



Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 12 December 2013¹

Case C-470/12

Pohotovosť s. r. o.
v
Miroslav Vašuta

(Request for a preliminary ruling from the Okresný súd Svidník (Slovakia))

(Unfair terms in consumer contracts — Enforcement of an arbitral award — Right of a consumer protection association to intervene — Request for a preliminary ruling — ‘Withdrawal’ of the action for enforcement by the applicant in the main proceedings — Request maintained by the referring court — Jurisdiction of the Court)

1. By the present request for a preliminary ruling, the Okresný súd Svidník (District Court, Svidník) (Slovakia) is seeking an interpretation of a number of provisions of Directive 93/13/EEC,² in conjunction with Articles 38 and 47 of the Charter of Fundamental Rights of the European Union,³ in order to determine whether consumer protection associations must, in the pursuit of a high level of consumer protection enshrined in EU law, enjoy a right to intervene in proceedings for enforcement of an arbitral award.

2. In addition to the substantive issue which has been formally referred to the Court, the question also arises whether the Court still has jurisdiction to give a ruling. In the light of the developments in the national proceedings relating to the main action, resulting from the withdrawal of the applicant – and, at the same time, the likely settlement of the dispute which gave rise to the request for a preliminary ruling – it should first be determined whether there is still any need for the Court to give a ruling, given that the referring court has thus far not formally withdrawn that request.

3. Despite the doubts which may legitimately be held over whether there is still any need to give a ruling and the scarcity of the information provided by the referring court, I take the view that the spirit of cooperation which must drive the preliminary ruling procedure should ultimately lead the Court not to decline jurisdiction. On the substance, I consider that, as EU law stands at present, the effectiveness of the protection conferred on consumers is undermined neither by national legislation which does not permit a consumer rights association to intervene in proceedings for enforcement of an arbitral award nor by national legislation which allows it to do so.

¹ — Original language: French.

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

³ — ‘The Charter’.

I – Legal framework

A – Directive 93/13

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

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

5. Article 7 of that directive provides:

‘1. 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.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.’

6. Article 8 of Directive 93/13 reads as follows:

‘Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.’

B – Slovak law

7. Paragraph 93 of the Code of Civil Procedure, in the version applicable to the facts in the main proceedings, provides:

‘1. A person who has a legal interest in the outcome of the proceedings, except in the case of divorce proceedings, proceedings concerning the validity of a marriage or proceedings to determine whether a marriage exists, may participate in proceedings as an intervener in support of the form of order sought by the applicant or the defendant.

2. A legal person, the purpose of whose activity is the protection of rights under specific legislation, may also participate in proceedings as an intervener in support of the form of order sought by the applicant or the defendant.

...’

8. Paragraph 251(4) of the Code of Civil Procedure provides:

'Enforcement of judgments and enforcement proceedings governed by specific legislation ... shall be governed by the provisions of the preceding sections, where that specific legislation does not provide otherwise. However, decisions shall always be taken by way of decree.'

9. Paragraph 37(1) of the Enforcement Code, in the version applicable to the facts in the main proceedings, provides:

'The parties to the proceedings shall be the creditor and the debtor; other persons shall be party only to those parts of the proceedings in respect of which they are granted the status of a party to the proceedings by this law. Where the court rules on the costs of enforcement, the authorised bailiff shall also be a party to the proceedings.'

10. Under Paragraph 25(1) and (2) of Law No 250/2007 on consumer protection, an association may take action before an administrative body or before a court concerning the protection of consumer rights or may be a party to proceedings if such objectives constitute the main purpose of its activity or if it is included on the list of entities authorised by the European Commission, without prejudice to the right of the court to review whether the entity in question is authorised to take action in each case. In addition, an association may, if duly mandated by a consumer, represent that consumer in proceedings before State bodies concerning the exercise of his rights, including compensation for damage caused by the violation of the consumer's rights.

II – Facts and the questions referred for a preliminary ruling

11. The facts of the case, as outlined by the referring court, may be described as follows.

12. Pohotovosť s. r. o. ('Pohotovost'), the applicant in the main proceedings, granted Mr Vašuta, the defendant in the main proceedings, consumer credit.⁴

13. For reasons not mentioned, Mr Vašuta was ordered, by an arbitral award of the Stály rozhodcovský súd (Permanent Court of Arbitration) of 9 December 2010, to repay an unspecified amount to that company. According to the information provided by the referring court, that arbitral award became final and enforceable.

14. Pohotovosť subsequently applied to the competent bailiff for enforcement in accordance with the Slovak rules in force. On 25 March 2011, the bailiff applied to the Okresný súd Svidník for a mandate for enforcement on the basis of that arbitral award. On 29 June 2011, that court discontinued the part of the proceedings concerning recovery of the interest for late payment and ordered the bailiff to pay the costs of the discontinued part of the enforcement proceedings.

15. On 9 September 2011, the Združenie na ochranu občana spotrebiteľa HOOS (HOOS Consumer Protection Association, 'the HOOS association') sought leave to intervene in the enforcement proceedings. In essence it claimed inter alia that the bailiff, who had in the past held a contract of employment with Pohotovosť, had failed in his duty of impartiality and that, moreover, the enforcement proceedings should be discontinued.

16. On 27 March 2012, Pohotovosť claimed that the HOOS association should not be allowed to participate in the proceedings as an intervener since provision was not made for that possibility in the Enforcement Code.

⁴ — According to information of which I became aware after consulting the national case file, that contract was concluded in the course of 2010.

17. The referring court, by an order issued by the senior court official⁵ on 24 May 2012, ruled not to grant the HOOS association leave to intervene in the enforcement proceedings and, at the same time, refused its requests.

18. On 18 June 2012, the HOOS association lodged an appeal against that order before the same referring court. It claimed that Mr Vašuta had not been adequately informed, that the court had failed to provide him with sufficient protection *ex officio* against an unfair arbitration clause and had failed to draw legal conclusions from the failure to include the annual percentage rate of charge (APR) in the consumer credit contract. According to the HOOS association, the referring court had not correctly applied the case-law.⁶

19. In those circumstances, the Okresný súd Svidník decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- '1. Are Articles 6(1), 7(1) and 8 of Directive 93/13 ..., in conjunction with Articles 38 and 47 of the Charter ..., to be interpreted as precluding national legislation such as Paragraph 37(1) and (3) of the Enforcement Code, which does not allow a consumer protection association to intervene in enforcement proceedings?
2. Where the answer to the first question is that that legislation does not conflict with [EU] law, is Paragraph 37(1) and (3) of the Enforcement Code to be interpreted as not precluding the national court from granting a consumer protection association leave to intervene in enforcement proceedings in accordance with Articles 6(1), 7(1) and 8 [of that directive]?'

III – Analysis

A – *The need for the Court to give a ruling*

20. In the light of the developments which have been brought to the attention of the Court and which result primarily from the supposed withdrawal of the application for enforcement brought against Mr Vašuta – I will describe those developments more precisely below – there is good reason to raise the question whether the Court still has jurisdiction to give a ruling on the questions referred to it.

21. First and foremost, and further to the statements I have made on another occasion,⁷ I consider that the Court must maintain a relatively strict position as regards its jurisdiction.

22. It is well established that the national court is best placed, in the light of the circumstances of the case, to assess both the necessity for that reference in order to be able to give its decision and the relevance of the questions it refers to the Court.⁸

23. It seems fairly common to treat an examination of the existence of a dispute actually pending before the referring court, which determines whether the Court has jurisdiction, as the assessment of the inherent relevance of the questions asked, which relates in turn to the effectiveness of the answers with a view to disposing of the main proceedings.

5 — That is the description given in the order for reference. It is not possible to ascertain whether or not this official has the status of a law officer.

6 — It refers to the judgment in Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579 and to the order in Case C-76/10 *Pohotovost'* [2010] ECR I-11557.

7 — See my Opinion in Case C-482/12 *Macinský and Macinská*, pending before the Court.

8 — Case C-467/08 *Padawan* [2010] ECR I-10055, paragraph 21 et seq. and case-law cited, and Case C-241/09 *Fluxys* [2010] ECR I-12773, paragraph 28.

24. However, although it may readily be conceded that the effectiveness of the questions asked may be presumed, it seems much more difficult to conclude that, from the time a matter is referred to it, the Court must assume jurisdiction except in exceptional circumstances. By definition, jurisdiction, and particularly that of the Court, cannot be presumed, but must be recognised.

25. It follows that, unlike the certain degree of flexibility which, to my mind, must form the main feature in the assessment of the inherent relevance of the questions referred – a problem to which I will return in the second part of this Opinion – the Court must adopt a more stringent approach when assessing the actual existence of a dispute.

26. The Court's jurisdiction is dependent on the existence of a dispute and may, indeed must where necessary, be raised of its own motion.⁹

27. It is also settled case-law that a national court or tribunal is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling unless a case is pending before it, in which it is called upon to give a decision which is capable of taking account of the preliminary ruling.¹⁰ Accordingly, the Court has no jurisdiction to hear a reference for a preliminary ruling when at the time it is made the procedure before the court making it has already been terminated.¹¹ The justification for a request for a preliminary ruling, and hence for the jurisdiction of the Court, is not that it enables advisory opinions on general or hypothetical questions to be delivered,¹² but rather that it is necessary for the effective resolution of an actual dispute. If that dispute ends, it is therefore no longer necessary to answer the questions referred.

28. These guidelines, which have been recalled only recently,¹³ are not merely of practical significance in so far as they may ultimately help to streamline the flow of cases which the Court has to hear and determine. They contribute to the definition of the role conferred on the Court in this regard, a judicial power of interpretation which cannot be exercised in an abstract manner, but must be connected with a question actually raised in the main proceedings. Otherwise, there would be a considerable risk that the Court would be interfering in a legal debate which is, in the final analysis, unrelated to the interpretation of EU law.¹⁴ It must follow from these principles that, where it appears that the questions asked in a reference for a preliminary ruling are not connected to an actual dispute, there is no need for the Court to answer them.

29. It is undoubtedly for the referring court to establish that the reference is connected to a dispute actually pending before it. In the words used in *Foglia*,¹⁵ it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment. The Court's duty to have regard to the national court's proper responsibilities implies at the same time that the national court should have regard to the proper function of the Court in requests for preliminary rulings. Thus, the Court recently found that there was no need for it to give a ruling in a situation where, despite an invitation

9 — See, inter alia, Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraph 40, and the order in Case C-252/11 *Šujetová*.

10 — See, to this effect, Case C-225/02 *García Blanco* [2005] ECR I-523, paragraph 27, and the order in Case C-525/06 *Nationale Loterij* [2009] ECR I-2197, paragraphs 10 and 11.

11 — Case 338/85 *Pardini* [1988] ECR 2041, paragraph 11, and Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, paragraph 12.

12 — Case C-313/12 *Romeo* [2013] ECR, paragraph 40 and case-law cited.

13 — See the order in *Šujetová*, paragraphs 27 to 32, and Case C-180/12 *Stoilov i Ko* [2013] ECR, paragraphs 39, 44 and 46.

14 — Staying with the main proceedings, for example, it seems, from reading the written observations, that Slovak courts have different interpretations of the provisions of the Code of Civil Procedure and of the Enforcement Code relating to the right of consumer protection associations to intervene in enforcement proceedings. In addition, there are suspicions of the partiality on the part of persons involved in the enforcement proceedings, in this instance the bailiff responsible for enforcement (see point 15 of this Opinion).

15 — Case 244/80 *Foglia* [1981] ECR 3045, paragraphs 17 and 20.

made to it, the referring court had maintained its request for a preliminary ruling and not taken a position on the bearing of a development or an event of which the Court had become aware on the decision in the main proceedings or on the relevance of the questions referred with a view to the resolution of the main proceedings.¹⁶

30. What conclusion should be drawn from these principles in the present case?

31. To summarise, the Court is faced with a particular situation characterised by the following two aspects.

32. On the one hand, in its written observations submitted pursuant to the second paragraph of Article 23 of the Statute of the Court of Justice of the European Union, Pohotovost' informed the Court inter alia that on 14 November 2012 it had submitted to the referring court a written pleading by which it withdrew its application for enforcement in its entirety and had requested it to 'discontinue' enforcement. In its observations Pohotovost' stated that under Article 57(1)(c) of the Enforcement Code the referring court was required to rule on the withdrawal of its action by terminating the enforcement proceedings and that, in any event, since the dispute was extinguished in the main proceedings, there was no need for the Court to rule on the present request for a preliminary ruling.

33. On the other hand, when asked by the Court to confirm whether, in the light of the withdrawal thus notified, it was still seised of the dispute in which it had initially made its request for a preliminary ruling and whether, with that in mind, it was maintaining that request, the referring court merely stated, by letter of 2 July 2013, that the case was still pending and that, for that reason, it was in fact maintaining its request. The referring court supplemented that information by a letter which was received by the Court on 10 September 2013, stating that it had actually taken note of a request from Pohotovost' for the 'discontinuation'¹⁷ of the enforcement proceedings and that, in addition, the matter was before the Krajský súd v Prešove (Regional Court, Prešov), which was hearing an appeal brought against the decision ordering the present request for a preliminary ruling.

34. It is absolutely astonishing and regrettable that the referring court, first, did not consider it necessary to inform the Court of a procedural step taken a little more than one month after the present request for a preliminary ruling was made, and, second, that, when the Court had asked it to do so, it failed to state the precise reasons why it considered the main proceedings to be still pending despite the fact that there seems to be a relationship of absolute dependence between the enforcement proceedings at national level and the present request for a preliminary ruling.

35. It could be expected, having regard to the spirit of cooperation governing relations between the Court of Justice and national courts and tribunals,¹⁸ that, in such circumstances and having been asked about this aspect by the Court, the referring court would provide information on the legal consequences of such withdrawal on its position in order to justify the need for an answer to the questions referred for a preliminary ruling with a view to the settlement of its dispute and, thus, the jurisdiction of the Court.

16 — That is the situation in Case C-492/11 *Di Donna* [2013] ECR, paragraph 28. See also, to this effect, *Stoilov i Ko*, paragraphs 39, 44 and 46.

17 — However, the referring court stated that that request had been notified to it on 27 December 2012.

18 — It should be pointed out in this regard that point 30 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2012 C 338, p. 1) expressly mentions that in the interests of the proper conduct of the preliminary ruling proceedings before the Court and in order to maintain their effectiveness, it is incumbent on the referring court or tribunal to inform the Court of any procedural step that may affect the referral.

36. However, if, as in the present case, there is doubt as to the evaluation of the consequences of a procedural step for the actual existence of the dispute, that doubt must, as it were, benefit the referring court. Accordingly, the Court has endeavoured on several occasions, in order to prevent any obstacle to good cooperation between it and national courts and tribunals, to trust the judgement of the national court or tribunal.¹⁹

37. In addition, it should be borne in mind that, in the preliminary ruling procedure, which establishes a dialogue between courts, the national court is the privileged interlocutor of the Court of Justice. In the circumstances of this case, it would seem to be difficult simply to consider information communicated by one of the parties to the main proceedings in order to conclude that the main proceedings are now wholly devoid of purpose²⁰ and, consequently, that the Court does not have jurisdiction.

38. In the light of the spirit of cooperation and mutual trust which must govern relations between national courts and tribunals and the Court of Justice, I therefore take the view that the Court must nevertheless trust the finding reached by the referring court and, consequently, not decline jurisdiction.

B – The questions referred for a preliminary ruling

39. As a preliminary point, it is necessary to examine the inherent relevance, and therefore the admissibility, of the questions referred for a preliminary ruling, given that the German and Slovak Governments expressed serious doubts in this regard in their written observations.

40. The German and Slovak Governments argued, in essence, that the referring court had not indicated the reasons why the provisions of Directive 93/13 mentioned had a bearing on the main proceedings and thus to what extent the Court's answer was necessary for the resolution of the dispute. The referring court is not seeking information connected with the assessment of possible unfair terms in contracts, but is attempting to obtain a review of national procedural rules which are not covered by the harmonisation under the directive. The Slovak Government also states that the second question, by which the referring court asks the Court to give its view on national legislation, must be declared inadmissible in any event.

41. I take the view that, whilst the points raised regarding the admissibility of the questions referred are perfectly understandable, the Court must, in so far as possible and in keeping with the spirit of cooperation which must guide the preliminary ruling procedure, endeavour to give a useful answer to the referring court.

42. Considered in the context of the main proceedings, it is possible that the questions referred could, taken together and with some reformulation, still be relevant.

43. It would seem that, rather than seeking the interpretation of the provisions of Directive 93/13, in the light of the Charter, the referring court wishes to ascertain, through its two questions, whether the effectiveness of the system to protect consumers against unfair terms is, in some way, compromised by rules of national law which do not grant consumer protection associations a right to intervene in proceedings for enforcement of an arbitral award.

19 — See to that effect, inter alia, Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, paragraph 4, and Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 96.

20 — In this regard, the main proceedings are different from *Šujetová*, which directly followed the withdrawal of Mrs Šujetová, who benefited from the protection under Directive 93/13, and not information originating from the creditor company alone.

44. It is clear from the order for reference that, in the main proceedings, the HOOS association wished to be granted leave to intervene in the enforcement proceedings brought by Pohotovost' against Mr Vašuta, in particular because it believed that, by its decision to discontinue only part of the enforcement proceedings and to permit enforcement in other respects, the referring court had failed to provide the consumer with sufficient protection *ex officio* against an unfair arbitration clause and had failed to draw all the legal conclusions from the failure to include the APR in the consumer credit contract.

45. In view of the procedural evolution that cases concerning the interpretation of Directive 93/13 have undergone, I can, moreover, easily understand the hesitations of the referring court. This is shown in particular by the decisions cited by the referring court in this regard,²¹ and more generally by the Court's case-law on this issue which, whilst noting the principle of procedural autonomy, has framed that principle in the light of the principles of effectiveness and equivalence.²²

46. I therefore take the view that the questions asked should be reformulated slightly as seeking to ascertain whether EU law, and in particular the system of protection established by Directive 93/13, requires or, on the contrary, precludes a consumer protection association from being granted leave to intervene in proceedings for enforcement of an arbitral award.

47. Having made these clarifications, in the following explanations I will set out the reasons why I, like the Slovak and German Governments and the Commission, take the view that the question of the right of consumer protection associations to intervene in individual disputes is not regulated directly or indirectly by EU law. After explaining the reasons why the provisions of Directive 93/13, and EU law more generally, do not preclude national legislation which rules out intervention by a consumer association (section 1 below), I will show why, on the other hand, there is nothing to prevent a national provision or national court allowing such intervention (section 2 below).

1. Directive 93/13 does not preclude national legislation which rules out intervention by a consumer association

48. It must be stated at the outset that the provisions of Directive 93/13, and in particular those mentioned by the referring court, do not contain any guidance as to the possible right of a consumer protection association to be granted leave to intervene in individual disputes in general,²³ and in proceedings for enforcement of an arbitral award in particular.

49. More generally, Directive 93/13, which effects minimum harmonisation, does not harmonise the procedural means at the disposal of such associations.²⁴

50. It must still be determined, however, whether the pursuit of the objectives mentioned by Directive 93/13, including those mentioned in Articles 6 and 7 of that directive, must result indirectly in the establishment of such a right, having regard to the principle of effectiveness, which alone is called into question in the present case.

21 — The judgment in *Asturcom Telecomunicaciones* concerned an action for enforcement of an arbitral award which became final and was made in the absence of the consumer and the obligation on the court or tribunal responsible for enforcement to assess of its own motion whether an arbitration clause is unfair. The order in *Pohotovost'* states, further to that judgment, that the court or tribunal responsible for enforcement is obliged to assess of its own motion whether the penalty laid down by a credit contract is unfair.

22 — See, inter alia, Case C-618/10 *Banco Español de Crédito* [2012] ECR, and Case C-415/11 *Aziz* [2013] ECR.

23 — This question is distinct from any advocacy by associations (see point 59 et seq. of this Opinion).

24 — See point 19 of the Opinion of Advocate General Mengozzi of 5 September 2013 in Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León* [2013] ECR.

51. 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.²⁵

52. As regards the disadvantageous position of the consumer, Article 6(1) of Directive 93/13 provides that unfair terms are not to be binding on the consumer. As follows from the case-law, it 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.²⁶

53. In order to guarantee the protection intended by Directive 93/13, the Court has also stated on a number of occasions 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.²⁷

54. An examination of the Court's case-law relating to Directive 93/13 clearly shows, in my view, that the 'unconnected action' in question consists, first and foremost, in that of the court responsible for settling the dispute, irrespective of the nature of the dispute or the stage of the proceedings at which it acts. The obligation for the court to assess of its own motion whether a contractual term is unfair²⁸ must be regarded as constituting a proper means both of achieving the result sought by Article 6 of Directive 93/13, namely preventing an individual consumer from being bound by an unfair term, and of contributing to the attainment of the objective of Article 7, since, if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms being used by traders in contracts concluded with consumers.²⁹

55. In a situation like that at issue in the main proceedings, it would seem to follow clearly from the case-law that such action is incumbent on a court hearing proceedings for enforcement of a final arbitral award. As the Court has stated, where the national court or tribunal seised of an action for enforcement of a final arbitral award is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict 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 that directive, where it has available to it the legal and factual elements necessary for that task.³⁰

56. It is through this action by the court that the effectiveness of the protection of consumers against unfair terms in contracts is guaranteed, since, in the absence of an agreement between the parties, only the court has the power, in principle, to annul or revise the content of an unfair term.

25 — Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25; and the order in *Pohotovost'*, paragraph 37.

26 — *Mostaza Claro*, paragraph 36; Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 25; and the order in *Pohotovost'*, paragraph 38.

27 — *Océano Grupo Editorial and Salvat Editores*, paragraph 27; *Mostaza Claro*, paragraph 26; *Asturcom Telecomunicaciones*, paragraph 31; and the order in *Pohotovost'*, paragraph 39.

28 — See, inter alia, *Banco Español de Crédito*, paragraphs 42 to 44, and *Aziz*, paragraphs 46 and 47.

29 — Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraph 32; *Mostaza Claro*, paragraph 27; and the order in *Pohotovost'*, paragraph 41.

30 — See, to this effect, *Pannon GSM*, paragraph 32; *Asturcom Telecomunicaciones*, paragraph 53; and the order in *Pohotovost'*, paragraph 51.

57. According to the information provided by the Slovak Government, a combined reading of Articles 2 and 45(1)(c) of Law No 244/2002 on the arbitration procedure, as amended, requires the court responsible for enforcement to rule of its own motion that there is no need to give judgment on enforcement in certain cases, including where the arbitral award orders one party to fulfil an act of performance which is materially impossible to execute. The referring court is therefore obliged not only to examine whether the terms of the credit contract at issue are unfair, but is also able to rule that there is no need to adjudicate on enforcement.³¹

58. Furthermore, it is clear from the order for reference that the referring court, being required to act before the enforcement of the arbitral award, did not fail to raise and criticise the unfair term concerning interest for late payment,³² but it did not consider it necessary, it would seem, to raise of its own motion the unfair character of the arbitration clause contained in the contract concluded between the parties in the main proceedings.³³

59. In the light of this consideration, I find it difficult to see how intervention by the consumer association would have been capable of guaranteeing the effectiveness of the consumer protection under Directive 93/13. Such intervention is not likely to facilitate or restrict the assessment by the court whether the terms of the contract in question are unfair.

60. Whilst the role that can be played by consumer protection associations in pursuing the objectives of Directive 93/13 must not be ignored, as is stated in the twenty-third recital in the preamble to that directive, it is at a very different level and from a very different perspective to that required of the court. Direct injunctions brought by persons or organisations regarded as having a legitimate interest in protecting consumers have, in principle, a deterrent nature and a dissuasive purpose, independent of any particular dispute.³⁴

61. The Court thus pointed out that Article 7(1) of Directive 93/13 requires the Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers and that it is apparent from Article 7(2) of the directive that the aforementioned means are to include the possibility for persons or organisations having a legitimate interest under national law in protecting consumers to take action in order to obtain a judicial decision as to whether contract terms drawn up for general use are unfair and where appropriate, to have them prohibited.³⁵

31 — I note that in the order in *Pohotovost'*, paragraphs 40 and 41, the Court had already made significant clarifications regarding the possibilities open to the court in the case of contracts which do not mention the APR.

32 — It was thus decided on 29 June 2011 to discontinue the part of the proceedings concerning recovery of the interest for late payment, as provided for in the order for payment, of 0.25% per day on the sum of EUR 309 from 8 July 2010 until payment, and to recover the costs of the discontinued part of the enforcement proceedings.

33 — The annex to Directive 93/13, which contains an indicative list of the terms which may be regarded as unfair, mentions, in point 1(q), terms which have the object or effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract'.

34 — Case C-472/10 *Invitel* [2012] ECR, paragraph 37 and case-law cited. See also point 12 of the Opinion of Advocate General Geelhoed in Case C-70/03 *Commission v Spain* [2004] ECR I-7999.

35 — *Invitel*, paragraphs 35 and 36 and case-law cited.

62. Those provisions require the Member States to permit consumer protection associations to bring an action of their own against unfair terms by virtue of their legitimate interest. In contrast, Directive 93/13 does not, any more for that matter than the legislation governing injunctions for the protection of consumers' interests,³⁶ contain provisions governing the role which may or must be accorded to consumer protection associations in individual disputes involving a consumer.

63. Consequently, by failing to provide for the possibility for a consumer protection association to intervene in proceedings for enforcement of a judicial decision or a final arbitral award, national legislation like that at issue in the main proceedings does not impair the effectiveness of the objectives pursued by Directive 93/13.

64. Furthermore, it should be added that, under the legislation at issue in the main proceedings, an association may directly represent such a consumer in any proceedings, including enforcement proceedings, if authorised by the consumer. As regards the possibility of such a consumer not being informed of proceedings concerning him, the consequence of such a situation cannot be that the principle of effectiveness is interpreted as requiring, in such circumstances, recognition of a right for a consumer protection association to intervene in the proceedings to make up for the absence of a defence for that consumer, since the principle of effectiveness cannot mean that it is necessary to make up fully for the total inertia on the part of the consumer concerned.³⁷

65. I must still examine whether the provisions of the Charter mentioned by the referring court can affect this conclusion.

66. With regard, first, to Article 38 of the Charter, which provides that 'Union policies shall ensure a high level of consumer protection', although it is not among the examples mentioned in the Explanations relating to the Charter,³⁸ it seems that this article, which has nothing to say about a directly defined individual legal position, establishes a principle and not a right³⁹ and is therefore judicially cognisable, under Article 52(5) of the Charter, only in the interpretation of Union acts and in the ruling on their legality, in this instance Directive 93/13.

67. However, even though Directive 93/13 recognises that consumer protection associations have a legitimate interest in protecting consumers by taking action before the courts in order to obtain a judicial decision as to whether contract terms drawn up for general use are unfair and, where appropriate, to have them prohibited, the directive does not establish a right for such associations to intervene in individual disputes involving such consumers and, in this regard, Article 38 of the Charter cannot require an interpretation of the directive in favour of recognition of such a right.

68. Article 47 of the Charter provides for a right to an effective remedy and access to an impartial tribunal, meaning, as the case may be, that legal aid is made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

36 — It is interesting to note that Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ 2009 L 110, p. 30) and Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13 and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64) also do not provide for the possibility for a consumer association to intervene in an individual dispute.

37 — See, to this effect, *Asturcom Telecomunicaciones*, paragraph 47.

38 — The explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) cite as examples for principles recognised in the Charter Articles 25, 26 and 37.

39 — With regard to the distinction between 'rights' and 'principles' and the conditions under which principles may be invoked, reference is made, *inter alia*, to point 43 et seq. of the Opinion of Advocate General Cruz Villalón in Case C-176/12 *Association de médiation sociale*, pending before the Court.

69. However, in so far as, as I stated above, Directive 93/13 requires, in disputes between a seller or supplier and a consumer, positive action unconnected with the actual parties to the contract from the court to which such disputes are referred, it is difficult to see how the refusal to grant leave for an association to intervene in support of a consumer in a dispute between the consumer and a seller or supplier constitutes a violation of that consumer's right to an effective judicial remedy as guaranteed by Article 47. In addition, intervention by a consumer protection association cannot be treated in the same way as legal aid which must be made available in certain cases to those who lack sufficient resources under Article 47(4).

70. With regard, second, to the possibility for a consumer protection association to rely on Article 47 in this situation, it should be stated that the refusal to grant the association leave to intervene in proceedings involving a consumer does not affect its right to an effective judicial remedy to protect its rights as an association of this kind, including its rights to collective action as recognised by Article 7(2) of Directive 93/13.

2. Directive 93/13 does not preclude the recognition of a right to intervene for consumer protection associations

71. On the other hand, I take the view that, in so far as Directive 93/13 establishes minimum harmonisation, the Member States may, pursuant to Article 8 of the directive, adopt or retain the most stringent provisions compatible with the Treaty in the area covered by the directive, to ensure a maximum degree of protection for the consumer, and that national legislation like Article 93(2) of the Slovak Code of Civil Procedure may accord consumer protection associations the right to intervene in civil proceedings dealing with the merits in support of consumers. Similarly, such provisions should not preclude the court from granting a consumer protection association leave, where the consumer in question consents, to intervene in proceedings for enforcement of an arbitral award.

72. Such intervention may be considered to contribute to consumer protection, as provided for *inter alia* by Directive 93/13, by providing supplementary action, not provided for in the directive, to the court's unconnected, positive action required by that directive. As the HOOS association has mentioned, intervention by consumer associations may bring to the court's attention certain national practices or terms which have been regarded as unfair by other national courts or tribunals.

73. In addition, intervention by consumer associations in enforcement proceedings, in so far as the detailed rules and conditions governing the grant of leave to intervene are not less favourable than those applicable to similar situations under domestic law, should be regarded as fully consistent with the principle of equivalence. In the case of the main proceedings, it seems that, under Article 37(1) of the Enforcement Code, the question of intervention by consumer protection associations affects all persons wishing to intervene in any enforcement proceedings, whatever their status or the area concerned.

74. In the light of all the above considerations, it is proposed that the answer given to the referring court be that the protection conferred on consumers by Directive 93/13, in conjunction with Articles 38 and 47 of the Charter, is to be interpreted, in circumstances like those in the main proceedings, as not precluding national legislation which does not allow a consumer protection association to intervene in proceedings for enforcement of an arbitral award. Nor does such legislation preclude the court from granting such an association leave to intervene in proceedings for enforcement of an arbitral award.

IV – Conclusion

75. In the light of all the above considerations, I propose that the Court answer the questions asked by the Okresný súd Svidník as follows:

The protection conferred on consumers by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in particular Articles 6(1), 7(1) and 8 thereof, in conjunction with Articles 38 and 47 of the Charter of Fundamental Rights of the European Union, is to be interpreted, in circumstances like those in the main proceedings, as not precluding national legislation which does not allow a consumer protection association to intervene in proceedings for enforcement of an arbitral award. Nor does such legislation preclude the court from granting such an association leave to intervene in proceedings for enforcement of an arbitral award.