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ECLI:EU:C:2023:555

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

6 July 2023 (*)

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Scope – Article 1(2) – Exclusion of contractual terms reflecting mandatory statutory or regulatory provisions – Credit agreement denominated in a foreign currency – Terms relating to the exchange rate – Presumption of knowledge of the law)

In Case C-593/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Specializat Cluj (Specialised Court, Cluj, Romania), made by decision of 23 May 2022, received at the Court on 12 September 2022, in the proceedings

FS,

WU

v

First Bank SA,

THE COURT (Eighth Chamber),

composed of M. Safjan, President of the Chamber, N. Piçarra and N. Jääskinen (Rapporteur),
Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– First Bank SA, by D. Barbu and R. Muraru, avocați,

- the Romanian Government, by M. Chicu, E. Gane and O.-C. Ichim, acting as Agents,
- the Portuguese Government, by P. Barros da Costa, A. Cunha, I. Gameiro and L. Medeiros, acting as Agents,
- the European Commission, by A. Boitos 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 1(2) 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 FS and WU, on the one hand, and First Bank SA, on the other, regarding a finding of unfairness in respect of a contractual term.

Legal context

European Union law

3 The thirteenth recital of Directive 93/13 states:

‘Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording “mandatory statutory or regulatory provisions” in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established’.

4 Article 1(2) of that directive provides:

‘The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.’

Romanian law

5 Article 970 of the Codul Civil (Civil Code), in the version applicable to the dispute in the main proceedings (‘the former Civil Code’), provided:

‘Agreements must be performed in good faith.

They shall be binding not only as regards what is specifically provided for therein but also as regards all the consequences which arise from equity, custom or law according to the nature of the obligation.’

6 Article 1578 of the former Civil Code stated:

‘The debt arising under a money loan shall always be limited to the numerical sum set out in the agreement.

Where there is an increase or a decrease in the value of the currency before the due date for payment, the debtor shall repay the numerical sum lent and shall be obliged to repay that sum only in currency that is legal tender at the time of payment.’

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

7 On 17 August 2007, the applicants in the main proceedings, as consumers, entered into a loan agreement of a value of 78 180 Swiss francs (CHF) (approximately EUR 78 500) with Piraeus Bank Romania SA, now First Bank.

8 In accordance with the term set out in the first sentence of Article 6.3 of the loan agreement, the applicants in the main proceedings were required to deposit, at the latest on the due date, the amount necessary for repayment into the current account opened with First Bank, in the currency indicated in the repayment schedule.

9 The applicants in the main proceedings brought an action before the Judecătoria Cluj-Napoca (Court of First Instance, Cluj-Napoca, Romania) seeking, first, a declaration that the terms of the loan agreement under which they had to bear the foreign exchange risk were unfair and invalid. Second, they requested that First Bank be ordered, in order to restore contractual balance, to calculate and collect the monthly instalments, interest and commissions at the rate of exchange between Swiss francs and Romanian lei announced by the Banca Națională a României (National Bank of Romania) on the day on which the agreement was concluded, with both retroactive and future effect, up to repayment of the loan, and to reimburse the sums paid in excess.

10 By judgment of 31 January 2018, that court dismissed that action. After noting that the applicants in the main proceedings were challenging the fact that there was no term protecting them from the exchange rate risk, it pointed out that the obligation to repay the loan in the currency in which it was granted reflected the principle of monetary nominalism enshrined in Article 1578 of the former Civil Code, so that the applicants in the main proceedings could not invoke ignorance of the effects of that obligation arising from the law itself.

11 The applicants in the main proceedings brought an appeal against that judgment before the Tribunalul Specializat Cluj (Specialised Court, Cluj, Romania), the referring court, claiming that the court of first instance had misapplied the principle of monetary nominalism enshrined in Article 1578 of the former Civil Code and that First Bank had failed to fulfil its obligation to provide information concerning the foreign exchange risk.

12 For its part, First Bank submits that the term at issue in the main proceedings reflects Article 1578 of the former Civil Code, which constitutes, in accordance with the second paragraph of Article 970 of that code, a mandatory provision of Romanian law. Thus, since that term does not fall within the scope of Directive 93/13, the first-instance court was right not to ascertain whether that term was unfair, in accordance with the national provision transposing Article 1(2) of that directive.

13 The referring court is uncertain as to the interpretation to be given to the expression ‘contractual terms which reflect [statutory] provisions’ within the meaning of Article 1(2) of Directive 93/13, in particular the verb ‘to reflect’ which appears in that provision.

14 It asks whether, in the present case, the fact that the term at issue in the main proceedings does not contain any reference either to Article 1578 of the former Civil Code or to the principle of ‘monetary nominalism’ and does not reproduce verbatim or paraphrase the content of that article precludes that term from being regarded as ‘reflecting’ that article.

15 In that regard, it asks, in particular, whether the consumer must be able to understand, on the basis of the contractual term at issue or in conjunction with other contractual terms, the consequences to which he or she is exposed, without having to consult national legislative texts which are not expressly or implicitly referred to in the contract concluded with the seller or supplier.

16 Lastly, the referring court observes that the Court’s case-law does not provide an answer to that question. In the cases that gave rise to the judgment of 9 July 2020, *Banca Transilvania* (C-81/19, EU:C:2020:532), and the order of 14 October 2021, *NSV and NM* (C-87/21, not published, EU:C:2021:860), in which Article 1578 of the former Civil Code was also at issue, the referring courts and the Court of Justice took as a basis the premiss that the contractual term the alleged unfairness of which was invoked reflected a supplementary provision of national law. As for the judgment of 21 December 2021, *Trapeza Peiraios* (C-243/20, EU:C:2021:1045), it concerned a case in which the term contested by the consumer paraphrased Article 291 of the Greek Civil Code.

17 In those circumstances, the Tribunalul Special Cluj (Specialised Court, Cluj) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 1(2) of [Directive 93/13] to be interpreted as meaning that:

(a) a “contractual term which reflects statutory provisions” must reproduce, in whole or in part, the corresponding legal rule set out in the relevant statutory provision;

or that

(b) a “contractual term which reflects statutory provisions” must contain an express reference to the corresponding legal rule set out in the relevant statutory provision;

or, on the contrary, that,

(c) in order for the exclusion from the scope of the analysis of the unfairness of a contractual term provided for in Article 1(2) of Directive 93/13 to be deemed to apply, it is sufficient to apply the general civil law rule that contracts are supplemented by the law, without any specific reference being made to the corresponding legal rule set out in the relevant statutory provision?

(2) Is Article 1(2) of [Directive 93/13] to be interpreted as meaning that, in the context of the special legal regime for the protection of consumer rights, it is excessive to take the view that the consumer is under an obligation to be familiar with the content of all the legal rules set out in the statutory provisions which supplement a contract, without the seller or supplier first providing the consumer with information to that effect?’

Consideration of the questions referred

The first question

18 By its first question, the referring court asks, in essence, whether Article 1(2) of Directive 93/13 must be interpreted as meaning that, in order to fall within the exclusion from the scope of that directive laid down by that provision, the term included in a loan agreement concluded between a consumer and a seller or supplier must reproduce, in whole or in part, the corresponding mandatory statutory or regulatory provision of national law or, at the very least, make an express reference to such a provision.

19 As a preliminary point, it should be noted that Article 1(2) of Directive 93/13 excludes from the scope of that directive terms ‘which reflect’, inter alia, mandatory statutory or regulatory provisions.

20 Furthermore, having regard to the objective of consumer protection referred to in that directive, the exception provided for in Article 1(2) thereof must be interpreted strictly (judgment of 21 December 2021, *Trapeza Peiraios*, C-243/20, EU:C:2021:1045, paragraph 37).

21 As regards, first, the expression ‘mandatory statutory or regulatory provisions’, it is apparent from settled case-law that that expression, read in the light of the thirteenth recital of that directive, encompasses both provisions of national law which apply between the parties to a contract independently of their choice and those which are supplementary in nature, that is to say, which apply by default in the absence of other arrangements established by the parties (judgment of 21 December 2021, *Trapeza Peiraios*, C-243/20, EU:C:2021:1045, paragraph 30 and the case-law cited).

22 Second, as regards the question whether a contractual term reflects, for the purposes of Article 1(2) of Directive 93/13, such a mandatory statutory or regulatory provision of national law, it should be recalled that the exclusion established by that provision of Directive 93/13 is justified by the fact that it is, in principle, legitimate to presume that the national legislature has struck a balance between all the rights and obligations of the parties to certain contracts, a balance which the EU legislature expressly intended to preserve. Moreover, the fact that such a balance has been struck does not constitute a condition for the application of the exclusion laid down in Article 1(2), but the justification for such an exclusion (judgment of 21 December 2021, *Trapeza Peiraios*, C-243/20, EU:C:2021:1045, paragraph 35 and the case-law cited).

23 From that point of view, a contractual term which reflects a mandatory statutory or regulatory provision of national law which is not applicable to the relevant contract concluded by the parties or which merely makes a general reference to the statutory provisions applicable independently of such a term cannot be regarded as reflecting such a mandatory provision within the meaning of Article 1(2) of Directive 93/13 (see, to that effect, judgments of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 30, and of 3 April 2019, *Aqua Med*, C-266/18, EU:C:2019:282, paragraphs 35 to 38).

24 By contrast, it cannot be required, for the purposes of the applicability of the exclusion introduced in Article 1(2) of Directive 93/13, that the contractual term concerned should correspond perfectly, from a formal point of view, to the mandatory statutory or regulatory provision of national law which that term is intended to reflect. Such an interpretation ultimately undermines the effectiveness of that exclusion.

25 Therefore, in order for a contractual term to ‘reflect’ a mandatory statutory or regulatory provision within the meaning of Article 1(2) of Directive 93/13, that term must reproduce the normative content of a mandatory provision applicable to the relevant contract so that it may be regarded as expressing in concrete terms the same legal rule as that envisaged by that mandatory provision. That is the case not only where the contractual term corresponds verbatim to the mandatory provision or contains an express reference to that mandatory provision, but also where that term, although expressed in different terms, is substantively equivalent to that mandatory provision.

26 In the present case, it is for the referring court to carry out the necessary assessments, taking into consideration, inter alia, the nature, general scheme and terms of the loan agreement at issue in the main proceedings and the legal and factual context of which that agreement is part, in order to determine whether the contractual term at issue in the main proceedings reflects, within the meaning of Article 1(2) of Directive 93/13, Article 1578 of the former Civil Code.

27 Since, as has been stated in paragraph 24 of the present judgment, the applicability of Article 1(2) of that directive does not presuppose that the term at issue in the main proceedings and Article 1578 of the former Civil Code must correspond in form, in the sense that it must quote that provision verbatim or contain an express reference to it, the referring court must ascertain in particular whether that term and Article 1578 are substantively equivalent, in the sense that the application of that term leads, for the applicants in the main proceedings, to a payment obligation identical to that which stems from the direct application, in the context of the agreement at issue in the main proceedings, of Article 1578.

28 In the light of the foregoing considerations, the answer to the first question is that Article 1(2) of Directive 93/13 must be interpreted as meaning that, in order to fall within the exclusion from the scope of that directive laid down by that provision, it is not necessary for the term included in a loan agreement concluded between a consumer and a seller or supplier to quote the corresponding mandatory statutory or regulatory provision of national law verbatim or to refer expressly thereto, but it is sufficient that it is substantively equivalent to that mandatory provision, that is to say that it has the same normative content.

The second question

29 By its second question, the referring court asks, in essence, whether Article 1(2) of Directive 93/13 must be interpreted as meaning that, in order to determine whether a term included in a loan agreement concluded between a consumer and a seller or supplier falls within the exclusion from the scope of that directive laid down by that provision, it is relevant that the consumer did not have knowledge of the fact that that term reflects a mandatory statutory or regulatory provision of national law.

30 The application of that exclusion, established by Article 1(2) of Directive 93/13 requires that two conditions be met, namely that the contractual term concerned must reflect a statutory or regulatory provision and that that provision must be mandatory (see, to that effect, order of 14 October 2021, *NSV and NM*, C-87/21, not published, EU:C:2021:860, paragraph 25 and the case-law cited).

31 Thus, as the Commission noted in its written observations, the application of Article 1(2) of Directive 93/13 is objective in nature and therefore does not depend on the information provided to the consumer by the seller or supplier or on the consumer’s knowledge of the applicable legal provisions.

32 Moreover, the Court has already held, in interpreting Article 1(2), that the exclusion from the scope of that directive, laid down by that provision, is applicable even if the seller or supplier has not met its information and transparency obligations (see, to that effect, order of 14 October 2021, *NSV and NM*, C-87/21, not published, EU:C:2021:860, paragraph 42).

33 In the light of the foregoing, the answer to the second question is that Article 1(2) of Directive 93/13 must be interpreted as meaning that, in order to determine whether a term included in a loan agreement concluded between a consumer and a seller or supplier falls within the exclusion from the scope of that directive laid down by that provision, it is irrelevant that the consumer has no knowledge of the fact that that term reflects a mandatory statutory or regulatory provision of national law.

Costs

34 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 (Eighth Chamber) hereby rules:

1. **Article 1(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts**

must be interpreted as meaning that, in order to fall within the exclusion from the scope of that directive laid down by that provision, it is not necessary for the term included in a loan agreement concluded between a consumer and a seller or supplier to quote the corresponding mandatory statutory or regulatory provision of national law verbatim or to refer expressly thereto, but it is sufficient that it is substantively equivalent to that mandatory provision, that is to say that it has the same normative content.

2. **Article 1(2) of Directive 93/13**

must be interpreted as meaning that, in order to determine whether a term included in a loan agreement concluded between a consumer and a seller or supplier falls within the exclusion from the scope of that directive laid down by that provision, it is irrelevant that the consumer has no knowledge of the fact that that term reflects a mandatory statutory or regulatory provision of national law.

[Signatures]

* Language of the case: Romanian.