ECLI:EU:C:2023:311

Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

20 April 2023 (*)

(Reference for a preliminary ruling – Unfair terms in consumer contracts – Directive 93/13/EEC – Articles 3 to 6 – Criteria for assessing the unfairness of a contractual term – Requirement of transparency – Group insurance contract – Permanent invalidity of the consumer – Duty to provide information – Non-disclosure of a term limiting or excluding cover against the insured risk)

In Case C-263/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal de Justiça (Supreme Court, Portugal), made by decision of 8 April 2022, received at the Court on 20 April 2022, in the proceedings

Ocidental – Companhia Portuguesa de Seguros de Vida, SA

v

LP,

intervening parties:

Banco Comercial Português SA,

Banco de Investimento Imobiliário SA,

THE COURT (Ninth Chamber),

composed of L. S. Rossi, President of the Chamber, S. Rodin and O. Spineanu-Matei (Rapporteur), Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– LP, by E. Abreu, advogada,

– the Portuguese Government, by P. Barros da Costa, L. Medeiros, A. Pimenta and A. Rodrigues, acting as Agents,

– the European Commission, by I. Melo Sampaio, I. Rubene and N. Ruiz García, 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 Article 3(1) and (3), Article 4(2) and Article 5 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 Ocidental – Companhia Portuguesa de Seguros de Vida SA ('Ocidental'), an insurance company with its registered office in Portugal, and LP, a consumer, concerning the refusal by the former to make loan repayments further to the permanent invalidity of the latter, as an insured person, on account of the alleged nullity or inapplicability of the insurance contract between Ocidental and LP.

Legal context

European Union law

3 Under the 16th and 20th recitals of Directive 93/13:

'… in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account;

…

'… contracts should be drafted in plain, intelligible language, 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.'

4 Article 3 of that 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.

…

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

5 Article 4 of that directive is worded as follows:

'(1) 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.

(2) Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplie[d] in exchange, on the other, in so far as these terms are in plain intelligible language.'

6 Article 5 of that directive states:

'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. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).'

7 Article 6(1) of Directive 93/13 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.'

8 The annex to that directive, entitled 'Terms referred to in Article 3(3)', is worded as follows:

'(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;

…

…'

Portuguese law

Decree-Law No 176/95

9 Article 4, headed 'Group insurance', of Decreto-Lei No 176/95 (Estabelece regras de transparência para a actividade seguradora e disposições relativas ao regime jurídico do contrato de seguro) (Decree-Law No 176/95 laying down rules of transparency in respect of insurance activities

and provisions on insurance contracts) of 26 July 1995 (*Diário da República* I, Series I-A, No 171, of 26 July 1995, p. 4740) provides:

‘(1) In relation to group insurance policies, the policy holder must in all cases inform the insured of the cover and exclusions agreed, the obligations and rights in the event of a claim and any subsequent changes that occur in relation to the foregoing, in accordance with a model drawn up by the insurer.

(2) It is incumbent on the policyholder to demonstrate that it has provided the information referred to in the preceding paragraph.

(3) In respect of contributory group insurance policies, if the policy holder fails to comply with paragraph 1 above it must, at its own expense, pay the part of the premium corresponding to the insured, without the insured losing any form of cover, until the policy holder demonstrates that it has complied with that obligation.

(4) The contract may provide that the insurer takes over the obligation of informing the insured, referred to in paragraph 1.

(5) In respect of group insurance policies, the insurer must provide the insured, at their request, with all the information necessary in order properly to understand the contract.’

Decree-Law No 446/85

10 Article 5, headed ‘Notification’, of Decreto-Lei nº 446/85 (Institui o regime jurídico das cláusulas contratuais gerais) (Decree-Law No 446/85 laying down the legal rules on general contractual conditions) of 25 October 1985 (*Diário da República* I, Series I-A, No 246, of 25 October 1985, p. 3533), provides:

‘(1) The full text of the general contractual conditions must be notified to persons becoming parties to it who merely sign or accept those conditions.

(2) The conditions must be notified by appropriate means and in sufficient time to enable any normally diligent person effectively and fully to become acquainted with them, having regard to the value of the contract and the length and complexity of the terms.

(3) The contracting party that presents the general contractual conditions to the other party must demonstrate that it has appropriately and effectively notified those conditions.’

11 Under Article 8 of that decree-law:

‘The following shall be deemed to be excluded from the individual contracts:

(a) any terms that have not been notified in accordance with Article 5;

…’

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

12 LP and her spouse entered into a loan agreement with Banco de Investimento Imobiliário SA (‘the bank’). In that context, they became party to a group insurance contract (‘the insurance

contract'), agreed between that bank, as the policyholder, and Ocidental, an insurance company, under which the latter would be required to make the loan repayments in the event of LP's permanent incapacity.

13 In the course of the performance of the loan agreement, LP was permanently incapacitated. Ocidental refused, however, to perform that insurance contract on the ground that the latter was void on account of incorrect and/or incomplete declarations concerning LP's state of health at the time when the insurance contract was concluded. Ocidental also relied on the applicability of the provisions of that contract providing for the exclusion of cover against the risk of permanent incapacity of the insured person resulting from illness prior to the conclusion of that insurance contract.

14 LP submitted an application seeking, in essence, an order requiring Ocidental to pay to the bank the outstanding amount of the loan after the date on which her permanent incapacity was established and to pay her the loan instalments which she and her spouse had themselves had to pay to the bank from that date. According to the information set out in the request for a preliminary ruling, LP argued, in support of her application, that the medical information contained in the proposal to become party to the insurance contract had been completed by the bank employee who had presented that contract to her for signature, that she did not complete any questionnaire concerning her state of health and that she signed that proposal to become party to the insurance contract. She claims that no clause concerning exclusion of cover against the insured risk was read or explained to her. Accordingly, the exclusion clauses should be regarded as not written and devoid of legal effect.

15 The bank was granted leave to intervene in the proceedings in support of the form of order sought by LP.

16 The court of first instance held that the insurance contract was void on account of incorrect or incomplete statements made by LP and dismissed the latter's application.

17 LP's appeal against that dismissal was upheld in part by the Tribunal da Relação do Porto (Court of Appeal, Oporto, Portugal), which, applying Decree-Law No 446/85 but without having examined the question in the light of the specific legislation on group insurance laid down by Decree-Law No 176/95, held, in essence, that the insurance contract was valid, but that the clauses excluding cover against the insured risk had to be deemed not written since they had not been notified to LP.

18 Ocidental brought an appeal against that decision before the Supremo Tribunal de Justiça (Supreme Court, Portugal), the referring court.

19 That court considers that the central question in the main proceedings is whether, in circumstances such as those at issue in the main proceedings, an insurance company is required to notify a party to an insurance contract of the terms of that contract, including the clauses relating to the invalidity of that party and those relating to the exclusion or limitation of cover against the insured risk. Furthermore, it would also be necessary to ascertain, in the event that such an obligation to notify is incumbent on the policyholder, whether a failure by the latter – in this case, the bank – to comply with that obligation is enforceable against the insurance company.

20 In that regard, the referring court notes that Portuguese case-law is not unanimous. According to one line of case-law, the legislative scheme relating to group insurance, laid down by Decree-Law No 176/95, is a special scheme that precludes the application of the general legislation on

terms that have not been individually negotiated, provided for by Decree-Law No 446/85. The referring court states that it must therefore be found that, since the insurer is not legally subject to the duties to notify and to provide information about the general conditions of a group insurance contract – which duties are incumbent, pursuant to Article 4 of Decree-Law No 176/95, on the policyholder – and, accordingly, the insured cannot rely, against the insurer, on a failure to discharge those duties.

21 Under another line of case-law, that special scheme does not preclude the application of the general legislation laid down by Decree-Law No 446/85. That scheme imposes an obligation to notify parties of the general conditions and the exclusion thereof in the event of failure to comply with that obligation. Thus, according to the referring court, it must be held either that the insurer is bound by those obligations to inform and notify, or that the policyholder's failure to comply with those obligations may be relied on against the insurer.

22 Referring to the case-law of the Court, the referring court entertains doubts as to the compatibility of the first line of case-law, set out in paragraph 20 of the present judgment, with the effectiveness to be given by the national court to the consumer protection afforded by Directive 93/13, having regard, in particular, to the referring court's obligation to assess the transparency and unfairness of contractual terms.

23 In those circumstances, the Supremo Tribunal de Justiça (Supreme Court, Portugal) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 5 of Directive 93/13/EEC, which provides that the "*terms offered to the consumer … must always be drafted in plain, intelligible language*", in the light of the twentieth recital of that directive, be interpreted as meaning that consumers must always have an opportunity to become acquainted with all the terms?

(2) Must Article 4(2) of Directive [93/13], according to which terms relating to the main subject matter of the contract are subject to assessment unless "*these terms are in plain intelligible*", be interpreted as meaning that it requires consumers always to have an opportunity to become acquainted with those terms?

(3) In the context of national legislation which allows the courts to review the unfairness of terms that have not been individually negotiated relating to the definition of the main subject matter of the contract: (i) in relation to a contributory group insurance contract, does Article 3(1) of Directive [93/13], in conjunction with point (i) in the indicative list referred to in Article 3(3), preclude the insurer from relying against the insured on a term excluding or limiting the insured risk, where that term has not been notified to the insured and with which, as a result, the insured has not had an opportunity to become acquainted; (ii) does the foregoing apply even where, at the same time, if the duties to notify and provide information about the terms have not been discharged, under the national legislation the policy holder is liable to pay compensation for damage caused to the insured where that compensation does not, however, restore the insured to the position in which he or she would have been had the insurance cover been effective?'

Consideration of the questions referred

The first and second questions

24 By its first and second questions, which it is appropriate to examine together, the referring court is asking, in essence, whether Article 4(2) and Article 5 of Directive 93/13, read in the light of

the 20th recital of that directive, must be interpreted as meaning that a consumer must always be given the opportunity, before entering into a contract, to become acquainted with the terms relating to the main subject matter of that contract, or even with all the terms of that contract.

25 Under the first sentence of Article 5 of that directive, the terms of contracts concluded with a consumer in written form are always to be drafted in plain, intelligible language. The Court has already stated that such a requirement has the same scope as that referred to in Article 4(2) of that directive, which makes the exception, provided for in the latter provision, subject to the mechanism for review by the national court of the unfairness of those terms, in particular those relating to the main subject matter of the contract, provided that those terms are drafted in plain, intelligible language (see, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 69, and of 3 March 2020, *Gómez del Mortal Guasch*, C-125/18, EU:C:2020:138, paragraph 46).

26 The Court has stated that the requirement of transparency of contractual terms, as resulting from those provisions, must be construed broadly and that it cannot be reduced merely to those terms being formally and grammatically intelligible. That requirement requires that an average consumer, who is reasonably well informed and reasonably observant and circumspect, is in a position to understand the specific functioning of that term and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term for his or her financial obligations (see, to that effect, judgments of 10 June 2021, *BNP Paribas Personal Finance*, C-609/19, EU:C:2021:469, paragraphs 42 and 43, and of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraphs 63 and 64 and the case-law cited).

27 As regards the time at which that information must be brought to the consumer's attention, the Court has already held that providing information, before concluding such a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer, since it is on the basis of that information in particular that the consumer decides whether he or she wishes to be bound by the terms drawn up in advance by the seller or supplier (see, to that effect, judgments of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 50 and the case-law cited, and of 12 January 2023, *D.V. (Lawyer's fees – Basis of an hourly rate)*, C-395/21, EU:C:2023:14, paragraph 39 and the case-law cited).

28 Thus, in a case where, as in the case in the main proceedings, a consumer had entered into a group insurance contract at the time of the conclusion of a loan agreement, the Court held that of fundamental importance to the consumer, for the purpose of complying with the requirement of transparency, is the information given prior to the conclusion of the contract concerning the conditions as to liability as well as, in particular, the information given concerning the specific features of the arrangements for covering the loan repayments payable to the lender in the event of the borrower's total incapacity for work, so that that consumer is in a position to evaluate, on the basis of plain, intelligible criteria, the economic consequences for him or her which derive from it. That information is necessary in order for the scope of the term concerned to be understood by the consumer, who cannot be required, when concluding related contracts, to have the same vigilance regarding the extent of the risks covered by that insurance contract as he or she would if he or she had concluded that contract and the loan contracts separately (see, to that effect, judgment of 23 April 2015, *Van Hove*, C-96/14, EU:C:2015:262, paragraphs 41 and 48).

29 Since the requirement of transparency of contractual terms thus interpreted by the Court entails the obligation to provide the consumer, prior to the conclusion of the contract, with all the

information necessary to enable the consumer to understand the economic consequences of those terms and to decide, in full knowledge of the facts, to be contractually bound, that requirement necessarily presupposes that the consumer is able to become acquainted with all the terms of a contract before the conclusion thereof.

30 The fact that those terms do or do not relate to the main subject matter of that contract is irrelevant in that regard. In order for the consumer to be able, in accordance with the objective pursued by that requirement of transparency, to decide in full knowledge of the facts whether he or she wishes to be bound by the terms drawn up in advance by the seller or supplier, he or she must necessarily, before making such a decision, have been able to become acquainted with the contract as a whole, since it is the terms of that contract taken as a whole that will determine, inter alia, the rights and obligations of the consumer under that contract. The Court has, moreover, already clarified that that requirement of transparency also applies where a term relates to the main subject matter of the contract (see, to that effect, judgment of 3 March 2020, *Gómez del Mortal Guasch*, C-125/18, EU:C:2020:138, paragraphs 46 and 47 and the case-law cited).

31 Such a requirement of prior knowledge of all the terms of a contract is, furthermore, clearly highlighted by the 20th recital of Directive 93/13, under which not only must contracts be drafted in plain, intelligible language, but the consumer should actually be given an opportunity to examine all the terms. Thus, the EU legislature emphasised the interest in obtaining prior knowledge of all the terms of a contract in order to enable the consumer to decide, in full knowledge of the facts, whether he or she wishes to be bound by those terms.

32 Furthermore, in so far as the referring court notes that the Portuguese legislation on group insurance constitutes, according to a certain interpretation in the case-law, a *lex specialis* which excludes the application of the general legislation relating to terms which have not been individually negotiated, it should be recalled that the requirement of transparency of contractual terms laid down by Directive 93/13 cannot be disregarded on the ground that there is a special legal scheme applicable to a certain type of contract. According to settled case-law, it is by reference to the capacity of the contracting parties that the directive defines the contracts to which it applies (see, to that effect, judgment of 21 March 2019, *Pourvin and Dijoux*, C-590/17, EU:C:2019:232, paragraph 23 and the case-law cited, and order of 10 June 2021, *X Bank*, C-198/20, not published, paragraph 24).

33 In that connection, it should also be recalled that the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the directive in question is fully effective and to achieving an outcome consistent with the objective pursued by it (judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 59 and the case-law cited).

34 In the light of the foregoing considerations, the answer to the first and second questions is that Article 4(2) and Article 5 of Directive 93/13, read in the light of the 20th recital of that directive, must be interpreted as meaning that a consumer must always be afforded the opportunity, before the conclusion of a contract, to become acquainted with all the terms that the latter contract contains.

The third question

35 According to settled case-law, in the procedure laid down in Article 267 TFEU, which provides for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to resolve the dispute before it. To that end, the Court may have to reformulate the questions referred to it and, in that context, to interpret all provisions of EU law which national courts require in order to resolve the disputes before them, even if those provisions are not expressly indicated in the questions referred to it by those courts (see, in particular, judgment of 4 October 2018, *Kamenova*, C-105/17, EU:C:2018:808, paragraph 21 and the case-law cited).

36 In that regard, it should be noted, in the first place, that, by its third question, the referring court is asking about the interpretation of Article 3(1) and (3) of Directive 93/13, read in conjunction with point 1(i) of the Annex thereto, and the consequences of that interpretation on the enforceability, by an insurance company against a consumer, in the context of a group insurance contract, of a clause excluding or limiting cover against the insured risk, with which that consumer has not had the opportunity to become acquainted before the conclusion of that contract. Although it is apparent from the request for a preliminary ruling that, in the present case, the consumer was unable to acquaint herself with the terms concerned before the conclusion of the insurance contract at issue in the main proceedings, that court does not state that that contract contains a term the aim or effect of which is, as stated in point 1(i) of that annex, that of 'irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'. It follows that it is not necessary to examine that question in the light of either Article 3(3) of that directive or that annex.

37 In the second place, it is apparent from the request for a preliminary ruling that, by that question, the referring court is seeking to ascertain, first, the consequences of a failure, before the conclusion of the contract, to become acquainted with terms relating to the main subject matter of a contract – such as terms relating to the exclusion or limitation of cover against the insured risk – on the assessment of the unfairness of those terms and, second, whether such terms, where they have not been the subject of prior notification to the consumer, may be enforced against the consumer where he or she has not been able to become acquainted therewith, and whether the fact that the policyholder could be held liable for that lack of knowledge is a factor which must be taken into account for the purposes of that assessment.

38 Consequently, it must be held that, by its third question, the referring court is asking, in essence, whether Article 3(1) and Articles 4 to 6 of Directive 93/13 must be interpreted as meaning that a term in an insurance contract relating to the exclusion or limitation of cover against the insured risk, with which the consumer could not have become acquainted prior to the conclusion of that contract, may be enforced against that consumer, even where the policyholder may be held liable for such a failure to become acquainted with such a term, and even though such liability does not place that consumer in the same situation as he or she would have been in had he or she benefited from that cover.

39 It is settled case-law that the Court's jurisdiction to examine whether a contractual term is unfair, within the meaning of Article 3(1) of Directive 93/13, concerns the interpretation of the criteria which the national court may or must apply when examining that term in the light of the provisions of that directive. It is therefore for that court to rule, in the light of those criteria, on the actual classification of a particular contractual term in the light of the specific circumstances of the case. It follows that the Court must confine itself to providing the referring court with guidance which the latter must take into account in order to assess whether the term at issue is unfair (see, to that effect, judgment of 3 September 2020, *Profi Credit Polska*, C-84/19, C-222/19 and C-252/19, EU:C:2020:631, paragraph 91 and the case-law cited).

40 In that connection, it should be borne in mind, in the first place, that with regard to Article 5 of Directive 93/13, the transparent nature of a contractual term is one of the elements to be taken into account in the assessment of whether that term is unfair, which is for the national court to carry out pursuant to Article 3(1) of that directive (judgment of 12 January 2023, *D.V. (Lawyer's fees – Basis of an hourly rate)*, C-395/21, EU:C:2023:14, paragraph 74 and the case-law cited).

41 While the non-transparent nature of a contractual term, due to a lack of plainness or intelligibility of that term, may be an element to be taken into account in the assessment of whether that term is unfair, a lack of transparency, due to the fact that it is impossible for the consumer to become acquainted with that term before the conclusion of the contract at issue, may, a fortiori, constitute such an element.

42 In the second place, in the context of the assessment of whether an contractual term is unfair, it is for that court to assess, having regard to all the circumstances of the case, first, the possible failure to observe the requirement of good faith and, second, the possible existence of a significant imbalance to the detriment of the consumer within the meaning of that provision (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 49 and the case-law cited). In accordance with Article 4(1) of that directive, that court is to carry out that assessment by referring, inter alia, to the time of conclusion of the contract and to all the circumstances attending the conclusion thereof.

43 In so far as concerns, first, the requirement of good faith, it should be noted, as is apparent from the 16th recital of Directive 93/13, that, in the context of the assessment of good faith, the national court must take account, in particular, of the strength of the bargaining positions of the parties and the question whether the consumer had an inducement to agree to the term concerned.

44 In the present case, subject to the checks to be carried out by the referring court, LP argued in that connection, in her written observations, that she and her husband were 'required' to take out the insurance contract in order to obtain the bank loan at issue with a view to purchasing a property. On that occasion, they merely signed the proposal to become party to that contract which was submitted to them by the bank, without ever having been informed of all of its content. That proposal to become party to the group insurance was completed by the bank employee who presented the contract to them for signature. LP signed that proposal without any term excluding cover against the insured risk taken out having been read to her.

45 Second, as to the question whether, contrary to the requirement of good faith, a term causes a significant imbalance in the contracting parties' rights and obligations arising under the contract to the detriment of the consumer, the national court must, according to settled case-law, assess whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations (see, in particular, judgments of 3 September 2020, *Profi Credit Polska*, C-84/19, C-222/19 and C-252/19, EU:C:2020:631, paragraph 93 and the case-law cited, and of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 98 and the case-law cited).

46 Consequently, in order to assess whether the terms of a contract, such as those at issue in the main proceedings, cause such an imbalance to the detriment of the consumer, account must be taken of all the circumstances which could have been known to the seller or supplier or the representative thereof at the time when the contract was concluded and which were of such a nature as to have an influence on the subsequent performance of that contract. The national court will therefore have to determine whether the consumer received all the information likely to have a bearing on the scope

of his or her obligations under that contract and enabling him or her to assess, in particular, the consequences of that contract.

47 In that regard, the fact that the consumer was unable to become acquainted with a contractual term prior to the conclusion of the contract at issue is an essential element in the assessment of whether that term is unfair, in so far as that fact could lead the consumer to assume obligations to which he or she would not otherwise have agreed and, consequently, could create a significant imbalance in the mutual obligations of the parties to the contract at issue.

48 In the present case, LP had no opportunity either to become acquainted with the terms of the insurance contract relating to the exclusion or limitation of cover against the insured risk or to inform Ocidental of her state of health at the time when that contract was concluded, since she did not complete any questionnaire concerning her state of health when she became party to that contract.

49 In those circumstances, the verification of which is a matter for the referring court, the application of such clauses excluding or limiting cover against the insured risk means that the consumer no longer benefits from that cover if that risk materialises, and that he or she must, in principle, make the loan repayments still due from the date of the finding of permanent incapacity due to a pre-existing health problem, of which he or she has not had the opportunity to inform the insurer. Where appropriate, he or she would have to pay at least part of those loan instalments where, under applicable national legislation, such as that at issue in the main proceedings, the bank is held liable for damage caused by the failure to notify the consumer of those terms, without, however, placing that consumer in the same position as he or she would have been if he had benefited from that cover. That consumer may therefore be faced with a situation in which, in the light of a loss of income as a result of his or her permanent incapacity, it is difficult, if not impossible, for him or her to make those loan repayments, when it is precisely against that risk that he or she wished to be insured by becoming party to an insurance contract such as that at issue in the main proceedings.

50 Thus, by not allowing the consumer concerned to become acquainted, prior to the conclusion of that contract, with the information relating to those contractual terms and all the consequences of the conclusion of that contract, the seller or supplier places that risk, arising from any permanent incapacity, in whole or at least in part, on that consumer.

51 If, following an assessment of the particular circumstances of the case, the referring court were to take the view that, in the present case, contrary to the requirement of good faith, Ocidental could not reasonably expect, in compliance with the requirement of transparency vis-à-vis LP, that the latter would, following individual negotiation, accept the contractual terms in question, that court would have to find that those terms were unfair.

52 According to settled case-law, once a term has been declared unfair and therefore void, it is for the national court, in accordance with Article 6(1) of Directive 93/13, to exclude the application of that term so that it does not produce binding effects on the consumer, unless the latter objects to this (judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 50).

53 In the present case, it would follow that the term excluding or limiting cover against the insured risk could not be enforced against LP. That finding could not be called into question by national legislation, such as that to which the referring court makes reference, pursuant to which a policyholder who fails to comply with the obligation, incumbent on the policyholder by virtue of

that legislation, to notify the consumer of the contractual terms, may have to pay compensation in respect of the damage suffered as a result of that lack of notification without, however, restoring the legal and factual situation that the consumer would have been in if he or she had benefited from that cover. That legislation, which concerns the consequences, in respect of civil liability, of that failure to notify, could not affect the unenforceability of a contractual term classified as unfair with regard to the consumer, pursuant to Directive 93/13.

54 Moreover, according to the settled case-law of the Court, a finding that a term in an agreement is unfair must allow the restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed (see, to that effect, judgment of 12 January 2023, *D.V. (Lawyer's fees – Basis of an hourly rate)*, C-395/21, EU:C:2023:14, paragraph 54 and the case-law cited)

55 The unenforceability of such a contractual term classified as unfair with regard to the consumer is, however, without prejudice to the possible consequences, in respect of the policyholder's civil liability vis-à-vis the insurer, of the fact that the policyholder failed to notify the consumer of that term.

56 It follows from all the foregoing considerations that Article 3(1) and Articles 4 to 6 of Directive 93/13 must be interpreted as meaning that, where a term of an insurance contract relating to the exclusion or limitation of cover against the insured risk, with which the consumer concerned could not have become acquainted prior to the conclusion of that contract, is found to be unfair by the national court, that court is required to exclude the application of that term in order that it may not produce binding effects with regard to that consumer.

Costs

57 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 (Ninth Chamber) hereby rules:

1. **Article 4(2) and Article 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in the light of the 20th recital of that directive,**

must be interpreted as meaning that a consumer must always be afforded the opportunity, before the conclusion of a contract, to become acquainted with all the terms that the latter contract contains.

2. **Article 3(1) and Articles 4 to 6 of Directive 93/13**

must be interpreted as meaning that where a term of an insurance contract relating to the exclusion or limitation of cover against the insured risk, with which the consumer concerned could not have become acquainted prior to the conclusion of that contract, is found to be unfair by the national court, that court is required to exclude the application of that term in order that it may not produce binding effects with regard to that consumer.

[Signatures]

* Language of the case: Portuguese.