Case C-365/23[Arce] [1]

Request for a preliminary ruling

Date lodged:

9 June 2023

Referring court:

Augstākā tiesa (Senāts) (Latvia)

Date of the decision to refer:

7 June 2023

Appellant and applicant at first instance:

SIA A

Other parties in the appeal and defendants at first instance:

C

D

E

[…]

Civillietu departaments (Department of Civil Cases)

Latvijas Republikas Senāts (Supreme Court (Senate) of the Republic of Latvia)

DECISION

Riga, 7 June 2023

The Senate […] [composition of the referring court]

has examined by written procedure whether a reference should be made to the Court of Justice of the European Union for a preliminary ruling in a civil action

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

brought by SIA A against the natural persons C, D and E, seeking payment of the remuneration under an agreement for the provision of services for development and career support in a particular sport, in which appeal proceedings have been commenced, originating in an appeal on a point of law lodged by SIA A against the judgment of the Rīgas apgabaltiesa (Regional Court, Riga, Latvia) of 22 January 2021.

Subject matter of the main proceedings and relevant facts

1 On 14 January 2009, SIA A entered into an agreement with C and his parents, D and E, for the provision of services for development and career support in a particular sport ('the agreement'), with the purpose of achieving the desired outcome, namely enabling C to have a successful career as a professional sportsperson. The agreement was concluded for a term of 15 years, that is to say, until 14 January 2024. Under the agreement, SIA A would provide the young sportsperson with various services (coaching and training, sports medicine and psychology services, career guidance – development, application and monitoring of a career plan and the conclusion of contracts between the sportsperson and sports clubs –, marketing and legal and accountancy services) in return for which the sportsperson was to pay remuneration consisting of 10% of his income during the term of the agreement.

On the date on which the agreement was concluded, C was 17 and was not a professional sportsperson.

2 On 29 June 2020, SIA A brought proceedings against C, D and E seeking payment of the remuneration under the agreement. The application stated as follows:

[2.1]. 'The applicant is a commercial company set up to develop the practice of a particular sport and its players in Latvia. In pursuance of that objective, the applicant offered sportspersons a range of services to develop their professional capacities and careers, by concluding agreements containing an obligation to pay the company in the future if the sportspersons earned at least EUR 1 500 per month.

[2.2] In performance of the agreement, in 2009 and 2010 the applicant provided C with the development and career support services set out in the schedule to the agreement. C did not use some of the services proposed but did make use of others, including but not limited to individual and team training sessions under the direction of highly qualified specialists. Providing the services required the applicant to invest financial resources, whereas, by clause 6.1 of the agreement, C undertook to pay the applicant remuneration consisting of 10% plus the VAT applicable in Latvia of all net income from playing activities in the sport in question, advertising, marketing and media appearances.

[2.3] The applicant performed its obligations under the agreement, whereas the defendants breached the terms of the agreement and failed to pay the remuneration established in the agreement for the services provided. Since C's income from

contracts concluded with clubs in the relevant sport amounts to EUR 16 637 779.90, the defendants should pay the applicant 10% of the amounts under those contracts, totalling EUR 1 663 777.99'.

3 The first instance court and the appeal court found against its claims.

The applicant brought an appeal on a point of law. Challenging the judgment of the appeal court which dismissed its appeal because it found that the agreement did not comply with consumer protection rules, the applicant and now appellant claims that the agreement falls within the category of contracts for 'joueurs espoir' sportspersons to which, according to the appellant, consumer protection rules do not apply. The notice of appeal also states that it is necessary to request a preliminary ruling from the Court of Justice on the matters of the interpretation of EU law that have been found to be unclear and are material to the outcome of the case.

Relevant provisions of national and EU law

4 EU provisions

Charter of Fundamental Rights of the European Union: Articles 17(1) and 24(2).

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Directive 93/13'): Article 1(1), Article 2(b) and (c), Article 3(1), Article 4(2), Article 5, Article 6(1) and Articles 8 and 8a.

5 Relevant provisions of Latvian law:

[5.1] Civillikums (Civil Code) (https://likumi.lv/ta/id/225418-civillikums):

'186. Parents shall jointly represent a child in his or her personal and property relations (joint representation). …

…

223. The father and mother shall be the natural guardians of their minor children, on the basis of their right of custody.

…

293. A guardian may, in matters concerning the minor and in the interests of the minor, enter into any type of contract and accept and make payments. All the foregoing acts shall be binding on the minor, provided the guardian has acted in good faith and within the limits of sound financial management, but shall not be binding on the minor, in the absence of special requirements, beyond the time at which he or she reaches full age.

…

1408. Minors lack the capacity to act.

…’

[5.2] Patērētāju tiesību aizsardzības likums (Law on Consumer Rights Protection), in the version in force at the time the agreement was concluded (current and previous versions available at https://likumi.lv/doc.php?id= 23309):

‘Article 1. Terms used in this law

The following terms are used in this Law:

…

(3) “consumer”: a natural person who expresses a wish to acquire or who acquires or may acquire or use goods or services for purposes outside his or her economic activity or profession;

(4) “service provider”: any person who, within the scope of that person’s economic activity or profession, provides a service to a consumer; …

…

Article 6. Unfair Contractual Terms …

(2) Contractual terms shall be expressed in in plain intelligible language.

…

(3) A contractual term which has not been individually negotiated by the parties shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations established in the contract, to the detriment of the consumer.

…

(8) Unfair terms used in a contract concluded with a consumer by a manufacturer, seller or service provider shall be null and void from conclusion of the contract, but the contract shall remain effective if it is capable of continuing in existence without the unfair terms’.

[5.3] Law on Consumer Rights Protection, in the wording that came into force on 1 July 2014:

‘Article 6. Unfair Contractual Terms …

(2^2) This article shall not apply to contractual terms that define the subject matter of the contract or relate to the adequacy of the price and remuneration, on the one

hand, as against the services or goods, on the other, in so far as these terms are in plain intelligible language.'

Reasons why the referring court entertains doubts concerning the application and interpretation of EU law

6 The Court of Justice of the European Union has interpreted the term 'consumer' in several cases but has not, to date, examined the applicability of the consumer protection provisions in the area of sport.

7 The Senate believes that the following considerations should be taken into account.

[7.1] The Commission White Paper on Sport stipulates that sport activity is subject to the application of EU law. Competition law and Internal Market provisions apply to sport in so far as it constitutes an economic activity. Sport is also subject to other important aspects of EU law, such as the prohibition of discrimination on grounds of nationality, provisions regarding citizenship of the Union and equality between men and women in employment. At the same time, sport has certain specific characteristics, which are often referred to as the 'specificity of sport'. In line with established case-law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law (Commission White Paper on Sport of 11 July 2007, COM(2007) 391, section 4.1).

[7.2] According to the Court's established case-law, having regard to the objectives of the European Union, sport is subject to European Union law to the extent that it constitutes an economic activity (see judgment of 25 April 2013, *Asociaţia Accept*, C-81/12, EU:C:2013:275, paragraph 45 and the case-law cited). That being so, the Court has analysed, for example, whether an obligation on sportspersons in the 'joueur espoir' category to sign their first professional contract with the club that trained them and to pay damages for breach of that obligation is compatible with the freedom of movement of workers within the European Union (see judgment of 16 March 2010, *Olympique Lyonnais*, C-325/08, EU:C:2010:143, in particular, paragraph 26), and other issues in the area of sport (see judgments of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, in particular, paragraph 42, and of 25 April 2013, *Asociaţia Accept*, C-81/12, EU:C:2013:275, in particular, paragraph 45, and *Royal Antwerp Football Club*, C-680/21, currently pending).

In the light of the foregoing case-law of the Court in the area of sport, and bearing in mind that there is no specific rule whereby contracts concluded in the area of sport that qualify under Directive 93/13 as contracts concluded with consumers by sellers or suppliers are excluded from the scope of that directive, the Senate finds no reason to consider that the provisions of that directive would not apply to a contract concluded between a sports club in the context of its economic activities and a young sportsperson who has not yet commenced a professional sports

career. The fact that practices in the sport sector may include a number of examples of similar contracts that are not covered by consumer protection rules cannot serve as grounds for denying consumers the protection flowing from EU law.

In the present case, it is not disputed that at the time the agreement was concluded, the young sportsperson had not yet commenced his professional career, that is to say, had not yet been employed by any club in the sport in question.

[7.3] The fact that a person who concluded a contract for the provision of services as a consumer subsequently becomes a professional calls for further clarification. According to the Senate, the present case is fundamentally different from those relating to the Court's case-law on the application of the rules determining jurisdiction (see judgments of 25 January 2018, *Schrems*, C-498/16, EU:C:2018:37, paragraphs 31, 38 and 39, and of 10 December 2020, *Personal Exchange International*, C-774/19, EU:C:2020:1015, paragraphs 40 and 41). In its view, in so far as concerns the scope of application of consumer rights, the fact that the activity of the young sportsperson in the area to which the agreement relates has subsequently become predominantly professional is irrelevant and cannot in itself deprive the recipient of the services of the status of 'consumer'.

[7.4] The need to refer questions for a preliminary ruling on whether the consumer protection requirements of Directive 93/13 apply to contracts of this type concluded by young sportspersons and sports clubs is also plain in the light of the divergences in the case-law of the EU Member States.

According to the information available to the Senate, the Cour d'appel de Paris (Court of Appeal, Paris, France), in its judgment of 23 May 2019, held that a basketball player was acting as a consumer and not as a seller or supplier where, as a future player, he had concluded a contract for services with a sports agency, under which the agency undertook to negotiate the player's employment with sports clubs on behalf of the sportsperson, in return for which the basketball player undertook to pay the agency a particular amount corresponding to part of the price of the contracts concluded as a result of that cooperation (Cour d'appel de Paris, 2, 23-05-2019, No 16/02277). The Oberlandesgericht München (Higher Regional Court, Munich, Germany), for its part, by a judgment of 7 November 2002, in a dispute between a young tennis player and a sports agency arising from a similar contract for services between the parties in the case, held that the consumer protection rules should not apply to that legal relationship (OLG München 07.11.2002 – 19 U 3238/02).

In the light of the foregoing, the answer to the questions referred for a preliminary ruling in the present case is particularly important with a view to securing uniform interpretation of EU law (see judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799, paragraph 49).

8 In the present case, the appeal court found the contractual term under which the young sportsperson had to pay remuneration of 10% of his income during the term of the agreement (15 years) to be unfair.

The Senate notes that the remuneration in question is effectively the main consideration that the service provider expects to receive from the recipient of the services.

In order to determine which EU legislation applies to that point, it is necessary to determine whether the contractual term in question contains a definition of the main subject matter of the contract or relates to the adequacy of the price and remuneration, on the one hand, as against the services, on the other, within the meaning of Article 4(2) of Directive 93/13.

The Senate draws attention to the fact that Article 6(2.[2]) of the Law on Consumer Rights Protection, which transposes Article 4(2) of Directive 93/13 into national law, came into force after the agreement was concluded.

[8.1] If that term contains a definition of the main subject matter of the contract or relates to the adequacy of the price and remuneration, on the one hand, as against the services, on the other, the Senate wishes to ascertain whether it must be found that the term is not drafted in plain, intelligible language, within the meaning of Article 5 of Directive 93/13, and that it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, within the meaning of Article 3(1) of Directive 93/13.

An additional question is raised in that respect, arising from the judgment in *Olympique Lyonnais*, in which the Court held that a 'joueur espoir' who, at the end of the training period, signs a professional contract with a club in another Member State is liable to pay damages calculated in a way that is unrelated to the actual costs of the training (see judgment of 16 March 2010, *Olympique Lyonnais*, C-325/08, EU:C:2010:14, paragraph 50): would a decision of a national court be contrary to the requirements of Article 6(1) of Directive 93/13 where it reduces the amount that a consumer may be required to pay to the service provider to the amount of the actual expenditure incurred by the service provider in providing the services to the consumer under the contract? It would appear that regard must also be had for the Court's case-law according to which, if it were open to the national court to revise the content of unfair terms included in such a contract, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13 (see judgment of 27 January 2021, *Dexia Nederland*, C-229/19 and C-289/19, EU:C:2021:68, paragraph 64).

[8.2] If that contractual term contains a definition of the main subject matter of the contract or relates to the adequacy of the price and remuneration, on the one hand, as against the services, on the other, the Senate wishes to ascertain, in addition, whether a court may, where it finds the amount of the remuneration to be

manifestly disproportionate to the contribution made by the service provider, declare that term to be unfair on the basis of national law.

In that respect, another question is raised, relating to Article 8a of Directive 93/13. Specifically, does the fact that Latvia has informed the European Commission that its national law does not go beyond the minimum standard established in Directive 93/13 limit the jurisdiction of the courts? The information published by the European Commission on notifications by the Member States under Article 8a of the directive shows that the Member States have either declared that their national law does not set standards that go beyond the minimum standards established in the directive; or have declared, for example, that their national law establishes a list of contractual terms considered unfair in all circumstances, or a list of terms considered unfair unless it is proven that they are fair; or have declared that the assessment of the unfair nature of terms has been extended (in breach of Article 4(2) of Directive 93/13) to terms drafted in plain, intelligible language. Those notifications are in accordance with the requirement in Article 8a of Directive 93/13 to inform the European Commission, in particular, of provisions relating to the assessment of contractual terms, and of lists of contractual terms. The list contains no information on whether any Member State has expanded the definition of the concept of 'consumer' and does not even include notification to that effect by Italy, despite the fact that an Italian court appears to have extended the scope of application of the protection under the directive to entities other than natural persons (see judgment of 2 April 2020, *Condominio di Milano, via Meda*, C-329/19, EU:C:2020:263, paragraph 35). According to the Senate, this demonstrates that the notifications from the Member States published under Article 8a may not be a compelling factor in determining whether a Member State has expanded the definition of the concept of 'consumer'.

9 The Court's case-law on the application of the provisions of Directive 93/13 has not yet addressed the matter of how properly to assess the fact that the consumer was a minor at the time the agreement was concluded. In general, minors do not have legal capacity to contract (under the legislation they may only conclude transactions in exceptional cases, such as to dispose of assets that are freely at their disposal and, in the circumstances laid down by law, in employment relationships). It is therefore necessary to examine the significance of the fact that a contract concluded with a service provider on behalf of a consumer who is a minor by the parents of that consumer has lasting material repercussions on the economic position and, accordingly, the right to property of the minor (in the case of a contract of this nature, in essence for the entire duration of that person's potential professional career).

[9.1] In the Senate's view, having regard to the protection of the child enshrined in Article 24(2) of the Charter of Fundamental Rights of the European Union, it is imperative to clarify how the courts should effectively satisfy themselves that a contract, concluded between a service provider and a consumer who was a minor at the time the contract was concluded and is therefore subject to the requirements of Directive 93/13, is not contrary to the child's best interests.

The courts must also verify whether a contract of that nature is excessively restrictive of the minor's right to property protected by Article 17(1) of the Charter of Fundamental Rights of the European Union.

[9.2] On the other hand, if it is found that the agreement does not fall within the scope of application of Directive 93/13 and that, in addition, that directive precludes the national courts from applying the consumer protection provisions under the directive to contracts of that nature, the Senate enquires whether it is necessary to determine whether the agreement infringes the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union and referred to above, in view of the fact that sporting activities as such are included in the scope of application of EU law (see sections 7.1 and 7.2. of this decision).

10 Having regard to the foregoing, the Senate considers it necessary to refer to the Court in order to clarify how the provisions on unfair terms in consumer contracts are to be applied.

Operative part

In accordance with Article 267 of the Treaty on the Functioning of the European Union […] [national procedural rules], the Senate

hereby

Refers the following questions to the Court of Justice for a preliminary ruling:

1) Does a contract for the provision of services for development and career support for a sportsperson, concluded between a trader carrying on its professional activity in the field of the development and coaching of sportspersons, on the one hand, and, on the other, a minor represented by his or her parents who, at the time the contract was concluded was not carrying on a professional activity in the field of the sport in question, fall within the scope of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Directive 93/13')?

2) In the event that the answer to the first question is in the negative, does Directive 93/13 preclude national case-law that interprets the legislation transposing that directive into national law in such a way that the consumer protection provisions contained in that legislation are also applicable to such contracts?

3) In the event that the answer to the first or the second question is in the affirmative, may a national court carry out an assessment of the unfair nature, in accordance with Article 3 of Directive 93/13, of a contractual term which provides that, in exchange for the provision of the services, specified in the contract, for development and career support in a particular sport, the young sportsperson agrees to pay remuneration consisting of 10% of the income received over the following 15 years, and find the term in question not to be one whose unfair

nature is not, in accordance with Article 4(2) of Directive 93/13, subject to assessment?

4) In the event that the answer to the third question is in the affirmative, must a contractual term be found to have been drafted in plain, intelligible language within the meaning of Article 5 of Directive 93/13 where it provides that, in exchange for the provision of the services, specified in the contract, for development and career support for a sportsperson, the young sportsperson agrees to pay remuneration consisting of 10% of the income received over the following 15 years, having regard to the fact that, at the time the contract was concluded, the young sportsperson did not have clear information about the value of the service provided or the amount he would have to pay in return for that service such as to enable him to evaluate the economic consequences it could have for him?

5) In the event that the answer to the third question is in the affirmative, must it be found that a contractual term according to which, in return for the provision of the services, specified in the contract, for development and career support for a sportsperson, the young sportsperson agrees to pay remuneration consisting of 10% of the income received over the following 15 years, is, in accordance with Article 3(1) of Directive 93/13, a term that causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, in view of the fact that under that Article 3(1) the value of the service provided is not linked to the cost it involves for the consumer?

6) In the event that the answer to the fifth question is in the affirmative, would a decision of a national court be contrary to Article 6(1) of Directive 93/13 where it reduces the amount that a consumer may be required to pay to the service provider to the amount of the actual expenditure incurred by the service provider in providing the services to the consumer under the contract?

7) In the event that the answer to the third question is in the negative, if a contractual term which provides that, in exchange for the provision of the services, specified in the contract, for development and career support for a sportsperson, the consumer agrees to pay remuneration consisting of 10% of the income received over the following 15 years, is not, by virtue of Article 4(2) of Directive 93/13, subject to an assessment of whether it is unfair, may a national court, which has found the amount of the remuneration to be manifestly disproportionate to the contribution made by the service provider, nevertheless declare the contractual term in question to be unfair on the basis of national law?

8) In the event that the answer to the seventh question is in the affirmative, in the case of a contract concluded with a consumer before Article 8a of Directive 93/13 came into force, must regard be had to the information provided by the Member States to the European Commission under Article 8a of that directive on the measures adopted by the Member State under Article 8 of the directive and, if it must, is the jurisdiction of the national courts limited by the information provided by that Member State under Article 8a of Directive 93/13 where the

Member State has indicated that its legislation does not go beyond the minimum standard established in that directive?

9) In the event that the answer to the first or the second question is in the affirmative, in the light of Article 17(1), in conjunction with Article 24, of the Charter of Fundamental Rights of the European Union, what is the significance as regards the application of the legislation transposing the provisions of Directive 93/13 into national law, of the fact that, at the time of conclusion of the contract for the provision of services in question, with a term of 15 years, the young sportsperson was a minor and, therefore, the contract was concluded by the minor's parents on his behalf, and established an obligation on him to pay remuneration of 10% of all income received in the following 15 years?

10) In the event that the answer to the first or the second question is in the negative, having regard to the fact that sporting activities fall within the scope of EU law, are the fundamental rights enshrined in Article 17(1), in conjunction with Article 24(2), of the Charter of Fundamental Rights of the European Union, infringed by a contract for the provision of services with a term of 15 years concluded with a young sportsperson, who is a minor – concluded on his behalf by his parents – under which the minor is obliged to pay remuneration consisting of 10% of all income received in the following 15 years?

Stays the proceedings until the Court of Justice of the European Union makes a ruling.

No appeal lies against this decision.

[…]
[signatures]