



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

30 May 2013\*

(Directive 93/13/EEC — Unfair terms in consumer contracts — Residential tenancy agreement between a landlord acting on a commercial basis and a tenant acting on a non-commercial basis — Examination by the national court, of its own motion, as to whether a contractual term is unfair — Penalty clause — Annulment of the clause)

In Case C-488/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the *Gerechtshof te Amsterdam* (Netherlands), made by decision of 13 September 2011, received at the Court on 23 September 2011, in the proceedings

**Dirk Frederik Asbeek Brusse,**

**Katarina de Man Garabito**

v

**Jahani BV,**

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Ilešič, E. Levits, M. Safjan and M. Berger (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Hungarian Government, by M. Fehér and K. Szíjjártó, acting as Agents,
- the European Commission, by M. van Beek and M. Owsiany-Hornung, acting as Agents,

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

gives the following

\* Language of the case: Dutch.

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) ('the Directive'), in particular Article 6(1) thereof.
- 2 The request has been made in proceedings between, on the one hand, Mr Asbeek Brusse and Ms de Man Garabito and, on the other, Jahani BV ('Jahani') concerning the payment, by the former parties, of rent arrears, contractual interest and penalties due under a residential tenancy agreement.

### Legal context

#### *European Union law*

- 3 The ninth and tenth recitals in the preamble to the directive are worded as follows:  
  
'... "acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts";  
  
... more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; ... those rules should apply to all contracts concluded between sellers or suppliers and consumers; ... as a result inter alia contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organisation of companies or partnership agreements must be excluded from this Directive.'
- 4 Article 1 of the directive provides:  
  
'1. The purpose of this 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.  
  
2. The contractual terms which reflect mandatory statutory or regulatory provisions ... shall not be subject to the provisions of this Directive.'
- 5 Article 2 of the directive defines the concepts of 'consumer' and 'seller or supplier' as follows:  
  
'For the purposes of this Directive:  
  
...  
  
(b) "consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;  
  
(c) "seller or supplier" means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.'

6 Article 3 of the directive defines an unfair term as follows:

‘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.

...

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

7 So far as concerns the effects linked to a finding that a term is unfair, Article 6(1) of the directive provides:

‘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 Under Article 7(1) of the directive, ‘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’.

9 The annex to the directive contains a list of the terms referred to in Article 3(3) thereof. Those terms include:

‘1. Terms which have the object or effect of:

...

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

...’

#### *National law*

10 The directive was implemented in the Netherlands by the provisions on standard terms of contracts contained in Articles 6:231 to 6:247 of the Burgerlijk Wetboek (Civil Code) (‘the BW’).

11 The first paragraph of Article 6:233, point (a), of the BW provides:

‘A clause constituting one of the standard terms of a contract may be declared invalid:

(a) if it is excessively onerous for the other party, having regard to the nature and content of the contract, the manner in which the terms came to be formulated and the interests of each party, as evident to the other, and the other circumstances of the case’.

12 According to Article 3:40 of the BW, a measure which is contrary to public morality, public policy or a mandatory statutory provision is to be considered invalid. However, in the case of infringement of a provision which seeks to protect only one of the parties to a multilateral measure, there is merely an option to annul the measure, in so far as the scope of the provision at issue does not contain indications to the contrary.

- 13 In respect of penalty clauses, Article 6:94(1) of the BW provides that the court has, at the debtor's request, the power to mitigate the penalty provided for if equity evidently requires it.
- 14 In addition, it is apparent from the file before the Court that, in appeal proceedings, the court dealing with those proceedings may rule only on the complaints which were put forward by the parties in the first claims lodged on appeal. The court hearing the appeal must, however, apply of its own motion the relevant provisions of public policy, even if these have not been invoked by the parties.

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

- 15 In 2007, Jahani, a company letting residential property on a commercial basis, rented to Mr Asbeek Brusse and Ms de Man Garabito, who were acting on a non-commercial basis, premises to be used for residential purposes in Alkmaar (the Netherlands).

- 16 The tenancy agreement for this purpose was concluded on the basis of standard terms drawn up by a professional real-estate association, the Raad voor Onroerende Zaken (Real Estate Council).

- 17 Those standard terms contained, inter alia, a penalty clause drafted as follows:

‘20.1 The tenant shall be in default by virtue of the expiry of a specified period.

20.2 In every case where the tenant is in default as regards the timely and full payment of a specified sum of money, he shall be obliged to pay 1% interest per month on the principal sum owing, from the due date to the date on which the principal sum is paid in full.

...

20.6 The tenant shall owe the landlord an immediately payable penalty of EUR 25 per calendar day for each obligation arising from this agreement and the accompanying Standard Terms which he fails to fulfil or infringes, without prejudice to his obligation to remedy the breach and without prejudice to any other rights that the landlord may have to compensation or otherwise. ...’

- 18 The rent provided for in the tenancy agreement, which was initially set at EUR 875 per month, was increased to EUR 894.25 from 1 July 2008, pursuant to the indexation clause provided for by that contract. Mr Asbeek Brusse and Ms de Man Garabito did not pay the sum corresponding to that increase in rent. They paid, in respect of February 2009, a total of EUR 190 and then ceased to pay rent.

- 19 In July 2009, Jahani brought proceedings against the tenants, seeking, inter alia, termination of the tenancy agreement and an order requiring the defendants to pay a total of EUR 13 897.09, which was made up as follows:

- EUR 5 365.50 in respect of rent;
- EUR 156.67 in respect of contractual interest already due;
- EUR 96.25 in respect of rent owed due to rent indexation;
- EUR 4 525 in respect of penalties for unpaid rent;
- EUR 3 800 in respect of penalties for unpaid rent indexation; and
- EUR 658.67 in extrajudicial costs.

- 20 By judgment of 21 October 2009, the Rechtbank Alkmaar (Alkmaar District Court) upheld Jahani's claims.
- 21 Before the referring court, to which they had applied on appeal, Mr Asbeek Brusse and Ms de Man Garabito requested that the amounts granted by way of penalties be reduced, having regard to the discrepancy between, on the one hand, those sums, and, on the other, the detriment suffered by the landlord.
- 22 In those circumstances, the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) Should a person who lets residential premises on a commercial basis and who lets a residential property to an individual be deemed to be a seller or supplier within the meaning of the Directive? Does a tenancy agreement between a person who lets residential premises on a commercial basis and a person who rents such premises on a non-commercial basis fall within the scope of the Directive?
- (2) Does the fact that Article 6 of the Directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy mean that, in a dispute between individuals, the national transposition measures with regard to unfair contractual terms are a matter of public policy, so that the national court is competent and obliged, both in first-instance proceedings and in appeal proceedings, of its own motion (and thus also outside the ambit of the grounds of complaint), to assess a contractual term against the national transposition measures and to find that term to be void if it comes to the conclusion that the term is unfair?
- (3) Is it compatible with the practical effect of [European Union] law that the national court does not refrain from applying a penalty clause which must be deemed to be an unfair contractual term within the meaning of the Directive, but, by the application of national legislation, merely mitigates the penalty, in a case where an individual has invoked the mitigation powers of the court, but not the voidability of the term concerned?'

## **The questions referred**

### *The first question*

- 23 By its first question, the referring court is essentially asking whether a tenancy agreement relating to premises to be used as a residence, concluded between a landlord acting for purposes relating to his trade, business or profession and a tenant acting on a non-commercial basis, comes within the scope of the directive.
- 24 Article 1(1) of the directive defines its purpose.
- 25 There is, however, a degree of discrepancy between the various language versions of that provision. Thus, the Dutch version of Article 1(1) of the directive states that the purpose of the latter is to approximate the national provisions relating to unfair terms in contracts concluded between a 'seller' ('verkoper') and a consumer. The other language versions of that provision use, for their part, an expression which is wider in scope to designate the other party to the contract with the consumer. The French version of Article 1(1) of the directive refers to contracts concluded between a 'professionnel' and a consumer. That wider approach is found in the Spanish version ('profesional'),

the Danish version ('erhvervsdrivende'), the German version ('Gewerbetreibender'), the Greek version ('επαγγελματίας'), the Italian version ('professionista') and the Portuguese version ('profissional'). The English version uses the terms 'seller or supplier'.

- 26 It is settled case-law that the need for uniform application and, accordingly, for uniform interpretation of a European Union measure makes it impossible to consider one version of the text in isolation, but requires that that measure be interpreted on the basis of both the real intention of its author and the aim that the latter seeks to achieve, in the light, in particular, of the versions in all other official languages (see, inter alia, Case C-569/08 *Internetportal und Marketing* [2010] ECR I-4871, paragraph 35, and Case C-52/10 *Eleftheri tileorasi and Giannikos* [2011] ECR I-4973, paragraph 23).
- 27 It must be observed in this connection that the term 'verkoper', used in the Dutch version, is defined in Article 2(c) of the directive in the same way as in the other language versions, as designating 'any natural or legal person who ... is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned'.
- 28 It thus appears that, beyond the term used to designate the other party to the contract with the consumer, the legislature's intention was not to restrict the scope of the directive solely to contracts concluded between a seller and a consumer.
- 29 In addition, it is necessary to note that no provision, in the body of the directive, specifies the types of contracts to which the directive applies. While a number of the recitals in the preamble thereto, such as the ninth recital, draw attention to the need to protect acquirers of goods and services against the abuse of power by the seller or supplier, the tenth recital in the preamble to the directive has a wider scope inasmuch as it states that the uniform rules of law in the matter of unfair terms should apply to 'all contracts' concluded between sellers or suppliers and consumers, as defined in Article 2(b) and (c) of the directive.
- 30 It is therefore by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, that the directive defines the contracts to which it applies.
- 31 That criterion corresponds to the idea on which the system of protection implemented by the directive is based, namely 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 (see, inter alia, Case C-618/10 *Banco Español de Crédito* [2012] ECR, paragraph 39, and Case C-472/11 *Banif Plus Bank* [2013] ECR, paragraph 19).
- 32 That protection is particularly important in the case of a residential tenancy agreement concluded between, on the one hand, an individual acting on a non-commercial basis and, on the other hand, a real estate professional. The consequences of the inequality existing between the parties are aggravated by the fact that, from an economic perspective, such a contract relates to an essential need of the consumer, namely to obtain lodging, and involves sums which most frequently, for the tenant, represent one of the most significant items in his budget, while, from a legal perspective, this is a contract which, as a general rule, is covered by complex national rules about which individuals are often poorly informed.
- 33 It must, however, be observed that, in accordance with Article 1(2) of the directive, contractual terms which reflect mandatory statutory or regulatory provisions of national law are not subject to the provisions of the directive (see Case C-92/11 *RWE Vertrieb* [2013] ECR, paragraph 25). It is a matter for the national court to ascertain whether that is true of the terms which are the subject of the dispute pending before it.



34 In the light of the foregoing, the answer to the first question is therefore that the directive must be interpreted as meaning that, subject to contractual terms which reflect mandatory statutory or regulatory provisions set out by national law, which is a matter for the national court to ascertain, it applies to a residential tenancy agreement concluded between a landlord acting for purposes relating to his trade, business or profession and a tenant acting for purposes which do not relate to his trade, business or profession.

*The second question*

35 By its second question, the referring court is essentially asking whether, in the light of the Court's case-law relating to Article 6 of the directive, the latter must be interpreted as meaning that the rules transposing it into national law must be accorded the procedural treatment reserved, within the domestic legal system, to rules of public policy, with the result that the national court is obliged to examine of its own motion whether a contractual term is unfair and, if necessary, to annul that term.

36 There are two parts to this question, the first relating to the obligation devolving on the national court to determine, of its own motion, whether a term is unfair, while the second concerns the consequences to be drawn by the national court from a finding that a term is unfair.

The obligation on the court to determine, of its own motion, whether a term is unfair

37 It is apparent from the file before the Court that the first part of the second question is linked to the existence, in national law, of a rule which requires a national court hearing appeal proceedings to keep in general to the complaints submitted by the parties and to base its decision on those complaints, but which allows it nevertheless to apply, of its own motion, provisions of public policy.

38 As a preliminary point, it must be observed that Article 6(1) of the directive, according to which unfair terms are not binding on the consumer, 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 (see, inter alia, *Banco Español de Crédito*, paragraph 40, and *Banif Plus Bank*, paragraph 20).

39 In order to guarantee the protection intended by the directive, the Court has already stated on several occasions 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 (see, inter alia, *Banco Español de Crédito*, paragraph 41, and *Banif Plus Bank*, paragraph 21 and the case-law cited).

40 It is in the light of that consideration that the Court has held that the national court is required, as soon as it has available to it the legal or factual elements necessary for that task, to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier (see, inter alia, *Banco Español de Crédito*, paragraph 42, and *Banif Plus Bank*, paragraph 22).

41 Consequently, the role attributed to the national court by European Union law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task (see, inter alia, *Banco Español de Crédito*, paragraph 43, and *Banif Plus Bank*, paragraph 23).

42 In respect of the implementation of those obligations by a national court ruling in appeal proceedings, it must be noted that, in the absence of European Union legislation, the procedural rules governing appeal proceedings seeking to safeguard the rights that individuals derive from European Union law fall within the internal legal order of the Member States by virtue of the principle of procedural

autonomy of those Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and may not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law (principle of effectiveness) (see, to that effect, *Banco Español de Crédito*, paragraph 46, and *Banif Plus Bank*, paragraph 26).

- 43 So far as concerns the principle of equivalence, to which the second question for a preliminary ruling implicitly refers, it must be pointed out that, as recalled in paragraph 38 above, Article 6(1) of the directive is a mandatory provision. Furthermore, according to the Court's case-law, that directive as a whole constitutes a measure which is essential to the accomplishment of the tasks entrusted to the European Union and, in particular, to raising the standard of living and the quality of life throughout the European Union (see Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 26, and *Banco Español de Crédito*, paragraph 67).
- 44 The Court has, furthermore, held that, in view of the nature and importance of the public interest underlying the protection which the directive confers on consumers, Article 6 thereof must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy (see Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 52, and order in Case C-76/10 *Pohotovost'* [2010] ECR I-11557, paragraph 50). It must be held that that classification extends to all the provisions of the directive which are essential for the purpose of attaining the objective pursued by Article 6 thereof.
- 45 It follows that, where the national court has the power, under internal procedural rules, to examine of its own motion the validity of a legal measure in the light of national rules of public policy, which, according to the information provided in the order for reference, is the case in the Netherlands judicial system for a court ruling in appeal proceedings, it must also exercise that power for the purposes of assessing of its own motion, in the light of the criteria laid down in the directive, whether a contractual term coming within the scope of that directive may be unfair.
- 46 The national court is also under such an obligation where, under the domestic legal system, it merely has a discretion to consider of its own motion whether such a term is in conflict with national rules of public policy (see *Asturcom Telecomunicaciones*, paragraph 54 and the case-law cited).

The consequences to be drawn by the national court from the finding that a contractual term is unfair

- 47 It is apparent from the file before the Court that the second part of the second question is linked to the existence, in national law, of a rule according to which the national court cannot, generally, annul an unfair term unless the consumer has argued that it is invalid. The national court may, however, annul of its own motion a term which is contrary to public policy or to a mandatory statutory provision, where the scope of that statutory provision warrants such a sanction.
- 48 It must be recalled that the first part of Article 6(1) of the directive requires Member States to lay down that unfair terms are, 'as provided for under their national law,' not to be binding on the consumer.
- 49 The Court has interpreted that provision as meaning that it is for the national court to establish all the consequences, arising under national law, of a finding that the term in question is unfair in order to ensure that the consumer is not bound by that term (*Banco Español de Crédito*, paragraph 63, and *Banif Plus Bank*, paragraph 27). In this connection, the Court has stated that, where the national court considers a contractual term to be unfair, it must not apply it, except if the consumer opposes that non-application (see *Pannon GSM*, paragraph 35).



- 50 It follows from that case-law that the full effectiveness of the protection provided for by the directive requires that the national court which has found of its own motion that a term is unfair should be able to establish all the consequences of that finding, without waiting for the consumer, who has been fully informed of his rights, to submit a statement requesting that that term be declared invalid (*Banif Plus Bank*, paragraphs 28 and 36).
- 51 For the same reasons as those set out in paragraphs 43 and 44 of the present judgment, it follows that, where the national court has the power, under internal procedural rules, to annul of its own motion a term which is contrary to public policy or to a mandatory statutory provision the scope of which warrants such a sanction, which, according to the information provided in the order for reference, is true in the Netherlands judicial system with regard to a court ruling in appeal proceedings, it must also annul of its own motion a contractual term which it has found to be unfair in the light of the criteria laid down by the directive.
- 52 In that context, it must be recalled that the principle of *audi alteram partem*, as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure (*Banif Plus Bank*, paragraphs 31 and 36).
- 53 In the light of the foregoing considerations, the answer to the second question is that the directive must be interpreted as meaning that:
- where a national court, before which an action has been brought by a seller or supplier against a consumer concerning the performance of a contract, has the power, under internal procedural rules, to examine of its own motion whether the term upon which the claim is based is contrary to national rules of public policy, it must, in the same way, where it has established that that term falls within the scope of that directive, assess of its own motion whether that term is unfair in the light of the criteria laid down in that directive;
  - where the national court has the power, under internal procedural rules, to annul of its own motion a term which is contrary to public policy or to a mandatory statutory provision the scope of which warrants such a sanction, it must, as a rule, after having invited each of the parties to set out its views on that matter, with the opportunity to challenge the views of the other party, annul of its own motion a contractual term which it has found to be unfair in the light of the criteria laid down by that directive.

### *The third question*

- 54 By its third question, the referring court is essentially asking whether Article 6 of the directive can be interpreted as meaning that it allows a national court, in the case where it has established that a penalty clause is unfair, instead of disapplying that clause, merely to mitigate the amount of the penalty provided for by that clause, as it is authorised to do by the national law and as the consumer has requested.
- 55 First of all, it should be stated that point 1(e) of the annex to that directive mentions, among the terms which may be declared unfair within the meaning of Article 3(3) of that directive, terms which have the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation. The Court has held in that regard that, while the content of that annex does not suffice in itself to establish automatically the unfair nature of a contested term, it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term (Case C-472/10 *Invitel* [2012] ECR, paragraph 26).

- 56 As regards the issue of whether the national court, in the case where it has established that a penalty clause is unfair, can merely mitigate the amount of the penalty provided for by that clause, as it is authorised to do in the present case by Article 94(1) of the BW, it must be observed that it is expressly provided in the second part of Article 6(1) of the directive that the contract concluded between the seller or supplier and the consumer is to continue to bind the parties ‘upon those terms’ if it is capable of continuing in existence ‘without the unfair terms’.
- 57 The Court has inferred from that wording of Article 6(1) that national courts are required to exclude the application of an unfair contractual term in order that it does not produce binding effects with regard to the consumer, without being authorised to revise the content of that term. That contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible (*Banco Español de Crédito*, paragraph 65).
- 58 The Court has also observed that that interpretation is, moreover, borne out by the objective and overall scheme of the directive. In this connection, it has pointed out that, given the nature and significance of the public interest which constitutes the basis of the protection guaranteed to consumers, the directive requires Member States, as is apparent from Article 7(1) thereof, to provide for adequate and effective means ‘to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers’. If it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of the directive, since it would weaken the dissuasive effect on sellers or suppliers of the straightforward non-application of those unfair terms with regard to the consumer (*Banco Español de Crédito*, paragraphs 66 to 69).
- 59 It follows that Article 6(1) of the directive cannot be interpreted as allowing the national court, in the case where it establishes that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair, to reduce the amount of the penalty imposed on the consumer instead of excluding the application of that clause in its entirety with regard to that consumer.
- 60 Having regard to the foregoing, the answer to the third question is that Article 6(1) of the directive must be interpreted as meaning that it does not allow the national court, in the case where it has established that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair, merely, as it is authorised by national law, to reduce the amount of the penalty imposed on the consumer by that clause, but requires it to exclude the application of that clause in its entirety with regard to the consumer.

## Costs

- 61 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. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that, subject to contractual terms which reflect mandatory statutory or regulatory provisions set out by national law, which is a matter for the national court to ascertain, it applies to a residential tenancy agreement concluded between a landlord acting for purposes relating to his trade, business or profession and a tenant acting for purposes which do not relate to his trade, business or profession.**

**2. Directive 93/13 must be interpreted as meaning that:**

- where a national court, before which an action has been brought by a seller or supplier against a consumer concerning the performance of a contract, has the power, under internal procedural rules, to examine of its own motion whether the term upon which the claim is based is contrary to national rules of public policy, it must, in the same way, where it has established that that term falls within the scope of that directive, assess of its own motion whether that term is unfair in the light of the criteria laid down in that directive;
- where the national court has the power, under internal procedural rules, to annul of its own motion a term which is contrary to public policy or to a mandatory statutory provision the scope of which warrants such a sanction, it must, as a rule, after having invited each of the parties to set out its views on that matter, with the opportunity to challenge the views of the other party, annul of its own motion a contractual term which it has found to be unfair in the light of the criteria laid down by that directive.

**3. Article 6(1) of Directive 93/13 must be interpreted as meaning that it does not allow the national court, in the case where it has established that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair, merely, as it is authorised by national law, to reduce the amount of the penalty imposed on the consumer by that clause, but requires it to exclude the application of that clause in its entirety with regard to the consumer.**

[Signatures]