

Case C-197/24 [Šil'arský] ⁱ

Request for a preliminary ruling

Date lodged:

12 March 2024

Referring court:

Mestský súd Bratislava IV (Slovakia)

Date of the decision to refer:

13 February 2024

Applicant:

AK

Defendant:

RU

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

[...]

[...] [reference number]

ORDER

The Mestský súd Bratislava IV (City Court, Bratislava IV, Slovakia), in an action brought by the **applicant AK** against the **defendant RU**, [...] [lawyer's details] **for payment of EUR 3 250 and also the amount of the ancillary claims,**

has decided as follows:

The Mestský súd **stays** the proceedings and **refers** the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Must Article 1(2) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, as amended, in conjunction with Article 2(1) and (3) and 6(1) thereof, be interpreted as meaning that (i) a natural person who, in a case such as that in the main proceedings, avails him or herself of the legal services of a lawyer with a view to founding a commercial company, in which he or she is to become a managing director and one of the two founders and members, is to be regarded as an 'undertaking', and (ii) a transaction which, in a case such as that in the main proceedings, leads to the provision of services by a lawyer to such a person with a view to founding a commercial company, is to be regarded as a 'commercial transaction'?
2. If the answer to the first question is in the negative, must the term 'consumer' used in Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, as amended, in conjunction with Article 8 thereof, be interpreted as meaning that, in a case such as that in the main proceedings, it also encompasses a natural person against whom a claim is made under a contract for the provision of legal services, where the object of that contract was the provision of services with a view to founding a commercial company and the defendant was to become a managing director and one of the two founders and members of that company?

Grounds

- 1 The Mestský súd Bratislava IV (District Court, Bratislava IV) is hearing [...] [reference number] the case between the applicant and the defendant for payment of the amount of EUR 3 250 and also the amount of the ancillary claims. The ancillary claims consist of (i) default interest of 10.5% per annum calculated on the amount of EUR 3 250 from 18 January 2023 until the date of payment and (ii) a fixed amount of compensation for recovery costs.

- 2 Having examined the case, the referring court is satisfied of the need to submit the questions set out in the operative part of this order to the Court of Justice for a preliminary ruling. The referring court refers the questions for a preliminary ruling following an exchange of arguments between the parties. [...] [information on the course of the proceedings]

I. Succinct presentation of the subject matter of the dispute and the facts

- 3 The subject matter of the dispute is the payment of remuneration for legal services provided. The applicant is a commercial company which provides legal services. The defendant is a natural person. The claim made in the amount of EUR 3 250 and also the amount of the ancillary claims was transferred to the applicant. The original creditor of the claim is a current managing director of the applicant, who is a lawyer. She transferred the claim due to a change in the way she practises as a lawyer. She originally practised as a sole practitioner, but now practises as a member in a limited liability company. For that reason, the referring court uses the term ‘applicant’ interchangeably in this order, referring without distinction to the original applicant and the current applicant.
- 4 In the application, the applicant states that in March or April 2022 the defendant contacted it and expressed an interest in legal services. The defendant wanted to found a limited liability company under Slovak law and was to become one of the two founders and members of that company. He was also to become a managing director thereof. In connection with the above, an oral mandate contract was concluded and the applicant undertook to provide legal services to the defendant in return for a flat rate of remuneration. The applicant drew up a draft memorandum and articles of association and further documentation, which it sent to the defendant. In connection with the advice given, the applicant also analysed a number of issues relating to the foundation of the company and the personal participation therein of the future founders. In addition to the defendant, one of the founders was to be a foreign person. The applicant issued the defendant an invoice for the services provided in the amount of EUR 3 250, which the defendant failed to pay by the due date, namely 17 January 2023. In the view of the applicant, this is a commercial dispute and the defendant is not a consumer. The claims asserted by the applicant are claims under commercial law.
- 5 By contrast, the defendant contends that he did not enter into any contract for the provision of legal services with the applicant. Nor was there any agreement on remuneration for services. The applicant did not perform a service relating to the foundation of a commercial company for the defendant, and the defendant, as recipient, did not accept any service from the applicant. The defendant contends that the applicant sent him the memorandum and articles of association and related documentation without having been solicited to that effect. The defendant contends that he has the status of a consumer and that the relationship between the parties is not governed by commercial law.

II. Wording of the provisions of national law and European Union law cited

- 6 In this section, the referring court cites the relevant provisions of national law applicable to the present case. At the same time, the referring court also cites the relevant provisions of European Union law.

(a) Provisions of national law

- 7 Paragraph 2(2)(a) of zákon č. 513/1991 Zb. Obchodný zákonník (Law No 513/1991 establishing the Commercial Code; ‘Commercial Code’), provides that:

‘The following shall be a seller or supplier within the meaning of this Law: (a) a person entered in the commercial register (...)’.

- 8 Paragraph 57(1) of the Commercial Code, as amended by zákon č. 530/2003 Z. z. (Law No 530/2003), provides that:

‘Unless otherwise provided by other provisions of this Law, a company shall be founded on the basis of a memorandum and articles association signed by all the founders. The veracity of the signatures of the founders must be officially certified’.

- 9 Paragraph 62(1) of the Commercial Code provides that:

‘A company shall come into existence on the date of its entry in the commercial register [...]’.

- 10 Paragraph 369c of the Commercial Code, as amended by zákon č. 9/2013 Z. z. (Law No 9/2013), provides that:

‘(1) In the event of default by the debtor, the creditor shall, in addition to the claims under Paragraphs 369, 369a and 369b, also be entitled to a fixed amount of compensation for recovery costs, without the need for separate notification. The amount of the fixed compensation for recovery costs shall be determined by the vláda Slovenskej republiky (Government of the Slovak Republic) by a regulation.

(2) Paragraph 369c(1) shall not apply if the obligation arises from a consumer contract and the debtor is a consumer.’

- 11 Paragraph 52 of zákon č. 40/1964 Zb. Občiansky zákonník (Law No 40/1964 establishing the Civil Code), as amended by zákon č. 568/2007 Z. z. (Law No 568/2007), ‘the Slovak Civil Code’, provides that:

‘(1) “Consumer contract” means any contract, regardless of its legal form, concluded between a seller or supplier and a consumer.

(2) Provisions concerning consumer contracts and all other provisions governing the legal relations into which a consumer has entered shall always be applied to the advantage of the party to the contract who is a consumer. Different contractual arrangements or agreements whose content or purpose is to circumvent those provisions shall be invalid. The provisions of the Civil Code shall always prevail in all legal relations into which a consumer has entered, even where the provisions of commercial law would otherwise apply.

(3) A “seller or supplier” is a person who, when concluding and performing a consumer contract, acts in the course of his or her trade or of another commercial activity.

(4) A “consumer” is a natural person who, when concluding and performing a consumer contract, does not act in the course of his or her trade or of another commercial activity’.

- 12 Paragraph 18(4) of zákon č. 586/2003 Z. z. o advokácii a o zmene a doplnení zákona č. 455/1991 Zb. o živnostenskom podnikaní (živnostenský zákon) (Law No 586/2003 on the legal profession and amending and supplementing Law No 455/1991 on trade licensing (Law on trade licensing)], as amended by subsequent legislation amended by zákon č. 304/2009 Z. z. (Law No 304/2009), ‘the Law on the legal profession’, provides that:

‘In the course of providing legal services, a lawyer is obliged to inform the client, who is a consumer of legal services, of the amount of the remuneration for the act of providing legal services before that act commences. Otherwise, he or she shall not be entitled to remuneration. [...]’.

(b) Provisions of European Union law

- 13 Article 1(2) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, in the applicable version here (‘Directive 2011/7’), provides:

‘This Directive shall apply to all payments made as remuneration for commercial transactions’.

- 14 Article 2(1) and (3) of Directive 2011/7 provides:

1. “commercial transactions” means transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration;

(...)

3. “undertaking” means any organisation, other than a public authority, acting in the course of its independent economic or professional activity, even where that activity is carried out by a single person’.

15 Article 6(1) of Directive 2011/7 provides:

‘Member States shall ensure that, where interest for late payment becomes payable in commercial transactions in accordance with Article 3 or 4, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40’.

16 Article 1(1) of Council Directive of 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in the version applicable here (‘Directive 93/13’), provides:

‘The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer’.

17 Article 2(b) of Directive 93/13 provides:

‘For the purposes of this Directive:

[...]

“consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession.

18 Article 8 of Directive 93/13 provides:

‘Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer’.

19 Recital 12 [...] of Directive 93/13 states:

‘Whereas, however, as they now stand, national laws allow only partial harmonization to be envisaged; whereas, in particular, only contractual terms which have not been individually negotiated are covered by this Directive; whereas Member States should have the option, with due regard for the [EEC] Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive’.

III. The reasoning in the request for a preliminary ruling

20 The referring court is referring the questions to the Court of Justice for a preliminary ruling for the following reasons:

(a) The first question

21 The applicant seeks payment of fixed compensation for recovery costs in the amount of EUR 40 pursuant to Paragraph 369c(1) of the Commercial Code. Paragraph 369c(1) of the Commercial Code transposes Article 6(1) of Directive 2011/7.

- 22 According to the Court of Justice, all authorities of a Member State, in applying national law, are required to interpret it as far as possible in the light of the wording and purpose of the Community directives in order to achieve the result pursued by those directives (see, to that effect, judgment of 5 July 2007, *Hans Markus Kofoed*, C-321/05, EU:C:2007:408, paragraph 45). The referring court is aware of that obligation.
- 23 For that reason, the referring court must interpret the national provision which is Paragraph 369c(1) of the Commercial Code, in a way which enables the result pursued by Article 6(1) of Directive 2011/7 to be achieved.
- 24 With regard to the term ‘commercial transaction’, the Court of Justice has made it clear that, in order for a transaction to be classified as a ‘commercial transaction’ within the meaning of the latter provision, it must therefore satisfy two conditions. First, it must be carried out either between undertakings or between undertakings and public authorities. Second, it must lead to the delivery of goods or the provision of services for remuneration (judgment of 20 October 2022, *BFF Finance Iberia SAU*, C-585/20, EU:C:2022:806, paragraph 22 and the case-law cited).
- 25 According to recital 19 of Directive 2011/7, the purpose of Article 6(1) thereof is to discourage late payment and ensure that creditors receive fair compensation for the recovery costs incurred due to late payment. However, the directive, according to Article 1(2) thereof, only applies to all payments that constitute consideration in commercial transactions. Under Article 2(1) of Directive 2011/7, commercial transactions are transactions between undertakings. The definition of ‘undertaking’ contained in Article 2(3) of Directive 2011/7 implies that an organisation other than a public authority (the present case does not concern a public authority) acts in the course of its independent economic or professional activity.
- 26 According to the applicant, it is a creditor as specifically referred to in Paragraph 369c(1) of the Commercial Code which is entitled to fixed compensation for recovery costs. However, it is not clear to the referring court whether that provision of national law can be interpreted in the light of the purpose of Article 6(1) of Directive 2011/7, in conjunction with Articles 1(1) and 2(1) and (3) thereof, as meaning that the term ‘undertaking’ can also be understood as encompassing a natural person who avails him or herself of the legal services of a lawyer to found a commercial company, if he or she is merely to become one of the two founders and members and a managing director of that company. In other words, the court seeks to establish whether, if such a natural person avails him or herself of legal services to found a commercial company, he or she is a consumer (to which the second question relates) or whether that person can be regarded as an ‘undertaking’ within the meaning of Article 2(3) of Directive 2011/7.

- 27 According to the national provision which is Paragraph 57(1) of the Commercial Code, a limited liability company, such as that at issue in the present case, is founded, in the case of two founders, by concluding a memorandum and articles of association, which are signed by all the founders. The conclusion of the memorandum and articles of association is the first step, as a result of which the company is being founded but has not yet come into existence as a legal entity. The second step is the coming into existence of the company and its acquisition of the status of a legal entity in accordance with Paragraph 62(1) of the Commercial Code, which only takes place once it is entered in the commercial register. Under Paragraph 2(2)(a) of the Commercial Code, upon that entry such an entity simultaneously becomes a seller or supplier for the purposes of that law, and also the assessment of the merits of a claim under Paragraph 369c(1) of the Commercial Code.
- 28 In this regard, it is logical for those two steps to be preceded by the actual drafting of the memorandum and articles of association and further related documentation (for example, a specimen signature of a future managing director of the company or various declarations by the founders, which are required by national law). Although at the time that takes place, the founders and future members are not formally sellers or suppliers under national law, the referring court is uncertain whether or not they already fall at that stage of the company's formation within the notion of 'undertaking' under Article 2(3) of Directive 2011/7 and the preparation of such incorporating documents as part of the legal services provided by a lawyer to a founder of that company falls within the notion of 'commercial transaction' under Article 2(1) of Directive 2011/7, as interpreted by the Court of Justice (judgment of 20 October 2022, cited above, *BFF Finance Iberia SAU*, C-585/20, EU:C:2022:806, paragraph 22).
- 29 The referring court bases that reasoning on two conclusions reached by the Court of Justice:
- 30 Firstly, as regards the wording of Article 2(1) of Directive 2011/7, the use of the term 'transactions' shows that the concept of 'commercial transactions' must be understood broadly and accordingly that it does not necessarily coincide with the concept of 'contract'. Therefore, to interpret the concept of 'commercial transaction' restrictively would be inappropriate (see, to that effect, judgment of 1 December 2022, *[X] sp. z o.o., sp.k.*, C-419/21, EU:C:2022:948, paragraphs 22 and 25).
- 31 Secondly, the Court of Justice, has, with reference to the relationship between a company and one of its managing directors, pointed out that such a relationship cannot be regarded as outside and independent of any trade or professional activity or purpose while the individual concerned has close professional links with that company, such as being its managing director or majority shareholder. The fact that the guarantor is a natural person is not sufficient to establish that he or she is a consumer (see, to that effect, judgment of 14 March 2013, *Česká spořitelna*, C-419/11, EU:C:2013:165, paragraphs 37 and 38).

- 32 In the view of the referring court, those two conclusions of the Court of Justice militate in favour of an affirmative answer to the first question. However, the difference – and this is precisely what gives rise to uncertainty on the part of this court – is that the case of *Česká spořitelna* cited concerned a dispute between a natural person and an existing company. That company existed in the legal sense as a legal person and was not merely an entity not yet in existence (as is the case here), which did not necessarily have to be founded or come into existence.
- 33 The referring court is familiar with the judgment of the Court of Justice of 3 July 1997. In that judgment, the Court of Justice stated that only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character (see judgment of 3 July 1997, *Benincasa*, C-269/95, EU:C:1997:337, paragraph 17).
- 34 However, the *Benincasa* case concerned a different matter, which gave rise to doubt on the part of the referring court as to whether conclusions arising from it can be taken into account. That is so because Mr Benincasa entered into [...] a contract for the purpose of setting up and operating a shop. Although it was a future activity, that activity was to be carried out by him himself (see judgment of 3 July 1997, *Benincasa*, C-269/95, EU:C:1997:337, paragraph 10) and not by a legally separate entity, as in the present case, which, moreover, did not yet exist and had not been founded at the time the services were provided.
- 35 Answering the first question would help the referring court in dispelling that doubt as to the interpretation of Article 1(2) of Directive 2011/7, in conjunction with Articles 2(1) and (3) and 6(1) thereof. If that question were answered in the affirmative, it would be clear to the referring court that national law [...] must be interpreted as meaning that the defendant is a seller or supplier within the meaning of Paragraph 2(2)(a) of the Commercial Code and that, subject to the fulfilment of the other statutory conditions, the applicant is entitled to claim [...] fixed compensation for recovery costs in accordance with the provision of national law which is Paragraph 369c(1) of the Commercial Code.

(b) The second question

- 36 The second question follows on from the first in the event that the answer to the first question is in the negative. If that is the case, the referring court would like to know whether the defendant falls within the concept of a 'consumer' within the meaning of Directive 93/13. In other words, the court is interested as to whether the concept of a 'consumer' used in Directive 93/13 also covers a natural person against whom a claim is made by virtue of a legal services contract if the object

thereof was legal services with a view to founding a commercial company and the defendant was to be one of the founders and members of that company.

- 37 The second question relates to the interpretation of Directive 93/13, although the present case does not *prima facie* concern unfair terms in a consumer contract. In the event that the first question is answered in the negative, resolution of the question whether the defendant is a consumer is also of relevance to the case precisely because under national law [...] such an assessment has further legal consequences. The primary issue is the payment for legal services provided by the applicant.
- 38 The concept of ‘consumer’ in the provision of national law which is Paragraph 52(4) of the Slovak Civil Code is the result of the transposition of the concept defined in Article 2(b) of Directive 93/13, and it is precisely for this reason that the interpretation of that concept is of relevance in the present proceedings. If the defendant does not fall within the concept of ‘undertaking’ under Directive 2011/7, the referring court could apply the provision of national law which is Paragraph 52(4) of the Slovak Civil Code. The referring court will have to effect an interpretation in the light of the objective pursued by Directive 93/13, which has been transposed into that provision of national law (for more details, see point 22).
- 39 The Slovak Republic introduced the provision of national law which is Paragraph 18(4) of Law No 586/2003, under which a lawyer is obliged to inform a client, who is a consumer of legal services, in the course of providing legal services, of the amount of the remuneration for the act of providing legal services before that act commences. Otherwise, he or she is not entitled to a remuneration. The referring court understands that provision as meaning that Slovakia introduced an obligation to apply the concept of ‘consumer’ in relation to lawyers’ remuneration for the provision of legal services, even though that is an area which does not fall within the scope of Directive 93/13.
- 40 According to the twelfth recital of Directive 93/13, that directive carries out only a partial and minimum harmonisation of national laws relating to unfair terms, leaving it open to the Member States, with due regard for the Treaty on the Functioning of the European Union, to afford consumers a higher level of protection through national provisions that are more stringent than those of that directive. In addition, under Article 8 of that directive, Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by that directive, to ensure a maximum degree of protection for the consumer (judgment of 13 December 2022, *FV*, C-405/21, EU:C:2022:793, paragraph 30 and the case-law cited).
- 41 Member States may apply the provisions of that directive to situations which do not fall within its scope if that is compatible with the objectives pursued by that directive and the Treaties (see, to that effect, judgment of 21 December 2021, *DP and SG*, C-243/20, EU:C:2021:1045, paragraph 55).

- 42 In accordance with Article 169(4) of the Treaty on the Functioning of the European Union, Member States may maintain or introduce more stringent consumer protection measures provided that they are compatible with the Treaties (judgment of 2 April 2020, *Condominio di Miláno, via Meda*, C-329/19, EU:C:2020:263, paragraph 32).
- 43 In that regard, the Court of Justice has ruled that the concept of ‘consumer’, within the meaning of Article 2(b) of Directive 93/13, ‘is objective in nature’ and ‘must be assessed by reference to a functional criterion, consisting in an assessment of whether the contractual relation at issue has arisen in the course of activities outside a trade, business or profession’ (order of 19 November 2015, *Tarcău*, C-74/15, EU:C:2015:772, paragraph 27).
- 44 The referring court is aware that, in its judgment in *Johann Gruber* the Court of Justice noted that it is for the court seised to decide whether the contract at issue was concluded in order to satisfy, to a non-negligible extent, needs of the business of the person concerned or whether, on the contrary, the trade or professional purpose was negligible. It also pointed out that a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the advantages stemming from that situation (judgment of 20 January 2005, *Johann Gruber*, C-464/01, EU:C:2005:32, paragraph 54).
- 45 That, in the context of the circumstances of the present case, leads the referring court to answer the second question in the affirmative. However, the referring court’s doubt – as in the case of the first question – lies in the fact that, in the present case, the economic activity was to be carried out by a company which was only [...] in the process of being formed. The economic activity was therefore to be carried out in the strict sense by an entity other than the defendant. For that reason, the court does not know whether or not it should apply the conclusions arising from the judgment in *Johann Gruber*.
- 46 If the answer to the second question were in the affirmative, the referring court would apply in the present case Paragraph 18(4) of Law No 586/2003, in conjunction with Paragraph 52(4) of the Slovak Civil Code, in a manner consistent with the affirmative answer to the second question, and would consider the defendant to be a consumer. At the same time, the defendant, as a consumer, would also not be obliged to pay a fixed amount of compensation for recovery costs to the applicant in accordance with the national provision which is Paragraph 369c(2) of the Commercial Code.

IV. Conclusion

- 47 For all the reasons set out, the referring court concluded that it was necessary to make a reference to the Court of Justice for a preliminary ruling in the present case. Consequently, in accordance with Paragraph 162(1)(c) of the *Civilný sporový poriadok* (Code of Civil Procedure) and Article 267 of the Treaty on the

Functioning of the European Union, the referring court stayed proceedings and ruled as set out in the operative part of this order. [...]

[...]

[matters of procedure, names] [...]

WORKING DOCUMENT