



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

21 February 2013*

(Directive 93/13/EEC — Unfair terms in consumer contracts — Examination by the national court, of its own motion, as to whether a term is unfair — Obligation on the national court, once it has found, of its own motion, that a term is unfair, to invite the parties to submit their observations before drawing conclusions from that finding — Contractual terms to be taken into account in the assessment of that unfairness)

In Case C-472/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Bíróság (now the Fővárosi Törvényszék) (Hungary), made by decision of 16 June 2011, received at the Court on 16 September 2011, in the proceedings

Banif Plus Bank Zrt

v

Csaba Csipai,

Viktória Csipai,

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. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2012,

after considering the observations submitted on behalf of:

- Banif Plus Bank Zrt, by E. Héjja, ügyvéd,
- the Hungarian Government, by Z. Fehér and K. Szíjjártó, acting as Agents,
- the Spanish Government, by S. Martínez-Lage Sobredo, acting as Agent,
- the Slovak Government, by M. Kianička, acting as Agent,

* Language of the case: Hungarian.

— the European Commission, by B. Simon and M. van Beek, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 6 and 7 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 Banif Plus Bank Zrt ('Banif Plus Bank') and Mr and Mrs Csipai concerning the payment of sums due under a credit agreement in the event of the early termination of that agreement by the lending institution on grounds of conduct attributable to the borrower.

Legal context

European Union law

- 3 Article 3(1) of the Directive defines an unfair term as follows:

'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.'
- 4 With regard to the examination as to the unfairness of a term, Article 4(1) of the Directive states:

'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 As regards the effects of 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.'
- 6 Article 7(1) of the Directive adds:

'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.'

National law

- 7 Under Paragraph 209(1) of the Civil Code, ‘a standard contractual term or a contractual term not negotiated individually in a consumer contract shall be unfair if it establishes the rights and obligations of the parties arising from the contract unilaterally and unjustifiably, in breach of the requirement of good faith and fairness and to the detriment of the party to the contract who did not draw up that term’.
- 8 Paragraph 209/A(2) of the Civil Code provides that such terms are invalid.
- 9 Paragraph 2(j) of Government Decree No 18/1999 of 5 February 1999 on terms to be considered unfair in consumer contracts provides:
- ‘Contract terms are to be presumed unfair, until proven otherwise, if, in particular, they:
- ...
- (j) oblige the consumer to pay an excessive amount of money if the consumer does not carry out his obligations under the contract, or does not carry out those obligations in accordance with the contract’.
- 10 Under Paragraph 3(2) of Law No III of 1952 on the Code of Civil Procedure, the court, unless otherwise provided for by law, is bound by the submissions and legal statements submitted by the parties.

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

- 11 On 16 June 2006, Mr Csipai concluded a credit agreement with Banif Plus Bank, the term of which was to expire on 15 June 2012.
- 12 Clause 29 of the agreement drafted in advance by Banif Plus Bank provided that, if that agreement were to be terminated before its expiry for any reason resulting from breach of contract on the part of the borrower or from conduct attributable to him, the borrower would be obliged to pay the sum total of all outstanding instalments, in addition to default interest and costs. The instalments payable included interest on the transaction and an insurance fee, in addition to the capital amount.
- 13 Mr Csipai last paid an instalment in February 2008. Consequently, Banif Plus Bank terminated the agreement and requested the borrower to pay the outstanding amounts due pursuant to clause 29 of that agreement. As Mr Csipai did not comply with that request, Banif Plus Bank brought an action against him and, on the basis of the rules governing family law, against his wife.
- 14 In the context of the proceedings pending before it, the Pesti Központi kerületi bíróság (Pest Central District Court), in its capacity as a court of first instance, informed the parties that it took the view that clause 29 was unfair and invited the parties to comment on that matter. Mr Csipai submitted that he considered Banif Plus Bank’s claims to be excessive and that he accepted that there was a justified claim only in relation to the capital sum. Banif Plus Bank disputed the contention that the clause at issue was unfair.
- 15 By decision of 6 July 2010, the Pesti Központi kerületi bíróság ordered Mr Csipai to pay Banif Plus Bank a sum calculated without application of clause 29 of the agreement.

- 16 Banif Plus Bank appealed against that decision. In those circumstances, the Fővárosi Bíróság (Budapest Municipal Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1. Are the procedures of a national court consistent with Article 7(1) of [the Directive] if, where a contract term is held to be unfair, and the parties did not submit a claim to that effect, the court informs them that it holds sentence 4 of clause 29 of the standard contract terms of the loan agreement between the parties to the proceedings to be invalid? That invalidity arises from breach of the legislation, namely Paragraphs 1(1)(c) and 2(j) of Government Decree No 18/1999 ...
 2. In the circumstances of the first question, is it permissible for the court to direct the parties to the proceedings to make a statement in relation to the contract term in question, so that the legal implications of any unfairness may be established and so that the aims expressed in Article 6(1) of [the Directive] may be achieved?
 3. In the circumstances described above, is it permissible for the court, when examining an unfair contract term, to examine all the terms of the contract, or may it examine only the terms on which the party concluding the contract with the consumer bases his claim?

The questions referred for a preliminary ruling

The first and second questions

- 17 By its first and second questions, which it is appropriate to consider together, the national court asks, in essence, whether Articles 6(1) and 7(1) of the Directive must be interpreted as precluding or, on the contrary, allowing the national court which has held, of its own motion, that a contractual term is unfair to inform the parties that it has found that there are grounds for invalidity and to invite them to submit a statement in that regard.
- 18 It is apparent from the file that those questions are linked to the existence, under national law, of a rule pursuant to which the court which has held, of its own motion, that there are grounds for invalidity must inform the parties of that fact and must give them the opportunity to make a statement on the possible finding that the legal relationship concerned is void, failing which it cannot make a declaration of invalidity.
- 19 In order to answer those questions, it is necessary to bear in mind that the system of protection implemented by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (see, inter alia, Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 29, and judgment of 14 June 2012 in Case C-618/10 *Banco Español de Crédito*, paragraph 39).
- 20 In the light of that weaker position, Article 6(1) of the Directive provides that unfair terms are not binding on the consumer. As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and the obligations of the parties with an effective balance which re-establishes equality between them (see, inter alia, Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-10847, paragraph 47, and *Banco Español de Crédito*, paragraph 40).

- 21 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*, *VB Pénzügyi Lízing*, paragraph 48, and *Banco Español de Crédito*, paragraph 41).
- 22 It is in the light of those considerations that the Court has held that the national court is required 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*, *VB Pénzügyi Lízing*, paragraph 49, and *Banco Español de Crédito*, paragraph 42).
- 23 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*, Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 32, and *Banco Español de Crédito*, paragraph 43).
- 24 In this connection, in ruling on an order for reference submitted by a national court before which adversarial proceedings between a consumer and a seller or supplier have been brought, the Court has held that that national court must investigate of its own motion whether a term in a contract concluded between a seller or supplier and a consumer falls within the scope of the Directive and, if it does, assess of its own motion whether such a term is unfair (see, to that effect, *VB Pénzügyi Lízing*, paragraph 56, and *Banco Español de Crédito*, paragraph 44).
- 25 As regards the conclusions to be drawn from a finding that a contractual term is unfair, Article 6(1) of the Directive requires Member States to provide that such a term does not bind consumers ‘as provided for under their national law’.
- 26 In that regard, it must be noted that, in the absence of European Union legislation, the procedural rules governing actions for safeguarding 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, *Asturcom Telecomunicaciones*, paragraph 38, and *Banco Español de Crédito*, paragraph 46).
- 27 As regards the obligation to ensure the effectiveness of the protection afforded by the Directive with regard to the penalising of an unfair term, the Court has already stated that it is for the national court to establish all the consequences, arising under national law, of a finding that a term is unfair in order to ensure that the consumer is not bound by that term (*Asturcom Telecomunicaciones*, paragraph 59). The Court has, however, stated that the national court is not required under the Directive to exclude the possibility that the term in question may be applicable if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status (see *Pannon GSM*, paragraphs 33 and 35).
- 28 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.
- 29 However, in implementing European Union law, the national court must also respect the requirements of effective judicial protection of the rights that individuals derive from European Union law, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. Among those

requirements is the principle of *audi alteram partem*, as part of the rights of defence and which is binding on that court, in particular when it decides a dispute on a ground that it has identified of its own motion (see, to that effect, Case C-89/08 P *Commission v Ireland and Others* [2009] ECR I-11245, paragraphs 50 and 54).

- 30 Thus, the Court has held that, as a general rule, the principle of *audi alteram partem* does not merely confer on each party to proceedings the right to be apprised of the documents produced and observations made to the court by the other party and to discuss them, but it also implies a right for the parties to be apprised of pleas in law raised by the court of its own motion, on which it intends to base its decision, and to discuss them. The Court has pointed out that, in order to satisfy the requirements associated with the right to a fair hearing, it is important for the parties to be apprised of, and to be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings (see *Commission v Ireland and Others*, paragraphs 55 and 56).
- 31 It follows that, where the national court, after establishing, on the basis of the matters of fact and law at its disposal, or which were communicated to it following the measures of inquiry which it undertook of its own motion, that a term comes within the scope of the Directive, finds, following an assessment made of its own motion, that that term is unfair, it is, as a general rule, required to inform the parties to the dispute of that fact and to invite each of them to set out their 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.
- 32 The national rule at issue in the dispute in the main proceedings, under which the court which has held of its own motion that there are grounds for invalidity must inform the parties of that fact and give them the opportunity to make a statement on the possible finding that the legal relationship concerned is void, satisfies that requirement.
- 33 Where a court establishes of its own motion the unfairness of a contractual term, the obligation to notify the parties and to give them the opportunity to set out their views cannot, moreover, be regarded as being, in itself, incompatible with the principle of effectiveness which governs the implementation, by the Member States, of rights conferred by European Union law. It is undisputed that that principle must be applied by taking into account, inter alia, the basic principles of the domestic judicial system, such as protection of the rights of the defence, of which the principle of *audi alteram partem* is an element (see, to that effect, *Asturcom Telecomunicaciones*, paragraph 39).
- 34 In those circumstances, it must be held that the national court acted in accordance with the principle of *audi alteram partem*, and without compromising the effectiveness of the protection provided by the Directive for the benefit of the consumer, when, in the context of the main proceedings, it invited both the financial institution, the applicant in those proceedings, and the consumer, the defendant in those proceedings, to submit their observations on the court's assessment as to the unfair nature of the term in dispute.
- 35 That opportunity afforded to the consumer to set out his views on that point also fulfils the obligation on the national court, as was pointed out in paragraph 25 of the present judgment, to take into account, where appropriate, the intention expressed by the consumer when, conscious of the non-binding nature of an unfair term, that consumer states nevertheless that he is opposed to that term being disregarded, thus giving his free and informed consent to the term in question.
- 36 Consequently, the answer to the first and second questions is that Article 6(1) and 7(1) of the Directive must be interpreted as meaning that the national court which has found of its own motion that a contractual term is unfair is not obliged, in order to be able to draw the consequences arising from that finding, to wait for the consumer, who has been informed of his rights, to submit a statement requesting that that term be declared invalid. However, 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.

The third question

- 37 By its third question, the national court asks whether the Directive must be interpreted as permitting the national court, or even requiring it, when examining an unfair contract term, to examine all the terms of the contract or whether, on the contrary, it must limit its examination to the terms on which the action before it is based.
- 38 As a preliminary point, it should be pointed out that it is apparent from the case-file that, in the case in the main proceedings, the action brought by Banif Plus Bank against Mr and Mrs Csipai is based on clause 29 of the credit agreement which they concluded and that the determination as to whether that term is or is not unfair is crucial to the national court's decision on the application for payment of the various amounts which Banif Plus Bank seeks to recover.
- 39 The third question must therefore be interpreted as meaning that the national court is seeking to ascertain whether, when examining whether the contractual term on which the application is based is unfair, it may or must take account of the other terms of the contract.
- 40 Under Article 3(1) of the Directive, a term is considered to be 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. Pursuant to Article 4(1) of the same directive, that assessment must have regard to the nature of the services for which the contract was concluded as well as 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.
- 41 Consequently, the answer to the third question is that the national court must, in order to determine whether the contractual term on which the claim brought before it is based may be unfair, take account of all of the other terms of the contract.

Costs

- 42 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:

- Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that the national court which has found of its own motion that a contractual term is unfair is not obliged, in order to be able to draw the consequences arising from that finding, to wait for the consumer, who has been informed of his rights, to submit a statement requesting that that term be declared invalid. However, 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.**

- 2. The national court must, in order to determine whether the contractual term on which the claim brought before it is based may be unfair, take account of all of the other terms of the contract.**

[Signatures]