ECLI:EU:C:2018:320

JUDGMENT OF THE COURT (Fifth Chamber)

17 May 2018 (*)

(Reference for a preliminary ruling — Directive 93/13/EEC — Unfair terms in consumer contracts concluded between a seller or supplier and a consumer — Examination by the national court of its own motion of the question of whether the contract is within the scope of that directive — Article 2(c) — Notion of 'seller or supplier' — Higher educational establishment financed mainly by public funds — Contract for an interest-free repayment plan for registration fees and share of costs of a study trip)

In Case C-147/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the vredegerecht te Antwerpen (Magistrates' court, Antwerp, Belgium), made by decision of 10 March 2016, received at the Court on 14 March 2016, in the proceedings

Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen VZW

v

Susan Romy Jozef Kuijpers,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits, A. Borg Barthet, M. Berger (Rapporteur) and F. Biltgen, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 March 2017,

after considering the observations submitted on behalf of

– the Belgian Government, by J. Van Holm, M. Jacobs and L. Van den Broeck and by J.-C. Halleux, acting as Agents, assisted by P. Cambie and B. Zammitto, experts,

– the Austrian Government, by G. Eberhard, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by M. van Beek and D. Roussanov, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 November 2017,

gives the following

Judgment

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

2 The request has been made in proceedings between Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen VZW, a free educational establishment established in Antwerp (Belgium) ('KdG'), and Susan Romy Jozef Kuijpers, concerning the reimbursement by the latter of registration fees and costs of a study trip, together with interest and a costs indemnity.

Legal context

EU law

3 Recital 10 of Directive 93/13 provides:

'Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; whereas those rules should apply to all contracts concluded between sellers or suppliers and consumers; whereas as a result inter alia contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organisation of companies or partnership agreements must be excluded from this Directive'.

4 The fourteenth recital of the directive is worded as follows:

'Whereas Member States must however ensure that unfair terms are not included, particularly because this Directive also applies to trades, business or professions of a public nature.'

5 According to Article 1(1) of the directive:

'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.'

6 Article 2 of Directive 93/13 provides:

'For the purposes of this Directive:

…

(b) “consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;

(c) “seller or supplier” means 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.’

7 Article 3 of the directive provides:

‘1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

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

8 Article 6(1) of that directive states:

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

Belgian law

9 Directive 93/13 was transposed into Belgian law in Articles 73 to 78 of the Wet betreffende marktpraktijken en consumentenbescherming (Law on market practices and consumer protection) of 6 April 2010 (*Belgisch Staatsblad*, of 12 April 2010, p. 20803). Those articles were later repealed and their content moved to Articles VI.83. to VI.87. of Wetboek van economisch recht (Code on Economic Law).

10 Article VI.83. of the Code on Economic Law provides that the provisions concerning unfair terms only apply to contracts between an undertaking and a consumer.

11 Article I.1. of the Code defines an undertaking as ‘any natural or legal person pursuing a long-term economic aim, including any associations of such persons’.

12 It is clear from the order for reference that the Law on market practices and consumer protection introduced the term ‘undertaking’ in the Code on Economic Law, which was substituted for that of ‘seller’.

13 Article 806 of the Gerechtelijk Wetboek (Judicial Code) reads as follows:

‘In a judgment in default, the court must allow the claims or defences of the party present, save to the extent that the legal procedure or the claims or pleas might be contrary to public policy.’

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

14 On 3 February 2014, Ms Kuijpers, then a student at KdG, was required to pay a total amount of EUR 1 546 to KdG representing, first, her registration fee for the academic years 2012/13 and 2013/14 and, second, the costs connected with a study trip.

15 As Ms Kuijpers was not able to pay that debt in a lump sum, she and that KdG studievoorzieningsdienst (‘KdG Stuvo’) agreed, by a written contract, an interest-free plan for repayment by instalments. In accordance with that contract, the KdG Stuvo was required to advance to Ms Kuijpers the amount that she needed to pay her debt to the KdG, while Ms Kuijpers was required to pay KdG Stuvo the sum of EUR 200 each month with effect from 25 February 2014, for seven months. It was also provided that the final instalment of the debt, an amount of EUR 146, was to be paid on 25 September 2014.

16 Furthermore, the contract contained a clause applicable in the event of non-payment, worded as follows:

‘If the sum borrowed is not repaid on time (in whole or in part), interest of 10% per annum shall be payable automatically and without formal notice, calculated on the outstanding debt from the day following the due date, in the absence of settlement. An indemnity to cover debt collection costs shall also be payable in such a case, which shall be set by this contract at 10% of the outstanding debt, with a minimum of EUR 100.’

17 Despite receiving a letter of formal notice from KdG Stuvo, Ms Kuijpers remained in default of her repayments.

18 On 27 November 2015 KdG issued a summons against Ms Kuijpers before the Vredegerecht te Antwerpen (Magistrates’ Court, Antwerp, Belgium, seeking to obtain the principal sum EUR 1 546 together with default interest at 10% from 25 February 2014, namely EUR 269.81, and a costs indemnity of EUR 154.60. Ms Kuijpers did not appear and was not represented before that court.

19 By an interim ruling of 4 February 2016, the referring court upheld the claim by KdG concerning principal sum due. As regards the interest and costs indemnity that were also sought, it ordered a re-opening of the oral procedure and invited KdG to present any observations on a possible reference to the Court of Justice for a preliminary ruling.

20 The referring court states that, given that Ms Kuijpers did not appear, it is required under Article 806 of the Judicial Code, to uphold KdG’s claim, unless the legal procedure or claim is contrary to public policy.

21 In that regard, in the first place, the referring court wonders whether, in the context of a default procedure, it may, of its own motion, examine whether the contract on which KdG’s claim is based falls within the scope of the national law implementing Directive 93/13. In particular, it is not certain that, in Belgium, the law on unfair terms is a matter of public policy. Therefore, that court

wonders whether the national procedural rules are consistent with the directive, in so far as that they preclude such an assessment.

22 In the second place, the referring court wonders whether the contract agreed between KdG and Ms Kuijpers falls within the scope of the national law on unfair terms. In that context, that court has doubts as to whether that law is consistent with Directive 93/13, since the scope of that law is defined not by reference to contracts concluded between a consumer and a 'seller or supplier', but by reference to contracts concluded between a consumer and an 'undertaking'. In any event, the court wonders whether an educational establishment, such as the KdG, which is financed mainly by state funds, must be regarded as an 'undertaking' and/or a 'seller or supplier' when it grants a student a repayment plan, such as that at issue in the main proceedings.

23 In those circumstances, le vredegerecht te Antwerpen (Magistrates' court, Antwerp) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does a national court, when a claim is lodged with it against a consumer in relation to the performance of a contract and that court, under national procedural rules, have the power only to examine of its own motion whether the claim is contrary to national rules of public policy, have the power to examine in the same manner, of its own motion, even if the consumer does not appear at the hearing, whether the contract in question comes within the scope of [Directive 93/13] as implemented in Belgian law?

(2) Is a free educational establishment which provides subsidised tuition to a consumer to be regarded, in respect of the contract for the provision of that tuition in return for payment of a registration fee, increased, as it may be, by amounts for the reimbursement of costs incurred by the educational establishment, as an undertaking within the meaning of EU law?

(3) Does a contract between a consumer and a subsidised free educational establishment relating to the provision of subsidised tuition by that establishment come within the scope of [Directive 93/13] and is a free educational establishment which provides subsidised tuition to a consumer to be regarded, in respect of the contract for the provision of that tuition, as a seller or supplier within the meaning of that directive?'

Consideration of the questions referred

The first question

24 By its first question, the referring court asks, in essence, whether Directive 93/13 must be interpreted as meaning that a national court giving judgment in default, and which has the power, under national procedural rules, to examine of its own motion whether the term upon which the claim is based is contrary to national public policy laws may, or must, examine of its own motion whether the contract containing that term falls within the scope of application of that directive.

25 It is stated in the order for reference that that question is linked to the existence, in Belgian law, of Article 806 of the Judicial Code, which requires national courts giving judgment in default to uphold claims or defences of the party who does appear, save to the extent that the procedure, or those claims or defences are contrary to public policy. Therefore, a national court giving judgment in default can raise of its own motion only those pleas raising issues of public policy. Since it is unclear whether the Belgian law on unfair terms raises an issue of public policy, that court has doubts as to whether it may examine of its own motion, inter alia, whether a contract such as that at issue in the main proceedings is within the scope of application of Directive 93/13.

26 For the purpose of replying to the question referred, it should be recalled that, according to settled case-law, the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (Judgments of 9 November 2010, *VB Pénzügyi Lízing*, C-137/08, EU:C:2010:659, paragraph 46 and the case-law cited; 21 February 2013, *Banif Plus Bank*, C-472/11, EU:C:2013:88, paragraph 19 and the case-law cited, and 7 December 2017, *Banco Santander*, C-598/15, EU:C:2017:945, paragraph 36 and the case-law cited).

27 The Court of Justice has also held that, on account of that weaker position, Article 6(1) of the directive provides that unfair terms are not binding on the consumer. As is apparent from case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (judgments of 9 November 2010, *VB Pénzügyi Lízing*, C-137/08, EU:C:2010:659, paragraph 47 and the case-law cited; 21 February 2013, *Banif Plus Bank*, C-472/11, EU:C:2013:88, paragraph 20 and the case-law cited, and 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 41 and the case-law cited).

28 In order to guarantee the protection intended by the directive, the Court has also stated that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract (judgments of 9 November 2010, *VB Pénzügyi Lízing*, C-137/08, EU:C:2010:659, paragraph 48 and the case-law cited; 21 February 2013, *Banif Plus Bank*, C-472/11, EU:C:2013:88, paragraph 21 and the case-law cited, and 14 April 2016, *Sales Sinués and Drame Ba*, C-381/14 and C-385/14, EU:C:2016:252, paragraph 23 and the case-law cited).

29 It is in the light of those considerations that the Court has held that, in the exercise of the functions incumbent upon it pursuant to the provisions of Directive 93/13, a national court is required to assess of its own motion whether a contractual term is unfair and, in so doing, correct the imbalance that exists between the consumer and the seller or supplier (see, to that effect, the judgments of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraph 38, and 21 February 2013, *Banif Plus Bank*, C-472/11, EU:C:2013:88, paragraphs 22 and 24, and the case-law cited).

30 Included within that obligation for the national court, is that of examining whether the contract containing the term which is the basis of the claim is within the scope of application of that directive (see, to that effect, the judgment of 9 November 2010, *VB Pénzügyi Lízing*, C-137/08, EU:C:2010:659, paragraph 49, and, by analogy, the judgment of 4 June 2015, *Faber*, C-497/13, EU:C:2015:357, paragraph 46). In order to examine of its own motion whether the terms in the contract in question are unfair the court must, as a preliminary matter, ascertain whether the contract falls within the scope of application of the directive.

31 Those obligations for the national court must be regarded as necessary for ensuring that the consumer enjoys effective protection, as guaranteed by Directive 93/13, in view in particular of the real risk that he is unaware of his rights or encounters difficulties in enforcing them (see, to that effect, the judgment of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraph 28 and the case-law cited, and the order of 16 November 2010, *Pohotovosť*, C-76/10, EU:C:2010:685, paragraph 42).

32 The protection which the directive confers on consumers thus extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfair nature of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve (see, to that effect, the judgment of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraph 29 and the case-law cited, and the order of 16 November 2010, *Pohotovost'*, C-76/10, EU:C:2010:685, paragraph 43).

33 In respect of the implementation of those obligations by a national court giving judgment in default, it must be noted that, in the absence of EU legislation, the procedural rules governing appeal proceedings for safeguarding the rights that individuals derive from EU law fall within the internal legal order of the Member States by virtue of the principle of procedural autonomy of those Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (see, by analogy, the judgment of 30 May 2013, *Asbeek Brusse andde Man Garabito*, C-488/11, EU:C:2013:341, paragraph 42 and the case-law cited).

34 So far as concerns the principle of equivalence, to which the first question for a preliminary ruling implicitly refers and which is the only principle at issue in the present case, it must be pointed out that, as recalled in paragraph 27 above, Article 6(1) of Directive 93/13 is a mandatory provision (judgment of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 43 and the case-law cited).

35 In addition, the Court of Justice has held that, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 thereof must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy. It must be held that that classification extends to all the provisions of the directive which are essential for the purpose of attaining the objective pursued by Article 6 thereof (judgment of 30 May 2013, *Asbeek Brusse andde Man Garabito*, C-488/11, EU:C:2013:341, paragraph 44 and the case-law cited).

36 It follows that, where the national court has the power, under internal procedural rules, to examine of its own motion whether a claim is contrary to national rules of public policy, which, according to the information provided in the order for reference, is the case in the Belgian judicial system for a court giving judgment in default, it must also exercise that power for the purposes of assessing of its own motion, in the light of the criteria laid down in Directive 93/13, whether the disputed term on which the claim is based and the contract containing that term come within the scope of that directive and, if so, whether that term is unfair (see, by analogy, the judgment of 30 May 2013, *Asbeek Brusse andde Man Garabito*, C-488/11, EU:C:2013:341, paragraph 45).

37 In view of all the foregoing considerations, the reply to the first question referred is that Directive 93/13 must be interpreted as meaning that a national court giving judgment in default, and which has the power, under national procedural rules, to examine of its own motion whether the term upon which the claim is based is contrary to national public policy laws, is required to examine of its own motion whether the contract containing that term falls within the scope of that directive and, if so, whether that term is unfair.

The second and third questions

38 By its second and third questions, the referring court asks, first, whether a free educational establishment, such as the KdG, must be regarded as an undertaking within the meaning of EU law when it provides subsidised tuition to a consumer and receives for that purpose payment of a registration fee only, supplemented, where appropriate, by sums for the reimbursement of costs incurred by that educational establishment. Second, the court asks whether the contract agreed between a consumer and such an establishment, and covering the supply of that tuition, falls within the scope of Directive 93/13, and whether that establishment must, in the context of that contract, be regarded as a 'seller or supplier' within the meaning of that directive.

39 As a preliminary matter, it must be recalled that, pursuant to Article 1 thereof, Directive 93/13 applies not to contracts between an 'undertaking' and a consumer, but to those between a 'seller or supplier' and a consumer, and it follows that it is unnecessary in the context of the case in the main proceedings to determine whether an educational establishment such as KdG must be regarded as an 'undertaking' within the meaning of EU law.

40 In addition, it is clear from the documents before the Court that the term 'undertaking' in Article VI.83 of the Code on Economic Law was used by the Belgian legislature in order to transpose into the national legal order the term 'seller or supplier' used in Article 2(c) of Directive 93/13.

41 In that regard, it must be borne in mind, as the Court has consistently held, that when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of Directive 93/13 in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with EU law is inherent in the system of the FEU Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them (see, by analogy, judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 79 and the case-law cited).

42 It follows that, in the case in the main proceedings, the notion of 'undertaking', as it is used in Belgian law, must be interpreted by the national court consistently with that of 'seller or supplier' within the meaning of Directive 93/13 and, in particular, the definition set out in Article 2(c) thereof.

43 Furthermore, it is clear from the documents before the Court that the contract at issue in the main proceedings, signed by the KdG and Ms Kuijpers, provides for an interest-free instalment repayment plan of sums due by the latter in respect of registration fees and costs connected with a study trip.

44 In that context, the second and third questions, which it is appropriate to consider together, must be understood as meaning that the referring court asks, in essence, whether a free educational establishment, such as that at issue in the main proceedings, which, by contract, has agreed with one of its students to provide repayment facilities for sums due by the latter in respect of registration fees and costs connected with a study trip, must be regarded, in the context of that contract, as a 'seller or supplier', within the meaning of Article 2(c) of Directive 93/13, with the result that that contract falls within the scope of application of that directive.

45 In that regard, it should be recalled that the directive applies, as is apparent from Article 1(1) and Article 3(1) thereof, to the terms of 'contracts concluded between a seller or supplier and a consumer' which have not been 'individually negotiated'.

46 As the 10th recital of Directive 93/13 states, the uniform rules of law in the matter of unfair terms should apply to ‘all contracts’ concluded between ‘sellers or suppliers’ and ‘consumers’, as defined in Article 2(b) and (c) of that directive.

47 Article 2(c) of the directive defines the term ‘seller or supplier’ 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 or privately owned.

48 It is clear from the wording itself of that provision that the EU legislature intended a broad definition to be given to the notion of ‘seller or supplier’ (see, to that effect, the judgment of 30 May 2013, *Asbeek Brusse andde Man Garabito*, C-488/11, EU:C:2013:341, paragraph 28 and the case-law cited).

49 In the first place, the use of the term ‘any’ in that provision shows that every natural or legal person must be regarded as a ‘seller or supplier’, within the meaning of Directive 93/13, when performing a professional activity.

50 In the second place, that same provision covers all professional activity, whether it is ‘publicly owned or privately owned’. Finally, as the fourteenth recital states, Directive 93/13 also applies to professional activities of a public nature (see, to that effect, the judgment of 15 January 2015, *Šiba*, C-537/13, EU:C:2015:14, paragraph 25).

51 It follows that Article 2(c) of Directive 93/13 does not exclude from its scope of application entities that pursue a task in the public interest, nor those that are governed by public law (see, by analogy, the judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, C-59/12, EU:C:2013:634, paragraph 32). Furthermore, as the Advocate General observed in paragraph 57 of her opinion, since tasks of a public nature and in the public interest are often conducted on a not-for-profit basis, the fact that a body is a not-for-profit organisation is irrelevant to the definition of the notion of ‘seller or supplier’, within the meaning of that provision.

52 In addition, it is clear from the wording of Article 2(c) of Directive 93/13 that, in order to be regarded as a ‘seller or supplier’, it is necessary that the person concerned is acting ‘for purposes relating to his trade, business or profession’. Article 2(b) of the directive provides that ‘a consumer is ‘any natural person who, in contracts covered by this directive, is acting for purposes which are outside his trade, business or profession’.

53 It is therefore by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, that the directive defines the contracts to which it applies (judgments of 30 May 2013, *Asbeek Brusseand de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 30, and of 3 September 2015, *Costea*, C-110/14, EU:C:2015:538, paragraph 17 and the case-law cited).

54 That criterion corresponds to the idea, recalled in paragraph 26 above, upon which the system of protection implemented by that directive is based, namely that the consumer is in a weaker position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (judgments of 30 May 2013, *Asbeek Brusse andde Man Garabito*, C-488/11, EU:C:2013:341, paragraph 31, and of 3 September 2015, *Costea*, C-110/14, EU:C:2015:538, paragraph 18 and the case-law cited).

55 It follows that the notion of ‘seller or supplier’, within the meaning of Article 2(c) of Directive 93/13 is a functional concept, requiring determination of whether the contractual relationship is amongst the activities that a person provides in the course of their trade, business or profession (see, by analogy, the order of 27 April 2017, *Bachman*, C-535/16, not published, EU:C:2017:321, paragraph 36 and the case-law cited).

56 In the present case, the Belgian and Austrian governments submitted that as a higher educational establishment subsidised, for the main part, by public funds, the KdG could not be regarded as an undertaking, in accordance with the interpretation given to that notion in EU competition law and, hence, as a ‘seller or supplier’, for the purposes of Directive 93/13, given that the supply of tuition which it provides is not a ‘service’ within the meaning of Article 57 TFEU (see, to that effect, the judgment of 7 December 1993, *Wirth*, C-109/92, EU:C:1993:916, paragraphs 16 and 17).

57 In that regard, it is clear from the case file before the Court that, in any event, the case in the main proceedings does not directly concern the task of an educational establishment such as the KdG. Rather, in issue is a service provided by that establishment, which is complementary and ancillary to its educational activity, consisting in offering, through a contract, an interest-free, instalment repayment plan in respect of sums due to it by a student. Such a supply is, by its nature, an agreement to provide payment facilities for an existing debt, and is, fundamentally a contract for credit.

58 Therefore, subject to the referring court verifying the elements referred to in the previous paragraph, it must be held that, by providing, in that contract, such a service which is complementary and ancillary to its educational activity, an establishment such as the KdG acts as a ‘seller or supplier’ within the meaning of Directive 93/13.

59 That interpretation is corroborated by the protective purpose of that directive. In the context of a contract such as that at issue in the main proceedings, there is, in principle, an inequality between the educational establishment and the student, owing to the asymmetry of information and expertise between the parties. Such an establishment has at its disposal a permanent organisation and expertise that the student, acting on a private basis, does not necessarily have available to him when faced incidentally with such a contract.

60 Having regard to all the foregoing considerations, and subject to the verifications to be carried out by the referring court, the answer to the second and third questions is that Article 2(c) of Directive 93/13 must be interpreted as meaning a free educational establishment, such as that at issue in the main proceedings, which, by contract, has agreed with one of its students to provide repayment facilities for sums due by the latter in respect of registration fees and costs connected with a study trip, must be regarded, in the context of that contract, as a ‘seller or supplier’, within the meaning of Article 2(c) of Directive 93/13, with the result that that contract falls within the scope of application of that directive.

Costs

61 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 (Fifth Chamber) hereby rules:

1. **Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court giving judgment in default and which has the power, under national procedural rules, to examine of its own motion whether the term upon which the claim is based is contrary to national public policy laws is required to examine of its own motion whether the contract containing that term falls within the scope of that directive and, if so, whether that term is unfair.**

2. **Subject to verifications to be carried out by the referring court, Article 2(c) of Directive 93/13 must be interpreted as meaning that a free educational establishment, such as that at issue in the main proceedings, which, by contract, has agreed with one of its students to provide repayment facilities for sums due by the latter in respect of registration fees and costs connected with a study trip, must be regarded, in the context of that contract, as a 'seller or supplier', within the meaning of Article 2(c) of Directive 93/13, with the result that that contract falls within the scope of application of that directive.**

[Signatures]

* Language of the case: Dutch.