

**Case C-519/19**

**Request for a preliminary ruling**

**Date lodged:**

9 July 2019

**Referring court:**

Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland)

**Date of the decision to refer:**

13 June 2019

**Applicant:**

Passenger Rights spółka akcyjna, with its seat in Warsaw

**Defendant:**

Ryanair DAC, with its seat in Dublin (Ireland)

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[Or. 1] [...]

**DECISION**

13 June 2019

the Sąd Okręgowy w Warszawie XXIII Wydział Gospodarczy Odwoławczy  
(Regional Court, Warsaw, 23rd Commercial Appeals Division) [...]

[...]

having heard [...]

[...]

the case brought by Passenger Rights spółka akcyjna with its seat in Warsaw  
(formerly Passenger Rights sp. z o.o. with its seat in Warsaw)

against Ryanair DAC with its seat in Dublin (Ireland)

concerning payment

following an objection lodged by the defendant

against the decision of the Sąd Rejonowy dla m. st. Warszawy w Warszawie  
(District Court for the Capital City of Warsaw, Warsaw)

of 15 February 2019 [...]

decides:

**to refer the following question to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union:**

Should Articles 2(b), 3(1) and (2) and 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and Article 25 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters — as regards examination of the validity of an agreement conferring jurisdiction — be interpreted as meaning that the final purchaser of a claim acquired by way of assignment from a consumer, which final purchaser is not a consumer himself, may rely on the absence of individual negotiation of contractual terms and on unfair contractual terms arising from a jurisdiction clause?

**[Or. 2]**

**Grounds**

## **1. FACTS AND MAIN PROCEEDINGS:**

The applicant, Passenger Rights spółka akcyjna with its seat in Warsaw, requested that the defendant, Ryanair DAC with its seat in Dublin (Ireland), be ordered to pay the amount of EUR 250 as compensation for a cancelled flight from Milan to Warsaw.

In response to the claim, the defendant raised an objection of lack of national jurisdiction of the Polish court, and asked for the action to be dismissed. The defendant pointed out that the contract of carriage had been concluded pursuant to Ryanair's General Terms and Conditions of Carriage, which the passenger had accepted by purchasing the air ticket online. It also pointed out that pursuant to Section 2.4 of the General Terms and Conditions of Carriage, unless otherwise provided by the Convention or applicable law, the contract of carriage with the defendant as the carrier, the General Terms and Conditions of Carriage, and the defendant's Regulations on Specific Subjects were to be governed by and interpreted in accordance with the laws of Ireland and any disputes arising out of or in connection with the contract of carriage were to be subject to the jurisdiction of the Irish courts. The defendant submitted that the applicant as purchaser of the

claim from the passenger was also bound by the clause stating that the Irish courts had jurisdiction.

By decision of 15 February 2019, the court of first instance refused to dismiss the action, as did other Polish courts in several dozen similar cases. The Sąd Rejonowy (District Court) hearing the case stated that the assignor of the claim pursued in the action and the defendant had concluded an agreement with a jurisdiction clause which stated that Irish law would apply to the contract of carriage and any disputes arising therefrom would be heard by an Irish court, but took the view that the clause in question had not been binding on the assignor of the claim (the passenger). The court cited Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, which provides that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The defendant appealed, arguing that the special system for consumer protection provided for in EU law only applied to a private final consumer [Or. 3] not engaged in trade or professional activities. The defendant pointed out that the applicant was not a consumer and thus it could not benefit from the jurisdictional protection provided for consumer contracts. The defendant alleged, inter alia, that the court had infringed Article 1099(1) of the Kodeks postępowania cywilnego (Code of Civil Procedure) and Article 17(3) in conjunction with Article 19 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council ('Brussels Ia Regulation') by failing to apply them and, consequently, by assuming that the General Terms and Conditions of Carriage and the Regulations were not binding on the consumer and, consequently, on the applicant. The defendant also alleged that the court had infringed Article 385<sup>1</sup> of the Kodeks cywilny (Civil Code) in conjunction with Article 385<sup>3</sup>(23) of the Civil Code in conjunction with Article 509 of the Civil Code by applying them to the present case, in particular by finding that the provisions of the defendant's Regulations which excluded the jurisdiction of the Polish courts were not binding on the consumer (the applicant's legal predecessor) and, consequently, were also not binding on the applicant as the assignee.

### **1. EUROPEAN UNION LAW:**

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

#### *Article 25*

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that

court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing;
- (b) in a form which accords with practices which the parties have established between themselves; or
- (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

**[Or. 4]** 3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

***Article 2***

For the purposes of this Directive:

- (a) 'unfair terms' means the contractual terms defined in Article 3;
- (b) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;

***Article 3(1) and (2)***

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. [Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

[Or. 5] The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.]<sup>1</sup> 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

#### **Article 6(1)**

1. 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.

#### **2. NATIONAL LAW**

– Kodeks cywilny z dnia 10 maja 2018 (Civil Code of 10 May 2018, Dz.U. 2018 item 1025)

– Kodeks postępowania cywilnego z dnia 14 czerwca 2018 r. (Code of Civil Procedure of 14 June 2018, Dz.U. 2018 item 1360)

#### **Article 1099(1) of the Code of Civil Procedure**

If there are no grounds to justify national jurisdiction in a given case and it is impossible to conduct proceedings or to request proceedings to be conducted before a court or another authority of a foreign State, the case shall fall under national jurisdiction if there is a sufficient connection with the Polish legal order.

<sup>1</sup> Translator's note: The text within square brackets is Article 18 TFEU and appears to have been inserted by mistake.

Article 385<sup>1</sup>, Article 385<sup>3</sup>(23) and Article 509 of the Civil Code

[Or 6] (385<sup>1</sup>) § 1. Provisions of a contract concluded with a consumer which have not been agreed individually shall not be binding on the consumer if his rights and obligations are set forth in a way that is contrary to good practice and grossly infringes his interests (unlawful clauses). This shall not apply to provisions defining the principal obligations of the parties, including price or remuneration, so long as they are worded clearly.

§ 2. If a contractual term is not binding on the consumer pursuant to § 1, the contract shall otherwise continue to be binding on the parties.

§ 3 Provisions of a contract which are not agreed individually are those over the content of which the consumer had no genuine influence. This shall refer in particular to contractual provisions taken from a standard contract proposed to a consumer by a contracting party.

§ 4. The burden of proof that a provision has been agreed individually rests with the person relying thereon.

(385<sup>3</sup>(23)) In the case of doubt it shall be presumed that unlawful contractual terms are those which in particular exclude the jurisdiction of the Polish courts or which give jurisdiction to an arbitration tribunal situated in Poland or another State or to another authority, as well as clauses which require a matter to be brought before a court which has no territorial jurisdiction under Polish law.

(509) § 1. A creditor may, without the consent of the debtor, assign a claim to a third party (transfer), save where this would be contrary to the law, a contractual stipulation or a characteristic of the obligation.

§ 2. All rights associated with the claim, in particular any claim to arrears of interest, are transferred together with the claim.

**LEGAL DOUBTS OF THE NATIONAL COURT:**

1. Within the scheme of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the jurisdiction of the courts of the Member State of the defendant's domicile or seat is a general principle laid down in Article 4 of the regulation. It is only by way of derogation from that principle that the provision in question provides for an exhaustive list of cases in which the defendant may or must be sued before the courts of another Member State. The rules of jurisdiction which derogate from that [Or. 7] general principle are to be strictly interpreted, in the sense that they cannot give rise to an interpretation going beyond the cases expressly envisaged by that regulation (see judgment of the Court of Justice of 25 January 2018, *Schrems*, C-498/16, EU:C:2018:37, and judgment of the Court of Justice of 20 January 2005, *Gruber*, C-464/01, EU:C:2005:32, paragraph 32).

2. In its judgment of 9 July 2009 in *Peter Rehder v Air Baltic Corporation* (C-204/08, EU:C:2009:439), the Court of Justice of the European Union held that the second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the case of air transport of passengers from one Member State to another Member State, carried out on the basis of a contract with only one airline, which is the operating carrier, the court having jurisdiction to deal with a claim for compensation founded on that transport contract and on Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, is that, at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that contract. In the present case, the place of departure was Poland.
3. In the present case, however, the passenger — the assignor of the claim pursued in the action — and the defendant concluded an agreement with a jurisdiction clause which stated that Irish law would apply to the contract of carriage and any dispute arising therefrom would be heard by the Irish courts. The court of first instance found that this clause had not been binding on the assignor of the claim (the passenger), since pursuant to Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, a contractual term which has not been individually negotiated is to be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The court of first instance found that the provisions of the General Terms and Conditions of Carriage and of the Regulations had not been negotiated with the consumer, and, consequently, had not been binding on the applicant to whom the claim had been assigned. The court of first instance also referred to similar provisions of national law — Article 385<sup>1</sup> of the Civil Code in conjunction with Article 385<sup>3</sup>(23) of the Civil Code, which provide for special substantive law protection of consumers.

[Or. 8]

4. Pursuant to Article 25(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, if the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

5. It should be pointed out that as a result of the assignment agreement, the claim due to the consumer was transferred to an entity which is a legal person. In the light of national law as well as the current case-law of the Sąd Najwyższy (Supreme Court), even a claim considered abusive may be assigned, and a consumer who entrusts a professional entity with the collection of that claim has a better chance of enforcing it than if he acted independently vis-à-vis a trader whose unlawful practices he had been previously subjected to. Abusive contractual clauses may result in a claim that is only in favour of the consumer, but that claim may nevertheless be satisfied by making a payment to other entities, for instance by making a trust assignment for the purposes of collection, in which case the assignee collects the assigned claim on its own behalf but for the account of the consumer who has made the assignment. The consumer's interests are not prejudiced as a result. The unlawful nature of a contractual clause may be determined in the course of an action for payment brought against the debtor by the trader who has acquired the claim. [...] The Sąd Najwyższy (Supreme Court) did not, however, analyse the aforementioned issue from the point of view of the interpretation of EU law.
6. The Sąd Rejonowy (District Court) raised doubts as to whether, in the light of Article 3(1) and Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, the entity which purchased the claim from the consumer could also be regarded as a consumer, since that assessment determines whether there are grounds for examining the validity of the agreement conferring jurisdiction [Or. 9]. It is beyond doubt that the applicant (the purchaser of the claim) is a trader and that it purchased the claim from the passenger (consumer) in the course of its business. The question therefore arises as to whether the applicant may rely on rights which are de facto consumer rights in respect of a jurisdiction clause and whether the national court is competent to review that clause from the point of view of consumer protection in the light of Article 3(1) and Article 6(1) of Council Directive 93/13/EEC.
7. In the light of EU law, a consumer is a person who is acting for a purpose which is outside his trade, business or profession. A 'consumer' is defined as the opposite of an 'economic operator' (Court of Justice judgments of 3 July 1997 in *Benincasa*, C-269/95, EU:C:1997:337, paragraph 16, and of 20 January 2005 in *Gruber*, C-464/01, EU:C:2005:32, paragraph 36). In the light of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, a 'consumer' means any natural person who is acting for purposes which are outside his trade, business or profession. In its judgment of 19 January 1993 in *Shearson Lehmann Hutton v TVB* (C-89/91, EU:C:1993:15), the Court of Justice held that the special system of consumer protection provided for in EU law serves to ensure adequate protection for the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other, commercial, party to the contract, who must not therefore be discouraged from suing by being compelled to bring his action before the courts in the State in which the other party to the contract is domiciled. In the same case, the Court observed that the provisions affect only a private final consumer, not engaged in trade or professional activities.

8. Based on the Court of Justice's rulings, the notion of a 'consumer' must be strictly construed, reference being made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned, since the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others (see, to that effect, judgments of 3 July 1997, *Benincasa*, C-269/95, EU:C:1997:337, paragraph 16, and of 20 January 2005, *Gruber*, C-464/01, EU:C:2005:32, paragraph 36).

**[Or. 10]**

9. The national court has doubts as to whether, as a result of the claim having been assigned by a consumer to a trader, the latter enters into the rights of the consumer and can rely on the favourable EU regime concerning the protection of consumers arising inter alia from Articles 3(1) and 6(1) of Council Directive 93/13/EEC of 5 April 1993. As the Court of Justice has held in a different context, the assignment of claims cannot, by itself, have an impact on the determination of the court having jurisdiction (judgments of the Court of 18 July 2013 in *ÖFAB*, C-147/12, EU:C:2013:490, and of 21 May 2015 in *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335). Moreover, the Court pointed out that an assignment of claims, which is the issue in the main proceedings, cannot lead to the creation of a new special jurisdiction for the consumer to whom those claims have been assigned. The Court held that where a claim falls within the field of liability in tort which is closely connected to the place where the event in question occurred, the assignment of the claim by the original creditor to another person does not affect the determination of the competent court. Thus, in the Court's view, the nature (category) of the claim is of essence in the sense that it affects the jurisdiction. The assignment of a claim does not alter the nature of the original obligation, hence the jurisdiction remains unchanged.
10. In its judgment of 7 February 2013 in *Refcomp* (C-543/10, EU:C:2013:62), the Court of Justice held that a jurisdiction clause contract may produce effects only in the relations between the parties who have given their agreement to the conclusion of the contract. That is because it was agreed upon between the parties. In order for a third party to rely on the clause it is, in principle, necessary that the third party has given his consent to that effect.
11. However, it appears that in its judgment of 25 January 2018 in *Schrems*, C-498/16, the Court of Justice held differently, finding that since the special system established in Article 15 et seq. of Regulation (EC) No 44/2001 is inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, the consumer is protected only in so far as he is, in his personal capacity, the applicant or defendant in proceedings. Consequently, an applicant who is not himself a party to the consumer contract in question cannot enjoy the benefit of the jurisdiction relating to consumer contracts (see, to that effect, judgment of 19 January 1993, *Shearson Lehmann Hutton*, C-89/91, EU:C:1993:15,

paragraphs 18, 23 and 24). The same considerations must also be taken into account in relation to a consumer to whom the claims of other consumers have been assigned.

**[Or. 11]** In the view of the Court of Justice, the rules on jurisdiction laid down as regards consumer contracts in Article 16(1) of that regulation apply, in accordance with the wording of that provision, only to an action brought by a consumer against the other party to the contract, which necessarily implies that there be a contract concluded by the consumer with the professional concerned (judgment of 28 January 2015, *Kolassa*, C-375/13, EU:C:2015:37, paragraph 32). The condition that there must be a contract concluded between the consumer and the professional concerned makes it possible to ensure that the attribution of jurisdiction is predictable, which is one of the objectives of Regulation (EC) No 44/2001, as is apparent from recital 11 of the regulation.

12. These judgments therefore raise doubts as to whether the ‘original’ nature of the obligation is relevant for determining the jurisdiction of the court and the validity of the jurisdiction clause, or whether the trader who has purchased the claim may challenge the jurisdiction clause as an unlawful one, relying on provisions which protect consumers.
13. If the notion of a consumer is understood in the narrow sense, then a trader who purchases a claim from a consumer will not be able to benefit from consumer protection and rely on the invalidity of the jurisdiction clause.
14. It may, however, also be taken into consideration that it is only the initial claim, the source of the obligation giving rise to the claim, determining its character, which is of essential importance, while the assignment itself does not change the form of that obligation. In that case, the trader could rely on consumer protection under Article 3(1) and Article 6(1) of Directive 93/13/EEC of 5 April 1993, entering as it were into the rights and obligations of the consumer, that is to say, the entire status of the consumer, with all the consequences that this entails. What is concerned is the transfer not just of the jurisdiction clause to the purchaser, but of the entire system of special protection for consumers, which arises from the fact that one party to the contract is weaker.
15. Such an extension of the scope of protection does not appear justified, given the rather narrow definition of the term ‘consumer’. Moreover, the Directive imposes on the Member States an obligation to introduce a model of national law under which unfair terms in contracts concluded with a consumer by a seller or supplier are not binding on the consumer as the economically weaker party. This is the purpose of the system of consumer protection arising from EU law. The intention is to guarantee protection of the consumer, as the party deemed to be economically weaker and less **[Or. 12]** experienced in legal matters than the trader, so that the consumer must not be discouraged from suing by being compelled to bring his action before the courts of the State in which the other party to the contract is domiciled (judgment of the Court of Justice of 19 January

1993, *Shearson Lehmann Hutton*, C-89/91, EU:C:1993:15). In the light of these circumstances, an answer is required in order to resolve the dispute before the national court.

WORKING DOCUMENT