



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 11 November 2015¹ⁱ

Case C-49/14

Finanmadrid EFC SA

v
VA,
QE,
DG,
NZ

(Request for a preliminary ruling from the Juzgado de Primera Instancia No 5 de Cartagena (Court of First Instance No 5 of Cartagena, Spain))

(Directive 93/13/EEC — Unfair terms in consumer contracts — Order for payment procedure — Enforcement proceedings — Power of the national court to raise of its own motion the ineffectiveness of an unfair term during the enforcement of an order for payment — Order for payment issued by a court registrar — Principle of *res judicata* — Principle of effectiveness)

I – Introduction

1. This request for a preliminary ruling allows the Court to clarify the extent of the national court's powers when reviewing unfair terms in consumer contracts falling within the scope of Directive 93/13/EEC.²
2. The referring court, before which an application for enforcement of an order for payment was brought, questions whether it falls to it to raise of its own motion the ineffectiveness of an unfair contract term where no review of unfair terms was conducted during the examination of the application for an order for payment.³
3. This question concerns the situation where the order for payment procedure is followed by enforcement proceedings, a situation which the Court has not previously had the opportunity to consider in its extensive case-law on the review of unfair terms.

¹ Original language: French.

² Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

³ The same Spanish court raises a similar question in *Aktiv Kapital Portfolio Investment* (C-122/14, pending before the Court).

II – Legal framework

A – *EU law*

4. Article 6(1) of Directive 93/13 states:

‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.’

5. Article 7(1) of Directive 93/13 provides:

‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’

B – *Spanish law*

6. The order for payment procedure is governed by the Law on civil procedure (Ley de Enjuiciamiento Civil) of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575), in the version applicable to the main proceedings (‘the Law on civil procedure’).

7. Article 812(1) of that law states:

‘Any person claiming from another the payment of a certain, due and payable pecuniary debt of any specific amount may use the order for payment procedure, where the debt is evidenced by any of the following:

(1) the production of documents, whatever their form, type or physical medium, signed by the debtor ...;

...’

8. Article 815(1) and (3) of the Law on civil procedure provides:

‘1. Where the documents attached to the application ... constitute prima facie evidence of the applicant’s right, confirmed by the contents of the application, the secretario judicial [(court registrar)] shall order the debtor to pay the applicant within a period of 20 days and to provide evidence of that payment to the court or tribunal, or to appear before it and to state briefly, in a statement of objection, the reasons for which he considers that he is not liable for all or part of the amount claimed.

...

3. If the documents attached to the application indicate that the amount claimed is incorrect, the secretario judicial [(court registrar)] shall notify the court, which may, where appropriate, issue an order inviting the applicant to accept or refuse a proposal for an order for payment for a specified amount lower than that initially sought.

...'

9. Article 816(1) and (2) of the law provides:

'1. If the debtor fails to comply with the order for payment or fails to appear, the secretario judicial [(court registrar)] shall issue a reasoned decision bringing the order for payment procedure to a close and shall call upon the creditor to seek an enforcement order, for which the application alone will suffice.

2. Once an order for enforcement has been issued, the procedure applicable to the enforcement of judgments must be followed and any objection permitted in such cases may be raised

...'

10. The first subparagraph of Article 818(1) of the Law on civil procedure, relating to objections by the debtor, provides:

'If the debtor lodges an objection in due time, a definitive decision shall be made on the dispute after the appropriate procedure has been followed, whereupon the judgment shall acquire the force of *res judicata*.'

11. Enforcement proceedings are governed by the provisions of Title III of the Law on civil procedure. The procedure for the enforcement of judicial or arbitral instruments differs from that prescribed for the enforcement of other enforceable instruments.

12. The second subparagraph of Article 552(1) of the Law on civil procedure allows the court with responsibility for enforcement to refuse to issue an enforcement order where any of the enforceable instruments listed in Article 557(1) contain unfair terms. The objections laid down in Article 557 only relate to enforceable instruments that are not judicial or arbitral.

III – The dispute in the main proceedings

13. On 29 June 2006, VA concluded a loan agreement in the amount of EUR 30 000 with Finanmadrid, in order to finance the purchase of a motor vehicle.

14. Under the terms of the agreement, QE, DG and NZ were joint and several guarantors. The agreement provided for a loan period of 84 months with an interest rate of 7% per annum plus a late-payment interest rate of 1.5% per month and a penalty for payment default of EUR 30 for each unpaid instalment due.

15. Since VA had stopped paying the instalments due at the beginning of 2011, Finanmadrid accelerated the repayment of the loan and, on 8 November 2011, initiated an order for payment procedure against the four defendants in the main proceedings in the amount of EUR 13 447.01.

16. The secretario judicial (registrar of the referring court) declared the application admissible, without forwarding it to the court. The application for an order for payment, which was served on VA and QE, required them to forward the application to the other two defendants.

17. Since the defendants in the main proceedings did not respond to the demand for payment or lodge objections, the secretario judicial (registrar of the referring court) closed the order for payment procedure by decision of 18 June 2012.

18. On 8 July 2013, Finanmadrid lodged an application for enforcement of the decision referred to in the previous point before the Juzgado de Primera Instancia No 5 de Cartagena (Court of First Instance No 5 of Cartagena).

19. On 13 September 2013, the referring court invited the parties to the main proceedings to submit observations on whether the contract terms concerned were unfair, whether a court could still examine those terms of its own motion, and whether the right to effective judicial protection had been infringed.

20. Only the applicant in the main proceedings submitted observations.

21. The referring court states that, under Spanish procedural law, the court is not informed of the order for payment procedure except where the secretario judicial (court registrar) considers it expedient or the debtors lodge an objection. Thus, as was the case here, the court only becomes aware of that procedure in the course of the enforcement of the decision of the secretario judicial. Since the decision of the secretario judicial is an enforceable instrument of a judicial nature with the force of *res judicata*, the court with responsibility for enforcement cannot examine of its own motion whether the contract giving rise to the order for payment procedure contains unfair terms.

22. The referring court has doubts as to whether this legislation, in so far as it does not allow a court to review unfair terms of its own motion at any stage of the procedure, is consistent with Directive 93/13.

IV – The questions referred for a preliminary ruling and the procedure before the Court

23. In those circumstances, the Juzgado de Primera Instancia No 5 de Cartagena (Court of First Instance No 5 of Cartagena) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

- ‘(1) Must Directive [93/13] be interpreted as precluding national legislation such as that currently governing the Spanish order for payment procedure (Articles 815 and 816 [of the Law on civil procedure]), which does not mandatorily provide either for the examination of unfair terms or the intervention of the court, except when the secretario judicial (court registrar) considers it expedient or the debtors lodge an objection, because that legislation hinders or prevents examination of their own motion by the courts of contracts which may contain unfair terms?
- (2) Must Directive 93/13/EEC be interpreted as precluding national legislation such as the Spanish law that does not permit a court to consider, of its own motion and *[in] limine litis*, during subsequent enforcement proceedings [relating to] an enforceable instrument (a reasoned decision issued by the secretario judicial (court registrar) bringing the order for payment procedure to a close), whether the contract giving rise to the reasoned decision

whose enforcement is sought contained unfair terms, because under national law the matter is *res judicata* (Articles 551 and 552 in conjunction with Article 816(2) [of the Law on civil procedure])?

- (3) Must the Charter of Fundamental Rights of the European Union be interpreted as precluding national legislation such as that relating to the order for payment procedure and the procedure for the enforcement of judicial instruments, that does not provide for review by the court in every case during the declaratory stages of proceedings and does not permit the court at the enforcement stage to reconsider the reasoned decisions previously taken by the secretario judicial (court registrar)?
- (4) Must the Charter of Fundamental Rights of the European Union be interpreted as precluding national legislation that prohibits a court from considering, of its own motion, whether the right to be heard has been observed, because the matter is *res judicata*?

24. The decision to refer of 23 January 2014 was lodged at the Court Registry on 3 February 2014. Written observations were submitted by the Spanish, German and Hungarian Governments, as well as by the European Commission. These interested parties, except for the Hungarian Government, also participated in the hearing held on 2 September 2015.

V – Analysis

A – Preliminary observations

25. The referring court's questions concern the powers of the national court in the context of the adoption of an order for payment and its enforcement, from the standpoint of both Directive 93/13 and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

26. I will examine the two questions concerning Directive 93/13 first, as I consider the two questions relating to the interpretation of the Charter to be of a secondary nature.

27. The order for payment procedure is a procedure which enables creditors to secure an enforceable instrument for uncontested claims swiftly and with minimal procedural requirements. Although the specific rules vary from one country to the next, in the main, the procedure does not entail any exchange of arguments on the substance, except where triggered by the debtor's objections. This shift of procedural initiative to the defendant — known as a reversal — means that responsibility for initiating adversarial proceedings to prevent the payment order from becoming enforceable lies with the person to whom it is addressed.⁴

28. Provision is made at European level for a similar procedure for certain uncontested cross-border claims.⁵

⁴ For a comparative analysis dating from the discussions on the relevant European procedure, see the report of E. Serverin, 'Des procédures de traitement judiciaire des demandes de faible importance ou non contestées dans les droits des États membres de l'Union européenne', pp. 27 and 28 (<http://ec.europa.eu/civiljustice>), as well as the Green Paper on a European order for payment procedure (COM(2002) 746 of 20 December 2002, p. 9).

⁵ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1).

29. The question in issue in the present case can therefore be summarised as follows: how can one ensure that a court will be able to review unfair terms of its own motion in the course of this simplified procedure, which provides for an exchange of arguments before a court only where an objection has been lodged? Is the court also required to conduct such a review at the stage of enforcement of the order, where it has not been called upon to intervene at an earlier stage because no objection was lodged?

B – Scope of the court’s powers during the enforcement of an order for payment (first and second questions)

1. Reformulation of the first and second questions

30. By its first and second questions, the referring court asks whether Directive 93/13 precludes national legislation that, firstly, does not mandatorily provide for a court to review unfair terms of its own motion at the stage of examination of the application for an order for payment and, secondly, does not permit such a review at the stage of enforcement of the order for payment.

31. These two questions are closely linked, since they concern two consecutive procedures resulting in the adoption then the enforcement of an order for payment. The question of the review of unfair terms at the stage of enforcement of an order for payment arises only where such a review ought necessarily to have been guaranteed at an earlier stage, before the adoption of the order, but was not.

32. Thus, in order to examine whether the Spanish order for payment procedure ensures that the protection provided for in Directive 93/13 is effective, the relevant body of procedural rules must be kept in mind.

33. Consequently, I am not convinced by the German Government’s argument that the first question relating to the adoption of the order for payment is inadmissible because the proceedings before the referring court concern only the stage at which an order is enforced.

34. In order to provide a useful answer to the referring court, it is therefore necessary to examine whether Directive 93/13 precludes national legislation which neither provides for a court to review unfair terms of its own motion at the stage of examination of the application for an order for payment nor permits the court with responsibility for enforcing the order to conduct such a review.

2. Summary of the case-law

35. I recall at the outset that Article 6(1) of Directive 93/13 provides that unfair terms are not binding on the consumer.

36. This is a mandatory provision which, in contractual relations between sellers or suppliers and consumers, aims to re-establish equality between the parties to the contract.⁶

⁶ See, in particular, judgments in *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 36) and *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 30).

37. In its judgment in *Océano Grupo Editorial*,⁷ the Court held that the aim pursued by Article 6 of Directive 93/13 may be attained only if the national court acknowledges that it has power to evaluate of its own motion whether a contract term is unfair.

38. Since that judgment, the Court has consistently held that the role attributed to the national court in this area is not limited to a mere power, but also consists of the obligation to examine unfair terms of its own motion, where it has available to it the legal and factual elements necessary for that task.⁸

39. Furthermore, the national court is required to investigate in order to be able to conduct this assessment of its own motion.⁹

40. In its judgment in *Banco Español de Crédito*,¹⁰ the Court considered that the obligation on the national court to assess unfair terms of its own motion also extends to the order for payment procedure, even before the consumer lodges an objection to the order.

41. I recall, in that regard, that, in the absence of harmonisation of the national mechanisms for recovery of uncontested claims, the rules implementing national order for payment procedures are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States, on condition, however, that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness).¹¹

42. The Court has nevertheless held that Directive 93/13 precludes legislation of a Member State which does not allow the court before which an application for an order for payment has been made to assess of its own motion whether a contract term is unfair, even though it already has the legal and factual elements necessary for that task available to it and the consumer has not lodged an objection. This finding is based on the consideration that, in the light of the progress and the special features of the order for payment procedure under Spanish law, viewed as a whole, there is a significant risk that consumers will not lodge an objection.¹²

3. Obligation on the court to review unfair terms of its own motion at the stage of examination of the application for an order for payment

43. In my opinion, the judgment in *Banco Español de Crédito*¹³ must be interpreted as the approach to be followed as a matter of principle which, having regard to the special features of the order for payment procedure under Spanish law, strikes a balance between the notion that a court should compensate for a procedural omission on the part of a consumer who is unaware of his rights and the notion that it should make up fully for the consumer's total inertia.¹⁴

⁷ C-240/98 to C-244/98, EU:C:2000:346, paragraphs 26 and 28.

⁸ Judgments in *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 38); *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 32); and *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 32).

⁹ See judgments in *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659, paragraph 56); *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 44); and *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 24).

¹⁰ C-618/10, EU:C:2012:349, paragraphs 53 and 54.

¹¹ *Ibid.* (paragraph 46).

¹² *Ibid.* (paragraph 57).

¹³ C-618/10, EU:C:2012:349.

¹⁴ For the relationship between these two notions, see judgment in *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 47).

44. Thus, short of reconsidering the approach followed by the Court in its judgment in *Banco Español de Crédito*, I cannot accept the arguments of the German and Hungarian Governments to the effect that a court cannot be required to review unfair terms in an order for payment procedure where the consumer has remained passive and has not objected.

45. I also note that the judgment in *Banco Español de Crédito* is wholly relevant in the main proceedings, even though it concerns the order for payment procedure as it was prior to the 2009 reform of Spanish law.¹⁵

46. As is apparent from the order for reference, the aim of that reform was to transfer jurisdiction over the order for payment procedure to the court registrar, the secretario judicial, so that now the court intervenes in the procedure only if the secretario judicial considers it expedient or the debtor lodges an objection, thereby triggering the ordinary procedure.

47. In my view, the case-law of the Court on the role of the national courts in reviewing unfair terms must be extended to cover other court bodies, such as registrars, where powers are transferred to them which directly affect the application of Directive 93/13.

48. This is the case here, because the secretario judicial (registrar) was given the power to take decisions which, under Spanish procedural law, produce effects analogous to those of a court decision.

49. Since, under Spanish law, the power to examine an application for an order for payment and take decisions that are comparable to court decisions now lies with the secretario judicial (registrar), national law must require the secretario judicial to raise of his own motion the question whether a contract term is unfair and, where there is doubt, bring the matter before the court, so that a contract term can be examined in the course of a procedure that observes the principle of *audi alteram partem*.¹⁶

50. The present case can be distinguished in this respect from the case giving rise to the recent judgment in *ERSTE Bank Hungary*,¹⁷ in which the Court held, drawing inspiration from Advocate General Cruz Villalón's proposal, that the case-law concerning the review of unfair terms by courts acting of their own motion does not apply to notaries, having regard to the fundamental differences between the duties of a judge and those of a notary.

51. Unlike a notary, the sole duty of a secretario judicial (registrar) is to contribute to the administration of justice, for which purpose he is assigned to a court and acts under the supervision of a judge.

52. A Member State cannot avoid its obligation to ensure that a court reviews unfair terms of its own motion in the order for payment procedure by transferring the power to adopt orders for payment to the court registrar. National legislation must require the registrar to conduct such a review of his own motion and to bring the matter before the court, in the event of doubt.

¹⁵ Pursuant to Law 13/2009 reforming procedural legislation to establish a new registry (*Ley 13/2009 de reforma de la legislación procesal para la implantación de la nueva oficina judicial*) of 3 November 2009 (BOE No 266 of 4 November 2009, p. 92103).

¹⁶ As a general rule, this principle requires the national court which has found of its own motion that a contract term is unfair to inform the parties to the dispute of that fact and to provide them with the opportunity to debate and to challenge the views of the other party on the matter in accordance with the formal requirements laid down in that regard by the national rules of procedure. See, to that effect, judgment in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraphs 17 to 36).

¹⁷ C-32/14, EU:C:2015:637, paragraphs 47 and 48.

4. *Obligation on the court to review unfair terms of its own motion at the stage of enforcement of an order for payment*

53. Next, it is necessary to examine the question — which is of fundamental importance in this case — whether national law should also allow the court with responsibility for enforcement to review unfair terms of its own motion, where no such review has taken place at the stage of examination of the application for an order for payment.

54. There are a number of reasons why it is not desirable, in principle, to provide for such a review at the enforcement stage.

55. Firstly, enforcement proceedings are ill-suited to an examination of the substance of the claims. If a court intervenes in these proceedings, it is rarely in possession of the facts necessary to examine the contract terms and, therefore, is required as a rule to adopt measures of inquiry in order to obtain them.

56. Secondly, where the proceedings are intended to enforce an order handed down by a court, the review of unfair terms risks clashing with the principle of *res judicata*.

57. Thirdly, an approach which requires the court to review unfair terms during the enforcement of an instrument emanating from an order for payment procedure is difficult to reconcile with the model defined by the EU law measures creating the European order for payment procedure as well as the European Enforcement Order for uncontested claims.

58. Under the European order for payment procedure, a European order for payment may not, under any circumstances, be reviewed as to its substance in the Member State of enforcement.¹⁸ The same is true of the European Enforcement Order, under the European rules on the enforcement of uncontested claims.¹⁹

59. Since the review of unfair terms by a court acting of its own motion is expressly precluded during the enforcement of an order for payment or a European Enforcement Order from another Member State falling within the scope of the abovementioned European rules, it seems to be inconsistent to provide for such a review during the enforcement of orders that are entirely a matter for national law, such as the order at issue in the main proceedings.²⁰

60. Whilst recognising the value of these arguments, put forward by the Spanish, German and Hungarian Governments, I nevertheless take the view that the consideration regarding the effectiveness of Article 6 of Directive 93/13 must prevail where there is no obligation under national law requiring a court to review unfair terms of its own motion at any stage of the procedure resulting from an application for an order for payment.

¹⁸ Article 22(3) of Regulation No 1896/2006.

¹⁹ Article 21(2) of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15).

²⁰ I note, *de lege ferenda*, that it would be desirable to amend Regulation No 1896/2006, which potentially covers claims arising from consumer contracts, so as to make express provision for a court to review unfair terms of its own motion at the stage of adoption of a European order for payment.

61. The point is not to rectify any omissions that may have occurred in the course of the order for payment procedure, but rather to resolve a systemic problem, in line with the consideration that provision must be made for a court to review unfair terms of its own motion at one of the stages of the procedure relating to the adoption and enforcement of an order for payment.

62. Thus, as an exception and for lack of a better solution, where national procedural rules make no provision for such a review at any earlier stage, the onus is on the court with responsibility for enforcement to ensure that it takes place in the last resort.

63. This seems to be the case in the main proceedings, which is a matter for the national court to ascertain.

64. Although the Spanish Government points out that the order for payment procedure is being reformed in order to take account of the judgment in *Banco Español de Crédito*²¹ and that, as a result of the reform, the secretario judicial will be required, before ruling on the order for payment, to notify the court of applications concerning consumer contracts, so that the court can review unfair terms, the Government also states that the reform has not yet come into force.²²

65. Furthermore, even assuming that — as the Spanish Government submits — the new rules have been implemented *de facto* since delivery of the judgment in *Banco Español de Crédito* and that, in consequence, secretarios judiciales (registrars) notify the courts of applications to initiate an order for payment procedure involving consumer contracts, the fact remains that such *de facto* implementation is not sufficient to ensure that the rights flowing from Directive 93/13 are protected effectively. In any event, as the Spanish Government concedes in its written observations, the order for payment procedure in the main proceedings pre-dates the delivery of the judgment in *Banco Español de Crédito*.

66. In my opinion, in a situation such as this, characterised by the total absence of a review of unfair terms by a court acting of its own motion at all stages of the procedure leading to the adoption of an order for payment, the requirement of effective protection of the rights flowing from Directive 93/13 must prevail over the practical arguments militating against permitting that review at the stage of enforcement of an order for payment.

67. However, it is still necessary to examine whether a review of unfair terms by a court acting of its own motion at the stage of enforcement of an order for payment conflicts with the principle of *res judicata* under the rules of Spanish procedural law, which acknowledge that a decision of a secretario judicial (registrar) produces effects that are similar to those of a court decision.

68. I note that, according to the settled case-law of the Court, EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement, by the decision at issue, of a provision of EU law, regardless of its nature.²³

²¹ C-618/10, EU:C:2012:349.

²² I note that Law 42/2015 reforming the Law on civil procedure (Ley 42/2015 de reforma de la Ley de Enjuiciamiento Civil) of 5 October 2015 (BOE No 239, 6 October 2015, p. 90240) was adopted shortly after the hearing held in this case. However, it is apparent from the transitional provisions of Law 42/2015 that the reform does not affect order for payment procedures — such as the procedure at issue in the main proceedings — which were closed before the law comes into force.

²³ Judgments in *Kapferer* (C-234/04, EU:C:2006:178, paragraph 21) and *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 37). For an analysis of the tension between the principle of procedural autonomy and the mechanisms under EU law making it possible to limit the binding force of final judgments under national law, see Taborowski, M., *Konsekwencje naruszenia prawa Unii Europejskiej przez sądy krajowe* (The consequences of an infringement of EU law by national courts), Lex — Wolters Kluwer, Warsaw 2012, p. 259 et seq.

69. In the absence of EU legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, these rules must observe the principles of equivalence and effectiveness.²⁴

70. As regards the principle of equivalence, there is no evidence in the present proceedings to support a finding that the rules implementing the principle of *res judicata* under Spanish law in the cases relating to Directive 93/13 are less favourable than those governing situations falling outside the scope of this directive.

71. As regards the principle of effectiveness, the Court has held that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies.²⁵

72. I note that conferring finality on an order for payment decision may raise questions, including where such a decision is taken by a court and not, as in the present case, by a court registrar. These doubts are due, in particular, to the fact that the order for payment procedure does not involve any adversarial examination of the application and places a significant burden on the defendant, requiring him to trigger the exchange of arguments.²⁶

73. Thus, in the present case, the decision of the secretario judicial (registrar) closing the order for payment procedure became final solely because the consumers did not lodge objections to the order within the period prescribed for that purpose and the secretario judicial did not consider it expedient to refer the matter to the court. In that regard, it is apparent from the rules governing the order for payment procedure that the secretario judicial simply carried out a formal review of the application under Article 815(1) to (3) of the LEC. It did not fall to him to assess the content of the contract terms or even notify the court of that content.

74. The effect of these procedural rules is not only to confer jurisdiction to adopt an order for payment on the court registrar, even though he is not empowered to review unfair terms, but is also to confer finality on his decisions, making it impossible to review unfair terms at the stage of enforcement of an order.

75. In my opinion, such rules implementing the principle of *res judicata* in the context of the order for payment procedure conflict with the principle of effectiveness, in so far as they prevent national courts from ensuring that Article 6 of Directive 93/13 is applied effectively.

76. In those circumstances, it is a matter for the court with responsibility for enforcement to ensure that the rights flowing from Directive 93/13 are protected effectively by disapplying the rule of national law which confers finality on an order for payment decision taken by a court registrar.

²⁴ Judgment in *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 38 and the case-law cited).

²⁵ Judgments in *Peterbroeck* (C-312/93, EU:C:1995:437, paragraph 14) and *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 39).

²⁶ For a critical reflection on this matter, see the Green Paper of the Commission (COM(2002)746, questions 23 to 26).

77. In the light of all of the foregoing considerations, I propose answering the first and second questions referred by the national court as follows: Directive 93/13, particularly Articles 6 and 7 thereof, and the principle of effectiveness preclude national legislation which, without requiring a court to raise of its own motion the ineffectiveness of a possibly unfair term at the stage of examination of the application for an order for payment, which takes place before the court registrar, does not permit the court with responsibility for enforcing that order to raise such invalidity of its own motion.

C – The compatibility of the procedural rules in question with the Charter (third and fourth questions)

78. By its third and fourth questions, the national court asks whether the rules of Spanish procedural law are compatible with the fundamental rights enshrined in the Charter and, more specifically, with the right to effective judicial protection under Article 47 thereof.

79. If the Court agrees with my proposal as regards the first two questions, it will not be necessary to answer the referring court's questions concerning the Charter. Under my proposal, the national court would have to disapply the national rules in question, without there being any need to examine their compatibility with Article 47 of the Charter.

80. None the less, I will briefly address the question of consistency with the requirements of the Charter in case the Court should opt for a different approach.

81. As regards, first of all, the scope of the Charter, the German Government submits that the rules of Spanish procedural law at issue in the present case come under the principle of the procedural autonomy of national law, with the result that they do not fall within the scope of the Charter.

82. I do not agree with that view.

83. The national courts must comply with the requirements of effective judicial protection, as guaranteed by Article 47 of the Charter, in all legal actions seeking to safeguard the rights conferred on individuals under EU law.²⁷

84. This consideration arises from the fact that the protection of rights under EU law is, in general, based on the legal remedies provided for under national law. If Member States could avoid their obligation to comply with Article 47 of the Charter by invoking the principle of the autonomy of national procedural law, the effective judicial protection of rights under EU law would be stripped of its substance.

85. I note that the Court has not yet had the opportunity to clarify the relationship between the requirements flowing from Article 47 of the Charter and those flowing from the principles of equivalence and effectiveness, which are very similar. The latter principle also embodies the

²⁷ See, to that effect, judgment in *DEB* (C-279/09, EU:C:2010:811, paragraphs 28 and 29). Also see, *a contrario*, judgment in *Torralbo Marcos* (C-265/13, EU:C:2014:187, paragraph 34) and order in *Sociedade Agrícola e Imobiliária da Quinta de S. Paio* (C-258/13, EU:C:2013:810, paragraph 23).

general obligation on the Member States to ensure the judicial protection of rights deriving from EU law. Therefore, the question might arise as to whether Article 47 of the Charter supplements or replaces the principle of effectiveness.²⁸

86. Notwithstanding this uncertainty, there is no doubt that the Member States are required to ensure that Article 47 of the Charter is also observed in the field of procedural law.

87. Thus, according to settled case-law on the application of Directive 93/13, the obligation on the Member States to ensure the effectiveness of the rights that individuals derive from the directive against the use of unfair terms implies a requirement of judicial protection, also guaranteed by Article 47 of the Charter, that is binding on the national court.²⁹

88. Returning to the questions relating to the interpretation of the Charter raised by the referring court, by its third question the court asks whether the Charter precludes national legislation that, where the defendant does not lodge objections, does not provide for any review by a court of the substance of the claims either at the stage of examination of the application for an order for payment or at the stage of its enforcement. By its fourth question, the referring court wishes to know whether the Charter precludes national legislation that does not permit the court with responsibility for enforcement to review of its own motion whether the right to be heard has been observed in the context of the order for payment procedure.

89. Although I have already found that Directive 93/13 and the principle of effectiveness preclude the national rules in question, that finding cannot, to my mind, be drawn from Article 47 of the Charter alone.

90. This divergence is due to the fact that the level of judicial protection of the rights that consumers derive from Directive 93/13 is higher than that flowing from Article 47 of the Charter for the parties to a civil action involving EU law.

91. As the Commission correctly states, Article 47 of the Charter does not, in general, prevent a non-judicial body from taking certain decisions falling within the exercise of judicial functions, provided that those decisions may be subject to an *a posteriori* review by a court. Furthermore, the right to a court laid down in Article 47 does not, in itself, include the requirement for a court to conduct a review of its own motion in order to safeguard the rights that parties derive from EU law.

92. The requirement for a court to conduct a review of its own motion is a special feature of proceedings characterised by an imbalance between the parties. In the present case, this requirement can only flow from the need to ensure that consumers are protected, as provided for in Article 6 of Directive 93/13.

93. Thus, in my opinion, Article 47 of the Charter does not preclude a simplified national procedure which provides for an examination of the substance of the claims only where the defendant has lodged objections and does not therefore allow the court to review the contract terms of its own motion in the absence of objections. Furthermore, Article 47 does not preclude

²⁸ See, as regards the relationship between these principles, the opinions of Advocate General Bot in *Agrokonsulting-04* (C 93/12, EU:C:2013:172, point 30); Advocate General Cruz Villalón in *E.ON Földgáz Trade* (C 510/13, EU:C:2014:2325, point 43); and Advocate General Jääskinen in *Orizzonte Salute* (C 61/14, EU:C:2015:307, point 24).

²⁹ See judgments in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 29); *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 35); and *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 47).

a procedural rule which prevents the court with responsibility for enforcement from raising of its own motion an infringement of the rights of the defence arising from improper service of documents, where the defendant has not lodged objections.

94. I recall, in that regard, that observance of the rights of the defence is not absolute and may be subject to restrictions. In its case-law on the interpretation of Regulation (EC) No 44/2001,³⁰ the Court accepted the possibility of taking further steps in the proceedings without the defendant's knowledge, provided that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant, in the light of the fact that the defendant will be able to object to recognition of the judgment at a later stage.³¹

95. A different approach would have to be taken if the defendant did not have access to an effective remedy enabling him to object to the order, for example, due to the restrictive rules on the manner in which the period prescribed for lodging objections is calculated,³² the prohibitive cost of the procedure or the very absence of a procedure permitting reconsideration of an order for payment adopted without the defendant's knowledge.³³

96. The order for reference does not contain enough information for the Court to be able to answer those questions. In particular, even though the referring court appears to be of the view that there was improper service in the order for payment procedure in this case, it does not explain why it regards such service as improper and does not state whether there are any remedies enabling the parties concerned to object to enforcement when they finally become aware of the decision taken without their knowledge.

97. I therefore consider that if the Court finds it necessary to answer the third and fourth questions, it should do so as follows: Article 47 of the Charter does not preclude national legislation that prevents the court with responsibility for enforcement from reviewing the enforceable instrument of its own motion and raising defects in the order for payment procedure of its own motion, provided that the defendant has access to an effective remedy enabling him to object to the order for payment and argue that his rights of the defence have been infringed.

³⁰ Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

³¹ Judgments in *Gambazzi* (C-394/07, EU:C:2009:219, paragraph 29) and *Hypoteční banka* (C-327/10, EU:C:2011:745, paragraph 50).

³² See my opinion in *BBVA* (C-8/14, EU:C:2015:321, points 54 to 67).

³³ Thus, for example, under the scheme of Regulation No 1896/2006, the lack of proper service may result in the European order for payment being reviewed before the competent court in the Member State of origin (Article 20).

VI – Conclusion

98. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Juzgado de Primera Instancia No 5 de Cartagena (Court of First Instance No 5, Cartagena) as follows:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and the principle of effectiveness preclude national legislation on the order for payment procedure which, without requiring a court to raise of its own motion the possible ineffectiveness of an unfair term at the stage of examination of the application for an order for payment, which takes place before the court registrar, does not permit the court with responsibility for enforcing that order to raise such ineffectiveness of its own motion.

ⁱ The names set out on page 1 and in points 13 to 16 have been replaced by letters following a request for anonymisation.