

Case C-693/19

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:

13 September 2019

Referring court:

Tribunale di Milano (District Court, Milan, Italy)

Date of the decision to refer:

10 August 2019

Applicants:

SPV Project 1503 Srl

Dobank SpA

Defendant:

YB

Subject-matter of the main proceedings

Enforcement proceedings — Compulsory expropriation

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)

Question referred for a preliminary ruling

Under what conditions, if any, do 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 law, such as the one referred to, which prevents the enforcement court from performing a review of the content of a judicial enforceable instrument that

has become final and, where a consumer has expressed his or her desire to rely on the unfairness of a term contained in the contract in respect of which the enforceable instrument was issued, precludes the same court from overriding the effects of the implicit force of *res judicata*?

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), otherwise known as the codice del consumo (Consumer Code), and in particular Article 33(1) and (2)(f) 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 cause a significant imbalance in the rights and obligations under the contract to the detriment of the consumer.

2. Until proven otherwise, terms shall be presumed to be unfair if they have the object or effect of:

[...]

(f) requiring the consumer, in the event of non-performance or late performance, to pay a disproportionately high sum in compensation, under a penalty clause or equivalent; [...]

and Article 36:

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

[...]

3. The invalidity shall apply solely for the benefit of the consumer and may be determined by the court of its own motion’.

Succinct presentation of the facts and procedure

- 1 The defendant, YB, entered into various loan agreements for an amount totalling EUR 18 200 with Findomestic Banca SpA, which assigned its claim to Activa

Factor SpA. In turn, Activa Factor SpA assigned that claim to the applicant, SPV Project 1503 srl ('SPV').

- 2 Under the terms of those loan agreements, in the event of late performance of the loan repayment obligation, a penalty and default interest were to apply.
- 3 Pursuant to those terms, SPV served an order for payment on YB, which the debtor did not contest and which therefore became final. Subsequently, SPV served an attachment order on YB for claims that YB held against certain banks. The attachment order served mentioned a figure of EUR 31 332.
- 4 That amount is broken down as follows: EUR 16 290.52 in 'principal, as referred to in the order for payment', EUR 13 539.27 in 'interest, as per the order for payment', with the remainder consisting of expenses and fees.
- 5 At the hearing, SPV stated that its claim was for EUR 34 479.25.
- 6 During the enforcement proceedings, after the referring court found that the term determining the default interest rate (which was more than 14% per annum) could be considered unfair, it asked the debtor to indicate whether he wished to rely on the unfairness of the terms relating to the default interest, which, if established, could potentially reduce SPV's claim.

The essential arguments of the parties in the main proceedings

- 7 During the expropriation proceedings, YB stated that he wished to rely on the unfairness of the term setting the default interest rate. Citing the judgment of 9 November 2010, *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659), the referring court noted the possibility of exercising its investigative powers of its own motion in order to ascertain whether the term setting the default interest rate was unfair.
- 8 SPV argued that the force of *res judicata* acquired by the order for payment could not be overridden, since the purpose of this was to ensure legal certainty. It further noted, in the alternative, that the burden of proof as to the unfairness of the term rested with YB and concluded that the agreed default interest rates were not usurious.

Succinct presentation of the reasoning in 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 actual delivery 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 issued in respect of that claim, thus precluding any further examination of the reasons adduced to justify that application.

- 10 That principle, which is derived from case-law and referred to as the ‘implicit force of *res judicata*’, is based on the logical argument that, if the court has ruled on a particular matter, it has clearly dealt with all the other matters considered preliminary to the matter actually decided and has found that they do not preclude its ruling.
- 11 However, once the order for payment has been obtained, provided that the creditor serves the enforcement order, it may, by giving notice of the attachment, initiate compulsory expropriation proceedings. In the case of expropriation from third parties in particular, the creditor undertakes compulsory expropriation, on the basis of an enforceable instrument, in respect of the claims that that debtor has against third parties (by serving a notice of the attachment).
- 12 According to the case-law of the Corte suprema di cassazione (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 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 enforcement court 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 while the expropriation is ongoing, failing which the expropriation cannot proceed. The enforcement court thus has the power and the duty to verify the existence of the enforceable instrument at the start of and throughout the enforcement proceedings and must discontinue the proceedings should the order lapse. However, the power that may be exercised by the enforcement court 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 also points out that, in the expropriation of claims, the third party (in other words, the debtor of the debtor who is subject to the expropriation), once notified of the attachment order, becomes the custodian of the sums owed by him up to the amount of the claim indicated in the enforcement order, and is required to inform the creditor ‘of what or how much he owes or is in his possession and when payment or delivery is to take place’ (first paragraph of Article 547 of the codice di procedura civile (Code of Civil Procedure)).
- 15 Lastly, at the current stage of the main proceedings, the enforcement court may exercise powers of its own motion aimed at verifying not only the existence of the

enforceable instrument, but also the correct quantification of the claim; however, as is stated above, this does not extend to the content of the instrument.

- 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 the court 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 the unfairness of the term as soon as 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 desire 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, 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), 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 take place before a court of law) could be remedied when that instrument was enforced.
- 23 In the view of the referring court, there is also a difference between the present proceedings and the main proceedings in the *Asturcom* judgment.
- 24 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.
- 25 By contrast, the debtor participated in the present enforcement proceedings (and thus brought to an end his failure to act which had led to the delivery of the order

for payment, which had become final) and expressed his desire to rely on the (possible) unfairness of the contractual terms.

- 26 Conversely, in its judgment of 18 February 2016, *Finanmadrid* (C-49/14, EU:C:2016:98), the Court found that Spanish procedural rules that did not allow, in the context of proceedings for the issuance of an order for payment or for the enforcement of an order for payment, an assessment of its own motion of the possible unfairness of the terms included in the contract from which the claim arose were contrary to the principle of effective protection provided for by Directive 93/13.
- 27 In the case at issue, the referring court doubts that the term quantifying the default interest due to the creditor and the term that, in addition to the default interest, provides for a penalty clause 'set at 8%' are compliant with Article 33(2)(f) of Legislative Decree No 206 (and the corresponding provision of Directive 93/13).
- 28 According to the order for payment, the court that issued that order did not rule on the possible unfairness of those terms.
- 29 According to national law and case-law, since YB did not contest the order for payment, that order became final, and the (lack of) unfairness of the terms contained in the contract concluded between the creditor and the debtor must now be regarded as subject to the implicit force of *res judicata*.
- 30 In the light of the principle of equivalence of protection, it follows that it is impossible for the enforcement court to find that the terms contained in that contract are unfair. Not only is the enforcement court prevented under national law from performing an assessment of the content of the judicial enforceable instrument, but that instrument has now also acquired the force of *res judicata*.
- 31 The referring court therefore wishes to ask the Court, first, whether the need to replace the formal balance which the contract establishes between the rights and obligations of the seller or supplier and the consumer with an effective balance which re-establishes equality between them allows the enforcement court to inform the consumer (even though he failed to act during the proceedings that gave rise to the delivery of the enforceable instrument, which has now become final) of the possible unfairness of the contractual terms, which has not been expressly ruled out by the decision which has become final, and, second, whether, if the consumer wishes to rely on the unfairness of those terms, the same court may examine the unfairness of the contractual terms, despite the fact that the enforcement court is prevented from performing an examination of the content of the enforceable instrument and that that instrument has now become final.
- 32 According to the referring court, the failure to examine whether the terms were unfair in law could result in incomplete and inadequate consumer protection which fails to provide an appropriate and effective means of preventing the use of unfair terms.

- 33 The court's initiative in informing the consumer of the possible infringement of rules introduced to protect the weaker party to the contract does not undermine its impartiality.
- 34 The referring court notes the Court's assertion that the impartiality of the court involves it ensuring a level playing field for 'the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings'. In that respect, the exercise of the court's official powers, rather than being an expression of the court's lack of impartiality, is indicative of the notion that the court is not only the arbiter of a dispute between the parties, but also represents society's common interest (see, to that effect, judgment of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraphs 61 and 64).
- 35 Lastly, in addition to that impartiality, the referring court also bases its question on Article 47 of the Charter, since the Court has attached particular importance to that provision from the point of view of the 'effectiveness of the rights that the parties derive from Directive 93/13 against the use of unfair clauses' (judgment of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 35).