

Anonymised version

Translation

C-200/21-1

Case C-200/21

Request for a preliminary ruling

Date lodged:

31 March 2021

Referring court:

Tribunalul Bucureşti (Romania)

Date of the decision to refer:

25 February 2021

Appellants:

TU

SU

Respondents:

BRD Groupe Société Générale S.A.

Next Capital Solutions Limited

Request for a preliminary ruling

[...] Tribunalul Bucureşti (Regional Court, Bucharest), Sixth Chamber [...]

[...] decision of 25 February 2021

Appellants: TU and SU [...]

Respondents: NEXT CAPITAL SOLUTIONS LIMITED, represented by SC EOS KSI ROMANIA SRL, established in Bucharest [...], and BRD GROUPE SOCIETE GENERALE S.A., established in Bucharest [...]

In the case brought by TU and SU, the applicants at first instance, against Next Capital Solutions Limited, represented by SC EOS KSI România SRL, and BRD Groupe Société Générale S.A., the defendants at first instance, concerning an objection to enforcement, following the appeal brought by the applicants at first instance against the civil judgment [...] of 3 July 2020 given by the Judecătoria Sectorului 1 (Court of First Instance, Sector 1), the Tribunalul București (Regional Court, Bucharest), in its capacity as the court of appeal, has made, at the public hearing on 25 February 2021, the following

DECISION

The following question is referred to the Court of Justice of the European Union for a preliminary ruling:

— Does Directive 93/13/EEC preclude a rule of national law, such as that resulting from Article 712 et seq. of Chapter VI 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 enforceable instrument, given that an action seeking to establish the existence of unfair terms in an enforceable instrument is not subject to any time limit and, in this connection, a debtor may seek suspension of enforcement of the instrument under Article 638(2) of the Code of Civil Procedure?

Grounds:

I. Facts:

- 1 A loan agreement [...] was concluded on 18 October 2007 between BRD Groupe Société Générale S.A., as lender, and TU, as borrower. In June 2009, the defendant at first instance BRD [Groupe Société Générale] S.A. concluded an assignment-of-debt agreement by which it assigned the debt arising from the agreement concluded with the applicant at first instance [TU] to IFN Next Capital Finance S.A; subsequently, in August 2009, IFN Next Capital Finance S.A. assigned the debt to the respondent Next Capital Solutions Limited.
- 2 To enforce the enforceable instrument consisting of the loan agreement [...], on 23 February 2015 the respondent Next Capital Solutions Limited, through the asset manager SC EOS KSI România SRL, referred the matter to the Biroul executorului judecătoresc (Office of the judicial officer) [...], which opened an enforcement case file [...], in accordance with the decision of 23 February 2015. **[OR. 2]**
- 3 On 24 February 2015, the judicial officer issued an order for payment, with an associated garnishment order, by which he ordered the debtor, within one day following receipt or deposit thereof at his domicile, to comply with the enforceable instrument consisting of the loan agreement [...] concluded with BRD [Groupe Société Générale S.A.] by paying the debt assignee the following

amounts: 39 176.36 Romanian lei (RON), representing the remaining debt, and RON 5 357.08, representing the enforcement costs. On the same date, the judicial officer also issued an order for the seizure of financial resources, in Romanian lei and in foreign currency, present and future, which the debtor TU held in accounts opened with various banking institutions, and notified the debtor of the seizure order at the same time.

- 4 The enforcement measures (the decision opening an enforcement case file of 24 February 2015, the order for payment of 24 February 2015, the decision determining the enforcement costs, the decision initiating enforcement, the enforceable instrument, the notification of seizure of 24 February 2015, and the seizure order) were sent to the party objecting to enforcement on 2 March 2015.
- 5 Subsequently, the judicial officer seized an amount of one third of the debtor's net monthly income, which the third party Total Prest 2000 SRL owed to the debtor, by a third-party seizure order of 6 March 2015, and at the same time issued notification of the seizure order, communicated to the debtor at his domicile, by deposit in his letterbox, on 13 March 2015.
- 6 On 17 March 2015, the party objecting to enforcement registered with the judicial officer an application by which he declared his intention to contest the remaining debt calculated by EOS KSI România, and on 5 August 2015, as the debtor subject to enforcement [...], the party objecting to enforcement requested approval of a payment commitment for a period of six months, as from September, for a monthly amount of RON 500.
- 7 On 6 December 2018, the judicial officer issued an order for payment, with an associated mortgage agreement, by which he ordered the debtor, within 15 days following receipt or deposit thereof at his domicile, to comply with the enforceable instrument by paying the creditor the following amounts: RON 40 849.67, representing the remaining debt, [namely] the loan plus interest until payment in full by the debtor, and RON 5 437.08, representing the enforcement costs, failing which enforcement would be effected against the share of the property, situated in Bucharest, owned by the debtor [...].
- 8 The debtor lodged an objection to enforcement, relying on the limitation period applicable to the right to request enforcement, which was registered with the Judecătoria Sectorului 1 (Court of First Instance, Sector 1) [...] and decided by Civil Judgment No 2090/2019, which became final following dismissal of the appeal. In that case, it was established definitively that the objection at issue (in the context of which the limitation period applicable to the right to request enforcement was relied on) was out of time.
- 9 On 17 February 2020, the debtor lodged an objection to enforcement, registered with the Judecătoria Sectorului 1 [...], claiming that that court should, by a judgment, declare that the term relating to the charging of a fee for opening a file and the term concerning the charging of a monthly fee for managing the loan are

unfair and annul the enforcement measures from the enforcement case file [...] registered [with the office of the judicial officer], following a finding that the terms at issue are unfair. In the grounds of the application, the debtor claims that it is necessary to repay the sums unlawfully seized under those terms.

II. Forms of order sought and arguments of the parties:

- 10 The respondents, Next Capital Solutions [Limited] and BRD Groupe Société Générale S.A., raised a plea alleging that the objection to enforcement was out of time, contending that the period within which enforcement may be challenged, in the light of the provisions of Article 715(1) and (2) of the Code of Civil Procedure, started to run on 2 March 2015 when [OR. 3] the first enforcement measures were communicated to the party objecting to enforcement. Furthermore, the party objecting to enforcement became aware of the enforcement as from the date of the first deduction, according to the receipt [...] of 8 April 2015 and according to the request and payment commitment of 5 August 2015 – from which date he was within the time limits for raising the grounds of objection set out in the application initiating legal proceedings. Consequently, in view of the date on which the first enforcement measures were communicated (2 March 2015) and, moreover, the date of the first deduction (8 April 2015) and the date on which the objection to enforcement was lodged (28 December 2018), more than three years after [the party objecting to enforcement] became aware [of the enforcement], refusal of the objection to enforcement was sought on the ground that it was lodged out of time.
- 11 The parties objecting to enforcement maintained that the objection was lodged in accordance with the order made by [the Court of Justice of the European Union] in November 2019 in Case C-75/19.

III. Conduct of the proceedings to date:

- 12 The court of first instance upheld the plea alleging that the objection to enforcement was out of time and refused the objection to enforcement on the ground that it was lodged out of time under Article [715](1)(3) of the Code of Civil Procedure and in the light of the order of the Court [of Justice] of November 2019, ruling that the latter requires there to be a possibility for the consumer to rely on the unfairness of contractual terms, but not a possibility to make use of such a remedy indefinitely. In that regard, the following was stated:

‘In that case, the Court [of Justice] did not state anything new since it was unanimously accepted that the unfairness of terms could always be relied on by a consumer, in any proceedings.

Furthermore, in that case [the Court of Justice] merely held that a consumer does not forfeit the right to rely on the unfairness of terms when objecting to enforcement, notwithstanding the fact that, subsequent to Law No 310/2018,

which amended the Code of Civil Procedure, he has an alternative remedy at his disposal, namely that of ordinary law, which, in any event, has not been challenged in domestic law.

All the arguments [of the Court of Justice] underlying the decision in question took into account the need to be able to rely, during the enforcement, by way of an objection to enforcement, on the unfairness of terms, but not the use of an objection to enforcement as a remedy that may be used to challenge the enforcement at any time’.

- 13 The Tribunalul Bucureşti (Regional Court, Bucharest) is now called upon to rule on the appeal brought by the appellants against the judgment at first instance, which claims that the plea alleging that the objection is out of time should be rejected and the action should be upheld.

IV. Legal basis

Legal basis in EU law:

- 14 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29; ‘Directive 93/13/EEC’).

National law:

- 15 Legea nr. 193 din 6 noiembrie 2000 privind clauzele abusive din contractele încheiate între profesionişti şi consumatori (Law No 193 of 6 November 2000 on unfair terms in contracts concluded between sellers or suppliers and consumers) (Monitorul Oficial al României, Part I, No 560, of 10 November 2000), as most recently amended in 2014 (‘Law No 193/2000’), Articles 1 and 6 of which provide, respectively, for a prohibition on sellers or suppliers laying down unfair terms in contracts concluded with consumers and that such terms are to produce no effects vis-à-vis consumers. Article 14 of [Law No 193/2000] provides that consumers injured by a contract concluded in breach of the provisions of that law have the right to apply to the courts in accordance with the provisions of the Civil Code and the Code of Civil Procedure. **[OR. 4]**
- 16 Legea nr. 134 din 1 iulie 2010 privind Codul de procedură civilă (Law No 134 of 1 July 2010 establishing the Code of Civil Procedure) (Monitorul Oficial al României, Part I, No 247/2015; ‘the Code of Civil Procedure’), Article 712(1) of which confers on persons concerned or injured by enforcement the right to lodge an objection to enforcement, to the decisions adopted by the judicial officer, and to any enforcement measure. Article 712(2) of that law provides that an objection may also be lodged in a situation where it is necessary to clarify the meaning, scope, or implementation of the enforceable instrument.
- 17 Article 713 of the Code of Civil Procedure, relating to the conditions for the admissibility of an objection to enforcement, provides, in paragraph 2 thereof,

that, 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 enforcement, on factual or legal grounds concerning the substance of the right underlying the enforceable instrument only if the law does not provide, in respect of that enforceable instrument, for a specific procedural remedy for its annulment. Under paragraph 3 of that article, that party may not lodge a new objection on grounds which existed on the date of the first objection.

- 18 Article 715 of that code, relating to time limits, provides, in paragraph 1 thereof, that an objection to enforcement may be lodged within 15 days of the date on which the party objecting to enforcement became aware of the enforcement measure to which he is objecting and, as regards a debtor who is challenging the enforcement itself, the time limit is calculated from the date on which he received the instrument containing the declaration of enforceability or the order, or from the date on which he became aware of the first enforcement measure. In paragraph 3, it provides that an objection relating to clarification of the meaning, scope or implementation of the enforceable instrument may be lodged at any time within the limitation period applicable to the right to obtain enforcement.
- 19 Article 720 of that code, relating to the effects of the decision on the objection, provides, in paragraph 1 thereof, that, if the objection to enforcement is upheld, the court seised is, having regard to the subject matter of that objection, to correct or annul the contested enforcement measure, as the case may be, order annulment or termination of the enforcement itself, or annul or interpret the enforceable instrument.
- 20 Article 638(2) [of the Code of Civil Procedure] provides that suspension of enforcement of enforceable instruments, including loan agreements, may also be sought in connection with an action for their annulment and, in that case, the same procedural rules are to apply as are applicable to an application for suspension of enforcement submitted in connection with an objection to enforcement, namely the provisions of Article 719 of that code.

V. Question referred

Basis for the reference for a preliminary ruling:

- 21 Article 267 of the Treaty on the Functioning of the European Union.

Reasons for the question referred:

- 22 In the present case, the question arises as to how to interpret [Directive 93/13/EEC] from the point of view of the need to ensure the consumer's right to rely on the unfairness of contractual terms at any time during the enforcement by way of an objection to enforcement, even though he may also bring an action pursuant to ordinary law in that regard and may apply, in the main action, for suspension of enforcement. This question arises, on the one hand, because the

enforcing court may also rule on the validity of the enforcement measures by the same judgment and is the only one which may rule on the effects of the invalidity of the enforceable instrument on the enforcement proceedings. On the other hand, the Court [of Justice], by order of 6 [OR. 5] November 2019 in Case C-75/19, EU:C:2019:950, ruled that Directive 93/13/EEC 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 forfeits the right to rely on the existence of unfair terms in order to challenge those proceedings following the expiry of a period of 15 days from service of the first documents in those proceedings, but the bringing of an action pursuant to ordinary law for a declaration that terms are unfair is not subject to any time limit and does not allow enforcement to be suspended until the dispute has been resolved. Since the situation in the present case is similar to that in Case C-75/19 but differs as regards essential aspects examined by the Court [of Justice], it is necessary to provide an interpretation of [Directive 93/13/EEC] also in a situation where the action pursuant to ordinary law allows enforcement to be suspended.

- 23 If the answer is in the affirmative, it is for the national court to seek, within the limits of the principle of legality, a means of interpreting national rules on enforcement which allows the consumer, within the national legal system, to lodge an objection to enforcement based on the unfairness of contractual terms even beyond the 15-day period governed by Article 715 of the Code of Civil Procedure.
- 24 If the national court does not identify such a means of interpretation, an answer must be given to the question whether, if the Court [of Justice] finds that effective protection of the rights arising from a directive (in this case Directive 93/13/EEC) cannot be guaranteed by the national procedural system, the interpretation of that directive given by the Court [of Justice] requires the Member State to disapply a rule of procedural law, such as Article 715 [of the Code of Civil Procedure], which governs the period within which the objection to enforcement may be lodged.