



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

12 October 2023*

(Reference for a preliminary ruling – Unfair terms in consumer contracts – Directive 93/13/EEC – Effects of a term being found to be unfair – Intention of a consumer to preserve a contract by amending the terms found to be unfair – Powers of the national court)

In Case C-645/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), made by decision of 12 October 2022, received at the Court on 13 October 2022, in the proceedings

R.A. and Others

v

‘Luminor Bank AS’, acting through ‘Luminor Bank AS’ Lietuvos skyrius,

THE COURT (Ninth Chamber),

composed of O. Spineanu-Matei (Rapporteur), President of the Chamber, S. Rodin and L.S. Rossi, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- ‘Luminor Bank AS’, acting through ‘Luminor Bank AS’ Lietuvos skyrius, by K. Karpickis, A. Klezys, advokatai, and A. Sovaitė,
- the Lithuanian Government, by K. Dieninis, S. Grigonis and V. Kazlauskaitė-Švenčionienė, acting as Agents,
- the Portuguese Government, by P. Barros da Costa, A. Cunha, M.I. Gameiro and L. Medeiros, acting as Agents,

* Language of the case: Lithuanian.

– the European Commission, by J. Jokubauskaitė 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) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).
- 2 The request has been made in proceedings between R.A. and Others, on the one hand, and ‘Luminor Bank AS’, acting through ‘Luminor Bank AS’ Lietuvos skyrius, on the other, concerning the unfairness of terms in several loan agreements concluded between those parties and the consequences thereof.

Legal context

European Union law

- 3 The twenty-first and twenty-fourth recitals of Directive 93/13 are worded as follows:

‘Whereas Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier ...

...

Whereas 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 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.’
- 5 Article 7(1) of that directive 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.’

Lithuanian law

- 6 Article 6.228⁴(8) of the Lietuvos Respublikos civilinis kodeksas (Civil Code of the Republic of Lithuania) provides:

‘Where a court finds a term or terms of the contract to be unfair, that term or those terms shall be invalid as from the conclusion of the contract, and the remaining terms of the contract shall remain binding on the parties, provided that the contract is capable of continuing in existence after the removal of the unfair terms.’

- 7 Article 353(1) and (2) of the Lietuvos Respublikos civilinio proceso kodeksas (Code of Civil Procedure of the Republic of Lithuania) provides:

‘1. The court of cassation shall, within the scope of the appeal on a point of law, review the judgments and/or orders appealed against as regards the application of the law. The court of cassation shall be bound by the facts established by the court of first instance and the appeal court.

2. The court shall have the power to go beyond the scope of an appeal on a point of law where the public interest so requires and the rights and legitimate interests of a person, society or the State would be infringed if the limits of the appeal were not exceeded. ...’

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

- 8 In 2008, the applicants in the main proceedings entered into several loan agreements denominated in Swiss francs (‘the agreements at issue’) with the defendant in the main proceedings, under which they borrowed from the latter a sum of money in Swiss francs, converted existing loans denominated in euro or Lithuanian litai into Swiss francs, or refinanced loans held with other credit institutions in a currency other than the Swiss franc. The loans thus issued were to be repaid in Swiss francs. Due to a significant depreciation of the Lithuanian litas in relation to the Swiss franc, the amount to be repaid has almost doubled since the conclusion of those agreements.
- 9 In 2017, considering that certain terms of those agreements were unfair, the applicants in the main proceedings brought an action before the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania) seeking, inter alia, to change the currency from the Swiss franc to the euro, at the exchange rate applicable on the date on which the loans concerned were issued, and to convert into euro the instalments paid in Swiss francs to repay the loan (capital and interest), at the exchange rate applicable on the date of those instalments.
- 10 By judgment of that court of 20 November 2018, which was upheld on appeal on 5 May 2020 by judgment of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania), the claim brought by the applicants in the main proceedings was dismissed.
- 11 The applicants in the main proceedings brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania). By judgment of 14 April 2021, that court referred the case back to the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) for re-examination of whether the relevant terms of the agreements at issue were unfair. According to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), the fact that the defendant

in the main proceedings fulfilled its obligation to disclose the risk of fluctuation in the exchange rate of the Swiss franc did not mean that the court was not under an obligation to examine whether those terms were unfair.

- 12 By order of 4 May 2021, the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) ordered the applicants in the main proceedings to submit their proposals as to how the relevant terms of the agreements at issue should, in their view, be amended if they were found to be unfair. They stated that they were requesting that the court amend those terms in accordance with the application by which they initiated the proceedings, namely, in essence, by changing the currency from the Swiss franc to the euro, at the exchange rate applicable on the date on which the loans concerned were issued. By contrast, the defendant in the main proceedings stated that there were no grounds for finding those terms to be unfair and amending them, since there were no supplementary rules in the Lithuanian legal system.
- 13 By judgment of 2 September 2021, the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) found the terms of the agreements at issue relating to the currency in which the loans concerned were denominated to be unfair, on the ground that they did not meet the requirement of transparency, and amended those agreements to be denominated in euro, at the exchange rate applicable on the date on which those loans were issued, and by changing the base interest rate in those agreements from the LIBOR CHF to the Euribor. According to that court, such an approach was consistent with the principles of fairness, good faith and reasonableness and with the objectives pursued by Directive 93/13.
- 14 The defendant in the main proceedings brought an appeal on a point of law against that judgment before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), the referring court, claiming that the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) had incorrectly classified the relevant terms of the agreements at issue as ‘unfair’ and that that court was not entitled to amend those terms since, under Lithuanian law, there were no supplementary provisions that could replace those terms and the amendment of those terms on the basis of the principles of fairness, good faith and reasonableness was prohibited by Article 6(1) of Directive 93/13.
- 15 By a partial judgment of 25 August 2022, the referring court upheld the judgment of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) of 2 September 2021 in so far as it had classified the relevant terms of the agreements at issue as ‘unfair’, and reopened the proceedings with regard to the latter court’s amendment of those agreements.
- 16 Before the referring court, the applicants in the main proceedings claim that, owing to the passive behaviour of the defendant in the main proceedings, the parties failed to reach a compromise regarding any amendment of the terms found to be unfair. They also state that they do not agree to preserve those terms and request, principally, that the agreements at issue be amended in the way they indicated in the application by which they initiated the proceedings. However, if it were considered that there are no legal grounds for such amendment, the applicants in the main proceedings seek the annulment of those agreements and the restitution of the services provided thereunder. The defendant in the main proceedings seeks a declaration that those agreements are invalid *ex nunc*.
- 17 The referring court is uncertain as to the consequences of classifying the relevant terms of the agreements at issue as ‘unfair’, in so far as the applicants in the main proceedings requested that those agreements be preserved and that those terms be amended. In that regard, that court states

that, in the present case, it is not disputed that those agreements are not capable of continuing in existence without those terms. That court observes that the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) did not examine whether the possible annulment of the agreements at issue would have particularly unfavourable consequences for the applicants in the main proceedings. According to the referring court, the failure to carry out such an examination is explained by the fact that the application initiating the proceedings did not seek the annulment of those agreements, but only their amendment, and that Article 265(2) and Article 320(2) of the Code of Civil Procedure of the Republic of Lithuania prohibit the court of first instance and the appeal court, respectively, from going beyond the limits of the claims brought before them.

- 18 Consequently, the referring court harbours doubts, in the first place, as to whether the appeal court could amend the agreements at issue without first examining whether the annulment of those agreements would have particularly unfavourable consequences for the applicants in the main proceedings. According to that court, the answer to that question depends on the value to be attached to the intention of the applicants in the main proceedings to preserve those agreements by amending the unfair terms contained therein.
- 19 The referring court is uncertain, in the second place, as to whether the answer to that question depends on whether the national court has the possibility of replacing an unfair term with a supplementary provision of national law or with a provision applicable where the parties to the contract in question so agree.
- 20 That court considers that the answers to those two questions could be in the affirmative. Thus, an answer to the first question in the affirmative would be consistent with the objective of Directive 93/13, which aims, inter alia, to restore the balance between the parties, while, in principle, preserving the validity of the contract as a whole, not to abolish all contracts containing unfair terms (judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 31). Next, the second question could also be answered in the affirmative, since, if it is possible to replace an unfair term with a supplementary provision of national law or with a provision applicable where the parties to the contract in question so agree and if the consumer requests that that contract be preserved by amending that unfair term, the national court must be able to rule on the issue of amending that term without first examining the consequences of annulling that contract in its entirety.
- 21 By contrast, the referring court considers that, where there is no appropriate supplementary provision in national law and the parties do not so agree, the court must, irrespective of the intention expressed by the consumer, rule on the annulment the contract in question in its entirety, except where the consumer has expressed his or her wish to preserve the unfair terms. When doing so, the court must take all measures necessary to protect the consumer from the particularly unfavourable consequences of such annulment.
- 22 Since, in the present case, there is no supplementary provision in Lithuanian law that could replace the terms of the agreements at issue that have been found to be unfair and there is no mutual agreement between the parties on a provision to be applied, the intention expressed by the applicants in the main proceedings to preserve those agreements and to amend those terms cannot prevent the court from ruling on the annulment of those agreements.

23 In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Can Article 6(1) and Article 7(1) of Directive [93/13] be interpreted as meaning that, where a consumer expresses the intention to preserve a contract by replacing an unfair term contained therein, a court, after finding that the contract cannot remain valid following the removal of the term found to be unfair, may rule on the issue of replacing the unfair term without first assessing the possibility of annulling the contract in its entirety?
- (2) Does the answer to the first question depend on whether the national court has the possibility of replacing the unfair term contained in the contract with a supplementary provision or a provision of national law applied by mutual agreement of the parties to the contract in question?’

Consideration of the questions referred

- 24 As a preliminary point, the Court observes that, although the referring court seeks an interpretation of Article 6(1) and Article 7(1) of Directive 93/13, it is uncertain as to the consequences of finding a contractual term to be unfair. Consequently, in the light of the information contained in the order for reference, the questions referred must be understood as referring solely to Article 6(1).
- 25 Thus, it must be considered that, by its 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 precluding a national court, where it has found that a contract cannot remain valid following the removal of an unfair term and the consumer concerned expresses the intention to preserve that contract by amending that term, from ruling on the measures to be taken to restore the effective balance between the rights and obligations of the parties to that contract without first examining the consequences of annulling that contract in its entirety. The referring court also asks whether it is relevant in that regard that that national court has the possibility of replacing that term with a supplementary provision of national law or with a provision applicable where those parties so agree.
- 26 In order to answer those questions, it should be recalled that, as is clear from the Court’s case-law, a finding that a term in an agreement is unfair must allow the restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed (judgment of 12 January 2023, *D.V. (Lawyers’ fees – Principle of an hourly rate)*, C-395/21, EU:C:2023:14, paragraph 54 and the case-law cited).
- 27 Under Article 6(1) of Directive 93/13, it is for the national court to exclude the application of unfair terms so that they do not produce binding effects with regard to the consumer, unless the consumer objects. 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 (judgment of 12 January 2023, *D.V. (Lawyers’ fees – Principle of an hourly rate)*, C-395/21, EU:C:2023:14, paragraph 55 and the case-law cited).

- 28 Thus, the national court is not required to exclude the possibility that an unfair term may be applicable if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status, thus giving his or her free and informed consent to that term (see, to that effect, judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 53 and the case-law cited).
- 29 The Court has held that, since the system of protection offered by Directive 93/13 does not apply if the consumer objects to it, that consumer must a fortiori be entitled to object to being protected, under that system, against the unfavourable consequences caused by the contract being annulled in its entirety where he or she does not wish to rely on that protection (judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 55).
- 30 By contrast, where the consumer expresses the intention to rely on the protection offered by Directive 93/13, the national court must examine whether, in the light of the criteria laid down by national law, the contract may continue in existence without any amendment other than that resulting from the removal of the unfair term in question.
- 31 That examination of the possibility of a contract continuing in existence without the unfair term in question is an objective examination which it is for the national court to carry out in the light of the rules of national law and irrespective of the fact that the consumer expresses the intention to preserve that contract (see, to that effect, judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraphs 39 to 41 and the case-law cited).
- 32 If, pursuant to the relevant rules of national law, the contract would not be capable of continuing in existence after the unfair term in question has been removed, Article 6(1) of Directive 93/13 does not preclude the annulment of that contract (judgment of 12 January 2023, *D.V. (Lawyers' fees – Principle of an hourly rate)*, C-395/21, EU:C:2023:14, paragraph 59).
- 33 It is only if the annulment of the contract in its entirety would expose the consumer to particularly unfavourable consequences, such as placing the consumer in a situation of legal uncertainty, but which cannot be reduced solely to purely pecuniary consequences, that the national court has the exceptional possibility of replacing an unfair term that has been annulled with a supplementary provision of national law or a provision applied by mutual agreement of the parties to the contract in question (see, to that effect, judgment of 12 January 2023, *D.V. (Lawyers' fees – Principle of an hourly rate)*, C-395/21, EU:C:2023:14, paragraphs 60 to 62).
- 34 It is also apparent from the case-law that, where there are no supplementary provisions of national law or provisions applicable where the parties to the contract so agree which may replace the unfair terms in question and annulling the contract would expose the consumer to particularly unfavourable consequences, the national court must, while taking into account all of its national law, take all the measures necessary to protect the consumer from those consequences and thus restore the effective balance between the reciprocal rights and obligations of the parties (see, to that effect, judgment of 25 November 2020, *Banca B.*, C-269/19, EU:C:2020:954, paragraph 41).
- 35 Where a national court finds that a contractual term is unfair, and removing that term would entail the annulment of the contract of which it forms part, the measures it may adopt are not exhaustive (see, to that effect, judgment of 25 November 2020, *Banca B.*, C-269/19, EU:C:2020:954, paragraph 40), subject to the proviso that a national court cannot supplement that contract by revising the content of that term (judgments of 26 March 2019, *Abanca*

Corporación Bancaria and Bankia, C-70/17 and C-179/17, EU:C:2019:250, paragraph 53, and of 12 January 2023, *D.V. (Lawyers' fees – Principle of an hourly rate)*, C-395/21, EU:C:2023:14, paragraph 65).

- 36 In that regard, the Court has held 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 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, paragraph 62).
- 37 It follows from the foregoing that the intention expressed by the consumer to rely on the protection offered by Directive 93/13 and to preserve a contract is without prejudice to the obligation on the national court to examine, objectively and in the light of the rules of national law, whether that contract is capable of continuing in existence after the unfair term in question has been removed.
- 38 Moreover, where it has found that a contract cannot remain valid following the removal of such an unfair term, the national court may not replace that term with a supplementary provision of national law or a provision applicable where the parties to that contract so agree or, if there are no such provisions in national law, adopt other measures to restore the effective balance between the rights and obligations of those parties without first examining whether and finding that the annulment of that contract in its entirety would expose the consumer concerned to particularly unfavourable consequences.
- 39 In the present case, an appeal on a point of law has been brought before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) against a judgment of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) by which the latter court, after finding that terms constituting the main subject matter of the agreements at issue, namely those relating to the currency in which the loans concerned were denominated, were unfair, granted the request made by the applicants in the main proceedings and amended those agreements without first examining the consequences, for the applicants in the main proceedings, of the possible annulment of those agreements. The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) upheld the judgment under appeal as regards the classification of those terms as 'unfair'. By contrast, as regards the consequences of that classification, the referring court harbours doubts as to whether the appeal court could grant the request made by the applicants in the main proceedings that the agreements at issue be preserved by amending those terms without first examining whether that annulment would have particularly unfavourable consequences for the applicants in the main proceedings.
- 40 As is apparent from the case-law of the Court referred to in paragraphs 26 to 38 of the present judgment, where the applicants in the main proceedings intend to rely on the protection offered by Directive 93/13 and where, under national law, the agreements at issue are not capable of continuing in existence after the unfair terms in question have been removed, the national court is under an obligation to examine the consequences of annulling those agreements, irrespective of the intention expressed by the applicants in the main proceedings to preserve those agreements by amending those terms. It is only if those consequences are so serious that they may be classified as 'particularly unfavourable' to the applicants in the main proceedings that it is for that court, in the absence of supplementary provisions or provisions applicable where the parties to the agreements

at issue so agree, to take all the measures necessary to protect the consumer from those consequences and to restore the effective balance between the rights and obligations of those parties, subject to the proviso that that court cannot supplement those agreements by revising the content of those terms.

- 41 In the light of the foregoing considerations, the answer to the questions referred is that Article 6(1) of Directive 93/13 must be interpreted as precluding a national court, where it has found that a contract cannot remain valid following the removal of an unfair term and the consumer concerned expresses the intention to preserve that contract by amending that term, from ruling on the measures to be taken to restore the effective balance between the rights and obligations of the parties to that contract without first examining the consequences of annulling that contract in its entirety, even where that court has the possibility of replacing that term with a supplementary provision of national law or with a provision applicable where those parties so agree.

Costs

- 42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Ninth 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 precluding a national court, where it has found that a contract cannot remain valid following the removal of an unfair term and the consumer concerned expresses the intention to preserve that contract by amending that term, from ruling on the measures to be taken to restore the effective balance between the rights and obligations of the parties to that contract without first examining the consequences of annulling that contract in its entirety, even where that court has the possibility of replacing that term with a supplementary provision of national law or with a provision applicable where those parties so agree.

[Signatures]