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Provisional text

JUDGMENT OF THE COURT (First Chamber)

27 January 2021 (*)

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Articles 3(1), 4(1) and 6(1) – Assessment of the unfairness of contractual terms – Term fixing in advance the creditor’s potential advantage in the event of termination of the contract – Significant imbalance in the parties’ rights and obligations under the contract – Date on which the imbalance must be assessed – Finding that a term is unfair – Consequences – Replacement of an unfair term with a supplementary provision of national law)

In Joined Cases C-229/19 and C-289/19,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam, Netherlands) (C-229/19) and the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands) (C-289/19), by decisions of 5 March 2019 and of 2 April 2019, received at the Court on 14 March 2019 and 9 April 2019, respectively, in the proceedings

Dexia Nederland BV

v

XXX (C-229/19),

Z (C-289/19),

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan and N. Jääskinen (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 September 2020,

after considering the observations submitted on behalf of:

- Dexia Nederland BV, by J. de Bie Leuveling Tjeenk, J.M.K.P. Cornegoor and P.W. Post, advocaten,
- XXX, by J.B. Maliepaard, advocaat,
- Z, by J.B. Maliepaard, advocaat,
- the European Commission, initially by N. Ruiz García, P. Vanden Heede and M. van Beek, and subsequently by N. Ruiz García and P. Vanden Heede, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The requests have been made in two sets of proceedings between Dexia Nederland BV ('Dexia') and consumers, concerning the refusal to pay final statements drawn up by Dexia, following the termination of the share leasing agreement concluded between those consumers and a company of which Dexia was the successor.

Legal context

EU law

3 The thirteenth recital of Directive 93/13 is worded as follows:

'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 [European Union] 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 of that directive 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 [European Union] are party, particularly in the transport area, shall not be subject to the provisions of this Directive.'

5 Article 3(1) and (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.

...

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

6 The terms listed in that annex include, inter alia, in point 1(e) thereof, those which have the object or effect of 'requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation'.

7 Article 4(1) of the directive 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.'

8 Under Article 6(1) of Directive 93/13:

'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.'

9 Article 7(1) of that directive provides:

'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.'

Netherlands law

10 Article 6:271 of the Burgerlijk Wetboek (Civil Code), in the version applicable to the facts in the main proceedings ('the BW'), provides:

'The termination of a contract shall release the parties from their obligations under that contract. In so far as those obligations have already been fulfilled, the legal basis for compliance with those obligations shall be maintained, but an obligation arises for the parties to return or provide compensation for what has already been received'

11 Article 6:277 of the BW reads as follows:

‘1. In the event of total or partial termination of a contract, the party whose failure to fulfil obligations constitutes a ground for termination shall compensate the other party for any harm suffered as a result of the contract being terminated rather than continued by both parties.

...’

12 Paragraph 7A:1576e of the BW reads as follows:

‘1. The purchaser shall still be allowed to pay in advance one or more repayment instalment[s] of the outstanding sale price.

2. In the event of a single advance payment of the total outstanding balance, there is a right to a deduction calculated at a rate of 5% per annum on each repayment instalment paid in advance.

3. The parties may derogate from the provisions of this article in favour of the purchaser.’

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

13 The disputes in the main proceedings arise from the refusal of XXX and Z to settle the balances set out in the final statements drawn up by Dexia following termination of the share leasing agreements, which were concluded between them and Dexia’s predecessor in title, on account of delays in payment of the monthly instalments payable to Dexia.

14 Under such agreements, the lessee, who is usually a consumer, borrows from a bank, for a fixed period, a sum of money, designated as the ‘principal’, with which that bank acquires shares on behalf of and for the benefit of the lessee. That bank remains the owner of those shares until the repayment in full of the sum borrowed, but any dividends are paid to the lessee. Throughout the term of the leasing agreement, the lessee pays a monthly instalment, corresponding to the interest to be paid on the principal and, in certain cases, to its repayment. At the end of the agreement, the shares are sold and the lessee receives income from the sale of those shares, after deduction of the balance of the principal and any monthly instalments still payable to the bank.

15 It is apparent from the documents before the Court that Dexia terminated the leasing agreements early on account of late payment, in accordance with the specific terms and conditions of the agreements at issue in the main proceedings. On the termination of those agreements, Dexia drew up the final statements pursuant to Articles 6 and 15 of those specific terms and conditions. Those articles read as follows:

‘6. If (a), despite a letter of formal notice, the lessee does not pay one or more monthly instalments or does not perform any other obligation arising under the agreement or under any other leasing agreement similar to the agreement at issue in the present case, or if (b) the lessee petitions for the winding up of the bank or if the bank is declared insolvent, the bank is authorised to terminate the contract and all similar leasing agreements with immediate effect and to require payment of all the outstanding balance of the total amount(s) under the existing leasing agreement(s), which are similar to the present agreement, and to sell the shares on the stock exchange or otherwise at a time determined by the bank. The bank shall deduct the proceeds of sale from the sum owed to it by the lessee. Any positive balance shall be paid by the bank to the lessee.

15. ... In the event of termination of the agreement, the lessee’s claim shall consist of an amount equal to the market value of the shares on the date of termination, after deduction of an amount

corresponding to the present value of the unpaid balance of the total amount leased. The present value is calculated in accordance with Article 7A:1576e(2) of the BW.'

16 The referring courts state that the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has recently been called upon to rule on the compatibility of those terms with Directive 93/13 and has held, in a judgment of 21 April 2017 (NL:HR:2017:773, *Dexia v Tijhuis*), that Article 6 of the specific terms and conditions of the agreements at issue in the main proceedings created a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

17 Furthermore, it follows from the orders for reference that, according to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the calculation method for the amount of the sum which Dexia is entitled to claim, pursuant to Article 6 of the specific terms and conditions of the agreements at issue in the main proceedings, does not take into consideration the advantage which Dexia derives from termination, in so far as the amount it receives is again interest-bearing, and the fact that Dexia, under Article 15 of the specific terms and conditions, discounts the amount of the monthly instalments still outstanding by 5% per annum compensates for that advantage only to a very limited extent. That calculation method means that the benefit that Dexia could obtain by earlier reinvestment of the funds on the capital markets was fixed at 5% per annum. Consequently, as the market rate is greater than 5%, the difference between the flat rate and the actual market rate is to Dexia's advantage. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) points out that, depending on the interest rate and the date of termination of the contract, the advantage that Dexia derives from premature termination may be very significant.

18 Finally, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) noted that, in the event of non-payment, Dexia retains the possibility of terminating the contract and that it may then, under Article 6: 277 of the BW, claim damages.

Case C-229/19

19 In 1999, XXX concluded two leasing agreements with a company of which Dexia was the successor.

20 On 6 June 2005, on account of late payments, after giving XXX formal notice to pay, Dexia terminated the leasing agreements concerned in advance and drew up final statements.

21 It is apparent from the documents before the Court that Dexia prepared final statements pursuant to Articles 6 and 15 of the specific terms and conditions of the agreements at issue in the main proceedings and invoiced XXX the debit balance set out in those statements.

22 XXX brought legal proceedings seeking, inter alia, the annulment of the two leasing agreements and the repayment of the sums paid to Dexia. Dexia brought a counterclaim seeking an order that XXX pay a sum corresponding to the total amount, together with default interest, which was still outstanding under the two leasing agreements.

23 By judgment of 19 November 2008, the kantonrechter (Cantonal Court, Netherlands) ordered Dexia to pay XXX the sum of EUR 2 507.69 per leasing agreement, as compensation, together with statutory interest, and dismissed Dexia's counterclaim.

24 Both parties in Case C-229/19 appealed against that judgment before the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam, Netherlands). Dexia contends that XXX's application

should be dismissed and its counterclaim upheld. XXX seeks a higher amount of compensation than that awarded to XXX at first instance.

25 In that context, the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam) states that, since the dispute before it concerns contracts concluded between a financial services provider and consumers, it must examine of its own motion whether a term in the specific terms and conditions of the contracts at issue in the main proceedings is unfair having regard to the criteria laid down in Directive 93/13 and, if so, declare that term void of its own motion. Following the judgment of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), referred to in paragraphs 16 to 18 above, in which Article 6 of the specific terms and conditions of the contracts at issue in the main proceedings was considered to constitute an unfair term, within the meaning of Directive 93/13, the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam) has doubts as to the application of those criteria.

26 According to the referring court in Case C-229/19, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) confined itself to examining in the abstract whether, in relation to national legislation, a term could have unfavourable consequences for the consumer and concluded that the mere possibility of a disadvantage for the consumer was sufficient for such a term to be regarded as unfair, within the meaning of Directive 93/13.

27 However, that referring court considers that account must be taken, in particular, of the fact that share leasing agreements are contracts where there is an ongoing obligation concluded for a period of up to 20 years, which means that, in principle, when those contracts are concluded, it is still not certain that a provider of financial services, such as Dexia, will derive any advantage in the event of premature termination. The significance of that advantage varies according to the rate in force on the date of the premature termination of the contract concerned and at which the amount received early could be invested during the remaining period of that contract.

28 In the present case, Article 15 of the specific terms and conditions of the contracts at issue in the main proceedings establishes in advance the creditor's potential advantage, in the event of premature termination of the contract, at 5% per annum of the outstanding balance of the amount agreed in the leasing agreement, for the remaining period of the contract. Thus, according to the referring court, it is necessary to ascertain, first of all, whether, in the light of all the circumstances of the case, as at the date on which the contracts at issue in the main proceedings were concluded, the fixing of that potential advantage for Dexia is unfair, for example, by comparing that term with those normally used in similar cases of sale on instalment credit terms or with the interest rate applied, in the context of court proceedings, during the updating of the amounts for contracts with a comparable duration and capital to that of the contracts concerned.

29 Next, in accordance with the Court's case-law, it is necessary to determine whether the average consumer, normally informed and reasonably attentive and circumspect, could have accepted, when concluding the contract concerned, that, in the event of premature termination of that contract, Dexia's advantage would be, by way of derogation from the applicable rules, determined pursuant to Articles 6 and 15 of the specific terms and conditions of the contracts at issue in the main proceedings, taking into account the expertise and knowledge of that bank with regard to possible changes in interest rates and being aware that, in the event that the provisions of Article 6:277 of the BW are applied, no such advantage would be prescribed (see, to that effect, judgments of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraphs 68 and 69, and of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraphs 57 and 58).

30 Furthermore, according to the referring court in Case C-229/19, the judgment of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), referred to in paragraphs 16 to 18 above, is contrary to the judgment of 7 August 2018, *Banco Santander and Escobedo Cortés* (C-96/16 and C-94/17, EU:C:2018:643). In that judgment, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) did not prescribe specific criteria enabling the national courts to assess whether Article 6 of the specific terms and conditions of the contracts at issue in the main proceedings is unfair and held, on the contrary, that that provision is, in all cases, incompatible with Directive 93/13 since it could have unfavourable consequences for the consumer, if certain circumstances arose during the contractual period.

31 Finally, the referring court in Case C-229/19 is uncertain as to the consequences to be drawn from the declaration that Articles 6 and 15 of the specific terms and conditions of the agreements at issue in the main proceedings were void. In that context, it points out, first, that the share leasing agreement remains binding on the parties, even after those articles were declared void, since the contract is capable of continuing in existence without those articles. Secondly, according to the referring court, Dexia should not be able to rely on the provisions of the BW which, in the circumstances of the case, are even more unfavourable to the consumer.

32 It was in those circumstances that the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Should Directive 93/13 be interpreted as meaning that a contractual term, from the point of view of the criteria laid down in that directive, should already be regarded as unfair if that contractual term, assessed in the light of all the circumstances attending the conclusion of the contract, contains the mere possibility of causing a significant imbalance depending on the circumstances that materialise during the course of the contract, in particular because that contractual term fixes in advance a potential advantage that arises for the seller at the time of the premature termination of the contract, at a certain percentage of the remaining lease sum, thereby derogating from the applicable rules of national law under which such an advantage is not fixed in advance but must be determined on the basis of the circumstances attending the termination of the contract, in particular, the level of the interest rate that should be applied for the remaining duration of the contract to an amount received prematurely?’

Case C-289/19

33 On 17 March 2000, Z signed, as lessee, two share leasing agreements with a company of which Dexia was the successor.

34 In 2006, as a result of late payment, Dexia prematurely terminated the share leasing agreements concluded with Z and drew up, pursuant to Articles 6 and 15 of the specific terms and conditions of the contracts at issue in the main proceedings, final statements on which the debit balances that Z refused to pay appear.

35 Furthermore, it follows from the request for a preliminary ruling that, in the course of the proceedings between Dexia and Z, Dexia acknowledged that Z’s financial situation was such that the payment obligations under those contracts represented an excessively heavy financial burden for Z and that, therefore, in accordance with national case-law concerning the consequences of a bank’s failure to comply with its due diligence obligations, it had to pay Z damages. Dexia submits that, according to that case-law, those damages amounted to two thirds of the monthly instalments already paid, after deduction of the dividends already paid, and to two thirds of the remaining debt,

but it considered that it was still entitled to payment of one third of the monthly instalments that had not yet been paid.

36 By a judgment of 21 May 2013, the kantonrechter (Cantonal Court) ordered Dexia, on the basis of Z's counterclaim, to pay Z an amount of EUR 18 804.60. Dexia appealed against that judgment to the referring court in Case C-289/19.

37 By judgment of 29 November 2016, that referring court adjourned the case pending the decision of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) in the case that gave rise to the judgment referred to in paragraphs 16 to 18 above.

38 In the light of the answers given by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), Z and Dexia now disagree before the referring court on whether, if Dexia cannot rely on Article 6 of the specific terms and conditions of the agreements at issue in the main proceedings, it may nevertheless claim compensation under the provisions of the applicable national legislation.

39 The referring court notes that the question whether the national court may replace an unfair term with a supplementary provision of domestic law has already been addressed in the Opinion of Advocate General Wahl in Joined Cases *Banco Santander and Escobedo Cortés* (C-96/16 and C-94/17, EU:C:2018:216), where it was concluded that that possibility should be limited to cases in which the invalidity of an unfair term would require the court to declare the contract void in its entirety, thereby exposing the consumer to such consequences that he would be penalised as a result. Nevertheless, since the Court held in those joined cases that there was no need to answer the question relating to that point, clarification is still necessary.

40 In those circumstances, the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '1. Can the user of an unfair term relating to the payment of compensation in the event of a consumer's non-compliance with his obligations, which has been declared void, claim the legal compensation provided for by way of supplementary law?
2. For the purpose of answering that question, does it matter whether the compensation that can be claimed by the application of the statutory compensation scheme is equal to or lower or higher than the compensation under the term which has been declared void?'

Consideration of the questions referred

The question referred in Case C-229/19

41 By the question referred for a preliminary ruling, the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam) asks the Court, in essence, whether, in accordance with the provisions of Directive 93/13, in a risk-weighted contract, such as the share leasing agreement at issue in the main proceedings, a term fixing in advance the advantage to be enjoyed by the seller or supplier in the event of premature termination of the contract must be regarded as unfair merely because, assessed solely in the light of the circumstances surrounding the conclusion of the contract concerned, that term is liable to create a significant imbalance in the parties' rights and obligations arising under the contract during the performance of that contract.

42 In the present case, as noted in paragraph 15 of the present judgment, it is apparent from the documents before the Court that, pursuant to Article 6 of the specific terms and conditions of the contracts at issue in the main proceedings, in the event of the premature termination of those contracts, Dexia is entitled, from the date of termination, to the unpaid interest up to the date of premature termination of the contract concerned and to the principal and interest which would have been due during the period from the premature termination to the expiry date of that contract initially agreed. Article 15 of those specific terms and conditions provides for a 5% per annum update on that principal and interest, thus fixing in advance Dexia's advantage in the event of premature termination, inasmuch as it recovers that principal and interest more rapidly and can reinvest them.

43 As a preliminary point, it should be noted that the question referred by the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam) is based on the premiss that Articles 6 and 15 of the specific terms and conditions of the agreements at issue in the main proceedings must be interpreted together, even though there is no consensus between the parties on that point.

44 In that regard, it is sufficient to recall that, according to settled case-law, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law (judgment of 8 June 2016, *Hünnebeck*, C-479/14, EU:C:2016:412, paragraph 36). The Court must take account, under the division of jurisdiction between the Court and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (judgment of 6 December 2018, *Preindl*, C-675/17, EU:C:2018:990, paragraph 24).

45 Furthermore, it is important to note that, according to settled case-law, the relevant jurisdiction of the Court extends to the interpretation of the concept of 'unfair term' used in Article 3(1) of Directive 93/13 and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case. It is thus clear that the Court must limit 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 (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).

46 Under Article 3(1) of Directive 93/13, a term is to be regarded as 'unfair' if it causes a significant imbalance in the parties' rights and obligations arising under the contract concluded between that consumer and a seller or supplier, to the detriment of the consumer.

47 In referring to concepts of 'good faith' and 'significant imbalance' in the parties' rights and obligations arising under the contract, to the detriment of the consumer, Article 3(1) of Directive 93/13 however merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 67 and the case-law cited).

48 The Court has thus held that, in order to determine whether a term causes a 'significant imbalance' in the parties' rights and obligations under a contract to the detriment of the consumer, particular account must be taken of which rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. Similarly, it is

appropriate, to that end, to carry out an assessment of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms (judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 59 and the case-law cited).

49 Moreover, the assessment of whether any ‘significant imbalance’ exists cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract and the costs charged to the consumer under that clause. A significant imbalance can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 51).

50 Furthermore, the Court has held that the contract should set out transparently the specific functioning of the mechanism to which the relevant term relates and, where appropriate, the relationship between that mechanism and that provided for by other contractual terms, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from the contract (see, to that effect, judgment of 20 September 2017, *Andriuc and Others*, C-186/16, EU:C:2017:703, paragraph 45 and the case-law cited).

51 Article 4(1) of Directive 93/13 states 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 concerned was concluded and all the circumstances attending the conclusion of the contract and all the other terms of that contract or of another contract on which it is dependent.

52 It follows from that provision, and from Article 3 of that directive, as interpreted by the Court, that the assessment of the unfairness of a contractual term must be carried out by reference to the date of conclusion of the contract concerned (see, to that effect, judgment of 9 July 2020, *Ibercaja Banco*, C-452/18, EU:C:2020:536, paragraph 48).

53 According to settled case-law, the circumstances referred to in Article 4(1) of that directive are those which could have been known to the seller or supplier at that time the agreement was concluded and which were of such a nature that they could affect the future performance of the agreement, since a contractual term may give rise to an imbalance between the parties which only manifests itself during the performance of the contract (see, to that effect, judgments of 20 September 2017, *Andriuc and Others*, C-186/16, EU:C:2017:703, paragraph 54, of 5 June 2019, *GT*, C-38/17, EU:C:2019:461, paragraph 40, and of 9 July 2020, *Ibercaja Banco*, C-452/18, EU:C:2020:536, paragraph 48).

54 Thus, it is apparent from that case-law that, pursuant to Directive 93/13, the national court must, when assessing whether a term is unfair, refer only to the date of conclusion of the contract concerned and assess, in the light of all the circumstances attending the conclusion of the contract, whether that term in itself gave rise to an imbalance between the rights and obligations of the parties in favour of the seller or supplier. While such an assessment may take account of the performance of the contract, it cannot, under any circumstances, depend on the occurrence of events subsequent to the conclusion of the contract that are beyond the control of the parties.

55 Therefore, while it is indisputable that, in certain situations, the imbalance referred to in Article 3(1) of Directive 93/13 can arise only during the performance of the contract, it is necessary

to ascertain whether, from the date on which the contract was concluded, the terms of that contract gave rise to that imbalance, even though that imbalance could occur only if certain circumstances arose and, in other circumstances, that term could even benefit the consumer.

56 First, the opposite line of reasoning would amount to making the assessment of the unfairness of a term subject to the circumstances in which the performance of the contract takes place and to any future changes in circumstances which have an effect on that performance, with the result that sellers or suppliers could speculate on that performance and those developments and include a potentially unfair term, by relying on the fact that that term will escape classification as unfair in certain circumstances.

57 Secondly, it should be recalled that Article 6(1) of Directive 93/13 provides that unfair terms are not binding on the consumer and must, therefore, be deemed never to have existed. If the assessment of the unfairness of a term could depend on events occurring after the conclusion of the contract that are independent of the will of the parties, the national court could confine itself to excluding the application of the term at issue only in respect of those periods where the term in question must be regarded as unfair.

58 Furthermore, it should also be recalled that it is clear from the Court's settled case-law that 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 the other terms of the contract in question (judgment of 10 September 2020, *A (Sub-letting of social housing)*, C-738/19, EU:C:2020:687, paragraph 25).

59 Thus, where the contract concluded between a seller or supplier and a consumer is, by its very nature, risk-weighted, as is the case with the share leasing agreements at issue in the main proceedings, the national court must also ascertain that a term, having regard to the interaction with the other terms which form part of the contract, does not result in a very unequal sharing of the risks borne by the parties to that contract.

60 It follows from all the foregoing considerations that the answer to the question referred in Case C-229/19 is that the provisions of Directive 93/13 must be interpreted as meaning that a term in a risk-weighted contract concluded between a seller or supplier and a consumer, such as share leasing agreements, must be regarded as unfair, since, having regard to the circumstances surrounding the conclusion of the contract in question and by reference to the date of its conclusion, that term may create a significant imbalance between the rights and obligations of the parties during the performance of the contract, even though that imbalance could occur only if certain circumstances were to arise and, in other circumstances, that term could even benefit the consumer. In those circumstances, it is for the referring court to ascertain, in the light of the circumstances attending the conclusion of the contract, whether a term fixing in advance the advantage which the seller or supplier is to enjoy in the event of premature termination of the contract was, from the time that contract was concluded, liable to create such an imbalance.

The questions referred in Case C-289/19

61 By the two questions referred for a preliminary ruling, which it is appropriate to examine together, the *Gerechtshof Den Haag* (Court of Appeal, The Hague) asks, in essence, whether a seller or supplier who has imposed on the consumer a term which has been declared unfair and, consequently, void, by the national court, may claim compensation under a supplementary provision of national law that would be applicable in the absence of that term.

62 According to settled case-law, it is for the national court, under Article 6(1) of Directive 93/13, to exclude the application of the unfair terms so that they do not produce binding effects with regard to the consumer, unless the consumer objects (see, to that effect, judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 58 and the case-law cited). However, that contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of national law, such continuity of the contract is legally possible (see, to that effect, judgment of 5 June 2019, *GT*, C-38/17, EU:C:2019:461, paragraph 42 and the case-law cited).

63 Consequently, where a national court finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, that court cannot modify that contract by revising the content of that term (see, to that effect, judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 59 and the case-law cited).

64 The Court has held that if it were open to the national court to revise the content of unfair terms included in such a contract, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers (judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 69; of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 79; of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 54, and of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 60).

65 In the present case, it is apparent from the file before the Court that the share leasing agreements at issue in the main proceedings are capable of continuing in existence without the unfair term.

66 In that regard, it should be noted that it is apparent from the case-law cited in paragraphs 62 to 64 of this judgment that, in a situation such as that in Case C-289/19, in accordance with Article 6(1) of Directive 93/13, the national court does not have the power to replace the unfair term with a supplementary provision of national law, since the invalidity of that term does not oblige the court to declare the contract void in its entirety, thereby exposing the consumer to particularly unfavourable consequences, with the result that the consumer would be penalised.

67 It follows from all the foregoing considerations that the answer to the questions referred in Case C-289/19 is that the provisions of Directive 93/13 must be interpreted as meaning that a seller or supplier which has imposed on a consumer a term declared unfair and, consequently, void by the national court cannot claim the statutory compensation provided for by a supplementary provision of national law which would have been applicable in the absence of that term where the contract is capable of continuing in existence without that term.

Costs

68 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 (First Chamber) hereby rules:

1. **The provisions of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a term in a risk-weighted contract concluded between a seller or supplier and a consumer, such as share leasing agreements, must be regarded as unfair, since, having regard to the circumstances surrounding the conclusion of the contract in question and by reference to the date of its conclusion, that term may create a significant imbalance between the rights and obligations of the parties during the performance of the contract, even though that imbalance could occur only if certain circumstances were to arise and, in other circumstances, that term could even benefit the consumer. In those circumstances, it is for the referring court to ascertain, in the light of the circumstances attending the conclusion of the contract, whether a term fixing in advance the advantage which the seller or supplier is to enjoy in the event of premature termination of the contract was, from the time that contract was concluded, liable to create such an imbalance.**
2. **The provisions of Directive 93/13 must be interpreted as meaning that a seller or supplier which has imposed on a consumer a term declared unfair and, consequently, void by the national court cannot claim the statutory compensation provided for by a supplementary provision of national law which would have been applicable in the absence of that term where the contract is capable of continuing in existence without that term.**

[Signatures]

* Language of the case: Dutch.
