

Case C-320/24**Summary of reference for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

30 April 2024

Referring court:

Corte suprema di cassazione (Italy)

Date of the decision to refer:

26 April 2024

Appellants:

CR

TP

Respondent:

Soledil Srl, a company that has entered into a composition agreement with its creditors [formerly Soledil SpA]

Subject matter of the main proceedings

Dispute between two consumers and a construction company concerning the quantification of the penalty due by them following the termination for breach of a preliminary contract of sale relating to a property signed in 1998. The main proceedings are being held before the Corte di cassazione (Supreme Court of Cassation, Italy) and relate to the legality review of a judgment on the merits handed down by the Corte d'Appello (Court of Appeal, Italy) at the end of a case that had been remanded on the basis of an earlier Court of Cassation judgment on a first appellate ruling. In the context of those main proceedings, the private individuals have for the first time asserted the unfair nature of a penalty clause and its nullity/lack of legal effect within the meaning of Directive 93/13/EEC on consumer protection; the question therefore arises as to whether the res judicata authority implicitly formed on the issues not expressly dealt with in the proceedings (such as, in this case, the question of the nullity or lack of legal effect of the unfair terms) can be overcome, and whether that question of nullity or lack

of legal effect can therefore be raised by the Supreme Court of Cassation of its own motion in the new proceedings.

Subject matter and legal basis of the reference for a preliminary ruling

Pursuant to Article 267 TFEU, the Court is asked whether Directive 93/13/EEC on unfair terms in consumer contracts may be interpreted as precluding national procedural rules which prevent a court from finding of its own motion that an unfair term is null and lacking legal effect where a judgment has been implicitly handed down in previous proceedings on the merit and on the legality of the judgement, in the course of which the validity and legal effect of that term had always been assumed, taking into account the fact that the persons concerned never relied on such nullity/lack of legal effect in the course of those proceedings.

Question referred

Are Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and Article 47 of the Charter of Fundamental Rights of the European Union to be interpreted:

(a) as meaning that they preclude the application of the national procedure principles according to which preliminary questions, including those relating to the nullity of the contract, which have not been raised before the Court of Cassation, and which are logically incompatible with the nature of that court's judgment, cannot be examined in the remitted proceedings or upon the review of legality to which the parties submit the judgment which was handed down by the court to which the case had been remitted;

(b) also considering the complete passivity on the part of the consumers, where they never challenged the nullity/lack of legal effect of the unfair terms, except by appealing before the Supreme Court of Cassation at the outcome of the proceedings held before the court to which the case had been remitted;

(c) and this with particular reference to the finding that a manifestly excessive penalty clause is unfair, the adjustment of its reduction according to appropriate criteria (quantum) having been ordered by the Supreme Court of Cassation, also on account of the consumers' failure to argue that the clause is unfair (cause of action) except after the ruling by the court to which the case had been remitted?

Provisions of EU law relied on

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Directive 93/13'): in particular, Articles 6 and 7 thereof

Charter of Fundamental Rights of the European Union ('the Charter'): Article 47

Judgments of the Court of Justice of 4 June 2020, *Kancelaria Medius* (C-495/19, EU:C:2020:431), as well as of 17 May 2022, *SPV Project 1503 and Others* (C-693/19 and C-831/19, EU:C:2022:395); *Unicaja Banco* (C-869-19, EU:C:2022:397); *Ibercaja Banco* (C-600/19, ECLI:EU:C:2022:394) and *Impuls Leasing Romania* (C-725/19, EU:C:2022:396)

Provisions of national law relied on

Article 1341, second paragraph of the *Codice Civile* (Italian Civil Code, ‘the Civil Code’), concerning the necessity of a specific double signature of clauses determining, for one party, a significant imbalance in the rights and obligations arising from a contract

Article 1469-bis, third paragraph, number 6, of the Civil Code in the version in force on 9 September 1998 (the date on which the contract at issue in the main proceedings was signed), introduced by Law No 52 of 6 February 1996 in express implementation of Directive 93/13 [now Article 33 of Legislative Decree No 206 of 6 September 2005 – *Codice del consumo* (Italian Consumer Code, ‘the Consumer Code’), under which there is a presumption of unfairness in respect of clauses which, in the event of breach, provide for the payment of a manifestly excessive sum

Article 1469-quinquies of the Civil Code, in the version in force on 9 September 1998, introduced by Law No 52/1996 [which in the meantime has become Article 36 of the Consumer Code], pursuant to which unfair terms are null and lack legal effect, benefiting only consumers, and this may be ruled by the court of its own motion

Article 394 of the *Codice di procedura civile* (Italian Code of Civil Procedure, the ‘Code of Civil Procedure’) and related interpretative case-law. Pursuant to this provision, the proceedings remanded to the Court of Appeal are ‘closed’ proceedings, preordained to issue a new ruling to replace the one annulled by the Supreme Court of Cassation, with the parties not being able to expand the subject matter of the judgement by putting forward new claims and objections, including matters that could have been raised by the court of its own motion that were not considered by the Supreme Court of Cassation and on which an implied judgement had been developed (among others, orders of the Supreme Court of Cassation, Section 2, No 29879 of 27 October 2023; Section 6-3, No 27736 of 22 September 2022; Section 6-5, No 26108 of 18 October 2018)

Established case-law of the Supreme Court of Cassation whereby the principles set out in judgments of the Court of Justice interpreting EU law constitute *ius superveniens* and are immediately applicable in national law (among others, judgments of the Supreme Court of Cassation, Section 5, No 14624 of 25 May 2023; Section 5, No 9375 of 5 April 2023)

Succinct presentation of the facts and the proceedings

A. The arbitration award, the judgment before the Ancona Court of Appeal and the first appeal before the Supreme Court of Cassation

- 1 On 9 September 1998, CR and TP entered into a preliminary sale contract for a house with the company Soledil. They paid Soledil an advance of EUR 72 869.16 and took possession of the property, using it immediately, pending the signing of the final contract.
- 2 The preliminary contract contained a penalty clause whereby the parties had predetermined what was due to the other party in the event of non-performance by one of the contracting parties ('penalty clause'), quantifying it as the total amount of the advance payments made, without prejudice to compensation for any greater damages.
- 3 A dispute arose between the parties over the failure to sign the final contract; that dispute was initially submitted to an arbitration board, which had jurisdiction by virtue of an arbitration clause contained in the preliminary contract.
- 4 Subsequently, CR and TP challenged the arbitration award before the Ancona Court of Appeal, which, in a judgment of 28 March 2009, declared it null and void, inter alia, for failure to comply with a deadline. That Court then ruled the termination of the preliminary contract for non-performance, due to the unjustified refusal of CR and TP to enter into the final contract and settle the balance of the price due, ordering them to return the property. At the same time, Soledil was ordered to pay back the advance received, retaining – as a penalty thus reduced by the court – only the interest accrued on that sum. Soledil's claim for further damages was rejected in the absence of evidence in this regard.
- 5 Soledil appealed against that judgment before the Supreme Court of Cassation (first Supreme Court of Cassation appeal), asserting the undue reduction of the penalty and the unjustified rejection of the claim for compensation. CR and TP opposed the appeal and, at the same time, lodged a cross-appeal, disputing that the breach was due to any fault of theirs.
- 6 In its judgment of 14 November 2015, the Supreme Court of Cassation upheld Soledil's first ground of appeal, finding the reasoning of the Ancona Court of Appeal with regard to the criteria it had adopted to quantify the reduced penalty insufficient. By contrast, the cross-appeal was dismissed, with confirmation of the breach of contract judgment against CR and TP. Accordingly, the Supreme Court of Cassation set aside the contested judgment in so far as it related to the upheld ground and remanded the case to the Court of Appeal of Bologna for it to re-estimate the amount of the penalty owed to Soledil in accordance with the Supreme Court of Cassation's indications, pursuant to Article 394 of the Code of Civil Procedure.

B. The judgement remanding the case before the Bologna Court of Appeal and the second appeal before the Court of Cassation

- 7 Thereafter, Soledil resumed the case before the Bologna Court of Appeal, noting that the reduction of the penalty had not taken into account the creditor's interest in the performance of the contract, the balance of the various services, and, in particular, the nine-year period in which CR and TP had held and used the property, during which Soledil had not been able to rent it out for the purpose of deriving income from it. Therefore, it sought to confirm the quantification of the penalty in the amount provided for in the preliminary contract, equal to the advance payment of EUR 72 869.15, and to recognise the further damage resulting from the unlawful and protracted holding of the property by CR and TP, who, in turn, sought the dismissal of those claims.
- 8 At the end of the remanded proceedings, the Bologna Court of Appeal, by judgment of 12 October 2018, on the one hand quantified the penalty due by CR and TP in the amount of EUR 61 600.00, and, on the other hand, rejected the claim for further damages put forward by Soledil, reasoning, in particular: (a) that the subject matter of the remanded proceedings was limited to the application of the penalty and its potential reduction, as well as to the demonstration of any greater damage; (b) that it was well established and covered by the previous judgment that the conditions had been met for Soledil to obtain the penalty agreed in the preliminary contract; (c) that the said penalty clause was excessive, even taking into account that the de facto occupation of the property that lasted for many years and the creditor's interest in selling or renting the property (d) that CR and TP had paid the agreed advance payment while Soledil had in the meantime been able to receive interest income on those sums or to save interest expense on the sums that it may have otherwise borrowed; (e) that it was considered fair to consider a rent of EUR 550.00 per month (the average value between the rents indicated by the two parties to the dispute), for a total amount due of EUR 61 600.00, without interest and revaluation, in view of point (d); (f) that Soledil had not proved that it had suffered any further damage.

(c) The main proceedings (appeal before the Supreme Court of Cassation against the judgment of the Bologna Court of Appeal concluding the remanded proceedings)

- 9 Against that judgment, CR and TP brought an appeal for a legality review before the Supreme Court of Cassation (second appeal before the Supreme Court of Cassation), and the need for a preliminary ruling by the Court of Justice on the interpretation of Directive 93/13 arose in the context of those main proceedings.

Main arguments of the parties to the main proceedings

- 10 In that appeal, CR and TP ('the appellants') put forward for the first time a new plea in law, namely that the preliminary contract of sale constituted a contract between a consumer and a trader, and that the penalty clause at issue was unfair in

that it imposed the payment of a manifestly excessive sum of money by way of compensation. As such, it should have been the subject of a specific double signature by the consumers and, as this did not occur, it should be declared null and void, potentially by the court of its own motion, pursuant to Article 1341, par. 2 and Article 1469-*bis*, par. 3, number 6 of the Civil Code, read in conjunction with Article 1469-*quinquies* of the Civil Code, all of which considered in the version in force at the time the contract was entered into.

- 11 Consequently, the Bologna Court of Appeal allegedly erred in failing to find of its own motion that this clause was null and void. In this regard, the appellants take the view that the court finding the nullity of its own motion cannot be precluded by the implied judgment formed following the first judgment of the Court of Cassation, since consumer protection must in any event prevail.
- 12 In the alternative, if that plea is not upheld, the appellants submit that the court ruling on the merits quantified the penalty due by them erroneously and with contradictory reasoning.

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

- 13 First of all, the Court of Cassation recalls its own case-law whereby the consumer protection legislation is applicable to a preliminary contract for the sale of property where, as in the case at hand, it is entered into between a trader and private persons acting for purposes unconnected with the exercise of any professional activity (among others, Order No 497 of 14 January 2021 by Supreme Court of Cassation, Section 6-2).
- 14 In this regard, the Supreme Court of Cassation states that deposits, penalty clauses and other similar clauses, whereby the parties have agreed in advance on the amount of compensation owed to the other in the event of withdrawal or breach, are not unfair *per se*, since they do not fall within the cases referred to in Article 1341 of the Civil Code, and therefore do not require specific approval by the consumer. Nonetheless, as a result of the rules introduced into Articles 1469-*bis* and 1469-*quinquies* of the Civil Code by Law No 52/1996 in implementation of Directive 93/13 – rules in force at the time the contract was entered into – there is a presumption of unfairness regarding clauses that, in the event of breach, impose the payment of a manifestly excessive sum. Such unfairness is sanctioned by the nullity/lack of legal effect of these clauses, which operates only for the benefit of the consumer and which ‘may be found by the court of its own motion’ pursuant to the aforementioned Article 1469-*quinquies*.
- 15 This is, however, a new ground of appeal, raised by the appellants only in the second appeal before the Supreme Court of Cassation, brought after the remanded judgment, a ground which, first and foremost, runs counter to a judgment implicitly formed to the effect that the penalty clause at issue was valid and effective. Indeed:

(a) on the one hand, the decision on the reduction of the penalty clause as being excessive, adopted by the Supreme Court of Cassation in the first judgment, necessarily presupposes, from a logical-legal point of view, the validity and effectiveness of that clause, which became applicable following the termination of the contract pronounced on account of the breach of contract by the appellants, and

(b) on the other hand, no objection as to the nullity/lack of legal effect of the penalty clause was raised by the appellants at the previous instances.

- 16 In this respect, the Supreme Court of Cassation recalls that the remanded judgement was a ‘closed’ proceeding, aimed at issuing a new ruling to replace the one annulled by the Supreme Court of Cassation. The case-law on this article states that not only are the parties precluded from expanding the subject matter of the case by formulating new claims, but that the preclusions deriving from the implicit judgement formed by means of the first judgement handed down by the Supreme Court of Cassation also apply, so that questions which could be raised or examined by the court of its own motion and questions which are superseded, although not expressly dealt with, by the solution of another question cannot be raised or examined either (in this sense, the orders of the Supreme Court of Cassation, Section 2: No 29879 of 27 October 2023; Section 6-3, No 27736 of 22 September 2022; Section 6-5, No 26108 of 18 October 2018).
- 17 In this context, the Supreme Court of Cassation adds that, in the case at hand, the power to raise of its own motion any nullity/lack of legal effect of the clause has already been exhausted, since it had the opportunity to raise of its own motion such a nullity, but, having decided to set aside only the ground of the penalty reduction indicated by the Court of Appeals, it had necessarily assumed the validity and effectiveness of that clause, consequently circumscribing the remanded judgment to the quantification of the penalty.
- 18 Nevertheless, the Court of Cassation emphasises its well-established orientation whereby the principles set out in the judgments interpreting EU law handed down by the Court of Justice produce the effects of *ius superveniens* and are immediately applicable in the national legal system and, consequently, also in the context of a ruling remanded to a court deciding on the merit of the case, following a judgment of annulment delivered by the Court of Cassation, with the sole limitation, however, of relationships that have ended (in this sense, among others, judgments of the Court of Cassation; Section 5, No 14624 of 25 May 2023; Section 5, No 9375 of 5 April 2023). Moreover, precisely on the subject of nullity aimed at consumer protection, the Supreme Court of Cassation has stated that the indications coming from the Court of Justice on unfair terms in contracts between traders and consumers reveal a strengthening of the court’s power and duty to find nullity of its own motion, which is essential for the purposes of deterring abuses to the detriment of weak contracting parties (consumers, savers, investors) and for the proper functioning of the market (judgment No 26242 of 12 December 2014 handed down by Supreme Court of Cassation’s United Sections).

- 19 The Supreme Court of Cassation therefore asks whether, notwithstanding the national procedural provisions binding it to respect a *res judicata*, it is nevertheless obliged to find of its own motion that the penalty clause at issue is null and void, since it is a consumer protection regulation implementing European Union law in the matter.
- 20 In that regard, the Court of Cassation points out that the Court of Justice recently ruled precisely on the compatibility of Directive 93/13 with certain procedural rules of certain Member States (Spain, Romania and Italy, respectively) preventing, in the case of *res judicata* judgments, the court tasked with enforcement (or the court of appeal) from examining of its own motion the unfair nature of the terms contained in contracts between consumers and traders which are the subject matter of a *res judicata* judgment. These are the judgments of the Court, Grand Chamber, of 17 May 2022, *SPV Project 1503 and Others* (C-693/19 and C-831/19, EU:C:2022:395); *Unicaja Banco* (C-869-19, EU:C:2022:397); *Ibercaja Banco* (C-600/19, ECLI:EU:C:2022:394) and *Impuls Leasing Romania* (C-725/19, EU:C:2022:396).

It is pointed out that, with regard to Italian law, the Court of Justice has held that Articles 6(1) and 7(1) of Directive 93/13/EEC preclude national legislation providing that, where an order for payment issued by a court on application by a creditor has not been opposed by the debtor, the court charged with enforcement cannot subsequently review whether those terms are unfair, on the ground that the *res judicata* of that order for payment implicitly covers the validity of the terms of the contract on which it is based, precluding any examination of their validity (*SPV Project 1503 and Others*, C-693/19 and C-831/19).

With regard to the procedural conduct of the parties, the Court held in its judgment on Spanish law that those same provisions of Directive 93/13/EEC preclude legislation under which a national court, hearing an appeal against a judgment limiting in time the repayment of sums unduly paid by the consumer on the basis of a term declared unfair, cannot raise of its own motion a ground based on infringement of that provision and order the full repayment of those sums, where the failure of the consumer concerned to challenge that time limitation cannot be attributed to his or her complete passivity (*Unicaja Banco*, C-869-19).

- 21 The Supreme Court of Cassation adds that such case-law is consistent with the case-law of the Court of Justice concerning the principle of consumer protection effectiveness within the meaning of Directive 93/13 and Article 47 of the Charter, which preclude the interpretation of a national provision as preventing a court – seized of an action brought by a trader against a consumer falling within the scope of that directive and giving judgment in absentia because the consumer did not appear at the hearing to which he or she had been summoned – from taking the inquiry measures necessary to assess, of its own motion, the unfairness of the contractual terms on which the trader has based its claim, where that court has doubts as to the unfairness of those terms, within the meaning of that directive (*Kancelaria Medius v Commission*, C-495/29, 4 June 2020, EU:C:2020:431).

- 22 For the reasons summarised above, the Supreme Court of Cassation stays the proceedings and asks the Court of Justice whether Directive 93/13 can be interpreted as precluding national procedural rules preventing a court from finding of its own motion that an unfair term is null and/or lacks legal effect where a judgment has been implicitly developed in proceedings both on the substance and on the legality of the case, with that term assumed as being valid and effective throughout the proceedings, also taking into account the fact that the persons concerned have never argued that nullity/lack of legal effect in the course of those proceedings.

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