Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 14 April 2016[1]

Case C-168/15

Milena Tomášová
v
Ministerstvo spravodlivosti SR
Pohotovosť s. r. o.
(Request for a preliminary ruling

from the Okresný súd Prešov (District Court, Prešov, Slovakia))

(Reference for a preliminary ruling — Consumer protection — Unfair terms in consumer contracts — Directive 93/13/EEC — Consumer loan contract — Enforcement of an arbitration award — Failure of the enforcement court to assess whether the terms contained in the contract were unfair — Liability of a Member State for damage caused to individuals owing to infringements of EU law attributable to a national court — Conditions governing liability — Whether there exists a sufficiently serious infringement of EU law)

I – Introduction to the issues in the main proceedings, the facts in the main proceedings and the questions referred for a preliminary ruling

1. The entrenching in EU law of the duty of a national court, when it has available to it the legal and factual elements necessary to that end, to raise of its own motion the existence of an unfair term in a contract between a consumer and a seller or supplier, under Directive 93/13/EEC,[2] constitutes a significant advance in consumer protection.

2. The present case invites the Court to determine whether the effectiveness of Directive 93/13 necessarily means that, in addition, the Member State incurs non-contractual liability owing to the failure of a national court, within the specific framework of enforcement proceedings, to assess of its own motion the existence of an unfair term contained in a consumer credit contract. The question arises more generally whether, and if so in what circumstances, the infringement by national courts of their obligation to assess of their own motion the existence of an unfair term in a contract binding a seller or supplier to a consumer may be penalised by the incurring of the liability of the Member State concerned.

3. This case arises in proceedings between Ms Tomášová and the Ministerstvo spravodlivosti SR (Ministry of Justice of the Slovak Republic) and Pohotovosť s. r. o. ('Pohotovosť') concerning the enforcement of an arbitration award by which Ms Tomášová had been ordered to pay sums of money linked to the conclusion of a consumer credit contract.

1 — Original language: French.

2 — Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

4. It is apparent from the order for reference that Ms Tomášová is an old-age pensioner whose only income is a pension of EUR 347. In 2007, she concluded a contract for a consumer loan with Pohotovosť, with which she entered into an agreement for a loan of EUR 232.

5. That contract was in the form of a pre-formulated standard contract including an arbitration clause under which Ms Tomášová had to agree that disputes relating to the contract would be settled by an arbitration tribunal having its seat more than 400 km from her home. Moreover, under that contract, the penalty interest was 91.25% per annum. Furthermore, the contract at issue did not indicate the annual percentage rate of charge.

6. Ms Tomášová having fallen into arrears and being unable to pay the abovementioned penalty interest, she took out another loan of EUR 232.36 with Pohotovosť.

7. By decisions of 9 April and 15 May 2008 of the Stálý rozhodcovský súd (Permanent Arbitration Tribunal, Slovakia), Ms Tomášová was ordered to pay Pohotovosť several sums on the ground of non-repayment of the loan at issue, penalty interest and costs.

8. After those awards had become *res judicata*, Pohotovosť, on 13 and 27 October 2008, applied for enforcement before the Okresný súd Prešov (District Court, Prešov, Slovakia), which granted the application by decisions dated 15 and 16 December 2008.

9. According to the order for reference, the enforcement proceedings at issue were still ongoing when this reference for a preliminary ruling was made.

10. On 9 July 2010 Ms Tomášová brought an action against the Ministry of Justice of the Slovak Republic seeking compensation in the amount of EUR 2 000 for damage arising, she maintained, from an infringement of EU law by the Okresný súd Prešov (District Court, Prešov), on the grounds that, in those proceedings, that court granted the applications for enforcement based on an unfair arbitration clause and designed to recover sums on the basis of an unfair term.

11. By judgment of 22 October 2010, the Okresný súd Prešov (District Court, Prešov) dismissed Ms Tomášová's application as unfounded on the ground that she had not made use of all available legal remedies, that the enforcement proceedings at issue had not yet been finally closed and that, therefore, there could not yet be any question of damage, so that the application had been made prematurely.

12. Ms Tomášová has appealed against that decision.

13. By decision of 31 January 2012, the Krajský súd v Prešove (Regional Court, Prešov, Slovakia) set aside that judgment and referred the case back to the Okresný súd Prešov (District Court, Prešov). It found that the arguments put forward by the Okresný súd Prešov (District Court, Prešov) for not accepting the claim for compensation brought by Ms Tomášová were not convincing.

14. It was in those circumstances that the Okresný súd Prešov (District Court, Prešov) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is there a serious breach of EU law if, in an enforcement procedure carried out on the basis of an arbitration award, performance of an unfair term is enforced, contrary to the case-law of the Court of Justice of the European Union?

(2) May a Member State be held liable for a breach of [EU] law before a party to proceedings has used all legal remedies available in the legal order of the Member State in proceedings for enforcement of an award? In the light of the facts of the case, may that liability of a Member State arise in the present case before the actual conclusion of the proceedings for enforcement of the award and before the applicant has exhausted all opportunities of claiming recovery of the sum unduly paid?

(3) If so, is the conduct of an authority as described by the applicant, in the light of the particular facts and in particular of the absolute inactivity of the applicant and the failure to exhaust all legal remedies made available by the law of the Member State, a sufficiently clear and serious breach of [EU] law?

(4) If there is a sufficiently serious breach of [EU] law in the present case, does the sum claimed by the applicant represent damage for which the Member State is liable? Is it possible for the damage as so understood to be equated with the debt collected, which unjust enrichment?

(5) Does an action for recovery of a sum unduly paid, as a legal remedy, have priority over compensation for damage?'

15. Written observations were submitted by the Slovak and Czech Governments and by the European Commission.

16. On 18 December 2015, the Court sent a request for clarification to the national court pursuant to Article 101 of the Rules of Procedure of the Court. By that request, the national court was invited to state whether, and if so in what circumstances, it was called upon to adjudicate at last instance in the enforcement proceedings at issue in the main proceedings. The court replied to that request by letter received at the Court on 16 February 2016.

II – Analysis

17. This case concerns the conditions governing the liability of a Member State when compensation is sought for damage caused to individuals by infringements of EU law attributable to a national court. The questions raised fall within the specific context of proceedings concerning the enforcement of an arbitration award stemming from the conclusion of a consumer credit contract which it is alleged contained unfair terms, within the meaning of Directive 93/13.

18. By its first, second and third questions, which I consider should be examined together, the national court asks, in essence, whether, and if so in what circumstances, an infringement of EU law arising from a court decision given in proceedings for enforcement of an arbitration award, granting an application for recovery of sums in accordance with a clause that has to be considered unfair, constitutes an infringement 'sufficiently serious' for the Member State concerned to incur non-contractual liability. In that context, it wonders whether the facts that the enforcement procedure has not been closed, that the person to whom it relates has shown absolute inactivity and has not exhausted the legal rights and remedies, such as an action for recovery of a sum unduly paid, available to her in the legal order concerned, has a bearing in that respect.

19. The fourth and fifth questions relate to the scope of a possible claim for compensation for damage suffered owing to the national court's inaction, consisting in the fact that it failed to assess whether the terms of the contract at issue were unfair, and to its link with other civil actions.

A – *The first three questions referred for a preliminary ruling: expediency of and conditions for establishing State liability for an infringement by the national enforcement court of its obligation to assess of its own motion the existence of an unfair term under Directive 93/13*

20. The first, second and third questions lead us, in essence, to consider whether the fact that the national enforcement court failed to assess of its own motion whether the terms of the consumer contract at issue in the main proceedings were unfair — and subsequently disregarded them in the enforcement procedure at issue — is sufficient to make the Member State concerned incur non-contractual liability.

21. This problem covers, in my view, two aspects which I shall consider in turn.

22. The first aspect concerns the question whether, in situations such as that in this case, the Member State may incur non-contractual liability for an infringement of EU law because of an act or omission of a national court which, it appears, does not have to adjudicate at last instance.

23. The second aspect relates to the question whether and, where appropriate, in what circumstances the failure to raise and dismiss the existence of an unfair term may be described as a 'sufficiently serious infringement' of a rule of EU law intended to confer rights on individuals.

1. The first aspect: may the national enforcement court incur liability before the enforcement proceedings are closed and even when the person deemed to have suffered damage has not exhausted all national legal remedies available to her?

24. In the present case, it is apparent from the questions referred for a preliminary ruling that the main proceedings concern a situation in which the national court is not called upon to rule at last instance. Those questions appear to have meaning only if it were to be considered that the enforcement procedure at issue has not been definitively closed. According to my understanding of the documents in the file, it would seem that a final decision binding the applicant in the main proceedings has not yet been given on the merits and that she has brought a claim for compensation for the damage which she suffered owing to a legal decision against which an ordinary judicial appeal could be brought.

25. However, it is not clear from the documents submitted to the Court whether or not, in the main proceedings, the Okresný súd Prešov (District Court, Prešov) is ruling at last instance.

26. In its letter following the Court's request for clarification, the national court did not give a definite answer to those points. It is apparent from the applicable national law that an appeal may lie from a court order rejecting an application for authorisation of enforcement.[3] Similarly, an ordinary appeal could be brought against the decision upholding the debtor's objections.[4] These facts indicate, as the Slovak Government has stated, that, depending on the circumstances of the case, the enforcement court whose procedure is the subject matter of these proceedings may be, but is not necessarily,[5] a court ruling at last instance.

27. This last consideration seems to me, however, to be at the core of the problem of the incurring of the liability of the Member States for an infringement committed by courts within their legal order.

3 — See Paragraphs 44 and 45 of Law No 233/1995 concerning bailiffs and the enforcement procedure, amending and supplementing other laws.

4 — See Paragraph 50 of the abovementioned law and Paragraph 202(2) of Law No 99/1993 establishing the Code of Civil Procedure.

5 — See, in that regard, the judgment of the Okresný súd Prešov (District Court, Prešov) of 22 October 2010, referred to above (see point 11 of this Opinion), which dismisses, as having been submitted prematurely, the applicant's claim for compensation on the grounds inter alia that she had not made use of all available legal remedies, such as an application for annulment of the arbitration award at issue.

28. Indeed, it is well established that the principle that Member States are liable for damage caused to individuals owing to an infringement of EU law, affirmed since the judgment in *Francovich and Others*[6] and the conditions for which were set out by the judgment in *Brasserie du pêcheur and Factortame*,[7] applies to *any infringement of EU law* by a Member State, *no matter what body of the Member State* is responsible for the action or failure to act which results in the infringement.[8]

29. The Court thus made it clear, in the judgment in *Köbler*,[9] that that principle was also applicable, on certain conditions, where the infringement of EU law stemmed from a decision of a national court.

30. The possibility cannot, therefore, automatically be excluded that, generally speaking, State liability is incurred for an infringement of EU law arising out of an act or omission of a national court, whatever its nature or position in the judicial organisation at issue.

31. If, in theory, any decision of a national court which infringes EU law may potentially incur State liability, it is, nevertheless, not always sufficient in every case for that liability to be incurred.

32. When that act or omission takes place in the exercise of the judicial function and is open to review, in accordance with the applicable national rules of procedure, in an appeal or an appeal on a point of law alone brought against the judgment at issue, it is the decision of the court ruling at last instance that gives rise, *ultima ratio*, to an act or omission by the State contrary to EU law.

33. It is thus clear from the judgment of 30 September 2003 in *Köbler* (C-224/01, EU:C:2003:513), and from subsequent case-law[10] that, in such a configuration, the principle appears to be applicable only in respect of courts ruling at last instance.

34. Thus, in that fundamental judgment, it was on the basis of, in particular, the essential role played by the judiciary in the protection of the rights derived by individuals from EU rules and of the fact that a court adjudicating at last instance is by definition the last judicial body before which they may assert the rights conferred on them by EU law, that the Court had concluded that the protection of those rights would be weakened — and the full effectiveness of EU rules conferring similar rights would be called into question — if individuals were precluded from being able, under certain conditions, to obtain reparation for damage caused to them by an infringement of EU law attributable to a *decision of a national court adjudicating at last instance*.[11]

35. To the same effect, the Court clearly stated, in its judgment in *Traghetti del Mediterraneo*,[12] that, having regard to the specific nature of the judicial function and to the legitimate requirements of legal certainty, State liability in such a case was not unlimited. In the words of that judgment, 'State liability can be incurred *only in the exceptional case where the national court [adjudicates] at last instance*'.[13]

36. More recently, in the judgment in *Târșia*,[14] the Court held that it was specifically the fact that the judicial decision obliging Mr Târșia to pay a tax had become final — a decision which, in essence, was subsequently declared incompatible with EU law — that provided a basis for establishing State liability in order that the person concerned might obtain legal protection of his rights.

6 — Judgment of 19 November 1991 (C-6/90 and C-9/90, EU:C:1991:428, paragraphs 31 to 37).

7 — Judgment of 5 March 1996 (C-46/93 and C-48/93, EU:C:1996:79, paragraph 74).

8 — See, in particular, judgment of 5 March 1996 in *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 34).

9 — Judgment of 30 September 2003 (C-224/01, EU:C:2003:513, paragraphs 33 to 36).

10 — See judgments of 13 June 2006 in *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391, paragraph 31); 24 November 2011 in *Commission* v *Italy* (C-379/10, EU:C:2011:775); 9 September 2015 in *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565, paragraph 47); and 6 October 2015 in *Târșia* (C-69/14, EU:C:2015:662, paragraph 40).

11 — Judgment of 30 September 2003 in *Köbler* (C-224/01, EU:C:2003:513, paragraphs 33 to 36).

12 — Judgment of 13 June 2006 (C-173/03, EU:C:2006:391, paragraph 32).

13 — Emphasis added.

14 — Judgment of 6 October 2015 (C-69/14, EU:C:2015:662, paragraph 40).

37. Although there may have been some doctrinal debate as to whether State liability could be established as a consequence of decisions of national courts not necessarily ruling at last instance, [15] I think it is apparent from now settled case-law of the Court that the establishment of that liability is clearly limited to omissions of national courts whose decisions are not open to ordinary appeal.

38. The innovation introduced by the judgment in *Köbler*, [16] which stems from the Court's *broad and unitary* conception of 'State', with regard to the incurring of non-contractual liability for infringement of EU law, made sense in that case only because there was a decision attributable to a national court adjudicating at last instance — which does not mean however that it is necessarily a supreme court.

39. That consideration seems to me to emerge unambiguously from that judgment. In the judgment, the Court, it appears to me, stressed the finality of the decision of courts adjudicating at last instance. The Court accordingly stated 'that a [national] court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law' and that 'since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals may not be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights'. [17]

40. In addition, I think that that conclusion ensures a fair balance between the necessity of guaranteeing effectively the rights of individuals under EU law, on the one hand, and the specific features characterising the intervention of the judicial bodies in each Member State and the difficulties which national courts may face in the exercise of the judicial function, on the other hand.

41. In other words, there is an infringement of EU law sufficient to establish State liability owing to damage caused by a judicial decision only in a situation that reflects the failure of a judicial system taken as a whole, that is to say, when the court adjudicating at last instance has been unable to ensure effective protection for a right conferred by EU law. For there to be a failure by a State to fulfil its obligations that is attributable to a judicial infringement, I think there has to be a judicial decision that has become final and is liable to fix the legal position of the persons concerned in the future. [18]

42. As shown, in my view, by the Court's case-law, [19] that conclusion seems to be valid both for situations in which the national court has failed in its obligation to make a reference for a preliminary ruling which, under the third paragraph of Article 267 TFEU, courts whose decisions are not open to judicial appeal under national law are required to do if they have doubts as to the interpretation of EU law, and for cases in which it is the observance of EU substantive law that is at issue, such as that which requires the courts, in order to ensure the effectiveness of Directive 93/13 and more particularly of Article 6(1) thereof, to assess whether terms contained in consumer contracts are unfair and, possibly, to set them aside.

15 — See, inter alia, Beutler, B., 'State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle', *Common Market Law Review* 46, 2009, No 3, pp. 773 to 804 (especially p. 789), and Huglo, J.-G., 'La responsabilité des États membres du fait des violations du droit communautaire commises par les juridictions nationales : un autre regard', *Gazette du Palais*, 12 June 2004, I Jur., p. 34.

16 — Judgment of 30 September 2003 (C-224/01, EU:C:2003:513).

17 — Judgment of 30 September 2003 in *Köbler* (C-224/01, EU:C:2003:513, paragraph 34).

18 — As Advocate General Geelhoed put it in his Opinion in *Commission* v *Italy* (C-129/00, EU:C:2003:319, point 63), following the example of what serves as a basis for the structure of Article 234 EC (now Article 267 TFEU) with regard to the obligation to make a reference for a preliminary ruling, the idea is that individual judgments of lower national courts in which EU law is applied incorrectly can still be corrected within the national judicial hierarchy. Even where this does not occur, an individual incorrect judgment of a lower court will not necessarily result in the undermining of the practical effect of the provision concerned within the Member State. On the other hand, such consequences are likely if there is contrary national case-law of the supreme national court from which the lower courts will derive guidance within the national legal system.

19 — Thus, in the cases leading to the judgments of 13 June 2006 in *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391) and 24 November 2011 in *Commission* v *Italy* (C-379/10, EU:C:2011:775) the infringement attributable to the national court adjudicating at last instance was based on its interpretation of the rules of law.

43. Do the necessity of giving special protection to consumers, the party traditionally held to be vulnerable, and the public policy status conferred by the Court on rules ensuring consumer protection under Directive 93/13,[20] constitute reasons for reviewing that conclusion or amending it in the light of the limits imposed on the principle of procedural autonomy in respect of the specific conditions for the incurring of State liability?

44. I think not.

45. I consider that the effectiveness of Directive 93/13 is ensured by the power, or the obligation in certain situations, of the national court to find unfairness and the possibility, for the court adjudicating at last instance, of reviewing a decision taken in disregard of that obligation. It would, in my view, be a step too far to contemplate the non-contractual liability of the State being incurred in every case in which it is alleged that a court, whatever its place in the national judicial structure and its level of intervention, has not fulfilled its obligation to assess the unfairness of a contractual term in a contract between a consumer and a seller or supplier and, in certain circumstances, to set it aside.

46. However, if the principle of effectiveness is not, therefore, affected, it may be different from the point of view of the principle of equivalence.[21] Although the conditions for liability to be incurred identified by the Court are necessary and sufficient to create a right for individuals to obtain compensation, State liability may conceivably be incurred in less restrictive circumstances on the basis of national law. Accordingly, if it is possible, under the applicable national law, for the liability of courts not adjudicating at last instance to be incurred for infringement of the applicable national rules of law, that possibility should also be open in the same circumstances for the situation in which the national court has infringed the rights of individuals under EU law, and, in particular, those deriving from Directive 93/13.

47. It follows from all those considerations that, subject to observance of the principle of equivalence, EU law does not in itself require the Member State to compensate damage resulting from a judicial decision against which an ordinary appeal may still lie.

48. In conclusion, State liability for damage caused to an individual by an infringement of EU law committed by a national court can be incurred only in the exceptional case in which that court adjudicates at last instance, which, in the case in the main proceedings, it is for the national court to ascertain, taking into account the particular circumstances of those proceedings.

49. If the national court must be regarded, in connection with the main proceedings, as a court adjudicating at last instance, the question would then arise of the extent to which it has committed a sufficiently serious infringement of a rule of law intended to confer rights on individuals.

20 — See judgment of 4 June 2015 in *Faber* (C-497/13, EU:C:2015:357, paragraph 56).

21 — In that regard, I must point out that it was specifically in accordance with the principle of equivalence that the judgment of 6 October 2009 in *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraphs 49 to 59), affirmed that a national court or tribunal hearing an action for enforcement of an arbitration award which has become final is required to assess whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair.

2. The second aspect: in what circumstances may the failure to assess whether consumer contracts contain unfair terms and, if necessary, to set those terms aside, be classified as a sufficiently serious infringement of a rule of EU law intended to confer rights on individuals?

50. With regard to the conditions for State liability to be incurred owing to an infringement of EU law, the Court has repeatedly held that individuals who have been harmed have a right to reparation for the damage suffered when three conditions are met, namely, the rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties.[22] State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of EU law is governed by the same conditions.[23]

51. It is, in principle, for the national courts to apply the conditions for Member States to incur liability for damage caused to individuals by breaches of EU law, in accordance with the guidelines laid down by the Court for the application of those conditions.[24]

52. Those guidelines can be summarised as follows.

53. In the first place, it must be determined whether the rule infringed is intended to confer rights on individuals. I have little doubt that the provisions of Directive 93/13 and the obligations imposed on national courts in order to ensure its full effectiveness give rise to rights for individuals which the national courts must protect.

54. In the second place, as regards to the condition concerning the existence of a 'manifest' infringement, it is accordingly well established that, in view of the specific nature of the judicial function and the legitimate requirements of legal certainty, State liability for damage caused to individuals owing to an infringement of EU law by a decision of a national court is not unlimited. Therefore, in addition to the fact, pointed out above, that that liability may be established only in the exceptional case in which the national court at issue adjudicates at last instance, it must be established whether that court has manifestly infringed the law applicable.[25]

55. What of the obligation imposed on the national court to raise of its own motion the existence of an unfair term in a contract concluded between a consumer and a seller or supplier?

56. I note that 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 their content.[26]

22 — See, inter alia, judgments of 5 March 1996 in *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51); 30 September 2003 in *Köbler* (C-224/01, EU:C:2003:513, paragraph 51); 12 December 2006 in *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 209); 25 November 2010 in *Fuß* (C-429/09, EU:C:2010:717, paragraph 47); and 14 March 2013 in *Leth* (C-420/11, EU:C:2013:166, paragraph 41).

23 — See judgment of 30 September 2003 in *Köbler* (C-224/01, EU:C:2003:513, paragraph 52).

24 — See judgments of 30 September 2003 in *Köbler* (C-224/01, EU:C:2003:513, paragraph 100); 12 December 2006 in *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 210); and 25 November 2010 in *Fuß* (C-429/09, EU:C:2010:717, paragraph 48).

25 — See judgments of 30 September 2003 in *Köbler* (C-224/01, EU:C:2003:513, paragraph 53) and 13 June 2006 in *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391, paragraphs 32 and 42).

26 — Judgments of 27 June 2000 in *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 25), and 26 October 2006 in *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 25).

57. In the light of that weaker position, Article 6(1) of Directive 93/13 provides that unfair terms are not binding on the consumer. As is apparent from the case-law, that is a mandatory provision that is intended to replace the formal balance established by the contract between the rights and obligations of the parties with an effective balance that re-establishes equality between them. [27]

58. In order to guarantee the protection intended by Directive 93/13, the Court has also stated on several occasions that the imbalance existing between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract. [28]

59. It is in the light of those principles that the Court has held that the national court was required to assess of its own motion whether a contractual term was unfair. [29]

60. As regards the question whether a court has committed a 'sufficiently serious infringement of EU law' by failing to point out, in circumstances such as those described in the order for reference, the unfairness of a term contained in a consumer contract, several elements are, according to the case-law, [30] relevant, elements which I believe I can place in two categories.

61. The first category relates to the general degree of clarity and precision of the rule infringed, which involves, depending on the circumstances, determining whether there is clear case-law of the Court on the point of law submitted to the national court. The second category concerns all the specific circumstances of the situation concerned, such as the discretion left to the national bodies by the rule infringed, the blatant, intentional and/or excusable nature of the alleged infringement and all the factual and legal elements brought to the attention of the national court in particular by the parties to the dispute. With regard to this second aspect, the Court has stated that the national court hearing a claim for reparation must take account of all the factors that characterise the situation put before it. [31]

62. First, as to whether the rule infringed is sufficiently clear and precise, it cannot be denied that a breach of EU law will clearly be sufficiently serious if it has persisted despite the delivery of a judgment declaring the infringement in question established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement. [32]

63. In the present case, as regards the obligation of the court enforcing an arbitration award to raise of its own motion the unfairness of a contractual term, I consider that that rule, which has been identified judicially by the Court, was not necessarily characterised, at the date of the decisions authorising the enforcement at issue in the main proceedings, by the required degree of clarity and precision. In particular, it cannot easily be concluded that that rule, at the time of the adoption of the judicial decisions, dated respectively 15 and 16 December 2008, at issue in the main proceedings, was apparent from the case-law.

64. Two main reasons lead me to this conclusion.

27 — Judgments of 26 October 2006 in *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 36), and 4 June 2009 in *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 25).

28 — See judgments of 27 June 2000 in *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 27); 26 October 2006 in *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 26); 6 October 2009 in *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 31); and 14 June 2012 in *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 41).

29 — See, inter alia, judgments of 4 June 2009 in *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 32), and 6 October 2009 in *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 32).

30 — See judgments of 30 September 2003 in *Köbler* (C-224/01, EU:C:2003:513, paragraphs 53 to 55), and 13 June 2006 in *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391, paragraph 32).

31 — See judgment of 30 September 2003 in *Köbler* (C-224/01, EU:C:2003:513, paragraph 54).

32 — See, to that effect, judgment of 12 December 2006 in *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 214 and the case-law cited).

65. In the first place, it seems to me that the Court, seised of references for preliminary rulings concerning the interpretation of the provisions of Directive 93/13 arising in very varied disputes, has not always given a clear-cut reply to the question whether the national court 'must' or 'might' raise the issue of a term which it considers unfair and, if so, whether it could or must set it aside. Although the most recent case-law undeniably takes the view that the court is required to raise the abusiveness of a term in certain circumstances [33] and, if necessary, to draw the necessary conclusions, it has not always been so. The expressions used by the court have long been marked by a certain ambiguity, which is most often explained by the circumstances of each case. [34]

66. Moreover, in many cases, it has merely been a question of the obligation for the court to assess the unfairness of terms submitted for its assessment in very specific circumstances. According to a now settled line of authority, a national court is required to assess, of its own motion, whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in that way for the imbalance which exists between the consumer and the seller or supplier, *when it has available to it the legal and factual elements necessary for that task*. [35]

67. In the second place, that recognition of an 'obligation' is still less evident with regard to enforcement proceedings, such as those at issue in the case in the main proceedings, which often involve a marginal [36] or even non-existent [37] intervention by the competent national court. As I have already had occasion to mention, it is not unusual, in such proceedings, which are conducted along simplified lines, for the court to be unaware of all the relevant factual and legal elements.

68. Indeed, it should be pointed out that it was only in its order in *Pohotovosť* [38] that the Court examined a situation such as that at issue in the main proceedings and held, inter alia, that when the national court or tribunal seised of an action for enforcement of a final arbitration award must, in accordance with domestic rules of procedure, assess of its own motion whether an arbitration clause is incompatible with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair in the light of Article 6 of Directive 93/13, when it has available to it the legal and factual elements necessary for that task.

69. Although that order refers, admittedly, to the case-law developed until then by the Court [39] to reply to the questions raised, the possibility remains that, in the eyes of the national court, the obligations then imposed on it may have raised certain queries.

33 — See, inter alia, judgments of 14 March 2013 in *Aziz* (C-415/11, EU:C:2013:164, paragraph 46); 30 May 2013 in *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraph 49); 27 February 2014 in *Pohotovosť* (C-470/12, EU:C:2014:101, paragraph 34); 30 April 2014 in *Barclays Bank* (C-280/13, EU:C:2014:279, paragraph 34); 17 July 2014 in *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 24); 9 July 2015 in *Bucura* (C-348/14, EU:C:2015:447, not published, paragraphs 43 and 44), and order of 16 July 2015 in *Sánchez Morcillo and Abril García* (C-539/14, EU:C:2015:508, paragraphs 26 to 28).

34 — It seems that it is since the judgment of 4 June 2009 in *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 32), that the Court has clearly taken the view that the national court has an 'obligation' rather than the possibility accorded to it in previous cases.

35 — See, inter alia, judgment of 14 March 2013 in *Aziz* (C-415/11, EU:C:2013:164, paragraph 46 and the case-law cited).

36 — As I had pointed out in my View in *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2110, point 53), enforcement proceedings such as those at issue in that case, the subject matter of which is the recovery of a debt supported by an enforceable instrument presumed to be valid, are, by their very nature, very different from the proceedings on the substance of the matter.

37 — See, inter alia, judgment of 1 October 2015 in *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637), concerning the simplified notarial enforcement procedure existing in Hungary.

38 — Order of 16 November 2010 (C-76/10, EU:C:2010:685, paragraph 51).

39 — Judgments of 27 June 2000 in *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346); 21 November 2002 in *Cofidis* (C-473/00, EU:C:2002:705); 26 October 2006 in *Mostaza Claro* (C-168/05, EU:C:2006:675); 4 June 2009 in *Pannon GSM* (C-243/08, EU:C:2009:350); and 6 October 2009 *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615).

70. In that regard, it seems to me that the fact that the Court considered it expedient to settle Case C-76/10 *Pohotovost'* [40] by means of an order issued on the basis of the first subparagraph of Article 104(3) of the Rules of Procedure of the Court in the version in force at the date of that case, [41] is by no means conclusive in considering that the obligations imposed on the court enforcing an arbitration award derived 'clearly and precisely' from the case-law.

71. I consider that the assessment of whether the national court faced a clear and precise rule of law is unconnected with the Court's choice of recourse to a simplified procedure in order to interpret such a rule. The mere fact that a request for a preliminary ruling may have been made leads to the assumption that, at least for some national courts, the rule of law at issue was such as to present problems of interpretation.

72. As the Advocate General explained in the case which gave rise to the judgment of 4 June 2002 in *Lyckeskog* (C-99/00, EU:C:2002:329), [42] with regard to the connection that could be made between the issue of whether there is clearly reasonable doubt which requires the national court to make a reference for a preliminary ruling in accordance with the case-law in *Cilfit and Others* [43] and the wording of Article 104(3) of the former Rules of Procedure of the Court, 'in the first case, the issue, so to speak, is the existence and degree of the doubts that the *national court* must have on a question of Community law in order to decide whether or not to refer it to the Court of Justice; in the second case, on the contrary, we are concerned with the doubts that the answer to the question may raise *for the Court* for the purpose of determining the procedure to be followed in replying to it'. [44]

73. Secondly, and even if the rule of law intended to confer rights on individuals at issue here were to be considered well established at the time of the relevant facts, the second aspect which, in my view, should be examined, in order for it to be determined whether there is a 'manifest infringement' of a rule of law, concerns all the circumstances surrounding the case.

74. The court is required to raise of its own motion the unfairness of a term — and, if necessary, to set it aside — only if it is in possession of *all the relevant factual and legal elements*. It is crucial to take into account all the circumstances and that is why the Court, while agreeing to interpret general criteria used by the European legislature in Article 3 of Directive 93/13, in order to define the concept of unfair terms, has generally been careful not to rule on the application of those criteria to a particular term. [45]

75. I consider that the factual elements that must be taken into account include the responsiveness or, on the contrary, the inertia of the consumer concerned. The Court has stated that, if Directive 93/13 requires that the national court hearing disputes between consumers and sellers or suppliers take positive action unconnected with the parties to the contract, the need to observe the principle of effectiveness is not to be stretched so far as to make up fully for the total inertia on the part of the consumer concerned. Therefore, the fact that the consumer may rely on the protection of legislative provisions on unfair terms only if he brings court proceedings cannot in itself be regarded as contrary to the principle of effectiveness. [46]

40 — Order of 16 November 2010 (EU:C:2010:685).

41 — That provision stated that, where the answer to a question referred for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt, the Court could, after hearing the Advocate General, at any time give its decision by reasoned order.

42 — Opinion of Advocate General Tizzano in *Lyckeskog* (C-99/00, EU:C:2002:108, point 74).

43 — Judgment of 6 October 1982 in *Cilfit and Others* (283/81, EU:C:1982:335).

44 — Emphasis added.

45 — Judgment of 1 April 2004 in *Freiburger Kommunalbauten* (C-237/02, EU:C:2004:209, paragraphs 22 and 23).

46 — Judgment 1 October 2015 in *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 62 and the case-law cited).

76. This latter requirement, that an effort be made by the person allegedly harmed in order to prevent, or at least limit, the extent of the damage suffered has specifically been identified by the Court [47] and is undeniably linked to the need for there to be a legal decision given by a court adjudicating at last instance. [48]

77. In short, it must be concluded that the national court is obliged to assess of its own motion the unfairness of contractual terms under Directive 93/13 only if it is in possession of the factual and legal elements needed for that task.

78. That assessment is highly subjective and is a matter for the national court. In order for it to be possible to conclude that the court's failure to assess and, if necessary, set aside unfair terms contained in contracts concluded between consumers and sellers or suppliers is patently obvious and may be penalised by State liability being incurred for infringement of EU law, account will have to be taken of whether or not that failure was excusable.

79. The fact that the attention of the court seised may have been drawn, either by the consumer himself or by any other means of information, to that aspect is also very significant.

B – *The fourth and fifth questions*

80. As I have mentioned previously, the fourth and fifth questions relate to the scope of a possible claim for compensation for the damage suffered owing to the court's failure to act and to the relationship of that claim with other actions.

81. By its fourth question, the national court asks, in essence, whether the damage caused by the possible infringement of EU law at issue in the case in the main proceedings corresponds to the amount of compensation claimed by Ms Tomášová and whether that amount can be equated to the debt recovered, that is to say, unjust enrichment. By its fifth question, the national court wishes to know whether an action for recovery of a sum unduly paid, as a legal action, has priority over compensation for damage.

82. It seems to me that the questions put by the national court relate to aspects concerning the procedural autonomy of the Member States.

83. In that regard, it should be pointed out that, when the conditions for State liability are met, which it is for the national courts to determine, it is on the basis of rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused, provided that the substantive and procedural conditions for reparation of loss or damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it in practice impossible or excessively difficult to obtain reparation (principle of effectiveness). [49]

47 — See judgment of 5 March 1996 in *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraphs 84 and 85).

48 — In the judgment of 24 March 2009 in *Danske Slagterier* (C-445/06, EU:C:2009:178, paragraph 69), the Court had therefore stated that '[Community law does not preclude] the application of national legislation which lays down that an individual cannot obtain reparation for loss or damage which he has wilfully or negligently failed to avert by utilising a legal remedy, provided that utilisation of that remedy can reasonably be required of the injured party, a matter which is for the referring court to determine in light of all the circumstances of the main proceedings. The likelihood that a national court will make a reference for a preliminary ruling under Article 234 EC or the existence of infringement proceedings pending before the Court of Justice cannot, in itself, constitute a sufficient reason for concluding that it is not reasonable to have recourse to a legal remedy'.

49 — See judgments of 19 November 1991 in *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 42); 30 September 2003 in *Köbler* (C-224/01, EU:C:2003:513, paragraph 58); 24 March 2009 in *Danske Slagterier* (C-445/06, EU:C:2009:178, paragraph 31); 25 November 2010 in *Fuß* (C-429/09, EU:C:2010:717, paragraph 62); and 9 September 2015 in *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565, paragraph 50).

84. It follows that the rules for assessing damage caused by an infringement of EU law are determined by the national law of each Member State, on the understanding that the national legislations concerning compensation for damage fixing those rules must observe the principles of equivalence and effectiveness.

85. Similarly, the relationship between an action for compensation for damage allegedly suffered owing to an infringement of the rule of law and the other actions available under national law, in particular an action for recovery of a sum unduly paid, that may be brought under national law, is determined by the national laws subject to observance of the principles of equivalence and effectiveness.

86. It is therefore for the domestic legal order of every Member State, subject to observance of the principles of equivalence and effectiveness, to establish the criteria for identifying and assessing the harm caused by an infringement of EU law.

III – Conclusion

87. It is proposed that the questions referred by the Okresný súd Prešov (District Court, Prešov, Slovakia) be answered as follows:

(1) A Member State may not be held liable for the failure of a national court, in proceedings for enforcement of an arbitration award, to set aside a contractual term deemed unfair under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, if the debtor in the proceedings at issue has not used all ordinary legal remedies available under the applicable national law.

(2) In order for failure by the court adjudicating at last instance in enforcement proceedings to assess the unfairness of a contractual term under Directive 93/13 to be classified as a sufficiently serious infringement such as to give rise to State liability, account must be taken of all the factual and legal elements brought to its attention by the date on which it gives its ruling. Such an infringement of EU law cannot be considered sufficiently serious when the failure of the national court to assess the unfairness of a term contained in a contract between a seller or supplier and a consumer is excusable. On the other hand, such an omission may be classified as a sufficiently serious infringement when, in spite of the information brought to its attention, either by the consumer himself or by other means, the court called upon to adjudicate at last instance has failed to raise of its own motion the unfairness of a contractual term contained in such a contract.

(3) It is for the domestic legal order of every Member State, subject to observance of the principles of equivalence and effectiveness, to establish the criteria for identifying and assessing the harm that may have been caused by an infringement of EU law.