



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

16 January 2014*

(Directive 93/13/EEC — Consumer contracts — Contract for the purchase of immovable property —
Unfair terms — Criteria for assessment)

In Case C-226/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Provincial de Oviedo (Spain), made by decision of 7 May 2012, received at the Court on 14 May 2012, in the proceedings

Constructora Principado SA

v

José Ignacio Menéndez Álvarez,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet and M. Berger (Rapporteur),
Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Menéndez Álvarez, by himself,
- the Spanish Government, by S. Centeno Huerta, acting as Agent,
- the Czech Government, by M. Smolek and S. Šindelková, acting as Agents,
- the European Commission, by M. van Beek, J. Baquero Cruz, 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: Spanish.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 3(1) 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 request has been made in proceedings between Constructora Principado SA ('Constructora Principado') and Mr Menéndez Álvarez concerning the refund of sums paid by the latter pursuant to a contract for the purchase of immovable property concluded with that company.

Legal context

European Union law

- 3 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.

...

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.'

- 4 Under Article 4(1) of the Directive:

'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.'

- 5 Article 5 of the Directive provides:

'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail ...'

Spanish law

- 6 In Spain, consumers were protected against unfair terms first of all by General Law 26/1984 on 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, p. 21686).

- 7 General Law 26/1984 was subsequently 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, p. 12304), which transposed the Directive into Spanish national law.
- 8 On the date when the contract which is the subject of the main proceedings was concluded, Article 10a(1) of General Law 26/1984, as amended by Law 7/1998, provided as follows:

‘Contractual terms which have not been individually negotiated and all practices that have not been expressly agreed to shall be regarded as unfair if, contrary to the requirement of good faith, they cause a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. In every case, the terms listed in the first additional provision to this Law shall be regarded as unfair.

The fact that certain aspects of a clause, or that an individual term, have been negotiated individually shall not exclude application of this article to the rest of the 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.

The unfairness of a term will be assessed by reference to the nature of the goods or services for which the contract was concluded and to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of any other contract on which the latter is dependent.’

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

- 9 On 26 June 2005, Mr Menéndez Álvarez entered into a contract with Constructora Principado for the purchase of a dwelling (‘the contract’). Clause 13 of the contract was worded as follows:
- ‘The purchaser shall be responsible for payment of the municipal tax on the increase in value of urban land, and the price of the property which is the subject of the contract has been determined on that basis.
- The purchaser shall also be responsible for payment of the charges for individual connection to the various utilities, such as water, gas, electrical power, drainage, etc., even where they have been paid in advance by the vendor.’
- 10 Initially, Mr Menéndez Álvarez paid a total sum of EUR 1 223.87, of which EUR 1 000 was for the municipal tax on the increase in value of urban land (‘the capital gains tax’) and EUR 223.87 was for connecting the dwelling to the water and drainage system.
- 11 Subsequently, Mr Menéndez Álvarez brought an action against Constructora Principado before the Juzgado de Primera Instancia nº 2 de Oviedo (Court of First Instance No 2, Oviedo) for repayment of those sums. The claim was based on the ground that clause 13 of the contract, under which the purchaser had to pay those sums, should be considered unfair by virtue of Article 10a of General Law 26/1984, as amended by Law 7/1998, in that it was not negotiated, and it caused a significant imbalance in the rights and obligations of the parties to the contract.
- 12 In its defence, Constructora Principado contended that the clause had been negotiated with the purchaser and that there was no significant imbalance when the sums claimed were compared with the total price paid by the purchaser for the purchase of his dwelling.

- 13 By decision of 28 September 2011, the Juzgado de Primera Instancia nº 2 de Oviedo upheld the action, finding that the clause in question was unfair because it was detrimental to the interests of the consumer by requiring him to pay charges for which he was not responsible, and further because it had not been established that the clause was specifically negotiated with him.
- 14 Constructora Principado lodged an appeal against that decision claiming that the clause at issue had been individually negotiated, and that the clause itself stipulated that the consumer's assumption of responsibility for payment of the capital gains tax had been taken into account in determining the price of the property sold. The company also repeated that there was no significant imbalance between the parties because the assessment of such an imbalance could not be limited to taking into account a specific term but should involve consideration of the contract as a whole and the weighing up of all its terms.
- 15 Mr Menéndez Álvarez contended that the decision at first instance should be upheld. In his opinion, the amount of capital gains tax which he paid and the percentage which that amount represented compared to the price of the dwelling were irrelevant. The imbalance, which was a feature of the unfairness of clause 13, arose solely because that clause required the consumer to pay a tax which he is not liable for by law.
- 16 In those circumstances, the Audiencia Provincial de Oviedo decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'In the case of a contractual term which passes on to the consumer payment of an amount which by law is payable by the seller or supplier, is the imbalance referred to in Article 3(1) of the Directive ... to be interpreted as arising merely from the act of passing on to the consumer an obligation to pay which by law falls on the seller or supplier, or does the fact that the Directive requires the imbalance to be significant mean that, in addition, the financial burden on the consumer must be significant in relation to the total amount of the transaction?'

The question referred for a preliminary ruling

- 17 By its question the referring court asks, in essence, whether the term 'significant imbalance', which is one of the general criteria set out in Article 3(1) of the Directive for defining an unfair term, must be interpreted as meaning that the costs charged to the consumer by such a term have, as regards that consumer, a significant economic impact having regard to the value of the transaction in question, or that only the effects of such a term on the rights and obligations of the consumer must be taken into consideration.
- 18 As a preliminary point, it must be stated that, as is clear from Article 3(1) of the Directive, only the terms of a contract concluded between a seller or supplier and a consumer which have not been individually negotiated fall within the scope of the Directive.
- 19 It is clear from the order for reference that, in the dispute in the main proceedings, the parties disagree as to whether or not clause 13 of the contract was individually negotiated. It is therefore a matter for the referring court to rule on this question, taking into consideration the rules relating to the apportionment of the burden of proof laid down in the first and third subparagraphs of Article 3(2) of the Directive, which provide inter alia that where the seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect is incumbent on him.
- 20 In addition to that preliminary point, it must also be stated that, according to the Court's settled case-law, the relevant jurisdiction of the Court 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. It is thus clear that the Court must limit itself to providing the referring court with guidance which the latter must take into account in order to assess whether the term at issue is unfair (see Case C-415/11 *Aziz* [2013] ECR, paragraph 66 and the case-law cited).

- 21 In that regard, the Court has held that in order to ascertain whether a term causes a ‘significant imbalance’ in the parties’ rights and obligations under a contract to the detriment of the consumer, particular account must be taken of which rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force (see *Aziz*, paragraph 68).
- 22 It thus appears that the question whether that significant imbalance exists cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract and the costs charged to the consumer under that clause.
- 23 On the contrary, a significant imbalance can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules.
- 24 In that regard, the Court has confirmed that, pursuant to Article 4(1) of the Directive, the unfairness of a contractual term is to be assessed taking into account the nature of the goods or services for which the contract in question was concluded and by referring to all the circumstances attending its conclusion, as well as all the other clauses in the contract (see Case C-472/11 *Banif Plus Bank* [2013] ECR, paragraph 40). In that respect, it follows that the consequences of the term under the law applicable to the contract must also be taken into account, requiring consideration to be given to the national legal system (see *Aziz*, paragraph 71).
- 25 The Court has also stated, in the context of Article 5 of the Directive, that before the contract is concluded the information relating to the contractual terms and the consequences of concluding the contract is of fundamental importance to the consumer. It is, in particular, on the basis of that information that the consumer decides whether he wishes to be bound by the conditions drafted in advance by the seller or supplier (see Case C-92/11 *RWE Vertrieb* [2013] ECR, paragraph 44).
- 26 As regards, in particular, the first obligation imposed on the consumer by clause 13 of the contract, namely, payment of the capital gains tax, it is apparent from the documents submitted to the Court that that obligation has the effect of transferring to the consumer, in his capacity as a purchaser, a tax liability which, under the applicable national legislation, should be borne by the seller in its capacity as vendor and as the recipient of an economic advantage that is subject to taxation, namely, the capital gain made as a result of the increase in value of the property sold. Thus, it appears that, while the seller benefits from the increase in the value of the property it is selling, the consumer must pay not only a purchase price that includes the increase in value achieved by that property, but also a tax charged on that increase in value. Furthermore, according to the written observations submitted to the Court by Mr Menéndez Álvarez, the amount of that tax was unknown at the date on which the contract was concluded and is to be determined only *ex post* by the relevant authority; if that is the case, this could lead to uncertainty on the part of the consumer as to the extent of the commitment undertaken.
- 27 It is for the referring court first to ascertain whether, under Spanish domestic law, the facts of the dispute in the main proceedings correspond to the situation described in the preceding paragraph. Next, it is for the referring court to assess whether clause 13 of the contract, in so far as it imposes an

additional obligation on the consumer which was not envisaged by the rules of national law, constitutes a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions. If appropriate, it should then ascertain whether the information received by the consumer before the contract was concluded satisfies the requirements of Article 5 of the Directive.

- 28 As regards the second obligation imposed on the consumer by clause 13 of the contract, namely, payment of the charges for individual connection to the various utilities, such as water, gas, electrical power, and drainage, it is for the referring court to ascertain whether those charges include the costs of connecting with the general facilities essential for ensuring that the dwelling is habitable, which charges should, according to the relevant national rules, be borne by the vendor as part of its contractual obligation to provide a dwelling that is fit for its intended purpose, that is to say, in a proper habitable state. If that is the case, it is for the referring court to assess whether that contractual term, in so far as it restricts the rights which, under the rules of national law, the consumer enjoys under the contract and imposes on him an additional obligation not envisaged by those rules, constitutes a sufficiently serious impairment of the legal situation which national law confers on that consumer as a party to the contract.
- 29 It should be added that, the indication in clause 13 of the contract that the consumer's assumption of responsibility for payment of the capital gains tax has been taken into account in determining the sale price does not of itself constitute proof of consideration which the consumer would have benefited from. In order to ensure that the scrutiny of unfair terms is to be effective, proof of a reduction of the price in consideration for the consumer accepting additional obligations cannot be provided by the seller or supplier including a simple statement to that effect in a contractual term which has not been individually negotiated.
- 30 In the light of the foregoing considerations, the answer to the question referred is that Article 3(1) of the Directive must be interpreted as meaning that:
- the existence of a 'significant imbalance' does not necessarily require that the costs charged to the consumer by a contractual term have, as regards that consumer, a significant economic impact having regard to the value of the transaction in question, but can result solely from a sufficiently serious impairment of the legal situation in which that consumer, as a party to the contract, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under that contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules;
 - in assessing whether there is a significant imbalance, it is for the referring court to take into account the nature of the goods or services for which the contract was concluded by referring to all the circumstances attending the conclusion of that contract, as well as all the other terms of contract.

Costs

- 31 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:

Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that:

- the existence of a ‘significant imbalance’ does not necessarily require that the costs charged to the consumer by a contractual term have, as regards that consumer, a significant economic impact having regard to the value of the transaction in question, but can result solely from a sufficiently serious impairment of the legal situation in which that consumer, as a party to the contract, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under that contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules;
- in assessing whether there is a significant imbalance, it is for the referring court to take into account the nature of the goods or services for which the contract was concluded by referring to all the circumstances attending the conclusion of that contract, as well as all the other terms of contract.

[Signatures]