

**Case C-267/19****Request for a preliminary ruling****Date lodged:**

28 March 2019

**Referring court:**

Trgovački sud u Zagrebu (Croatia)

**Date of the decision to refer:**

20 March 2019

**Applicant:**

PARKING d.o.o.

**Defendant:**

SAWAL d.o.o.

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[...]

Court of Justice of the European Union

[...]

**Subject matter:**

Request for a preliminary ruling and request for interpretation of the grounds of the Court's judgments of 9 March 2017, *Zulfikarpašić* (C-484/15, EU:C:2017:199) and *Pula Parking* (C-551/15, EU:C:2017:193), in the case brought before the referring court under reference Povrv-1614/18.

First of all, the referring court asks that the personal data of the party seeking enforcement and the party against whom enforcement is sought, as parties to the main proceedings, be protected.

**Request by the referring court:**

Pursuant to Article 19(3)(b) of the Treaty on European Union and Article 267 of the Treaty on the Functioning of the European Union, the Trgovački sud u Zagrebu (Commercial Court, Zagreb, Croatia), as a court or tribunal of a Member

State, submits, through the judge Mislav Kolakušić, a request for a preliminary ruling for the purpose of the uniform interpretation and application of EU law and a request for interpretation of the judgments delivered by the Court in Cases C-484/15 and C-551/15, in the context of Case Povrv-1614/18 brought before the Trgovački sud u Zagrebu (Commercial Court, Zagreb) (Annex 1).

In the judgment delivered on 9 March 2017 in Case C-551/15, the Court of Justice held: ‘Regulation No 1215/2012 must be interpreted as meaning that, in Croatia, notaries, acting within the framework of the powers conferred on them by national law in enforcement proceedings based on an “authentic document”, do not fall within the concept of “court” within the meaning of that regulation’.

Although the Court’s position is clear and unequivocal as to the fact that, in Croatia, notaries are not entitled to issue writs of execution based on an authentic document, that practice, which is at odds with Regulation No 1215/2012, continues. Following the decision of the Court of 9 March 2017, notaries have issued more than one million writs of execution.

Since 1 July 2013, the Republic of Croatia has been a full member of the European Union, whose institutions guarantee equal legal treatment for all citizens and legal persons of all Member States.

The courts and tribunals of the Republic of Croatia do not interpret the Court’s decision in Case C-551/15 in the same way. For the most part, they consider that the decision relates exclusively to enforcement proceedings conducted by notaries in which the party against whom enforcement is sought is a natural person and national of another EU Member State. **[Or.2]**

For example, in Cases Povrv-1434/18, Povrv-3326/17 and Povrv-3380/18, the Trgovački sud u Zagrebu (Commercial Court, Zagreb) maintained the effects of orders to pay made in writs issued by notaries against foreign legal persons.

By contrast, in Case Povrv-113/18, the Trgovački sud u Zagrebu (Commercial Court, Zagreb) dismissed an application for enforcement submitted to a notary and annulled a writ of execution issued by a notary based on an authentic document.

The referring court does not agree with the positions and decisions of the Croatian courts establishing a discriminatory difference in the way in which the law and Regulation No 1215/2012 are applied as between citizens and legal persons from the Republic of Croatia, on the one hand, and citizens and legal persons from other EU Member States, on the other.

Consequently, the Trgovački sud u Zagrebu (Commercial Court, Zagreb), as a court or tribunal of a Member State, refers a request for a preliminary ruling to the Court in order to ensure the uniform application of EU law in all Member States and observance of the principle of equal treatment and equality of citizens and legal persons in the application of EU law in Case Povrv-1614/18, brought before the referring court.

In view of the divergent application of the Court's decisions, it is necessary to submit this request in order to determine whether natural and legal persons from Croatia, as citizens of the European Union, are on an equal footing with natural and legal persons from other EU Member States, and whether foreign legal persons are on an equal footing with foreign natural persons as regards the application of EU law in the Republic of Croatia.

The referring court asks the Court to join the present case to the request for a preliminary ruling submitted by the Općinski sud u Novom Zagrebu (Municipal Court, New Zagreb, Croatia) under number C-657/18 and the request for a preliminary ruling submitted by the referring court on 11 March 2019, and to examine those cases together.

In accordance with Article 94 of the Rules of Procedure of the Court of Justice of the European Union and the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, the referring court, the Trgovački sud u Zagrebu (Commercial Court, Zagreb), bases its request on the following:

**I. Summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court in the case registered under reference Povrv-1614/18**

The parties to the main proceedings are PARKING d.o.o., Croatia, [...], the party seeking enforcement, and SAWAL d.o.o., Slovenia [...], the party against whom enforcement is sought. On 25 April 2016, enforcement proceedings were initiated following an application for enforcement based on an authentic document. On 23 May 2016, the notary [...] Croatia, issued a writ of execution based on the authentic document by which he ordered the party against whom enforcement is sought to settle, within 8 days, the debt claimed in the application for enforcement of HRK 100, plus statutory late payment interest, as well as the costs of the proceedings of HRK 1 741.25. The debt of HRK 100 is based on a certified statement of account [...], the authentic document, and relates to a request for payment of a fee under the Zakon o Hrvatskoj radioteleviziji (Croatian Law on radio and television). The request was sent to the defendant at the same time as the writ of execution, on 9 February 2017. The party against whom enforcement is sought lodged an opposition to that writ, in a timely fashion, challenging the basis and amount of the debt and contends, in particular, that a Croatian notary is not and cannot be a competent judicial authority.

In accordance with the judgments delivered by the Court in Cases C-484/15 and C-551/15, notaries in Croatia acting in enforcement proceedings based on an 'authentic document' cannot be regarded as a court or tribunal within the meaning of the Regulation on the European Enforcement Order, nor for the purposes of applying the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Furthermore, in those judgments, the

Court found that compliance with the principle of mutual trust between EU Member States in the field of cooperation in civil and commercial matters requires that decisions taken by the authorities of a Member State, the enforcement of which is sought in another Member State, have been delivered in court proceedings offering guarantees of independence and impartiality and in compliance with the principle of *audi alteram partem*. Therefore, the procedure prior to the issue of a writ of execution is not a procedure giving effect to the *audi alteram partem* principle and that decision is not delivered by a judicial authority, but by a notary [Or.3] who, as indicated above, cannot be regarded as a court or tribunal. Those considerations support the conclusion that the abovementioned writ is issued by an authority with an absolute lack of jurisdiction and that, in consequence, the rules on absolute lack of jurisdiction apply. Accordingly, the referring court cannot accept measures taken by an authority absolutely lacking in jurisdiction, which is why it is not possible to continue the opposition proceedings brought against the writ of execution. Therefore, what is invalid *ab initio* may not become valid or be validated in the course of the procedure, since this would be contrary to the principle of equality of arms.

## **II. The content of the national provisions applicable in the case and the relevant national case-law**

The contested provision is Article 1 of the Ovršni zakon (Croatian Law on enforcement; ‘the OZ’) (published in the Narodne novine No 112/12, 25/13, 93/14, 55/16 and 73/17), the national law giving notaries the power to enforce the recovery of debts based on an ‘authentic document’ by issuing a writ of execution, as an enforcement order, without the express agreement of the party against whom enforcement is sought. Therefore, since the question at issue is that of the jurisdiction of notaries in the present civil case, the court did not conduct an examination of the merits.

The court of first instance took the view that the grounds and interpretation of the Court’s judgments of 9 March 2017, *Zulfikarpašić* (C-484/15, EU:C:2017:199) and *Pula Parking* (C-551/15, EU:C:2017:193), are also of importance under national law and applied the Court’s case-law and interpretation in that regard in Case Povrv-1614/18.

Case-law:

In Case Povrv-57/18 (Annex 2), the Općinski sud u Novom Zagrebu (Municipal Court, New Zagreb) dismissed an application for enforcement and annulled a writ of execution issued by a notary with reference to the judgment of the Court in Case C-551/15, giving the following reasons: ‘[...] the procedure prior to the issue of a writ of execution is not a procedure giving effect to the *audi alteram partem* principle and that decision is not delivered by a judicial authority, but by a notary who, as indicated above, cannot be regarded as a court or tribunal. Those considerations support the conclusion that the abovementioned writ is issued by

an authority with an absolute lack of jurisdiction and that, in consequence, the rules on absolute lack of jurisdiction apply. Accordingly, the referring court cannot accept measures taken by an authority absolutely lacking in jurisdiction, which is why it is not possible to continue the opposition proceedings brought against the writ of execution. Therefore, what is invalid *ab initio* may not become valid or be validated in the course of the procedure, since this would be contrary to the principle of equality of arms’.

By contrast, by order No Gž Ovr-645/2018 (Annex 3), the Županijski sud u Puli (County Court, Pula, Croatia) annulled the decision in Povrv-57/18 on the following grounds: ‘[...] the position of the court of first instance on notaries’ lack of jurisdiction in procedures for the adoption of a writ of execution based on an authentic document is incorrect, since their jurisdiction is laid down in the provisions of Title 26 of the OZ (Narodne novine No 112/12, 25/13, 93/14, 55/16 and 73/17). The notary thus acted lawfully where, in accordance with the provisions of Article 282 of the OZ, following the opposition lodged by the party against whom enforcement is sought challenging the writ of execution issued by that notary on the basis of an authentic document, he forwarded the papers in the case to the court of first instance for it to rule on the opposition proceedings as the court with jurisdiction. At that stage of the procedure, in a case in which the party against whom enforcement is sought is domiciled in the Republic of Croatia, in the territory falling within the jurisdiction of the court of first instance, that court should have, under Article 282(3) of the OZ, ruled on the opposition lodged by that party pursuant to Articles 57 and 58 of the OZ and delivered a decision in accordance with those provisions. Given that, by misapplying the provisions of Article 16 ZPP [Zakon o parničnom postupku (Code of Civil Procedure)], it rejected the application for enforcement and annulled in its entirety the writ of execution based on an authentic document on the ground of the notary’s absolute lack of jurisdiction, it infringed essential procedural requirements, as set out in Article 354(1), which is the result of that misapplication of Article 16 of the ZPP, and Article 21(1) of the OZ, which was pleaded on appeal [...]’.

Therefore, the Županijski sud u Puli (County Court, Pula) considers that the effects of the part of the notary’s writ ordering the party against whom enforcement is sought to make the payment at issue may be maintained. **[Or.4]**

In addition, in Cases Povrv-1434/18, Povrv-3326/17 and Povrv-3380/18 (Annex 4), the Trgovački sud u Zagrebu (Commercial Court, Zagreb) maintained the effects of orders to pay made in writs of execution issued by notaries against foreign debtors who are legal persons.

By contrast, in Case Povrv-113/18 (Annex 5), the Trgovački sud u Zagrebu (Commercial Court, Zagreb) dismissed an application for enforcement submitted to a notary and annulled a writ of execution issued by a notary based on an authentic document with reference to the Court’s judgment in Case C-551/15, giving the following reasons: ‘[...] the procedure prior to the issue of a writ of execution is not a procedure giving effect to the *audi alteram partem* principle and

that decision is not delivered by a judicial authority, but by a notary who, as indicated above, cannot be regarded as a court or tribunal. Those considerations support the conclusion that the abovementioned writ is issued by an authority with an absolute lack of jurisdiction and that, in consequence, the rules on absolute lack of jurisdiction apply. Accordingly, the referring court cannot accept measures taken by an authority absolutely lacking in jurisdiction, which is why it is not possible to continue the opposition proceedings brought against the writ of execution. Therefore, what is invalid *ab initio* may not become valid or be validated in the course of the procedure, since this would be contrary to the principle of equality of arms<sup>7</sup>.

These decisions by national courts and tribunals reflect the differing legal views on whether notaries have jurisdiction to issue enforcement orders.

### **III. Statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings**

The request for a preliminary ruling seeks to ensure the uniform application of EU law in all Member States and observance of the principle of equal treatment and equality of citizens in the application of EU law, and to bring uniformity to the case-law of the national court making the reference in the application of the *acquis* of the European Union.

Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 14 of that convention prohibits discrimination and provides that the enjoyment of the rights and freedoms set forth therein must be secured without distinction on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Article 18 TFEU provides that, within the scope of application of the Treaties and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is prohibited. The referring court is of the view that, in the present case, Croatian nationals and legal persons are discriminated against in comparison with nationals and legal persons from other EU Member States, as is apparent from the Court's judgments of 9 March 2017, *Zulfikarpašić* (C-484/15, EU:C:2017:199) and *Pula Parking* (C-551/15, EU:C:2017:193), cited above. In accordance with the abovementioned judgments, enforcement orders will not be recognised as such in other EU Member States for the purpose of the Regulation on the European Enforcement Order and the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Therefore, national law gives notaries the power to issue enforcement orders which are not recognised as such or as a judicial decision in other EU Member States. It is clear from the

grounds of those judgments that the procedure before a notary does not offer any guarantee of independence and impartiality and does not give effect to the *audi alteram partem* principle. That situation brings about unequal treatment of natural and legal persons from Croatia in comparison with natural and legal persons from other EU Member States and unequal treatment of foreign natural and legal persons to such an extent as to constitute discrimination. The fact that the procedure does not give effect to the *audi alteram partem* principle results in unequal treatment between the parties and thus infringes the fundamental right to a fair trial enshrined in the ECHR. [Or.5]

Company law requires harmonisation of the relevant European rules within the European Union in order to increase legal certainty, so as to promote economic activity and investment, in accordance with the Accession Treaty and the Treaty on the Functioning of the European Union. The interpretation, which is at variance with the principle of the equality of companies, places national companies at a disadvantage in comparison with companies from other EU Member States, which is contrary to the founding principles of the European Union.

The following questions are referred to the Court for a preliminary ruling:

1. Is a provision of national law, namely Article 1 of the Ovršni zakon (published in the Narodne novine No 112/12, 25/13, 93/14, 55/16 and 73/17), which gives notaries the power to enforce the recovery of debts based on an authentic document by issuing a writ of execution, as an enforcement order, without the express agreement of the debtor who is a legal person established in the Republic of Croatia, compatible with Article 6(1) of the ECHR and Article 18 TFEU, in the light of the Court's judgments in Cases C-484/15 and C-551/15?

2. Can the interpretation given in the Court's judgments of 9 March 2017, *Zulfikarpašić* (C-484/15, EU:C:2017:199) and *Pula Parking* (C-551/15, EU:C:2017:193), be applied to Case Povrv-1614/2018, described above, brought before the referring court, and, specifically, is Regulation No 1215/2012 to be interpreted as meaning that, in Croatia, notaries, acting within the framework of the powers conferred on them by national law in enforcement proceedings based on an 'authentic document', in which the parties against whom enforcement is sought are legal persons established in other EU Member States, do not fall within the concept of 'court' within the meaning of that regulation?

[...]

[...] [postal and email address]

Annexes:

- 1) Documents relating to the main proceedings, Povrv-1614/18, numbered 1 to 20.

- 2) Case-law of the Općinski sud u Novom Zagrebu (Municipal Court, New Zagreb), Case Povrv-57/18, numbered 21 and 22.
- 3) Case-law of the Županijski sud u Puli (County Court, Pula), Case Gž Ovr-645/18, numbered 23 and 24.
- 4) Case-law of the Trgovački sud u Zagrebu (Commercial Court, Zagreb), Cases Povrv-1434/18, Povrv-3326/17 and Povrv-3380/18, numbered 24 to 29.
- 5) Case-law of the Trgovački sud u Zagrebu (Commercial Court, Zagreb), Case Povrv-113/18, numbered 30 and 31.

WORKING DOCUMENT