

**Case C-178/23**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

21 March 2023

**Referring court:**

Tribunalul Specializat Mureş (Romania)

**Date of the decision to refer:**

3 December 2021

**Applicant for revision:**

ERB New Europe Funding II

**Respondent:**

YI

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**Subject matter of the main proceedings**

Revision of a judicial decision on consumer protection which disregards the force of *res judicata* of an earlier final judgment

**Subject matter and legal basis of the request**

Under Article 267 TFEU, interpretation is sought of Article 7(1) of [Council] Directive 93/13/EEC on unfair terms in consumer contracts ('Directive 93/13').

**Question referred for a preliminary ruling**

When applying the provisions of Article 7(1) of Directive 93/13, in the light of, in particular, the twenty-third recital of that directive and the *principle of effectiveness*,

must those provisions be interpreted as not precluding the possibility for a national court to examine suspicions concerning the unfair nature of contractual terms

stipulated in an agreement concluded between a seller or supplier and a consumer, even when they have previously been examined by another national court in judicial proceedings at first instance at the request of the consumer, who did not attend the related hearing and was not properly assisted or represented by a lawyer, and have been rejected by a judicial decision which has never been challenged by the consumer – [and] which has, therefore, acquired, in the domestic procedural order, the force of *res judicata* – if, from the particular circumstances of the case, it appears, in a plausible and reasonable manner, that that consumer did not make use of the legal remedy in those first judicial proceedings because of his or her limited knowledge or information?

### **Provisions of European Union law [and case-law] relied on**

Article 6(1), Article 7(1) and the twenty-third recital of Directive 93/13

Article 47 of the Charter of Fundamental Rights of the European Union

Case-law of the Court of Justice of the European Union (‘the Court of Justice’), and in particular the judgment of 18 February 2016, *Finanmadrid EFC*, C-49/14, EU:C:2016:98

### **Provisions of national law relied on**

Legea nr. [193 din 6 noiembrie 2000] privind clauzele abuzive din contractele încheiate între profesioniști și consumatori (Law No 193 of 6 November 2000 on unfair terms in contracts concluded between sellers or suppliers and consumers), which transposes the provisions of Directive 93/13 into national law

Codul de procedură civilă (Romanian Code of Civil Procedure), in particular the provisions concerning the force of *res judicata* and the extraordinary remedy of revision of a judgment delivered in disregard of the force of *res judicata* of an earlier final judgment

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 On 10 May 2018, a consumer, YI, domiciled in Romania, brought a civil action before the Judecătoria Sectorului 2 București (Court of First Instance, Sector 2, Bucharest, Romania) against the debt collection company ERB New Europe Funding II, established in the Netherlands, seeking a declaration that the terms of a credit agreement regarding, in essence, the commission relating to that agreement and the possibility for the bank which had granted the credit to amend unilaterally the interest are unfair.
- 2 In addition, on the basis of the non-binding effect of unfair terms on consumers, YI requested that he be repaid the sums paid by way of commission, as well as those consisting of the difference between the interest rate fixed at the time of the

conclusion of the agreement and that actually paid on the basis of the interest rates unilaterally amended by the bank.

- 3 By judgment of 26 November 2018, which became final as it was not appealed ('the judgment of the Court of First Instance, Sector 2, Bucharest'), the Court of First Instance, Sector 2, Bucharest, dismissed the action.
- 4 On 14 August 2019, through a lawyer to whom he had given a mandate, YI brought a similar action against the same company before the court with territorial jurisdiction over his domicile, namely the Judecătoria Sighișoara (Court of First Instance, Sighișoara, Romania).
- 5 By judgment of 5 December 2019, the Court of First Instance, Sighișoara, upheld [YI]'s action, declared that the contractual terms at issue were unfair and ordered ERB New Europe Funding II to repay to [YI] the sums paid on the basis of those terms.
- 6 ERB New Europe Funding II brought an appeal against that judgment and, in the course of the appeal proceedings, raised an objection based on the force of *res judicata* of the judgment of the Court of First Instance, Sector 2, Bucharest.
- 7 By decision of 6 April 2021 ('the decision of 6 April 2021'), the Tribunalul Specializat Mureș (Specialised Court, Mureș, Romania), as the court of last instance, upheld, in essence, the judgment of the Court of First Instance, Sighișoara, which had declared that the contractual terms were unfair. However, the Specialised Court, Mureș, failed to examine the objection based on the force of *res judicata*.
- 8 On 31 May 2021, ERB New Europe Funding II brought an extraordinary appeal (an application for revision) before the referring court, by which it requested the variation in full of the decision of 6 April 2021 and the dismissal of YI's action as a consequence of the force of *res judicata* of the judgment of the Court of First Instance, Sector 2, Bucharest.

#### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 9 As a preliminary point, the referring court observes that the legal issue before it does not concern a specific provision of Directive 93/13, but rather the principle of effectiveness arising from Article 6(1) and Article 7(1) of that directive.
- 10 The referring court recalls that the principle of effectiveness means that national procedural rules must not, in theory or in practice, make it impossible or excessively difficult to exercise the rights conferred on consumers by EU law. According to the case-law of the Court of Justice, the principle of effectiveness protects consumers against unfair terms and national courts are required to assess of their own motion whether the terms of contracts concluded between consumers and sellers or suppliers are unfair.

- 11 In that context, the referring court states that, on the one hand, the Court of Justice has held that the principle of legal certainty must also be taken into consideration. In that regard, compliance with the rules concerning the force of *res judicata* is essential in order to guarantee in practice the principle of legal certainty. It follows that consumer protection is not absolute and cannot lead to non-compliance with national rules concerning the force of *res judicata*.
- 12 On the other hand, when assessing the effectiveness of certain remedies from the perspective of the principle of effectiveness, the Court of Justice has also taken into consideration consumers' lack of knowledge or information relating to their rights.
- 13 In the present case, according to the referring court, the force of *res judicata* of the judgment of the Court of First Instance, Sector 2, Bucharest, arose from judicial proceedings in the course of which a consumer, who was not assisted by a lawyer, was not aware of the rights provided for by the national legislature under the rules governing consumer protection. This follows from the following circumstances:
  - YI initially applied to a court for the place where the seller or supplier is situated, namely the Court of First Instance, Sector 2, Bucharest, whereas the national legislation expressly recognised his right to apply to the court of his domicile, namely the Court of First Instance, Sighișoara;
  - he did not attend the hearing before the Court of First Instance, Sector 2, Bucharest, perhaps because of the considerable distance between his domicile and the seat of that court (approximately 500 km) and the costs entailed by travelling such a distance;
  - although the judgment of the Court of First Instance, Sector 2, Bucharest, expressly mentioned the possibility of lodging an appeal against that judgment, YI did not make use of such a remedy. Instead, he instructed a lawyer of his choice only after that judgment had become final. That lawyer brought a similar action, against the same company and concerning, in essence, the same contractual terms, before the Court of First Instance, Sighișoara.
- 14 The Court of First Instance, Sighișoara, which had not been duly informed of the existence of the judgment of the Court of First Instance, Sector 2, Bucharest, re-examined the substance of the case and, by judgment of 5 December 2019, which departed from that first judgment, upheld YI's action and declared that the terms thus re-examined were unfair.
- 15 Although it lodged an appeal against that second judgment, ERB New Europe Funding II did not raise an objection based on the force of *res judicata* until the final stage of the proceedings initiated following that appeal. However, the appeal court failed to rule on that objection and, by the decision of 6 April 2021, upheld, in essence, the judgment of the Court of First Instance, Sighișoara, which had declared that the contractual terms were unfair.

- 16 In that context, the referring court – before which an extraordinary appeal (application for revision of the decision of 6 April 2021) has been brought on the ground of the existence of the force of *res judicata* – is uncertain as to whether, in the context of ruling on the application for revision, it can still examine the unfair nature of the terms of the agreement at issue.
- 17 As it has not found any further indications in the case-law of the Court of Justice which would help it to resolve such uncertainty in accordance with EU law, the referring court concludes that an answer from the Court of Justice to the question referred for a preliminary ruling is necessary for that purpose.

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