

**Árpád Kásler
and
Hajnalka Káslerné Rábai**

v

OTP Jelzálogbank Zrt

(Request for a preliminary ruling from the Kúria)

(Directive 93/13/EEC — Unfair terms in a contract concluded between a seller or supplier and a consumer — Articles 4(2) and 6(1) — Assessment of the unfairness of the contractual terms — Exclusion of terms relating to the main subjectmatter of the contract or the adequacy of the price and the remuneration provided they are drafted in plain intelligible language — Consumer credit contracts denominated in foreign currency — Terms relating to the exchange rate — Difference between the buying rate of exchange applicable to the advance of the loan and the selling rate of exchange applicable to its repayment — Powers of the national court when dealing with a term considered to be unfair — Substitution of the unfair term by a supplementary provision of national law — Whether lawful)

Summary — Judgment of the Court (Fourth Chamber), 30 April 2014

1. *Consumer protection — Unfair terms in consumer contracts — Directive 93/13 — Scope — Terms defining the main subject-matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration — Concept — Term incorporated in a loan agreement denominated in a foreign currency concluded between a seller or supplier and a consumer which was not individually negotiated — Not included*

(Council Directive 93/13, Art. 4(2))

2. *Consumer protection — Unfair terms in consumer contracts — Directive 93/13 — Scope — Terms defining the main subject-matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration — Not included — Conditions — Obligation to satisfy the requirement that terms are to be drafted in plain intelligible language — Scope*

(Council Directive 93/13, Art. 4(2))

3. *Consumer protection — Unfair terms in consumer contracts — Directive 93/13 — Declaration of unfairness of a contractual term — Scope — National law enabling the national court declaring an unfair term to be invalid to substitute for it a supplementary provision of national law — Whether permissible*

(Council Directive 93/13, Art. 6(1))

1. Article 4(2) of Directive 93/13 on unfair terms in consumer contracts must be interpreted as meaning that the expression the ‘main subjectmatter of a contract’ covers a term, incorporated in a loan agreement denominated in foreign currency concluded between a seller or supplier and a consumer and not individually negotiated, pursuant to which the selling rate of exchange of that currency is applied for the purpose of calculating the repayment instalments for the loan, only in so far as it is found, which it is for the national court to ascertain having regard to the nature, general scheme and stipulations of the contract and its legal and factual context, that that term lays down an essential obligation

of that agreement which, as such, characterises it. Such a term, in so far as it contains a pecuniary obligation for the consumer to pay, in repayment of instalments of the loan, the difference between the selling rate of exchange and the buying rate of exchange of the foreign currency, cannot be considered as ‘remuneration’ the adequacy of which as consideration for a service supplied by the lender cannot be the subject of an examination as regards unfairness under Article 4(2) of Directive 93/13.

Taking account of the fact that Article 4(2) of Directive 93/13 represents a derogation and the ensuing necessity of its being interpreted strictly, contractual terms falling within the notion of the ‘main subject-matter of the contract’, within the meaning of that provision, must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it. By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within the notion of the ‘main subject-matter of the contract’ within the meaning of that article.

In that connection, it is clear from the wording of Article 4(2) of that directive that the category of terms which concerns adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other which cannot be examined as regards unfairness is limited in scope, for that exclusion concerns only the adequacy of the price or remuneration as against the services or goods supplied in exchange.

Therefore, the exclusion of the assessment of the unfairness of a term being limited to the adequacy of the price and the remuneration on one hand as against the services or goods supplied on the other, it cannot apply where there is a challenge to the variation between the selling rate of exchange of a foreign currency, which must be used in accordance with that term in order to calculate the repayment instalments, and the buying rate of exchange of that currency, which must be used in accordance with other terms of the loan agreement in order to calculate the amount of the loan advanced.

(see paras 49, 50, 54, 57, 59, operative part 1)

2. If a term falls within the ‘main subjectmatter of the contract’, within the meaning of Article 4(2) of Directive 93/13 on unfair terms in consumer contracts, an assessment of the unfairness of that term may be avoided only if it is drafted in clear and intelligible language.

Article 4(2) of Directive 93/13 must be interpreted as meaning that the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term be grammatically intelligible to the consumer, but also that the contract set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.

Furthermore, as regards the particularities of the mechanism for conversion of the foreign currency, it is for the referring court to determine whether, having regard to all the relevant information, including the promotional material and information provided by the lender in the negotiation of the loan agreement, the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the existence of the difference, generally observed on the securities market, between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to assess the potentially significant economic consequences for him resulting from the application of the selling rate of exchange for the calculation of the repayments for which he would ultimately be liable and, therefore, the total cost of the sum borrowed.

(see paras 61, 74, 75, operative part 2)

3. Article 6(1) of Directive 93/13 on unfair terms in consumer contracts must be interpreted as meaning that, in a situation in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, that provision does not preclude a rule of national law enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law.

The substitution of an unfair term for a supplementary provision of national law is consistent with the objective of Article 6(1) of Directive 93/13, since that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties a real balance re-establishing equality between them, and not to annul all contracts containing unfair terms.

However, if it were not permissible to replace an unfair term with a supplementary provision, requiring the court to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, so that the dissuasive effect resulting from the annulment of the contract could well be jeopardised.

Therefore, the consequence of such an annulment is that, in general, the outstanding balance of the loan becomes due forthwith, which is likely to be in excess of the consumer's financial capacities and, as a result, tends to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts.

(see paras 82-85, operative part 3)