



A standard term in consumer contracts remains subject to review for unfairness even if it does no more than reproduce national legislation applicable to a different category of contracts

It is for the national court to assess in each individual case whether such a term allowing a supplier of gas unilaterally to alter the price satisfies the requirements of good faith, balance and transparency

The Verbraucherzentrale Nordrhein-Westfalen (consumer association for North Rhine-Westphalia) is challenging before the German courts a standard contractual term by which RWE, a German undertaking supplying natural gas, reserves the right unilaterally to amend the price charged to its customers if they are on a special tariff (*Sonderkunden*). Instead of opting for the standard tariff which German gas suppliers are obliged to offer consumers, those customers entered into contracts on the basis of freedom of contract. Since it regards that term as unfair, the association, acting on behalf of 25 consumers, seeks reimbursement of the additional amounts the consumers paid RWE following four price increases from 2003 to 2005, a total of €16,128.63.

RWE considers inter alia that the disputed term, which forms part of the general terms and conditions applicable to the customers in question, cannot be reviewed for unfairness. The term merely refers to the German legislation applicable to standard tariff contracts. That legislation allows the supplier to vary gas prices unilaterally without stating the grounds, conditions or extent of such a variation, while ensuring, however, that customers will be notified of the variation and will be free, if appropriate, to terminate the contract.

Having lost before the lower courts, RWE turned to the Bundesgerichtshof (Federal Court of Justice, Germany), which puts questions to the Court of Justice on the interpretation of the rules of EU law intended to protect consumers against unfair and/or non-transparent standard contractual terms¹. The German court is uncertain in particular about the scope of the exclusion from review for unfairness of **standard terms which merely reproduce mandatory statutory or regulatory provisions**.

By its judgment of today, the Court of Justice answers that such terms **must be subject to review for unfairness² if the statutory provisions they reproduce are applicable only to another category of contracts**.

Exclusion of review for unfairness of contractual terms that reflect the provisions of national legislation governing a certain category of contracts is justified by the fact that it can legitimately be assumed that the national legislature struck a balance between all the rights and obligations of the parties to those contracts. That reasoning does not apply, however, to terms in a different contract. To exclude a term in such a contract from review for unfairness merely because it reproduces legislation that applies only to another category of contracts would call into question the protection of consumers aimed at by EU law.

¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).

² Under Directive 93/13, cited in footnote 1.

As regards the possible unfairness of the disputed term, the Court finds that the EU legislature recognised that, in the context of contracts of indefinite duration such as contracts for the supply of gas, the supplying undertaking has a legitimate interest in altering the charges for its service. **A standard term allowing such a unilateral alteration must however satisfy the requirements of good faith, balance and transparency.** In this respect, the Court points out that ultimately it is not for it but **for the national court to determine in each individual case whether that is so.**

When making that assessment the national court must accord fundamental importance to the following criteria:

- **The contract must set out in transparent fashion the reason for and method of the variation of the charges**, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to them.

The Court emphasises that the lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation.

- **The right of termination conferred on the consumer must actually be capable of being exercised in the specific circumstances.** That would not be the case if, for reasons connected with the details of the termination procedure or the conditions of the market concerned, the consumer has no real possibility of changing supplier, or if he has not been informed suitably and in good time of the change.

Moreover, **the Court dismisses the applications by the German Government and RWE to limit the temporal effects of its judgment in order to limit its financial consequences.** The interpretation of EU law given by the Court in this judgment therefore applies not only to changes to tariffs that take place from now on, but to all changes to tariffs that have taken place since the coming into force of the provisions of EU law interpreted by the judgment³. It is also necessary that the conditions for bringing before the courts having jurisdiction an action relating to the application of those provisions are satisfied.

The Court observes in this respect that the financial consequences for gas supply undertakings in Germany which have concluded special contracts with consumers cannot be determined on the sole basis of the interpretation of EU law given by the Court in today's judgment. It is for the national court to determine in the light of that interpretation whether a particular contractual term is actually unfair in the circumstances of the particular case.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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Press contact: Christopher Fretwell ☎ (+352) 4303 3355

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³ Directive 93/13, cited in footnote 1, entered into force on 14 April 1993 and the final date for its transposition into national law was 31 December 1994. Directive 2003/55, also cited in footnote 1, entered into force on 1 November 2003 and the final date for its transposition into national law was 30 April 2004.