

JUDGMENT OF THE COURT (First Chamber)

3 June 2010 *

In Case C-484/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal Supremo (Spain), made by decision of 20 October 2008, received at the Court on 10 November 2008, in the proceedings

Caja de Ahorros y Monte de Piedad de Madrid

v

Asociación de Usuarios de Servicios Bancarios (Ausbanc),

* Language of the case: Spanish.

THE COURT (First Chamber),

composed of A. Tizzano (rapporteur), President of Chamber, acting for the President of the First Chamber, E. Levits, C. Toader, M. Ilešić and J.-J. Kasel, Judges,

Advocate General: V. Trstenjak,
Registrar: R. Grass,

having regard to the written procedure and further to the hearing on 10 September 2009,

after considering the observations submitted on behalf of:

- Caja de Ahorros y Monte de Piedad de Madrid, by M. Merola, avvocato, and J. Cadarso Palau, abogado,
- the Asociación de Usuarios de Servicios Bancarios (Ausbanc), by J. Rodríguez Teijeiro, procuradora, and by L. Pineda Salido and M. Mateos Ferres, abogados,
- the Spanish Government, by J. López-Medel Bascones and M. Muñoz Pérez, acting as Agents,
- the German Government, by M. Lumma and J. Kemper, acting as Agents,

- the Austrian Government, by E. Riedl, acting as Agent,
- the Portuguese Government, by L. Inez Fernandes, H. Almeida and P. Contreiras, acting as Agents,
- the Commission of the European Communities, by E. Gippini Fournier and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 October 2009,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Articles 4(2) and 8 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29; ‘the Directive’).

- 2 The reference has been made in the course of proceedings between Caja de Ahorros y Monte de Piedad de Madrid ('Caja de Madrid') and the Asociación de Usuarios de Servicios Bancarios (the Spanish association of users of banking services; 'Ausbanc') concerning the legality of a term introduced by Caja de Madrid in variable-rate loan agreements concluded with its clients for the purchase of residential property.

Legal context

European Union legislation

- 3 The 12th and 19th recitals in the preamble to the Directive state:

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

...

..., for the purposes of [the] Directive, assessment of unfair character shall not be made of terms which describe the main subject-matter of the contract nor the quality/price ratio of the goods or services supplied; ... the main subject-matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; ...'

4 Article 3 of the Directive provides:

'1. 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.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.’

5 Article 4 of the Directive is set out in the following terms:

‘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 [to be supplied] in exchange, on the other, in so far as these terms are in plain intelligible language.’

6 Article 8 of the 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.’

National legislation

- 7 Under Spanish law, consumers were protected against unfair terms by General Law 26/1984 for the protection of consumers and users (Ley General 26/1984 para la Defensa de los Consumidores y Usuarios) of 19 July 1984 (BOE No 176 of 24 July 1984).
- 8 Law 26/1984 was amended by Law 7/1998 on general contractual conditions (Ley 7/1998 sobre Condiciones Generales de la Contratación) of 13 April 1998 (BOE No 89 of 14 April 1998), which transposed the Directive into national law.
- 9 Law No 7/1998 did not, however, transpose Article 4(2) of the Directive into national law.

Facts of the dispute and questions referred for a preliminary ruling

- 10 It is apparent from the decision making the reference that the variable-rate loan agreements for the purchase of residential property which are concluded between Caja de Madrid and its clients contain a written clause, introduced in advance in a model contract, pursuant to which the nominal interest rate laid down in the contract, variable from time to time in accordance with the agreed reference index, is to be rounded up, with effect from the first revision, to the next quarter of a percentage point ('the rounding-up term').

- 11 On 28 July 2000, Ausbanc brought an action seeking, in particular, to require Caja de Madrid to annul the rounding-up term in those loan contracts and to prohibit its use in the future. By decision of 11 September 2001, the Juzgado de Primera Instancia de Madrid (Court of First Instance, Madrid) upheld the action, taking the view that the rounding-up term was unfair and thus invalid, in accordance with the national legislation which had transposed the Directive.
- 12 Caja de Madrid appealed against that decision to the Audiencia Provincial de Madrid (Provincial Court, Madrid), which, on 10 October 2002, delivered a judgment confirming the decision at first instance.
- 13 On 27 November 2002, Caja de Madrid appealed in cassation against that judgment to the Tribunal Supremo (Supreme Court).
- 14 According to the Tribunal Supremo, the rounding-up term is liable to constitute an essential element of a contract for a bank loan, such as that at issue in the main proceedings. However, given that Article 4(2) of the Directive excludes from the assessment of unfairness a term which concerns, in particular, the subject-matter of the contract, it is not possible, in principle, for a term such as that at issue in the main proceedings to be subjected to an assessment as to whether it is unfair.
- 15 However, the Tribunal Supremo also states that, as the Kingdom of Spain has not transposed Article 4(2) into its legal system, the Spanish legislation subjects the entire contract to such an assessment.

16 It was in those circumstances that the Tribunal Supremo decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘1. Must Article 8 of [the Directive] be construed as meaning that a Member State may provide in its legislation, for the benefit of consumers, that the assessment as to whether contractual terms are unfair is to be carried out also in respect of terms which, pursuant to Article 4(2) of [the Directive], fall outside the scope of such an assessment?

2. Consequently, does Article 4(2) of [the Directive], read in conjunction with Article 8 thereof, preclude a Member State from providing in its legislation, for the benefit of consumers, that the assessment as to whether contractual terms are unfair is to be carried out also in respect of terms which relate to “the definition of the main subject-matter of the contract” or to “the adequacy of the price and remuneration, on the one hand, as against the services or goods [to be supplied] in exchange, on the other”, even where those terms are in plain, intelligible language?

3. Is an interpretation of Articles 8 and 4(2) of [the Directive] under which it is possible for a Member State to provide for assessment by the courts as to whether contractual terms are unfair, which are in plain, intelligible language and which define the main subject-matter of the contract or the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other, compatible with Articles 2 EC, 3(1)(g) EC and 4(1) EC?’

The questions referred for a preliminary ruling

Admissibility

- ¹⁷ Ausbanc, the Spanish Government and the Commission of the European Communities challenge the admissibility of the reference for a preliminary ruling on the ground that it is of no use for the purpose of resolving the dispute before the national court. In that regard, they contend that the rounding-up term at issue in the main proceedings does not concern the main subject-matter of the contract in question, but constitutes a subsidiary element to it, with the result that Article 4(2) of the Directive is not applicable to the dispute in the main proceedings.
- ¹⁸ In that regard, it is necessary to state, at the outset, that, in accordance with settled case-law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the forthcoming judicial decision, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33; Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 43; and Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraphs 27 and 32).

19 Thus, although the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21, and Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 41), the Court may decline to rule on a question referred for a preliminary ruling by a national court only where, inter alia, it is quite obvious that the provision of European Union law referred to the Court for interpretation is incapable of applying (see Case C-85/95 *Reisdorf* [1996] ECR I-6257, paragraph 16, and Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraph 43).

20 That is not, however, the position in the present case.

21 In its decision making the reference, the Tribunal Supremo expresses uncertainty as to the extent of the obligations imposed on Member States, in the light of the Directive, concerning the scope of judicial review as to whether certain contractual terms which, in the Tribunal Supremo's opinion, come within the scope of Article 4(2) of the Directive are unfair.

22 Although that assessment by the Tribunal Supremo is not shared by all of the parties, it at least does not appear obvious that that provision of the Directive is incapable of applying in the case in the main proceedings.

23 In those circumstances, it must be held that the Court has jurisdiction to rule on the questions for a preliminary ruling which have been submitted to it by the national court and that, therefore, the reference for a preliminary ruling must be declared admissible.

Substance

The first and second questions

- ²⁴ By its first two questions, which it is appropriate to consider together, the national court asks, in essence, whether Articles 4(2) and 8 of the Directive preclude a Member State from providing in its legal system, for the benefit of consumers, for an assessment as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language.
- ²⁵ Caja de Madrid submits that Article 8 of the Directive does not allow Member States to introduce, by way of transposition measures, or to maintain, where no such measures exist, national legislation which is contrary to Article 4(2) of the Directive. That provision, it argues, defines, in a binding way, the scope of the system of protection provided for by the Directive, thereby excluding any possibility for Member States to derogate from it, even in order to provide for national legislation which is more favourable to consumers.
- ²⁶ By contrast, the other interested parties which have submitted observations contend that Articles 4(2) and 8 of the Directive do not preclude such a possibility. They take the view that the adoption or maintenance of national legislation of that kind are matters coming within the discretion of Member States to institute, in the area covered by the Directive, more stringent mechanisms of consumer protection.

- ²⁷ In order to reply to the questions referred, it is necessary to point out that, according to settled case-law, the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. 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 (Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25, and Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25).
- ²⁸ Nevertheless, as expressly indicated in the 12th recital in its preamble, the Directive carried out only a partial and minimum harmonisation of national legislation concerning unfair terms, while recognising that Member States have the option of affording consumers a higher level of protection than that for which the Directive provides.
- ²⁹ Thus, Article 8 of the Directive formally 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, to ensure a [greater] degree of protection for the consumer’.
- ³⁰ It is thus necessary to determine whether the scope of Article 8 of the Directive extends to the entire area covered by that directive and, consequently, to Article 4(2) thereof, or whether, as Caja de Madrid argues, Article 4(2) is excluded from the scope of Article 8.
- ³¹ In that regard, it should be borne in mind that Article 4(2) of the Directive provides only that the ‘[a]ssessment of the unfair nature’ is not to apply to the terms to which that provision relates, on condition that they are drafted in plain, intelligible language.

- ³² It thus follows from the actual wording of Article 4(2) of the Directive that that provision, as the Advocate General has noted in point 74 of her Opinion, cannot be regarded as laying down the scope *ratione materiae* of the Directive. On the contrary, the terms referred to in Article 4(2), while they come within the area covered by the Directive, escape the assessment as to whether they are unfair only in so far as the national court having jurisdiction should form the view, following a case-by-case examination, that they were drafted by the seller or supplier in plain, intelligible language.
- ³³ It follows, moreover, from the Court's case-law that Articles 3(1) and 4(1) of the Directive, taken as a whole, define the general criteria permitting an assessment as to whether the contract terms subject to the provisions of the Directive are unfair (see, to that effect, Case C-478/99 *Commission v Sweden* [2002] ECR I-4147, paragraphs 11 and 17, and Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraphs 18, 19 and 21).
- ³⁴ Similarly, Article 4(2) of the Directive is concerned, as the Advocate General has noted in point 75 of her Opinion, solely with establishing the detailed rules and the scope of the substantive assessment of contract terms which have not been individually negotiated and which describe the essential obligations of contracts concluded between a seller or supplier and a consumer.
- ³⁵ It follows that the terms referred to in Article 4(2) do indeed come within the area covered by the Directive and that, consequently, Article 8 of the Directive applies equally to Article 4(2).

- 36 That conclusion cannot be called into question by the arguments of Caja de Madrid that, as follows from, inter alia, the judgment in Case C-144/99 *Commission v Netherlands* [2001] ECR I-3541, Article 4(2) of the Directive is mandatory and binding for Member States, with the result that they cannot rely on Article 8 of the Directive in order to adopt or maintain in their respective national legal systems provisions which are liable to alter the scope of Article 4(2).
- 37 In that regard, suffice it to point out that those arguments result from an erroneous reading of the judgment in *Commission v Netherlands*. In that judgment, the Court held that the Kingdom of the Netherlands had failed to fulfil its obligations under the Directive, not by failing to transpose Article 4(2) thereof, but merely by failing to transpose it in full, with the result that the national legislation at issue was not capable of achieving the results intended by that provision.
- 38 That national legislation excluded any possibility of judicial review of terms describing the essential obligations in the contracts concluded between a seller or supplier and a consumer, even where the drafting of those terms was obscure and ambiguous, with the result that the consumer was absolutely prevented from invoking the unfair nature of a term relating to the definition of the main subject-matter of the contract or to the adequacy of the price as against the services or goods to be supplied in exchange.
- 39 Thus, it cannot be inferred in any way from the judgment in *Commission v Netherlands* that the Court took the view that Article 4(2) of the Directive constituted a mandatory and binding provision and that, as such, its transposition by Member States was obligatory. On the contrary, the Court merely held that, in order to safeguard in practice the objectives of consumer protection pursued by the Directive, any transposition of Article 4(2) had to be complete, with the result that the prohibition of the assessment of the unfairness of the terms relates solely to those which are drafted in plain, intelligible language.

- 40 It follows from all of the foregoing that Member States cannot be prevented from adopting or retaining, throughout the area covered by the Directive, including Article 4(2) thereof, rules which are more stringent than those provided for by the Directive itself, on condition that they are designed to afford consumers a higher level of protection.
- 41 However, with regard to the Spanish legislation at issue in the main proceedings, it should be pointed out that, as is apparent from the case-file submitted to the Court, Law 7/1998 did not transpose Article 4(2) of the Directive into national law.
- 42 It follows that, in the Spanish legal system, as the Tribunal Supremo states, a national court may, in all circumstances, assess, in a dispute concerning a contract concluded between a seller or supplier and a consumer, the unfairness of a term which was not individually negotiated and which relates to, *inter alia*, the main subject-matter of the contract, even in the case where that term was drawn up in advance by the seller or supplier in plain, intelligible language.
- 43 Against that background, it must be held that, in authorising the possibility of a full judicial review as to the unfairness of terms such as those referred to in Article 4(2) of the Directive, provided for in a contract concluded between a seller or supplier and a consumer, the Spanish legislation at issue in the main proceedings makes it possible for consumers to be afforded, in accordance with Article 8 of the Directive, a higher level of protection than that established by that directive.
- 44 In the light of those considerations, the answer to the first and second questions is that Articles 4(2) and 8 of the Directive must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which authorises a judicial review as to the unfairness of contractual terms which relate to the definition

of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language.

The third question

⁴⁵ By its third question, the national court asks whether Articles 2 EC, 3(1)(g) EC and 4(1) EC preclude an interpretation of Articles 4(2) and 8 of the Directive according to which Member States may adopt national legislation which authorises judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language.

⁴⁶ With regard to Articles 2 EC and 4(1) EC, suffice it to state that, according to settled case-law, those provisions set out general objectives and principles which are necessarily applied in combination with the respective chapters of the EC Treaty intended to give effect to those principles and objectives. They cannot therefore in themselves have the effect of creating for Member States clear and unconditional legal obligations (see, to that effect, concerning Article 2 EC, Case C-339/89 *Alsthom Atlantique* [1991] ECR I-107, paragraph 9, and, with regard to Article 4(1) EC, Case C-9/99 *Échirrolles Distribution* [2000] ECR I-8207, paragraph 25).

⁴⁷ Likewise, Article 3(1)(g) EC also cannot, by itself, produce legal obligations for the Member States. That provision is limited to indicating, as the Court has already clarified, an objective which must, however, be specified more closely in other provisions of the Treaty, in particular those concerning competition rules (see, to that

effect, Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461, paragraph 29, and *Alsthom Atlantique*, paragraph 10).

48 Moreover, it must be stated that the information contained in the order for reference does not enable the Court to identify clearly the Treaty provisions on competition rules an interpretation of which would be useful for purposes of resolving the dispute in the main proceedings.

49 In the light of all those considerations, the answer to the third question is that Articles 2 EC, 3(1)(g) EC and 4(1) EC do not preclude an interpretation of Articles 4(2) and 8 of the Directive according to which Member States may adopt national legislation which authorises judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language.

Costs

50 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:

- 1. Articles 4(2) and 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, such as that at issue in the main proceedings, which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language.**

- 2. Articles 2 EC, 3(1)(g) EC and 4(1) EC do not preclude an interpretation of Articles 4(2) and 8 of Directive 93/13 according to which Member States may adopt national legislation which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language.**

[Signatures]