



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

4 May 2023 *

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Enforcement proceedings in respect of a loan agreement constituting an enforceable instrument – Objection to the enforcement – Review of unfair terms – Principle of effectiveness – National legislation not permitting the court hearing the enforcement proceedings to review the possible unfairness of a clause beyond the time limit imposed on a consumer for lodging an objection – Existence of an action under ordinary law that cannot become time-barred enabling the court hearing the substance of the case to carry out such a review and to order suspension of the enforcement – Conditions which do not render impossible in practice or excessively difficult the exercise of rights conferred by EU law – Requirement for the consumer to pay a security in order to suspend the enforcement proceedings)

In Case C-200/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul București (Regional Court, Bucharest, Romania), made by decision of 25 February 2021, received at the Court on 31 March 2021, in the proceedings

TU,

SU

v

BRD Groupe Société Générale SA,

Next Capital Solutions Ltd,

THE COURT (Ninth Chamber),

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

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Romanian.

after considering the observations submitted on behalf of:

- BRD Groupe Société Générale SA, by M. Avram, avocată,
- the Spanish Government, by M.J. Ruiz Sánchez, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. Greco, avvocato dello Stato,
- the European Commission, by M. Carpus Carcea and N. Ruiz García, acting as Agents,

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

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).
- 2 The request has been made in proceedings between TU and SU, on the one hand, and BRD Groupe Société Générale SA ('BRD') and Next Capital Solutions Ltd ('NCS'), on the other, concerning an objection to the enforcement of the repayment obligation relating to a loan agreement concluded between TU and SU, on the one hand, and BRD, on the other, the latter's claim subsequently being assigned to NCS.

Legal context

European Union law

- 3 The 24th recital of Directive 93/13 states that 'the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts'.
- 4 Article 6(1) of that directive 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(1) of that directive provides:

'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.'

Romanian law

- 6 Article 638(1)(4) of the Legea nr. 134/2010 privind Codul de procedură civilă (Law No 134/2010 on the Code of Civil Procedure), in the version applicable to the dispute in the main proceedings ('the Code of Civil Procedure'), provides:

'The following are also enforceable instruments and may be subject to enforcement:

...

4. Debt instruments or other instruments which are enforceable under the law.'

- 7 Under Article 638(2) of the Code of Civil Procedure:

'Suspension of enforcement of instruments stipulated in paragraph 1(2) and (4) may also be sought in connection with an action for their annulment. The provisions of Article 719 shall apply by analogy.'

- 8 Article 713(2) of the Code of Civil Procedure provides:

'Where the enforcement is effected on the basis of an enforceable instrument other than a judicial decision, the debtor may also rely, in an objection to the enforcement, on factual or legal grounds concerning the substance of the right underlying the enforceable instrument only if the law does not provide ... for a specific procedural remedy for its annulment ...'

- 9 Article 715(1)(3) of the Code of Civil Procedure provides:

'1. Unless otherwise provided by law, an objection to enforcement may be lodged within 15 days, which shall run from the date on which:

...

3. the debtor contesting the enforcement itself has received the decision authorising the enforcement or the order, or from the date on which he or she became aware of the first enforcement act, where he or she has not received either the decision authorising the enforcement or the order, or where the enforcement is carried out without an order.

...'

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

- 10 In October 2007, TU and SU concluded a loan agreement with BRD ('the loan agreement at issue'). In June 2009, BRD assigned the claim arising from that loan agreement to IFN Next Capital Finance SA, which, in August of that year, assigned that claim to NCS.
- 11 On 23 February 2015, NCS instructed a bailiff to enforce payment of the debt owed by TU, on the basis of the loan agreement at issue, which was enforceable under Romanian law. In that context, the bailiff issued a payment order to TU, requiring him to pay the outstanding amounts owed under the loan agreement at issue and the costs of enforcement. On the same day, the bailiff ordered the seizure of financial assets in accounts held by TU with a number of banking establishments. Those various enforcement measures were notified to him on 2 March 2015.

- 12 By measure of 6 March 2015, the bailiff carried out a seizure of part of TU's salary directly from his employer. That measure was also notified to TU on 13 March 2015.
- 13 On 17 March 2015, TU challenged the bailiff in respect of the amounts sought from TU, and then, on 5 August 2015, requested the grant of a six-month repayment plan. Subsequently, on 25 May 2016, the bailiff again ordered part of TU's salary to be seized.
- 14 On 6 December 2018, the bailiff issued a new order for payment of the sums still owed to NCS, plus enforcement costs, failing which TU's share of ownership in a building situated in Bucharest (Romania) would be seized.
- 15 On 28 December 2018, TU lodged an objection to that enforcement before the Judecătoria sectorului 1 Bucureşti (Court of First Instance, Sector 1, Bucharest, Romania), claiming that the right to seek enforcement was time-barred. By final judgment, delivered on 18 April 2019, that court held that the objection to the enforcement was out of time.
- 16 On 17 February 2020, TU and SU brought, before that court, a new objection to the enforcement, arguing that two clauses of the loan agreement at issue, relating to the charging of a fee for the opening of a loan file and a monthly credit handling and management fee respectively, were unfair. By their application, TU and SU also sought annulment of the enforcement measures and repayment of the sums unduly received by NCS on account of the unfairness of those clauses.
- 17 In support of that new objection, TU and SU relied on the order of 6 November 2019, *BNP Paribas Personal Finance SA Paris Sucursala Bucureşti and Secapital* (C-75/19, not published, EU:C:2019:950), in which the Court held that Directive 93/13 must be interpreted as precluding a rule of national law, such as Article 713(2) of the Code of Civil Procedure, by which a consumer against whom enforcement proceedings have been initiated is time-barred, beyond a period of 15 days from service of the first documents in those proceedings, from relying on the existence of unfair terms in the contract the enforcement of which is sought, even if, under national law, the consumer has an action for a finding of unfair terms which is not subject to any time limit, but the outcome of which has no bearing on the outcome of the enforcement proceedings, which may be binding on the consumer before the outcome of the action for a finding of unfair terms.
- 18 By judgment of 3 July 2020, the Judecătoria sectorului 1 Bucureşti (Court of First Instance, Sector 1, Bucharest) upheld the plea raised by BRD and NCS alleging that that objection was out of time. According to that court, although, in the order of 6 November 2019, *BNP Paribas Personal Finance SA Paris Sucursala Bucureşti and Secapital* (C-75/19, not published, EU:C:2019:950), the Court held that the consumer had to be able to rely on the unfairness of the contractual terms in the context of an objection to the enforcement of the contract concerned, the fact remained that that right cannot be exercised effectively at any time, without being subject to the time limits laid down by law for that purpose.
- 19 TU and SU brought an appeal against that judgment before the referring court, the Tribunalul Bucureşti (Regional Court, Bucharest, Romania), requesting it to alter the decision at first instance which had upheld the plea alleging that that objection was out of time, on the ground that the reasoning given by the Judecătoria sectorului 1 Bucureşti (Court of First Instance, Sector 1, Bucharest) was incorrect in law.

- 20 The referring court states that the case before it and the case which gave rise to the order of 6 November 2019, *BNP Paribas Personal Finance SA Paris Sucursala București and Secapital* (C-75/19, not published, EU:C:2019:950), are similar. However, it asks whether the fact that the court before which the consumer may bring an action under ordinary law has the power to suspend enforcement of the contract pending a ruling on that action, as follows from Article 638(2) of the Code of Civil Procedure, is such as to affect the guidance resulting from that order.
- 21 Furthermore, in the event that that is not the case and it is not possible to interpret the rules of national law relating to enforcement in a manner consistent with EU law, by allowing the consumer to lodge an objection to the enforcement of the contract beyond the 15-day period by pleading that the terms of the contract concerned are unfair, the referring court raises the question of the consequences which it should draw from that.
- 22 In those circumstances, the Tribunalul București (Regional Court, Bucharest) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Directive 93/13 preclude a rule of national law, such as that resulting from Article 712 et seq. ... of the Code of Civil Procedure, which lays down a period of 15 days within which a debtor may, by way of an objection to enforcement, rely on the unfairness of a contractual term of [the contract forming] the enforceable instrument, given that an action seeking to establish the existence of unfair terms in [the contract forming] the enforceable instrument is not subject to any time limit and, in this connection, a debtor may seek suspension of enforcement ... under Article 638(2) of the Code of Civil Procedure?’

Consideration of the question referred

- 23 By its question, the referring court asks, in essence, whether Directive 93/13 must be interpreted as precluding a provision of national law which does not allow the court hearing the enforcement proceedings, before which an objection to enforcement of a contract concluded between a consumer and a seller or supplier, which is enforceable, has been brought outside the 15-day period laid down by that provision, to assess, of its own motion or at the request of the consumer, the unfairness of the terms of that contract, when that consumer also has an action on the merits which enables him or her to request the court hearing that action to carry out such a review and to order suspension of the enforcement pending the outcome of that action, in accordance with another provision of that national law.
- 24 According to settled case-law of the Court, 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 or her bargaining power and his or her level of knowledge (see, in particular, judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 40 and the case-law cited).
- 25 As regards that weaker position, Article 6(1) of the directive provides that unfair terms are not binding on consumers. 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 (see, in particular, judgments of

21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 53 and 55, and of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 41).

- 26 In that context, the Court has stated on several occasions that the 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 this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task (judgments of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 46 and the case-law cited; of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 58; and of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 43).
- 27 Furthermore, Directive 93/13, as is apparent from Article 7(1) in conjunction with the 24th recital of the directive, obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers (judgment of 26 June 2019, *Addiko Bank*, C-407/18, EU:C:2019:537, paragraph 44 and the case-law cited).
- 28 While the Court has already defined, on several occasions and taking account of the requirements of Article 6(1) and Article 7(1) of Directive 93/13, the way in which national courts must ensure that the rights which consumers derive from that directive are protected, the fact remains that, in principle, EU law does not harmonise the procedures applicable to examining whether a contractual term is unfair and that those procedures accordingly fall within the domestic legal system of the Member States, provided, however, that those procedures are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 26 June 2019, *Addiko Bank*, C-407/18, EU:C:2019:537, paragraphs 45 and 46 and the case-law cited).
- 29 In addition, the Court has stated that the obligation on the Member States to ensure the effectiveness of the rights that individuals derive from EU law, particularly the rights deriving from Directive 93/13, implies a requirement for effective judicial protection, reaffirmed in Article 7(1) of that directive and also guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, which applies, inter alia, to the definition of detailed procedural rules relating to actions based on such rights (see, to that effect, judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 29 and the case-law cited).
- 30 In that regard, the Court has held that, in a situation where the enforcement proceedings culminated before the decision of the court having jurisdiction to rule on the substance of the case declaring the contractual term on which that enforcement was based to be unfair and, consequently, the invalidity of those proceedings, that decision would enable that consumer to be guaranteed only ex post protection by way of compensation, which would be incomplete and insufficient and would not constitute an adequate or effective means of preventing the continued use of that term, contrary to what is provided for in Article 7(1) of Directive 93/13 (order of 6 November 2019, *BNP Paribas Personal Finance SA Paris Sucursala București and Secapital*, C-75/19, not published, EU:C:2019:950, paragraph 32 and the case-law cited).

- 31 Thus, in paragraph 34 of the order of 6 November 2019, *BNP Paribas Personal Finance SA Paris Sucursala București and Secapital* (C-75/19, not published, EU:C:2019:950), to which the referring court refers, the Court held that Directive 93/13 must be interpreted as precluding a rule of national law under which a consumer who has concluded a loan agreement with a credit institution and against whom that seller or supplier has initiated enforcement proceedings is time-barred, beyond a period of 15 days from service of the first documents in those proceedings, from relying on the existence of unfair terms in order to object to those proceedings, even if that consumer has, under national law, an action for a finding of unfair terms which is not subject to any time limit, but the outcome of which has no bearing on the outcome of the enforcement proceedings, which may be binding on the consumer before the outcome of the action for a finding of unfair terms.
- 32 The referring court is uncertain, however, whether that interpretation is also valid where the court hearing the substance of the action has jurisdiction to suspend the enforcement.
- 33 In that regard, it should be noted that the possibility, for the consumer, of bringing an action under ordinary law, before the court having jurisdiction to rule on the substance of the case, seeking a review of the potentially unfair nature of the terms of the contract in respect of which enforcement is sought, in which he or she may have that court suspend that enforcement, may, in principle, make it possible to avert the risk that the enforcement proceedings are brought to a close before the outcome of the action for a finding of unfair terms.
- 34 However, it must be noted that, after the present request for a preliminary ruling was made, the Court gave judgment of 17 May 2022 in *Impuls Leasing România* (C-725/19, EU:C:2022:396). In paragraph 60 of that judgment, the Court held that Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation which does not allow the court hearing the enforcement proceedings, before which an objection to enforcement has been lodged, to assess, of its own motion, or at the request of the consumer, whether the terms of a contract concluded between a consumer and a seller or supplier which constitutes an enforceable instrument are unfair, where the court having jurisdiction to rule on the substance of the case, which may be seised of a separate action under the ordinary law with a view to an assessment as to whether the terms of that contract are unfair, may suspend the enforcement proceedings until a decision has been given on the substance only if a security is paid, the level of which is likely to dissuade the consumer from bringing and continuing such an action.
- 35 When asked whether the present request for a preliminary ruling should continue in the light of that judgment, the referring court stated that that judgment contained the answer to a similar question relating to an identical legal issue.
- 36 It is true that, in the dispute in the main proceedings which gave rise to the judgment of 17 May 2022, *Impuls Leasing România* (C-725/19, EU:C:2022:396), the court hearing an objection to the enforcement did not have the power to review the potential unfairness of the terms of the contract on which that enforcement was based, whereas, in the circumstances of the case which gave rise to the present reference for a preliminary ruling, that court does have the possibility of doing so, provided that an action has been brought before it within 15 days, on the expiry of which the consumer is time-barred. Nevertheless, in both situations, the essential question is whether the possibility, for the consumer, of bringing an action on the merits in which he or she may request suspension of the enforcement is, in view of the detailed rules for such a suspension, capable of ensuring the effectiveness of the protection intended by Directive 93/13.

- 37 It is apparent from the order for reference that such a suspension is subject to the provisions of Article 719 of the Code of Civil Procedure. The procedural context appears, in that regard, to be identical to that referred to in paragraph 57 of the judgment of 17 May 2022, *Impuls Leasing România* (C-725/19, EU:C:2022:396), in which the Court stated that, in the event of a separate action before the court having jurisdiction to rule on the substance, the consumer seeking suspension of the enforcement proceedings is required to pay a security which is calculated on the basis of the value of the subject matter of the action. The wording of Article 719 of the Code of Civil Procedure, as reproduced in the observations submitted by the European Commission in the context of the present reference for a preliminary ruling, confirms that finding.
- 38 It should therefore be noted that, in paragraph 58 of the judgment of 17 May 2022, *Impuls Leasing România* (C-725/19, EU:C:2022:396), the Court referred to the case-law according to which the costs which legal proceedings would entail in relation to the amount of the disputed debt must not be such as to dissuade the consumer from bringing court proceedings for the purpose of assessing the potential unfairness of the contractual terms. In paragraph 59 of that judgment, the Court stated that it is likely that a debtor in default does not have the financial resources necessary to provide the guarantee required.
- 39 Accordingly, it must be held that the possibility, available to the consumer, of bringing, without being required to comply with a time limit, an action on the merits in which he or she may request suspension of the enforcement proceedings by providing a security is not such as to ensure the effectiveness of the protection intended by Directive 93/13 if the level of the amount required to set up that security is likely to dissuade that consumer from bringing and continuing such an action, which it is for the referring court to verify.
- 40 As to the remainder, the referring court stated that the part of its request for a preliminary ruling, referred to in paragraphs 23 and 24 of that request, relating to the approach to be taken by the national court where it is impossible for that court to interpret national law in a manner consistent with EU law, remains relevant.
- 41 In that regard, it should be noted that, where they cannot interpret and apply national legislation in accordance with the requirements of Directive 93/13, national courts are obliged to examine of their own motion whether the provisions agreed between the parties are unfair and, where necessary, are to disapply any national legislation or case-law which precludes such an examination (judgment of 7 November 2019, *Profi Credit Polska*, C-419/18 and C-483/18, EU:C:2019:930, paragraph 76 and the case-law cited).
- 42 It follows that the answer to the question referred is that Directive 93/13 must be interpreted as precluding a provision of national law that does not allow the court which is responsible for the enforcement proceedings and which hears, outside the 15-day period laid down by that provision, an objection to the enforcement of a contract that is concluded between a consumer and a seller or supplier and constitutes an enforceable instrument, to assess, of its own motion or at the request of the consumer, the unfairness of the terms of that contract, when that consumer also has an action on the merits which enables him or her to request the court hearing that action to carry out such a review and to order the suspension of the enforcement pending the outcome of that action, in accordance with another provision of that national law, where that suspension is possible only by way of payment of a security the amount of which is likely to dissuade the consumer from bringing and continuing such an action, which it is for the referring court to verify. Where it is not possible to interpret and apply the national legislation in a manner that is consistent with the requirements of that directive, the national court hearing an objection to the

enforcement of such a contract is obliged to examine of its own motion whether the terms of that contract are unfair, and, where necessary, is to disapply any national provisions which preclude such an examination.

Costs

- 43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

must be interpreted as precluding a provision of national law that does not allow the court which is responsible for the enforcement proceedings and which hears, outside the 15-day period laid down by that provision, an objection to the enforcement of a contract that is concluded between a consumer and a seller or supplier and constitutes an enforceable instrument, to assess, of its own motion or at the request of the consumer, the unfairness of the terms of that contract, when that consumer also has an action on the merits which enables him or her to request the court hearing that action to carry out such a review and to order the suspension of the enforcement pending the outcome of that action, in accordance with another provision of that national law, where that suspension is possible only by way of payment of a security the amount of which is likely to dissuade the consumer from bringing and continuing such an action, which it is for the referring court to verify. Where it is not possible to interpret and apply the national legislation in a manner that is consistent with the requirements of that directive, the national court hearing an objection to the enforcement of such a contract is obliged to examine of its own motion whether the terms of that contract are unfair, and, where necessary, is to disapply any national provisions which preclude such an examination.

[Signatures]