Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

30 June 2022 *

(Reference for a preliminary ruling – Directive 93/13/EEC – Consumer credit – Unfair terms in consumer contracts – Article 6(1) – *Ex officio* review – Refusal to issue an order for payment in the event of a claim based on an unfair term – Consequences relating to the unfairness of a contractual term – Right to restitution – Principles of equivalence and effectiveness – Offsetting *ex officio*)

In Case C-170/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sofiyski rayonen sad (Sofia District Court, Bulgaria), made by decision of 15 March 2021, received at the Court on 15 March 2021, in the proceedings

Profi Credit Bulgaria EOOD

v

T.I.T.,

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, L.S. Rossi and O. Spineanu-Matei (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Profi Credit Bulgaria EOOD, by I. Peneva,

– the European Commission, by E. Georgieva and N. Ruiz García, acting as Agents,

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

gives the following

* Language of the case: Bulgarian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in proceedings between Profi Credit Bulgaria EOOD ('PCB'), a financial institution under Bulgarian law, and T.I.T., a consumer, regarding an application for an order for payment of a monetary debt pursuant to a consumer credit agreement concluded between the parties to the main proceedings.

Legal context

European Union law

3 Article 6(1) of Directive 93/13 states:

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

Bulgarian law

The GPK

4 Article 410 of the Grazhdanski protsesualen kodeks (Code of Civil Procedure; 'the GPK') provides:

'(1) An applicant may apply for an enforcement order:

1. on the grounds of monetary claims or claims to fungible goods, provided that the rayonen sad [(District Court)] has jurisdiction to hear the application;

…

(3) Where the claim arises from a consumer contract, the contract, if in writing, together with all annexes and amendments thereto, as well as any general terms and conditions applicable thereto, shall be attached to the application.'

5 Under Article 411 of the GPK:

'(1) The application shall be lodged with the rayonen sad [(District Court)] within the district of which the debtor has his or her permanent address or domicile; that district court shall review *ex officio* its territorial jurisdiction within a period of three days. …

(2) The court shall examine the application at a preparatory hearing and shall issue an enforcement order within the period stipulated in paragraph 1, except where:

1. the claim does not fulfil the requirements of Article 410 [of this Code] and the applicant fails to remedy the errors within three days of notification;

2. the claim is unlawful or contrary to the accepted principles of morality;

3. the claim is based on an unfair term in a consumer contract or there are reasonable grounds to suspect that that is the case;

…

(3) If the application is granted, the court shall issue an enforcement order, a copy of which shall be served on the debtor.'

6 Under Article 413(2) of the GPK, a ruling rejecting an application for an enforcement order in whole or in part may be challenged by the applicant by means of an individual action, a copy of which is not required for service.

7 Article 414(1) and (2) of the GPK is worded as follows:

'(1) The debtor may lodge a written objection against the enforcement order or parts of that order. There is no requirement to state reasons for that objection, except in the cases referred to in Article 414a [of this Code].

(2) Objections shall be lodged within one month of service of the order. That period cannot be extended.'

8 Article 422 of the GPK states:

'(1) An action for a declaratory judgment acknowledging the claim shall be deemed to have been brought at the time when the application for an enforcement order was lodged, provided that the period prescribed in Article 415(4) [of this Code] has been observed.

(2) The bringing of an action in accordance with paragraph 1 shall not have the effect of suspending the immediate enforcement granted, except in the cases referred to in Article 420 [of this Code].

(3) If the action is dismissed by final judgment, enforcement shall be discontinued …

(4) No writ reversing enforcement shall be issued if the action is dismissed on the ground that the claim is unenforceable.'

The ZZD

9 Article 76 of the zakon za zadalzheniyata i dogovorite (Law on Obligations and Contracts) (DV No 275 of 22 November 1950), in the version applicable to the dispute in the main proceedings ('the ZZD'), provides:

'(1) A person who owes the performance of several obligations of the same kind to the same person may, in so far as enforcement is not sufficient to extinguish all the claims, specify which of them he or she is extinguishing. If he or she does not specify this, the most onerous claim for the debtor shall be extinguished. In the case of several claims that are equally onerous, the oldest shall be extinguished, and, if they arose at the same time, each claim shall be extinguished proportionately.

(2) Where enforcement is not sufficient to cover the interest, the charges and the claim for the principal, the charges shall be repaid first, then the interest and finally the claim for the principal.'

The ZPK

10 Article 9(1) of the Zakon za potrebitelskia kredit (Law on Consumer Credit) of 18 February 2010 (DV No 18 of 5 March 2010, p. 2), in the version applicable to the dispute in the main proceedings ('the ZPK'), provides:

'A consumer credit agreement is an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, a loan or other similar financial accommodation, except for agreements for the provision of services or the supply of goods of the same kind, over a continuous period, where the consumer pays for such services or goods for the duration of their provision or supply by means of instalments throughout that period.'

11 Article 10a of the ZPK states:

'(1) The creditor may charge the consumer fees and commissions for additional services related to the consumer credit agreement.

(2) The creditor may not charge fees or commission for activities related to the drawdown and servicing of the credit.

(3) The creditor may charge fees and/or commissions for the same activity only once.

(4) The nature and amount of fees and/or commissions and the activity for which they are charged must be clearly and precisely specified in the consumer credit agreement.'

12 Article 19 of the ZPK provides:

'…

(4) The annual percentage rate of charge shall not be more than five times the statutory rate of default interest in Bulgarian leva (BGN) or in a foreign currency determined by decision of the Council of Ministers of the Republic of Bulgaria.

(5) Contractual terms that go beyond those specified in paragraph 4 shall be deemed to be null and void.

(6) In the case of payments under contracts containing terms declared null and void under paragraph 5, amounts paid in excess of the threshold under paragraph 4 shall be offset against subsequent payments under the credit.'

Dispute in the main proceedings and the questions referred for a preliminary ruling

13 PCB lodged an application with the referring court pursuant to Article 410 of the GPK for an order for payment against T.I.T., a Bulgarian national ('the consumer concerned'), with a view to the payment by the latter of a monetary debt, consisting of the principal sum, contractual interest, the remuneration for a package of additional services and default interest, pursuant to a consumer credit agreement concluded between the parties to the main proceedings on 29 December 2017. According to the information provided by the referring court, such proceedings for the issuance of an order for payment take place on a unilateral basis until that order is issued.

14 Pursuant to that consumer credit agreement, the consumer concerned had paid, according to PCB, 11 monthly instalments before defaulting and being notified that the consumer credit concerned had become due for early repayment.

15 After finding that a term of that consumer credit agreement, relating to the remuneration for the provision of a package of additional services, was unfair, the referring court found that the application for an order for payment, in so far as it related to the payment of that remuneration, had to be rejected on the basis of Article 411(2)(3) of the GPK. Moreover, that court found that the amount already paid by the consumer concerned had to be allocated, in accordance with Article 76(2) of the ZZD, to the repayment of the contractual interest and the principal, so that 17 instalments of that interest and 16 complete instalments and part of a 17th instalment of that principal had been paid.

16 Consequently, by order of 9 November 2020, the referring court issued an order for payment against the consumer concerned, pursuant to that consumer credit agreement, under which order he was required to repay to PCB a sum recalculated by that court, which offset *ex officio* the payments already made against the amount of the claim relied on by PCB.

17 PCB lodged an appeal against that order with the Sofiyski gradski sad (Sofia City Court, Bulgaria). By order of 16 February 2021, first, that court found that, in accordance with Article 411(2)(3) of the GPK, the court of first instance was required to refuse to issue an order for payment where the application for that order was based on an unfair term in a consumer contract, which that court of first instance was entitled to find *ex officio* and without the need for objection on the part of the debtor. On the substance, that court confirmed that an unfair term was used in the consumer credit agreement concerned.

18 Second, the Sofiyski gradski sad (Sofia City Court) found that the remainder of the appeal was well founded. It took the view, in particular, that, by allocating the consumer's payments to the repayment of interest and the principal, in accordance with Article 76(2) of the ZZD, the court of first instance had exceeded its powers in respect of the issuance of an order for payment. The purpose of the order for payment proceedings based on Article 410 of the GPK, in accordance with the case-law of the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria), was

not to obtain a finding that the claim concerned existed, but merely to ascertain whether that claim was disputed. The issue of whether the claim asserted exists should, on the other hand, be determined by means of proceedings for a declaratory judgment, instigated by the creditor concerned, in accordance with Article 422 of the GPK, if the debtor concerned exercises the right to object to the order in accordance with Article 414 of the GPK.

19 The appeal court, consequently, partially annulled the referring court's order of 9 November 2020, upholding only the rejection of the application in so far as it related to the payment of the remuneration for the package of additional services concerned, inasmuch as that remuneration was based on a term which was regarded as being unfair. It then ruled that an order must be issued in PCB's favour, under Article 410 of the GPK, for payment of all of the other sums claimed and referred the case back to the referring court, as court of first instance, to issue an order for payment.

20 The referring court, having doubts as to how to proceed, observes that, if it were accepted, in a scenario such as that in the present case, where it has been established that the consumer concerned made repayments under an unfair term in a consumer credit agreement, that, in order to disapply that term, the court is to carry out offsetting *ex officio*, applying by analogy a provision of the ZPK, namely Article 19(6) of the ZPK, read in conjunction with Article 76(2) of the ZZD, that consumer would not have to lodge an objection under Article 414 of the GPK or bring a court action to assert the right to offsetting.

21 It is therefore necessary to determine, assuming that Article 6(1) of Directive 93/13 allowed the national court partially to refuse to issue an order for payment, whether, under that provision, that court must, *ex officio*, establish all the consequences of the unfair nature of the term concerned and carry out offsetting *ex officio* or whether it must, on the contrary, comply with the case-law of a higher court which, notwithstanding the finding that an unfair term is present in the consumer credit agreement concerned, rules that an order for payment must be issued and rejects the application for that order only in so far as it relates to the sums claimed on the basis of that unfair term, with no possibility of offsetting. The referring court specifies, in that regard, that it is asking that question in the context of the provision of effective means of consumer protection, to the extent that, under Bulgarian law, the offsetting of claims by the courts is permissible only where an individual right to offsetting is exercised. It could be carried out *ex officio*, on the other hand, only by way of exception, under Article 19(6) of the ZPK.

22 In those circumstances, the Sofiyski rayonen sad (Sofia District Court, Bulgaria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 6(1) of Directive [93/13] be interpreted as requiring the national court, in proceedings to which the debtor is not party until the issuance of a court order for payment, to assess of its own motion the unfairness of a contractual term and, if there is a suspicion that the term is unfair, to disapply it?

(2) If the first question is answered in the affirmative, is the national court required to refuse to issue a court decision ordering payment altogether where part of the claim was based on an unfair contractual term which gives rise to the amount of the claim asserted?

(3) If the first question is answered in the affirmative and the second [question] in the negative, is the national court required partially to refuse to issue a court decision ordering payment, in respect of the part of the claim that was based on the unfair term?

(4) If the third question is answered in the affirmative, is the national court required, and, if so, under what conditions, to take into account of its own motion the consequences of the unfairness of a term in the case where it has available to it information about a payment based on that term, inter alia by offsetting that payment against other outstanding debts under the contract concerned?

(5) If the fourth question is answered in the affirmative, is the national court bound by the instructions of a higher court which, under national law, are binding on the instance under review, in the case where those instructions do not take the consequences of the unfairness of a term into account?'

Consideration of the questions referred

Admissibility

23 In the first place, PCB questions the admissibility of the first question, on the ground that the Court held, in the judgment of 13 September 2018, *Profi Credit Polska* (C-176/17, EU:C:2018:711), that effective protection of the rights conferred on the consumer by Directive 93/13 can be guaranteed only if the national procedural system concerned allows the court, inter alia, during the order for payment proceedings, to check of its own motion whether terms in the consumer contract concerned are unfair.

24 In that regard, it should be recalled, first, that, even when there is case-law of the Court resolving the point of law concerned, national courts remain entirely at liberty to bring a matter before the Court if they consider it appropriate to do so; the fact that the provisions whose interpretation is sought have already been interpreted by the Court does not deprive the Court of jurisdiction to give a further ruling (judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 21 and the case-law cited).

25 Second, it is settled case-law that, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the question submitted concerns the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 23 and the case-law cited).

26 In the second place, regarding PCB's claim that the referring court did not find that there is an incompatibility between Bulgarian law and Article 6(1) of Directive 93/13, whose interpretation is now sought, but seeks to have provisions of Bulgarian law interpreted, it must be pointed out that it is apparent from the request for a preliminary ruling that that court questions how that

provision is to be interpreted in order to establish whether it must disapply, under the principle of primacy of EU law, national legislation as interpreted by a higher court whose case-law is binding on it.

27 In the light of all of the foregoing considerations, it must be concluded that the request for a preliminary ruling, including the first question, is admissible.

Substance

First to third questions

28 By its first to third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 6(1) of Directive 93/13 must be interpreted as meaning that the national court, on receiving an application for an order for payment and where the debtor-consumer does not take part in the proceedings until that order for payment is issued, is obliged to disapply *ex officio* an unfair term of the consumer credit agreement concluded between that consumer and the seller or supplier concerned, on which a part of the claim relied on is based, and whether, in that case, that court has the option of rejecting that application only in part.

29 Under Article 6(1) of Directive 93/13, Member States are to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier are not, as provided for under their national law, to be binding on the consumer and that the contract is to continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

30 That mandatory provision 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 (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 55 and the case-law cited).

31 To that end, in the first place, it is for the national court, subject to the conditions laid down by domestic law, to assess *ex officio* whether a contractual term coming within the scope of Directive 93/13 is unfair and to exclude its application so that it does not produce binding effects with regard to the consumer concerned, unless that consumer objects (see, to that effect, judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 52 and the case-law cited).

32 In that regard, it is important to recall that, while the national court, by so doing, compensates for the imbalance existing between the consumer and the seller or supplier, that is so only if the national court has available to it the legal and factual elements necessary for that task (see, to that effect, judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 42 and the case-law cited). It follows that, where applicable, the national court will be required to take, where the consumer concerned does not raise an objection and, if necessary, of its own motion, investigative measures in order to complete the case file, by asking the parties, in observance of the *audi alteram partem* principle, to provide it with additional information for that purpose (see, to that effect, order of 26 November 2020, *DSK Bank and FrontEx International*, C-807/19, EU:C:2020:967, paragraphs 52 and 54 and the case-law cited).

33 Those grounds also apply in respect of an order for payment procedure (see, to that effect, judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 43 and the case-law cited).

34 In the second place, according to settled case-law, Article 6(1) of Directive 93/13 does not require, in addition to the contractual term declared unfair, the national court to set aside those terms which have not been classed as such (judgment of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 54 and the case-law cited).

35 The objective pursued by that provision, and in particular its second part, consists not in cancelling all contracts containing unfair terms but in restoring the balance between the parties by not applying those contractual terms held to be unfair, whilst maintaining, in principle, the validity of the other terms of the contract concerned. That contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms. Thus, that contract may be continued as long as, in accordance with the rules of domestic law, such continuity of that contract is legally possible without the unfair terms (see, to that effect, judgments of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, EU:C:2018:643, paragraph 75, and of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 83 and the case-law cited).

36 In that context, the Court has, moreover, held that that provision precludes a rule of national law which allows the national court to modify the contract concerned by revising the content of a term which it has found to be unfair (see, to that effect, judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 53 and the case-law cited).

37 It follows from the foregoing that the national court to which an application for an order for payment has been made on the basis of a consumer credit agreement which contains an unfair term will be entitled to grant that application, while disapplying that term, provided that the agreement can continue in existence without any further amendment, revision or supplementation, which it is for the court to verify. In that case, it must be open to that court to reject that application in respect only of the part of the claims arising from that term, if those claims can be distinguished from the remainder of the application.

38 In the light of all of the foregoing considerations, the answer to the first to third questions is that Article 6(1) of Directive 93/13 must be interpreted as meaning that the national court, on receiving an application for an order for payment and where the debtor-consumer does not take part in the proceedings until the order for payment is issued, is obliged to disapply *ex officio* an unfair term in the consumer credit agreement concluded between that consumer and the seller or supplier concerned, on which a part of the claim relied on is based. In that case, that court has the option of rejecting that application in part, provided that that agreement can continue in existence without any further amendment, revision or supplementation, which it is for the court to verify.

Fourth question

39 By its fourth question, the referring court asks, in essence, whether Article 6(1) of Directive 93/13 must be interpreted as meaning that it obliges the national court, on receiving an application for an order for payment, to establish *ex officio* the consequences of the unfair nature of a term of a consumer credit agreement where that term has given rise to a payment, with the result that it would be obliged to offset *ex officio* that payment against the balance due under that agreement.

40 In that regard, the referring court states that, should the national court have such an obligation, under Article 6 of that directive, the consumer concerned would no longer have to initiate separate proceedings to assert his right to offsetting.

41 According to settled case-law, it is for the national court, under Article 6(1) of Directive 93/13, to establish all the consequences, arising under national law, of a finding that a term is unfair in order to ensure that the consumer concerned is not bound by that term (judgment of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 49 and the case-law cited). Such an obligation implies, as recalled in paragraph 31 of this judgment, that it is for that court to exclude the application of the term regarded as being unfair so that that term does not produce binding effects with regard to that consumer.

42 Since such a term must be regarded, in principle, as never having existed, so that it cannot have any effect on that consumer, the obligation for the national court to exclude the application of an unfair contract term which imposes the payment of an amount entails, in principle, a corresponding restitutory effect in respect of that amount (see, to that effect, judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 61 and 62).

43 In that context, the Court has found that it is for the Member States, by means of their national legislation, to define the detailed rules under which the unfairness of a contractual clause is established and the actual legal effects of that finding are produced. However, that finding must allow the restoration of the legal and factual situation that the consumer concerned would have been in if that unfair term had not existed, by, inter alia, creating a right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier concerned on the basis of that unfair term. Such regulation by national law of the protection guaranteed to consumers by Directive 93/13 may not adversely affect the substance of that protection (see, to that effect, judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 65 and 66).

44 While Member States are thus obliged, under Article 6(1) of Directive 93/13, to lay down in their national law procedural rules to ensure that that right to restitution is respected, it does not give rise, on the other hand, to an obligation to implement that right by means of offsetting to be carried out by the national court *ex officio*, even though that court is obliged to exclude the application of the unfair term.

45 It follows that national legislation, such as that at issue in the main proceedings, under which the court to which an application for an order for payment has been made is required to reject that application to the extent that it is based on an unfair term, but is not permitted to offset *ex officio* the payments made on the basis of that term against the balance due, with the result that the

debtor, who does not take part in the order for payment proceedings, is obliged to initiate separate proceedings to exercise his or her right to full restitution, is not, in principle, contrary to Article 6 of Directive 93/13.

46 Nevertheless, it is settled case-law that the means of safeguarding the rights arising under EU law, which the Member States establish by virtue of the principle of procedural autonomy, must meet the dual condition that they are no less favourable than those governing similar, domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness) (see, to that effect, judgment of 18 February 2016, *Finanmadrid EFC*, C-49/14, EU:C:2016:98, paragraph 40 and the case-law cited).

47 In the first place, as regards the principle of equivalence, it should be observed that, according to the position under domestic law as described in the request for a preliminary ruling, Article 19(6) of the ZPK provides for offsetting *ex officio* where a term is null and void under Article 19(5) of the ZPK, with regard to payments made under a term which exceeds the upper limit on the annual percentage rate of charge, defined in Article 19(4) of that law. In the view of the referring court, the application, by analogy, of that Article 19(6), read in conjunction with Article 76 of the ZZD, would make it possible, in the context of order for payment proceedings based in part on an unfair term, also to carry out offsetting *ex officio*, inter alia, with regard to payments made on the basis of that term, with the result that the consumer concerned would no longer have to initiate separate proceedings for restitution of the amounts wrongly paid. However, to the extent that, in responding to a request for information made by the Court in that regard, the referring court stated, first, that there was conflicting case-law concerning the conditions under which the national court is required, in the context of order for payment proceedings, to carry out offsetting *ex officio* in the event of a finding of an unfair term, such as that provided for in Article 19(6) of the ZPK, and, second, that there was divergent case-law concerning the legality of the application, by analogy, of that provision in order to carry out offsetting *ex officio* in cases which do not only involve the application of Article 19(4) of the ZPK, the Court does not have sufficient information at its disposal to assess compliance with the principle of equivalence. It will consequently be for the national court, which alone is in a position to have direct knowledge of the procedural rules governing the right to restitution in its domestic legal system, to ascertain whether that principle is complied with, taking into consideration the purpose, cause and essential characteristics of those procedural rules.

48 In the second place, regarding the principle of effectiveness, it is not apparent from the information provided by the referring court, and in particular that relating to the interpretation in the case-law of Article 410 of the GPK, according to which interpretation the court does not have the power, in the context of order for payment proceedings, to determine whether the claim concerned exists and the consumer concerned is consequently obliged, in order to exercise his right to full restitution which arises under Article 6 of Directive 93/13, to conduct separate proceedings, that that article makes it impossible or excessively difficult to exercise that right, even though that obligation requires action on the part of the debtor concerned and the pursuit of adversarial proceedings. It does not appear, therefore, that those procedural rules, on their own, make the exercise of the right to restitution conferred by EU law impossible or excessively difficult, which it will, however, be for the referring court to verify. In that regard, it should, in addition, be recalled that the need to comply with the principle of effectiveness cannot be stretched so far as to make up fully for total inertia on the part of the consumer concerned (see, to that effect, judgment of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 56).

49 In the light of all of the foregoing considerations, the answer to the fourth question is that Article 6(1) of Directive 93/13 must be interpreted as meaning that, while that provision obliges the national court, on receiving an application for an order for payment, to establish all the consequences, arising under national law, of a finding that a term in a consumer credit agreement concluded between a consumer and a seller or supplier is unfair, in order to ensure that that consumer is not bound by it, that does not, in principle, oblige that court to offset *ex officio* the payment made on the basis of that term against the balance due under that agreement, subject, however, to compliance with the principles of equivalence and effectiveness.

Fifth question

50 By way of introduction, it should be pointed out that the referring court asked the fifth question should the fourth question be answered in the affirmative.

51 Thus, by the fifth question, the referring court asks, in essence, whether, where, under Article 6(1) of Directive 93/13, read in the light of the principles of equivalence and effectiveness, the national court, on receiving an application for an order for payment, would be obliged to offset *ex officio* the payment made on the basis of an unfair term in a consumer credit agreement against the balance due under that agreement, that provision must be interpreted as meaning that that court would be obliged to disregard the case-law of a higher court prohibiting such offsetting *ex officio*.

52 In that regard, it must be observed that it is apparent from the case-law of the Court that it is for that national court, in the light of the principle of primacy of EU law, to disregard the case-law of a higher court, such as that at issue in the main proceedings, which prohibits it from offsetting *ex officio*, in the context of an order for payment, the amounts paid by the debtor concerned on the basis of terms regarded as being unfair against the balance due under the consumer credit agreement concerned, because, in that scenario, that case-law would not be compatible with EU law (see, to that effect judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 74).

53 In the light of all of the foregoing considerations, Article 6(1) of Directive 93/13 must be interpreted as meaning that, where, under that provision, read in the light of the principles of equivalence and effectiveness, the national court, on receiving an application for an order for payment, would be obliged to offset *ex officio* the payment made on the basis of an unfair term in a consumer credit agreement against the balance due under that agreement, that court is obliged to disregard the case-law of a higher court to the contrary.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that the national court, on receiving an application for an order for payment and where the debtor-consumer concerned does not take part in the proceedings until the order for payment is issued, is obliged to**

disapply *ex officio* an unfair term in the consumer credit agreement concluded between that consumer and the seller or supplier concerned, on which a part of the claim relied on is based. In that case, that court has the option of rejecting that application in part, provided that that agreement can continue in existence without any further amendment, revision or supplementation, which it is for the court to verify.

2. **Article 6(1) of Directive 93/13 must be interpreted as meaning that, while that provision obliges the national court, on receiving an application for an order for payment, to establish all the consequences, arising under national law, of a finding that a term in a consumer credit agreement concluded between a consumer and a seller or supplier is unfair, in order to ensure that that consumer is not bound by it, that does not, in principle, oblige that court to offset *ex officio* the payment made on the basis of that term against the balance due under that agreement, subject, however, to compliance with the principles of equivalence and effectiveness.**

3. **Article 6(1) of Directive 93/13 must be interpreted as meaning that, where, under that provision, read in the light of the principles of equivalence and effectiveness, the national court, on receiving an application for an order for payment, would be obliged to offset *ex officio* the payment made on the basis of an unfair term in a consumer credit agreement against the balance due under that agreement, that court is obliged to disregard the case-law of a higher court to the contrary.**

[Signatures]