

Provisional text

JUDGMENT OF THE COURT (Third Chamber)

11 March 2020 (*)

(Reference for a preliminary ruling — Consumer protection — Directive 93/13/EEC — Unfair terms in consumer contracts — Foreign currency based loan contract — Article 4(1) — Consideration of all the other terms of the contract for the purpose of assessing the unfairness of the contested term — Article 6(1) — Examination by the national court of its own motion as to whether the clauses in the contract are unfair — Scope)

In Case C-511/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decision of 18 July 2017, received at the Court on 21 August 2017, in the proceedings

Györgyné Lintner

v

UniCredit Bank Hungary Zrt.,

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Third Chamber, L.S. Rossi, J. Malenovský and F. Biltgen, Judges,

Advocate General: E. Tanchev,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 19 September 2019,

after considering the observations submitted on behalf of:

- UniCredit Bank Hungary Zrt., by Z. Lajer, Á. Szőke and J. Pettkó-Szandtner, ügyvédek,
- the Hungarian Government, by M.Z. Fehér, acting as Agent,
- the European Commission, by L. Havas and N. Ruiz García, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 December 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(1) 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 Ms Györgyné Lintner and UniCredit Bank Hungary Zrt. ('UniCredit Bank') concerning the unfair nature of certain terms in a foreign currency mortgage loan agreement.

Legal context

European Union law

- 3 According to the 21st recital of Directive 93/13:

'Whereas Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions.'

- 4 Article 4(1) of that 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 Article 6(1) of that 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 Directive 93/13 provides:

'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.'

- 7 Article 8 of that directive states:

'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.'

Hungarian law

- 8 Under Paragraph 3(2) of the Polgári perrendtartásról szóló 1952. évi III. törvény (Law No III of 1952 on the Code of Civil Procedure), in the version applicable to the dispute in the main proceedings ('the Civil Procedure Code'):

'The court — in the absence of any statutory provision to the contrary — shall be bound by the submissions and legal statements made by the parties. The court shall consider applications and statements made by the parties in the light of their content, rather than their formal designation. ...'

- 9 Paragraph 23(1) of the Civil Procedure Code provides:

'The county courts have jurisdiction to hear the following:

...

(k) cases seeking a declaration of invalidity of unfair contract terms;

...’

10 Paragraph 73/A(1) of that code provides:

‘Legal representation is mandatory:

...

(b) in cases which come under the jurisdiction of a county court as a court of first instance, at every stage of the proceedings, and also in the context of an appeal ...’

11 Under Paragraph 215 of the Civil Procedure Code:

‘The decision of a court may not go beyond what has been requested in the application or in the defence; this rule shall also apply to claims which are ancillary to the main claim (interest, costs, etc.).’

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

12 On 13 December 2007, Ms Lintner concluded with UniCredit Bank a mortgage loan contract denominated in a foreign currency. That contract contains certain terms giving UniCredit Bank the right to make unilateral amendments to that contract.

13 On 18 July 2012, Ms Lintner brought an action before the Fővárosi Törvényszék (Budapest High Court, Hungary), seeking a declaration of invalidity of those terms, with retroactive effect, on the basis of Directive 93/13. By judgment delivered on 29 August 2013, the court dismissed that action.

14 By order of 1 April 2014, the Fővárosi Ítéltábla (Budapest Regional Court of Appeal, Hungary), on appeal by Ms Lintner, set aside that judgment and referred the case back to the Fővárosi Törvényszék (Budapest High Court). The Fővárosi Ítéltábla (Budapest Regional Court of Appeal) stated in that order that, in its case-law relating to Directive 93/13, the Court of Justice had consistently referred to the principle that the court must, in cases concerning consumer contracts, examine, of its own motion (*ex officio*), whether the terms in those contracts are unfair. It stated, in that regard, that according to its understanding of that directive and the related case-law as well as the applicable national law, an effective application of that directive is possible only if the national court examines of its own motion the whole contract at issue. It thus instructed the Fővárosi Törvényszék (Budapest High Court) to ask Ms Lintner to state whether she wished to invoke the unfairness of the terms referred to in that order or other terms of the contract that were not referred to in her initial action, and whether she considered herself bound by the contract once the terms in question were disapplied.

15 By order of 7 December 2015, the Fővárosi Törvényszék (Budapest High Court), having reopened the procedure, closed the proceedings on the ground that Ms Lintner had not taken up the invitation to submit a request for ‘the application of the legal consequences of invalidity’, in accordance with specific legislation concerning foreign currency loan contracts such as the one at issue in the main proceedings, adopted in 2014 after the conclusion of the loan contracts that legislation concerns. That legislation includes, in particular, the Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvény (Law XXXVIII of 2014 regulating specific matters relating to the decision of the Kúria (Supreme Court, Hungary) to safeguard the uniformity of the law concerning loan contracts concluded by financial institutions with consumers; ‘Law DH1’), and the Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvényben rögzített elszámolás szabályairól és egyes egyéb rendelkezésekről szóló 2014. évi XL. törvény (Law XL of 2014 on the rules relating to the settlement of accounts referred to by

Law XXXVIII of 2014, regulating specific matters relating to the decision of the Kúria (Supreme Court) to safeguard the uniformity of the law concerning loan contracts concluded by financial institutions with consumers and various other provisions; ‘Law DH2’), which contain provisions governing the determination of unfairness and the consequences to be drawn from it with regard to certain terms contained in such contracts, namely those relating, first, to the power to make unilateral amendments to the contract and, second, to the difference between the buying and selling rates of the currency concerned.

- 16 On 29 March 2016, the Fővárosi Ítéltábla (Budapest Regional Court of Appeal), before which Ms Lintner had once again brought an appeal, upheld that order as regards the terms of the contract covered by Laws DH1 and DH2, but set it aside as to the remainder and ordered the Fővárosi Törvényszék (Budapest High Court) to adopt a new decision.
- 17 In that regard, the Fővárosi Ítéltábla (Budapest Regional Court of Appeal), considered that, although the terms covered by Laws DH1 and DH2 could no longer be the subject of a judicial decision, the Fővárosi Törvényszék (Budapest High Court) should nevertheless, having regard to Ms Lintner’s claims, examine the terms of that contract relating to the notarial certificate, the grounds for termination and certain fees payable by the consumer.
- 18 The Fővárosi Törvényszék (Budapest High Court), called upon to rule on those terms, states that it is thus required to examine of its own motion the contractual terms which Ms Lintner did not dispute at first instance, without Ms Lintner having stated facts in the grounds of her action from which it could be inferred that she also sought a declaration that the terms identified by the Fővárosi Ítéltábla (Budapest Regional Court of Appeal) were unfair.
- 19 As a result, the referring court is uncertain to what extent, first, it must examine the unfair nature of each term of a contract, some terms of which are the subject matter of an action brought by the consumer, and, second, it is bound, as regards that examination, by the form of order sought by the applicant. The referring court refers, in this regard, to the Court’s case-law, in particular the judgment of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350), from which it is apparent that the assessment, of the court’s own motion, of the unfairness of terms is based on the fact that the consumer is unaware of his or her rights or is deterred from enforcing them on account of the costs which judicial proceedings would involve. The referring court states that, in Hungarian law, proceedings seeking a declaration of invalidity of unfair contract terms may only be brought through a lawyer.
- 20 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Must Article 6(1) of [Directive 93/13] — having regard also to the national legislation requiring legal representation — be interpreted as meaning that it is necessary to examine each of the clauses of a contract individually in the light of whether it may be regarded as unfair, irrespective of whether an examination of all the terms of the contract is actually necessary in order to rule on the claim made in the action?
- (2) If not, is it necessary, contrary to the suggestion in Question 1, to interpret Article 6(1) of [Directive 93/13] as meaning that, in order to find that the clause on which the claim is based is unfair, all the other terms of the contract must also be examined?
- (3) If the answer to Question 2 is affirmative, does this mean that it is in order to be able to establish that the clause at issue is unfair that it is necessary to examine the entire contract, that is to say, that it is not necessary to examine each part of the contract individually for unfairness, independently of the clause disputed in the action?’

Consideration of the questions referred

The first question

- 21 By its first question, the referring court asks, in essence, whether Article 6(1) of Directive 93/13 must be interpreted as meaning that a national court, hearing an action brought by a consumer seeking a declaration that certain terms in a contract that that consumer concluded with a professional are unfair, is required to examine, of its own motion and individually, all the other contractual terms, which were not challenged by that consumer, in order to ascertain whether they can be considered to be unfair.
- 22 It is apparent from the order for reference that the initial action brought by Ms Lintner sought only a declaration that the contractual terms giving UniCredit Bank the power to unilaterally change the loan contract at issue in the main proceedings were unfair. However, at the current stage of proceedings, the referring court is called upon to rule on whether, under Directive 93/13, it is required, of its own motion — as the decision of the Fővárosi Ítéltábla (Budapest Regional Court of Appeal) given on appeal obliges it to — to extend the dispute pending before it to an assessment of whether the terms of that contract relating to the notarial certificate, the grounds for termination of the contract and certain fees imposed on Ms Lintner are unfair, even though those terms were not challenged by the applicant in the main proceedings in her initial action.
- 23 In that regard, according to the settled case-law of the Court, the system of protection implemented 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 or her bargaining power and his or her 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, judgments of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 22, and of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, EU:C:2018:320, paragraph 26).
- 24 The Court has also held that, on account of that weaker position, Article 6(1) of that directive provides that unfair terms are not binding on the consumer. As is apparent from case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (judgment of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, EU:C:2018:320, paragraph 27 and the case-law cited).
- 25 In order to guarantee the protection intended by the directive, the Court has also stated that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the parties to the contract (judgments of 9 November 2010, *VB Pénzügyi Lízing*, C-137/08, EU:C:2010:659, paragraph 48, and of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, EU:C:2018:320, paragraph 28 and the case-law cited).
- 26 Therefore, in the first place and according to settled case-law, the national court is required to assess of its own motion whether a contractual term coming within the scope of Directive 93/13 is unfair, and in doing so, compensate for that imbalance between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task (judgments of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, EU:C:2018:320, paragraph 29, and of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 87 and the case-law cited).
- 27 Accordingly, the obligatory examination that the national court hearing the case must carry out of its own motion pursuant to Directive 93/13 is limited, first, to contractual terms the unfair nature of which can be established on the basis of the elements of law and fact available in the file before that national court. If the latter does not have available to it all those elements it will not be in a position to carry out that examination (see, to that effect, judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraphs 46 and 47).

- 28 Such an examination must, second, respect the limitations of the subject matter of the dispute, understood as being the result that a party pursues by its claims, in the light of the heads of claim and pleas in law put forward to that end.
- 29 To begin with, although the consumer protection intended by Directive 93/13 requires positive intervention on the part of the national court hearing the case, it is nonetheless necessary, in order for that protection to be granted, for one of the parties to the contract to have brought court proceedings (see, to that effect, judgment of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 63).
- 30 Next, the effectiveness of the protection that the national court concerned is deemed to grant to the consumer, pursuant to that directive, by intervention of its own motion, cannot go so far as to ignore or exceed the limitations of the subject matter of the dispute as defined by the parties by their claims, in the light of the pleas they have raised, with the result that that national court is not required to extend that dispute beyond the forms of order sought and the pleas in law submitted to it, by analysing individually, for the purpose of assessing whether they are unfair, all the other terms of a contract of which only some terms are the subject matter of the action brought before it.
- 31 That assessment is justified, inter alia, by the fact that the principle that the subject matter of an action is delimited by the parties, as well as the principle of *ne ultra petita*, according to which the court cannot rule beyond the pleadings of the parties — principles to which the Hungarian Government also referred during the hearing — risk being disregarded if national courts were required, under Directive 93/13, to ignore or exceed the limitations of the subject matter of the dispute established by the forms of order sought and the pleas in law of the parties, as the Advocate General also stated, in essence, in points 43 and 51 of his Opinion.
- 32 Accordingly, it is within the limits of the subject matter of the dispute before it that the national court is called upon to examine of its own motion a contractual term, by virtue of the protection which must be granted to a consumer under Directive 93/13, in order to prevent the consumer's claims from being rejected by a potentially final decision when they could have been upheld had the consumer not, for lack of knowledge, omitted to invoke the unfair nature of that term.
- 33 It should also be clarified that, in order for the consumer to fully benefit from the protection afforded to him or her by Directive 93/13 and for the effectiveness of that protection not to be compromised, the national court must not interpret the claims put before it in a formalistic manner, but must, instead, comprehend their content in the light of the pleas of law relied on in support of them.
- 34 It follows from the considerations set out in paragraphs 27 to 33 above that the duty of *ex officio* examination incumbent on the national court hearing the dispute concerns only the contractual terms which, although not challenged by the consumer's action, are connected to the subject matter of the dispute as defined by the parties in the light of their pleas in law and the forms of order sought, and that these terms must be examined in order to determine whether they are unfair, where that court has available to it the legal and factual elements necessary for that task.
- 35 In the second place, as regards the implementation of that duty of *ex officio* examination, although it is limited to the terms referred to in the previous paragraph, it cannot follow from this that the national court hearing the dispute should, for the purposes of that examination, confine itself, in all circumstances, exclusively to the elements of law and fact provided by the parties, in order to limit that examination to the terms the unfair nature of which can be definitively assessed on the basis of only those elements.
- 36 The Court has repeatedly held that the national court must investigate of its own motion whether a term in the contract which gave rise to the dispute before it, concluded between a seller or supplier and a consumer, comes within the scope of Directive 93/13 (see, to that effect, judgments of 9 November 2010, *VB Pénzügyi Lízing*, C-137/08, EU:C:2010:659, paragraph 56, and of 7 November 2019, *Profi Credit Polska*, C-419/18 and C-483/18, EU:C:2019:930, paragraph 66).

- 37 In the same way, and as the Advocate General stated, in essence, in points 61 to 64 of his Opinion, if the elements of law and fact in the file before the national court give rise to serious doubts as to the unfair nature of certain clauses which were not invoked by the consumer but which are related to the subject matter of the dispute, without it being possible to make definitive assessments in that regard, then it is for the national court to take, if necessary of its own motion, investigative measures in order to complete that case file, by asking the parties, in observance of the principle of *audi alteram partem*, to provide it with the clarifications or documents necessary for that purpose.
- 38 It follows from this that the national court is required to take *ex officio* investigative measures such as those referred to in the previous paragraph, provided that the elements of law and fact already contained in that file raise serious doubts as to the unfair nature of certain terms which, despite not having been challenged by the consumer, are connected to the subject matter of the dispute, and that, as a result, the implementation of the *ex officio* examination incumbent on that court requires such investigative measures to be taken.
- 39 In the present case, it seems to follow from the considerations set out in paragraph 22 above that the referring court proceeds from the assumption that the terms which Ms Lintner did not challenge are not connected to the subject matter of the dispute in the main proceedings, since the appropriate course of action to be followed as regards her claims, which specifically refer to the terms which allow UniCredit Bank to unilaterally change the contract, is in no way dependent on a decision regarding those unchallenged terms. In this case, the duty of *ex officio* examination resulting from Directive 93/13 does not extend to those terms, subject to verifications that the referring court must, where necessary, carry out as regards the precise subject matter of the dispute in the light of Ms Lintner's claims and the pleas in law raised by her. This finding is, however, without prejudice to the fact that Ms Lintner could, if necessary, under the applicable national law, bring a new action concerning the terms of the contract which were not the subject matter of her initial action or extend the subject matter of the dispute before the referring court on the invitation of the latter or on her own initiative.
- 40 Furthermore, the fact that Ms Lintner is represented by a lawyer does not affect the preceding analysis since the general issue of the scope of the national court's duty to make an *ex officio* examination must be settled independently of the specific circumstances of each case (see, by analogy, judgment of 4 October 2007, *Rampion and Godard*, C-429/05, EU:C:2007:575, paragraphs 62 and 65).
- 41 Lastly, it should be borne in mind, first, that, under Article 8 of Directive 93/13, 'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer'. As a result, Member States remain free to make provision, in their national law, for a more extensive *ex officio* examination than that which their courts must carry out under that directive, in accordance with the reasoning set out in paragraphs 28 to 38 above.
- 42 Second, where the national court — after establishing, on the basis of the matters of fact and law which it had 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 that directive — finds, following the 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 (see, to that effect, judgments of 21 February 2013, *Banif Plus Bank*, C-472/11, EU:C:2013:88, paragraphs 31 and 32, and of 7 November 2019, *Profi Credit Polska*, C-419/18 and C-483/18, EU:C:2019:930, paragraph 70).
- 43 Third, the national court is not required under Directive 93/13 to exclude the possibility that such contractual terms 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 (judgment of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 33).

44 Having regard to the foregoing considerations, the answer to the first question is that Article 6(1) of Directive 93/13 must be interpreted as meaning that a national court, hearing an action brought by a consumer seeking a declaration that certain terms in a contract that it entered into with a professional are unfair, is not required to examine of its own motion and individually all the other contractual terms, which were not challenged by that consumer, in order to ascertain whether they can be considered unfair, but must examine only those terms which are connected to the subject matter of the dispute, as delimited by the parties, where it has available to it the legal and factual elements necessary for that task, as supplemented, where necessary, by measures of inquiry.

The second and third questions

45 By the second and third questions, which should be examined together, the referring court asks, in essence, whether Article 4(1) and Article 6(1) of Directive 93/13 must be interpreted as meaning that, if, in order to assess whether the contractual term forming the basis of a consumer's claim is unfair all the other terms of the contract that the consumer concluded with a professional should be taken into consideration, does taking such terms into account entail, as such, an obligation on the national court hearing the case to examine of its own motion whether all those terms are unfair.

46 In that regard the Court has noted that, in accordance with Article 4(1) of Directive 93/13, 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 (judgment of 21 February 2013, *Banif Plus Bank*, C-472/11, EU:C:2013:88, paragraph 41).

47 That obligation to take account of all the other terms of the contract concluded between a professional and a consumer can be explained by the fact that the examination of the contested term must take into account all the elements that may be relevant to understanding that term in its context, in so far as, depending on the content of that contract, it may be necessary, for the purpose of assessing whether that term is unfair, to assess the cumulative effect of all the terms of that contract (see, to that effect, judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 95).

48 However, as is clear from the considerations set out in the context of the analysis of the first question, and as the Advocate General also stated in point 75 of his Opinion, it does not follow that the national court is required to examine of its own motion those other terms autonomously for unfairness as part of the assessment it makes under Article 6(1) of Directive 93/13.

49 Having regard to the foregoing considerations, the answer to the second and third questions is that Article 4(1) and Article 6(1) of Directive 93/13 must be interpreted as meaning that, while all the other terms of the contract concluded between a professional and that consumer should be taken into consideration in order to assess whether the contractual term forming the basis of a consumer's claim is unfair, taking such terms into account does not entail, as such, an obligation on the national court hearing the case to examine of its own motion whether all those terms are unfair.

Costs

50 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 (Third Chamber) hereby rules:

- 1. Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court, hearing an action brought by a consumer seeking to establish the unfair nature of certain terms in a contract that that**

consumer concluded with a professional, is not required to examine of its own motion and individually all the other contractual terms, which were not challenged by that consumer, in order to ascertain whether they can be considered unfair, but must examine only those terms which are connected to the subject matter of the dispute, as delimited by the parties, where that court has available to it the legal and factual elements necessary for that task, as supplemented, where necessary, by measures of inquiry.

- 2. Article 4(1) and Article 6(1) of Directive 93/13 must be interpreted as meaning that, while all the other terms of the contract concluded between a professional and that consumer should be taken into consideration in order to assess whether the contractual term forming the basis of a consumer's claim is unfair, taking such terms into account does not entail, as such, an obligation on the national court hearing the case to examine of its own motion whether all those terms are unfair.**

[Signatures]

* Language of the case: Hungarian.