Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 15 July 2021 [1]

Case C-725/19

IO
v
Impuls Leasing România IFN SA

(Request for a preliminary ruling from the Judecătoria Sectorului 2 București (Court of First Instance, Sector 2, Bucharest, Romania))

(Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Articles 6(1) and 7(1) – Principle of effectiveness – Enforcement proceedings – National legislation precluding the court seised of an objection to enforcement from examining the unfairness of the contractual terms – Existence of a separate action)

I. Introduction

1. This request for a preliminary ruling submitted by the Judecătoria Sectorului 2 București (Court of First Instance, Sector 2, Bucharest, Romania) concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. [2] It is situated in the context of enforcement proceedings carried out on the basis of a leasing contract having the status of an enforceable instrument.

2. The main issue raised by the present case is essentially whether Articles 6(1) and 7(1) of Directive 93/13 preclude national legislation which does not allow a national court hearing proceedings in which the consumer contests the enforcement to examine, either of its own motion (*ex officio*) or at the consumer's request, whether the terms of the contract are unfair because there is the possibility under national law for the consumer to bring a separate action in which the contract may be examined to determine whether it contains unfair terms.

3. The present case is being heard by the Court in parallel with four other cases (C-600/19, C-693/19, C-831/19 and C-869/19) in which my Opinions are being delivered today. Those cases are based on Spanish and Italian requests for preliminary rulings and also touch on similar and potentially sensitive issues relating to the extent of the national court's obligation to examine *ex officio* the unfairness of contractual terms in accordance with the Court's case-law interpreting Directive 93/13 and the relationship with the national procedural systems.

[1] Original language: English.

[2] OJ 1993 L 95, p. 29.

4. Consequently, the present case provides the Court with the opportunity to develop its case-law on the judicial review of unfair terms under Directive 93/13 with respect to accelerated procedures in which creditors seek recovery of consumer debts in the Member States.

II. Legal framework

A. Union law

5. 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.'

6. Article 7(1) of Directive 93/13 states:

'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.'

B. Romanian law

7. Legea nr. 193/2000 privind clauzele abuzive din contractele încheiate între profesionişti şi consumatori (Law No 193/2000 on unfair terms in contracts concluded between sellers or suppliers and consumers), of 6 November 2000 (*Monitorul Oficial al României*, Part I, No 560 of 10 November 2000), as amended ('Law No 193/2000'), transposed Directive 93/13 into Romanian law.

8. Article 713(2) of the Codul de procedură civilă ('the Code of Civil Procedure'), in the version currently in force following its amendment by Law No 310/2018, [3] provides:

'If enforcement is carried out by virtue of an enforceable instrument other than a court decision, points of fact or law relating to the substance of the right referred to in the enforceable instrument may be raised in support of the opposition only if the law does not provide for any procedural remedy for the annulment of that instrument, including an action in common law.'

9. Article 713(2) of the Code of Civil Procedure, prior to its amendment by Law No 310/2018, had provided:

'If enforcement is carried out by virtue of an enforceable instrument other than a court decision, points of fact or law relating to the substance of the right referred to in the enforceable instrument may be raised in support of the opposition only if the law does not provide for any specific procedural remedy for the annulment of that instrument.'

[3] Legea nr. 310/2018 pentru modificarea și completarea Legii nr. 134/2010 privind Codul de procedură civilă, precum și pentru modificarea și completarea altor normative act (Law No 310/2018 amending and supplementing Law No 134/2010 on the Code of Civil Procedure, as well as other normative acts) (*Monitorul Oficial al României*, Part I, No 1074 of 18 December 2018) ('Law No 310/2018'), which entered into force on 21 December 2018.

III. Facts, procedure and question referred

10. According to the order for reference, on 20 August 2008, Impuls Leasing România IFN SA ('Impuls Leasing'), as the finance provider, and IO, acting in the capacity of consumer and as the user, entered into a leasing contract regarding the use of a motor vehicle for a period of 48 months.

11. Thereafter, IO became unable to meet the payment obligations under the contract. On 19 March 2010, IO returned the motor vehicle to Impuls Leasing. On 29 June 2010, Impuls Leasing sold that vehicle to a third party for EUR 5 294.12.

12. On 15 October 2010, Impuls Leasing lodged with a court enforcement officer an application for enforcement against IO on the basis of the contract. After the sum of 5 168.28 Romanian lei (RON) (approximately EUR 1 200) had been recovered, on 16 November 2016, this enforcement procedure was apparently closed on the ground that IO had no further attachable assets.

13. On 26 March 2019, Impuls Leasing lodged with a different court enforcement officer a further application for enforcement against IO on the basis of the contract, seeking the liquidation of the remaining claims allegedly due to it in the amount of RON 137 502.84 (approximately EUR 29 000).

14. By order of 12 April 2019, the Judecătoria Sectorului 2 București (Court of First Instance, Sector 2, Bucharest) approved the application for enforcement in that amount, plus the costs of the enforcement.

15. By order of 8 May 2019, the court enforcement officer fixed the costs of the enforcement. On the same day, that officer executed the enforcement measures, which were communicated to IO.

16. On 24 May 2019, IO lodged with the Judecătoria Sectorului 2 București (Court of First Instance, Sector 2, Bucharest) an objection to enforcement, seeking the annulment of enforcement measures adopted in those proceedings and the restoration of the situation as it had been prior to the enforcement of the contract.

17. The referring court indicates that the contract on the basis of which the enforcement proceedings were commenced against IO contains certain terms which could be regarded as unfair pursuant to Law No 193/2000, which transposed Directive 93/13 into Romanian law. In that regard, the referring court notes that clause 10.9.1 of the contract entitles the finance provider, in the event of delay in the payment of any sum of money owed by the user, to apply late payment penalties at the rate of 0.35% of the outstanding amount for each day of delay, pursuant to which Impuls Leasing claims RON 116 723.72 (approximately EUR 25 000), whereas the total value of the contract was EUR 9 232.07. In addition, the referring court points out that clause 13 of the contract governs the extent of the damages which may be claimed by the finance provider in the event of the user's failure to meet the contractual obligations and that, on the basis of that clause, Impuls Leasing seeks compensation, inter alia, for a capital shortfall of RON 25 155.43 (approximately EUR 5 300) and unpaid invoices amounting to RON 13 453.96 (approximately EUR 2 800).

18. The referring court explains that, under Article 713(2) of the Code of Civil Procedure before it was amended by Law No 310/2018, it was permissible for a national court to examine the unfairness of contractual terms in the context of an objection to enforcement, since as far as leasing contracts were concerned, there was no specific procedural remedy for their annulment

within the meaning of that provision. In contrast, according to the current version of Article 713(2) of the Code of Civil Procedure as amended by that law, which is applicable to the main proceedings, this is the case only if there is no procedural remedy for the annulment of such contracts, including a common law action. According to the referring court, since a consumer can bring a common law action of that type pursuant to Law No 193/2000 in which such contracts may be examined to determine whether they contain unfair terms, this means that a national court can no longer examine the unfairness of contractual terms in the context of an objection to enforcement.

19. The referring court observes that, having regard to the Court's case-law, national enforcement mechanisms must, in accordance with the principle of effectiveness, not make it impossible or excessively difficult to exercise the rights which Union law confers on consumers and that those rights can be protected effectively only if the national procedural system also permits an *ex officio* examination of the potentially unfair nature of the terms of the contract in the context of enforcement proceedings. The referring court therefore has doubts whether Article 713(2) of the Code of Civil Procedure, as amended by Law No 310/2018, is consistent with Directive 93/13, given that consumers are obliged to bring a common law action without being able to exercise the rights conferred on them by that directive through an objection to enforcement.

20. It was in those circumstances that the Judecătoria Sectorului 2 Bucureşti (Court of First Instance, Sector 2, Bucharest) decided to stay the main proceedings and to refer the following question to the Court for a preliminary ruling:

'Taking into account the principle of effectiveness, is Directive 93/13/EEC to be interpreted as precluding national legislation, such as the Romanian legislation in force concerning the conditions under which an objection to enforcement is admissible, namely Article 713(2) of the Code of Civil Procedure, as amended by Law No 310/2018, pursuant to which, in the context of an objection to enforcement, the examination, at the request of the consumer or by the court acting of its own motion, of whether the terms of a leasing contract that constitutes the enforceable instrument are unfair is precluded because it is possible to bring a common law action in which a contract concluded between a "consumer" and a "seller or supplier" may be examined in order to determine whether it contains unfair terms within the meaning of that directive?'

21. Written observations were submitted to the Court by Impuls Leasing and the Commission. Those parties, along with IO and the Romanian Government, took part in the hearing held on 27 April 2021.

IV. Summary of the observations of the parties

22. According to IO, the enforcement proceedings represent an accelerated, non-contentious procedure in which a court decides on the approval of the enforcement within a period of seven days of the lodging of the claim by way of an order in camera and without summoning the parties. IO emphasises that there are no other means of challenging the order approving the enforcement than by way of an objection to enforcement.

23. Impuls Leasing submits that the question is inadmissible because it concerns the interpretation of national procedural law and, in the alternative, that there is no contradiction between Article 713(2) of the Code of Civil Procedure, as amended by Law No 310/2018, and

Directive 93/13. In its view, the access of litigants to a common law action does not limit their procedural rights, and having regard to the Court's case-law, the national courts have the right to examine *ex officio* the unfairness of contractual terms in the light of Directive 93/13, including in the context of enforcement proceedings, and thus consumers are granted effective protection.

24. The Romanian Government contends that Directive 93/13 does not preclude the national legislation at issue. It explains that the enforcement proceedings are carried out on the basis of a court decision or an enforceable instrument, including leasing contracts, such as the contract in the present case.[4] To initiate the enforcement proceedings, a creditor makes a request with the competent court enforcement officer, and that officer calls for an order to approve the enforcement to be issued by the court. The court decides on the order within a short deadline following a non-contentious procedure without summoning the parties. In that context, the court verifies that certain formal conditions are fulfilled and cannot refuse the enforcement on the ground that the instrument contains unfair terms.

25. The Romanian Government points out that a debtor, by way of an objection to enforcement, may request the annulment of the order approving the enforcement, which is subject to a 15-day time limit. Since that order does not have the force of *res judicata*, it can be challenged when the debtor lodges the objection and, as the unfairness of the contractual terms cannot be invoked, including within the 15-day time limit, there is also no issue of time-barring. Under Article 713(2) of the Code of Civil Procedure, as amended by Law No 310/2018, a consumer, as the debtor, cannot invoke the unfairness of contractual terms in an objection to enforcement because he or she can bring a common law action, which is a separate, imprescriptible action in which the judicial review of unfair terms can take place. In that action, the consumer can request the suspension of the enforcement, which is an element not considered by the Court in the order of 6 November 2019, *BNP Paribas Personal Finance SA Paris Sucursala Bucureşti and Secapital*.[5] It asserts that it can be arranged on a speedy basis if urgency is shown, the conditions under which the suspension of the enforcement are obtained in that action are the same as those under which the suspension would be obtained in an objection to enforcement and the payment of a security is deposited in the same way in that action as in an objection to enforcement.

26. The Commission submits that Directive 93/13 precludes the national legislation at issue. In its view, Article 713(2) of the Code of Civil Procedure, as amended by Law No 310/2018, gives rise to a significant risk that consumers will not benefit from the protection guaranteed by Directive 93/13. While a common law action is not subject to a time limit, that action has no effect on the enforcement proceedings, which can therefore be carried out before a court has ruled in that action to have the unfair terms set aside, and although it is possible for a consumer to request the suspension of the enforcement in that action, the requirement set out in Article 719(2) of the Code of Civil Procedure to pay a security calculated on the basis of the value of the subject matter of the claim can result in high costs for the consumer and dissuade him or her from taking such action. As the Commission argued at the hearing, the present case involves a situation worse than that giving rise to the order of 6 November 2019, *BNP Paribas Personal Finance SA Paris Sucursala Bucureşti and Secapital*,[6] since there is no possibility for a national court to examine the unfairness of contractual terms at any stage of the enforcement proceedings and the consumer is obliged to bring separate proceedings, which is contrary to the requirements set out in the Court's case-law.

4 The Romanian Government indicates that, pursuant to recent legislative reforms, which are not applicable *ratione temporis* to the main proceedings, the enforceable nature of leasing contracts in which the user is a consumer has been removed.

5 C-75/19, not published, EU:C:2019:950.

6 C-75/19, not published, EU:C:2019:950.

V. Analysis

27. By its question, the referring court asks, in substance, whether Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, preclude national legislation which does not permit a court, in the context of proceedings in which the consumer contests the enforcement, to examine, of its own motion or at the consumer's request, the unfairness of the terms of the contract which constitutes the enforceable instrument because it is possible for the consumer to bring separate proceedings in which the contract may be examined in order to determine whether it contains unfair terms.

28. As is apparent from the order for reference, that question arises from the procedural arrangements concerning enforcement proceedings as set out in Romanian law, according to which, following the amendment of Article 713(2) of the Code of Civil Procedure by Law No 310/2018 (see points 8 and 9 of this Opinion), a court seised of an objection to enforcement may no longer examine the unfairness of contractual terms due to the existence of a separate action that must be brought by the consumer allowing for the judicial review of unfair terms with regard to Directive 93/13.

29. With a view to answering the question raised in the present case, I will first address the arguments put forward by Impuls Leasing concerning the admissibility of that question (section A). I will then consider the Court's case-law regarding the national court's *ex officio* review of unfair terms under Directive 93/13 (section B) and the application of the principles developed in that case-law to the circumstances of the present case (section C).

30. On the basis of that analysis, I have reached the conclusion that the question referred in the present case is admissible and that Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, preclude national legislation such as that at issue.

A. Admissibility

31. According to the arguments put forward by Impuls Leasing, the question referred in the present case is inadmissible because it concerns the interpretation of national law.

32. In my view, those arguments should be rejected.

33. Under settled case-law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Consequently, when the question put by the national court concerns the interpretation of Union law, the Court is in principle bound to give a ruling.[7]

34. In the present case, since the question concerns the interpretation of Directive 93/13, the Court has jurisdiction to rule on it.

35. Therefore, I consider that the question referred in the present case is admissible.

[7] See judgment of 29 April 2021, *Rzecznik Praw Obywatelskich* (C-19/20, EU:C:2021:341, paragraph 64).

B. Pertinent case-law of the Court on the ex officio review of unfair terms by national courts

36. Article 6(1) of Directive 93/13 requires the Member States to lay down that unfair terms used in consumer contracts are not binding on the consumer.[8] Article 7(1) of that directive, read in conjunction with the twenty-fourth recital thereof, obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in consumer contracts.[9] While those provisions have given rise to an extensive body of case-law, I will outline the applicable principles drawn from that case-law relating to the existence and extent of the national court's duty to review *ex officio* the unfairness of contractual terms which are most pertinent to my analysis of the present case.

1. Existence of the national court's duty of ex officio *review*

37. According to settled case-law, the system of protection implemented 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 bargaining power and level of knowledge, which 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.[10] In order to guarantee the protection intended by Directive 93/13, the imbalance that exists between the consumer and the seller or supplier may be corrected only by positive action unconnected to the parties to the contract.[11]

38. Therefore, in the light of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, the national court is required to assess of its own motion whether a contractual term is unfair and, in doing so, compensate for that imbalance between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task.[12] In effect, that obligation constitutes a means of achieving the result laid down in Article 6(1) of Directive 93/13, namely preventing a consumer from being bound by an unfair term, and of contributing to the attainment of the objective referred to in Article 7(1) of that directive, in so far as such an examination may have a dissuasive effect, helping to put an end to the use of unfair terms in consumer contracts.[13]

2. Extent of the national court's duty of ex officio *review*

39. Under equally consistent case-law, Directive 93/13 requires the Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair.[14] The Court has also emphasised that the specific

8 See judgment of 27 January 2021, *Dexia Nederland* (C-229/19 and C-289/19, EU:C:2021:68, paragraph 57). See also the twenty-first recital of Directive 93/13. As the Court has recognised, Article 6(1) of Directive 93/13 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 judgment of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188, paragraph 24).

9 See judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Societé Générale* (C-698/18 and C-699/18, EU:C:2020:537, paragraph 52).

10 See judgments of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 25), and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 49).

11 See judgments of 9 November 2010, *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659, paragraph 48), and of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188, paragraph 25).

12 See judgments of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350, paragraphs 31 and 32), and of 4 June 2020, *Kancelaria Medius* (C-495/19, EU:C:2020:431, paragraph 37).

13 See judgment of 9 July 2015, *Bucura* (C-348/14, not published, EU:C:2015:447, paragraph 42).

14 See judgment of 3 March 2020, *Gómez del Moral Guasch* (C-125/18, EU:C:2020:138, paragraph 44).

characteristics of court proceedings which take place under national law between consumers and sellers or suppliers cannot constitute a factor which is liable to affect the legal protection from which consumers must benefit under Directive 93/13. [15]

40. While the Court has defined, in a number of respects and taking account of the requirements of Articles 6(1) and 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 the absence of Union harmonisation, the rules governing the procedures applicable to examining whether a contractual term is unfair fall within the legal systems of the Member States, provided they are not less favourable than those governing similar domestic actions (principle of equivalence) and do not make it impossible or excessively difficult to exercise the rights conferred by Union law (principle of effectiveness). [16]

41. As regards the principle of effectiveness, the Court has held that every case in which the question arises as to whether a national procedural rule makes the application of Union law impossible or excessively difficult must be analysed by reference to the role of that rule in the procedure, its conduct and its special features viewed as a whole, along with, where relevant, the principles underlying the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings. [17]

42. Furthermore, the Court has recognised that the fact that the consumer can rely on the protection guaranteed by Directive 93/13 only if he or she brings court proceedings is not regarded in itself as contrary to the principle of effectiveness, since that protection is based on the premiss that one of the parties to the contract will bring an action before the national courts. [18] Nevertheless, in the light of Article 7(1) of Directive 93/13 and the principle of effectiveness, adequate and effective means to prevent the use of unfair terms in consumer contracts must include provisions enabling consumers to be guaranteed effective judicial protection which makes it possible for them to bring legal proceedings against the disputed contract, including in the enforcement phase, under reasonable procedural conditions so that the exercise of their rights is not subject to conditions, inter alia, time limits or costs, which reduce the exercise of the rights guaranteed by Directive 93/13. [19]

43. In particular, the Court has ruled that the effective protection of the rights conferred on consumers by Directive 93/13 can be guaranteed only if the national procedural system allows the court, during the order for payment proceedings or the enforcement proceedings concerning an order for payment, to check of its own motion whether terms of the contract are unfair. [20] Thus, in a case in which the national court's *ex officio* review of unfair terms is not provided for at the enforcement stage of the order for payment, a national law is regarded as undermining the effectiveness of the protection afforded by Directive 93/13 if it does not provide for such an examination when the order is granted or, in the case where such an examination is provided for only when an objection is lodged against the order granted, if there is a significant risk that consumers will not lodge the objection required, whether because of the short period provided for that purpose, because they might be dissuaded from defending themselves in view of the costs

15 See judgment of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 50).

16 See judgment of 26 June 2019, *Kuhar* (C-407/18, EU:C:2019:537, paragraphs 45 and 46).

17 See judgment of 22 April 2021, *PROFI CREDIT Slovakia* (C-485/19, EU:C:2021:313, paragraph 53).

18 See judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 63).

19 See, to this effect, judgment of 26 June 2019, *Kuhar* (C-407/18, EU:C:2019:537, paragraph 57).

20 See judgment of 13 September 2018, *Profi Credit Polska* (C-176/17, EU:C:2018:711, paragraph 44), and 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 25).

which legal proceedings would entail in relation to the amount of the disputed debt or because the national legislation does not lay down the obligation that all the information must be communicated to them which is necessary to enable them to determine the extent of their rights.[21] Directive 93/13 therefore precludes national legislation which allows an order for payment to be issued without allowing the consumer to benefit, at any time during the proceedings, from the guarantee of a check that there are no unfair terms undertaken by the court.[22]

44. Moreover, the Court has placed emphasis on the importance of interim measures, including the suspension of the enforcement proceedings, where such relief is necessary to ensure the full effectiveness of the final decision of the court hearing the declaratory proceedings which is competent to verify the unfairness of the terms of the contract giving rise to the enforcement.[23]

45. For example, in the judgment of 26 June 2019, *Kuhar*,[24] the Court held that Directive 93/13, read in the light of the principle of effectiveness, precluded national legislation under which a court in mortgage enforcement proceedings did not have the option, either of its own motion or at the consumer's request, to examine the unfairness of the contractual terms and on that basis to suspend the enforcement sought. In particular, the Court found that the possibility for the consumer to apply for suspension of enforcement was subject to strict procedural conditions and to the payment of a guarantee at the creditor's request which made it virtually impossible to obtain such suspension, since it was likely that a debtor in default would not have the necessary financial resources. The Court further emphasised that the fact that the check regarding unfair terms may be carried out only later and, where applicable, by the court hearing declaratory proceedings brought by the consumer was manifestly insufficient to ensure the full effectiveness of the consumer protection intended by Directive 93/13. In the absence of a right for the enforcement court to suspend enforcement, it was likely that the mortgaged property would be repossessed before the court gave judgment in the declaratory proceedings, with the result that the consumer would receive only protection a posteriori in the form of financial compensation which was incomplete and insufficient and thus constituted neither an adequate nor an effective means of preventing the continued use of unfair terms under Article 7(1) of Directive 93/13.

46. It should also be made clear that the order of 6 November 2019, *BNP Paribas Personal Finance SA Paris Sucursala Bucureşti and Secapital*,[25] concerned enforcement proceedings under Romanian law in a situation arising prior to the amendment of Article 713(2) of the Code of Civil Procedure by Law No 310/2018. In that order, the Court held that Directive 93/13 precluded national legislation laying down a 15-day time limit within which a consumer may, by way of an objection to enforcement, raise the unfairness of contractual terms, even though under national law the consumer had the right to bring separate proceedings which were not subject to any time limit, but which had no effect on the enforcement proceedings. The Court underlined that, where the enforcement proceedings were concluded before the decision of the court in the

[21] See judgment of 20 September 2018, *Danko and Danková* (C-448/17, EU:C:2018:745, paragraph 46 and point 2 of the operative part), and order of 6 November 2019, *BNP Paribas Personal Finance SA Paris Sucursala Bucureşti and Secapital* (C-75/19, not published, EU:C:2019:950, paragraph 26). In that regard, the Court has considered that high court costs may, in themselves, be likely to dissuade consumers from lodging an objection to enforcement or bringing an action to enforce rights based on Directive 93/13. See judgments of 13 September 2018, *Profi Credit Polska* (C-176/17, EU:C:2018:711, paragraph 68), and of 16 July 2020, *Caixabank et Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578, paragraphs 98 and 99).

[22] See judgment of 20 September 2018, *Danko and Danková* (C-448/17, EU:C:2018:745, paragraph 49), and order of 6 November 2019, *BNP Paribas Personal Finance SA Paris Sucursala Bucureşti and Secapital* (C-75/19, not published, EU:C:2019:950, paragraph 28).

[23] See judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraphs 44 and 45).

[24] C-407/18, EU:C:2019:537, in particular paragraphs 60 to 63 and 68.

[25] C-75/19, not published, EU:C:2019:950, in particular paragraphs 29 to 34.

separate proceedings, that decision only provided the consumer with protection a posteriori, which was incomplete and insufficient with regard to Directive 93/13 and thereby contrary to the objective set out in Article 7(1) thereof.

47. Consequently, it follows from the foregoing case-law that the Member States are not required by Directive 93/13 to adopt a particular procedural system for the judicial review of unfair terms, provided that they comply with their obligations under Union law, including the principles of equivalence and effectiveness, and therefore ensure that there is a check conducted by a national court with regard to the unfairness of any contractual term irrespective of the proceedings. There must be an *ex officio* review either by the first court in the proceedings, or by the second court, whether seised of the enforcement or on the merits, which can be triggered by the consumer, so long as there is not a significant risk that the particular procedural route will not be undertaken by the consumer, thus closing off the possibility for the judicial review of unfair terms in accordance with Directive 93/13.

48. It is in the light of those principles developed in the Court's case-law that it is necessary to examine the circumstances of the present case.

C. Application of the principles developed in the Court's case-law to the circumstances of the present case

49. As is apparent from the order for reference and the observations of the Romanian Government and the Commission, the enforcement proceedings in the present case display the following features.

50. First, it is common ground that there is no review by a national court, either of its own motion or at the consumer's request, of the unfairness of contractual terms in the enforcement proceedings. As indicated by the Romanian Government, the national court which issues the order approving the enforcement may not refuse the enforcement because of the presence of unfair terms in the contract constituting the enforceable instrument. In addition, under Article 713(2) of the Code of Civil Procedure, as amended by Law No 310/2018, in the context of proceedings in which the consumer contests the enforcement, the national court may not examine, either of its own motion or at the consumer's request, the unfairness of the terms of the contract.

51. Second, the consumer is obliged to bring separate proceedings, which are not subject to any time limit, so that the contract constituting the enforceable instrument may be examined by a national court in order to determine whether it contains unfair terms.

52. Third, the suspension of the enforcement is possible in the event that the consumer brings separate proceedings.

53. Fourth, the suspension of the enforcement until a final decision is given by the court in the separate proceedings is not automatic. In those proceedings, the consumer may apply for the suspension of the enforcement, which is subject to legal conditions that must be fulfilled, and, in particular, proof of urgency if the suspension is requested on a speedy basis, along with the payment of a security, which is calculated on the basis of the value of the subject matter of the claim, according to the observations of the Commission which were not contradicted by the Romanian Government.

54. Since there are no indications in the present case which could give rise to doubts with regard to the principle of equivalence, all that has to be examined is whether the national legislation at issue is consistent with the principle of effectiveness.

55. I should state at the outset that there are strong indications, based on the Court's case-law, that Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, preclude the national legislation at issue.

56. In the first place, it should be pointed out that there is no review carried out by a national court, either of its own motion or at the consumer's request, of the potential unfairness of the terms of the contract constituting the enforceable instrument at any stage of the enforcement proceedings.

57. In the second place, there appears to be a significant risk that the consumers concerned may be deterred from bringing separate proceedings and applying for the suspension of the enforcement because of the costs which the proceedings will entail or because they are unaware or do not appreciate the extent of their rights.

58. In that regard, it seems to me that a consumer is liable to be dissuaded from making a request for the suspension of the enforcement, given that it is subject to the payment of a security which is calculated on the basis of the value of the subject matter of the claim. Such a requirement can be considered to make it virtually impossible in practice to obtain such a suspension, since it is likely that the consumer, as the debtor in default, will not have the necessary financial resources to provide the security required. Indeed, such a requirement has the result that the higher the value of the claim sought by the creditor which may be based on allegedly unfair terms – as illustrated by the present case involving claims which are significantly greater than the total value of the contract as noted by the referring court (see point 17 of this Opinion) – the greater the likelihood that the consumer will be disinclined to seek the suspension of the enforcement or will be incapable of doing so.

59. In those circumstances, having regard to the Court's case-law as referred to in points 45 and 46 of this Opinion, it seems likely, to my mind, that the enforcement proceedings will be concluded before the decision of the court in the separate proceedings, with the result that the consumers concerned will receive only protection a posteriori, which is incomplete and insufficient and thus neither an adequate nor an effective means of preventing the use of unfair terms pursuant to Article 7(1) of Directive 93/13. I therefore share the view of the Commission that there is a real risk that, by means of separate proceedings alone, the decision of the court ruling on the unfairness of contractual terms will be belated and ineffective.

60. Furthermore, it is true, as indicated by the Romanian Government, that the Court did not consider the possibility of the suspension of the enforcement in the order of 6 November 2019, *BNP Paribas Personal Finance SA Paris Sucursala Bucureşti and Secapital*,[26] as mentioned in point 46 of this Opinion. However, this does not, in my view, invalidate the fact that, under the national legislation in this case – which was not at issue in that order – the review of the unfairness of the terms of the contract constituting the enforceable instrument is not carried out by the national court in the context of the enforcement proceedings, but rather is liable to be

[26] C-75/19, not published, EU:C:2019:950.

carried out only later, if at all, by the national court ruling in separate proceedings brought by the consumer and thus can be regarded as manifestly insufficient to ensure the full effectiveness of the consumer protection intended by Directive 93/13.

61. Consequently, it should be considered that the national legislation at issue runs counter to the principle of effectiveness, since it makes it impossible or excessively difficult to ensure the protection conferred on consumers by Directive 93/13.

62. I therefore conclude that Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, preclude national legislation such as that at issue in the main proceedings.

VI. Conclusion

63. In the light of the foregoing considerations, I propose that the Court answer the question referred by the Judecătoria Sectorului 2 București (Court of First Instance, Sector 2, Bucharest, Romania) as follows:

Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted, in the light of the principle of effectiveness, as precluding national legislation under which the court, in the context of an objection to enforcement, does not have the option, either of its own motion or at the consumer's request, to examine whether the terms of a leasing contract that constitutes the enforceable instrument are unfair because it is possible for the consumer to bring separate proceedings in which the contract may be examined in order to determine whether it contains unfair terms within the meaning of that directive.