

JUDGMENT OF THE COURT (Grand Chamber)

9 November 2010*

In Case C-137/08,

REFERENCE for a preliminary ruling under Article 234 EC, from the Budapesti II. és III. kerületi bíróság (Hungary), made by decision of 27 March 2008, received at the Court on 7 April 2008, in the proceedings

VB Pénzügyi Lízing Zrt.

v

Ferenc Schneider,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts and J.-C. Bonichot (Presidents of Chambers), R. Silva de Lapuerta (Rapporteur), M. Ilešič, J. Malenovský, U. Lohmus, E. Levits, A. Ó Caoimh, L. Bay Larsen and P. Lindh, Judges,

* Language of the case: Hungarian.

Advocate General: V. Trstenjak,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Hungarian Government, by J. Fazekas, R. Somssich, K. Borvölgyi and M. Fehér, acting as Agents,
- Ireland, by D.J. O'Hagan, acting as Agent, assisted by A.M. Collins SC,
- the Spanish Government, by J. López-Medel Báscones, acting as Agent,
- the Netherlands Government, by C.M. Wissels, acting as Agent,
- the United Kingdom Government, by S. Ossowski and L. Seeboruth, acting as Agents, and by T. de la Mare, barrister,

— the European Commission, by B.D. Simon and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 July 2010,

gives the following

Judgment

- ¹ This reference 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, ‘the Directive’).
- ² The reference has been made in proceedings between VB Pénzügyi Lízing Zrt. (‘VB Pénzügyi Lízing’) and Mr Schneider concerning an order for payment.

Legal context

European Union law

- 3 Article 23 of the Statute of the Court of Justice of the European Union reads as follows:

‘In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute.

Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.

....’

- 4 According to Article 1, the purpose of the Directive is to ‘approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer’.

5 Article 3(1) and (2) 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.’

6 Article 3(3) of the Directive refers to the Annex thereto which contains ‘an indicative and non-exhaustive list of the terms which may be regarded as unfair’. Paragraph 1 of that annex concerns ‘[t]erms which have the object or effect of:

...

(q) excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy ...’

7 Under Article 6(1) of the 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.’

8 Article 7(1) and (2) of the Directive provides:

‘1. 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.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.’

National law

- 9 At the time of the facts at issue in the main proceedings, the Civil Code, in the version resulting from Law No III of 2006, and Government Decree No 18/1999 on terms to be considered unfair in consumer contracts were applicable.
- 10 Under Paragraph 209/A(2) of the Civil Code, in a consumer contract, unfair terms included either as standard contractual terms or predetermined unilaterally and without individual negotiation by the party concluding the contract with the consumer are null and void.
- 11 Government Decree No 18/1999 classes contractual terms in two categories. The first category contains those contractual terms the use of which is prohibited in consumer contracts, and which are, consequently, automatically null and void. The second category contains terms presumed to be unfair until evidence to the contrary is presented, the party which drafted that term being entitled to rebut that presumption.
- 12 Paragraph 155/A(2) of the Law on civil procedure provides:

“The court shall decide to refer a question to the Court of Justice of the European Communities for a preliminary ruling by order and, at the same time, stay proceedings. In its order the court shall set out the question referred to the Court of Justice in order to obtain a preliminary ruling and state the facts and the relevant Hungarian

legislation to the extent necessary to enable the Court of Justice to reply to the question referred. The court shall send its order to the Court of Justice and at the same time send it for information to the Minister responsible for Justice.’

- ¹³ Under Paragraph 164(1) of that Law, the burden of proving the facts necessary for a ruling in a dispute falls, as a rule, on the party who has an interest in the court’s finding those facts to be proven. Paragraph 164(2) provides that the court may order measures of inquiry of its own motion if the Law permits it.

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

- ¹⁴ On 14 April 2006 the parties to the main proceedings concluded a loan contract to finance the purchase of a car.
- ¹⁵ When Mr Schneider ceased to fulfil his contractual obligations, VB Pénzügyi Lízing terminated that loan contract and brought an action before the referring court for the repayment of a debt of HUF 317 404 with interest on the outstanding amount and costs.
- ¹⁶ VB Pénzügyi Lízing did not bring its application for a payment order before the court corresponding to the place where Mr Schneider lived but relied on the term conferring jurisdiction included in that loan contract which conferred jurisdiction in any dispute between the parties on the referring court.

- 17 The order sought was made in ‘*ex parte*’ proceedings, which do not require the court to hold a hearing or hear the other party. When it made the order, the referring court did not raise any question concerning its jurisdiction or concerning the term conferring jurisdiction in the loan contract.
- 18 Mr Schneider appealed against the order for payment before the referring court without, however, stating any grounds for that appeal. The consequence was that the proceedings became *inter partes* and were then governed by the provisions of the general law on civil procedure.
- 19 The referring court found that Mr Schneider did not live within its territorial jurisdiction, although the rules of civil procedure provide that the court which has jurisdiction to hear a dispute such as that before it is the court within whose jurisdiction the defendant lives.
- 20 It was in those circumstances that the Budapesti II. és III. kerületi bíróság decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘1. Does the consumer protection guaranteed by [the Directive] require that — irrespective of the type of proceedings and whether they are *inter partes* or not — in the context of the review of their own competences, the national courts are to assess, of their own motion, the unfair nature of a contractual term before them even if not specifically requested to do so?

2. If Question 1 is to be answered in the affirmative, what criteria may the national courts take into account in the context of that review, in particular in the case that the contractual term does not grant jurisdiction to the judicial body corresponding to the registered office of the service provider, but to a different judicial body which is located close to that registered office?

3. Pursuant to the first paragraph of Article 23 of the Protocol on the Statute of the Court of Justice annexed to the Treaty on European Union, the Treaty establishing the European Community and the Treaty establishing the European Atomic Energy Community, is the possibility precluded for the national courts to inform the Ministry of Justice of their own Member State that a reference for a preliminary ruling has been made at the same time as making that reference?

Procedure before the Court

- 21 By decision of the President of the Court of 13 February 2009, proceedings in the case were stayed pending the delivery of the judgment of 4 June 2009 in Case C-243/08 *Pannon GSM* [2009] ECR I-4713.

- 22 Following the delivery of that judgment, on 2 July 2009, the referring court informed the Court of Justice that it no longer considered it necessary for the Court of Justice to reply to the first and second questions referred in its decision of 27 March 2008. However, the referring court stated that it still wished to obtain an answer to the third question.

- 23 Furthermore, the referring court raises the question of the role of the Court of Justice in guaranteeing the uniform application in all the Member States of the level of protection of consumers' rights laid down by the Directive. In that regard, it states

that it concludes from paragraphs 34 and 35 of the judgment in *Pannon GSM* that the specific characteristics of the procedure for determining jurisdiction, which takes place under national law between the seller or supplier and the consumer, cannot constitute a factor which is liable to affect the legal protection from which the consumer must benefit under the provisions of the Directive. One of the consequences of paragraphs 34 and 35 is that the national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task.

²⁴ In the view of the referring court, the indications given by the Court of Justice in its judgment in *Pannon GSM* did not make it possible to decide the question whether the national court may examine the unfairness of a contractual term of its own motion only where it has available to it the legal and factual elements necessary for that task, or whether, rather, examining the unfairness of a term of its own motion implied that in the course of that examination the national court was also required to establish of its own motion the facts and the law necessary for that examination.

²⁵ Having regard to those considerations, the Budapesti II. és III. kerületi bíróság decided to refer the following additional questions to the Court of Justice:

- '1. Do the powers of the Court of Justice under Article 234 EC include that of interpreting the concept of "unfair term" referred to in Article 3(1) of Directive 93/13/EEC of 5 April 1993 and the terms listed in the Annex to that directive?
2. If the answer to the first question is in the affirmative, can a reference for a preliminary ruling seeking such an interpretation — in the interest of the uniform application in all Member States of the level of protection of consumer rights guaranteed by Directive 93/13 — ask what aspects the national court may or must

take into account should the general criteria laid down in the Directive apply to a particular individual term?

3. If the national court itself observes, where the parties to the dispute have made no application to that effect, that a contractual term is potentially unfair, may it undertake, of its own motion, an examination with a view to establishing the factual and legal elements necessary to that examination where the national procedural rules permit that only if the parties so request?’

The questions referred

The third question originally referred

²⁶ By this question, the referring court raises the question whether the first paragraph of Article 23 of the Statute of the Court of Justice precludes a provision of national law which provides that a court which initiates a procedure for referring a question for a preliminary ruling must, of its own motion, inform the Minister responsible for Justice at the same time.

²⁷ In that regard, it must be observed that the first paragraph of Article 23 of the Statute of the Court of Justice, which provides that the decision of the national court which stays proceedings and refers a question to the Court is to be notified to the Court by the court or tribunal concerned and that that decision is then to be notified by the Registrar of the Court to, inter alia and as appropriate, the parties, the Member States and the Commission and to the institutions, bodies, offices or agencies of the

Union, is silent regarding other measures for the purposes of information which may be taken by the national court in connection with its decision to refer a question to the Court of Justice for a preliminary ruling.

- 28 In order to reply to the question asked, it must be emphasised that the system established by Article 267 TFEU with a view to ensuring that European Union law is interpreted uniformly throughout the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties (Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 31; Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 41; and Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 90).
- 29 The system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary (*Kempter*, paragraph 42, and *Cartesio*, paragraph 91).
- 30 In the light of those principles underlying the preliminary reference mechanism and having regard to the question referred, it must be determined whether the obligation to inform which is at issue may have an effect on the powers conferred on the national courts under Article 267 TFEU.
- 31 In that regard, it does not appear that an obligation like that at issue in the main proceedings may be considered to interfere with the dialogue between the courts set up by Article 267 TFEU.

- 32 The obligation on the national courts of the Member State concerned to inform the Minister for Justice when a decision to refer a question to the Court of Justice is sent does not constitute a condition for the reference. Thus, it can have no effect on the right of such courts to make a reference for a preliminary ruling or prejudice the prerogatives conferred on those courts under Article 267 TFEU.
- 33 Moreover, it does not appear that any breach of that obligation to inform has legal implications liable to encroach on the procedure provided for in Article 267 TFEU.
- 34 Moreover, as the Advocate General observed in point 74 of her Opinion, no evidence has been adduced from which it might be inferred that the national courts of the Member State concerned might be deterred, by such an obligation to inform, from referring a question to the Court of Justice for a preliminary ruling.
- 35 Therefore, the answer to the third question originally referred is that the first paragraph of Article 23 of the Statute of the Court of Justice does not preclude a provision of national law which provides that the court which initiates a preliminary reference procedure is at the same time to inform, of its own motion, the Minister with responsibility for Justice in the Member State concerned.

The first and second additional questions referred

- 36 By these questions, which it is appropriate to examine together, the referring court asks whether Article 267 TFEU must be interpreted as meaning that the jurisdiction of the Court of Justice extends to the interpretation of the concept of ‘unfair term’ appearing in Article 3(1) of the Directive and in the annex thereto, and to the criteria

which the national court may or must apply when examining a contractual term in the light of the provisions of the Directive.

- ³⁷ In order to answer those questions, it must be borne in mind that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such European Union law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see, *inter alia*, Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 18, and Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 17).
- ³⁸ As regards the provisions of European Union law which may be the subject of a ruling of the Court of Justice under Article 267 TFEU, it must be recalled that the Court of Justice has jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the European Union without exception (see Case C-322/88 *Grimaldi* [1989] ECR 4407, paragraph 8, and Case C-11/05 *Friesland Coberco Dairy Foods* [2006] ECR I-4285, paragraphs 35 and 36).
- ³⁹ Accordingly, as regards legislation which is part of European Union law, the Court of Justice may be called upon by a national court to interpret concepts appearing in an instrument of secondary law, such as the concept of ‘unfair term’ used in the Directive and its annex.
- ⁴⁰ In that connection, the Court of Justice has held 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 contractual terms subject to the provisions of the Directive are unfair (see Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* [2010] ECR I-4785, paragraph 33, and the case-law cited).

- 41 Moreover, a similar question was raised in the preliminary reference proceedings leading to the judgment in *Pannon GSM* in so far as, in that case, the referring court sought guidance from the Court of Justice on the factors which the national court must consider in assessing the possible unfairness of a contractual term.
- 42 In that connection, the Court of Justice observed, in paragraphs 37 to 39 of that judgment, that Article 3 of the Directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated, that the Annex to which Article 3(3) of the Directive refers contains only an indicative and non-exhaustive list of terms which may be regarded as unfair and that Article 4 of the Directive provides that the unfairness of a contractual term is to 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 it.
- 43 Against that background, in the reply to that question, the Court of Justice made clear that it is for the national court to determine whether a contractual term satisfies the criteria to be categorised as ‘unfair’ within the meaning of Article 3(1) of the Directive, and that, in so doing, the national court must take account of the fact that a term, contained in a contract concluded between a consumer and a seller or supplier, which has been included without being individually negotiated and which confers exclusive jurisdiction on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business may be considered to be unfair (see *Pannon GSM*, paragraph 44).
- 44 The answer to the first and second additional questions referred is therefore that Article 267 TFEU must be interpreted as meaning that the jurisdiction of the Court of Justice extends to the interpretation of the concept of ‘unfair term’ used in Article 3(1) of the Directive and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions

of the Directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case.

The third additional question referred

⁴⁵ By this question, which is drafted in very general terms, the referring court seeks to establish the responsibilities incumbent upon it, under the provisions of the Directive, from the time when it begins to consider whether a contractual term conferring exclusive territorial jurisdiction may be unfair. That court asks, *inter alia*, whether, in such a situation, the national court is obliged to undertake, of its own motion, an investigation with a view to establishing the factual and legal elements necessary to assess whether a term is unfair, where the national procedural rules permit that only if one of the parties so requests.

⁴⁶ For the purpose of replying to the question referred, it should be noted 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; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25; and Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 29).

- 47 The Court of Justice has also held that, on account of that weaker position, Article 6(1) of the Directive provides that unfair terms are not binding on the consumer. As is apparent from case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (*Mostaza Claro*, paragraph 36, and *Asturcom Telecomunicaciones*, paragraph 30).
- 48 In order to guarantee the protection intended by the Directive, the Court has also stated that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract (*Océano Grupo Editorial and Salvat Editores*, paragraph 27, *Mostaza Claro*, paragraph 26, and *Asturcom Telecomunicaciones*, paragraph 31).
- 49 Thus, in the exercise of the functions incumbent upon it under the provisions of the Directive, the national court must ascertain whether a contractual term which is the subject of the dispute before it falls within the scope of that Directive. If it does, that court must assess that term, if necessary, of its own motion, in the light of the requirements of consumer protection laid down by that Directive.
- 50 As regards the first stage of the examination to be carried out by the national court, it appears from Article 1 in conjunction with Article 3 of the Directive that it applies to any term conferring exclusive territorial jurisdiction which was not individually negotiated appearing in a contract concluded between a seller or supplier and a consumer.
- 51 In order to safeguard the effectiveness of the consumer protection intended by the European Union legislature, the national court must thus, in all cases and whatever the rules of its domestic law, determine whether or not the contested term was individually negotiated between a seller or supplier and a consumer.

- 52 As regards the second stage of that examination, it must be found that the contractual term which is the subject of the dispute in the main proceedings provides, as the referring court states, for the exclusive territorial jurisdiction of a court which is not the court in whose jurisdiction the defendant lives or the one with jurisdiction for the place where the applicant has its registered office but the one which is situated close to the registered office of the applicant both geographically and in terms of transport links.
- 53 As regards a term which is included, without being individually negotiated, in a contract between a consumer and a seller or supplier within the meaning of the Directive, where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, the Court has held, in paragraph 24 of *Océano Grupo Editorial and Salvat Editores*, that it follows that such a term must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
- 54 It must be observed that the term which the national court is examining in the main proceedings, like a term whose purpose is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive (see *Océano Grupo Editorial and Salvat Editores*, paragraph 22).

- 55 In addition, such a term enables the seller or supplier to deal with all the litigation relating to his trade, business or profession in one court, which is not the one within whose jurisdiction the consumer lives, which makes it easier for the seller or supplier to arrange to enter an appearance and makes it less onerous for him to do so (see, to that effect, *Océano Grupo Editorial and Salvat Editores*, paragraph 23).
- 56 The answer to the third additional question referred is thus that the national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of the Directive and, if it does, assess of its own motion whether such a term is unfair.

Costs

- 57 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 (Grand Chamber) hereby rules:

- 1. The first paragraph of Article 23 of the Statute of the Court of Justice does not preclude a provision of national law which provides that the court which initiates a preliminary reference procedure is at the same time to inform, of its own motion, the Minister with responsibility for Justice in the Member State concerned.**

- 2. Article 267 TFEU must be interpreted as meaning that the jurisdiction of the Court of Justice of the European Union extends to the interpretation of the concept of ‘unfair term’ used in Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that Directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case.**
- 3. The national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair.**

[Signatures]