



Reports of Cases

ORDER OF THE COURT (Tenth Chamber)

14 September 2016*

(Reference for a preliminary ruling — Consumer protection — Directive 93/13/EEC — Unfair terms — Article 1(1) — Article 2(b) — Status of consumer — Assignment of a debt by novation of loan agreements — Contracts providing immovable property as security entered into by individuals not having any professional relationship with the new debtor company)

In Case C-534/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Judecătoria Satu Mare (Court of First Instance, Satu Mare, Romania), made by decision of 30 September 2015, received at the Court on 12 October 2015, in the proceedings

Pavel Dumitraş,

Mioara Dumitraş

v

BRD Groupe Société Générale — Sucursala Judeţeană Satu Mare,

THE COURT (Tenth Chamber),

composed of F. Biltgen, President of the Chamber, A. Borg Barthet and M. Berger (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Dumitraş and Ms Dumitraş, by themselves,
- the Romanian Government, by R. Radu, A. Wellman and L. Liţu, acting as Agents,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by F. Di Matteo, avvocato dello Stato,
- the European Commission, by C. Gheorghiu and D. Roussanov, acting as Agents,

* Language of the case: Romanian.

having regard to the decision taken, after hearing the Advocate General, to give a decision on the action by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

- 1 This request for a preliminary ruling concerns the interpretation of Articles 1(1) and 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).
- 2 The request has been made in proceedings between Mr Pavel Dumitraș and Ms Mioara Dumitraș, on one hand, and BRD Groupe Société Générale — Sucursala Județeană Satu Mare (Departmental Branch of BRD Groupe Société Générale, Satu Mare; ‘BRD Groupe Société Générale’), on the other, concerning three credit agreements and a contract providing immovable property as security.

Legal context

EU law

- 3 The 10th recital of Directive 93/13 provides:

‘Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; whereas those rules should apply to all contracts concluded between sellers or suppliers and consumers; whereas as a result inter alia contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organisation of companies or partnership agreements must be excluded from this Directive.’

- 4 Under Article 1(1) of the directive:

‘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.’

- 5 Article 2 of the directive defines the concepts of ‘consumer’ and ‘seller or supplier’ as follows:

‘For the purposes of this Directive:

...

- (b) “consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
- (c) “seller or supplier” means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.’

- 6 Article 3(1) of Directive 93/13 provides:

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

Romanian law

Law No 193/2000

7 Directive 93/13 was transposed into Romanian law by Legea nr. 193/2000 privind clauzele abuzive din contractele încheiate între comercianți și consumatori (Law No 193/2000 on unfair terms in agreements concluded between traders and consumers) of 10 November 2000, in its republished version (*Monitorul Oficial al României*, Part I, No 305 of 18 April 2008).

8 Pursuant to Article 1(1) to (3) of Law No 193/2000:

‘(1) Any contract concluded between traders and consumers for the sale of goods or the supply of services must contain clear, unambiguous terms, intelligible without need of specialist knowledge.

(2) In cases of doubt as to the interpretation of any terms of a contract, they must be interpreted in favour of the consumer.

(3) Traders are prohibited from inserting unfair terms into contracts concluded with consumers.’

9 Article 2(1) and (2) of Law No 193/2000 defines the concepts of ‘consumer’ and ‘seller or supplier’ as follows:

‘(1) “Consumer” means any natural person (or group of natural persons forming an association) who, on the basis of a contract covered by this law, is acting for purposes that are outside his trade, business, industry or profession.

(2) “Trader” means any natural person or duly authorised legal person who, on the basis of a contract covered by this law, is acting for purposes that relate to his trade, business, industry or profession, as well as any other person acting for those purposes for and on behalf of that person.’

The Civil Code

10 Article 1128 of the Civil Code provides:

‘Novation may be effected in three ways:

1. where the debtor undertakes a new obligation in respect of the creditor, which supersedes and extinguishes the original obligation.

2. where a new debtor is substituted for the original debtor who is released from all obligation to the creditor;

3. where, as a result of a new undertaking, a new creditor is substituted for the original creditor, with respect to whom the debtor is released from all obligation.’

11 Article 1132 of the Civil Code states:

‘An act by which one debtor is substituted by another debtor who undertakes obligations towards the creditor does not give rise to novation if the creditor has not expressly declared that it intended to release from all obligation the debtor who made the substitution.’

12 Article 1135 of the Civil Code provides:

‘Where novation occurs by the substitution of a new debtor, the privileges and original mortgages of the loan cannot attach to the new debtor’s property.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Between 2005 and 2008, BRD Groupe Société Générale, as the lender, and SC Lanca SRL, as the borrower, concluded three loan agreements.

14 In order to guarantee obligations arising under those contracts, Mr Dumitraș, the director and sole member of Lanca, and Ms Dumitraș, entered into a mortgage guarantor agreement vis-à-vis BRD Groupe Société Générale.

15 On 30 July 2009, BRD Groupe Société Générale, as the lender, SC Lanca Construcții SRL, as borrower, and Lanca as co-debtor, concluded three credit agreements numbered 54/30.07.2009, 55/30.07.2009 and 56.30.07.2009, concerning the refinancing and rescheduling of the three loan agreements previously concluded between BRD Groupe Société Générale and Lanca.

16 On the same date, by notarial instrument bearing authentication No 1017, entitled ‘Sale contract by subjective novation — perfect delegation’, Lanca, the delegating company, substituted by delegation Lanca Construcții, as the debtor in respect of its obligations arising under the credit agreements originally signed with BRD Groupe Société Générale, with the consent of BRD Groupe Société Générale, in its capacity as the company to which the debtor has undertaken obligations.

17 It is also apparent from the order for reference, first, that neither Mr Dumitraș nor Ms Dumitraș were directors of Lanca Construcții, second, that they acted as mortgage guarantors for the latter’s obligations as a result of the novation, third, for that purpose, they signed in their own names, as mortgage guarantors, the three credit agreements of 30 July 2009 and, fourth, that Lanca no longer has any obligations to BRD Groupe Société Générale in respect of the credit agreements originally signed.

18 On 6 December 2013, Mr Dumitraș and Ms Dumitraș brought an action against BRD Groupe Société Générale seeking a declaration that certain terms of the credit agreements concluded on 30 July 2009, providing for the charging of commission, were void *ab initio* on the ground that they were unfair.

19 During the proceedings at first instance, BRD Groupe Société Générale raised, inter alia, a plea of inadmissibility based on the fact that, since Mr Dumitraș and Ms Dumitraș have not acted for purposes that are outside their trade, business, industry or profession, they could not claim to be consumers within the meaning of Article 2 of Law No 193/2000.

20 It was in those circumstances that the Judecătoria Satu Mare (Court of First Instance, Satu Mare), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 2(b) of Directive 93/13, as regards the definition of “consumer”, be interpreted as including in or, conversely, as excluding from, that definition natural persons who have, as guarantors/sureties, concluded additional acts and contracts (guarantee contracts, contracts providing immovable property as security) ancillary to the credit agreement entered into by a commercial company for the purposes of its business, where those natural persons have no connection with the activities of the commercial company and have acted for purposes unconnected with their trade, business or profession, in the light of the fact that, initially, the applicants were natural persons acting as guarantors of the principal debtor — a legal person of

which one of the applicants was director — in connection with a loan agreement concluded with the defendant creditor, but subsequently the agreement in question was amended and the original debtor, of which the applicant referred to above was director, entered into a novation of the loan, with the agreement of the defendant creditor, with another legal person, neither of the applicants holding the position of director of that legal person but having undertaken, as sureties, for the benefit of the new debtor (a legal person), the obligation under the novation vis-à-vis the new debtor?

- (2) Must Article 1(1) of Directive 93/13 be interpreted as meaning that only contracts concluded between traders and consumers concerning the sale of goods or supply of services fall within the ambit of that directive or as meaning that contracts (contracts of guarantee and of surety) ancillary to a credit agreement, the beneficiary of which is a commercial company, concluded by natural persons who have no connection with the activities of that commercial company and who have acted for purposes unconnected with their trade, business or profession also fall within the ambit of that directive, in the light of the fact that, initially, the applicants were natural persons acting as guarantors of the principal debtor — a legal person of which one of the applicants was director — in connection with a loan agreement concluded with the defendant creditor, but that subsequently the agreement in question was amended and the original debtor, of which the applicant referred to above was director, entered into a novation of the loan, with the agreement of the defendant creditor, with another legal person, neither of the applicants being director of that legal person but having undertaken, as sureties, for the benefit of the new debtor (a legal person), the obligation under the novation vis-à-vis the new debtor?’

Consideration of the questions referred for a preliminary ruling

- 21 Pursuant to Article 99 of its Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, give its decision by reasoned order.
- 22 It is appropriate to apply that provision in the context of the present reference for a preliminary ruling.
- 23 By its questions, which it is appropriate to examine together, the referring court asks essentially whether Article 1(1) and Article 2(b) of Directive 93/13 must be interpreted as meaning that that directive may apply to contracts providing immovable property as security concluded between natural persons and a credit institution, such as BRD Groupe Société Générale, to guarantee obligations that a commercial company, such as Lanca Construcții contracted with that credit institution under a loan agreement, if those natural persons have no professional connection with that company, but that they were mortgage guarantors for three loan agreements originally concluded between that credit institution and another commercial company, such as Lanca, and that one of them was the director and sole member of Lanca which, by novation, has transferred its obligations to the new debtor company Lanca Construcții.
- 24 From the outset, it must be emphasised that the answer to those questions may be clearly deduced from the case-law of the Court, in particular, from the order of 19 November 2015, *Tarcău* (C-74/15, EU:C:2015:772).
- 25 In that connection, it must be recalled that Directive 93/13 applies, as is clear from Article 1(1) and Article 3(1) thereof, to the terms of ‘contracts concluded between a seller or supplier and a consumer’ which have not been ‘individually negotiated’ (order of 19 November 2015, *Tarcău*, C-74/15, EU:C:2015:772, paragraph 20 and the case-law cited).

- 26 As the 10th recital of Directive 93/13 states, the uniform rules of law in the matter of unfair terms should apply to ‘all contracts’ concluded between sellers or suppliers and consumers, as defined in Article 2(b) and (c) of Directive 93/13 (order of 19 November 2015, *Tarcău*, C-74/15, EU:C:2015:772, paragraph 21 and the case-law cited).
- 27 The purpose of the contract is thus, subject to the exceptions listed in the 10th recital of Directive 93/13, irrelevant in determining the scope of the directive (see, order of 19 November 2015, *Tarcău*, C-74/15, EU:C:2015:772, paragraph 22 and the case-law cited).
- 28 It is therefore by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, that the directive defines the contracts to which it applies (order of 19 November 2015, *Tarcău*, C-74/15, EU:C:2015:772, paragraph 23 and the case-law cited).
- 29 That criterion corresponds to the idea on which the system of protection implemented by the directive is based, namely that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (order of 19 November 2015, *Tarcău*, C-74/15, EU:C:2015:772, paragraph 24 and the case-law cited).
- 30 That protection is particularly important in the case of a contract providing security or a contract of guarantee concluded between a banking institution and a consumer. Such a contract is based on a personal commitment of the surety or guarantor to pay a contractual debt owed by a third party. That commitment involves onerous obligations for the person entering into it, the effect of which is to subject that person’s own property to a financial risk which is often difficult to quantify (order of 19 November 2015, *Tarcău*, C-74/15, EU:C:2015:772, paragraph 25).
- 31 As to whether a natural person who agrees to secure the contractual obligations owed by a commercial company to a banking institution under a credit agreement can be regarded as a ‘consumer’ within the meaning of Article 2(b) of Directive 93/13, it should be observed that while a contract providing security or a contract of guarantee can be described, with regard to its purpose, as a contract which is ancillary to the principal contract which gives rise to the debt it secures (see, to that effect, judgment of 17 March 1998, *Dietzinger*, C-45/96, EU:C:1998:111, paragraph 18), from the point of view of the contracting parties it presents itself as a distinct contract, as it is concluded between persons other than the parties to the principal contract. It is therefore as parties to the contract providing security or contract of guarantee that the capacity in which those parties acted must be assessed (order of 19 November 2015, *Tarcău*, C-74/15, EU:C:2015:772, paragraph 26).
- 32 In that regard, it should be observed that the concept of ‘consumer’, within the meaning of Article 2(b) of Directive 93/13, is objective in nature. It 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 (see, order of 19 November 2015, *Tarcău*, C-74/15, EU:C:2015:772, paragraph 27 and the case-law cited).
- 33 The national court before which an action relating to a contract which may be covered by that directive has been brought is required to determine, taking into account all the circumstances of the case and all of the evidence, whether the contracting party in question may be categorised as a ‘consumer’ within the meaning of that directive (order of 19 November 2015, *Tarcău*, C-74/15, EU:C:2015:772, paragraph 28 and the case-law cited).

- 34 In the case of a natural person who has given security for the performance of the obligations of a commercial company, it is therefore for the national court to establish whether that person acted for purposes relating to his trade, business or profession or because of functional links he has with that company, such as a directorship or a non-negligible shareholding, or whether he acted for purposes of a private nature (order of 19 November 2015, *Tarcău*, C-74/15, EU:C:2015:772, paragraph 29).
- 35 In the present case, it is apparent from the documents before the Court that, when the three loan agreements were concluded in the period between 2005 and 2008 between BRD Groupe Société Générale as the lender and Lanca as the borrower, Mr Dumitraș, having acted as guarantor of those contracts, was the director and sole member of the latter company.
- 36 Therefore, subject to the verifications which are for the referring court to make, it appears that, when those contracts were concluded, Mr Dumitraș acted by reason of the functional links he had with Lanca and cannot therefore be treated, in that regard, as a ‘consumer’, within the meaning of Article 2(b) of Directive 93/13.
- 37 It is also clear from the evidence before the Court that, on 30 July 2009, Lanca Construcții entered into, with BRD Groupe Société Générale, three credit agreements concerning refinancing and rescheduling of the three loan agreements signed by Lanca between 2005 and 2008. By novation, Lanca Construcții was substituted for Lanca as debtor of the obligations contracted by the latter with BRD Groupe Société Générale for the three loans originally granted. As a result of that novation, Lanca was released from all obligations to BRD Groupe Société Générale with regard to the loans originally granted.
- 38 Furthermore, it is common ground that neither Mr Dumitraș nor Ms Dumitraș were directors of Lanca Construcții and that they acted as guarantors of the obligation of the latter following the novation. Nor does it appear from the order for reference that the applicants in the main proceedings had a non-negligible shareholding in that company.
- 39 Therefore, subject to the verifications which are for the referring court to make, it appears that, when the credit agreements and the guarantee providing immovable property as security were signed on 30 July 2009, Mr Dumitraș and Ms Dumitraș did not act by reason of functional links which they had with Lanca Construcții. It is also for the referring court to establish whether Mr Dumitraș and Ms Dumitraș, as mortgage guarantors of that company, acted for purposes relating to their trade, business or profession and, if not, to draw all the appropriate inferences in order to treat them as ‘consumers’ within the meaning of Article 2(b) of Directive 93/13. That would be the case, in particular, if Mr Dumitraș, as a mortgage guarantor, had acted by reason of the functional links he had with Lanca, which is for the referring court to ascertain.
- 40 In those circumstances, the answer to the questions referred is that Articles 1(1) and 2(b) of Directive 93/13 must be interpreted as meaning that that directive applies to a contract providing immovable property as security concluded between natural persons and a credit institution in order to guarantee the obligations that a commercial company has undertaken with respect to that credit institution for a credit agreement, where those natural persons have acted for purposes which are outside their trade, business or profession and have no functional links with that company, which is for the referring court to determine.

Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby orders:

Articles 1(1) and 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that that directive applies to a contract providing immovable property as security concluded between natural persons and a credit institution in order to guarantee the obligations that a commercial company has undertaken with respect to that credit institution for a credit agreement, where those natural persons have acted for purposes which are outside their trade, business or profession and have no functional links with that company, which is for the referring court to determine.

[Signatures]