

Case C-176/23**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:

2 March 2021

Appellant and applicant at first instance:

UG

Respondent and defendant at first instance:

SC Raiffeisen Bank SA

Subject matter of the main proceedings

Appeal against a judgment of the Judecătoria Sighişoara (Court of First Instance, Sighişoara, Romania) which dismissed an action brought by the appellant and applicant at first instance ('the applicant at first instance') in which he requested, in essence, that certain terms included in a credit agreement he had concluded with the respondent and defendant at first instance ('the defendant at first instance') be declared unfair. This request for a preliminary ruling concerns the scope of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Directive 93/13').

Subject matter and legal basis of the request for a preliminary ruling

The Court is requested, on the basis of Article 276 TFEU, to interpret Article 1(2) of Directive 93/13, read in the light of the twelfth and thirteenth recitals of that directive.

Questions referred

(1) When applying the provisions of Article 1(2) of Directive 93/13/EEC on unfair terms in consumer contracts, transposed into national law by the provisions of Article 3(2) of Legea nr. 193/2000, republicată, privind clauzele abuzive în contractele încheiate între profesioniști și consumatori (Law No 193/2000, republished, on unfair terms in contracts concluded between sellers or suppliers and consumers),

in the light of, in particular, the twelfth and thirteenth recitals of that directive,

but also taking into account the provisions of Articles 80 and 81 of Ordonanța de urgență a Guvernului (OUG) nr. 50/2010 privind contractele de credit pentru consumatori (Government Emergency Order No 50/2010 concerning consumer credit agreements; ‘OUG No 50/2010’),

must those provisions be interpreted as not precluding national courts from also examining suspicions concerning the unfair nature of contractual terms stipulated in supplementary agreements to credit agreements concluded between sellers or suppliers and consumers before the aforementioned act having the force of law came into effect, that is to say, pursuant to the provisions of Article 95 of OUG No 50/2010, regardless of whether those terms have been expressly accepted by the consumer in the manner provided for by the provisions of Article 40(1) of OUG No 50/2010 or whether they have been considered tacitly accepted by law in the manner provided for by the provisions of Article 40(3) of OUG No 50/2010?

(2) If the first question is answered in the affirmative, the [referring] court also asks: would it be at odds [with the possibility referred to in Question 1], in light of the background set out above and the circumstances of the dispute pending before it, for there to be a line of case-law of the national courts establishing that express acceptance of a supplementary agreement drawn up in the manner provided for by Article 40(1) of OUG No 50/2010 and pursuant to the provisions of Article 95 thereof automatically leads to the conclusion that [that supplementary agreement] has been negotiated and, consequently, there can be no examination of any suspicions that the terms stipulated within it are unfair?

Provisions of European Union law and case-law relied on

Directive 93/13, twelfth, thirteenth and fifteenth recitals, [as well as] Article 1(2), Article 2(b), Article 6(1), Article 7(2) and Article 8.

Judgments of the Court of Justice of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532; of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207; of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750; of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703; [and] of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189.

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), Article 1, Article 2(1) and (2), Article 3(2), and Articles 6, 12 and 14. That law, which transposes Directive 93/13 into national law, provides, in Article 3(2) thereof, that ‘contractual terms stipulated on the basis of other legislative acts in force are not subject to the provisions of this Law’.

Legea nr. 289 din 24 iunie 2004 privind regimul juridic al contractelor de credit pentru consum destinate consumatorilor, persoane fizice (Law No 289 of 24 June 2004 on the legal provisions governing consumer credit agreements addressed to consumers who are natural persons). Article 8 of the version of that law which was in force when the credit agreement [at issue] was signed provided, inter alia, that a credit agreement must include the actual annual interest rate and an indication of the conditions under which that rate may be changed. That article was amended by Ordonanța de urgență [a Guvernului] nr. 174 din 19 noiembrie 2008 pentru modificarea și completarea unor acte normative privind protecția consumatorilor (Government Emergency Order No 174 of 19 November 2008 amending and supplementing certain legislative acts regarding consumer protection) to state that a credit agreement must include ‘the interest rate, specifying the type of rate (fixed and/or floating); in the event of a floating interest rate, the variation must not depend on the will of the creditor, [but must] correspond to fluctuations in verifiable reference indices mentioned in the agreement or to legislative changes requiring [such a variation]’.

Ordonanța de urgență a Guvernului nr. 50 din 9 iunie 2010 privind contractele de credit pentru consumatori (Government Emergency Order No 50 of 9 June 2010 concerning consumer credit agreements), Articles 37, 80, 81 and 95. That emergency order repealed Law No 289/2004.

Article 37 of OUG No 50/2010, in the version applicable to the dispute in the main proceedings, established, inter alia, that, for credit agreements with floating interest rates, ‘the interest rate must correspond to fluctuations in the EURIBOR/ROBOR/LIBOR reference indices or the BNR [Banca Națională a României (National Bank of Romania)] benchmark interest rate, depending on the currency of the loan, to which the creditor may add a certain margin which shall remain fixed for the entire duration of the agreement’.

Article 40(1) of OUG No 50/2010 provides that ‘contractual terms which give the creditor the right to amend contractual terms unilaterally without concluding a supplementary agreement which is accepted by the consumer shall be prohibited’. Article 40(3) thereof provides that ‘in the case of amendments imposed by legislation, should the consumer fail to sign the supplementary agreements provided for in paragraph 1, this shall be deemed to constitute tacit acceptance [...]’.

Article 95 of OUG No 50/2010, in its initial version, provided:

‘(1) For ongoing contracts, creditors are obliged to ensure, within 90 days of this Emergency Order entering into force, that the contract complies with the provisions of this Emergency Order.

(2) Ongoing contracts must be amended by means of supplementary agreements within 90 days of this Emergency Order entering into force.

[...]

(5) Should the consumer fail to sign the supplementary agreements provided for in paragraph 2, this shall be deemed to constitute tacit acceptance’.

OUG No 50/2010 was submitted for approval to the Romanian Parliament which, by Legea nr. 288 din 28 decembrie 2010 (Law No 288 of 28 December 2010), amended Article 95 of that emergency order as follows:

‘The provisions of this Emergency Order shall not apply to contracts which are ongoing on the date of [its] entry into force [...]’.

Ordonanța de urgență a Guvernului nr. 19 din 29 martie 2019 pentru modificarea și completarea unor acte normative (Government Emergency Order No 19 of 29 March 2019 amending and supplementing certain legislative acts), Articles II and XI.

Codul civil (Romanian Civil Code), Articles 993, 994, 1088 and 1092.

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 23 March 2007, the parties entered into a credit agreement with a floating interest rate, in which the defendant at first instance granted the applicant at first instance a loan of 15 300 Swiss francs (CHF), to be repaid over a period of 156 months.
- 2 Under point 1.1 of that agreement, the applicant at first instance was required to pay a loan handling fee of CHF 300, corresponding to 2% of the amount of the loan. In addition, under point 3.3 thereof, the interest rate at the date on which the agreement was concluded was 5.9% per annum, but the defendant at first instance was entitled to change this depending on financial market trends. Any new interest rate was to be brought to the attention of the applicant at first instance.
- 3 On 10 September 2010, the applicant at first instance was notified of an amendment to the credit agreement in question. In essence, the defendant at first instance confirmed in that notification that, by OUG No 50/2010, the legislature had required certain changes to be made to all consumer credit agreements, in particular with regard to terms relating to the structure of floating interest rates. Those rates now had to correspond to an objective index depending on the

currency of the loan, to which a fixed margin determined by the credit institution was added. For loans in CHF, the index was the LIBOR 6 M.

- 4 On 29 December 2017, the applicant at first instance brought an action in which he requested, in essence, that the terms laid down in points 1.1 and 3.3 of the credit agreement [at issue] be declared unfair.
- 5 In its defence, the defendant at first instance argued that the terms in question could not be subject to an examination of whether they were unfair, and, to that end, relied on Article 4(6) of Law No 193/2000, as well as Article 3(2) thereof. In that regard, it indicated, on the one hand, that the terms in question related to the definition of the subject matter of the agreement and to the appropriateness of the remuneration for the services provided, and, on the other hand, that the floating rate of interest on the loan stemmed from a supplementary agreement to the credit agreement [at issue] which reflected the provisions of OUG No 50/2010.
- 6 By judgment of 10 June 2020, the Court of First Instance, Sighișoara, dismissed the action brought by the applicant at first instance on the grounds set out by the defendant at first instance. The applicant at first instance has brought an appeal against that judgment before the referring court.

The essential arguments of the parties in the main proceedings

- 7 The applicant at first instance submits that the act with the force of law constituted by OUG No 50/2010 contains provisions the sole purpose of which is enhancing consumer protection. However, those provisions were not correctly incorporated into the credit agreement at issue, because account was not taken of the specific situation at the time when that agreement was concluded, but rather of the situation near the time when OUG No 50/2010 entered into force, at which point the interest rate for the [credit] agreement [at issue] had already been fixed on the basis of the terms which are suspected of being unfair.
- 8 The defendant at first instance argues that the effects of the original term set out in point 3.3 of the [credit] agreement [at issue] ceased on the date on which the supplementary agreement of 10 September 2010 came into effect. That term was replaced by the one currently in force, as a result of which the floating rate of interest on the loan corresponds to a verifiable reference index, namely the LIBOR 6 M, to which a fixed margin has been added. Therefore, the defendant at first instance complied with the mandatory provisions of OUG No 50/2010 and the manner in which it acted was deemed appropriate by the Autoritatea Națională pentru Protecția Consumatorilor (National Consumer Protection Authority, Romania), as demonstrated by a letter from that authority dated 5 October 2010.

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

- 9 The referring court considers that the exclusion, from the examination of unfairness, of certain contractual terms which reflect the provisions of OUG No 50/2010 should be analysed in the light of Directive 93/13 and the relevant case-law of the Court of Justice.
- 10 In this regard, the Court has emphasised that, as they constitute an exception to the rules on the protection of consumers against unfair contractual terms, the provisions of Article 1(2) of Directive 93/13 must be interpreted restrictively, given that the rationale for such an exclusion from the scope of that directive is based on the legitimate assumption that the national legislature has struck a balance between all the rights and obligations of the parties to certain agreements.
- 11 In order to ascertain whether a contractual term reflects a mandatory statutory provision for the purposes of Article 1(2) of Directive 93/13, the referring court considers that it must be established whether the provisions of national law in question apply to the contracting parties irrespective of their choice, as well as whether those provisions are supplementary in nature, meaning that they would apply automatically unless otherwise agreed between the contracting parties.
- 12 The referring court notes that, by the provisions of OUG No 50/2010, the Romanian legislature considered it necessary to regulate credit agreements concluded between sellers or suppliers and consumers, after recognising that the previous legislation had proved itself incapable of appropriately protecting consumers from the natural instinct of sellers and suppliers to use the persuasive power of their experience and their tangible opportunities to impose contractual terms that could be unfair. The legislature thus sought to eliminate the possibility of abuse by sellers and suppliers owing to the lack of regulation of consumer credit agreements with floating interest rates.
- 13 By Article 95 of OUG No 50/2010, in its original form, provision was made for a mechanism which allowed credit institutions immediately to implement such mandatory provisions, including with regard to ongoing credit agreements. Therefore, an agreement of that kind should have been amended by means of a supplementary agreement, which should have been sent to the consumer for signing. It was assumed that a failure to sign the supplementary agreement constituted a tacit acceptance of its terms. However, the referring court emphasises that the legislature failed to regulate the option of actually negotiating the contractual terms affected by amendments. Although that mechanism was eliminated by Law No 288/2010 approving OUG No 50/2010, that elimination came too late for the present case, as the supplementary agreement in question had already been (i) sent to the applicant at first instance and (ii) deemed to have been signed by him.
- 14 In those circumstances, the referring court has doubts as to whether the relevant provisions of OUG No 50/2010 satisfy the requirement that a balance be struck

between all the rights and obligations of the parties to certain agreements. In addition, the referring court has doubts as to whether the contractual terms contained in the supplementary agreement in question reflect the provisions of OUG No 50/2010, as the content of those terms lacks data and information that would have been essential for the applicant at first instance to understand the scope of the obligations he was assuming.

- 15 The referring court also emphasises that Article 37 of OUG No 50/2010 determines only the structure of the floating contractual interest rate, in the form of an objective reference index and a fixed margin. The margin reflects the contractual interests of the seller or supplier, while the index is independent of the will of the parties. That index, however, is susceptible to considerable fluctuations over time and may be best exploited by the seller or supplier, who has experience and a greater capacity to anticipate than the average consumer who is reasonably observant and circumspect. Therefore, the referring court has doubts as to whether the provisions of that article can (i) be implemented independently of the will of the parties or (ii) operate automatically without an agreement between the parties.
- 16 In this regard, the referring court states that, in fixing a floating rate of interest for credit agreements by means of a supplementary agreement reflecting the provisions of OUG No 50/2010, sellers and suppliers took account of the structure of the floating interest rate in a manner exclusively beneficial to them, based on the specific circumstances at the time, as, when OUG No 50/2010 entered into force, the reference indices were exceptionally low. They converted the difference between those indices and the interest rate stipulated in the agreements into the fixed margin to which they were entitled and which had been granted to them by the legislature. Since the reference indices could only fluctuate upwards, the contractual floating interest rate followed the same trend, exclusively in favour of the sellers and suppliers and to the clear detriment of the consumer.
- 17 Thus, the legislature's generous intention to establish rules for enhanced consumer protection deteriorated, when OUG No 50/2010 was actually implemented, into consumers being manifestly more vulnerable from a contractual perspective.
- 18 Lastly, the referring court emphasises that the case-law of the national courts on the subject is to the effect that contractual terms such as those at issue in the dispute in the main proceedings cannot be the subject of an examination of whether they are unfair. Consequently, it would not be possible either to negotiate such terms or to provide appropriate safeguards allowing consumers to challenge a potentially unfair application, by sellers or suppliers, of the legislative provisions which those terms reflect.