Reports of Cases

ORDER OF THE COURT (Sixth Chamber)

14 April 2021 *

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Consumer protection – Unfair terms – Directive 93/13/EEC – Article 1(2) – Exclusion from the scope of that directive of contractual terms which reflect mandatory provisions of national law – Article 4(2) – Exception to the assessment of whether a term is unfair – Credit agreement denominated in a foreign currency – Alleged infringement of the obligation of information borne by a seller or supplier – Examination to be carried out by the national court as a matter of priority in the light of Article 1(2))

In Case C-364/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Galați (Regional Court, Galați, Romania), made by decision of 27 February 2019, received at the Court on 7 May 2019, in the proceedings

XU,

YV,

ZW,

AU,

BZ,

CA,

DB,

EC

v

SC Credit Europe Ipotecar IFN SA,

Credit Europe Bank NV,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, President of the Chamber, C. Toader and N. Jääskinen (Rapporteur), Judges,

* Language of the case: Romanian.

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Romanian Government, initially by R.I. Hațieganu and A. Rotăreanu and by C.-R. Canțăr, subsequently by E. Gane, R.I. Hațieganu and A. Rotăreanu, acting as Agents,

– the European Commission, by N. Ruiz García and C. Gheorghiu, acting as Agents,

having decided, after hearing the Advocate General, to rule by reasoned order, in accordance with Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

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

2 The request has been made in proceedings between XU, YV, ZW, AU, BZ, CA, DB and EC, on the one hand, and SC Credit Europe Ipotecar IFN SA ('Credit Europe Ipotecar') and Credit Europe Bank NV, on the other, concerning the alleged unfairness of a term included in a credit agreement denominated in a foreign currency, which requires that the loan amount be repaid in that currency and imposes on the borrowers the risk inherent to fluctuations in the exchange rate of that currency.

Legal context

EU law

3 Under the thirteenth recital of Directive 93/13:

'Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording "mandatory statutory or regulatory provisions" in Article 1(2) also covers rules which, according to the law, shall apply between the parties to the contract provided that no other arrangements have been established'.

4 Article 1(2) of that directive provides:

'The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.'

5 Article 4(2) of that directive is worded as follows:

‘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 supplies in exchange, on the other, in so far as these terms are in plain intelligible language.’

Romanian law

6 Article 1578 of the Cod Civil (Civil Code), in its version in force at the material time in the main proceedings (‘the Civil Code’), provided:

‘The obligation arising from a money loan is always limited to the same numerical sum shown in the contract.

Whenever the value of a currency increases or decreases, before the due date for payment, the debtor must return the numerical sum lent and is obliged to return that sum only in the currency used at the time of payment.’

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

7 On 8 November 2007, four of the applicants in the main proceedings, who are consumers, concluded with Credit Europe Ipotecar, a company established in Romania, a mortgage loan agreement denominated in Swiss francs (CHF) for a term of 30 years. The other applicants in the main proceedings are the heirs of a fifth consumer who had been a party to that contract and who died on 6 April 2014.

8 Article 6.1 of that agreement stipulated, in particular, that the loan was to be repaid in the foreign currency in which it had been denominated and that the exchange rate risk, namely the risk associated with fluctuations in the exchange rate between that currency and the Romanian leu (RON), if any, was to be borne by the borrowers.

9 On 31 March 2009, Credit Europe Ipotecar assigned its claim under that agreement to Credit Europe Bank.

10 On 3 October 2011, following a request by the consumers concerned to reschedule repayments, the parties to the contract concluded an addendum amending Article 6.1 of the credit agreement at issue. However, it was still provided that repayment was to be made in Swiss francs and that the exchange rate risk, if any, was to be borne by the borrowers.

11 On 16 March 2015, the applicants in the main proceedings brought proceedings against Credit Europe Ipotecar before the Judecătoria Galați (Court of First Instance, Galați, Romania), principally for (i) a declaration that the term set out in Article 6.1 of the credit agreement at issue was unfair and null and void, and (ii) the setting of the CHF-RON exchange rate at the rate prevailing on the date of the conclusion of the contract, with the sums paid in excess, due to the devaluation of the Romanian leu against the Swiss franc since that date, to be refunded. In support of their action, they claimed that they had taken out a loan denominated in Swiss francs on the advice of Credit Europe Ipotecar, which had not informed them of the risk of overvaluation of that currency, even though such a risk was foreseeable for that lender, which, unlike consumers, had financial expertise.

12 In defence, Credit Europe Ipotecar, first of all, claimed that the claims relating to Article 6.1 of the credit agreement concerned were inadmissible on the grounds that Directive 93/13 was not applicable and that Romanian law did not allow the competent court to supplement a contract with an additional term. Next, that company claimed that it was under no obligation to inform borrowers about the exchange rate risk, since changes in a currency exchange rate could not be known in advance with certainty and were an element of chance perceptible by any average consumer. Lastly, it maintained that the existence of a contractual imbalance could not be accepted, in so far as the principle of 'monetary nominalism' had been established by the national legislature under Article 1578 of the Civil Code, and that the action in the main proceedings would infringe that provision to the extent that it sought to eliminate the exchange rate risk.

13 By judgment of 30 January 2018, the Judecătoria Galați (Court of First Instance, Galați) dismissed as unfounded the head of claim relating to the unfairness – and therefore invalidity – of the term set out in Article 6.1 of the credit agreement at issue.

14 In that regard, that court inter alia found that the applicants in the main proceedings had been free to choose a loan denominated in Romanian lei or in other currencies and that, by signing up to a 30-year loan denominated in a currency different from that in which they received their employment income, they had implicitly agreed to assume the risk of currency fluctuations, that is to say, the risk of changing circumstances which existed as on the date of conclusion of that agreement.

15 In addition, it found that the terms of that agreement requiring the borrowers to repay loan instalments in Swiss francs did not create any significant imbalance between the rights and obligations of the parties, since the lender bore the risk of decrease in the Swiss franc exchange rate, as against the value that was applicable to the conversion of that currency into Romanian lei at the time the agreement concerned was concluded, whereas the borrowers bore the risk of increase of that rate.

16 According to the Judecătoria Galați (Court of First Instance, Galați), it cannot be assumed that, on the basis of its capacity as seller or supplier in the financial and banking sector, the lender knew or predicted how the Swiss franc exchange rate would change. Moreover, while it is true that a bank is required to inform consumers of the essential aspects of its credit offer, the risks generated by the volatility of the exchange rate are, however, aspects which must be specifically assessed by each borrower.

17 In March 2018, the applicants in the main proceedings, on the one hand, and Credit Europe Ipotecar and Credit Europe Bank, on the other, brought an appeal against the judgment delivered by that court before the Tribunalul Galați (Regional Court, Galați, Romania), essentially reiterating the arguments they had put forward at first instance.

18 The referring court takes the view that it follows from the case-law of the Court on Directive 93/13 that, under Article 1(2) of that directive, where a contractual term reflects provisions of national law which are applicable between the parties to the contract irrespective of their choice or in the absence of other arrangements established by them, that term does not fall within the scope of that directive.

19 Moreover, it states that Article 1578 of the Civil Code, which is supplementary in nature, provides that the borrower is obliged to repay to the lender the numerical sum shown in the credit agreement, notwithstanding the appreciation or depreciation of the currencies in which the loan is denominated that might have occurred before the payment date, and that that statutory provision enshrines the 'principle of monetary nominalism' according to the designation provided by Romanian legal writers. The referring court specifies that, in the context of the contractual relationship at issue in the main proceedings, the Swiss franc exchange rate rose by 204.12%, to the detriment of the borrowers, between the date on which the credit agreement at issue was concluded, 8 November 2007, and the date on which the action at first instance was brought, 16 March 2015.

20 It is also apparent from the order for reference that, following the judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703), Romanian case-law has held for the most part that, where the unfair nature of contractual terms is invoked, the national courts must assess, as a matter of priority, whether the disputed terms constitute the transposition of a national rule which is supplementary in nature, such as that provided for in Article 1578 of the Civil Code, and, if so, exclude those terms from the assessment of whether the terms of the contract at issue are unfair under Article 1(2) of Directive 93/13. In the latter case, however, the competent courts seemingly do not have the opportunity to assess the pre-contractual conduct of the seller or supplier and, in particular, whether or not he or she has complied with his or her obligation to inform the consumer, which arises from Article 4(2) of that directive.

21 Accordingly, the referring court asks, first, about the methodology that should be followed when examining a term relating to the exchange rate risk, questioning whether it is appropriate to examine such a term, first of all, in the light of the exception provided for in Article 1(2) thereof or in the light of the requirement of transparency arising from Article 4(2) thereof.

22 Secondly, that court wishes to know whether, in the event that the competent courts were to examine the contested term as a matter of priority under Article 4(2) of Directive 93/13 and take the view that the seller or supplier concerned had not complied with the obligation of prior information laid down in that provision, that seller or supplier would be able, despite that failing, to take advantage of the exception to the assessment of whether contractual terms were unfair that would arise from Article 1(2) of that directive.

23 In those circumstances, the Tribunalul Galați (Regional Court, Galați) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are Article 1(2) and Article 4(2) of Directive 93/13 …, as interpreted in [the judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703)], to be interpreted as meaning that, where the contract contains a term relating to exchange rate risk that reflects a provision of national law, national courts are required to examine as a first priority the relevance of the [prohibition] laid down in Article 1(2) of the directive, or instead the [seller or supplier]’s compliance with the obligation to provide information governed by Article 4(2) of the directive, without first assessing the relevance of the provisions of Article 1(2) of the directive?

(2) Are Article 1(2) and Article 4(2) of Directive 93/13 … to be interpreted as meaning that, in the event of a failure to comply with the obligation to inform the consumer prior to the conclusion of the loan agreement, the [seller or supplier] may rely on the provisions of Article 1(2) of the directive, so that a contractual term relating to exchange rate risk that reflects a provision of national law is excluded from any assessment of whether the contractual terms are unfair?’

Consideration of the questions referred

24 Under Article 99 of the Rules of Procedure of the Court, the Court may at any time, on a proposal by the Judge-Rapporteur, after hearing the Advocate General, decide to give a reasoned order where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from the case-law or leaves no reasonable doubt.

25 It is appropriate to apply that provision in the context of the present proceedings for a preliminary ruling.

26 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(2) and Article 4(2) of Directive 93/13 must be interpreted as meaning that, where a court of a Member State is hearing a dispute relating to an allegedly unfair contractual term which

reflects a provision of national law which is supplementary in nature, it is required to examine, as a matter of priority, the effect of the exclusion from the scope of that directive laid down in Article 1(2) thereof, or the effect of the exception to the assessment of whether contractual terms are unfair provided for in Article 4(2) of that directive, and, in the event that the latter course of action were to be followed, whether a seller or supplier who had not complied with the obligation of transparency arising from Article 4(2) could nevertheless rely on Article 1(2) thereof to prevent the examination of whether such a contractual term was unfair.

27 In that regard, it is important to recall that, first, Article 1(2) of Directive 93/13 excludes from the scope of that directive contractual terms which reflect 'mandatory statutory or regulatory provisions', an expression which, in the light of the thirteenth recital of that directive, covers not only provisions of national law which apply between contracting parties irrespective of their choice, but also those which are supplementary in nature, that is to say, which apply by default, in the absence of other arrangements established by the parties (see, to that effect, judgments of 26 March 2020, *Mikrokasa and Revenue Niestandaryzowany Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty*, C-779/18, EU:C:2020:236, paragraphs 50 to 53, and of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraphs 23 to 25 and 28).

28 That interpretation of Article 1(2) of Directive 93/13 has been adopted by the Court notwithstanding the existence of a difference – noted also by the referring court in the present proceedings – between the wording of that provision in the respective French-language and Romanian-language versions of Directive 93/13 (see, to that effect, judgment of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraphs 32 to 34).

29 The exclusion from the application of the rules of Directive 93/13 which is provided for in that provision has been justified by the fact that it may legitimately be supposed that the national legislature has struck a balance between all the rights and obligations of the parties to certain contracts, a balance which the EU legislature has expressly intended to preserve (see, to that effect, judgments of 26 March 2020, *Mikrokasa and Revenue Niestandaryzowany Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty*, C-779/18, EU:C:2020:236, paragraph 54, and of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraph 26).

30 Secondly, Article 4(2) of that directive lays down an exception to the mechanism for reviewing the substance of unfair terms, such as that provided for in the system of consumer protection put in place by that directive, an exception which applies in respect of terms falling within one of the two categories referred to in that paragraph 2, provided that the term at issue has been drafted in a plain and intelligible manner, in accordance with the requirement of transparency arising from that provision (see, to that effect, judgments of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraphs 34, 35, 43 and 44, and of 3 September 2020, *Profi Credit Polska*, C-84/19, C-222/19 and C-252/19, EU:C:2020:631, paragraphs 65 and 66).

31 With regard to how Article 1(2) and Article 4(2) of Directive 93/13 are structured, as the Romanian Government and the European Commission both suggest, the questions referred by the referring court must be answered as meaning that priority must be given, by the court hearing a dispute such as that in the main proceedings, to the assessment based on the exclusion from the scope of Directive 93/13 which is laid down in Article 1(2) thereof, over the assessment based on the exception to the review of whether the contractual terms are unfair which is laid down in Article 4(2) of that directive

32 That approach is necessary when it is clear that any instrument of EU law is applicable to a given situation only to the extent that it falls within the scope of that instrument (see, to that effect, judgment of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraph 23 and the case-law cited, and order of 3 July 2014, *Tudoran*, C-92/14, EU:C:2014:2051, paragraphs 28 to 32).

33 In addition, more specifically, it is clear from the very structure of Directive 93/13 that any assessment of whether of a term is unfair in the light of the provisions of that directive, and in particular of Article 4 thereof, requires establishing, at the outset, whether the term concerned falls within the scope of that directive, especially in the light of the exclusion from that scope which is laid down in Article 1(2) of that directive.

34 That is why, in the judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraphs 30 to 32), the Court stated that it was for the competent national court to assess, having regard to the nature, the general scheme and the stipulations of the loan agreements concerned, as well as the legal and factual context of which those matters formed part, whether the term at issue in the main proceedings, under which the loan had to be repaid in the same currency as that in which it had been granted, reflected mandatory provisions of national law, within the meaning of Article 1(2) of Directive 93/13, then, only in the event that that court were to find that the term concerned was not covered by the exclusion provided for in that provision, to examine the application of Article 4(2) of that directive.

35 In the present proceedings, it is true that the Romanian Government and the Commission have expressed reservations that a term such as that at issue in the main proceedings, the content of which is mentioned in paragraph 8 of this order, does in fact fall within the exception established in Article 1(2) of Directive 93/13.

36 However, it is apparent from the information provided by the referring court that that court takes the view, first, that such a term reflects the principle of monetary nominalism enshrined in Article 1578 of the Civil Code, and, second, that that article constitutes a statutory provision which is supplementary in nature within the meaning of the case-law referred to in paragraph 27 of this order, namely a provision that applies to a contract where the parties to the contract have not established other arrangements.

37 In that regard, it must be observed that, in a similar context relating to the same national provision as that at issue in the main proceedings, the same view had been adopted by the Romanian referring court that had referred questions to the Court in the case giving rise to the judgment of 9 July 2020, *Banca Transilvania* (C-81/19, EU:C:2020:532, paragraph 30).

38 It follows from that legal classification, which it is for the competent national courts alone to make, that the contractual term which the applicants in the main proceedings alleged to be unfair reflects a provision of national law which is supplementary in nature, such that that term falls within the exception laid down in Article 1(2) of Directive 93/13 and is therefore not covered by the scope of that directive (see, by analogy, judgment of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraphs 31 and 37).

39 Furthermore, it must be stated, first, that the fact that the parties to the contract have the possibility of derogating from a provision of national law which is supplementary in nature – as is the case here, according to the Romanian Government and the Commission – is irrelevant to the determination of whether a contractual term which reflects such a provision is excluded from the scope of Directive 93/13 pursuant to Article 1(2) thereof (see, to that effect, judgment of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraph 35).

40 Secondly, the fact that a contractual term reflecting one of the provisions of national law referred to in Article 1(2) has not been individually negotiated – as is the case here, according to the Romanian Government – has no bearing on whether it is excluded from the scope of that directive (see, to that effect, judgment of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraph 36).

41 Lastly, with regard to the possible effect of the requirement of transparency arising from Article 4(2) of Directive 93/13, referred to in particular in the context of the second question referred, there is no need for the Court to give a ruling in that regard: since the referring court considers that the term at issue in the main proceedings reflects a national provision which may be classified as supplementary, that term falls outside the scope of that directive, pursuant to Article 1(2) thereof (see, to that effect, judgment of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraph 38).

42 In the light of the foregoing considerations, the answer to the questions referred is that Article 1(2) and Article 4(2) of Directive 93/13 must be interpreted as meaning that, where a court of a Member State is hearing a dispute relating to an allegedly unfair contractual term which reflects a provision of national law which is supplementary in nature, it is required to examine, as a matter of priority, the effect of the exclusion from the scope of that directive laid down in Article 1(2) thereof, and not the effect of the exception to the assessment of whether contractual terms are unfair provided for in Article 4(2) of that directive.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby orders:

Article 1(2) and Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that, where a court of a Member State is hearing a dispute relating to an allegedly unfair contractual term which reflects a provision of national law which is supplementary in nature, it is required to examine, as a matter of priority, the effect of the exclusion from the scope of that directive laid down in Article 1(2) thereof, and not the effect of the exception to the assessment of whether contractual terms are unfair provided for in Article 4(2) of that directive.

[Signatures]