

Case C-329/19**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:**

23 April 2019

Referring court:

Tribunale di Milano (Italy)

Date of the decision to refer:

1 April 2019

Applicant:

Condominio di Milano

Defendant:

Eurothermo SpA

Subject matter of the action in the main proceedings

Objection lodged by an entity comprising owners of apartments in a building (*condominio*) to a formal notice requiring payment of certain sums to an economic operator, also challenging the contractual term relating to the quantification of default interest, classified as ‘unfair’ by the *condominio*.

Subject matter and legal basis of the request

Interpretation of the concept of ‘consumer’ set out in Article 2(b) of Directive 93/13/EEC with regard to the possibility of including therein ‘the *condominio*’, as governed by Italian law, in cases where it concludes a contract for purposes which fall outwith its trade, business or profession and where it is in a position of weakness vis-à-vis the seller or supplier.

Article 267 TFEU

Question referred for a preliminary ruling

Does the concept of consumer, as adopted by Directive 93/13/EEC, preclude classification as a consumer of an entity (such as the entity comprising owners of apartments in a building (*condominio*) in Italian law), which does not come within the concept of ‘natural person’ or ‘legal person’, in cases where that entity concludes a contract for purposes which are outside its trade, business or profession and where it is in a position of weakness vis-à-vis the seller or supplier, as regards both its bargaining power and its level of knowledge?

Provisions of EU law invoked

- Articles 2(b) and 6 of Directive 93/13/EEC, and Article 1(e) of the annex thereto.
- Recital 13 and Article 2(1) of Directive 2011/83/EU.

Provisions of national law invoked

(A) Procedural rules

Decreto legislativo n. 28/2010, Attuazione dell’articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali (Legislative Decree No 28/2010 implementing Article 60 of Law No 69 of 18 June 2009 on mediation for the purpose of conciliation in civil and commercial litigation):

Article 11: ‘1. *Where an amicable settlement has been reached, the mediator shall draw up a record to which the text of the agreement shall be annexed ...*’.

Article 12 ‘1. *Where all the parties to the mediation are assisted by a lawyer, the agreement which has been signed by the parties and those lawyers shall be enforceable. The lawyers shall attest and certify that the agreement conforms to mandatory provisions and public policy*’.

Article 480(1) of the Code of Civil Procedure: ‘*The writ of execution shall consist in a formal notice to fulfil the obligation arising from the enforcement order within a period of not less than ten days ...,with a warning that, in the event of failure to do so, compulsory enforcement will be effected*’.

(B) Substantive rules

Consumer protection

Legislative Decree No 206/2005, known as the ‘Consumer Code’ (which transposes, in particular, Directive 93/13/EEC):

- Article 3(1)(a): ‘consumer’ is defined as a natural person who is acting for purposes which are outside any business, commerce, trade, or profession in which he may be engaged.
- Article 33(2)(f): terms which require from the consumer, in the event of non-fulfilment or late fulfilment, payment, by way of compensation, penalty or equivalent, of a manifestly excessive amount, shall be presumed to be ‘unfair’, until proven otherwise.
- Articles 1341 and 1342 of the Civil Code, relating to general contractual conditions and the detailed rules on the signing of contracts.

Provisions governing the ‘condominio’ contained in the Civil Code

Article 1117 *bis*: there is a *condominio* where ‘*several housing units or several buildings ... have shared parts within the meaning of Article 1117*’.

Article 1117: all the parts of the building necessary for common use — such as, for example, the land on which it stands, the foundations, the supporting beams, the roofs, the stairs, the entrance doors, the shared services facilities and the lifts — are to be the common property of the owners of the building’s individual housing units (‘the co-owners’).

Those common parts are to be managed by the meeting of co-owners and the administrator of the *condominio*.

Article 1135: the meeting of co-owners is designed to ensure, inter alia, the appointment of the administrator, approval of the estimate of expenses necessary during the year and the allocation thereof among the co-owners, and the decisions on extraordinary maintenance works and innovations, through the mandatory establishment of a special fund in an amount equal to those costs.

Article 1130: the administrator is required to: implement the resolutions of the meeting, convene it annually to approve the report on the *condominio* ... and ensure compliance with rules governing the *condominio*; regulate the use of the common parts ... so as to ensure the maximum enjoyment of each of the co-owners; and to collect the contributions and pay the expenses necessary for the ordinary maintenance of the common parts of the building and for providing the common services.

Article 1129: the administrator is also required ‘*to transfer amounts received for whatever reason from the co-owners or third parties, and those paid for any reason on behalf of the body of the co-owned apartment building, to a specific current account in the name of the body of the co-owned apartment building*’.

Article 1131: the administrator is to represent the *condominio* and may take legal action to protect its interests either against the co-owners or third parties, or may be sued for any action concerning the common parts of the building.

Article 1133: the measures taken by the administrator within the scope of his powers are to be ‘*binding on the co-owners*’.

Article 2659: the *condominio* is to have own tax code, which must be indicated in any acts which may be recorded in the land register.

Article 71 *bis* of the provisions implementing the Civil Code (annexed to that code): in order to perform the function of administrator of the *condominio*, certain personal requirements must be met, such as enjoyment of civil rights and a lack of criminal convictions for certain offices, as must certain professional requirements relating to educational qualifications, attendance on a training course for administrators of the *condominio* and the relevant refresher courses. The function of administrator of the *condominio* may also be performed by a company.

Succinct presentation of the facts and the main proceedings

- 1 The Condominio di Milano (the entity comprising owners of apartments in a building in Milan; hereinafter: ‘the *Condominio*’) was served with a writ of execution by which Eurothermo SpA (hereinafter: ‘Eurothermo’) gave it formal notice to pay EUR 21 025.43 by way of default interest.
- 2 A similar quantification of interest had been provided for in the general conditions of the contract initially concluded between the parties, drawn up by Eurothermo and accepted by the *Condominio*, and had been expressly referred to in the subsequent mediation agreement signed by them on 14 November 2014 with the assistance of the relevant lawyers. Under that agreement, the amount owned by the *Condominio* to Eurothermo — the capital sum of EUR 71 392.31, plus interest, calculated up to the date of the agreement, amounting to EUR 15 648.62 — was to be paid in monthly instalments of EUR 5 000 each. The mediation agreement provided for the calculation of default interest as per the initial contract, which set the rate at 9.25% (higher than the statutory rate) and the related adjustment at the time of the final settlement.
- 3 Subsequently, the *Condominio* had paid the instalments covering the entire principal sum and part of the interest, as stated in the mediation agreement. However, following failure to pay the instalment due in February 2016, Eurothermo had notified the writ of execution in question to the *Condominio*, issuing a formal demand for payment of EUR 21 025.43 by way of default interest, calculated at the rate of 9.25%, for the period from 1 January 2011 (the date on which the initial contract was concluded) to 17 February 2016 (the date of the failure to pay an instalment).
- 4 The *Condominio* lodged an objection to that writ of execution with the referring court.

The essential arguments of the parties to the main proceedings

- 5 It is common ground between the parties that the *Condominio* paid the entire amount owed by way of capital, but they disagree as to whether further sums are owed by way of default interest for a period following the mediation agreement of 14 November 2014.
- 6 The *Condominio* considers that that agreement has given rise to a new obligation, replacing that covered by the initial contract, with the result that Eurothermo cannot demand interest higher than that calculated definitively on the date of the mediation agreement and stipulated therein, in the amount of EUR 15 648.62, less the amount of that interest already paid by it in the monthly instalments made pursuant to that agreement.
- 7 The *Condominio* further takes the view that it has the *status* of consumer vis-à-vis that company and consequently claims that the referring court should declare ‘unfair’ the term of the initial contract, referred to in the mediation agreement, relating to the default interest in dispute.
- 8 Eurothermo replies that it is irrelevant, for the purposes of the decision, to establish whether or not the *Condominio* has the *status* of consumer, given that, in any event, the parties’ right to set default interest above the statutory rate remains unaffected.
- 9 That company goes on to assert that the contractual term relating to interest was signed twice by the *Condominio*, as provided for by Articles 1341 and 1342 of the Civil Code. Finally, the default interest rate set in that term (9.25%) cannot be regarded as unfair since the applicable statutory rate of interest is 8%.

Succinct presentation of the reasons for the request for a preliminary ruling

- 10 The referring court considers that the term in dispute is ‘unfair’ for the purposes of the legislation on consumer protection (in particular Article 33(2) of Legislative Decree No 206/2005).
- 11 However, the prerequisite for reaching such a conclusion is the possibility of classifying the *condominio* as a ‘consumer’.
- 12 In this regard, the referring court observes firstly that in national law, in the absence of a specific definition in the Civil Code, the legal nature of the *condominio* is the subject of conflicting approaches in the case-law of the Corte Suprema di cassazione (Supreme Court of Cassation).
- 13 According to a traditional approach, the *condominio* is a management entity with no legal personality distinct from that of the co-owners.

- 14 According to a more recent approach, it is an autonomous legal person, distinct from the co-owners, even though it does not have full financial autonomy.
- 15 Secondly, as regards the specific question of whether or not the status of ‘consumer’ can be conferred on the *condominio*, the referring court notes that there is settled case-law of the Corte Suprema di cassazione according to which the rules on consumer protection must be applied to a contract concluded by the administrator of the *condominio* with a seller or supplier. This is because the administrator acts as a duly authorised representative of the individual co-owners, who in turn must be regarded as consumers as they are natural persons acting for purposes which are outside their trade, business or profession.
- 16 That notwithstanding, the referring court has doubts as to the possibility of classifying the *condominio* as a ‘consumer’ since the concept of consumer adopted in EU law (which the national law on consumer protection implements) concerns, according to its wording, a ‘natural person’ who acts for purposes which are outside any business, commerce, trade, or profession in which he may be engaged (Article 2(b) of Directive 93/13/EEC and Article 33(2) of Legislative Decree No 206/2005).
- 17 In particular, according to the referring court, the Court of Justice of the European Union (hereinafter: ‘the Court’) interprets the concept narrowly. In this regard, in a case relating to two contracts concluded between undertakings it found that ‘*the term consumer, as defined in Article 2(b) of [Directive 93/13/EEC], must be interpreted as referring solely to natural persons*’ (judgment of 22 November 2001, C-541/99 and C-542/99, *Cape Snc*).
- 18 The referring court further observes that on many occasions the Court has examined the concept in question, not on the basis of the natural person/legal person dichotomy, but rather by considering the capacity of the contracting parties in a specific case and, more precisely, whether or not, in concluding a particular contract, they are acting for purposes which are outside their trade, business or profession (judgments of 19 November 2015, C-74/15, *Tarcău*; of 15 January 2015, C-537/13, *Šiba*; and of 30 May 2013, C-488/11, *Asbeek Brusse and de Man Garabitó*).
- 19 A similar approach was taken by the Court in view of the logic underlying the protection afforded to the consumer, that is to say, the weaker position that the consumer is in vis-à-vis the seller or supplier, as regards both his bargaining power and level of knowledge. This weaker position, which leads to the weak consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (judgment of 26 October 2006, C-168/05, *Mostaza Claro*), forms the basis for the action pursuant to Article 6 of Directive 93/13/EEC aimed at restoring substantive equality between the parties (judgments of 17 July 2014, C-169/14, *Sánchez Morcillo*, and of 14 June 2012, C-618/10, *Banco Espanol de Crédito*).

- 20 By the same reasoning, the Court has declared that the concept of consumer is ‘*objective in nature*’ and is distinct from the concrete knowledge that the person in question may have, or from the information that person actually has, with the result that the national court must, in order to establish whether a contracting party can be classified as a consumer, take into account all the circumstances of the case, ‘*particularly the nature of the goods or service covered by the contract in question, capable of showing the purpose for which those goods or that service is being acquired*’ (judgment of 3 September 2015, C-110/14, *Costea*, [paragraphs 21 and 23] in which the Court held that it is not possible to exclude a lawyer from being categorised as a consumer in the case where he is acting for purposes which are outside his trade, business or profession).
- 21 In the light of the legislation and case-law of the Court cited by the referring court, it is not, in its view, possible, despite the cited case-law of the Italian Corte Suprema di cassazione stating that it is possible, to declare that the *condominio* has the capacity of ‘consumer’ as it is not a ‘natural person’.
- 22 The referring court nevertheless retains a fundamental doubt arising from the fact that the distinction between a natural person and a legal person (on the basis of the concepts of consumer and seller or supplier in EU law and national implementing law) is reductive since it disregards the existence of particular persons (which are to be found only in certain national legal systems) who cannot be covered by it and who nevertheless may be in a weaker position vis-à-vis the seller or supplier, as regards both their bargaining power and level of knowledge. Also, in such situations, they too may require legal protection capable of restoring genuine balance and substantive equality between the parties.
- 23 The referring court therefore considers it appropriate to ask the Court whether it is possible to overcome the reasoning set out above and to afford the status, and the consequent protection, of consumer also to an entity such as the *condominio*, which, although it cannot be regarded as a natural person or a legal person, is in a position of weakness vis-à-vis the seller or supplier.
- 24 This question is relevant to the resolution of the present dispute since, if the answer of the Court is in the affirmative, the referring court will have to allow the objection raised by the Condominio di Milano to the order for payment issued by Eurothermo.