos Inmobiliarios*, C-79/21, not published, EU:C:2021:945, paragraph 38).
- 26 Consequently, it is for the national court to assess, having regard to all the circumstances of the case concerned, first, the possible failure to observe the requirement of good faith and, second, the possible existence of a significant imbalance to the detriment of the consumer within the meaning of Article 3(1) of Directive 93/13 (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 49 and the case-law cited).
- 27 In those circumstances, it must be held that the two elements referred to in Article 3(1) of Directive 93/13 require, having regard to all the circumstances of the case concerned, an assessment by the national court in the light of the criteria specific to them, in order subsequently to determine whether the term at issue is unfair, given that the assessment of those factors on the basis of those criteria does not preclude a link between them.
- 28 In addition, the transparent nature of a contractual term, as required under Article 5 of Directive 93/13, is also one of the elements to be taken into account in the assessment of whether that term is unfair, which is for the national court to carry out pursuant to Article 3(1) of that directive (see, to that effect, judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-609/19, EU:C:2021:469, paragraph 62 and the case-law cited).
- 29 In the present case, the referring court seeks to ascertain, in essence, whether it may, under the Slovenian rules, rule on the dispute in the main proceedings without examining whether the seller or supplier has acted in good faith. The question therefore arises whether the existence, to the detriment of the consumer, of a significant imbalance in the parties’ rights and obligations arising under the contract might be sufficient, in compliance with EU law, for the purpose of establishing that a contractual term is unfair.
- 30 In that regard, it should be noted, first of all, that, according to the 12th recital of Directive 93/13, that directive carries out only a partial and minimum harmonisation of national laws relating to unfair terms, leaving it open to the Member States, with due regard for the FEU Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of that directive. In addition, under Article 8 of that directive, Member States may adopt or

retain the most stringent provisions compatible with the Treaty in the area covered by that directive, to ensure a maximum degree of protection for the consumer (judgment of 21 December 2021, *Trapeza Peiraios*, C-243/20, EU:C:2021:1045, paragraph 54 and the case-law cited).

- 31 Next, it should be noted that Directive 93/13 is transposed into Slovenian law by the ZVPot. Thus, Paragraph 24(1) of the ZVPot provides for four situations, linked by the conjunction ‘or’, in which a contractual term is considered to be unfair. Those situations include the creation by the contractual term, to the detriment of the consumer, of a significant imbalance in the parties’ rights and obligations arising under the contract (first indent) and that of infringement by the contractual term of the principle of good faith and fairness (fourth indent).
- 32 In that context, having regard to the written observations of the Slovene Government concerning the concept of ‘the principle of good faith and fairness’, it should be pointed out that, in accordance with settled case-law, the Court must take into account, under the division of jurisdiction between the Court and national courts, the factual and legal context, as set out in the order for reference, of the questions referred for a preliminary ruling, so that a reference for a preliminary ruling cannot be examined in the light of the interpretation of national law relied on by the government of a Member State or by a party to the main proceedings (see, to that effect, judgment of 15 April 2021, *État belge (Circumstances subsequent to the transfer decision)*, C-194/19, EU:C:2021:270, paragraph 26 and the case-law cited).
- 33 Moreover, as noted in paragraphs 23 and 24 above, the requirement of ‘good faith’, within the meaning of Article 3(1) of Directive 93/13, must be interpreted in the light of the 16th recital of that directive.
- 34 Finally, in accordance with Article 8 of Directive 93/13, the Member States are free in principle to extend the protection provided by Article 3(1) of that directive (see, to that effect, judgment of 19 September 2019, *Lovasné Tóth*, C-34/18, EU:C:2019:764, paragraph 47), provided that the national legislation concerned ensures a maximum degree of protection for the consumer and is not precluded by the Treaties (see, to that effect, judgment of 2 April 2020, *Condominio di Milano, via Meda*, C-329/19, EU:C:2020:263, paragraph 37).
- 35 National legislation such as that at issue in the main proceedings pursues the objective of consumer protection guaranteed by Directive 93/13. Moreover, it is capable of providing consumers, in accordance with Article 8 of that directive, with a higher level of effective protection than that established by the directive, which it is, however, for the national court to ascertain, taking account also of the relevant national case-law.
- 36 Furthermore, in the light of the referring court’s questions, it should be noted that the Commission stated in its observations submitted to the Court that the Slovenian authorities had indeed informed it of the relevant rules relating to the criteria and detailed rules for assessing the unfairness of contractual terms, as provided for in Article 8a of Directive 93/13, with the result that that provision cannot, in the present case, affect the interpretation requested.
- 37 In the light of the foregoing, the answer to the question referred is that Article 3(1) and Article 8 of Directive 93/13 must be interpreted as not precluding national legislation which permits a finding that a contractual term is unfair where it causes a significant imbalance in the parties’ rights and

obligations arising under the contract, to the detriment of the consumer, without, however, carrying out an examination, in such a case, of the requirement of ‘good faith’ within the meaning of Article 3(1).

Costs

- 38 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 (Tenth Chamber) hereby rules:

Article 3(1) and Article 8 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

must be interpreted as not precluding national legislation which permits a finding that a contractual term is unfair where it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, without, however, carrying out an examination, in such a case, of the requirement of ‘good faith’ within the meaning of Article 3(1).

[Signatures]