

Case C-243/08

Pannon GSM Zrt.

v

Erzsébet Sustikné Győrfi

(Reference for a preliminary ruling from the Budaörsi Városi Bíróság)

(Directive 93/13/EEC – Unfair terms in consumer contracts – Legal effects of an unfair term – Power of and obligation on the national court to examine of its own motion the unfairness of a term conferring jurisdiction – Criteria for assessment)

Summary of the Judgment

1. *Approximation of laws – Unfair terms in consumer contracts – Directive 93/13*

(Council Directive 93/13, Art. 6)

2. *Approximation of laws – Unfair terms in consumer contracts – Directive 93/13*

(Council Directive 93/13)

3. *Approximation of laws – Unfair terms in consumer contracts – Directive 93/13*

(Council Directive 93/13, Art. 3)

1. Article 6(1) of Council Directive 93/13 on unfair terms in consumer contracts must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand.

The aim of Article 6 of that directive, which is to strengthen consumer protection, would not be achieved if the consumer were himself obliged to raise the unfairness of contractual terms. In addition, effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.

(see paras 23, 28, operative part 1)

2. The national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application. That duty is also incumbent on the national court when it is ascertaining its own territorial jurisdiction.

The court seised of the action is required to ensure the effectiveness of the protection intended to be given by the provisions of Directive 93/13 on unfair terms in consumer contracts. Consequently, the role thus attributed to the national court by Community 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, including when it is assessing whether it has territorial jurisdiction. In carrying out that obligation, the national court is not, however, required under that 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 paras 32-33, 35, operative part 2)

3. It is for the national court to determine whether a contractual term, such as a term conferring jurisdiction, satisfies the criteria to be categorised as unfair within the meaning of Article 3(1) of Directive 93/13 on unfair terms in consumer contracts. In so doing, the national court must take account of the fact that a term, contained in a contract concluded between a consumer and a seller or supplier, which has been included without being individually negotiated and which confers exclusive jurisdiction on the court

in the territorial jurisdiction of which the seller or supplier has his principal place of business, may be considered to be unfair.

(see para. 44, operative part 3)

JUDGMENT OF THE COURT (Fourth Chamber)

4 June 2009 (*)

(Directive 93/13/EEC – Unfair terms in consumer contracts – Legal effects of an unfair term – Power of and obligation on the national court to examine of its own motion the unfairness of a term conferring jurisdiction – Criteria for assessment)

In Case C-243/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Budaörsi Városi Bíróság (Hungary), made by decision of 22 May 2008, received at the Court on 2 June 2008, in the proceedings

Pannon GSM Zrt.

v

Erzsébet Sustikné Győrfi,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, R. Silva de Lapuerta (Rapporteur), E. Juhász and J. Malenovský, Judges

Advocate General: V. Trstenjak,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 2 April 2009,

after considering the observations submitted on behalf of:

- Pannon GSM Zrt., by J. Vitári, C. Petia and M.B. Bíró, ügyvédek,
- the Hungarian Government, by J. Fazekas, R. Somssich, K. Borvölgyi and M. Fehér, acting as Agents,
- the Czech Government, by M. Smolek, acting as Agent,
- the Spanish Government, by J. López-Medel Bascones, acting as Agent,
- the French Government, by B. Cabouat and R. Loosli-Surrans, acting as Agents,
- the Austrian Government, by C. Pesendorfer and A. Hable, acting as Agents,

- the United Kingdom Government, by S. Ossowski, acting as Agent, and by T. de la Mare, Barrister,
 - the Commission of the European Communities, by W. Wils and B. Simon, acting as Agents,
- having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation 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 reference has been made in the course of proceedings between Pannon GSM Zrt. (‘Pannon’) and Mrs Sustikné Győrfi relating to the performance of a telephone subscription contract concluded between those parties.

Legal context

Community legislation

- 3 According to Article 1(1) of the Directive, its purpose is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.
- 4 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.
- ...
3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.’
- 5 Subparagraph (q) of paragraph 1 of that annex refers to terms which have the object or effect of:
- ‘excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy ...’
- 6 Article 4(1) of the Directive provides:
- ‘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.’
- 7 Article 6(1) of the Directive states:
- ‘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.'

8 Article 7(1) and (2) of the Directive states:

'1. 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.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'

National legislation

9 At the time of the facts at issue in the main proceedings, the Civil Code, in the version resulting from Law No CXLIX of 1997 (*Magyar Közlöny* 1997/115, 'the Civil Code'), and Government Decree No 18/1999 on terms to be considered unfair in consumer contracts (*Magyar Közlöny* 1998/8), in the version in force at the time of the dispute in the main proceedings, were applicable.

10 In accordance with Article 209(1) of the Civil Code, a party can challenge any general contractual term which it considers to be unfair. Under Article 209B(4) of that code, specific provisions set out terms which are regarded as unfair in consumer contracts. Under Article 235(1) of the Civil Code, where a challenge to a term is upheld, the contract in question loses its legal force from the date on which it was concluded. According to Article 236(1) of the Civil Code, a challenge to a term of the contract must be communicated in writing to the other party within a period of one year.

11 Government Decree No 18/1999, in the version in force at the time of the dispute in the main proceedings, classes the contractual terms in two categories. The first category contains those contractual terms the use of which is prohibited in consumer contracts, and which are, consequently, null and void. The second category contains terms presumed to be unfair until evidence to the contrary is presented, the party which drafted that term being entitled to rebut that presumption.

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

12 On 12 December 2004, Mrs Sustikné Győrfi entered into a subscription contract with Pannon for the provision of mobile telephone services. The contract was concluded on the basis of a form supplied by Pannon which stipulated that, by signing the contract, Mrs Sustikné Győrfi acknowledged the applicable terms and conditions, including the general contractual conditions forming an integral part of the contract, and accepted their content.

13 Under those terms and conditions, the two parties to the main proceedings accepted that the court for the place where Pannon has its principal place of business has jurisdiction for any dispute arising from the subscription contract or in relation to it. That term conferring jurisdiction was not individually negotiated by the two parties.

14 Taking the view that Mrs Sustikné Győrfi had not complied with her contractual obligations, Pannon applied, pursuant to that term, to the Budaörsi Városi Bíróság (Budaörs District Court) for an order for payment, it being the court in the territorial jurisdiction of which Pannon has its principal place of business.

15 That court made the order sought by Pannon. Mrs Sustikné Győrfi then filed, within the prescribed time-limit, a statement of opposition to that order, and the proceedings thereby became contentious.

- 16 That court noted that Mrs Sustikné Győrfi's place of residence was not within its jurisdiction. It held that Mrs Sustikné Győrfi, who receives invalidity benefit, has her place of residence in Dombegyház, in the judicial district of Békés, 275 km from Budaörs, and indicated that means of transport between Budaörs and Dombegyház are very limited on account of the lack of a direct train or bus service.
- 17 The Budaörsi Városi Bíróság observed that the applicable rules of procedure provide that the court with territorial jurisdiction is the court for the place where Mrs Sustikné Győrfi resides, that is to say, the Battonyai Városi Bíróság (Battonya District Court).
- 18 The referring court explained that the Code of Civil Procedure provides that the court, in the district in question, must raise, of its own motion, the issue of territorial jurisdiction. However, as the jurisdiction is not exclusive, it is no longer possible to raise that issue after the first filing by the defendant of her defence to the substance of the dispute. The court which is seised may examine the accuracy of the facts relied on, to establish that it has jurisdiction, only where they are inconsistent with self-evident facts or facts of which the court has knowledge *ex officio*, or if such facts are impossible to prove or the other party disputes them.
- 19 In those circumstances, the Budaörsi Városi Bíróság, entertaining doubts as to the possible unfairness of the term conferring jurisdiction in the general conditions of the contract at issue, decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:
- ‘1. Can Article 6(1) of ... Directive [93/13] – pursuant to which Member States are to provide 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 – be construed as meaning that the non-binding nature vis-à-vis the consumer of an unfair term introduced by the seller or supplier does not have effect ipso jure but only where the consumer successfully contests the unfair term by lodging the relevant application?
 2. Does the consumer protection provided by Directive [93/13] require the national court of its own motion – irrespective of the type of proceedings in question and of whether or not they are contentious – to determine that the contract before it contains unfair terms, even where no application has been lodged, thereby carrying out, of its own motion, a review of the terms introduced by the seller or supplier in the context of exercising control over its own jurisdiction?
 3. In the event that the second question is answered in the affirmative, what are the factors which the national court must take into account and evaluate in the context of exercising this control?’

The questions referred

The first question

- 20 By this question, the referring court wishes to know whether Article 6(1) of the Directive, pursuant to which unfair terms used in a contract concluded with a consumer by a seller or supplier are not binding on the consumer, must be interpreted as meaning that it is only where the consumer has successfully challenged such a term that he is not bound by it.
- 21 In order to reply to the question referred, it should be recalled, at the outset, that the obligation imposed on the Member States under Article 6(1) of the Directive is intended to accord a right to the citizen, in his role as a consumer, and defines the result sought by the Directive (see Case C-144/99 *Commission v Netherlands* [2001] ECR I-3541, paragraph 18, and Case C-478/99 *Commission v Sweden* [2002] ECR I-4147, paragraphs 16 and 18).
- 22 Thus, the system of protection introduced 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 (Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25).

- 23 The Court also held, in paragraph 26 of that judgment, that the aim of Article 6 of the Directive would not be achieved if the consumer were himself obliged to raise the unfairness of contractual terms, and that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.
- 24 It must be pointed out, in that regard, that, if that power is to be granted to the national court, Article 6(1) of the Directive cannot be interpreted as meaning that it is only in the event that the consumer has brought a specific application in relation to it, that an unfair contract term is not binding on that consumer. Such an interpretation would rule out the possibility of the national court assessing, of its own motion, in the context of examining the admissibility of the action which is before it, and without a specific application from the consumer to that effect, the unfairness of a contractual term.
- 25 As regards the legal effects of an unfair term, the Court stated, in Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 36, that the importance of consumer protection has led the Community legislature to lay down, in Article 6(1) of the Directive, that unfair terms used in a contract concluded with a consumer by a seller or supplier 'shall ... not be binding on the consumer'. It emphasised that it is a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.
- 26 The Court added further, in paragraph 37 of that judgment, that as the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the European Community and, in particular, to raising the standard of living and the quality of life in its territory.
- 27 Consequently, the expression 'as provided for under their national law', set out in Article 6(1) of the Directive, cannot be understood as enabling Member States to subject the non-binding status of an unfair term to a condition such as that mentioned in the first question referred.
- 28 Therefore, the reply to the first question is that Article 6(1) of the Directive must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand.

The second question

- 29 By this question, the referring court asks the Court about the obligations on the national court, by reason of the provisions of the directive, in order to determine whether the national court, in the context of assessing its jurisdiction and irrespective of the type of action, must rule, if necessary of its own motion, on the unfairness of a contractual term.
- 30 In order to reply to that question, it should be recalled that, in Case C-473/00 *Cofidis* [2002] ECR-10875, paragraph 34, the Court has held that the protection which the Directive confers on consumers extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfairness of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve.
- 31 It should also be pointed out that the Court has held, in *Mostaza Claro*, paragraph 38, that the nature and importance of the public interest underlying the protection which the Directive confers on consumers justify the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.

32 The court seised of the action is therefore required to ensure the effectiveness of the protection intended to be given by the provisions of the Directive. Consequently, the role thus attributed to the national court by Community 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, including when it is assessing whether it has territorial jurisdiction.

33 In carrying out that obligation, the national court is not, however, 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.

34 In those circumstances, the specific characteristics of the procedure for determining jurisdiction, which takes place under national law between the seller or supplier and the consumer, cannot constitute a factor which is liable to affect the legal protection from which the consumer must benefit under the provisions of the Directive.

35 The reply, therefore, to the second question is that the national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application. That duty is also incumbent on the national court when it is ascertaining its own territorial jurisdiction.

The third question

36 By this question, the national court seeks guidance on the factors which it must consider in assessing the possible unfairness of a contractual term.

37 In order to reply to that question, it should be noted that in referring to concepts of good faith and significant imbalance between the rights and obligations of the parties, Article 3 of the Directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 19).

38 In that context, the Annex to which Article 3(3) of the Directive refers contains only an indicative and non-exhaustive list of terms which may be regarded as unfair (*Freiburger Kommunalbauten*, paragraph 20).

39 Furthermore, Article 4 of the Directive provides that the unfairness of a contractual term is to 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 it.

40 However, as regards the term which is the subject-matter of the dispute in the main proceedings, it should be borne in mind that, in *Océano Grupo Editorial and Salvat Editores*, paragraphs 21 to 24, the Court has held that, in a contract concluded between a consumer and a seller or supplier within the meaning of the Directive, a term, drafted in advance by the seller or supplier – which was not subject to individual negotiation – the purpose of which is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller has his principal place of business, satisfies all the criteria necessary for it to be judged unfair for the purposes of the Directive.

41 As the Court stated in *Océano Grupo Editorial and Salvat Editores*, paragraph 22, a term of this kind obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. The Court therefore concluded that such a term falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive.

42 While it is true that the Court, in exercising the jurisdiction conferred on it by Article 234 EC, in *Océano Grupo Editorial and Salvat Editores*, paragraph 22, interpreted the general criteria used by the Community legislature in order to define the concept of unfair terms, it cannot however rule on the application of those general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question (see *Freiburger Kommunalbauten*, paragraph 22).

43 It is for the national court, in the light of the foregoing, to assess whether a contractual term may be categorised as unfair within the meaning of Article 3(1) of the Directive.

44 In those circumstances, the reply to the third question is that it is for the national court to determine whether a contractual term, such as that which is the subject-matter of the dispute in the main proceedings, satisfies the criteria to be categorised as unfair within the meaning of Article 3(1) of the Directive. In so doing, the national court must take account of the fact that a term, contained in a contract concluded between a consumer and a seller or supplier, which has been included without being individually negotiated and which confers exclusive jurisdiction on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business may be considered to be unfair.

Costs

45 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 (Fourth 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 an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand.**
- 2. The national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application. That duty is also incumbent on the national court when it is ascertaining its own territorial jurisdiction.**
- 3. It is for the national court to determine whether a contractual term, such as that which is the subject-matter of the dispute in the main proceedings, satisfies the criteria to be categorised as unfair within the meaning of Article 3(1) of Directive 93/13. In so doing, the national court must take account of the fact that a term, contained in a contract concluded between a consumer and a seller or supplier, which has been included without being individually negotiated and which confers exclusive jurisdiction on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business may be considered to be unfair.**

[Signatures]