ECLI:EU:C:2020:687

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

10 September 2020 (*)

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Annex, point 1(e) – Unfair terms in consumer contracts – Social housing – Obligation of residence and prohibition on subletting the property – Article 3(1) and (3) – Article 4(1) – Assessment of whether penalty clauses are unfair – Criteria)

In Case C‑738/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), made by decision of 19 September 2019, received at the Court on 7 October 2019, in the proceedings

A

v

B,

C,

THE COURT (Sixth Chamber),

composed of M. Safjan, President of the Chamber, L. Bay Larsen and C. Toader (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– A, by M. Scheeper, advocaat,

– the Czech Government, by M. Smolek, J. Vláčil and S. Šindelková, acting as Agents,

– the European Commission, by M. van Beek 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 point 1(e) of the Annex to 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 the context of a dispute between A, in its capacity as the landlord of a social housing dwelling, and its tenant B and the subtenant C, concerning the payment, first, of the contractual penalty for breach of the obligation to reside in that dwelling and of the prohibition on subletting and, second, of a sum corresponding to the profit unlawfully made from the subletting by B.

Legal context

European Union law

3 Article 1 of Directive 93/13 provides:

'1. The purpose of this Directive 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.

2. 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.'

4 Under Article 2 of that directive, the term 'seller or supplier' is defined as 'any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned'.

5 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.'

6 Article 4(1) of Directive 93/13 states:

'Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.'

7 Article 6(1) of that directive provides:

'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

8 The annex to that directive is headed 'Terms referred to in Article 3(3)'. Point 1(e) of that annex is worded as follows:

'Terms which have the object or effect of:

…

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

…'

Netherlands law

9 Under Article 6:104 of the Burgerlijk Wetboek (the Netherlands Civil Code), where a person, who is liable to another person for an unlawful act or a breach of an obligation towards that other person, has profited from that act or breach, the court may, on the request of that other person, assess the damage to the amount of that profit or a part thereof.

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

10 By a contract which took effect on 12 April 2017, A, a foundation responsible for the leasing of social housing, granted a lease to B in respect of a social housing dwelling located in Amsterdam (the Netherlands), the monthly rent of which is currently EUR 648.96 ('the contract at issue').

11 The contract at issue is, inter alia, subject to the *Algemene Voorwaarden Sociale Woonruimte van 1 november 2016* (General terms and conditions of social housing of 1 November 2016; the 'terms and conditions'). Those terms and conditions include a number of penalty clauses concerning, inter alia, the prohibition on subletting the dwelling, the requirement for the tenant to occupy the dwelling personally and to vacate it fully upon termination of the contract. According to clause 7.14 of the terms and conditions, in the event of breach of the prohibition on subletting the dwelling, the tenant will be required to pay a penalty of EUR 5 000, due immediately to the landlord, without prejudice to the landlord's right to seek full compensation for the damage suffered. The terms and conditions also include a general 'residual' penalty clause, which applies in

the event of breach by the tenant of one of his contractual obligations, where no special penalty clause is applicable.

12 Following an inspection of the dwelling, A brought an action before the referring court, the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) seeking termination of the contract at issue, eviction of both the tenant, B, and the subtenant, C, payment of overdue rent and of a penalty of EUR 5 000 for breach of the prohibition on subletting as well as restitution of the resulting profit, in as much as B sublet the dwelling in question for a higher rent than that which he was himself contractually obliged to pay.

13 The referring court found that B had breached the obligation of residence and the prohibition on subletting provided for in the terms and conditions, inter alia, in clause 7.14 thereof.

14 Nevertheless, the referring court is uncertain whether or not clause 7.14 of the terms and conditions is unfair, within the meaning of Article 3(1) of Directive 93/13 and the interpretation thereof in the judgment of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283).

15 Although the referring court is of the view that, considered in isolation, that term imposing a penalty of EUR 5 000 in the event of breach of the prohibition on subletting is not unfair, since it concerns a social housing dwelling, that court nevertheless asks whether, for the purpose of such an assessment, it should not take into account all of the penalty clauses contained in the contract at issue, as specified, in its view, by the Court in that judgment.

16 In that regard, the referring court mentions that, as regards the contract at issue, only two breaches of contract, which are closely related to one another, have been established, namely, breach, first, of the tenant's obligation to occupy the dwelling personally as his main residence and, secondly, of the prohibition on subletting. However, according to the referring court, by its action, A only seeks payment of the penalty for subletting provided for in the contract at issue and its request for restitution of the profit made by B is based not on the contract, but on Article 6:104 of the Civil Code.

17 In those circumstances, the Rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) How should Directive 93/13 and, more specifically, the principle of cumulative effect contained therein, be interpreted when assessing whether the sum which a consumer who fails to fulfil his obligations is required to pay in compensation ("penalty clause") is disproportionately high within the meaning of point 1(e) of the annex to that directive, in a case in which the penalty clauses are directed at breaches of various kinds which, by their very nature, do not have to occur together, and indeed do not do so in the present case?

(2) Is it also relevant in that regard that, with regard to the breach on the basis of which payment of the penalty is sought, compensation in the form of the restitution of unfairly made profits is also sought?'

Consideration of the questions referred

18 As a preliminary point, it must be noted at the outset that all three of the parties to the main proceedings fall within the scope *rationae personae* of Directive 93/13, notwithstanding that A, the applicant in the main proceedings, is a foundation responsible for offering social housing for rent.

19 According to Article 2 of Directive 93/13 the term 'seller or supplier' refers to 'any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned'. In the present case, the request for a preliminary ruling gives no indication that might suggest that the leasing activity of that foundation is marginal or does not constitute its business.

20 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 3(1) and (3) and Article 4(1) of Directive 93/13 must be interpreted as meaning that, where a national court examines whether a term in a consumer contract is unfair, within the meaning of those provisions, it must take account of all the terms of the contract or only certain of them and, when assessing, more specifically, whether the amount of compensation which the consumer is required to pay is disproportionately high, within the meaning of point 1(e) of the annex to that directive, whether such an assessment must concern solely those terms which relate to the same breach.

21 In the case at hand, those questions have arisen in the context of a dispute in which, aside from the termination of the contract in question and the eviction of the occupiers, the landlord seeks payment of the contractual penalty in respect of the prohibition on subletting and the restitution of the profits made from that subletting.

22 In that regard, as follows from the order for reference, first, the contract in question includes an explicit term prohibiting subletting. Secondly, the restitution of the profits made from the subletting is sought on the basis of the national rules in the field of civil liability, in this case, Article 6:104 of the Civil Code.

23 In that regard, it must be recalled that Directive 93/13 requires Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair (judgment of 7 November 2019, *Profi Credit Polska*, C-419/18 and C-483/18, EU:C:2019:930, paragraph 53 and the case-law cited).

24 Under Article 3(1) of Directive 93/13, such a term is to 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. Article 3(3) of that directive indicates that the annex thereto contains an indicative and non-exhaustive list of the terms that may be regarded as unfair. Accordingly, while the fact that the content of a term under consideration by the national court corresponds to that of a term included in that annex does not suffice in itself to establish whether that term is unfair, it is nevertheless an essential element upon which that court may base its assessment as to whether the term under consideration is unfair (see, to that effect, judgment of 26 April 2012, *Invitel,* C-472/10, EU:C:2012:242, paragraph 26).

25 In accordance with Article 4(1) of Directive 93/13, the national court must, in order to determine whether the contractual term on which the claim brought before it is based is unfair, take account of all of the other terms of the contract (see, to that effect, order of 16 November 2010, *Pohotovosť*, C-76/10, EU:C:2010:685, paragraph 59; judgments of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 94, and of 11 March 2020, *Lintner*, C-511/17, EU:C:2020:188, paragraph 46).

26 According to the settled case-law of the Court, the assessment of whether the terms are unfair is on a case-by-case basis and the obligation to take account of all of the other terms of the contract can be explained by the fact that the examination of the contested term must take into account all the elements that may be relevant to understanding that term in its context, in so far as, depending

on the content of that contract, it may be necessary, for the purpose of assessing whether that term is unfair, to assess the cumulative effect of all the terms of that contract (see, to that effect, judgments of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 95, and of 11 March 2020, *Lintner*, C-511/17, EU:C:2020:188, paragraph 47). Not all contract terms are of equal importance, and the degree of interaction of a given term with other terms necessarily depends on their respective scope and on the extent to which each term contributes to any significant imbalance in the rights and obligations of the parties arising under the contract at issue, within the meaning of Article 3(1) of Directive 93/13.

27 Thus, in contrast with the case that gave rise to the judgment of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283), mentioned by the referring court in its request for a preliminary ruling, which concerned a contract producing obligations whereby one and the same breach gave rise to the simultaneous application of several penalty clauses, it must be noted, as has been argued by all of the interested parties who submitted written observations in this case, that where two penalty clauses are related to one and the same breach, as was the case in the proceedings that gave rise to that judgment, those clauses must be examined cumulatively.

28 In the case at hand, although the referring court mentions the existence, in the contract at issue, of other special penalty clauses and of a 'residual' penalty clause, that court nonetheless indicates that A's action is not based on those clauses, with the result that there can be no cumulative penalties for a single breach.

29 Accordingly, as the referring court considers, the solution adopted by the Court in the judgment of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283), concerning a consumer loan contract, cannot be directly transposed to a situation, such as that at issue in the main proceedings, where the payment of a single penalty is sought by the landlord of a social housing dwelling.

30 It is for that court, however, to ascertain whether, in respect of the same breach, other terms of the contract at issue are relied on by the supplier against the consumer or may be relied on in the context of separate actions brought against that consumer. If that is the case, the cumulative effect of the application of all of those terms, even though those terms do not appear, in themselves, to be unfair, must be taken into account by the referring court in order to assess whether the contractual term forming the basis of the request before it is unfair.

31 In any case, it must be recalled that, in the assessment of whether a contractual term is unfair, it is for that same referring court to rule on the classification of that term in accordance with the particular circumstances of the case, and for the Court of Justice to elicit from the provisions of Directive 93/13 the criteria that the national court may or must apply when examining contractual terms (see, to that effect, judgment of 23 April 2015, *Van Hove*, C-96/14, EU:C:2015:262, paragraph 28 and the case-law cited).

32 In that regard, the Court has held on many occasions that regard should be had to the nature of the obligation in the context of the contractual relationship at issue, inter alia, whether that obligation is of essential importance (see, to that effect, judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 73; order of 14 November 2013, *Banco Popular Español and Banco de Valencia*, C-537/12 and C-116/13, EU:C:2013:759, paragraph 70; and judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 66).

33 In the present case, clause 7.14 of the terms and conditions penalises any breach of the prohibition on subletting and of the obligation to reside personally in the rented dwelling. Since the

lease relates to social housing, it is clear that that prohibition and that obligation are of a special nature, which forms part of the very essence of the contractual relationship.

34 As for the damages claimed by A to the amount of the profits made from the subletting by B, which would, if applicable, be imposed cumulatively along with the EUR 5 000 contractual penalty, it should be borne in mind that, according to Articles 1(1) and 3(1) of Directive 93/13, that directive applies to the terms contained in contracts concluded between a seller or supplier and a consumer which have not been individually negotiated (judgments of 7 November 2019, *Profi Credit Polska*, C-419/18 and C-483/18, EU:C:2019:930, paragraph 51 and the case-law cited, and of 4 June 2020, *Kancelaria Medius*, C-495/19, EU:C:2020:431, paragraph 24).

35 In the present case, it is apparent from the file submitted to the Court that that request for compensation is founded not on the lease, but on the national legislation concerning civil liability, more specifically, Article 6:104 of the Civil Code, according to which, where a person, who is liable to another person for an unlawful act or a breach of an obligation towards that other person, has profited from that act or breach, the court may, on the request of that other person, assess the damage to the amount of that profit or a part thereof.

36 In that regard, the fact that national legislation forms the basis for that request precludes a provision of national law such as Article 6:104 of the Civil Code from falling within the scope of Directive 93/13.

37 It is true that, in the assessment of whether the contractual term in question is unfair, account must be taken of the legal context that determines, together with that term, the rights and obligations of the parties (see, by analogy, judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 42).

38 However, it is for the referring court to ascertain the extent to which the application of Article 6:104 of the Civil Code, which provides for the recovery of an unjustified sum, such as that proceeding from the rent at issue in the main proceedings, can be regarded as a penalty.

39 In the light of all of the considerations above, the answer to the questions asked is that Article 3(1) and (3) and Article 4(1) of Directive 93/13 must be interpreted as meaning that, where a national court examines whether a term in a consumer contract is unfair, within the meaning of those provisions, it must take account, among the terms which fall within the scope of that directive, of the degree of interaction between the term at issue and other terms, having regard, inter alia, to their respective scope. In order to assess whether the amount of the penalty imposed on the consumer is disproportionately high, within the meaning of point 1(e) of the annex to that directive, significant weight must be attached to those terms which relate to the same breach.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Sixth Chamber) hereby rules:

Article 3(1) and (3) and Article 4(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that, where a national court examines whether a term in a consumer contract is unfair, within the meaning of those

provisions, it must take account, among the terms which fall within the scope of that directive, of the degree of interaction between the term at issue and other terms, having regard, inter alia, to their respective scope. In order to assess whether the amount of the penalty imposed on the consumer is disproportionately high, within the meaning of point 1(e) of the annex to that directive, significant weight must be attached to those terms which relate to the same breach.

[Signatures]

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* Language of the case: Dutch.