

Case C-831/19

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:

14 November 2019

Referring court:

Tribunale di Milano (District Court, Milan, Italy)

Date of the decision to refer:

31 October 2019

Applicants:

Banco di Desio e della Brianza SpA

Banca di Credito Cooperativo di Carugate e Inzago SC

Intesa Sanpaolo SpA

Banca Popolare di Sondrio SCpA

Cerved Credit Management SpA

Defendants:

YX

ZW

Subject matter of the main proceedings

Enforcement proceedings — Expropriation of property

Subject matter and legal basis of the request

Interpretation of Article 47 of the Charter of Fundamental Rights of the European Union and Articles 6 and 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), with particular reference

to a situation in which a guarantor, citing consumer protection legislation, asks the court to determine whether a contractual term is unfair.

Questions referred

(a) Under what conditions, if any, do the combined provisions of Articles 6 and 7 of Directive 93/13/EEC and Article 47 of the Charter of Fundamental Rights of the European Union preclude a national rule, such as that under consideration, which prevents the court hearing enforcement proceedings from carrying out a review of the content of an enforceable judicial instrument that has acquired the force of *res judicata*, when the consumer, having become aware of his status (an awareness not previously possible under the law as applied at the relevant time), requests such a review?

(b) Under what conditions, if any, do the combined provisions of Articles 6 and 7 of Directive 93/13/EEC and Article 47 of the Charter of Fundamental Rights of the European Union preclude a legal system, such as the national system under consideration, which, in the light of an implicit decision that a contractual term is fair, a decision having acquired the force of *res judicata*, prevents the court hearing enforcement proceedings, called upon to rule on the consumer's objection to the enforcement, from finding the term to be unfair? Moreover, can such a court be so precluded where — under the law as it was applied at the time that decision acquired the force of *res judicata* — it was not possible to consider whether the term was unfair because the guarantor could not be classified as a consumer?

Provisions of EU law relied upon

Charter of Fundamental Rights

Directive 93/13/EEC

Provisions of national law cited

Decreto legislativo 6 settembre 2005, n. 206 (Legislative Decree No 206 of 6 September 2005), or the 'codice del consumo' (Consumer Code), and in particular Article 33(1) and (2)(t) and (u) thereof:

‘1. In a contract concluded between a consumer and a seller or supplier, terms shall be regarded as unfair where, even if they were agreed in good faith, they give rise to a significant imbalance in the rights and obligations under the contract to the detriment of the consumer.

2. In the absence of proof to the contrary, terms shall be presumed to be unfair if they have the object or effect of:

[...]

(t) penalising the consumer through the imposition of time limits for the bringing of an action, limitations on the right to lodge objections, derogations from the jurisdiction of the courts, limitations on the submission of evidence, a reversal or modifications of the burden of proof, restrictions on freedom to enter into contracts in relations with third parties;

(u) establishing as the venue for the court having jurisdiction to hear disputes a place other than that of the consumer's place of residence or that of his address for service ...'

and Article 36:

'1. Terms regarded as unfair within the meaning of Articles 33 and 34 shall be void, while the contract shall remain valid as to the remainder.

[...]

3. Where a term is deemed void, this shall apply solely for the benefit of the consumer and may be raised by the court of its own motion.'

Succinct presentation of the facts and procedure

- 1 On 18 November 2005, Banco di Desio entered into surety agreements with YX and ZW. The agreements were intended as security for loans taken out by a commercial company ('the principal debtor').
- 2 After obtaining an order for payment, which was not contested and therefore became *res judicata*, Banco di Desio initiated proceedings for the expropriation of property in respect of assets owned (half each) by YZ and ZW.
- 3 The other applicants, creditors on various grounds of YX, ZW and the principal debtor joined the proceedings.
- 4 By deed of transfer of 29 January 2013, ZW became a shareholder of the principal debtor with a 22% stake in the company. However, it is not apparent that ZW has ever held any position of responsibility within the principal debtor. In addition, it is apparent that ZW is an employee of another commercial company.
- 5 In the light of those facts, the referring court ruled that YX (the legal representative of the principal debtor) could be classified as a consumer, but allowed the possibility of classifying ZW as a consumer.

The essential arguments of the parties in the main proceedings

- 6 The applicants argue that ZW cannot be classified as a consumer in view of her status as a shareholder of the principal debtor and the marital relationship between her and YX, the legal representative of the principal debtor.

- 7 In addition, the 22% stake in the principal debtor entitles her to receive a share of the company profits, which is also sufficient to constitute ZW's sole income.
- 8 Lastly, the referring court's jurisdiction is contested as regards the alleged breach of antitrust rules.

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

- 9 According to the case-law of the Corte suprema di cassazione (Supreme Court of Cassation), the principle of *res judicata* covers not only the express terms of the decision, but also the reasons that form, albeit implicitly, its logical and legal basis. The same approach also applies to an order for payment requiring the payment of a sum of money, which, if it is not contested, becomes final not only in relation to the claim in respect of which the action is brought, but also in relation to the instrument on which that claim is based, thus precluding any further examination of the reasons adduced to justify the application in question.
- 10 That principle, which is derived from case-law and referred to as '*giudicato implicito*' (the 'force of *res judicata*' by implication), is based on the logical argument that, if the court has ruled on a particular matter, it has clearly dealt with all the other issues that may be regarded as preliminary to the matter expressly decided and has found that they do not preclude its ruling.
- 11 However, once the order for payment has been obtained, provided the creditor serves the enforcement order, it may, by giving notice of the order for attachment, initiate expropriation proceedings. With the expropriation of property in particular, the creditor, on the basis of an enforceable instrument, expropriates (by serving a notice of attachment) the right *in rem* over immovable property owned by the debtor.
- 12 According to the case-law of the Supreme Court of Cassation, expropriation proceedings, unlike declaratory proceedings, 'do not consist of a continuous sequence of actions leading to a single final measure, but of a collection of sub-proceedings — in other words, a separate series of actions divided into different successive measures'. In enforcement proceedings, the court provides direction which is 'limited to overseeing the proper completion of the actions comprising the enforcement proceedings in a timely and appropriate manner'. It is therefore precluded from exercising any decision-making powers.
- 13 Regarding the powers that may be exercised by the court hearing the enforcement proceedings of its own motion, the referring court also notes that the existence of a valid enforceable instrument is a prerequisite for the enforcement action. As a result, the enforceable instrument must remain valid throughout the expropriation procedure, failing which the expropriation cannot proceed. The court hearing the enforcement proceedings thus has the power and the duty to verify that the enforceable instrument exists at the start of and throughout the enforcement proceedings and must discontinue the proceedings should that instrument be

invalid. However, the power that may be exercised by the court hearing the enforcement proceedings of its own motion is limited to verifying the existence of the enforceable instrument and does not extend to its ‘intrinsic content’.

- 14 The referring court cites the case-law of the Court of Justice according to which ‘Articles 1(1) and 2(b) of Directive 93/13 [...] must be interpreted as meaning that that directive applies to a contract providing immovable property as security concluded between natural persons and a credit institution in order to guarantee the obligations that a commercial company has undertaken with respect to that credit institution for a credit agreement, where those natural persons have acted for purposes which are outside their trade, business or profession and have no functional links with that company, which is for the referring court to determine’ (Order of the Court of 14 September 2016, C-534/15, *Dumitraş*, EU:C:2016:700).
- 15 A similar approach was also recently adopted by the Supreme Court of Cassation. By Judgment No 32225 of 13 December 2018, it found that the subjective requirements for consumer protection laws to apply to a surety agreement entered into by a shareholder for the benefit of the company must be assessed by reference to the terms of that surety agreement (rather than the separate main agreement), focusing on the size of the equity stake and any role as director of the company in respect of which the guarantee was given performed by the guarantor. It should be noted, however, that, prior to that decision, the Court of Cassation had, on the other hand, consistently held that, in the presence of a surety agreement, the subjective requirement for consumer status should relate to the secured obligation, given the ancillary nature of the guarantor’s obligation in relation to the secured obligation.
- 16 The referring court goes on to cite the case-law of the Court of Justice according to which ‘the system of protection introduced by the Directive [93/13] is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms’ and ‘the aim of Article 6 of [Directive 93/13], which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers’ fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair. It follows that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion’ (judgment of 27 June 2000, *Océano Grupo Editorial and Salvat Editores*, C-240/98 to C-244/98, EU:C:2000:346, paragraphs 25 and 26).

- 17 According to the referring court, what was merely an option for courts in the judgment in *Océano* became, in the judgment of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350), a veritable duty to examine of its own motion whether the term is unfair where it has available to it, according to the wording in paragraph 35 of the judgment in *Pannon*, ‘the legal and factual elements necessary for that task’ (without prejudice to the need for the consumer to express his or her intention to rely on the unfairness and non-binding nature of the term). That duty is consistent with the court’s task of ensuring the effectiveness of the protection intended by the provisions of Directive 93/13.
- 18 Moreover, the Court of Justice has held that Article 6(1) of Directive 93/13 is ‘a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them’ and that ‘the nature and importance of the public interest underlying the protection which the directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier’ (judgment of 26 October 2006, C-168/05, *Mostaza Claro*, EU:C:2006:675, paragraphs 36 and 38). The importance of the interest underlying the consumer protection afforded by Directive 93/13 has been further confirmed in rulings in which the Court of Justice, in view of the principle of equivalence (which is limited — together with the principle of effective protection — by the principle of the procedural autonomy of Member States), has found Article 6 of Directive 93/13 to be equivalent to national rules that have, within the domestic legal system, the character of rules of public policy (see, inter alia, judgment of 21 December 2016, *Gutiérrez Naranjo*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 54).
- 19 In the opinion of the referring court, this applies to those decisions that, in observance either of the principle of equivalence or of the principle of effective protection, have conferred on the national court investigative powers that it can use of its own motion (see, inter alia, judgment of 9 November 2010, *VB Pénzügyi Lízing*, C-137/08, EU:C:2010:659) and those decisions that, under certain conditions, allowed the force of *res judicata* to be overridden.
- 20 Among the latter category of decisions, the referring court points to the judgment of 6 October 2009 *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615), in which the Court held, in paragraph 53, that ‘inasmuch as the national court or tribunal seised of an action for enforcement of a final arbitration award is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair in the light of Article 6 of [Directive 93/13]’.

- 21 In that judgment, the Court ruled that, in observance of the principle of effective protection, the Spanish court hearing an action for enforcement of an arbitration award which was not contested and which was made in proceedings in which the consumer did not participate could not raise of its own motion the argument that a contractual term was unfair (in that case, the term in question established the seat of the arbitration tribunal).
- 22 In the same case, according to the referring court, Advocate General Trstenjak came to a different conclusion, taking the view that the national court's ruling in favour of an argument raised of its own motion was the solution that was most consistent with the objective of consumer protection pursued by Directive 93/13, and that the consumer's failure to act in the proceedings which culminated in the delivery of the enforceable instrument (proceedings which, moreover, did not in fact take place before a court of law) could be remedied when that instrument was enforced.
- 23 The referring court doubts whether the surety agreement concluded between Banco di Desio and ZW complies with Article 33(2)(u) of Legislative Decree No 206 (and the corresponding provision of Directive 93/13).
- 24 According to national law and case-law, since ZW did not contest the order for payment, that order acquired the force of *res judicata*, and the (lack of) unfairness of the terms contained in the contract between Banco di Desio and ZW must now be regarded as subject to the force of *res judicata* by implication.
- 25 In the opinion of the creditors, this precludes the possibility of examining whether the contractual terms are unfair, particularly in the light of the *Asturcom* judgment.
- 26 However, the referring court has doubts as to whether that case-law is directly applicable, considering the differences between the Italian and Spanish legal systems and the individual circumstances of the case at issue.
- 27 First, the proceedings initiated by Asturcom were not adversarial proceedings; at the end of those proceedings, the court, in the (physical) absence of the debtor (who had previously failed to act when the enforceable instrument was issued), was limited to a choice between issuing or not issuing the general enforcement order.
- 28 In the present proceedings, however, the debtor — who has already entered an appearance — has expressed her intention to rely on the (possible) unfairness of the contractual terms. The debtor's failure to act prior to the delivery of the final judgment therefore came to an end. After claiming consumer status, the debtor has assumed an active role, indicating various terms whose unfairness she intends to rely on.
- 29 Second, as regards the individual circumstances of the specific case, the referring court notes that, when the orders for payment were issued, the decisions in which the Court of Justice laid down the criteria for classifying the guarantor as a

consumer had not yet been made. Consequently, at that time, ZW — who in view of the settled case-law of the Court of Cassation could not present herself as a consumer — was unable to assert that terms contained in the contract entered into with the seller or supplier were unfair, even when contesting the order for payment.

- 30 Consequently, through no fault of her own, ZW lacked the knowledge to make an informed choice as to whether or not to rely on the protection granted to a natural person entering into a contract for a purpose not related to that occupation. Such an informed choice was possible only after the expropriation procedure had commenced, at a time when, according to national law, the decisions contained in the orders for payment could not be overturned.
- 31 The referring court therefore asks whether, in this situation, the applicable law makes it impossible or excessively difficult to exercise the rights afforded consumers under national legislation transposing Directive 93/13, and whether the need to ensure effective protection for the debtor permits scrutiny of the unfairness of terms contained in a contract on the basis of which an order for payment was obtained, even though that order for payment has acquired the force of *res judicata* because it was not contested.
- 32 Regarding the second question referred for a preliminary ruling, the referring court observes that, in the light of national procedural principles, the question whether the terms of the surety agreement are unfair is subject to the force of *res judicata* by implication.
- 33 It follows from this that it is impossible to rely on the unfairness of those terms in substantive proceedings. Furthermore, opposition to enforcement is not permissible if it is based on grounds that the party should have put forward when the enforceable instrument was being issued.
- 34 In its judgment of 26 January 2017, *Banco Primus* [C-421/14] (EU:C:2017:60), the Court of Justice ruled that the national legislation in question was contrary to Directive 93/13 in so far as Spanish law ‘prohibits the national courts from examining of their own motion the unfairness of contractual terms which have been entered into with a seller or supplier, where a ruling has already been given on the lawfulness of the terms of the contract, taken as a whole, with regard to Directive 93/13, in a decision which has become *res judicata*’ (paragraph 49). However, in the same judgment, the Court held that ‘where there are one or more contractual terms the potential unfair nature of which has not been examined during an earlier judicial review of the contract in dispute which has been closed by a decision which has become *res judicata*, Directive 93/13 must be interpreted as meaning that a national court, before which a consumer has properly lodged an objection, is required to assess the potential unfairness of those terms, whether at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose’ (paragraph 54) and that ‘where, in a previous examination of a contract in dispute which led to the adoption of a

decision which has become *res judicata*, the national court limited itself to examining of its own motion, with regard to Directive 93/13, one or certain terms of that contract, that directive requires a national court, such as the one in the main proceedings, before which a consumer has properly lodged an objection to enforcement proceedings, to assess, at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose, the potential unfairness of other terms of that contract. In the absence of such a review, consumer protection would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13' (paragraph 52).

- 35 In the light of the foregoing, the referring court considers that the Court of Justice, while ruling out the possibility of overriding the explicit force of *res judicata*, has not examined the compatibility of the concept of the force of *res judicata* by implication with Articles 6 and 7 of Directive 93/13 and Article 47 of the Charter of Fundamental Rights of the European Union.
- 36 The referring court therefore asks whether the need for certainty in legal situations on which a decision having the force of *res judicata* is based has the same effect — in terms of the stability of the decision — both in the case of the express force of *res judicata* and in the case of *res judicata* by implication, or whether Articles 6 and 7 of Directive 93/13, read in the light of Article 47 of the Charter, allow the force of *res judicata* by implication to be overridden if the decision that has acquired the force of *res judicata* (by implication) is clearly contrary to the right to an effective judicial remedy.
- 37 In other words, the referring court asks whether the right to effective protection under Articles 6 and 7 of Directive 93/13, read in conjunction with Article 47 of the Charter, enables the consumer to challenge (by opposing enforcement) the intrinsic content of a court decision which — although not having expressly ruled on whether terms contained in a contract are unfair — has now acquired the force of *res judicata*.