



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

21 March 2013*

(Directive 2003/55/EC — Internal market in natural gas — Directive 93/13/EEC — Articles 1(2) and 3 to 5 — Contracts between suppliers and consumers — General conditions — Unfair terms — Unilateral alteration by the supplier of the price of the service — Reference to mandatory legislation designed for another category of consumers — Applicability of Directive 93/13 — Obligation of use of plain and intelligible language and transparency)

In Case C-92/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 9 February 2011, received at the Court on 28 February 2011, in the proceedings

RWE Vertrieb AG

v

Verbraucherzentrale Nordrhein-Westfalen e.V.,

THE COURT (First Chamber),

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

Advocate General: V. Trstenjak,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 28 June 2012,

after considering the observations submitted on behalf of:

- RWE Vertrieb AG, by P. Rosin, J. Schütze and A. von Graevenitz, Rechtsanwälte,
- Verbraucherzentrale Nordrhein-Westfalen e.V., by P. Wassermann, Rechtsanwalt,
- the German Government, by T. Henze and J. Kemper, acting as Agents,
- the Belgian Government, by T. Materne and J.-C. Halleux, acting as Agents,
- the European Commission, by M. Owsiany-Hornung and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2012,

* Language of the case: German.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 1(2), 3 and 5 of and point 1(j) and the second indent of point 2(b) of the annex to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) and Article 3(3) of and points (b) and (c) of Annex A to Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).
- 2 The request has been made in proceedings between RWE Vertrieb AG ('RWE') and the consumer association Verbraucherzentrale Nordrhein-Westfalen e.V. concerning the use by RWE of allegedly unfair terms in consumer contracts.

Legal context

European Union law

Directive 93/13

- 3 The 13th recital in the preamble to Directive 93/13 states:

'... 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; ... therefore, it does not appear to be necessary to subject [to the provisions of this directive] 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; ... in that respect the wording "mandatory statutory or regulatory provisions" in Article 1(2) [of this directive] also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established'.

- 4 The 20th recital in the preamble states:

'... the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail'.

- 5 In accordance with Article 1(2) of the directive:

'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.'

- 6 Article 3 of the directive provides:

'1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

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

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

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

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

7 Under Article 4(1) of the directive:

'... 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'.

8 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. ...'

9 The annex to Directive 93/13 lists the terms referred to in Article 3(3) of the directive:

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

...

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

...

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

...

2. Scope of subparagraphs ... (j) and (l)

(b) ...

Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

...

(d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.'

Directive 2003/55

10 Article 3(3) of Directive 2003/55 reads as follows:

'Member States shall take appropriate measures to protect final customers and to ensure high levels of consumer protection, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers, including appropriate measures to help them avoid disconnection. In this context, they may take appropriate measures to protect customers in remote areas who are connected to the gas system. Member States may appoint a supplier of last resort for customers connected to the gas network. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding general contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is effectively able to switch to a new supplier. As regards at least household customers these measures shall include those set out in Annex A.'

11 Annex A to Directive 2003/55, concerning measures on consumer protection, reads as follows:

'Without prejudice to Community rules on consumer protection, in particular Directives 97/7/EC of the European Parliament and of the Council [of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19)] and ... Directive 93/13 ..., the measures referred to in Article 3 are to ensure that customers:

(a) ...

Conditions shall be fair and well known in advance. In any case, this information should be provided prior to the conclusion or confirmation of the contract. Where contracts are concluded through intermediaries, the above information shall also be provided prior to the conclusion of the contract:

(b) are given adequate notice of any intention to modify contractual conditions and are informed about their right of withdrawal when the notice is given. Service providers shall notify their subscribers directly of any increase in charges, at an appropriate time no later than one normal billing period after the increase comes into effect. Member States shall ensure that customers are free to withdraw from contracts if they do not accept the new conditions, notified to them by their gas service provider;

(c) receive transparent information on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of gas services;

(d) ... General terms and conditions shall be fair and transparent. They shall be given in clear and comprehensible language. Customers shall be protected against unfair or misleading selling methods;

...'

German law

12 In accordance with Paragraph 1(1) and (2) of the regulation on general terms and conditions for the supply of gas to standard tariff customers (Verordnung über Allgemeine Bedingungen für die Gasversorgung von Tarifkunden, ‘the AVBGasV’), applicable during the period concerned by the main proceedings:

‘(1) The general terms and conditions on which gas supply undertakings ... must connect any person to their supply network and supply him at general tariff prices laid down in Paragraphs 2 to 34 of this regulation. They form part of the supply contract.

(2) A customer within the meaning of this regulation is a standard tariff customer.’

13 Under Paragraph 4(1) and (2) of the AVBGasV:

‘(1) The gas supply undertaking provides gas on the relevant general tariffs and conditions. The calorific value with the margin of fluctuation arising from the undertaking’s production or purchasing circumstances and the static pressure of the gas relevant for supplying the customer are determined according to the general tariffs.

(2) Changes to the general tariffs and conditions come into effect only after they are published.

...’

14 Under Paragraph 32(1) and (2) of the AVBGasV:

‘(1) The contractual relationship continues to run without interruption until it is terminated by either party, giving one month’s notice expiring at the end of a calendar month ...

(2) If the general tariffs change or if the gas supply undertaking changes its general terms and conditions within the framework of this regulation, the customer can terminate the contractual relationship, giving two weeks’ notice expiring at the end of the calendar month following publication.

...’

15 Paragraph 307 of the German Civil Code (Bürgerliches Gesetzbuch, ‘the BGB’), provides:

‘(1) Provisions in general terms and conditions are of no effect if they unreasonably disadvantage the contracting partner of the party using them, contrary to the requirements of good faith. Unreasonable disadvantage may also arise from the provision not being clear and intelligible.

(2) In case of doubt, unreasonable disadvantage is to be assumed to exist if a provision

1. is incompatible with essential basic principles of the statutory rule from which it diverges, or
2. restricts essential rights or obligations arising from the nature of the contract in such a way that achieving the purpose of the contract is jeopardised.

(3) Subparagraphs 1 and 2 and Paragraphs 308 and 309 apply only to provisions in general terms and conditions by which terms are agreed that diverge from statutory rules or supplement them. Other provisions may be of no effect in accordance with the second sentence of subparagraph 1 in conjunction with the first sentence of subparagraph 1.’

16 Under Paragraph 310(2) of the BGB:

‘Paragraphs 308 and 309 do not apply to contracts of electricity, gas, block heating and water supply undertakings for the supply of electrical energy, gas, block heating and water from the supply network to special customers, in so far as the conditions of supply do not diverge, to the disadvantage of the customers, from regulations on general terms and conditions for the supply of electrical energy, gas, block heating and water to standard tariff customers. The first sentence applies by analogy to contracts for the collection of waste water.’

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

- 17 RWE, a gas supply undertaking, concluded contracts with consumers for the supply of natural gas, on the basis of freedom of contract (special contracts). As well as the possibility of concluding such contracts, RWE and other gas suppliers are obliged under national legislation to conclude contracts with consumers in which a standard tariff is applied (standard tariff contracts).
- 18 The provisions on changes to gas prices in the general terms and conditions incorporated into the special contracts at issue in the present case referred to the national legislation or the standard conditions whose wording corresponded to that legislation, which did not apply to those contracts and governed standard tariff contracts only. The legislation allowed the supplier to vary gas prices unilaterally without stating the grounds, conditions or scope of the variation, while ensuring, however, that customers would be informed of the variation and would if appropriate be free to terminate the contract.
- 19 In the period from 1 July 2003 to 1 October 2005 RWE increased its gas prices on four occasions. During that period the customers concerned in the main proceedings had no possibility of changing gas suppliers.
- 20 Verbraucherzentrale Nordrhein-Westfalen e.V., acting on behalf of those consumers, claimed from RWE reimbursement of the additional amounts paid to it by those consumers following the price increases.
- 21 The Landgericht Dortmund (Regional Court, Dortmund) allowed the claim for reimbursement of EUR 16 128.63 with interest. RWE’s appeal to the Oberlandesgericht (Higher Regional Court) was unsuccessful.
- 22 RWE appealed on a point of law against the judgment of the Oberlandesgericht. The Bundesgerichtshof (Federal Court of Justice) considered that the outcome of the main proceedings depended on the interpretation of the relevant provisions of European Union law.
- 23 In those circumstances the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘1. Is Article 1(2) of ... Directive 93/13 ... to be interpreted as meaning that contractual terms concerning price variations in gas supply contracts with consumers who are to be supplied outside the general obligation to supply gas and on the basis of the general freedom of contract (special customers) are not subject to the provisions of the directive if, in those contractual terms, the statutory provisions which apply to standard tariff customers within the framework of the general obligation to provide a connection and supply gas are incorporated unchanged in the contractual relationships with special customers?’

2. Are Articles 3 and 5 of ... Directive 93/13 ... – in so far as they are applicable – in conjunction with point 1(j) and the second sentence of point 2(b) of the annex ... [to] that directive, and Article 3(3) of, in conjunction with points (b) and/or (c) of Annex A to, Directive 2003/55 ... to be interpreted as meaning that contractual terms concerning price variations in natural gas supply contracts with special customers meet the requirements for plain and intelligible wording and/or possess the requisite degree of transparency if, although the grounds, conditions and scope of a change in price are not set out, it is nevertheless ensured that the gas supply company informs its customers of every price increase in good time in advance and those customers have the right to terminate the contract by way of notice if they do not wish to accept the amended conditions of which they have been informed?

Consideration of the questions referred

Question 1

- 24 By its first question the referring court asks essentially whether Article 1(2) of Directive 93/13 must be interpreted as meaning that that directive does not apply to provisions in general terms and conditions, incorporated into contracts concluded between a supplier and a consumer, which reproduce a rule of national law applicable to another category of contracts and are not subject to the national legislation concerned.
- 25 It must be recalled that, as stated in Article 1(2) of Directive 93/13, contractual terms which reflect mandatory statutory or regulatory provisions are not subject to the provisions of the directive.
- 26 As stated in the 13th recital in the preamble to Directive 93/13, the exclusion in Article 1(2) of that directive extends to terms which reflect provisions of national law that apply between the parties to the contract independently of their choice or provisions that apply by default in the absence of other arrangements established by the parties.
- 27 Moreover, contractual terms are excluded from the scope of that directive if they reflect provisions of national legislation governing a certain category of contracts, not only if the contract concluded by the parties is within that category but also with respect to other contracts to which that legislation applies in accordance with a provision of national law.
- 28 As the Advocate General observes in point 47 of her Opinion, that exclusion of the application of the rules of Directive 93/13 is justified by the fact that, in the cases referred to in paragraphs 26 and 27 above, it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts.
- 29 That reasoning does not, however, apply to terms in a contract that differs from those referred to in paragraph 27 above. In such a situation the national legislature has decided to exclude that contract from the scope of the rules laid down for other categories of contracts. An intention of the parties to extend the application of those rules to a different contract cannot be equated to the establishment by the national legislature of a balance between all the rights and obligations of the parties to the contract.
- 30 Moreover, if it were permitted to exclude the application of Directive 93/13 to contractual terms merely because they reproduce national statutory or regulatory provisions that do not apply to the contract concluded by the parties, or refer to such provisions, that would call into question the system of consumer protection established by that directive.

- 31 In those circumstances a supplier could easily avoid review of the unfairness of terms not individually negotiated with a consumer by drafting the terms in his contracts in the same way as those laid down by national legislation for certain categories of contracts. All the rights and obligations created by a contract drawn up in that way would not necessarily correspond to the balance the national legislature intended to establish for the contracts governed by its legislation on the point.
- 32 In the present case, as may be seen from the national case-file, the possibility for a supplier of unilaterally varying gas prices without stating the grounds, conditions or scope of a variation of the price was provided for by national legislation, namely the AVBGasV, which did not apply to the special contracts for the supply of natural gas concluded by RWE with consumers on the basis of freedom of contract.
- 33 The German legislature thus chose to exclude the special contracts from the scope of the AVBGasV.
- 34 That conclusion is moreover not called into question by the fact that the prohibition of the particular terms mentioned in Paragraphs 308 and 309 of the BGB does not apply, in accordance with Paragraph 310(2) of the BGB, to contracts of gas supply undertakings for the supply to special customers, in so far as the conditions of supply do not diverge, to the disadvantage of those customers, from regulations on general conditions for the supply to standard tariff customers.
- 35 Those special contracts are subject to Paragraph 307 of the BGB, under which provisions in general terms and conditions are of no effect if they unreasonably disadvantage the contracting partner of the party using them, contrary to the requirements of good faith, and unreasonable disadvantage may also arise from the provision not being clear and intelligible.
- 36 Paragraph 307 of the BGB corresponds to Article 3 of Directive 93/13, which is a basic element of the system of consumer protection established by that directive.
- 37 It follows from the above considerations that, as the Advocate General observes in substance in point 56 of her Opinion, the German legislature deliberately decided not to apply to special contracts the rules laid down by the national legislation determining the content of terms in contracts for the supply of gas.
- 38 In those circumstances, the application of Directive 93/13 to terms such as those of the special contracts at issue in the main proceedings is not excluded by Article 1(2) of that directive.
- 39 In the light of all the foregoing, the answer to Question 1 is that Article 1(2) of Directive 93/13 must be interpreted as meaning that that directive applies to provisions in general terms and conditions, incorporated into contracts concluded between a supplier and a consumer, which reproduce a rule of national law applicable to another category of contracts and are not subject to the national legislation concerned.

Question 2

- 40 By its second question the referring court asks essentially whether Articles 3 and 5 of Directive 93/13, in conjunction with point 1(j) and the second sentence of point 2(b) of the annex to that directive, and Article 3(3) of Directive 2003/55, in conjunction with points (b) and/or (c) of Annex A to that directive, must be interpreted as meaning that a standard contractual term by which the supply undertaking reserves the right unilaterally to vary the gas supply price, but which does not indicate the grounds, conditions or scope of such a variation, complies with the requirements laid down by those provisions, if it is ensured that consumers will be informed of the price variation in good time and will then have the right to terminate the contract if they do not wish to accept the variations.

- 41 To answer the question, it must first be recalled that the system of protection established by Directive 93/13 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, which 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 (Case C-453/10 *Pereničová and Perenič* [2012] ECR, paragraph 27, and Case C-472/10 *Invitel* [2012] ECR, paragraph 33).
- 42 In view of that weak position, Directive 93/13 prohibits, first, in Article 3(1), standard terms which, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
- 43 Directive 93/13 imposes, secondly, in Article 5, an obligation on the seller or supplier to draft terms in plain, intelligible language. The 20th recital in the preamble to Directive 93/13 specifies that the consumer must actually be given an opportunity to examine all the terms of the contract.
- 44 Information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier.
- 45 The European Union legislature, moreover, also accorded particular importance to the provision of information to the consumer in the context of Directive 2003/55, in other words specifically in relation to contracts for the supply of gas. Thus Directive 2003/55, by virtue of Article 3(3), requires the Member States to ensure a high level of consumer protection with respect to transparency regarding contractual terms and conditions. In this respect, it is apparent from points (a), (c) and (d) of Annex A to that directive that the Member States are obliged in particular to adopt measures to ensure that those terms and conditions are fair and transparent, are stated in clear and comprehensible language and are notified to consumers before the contract is concluded, and that consumers receive transparent information on applicable prices and tariffs and on standard terms and conditions. The annex also specifies that the measures it mentions apply without prejudice to Directive 93/13.
- 46 With respect to a standard term such as that at issue in the main proceedings which allows the supply undertaking to vary unilaterally the charge for the gas supply, it must be observed that it follows both from the second sentence of point 2(b) and point (d) of the annex to Directive 93/13 and from point (b) of annex A to Directive 2003/55 that the legislature recognised, in the context of contracts of indeterminate length such as contracts for the supply of gas, the existence of a legitimate interest of the supply undertaking in being able to alter the charge for its service.
- 47 A standard term which allows such a unilateral adjustment must, however, meet the requirements of good faith, balance and transparency laid down by those directives.
- 48 It must be recalled that ultimately it is not for the Court but for the national court to determine in each particular case whether that is so. The jurisdiction of the Court extends to the interpretation of the provisions of those directives and to the criteria which the national court may or must apply when examining a contractual term in the light of those provisions, 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 (see Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-10847, paragraph 44, and *Invitel*, paragraph 22).
- 49 As regards the assessment of a term that allows the supplier to alter unilaterally the charges for the service to be supplied, the Court has previously stated that it follows from Articles 3 and 5 of and points 1(j) and (l) and 2(b) and (d) of the annex to Directive 93/13 that it is of fundamental importance for that purpose, first, whether the contract sets out in transparent fashion the reason for

and method of the variation of the charges for the service to be provided, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges and, secondly, whether consumers have the right to terminate the contract if the charges are in fact altered (see, to that effect, *Invitel*, paragraphs 24, 26 and 28).

- 50 With respect, in the first place, to the information to be given to the consumer, it is clear that that obligation to make the consumer aware of the reason for and method of the variation of those charges and his right to terminate the contract is not satisfied by the mere reference, in the general terms and conditions, to a legislative or regulatory act determining the rights and obligations of the parties. It is essential that the consumer is informed by the seller or supplier of the content of the provisions concerned (see, to that effect, *Invitel*, paragraph 29).
- 51 While the level of information required may vary according to the particular circumstances of the case and the goods or services concerned, the lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation.
- 52 While from the point of view of point 2(b) of the annex to Directive 93/13 and point (b) of Annex A to Directive 2003/55 it is indeed for the supply undertaking to notify consumers in good time of any increase in tariffs and of their right to terminate the contract, that obligation, laid down for cases in which the undertaking actually wishes to exercise the right reserved to it to amend the tariffs, is in addition to the obligation to inform the consumer, before conclusion of the contract and in clear and intelligible terms, of the principal conditions of the exercise of that right of unilateral variation.
- 53 Those strict requirements as to the information to be given to the consumer, both at the stage of the conclusion of a supply contract and during the performance of the contract, as regards the right of the supplier unilaterally to alter the terms of the contract, correspond to a balancing of the interests of the two parties. To the supplier's legitimate interest in guarding against a change of circumstances there corresponds the consumer's equally legitimate interest, first, in knowing and thus being able to foresee the consequences which such a change might in future have for him and, secondly, in having the data available in such a case to allow him to react most appropriately to his new situation.
- 54 With respect, in the second place, to the consumer's right to terminate the supply contract he has concluded in the event of a unilateral alteration of the tariffs applied by the supplier, it is of fundamental importance, as the Advocate General says in substance in point 85 of her Opinion, that the right of termination given to the consumer is not purely formal but can actually be exercised. That would not be the case if, for reasons connected with the method of exercise of the right of termination or the conditions of the market concerned, the consumer has no real possibility of changing supplier, or if he has not been informed suitably in good time of the forthcoming change, thus depriving him of the possibility of checking how it is calculated and, if appropriate, of changing supplier. Account must be taken in particular of whether the market concerned is competitive, the possible cost to the consumer of terminating the contract, the time between the notification and the coming into force of the new tariffs, the information provided at the time of that communication, and the cost to be borne and the time taken to change supplier.

55 Having regard to the above considerations, the answer to Question 2 is:

- Articles 3 and 5 of Directive 93/13 in conjunction with Article 3(3) of Directive 2003/55 must be interpreted as meaning that, in order to assess whether a standard contractual term by which a supply undertaking reserves the right to vary the charge for the supply of gas complies with the requirements of good faith, balance and transparency laid down by those directives, it is of fundamental importance:
 - whether the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges. The lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation; and
 - whether the right of termination conferred on the consumer can actually be exercised in the specific circumstances.
- It is for the national court to carry out that assessment with regard to all the circumstances of the particular case, including all the general terms and conditions of the consumer contracts of which the term at issue forms part.

Temporal limitation of the effects of the present judgment

- 56 Should the judgment to be delivered have the consequence that a term such as that at issue in the main proceedings does not satisfy the requirements of European Union law, the German Government, in its written observations, asked the Court to limit the temporal effects of its judgment, so that the interpretation adopted in that judgment would not apply to variations in tariffs that took place before the date of the judgment. RWE, which also made a request to that effect in its written observations, considers that the effects of the judgment should be postponed for 20 months in order to enable the undertakings concerned and the national legislature to adapt to the consequences of the judgment.
- 57 In support of their requests, the German Government and RWE pleaded the serious financial consequences that could be produced with respect to a large number of gas supply contracts in Germany, bringing about a substantial loss for the undertakings concerned.
- 58 It must be recalled that, according to settled case-law, the interpretation which the Court, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, gives to a rule of European Union law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may and must be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied (see, inter alia, Case 24/86 *Blaizot and Others* [1988] ECR 379, paragraph 27; Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 50; Case C-313/05 *Brzeziński* [2007] ECR I-513, paragraph 55; and judgment of 7 July 2011 in Case C-263/10 *Nisipeanu*, paragraph 32).
- 59 Only in altogether exceptional cases may the Court, in application of the general principle of legal certainty inherent in the legal order of the European Union, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned have acted in good faith and

that there is a risk of serious difficulties (see, inter alia, *Skov and Bilka*, paragraph 51; *Brzeziński*, paragraph 56; Case C-2/09 *Kalinchev* [2010] ECR I-4939, paragraph 50; and Case C-263/11 *Rēdlihs* [2012] ECR, paragraph 59).

- 60 As regards the risk of serious difficulties, it must be observed, to begin with, that in the present case the interpretation of European Union law given by the Court in this judgment relates to the concept of ‘unfair term’ used in Article 3(1) of Directive 93/13 and to the criteria which the national court may or must apply when examining the contractual term at issue from the point of view of the provisions of Directive 93/13, taking into account the provisions of Directive 2003/55. It is for the national court to determine in the light of those criteria whether a particular contractual term is actually unfair in the circumstances of the case (*VB Pénzügyi Lízing*, paragraph 44, and *Invitel*, paragraph 22).
- 61 In those circumstances, the financial consequences for gas supply undertakings in Germany that have concluded special contracts with consumers for the supply of natural gas cannot be determined on the sole basis of the interpretation of European Union law given by the Court in the present case (see, by analogy, Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 131).
- 62 Consequently, the existence of a risk of serious difficulties within the meaning of the case-law cited in paragraph 59 above, capable of justifying a limitation of the temporal effects of the present judgment, cannot be regarded as established.
- 63 As the second criterion mentioned in paragraph 59 above is not satisfied, it is not necessary to ascertain whether the criterion of the good faith of those concerned is satisfied.
- 64 It follows that there is no occasion to limit the temporal effects of the present judgment.

Costs

- 65 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. Article 1(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that that directive applies to provisions in general terms and conditions, incorporated into contracts concluded between a supplier and a consumer, which reproduce a rule of national law applicable to another category of contracts and are not subject to the national legislation concerned.**
- 2. Articles 3 and 5 of Directive 93/13 in conjunction with Article 3(3) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC must be interpreted as meaning that, in order to assess whether a standard contractual term by which a supply undertaking reserves the right to vary the charge for the supply of gas complies with the requirements of good faith, balance and transparency laid down by those directives, it is of fundamental importance:**
 - whether the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges. The lack of information on the point before the contract is concluded cannot, in principle, be**

compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation; and

- **whether the right of termination conferred on the consumer can actually be exercised in the specific circumstances.**

It is for the national court to carry out that assessment with regard to all the circumstances of the particular case, including all the general terms and conditions of the consumer contracts of which the term at issue forms part.

[Signatures]